Chapter 4

DOES STATE LAW, FEDERAL LAW, OR THE CONTRACT GOVERN THE ARBITRATION OR JUDICIAL PROCEEDINGS?

SYNOPSIS

§ 4.1 • INTRODUCTION

As discussed in Chapter 3, either state or federal arbitration law may be applicable to an arbitration or to a judicial proceeding concerning arbitration. In general, federal arbitration law will be applicable if the subject matter involves interstate commerce (unless the parties agree that state law shall govern), or if the parties agree that federal arbitration law shall govern. If federal law governs, generally it preempts state law at least to the extent the state law is inconsistent or contrary to federal law and policy. The focus of this chapter is on when and to what extent federal law preempts state law. However, as to many issues arising under the FAA, there is no federal law and state law is borrowed and applied.

§ 4.2 • APPLICABILITY OF COLORADO AND FEDERAL ARBITRATION LAW

Whether state or federal law governs the arbitration is determined by the terms of the federal and state arbitration acts, the U.S. constitutional provision providing for supremacy of federal law (preemption by federal law), and the agreement of the parties. The extent of preemption of state law by federal law is defined by case law.

In Colorado state courts, the statutory law that may be applicable to an arbitration includes:

- The Colorado state statutes — the Colorado Revised Uniform Arbitration Act (CRUAA), C.R.S. §§ 13-22-201 (2016), *et seq.*;
- The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*; or
- The substantive arbitration law of another state pursuant to Colorado choice-of-law rules.

(The CRUAA and the CUAA utilize the same statutory numbers. Hence, in citing to either, it must be explicitly stated whether the citation is to the CRUAA or the CUAA, as each uses the same title, article, and section numbers. This book attempts to identify the CUAA as the 2003 statute and the CRUAA as the 2016 statute.)

State and federal common law also may be applicable. Lastly, other state or federal statutes may be applicable to a specific situation.

In the federal courts, the statutory arbitration law that may be applicable usually is:

- FAA; or
- CRUAA (or other state's arbitration statutes).

§ 4.2.1—Applicability Of State (Colorado) Arbitration Law (CRUAA)

In the Colorado courts, state arbitration law governs arbitration unless preempted (in part) by the FAA. Generally speaking, if the FAA applies, it preempts only state substantive arbitration law, while state procedural arbitration law continues to apply. However, in some instances, the FAA may preempt state procedural law. See the discussion in § 4.3.

In sum, state arbitration law governs unless and until it is established that the FAA is applicable. The FAA is applicable only if interstate commerce is involved or the parties agree to the application of the FAA. If the FAA applies, it preempts those state laws that are in conflict with or obstacles to achieving the policies of the FAA. When issues are presented in state court concerning an arbitration that is subject to the FAA, in part the FAA will be applied and in part the CRUAA will be applied.

But all arbitration is not covered by the CRUAA or FAA. The former No Fault Act, C.R.S. § 4-714 (2002), provided for mandatory arbitration. The Colorado Supreme Court held that the trial court's denial of the motion to dismiss should not be treated as a denial of a motion to compel arbitration, hence the denial was not interlocutory, and therefore was not appealable under CUAA, C.R.S. § 13-22-221(1)(a).[1] Section 221(1)(a) of the CUAA was not applicable because the court found that the motion was not based upon an arbitration agreement entered into under C.R.S. § 13-22-204 — it was based upon a statute requiring arbitration. Sections 203 and 204 referred to written arbitration agreements or contractual arbitration provisions, not to statutes. Moreover, the movant did not seek to compel arbitration — only to dismiss the complaint. *See also* § 2.3.

The importance of this case, particularly since the mandatory arbitration provisions were thereafter repealed, is that it raises issues as to when an arbitration is subject to the CRUAA or the FAA. Can a statutory arbitration be subject to only a portion of those statutes? Note that the CRUAA, C.R.S. § 13-22-203, provides that it governs an "agreement to arbitrate. . . ." As to statutes requiring mandatory arbitration, see § 3.8.

See also § 4.4 as to parties' choice of law.

§ 4.2.2—Applicability Of The Federal Arbitration Act (FAA)

The FAA applies in federal courts and in state courts (in part), if the requirements for its applicability are met. State arbitration acts apply in federal court when the FAA is not applicable. When state arbitration law is applicable to a federal court proceeding, it may be that only state substantive law is applicable, and the procedural aspects of the FAA might apply.

Interstate Commerce Requirement

Section 2 of the FAA defines the FAA as applying to contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."

"Involving commerce" is equivalent to "affecting commerce," generally being the maximum breadth of the scope of power under the commerce clause.[2] In *Citizens Bank v. Alafabco, Inc.*,[3] the U.S. Supreme Court held that 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."[4] 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."[5]

"Evidencing" a transaction involving commerce means that the FAA applies not when the parties *contemplated* their transaction would involve interstate commerce, but when the transaction *involves* interstate commerce.[6]

The Colorado Court of Appeals has provided its own definition of when the FAA applies (and preempts inconsistent state law):

> 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.[7]

When the FAA is applicable in a proceeding in state court, the FAA will govern to the extent state law is inconsistent.

The U.S. District Court for the District of Colorado has emphasized the limited interstate involvement of a transaction required under 9 U.S.C. § 32 in order for the FAA to be applicable. In a dispute arising out of the alleged promise of assigned parking places at a condominium complex in Vail, the court noted the suit was between citizens of different states and noted that the construction industry affects interstate commerce.[8]

- Annot., *When Does Contract Evidence Transaction Involving Interstate Commerce Within Meaning of Federal Arbitration Act (FAA)*, 11 A.L.R. Fed.2d and 10 A.L.R. Fed.2d 489.

§ 4.2.3—Waiver Of Objection To Arbitration Law Applied

A party may waive objection to the application of the FAA by invoking the FAA.[9] Waiver probably can also apply to application of state arbitration law in federal courts.

A party also may waive its objections to the applicability of the FAA by invoking the FAA in earlier proceedings.[10] *See generally* §§ 7.8 and 7.9.

§ 4.2.4—Applicable Law In Federal Court When Jurisdiction Is Based On Diversity Of Citizenship

When the jurisdiction of the federal district court is based on diversity of citizenship only, state substantive law and federal procedural law applies.[11] Thus, for example, if a motion to confirm an arbitration award is brought in federal court on the basis of diversity of citizenship, and the CRUAA and not the FAA applied, the federal rules of civil and appellate procedure would govern procedures, and state law would govern substance.

§ 4.2.5—Applicability Of State Law As To Validity Of Arbitration Agreement (Including Defenses) Governed By The FAA

Generally, the validity of an arbitration agreement (or arbitration clause in a contract) governed by the FAA is governed by state law. For example, have the elements for the formation of a contract being fulfilled. *See* Chapter 5, including § 5.2.3.

Similarly, defenses to the validity or enforcement of an arbitration agreement (or arbitration clause in the contract) governed by the FAA are governed by state law. The exception is when state law does not reflect the policy of the FAA in favor of arbitration. *See* Chapter 5.

§ 4.3 • PREEMPTION OF STATE ARBITRATION LAW (CRUAA) BY FEDERAL ARBITRATION LAW (FAA)

This section deals with the historical issue of what happens when state and federal law collide.[12]

§ 4.3.1—The Doctrine Of FAA Preemption Of State Arbitration Law

Article VI, Clause 2 of the U.S. Constitution, referred to as the "Supremacy Clause," states that the Constitution, laws of the United States, and treaties "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Early in the history of the United States, the Supreme Court applied the Supremacy Clause to declare certain state laws void — preempted by the laws of the United States.[13]

Preemption may occur when, in federal legislation, Congress expressly states that federal law preempts state law.[14] It may also occur by implication, in two ways. First, conflict preemption occurs under the Supremacy Clause when any state law that conflicts with federal law is preempted/voided.[15] Second, implied preemption can occur when Congress by its legislation occupies the entire field.[16]

The U.S. Supreme Court stated in *Southland Corp. v. Keating*[17] that the FAA created a body of substantive law applicable in both state and federal courts. State statutes that invalidate arbitration agreements covered by the FAA may violate the Supremacy Clause. The essence of the Supremacy Clause is to void state law contrary to or impeding implementation of federal law and policy. So, specifically as to arbitration law: when the FAA is applicable, contrary state law that restricts or limits the philosophy of the FAA is void (and perhaps more). In general, for purposes of determining whether there is preemption of state law, there are two points of possible conflict between state and federal law of arbitration:

1) The FAA promotes the resolution of claims by arbitration, whereas some state law does not, or is more restrictive; and
2) The FAA requires that arbitration agreements shall be treated the same as any other contracts. State law that singles out arbitration contracts for more restrictive treatment will be preempted.[18]

As discussed in § 4.2.2, the FAA applies, generally stated, when the dispute involves interstate commerce. Under the preemption doctrine, this means that while the case may be in state court, when the FAA applies, it preempts portions of otherwise applicable state law.

However, under the preemption doctrine generally (not just as to arbitration law), federal law preempts only state substantive law, and not state procedural law. When the FAA is applicable to a state-court arbitration case, traditionally only substantive law of the FAA is applied under the classic preemption doctrine. FAA substantive law displaces state substantive arbitration law. The issue becomes which arbitration laws are substantive, and which are procedural.

In the arbitration law context, the preemption doctrine generally is broader (although sometimes narrower). While a specific federal arbitration law might be "procedural," if its application is

deemed necessary to promote the national policy (as evidenced by the FAA) in favor of arbitration, the procedural law might preempt a contrary state procedural law. Similarly, if the state law is not an obstacle, FAA substantive law might not preempt the state law.

Thus, the U.S. Supreme Court announced that:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any agreement within the coverage of the Act.[19]

Shortly after that Supreme Court decision, the Court declared that FAA substantive law applied and had to be enforced in state courts (when the FAA applied) as well as in federal courts.[20]

The Supreme Court has acknowledged that the FAA was not intended to be the sole arbitration law to the exclusion of all state law, and that states may use their own procedures to enforce the FAA dictates that arbitration agreements to which the FAA applies must be enforced unless revocable on grounds that would be applicable to any contract.[21]

Classic application of FAA preemption has occurred when (1) state law discriminated against arbitration agreements as compared to other contracts by requiring that in order for arbitration agreements to be valid, the agreements contain a statement about the arbitration requirement in large letters (discrimination against arbitration agreements);[22] and (2) state laws prohibiting, for example, an award of punitive damages by an arbitrator were preempted by the FAA, which allows such award.[23]

§ 4.3.2—Expanding Scope Of FAA Preemption Of State Arbitration Law

As late as 2006, the U.S. Supreme Court noted that FAA § 2 is "the only [FAA] provision that we have applied in state court."[24] This is not the case today, as additional sections of the FAA have been held to preempt state law.

Today, as to preemption of state arbitration law, and state law applied to issues of formation of contracts and defenses thereto, the U.S. Supreme Court looks to whether the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" a liberal federal policy favoring arbitration.[25]

§ 4.3.3—When Federal Arbitration Law (FAA) Preempts State Arbitration Law (CRUAA)

As discussed above at § 4.2.2, the FAA governs arbitration when the dispute involves a transaction in interstate commerce.[26] However, the Act does not contain any specific preemptive provision, and, when applicable, does not occupy the entire field of arbitration law,[27] at least in state courts.

Generally, if the FAA does not apply, a state arbitration act such as the CUAA or the CRUAA does. For example, when two parties enter into a consumer contract containing an arbitration clause and the transaction involves interstate commerce, the FAA applies and overrules any and all contrary anti-arbitration state laws inconsistent with federal statute and policy.[28]

The U.S. Supreme Court, in *Volt Information Sciences, Inc. v. Board of Trustees*,[29] defined the scope of preemption:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law — that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The question before us, therefore, is whether application of [state law] to stay arbitration under this contract in interstate commerce . . . would undermine the goals and policies of the FAA.[30]

Preemption of state arbitration law by federal arbitration law occurs when the FAA applies. Section 2 of the FAA preempts state arbitration statutes to the extent inconsistent with the FAA.[31] While the FAA applies to all arbitration agreements involving interstate commerce (unless the parties otherwise agree), it contains no specific preemptive provision as to state law and does not occupy the entire field of arbitration law.[32] Thus, even when the FAA applies to the arbitration, state arbitration law, in part, may also apply.

Chilcott Entertainment L.L.C. v. John G. Kinnard Co.,[33] a Colorado Court of Appeals decision, illustrates a dilemma that 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 FAA 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.

On March 9, 1999, more than six months after the arbitration award was entered, Chilcott filed a motion to vacate the award in Denver District Court. Kinnard moved to dismiss the motion to vacate on the ground that Chilcott did not file the motion to vacate within the three-month limitation prescribed by 9 U.S.C. § 12. The court applied the federal statutory time period, not the 30-day period of the CUAA, C.R.S. § 13-22-214(2), without discussion. The Colorado Court of Appeals held that the time period under the FAA was not tolled during the period in 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 § 12 of the FAA. Thus, at least according to the Colorado Court of Appeals, apparently the time periods of the FAA, when the FAA applies, preempt any shorter time periods of the CUAA or CRUAA. Perhaps there would be no preemption if the state time limits were longer. The safer practice is to comply with the shorter time period.

In 1995 and 1996, the Colorado Court of Appeals and Colorado Supreme Court considered a similar issue.[34] The court of appeals held that the arbitration agreement was invalid for failure to comply with requirements of the Colorado Health Care Coverage Act (HCCA). The supreme court affirmed, holding that to be valid, the arbitration agreement had to comply with both the HCCA and the FAA. The Supreme Court refused to consider the contention that the health-care statutes were preempted by the FAA because the issue had not been raised in the trial court or in the court of appeals. Thus, according to the Colorado Supreme Court, federal preemption of state laws can be waived.

In 1997, the U.S. District Court for the District of Colorado ruled that the FAA preempts the provisions in the Colorado HCCA, which, *inter alia*, mandate specific language and typeface requirements for arbitration provisions contained in medical services agreements to be valid.[35] Under this decision, arbitration agreements within the scope of the HCCA and the FAA are valid, even if not in compliance with the detailed requirements of the Colorado HCCA statute, if they fulfill the requirements of the FAA. Thus, the court rejected the assertion that the arbitration agreement was invalid because it did not fulfill the HCCA requirements, because the agreement did fulfill the FAA requirements for a valid agreement to arbitrate.

However, in 2003, the Colorado Supreme Court held that an arbitration agreement was invalid for noncompliance with the requirements of the HCCA, notwithstanding that the FAA was applicable and its requirements were fulfilled. 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 HCCA. The court found the HCCA, including its requirements for a valid arbitration agreement, was enacted for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act. Therefore, the FAA did not preempt the HCCA requirements for an arbitration clause to be valid and enforceable.[36] The McCarran-Ferguson Act was not discussed in the earlier federal court decision.

- Annot., *Preemption by Federal Arbitration Act (9 U.S.C.A. secs. 1 et. seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 179.

§ 4.3.4—FAA Preemption Of State Arbitration Law (CRUAA) In Federal Court

Normally, one thinks of preemption of state law as occurring only in state courts: the state court has an issue that state arbitration law ordinarily governs, but for the potential preemptive application of the FAA because the dispute involves interstate commerce. When the FAA applies, it must be enforced in state and federal courts.[37]

As concerns the application of state versus federal arbitration law, it is doubtful that the preemption doctrine has any application in the federal courts. Even in the unusual scenario where federal court jurisdiction is premised upon diversity of citizenship, but the parties to the arbitration agreement are not involved in interstate commerce, it is anticipated that the federal court would apply the substantive provisions of the CRUAA, conforming to the usual application of state law when federal law is not applicable by its terms. Generally, the federal court would apply the FAA procedural provisions, but perhaps not when those procedural provisions conflict with the policies and purposes of the CRUAA. However, no Colorado federal court has addressed this issue.

The FAA preempts state law, even in diversity cases, where the arbitration clause is in "a contract evidencing a transaction involving commerce. . . among the states."[38]

§ 4.3.5—Defining Arbitration — FAA Preemption Of State Law Only As To Arbitration Agreements Subject To The FAA

See Chapter 2 as to types of arbitration. As to the definition of arbitration, see § 3.7 and Chapter 7.

§ 4.3.6—The Scope Of Federal (FAA) Preemption Of State (CRUAA) Arbitration Law

Once it is determined 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 state statute) are preempted? (As earlier discussed, the preemption doctrine probably only has application in state court proceedings.)

- Annot., *Preemption by Federal Arbitration Act* (9 U.S.C.A. § 1, et. seq.) *of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 179.

Colorado Case Law on FAA Preemption

The Colorado Supreme Court has defined six circumstances in which federal law preempts state law.[39] As relates to the FAA, two circumstances appear to be most applicable:

- When there is an outright or actual conflict between the FAA and state law; and
- When state law stands as an obstacle to accomplishment of the objects of the FAA.

Federal preemption is governed by federal law[40] and is considered on appeal by a Colorado court *de novo*.[41]

The Colorado Court of Appeals defined generally its perception of the scope of FAA preemption of state arbitration law:

> 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.[42]

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 only to state laws restricting formation or enforcement of arbitration agreements. It is unclear from the court's opinion which 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 unclear as to the total extent of federal law preemption of state law, *i.e.*, what state procedural and substantive law would continue to apply, and whether the procedural law would apply only in state courts or also in the federal courts.[43]

In *Fonden v. U.S. Home Corp.*,[44] the Colorado Court of Appeals found that the FAA applied and, following the philosophy of its earlier decisions, stated: "Although the FAA preempts inconsistent state law, its preemptive effect is restricted to the area of arbitration and whether the agreement to arbitrate is valid."[45]

The court denied the plaintiff's appeal of an interlocutory order of the trial court granting the defendant 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 possibly *dictum*. The court concluded:

> [W]e recognize that appellate courts in other states have held various FAA procedural provisions inapplicable in state court. 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 FAA.[46]

It can only be said that it is very unsettled in Colorado (and elsewhere) as to which state law arbitration provisions will be applied by a state court when the FAA is applicable to the arbitration.

In *Galbraith v. Clark*,[47] the Colorado Court of Appeals held that "under the FAA, an order compelling arbitration and dismissing the case [instead of compelling arbitration and staying the civil action pending arbitration] was a final appealable order."[48] The court relied on *Green Tree Financial Corp.-Alabama v. Randolph*,[49] a U.S. Supreme Court decision. *Green Tree* held that under the FAA, an order compelling arbitration and dismissing the underlying claims was a final judgment and therefore appealable under FAA § 16(a)(3), providing that an appeal may be taken from a "final decision" with respect to an arbitration that is subject to the FAA. "Final decision" was defined as a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.

No doubt the same result could have been reached in *Galbraith* by applying Colorado law (which was not mentioned) instead of federal law. C.R.S. § 13-4-102(1) is practically identical to FAA § 16(a)(3). C.R.S. § 13-4-102(1) (legislative grant of appellate jurisdiction) provides that the court of appeals shall have jurisdiction from final judgments of the district court (with certain exemptions). A dismissal of a case is a final judgment.[50] *See also* the CRUAA, C.R.S. §§ 13-22-228(1)(f) and (2) (2016).

However, of note is that the Colorado Court of Appeals seemed to say that a federal statute (FAA) and federal case law thereunder can define the jurisdiction of the Colorado Court of Appeals (appealable orders), at least when applying the FAA to the issues presented. This is interesting given that the Colorado Constitution empowers only the legislature to define the jurisdiction of the court of appeals.

Similarly, the court ruled that issues of arbitrability — whether a particular dispute should be arbitrated — are presumptively submitted to the court unless there is clear and unmistakable evidence of the parties' intent that the issues be decided first by the arbitrator. Again, this holding is consistent with Colorado cases not applying the FAA. However, the court did not cite prior Colorado decisions and instead relied primarily on federal court decisions applying the FAA.

In sum, *Galbraith* starts to show "how much" federal law applies when the FAA is applicable to the arbitration in a state court proceeding.

Other States' Law on FAA Preemption

California decisions provide a somewhat detailed analysis of preemption of state law by the FAA, which to some extent follows the general principles annunciated by the Colorado Court of

Appeals. In *Rosenthal v. Great Western Financial Securities Corp.*,[51] the California Supreme Court addressed the issue of whether a procedural portion of the FAA applied to state-court litigation. The court determined that the jury trial provided for in 9 U.S.C. § 4, to determine whether there is an arbitration agreement, did not apply to state-court litigation, even when the FAA was otherwise applicable.

In *Siegel v. Prudential Insurance Co. of America*,[52] the respondent asserted that the FAA allowed the merits of an arbitration award to be voided by the state court when there has been a manifest disregard of the law by an arbitrator. The Court of Appeal of California recognized that most federal courts then recognized manifest disregard of the law by the arbitrator as a non-statutory ground under the FAA for vacating an arbitration award. *Compare* § 17.4.15. However, the case presented the issue of whether the manifest disregard of the law is a ground for vacating an award by a state court, if the FAA is applicable. Under California law, the grounds to vacate an award did not include the manifest disregard of law.

The court in *Rosenthal* held that § 4 of the FAA does not explicitly govern the procedures to be followed in state court when the FAA is applicable. The FAA contemplates a petition in the U.S. district court and provides that certain steps are to be taken in the manner provided by the Federal Rules of Civil procedure. The second test under *Rosenthal* was to look at the broad principles of federal preemption, saying that states may establish the rules of procedure governing the litigation in their own court, even if the controversy is governed by federal substantive law. "By the same token, however, where state courts entertain a federally created cause of action, the federal rights cannot be defeated by the forms of local practice."[53] Thus, a state procedural rule must give way to federal procedure if it impedes the uniform application of the federal statute to effectuate its purpose. "At a minimum the state procedure must be neutral as between the state and federal law claim."[54]

Based upon the prior pronouncements of the Colorado appellate courts, it would be reasonable to anticipate that when the FAA is applicable, a Colorado court will not vacate an arbitration award on the additional grounds permitted by federal law, but only those grounds provided by Colorado law.

The foregoing principles are relatively well established. However, the matter of which sections of the federal and state arbitration acts are substantive so as to be applicable under the foregoing principles, and which sections of those acts may be procedural, are matters that have been infrequently considered. As to the latter, a state court may not be required to apply federal statutes even though the dispute arises out of interstate commerce, but may in fact apply state procedural law. As to an arbitration dispute in federal court that does not arise out of a transaction in interstate commerce, the federal court is required to apply state substantive arbitration law, but perhaps is not required to apply the portions of the state arbitration law that are procedural in nature under the principles of *Erie Railroad Co. v. Tompkins*.[55]

On the other hand, if the parties expressly state the arbitration will be pursuant to and governed by the FAA, this may mean the arbitration will be governed solely by federal law.[56] However, it is likely that parties cannot dictate all procedures to be followed by a court.

A Texas appellate court, in *Cleveland Construction, Inc. v. Levco Construction, Inc.*,[57] held that the FAA applied to the appeal of a Texas district court order enjoining arbitration. First, the court determined that the order was appealable under FAA § 16 (Texas law apparently resulted in the same out-

come). Thus, § 16 was deemed to preempt the state appeal statute. Second, a Texas statute provided generally that any contract provision requiring the arbitration to be held out of state was preempted (and voided) by the FAA. The Texas court held this Texas statute was preempted by the FAA because the state statute conditioned the enforceability of arbitration agreements on the selection of Texas as the forum — a requirement not applicable to contracts generally.[58] The court concluded that applying the state statute "would prevent us from enforcing a term of the parties' arbitration agreement — the venue — on a ground that is not recognized by the FAA or by general state-law contract principles."[59]

As perhaps is to be expected, federal court definitions of FAA preemption of state arbitration law tend to be broader than Colorado and other state courts' interpretations of FAA preemption. Indeed, in recent decisions, the U.S. Supreme Court has reversed state supreme court decisions taking a narrower view of FAA preemption of state arbitration law.[60]

- Annot., *Preemption by Federal Arbitration Act of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 103 A.L.R. Fed. 179.

§ 4.3.7—FAA Preemption Of State Substantive Or Procedural Arbitration Law

Traditionally, preemption is thought of in terms of substantive law, and not procedural law. When the FAA is applicable, state courts are thought generally to be free to apply their own procedural law to implement FAA substantive law. This division between procedural and substantive law has its genesis in *Erie Railroad Co. v. Tompkins*.[61] *See* § 4.3.6.

However, the line between procedural and substantive provisions is difficult — perhaps impossible — to meaningfully define. And the definition most certainly differs from state to state and case to case. Hence, it is of limited value to discuss FAA preemption in terms of whether provisions are substantive or procedural. See, particularly, the Colorado preemption cases discussed in § 4.3.6.

The FAA[62] was passed in 1925, and has been amended several times. However, the original statute remains essentially unchanged.

Speaking very generally, the FAA governs arbitration when the dispute involves a transaction in interstate commerce.[63] (The Interstate Commerce Clause of the U.S. Constitution is the basis for Congress's 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 to settle by arbitration a controversy thereafter arising out of such contract or transaction."[64] Section 1 defines "commerce" as "among the several States or with foreign nations. . . ." The term "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."[65] "Involving commerce" is equivalent to "affecting commerce," generally being the maximum scope of power under the Commerce Clause.[66] "Evidencing" means that the FAA applies not when the parties *contemplated* that their transaction would involve interstate commerce, but when the transaction *involves* interstate commerce.[67]

- Annot., *When Does Contract Evidence Transaction Involving Interstate Commerce Within Meaning of Fed. Arbitration Act (FAA) — Serv. Contracts*, 11 A.L.R. Fed.2d 233.

- Annot., *When Does Contract Evidence Transaction Involving Interstate Commerce Within Meaning of Federal Arbitration Act (FAA) — Legal Issues and Principles*, 10 A.L.R. Fed.2d 489.

Generally, if the FAA does not apply, a state arbitration act such as the CRUAA applies. Whether the CRUAA 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 FAA.

Very generally speaking, the FAA and CUAA do not differ much in substance, although they are very different in some particulars. The CRUAA, on the other hand, is substantially more detailed, and fills in many gaps in the FAA and the CUAA. However, at least two specific points about the statutes should be noted:

- *Jurisdiction.* The fact that the FAA governs an arbitration does not give the federal courts jurisdiction over disputes arising with respect to arbitrations governed by the statute. *See* Chapter 19, "Jurisdiction and Venue of the State and Federal District Courts and of the Arbitrator." Generally, it does not provide 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. *See* § 19.3.

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, at least in part.[68] Colorado Court of Appeals decisions suggest that federal preemption of state law applies only to portions of the state arbitration law. *See* § 4.3.

- *Time limits.* Deadlines are generally shorter under the CRUAA than under the FAA. See, for example, the time for seeking a change or correction of award (CRUAA § 220 versus FAA § 12); confirmation of award (CRUAA § 222 versus FAA § 9); vacating an award (CRUAA § 223 versus FAA § 12); and modification of award (CRUAA § 223 versus FAA § 12). Generally, if the FAA applies, its time limit "probably" governs.[69] 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 is otherwise applicable to the arbitration. *See* § 4.3.8.

The FAA defines many procedures to implement an arbitration. The Colorado Supreme Court has specifically stated that the FAA is a source of "federal substantive law" of arbitration.[70] Thus, as to those sections of the FAA deemed "substantive," when the FAA is applicable in state court proceedings, those substantive provisions preempt state law to the contrary and govern the proceedings.[71]

On the other hand, many of the provisions of the FAA are procedural, and do not preempt state court procedures when in conflict. For example, the U.S. Supreme Court has consistently held that interpretation of an arbitration agreement is a matter of state law. The FAA defines limits, such as that arbitration is "a matter of consent, not coercion."[72] See §§ 4.3 and 7.6 for discussions of encroachment of federal "substantive" law of arbitration upon state law of "grounds as exist at law or in equity for the revocation of any contract" under FAA § 2.

In two recent class arbitration cases, the U.S. Supreme Court held that federal common law under the FAA preempted California state law of unconscionability as applied to class action waiver[73] and preempted state law interpreting an arbitration agreement (to allow class arbitrations).[74] *See* § 6.7. As to FAA preemption of state-law grounds for *vacatur* of an award, see § 17.9.

The Court noted that the Oklahoma court's deciding the validity of the contract (whether the covenant not to compete was valid under the Oklahoma statute) constituted "judicial hostility towards arbitration," which the FAA forecloses.[75] Thus, the FAA preempts state law as to who decides arbitration issues (*see* Chapter 8), or at least some of them, including the validity of the agreement with a covenant not to complete.

Courts differ dramatically in preemption contexts as to what law is substantive and what is procedural. For example, a California appellate court, in *Swissmex-Rapid, S.A. de C.V. v. SP Systems, LLC*,[76] held that while the FAA was applicable in the state court proceeding, FAA § 9 (providing that if the parties in their agreement have agreed that a judgment of the court shall be entered upon the arbitration award, the court may do so) was procedural, and therefore did not supersede state law. The state law did not refer to parties agreeing to entry of judgment in order for a judgment on the award to be entered. Section 9 is procedural as it is intended to implement the substantive provisions of the FAA. However, the court did note that other courts had characterized FAA § 9 as substantive and held § 9 preempted state law.[77]

A Tennessee court found that a majority of jurisdictions considering the issue have held that a state's law on appealability of an arbitration order is procedural and applies to state court appeals, unless the state-law appealability statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA.[78] Several guiding principles emerged as to which sections of the FAA may not preempt state law:

- The state law does not impinge on "the basic policy upholding enforceability of arbitration agreements."
- There is no conflict between the state and federal laws.[79]

Note, however, that had the state law on confirmation of an award substantially impinged upon the process of confirmation by making confirmation substantially more difficult, the state law probably would be preempted. It may be more accurate to state that whether the FAA (when applicable) preempts state law depends upon:

- The nature of the federal statute — is it substantive, or does it provide for implementing substantive procedures?
- Whether the state statute as applied impinges upon the attainment of the objectives of the FAA.

§ 4.3.8—Summary: Which Sections Of The FAA (When The FAA Is Applicable) Preempt State Arbitration Law, And Which Do Not?

Some courts have attempted to define which sections of their state law are preempted by the FAA.[80] Again, however, the determination must consider the specific statute that may be preempted, as well its application. In the coming years, no doubt many preemption issues will be raised, given the

U.S. Supreme Court decision in *AT&T Mobility v. Concepcion* (holding the FAA preempted state law of unconscionability, as applied).[81]

§ 4.3.9—FAA Preemption Of Specific Provisions Of State Arbitration Law

After considering the various judicial statements and occasional holdings as to the scope of preemption of state law by the FAA when the FAA is applicable, one may opine as to what exactly it means in the daily practice of arbitration. In brief, in terms of judicial actions in the arbitration process, the questions are: (1) when does the FAA apply; (2) when does the state law apply even when the FAA applies; and (3) to which state arbitration laws does the preemption apply? The law in this area is not sufficiently settled to provide many definitive answers.

Fortunately, in most respects, federal and Colorado law do not substantially differ.

Who Decides the Arbitrability Issue?

Most litigators will concur that while "the law is the law," the decision on an issue of law may depend upon who decides the issue: Which judge? A jury? An arbitrator? The courts have varied dramatically as to who decides the many arbitral issues that reach the court. Sometimes, who decides is determined by the tribunal to which the issue was first brought. *See* § 8.8.

A statute of limitations defense is somewhat common in arbitration. When it is asserted, who decides the defense? In a New York Court of Appeals case, *N.J.R. Associates v. Tausend*,[82] which was governed by the FAA, the threshold issue of timeliness under New York law was held to be before the arbitrator under FAA and New York law. The court found that the case law under the FAA provides for the arbitrator to decide the issue. While the majority avoided resolving that issue, a concurring opinion concluded that because the FAA applied, the statute of limitations issue must be decided by the arbitrator as required under the FAA. Effectively, without discussion, the concurring opinion stated that the FAA law as to who decides the issue preempts contrary New York law on the question as to who decides statute of limitations issues. *See also* Chapter 8.

Applicability of Federal or State Law to the Dispute Procedure

Federal law determines whether a dispute resolution procedure is "arbitration" within the scope of the FAA. State law determines whether a dispute is within the scope of state arbitration law. If there is a conflict, federal law preempts state law. However, generally, the parties can define by agreement which law governs the arbitration agreement. The parties may be able to agree on which statutes govern their dispute resolution procedure, even if it is not "arbitration" for purposes of the acts. Perhaps the parties can agree that an arbitration statute governs their arbitration-like procedure.

Preemption as to Whether There Was an Agreement to Arbitrate

FAA § 2 defines that an agreement to arbitrate "is valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In order to stay litigation pending arbitration or to compel arbitration under §§ 3 and 4, the court must make a finding of whether there is an agreement to arbitrate under § 2. This is a matter of federal law and preempts state law.[83] However, generally, there is little federal statutory or common law defining what an "agreement" is — what the elements for finding the existence of an agreement are. Hence, in essence, the federal law "borrows" state law for purposes of defining an agreement to arbitrate under § 2. As stated by the U.S. Supreme Court, generally, state law principles regarding contract formation govern whether a valid agreement to arbitrate exists.[84]

Preemption as to Whether the Dispute is Within the Scope of the Arbitration Agreement

Once it is found that there is an agreement to arbitrate, the next question is whether the dispute is within the scope of the arbitration agreement — is this dispute a dispute that the parties agreed to arbitrate. The analysis is the same as the determination of whether there is an agreement to arbitrate: when the FAA applies, this is an issue of federal substantive law.

Preemption as to Grounds as Exist at Law or in Equity for the Revocation of a Contract

FAA § 2 provides that arbitration agreements are valid, irrevocable, and enforceable, except on grounds that exist for the revocation of any contract. "Revocation" has been applied to mean defenses to the validity of contracts or defenses for the avoidance of contracts. These definitions are generally enumerated and discussed in § 7.6.

Does federal arbitration law define the defenses, or define the elements applicable therein? For the most part, there is no federal common law of traditional contract defenses. The courts generally have simply applied/borrowed state law of contract defenses.

However, if the state law of these defenses were found to burden the national policy in favor of arbitration, when the FAA is applicable, it is likely that the courts would not accept unique restrictions of state law upon the validity of arbitration contracts. FAA § 2 refers to grounds that apply to "any contract." Thus, a state-law defense that was designed for arbitration agreements alone probably would not be within § 2. Moreover, even if the state defense applied to all contracts, restraints thereof that burdened the arbitration agreement probably would not be applied when the FAA was applicable.

In 2011, the U.S. Supreme Court spoke on the issue in *Concepcion*.[85] The Court held that state law of unconscionability as applied generally to contracts that invalidated an arbitration class action waiver/prohibition clause was preempted by the FAA. Therefore, the contractual waiver of arbitration class actions, which was unconscionable under state law, was valid and enforceable under the FAA. In specific circumstances, the FAA may now preempt state law "grounds as exist at law or in equity for the revocation of any contract."

Concepcion might be limited to the specific elements of unconscionability that the Supreme Court found to be preempted. Other definitions and applications of unconscionability by state law might not be preempted, or the courts may create a federal common law of unconscionability. Preemption often implies that there is a federal law to replace the state law. In *Concepcion*, the Court did not define a federal law of unconscionability that replaced the state law.

Validity of Agreement to Arbitrate

Section 2 of the FAA states that arbitration agreements complying with the Act are valid, irrevocable, and enforceable. When the FAA is applicable, this section preempts any state law to the contrary. If the FAA is applicable, federal law, with non-discriminatory state law incorporated, determines validity/enforceability of agreements to arbitrate. For example, the FAA requires that the agreement be in writing. If a state statute required arbitration agreements, but not other contracts, to be in red ink, the requirement probably would be preempted. On the other hand, state law as to elements of a contract will be applied. Generally, a state statute that imposes particular requirements or conditions for an agreement to arbitrate to be valid — not required by the FAA and not applied to other contracts under state law — are preempted. The FAA has been interpreted to mean that it preempts any state law that

would make an arbitration agreement invalid if that state law imposes greater requirements for arbitration agreements than for other agreements.

An example is a Texas law that conditioned arbitrability of personal injury claims on whether the claimant was represented by counsel at the time the arbitration agreement was signed. This statute was held to be preempted by the FAA.[86] The FAA "law" is that such a provision is more restrictive than the FAA, and therefore void.

Similarly, a state statute voided arbitration agreements for medical malpractice that were executed prior to the malpractice and the dispute arising. The FAA preempted/voided this provision as the statute singled out arbitration agreements for disparate treatment among contracts.[87]

Stay of Civil Action/Motion to Compel Arbitration

Generally, if the FAA is applicable to the arbitration, whether §§ 3 and 4 of the FAA are applicable in state courts is an open issue.[88]

Arbitrability — Is There a Defense to Enforcement?

State law governs as to the defenses to the formation or existence of the contract, to the extent the defenses are as to all contracts. Thus, Colorado common law of fraud, duress, misrepresentation, lack of mutuality, statute of limitations, etc., can be applied to hold that an alleged contract to arbitrate is not valid or enforceable when the FAA is applicable, but only in circumstances where the defense is not preempted by the FAA.

Motion to Compel or Stay Arbitration

It is anticipated that Colorado state law on compelling or staying arbitration applies in state court when the FAA is applicable. Again, this is because Colorado state law is not contrary to enforcement of arbitration agreements that are made valid under federal law and does not impose unreasonable burdens on the right to arbitrate and the arbitration process. Similarly, Colorado procedures for such motions should apply.

When the FAA applies, a state law that precludes a state court from compelling arbitration when part of the claims are not arbitrable is preempted by the FAA. The state court therefore must compel arbitration of the arbitrable claims, even if intertwined with non-arbitrable claims, contrary to state law,[89] because federal arbitration law is contrary. *See* § 7.12.

Arbitrability — Generally

An agreement to arbitrate is normally interpreted under state law to determine whether the dispute is within the scope of the arbitration clause. Again, however, it can only be state law as applied to all contracts and not state law applicable only to agreements to arbitrate.

Arbitrability — Is There an Arbitration Agreement?

Whether a document constitutes a contract normally is governed by state contract law. However, if the state has additional requirements for a valid contract to arbitrate, the FAA preempts such law.[90] The test is whether the state law would invalidate the arbitration clause or enforce it.

Arbitration — Is the Dispute Within the Scope of the Arbitration Agreement?

Even when the FAA is applicable, state law of interpretation of contracts generally is applicable — in state and federal courts.

Waiver of Arbitration and Arbitration Provision

There is no clear answer as to whether there is only federal law of waiver, applicable when the FAA is applicable, or whether state law of waiver that is applicable to contracts generally continues to govern, notwithstanding FAA preemption. Probably the state law of contracts governs insofar as a waiver is applicable. The CRUAA waiver rules are found at C.R.S. § 13-22-204 (2016).

However, the Ninth Circuit has held that when the FAA applies, the FAA provides the law of waiver, and not state law: "[T]he question of whether a party has waived its right to compel arbitration directly concerns the allocation of power between courts and arbitrators."[91]

Initiation of Arbitration

Except in the CRUAA, there is little law concerning the form that a demand for arbitration must take and the means of service. No doubt the due process clause requirements for valid service in a civil action are the minimum. Nothing in Colorado law pertaining to service singles out or is adverse to arbitration.

Consolidation

Consolidation of arbitrations in most situations is not contrary to enforcement of arbitration agreements or contrary to the arbitration process, and may enhance it. Hence, the Colorado law presumably would apply to most consolidation issues in state court, even when the FAA applies.

Arbitrators: Qualifications, Disclosures, and Disqualification

Presently, there does not appear to be any conflict between Colorado and federal law concerning qualifications, disclosures, and disqualification of arbitrators. Were a state to create extreme or unreasonable burdens to qualify to serve as an arbitrator or extreme remedies concerning disqualification, it might create such a burden on arbitration as to be preempted by federal law, since no such provisions are in federal arbitration law.

The Arbitration Process — Hearing

Generally, the Colorado and federal procedures for the arbitration hearing are not in substantial conflict. Neither the FAA nor the CUAA has any meaningful definition of the hearing process. Even the CRUAA has limited "rules." There is very little common law. Again, so long as consistent with federal policy, a state court probably can apply state law concerning the hearing process.

Venue

Federal venue provisions define in which federal court district a suit may be maintained. The District of Colorado encompasses the entire state of Colorado, with the court primarily sitting in Denver, although authorized to sit in Pueblo and Grand Junction.

Colorado venue provisions define in which county in Colorado a civil action may be maintained. The Colorado district courts sit in every county. It is anticipated that in a state-court action in which the FAA applies, the state venue statutes would not be preempted.

Provisional Remedies

Probably there is little or no difference between Colorado and federal law concerning provisional remedies. Colorado state law and procedures should govern so long as consistent with the philosophy of the FAA: to uphold and enforce agreements to arbitrate, as well as to enable the arbitration.

Immunity of Arbitrator

There is no federal statute on immunity, although there is some federal common law that would be consistent with Colorado common law and the CRUAA. It would seem inconsistent with federal arbitration policy were state law to withdraw immunity that would otherwise exist under the federal common law. Thus, such state law might be preempted. *See* § 11.11.

Representation of Parties by Attorneys

Federal and Colorado law provide for the right of parties to be represented by attorneys. Were a state statute to preclude this right, however, federal law might well preempt it because representation by an attorney might well be viewed as necessary to upholding the arbitration process. *See* Chapter 10.

Subpoenas/Discovery

The right to subpoena persons to an arbitration hearing is an important substantive and procedural right. The mechanics of issuance, service, and enforcement of subpoenas are procedural. While there are questions as to whether the FAA permits pre-hearing discovery subpoenas, these are expressly allowed by the CRUAA. These matters would seem to be procedural, and not inconsistent with arbitration. There seems to be no reason why an arbitrator in Colorado would not have the powers provided by the Colorado statute, even when the FAA is applicable.

Judicial Enforcement of Pre-Award Ruling by Arbitrator

The CRUAA and the federal common law provide for judicial enforcement of pre-award rulings by the arbitrator. The result ought to be the same in state or federal court.

The Award

There do not appear to be any substantial inconsistencies between Colorado and federal law with respect to issuance of the award, form, timing, etc.

Remedies — Fees and Expenses of Arbitration Proceedings

There is no substantial difference between Colorado and federal law (including common law) as to the powers of the arbitrator to award fees and expenses of arbitration. However, when the FAA is applicable, state law that is more restrictive than federal law as to award of fees and expenses may be preempted.

Modification or Correction of Award, Including Deadline for Vacating Award

Presently, there are no substantial differences between federal and Colorado law concerning vacating an arbitration award.

Rodriquez v. Prudential-Bache Securities, Inc.[92] involved the plaintiff's claim of wrongful termination. The U.S. District Court for the District of Puerto Rico ordered a stay of the litigation and compelled arbitration. The arbitration was under the rules of the New York Stock Exchange. An award was entered in favor of the plaintiff/claimant.

The U.S. District Court for the District of Puerto Rico held that the FAA 90-day time period for filing a motion to vacate an award governed, rather than the 30-day period provided by Rule 627g of the New York Stock Exchange. Thus, this case suggests that a contractually shorter time to petition the court cannot supersede the statute. *See also* § 4.3.3.

The claimant urged that because it was a diversity action, the Erie Doctrine required the court to look to the law of Puerto Rico rather than the FAA. Puerto Rico law requires such motions to be filed within 30 days. The court noted, however, that diversity jurisdiction served only as a basis to invoke the provisions of the FAA and not as a ground for invoking the application of a judicially developed common law arbitration rule.

Grounds for Vacating Award

Whether FAA § 10 preempts state law grounds for vacating an award when the FAA is applicable in state court is largely an open question. A few decisions have held it does.[93] Often, it is not an issue because the state and federal grounds are similar. However, it is likely this will be an issue in coming years. The Supreme Court of Tennessee held that whether an order vacating an award is determined by state law is procedural and does not stand as an obstacle to purposes and objectives of the FAA.[94]

The Court of Appeal of California held that although the FAA was applicable, it did not preempt state law as to grounds upon which an arbitration award could be vacated. Specifically, the court held that the FAA did not preempt the state arbitration statute so as to allow the state court to set aside an award on the federal common law ground of the arbitrator's manifest disregard of the law.[95] Similarly, the Sixth Circuit held the FAA's provisions on *vacatur* applied even though the contract provided it would be governed by Michigan law.[96] While the parties could define the law applicable to their substantive rights and allegations, the generic choice-of-law clause did not apply to procedural issues such as *vacatur* of an award.

Confirmation/Judgment on Award — Attorney Fees and Litigation Expenses

Unless the state provisions substantially reduced the recovery, probably the law of the forum will govern. However, a Pennsylvania statute that required corporations to be registered in order to have access to state or federal courts (*e.g.*, to confirm an award) was preempted as it stands as an obstacle to execution of the FAA.[97]

Appeals

The Colorado Court of Appeals, in *Galbraith v. Clark*,[98] held that in a matter governed by the FAA, under federal law an order compelling arbitration and dismissing the civil action is a final appealable order. Probably the same result could have been reached under the CUAA. However, the importance of the case is that the court of appeals seemed to assume that federal law preempted state law insofar as the appealability of a state court order. *See also* § 4.3.6.

Compare, however, a decision of the Court of Appeal of Louisiana.[99] After denying an appeal of right, the court converted the appeal to an application for a discretionary supervisory writ, granted it, and reversed the trial court, which, in essence, ordered arbitration. The court found that the FAA applied to the arbitration. Title 9 U.S.C. § 16(a) provides an appeal may be taken from an order denying arbitration. The Louisiana trial court denied the defendant's motion to dismiss the civil action by rea-

son of an arbitration agreement. Notwithstanding FAA § 16, the appellate court held the trial court order was interlocutory, and under Louisiana law was not appealable, unless a discretionary writ was granted. "Although we agree that the FAA governs this case, we find the FAA does not preclude applying Louisiana procedural law regarding the right to appeal an interlocutory judgment denying arbitration."[100] The court concluded that the FAA provisions governing the timing of appeals were procedural, and that state courts were therefore free to follow their own rules on timing appeals "unless those rules undermine the goals and principles of the FAA."[101] Denying review at this stage of an order denying arbitration did not undermine the goals and principles of the FAA. Thus, review presumably could be had only as an appeal from a trial court judgment on the merits.

State Statute Defining Forum for Statutory Claim

The U.S. Supreme Court held that when a claim is within the scope of an arbitration clause, a state statute defining a court as the forum for trial of a statutorily created cause of action is preempted by the FAA. "When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."[102]

As to FAA preemption of state grounds for *vacatur*, see § 17.9.

§ 4.3.10—FAA Preemption In The State Courts

It is well established that if the FAA applies, it governs, even if the civil action is in state court.[103] When applicable, the FAA preempts state law (where in conflict) in state courts.

Should arbitration be equated to "litigation" and "civil actions" and "courts" when used in statutes? The New Mexico Supreme Court held that for the purposes of a common law malicious abuse of process claim, judicial proceedings included arbitration.[104]

§ 4.3.11—FAA Preemption In Class Action Arbitration

Most of the recent U.S. Supreme Court decisions on FAA preemption of state law have occurred in the context of consumer and employment agreements that provide for arbitration, and are either silent about class action arbitration or preclude it. Commercial parties dealing with consumers may include in contracts of adhesion an arbitration clause and either remain silent or affirmatively prohibit class proceedings. The net result is that the court will uphold the arbitration clause (over which there is usually no dispute), hold that prohibition as to class proceedings is valid, and hold that there must be specific agreement of the parties to class action arbitration or it is denied. Thus, the consumer's claim must proceed as an individual arbitration. *See* § 6.8.

This topic, and the decisions underlying it, cannot be fully covered in the limited space allowed in this book.

§ 4.3.12—Colorado Arbitration Law Exempt From Preemption — Reverse Preemption

The Colorado Health Care Availability Act, C.R.S. § 13-64-403, requires that an agreement containing an arbitration clause contain above signatures in 10 point, bold face type, a lengthy statement that might be fairly characterized as anti-arbitration. The cases are somewhat conflicted as to whether this statute is preempted by the FAA. *See* §§ 4.3.3, 5.6, and 6.15.

Even if the FAA is applicable on its face, certain state law as to arbitration is "exempt" from preemption by the FAA. For example, the Colorado Supreme Court held that the arbitration provisions of the Colorado Health Care Availability Act were not preempted by the FAA because the federal McCarran-Ferguson Act delegated to the states the regulation of insurance.[105] Earlier, the U.S. District Court for the District of Colorado held opposite, but without consideration of the impact of the McCarran-Ferguson Act.[106]

The McCarran-Ferguson Act, 15 U.S.C. §§ 1101, *et seq.*, allows state regulation of insurance free from federal intrusion. Thus, a state may bar arbitration of insurance disputes, even though the dispute falls within the scope of the FAA. The FAA would invalidate the barrier to arbitration, but the McCarran-Ferguson Act preempts the FAA, exempting that insurance law from FAA preemption.[107]

§ 4.3.13—Waiver Of Preemption

The Colorado Supreme Court has in essence held that preemption of Colorado state arbitration law by the FAA can be waived by failure to timely raise the preemption.[108]

§ 4.4 • CHOICE-OF-LAW RULES: THE ARBITRATION LAW OF COLORADO, THE ARBITRATION LAW OF ANOTHER STATE, OR THE ARBITRATION LAW OF THE FAA

Like any other state law, the applicable arbitration law is subject to choice-of-law rules and to federal preemption. A unique situation might occur in arbitration in Colorado where the agreement made the arbitration law of another state applicable.[109] 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.

See generally §§ 3.7.4, 4.3.7-4.3.9. Note, "An Unnecessary Choice of Law: *Volt*, *Mastrobuono*, and Federal Arbitration Act Preemption," 115 *Harv. L. Rev.* 2250 (2002).

- Annot., *Conflict of Laws as to Validity and Effect of Arbitration Provisions in Contract for Purchase or Sale of Goods, Products or Services*, 95 A.L.R.3d 1145.

§ 4.5 • AGREEMENT OF THE PARTIES AS TO GOVERNING ARBITRATION LAW

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.[110] Conversely, the parties can agree that federal law shall apply instead of state law.[111] Exceptions may exist when substantial questions of state or federal policy are involved.[112] A common choice-of-law provision in form construction contracts provides that the contract will be governed by the law of the place where the project is located. This clause is effective as to a choice of substantive state law, but does not define the parties' selection of state or federal arbitration law as governing. This language invokes both state substantive and federal arbitration law when interstate com-

merce is involved.[113] Thus, "generally" arbitration law is considered procedural. However, parts of arbitration law, *e.g.*, validity of agreements to arbitrate, are substantive, and federal law, when applicable, preempts state law.

Where the arbitration agreement provided that it "shall be governed by and construed in accordance with the laws of the State of Montana," the Colorado Court of Appeals held that nevertheless Colorado law controls as to procedural matters in the Colorado courts.[114] The substantive law issue was whether the parties intended the arbitration agreement to cover a particular dispute. The court also noted that the standard of appellate review was procedural, and hence Colorado law governed the issue.[115]

In *1745 Wazee LLC v. Castle Builders, Inc.*,[116] the Colorado Court of Appeals applied the FAA, and (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 applied only to substantive law); and (3) since the FAA applied, the then federal common law ground for vacation of an arbitration award by reason of being "contrary to public policy" was applicable in a Colorado state court proceeding. The court distinguished and declined to follow the earlier decision of the court of appeals in *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*,[117] which held that in state court, when the FAA is applicable, the federal common law ground for vacating an arbitration award for 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.*,[118] the agreed-upon choice of law as to arbitration must be specifically stated, *e.g.*, "the arbitration and the substantive rights and procedural requirements and limitations shall be governed by the Federal Arbitration Act." A choice-of-law clause providing that the laws of a given state shall govern is ambiguous.

The importance of specific wording choosing state or federal arbitration law was discussed in *Barker v. Halliburton Co.*[119] There, absent agreement, the FAA was applicable. The Texas Court of Appeals held that a Texas choice-of-law provision did not include Texas arbitration law because the parties did not expressly include its application.[120]

There are limits, however, to when the parties may agree to apply state arbitration law instead of the FAA. For example, if application of the state arbitration law would undermine the federal arbitration law, the agreement to apply state law might not be enforced.[121]

The "specificity approach" was applied by the Oregon Supreme Court in *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*[122] A contract providing "any arbitration hearings" will be governed by the Oregon Arbitration Act was held to mean the Oregon Act governed the conduct of the hearing while the FAA governed pre-hearing issues of arbitrability. On the other hand, some courts find that a general choice-of-law clause makes the chosen law govern both the arbitration proceedings as well as the decision resolving the controversy.[123]

§ 4.5.1—Agreement To The Applicability Of Part Of The FAA And Part Of The CRUAA

In many circumstances, it seems reasonable that the parties can agree that certain provisions of the FAA and the CRUAA shall govern the arbitration.

Thus, when in federal court, and by its terms the FAA is applicable, the court will enforce the parties' agreement to apply state arbitration law, at least to the extent substantive and not procedural.

Similarly, when in state court, and by its terms the FAA is not applicable, the court will enforce an agreement providing the substantive terms of the FAA shall govern.

The topic is covered in Benson, "Application of the Federal Arbitration Act in State Court Proceedings," 43 *Colo. Law.* 33 (Dec. 2014).

For example, if the FAA is applicable to an arbitration, nevertheless it may not extend to subpoenas for witnesses and trial. If the arbitrator applies the CRUAA (specifically permitting discovery subpoenas), will the federal court enforce the CRUAA as to subpoenas? It is perhaps a stronger case if the parties expressly define the portions of each statute that shall be applicable.

It is not uncommon for a contract to have a general clause that it shall be interpreted and governed by Colorado law, and also an arbitration provision providing that such arbitration shall be governed by the FAA. This result is to be expected: The substantive rights and duties are governed by the general choice-of-law clause (Colorado), and the arbitration is governed by the arbitration choice-of-law clause (FAA).[124] Often, however, there is a general choice-of-law clause but no provision as to the arbitration law to be applied. In this case, the substantive issues are governed by the choice-of-law clause, and the arbitration governed by the FAA if applicable by its terms, and, if not, by state law under common law choice of law as between states.

§ 4.5.2—General Choice-Of-Law Clauses As Defining Applicable Arbitration Law

It is common for contracts to contain a general choice-of-law clause: "This agreement shall be governed by and interpreted in accordance with the law of the State of XYZ." Multiple questions arise as to whether such a clause defines the applicable arbitration law. That issue generally is "simply" a matter of contract interpretation, and may depend upon the precise wording in the clause: whether the clause is part of the arbitration provision, part of the "dispute" section, or elsewhere in the contract. The law is not uniform, but in general such clauses are held not to define the applicable arbitration law, at least so as to prescribe state arbitration law over the FAA, which would be otherwise applicable.[125]

§ 4.5.3—Choice-Of-Law Clause Versus Incorporation Of Rules

Where the arbitration agreement contained both a general choice-of-law provision (*e.g.*, this agreement shall be governed by the arbitration laws of New York) and incorporated arbitration rules of an organization (NASD), which were in conflict with the laws of New York, the U.S. Supreme Court held that the choice-of-law clause provided the substantive principles the "courts would apply, but [did not] include special rules limiting the authority of the rules of the arbitrator."[126]

This concept was subsequently applied by the Supreme Court: "[T]he 'best way to harmonize' the parties' adoption of the AAA rules and their selection of California law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's 'special rules limiting the authority of arbitrators.'"[127] *See also* § 3.3.1.

§ 4.5.4—Contract Versus Incorporated Rules

When a provision of a contract conflicts with the arbitration rules incorporated into the contract, the contract provision prevails.[128] Frequently, form rules provide that they can be altered by agreement of the parties.[129] *See* §§ 3.3.1, 4.5.3, 5.7.1, and 8.4.3.

§ 4.6 • CONTRACTUAL AGREEMENTS AS TO APPLICABLE ARBITRATION LAW AS SUPERSEDING STATE OR FEDERAL ARBITRATION LAW OR FORUM'S RULES

The preceding sections have discussed how, when applicable, federal law preempts state law. However, many provisions of the state and federal statutes apply only to the extent the parties have not otherwise agreed. Hence, in essence, the agreement of the parties can preempt much of the state or federal statutes.

The priority between the parties' agreement and the provisions of the rules incorporated therein, in general, is as follows:

- If the agreement and the rules are silent as to priority, the agreement probably governs.
- If the agreement states it governs over the rules (arbitration in accordance with the AAA rules, except as provided in the agreement), the express provisions of the agreement probably govern, notwithstanding any provisions in the incorporated rules to the contrary.
- If the agreement is silent as to priority, but the incorporated rules define the priority, those rules govern.[130]

Rule 1 of most of the AAA rules provides, if incorporated, that its rules govern, but may by written agreement be varied.

§ 4.7 • PREEMPTION OF ARBITRATION LAW — APPLICABILITY IN STATE OR FEDERAL COURT

Earlier sections discussed the scope and extent of preemption of state arbitration law by the FAA, when the FAA is applicable. When an arbitration issue is brought to a state court, that state court will apply the FAA to the extent of its preemption of state arbitration law, and will apply state arbitration law to the extent not preempted by the FAA.[131]

But, if the same case is brought in federal court and the FAA governs, does the federal court apply only federal law? Probably, to the extent the provisions of the FAA are substantive, they apply under the Supremacy Clause. To the extent they are procedural, they apply when the matter is in federal court under the *Erie v. Tompkins* principles.

§ 4.8 • APPLICABILITY OF GENERAL LITIGATION RULES AND STATUTES TO ARBITRATION

The extent to which arbitrators are "governed" by substantive law is discussed in §§ 3.13 and 16.4.

The statute books are filled with provisions applicable to the conduct of litigation. The Colorado and federal rules of civil procedure define in detail the procedures governing civil actions. To what degree are these statutes and rules applicable to arbitration?

§ 4.8.1—Applicability Of Colorado Statutes Governing Civil Actions

There are numerous provisions in the Colorado Revised Statutes that govern various aspects of civil actions. Examples of these statutes include:

- C.R.S. § 13-16-101. Security for costs.
- C.R.S. § 13-16-107. Costs on motion to dismiss.
- C.R.S. § 13-16-111. Recovery of costs of suit.
- C.R.S. § 13-16-113. Costs upon dismissal or summary judgment.
- C.R.S. §§ 13-17-101, *et seq*. Attorney fees for frivolous, groundless, or vexatious actions.
- C.R.S. § 13-17-202. Award of actual costs and fees when offer of settlement was made.
- C.R.S. § 13-20-602. Certificate of review (actions against licensed professionals).
- C.R.S. § 13-21-111. Negligence cases — comparative negligence as measure of damages.
- C.R.S. § 13-21-111.5. Civil liability cases — pro rata liability of defendants — shifting financial responsibility for negligence in construction agreements.
- C.R.S. §§ 13-50.5-101, *et seq*. Uniform Contribution Among Tortfeasors Act.
- C.R.S. §§ 13-80-101, *et seq.* Limitation of Actions.

For example, C.R.S. § 13-17-202, Award of Actual Costs and Fees When Offer of Settlement Was Made, in general, provides that when a plaintiff or defendant serves an offer of settlement upon the opposing party that is rejected by the opposing party, if the opposing party ultimately obtains a less favorable result then it would have had, had it accepted the offer of settlement, the offering party may recover the actual costs accruing after the offer of settlement. The statute sets forth the details of its operation.

"Assume" that this statute is procedural and not substantive. The statute does not refer to arbitration, nor is there any other statute known to this author that expressly makes the statute applicable to arbitration. Similarly, there is no Colorado reported judicial decision known to the author holding that the statute applies to any arbitration. The statute is contained in Part 2 of Article 17 of Title 13 of the Colorado Revised Statutes, "Attorney Fees in Civil Actions in General." The statute refers throughout to a "civil action," service "before the commencement of trial," etc. The statute defines its applicability to "any civil action of any nature commenced or appealed in any court of record in this state."[132] Arbitration is not within this definition of applicability as the words are commonly used, nor is there any suggestion in the statute supporting a "broad" definition of "civil action" so as to include arbitration. The statute refers to a "defendant" or "plaintiff" receiving a "final judgment." An arbitrator does

not render a final judgment, although a court may confirm an arbitration award and enter "final" judgment thereon.[133] The language of the statute is with reference to a court action. Is it grounds for vacating an arbitration award if the arbitrator refuses to apply the statute in circumstances in which a court would apply it?

On the other hand, the Colorado Court of Appeals held that the statutory power to engage in "litigation" under the Colorado Common Interest Ownership Act includes the power to engage in arbitration. Recognizing that out-of-state authority is split as to whether "litigation" does or does not include arbitration, the court concluded it did based upon an analysis including the state's public policy that arbitration is a favored method of dispute resolution.[134]

There are statutes referring to judicial actions that have in one way or another been adopted in or applied to arbitration. For example, the statute that defines the interest rate that courts use for prejudgment and post-judgment interest, C.R.S. § 5-12-102, is often "applied" in arbitration. However, this is not because the statute provides that it applies to arbitration or any rule of law so providing. Rather, it is because the statute is not limited to civil actions, often the parties by agreement so provide, and in most circumstances the arbitrator has discretionary power and jurisdiction with respect to award of interest. The statute is in essence borrowed, and the arbitrator adopts the rate or applies it as governing law as to the rate of interest due on amounts owing.

By way of further example, the Colorado Rules of Civil Procedure, defined by Rule 1 to govern the procedure in the courts of Colorado "in all actions, suits and proceedings of a civil nature," do not apply to arbitration, unless, and to the extent, agreed upon by the parties in their arbitration agreement. (However, it could be argued that arbitration is a proceeding "of a civil nature.") Sometimes parties adopt the Rules of Civil Procedure into the arbitration provisions to the extent they can be reasonably applied. There are no doubt statutes that refer to courts and that may be applicable to arbitration without more, but this author need not consider that question. The parties could agree to provide for the applicability of the principles of the rules to the arbitration in an arbitration agreement. AAA Commercial Arbitration Rule R-1(a) provides, "The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator." Furthermore, an arbitrator might well define the substance of the statute as part of his or her prehearing and hearing procedures, provided that the parties were given reasonable notice of such adoption in advance. Similarly, there are numerous other statutes that in one form or another can be adopted into an arbitration procedure. The statute is not embodied in arbitration procedures as a matter of law, although it may be incorporated. Moreover, unless the parties' agreement otherwise provides, an arbitrator has the same discretion to award costs under the CRUAA as under C.R.S. § 13-16-122. C.R.S. § 13-22-221(1) provides:

> 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.[135]

C.R.S. § 13-16-122 is incorporated into the CRUAA by C.R.S. § 13-22-221(1); *see also* Rule R-48 of the AAA Construction Industry Arbitration Rules. *See also* C.R.S. § 13-22-212 of the CUAA:

> 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.

As to each of these, and other statutes, it might be held that they apply to arbitration to the same extent as substantive laws, that the arbitrator is free to follow or not follow them, or that they have no place in arbitration. For example, the Washington Court of Appeals held that absent agreement of the parties, statutes of limitations had no application to arbitrations.[136]

The Tenth Circuit avoided this issue with respect to C.R.S. § 13-17-102, award of attorney fees for frivolous, groundless, or vexatious action.[137] The arbitration award included an award of attorney fees pursuant to statute. The respondent in its motion to vacate urged that the statute by its terms applied only to civil actions brought in Colorado state courts, and therefore must be vacated as a manifest disregard of the law.

The Tenth Circuit rejected the contention in view of the fact that during the arbitration both parties urged that the statute permitted the arbitrators to award attorney fees, and neither suggested that it applied only to civil suits brought in state court. While the statute required setting forth the specific reasons for the award considering defined factors, it did not apply, as arbitrators are "not required to delineate the reasons for their decision[s]."

Where a statute refers to "civil actions" or "courts," should the statute be interpreted to refer to arbitration?[138] In the first instance, that decision should be governed by the full wording of the statute, the subject matter, legislative intent, and whether such interpretation is logical. Should such statutes "govern" the arbitrators, or simply provide discretion?

Generally, the parties could incorporate many of these statutes — or at least the concepts — into their contract. As with any other provisions of their contract, these provisions would govern any arbitration between them. However, absent such incorporation, do the principles of such statutes apply? What effect does a provision in the arbitration agreement have that provides all disputes shall be resolved in accordance with the law of the State of Colorado?

§ 4.8.2—Applicability Of The Federal Rules Of Civil Procedure

See § 3.7.1.

§ 4.8.3—Applicability Of Law As Governing The Arbitrator

There are numerous judicial decisions stating that an arbitrator is not obligated to follow the law. *See* §§ 3.13 and 16.4; *compare* § 17.4.15. There are also numerous decisions in which courts considered whether to vacate an arbitration award because of the arbitrator's manifest disregard of the law. *See* §17.4.15. (This may have been eliminated as a separate ground for vacating an award. However, the concept of manifest disregard of the law is probably within the scope of one of the statutory grounds for vacation of an award.)

However, there is a difference between an arbitrator's attempted but erroneous effort to apply applicable law, and an intentional disregard of applicable law. The arbitrator's obligation to apply law may be determined by the language in the arbitration agreement.

The Issues to Be Arbitrated Shall Be Decided in Accordance with the Law of the State of Colorado

With such a clause, the obligation of the arbitrator to apply the law seems clear; however, his or her failure to do so, intentionally or unintentionally, may not give way to a vacation of the award. *See* § 17.4.15.

Silence

Suppose there is no clause in the arbitration agreement with respect to the law to be applied. Lawyer arbitrators in general feel more comfortable deciding issues by applying law. But, can they ignore the law and decide the issues based upon their personal sense of justice or fairness?

§ 4.8.4—Application Of The Federal Arbitration Act In State Court Proceedings And Vice Versa

This topic is extensively covered in Benson, "Application of the Federal Arbitration Act in State Court Proceedings," 43 *Colo. Law.* 33 (Dec. 2014).

§ 4.9 • WHEN SHOULD THE LAW APPLIED IN ARBITRATION AND IN JUDICIAL PROCEEDINGS BE THE SAME?

Generally, and subject to certain discretionary powers of the arbitrator, an arbitrator should apply the same substantive law as would a court hearing the same issue. So to, very generally, as to procedural issues. Generally, arbitration is intended to provide a different forum and procedure, but not necessarily a different result.

Choice of Law

If the parties' agreement has a choice-of-law provision, generally, a court and an arbitrator should follow that choice in the same circumstances. Similarly, if the contract is silent, normally an arbitrator should follow the same choice-of-law rules as would a court.

Waiver of Class Actions

The issue of contractual waiver of class actions frequently arises in arbitration, particularly in consumer disputes. The validity of the waiver should be determined under the rules defined by the applicable case law and statutes,[139] regardless of whether determined by a judge or arbitrator. Arbitration should not be a device to avoid substantive law. *See* § 6.8.

Validity of a Contract

Generally, the validity of contracts is governed by state law. Hence, the result of a case should not be different when heard by a judge or an arbitrator — at least, no different than if heard by two different judges. The law should be the same when applied by an arbitrator or a judge, unless the parties have "freed" the arbitrator from the burden of law.

Affirmative Defenses

The law of affirmative defenses is generally governed by state law, if a state law cause of action is asserted. Again, that law ought not to differ whether applied by a judge or an arbitrator, or, at

least not to any greater degree than if applied by two judges. Compare, however, if the dispute is to be determined by applying equity, reason, fairness, and justice. *See also* § 4.3.9.

§ 4.10 • APPLICABLE LAW IN JUDICIAL PROCEEDINGS CONCERNING THE ARBITRATION

The foregoing discussion has covered whether state or federal law governs in "arbitration proceedings," including judicial proceedings concerning an arbitration. However, multiple circumstances may exist that affect the general rules. These "proceedings" could be of any trial court issues, including motions to compel or stay arbitration, appointment of the arbitrator, enforcement of subpoenas, confirmation or vacation of the award, etc. *See* Chapters 13, 14, 17, and 18. This section will attempt to briefly summarize these circumstances.

§ 4.10.1—State District Court Proceedings — CRUAA Applies

If it is determined that the CRUAA is applicable (by agreement of the parties, or by reason of the FAA not being applicable, §§ 4.2.1 and 4.2.2), Colorado district court proceedings are governed by the CRUAA, and any other applicable state laws. The Colorado Rules of Civil Procedure are applicable to the extent not inconsistent with the CRUAA.

§ 4.10.2—State District Court Proceedings — FAA Applies

When arbitration proceedings are in state court, but the FAA is applicable, the FAA governs in part, the CRUAA may govern in part, and other state law and rules may govern in part. Thus, when applicable, the FAA preempts state law, but only state law that is inconsistent or hostile to the policy and purposes of the FAA. *See* § 4.3.9. As a broad generality, most state "procedural" law such as the rules of civil procedure and procedural provisions of the CRUAA are not preempted, and therefore are applied even when the FAA is applicable. *See* §§ 4.3, 4.6-4.8, and 3.7.1.

§ 4.10.3—State Appellate Court Proceedings — CRUAA Applies

The same analysis applies here as to district court proceedings. Appellate jurisdiction of state courts would be under the CRUAA and any other applicable state statutes and rules, including the Colorado Rules of Appellate Procedure, to the extent not inconsistent. So too, appeals and appellate review would be under Colorado law.

§ 4.10.4—State Appellate Court Proceedings — FAA Applies

While the FAA and CRUAA provisions as to appeals of district court judgments, orders, etc. are similar, issues may arise as to which statute concerning "appealability" governs. So too, other provisions of state and federal law as to interlocutory appeals. Again, even when the FAA is applicable, it preempts state law only to the extent inconsistent or hostile to the policies and objectives of the FAA. *See* § 4.2.1. Usually, state appellate law is not preempted. But the issue can be analyzed only in light of specific circumstances and rules. Compare, however, § 20.2.2 discussing the Colorado Court of Appeals apparently applying the FAA to hold an order compelling arbitration and dismissing the civil action was appealable.

See Benson, "Application of the Federal Arbitration Act in State Court Proceedings," 43 *Colo. Law.* 33 (Dec. 2014) for a detailed treatment of this topic.

§ 4.10.5—Federal District Court — FAA Applies

If the FAA is applicable to the arbitration, proceedings in the federal district court are governed by the FAA and other federal laws and rules. This conclusion applies if federal district court jurisdiction is based upon a federal question. If federal court jurisdiction is based on diversity of citizenship but the FAA is applicable, the conclusion probably is the same. However, it is beyond the scope of this book to analyze the conclusion under all circumstances where diversity is the basis of the district court's jurisdiction.

§ 4.10.6—Federal District Court — CRUAA Applies

As discussed in Chapter 19, the CRUAA is applicable if the underlying transaction does not involve interstate commerce or if the parties agree the CRUAA governs. Normally, the federal court's jurisdiction would be based upon diversity of citizenship.

Generally, the *Erie v. Tomkins* type of analysis would apply: federal procedural law and rules apply, and substantive provisions of the CRUAA apply. As always, the devil is in determining which are procedural and which are substantive. *See* § 4.3.6.

§ 4.10.7—Federal Court Of Appeals — FAA Applies

Federal law and rules govern all aspects of an appeal from the district court to the court of appeals when the FAA is applicable.

§ 4.10.8—Federal Court Of Appeals — CRUAA Applies

The Tenth Circuit recently clearly defined that under the Constitution (Art. 3, § 1) inferior Article III courts may only hear cases when empowered to do so by the Constitution and by act of Congress.[140] The court explicitly rejected any jurisdiction based upon the appeal provisions of the CRUAA, given that a state legislature cannot confer jurisdiction upon a federal court.

§ 4.11 • BIBLIOGRAPHY

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NOTES

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

3. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). *See also Gonzales v. Raich*, 545 U.S. 1 (2005).

4. *Citizens Bank*, 539 U.S. at 56.

5. *Id.* at 56-57.

6. *Allied-Bruce Terminix Cos.*, 513 U.S. at 281. *See F.A. Dobbs & Sons, Inc. v. Northcutt*, 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).

7. *Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 725 (Colo. 1998) (citing *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232 (D. N.J. 1994)).

8. *Stone v. Vail Resorts Dev. Co.*, 2010 U.S. Dist. LEXIS 80849, 2010 WL 2653314 (D. Colo. July 1, 2010).

9. *Thomas Petroleum, Inc. v. Morris*, 355 S.W.3d 94 (Tex. App. 2011).

10. *Id*.

11. *KCOM, Inc. v. Emp'rs Mut. Cas. Co.*, 829 F.3d 1192, n. 1 (10th Cir. 2016). *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

12. *See generally* Annot., *Pre-emption by Federal Arbitration Act of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 100 A.L.R. Fed. 129.

13. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). *See generally Ware v. Hylton*, 3 U.S. 199 (3 Dall.) (1796).

14. *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008).

15. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

16. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

17. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

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

19. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

20. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

21. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

22. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

23. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995). *See also* § 16.6.2.

24. *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 447 (2006).

25. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

26. *See* 9 U.S.C. §§ 1 and 2.

27. *Volt Info. Scis., Inc.*, 489 U.S. at 477.

28. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *see generally Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003).

29. *See Volt Info. Scis., Inc.*, 489 U.S. 468 (1989).

30. *Id.* at 477-78.

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

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33. *Chilcott Entm't L.L.C. v. John G. Kinnard Co*, 10 P.3d 723 (Colo. App. 2000).

34. *Evans v. Colo. Permanente Med. Grp., P.C.*, 902 P.2d 867 (Colo. App. 1995), *modified on other grounds*, 926 P.2d 1218 (Colo. 1996).

35. *Morrison v. Colo. Permanente Med. Grp., P.C.*, 983 F. Supp. 937 (D. Colo. 1997).

36. *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003). To the same effect, *see In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005), *overruled on other grounds by In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009).

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38. *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986).

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42. *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771, 774 (Colo. App. 2000) (citing *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997)). *See also Fonden v. U.S. Home Corp.*, 85 P.3d 600, 602 (Colo. App. 2003); *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836 (Tex. App. 2002) (when FAA applies, state court applies state procedural rules, *e.g.*, as to whether an appeal lies).

43. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

44. *Fonden v. U.S. Home Corp*., 85 P.3d 600, 602 (Colo. App. 2003).

45. *Id.* at 602.

46. *Id.* at 603 (citation omitted).

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

48. *Id.* at 1063.

49. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000).

50. *See Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982).

51. *Rosenthal v. Great Western Fin. Sec. Corp.*, 926 P.2d 1061 (Cal. 1996).

52. *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr.2d 726 (Cal. Ct. App. 1998). *See also Cronus Invs., Inc. v. Concierge Servs.*, 107 P.3d 217 (Cal. 2005).

53. *Rosenthal*, 926 P.2d at 1061.

54. *Id.*

55. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

56. *See Rodriguez v. Am. Techs., Inc.*, 39 Cal. Rptr. 3d 437 (Cal. App. 2006).

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62. 9 U.S.C. §§ 1, *et seq.*

63. *See* 9 U.S.C. §§ 1 and 2.

64. 9 U.S.C. § 2.

65. *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 56 (2003).

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

67. *Id.* at 281. As to a state court perspective, see *F.A. Dobbs & 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 Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999); *Morrison v. Colo. Permanente Med. Grp., P.C.*, 983 F. Supp. 937 (D. Colo. 1997). Annot., *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).

68. *See Chilcott Entm't L.L.C. v. John G. Kinnard Co.*, 10 P.3d 723 (Colo. App. 2000) (Colorado state court applied the FAA three-month limitation period in which to file a motion to vacate, modify, or correct an arbitration award).

69. *Cf. id.* at 727.

70. *Id.*

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72. *Volt Info. Scis., Inc.*, 489 U.S. at 479.

73. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

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76. *Swissmex-Rapid, S.A. de C.V. v. SP Sys., LLC*, 212 Cal.App.4th 539 (Cal. App. 2012).

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80. *See Rosenthal v. Great West Fin. Secs. Corp.*, 926 P.2d 1061 (Cal. 1996).

81. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

82. *N.J.R. Assocs. v. Tausend*, 973 N.E.2d 730 (N.Y. 2012).

83. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

84. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

85. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

86. *Barker v. Halliburton Co.*, 2008 U.S. Dist. LEXIS 34244, 2008 WL 1883880 (S.D. Tex. Apr. 25, 2008).

87. *Triad Health Mgmt. of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. App. 2009).

88. *Volt Info. Scis., Inc.*, 489 U.S. at 477 n. 6; *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 10 (1984).

89. *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011).

90. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

91. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), *opinion amended on denial of reh'g*, 289 F.3d 615 (9th Cir. 2002).

92. *Rodriguez v. Prudential-Bache Secs., Inc.*, 882 F. Supp. 1202 (D.P.R. 1995), *aff'd*, 72 F.3d 234 (1st Cir. 1995).

93. *E.g.*, *In re Chestnut Energy Partners, Inc.*, 300 S.W.3d 386 (Tex. App. 2009) (also holding that procedural matters relating to the confirmation of arbitration award in Texas courts are governed by Texas law even if the FAA supplies the substantive rules of decision); *Warbington Constr. Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853 (Tenn. App. 2001).

94. *Morgan Keegan & Co. v. Snythe*, 401 S.W.3d 595, 607 (Tenn. 2013).

95. *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr. 2d 726 (Cal. App. 1998). *See also Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 795 (Mo. App. 1998); *Greenway Capital Corp. v. Schneider*, 494 S.E.2d 287, 288-89 (Ga. App. 1997).

96. *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies Inc.*, 401 F.3d 701 (6th Cir. 2005). *Compare Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). *See* Chapter 17.

97. *Generational Equity LLC v. Schomaker*, 602 F. App'x 560 (3d Cir. 2015).

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

99. *Saavedra v. Dealmaker Devs., LLC*, 8 So.3d 758 (La. App. 2009).

100. *Id.* at 762.

101. *Id.*

102. *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

103. *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093 (Colo. App. 2009); *Fonden v. U.S. Home Corp.*, 85 P.3d 600, 602 (Colo. App. 2003).

104. *Durham v. Guest*, 204 P.3d 19 (N.M. 2009).

105. *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003).

106. *Morrison v. Colo. Permanente Med. Grp., P.C.*, 983 F. Supp. 937 (D. Colo. 1997).

107. *Allen v. Pacheco,* 71 P.3 375 (Colo. 2003). *Southern Pioneer Life Ins. Co. v. Thomas*, 385 S.W.3d 770 (Ark. 2011). *Williamsburg Care Co., LP v. Acosta*, 406 S.W.3d 711, (4th Dist. Ct. App. Tex. 2013). *See also Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2020) and § 6.15.

108. *Evans v. Colo. Permanente Med. Grp., P.C.*, 926 P.2d 1218 (Colo. 1996).

109. *Cf. Russell v. Lutheran Brotherhood*, 2004 WL 316383 (Denver Dist. Ct. 2004).

110. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468 (1989). *See Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008).

111. *See Taylor v. Butler*, 142 S.W.3d 277, 282 (Tenn. 2004).

112. *E.g.*, *Fiser*, 188 P.3d at 1218.

113. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774 (Tex. 2006).

114. *SourceGas Distrib., L.L.C. v. Bitter Creek Pipelines, L.L.C.*, 2012 WL 1883923 (Colo. App. 2012). *See generally Volt Info. Scis. v. Bd. of Trs.*, 389 U.S. 468, 478 (1989).

115. *See also Morgan Keegan & Co. v. Smythe*, 2011 Tenn. App. LEXIS 613, 2011 WL 5517036 (Tenn. App. Jan. 19, 2011) (Tennessee appeals statute not preempted and is procedural, as not in conflict with FAA).

116. *1745 Wazee LLC v. Castle Builders, Inc.*, 89 P.3d 422 (Colo. App. 2003).

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

118. *Mastrobuono*, 514 U.S. at 63-64.

119. *Barker v. Halliburton Co.*, 2008 U.S. Dist. LEXIS 34244, 2008 WL 1883880 (S.D. Tex. Apr. 25, 2008).

120. *Glenn J. Deadman, P.C. v. SBC*, 2007 Tex. App. LEXIS 3114, 2007 WL 1200108 (Tex. App. Apr. 25, 2007). S*ee also Volk v. X-Rite, Inc.*, 599 F. Supp. 2d 1118 (S.D. Iowa 2009) (provision that Michigan law applied if "not displaced by applicable law" held not to preclude preemption by FAA).

121. *Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546 (7th Cir. 2008). *Compare Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

122. *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 142 P.3d 1044 (Ore. 2006).

123. *Glazer's Distribs. of Illinois, Inc. v. NWS-Illinois, LLC*, 876 N.E.2d 203, 212-13 (Ill. App. 2007). *See* § 4.5.2.

124. *See Barrett v. Inv. Mgmt. Consultants, Ltd.*, 190 P.3d 800 (Colo. App. 2008). *See also Mastrobuono*, 514 U.S. at 64; *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 424-25 (Colo. App. 2003).

125. *In re Olshan Found. Repair Co., L.L.C.*, 277 S.W.3d 124 (Tex. App. 2009); *Sovak*, 280 F.3d at 1270 ("But a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration. . . . [It] simply suppl[ies] state substantive, decisional law, and not state law rules for arbitration.").

126. *Mastrobuono*, 514 U.S. at 64.

127. *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (citations omitted).

128. *Brady v. Williams Capital Grp., L.P.*, 878 N.Y.S.2d 693 (N.Y. App. Div. 2009).

129. *E.g.*, AAA Commercial Arbitration Rule R-1.

130. *See Brady v. Williams Capital Group, L.P.*, 878 N.Y.S.2d 693 (N.Y. App. Div. 2009).

131. *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093 (Colo. App. 2009). *See* § 4.3.6.

132. C.R.S. § 13-17-102.

133. C.R.S. § 13-22-225.

134. *Rosenthal v. Great Western Fin. Secs. Corp.*, 926 P.2d 1061 (Cal. 1996).

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

136. *Broom v. Morgan Stanley DW, Inc.*, 146 Wash. App. 1043 (Wash. App. 2008), *aff'd*, 236 P.3d 182 (Wash. 2010); *Wachovia Secs., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012) (referring to South Carolina Frivolous Civil Proceeding Act, stating that there is no requirement "that state procedural requirements must be imported into arbitration.").

137. *Hollern v. Wachovia Secs., Inc.*, 458 F.3d 1169 (10th Cir. 2006).

138. *Mt. Hawley Ins. Co. v. Casson Duncan Constr., Inc.*, 2016 COA 164 (term "arbitration proceeding" was a "suit" as used in an insurance policy).

139. As to waiver issues, in the federal courts, federal law of waiver may be applicable, while in state courts, the same issue may be determined by state law. *See generally* Annot., *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. Fed. 688, § [b].

140. *KCOM, Inc. v. Emp'rs Mut. Cas. Co.*, 829 F.3d 1192 (10th Cir. 2016).