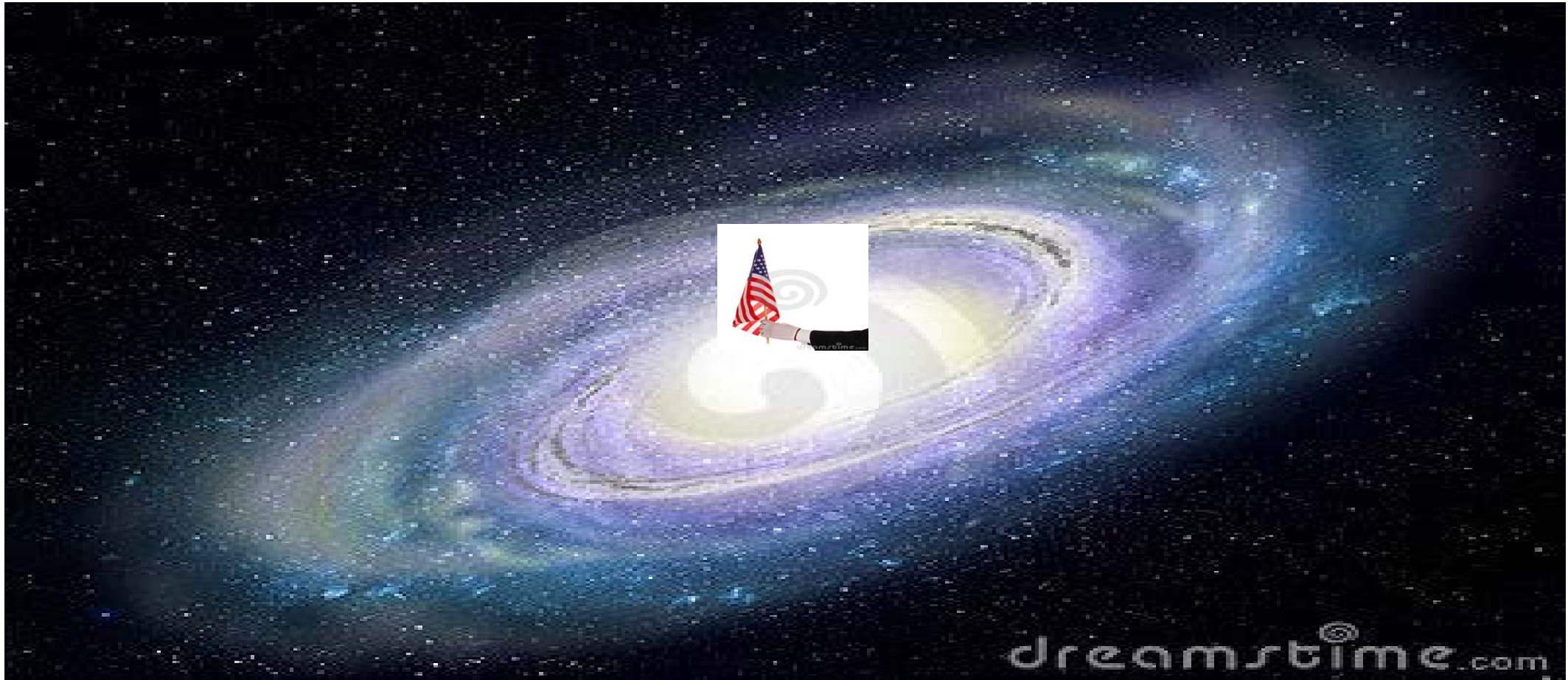




# Competence-Competence: How it's handled at the Center of the Universe

Alexander M. Gordon

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walderwyss attorneys at law

# Key Difference between U.S. and Others: Case-Law vs. Codification

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# The **Type** of Dispute at Issue **Should** determine how the Question is addressed

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Is the dispute over whether a valid agreement even exists?

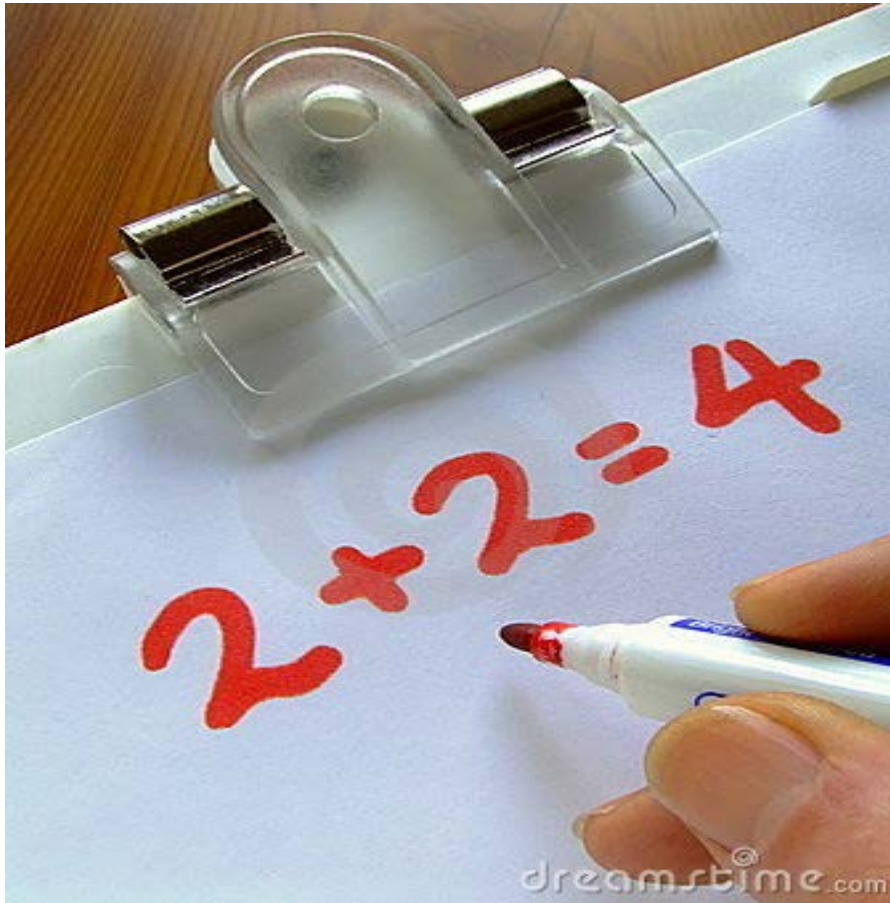


Or Is the dispute over the scope of an admittedly valid agreement?



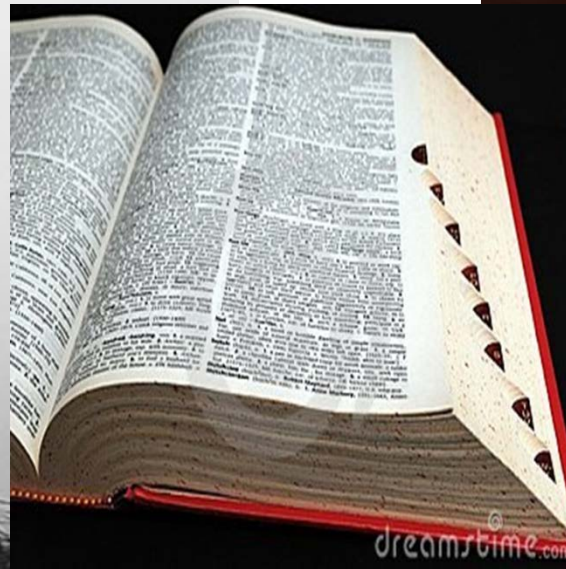
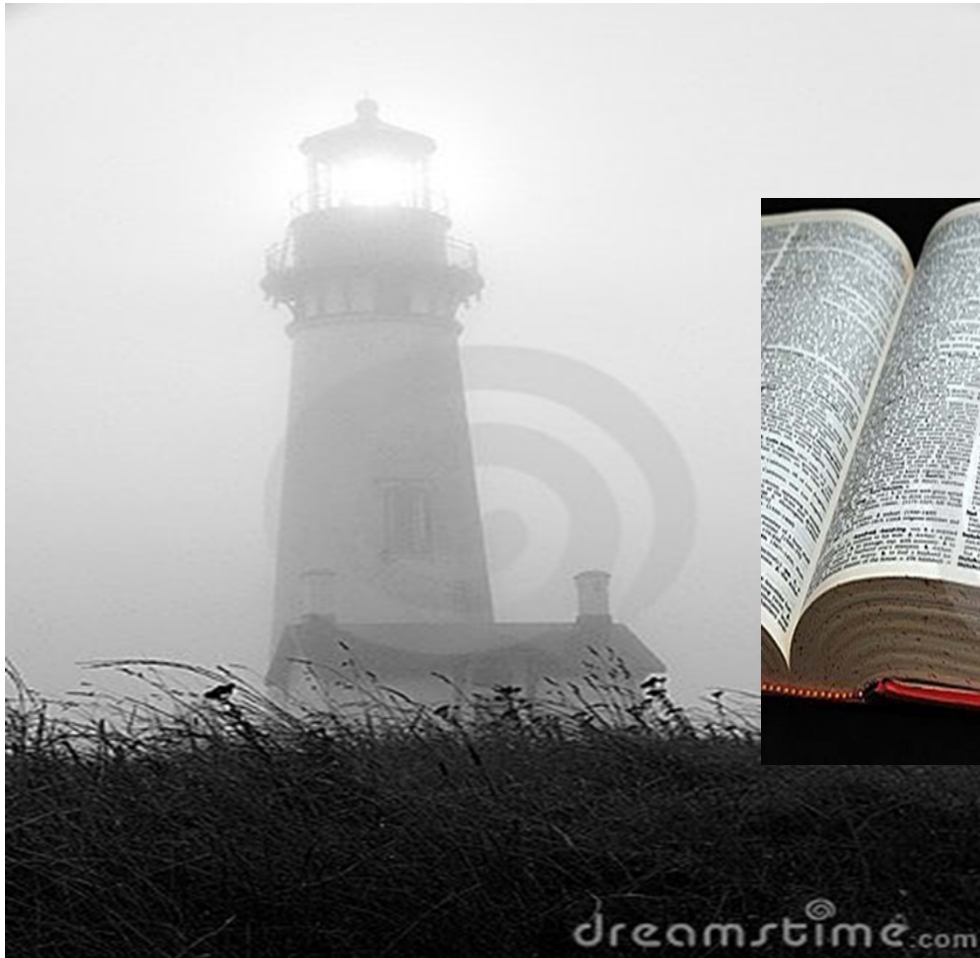
# Before 1995, Supreme Court Decisions made this an easy Question...

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# Clarity Disappears behind Questions of Arbitrability: *First Options v. Kaplan*

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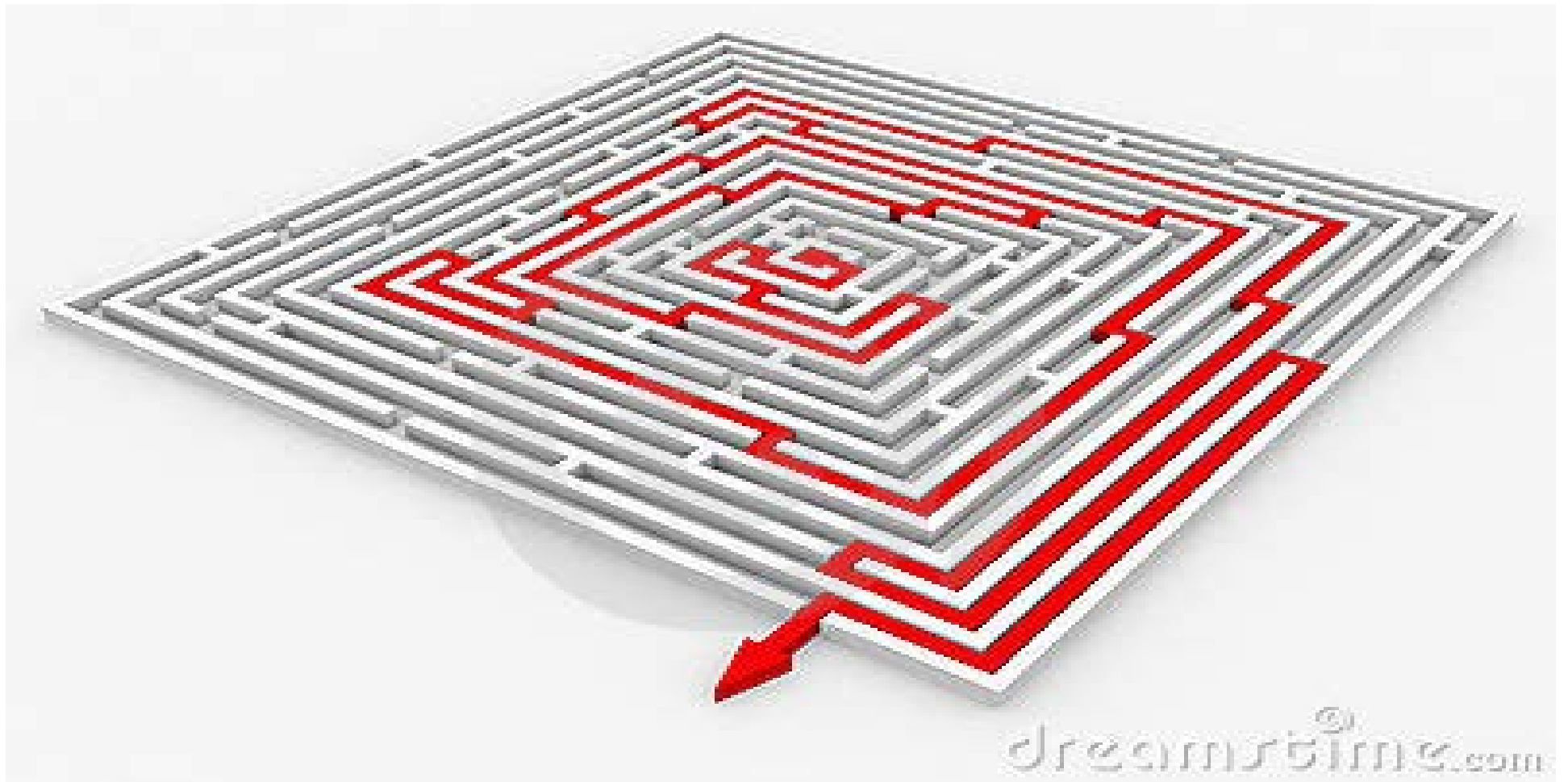
# Misinterpretations of *First Options* has led to confusion, logical fallacies

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# How can the U.S. get back on the Correct Path?

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# KEY POINTS

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- Competence-competence is handled differently in the U.S. than other countries such as Switzerland, or those that have adopted the UNCITRAL Model Law as their *lex arbitri*, due to a key distinction in the respective national arbitration laws: Incorporation (or lack thereof) of competence-competence into *lex arbitri*.
- Incorporation grounds the principle in the *lex arbitri*. Since there is no such incorporation in the U.S. (FAA), the principle is premised on the parties' agreement, and influenced by how FAA is interpreted by U.S. Courts.
- **Two distinct legal issues:** **(1)** Whether a valid, enforceable arbitration agreement exists between the Parties; and, if so, **(2)** Whether a particular dispute falls within the scope of that agreement.
- Given lack of incorporation of Comp.-Comp. in FAA, US Courts should apply different legal rules depending on which of the two aforementioned issues are involved



# KEY POINTS (cont'd)

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- Pre-1995, US Supreme Court used “**two threshold question framework**”: **(1)** Did the parties enter into a valid/enforceable arbitration agreement; and **(2)** Does the specific dispute fall within the scope of that agreement?
- Each question subject to different legal rules: Challenges to existence/validity of arbitration agreement **MUST** be decided by courts. Challenges to scope of arbitration agreement presumably for courts BUT exception if “clear and convincing evidence” is found. This framework is supported by the text of the FAA.
- ***First Options v. Kaplan (1995)***: Since there was no “clear and unmistakable” evidence that parties intended arbitrators to decide questions of arbitrability, District Court should have made its own independent determination of the issue. Arbitral award vacated.

# KEY POINTS (cont'd)

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- Court did not utilize the “two threshold question” framework, asking instead who should have the primary power to decide the **arbitrability** of the dispute. This was a mistake because it obscures the distinction between issues of existence and scope.
- Many lower courts have misinterpreted *First Options*. Ask: “What did the parties agree with regard to who decides questions of arbitrability?” Often look to the text of the arbitration agreement, even if its very existence/validity is being challenged. Logically, this makes no sense, and it may result in parties being forced to arbitrate when they never agreed to do so.
- US courts should return to the principles that were set forth prior to *First Options*.