Chapter 5

AGREEMENTS TO ARBITRATE

SYNOPSIS

§ 5.1 • INTRODUCTION

"Arbitration" as discussed in this book is a consensual process. Therefore, what the parties agreed to is the primary definition of the arbitration. Arbitration agreements deal with two types of disputes: an agreement to arbitrate future disputes that may arise between the parties (usually with respect to a specified subject or transaction) or an agreement to arbitrate a specific existing dispute. Typically, the former "agreement" is simply part of a contract with respect to a transaction or relationship between the parties. The latter is a contract defining the dispute resolution process for one or more disputes that have arisen.

Yet, every dispute resolution process that is labeled "arbitration" by the parties may not be "arbitration" for purposes of being governed by the federal or state arbitration statutes. Thus, simply referring to a dispute resolution process as arbitration does not make the state or federal arbitration statutes the governing law. Rather, only arbitration as interpreted by the courts is subject to the statutes.

All discussions and issues in arbitration begin with the pronouncements in the Federal Arbitration Act (FAA) and Colorado Revised Uniform Arbitration Act (CRUAA) that an agreement to submit a dispute to arbitration is valid, enforceable, and irrevocable except upon a ground in law or in equity for the revocation of a contract. FAA § 1; C.R.S. § 13-22-206(1) (2016).

See generally Chapter 7, "Arbitrability of Disputes: The Issues and the Law."

§ 5.2 • REQUIREMENTS FOR AN AGREEMENT TO ARBITRATE

The references in this section to an agreement to arbitrate are to either an arbitration clause in a contract for a transaction other than arbitration or an agreement limited to defining arbitration for a specific dispute(s). Both are agreements to arbitrate, and both must fulfill the statutory and common law requirements to be enforceable.

§ 5.2.1—FAA Requirements For A Valid Arbitration Agreement

Arbitration clauses at common law often were not enforceable. This was changed by the adoption of the FAA, and thereafter in many states by the passage of the Uniform Arbitration Act or its equivalent. As noted in Chapter 2, the public policy of Colorado favored arbitration long before the adoption of the FAA or the Uniform Arbitration Act.

FAA § 2 provides:

> A written provision 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

FAA § 9 provides for confirmation of an award, "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award." The transactions and contracts to which the FAA applies are discussed below. However, the elements of a valid arbitration clause under the FAA are:

An agreement in writing:

1) To submit an existing or future dispute to arbitration; and
2) Providing that judgment may be entered by a court on the award.

This probably does not mean that there must be any explicit language that an enforceable judgment may be entered by a court on the award.[1]

The FAA does not require that the agreement to arbitrate be signed by the parties.[2]

As indicated above, the only statutory requirement for an arbitration agreement is that it be in writing (physical or electronic form). If an agreement is governed by the FAA, it might also need to state that a court may enter judgment on any award.

The FAA § 9 statement that confirmation is authorized where "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," has resulted in litigation, probably unnecessarily. For example, providing in the agreement that the award was "binding" was held to not fulfill the § 9 requirement,[3] whereas "shall be final and binding on the parties" has been held sufficient.[4] A provision that the award "shall be final and binding upon each party and may be enforced in any court of competent jurisdiction" fulfills the requirement.[5] Similarly, where the arbitration agreement did not have a provision that judgment may be entered upon the award (FAA § 9), the incorporation of American Arbitration Association (AAA) rules that provided that the parties all be deemed to have consented that judgment upon the award may be entered sufficed to fulfill § 9.[6]

In a somewhat unique case, a federal district court held that "in the cotton yarn textile industry a plaintiff is subject to the general obligation to arbitrate disputes and must proceed by arbitration, if at all, due to the established usage of trade in the industry."[7] Generally, custom is incorporated into all contracts.

Where an agreement governed by the FAA fails to provide that judgment may be entered on an award, the losing party may assert that the award cannot be enforced. Such an attack probably will not succeed, since incorporated rules may so provide.[8]

An arbitration agreement may be very short, *e.g.*, "the parties agree to arbitrate any dispute that arises, hereinafter, or that exists with respect to a subject," plus perhaps a provision for enforcement in a court. Indeed, in one non-Colorado case, only two words in an agreement were held to constitute an agreement to arbitrate: "arbitration clause."[9] The details of the arbitration process are defined by the applicable statutory and common law, *and the agreement of the parties*, and thereafter further defined by the arbitrator pursuant to his or her inherent powers. Frequently, "agreements of the parties" incorporate the rules of the AAA or other arbitral organization, which make them a part of the agreement.

By contrast, the arbitration agreement may be extremely long and detailed, defining the arbitration process in minute detail. If not contrary to applicable statutory and common law provisions that do not allow variation by agreement of the parties, the parties generally are free to define their arbitration procedure, and the arbitrator must proceed in accordance with the agreement. Arbitration is not a single "system." Rather, within the limitations of the statutes, the parties can design by agreement the system that best fits their needs. With limited statutory exemptions, the agreement of the parties governs.

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

A valid "short form" arbitration agreement might read:

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

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

Website Arbitration Clauses in Retail Purchases

In frequent litigation are the website purchases where an arbitration clause is a part of the purchase. For example in *Nguyen v. Barnes & Noble, Inc.*,[10] the issue was whether the plaintiff/purchaser had assented to the website's "Terms of Use," which would make them part of the purchase contract. The terms provided for arbitration. The terms were available to visitors to defendant/sellers websites via a hyperlink in the lower left corner of every page of the website. Plaintiff never pulled up the terms or otherwise read them. The "Terms of Use" were a browse wrap agreement: one where "the user can continue to use the website or services without visiting the page hosting the browse wrap agreement or even knowing that such a webpage exists." Compare a "click wrap" agreement, which requires the user to "click" on a box indicating agreement with the terms.

The court, in holding that there was no agreement to arbitrate, said:

> [W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more is insufficient to give rise to constructive notice.

See also § 5.2.3.

§ 5.2.2—CRUAA Requirements For A Valid Arbitration Agreement

Colorado law begins with the Colorado Constitution, art. XVIII, § 3, adopted in 1876:

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

The only requirement is "mutual agreement." That provision today is implemented by either the Colorado Uniform Arbitration Act (CUAA) or the CRUAA.

The CRUAA, C.R.S. § 13-22-206 (2016), provides:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

The CRUAA, C.R.S. § 13-22-201 (2016), defines "record":

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

Therefore, the CRUAA requires an agreement that is "contained in a record," which is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

These provisions of the CRUAA were applied by the Colorado Court of Appeals, holding that under the statute as well as the common law of contract formation, the arbitration agreement need not be signed by the parties. Rather, the agreement must simply be "contained in a record."[11]

While an arbitration agreement must be in written or electronic form, none of the acts requires that the agreement be signed by the parties.[12] For example, an e-mail satisfies the "writing" requirement, a result dictated by the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7003.[13]

§ 5.2.3—The Common Law Of Contracts

Federal

If the FAA governs the arbitration, the state common law and statutory law of formation of contracts generally applies. Thus, the elements of a contract are as defined by Colorado common law.[14] However, if the FAA applies, a state statute may not impose requirements for an "arbitration" agreement distinct from requirements for contracts generally, if it imposes additional burdens or restrictions. The FAA created a body of federal substantive law.[15] To the extent that a state statute or common law imposes obstacles to implementation of the federal policy favoring arbitration, such obstacles are preempted by the FAA when applicable.

"[A]rbitration agreements . . . are subject to all defenses to enforcement that apply to contracts generally."[16] Usually these defenses are under state law.

For example, the U.S. Supreme Court, in *Doctor's Associates, Inc. v. Casarotto*,[17] held that the FAA preempted a Montana statute that conditioned enforceability of an arbitration clause on compliance with a requirement that "[n]otice that [the] contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract." The notice requirement, which governed only contracts with an arbitration provision, conflicted with the FAA, which imposed no such requirement, and therefore was preempted. *See* § 5.6. Preemption of state law by the FAA is covered in Chapter 4.

Some "basic" contract law issues arise in an arbitration context. For example, the U.S. District Court for the District of Colorado, in *Avedon Engineering, Inc. v. Seatex*,[18] held that an acceptance of an offer to provide goods or services that contains an arbitration clause in the circumstances presented was not deemed a material alteration in the offer under the UCC, and therefore the clause was enforceable as part of the contract.

Similarly, as with all contracts, the parties must expressly or impliedly agree to the terms of the arbitration agreement.[19] As with any contract, an arbitration agreement perhaps can be implied in fact.[20] However, the "implication" may have to be based on writings or some other type of record. If a person is acting as agent for a party, the agent must have authority to agree to arbitration. A lawyer does not have inherent authority to agree to arbitration on behalf of a client, and thereby waive trial. No attorney has the authority to forego a jury trial in favor of arbitration without the client's consent.[21]

Federal common law defines the term "arbitration" as used in the FAA, which may determine whether the FAA governs the proceeding. *See* §§ 2.1.2, 3.7.2, and 4.3.5.

§ 5.2.4—Reasonable Costs

A frequently raised defense to the enforcement of an arbitration agreement is the perceived high cost of arbitration. When a court finds the cost of arbitration may effectively deprive a party of his or her federal statutory rights, courts sometimes have refused to compel arbitration. *See* Chapter 6, "Arbitration of Particular Kinds of Claims and Between Particular Entities." The defense has also been asserted with respect to state statutory or common law rights.[22]

§ 5.2.5—Membership In Organization Whose Bylaws Provide For Arbitration

- *See* Annot., *Contract Providing that it is Governed by or Subject to Rules or Regulations of a Particular Trade, Business or Association as Incorporating Agreement to Arbitrate*, 41 A.L.R.2d 872.
- *See also* §§ 3.3.3.

§ 5.2.6—Governing Law

See Chapter 4.

CRUAA

If the CRUAA is applicable, the formation of the arbitration agreement and any defenses thereto are governed by Colorado law, or, if applicable, as defined by the choice-of-law rules. Thus, Colorado state law rules that govern the formation of contracts apply to determine whether there is a valid arbitration agreement.[23]

FAA

If the FAA is applicable, the formation of the arbitration agreement and any defenses thereto are typically governed by "borrowed" state law, subject to preemption if the state law presents an obstacle to achieving the objectives of the FAA. "[A] state-law principle that takes its meaning from the fact that an agreement to arbitrate is at issue does not comport with section 2 of the FAA and therefore is preempted."[24]

The courts frequently state that under the FAA, arbitration agreements are interpreted according to state-law rules of contract construction.[25] That certainly is in fact the general rule. However, the U.S. Supreme Court held, in *AT&T Mobility LLC v. Concepcion*,[26] that FAA § 2 prohibits (preempts) invalidation of an arbitration agreement under a state law that held that waiver of class-wide arbitration was unconscionable and therefore unenforceable. Before application of state law rules of interpretation, as well as state contract defenses, the application must be examined to determine if it "interferes with fundamental attributes of arbitration" to the degree that it "creates a scheme inconsistent with the FAA" or constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[27] If so, the state rules of interpretation and defenses are preempted by the FAA.

Notwithstanding that historically the courts have relied on established authority that ordinary state-law principles that govern the formation of contracts are applied to determine whether a party has agreed to arbitrate a dispute,[28] the *Concepcion* case appears to be the start of a growing wave of appli-

cation of federal law — in instances where state law might inappropriately restrict the formation of arbitration agreements when implementing the policies of the FAA.

Previously, when the FAA was applicable, state law determined whether the arbitration agreement was void in whole or in part because of unconscionability. Now the U.S. Supreme Court upheld the validity of a clause in the arbitration agreement (waiver/prohibition of arbitration class actions) by preempting state law. (In doing so, the Court did not define what the federal law of unconscionability was, it merely preempted application of the state law.)

When the FAA applies, federal law governs the interpretation of the arbitration agreement. Once the court finds that "there is a valid agreement to arbitrate, regardless of whether the action is in a federal or a state court, the determination of whether 'a particular dispute is within the class of those disputes governed by the arbitration clause . . . is a matter of federal law.'"[29] The term "arbitration" as used in the FAA (which defines what proceedings are subject to the FAA) is defined by federal common law, although the circuits are somewhat split.[30] In determining whether a dispute is within the scope of the arbitration agreement "there is a [federal law] presumption of arbitrability[;] an order to arbitrate the particular grievance should not be denied [under federal law when the FAA applies] unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[31]

"'In determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts."[32] This statement is obvious when the CRUAA or other state arbitration law is applicable. However, it is also true when the FAA is applicable,[33] perhaps primarily because there is little federal statutory or common law of contract formation. However, when state-law contract principles collide with FAA objectives, the FAA (and common law thereunder) preempts state contract law, *e.g.*, state law of unconscionability. *See* § 6.8.

§ 5.2.7—Who Is Bound By The Agreement To Arbitrate — Non-Signatories

See § 7.3.1.

To date, this issue is governed by the applicable state contract law that applies to all contracts.[34] However, such law will be preempted/voided/ignored if it is inconsistent with the policies of the FAA. *See* § 5.2.6.

§ 5.2.8—Agreements Of Government Entities To Arbitrate

See Chapter 22.

§ 5.3 • OPTIONAL TERMS FOR AN ARBITRATION AGREEMENT

An arbitration agreement can be quite long, covering topics such as:[35]

- Number of arbitrators;
- Method of selection of the arbitrator(s);

- Arbitrator qualifications, and qualifications not required, *e.g.*, need not be a lawyer, education, experience, etc.;
- Non-lawyers as arbitrators and as representatives of the parties;
- Manner of notice of an initial application to a court for an order;[36]
- Location of the arbitration;
- Determination of arbitrable issues;
- Language to be used in the hearing;
- Governing arbitration law;
- Whether the intertwining doctrine applies;
- Conditions precedent to arbitration, including negotiation, mini-trial, mediation, and/or dispute review board;
- Preliminary relief;
- Consolidation of arbitrations;
- Document discovery;
- Depositions;
- Duration of arbitration proceedings;
- Interim awards;
- Remedies;
- Baseball arbitration awards;
- Arbitration limited to defined monetary limits;
- Power of arbitrator to enter sanctions for noncompliance with orders;
- Incorporation/application of ABA/AAA Code of Ethics;
- Default procedures for non-payment of fees;
- Assessment of attorney fees and costs;
- Form of opinion accompanying the award;
- Confidentiality;
- Scope of appeals (non-appealability of arbitrator's award);
- Judicial reference;
- Statutes of limitation;
- No appeal of district court judgment;
- Whether class actions can be maintained;
- Applicability of emergency procedure rules (if an AAA arbitration); and
- Forum.

Not all of these provisions are valid in all circumstances. Usually, most of these provisions are not needed.

As discussed in Chapter 17, both Colorado and many of the federal courts have eliminated manifest disregard of the law as a common law ground for vacating an arbitration award. Historically, and perhaps substantially today, arbitrators were generally not required to follow the law. *See* § 16.4.

However, it is increasingly common for the parties to desire the arbitrator to apply and decide the dispute "in accordance with the law." Indeed, they want the award, insofar as interpretation and application of applicable law, to be subject to at least limited judicial review.

Hence, the parties may provide:

> The arbitrator shall apply the substantive law of the State of Colorado and decide all issues in accordance therewith. The arbitrator shall not have jurisdiction or authority to render an award not in accord with the law of the State of Colorado.

Obviously, the arbitrator is bound by this provision, and, if it is felt he or she did not decide in accordance with the law, limited judicial review perhaps may be had under the statutory ground of the arbitrator exceeding or imperfectly executing his or her power, or simply as an award outside the arbitrator's defined jurisdiction.[37]

For example, the California Supreme Court, in ruling that whether claims were barred by the statute of limitations was an issue for the arbitrator, acknowledged "[t]he possibility that arbitrators may base their decision upon broad principles of justice and equity" and award damages that would be barred by the statute of limitations in court. However, the court suggested that the parties could "avoid this risk . . . by specifically agreeing that the arbitrators must act in conformity with rules of law."[38]

§ 5.4 • VOID, VOIDABLE, AND UNENFORCEABLE PROVISIONS IN AN AGREEMENT TO ARBITRATE

§ 5.4.1—Terms That May Void An Arbitration Contract/Clause

Generally, the common law of contracts determines the validity of an agreement to arbitrate. Sometimes, provisions within an arbitration agreement will be severed and the arbitration clause enforced. In other instances, the "illegal" clause permeates the entire agreement and makes the arbitration provision unenforceable. *See* § 7.11.1. One example of a common law rule affecting enforceability is lack of mutuality of the obligation to arbitrate.[39]

Even if there is an agreement to arbitrate, the agreement may be void or voidable. State and federal statutes provide that agreements to arbitrate shall be valid and enforceable, except on the grounds that exist at law or in equity for the revocation of a contract. These grounds apply to all contracts. If it is a ground for voiding a contract applicable only to arbitration contracts, if the FAA applies, it may preempt and eliminate the ground for voiding the contract.

The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*, has been interpreted by the Federal Trade Commission to preclude pre-dispute arbitration provisions that would eliminate a plaintiff's access to the courts for remedies. This Act has been found to be superseded by the FAA, although the courts are split. The courts are somewhat split as to whether rules issued under the Magnuson-Moss Warranty Act barring pre-dispute binding arbitration clauses, 40 Fed. Reg. 60168, 60211, are valid, given the dictates and policy of the FAA. For example, arbitration clauses are barred.[40]

The grounds under Colorado law for revocation of contracts generally include fraud or deceit, negligent misrepresentation, duress, undue influence, mistake, illusoriness, and impossibility of performance.[41] State law probably applies to define these grounds, even when the FAA applies to the arbitration agreement. *But see* § 5.2.6.

In *Huizar v. Allstate Insurance Co.*,[42] the Colorado Supreme Court held that a trial *de novo* clause in an uninsured motorist arbitration provision of an automobile insurance policy was void as against public policy. The clause was applicable only when the award exceeded the $25,000 financial responsibility limits of the State of Colorado. The public policies considered were:

1) Policy against dilution of the uninsured motorist coverage;
2) Policy against undue delay in access to the courts and in favor of speedy resolution of disputes; and
3) Policy in favor of encouraging arbitration.

The court noted that the clause favored the insurer because it is unlikely that the insured would ever seek to avoid a high award, even if the award was lower than the insured's expectations.[43]

An arbitration clause that attempts to bind one party to the arbitration agreement as written, while withholding the power to interpret, modify, rescind, or supplement its terms unilaterally, is illusory, as it binds one party without binding the other.[44] "Plaintiffs would be both irretrievably bound and at the defendant's mercy, while defendants are bound to nothing."[45]

Similarly, a provision in the arbitration agreement that requires the plaintiff to pay one-half the costs of arbitration may be unenforceable, at least where an employee asserts employment rights and cannot afford the cost of arbitration.[46] A provision in the clause that limits the hearing to two days may be void if it is an impossible period of time in which the plaintiffs can present their case. Such a provision constitutes a limitation on a plaintiff's access to an adequate forum for statutory relief.[47] Similarly, where the agreement provided that the prevailing party could recover attorney fees, the statute upon which the claim was based provided for the plaintiff's recovery of attorney fees, and the plaintiff testified that he could not pay attorney fees were he to lose, the contract clause was unenforceable. Thus, as to statutory claims, the arbitration must be an effective and accessible forum for the statutory claims and vindicate the plaintiff's statutory rights.[48] So, too, a prohibition on post-hearing briefs may violate a statutory right of a plaintiff to collect attorney fees if successful.[49]

The fact that arbitration may result in greater limitations on discovery, either because of express provisions in the arbitration agreement or as a result of the arbitrator's discretion, does not make an arbitration clause invalid, either generally or as to specific claims.[50]

Restrictive provisions that generally may be valid in an arbitration clause may not be valid as applied to statutorily created claims. For example, provisions in arbitration agreements barring the recovery of treble damages, attorney fees, and costs may be invalid when applied to antitrust claims, because they "prevent the vindication of statutory rights under state and federal law."[51]

When an agreement is subject to unilateral alteration by the employer, the arbitration agreement may be illusory, unenforceable, and void in its entirety.[52]

In *Encore Productions Inc. v. Promise Keepers*,[53] the arbitration clause incorporated the Rules of Procedure for Christian Conciliation. Those rules provided that "the Holy Scriptures (the Bible) shall be the supreme authority covering every aspect of the conciliation process."[54] The plaintiff asserted these rules conflicted with the provision that Colorado law shall govern the interpretation of the

contract. The court held that there was no impermissible conflict because the contract provided the rules control "except where the state or federal rules specifically indicate that they may not be superseded."[55]

See also § 7.11.

§ 5.4.2—Class Action Waivers

For the validity of class action waivers in arbitration clauses, see § 6.8. Generally, the validity or invalidity of class action waivers should be the same whether determined by a court or an arbitrator, and whether with respect to an arbitration or a civil action. This should not be an issue the outcome of which depends on the forum.

• Annot., *Validity of Arbitration Clauses Precluding Class Actions*, 13 A.L.R.6th 145.

§ 5.4.3—Clauses Imposing Limitations On Time For Commencing Arbitration That Are Shorter Than Statutory Time Limits

Contractual limitations on the time period in which to commence a civil action are common in non-arbitration dispute resolution. The validity of a shortened "contractual statute of limitations" ought to be the same, whether the claim is asserted in arbitration or in court, since arbitration is intended to provide an alternative forum and procedure, not an alternative result.

In *Kristian v. Comcast Corp.*,[56] the claims were for violation of state and federal antitrust laws. The defendant sought to compel arbitration, and the plaintiffs urged "that the arbitration agreements prevent[ed] them from vindicating their statutory rights" because the agreements:

1) Provided for limited discovery;
2) Established a shortened statute of limitations;
3) Barred recovery of treble damages;
4) Prevented recovery of attorney fees; and
5) Prohibited class arbitration.

However, the issue was solely whether these provisions raised a question of arbitrability for the court to decide. In a subsequent District of Colorado decision, the court held that shortening the statute of limitations and waivers of FLSA claims "to the extent permitted by law" did not invalidate the arbitration agreement.[57]

The state and federal antitrust acts provided a four-year limitation period, whereas the arbitration agreement in essence provided a one-year limitation period. The court held that the plaintiff's challenge to the contractual limitations period was not an issue of arbitrability, but simply an affirmative defense to be determined by the arbitrator.[58]

§ 5.4.4—Arbitration Of Nonarbitrable Claims

As to arbitration of intertwining claims — arbitrable and nonarbitrable claims based upon approximately the same facts — *see* §§ 7.3.3 and 7.12-7.13.

§ 5.4.5—Defenses To Enforcement Of Agreements To Arbitrate

Section 2 of the FAA provides an agreement to arbitrate is valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract. The "grounds" are generally the grounds under the applicable state law for the avoidance of enforcement of the agreement, *e.g.*, duress, fraud, and unconscionability. These defenses/grounds for avoidance are discussed in § 7.6.

§ 5.4.6—Clauses Potentially Voiding Arbitration Of Statutory Claims

Claims under state or federal statutes receive special attention when they are subject to arbitration. This special attention is not because the plaintiff/claimant must pursue the claim in an arbitration forum rather than a judicial forum. The concern of the courts about compelling arbitration of statutory claims comes from the drafter of the arbitration clause frequently including special provisions in the clause than could not exist if other claims were presented in a judicial forum.

For example:

1) A forum selection clause for an inconvenient forum for the claimant.
2) The claimant must bear all costs and expenses of the arbitration.
3) The respondent may have greater rights in selection of the arbitrator.
4) Requiring three arbitrators, with the attendant expense.
5) Short contractual limitations of actions.

Thus the rule in state and federal courts that an individual cannot be compelled to forego substantive statutory rights merely by submitting his or her claim to arbitration; the terms cannot prevent an individual from effectively vindicating his or her statutory rights. If the terms have such an effect, the arbitration is void and will not be compelled, or the adverse clauses will be voided.

However, when such terms exist, the courts usually will strike the offending terms and enforce the balance of the arbitration agreement. *See* § 5.5.

FAA

Brownlee v. Lithia Motors, Inc.,[59] was an action by the defendant to compel arbitration of Colorado Wage Claim Act claims. The plaintiff asserted the arbitration clause was not enforceable because it prevented him from effectively pursuing his right to collect unpaid wages under the Wage Act: the burden of being obligated to pay all arbitration fees and costs denied him an effective forum in which to pursue his statutory rights. Arbitration was not a reasonable forum.

The following general rules were noted:

- Statutory employment rights can, as a general rule, be subject to a mandatory arbitration clause.[60]
- An individual cannot by arbitration be forced to forego substantive statutory rights by merely submitting his or her resolution to an alternative forum.[61]
- Mere risk of having to pay high arbitration costs does not prevent a plaintiff from vindicating statutory rights. Plaintiff bears the burden of showing the likelihood of incurring such costs.[62]

- An unsupported assumption that the arbitrator will be hostile to statutory rights is inappropriate.[63]
- Mandatory fee shifting — awarded to prevailing party — prevents a plaintiff from vindicating statutory rights.[64]

However, in *American Express Co v. Italian Colors Restaurant*,[65] the U.S. Supreme Court held that a class action waiver cannot be invalidated merely because proving claims on an individual basis would cost more that the potential recovery. "[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."[66] The Court in essence rejected most of the "effective vindication" of federal statutory rights as a tool to void clauses that eliminated the effective vindication. Thus, the Court said that the doctrine applies only if "rights to pursue" federal statutory remedies are prevented. The doctrine does not apply even if the cost to pursue those claims make it economically impractical.

§ 5.4.7—Provisions Undermining Federal Statutory Arbitration Policy

Generally, arbitration is a sufficient forum for resolving federal statutory claims. However, there are limits.[67]

- The prospective litigant must be able to effectively vindicate its statutory cause of action in the arbitral forum.[68] If not, the presumption in favor of arbitration disappears if the terms of an arbitration agreement actually prevent an individual from effectively vindicating the statutory rights.[69]
- The arbitration agreement must provide an effective and accessible forum.[70]
- An arbitration agreement may not operate "as a prospective waiver of a party's right to pursue statutory remedies."[71]

Thus, the U.S. District Court for the District of Colorado,[72] in a Fair Labor Standards Act (FLSA) case, held two provisions of an arbitration agreement to violate federal statutory policy:

1) Arbitrator fee-splitting provisions, along with condition that claimant bear the costs of producing experts, witnesses, and preparation and presentation of proof.
2) Requiring claimant to bear the costs of her own counsel even should she prevail, as it amounts to a prospective waiver of a statutory remedy while undermining the enforcement scheme of the FLSA.

§ 5.5 • REMEDIES FOR ILLEGAL OR VOID PROVISIONS

See also § 7.11.1.

If a provision in the arbitration agreement is found to be unconscionable or otherwise invalid, what is the remedy? Does it make the agreement to arbitrate unenforceable or only that particular clause? The answer may depend upon whether there is a severability clause and how many void provisions there are.

In *Booker v. Robert Half International, Inc.*,[73] Judge Roberts (now Chief Justice Roberts) examined the following question:

> [W]hat should a court do when confronted with a statutory claim and an arbitration agreement that is unenforceable as written, because it contains a provision purporting to limit such rights: decline to enforce the agreement and allow the statutory claims to proceed in court, or sever the offensive provision and require arbitration under the remainder of the agreement?[74]

The claim alleged racial discrimination and wrongful constructive discharge. The arbitration clause was unenforceable as written because it precluded an award of punitive damages, which were available under the District of Columbia statute. The agreement also contained a severability clause.

Booker's first argument was that the waiver provision prohibited any change in the agreement except by a written agreement of the parties. The court, however, found the waiver and severability clauses compatible. Severability was a contingency contemplated by the parties, not a modification of the contract subject to the waiver clause.

Booker's second argument focused on the employment context in which this issue arises:

> [Appellant urges that] responding to illegal provisions in arbitration agreements by judicially pruning them out leaves employers with every incentive to "overreach" when drafting such agreements. If judges merely sever illegal provisions and compel arbitration, employers would be no worse off for trying to include illegal provisions than if they had followed the law in drafting their agreements in the first place. On the other hand, because not every claimant will challenge the illegal provisions, some employees will go to the arbitral table without all their statutory rights.[75]

The court answered this "why not overreach" argument, by saying, "[T]he more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the [arbitration] clause."[76] In this case, there was but one discrete illegal provision, which could easily be severed without undermining the parties' agreement. The court severed the bar against award of punitive damages and compelled arbitration.

The U.S. District Court for the District of Colorado defined when unenforceable provisions of an arbitration provision can be severed so that the arbitration agreement can be saved:

- There must be a savings clause; and
- There must be an ambiguity in the unenforceable provision.

Otherwise, the entire arbitration agreement is unenforceable.[77]

Similarly, the U.S. District Court for the District of Colorado severed a provision calling for the parties to share the costs of arbitration, when the plaintiff asserted employment claims and could not afford the costs.[78] However, where there is no severability clause and multiple unenforceable clauses, the court may refuse to sever the offending clauses, and instead refuse to enforce the arbitra-

tion clause. For example, in a case involving Title VII and related claims, there was no severability clause, and there were three unenforceable provisions: employee required to share costs of arbitration, hearing limited to maximum of two days, and preclusion of post-hearing application for attorney fees.[79]

On the other hand, the same judge held that in an employment dispute, where the contract contained a severability clause and the only unenforceable provision was the requirement that the employee pay part of the arbitrator's fees, the clause could be severed and the arbitration agreement enforced.[80] Other courts have taken different approaches.[81]

Venue

An arbitration clause placing venue in a forum distant from the claimant may be invalid, at least if it is a small-dollar consumer complaint.[82] The venue may impose an unreasonable geographic barrier.

§ 5.6 • OTHER SPECIFIC REQUIREMENTS FOR VALID ARBITRATION AGREEMENTS

Some states have passed statutes imposing specific requirements for agreements to arbitrate certain types of disputes to be valid and enforceable. These requirements typically are not contained in the state's arbitration act, but rather in sections dealing with specific subjects. Such requirements may include that the arbitration language be in capitals of a defined size, that the parties initial the arbitration provisions in a contract, and other similar provisions.

§ 5.6.1—Health Care Availability Act

For example, in the Colorado Health Care Availability Act, C.R.S. § 13-64-403, Colorado has adopted extensive requirements and restrictions for an arbitration agreement between a patient and a health-care provider to be valid and enforceable:

- A medical malpractice insurer cannot require a health-care provider to utilize arbitration agreements with patients.
- Exemplary damages may be awarded (contrary to C.R.S. § 13-21-201(5)), but any such award may be modified by the district court if excessive or inadequate.
- An arbitration agreement shall state:

> It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of part 2 of article 22 of this title, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. The patient has the right to seek legal counsel concerning this agreement, and has the right to rescind this agreement by written notice to the physician within ninety days after the agreement has been signed and executed by both parties unless said agreement was signed in contemplation of the patient being hospitalized, in which case the

> agreement may be rescinded by written notice to the physician within ninety days after release or discharge from the hospital or other health care institution. Both parties to this agreement, by entering into it, have agreed to the use of binding arbitration in lieu of having any such dispute decided in a court of law before a jury.

- Immediately preceding the signature lines for such an agreement, the following notice must be printed in at least 10-point, bold-face type:

> **NOTE: BY SIGNING THIS AGREEMENT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION RATHER THAN BY A JURY OR COURT TRIAL.**
>
> **YOU HAVE THE RIGHT TO SEEK LEGAL COUNSEL AND YOU HAVE THE RIGHT TO RESCIND THIS AGREEMENT WITHIN NINETY DAYS FROM THE DATE OF SIGNATURE BY BOTH PARTIES UNLESS THE AGREEMENT WAS SIGNED IN CONTEMPLATION OF HOSPITALIZATION IN WHICH CASE YOU HAVE NINETY DAYS AFTER DISCHARGE OR RELEASE FROM THE HOSPITAL TO RESCIND THE AGREEMENT.**
>
> **NO HEALTH CARE PROVIDER SHALL WITHHOLD THE PROVISION OF EMERGENCY MEDICAL SERVICES TO ANY PERSON BECAUSE OF THAT PERSON'S FAILURE OR REFUSAL TO SIGN AN AGREEMENT CONTAINING A PROVISION FOR BINDING ARBITRATION OF ANY DISPUTE ARISING AS TO PROFESSIONAL NEGLIGENCE OF THE PROVIDER.**
>
> **NO HEALTH CARE PROVIDER SHALL REFUSE TO PROVIDE MEDICAL CARE SERVICES TO ANY PATIENT SOLELY BECAUSE SUCH PATIENT REFUSED TO SIGN SUCH AN AGREEMENT OR EXERCISED THE NINETY-DAY RIGHT OF RESCISSION.**

Lastly, the Act defines that an agreement may be declared invalid by a court, if shown by clear and convincing evidence that:

- The agreement failed to meet the requirements of the section above;
- The agreement was induced by fraud;
- The patient executed the agreement as a direct result of the willful and negligent disregard of the patient's right to refrain from such execution; or
- The patient was unable to communicate effectively in the language of the agreement.

The Colorado Court of Appeals recently held that strict compliance with C.R.S. § 13-64-403(4) was required.[83] In that case, the deficiencies in the § 430(4) wording were that the required language was only in capital letters and was not in bold-face type — therefore the arbitration agreement

was not valid and the motion to compel arbitration was denied. The court found it unnecessary to decide the effect of typographical errors and minor wording discrepancy. Apparently the question of whether the statutory requirements were preempted by the FAA was not raised. *See* § 4.3.3.

When state law governs the arbitration, the foregoing requirements are valid and enforceable. However, when the FAA governs the arbitration, issues arise as to whether these requirements for a valid arbitration clause are enforceable. The U.S. District Court for the District of Colorado held that these "special" requirements for an arbitration agreement imposed by Colorado are void, as preempted by the FAA.[84] But, the Colorado Supreme Court found these requirements not preempted by the FAA.[85] These cases are discussed in § 4.3.3 of this book.

See also § 6.15.

§ 5.6.2—Execution Of The Agreement/Power Of Attorney

As discussed in § 5.2.1, the arbitration statutes require that the agreements be in writing or in some other "storable" or "tangible" or "retrievable" form. However, there is no requirement that the parties execute the agreement.

Generally, there are few issues about the scope of authority of the agent in executing an arbitration agreement, or an agreement containing an arbitration clause. If the agent has authority to execute an agreement, the fact that it contains an arbitration clause would not affect that authority.

However, in Colorado, and many other jurisdictions, the health-care industry has created special problems of scope of authority. The Colorado Supreme Court has held that a person with power of attorney has power to execute forms for admission to a long-term health-care facility even if they contain an arbitration agreement. While the Colorado Health Care Availability Act provides little support or guidance for the holding, the general statutory power of attorney expressly grants an agent the power to submit matters to arbitration.[86]

§ 5.7 • INTERPRETATION OF THE AGREEMENT

§ 5.7.1—General Rules

If there is found to be an arbitration agreement, any doubts about whether the dispute is within the scope of the agreement should be resolved in favor of arbitration.[87] For example, when the agreement states that the parties "may" arbitrate, whether it calls for binding arbitration and for mandatory arbitration must be construed from the total context.[88] In that case, "may" was construed as mandatory. There is a strong presumption requiring that all doubts concerning whether a matter is within the arbitrator's powers are to be resolved in favor of arbitration.[89]

In *National American Insurance Co. v. SCOR Reinsurance Co.*,[90] National American sued SCOR to recover for losses on two surety bonds. The parties had entered into two agreements: first, a reinsurance treaty that covered the bonds and contained an arbitration clause; second, a hold harmless and indemnity agreement whereby SCOR agreed to act as a co-surety and National American agreed to hold SCOR harmless and to indemnify SCOR from any losses relating to the bonds. This later agree-

ment did not have an arbitration clause. National American urged that its claims were independent of the treaty and arose solely out of SCOR's co-surety obligation contained in the hold harmless agreement.

The Tenth Circuit in essence held that the two agreements should be construed together. While the treaty might be viewed independently, its arbitration clause was broad enough to cover claims under the hold harmless agreement:

> [W]hen two agreements are at issue, one with an arbitration clause and one without, the fact that one agreement references the other supports arbitrating claims arising from either agreement.[91]

In 2006, the Colorado Court of Appeals defined its approach to interpretation of arbitration agreements:

> Because of the policy favoring arbitration, we construe any ambiguities in favor of arbitration, and when an arbitration clause is broad or unrestricted, the strong presumption favoring arbitration applies with even greater force.[92]

The rules were summarized by U.S. District Court Judge Miller: unlike the general rule that ambiguities in a contract must be construed against the drafter, ambiguities in an arbitration agreement must be construed in favor of arbitration. "More specifically, we must compel arbitration unless we can say 'with positive assurance' that the arbitration clause is not susceptible of any interpretation that encompasses the subject matter of the dispute. Moreover, a 'broad or unrestricted' arbitration clause makes the strong presumption favoring arbitration apply with even greater force."[93]

When an agreement contains both a forum selection clause (Denver District Court shall have exclusive jurisdiction over interpretation and enforcement) and an arbitration clause (any claim or controversy), they may be reconcilable. The forum clause may relate to a judicial forum to compel arbitration and enforce an award.[94]

See § 7.8.3.

AAA Administration

When the parties have agreed to arbitrate and "authorize the AAA to administer the arbitration," the court cannot compel a non-AAA administered arbitral proceeding.[95]

However, a New York court held that a contract clause calling for arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association does not require that the arbitration be administered by the AAA.[96] The court appeared to ignore AAA Commercial Arbitration Rule R-2, providing that "[w]hen parties agree to arbitrate under these rules, . . . they thereby authorize the AAA to administer the arbitration."

"Rules" of Interpretation

The courts have adopted rules of interpretation to assist in determining whether the parties have agreed to arbitrate, and, if so, the scope of the agreement to arbitrate, who decides arbitrability issues, etc. These include:

1) Whether there is a valid and enforceable agreement to arbitrate. (Whether the parties agreed to arbitrate.) Generally, there are no special presumptions or other rules of interpretation. The issue usually is determined under state law rules of interpretation of contracts generally.[97]
    a) "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[98]
    b) The proponent of arbitration has the initial burden of presenting evidence sufficient to demonstrate that an enforceable arbitration agreement exists. If that burden is met, the burden shifts to the party opposing arbitration to show that there is a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in F.R.C.P. 56.[99]
2) Whether a particular dispute is within the scope of an arbitration agreement. Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.[100]
    Where the arbitration clause is broad, there arises a presumption of arbitrability, and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.[101]
3) Whether any statute, case law, or policy renders the claims nonarbitrable (any defense to the arbitrability of the dispute).
    a) Any doubts concerning the scope of arbitrable issues should be decided in favor of arbitration.[102]
4) For a dispute to arise from a contract it "must either involve rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination, or relate to events which have occurred in part while the agreement was still in effect."[103]

All four issues may be considered arbitrability issues. However, they are sometimes treated differently.

Courts do not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. However, the law treats silence or ambiguity as to "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question of "whether a particular or merit-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" — in the latter case the presumption is that they did not do so.[104]

"When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."[105]

"'[S]trong federal policy favoring arbitration . . . does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'"[106]

§ 5.7.2—Applicable Law As To Interpretation Of Arbitration Agreements

Even if the FAA is applicable, generally, questions as to interpretation of the arbitration agreement are decided under state law.[107] Generally, there is very little federal common law of contracts or contract interpretation.

However, should state laws of contract or contract interpretation conflict with or be an obstacle to FAA policy strongly favoring the arbitration of disputes, they may be preempted.[108] One can anticipate state law will be preempted and modified or interpreted accordingly.[109]

See Chapter 4.

§ 5.8 • SCOPE OF THE AGREEMENT TO ARBITRATE

See generally §§ 7.5.2 and 7.8.

Of particular importance is the scope of the arbitration agreement. Although arbitration is a consensual relationship between the parties, once the agreement is reached, the parties are contractually obligated to submit to arbitration those disputes within the scope of the agreement, *i.e.*, the disputes defined by the agreement.

Issues as to scope of the arbitration clause particularly arise when the claim asserted is in tort, or is a statutory claim, as distinguished from a claim for a breach of the contract containing the clause. This usually becomes a question of interpretation of the clause. *See* § 5.7. For example, when the insured sought arbitration of its coverage dispute with the insurer under the arbitration clause in the policy, but separately commenced a civil action against the insurer for bad faith, the court held the bad faith claim was within the scope of the arbitration clause.[110]

However, the scope may expressly or impliedly be amended by the parties. For example, if issues are submitted to the arbitrator without objection, the arbitration agreement is impliedly amended to include those issues within the scope.[111]

Johnson v. Blue Haven Pools of Louisiana[112] provided a rather unique interpretation of the scope of an arbitration clause. The plaintiff entered into a contract with the defendant for construction of a swimming pool. The contract called for a 10 percent down payment, provided that the "Agreement is subject to arbitration under the Commercial Arbitration Rules" of the AAA, and provided for cancellation if done within three days after execution of the contract. The plaintiff cancelled the contract and sued to recover her deposit. The court denied a motion to stay litigation pending arbitration, saying that the contract did not state that the arbitration clause applied to the validity (cancellation) of the contract and, instead, referred to disputes involving the contract, such as construction, payment, etc. The court also noted that if the contract "was timely cancelled, revoked or terminated, then there is no contract and thus, no mediation clause."[113] The court relied upon its Uniform Arbitration Act, which provided that "[i]f the making of the arbitration agreement . . . is in issue, the court shall proceed summarily to the trial thereof."[114]

Arbitration clauses frequently provide that they are applied to "claims arising out of or relating to" the contract in which the clause is contained. The Fourth Circuit has held that such terminology embraces every dispute between the parties having a significant relationship to the contract, regardless of the label attached to the dispute, and that the governing standard is whether the claims have a significant relationship to the contract.[115]

Similarly, "arising out of or relating to the relationship created by the Agreement" has been held to cover tort claims not involving breach of duties under the agreement.[116] On the other hand, assault and battery claims by an employee against a supervisor have been held outside a similarly broadly worded arbitration clause.[117]

Extending the issue, a broad arbitration clause in a business contract was held not to encompass a dispute between the parties not involving or connected with that contract or the subject thereof.[118] Similarly, a few state courts have held that fraud and misrepresentation as to the formation of a contract as a whole is not an arbitrable issue, rejecting *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[119]

An arbitration clause in a lease providing a scope of "arising out of or related" to the lease was held to apply also to a dispute under a separate joint venture agreement that was related to the lease.[120] The court cautioned that when such broad clauses are used as to scope of disputes subject to arbitration, if there are collateral agreements and issues to be excluded from arbitration, the agreement "'must expressly state such an intent.'"

On the other hand "arising under" and "arising from" have received different interpretations as to scope.[121]

See § 7.5.3.

§ 5.8.1—Retroactivity Of Arbitration Agreement

Generally, an arbitration agreement does not apply retroactively to causes of action arising prior thereto, unless specifically provided.[122]

§ 5.9 • DEATH OF A PARTY: SURVIVAL UPON TERMINATION OF CONTRACT

A dispute arises under an expired or previous contract "if it involves rights that to some degree vested or accrued during the life of the contract and merely ripened after expiration, or relates to events that occurred at least in part while the contract was still in effect."[123] While an arbitration provision in a contract is presumed to survive the expiration of that contract, the presumption can be overcome by evidence of such contrary intent.[124] Generally, a savings clause is not necessary for an arbitration provision to survive the termination of the contract.[125] However, this can depend on the specific wording.

- Annot., *Death of a Party to Arbitration Agreement Before Award as Revocation or Termination of Submission*, 63 A.L.R.2d 754.
- Annot., *Enforcement of Contractual Arbitration Clause as Affected by Expiration of Contract Prior to Demand for Arbitration*, 5 A.L.R.3d 1008.

§ 5.10 • LAW GOVERNING AGREEMENTS TO ARBITRATE

The arbitration may be governed by the law for one jurisdiction, while the substantive law applicable may be of another jurisdiction. Thus, the issues are

- What "law of arbitration" governs:
  - Federal or state law?
  - If state law, of which state?
- What law governs the substantive issues:
  - Federal or state law?
  - If state law, of which state?

Generally, the validity, etc. of the contract or clause in a contract to arbitrate, or in the contract in which an arbitration clause is found, is governed by the substantive state law of the applicable jurisdiction. Generally, there is no federal common law of contracts. However, if the federal law of arbitration (FAA) is applicable, it may in certain aspects preempt state law contract law. *See* Chapter 4.

See §§ 4.3-4.4. *See also* § 6.15.

§ 5.11 • SPECIFIC TYPES OF ARBITRATION AGREEMENTS

§ 5.11.1—Electronic Agreements

Arbitration clauses created on the internet by checking "I accept terms" or something to that effect are generally valid.[126] These include:

- "Clickwrap" or "click-through" agreements, "in which the Internet purchaser is required to affirmatively click an 'I agree' box after being presented with a list of terms and conditions of use."[127]
- "Browse wrap" agreements, "in which terms and conditions of use are posted on a website accessible through a hyperlink at the bottom of the . . . computer screen [and the consumer] conveys assent simply by using the product."[128]

Under both types of electronic agreements, as well as hybrids, the threshold issue is whether the consumer had reasonable notice (actual or constructive) of the terms of the asserted agreement, and whether the consumer manifested assent to those terms (usually by clicking "I accept").

However, the Second Circuit held that an internet merchant cannot compel arbitration with a consumer when it only e-mailed the consumer the arbitration agreement after the consumer agreed to the purchase, without any requirement that the consumer affirmatively consent to the terms.[129] However, the courts uphold arbitration agreements created on the internet by the claimant's checking a box indicating assent to terms and conditions.[130] Whether the parties have agreed to arbitrate generally is a matter of state contract law.

§ 5.12 • DEFENSES TO THE VALIDITY OF ARBITRATION AGREEMENTS

See § 7.6 for discussion of defenses to arbitration.

Once the existence of an agreement to arbitrate is found, there may be defenses to the enforcement/validity of that agreement. FAA § 2 provides that an arbitration agreement may be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." Under the CRUAA, C.R.S. § 13-22-206(1), the issues as to the validity of an agreement to arbitrate are similar.

When the CRUAA governs, Colorado legal defenses to enforcement/validity of contracts generally are applicable to an arbitration agreement. When the FAA is applicable, generally the case law holds that state law governs the formation of an arbitration agreement.[131] However, that statement perhaps is not 100 percent accurate. Because FAA § 2 refers to "grounds that exist at law or in equity" without reference to state or federal law of grounds for the revocation of a contract, probably both will apply. Generally, state law of such grounds is followed, as there is little federal law on contract defenses.

However, as a somewhat technical point, when the FAA governs, the state law of contract defenses is only looked to for "guidance."[132] "[I]n deciding whether there is an enforceable agreement to arbitrate, 'courts generally should apply ordinary state-law principles that govern the formation of contracts.' The court's application of state law principles must also give 'due regard . . . to the federal policy favoring arbitration.' . . . Grounds for invalidating an arbitration agreement would include 'generally applicable contract defenses such as fraud, duress, or unconscionability.'"[133]

§ 5.13 • DRAFTING THE ARBITRATION AGREEMENT

There are numerous references and samples of possible provisions for an arbitration agreement; one of the best is found at the American Arbitration Association website, www.adr.org. Sample provisions are provided. In addition, JAG (Judicial Arbiter Group) and JAMS offer sample arbitration agreements. See § 5.3 for types of clauses that the practitioner may want to include.

§ 5.13.1—AAA Form Provisions

Referring to the AAA sample provisions, this author suggests simply using the basic clause, unless any arbitration that might result will be extremely complex and involve huge quantities of proof.

The drawback to using the AAA standard clause without more, according to some, involves two potential disadvantages:

- The AAA Rules are adopted carte blanche.
- The points that may be covered specifically by contract clauses are instead left to arbitrator discretion, *e.g.*, discovery.

To others, these disadvantages are in fact advantages.

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NOTES

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17. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Cook v. PenSa, Inc.*, 2014 U.S. Dist. LEXIS 106730, 2014 WL 1660480 (D. Colo. Aug. 1, 2014).

18. *Avedon Eng'g, Inc. v. Seatex*, 112 F. Supp. 2d 1090 (D. Colo. 2000). *Compare Kleveland v. Chicago Title Ins. Co.*, 46 Cal. Rptr.3d 314 (Cal. App. 2006).

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43. See also *F.D.I.C. v. Am. Cas. Co.*, 843 P.2d 1285 (Colo. 1992), as to contract clauses void on public policy grounds generally.

44. *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196, 1202-03 (D. Colo. 2001).

45. *Id.* at 1202.

46. *Id.*; *Fuller v. Pep Boys – Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158 (D. Colo. 2000). *Daugherty v. Encana Oil & Gas (USA), Inc.*, 2011 U.S. Dist. LEXIS 76802, 2011 WL 2791338 (D. Colo. July 15, 2011), *subsequent proceedings*, 838 F. Supp. 2d 1127 (D. Colo. 2011).

47. *Gourley*, 178 F. Supp. 2d at 1204.

48. *Daugherty*, 2011 U.S. Dist. LEXIS 76802, 2011 WL 2791338.

49. *Gourley*, 178 F. Supp. 2d at 1204.

50. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

51. *Kristian*, 446 F.3d at 29. *See also* Chapter 6.

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

53. *Encore Prods. Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999).

54. *Id.* at 1111.

55. *Id.*

56. *Kristian*, 446 F.3d at 37.

57. *Pollard v. ETS PC, Inc.*, 186 F. Supp. 3d 1166 (D. Colo. 2016).

58. *Kristian*, 446 F.3d at 43-44 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)).

59. *Brownlee v. Lithia Motors, Inc.*, 49 F. Supp. 3d 875 (D. Colo. 2014).

60. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

61. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234, 1335 (10th Cir. 1999) ("consent to arbitration as a condition of continued employment, and requiring employee to split the arbitrator's substantial fees clearly undermine the remedial and deterrent function of the federal anti-discrimination laws").

62. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000). *See also* § 6.4.

63. *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 780 (10th Cir. 2010).

64. *Smith v. AHS Oklahoma Heart, LLC*, 2012 U.S. Dist. LEXIS 108501, 2012 WL 3156877 (N.D. Okla. Aug. 3, 2012).

65. *Am. Express Co v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

66. *Id.* at 2312 n. 5.

67. *Nesbitt v. FCNH, Inc.*, 4 F. Supp. 3d 1366, 1372 (D. Colo. 2014).

68. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

69. *Shankle*, 163 F.3d at 1234.

70. *Id.*

71. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

72. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366 (D. Colo. 2014).

73. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

74. *Id.* at 79. This issue is similar to the issue of validity of a covenant not to compete because of geographic scope and duration.

75. *Id.* at 84.

76. *Id.* at 85.

77. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366 (D. Colo. 2014).

78. *Fuller v. Pep Boys – Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158 (D. Colo. 2000); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001). *Cf. Shankle v. B-G Maint. Mgmt. of Colo. Inc.*, 163 F.3d 1230 (10th Cir. 1999). *See also Kepas v. eBay*, 412 F. App'x 40 (10th Cir. 2010). *See also Ramirez-Baker v. Beazer Homes, Inc.*, 636 F. Supp. 2d 1008 (E.D. Cal. 2008) (court severed employer's unilateral right to modify or terminate the agreement as being unconscionable). *Compare Samadi v. MBNA Am. Bank, N.A.*, 178 F. App'x 863 (11th Cir. 2006).

79. *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001).

80. *Fuller v. PepBoys – Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158 (D. Colo. 2000).

81. *E.g.*, *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229 (Cal. Dist. Ct. App. 2005).

82. *Id.*

83. *Fischer v. Colorado Health Care, LLC*, 2016 WL 4699115 (Colo. App. 2016) (not released for permanent publication).

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

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

86. C.R.S. § 15-1-1313(1)(e). *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068 (Colo. 2009).

87. *Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268 (10th Cir. 2010).

88. *See Adcock v. Adams Homes, LLC*, 906 So.2d 924 (Ala. 2005).

89. *Hicks v. Cadle Co.*, 355 F. App'x 186 (10th Cir. 2009).

90. *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288 (10th Cir. 2004). *See also Safer v. Nelson Fin. Grp., Inc.*, 422 F.3d 289 (5th Cir. 2005).

91. *Nat'l Am. Ins. Co.*, 362 F.3d at 1291. *See also Barras v. Branch Banking & Trust Co.*, 685 F.3d 1269 (11th Cir. 2012) (cost and fee-shifting provision found unconscionable; severed arbitration agreement then enforced).

92. *BFN-Greeley, LLC v. Adair Grp., Inc.*, 141 P.3d 937 (Colo. App. 2006).

93. *Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1214 (D. Colo. 2005), *Let's Go Aero, Inc. v. Cequent Performance Prods., Inc.*, 78 F. Supp. 3d 1363, 1374 (D. Colo. 2015).

94. *Dorsey v. Dorsey*, 342 P.3d 491 (Colo. App. 2014).

95. *In re Crosstex CCNG Processing Ltd.*, 2008 Tex. App. LEXIS 8391, 2008 WL 4823229 (Tex. App. Nov. 7, 2008).

96. *Nachmani v. By Design, LLC*, 901 N.Y.S. 2d 838 (App. Div. 2010).

97. *See Axis Venture Grp., LLC v. 1111 Tower, LLC*, 2010 U.S. Dist. LEXIS 30574, at *6-7, 2010 WL 1278306, at *2 (D. Colo. March 30, 2010) and cases therein cited. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1968); *Gilmore v. Brandt*, 2011 U.S. Dist. LEXIS 125812, 2011 WL 5240421 (D. Colo. Oct. 28, 2011).

98. *AT&T Techs., Inc.*, 475 U.S. at 649. *See also Pikes Peak Nephrology Assocs., P.C. v. Total Renal Care, Inc.*, 2010 U.S. Dist. LEXIS 42694, 2010 WL 134826 (D. Colo. March 30, 2010).

99. *Axis Venture Grp.*, 2010 U.S. Dist. LEXIS 30574, 2010 WL 1278306.

100. *Radil v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 233 P.3d 688, 692 (Colo. 2010).

101. *St. Paul Fire & Marine Ins. Co. v. Apt. Inv. & Mgmt. Co.*, 2010 U.S. Dist. LEXIS 26485, at *6, 2010 WL 743502, at *2 (D. Colo. March 2, 2010), as amended (March 3, 2010) (quoting *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001)).

102. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Gilmore v. Brandt*, 2011 U.S. Dist. LEXIS 125812, 2011 WL 5240421 (D. Colo. Oct. 28, 2011).

103. *Let's Go Aero, Inc. v. Cequent Performance Prods., Inc.*, 78 F. Supp. 3d 1363, 1375 (D. Colo. 2014) (quoting *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 115, 781 (10th Cir. 1998) (quoting *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1020, 1024-25 (10th Cir. 1990))).

104. *Gilmore v. Brandt*, 2011 U.S. Dist. LEXIS 125812, 2011 WL 5240421 (D. Colo. Oct. 28, 2011) (quoting *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986)).

105. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), *quoted in EEC, Inc. v. Baker Hughes Oilfield Operations, Inc.*, 460 F. App'x 731, 733 (10th Cir. 2012).

106. *Bazemore v. Jefferson Capital Sys., LLC*, 2015 U.S. Dist. LEXIS 61491, at *9, 2015 WL 2220057 (S.D. Ga. 2015) (quoting *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 396 (5th Cir. 2006)), *aff'd*, 827 F.3d 1325 (11th Cir. 2016).

107. *Cf. Gilmore v. Brandt*, 2011 U.S. Dist. LEXIS 125812, 2011 WL 5240421 (D. Colo. Oct. 28, 2011).

108. *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135 (D. Colo. 2012); *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 475-76 (1989).

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

110. *BCS Ins. Co. v. Independence Blue Cross*, 2009 U.S. Dist. LEXIS 2812, 2009 WL 102978 (N.D. Ill. Jan. 15, 2009).

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

112. *Johnson v. Blue Haven Pools of Louisiana*, 928 So.2d 594 (La. App. 2006).

113. *Id.* at 598.

114. *Id.*

115. *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762 (4th Cir. 2006).

116. *In re Swift Transp. Co.*, 279 S.W.3d 403 (Tex. App. 2009).

117. *Niolet v. Rice*, 20 So.3d 31 (Miss. App. 2009).

118. *Tubbs v. Hudec*, 8 So.3d 1194 (Fla. Dist. Ct. App. 2009).

119. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *See* § 8.7.4 and *Long v. Jeb Breithaupt Design Build Inc.*, 4 So.3d 930 (La. App. 2009).

120. *Gamble v. Schurke*, 2008 Minn. App. Unpub. LEXIS 607, 2008 WL 2168383 (Minn. Ct. App. May 27, 2008).

121. *Vemco, Inc. v. Flakt, Inc.*, 96 F.3d 1449 (6th Cir. 1996); *Petition of Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961). *Compare Clarendon Nat'l Ins. Co. v. Lan*, 152 F. Supp. 2d 506 (S.D.N.Y. 2001); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996).

122. *Azevedo v. Carnival Corp*, 2008 U.S. Dist. LEXIS 42943, 2008 WL 2261195 (S.D. Fla. May 30, 2008). *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (excellent discussion of language and case law as to when an arbitration clause is retroactive in application).

123. *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1275 (10th Cir. 2010).

124. *Id.*

125. *Cleveland Constr., Inc. v. Levco Constr., Inc.*, 359 S.W.3d 843 (Tex. App. 2012).

126. *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135 (D. Colo. 2012); *Grosvenor v. Qwest Commc'ns Int'l, Inc.*, 2010 WL 3906253 (D. Colo. 2010); *Hancock v. AT&T Co.*, 701 F.3d 1248 (10th Cir. 2012).

127. *Vernon*, 857 F. Supp. 2d at 1149.

128. *Id.*

129. *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012).

130. *Id.*

131. *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("[C]ourts generally . . . should apply ordinary state-law principles that govern formation of contracts.").

132. *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1156 (D. Colo. 2012).

133. *Id.* at 1142 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 475-76 (1989); and *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996)).