

A background image featuring a blurred figure of a person in a dark suit and tie, sitting at a desk and writing on a document with a pen. In the foreground, a pair of brass scales of justice is visible, slightly out of focus. The scales have a vertical stand and two pans hanging from a horizontal beam. The lighting is warm, with a soft glow from the left.

DISPUTE RESOLUTION

DISPUTE RESOLUTION CLAUSE
IN THE GTCS

Dispute Resolution

Dispute resolution clause in the GTCs

What the issue is

In practice, we notice that the parties most often decide to include their **dispute resolution clauses** in the **general terms and conditions** (also referred to as the GTCs) they send to each other via emails. An effective introduction of this clause should yet leave no room for interpretation. In a conflict situation an opposing party might use every possible means to torpedo the case and prevent the other party from enforcing its rights. This results in a substantial number of chargeable hours spent on deciding on the dispute resolution route rather than solving the matter as to its merits. The situation becomes even more critical if the party has an urgent need to directly assign the case for its definite resolution, e.g. due to the statute for limitations issues or others.

Clause in the GTCs

If you decide to introduce a dispute resolution clause to the general terms and conditions you send to the other party via email, please note the following.

From the Polish law perspective, for the GTCs used in an electronic version sent via email:

- a. they should be made available for the contracting party before the contract is concluded

This means that the other party should have access to them before, for instance, the parties put their electronic signatures. However, this also applies, among others, to the situations in which the parties put their wet signatures on the contract while at the same time they are using the GTCs in an electronic form.

and

- b. they should be made available in a way which allows to keep them/store them and have access to them even after the contract is executed.

Although it might be a disputable issue, the mere reference made in the offer to the website might not be sufficient. In particular, this will be difficult to be acknowledged by the court in a situation when, at a time of the dispute, the parties need to refer to the GTCs which might no longer be available online or a revised version is present there.

In practice, for the purpose of any future dispute, we advise that a party should, thus, send an email with an electronic version of the GTCs (ideally in a .pdf version) to the other party before the contract is concluded and keep this sent email for future reference as this will serve as a proof in the dispute. The sole statement of the other party that these two above-mentioned requirements were fulfilled might only be only further supporting evidence.



Also, please make sure that while concluding the contract, the other party's general terms and conditions are not effectively introduced to the agreement. For instance, you should react to the situation in which the contract countersigned by the other party is sent to you with the other party's terms and conditions. There is a risk one cannot entirely exclude that the court might decide that the opposing party's GTCs prevail e.g. under the so called "last shot" concept (as, ultimately, this was the last version of the arrangements being the basis for the future parties' performance) or none of the dispute resolution clauses used by the parties apply as they are contrary to each other. In order to avoid any future disputes and to make the situation crystal clear it is advisable that you should then explicitly decline the application of the other GTCs and request your contractor for the confirmation that they still wish to enter into the contract under the terms and conditions you proposed.

Finally, if you wish to have a dispute resolved through arbitration, from the Polish procedural law it would be ideal if additionally:

- a. the main contract was made in writing (with wet signatures or with qualified electronic signatures),
and
- b. it should make a clear reference to the specified general terms and conditions with the arbitration clause stating that the arbitration clause included in the directly specified GTs is incorporated into the agreement and it constitutes its part, and the contractors consented to their application.

Clause directly in the concluded contract

In order to protect your position to the fullest extent possible, we recommend our clients that the proposed dispute resolution should be included directly in the contract (e.g. in the 'Miscellaneous' part) that is signed by both parties.

It should allow to avoid unnecessary discussions as to whether the dispute resolution was effectively introduced. This is critical in case the parties to the contract use their own general terms and conditions which provide for different dispute resolution clauses. Where the content of the concluded contract is contrary to the general terms and conditions, the decision made in the contract will prevail over contradicting clauses included in the general terms and conditions.

As noted above, in the event of a conflict, it is of utmost importance to have the crystal-clear rules on how to resolve a dispute.



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