

THROUGH THE LOOKING GLASS: WHAT A COMPARISON WITH THE NEW POLISH LEGAL FRAMEWORK OF ARBITRATION REVEALS ABOUT THE U.S. LEGAL FRAMEWORK OF ARBITRATION[†]

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ABSTRACT

Domestic and international arbitration in Poland is regulated by the Civil Procedure Code. In October of 2005, a new set of regulations went into effect that completely altered the Polish legal framework for arbitration. A comparison of this framework with that of the United States reveals several similarities and a few key differences. These differences involve the power of arbitrators to decide upon their own jurisdiction, the arbitrability of employment disputes and the consequences of an arbitrator's failure to consider applicable national law.

A comparison of how similar cases would be resolved under new Polish standards versus U.S. standards raises the question of how U.S. standards evolved and whether they are truly the most desirable or practical. Ultimately, as a result of this comparison, the author concludes that Congress should amend the Federal Arbitration Act to eliminate certain troublesome ambiguities.

[†] This exercise in comparative law is intended to highlight how the relevant provisions of the Polish Code of Civil Procedure are in some ways more logical than the U.S. legal framework of arbitration. The phrase "through the looking glass" is obviously borrowed from Lewis Carroll. Upon reading this Article, the reader will appreciate how the metaphor of Alice encountering seemingly illogical absurdities in Wonderland more aptly applies to practitioners dealing with U.S. jurisprudence than the Polish framework governing arbitration. In the words of Oliver Wendell Holmes, "a page of history is worth a volume of logic" for the purposes of understanding seemingly illogical practices in common law jurisdictions. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). This Article is part of a growing chorus suggesting that it is time for Congress to take action to reform the Federal Arbitration Act (FAA) and mitigate some egregious idiosyncrasies and inconsistencies. The title of this Article was chosen before realizing that this is a continuation of a distinguished tradition of co-opting the "looking glass" metaphor for use in the titles of scholarly legal works. *See, e.g.*, J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411 (1996).

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I. INTRODUCTION

Public laws provide a framework for the enforcement of both arbitration agreements and arbitral awards, as well as a guide as to when such awards should be nullified. The framework of U.S. law governing arbitration has attracted scrutiny and debate largely because of the tension between, on the one hand, the desirability of arbitration as an efficient and discrete vehicle for dispute resolution and, on the other, concerns that arbitration may compromise the enforcement of mandatory statutory protections and due process rights. Arbitral procedures, it is argued, can lack transparency, public accountability and procedural safeguards, and may place non-lawyers in the position of having to accurately interpret statutes that serve important public policy objectives.

Comparing U.S. laws to those of Poland results in the realization that U.S. standards are not always perfectly consistent, logical or desirable. U.S. courts are sometimes criticized for being too permissive of arbitration when it may compromise procedural due process or substantive rights, but they do not encourage arbitration in all situations. In some instances, U.S. jurisprudence appears to unreasonably favor the enforcement of arbitral outcomes.

This Article begins with a review of U.S. arbitration law. Next, this Article highlights the most significant reforms to the Polish legal framework of arbitration. The most significant differences between the U.S. and Polish frameworks are then explored. This comparison reveals that U.S. law is sometimes not the most conducive to arbitration, nor, from a policy perspective, is it the most desirable for arbitration. Ultimately, some of the inconsistencies and uncertainty surrounding U.S. arbitration

law are attributable to the U.S.'s common law tradition and its federalist structure. One possible solution to these shortcomings, discussed in this Article, is for Congress to reform the Federal Arbitration Act.

II. THE U.S. LEGAL FRAMEWORK OF ARBITRATION

Since 1925, the most important component of U.S. arbitration law has been the Federal Arbitration Act (FAA).¹ Congress enacted the FAA to “revers[e] centuries of judicial hostility to arbitration agreements.”² The FAA provides that written agreements to arbitrate in the context of interstate and international commercial transactions shall be enforceable, except “upon such grounds as exist at law or in equity for the revocation of any contract.”³ The FAA allows courts to compel arbitration where there is a valid agreement to arbitrate but where one party refuses to submit to arbitration.⁴ The FAA also allows courts to confirm or enforce arbitral awards.⁵ The only grounds stated in the FAA for vacating an arbitral award are fraud, partiality or corruption of an arbitrator, arbitrator misconduct and lack of jurisdiction.⁶

Chapter Two of the FAA was added to implement the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).⁷ Chapter Three was added to implement the 1975 Inter-American Convention on International Commercial Arbitration (the “Panama Convention”).⁸ These Conventions require the courts of contracting states to compel arbitration arising under a valid arbitration agreement and to enforce properly rendered foreign arbitral awards.

Although every U.S. state has its own law governing the enforceability of arbitration agreements and outcomes, the U.S. Supreme Court ruled in *Allied-Bruce Terminex Cos., Inc. v. Dobson* that the FAA preempts state law.⁹ In *Dobson*, an Alabama statute that prohibited the enforcement of

1. U.S. Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–13 (2000)). The original Act contained only the first chapter of the current statute.

2. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974)).

3. 9 U.S.C. § 2 (2000).

4. 9 U.S.C. § 4 (2000).

5. 9 U.S.C. § 9 (2000).

6. 9 U.S.C. § 10 (2000).

7. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter *New York Convention*].

8. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 17 U.S.T. 1270, 14 I.L.M. 336.

9. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

pre-dispute arbitration agreements was held to be preempted by the FAA, despite arguments to the contrary in an amicus brief filed by twenty state attorneys general.¹⁰ The court reasoned that Congress's power to preempt state arbitration laws was based on the Commerce Clause of the U.S. Constitution.¹¹ The Supreme Court subsequently ruled that the FAA preempted a state statute requiring arbitration provisions to be printed in underlined, capital letters on the first page of contracts, even though the intent of the law was to ensure informed consent to arbitration provisions.¹² Therefore, when evaluating the law governing arbitration in the United States, it is appropriate to focus on the FAA and how it has been interpreted by the courts.

While the evolution of FAA jurisprudence in specific contexts will be explained in greater detail below, it is worth noting at the outset that arbitration under the FAA has grown drastically beyond what its drafters intended, which was only to protect the procedural rights of contracting parties.¹³ The FAA has instead become a "national regulatory statute."¹⁴ In the words of retired U.S. Supreme Court Justice Sandra Day O'Connor, "over the past decade, the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."¹⁵ This view has also been expressed by scholars such as Susan Karamanian: "As a result of statutory mandate, or at times due to their own devices, U.S. courts have become imbedded in the international arbitration process. . . . [T]he judicial landscape is far from clear."¹⁶

10. *Id.* at 272.

11. *Id.* at 273–74.

12. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 687 (1996). In this case, the U.S. Supreme Court reversed the Montana Supreme Court's decision that a Montana Subway sandwich shop franchisee would not have to travel to the franchisor's location in Connecticut because the form contract did not follow Montana's specifications for font size and location of arbitration provisions in the contract. *See Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), *rev'd* 517 U.S. 681 (1996).

13. *See Maye v. Smith Barney*, 897 F. Supp. 100, 105 (S.D.N.Y. 1995).

14. Jack Wilson, "No-Class-Action Arbitration Clauses," *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 849 (2004) (citing IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION-NATIONALISM-INTERNATIONALIZATION 83 (1992)).

15. *Dobson*, 513 U.S. at 283 (O'Connor, J., concurring) (citing *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting)).

16. Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 17–19 (2002).

III. THE POLISH LEGAL FRAMEWORK OF ARBITRATION

In Poland, both domestic and international arbitration are regulated by the Code of Civil Procedure, which was enacted in 1964.¹⁷ On July 28, 2005, the Polish Parliament passed a completely new set of regulations concerning arbitration, which have been in effect since October 2005. The changes liberalized the legal framework of arbitration and were based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.¹⁸ The references below are to the new articles introduced into the Polish *Kodeks Postępowania Cywilnego*, or Civil Procedure Code.

Some new provisions clarified previously ambiguous issues, including when courts may nullify agreements to arbitrate. For example, having a power of attorney now clearly includes the power to enter into binding arbitration agreements.¹⁹ In the context of a comparison between Polish and U.S. standards, it is particularly interesting to note that the Polish Civil Procedure Code voids contractual provisions that give unequal power to parties to an arbitration, including provisions that entitle only one party to opt for arbitration.²⁰

Other changes relate to the arbitrability of disputes. All asset-related disputes are now arbitrable except for those involving child support payments.²¹ Disputes within corporations, cooperatives and associations are now arbitrable.²² A corporation and its shareholders are bound by arbitration clauses in the articles of association,²³ and disputes between Polish parties will be arbitrable in foreign arbitration courts.²⁴ In addition, labor and employment law disputes are now arbitrable, but only if a written agreement to arbitrate is entered into after the dispute begins.²⁵

Several new provisions involve arbitral jurisdiction and procedures. Parties now have complete freedom to determine the composition of

17. *Kodeks Postępowania Cywilnego* [Civil Procedure Code](Pol.) [hereinafter Polish Civil Procedure Code].

18. United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 40 U.N. GAOR Supp. (No. 17), Annex I at 81, U.N. Doc. A/40/17, annex 1 (June 21, 1985) [hereinafter UNCITRAL Model Law].

19. Polish Civil Procedure Code, *supra* note 17, art. 1167.

20. *Id.* art. 1161, § 2.

21. *Id.* art. 1157.

22. *Id.* art. 1163

23. *Id.* art. 1163, § 1.

24. *See id.* arts. 1154–56.

25. *Id.* art. 1164.

arbitral tribunals and to select arbitrators.²⁶ Parties also have the ability to determine rules and procedures, as long as all parties are treated equitably by such procedures.²⁷ Also, retired state judges are now allowed to serve as arbitrators.²⁸ In the context of this Article, it is especially noteworthy that the new provisions adopt the principle of *kompetenz-kompetenz*, which means that an arbitral tribunal is able to decide for itself whether it has jurisdiction over a matter and whether an arbitration agreement is valid.²⁹ Consistent with the principle of *kompetenz-kompetenz*, the invalidation or expiration of an agreement that includes an arbitration clause will not necessarily mean that the agreement to arbitrate is invalid or has expired.³⁰

The new provisions also address applicable law and when awards should be set aside. Arbitrators can adjudicate disputes according to the applicable law and in accordance with the agreement between the parties and established customs.³¹ If so empowered by the parties, arbitrators may rule according to general legal or moral principles.³² The possible grounds for setting aside an arbitral award closely resemble the provisions of Article V of the New York Convention of 1958.³³ The only means of challenging an arbitral ruling is to have the ruling overturned in court. An award will be set aside only if there was no valid arbitration clause, if there was procedural unfairness such that a party was unable to present its case, if Polish law prohibits the arbitration of the subject matter, or if the award violates fundamental principles of justice.³⁴ Parties have three months from the date of the arbitral decision to appeal.³⁵

Finally, the new provisions streamline the acknowledgement and enforcement of arbitral awards. Previously, enforcement proceedings included two stages, which increased the time required to obtain a judgment. The new rules outline two distinct procedures. In the first, a party may simply seek an acknowledgement, such as a confirmation of the arbitrator's decision regarding the meaning of a contract term. In the second, a party may seek enforcement, such as the recovery of monetary damages. In either case, a party must bring the matter to a court. In the

26. *Id.* art. 1169.

27. *Id.* art. 1183.

28. *Id.* art. 1170, § 2.

29. *Id.* art. 1180, § 1.

30. *Id.* art. 1180, § 1.

31. *Id.* art. 1194.

32. *Id.*

33. New York Convention, *supra* note 7.

34. Polish Civil Procedure Code, *supra* note 17, arts. 1205–07.

35. *Id.* art. 1208.

first instance, the court may acknowledge the arbitral determination, issuing the decision in a closed session. In the second case, the court issues an executory order.³⁶

A separate article controls the acknowledgement and enforcement of rulings and settlements by foreign arbitrators. In such cases, a party must still go to a court to have an award acknowledged or enforced.³⁷ The grounds for refusing to recognize or enforce an award are essentially the same as in domestic cases.³⁸ Namely, a court may refuse to recognize or enforce a foreign arbitral award on the grounds that there was no valid agreement to arbitrate, there was procedural unfairness, the award was overturned by a court in a relevant foreign jurisdiction, the subject of the arbitration is inarbitrable under Polish law, or the award violates fundamental principles of justice.³⁹

IV. HOW U.S. AND POLISH LAW DIFFER

A. *Kompetenz-Kompetenz*

In the U.S., the question of whether an arbitral body has jurisdiction over a dispute is typically one that courts decide, in accordance with the FAA. The alternative approach, prevalent throughout most of the world and prominent in most internationally-recognized rules of arbitration,⁴⁰ is

36. *Id.* art. 1214.

37. *Id.* art. 1215.

38. *Id.* art. 1205.

39. *Id.*

40. The UNCITRAL Rules of Arbitration state that “[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.” Arbitration Rules of the United Nations Commission on International Trade Law, 31 U.N. GAOR Supp. (No. 17), U.N. Doc. A/31/17 (1976). The International Chamber of Commerce (ICC) Rules of Arbitration allow a court to determine whether an agreement to arbitrate exists; if so, all other decisions related to jurisdiction are for the arbitral tribunal to decide. International Chamber of Commerce, *Rules of Arbitration*, art. 6(2), ICC No. 808 (Jan. 1, 1998). The Arbitration Rules of the International Center for Settlement of Investment Disputes (ICSID) and the American Arbitration Association (AAA) International Arbitration Rules likewise give arbitral tribunals the power to rule on their own jurisdiction, including objections with respect to the existence of the arbitration agreement. ICSID, Rules of Procedure for Arbitration Proceedings, ch. 4, rule 41(1), ICSID/15 (Apr. 2006), available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> American; AAA, International Dispute Resolution Procedures, art. 15 (Sept. 1, 2007), available at <http://www.adr.org/sp.asp?id=28144#introduction>. The London Court of International Arbitration (LCIA) Rules state that “[b]y agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal’s jurisdiction or authority” LCIA, LCIA Arbitration Rules, art. 23.4 (Jan. 1, 1998), available at http://www.lcid.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf.

known as *kompetenz-kompetenz*.⁴¹ Stated simply, this principle gives arbitrators the power to decide their own jurisdiction.⁴² The UNCITRAL Model Law endorses the principle of *kompetenz-kompetenz*,⁴³ allowing a limited period of expedited court review to appeal jurisdictional questions. Poland has adopted the principle of *kompetenz-kompetenz*, as proposed by the UNCITRAL Model Law, providing an arbitral tribunal not only the power to decide questions of its own jurisdiction, but also to decide whether an arbitration agreement is valid and effective. Consistent with the doctrine of *kompetenz-kompetenz*, the invalidity or expiration of a contract does not in itself cause an arbitration agreement contained therein to be invalid or to expire.

In the U.S., the question of whether an arbitral tribunal has the power to decide questions regarding its own jurisdiction has become obfuscated recently by the Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*.⁴⁴ While the Court confirmed that in the U.S., courts will decide challenges to the jurisdiction of arbitral tribunals,⁴⁵ it carved out an exception which has proven to be the source of confusion and inconsistency. The exception arises where there is "clear and unmistakable evidence" that the parties intended to submit the arbitrability issue to arbitration.⁴⁶ In such a situation, a court must give "considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."⁴⁷

One could interpret the *First Options* exception to be nudging U.S. jurisprudence toward a position more consistent with *kompetenz-*

41. The doctrine originated in German courts, and hence, while the term "competence-competence" is sometimes used in the U.S., the doctrine is most frequently referred to by its German name. Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 352 n.3 (1997) (citing Frank-Bernd Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, 11 ARB. INT'L 398, 404 (1995)).

42. *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 287 (3d Cir. 2003).

43. HOWARD M. HOLTSMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, LEGISLATIVE HISTORY AND COMMENTARY 480 (1989).

44. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

45. *Id.* at 947–49.

46. *Id.* at 944 (internal quotations omitted).

47. *Id.* at 943. The Supreme Court followed *First Options* with their opinion in *Green Tree Financial v. Bazzle*, 539 U.S. 444, 453–54 (2003), where the Court found that, in the consumer loan context, arbitrators should be allowed exclusive authority to decide whether claimants can proceed collectively when their arbitration agreements are silent on the issue of class arbitration, potentially signalling that the movement toward allowing arbitrators more discretion over their jurisdiction is stronger than many imagined at the time of *First Options*. *Id.*

kompetenz,⁴⁸ but by (1) stating this as an exception to the U.S. default rule and (2) failing to reconcile this exception with the language of the FAA,⁴⁹ the opinion has generated scholarly critique and inconsistent opinions in the Courts of Appeals.⁵⁰ Conflict among the circuits has emerged in the context of contracts in the securities industry, which include a six-year limit on the eligibility of disputes for arbitration. Some circuits interpret this threshold issue of arbitrability to be a question for the courts in the absence of evidence of contrary intentions of the parties.⁵¹ Other circuits have interpreted this six-year limit as a matter for arbitrators to decide, per the *First Options* opinion.⁵²

The most credible resolution to this problem is to eliminate the basis for inconsistency through legislative reform. The FAA states that courts must resolve questions of arbitral jurisdiction, so it would be improper for even the Supreme Court to attempt to contradict the clear text of this law. Therefore, Congress should pass legislation to reform the FAA and clearly state the situations where arbitral bodies may decide questions of their own jurisdiction, and when and how such controversies may be resolved by the courts.

B. Arbitrability of Employment Disputes

As stated above, employment disputes are only arbitrable in Poland if the agreement is entered into after the dispute arises. In the U.S., a pre-dispute agreement to arbitrate may be enforced in the context of employment law. However, there are some important caveats to this general rule. Most significantly, state contract law will provide a basis for

48. Some have pointed out that previously there were limited circumstances in which U.S. courts would allow arbitrators to decide their own jurisdiction if so allowed by the arbitration rules adopted in the arbitration agreement. See Conrad K. Harper, *The Options in First Options: International Arbitration and Arbitral Competence*, 771 PLI/COMM 127, 141–43 (1998).

49. *First Options*, 514 U.S. at 943.

50. Adriana Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle*, 2 PEPP. DISP. RESOL. L.J. 77, 85–91 (2002); Wyss, *supra* note 41, at 360–61; Shirin Philipp, *Is the Supreme Court Bucking the Trend?* *First Options v. Kaplan in Light of European Reform Initiatives in Arbitration Law*, 14 B.U. INT'L L.J. 119, 124–26 (1996).

51. The Third, Sixth, Seventh, Tenth and Eleventh Circuits have held that a court must decide the applicability of a time limitation because such a bar is a substantive eligibility requirement. See, e.g., *Smith Barney Inc. v. Schell*, 53 F.3d 807, 809 (7th Cir. 1995); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 514 (7th Cir. 1992); *PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989).

52. In contrast, the First, Fifth, Eighth and Ninth Circuits either deemed the time limits to be a procedural question for arbitrators to decide or found clear and obvious intent on the part of the parties to be bound to the decisions of arbitrators as to such a decision. See, e.g. *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 754 (5th Cir. 1995); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994).

nonenforcement of pre-dispute agreements to arbitrate in the context of employment law, but the standard for defining such situations is ambiguous. To fully understand how this ambiguity could arise, a brief review of the relevant jurisprudence is required.

It would appear that the text of the FAA does not ensure that pre-dispute arbitration agreements in the context of employment law would be enforced. Excluded from the coverage of the FAA are “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁵³ Some observers believe that Congress did not intend for the FAA to reach beyond disputes between business people, arguing, for example that:

It is hard to imagine any office accountable to an electorate who would openly avow the purpose of enabling those with economic power to diminish the enforceability of rights conferred by Congress and state legislatures on consumers, patients, employees, investors, shippers, passengers, franchisees, and shopkeepers.⁵⁴

Courts have come to similar conclusions regarding employment law statutes:

[A]n employee who brings a claim against his employers . . . on behalf of the federal government should not be forced by unequal bargaining power to accept a forum demanded as a condition of employment by the very party on which he informed.⁵⁵

The Ninth Circuit Court of Appeals was among the courts that construed Section One of the FAA to not require the enforcement of arbitration agreements entered into as a condition of employment.⁵⁶ Until 2001, *Gilmer v. Interstate/Johnson Lane Corp.*⁵⁷ was the Supreme Court case that came closest to providing guidance on this point. The *Gilmer*

53. 9 U.S.C. § 1 (2000).

54. Wilson, *supra* note 14, at 850 (citing Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 402). For other authorities arguing that the FAA was intended to apply to merchants of roughly equal bargaining power, see, e.g., Margaret M. Harding, *The Redefinition of Arbitration by those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (1999).

55. *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2000). On appeal, the circuit court held that aside from the question of whether the matter under a federal statute is arbitrable, a fundamental question existed as to whether there was valid assent by the employee to the arbitration agreement and whether the agreement covered such a situation. *Nguyen v. City of Cleveland*, 312 F.3d 243, 246 (6th Cir. 2002).

56. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1072 (9th Cir. 1999) [hereinafter *Circuit City*].

57. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

decision required a registered securities representative to arbitrate his Age Discrimination in Employment Act (ADEA) claim.⁵⁸ Since the agreement to arbitrate was in the securities registration document and not an employment contract, the Supreme Court stated that it need not interpret Section One of the FAA in the context of employment disputes at that time.⁵⁹

In *Circuit City Stores, Inc. v. Adams*, a retailer sued in federal court in California to block a sales employee's discrimination action in state court.⁶⁰ Circuit City asked the district court to require the employee to arbitrate his claims under the FAA.⁶¹ Circuit City argued that the arbitration clause in their standardized employment contract should be enforced.⁶² The Ninth Circuit reversed the district court's order for arbitration on the grounds that all employment contracts were excluded from enforcement under the FAA, a position that was in conflict with all other circuits to have addressed the question, yet based on an understandable and credible reading of the FAA's Section One.⁶³

The Supreme Court ruled that the exceptions in Section One of the FAA were intended to apply only to transportation workers, whose employment disputes were subject to regulation under other statutes, such as the Railway Labor Act.⁶⁴ The Court held that all other employment contracts are subject to Section Two of the FAA, which permits federal courts to enforce arbitration agreements in any "contract evidencing a transaction involving commerce."⁶⁵

However, the *Circuit City II* decision is silent on vital questions, such as the consequence of the failure of an arbitration agreement to meet the

58. *Id.* at 27.

59. *Id.* at 25 n.2.

60. *Circuit City*, 194 F.3d at 1070.

61. *Id.* at 1071.

62. *Id.* The arbitration clause read:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109–10 (2001) (emphasis in original) [hereinafter *Circuit City II*].

63. *Circuit City*, 194 F.3d at 1071.

64. *Circuit City II*, 532 U.S. at 121.

65. *Id.* at 123.

requirements of an enforceable contract or situation in which arbitral procedures are not as protective of statutory rights as the rules of civil procedure of the courts.

Therefore, courts still have some latitude to find that an agreement to arbitrate an employment dispute would be unconscionable. The Third Circuit came to such a conclusion in *Parilla v. IAP Worldwide Services VI, Inc.*⁶⁶ In that case Parilla, a dismissed employee, sued her former employer for violations of Title VII and Titles 10 and 24 of the Virgin Islands Code, wrongful discharge, breach of contract, misrepresentation and negligent and/or intentional infliction of emotional distress.⁶⁷ In response to IAP's motion to compel arbitration, the district court adopted its previous reasoning in *Plaskett v. Bechtel International, Inc.*⁶⁸ On appeal, the Third Circuit adopted its own prior logic, expressed in *Alexander v. Anthony Int'l L.P.*,⁶⁹ namely, that if employment contracts are enforceable to the same extent as any other contracts, then unconscionable employment contracts cannot be enforced.⁷⁰

The *Parilla* case is especially instructional because it reveals the complexity and uncertainty of decisions regarding the conscionability of arbitration clauses in employment contracts. The Third Circuit ruled on six questions pertaining to the conscionability of the arbitration clause. First, it decided that a thirty-day notice provision, requiring the presentation of a written complaint to the company within thirty days of a dispute, was unconscionable.⁷¹ Second, it ruled that requiring each side to "bear its own costs and expenses, including attorney's fees" was unconscionable.⁷² The Third Circuit, however, disagreed with the district court and deemed a confidentiality provision conscionable.⁷³ Both the Third Circuit and the district court agreed that the provision requiring disputes to be arbitrated, rather than resolved in court or through an administrative agency, was conscionable.⁷⁴ In addition, both courts found that a provision prohibiting the selection of a resident of the Virgin Islands as arbitrator was conscionable.⁷⁵

66. *Parilla v. IPA Worldwide Servs. VI, Inc.*, 368 F.3d 269 (3d Cir. 2004).

67. *Id.* at 273.

68. *Plaskett v. Bechtel Int'l, Inc.*, 243 F. Supp. 2d 334 (D.V.I. 2003)

69. *Alexander v. Anthony Int'l L.P.*, 341 F.3d 256 (3d Cir. 2003).

70. *Parilla*, 368 F.3d at 275–76.

71. *Id.* at 277–78.

72. *Id.* at 278–79.

73. *Id.* at 281.

74. *Id.* at 282.

75. *Id.* at 283.

Finally, the Third Circuit remanded to the district court the question of whether to sever the unenforceable provisions from the rest of the agreement to arbitrate or to wholly invalidate the entire agreement:

The existence of multiple unconscionable provisions will not always evidence “serious moral turpitude” or serious misconduct, precluding enforcement of the agreement to arbitrate. That will depend on whether the number of such provisions and the degree of the unfairness support the inference that the employer was not seeking a *bona fide* mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage.⁷⁶

The case of *Hooters v. Philips* is the textbook case for such a scenario.⁷⁷ There, the Fourth Circuit found that an agreement to arbitrate included so many unfair arbitral procedures that it rendered the entire agreement to arbitrate unenforceable.⁷⁸

Here we see a huge potential for inconsistency in the U.S. approach to pre-dispute arbitration agreements in the employment law context. To judge the unconscionability of arbitration procedures requires application of contract law. Each of the fifty state jurisdictions has its own body of contract law case law. This fact may result in some inconsistency among jurisdictions as to what qualifies as conscionable, especially when one takes into account the individual sympathies of various judges. Indeed, some inconsistencies have emerged among the circuits already. For example, in some jurisdictions, an employment agreement that limits the available damages may not be enforced,⁷⁹ while in others it will be.⁸⁰

C. Remedies for Agreements that are Unconscionable

As explained above, the Polish Code of Civil Procedure renders void any contractual provision that allocates unequal power, including an agreement that allows one party to choose whether to arbitrate. U.S. cases involving unconscionability as grounds for invalidating arbitration clauses in the employment law context, as discussed above, as well as other cases involving unconscionability, similarly cite unfair procedural provisions.⁸¹

76. *Id.* at 289.

77. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

78. *Id.* at 938.

79. *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060 (11th Cir. 1998).

80. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 552 (4th Cir. 2001).

81. For a discussion of U.S. cases using unconscionability to invalidate provisions in agreements

Thus, it is noteworthy that Polish law and U.S. law are roughly comparable when it comes to finding grounds to invalidate unfair procedural provisions or entire arbitration agreements. The key difference, as noted in the previous section, is that the ambiguity and inconsistency that characterize the issue of arbitrating employment disputes in the U.S. is eliminated in Poland by the new Code of Civil Procedure regulations.

D. Consequences of a Foreign Tribunal's Failure to Consider Applicable National Law

As discussed above, Polish law does not provide that courts may set aside an arbitral award for failure to consider Polish national law. In contrast, one of the persistent mysteries of U.S. law is the “second look” doctrine established by the U.S. Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth*.⁸² In *Mitsubishi*, an auto distributor wanted to sue Mitsubishi under antitrust laws in court despite a pre-dispute agreement to arbitrate.⁸³ The Supreme Court was convinced that a Japanese arbitrator, acting under Swiss choice-of-law rules, could apply U.S. antitrust laws.⁸⁴ In its famous footnote 19, the *Mitsubishi* court addressed the concern that U.S. citizens may be deprived of important protections provided by U.S. statutes.⁸⁵ Footnote 19 states that where choice-of-law and choice-of-forum clauses operate together as a prospective waiver of statutory rights, the agreement should be struck down on public policy grounds.⁸⁶ Further, footnote 19 states that if a foreign arbitral forum does not apply U.S. law in a situation where it ought to do so, U.S. courts could review the arbitral decision at the enforcement stage and refuse to enforce the arbitral outcome on the grounds that appropriate and applicable U.S. law was not considered.⁸⁷ This ability to review the arbitral decision at the enforcement stage is the “second look” doctrine that has sparked so much controversy over the past two decades.

The implications of *Mitsubishi* are an enduring mystery because, while scholars have spilt much ink in analyzing them⁸⁸ and while courts have

to arbitrate, see Mary Jane Groff, *Where Can Unconscionability Take Arbitration? Why the Fifth Circuit's Conscience Was Only Partially Shocked*, 2005 J. DISP. RESOL. 131 (2005).

82. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985).

83. *Id.* at 619.

84. *Id.* at 633.

85. *Id.* at 637 n.19.

86. *Id.*

87. *Id.*

88. See Dulic, *supra* note 50, at 86–87; Wilson, *supra* note 14; Lisa Sopata, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.: International Arbitration and Antitrust Claims*, 7 NW. J. INT'L

relied on them to greatly expand their deference to arbitral tribunals,⁸⁹ there has not been a single instance where a U.S. court used its “second look powers” to recognize—or to refuse to recognize—a foreign arbitral award. The “second look” doctrine is also controversial in that it does not appear to completely please either pro-arbitration advocates or individuals who are staunchly suspicious of secretive foreign forums applying U.S. public laws. On the one hand, *Mitsubishi* opened the door for a wide variety of statutes involving public policy to be interpreted and applied by private arbitral forums. In this sense, *Mitsubishi* is rightfully seen as conducive to private dispute resolution. On the other hand, *Mitsubishi*’s footnote 19 appears to have created a ground for non-recognition that does not appear in the New York Convention: namely, that aside from fundamental notions of fairness and justice, the mere fact that national law was not considered can serve as grounds for non-recognition.

While footnote 19 of *Mitsubishi* and the “second look” doctrine have arguably been relegated to the status of dicta over the past two decades,⁹⁰ *Mitsubishi*’s “second look” doctrine has never been overruled or disavowed by the Supreme Court. Therefore, it is worth noting that in this regard, U.S. jurisprudence still retains a feature which is less conducive to arbitral outcomes than Polish law. *Mitsubishi* still raises questions as to the finality of international arbitral awards that may require enforcement in the U.S.

V. CONCLUDING OBSERVATIONS

The preceding comparison of the U.S. and Polish legal frameworks of arbitration reveals that in some instances, Polish law is currently more favorable to arbitration than U.S. law. Polish arbitration law is more favorable in that Polish arbitrators are explicitly allowed to decide whether they have jurisdiction to resolve a controversy and that there is no basis for invalidating international awards for failure to apply Polish law. Additionally, the new Polish framework contains a safeguard that appeals to common sense inasmuch as it protects parties with inferior bargaining power; namely, that pre-dispute arbitration agreements will not be

L. & BUS. 595 (1986).

89. See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995); *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294 n.4 (9th Cir. 1998), cert. denied 525 U.S. 943 (1998); *George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1210 (6th Cir. 1995); *Simula v. Autoliv*, 175 F.3d 716, 722–23 (9th Cir. 1999).

90. See, e.g., *Vimar Seguros y Reaseguros*, 515 U.S. at 541; *Richards*, 135 F.3d at 1294 n.4; *George Fischer Foundry Sys.*, 55 F.3d at 1210; *Simula*, 175 F.3d at 722–23.

enforced in the context of employment law. Such a safeguard appears to be absent from the legal framework of arbitration in the United States.

Ultimately, this comparison of U.S. jurisprudence with Polish regulations also reveals the confusion and uncertainty that can characterize U.S. law. Some differences between states and circuits are of course inevitable due to the U.S. structure of federalism and its common law tradition, but the confusion and ambiguity are especially glaring in this context and are exacerbated by less-than-ideal legislative drafting.⁹¹ This is neither the first Article nor the last to argue that Congress should reform the FAA to address well-founded concerns.⁹² Specifically, Congress ought to clarify whether Congressional intent is that pre-dispute arbitration agreements in employment contracts are to be enforced, whether arbitrators have the ability to resolve challenges to their own jurisdiction, and whether arbitral awards may be nonenforceable if applicable U.S. laws are not considered by foreign arbitrators.

91. Karamanian, *supra* note 16, at 20 (“To a certain extent, inartful drafting in the [New York] Convention and/or in the Convention Act [which made the New York Convention’s provisions part of the FAA] has contributed to the varying judicial opinions. Also, an apparent lack of awareness of the intricacies of the treaty and the legislative scheme is at fault.”) Karamanian goes on to point out that the implementing legislation of the New York Convention fails to define elementary terms like “agreement in writing” and “arbitral award.” Karamanian also provides examples of contradictory court decisions, for example, on the issue of whether unsigned documents that include an arbitration clause amount to an agreement in writing. *Id.* at 62–74. Karamanian also points out the uncertainty as to whether an arbitral command to produce a document such as a tax return is an interim order or an arbitral award that can be enforced by a court. *Id.* at 93.

92. *See, e.g.*, Dulic, *supra* note 50; Wilson, *supra* note 14; Sopata, *supra* note 82.