

A close-up photograph of two people shaking hands. The person on the left is wearing a light brown blazer over a white top and a red and black patterned scarf. They are wearing a silver watch on their left wrist. The person on the right is wearing a brown, textured sweater. The background is blurred, showing an office or meeting environment.

DISPUTE RESOLUTION

ARBITRATION CLAUSE

Dispute resolution

Provisions of law critical for litigation and arbitration practice

This time, **NGL Legal's Dispute Resolution Team** outlines the Polish perspective on what to keep in mind when deciding to include an arbitration clause in a contract.

Under an arbitration clause the parties agree that, as a rule, their potential disputes will be resolved by an arbitration tribunal, and not by a state court. The arbitration clause is, therefore, critical if a conflict arises between the contracting parties. Should this clause be drafted incorrectly, serious doubts as to its validity make it particularly difficult to decide whether the dispute should be assigned to arbitration or to litigation. These ambiguities are time and cost-consuming for clients, and, in practice, they can sometimes prevent the party from winning the case as to its merits.

Therefore, we indicate what elements are necessary for such a clause to be effective, give examples of additional provisos, and point out what should not be included in the arbitration clause, as well as provide our practical recommendations.

We hope that this brochure will be helpful to get an idea on how an arbitration clause should be drafted.

Arbitrability - what kind of disputes might be resolved through arbitration

- property rights disputes, except for maintenance cases,

Important!

Property rights disputes are those the outcome of which will have a strong connection with the financial condition of the claimant.

- non-property rights disputes providing that they may be resolved through a settlement agreement.

Important!

Non-property rights disputes may be resolved through a settlement agreement only exceptionally. A dispute can be resolved through a settlement agreement if the parties are entitled to control the legal relationship to which the claim relates, i.e. whether the parties, through legal actions taken under the freedom of contract, may decide, for example, that this relationship will be created, that its content will be changed, or that it will be terminated.

When may the parties assign the dispute to arbitration

- before the dispute arises for the purpose of potential future contentious issues;
- after the disputes arises to resolve the contentious issue that has already arisen.

Form of the arbitration clause

- in writing;
- in letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded;
- in general terms and conditions if the main contract is made in writing and the reference to the general terms and conditions incorporates that arbitration clause into the main contract;
- for the purpose of corporate disputes: in the company's articles of association (the arbitration clause binds the company, its shareholders, governing bodies and their members); and for the purpose of consumer and employment disputes: in writing and only after a dispute has arisen.

Important!

In order to avoid any doubts, it is recommended that, also for the purpose of cross-border disputes, an arbitration clause be properly documented by the parties by clearly indicating that they agree to arbitration. This approach is justified by the form requirements and the obligation to present the Polish state court with the original arbitration clause or its copy to enforce the arbitral award or to confirm its final force.

It is disputable what scope of power of attorney allows for the conclusion of an arbitration clause, so it is advisable that the granted authorisation for such clauses is expressly stated.



Arbitration clause - necessary elements

- the indication of potential disputable matters or the legal relationship from which a dispute might arise.

Important!

For the disputes that aim at challenging the shareholders' resolutions, the arbitration clause needs to provide the obligation to announce the commencement of the arbitration (within one month from the commencement date at the latest) as required for any company's announcements.

For consumer disputes, the arbitration clause should indicate that the parties do have knowledge about the effects of the arbitration clause, in particular on the legal force of an arbitration award or of a settlement agreement concluded before an arbitration tribunal (that will be equal to a state court ruling or a settlement agreement concluded before a state court after their approval by a state court).

Arbitration clause - examples of additional elements

- in case the parties decide on an institutional arbitration: a decision on the arbitration rules applicable to the dispute (whether those in force on the date of the statement of claim apply or, for instance, those in force on the date of the arbitration clause),
- the decision on the rules for the arbitration, for instance, the rules on pleadings submission, hearings or taking up the evidence,
- the decision on the place/seat of the arbitration and the place of the arbitration meetings/hearings/conferences as well as the place of the rendering of the arbitration award.

Important!

The place/seat of the arbitration does not necessarily need to be the place of the arbitration meetings/hearings/conferences or the place of the rendering of the arbitration award.

The place/seat of the arbitration determines, for instance: whether relevant Polish procedural rules apply, whether the Polish state courts have the authority to control the arbitration as well as it implies some requirements as to the form of the arbitration clause, and it may also decide on the governing law for arbitration clauses. It may also indirectly imply the place of the rendering of the arbitration award, which is a fundamental issue from the perspective of post-arbitration proceedings because it determines whether Polish courts have the jurisdiction for setting the arbitral award aside and what rules of arbitral award enforcement/recognition proceedings apply.



Arbitration clause - examples of additional elements (cont.)

- the decision on number of arbitrators, their appointment rules, and the procedure on excluding an arbitrator;
- the decision on the language of arbitration;
- the decision on the rules on granting the interim injunctions by the arbitration tribunal;
- the decision on the numbers of arbitration tires;
- the decision on the arbitration commencement date;
- the decision on the settlements on the costs of the arbitration, for instance, the payments of the advances of the arbitration costs as ruled by the arbitration tribunal;
- the decision on the governing law for the arbitration clause;
- the decision on the deadline to correct the inaccuracies in the arbitral award or resolve any doubts concerning its content as well as to supplement the arbitral award as to the ruling on the claims that has been raised by the claimant but the arbitration tribunal has not resolved yet.

Arbitration clause - what should not be included

- Provisions of an arbitration clause which violate the principle of equality of the parties, in particular the provisions which entitle only one party to bring a dispute before an arbitration tribunal or before a state court or the provisions which give one party more rights to appoint an arbitration tribunal.

What if the dispute is brought to the state court despite the arbitration clause

- If a case covered by an arbitration clause is brought before a state court, the state court will reject a statement of claim if the defendant raises the point of the arbitration clause before presenting its standpoint on the merits of the case.
- The matter will be resolved by the state court if the arbitration clause turns out to be invalid, ineffective, unenforceable or has expired, and if the arbitration court declines jurisdiction.



Conversion of state court proceedings into arbitration

- The parties may transfer the dispute pending before a state court to arbitration as long as it is not finally resolved by the state court.
- The state court will terminate the pending proceedings upon the unanimous parties' request, filed after these parties have entered into the arbitration clause. This will not happen yet if the content of the arbitration clause and the circumstances of the case indicate that it would be contrary to the law, the principles of social intercourse or it would aim at circumventing the law, or the arbitration clause is invalid or ineffective. The statute of limitations for claims covered by the arbitration clause will begin to run anew from the date the decision on the termination of the state court proceedings becomes final.
- The court will return to a party three fourths of the court fee paid for a statement claim (reduced by the minimum fee of approx. EUR 7) if the proceedings are terminated upon the joint request of the parties made before the court of the first instance due to the conclusion of an arbitration clause.

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