



# The Role of Foreign Lawyers in CIETAC Arbitration Proceedings

*When considering arbitration in China, it helps to know what foreign lawyers may and may not do under PRC law*

Daniel Arthur Laprès

There is general, though not unanimous, agreement that foreign lawyers may represent clients in proceedings before the China International Economic and Trade Arbitration Commission (CIETAC) in disputes that do not involve “Chinese legal affairs.” Debate arises because pleading a case on Chinese territory, even in foreign law, might amount to

practicing law in China without a local license. Violations of mandatory local rules or criminal laws that govern the involvement of foreign lawyers in legal disputes could expose practitioners to difficulties in recovering legal fees and—in cases of malpractice—rejections of insurance claims, as well as administrative and professional sanctions.

## The CIETAC framework

According to CIETAC's constituting documents, "Parties may appoint attorneys to defend their interests during the proceedings of a case before the Arbitration Commission. Such attorneys may be citizens of the People's Republic of China or foreign citizens." Under CIETAC's Arbitration Rules, the parties may act through designated "representatives," who may be either Chinese or foreign citizens.

At several stages of the proceedings, the parties are entitled to the services of their designated "representatives," who may file applications and defenses on their behalf, accompany them at oral hearings, and receive communication of their decisions and documents. Once an application is complete, the commission decides whether CIETAC has jurisdiction before setting up an arbitration tribunal to handle the matter.

According to Article 3 of the CIETAC Arbitration Rules, the cases over which CIETAC arbitration tribunals may accept jurisdiction are classified into three categories: domestic disputes; those related to Hong Kong, Macao, or Taiwan; and international or foreign-related disputes. This threefold distinction may explain why the rules governing the qualifications of the parties' representatives in arbitration proceedings vary depending on whether the dispute is domestic. In domestic cases, foreign lawyers may not intervene on behalf of their clients, but in non-domestic disputes they may. According to the Supreme People's Court, international or foreign-related disputes are those in which:

- At least one of the parties is a foreign or stateless individual or a foreign legal person;
- A civil relationship is created, modified, or terminated outside China; or
- The subject matter of the dispute is outside China. China's Supreme People's Court has stated that in some "international or foreign-related disputes" PRC law could apply. An example is a dispute between a Chinese and a foreign party over an object located in the foreign country under a contract in which the parties have chosen to apply PRC law. In such a scenario, foreign lawyers would, under China's regulations, be unable to represent their foreign clients in arbitration proceedings in China. In short, the domestic and non-domestic dichotomy is not a fully functional criterion for determining when foreign lawyers may represent clients in arbitration proceedings in China.

In the end, arbitral tribunals decide whether to recognize the parties' representatives during the proceedings. According to Article 29 of the Arbitration Rules, a CIETAC arbitration tribunal may "examine the case in any way that it deems appropriate unless otherwise agreed by the parties." The

major specified constraint on arbitration tribunals is that they must act "impartially and fairly and afford reasonable opportunities to all parties for presentations and debates." If a foreign lawyer introduces an argument based on PRC law in his or her oral or written pleadings, the arbitrators in CIETAC proceedings would consider whether the foreign lawyer was acting jointly with a Chinese practitioner and whether the arguments based on PRC law were supported by opinions of Chinese legal practitioners.

## Quick Glance

- PRC rules about who is qualified to practice "Chinese legal affairs" help define who may represent parties in arbitration proceedings.
- There is general agreement that foreign lawyers can represent clients in China International Economic and Trade Arbitration Commission (CIETAC) disputes that do not involve "Chinese legal affairs."
- Practitioners who violate mandatory local rules could encounter difficulties in recovering legal fees and—in cases of malpractice—rejections of insurance claims.

## The PRC regulatory framework

CIETAC's rules are clear on the role of foreign lawyers, but uncertainty arises from other rules that limit the scope of foreign lawyers' work in China. The PRC Law on Lawyers, which was adopted in 1996 and most recently revised in 2007, defines the practice of law to include "acceptance of authorizations by parties to participate in mediation and arbitration activities." This definition appears to exclude all persons not qualified in PRC law from representing clients in arbitrations in China, regardless of the subject matter or the origins of the parties. (To qualify in PRC law, one must have passed the PRC bar exam and have met other requirements, as defined in Article 5 of the Law on Lawyers. Only PRC citizens may take the bar exam, however.)

Article 29 of the Arbitration Law states that the "parties and their legal representatives may appoint lawyers or engage agents

to handle matters relating to arbitration proceedings." Though this provision could be interpreted to mean that all lawyers, not just Chinese lawyers, may represent clients in all respects in arbitration proceedings, such an interpretation would probably be overly broad, as it would allow foreign lawyers to represent clients in all arbitrations in China. In the end, the provision is probably best read as meaning that only "qualified" lawyers may be appointed.

In connection with China's World Trade Organization accession commitments (see p.48), the State Council in 2001 issued Rules on the Administration of Foreign Law Firms' Representative Offices in China (the Foreign Law Firm Rules). These rules apply to the establishment of offices in China by foreign law firms and to the provision of legal services from those offices. They do not appear to apply to the provision of legal services in China from foreign legal bases. The Foreign Law Firm Rules reiterate China's WTO commitments but add that foreign lawyers in China may conduct those activities only when they do not encompass "Chinese legal affairs." The implementing regulations for the Foreign Law Firm Rules, issued by the Ministry of Justice on July 4, 2002, state that practicing in Chinese legal affairs includes

- Engaging in any litigation in China as a lawyer;
- Giving legal opinions or certifications for specific issues in contracts, agreements, articles of association, or other written documents on the application of PRC law;
- Providing legal opinions or certifications for acts on the application of Chinese law;
- Processing, on behalf of a client, any registration change, application filing, or other procedure with PRC government authorities or with other organizations that are authorized by laws or regulations to carry out administrative functions; and
- Providing opinions on the application of PRC law in the capacity of attorney in arbitration proceedings.

The language in the last point above arguably targets only the provision of “legal opinions” on PRC law in an arbitration proceeding in China. Implicitly, foreign lawyers would be entitled to plead arbitration cases involving “Chinese legal affairs” as long as a duly qualified Chinese lawyer had provided an opinion on any PRC law questions. (According to unofficial reports, Beijing’s municipal-level bureau of the Ministry of Justice in 2005 investigated foreign lawyers under the 2002 regulations for representing clients in arbitration proceedings that concern PRC law. There have been no reports of the imposition of sanctions.)

## Foreign lawyers’ role in practice

Anecdotal evidence suggests that PRC arbitration tribunals usually accept foreign lawyers’ representation of parties in disputes that do not involve “Chinese legal affairs,” which in practice most often means matters not governed by PRC law. Given CIETAC arbitrators’ customary liberal attitude toward the parties’ freedom to influence the conduct of the proceedings, and given that CIETAC’s practice reflects that general attitude, the main disincentives to foreign lawyers’ participation in CIETAC arbitrations are more likely to arise in their countries of origin in the context of debates over collection of legal fees, honoring of insurance claims, and enforcement of awards.

Meanwhile, at least for CIETAC arbitration proceedings, foreign lawyers are generally entitled to plead cases that do not involve “Chinese legal affairs,” regardless of whether the lawyers and their firms are established in China. 完

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## Legal Services in China’s WTO Agreement

During the negotiations that led to China’s World Trade Organization (WTO) entry, the access of foreign professionals to the PRC legal market was a subject of spirited discussion. The Council of the Bars and Law Societies of the European Union called upon China to allow foreign law firms to advise on home country, any third country, and international law as well as to allow Chinese lawyers working for foreign law firms to advise on PRC law. US negotiators also attempted to obtain the right for their professionals to advise on PRC law.

The WTO accession agreement authorizes foreign lawyers in China to

- Provide clients with counsel with respect to the laws of the countries where they are qualified to practice law and on international conventions and international practices;

- Handle legal affairs in the country where the lawyers of the firm are qualified to practice law when entrusted to do so by clients or Chinese law firms;
- Entrust Chinese law firms to deal with Chinese legal affairs on behalf of foreign clients;

- Enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs; and
- Provide information on the impact of China’s legal environment.

The Rules on the Administration of Foreign Law Firms’ Representative Offices in China (the Foreign Law Firm Rules), issued in 2001, contain a qualifier not written into the WTO accession agreement: Authorized activities may be conducted only when they do not encompass “Chinese legal affairs.” Whether the exclusion of “Chinese legal affairs” from foreign law firms’ scope of activities is consistent with China’s WTO commitment is controversial. In other WTO-member countries, Chinese lawyers may be admitted to practice if they qualify under local rules. Because only PRC citizens may take the bar exam, however, foreign citizens cannot access the PRC market for legal services, and Chinese law firms and practitioners have enjoyed exceptional protection from other WTO-member countries’ law firms and practitioners.

Also, the wider scope of activities granted to foreign law firms’ representative offices in China compared with that granted to foreign law firms offering their services in China without a representative office is inconsistent with the WTO principles that ban discrimination against foreign enterprises. Representation rights enjoyed by lawyers attached to the representative offices of foreign law firms must also be considered to accrue to foreign law firms without establishments in China.

Although one could argue that Chinese legislators have added “Chinese legal affairs” to the Foreign Law Firm Rules—a phrase absent from the WTO accession agreement—the rules seem to conform to the terms accepted by China’s WTO partners. In the absence of explicit prohibitions of access for foreigners to take the national bar exam, individuals who acquire the language and technical skills may one day be able to obtain exceptional permission to take the Chinese bar exam, join Chinese law firms, and practice “Chinese legal affairs.”

—Daniel Arthur Laprès