Arbitration Law

What Every Litigating Should Know

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Overview of Discussion

• Before
  – Arbitration forum
  – Federal and state arbitration law
  – Motions practice

• During
  – Limited rules apply

• After
  – Motions practice
  – Appeals
Before
Basics

• Arbitration is an agreement to use a forum that is different from court.
  – Hire an arbitrator or a group of arbitrators to render an “award” regarding a controversy that is subject to the agreement to arbitrate.

  – Arbitration is favored.
Agreements to Arbitrate

• When dispute arises:
  – Look for an arbitration provision.
  – Contained within a contract between the parties.
AAA’s Model Arbitration Provision

- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
Reviewing the Arbitration Clause

• Does federal (FAA) or state arbitration law apply?
• Is a certain arbitration forum (AAA, FINRA) required to be hired?
• If not, are the rules of the forum required to be used?
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What Else to Look For?

– Is there a method for selecting an arbitrator?
– Who pays the expenses of the arbitration?
– Does it set forth a timetable for the case?
– Is there a privacy/confidentiality provision?
– Does it discuss discovery/rules of evidence?
– Can the award be confirmed in Court?
Relevant Statutes

- Both require an agreement to arbitrate.
- Common law also governs.
The FAA applies to:

- All lawsuits in state or federal court.
- When the dispute concerns a “contract evidencing a transaction involving commerce.”
- May apply in addition to a state arbitration statute.
- Assume the FAA always applies unless the arbitration provision says that state law applies.
FAA and CUAA - More

• FAA governs arbitration procedural law.
  – When arbitration agreement says FAA applies, or
  – Most likely when agreement is silent.

• State arbitration law also can apply as a gap filler.
  – FAA preempts inconsistent state law.
  – If state arbitration statute not inconsistent with the FAA, state statute may be a gap filler.
Court Compels Arbitration Under the FAA of Claim Seeking Exemplary Damages

- Colorado statute precludes arbitrators from awarding exemplary damages, C.R.S. § 13-21-102(5).

Malpractice Tip

• FAA and state law may have different timelines.
  – Ex: 90 days to move to modify or correct an arbitration award under CUAA; 3 months under FAA.
• Arbitration forum rules may have different timelines.
• Be aware of timelines and be conservative when you aren’t sure which law applies.
Starting the Arbitration

– Make a written demand.
  • Demand all remedies in arbitration.
– CUAA has a provision on what constitutes “notice.”
– FAA merely requires a refusal to arbitrate in order to start the court machinery.
– Best practice – file your case with the arbitration tribunal.
Motions Practice

• Motion to compel arbitration.
  – Case filed by opposing party and you want to stop litigation in favor of litigation, or
  – You can’t get opposing party to go to arbitration so you seek the court’s assistance.
Move to Stay or Dismiss?

• Motion to stay – allows case to remain open pending arbitration.
  – Permits confirmation of award.
  – Permits motions practice to vacate, modify, correct award.

• Dismissal might be a hollow victory if case needs to be reopened.
Court Administratively Closes Case Pending Arbitration

• Alternative to granting a stay pending arbitration.


Seek All Relief in One Motion

• Stay pending arbitration denied when motion referred to U.S. Magistrate and separate motion to dismiss and compel before U.S. District Court judge.

• Two cases:
  – *Hirschfeld, Jr. v. 1111 Tower LLC*, 2009 U.S. Dist. LEXIS 78210;
Interlocutory Appeals

• Can file an interlocutory appeal of an order denying stay of litigation or denying a motion to compel arbitration.

• Can’t file an interlocutory appeal of an order compelling arbitration.

• Reflects policy favoring arbitration.
To Appeal Order Dismissing Claim Subject to Arbitration, Must Request Relief Under FAA

• 9 U.S.C. § 16(a).
• *Conrad v. Phone Directories Co.*, 585 F.3d 1376.
Bright Line Rule

• A defendant must either:
  • a) move to compel arbitration and stay litigation explicitly under the FAA, or
  • b) make it plainly apparent in his prayer for relief that he seeks only the remedies provided for by the FAA (arbitration rather than any judicial determination).
Arbitrator vs. Court
Who Decides What?

• Court:
  – Whether a valid arbitration exists.
    • No presumption in favor of arbitration here.
  – Whether a controversy is subject to arbitration.
    • Called “question of arbitrability.”

• Arbitrator:
  – Whether the contract containing the arbitration agreement is enforceable.
  – Whether statute of limitations applies?
Arbitrator May Decide Arbitrability If Rules Permit

• Case of first impression under the FAA.
• An arbitrator may determine whether an issue is subject to arbitration if the arbitration agreement incorporates rules of an arbitration forum that empowers the arbitrator to decide arbitrability.

Waiver

• Whether a party has waived right to arbitrate by litigating a matter instead of going to arbitration.

• Waiver if a party substantially invokes the litigation machinery.
During Arbitration
Arbitrator’s Broad Powers

• Must give notice and opportunity to be heard.

• Evidence rules relaxed.
  – Assume rules will be loosely followed but arbitrator might not be a lawyer.

• Discovery is limited.
  – Can issue subpoenas.

• Arbitration forum rules provide additional guidance.
Under Colorado Law, Arbitrators Are Not Required to Explain their Reasoning in the Arbitration Award Unless Required by the Arbitration Provision

After Arbitration
Confirming the Arbitration Award

- Arbitration award is not a judgment.
- Must be confirmed in order to invoke Court’s procedures for enforcing an award and to appeal.
- Parties might want award to be private and thus don’t want it confirmed.
  - Award is still valid and enforceable.
Rules for Confirming the Award

• CUAA permits confirmation.

• FAA requires an agreement to confirm.
  – Requires award to be confirmed within one year.
If parties to an arbitration agreement: 

“have agreed that a judgment of the court shall be entered upon the [arbitration] award”

any party to the arbitration may apply to the court for an order confirming the arbitration award.
Absent Express Consent, Courts Look for One of Two Provisions in Arbitration Agreement

• A “finality” provision where the parties agreed that the arbitration award will be final and binding; or

• The parties agreed that the rules of the American Arbitration Association govern the arbitration.
Court Refuses to Confirm Arbitration Award

- Court found that the parties did not expressly consent to confirm the award, and
- Arbitration agreement did not contain a “Finality Provision” or require the parties to arbitrate under the AAA Rules.
Correcting/Modifying the Award

• Arbitrator corrections:
  – Forum often provides time period for seeking a correction after award issued.
  – CUAA imposes 20 day deadline.
  – Not discussed in FAA.

• Court corrections:
  – In response to motion to confirm,
  – 90 days under CUAA, or
  – 3 months under FAA.
Court’s Powers to Correct/Modify

• CUAA - C.R.S. § 13-22-224.
  – Evident mathematical error or description of something in the award; or
  – Award imperfect but doesn’t effect merits.

  – Same as first bullet of CUAA but must be material.
  – Same as second bullet.
  – Arbitrator makes an award on a claim not submitted to arbitrator and correction doesn’t affect the merits on claims submitted.
Arbitrator Can Clarify the Award

• In Colorado, if award is ambiguous, the arbitrator can clarify the award if it does not redetermine the merits.

• A trial court also may correct the award if the record is adequate to do so, otherwise it must remand to the arbitrator.
Vacating Award

• Similar reasons under FAA and CUAA:
• Award procured by corruption, fraud or undue means;
• Evident arbitrator partiality or corruption;
• Misconduct of the arbitrators prejudicing rights of a party:
  – Refusing to postpone a hearing.
  – Refusing to hear pertinent and material evidence.
Vacating Award – Cont’d

• Arbitrators exceeded their powers.

• Additional CUAA.
  – No agreement to arbitrate unless waiver.

• Judicially created (unclear whether viable).
  – Arbitrators violated public policy.
  – Acted with manifest disregard of the law.
  – Arbitrators denied a fundamentally fair hearing.
Can’t Be Supplemented by Contract

• The grounds under the FAA for modifying, correcting, or vacating an award cannot be supplemented by contract.

Manifest Disregard of the Law

• Standard articulated in many ways:
  – Primarily that the arbitrator knows about a legal
    principal but refuses to apply it or is willfully
    inattentive to the law.

• Rarely used to overturn an award.

• Standard probably doesn’t apply in Colorado.
Appeals

• Award must be confirmed.
• Beware of denial of motion to vacate, modify or correct by operation of law.
  – C.R.C.P. 59(J) – trial court has 60 days to decide a post-trial motion and it is deemed denied if not ruled upon.
  – Starts clock running for an appeal.
Appeals

• Govern interlocutory appeals.
  – Order refusing a stay of litigation or denying motion to compel arbitration.
• Other appeals.
  – Order on confirmation of award or modifying, correcting, or vacating award.
  – Final judgment.
• CUAA – C.R.S. § 13-22-228.
Attorneys’ Fees Awarded on Appeal of Arbitration Award

• Warning to parties not to be careful in appealing arbitration award.

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

• Questions?
• Thank you!
• Supplementary materials reference during the presentation can be found here.