

Kluwer Arbitration Blog

Concluding an Arbitration Agreement via Means of Remote Communication under Polish Law: A Short Guide for Practitioners

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The COVID-19 pandemic made us realize that a lot of business can be conducted remotely, and that drafting contracts does not have to involve physical signatures on the same documents by all the parties involved. This progress, of course, has not bypassed arbitration. In this post, we will look at how to effectively conclude an arbitration agreement under Polish law using modern forms of remote communication.

Crucial to the matter at hand is Article 1162 of the [Polish Code of Civil Procedure](#) (“**CCP**”). In accordance with the aforesaid provision, an arbitration clause should be made in writing (Article 1162 (1) CCP), although the requirements concerning the form of an arbitration clause will also be met if the clause is included in letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded. Moreover, a reference in an agreement to a document containing a provision to bring a dispute before an arbitration tribunal complies with the requirements concerning the form of an arbitration clause if such an agreement is made in writing and the reference incorporates that clause into the agreement (Article 1162 (2) CCP).

Arbitration Agreement Concluded “In Writing”

As far as the term “in writing” is concerned, in practice we can refer to two scenarios.

Firstly, the arbitration agreement is concluded by means of a physical “wet-ink” signature, as used for centuries.

Secondly, a document containing an arbitration clause is signed with a qualified electronic signature. This finding is justified by the fact that, under Polish law, a qualified electronic signature is recognised as equal to a physical signature (Article 78¹ of the [Polish Civil Code](#)). Exactly what is meant by a “qualified electronic signature”, and what requirements apply to it, are addressed in the [Regulation \(EU\) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC](#) (the “**eIDAS Regulation**”).

A qualified electronic signature is based on a certificate issued by (public and/or private) qualified trust service providers. The list of qualified trust service providers in the European Union is published by the [European Commission \(European Union Trusted List\)](#). A signature that meets all requirements in this regard is, for example, the well-known Docu Sign.

It is worth mentioning that, in accordance with Article 25(3) of the eIDAS Regulation, a qualified electronic signature issued by a trust service provider from any of the EU countries is sufficient to comply with the electronic form requirement under Polish law and may be used to maintain the equivalence between electronic and written forms of the declaration of intent. Therefore, if your counterparty uses a qualified electronic signature registered in any EU country and entered on European Union Trusted List, you can conclude an arbitration agreement with them without any worries.

Arbitration Agreement Concluded by Means of Remote Communication

Article 1162(2) of the CCP liberalises the requirements regarding the “in writing” form of an arbitration agreement, allowing such clause to be concluded via letters exchanged between the parties or statements made by means of remote communication which enable their content to be recorded.

The notion of “means of remote communication” applies to simple electronic forms (without the parties’ signatures), such as **telefax, telegram, e-mail or short text messages** – this in light of both CCP as well as the [1958 New York Arbitration Convention](#), which Poland is a party thereto. The Polish Supreme Court also took the position that an electronic signature is not required **for exchange of electronic correspondence. It is permissible to conclude an arbitration clause also in “simple” electronic form, i.e., not requiring that the clause be accompanied by a secure electronic signature verified with a valid qualified certificate** – subject, of course, to the condition that the technical means enable the content of the declarations of intent to be recorded (see the decision of [28 November 2018, case no. III CSK 406/16](#)).

However, two important exceptions should be pointed out in this regard.

Firstly, Article 1162(2) of the CCP does not apply when the arbitration agreement is concluded with **consumers**. An arbitration clause covering disputes arising from contracts to which a consumer is a party may be executed only after the dispute has arisen and must be made in writing (within the meaning of Article 1161(1) CCP, i.e. with a wet-ink or qualified electronic signature).

Secondly, conclusion of an arbitration agreement by means of remote communication may not be sufficient in the case of so-called **arbitration clauses by reference**.

In accordance with the second sentence of Article 1162(2) of the CCP, reference in an agreement to a document containing a provision to take a dispute before an arbitration tribunal, complies with the requirements concerning the form of an arbitration clause if such agreement is made “*in writing*” and there is a reference incorporating that clause into the agreement (the so-called arbitration clause by reference). In accordance with the views presented by Polish legal scholars, “*in writing*” is when an agreement containing a reference to an arbitration clause included in another document was concluded with handwritten signature or a qualified electronic signature. In other words, there is no possibility to conclude arbitration agreement by reference included in a

statement made by means of remote communication.

Is It Safe?

A party may file a motion to set aside an arbitral award issued in Poland if, *inter alia*, there was no arbitration clause, or an arbitration clause is void, invalid or has expired in accordance with relevant law. For the same reasons, the court may refuse to recognize or confirm enforcement of a judgment of an arbitration court issued abroad.

It is acknowledged that invalidity of an arbitration clause arises, *inter alia*, when the proper form has not been complied with in accordance with Article 1162 of the CCP. In this regard, an arbitration clause may be perceived as invalid e.g., if it is included in an audio / videophone recording exchanged between the parties or the document with an arbitration clause does not contain the parties' signatures (in any form) or has not been exchanged by means of remote communication which enable its content to be recorded.

That being said, considering the liberalized requirements for conclusion of an arbitration agreement as well as the wide interpretation of the notion "in writing", there are no potential obstacles under Polish law to enforcement of arbitral awards if the arbitration agreement is concluded, for example, by qualified electronic signature or via e-mails.

Moreover, it should be noted that, under Article IV.1(b) of the 1958 New York Arbitration Convention as well as Article 1213(1) of the CCP, it is required to enclose the original or an officially certified copy of the arbitration clause with the party's petition to obtain recognition and/or enforcement of an arbitral award. If the arbitration agreement is concluded via telegram or e-mail, some may say that such original or certified copy of the arbitration clause does not exist. In this regard, the Polish Supreme Court has stated that the requirements for presentation of an arbitration agreement in Article IV(1) must be considered taking into account the form in which the agreement may have been concluded. The Supreme Court emphasised that, **in the event the arbitration agreement is concluded via e-mail, there is no "original" thereof** within the meaning of Article IV(1)(b) of 1958 New York Arbitration Convention; in such a case, **supplying the court with written confirmation of the agreement** (e.g., print-out of e-mails) **is sufficient** (see the decision of 13 September 2012, case no. V CSK 323/11).

Final Remarks

The Polish rules on the conclusion of arbitration agreements move with the times and meet the current business needs. So, if you and your counterparty have a qualified electronic signature or e-mail, you can effectively conclude an agreement containing an arbitration clause without ever meeting each other.


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This entry was posted on Sunday, November 13th, 2022 at 8:35 am and is filed under [Agreement in writing](#), [Arbitration Agreement](#), [Poland](#)

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