Chapter 2

INTRODUCTION TO COLORADO AND FEDERAL LAWS OF ARBITRATION

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§ 2.1 • INTRODUCTION

Arbitration and mediation are the most commonly used means of alternative dispute resolution (ADR). Because mediation requires that the parties agree upon a resolution in order to resolve a dispute, there are relatively few legal requirements governing the mediation process. Arbitration, on the other hand, requires that the parties agree only upon the process to be followed to result in a resolution — not on the resolution itself. As a result, arbitration is evolving into a process much more akin to litigation, with increasing rules and structure, while still maintaining its distinct characteristics and flexibility as compared to litigation. The following chapters provide an overview of those rules and structures as embodied in Colorado statutes and case law, federal statutes, and Colorado federal court case law.

§ 2.1.1—What Is Arbitration?

The U.S. Supreme Court has clearly defined that arbitration under the Federal Arbitration Act (FAA) is a matter of contract, and must be vigorously enforced.[1] Arbitration is defined in the Colorado Dispute Resolution Act as "the referral of a dispute to one or more neutral third parties for a decision based on evidence and testimony provided by the disputants."[2] As will hereinafter be seen, that definition is narrower than the scope of arbitration subject to the arbitration statutes. Generally, arbitration does not require that all of the arbitrators be neutral. There is no reference to binding or conclusive results being rendered.

Arbitration can be binding or non-binding. 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. This book deals primarily with binding arbitration.

In certain cases, however, the parties agree to non-binding arbitration. Then, the courts and the arbitrator are bound by the parties' agreement that their arbitration is advisory only.[3] Very generally speaking, all procedures for non-binding arbitration should be the same as for binding arbitration. Only the effect of the award would differ. The role of the court in non-binding arbitration has not yet been tested. See § 2.3.1, as to whether a non-binding process is within the arbitration statute.

However, while there are cases to the contrary, most cases hold that the FAA applies to non-binding arbitration agreements, and specifically § 3 (stay of litigation).[4]

See §§ 3.4, 3.4.1, 3.7.2, 7.4, and 8.6.2.

It should be noted that Colorado has many statutes imposing arbitration in very specific situations. These statutes are discussed in a later chapter, including § 3.8. Various trade organizations have implemented their own unique types of arbitration, which may or may not be within the scope of the arbitration statutes. There have been no cases defining what constitutes "arbitration" for purposes of application of the Colorado Revised Uniform Arbitration Act (CRUAA).

§ 2.1.2—What Is Arbitration For Purposes Of The Arbitration Statutes?

FAA

See §§ 2.1, 3.4.1, 3.7.2, 4.3.5, and 8.6.2 of this book as to case law defining what constitutes arbitration for purposes of applying the CRUAA and FAA. *See also* § 25.6.

§ 2.2 • A BRIEF HISTORY OF ARBITRATION

While arbitration has received a sharp burst of popularity in recent years, the process is not new. Thomas Oehmke, in his book *Commercial Arbitration*,[5] sets forth the historical mileposts in the use of arbitration. These mileposts include:

1500 B.C.	Earliest evidence of use of arbitration (Egypt).
1224 A.D.	First recorded use of arbitration in English law.
1800s A.D.	Pennsylvania passes precursor to first modern-type arbitration statute.
1854 A.D.	*Buchell v. Marsh*, 58 U.S. 344 (1854), holds award will not be set aside for errors of law or fact.
1920 A.D.	New York passes first modern arbitration statute.

The FAA was passed in 1925 to overrule the federal "judiciary's longstanding refusal to enforce agreements to arbitrate."[6] Thus, at common law, the judiciary at best was reluctant to enforce contracts to arbitrate disputes.

On the other hand, Colorado has no such history of judicial hostility to arbitration agreements. Indeed, in 1861, the Colorado Territorial Legislature adopted the first Colorado arbitration statute.[7]

In 1875, in *Perrigo Gold Mining & Tunneling Co. v. Grimes*,[8] the Supreme Court of the Colorado Territory determined that the parties' dismissal of a *replevin* action and submission of the dispute to arbitration concluded the *replevin* suit. The court noted that when the parties submit a dispute to arbitration, the court loses jurisdiction, and that the statute provided for the clerk of court to enter judgment upon an arbitration award.

The next year, in *Schaefer v. Gildea*,[9] the Supreme Court of the Colorado Territory stated, "The decision of an arbitrator is binding after publication, and a parol award is good. . . . A parol award delivered to one party in the absence of the other is binding."[10]

In 1876, Article XVIII, § 3 was added to the Colorado Constitution:

> 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.

Thereafter, in *Lee v. Grimes*,[11] the court noted that its earlier decision in *Perrigo Gold Mining & Tunneling Co. v. Grimes*[12] held that the parties' submission of a *replevin* dispute to arbitrators would not discharge the sureties on the *replevin* bond. However, under the circumstances now presented, the court further held that the surety was bound by the arbitration award. Interestingly, and perhaps not the law today, the court held that "[i]t is within the general powers of an attorney-at-law to submit the suit of his client to arbitration."[13]

It was apparent that even when Colorado was a territory, the Colorado courts were not hostile to arbitration, and the adoption of Article XVIII, § 3 of the Colorado Constitution reflected a favorable disposition of the legislature and citizenry to the arbitration process.

For many years, the Colorado Constitution, miscellaneous statutes, and provisions in the rules of procedure defined the law of arbitration in Colorado. Although the Uniform Arbitration Act was promulgated in 1955, Colorado did not adopt the Act until 1975. It was not adopted by Colorado simply to validate agreements to arbitrate, as they were already valid in Colorado. Rather, adoption of the Act was also to "(2) assure an effective arbitration process, (3) provide necessary procedural safeguards, and (4) provide an efficient procedure when judicial assistance is necessary."[14]

However, in *Lim v. American Economy Insurance Co.*,[15] the Colorado federal district court appeared to hold that the process result had to be binding on the parties. Since a non-binding process was in issue, it could be viewed as dictum. *See also* § 2.1.1.

See Fazzi, "Mediation and Arbitration in the Middle Ages: England 1154 to 1158," *Dispute Resolution Journal* (ABA 2013).

§ 2.3 • THE VARIOUS TYPES AND MEANINGS OF "ARBITRATION"

Fortunately, the term "arbitration" does not have a fixed meaning, and parties have somewhat broad latitude to define the process themselves in their own agreements. However, there probably are a few characteristics that must exist for the term to apply. These may include: (1) a decision/resolution of the dispute must be rendered, whether binding or non-binding; (2) the parties present their respective evidence (adversary system), as distinguished from an adjudicative system whereby the "arbitrator" might seek out the evidence; and (3) perhaps at least one arbitrator must serve as neutral decision-maker. Of course, as discussed elsewhere, there are other characteristics that must be present in order for the process to be within the scope of the arbitration statutes. *See* § 2.1.1.

See generally §§ 2.1-2.2, 3.4.1, 3.7.2, 4.3.5.

§ 2.3.1—Binding Versus Non-binding 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 arbitration 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, chief of which is that it enables the parties to see how a neutral would decide the claims, providing a strong foundation for negotiation of a settlement.

However in *Lim v. American Economy Insurance Co.*,[16] the Colorado federal district court appeared to hold that the process result had to be binding on the parties. However, since a non-binding process was in issue, it could be viewed as dictum on the issue. *See also* § 2.1.1.

Non-binding arbitration is discussed in Chapter 25, "Other ADR Procedures," and § 2.1.1.

§ 2.3.2—Administered Versus Non-administered Arbitration

In a non-administered arbitration, the arbitrator provides all administration of the arbitration. In other words, it is like a judicial procedure in which the judge does not have a clerk of court to handle the administrative matters; he or she handles them himself or herself.

An administered arbitration, on the other hand, adds a "clerk of arbitration" to handle administrative matters that are analogous to matters handled by a clerk of court. This administration provides a separation between the arbitrator and the parties that often is very helpful. For example, with administration, the arbitrator usually is not in contact with the parties concerning compensation. In addition, the administrator may have defined powers, including the power to disqualify the arbitrator.

The American Arbitration Association, the oldest and largest provider of arbitration services, administers arbitrations through its case managers. Other arbitration organizations also provide administration, while others do not.

The CRUAA defines an "arbitration organization" as:

> an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.[17]

See also § 12.2.

§ 2.3.3—Compulsory Versus Voluntary Arbitration

Can the courts or the legislature require that parties resolve disputes by arbitration? In 1886, the Colorado Supreme Court considered "A Bill for an Act to provide for the amicable adjustment of grievances and disputes that may arise between employers and employees, and to authorize the creation of a Board of Arbitration."[18] The question submitted to the court was: "Is said bill, as to its compulsory provisions, in conflict with section 3, of article XVIII, of the constitution, and of section 7, article II, of the bill of rights?" In a *per curiam* decision, the court ruled:

> We are of the opinion that section 3, article XVIII, neither contemplates nor admits of a law providing for the compulsory submission of differences to arbitration. A submission of differences to the decision of arbitrators must be by mutual agreement of the parties to the controversy, who (in the language of the section) choose that mode of adjustment.
>
> We see nothing in the provisions of the bill in conflict with section 7, article II of the bill of rights.

But see Chapter 25.

If the agreement to arbitrate is oral instead of in writing, it did not follow the prerequisites of former C.R.C.P. 109, providing procedures for arbitration prior to the adoption of the Colorado Uniform Arbitration Act (CUAA). However, the oral agreement to arbitrate fulfilled the requirements of the common law of arbitration. Therefore, the award was valid, but execution could only follow as a judgment in an action on the award.[19]

Perhaps a federal court can order binding arbitration pursuant to 28 U.S.C. § 651.[20]

§ 2.3.4—International Arbitration

Arbitration is a major means of resolution of commercial disputes between companies of different nations. International arbitration is not within the scope of this book. However, a brief introduction is provided in Chapter 23.

§ 2.4 • 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. Alexander Hamilton is said to have generally favored arbitration or amicable settlement in lieu of lawsuits.[21] However, at common law in most jurisdictions, arbitration agreements were not enforceable, although that was not true under Colorado common law.[22]

CRUAA

In *Coors Brewing Co. v. Cabo*,[23] the Colorado Court of Appeals stated that the "CUAA [Colorado Uniform Arbitration Act] is in derogation of the common law and must be strictly construed."[24] But, it is suggested that the arbitration statutes are not in derogation of Colorado common law, and these statutes should not be strictly construed.

At least since 1861, the policy of the Territory and State of Colorado has been to foster and encourage arbitration as a method of dispute resolution, and all disagreements as to whether a dispute is arbitrable are to be resolved in favor of arbitration.[25] *See* § 1.6.

On the other hand, the Colorado Court of Appeals has defined the purpose of the Colorado Uniform Arbitration Act as "to provide a uniform statutory framework for arbitration and to encourage settlement of disputes through the arbitration process."[26]

FAA

As reflected in the FAA, federal law also establishes a strong policy favoring arbitration.[27] Public policy in Colorado also strongly encourages the resolution of disputes through arbitration.[28] "A broad or unrestricted arbitration clause makes the 'strong presumption favoring arbitration [apply] with even greater force.'"[29] Any state law relative to arbitration will not take precedence over the federal policy when the federal act is applicable.[30] Failure to follow the mandates of a valid alternative 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.[31]

The U.S. Supreme Court has repeatedly observed that the achievement of "finality" (a word that is often used in the arbitration context as a synonym for "efficiency") is not the primary policy underlying the FAA. Rather, the primary policy underlying the FAA is the enforcement of the parties' agreement to arbitrate. In *Dean Witter Reynolds, Inc. v. Byrd*,[32] the Court stated:

> The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately negotiated arbitration agreements. The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.

Similarly, in *First Options of Chicago, Inc. v. Kaplan*,[33] the Supreme Court said:

> After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, *Dean Witter Reynolds*, *supra*, at 219-220, but to ensure that commercial arbitration agreements, like other contracts, "'are enforced according to their terms,'" *Mastrobuono*, *ante*, at 54 (quoting *Volt Information Sciences*, 489 U.S. at 479), and according to the intentions of the parties, *Mitsubishi Motors*, 473 U.S. at 626. *See Allied-Bruce*, 513 U.S. at 271.

See also § 1.7.

In *Advanced Bodycare Solutions, LLC v. Thione, International, Inc.*,[34] the Eleventh Circuit stated that "[t]he purpose of the FAA is to 'relieve congestion in the courts and to provide parties with an alternative method of dispute resolution that is speedier and less costly than litigation.'"[35]

See also § 3.10.

§ 2.5 • SPECIALIZED STATUTES DEFINING, REQUIRING, LIMITING, AND PROMOTING ARBITRATION

§ 2.5.1—Colorado Statutes

Colorado has numerous statutory provisions governing, providing, or referring to arbitration. See Chapter 3 as to statutes regulating arbitration. The following are some of these statutes:

- C.R.S. § 5-3.5-102(1)(e), Consumer Equity Protection. Limitations on mandatory arbitration clauses (certain loans);

- C.R.S. §§ 6-1-410 and 6-1-509, Colorado Consumer Protection Act. Certain disputes under parts 4 and 5 among manufacturers, dealers, and lessors concerning enforcement of consumer rights "shall be subject to arbitration pursuant to the Colorado rules of civil procedure." The award of the arbitrator "shall be binding upon the parties and shall only be subject to court review by trial de novo";
- C.R.S. § 7-30-107, Uniform Unincorporated Nonprofit Association Act. Capacity to sue or be sued in common name includes in arbitration;
- C.R.S. § 8-1-123, Division of Labor — Industrial Claim Appeals Office. Director shall promote arbitration, mediation, and conciliation;
- C.R.S. § 8-3-112, Labor Peace Act. Arbitration by parties to a labor dispute;
- C.R.S. § 8-43-206.5, Labor and Industry — Settlement and Hearing Procedures. Right to Binding Arbitration;
- C.R.S. § 10-3-523, Regulation of Insurance Companies — Insurers' Rehabilitation and Liquidation. No action at law or in arbitration shall be brought against insurer or liquidator;
- C.R.S. § 12-14.3-107, Colorado Consumer Credit Reporting Act. Consumer's right to file action in court or arbitrate disputes;
- C.R.S. § 13-20-802.5, Construction Defect Actions. "Action," as used therein, "means a civil action or an arbitration proceeding for damages, indemnity, or contribution brought against a construction professional";
- C.R.S. § 13-25-102, Evidence. Section 102 mortality table applies to other modes of litigation before persons having power and authority to receive evidence;
- C.R.S. § 13-62.1-101, Uniform Foreign-Money Claims Act. "Action," as used therein, includes a judicial proceeding or arbitration;
- C.R.S. §§ 13-64-302.5 and -403. Arbitration between patient and health-care provider under the Colorado Healthcare Act;
- C.R.S. § 13-64-402, Health Care Availability Act — Collateral source evidence. Section applies to any court or arbitration proceeding;
- C.R.S. § 13-64-403, Health Care Availability Act. Requires notice in bold-faced type of an arbitration clause in a contract;
- C.R.S. § 13-80-107.5, Limitation of actions for uninsured or underinsured motorist insurance. Applies to an action and to arbitration;
- C.R.S. § 15-1-804(2)(r), Probate, Trusts, and Fiduciaries. Power to submit certain issues to arbitration;
- C.R.S. § 18-5-401, A bribe to violate neutral arbitrator's fiduciary duty is a felony;
- C.R.S. § 24-4-107, Rule-Making and Licensing Procedures by State Agencies. Article does not apply to arbitration and mediation functions;
- C.R.S. § 24-60-1301, Arbitration under multi-state tax compacts (Article IX thereof);
- C.R.S. § 30-6-101, Arbitration of boundary disputes between counties;
- C.R.S. §§ 33-3-104(1)(d) and -203, Damage by Wildlife. Arbitration of claims for compensation;
- C.R.S. §§ 33-5-105 and -107. Arbitration of Wildlife Commission claims that construction will adversely affect streams;
- C.R.S. § 35-5.5-110, Colorado Noxious Weed Act. Arbitration panel may be requested to determine final management plan;
- C.R.S. §§ 35-27-122 and -123, Colorado Seed Act. Commissioner may approve arbitration counsel to determine certain issues submitted by seed buyer;

- C.R.S. §§ 35-46-102 and -104. "Referees" of grazing rights on public domain range;
- C.R.S. § 35-53-125. Arbitration of disputed ownership of cattle;
- C.R.S. § 38-5-107. Arbitration of terms or conditions of crossings of property for high-voltage lines;
- C.R.S. § 38-33-109, Condominium Ownership Act. Unit owners' liability applies to a suit or arbitration;
- C.R.S. § 38-33.3-124, Colorado Common Interest Ownership Act. Common interest communities are encouraged to adopt protocols that make use of mediation or arbitration as alternatives to, or preconditions to, filing of a complaint;
- C.R.S. §§ 39-8-107 through -108.5. Arbitration of denial of adjustment of property tax assessment by the board of county commissioners;
- C.R.S. §§ 39-24-101, *et seq*. Arbitration under the Uniform Act on Interstate Compromise and Arbitration of Inheritance Tax;
- C.R.S. § 40-27-110, Killing Stock — Fencing. Finding of state board of stock inspection commissioners shall be considered as an arbitration of the issues;
- C.R.S. § 40-27-111, Killing Stock — Fencing. Owner of animal killed or wounded by railroad may submit claims to arbitration;
- C.R.S. § 42-10-107, Motor Vehicle Warranties. Statute of limitations tolled for period consumer has submitted issues to arbitration under section 42-10-106 (federal dispute settlement procedure for refund or replacement); and
- C.R.S. § 43-2-117. Arbitration of county line road location.

§ 2.5.2—Federal Statutes

A sampling of federal statutes dealing with or providing for arbitration includes the following:

- 5 U.S.C. §§ 571, *et seq.*, Alternative means of dispute resolution in the administrative process;
- 5 U.S.C. § 7122, Arbitration in labor-management relations; exceptions to arbitral awards;
- 7 U.S.C. § 15b, Agriculture — Commodity Exchanges — Cotton Futures Contracts. Adjustment of the price of the grade or grades by arbitration;
- 7 U.S.C. § 21, Agriculture — Commodity Exchanges — Registered Futures Associations. The rules of the association should provide a fair, equitable, and expeditious procedure through arbitration or otherwise for the settlement of consumers' claims and grievances against any member or employee;
- 7 U.S.C. § 136a, Registration of pesticides, arbitration;
- 7 U.S.C. § 255, Agriculture — Warehouses. A federal district court shall have exclusive jurisdiction over any action brought under this chapter, but does not prevent enforcement of agreements to arbitrate under FAA;
- 7 U.S.C. § 671, Agricultural marketing agreements; arbitration of disputes concerning milk;
- 7 U.S.C. § 1359ff, Arbitration of disputes between processor and producer;
- 9 U.S.C. §§ 201, *et seq*., Convention on Recognition and Enforcement of Foreign Arbitral Awards;
- 9 U.S.C. §§ 303, *et seq*., Inter-American Convention on International Commercial Arbitration;
- 15 U.S.C. § 78o-4(b)(2)(D), Arbitration and municipal securities rulemaking;
- 15 U.S.C. § 1226, Motor vehicle franchise contract dispute resolution;

- 16 U.S.C. § 973n, Tuna Convention arbitration;
- 17 U.S.C. § 907, Copyrights — Protection of Semiconductor Chip Products — Limitation on Exclusive Rights: Innocent Infringement. Determination by the court in a civil action for infringement unless the parties resolve the issue by voluntary negotiation, mediation, or binding arbitration;
- 17 U.S.C. § 1321, Copyrights — Protection of Original Designs — Remedy for Infringement. Use of arbitration to resolve dispute;
- 19 U.S.C. § 1337, Arbitration of unfair practices in import trade;
- 20 U.S.C. § 107d-1, Grievances of blind licensees (of vending facility), arbitration;
- 20 U.S.C. § 107d-2, Education — Vending Facilities for Blind in Federal Buildings. Arbitration of complaints;
- 20 U.S.C. § 975, Education — Indemnity for Exhibitions of Arts and Artifacts — Claims for Losses. Adjustment of valid claims for losses by arbitration of issues relating to the dollar value of damages involving less than total loss or destruction of such covered objects;
- 20 U.S.C. § 1099b, Education — Higher Education Resources and Student Assistance — Recognition of Accrediting Agency or Association. Arbitration;
- 20 U.S.C. § 1416, Education — Education of Individuals with Disabilities — Monitoring, Technical Assistance, and Enforcement. Use of resolution session, mediation, and voluntary binding arbitration;
- 22 U.S.C. § 290k-9, Jurisdiction of United States courts and enforcement of arbitral awards;
- 22 U.S.C. § 1650a, Foreign Relations and Intercourse — Settlement of Investment Disputes — Arbitration Awards Under the Convention. Arbitration awards under the Convention, full faith and credit; non-application of FAA to an award of an arbitral tribunal rendered pursuant to chapter IV of the Convention;
- 22 U.S.C. § 2197, Foreign Relations and Intercourse — Foreign Assistance — General Provisions Relating to Insurance, Guaranty, Financing, and Reinsurance Programs. Arbitration award shall be final and conclusive notwithstanding any other provision of law;
- 22 U.S.C. § 2370, Foreign Relations and Intercourse — Foreign Assistance — Prohibitions Against Furnishing Assistance. Available legal remedies shall include arbitration;
- 22 U.S.C. § 2370a, Foreign Relations and Intercourse — Foreign Assistance — Expropriation of United States Property. Arbitration under the rules of the Convention for the Settlement of Investment Disputes or other mutually agreeable binding international arbitration;
- 22 U.S.C. § 2395, Foreign Relations and Intercourse — Foreign Assistance — General Authorities. Settlement and arbitration of claims arising under investment guaranty operations;
- 22 U.S.C. § 2710, Expenses relating to participation in the arbitration of certain disputes;
- 22 U.S.C. § 3701, Foreign Relations and Intercourse — Panama Canal — Labor-Management Relations. Use of binding arbitration;
- 22 U.S.C. § 6083, Foreign Relations and Intercourse — Cuban Liberty and Democratic Solidarity (Libertad) — Proof of Ownership of Claims to Confiscated Property. Binding international arbitration;
- 22 U.S.C. § 7844, Foreign Relations and Intercourse — North Korean Human Rights — United Nations High Commissioner for Refugees. Arbitration of issues;
- 25 U.S.C. § 416a, Indians — Lease, Sale, or Surrender of Allotted or Unallotted Lands — Lease Provisions. Binding arbitration of disputes;

- 26 U.S.C. § 7123, Internal Revenue Code — Closing Agreements and Compromises — Appeals Dispute Resolution Procedures. Pilot program for arbitration;
- 28 U.S.C. § 654, Alternative Dispute Resolution Act of 1998;
- 28 U.S.C. § 2677, Tort claims against United States;
- 35 U.S.C. § 294, Patents;
- 36 U.S.C. § 220522, U.S. Olympic Committee, national governing bodies, arbitration;
- 39 U.S.C. § 1207 and 1005(c), Postal Service — Employee-Management Agreements — Collective-Bargaining Agreements. Procedures culminating in binding third-party arbitration;
- 40 U.S.C. § 18301, National capital area interest arbitration;
- 42 U.S.C. § 300ff-12, The Public Health and Welfare — Public Health Service — Administration and Planning Council. Grievances with respect to funding submitted to binding arbitration;
- 42 U.S.C. § 2000g-1 and 2000g-2, Civil rights, conciliation services of community relations;
- 42 U.S.C. § 3602, Fair housing;
- 42 U.S.C. § 3610, The Public Health and Welfare — Fair Housing — Administrative Enforcement; Preliminary Matters. A conciliation agreement may provide for binding arbitration;
- 42 U.S.C. § 4083, The Public Health and Welfare — National Flood Insurance — Settlement of Claims; Arbitration. Use of arbitration;
- 42 U.S.C. § 6249, The Public Health and Welfare — Energy Policy and Conservation — Contracting for Petroleum Product and Facilities. The Secretary may agree to binding arbitration of disputes under any contract entered into under subsection;
- 42 U.S.C. § 7651d, The Public Health and Welfare — Air Pollution Prevention and Control — Phase II Sulfur Dioxide Requirements. Agreement for purposes of establishing terms and conditions of the electric utility's purchase of power may provide for arbitration;
- 42 U.S.C. § 9622, The Public Health and Welfare — Comprehensive Environmental Response, Compensation, and Liability — Settlements. Use of arbitration;
- 42 U.S.C. § 10137, The Public Health and Welfare — Nuclear Waste Policy — Consultation with States and Affected Indian Tribes. Use of arbitration;
- 42 U.S.C. § 10155, The Public Health and Welfare — Nuclear Waste Policy — Storage of Spent Nuclear Fuel. Use of arbitration;
- 42 U.S.C. § 12212, The Public Health and Welfare — Equal Opportunity for Individuals with Disabilities — Alternative Means of Dispute Resolution. The use of arbitration is encouraged to resolve disputes;
- 42 U.S.C. § 12636, The Public Health and Welfare — National and Community Service — Notice, Hearing, and Grievance Procedures. Arbitration;
- 42 U.S.C. § 16431, Energy Policy, 2005 — The Public Health and Welfare — Federal Utility Participation in Transmission Organizations. Provisions for the resolution of disputes through arbitration or other means;
- 43 U.S.C. § 617d, Public Lands — Boulder Canyon Project — Contracts for Storage and Use of Waters for Irrigation and Domestic Purposes; Generation and Sale of Electrical Energy. Disputes or disagreements as to interpretation or performance of such contract may be determined by arbitration;
- 43 U.S.C. § 618h, Public Lands — Boulder Canyon Project — Termination of Existing Lease of Hoover Power Plant; Lessees as Agents of United States; Termination of Agency. Interpretation or performance may be determined by arbitration;

- 43 U.S.C. § 619a, Public Lands — Boulder Canyon Project — Renewal Contracts for Power. Interpretation or performance of the provisions of this subchapter or of applicable regulations or of the contract may be determined by arbitration;
- 43 U.S.C. § 1606, Public Lands — Alaska Native Claims Settlement — Regional Corporations. Provides for arbitration;
- 43 U.S.C. § 1611, Public Lands — Alaska Native Claims Settlement — Native Land Selections. Arbitration of disputes over land selection rights and boundaries;
- 43 U.S.C. § 1636, Public Lands — Implementation of Alaska Native Claims Settlement and Alaska Statehood — Alaska Land Bank. Actions of trustee, receiver, or custodian that are for purposes of exploration or pursuant to a judgment in law or in equity (or arbitration award) arising out of any claim made pursuant to Alaska Native Claims Settlement Act;
- 43 U.S.C. § 1641, Public Lands — Implementation of Alaska Native Claims Settlement and Alaska Statehood — Conveyances to Village Corporations. The conveyance shall not be effective as to such lands until an arbitration decision or other binding agreement between or among the corporations is filed with and published by the Secretary of the Interior;
- 43 U.S.C. § 1653, Public Lands — Trans-Alaska Pipeline — Liability for Damages. Claims for such injury or damages may be determined by arbitration;
- 43 U.S.C. § 1716, Public Lands — Federal Land Policy and Management — Exchanges of Public Lands or Interests Therein Within the National Forest System. The appraisal "shall be submitted to an arbitrator appointed by the Secretary from a list of arbitrators submitted to him by the American Arbitration Association";
- 45 U.S.C. § 157, Railroads — Railway Labor — Arbitration. Controversy between a carrier or carriers and its or their employees not settled may be submitted to arbitration;
- 45 U.S.C. § 158, Railroads — Railway Labor — Agreement to Arbitrate; Form and Contents; Signatures and Acknowledgment; Revocation. "The agreement to arbitrate (a) [s]hall be in writing; (b) [s]hall stipulate that the arbitration is had under the provisions of this Act; (c) [s]hall state whether the board of arbitration is to consist of three or six members";
- 45 U.S.C. § 159, Railroads — Railway Labor — Award and Judgment Thereon; Effect on Individual Employee. "The award of a board of arbitration, having been acknowledged as herein provided, shall be filed with the clerk's office of the district court designated in the agreement. . . .";
- 45 U.S.C. § 744, Railroads — Regional Rail Reorganization — Termination and Continuation of Rail Services. Disputes with respect to the application of regulations may be submitted to arbitration;
- 45 U.S.C. § 797m, Railroads — Regional Rail Reorganization — Arbitration. Employee dispute with respect to the interpretation, application, or enforcement of the provisions of this subchapter submitted to arbitration;
- 45 U.S.C. § 836, Railroads — Railroad Revitalization and Regulatory Reform — Employee Protection. Issues subject to arbitration;
- 45 U.S.C. § 1005, Railroads — Rock Island Railroad Employee Assistance — Employee Protection Agreement. Arbitration of disputes over an employee's eligibility or claim;
- 46 U.S.C. § 30912, Government vessels, arbitration;
- 46 U.S.C. § 31108, Shipping — Suits Involving Public Vessels — Arbitration, Compromise, or Settlement. "The Attorney General may arbitrate, compromise, or settle a claim under this chapter if a civil action based on the claim has been commenced";

- 47 U.S.C. § 252, Telecommunications — Wire or Radio Communication — Procedures for Negotiation, Arbitration, and Approval of Agreements. Procedures for negotiation, arbitration, and approval of agreements;
- 49 U.S.C. § 14708, Transportation — Enforcement; Investigations; Rights; Remedies — Dispute Settlement Program for Household Goods Carriers — Offering Shippers Arbitration. A carrier providing transportation of household goods subject to jurisdiction;
- 49 U.S.C. § 42111, Transportation — Labor-Management Provisions — Mutual Aid Agreements. Disputes of striking employees can be submitted to binding arbitration; and
- 49 U.S.C. § 44308, Transportation — Insurance — Administrative. The Secretary of Transportation may prescribe the policies that may authorize the binding arbitration of claims made thereunder.

§ 2.6 • WHY ARBITRATION?

Arbitration has developed because of the perceived disadvantages of dispute resolution through our judicial system, as well as perceived advantages of arbitration. These advantages include

- Reduced cost;
- Speed;
- Reduction in costly/unnecessary discovery;
- Increased efficiency;
- Expertise of the decision-maker in the subject matter;
- Flexible/informal procedures;
- Finality of decision (limited appeal);
- Confidentiality;
- Decision-maker with sufficient time;
- Party control and flexibility — the parties can design the process/procedures to meet their particular needs (*e.g.*, limits on time, witnesses, discovery, locales of hearing, and briefing);
- Ease of enforcement of award in many foreign countries; and
- Avoidance of juries.

In any given arbitration, some of these perceived benefits may not be realized.

§ 2.7 • WHY NOT ARBITRATION?

In recent years, arbitration has come under attack by its detractors on multiple grounds. These perceived grounds include:

- Cost. Arbitration is not cheaper than litigation when the arbitrator, as is common, allows the same discovery (or more) than in litigation and prehearing motions. Arbitrators' fees can be very expensive.

- Speed. Arbitrators are loath to force the parties (counsel) to hold the hearing "quickly" after service of the demand, particularly as arbitration has become more like litigation (discovery, motions, etc.).
- Limited Appeal. The grounds on which an arbitration decision may be appealed are very narrow when compared to appeal of a litigation judgment. Thus, substantial errors of the arbitrators remain uncorrected.
- Arbitrators may not be required to follow law, and often do not.
- Arbitration clauses are often used by large entities in adhesion contracts with customers to eliminate class action litigation, thereby effectively eliminating any relief for wronged customers.

FAA

See §§ 3.4.1 and 3.7.2 as to case law defining what constitutes arbitration for purposes of applying the CRUAA and FAA. *See also* § 25.6.

§ 2.8 • ETHICAL REQUIREMENT TO ADVISE CLIENTS OF ADR

Rule 2.1 of the Colorado Rules of Professional Conduct provides in part:

> In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

This ethical rule emphasizes the strong public policy in favor of arbitration and other means of alternative dispute resolution. Indeed, few states have any similar ethical rules.

§ 2.9 • RECENT LEGISLATION INVOLVING ARBITRATION

§ 2.9.1—Recent Colorado Statutes Involving Arbitration

C.R.S. § 12-58.5-103, with respect to private investigators, adding to definition of private investigation, as meaning an investigation for purposes of securing for others evidence for arbitrations, as well as for trials, etc.

C.R.S. § 13-80-107.5, amending limitation of actions for uninsured/underinsured motorists insurance to include in applicability "arbitrations" under Title 10 in addition to "actions."

C.R.S. § 24-75-1107, concerning findings by an arbitration panel regarding the payments to State of Colorado tobacco litigation settlement monies.

C.R.S. § 29-5-203, providing "advisory fact-finders" with respect to firefighters' collective bargaining means persons agreed upon by the parties as appointed by the American Arbitration Association or similar organization.

C.R.S. § 39-5-122.8, concerning creation of arbitration as an alternative tax valuation protest and appeal procedure within the City and County of Denver.

§ 2.9.2—Recent Federal Legislation Involving Arbitration

49 U.S.C. § 11708 providing for voluntary arbitration to resolve rail rate and practice complaints.

54 U.S.C. § 101915, providing for arbitration of disputes between concessionaires and the National Park Service.

Consolidated Appropriations Act 2016, § 8097, providing generally that funds may not be expended for any federal contract for more than $1 million, unless the contractor agrees not to require employees or independent contractors to arbitrate employment disputes.

NOTES

1. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).
2. C.R.S. § 13-22-302(1) (2016).
3. *Water Works Emp. Local No. 1045, AFSCME, AFL-CIO v. Bd. of Water Works*, 615 P.2d 52 (Colo. App. 1980).
4. *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998); *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231 (2d Cir. 2006).
5. Thomas Oehmke, *Commercial Arbitration* (Lawyers Co-operative Publishing Co. 1987).
6. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).
7. L. 1861, pp. 380-82.
8. *Perrigo Gold Mining & Tunneling Co. v. Grimes*, 2 Colo. 651 (Colo. 1875).
9. *Schaefer v. Gildea*, 3 Colo. 15 (Colo. 1876).
10. *Id.* at 19.
11. *Lee v. Grimes*, 4 Colo. 185 (Colo. 1878).
12. *Perrigo Gold Mining & Tunneling Co. v. Grimes*, 2 Colo. 651 (Colo. 1875).
13. *Lee*, 4 Colo. at 189.
14. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 346 (Colo. 1998).
15. *Lim v. Am. Econ. Ins. Co.*, 2014 U.S. Dist. LEXIS 51304, 2014 WL 1464400 (D. Colo. April 14, 2014).
16. *Id*.
17. C.R.S. § 13-22-201(1) (2016).
18. *In re Bill Relating to Compulsory Arbitration*, 21 P. 474 (Colo. 1886).
19. *Koscove v. Peacock*, 317 P.2d 332 (Colo. 1957).
20. *Advanced Network Installations, Inc. v. Cameron*, 2009 U.S. Dist. LEXIS 33913 (W.D. Pa. April 22, 2009).
21. Chernow, *Alexander Hamilton* 188 (New York, N.Y.: Penguin Books, 2004).
22. *Wales v. State Farm Mut. Auto. Ins. Co.*, 559 P.2d 255, 257 (Colo. App. 1976). *Cf. Ezell v. Rocky Mountain Bean & Elevator Co.*, 232 P. 680 (Colo. 1925); *Coors Brewing Co. v. Cabo*, 114 P.3d 60 (Colo. App. 2004).
23. *Coors Brewing Co.*, 114 P.3d 60.
24. *Id.* at 65.
25. *Huizar v. Allstate Ins. Co.*, 932 P.2d 839, 840 (Colo. App. 1996), *rev'd on other grounds*, 952 P.2d 342 (Colo. 1998).

26. *Sopko v. Clear Channel Satellite Servs., Inc*., 151 P.3d 663, 666-67 (Colo. App. 2006) (citing *Lane v. Urqitus*, 145 P.3d 672 (Colo. 2006); *Farmers Ins. Exch. v. Taylor*, 45 P.3d 759,761 (Colo. App. 2001)).

27. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

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

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

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

31. *See Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999); *City & County of Denver v. Dist. Court*, 939 P.2d 1353 (Colo. 1997).

32. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

33. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

34. *Advanced Bodycare Solutions, LLC v. Thione, Int'l, Inc.*, 524 F.3d 1235 (11th Cir. 2008).

35. *Id.* at 1239-40 (quoting *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc*., 508 F.3d 995, 1001 (11th Cir. 2007)).