


Supreme People's Court of PRC Rules That Arbitration Clause Overrides CIETAC Rules on Appointment of Arbitrators in Multiparty Arbitration

In a decision made by the Supreme People's Court of the PRC (Court) on 29 December 2020 ((2019) Zui Gao Fa Min Te No. 4), the court held that where parties expressly agreed in the arbitration clause that each side of the arbitration shall appoint one arbitrator, that clause shall override Article 27.3 of the CIETAC Arbitration Rules 2012 (2012 Rules), pursuant to which the chairman of CIETAC shall, in a multiparty arbitration, appoint all three arbitrators when either side fails to agree on the arbitrator appointment.



The arbitration clause at issue was agreed to in a share-purchase agreement (SPA) between Ms. Zhang Lan and two BVI companies (to which Ms. Zhang is the sole shareholder) as the sellers, on one side, and La Dolce Vita Fine Dining Holdings Limited as the buyer, on the other side. After disputes arose from the SPA, the buyer commenced arbitration against the three sellers as the respondents, applying the 2012 Rules. During the appointment of arbitrators, the respondents raised, in their correspondence to CIETAC, that the three respondents could not reach an agreement on the appointment of an arbitrator for the respondents' side. The respondents argued that Article 27.3 of the 2012 Rules shall apply, and therefore all three arbitrators shall be appointed by CIETAC, notwithstanding that the claimant had appointed an arbitrator pursuant to the arbitration clause. The institution did not agree with the respondents' line of argument, and issued a notice requesting the three respondents to jointly appoint an arbitrator, failing which the arbitrator shall be appointed by the institution according to the arbitration clause. The respondents subsequently appointed an arbitrator jointly in compliance with the notice but in their letter to CIETAC expressly reserved their rights to dispute in this regard.

After the final award was granted by the tribunal in April 2019, the respondents applied to set aside the arbitration award on the ground that the institution had erred in procedure by deviating from Article 27.3 of the 2012 Rules when constituting the tribunal. The Court held that Article 4.3 of the 2012 Rules provides that where the 2012 Rules have been modified by the parties' agreement, that agreement shall prevail unless it is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. Further, when interpreting a contract clause, the Court shall take an approach in favor of giving effect to the clause rather than treating it as redundant. Therefore, as the parties have agreed that each side shall appoint one arbitrator, applying Article 27.3 of the 2012 Rules will deprive one side of its right to appoint an arbitrator because of the other side's failure to agree on the appointment, which is inconsistent with the arbitration clause.

Tip: Companies should be mindful when drafting an arbitration clause, especially on the appointment of arbitrators when there are multiple parties to a contract. An arbitration clause providing that each side of the arbitration shall appoint one arbitrator may well be interpreted by CIETAC and PRC courts as overriding Article 27.3 of the 2012



Rules. This may have an adverse impact on companies whose interests do not align with those of other co-claimants or co-respondents in a multiparty arbitration.

In addition, Article 8.2 of the 2018 HKIAC Administered Arbitration Rules (HKIAC 2018 Rules) has a similar provision to Article 27.3 of the 2012 Rules:

Rule	Article
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Rule	Article
CIETAC Arbitration Rules 2012	<p>Article 27.3 Where either the Claimant side or the Respondent side fails to jointly nominate or jointly entrust the Chairman of CIETAC with appointing one arbitrator within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Chairman of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.</p>

Rule	Article
<p>CIETAC Arbitration Rules 2015</p>	<p>Article 29.3 Where either the Claimant side or the Respondent side fails to jointly nominate or jointly entrust the Chairman of CIETAC to appoint one arbitrator within fifteen (15) days from the date of its receipt of the Notice of Arbitration, the Chairman of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.</p>

Rule	Article
2018 HKIAC Administered Arbitration Rules	<p>Article 8.3 Where there are more than two parties to the arbitration and the dispute is to be referred to three arbitrators, the arbitral tribunal shall be constituted as follows, unless the parties have agreed otherwise:</p> <p>...</p> <p>(c) in the event of any failure to designate arbitrators under Article 8.2(a) or if the parties do not all agree that they represent two separate sides (as Claimant and Respondent respectively) for the purposes of designating arbitrators, HKIAC may appoint all members of the arbitral tribunal with or without regard to any party's designation.</p>

Likewise, Article 8.2 of the HKIAC 2018 Rules can be modified or excluded by the parties' agreement. Therefore, while the ruling is made by a PRC court concerning CIETAC rules, it is highly recommended that parties selecting the HKIAC 2018 Rules to govern procedural rules also be aware of this potential impact when drafting an arbitration

clause to better protect their positions.

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