Counsel beware when submitting unspecified notices of arbitration

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Introduction

In a 6 February 2018 decision[(1)] the Supreme Court considered whether a rather brief and general notice of arbitration in *ad hoc* proceedings containing a nomination had properly initiated the arbitration proceedings and was thus sufficient grounds to request the Supreme Court to appoint an arbitrator, following the respondents' refusal to nominate one.

As of 2 January 2014, proceedings to appoint or challenge arbitrators fall within the exclusive jurisdiction of the Supreme Court (Section 615 of the Code of Civil Procedure) in light of the 2013 amendment to the Arbitration Act.

Facts

The claimants initiated *ad hoc* arbitration proceedings against several respondents by submitting a broad and vaguely drafted notice of arbitration. The respondents failed to nominate an arbitrator, arguing that the notice did not permit them to make an educated selection. Most importantly, the respondents argued that the notice had failed to specify the subject matter sufficiently. The arbitration agreement stipulated, among other things, that the Commercial Court in Vienna would be competent to appoint an arbitrator if the respondents refused to do so.

The claimants objected to the respondents' argument and referred to the arbitration agreement, which – according to the claimants – did not specifically provide that the notice of arbitration must contain any specification with regard to the dispute's subject matter. The claimants argued that the arbitration clause's wording was the only relevant factor when assessing whether the notice of arbitration must specify the subject matter. In the claimants' view, Section 587(4) of the Code of Civil Procedure, which stipulates that a request to nominate an arbitrator must also contain information concerning the claim brought forward, was irrelevant in the case at hand. According to the claimants, it was sufficient to merely inform the respondents of the intention to initiate arbitral proceedings. Any additional requirement would seriously impede the parties' access to justice.

Moreover, the claimants argued that the concrete subject matter was evident from the arbitration clause itself, which encompassed "all the disputes arising from this agreement and from the parties' legal relationship with each other". This wording was specific enough to enable the parties to nominate a competent arbitrator in the proceedings. Further, the notice of arbitration clearly identified the

subject matter as "claims for payment of contractual penalties and damages and for the voidance of the implementation agreements".

Despite the claimants' request, the Vienna Commercial Court's president refused to appoint an arbitrator. The claimants consequently invoked Section 587(3)(3) of the Code of Civil Procedure, which specifies that an arbitrator is to be nominated by the court if the third party initially envisaged to nominate a suitable candidate fails to do so within three months of receiving the nomination request.

Since the Vienna Commercial Court's president expressly refused to appoint an arbitrator promptly on receiving the request, the claimants reasoned that there would be no need to observe the three-month period and submitted a nomination request with the Supreme Court.

However, the Supreme Court concluded that the request was unjustified.

Decision

First, the Supreme Court clarified that even though the three-month period set out in Section 587(3)(3) of the Code of Civil Procedure had not passed when the claimants filed their request, this did not preclude the request. The three-month period is mandatory insofar as it cannot be reduced by agreement between the parties. However, if the third party meant to appoint the arbitrator expressly refuses to do so – as in the present case – it would be needless to wait for the period to expire. Thus, the claimants' request was not made prematurely.

Second, the Supreme Court considered whether Section 587(4) of the Code of Civil Procedure applied to the case at hand. It concluded that it did, as the arbitration clause had required the notice of arbitration:

- to be sent to the opposing party via registered mail; and
- to contain the request for the opposing party to nominate an arbitrator.

Further requirements were not stipulated; yet, according to the Supreme Court, this did not mean that the arbitration clause had not required the formal notice to specify the subject matter in more detail than the specification already evident from its wording (ie, applying to "all the disputes arising from this agreement and from the parties' legal relationship with each other"). To the contrary, the requirements of Section 587(4) must be considered.

The Supreme Court thus had to assess whether the claimants' written request for the respondents to nominate an arbitrator contained adequate information pursuant to Section 587(4) of the Code of Civil Procedure. Although legal literature agrees that an overly strict test is unnecessary in this respect, the Supreme Court stated that a request to nominate an arbitrator should specify the subject matter of the dispute in such a way as to enable the respondent to understand the claim and react adequately. The Supreme Court also directly referred to Article 3 of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which stipulates as follows: "The notice of arbitration shall include the following… lit e: a brief description of the claim and an indication of the amount involved, if any; lit f: the relief or remedy sought."

Considering that the claimants' written request to nominate an arbitrator contained neither a specific description of the subject matter nor the amount of the claim, the Supreme Court concluded that the request had been too vague and unspecific for the respondents to properly understand and react.

The Supreme Court thus rejected the claimants' request because it did not meet the requirements set out in Section 587(4) of the Code of Civil Procedure.

Comment

In the present decision, the Supreme Court clarified three important points which counsel should keep in mind when negotiating arbitration clauses and filing notices for arbitration or nomination request.

First, Austrian legal scholars are still debating whether Section 587(4) of the Code of Civil Procedure is mandatory (ie, whether a request to nominate an arbitrator must be specified and contain a description of the subject matter). Yet, the present decision clarifies that the requirements set out in Section 587(4) of the Code of Civil Procedure cannot be ignored, especially if an arbitration clause remains silent as to the specificity of the formal notice and request to nominate an arbitrator. The Supreme Court thus seems to (cautiously) favour Section 587(4) of the Code of Civil Procedure being mandatory.

Second, the present decision should serve as a careful reminder for counsel to always specify the subject matter and indicate the amount involved when drafting a notice of arbitration or a request to nominate an arbitrator. These facts are essential for the counterparty to understand the imminent claim and react adequately (eg, by nominating a competent arbitrator who is an expert in a particular field). The Supreme Court also refers to the UNCITRAL Arbitration Rules in this regard, which counsel could consult as guidelines. Failing to describe the subject matter could lead to court proceedings delaying the arbitration, similar to the ones described herein.

Third, the Supreme Court's decision briefly touched on a delicate topic that is often overlooked in this regard: the limitation period. Specifying the subject matter in the notice of arbitration or the request to nominate an arbitrator is absolutely crucial under Austrian law in order to interrupt any limitation periods. Again, failure to describe the subject matter could prove extremely costly and even put at risk the claim's admissibility.

In conclusion, the Supreme Court's decision is a soft reminder for counsel that sending out incomplete notices of arbitration or nomination requests can sometimes be a time-consuming and costly endeavour and thus not in the client's best interest.

What is also remarkable is that the Supreme Court issued the decision without inviting the respondents to comment within the proceedings. As the claimants had apparently also submitted the respondents' comments in earlier communications between the parties, the Supreme Court apparently saw no need to hear the respondents again. This procedure indicates the Supreme Court's arbitration-friendly and practically minded approach, as the proceedings were concluded rapidly, permitting the claimant to cure its defects and resubmit a properly specified notice of arbitration.

The decision highlights several issues that would typically not occur in institutional proceedings. The appointing authority under the arbitration agreement was the Vienna Commercial Court's president. Since neither the court's nor the president's tasks encompass the appointment of arbitrators, the president rightfully declined to accept that mandate unilaterally imposed on her by the contract drafters (many years ago). Further, the appointment process and thus commencement of arbitration can lead to significant delays in *ad hoc* proceedings if the arbitration agreement fails (as is usually the case) to contain clear rules. Finally, while appointment decisions by institutions are typically passed in a matter of days or weeks, requesting the Supreme Court's input – even though it acted swiftly in this case – may result in a delay of months (as well as additional party and court fees).

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Endnotes

(1) Docket 18 ONc 4/17h.