

# The Importance of Choosing the Right Place of Arbitration in Corporate Disputes

(continental law perspective)

# Introductory remarks

1. **Corporate disputes** (for the purpose of this presentation) refer to **internal disputes in corporations** between:

minority shareholders

*versus*

the company and/or majority shareholders

e.g., disputes on:

- (1) **the invalidation of company resolutions,**
- (2) **the dissolution of the company,** and
- (3) **the expulsion of shareholders.**

2. An assumption, the corporate disputes in the given jurisdiction are **arbitrable**.

# “Elektrim” case study (1)

## FACTS

1. **The Articles of Association (AoA)** of PTC (the largest Polish mobile telephone operator at that time) contained an **arbitration clause** covering all corporate disputes.
2. The AoA were governed by the **Polish law** (expressly stipulated in the AoA and the mandatory rules of Polish Company Law, s.c. “*lex societatis*”).
3. **Vienna** was expressly chosen as the place of **arbitration place** in the AoA.
4. According to the AoA, a **Supervisory Board (SB) resolution was required** for any share transfers.
5. Elektrim transferred its shares to Telco (Vivendi’s subsidiary), without the resolution of the SB. DT **challenged the transfer** by filing the lawsuit **at the VIAC against Elektrim and Vivendi’s subsidiary**.

# “Elektrim” case study (2)

## ISSUE

1. Claim for establishment: (1) **was the SB resolution invalid** (lack of a majority of votes according to the AoA), and (2) therefore was the transfer of the shares invalid?
2. **Is Vivendi's subsidiary bound by the arbitration clause** contained in the AoA in the event the transfer was invalid and Vivendi`s subsidiary never gained the status of a shareholder?

# “Elektrim” case study (3)

## DECISIONS

### A. VIAC Tribunal

1. The SB **resolution was deemed invalid**, and therefore the share transfer was also invalid, nevertheless
2. **The Tribunal admitted its lack of jurisdiction** over Vivendi's subsidiary.

### B. Polish courts (in NY Conv recognition proceeding)

1. By choosing Vienna as the **place of arbitration** for PTC, (and being silent on the law applicable to this clause), the clause is governed by Austrian Law.
2. It's a matter of Austrian, and not the Polish law, as to who is bound by the arbitration clause contained in the PTC AoA.

# “Elektrim” case study (4)

## CONCLUSIONS (1)

1. The legal framework for the application of the Austrian law by the Polish courts?

- Art. V 1. a) of the New York Convention
- Art. 36.1, a) I of the UNCITRAL Model Law
- Art. 39.2 of the Polish Private International Law

2. The law **applicable to the arbitration clause** is:

- primarily, the law to **which the parties have subjected** the clause,

and, in the case of parties failing to choose the applicable law

- the law of the country of the **place of arbitration** (or where the **award was issued**).

# “Elektrim” case study (5)

## CONCLUSIONS (2)

3. *Prima facie*, the application of the Austrian law to the arbitration clause contained in the AoA of a Polish company seems to be justified:

failing to expressly choose the law governing the arbitration clause in the AoA

+

selecting Vienna as the place of arbitration in the AoA

=

the shareholders subjected the arbitration clause to Austrian law  
(law of the place of arbitration/where the award was issued)

# Final question

**Are the parties really free to choose the place of arbitration in corporate disputes? Different than the place of its registered office?**

e.g.

can the shareholders of a Czech/Polish/German corporation choose **Vienna**,  
or even better

**Mauritius or Hawaii**

as an arbitration forum for resolving their corporate disputes?

*Many wish they could do so...*

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