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

In Poland, domestic and international arbitrations are regulated by the Civil Procedure Code. A completely new set of regulations concerning arbitration went into effect in October, 2005.

A comparison of the Polish and American legal frameworks of arbitration reveals many similarities and a few key differences. The differences involve the powers of arbitrators to decide upon their own jurisdiction, the arbitrability of employment disputes and the consequences of failure to consider applicable national law.

Comparing how similar cases would be resolved under the new Polish standards and U.S. standards raises the question of how U.S. standards evolved and whether they are truly the most desirable and practical. Ultimately, the author concludes that Congress should ammend the Federal Arbitration Act to eliminate certain troublesome ambiguities.

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Through the Looking Glass: What a Comparison with the New Polish Legal Framework of Arbitration Reveals About the U.S. Legal Framework of Arbitration[1]

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I. Introduction

Public laws provide frameworks for the enforceability of arbitration agreements, the enforcement of arbitral awards and the setting aside of arbitral awards. The public laws governing arbitration have 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

[1] To explain the title of this paper: in the U.S., describing something as Polish does not always have a positive connotation. This exercise in comparative law is intended to highlight how, despite U.S. prejudices, in the context of their legal frameworks of arbitration, the new Polish regulations are in some ways more logical than U.S. jurisprudence. 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 is more aptly applied 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 thousand of logic" for the purposes of understanding seemingly illogical outcomes in common law jurisdictions. Be that as it may, this article is part of a growing chorus suggesting that it is time for Congress to take action to reform the Federal Arbitration Act and mitigate some egregious idiosyncrasies and inconsistencies through legislative reform. The title of this paper 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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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 another country can result in the realization that U.S. standards are in some instances not perfectly consistent, logical or desirable. The standards of U.S. courts, sometimes criticized for being too permissive of arbitral dispute resolution when it may compromise procedural due process or substantive rights, sometimes turn out not to be the most encouraging of arbitration in all situations. In other situations, U.S. jurisprudence indeed appears to be unreasonably favorable of enforcing arbitral outcomes.

This paper will begin with a review of the basic framework of U.S. arbitration law. Next, this paper will highlight the most significant reforms to the Polish legal framework of arbitration. The most significant differences between the U.S. and Polish frameworks will then be explored. This comparison will reveal that U.S. law is in some ways not the most conducive to arbitration. This paper will also point out how U.S. law is, in other contexts, not the most desirable from a public policy perspective. Ultimately, some of the inconsistencies and uncertainty surrounding the U.S. legal framework of arbitration are attributable to the nature of the common law legal tradition and the U.S. structure of federalism. One possible solution to the shortcomings discussed in this paper would be Congressional action to reform the Federal Arbitration Act.

II. The U.S. Legal Framework of Arbitration

Since 1925, the most important component of the U.S. framework of public laws governing arbitration has been the Federal Arbitration Act (FAA).[3] Congress enacted the FAA to "revers[e] centuries of judicial hostility to arbitration agreements".[4] 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.[5] The FAA allows courts to compel arbitration where there is a valid agreement to arbitrate but where one party refuses to arbitrate.[6] The FAA also allows courts to confirm or enforce arbitral awards.[7] The only grounds stated in the FAA for vacating an arbitral award are fraud, partiality or corruption of an arbitrators, arbitrator misconduct or lack of jurisdiction.[8]

Chapter 2 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"). Chapter 3 of the FAA was added to implement the 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention"). 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 state has its own act governing the enforceability of arbitral agreements and outcomes, the FAA was ruled to preempt state laws by the U.S. Supreme Court decision in *Allied-Bruce Terminex Cos., Inc. v. Dobson*.[9] There, an Alabama statute that prohibited the

[3] U.S. Arbitration Act, ch.213, §§ 1-5, 43 Stat. 883-86 (1925). The original Act contained only the first chapter of the current statute.
[4] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974)).
[5] 9 U.S.C. § 2 (2000).
[6] 9 U.S.C. § 4 (2000).
[7] 9 U.S.C. § 9 (2000).
[8] 9 U.S.C. § 10 & 11 (b) (2000).
[9] 513 U.S. 265 (1995).

enforcement of pre-dispute arbitration agreements was held to be preempted by the FAA despite an amicus brief filed by twenty states attorney general.[10] The court reasoned that Congress has the power to preempts state laws in this context based on the commerce clause of the U.S. Constitution.[11] The Supreme Court subsequently ruled that the FAA preempted a state statute that required arbitration provisions to be printed in underlined capital letters on the first page of contracts, even when the intent of the law was to ensure informed consent to arbitration provisions.[12] Thus, for all intents and purposes, when evaluating the public law framework governing arbitration in the United States, it is appropriate to focus on the FAA and how the FAA has been interpreted by court decisions.

While the evolution of FAA jurisprudence in specific contexts will be explained in greater detail *infra*, it is worth noting from the onset that arbitration under the FAA has grown drastically beyond what its drafters intended, which was to assure only on procedural rights of contracting parties.[13] The FAA has instead become a "national regulatory statute."[14] In the words of Justice O'Connor, "over the past decade, the 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

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[10] *Id.* at 272.
[11] *Id.* at 273-274.
[12] *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. at 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 about the font size and location of arbitration provisions in a contract. *Casarotto v. Lombardi*, 886 P.2d 931, 933 (Mont. 1994), rev'd 517 U.S. at 681 (1996).
[13] Tom Carbonneau, *Cases and Materials on Commercial Arbitration,* 20 (Adams & Reese Legal Services, 1997) at 173 n.7 (quoting *Maye v. Smith Barney*, 897 F. Supp. 100 (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 QLR 737, 849 (2004).
[15] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (citing *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting)).

devices, U.S. courts have become imbedded in the international arbitration process. ...[T]he judicial landscape is far from clear."[16]

III. Polish Legal Framework of Arbitration

In Poland, both domestic and international arbitrations are regulated by the Civil Procedure Code, enacted in 1964. A completely new set of regulations concerning arbitration were passed on July 28, 2005, and have been in effect since October 2005. The changes liberalized the legal framework of arbitration and were based on the UNCITRAL Model Law. The references below are to the new articles introduced into the Polish *Kodeks Postepowania Cywilnego*, or Civil Procedure Code.

Some new provisions clarified previously ambiguous issues, including when courts may nullify agreements to arbitrate. For example, having the powers of attorney now clearly includes the power to enter into binding arbitration agreements (art. 1167). In the present context of comparing current Polish standards with U.S. standards, it is particularly interesting 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.

Other changes relate to the arbitrability of disputes. All asset-related disputes are now arbitrable except for those involving child support payments (art. 1157). Disputes within corporations, cooperatives and associations are now arbitrable. A company and its shareholders are now bound by arbitration clauses in the articles of association (art 1163 § 1) and disputes between Polish parties will be arbitrable in foreign arbitration courts. However, in the context of

[16] Susan L. Karamanian, "*The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*," 34 Geo. Wash. Int'l. Rev. 17 (2002)

this paper, it is particularly interesting to note that labor and employment disputes are now arbitrable, but only if a written agreement to arbitrate is entered into after the dispute begins (art. 1164).

Several new provisions involve arbitral jurisdiction and procedures. Parties now have complete freedom to determine the composition of arbitral tribunals and select arbitrators. Parties also now have complete freedom to determine rules and procedures, as long as parties are treated equitably in the procedures (art. 1183). Also, retired state judges are now allowed to serve as arbitrators (art. 1170 § 2). In the context of this paper, it is especially noteworthy that the new provisions adopt the principle of *kompetenz-kompetenz*; namely, an arbitral tribunal is able to decide whether it has jurisdiction over a matter and whether an arbitration agreement is valid (art. 1180 § 1). Consistent with the principle of *kompetenz-kompetenz*, validity or expiry of an agreement that includes an arbitration clause will not necessarily mean that an arbitration agreement is invalid or expires (art. 1180 § 1).

The new provisions also address applicable law and setting aside awards. Arbitrators can adjudicate disputes according to applicable law and in accordance with the agreement between the parties and established customs. If so empowered by the parties, arbitrators may rule according to general legal or moral principles (art. 1194). The possible grounds for setting aside an arbitral award closely resemble the provisions of Article V of the New York Convention of 1958. The only means of challenging an arbitral ruling in Poland will be to have the ruling overturned in court. An award will be set aside only if there was no valid arbitration clause, procedural unfairness such that a party was unable to present its case, if the arbitral award was overruled by a court, if Polish law prohibits the arbitration of the subject matter, or if the award

violates fundamental principles of justice (art. 1205 and subsequent articles). Parties have three months from the date of the arbitral decision to appeal the ruling in court (art. 1208).

Finally, the new provisions streamline the acknowledgement and enforcement of arbitral awards. Until now the proceedings have included two stages, which increased the time required to obtain an enforceability judgment. The new rules outline two distinct procedures. In the first, a party may be seeking simply an acknowledgement, such as a confirmation of the arbitrator's decision as to the meaning of a contract's term. In the second, a party may be seeking enforcement, such as recovering monetary damages. In either case, a party must bring the matter to a court. In the first case, the court may acknowledge the arbitral determination, issuing the decision in a closed session. In the second case, the court issues an executory order (art. 1214).

A separate article controls the acknowledgement or 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 (art. 1215). The grounds for refusing to recognize or enforce an award are essentially the same as in domestic cases (art. 1205). Namely, a court may refuse to recognize or enforce a foreign arbitral award on the grounds that there was no valid agreement to arbitrate, procedural unfairness, that the award was overturned by a court in a relevant foreign jurisdiction, that the subject of the arbitration is inarbitrable under Polish law or that the award violates fundamental principles of justice.

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 for the courts to decide, per the FAA. The alternative approach, prevalent in most of the world and prominent in most internationally-recognized rules of arbitration,[17] is known as *kompetenz-kompetenz*.[18] Stated simply, this principle gives arbitrators the power to decide their own jurisdiction."[19] The UNCITRAL model law endorses the principle of *kompetenz-kompetenz*,[20] 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, allowing 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 expiry of a contract does not in itself cause the arbitration agreement to be invalid or 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

[17] The United Nations Commission on International Trade Law (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." UNCITRAL Arbitration Rules Art. 21. 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. ICC Rules of Arbitration Art. 6(2). 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 Arbitration Rule 41(1); AAA International Arbitration Rules Art. 15. 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 Rules of Arbitration Art. 23.4.

[18] 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 at fn 3 (1997) (citing to Frank-Bernd Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, 11 Arb. Int'l 398, 404 (1995)).

[19] *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, C.A.3 (N.J.),2003.

[20] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary* 480 (1989).

in *First Options of Chicago, Inc. v. Kaplan*.[21] While the Court clarified that, in the U.S., the courts are to decide challenges to the jurisdiction of arbitral tribunals,[22] it carved out an exception which has proven to be the source of confusion and inconsistency. The exception arises when there is "clear and unmistakable evidence" that the parties intended to submit the arbitrability issue to arbitration.[23] In such a situation, a court must give "considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."[24]

One could interpret the *First Options* exception to be nudging U.S. jurisprudence toward a position more consistent with *kompetenz-kompetenz*,[25] but by (1) stating this as an exception to the U.S. default rule and (2) failing to reconcile this exception with the language FAA,[26] the opinion has generated several critiques and inconsistent outcomes.[27] The best evidence that the Supreme Court obfuscated the issue is the ensuing conflict among the Circuit Courts of Appeal. Conflicts between the circuits have 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

[21] 514 U.S. 938 (1995).
[22] *Id.* at at 947-49.
[23] *Id.* at 944.
[24] *Id.* at 943. The Supreme Court followed up *First Options* with their opinion in *Green Tree Financial v. Bazzle*, where it found that, in the consumer loan context, arbitrators should be allowed exclusive authority to decide whether claimants can procede 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*.
[25] Some have pointed out that there were some limited circumstances where previously 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).
[26] *Id.* at 938-49.
[27] Adriana Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz*, 2 Pepp. Disp. Resol. L.J. 77, (2002); Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 Tul. L. Rev. 351 (1997); 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 (1996).

evidence of contrary intentions of the parties.[28] Other circuits have interpreted this six-year limit as a matter for arbitrators to decide, per the *First Options* opinion.[29]

The most credible resolution to this problem is to eliminate the basis for inconsistency through legislative reform. The FAA states that it is a court issue to resolve questions of arbitral jurisdiction, so it would be improper for even the Supreme Court to attempt to contradict the clear text of a constitutional law passed by Congress. 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 *supra*, 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 still provides a basis for 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.

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[28] The Third, Sixth, Seventh, Tenth and Eleventh circuits have held that a court must decide the applicability of a time limitation because they found that the bar is a substantive eligibility requirement. *See, e.g., Smith Barney Inc. v. Schell,* 53 F3d 807 (7th Cir. 1995); *Edward D. Jones & Co. v. Sorrells,* 957 F.2d 509 (7th Cir. 1992); *PaineWebber Inc. v. Farnam,* 870 F.2d 1286, 1292 (7th Cir. 1989).

[29] In contrast, the First, Fifth, Eighth and Ninth Circuits either deemed the time limits to be a procedural question for arbitrators to decide or else 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 (5th Cir. 1995); *FSC Securities Corp. v. Freel***,** 14 F.3d 1310 (8th Cir. 1994).

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. Section One of the FAA excludes from the statute's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[30] There are many in the U.S. that believe that Congress did not intend the FAA to reach beyond disputes between businesspeople, 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.[31]

Courts have come to similar conclusions about 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.[32]

The Ninth Circuit Court of Appeals was among the courts construing Section One of the FAA to not require the arbitration of employment disputes.[33] Until 2001, *Gilmer v. Interstate/Johnson*

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[30] 9 USC § 1 (2000).
[31] *See* Wilson, *supra* note 14 at 849. 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*, Utah L. Rev. 857 (1999).
[32] *Nguyen v. City of Cleveland*, 121 F.Supp.2d 643 (N.D.Ohio Nov 21, 2000) (on appeal, the Circuit Court held that, besides the question of whether the matter under a federal statute are arbitrable, a fundamental question existed as to whether there was even 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 (C.A.6, Ohio, 2002).
[33] *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, C.A.9 (Cal.),1999.

Lane Corp.,[34] was the Supreme Court case that came closest to providing guidance on this point. The *Gilmer* decision barred a lawsuit under the federal Age Discrimination in Employment Act, thus requiring a registered securities representative to arbitrate his claim. 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 1 of the FAA in the context of employment disputes at that time.

In the case of *Circuit City v. Adams*, the retailer sued in federal court in California to block a sales employee's discrimination action in state court.[35] Circuit City asked the federal court to require the employee to arbitrate his claims under the FAA. Circuit City argued that the arbitration clause in their standardized employment contract should be enforced.[36] 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.[37]

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.[38] The Court held that all other employment

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[34] 500 U.S. 20 (1991).
[35] *Id.*
[36] 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."
[37] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
[38] *Id.* at 121.

contracts are subject to Section 2 of the FAA, which permits federal courts to enforce arbitration agreements in any "contract evidencing a transaction involving commerce."

However, the *Circuit City* decision is silent on vital questions, such as the consequences of the failure of arbitration agreements to meet the requirements of an enforceable contract or if arbitral procedures are not as protective of statutory rights as the rules of civil procedure in the courts.

Therefore, courts are still free to find that an agreement to arbitrate is unconscionable. The Third Circuit came to such a conclusion in *Parilla v. IAP Worldwide Services VI, Inc.*[39] In this 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, negligent and/or intentional infliction of emotional distress. In response to IAP's motion to compel arbitration, the District Court adopted its previous reasoning in *Plaskett v. Bechtel International, Inc.*[40] On appeal, the Third Circuit adopted its own previous logic, expressed in *Alexander v. Anthony Int'l L.P.*;[41] namely, that if such employment contracts are enforceable to the same extent as any other contracts, then unconscionable employment contracts cannot be enforced.[42]

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, the Court decided that a thirty-day notice provision, requiring the presentation of a written complaint to the company within 30 days of a dispute, to be

[39] 368 F.3d 269 (3d Cir 2004).
[40] 243 F.Supp. 2d 334 (D.Vi. 2003)
[41] 341 F.3d 256 (3d Cir. 2003)
[42] 368 F.3d at 275-6.

unconscionable.[43] Second, the Court ruled that requiring each side to "bear its own costs and expenses, including attorney's fees" to be unconscionable.[44] The Third Circuit, however, disagreed with the District Court and deemed a confidentiality provision conscionable. Both the 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.[45] Both the District Court and Third Circuit deemed that a provision prohibiting the selection of a resident of the Virgin Islands as arbitrator was conscionable.[46]

Finally, the Third Circuit remanded to the District Court on 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 unfair 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.[47]

The case of *Hooters v. Philips* is the typical textbook case for such a scenario.[48] There, the Fourth Circuit stated that the agreement to arbitrate included so many unfair arbitral procedures that it rendered the entire agreement to arbitrate unenforceable.

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[43] *Id.* at 277-8.
[44] *Id.* at 278-9.
[45] *Id.* at 282.
[46] *Id.* at 283.
[47] *Id.* at 289.
[48] *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, C.A.4 (S.C.),1999.

Here we see the huge opportunity for inconsistency in the U.S. approach to pre-dispute arbitration agreements in the employment law context. Judging the unconscionability of arbitration procedures requires applying contract law. Each of fifty state jurisdictions has its own body of contract case law. This fact may result in some inconsistency between jurisdictions as to what qualifies as conscionable, especially when one takes into account the individual sympathies of various judges. Indeed, some inconsistencies have emerged between the circuits already. For example, in some jurisdictions, an employment agreement that limits the available damages may not be enforced,[49] while in others, it will be.[50]

C. Remedies for agreements that are unconscionable

As explained *supra*, the Polish Code of Civil Procedure makes void any contractual provisions that allocate unequal powers, including those that allow only one party the choice of whether to arbitrate. The U.S. cases involving unconscionability as grounds for invalidating arbitration clauses *supra* in the employment law context and other varieties of cases involving unconscionability all cite to unfair procedural provisions.[51] Thus, it is noteworthy that Polish and U.S. law are roughly comparable when it comes to finding grounds to invalidate unfair arbitral procedure 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.

[49] *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, (11th Cir.(Fla.) Feb 04, 1998).
[50] *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir.(N.C.) Jan 22, 2001).
[51] For a discussion of U.S. cases using unconscionability to invalidate provisions in agreements to arbitrate, *see* Mary Jane Groff, *Where Can Unconscionability Take Arbitration? Why the Fifth Circuit's Conscience Was Only Partially Shocked*, J. Disp. Resol. 131 (2005).

D. Consequences of a foreign tribunal's failure to consider applicable national law

As mentioned *supra*, Polish law does not state that courts may set aside an arbitral award for failing 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*.[52] The Mitsubishi case involved an auto distributor who wanted to sue Mitsubishi under antitrust laws in court despite a pre-dispute agreement to arbitrate. The Supreme Court was convinced that a Japanese arbitrator under Swiss choice-of-law rules would apply U.S. antitrust laws. In its famous footnote 19 to the opinion, the *Mitsubishi* court addressed the concern that citizens may be deprived of important protections of U.S. statutes.[53] Footnote 19 states that where choice-of-law and choice-of-forum clauses operate together as a prospective waiver of statutory rights, the agreement would be struck down on public policy grounds. Further, footnote 19 states that if a foreign arbitral forum ever failed to apply U.S. law in a situation where it was so appropriate, 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. This ability to review the arbitral decision at the enforcement stage is the "second look" that has stirred so much controversy over the past two decades.

The second look doctrine is an enduring mystery because, while scholars have spilt much ink in analyzing it[54] and while courts have relied on it to greatly expand their deference to

[52] 473 U.S. 614, 638 (1985).
[53] *Id.*
[54] Dulic, *supra* note 27; Wilson, *supra* note 14; Lisa Sopata, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.: International Arbitration and Antitrust Claims,* 7 Nw. J. Int'l L. & Bus. 595 (1986).

arbitral tribunals,[55] there has not been a single instance where a U.S. court has 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, the Mitsubishi decision opened the door for a wide variety of statutes involving public policy to be interpreted and applied by private arbitral forums. In this sense, the Mitsubishi decision 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, just the very fact that national law was not considered can serve as grounds for non-recognition.

While footnote 19 of the Mitsubishi decision and the second look doctrine have been relegated to the status of dicta over the past two decades,[56] the Mitsubishi decision'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 of arbitral outcomes than Polish law. The Mitsubishi decision still raises questions as the finality of international arbitral awards that may require enforcement in the U.S.

V. Concluding Observations

[55] *See, e.g.*, *Vimar Seguros v Reaseguros v. M/V Sky Reefer,* 515 U.S. 528 (1995); *Richad's v. Lloyd's of London,* 135 F.3d 1289 (9th Cir. 1998), *cert. denied* 525 U.S. 943 (Oct. 13, 1998); *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 1994-1 CCH Trade Cases 70,566 (E.D. Mich. 1994), *aff'd*, 55 F.3d 1206 (6th Cir. 1995); *Simula v. Autoliv,* 175 F.3d 716, 722 (9th Cir. 1999).

[56] *See, e.g.*, *Vimar Seguros v Reaseguros v. M/V Sky Reefer,* 515 U.S. 528 (1995); *Richad's v. Lloyd's of London,* 135 F.3d 1289 (9th Cir. 1998), *cert. denied* 525 U.S. 943 (Oct. 13, 1998); *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 1994-1 CCH Trade Cases 70,566 (E.D. Mich. 1994), *aff'd*, 55 F.3d 1206 (6th Cir. 1995); *Simula v. Autoliv,* 175 F.3d 716, 722 (9th Cir. 1999).

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, and highlights several oddities of U.S. law. Polish arbitration law is more favorable of arbitration than U.S. law in that Polish arbitrators are explicitly allowed to decide whether they have jurisdiction and there is no basis for invalidating international awards for failure to apply Polish law when appropriate. In other regards, the new Polish framework contains a safeguard that appeals to common sense, even as it appears to be absent from the jurisprudence of the United States. Namely, pre-dispute arbitration agreements will not be enforced in the context of employment law.

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 in this context are exacerbated by less-than-ideal legislative drafting.[57] This is not the first paper to argue that Congress should reform the FAA to address well-founded concerns,[58] nor is this paper likely to be the last. Specifically, Congress ought to clarify whether indeed Congressional intent is that pre-dispute arbitration agreements in employment contracts are to be enforced, that arbitrators have the ability to decide

[57] Susan L. Karamanian, *supra* note 16, *see* 19-95 ("To a certain extent, 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." Susan Karamanian goes on to point out that the implementing legislation of the New York Convention fails to define elementary terms from "agreement in writing" to "arbitral award." Karamanian provides examples of contradictory court decisions on, for example, the issue of whether unsigned documents that include an arbitration clause amount to an agreement in writing. 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.

[58] Dulic, *supra* note 27; Wilson, *supra* note 14; Lisa Sopata, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.: International Arbitration and Antitrust Claims,* 7 Nw. J. Int'l L. & Bus. 595 (1986).

challenges to their own jurisdiction, and that arbitral awards may be nonenforceable if applicable U.S. laws are not considered by arbitrators.