Chapter 12

PLEADINGS, MOTIONS, FEES, AND DEFAULT

SYNOPSIS

§ 12.1 • INTRODUCTION

Arbitration agreements may be a part of a contract between parties defining a transaction or relationship they have entered into. If so, the arbitration clause defines the method for resolving disputes with respect to that relationship or transaction (or some portion thereof) in case a dispute should arise. However, if there is no contractual clause, after a dispute between two or more parties arises, those parties may enter into an agreement to have that specific dispute resolved by arbitration.

An arbitration proceeding is commenced by the service/filing of what is commonly referred to as a demand for arbitration. Once any arbitrability issues that need to be determined by a court have been determined and the controversy is submitted to arbitration, it remains before the arbitrator until the parties mutually agree to withdraw it.[1] Very generally, once it is established that the dispute is subject to an arbitration, the court no longer has subject matter jurisdiction, as the dispute must be submitted to arbitration.[2] In general, that lack of jurisdiction continues until the award is entered, subject to separate statutory and common law jurisdiction, *e.g.*, to enforce subpoenas.

Generally, the party asserting a claim has the burden of initiating arbitration.[3] For example, if the plaintiff commences a civil action, the defendant may move to stay the civil action on the ground that the dispute is subject to arbitration. However, the defendant need not commence the arbitration in order to prevail on the motion to stay the litigation. If the defendant prevails, he or she still need not commence the arbitration, and instead can wait until, and unless, the plaintiff commences the arbitration.[4]

§ 12.2 • ADMINISTERED AND NON-ADMINISTERED ARBITRATION

An arbitration proceeding may be either "administered" or "non-administered." An administered arbitration is one where there is an agency that serves somewhat like a clerk of court. The filings are made with the administering agency, orders may be issued through the agency, compensation of the arbitrators is handled through the agency, and the agency may be involved in the selection and disqualification of the arbitrators. The best-known administrating agency is the American Arbitration Association (AAA). It provides clerk-of-court-type functions, but also substantive functions, such as rulings on requests to disqualify an arbitrator. Other organizations also administer arbitrations.

See § 2.3.2.

Non-administered arbitration differs in that there is no administering agency between the parties and the arbitrator. All communications are directly between the parties and the arbitrator, and the arbitrator handles everything, including such matters as compensation, filings, scheduling, arranging conferences, issuing orders, etc.

§ 12.3 • STATUTES AND RULES GOVERNING INITIATION/ COMMENCEMENT OF ARBITRATION

Usually, the parties can agree on most arbitration procedures (*e.g.*, rules of procedure) and frequently agree to simply incorporate arbitration rules. In the absence of such rules, the statutes govern, as supplemented by the arbitrator. The commencement of the arbitration is by filing or serving a demand for arbitration.

CRUAA

The Colorado Revised Uniform Arbitration Act (CRUAA), C.R.S. § 13-22-209 (2016), provides:

> (1) A person may initiate an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of an agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized by law for the commencement of a civil action. The notice shall describe the nature of the controversy and the remedy sought.

Thus, under the CRUAA, the arbitration is initiated by "giving notice in a record" to the other parties to the agreement to arbitrate. The "notice" given probably is the same as a "demand." "Record" is defined in C.R.S. § 13-22-201(6) (2016) as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Thus, e-mail may suffice. "Giving notice" is defined in C.R.S. §§ 13-22-202 and -209 (2016). The notice must simply "describe the nature of the controversy and the remedy sought." This statutory definition of a notice probably reflects the common law or custom.

Service under § 209 of the CRUAA is in the manner agreed to by the parties, by certified or registered mail, or as provided under rules and statutes governing civil actions.

FAA

The FAA is silent as to how an arbitration proceeding is commenced or service is made. Section 209 of the CRUAA provides a definition that most courts would accept, although by common law or custom an arbitration proceeding is commenced by the claimant's "serving" a demand for arbitration upon the respondent.

AAA

See Rule R-4 of the Commercial Arbitration Rules of the American Arbitration Association, "Filing Requirements." *See also* Chapter 26.

- Annot., *Which Statute of Limitation Applies to Efforts to Compel Arbitration of Dispute*, 77 A.L.R.4th 1071, 96 A.L.R. Fed. 378.

§ 12.4 • PLEADINGS: DEMAND, ANSWER, AND COUNTERCLAIM

Arbitration often is characterized by the sparseness of pleadings. On the other hand, the file can become as extensive as any court proceeding.

See Chapter 26.

§ 12.4.1—Demand

As indicated above, the FAA does not have any provisions with respect to the form or contents of a notice or demand for arbitration. Section 209 of the CRUAA requires that the notice "shall describe the nature of the controversy and remedies sought." However, given that the FAA does not have any provisions, and the issue also does not appear to have been the subject of judicial decision, it is likely that the requirement under all acts is nothing more than naming the parties and stating that there is a controversy within the scope of an arbitration agreement.[5] Thereafter, the arbitrator can ensure full disclosure of the claims so that the respondent will not be surprised.

The AAA rules define its requirements.

The notice probably must be in English when served on an English-speaking entity, if the recipient has no reason to know the contents.[6]

§ 12.4.2—Manner Of Service Of The Demand: Notice

Unless a person objects for lack or insufficiency of notice under FAA § 15(c) not later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack of or insufficiency of notice.

By custom, and perhaps common law, the issue has always been whether the respondent in fact received notice of the demand, without formality as to the manner of service. The FAA does not have provisions with respect to service of the notice or demand for arbitration. As quoted above, the CRUAA provides in § 209(1) that notice be given to the other parties to the agreement to arbitrate "in the agreed manner between the parties, or in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized by law for the commencement of a civil action." In Colorado, "service as authorized by law for the commencement of a civil action" is defined by C.R.C.P. 4 and F.R.C.P. 4.

The CRUAA, C.R.S. § 13-22-209, provides that "[a] person may initiate an arbitration proceeding by giving notice in a record to the other parties to the agreement. . . . The notice shall describe the nature of the controversy and the remedy sought." For example, where the parties' contract contains an arbitration clause, a letter by the attorney for the claimant asserting unpaid amounts, demanding payment within 10 business days, and stating that failure to pay in full will result in the creditor's moving forward to protect its legal rights, does not constitute notice of the arbitration.[7] The Colorado Court of Appeals has found a notice insufficient where it failed to inform the respondent of the pendency of an arbitration.[8]

C.R.S. § 13-22-202 defines "notice":

> (1) Except as otherwise provided in this [Act], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.
> (2) A person has notice if the person has knowledge of the notice or has received notice.
> (3) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

No doubt the manner of service provided under § 209(1) of the CRUAA would suffice under the FAA. More often, service is given simply by U.S. mail. While this may not suffice under the CRUAA, it should suffice under the FAA, provided that such service is in fact accomplished. Indeed, service by e-mail "might" suffice.[9] Under the CRUAA, the doctrine of waiver, discussed above, will allow regular U.S. mail if no objection is made.

If the AAA Commercial Arbitration Rules have been incorporated, Rule R-4 defines the service.

See § 17.4.13.

Waiver of Service

The CRUAA, C.R.S. § 13-22-209(2) (2016), provides:

> (2) Unless a person objects to the lack of notice or the insufficiency of notice under section 13-22-215(3) not later than the beginning of the arbitration hearing, a person who appears at the arbitration hearing waives any objection to the lack of notice or insufficiency of notice.

There are no similar provisions in the FAA. It is probable that under the FAA, and perhaps under the CRUAA, waiver could be found by the failure to object much earlier than the beginning of the arbitration hearing. For example, if the opposing party filed a response and did not object to the lack of notice or insufficiency of notice, that would be a waiver under Rule 12(b) of the Colorado Rules of Civil Procedure.[10] It is reasonably likely that an arbitrator and a court would hold the same in arbitration. Similarly, if a preliminary hearing were scheduled by the arbitrator, no notice of objection were given, and the parties "planned" for the forthcoming arbitration without objection, a waiver might well be found.

Note that under § 204(2) of the CRUAA, prior to a controversy arising under an agreement to arbitrate, the parties may not agree to unreasonably restrict the right under § 209 to receive notice of the initiation of the arbitration. This refers simply to notice, and perhaps not to the manner of notice, and it applies prior to a controversy arising.

§ 12.4.3—Jurisdictional Boundaries Of Service

Historically, parties could consent in advance to service of process upon them in a state outside the state in which the litigation was commenced. This was true even if the court would not have jurisdiction over the consenting party, *e.g.*, beyond the reach of the long-arm statute.

Hence, while rarely litigated, it appears that by agreeing to arbitration, a party has consented to service wherever it might be. Where the arbitration is to be held — the venue for the arbitration — is a separate topic, discussed in Chapter 13.

C.R.S. § 13-1-124(1)(g) provides that a person who enters into an arbitration agreement is subject to service under the long-arm statute. That should apply not only to judicial proceedings concerning the arbitration, but also to the arbitration itself.

§ 12.4.4—Answer/Response/Counterclaim To A Demand/Notice For Arbitration

There is no provision in any of the statutes for an answer or response or counterclaim by the respondent. Rule 5 of the AAA Commercial Arbitration Rules states that a respondent may file an answering statement with the AAA within 14 days after notice of the filing of the demand is sent by the AAA.

Again, it appears to be generally accepted practice and procedure in arbitration that unless the parties' agreement specifically provides for or requires a response to the notice of demand for arbitration, none is required. However, a response can be filed. When there is no time limit defined, the arbitrator can define the cutoff date.

Counterclaims

None of the statutes provides for a counterclaim. However, it is probable that custom (common law) allows counterclaims, at least if within the scope of the arbitration clause. Under AAA Commercial Arbitration Rule R-5, if a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedies sought — about the same content as a demand.

There is no authority in Colorado as to whether counterclaims in arbitration are compulsory under appropriate circumstances, such as defined in C.R.C.P. 13. It is not apparent whether an arbitrator has the power to require that compulsory counterclaims, as defined by the Rules of Procedure, be asserted. Lastly, if the respondent filed a separate demand for arbitration with respect to its claims against the claimant, could the arbitrator consolidate those two arbitrations? Could the court do so?

- Annot., *Claim as to Which Right to Demand Arbitration Exists as Subject of Compulsory Counterclaim under Federal Rules of Civil Procedure 13(a)*, 2 A.L.R. Fed. 1051.

Affirmative Defenses

Neither act refers to the pleading of affirmative defenses. Most arbitrators will require a respondent to define any affirmative defenses so that the claimant will not be surprised at the hearing.

§ 12.4.5—Further Pleadings And Procedures

The statutes do not provide for any further procedures or pleadings. The AAA Commercial Arbitration Rules provide for new or different claims or counterclaims in Rule R-6, and for an administrative conference pursuant to Rule R-10.

Prehearing Conferences

Regardless of whether rules defining subsequent procedures are a part of the arbitration agreement, most would agree that it is within the arbitrator's inherent power to reject subsequent pleadings, as well as hold pre-hearing conferences and similar pre-hearing proceedings.

§ 12.4.6—Objections To Initiation Of Arbitration And Notice — Waiver

A party waives objections to a notice of initiation of arbitration or notice of the arbitration hearing if he or she appears at the hearing without objection.[11] The arbitrator may "cure" any deficiencies in notice or service, usually by postponing the hearing. "However, if a party does object but the arbiter wrongfully refuses to postpone the hearing, or if the party does not appear, that party perhaps may later move the district court to vacate the award [under C.R.S. §§ 13-22-223(1)(c) and (f)]."[12]

Notice must be given to initiate an arbitration, and is treated as a condition precedent to arbitrability.[13] Under C.R.S. § 13-22-206(3), the arbitrator decides whether such condition precedent has been fulfilled.[14] However, when insufficiency of notice is asserted as a ground to vacate an award, C.R.S. §§ 13-22-213(1)(f) and -223(1)(f), the court and not the arbitrator is the final judge of fact and law. The district court must make its own, independent findings as to the adequacy of the notice.[15]

§ 12.5 • MOTIONS

What motions can be filed in arbitration? The statutes generally do not have any provisions with respect to traditional motions in a civil action. An exception is the CRUAA, C.R.S. § 13-22-215(2), which provides for motions for summary disposition. The courts have held that arbitrators have the authority to grant prehearing motions.[16] Potential motions that might be made include:

- To dismiss on the ground that the dispute is not arbitrable;
- To dismiss for failure to state a claim;
- For preliminary injunction;
- To certify as a class;
- To bifurcate or consolidate;
- To join parties;
- To compel discovery;
- To quash or enforce a subpoena;
- To exclude evidence (motion *in limine*);
- To enforce orders (grant sanctions);
- To dismiss/transfer for improper or inconvenient forum; and
- For summary judgment.

Motions with respect to the arbitrability of the dispute may or may not be for the arbitrator, as distinguished from a judge. As provided by the statutes, motions to enforce subpoenas, at least if directed to non-parties, must, by statute, be made to a judge.

In the absence of anything in the agreement to arbitrate requiring or prohibiting motions, most arbitrators consider it within their inherent power to hear certain motions. Generally, they are the same

kinds of motions as a court would entertain, and with the same reluctance and hesitancy with respect to motions to dismiss for failure to state a claim, motions for summary judgment, etc. In sum, most arbitrators will follow very generally the court systems and procedures with respect to allowing motions.

§ 12.5.1—Motions For Summary Judgment/Dismissal

The CRUAA, C.R.S. § 13-22-215(2) (2016), provides that an arbitrator may decide a request for summary disposition of a claim or particular issue if (1) all interested parties agree, or (2) the requesting party gives notice to the other parties and they have a reasonable opportunity to respond.

While the FAA does not have a similar provision, numerous courts have held that an arbitrator has the power under the FAA to grant dispositive motions.[17]

In addition, AAA rules expressly give arbitrators authority to entertain dispositive motions. So too, the rules of other arbitration organizations.

§ 12.6 • FAILURE/INABILITY/REFUSAL OF ONE PARTY TO PAY FEES

None of the statutes has direct provisions relating to the arbitrator's fees and expenses.

What happens if a party is unable or unwilling to pay its share of the arbitration fees and costs?

- Annot., *Liability of Parties to Arbitration for Costs, Fees and Expenses*, 57 A.L.R. Fed.3d 633.

CRUAA

The CRUAA, C.R.S. § 13-22-221 (2016), "Remedies – Fees and Expenses of Arbitration Proceeding," in subsection (2) provides:

> (2) An arbitrator's expenses and fees, together with other expenses, shall be paid as provided in the award.

This provision provides little assistance to the arbitrator who desires progress payments of his or her fees as the arbitration proceeds. It is possible that an award would provide for one or both parties to pay the arbitrator unpaid fees. Query if it could be reduced to judgment?

AAA Rules

The Commercial Arbitration Rules of the AAA, Rule R-57, "Remedies for Nonpayment," provides:

> If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

> (a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.
> (b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.
> (c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.
> (d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.
> (e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
> (f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

A Fifth Circuit decision involved the AAA directing the parties to make deposits to cover the hearing fees and expenses.[18] The claimant paid its share, but the respondent did not, asserting that it had no funds or assets to pay its share of the deposits. The claimant refused to pay the respondent's share. Pursuant to Rule R-54 (now R-57), the panel indefinitely postponed the hearing.

The claimant commenced the civil action to compel the respondent to pay its portion of the deposits, and the trial court so ordered. The Fifth Circuit held that payment of fees is a procedural condition precedent that the trial court should not review. The trial court erred in compelling the respondent to pay the deposit as this was a procedural issue left to the discretion of the arbitrators. The case was remanded for dismissal of the claimant's motion to compel.

It is difficult to predict the result if the proceeding does not incorporate a provision such as AAA Rule R-57.

FAA

The Tenth Circuit, in *Pre-Paid Legal Services, Inc. v. Cahill*,[19] discussed the case law of remedies upon the failure or refusal of a party to pay its share of arbitration fees:

- A party's failure to pay its share of arbitration fees is a breach of the arbitration agreement.
- This breach precludes any subsequent attempt by the breaching party to enforce the arbitration agreement.
- A party who breaches the arbitration agreement by refusing to property participate is tantamount to repudiation of the arbitration agreement.

- Failure to pay fees in accordance with AAA rules will result in the termination of an FAA § 3 stay of litigation.
- The non-breaching party is free to pursue its claims in court.

This case was subsequently followed in *Norgren, Inc. v. Ningbo Prance Long, Inc.*[20]

- Annot., *Liability of Parties to Arbitration for Costs, Fees and Expenses*, 57 A.L.R. Fed.3d 633.

In *Life Scan Inc. v. Premier Diabetic Services, Inc.*,[21] the parties submitted their dispute to an AAA-administered arbitration proceeding. After initial proceedings, the respondent announced it was unable to pay its pro rata share of the arbitrator's estimated fees and costs for the remainder of the proceedings. Pursuant to its rules, the AAA offered the claimant the option of advancing all the fees, subject to allocation by the arbitrator in the final award. The claimant rejected the offer, suggesting instead that the arbitration proceed, but that the respondent be precluded from presenting any evidence. The AAA (apparently not the arbitrator) rejected the proposal, and, pursuant to its rules, suspended the proceedings because only one-half of the estimated fees and costs had been deposited. The Ninth Circuit upheld the application of the AAA rules, the solution being within the arbitrator's discretion. The Ninth Circuit seems to have implied that the district court could have ordered the respondent to pay the fees as a part of its power to compel arbitration.

If a party in an arbitration fails to pay its portion of arbitration fees, it constitutes a default under § 3 of the FAA. That default precludes him or her from seeking arbitration when a court action is brought on the same claims.[22] The absence of a formal finding of default by the arbitrators does not preclude the court from making that determination under FAA § 3.

The Tenth Circuit followed *Lifescan*, holding that where the arbitration under AAA rules was properly terminated for nonpayment of AAA fess and arbitration compensation, under the AAA rules, the arbitration had been held in accordance with the arbitration agreement. Therefore, the FAA § 3 requirement for the court to stay the civil action no longer was applicable, and the plaintiff could proceed in court.[23]

The Ninth Circuit Court of Appeals[24] recently took the *Lifescan* decision and held that where the arbitration was terminated without award when the plaintiff failed to pay her share of the arbitration costs, and the district court found the plaintiff's failure to pay the fees was because of financial incapacity, the plaintiff could maintain her lawsuit notwithstanding the existence of an arbitration clause covering the dispute.

In *Tillman v. Rheingold, Valet, Rheingold, Shkolnik & McCartney*,[25] Plaintiff Tillman sued the defendant law firm. The district court granted the defendant firm's motion to compel arbitration and stay litigation pursuant to an arbitration clause in the parties' retainer agreement. The arbitration was governed by the FAA, and AAA rules.

After the arbitration was commenced, the AAA pursuant to its rules, called upon each party to pay a $18,562 deposit to cover estimated fees, expenses, and arbitrator compensation as a condition of the arbitration proceeding. Tillman was financially unable to pay her deposit. The firm paid its deposit.

The AAA, pursuant to its rules, asked the firm whether it was willing to advance Tillman's deposit, subject to the final award. The firm declined. Tillman then requested that the AAA/arbitrator require the firm to pay both parties' deposits. Tillman based her request on the AAA rules authorizing generally an arbitrator to grant "interim" relief.

The arbitrator responded that he did not intend to decide the motion for interim relief until all deposits had been paid. Tillman failed to meet a deadline for making the deposit, and ultimately the arbitrator terminated the arbitration.

The firm then asked the district court to lift the stay of litigation and to dismiss Tillman's complaint pursuant to F.R.C.P. 41(b), contending Tillman's failure to pay her deposits was a violation of the court's order compelling arbitration.

Tillman responded that she had done everything in her power to pay her deposits so as to continue the arbitration, but chose not to.

The district court:

- Found Tillman was in fact financially unable to pay her deposit.
- Dismissed Tillman's lawsuit, as:
    - AAA rules required the parties to bear costs of arbitration equally, and allowed the arbitrator to suspend proceedings for nonpayment.
    - The FAA deprived the court of authority to hear claims that were subject to an arbitration agreement.

On appeal, the Ninth Circuit reasoned and held:

- The arbitration had been held in accordance with the arbitration agreement. FAA § 3 only requires stay of court proceedings until arbitration has been had in accordance with the arbitration agreement.
    - All steps under the AAA rules were followed, including terminating the proceedings without issuance of an award.
    - The stay of the litigation was properly lifted.
- The district court did not abuse its discretion in refusing to dismiss under F.R.C.P. 41(b).
    - The harsh penalty of dismissal was not justified, because Tillman did not have financial resources to pay her deposits. The firm could have fronted Tillman's deposits, but chose not to do so.
    - Tillman's failure to pay was not culpable.
- The district court erred in dismissing the civil action on other grounds.
    - Tillman may proceed with her civil action against the firm.

The court also discussed in *dicta* the possible result if Tillman had had the financial resources to pay the deposits, but chose not to. This *dicta* is important when the claimant fails to pay required deposits. The court also noted: "The outcome would likely be different if Tillman were the one seeking a stay of the district court proceedings, as that would frustrate the . . . firm's attempts to have the case heard in either the court or the arbitral forum."[26]

Other States' Laws

In California, an arbitrator properly ruled that the respondent had waived his right to participate in the arbitration proceeding due to his failure to pay his share of the fees and costs.[27] The court noted that the key question was whether the remedy exceeded the arbitrator's contractual authority. As an alternative holding, the court also ruled that the respondent had not made an adequate showing of prejudice. (The court awarded the claimant damages on his claim for defects in a house purchase knowingly not disclosed, plus attorney fees and costs.)

- Annot., *Liability of Parties to Arbitration for Costs, Fees, and Expenses*, 57 A.L.R. Fed.3d 633.

§ 12.7 • DEFAULT: PROCEEDING WITH ARBITRATION WHEN RESPONDENT FAILS TO APPEAR

In civil litigation, if a plaintiff files and serves a complaint, and the defendant fails to respond within the allotted time, the rules of civil procedure provide a remedy: request entry of default and move for judgment by default supported by affidavit or testimony to establish a *prima facie* case. The court can then enter judgment in favor of the plaintiff and against the non-appearing defendant.[28]

But what happens in arbitration if, after service, the respondent fails to appear, or affirmatively states that he or she will not appear? If there is an AAA arbitration governed by the Commercial Arbitration Rules, Rule R-31, "Arbitration in the Absence of a Party or Representative," defines a procedure similar to the judicial procedure:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

There is little case law as to what leeway the arbitrator has with respect to determining what constitutes "evidence as the arbitrator may require."

The FAA does not have provisions for default proceedings. The CRUAA, C.R.S. § 13-22-215(3) (2016), provides for hearings: "The arbitrator may hear and determine the controversy upon the evidence produced even if a party who was duly notified of the arbitration proceeding does not appear."

The CRUAA, C.R.S. § 13-22-215(3) (2016), expressly provides that the arbitrator may hear and determine the controversy upon the evidence, notwithstanding the failure of a party to appear after proper notice of the hearing has been given. Thus, the procedure fundamentally is the same as under C.R.C.P. 55 and F.R.C.P. 55 for entry of a default and default judgment — the arbitrator determines whether the claimant has proven its case. The FAA is silent on the subject, but no doubt the common law allows the arbitrator to take similar action.

Similarly, AAA Commercial Arbitration Rule R-31 provides for proceeding with the arbitration when one party fails to appear. This rule generally will govern when incorporated into the arbitration agreement, and it does not appear to be in conflict with the Colorado statutes. Ultimately, the test may be whether the default proceeding is fair, given that a party fails or refuses to appear.

Under § 204 of the CRUAA, these provisions may be waived, *e.g.*, by agreement of the parties or their conduct.

Once an award is entered against a defaulting respondent, the confirmation procedures are approximately the same as if the respondent had appeared. However, in addition to the statutory grounds for vacation of the award discussed in Chapter 17, the respondent probably can assert defenses such as lack of *in personam* jurisdiction of the arbitrator, insufficiency of service, and any number of arbitrability defenses. However, if the respondent was given proper notice of the arbitration and an opportunity to participate, any arbitrability defenses under the arbitration agreement that were to be determined by the arbitrator could be waived.[29]

However, in limited circumstances, the claimant may want to have a court determine issues of arbitrability before proceeding, particularly if the arbitration agreement provides that arbitrability issues are for judicial determination. In such event, the claimant can file its motion to compel arbitration pursuant to the statutes and thereby have arbitrability issues resolved (subject to the respondent's post-award appeal) before proceeding with the arbitration.

Practice Pointer
It is doubtful that any court would confirm a default award based solely upon the absence of the respondent, without at least *prima facie* proof that the claimant was entitled to the relief it sought. Thus, following the principles of C.R.C.P. and F.R.C.P. 55 is the wise course of action.

§ 12.8 • MOTION TO STAY ARBITRATION

See Chapter 9, "Procedures to Stay or Compel Arbitration."

§ 12.9 • APPOINTMENT OF ARBITRATOR

See Chapter 11, "The Arbitrator: Qualification, Jurisdiction, Appointment, Disclosure, Resignation, Disqualification, Immunity, and Ethics," § 11.2.

§ 12.10 • MOTION TO DISQUALIFY ARBITRATOR

Generally, the court does not become involved in motions to disqualify an arbitrator. Rather, the issue comes before the court upon a motion to vacate an award on statutory grounds.

The Fifth Circuit held that the FAA does not authorize a federal court to remove an arbitrator appointed under a valid arbitration agreement prior to the issuance of an award.[30] However, AAA Commercial Arbitration Rule R-18, "Disqualification of Arbitrator," provides for disqualification at any time:

> (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
>
> i. partiality or lack of independence,
>
> ii. inability or refusal to perform his or her duties with diligence and in good faith, and
>
> iii. any grounds for disqualification provided by applicable law.
>
> (b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.
>
> (c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

§ 12.11 • ENFORCEMENT OF ARBITRATOR'S PRE-HEARING ORDERS

Prior to the hearing, the arbitrator might issue a wide variety of orders concerning matters such as the locale for hearing, disclosure, discovery, dates and deadlines, procedure, etc. *See* Chapter 13, "The Prehearing Arbitration Process," and Chapter 14, "Pre-Award Rulings, Interim and Provisional Orders, Sanctions and Enforcement, and Judicial Involvement in the Arbitration Process." *See also* § 12.5, "Motions."

NOTES

1. *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54, 56 (Colo. App. 1982).

2. *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1111 (D. Colo. 1999); *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo. App. 1993).

3. *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43, 46 (Colo. App. 1997).

4. *See also Northcom, Ltd. v. James*, 848 So.2d 242 (Ala. 2002) (under AAA rules); *Klein*, 948 P.2d at 46; *Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928, 930 (Colo. 1990).

5. *See Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1216 (D. Colo. 2005) (essential parts of an arbitration agreement include "some language concerning scope and applicability").

6. *Cf. GEEG v. LUMOS LLC*, 829 F.3d 1201 (10th Cir. 2016).

7. *Braata, Inc. v. Oneida Cold Storage Co.*, 251 P.3d 584 (Colo. App. 2010).

8. *Id.*

9. *Bernuth Lines Ltd. v. High Seas Shipping Ltd.*, Civil Court, London, England (2005).

10. C.R.C.P. 12(h).

11. *Braata, Inc.*, 251 P.3d at 587 (citing C.R.S. §§ 13-22-209(2) and -215(3)).

12. *Id. But see* § 7.10.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Sherrock Bros., Inc. v. DaimlerChrysler Motors Co.*, 260 F. App'x 497, 502 (3d Cir. 2008).

17. *E.g.*, *Sherrock Bros., Inc. v. Daimler Chrysler Motors Co.*, 260 F. App'x 497 (3d Cir. 2008); *Global Int'l Reinsurance Co. v. TIG Ins. Co.*, 2009 U.S. Dist. LEXIS 7697 (S.D.N.Y. Jan. 20, 2009).

18. *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884 (5th Cir. 2009).

19. *Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 373 (2015).

20. *Norgren, Inc. v. Ningbo Prance Long, Inc.*, 2015 U.S. Dist. LEXIS 126716, 2015 WL 5562183 (D. Colo. Sept. 22, 2015).

21. *Life Scan Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010 (9th Cir. 2004). *See generally Kudler v. Truffelman*, 2008 N.Y. Misc. LEXIS 8665 (N.Y. Sup. Ct. March 12, 2008) (Court directing parties to proceed in accordance with AAA rules when one party refused to pay amount of deposit imposed by AAA, and refusing to order payment).

22. *Norgren, Inc. v. Ningbo Prance Long, Inc.*, 2015 U.S. Dist. LEXIS 126716, 2015 WL 5562183 (D. Colo. Sept. 22, 2015). *See also Pre-Paid Legal Servs., Inc.*, 786 F.3d at 1294-95 & n. 3.

23. *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 373 (10th Cir. 2015).

24. *Tillman v. Rheingold, Valet, Rheingold, Shkolnik & McCartney*, 825 F.3d 1069 (9th Cir. 2016).

25. *Id*.

26. *Id.* at 1076.

27. *Taylor v. Lyras*, 2008 Cal. App. Unpub. LEXIS 3995, 2008 WL 2068082 (Cal. App. May 16, 2008).

28. C.R.C.P. 55 and F.R.C.P. 55.

29. *Able Building Maint. Co. v. Bd. of Trustees*, 175 F. App'x 118 (9th Cir. 2006).

30. *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002).