



NLIU-TRA CONTRACT DRAFTING COMPETITION, 2015

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| <p>CONFIDENTIAL INSTRUCTIONS FOR REPRESENTATIVE OF NE PAS TRADUIRE</p> |
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BACKGROUND

1. Ne Pas Traduire (“NPT”) is a French company headquartered in Paris, with interests in manufacturing, electronics, and consumer goods.
2. You are an associate at a Mumbai based law firm. NPT is a client of your firm and has approached your partner and you for advice on a proposed transaction.
3. NPT regularly bids for new inventions and develops them commercially. One of the most interesting invention companies to come out of the Asian-Pacific region in the recent past has been Inventors’ Clinic Pvt. Ltd. (“IC”), a company based in India.
4. IC is a research and development company established by Mr. Rajesh Khetrupal. Since its establishment in 1995, IC has been responsible for many useful inventions such as a portable multi-exercise machine which can be packed into a mid-sized backpack; the Amhibina, an amphibian transport system for four; and the xAlarm, which automatically informs emergency services if a car meets with an accident.
5. NPT and another competing company have always been keen to make bids for the rights to commercially market IC’s products.

THE DEAL

6. Mr. Khetrupal has approached NPT and told them of his intentions to commercially develop IC. He has acknowledged IC’s lack of expertise in manufacturing and marketing. He has suggested to NPT that IC is keen on collaborating with NPT.
8. While NPT cannot confirm this, it is almost certain that Mr. Khetrupal has made the same proposal to its competitor.
9. IC’s brief proposal to NPT was as follows:-
 - a. NPT and IC will enter into collaboration where NPT will market IC’s inventions.

- b. NPT will carry out manufacturing and marketing activities for IC's inventions at its own cost.
- c. IC will carry out R&D activities and develop new products at its own cost.
- d. The share of the profits for the new products will be split between NPT and IC according to an agreed proportion based on IC's costs of R&D and NPT's costs of manufacturing and marketing.
- e. All marketing and distribution will be done under NPT's name and the intellectual property in the products will also vest with NPT.

CLIENTS' INSTRUCTIONS

10. NPT has the following concerns / questions regarding IC's proposals:
- a. NPT is worried that it is very difficult to verify what costs IC has incurred in the R&D of the products. Either party may inflate costs. Besides even if the costs are accounted for, there needs to be a mechanism to ensure that the costs incurred are not disproportionate to what should be spent in the development of a product, keeping its commercial viability in mind. Accordingly, NPT suggests that there should be a joint committee with representatives (two each) of both NPT and IC for keeping a tab on the cost being incurred and its viability. If the joint committee does not agree on something, then that issue may be referred to the chairmen of both IC and NPT to resolve the issue.
 - b. The Joint Committee will consider and approve the budget for expenditure on R&D by IC and on marketing and manufacturing by NPT and will also be responsible to verify the statements of costs incurred. If either party exceeds the budget, then such expenditures will not be taken into account for the calculation of the profit-share ratio.
 - c. NPT is also worried that R&D and marketing costs are not one-time costs but are incurred from time to time. Accordingly, NPT suggests that the expenditure of both parties should be calculated on a quarterly basis, and the profits should be split in the ratio that is arrived at after taking into account the cumulative expenditure incurred up to the end of that quarter from the commencement of work on that product.
 - d. NPT is happy with IC's proposal that all Intellectual Property ("IP") in a certain product should vest in NPT and that the products should be marketed under NPT's name. However, it is concerned that if there are any law suits or claims of intellectual property infringement pertaining to the product in question, then these claims will be made against NPT (given that the IP is in NPT's name). It therefore wants IC to indemnify NPT against any such

liability. NPT has mentioned this concern to IC earlier. IC agreeing reluctantly, however, said that it would only indemnify NPT up to a maximum of US 1.5 million and in no case would it take any responsibility to litigate a claim of infringement. This responsibility would entirely be NPT's. NPT agreed to this.

NPT is also concerned that as the product would be marketed in NPT's name, consumer suits and other product claims would be raised against NPT alone, even though it has no role in the development of the product. IC negotiated with NPT in this regard that if a liability accrues on NPT as a result of a manufacturing defect then it is completely NPT's responsibility. However, if there is a design defect then IC would indemnify NPT in entirety. NPT is happy with this outcome but has requested your advice on how the contract can provide for determination of whether a defect is a manufacturing defect or a design defect.

NPT proposes that the agreement must be governed by French Law as it is more familiar with French Law. It is also concerned that Indian courts or arbitration system may take longer to resolve a dispute. NPT has been advised by their in-house lawyer that they should confirm whether an arbitral award passed in a proceeding in France will be enforceable in India. If the answer to the question is no then it would rather go for an Indian arbitration as the primary assets of IC are located in India. NPT has also been informed by its in-house lawyer that Indian courts can set aside both domestic and foreign arbitral awards, but he was unsure about this position. NPT wants you to check if it would be possible to avoid such intervention of the Indian Courts by arbitrating outside of India. If yes, then a foreign arbitration is very attractive to NPT. Accordingly NPT is relying on you to decide on an appropriate seat of arbitration. In any case, it wants an ad-hoc arbitration procedure where the arbitrator is nominated by NPT.

11. NPT would like that the agreement should operate for a term of four years unless it is mutually terminated by the parties or if either of the parties are in material breach of the terms of the agreement. However, NPT has requested you to suggest and draft in the agreement a provision for determining what a material breach would be. NPT also wants you to suggest and provide in the contract on what would happen (i) if the agreement is terminated prior to five years and significant costs have been incurred in the manufacturing of a product, or (ii) if a product is developed and manufactured by the end of the five year term and there is no time to sell it.
12. NPT is very particular about confidentiality of the terms of the arrangement between itself and IC and also about all information that would be shared between them during the course of this business relationship.
13. You have been directed by your partner to draft a collaboration agreement. Your partner has advised you to find an appropriate precedent for a collaboration agreement

to use as a guide. You may also search for joint venture agreements or a memorandum of understanding as several clauses of such agreements could be relevant for use in a collaboration agreement. While drafting this agreement, you should bear in mind the concerns of your client, but you may not retract from the position already agreed to by the parties. You must also provide comments on a separate sheet in response to any advice that NPT has sought from you. There is no word limit for the comments sheet. If you seek any clarification from the client, you may write to the Centre for Business and Commercial Laws with your questions at nliubhopal.tra@gmail.com before 15th November, 2015. Please keep your questions to the minimum (no more than three) and succinct (no more than 75 words for each question).

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