
When the Arbitration Clause Leaves the Number of Arbitrators Implied

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What happens when the parties to a contract have chosen an arbitration institution, but not specified the number of arbitrators to resolve the dispute? In effect, the parties have already chosen the number of arbitrators, because arbitration institutions have provisions for choosing the number of arbitrators when the arbitration clause is silent. If the parties adopted a summary/expedited procedure, they have elected a single arbitrator.

Institutions take varied positions on the implied number of arbitrators assigned to a tribunal. All authorities agree that the choice is only between one and three arbitrators.

The graph below displays the positions taken by the rules of four institutions, CIETAC, BAC, SIAC, and HKIAC, as well as the UNCITRAL rules. The implied number of arbitrators are given, and whether the determinate implication of number is presumptive or firm is indicated. Note that the implied number below do not reflect separate and distinct Summary/Expedited Procedures.

Rules	Implied Number	Presumptive or Firm
CIETAC	Three	Firm
BAC	Three	Firm
SIAC ¹	One	Presumptive
HKIAC	Indeterminate	Case by Case
UNCITRAL	Three	Presumptive

The HKIAC Rules (2013) decline to set a determinate number of arbitrators. Either the parties have explicated their agreement, or the circumstances determine the appropriate number. Accordingly, HKIAC Rule 6.1 states:

If the parties have not agreed upon the number of arbitrators, HKIAC shall decide whether the case shall be referred to a sole arbitrator or to three arbitrators, taking into account the circumstances of the case.

The SIAC Rules (2016) set a single arbitrator. Parties may provide their opinions on whether any of several factors overcome the presumption of a single arbitrator in their notice of arbitration or in response to the notice of arbitration. Accordingly, SIAC Rule 9.1 states:

A sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators.

¹ According to the New SIAC Rules effective August 1, 2016.

Meanwhile, both the CIETAC Rules (2015) and the BAC Rules (2015) assign three arbitrators, unless the parties have agreed otherwise.² The implication of three arbitrators remains fixed, but the parties may together agree to a sole arbitrator. Such an agreement is possible, but may perhaps prove uncommon in practice.

Sometimes, the number of arbitrators can spiral out of hand. Take the example of an arbitration agreement where “each Member that is a party to such Dispute” was permitted an appointment; therefore, seven arbitrators were appointed, the seven nominated two more, and a nine-member panel resulted.³ Under the U.S.’s FAA, the North Texas District Court ruled it was powerless to interject itself into the active proceedings, and that a proper time for challenge would come after the award.

Of course, SIAC, HKIAC, CIETAC, and BAC all have expedited procedure mechanisms, each of which provide for a sole arbitrator. The total amount in controversy must remain under a threshold quantity to trigger expedited procedure, although other factors may also come into play.

The Model Clauses provided by the various arbitration institutions all prompt an explicit choice of number of arbitrators. This reflects best practice. But if the parties have not explicated the number of arbitrators, they have in fact made an implied choice as reflected in their selection of the arbitral rules.

² CIETAC Rules (2015) Article 25(2), BAC Rules (2015) Article 19(1).

³ *AVIC Int’l USA, Inc. v. Tang Energy Group*, N.D. Texas, (Feb. 5, 2015)