Reoccurring Problems in Church Autonomy Doctrine
The Question of Private Arbitration of Disputes

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Introduction

The Church Autonomy Doctrine prohibits "state action" by the courts in certain situations, discussed in detail Prof. Esbeck's materials on "Reoccurring Problems in Church Autonomy Doctrine" ("Esbeck Materials"). It may operate to prohibit any "neutral" determination of disputes by a court between a "minister" and a "church" or other religious organization. But if there is no transcendent authority to decide who is right and who is wrong in such disputes, then the "church" or other religious organization effectively decides the disputes by unilateral pronouncement or diktat – often without any "due process" protocols or under circumstances suggesting that the decision was a sheer "power play." In practice, it can look the "*Fox guarding the Chicken Coop*," resulting in real or imagined injustices – neither of which reflects well on the church or religious organization. Consider the following hypothetical[1]:

> "Mike" is called as the Senior Pastor by New Church in another state. New Church is an independent Evangelical church with no ties to any denomination or other Ecclesiastical authority. New Church's Charter Documents provide that its Elder Board decides all matters pertaining to New Church's spiritual and temporal matters, and that its Senior Pastor serves at its pleasure. In accepting this call, Mike leaves his congregation at Old Church, where he was loved and appreciated for over a decade and where he might have continued in ministry indefinitely. His position at Old Church will be filled by someone else, and he will not be able to go back to it. Mike therefore asks New Church to enter into a written employment agreement that includes a guaranty that, absent "Cause," he will be employed there for at least three years and that if his employment is terminated before that term, then he will continue to receive his salary and benefits until he is able to find a new pastoral position elsewhere (or until his term elapses). The employment agreement defines "Cause" as a "moral failure" or a "failure to adhere to New Church's doctrine or statement of faith in preaching or practice." A year after Mike arrives at New Church, attendance and tithe revenue is down and the church is struggling financially. New Church's Elder Board decides they need to get a new Senior Pastor, but New Church lacks the funds to pay both a new Senior Pastor and Mike under his severance package. Citing Mike's alleged deviation from New Church's doctrine or statement of faith in his preaching, New Church terminates Mike for "Cause" and refuses to pay him any severance. Mike denies these allegations and asserts that this supposed grounds for his termination is pretextual and trumped up to allow New Church to avoid paying him the

[1] This hypothetical is loosely based on the fact pattern in the attached case of *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018).

> termination amounts due under his employment contract. Mike and his family are homeless and penniless. What result?

The above hypothetical is intended to trigger one or more (and perhaps all) of the five subject matters or types of disputes that the U.S. Supreme Court has identified as coming within the zone of church autonomy, which are: (i) doctrinal questions and religious disputes; (ii) issues over ecclesial polity; (iii) determinations of who can be a minister or other religious functionary for the organization; (iv) qualifications for membership and excommunication, including who is in good standing with the church; and (v) internal communications about any of the four foregoing matters. (See Esbeck Materials at § I.2.) These five subject matters or types of disputes are what are meant by "**entanglement**" in this article. Thus, if Mike tries to bring an action in a court of law against New Church, the Church Autonomy Doctrine will effectively leave Mike without any court remedy.

As the Supreme Court has summarized:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, ... interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. Accordingly, the state the power to determine which individuals will minister to the faithful also violates the Establishment Cause, which prohibits government involvement in such ecclesiastical decisions.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Put simply, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184, 132 S.Ct. 694.

Significantly, ***Hosanna-Tabor* expressly noted that its holding did not apply to contract actions**:

> "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."

Id. at 196, 132 S.Ct. 710. (Underlined emphasis added.)

However, in *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018), the court observed that some types of contract claims can still invite prohibited government entanglement:

> "Hosanna-Tabor involved a statutorily-based employment discrimination suit, and the Supreme Court explicitly declined to state whether the ministerial exception "bars other types of suits, including actions by employees alleging breach of contract ... by their religious employers." (Internal citations omitted.) Before Hosanna-Tabor, our Court recognized that the ministerial exception precludes, under the Free Exercise Clause, judicial action or application of state or federal law limiting a religious organization's choice of spiritual messenger. (Internal citations omitted.) We also noted that "a church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court" because "[e]nforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights." (Internal citations omitted.) Even assuming a church can contractually limit its free exercise rights, a court nonetheless must be cognizant of the ministerial exception when asked to adjudicate a contractual dispute, as a court's resolution of the dispute may involve "excessive government entanglement with religion," and thereby offend the Establishment Clause. (Internal citations omitted.) Such "[e]ntanglement may be substantive—where the government is placed in the position of deciding between competing religious views—or procedural—where the state and church are pitted against one another in a protracted legal battle." (Internal citations omitted.) Thus, a court may resolve only disputes that "turn[ ] on a question devoid of doctrinal implications" and "employ neutral principles of law to adjudicate." Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc., 684 F.3d 413, 418-19 (3d Cir. 2012); see also Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008) (stating that the ministerial exception is not a "complete barrier to suit" and that "a case may proceed if it involves a limited inquiry that ... can prevent a wide-ranging intrusion into sensitive religious matters" (internal citation and quotation marks omitted)).

Id. at 119–20. (Underlined emphasis added.)

But how might this situation be different if Mike's Employment Agreement with New Church included an "**Alternative Dispute Resolution Agreement and Addendum to Employment Agreement**" of the kind attached to these materials? Arbitration does not involve "state action" because it is private and contractual. What's more, because an arbitrator is a private person appointed by the parties to decide their disputes, there can be no government entanglement in the arbitration process itself. Can the use of such an agreement to arbitrate resolve the problem for Mike and New Church?

"Court Action" versus "Arbitration" – An Executive Overview

1. Arbitration is "private action," not "state action" by any government (or "State Actor"), so the arbitration process itself is, and an arbitrator's rulings and actions are, ***not*** constrained by any Federal or State Constitutions;

2. Arbitrators render their decisions on the substantive merits of the parties' claims and defenses in a final arbitration award. Upon rendering such a final arbitration award, the arbitrator's powers and office are ***functus officio*** and the arbitrator may not thereafter

do anything further with respect to the dispute, except as expressly allowed by law or the parties' arbitration agreement.

3. Arbitrators have no power or ability to enforce the arbitration awards that they render. Only the judges of State Actors have ***contempt powers*** that invoke the apparatus of State Actor law enforcement agencies to coerce or enforce compliance with an Arbitrator's award;

4. Since private arbitrators have no "contempt" powers to enforce their own orders or awards, they must rely upon either:

    a. The "Good Faith and Fair Dealing" of the parties to the arbitration proceeding to voluntarily comply with the arbitrator's rulings in their dispute (which is often problematic when one or both sides ignore them or act in bad faith); or

    b. State Actor power to ***involuntarily*** enforce the arbitrator's rulings in the absence of the parties' voluntary "Good Faith and Fair Dealing;"

5. All arbitration statutes, both state and federal, allow a court only three courses of action when handling an arbitrator's "award": the court can (1) <u>confirm</u> it; (2) <u>modify</u> and confirm it; or (3) <u>vacate</u> it (see Diagram #3, *supra*). If the court "confirms" the arbitrator's "award" then it becomes a <u>judgment</u> of the court and is enforceable as such;

6. Generally, courts grant tremendous deference to arbitrators and arbitrators' decisions and will even uphold arbitration decisions that are "contrary to law." So, if an arbitrator makes a ruling based on a mistake of law, courts will not normally presume to interfere with it and will usually nonetheless enforce the arbitrator's erroneous award in the absence some rare exception to this rule. Importantly here, courts will not revisit or "second guess" an arbitrator's award;

7. But a State Actor can only exert its enforcement power to involuntarily enforce the arbitrator's award when it has ***jurisdiction*** to do so, and even then it will not generally presume to otherwise 'meddle' in private arbitration proceedings;

8. If a State Actor is asked by a party to an arbitration to do something concerning the arbitration, then the State Actor is constrained by (1) the arbitration statutes that allow it to do so and/or (2) by applicable State or Federal Constitutions;

9. Concerning the previous point, <u>an unresolved question</u> in both the Church Autonomy Doctrine and in private arbitration law is whether the Church Autonomy Doctrine prevents the courts from taking any actions concerning the arbitration process (e.g., compelling arbitration when one party resists arbitration) or the confirmation, modification or vacatur of an arbitration award or the enforcement of a court judgment entered thereon.

10. As argued below, the Church Autonomy Doctrine is rendered inapplicable by the contractual waiver that arises from a church or religious organization entering into an agreement to arbitrate disputes - like the "**Alternative Dispute Resolution Agreement and Addendum to Employment Agreement**" attached to these materials. Such a contract, in effect, becomes a "superseding, intervening occurrence or event" that removes a State Actor from entanglement of the kind prohibited by the Church Autonomy Doctrine and the First Amendment. Importantly, while a court might still be asked to compel arbitration or to confirm, modify or vacate an arbitration award, such activities are usually non-substantive, procedural acts that do not involve any re-determination of the merits of the parties' substantive disputes, which might otherwise lead to prohibited "entanglement" issues. Arbitration is a practical, non-State Actor forum in which to resolve disputes between and amongst churches and "ministers" in a manner consistent with I Cor. 6: 1-8 and Matt. 18: 15-19, which are otherwise prohibited from resolution in the courts by the Church Autonomy Doctrine.

Primary Substantive American Arbitration Law Statutes

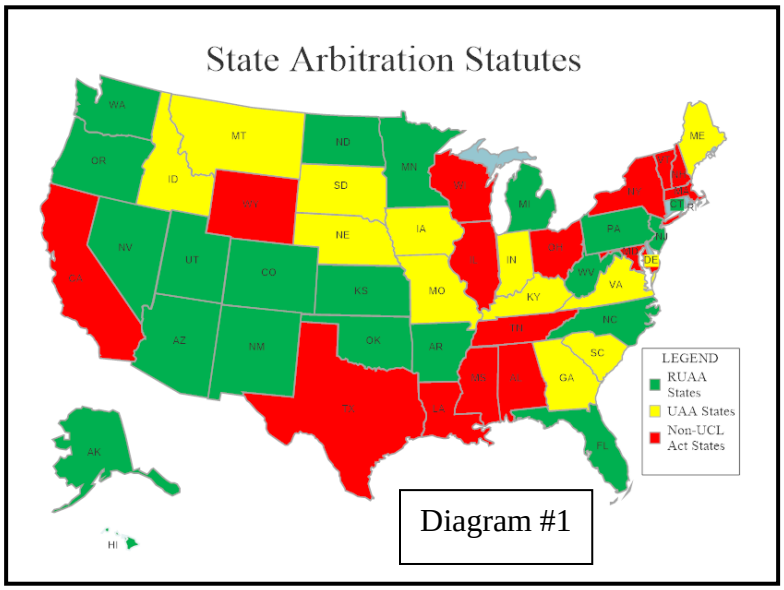


Diagram #1

There are three primary substantive arbitration statutes that govern the arbitration of disputes in the United States: (1) the Federal Arbitration Act embodied in Title 9, United States Code, Section 1-14, (the "FAA"), enacted by Congress in 1925, applies in all fifty states and U.S. territories; (2) the Uniform Arbitration Act (the "UAA")[2] promulgated in 1955 by the Uniform Law Commission (the "ULC" - formerly known as the National Conference of Commissioners on Uniform State Laws - "NCCUSL"), one of the most successful ULC Acts, was later adopted by 35 states (with 14 other states adopting substantially similar legislation); and (3) the Revised Uniform Arbitration Act (the "RUAA")[3] promulgated in 2000 by the ULC, which has since been adopted in 21 states and the District of Columbia. All told,

[2] See https://www.uniformlaws.org/committees/community-home?CommunityKey=f60b379c-6378-4d9d-b271-97522fad6f89 for information about the UCL's 1955 UAA.

[3] See https://www.uniformlaws.org/committees/community-home?communitykey=a0ad71d6-085f-4648-857a-e9e893ae2736&tab=groupdetails for information about the UCL's 2000 RUAA.

forty-nine jurisdictions have arbitration statutes. Diagram #1 shows a map of those states that have adopted the UAA or RUAA.

Because the FAA was passed almost a century ago and has had little statutory change or update since to the provisions affecting domestic arbitration, the UCL's 1955 UAA and 2000 RUAA sought to "update" those arbitration statutes to conform and synchronize them to later case law interpreting the FAA and other arbitration statutes and to confirm such arbitration statutes to evolving and improving arbitration industry standards, practices and demands. Of the three substantive arbitration statutes, the RUAA is by far the most flexible, durable, and relevant to modern arbitration practice, but the FAA remains the "default" arbitration statute applicable to most parties' disputes unless their arbitration agreement "clearly and unmistakably" designates the substantive arbitration law of another state or jurisdiction. [4]

The Parties' 'Agreement to Arbitrate'

As the United States Supreme Court observed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), "… a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U. S. C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers);…"

FAA § 2 provides, in part: "A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract …, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Although there is a body of law permitting the arbitration of disputes in the absence of such a written contract, that topic is beyond the scope of this article.

Importantly, the FAA, UAA and RUAA all allow parties to "by-pass" the normal conflict resolution "default" to the courts if they agree to submit their disputes to private arbitration. As such, the parties' "agreement to arbitrate" creates, literally, a "private right of action" to assert a claim in a non-governmental, non-judicial forum. Doing so circumvents any "state action" in determining the substantive merits of the parties' claims and defenses – particularly since many "arbitrability"

[4] See, generally, *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015) ("… federal law governs the arbitrability question by default because the Agreement is covered by the FAA (citations omitted) and the parties have not clearly and unmistakably designated that nonfederal arbitrability law applies (citations omitted)" and "[f]or "any arbitration agreement within the coverage of the [FAA]," "[t]he court is to make th[e] [arbitrability] determination by applying the federal substantive law of arbitrability" (citations omitted) "absent clear and unmistakable evidence that the parties agreed to apply non-federal arbitrability law (citations omitted)."

disputes normally resolved by a court can be delegated to the arbitrator(s) to decide. (See, e.g., *First Options*, wherein the court held that if the parties' arbitration agreement "clearly and unmistakably" delegates to the arbitrator to decide the issue of arbitrability, then the arbitrator may do so even though the FAA expressly provides otherwise.)

The Arbitration Rules of Various "Arbitration Organizations"

"**Arbitration Organization**" has the meaning assigned to it in the RUAA (discussed below), which is as "*an association, agency, board, commission or other entity that is neutral and that initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator*." Such Arbitration Organizations include "secular" entities like the American Arbitration Association ("AAA"), the Judicial and Arbitration and Mediation Service ("JAMS"), the International Center for Dispute Resolution ("ICDR"), and the International Institute for Conflict Prevention & Resolution ("CPR"), among others. There are also at least two distinctly Christian "Arbitration Organizations" – the Institute for Christian Conciliation – a division of Ambassadors of Reconciliation (the "ICC" – see https://www.aorhope.org/icc) and Christian Conciliation Service™, a division of Relational Wisdom 360 (the "CCS" - see https://rw360.org/christian-conciliation-service/). These Arbitration Organizations typically have their own set of arbitration rules, which are normally incorporated by reference into the parties' arbitration agreement – becoming a material part of their arbitration agreement (an "Arbitration Organization's Rules").[5]

The Interplay between Arbitration Statutes, Arbitration Agreements & Arbitration Rules

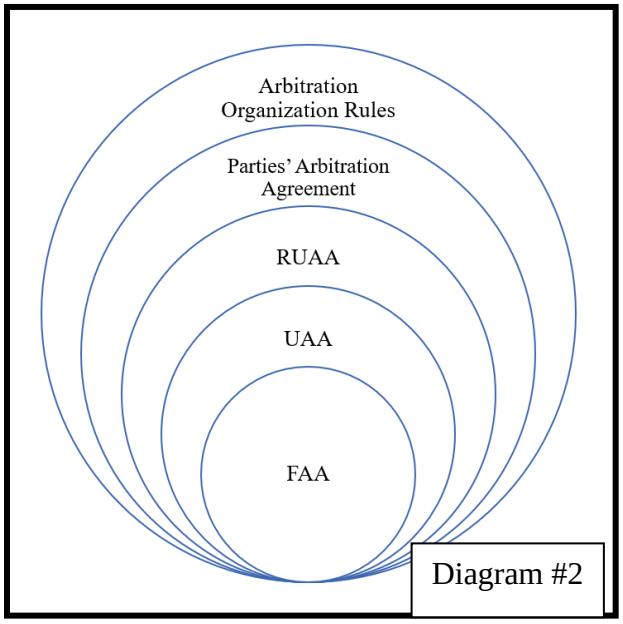


Diagram #2

Generally, the parties' written arbitration agreement is predicated on some substantive arbitration law statute (the FAA by default), which the parties are free to supplement in their arbitration agreement with other processes and procedures by which their disputes may be arbitrated. Usually, such "supplementation" includes incorporation by reference of some Arbitration Organization's Rules into the parties' arbitration agreement as a part of it. However, the parties' arbitration agreement must not otherwise run afoul of the substantive arbitration law statute they have selected to govern their dispute. These concepts are illustrated in Diagram #2.

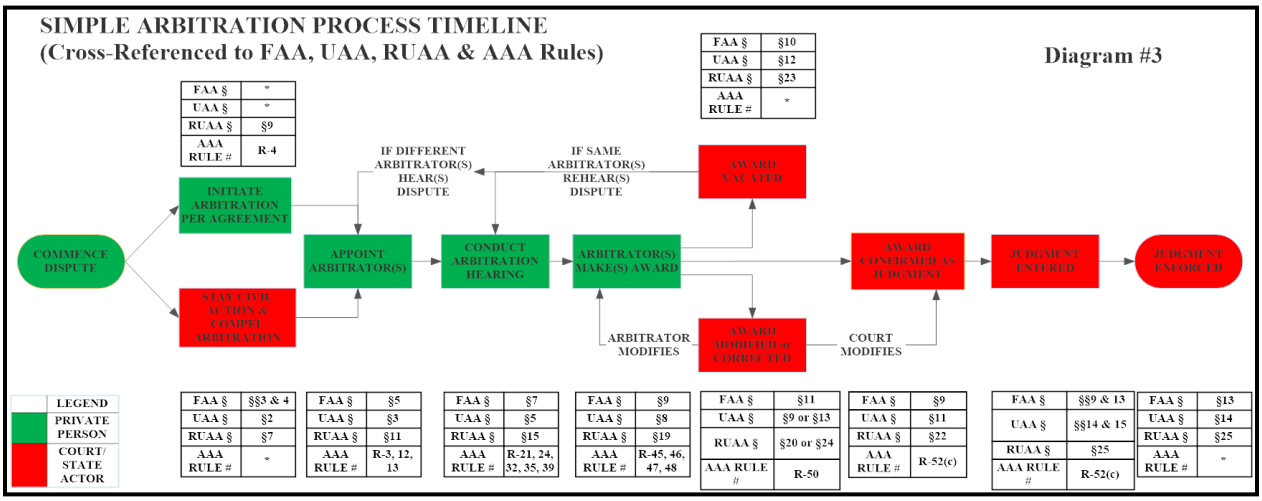
[5] See, e.g., AAA Commercial Arbitration Rule R-1, which provides, in relevant part: "(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules."

Generally, the older or more antiquated the substantive arbitration law statute the parties select to govern their dispute, the more they must rely upon either their arbitration agreement and/or its incorporated Arbitration Organization's Rules to give them additional rights and remedies that they may desire to govern their disputes. In effect, the parties' arbitration agreement, including its usual incorporation of some Arbitration Organization's Rules, usually "fleshes out," supplements or enhances the scant provisions or ambiguities of the substantive arbitration statute that may otherwise govern their dispute.

There is, however, a practical limitation on what powers the parties can confer on an arbitrator, an arbitration tribunal, or a court. For example, just as parties cannot confer subject matter jurisdiction on a court by agreement or stipulation, they cannot confer upon an arbitration tribunal powers that are exclusively reserved to the courts or prohibited by the substantive arbitration law statute that governs their dispute. Similarly, the parties may not be able to confer upon a court substantive arbitration rights not otherwise conferred by applicable arbitration statutes.

The "Simple" Arbitration Process Contemplated by the Arbitration Statutes

As originally envisioned in 1925 for the FAA (and again in 1955 for the UAA), arbitration was envisioned to be a simple, streamlined alternative to the court system. Central to this "simple" arbitration scheme was the arbitration hearing, which was expected and intended to be a streamlined evidentiary hearing that provided the necessary evidence to the arbitrator to decide the matter and inform an arbitrator's creation of a written "award" on the merits of the matter. Diagram #3 shows how this "simple" arbitration process is to operate.



What is important about the above diagram is that those activities designated with "**GREEN** process icons" comprise the "private actions" of the arbitrator and/or Arbitration Organization, while those activities designated with "**RED** process icons" comprise the "State Action" of a court.

Do the State Actor Activities Designated with "RED Process Icons" Create "Entanglement"?

Remember, as used in this article "entanglement" means one (or more) of the five subject matters or types of disputes that the U.S. Supreme Court has identified as coming within the zone of church autonomy, which are: (i) doctrinal questions and religious disputes; (ii) issues over ecclesial polity; (iii) determinations of who can be a minister or other religious functionary for the organization; (iv) qualifications for membership and excommunication, including who is in good standing with the church; and (v) internal communications about any of the four foregoing matters. (See Esbeck Materials at § I.2.) Let's examine each of the State Actor processes shown with the "**RED** process icons" identified on Diagram #3 on the immediately preceding page.[6]

Motions to Compel Arbitration or Stay Proceedings

FAA § 3 provides:

> **Stay of proceedings where issue therein referable to arbitration**
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

FAA § 4 provides, in relevant part:

> **Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such

[6] This analysis is framed in terms of the relevant FAA provisions, but the analysis would be similar under relevant provisions of the UAA or RUAA.

arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

In considering whether there is an "agreement for arbitration" between the parties, it is important to note that such an "agreement for arbitration" is considered to be an agreement separate and distinct from the contract in which it is included. This introduces the legal notion of '***separability***," which is the judicial fiction by which the courts will consider the parties' arbitration clause to be an agreement that is independent and separate from the principal contract of which it is a part. In short, an 'arbitration clause' is its own kind of 'agreement within an agreement.' The seminal case in this area is *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967), in which the United States Supreme Court explained the doctrine as follows:

> "... except where the parties otherwise intend – arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and .... where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402, 87 S. Ct. at 1805.

The notion of "separability" is also expressly stated in many arbitration organizations' arbitration rules, including the AAA Rules[7]. But even where this notion of 'separability' is not expressly stated in those arbitration rules, it is often subtly implied and embedded elsewhere in them. For example, if one reads the AAA Rules closely one notices that they refer to both the parties' '**contract**' and to the parties' '**agreement**' - terms of art that are NOT used interchangeably[8].

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[7] See, e.g., AAA Rule 7(a), which provides: "*The arbitrator shall have the power to determine the existence, scope or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause*." (Emphasis added.)

[8] In addition to AAA Rule 7(a) and (b), see also, e.g., the preamble to the AAA Rules, which provides, in part: "*The parties can provide for arbitration of future disputes by inserting the following clause into their **contracts**:*

"**Contract**" in the AAA Rules refers to the overall, substantive contractual arrangement of the parties (e.g., their lease, purchase contract, business buy-sell agreement, etc.), while the term '**arbitration clause**' or '**agreement'** only refers to the parties' "*written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties*" within the meaning of any Arbitration Statute, whether FAA, UAA or RUAA.

This means that a court will not otherwise review non-arbitration clause provisions of the parties' operative contracts when determining whether to compel or stay an arbitration proceeding. It will only consider the arbitration clause, which does not in itself raise entanglement issues. Thus, no entanglement issues are raised by a court's compelling or staying arbitration between the parties.

Also, in practice, most arbitrations are governed by an "Arbitration Organization's" written rules of procedure, which are incorporated by reference into the parties' arbitration agreement. Almost all of the Arbitration Organizations' rules of procedure include a rule like this one: "***The arbitrator shall have the power to determine the existence, scope and validity of the parties' arbitration agreement***" (an "Arbitrator Jurisdiction Rule") . Such Arbitrator Jurisdiction Rules are directly contradictory to the language of the Arbitration Statutes, which all clearly state that the court is to decide such matters. If the FAA, the UAA and the RUAA all clearly proscribe that the court, and not the arbitrator, has the jurisdiction to decide the 'existence, scope and validity of an arbitration agreement,' then why do all of these respected arbitration organizations have Arbitrator Jurisdiction Rules that effect just the opposite? Are they ignorant of the Arbitration Statutes?

The apparent conflict between the above Arbitration Organizations' Arbitrator Jurisdiction Rules and the Arbitration Statutes over 'jurisdiction to determine arbitral jurisdiction' arises from the United States Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

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*Any controversy or claim arising out of or relating to **this contract**, or the breach thereof,…"* and *"If the parties want to adopt mediation as a part of their **contractual** dispute settlement procedure, they can insert the following mediation clause into **their contract**…" See also AAA Rules R-1 ("**Agreement** of Parties. (a) The parties shall be deemed to have made these rules a part of their **arbitration agreement** whenever they have provided for arbitration by the (AAA)"); R-4 ("Filing Requirements. (a) Arbitration under an **arbitration provision** in a **contract** shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable **arbitration agreement** from the parties' **contract** which provides for arbitration.; R-13 ("Direct Appointment by a Party. (a) If the **agreement** of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed."); R-16 ("Number of Arbitrators**.** If the **arbitration agreement** does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator,..."); R-44 ("Majority Decision. When the panel consists of more than one arbitrator, unless required by law or by the **arbitration agreement**, a majority of the arbitrators must make all decisions."); R-47 ("Scope of Award. (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the **agreement** of the parties, including, but not limited to, specific performance of a **contract**; …(d) The award of the arbitrator(s) may include:...; (ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their **arbitration agreement**.)"* (Emphasis added.)

115 S. Ct. 1920 (1995) – in which the Supreme Court, in interpreting the FAA, held that unless the parties 'clearly and unmistakably' provide otherwise, the question of whether they agreed to arbitrate the particular dispute is to be decided by the court, not the arbitrator. However, in so holding, the court expressly (and quite deliberately) left open the prospect that the parties could forge an arbitration agreement between themselves that conferred the jurisdictional powers to decide such arbitral matters on the arbitrator to the exclusion of the courts (the "First Options/FAA Exception").

The Arbitration Organizations' Arbitrator Jurisdiction Rules are all intended to be the very kind of "clear and unmistakable" arbitration agreement contemplated in First Options. So then, the "First Options/FAA Exception" arises when (1) the FAA applies, and (2) the parties' arbitration agreement 'clearly and unmistakably' gives the arbitrator the power to determine the existence, scope and validity of the parties' arbitration agreement, which any Arbitrator Jurisdiction Rule will do. When a First Options/FAA Exception is present (and it almost always is), then the court will not even be able to determine a motion to compel arbitration or stay arbitration proceedings because such a matter will be decided by the arbitrator and not the court. In such a case, the remote possibility of a prohibited "entanglement" issue arising becomes even more unlikely.

Motions to Confirm an Arbitration Award

FAA § 9 provides, in relevant part:

> **Award of arbitrators; confirmation; jurisdiction; procedure**
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title... (Underlined emphasis added.)

Note that "confirmation" of an arbitration award is a non-discretionary, ministerial task – the court "must" confirm the arbitration award unless it's vacated, modified, or corrected. Such "non-discretionary," ministerial tasks do not involve prohibited "entanglement" issues.

Motions to Vacate an Arbitration Award

FAA § 10 provides, in relevant part:

> **Same; vacation; grounds; rehearing**
>
> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made…

Note that all of the grounds for vacatur of an arbitration award in FAA § 10 deal with procedural due process problems or issues – that is, HOW the arbitration process was conducted, not whether the arbitrator's legal reasoning was correct or not. Moreover, in *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576 (2008) the U.S. Supreme Court held that FAA §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification. In so doing, the court rejected the idea that a court could revisit or change an arbitrator's supposed "manifest disregard of the law" or "legal error" in the arbitrator's award. In other words, there can be no prohibited "entanglement" by a court in considering vacatur of an arbitrator's award where the court cannot revisit the merits or reasoning of the arbitrator's award – only how the arbitrator conducted the arbitration proceeding. Such "procedural" matters do not raise entanglement issues.

Motions to Modify or Correct an Arbitration Award

FAA § 11 provides, in relevant part:

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

FAA §11 deals with imperfections in the award itself, such as arithmetic errors or mistakes, errors in the description of real property, or where an arbitrator issued a ruling on a matter not subject to the parties' agreement to arbitrate. Note that a court is prohibited from reconsidering the "merits of the controversy." As such, motions to modify or correct an arbitration award are, again, ministerial matters do not raise entanglement issues.

Conclusion

While disputes like the one raised in the hypothetical involving Mike and New Church prohibit courts from resolving them because of the "entanglement" issues raised by the Church Autonomy Doctrine, such "entanglement" issues are not present in private arbitration proceedings, which do not involve state action. Thus, private arbitration are a practical and Biblical option and forum for resolving such disputes in a forum the Church Autonomy Doctrine is irrelevant. In those instances where a court or State Actor may be called upon to compel arbitration or to confirm, vacate or modify or correct an arbitration award involving such disputes, it will not involve prohibited "entanglement issues" of the kind forbidden by the Church Autonomy Doctrine.