Chapter 21

ARBITRATION AND MEDIATION OF CONSTRUCTION DISPUTES

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Editor's Note: For a more detailed presentation of the topics covered in this Chapter, as well as other ADR topics, the reader is referred to Benson, *Arbitration Law in Colorado*, First Ed. (CLE in Colo., Inc., 2006).

SYNOPSIS

§ 21.1 • INTRODUCTION/SCOPE OF CHAPTER

This chapter provides an overview of the Colorado law of alternative dispute resolution, the means of resolving construction disputes other than or as an alternative to the court system. Alternative dispute resolution (ADR) has long been recognized as extremely important to the construction industry because it recognizes that judicial resolution of construction disputes often is not satisfactory. Factors that have led the construction industry to utilize alternative procedures include, *inter alia*, cost, delay, and lack of expertise of the tribunal in the subject matter of the dispute.

The alternative procedure that will be covered in the greatest detail is arbitration. However, mediation, dispute review boards, and early neutral evaluation are briefly discussed, and are also important to the construction industry.

The reader should be aware of the importance of carefully reading the applicable statute and case law. This chapter is merely a starting point to the solution of issues presented by ADR.

§ 21.2 • ARBITRATION

Arbitration and mediation are by far the most commonly used alternative means of dispute resolution in the construction industry. Because mediation requires an agreement of the parties in order to resolve a dispute, there are relatively few legal requirements governing the process. Arbitration, on the other hand, requires only that the parties agree upon the process. However, arbitration is evolving into a procedure much more akin to litigation with increasing rules and structure, but maintaining its distinct characteristics as an alternative to litigation. This section attempts to provide an overview of those rules and structures based on Colorado statutes and case law, as well as federal statutes and Colorado federal court case law. No attempt is made to cover the mass of decisions decided by non-Colorado courts.

Arbitration is defined in the Colorado Dispute Resolution Act at C.R.S. § 13-22-302(1) as "the referral of a dispute to one or more neutral parties for a decision based on evidence and testimony provided by the disputants." As the reader will see, that definition is narrower than the scope of arbitration covered by this chapter. For example, arbitration outside that act does not require that all of the arbitrators be neutral. Indeed, perhaps none must avoid the appearance of non-neutrality.

Arbitration can be binding or non-binding. This chapter deals primarily with binding arbitration. Generally, a reference to arbitration is to binding arbitration, meaning the arbitrator's award is final and conclusive upon the parties, except for the limited judicial review provided by the state and federal arbitration statutes. However, sometimes the parties agree the arbitration is non-binding. Very generally speaking, all procedures should be the same except the effect of the award. However, the role of the court is untested in non-binding arbitration.

It should be noted that Colorado has many statutes imposing mandatory arbitration in very specific situations. *See* "Other Colorado Statutes Pertaining to Arbitration" included in § 21.2.2.

§ 21.2.1—Public Policy And The Common Law Of Arbitration

Arbitration is a very long and well-established method of dispute resolution. George Washington reputedly had an arbitration clause in his will. However, at common law in most jurisdictions, arbitration agreements were not enforceable, although that was not true under Colorado common law.[1]

Since 1876, the Colorado Constitution, art. XVIII, § 3 has provided:

> It shall be the duty of the general assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by mutual agreement of the parties to any controversy who may choose that mode of adjustment. The powers and duties of such arbitrators shall be as prescribed by law.

It is, at least since 1876, the policy of the State of Colorado to foster and encourage arbitration as a method of dispute resolution,[2] and all disputes as to whether a dispute is arbitrable are to be resolved in favor of arbitration.[3]

As reflected in the Federal Arbitration Act, federal law also establishes a strong policy favoring arbitration. Public policy in Colorado also strongly encourages the resolution of disputes through arbitration.[4] "A broad or unrestricted arbitration clause makes the 'strong presumption favoring arbitration [apply] with even greater force,'"[5] and any state law relative to arbitration will not take precedence over the federal policy when the federal act is applicable.[6] Failure to follow the mandates of a valid alternate dispute resolution clause will contravene that policy.

As a result of this state and federal public policy, when issues involved in arbitration are presented to a court, the starting point is a public policy in favor of the arbitration process.[7]

§ 21.2.2—Arbitration: Applicable Law, Rules, And Procedure

Generally

Arbitration is governed by statutes (state or federal); common law (state or federal); the agreement to arbitrate, including the rules adopted by the parties; and the arbitrator's inherent power. Generally, the order of precedence in defining the rules governing arbitration is as follows:

1) **The arbitration agreement agreed to by the parties, including incorporated rules such as those of the American Arbitration Association.** Arbitration is a consensual process. Without the agreement of parties to arbitrate, there is no arbitration. Within the broad confines of the statutes, the parties can design the arbitration any way they want because it is alternative dispute resolution (alternative to litigation), and the parties can conduct it in nearly any way they wish. Some of the restrictions will be discussed hereafter.

Thus, the agreement of the parties governs the arbitration, unless overridden by a statute or the common law. Examples of statutory provisions that cannot be overridden by the parties' agreement include increasing the scope of subpoena power of arbitrators over non-parties, grounds for vacating arbitration awards (some jurisdictions), the right to be represented by counsel, motions to compel arbitration, and the scope of an appeal. Generally, however, the agreement of the parties will govern most aspects of an arbitration and will govern the arbitrator.

2) **Applicable statutes, unless the statute provides that the parties may otherwise agree, and the parties have otherwise agreed.** Some provisions of the arbitration statutes expressly provide that they apply to an arbitration only upon the failure of the parties to otherwise agree: they are default provisions. Two examples are Federal Arbitration Act § 5 (applicable if no agreement as to how arbitrator is to be selected, or agreed method fails) and Colorado Uniform Arbitration Act, C.R.S. § 13-22-207 (if no agreement as to time and place of hearing and notification, adjournment, and postponement; right to be heard, present evidence, and cross-examine witnesses, arbitrator not to give undue weight to hearsay).

A primary purpose of the arbitration statutes is to validate agreements to arbitrate future disputes[8] in order to overcome the common law rule in most jurisdictions that agreements to arbitrate future disputes were unenforceable. The statutes also define the arbitration procedures where the parties fail to agree upon procedures. Finally, the statutes provide for judicial involvement where the arbitration process might otherwise collapse.

Within the very broad confines of the statutes, the parties have tremendous freedom to define the arbitration process to fit their particular circumstances. As the second category in the order of precedence, the statutes primarily supplement the agreement of the parties, but in some instances preempt any agreement of the parties. The statutes also place the enforcement power of the judiciary behind every stage of the arbitration process.

In Colorado, absent an extraordinary situation, one of three statutes is applicable to an arbitration: Federal Arbitration Act (FAA), Colorado Uniform Arbitration Act (CUAA), or Colorado Revised Uniform Arbitration Act (CRUAA). These acts are discussed below.

3) **Applicable common law.** The common law of arbitration, as reflected by the case law and like statutory law, governs an arbitration unless it has been overridden by an agreement of the parties, or unless the common law supersedes the agreement of the parties.

4) **The arbitrator's inherent power.** The last resort to defining the rules that govern and define the arbitration is the inherent power of the arbitrator. To the extent the parties have not agreed, and there is no applicable law, the arbitrator defines the procedures and process. For example, when there is no agreement between the parties, the arbitrator has inherent power to define the date, time, and location of the arbitration; the discovery he or she will permit between the parties; the form of the award; most hearing procedures; whether rules of evidence will be followed; whether dispositive motions will be considered; and the form of the award.

The Parties' Agreement (Including Adopted Rules)

Subject to a few limitations imposed by law (discussed below), the parties' agreement governs the arbitration process — at least to the extent that the parties do not choose to remain silent and have the procedures defined by the statutory default procedures and the arbitrator's inherent powers. These points are discussed more fully hereafter. However, it should be remembered that the agreement of the parties can be and often is the most important definition of the arbitration process.

Colorado Revised Uniform Arbitration Act (CRUAA)

The Colorado Revised Uniform Arbitration Act (CRUAA), C.R.S. § 13-22-201 (2005), was passed in 2004 and applies to arbitration agreements in Colorado entered into after August 4, 2004, unless preempted by the FAA, and to earlier agreements if the parties so agree.[9] Thus, application of the CRUAA will "gradually" replace the Colorado Uniform Arbitration Act.

The CRUAA and the CUAA have the same statutory numbering system. Hence, when citing to either of them, it must be explicitly stated whether the citation is to the CRUAA or the CUAA. Colorado Revised Statutes in 2005 and thereafter contain only the CRUAA, although many arbitrations occurring in 2005 will be governed by the CUAA. In this chapter, when the statutory citation is followed by "(2004)," that means that the cite is to the CUAA; if the citation is followed by "(2005)," the cite is to the CRUAA.

Of course, it is conceivable that a case might arise in Colorado where state law governs, but under Colorado's choice of law rules or the parties' choice of law agreement, the substantive arbitration law of another state would be applicable.[10] However, unless the parties validly selected the law of a particular state, such an arbitration having such an interstate nature probably would mean federal law would apply. Applying the concept enunciated in *Erie Railroad Co. v. Tompkins,*[11] that only state substantive law and not procedural law is applicable to a federal court diversity of citizenship case applying state law, presumably only the substantive arbitration law of that other state would be applicable, as discussed below. Much of the arbitration statutes are procedural, and the Colorado courts probably would apply this state's procedural arbitration law.

Colorado Uniform Arbitration Act (CUAA)

The Colorado Uniform Arbitration Act, C.R.S. §§ 13-22-201, *et seq.* (2004), applies to Colorado arbitration agreements entered into after July 14, 1975, and prior to August 4, 2004, except those agreements preempted by federal law, and except arbitration agreements that the parties have agreed to be governed by the CRUAA or by the FAA.[12]

Federal Arbitration Act (FAA)

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, was passed in 1925, and has been amended several times since passage. However, the original statute remains essentially unchanged.

Speaking very generally, the FAA[13] governs arbitration when the dispute involves a transaction in interstate commerce.[14] (The Interstate Commerce Clause of the U.S. Constitution is the basis for Congress, exercising jurisdiction over certain arbitrations.) More specifically, § 2 of the FAA validates arbitration clauses "in any maritime transaction or a contract evidencing a transaction involving commerce." Section 1 provides that "commerce" means "among the several States or with foreign nations . . . ." "Transactions involving commerce" has been defined by the U.S. Supreme Court as being the "functional equivalent of . . . 'affecting commerce' — words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."[15] The act defines its application as to contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."[16] "Involving commerce" is equivalent to "affecting commerce," generally being the maximum scope of power under the Commerce Clause.[17] "Evidencing" means that the FAA applies not when the parties contemplated their transaction would involve interstate commerce, but when the transaction involves interstate commerce.[18]

Generally, if the FAA does not apply, a state arbitration act such as the CUAA applies. Whether the CUAA or the arbitration statutes of another state govern generally depends upon application by the court of traditional choice of law rules. However, unless otherwise agreed by the parties, state arbitration acts apply only when not preempted by the federal act's applicability.

Very generally speaking, the FAA and CUAA do not differ substantially in substance, although they are very different in some particulars. The differences are somewhat expanded by the Colorado Revised Uniform Arbitration Act (CRUAA). However, at least two specific points about the statutes should be noted:

1) The fact that an arbitration is governed by the FAA does not give the federal courts jurisdiction over disputes arising with respect to arbitrations governed by the statute. It does not constitute federal question jurisdiction under 28 U.S.C. § 1331. For the federal court to have jurisdiction, there must be a separate jurisdictional basis, such as diversity of citizenship, 28 U.S.C. § 1332. A few courts suggest that there is federal court jurisdiction if the underlying issues present a federal question, even though an arbitrator and not the court is being asked to determine that issue.[19] However, most courts hold that if the FAA governs, but there is no other basis for federal court jurisdiction, the suit must be brought in state court, which will then apply the FAA.[20] However, certain Colorado Court of Appeals decisions may suggest a narrower preemption, *i.e.*, the preemption applies only to a portion of the state arbitration law.

2) Deadlines are generally much shorter under the state CUAA than under the federal act. *See, e.g.*, time for seeking a change or correction of award (§ 211 versus § 12), confirmation of award (§ 213 versus § 9), vacating an award (§ 214 versus § 12) and modification of award (§ 214 versus § 12). Generally, if the federal act applies, its time limit may govern.[21] However, there are those who may assert that time limitations are procedural, and therefore a Colorado court should apply the Colorado statutory time limit, even if the FAA were otherwise applicable to the arbitration.

On the other hand, the CRUAA is substantially more detailed, and fills in many gaps in the FAA and the CUAA.

Other Colorado Statutes Pertaining to Arbitration

Colorado statutes have numerous provisions calling for arbitration. While infrequently applied, the following are some of these statutes.

1) C.R.S. § 13-64-403, Colorado Healthcare Act. Defines specific requirements as to form and content for an agreement to arbitrate to be valid and enforceable. As to the validity of that statute, *see* the discussion below.
2) C.R.S. § 13-21-102(5). Prohibition on the arbitrator's power to award punitive damages. *See* discussion below.
3) C.R.S. § 13-64-403(1). Prohibition of medical malpractice insurers, requiring healthcare providers to utilize arbitration as a condition to obtaining insurance. Prohibited utilization is an unfair insurance practice under C.R.S. Title 10, Article 3, part 11.

4) C.R.S. §§ 13-64-403(1.5) through (12). Required terms for arbitration clause in agreement for medical services. Punitive damages may be awarded in arbitration under this section.
5) C.R.S. § 18-5-401. Accepting a bribe to violate neutral arbitrator's fiduciary duty is a felony.
6) C.R.S. § 24-4-107. State Administrative Procedures Act does not apply to arbitration and mediation functions of state agencies.
7) C.R.S. § 24-60-1301. Arbitration under Multistate Tax Compacts (Article IX thereof).
8) C.R.S. § 30-6-101. Arbitration of boundary disputes between counties.
9) C.R.S. §§ 33-5-105 and 107. Arbitration of Wildlife Commission claims that construction will adversely affect streams.
10) C.R.S. § 35-46-102-104. "Referees" determine grazing rights on Public Domain Range.
11) C.R.S. § 35-53-125. Arbitration of disputed ownership of cattle.
12) C.R.S. § 38-5-107. Arbitration of term of conditions of crossings of property for high voltage lines.
13) C.R.S. § 39-8-108-108.5. Arbitration of denial of adjustment of property tax assessment by the board of county commissioners.
14) C.R.S. §§ 39-24-101, *et seq.* Arbitration under the Uniform Action Interstate Compromise and Arbitration of Inheritance Tax.
15) C.R.S. § 43-2-117. Arbitration of county line road location.

Common Law

There is a large body of federal and Colorado case law applying the common law of arbitration where the statutes and agreements are silent. The common law fills in the gaps in the statutory law and the agreements of the parties, and interprets both.

The Arbitrator's Inherent Power

See "Scope of Arbitrator's Authority and Power" in § 21.2.11 and "Arbitration: Applicable Law, Rules, and Procedure" in § 21.2.2.

Non-binding (Advisory) Arbitration

While this author knows of no Colorado case dealing with non-binding arbitration (except as a condition precedent to litigation), there is no reason why the statutes and common law are not applicable, at least through the hearing, short of confirmation and appeal. Non-binding arbitration, while not bringing finality, does have other benefits — one benefit being that it enables the parties to see how a neutral party would decide the claims, providing a strong foundation for negotiation of a settlement.

§ 21.2.3—Applicability Of State Or Federal Law To Arbitration Disputes

Whether state or federal law governs the arbitration is determined by the terms of the federal and state arbitration acts, U.S. constitutional doctrine of preemption by federal law, and the agreement of the parties.

Selection of Applicable Arbitration Law by Agreement

Generally, the parties are free to agree upon the arbitration law that will govern — state or federal. Thus, while the FAA may apply according to its terms, the parties generally may agree that state arbitration law shall govern.[22] Conversely, the parties can agree that federal law shall apply instead of state law.[23] Exceptions may exist when substantial questions of federal or state policy are involved.

In *1745 Wazee LLC v. Castle Builders Inc.,*[24] the Colorado Court of Appeals (1) recognized that the parties may agree in certain circumstances that an arbitration dispute will be governed by state arbitration law rather than the FAA; (2) held that a contract clause stating that "The contract shall be governed by the law of the place where the contract is located" did not select state arbitration law over the FAA, which was otherwise applicable; and (3) held that under the FAA, the federal common law ground for vacation of an arbitration award by reason of being "contrary to public policy" was applicable in a state court proceeding. (This latter point is to be compared with the decision of the Court of Appeals in *Byerly v. Kirkpatrick, Pettis Smith Polian, Inc.,*[25] which held that in state court, when the FAA is applicable, the federal common law ground for vacating an arbitration award of manifest disregard of the law would not be applied, as Colorado statutory and common law did not recognize that ground.)

Therefore, in order for the parties to select the law of a particular state insofar as the arbitration rights and procedures, given the *1745 Wazee* case and as to federal law, *Mastrobuono v. Shearman Lehmann Hutton, Inc.*,[26] the agreed-upon choice of law as to arbitration must be extremely specifically stated, *e.g.*, the arbitration and the substantive rights and procedural requirements and limitations shall be governed by the Federal Arbitration Act. The FAA shall apply in its entirety.

Federal Law Preemption of State Arbitration Law

The applicable statutory law may be either the Colorado state statutes (Colorado Revised Uniform Arbitration Act, C.R.S. §§ 13-22-201 (2005), *et seq.* or the Colorado Uniform Arbitration Act, C.R.S. §§ 13-22-201 (2004), *et seq.*), or the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, or the substantive arbitration law of another state pursuant to Colorado choice of law. (The CRUAA and the CUAA have the same statutory numbering system. Hence, in citing to either, it must be explicitly stated whether the citation is to the CRUAA or the CUAA, as each has a title, article, and section having the same numbers.)

In addition, the state and federal common law may be applicable. Lastly, other statutes may be applicable, and are hereafter discussed.

Federal Preemption

As discussed above, very generally, the FAA governs an arbitration when the dispute involves a transaction in interstate commerce.[27] However, the act does not contain any specific preemptive provision and does not occupy the entire field of arbitration law when applicable.[28]

Whenever the FAA applies, it pre-empts state law. The FAA defines its application as to contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."[29] "Involving commerce" is equivalent to "effecting commerce," generally being the maximum breadth of the scope of power under the Commerce Clause.[30] The Supreme Court held that the Commerce Clause "may be exercised in individual cases without showing any specific effect upon interstate commerce, if, in the aggregate, the economic activity in question would represent a "general practice . . . subject to federal control."[31] "Evidencing" means that the FAA applies not when the parties contemplated their transaction would involve interstate commerce, but when the transaction in fact involves interstate commerce.[32]

The Colorado Court of Appeals has defined when there is preemption by the FAA:

> For the FAA to apply, a court must conclude that a contract containing an arbitration clause evidences a transaction involving commerce. This is not a rigorous inquiry. The contract need only have the slightest nexus with interstate commerce.[33]

For example, the Colorado federal district court has ruled that the FAA preempts the Colorado Health Care Availability Act (HCAA), which, *inter alia,* mandates specific language and typeface requirements for arbitration provisions contained in medical services agreements in order to be valid.[34] Under this decision, arbitration agreements within the scope of HCAA and governed by the FAA are valid even if not in compliance with the detailed requirements of this Colorado statute. Thus, the federal district court rejected the assertion that the arbitration agreement was invalid because it did not fulfill the HCAA requirements, because the agreement did fulfill the FAA requirements for a valid agreement to arbitrate.

However, in 2003, the Colorado Supreme Court came to a generally opposite conclusion and held that an arbitration agreement was invalid for noncompliance with the requirements of HCAA, notwithstanding that the FAA was applicable and its requirements were met.[35] The federal McCarran Ferguson Act gives the states the power to regulate the business of insurance without interference by the federal government. The Colorado Supreme Court held that the McCarran Ferguson Act negates the FAA's general preemption of state arbitration law as to the Colorado Health Care Availability Act. The court found that this Health Care Act, including its requirements for an arbitration agreement to be valid, was enacted for the purpose of regulating the business of insurance within the meaning of the McCarran Ferguson Act. Therefore, the HCAA requirements for an arbitration clause were held to be valid and enforceable and not preempted by the FAA.

Until those conflicting decisions are resolved by a higher court, an arbitration agreement within the scope of HCAA and involving interstate commerce (FAA governs) must comply with the requirements of HCAA if validity is tested in a state court, but need not comply if the case is brought in federal court. Thus, the Colorado courts enforce the HCAA requirements for a valid arbitration agreement, while the federal courts do not.

A few years earlier, the Colorado Court of Appeals and Colorado Supreme Court considered a similar issue.[36] The court of appeals held that the arbitration agreement was void for failure

to comply with HCAA requirements. On appeal, the supreme court held that to be valid, the arbitration agreement had to comply with both the Health Care Coverage Act and the Health Care Availability Act. The supreme court refused to consider the contention that the FAA was preempted by the healthcare statutes because the argument had not been made at trial or in the court of appeals. Thus, federal preemption of state laws can be waived.

Generally, if the Federal Arbitration Act does not apply, a state arbitration act such as the Colorado Uniform Arbitration Act or the Colorado Revised Uniform Arbitration Act applies. State arbitration statutes and common law apply only when not preempted by the federal act's applicability. For example, when two parties enter into a consumer contract containing an arbitration clause in which the transaction involves interstate commerce, the FAA applies to preempt any and all contrary anti-arbitration state laws.[37]

Extent to Which Federal Arbitration Law Preempts State Arbitration Law

Once it is determined that that federal arbitration law is applicable, the second step is to determine which portions of the state law are preempted. More specifically, when the FAA applies, which sections of the CUAA or CRUAA (or other statute) or state common law are preempted? The Colorado Court of Appeals has generally defined the scope of federal arbitration law preemption:

> The FAA preempts state law only to the extent that such [state] laws purport to invalidate otherwise enforceable agreements to arbitrate. Where the FAA applies and the trial court has found a valid and enforceable agreement to arbitrate, the resulting arbitration thereafter proceeds pursuant to state procedural and substantive law.[38]

Thus, according to the Colorado Court of Appeals, the FAA preempts state arbitration law only as to whether the arbitration agreement is valid and enforceable; preemption applies when the FAA is applicable only to state laws restricting formation or enforcement of arbitration agreements. It is unclear from the court's opinion when the provisions of the FAA apply, other than as to validity and enforceability of the arbitration agreements. Federal case law is not necessarily in accord with this narrow definition of preemption.

It is suggested that if a case is brought in a federal court, only limited reliance should be placed upon those comments of the Colorado Court of Appeals, as it is very unclear as to the total extent of federal law preemption of state law: what state procedural and substantive law continues to apply, and whether the procedural law would apply only in state court or also in the federal courts.[39]

In *Fonden v. U.S. Home Corp.*,[40] the Colorado Court of Appeals found that the FAA applied, but like the court in earlier decisions, stated:

> Although the FAA preempts inconsistent state law, its preemptive effect is restricted to the question of arbitrability and whether the agreement to arbitrate is valid.

The court then denied the plaintiff's appeal of an interlocutory order of the trial court granting a stay of the plaintiff's civil action and compelling arbitration of the dispute on the ground that federal law did not permit such an appeal. However, the court appeared to recognize that the order was not appealable under state law either, making the determination of applicability of federal law as to appeals moot. The court concluded:

> In so concluding, we recognize that appellate courts in other states have held various FAA procedural provisions inapplicable in state court. [Citation omitted.] These courts have applied a different analysis when addressing the issue of finality for purposes of appeal, concluding that the FAA's finality provision [finality of order in order to appeal] does not preempt the state's own procedural rules unless those rules defeat substantive rights granted by the parties.

The court concluded by holding that the trial court order was not final for purposes of appeal under either the FAA or the CUAA. Therefore, in essence it did not matter which law was applied, perhaps making much of the court's discussion merely *dictum*. It can only be said that it is very unsettled in Colorado (and elsewhere) as to what CUAA or CRUAA provisions will be applied by a state court when the FAA is applicable to the arbitration.

Chilcott Entertainment L.L.C. v. John G. Kinnard Co.[41] illustrates a dilemma the scope of federal preemption may create. An arbitration award was entered in favor of Kinnard and against Chilcott on July 2, 1997. Apparently, it was undisputed that the Federal Arbitration Act was applicable. On September 19, 1997, two months and 17 days after entry of the award, Chilcott commenced a federal court action to vacate the arbitration award. On December 24, 1997, the federal court dismissed the civil action for lack of jurisdiction in that there was no diversity of citizenship between the parties and no federal question. Reconsideration was denied on January 22, 1999.

Chilcott then filed on March 9, 1999, a motion to vacate the award in Denver District Court. Kinnard moved to dismiss on the ground Chilcott had failed to file the action within the three-month period prescribed by 9 U.S.C. section 12. The court applied the federal time period, not the state time period, without discussion. The court of appeals held the three-month time period was not tolled by the period during which the suit was pending in federal court. The court further held that the Colorado savings statute, C.R.S. § 13-80-111, was preempted by section 12 of the FAA. Thus, at least according to the Colorado Court of Appeals, apparently the time periods of the FAA preempt any shorter time periods of the CUAA or CRUAA. Perhaps there would be no preemption if the state time limits were longer.

Choice of Law Rules: Colorado Versus Foreign State Arbitration Law

A unique situation might occur in an arbitration in Colorado wherein the agreement made the arbitration law of another state applicable.[42] Presumably, every effort would be made to limit that choice of law to the state's substantive arbitration law and apply Colorado procedural arbitration law.

§ 21.2.4—Arbitration Agreements

As discussed above, arbitration is a consensual process, and therefore what the parties agreed to is the primary definition of the arbitration.

Statutory Requirements for Valid Arbitration Agreements

As discussed above, at common law agreements to arbitrate were void in many jurisdictions, although not in Colorado. As to arbitrations subject to the FAA, section 2 simply provides that a written agreement to arbitrate shall be valid and enforceable. A written agreement suffices, but what contents are required?

An agreement to arbitrate can be extremely short. FAA section 2 provides:

> A written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction, 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 . . .

For example, while the arbitration agreement must be in writing, it need not be signed. The unsigned written document may become an agreement if the course of conduct of the parties evidences an intent to be bound.[43]

In addition, section 9 provides for confirmation of an award, "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . . ." Therefore, such a provision should also be included.

Similarly, under the CUAA, C.R.S. § 13-22-203:

> A 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 is valid, enforceable, and irrevocable, save upon such grounds as existed at law or in equity for the revocation of any contract.

See also CRUAA, C.R.S. § 13-22-206, which provides:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except . . . .

CRUAA, C.R.S. § 13-22-201, defines "record":

> (6) "Record" means information that is inscribed on a tangible medium that is stored in an electronic or other medium and is retrievable in perceivable form.

All of the statutes invalidate arbitration agreements on such grounds as exist at law or in equity for the revocation of any contract.

In summary, the statutory requirements for a valid arbitration agreement are simple: an agreement of the parties in writing or other tangible medium. While an arbitration agreement must be in writing, there is no requirement that it be signed by the parties.[44] However, some statutes attempt to impose special requirements for an agreement to arbitrate to be valid. For example, the Colorado Health Care Availability Act, C.R.S. § 13-64-403, defines extensive requirements for an arbitration agreement in an agreement for the provision of medical services to be valid. These requirements include specific language in bold face, ten-point type immediately preceding the signature lines.

Valid and Invalid Terms of the Arbitration Agreement

As frequently stated throughout this chapter, in most instances the agreement between the parties governs the form and substance of the arbitration. As discussed below, as to some subjects, the law imposes terms that cannot be altered by agreement of the parties, or that can be altered only after the dispute arises.

However, there are also certain clauses that under the common law a court will not enforce. These invalid terms are usually found when the parties have disparate bargaining power, particularly in consumer arbitration agreements. Sometimes seemingly one-sided clauses have been upheld; in other cases, they have been stricken.

In *Dumais v. American Golf Corp.*,[45] the Tenth Circuit held that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope was an illusory contract and therefore void. The court did not state whether the Federal Arbitration Act or the New Mexico Arbitration Act was applicable. The court applied New Mexico substantive law to determine the validity of the contract. The case involved a sexual discrimination claim by an employee against her employer.

However, thereafter the Tenth Circuit defined certain limits to the *Dumais* decision. The unilateral right of one to terminate or amend a dispute resolution agreement does not make the agreement illusory and unenforceable if the amendments are restricted to claims of which the amending party did not have actual notice, and if the power to amend or terminate can be exercised only after 10 days' notice.[46]

On the other hand, in *Rains v. Foundation Health Systems Life & Health*,[47] the court upheld the validity of an arbitration provision that permitted only one party to compel arbitration, afforded remedies to that party outside of arbitration, gave that party the right to propose three neutral arbitrators from whom the other party had to select the arbitrator, and did not expressly provide for document discovery. However, a mandatory arbitration agreement entered into as a condition of continued employment and which required an employee to pay a portion of the arbitrator's fees was held unenforceable under the FAA.[48] Such a provision can be severed from the otherwise valid arbitration agreement.

In *Gergel v. High View Homes, L.L.C.*,[49] the plaintiffs unsuccessfully sought to enjoin arbitration, *inter alia,* on the grounds that the AAA was not impartial, and that its alleged excessive, unreasonable administrative fees rendered the arbitration clause unconscionable.

The Colorado Court of Appeals has held that under the CUAA, the parties cannot by agreement define and prescribe the powers of the appellate court with respect to appeals of arbitration awards.[50] In that case, the arbitration agreement provided:

> The parties further agree that for the purpose of any appeal to the Colorado Court of Appeals or the Colorado Supreme Court the arbitrators' award shall be reviewed using the same standards as findings of fact and the conclusions of law by a Colorado District Court.

The court held that the parties' agreement conferring authority on the court to review on a substantive basis the award of the arbitrators was void and unenforceable, as under the Colorado Constitution the authority to determine the jurisdiction of the court was vested exclusively in the General Assembly.[51]

The Tenth Circuit Court of Appeals has similarly held that the parties by agreement may not modify the judicial review standards of the FAA.[52]

Statutory Exclusions from Validity of Arbitration Agreements

FAA Employee-Employer Exclusion

Section 1 of the FAA excludes from its scope (and therefore from its validating provisions) "contracts of employment of seamen, railroad employees, or any class of workers engaged in foreign or interstate commerce." The courts have construed this exception narrowly.[53] On the other hand, the CUAA expressly includes employer-employee contracts within its scope. The CRUAA simply omits any exclusion such as is contained in the FAA or specific inclusion such as is in the CUAA.

Thus, the CUAA specifically, and the CRUAA implicitly, apply to and validate arbitration agreements between employers and employees. This may be a reason in appropriate circumstances to agree to the applicability of state arbitration law.

Invalidity on Grounds in Law or Equity for Revocation of Contracts

The federal and Colorado arbitration acts validate agreements to arbitrate, except that arbitration agreements can be invalidated/voided on the grounds that exist at law or in equity for the revocation of any contract. Common law grounds for revocation of contracts generally include fraud in the inducement, illusory contract, mutual mistake, and duress. State law probably is applicable to define these grounds, even when the FAA is applicable to the arbitration agreement.

However, to escape the arbitration clause, the party must not only prove, *e.g.*, fraud in the inducement of the contract as a whole, but rather fraud in the inducement of the arbitration clause

itself. Otherwise, the arbitration clause remains valid, and the arbitrator determines whether the contract as a whole was induced by fraud.[54]

In *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*,[55] the supreme court held that under the CUAA, C.R.S. § 13-22-204(1), "A fraudulent inducement claim, if it is to be considered by the trial court, must be directed specifically to fraud inducing the plaintiff to agree to arbitrate. Broader allegations of fraudulent inducement . . . must be resolved in arbitration." This decision was followed by *J.A. Walker Co. v. Cambria Corp.*,[56] holding to the same effect under the CRUAA. The CRUAA, C.R.S. § 13-22-207, has a more explicit provision.

Other Terms of the Arbitration Agreement

Any arbitration agreement may be very short — parties agree to arbitrate any disputes that arise, or that exist, plus perhaps a provision for enforcement by a court. Indeed, in one non-Colorado case, just two words in an agreement were held to constitute an agreement to arbitrate: "arbitration clause."[57] The details of the arbitration process are defined by the applicable statutory and common law, and thereafter further defined by the arbitrator pursuant to his or her inherent powers. Frequently, "agreements of the parties" incorporate the rules of the AAA — which make them a part of the agreement.

On the other hand, the arbitration agreement may be extremely long and detailed, defining the arbitration process in minute detail. So long as it is not contrary to those applicable statutory and common law provisions that do not allow variation by agreement of the parties, the parties are free to define their alternative dispute resolution procedure, and the arbitrator must proceed in accordance with the agreement. Arbitration is not a single "system." Rather, within the limitations of the statutes, the parties are free to design by agreement the system that best fits their needs. With limited statutory exemptions, the agreement of the parties governs.

There are, however, exceptions. For example, most courts hold that the parties cannot by agreement define a scope of appeal from the trial to the appellate court differently than the statutes provide. The parties cannot vary the grounds for appeal, since that is a power reserved to the legislature.[58] Other examples of the law (CRUAA) imposing requirements that generally cannot be waived or altered substantially by the parties prior to the controversy arising include: motions to compel or stay arbitration, immunity of the arbitrator, judicial enforcement of pre-award rulings, submission by a court to the arbitrator of a motion to modify or correct an award, confirmation of awards, vacating the award, modification or correction of an award, and judgment on the award, including costs.[59] While these limitations are taken from the CRUAA, the common law under the CUAA and FAA probably is the same. The CRUAA also expressly defines statutory provisions that can be waived only after a dispute arises under an agreement to arbitrate.[60]

In summary, the agreement of the parties governs the arbitration to the extent of its terms, except to the extent that statutory and common law may restrict that agreement in a few limited areas.

A valid "short form" arbitration agreement might read:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Even if this statement is all that the parties have agreed to, it is an enforceable arbitration agreement. For the arbitration, this clause is supplemented by the applicable statute and the arbitrator's inherent powers to define the complete procedure and system.

On the other hand, an arbitration agreement can be quite long, covering topics such as[61]:

- Method of selection of the arbitrator(s);
- Number of arbitrators;
- Arbitrator qualifications, and qualifications not required, *e.g.*, need not be a lawyer;
- Non-lawyers as arbitrators and as representatives of the parties;
- Location of arbitration;
- Language to be used;
- Governing arbitration law;
- Conditions precedent to arbitration;
- Preliminary relief;
- Consolidation;
- Document discovery;
- Depositions;
- Duration of arbitration proceedings;
- Remedies;
- Baseball arbitration;
- Arbitration within monetary limits;
- Incorporation/application of ABA/AAA Code of Ethics;
- Attorney fees and costs;
- Assessment of attorney fees;
- Form of opinion accompanying the award;
- Confidentiality;
- Appeals;
- Judicial reference;
- Mini-trial;
- Mediation as condition precedent;
- Statutes of limitation;
- Dispute review board determination as condition precedent;
- Parties may be represented by non-lawyers; and
- Intertwining claims.

Scope of the Arbitration Agreement: Disputes within the Scope of the Agreement

One of the first issues to consider in determining whether arbitration is the correct forum for resolution of the dispute is a determination of whether an arbitrable dispute exists. For a dispute, claim, or question to be present and subject to arbitration, a difference between the parties is required. If there is no difference, there is no question to submit and hence no duty to arbitrate.[62]

However, if there is a dispute, it must be within the scope of the arbitration clause to be arbitrable. If the FAA is applicable, it is generally held that the determination of whether a dispute is within the scope of the arbitration clause is governed by federal law.[63] Because arbitration is a favored means of dispute resolution and state and federal public policy favors arbitration, any doubts about the scope of an arbitration clause should be resolved in favor of arbitration.[64]

The Tenth Circuit[65] makes a three-part inquiry to determine whether a particular dispute falls within the scope of an arbitration clause:

> First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability, and arbitration of even a collateral matter must be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.

An arbitration clause may be either very broad in scope as to the types of disputes to be arbitrated, or very narrow and limited. The parties to a contract "who agree to submit matters to arbitration are presumed to have agreed that everything, both as to law and fact, necessary to render an ultimate decision, is included in the authority of the arbitrator."[66] Like every contract interpretation issue, the objective is to ascertain and give effect to the mutual intent of the parties and to carry out the purposes of the agreement.[67]

An arbitration clause requiring the arbitration of all claims "relating to the contract" is considered broad in scope, rather than restrictive, and will encompass any dispute between the parties regarding the subject matter of the contract.[68]

In *Galbraith v. Clark*,[69] the Colorado Court of Appeals reaffirmed the rule of interpretation in determining whether the dispute was within the scope of the arbitration agreement: the court will focus on the underlying factual allegations rather than the parties characterization of their claims. If the allegations underlying the claims touch matters covered by the parties arbitration agreement, those claims must be arbitrated, regardless to the legal labels attached to them.

According to a case decided under the former Civil Code, the submission under a narrow or limited arbitration clause of any special claims to arbitration will be limited to those within the scope of the clause, but may extend to questions that necessarily arise therefrom.[70] Accordingly, tort and other non-breach of contract claims are not, by reason of not being breach of contract claims, necessarily excluded from an arbitration clause contained in a contract.[71] Absent waiver or estoppel, an arbitration may include claims for negligent construction, construction contrary to the contract documents, and violations of any applicable laws and building codes.[72] A claim based upon promissory estoppel will also be within the scope of a general arbitration clause.[73] Where the underlying facts and contract interpretation issues arise out of a contract, a claim for declaratory relief will not take the issue out of the arbitration clause.[74]

Similarly, a contractor's claims for termination costs arising out of the termination of a subcontract, reimbursement of advance payments made to the subcontractor, warranty costs, and alleged overbilling claims have all been held to be within the scope of a general arbitration clause.[75]

Where a verbal settlement of a claim is made and one party fails to abide by the settlement, if the factual basis for the underlying claim is within the scope of the arbitration clause in the underlying agreement, the issues relative to the settlement may also be within the scope of the arbitration clause.[76] However, some courts may view the settlement as a separate and independent contract.

The parties will not be bound to participate in an arbitration where the claim is merely for payment of an undisputed and liquidated sum of money. Attempts to create a dispute over a liquidated sum after a suit has been filed will not divest the court of jurisdiction, even if the parties have agreed to an arbitration.[77] However, an otherwise valid disputed claim for the unpaid contract balance is within the scope of an arbitration clause.[78] It has also been held that where the contractor does not dispute the defect in the work that gives rise to the claim and gives assurances that it will be corrected, there is no dispute to be arbitrated.[79]

With respect to the arbitration of a dispute arising out of a construction contract entered into with a governmental entity, unless an appropriation for the work has been made by the governmental entity, the arbitrator may have no jurisdiction, and any award it enters may be set aside.[80] This result has been ameliorated in large measure by the enactment of C.R.S. § 24-91-103.6. However, for a claiming contractor to obtain a monetary recovery, it must not only comply with the requirements of the contract documents for claim submission, but it may also have to certify its claim. If the appropriation applicable to the project has been exhausted and the contractor fails to certify its claim, the contractor runs the risk that it will be unable to recover on any award, inasmuch as a governmental entity generally has no liability beyond the amount appropriated.[81]

A broad form arbitration clause with respect to warranties was held to apply to claims alleged under the Consumer Protection Act, negligent misrepresentation, negligent concealment, and breach of the Soil Disclosure Act.[82]

The court of appeals has construed a broad form arbitration clause ("any claim arising out of or related to the contract") to give the arbitrator power to decide post-construction claims relating to time extensions and change orders without the consent of HUD, even when the contract provided that the "time by which the work may be completed may be extended . . . only with the prior written approval of HUD." However, the decision may be reasonably construed that the effect of the written approval clause is for the arbitrator's and not simply ignored.[83]

An arbitration clause in a contract may be presumed to survive the termination of the contract (unless otherwise provided), even if the facts of the dispute occurred after the contract expired.[84]

Similarly, an arbitration clause survives the expiration of a warranty agreement under which the claim is asserted. In *Shams v. Howard*,[85] the court also held that the arbitrator must determine whether the plaintiffs had a viable warranty claim, despite lapse of the one-year period during which the alleged defects were latent; whether the plaintiffs' tort claims are also warranty claims; and whether lack of a warranty claim meant that the plaintiffs had no remedy.

The Meaning of "May Arbitrate"

Regrettably, some parties use language such as "in the event a dispute hereafter arises, the parties may submit their dispute to arbitration." Compare the use of the words "shall submit their dispute to arbitration" with the words "may arbitrate." The words "may arbitrate" in an arbitration clause have been held to merely give a party the choice of either arbitrating or abandoning the claim — it does not permit one party to unilaterally elect whether to arbitrate or litigate the claim.[86] If the agreement is ambiguous, parol evidence as to the parties' intent may be allowed.

Intertwining Claims

On any given construction project, it is not uncommon for multiple claims to arise, some of which are subject to an arbitration agreement while others are not. Sometimes, the same facts are involved, but involve different parties. For this situation, the courts created the intertwining doctrine, the purpose of which is to avoid duplication of effort and inconsistent determinations by different forums.[87] CUAA, C.R.S. § 13-22-204(4), and CRUAA, C.R.S. § 13-22-207, appear to give a court statutory jurisdiction to make this determination.

Colorado courts long held that if the arbitrators are required to hear the same facts as are needed to establish the non-arbitrable claims before a court, the court would not refer the arbitrable claims to arbitration. Instead the court would hear all of the claims itself.[88] This intertwining claims doctrine stated that where the factual bases of arbitrable and non-arbitrable claims were the same, arbitration will not be ordered. Instead, all claims would be heard by the court: under the CUAA, if the arbitrator would be required to hear the same facts needed to establish the non-arbitrable claims, the court would not refer the arbitral claims to arbitration and instead will hear all of the claims itself.[89] However, in *Ingold v. AIMCO/Bluffs, L.L.C. Apartments* and *J.A. Walker Co., Inc. v. Cambria Corp.*, the Colorado Supreme Court abolished the intertwining doctrine.[90]

Colorado's adoption of the intertwining doctrine followed the federal court's adoption of the doctrine. Subsequently, however, the U.S. Supreme Court repudiated the doctrine when the FAA is applicable. Thus, the intertwining doctrine is not applicable in cases controlled by the FAA,[91] absent agreement of the parties. The FAA requires a court to compel arbitration of pendant arbitrable claims, even if it leads to inefficient maintenance of separate proceedings involving the same facts in different forums. The Supreme Court held that the possible efficiencies and consistent result to be gained by having one forum, rather than two, pass upon common factual or legal issues could not justify refusing to enforce an agreement to arbitrate. However, the arbitrator's award would not necessarily be binding upon the court's resolution of the same issues, and arbitration proceedings need not be stayed pending completion of the litigation. *But see GATX Management Services, LLC v. Weakland*.[92] Thus, when a party asserts multiple claims, the federal court allows non-arbitrable claims to continue in court and the arbitrable claims to proceed in arbitration, in accordance with federal law.[93]

Notwithstanding the rejection by the federal courts of the intertwining claims doctrine, at least insofar in allowing a court to determine arbitrable and non-arbitrable claims, there has been at least one attempt to assert that the arbitrator should determine arbitrable and non-arbitrable claims when intertwined.[94]

Splitting Claims Between the Court and Arbitrator

Sometimes, a plaintiff may assert claims arising out of the same events against two parties, one with whom it has an arbitration agreement and one with whom it does not. This is particularly common in construction project disputes. For example, a contractor may sue the owner with whom it has a contract containing an arbitration clause and an engineer with whom it does not have a contract or arbitration agreement.

In *Quist v. Specialty Supply Co.*,[95] decided under the CUAA, the purchaser of a new home damaged by fire from a fireplace recovered damages in arbitration against the builder/vendor. The court disallowed the compensatory damages recovered in the arbitration to also be recovered in the civil action against the installation contractor (standard law precluding double recovery for the same damages) but allowed recovery in the civil action of punitive damages and of enhanced damages under the Colorado Consumer Protection Act.

Such a concept might be utilized where the claimant seeks punitive damages and Colorado law is applicable — including the Colorado statute forbidding an arbitrator to award punitive damages.

When some of a plaintiff's claims are subject to an arbitration agreement and some are not, the trial court can stay the trial on the non-arbitrable claims pending the outcome of the arbitration, or, alternatively, allow the plaintiff to separately litigate some or all of their non-arbitrable claims.[96]

Mechanic's Lien and Miller Act Claims

C.R.S. § 38-22-110 requires that to enforce a mechanic's lien, a civil action be commenced within six months after the (substantial completion of) last work or labor is performed or material furnished, or after completion. An arbitration clause in a construction contract does not constitute a waiver under C.R.S. § 38-22-119 of the right to assert a mechanic's lien, which is generally believed to require commencement of a civil action.[97] Thus, notwithstanding an arbitration clause, the Colorado Supreme Court has stated where a party has filed a mechanic's lien, the claimant still must commence a judicial foreclosure action within the statutory time, which is then stayed pending the arbitration.[98] The arbitrator then can determine the issues as between or among the parties to the arbitration. This normally can include the amount owing to the claimant, although when a suit to foreclose the mechanic's lien based upon those findings is filed, the non-parties to the arbitration holding junior interests in the property may have a right to contest the amount of the lien. If the claimant prevails, the civil action proceeds with the foreclosure of the lien.

Generally, an arbitrator cannot enter and enforce a foreclosure decree or foreclose on property. First, all parties claiming interest in the subject property may not be parties to the arbitration agreement. Second, arbitrators do not normally hold foreclosure sales or otherwise execute upon an award, nor do they have powers to direct sheriffs.

Similarly, the parties may agree to arbitrate claims under the federal Miller Act.[99] Like proceedings under the Colorado mechanic's lien statute, the claimant must assert its claims in a timely fashion and probably must commence a civil action and not simply an arbitration. A Miller Act lawsuit should be filed timely, and then a motion to stay the civil action under 9 U.S.C. §§ 3 and 4 or C.R.S. § 13-22-204 should be filed pending arbitration of the claims.

Waiver of Agreements and Objections to Arbitration and Provisions Thereof

Like any other contract right, an agreement to arbitrate (as well as any specific provisions thereof) may be waived.[100] The right to arbitrate can be waived by actions inconsistent with such right in circumstances where prejudice will occur to the other parties.[101] Neither the Federal Arbitration Act nor the Colorado Uniform Arbitration Act has provisions defining waiver. On the other hand, the CRUAA, C.R.S. § 13-22-204, defines the provisions of that statute that may be waived and at what stage of the proceedings. CRUAA also defines the provisions of the statute that the parties may vary by agreement. There are no Colorado judicial decisions under that statute, and the reader is referred to that statute should a waiver situation occur where that statute might be applicable.

Whatever the parties agreement provides, however, it probably can be waived by their conduct. In *Galbraith v. Clark*,[102] the court acknowledged that given the specific language of the arbitration agreement, an issue of arbitrability should have been addressed first by the arbitrator. However, the parties did not ask the district court to refrain from addressing the issue and did not raise the issue on appeal. On appeal, appellant simply complained of the district court decision. The Court of Appeals held that the parties forfeited/waived any right to have the arbitrator to determine the issue of arbitrability as provided by their agreement.

On the other hand, there is extensive common law of waiver under the FAA and the CUAA. This common law probably applies to the CRUAA to the extent not directly contrary to CRUAA provisions. Under all three of the statutes, "[a] party may waive its right to arbitration by taking the actions that are inconsistent with an arbitration provision."[103] While there is no set criteria as to what constitutes a waiver or abandonment of the right to arbitration, the courts have defined various factors to be considered in determining whether a waiver has occurred. These factors include whether:

1) The party has actually participated in the lawsuit or taken other action inconsistent with its rights to arbitrate;
2) Litigation has substantially progressed by the time the intention to arbitrate was communicated by the party moving to dismiss;
3) There has been a long delay prior to seeking a stay of the litigation;
4) The defendant filed counterclaims without asking for a stay of the arbitration;
5) A request to compel arbitration was initiated close to trial;
6) The party seeking the arbitration has taken unfair advantage of discovery that would not have been available in arbitration; and
7) The other party was adversely affected, misled, or prejudiced by the delay.

In sum, the elements are whether the parties' actions are inconsistent with the right to arbitrate and whether the delay affected, misled, or prejudiced the opposing party.[104]

On the other hand, a Colorado court found no waiver of the right to arbitrate where a party initiated a lawsuit to enforce the arbitration clause and the complaint stated that it did not waive arbitration,[105] or where an owner initiated litigation to preserve its right to arbitrate.[106] Engaging in discovery in pending litigation does not automatically constitute waiver of the arbitration agreement; if the discovery in the judicial procedure is approximately the same as generally available in the arbitration proceeding, discovery may not constitute waiver if there is no prejudice.[107]

Undertaking discovery in the judicial proceedings was perhaps a dispositive factor in one court's finding of waiver of the right to arbitration.[108] The court noted that such discovery in arbitration would not have been of right, but would have been allowed in arbitration only at the arbitrator's discretion.

Perhaps a classic case extending the concept of waiver of the right to arbitration is found in the decision of our sister state of Wyoming in *Scherer v. Schuler Custom Homes Construction, Inc.*[109] In finding that Custom Homes had waived its right to arbitration, the Wyoming Supreme Court said:

> Custom Homes' strategy was to delay resolution of this matter and not to exercise its right under the contract for alternative dispute resolution. When faced with a direct request for alternative dispute resolution, it chose to ignore the request. . . .

> . . . Custom Homes' only goal was to have the litigation dismissed. Custom Homes did not comport with the spirit of alternative dispute resolution provision of the agreement, which created a mechanism for prompt resolution of the parties' differences.

Similarly, allowing three years between the date the defendant contractor answered the owner's complaint in its efforts to compel arbitration, during which time the contractor filed motions, conducted discovery, and utilized judicial resources, was found to result in prejudice and therefore a waiver of the arbitration agreement.[110]

By failing to object to an arbitrator's actions, any objection thereto may be waived. For example, in *Osborn v. Packard,*[111] on appeal the appellee urged that the arbitrator lacked jurisdiction to enter rulings clarifying his original rulings. The court found a waiver of the objection by failing to object to the arbitrator's authority to issue such clarifications until the appeal. Because there might be questions as to applying waiver to subject matter jurisdiction, it might be desirable to refer to the holding as implied consent or amendment to the arbitration agreement.

Typically, it is the court and not the arbitrator who determines whether a party has waived the arbitration provisions.[112] In part, this is because the issue normally comes on upon a motion to compel arbitration and stay a civil action. Generally, under the rules discussed above as to whether there is a valid arbitration agreement, the issue of waiver is subsumed and is an issue for the court. However, there does not appear to be any prohibition to an arbitrator determining the issue, although it might be determined *de novo* by the court "on appeal."

§ 21.2.5—Arbitration Of Particular Kinds Of Claims

Arbitration of Employer-Employee Disputes

Employer/employee arbitration was well developed long before arbitration generally became popular. Many of these arbitrations were pursuant to collective bargaining agreements.

There are principles of law applicable to labor arbitrations that are not commonly applicable to arbitrations generally. Labor arbitrations are beyond the scope of this chapter, although they are well covered by the Colorado case law and articles. *See also* AAA labor arbitration rules and procedures. Generally, arbitration clauses in employment contracts are enforceable.[113] However, arbitration provisions in employee handbooks in some circumstances are held unenforceable.[114]

Generally, the District of Colorado recognizes that claims by employees of discrimination on the basis of race, color, ancestry, and national orientation and for retaliation under 42 U.S.C. § 1981 as well as state law claims of outrageous conduct and negligent supervision can be the subject of an arbitration agreement.[115]

Arbitration of Disputes with Consumers

Like labor arbitrations, special rules (or interpretations of rules) and procedures have developed for the arbitration of consumer claims against, *e.g.*, homebuilders and manufacturers.

These special rules are beyond the scope of this chapter. However, *see* Chapter 14, "Residential Construction." *See also* the American Arbitration Association Protocol for Consumer Disputes.

A claim under the Wrongful Withholding of Security Deposits Act, C.R.S. § 38-12-101, is not subject to arbitration. The statute provides for "legal proceedings," which the court interpreted to mean a civil action filed in court. The court also found that the Act precludes waiver of such provisions.[116]

Claims based upon the Colorado Consumer Protection Act can be covered by an agreement to arbitrate.[117]

The leading U.S. Supreme Court decision and the leading Colorado decision should be noted.[118]

Arbitration of Statutory Claims

Some parties have asserted that an arbitration clause requiring statutorily created rights to be arbitrated is invalid, because, *inter alia*, administrative fees and arbitrator's fees must be paid but are not costs in litigation. The litigant asserts that these costs effectively deprive the party of his or her statutorily granted rights. In addition, since arbitration does not utilize a jury, some parties have asserted they are being deprived of their right to trial by jury as provided by the statute. These complaints primarily have been in the labor and consumer areas, discussed above, and limitations on the arbitration costs to be paid by consumers and employees have developed.

The courts have generally held that arbitration agreements encompassing statutory claims are enforceable under the FAA. The issue is not conclusively resolved under the CUAA or the CRUAA. For example, the Colorado Supreme Court has held that the Colorado Wage Claim Act is not arbitrable under the CUAA.[119] Subsequently, the Colorado Court of Appeals seemed to confirm that claims for unpaid commissions were subject to arbitration when the FAA was applicable, saying, "In the context of plaintiff's claim for unpaid commissions at issue here, and mindful that there is no general policy against enforcing statutory claims through arbitration . . . ."[120] Numerous arbitration cases have involved statutory claims.

Statutorily created rights involved in the construction industry probably can be subjected to arbitration under the CUAA and CRUAA, although the particular facts and circumstances, and the case law, should be considered.[121]

§ 21.2.6—Conditions Precedent To Arbitration

Arbitration agreements frequently require specific actions be taken prior to the arbitration. These actions may include negotiation, mediation, document exchange, dispute evaluation, nonbinding fact-finding, and similar steps. These provisions generally will be enforced as conditions precedent to arbitration.[122]

The CRUAA, C.R.S. § 13-22-206, allows the arbitrator to make the determination of whether a condition precedent has been fulfilled. Under state and federal common law, absent

agreement of the parties, whether conditions precedent to arbitration have been fulfilled is a question for the arbitrator.[123]

Conditions Precedent to Arbitration: Design Professional Certification and Certificate of Good Cause

Some construction contracts require issuance of an architect's certification or decision prior to specific action being taken by the owner or contractor. For example, a contract may require the architect to certify that the contractor is in default as a condition precedent to the owner's termination of the contractor for default. An architect's decision on a claim for additional compensation or a time extension may also be a prerequisite to initiation of an arbitration.

In a 1925 decision, where an architect's certificate was issued prior to an owner's default termination of the contractor, but the contract did not make the architect's decision final and binding, the contractor was entitled to proceed with arbitration.[124] The same result was reached where a claims provision required an architect's certificate and a statement that the decision was final and binding as a condition to arbitration, and the architect's decision failed to contain the statement.[125]

Mediation as a Condition Precedent to Arbitration

Fulfillment of a mediation requirement has been enforced as a condition precedent to arbitration.[126]

§ 21.2.7—Enforcement Of The Arbitration Agreement

One of the principal purposes of the arbitration statutes is to provide a means of determining the enforceability of the agreement to arbitrate as against a party who believes it is not bound by the agreement, or that the particular dispute is not within the scope of the arbitration clause. Without an enforcement mechanism, agreements to arbitrate entered into prior to the dispute arising would often be for naught. Enforcement authority is given to the courts by the arbitration statutes.

Who May Enforce and Who Is Bound by the Arbitration Agreement

The courts have sometimes found non-signatories bound by or entitled to enforce arbitration agreements on multiple theories:

- Signatory enters into a contract with non-signatory incorporating an arbitration agreement; *e.g.*, a surety whose performance bond incorporated by reference the subcontract, which incorporated by reference the general contract, which contained a duty to arbitrate.[127]
- The non-signatory is the principal of an agent signatory.[128]
- The non-signatory is the alter ego (piercing the corporate veil) of a party.[129]
- The non-signatory is estopped to deny that it is bound by the arbitration agreement. The non-signatory expressly or impliedly by conduct assumed the obligation to arbitrate.
- The non-signatory is the employee of a signatory.[130]
- The non-signatory is a third-party beneficiary.[131]
- The party is the successor in interest to a signatory.[132]

All of these theories are carefully defined and explained in a decision by the Second Circuit Court of Appeals.[133] As to construction contracts, *see Enforcement of Arbitration Agreement Contained in Construction Contract By or Against Non-signatory*, 100 A.L.R. 5th 481.

For example, heirs and personal representatives were held bound by an arbitration provision in an agreement between a member and a health care organization, the court saying:

> [W]e construe an arbitration provision expressly purporting to bind not only the signatory, but also certain non-parties who are in privity with the signatory, namely an "heir" or personal representative or . . . a person claiming that a duty to him or her arises from a Member's relation with [the other party].[134]

Similarly, a third-party beneficiary can both enforce an arbitration clause in an agreement and be compelled to arbitrate under an arbitration provision.[135] Such a beneficiary can only accept all of the benefits and burdens of the contract, or none.

In *Lane v. Urgitus*,[136] a dispute arose between two real estate brokers over real estate transaction referral fees. Both brokers were members of a realtors association when the transaction occurred and the dispute arose. Each of them, in applying for membership in the association, consented to arbitrate disputes as a condition of membership.

The court held that the parties had agreed to arbitrate their dispute because:

- Each of the licensed brokers had consented to arbitrate disputes with other members of their professional organization;
- Each of the brokers was a member of the organization when they entered into the alleged referral fee agreement and the dispute arose; and
- Their consents to arbitrate constituted or implied a condition of the alleged referral fee agreement.

The court specifically limited its holding, stating:

> We do not decide or address whether bylaws of a voluntary association are enforceable against and among individuals absent a contractual relationship that would include an implied condition as exists in this case.

Governmental Entities

Generally, but perhaps dependent upon the nature of the dispute, state and municipal entities may enter into arbitration agreements. In *Fraternal Order of Police v. City of Commerce City*,[137] the Colorado Supreme Court upheld the validity of a municipal charter provision creating a permanent panel of arbitrators to resolve impasses in collective bargaining with police officers. This decision is educational on the general issue of the power of municipal governments to submit disputes to binding arbitration.

Our supreme court has held that binding grievance arbitration of public employment disputes under the terms of a collective bargaining agreement is not *per se* unconstitutional as a delegation of legislative authority and discussed matters that may be submitted by a city to binding arbitration, and those that may not.[138] The City and County of Denver's dispute resolution procedure that practically is the same as arbitration has been approved. *See* § 21.5, *infra*.

Similarly, applying the FAA and rejecting the city's waiver defense, the court enforced an arbitration agreement between the City of Aurora and its contractor in *Martin K. Eby Construction Co. v. City of Aurora*.[139]

Agreement of Subcontractor to Arbitration by Reason of a "Flow-Through" Clause

While Colorado courts have not specifically ruled on the issue, other jurisdictions have held that a subcontractor will be bound by an arbitration clause in the prime contract by reason of a properly drafted flow-through clause in the subcontract.[140]

Judicial Involvement: Generally

Except as provided by statute and common law, pending the conclusion of an arbitration, a valid and enforceable arbitration clause will divest a court of jurisdiction over any claims that the parties have agreed to submit to arbitration.[141]

However, prior to the arbitration commencing, two issues may be presented: whether there is a valid and enforceable agreement to arbitrate, and, if so, whether the particular dispute is within the scope of that agreement. Usually, these issues arise before a court in conjunction with a motion to a court to stay or compel arbitration. On the other hand, sometimes the issues are simply submitted to the arbitrator as preliminary issues for his or her determination, with or without express agreement in the arbitration agreement as to whether the arbitrator has jurisdiction/power to determine them.

Subject to the discussion below, and speaking very generally only:

1) If the arbitration agreement is silent, the court has jurisdiction over issues of arbitrability;
2) If the arbitration agreement provides that the arbitrator is to determine the issues of arbitrability, the courts usually will defer to the arbitrator. This means that if the issues are raised in a motion to compel or stay arbitration, the court may convene the arbitration for a ruling on these issues before it rules on the motion; and
3) If the agreement is silent, and the issues are presented to the arbitrator, the finality of the arbitrator's issues might not be as defined in the vacation of award statutes, but perhaps *de novo* review.

The Colorado Long Arm Statute, C.R.S. § 13-1-124, expressly provides that the jurisdiction of the Colorado courts extends to persons and entities, whether or not a resident of the state, concerning any cause of action arising from entering into an agreement pursuant to the CUAA or the CRUAA. One might reason that this approach should apply to arbitrations commenced in Colorado.

Division of Authority between Court and Arbitrator: Whether the Arbitration Agreement Is Valid and Enforceable

Colorado follows the principle that the court determines the validity of an arbitration agreement, unless the agreement is clear that the parties intended to submit the issue to the arbitrator.[142] Applying this principle, the Tenth Circuit held that an arbitration panel exceeded its authority by proceeding with the arbitration before a judicial determination of the arbitrability of the dispute.[143] The respondent asserted it had not agreed to arbitrate the dispute. Apparently, the arbitrators found there was an arbitration agreement. The arbitration proceeded without participation of the respondent. The claimant's assertion that the arbitrability question could be decided by the court after the arbitration was held was rejected. The court held that if the issue is raised, it must be determined by the court prior to proceeding with the arbitration. On the other hand, whether conditions precedent to arbitration have been fulfilled is a question for the arbitrator, and not the court.[144]

Similarly, the Tenth Circuit held that under the FAA, the trial court has jurisdiction to determine whether an arbitration claim is time barred.[145] In determining the validity of the arbitration agreement to which the FAA is applicable, state law governs, unless the parties otherwise agree — it is not preempted by federal law.[146]

In *Buckeye Check Cashing, Inc. v. Cardegna*,[147] the plaintiff asserted that the contract containing the arbitration clause was illegal and void *ab initio*. The U.S. Supreme Court held that a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court, following *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[148] As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance unless the parties otherwise agree. Lastly, this arbitration law applies in state as well as federal courts in proceedings under the Federal Arbitration Act.

Division of Authority Between Court and Arbitrator: Whether the Dispute Is Within the Scope of the Agreement

Once the validity of an arbitration clause has been established, a court must also determine the tribunal the parties have agreed upon to decide whether a particular dispute falls within the scope of the disputes clause — the second prong to the issue of arbitrability. If the clause is silent or ambiguous, the court normally makes the decision, not the arbitrator.[149] It is the factual basis for the claims being asserted, rather than the legal cause of action pled, that should guide a court in determining whether a dispute is subject to arbitration. Unless the agreement provides otherwise, tort and non-breach of contract claims are not necessarily to be excluded from a contractual arbitration clause.[150]

Like determining issues of arbitrability, the jurisdiction of the court extends to clarification of the issues that are subject to arbitration.[151]

In *Cummings v. FedEx Ground Package System, Inc.*,[152] the court dealt with whether a dispute between the parties was within the scope of the arbitration agreement. The court defined the inquiry to resolve that issue.[153]

> (1) Classify the particular arbitration agreement clause as either broad or narrow:
>
> - If reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or collateral issue somehow connected to the main agreement that contains the arbitration clause.
> - Where the arbitration clause is narrow, the collateral matter will generally be ruled upon to be beyond its purview.
> - Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issue of contract construction or the parties rights and obligations under it.
>
> (2) The court specifically noted that "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," is an issue for the court to determine.[154] However, one assumes that the parties by agreement provide that the arbitrator may decide the issue.

Summary: Determining Arbitrability and Division of Power Between Arbitrator and Court

The Colorado Court of Appeals laid out a comprehensive definition of the issues to be decided when a party challenges whether a dispute must be arbitrated:[155]

> [T]he court must resolve three questions (depending on the answers to the first two, and assuming that all issues regarding arbitrability, including contract formation, have not been entrusted by the agreement to the arbitrator [citation omitted]). First, does the agreement contain a valid and binding arbitration clause? Second, if so, who decides whether a particular dispute falls within the scope of the arbitration clause, the court or the arbitrator? Third, if the court is to decide whether a particular dispute falls within the scope of the arbitration clause, does the dispute fall within the scope of the arbitration clause? [Citations omitted.]
>
> The first question entails determining, to the extent such matters are disputed, (1) whether the contract in question contains a provision regarding arbitration of disputes, and (2) whether that clause is valid. [Citations of examples omitted.]
>
> . . .
>
> As to the second question — whether the court or the arbitrator decides if a dispute falls within the scope of the arbitration clause . . . where the agreement is silent or ambiguous . . . then the determination should be made by the court, not the [arbitrator]. . . .

> The contract provides that "any controversy or Claim arising out of the Contract, or the breach thereof, shall be settled by binding arbitration" [and] . . . defines "claim" broadly as a "demand" or assertion of one of the parties seeking adjustment or *interpretation of Contract terms* . . . other disputes and matters in question . . . arising out of or relating to the Contract . . . .
>
> Because the contract entrusts questions of contract interpretation to the arbitrator, he was empowered to decide whether the disputes falls within the scope of the arbitration clause. [Citation omitted.]
>
> . . .
>
> [T]he inquiry here [to the third question] is limited to whether the factual allegations underlying the claim for relief asserted fall within the scope of that clause. [Citations omitted.] Only where a claim is clearly outside the scope of the arbitration provision should arbitration be denied by a court. . . .

(Emphasis in original.) The court held that under the Colorado arbitration statute, issues concerning compliance with alleged conditions precedent to arbitration are to be decided before the arbitrator. Nothing in the current statute, CRUAA, C.R.S. § 13-22-206(3) (2006), expressly provides that the arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.

Compelling or Staying Arbitration

The FAA, CUAA, and CRUAA permit a party to apply to a court to compel the opposing party who has agreed to arbitrate, to arbitrate in accordance with the arbitration agreement of the parties, and to stay any litigation pending that arbitration. *See* 9 U.S.C. §§ 3 and 4; CUAA, C.R.S. § 13-22-204 (compel or stay arbitration); CRUAA, C.R.S. § 13-22-207 (compel or stay arbitration). These provisions require the court to order arbitration unless the opposing party denies the existence of an agreement to arbitrate, or denies the particular dispute is within the scope of the agreement, in which case the court proceeds to summarily determine the "arbitrability" issues.[156]

Under the FAA, a court lacks authority to compel arbitration in other districts, or in its own district if another district has been specified in the agreement; when an agreement contains a forum selection clause, only a court in that forum can compel arbitration.

In *Tucker v. Lanier Worldwide, Inc.*,[157] the magistrate judge made recommendations to the district court on the defendant's motion to dismiss, or, in the alternative, to stay judicial proceedings and to compel arbitration. The court first noted that because the agreement governing the relationship concerns interstate commerce and contains an arbitration provision applicable to any claim or controversy arising out of or relating to that agreement , the FAA controls. The magistrate judge noted that Section 3 of the FAA requires a court to stay proceedings when (i) a party files suit; (ii) that suit involves issues that are subject to a written agreement to arbitrate; and (iii) the opposing party makes an application to the court to stay the proceedings until arbitration is held pursuant to an agreement between the parties.

With respect to defendant's assertion that plaintiff's claims were barred by claim and issue preclusion, the court indicated that the preclusive effect of arbitration is a matter of contract, rather than a matter of law.

> [T]he question of preclusive effect of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator (in a second arbitration) to decide . . . . Therefore, . . . the issue of preclusion should be submitted to arbitration.[158]

The magistrate judge found that the arbitration agreement called for arbitration at a "neutral site." The court concluded that since the parties agreed to any neutral site for arbitration, the court had authority to compel arbitration in any neutral arbitration forum. The court cited *Ansari v. Qwest Communications Corp.*,[159] which held that the court "lacked jurisdiction to compel arbitration in its own or another district because the arbitration clause at issue specifically provided for Washington, D.C. as the venue for arbitration."

The district judge accepted the magistrate judge's recommendations, except rejected the motion to compel at a neutral site. Apparently, in fact the parties agreed that the agreement required arbitration in Georgia, but the plaintiff asserted that it should be ordered in Colorado because he was forced into entering into the agreement. The judge concluded that he did not have authority to compel arbitration in either Colorado or Georgia and therefore could not compel arbitration, citing *Ansari v. Qwest Communications Corp.*[160]

Generally, both state and federal courts construe clauses in favor of arbitration. If the arbitration clause is broad, but the exclusion from the scope of the arbitration clause is vague, only the most forceful evidence of intent to exclude a claim from arbitration will deter a court from directing arbitration.

On the other hand, a court has jurisdiction to stay arbitration upon a showing that there is no agreement to arbitrate. FAA § 4; CUAA, C.R.S. § 13-22-204(2); CRUAA, C.R.S. § 13-22-207. Similarly, a court should stay the arbitration where it is clear that the dispute is beyond the scope of arbitration.[161] However, if there is a reasonable basis for construing the arbitration agreement to cover the dispute, the issue should be determined by the arbitrator.[162]

Procedures for Compelling or Staying Arbitration

Proceedings to compel or stay arbitration are statutory judicial proceedings. Whether this proceeding should be or can be brought in state or federal courts, and the venue for each, is discussed elsewhere in this Chapter. The Tenth Circuit held that when the arbitration agreement defines a venue, venue to compel arbitration lies only in the district court of the selected forum.[163]

If, upon the filing of a civil action, the court grants a motion to compel arbitration, 9 U.S.C. § 3 specifically provides for stay of the civil action pending arbitration.[164] That is the procedure generally followed by the U.S. District Court for the District of Colorado. However, that court has noted that "[d]espite the seemingly mandatory language of section 3, the majority of federal courts hold that a district court may dismiss rather than stay a complaint when all claims therein are arbitrable." (Citations omitted.) The court noted that "[a]lthough the Tenth Circuit has not [at that

time] addressed this issue directly, it has intimated that a district court may dismiss [the civil action] when a party specifically requests dismissal rather than a stay." (Citations omitted.)[165]

Disputes under arbitration agreements are subject to the Colorado Long Arm Statute, C.R.S. § 13-1-124, giving both state and federal courts a long reach to bring the parties to the agreement before the court.

Whether the FAA or state procedures are followed is discussed elsewhere. Under sections 3 and 6 of the FAA, the proceeding is commenced by a motion to the court, which is made and heard in the manner for the making and hearing of motions. Five days' notice of the application must be given to a party refusing to arbitrate, with service in the manner provided by the Federal Rules of Civil Procedure. If the making of the agreement to arbitrate or the failure to comply therewith is not in issue, the court shall order the parties to arbitrate in accordance with their agreement. If the making of the arbitration agreement or failure to arbitrate is in issue, the court proceeds to summary trial. Those issues are then determined, and an appropriate order is issued.

The District of Colorado stated that the standards similar to those governing motions for summary judgment control motions to compel arbitration under the FAA. First, the moving party must present evidence sufficient to demonstrate the existence of an enforceable arbitration agreement. Once the moving party makes such a showing, the respondent must then establish a genuine issue of material fact as to the making of the agreement. If the respondent is successful in this endeavor, a trial on the existence of the arbitration agreement is proper under § 4 of the FAA.[166]

The District of Colorado has followed the lessons of *Buckeye Check Cashing, Inc. v. Cardegna*[167] and held that the court and not the arbitrator should adjudicate the validity of the arbitration provisions[168] unless there is clear and unmistakable evidence within the four corners of the agreement that the parties intended to submit to the arbitrator the question of whether an agreement to arbitrate exists. The federal courts apply the ordinary state law principles that govern the formation of contracts. This extends to defenses to the validity of the contract, such as illusory contract, unconscionability, waiver, and breach of contract.

In *MAX Software Inc. v. Computer Associates Int'l, Inc.*,[169] plaintiff MAX filed the civil action and defendant responded with a motion to stay the civil action and compel arbitration. Plaintiff responded asserting that it required discovery to determine whether the arbitration provision was fraudulently induced, unconscionable, in violation of public policy, or had been waived. The magistrate judge found that plaintiff MAX had alleged no specific facts claiming to show how Computer Associates sought or intended to reap a benefit from the arbitration agreement over and above the normal benefit of such agreement that the parties expect in the event disputes arise: *e.g.*, limited, less burdensome and less expensive discovery than the wide-open discovery that is *de rigueur* in civil litigation.[170] The court found that the contention that the arbitration clause was inserted in the contract to prevent MAX from obtaining adequate discovery did not constitute a well-supported or well-founded claim of fraud in the inducement of the agreement to arbitrate. Therefore, the allegations were not sufficient to convince the court to allow the plaintiff to conduct discovery with respect to defenses to the arbitration clause.[171]

With respect to the plantiff MAX's allegations of fraud, unconscionability in violation of public policy in connection with the arbitration clause, the magistrate judge found them to be merely unsubstantiated indictment of the arbitration system. Hence, he declined to allow discovery on the defenses to enforceability of the arbitration clause.[172]

The Colorado Supreme Court has interpreted the CRUAA, C.R.S. § 13-22-207(1)(b) to the effect that the trial court "shall proceed summarily to decide" a challenge to an arbitration agreement. These steps are an expedited procedure under which the trial court first considers affidavits, pleading, discovery, and stipulations to determine whether material issues of fact are disputed. If the material facts are undisputed, the court can resolve the challenge on the record. If the material facts are undisputed, the court must conduct an expedited evidentiary hearing to resolve the dispute. "Thus, an evidentiary hearing only is necessary if the material facts necessary to determine the issue are controverted, by an opposing affidavit or otherwise admissible evidence . . . ."[173]

The procedures under the CUAA are very analogous. *See* §§ 204 and 218. So too, under the CRUAA § 207.

§ 21.2.8—Initiation/Commencement Of Arbitration

Generally, the party asserting a claim has the burden to initiate arbitration.[174] For example, if the plaintiff commences a civil action, the defendant may move to stay the civil action on the grounds the dispute is subject to arbitration. However, the defendant need not commence the arbitration and instead can wait until, and unless, the plaintiff commences the arbitration.[175]

The procedures for commencement of an arbitration usually are defined by the rules incorporated into the arbitration agreement. If there is no provision in the agreement, probably a very short statement of claim and damages and delivery of the statement to the respondent suffices to commence an arbitration. It is generally referred to as a Demand for Arbitration.

Procedure

Neither the FAA nor the CUAA has provisions with respect to commencement of the arbitration. Hence, an arbitration is commenced in the manner provided by the agreement (including, of course, any rules incorporated therein). In the absence thereof, common law suggests that a very general notice of the claim ("Demand for Arbitration") and any actual delivery to the respondent will suffice.

Under the CRUAA, C.R.S. § 13-22-209, the procedures for initiation of an arbitration are specifically defined. However, those procedures may be waived, *e.g.,* by agreement upon alternative procedures. The CRUAA specifically defines the manner of commencement of an arbitration. A person may initiate an arbitration by giving notice to the other parties to the agreement to arbitrate in the manner agreed to by the parties. (The requirements of notice are defined in CRUAA § 202.) If the parties have not agreed upon the manner, notice must be given by certified or registered mail, return receipt requested and obtained, or by service as authorized by law for the commencement of a civil action. The notice shall state the nature of the controversy and the remedy sought.

Under CRUAA § 204(2), before a controversy arises under an agreement to arbitrate, a party may not agree to unreasonably restrict the right under § 209 to receive notice of the initiation of an arbitration. However, under section 209(2), unless a party objects to lack of or insufficiency of notice not later than the beginning of the arbitration hearing, an appearance at the hearing waives the objection. Should these issues arise under the FAA or CUAA, it is anticipated that the common law applied would be approximately the same.

When the arbitration agreement is silent as to where the arbitration is to be held, questions can arise as to where non-resident parties can be forced to arbitrate. *See generally* the Colorado Long Arm Statute, C.R.S. § 13-1-124(1)(g).

§ 21.2.9—Representation Of Parties By Attorneys And Non-Attorneys

Both the CUAA, C.R.S. § 13-22-208, and the CRUAA, C.R.S. § 13-22-216, expressly provide that a party to an arbitration may be represented by an attorney. The FAA is silent on the subject, but no doubt that right to counsel in an arbitration exists in arbitrations governed by the FAA. The CRUAA, C.R.S. § 13-22-204(2)(d) (2005), provides that the right to be represented cannot be waived prior to the controversy arising, implying that it can be waived after a controversy arises.

A question arises as to whether a party may be "represented" by a non-lawyer in an arbitration. For example, may a corporate party be represented by one of its officers or employees who is a non-lawyer? May a party be represented by a non-lawyer friend or acquaintance? Particularly in the early days of arbitration, and particularly in construction disputes, often attorneys were not involved in arbitrations. The informal nature of arbitration procedures and the nature of the disputes often made it appropriate for parties not to retain counsel and for the arbitrator not to be a lawyer. At the present, there does not appear to be any answer under the Colorado Unauthorized Practice of Law rules or cases thereunder. There is an issue as to whether service as an arbitrator and service as a representative of a party to an arbitration is the practice of law. Similarly, the issue may be the extent to which "the law" governs proceedings and the award.

It appears that the Office of Attorney Regulation Counsel, which handles Unauthorized Practice of Law issues, generally will defer to the arbitrator as to who may appear in the arbitration to "represent" the parties, at least so long as the parties do not complain. Given the long history of non-lawyers serving as arbitrators, including applying "a bit of law," most people would hope that the courts defer to the process. So long as neither party objects to non-lawyers, the courts and Attorney Regulation Counsel should not object either. This is another appropriate topic to consider covering in the agreement to arbitrate.

§ 21.2.10—Provisional Remedies

Neither the FAA nor the CUAA mentions the power of the courts or the arbitrator to enter interim relief pending the arbitration hearing. Nevertheless, the common law has generally recognized the power of arbitrators and courts to enter interim relief.[176] In *Hughley v. Rocky Mountain Health Maintenance Organization, Inc.*,[177] the Colorado Supreme Court upheld the trial court's jurisdiction and power to grant injunctive relief to preserve the status quo pending the outcome of

the arbitration, so long as it does not invade the province of the arbitrator by considering the merits of the case.[178] The court did not discuss whether the issue of interim relief could have or should have been submitted to the arbitrator.

The CRUAA follows the common law and expressly provides for provisional or interim remedies to be ordered by the court or the arbitrator. Specifically, C.R.S. § 13-22-208 provides:

> (1) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.
> (2) After an arbitrator is appointed and is authorized and able to act:
> (a) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and
> (b) A party to an arbitration proceeding may request the court to issue an order for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.
> (3) A party does not waive a right of arbitration by making a motion under subsection (1) or (2) of this section.

CRUAA, C.R.S. § 13-22-218, provides for judicial enforcement of a pre-award ruling by the arbitrator.

AAA Construction Arbitration Rule R-35, Interim Measures, provides:

> (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief, and measures for the protection or conservation of property and disposition of perishable goods.
> (b) Such interim measures may be taken in the form of an interim award, and the arbitrator may require security for the costs of such measures.
> (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

Of course, the rules/agreement cannot give the arbitrator power over non-parties. However, if the parties have agreed to the application of the AAA rules, the arbitrator is specifically given much the same interim power as is given under the FAA and CUAA. Such rules probably cannot add powers to the judiciary — although courts probably already have those powers.

§ 21.2.11—The Arbitrator

The arbitrator is by far the most important component in the arbitral process: the skills, knowledge, education, and experience of the person or persons agreed upon to run the process and decide the dispute. Hence, in agreeing to arbitration and implementing arbitration, the arbitrator is the key component for the attention of the parties.

The ABA/AAA Model Code of Ethics for Arbitrators in Commercial Disputes provides that there is a presumption of neutrality of all arbitrators, including party-appointed arbitrators, unless the parties otherwise agree. However, that Code is binding only in AAA arbitrations in accordance with its rules and when the parties adopt the Code. The Wisconsin Supreme Court made the presumption of neutrality a matter of law, in line with New Jersey and New York.[179]

Qualifications and Appointment of the Arbitrator

Arbitrators are appointed/selected in accordance with the agreement to arbitrate, including the rules the parties incorporate, and any subsequent agreement of the parties. Judicial appointment will occur where there is an absence of a contractual method of appointment, the parties fail to agree, or there is a failure in the method prescribed by the agreement to arbitrate. Where an appointed arbitrator is unable to serve, the courts also have authority to appoint a replacement arbitrator. The FAA, CUAA, and CRUAA all have similar provisions.

Absent a provision in the arbitration agreement or incorporated rules, there are no required qualifications for a person to serve as an arbitrator.

Additionally, the statutes do not require that an arbitrator take an oath.[180]

Disclosure by and Disqualification of Arbitrator

At common law, an arbitrator has a duty to disclose facts and circumstances that might be construed as "evident partiality" under the vacation of award statute.[181] Circumstances that may be evidence of partiality include pecuniary interest, familial relationship, and an adversarial or sympathetic relationship.[182] However, in a medical malpractice arbitration, the fact that relatives of the arbitrator were healthcare professionals did not establish evident partiality and need not be disclosed.[183]

Neither the FAA nor the CUAA defines what disclosures must be made by an arbitrator and under what circumstances an arbitrator can be disqualified, or by whom. Limited common law exists on the subject. The grounds for vacating an arbitration award provide some guidance as to what a proposed arbitrator should disclose. For example, 9 U.S.C. § 10 defines as a ground for vacating an award "where there was evident partiality or corruption in the arbitrators . . . ." Thus, any facts that might suggest partiality (*e.g.*, conflict of interest) ought to be revealed. The failure of a party to object to the appointment/selection of the arbitrator after disclosure probably is a waiver of the objection.

The CRUAA, C.R.S. § 13-22-212(1) (2005), defines what must be disclosed by an arbitrator: ". . . known facts that a reasonable person would likely consider to affect the impartiality of the arbitrator," including financial and personal interest in the outcome, or a current or previous

relationship with any of the parties, counsel or representative, witness, or another arbitrator. The statute requires that the arbitrator make "reasonable inquiry" to learn of disclosable matters. Similarly, disclosure of facts learned after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator is a continuing obligation. Apparently, these disclosure requirements apply to neutral and non-neutral arbitrators.

Under the statute, if the arbitrator discloses facts required to be disclosed, and if a party objects to the appointment of or continued service by the arbitrator based upon such facts, and the arbitrator serves, the "overruled" objection "may" be a ground for thereafter vacating an award.

Similarly, the statute provides that if the arbitrator does not disclose a fact as required, upon timely objection by a party, the court may vacate an award. Section 212(5) provides that a "neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party shall be presumed to act with evident partiality . . . ." Under C.R.S. § 13-22-223(1)(b) (2005), evident partiality is a ground for vacating an arbitration award. Section 212 provides that prior to an actual controversy arising under an agreement to arbitrate, the parties may not agree to unreasonably restrict the right under § 212 to disclosure of any facts by a neutral arbitrator.

The CRUAA generally reflects the common law approach taken by the Colorado Court of Appeals in *McNaughton & Rogers v. Besser*,[184] holding that under the "evident partiality" ground for vacating an arbitration award under the CUAA:

> [A]rbitrators have a duty to disclose any potential conflict which could constitute evident partiality — that is, a relationship which would persuade a reasonable person that the arbitrator is likely to be partial to one side in the dispute [citation omitted]. Evident partiality has been found when a reasonable person would have to conclude that an arbitrator would be predisposed to favor one party to the arbitration. [Citation omitted.] Some facts indicating bias include pecuniary interest, familial relationship and the existence of an adversarial or sympathetic relationship.

If the parties have agreed to apply the AAA Construction Arbitration Rules, Rule R-17(a) provides:

> Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

As a qualification to such disclosures, subpart (c) of the rule provides:

> In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-17 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to affect impartiality or independence.

The Wisconsin Supreme Court addressed the issue of evident partiality and, specifically, whether evidence of partiality can be avoided by disclosure of the relationship and whether a judicial challenge to an arbitrator can be made prior to the arbitration.[185] The issue was presented by one party appointing as an arbitrator a person who regularly served as attorney for the appointing party. The arbitrator disclosed the relationship, assured the other party he could be neutral, and refused to recuse himself.

The court first found that there was a rebuttable presumption that the arbitrator must be neutral, and that "evident partiality" could not be avoided by simply disclosing the relationship that would cause the partiality.

The court then considered at what point in the arbitration might a court remove an arbitrator. The court held that an arbitrator may be removed before an award is issued, as this was the best way to "reduce the likelihood of potentially wasteful post-arbitration challenges" and promote efficiency of the arbitration process. Of course, the counter to the efficiency argument is that pre-award challenges to the arbitrator have the potential of dramatically slowing down the speed of reaching an arbitration decision.

Here, apparently, the court concluded that the relationship between the lawyer and the appointing party was "evident partiality" as a matter of law, and vacated the award.

ABA/AAA Code of Ethics

Effective March 1, 2004, the ABA and AAA jointly promulgated The Code of Ethics for Arbitrators in Commercial Disputes. Unless adopted by the parties, this Code probably is mandated applicable only to AAA arbitrations. However, this Code probably will hereafter define the common law ethical standards in all arbitrations, absent some contrary agreement of the parties.

Canon II of the Code provides: "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." The Canon then defines in detail the disclosures to be made to implement the Canon. Canon X makes provision for party-appointed arbitrators.

Pre-Award Judicial Involvement in Arbitrator Disqualification

The United States Court of Appeals for the Fifth Circuit has held that the FAA does not authorize a federal district court to remove an arbitrator appointed under a valid arbitration agreement prior to the issuance of the arbitration award.[186] Thus, the court apparently will not become involved in an arbitrator's possible bias, etc., until after the arbitrator issues an award. To otherwise become involved might add a long delay to the arbitration process while judicial consideration of arbitrator disqualification is underway. Therefore, if one party makes a possibly sound objection to an arbitrator asserting bias, it may be desirable for the other party to agree to the disqualification of the arbitrator so as to avoid a process that might at the end be for naught if the court vacates the award. If the objection is made during the course of the proceeding to newly learned and disclosed information, the risk of proceeding with one party objecting is much less: it is anticipated that in such a circumstance the court would implicitly apply a much higher standard to disqualification.

See also AAA rules defining the AAA role in ruling on disqualification requests at any juncture.

Scope of Arbitrator's Authority and Powers

As discussed above, the arbitrator has the power to define the arbitration process to the extent not preempted by the agreement of the parties and by the applicable statute and common law. Colorado courts have reaffirmed the principles that arbitrators are not bound by any particular substantive or procedural rules of law, unless the arbitration agreement so provides. An arbitrator may decide the dispute contrary to rules of law that would be applied by a court so long as there is no violation of an express term of the agreement to arbitrate.[187]

See also "The Arbitrator's Inherent Power" under § 21.2.2.

Ethical Standards of the Arbitrator

The ABA/AAA 2004 Code of Ethics for Arbitrators in Commercial Disputes should be consulted. (The term "commercial disputes" is much broader than, for example, disputes to which the AAA Commercial Rules of Arbitration apply.) Like its predecessor, the 1997 Code of Ethics, the 2004 Code does not have the force of law since it has not been adopted by any government. It may govern arbitrations administered by the AAA.

The principal changes made by the new Code are as follows:

- Presuming that all arbitrators and party-appointed arbitrators are neutral;
- Increasing disclosure requirements;
- Limiting communications between parties and arbitrators or prospective arbitrators;
- Defining limitations on advertising, representation, and compensation of arbitrators.

It seems likely that this 2004 Code of Ethics will become the standard by which courts rule on ethical issues pertaining to arbitrators. However, when the arbitrator is a lawyer, it is probable that the Colorado Rules of Professional Conduct also apply.

Action by Majority of Arbitrators

The state acts provide that when there is a panel of arbitrators, all of the actions shall be taken by a majority of the arbitrators.[188] The FAA is silent, but no doubt the same result would be reached. Of course, the parties by agreement can require unanimous agreement of the arbitrators.

Immunity of Arbitrator (Competency to Testify, Attorney Fees, and Costs)

Neither the FAA nor the CUAA contains provisions concerning the immunity of an arbitrator with respect to competency to testify and related issues. However, an extensive body of common law has developed and at least one Colorado trial court has held the American Arbitration Association as administrator is immune.[189]

However, the CRUAA at C.R.S. § 13-22-214 (2005) has specific provisions with respect to the immunity of arbitrators. No reported Colorado decisions have been issued under that section to date.

The Tenth Circuit has adopted the doctrine of arbitral immunity.[190] (The decision involved immunity of NASD as an arbitral organization, but the language clearly encompassed arbitrators.)

However, the claim against the arbitrator or arbitration organization must arise out of a decisional act — does the claim effectively seek to challenge the decisional act of the arbitrator? "If so, then the doctrine of arbitral immunity should apply." Thus, immunity extends only to discretionary acts, and not to failure to perform required ministerial acts. Immunity protects an arbitrator's failure to act when a lawful reason prevents an arbitrator from issuing an award; however, failure to issue an award, without lawful justification, is not within common law immunity.[191]

§ 21.2.12—Prehearing Procedures

The agreement to arbitrate may define some or all of the prehearing procedures. Some procedures are defined by the applicable statute. Absent such agreement or provision in the statute, the arbitrator determines most of the prehearing procedures, subject to a court undertaking direction and control.

Joinder of Other Parties

Arbitration exists only as a matter of contract: the express agreement of the parties. Consequently, a non-party to an agreement containing an arbitration clause normally may not be compelled to participate in an arbitration between the parties to the arbitration agreement.[192] Conversely, arbitration may not be denied as to the two parties to an arbitration provision simply because one or more other parties with responsibility for the subject matter of the dispute cannot be ordered to participate in the arbitration.[193]

Consolidation of Arbitrations

A common situation is as follows: The owner makes a claim against the architect and the contractor for defective design and construction. The owner has a separate contract with each, and each contains an arbitration clause. May the owner join both parties in a single arbitration, or must separate arbitrations be pursued?

Many form arbitration agreements have a clause prohibiting consolidation of arbitrations, unless all parties agree.[194] Similarly, where the agreement does not contain either a clause prohibiting consolidation or a clause allowing consolidation, some courts hold that an arbitrator does not have the power to consolidate arbitrations.[195] On the other hand, an owner confronted with potentially conflicting decisions in disputes with the architect and with the contractor might want an express provision in the arbitration agreement not only allowing, but mandating, consolidation.

Suppose that the owner commences an arbitration against the contractor. May the contractor assert a third-party claim in the arbitration against the architect, with whom the contractor has no contract and no agreement to arbitrate? Generally, the answer is no.[196]

The CRUAA, C.R.S. § 13-22-110, provides that unless the arbitration agreement prohibits consolidation, the court may order consolidation of separate arbitration proceedings "if all parties in the arbitration proceeding consent" or if certain factual circumstances exist. Neither the FAA nor the CUAA has provisions relating to consolidation.

The AIA Document A-201, General Conditions of the Contract for Construction (1997), includes the following provision with respect to consolidation or joinder:

> 4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation and joinder or in any other manner, the Architect . . . , except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or any other manner, parties other than the Owner, Contractor, a separate contractor . . . and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration . . . .

Colorado has not resolved the issue of joinder, and there is a split of authority among other jurisdictions as to whether arbitrations can be consolidated, and whether the court or arbitrator makes that determination.[197]

In *Seretta Construction, Inc. v. Great American Insurance Co.*,[198] a Florida court was presented with a typical consolidation issue. Subcontractor Seretta filed a demand for arbitration against general contractor Pertree for monies owed. Pertree denied the claim, counterclaimed against Seretta, and initiated a third-party arbitration against another subcontractor, Five Arrows, alleging defective work. Both subcontracts contained identical arbitration provisions calling for arbitration in accordance with AAA construction rules. The arbitrator, acting under AAA Construction Industry Arbitration Rule R-7, granted Pertree's motion to consolidate, over Seretta's objection. Five Arrows then filed a crossclaim for indemnity in the consolidated arbitration against Seretta. Seretta objected to the claim on the ground that there was no agreement to arbitrate between Seretta and Five Arrows, and therefore any dispute between them was not arbitrable. The trial court denied Seretta's request that the Pertree-Seretta dispute be arbitrated separately from the Pertree-Five Arrows dispute, and that Five Arrows' indemnity claim be dismissed from the arbitration.

On appeal, the court rejected the position of some state courts that the statutorily conferred power to enforce arbitration agreements includes the power to direct that an agreed arbitration be conducted in conjunction with a sufficiently related second arbitration. Instead, the court adopted the view of the federal courts and some states that a court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation. The court recognized that an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. Lastly, the court dismissed Five Arrows' indemnity claim against Seretta in the arbitration, as there was no arbitration agreement between them.

Discovery

Neither the FAA nor the CUAA directly addresses the issue of discovery in arbitration. However, the common law has addressed it. Absent a grant of power by statute, the arbitrator has no power over third parties. While the parties by agreement grant the arbitrator certain powers over themselves, they cannot grant such power over third parties. As to ordering third parties to allow discovery in the form of production of documents or appearing for depositions, *see* the discussion of subpoenas.

Generally, the parties may agree as between themselves as to what discovery shall be allowed between or among themselves. The arbitrator can enforce those agreements. In the absence of such an agreement, and in the absence of any statutory provision, discovery between the parties is left to the discretion of the arbitrator.

In *Carson v. PaineWebber, Inc.,*[199] the Colorado Court of Appeals refused to vacate the arbitrator's award because the arbitrator refused to order the respondent to produce documents. The court reasoned that refusal to allow discovery was not one of the statutory grounds for vacating an award, and that for such refusal to constitute a failure of the arbitrator to consider material evidence (which is a ground for vacating an award), substantial prejudice must be shown. It was not. Conversely, this decision implies that upon a showing of prejudice, an arbitrator's award could be vacated for failure to order production of documents, at least if the arbitration agreement does not prohibit discovery.[200] *Rains v. Found. Health Sys. Life & Health*[201] rejected that an arbitration clause was void if it did not provide for discovery. When the agreement is silent, the arbitrator may have discovery powers under the applicable statute or within his or her inherent powers.

Where a potential witness cannot be subpoenaed for the hearing or is unable to attend the hearing, the arbitrator under all acts has authority to permit the taking of the witnesses' deposition to perpetuate testimony.[202] Any deposition to be taken is for use as evidence, and is to be taken in the manner and upon the terms designated by the arbitrator.[203]

On the other hand, under the CRUAA, C.R.S. § 13-22-217, the arbitrator is given express authority to permit such discovery as he or she decides is appropriate (as between the parties and as directed to third parties by subpoena). The arbitrator may order a party and non-party to comply with discovery-related orders, the arbitrator may issue protective orders with respect to discovery requests, and the court may enforce subpoenas and discovery-related orders.

Subpoenas

The FAA § 7 provides:

> The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as fees of witnesses before masters of the United States courts. Said summons . . . shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; . . . the United States district court for the district in which such arbitrators . . . are sitting may compel the attendance of such person . . . .

Multiple questions have arisen under the statute, such as:

- Does Section 7 authorize issuance of subpoenas for discovery, as distinguished from for attendance at the hearing or perpetuation of testimony?
- Must the subpoena be served in the same state or judicial district in which the arbitrator is sitting?
- If subpoenas can be issued for depositions, where must the deposition be taken?

These issues have been the subject of articles and court decisions.[204] The topic is too extensive for in-depth consideration in this chapter.

The CUAA has approximately the same provision. C.R.S. § 13-22-209 (2004) provides:

- The arbitrators may issue (or cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence;
- Subpoenas shall be served and enforced in the manner provided by law for the service and enforcement of subpoenas in civil actions;
- On application of a party and for use as evidence, the arbitrators may allow a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing;
- All provisions of the law compelling a person under a subpoena to testify are applicable;
- Fees for the attendance as a witness shall be the same as for a witness in the district court.

Much the same questions exist under the CUAA as arise under the FAA.

However, the CRUAA attempts to answer or avoid the issues under the FAA and its predecessor CUAA. C.R.S. § 13-22-217 (2005) provides:

- The arbitrator may issue subpoenas for persons and documents at the hearing;
- The subpoena shall be served in the manner of a subpoena issued in a civil action, *i.e.*, C.R.C.P. 44(c);
- Enforcement is by the court in the same manner as civil actions;
- The arbitrator can issue a subpoena for the deposition of a witness to be used as evidence at the hearing;
- The arbitrator may issue subpoenas to third parties for discovery;
- The court may enforce a subpoena for the attendance of a witness and production of documents within this state in an arbitration in another state.

Thus, the CRUAA specifically provides that discovery subpoenas can be issued to third parties. (An interesting question exists as to whether this provision may be utilized when the FAA applies. *See* the discussion above.)

Another problem may arise when a subpoena is sought in another state for an arbitration in Colorado, or a subpoena is sought in Colorado in conjunction with an arbitration in another state. If the state in which the subpoena is to be obtained and served has adopted the Revised Uniform Arbitration Act, the procedure is defined. CRUAA, C.R.S. § 13-22-217(7). Otherwise, one is dependent upon the comity of the court to issue a subpoena in aid of arbitration. Hopefully, the court might follow the provisions of the statute providing for Colorado subpoenas in out-of-state civil actions, C.R.S. § 13-90-111.

Numerous articles have been written analyzing the subpoena powers in arbitration, and some courts have considered the issues.[205]

Witnesses

Privilege

There does not appear to be any decisions concerning the applicability of the Colorado privilege statutes to exclude testimony in arbitration. However, it is most likely they apply without allowing any discretion on the part of the arbitrator.

Subpoenas

See "Subpoenas" in § 21.2.12.

Oaths

Under AAA Construction Industry Arbitration Rule R-26, the arbitrator "may" take an oath of office, and, if required by law, "shall do so." *See* "Qualifications and Appointment of the Arbitrator" in § 21.2.11. The arbitrator "may" require witnesses to testify under oath, and "if it is required by law or requested by any party, shall do so."

Prehearing Motions

There is nothing in the arbitration statutes or in the common law that defines whether pre-hearing motions to dismiss or for summary judgment can be filed. Of course, the agreement of the parties can so provide, and, if so, it governs. Absent agreement, the arbitrator's inherent powers probably permit him or her to accept or reject prehearing motions.

Rule R-31(b) of the AAA Construction Industry Arbitration Rules provides:

> . . . The arbitrator shall entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders.

There is no "right to a hearing" in arbitration, and an arbitrator can determine a case upon a dispositive motion,[206] unless the parties otherwise agree.

§ 21.2.13—Judicial Enforcement Of Pre-Award Rulings And Orders

During the course of an arbitration, but prior to the final award, the arbitrator may have occasion to enter pre-award rulings requiring enforcement. Usually, these rulings are in the form of an injunction. CRUAA, C.R.S. § 13-22-218 provides for enforcement of some such orders by the courts. The FAA and CUAA are silent.

Recently, the Colorado Court of Appeals expressly upheld that under AAA rules incorporated into the arbitration agreement, the arbitrator has authority to issue an interim award and retain jurisdiction pending issuance of the final award.[207] However, the court did not reach the question of the arbitrator's inherent power to issue an interim award absent specific provisions in the agreement. Of course, the arbitrator may issue some interim orders with respect to which the arbitrator must be his or her own enforcer. Examples might include discovery/disclosure orders to parties. It is anticipated that an arbitrator has inherent enforcement powers analogous to C.R.C.P. 37.

See also § 21.2.10, "Provisional Remedies."

§ 21.2.14—The Arbitration Hearing

There is no "right" to a hearing. *See* "Prehearing Motions" above. An arbitrator is, however, required to hear all relevant and material evidence. The parties must be given a reasonable opportunity to present such evidence, although the presentation may not be in the form of a hearing.

Generally

Absent agreement of the parties, there are few requirements as to conducting the arbitration hearing. Defining the locale and type of room is within the arbitrator's inherent powers. In the arbitration of a construction dispute, it is not uncommon for some or all of the hearing to be held on the project site. There is no requirement for a court reporter. The arbitrator may choose to have or not have opening statements. Witnesses perhaps must be sworn (the statutes provide that the arbitrator may administer oaths), but there is no requirement that testimony be presented by question-and-answer form — instead, evidence can be presented by narrative statement if acceptable to the arbitrator. Similarly, under the common law as well as AAA rules, affidavits can be submitted. Witnesses also can testify via telephone.

The limitations upon the arbitrator's conduct of the hearing, imposed by the statutes, include generally the following:

1) Parties must be allowed to be represented by counsel;[208]
2) The arbitrator cannot refuse to hear relevant evidence;
3) The arbitrator cannot deny a postponement if sufficient cause is shown;
4) Each party has the right to be heard, to present material evidence, and to cross-examine witnesses appearing at the hearing.

Under the CUAA, C.R.S. § 13-22-207(1), unless the parties otherwise agree, the arbitrator must give notice of the time and place of the hearing by personal service or by registered mail

five days prior to the hearing. However, appearance at the hearing waives notice. No equivalent provision exists in the FAA, although there is one in the CRUAA, C.R.S. § 13-22-215.

Unless the parties otherwise agree, there are no arbitration rules of evidence, but the arbitrator cannot give undue weight to hearsay or other improper and unsubstantiated evidence. Of course, by agreement, the parties can provide that rules of evidence apply, or the arbitrator probably can decide to apply them, unless prejudice would result.

The hearing procedure can be largely defined by the agreement of the parties. Few legal requirements exist, and generally the statutes are default provisions — when the parties have failed to agree. When a question is not resolved by the agreement or the statutes/common law, the inherent powers of the arbitrator govern.

The CRUAA, C.R.S. § 13-22-215, defines some procedures for the hearing process, including that the arbitrator has power:

- To conduct an arbitration in a manner that the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding;
- To hold prehearing conferences with the parties;
- To determine the admissibility, relevance, materiality, and weight of any evidence;
- To decide a request for summary disposition of a claim or particular issue, but only if all interested parties agree, or the other parties have a reasonable opportunity to respond;
- To set a time and place for hearing, upon five days' notice (objections to notice are waived by appearance, unless objection is made);
- To adjourn the hearing, but not to a time later than as fixed by the agreement for making the award, unless the parties consent;
- To hear and decide a controversy even if a duly noticed party does not appear.

Under section 204, these provisions may be waived, *e.g.*, by agreement of the parties or their conduct. These powers probably do no more than record the inherent powers of the arbitrator under the common law.

CUAA, C.R.S. § 13-22-207, briefly defines the hearing powers of and requirements imposed upon the arbitrator, "unless otherwise provided by the agreement." The FAA defines very little of the powers or requirements.

Unless the arbitration agreement specifically requires a hearing, the arbitrator can determine the matter on the submitted record, unless a party can show prejudice by the lack of a hearing.[209]

In sum, the essence of arbitration is the requirement that each party has a full and fair opportunity to present its case. The manner of implementation is a requirement left to the discretion of the arbitrator — unless the parties have agreed upon how the arbitration will be conducted.

Continuances

Under all three acts, an arbitrator is required to postpone a hearing upon good cause being shown. If a motion for postponement is denied, an award entered may be vacated if the court finds there was good cause shown for the postponement and the requesting party was prejudiced by the denial.

The CUAA permits the arbitrator to continue a hearing for good cause, but further provides that any postponement may be only to a time not later than that fixed by the agreement for making the award, unless the parties otherwise consent.[210] Section 214 of the CUAA defines that an award may be vacated if an arbitrator refuses to postpone the hearing when good cause is shown. Section 223 of the CRUAA has the same effect.

A party to an arbitration proceeding is not entitled to a continuance by merely requesting one. An arbitrator was found not to have abused his discretion in refusing to grant a continuance where the new date sought presented a number of scheduling conflicts.[211] Presumably, the court did not find a strong need or justification for the continuance.

Similarly, one of the grounds for vacating an award under the FAA is that the "arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . . ." No doubt this standard is roughly the same as for a judge who denies a motion for continuance. The ultimate issue is whether a party was deprived of a fair hearing because of the arbitrator's refusal, after "sufficient cause" being shown, to vacate the hearing. "Sufficient cause" usually may mean a cause without the fault of the moving party, or in some instances, only "reasonable fault."

Default: Non-appearing Party

The CUAA, C.R.S. § 13-22-207(1), and the CRUAA, C.R.S. § 13-22-215(3), expressly provide that the arbitrator may hear and determine the controversy upon the evidence, notwithstanding the failure of a party to appear after proper notice of the hearing has been given. Thus, the procedure is fundamentally generally the same as under the Colorado and Federal Rules of Civil Procedure for entry of a default judgment. The FAA is silent on the subject, but no doubt the common law would allow the arbitrator to take similar action.

Similarly, the AAA Construction Industry Arbitration Rule R-30 provides for proceeding with the arbitration when one party fails to appear. This rule generally will govern when incorporated into the arbitration agreement, and does not appear to be in conflict with the Colorado statutes. Ultimately, the test may be whether the default proceeding is fair, given that a party fails or refuses to appear.

Arbitrator Ceases or Fails to Act

One of the most frustrating situations for a party to an arbitration is for the arbitrator to refuse to act. When that occurs, what is a party to do? CRUAA, C.R.S. § 13-22-211 provides that if an appointed arbitrator fails or is unable to act, the court on motion shall appoint an arbitrator — apparently a new one. The FAA § 3 and CUAA, C.R.S. §§ 13-22-211 and -215(5), are similar provisions.

More importantly, CUAA, C.R.S. § 13-22-207(1)(a), and the CRUAA, C.R.S. § 13-22-215(3), provide that a court on motion may direct an arbitrator to conduct the hearing promptly and render a timely decision. Presumably, an arbitrator is within the contempt jurisdiction of the court.

The AAA Construction Industry Arbitration Rules have more extensive provisions concerning arbitrator vacancy. Rule R-18(a) provides grounds for disqualification of an arbitrator. Rule R-18(b) provides:

> (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

An issue may arise when one member of a three-arbitrator panel dies or withdraws because of newly discovered conflicts after the hearing commences.

Rule R-20 provides for vacancies. Upon satisfactory proof that an arbitrator is unable to perform his or her duties, the AAA may declare the office vacant. This, of course, includes disqualification, under Rule R-18(b). Rule R-20 continues:

- If a vacancy occurs in a panel of neutral arbitrators after the hearing has commenced, the remaining arbitrator(s) "may" continue the hearing unless the parties agree otherwise; and
- In the event of appointment of a substitute arbitrator, the panel of arbitrators determines in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

§ 21.2.15—The Award

The award defines the arbitrator's resolution of the dispute; in judicial vernacular, it is the judgment issued by the arbitrator. However, the award is not a judgment until it is confirmed by the court and the court enters a judgment.

Form of Award — Findings and Conclusions

In the absence of statute or agreement of the parties, there is no requirement that an arbitrator issue any findings of fact and conclusions of law.[212] Indeed, the statutes do not require any specific form of award, other than the conclusion.

However, by agreement, including by adoption of American Arbitration Association rules, the parties may agree upon the form of the award, which is binding upon the arbitrator. *See* AAA Construction Industry Arbitration Rule 43, which provides that the arbitrator shall provide "a concise, written breakdown of the award." However, if requested by the parties prior to appointment of the arbitrator, or in the arbitrator's discretion, the arbitrator may provide a written explanation of the award.

Absent agreement of the parties, "arbitration awards generally need not delineate reasons or reasoning, at least where the grounds for the award may be gleaned from the record." The arbitrator is not "required to set forth a precise mathematical calculation of damages when the record provides adequate support for the amount of the award."[213]

Action by Arbitrators

The CUAA and CRUAA provide that the powers of the arbitrators on a three-arbitrator panel may be exercised by a majority, unless otherwise provided by the agreement to arbitrate.[214] The FAA is silent. Under the CUAA, if, during the hearing, an arbitrator ceases to act, the remaining arbitrators appointed to act as neutrals may continue with the hearing.[215] It is unclear under the FAA and CRUAA whether two of a panel of three arbitrators can continue, *e.g.*, if the third dies or is disabled during the course of the hearing.

The award must be in writing and signed by the arbitrators joining in the award.[216]

If incorporated into the agreement, AAA rules have specific provisions on these subjects that may govern.

Remedies and Relief — Generally

Both Colorado statutes have provisions with respect to the remedies that may be awarded by an arbitrator. However, the FAA does not have a provision.

The Tenth Circuit Court of Appeals affirmed an arbitrator's broad remedial powers under an American Arbitration Association rule providing that an arbitrator may grant any remedy or relief deemed just and equitable, even if the relief were not available had the matter been heard in court.[217] The broad form arbitration clause was held to cover a claim for preliminary injunction. Moreover, such a clause may continue in force after termination of the agreement as to wrongs committed thereafter touching the contract.[218]

As indicated above, an arbitrator may award any type of relief that he or she deems appropriate, notwithstanding that such relief might not be available in court. For example, under the FAA, the court upheld the arbitrator's award ordering clean-up of the plaintiff's property relating to a leaking oil pipeline, and establishment of an escrow fund, both equitable remedies.[219] Similarly, the Colorado Court of Appeals has emphasized that under Colorado law, an arbitrator has great flexibility in fashioning remedies, including specific performance and conditional assessment of damages.[220]

In a demand for arbitration, the claimant alleged breach of contract, including a breach by the respondent to provide "reasonable cooperation" in a matter between the parties. The panel found that the respondent was not in breach, but ordered the respondent to work with the claimant to find better ways to carry out certain required actions. The respondent asserted that absent a breach, the panel could not order it to take any future action — there was a lack of justiciability. The court rejected that the justiciability requirement in Article III of the U.S. Constitution applied to arbitration. Thus, the trial court properly defined the meaning of "reasonable cooperation" in directing the parties to act in the future in accordance with that definition.[221]

Neither the FAA nor the CUAA specifically provides for equitable relief, although the courts have affirmed such powers. The CRUAA, C.R.S. §§ 13-22-208 (provisional remedies) and 222(2), acknowledge or give the arbitrator power to award equitable relief. Subsection 3 of section 222 relates to the Colorado statute prohibiting arbitrators from awarding punitive damages, discussed hereafter, making sure the statute remains intact after the passage of the CRUAA. The addition of this subsection is one of the changes made by the Colorado legislature to the Revised Uniform Arbitration Act.

The AAA arbitration rules allow arbitrators the discretion to apply just and equitable relief within the scope of the parties' arbitration agreement. Specifically, Rule R-44 of the Construction Industry Arbitration Rules provides that:

> (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, equitable relief and specific performance of a contract.

Carson v. PaineWebber, Incorporated[222] held that CUAA, C.R.S. § 13-22-212 prohibits an arbitrator from awarding attorney fees, unless the parties have specifically agreed to such an award. In that case, while the NASD Code of Arbitration provided for arbitration of attorneys fees, the NASD Code's reference to authority to award attorney fees "in accordance with applicable law" was determined to refer to Colorado law. The court rejected that both parties' requesting attorney fees in their pleadings constituted an agreement that the arbitrator could award attorney fees. Compare: AAA Construction Industry Arbitration Rule 44(d), discussed hereafter.

Specific Remedies

Fees and Expenses of Arbitration

Under the CUAA, unless otherwise provided in the agreement to arbitrate or order compelling arbitration, the fees and expenses of the arbitration, other than attorney fees, are to be paid as provided in the award.[223]

CUAA, C.R.S. § 13-22-212, Fees and Expenses of Arbitration, provides:

> Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award.

Thus, if not collected in advance, the award is the arbitrator's mechanism for collection of his or her fees.

The plain wording of that provision has been applied by the Colorado courts.[224] However, that application includes recognition of the language "not including counsel fees," unless the parties have specifically agreed that the arbitrator may award attorney fees.[225] In this case, the clause merely stated "pay all attorneys fees and expenses incurred by [landscaper] . . . in connection with any arbitration or litigation."

CRUAA, C.R.S. § 13-22-221, Remedies-Fees and Expenses of Arbitration Proceeding, provides:

> (1) An arbitrator may award reasonable attorneys fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.
> (2) An arbitrator's expenses and fees, together with other expenses, shall be paid as provided in the award.
> (3) Nothing in this section shall be construed to alter or amend the provisions of Section 13-21-102(5).

Subsection (3) refers to the statute prohibiting the award of punitive damages, discussed below. The FAA is silent on fees and expenses of arbitration.

Pre-Award Interest

The applicability of the Colorado prejudgment interest statute to arbitration has not been defined, although the different forms of proceeding should not affect the relief granted. Entry of an arbitration award on a contract represents a liquidated sum that is within the statute allowing recovery of interest. Therefore interest will accrue on the award from date of its entry.[226]

AAA Construction Industry Arbitration Rule 44(d) (Commercial Arbitration Rule R-43(d)) provides that the award may include interest at such rate and from such date as the arbitrator may deem appropriate. By adoption of its rules, the parties have agreed as to this authority of the arbitrator and should be enforceable.

There does not appear to be a definitive ruling on the arbitrator's inherent power to award pre-award interest. However, pre-award interest would appear to be within the arbitrator's broad discretion as to relief granted, including whether it is awarded, and if so, the rate.

Where interest was not requested and not awarded by the arbitrator, the court cannot upon confirmation add interest to the award.[227] However, a California court has held that an arbitrator may award pre-judgment interest even though the plaintiffs did not specifically request such interest.[228] Title 28, U.S.C. § 1961 provides for the award of post-judgment interest on federal court judgments, and case law has held that it is not necessary that the party request such interest.

It is suggested that arbitrators have inherent power to award pre-award interest, as well as post-award interest, through the date of confirmation of the award.

In *Peoplesoft, Inc. v. Amherst, L.L.C.*,[229] the parties stipulated that the FAA was applicable. Apparently, the jurisdiction of the federal district court was based upon the diversity of citizenship of the parties. The parties did not take issue with the arbitrator's determination that Colorado law applied to the issues. In confirming the arbitration award, the court stated, without discussion, that the Claimant was entitled to recover interest on the award through the date of judgment pursuant to C.R.S. § 5-12-102(1). The decision did not say whether the arbitrator

awarded interest on the award. Presumably, when judgment was entered on the award by the federal court, it bore interest pursuant to the federal statute, 28 U.S.C. § 1961.

Punitive Damages and Treble Damages

C.R.S. § 13-21-102(5) prohibits an arbitrator from awarding punitive damages. The adoption of the CRUAA expressly does not affect that statute.[230] However, unless the parties otherwise agree, this restriction does not apply to arbitrations governed by the FAA.[231]

A claim for punitive damages is generally within an arbitration clause covering any dispute, claim, or controversy.[232] A defendant who fails to timely assert the statute prohibiting punitive damages may be found to have waived the bar to an arbitrator's awarding punitive damages.[233] The U.S. Supreme Court has acknowledged the broad remedial powers of arbitrators under the FAA, including the authority to award punitive damages where the award comports with the intent of the contracting parties.[234] The *Bowlen* case, discussed above, involved an Oklahoma statute that prohibited a judicial award of punitive damages under the facts of the case. However, in their arbitration agreement, the parties agreed to be governed by rules that authorized "any remedy or relief which the Tribunal deems just and equitable and within the scope of the agreement of the parties." This was held to give the arbitrators the power to award punitive damages,[235] notwithstanding the statute.

Treble damages are generally held in most jurisdictions not to be punitive damages and therefore would be outside the scope of C.R.S. § 13-21-102(5). Therefore, an arbitration clause prohibiting the award of punitive damages probably does not preclude an arbitrator from awarding treble damages, because they serve a distinct compensatory and remedial role rather than a punitive one.[236]

Attorney Fees

To the extent not precluded by the statute or common law, the parties may agree upon, define or limit the remedies that may be awarded by an arbitrator. For example, AAA Construction Arbitration Rule 44(d) provides that the arbitrator may award attorney fees as a part of the award "if all parties have requested such an award . . . ." Thus, if the parties in their arbitration agreement have not agreed to an award of attorney fees, parties should pray for an award of attorney fees only after consideration of the effect of the prayer should they lose.

The CUAA, C.R.S. § 13-22-312, provides that an arbitrator may not award attorneys' fees, unless otherwise provided in the agreement to arbitrate. This does not appear to result in a different outcome.

The CRUAA, C.R.S. § 13-22-221, provides that an arbitrator may award reasonable attorney fees if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration. Thus, the statute defines the same rules for the award of attorney fees as are applied by courts. No doubt these rules are a part of the common law of arbitration.

The FAA is silent.

Timely Issuance and Delivery of Award

Timely Issuance

The CUAA requires the award to be made within the time fixed by the agreement to arbitrate, or by court order upon application of a party.[237] Any award that is not rendered within the established time limitation may be void.[238] The time for making the award may be extended by the parties either before or after the expiration of the fixed time.

However, in *Sopko v. Clear Channel Satellite Services, Inc.*,[239] the court of appeals defined the rules for when a "late" award would be invalid. In *Sopko*, the arbitration clause and the incorporated AAA rules provided for an award to be rendered within 30 days after the closing of the hearing. The hearing was closed on December 28, 2004, and the arbitrator issued an interim award on January 24, 2005, in the plaintiff's favor and ordered a further evidentiary hearing on certain damages and attorney fees.

> In the absence of language in an arbitration agreement that time is of the essence or that any arbitration award issued after the expiration of the period specified in the agreement is void, the party seeking to preclude an award issued after the time prescribed by the agreement must show that it made a timely objection to issuing an award after the time limitation in the agreement and that it has been prejudiced by the delay.

Such an objection appears to be an objection as to the jurisdiction of the arbitrator, and therefore generally an issue for the court. However, the court noted that the AAA rules incorporated into the arbitration agreement provided that any dispute as to the agreement, including enforceability, scope, and terms, was for the arbitrator. Therefore, the interpretation and application of the 30-day provision was one that the parties contractually entrusted to the arbitrator, and the courts will enforce that authority. The court rejected that it had *de novo* review of the arbitrator's decision, or that the arbitrator lost jurisdiction to conduct further hearings 30 days after the hearing was closed.

However, a party is obligated to timely object to the arbitrator's failure to render the award within the required time, and failure to raise a timely objection will constitute a waiver of the right to object. A party may not wait to see if the results of the award are unfavorable to it before objecting to the timeliness.[240]

CRUAA, C.R.S. § 13-22-219(2), is approximately the same as the CUAA.

Delivery of Award

The FAA probably does not have any requirements for service of the award, although sections 9 (application to confirm) and 12 (motion to vacate, modify, or correct) may provide guidance by analogy. The CUAA, C.R.S. § 13-22-210(1), provides that the award shall be delivered to each party personally, by registered mail, or as provided in the agreement. CRUAA, C.R.S. § 13-22-219, provides that notice of the award, including a copy of the award, shall be given to each party. Section 202 defines notice.

The parties by agreement can override statutory provisions as to time and delivery. Thus, if rules incorporated into the arbitration agreement provide for a specific manner of service, they probably preempt (waive) the statutes, at least if reasonable. For example, *see* AAA Construction Industry Arbitration Rules R-4, R-5, R-40, R-42, and R-46.

Binding Effect of Award

An award entered in an arbitration between two parties will be binding upon them, subject only to the limited power of the arbitrator or court to vacate, correct, or modify. However, the award rendered in that arbitration generally will not be binding upon a third party who may have legal rights or responsibility with respect to the subject matter of that arbitration but was not made a party. Thus, an award entered in an arbitration between a subcontractor and an owner where the contractor was not a party was not binding upon the contractor in a suit by the contractor against that subcontractor.[241]

However, in proper circumstances, the doctrine of *res judicata* and collateral estoppel ("issue preclusion") may be applied.[242] *See also* "Intertwining Claims," discussed in § 21.2.4.

Issues Resolved by the Arbitration

An award that states that it is in full settlement of all claims and counterclaims submitted to the arbitration answers the question as to whether the award is complete.[243]

In Accordance with the "Law"

An arbitrator has no duty to decide disputes in accordance with substantive or procedural law, unless the arbitration agreement so provides.[244] While that principle of arbitration is long and solidly established, for those to whom it gives concern, it should be recalled that historically most arbitrators were not lawyers, and relied upon their experience in the industry and common sense to reach a just award.

However, the parties may require in their agreement that the arbitrator apply the law.

§ 21.2.16—Post-Award Proceedings

Nothing "automatically" occurs after the entry of the award. Further proceedings, either by the arbitrator or by the court, occur only upon application of a party.

Confirmation of Award

Under the CUAA and applicable common law, an award entered in arbitration is tantamount to a judgment, and is entitled to be given such status by a court sitting in review.[245] Subject to a timely and proper application to modify or vacate the award, sections 213 and 214(4) of the CUAA mandate judicial confirmation of the award upon the application of a party. Once confirmed, judgment shall be entered.[246] These same principles are generally also defined by the CRUAA and the FAA.

On the other hand, the parties probably are "bound" by an unconfirmed arbitration award, although judicial enforcement may not be available. However, the doctrines of *res judicata* and collateral estoppel may apply to an unconfirmed award.

The existence of a dispute between other parties in a consolidated suit will not defer confirmation.[247] Where a valid arbitration clause states that any award entered in an arbitration will be binding upon the parties, but the decision of the arbitrator will be a condition precedent to any right to legal action, the judicial action will only be to confirm, modify, correct, or vacate the award under the CUAA.[248] It does not mean the arbitration award is non-binding.

In *Judd Construction Co. v. Evans Joint Venture*,[249] Judd Construction contracted with the owner Evans to serve as general contractor. Subcontractor Ace sued Judd and Evans for monies owed. Evans counterclaimed against Ace and crossclaimed against Judd. Judd successfully moved to dismiss Evans' crossclaim by reason of the parties' having agreed to arbitration.

Judd and Evans arbitrated the dispute, and Judd was awarded $14,236.62, but the award also required Judd to hold Evans harmless from the lawsuit filed by Ace. The award was confirmed and Evans moved to vacate the judgment and to consolidate that civil action with the Ace civil action. Evans requested entry of judgment on the award to be delayed until all claims in the Ace litigation were resolved. The Colorado Supreme Court held that a judgment may be entered confirming an award of an arbitrator even if other claims remain to be resolved in a consolidated action.

Post-Award Modification or Correction (Change) of the Award

Before a court determines a motion to confirm an arbitration award, one or more of the parties may have filed a motion for modification or correction, which must be determined before consideration of the motion to confirm.

By the Arbitrator

Generally, upon issuing an award, under the doctrine of *functus officio*, the arbitrator loses jurisdiction to amend, revise, or correct an arbitration award.[250] The statutory provisions allowing modification or correction of an award by the arbitrator are modifications of that doctrine.

CUAA, C.R.S. § 13-22-211, provides for a Change of Award by Arbitrators. This statute provides that upon application of a party, or if application to a court is pending under sections 213 (Confirmation of an Award), 214 (Vacating an Award), or 215 (Modification or Correction of Award), upon application to the court, on submission by the court to the arbitrators under such conditions as the court may order, the arbitrator may modify or correct the award on the grounds stated in §§ 215(1)(1) and (c), or for purposes of clarifying the award. The application to the arbitrator must be made within 20 days after delivery of the award to the applicant, and the opposing party shall serve objections thereto, if any, within 10 days after notice of the application.

The grounds for modification or correction of award under (1)(a) and (c) of section 215 are: (1)(a), an evident miscalculation of figures or an evident mistake in the description of any person, thing, or place; and (c), the award is imperfect in a manner or form not affecting the merits of the controversy.

"Evident miscalculation of figures" as used in CUAA § 215 refers only to mathematical errors.[251] Generally, the "evident miscalculation of figures or an evident mistake in the description" must be so gross so as to evidence that the award did not actually represent the arbitrator's intent.[252]

The motions to the court under the CUAA, C.R.S. §§ 13-22-213, 214, and 215 must be made within 30 days after delivery of a copy of the award to the applicant. Thus, under the CUAA, the application to the court can be made later than the application to the arbitrators, and the grounds for modification and correction by the court are broader than the powers of the arbitrator. An application to the arbitrator for change of the award pursuant to section 211 tolls the time limit for motions to the court under sections 213, 214, and 215 (Judicial Modification or Correction of an Award).[253]

The Colorado Supreme Court has defined the scope of an arbitrator's power to correct or modify his or her award. In *Sooper Credit Union v. Sholar Group Architects, P.C.*,[254] the arbitrator awarded the claimant $199,338. The claimant/plaintiff moved the district court to (1) confirm the award, and (2) correct and modify the award by increasing it by $11,200. The respondent/defendant also moved to correct the award calculations. The court submitted the defendant's motion to the arbitrator for consideration, who then acknowledged a miscalculation and changed his award to be in favor of the respondent/defendant in the amount of $223,063. The trial court confirmed the changed award in favor of the defendant.

On appeal, the Colorado Court of Appeals reversed, holding that the confessed error of the arbitrator was not "evident" or "patent" on the face of the award, and therefore was not correctible under CUAA, C.R.S. § 13-22-211; the error was not an evident miscalculation on the face of the award, and therefore the corrected award was an impermissible redetermination of the merits.[255] An arbitrator may correct any clerical, typographical, technical, or computational errors in the award, but may not redetermine any claim. Having done so, the arbitrator exceeded his powers.

The Colorado Supreme Court reversed the court of appeals and reinstated the trial court's confirmation of the award as corrected by the arbitrator.[256] The issue was whether the change/modification/correction of the award by the arbitrator was permissible under CUAA, C.R.S. § 13-22-211 (change of award by arbitrator):

> . . . the arbitrator may modify or correct the award upon the grounds stated in section 13-22-215(1)(a) and (1)(c) or for the purpose of clarifying the award. . . . [Emphasis added.]

Section 215 provided:[257]

> (1) . . . the court shall modify or correct the award where:
>
> (a) There was an evident miscalculations of figures or an evident mistake in the description of any person, thing or property referred to in the award.

* * *

> (c) The award is imperfect in a manner of form, not affecting the merits of the controversy.

* * *

The court noted that under section 211, the arbitrator could modify or correct the award either "upon the grounds stated in section 13-22-215(1)(a) or (1)(c) or for the purpose of clarifying the award."[258] (Emphasis added.] As to the latter grounds, "for the purpose of clarifying the award," there was no requirement in the statute such as imposed by the court of appeals, that there be an "evident" or "patent ambiguity in the original award."[259] The court stated:

> The unambiguous phrase [for the purpose of clarifying the award] means that a confusing award may be clarified as required for better understanding. Nowhere does the statute impose an additional requirement that the confusion be evident or apparent strictly on the face of the award. Had the General Assembly intended to limit clarification to patently ambiguous awards, it would have said so.[260]

It should be noted that under the other grounds for modification or correction under section 211, the grounds stated in sections 215(1)(a) and (1)(c), require an "evident" miscalculation or mistake or an award "imperfect" in manner of form.

Perhaps the supreme court's statement of the issue better defines the result than even its reasoning:

> The case concerns the statutory power of an arbitrator to modify an admittedly erroneous award upon a party's timely motion.[261]

The supreme court made other observations of importance to the modification or correction of awards:

- The parties bargained for the arbitrator's intent in the award, not the intent of the court.[262]
- Where an ambiguity cannot be resolved from the record, the court must not attempt to interpret the terms. Rather, the award must be remanded to the arbitrator for clarification.[263]
- Arbitrators are not infallible. Some errors are not evident on the face of an award, such as a slightly misplaced numeric decimal point might not be patently ambiguous.[264]

The CRUAA, C.R.S. § 13-22-220, provides that one ground for change of an award by the arbitrator is "to clarify the award." Thus, it is anticipated that the same result would be obtained in *Sholar* under the CRUAA, as was obtained under the CUAA.

If the application to modify or correct an award is based upon ambiguity, the court may resolve the ambiguity if it can do so based on the record. However, if the ambiguity cannot be resolved from the record, the issue should be remanded to the arbitrator, who, after holding such further proceedings as he or she deems necessary, should issue a modified arbitration award that clarifies the ambiguity.[265]

The time limits for applications to modify or correct an award are extremely important. The time limit may differ, depending upon which statute is applicable, and depending perhaps on the parties' agreement. The prudent approach is to review all of the statutes and "assume" for this purpose that the shortest time limit governs.

Sections 220 and 224 of the CRUAA are analogous to the CUAA. However, particularly note the 90 days provision for an application to the court to modify or correct. Under the CUAA, an application to the arbitrator tolls the time for seeking review by the court under sections 214 and 215.[266]

The FAA does not have a provision allowing any post-award review by the arbitrator. However, the common law may allow a court to "remand" an award for further consideration by the arbitrator.

By the Court

FAA. Section 11 of the FAA provides that the court may modify or correct an award:

- 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;
- Where the arbitrators have awarded upon a matter not submitted to them, unless it does not affect the merits of the decision upon the matter submitted;
- Where the award is imperfect in matter of form not affecting the merits of the controversy.

However, this modification or correction can be done only by the court. No provision exists for application by a party to the arbitrator, or for submission by the court to the arbitrator. Further, the section specifically states that the modification and correction can be made only to affect the intent of the award and to promote justice between the parties.

Section 9 provides that a motion to modify or correct an award must be served within three months after the award is filed or delivered and has specific provisions with respect to service. The practitioner should be alert that a state court applying the FAA might apply the state arbitration statute time limits.

CUAA. The only permitted grounds for modification under the CUAA, stated very generally, are:

1) Evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award; or
2) An award was entered on a matter not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision on the issues properly submitted; or
3) The award is imperfect in form not affecting the merits;[267] or
4) For the purpose of clarifying the award.

The phrase "evident miscalculation of figures" refers only to mathematical errors patently apparent to the court.[268] The mistake must be so blatantly clear as to evidence that the award did not reflect the arbitrator's intent, and the correction will effectuate that intent.[269]

Recently the Colorado Court of Appeals in *Superior Construction Company v. Bentley*[270] stated:

> The role of the court in considering a motion to change an arbitration award is strictly limited to vacating the award on the grounds permitted by the former § 13-22-214(1)(a) or modifying or correcting an award on the grounds permitted by former § 13-22-215(1) (now codified with amendments at § 13-22-224(1), C.R.S. 2004).
>
> . . .
>
> Arbitration is a special statutory proceeding, and the sole bases for vacating, modifying or correcting an arbitration award are set forth in the former §§ 13-22-214(1) and 13-22-215(1) (now codified at §§ 13-22-223(1) and 13-22-224(1), C.R.S. 2004).

The references to "former" sections are to the CUAA and the references to "now codified" are references to the CRUAA.

Any application to the court shall be made within 20 days after delivery of the award and upon notice of the application to the opposing party.[271]

The court's jurisdiction to modify or correct the award[272] is limited to those grounds stated in the statute.[273] In *Appelhans v. Farmers Insurance Exchange*,[274] the court of appeals held that an arbitrator exceeded his power when he reduced his award in an uninsured/underinsured motorist case to the applicable policy limits. The court concluded that the action was not within the grounds allowed for modification of awards under CUAA, C.R.S. § 13-22-220. The trial court erred in declining to vacate the modified final award.

Roca v. Financial Indemnity Co.[275] followed the *Applehans* decision, holding that the arbitrator exceeded his authority in modifying the initial arbitration award. However, the court found that the trial court did not err in refusing to confirm the initial arbitration award. First, the court reiterated that where the issue of underinsured policy limits is not presented to the arbitrator,

whether the arbitrator's award in excess of the policy limits must be confirmed by the court requires an analysis of the scope of the arbitration provision.[276]

- If the arbitration provision authorizes the arbitrator to determine only the amount of payment the insured is entitled to recover from the uninsured or underinsured motorist, then the issue of policy limits is not properly before the arbitrator, and any award in excess of policy limits may be vacated by the court.[277]
- On the other hand, if the arbitration clause authorizes the arbitrator to determine the amount of benefits payable under the terms of the policy, and there is a dispute concerning that issue, then the arbitrator has authority to rule on the issue of policy limits, and an award in excess of policy limits is not ordinarily subject to judicial modification.
- The existence of policy limits and setoffs is an affirmative defense that must be raised and proved in the arbitration. This defense is waived if not raised and evidence introduced to support it in the arbitration.
- An insurer's coverage defenses are not waived if the insurer stipulated with the insured not to present evidence of policy limits or applicable setoffs to the arbitrator.

CRUAA. The CRUAA, C.R.S. § 13-22-220, provides for a change of award by the arbitrator, and § 224 provides for modification or correction of the award by the court. With respect to the latter, the grounds are approximately the same as the CUAA and the FAA. The motion must be made within 90 days after the movant receives notice of the award, or of the arbitrator's modified or corrected award.

Vacating the Award

Grounds for Vacating the Award

Arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside by a court for a mistake in either. The merits of the award are not subject to judicial review.[278] Strict adherence to the legal punctilio required in a court proceeding is not required in an arbitration.[279]

An award will not be reviewed or set aside for a mistake in law or fact unless it results in a failure of the intent, breach of the arbitrator's authority, or is so gross or palpable as to establish fraud or misconduct.[280] A court must "be cautious in interfering where an award is fair on its face and should never do so, except to prevent a 'manifest injustice.'"[281]

As a result of the foregoing principles, an award entered in an arbitration is not open to review by the court on its merits. Neither is an arbitrator's interpretation of the contract open to review on its merits, nor is an unfavorable interpretation of the contract subject to review on its merits by the court.[282] Even if a court believed the arbitrator misinterpreted the contract or erred in his or her determination, it cannot substitute its judgment for that of the arbitrator.[283] Also, neither an individual nor a state agency may freely participate in an arbitration and then, when an unfavorable award is entered, seek judicial review. Arbitration is a method of settling disputes without resort to court.[284]

Some reported case authority addresses specific claims of arbitrator misconduct. For example, a refusal by an arbitration tribunal to receive relevant and material evidence may constitute misconduct sufficient to set aside an award.[285] Absent the parties' agreement, an arbitrator may not delegate to others the authority granted to him or her, and a delegation will constitute grounds to set aside an award.[286] Where a dispute exists between a governmental entity and its contractor, unless the contractor has complied with C.R.S. § 24-91-103.6 or there has been an appropriation, any award will be set aside, as the arbitrator has no jurisdiction.[287]

CUAA and CRUAA. The grounds for vacating an arbitrator's award are sharply restricted under both the federal and Colorado arbitration acts.[288] Section 214 of the CUAA and section 223 of the CRUAA enumerate the only grounds to vacate an award.[289] The grounds under both statutes are approximately the same (but should be carefully consulted):

1) An award procured by corruption, fraud, or other undue means;
2) Evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
3) The arbitrator exceeded his or her powers; and
4) The arbitrator refused to postpone the hearing upon sufficient cause being shown, refused to hear evidence material to the controversy, or conducted the hearing contrary to § 207 of the CUAA so as to substantially prejudice the rights of a party.

At least unless the parties otherwise agree, it is not a ground for vacating or refusing to confirm the award that the type of relief granted in the award could not or would not have been granted by a court.[290] Evident partiality has been considered by the Colorado courts.[291]

In *Pyle*,[292] the court noted that in order to find that an arbitrator's award was in manifest disregard of the law, in the circumstances there involved, a transcript of the arbitration would be necessary.

To vacate on the ground that the award was procured by undue means requires a causal relation between the improper conduct and the arbitration award. Affidavits, and probably testimony of the arbitrators, may be considered on the causation issue, so long as they do not invade or define the thought process of the arbitrator.[293] Undue means encompasses impropriety in the arbitration process such as a party-appointed arbitrator's nondisclosure of a substantial business relationship. In the case cited in the footnote, the arbitrator's law firm had a substantial business relationship with the insurance carrier party, which was not disclosed.

An award is not "procured" by fraud if the arbitrator learns that the testimony was false before rendering an award.[294]

To vacate an award because of the arbitrator's refusal to consider material evidence, the moving party must also prove that he or she was substantially prejudiced by the refusal.[295]

The ground for vacation of the arbitrator's exceeding his or her powers generally requires proof that the arbitrator refused to apply or ignored the legal standard agreed to by the parties for the resolution of the dispute.[296]

Shortly after the *Bentley* decision, discussed above, the Colorado Court of Appeals decided *Coors Brewing Co. v. Cabo*.[297] In this decision, the court reviewed extensively the decisions under the FAA allowing and not allowing vacation of arbitrators' awards based on a common law ground of manifest disregard of the law. It noted that in prior decisions, the Colorado Court of Appeals had refused to vacate an arbitration award on the ground that the award was in manifest disregard of the law, but another decision had held that where an award is governed by the FAA, the court could vacate the award on the ground that it was "against public policy," another non-statutory ground for vacation created by federal courts. In conclusion, the court declined to adopt an arbitrator's manifest disregard of the law as a basis for vacating an arbitration award under the Colorado Uniform Arbitration Act, either as an interpretation at C.R.S. § 13-22-214(1)(a)(iii) or as a non-statutory common law ground.

FAA. The Federal Arbitration Act defines the grounds upon which a court may vacate an arbitration as:

1) Award procured by corruption, fraud or undue means;
2) There was evident partiality or corruption in the arbitrators;
3) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being 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; and
4) 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.

In the federal courts, the circuits are in conflict as to whether there are common law grounds for vacating an arbitration award in addition to statutory grounds, such as manifest disregard of the law. In *Coors Brewing Co. v. Cabo*,[298] the Colorado Court of Appeals summarized these decisions under the FAA. The Tenth Circuit recognizes judicially created grounds for vacating an arbitration award, in addition to those listed in § 10.[299]

The Tenth Circuit adopted arbitrator's manifest disregard of the law as a judicially created basis for vacating an award in 1995[300] and has consistently reaffirmed it.[301] Under those decisions, "erroneous interpretations or applications of law are not reversible." Rather, there must be a finding that "the arbitrator knew the law and explicitly disregarded it."

The Tenth Circuit apparently has created a test as to the statutory ground of an arbitrator exceeding his or her authority and the common law ground of manifest disregard of law of "whether the arbitrator's decision draws its essence from the agreement."[302]

Procedures for Vacating the Award

CUAA. Any application under the CUAA to vacate an award must be made within 30 days after delivery of the award to the applicant, or if predicated upon corruption, fraud, or other undue means, within 30 days after such grounds are known or should be known.[303]

In a proper judicial proceeding challenging an award, extrinsic evidence will be admissible to establish misconduct. A court may also properly receive testimony from the arbitrator to explain what took place before him or her, what was in controversy, and what matters entered into his or her decision-making process.[304] However, generally an arbitrator cannot be questioned concerning his or her thought processes.

CRUAA. C.R.S. § 13-22-223(2) provides that a motion to vacate the award shall be filed with the court within 90 days after the movant receives notice of the award or modified or corrected award, or within 90 days after the movant knew or, by exercise of reasonable care, should have known of the ground of corruption, fraud, or other undue means. A motion to vacate is treated generally in the same manner as other motions, and an evidentiary hearing is not necessarily required.[305]

FAA. Section 12 provides that a motion to vacate shall be served within three months after the award is filed or delivered, and defines the means of service.

"A party to an arbitration award who fails to comply with the statutory precondition of timely service of notice forfeits the right to judicial review of the award."[306] However, the doctrine of equitable tolling applies when facts justify the application of the doctrine. Colorado has recognized that under the FAA, the parties may provide for review of an arbitrator's award by an "appellate arbitrator."[307] Presumably, however, thereafter the district court review under the statute remains available, unless the parties have agreed to modify that procedure.

State Versus Federal Court Time Limits. The practitioner is alerted to the possibility that a state court applying the FAA may still follow state law time limits. It is unclear which time limit applies in a federal court case in which the state statute is applicable, or in a state court case in which the federal statute is applicable. The better rule is to follow the shorter rule.

Procedure upon Vacation of an Award

If the court finds that a portion of the award was procured by corruption and fraud, and if the court cannot segregate the tainted portion of the award, the entire award must be vacated and the case remanded for a rehearing before a new arbitrator.[308]

§ 21.2.17—Judgment On The Award — Attorney Fees And Litigation Expenses

Under the CRUAA and CUAA, once the court has confirmed, modified, or corrected an award, the judge enters a judgment in conformity with the award. At that point, the award — now a judgment — is treated the same way as any other judgment.[309]

Under the FAA, section 9 provides that if the parties have agreed that a judgment of the court shall be entered upon the arbitration award, then upon application the court shall confirm the award unless vacated, modified, or corrected, and, under section 13, judgment is entered thereon having the same force and effect as any other judgment.

The court has power to award costs of the judicial proceeding into the judgment, including attorney fees if the parties have so agreed.[310]

***Res Judicata*/Collateral Estoppel Effect of Confirmed Award**

An order confirming an arbitration award is entitled to *res judicata* and collateral estoppel effect in subsequent proceedings.[311]

§ 21.2.18—Jurisdiction Of The Courts And Arbitrator

Jurisdiction of the Colorado State Courts

The CUAA, C.R.S. § 13-22-219, states that an arbitration agreement providing for arbitration in this state, pursuant to the choice of the parties or pursuant to the choice of arbitration, mediation, or conciliation rules that the state has determined to be appropriate, confers jurisdiction on the court to enforce the agreement and to enter judgment on the award.

CRUAA, § 226, provides that a court having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate. An agreement to arbitrate in Colorado confers jurisdiction on the court to enter judgment on the award.

Jurisdiction of the Federal Courts

The Federal Arbitration Act does not contain a jurisdiction provision and, as discussed above, does not confer federal court jurisdiction: the jurisdiction of the federal court normally must be established in the traditional manner, *e.g.*, diversity of citizenship or federal question (and applicability of the FAA does not make proceedings a federal question).[312] However, some federal courts have examined the underlying issues to see if those issues present a federal question. If so, they may allow federal court jurisdiction to be premised upon that underlying federal question, even if the arbitrator and not the court will determine those issues.[313]

Jurisdiction of the Arbitrator

The parties may have in their agreement an express provision as to the jurisdiction of the arbitrator. For example, if incorporated into the agreement, AAA Construction Industry Arbitration Rule R-8 provides:

- Arbitrator has power to rule on his own jurisdiction, including as to existence, scope or validity of the arbitration agreement.
- Arbitrator has power to determine the existence or validity of a contract containing the arbitration clause.

Generally, such agreements granting such jurisdiction/power to the arbitrator are upheld. CRUAA, C.R.S. §§ 13-22-206(2) and (3), is generally contrary to Rule R-8; however, C.R.S. § 13-22-204 permits parties to agree to waive sections 206(2) and (3).

§ 21.2.19—Venue

Federal Court Venue

If the federal court suit concerning arbitration is under the FAA, the statute has certain venue provisions that must be followed. For example, section 4 provides that a motion to compel arbitration may be filed in "any United States district court which, save for such [arbitration] agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties . . . ." Section 9 provides that if no court is specified in the arbitration agreement, the application for confirmation of an arbitration award shall be made to the U.S. District Court in the district within which the award was made. Sections 10 and 11 provide that the venue for vacating an award and for modification or correction is also the district wherein the award was made. However, at least the sections 9 through 11 venue provisions are non-exclusive and permissive; these proceedings can be brought in any district in which venue is proper under the general venue statute.[314] Moreover, the district in which the award is made is not defined.

State Court Venue — CUAA and CRUAA

Presumably, venue provisions are generally considered to be procedural, and therefore the FAA venue provisions "probably" do not apply to state court actions applying the FAA. The allowable venue, geographically speaking, would be far greater under the FAA, but is not consistent with the organization of the state court system.

CUAA, C.R.S. § 13-22-220, provides:

> An initial application shall be made to any court within the county specified by the agreement, or, if the hearing has already been held, within the county in which it was held. Otherwise, the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

The CRUAA, C.R.S. § 13-22-227, is an analogous provision. C.R.C.P. 98 may also be applicable.

Venue of the Arbitration

FAA § 4 defines that if a motion compelling arbitration is granted, "The hearing and proceedings, under such an agreement, shall be within the district in which the petition for an order directing such arbitration is filed." CUAA, C.R.S. § 13-22-207, provides that unless otherwise provided by the agreement, the arbitrators shall appoint a time and place for the arbitration. *See also* CRUAA, C.R.S. §§ 13-22-215 and -204.

Forum Selection Clauses

Forum selection clauses in arbitration agreements (location of the arbitration hearing) are generally enforceable.[315] However, if the clauses are unreasonable, courts have refused to enforce them. For example, in *Cameron*,[316] the U.S. District Court for the District of Colorado refused to enforce a forum selection clause in an arbitration agreement because:

1) The opposing party established fraud, undue influence, or overreaching bargaining power;
2) The language was ambiguous, both in terms of whether the location was mandatory or permissive, but also as to whether it applied to the specific claims;
3) It did not state that it was the exclusive forum; and
4) It would be unreasonable in the circumstances to enforce it.

§ 21.2.20—Appeal Of The Trial Court's Orders And Judgments

The district court orders that may be appealed are defined in FAA § 16; CUAA, C.R.S. § 13-22-221; and CRUAA, C.R.S.§ 13-22-228.

CUAA

C.R.S. § 13-22-221 defines that an appeal from the trial court to the court of appeals may be taken from an order under the act:

- Denying an application to compel arbitration;
- Granting an application to stay arbitration;
- Confirming or denying confirmation of an award;
- Modifying or correcting an award;
- Vacating an award without directing a rehearing and from a judgment or decree.

Where a court denies a motion to compel arbitration under section 204, section 221(a) of the CUAA permits an immediate appeal.[317] This is in addition to the right to appeal after final judgment has been entered.[318] On the other hand, a trial court order denying a motion to stay the arbitration is not appealable.[319] It is not a violation of the equal protection clause for the statute to permit an interlocutory appeal of an order denying a motion to compel arbitration, but not to permit an interlocutory appeal of an order compelling arbitration.[320]

The statute does not include an order compelling arbitration as an appealable order.[321] However, if the trial court grants a motion to compel arbitration and dismisses the case, it is a final order and appealable.[322] However, in most cases, when the court orders arbitration, it merely stays the civil action pending completion of the arbitration. In that case, the order is not appealable.

A writ of prohibition may also be an appropriate remedy where a trial court has abused its discretion and a later appellate remedy would not be adequate.[323]

The parties may not by agreement modify the grounds for appeal, or the standard of review, since these are powers solely of the legislature. For example, an agreement for the appel-

late court to conduct a substantive review of the arbitrator's award is void, as contrary to the jurisdictional statutes.[324]

While the CUAA does not so provide, in *Galbraith v. Clark*,[325] the Colorado Court of Appeals held that an order compelling arbitration and dismissing the civil action (instead of staying the civil action pending arbitration) was a final appealable order. This decision was not based upon either the Colorado arbitration statute or under the Colorado "appeal" statute. Rather the court held that because the FAA governed the arbitration, and dismissal of an action while compelling arbitration was appealable under federal law, that rule applied in state court. It would seem that the same result could have been achieved under the Colorado statute defining the district court orders generally that are appealable to the Court of Appeals — which includes final judgment.[326]

CRUAA

The trial court orders from which an appeal may be taken under CRUAA are approximately the same as under the CUAA.

FAA

Under the FAA, 9 U.S.C. § 16, the trial court actions that may be appealed are:

- An order refusing a stay of litigation;
- An order denying an application to compel arbitration;
- An order confirming or denying confirmation of an award;
- An order modifying, correcting, or vacating an award; in addition, an interlocutory order granting, continuing, or modifying an injunction against arbitration and a final decision with respect to an arbitration are also appealable;[327]
- A judgment or decree entered pursuant to the Act.

On the other hand, unless appealable under 28 U.S.C. § 1291(b), no appeal may be taken of interlocutory orders:

- Granting a stay of litigation pending arbitration;
- Directing arbitration to proceed;
- Compelling arbitration;
- Refusing to enjoin an arbitration.

In *Crystal Clear Communications, Inc. v. Southwestern Bell Telephone Co.*,[328] the court applied *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[329] wherein the Supreme Court held that a district court stay of litigation is not ordinarily a final decision for purposes of an appeal under 28 U.S.C. § 1291 (as distinguished from appeals allowed under the FAA Section 16). The court also recognized an exception to the rule in cases in which the stay order operates to put a party effectively out of court. Most orders staying litigation do not operate to put the plaintiff effectively out of court. A stay pending arbitration is not a final order because the plaintiff could return to court following the arbitrator's decision.

Section 16 of the FAA provides that an order confirming or denying confirmation of an arbitrator's award or "partial award" may be appealed. Thus, an arbitration award that does not resolve all controversies between the parties may be confirmed and an appeal taken from that confirmation, even if the district court or the arbitrator has remaining issues for determination. Thus, a confirmation order is final for purposes of appeal even absent the interest of a final judgment satisfying the usual prerequisites of 28 U.S.C. § 1291 and F.R.C.P. 58.[330]

In summary, the philosophy of the state and federal statutes is to allow appeals where the order or result is against proceeding with the arbitration, and to not allow an appeal of an order in aid of the arbitration going forward. The state and federal acts do vary in some aspects. These differences may be important, depending upon which appeal statute a court determines applies.

Upon a party's taking an interlocutory appeal under 9 U.S.C. § 16(a)(1)(C) of the denial in part of a motion to compel arbitration, the Tenth Circuit holds that the district court is automatically divested of jurisdiction, and the court of appeals can grant a stay of further proceedings in the trial court.[331]

§ 21.2.21—Scope Of Review By Appellate Courts

Federal Courts

On appeals from the district court's confirmation of an award and denying a motion to vacate the award, the district court's factual findings are reviewed for clear error and its legal conclusions *de novo*.[332]

§ 21.3 • MEDIATION AND THE DISPUTE RESOLUTION ACT

§ 21.3.1—Generally

Mediation is defined in the Colorado Dispute Resolution Act, C.R.S. §§ 13-22-301, *et seq.*, as "an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own resolution." The statute addresses a series of alternative dispute resolution procedures, including mediation, arbitration, med-arb, early neutral evaluation, mini trials, fact-finding, settlement conferences, special master, and summary jury trial.

§ 21.3.2—Settlement

In *National Union Fire Insurance Co. v. Price*,[333] the parties applied section 208 dealing with settlement of disputes:

> If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

The court held that an oral agreement reached at a private mediation could not be enforced. The court stated that the act applies to all mediation or dispute resolution programs conducted in the state, including those conducted by a private mediator. It does not appear that the act also applies to a settlement resulting from two parties negotiating without a mediator, but it is not clear. The Dispute Resolution Act does not appear to deal with negotiation. In addition, the statute refers to "upon request of the parties shall be reduced to writing . . ." implying that the parties are requesting a third party, *e.g.*, mediator.

Recently, the court of appeals again considered the enforceability of a settlement reached in mediation under the Dispute Resolution Act.[334] At the end of a successful mediation, the parties executed a "Basic Terms of Settlement," which stated that it was a "binding enforceable agreement." However, it also provided, "Formal documents to be prepared [by defendant] within 14 days." Thereafter, the parties were unable to agree upon the terms/wording of the formal settlement agreement. The court enforced the terms of the defendant's proposed wording, finding "agreement" of the parties even without the plaintiff's having signed the final documents: "[T]he parties and their attorneys approved the agreement through their conduct and representations to the trial court."

However, the court went further and acknowledged the ramifications of the decision:

> We are mindful that the practical implication of this opinion may be that parties and mediators end up working harder and longer to make sure they have reached a full and final settlement agreement by the end of the mediation. Of course, the settlement memorandum could state that, if the parties do not reach agreement on additional documentation within a stated period of time, then any party shall be entitled to have the case resolved solely on the terms of the settlement memorandum.
>
> In contrast to either of these approaches, however, is the practice of leaving for another day, additional terms to be negotiated, which, ironically, invites the potential for further litigation rather than ending it. This dispute is a case in point.

§ 21.3.3—Ethical And Honesty Standards

Increasingly, issues are arising as to whether a settlement should be vacated or damages awarded because of fraudulent or negligent misrepresentation or concealment in the course of settlement negotiations or mediation. That subject is beyond the scope of this chapter. However, excellent articles are cited in the bibliography at the end of this chapter. The reader is also referred to CLE programs that have included this topic.

§ 21.3.4—Judicial Power To Order Mediation

In *In re Atlantic Pipeline*,[335] the First Circuit held that courts in appropriate cases have inherent power to order nonconsensual mediation — to compel an unwilling party to participate in, and share the costs of, non-binding mediation conducted by a private mediator. However, the order must have certain procedural and substantive safeguards such as (1) a timetable for the mediation, (2) a cap on the fees/hours charged, and (3) recognition that participation will not be taken as a waiver of any litigation position. *In dictum*, the court also noted that a court could order

mandatory mediation pursuant to an explicit statutory provision or local rule. The court noted that the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471, *et seq.*, provides for district courts to adopt an alternative dispute resolution program.

§ 21.3.5—Enforcement Of ADR Agreements And Requirements

This topic is thoroughly covered in English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith In, or Comply With Agreement Made In, Mediation*, 43 A.L.R. 5th 545.

§ 21.3.6—Mediation As A Condition Precedent

An agreement to mediate as a condition precedent to arbitration is generally enforced by the courts. Similarly, a California court enforced a contract provision requiring the acceptance of mediation as a condition for the award of attorney fees.[336]

§ 21.4 • COLORADO INTERNATIONAL DISPUTE RESOLUTION ACT

The Colorado International Dispute Resolution Act, C.R.S. §§ 13-22-501, *et seq.*, is designed to encourage parties to international commercial and non-commercial transactions to resolve disputes through alternative dispute resolution vehicles similar to those contained in the Dispute Resolution Act. Parties involved in international construction projects should familiarize themselves with this statute, as well as relevant federal statutes and the rules of the International Centre for Dispute Resolution, International Chamber of Commerce, etc.

See also federal statutes and treaties concerning international arbitration.

§ 21.5 • "ARBITRATION" UNDER THE DENVER REVISED MUNICIPAL CODE

Where a municipal contract calls for a city official to be the arbitrator, that provision will not render the disputes clause invalid so long as the disputes clause also provides for limited judicial review of that official's determination.[337]

The Denver Revised Municipal Code has adopted an administrative procedure for the resolution of disputes.[338] The procedure is supplemented by the Public Works Rules and Regulations currently in effect. Although included in the chapter of the Code relative to utilities, sewers in particular, the city does incorporate this section into some of its construction contracts as an ADR procedure. This procedure has not been held to be subject to the CUAA or CRUAA.

In accordance with the provisions of § 56-106 of the Code, a claiming party has a right, within one year after receipt of the disputed bill, to make a written request to the agency or divi-

sion of the department of public works for a revision or modification of the charge. The agency or division is then obligated to issue a written determination, granting or denying the request.

The section then extends a right to appeal any determination made at the initial hearing level, by submitting a written petition to the Manager of Public Works. The petition must be filed by the petitioner within 30 days after it has been notified of the initial determination by the city. The petitioner must also submit, under oath or affirmation and either in the petition or orally at a hearing, the facts and figures relied upon by the petitioner.

A hearing may be held, either by the Manager of Public Works or another officer or employee designated by the manager as a hearing officer. Any hearing is to be conducted in accordance with the rules and regulations issued by the Manager of Public Works, and the proof is the same as required in a civil non-jury case in the state district court.

The Manager of Public Works or his or her designee is obligated to make a final determination. The final determination is considered a final order of the Manager, subject to review by the district court of the Second Judicial District. Any judicial review is made of questions of law and fact determined by the Manager of Public Works.[339]

Colorado law permits a limited judicial review of an administrative decision made by a governmental body, *e.g.*, the decision of the Manager of Public Works of Denver.[340] The review is limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

The review is initiated by filing of a complaint with the court. The filing may also be accompanied by a motion and proposed order requiring certification of a written record of the proceedings before the body or officer. The remainder of the procedure is governed by Colorado Rule of Civil Procedure 106(a)(4)(I) through (IX).

§ 21.6 • DISPUTE REVIEW BOARDS

A dispute review board (DRB) is defined by the AAA as "[t]hree neutral individuals mutually selected by the owner and contractor to consider and recommend resolution of disputes referred to it." The definition properly emphasizes how broad the potential powers, duties, and responsibilities of a dispute review board are, and are to be defined and agreed to by the parties.

Very generally, however, a dispute review board is appointed and begins functioning at the commencement of the work on the construction project. One of the first steps is to agree upon a DRB Operating Agreement, defining the procedures of the DRB to implement the original agreement between the parties. Next, the DRB becomes familiar with the work and meets periodically with the contractor and owner to discuss progress on the project, and particularly any potential issues, problems, or disputes that are foreseen, with the anticipation of working with the parties to avoid the problems.

If disputes arise, according to the procedures agreed to by the parties, a hearing is held. Generally, this hearing is somewhat informal in nature, but the parties are given the opportunity to present documents and facts, and to explain their procedures. Again, the procedures are defined by agreement.

The DRB typically renders a written recommendation/decision for resolution of the dispute, together with the board's reasoning and analysis. Typically, the parties are free to reject the recommended resolution, but usually they do not.

If one party rejects the recommendation, by agreement the recommendation may have several future impacts. The parties may agree that (1) it shall have no impact, (2) the recommendation may be offered in a future arbitration or litigation of the issue, or (3) if the rejected party does not thereafter obtain a "better resolution," the rejecting party shall be liable for attorneys fees and costs of the accepting party.

In sum, a DRB offers huge potential for avoiding disputes and resolving disputes on construction projects. Obviously, many participants in projects may feel that they cannot justify usage of a DRB; however, how many project participants can afford the cost of resolving disputes without DRBs?

§ 21.7 • EARLY NEUTRAL EVALUATION AND FACT FINDING

The Dispute Resolution Act defines early neutral evaluation as "intervention in a lawsuit by a court appointed evaluator to narrow, eliminate, and simplify issues and assist in case planning and management. Settlement of the case may occur under early neutral evaluation." The basic theory supporting this approach is that if the parties understand the issues, settlement is more likely. Adding to that the evaluation of the claims by a neutral may further enhance the settlement process. Lastly, having a neutral assist in case planning and management may substantially reduce the cost of litigation or arbitration. Of course, the evaluator need not be appointed by the court.

Similarly, "fact finding" is defined as an investigation of a dispute by a public or private body that examines the issues and facts in a case and may or may not recommend settlement procedures.

§ 21.8 • ARBITRATION AND MEDIATION WITH THE FEDERAL GOVERNMENT AND ITS AGENCIES

Arbitration and mediation with the federal government and its agencies is a topic too extensive to be covered in this chapter. However, it should be noted that after a long history of resistance to ADR, the federal departments and agencies, under pressure from Congress and Presidents, are becoming more and more involved in ADR.

Some of the sources you should review when considering the use of ADR in federal government disputes include:

- 5 U.S.C. § 571, Administrative Dispute Resolution Act. Authorizes use of binding arbitration.
- Dept. of Justice Order (DOJ) 1160, April 6, 1995. Establishes an ADR program in the Department. *See also* DOJ Policy Statement, Policy on Use of ADR and Case Identification Criteria for ADR, 61 Fed. Reg. 36895-02, July 15, 1996.
- Executive Order 12988, 61 Fed. Reg. 4725, February 5, 1996. *See also* Executive Order 12979, Fed. Reg. 55171, October 25, 1995 (authorizing use of ADR to resolve agency procurement requests).
- Office of the Assistant Attorney General, Opinion on Constitutional Limitations on Federal Government Participation in Binding Arbitration, September 7, 1965.

See also Bibliography at the end of this chapter.

§ 21.9 • ARBITRATION IN CONSTRUCTION DISPUTES: SHOULD IT BE USED?

In *Gergel v. High View Homes, LLC*,[341] the court held that the broad form arbitration clause in the homeowner's warranty covered the purchaser's claims for negligence, violation of the Consumer Protection Act, negligent misrepresentation, negligent concealment, and breach of the Soils Disclosure Act.

At least when a consumer is a party to an arbitration clause, the United States Supreme Court has recognized that the consumer party may invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive to it. However, the party asserting the invalidity of the arbitration agreement on that basis has the burden of proving the likelihood of incurring such prohibitive costs.[342] The underlying theory is that too great of fees imposed upon a party to the arbitration may effectively preclude enforcement of rights. *Green Tree* dealt with federal claims and not state claims, although the same principal should be applicable to state claims, at least if the Federal Arbitration Act applies. This argument was asserted, but not decided, in *Gergel*.[343]

Another arbitration issue with respect to construction disputes that has not been resolved in Colorado is the arbitrability of pass-through claims pursuant to a contractor's arbitration agreement with the owner. For example, in *Aetna Bridge Co. v. State Department of Transportation*,[344] the Rhode Island Supreme Court adopted the Severin doctrine, prohibiting a public works contractor from presenting the state with a pass-through claim on behalf of a subcontractor, unless the contractor establishes that it is potentially liable to the subcontractor. The court further held that under that doctrine a public works contractor's pass-through claim on behalf of a subcontractor is not arbitrable. The Rhode Island Supreme Court remanded the case to the trial court, saying that if the claim were determined to be a pass-through claim, the motion to vacate the arbitration award

because it was not subject to arbitration should be granted. *See also Board of Governors for Higher Education v. Infinity Construction Services, Inc.*,[345] holding that a public works contractor cannot, by way of a liquidation agreement, confer upon its subcontractor a right to arbitrate the subcontractor's dispute with the public entity. This case involved the holding that the public works contractor cannot by way of a liquidation agreement assign its arbitration right to a subcontractor.

§ 21.10 • DESIGNING AN ALTERNATIVE DISPUTE REVIEW SYSTEM

Arbitration, mediation, dispute review boards and early neutral evaluations are truly procedures that allow the parties to have their dispute resolution system as they want it to be — as long as all parties agree. Litigation is a well-defined procedure, and governed by thick books of rules and court decisions. Alternative dispute resolution, on the other hand, is intended to be exactly that — an alternative to litigation. In addition, the important characteristic of ADR procedures is that they are not well-defined — allowing the parties to select a system and define procedures that best reflect their particular needs.

Often, construction disputes are not well suited for the judicial system. It is suggested that a tailored ADR system may be to the benefit of all parties to a construction project dispute.

§ 21.11 • BIBLIOGRAPHY

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Burton and McIver, "Evaluating the Impact of Court-Annexed Arbitration," 18 *Colo. Law.* 829-928 (1989).

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Van Westrum, "Best Practices for Avoiding Unauthorized Practice of Law in Mediation," Introduction, 36 *Colo. Law.* 21 (June 2007).

NOTES

Editor's Note: For a more detailed presentation of the topics covered in this Chapter, as well as other ADR topics, the reader is referred to Benson, *Arbitration Law in Colorado*, First Ed. (CLE in Colo., Inc., 2006).

1. *Wales v. State Farm Mutual Ins. Co.*, 559 P.2d 255, 257 (Colo. App. 1976). In *Coors Brewing Co. v. Cabo*, 114 P.3d 60 (Colo. App. 2004), the court stated that the "CUAA is in derogation of the common law and must be strictly construed." *Id.* It is suggested that this panel misspoke: the CUAA is not in derogation of Colorado common law, and the Act should not be strictly construed.

2. *Huizar v. Allstate Ins. Co.*, 932 P.2d 839, 840 (Colo. App. 1996), *rev'd on other grounds*, 952 P.2d 342 (Colo. 1998).

3. *Id.*

4. *Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928, 930 (Colo. 1990).

5. *City and County of Denver v. District Court*, 939 P.2d 1353, 1364 (Colo. 1997), quoting Domke, *The Law of Practice on Commercial Arbitration* § 12.05 (Rev. Ed. Supp. 1993).

6 *Martin K. Eby Construction Co. v. City of Arvada*, 522 F. Supp. 449 (D. Colo. 1981).

7. *See Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999).

8. 9 U.S.C. § 2; CUAA, C.R.S. §§ 13-22-202 and 203; CRUAA, C.R.S. § 13-22-206.

9. *See* discussion concerning parties' right to agree upon the applicable arbitration statute, CRUAA, C.R.S. §§ 13-22-203 and -230.

10. *Cf*., *Russell v. Lutheran Brotherhood*, 2004 WL 316383 (Colo. Dist. Ct. 2004).

11. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

12. *See Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989).

13. 9 U.S.C. §§ 1, *et seq*.

14. *See* 9 U.S.C. §§ 1 and 2; *Comanche Indian Tribe v. 49, L.L.C.*, 391 F.3d 1129 (10th Cir. 2004).

15 *Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003).

16. 9 U.S.C. § 2.

17. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995).

18. *Id.* at 281. As to a state court perspective, *see F.A. Dobbs and Sons, Inc. v. Northcutt*, 819 So.2d 607, 610 (Ala. 2001) (the transaction or agreement involves interstate commerce if it has "a substantial effect on the generation of goods or services for interstate markets and their distribution to the consumer"). *See generally Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp.2d 1101 (D. Colo. 1999); *Morrison v. Colorado Permanente Medical Group, P.C.*, 983 F. Supp. 937 (D. Colo. 1997). Anno., *Preemption by Federal Arbitration Act of State Laws Prohibiting or Restricting Formulation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 179, §§ 37 and 38 (1992).

19. *Discover Bank v. Vaden*, 396 F.3d 366 (4th Cir. 2005). *See ICG Telecom Group, Inc. v. Qwest Corp.*, 375 F. Supp.2d. 1084 (D. Colo. 2005). Telecommunications company brought action to compel another provider to arbitrate a dispute that arose out of their interconnection agreement. The court noted that the FAA is not a source of jurisdiction. Plaintiff ICG filed the action to compel Qwest to arbitrate a dispute between them arising out of their interconnection agreement, but their commercial agreements were governed by the Telecommunications Act. ICG asserted jurisdiction under 28 U.S.C. §§ 1331 and 1337, and 9 U.S.C. §§ 2 and 4. Qwest denied jurisdiction. The parties agreed that the ICG request for preliminary injunction was now mute, but ICG continued to pursue an award of attorneys' fees. The court noted the jurisdiction to award attorneys' fees is predicated upon jurisdiction over the underlying dispute. The court held that it had jurisdiction, although the FAA alone was not a source of federal jurisdiction.

20. *See Chilcott Entertainment L.L.C. v. John G. Kinnard Co.*, 10 P.3d 723 (Colo. App. 2000) (state court applied FAA three-month limitation period in which to file a motion to vacate, modify, or correct an arbitration award).

21. *Cf.*, *Chilcott Entertainment L.L.C.*, 10 P.3d at 727.

22. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989).

23. *Taylor v. Butler*, 142 S.W.3d 277, 282 (Tenn. 2004), *cert. denied*, *City Auto Sales, LLC v. Taylor*, 125 S.Ct. 1304 (2005).

24. *1745 Wazee LLC v. Castle Builders, Inc.*, 89 P.3d 422 (Colo. App. 2003), *cert. denied* (Colo. 2004).

25. *Byerly v. Kirkpatrick, Pettis, Smith, Polian, Inc.*, 996 P.2d 771, 775 (Colo. App. 2000).

26. *Matrobuono v. Shearson Lehmann Hutton, Inc.*, 514 U.S. 52, 63-64 (1995).

27. *See* 9 U.S.C. § 1 and 2.

28. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989).

29. 9 U.S.C. § 2.

30. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995). *See also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), holding the statutory phrase was the "functional equivalent of . . . 'affecting commerce' — words of art that ordinarily signal the broadest permissible exercise of Congress' commerce clause power."

31. *Citizens Bank*, 539 U.S. at 56-57.

32. *Allied-Bruce Terminix*, 513 U.S. at 281. *See F.A. Dobbs & Sons, Inc. v. Northcut,* 819 So.2d 607 (Ala. 2001) (The transaction or agreement involves interstate commerce if it has "a substantial effect on the generation of goods or services for interstate markets and their distribution to the consumer.").

33. *Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 725 (Colo. 1998).

34. *Morrison v. Colorado Permanente Medical Group, P.C.*, 983 F. Supp. 937 (D. Colo. 1997).

35. *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003), *cert. denied*, 540 U.S. 1212 (2004).

36. *Evans v. Colorado Permanente Med Group, P.C.*, 902 P.2d 867 (Colo. App. 1995), *aff'd in part, rev'd in part*, 926 P.2d 1218 (Colo. 1996).

37. *See Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *see also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003), *cert. denied*, 540 U.S. 1212 (2004).

38. *Byerly*, 996 P.2d at 774. *See also Fonden v. U.S. Home Corp.*, 85 P.3d 600, 602 (Colo. App. 2000), *cert. denied* (2004).

39. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

40. *Fonden*, 85 P.2d at 602.

41. *Chilcott Entertainment L.L.C. v. John G. Kinnard Co.*, 10 P.3d 723 (Colo. App. 2000).

42. *Cf.*, *Russell v. Lutheran Brotherhood*, 2004 WL 316383 (Colo. Dist. Ct. 2004).

43. *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653 (10th Cir. 2006) (applying Texas or Kansas law). *See also Hardin v. First Cash Financial Svcs., Inc.*, 465 F.3d 470, 477-78 (10th Cir. 2006) (employee continuing employment when agreement provided continued employment after defined date would manifest assent to Dispute Resolution Agreement).

44. *Todd Habermann Constr., Inc. v. Epstein*, 70 F. Supp.2d 1170, 1174 (D. Colo 1999). *See* C.R.S. § 13-22-203 (2004), C.R.S. § 13-22-206 (2005), and 9 U.S.C. § 2. *Compare Encore Productions, Inc.*, 53 F. Supp. at 1113, and *Medical Development Corp. v. Industrial Molding Corp.*, 479 F.2d 345 (10th Cir. 1973).

45. *Dumais v. American Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002).

46. *Hardin v. First Financial Svcs., Inc.*, 465 F.3d 470 (10th Cir. 2006).

47. *Rains v. Foundation Health Sys. Life & Health*, 23 P.3d 1249 (Colo. App. 2001).

48. *Fuller v. Pep Boys — Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp.2d 1158 (D. Colo. 2000) (employment case). *See also Avedon Eng'g, Inc. v. Seatex*, 112 F. Supp.2d 1090 (D. Colo. 2000), *aff'd*, 126 F.3d 1279 (10th Cir. 1997) (unilateral insertion of arbitration clause in sales contract); *City and County of Denver v. District Court*, 939 P.2d 1353 (Colo. 1997) (Denver's dispute resolution procedure upheld, under which Denver selects the hearing officer).

49. *Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132 (Colo. App. 2002), *cert. denied* (Colo. 2002).

50. *South Washington Ass'n v. Flanagan*, 859 P.2d 217 (Colo. 1992).

51. *Compare Galbraith v. Clark*, 122 P.3d 1061 (Colo. App. 2005) (state trial court order compelling arbitration and dismissing civil action appealable to Colorado Court of Appeals pursuant to FAA case law).

52. *Bowlen v. Amoco Pipeline Co.*, 254 F.3d 925, 927 (10th Cir. 2001).

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

54. *See Prima Paint Corp. v. Flood & Conklin Manu. Co.*, 388 U.S. 395 (1967). Colorado generally has followed that ruling. *National Camera, Inc. v. Love*, 644 P.2d 94 (Colo. App. 1982); *R.P.T. of Aspen, Inc. v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. App. 1996).

55. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

56. *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

57. *Guarantee Trust Life Ins. Co. v. American United Life Ins. Co.*, 2003 U.S. Dist. LEXIS 22777, 2003 WL 23518661 (N.D. Ill. 2003) involved claims asserting a breach of a reassurance contact to which the defendant moved to compel arbitration. The court found that the words "arbitration clause" was a sufficient agreement to arbitrate..

58. *South Washington Assoc. v. Flanagan*, 859 P.2d 217 (Colo. 1992).

59. CRUAA, C.R.S. § 13-22-204(2) (2005).

60. C.R.S. § 13-22-204(2) (2005).

61. American Arbitration Association, "Drafting Dispute Resolution Clauses – A Practical Guide."

62. *Cox v. Fremont County Pub. Bldg. Auth.*, 415 F.2d 882, 886 (10th Cir. 1969).

63. *Tracer Research Corp. v. National Environmental Services Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994), *cert. dismissed*, 515 U.S. 1187 (1995); *Salt Lake Tribune Publishing Co. v. Management Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004).

64. *Gergel*, 996 P.2d at 235.

65. *McCauley v. Halliburton Energy Svcs., Inc.*, 161 Fed. Appx. 760 (10th Cir. 2005), *quoting Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258, 1262 (10th Cir. 2005).

66. *Container Tech. Corp. v. J. Gadsden Pty, Ltd.*, 781 P.2d 119, 121 (Colo. App. 1989), *cert. denied* (1989).

67. *Eychner v. Van Fleet*, 870 P.2d 486 (Colo. App. 1993).

68. *City and County of Denver*, 939 P.2d at 1366.

69. *Galbraith v. Clark*, 122 P.3d 1061 (Colo. App. 2005).

70. *Twin Lakes Reservoir & Canal Co. v. Platt Rogers, Inc.*, 147 P.2d 828, 832 (Colo. 1944).

71. *City and County of Denver*, 939 P.2d at 1364.

72. *Zahn v. District Court in and for County of Weld*, 457 P.2d 387 (Colo. 1969).

73. *Cf.*, *City and County of Denver*, 939 P.2d at 1368.

74. *Id.*

75. *Id.*

76. *Id.* at 1367-68.

77. *Colorado Real Estate & Dev., Inc. v. Sternberg*, 433 P.2d 341, 343 (Colo. 1967).

78. *City and County of Denver*, 939 P.2d at 1368.

79. *Cox*, 415 F.2d at 886.

80. *Parry v. Colorado Bd. of Corrections*, 28 P.2d 251 (Colo. 1933); C.R.S. § 29-1-110.

81. *F.J. Kent Corp. v. Town of Dillon*, 648 P.2d 669 (Colo. App. 1982).

82. *Gergel*, 996 P.2d at 236-237; *see generally Shams v. Howard*, 2007 Colo. App. LEXIS 177 (Colo. App. May 24, 2007).

83. *BFN-Greeley, LLC v. Adair Group, Inc.*, 141 P.3d 937 (Colo. App.), *cert. denied* (2006).

84. *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp.2d 1101, 1108 (D. Colo. 1999) (FAA).

85. *Shams v. Howard*, 2007 Colo. App. LEXIS 177 (Colo. App. May 24, 2007).

86. *Block 175 Corp. v. Fairmont Hotel Management Co.*, 648 F. Supp. 450, 452 (D. Colo. 1986).

87. *City and County of Denver v. District Court*, 939 P.2d 1353, 1369 (Colo. 1977).

88. *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278, 1286 (Colo. App. 2001) (defendant cannot file a permissive counterclaim and third-party claim, and join a third party, thereby defeating the third party's right to have the claims against it arbitrated. *See also Amtel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 797 (Colo. App. 2001).

89. *Sandefer v. District Court*, 635 P.2d 547 (Colo. 1981), *overruled in part on other grounds (unrelated to the intertwining doctrine)*, *Sager v. District Court*, 698 P.2d 250 (Colo. 1985).

90. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007); *J.A. Walker Co., Inc. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

91. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

92. *GATX Management Services, LLC v. Weakland*, 171 F. Supp.2d 1159, 1166 (D.Colo. 2001) (". . . equitable estoppel allows non-signatories to compel arbitration if there are intertwined claims").

93. *F.D. Import & Export Corp. v. M/V REEFER SUN*, 248 F. Supp.2d 240 (S.D.N.Y. 2002).

94. *McCauley v. Halliburton Energy Svcs., Inc.*, 161 Fed. Appx. 760 (10th Cir. 2005).

95. *Quist v. Specialty Supply Co.*, 12 P.3d 863 (Colo. App. 2000).

96. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

97. *Parklane Properties, Inc. v. Fisher*, 5 P.2d 577, 579 (Colo. 1931); *Paul Mullins Construction Co. v. Alspaugh*, 628 P.2d 113, 114 (Colo. App. 1980).

98. *Mountain Plains Constructors v. Torrez*, 785 P.2d 928, 930 (Colo. 1990). *See* C.R.S. § 38-22-110; *Paul Mullins Construction Co.*, 628 P.3d at 114.

99. 40 U.S.C. § 1331; *United States ex rel. Tanner v. Daco Construction, Inc.*, 38 F. Supp.2d 1299, 1302 (W.D. Okla. 1999) (*dictum*).

100. *School District No. 6 v. Alfred Watts Grant and Associates*, 399 P.2d 101, 103 (Colo. 1965).

101. *Waldman v. Old Republic Nat'l Title Ins. Co.*, 12 P.3d 835, 837 (Colo. App. 2000), *cert. denied* (2000).

102. *Galbraith v. Clark*, 122 P.3d 1061 (Colo. App. 2005).

103. *Mountain Plains Constructors*, 785 P.2d at 931.

104. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *City and County of Denver*, 939 P.2d at 1369; *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado*, 614 F.2d 698, 702 (10th Cir. 1980).

105. *Martin K. Eby Construction Co. v. City of Arvada*, 522 F. Supp. 449, 450 (D. Colo. 1981).

106. *Paul Mullins Construction Co.*, 628 P.2d at 113.

107. *See Blumenthal-Kahn Electric Ltd. v. American Home Assurance Co.*, 236 F. Supp.2d 575 (E.D. Va. 2002).

108. *Waldman*, 12 P.3d at 837.

109. *Scherer v. Schuler Custom Homes Construction, Inc.*, 98 P.2d 159 (Wyo. 2004).

110. *Red Sky Homeowners' Ass'n v. Heritage Co.*, 701 P.2d 603, 606 (Colo. App. 1984).

111. *Osborn v. Packard*, 2004 Colo. App. LEXIS 2124 (Nov. 18, 2004), *cert. denied*, *Packard v. Osborn*, 2005 Colo. LEXIS 705 (Colo. Aug. 8, 2005).

112. *See Alspaugh v. District Court*, 545 P.2d 1362, 1364 (Colo. 1976).

113. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), including Title VII claims. Only employment contracts of transportation workers are exempt from the FAA. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994).

114. *Gourley v. Yellow Transportation, LLC*, 178 F. Supp.2d 1196 (D. Colo. 2001). As to EEOC claims, *see Dumais v. American Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002); *but see Alarape v. Group I Automotive, Inc.*, 2006 U.S. Dist. LEXIS 76206 (D. Colo. 2006).

115. *Alarape v. Group I Automotive, Inc.*, 2006 U.S. Dist. LEXIS 76206 (D. Colo. 2006).

116. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007). *See also Lambdin v. District Court*, 903 P.2d 1126 (Colo. 1995) (Colorado Wage Claim Act).

117. *Shotkoski v. Denver Investment Group, Inc.*, 134 P.3d 513 (Colo. App. 2006).

118. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132 (Colo. App.), *cert. denied* (2002).

119. *Lambdin v. District Court*, 903 P.2d 1126 (Colo. 1995).

120. *Byerly v. Kirkpatrick, Pettis, Smith, Polian, Inc.,* 996 P.2d 771 (Colo. App. 2000).

121. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482 (10th Cir. 1994) (Title VI civil rights claim for unlawful discrimination is subject to compulsory arbitration and is not precluded by FAA § 1); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (statutory anti-trust claims); *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3rd Cir. 1989) (bankruptcy adversary proceeding).

122. *See Todd Haberman Construction, Inc. v. Epstein*, 70 F. Supp.2d 1170, 1175 (D. Colo. 1999).

123. *Id.* (contract required mediation prior to arbitration).

124. *Elliott v. Wolfer*, 240 P. 694 (Colo. 1925).

125. *Sollenberger v. AA Constr. Co.*, 481 P.2d 428, 431 (Colo. App. 1971) (not selected for official publication).

126. *Todd Habermann Construction*, 70 F. Supp. at 1175.

127. *Exchange Mutual Co. v. Haskell Co.*, 742 F.2d 274 (6th Cir. 1984); *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

128. *See generally Cherry Creek Card & Party Shop, Inc. v. Hallmark Marketing Corp.*, 176 F. Supp.2d 1091 (D. Colo. 2001) (discusses multiple theories upon which non-signatories are bound).

129. *Roe v. Gray*, 165 F. Supp. 1164, 1174 (D. Colo. 2001).

130. *Eychner v. Van Fleet*, 870 P.2d 486 (Colo. App. 1993).

131. *Parker v. Center for Creative Leadership*, 15 P.3d 297, 298 (Colo. App. 2000).

132. *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003), *cert. denied* 540 U.S. 1212 (2004).

133. *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2nd Cir. 1995).

134. *Allen*, 71 P.3d at 380 n. 4.

135. *Parker v. Center for Creative Leadership*, 15 P.3d 297, 298 (Colo. App. 2000); *Eychner v. Van Fleet*, 870 P.2d 486 (Colo. App. 1993); *Everett v. Dickinson & Co.*, 929 P.2d 10 (Colo. App. 1996).

136. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006) (4-3 decision); *see also Winter Park Real Estate and Investments, Inc. v. Anderson*, 160 P.3d 399 (Colo. App. 2007).

137. *Fraternal Order of Police v. City of Commerce City*, 996 P.2d 133 (Colo. 2000).

138. *City & County of Denver v. Denver Firefighters Local 858*, 663 P.2d 1032 (Colo. 1983).

139. *Martin K. Eby Construction Co. v. City of Aurora*, 522 F. Supp. 449 (D. Colo. 1981).

140. *Cf., Case Int'l Co. v. T.L. James and Co.*, 907 F.2d 65 (8th Cir. 1990). *See Commercial Union Ins. Co. v. Gilbane Building Co.*, 992 F.2d 386 (1st Cir. 1993); *Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Limited*, 210 F.3d 262, 265 (4th Cir. 2000). *Compare MPACT Construction Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (Ind. 2004).

141. *Mountain Plains Constructors, Inc.*, 785 P.2d at 930.

142. *Encore Productions, Inc.*, 53 F. Supp.2d at 1108; *Parker*, 15 P.3d at 298; *Eychner v. Van Fleet*, 870 P.2d 486 (Colo. App. 1993).

143. *Smith v. Currency Trading Int'l, Inc.*, 188 F.3d 519 (10th Cir. 1999) (unpublished), *affirming* 10 F. Supp.2d 1189 (D. Colo. 1998).

144. *Todd Habermann Constr., Inc.*, 70 F. Supp.2d at 1175-76.

145. *Cogswell*, 78 F.3d at 476-481.

146. *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279 (10th Cir. 1997), *affirming* 112 F. Supp.2d 1090 (D. Colo. 2001).

147. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

148. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 985 (1967).

149. *Carpenters Dist. Council of Denver and Vicinity*, 513 F.2d at 3; *City and County of Denver*, 939 P.2d at 1363.

150. *City and County of Denver*, 939 P.2d at 1364.

151. *Associated Natural Gas, Inc. v. Nordic Petroleums, Inc.*, 807 P.2d 1195 (Colo. App. 1990), *cert. denied* (1991).

152. *Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258 (10th Cir. 2005); *applied in Greenberg & Assoc., Inc. v. Cohen*, 2005 U.S. Dist. LEXIS 36638 (D. Colo. 2005).

153. *Id.* at 1261 (citations omitted).

154. *Id.* (citations omitted).

155. *BRM Construction, Inc. v. Marais Gaylord, L.L.C.*, 2007 Colo. App. LEXIS 1209 (Colo. App. June 28, 2007).

156. *Eagle Ridge Condominium Ass'n v. Metropolitan Builders, Inc.*, 98 P.3d 915 (Colo. App. 2004), *cert. granted* (Colo. 2004).

157. *Tucker v. Lanier Worldwide, Inc.*, 2005 WL 1924407 (D. Colo. 2005). Magistrate judge's recommendations accepted in part and repealed in part, 2005 WL 1924425 (D. Colo. 2005).

158. *Id.*, 2005 WL 1924407 at *4.

159. *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214 (10th Cir. 2005).

160. *Tucker*, 2005 WL 1924425 (D. Colo. 2005), *citing Ansari*, 414 F.3d 1214 (10th Cir. 2005).

161. *Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999), *cert. denied* (2000).

162. *Cabs, Inc. v. Delivery Drivers, Warehousemen and Helpers Local Union No. 435*, 566 P.2d 1078 (Colo. App. 1977).

163. *Ansari v. Qwest Communications Corp.*, 414 P.3d 1214 (10th Cir. 2005).

164. *Alarape Group I Automotive, Inc.*, 2006 U.S. Dist. LEXIS 76206 (D. Colo. 2006).

165. *Citing Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 796-97 (10th Cir. 1995).

166. *Cornell v. Harmony Homes, Inc.*, 2007 U.S. Dist. LEXIS 564 (D. Colo. 2007), *citing Stein v. Burt-Kuni One, LLC*, 396 F. Supp.2d 1211, 1212 (D. Colo. 2005), and *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997).

167. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

168. *Crawford v. United Services Automobile Association Insurance*, 2006 U.S. Dist. LEXIS 46433 (D. Colo. 2006).

169. *MAX Software, Inc. v. Computer Associates Int't, Inc.*, 364 F. Supp.2d 1233 (D. Colo. 2005).

170. *Id.* at 1236-37.

171. *Id.* at 1237.

172. *Id.*

173. *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

174. *Klein v. State Farm Mutual Insurance Co.*, 948 P.2d 43, 46 (Colo. App. 1997), *cert. denied* (1997).

175. *See also Northcom, Ltd. v. James*, 848 So.2d 242 (Ala. 2002); *Klein v. State Farm Mutual Auto. Ins. Co.*, 948 P.2d 43, 46 (Colo. App. 1997); *Mountain Plains Constructors, Inc.,* 785 P.2d at 930.

176. *See GATX Management Services, LLC v. Weakland*, 71 F. Supp.2d 1159 (D. Colo. 2001).

177. *Hughley v. Rocky Mountain Health Maintenance Organization, Inc.*, 927 P.2d 1325 (Colo. 1996).

178. *Id. See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court*, 672 P.2d 1015 (Colo. 1983).

179. *Borst v. Allstate Ins. Co.*, 717 N.W.2d 42 (Wis. 2006).

180. *In re Salter v. Farner*, 653 P.2d 413 (Colo. App. 1982), *cert. denied* (1982).

181. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996), *cert. denied* (1997).

182. *Id.*

183. *Giraldi v. Morrell*, 892 P.2d 422 (Colo. App. 1994), *cert. denied* (1995).

184. *McNaughton*, 932 P.2d at 822.

185. *Borst v. Allstate Ins. Co.*, 717 N.W.2d 42 (Wis. 2006). *See also McGinity v. Pawtucket Mut. Ins. Co.*, 899 A.2d 504 (R.I. 2006) (failure of party-appointed arbitrator to reveal attorney-client relationship with appointing party created rebuttable presumption of causal nexus between award and arbitrator's improper conduct).

186. *Gulf Guarantee Life Ins. Co. v. Connecticut General Life Ins. Co.*, 304 F.2d 476 (5th Cir. 2002).

187. *Byerly*, 996 P.2d at 774.

188. CUAA, C.R.S. § 13-22-206; CRUAA, C.R.S. § 13-22-213.

189. *Sterz v. 1010 East Orange, LLC*, Case No. 00CV878, District Court, City and County of Denver (Feb. 13, 2001). *See Stasz v. Schwab,* 17 Cal. Rptr.3d 116 (Cal. App. 2004); *Preston v. O'Rourke*, 811 A.2d 753 (Conn. App. 2002); *Bradley v. Fisher,* 80 U.S. 335 (1871) (judicial immunity); *Cahn v. Int'l Ladies Garmet Union*, 311 F.2d 113 (3rd Cir. 1962), 4 Am. Jur. 2d, *Alternative Dispute Resolution* § 172.

190. *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155 (10th Cir. 2007).

191. *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*, 2006 Cal. App. LEXIS 911 (Cal. App. June 20, 2006).

192. *City and County of Denver*, 939 P.2d at 1370.

193. *See Martin K. Eby Constr. Co., Inc.*, 522 F. Supp. at 450.

194. *See, e.g.*, AIA A-201, General Conditions of the Contract for Construction §§ 4.6.4 and 7.9.1 (1997 Ed.).

195. *E.g.*, *Weyerhauser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*.

196. *See* "Intertwined Claims" under § 21.2.4.

197. *Seretta Construction, Inc. v. Great American Ins. Co.*, 869 So.2d 676 (Fla. App. 2004).

198. *Id.*

199. *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002), *cert. denied* (2003).

200. *See* Benson, "The Power of Arbitrators and Courts to Order Discovery in Arbitration," Part I, 25 *Colo. Law.* 55 (Feb. 1996), Part II, 25 *Colo. Law.* 35 (March 1996).

201. *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249 (Colo. App. 2001).

202. C.R.S. § 13-22-209(2) (2004).

203. *See* Benson, *supra* n. 200.

204. *See* Pearson, "Discovery Under the Federal Arbitration Act," *Dispute Resolution Journal* 47 (Aug./Oct. 2004); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) (FAA only permits subpoenaing of documents with a person for the hearing).

205. *See* articles cited in § 21.11, "Bibliography"; *Odfjell ASA v. Celanese*, 348 F. Supp.2d 283 (S.D.N.Y. 2004); *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999); *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995); *In re Security Life Ins. Co. of America*, 228 F.3d 865 (8th Cir. 2000).

206. *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002), *cert. denied* (2003).

207. *BFN-Greeley, LLC v. Adair Group, Inc.*, 141 P.3d 937 (Colo. App.), *cert. denied* (2006).

208. C.R.S. § 13-22-208.

209. *Carson v. PaineWebber, Inc.,* 62 P.3d 996 (Colo. App. 2002), *cert. denied* (Colo. 2003).

210. C.R.S. § 13-22-207(1) (2004).

211. *Painters Local Union #171 v. Williams & Kelly, Inc.*, 605 F.2d 535, 538 (10th Cir. 1979).

212. *Columbine Valley Constr. Co. v. Bd of Dir., Roaring Fork School Dist.*, 626 P.2d 686, 695 (Colo. 1981). *See also Ash Apartments v. Martinez*, 656 P.2d 708, 709 (Colo. App. 1982).

213. *Dominion Video Satellite, Inc. v. Echostar Satellite, L.L.C.*, 430 F.3d 1269, 1278 (10th Cir. 2005), *citing United Food and Comm'l Workers, Local Union 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 947-48 (10th Cir. 1989).

214. C.R.S. §§ 13-22-206 and -207(1)(c) (2004); C.R.S. § 13-22-213 (2005).

215. C.R.S. § 13-22-207(1)(c) (2004). *See also* AAA rules.

216. C.R.S. § 13-22-210(1) (2004). *See also* CRUAA, C.R.S. § 13-22-219 (2005).

217. *Brown v. Coleman Co.*, 220 F.3d 1180 (10th Cir. 2000), *cert. denied,* 531 U.S. 1192 (2001).

218. *GATX Mgmt Services, LLC*, 171 F. Supp.2d at 1164-65.

219. *Bowlen v. Amoco Pipeline Company*, 254 F.3d 925 (10th Cir. 2001).

220. *R.P.T. of Aspen, Inc. v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. App. 1996).

221. *Dominion Video Satellite*, 430 F.3d at 1277.

222. *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002), *cert. denied* (2002).

223. C.R.S. § 13-22-212 (2004).

224. *Compton v. Lemon Ranches, Ltd.*, 972 P.2d 1078 (Colo. App. 1999).

225. *Camelot Investments, LLC v. LANDDesign, LLC*, 973 P.2d 1279 (Colo. App. 1999).

226. *Recreational Dev. Co. of Am. v. American Construction Co.*, 749 P.2d 1002 (Colo. App. 1987); *Columbine Valley Construction Co. v. Board of Directors, Roaring Fork School District*, 626 P.2d 686 (Colo. 1981).

227. *Duncan v. National Home Ins. Co.*, 36 P.3d 191 (Colo. App. 2001).

228. *Bfunny, Inc. v. Donald Cornelius Production, Inc.*, 2003 Cal. App. Unpub. LEXIS 3925 (Cal. App. 2003) (not selected for official publication).

229. *Peoplesoft, Inc. v. Amherst, L.L.C.*, 369 F. Supp.2d 1263 (D. Colo. 2005).

230. C.R.S. § 13-22-221(3).

231. *Pyle v. Securities U.S.A., Inc.*, 758 F. Supp. 638 (D. Colo. 1991); *cf.*, *Padilla v. D.E. Frey & Co.*, 939 P.2d 475, 478 (Colo. App. 1997) (waiver of objection to award of punitive damages).

232. *Pyle*, 758 F.Supp. at 639.

233. *Padilla*, 939 P.2d at 478.

234. *Mastrobuono v. Shearson Lehmann Hutton, Inc.*, 514 U.S. 52 (1995).

235. *Bowlen v. Amoco Pipeline Company*, 254 F.3d 925 (10th Cir. 2001).

236. *Investment Partners L.P. v. Glamor Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002).

237. C.R.S. § 13-22-210(2) (2004).

238. *See Ash Apartments,* 656 P.2d at 709.

239. *Sopko v. Clear Channel Satellite Svcs., Inc.*, 151 P.3d 663 (Colo. App. 2006).

240. *Id.*

241. *Hosek Mfg.-Overland Foundry Co. v. Teats*, 110 P.2d 976 (Colo. 1941).

242. *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653, 662 (10th Cir. 2006).

243. *Columbine Valley Constr. Co.*, 626 P.2d at 695.

244. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54 (Colo. App. 1982).

245. *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982).

246. C.R.S. § 13-22-216 (2004). *See id.*

247. *See Judd Constr. Co.*, 642 P.2d at 922.

248. *Ringwelski v. Pederson*, 919 P.2d 957 (Colo. App. 1996). *See Paul Mullins Constr. Co.*, 628 P.2d at 114.

249. *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982).

250. *Osborn v. Packard*, 2004 Colo. App. LEXIS 2124 (Nov. 18, 2004), *cert. denied*, *Packard v. Osborn*, 2005 Colo. LEXIS 705 (Colo. Aug. 8, 2005).

251. *In re Gavend*, 781 P.2d 161 (Colo. App. 1989).

252. *Foust v. Aetna Cas. & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989).

253. *Swan v. American Family Mut. Ins. Co.*, 8 P.3d 546 (Colo. App. 2000).

254. *Sooper Credit Union v. Sholar Group Architects, P.C.*, 113 P.3d 768 (Colo. 2005), *reversing Sholar Group Architects v. Sooper Credit Union*, 97 P.3d 258 (Colo. App. 2004).

255. *Sholar Group Architects v. Sooper Credit Union*, 97 P.3d 258 (Colo. App. 2004).

256. C.R.S. § 13-22-211 (2003), repealed and reenacted as amended at C.R.S. § 13-22-220 (2004).

257. C.R.S. §§ 13-22-215(1)(a) and (c) (2003), repealed and reenacted as amended at C.R.S. § 13-22-224 (2004).

258. *Sooper Credit Union*, 113 P.3rd at 771.

259. *Id* at 772.

260. *Id.*

261. *Id* at 769.

262. *Id.* at 772 (*citing* C.R.S. § 13-22-215)

263. *Id.* at 773.

264. *Id.*

265. *Osborn v. Packard*, 2004 Colo. App. LEXIS 2124 (Nov. 18, 2004), *cert. denied*, *Packard v. Osborn*, 2005 Colo. LEXIS 705 (Aug. 8, 2005). *See also* Anno., *Power of Court to Resubmit Matter to Arbitrators for Correction or Clarifications*. . . . , 37 A.L.R.3d 200.

266. *Swan v. American Family Mutual Ins. Co.*, 8 P.3d 546 (Colo. App. 2000).

267. C.R.S. §§ 215(1)(a) and 1(c) (2004).

268. *In re Gavend*, 781 P.2d 161 (Colo. App. 1989).

269. *Foust v. Aetna Casualty & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989).

270. *Superior Construction Co. v. Bentley*, 104 P.2d 331 (Colo. App. 2004).

271. C.R.S. § 13-22-211 (2004).

272. C.R.S. § 13-22-215 (2004).

273. *Applehans v. Farmers Ins. Exchange*, 68 P.3d 594, 597 (Colo. App. 2003); *Superior Construction Co. v. Bentley*, 104 P.3d 331 (Colo. App. 2004).

274. *Applehans v. Farmers Ins. Exchange*, 68 P.3d 594 (Colo. App. 2003).

275. *Roca v. Financial Indemnity Co.*, 155 P.3d 602 (Colo. App. 2006).

276. *Id.*, *citing Farmers Ins. Exchange v. Taylor*, 45 P.3d 759, 761-62 (Colo. App. 2001).

277. *See Kutch v. State Farm Mut. Auto Ins. Co.*, 960 P.2d 93 (Colo. 1998).

278. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo. App. 2003).

279. *Sisters of Mercy of Colo. v. Mead & Mount Constr. Co.*, 439 P.2d 733, 736 (Colo. 1968).

280. *Twin Lakes Reservoir & Canal Co.*, 147 P.2d at 834.

281. *Sisters of Mercy of Colo.*, 439 P.2d at 736, *quoting McIntosh v. Hartford Fire Ins. Co.*, 78 P.2d 82 (Mont. 1938).

282. *Container Tech. Corp.*, 781 P.2d at 122.

283. *Columbine Valley Constr. Co.*, 626 P.2d at 695.

284. *Sisters of Mercy of Colo.*, 439 P.2d at 736.

285. *Twin Lakes Reservoir & Canal Co.*, 147 P.2d at 836.

286. *Id.* at 832.

287. *Parry,* 28 P.2d at 252.

288. *See* 9 U.S.C. § 10; C.R.S. § 13-22-214 (2004); C.R.S. § 13-22-228 (2005).

289. *Sportsman's Quikstop I, Ltd. v. Didonato*, 32 P.3d 633 (Colo. App. 2001); *Foust v. Aetna Casualty & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989).

290. C.R.S. § 13-22-214(1)(b).

291. *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. App. 1996); *Giraldi by and through Giraldi v. Morrell*, 802 P.2d 422 (Colo. App. 1994).

292. *Pyle*, 758 F. Supp. at 640.

293. *Nasca v. State Farm Mutual Auto Ins. Co.*, 12 P.3d 346 (Colo. App. 2000); *cf. Twin Lakes Reservoir & Canal Co.*, 147 P.2d 828 (1944).

294. *BFN-Greeley, LLC v. Adair Group, Inc.*, 141 P.3d 937 (Colo. App.), *cert. denied* (2006).

295. *Carson v. PaineWebber, Inc.*, 62 P.3d 996 (Colo. App. 2002).

296. *Giraldi by and through Giraldi v. Morrell*, 892 P.2d 422 (Colo. App. 1994).

297. *Coors v. Cabo*, 114 P.3d 60 (Colo. App. 2004).

298. *Id.*

299. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001); *Curtiss Simmons Capital Resources, Inc. v. Edward Kraemer & Sons, Inc.*, 23 Fed. Appx. 924, 927 (10th Cir. 2001); *Peoplesoft, Inc. v. Amherst, L.L.C.*, 369 F. Supp.2d 1263 (D. Colo. 2005). *Cf.*, *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822 (10th Cir. 2005). *See also Hicks v. Bank of America, N.A.*, 2007 U.S. App. LEXIS 3984 (10th Cir. 2007); *Morrill v. G.A. Wright Marketing, Inc.*, 2006 U.S. Dist. LEXIS 52726 (D. Colo. 2006).

300. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995).

301. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269 (10th Cir. 2005), *followed in Benson v. Bridgestone/Firestone, Inc.*, 2006 U.S. App. LEXIS 9508 (10th Cir. April 14, 2006).

302. *Hermanns v. Albertson's Inc.*, 203 Fed. Appx. 916, 918 (10th Cir. 2006), *citing Pub. Serv. Co. of Colo. v. Int'l Bhd. of Elec. Workers, Local Union No. 111*, 902 F.3d 19, 20 (10th Cir. 1990).

303. C.R.S. § 13-22-214(2) (2004).

304. *Twin Lakes Reservoir & Canal Co.*, 147 P.2d at 836. *See also Gramling v. Food Machinery and Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957); *In re Andros Compania Maritma, S.A. and Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978).

305. *BFN-Greeley, LLC v. Adair Group, Inc.*, 141 P.3d 937 (Colo. App.), *cert. denied* (2006).

306. *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007), *quoting Int'l Bhd. of Elec. Workers, Local Union 969 v. Babcock Wilcox*, 826 F.2d 962, 966 (10th Cir. 1987).

307. *Alarape v. Group I Automotive, Inc.*, 2006 U.S. Dist. LEXIS 76206 (D. Colo. 2006).

308. *Superior Construction Co. v. Bentley*, 104 P.3d 331 (Colo. App. 2004).

309. C.R.S. § 13-22-216 (2004); CRUAA, C.R.S. § 13-22-216 (2005) (which adds vacating without directing a rehearing to the orders upon which a judgment may be entered).

310. *Camelot Investments, LLC v. LANDesign, LLC*, 973 P.2d 1279 (Colo. App. 1999).

311. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1202 (Colo. App. 2003).

312. *Cf. Wachovia Bank, N.A. v. Schmidt III*, 546 U.S. 303 (2006). *But see Summit Contractors, Inc. v. Legacy Corner, L.L.C.*, 147 Fed. Appx. 798 (10th Cir. 2005).

313. *Compare Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2nd Cir. 1996), *with Discover Bank v. Vadan*, 396 F.3d 366 (4th Cir. 2005), and *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999). *Cf.*, *ICG Telecom Group, Inc. v. Qwest Corp.*, 375 F. Supp.2d 1084 (D. Colo. 2005).

314. *Roe v. Gray*, 165 F. Supp.2d 1164 (D. Colo. 2001).

315. *See Roe v. Gray*, 165 F. Supp.2d 1164 (D. Colo. 2001).

316. *Cameron v. Group Voyagers, Inc.*, 308 F. Supp.2d 1232 (D. Colo. 2004).

317. *Ferla v. Infinity Development Assocs., LLC*, 107 P.3d 1006 (Colo. App. 2004), *cert. denied* (2005). *See McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 (10th Cir. 2005).

318. *Mountain Plains Constructors, Inc.*, 785 P.2d at 931.

319. *Gergel v. High View Homes, L.L.C.*, 996 P.2d 233 (Colo. App. 1999); *Ferla v. Infinity Development Associates*, 107 P.3d 1006 (Colo. App. 2004) (Equal protection clause not violated by allowing appeals of denial of motion to compel arbitration but not of order granting such motion.).

320. *Ferla v. Infinity Development Associates, LLC*, 107 P.3d 1006 (Colo. App. 2004), *cert. denied* (2005).

321. *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065 (Colo. App. 1983).

322. *Fonden v. U.S. Home Corp.*, 83 P.3d 600 (Colo. App. 2003), *cert. denied* (2004).

323. *City and County of Denver*, 939 P.2d at 1360-61; *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).

324. *South Washington Ass'n v. Flanagan,* 859 P.2d 217 (Colo. App. 1992).

325. *Galbraith v. Clark*, 122 P.3d 1061 (Colo. App. 2005).

326. *See* C.R.S. § 13-4-102(1).

327. *McCauley v. Halliburton Energy Servs, Inc.*, 413 F.3d 1158 (10th Cir. 2005), the Tenth Circuit held that the district court is divested of jurisdiction while a non-frivolous 9 U.S.C. § 16(a) motion is pending.

328. *Crystal Clear Commc'ns, Inc. v. Southwestern Bell Telephone Co.*, 415 F.3d 1171 (10th Cir. 2005).

329. *Moses H. Cone Mem'l Hosp. v. Mercury Constr Corp.*, 460 U.S. 1 (1983).

330. *Hicks v. Bank of America, N.A.*, 2007 U.S. App. LEXIS 3984 (10th Cir. 2007).

331. *McCauley v. Halliburton Energy Svcs., Inc.*, 413 F.3d 1158 (10th Cir. 2005).

332. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005), *following Denver & Rio Grande W. Ry. Co. v. Union Pac. Ry. Co.*, 119 F.3d 847, 849 (10th Cir. 1997).

333. *National Union Fire Insurance Co. v. Price*, 78 P.3d 1138 (Colo. App. 2003), *cert. granted* (2003), *appeal dismissed* (2004).

334. *Yaekle v. Andrews*, 2007 Colo. App. LEXIS 322 (Colo. App. Feb. 23, 2007).

335. *In re Atlantic Pipeline*, 304 F.3d 135 (1st Cir. 2002).

336. *Frei v. Davy*, 22 Cal. Rptr.3d 429 (Cal. App. 2004).

337. *City and County of Denver*, 939 P.2d at 1366 (opinion includes an extensive discussion of the City of Denver's procedures for dispute resolution, including Municipal Code § 56-106 and Article 6 used in the Denver International Airport terminal contract).

338. Denver Revised Municipal Code, § 56-106 (Utilities-Sewers).

339. For the validity of this procedure, *see City and County of Denver*, 939 P.2d at 1353.

340. C.R.C.P. 106(a)(4).

341. *Gergel v. High View Homes*, 58 P.3d 1132 (Colo. App. 2002).

342. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

343. *Gergel v. High View Homes*, 58 P.3d 1132 (Colo. App. 2002).

344. *Aetna Bridge Co. v. State Department of Transportation*, 790 A.2d 517 (R.I. 2002).

345. *Board of Governors for Higher Education v. Infinity Constr. Servs., Inc.*, 795 A.2d 1127 (R.I. 2002).