Chapter 20

APPEAL OF TRIAL COURT ORDERS AND JUDGMENTS

SYNOPSIS

§ 20.1 • INTRODUCTION

The "potential" appeals from the trial court to the appellate court include:

- Order denying motion to compel arbitration (or to stay arbitration);
- Order granting motion to compel arbitration (or to stay civil action);
- Order with respect to appointment/disqualification of arbitrator;
- Order enforcing or denying enforcement of subpoena;
- Order enforcing or denying enforcement of interim order;
- Order modifying or correcting award, and confirming award;
- Order vacating award and judgment; and
- Order confirming award and judgment.

In general, the arbitration statutes define district court orders that may be appealed to the appellate courts.[1] The cases reflect an element of judicial interpretation of these grounds. The philosophy of the state and federal statutes is generally to allow interlocutory appeals where the order or result is against proceeding with the arbitration, and to not allow an interlocutory appeal of an order in aid of the arbitration's going forward. The state and federal Acts do vary in some aspects. These differences may be important, depending upon which appeal statute is determined by a court to apply.

§ 20.2 • APPEALS OF COLORADO STATE DISTRICT COURT ARBITRATION ORDERS AND JUDGMENTS

Colorado appellate courts have jurisdiction over appeals from the Colorado district courts. In some instances, the appeal may be directly to the Colorado Supreme Court, but in most instances the appeal is to the court of appeals.

- Annot., *Appealability of State Court's Order or Decree Compelling or Refusing to Compel Arbitration*, 6 A.L.R.4th 652.

See generally John A. Criswell, "The 'Finality' of an Order When a Request for Attorney Fees Remains Outstanding," 43 *Colo. Law.* 41 (May 2014).

§ 20.2.1—Orders That May Be Appealed From The Colorado State District Court Under The State Statutes

General Appeal Statutes and Rule

The appellate jurisdiction of the Colorado Court of Appeals is derived from the Colorado Constitution, Article 6, §§ 1 and 2, and is defined by C.R.S. § 13-4-102, providing for "initial jurisdiction over appeals from *final judgments* of the district courts."[2] The Colorado arbitration statute provides for the district court to enter a judgment or order confirming, modifying, or correcting an award (upon which final action has been taken) — a final judgment. "Final judgment" has been defined by case law as a judgment "that constitutes a complete determination of the rights of the parties involved."[3] An order compelling arbitration and dismissing the civil action may be appealed as a final order under C.R.S. § 13-4-102,[4] or as an original proceeding under C.A.R. 21.[5] For example, in *Radil v. National Union Fire Insurance Co.*,[6] the Colorado Supreme Court allowed a direct appeal under C.A.R. 21 (motion for order to show cause) of a trial court's order, *inter alia*, compelling arbitration.

"Although a party may not appeal from an order staying proceedings pending arbitration, it may appeal from an order compelling arbitration and dismissing all claims."[7]

In 2010, the Colorado legislature passed an interlocutory appeal statute, C.R.S. §§ 13-4-102.1, *et seq.* It is similar to the federal interlocutory appeal statute, 28 U.S.C. § 1292(b), which may provide some guidance. In general, the district court may certify questions of law to the appellate courts.

In addition, C.R.C.P. 54(b) provides somewhat of an interlocutory appeal procedure:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

As is apparent, C.R.C.P. 54(b) is very narrow in scope. Nevertheless, in certain situations, it might provide the vehicle for appeal of a district court order with respect to arbitration. Consider also a writ of prohibition when the jurisdiction of the arbitrator is questioned.

In addition to these "general" appeal statutes and rules, the legislature has passed "appeal provisions" relating to specific matters. This is particularly true as to arbitration orders. In both state arbi-

tration statutes, the legislature has defined particular arbitration orders of the district court that are appealable, and that might not be appealable under the general appellate jurisdiction statutes.

CRUAA

C.R.S. § 13-22-228 (2016), defines the orders that can be appealed from the district court under the Colorado Revised Uniform Arbitration Act (CRUAA).

> (a) An order denying a motion to compel arbitration;
> (b) An order granting a motion to stay arbitration;
> (c) An order confirming or denying confirmation of an award;
> (d) An order modifying or correcting an award;
> (e) An order vacating an award without directing a rehearing; or
> (f) A judgment or decree entered pursuant to this part 2.[8]

Orders that are not listed as appealable under the CRUAA include:

- Arbitrator's actions and orders;
- Order granting a motion to compel arbitration;
- Order denying a motion to stay arbitration;
- Order denying modification or correcting an award; and
- Order vacating an award and directing a rehearing.

In addition, a final order dismissing a civil action and denying a motion to stay the arbitration proceeding is appealable under the final order statute. However, if the civil action is stayed pending completion of the arbitration, the order denying the motion to stay arbitration is not appealable. Thus, in order to fulfill the intent of the arbitration statutes to not allow appeals of orders enforcing arbitration, the district court should stay and not dismiss the civil action.

Generally

Colorado appellate courts have confirmed that a district court order compelling the parties to arbitrate pursuant to the Colorado Uniform Arbitration Act (CUAA) is not appealable, apparently more on the basis that it is not a final order and that it is not listed under § 13-22-221.[9] These decisions are under statutory provisions practically identical to CRUAA provisions.

However, the Colorado Supreme Court has also allowed direct appeals under C.A.R. 21 of orders compelling arbitration, at least in certain circumstances.[10]

In *Radil*, allowing the direct appeal of a trial court order compelling arbitration, the court stated:

> [D]irect appeal of the trial court's order [compelling arbitration] following the conclusion of the arbitration proceedings would be highly inefficient, particularly because we determine that the trial court erred in directing the arbitration panel to decide the defense of litigation-based waiver.[11]

The 2010 Colorado General Assembly enacted a bill, "Concerning Interlocutory Appeals in Civil Cases," which amended C.R.S. § 13-4-102, effective August 11, 2010. In general, it is analogous to the federal statute for interlocutory appeals, 28 U.S.C. § 1292(b). The statute expands the jurisdiction of the Colorado Court of Appeals to include "interlocutory appeals of certified questions of law in civil cases pursuant to section 13-4-102.1" from district courts. It provides for the Colorado Supreme Court to promulgate rules for certification of questions of law in civil matters in the district court if (1) immediate review may promote a more orderly or early final disposition of the case and (2) a controlling and unresolved question of law is an issue. The appeal may be heard *en banc* if permitted by the supreme court's rules and if the court of appeals so approves.

Note that when the statute allows an appeal, it is not necessarily "lost" if not taken at that juncture. If the court denies a motion to stay litigation and compel arbitration, the moving defendant may appeal at that juncture, or await final judgment in the civil action and then appeal the denial of the motion to compel arbitration.[12] Thus, a party whose motion to arbitrate was denied may:

- Appeal immediately after the trial court denies the motion to compel arbitration; or
- Await entry of final judgment in the civil action — after trial — and appeal (unless barred by waiver, etc.).

This "interlocutory" appeal defined by the arbitration statutes is in addition to the right to appeal after final judgment has been entered;[13] however, the moving party may be barred by waiver if the appeal is not taken when the right first arises.[14]

Generally, the philosophy of the statutes is that if the order allows or compels arbitration to proceed, it is not appealable; and, generally, if the order rejects arbitration, it is appealable. Interlocutory appeals should not vitiate this philosophy.

On the other hand, a trial court order denying a motion to stay the arbitration is not appealable,[15] unless the civil action is dismissed (final order). The statute does not allow an order compelling arbitration to be appealed, if the civil action is not dismissed.[16] In *Galbraith v. Clark*,[17] the plaintiff appealed the district court's judgment compelling arbitration and dismissing her civil action. The court phrased the initial issue as "whether we have jurisdiction to hear this appeal," concluding that it did have jurisdiction. The Colorado Court of Appeals noted that the arbitration was governed by the Federal Arbitration Act (FAA), and an order compelling arbitration and dismissing the case is a final appealable order, whereas an order that compels arbitration and stays proceedings is not a final order and is not appealable.

These provisions define the "arbitration" jurisdiction of the Colorado Court of Appeals. An appeal cannot be in lieu of an award, prior to confirmation or vacation.[18]

It is not a violation of the Equal Protection Clause of the U.S. Constitution for the statute to permit an interlocutory appeal of an order denying a motion to compel arbitration, but not permit an interlocutory appeal of an order compelling arbitration.[19]

A writ of prohibition may also be an appropriate means of appeal where a trial court has abused its discretion and a later appellate remedy would not be adequate.[20]

- Annot., *Appealability of State Court's Order or Decree Compelling or Refusing to Compel Arbitration*, 6 A.L.R. 4th 652. *See also* 94 A.L.R.2d 1021.
- Annot., *Appealability of Judgment Confirming or Setting Aside Arbitration Award*, 7 A.L.R.3d 608.

§ 20.2.2—Orders That May Be Appealed From The Colorado State District Court When The FAA Is Applicable To The Arbitration

Section 16 of the FAA defines which district court arbitration orders are appealable. While generally the same orders are appealable under the FAA as appealable under the CRUAA, there are some differences. This section deals with appealability of state court orders when the FAA is applicable to the arbitration.

In *Galbraith*, deciding that it had jurisdiction, the Colorado Court of Appeals stated the arbitration was governed by the FAA and said, "Under the FAA, an order compelling arbitration and dismissing the case is a final appealable order."[21] No mention of any Colorado decision or statute was made, except to note Colorado case law holds a party may not appeal from an order that compels arbitration and stays the civil action (instead of dismissing it). Thus, the court of appeals apparently premised its jurisdiction upon federal law.[22]

In *Fonden v. U.S. Home Corp.*,[23] the trial court granted a motion to compel arbitration and dismissed the case. The Colorado Court of Appeals held that the FAA applied, including as to what orders were appealable in state court. The court held that under federal law the dismissal of the civil action, even combined with an order compelling arbitration, was a final order and appealable. However, in most cases, when the court orders arbitration it does not dismiss the civil action; it merely stays the civil action pending completion of the arbitration. In that case, at least under state law, the order is not appealable until the court enters an order confirming or vacating the arbitration award. However, where the court issues a "final order" disposing of the entire case on the merits and leaves no part of the case pending before the court, it will be appealable.[24]

If the proceeding was in state court, and the FAA applied, would the scope of review be as defined under state law or federal law? Suppose the state law held either a much broader or much narrower scope than the federal law scope of review? In *Roadway Package System, Inc. v. Kayser*,[25] the Third Circuit held that the parties could opt out of the FAA *vacatur* grounds and fashion their own, and could agree that judicial review of an arbitrator's decision be conducted according to standards borrowed from state law. However, this approach of agreement by the parties probably was subsequently blocked by *Hall Street Associates, L.L.C. v. Mattel, Inc.*[26]

As discussed earlier, an arbitration issue may be "governed" by the FAA even though the issue is in state court. While uncommon, an arbitration dispute might be governed by state arbitration law, yet brought in federal court. When the FAA is applicable, the scope of FAA preemption is discussed in Chapter 4, "Does State Law, Federal Law, or the Contract Govern the Arbitration or Judicial Proceedings?" The general rule is that preemption by the FAA is only of substantive law, not procedural. Is scope of appeal procedural? Can FAA preemption grant a state appellate court jurisdiction where it does not exist under state statutes?

Thus, when the arbitration issue is brought in state court, *e.g.*, a motion to compel arbitration as a defense to a civil action, and the dispute is subject to the FAA, do Colorado statutes govern or does the FAA govern as to what orders may be appealed? In state proceedings, can federal statutes define the jurisdiction and procedures of the Colorado Court of Appeals and/or Colorado Supreme Court?

Galbraith[27] was a state court proceeding in which the FAA governed the arbitration. The plaintiff appealed the district court's judgment compelling arbitration and dismissing her complaint. The Colorado Court of Appeals noted:

> Under the FAA, an order compelling arbitration and dismissing the case is a final appealable order. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000). In contrast a party may not appeal from an order that compels arbitration and stays the proceeding. . . . [*Id.*] Because the district court dismissed the action, instead of ordering a stay, we have jurisdiction to review Galbraith's claims.[28]

Thus, the Colorado Court of Appeals relied upon federal law to conclude that it was an appealable order. Perhaps this is a questionable holding, although the same result probably could have been reached under state law.

If the Colorado arbitration act applies, but the judicial proceeding is brought in federal court pursuant to diversity of citizenship jurisdiction, does the state arbitration *appeals* law apply, or the federal? No Colorado federal court decision has been rendered on this point.

On the other hand, where the action was in state court and the trial court denied, in essence, a motion to compel arbitration, a Louisiana appellate court determined the denial was an interlocutory order and not appealable under state law. FAA appeal provisions (§ 16(a)) were deemed not applicable to state court proceedings because § 16(a) was procedural in nature. Denial of an interlocutory appeal was not held to undermine the goals and principles of the FAA.[29]

A strong argument could be made, however, that denial of an appeal of an order denying arbitration does in fact undermine the goals and principles of the FAA.

See § 20.6.

§ 20.2.3—Interlocutory Appeals

As discussed in § 20.2.2, Colorado has an interlocutory appeal statute and rule. Either of those may be helpful when an appeal of a district court order concerning arbitration is desirable and the order is not within the scope of appealable orders under C.R.S. § 13-22-223. *See* § 20.3.1.

§ 20.2.4—Appeals To Federal Court

A state court confirmation and judgment cannot be appealed to the federal district court.[30]

See Glenn, "Appellate Review of Collateral Orders Under Federal and Colorado Law," 43 *Colo. Law.* 69 (Dec. 2014).

§ 20.3 • APPEALS OF FEDERAL DISTRICT COURT ARBITRATION ORDERS AND JUDGMENTS UNDER THE FAA

Under the FAA, 9 U.S.C. § 16(a)(1), the trial court orders that may be appealed are:

- An order refusing a stay of any action under § 3 (an order refusing a stay of a civil action is usually a part of an order denying a motion to compel arbitration);
- An order denying a petition under § 4 to order arbitration to proceed;
- An order confirming or denying confirmation of an award or partial award;[31] and
- An order modifying, correcting, or vacating an award.[32]

In addition, §§ 16(a)(2) and (3) provide for appeals from:

- An interlocutory order granting, continuing, or modifying an injunction against an arbitration proceeding that is subject to Title 9; and
- A final decision with respect to an arbitration that is subject to Title 9.[33]

There are no express provisions providing for appeals of district court orders enforcing or denying enforcement of subpoenas or appointment of arbitrators. Nevertheless, federal appellate courts have jurisdiction to review a district court order directing compliance within a FAA § 7 subpoena, as a final order of a self-contained proceeding.[34]

Similarly, an interlocutory appeal of a district court's order as to boundaries for service of subpoenas under FAA § 7 was allowed. The court held that this was a "final decision with respect to an arbitration" under § 16(a)(3). The proceeding with respect to the propriety of the subpoena was an "independent proceeding." Hence, even though there was no "final decision" with respect to the arbitration, there was a final decision in the "independent proceeding" as to the propriety of the subpoena.[35]

Unless appealable under 28 U.S.C. § 1292(b), the statute expressly provides that no appeal may be taken of interlocutory orders:

- Granting a stay of any action under § 3;
- Directing arbitration to proceed under § 4; or
- Refusing to enjoin an arbitration that is subject to Title 9.

Federal circuit courts do not have jurisdiction over district court orders remanding for clarification, as the order is neither final nor appealable.[36]

Under the FAA, a party generally may not appeal from an order "compelling arbitration." However, if the order compelling arbitration also dismisses the civil action, it is a final decision with respect to arbitration, and an appeal may be taken under FAA § 16(a)(3).[37] The usual alternative to dismissal is to stay the civil action and administratively close the proceedings pending completion of the arbitration.

When a breach of contract action pending in state court was stayed pending arbitration, a federal district court's order compelling arbitration was found to be "independent," final, and immediately appealable under FAA § 16(a)(3). Therefore, an appeal filed more than 30 days thereafter was not timely.[38]

A substantial issue appears to remain under the FAA as to whether an order compelling arbitration and staying or dismissing the civil action is appealable. The statute provides that no appeal may be taken of an order granting a stay of a civil action under § 3, and of an order directing arbitration to proceed under § 4. On the other hand, the statute provides for appeal of a final decision with respect to an arbitration proceeding.

The resolution appears to be:[39]

- If there is a civil action, and the court orders the claims be arbitrated, it is not appealable. A stay is not a final decision.
- If there is no pending civil action except the motion to compel arbitration, if the court enters "judgment" compelling arbitration, it is a final appealable order. However, perhaps more properly, if the court orders arbitration, it should simply stay further judicial proceedings pending completion of the arbitration. In that case, probably there is no appeal.

The Tenth Circuit resolved an "unsettled issue nationwide" in *Conrad v. Phone Directories Co.*:[40] "Whether a Court of Appeals can or should treat a motion to dismiss as a motion under the FAA [to stay litigation/compel arbitration] for purposes of [FAA] § 16(a). . . ?"

The defendant moved to dismiss a civil action on the ground the plaintiff was contractually obligated to arbitrate his claims. Little was said about compelling arbitration, staying the litigation, or indeed, enforcing the provisions of the FAA. The district court denied the motion as to certain of the claims and granted it as to others. The defendant appealed the portion of the order denying dismissal of some of the claims.

Determining that it had no jurisdiction under FAA § 16(a) (and particularly paragraphs (1)(A) and (C)), the court held that in order to invoke appellate jurisdiction under § 16 of the FAA:

> [T]he movant must either explicitly move to stay litigation and/or compel arbitration pursuant to the Federal Arbitration Act, or it must be unmistakably clear from the four corners of the motion that the movant seeks relief provided for in the FAA.[41]

However, the Ninth Circuit has invoked *mandamus* under the All Writs Act, 28 U.S.C. § 1651, to reverse a district court's grant of a motion to compel arbitration and to stay the civil action.[42] Apparently, in order to issue the writ, the appellate court must find that the district court order was clearly erroneous as a matter of law.

In *In re Universal Service Fund Telephone Billing Practice Litigation*,[43] the federal district court denied a motion to compel arbitration and stay class action litigation. Normally, 9 U.S.C. §§ 16(a)(1)(A) and (B) provide the jurisdictional basis for an appeal to the court of appeals in such circumstances. However, in *Universal Service*, the defendant's assertion of its right to have the claims ar-

bitrated was not based upon an arbitration agreement between the plaintiffs and the defendant; rather, its assertion of a right to arbitrate was based upon an estoppel theory.

The Tenth Circuit held that under §§ 16(a)(1)(A) and (B), in an interlocutory appeal of a denial of a motion to compel arbitration by its terms, the right to arbitrate must be pursuant to the written agreement — not under a theory of equitable estoppel. Therefore, the interlocutory appeal was denied.

The Tenth Circuit recently defined many of the parameters of federal court jurisdiction.[44] The appeal was of the trial court's denial of confirmation of a property loss appraisal pursuant to a procedure under the terms of a property insurance contract. The insurer asserted that confirmation of the appraisal should be pursuant to the CRUAA, and the insured moved to vacate the appraisal pursuant to C.R.S. § 13-22-222. The insurer appealed the denial of confirmation.

The Tenth Circuit addressed the issue as defined by it: "The threshold question presented in this state law diversity action is whether we have appellate jurisdiction over the district court's nonfinal order denying confirmation of a property loss.

The insurer cited C.R.S. § 13-22-228 as its jurisdiction ground — an order denying confirmation of an award is immediately appealable. Subsequently, it stated the appraisal process was sufficiently like arbitration to be within the FAA, and specifically 9 U.S.C. § 16(a)(1)(D) providing for interlocutory appeal of denial of a motion to confirm an arbitration award. However, thereafter the insurer relied on the CRUAA.

The court responded:

- Inferior courts (below the Supreme Court) may hear cases only when empowered to do so by the Constitution and by act of Congress.
- A state legislature has no authority to prescribe federal court jurisdiction in diversity matters or otherwise.
- Where underlying state claim is based on state law, a proper *Erie v. Tompkins*[45] analysis establishes that federal law not state law controls the appealability of district court's order.
    - Colorado state law cannot provide a federal court with jurisdiction over an interlocutory appeal.
- A proper *Erie v. Tompkins* analysis establishes that federal law rather than state law controls the appealability of a district court order, when jurisdiction of the district court is premised upon diversity of citizenship.

The court further noted that had the insurer made its motion to confirm the award pursuant to 9 U.S.C. § 9 (instead of C.R.S. § 13-22-222), appellate jurisdiction under 9 U.S.C. § 16(a)(1)(D) would be "crystal clear." "EMC [Insurer] cannot now morph a motion brought under the CUAA [CRUAA] into one brought under the FAA."[46]

Note: If in state court, always assert the CRUAA is applicable. If removed for diversity, this court is now saying an award cannot be confirmed in federal court. FAA § 16(a)(1)(e) provides that appeal may be taken from an order "vacating an award." Most cases have held that an order vacating an award is appealable, even if the matter is remanded for rehearing.[47]

As discussed in § 7.3.1, a non-signatory to the arbitration agreement often has the right, in particular circumstances, to compel arbitration of claims asserted by or against it. If that non-signatory is denied a stay of a civil action pending arbitration, does it have a right to immediately appeal that order? There was "a substantial split among the Circuits" as to whether an interlocutory appeal may be taken from a denial of a motion to compel arbitration when the party appealing is not a signatory to the arbitration agreement in dispute.[48] The Tenth Circuit appeared to hold no.[49]

However, the U.S. Supreme Court held in 2009 that if a non-signatory is denied a stay of a civil action pending arbitration, it may immediately appeal that order, regardless of the merits of the stay request, if the non-party under applicable state law could enforce or be bound by the contract.[50] The Court first held that under FAA § 16(a)(1)(A) the underlying merits of the appeal are irrelevant. Second, the "parties" seeking a stay under FAA § 3 need only be a party to the litigation, and not to the arbitration agreement.

- Annot., *Appealability of Federal Court Order Granting or Denying Stay of Arbitration*, 31 A.L.R. Fed. 234.

§ 20.3.1—Interlocutory Appeals

Orders Granting Motions to Compel Arbitration

FAA § 16 defines the district court orders that may be appealed. While a district court order denying a motion to compel arbitration is appealable (§ 16(a)(1)(B); *see also* § 16(a)(2)), there is no similar provision allowing an appeal of an order granting a motion to compel. Indeed, to the contrary, §§ 16(b)(1) and (2) specifically provide there shall be no appeal of orders granting a stay of a civil action under § 3 or directing arbitration to proceed under § 4. However, § 16(b) is subject to a major exception: "Except as otherwise provided in section 1292(b) of title 28 . . ."

Section 1292(b), "Interlocutory decisions," provides for district judges to certify an order not otherwise appealable if (1) such order involves a controlling question of law as to which there is substantial ground for difference of opinion, and (2) if an immediate appeal from the order may materially advance the ultimate termination of the litigation. This procedure has been utilized to allow an appeal to be taken from an order granting a motion to compel arbitration.[51] However, the Tenth Circuit subsequently held that a "non-appealability clause in an arbitration agreement that forecloses judicial review . . . is enforceable."[52]

However, courts have also used it as a basis for appellate review of some "procedural" orders.

For example, an appeal of a district court's order enjoining the holding of an arbitration in New York (a venue order), an interlocutory appeal under 28 U.S.C. § 1292(a)(1), was permitted:

> [A] ruling fixing the place for hearing may cause irreparable harm to one or more of the parties. . . . [An] error in denying a change of venue cannot effectively be remedied on appeal from the final judgment [on the arbitration award].[53]

Section 16(a)(1)(A) permits an appeal only from an order "refusing a stay of any action under section 3 of this title." The U.S. Supreme Court has held that the underlying merits of the appeal should not be considered in determining whether there is jurisdiction, rather only whether the order is within § 16(a)(1)(A).[54]

Shortly thereafter, the Tenth Circuit defined two ways in which to determine whether the order being appealed refused a stay under § 9 of the FAA:[55]

1) Caption the motion in the district court as one brought under § 3; and
2) If the motion is not so explicitly stated, or the court suspects that the motion has been miscaptioned in an attempt to provide for an interlocutory appeal, look to the essential attributes of the motion.

"If the essence of movant's request is that the issues presented be decided exclusively by the arbitrator and not by any court, then the denial of that motion may be appealed under § 16(a)."[56]

The court found that the requested judicial relief was for dismissal of the circulation rather than for the court to refer the case to an arbitrator to decide the issues; therefore, there was no jurisdiction under § 16(a).

Thereafter in *Western Security Bank v. Schneider Limited Partnership*,[57] the Ninth Circuit applied this test. Western Security sued doctors on loan guaranties. Doctors asserted that Meriden Partners fraudulently induced them to guarantee the loan. Doctors moved the Court to stay the Western/Doctors litigation pending an arbitration between Doctors and Partners. The Court held it did not have jurisdiction because neither § 3 nor § 16(a) applies because Western was not a party to the arbitration agreement – there was no attempt to compel a party to the litigation to arbitrate. The Court referred to its earlier decision *supra*, holding that in order to invoke the appellate jurisdiction of § 16(a), a party in the district court must either move to compel arbitration and stay litigation explicitly under the FAA (§ 3 or § 4), or make it plain that be seeks only remedies provided by the FAA. Prohibited remedies include: judicial dismissal of the case rather than reference of the case to arbitration to decide the issues; motion seeking judicial dismissal and not requesting arbitration; motion indicated not intent to pursue arbitration.

Increasingly, 28 U.S.C. § 1291 is applied to permit appeal of an order compelling arbitration.[58]

Generally, however, there is a split of the circuits as to whether federal courts may hear an interlocutory appeal from an arbitral tribunal.[59]

Closely related to the interlocutory appeal doctrine is the collateral order doctrine, occasionally used as a means of appealing a non-final order.

> For a non-final order to be immediately appealable, the doctrine requires the order (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits, and (3) be effectively unreviewable on appeal from a final judgment.[60]

The court also described the doctrine as "a practical construction of the final judgment rule designed to 'accommodate a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and collateral to, rights asserted in the action."'"[61]

- Annot., *Appealability of Judgment Confirming or Setting Aside Arbitration Award*, 7 A.L.R.3d 608.
- Annot., *Appealability of Order Staying, or Refusing to Stay, Proceedings in Fed. Dist. Court Pending Arbitration Procedure*, 11 A.L.R. Fed. 640; 110 A.L.R. Fed. 148; 31 A.L.R. Fed. 234.
- *See generally* Criswell, "The 'Finality' of an Order When a Request for Attorney Fees Remains Outstanding," 43 *Colo. Law.* 41 (May 2014).

§ 20.4 • TIMING OF THE APPEAL

The CRUAA expressly provides appeals under the arbitration statutes are taken in the same manner as any other appeal.[62] Appeals under the FAA are also taken in the same manner as any other appeal, although there is no express provision to that effect.

These jurisdictional and timing issues were explained in *Blue Sky Group LLC v. Redcon Homes, Inc.*[63] Blue Sky and Redcon entered into an asset purchase agreement with an arbitration clause. Disputes arose, and Blue Sky filed a motion to compel Redcon and its president and principal shareholder, Stang, to arbitrate.

On October 24, 2004, both defendants filed a motion to stay the arbitration on the ground that Stang was not subject to the arbitration agreement. A January 2005 order compelled Blue Sky and Redcon to arbitrate, but held that Stang individually was not a party to the arbitration agreement. The Colorado Court of Appeals noted that the order denying the motion to compel Stang to arbitrate was appealable through interlocutory appeal under C.R.S. § 13-22-228. However, as no appeal was taken within 45 days as prescribed by C.A.R. 4(a), the right was lost. The court noted, however, that upon final judgment entering, the order denying the motion to compel Stang to arbitrate was appealable.

Blue Sky and Redcon proceeded to arbitration. However, Blue Sky asserted claims against Stang. Stang again filed a motion to stay arbitration on the ground that the court previously determined those issues not within the scope of the arbitration agreement. Blue Sky acknowledged that the court's January order concluded that the arbitration did not involve Stang personally, and Stang was not subject to the arbitration agreement. However, Blue Sky asked the court to pierce the corporate veil and allow it to arbitrate its claims against Stang individually.

In June 2005, the trial court granted Stang's motion to stay arbitration as against Stang individually, saying that the alter ego theory against Stang was simply an attempt to circumvent the January 2005 order.

Blue Sky appealed, saying the trial court erred in enjoining the arbitration against Stang individually because its corporate veil piercing claims (Stang liable for acts of Redcon) were within the scope of the arbitration.

The court held that it had jurisdiction over the June 2005 order but lacked jurisdiction to consider Blue Sky's appeal to the extent that Blue Sky, in fact, was challenging the merits of the January 2005 order. As noted above, Blue Sky had not taken a timely appeal of the January 2005 order.

If a party has a right under the arbitration statute immediately to appeal a trial court order (*e.g.*, an order denying a motion to compel arbitration), the failure to appeal at that time may constitute a waiver of the right to thereafter appeal that order.[64] Thus, a party seeking arbitration may not be able to not immediately appeal an order denying arbitration, proceed to trial, and only if it receives an unfavorable result, appeal the denial of the motion to compel arbitration.

In *Harper Hofer & Associates, LLC v. Northwest Direct Marketing, Inc.*,[65] the respondent objected to the arbitrability of the dispute (asserted it did not agree to arbitration), asked the arbitrator to determine no contract existed, was ruled against by the arbitrator, participated in the arbitration, and could not raise arbitrability as a ground to vacate the award. The respondent waived the no arbitrability defense by not seeking immediate independent judicial relief pursuant to C.R.C.P. 57. This holding was contrary to an earlier Colorado Court of Appeals decision (by a different division).[66]

§ 20.5 • AGREEMENTS TO ADD TO OR ELIMINATE STATUTORY GROUNDS FOR APPEAL — WAIVER OF RIGHT TO APPEAL

The Tenth Circuit has recognized that the parties by their agreement may restrict or eliminate appeals from the district court, but the agreement must be clear.[67] The parties may not agree to expand the grounds for appeal.[68] However, the Texas Supreme Court held that the FAA did not preempt enforcement of an agreement for expanded judicial review of an arbitration award under Texas law, since such provision was consistent with the FAA's purpose of ensuring that private arbitration agreements are enforced according to their terms.[69] The U.S. Supreme Court denied certiorari.

In *Bowen v. Amoco Pipeline Co.*,[70] the Tenth Circuit held that a provision in the arbitration agreement expanding the grounds for appeal to the circuit court beyond those provide by the FAA, *i.e.*, if "not supported by the evidence," was invalid. The court found that such expanded review "threatens to undermine the policies behind the FAA. We would reach an illogical result if we concluded that the FAA's policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review of the matter is arbitrated."[71]

The parties probably cannot define by agreement the orders that may be appealed, since these are powers solely of the legislature and Congress. For example, an agreement for the appellate court to conduct a substantive review of the arbitrator's award is void since it gives the court of appeals jurisdiction in excess of that granted by the legislature to the courts in the jurisdictional statutes.[72] The Colorado Court of Appeals held that the parties could not by agreement vary the court's appellate jurisdiction as defined by the legislature.[73] This decision involved expanding the scope of the review. However, the Fifth Circuit held that parties could expand judicial review so that "errors of law shall be subject to appeal."[74] This ground for jurisdictional review probably does not survive the U.S. Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc*.[75] However, to the extent that "errors of law" constitute "manifest disregard of the law," it may. *See* § 17.4.15.

In *MACTEC, Inc. v. Gorelick*,[76] the Tenth Circuit upheld a provision in the arbitration agreement providing: "Judgment upon the award rendered by the arbitrator shall be final and non-appealable and may be entered in any court having jurisdiction thereof."[77] The court held that the provision was enforceable and therefore deprived the court of appellate jurisdiction.

In reaching its decision, the Tenth Circuit reviewed its prior decision holding that parties to an arbitration agreement may eliminate judicial review by contract, although their intention to do so must be clear and unequivocal. The word "non-appealable" was found to be clear and unequivocal.

The court noted earlier decisions holding that an agreement that the district court judgment be "final" did not clearly evince intent to waive all appellate review. The court also noted that it earlier held that the parties may not contractually expand the standard of judicial review to allow the district court to vacate the award for insufficient evidence.

The court also noted, however, that not all agreed-upon restrictions on judicial review of arbitrators' awards would be upheld. For example, the Second Circuit held that a non-appealability provision cannot deprive the federal court of the ability to apply the standards set forth in 9 U.S.C. § 10(a), saying that a party cannot have the benefits of confirmation without the risk of *vacatur*.

Language in an arbitration agreement that "there can be no appeal from any decision made by the arbitrators," "[t]he award shall be exclusive, final, and binding to all issues and claims," and "[t]he parties shall be deemed to have consented to the Arbitrators' judgment upon the receipt of the arbitration decision" is not sufficient to constitute a waiver of appealability of the award beyond the district court under the FAA.[78] Such language does not expressly refer to non-appealability, and is not clear and unequivocal.

However, parties may agree as to whether the FAA or CRUAA shall be applicable. If in federal court, the agreement provides state arbitration law shall apply, and the state appellate provisions are different from the FAA, do the state provisions govern? As least one federal court would seem to answer yes.[79]

There is no decision on the topic under the CRUAA or CUAA.

- Annot., *Uninsured & Underinsured Motorists Coverage: Enforceability of Policy Provision Limiting Appeals from Arbitration*, 23 A.L.R.5th 801.

§ 20.6 • APPLICATION OF STATE OR FEDERAL "APPEAL" LAW: FAA PREEMPTION

Questions arise as to applicable "appeal law" based upon whether the action is in state or federal court, whether the FAA applies, and whether the parties have agreed upon the governing law.

In *Atlantic Aviation, Inc. v. EBM Group, Inc.*,[80] the federal district court vacated an arbitration award and directed a "re-arbitration" before a new arbitration panel. On appeal to the Fifth Circuit, the

appellee argued that the court lacked jurisdiction because the Texas Arbitration Act had been applied by the district court, and the parties had agreed the Uniform Arbitration Act governed. Under both of these statutes, an appeal of an order vacating an award and directing a rehearing was not appealable. The court rejected the argument, saying: "[T]he FAA governs judicial review of arbitration proceedings notwithstanding any choice of law provision or state law to the contrary."[81]

A Tennessee Court of Appeals was confronted with an issue in a state court case to which the FAA applied: whether the Tennessee statute or FAA governed appeals from district court orders. The FAA provides that an appeal may be taken from an order "vacating an award," whereas the state statute permitted an appeal only from "[a]n order vacating the award without directing a re-hearing." The trial court had vacated the award and remanded the case to FINRA for a new arbitration hearing. The court held that the state statute was procedural and applied, and concluded that the statute was not preempted by the FAA.[82] If a state court found that the FAA was applicable, if the FAA scope of appeal was broader than the state scope of appeal (when arbitration was denied), and it was held that the FAA pre-empted state scope of appeal law, could that preemption in essence expand the jurisdiction of the state appellate court beyond what was granted to it by the state legislature or constitution?[83]

See also § 20.3.

§ 20.7 • STAY OF LITIGATION OR ARBITRATION PENDING APPEAL OF GRANT OR DENIAL OF MOTION TO COMPEL ARBITRATION

When a court denies a motion to compel arbitration — an order appealable under the state and federal acts — what happens to the litigation pending the appeal?

Section 3 of the FAA expressly provides that in compelling arbitration, the district court "shall on application of one of the parties stay the trial of the action." Thus, a party moving to compel arbitration apparently can also move to stay the civil action, thereby avoiding a dismissal of the civil action that in turn avoids an appeal at that juncture. Some federal courts may differ.[84] In *Apache Bohai Corp. v. Texaco China B.V.*,[85] the court denied a petition for certiorari on the issue of the proper scope of the district court's authority to stay rather than dismiss a case upon entering an order compelling arbitration and staying judicial proceedings.

The Tenth Circuit held that an interlocutory appeal of a district court's denial of a motion to compel arbitration divested the district court of jurisdiction to proceed on the merits of the underlying case.[86] In some circuits, when a litigant files a motion to stay litigation in the district court pending appeal of a denial of a motion to compel arbitration, the district court should stay the litigation. Some courts hold that the district court should stay the litigation.[87] Other circuits seem to hold to the contrary.[88]

A federal district court has refused to stay its order staying the civil action while arbitration went forward pending appeal of the order:

> I also reject Defendant's request that the motion to stay this action be denied because of their pending appeal to the Tenth Circuit of my decision, *inter alia*, that the contract con-

> taining the arbitration clause was not superseded by the May 24, 1994 agreement which does not contain such clause. The fact that Defendants appeal is totally irrelevant to my consideration of the merits, *vel non*, of this motion.[89]

§ 20.8 • SCOPE OF REVIEW

In general, the parties cannot agree to expand the grounds of review beyond the statutorily defined appellate review.[90] For example, an agreement providing for the appellate court to conduct a substantive review of the arbitrator's award is contrary to statute and therefore void and unenforceable.[91]

The standards for and scope of appellate review are a part of the jurisdictional limitations and have been defined by case law. *South Washington Associates v. Flanagan*[92] involved an arbitration agreement that provided:

> [F]or the purpose of any appeal to the Colorado Court of Appeals or the Colorado Supreme Court the arbitrator's award shall be reviewed using the same standards as findings of fact and conclusions of law by a Colorado District Court.

The court of appeals refused to give effect to the agreed-upon term, finding that it had review jurisdiction only over the final judgment of the district court (confirming the arbitration award), and not over the arbitrator's award.

> [O]ur review is limited to the order and judgment confirming the award and the standard of review is whether the trial court properly applied and followed the standards for confirmation prescribed by the arbitration statute. . . . [T]his court may not review the substance or procedure underlying the arbitration panel's award, except insofar as the same was reviewed by the trial court.
>
> . . .
>
> [T]he parties, through their agreement, . . . are seeking to define and prescribe the powers of a court of law. This they cannot do. Under Colo. Const. Art. VI, § 1 and § 2, the authority to determine the jurisdiction of this court is vested exclusively in the General Assembly.[93]

Review of the arbitration award is "exceedingly deferential," and the award must be upheld if it "is rationally inferable from the letter or purpose of the underlying agreement."[94]

§ 20.8.1—Grant Or Denial Of Motion To Compel Arbitration

FAA

An appellate court review of a district court's denial of a motion to compel arbitration is *de novo* according to the Tenth Circuit: "'We review the denial of a motion to compel arbitration de novo and employ the same legal standard employed by the district court.'"[95]

The Tenth Circuit clarified appealability by specifically holding that a district court order staying the civil action and compelling arbitration is not appealable, citing the prohibition of 9 U.S.C. §§ 16(b)(1) and (2).[96] The court acknowledged that under *Green Tree Financial Corp. v. Randolph*,[97] had the district court compelled arbitration and dismissed the civil action, the order would have been appealable as "a final decision with respect to arbitration" under 9 U.S.C. § 16(a)(3).

The conclusions of law are reviewed *de novo* and findings of fact for law error. "However, '. . . review is restricted by the great deference accorded arbitration awards. The Eighth Circuit holds the award must be confirmed so long as the arbitrator is even arguably construing or applying the [agreement] even if the court thinks that his interpretation of the agreement is in error.'"[98]

When the issue is whether the dispute was subject to arbitration, which necessarily involves the interpretation of contract, the Colorado appellate court reviews *de novo*.[99]

CRUAA

The same rule is followed by the Colorado Supreme Court: "Whether an enforceable agreement to arbitrate exists in a case is a question of law we review *de novo*."[100]

Presumably, it is the same standard whether the issue is denial of a motion to compel arbitration or a grant of the motion. However, the latter probably will not be determined on an interlocutory appeal, in state or federal courts.[101]

The district court's legal conclusions are reviewed *de novo*.[102]

A Colorado appellate court reviews *de novo* a trial court's determination of whether an arbitration agreement exists[103] and whether an arbitration clause is invalid as unconscionable.[104] "In reviewing a district court's confirmation of an arbitration award, we review factual findings for clear error and legal determinations de novo. We are required nevertheless to 'give extreme deference to the determination of the [arbitrator].' 'Once an arbitration award is entered, the Tenth Circuit held the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances.'"[105] Whether an agreement to arbitrate exists is a matter of law and reviewed by the Colorado appellate courts *de novo*.[106] If the arbitration agreement is ambiguous, Colorado courts will exercise a presumption in favor of arbitration and resolve doubts about the scope of the arbitration clause in favor of arbitration.[107]

A district court's decision on a motion to compel arbitration is reviewed *de novo*.[108]

§ 20.8.2—Scope Of Review Of Specific Issues

Statute of Limitations Defense

Under federal law, the court of appeals reviews the district court decision *de novo.*

Intertwining Doctrine Issues

An appellate court's scope of review of a district court's application or rejection of the intertwining doctrine was whether the court abused its discretion.[109] The abuse of discretion standard means that the exercise of discretion on any decision will not be disturbed unless "manifestly arbitrary, unreasonable or unfair."[110] However, the intertwining doctrine no longer exists in Colorado.

Order Confirming or Denying Confirmation of an Award (Granting or Denying Motion to Vacate)

The court of appeals' review of the district court's vacating or enforcing of an arbitration award is *de novo*,[111] with factual findings reviewed for clear error, giving deference to the determination of the arbitrator.

If an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, 'the fact that' a court is convinced he committed serious error does not suffice to overturn his decision."[112]

Whether an arbitrator acts within his or her scope of authority is an issue of law reviewed by the appellate court.[113]

In reviewing a district court order vacating or confirming an arbitration award, the Colorado Court of Appeals reviews factual findings for clear error and legal conclusions *de novo*, giving the determinations of the arbitrator extreme deference.[114]

Waiver

The Tenth Circuit and Colorado appellate courts reviewed *de novo* a district court's denial of a motion to compel arbitration on the ground of waiver, applying the same legal standard as the district court should apply.[115]

Order Modifying or Correcting Award

Comparing an order remanding an award to the arbitrator for clarification, the First Circuit held an order vacating and remanding an award or partial award is not an interlocutory order and may be appealed.[116]

Order Vacating or Denying Vacation of Award

The court of appeals accepts findings of fact that are not clearly erroneous and decides questions of law *de novo*.[117] Orders vacating arbitration awards, either with or without directing rehearing, have been held appealable.[118] The review by a federal court of appeals of a district court's denial of a motion to vacate an award is *de novo*.[119] However, the review is "extremely narrow and exceedingly deferential."[120]

"An arbitrator is the final judge of both fact and law, and a court may not review the merits of an award without statutory grounds to vacate or modify."[121]

The review is of a matter of law and is *de novo*. The court uses standard principles of contract interpretation. "Looking to the plain language of the agreement, we interpret it in a manner that best effectuates the intent of the parties."[122]

Whether Arbitrability Is for the Court or Arbitrator to Decide

Whether the parties have agreed to arbitrate the question of arbitrability is considered by the appellate court *de novo*.[123]

Arbitrability

Questions of arbitrability are reviewed *de novo*.[124]

Interpretation of FAA

The Tenth Circuit reviews the district court's interpretation of the FAA *de novo*.[125]

Grant or Dismissal of a Motion to Stay Arbitration

A trial court's decision on a motion to stay arbitration is reviewed *de novo* by the Colorado appellate courts.[126]

Whether a Dispute Falls Within the Scope of an Arbitration Agreement

Whether a dispute is within the scope of an arbitration agreement is reviewed by the Colorado appellate courts *de novo*.[127] Once a court independently determines that the parties agreed to arbitrate an issue, it should give extreme deference to an arbitrator's decision regarding the scope of that agreement. "[T]he arbitrator's interpretation of the scope of his powers is entitled to the same level of [extreme] deference as his determination on the merits."[128]

Existence and Scope of an Arbitration Agreement

The existence and scope of an arbitration agreement are questions of law and reviewed *de novo*, applying state law principles governing contract interpretation.[129]

Statutory Construction

The court reviews questions of statutory construction *de novo*.[130] When a Colorado court is interpreting federal statutes and regulations, federal statutory interpretation rules apply.[131]

Subject Matter Jurisdiction of the Federal District Court Under the FAA

This is reviewed *de novo*.[132]

Interpretation of Documentary Evidence

This interpretation is a question of law subject to *de novo* review.[133]

Dismissal Instead of Stay Pending Arbitration

When the court orders arbitration and dismisses the civil action instead of staying it pending arbitration, the appellate review is for abuse of discretion.[134]

Interpretation of the Arbitration Agreement

This is a matter of law that is reviewed *de novo*.[135]

Order on Motion to Compel Based on Estoppel

Some courts apply a *de novo* standard, and others an abuse of discretion standard.[136]

§ 20.9 • RELIEF ACCORDED BY APPELLATE COURTS

§ 20.9.1—FAA

Of course, the appellate court can affirm a trial court order. The appellate court probably can reverse the trial court's order and

- Direct reconsideration by the district court in accordance with the appellate court order;
- Direct entry of a judgment, *e.g.*, reversing the district court vacation or modification/correction of award and directing confirmation of the arbitrator's award;
- Remand and direct the district court to modify the arbitration award and confirm the award as modified;[137] and
- Vacate confirmation of an award and direct vacation of the award.

See also § 19.3.3.

The provision of FAA § 16(a)(1)(A) allowing an appeal of an order "refusing a stay of any action under section 3" is relatively absolute. The underlying merits of the issue are irrelevant — even if frivolous.[138]

Attorney fees can be awarded under 28 U.S.C. § 1927 for frivolous appeals of confirmation of an arbitration award.[139]

§ 20.9.2—CRUAA

The appellate court can award the prevailing party attorney fees and costs of the appeal:[140]

1) Pursuant to C.R.S. § 13-22-225(2);
2) Pursuant to the arbitration award ("If [Defendants] fail to pay this award [Plaintiff] shall also be entitled to recover from [Defendants] any further reasonable costs that [Plaintiff] incurs in collection. . . .");
3) Pursuant to the arbitration clause if it so provides; or
4) Pursuant to C.A.R. 39 and 39.5.

§ 20.9.3—Sanctions

The Eleventh Circuit indicated a willingness to impose sanctions on parties who undermine the efficiency gains of arbitration by raising frivolous challenges to arbitration proceedings and awards.[141] The Sixth Circuit approved $7,822 in sanctions imposed on an attorney who disregarded an order to arbitrate by failing to conduct discovery, seeking the arbitrator's removal, and refusing to participate in scheduled conferences and hearings. The sanction reimbursed the respondent for attorney fees incurred by reason of the claimant's attorney's wrongful actions and inactions.[142]

See also Chapter 17.

§ 20.9.4—Frivilous Appeals

See §§ 9.7.5, 14.7, 16.6.9, and 17.7.

§ 20.9.5—Remand And New Arbitration

See § 17.6.

§ 20.9.6—Costs And Attorney Fees

See § 18.5.

§ 20.10 • APPELLATE ARBITRATION

Parties can agree to have their appeals from an award be to an "appellate" arbitrator.[143] However, the effect of such appellate arbitration upon appeals to the district court and thereafter to the appellate court is unclear.[144] The AAA has a set of rules specifically for appellate arbitration.

§ 20.11 • BIBLIOGRAPHY

Anderson, "Stepping on the Judiciary's Toes: Can Arbitration Agreement Modify the Standard of Review that the Judiciary Must Apply to Arbitration Decisions?" *Construction Law.* 13 (Summer 2004).

Freyer & Shamoon, "Limiting and Expanding by Contract U.S. Court Review of Arbitral Awards," *Mealey's Int'l Arb. Rep.* (March 2006).

Haydock, "Judicial Review of Arbitration Awards," *For the Defense* 56 (April 2005).

Annot., *Appealability of Judgment Confirming or Setting Aside Arbitration Award*, 7 A.L.R.3d 608.

NOTES

1. FAA § 16; CRUAA, C.R.S. § 13-22-228 (2016).
2. *Bill Dreiling Motor Co. v. Court of Appeals*, 468 P.2d 37 (Colo. 1970) (emphasis added).
3. *Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132, 1134 (Colo. App. 2002).
4. *Estate of Grimm v. Evans*, 251 P.3d 574 (Colo. App. 2010).
5. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).
6. *Radil v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 233 P.3d 688 (Colo. 2010).
7. *Estate of Grimm v. Evans*, 251 P.3d 574, 576 (Colo. App. 2010).
8. *See* C.R.S. § 13-4-102.
9. *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065 (Colo. App. 1983); *Thomas v. Farmers Ins. Exchange*, 857 P.2d 532 (Colo. App. 1993).
10. *See Radil v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 233 P.3d 688 (Colo. 2010). *See also Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 119 (Colo. 2007).
11. *Radil*, 233 P.3d at 692.
12. *See Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928 (Colo. 1990); *Blue Sky Grp., LLC v. Redcon Homes, Inc.*, 2006 Colo. App. LEXIS 1689 (Colo. App. Oct. 12, 2006).

13. *Mountain Plains*, 785 P.2d at 931; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

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

15. *Gergel*, 58 P.3d at 1132.

16. *Frontier Materials, Inc.*, 663 P.2d at 1065.

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

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

19. *Ferla v. Infinity Dev. Assocs., LLC*, 107 P.3d 1006, 1006 (Colo. App. 2004).

20. *City & County of Denver v. Dist. Court*, 939 P.2d 1353, 1360-61 (Colo. 1997); *see generally* Annot., *Appeal of Order Compelling or Refusing to Compel Arbitration*, 6 A.L.R.4th 652.

21. *Galbraith*, 122 P.3d at 1063 (citing *Green Tree Fin. Corp.*, 531 U.S. at 89).

22. *Compare* Terry, Chapter 2, "Jurisdiction of the Appellate Courts," *in Colorado Appellate Handbook*, § 2.1 (CLE in Colo., Inc. 2015) ("The jurisdiction of the Colorado Court of Appeals . . . is prescribed by statute.").

23. *Fonden v. U.S. Home Corp.*, 85 P.3d 600 (Colo. App. 2003); *Galbraith*, 122 P.3d at 1061; *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002); *cf. Rosenthal v. Great West Fin. Sec. Corp.*, 926 P.2d 1061 (Cal. 1996) (FAA does not preempt state procedural rules in state court).

24. *Green Tree Fin. Corp.*, 531 U.S. at 79.

25. *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001).

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

27. *Galbraith*, 122 P.3d at 1061.

28. *Id.* at 1063.

29. *Saavedra v. Dealmaker Devs., LLC*, 8 So.3d 758 (La. Ct. App. 2009). *See also Am. Gen. Fin. Servs. v. Vereen*, 639 S.E.2d 598 (Ga. Ct. App. 2006).

30. *QFA Royalties, LLC v. Klahn*, 558 F. App'x 793 (10th Cir. 2014).

31. An order vacating an arbitrators award is also appealable under 28 U.S.C. § 1291. *United Food & Commercial Workers Union Int'l, Local 7 v. King Soopers, Inc.*, 743 F.3d 1310 (10th Cir. 2014).

32. An order vacating an award is appealable, even if the court ordered a new arbitration before a new panel. *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017 (5th Cir. 1990).

33. "Final decision" has the same meaning as "final" in 28 U.S.C. § 1291. *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091 (6th Cir. 2002).

34. *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

35. *Amgen, Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 95 F.3d 562 (7th Cir. 1996).

36. *Murchis, Inc.*, 2014 BL 206413 (5th Cir. 2014).

37. *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109 (3d Cir. 2012).

38. *Clarendon Nat'l Ins. Co. v. Kings Reins. Co.*, 241 F.3d 131 (2d Cir. 2001).

39. *See generally Blair*, 283 F.3d at 599.

40. *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009), *followed in Western Sec. Bank v. Schneider Ltd. P'ship*, 816 F.3d 587 (9th Cir. 2016).

41. *Id.* at 1379.

42. *Douglas v. U.S. District Court*, 495 F.3d 1062 (9th Cir. 2007).

43. *In re Universal Serv. Fund Tele. Billing Practice Litig.*, 428 F.3d 940 (10th Cir. 2005).

44. *KCOM, Inc. v. Emp'rs Mut. Cas. Co.*, 829 F.3d 1192 (10th Cir. 2016).

45. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

46. *KCOM, Inc.*, 829 F.3d at 1197.

47. *E.g.*, *Morgan Keegan & Co. v. Smythe*, 2011 Tenn. App. LEXIS 613, 2011 WL 5517036 (Tenn. App. Nov. 14, 2011), *rev'd*, 401 S.W.3d 595 (Tenn. 2013).

48. *Ross v. Am. Express Co.*, 478 F.3d 96 (2d Cir. 2007), *rev'd*, 547 F.3d 137 (3d Cir. 2008). *Compare Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle LLP*, 521 F.3d 597 (6th Cir. 2008), *rev'd sub nom. Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

49. *In re Universal Serv. Fund Tele. Billing Practice Litig. v. Sprint*, 428 F.3d 940 (10th Cir. 2005), *abrogated by Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624 (2009).

50. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

51. *Vernon v. Qwest Commc'ns Int'l, Inc.*, 925 F. Supp. 1185 (D. Colo. 2013).

52. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005).
53. *Aerojet-General Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973).
54. *Arthur Andersen LLP*, 556 U.S. at 627, 629 (2009).
55. *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009).
56. *Id.* at 1386.
57. *Western Sec. Bank v. Schneider Ltd. P'ship*, 816 F.3d 587 (9th Cir. 2016).
58. *United Steel, Pipe & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Phillips 66 Co.*, 839 F.3d 1198 (10th Cir. 2016); *Newmont U.S.A. Ltd v. Ins. Co of N. Am.*, 615 F.3d 1268 (10th Cir. 2010).
59. *See La. Health Serv. Indem. Co. v. DVA Renal Healthcare, Inc.*, 422 F. App'x 313, 314 n. 1 (5th Cir. 2011).
60. *KCOM, Inc. v. Emp'rs Mut. Cas. Co.*, 829 F.3d 1192, 1199 (10th Cir. 2016).
61. *Id.* at 1198.
62. CRUAA, C.R.S. § 13-22-228(2) (2016).
63. *Blue Sky Grp., LLC v. Redcon Homes, Inc.*, 2006 Colo. App. LEXIS 1689 (Colo. App. Oct. 12, 2006).
64. *See Long v. Miller*, 2007 Tenn. App. LEXIS 594, 2007 WL 2751663 (Tenn. Ct. App. Sept. 21, 2007).
65. *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 2014 COA 153.
66. *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1098 (Colo. App. 2009).
67. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005); *see also Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294 (6th Cir. 2008); *but see Graham v. Bayne*, 59 U.S. 60 (1855).
68. *Compare MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005).
69. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).
70. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).
71. *Id.* at 935.
72. *South Wash. Assocs.*, 859 P.2d at 217.
73. *Id.*
74. *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995). *But see Mantle v. Upper Deck Co.*, 956 F. Supp. 719 (N.D. Tex.1997).
75. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).
76. *MACTEC, Inc.*, 427 F.3d at 831. *See also Montez v. Hickenlooper*, 640 F.3d 1126 (10th Cir. 2011).
77. *MACTEC, Inc.*, 427 F.3d at 827.
78. *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294 (6th Cir. 2008).
79. *Campbell's Foliage, Inc. v. F.D.I.C.*, 562 F. App'x 828 (11th Cir. 2014).
80. *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276 (5th Cir. 1994).
81. *Id.* at 1280.
82. *Morgan Keegan & Co. v. Smythe*, 2011 Tenn. App. LEXIS 613, 2011 WL 5517036 (Tenn. App. Nov. 14, 2011), *rev'd*, 401 S.W.3d 595 (Tenn. 2013).
83. *See generally Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008).
84. *Compare ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091 (6th Cir. 2002); *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707 (4th Cir. 2001).
85. *Apache Bohai Corp. v. Texaco China, B.V.*, 540 U.S. 880 (2003).
86. *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158 (10th Cir. 2005); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470 (10th Cir. 2006).
87. *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004); *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997); *In re Salomon, Inc. Shareholders Derivative Litig.*, 68 F.3d 554 (2d Cir. 1995); *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990).
88. *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990).
89. *NOS Commc'ns, Inc. v. Robertson*, 936 F. Supp. 761, 766 (D. Colo. 1996).
90. *Bowen*, 254 F.3d at 925.
91. *South Wash. Assocs.*, 859 P.2d at 217.
92. *Id.*
93. *Id.* at 220 (citation omitted).

94. *Saipem Am. v. Wellington Underwriting Agencies Ltd.*, 335 F. App'x 377, 379-80 (5th Cir. 2009) (internal quotations and citations omitted).

95. *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1218 (10th Cir. 2005) (quoting *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1218 (10th Cir. 2002)); discussion of scope of review of denial of a stay of litigation in *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268 (10th Cir. 2010); *Kepas v. eBay*, 412 F. App'x 40 (10th Cir. 2010).

96. *Comanche Indian Tribe of Okla. v. 49, L.L.C.*, 391 F.3d 1129, 1132-33 (10th Cir. 2004).

97. *Green Tree Fin. Corp.*, 531 U.S. at 87 n. 2.

98. *Williams v. Nat'l Football League*, 582 F.3d 863, 551 (8th Cir. 2009) (quoting *Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007)).

99. *Winter Park Real Estate & Invs., Inc. v. Anderson*, 160 P.3d 399, 403 (Colo. App. 2007); *see also Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 146 (Colo. 2006).

100. *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068, 1072 (Colo. 2009), *following Lane v. Urgitus*, 145 P.3d 672, 677 (Colo. 2006).

101. *1mage Software, Inc. v. Reynolds & Reynolds Co*, 459 F.3d 1044, 1055 (10th Cir. 2006).

102. *Barrett v. Inv. Mgmt. Consultants*, 190 P.3d 800, 802 (Colo. App. 2008); *Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006).

103. *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006).

104. *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 15 (Ohio 2008).

105. *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1344 (10th Cir. 2009) (citations omitted).

106. *Lane*, 145 P.3d at 677.

107. *Id*. at 678.

108. *Meister v. Stout*, 353 P.3d 916, 919 (Colo. App. 2015).

109. *City & County of Denver*, 939 P.2d at 1353.

110. *People v. Riggs*, 87 P.3d 109, 114 (Colo. 2004).

111. *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005); *Gateway Tech., Inc.*, 64 F.3d at 993. *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1344 (10th Cir. 2009) ("we review factual findings for clear error and legal determinations de novo . . . [and] 'give extreme deference to the determination of the [arbitrator].'") (citations omitted); *Legacy Trading Co., Ltd. v. Hoffman*, 363 F. App'x 633 (10th Cir. 2010); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268 (10th Cir. 2010). *PFW, Inc. v. Residences at Little Nell Dev., LLC*, 292 P.3d 1094 (Colo. App. 2012); *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp., Inc.*, 251 P.3d 1091 (Colo. App. 2010); *Sure-Shock Elec., Inc. v. Diamond Lofts Venture, LLC*, 259 P.3d 546 (Colo. App. 2011); *Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562 (10th Cir. 2010); *CEEG (Shanghai) Solar Sci. & Tech. Co., Ltd. v. LUMOS LLC*, 829 F.3d 1201 (10th Cir. 2016).

112. *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000), *quoted in Youngs v. Am. Nutrition, Inc.*, 537 F.3d 1135, 1144 (10th Cir. 2008) (internal quotations and citations omitted).

113. *PPG Indus., Inc. v. Int'l Chem. Workers Union Council*, 587 F.3d 648 (4th Cir. 2009).

114. *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14 (Colo. App. 2010).

115. *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 771 (10th Cir. 2010); *Radil v. Nat'l Union Fire Ins. Co.*, 233 P.3d 688, 692 (Colo. 2010).

116. *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321 (1st Cir. 2000).

117. *Hughes Training, Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001). *See also Braata, Inc. v. Onerda Cold Storage Co., LLP*, 251 P.3d 584 (Colo. App. 2010).

118. *Atlantic Aviation, Inc.*, 11 F.3d at 1276.

119. *Nat'l Cas. Co. v. First State Ins. Group*, 430 F.3d 492 (1st Cir. 2005).

120. *Id.* at 496.

121. *BFN-Greeley, LLC v. Adair Grp., Inc.*, 141 P.3d 937, 940 (Colo. App. 2006).

122. *Id.*

123. *Ahluwalia v. QFA Royalties, Inc.*, 226 P.3d 1093, 1098 (Colo. App. 2009); *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp.*, 251 P.3d 1091 (Colo. App. 2010).

124. *Hicks v. Cadle Co.*, 355 F. App'x 186, 192 (10th Cir. 2009); *Taubman Cherry Creek Shopping Ctr., LLC*, 251 P.3d at 1093 ("We also review *de novo* whether the parties have agreed to arbitrate the question of arbitrability.").

125. *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105, 1108 (10th Cir. 2009).

126. *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp.*, 251 P.3d 1091 (Colo. App. 2010).

127. *Radil v. Nat'l Union Fire Ins. Co.*, 233 P.3d 688, 692 (Colo. 2010); *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp.*, 251 P.3d 1091 (Colo. App. 2010).

128. *Burlington N. & Santa Fe Ry. Co.*, 636 F.3d at 568 (quoting multiple cases).

129. *Radil v. Nat'l Union Fire Ins. Co.*, 233 P.3d 688 (Colo. 2010); *Lane*, 145 P.3d at 677; *Dorsey v. Dorsey*, 342 P.3d 491 (Colo. App. 2014).

130. *Braata, Inc. v. Oneida Cold Storage Co., LLP*, 251 P.3d 584 (Colo. App. 2010); *PFW, Inc. v. Residences at Little Nell Dev., LLC*, 292 P.3d 1094 (Colo. App. 2012).

131. *PFW, Inc. v. Residences at Little Nell Dev., LLC*, 292 P.3d 1094 (Colo. App. 2012).

132. *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140 (2d Cir. 2013); *Cmty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

133. *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp., Inc.*, 251 P.3d 1091 (Colo. App. 2010).

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

135. *Sure-Shock Elec., Inc. v. Diamond Lofts Venture, LLC*, 259 P.3d 546 (Colo. App. 2011) (citing *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003)).

136. *See Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704 (10th Cir. 2011).

137. *See Atlantic Aviation, Inc.*, 11 F.3d at 1276.

138. *Arthur Andersen LLP*, 556 U.S. at 628-29.

139. *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341 (10th Cir. 2009).

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

141. *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006), *abrogation recognized by Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010), and *United Steel, Paper & Forestry Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Wise Alloys, LLC*, 807 F.3d 1258 (11th Cir. 2015). *See also Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021 (7th Cir. 2013) (expressing concern that frequency of motions to vacate arbitration awards undermines the integrity of the arbitration process).

142. *Legair v. Circuit City Stores, Inc.*, 213 F. App'x 436 (6th Cir. 2007).

143. *See UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998); *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865 (N.C. Ct. App. 2006), *rev'd on other grounds*, 655 S.E.2d 362 (N.C. 2008).

144. *Duncan v. Nat'l Home Ins. Co.*, 36 P.3d 191 (Colo. App. 2001); *Cofinco, Inc. v. Bakrie & Bros., N.V.*, 395 F. Supp. 613 (S.D.N.Y. 1975).