Chapter 7

ARBITRABILITY OF DISPUTES: THE ISSUES AND THE LAW

SYNOPSIS

§ 7.1 • INTRODUCTION

The term "arbitrability" refers to whether a dispute is subject to arbitration. Arbitrability issues arise if one party asserts that the dispute is not subject to arbitration. The term "arbitrability" encompasses all of the issues that can be raised and must be determined in order for a dispute to be resolved by arbitration.

While there are multiple ways of phrasing the issues and sub-issues of arbitrability, many courts define the following as the issues of arbitrability, although not necessarily in this order:

- Is there an agreement to arbitrate?
- Does the agreement to arbitrate bind the parties?
- Is the dispute within the scope of the agreement to arbitrate?
- Is the dispute resolution procedure governed by the arbitration statute (*i.e.*, does the agreement call for "arbitration" as used in the statutes)?
- Are there any defenses to the enforcement of the arbitration agreement?
- Are there any conditions precedent to arbitration?

Adopting a dictionary definition, the Tenth Circuit distinguished between arbitrability and the scope of an arbitrator's authority:[1]

- "An issue is arbitrable if it is subject to decision by arbitration or referable to an arbitrator or arbiter. . . ."
- "Arbitrability [is used] to refer to the quality or state of being arbitrable."[2]

The scope of authority question is directed to the scope of power of the arbitrator.

The court further noted that the U.S. Supreme Court had pronounced that "[s]o long as the parties have not specifically agreed to submit the arbitrability question itself to arbitration (i.e., to arbitrate arbitrability), a court will decide independently whether the merits of the parties' dispute is arbitrable."[3]

This chapter discusses the Colorado and Federal Arbitration Act (FAA) substantive law on these issues of arbitrability. The succeeding chapters will deal with whether the court or arbitrator determines the arbitrability issues and the procedures for staying or compelling arbitration (and resolving the arbitrability issues).

CRUAA

In *BRM Construction, Inc. v. Marais Gaylord, L.L.C.*,[4] relying on *Galbraith v. Clark*,[5] and *City & County of Denver v. District Court*,[6] the Colorado Court of Appeals defined three procedural questions to be resolved by a court (unless delegated to the arbitrator by the arbitration agreement) when a party challenges whether a particular dispute must be arbitrated:

1) Does the agreement contain a valid and binding arbitration clause?
2) If so, does the court or the arbitrator decide whether the dispute falls within the scope of the arbitration clause?
3) If the court is to decide the issue, does the dispute fall within the scope of the arbitration clause?"

The court continued: "The first question entails determining, to the extent such matters are disputed, (1) whether the contract in question contains a provision requiring arbitration of disputes, and (2) whether that clause is valid."[7]

The court noted earlier decisions held that the court's inquiry as to the validity of the arbitration clause is limited to specific challenges to the agreement to arbitrate and does not extend to the contract as a whole that contains the arbitration agreement. "The arbitrator must decide challenges to the enforceability of the contract as a whole."[8]

As to the second question, whether the court or arbitrator decides if a dispute falls within the scope of the arbitration clause, the court noted that if the agreement is silent or ambiguous as to who determines whether the dispute is within the arbitration clause, the court decides.

As to the third question, the court stated that even were it to occur that a court ordinarily decides whether the dispute falls within the scope of the arbitration clause, this inquiry does not apply to the respondent's defenses to arbitration when "the inquiry here is limited to whether the factual allegations underlying the claim for relief asserted fall within the scope of that clause."[9]

- Only if the court determines "a claim is clearly outside the scope of the arbitration provision" should arbitration be denied by a court.
- "Once it is decided that the subject of a particular dispute arguably falls within the scope of an arbitration provision, the court's inquiry ends, and the court must compel arbitration."[10]

The court followed the majority of other states in holding that the issue of compliance with conditions precedent is an issue to be decided by the arbitrator. (The case was decided under the Colorado Uniform Arbitration Act (CUAA), but the court noted that the Colorado Revised Uniform Arbitration Act (CRUAA) specifically provides the arbitrator shall decide whether a condition precedent has been fulfilled. C.R.S. § 13-22-206(3).)

Can the parties stipulate that condition precedent issues shall be determined by the court? Probably.

Colorado applies a three-part test to determine the applicability of an alternative dispute resolution (ADR) clause:

> (1) is the ADR agreement valid and binding; (2) does the agreement provide for the court or the ADR decision-maker to decide whether the dispute falls within the scope of the ADR clause; and (3) did the parties intend the dispute to fall within the scope of the ADR clause?[11]

FAA

Under the FAA, the courts define the issues of arbitrability much the same as they are defined under the CRUAA. Stated in simple form:

> To determine whether a dispute is arbitrable under the FAA, a court must determine "(1) whether there exists a valid agreement to arbitrate at all under the contract in question, and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement."[12]

The first issue — whether there exists a valid agreement to arbitrate — involves multiple sub-issues, such as:

- Was an agreement to arbitrate entered into by the parties?
- Are there any affirmative defenses to the enforcement of the contract?
- If so, do they void the contract, or, if applicable only to certain provisions (*e.g.*, unconscionability), can they be severed?
- Is the agreement subject to the FAA?
- Are there any conditions precedent to arbitration?

If all sub-issues are resolved in favor of arbitration, the remaining issue of arbitrability is whether the dispute is within the scope of the arbitration agreement. Where a valid agreement to arbitrate exists, "doubts as to whether a claim falls within the scope of the arbitration agreement should be resolved in favor of arbitrability."[13]

§ 7.2 • IS THERE AN AGREEMENT TO ARBITRATE?

As discussed in earlier chapters, the federal and state arbitration acts provide that agreements to arbitrate are valid and enforceable, except on such grounds as exist in law or in equity for the revocation of any contract. The subsections hereinafter discuss some of those grounds.

Both the federal and state arbitration statutes apply to "contracts" or "agreements" to arbitrate.

FAA § 2: "[A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy. . . ."

CRUAA § 203: "[T]his part 2 shall govern an agreement to arbitrate. . . ."

CRUAA § 206(1): "An agreement . . . to submit to arbitration . . . is valid, enforceable, and irrevocable except. . . ."

Absent clear evidence of the parties' intent to the contrary, an arbitration provision in a contract survives the termination of the contract.[14]

> [W]hen a dispute arises under an expired contract that contained a broad arbitration provision, courts must presume that the parties intended to arbitrate their dispute. This is so even if the facts of the dispute occurred after the contract expired.[15]

Similarly, the enforcement provisions of the statutes refer to enforcement of agreements. Hence, the first issue is whether there is an "agreement" to arbitrate.

The requisites for an "agreement" to arbitrate are covered in Chapter 5, "Agreements to Arbitrate." If those requisites are not met, the first requirement is not met. Whether there is an agreement has two elements: (1) Are the specific requirements of the federal or state arbitration statute for the formation of an agreement to arbitrate met? (2) Are the requirements for formation of a contract generally met? *See* § 5.2.6 (definition of arbitration governed by federal common law). *See* § 5.10, "Death of a Party: Survival upon Termination of Contract."

In order to meet the "agreement" requirement for the arbitration statute to apply, the agreement must be in writing. (The CRUAA requires that there be a record of the agreement, which includes electronic means as well as writings.) Beyond that requirement, the statutes state nothing as to the requirements for an agreement to arbitrate. However, by implication, the statutes may prohibit restrictions on the validity of arbitration agreements.

§ 7.2.1—Law Determining Whether There Is An Agreement To Arbitrate

The law of contracts, generally of the state whose law applies to the formation of an agreement, must be fulfilled. This means the state law of offer, acceptance, consideration, etc., must be fulfilled. However, when the FAA applies, state law that restricts validity of agreements to arbitrate will be preempted (voided) by the FAA. This is discussed at length in Chapter 4.

If a party asserts that there is no valid contract to arbitrate the dispute, the court must first determine that threshold issue.[16] Some of the grounds for such a claim are discussed below.

§ 7.2.2—Burden Of Proof And Rules Of Interpretation

The courts frequently reiterate that there is a presumption in favor of arbitration. However, most courts do not define precisely to what it applies and when. This issue was defined, but never fully resolved, in *Century Indemnity Co. v. Certain Underwriters at Lloyd's, London*.[17]

> [W]e consider two threshold questions concerning the legal standard that applies when determining whether there is a valid agreement to submit a dispute to arbitration. The first issue is whether the presumption in favor of arbitration applies to both or only the second of the two questions: (1) is there an agreement to arbitrate and (2) does the particular dispute fall within the existing agreement's scope? The second issue is whether the "express" and "unequivocal" standard to which courts have referred in arbitration cases requires more of arbitration agreements than it does of other contracts.

The court concluded that the issue need not be determined in the case before it, but stated that "[t]he presumption in favor of arbitration applies to the second question but probably does not apply to the first question."[18]

Turning to whether an agreement to arbitrate must be "express" and "unequivocal," the Third Circuit found that it does not require that there not be a genuine issue of material fact as to an arbitration agreement's existence before the court can determine whether the agreement exists as a matter of law and, if so, compel arbitration. Further, while even the U.S. Supreme Court has used the terms, they are not a substantive standard.

> [Such standards for the finding of an arbitration agreement] would require more of arbitration agreements than of contracts generally to be enforced whenever the standard differed from the applicable state-law principles of contract law. . . .
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> . . . But the FAA and Supreme Court precedent forbid us from placing more stringent requirements on arbitration agreements otherwise satisfying the criteria of the FAA than on other contracts, such as a substantive requirement that an arbitration agreement be "express" and "unequivocal" to be enforceable, rather than the standard that applies to contracts generally.[19]

§ 7.2.3—Battle Of The Forms

A classic issue in contract formation is a battle of the forms. A sends to B a purchase order with terms. B responds with its shipping order with somewhat different terms.[20] The U.S. District Court for the Southern District of New York held that inclusion of an arbitration clause in the confirmation of an oral agreement did not constitute a material alteration in the offer and therefore was an acceptance, with the arbitration clause incorporated into the parties' agreement.[21]

§ 7.2.4—Law Governing Definition Of Arbitration

Federal common law governs the meaning of the term "arbitration."[22] The process must be "arbitration" as used in the FAA in order for the FAA to apply. *See* §§ 5.2.6 and 25.6. However, even if the process is not "arbitration" as used in the FAA, the parties may be able to agree that their process will be governed by the FAA.

See §§ 7.4 and 8.6.2.

§ 7.2.5—Procedure For Determining Whether There Is An Agreement To Arbitrate

See Chapter 9.

CRUAA

C.R.S. §§ 13-22-206(2) and (3) provide that the court shall decide whether an agreement to arbitrate exists and whether it is enforceable. However, under § 13-22-204, these provisions may be waived or varied by the parties.

The issue normally arises when a motion to compel arbitration or a motion to stay arbitration is filed in court or in the arbitration. Under C.R.S. § 13-22-207(1), upon a motion to compel, "[i]f the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbi-

trate." However, if the refusing party opposes the motion, "the court shall proceed summarily to decide the issue." Under § 207(2), if a party denies there is an agreement to arbitrate, "the court shall proceed summarily to decide the issue."

The statute does not define the process of determining the issue, but generally it can be said that a summary type evidentiary hearing must be held if there is an issue of fact. *See* § 9.7.4.

FAA

Title 9, U.S.C. § 3 provides that if in a civil action of an issue referable to arbitration, the court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration," shall stay the civil action. Under Section 4, upon a motion to compel arbitration in a civil action, "the court shall hear the parties" and determine the issue. If the making of the arbitration agreement is an issue, "the court shall proceed summarily to the trial thereof." Further details of the proceeding are set forth in § 9.7.4.

§ 7.3 • IS THE AGREEMENT TO ARBITRATE BINDING UPON THE PARTIES TO THE DISPUTE?

Generally, contracts are binding only upon the parties to the contract. However, the law of contracts holds that in certain instances, a contract may be enforced against[23] or by a non-party. This common law of contracts applies to arbitration contracts.

§ 7.3.1—Non-signatories

Whether a non-signatory is bound by or entitled to enforce an arbitration agreement is determined under state contract law, so long as that law does not discriminate against arbitration agreements.[24]

Generally, the courts have found non-signatories bound by or entitled to enforce arbitration agreements on multiple theories in various factual circumstances:

- The signatory entered into a contract with a non-signatory, incorporating another contract with the arbitration agreement, *e.g.*, a surety whose performance bond incorporated by reference the subcontract that incorporated by reference the general contract that contained an arbitration clause.[25]
- The non-signatory is the principal of an agent signatory or the agent of the principal signatory.[26]
- The non-signatory is the alter ego (piercing the corporate veil) of a party.[27]
- The non-signatory is estopped to deny that it is bound by the arbitration agreement. The non-signatory expressly or impliedly by conduct assumed the obligation to arbitrate.[28]
- The non-signatory is the employee or principal of a signatory.[29]
- The non-signatory is a third-party beneficiary.[30] Similarly, a third-party beneficiary can both enforce an arbitration clause in an agreement and be compelled to arbitrate under an arbitration provision.[31] Such a beneficiary can only accept all of the benefits and burdens of the contract or none.
- The party is the successor in interest to a signatory.[32]

- The non-signatory is an assignee of a signatory.[33]
- The non-signatory is a member of a signatory group.[34]
- The parent signs for a minor child.[35]
- The parent company is bound by a subsidiary's arbitration agreement.[36]
- The party is an heir to a signatory.[37]
- The non-signatory is estopped to deny being bound.[38]
- The signatory is estopped to deny the non-signatories' right to arbitration — equitable estoppel to enable a non-signatory to compel a signatory to arbitrate.[39]

These theories are carefully defined and explained in a decision by the Second Circuit, to which the reader is referred.[40] In general, non-signatories are bound by and may enforce arbitration agreements for the same reasons as any other agreements.

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

> [W]e construe an arbitration provision expressly purporting to bind not only the signatory, but also certain non-parties who are in privity with the signatory, namely an "heir or personal representative or . . . a person claiming that a duty to him or her arises from a Member's relationship with [the other party]."[41]

The extreme may be evidenced by the Fifth Circuit in *Sherer v. Green Tree Servicing LLC*,[42] wherein a loan servicer successfully required a borrower to arbitrate his claims under the Fair Debt Collection Practices Act (15 U.S.C. § 1692) and the Fair Credit Reporting Act (15 U.S.C. § 1681). The borrower's agreement with the lender called for arbitration of any claims arising from "the relationships which result from this Agreement." That clause seemed to define the scope of disputes between the signatories that were subject to arbitration and not to make the servicer a third-party beneficiary.

A similar issue arose in the Second Circuit. Holders of MasterCard, Visa, and Diners Club credit cards sued American Express on various conspiracy claims. American Express attempted unsuccessfully to compel the cardholders to arbitrate based upon their arbitration agreements with their card issuers.[43]

On the other hand, there are sharp limits to extending the arbitration clause to third parties. For example, a party accused of interference with contract was held to be not bound by the arbitration clause in that contract.[44]

A condominium association that asserts claims on behalf of its members who are signatories to arbitration agreements with the condominium developer is estopped to deny it is not bound by the arbitration agreements.[45] The claims the association was asserting were based upon members' contracts with the developer, and therefore the association should be bound by the arbitration clauses therein.

The health-care cases involve special issues as to whether the patient is bound by an agreement with the facility to arbitrate disputes that are executed by someone on the patient's behalf, often because the patient is incapacitated.[46]

If a party wishes limited discovery so as to present evidence to the court as to whether a non-signatory is bound by the arbitration agreement (*e.g.*, the extent to which a non-signatory accepted benefits pursuant to the agreement with the arbitration clause), if it is an American Arbitration Association (AAA) arbitration, the matter of such discovery is for the arbitrator under AAA Rules R-21 (Preliminary Hearing) and R-22 (Pre-Hearing Exchange and Production of Information).[47]

In *Pikes Peak Nephrology Associates, P.C. v. Total Renal Care, Inc.*,[48] Judge Arguello of the U.S. District Court for the District of Colorado considered whether a non-signatory to the arbitration agreement was nevertheless bound by it. She noted that the "'court must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement.'"[49] The party seeking arbitration requested leave to conduct limited discovery on the issue of the extent to which the non-signatory party accepted benefits pursuant to the agreements containing the arbitration clause, or was otherwise bound under principles of third-party beneficiaries, promissory estoppel, or detrimental reliance. Noting then-current AAA Commercial Rules 20 (Preliminary Hearing) and 21 (Exchange of Information) were applicable, Judge Arguello denied the discovery request, stating that "the matter of additional discovery is properly within the arbitrator's purview."[50]

The Tenth Circuit, in *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*,[51] noted that the Colorado Supreme Court has not addressed whether equitable estoppel might compel arbitration between a non-signatory and a signatory of the arbitration agreement. However, it noted that the Colorado Court of Appeals applied equitable estoppel in *Smith v. Multi-Financial Securities Corp.*,[52] holding that plaintiffs were "estopped from avoiding the arbitration agreements whose benefits they seek to enforce."[53]

Where a claimant obtained an award against a corporation, the court has jurisdiction over the claimant's action to pierce the corporate veil and enforce the judgment against the principals.[54] The court rejected that the issue should be determined in arbitration under a theory that the principals were non-signatories bound by the arbitration agreement under the piercing the corporate veil theory. This decision is contrary to other courts. *See supra*, this section.

So to, an arbitration award may be enforced against a non-signatory — generally on the same type of grounds as piercing the corporate veil and a non-signatory being a party.[55]

See § 5.2.7.

- Annot., *Application of Equitable Estoppel Against Non signatory to Compel Arbitration Under Federal Law*, 43 A.L.R. Fed.2d 75.
- Annot., *Application of Equitable Estoppel to Compel Arbitration by or Against Nonsignatory-State Cases*, 22 A.L.R.6th 387.
- Annot., *Application of Equitable Estoppel by Nonsignatory to Compel Arbitration – Federal Cases*, 39 A.L.R. Fed.2d 17.
- Annot., *Enforcement of Arbitration Agreement Contained in Const. Contract by or Against Nonsignatory*, 100 A.L.R.5th 481.
- Annot., *Enforcement of Arbitration Agreement Contained in Real Estate Contract by or Against Nonsignatory under State Law*, 10 A.L.R.6th 669.

§ 7.3.2—Subcontractors And Flow-Through Clauses

While Colorado courts have not specifically ruled on the issue, other jurisdictions have held that a subcontractor will be bound by an arbitration clause in the prime contract by reason of a properly drafted flow-through clause in the subcontract.[56]

§ 7.3.3—Intertwined Defendants

When a plaintiff sues multiple defendants alleging essentially the same facts as to all defendants, and the plaintiff has an arbitration agreement with some defendants and those defendants enforce the arbitration agreement, then the other defendants perhaps may force the plaintiff to arbitrate its claims against them also. Thus, this "intertwined defendants" concept might reach a different result from the intertwined claims doctrine under state or federal law.[57] However, when the intertwining claims doctrine was rejected by the Colorado Supreme Court (*see* § 7.12), dictum suggests any intertwining defendant doctrine was also rejected.[58]

For example, in *RMES Communications, Inc. v. Qwest Business Government Services, Inc.*,[59] the plaintiff, a subcontractor of defendant Qwest on a DIA project, sued Qwest and related entities (Qwest defendants), other subcontractors, and Johnson, who was employed by someone (not determined) on the project. RMES alleged five claims against the defendants to the effect that the defendants colluded to undermine RMES contracts and business at DIA. Johnson was a defendant as to all five claims.

The court earlier granted the motion of the Qwest defendants to compel RMES to arbitrate its claims against them based on an arbitration provision in the RMES subcontract. The matter received further consideration upon Johnson's motion for the claims against him to be joined in the arbitration. Johnson was not a signatory to the RMES subcontract with Qwest. The court granted Johnson's motion to compel RMES to arbitrate the claims against him with the claims against the Qwest defendants.

> [T]he basis of the arbitration between [subcontractor] RMES and the Qwest defendants is the arbitration clause contained in the subcontract between RMES and Qwest. It appears to be beyond dispute that Johnson, whoever employed him, was not a signatory to this subcontract and is thus not bound by the arbitration clause. However, under theories of equitable estoppel, a non-signatory to an arbitration clause may join an arbitration if the signatory's claims against that party are "based on the same factual allegations" or "even the same contract" as the claims against the signatories. *Roe v. Gray*, 165 F. Supp.2d 1164, 1175 (D. Colo. 2001). Compelling arbitration of claims against the non-signatory is appropriate when "the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract."
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> . . .
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> These claims against Johnson are "substantially interdependent" with the claims against Qwest, and alleged "concerted misconduct" between Johnson and the Qwest defendants. The allegations rely on the same facts, make . . . largely the same claims and are thus "inherently inseparable."
>
> . . .

> Johnson has met his burden to show that the claims against him are intertwined with those of the signatory parties. It is therefore appropriate to allow him to join the arbitration [over the objection of the plaintiff, RMES].[60]

This case would seem to hold that when a plaintiff sues multiple defendants on essentially the same factual claims, and only one defendant has an arbitration agreement with the plaintiff, which is enforced, the other defendant may force the plaintiff to arbitrate the claims against him or her also.[61]

However, a different approach was taken by the U.S. District Court for the District of Colorado.[62] The plaintiff sued two insurance companies, Lexington and Twin City, for refusal to provide insurance coverage. The court granted Lexington's motion to compel arbitration. However, Twin City did not have an arbitration agreement with the plaintiff.

The court ordered the claims of the plaintiff against Lexington to be arbitrated and the litigation against Lexington to be stayed pending that arbitration. The court acknowledged that the disposition of the claim against Lexington in arbitration could produce a result inconsistent with disposition of the claims against Twin City by the court. "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute, but not to the arbitration agreement."[63]

See § 7.12.

§ 7.3.4—Validity Of Contract

Sometimes the issue of the validity of a contract is determined on the basis of affirmative defenses. *See* § 7.6. Sometimes the issue goes to whether the common law elements for existence of a contract exist.[64] Sometimes the issue is whether the validity of the entire contract is in issue or only the arbitration clause. Sometimes all of these are "mixed." In *Shotkoski v. Denver Investment Group*,[65] the plaintiffs sued the defendants, who countered with a motion to compel arbitration. The plaintiffs countered that the contract (as a whole) was illegal and unenforceable because the defendants had failed to obtain real estate licenses required for the sale, and because of the defendants' alleged violation of the Colorado Consumer Protection Act. On the surface, it would seem the plaintiffs were relying on affirmative defenses to the enforceability of the contract as a whole — a province for the arbitrator, unless the parties expressly agreed it was for determination by the court. *See* § 7.6.

Here, the Colorado Court of Appeals first defined that it had to determine "whether a valid agreement to arbitrate exists between the parties." The court determined that the failure of the defendant agent to obtain a broker's license and the agreement for her brokerage services did not invalidate the Customer Agreement and that the Colorado Consumer Protection Act did not apply to the transaction in issue and therefore did not invalidate the agreement. The court of appeals directed that the motion to compel arbitration be granted.

§ 7.3.5—Arbitration Agreement In Membership Or Religious Organizations

See § 3.3.3.

§ 7.3.6—Agreement By Agent

General contract law applies to determine whether a person was authorized by a party to enter into an arbitration agreement. Similarly, state law governs whether agents, etc. are bound by the arbitration provision.[66]

- Annot., *Attorney's Submission of Dispute to Arbitration, or Amendment of Arbitration Agreement, Without Knowledge or Consent of Client*, 48 A.L.R.4th 127.[67]

§ 7.4 • DOES THE AGREEMENT CALL FOR "ARBITRATION" AS DEFINED WITHIN THE FEDERAL OR COLORADO ARBITRATION ACTS?

There are many dispute resolution procedures — some of which are commonly called arbitration, and some of which the parties simply label "arbitration." However, the arbitration statutes do not apply to a dispute resolution procedure agreed to by the parties simply because the parties label it arbitration. Rather, the courts have developed the definition of the types of procedures that are governed by the arbitration statutes.

Federal law governs the determination of whether the dispute resolution procedure is "arbitration" for purposes of applicability of the FAA (*see* §§ 2.1.2, 3.7.2, and 3.8), and state law determines whether the dispute resolution procedure is arbitration for purposes of applicability of state arbitration law. In *Salt Lake Tribune Publishing Co. v. Management Planning, Inc.*,[68] the Tenth Circuit considered "whether a certain appraisal constituted an arbitration under the Federal Arbitration Act."[69] Reversing the trial court, the Tenth Circuit held that an appraisal procedure agreed upon by the parties did not constitute "arbitration," and therefore the FAA was not applicable to the agreement.

The Tenth Circuit, in a later decision in *Salt Lake Tribune Publishing Co.*,[70] made several important points:

- Federal law supplies the standard for determining whether the procedure is arbitration for purposes of the FAA.
- Federal law provides the definition of "arbitration" for purposes of the FAA. Congress intended by the passage of the FAA to ensure that state law would not undermine the arbitration agreement and intended uniformity of application throughout the states.
- State law governs the interpretation of the arbitration agreement. Central to any conception of classic arbitration is that the disputants empowered a third-party to render a decision settling their dispute — a definitive settlement.

Similarly, a dispute resolution clause may be within the scope of the FAA, even if the tribunal is by a religious body and "Holy Scriptures (the Bible) . . . [are] the supreme authority" for the arbitral process, except to the extent federal or state rules could not be superseded.[71]

There have been numerous decisions as to whether provisions in a contract (often insurance contracts) that call for determination of value of real or personal property are arbitration within the scope of the CRUAA or the FAA. If they are, all arbitration powers and procedures are applicable, *e.g.*,

powers of the appraisers, subpoenas, awards, confirmation, and appellate review. Generally, appraisal provisions are held not to be arbitration.[72]

If an agreed-upon dispute resolution procedure is found not to be "arbitration" as subject to the arbitration statutes, the party seeking to enforce the procedure still has remedies, *e.g.*, a specific performance action for breach of contract. One assumes the matter would proceed similarly to proceedings in Colorado prior to adoption of arbitration statutes. In other words, most alternative dispute resolution agreements are enforceable, although many are not enforceable under the arbitration statutes.

See Chapter 2 and §§ 3.4.1, 3.7-3.8, 4.3.5, 7.2.4, and 8.6.2.

§ 7.5 • IS THE DISPUTE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT?

Arbitration agreements generally are limited to certain defined disputes. Commonly, an arbitration provision applies to all disputes arising out of a certain agreement or transaction. It is not typical for parties to simply agree to arbitrate any dispute they may have in the future.

See generally Chapter 5 as to interpreting arbitration agreements.

§ 7.5.1—Is There An Arbitrable Dispute?

Whether arbitration is the correct forum for the resolution of the issue requires a determination of whether an arbitrable dispute exists. For a dispute, claim, or question to be present and subject to arbitration, a difference between the parties is required. If there are no differences, there is no question to submit and hence no duty to arbitrate.[73] Thus, whether there is an arbitrable dispute is analogous to the issue in courts of whether there is a case or controversy.

If there is ambiguity in the arbitration agreement, there is a presumption in favor of arbitration, and all doubts about the scope of arbitration are resolved in favor of arbitration.[74]

§ 7.5.2—Scope Of An Arbitration Clause — Generally

FAA

Once it is determined that there is an agreement to arbitrate, that there is an arbitration procedure within the scope of the arbitration statute, and that there is an arbitrable dispute, the dispute must be within the scope of the arbitration clause to be arbitrable. If the FAA applies, whether a dispute is within the scope of the arbitration clause is governed by federal law.[75] Because arbitration is a favored means of dispute resolution and state and federal public policy favors arbitration, any doubts about the scope of an arbitration clause should be resolved in favor of arbitration.[76] An arbitration agreement is a contract; therefore, the interpretation of the contract is a matter of law that is reviewed *de novo* on appeal.[77]

An agreement to arbitrate must implicitly or explicitly define the disputes to which it applies, *i.e.*, define the scope of the agreement to arbitrate. For example, an arbitration clause in a contract,

without more, probably will apply to all disputes arising out of the performance or non-performance of that contract. The public policy of Colorado and under the FAA favors the arbitration of disputes. Hence, once the court or arbitrator finds there is an agreement containing an arbitration clause, a presumption that the dispute is within the clause arises. That presumption is overcome only if "'it may be said with positive assurance'" that the dispute is outside the clause.[78]

Arbitration agreements frequently define their scope as any dispute arising under this agreement. Such language is typically given a broad construction.[79]

CRUAA

In *Galbraith v. Clark*,[80] the Colorado Court of Appeals reaffirmed an earlier rule of interpretation in determining whether the dispute was within the scope of an arbitration agreement:

> [W]e focus on the underlying factual allegations, rather than the party's characterization of its claim. "If the allegations underlying the claims 'touch matters' covered by the parties' [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them."[81]

Of course, the parties could agree to arbitrate only breach of contract claims, and not tort claims.

In *Gergel v. High View Homes, LLC*,[82] the issue presented was: which of the asserted claims were covered by the arbitration clause? The action was brought by plaintiffs who contracted with the defendant for the construction of a residence. The plaintiffs sought to recover for damage from swelling of expansive soil, alleging negligence, violation of Colorado Consumer Protection Act, negligent misrepresentation, negligent concealment, and breach of the Soils Disclosure Act. The court first acknowledged that it must determine whether the factual allegations underlying the claims were within the scope of the arbitration clause, regardless of how the claim was characterized (legal theory) in the pleading. Thus, a claim based upon tort does not necessarily take it out of a clause requiring arbitration of a contract dispute.

The contract provided that at closing the parties agreed to execute a Limited Warranty Agreement, which required arbitration of "all disputes relating to warranty issues." It further provided that after closing, "all claims, rights and remedies of purchasers arising out of this contract and sellers construction shall be limited to those set forth in such Limited Warranty Agreement." The warranty required arbitration under the rules of the AAA.

The court concluded that all of the plaintiffs' claims were based upon allegations that the defendant represented to the plaintiffs it would build them a home without defects and failed to do so, and failed to adequately and clearly inform plaintiffs that their home was being built on expansive soil. "Such claims, in our view, arise out of, or relate to, the warranty agreement."[83]

Compare, however, *Ferris v. Poplarhouse, LLC*,[84] where the court reached a somewhat opposite conclusion by comparing the *Gergel* contract language (all claims, rights, and remedies of plaintiffs that arose out of, or relate to the contract shall be limited to those set forth in the limited warranty) with the wording in this case that the plaintiffs accept the residence "as is," subject only to the defendants' limited warranty obligations, which excluded consequential damages. The court found the latter

language did not restrict the plaintiffs' remedies solely to those expressed in the limited warranty. Claims for damage to the residence were subject to arbitration as clearly within the limited warranty (defects in workmanship and material), while other claims such as loss of use of property, personal injury caused by exposure to mold, loss of profits, and loss of consortium did not involve the limited warranty against defects in workmanship and materials.

See § 5.8.

§ 7.5.3—Broad Versus Narrow Arbitration Clauses

An arbitration clause may be either very broad in scope as to the types of disputes to be arbitrated, or very narrow and limited. The parties to a contract "who agree to submit matters to arbitration are presumed to have agreed that everything, both as to law and fact, necessary to render an ultimate decision, is included in the authority of the arbitrator."[85] Like every contract interpretation issue, the objective is to ascertain and give effect to the mutual intent of the parties and to carry out the purposes of the agreement.[86]

For example, is an arbitration clause intended to cover all disputes arising out of the subject matter of the contract or only certain types of disputes? The arbitrability of claims is dramatically affected when there is a narrow arbitration clause. Some arbitration clauses are intentionally drawn narrowly, sometimes in a perceived effort to advantage one party. Some such clauses are intended as broad arbitration clauses, but are worded so as to exclude certain claims from the general type of claims covered by the clause.

An arbitration clause requiring the arbitration of all claims "relating to the contract" is considered broad in scope, rather than restrictive, and will encompass any dispute between the parties regarding the subject matter of the contract.[87]

In *Cummings v. FedEx Ground Package System, Inc.*,[88] the Tenth Circuit examined the impact of a narrow arbitration clause inserted by an employer, to its later detriment. This case involved claims by two former FedEx package delivery contractors who alleged that FedEx made oral representations to them concerning the income they would earn based on their workload and assigned delivery route, and the assistance that FedEx would provide them in reselling their route and the truck if they left FedEx. FedEx moved to compel arbitration of two claims (for breach of implied contract and for breach of the implied duty of good faith and fair dealing arising out of an implied contract) based on an arbitration clause that called for arbitration "in the event FedEx Ground acts to terminate this Agreement."[89]

Noting that the arbitration clause was narrow, the district court denied the motion to compel. On appeal, the Tenth Circuit stated:

> Where, as here, the parties dispute "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy, [the question] is for the court."[90]

The court articulated the process for determining whether a particular dispute falls within an arbitration provision, quoting from the Second Circuit decision in *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*:

> First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. *Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview*. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.[91]

FedEx argued that the drivers' implied contract claims were based on FedEx's termination of the agreement and that all doubts as to the scope of the arbitration clause should be construed in favor of arbitration. The Tenth Circuit denied the motion to compel. The general principle favoring arbitration is inapplicable in the case of a narrow arbitration clause.

> Under a narrow arbitration clause, a dispute is subject to arbitration only if it relates to an issue that is on its face within the purview of the clause, and collateral matters will generally be beyond its purview.[92]

The drivers did not allege that FedEx actually or constructively terminated the contract, which, according to its unambiguous terms, were the only disputes subject to arbitration. Since the subject matter of the claims was not reasonably factually related to a dispute over termination, they were collateral matters not subject to arbitration.

On the other hand, the U.S. District Court for the District of Colorado has held that "[w]hen the arbitration clause is broad ["arising out of or relating to"], '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.'"[93]

§ 7.5.4—Miscellaneous Decisions On The Scope Of Arbitration Clauses

In *Cohen v. Colonnade Homes, Inc.*,[94] the Colorado Court of Appeals reviewed an arbitration clause in a home purchase agreement. The warranty, containing an arbitration clause, covered all defects for one year and major structural damage for 10 years. Cohen sued for negligence relating to problems discovered and reported after the one-year warranty expired, but which were excluded from the 10-year warranty. The court concluded that, because the factual disputes did not involve either warranty, the agreement to arbitrate warranty disputes was inapplicable to the pending claim. The builder's specificity created a narrow-scope arbitration clause when it apparently intended to have all disputes subject to arbitration.

The role of the court under the FAA, and probably to the same effect under the CRUAA, was defined by the Eighth Circuit in *Pro Tech Industries, Inc. v. URS Corp.*:

> By its terms, the FAA "leaves no place for the exercise of discretion by a district court but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." A court's role under the FAA is therefore limited to determining (1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute.[95]

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

According to a case decided under the former Civil Code, the submission under a narrow or limited arbitration clause of any special claims to arbitration will be limited to those within the scope of the clause, but may extend to questions that necessarily arise therefrom.[96] Accordingly, tort and other non-breach of contract claims are not, by reason of not being breach of contract claims, necessarily excluded from an arbitration clause contained in a contract.[97] Absent waiver or estoppel, an arbitration proceeding may include claims for negligent construction, construction contrary to the contract documents, and violations of any applicable laws and building codes.[98] A claim based upon promissory estoppel will also be within the scope of a general arbitration clause.[99] Where the underlying facts and contract interpretation issues arise out of a contract, a claim for declaratory relief will not take the issue out of the arbitration clause.[100]

Similarly, a contractor's claims for termination costs arising out of the termination of a subcontract, reimbursement of advance payments made to the subcontractor, warranty costs, and alleged overbilling claims have all been held to be within the scope of a general arbitration clause.[101]

Where a verbal settlement of a claim is made and one party fails to abide by the settlement, if the factual basis for the underlying claim is within the scope of the arbitration clause in the underlying agreement, the issues relative to the settlement may also be within the scope of the arbitration clause.[102] However, some courts may view the settlement as a separate and independent contract.

The parties will not be bound to participate in arbitration where the claim is merely for payment of an undisputed and liquidated sum of money. Attempts to create a dispute over a liquidated sum after a suit has been filed will not divest the court of jurisdiction, even if the parties have agreed to arbitration.[103] However, an otherwise validly disputed claim for the unpaid contract balance is within the scope of an arbitration clause.[104] Where the contractor does not dispute the defect in the work that gives rise to the claim and gives assurances that it will be corrected, there is no dispute to be arbitrated.[105]

With respect to the arbitration of a dispute arising out of a construction contract entered into with a governmental entity, unless an appropriation for the work has been made by the governmental entity, the arbitrator may have no jurisdiction, and any award it enters may be set aside.[106] This result has been ameliorated in large measure by the enactment of C.R.S. § 24-91-103.6. However, for a claiming contractor to obtain a monetary recovery, it must not only comply with the requirements of the contract documents for claim submission, but it may also have to certify its claim. If the appropria-

tion applicable to the project has been exhausted and the contractor fails to certify its claim, the contractor runs the risk that it will be unable to recover on any award, inasmuch as a governmental entity generally has no liability beyond the amount appropriated.[107]

A broad form arbitration clause with respect to warranties applies to claims alleged under the Consumer Protection Act, negligent misrepresentation, negligent concealment, and breach of the Soils Disclosure Act.[108]

§ 7.5.5—Defining The Dispute

In "considering whether an arbitration provision applies to a particular dispute," the court must "look beyond the legal cause of action [alleged] and consider the factual allegations upon which the claims are based."[109] The Colorado Supreme Court stated that "[t]he factual allegations which form the basis of the claim asserted, rather than the legal cause of action pled, should guide the district court in making the determination as to whether a particular dispute falls within the reach of the ADR clause."[110] The court of appeals reaffirmed that a claim sounding in tort may be governed by a clause requiring arbitration of a contract dispute.[111] Nevertheless, if the arbitration clause is limited to contract disputes, the arbitrator may be limited to proof of the elements of breach of contract and damages therefor.

§ 7.6 • DEFENSES TO THE ENFORCEMENT OF THE AGREEMENT TO ARBITRATE

State contract law generally governs the formation of an arbitration agreement. *See* § 5.2.3. Similarly, most defenses to the enforcement of an arbitration agreement are based upon and governed by state law.[112]

FAA

See also § 8.6 as to who decides the defenses, and § 5.13.

FAA § 2 provides that arbitration agreements are enforceable — a mandate of FAA policy that arbitration agreements shall be enforced. However, § 2 further states a major exception to enforcement — that exception being that arbitration agreements are not enforceable upon "such grounds as exist in law or equity for the revocation of any contract." Thus, the arbitration agreement must be a valid and enforceable agreement. The precise words are important. The grounds are those "for the revocation of any contract," not grounds for the revocation of "arbitration contracts." Probably "all" means "any contract." Similarly, case law establishes that "revocation" includes "invaliding," "voiding," and similar terms.

As with interpretation of arbitration agreements, courts look to state law to define these grounds. However, such grounds as any state may have may not be adopted if they impede the implementation of the philosophy of the FAA. When a court under the FAA looks to the state law for such grounds and the elements of those grounds, the FAA is not uniform throughout the United States. The issue of the FAA overriding state law has substantially occurred with respect to the defense of unconscionability. *See* § 7.6.14.

The U.S. Supreme Court has defined examples of such "grounds" as fraud, duress, or unconscionability.[113] However, there is no reason to believe this list is exclusive.

CRUAA

The language of the CRUAA is practically identical to FAA § 2 as to defenses to enforceability of arbitration agreements: an arbitration agreement "is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[114] If the CRUAA is applicable, these grounds are governed by Colorado choice of law rules. Generally, state law also governs those grounds when the FAA is applicable.[115] However, if the state law defense to the enforcement of the arbitration agreement — duress, unconscionability, illusory, etc., *see* §§ 8.6 and 8.7 — results in no valid, enforceable contract, federal law may preempt state law and thereby avoid the state-law defense.[116] It appears, so far, that FAA preemption applies only in some circumstances when state law would block the arbitration from going forward.

The court or arbitrator may find that there was an offer containing an arbitration clause and an acceptance of that offer — in sum, a contract. Nevertheless, there may be defenses to the contract being a valid and binding contract.

Once it is determined that there is an agreement to arbitrate, and it is for a procedure within the scope of one of the arbitration statutes, if raised by a party, it must be determined whether the agreement is not enforceable because of some defense thereto. State contract law generally applies, but again, will be preempted or voided by federal law if the FAA applies and if the state law restricts the validity of the agreement to arbitration.

If the agreement is valid on initial inquiry, arbitration may be compelled even if one of the affirmative defenses might ultimately invalidate the contract. In *Comanche Indian Tribe of Oklahoma v. 49, L.L.C.*,[117] the Tribe's arguments revolved around its claim of sovereign immunity. The Tribe claimed that the Tribe's chairman did not have authority to sign the contracts (which contained the arbitration clauses) and that the waiver of sovereign immunity in the contracts was invalid.

The district court found that all but one of the contracts was valid and that the Tribe had waived its sovereign immunity. The court then stayed the pending court proceedings and compelled arbitration. An appeal to the Tenth Circuit followed.

In essence, the court made substantive rulings relating to sovereign immunity to determine whether the arbitration clause in the contracts was valid and enforceable. Having concluded that the Tribe had waived sovereign immunity, it was for the arbitrator to determine the claims relating to breach of the contracts. On appeal, the Tribe could argue that the arbitration clause was unenforceable because it did not effectively waive its sovereign immunity (and other issues that might arise). The Tenth Circuit was mindful that a gateway issue may require reversal, but, nonetheless, it was not ripe for decision.

The following is a brief discussion of some of the defenses that may apply to make an agreement to arbitrate unenforceable.

§ 7.6.1—Fraudulent Inducement Of The Contract

Fraudulent inducement to enter into a contract is a common law ground that makes a contract void or voidable. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[118] decided under the FAA, the U.S. Supreme Court held that establishing fraud in the inducement of a contract containing an arbitration provision does not void the arbitration clause; rather, to be a defense to enforcement of arbitration, there must be fraud in the inducement of the arbitration clause. If the defense asserted is fraud in the inducement of the contract as a whole, and not specifically of the arbitration clause, the court typically will enforce the arbitration clause and allow the arbitrator to decide the issue of fraud in the inducement of the contract as a defense to the underlying claims. Thus, as to many asserted defenses to the parties having agreed to arbitration, the courts hold that the arbitration clause portion exists separately from "the contracts in which they are embedded." Thus, a defense that the contract was "void" or "voidable" is arbitrated.[119]

Colorado has followed *Prima Paint* and held that to escape an arbitration clause in a contract, the fraud must be in the inducement of the arbitration clause itself unless otherwise agreed upon by the parties. An allegation of fraud in the inducement of the contract itself will be subject to arbitration.[120]

- Annot., *Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract*, 11 A.L.R.4th 774.

See § 8.7.4.

§ 7.6.2—Duress

Duress is a common law defense to the enforcement of contracts generally, and no doubt, an arbitration clause therein. Presumably, the *Prima Paint* approach will be followed when the defense is asserted: duress is a valid defense to the arbitration clause only if the duress relates to the inclusion of the arbitration clause in the contract. A contention of duress with respect to the contract as a whole will not defeat the arbitration of that issue — the court probably will enforce the arbitration clause and forward the duress defense to the contract to the arbitrator for determination.

§ 7.6.3—Mistake

Mistake — unilateral or mutual — may be a defense at common law to enforcement of a contract. Probably the *Prima Paint* approach to a fraudulent inducement defense would be followed were a mistake defense asserted to avoid the contract.

§ 7.6.4—Forgery

A signature forgery contention goes to the validity of the entire contract and, therefore, should be arbitrated.[121]

§ 7.6.5—Illusory

FAA

In *Dumais v. American Golf Corp.*,[122] the Tenth Circuit held that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope was an illusory contract and therefore void. The court did not state whether the FAA or the New Mexico

Arbitration Act was applicable. The court applied New Mexico substantive law to determine the validity of the contract. This case was subsequently called into question by *Vernon v. Qwest Communications International, Inc.*[123]

On the other hand, where one party reserved the right to terminate or modify the arbitration provision, but the reservation did not apply to claims of which the party had actual notice as of the date of the amendment, and any termination would not be effective until 10 days after reasonable notice or to claims that arose prior to the termination, these limitations were sufficient to avoid rendering the agreement illusory.[124]

CRUAA

In *Rains v. Foundation Health Systems Life & Health*,[125] the Colorado Court of Appeals upheld the validity of an arbitration provision that permitted only one party to compel arbitration, afforded remedies to that party outside of arbitration, gave that party the right to propose three neutral arbitrators from whom the other party had to select the arbitrator, and did not expressly provide for document discovery (other than in the arbitrator's discretion). In another case, a mandatory arbitration agreement entered into as a condition of continued employment that required an employee to pay a portion of the arbitrator's fees was held unenforceable under the FAA.[126] However, such a provision perhaps can be severed from the otherwise valid arbitration agreement.

§ 7.6.6—Waiver

See § 7.9.

§ 7.6.7—Expired/Terminated Contract

Some parties have asserted that when a contract expires or terminates, the arbitration clause therein expires, even if there are outstanding disputes concerning the contract. An arbitration clause in a contract is presumed to survive the termination of the contract (unless otherwise provided), even if the facts of the dispute occurred after the contract expired.[127]

CRUAA

The Colorado Court of Appeals has held that an arbitration clause in a warranty survived the expiration of the warranty.[128] The case involved claims for flooding against a contractor on a new home. The alleged wrongful acts (of construction) occurred before the warranty expired, although these acts were not known and could not have been reasonably discovered by the claimants until after the warranty expired.

Similarly, in *Newmont U.S.A. Ltd. v. Insurance Company of North America*, the Tenth Circuit stated: "[A]n arbitration clause in a contract is presumed to survive the expiration of that contract. This presumption might be overridden given some express or clearly implied evidence that the parties intended to override that presumption, or the relevant dispute cannot be said to have arisen under the previous contract."[129]

"A dispute 'arises under' a 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."[130]

Generally, arbitration clauses are severable from contracts.[131] Thus, "absent a clear intent to the contrary, the duty to arbitrate survives . . . termination of the *contract*."[132]

On the other hand, in *Aberdeen Golf & Country Club v. Bliss Construction, Inc.*,[133] a Florida court held that an arbitration clause in the construction contract documents did not survive the owner's wrongful termination of the contract. The court's decision that the owner's termination of the contract relieved the contractor of his agreement to arbitrate was based on: (1) waiver of the right to arbitrate, and (2) anticipatory repudiation of the contract.

> [T]he owner "unequivocally terminated" the entire agreement. The owner's repudiation empowered the [contractor] to forego his own performance of the contract's various provisions — including an ADR provision designed to ensure full performance by the owner — and sue for damages in court.
>
> . . . The ADR provision is just one part of the contract's provisions leading to a successful completion, and it does not specify that it survives a premature termination. Without a survival clause, the ADR provision went down with the whole.[134]

Some advocates suggest that the waiver portion of this decision is sound, but that the concept of a wrongful termination of the contract as terminating the ADR clause, if there is no survival provision, is not.

Where part of an insurance policy is rescinded or void, the arbitration clause contained in another section of the policy remains in effect, unless the arbitration clause is specifically challenged.[135]

Where a party fails to commence the arbitration within the contractual statute of limitations, the arbitrator does not have jurisdiction to hear the case.[136] However, concluding that the issue is jurisdictional may also raise the issue of whether the statute can be waived.

In *1mage Software v. Reynolds & Reynolds Co.*,[137] Judge Kane of the U.S. District Court for the District of Colorado noted that it was presumed under the federal law of arbitrability that an arbitration provision in a contract survives the expiration of that contract unless there is some express or implied evidence that the parties intended to override the presumption.[138] Of course, there may be a difference between termination and expiration of a contract.[139]

The majority rule in other jurisdictions is that despite contract expiration, an arbitration clause survives as to disputes that "arise under the contract."[140]

A post-expiration dispute arises under the contract where "it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."[141]

When a party rescinds a contract, the arbitration clause therein may not be rescinded.[142] The analysis should be the same as when it is asserted that the contract was fraudulently induced. *See* §§ 5.9 and 7.6.1.

- Annot., *Breach or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein*, 32 A.L.R.3d 377.
- Annot., *Enforcement of Contractual Arbitration Clause as Affected by Expiration of Contract Prior to Demand for Arbitration*, 5 A.L.R.3d 1008.

§ 7.6.8—Statute Of Limitations

Several Annotations in *American Law Reports* (A.L.R.) address the concept of statutes of limitations barring enforcement of the arbitration provision in a contract, or the underlying claim.[143]

At least one state supreme court has held that its statutes of limitations did not apply to arbitrations because those statutes refer to "suits" and not to "arbitrations."[144] It is doubtful this decision will be followed, even when the statutes are similar in language.

Comment: The forum selected — arbitration or the courts — should not be the cause of a major difference in result.

As to determination of the statute of limitations to be applied to the underlying claim, see *Barnett v. United Air Lines, Inc.*[145]

- Annot., *Which Statute of Limitation Applies to Efforts to Compel Arbitration of a Dispute*, 77 A.L.R.4th 1071.
- Annot., *Statute of Limitations as a Bar to Arbitration Under Agreement*, 94 A.L.R.3d 533.

§ 7.6.9—Contractual Time Limits

Contractual statutes of limitations in arbitration agreements generally are upheld under federal arbitration law. This reflects that an agreement generally may shorten the statute of limitations so long as the period is reasonable.[146]

The Georgia appellate court enforced a contractual time limit.[147] This is the general rule in the state courts.

§ 7.6.10—Laches And Estoppel

In *Galbraith v. Clark*,[148] the plaintiff opposed a motion to compel arbitration on the ground that her suit was outside the scope of the arbitration agreement. The trial court rejected the argument, and the plaintiff appealed, asserting the issue was for the arbitrator. The Colorado Court of Appeals acknowledged that because the parties had agreed that the arbitrator would decide questions of arbitrability, it was an issue for the arbitrator. However, because the parties did not ask the district court to refrain from deciding the issue, they "forfeited any right to compel arbitration on this issue of arbitrability."[149]

§ 7.6.11—Conditions Precedent

See § 7.7.

§ 7.6.12—Validity Of Contract Under The Antitrust Laws

"While antitrust issues may, in appropriate cases, be determined by an arbitration, when the legality of a contract is under scrutiny, that issue must be decided by the court."[150]

§ 7.6.13—Foreign Immunity

When foreign companies or states are a party to arbitration, their immunity may become an issue.[151]

§ 7.6.14—Unconscionability Of The Arbitration Clause — Other Than Class Action Provisions

As to unconscionability of clauses prohibiting/waiving class action arbitration and FAA preemption of state unconscionability law, see § 6.8.

While the black letter rules of unconscionability may be the same for all arbitration agreements, at a minimum, the rules are more rigorously applied in employment and consumer arbitration agreements. The unstated reason in part is that these agreements may "barely" satisfy the requirement that both parties (voluntarily) agree to arbitrate disputes. The concern is that the employee's only meaningful alternative is to decline employment, and the consumer's alternative is to not buy the product. In fact, often the consumer may not be actually aware of the existence of an arbitration clause, by reason of failure to carefully read all documents involved in, *e.g.*, the issuance of a credit card.

Examples of unconscionability in other states include:

- Employee refusal to sign arbitration agreement would have ended long-time employment and employee had no opportunity to negotiate the terms;[152]
- Clause required arbitration of employee's claims, but not arbitration of employer's claims; imposed excessive costs on employee; shortened limitations periods; and imposed discovery limitations;[153]
- Mandatory arbitration clause in home-purchase agreement was procedurally and substantively unconscionable;[154]
- Arbitration provision in residential property sales agreement was ambiguous and therefore not enforceable;[155]
- Arbitration provision in online purchase;
- Arbitration provision in credit card agreement; and
- One party unilaterally selects the arbitration service.[156]

For example, an arbitration provision in a take-it-or-leave-it auto loan agreement was held procedurally and substantively unconscionable and unenforceable against the borrower by the Wisconsin Supreme Court.[157] The arbitration provision was unconscionable procedurally because the auto lender was in the business of lending, was experienced in drafting such loan agreements, and was in a position of substantially greater bargaining power than the borrower, who was indigent and in need of cash. The provision was unconscionable substantively because of the broad, one-sided, unfair provision allowing the lender full access to the courts, free of arbitration, while limiting the borrower to arbitration.

An employment arbitration agreement restricting the breadth of discovery or length of the arbitration hearing is not substantively unconscionable, so long as the agreement gives the arbitrator the discretion to extend discovery or the hearing upon a showing of good cause.[158] The test is fundamental fairness — not actual bias.[159]

Unconscionability, as used under FAA § 2 as a defense, is normally determined by state law. However, if the defense applies only to arbitration, by deriving meaning from the fact that the agree-

ment to arbitrate is at issue, and "interferes with the fundamental attributes of arbitration" to the extent that it "creates a scheme inconsistent with the FAA" and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the state law defense is preempted (voided) by the FAA.[160]

The U.S. District Court for the District of Colorado, in *Daugherty v. Encana Oil & Gas (USA), Inc.*,[161] defined and applied Colorado law of unconscionability to determine whether an arbitration provision was unconscionable. The factors to be considered include:

> (1) the use of a standardized agreement executed by parties of unequal bargaining power; (2) the lack of opportunity for the customer to read or become familiar with the document before signing it; (3) the use of fine print in the portion of the contract containing the provision in question; (4) the absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (5) the terms of the contract, including substantive fairness; (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and (7) the circumstances surrounding the formation of the contract, including setting, purpose and effect.[162]

It is unclear as to the extent to which the district court applied *AT&T Mobility LLC v. Concepcion*[163] in holding the arbitration clause not unconscionable, saying "the Court would likely have found . . . the arbitration agreement at issue here unconscionable . . . if it were issuing this decision pre-*Concepcion*."[164]

While, historically, state law has defined whether an arbitration agreement or portion thereof is unconscionable, the district court noted that the U.S. Supreme Court in *Concepcion* held a state may not apply its own laws of contract formation, interpretation, and defenses in a manner that interferes with the FAA presumption in favor of arbitration:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA [*citing Preston v. Ferrer*, 552 U.S. 346 (2008)]. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable [to all claims and defenses], such as duress or . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.[165]

In *Concepcion*, the Court held that the California application of its law of unconscionability was inconsistent with the FAA in that it disfavored arbitration. Therefore, the California unconscionability holding was preempted by the FAA.

That unconscionability finding of the California Supreme Court was of a waiver of a right to proceed in arbitration as a class action. The factors that the California court found, in holding the class waiver unconscionable, included: a consumer contract of adhesion; typically small amount of damages involved; and one party had superior bargaining power and carried out a scheme to deliberately cheat a large number of consumers individually of small amounts of money; resulting in the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another.

Also, when the FAA applies, unconscionability must be shown as to the arbitration clause itself — not the entire agreement — in order to avoid arbitration or a particular clause.

The recent judicial activity as to unconscionability of arbitration clauses primarily has been with respect to clauses precluding class action arbitration. In those instances, federal arbitration law may preempt state law of unconscionability. *See* § 6.8.

When the issue of whether a class arbitration can be maintained is not involved, state law defining and applying unconscionability appears to continue to govern (unless the state law is an obstacle to federal arbitration policy). For example, a fee-shifting clause in an arbitration agreement was found unconscionable under South Carolina law and severed from the agreement. The balance of the arbitration agreement was enforced.[166] Similarly, a limitation of three discovery depositions was found unconscionable, but the remedy was to simply strike the provision.[167]

See § 6.8.

- Annot., *Claim of Unconscionability of Contract as Subject to Compulsory Arbitration Clause Contained in Contract*, 22 A.L.R.6th 49.

§ 7.6.15—Lack Of Mutuality

Non-mutuality of provisions in the arbitration agreement have long been the subject of litigation as to whether they void all or portions of the arbitration agreement. Often this defense is referred to as unconscionability. However, lack of mutuality is a more specific reference.

Given that the U.S. Supreme Court has held that the FAA preempts some state law of unconscionability, the question arises as to whether it extends to lack of mutuality. The Tennessee Supreme Court held that the FAA does not preempt that state's lack of mutuality of remedies defense.[168] The California courts have held that an arbitration agreement that requires one contracting party, but not the other, to arbitrate claims lacks mutuality and is invalid.[169] Many other jurisdictions have followed this lead.[170]

The requirement of mutuality in contracts has long been recognized as part of Colorado's common law of contract interpretation. The "reservation to either party to a contract, of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement."[171] In the arbitration context, an agreement that binds one party to arbitrate while granting the other party the unilateral option to choose not to arbitrate lacks mutuality and is unenforceable.[172] As stated by Judge Kane:

> Plaintiffs would be both irretrievably bound and at the Defendants' mercy, while Defendants are bound to nothing. Such terms in a contract render it illusory, as it binds one party without binding the other.
>
> . . .
>
> As a result, the arbitration "agreement" was unilateral rather than mutual and hence "no agreement at all."[173]

The requirement of a mutual agreement to arbitrate is defined by the Colorado Constitution: the arbitration agreement must be "the mutual agreement of the parties to any controversy who may choose that mode of adjustment."[174] The Colorado Supreme Court applied this constitutional provision, saying: "We are of the opinion that section 3, art. 18, neither contemplates nor admits of a law providing for the compulsory submission of differences to arbitration. A submission of differences to the decision of arbitrators must be by mutual agreement of the parties to the controversy. . . ."[175]

- Nahmias, "The Enforceability of Contract Clauses Giving One Party the Unilateral Right to Choose Between Arbitration and Litigation," 21 *Construction Law.* 36 (Summer 2001).

§ 7.6.16—Prohibitive Cost Of Arbitration

Courts have adopted the doctrine of "prohibitive cost" of arbitration as a defense to enforcement of an arbitration agreement. Thus, a reasonable reason for denying enforcement of arbitration exists if a party is "saddled with prohibitive [arbitration] costs" that could preclude the party "from effectively vindicating [his or her] federal statutory rights in the arbitral forum."[176] This doctrine was enunciated by the Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph*.[177] In that decision and subsequent decisions, in enunciating the principle above, the courts have defined certain elements to the defense, including:

- The prohibitive cost of arbitration defense must be analyzed on a case-by-case inquiry;
- The party seeking to avoid the arbitration agreement bears the burden of showing the likelihood of incurring prohibitive costs;
- The case-by-case inquiry must focus on the objecting party's expected or actual arbitration costs and his or her ability to pay those costs, measured against a baseline of the party's expected costs for litigation and his or her ability to pay those costs;[178]
- A relevant fact to the cost differential analysis is whether the arbitration agreement provides for fee-shifting, including the ability to shift forum fees based upon the inability to pay;[179]
- There may be a difference depending upon whether the claims are federal or state statutory claims, or common law claims; and
- There must be a showing both of individualized evidence that prohibitive costs from arbitration are likely and that the moving party cannot financially meet those costs.[180]

The prohibitive cost of arbitration defense was raised but not decided in *Gergel v. High View Homes, L.L.C.*,[181] a Colorado Court of Appeals decision. However, the Tenth Circuit applied the doctrine in *Shankle v. B-G Maintenance Management* with respect to an employee's statutory discrimination claim, saying:

> [A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition, falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. . . . Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.

> . . . The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place — it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. . . . Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws.[182]

The court noted that the plaintiff would have to pay an arbitrator between $1,875 and $5,000, and that he, and probably other similarly situated employees, could not afford such a fee.

However, the U.S. Supreme Court overruled this approach in *American Express Co. v. Italian Colors Restaurant*,[183] holding that a waiver of class arbitration in a contract cannot be defeated under the FAA on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Interestingly, the Court said that the fact that the statutory right to be vindicated is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.

§ 7.6.17—Waiver Of Class Actions

See § 6.8.

• Annot., *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R.6th 145, §§ 11, 12.

§ 7.6.18—Venue

• Annot., *Jurisdiction, Validity & Effect & Remedy in Respect of Contractual Stipulation to Submit Disputes to Arbitration in Another Jurisdiction*, 12 A.L.R.3d 892.

§ 7.6.19—Unavailability Of The Arbitration Administrator/Forum/Arbitrator

When the arbitration agreement defines a specific organization to administer the arbitration and to provide the arbitrator, and that organization declines to so serve, the arbitration agreement may be unenforceable.[184]

§ 7.6.20—Public Policy

The Ninth Circuit struck down Montana case law holding a certain arbitration agreement was void as against public policy.[185] The Montana rule held contracts of adhesion were void as against public policy if they are not "in the reasonable expectations of both parties when contracting." Montana courts had applied that rule to void arbitration agreements in contracts of adhesion because they waive parties' right to trial by jury and access to courts — unless the provisions were explained to and initiated by the consumers. Since the doctrine disproportionally affects arbitration agreements, it is preempted by the FAA under the *Concepcion* decision. This result obtained even though the doctrine was applied uniformly to all contracts.

§ 7.6.21—Default By Non-payment Of Arbitration Fees

See § 12.6.

§ 7.6.22—Indispensable Party

The courts will enforce an arbitration provision that excludes any claim from arbitration in the absence of an "indispensable party."[186]

§7.6.23—Failure To Obtain License

The failure of the claimant to obtain a license to perform the work that is the basis for its claim may be a bar to maintaining the arbitration.[187]

§ 7.6.24—Waiver/Estoppel To Assert Defenses

The foregoing defenses to the enforcement of an arbitration agreement are generally subject to being waived, or to the defendant asserting them being estopped.[188]

§ 7.7 • CONDITIONS PRECEDENT TO THE OBLIGATION TO ARBITRATE

As in any contract, there may be conditions precedent that must occur or be performed before there is an obligation on one or both of the parties to perform. Common conditions precedent to the obligation to arbitrate include engaging in negotiation or mediation in an attempt to resolve the dispute. These actions may also include document exchange, dispute evaluation, non-binding fact-finding, and similar steps. These provisions generally will be enforced as conditions precedent to arbitration.[189]

§ 7.7.1—Mediation As A Condition Precedent To Arbitration

Fulfillment of a contractual mediation requirement has been enforced as a condition precedent to arbitration.[190] Moreover, if the party seeking arbitration does not fulfill the condition precedent in good faith, the arbitration agreement may not be enforced.[191]

Whether conditions precedent to arbitration have been fulfilled is for the arbitrator to determine, under both the CUAA and the CRUAA.[192]

The CRUAA, C.R.S. § 13-22-206 (2016), allows the arbitrator to make the determination of whether a condition precedent has been fulfilled. Under state and federal common law, absent agreement of the parties, whether conditions precedent to arbitration have been fulfilled is a question for the arbitrator.[193]

See § 24.6.

§ 7.7.2—Design Professional Certification And Certificate Of Good Cause

Some construction contracts require issuance of an architect's certification or decision prior to specific action being taken by the owner or contractor. For example, a contract may require the architect to certify that the contractor is in default as a condition precedent to the owner's termination of the contractor for default. An architect's decision on a claim for additional compensation or a time extension may also be a prerequisite to initiation of arbitration.[194]

In a 1925 decision, where an architect's certificate was issued prior to an owner's default termination of the contractor, but the contract did not make the architect's decision final and binding, the

contractor was entitled to proceed with arbitration.[195] However, where a claims provision required an architect's certificate and a statement that the decision was final and binding as a condition to arbitration, and the architect's decision failed to contain the statement, arbitration was not available.[196]

Construction contracts sometimes provide that an initial decision by the architect shall be required as a condition precedent to mediation or arbitration. If there is no architect, what happens? The courts differ. Some hold it is an issue of fact as to whether the absence of an architect constitutes a waiver of arbitration.[197] The Colorado Court of Appeals, when indirectly presented this issue, directed the arbitrator to decide the issue. The arbitrator directed the claimant to submit the claim to the architect. However, the architect did not rule; the arbitrator did.[198]

§ 7.8 • INTERPRETING THE ARBITRATION AGREEMENT

See Chapter 5.

Both the federal and state statutes reflect a federal policy favoring arbitration, and any doubts about the interpretation of the scope of the agreement must be resolved in favor of arbitration.[199]

The Tenth Circuit has held that "[w]hen a contract contains a broad arbitration clause, matters that touch the underlying contract should be arbitrated."[200]

§ 7.8.1—The Meaning Of "May Arbitrate" And "Arising Under"

Regrettably, some parties use language such as "in the event a dispute hereafter arises, the parties may submit their dispute to arbitration," rather than clearer language such as "shall submit their dispute to arbitration." However, the words "may arbitrate" in an arbitration clause have been held merely to give a party the choice of either arbitrating or abandoning the claim — it does not permit one party to unilaterally elect whether to arbitrate or litigate the claim.[201] If the agreement is ambiguous, parol evidence as to the parties' intent may be allowed.

§ 7.8.2—Construing Multiple Documents Together

In *National American Insurance Co. v. SCOR Reinsurance Co.*,[202] 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 agreement 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.[203]

§ 7.8.3—Interpretation Of The Asserted Agreement To Arbitrate

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 rules include:

1) Whether there is a valid and enforceable agreement to arbitrate. Generally, there are no special presumptions as to arbitration or other rules of interpretation. The issue usually is determined under state-law rules of interpretation of contracts generally.[204]
    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."[205]
    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.[206]
2) Whether a particular dispute is within the scope of a valid arbitration agreement. Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.
3) "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."[207]

§ 7.9 • WAIVER OF RIGHT TO ARBITRATE

See § 8.6.5 as to whether the court or arbitrator decides the issue.

Like any other contract right, an agreement to arbitrate (as well as any specific provisions thereof) may be waived.[208] The right to arbitrate can be waived by actions inconsistent with such right in circumstances where prejudice will occur to the other parties.[209] Neither the FAA nor the CUAA has provisions defining the right to waiver.

CRUAA

The CRUAA, C.R.S. § 13-22-204 (2016), defines that the provisions of that statute that may be waived and at what stage of the proceedings. That section also defines the provisions of the statute that the parties may vary by agreement. There are no Colorado reported decisions under that statute, and the reader is referred to that statute should a waiver situation occur where that statute might otherwise be applicable.

In *Harper Hofer & Associates, LLC v. Northwest Direct Marketing, Inc.*[210] the plaintiff initiated an arbitration against the defendants for fees and costs. The defendants e-mailed the arbitrator requesting that a court determine whether the parties ever executed a valid contract containing the arbitration clause, and thereby agreed to arbitration. The defendants also requested that the arbitrator make a determination that no contract between the parties existed.

The arbitrator ruled that the parties had entered into the contract containing the arbitration agreement. The defendants never sought independent judicial relief pursuant to C.R.C.P. 57 (declaratory judgment) on the question of whether the parties had a valid agreement to arbitrate.

The arbitration proceeded, and an award was entered in favor of the plaintiff. When the plaintiff moved to confirm the award, the defendants moved to vacate the award on the ground that only the district court could determine the existence of a valid contract/arbitration agreement. The Colorado Court of Appeals held that under C.R.S. § 13-22-206(2), the court and not the arbitrator determines whether a controversy is subject to an agreement to arbitrate unless the parties have agreed that the arbitrator shall decide the issue in plain and unambiguous language.

Here, however, the defendants waived the right to have the court determine whether there was a contract/agreement to arbitrate between the parties. *See* C.R.S. § 13-22-204(3)(b) as to commercial entities.

> [W]e conclude that defendants willingly arbitrated that question [existence of contract] and in doing so, waived any ability to seek such relief [declaratory judgment]. When a party does not seek judicial resolution of the question of whether a contract exists before participating in an arbitration regarding the existence of the contract and the contract's arbitration clause, he waives any arguments about the underlying contract on appeal.[211]

FAA

There is extensive case law of waiver under the FAA. This common law probably applies to the CRUAA to the extent not directly contrary to CRUAA provisions. Under both statutes, "[a] party may waive its right to arbitration by taking the actions that are inconsistent with an arbitration provision."[212] While there are no set criteria as to what constitutes a waiver or abandonment of the right to arbitration, the courts have defined various factors to be considered in determining whether a waiver has occurred. These factors include whether (1) the party has actually participated in the lawsuit or taken other action inconsistent with its rights to arbitrate; (2) litigation has substantially progressed by the time the intention to arbitrate was communicated by the party moving to dismiss; (3) there has been a long delay prior to seeking a stay of the litigation; (4) the defendant filed counterclaims without asking for a stay of the arbitration; (5) a request to compel arbitration was initiated close to trial; (6) the party seeking the arbitration has taken unfair advantage of discovery that would not have been available in arbitration; and (7) the other party was adversely affected, misled, or prejudiced by the delay. In sum, the elements are whether the parties' actions are inconsistent with the right to arbitrate and whether the delay affected, misled, or prejudiced the opposing party.[213]

The Tenth Circuit Court of Appeals defined a six factor test to determine whether a party has waived its right to arbitration.[214]

1) Are the party's actions inconsistent with the right to arbitrate?
2) Has the litigation machinery been substantially invoked before an intent to arbitrate has been asserted?
3) Did the party request arbitration close to trial or delay for a long period?
4) Did the party file a counterclaim without asking for a stay?
5) Have important intervening steps not available in arbitration, such as judicial discovery, been taken?
6) Did the delay affect, mislead or prejudice the opposing party?

The U.S. District Court for the District of Colorado found no waiver of the right to arbitrate where a party initiated a lawsuit to enforce the arbitration clause and the complaint stated that it did not waive arbitration.[215] Similarly, the state court held no waiver where an owner initiated litigation to preserve its right to arbitrate.[216] Engaging in discovery in pending litigation does not automatically constitute waiver of the arbitration agreement. Particularly if the discovery in the judicial procedure is approximately the same as generally available in the arbitration proceeding, discovery may not constitute waiver if there is no prejudice.[217]

Undertaking discovery in the judicial proceedings was almost a dispositive factor in one court's finding of waiver of the right to arbitration.[218] The court noted that such discovery in arbitration would not have been of right, but would have been allowed in arbitration only at the arbitrator's discretion.

Perhaps a classic case extending the concept of waiver of the right to arbitration is found in the Wyoming case of *Scherer v. Schuler Custom Homes Construction, Inc.*[219] In holding that defendant contractor Custom Homes had waived its right to arbitration, the Wyoming Supreme Court said:

> Custom Homes' strategy was to delay resolution of this matter and not to exercise its right under the contract for alternative dispute resolution. When faced with a direct request for alternative dispute resolution, it chose to ignore the request. . . .
>
> . . . Custom Homes' only goal was to have the litigation dismissed. Custom Homes did not comport with the spirit of the alternative dispute resolution provision of the agreement, which created a mechanism for prompt resolution of the parties' differences.[220]

Similarly, allowing three years between the date the defendant contractor answered the owner's complaint and its effort to compel arbitration, during which time the contractor filed motions, conducted discovery, and utilized judicial resources, was found to result in prejudice and therefore a waiver of the arbitration agreement.[221]

A party may waive its right to arbitration by failing to take steps to enforce that right or by conduct inconsistent with that right. For example, in *Brown v. Dillard's Inc.*,[222] an employer who refused to participate in arbitration initiated by an employee was held to be barred from compelling arbitration when the employee thereafter commenced a civil action. A party seeking to enforce a contract must have complied with it, and the employer had breached the arbitration agreement.

> If we took [employer] Dillard's view and allowed it to compel arbitration notwithstanding its breach of the arbitration agreement, we would set up a perverse incentive scheme [for employers] . . . to refuse to arbitrate claims brought by employees in the hope that frustrated employees would simply abandon them.[223]

Contesting an arbitration panel's jurisdiction may result in waiver of the right to arbitrate.[224]

If the defendant in a civil action files and briefs a motion to dismiss the complaint on the merits, that action may be a waiver of any right to arbitration. That result obtains even if the defendant attempts to reserve its right to arbitration.[225]

The Third Circuit Court of Appeals has defined its approach to determining whether waiver of the right to arbitrate occurs:

> "[W]aiver is not to be lightly inferred," and "will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery."
>
> . . .
>
> "[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived by litigation conduct." To aid the analysis of waiver questions, we have "identified six nonexclusive factors to guide the prejudice inquiry:"
>
> (1) timeliness or lack thereof of the motion to arbitrate; (2) extent to which the party seeking arbitration has contested the merits of the opposing party's claims; (3) whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to seeking to enjoin the court proceedings; (4) the extent to which a party seeking arbitration engaged in non-merits motion practice; (5) the party's acquiescence to the court's pretrial orders; and (6) the extent to which the parties have engaged in discovery.[226]

If a defendant in a lawsuit has waived its right to arbitration by proceeding with the litigation, the right to demand arbitration may be revived under certain limited circumstances if the plaintiff files an amended complaint.[227] A primary circumstance to be considered is if the amended complaint unexpectedly changes the theory or scope of the case.

- Annot., *Waiver of Arbitration Provision in Contract*, 161 A.L.R. 1426.
- Annot., *Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein*, 98 A.L.R.3d 767.
- Annot., *Delay in Asserting Contractual Right to Arbitration as Precluding Enforcement Thereof*, 25 A.L.R.3d 1171.
- Annot., *Waiver of Arbitration Provision in Contract*, 117 A.L.R. 301.
- Annot., *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability*, 33 A.L.R.3d 1242.

A party asserting waiver probably has the right to an evidentiary hearing to prove pre-litigation waiver of a right to arbitrate, if facts are in issue.[228]

See also §§ 8.7.5 and 8.6.5 as to who determines whether a party has waived the right to arbitrate.

§ 7.10 • WAIVER OF OBJECTIONS TO ARBITRATION

CRUAA

By failing to object to an arbitrator's actions, any objection thereto may be waived. In *Osborn v. Packard*,[229] the appellee urged that the arbitrator lacked jurisdiction to enter rulings clarifying his original rulings. The court found a waiver of the objection by failing to object to the arbitrator's authority to issue such clarifications until the appeal. Because there might be questions as to applying waiver to subject matter jurisdiction, it might be desirable to refer to the holding as implied consent or amendment to the arbitration agreement.

A Connecticut appellate court held that a party may not simply not participate in the arbitration and then raise an arbitrability defense when the claimant seeks to confirm the award; rather, the respondent must preserve the defense by raising it in the arbitration (or, probably, by asserting it in a judicial action).[230]

Typically, it is the court and not the arbitrator who determines whether a party has waived the arbitration provisions,[231] at least if the parties have not agreed otherwise. In part, this is because the issue normally comes up on a motion to compel arbitration and stay a civil action. Generally, under the rules discussed above as to whether there is a valid arbitration agreement, the issue of waiver is subsumed and is an issue for the court. However, there does not appear to be any prohibition to an arbitrator's determining the issue, although it might be determined *de novo* by the court "on appeal."

The Colorado Court of Appeals stated that under C.R.S. § 13-22-206, the court, not the arbitrator, decides whether an agreement to arbitrate exists, as the parties did not agree by plain and unambiguous language that the arbitrator should decide.[232] The respondents/defendants requested of the arbitrator that a court determine whether there was a valid arbitration agreement. The defendants also requested the arbitrator to make that determination, which he did, finding a valid agreement. "Defendants never sought independent judicial relief pursuant to C.R.C.P. 57 [declaratory judgment] on the question of whether the parties had a valid agreement to arbitrate."[233] Instead, the arbitration proceeded, resulting in an award in favor of the plaintiff.

The plaintiff sought to confirm the award, and the defendants moved to vacate the award on the ground that only the court, and not the arbitrator, could determine whether the contract with the arbitration clause was valid. The court of appeals held that the defendants waived their right to have the court determine the validity of the arbitration agreement, citing C.R.S. §§ 13-22-201(3) and -204(1). The court said:

> When a party does not seek judicial resolution of the question of whether a contract exists before participating in an arbitration regarding the existence of the contract and the contract's arbitration clause, he waives any arguments about the existence of the underlying contract on appeal.[234]

The court held that participation in an arbitration waives a party's objection to the existence of a contract that contains an arbitration clause, even if the party unsuccessfully raised the issue to the arbitrator but did not timely seek judicial review of the arbitrator's denial. The following facts led to this result:

- The plaintiff/claimant initiated arbitration for fees and costs for work performed.
- The defendants/respondents via e-mail to the arbitrator requested that a court determine whether the parties executed a valid contract (and thereby agreed to arbitration).
- The defendants also requested that the arbitrator make a determination that no contract existed.
- The arbitrator ruled a contract existed.
- The defendants participated in the arbitration.
- The defendants never sought judicial relief pursuant to C.R.C.P. 57 (declaratory judgments).
- The arbitrator found for the claimant.

The defendants then moved to vacate the arbitrator's decision on the ground that only the district court could determine the existence of a contract between the parties. The court held that the defendants waived their objection to the arbitrator's authority to determine the existence of a valid contract by consenting to the arbitrator making a determination as to arbitrability.

- The CRUAA requires a court determine whether an agreement to arbitrate exists: § 13-22-206(2).
- So too, whether a controversy is subject to an agreement to arbitrate.
- The parties may waive or vary the effect of the CRUAA to the extent permitted by law: § 13-22-204.
- Such agreement to divest courts of jurisdiction to decide whether a dispute is within the scope of the arbitration agreement must be plain and unambiguous.
- A party may contest an arbitration award on the basis that there was no agreement to arbitrate, unless the person participated in arbitration without raising the objection to a court under § 13-22-215(3) not later than the beginning of the arbitration hearing: § 13-22-223(1)(e). *See* § 13-22-215(3).
- A commercial entity may waive or vary the effects of the CRUAA to the extent permitted by law: § 13-22-204(3)(b).

This decision is directly contrary to an earlier court of appeals decision by a different division.[235]

Practice Pointer

If an arbitration is commenced against your client, and the client asserts that there is no valid arbitration agreement, and that the court perhaps is the body that should determine the issue, you should seek judicial resolution, either under C.R.C.P. 57 (declaratory judgment) or C.R.S. § 13-22-207 (motion to stay).

FAA

In *Marie v. Allied Home Mortgage Corp.*,[236] the First Circuit held that an employer does not waive its right to arbitration by failing to raise the arbitration defense with the EEOC or by failing to initiate arbitration during the pendency of an EEOC investigation. Given that not only did the FAA

apply, but also that a federal cause of action was involved, it appears that the court applied the federal law of waiver.[237]

The Tenth Circuit held that a party who fails to explicitly and specifically object to arbitration and participates in the arbitration effectively waives that party's right to object to arbitration.[238] That same decision also recognized that a party who "forcefully object[s] to the arbitrators deciding their dispute" preserves his or her objection even if the party follows through with arbitration.[239]

- Annot., *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability Under State Law*, 56 A.L.R.5th 757.

§ 7.10.1—Judicial Estoppel

A party may also be judicially estopped to deny that the arbitration clause covers the claims asserted. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."[240]

§ 7.11 • VOID, INVALID, OR ILLEGAL PROVISIONS IN THE ARBITRATION AGREEMENT

As frequently stated throughout this chapter, in most instances the agreement between the parties governs the form and substance of the arbitration. The purpose of many provisions of the statutes is to provide rules and procedures, but not to supersede the agreement of the parties.[241] As to some subjects, the law imposes terms that cannot be altered by agreement of the parties, or that can be altered only after the dispute arises.

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

The Colorado Court of Appeals has held that under the CUAA the parties cannot by agreement define and prescribe the powers of the appellate court with respect to appeal of arbitration awards.[242] In that case, the arbitration agreement provided:

> The parties further agree that for the purpose of any appeal to the Colorado Court of Appeals or the Colorado Supreme Court the arbitrators' award shall be reviewed using the same standard as findings of fact and the conclusions of law by a Colorado District Court.[243]

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

The Colorado federal court decisions under the FAA as to modifying an appellate court's scope of review were somewhat confusing.[244] However, while there are still substantial issues as to its holding, the topic insofar as federal law is now governed by *Hall Street Associates, L.L.C. v. Mattel, Inc*.[245] See Chapter 17 for a detailed discussion.

Examples of statutory provisions under the CRUAA that generally cannot be waived or altered substantially by the parties prior to the controversy arising include: motions to compel or stay arbitration, immunity of the arbitrator, judicial enforcement of pre-award rulings, submission by a court to the arbitrator of a motion to modify or correct an award, confirmation of awards, vacating the award, modification or correction of an award, and judgment on the award, including costs.[246] While these limitations are defined by the CRUAA, the common law under the CUAA and the common law under the FAA probably are the same. The CRUAA also expressly defines statutory provisions that can be waived only after a dispute arises under an agreement to arbitrate.[247]

In *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp*.,[248] the California appellate court considered a provision in the prime contract requiring a dispute review board (DRB) procedure prior to litigation that was otherwise binding on a subcontractor, but did not give the subcontractor any voice in retention of the DRB neutrals. The court held, therefore, that the DRB was presumptively biased in favor of the owner and prime contractor, and the subcontractor was excused from complying with the DRB process.

As mentioned earlier, sometimes seemingly one-sided clauses have been upheld and in other cases stricken. According to some courts, these terms include altering the Title VII employment discrimination right of the plaintiff to recover attorney fees[249] and prohibition on class arbitration.[250] Upon such a finding, some courts may refuse to enforce the arbitration clause, whereas other courts will simply sever the offending provision and enforce the balance.

In *Discover Bank v. Superior Court*,[251] the California Supreme Court considered whether a waiver of the right to bring a class action in a Delaware bank's arbitration agreement with a credit card cardholder was enforceable in a putative nationwide class action brought in California. The California Supreme Court held that in some instances the FAA did not preempt California law barring enforcement of class action waivers. However, the supreme court remanded to determine whether California or Delaware law applied, and if the latter, whether the waiver was enforceable.

In the subsequent proceeding,[252] the California Court of Appeals held that under the choice of law rule as reflected in *Restatement (Second) Conflict of Laws* § 187(2), Delaware law was applicable unless it would contravene fundamental policy of California and California had a materially greater interest than Delaware in determining the issue. The court found Delaware had the greater interest and applied its law upholding the enforceability of class action waivers.[253]

§ 7.11.1—Remedies For Offending Provisions

See also § 5.5.

Once a court or arbitrator has found that a clause or clauses in the arbitration agreement are void or unenforceable, what is the remedy? Is the agreement to arbitrate void? Are the void provisions stricken and the balance of the agreement enforced? Are the terms of the agreement reformed?

Some courts have held that in the circumstances presented, the unconscionable clauses should be stricken and the balance of the agreement enforced.[254] For example, a provision in the arbitration clause barring the award of punitive damages that contravened District of Columbia law was severed in *Booker v. Robert Half International, Inc.*[255]

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:

> [R]esponding 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.[256]

The court answered the "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 clause."[257]

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 punitive damages and compelled arbitration.

The District of Colorado severed two offending terms from an arbitration agreement in another case, saying:

> To the extent . . . that any term or clause in the arbitration agreement . . . requires application of the AAA Commercial Rules, . . . permit[ing] assessment of any costs of the arbitration to be borne by Plaintiffs . . . [and] any term or clause of the arbitration agreement allows for the award of attorney's fees to [defendant] Encana in the event it is the prevailing party in an arbitration, it is also unenforceable, and is hereby likewise stricken. All other provisions of the arbitration agreement are to be enforced at arbitration as written.[258]

Similarly, a provision in an agreement that provided that only one party could recover costs and attorney fees from the other was held unconscionable. The remedy was to sever the unconscionable provision from the arbitration agreement.[259] Severance is an appropriate remedy when the agreement is not dependent upon the severed clause and can operate independently.[260]

Other courts hold, however, that if there is an invalid provision in the arbitration agreement, the entire arbitration provision is unenforceable. For example, when an employer sought to void the Title VII requirement that prevailing plaintiffs in employment discrimination cases be awarded attor-

ney fees, by a provision that called for employees to share the costs of arbitrating such claims, the entire arbitration provision was void.[261]

§ 7.12 • INTERTWINING CLAIMS

On any given construction project, it is not uncommon for multiple claims to arise, some of which are subject to an arbitration agreement while others are not. Sometimes, the same facts are involved but involve different parties. For this situation, the courts created the intertwining doctrine, the purpose of which is to avoid duplication of effort and inconsistent determinations by different forums.[262] The CRUAA (C.R.S. § 13-22-207 (2016)) appears to give a court statutory jurisdiction to make this determination.

Colorado courts long held that if the arbitrators were required to hear the same facts as were needed to establish the non-arbitrable claims before a court, the court would not refer the arbitrable claims to arbitration. Instead, the court would hear all of the claims itself.[263] This intertwining claims doctrine states that where the factual bases of arbitrable and non-arbitrable claims are the same, arbitration will not be ordered. Instead, all claims will be heard by the court. Under the CUAA, if the arbitrator would be required to hear the same facts needed to establish the non-arbitrable claims, the court will not refer the arbitrable claims to arbitration and instead will hear all of the claims itself.[264]

These principles were reaffirmed in *Breaker v. Corrosion Control Corp.*[265] The parties' incorporation of the CUAA into an arbitration agreement otherwise subject to the FAA made the Colorado intertwining doctrine applicable to the disputes arising out of the purchase agreement, to the extent there were common issues between arbitrable and non-arbitrable claims. However, the court found that there were no common issues between the arbitrable and non-arbitrable claims.[266]

Colorado's adoption of the intertwining doctrine followed the federal court adoption of the doctrine. Subsequently, however, the U.S. Supreme Court repudiated the doctrine when the FAA applies.[267] Thus, the intertwining doctrine is not applicable in cases controlled by the FAA, absent agreement of the parties. The FAA requires a court to compel arbitration of pendant arbitrable claims, even if it leads to inefficient maintenance of separate proceedings involving the same facts in different forums. The Supreme Court held that the possible efficiencies and consistent result to be gained by having one forum, rather than two, pass upon common factual or legal issues could not justify refusing to enforce an agreement to arbitrate. However, the arbitrator's award would not necessarily be binding upon the court's resolution of the same issues, and arbitration proceedings need not be stayed pending completion of the litigation.[268] Thus, when a party asserts multiple claims, the federal court allows non-arbitrable claims to continue in court and the arbitrable claims to proceed in arbitration, in accordance with federal law.[269] When the FAA applies, it probably preempts the state intertwining doctrine as it promotes arbitration.

In 2007, the Colorado Supreme Court overruled its prior decision establishing and upholding the intertwining claims doctrine and followed the U.S. Supreme Court's lead, holding that "claims that are subject to an arbitration agreement must be arbitrated regardless of their joinder with non-arbitrable claims. Claims that are not subject to arbitration should be stayed or proceed separately in litigation

based on the discretion of the trial court."[270] The court cited the CUAA, C.R.S. § 13-22-204(4), and CRUAA, C.R.S. § 13-22-207(4), as well as prior state and federal cases defining considerations as to whether to stay or proceed with the judicial proceeding.[271]

The federal courts have recognized that the demise of the intertwining doctrine could result in inconsistent results between the claims determined in arbitration and those determined by a court. "Under the [Federal] Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."[272] Thus, the Supreme Court noted that "it may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration. That decision is one left to the district court . . . as a matter of discretion to control its docket."[273] Factors to consider include judicial efficiency, avoidance of confusion, avoiding possible inconsistent results, and prejudice. Perhaps a court could also stay the arbitration pending resolution of the civil action. However, whether the arbitration award or trial court's decision results in issue preclusion may be an open question. In *Barnett v. Elite Properties of America, Inc.*, the Colorado Court of Appeals stated:

> In deciding whether to stay nonarbitrable claims until an arbitration of arbitrable claims is completed, courts should consider whether (1) piecemeal litigation of the nonarbitrable claims could result in inconsistent determinations of factual and legal issues to be determined by the arbitrator; (2) piecemeal litigation would be inefficient because of any overlap in the factual issues to be determined in the litigation and the arbitration; (3) the arbitrable issues predominate in the lawsuit; and (4) the nonarbitrable claims are of questionable merit.[274]

In the *Barnett* case, the district court ordered arbitration of all of the plaintiff's claims, except those for constructive fraud, civil conspiracy, and violations of the Colorado Consumer Protection Act, which the court stayed pending arbitration of the arbitrable claims.

The arbitrator found for the defendant on all claims submitted to him, except the plaintiff's damages on his Construction Defect Action Reform Act claim. The defendant moved to confirm the award. The defendant also moved for summary judgment on the plaintiff's claims that were not ordered to arbitration and were stayed, asserting that the claims stayed/not arbitrated were barred by the doctrine of claims preclusion. The district court confirmed the award and granted the summary judgment.

The court of appeals reversed the summary judgment and stated that the arbitration award could not be used as issue preclusion, as the confirmation judgment was not final for purposes of issue preclusion until certiorari had been resolved both in the Colorado Supreme Court and the U.S. Supreme Court. However, the court concluded:

> On remand, the district court should stay this claim until certiorari has been resolved both in the Colorado Supreme Court and the United States Supreme Court. Thereafter, if the arbitration award still stands, the district court may reenter its order granting summary judgment on this claim.[275]

Given the court's decision in the *Barnett* case that there is no issue preclusion until certiorari has been resolved by the state and federal supreme courts, if the arbitration is held first, it appears it would have

limited effect on the trial. So too, if the trial goes first, it would not have any impact on the arbitration until appeals are exhausted.

When the FAA is applicable, a state court cannot refuse to compel arbitration because some of the claims asserted are not within the scope of the arbitration agreement (non-arbitrable claims) under state law. That state law is preempted by the federal arbitration law that arbitration must be compelled as to the arbitrable claims.[276] "What is at issue is the [Florida] Court of Appeal's apparent refusal to compel arbitration on any of the four claims based solely on a finding that two of them . . . were nonarbitrable."[277]

> [W]hen a complaint contains both arbitrable and nonarbitrable claims, the Act [FAA] requires courts to "compel arbitration of pendant arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."[278]

See § 7.3.3, "Intertwined Defendants."

§ 7.13 • SPLITTING CLAIMS

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

In *Quist v. Specialty Supply Co.*,[279] decided under the CUAA, the purchaser of a new home damaged by fire from a fireplace recovered damages in arbitration against the builder/vendor. The court disallowed the compensatory damages recovered in the arbitration to also be recovered in the civil action against the installation contractor (standard law precluding double recovery for the same damages), but allowed recovery in the civil action of punitive damages and of enhanced damages under the Colorado Consumer Protection Act.

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

§ 7.14 • BIBLIOGRAPHY

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109. *Terrace at Green Mountain Homeowners Ass'n, Inc. v. Villa Montana, LLC*, 2010 Colo. App. LEXIS 1904, 2010 WL 5238600 (Colo. App. Dec. 16, 2010) (quoting *Smith v. Multi-Fin. Secs. Corp.*, 171 P.3d 1267, 1270 (Colo. App. 2007)).

110. *City & County of Denver*, 939 P.2d at 1363.

111. *Terrace at Green Mountain Homeowners Ass'n v. Villa Montana, LLC*, 2010 Colo. App. LEXIS 1904, 2010 WL 5238600 (Colo. App. Dec. 16, 2010).

112. *Arthur Anderson LLP v. Carlisle*, 556 U.S. 24 (2009). *See Pollard v. ETS PC, Inc.*, 186 F. Supp. 3d 1166 (D. Colo. 2016).

113. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

114. C.R.S. § 13-22-206 (2016).

115. *See Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1149 (D. Colo. 2012).

116. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and § 4.3.

117. *Comanche Indian Tribe of Oklahoma v. 49, L.L.C.*, 391 F.3d 1129 (10th Cir. 2004).

118. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Colorado generally has followed that ruling. *Nat'l Camera, Inc. v. Love*, 644 P.2d 94 (Colo. App. 1982); *R.P.T. of Aspen, Inc. v. Innovative Commc'ns, Inc.*, 917 P.2d 340 (Colo. App. 1996).

119. *Denny v. BDO Seidman, LLP*, 412 F.3d 58 (2d Cir. 2005).

120. *Nat'l Camera, Inc. v. Love*, 644 P.2d 94 (Colo. App. 1982). *See Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007); *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007).

121. *O'Neill v. Krebs Commc'ns Corp.*, 790 N.Y.S.2d 451 (App. Div. 2005).

122. *Dumais v. Am. Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002). *See also Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211 (D. Colo. 2005).

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

124. *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470 (10th Cir. 2006). *In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269 (11th Cir. 2012).

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

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

127. *Encore Prods., Inc.*, 53 F. Supp. 2d at 1108 (FAA); *R.P.T. of Aspen, Inc.*, 917 P.2d at 342. *See also Strasburg-Jarvis Inc. v. Radiant Sys., Inc.*, 2008 U.S. Dist. LEXIS 17204, 2008 WL 627486 (D. Kan. March 4, 2008). *Terrace at Green Mountain Homeowners Ass'n, Inc. v. Villa Montana, LLC*, 2010 Colo. App. LEXIS 1904, 2010 WL 5238600 (Colo. App. Dec. 16, 2010).

128. *Shams v. Howard*, 165 P.3d 876 (Colo. App. 2007).

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

130. *Id.*

131. *R.P.T. of Aspen, Inc. v. Innovative Commc'ns, Inc.*, 917 P.2d 340 (Colo. App. 1996); *see also Christensen v. Flaregas Corp.*, 710 P.2d 6 (Colo. App. 1985) (termination of contract does not terminate the effect of an arbitration clause if the dispute arises under the contract).

132. *R.P.T. of Aspen, Inc.*, 917 P.2d at 342 (emphasis added).

133. *Aberdeen Golf & Country Club v. Bliss Constr., Inc.*, 932 So.2d 235 (Fla. App. 2005).

134. *Id.* at 240-41.

135. *Gordon v. OM Fin. Life Ins. Co.*, 2009 Ohio App. LEXIS 666, 2009 WL 441977 (Ohio App. Feb. 24, 2009).

136. *Bapu Corp. v. Choice Hotels Int'l, Inc.*, 2008 U.S. Dist. LEXIS 49575, 2008 WL 2559306 (D.N.J. June 24, 2008).

137. *Image Software v. Reynolds & Reynolds Co.*, 273 F. Supp. 2d 1168 (D. Colo. 2003); *GATX Mgmt. Servs. v. Weakland*, 171 F. Supp. 2d 1159 (D. Colo. 2001).

138. Judge Kane cited *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998).

139. *See* Annot., *Enforcement of Contractual Arbitration Clause as Affected by Expiration of Contract Prior to Demand for Arbitration*, 5 A.L.R.3d 1008 and 3 A.L.R.3d 283.

140. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991) (applying federal law). *See generally* 1 Martin Domke, *Domke on Commercial Arbitrations* § 12:2, at 12-2 (3d ed. 2006) ("It is a well-established principle of arbitration law that disputes which arose during the lifetime of a contract may be arbitrated after the expiration of the contract").

141. *Litton Fin. Printing Div.*, 501 U.S. at 206.

142. *Scott v. EFN Invs., LLC*, 312 F. App'x 254 (11th Cir. 2009).

143. *See* Annot., *Which Statute of Limitations Applies to Efforts to Compel Arbitration of a Dispute*, 77 A.L.R.4th 1071; Annot., *Statute of Limitations as Bar to Arbitration Under Agreement*, 94 A.L.R.3d 533; Annot., *Laches or Statute of Limitations as Bar to Arbitration Under Agreement*, 37 A.L.R.2d 1125.

144. *Broom v. Morgan Stanley DW, Inc.*, 236 P.3d 182 (Wash. 2010).

145. *Barnett v. United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984).

146. *See Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947) (contractual limitation of action upheld in civil action).

147. *Holt & Holt, Inc. v. Choate Constr. Co.*, 609 S.E.2d 103 (Ga. App. 2004).

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

149. *Id.* at 1064.

150. *R.P.T. of Aspen, Inc.*, 917 P.2d at 343.

151. *See generally Comanche Indian Tribe of Okla. v. 49 L.L.C.*, 391 F.3d 1129 (10th Cir. 2004).

152. *Fitz v. NCR Corp.*, 13 Cal. Rptr.3d 88 (Cal. App. 2004).

153. *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr.3d 663 (Cal. App. 2004).

154. *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004).

155. *Luke v. Gentry Realty, Ltd.*, 96 P.3d 261 (Haw. 2004).

156. *Nishimura v. Gentry Homes, Ltd.*, 338 P.3d 524 (Haw. 2014) (remedy is appointment by both parties or the judge).

157. *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (Wis. 2006); *see also Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008).

158. *Rutter v. Darden Rests., Inc.*, 2008 U.S. Dist. LEXIS 96170, 2008 WL 4949043 (C.D. Cal. Nov. 18, 2008).

159. *Nishimura v. Gentry Homes, Ltd.*, 338 P.3d 524 (Haw. 2014).

160. *AT&T Mobility*, 563 U.S. at 344, 352, *applied in Barras v. Branch Banking & Trust Co.*, 685 F.3d 1269, 1277 (11th Cir. 2012).

161. *Daugherty v. Encana Oil & Gas (USA), Inc.*, 2011 U.S. Dist. LEXIS 76802 (D. Colo. July 15, 2011), *subsequent proceedings*, 838 F. Supp. 2d 1127 (D. Colo. 2011). *See also Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366 (D. Colo. 2014).

162. *Daugherty*, 2011 U.S. Dist. LEXIS 76802, at *22.

163. *AT&T Mobility*, 563 U.S. 333.

164. *Daugherty*, 2011 U.S. Dist. LEXIS 76802, at *26.

165. *AT&T Mobility*, 563 U.S. at 341.

166. *Barras v. Branch Banking & Trust Co*., 685 F.3d 1269 (11th Cir. 2012).

167. *Hulett v. Capitol Auto Grp., Inc.*, 2007 U.S. Dist. LEXIS 81380, 2007 WL 3232283 (D. Ore. Oct. 29, 2007).

168. *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740 (Tenn. 2015).

169. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 788 (9th Cir. 2002). *Contra Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861 (6th Cir. 2006).

170. *See* Halaiko, "Mutuality in Arbitration Agreements," *For the Defense* 58 (April 2005). *Cordova v. World Fin. Corp. of NM*, 208 P.3d 901 (N.M. 2009); *Dominguez v. Alden Enters., Inc.*, 2009 Cal. App. Unpub. LEXIS 35, 2009 WL 27146 (Cal. Ct. App. 2009) (unpublished).

171. *Howard v. Beavers*, 264 P.2d 858, 862 (Colo. 1953).

172. *See Perez v. Hospitality Ventures-Denver LLC*, 245 F. Supp. 2d 1172, 1174 (D. Colo. 2003); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006).

173. *Perez*, 245 F. Supp. 2d at 1174-75 (internal quotations and citations omitted). *See also Dumais v. Am. Golf Corp*., 299 F.3d 1216, 1219 (10th Cir. 2002) ("An arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.").

174. Colo. Const. art. XVIII, § 3.

175. *In re Bill Relating to Arbitration*, 21 P. 474 (Colo. 1886).

176. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (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); *Hicks v. Cadle Co.*, 436 F. App'x 874 (10th Cir. 2011). *See also Feeney v. Dell, Inc.*, 993 N.E.2d 329 (Mass. 2013).

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

178. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 n. 5 (4th Cir. 2001).

179. *Id.*

180. *Quizno's Master v. Kadriu*, 2005 U.S. Dist. LEXIS 7626 (N.D. Ill. April 4, 2005).

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

182. *Shankle v. B-G Maint. Mgmt.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (citations omitted). *See also Daugherty v. Encana Oil & Gas (USA), Inc.*, 2011 U.S. Dist. LEXIS 76802, 2011 WL 2791338 (D. Colo. July 15, 2011).

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

184. *Carr v. Gateway, Inc.*, 918 N.E.2d 598 (Ill. App. 2009); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 759 S.E.2d 727 (S.C. 2014); *Robinson v. EOR-ARK, LLC*, 841 F.3d 781, 784 (8th Cir. 2016) ("Many courts have recognized an exception to [9 U.S.C.] Section 5 when the choice of arbitrator is integral to the arbitration agreement.").

185. *Mortensen v. Bresnan Comm., LLC*, 722 F.3d 1151 (9th Cir. 2013).

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

187. *WB, The Building Co., LLC v. El Destino LP*, 257 P.3d 1182 (Ariz. App. 2011).

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

189. *See Todd Habermann Constr., Inc. v. Epstein*, 70 F. Supp. 2d 1170, 1175 (D. Colo. 1999); *Kemiron Atl., Inc. v. Aquakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002).

190. *Todd Habermann Constr.*, 70 F. Supp. 2d at 1175; *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003).

191. *See* Annot., *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation*, 43 A.L.R.5th 545.

192. *BRM Constr., Inc. v. Marais Gaylord, L.L.C.*, 181 P.3d 283 (Colo. App. 2007).

193. *Todd Habermann Constr.*, 70 F. Supp. 2d at 1175 (contract required mediation prior to arbitration).

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

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

196. *Sollenberger*, 481 P.2d at 431.

197. *Tillman Park, LLC v. Dabbs-Williams Gen. Contractors, LLC*, 679 S.E.2d 67 (Ga. App. 2009). *Compare Lopez v. 14th Street Dev., LLC*, 835 N.Y.S.2d 186 (N.Y. App. Div. 2007). *See Brasfield & Gorrie, L.L.C. v. Soho Partners L.L.C.*, 35 So.3d 601 (Ala. 2009) (question of whether the claim was first determined by the architect, a condition precedent to arbitration, is a matter of procedural arbitrability for the arbitrator to decide).

198. *BRM Constr. Inc. v. Marais Gaylord, L.L.C.*, 181 P.3d 283 (Colo. App. 2007).

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

200. *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000).

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

202. *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288 (10th Cir. 2004).

203. *Id.* at 1291.

204. *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.

205. *Id. 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).

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

207. *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)).

208. *School District No. 6 v. Alfred Watts Grant & Assocs.*, 399 P.2d 101, 103 (Colo. 1965); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1 (1st Cir. 2005); *Vernon*, 857 F. Supp. 2d at 1158 (D. Colo. 2012) (citing *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994)).

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

210. *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 2014 COA 153.

211. *Id.* at ¶ 16.

212. *Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928, 931 (Colo. 1990).

213. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *City & County of Denver*, 939 P.2d at 1369; *Reid Burton Constr., Inc. v. Carpenters Dist. Council of S. Colo.*, 614 F.2d 698, 702 (10th Cir. 1980). *See also BP Am. Prod. Co. v. Chesapeake Exploration, LLC*, 747 F.3d 1253 (10th Cir. 2014); *Stone v. Vail Resorts Dev. Co.*, 2010 U.S. Dist. LEXIS 80849, 2010 WL 2653314 (D. Colo. July 1, 2010); *Norgren, Inc. v. Ningbo Prance Long, Inc.*, 2015 U.S. Dist. LEXIS 126716, 2015 WL 5562183 (D. Colo. Sept. 22, 2015).

214. *Healy v. Cox Commc'ns, Inc.*, 790 F.3d 1112 (10th Cir. 2015); *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285 (N.D. Okla. 2003).

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

216. *Paul Mullins Constr. Co. v. Alspaugh*, 628 P.2d 113 (Colo. App. 1980).

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

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

219. *Scherer v. Schuler Custom Homes Constr., Inc.*, 98 P.3d 159 (Wyo. 2004).

220. *Id.* at 164.

221. *Red Sky Homeowners Ass'n v. Heritage Co.*, 701 P.2d 603, 606 (Colo. App. 1984). *See also Velasquez v. Filmex, Inc.*, 2005 WL 469347 (Colo. App. 2005) (not selected for official publication).

222. *Brown v. Dillard's Inc.*, 430 F.3d 1004 (9th Cir. 2005).

223. *Id.* at 1012.

224. *BP Am. Prod. Co. v. Chesapeake Exploration, LLC*, 747 F.3d 1253 (10th Cir. 2014).

225. *Hooper v. Advance Am.*, 2008 U.S. Dist. LEXIS 71839, 2008 WL 4371360 (W.D. Mo. Sept. 22, 2008), *aff'd*, 589 F.3d 917 (8th Cir. 2009).

226. *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 117 (3d Cir. 2012) (quoting *Hoxworth v. Blinder, Robinson & Co., Inc*., 980 F.2d 912, 926-27 (3d Cir. 1992)). *See also Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690 (4th Cir. 2012).

227. *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194 (11th Cir. 2011).

228. *Webb v. ALC of W. Cleveland, Inc.*, 2008 Ohio App. LEXIS 4082, 2008 WL 4358554 (Ohio App. Sept. 25, 2008).

229. *Osborn v. Packard*, 117 P.3d 77 (Colo. App. 2004). *See Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1098 (Colo. App. 2009) ("If a party willingly allows an issue to be submitted to arbitration, it cannot await the outcome and later argue that the arbitrator lacked authority to decide the matter. If, however, the party clearly and expressly reserves the right to object to arbitrability, participation in the arbitration does not preclude the party from challenging the arbitrator's authority in court.") (citations omitted), *declined to follow*, *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 2014 COA 153.

230. *MBNA Am. Bank v. Bailey*, 934 A.2d 316 (Conn. App. 2007).

231. *See Alspaugh v. Dist. Court of Cnty. of Boulder*, 545 P.2d 1362, 1364 (Colo. 1976).

232. *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 2014 COA 153.

233. *Id.* at ¶ 4.

234. *Id.* at ¶ 16.

235. *Ahluwalia v. OFA Royalties, LLC*, 226 P.3d 1093, 1098 (Colo. App. 2009).

236. *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1 (1st Cir. 2005).

237. *See generally* Annot., *Participation as Waiver of Objections*, 33 A.L.R.3d 1242.

238. *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140 (10th Cir. 2007).

239. *Id.* at 1148-49 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995)).

240. *Hicks v. Cadle*, 436 F. App'x 874, 878 (10th Cir. 2011) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

241. *Water Works Emps. Local No. 1045 v. Bd. of Water Works*, 615 P.2d 52, 53 (Colo. App. 1980).

242. *S. Wash. Assocs. v. Flanagan*, 859 P.2d 217 (Colo. App. 1992).

243. *Id.* at 219.

244. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 927 (10th Cir. 2001); *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005); *cf. Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005).

245. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

246. CRUAA, C.R.S. § 13-22-204(2) (2013).

247. *Id.*

248. *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp*., 4 Cal. Rptr.3d 655 (Cal. App. 2003).

249. *Perez v. Globe Airport Security Servs.*, 253 F.3d 1280 (11th Cir. 2001), *vacated on other grounds*, 294 F.3d 1275 (11th Cir. 2002).

250. *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

251. *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005).

252. *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. Rptr.3d 456 (Cal. App. 2005).

253. *Cf. Jenkins v. First Am. Cash Advance of Georgia, LLC*, 313 F. Supp. 2d 1370 (S.D. Ga. 2003), *rev'd on other grounds*, 400 F.3d 868 (11th Cir. 2005).

254. *See Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr.3d 267 (Cal. App. 2003).

255. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (opinion by Judge John Roberts (now Chief Justice)). *Hulett v. Capitol Auto Grp., Inc.*, 2007 U.S. Dist. LEXIS 81380, 2007 WL 3232283 (D. Or. Oct. 29, 2007) (struck discovery limitations).

256. *Booker*, 413 F.3d at 84.

257. *Id.*at 85.

258. *Daugherty v. Encana Oil & Gas (USA), Inc.*, 2011 U.S. Dist. LEXIS 76802, at *36, 2011 WL 2791338 (D. Colo. July 15, 2011), *subsequent proceedings*, 838 F. Supp. 2d 1127 (D. Colo. 2011).

259. *Barras v. Branch Banking & Trust Co.*, 685 F.3d 1269 (11th Cir. 2012).

260. *Id.*

261. *Perez v. Globe Airport Sec. Servs.*, 253 F.3d 1280 (11th Cir. 2001), *vacated on other grounds*, 294 F.3d 1275 (11th Cir. 2002); *see Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003).

262. *Cf. City & County of Denver*, 939 P.2d at 1369.

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

264. *Sandefer v. Dist. Court for City & County of Denver*, 635 P.2d 547 (Colo. 1981), *overruled in part on other grounds (unrelated to the intertwining doctrine)*, *Sager v. Dist. Court for Second Jud. Dist.*, 698 P.2d 250 (Colo. 1985).

265. *Breaker*, 23 P.3d at 1286.

266. *See also Atmel Corp.*, 30 P.3d at 797. *Eagle Ridge Condo. Ass'n. v. Metro. Builders, Inc.*, 98 P.3d 915 (Colo. App. 2004) (not selected for official publication).

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

268. *See GATX Mgmt. Servs., LLC v. Weakland*, 171 F. Supp. 2d 1159, 1166 (D. Colo. 2001) (". . . equitable estoppel allows nonsignatories to compel arbitration if there are intertwined claims"); *Becker v. Dale K. Ehrhart*, 2006 U.S. Dist. LEXIS 14812 (N.D. Fla. March 31, 2006), *rev'd on other grounds*, 491 F.3d 1292 (11th Cir. 2007).

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

270. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 125 (Colo. 2007); *Terrace at Green Mountain Homeowner's Ass'n, Inc. v. Villa Montana, LLC*, 2010 Colo. App. LEXIS 1904, 2010 WL 5238600 (Colo. App. Dec. 16, 2010).

271. *See* Sands & Ramming, "Demise of the Intertwining Doctrine in Colorado," 37 *Colo. Law.* 21 (Jan. 2008).

272. *Harwest Indus. Minerals Corp. v. Twin City Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 21045, at *4, 2010 WL 582364 (D. Colo. Feb. 18, 2010) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011).

273. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 n. 23.

274. *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 18 (Colo. App. 2010) (citing *Ingold*, 159 P.3d at 126).

275. *Id.* at 24.

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

277. *Id.* at 21.

278. *Id.* at 22 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

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