Chapter 9

PROCEDURES TO STAY OR COMPEL ARBITRATION

SYNOPSIS

§ 9.1 • INTRODUCTION

As discussed earlier, the 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 Colorado Uniform Arbitration Act (CUAA) in 1975, the CUAA provided a statutory basis and procedure for enforcement.

This chapter deals with enforcement of arbitration agreements — motions to compel arbitration and stay litigation, as well as motions to stay arbitration. These motions bring the arbitrability issues to the forefront: the party opposing arbitration asserts an arbitrability issue as a defense to arbitration. Today, these motions are largely statutory procedures.

The issues are raised in two primary contexts. First, a civil action is commenced, and the defendant asserts the dispute must be arbitrated. Hence, the defendant files a motion to compel arbitration and stay the litigation.

The second context is when an arbitration is commenced of disputes that the respondent asserts are not subject to arbitration. The respondent commences a civil action to stay the arbitration or requests the arbitrator to stay the arbitration.

The issues determinative of whether the dispute will be arbitrated are the arbitrability issues. Chapter 7 discusses the arbitrability issues and the law with respect thereto. Chapter 8 discusses whether the court or the arbitrator will determine the issues. This chapter discusses the procedures for raising and determining the issues.

§ 9.2 • STATUTORY PROVISIONS FOR COMPELLING OR STAYING ARBITRATION OR STAYING LITIGATION

§ 9.2.1—Compelling Arbitration Under The FAA

FAA § 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.

- Annot., *Construction & Application of Mandatory Stay Provision of Federal Arbitration Act*, 9 U.S.C.A. § 3, 1 A.L.R. Fed.2d 557.

FAA § 4

> **Failure to arbitrate under agreement**
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . If the jury [or court] 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 court] 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.

Staying Arbitration Under the FAA

The FAA does not have an express provision providing for a stay of arbitration in the event the court finds the dispute is not subject to arbitration; nevertheless, generally courts will stay such an arbitration proceeding.

§ 9.2.2—Compelling Arbitration Under The CRUAA

C.R.S. § 13-22-207

(1) Upon 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.

§ 9.2.3—Which Law In Which Court

The FAA, if applicable, is applicable in whole or in part in state court proceedings. Similarly, the CRUAA, if applicable, is applicable in state court proceedings. *See* Chapter 4.

§ 9.2.4—Statute Of Limitations

- Annot. *Which Statute of Limitations Applies to Efforts to Compel Arbitration of a Dispute*, 77 A.L.R.4th 107.

§ 9.2.5—In Which Forum Is The Motion Filed

If counsel is filing a motion in a pending civil action — a motion to stay litigation and compel arbitration — the court's jurisdiction over the motion is established by the jurisdiction over the underlying claims. If counsel is commencing a civil action so as to file the motion — a motion to stay litigation — independent jurisdiction probably must be established. *See* Chapter 19, "Jurisdiction and Venue of the State and Federal District Courts and of the Arbitrator."

§ 9.3 • COMPELLING OR STAYING ARBITRATION AND/OR STAYING CIVIL ACTION: GENERALLY

This section deals with the situation in which a civil action has been commenced, and the defendant asserts the dispute must be arbitrated.

§ 9.3.1—Motion By Defendant In Pending Civil Action To Stay The Civil Action And Compel Arbitration Of The Claims

FAA

The role of the court under the FAA, and probably to the same effect under the Colorado arbitration statutes, was defined by the Eighth Circuit Court of Appeals in *Pro Tech Industries, Inc. v. URS Corp.*[1]

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

Thus, prior to the arbitration's commencing, two issues may be presented: whether there is a valid and enforceable agreement to arbitrate, and, if so, whether the particular dispute is within the scope of that agreement. However, those issues encompass several sub-issues, discussed in earlier chapters. Usually, these issues are raised before a court in conjunction with a motion or response to a motion to a court to stay or compel arbitration. Sometimes the issues are simply submitted to the arbitrator as preliminary issues for his or her determination, with or without express agreement in the arbitration agreement as to whether the arbitrator has jurisdiction or power to determine them.

The Colorado federal district court defined the procedures and burden of proof for a motion to compel arbitration.[2]

- The motion is governed by a standard similar to that governing motions for summary judgment: evidence sufficient to demonstrate an enforceable arbitration agreement.
- If the movant shows the foregoing, the burden shifts to the opponent to raise a genuine issue of material fact as to the making of the agreement, evidence comparable to that identified in F.R.C.P. 56.
    - The facts must be supported by reference to an affidavit, deposition transcript, or specific exhibit.
- If a genuine issue of material fact is shown, then a trial on the existence of the arbitration agreement is held.
- A jury trial may be held on the issues of fact, if requested.

As to the role of a jury, see § 9.7.7.

CRUAA

In *Cabs, Inc. v. Delivery Drivers, Warehousemen & Helpers Local Union 435*,[3] the drivers union moved the court to compel the cab company to arbitrate certain contract issues, pursuant to an arbitration provision in the collective bargaining agreement. The cab company asserted that the issue — gasoline prices paid by drivers — was not within the scope of the arbitration agreement.

The Colorado Court of Appeals denied the motion to compel, setting forth the following principles:

- Arbitration is favored as a method of resolving disputes.
- The district court is empowered to stay arbitration proceedings upon a showing that there is no agreement to arbitrate.
- Where it is apparent from the language of the arbitration agreement that the issue sought to be arbitrated lies clearly beyond the scope of the arbitration clause, a court cannot order arbitration.
- If there is a reasonable basis for construing the agreement in support of arbitrability, the legislative policy underlying the Act requires that the scope of the arbitration be determined by the arbitrator.

Practice Pointer

If the plaintiff commences a lawsuit in the Colorado federal district court, and the defendant wishes to compel arbitration pursuant to §§ 3 and 4 of the FAA, caution must exercised as to how to "respond" to the complaint pursuant to F.R.C.P. 12, or the defendant may find itself in default. In *Let's Go Aero, Inc. v. Cequent Performance Products, Inc.*,[4] the defendant "responded" by filing a motion to "compel arbitration and to administratively close this case, or in the alternative, to stay proceedings under 9 U.S.C. § 3 pending the outcome of arbitration." The court held that such a motion was not a response to the complaint so as to eliminate further response under F.R.C.P. 12. Rather, to stop the 21-day time period to respond, the defendant should have filed a motion to compel arbitration or, alternatively, to dismiss the civil action.

§ 9.3.2—Application To Compel Arbitration And Stay Litigation

Whether the FAA or state procedures are followed is discussed in Chapter 4. *See* § 9.7.1.

§ 9.3.3—Effect Of Order Compelling Arbitration Upon The Pending Civil Action: Staying Or Dismissing The Civil Action

CRUAA

If the trial court enters an order compelling arbitration, most courts hold that the civil action should be stayed, and not dismissed.[5] Whether the court dismisses the civil action upon compelling arbitration may determine whether the order is appealable at that juncture. *See* Chapter 20.

FAA

The Colorado federal district court has noted that upon the granting of a motion to compel arbitration, "9 U.S.C. § 3 directs that the Court stay this action while arbitration proceeds. The Defendants point to no authority that permits the Court to dismiss the claims in anticipation of the completion of arbitration."[6]

However, an Indiana court held that if upon the commencement of an arbitration, the respondent asserts lack of arbitrator jurisdiction, the claimant is required by FAA § 4 to seek a court order compelling arbitration.[7]

§ 9.3.4—Federal Court Enjoining State Court Litigation Pending Arbitration

It is common for a court to stay litigation that is pending before it, pending arbitration of those claims. However, *American Family Life Assurance Co. of Columbus v. Biles*[8] presented the situation of the litigation pending in state court, and in essence a motion to stay that litigation in federal court under FAA § 4.

Plaintiff Biles filed a civil action against American Family in state court. After Biles refused to arbitrate, American Family filed a petition to compel arbitration pursuant to FAA § 4. (Thereafter, American Family also filed a motion to compel arbitration in the state court; however, that proceeding remained largely inactive during the federal court proceedings.) The district court issued a final judgment and order compelling arbitration. It does not appear that the order stated it was staying/enjoining the state court litigation, but apparently the order issued had such an effect.

The Fifth Circuit rejected Biles's arguments that (1) the district court should have abstained under the *Colorado River*[9] abstention doctrine in deference to the state court proceedings, and (2) that the federal relief was barred by the Anti-Injunction Act, 28 U.S.C. § 2283.

> [A] district court has the discretion to issue an order staying a related state court proceeding it has determined must be submitted to arbitration if the district court concludes that it is necessary to protect or effectuate its order compelling arbitration.[10]

The court further stated: "Accordingly, the district court's order compelling Appellants to arbitrate their claims . . . and enjoining Appellants from continuing to litigate such claims in state court is not barred. . . ."[11] The order of the Fifth Circuit read: "[W]e AFFIRM the district court's entry of summary judgment and order compelling arbitration of Appellants' claims against Aflac and its agents."[12] In the order, no mention was made of the district court's having enjoined the state court proceedings.

§ 9.3.5—Waiver Of Right To Compel Arbitration

A defendant may waive its right to compel arbitration by participating in the litigation for two years, where it suggested defendant was attempting multiple bites at the apple and heads I win, tails you lose strategy.[13]

§ 9.3.6—Staying Arbitration Or Litigation When Some Claims Must Be Heard In Each Forum

It is not uncommon for a civil action or demand for arbitration to have some claims that are subject to arbitration and some that are not. Sometimes the claims are against multiple defendants, one of which is a party to an arbitration agreement with the plaintiff, while the other is not. *See* § 7.3.3. Or, sometimes some of the claims against a defendant are within the scope of an arbitration agreement, and some are not. *See* § 7.12. When a court pursuant to a motion to compel arbitration or to stay civil action makes that determination, which claims go first: the ones to be arbitrated or the ones that will be determined in litigation?[14] Often the importance of this question is defined by the doctrines of claim and issue preclusion. The proceeding that first proceeds may in fact decide parts of the second proceeding.[15]

§ 9.4 • COMPELLING ARBITRATION WHEN NO CIVIL ACTION IS PENDING

Sometimes, a claimant commences an arbitration, but the respondent refuses to participate. Under AAA rules, and probably under the common law, the claimant could proceed with default proceedings. After a default award is entered, and the claimant seeks confirmation and judgment, the respondent could raise arbitrability defenses by a motion to vacate, and have them determined.

However, the claimant may want the arbitrability issues determined up front before proceeding further. Hence, the claimant may commence a civil action and file a motion in court to compel arbitration. The procedures are substantially the same as when a civil action on the claims is commenced and a motion to compel arbitration of those claims is filed.

The FAA does not directly deal with this procedure. C.R.S. § 13-22-207 applies to all situations when the movant seeks to compel arbitration.

- Annot., *Construction and Application of Mandatory Stay Provision of Federal Arbitration Act*, 9 U.S.C.A. § 13, 1 A.L.R. Fed.2d 557.

§ 9.5 • STAYING OR DISMISSING PENDING ARBITRATION BY THE ARBITRATOR WHEN NO CIVIL ACTION IS PENDING

If a respondent in an arbitration is to assert that the dispute is not the subject of arbitration, he or she potentially may either (1) refuse to participate, allow a default proceeding, and raise the issue when application for confirmation of award is made; (2) move the arbitrator to dismiss the arbitration; (3) participate in the arbitration, after objecting to the arbitrator to preserve the right to raise the issue if the claimant moves to confirm an award; or (4) commence a judicial proceeding to stay the arbitration. Options (2) and (3) run some risk of waiving the objections to arbitration.

If the respondent commences a civil action, the court determines whether it or the arbitrator has jurisdiction to determine the arbitrability issue.[16] If the arbitrator is to determine the issue, the issue is remanded to the arbitrator.

If the respondent makes timely objection to the arbitrator as to the arbitrability of the dispute, the arbitrator may decide the issue or, if it is an issue to be determined by the court, leave the issue undecided and proceed with the arbitration. The objection perhaps is preserved for subsequent determination by the court, but perhaps not. Or, the arbitrator may determine the issue, recognizing such determination is ultimately for the court, and that the arbitrator's decision is merely advisory.

On the other hand, a court has jurisdiction to stay an arbitration proceeding upon a showing that there is no agreement to arbitrate.[17] Similarly, a court should stay the arbitration where it is clear that the dispute is beyond the scope of arbitration.[18] However, if there is a reasonable basis for construing the arbitration agreement to cover the dispute, the issue should be determined by the arbitrator.[19]

The Colorado federal courts follow the principle that the court determines the validity of an arbitration agreement, unless the agreement is clear that the parties intended to submit the issue to the arbitrator.[20] Applying this principle, the Tenth Circuit held that an arbitration panel exceeded its authority by proceeding with the arbitration before a judicial determination of the arbitrability of the dispute.[21] The claimant/plaintiff commenced National Association of Securities Dealers (NASD) arbitration. The respondent/defendant objected to the arbitration on the ground it had not entered into an agreement to arbitrate. NASD proceeded with the arbitration and made an award in favor of the claimant. However, the respondent did not participate except to object to NASD's arbitration jurisdiction. Then, the claimant/plaintiff moved to confirm the award, and the respondent/defendant moved to vacate the award. The Tenth Circuit stated:

> The district court ruled in defendants' favor because it concluded that, in the face of the challenge to the existence of an agreement to arbitrate, a judicial determination about the arbitrability of [claimant] Mr. Smith's complaints should have been made before those matters were submitted to arbitration.[22]

The Tenth Circuit noted that because the arbitrators proceeded notwithstanding the objection, they "must have decided that the dispute was arbitrable despite their objections."[23] The court noted that the Supreme Court had held that the question of arbitrability "was subject to independent review by the courts."[24] The court noted that it "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."[25] However, the court did not address whether, in fact, the parties had agreed to arbitrate arbitrability issues. Perhaps the inference is that they did not.

The court rejected that a court need not decide the arbitrability question before the arbitration commences. If the decision was correctly decided, several principles can be defined.

- If the respondent objects to arbitration on the ground it did not agree to arbitrate, that issue must be determined before the arbitration proceeds.
- If there is no clear and unmistakable evidence that the parties agreed to arbitrate arbitrability issues, it is an issue for the court to determine.
- If so, the respondent need do nothing. The arbitration cannot proceed until the claimant files a civil action to compel arbitration and have the arbitrability issue determined.
- If there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability, then the arbitrator determines the issue.
- But, if the arbitrator determines there was an agreement to arbitrate, the respondent may have a right of "independent review" by a court before the arbitration can proceed.

On the other hand, whether conditions precedent to arbitration have been fulfilled is a question for the arbitrator, and not the court.[26]

In *Max Software, Inc. v. Computer Associates International, Inc.*,[27] the defendant moved to stay the civil action and compel arbitration. The plaintiff responded, challenging the validity of the arbitration clause and requesting discovery on its contention that the arbitration provision was fraudulently induced, unconscionable, against public policy, and had been waived. In refusing to stay

proceedings, including discovery, pending a determination of the arbitrability issue by the district judge, the magistrate judge found that the allegations must in essence factually allege sufficient basis for not enforcing the arbitration clause.

The CRUAA initially defines the division of authority between arbitrator and court as to determining the existence, validity, and scope of an arbitration agreement, as well as the existence of conditions precedent to arbitration. Section 13-22-206, after providing for the validity of arbitration agreements, states:

> (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.

However, § 204(1) provides that except as otherwise provided by subsections (2) and (3) of § 204, a party to an agreement to arbitrate may waive, or the parties may vary the effect of, the requirements. Subsections (2) and (3) do not apply to §§ 206(2), (3), and (4). Thus, §§ 206(2), (3), and (4) govern, unless the parties otherwise agree.

Proceedings to compel or stay arbitration are statutory judicial proceedings. Whether this proceeding should be or can be brought in state or federal courts (and the venue for each) is discussed in Chapter 19.

§ 9.5.1—Commencing Civil Action And Moving To Stay Arbitration

A respondent in an arbitration who asserts (1) that the dispute is not subject to arbitration, and (2) that the court and not the arbitrator should decide the issue, should commence a civil action and move to stay arbitration. Were the respondent to instead file the motion with the arbitrator, it may be estopped to deny the arbitrator's power to decide the issue.

§ 9.5.2—Motion To Arbitrator To Stay Arbitration

A respondent in arbitration who contends (1) that the dispute is not subject to arbitration, and (2) that the arbitrator, not a court, has the power to decide the issue, should file the motion to stay arbitration with the arbitrator. To file such a motion with the court probably constitutes a waiver of any right to have the issue resolved by the arbitrator.

If the respondent files its motion to stay with the arbitrator, the claimant may assert it is an issue to be determined by a court. It is unclear whether in that circumstance the claimant may note its objection to arbitrator determination but proceed to brief and argue before the arbitrator, or whether a court proceeding should be commenced.

§ 9.6 • JURISDICTION AND VENUE OF THE COURTS TO DETERMINE MOTION TO COMPEL OR TO STAY ARBITRATION AND TO STAY LITIGATION, AND CONTINUING JURISDICTION THEREAFTER

See Chapter 19.

If a civil action has been commenced on the claims for relief, then issues of jurisdiction, venue, and personal service may have been resolved before arbitration issues are raised. Typically, the issue arises when a lawsuit is filed and the defendant asserts the dispute must be arbitrated. Hence, the relief of staying the litigation and compelling arbitration is requested of the court.

However, if the court determines the arbitrability issue is one to be determined by the arbitrator, the court may require that an arbitration procedure be commenced and the arbitrability issue determined therein. It is equally likely, however, that the court will determine those issues before entering an order. There is no meaningful Colorado case law on the subject.[28]

§ 9.6.1—Jurisdiction And Role Of The Court Upon Entry Of Order Compelling Arbitration

The general rule is that upon determination that a dispute is within a valid and enforceable arbitration clause, the court, with limited exceptions, no longer has jurisdiction over the dispute.[29] However, in the District of Colorado, Judge Kane frequently retains jurisdiction to monitor the arbitration, particularly as to discovery. For example, in *1mage Software, Inc. v. Reynolds & Reynolds Co.*,[30] he granted the motion to compel arbitration and stay civil action, stating, "I shall retain jurisdiction to monitor the progress of the arbitration. Accordingly, the parties shall submit quarterly joint status reports governing the progress of the ADR efforts. . . ."[31]

Similarly, when the parties to a civil action settled their differences and entered into a settlement stipulation providing that issues thereafter arising thereunder would be arbitrated, upon approval of the stipulation, the district court retained jurisdiction to enforce its terms. Ultimately, the district court in the same civil action vacated a portion of an arbitration award.[32]

A Texas court was presented with the question of whether, prior to enforcing an arbitration clause under the FAA, the trial court can enter other orders that do not constitute a trial. "Does the FAA allow the trial court to exercise control of the litigation for everything prior to the trial date?" The court rejected that the trial court could order the parties to mediate, because it would "undermine[] the expectation of the parties that their dispute would be resolved by proceedings directed by an arbitrator."[33]

Of course, there are statutory and common law exceptions to this general rule, such as preliminary injunctions and enforcement of subpoenas.[34]

§ 9.6.2—Remand To State Court Versus Ruling On FAA § 3 Motion

The obligation of a federal court to rule on a motion under FAA § 3 takes priority over the discretion of that court to remand a case removed from a state court that asserts a declaratory judgment claim.[35]

§ 9.6.3—Jurisdiction Of Federal Magistrate

A motion to compel arbitration in federal court is considered non-dispositive, and therefore a magistrate judge may decide the motion.[36]

§ 9.7 • JUDICIAL PROCEDURE FOR DETERMINING A MOTION TO STAY OR COMPEL ARBITRATION

§ 9.7.1—Application For And Procedure To Compel Arbitration And Stay Litigation

Under §§ 3 and 6 of the FAA, the proceeding is commenced by a motion to the court, which is made and heard in the manner for the making and hearing of motions. Five days' notice of the application must be given to a party refusing to arbitrate, with service in the manner provided by the Federal Rules of Civil Procedure.[37] If the making of the agreement to arbitrate or the failure to comply therewith is not in issue, the court shall order the parties to arbitrate in accordance with their agreement. If the making of the arbitration agreement or failure to arbitrate is in issue, the court proceeds to summary trial, to the court or with a jury. Those issues are then determined, and an appropriate order is issued.

The procedures under CRUAA § 207 are analogous. The CRUAA, C.R.S. § 13-22-206(4) (2016), provides:

> (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.

The word "may" suggests that the arbitrator can decide to stay the arbitration, pending the court's determination of the challenge to arbitration. Query whether this stay takes priority over the parties' agreed deadline for the arbitration.

If a plaintiff files a civil action, and the defendant believes the claim is subject to an arbitration agreement, the typical response is for the defendant to file a motion to stay civil action and to compel arbitration. It is unclear whether Rule 12 of the Rules of Civil Procedure applies to this motion, or whether the defendant must join any other Rule 12(b) motions it has with respect to the civil action. However, this author respectfully submits that in order to expedite the arbitration process, a motion to compel arbitration ought to be permitted without joining other Rule 12(b) motions, and without waiving them.

Arbitration has also been enforced outside the provisions of the CRUAA and FAA. For example, upon application, a court issued an injunction against continuing an arbitration.[38]

The statutes do not mandate that a demand for arbitration be made before an application for a stay of the civil action is filed.[39]

After the court has entered a stay of a civil action and/or an order compelling arbitration, who has the duty to commence the arbitration in order for the claims to be pursued? If the defendant in a civil action seeks or obtains an order staying the litigation and compelling arbitration, he or she has no

duty to commence the arbitration — that is the duty of the party seeking relief.[40] If a court grants a motion to compel arbitration and, if the plaintiff does not thereafter commence arbitration, the court may dismiss with prejudice the civil action, analogizing it to dismissal for failure to prosecute.[41]

Upon a motion to stay litigation and compel arbitration, the court has discretion as to whether to stay discovery pending resolution of the motion. Factors to be weighed include: "(1) the interest of Plaintiff; (2) the burden on Defendants in going forward; (3) the Court's convenience; (4) the interest of non-parties, and (5) the public interest in general."[42]

See also § 9.8.

The Third Circuit, in *Guidotti v. Legal Helpers Debt Resolution, LLC*,[43] attempted to define when a motion to compel should be treated like a motion to dismiss (and discovery not allowed) and when it should be treated like a motion for summary judgment (and discovery generally allowed):

> [W]hen it is apparent, based on "the face of a complaint, and documents relied upon in the complaint," that certain of a party's claims "are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay." But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then "the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] questions." After limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard. In the event that summary judgment is not warranted because . . . there is "a genuine dispute as to the enforceability of the arbitration clause," the "court may then proceed summarily to a trial regarding 'the making of the arbitration agreement. . . .'"[44]

Discovery Pending Determination of the Motion

There are two types of discovery during the pendency of the motion:

1) Discovery relevant to determining the arbitrability motion; and
2) Discovery on the merits of the dispute.

Sometimes discovery is necessary with respect to the federal issues in the motion. For example, facts relevant to the signatory's authority to sign the arbitration agreement, the facts behind the alleged duress in executing the agreement, etc. As with any motion, the court can allow discovery relevant to the fact issues is raised by the motion.

With respect to discovery on the merits during the pendency of the motion, courts take different approaches: allow no discovery (particularly if the court is going to expedite determination of the motion), allow regular discovery to proceed, or allow essential discovery to proceed. The court will be particularly alert to what discovery can occur if the dispute goes to arbitration.

§ 9.7.2—Grounds For Motion To Compel Arbitration

In order to compel arbitration, "a party need only show: (1) an agreement to arbitrate, (2) a dispute within the scope of the arbitration, and (3) a refusal by the opposing party to proceed to arbitration."[45] Upon so alleging, the language of the statutes applies. *See* the previous sections in this chapter.

The FAA 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.[46] These provisions require the court to order arbitration unless an arbitrability issue raised by the opposing party is found in the opposing party's favor.[47]

§ 9.7.3—Procedure To Assert Arbitrability Issues

If an arbitration is commenced, and a respondent wishes to assert an arbitrability defense (dispute not subject to the arbitration), it appears the respondent might be able present the defense to the arbitrator, and, if denied, immediately move a court to stay the arbitration on the same ground.[48] However, the weight to be given the arbitrator's decision is unclear. Perhaps the motion to the court is more in the nature of an appeal.

Generally, the question of whether to stay or compel arbitration turns on arbitrability issues. These are typically contract issues, what have the parties agreed to. In addition, there are sometimes issues as to whether the court or the arbitrator will determine these contract issues.

FAA § 4 provides:

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue . . . the party alleged to be in default may . . . demand a jury trial of such issue, and upon such 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 specifically call a jury for that purpose.

The state statutes, by contrast, do not have such a provision, and may not follow that procedure: a motion to stay or compel is equitable in its nature, or simply a procedural issue not involving any right to a trial by jury. It is anticipated that even if the FAA were applicable, a state court's procedure for a motion to compel or stay would not be preempted.

However, even in federal court, the right to a jury trial to determine whether the parties agreed to arbitrate is not absolute. The party seeking the jury trial must establish a dispute of material fact — a genuine issue as to whether there was an agreement to arbitrate.[49] The Second Circuit described the necessary showing as an unequivocal denial that an agreement to arbitrate had been made, plus "some evidence" produced to substantiate the denial.[50]

A motion to compel arbitration is a motion to dismiss for lack of subject matter jurisdiction. It cannot be resolved by accepting the allegations of the motion as true; instead, a factual hearing must be held where factual issues are raised.[51]

The Colorado Supreme Court has defined the procedure to be followed if the validity of the arbitration agreement is raised:

> As between the trial court and the arbitrator, the trial court must resolve any allegation that the arbitration agreement is invalid. *J.A. Walker Co., Inc. v. Cambria Corp*, 159 P.3d 126, 130 (Colo. 2007). The trial court is permitted to "proceed summarily" to decide whether the agreement is valid. *Id.*; § 13-22-207(1)(b) (governing motions to stay and compel arbitration). A summary proceeding "is an expedited process that starts with a trial court considering affidavits, pleadings, discovery, and stipulations submitted by the parties. The court must determine whether material issues of fact are disputed and, if such factual disputes exist, it must conduct an expedited evidentiary hearing to resolve the dispute." *J.A. Walker*, 159 P.3d at 130 (internal quotations and citations omitted).[52]

§ 9.7.4—Evidentiary Hearing

Section 4 of the FAA provides for petitioning the court for an order directing that arbitration proceed (compelling arbitration). That section further provides, "The court shall hear the parties" with respect to whether there is an agreement to arbitrate the dispute. It further provides that if the making of the arbitration agreement, or the failure, neglect, or refusal to perform is in issue, "the court shall proceed summarily to the trial thereof." The CUAA and CRUAA, however, merely provide that the court shall proceed "summarily" to decide the issue.

Some parties have urged an automatic entitlement to an evidentiary hearing on issues of arbitrability to be determined by a court. Generally, this position has been rejected by the courts, unless there is a dispute of fact.[53] However, the court may allow discovery on the factual issues presented.[54]

The Tenth Circuit has emphasized that if there is a dispute as to material fact with respect to whether the parties had agreed to arbitrate, the court must proceed to summary trial on the issue — "an expeditious and summary hearing, with only restricted inquiry into factual issues." The court noted that only the party resisting arbitration has the right to demand a jury, and held that discovery should be limited, without defining the limits.[55]

Where allegations of fraud in the procurement of the arbitration clauses are true, they would not state a claim for fraud in the inducement of contract, and a court may deny a jury trial because of the existence of a valid contract, and grant the motion to compel arbitration.[56] Thus, the court's action appears to be dismissal of the objection to arbitration on the grounds of failure to state an objection upon which relief can be granted. F.R.C.P. 12(b) standards and procedures seem appropriate.

This same court held that the objector had not established any basis for discovery.

The procedure to be followed by the court has been summarized:

> "Before the party may be compelled to arbitrate under the [FAA], the district court must engage in a limited inquiry to determine whether a valid arbitration agreement exists between the parties and whether the specific dispute falls within the scope of that agreement." *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994).[57]

§ 9.7.5—Sanctions

The court may assess attorney fees against an attorney under 28 U.S.C. § 1927, without a finding of bad faith, when an attorney "knows or reasonably should know that a claim pursued is frivolous,

or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims."[58] For example, where the plaintiff's counsel reasonably should have known that the claims asserted in his complaint were within the scope of the parties' arbitration clause, but contested the defendant's motion to compel arbitration while seeking a preliminary injunction on claims he should have known were arbitrable, sanctions may be imposed.[59]

§ 9.7.6—*Sua Sponte* Action

Can a judge *sua sponte* dismiss a case because of the existence of an arbitration clause covering the dispute? The Seventh Circuit answered "no," because the parties are entitled to waive arbitration.[60]

§ 9.7.7—Jury Trial On Arbitrability Issues

FAA

FAA § 4, "Failure to arbitrate under agreement; petition to the United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination," provides that upon a motion to compel arbitration:

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may . . . on or before the return day of the notice of application, demand a jury trial of such issue, and upon such 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 a jury finds 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 finds that an agreement for arbitration was made in writing and that there is a default thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 4, in part quoted above, defines procedures to be followed upon the filing of a motion/petition to compel arbitration. Such a motion might occur in a civil action filed by the other party, or when one party commences or is about to commence arbitration and the other party refuses to participate, *e.g.*, on grounds that the dispute is not within the scope of the arbitration agreement, or that there is no arbitration agreement. In this latter circumstance, the claimant may not wish to go through the arbitration process, obtain an award, and then have the respondent raise these defenses. Hence, a motion to compel arbitration provides an opportunity to have the respondent's arbitrability defenses determined prior to the arbitration — at least if the parties have not agreed these defenses should be determined by the arbitrator.

On the other hand, FAA § 3, "Stay of proceedings where issue therein referable to arbitration," has no provisions similar to § 4 providing for jury determination. Often, but not always, if a motion under § 3 is filed, it will be combined with a motion to compel litigation. In any event, under § 3, a court might well follow § 4 procedures.

Is the Jury Provision Applicable?

Section 4 provides that upon filing the petition/motion under § 4, the judge "hear[s]" the parties. If then "satisfied that the making of the agreement for arbitration or failing to comply therewith is not an issue, the court shall make an order directing the parties to proceed to arbitration. . . ." The judge's determination of whether he or she is satisfied probably is simply a determination of the pleadings: is there a controversy about the duty to arbitrate the issue?

The second step is a determination of whether summary disposition can be made, *i.e.*, as in any case, under the standard for determination of a motion for summary judgment. If the court can determine any issues in this manner, the issues are concluded.

However, if the court cannot determine the arbitrability issues on a summary judgment basis, the issues go to hearing, either to a jury, if requested, or to the judge.[61]

If a jury is requested, the jury will determine factual issues and apply the law as instructed by the court. Thus, a mini trial is held.

Issues Potentially Determined by a Jury

Section 4 defines the issues:

- Was an agreement for arbitration entered into by the parties?
- Did a party (respondent) fail, neglect, or refuse to comply with the agreement to arbitrate?
- Is the dispute within the scope of the agreement?

If not within the province of the arbitrator to decide, the court might also submit to the jury affirmative defenses to the arbitration agreement such as duress, unconscionability, etc. *See* Chapter 7.

There have been very few reported uses of juries under §§ 3 and 4. Normally, the facts are not in substantial dispute.

CRUAA

The CRUAA does not have any provisions providing for juries. That is not to say, however, that a Colorado judge could not use a jury in much the same manner as under the FAA — even if only in an advisory capacity.

§ 9.7.8—Stay Of Discovery On The Merits Pending The Court's Determination Of Motion To Compel Arbitration

When a defendant in a civil action moves to stay the litigation and compel arbitration, the plaintiff may proceed with its discovery pending the court's determination of the matter. On the other hand, desiring less discovery and anticipating less discovery will be allowed in arbitration. The defendant may move the court to stay all discovery pending the court's determination of the motion to compel arbitration.

The U.S. District Court for the District of Colorado has held that it has such power to stay. In determining whether to stay discovery, the court should consider (1) the plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to the plaintiff of a delay; (2) the bur-

den on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil action; and (5) the public interest. As to the second, the court noted that requiring the parties to submit to full discovery prior to a ruling on the motion to compel may unnecessarily subject them to the very complexities, inconveniences, and expenses of litigation that they determined to avoid.[62]

§ 9.7.9—Waiver Of Right To Arbitrate And Objections To Arbitration

- Annot., *Availability and Scope of Declaratory Judgment Action in Determining Rights of Parties, or Powers and Exercise Thereof by Arbitrators, Under Arbitration Agreement*, 12 A.L.R.3d 854.

§ 9.7.10—Discovery On The Arbitrability Issue

When there are factual issues underlying with respect to the arbitrability issues presented to the court, the court should allow limited discovery on those issues.[63] Generally, once a motion is on re-arbitrability is filed, any discovery is limited to that issue.[64]

However, a court may allow discovery on the merits on the theory that discovery on the merits will be allowed if the dispute is in arbitration or before a court, so allowing discovery sooner is more expeditious.

§ 9.7.11—Appeal From Decision Of Magistrate Judge

Frequently, motions to stay litigation or arbitration, or to compel arbitration, are referred by federal district judges to magistrate judges. Federal statutes as well as rules of civil procedure define when and under what circumstances such referrals can be made. Generally, as to review of such decisions/orders of a magistrate judge on such motions by the district court, see *Adetomiwa v. Redstone College*.[65]

§ 9.8 • ROLE OF COURT UPON COMPELLING ARBITRATION

Except as provided by statute and common law, pending the conclusion of arbitration, a valid and enforceable arbitration clause will divest a court of jurisdiction over any claims that the parties have agreed to submit to arbitration.[66] *See* §§ 9.6.1, 14.1, and 14.6.

When the court grants a motion to stay civil action and compel arbitration, and the plaintiff does not commence arbitration, the court may issue an order setting a deadline for so commencing, and stating that if not timely commenced, the civil action will be dismissed with prejudice.[67]

§ 9.9 • STAY OR DISMISSAL OF CIVIL ACTION UPON ORDERING ARBITRATION

Upon entering an order to compel arbitration, should the court dismiss the civil action or simply stay the civil action pending arbitration? In the latter event, there is an open civil action for further proceedings in connection with the arbitration, such as appointment of the arbitrator; enforcement of

subpoenas; and motions to modify, correct, vacate, or confirm the arbitration award. In general, the court may retain jurisdiction to monitor the progress of arbitration,[68] although this seems contrary to the principle that a valid and unwaived arbitration clause deprives the court of jurisdiction.[69] However, the Colorado Supreme Court stated that when a motion to compel arbitration is granted, the underlying civil action should be stayed, not dismissed.[70]

The U.S. District Court for the District of Colordo, in *Harwest Industrial Minerals Corp. v. Twin City Fire Insurance Co.*,[71] further noted the U.S. Supreme Court's comment that "it may be advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration. That decision is one left to the district court [or to the state trial court under applicable state procedural rules] as a matter of its discretion to control its docket."[72] Acknowledging that the arbitrator's findings on the claim against Lexington may not be binding on the court as to claims against Twin City, "the arbitrator's decision . . . could 'at the least inform or aid this court's consideration of' the claims against Twin City, and considerations of judicial efficiency, avoidance of confusion, and possible inconsistent results seemingly weigh in favor of staying the claims against Twin City pending the resolution of the arbitration."[73]

In determining whether it should stay the court claims against Twin City pending arbitration of the Lexington claims, the court indicated a need to weigh potential unfair prejudice to any party against the interests of judicial efficiency and the potential for confusion or inconsistent outcomes.[74] "Section 3 of the Federal Arbitration Act contemplates continuing supervision by the district court to ensure that arbitration proceedings are conducted within a reasonable period of time, thus preventing any impairment of the plaintiffs' right to seek relief."[75]

Similarly, the federal courts generally hold that a court, upon granting a motion to stay the civil action pending arbitration, should stay the litigation and not dismiss the civil action. "Section 3 of the Federal Arbitration Act contemplates continuing supervision by the district court to ensure that arbitration proceedings are conducted within a reasonable period of time, thus preventing any impairment of the plaintiffs' right to seek relief."[76]

Dismissal instead of stay is a judicially created exception to FAA § 3, which provides for stay. Dismissal generally is appropriate where it is clear the entire controversy between the parties will be resolved by arbitration. Considerations include whether a party might be prejudiced by dismissal. For example, if the litigation is dismissed, and thereafter the arbitrator dismisses the arbitration on gateway grounds, the statute of limitations on bringing a new civil action may have run to bar re-filing.[77]

In the Colorado federal district court, when a motion to stay civil action and compel arbitration is granted, typically the court will administratively close the case pursuant to its local rules, subject to reopening for good cause, and with an automatic dismissal without prejudice on a future date certain if no action is taken.[78]

The arbitration statutes do not provide for appeal of a district court order compelling arbitration, and the FAA rejects it. However, by entering a final order of dismissal, it becomes appealable under the general jurisdiction statutes of the federal and state courts of appeal.

§ 9.10 • APPEALS OF ORDERS DENYING OR COMPELLING ARBITRATION

If all claims are federal as to arbitration, the court should stay, not dismiss, the civil action.[79]

The impact of this distinction is that dismissal would make appealable an order compelling arbitration, whereas stay does not.

- Annot., *Appealability of Order or Decree Compelling or Refusing to Compel Arbitration*, 94 A.L.R.2d 1071.

§ 9.11 • BIBLIOGRAPHY

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NOTES

1. *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871 (8th Cir. 2004) (citation omitted) (emphasis original); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

2. *Cf. Grosvenor v. Qwest Commc'ns Int'l, Inc.*, 2010 U.S. Dist. LEXIS 43492, 2010 WL 3906253, at *5 (D. Colo. April 1, 2010). *See also GE Commercial Distr. Fin. Corp. v. Donwin, LLC*, 2011 U.S. Dist. LEXIS 67951, 2011 WL 2518905 (D. Colo. June 24, 2011); *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135 (D. Colo. 2012), *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013).

3. *Cabs, Inc. v. Delivery Drivers, Warehousemen & Helpers Local Union 435*, 566 P.2d 1078 (Colo. App. 1977).

4. *Let's Go Aero, Inc. v. Cequent Performance Prods., Inc.*, 78 F. Supp. 3d 1363 (D. Colo. 2015).

5. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006). *See* § 9.9.

6. *Bushman Inv. Props., Ltd. v. DBSI e-470 East. LLC*, 2010 U.S. Dist. LEXIS 21011, at *8, 2010 WL 582351 (D. Colo. Feb. 15, 2010). *See also* § 9.9.

7. *See MBNA Am. Bank, N.A. v. Kay*, 888 N.E.2d 288 (Ind. Ct. App. 2008). *Contra Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 580 (8th Cir. 1988).

8. *Am. Fam. Life Assurance Co. of Columbus v. Biles*, 714 F.3d 887 (5th Cir. 2013).

9. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

10. *Biles*, 714 F.3d at 893.

11. *Id.*

12. *Id.* at 897.

13. *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, 790 F.3d 1112 (10th Cir. 2015). *See* §§ 7.9, 8.6.5, 8.7.5, and 9.7.9.

14. So too, third-party claims.

15. *See generally Brahma Grp., Inc. v. Ames Constr., Inc.*, 2016 U.S. Dist. LEXIS 44689, 2016 WL 1266973 (D. Colo. April 1, 2016); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20 n. 23 (1983); *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1200 (10th Cir. 2009).

16. *See* Chapter 8, "Arbitrability Issues: Who Decides Them?"

17. FAA § 4; CUAA, C.R.S. § 13-22-204(2); CRUAA, C.R.S. § 13-22-207.

18. *Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999).

19. *Cabs, Inc. v. Delivery Drivers, Warehousemen & Helpers Local Union No. 435*, 566 P.2d 1078 (Colo. App. 1977).

20. *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1108 (D. Colo. 1999); *Parker v. Center for Creative Leadership*, 15 P.3d 297, 298 (Colo. App. 2000); *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. App. 1993).

21. *Smith v. Currency Trading Int'l, Inc*., 1999 U.S. App. LEXIS 18182 (10th Cir. 1999), *aff'g*, 10 F. Supp. 2d 1189 (D. Colo. 1998).

22. *Smith*, 1999 U.S. App. LEXIS 18182, at *2.

23. *Id.* at *5.

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

25. *Id.* (quoting *First Options*, 514 U.S. at 944).

26. *Todd Habermann Constr., Inc. v. Epstein*, 70 F. Supp. 2d 1170, 1175-76 (D. Colo. 1999).

27. *Max Software, Inc. v. Computer Assocs. Int'l, Inc*., 364 F. Supp. 2d 1233 (D. Colo. 2005).

28. *See* Chapter 19, "Jurisdiction and Venue of the State and Federal District Courts and of the Arbitrator."

29. *Encore Prods., Inc.*, 53 F. Supp. 2d at 1111; *Eychner*, 870 P.2d at 489. *See also Sopko v. Clear Channel Satellite Servs., Inc*., 151 P.3d 663 (Colo. App. 2006). *See also* §§ 14.1 and 14.6.

30. *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 273 F. Supp. 2d 1168 (D. Colo. 2003).

31. *Id.* at 1174-75; *see also Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 270 F. Supp. 2d 1205 (D. Colo. 2003), *rev'd on other grounds*, 356 F.3d 1256 (10th Cir. 2004). *See generally Stone v. Vail Resorts Dev. Corp.*, 2010 U.S. Dist. LEXIS 80849, 2010 WL 2653314 (D. Colo. July 1, 2010). As to intertwined defendants, see *Harwest Indus. Minerals Corp. v. Twin City Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 21045, 2010 WL 582364 (D. Colo. Feb. 18, 2010).

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

33. *In re Heritage Building Sys., Inc.*, 185 S.W.3d 539, 543 (Tex. App. 2006).

34. *See* 9 U.S.C. § 7; C.R.S. § 13-22-209 (2003); C.R.S. §§ 13-22-208 and -217 (2016).

35. *Countrywide Home Loans, Inc. v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849 (9th Cir. 2011).

36. *Cook v. PenSa, Inc.*, 2014 U.S. Dist. LEXIS 106730, 2014 WL 3809409 (D. Colo. Aug. 1, 2014).

37. 9 U.S.C. § 4.

38. *The NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010 (2d Cir. 2014).

39. *United Nuclear Corp. v. Gen. Atomic Co.*, 597 P.2d 290, 299 (N.M. 1979).

40. *See Grand Texas Homes, Inc. v. Hill*, 2008 Tex. App. LEXIS 3784, 2008 WL 2168147 (Tex. App. May 22, 2008); *Chris Meyers Pontiac-GMC, Inc. v. Perot*, 991 So.2d 1281, 1284 (Ala. 2008) ("[I]t is the burden of the 'aggrieved party' . . . to initiate the arbitration process by filing a demand for arbitration and by paying the filing fee. . . . [T]he aggrieved party is best situated to produce a statement of the controversy and to pay the filing fee — which is determined by the amount of the aggrieved party's claim, an amount presumably not known by the defendant until the claim is made."); *LJA Eng'g & Surveying, Inc. v. Richfield Inv. Corp.*, 211 S.W.3d 443, 446 (Tex. App. 2006) ("[A]s the party to the arbitration agreements who is making the claim, it was Richfield's burden to initiate the arbitration process. . . ."); *ProSpec, L.L.C. v. Mazzei*, 963 So.2d 938 (Fla. Dist. Ct. App. 2007). *See also* AAA Commercial Rule R-53.

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46. *See* 9 U.S.C. §§ 3 and 4; CUAA, C.R.S. § 13-22-204 (compel or stay arbitration); CRUAA, C.R.S. § 13-22-207 (compel or stay arbitration).

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49. *Doctor's Assocs., Inc. v. Jabush*, 89 F.3d 109, 114 (2d Cir. 1996); *see also Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096 (2d Cir. 1987).

50. *Doctor's Assocs., Inc.*, 89 F.3d at 114.

51. *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. App. 1993).

52. *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068, 1079 (Colo. 2009). *See also Estate of Grimm v. Evans*, 251 P.3d 574 (Colo. App. 2010).

53. *BFN-Greeley, LLC v. Adair Grp., Inc.*, 141 P.3d 937 (Colo. App. 2006); *Smith Barney, Inc. v. Harridge*, 201 F.3d 449 (10th Cir. 1999); *Wilson v. Am. Inv. Servs.*, 33 F. App'x 424 (10th Cir. 2002); *Blue Sky Grp., LLC v. Redcon Homes, Inc.*, 2006 Colo. App. LEXIS 1689 (Colo. App. Oct. 12, 2006); *Bellman v. i3Carbon, LLC*, 563 F. App'x 608 (10th Cir. 2014).

54. *Cf. Brooks v. Fetch! Pet Care, Inc.*, 2011 N.J. Super. Unpub. LEXIS 1236, 2011 WL 2374808 (N.J. App. May 13, 2011); *Grosvenor v. Qwest Commc'ns Int'l, Inc.*, 2010 U.S. Dist. LEXIS 109884, 2010 WL 389400 (D. Colo. Sept. 30, 2010).

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67. *See Kargbo v. FedEx Ground Package Sys., Inc.*, 2012 U.S. Dist. LEXIS 95725, 2012 WL 2860656 (D. Nev. July 10, 2012).

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77. *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 770 (8th Cir. 2011). *Compare* C.R.S. § 13-80-111 (Colorado statute of limitations is tolled, if action is terminated because of lack of jurisdiction, etc.).

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79. *Katz v. Cellco Partnership*, 794 F.3d 341 (2d Cir. 2015).