Chapter 8

ARBITRABILITY ISSUES: WHO DECIDES THEM?

SYNOPSIS

§ 8.1 • INTRODUCTION

See also Chapter 7 as to arbitrability issues.

As discussed in Chapter 2, a primary reason for the adoption of the Federal Arbitration Act (FAA) was to enforce agreements to arbitrate, which at common law were often held void and unenforceable. While Colorado courts enforced agreements to arbitrate prior to the adoption of the FAA in 1925 and the Colorado Uniform Arbitration Act (CUAA) in 1975, the Acts provided a statutory basis and procedure for enforcement and implementation of the arbitration process.

This chapter discusses the statutes and case law defining whether the court or the arbitrator determines the arbitrability issues — whether the dispute will be arbitrated, including affirmative defenses and other defenses. When a party is served with a summons and complaint in a civil action and the party asserts that the dispute is subject to an agreement to arbitrate, the party files a motion to stay or dismiss the civil action and to compel arbitration. Similarly, when a party has been served a demand for arbitration and asserts that there is no valid and enforceable arbitration agreement, that party may file a motion to stay arbitration. This motion to stay arbitration may be filed with the arbitrator or with a court, depending on which has jurisdiction to determine the arbitrability issue — or depending upon which the party wishes to determine the issue.

The term "arbitrability" is not defined or used uniformly by the courts. Very generally, the term goes to issues of whether the parties are obligated to arbitrate their dispute. Some suggest that the term excludes such issues that are to be determined by an arbitrator.

If a party to an alleged arbitration agreement asserts that it is not required to arbitrate a particular dispute, the issue is typically brought to the forefront very early in the arbitration/litigation process (or potentially is waived). The issue will arise in one of two ways:

1) The plaintiff files a civil action, and the defendant responds with a motion to compel arbitration and/or to stay or dismiss the civil action; or
2) The claimant files a demand for arbitration, and the respondent:
    a) Moves the arbitrator to dismiss the arbitration for lack of arbitrability. Upon objection by claimant to the motion, the arbitrator first determines whether the arbitrator or a court has jurisdiction to determine the issue or both. (At some juncture, this determination is appealable.); or
    b) Commences a civil action seeking a stay of the arbitration on the grounds of lack of arbitrability of the claims. Upon such objection, the court determines whether the court or an arbitrator has jurisdiction to determine the issue.

As a footnote to the first option, the defendant may simply assert in its answer the defense that the court is without jurisdiction as the dispute is subject to an arbitration agreement. Normally, a court will schedule that defense for immediate hearing under Rule 12, at least if requested. One or both parties may attempt to utilize the judicial discovery rules before the case may be sent to arbitration. However, if defendant simply alleges the defense but proceeds with litigation, it may risk waiver of its right to arbitrate.

A third scenario, if the prospective claimant and/or respondent has denied any obligation to arbitrate, is for the party desiring arbitration to file a motion to compel arbitration. All of these procedures are discussed in Chapter 9.

Regardless of how the issue of whether a dispute is subject to arbitration is raised, the issue remains: whether the asserted claims are arbitrable — whether the claims are subject to arbitration. The first step to that determination may be whether the court or the arbitrator should determine the arbitrability issues. It should be noted, however, that if the issue is for determination by the arbitrator, the arbitrator is only the decision-maker of first resort. Any decision of the arbitrator probably is subject to review by a court at some juncture, although the scope of that review may be very limited. *See* Chapters 14, 17, 19, and 20. This possible right of "appeal" or "review" is very uncertain.

§ 8.2 • THE ISSUES THAT DETERMINE WHETHER A DISPUTE WILL BE DECIDED BY ARBITRATION

Whether a dispute is subject to arbitration depends upon the answers to basic questions:

Is there an agreement to arbitrate that binds the parties to the dispute? Arbitration is a consensual process. Enforcement of the arbitration process is only against those persons or entities that have agreed to or are otherwise bound by an arbitration agreement. The sub-issues that may arise because of this requirement include:

- Is there a legally binding agreement to arbitrate?
- Is the dispute resolution process called for by the agreement "arbitration" as used in the FAA or Colorado Revised Uniform Arbitration Act (CRUAA)? (Is the FAA or CRUAA applicable?)
- Is the objecting party bound by the agreement to arbitrate? For example, non-parties to an arbitration agreement sometimes are nevertheless bound by it.
- Is there a dispute?
- Are there any affirmative defenses to the enforcement of the arbitration agreement, such as duress, mistake, fraud, statute of limitations, etc.? This refers to defenses to arbitration. Defenses to the underlying contract claim generally are irrelevant to whether the dispute will be decided by arbitration.[1]
- Is the dispute within the scope of the arbitration agreement?
- Are there any conditions precedent to arbitration, such as mediation or negotiation?
- Are there any issues such as venue, notice, statute of limitations, etc.?
- Can there be a class arbitration?
- Was an arbitration agreement entered into by the parties? Sub-issues include:
    - Is it in writing (FAA) or in a record (CRUAA)?
    - Does it fulfill the (state law) requirements for a contract?
    - Were the parties competent?
    - If one party is a non-signor, is the agreement binding upon or enforceable by him or her?

See Chapter 7. In brief, arbitrability is whether a dispute is subject to arbitration, *i.e.*, whether the parties can be forced to arbitrate. It is the power to determine whether an arbitration proceeding has been properly commenced or must be commenced, the issues subject to arbitration, and whether any public policy concerns limit the ability of an arbitrator to resolve a dispute. Many courts take a narrow view of which issues are "arbitrability" issues.[2] Others define arbitrability issues as those decided by the court unless the parties otherwise agree.

All of the above issues as to whether a dispute is subject to arbitration also raise the issue of who decides the issue. The Colorado Court of Appeals, in *BRM Construction, Inc. v. Marais Gaylord, L.L.C.*,[3] combined the issues under the CRUAA, saying:

- "If a party challenges whether a particular dispute must be arbitrated, the court must resolve one to three questions (depending on the answers to the first two, and assuming that all issues regarding arbitrability, including contract formation, have not been entrusted by the agreement to the arbitrator)."
- "First, does the agreement contain a valid and binding arbitration clause," including two sub-issues:
    - whether there is an agreement to arbitrate disputes.
    - whether the arbitration agreement is valid, including defenses to validity such as unconscionability, legality, and violation of statutes. "The court's inquiry as to the validity of the arbitration clause is 'limited to specific challenges to "the agreement to arbitrate," not to the broader contract containing the arbitration provision.'" Generally, affirmative defenses are in this category.

- "Second, if so, who decides whether a particular dispute falls within the scope of the arbitration clause, the court or the arbitrator?"
    - If "the agreement is silent or ambiguous or [the question of who is to decide whether a dispute falls within the scope of the arbitration clause], then the determination should be made by the court, not the [arbitrator]. . . ."
- "Third, if the court is to decide whether a particular dispute falls within the scope of the arbitration clause, does the dispute fall within the scope of the arbitration clause?"
- "[T]his inquiry does not encompass . . . particular defenses to arbitration because the inquiry here is limited to whether the factual allegations underlying the claim for relief asserted fall within the scope of that clause."

The court then indicated that only where a claim is clearly outside the scope of the arbitration provision should arbitration be denied by a court.

A clause in an employment contract's arbitration provision delegating to an arbitrator the authority to decide arbitrability is not unconscionable on the ground that the arbitrator has an interest in deciding in favor of arbitrability.[4]

The reader should note that even if the law or the arbitration agreement defines who decides, whether the arbitrability issue is first raised in court or in the arbitration may be the determinative factor. *See* § 8.8.

§ 8.3 • WHO DECIDES ARBITRABILITY? STATUTORY PROVISIONS

Each of the two statutes has express provisions with respect to compelling arbitration and, by inference, with respect to staying arbitration. This is the context in which arbitrability issues usually are raised, and it provides guidance as to who decides the issues.

§ 8.3.1—Federal Arbitration Act: Title 9, U.S.C.

> **Section 3. Stay of proceedings where issue therein referable to arbitration**
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
>
> **Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which,

> save for such agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed . . . [procedural steps omitted]. If the jury [or judge if no jury is requested] find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury [or judge if no jury has been requested] find that an agreement for arbitration was made in writing and that there is a default in the proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Under § 3, if a civil action is filed, and if the defendant asserts that the dispute is subject to arbitration, the statute provides that the court determines whether it is referable to arbitration — it must be "satisfied" that the issue is referable to arbitration. Under § 4, if a party refuses to arbitrate an issue the claimant contends is arbitrable, the claimant may petition the court and request a court order to compel the recalcitrant party to arbitrate. If the court finds no agreement in writing for arbitration or no default in proceeding thereunder, the petition is dismissed. However, if the court (judge or jury) finds there is a written arbitration agreement and that the defendant has failed to proceed in accordance therewith, the court orders arbitration in compliance with the agreement. Thus, under § 4, the only finding is that there is an arbitration agreement in writing and there is a wrongful failure (default) by the party resisting arbitration. What reasons can the resisting party give for not arbitrating, but not being in default? The issues as to who decides whether there is a default quickly become more complex.

The federal courts are in concurrence that whether the parties have agreed to arbitrate is an issue for determination by the court, unless the parties have clearly and unmistakably agreed to submit such questions to an arbitrator.[5]

In *Hungry Horse LLC v. E Light Electric Services, Inc.*,[6] the Tenth Circuit said:

> [T]he initial question of whether the parties "agreed to arbitrate the merits" of their dispute is "about arbitrability of the dispute," which turns on the scope of the arbitration agreement. Unless the parties have expressly agreed to submit the question of arbitrability to the arbitration panel, the court must independently decide that preliminary question based on ordinary principals of state contract formation law.[7]

There is no provision in the federal statutes for staying arbitration upon a finding that arbitration is not required. Nevertheless, the trial courts imply such a power.

Why might a claimant file a motion to compel arbitration? Would it be better to proceed with the arbitration and obtain a "default" award? Often the answer is yes. However, if there are arbitrability issues, the claimant might want them determined early, rather than upon a motion to vacate award.

Role of the Jury

Section 4 of the FAA regarding motions to compel arbitration further provides that if the making of the agreement for arbitration or the failure, neglect, or refusal to perform the same is an issue:

> [T]he party alleged to be in default may . . . demand a jury trial of such issue, and upon demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceedings shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 8.3.2—CRUAA: C.R.S. § 13-22-207 (2016)

There are no similar provisions relating to the jury in the Colorado statutes. The same rules probably would obtain under the state statutes and, generally, in the state court. The party resisting arbitration must submit sufficient evidentiary facts, perhaps by affidavit, in support of its position to precipitate such a trial.[8] Equitable-type defenses to arbitration, such as waiver and adhesion, may not be for a jury, but only if the factual allegations (and perhaps affidavits) raise a genuine issue of material fact as to the making of the agreement for arbitration.[9]

Suppose P files a lawsuit against D. D responds with a motion to compel arbitration and stay litigation. P denies that there is any agreement to arbitrate between the parties, and asserts that if there is one, it is invalid because of duress, unconscionability, and a sundry of other defenses. There is also a very broad clause in the parties' agreement that provides all issues of any nature, including arbitrability and jurisdiction, shall be determined by the arbitrator. How does the court determine the motion to compel arbitration?

- Simply order that the court has no jurisdiction over the issues — the parties having agreed that jurisdiction is for the arbitrator to decide, subject to judicial review? Can the court order the parties to arbitrate regardless of whether there is an agreement between the parties to arbitrate, and whether the agreement is valid, binding, and enforceable?
- Alternatively, can the court cite the CRUAA, C.R.S. § 13-22-207, in the motion to compel or stay arbitration, and point out that C.R.S. § 13-22-204 provides that the parties may not waive or vary the effect of § 207? Section 207(1)(b) states that on the motion of a person showing an agreement to arbitrate, and alleging another person's refusal to arbitrate, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

C.R.S. § 13-22-206 (2016). Validity of Agreement to Arbitrate

. . .

> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

. . .

These provisions are waivable under C.R.S. § 13-22-204, *i.e.*, the parties can otherwise agree, *e.g.*, provide that the arbitrator shall decide whether an agreement to arbitrate exists.

C.R.S. § 13-22-207 (2016). Motion to Compel or Stay Arbitration

(1) On the motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(2) On the motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is not an agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(3) If the court finds that there is no enforceable agreement, it may not invoke the provisions of subsection (1) or (2) of this section to order the parties to arbitrate.

(4) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because one or more grounds for the claim have not been established.

(5) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion made under this section shall be filed with that court. Otherwise, a motion made under this section may be filed in any court pursuant to section 13-22-227.

(6) If a party files a motion with the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the ordering court renders a final decision under this section.

(7) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

Under § 204, the provisions of § 207 are not waivable and cannot be varied.

Role of the Jury

The CRUAA, unlike the FAA, does not mention referring issues to a jury. It is uncertain whether a judge under the CRUAA has power to or is required to submit certain contested fact issues to juries. Such relief may be viewed in the nature of injunctive relief.

§ 8.3.3—Waiver Of Statutory Directive Of Who Decides

If the parties proceed with having an arbitrability issue decided by the arbitrator, whereas the statute or agreement calls for a court to decide, the parties may be held to have waived the statutory provision to have a court decide. So too, if the parties proceed toward an arbitrability issue being decided by a court, whereas the statute or agreement calls for the arbitrator to decide, the parties may be held to have waived the statutory provision. *See* CRUAA, C.R.S. § 13-22-204. The general law of waiver as applied in litigation is generally applied to arbitration proceedings, subject under the CRUAA to § 204.

One division of the Colorado Court of Appeals held: "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."[10] "If, however, the party clearly and explicitly reserves the right to object to the

arbitrability, participation in the arbitration does not preclude the party from subsequently challenging the arbitrator's authority in court."[11]

This decision would seem to say that the party objecting to the arbitrator's jurisdiction, and who asserts that the arbitrator's jurisdiction is for the court to determine, not the arbitrator to determine, need not commence a judicial action to obtain that determination. Rather, the party asserting the arbitrator's jurisdiction, and the arbitrator's power to determine the issue, must file in court a motion to compel arbitration, so as to have those issues determined prior to the arbitration — unless that party is willing to have the arbitration held, with the other party then being able to appeal the arbitrator's decision that he or she had authority to determine his or her jurisdiction, and that he or she did have jurisdiction, along with appealing the award.

In the cited case, that is what occurred — the respondent continuously objected to the arbitrator having jurisdiction, and asserted that it was a question for a court, thereby not waiving the objection. The arbitrator determined he should decide, and decided that he had jurisdiction. The hearing was held, and the arbitrator entered an award for the claimant. The respondent then appealed (1) the arbitrator's decision that the arbitrator was to determine his jurisdiction, (2) the arbitrator's decision that he had jurisdiction, and (3) the award.

The Colorado Court of Appeals determined that its review of the question of whether arbitrability is for the court or for the arbitrator to decide is *de novo*. If the court determines that the arbitrator properly decided that he or she was to decide whether he or she had jurisdiction, the court should apply a deferential standard to the arbitrator's decision that he or she had jurisdiction.[12]

Five years later, a different division of the Colorado Court of Appeals came to a different conclusion, holding that a party's participation in arbitration proceedings, while objecting to the existence of an arbitration agreement and asserting the issue was for a court's determination, constituted waiver, even though it had made timely objections to arbitrability before the hearing on the merits — failure to not timely seek judicial review plus participation equally waived the right to object to arbitrability in a motion to vacate award.[13]

§ 8.4 • WHO DECIDES ISSUES OF ARBITRABILITY? AGREEMENT OF THE PARTIES

The answer to the question of "who has the primary power to decide arbitrability" may turn upon what the parties agreed to.[14] Courts should not assume that the parties agreed to arbitrate issues of arbitrability unless there is clear and unmistakable evidence that they did so.[15] However, it is generally accepted that if it is clear and unmistakable that the parties intended that the arbitrator is to determine some or all arbitrability issues, the agreement will be enforced, unless the applicable statute prohibits enforcement.

§ 8.4.1—Agreements Under The CRUAA

The CRUAA, C.R.S. § 13-22-206 (2016), creates both a "substantive and procedural" framework for the parties to agree as to who decides issues of arbitration.

- *Substantive arbitrability.* C.R.S. § 13-22-206(2): "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." However, under § 204, the parties may grant that authority to the arbitrator.
- *Procedural arbitrability.* C.R.S. § 13-22-206(3): "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." The arbitrator decides whether prerequisites, such as time limits, notices, laches, estoppel, and conditions precedent to an obligation to arbitrate have been met. However, under § 204, the parties may waive § 206(3).

Section 206 of the CRUAA generally reflects the case law under the FAA and CUAA defining that the parties can agree that the arbitrator determines issues of arbitrability, subject to § 207. But, as to procedural issues of arbitrability, can the parties agree that the court shall decide?

When arbitration rules, *e.g.*, of the AAA, are incorporated into the parties' agreement to arbitrate, they are part of the agreement as if set forth in full. *See* §§ 3.2, 4.5.3-4.5.4, and 5.7.1. Rule R-7 of the AAA's Commercial Arbitration Rules and Rule R-9 of the Construction Arbitration Rules, when incorporated, are the agreement of the parties to submit arbitrability questions to the arbitrator. *See* § 8.4.3.

Subject to the discussion below, and speaking very generally, if the arbitration agreement is silent on who decides, the court has jurisdiction over issues of substantive arbitrability.

- If the arbitration agreement provides that the arbitrator is to determine the issues of arbitrability, the courts usually will defer to the arbitrator.[16] This means that if the issues are raised in a motion to compel or stay arbitration, the court may direct the parties to commence the arbitration for a ruling on these issues before it rules on the motion.
- If the agreement is silent, and the issues are presented to the arbitrator, the finality of the arbitrator's decision might not be as defined in the vacation of award statutes, but perhaps subject to *de novo* review. On the other hand, the actions of the parties may be construed as agreement to determination by the arbitrator.

§ 8.4.2—Agreements Under The FAA

Many of the principles of who decides which issues have been delineated by the U.S. Supreme Court and are covered throughout this chapter.

Whether the parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination defined the basic principal:[17]

> [A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate the dispute. . . . To satisfy itself that such an agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. . . . Where there is no provision validly committing them to an arbitrator, . . . these issues typically concern the scope of the arbitration clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include when that agreement was formed.[18]

* * *

> [E]xcept where "the parties clearly and unmistakably provide otherwise," . . . it is "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning" a particular matter.[19]

§ 8.4.3—Agreements Incorporating Rules Providing Who Determines Arbitrability

Colorado and other federal courts recognize the validity of AAA rules incorporated into the arbitration agreement providing that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[20]

CRUAA

In *Taubman Cherry Creek Shopping Center, LLC v. Neiman-Marcus Group, Inc.*,[21] the Colorado Court of Appeals considered whether the arbitrator or the court should determine arbitrability under the AAA Commercial Rules.

The court first acknowledged that under C.R.S. § 13-22-206(2), "the court, not the arbiter, decides whether a controversy is subject to an agreement to arbitrate."[22] However, under C.R.S. § 13-22-204, the parties may waive or vary that statute. The court concluded that "the question of arbitrability is for a court to decide, unless the parties plainly and unambiguously agree otherwise."[23]

The agreement provided that the arbitration shall be "in accordance with the Commercial Arbitration Rules of the [AAA]." This was found by the court to incorporate the AAA rules into the arbitration provision.

The AAA rules in effect at the time of the execution of the agreement provided that "[t]hese Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated." The court noted that this provision meant that the parties agreed to any amendments the AAA might thereafter adopt, without the parties knowing at the time of agreement what those amendments would be. The then-current (at the time of the litigation) AAA Commercial Arbitration Rules provided that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." However, at the time of execution of the agreement, the AAA Rules were silent as to who decides the specific arbitrability questions. The arbitration provision did not state whether AAA rules in effect at the time of the agreement, when a dispute arises, or when arbitration is initiated, governed the arbitration.

An agreement to divest courts of jurisdiction (under C.R.S. §§ 13-22-206(2) and -204) requires more than agreement. For incorporation by reference into a contract, "'it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'"[24] Parties must clearly know of and assent to contract terms that do not yet exist when "the term is in abrogation of statutorily expressed public policy, the parties do not expressly agree to be bound by future amendments, neither party has any control over subsequent amendments, and there is no ascertainable standard for the promulgation of amendments or new rules."[25]

"Thus, the law requires that parties must plainly and unambiguously empower an arbiter to decide arbitrability and that they must clearly and knowingly assent to terms incorporated by reference."[26]

FAA

In *Rent-a-Center West, Inc. v. Jackson*,[27] the U.S. Supreme Court considered, under the FAA, the effect of an agreement to arbitrate providing that the arbitrator will determine the enforceability of the agreement. If a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator. Here, the challenge was as to unconscionability of the agreement as a whole — an issue for the arbitrator. The court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e] evidence that they did so.'"[28] "The presumption in favor of arbitration disappears when the parties dispute the existence of a valid arbitration agreement."[29]

In *Qualcomm Inc. v. Nokia Corp.*,[30] the court held that incorporation of AAA rules makes them a part of the agreement:

- AAA Commercial Rule 15 provided that "[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the agreement."
- The parties' incorporation of the AAA rules evidenced a clear and unmistakable intent of the parties to delegate the determination of arbitrability to the arbitrator.[31]

AAA rules provide that the arbitrator has the power to rule on his or her own jurisdiction, including as to the existence, scope, or validity of the agreement. Nevertheless, when the arbitration agreement provides it will be conducted in accordance with those rules, for some courts it is not "clear and unmistaken evidence" that the parties agreed to have the question of arbitrability determined by the arbitrator.[32]

§ 8.4.4—Waiver Of Agreements As To Who Determines Arbitrability Issues

The parties can waive their agreement as to who determines issues of arbitrability by their conduct. In *Galbraith v. Clark*,[33] the Colorado Court of Appeals acknowledged that an issue of arbitrability should have been addressed first by the arbitrator, given the specific language of the arbitration agreement. However, the parties did not ask the district court to refrain from addressing the issue or make it an issue on appeal. Therefore, the court of appeals held that the parties forfeited/waived any right to have the arbitrator determine the issue of arbitrability.[34]

§ 8.5 • WHO DECIDES ARBITRABILITY WHEN THE AGREEMENT IS SILENT? CASE LAW

§ 8.5.1—Generally — Under The FAA

Generally, under the FAA there is a presumption that arbitrability issues should be resolved by the courts, unless the parties clearly and unmistakably provide otherwise.[35] If the rules incorporated into the arbitration agreement (such as the AAA Rules), or the agreement itself, empower the arbitrator to determine issues of arbitrability, those provisions or rules constitute clear and unmistakable evidence of intent to delegate those issues to the arbitrator.[36]

Generally, whether the parties have agreed to submit a particular dispute to arbitration is an issue for judicial determination.[37] Similarly, when the dispute as to the parties' agreement to submit to arbitration concerns contract formation, the dispute is generally for the courts to decide.[38] A court may order arbitration of a particular dispute only where the court finds that the parties agreed to arbitrate "that dispute."[39] To satisfy itself that such an agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.[40]

Gateway disputes about whether the parties are bound by given arbitration clauses ("arbitrability") — including defenses as to enforceability and conscionability — are generally for a court to decide. However, when the arbitration agreement delegates to the arbitrator to arbitrate these gateway questions of arbitrability, generally they are enforced.[41]

However, if the court finds that the gateway issue is wholly groundless, the claim should not be sent to arbitration, and the court rules on the claim. There must be "plausible arguments that the dispute [is] covered by the agreement."[42]

> If the court concludes that the parties did not clearly and unmistakably intend to delegate arbitrability decisions to an arbitrator, the general rule that the "question of arbitrability . . . is . . . for judicial determination" applies and the court should undertake a full arbitrability inquiry in order to be "satisfied" that the issue involved is referable to arbitration. If, however, the court concludes that the parties to the agreement did clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator, then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is "wholly groundless."[43]

First Options of Chicago, Inc. v. Kaplan

In *First Options of Chicago, Inc. v. Kaplan*,[44] the U.S. Supreme Court defined certain of the rules for deciding arbitrability:

- Although the question of arbitrability is resolved by reference to ordinary state law principles governing the formation of contracts, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence they did so."[45]
- "[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-rated dispute is arbitrable because it is within the scope of a valid arbitration agreement' — for in respect to this latter question the law reverses the presumption."[46]

If the parties allow the arbitrator to decide the issue of arbitrability, *vel non*, the standard of review of the arbitrator's determination of that issue is as highly deferential as that applied to the arbitrator's decisions regarding substantive issues.[47]

Buckeye Check Cashing, Inc. v. Cardegna

In *Buckeye Check Cashing, Inc. v. Cardegna*,[48] the FAA applied to the arbitration agreement. The Court defined the issue as "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality."[49] The Court defined the basic rules governing determination of arbitrability issues by courts applying the FAA:

> Challenges to the validity of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" [9 U.S.C. § 2] can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. . . . The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. Respondents' claim is of this second type. The crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge.[50]

The Court noted that it previously held that the FAA created a body of federal substantive law that was applicable in state court (when the FAA applies) as well as in federal court. The Court, following its earlier decisions, held that whether a claim is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator and not the court.

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.[51]

Preston v. Ferrer

Preston v. Ferrer[52] held that if the FAA is applicable, it supersedes state law providing that the type of dispute at issue shall be heard by a state administrator. California law required determination of the issue presented by the Commissioner of Labor. However, there was an all-disputes arbitration clause, and the FAA applied, preempting the state law calling for decision by the Commissioner.[53]

Howsam v. Dean Witter Reynolds, Inc.

In *Howsam v. Dean Witter Reynolds, Inc.*,[54] the U.S. Supreme Court stated that "the question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'"[55]

The Court in *Howsam* noted that "one might call any potentially dispositive gateway question 'a question of arbitrability,' for its answer will determine if the underlying controversy will proceed to arbitration on the merits . . . [however,] the phrase 'question of arbitrability' has a far more limited scope."[56]

> The Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate. Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide.[57]

The Court noted cases holding that a court should decide whether an arbitration contract bound parties who did not sign the agreement, whether an arbitration agreement survived a corporate merger and bound the resulting corporation, whether an arbitration clause applies to a particular type of controversy, whether a labor management layoff controversy falls within the arbitration clause, and whether claims for damages for breach of a no-strike agreement were within an arbitration clause.

The *Howsam* Court then further noted that "procedural questions which grow out of the dispute and bear a final disposition are presumptively . . . for an arbitrator to decide."[58]

Rent-A-Center, West, Inc. v. Jackson

The syllabus of the Reporter of Decisions summarized the holding of *Rent-A-Center, West, Inc.*,[59] as follows:

> Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator.

1) The Court reiterated that FAA § 2 "places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms."[60]
    a) "Like other contracts, however, [under § 2] they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[61]
    b) Here, the employment agreement contained two arbitration provisions/agreements:
        - For arbitration of all disputes arising out of Jackson's employment.
        - For the arbitrator to have exclusive authority to resolve any dispute relating to the arbitration agreement's enforceability.
2) The Court reiterated that the parties can agree to arbitrate "gateway" questions of arbitrability "such as whether the parties agreed to arbitrate or whether their agreement covers a particular controversy."[62]
    a) "The court must enforce the delegation provision under §§ 3 and 4 unless it [the provision] is unenforceable under § 2."[63]
    b) "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce [under §§ 3 and 4], and the FAA operates on this additional arbitration agreement [delegation provision] just as it does any other."[64]
    c) "The additional agreement [delegation provision] is valid under § 2 'save upon such grounds as exist at law or in equity for the revocation of any contract. . . .'"[65] Judicial enforcement is by staying litigation under § 3 and compelling arbitration under § 4.
3) The Court then defined the issues as whether the delegation provision is valid under § 2, noting there are two types of validity challenges:
    a) A challenge specifically as to the validity of the agreement to arbitrate; and
    b) A challenge to the contract as a whole, "'either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.'"[66]

4) The Court again confirmed "that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable."[67]
    a) Section 2 "states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."[68]
5) "If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4."[69]
    a) As in *Prima Paint Corp. v. Flood & Conklin Manufacturing*,[70] if the fraud claimed had been in the inducement of the arbitration clause itself, then the court would have considered it because "[t]o immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract."[71]
    b) "[W]e . . . require the basis of the challenge to be directed specifically to the agreement to arbitrate before the court will intervene."[72] "[U]nless Jackson challenge[s] the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as whole for the arbitrator."[73]

§ 8.5.2—Generally — Under Colorado Law (CRUAA)

The Colorado Court of Appeals, in *BRM Construction Inc. v. Marais Gaylord, L.L.C.*,[74] defined the steps for determining whether a dispute must be arbitrated, assuming all issues regarding arbitrability, including contract formation, have not been entrusted by the agreement to the arbitrator.

> If a party challenges whether a particular dispute must be arbitrated, the court must resolve one to three questions (depending on the answers to the first two, and assuming that all issues regarding arbitrability, including contract formation, have not been entrusted by the agreement to the arbitrator . . .). First, does the agreement contain a valid and binding arbitration clause? Second, if so, who decides whether a particular dispute falls within the scope of the arbitration clause, the court or the arbitrator? Third, if the court is to decide whether a particular dispute falls within the scope of the arbitration clause, does the dispute fall within the scope of the arbitration clause?
>
> 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. The court's inquiry as to the validity of the arbitration clause is "limited to specific challenges to '*the agreement to arbitrate*,' not the broader contract containing the arbitration provision." The arbitrator must decide challenges to the enforceability of the contract as a whole.
>
> . . .
>
> Where "the agreement is silent or ambiguous on [the question of who is to decide whether a dispute falls within the scope of the arbitration clause], then the determination should be made by the court, not the [arbitrator]."[75]

In *Lane v. Urgitus*,[76] the Colorado Supreme Court defined in part the division of responsibilities between arbitrators and the court under the CRUAA, C.R.S. § 13-22-206.

The court shall decide:

- Whether an agreement to arbitrate exists; or
- Whether a controversy is subject to an agreement to arbitrate.

An arbitrator shall decide:

- Whether a condition precedent has been fulfilled; and
- Whether a contract containing a valid agreement to arbitrate is enforceable.

"If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders."[77]

In *Ahluwalia v. QFA Royalties, LLC*,[78] the Colorado Court of Appeals attempted to define explicitly that the issue of arbitrability is for determination by the courts, "unless the parties clearly and unmistakably provide otherwise."[79] In this case, the court found that the parties agreed that the arbitration proceeding would be conducted "according to the then current commercial arbitration rules of the American Arbitration Association." Rule R-7(a) provided that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The court concluded that "by incorporating the AAA Commercial Arbitration Rules into their agreement, the parties authorized the arbitrator to decide arbitrability issues."[80]

In *Radil v. National Union Fire Insurance Co.*,[81] the Colorado Supreme Court held that "absent the parties' clear intent to the contrary, litigation-based waiver is an issue that the trial court, not an arbitrator, properly determines."[82] ("Litigation-based waiver" is when the alleged waiver of the right to arbitrate is premised upon the waiving party participating in the judicial procedures without asserting the arbitration agreement.)

The court's ruling was based, *inter alia*, on the following points:

- The issue of litigation-based waiver is outside the scope of the arbitration clause because litigation-based waiver is a procedural defense unrelated to the underlying claim.
- The court "presumed" that the parties "thought" that a judge, not an arbitrator, would decide whether litigation-based waiver had occurred.
- Whether the waiver issue falls within the scope of the arbitration agreement is within the presumption favoring arbitration unless found with "positive assurance that the arbitration provision is not susceptible of any interpretation that encompasses the subject matter of the dispute."[83]
- Trial courts are better-suited than arbitrators to decide claims of litigation-based waiver, given that such waiver is based upon the parties' conduct before the court, and implicates trial court procedures with which arbitrators may have less familiarity.

- Trial courts are better positioned to "determine whether the belated request for arbitration is a thinly veiled attempt to forum shop."[84]
- "[S]ending waiver claims to an arbitrator is inefficient, given that a determination by the arbitrator that a party waived its right to arbitrate sends the proceedings back to the trial court without having made any progress with respect to the merits of the dispute."[85]
- "[T]he procedural question of litigation-based waiver is unrelated to the merits of the dispute, which the parties intended to be decided by an arbitrator."[86]

The court noted that the U.S. Supreme Court "has articulated a presumption that procedural defenses to compel arbitration are properly determined by the arbitrator."[87] However, the court further noted that lower federal courts hold that litigation-based waiver issues should be decided by the courts.

The court concluded its discussion by noting that if the parties want the arbitrator to determine procedural defenses, they can expressly so state in the arbitration agreement.

Comment: This case involved solely the procedural defense of litigation-based waiver. However, does the holding apply to all procedural defenses? Which defenses are procedural, and which are substantive? What if the parties want to have "absolutely everything" determined by the arbitrator?

§ 8.5.3—FAA Preemption Of State Law As To Who Decides The Arbitrability Issues

Suppose an arbitrability issue is brought before a state court, and the arbitration is governed by the FAA. The question arises as to whether the issue should be determined by the court or referred to the arbitrator. The New York Court of Appeals stated that if the FAA rule as to "who decides" is in conflict with the state rule, the federal rule as to who is the "decider" governs. Thus, the FAA preempts a conflicting state provision as to whether the court or the arbitrator decides the issue, when the FAA is applied.[88]

Suppose the somewhat reverse issue — the arbitral issue is raised in federal court, jurisdiction being diversity of citizenship. The FAA is not applicable, and state law governs. Would the federal court apply the state rule as to whether the court or arbitrator decides? Is that procedural or substantive?

See generally Chapter 4.

§ 8.5.4—Who Decides — Who First Receives The Issue?

Who first is presented an arbitrability issue may determine who first renders a decision, at least in the first instance. For example:

If the arbitration is initiated and the respondent moves the arbitrator to dismiss based upon arbitrability issues and affirmative defenses to the arbitration clause, what happens?

- The claimant (or the arbitrator) may assert that the issues are for judicial determination, and do nothing further. Or, the claimant may argue the issue to the arbitrator under protest. Either party may then go to the court, or do nothing. If nothing, probably the issue is reserved for post-hearing motions to vacate.

- The claimant may file in court to stay arbitration. Or, the respondent may file in court to compel arbitration. See also § 8.8 as to the effect of the forum in which the issues are raised.

Thus, when an issue is presented to the arbitrator, at least the party presenting may be deemed to have consented to the arbitrator's deciding. If the resisting party does not object, he or she too may be deemed to have consented.[89]

§ 8.6 • WHO DETERMINES EACH SPECIFIC ARBITRABILITY ISSUE UNDER THE FAA?

Given that the attempt of the courts to address the question of who decides issues that may prevent arbitration is generally confusing, this section turns to the subject of who decides the specific issues of arbitrability. The U.S. Supreme Court has provided general rules under the FAA as to the decision-maker of arbitrability issues, absent agreement of the parties: The question of whether the parties have agreed to arbitrate a particular dispute is for the court.

> [T]he question of "arbitrability" is limited to the gateway substantive issue of whether the parties are bound by a given arbitration clause. "Procedural" questions which grow out of the dispute and bear on its final disposition, such as allegations of waiver, delay, [time limits, notice, laches, estoppel,] or other "conditions precedent" are for the arbitrator to determine.[90]

"'Question[s] of arbitrability' is a term of art covering 'dispute[s] about whether the parties are bound by a given arbitration clause' [*i.e.*, formation] as well as 'disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy' [*i.e.*, scope]."[91]

The Tenth Circuit, in *EEC, Inc. v. Baker Hughes Oilfield Operations, Inc.*,[92] has clearly followed *Howsam v. Dean Witter Reynolds, Inc.*,[93] quoting: "[T]he question of arbitrability[] is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."

In the absence of clear and mistakable evidence, questions of arbitrability are presumptively resolved by the court, whether they are related to scope or formation.[94] This also applies to defenses to enforcement of the agreement.

§ 8.6.1—Whether The Parties Have Agreed In Writing To Arbitrate?

The FAA provides that in order to stay litigation or to order arbitration, the court must find the issue is referable to arbitration under an agreement in writing for arbitration.

The answer to this question involves several issues:

- The court decides whether the signatory was authorized — was it *ultra vires*.[95]
- *Is there an agreement to arbitrate?* Absent clear and unmistakable evidence of the parties' intent to the contrary, whether the parties entered into an agreement to arbitrate is an issue for the court, unless the parties specifically agree otherwise.[96]

"[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate. . . . [A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."[97]

Thus, the "infancy doctrine" (whether a signatory's age negates the existence of a contract) is for the court, not the arbitrator.[98] The U.S. District Court for the District of Maine attempted to define the boundaries between the jurisdiction of the court and the arbitrator, absent agreement of the parties:

- There are two types of threshold challenges to the agreement to arbitrate.[99]
    1) Challenges to the validity of the contract are generally for the arbitrator.
    2) Challenges to the arbitration clause are generally for the court.

They are referred to by some as questions of arbitrability. Arbitrability challenges do not include challenges to the validity of a contract generally. But the court does determine issues of "whether any agreement between the alleged obligor and obligee was ever concluded."[100]

The court decides whether the signor had mental capacity to assent.[101]

- "[A] party seeking to substitute an arbitral forum for a judicial forum must show, at a bare minimum, that the protagonists have agreed to arbitrate some claims."[102]
- "[C]hallenges going to the very existence of a contract that a party claims never to have agreed to" are for the court to decide.[103]
- A challenge to whether a contract was ever validly concluded is for the courts.

Perhaps a starting point is which party has the burden of proof. Normally, the proponent of the existence of a contract — the party seeking to compel arbitration — has the burden of proving the existence of the contract.[104] The party denying the obligations of the asserted contract may dispute the existence of the contract, but also assert affirmative defenses to the enforcement of the contract.[105] These defenses, absent agreement of the parties otherwise, normally seem to be for the arbitrator's decision.

Who determines the proper parties to the arbitration? Determination of the parties to an arbitration agreement generally falls to the courts and not the arbitrators, unless there is a clear and unmistakable intent of the parties to submit such determinations to the arbitrators. Thus, this is a determination of whether a party has agreed to arbitrate the dispute, *i.e.*, whether the party is a party to an arbitration agreement.[106]

Is the arbitration agreement binding on nonsignatories? Courts sometimes hold that a nonsignatory to an arbitration agreement can be compelled to arbitrate or be otherwise bound by the arbitration results. Absent a clear and unmistakable intent of the parties to submit the issue to arbitration, it becomes an issue for the court to decide.[107]

Note that while the arbitration statutes require that the agreement be in writing or a record, the signing thereof is not required.[108]

§ 8.6.2—Whether The Agreed-Upon Dispute Resolution Procedure Is "Arbitration" Within The Scope Of The FAA?

Applicability of the FAA to the dispute generally is an issue for the court. However, many terms of a statute can become terms of a contract.

In *LS Development Enterprises, Inc. v. Forest City Commercial Group, Inc.*,[109] Judge Matsch stated: "The plaintiff's arguments about the scope of the arbitration agreement and its contentions that this matter is not arbitrable because of procedural defects or delay on the part of defendant are matters to be determined in the context of the arbitration proceeding."[110]

In sum, whether a dispute resolution procedure constitutes arbitration, and therefore is subject to state and/or federal arbitration law may be of critical importance. However, if it is not "arbitration" for purposes of the FAA, and therefore there is no preemption, it could be arbitration under the Colorado statutes.

See also §§ 2.3, 3.4.1, 3.7-3.8, 4.3.5, and 7.2.4.

§ 8.6.3—Whether The Dispute Is Within The Scope Of The Agreement?

Determination of whether a particular dispute is within the scope of the concededly binding arbitration agreement is an issue usually determined by the court.[111] In *Cabs, Inc. v. Delivery Drivers, Warehousemen & Helpers Local Union No. 435*,[112] the Colorado Court of Appeals suggested that if there is a reasonable basis for finding that the dispute is within the scope of the arbitration agreement, then the scope should be determined by the arbitrator, unless the arbitration agreement otherwise provides.

However, the subsequently passed Colorado Revised Uniform Arbitration Act, C.R.S. § 13-22-206(2), provides: "The court shall decide whether . . . a controversy is subject to an agreement to arbitrate." Under § 204, § 206(2) by negative implication may be waived by the parties at any time: the parties may otherwise agree.

The U.S. Supreme Court has frequently held that, absent clear and unmistakable intent of the parties to the contrary, a court should determine whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.[113] *See* § 8.5.1.

The Tenth Circuit, applying the FAA, stated that once a "court independently determines the parties agreed to arbitrate an issue, it should give 'extreme deference' to an arbitrator's decision regarding the scope of the issue . . . '[being] the same level of deference as his determination on the merits.'"[114]

§ 8.6.4—Whether An Affirmative Defense Bars Enforcement Of The Agreement To Arbitrate?

The U.S. Supreme Court held under the FAA that issues of procedural arbitrability — time limits, notice, laches, estoppel, conditions precedent, waiver, and delay — are for determination by the arbitrator, perhaps unless the parties otherwise agree. Similarly, questions of substantive arbitrability, such as whether the parties agreed to arbitrate and whether the dispute is within the scope of the agreement, generally are for the court.[115]

Fraudulent Inducement to Enter into the Contract

See § 8.6.7.

Duress

This defense probably is an issue subject to the *Prima Paint* analysis and is for the arbitrator. *See* "Coercion," below.

Coercion

Coercion is an issue for determination by the arbitrator, as it is a challenge to the validity of the contract, and not to its formation.[116] However, when the alleged duress relates to the entire contract, and not specifically to the arbitration clause, the issue is for resolution by the arbitrator under the *Prima Paint* analysis.[117]

Mistake

Mistake is presumptively an issue for the arbitrator, and the *Prima Paint* approach applies.[118]

Illusory Contract

Illusory contract is generally a question for the court.[119] The issue goes to whether a contract was founded.

Expiration of the Arbitration Clause or Agreement

Expiration of the arbitration clause or agreement is usually a question for the court.[120]

Statute of Limitations

The Tenth Circuit held that under the FAA, the court has jurisdiction to determine whether an arbitration claim is time barred.[121] In determining the validity of the arbitration agreement to which the FAA is applicable, state law governs, unless the parties otherwise agree — to date it has not been pre-empted by federal law.[122] Other courts have held that whether a claim is barred by a statute of limitations generally is for determination by the arbitrator.[123]

Contractual Time Limits

The U.S. Supreme Court held that under the FAA, the issue of compliance with a contractual time limit should, in the first instance, be addressed by the arbitrator, absent clear evidence of a contrary intent of the parties.[124]

Laches or Estoppel

The Colorado Court of Appeals held under the FAA that whether a party is estopped to assert that a claim is subject to arbitration is an arbitrability issue, and is to be decided by the court, unless there is "clear and unmistakable" evidence that the parties intended the arbitrator to decide the issue.[125] On the other hand, the First Circuit held that, notwithstanding that the arbitration clause provided questions of arbitrability were for the arbitrator to decide, such a broad referral of arbitrability issues was not a clear and unmistakable intent to refer issues of waiver of right to arbitration to the arbitrator.[126]

Forum Selection

Issues concerning a forum selection clause are procedural, and presumptively for the arbitrator.[127]

Class Actions[128]

See § 6.8.

Adhesion

It appears that a majority of the federal circuit courts follow the *Prima Paint* approach and hold that whether an arbitration clause was a contract of adhesion and unconscionable is a question for the arbitrator, "because this issue pertains to the making of the agreement as a whole and not to the arbitration clause specifically."[129] The Ninth Circuit relied upon the separability doctrine enunciated by the U.S. Supreme Court in *Prima Paint*.[130] However, *Prima Paint* does not preclude the court from determining procedural unconscionability issues because they pertain specifically to the arbitration clause's validity — for example, a contention that the arbitration clause was buried in the 25th page of a 30-page franchise agreement. The arbitrator must determine whether a franchise agreement containing an arbitration clause is a contract of adhesion, but the court should determine whether an arbitration clause buried in the document is invalid by reason of being procedurally unconscionable. As to unconscionability concerning whether arbitration class actions can be pursued, see § 6.8.

Illegality

The U.S. Supreme Court, in *Buckeye Check Cashing, Inc. v. Cardegna*,[131] held that the FAA requires that a challenge to the validity of a contract containing an arbitration clause, but not specifically to the arbitration clause, must be determined by the arbitrator and not the court.[132] Three principals were defined:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. [It is unclear as to the scope of review (or grounds for reversal) by the courts of the arbitrator's determination.] Third, this arbitration law applies in state as well as federal courts.[133]

Consolidation

In *Blue Cross/Blue Shield of Massachusetts, Inc. v. BCS Insurance Co.*,[134] the arbitrator resolved the issue on consolidation, subject to judicial review after an award had been made.

Waiver of Right to Arbitrate

See § 8.6.5.

Lack of Mental Ability

Absent agreement of the parties, the court determines the mental capacity of the parties to contract.[135] The capacity to enter into the contract as a whole is an issue for the arbitrator, absent agreement of the parties to the contrary.[136]

Conditions Precedent

See § 8.6.10.

Res Judicata

There is no authority to cite at this time.

Standing

Standing is generally held to be an issue for the arbitrator to decide because it is a procedural issue.[137]

Lack of License

The courts are in conflict as to whether the question of whether lack of a license (*e.g.*, by a contractor) voids the existence of the contract or its enforceability is for decision by the court or by the arbitrator.[138]

Signatory of Contract not Authorized

This issue goes to formation of the contract, not its validity, and therefore is for the court.[139]

§ 8.6.5—Who Decides A Party Has Waived Its Right To Arbitrate?

See § 7.9 as to what constitutes waiver of the right to arbitrate and § 7.10 as to what constitutes waiver of objections to arbitration.

The federal courts are in concurrence that whether the parties have agreed to arbitrate is an issue for determination by the court, unless the parties have clearly and unmistakably agreed to submit such questions to an arbitrator.[140] When the issue of waiver of right to arbitration arises from inconsistent activity in the litigation forum, sending the waiver claims to the arbitrator would be especially inefficient.[141] However, waiver issues generally are for the arbitrator.[142] Judge Babcock, of the U.S. District Court for the District of Colorado, citing *Howsam v. Dean Witter Reynolds, Inc.*,[143] rejected any difference between waiver of arbitration resulting from the same litigation and waiver resulting from other activity. "[A]n arbitrator and not a judge should address the parties' arguments regarding waiver and estoppel. . . ."[144] If the FAA is applicable, federal law determines whether the right to arbitration has been waived.[145]

The split among the district courts in the Tenth Circuit as to whether the judge or arbitrator determines whether the right to arbitrate has been waived (if there is no provision in the agreement) was summarized in *Catholic Health Initiatives of Colorado v. Communication Workers of America*.[146] The district court noted that the Tenth Circuit had not yet addressed the issue. Thereafter, the Tenth Circuit considered an appeal of a district court's denial of a motion to stay action and compel arbitration on the grounds that the agreement to arbitrate had been waived. The Tenth Circuit, without discussion of whether an arbitrator should determine the waiver issue, reviewed the district court's denial *de novo* and reversed, holding that the motion to stay and compel arbitration should be granted.[147] Note that no arbitrator had yet been appointed. This may affect whether an arbitrator or the court can or should determine the waiver issues. *See* §§ 8.5.4 and 8.8.

Outside the Tenth Circuit, generally a court takes jurisdiction over the question of whether an arbitration agreement has been waived, unless the parties have otherwise agreed.[148] The District of Colorado concurs.[149] FAA § 3 provides that the court determines whether the movant is "in default in proceeding with arbitration."[150]

A question of whether a party has waived its right to have disputes arbitrated — usually because of proceeding with litigation without objection — can arise in court proceedings or in arbitration proceedings. Thus, a defendant in a judicial proceeding may proceed with initial pre-trial activities and

then assert that the action should be stayed or dismissed pending arbitration because of an agreement of the parties to arbitrate. Similarly, a respondent in an arbitration may assert that claimant waived its right to arbitrate. Who decides — the court or the arbitrator — may depend on whether the motion is filed in court or in arbitration, and upon the provisions of the arbitration agreement.

Notwithstanding the general statement of the U.S. Supreme Court in *Howsam v. Dean Witter Reynolds Inc.*[151] that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator to decide," such as "allegations of waiver," the Colorado federal district court held that that does not change the traditional rule that courts, not arbitrators, should decide the question of whether a party has waived its right to arbitrate by actively litigating the case in court.[152]

If there is a pending civil action, and the defendant seeks to arbitrate, does the court decide waiver or require commencement of an arbitration so that the arbitrator can decide? If the respondent in a pending arbitration asserts that the claimant waived its right to arbitrate, can the respondent make this assertion to the arbitrator? To the court, upon commencing an action to stay arbitration? To either? If the assertion is made to the arbitrator, can the arbitrator's decision be appealed? If so, at what juncture?

At least part of these issues were decided by the Sixth Circuit.[153] The respondent/defendant moved in the district court to compel arbitration of the plaintiffs' claims. That motion was denied on the grounds that the respondent/defendant had waived its right to arbitrate.

The Sixth Circuit held that the waiver issue asserted in the district court was for determination by the court and not the arbitrator. The court noted:

- Parties would not expect an arbitrator to resolve issues (waiver) regarding pre-litigation conduct because such conduct rarely affects the merits of a dispute.
- "[A] court is [more] adept at policing procedure-abusing conduct" and referring a waiver issue to an arbitrator would prove "exceptionally inefficient" because an arbitrator's decision would just refer the case back to the court.[154]

No mention was made as to whether the arbitration agreement provided who determined arbitrability questions. Presumably, the arbitrator in the arbitration did not have jurisdiction over the different but related claims in the court case, unless and until they were brought into the arbitration.

The Third Circuit, in *Ehleiter v. Grapetree Shores, Inc.*,[155] had earlier adopted the same approach. However, the court specifically noted the exception to the court's deciding the waiver issue: clear and unmistakable evidence of the parties' intent to have an arbitrator decide the question.

Boateng v. General Dynamics Corp.,[156] defined a further exception: If the facts alleged to constitute waiver occur outside a judicial proceeding, the court does not have any special insight into the facts of the alleged waiver, and therefore the arbitrator should decide.

A California court, in *Empire Film Productions, Inc. v. Arenas Entertainment*,[157] reached a similar conclusion, but under a specific California statute. However, the court noted that if federal law controlled, the issue of waiver was for the arbitrator. The court found no federal law preemption of the state waiver statute as "[t]here is no federal policy favoring arbitration under a certain set of procedural rules."

Litigation-based waiver is based upon facts occurring in litigation, *e.g.*, a party asserting that claims are subject to arbitration after having participated in judicial proceedings without having raised the asserted right to arbitrate those claims. Generally, in both Colorado and federal courts, such waiver issues are determined by the court.[158] This holding is based upon the logic that because such waiver is based upon the parties' conduct before the court and implicates trial court procedures, the court is "better positioned to determine whether the belated request for arbitration is a thinly veiled attempt to forum shop" and is "mo[re] adept at policing procedure-abusing conduct."[159] In addition, sending such claims to an arbitrator is inefficient, given that an arbitrator might not yet be appointed, and if the arbitrator found waiver, the matter would be sent back to the court without any progress on the merits. Lastly, the courts hold that usually the issue is not within the scope of the arbitration clause.[160]

However, these courts recognize that the parties may expressly provide that determination of procedural defenses, such as litigation-based waiver, is within the scope of their arbitration agreement.

- Annot., *Waiver of or Estopped to Assert Substantive Right or Rights to Arbitrate a Question for Court or Arbitrator*, 26 A.L.R.3d 604.

§ 8.6.6—Whether Arbitrations Should Be Consolidated?

Consolidation of arbitrations is an issue for the arbitrator, and not the court.[161]

§ 8.6.7—Whether The Contract Was Fraudulently Induced?

Arbitration law recognizes two categories of fraudulent inducement into the contract: fraudulent inducement as to the contract as a whole, and fraudulent inducement as to a specific provision of the contract — as here relevant, the arbitration provision. *See* § 7.6.1.

In 1967, the U.S. Supreme Court held that under the FAA, fraud in the inducement of a contract containing an arbitration provision does not void the arbitration clause, and the defense must be resolved by the arbitrator, absent contrary agreement by the parties.[162] To be a defense to the enforcement of arbitration, there must be fraud in the inducement of the arbitration clause. In this latter event, the court will determine the issue as a defense to enforcement of the arbitration clause.

§ 8.6.8—Whether The Agreement Or Arbitration Clause Is Unconscionable?

Following *Prima Paint*, the unconscionability of the contract as a whole presumptively was an issue for the arbitrator.[163] The Ninth Circuit, in a consumer case, held as to an unconscionability challenge that "even where the [arbitration] agreement's express terms delegate that determination [of validity] to the arbitrator, . . . a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter."[164] However, as to whether arbitration class actions can proceed, unconscionability may be subject to a separate analysis in which the FAA may preempt state law unconscionability. *See* § 6.8.

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

§ 8.6.9—Whether An Award Is Rendered Timely Or Further Proceedings May Be Held?

See § 8.7.9.

§ 8.6.10—Issues Of Procedural Arbitrability — Whether Conditions Precedent Have Been Fulfilled?

Generally, absent clear agreement of the parties, the arbitrator determines whether conditions precedent to arbitration have occurred.[165] However, when a party seeks to enforce an arbitration agreement, the court may deny enforcement upon determining that conditions precedent have not been fulfilled.[166] Absent agreement of the parties to the contrary, whether procedural conditions precedent to arbitration have been met is a question for the arbitrator.[167]

The arbitrator generally determines whether proper notice was given to invoke arbitration, at least unless the parties otherwise provide.[168]

Whether a condition precedent to arbitration requiring an architect's decision on the issue has been met is a procedural arbitrability question for the arbitrator to determine, as is whether a condition precedent requiring mediation has been waived. This procedural arbitrability involves issues such as laches, estoppel, or notice that grow out of the dispute itself, rather than the question of whether an agreement to arbitrate exists (substantive arbitrability).[169] Where waiver is directed to a condition precedent, it is an issue of procedural arbitrability; where the issue is whether a party substantially invoked the litigation process, it is for the court to decide — invoking the litigation process involves matters that occurred before the court or under its watch.[170]

§ 8.6.11—Where Is The Venue For The Arbitration?

Generally, questions as to interpretation and application of a venue provision are for the arbitrator.[171] *See* Chapter 19.

§ 8.6.12—Claim Preclusion (*Res Judicata*/Collateral Estoppel)?

Generally, absent agreement of the parties to the contrary, application of *res judicata* is an issue for determination by the arbitrator.[172]

The *res judicata* effect of a prior arbitration is an issue that should be decided by the arbitrator.[173]

See §§ 16.7.2 and 18.6.

§ 8.6.13—Whether The Signatories To An Agreement With An Arbitration Clause Have Authority To Sign?

This is an issue for determination by the courts.[174]

§ 8.6.14—Whether The Arbitration Agreement Is Ambiguous?

Where the parties executed two arbitration agreements, any ambiguity created by the differing clauses is for the arbitrator to resolve.[175]

§ 8.6.15—Whether The Dispute Is Subject To The FAA Or To The CRUAA, Or Excluded Therefrom?

FAA § 1 provides that the FAA does not apply "to contracts of employment of . . . any . . . class of workers engaged in . . . interstate commerce." Whether the claim is within this exception is a threshold question of arbitrability. Generally, this is an issue for the court. However, the U.S. Supreme Court acknowledges that the parties can agree to arbitrate gateway questions of arbitrability.[176] Incorporating AAA rules giving the arbitrator power to determine his or her own jurisdiction applies to threshold/gateway questions of arbitrability.[177]

§ 8.6.16—Whether The Parties Had The Mental Capacity To Contract?

It is doubtful that there is a defense that could be directed solely to the arbitration clause and not to the contract as a whole. Under both the FAA and CRUAA, mental capacity is a part of the overall issue of whether any arbitration agreement was concluded, and therefore to be determined by the court — following the principle that courts usually decide issues about contract formation.[178] In turn, the severability doctrine is not applied to the issue.[179]

§ 8.6.17—Whether A Party Has Waived The Right To Have The Arbitrator Determine Whether An Arbitration Clause Is Unconscionable, Or Other Affirmative Defenses?

As to class actions, see § 6.8.

A party may waive the right to have the arbitrator determine an issue of arbitrability by litigating the issue.[180] So too, a party may waive the right to have a court determine arbitrability by participating in the arbitration and not timely seeking judicial review.[181]

- Annot., *Waiver of, or Estoppel to Assert, Substantive Right or Right to Arbitrate As Question for Court or Arbitrator*, 26 A.L.R.3d 604.

§ 8.6.18—Whether The Agreement Provides For Class-Wide Arbitration

Whether an agreement provides for class-wide arbitration is a question of arbitrability to be decided by a court (at least if there is no delegation clause). While procedural questions generally are for the arbitrator, this is a substantive gateway dispute.[182]

On the other hand, some courts have found that the arbitrator, and not the court, interprets the arbitration agreement to determine whether it permits claimants' claims to proceed as a class action in arbitration — at least if there is a delegation clause in the agreement.[183]

§ 8.6.19—Whether Non-Signatories Are Bound By Or May Enforce The Arbitration Agreement

Such issues are for the court generally.[184]

The general rule is that a court must determine whether a non-signatory may be required to arbitrate a dispute with a signatory to the arbitration agreement.[185]

However, where the arbitration agreement incorporated the AAA Commercial Rules with its delegation of authority provision, the arbitrator had power to require a signatory to the arbitration agreement to arbitrate with a non-signatory.[186]

§ 8.6.20—Summary

Will-Drill Resources, Inc. v. Samson Resources Co.[187] provides an analysis of when the court versus the arbitrator determines issues relating to arbitrability, absent agreement of the parties.

The court first noted a two-step inquiry to determine whether the parties agreed to arbitrate the dispute:

> First, the court must determine whether the parties agreed to arbitrate the dispute. . . . There are two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of the arbitration agreement. . . .
>
> Once the court finds that the parties agreed to arbitrate, it must consider whether any federal statute or policy renders the claims non-arbitrable.[188]

The court summarized the holdings in other cases as to issues held to be determined by the court:

- Whether plaintiffs' signatures on forms containing the arbitration clause are forgeries, eliminating any agreement;
- Whether children were bound by a parent's signature on an agreement containing an arbitration clause;
- Whether a party was bound to an arbitration agreement if the party was not an original party to the agreement and had not signed it;
- Whether an assignee of a party was bound to an agreement containing an arbitration clause; and
- Whether the agent who signed the agreement lacked authority to bind the party.[189]

Issues held to be determined by the arbitrator include:

- Whether the party lacked mental capacity to execute the contract containing an arbitration clause (capacity defense directed at the contract generally, and not specifically at the arbitration clause);
- Whether the entire contract was induced by fraud;
- Whether there was fraud in obtaining signatures to the contract — a defense not specific to the arbitration agreement;
- Whether the contract was illegal — a defense not specifically related to the arbitration clause; and
- Whether the entire contract was void *ab initio*, rejecting the difference between defense of a void contract and defense of a voidable contract.

The court attempted to define the rules:

1) Arbitration is a matter of private contract, and a contract cannot bind a non-party.
2) A gateway dispute about whether the parties are bound by a given arbitration clause raises a question of arbitrability for a court to decide.

3) Absent clear and unmistakable evidence that the parties agreed to arbitrate the question of arbitrability, the court, not the arbitrator, decides whether the parties agreed to arbitrate the merits — the question of arbitrability, which generally should be determined by applying state formation of contracts law.
4) Where a party contends it has not signed any agreement to arbitrate, the court determines this issue, *e.g.*, the defense of a forged signature or an agent lacking authority.
5) Where parties have formed an agreement that contains an arbitration clause, any attempt to dissolve that agreement by having the entire agreement declared void or voidable is for the arbitrator, apparently even if the defense is that the agreement was void ab initio.
6) Only if the arbitration clause is attacked on an independent basis can the court decide the dispute; general attacks on the agreement are for the arbitrator.
7) So long as an agreement exists containing an arbitration clause, the fact that one of the parties disputes the enforceability of that agreement does not change the fact that, at some point in time, the parties reached an agreement that included the decision to arbitrate disputes arising out of it.

> The existence of this agreement provides the arbitrator with the authority required to decide whether the agreement will continue to exist. Even if the arbitrator concludes that the agreement was void, and the parties are returned to their pre-agreement positions *as if* the agreement never existed, the agreement existed long enough to give the arbitrator the power to decide the dispute.[190]

Hopefully, this guidance from the Fifth Circuit will reduce some of the controversy as to which issues are to be determined by the courts and which by the arbitrator. Alternatively, perhaps the decision will encourage parties to specifically define in their arbitration agreement who decides such issues.[191]

§ 8.6.21—Who Decides If A Party Is In Default?

There are multiple types of potential "defaults" under the FAA. Potential defaults include failure to proceed with the arbitration and failure to comply with the court or arbitrator's orders.

In *Prefab Legal Services, Inc. v. Cahill*,[192] the alleged default was the failure of respondent to pay its share of arbitration (AAA) fees. The district court had initially granted the defendant/respondent's motion to stay civil action pending arbitration under FAA § 3. This section provides for a stay of litigation pending arbitration provided "the applicant for the stay is not in default in proceeding with the arbitration." The plaintiff/claimant commenced an arbitration, but the defendant/respondent failed to pay its share of the arbitration fees. The arbitrators directed termination of the arbitration.

The plaintiff/claimant then moved in the court proceeding to lift the stay of litigation, as the defendant/respondent was in "default" under § 3. The defendant/respondent responded that the issue of default was for the arbitrators, and not the district court. The Tenth Circuit held that "in the circumstances of this case . . . the absence of a formal finding of default by the arbitrators does not preclude the district court from making that determination under § 3."[193] Alternatively, the court held that even assuming the issue of default must be left to the arbitrators, the arbitrators in fact had found that the respondent was in default.

§ 8.6.22—Whether Treble Damages Are Punitive Damages Precluded By The Agreement?

Whether award of statutory treble damages would violate the arbitration agreement banning the award of punitive damages is at least a threshold question for the arbitrator.[194]

§ 8.7 • WHO DETERMINES EACH SPECIFIC ARBITRABILITY ISSUE UNDER COLORADO LAW?

The Colorado Supreme Court has specifically said that "[a]s between the trial court and the arbitrator, the trial court must resolve any allegation that the arbitration agreement is invalid."[195] Yet, presumably that statement is subject to the qualification that the arbitrator decides the validity of the arbitration agreement if the parties so provide in that agreement.

§ 8.7.1—Whether The Parties Have Agreed In A Record To Arbitration?

The CRUAA definition of an enforceable arbitration agreement derives somewhat from the FAA definition. C.R.S. § 13-22-206, "Validity of agreement to arbitrate," provides:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.
> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
> (4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"Record," as defined in C.R.S. § 13-22-201(6), "means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

Whereas under the FAA the arbitration agreement must be "written," under the CRUAA it must be contained in a "record." The difference between a "writing" and a "record" appears simply to reflect that today's "writings" are often in electronic form. It would not be surprising to see the 1925 FAA statute interpreted to equate "written" with "record" to reflect technological developments of the past century.

C.R.S. § 13-22-206(2) provides that the court shall decide whether an agreement to arbitrate exists.[196] This probably includes whether the agreement is in a record. C.R.S. § 13-22-204(1) provides that "a party to an agreement to arbitrate or to an arbitration proceeding may waive, or, the parties may vary the effect of, the requirements" of C.R.S. § 13-22-206(2). Therefore, the parties may agree as to whether the court or the arbitrator shall determine whether the parties have agreed of record to arbitrate. Absent such agreement, however, the statute is clear that the issue is for the court to decide.

See § 8.6.1.

§ 8.7.2—Whether The Agreed-Upon Dispute Resolution Procedure Is "Arbitration" Within The Scope Of The CRUAA?

The CRUAA applies only to an "agreement to arbitrate" made on or after August 4, 2004, or by agreement of the parties.[197] There are many dispute resolution procedures (some that might commonly be referred to as arbitration) that are not within the scope of the CRUAA. Nevertheless, those procedures may be enforced and implemented under Colorado law, other than CRUAA. *See* Chapters 1, 2, and 3.

Under C.R.S. § 13-22-206(2), the court decides "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." Under C.R.S. § 13-22-204(1), the parties may waive that provision.

Thus, absent agreement of the parties to the contrary, the court determines whether the dispute resolution procedure is within the scope of and governed by the CRUAA. However, the parties may agree to have the arbitrator decide the issue (jurisdiction to determine jurisdiction). For example, the parties may agree to apply the AAA Commercial Arbitration Rule R-7, Jurisdiction, which provides for the arbitrator to rule on his or her own jurisdiction, including objections with respect to the existence, scope, and validity of the arbitration agreement.

§ 8.7.3—Whether The Dispute Is Within The Scope Of The Agreement?

C.R.S. § 13-22-206(2) provides that the court shall decide whether a controversy is subject to an agreement to arbitrate.[198] As discussed above, this provision may be waived under C.R.S. § 13-22-204(1), and the parties may agree that the issue shall be resolved by the arbitrator.

§ 8.7.4—Whether An Affirmative Defense Bars Enforcement Of The Agreement To Arbitrate?

As indicated in § 8.6.4, there are numerous potential defenses to the enforcement of an agreement to arbitrate. For the most part, Colorado has not specifically determined whether the arbitrator or court determines these issues. The decisions under the FAA provide guidance, but are not binding, unless FAA preemption is found.

Fraudulent Inducement of Contract

In *Estate of Grimm v. Evans*,[199] the Colorado Court of Appeals equated the defense of lack of mental capacity to enter into a contract with the defense of fraudulent inducement, holding the defense was separate from the separability doctrine. Even though the defense was aimed at the entire contract, it is to be resolved by the court, not the arbitrator, under C.R.S. § 13-22-206(2). However, the Wisconsin Supreme Court, in *Wisconsin Auto Title Loans, Inc. v. Jones*,[200] held that, under Wisconsin law, whether the facts found by the trial court render a contractual provision unconscionable is a question of law that the reviewing court determines independently of the lower courts.

Duress

See § 8.6.4.

Coercion

See § 8.6.4.

Mistake

See § 8.6.4.

Illusory Contract

See § 8.6.4.

Expiration of the Arbitration Clause or Agreement

See § 8.6.4.

Statute of Limitations

The court's objective is to give effect to the intent of the parties.[201]

Contractual Time Limits

See § 8.6.4.

Laches or Estoppel

See § 8.6.4.

Forum Selection

See § 8.6.4.

Class Actions

See §§ 8.6.4 and 6.8.

Adhesion

See § 8.6.4.

Unconscionability

See § 8.7.8.

Illegality

See Amadeus Corp. v. McAllister.[202]

Consolidation

See § 8.7.6.

Waiver of Right to Arbitrate

See § 8.7.5.

Lack of Mental Capacity

Lack of mental capacity is determined by the court under C.R.S. § 13-22-206(2).[203]

Conditions Precedent (Mediation, Negotiation, Etc.)

See § 8.7.10.

Res Judicata

See § 8.6.12.

Standing

See § 8.6.4.

Lack of License

Whether the agreement containing the arbitration clause is illegal and unenforceable because it compensates an unlicensed real estate broker is for the court to determine.[204] When confronted with a motion to compel arbitration, the Colorado Court of Appeals held an agreement to compensate an unlicensed real estate broker containing an arbitration clause was illegal and unenforceable. The court did not discuss whether the issue was for the arbitrator or whether it chose to resolve the issue, as there was no dispute of facts.

Signatory of Contract Not Authorized

See § 8.6.4.

§ 8.7.5—Whether A Party Has Waived The Right To Arbitrate?

When the waiver is based upon facts occurring in litigation (litigation-based waiver), such as a party asserting that claims are subject to arbitration after having participated in judicial proceedings without having raised the asserted right to arbitrate those claims, the issue is generally for determination by the court, absent an agreement of the parties to the contrary.[205]

See §§ 7.9 and 8.6.5.

§ 8.7.6—Whether Arbitrations Should Be Consolidated?

CRUAA, C.R.S. § 13-22-210(1), provides that, unless the agreement prohibits consolidation, upon motion of a party, "the court may order consolidation of separate arbitration proceedings" in certain circumstances. While consolidation is a procedural matter, whether there will be consolidation is for the court to determine under the statute.

§ 8.7.7—Whether The Contract Was Fraudulently Induced?

Arbitration law recognizes two categories of fraudulent inducement into the contract: fraudulent inducement as to the contract as a whole, and fraudulent inducement as to a specific provision of the contract — as here relevant, the arbitration provision. *See* § 7.6.1.

In 1967, the U.S. Supreme Court held that under the FAA, fraud in the inducement of a contract containing an arbitration provision does not void the arbitration clause and the defense must be resolved by the arbitrator, absent contrary agreement by the parties.[206] The arbitration clause is "severed" from the agreement. To be a defense to the enforcement of arbitration, there must be fraud in the inducement of the arbitration clause. In this latter event, the court will determine the issue as a defense to enforcement of the arbitration clause.

In 2007, the Colorado Supreme Court adopted these rules, which generally had been followed by the Colorado Court of Appeals.[207] On the other hand, the Colorado Court of Appeals has held that whether the agreement containing the arbitration clause is illegal and unenforceable because it compensates an unlicensed real estate broker is for the court to determine.[208]

§ 8.7.8—Whether The Agreement Or Arbitration Clause Is Unconscionable?

The common law doctrine of unconscionability of an agreement or portion thereof takes on special importance in arbitration. The doctrine may be used to void and sever portions of an agreement, or used to void the entire contract. As to the doctrine with respect to provisions in the arbitration agreement pertaining to class or collective arbitration, see § 6.8. Unconscionability may be directed solely to a provision in the arbitration clause, or to the agreement as a whole. If the former, the severability doctrine kicks in — if a provision in the arbitration clause is found unconscionable, it may be severed and the balance of the arbitration clause enforced.

In *Estate of Grim v. Evans*,[209] the court recognized the severability doctrine. Under C.R.S. § 13-22-206, absent agreement to the contrary, a court must resolve any challenge to the arbitration provision, but allow the arbitrator to decide any challenge to the entire contract.

§ 8.7.9—Whether An Award Is Rendered Timely Or Further Proceedings May Be Held?

In *Sopko v. Clear Channel Satellite Services, Inc.*,[210] the Colorado Court of Appeals held that the arbitrator, and not the court, determines whether further proceedings more than 30 days after the hearing concluded were barred. However:

> Where . . . a particular claim is not clearly beyond the scope of the arbitration clause — that is, where there is a reasonable basis for construing the agreement in support of arbitrability of the claim — the scope of the arbitration agreement must be determined by the arbitrator, not by the court. Similarly, . . . questions of contract application and interpretation are for the arbitrator, not the court, to decide.[211]

The decision is somewhat unclear whether this conclusion is a matter of law, regardless of the agreement of the parties, or a conclusion based upon the agreement of the parties. The court apparently also held that the only grounds for appealing the arbitrator's decision were grounds for vacating an award under C.R.S. § 13-22-214 (now § 13-22-223).

§ 8.7.10—Issues Of Procedural Arbitrability — Whether Conditions Precedent Have Been Met?

Absent agreement of the parties to the contrary, whether procedural conditions precedent to arbitration have been met is a question for the arbitrator.[212]

For example, whether a condition precedent to arbitration requiring an architect's decision on the issue has been met is a procedural arbitrability question for the arbitrator to determine, as is whether a condition precedent requiring mediation has been waived. This procedural arbitrability involves issues such as laches, estoppel, or notice that grow out of the dispute itself, rather than the question of whether an agreement to arbitrate exists (substantive arbitrability).[213] Where waiver is directed to a condition precedent, it is an issue of procedural arbitrability; where the issue is whether a party substantially invoked the litigation process, it is for the court to decide — invoking the litigation process involves matters that occurred before the court or under its watch. *See also* § 8.7.5.

§ 8.7.11—Where Is The Venue For The Arbitration?

Generally, questions as to interpretation and application of a venue provision are for the arbitrator.

§ 8.7.12—Claim Preclusion (*Res Judicata*/Collateral Estoppel)?

The *res judicata* effect of a prior arbitration is an issue that should be decided by the arbitrator. *See* §§ 16.7.2 and 18.6.1.

§ 8.7.13—Whether The Signatories To An Agreement With An Arbitration Clause Had Authority To Sign?

This should be an issue for the court under C.R.S. § 13-22-206, unless the parties otherwise agree.

§ 8.7.14—Whether The Arbitration Agreement Is Ambiguous?

This should be an issue for the court under C.R.S. § 13-22-206, unless the parties otherwise agree.

§ 8.7.15—Whether The Dispute Is Subject To The FAA Or To The CRUAA, Or Excluded Therefrom?

Whether a dispute is subject to the FAA is a matter of federal law. Indeed, the issue of whether the arbitration is governed by the FAA can be the basis for federal court jurisdiction under 28 U.S.C. § 1331. Both determining federal court jurisdiction and whether to apply the FAA are questions for the court.

Similarly, whether a dispute is subject to the CRUAA is a matter of Colorado law, and should be decided by the court.

§ 8.7.16—Whether The Parties Had Mental Capacity To Contract?

Generally, this is an issue for the court. Even if the defense is aimed at the entire contract (which one would expect) the defense is resolved by the court and not arbitrator "because it denies that 'an agreement to arbitrate exists' under Section 13-22-206(2)."[214]

§ 8.7.17—Whether A Party Has Waived The Right To Have The Arbitrator Determine Whether An Arbitration Clause Is Unconscionable, Or To Determine Other Affirmative Defenses?

See §§ 8.6.17, 5.12, 7.6, 7.9-7.10, 8.7.4, and 8.7.8.

§ 8.7.18—Whether The Agreement Provides For Class-Wide Arbitration?

See §§ 8.6.18 and 6.8.

§ 8.7.19—Whether Non-Signatories Are Bound By Or May Enforce The Arbitration Agreement?

See §§ 8.6.19 and 5.2.7.

§ 8.8 • WHAT IS THE EFFECT OF THE FORUM IN WHICH THE ISSUES ARE RAISED?

Generally, the parties may agree and define whether the court or arbitrator determines the issues. However, regardless of what the parties agree upon, the context in which the issue arises may govern the allocation of authority.

Suppose no arbitration has been commenced, the plaintiff commences a civil action to compel arbitration, and the defendant asserts all the arbitrability issues discussed above. The statutes are clear about enforcing the arbitration agreement.

If an arbitration is commenced by the plaintiff, and the defendant files a civil action to stay the arbitration, does the fact that an arbitration is pending affect what issues the court determines? Does the fact there is no pending arbitration affect the arbitrability issues the court will entertain?

The FAA, CUAA, and CRUAA permit a party to apply to a court to compel the opposing party, who has agreed to arbitrate, to arbitrate in accordance with the arbitration agreement of the parties and to stay any litigation pending that arbitration.[215] These provisions require the court to order arbitration unless the opposing party denies the existence of an agreement to arbitrate, or denies that the particular dispute is within the scope of the agreement. In this latter case, the court proceeds to summarily determine the "arbitrability" issues.[216]

Similarly, who decides the issue often depends upon the context of where the defense of unconscionability is raised. For example, in *Nesbitt v. FCNH, Inc.*,[217] the plaintiff filed a civil suit on its claims, the defendant moved to compel arbitration, and the plaintiff responded that the arbitration clause was unconscionable. The clause incorporated AAA rules. These rules provided that the arbitrator had the power to rule on any objection with respect to the existence, scope, or validity of the arbitration agreement.

There was no mention of the AAA provision in the opinion. Rather, the court determined the agreement was unconscionable and denied the motion to compel arbitration.

This decision on unconscionability made by the judge, instead of denial of the motion and referring the motion to the arbitrator for determination, may have been made on several basis.

First, the only proceeding was in court. No arbitrator had been appointed, and no arbitration had been commenced. For the court to have denied the motion on the basis that it should be determined by the arbitrator would have required the commencement of the arbitration, appointment of the arbitrator, and finally determination. Query the result if the defendant had filed an arbitration.

Second, § 3 of the FAA states that upon motion to compel arbitration, the "court" shall refer the matter to arbitration "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration."

Third, when a motion to compel arbitration is filed, the court may have exclusive or non-exclusive jurisdiction to determine all issues necessary to determination of the motion.

See also § 9.4.

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

On the other hand, a court has jurisdiction to stay arbitration upon a showing that there is no agreement to arbitrate.[218] Similarly, a court should stay the arbitration where it is clear that the dispute is beyond the scope of arbitration.[219] However, if there is a reasonable basis for construing the arbitration agreement to cover the dispute, the issue should be determined by the arbitrator.[220]

§ 8.9 • WHEN AND WHERE ARE ARBITRABILITY ISSUES DECIDED?

§ 8.9.1—Arbitrability Issues First Raised In A Civil Action

If a civil action is commenced and the defendant files a motion to stay civil action and compel arbitration, the plaintiff can raise arbitrability issues as a defense to the motion. The court may decide the issues as part of determining the motion or grant the stay and refer the issues to the arbitrator. That is the subject of the foregoing sections.

When a motion to compel arbitration and stay litigation is filed in a civil action, and the plaintiff contends the arbitration clause is unconscionable, the court determines arbitrability, without considering referring it to arbitration. *Nesbitt v. FCNH, Inc.*[221] held, *inter alia*, that enforceability or validity of the arbitration agreement was to be determined by the arbitrator (as well as incorporating the AAA rules). However, at that juncture, no arbitration had been commenced and no arbitrator appointed.

The motion for stay pending arbitration was under 9 U.S.C. § 3. It provides that the court must determine whether the dispute is referable to arbitration, and whether the applicant for stay is in default. It seems this language in the circumstance is sufficient to allow the court to determine arbitrability.

The alternative it seems is to require the moving party to commence an arbitration and submit the arbitrability issue to the arbitrator — per language of the agreement and incorporated AAA rules. This would also be a delegation of the court's responsibility to the arbitrator.

This author knows of no case where in a civil action a motion to stay pending arbitration was filed, the plaintiff asserted that the arbitration agreement was invalid, there was no pending arbitration, the arbitration agreement provided the arbitrator should decide arbitrability, the court deferred determination of the motion until an arbitration was commenced, and the arbitrator determined arbitrability. Hopefully, there will be no such cases in the future.

On the other hand, suppose an arbitration is commenced, and the respondent files a motion in district court to stay arbitration asserting that there is no valid arbitration agreement, and the agreement provides for the arbitrator to determine arbitrability issues. The court may well refer the arbitrability question to the arbitrator, and based upon the arbitrator's decision (and after such review thereof) determine the motion to stay arbitration.

If the court refers the issues to arbitration, thereafter the court may return to those issues upon the filing of a motion to confirm or vacate the award following the arbitrability decisions. Perhaps an interlocutory "appeal" of an arbitrator's decision upholding arbitrability (*i.e.*, before the hearing on the merits) can be made.

Qualcomm Inc. v. Nokia Corp.

In *Qualcomm Inc. v. Nokia Corp.*,[222] Qualcomm sued Nokia, and Nokia filed a demand for arbitration for determination of two affirmative defenses to the patent infringement claims and moved to stay the civil action pursuant to FAA § 3. Upon the motion to stay being denied, Nokia appealed. At issue in the denial of Nokia's motion to stay the civil action was whether Nokia's affirmative defenses were arbitrable.

The Federal Circuit defined the issue as:

> [H]ow to reconcile an agreement to delegate arbitrability decisions to an arbitrator in accordance with the language of section 3 of the FAA, which specifies that the district court be "satisfied" as to the arbitrability of an issue before ordering a stay. Thus, we must necessarily determine what inquiry the district court should perform in order to be "satisfied" under section 3.[223]

Nokia asserted that the agreement defined the parties' intent to delegate arbitrability issues to the arbitrator. Accordingly, Nokia asserted that the trial court was required to stay the civil action until an arbitrator decided the arbitrability of the disputed issue (unless wholly groundless).

Qualcomm, on the other hand, asserted that, notwithstanding the provision in the arbitration agreement, the court had to rule on the arbitrability of an issue in order to be "satisfied" under § 3 that the issue was arbitrable. The Federal Circuit answered:

> [I]n order to be "satisfied" of the arbitrability of an issue pursuant to section 3 of the FAA, the district court should first inquire as to who has the primary power to decide arbitrability under the parties' agreement. If the court concludes that the parties did not clearly and unmistakably intend to delegate arbitrability decisions to an arbitrator, the general rule that the "question of arbitrability . . . is . . . for judicial determination" applies and the court should undertake a full arbitrability inquiry in order to be "satisfied" that the issue involved is referable to arbitration. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). If, however, the court concludes that the parties to the agreement did clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator, then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is "wholly groundless." *See Dream Theater, Inc. v. Dream Theater*, 21 Cal. Rptr. 3d 322, 326 (Cal. App. 2004). If the court finds that the assertion of arbitrability is not "wholly groundless," then it should stay the trial of the action pending a ruling on arbitrability by an arbitrator. If the district court finds that the assertion of arbitrability is "wholly groundless," then it may conclude that it is not "satisfied" under section 3, and deny the moving party's request for a stay.[224]

As to waiver of the right to have the court determine arbitrability issues, see §§ 8.3.3 and 8.4.4.

§ 8.9.2—Arbitrability Issues First Raised In The Arbitration

If an arbitration is commenced and there is no pending civil action, all of the arbitrability issues may be raised in the arbitration for determination by the arbitrator. Alternatively, a respondent may commence a civil action and request a stay/dismissal of the arbitration. Whether the court or the arbitrator decides the issues is the subject of the prior sections.

Under FAA § 4, once a respondent raised arbitral defenses, such as asserting the invalidity of the arbitration clause, one court held that the claimant was required to petition the court for an order compelling arbitration.[225] This would not seem to be Colorado law. Generally, the party seeking relief — a stay or dismissal of the arbitration — should have the obligation to proceed to seek that relief. Perhaps the holding has more weight when the arbitral issue is one for the court, and not the arbitrator, to decide.

For example, in *Gilmore v. Brandt*,[226] the claimant commenced a FINRA arbitration. The respondent filed, *inter alia*, a document "reserving all rights to challenge the jurisdiction of FINRA at a later date," as well as asserting his jurisdictional objection in both his answer and prehearing brief and his post-award challenge. The arbitration panel did not address these arguments, other than stating that any relief not specifically addressed in the award was denied.

The court held that the claimant could properly raise his jurisdictional defense as a part of his motion to vacate, saying:

> Although procedurally, it would have been more proper for Brandt to seek a stay of the arbitration in order to contest the issue of arbitrability. . . given the presumption against agreements to arbitrate arbitrability . . . and the repeated nature of Brandt's challenge to the jurisdiction of the arbitration panel, I find that he sufficiently preserved his objection to arbitrability. . . . This does not mean that the dispute was not arbitrable, but simply that it falls to me to decide whether it was.[227]

The court did not discuss whether the parties had "clearly and unmistakably" agreed that the arbitrator should decide arbitrability questions and, if so, whether the parties waived that agreement.

When an arbitration is commenced, and the respondent asserts the claims are not arbitrable, the best course of action may be for the respondent to seek a stay of the arbitration to contest the issue of arbitrability. This stay could be sought from the arbitrator or the court, depending upon which the respondent contends has jurisdiction over the objection. If the respondent does not do so, he or she might be deemed to have waived his or her objection to arbitrability. *See* §§ 8.6.5 and 8.7.5. However, if the respondent objects at every opportunity to the jurisdiction of the arbitrators, his or her objection will be preserved for determination after the arbitration award by motion to vacate.[228] To the contrary effect, see *Harper Hoffer & Associates, LLC v. Northwest Direct Marketing, Inc.*[229]

If the claimant wants the arbitrability issue determined before the arbitration proceeds, he or she can move the arbitrator to decide the issue or, in court, move to compel arbitration.

If the arbitrator decides the issue, review is probably deferred until post-award. If a party asserts that the court and not the arbitrator should decide the issue, a prompt filing in court is best, although continuous objections to the arbitrator may preserve the issue.

As to waiver of the right to have the court determine arbitrability issues, see §§ 8.3.3 and 8.4.4.

§ 8.10 • PROCEDURES AFTER DETERMINING THE ARBITRATION ISSUES — APPEAL

After an arbitrator has determined issues such as have been discussed in this chapter, at some juncture the determinations are subject to "some" judicial review. The issues may include, provided timely objections were raised:

- That the court, not the arbitrator, should have decided the issue; and
- That the arbitrator's decision was wrong.

Whether an "interlocutory" appeal may be made, or whether an appeal may be made only after the arbitrator's final award, is discussed in Chapter 14, "Pre-Award Rulings, Interim and Provisional Orders, Sanctions and Enforcement, and Judicial Involvement in the Arbitration Process," and in Chapter 17, "Post-Award Proceedings Before Arbitrator and District Court: Modification/Correction/Vacation of the Award." The scope of review is also discussed in those chapters.

Similarly, if a district court decides the issue, appealability is discussed in Chapter 20, "Appeal of Trial Court Orders and Judgments."

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164. *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 919 (9th Cir. 2009), *rev'd*, 561 U.S. 63 (2010).

165. *Cf. John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Ironworkers, Shopman's Local #493 v. EFCO Corp. & Constr. Prods., Inc.*, 359 F.3d 954 (8th Cir. 2004); CRUAA § 13-22-206(3) (2016); *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) ("courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration . . . include[ing] . . . time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.").

166. *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003); *Kemiron Atlantic, Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002).

167. *BRM Constr., Inc. v. Marais Gaylord, L.L.C.*, 181 P.3d 283, 284 (Colo. App. 2007); *Serv. Emps. Int'l Union v. Mental Health Center of Denver*, 2010 U.S. Dist. LEXIS 90760, 2010 WL 2985619 (D. Colo. July 23, 2010); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs. Inc.*, 623 F.3d 476 (7th Cir. 2010).

168. *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476 (7th Cir. 2010).

169. *Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C.*, 35 So.3d 601 (Ala. 2009). *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

170. *Brasfield & Gorrie*, 35 So.3d at 607 n. 1; *UBS Fin. Servs., Inc. v. West Virginia Univ. Hosps., Inc.*, 660 F.3d 643, 655 (2d Cir. 2011) ("[V]enue is a procedural issue that FINRA's arbitrators should address in the first instance. . . .").

171. *See Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174 (10th Cir. 2007) (discussing a Texas state court decision).

172. *See White River Village, LLP v. Fid. & Deposit Co. of Maryland*, 2013 U.S. Dist. LEXIS 41276, 2013 WL 122110 (D. Colo. March 25, 2013); *Tucker v. Lamer Worldwide, Inc.*, 2005 WL 1924407 (D. Colo. 2005); *Employers Ins. Co. of Wausau v. Onebeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. 2014); *Grigsby & Assocs., Inc. v. M. Secs. Inv.*, 664 F.3d 1350 (11th Cir. 2011).

173. *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105 (10th Cir. 2009); *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126 (2d Cir. 2015).

174. *SMBRCOA, LLC v. Bayside Resort, Inc.*, 707 F.3d 267 (3d Cir. 2013).

175. *EEC, Inc. v. Baker Hughes Oilfield Operations*, 460 F. App'x 731 (10th Cir. 2012) (matters concerning how the arbitration is to be conducted are "procedural questions," which are "presumptively" not for the judge, but for an arbitrator to decide.).

176. *Rent-A-Center, West, Inc.*, 561 U.S. at 68-69.

177. *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

178. *Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n. 1.

179. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010).

180. *In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269 (11th Cir. 2012) (waiver of right to have arbitrator determine whether a cost and fee shifting provision was unconscionable.).

181. *Harper & Hofer Assocs., LLC v. Northwest Direct Mktg., Inc.*, 2014 COA 153.

182. *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326 (3d Cir. 2014).

183. *Dent v. Encana Oil & Gas, Inc.*, 166 F. Supp. 3d 1210 (D. Colo.) (excellent discussion of issue and cases by Judge Arguello).

184. *Contec Corp. v. Remote Solutions Co.*, 398 F.3d 205 (2d Cir. 2005).

185. *Microchip Tech., Inc. v. U.S. Philips Corp.*, 367 F.3d 1350 (Fed. Cir. 2004).

186. *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmer, LLC*, 756 F.3d 1098 (8th Cir. 2014).

187. *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211 (5th Cir. 2003).

188. *Id.* at 214.
189. *Id.*
190. *Id.* at 218-19.
191. *Cf.* AAA Commercial Rule of Arbitration R-7.
192. *Prefab Legal Servs., Inc. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015).
193. *Id.* at 1298.
194. *Pacific Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).
195. *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068, 1079 (Colo. 2009) (citing *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 130 (Colo. 2007)).
196. *See Parker v. Ctr. for Creative Leadership*, 15 P.3d 297 (Colo. App. 2000).
197. C.R.S. § 13-22-203.
198. *See also City & County of Denver*, 939 P.2d at 1363-64; *Radil v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 233 P.3d 688 (Colo. 2010).
199. *Estate of Grimm v. Evans*, 251 P.3d 574 (Colo. App. 2010).
200. *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (Wis. 2006).
201. *Eychner v. Van Fleet*, 870 P.2d 486, 490 (Colo. App. 1993); *Parker v. Ctr. for Creative Leadership*, 15 P.3d 287 (Colo. App. 2000).
202. *Amadeus Corp. v. McAllister*, 232 P.3d 107 (Colo. App. 2009).
203. *Estate of Grimm v. Evans*, 251 P.3d 574 (Colo. App. 2010).
204. *Amadeus Corp. v. McAllister*, 232 P.3d 107 (Colo. App. 2009).
205. *Radil*, 233 P.3d at 694.
206. *Prima Paint Corp. v. Flood & Conkin Mfg. Co.*, 388 U.S. 395 (1967).
207. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 119-21 (Colo. 2007) (allegations of fraudulent inducement of the contract as a whole must be resolved by arbitration); *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126 (Colo. 2007) (allegations of fraudulent inducement specifically directed to the arbitration clause are to be determined by the court); *PFW, Inc. v. Residences at Little Nell Dev., LLC*, 292 P.3d 1094 (Colo. App. 2012).
208. *Amadeus Corp. v. McAllister*, 232 P.3d 107 (Colo. App. 2009).
209. *Estate of Grimm*, 251 P.3d at 576.
210. *Sopko v. Clear Channel Satellite Servs., Inc.*, 151 P.3d 663 (Colo. App. 2006).
211. *Id.* at 666 (citations omitted).
212. *BRM Constr., Inc.*, 181 P.3d at 284 (Colo. App. 2007); C.R.S. § 13-22-206(3) (2016).
213. *Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C.*, 35 So.3d 601 (Ala. 2009). *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).
214. *Estate of Grimm*, 251 P.3d at 571. *See also Spahr*, 330 F.3d at 1273.
215. *See* 9 U.S.C. §§ 3 and 4; CRUAA, C.R.S. § 13-22-207 (2016) (compel or stay arbitration).
216. *Cf. Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc.*, 98 P.3d 915 (Colo. App. 2004).
217. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366 (D. Colo. 2014), *aff'd*, 811 F.3d 371 (10th Cir. 2016).
218. FAA § 4; CRUAA, C.R.S. § 13-22-207 (2016).
219. *Cf. Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999).
220. *Cabs, Inc. v. Delivery Drivers, Warehousemen & Helpers Local Union No. 435*, 566 P.2d 1078 (Colo. App. 1977).
221. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366 (D. Colo. 2014), *aff'd*, 811 F.3d 371 (10th Cir. 2016).
222. *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006).
223. *Id.* at 1370.
224. *Id.* at 1371.
225. *MBNA Am. Bank, N.A. v. Kay*, 888 N.E.2d 288 (Ind. App. 2008); *contra Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 580 (8th Cir. 1998).
226. *Gilmore v. Brandt*, 2011 U.S. Dist. LEXIS 125812, 2011 WL 5240421 (D. Colo. Oct. 28, 2011).
227. *Gilmore*, 2011 U.S. Dist. LEXIS 125812, at *7-8.
228. *Id.*
229. *Harper Hoffer & Assocs., LLC v. Northwest Direct Mktg., Inc.*, 2014 COA 153.