

Guest contributor:

# True Market Access to China's Legal Services: Possibilities Under China's New Regulatory Scheme

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## 1. Introduction

As with many aspects of the traditional Legal services are said to include advisory and representation services for host country law, home country and/or third country law, international law, legal documentation and certification, and other advisory and information services. For a discussion on market access to legal services in a particular country, however, the core issue is always whether such country allows foreign law firms to provide advisory and representation services on its domestic law. As it is not part of the basic commitments, but subject to specific commitments made by each WTO Member under the General Agreement on Trade in Services ("GATS"), market access to legal services in a host country could be seriously restricted or actually denied.

## 2. Hard Regulations on Foreign Law Firms

In its accession to the WTO in 2001, China allowed certain access to its legal services market. But on the core issue of domestic law practice, China has made no commitments to allowing foreign law firms provide advisory or representation services. In this regard, China only allows foreign law firms

to provide "information on the impact of the Chinese legal environment."

For this reason, regulations amended or newly introduced after China's accession to the WTO have a purpose of ensuring that foreign law firms are not providing any advisory or representation services with regard to the Chinese law. Those regulations include the State Council's (i.e., the Chinese Cabinet's) Regulations on the Administration of the Representative Institutions of Foreign Law Firms in China ("Basic Regulations"), and the Ministry of Justice's Implementation Rules for the Basic Regulations. By those regulations, a series of serious restrictions have been imposed on foreign law firms operating in China.

First, the regulations prohibit foreign investment in the sector of Chinese legal services or Chinese legal consulting, and allow only foreign investment in foreign and international legal services in the form of "Representative Office." The regulations further restrict the number of representative offices a foreign law firm could set up in China. Initially, only one was possible. Although, now, with certain conditions satisfied, a second, or even a third, may be possible.

Second, the regulations prohibit foreign law firms from providing advisory or representation services with regard to Chinese law, and actually prohibit any lawyer from any foreign law firm from interpreting Chinese law even in an arbitration case. Although the regulations do allow foreign law firms to provide “information on the impact of the Chinese legal environment,” they require that foreign law firms insert a disclaimer on the work they provide to their clients that it is not a legal opinion, but merely an information on the impact of the Chinese legal environment.

Third, the regulations prohibit foreign law firms from hiring licensed Chinese lawyers, and require suspension of the license of any Chinese lawyer hired by any foreign law firm. As they will lose their licenses for the period of their employment at foreign law firms, these qualified Chinese lawyers are typically called “Chinese Legal Consultants;” and they are also prohibited from interpreting Chinese law, advising, or representing clients on Chinese law.

Last, but not least, the regulations prohibit foreign citizens from taking the national bar exams and therefore from becoming qualified as Chinese lawyers. Although the Lawyers Act does not require citizenship for qualifying as a Chinese lawyer, the Ministry of Justice through its regulations on the national bar exams has imposed such requirement. Lawyers or persons from Hong Kong, Taiwan and Macao, as they are not foreign citizens, are allowed to take the national bar exams and to qualify as Chinese lawyers.

### 3. New Regulations Introduced in Shanghai Free Trade Zone

Facing a well-knit network of restrictions as briefly described above, foreign law firms have been struggling to develop profitable business in China. Various design-around strategies have been used, and the most common is to have the client retainer agreement signed with the home office of the foreign representative office. This has caused considerable loss of tax for China. Further, Chinese law firms have since started to expand into the international legal market. Large Chinese firms like King & Wood and Dacheng, not necessarily happy with their Swiss *verein* with Mallesons and Dentons, respectively, may wish to advocate for joint ventures between Chinese and foreign law firms.

On September 18, 2013, the State Council approved an overall action plan proposed by the Shanghai Municipal Government for implementing

the policy of establishing the Shanghai Free Trade Zone (“SFTZ”) and experimenting special policies. The action plan includes a proposal of “opening up” the legal services market. On January 27, 2014, the Ministry of Justice approved an action plan proposed by the Shanghai Bureau of Justice for pioneering new models of cooperation between Chinese and foreign law firms. On November 4, 2014, the Shanghai Bureau of Justice prepared two implementation rules and had them approved by the General Office of the Shanghai Municipal Government on November 18, 2014.

The new regulations do not allow joint ventures between Chinese and foreign law firms. Nevertheless, they allow Chinese and foreign law firms to cooperate in the following two ways: (a) seconding lawyers to each other’s law firm; and (b) setting up a joint operation. As a prerequisite for such cooperation, the cooperating parties must have a representative or branch office in the SFTZ. Once a joint operation or cross-secondment is set up in the SFTZ, however, the lawyers involved are not limited to serving clients only from the SFTZ, but could serve any clients from anywhere.

### 4. True, But Indirect, Market Access

Following the publication of the new regulations, some international and Chinese law firms acted immediately. By April 15, 2015, Baker & McKenzie and a small Chinese law firm set up the first such joint operation in the SFTZ. By March 30, 2016, a second joint operation was set up between Holman Fenwick Willan and another Chinese law firm. It is reported that the Baker & McKenzie joint operation in the SFTZ has been in real operation and involved in at least 65 projects, aiming at the provision of “one-stop” full services to clients, from within or outside China. It is not clear whether any international and Chinese law firm have tried the cross-secondment approach.

From the provisions of the new regulations, it is clear that the new regulations do not intend to allow any equity joint venture between any foreign law firm and any Chinese law firm. The joint operation has to be contractual and cannot be a legal entity separate from their investors. Yet, the joint operation may have a separate office in the SFTZ, with a separate legal team and separate supporting staff, and market and provide legal services in the name of that office. To such extent a joint operation may be described as “contractual joint venture,” something that was not uncommon in the early years of China’s opening-up to foreign investments in manufacturing and other businesses. As such, it is believed that equity joint

ventures between Chinese and foreign law firms will be allowed sooner or later.

Even for a cross-secondment arrangement, it may be also argued that certain market access has been allowed to foreign law firms in order for them to practice Chinese law. Although a seconded Chinese lawyer in a foreign law firm may still have to be registered with her Chinese law firm, the Chinese lawyer may be paid and managed by the foreign law firm, and provide advisory and representation services to the clients of the foreign law firm. In short, the foreign law firm can now provide Chinese law services to its clients through one or more seconded Chinese lawyers, something the “Chinese Legal Consultants” could not do lawfully.

## 5. Conclusions

In short, even with accession to the WTO, China has maintained hard regulations on foreign law firms for the purpose of preventing them from practicing Chinese law. Since 2014, nevertheless, China has introduced certain new regulations for the Shanghai Free Trade Zone, aiming at allowing certain market access to foreign law firms in order for them to practice, although indirectly, Chinese law. Certain international law firms have chosen to seize this opportunity and form joint operations with their Chinese partners. It remains to be seen whether more international law firms will follow and how such joint operations will change the Chinese legal service market.



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## Biography

*Mr. Jiang is a Senior Partner at Jurisino Law Group, based in Beijing. He is admitted to All Provinces (excluding Taiwan, Hong Kong and Macao)/China, New York/USA, and Ontario/Canada. Mr. Jiang obtained a Bachelor of Laws degree from Peking University in 1986, and a Master of Jurisprudence degree from Peking University in 1989. He further obtained a Master of Laws degree from Queen's University in 1994, and a Juris Doctor degree from York University in 2000. Mr. Jiang received further professional trainings in the relevant Bars.*

*Mr. Jiang was a professor of law at Peking University, and taught at a number of continuing legal education programs for judges, public prosecutors, lawyers, politicians and government officials. He was involved in the initial research on and drafting of a number of crucial PRC laws including the Judicial Review Act and the State Compensation Act. He also worked for several governmental agencies including the Environmental Protection Agency.*

*Mr. Jiang has worked at multiple law firms both in China and in North America, with Philips, Whirlpool, Merck Serono, Lonza, Fraser & Neave, Toyota, Samsung and other multinationals on his client list. Currently, he focuses on corporate governance, capital markets, mergers & acquisitions, cross-border investments, international trade and international arbitration.*

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