



## How doing business in China without a master written contract in Chinese is like playing roulette in Macau (but playing roulette, even when you lose, can still be so much more fun!)

*Be forewarned that the following, by necessity, is rife with oversimplifications. Every contract will require tailoring, often (but not always) at modest cost, to reflect the “deal” and any likely or possible intricacies. And the law of contracts in any given country can take more than a lifetime to fully grasp every nuance, much less attempt to summarize all those nuances, which would require thousands of pages, and would be far beyond anything that might be appropriate here.*

By David L. Woronov

A contract is a fundamental basis of commerce. In fact, it’s really a cornerstone of modern society (for example, think of the so-called “social contract” and the “contract with America”). Without going into what every law student suffers through in the first year of law school, a contract sets forth an agreement between (or if there are more than two parties involved, among) a number of parties on who is to do what, and when, and for how long, on the basis that each party is giving something to, and receiving something from, the other party or parties (consideration). There is also a concept of material terms, which will differ based on the terms and subject matter for various contracts, but usually will involve such fundamental factors as identification of who the parties are and where they are located, when the contract starts and ends, what the fundamental duties for each party are and what dates and quantities and qualities or standards are involved, and what the economic terms are.

In the United States, contracts are incredibly important. But in the past, and particularly during the past 60 years or so, numerous steps have been taken to make establishing commercial contracts, and figuring out the terms, somewhat simpler. Among many other things, the Uniform Commercial Code (known as the UCC) was adopted (albeit with some variations in different states), and has been revised repeatedly, so that there are certain uniform standards of conduct that apply to nearly all commercial and financial transactions involving personal property in the United States. Within that same framework, courts in the United States (and that includes state courts as well as federal courts), in the absence of clear written contracts, have established doctrines and precedents (and many of these are also set forth, or codified, in the UCC) whereby they may infer the terms of a contract between or among parties based on such factors as the written communications between the parties, and/or their behavior or course of conduct between (or among) the parties, or the standard of how similar parties tend to behave

or act within that particular industry in America. So a series of purchase orders between two parties, or even just emails between them, or even telephone calls that are “followed up” with sales and shipping and other activities, may be deemed to create a “contract” in America, and if something later is deemed to have somehow gone wrong, that may give rise to a valid legal claim for a breach of a contract, and related damages. And in the United States, damages for a breach of contract tend to follow almost a mathematical determination of liability, and assessment of actual damages proximately caused by the breach of contract, without assessment of liquidated or punitive damages.

Similar doctrines may apply under the International Chamber of Commerce, as well as under domestic laws in some other foreign countries.

BUT that is NOT how the law works in China! If you are doing business in China, you MUST have a written “master contract.” It is the first question that any Chinese court or arbitration panel will ask in any dispute—“Will you please provide us with a copy of your signed (and possibly chopped, if whether it was signed by a duly authorized officer is ever at issue) written contract?” And not only that, the contract must be enforceable in China—which means that having a contract only in English, that is totally one-sided on your behalf, provides that the laws of (for example) New York or California will be applied (and where the Chinese party has no offices or other real contacts or business base in those places), states that (for example) the Chinese party will deposit \$500,000 into a U.S. bank account in your name if its deliveries to you are more than one day late, and will not do business with anyone else in the U.S., ever...will undoubtedly be rejected by a court in China. So it likely will be of little use to you, either.

*“But the person I played golf with last weekend told me that you can do that in China,”* you may protest. I will remind you of other people who may have told you at times some other things, like that paying taxes in the U.S. is strictly voluntary, or that it is okay to use a device to unscramble cable television without paying license fees, or that making a non-custodial parent pay child support is unconstitutional, as it is tantamount to forced slavery. By listening to such people you could very possibly end up in jail. On the other hand, by following the advice of your friend at the golf course on this particular point, you probably are more likely merely to lose a great deal of money and business.

Again, to avoid the trap (and boredom) of going through all that must be in an enforceable contract in China, I will merely mention some basics, and then provide you with some simple advice. The contract must be in Chinese. If ever any dispute arises (and in my experience it is pretty likely that *some sort of dispute will arise, someday*) you will first want to refer to what was once agreed to between the two parties (and with the same logic as “an ounce of prevention is worth a pound of cure,” on many occasions, when a question or issue finally does arise, a short “walk through” of the contract can often avoid the need for much more costly trips to a law firm, and possibly to a court or an arbitration panel). To clarify, if the language of the contract (as translated) is sufficiently clear and explicit, you should be able to contact the other party and refer them to the appropriate pages and sections of the contract, and tell them what is wrong (and why) and suggest what might be done. This brings me to the fact that although the master contract will be in Mandarin Chinese, your team (hopefully) will have negotiated, drafted and redrafted the contract in English, with precise Mandarin translations, using reputable (and insured) professional translation services. So although the master contract will be in Chinese, you will have a precise translation to work off of.

Your contract should clearly state the duties and obligations of each party—try not to leave unstated any important, but ambiguous terms, as unlike in America, where a court may “fill in” such ambiguities by looking to “course of prior conduct” of the parties, or “course of trade” in the industry in general, be aware that is much less likely to happen in China.

Finally, unlike in the United States, Chinese courts (and arbitration panels) generally will not “determine” monetary damages for breaches of contract. So your contract will have to specify what those damages will be for each particular breach that may occur. This factor alone should provide you with ample reason to follow my simple advice: **you should see a lawyer who is knowledgeable in the subject of drafting and negotiating master supply (OEM), tooling, licensing or other contracts with counterparties in China.**



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