ARBITRATION:
The Fundamentals

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THE FUNDAMENTALS

I. INTRODUCTORY REMARKS

a. Introduction of Speakers
b. Biographies
c. Introduction to Arbitration: The Fundamentals:
   ▪ What, How, Who, Why?
   ▪ A roadmap of the arbitration model of dispute resolution
   ▪ Why choose arbitration?
   ▪ An arbitration timeline
   ▪ Choosing an arbitration forum
   ▪ Choosing an arbitrator
   ▪ How to commence arbitration
   ▪ Know what your client is getting into when agreeing to arbitration in a pre-dispute contract or after disputes have arisen.

II. WHAT IS ARBITRATION?

Dispute resolution by civil litigation – attributes and purposes. Litigation = trial by fire, ordeal or torture – uncivilized, feels like financial murder.

a. Civil Litigation
   ▪ Due process issues include:
     ▪ Service of process
     ▪ Forum jurisdiction
     ▪ Applicable law
     ▪ Jury trial rights
   ▪ Discovery
     ▪ Generally broad
     ▪ Disputes and hearings/argument
   ▪ Motion practice under Rules of Civil Procedure
   ▪ Appellate Proceedings
   ▪ Expensive
   ▪ Lengthy period until final disposition

b. Arbitration Defined

“Arbitration is a mode of settling differences through the investigation and determination, by one or more unofficial persons selected for the purpose, of some disputed matter submitted to them by the contending parties for decision and award, in lieu of a judicial proceeding. An arbitration agreement constitutes a prospective choice of forum which trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. That is, arbitration serves as a beneficial alternative to litigation that

can provide a more expeditious and less expensive resolution of disputes. In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. Arbitration is essentially contractual and its basic tenet is that of avoiding courts and resolving the dispute at issue.”

c. Goals of arbitration—justice in a “better, faster, cheaper” model
d. Straight Line” approach or . . . 
e. just another complex framework to master?

III. PROS AND CONS OF ARBITRATION

Issue: Should either or both of the parties to a proposed contract consider arbitration for dispute resolution rather than litigation before signing? Why would parties choose to arbitrate after a dispute has arisen but where the contract contains no arbitration clause?

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2 Am.Jur.2d Alternative Dispute Resolution § 2
3 Relativity, Escher. 1953
# FACTORS TO BE CONSIDERED

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**a. Litigator’s Perspective on Arbitration**

i. Not have to follow the law

ii. Rules of Evidence may be relaxed (good and bad)

iii. Psychological bias in the industry

iv. Unregulated – no oversight

v. Jury system advantages over neutrals

   a) Best system devised

   b) Jurors try to get to right answer

   c) Not affected by prior industry experience

   d) Most often correct factual decision / legal decision?

   e) Multi perspectives

   f) Few surprise results

vi. Relief for misconduct
IV. PROCEDURAL PROBLEMS AND CIRCUMSTANCES WHICH ADD DELAY AND EXPENSE PECULIAR TO ARBITRATION PROCEEDINGS

a. Issues Over Who is Bound & Who Can Enforce Arbitration.\(^4\)

b. Motions to Compel Arbitration: Arbitration provisions are not self-executing.\(^5\) C.R.S. § 13-22-206(2) expressly empowers the Court to decide “whether an agreement to arbitrate exists.” The Court is also required to decide if the “controversy is subject to an agreement to arbitrate.” Id.

c. Jurisdiction and Venue issues
   i. State
   ii. Federal (e.g., Ansari)\(^6\)

d. What law applies?
   i. State Uniform Arbitration Act?\(^7\)
   ii. Federal Arbitration Act?\(^8\)
   iii. Conflict of laws rules?\(^9\)
   iv. Who decides?\(^10\)

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\(^4\) In *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006), the Colorado Supreme Court held that assenting to membership in an organization that requires consent to arbitration results in an implied condition to arbitrate in later agreements between organizational members which do not mention arbitration. Non-parties have also been held to have standing to compel arbitration upon showing of third-party beneficiary status. *See Eagle Ridge Condominium Ass'n v. Metro. Builders, Inc.*, 98 P.3d 915, 917 (Colo. App. 2004) (“A nonparty, such as a third-party beneficiary, may fall within the scope of an arbitration agreement and may bring an action on the contract if that is the intent of the parties.”); *Parker v. Ctr. for Creative Leadership*, 15 P.3d 297, 298 (Colo. App. 2000) (same).

\(^5\) “A right to compel arbitration is not . . . self-executing. If a party wishes to compel arbitration, he must take active and decided steps to secure that right[.]” *Brock v. Kaiser Foundation Hospitals*, 13 Cal. Rptr. 2d 678, 682 (Cal. App. 1992) (quotation omitted).

\(^6\) *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214, 1219–1220 (10th Cir. 2005) (Because parties agreed to arbitration in a specified forum, only a district in that forum may compel arbitration.)


\(^8\) 9 U.S.C.A. § 1, *et seq.* (FAA applicable if the contract containing the arbitration clause evidences a transaction involving interstate commerce.)

\(^9\) Absent choice of law provision in contract, choice of law principles, including the choice of law principles of state law, will apply to determine law applicable to the arbitration proceedings. Consider making a valid (not contrary to public policy) selection of state law, *excluding its conflict of laws principles*.

\(^10\) Generally, the arbitrator will decide what law applies in the absence of a valid contractual designation.
e. Addressing the Threshold Question: Is there an Agreement to Arbitrate?

When a court is asked to compel arbitration, the threshold question is whether the parties have an agreement to arbitrate that covers the claims presented. Arbitration is a matter of contract. A party cannot be required to submit to arbitration absent an existing agreement to arbitrate.\textsuperscript{11}

f. Stays of Judicial Proceedings: Stays of judicial proceedings are permitted pending a ruling on the duty to arbitrate. But under the Arbitration Act, a Motion to Compel Arbitration is a pre-condition to obtain a stay. \textsuperscript{12}

g. Scope of Arbitration/Arbitrability: The court shall decide if “a controversy is subject to an agreement to arbitrate.” C.R.S. § 13-22-206(2).\textsuperscript{13}

\textsuperscript{11} Colorado’s Arbitration Act provides that “if there is no enforceable agreement [to arbitrate, the court] may not . . . order the parties to arbitrate.” C.R.S. § 13-22-207(3). See also Tracer Research Corp. v. National Environmental Serv. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (stating that “[n]otwithstanding the federal policy favoring it, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”) (quotation omitted).

\textsuperscript{12} “\textit{If a party files a motion with the court to order arbitration}, the court on just terms shall stay any judicial proceeding . . . until the ordering court renders a final decision under this section.” C.R.S. § 13-22-207(6) (emphasis added). Thus, to be entitled to a stay, a party must first move to compel arbitration under C.R.S. § 13-22-207(1). Whether raised via Motion to Compel or via a motion opposing arbitration, Colorado’s Arbitration Act repeatedly directs that the court “shall proceed summarily to decide the issue” whether an agreement to arbitrate exists. C.R.S. § 13-22-207(1)(b) & (2).

\textsuperscript{13} The case of Cabs, Inc. v. Delivery Drivers, Warehousemen and Helpers Local Union No. 435, 566 P.2d 1078 (Colo. App. 1977), holds: “interpretation of the scope of the party’s agreement to arbitrate devolves in the first instance upon the courts.” Id., 556 P.2d at 1080. This is true even though the law favors arbitration: “although arbitration is favored as a method of resolving disputes, . . . where it is apparent from the language of the contract that the issues sought to be arbitrated lies clearly beyond the scope of the arbitration clause, a court cannot order arbitration.” Id. at 1080. Note however that some federal courts have held that the mere recitation of AAA as the arbitral forum incorporates all of the Rules, including AAA Commercial Rule 7 which empowers the arbitrator to decide arbitrability of the dispute. Schneider v. Kingdom of Thailand, 688 F.3d 68, 71 (2dCir.2012) (“Where parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.”); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527, 202 L. Ed. 2d 480 (2019) (“Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court’s cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an
h. Clarity of Agreement as to disputes subject to arbitration

i. Legal limits to arbitrability or waivers of class action arbitration

i. Consumer cases

ii. Employment disputes

iii. Domestic relations issues

a) Custody
b) Visitation
c) Child support
d) Maintenance of former spouse

iv. Class actions, e.g., AT&T Mobility LLC v Concepcion

v. Professional limitations

a) Arbitration of negligence claims against physicians, healthcare providers, attorneys, accountants, licensed professionals? Look to the engagement agreement and check with insurers.

(1) Need certificate of review?

arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.”

14 Some of these include: danger of using forms; unintended consequences; fee and cost shifting scope of disputes to be arbitrated; discovery scope and limits; streamlining efforts, special powers of arbitrators as to provisional or supplemental remedies and case administration.

15 The Federal Arbitration Act (FAA) precludes a state law that disfavors arbitration of a particular type of claim, e.g., consumer contract dispute, when arbitration of other types of disputes is not so disfavored. 9 U.S.C.A. §2. Goodridge v. KDF Automotive Group, Inc., 2012 WL 3635279 (Cal. App. 4th Dist. 2012). Also, arbitration clauses prohibiting class actions or requiring waivers of arbitration clauses by consumers are suspect and may be unenforceable. Validity of Arbitration Clause Precluding Class Actions, 13 A.L.R.6th 145. Further the FAA supersedes only contrary state law.

16 Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002), cert. denied, 122 S. Ct. 2329, 153 L. Ed. 2d 160 (U.S. 2002) (Mandatory arbitration clause as to employee’s claims against employer but not as to employer’s claims against employee and had a damages limitation was unenforceable as unconscionable and a contract of adhesion under state law.)

17 Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters, 38 A.L.R.5th 69. Courts will enforce arbitration agreements between spouses when issues to be arbitrated concern alimony or spousal support. The trend is to enforce arbitration agreements concerning child support as well. The courts are divided, even within the same jurisdiction, as to the validity of arbitration clauses for determining custody or visitation.

18 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P. 10368 (2011) (Federal Arbitration Act preempts California state rule prohibiting class action arbitration waivers in consumer contracts thus permitting such waivers and requiring consumers to bring individual arbitration actions for fraud disputes.)
j. Waiver of Arbitration – express or implied

k. Revocation/Expiration of Prior Consent to Arbitrate

l. Provisional Remedies

19 Ordinarily, a party waives its right to arbitrate when it initially pursues litigation and then reverses course and attempts to arbitrate; however, waiver can also result from some overt act in court that evinces a desire to resolve an arbitrable dispute through litigation rather than arbitration. However, mere delay in naming an arbitrator falls far short of a waiver of the contractual right to arbitrate. *Bryant v. Serv. Corp. Int'l*, 801 F. Supp. 2d 898 (N.D. Cal. 2011), amended (Sept. 12, 2011), *rev'd sub nom. Biernacki v. Serv. Corp. Int'l*, 533 Fed. Appx. 741 (9th Cir. 2013) (Employees waived their right under the Federal Arbitration Act (FAA) to compel arbitration of their state law hour and wage claims against employer, where employees litigated their claims for over three years, by filing case at bar in federal court, filing amended complaint, undertaking considerable discovery including filing motion to compel, and filing motion for class certification, and where employer was prejudiced by time and expense of litigating case for three years.) See 9 U.S.C.A. § 4. See also *BOSC, Inc. v. Board of County Commissioners of County of Bernalillo*, 853 F.3d 1165 (10th Cir. 2017) (there are two forms of waiver of arbitration under the Federal Arbitration Act: (1) when a party intentionally relinquishes or abandons its right to arbitration, and (2) when a party's conduct in litigation forecloses its right to arbitrate). See 1 Domke on Com. Arb. § 17:8.

20 C.R.S. § 13-22-206(1) makes agreements to arbitrate “irrevocable except on a ground that exists at law or in equity for the revocation of a contract.” *Id.* Although no Colorado court appears to have addressed whether a subsequent agreement can revoke prior consent, this issue was addressed in *Golden Seed Co., Inc. v. Funk Seeds International, Inc.*, 315 N.E.2d 140 (Ill. App. 1974). Recognizing that “an arbitration agreement may be revoked by mutual consent of the parties, both at common law and under the Uniform Act[,]” the Golden Seed Court looked at the later franchise agreement to determine whether it required arbitration, ultimately holding that because the later agreement did not require arbitration, it superseded the earlier bylaws that did. *Id.*, 315 N.E.2d at 141-42. On expiration, see *Korody Marine Corp. v. Minerals & Chemicals Philipp Corp.*, 300 F.2d 124, 125 (2d Cir. 1962) (holding that arbitration clause in contract expired when the parties did not agree to renew the contract).

21 C.R.S.A. § 13-22-208:

(1) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(2) After an arbitrator is appointed and is authorized and able to act: (a) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, *to the same extent and under the same conditions as if the controversy were the subject of a civil action*; and, (b) A party to an arbitration proceeding may request the court to issue an order for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.
m.  Selection of Rules
n.  Discovery Disputes and resolution by arbitrator or master
o.  Enforceability of Subpoenas for Production and Testimony

V.  ETHICAL ISSUES IN ARBITRATION V. LITIGATION V. MEDIATION
   a.  Privileges
   b.  Grounds for invalidation of arbitration award
   c.  Applicability of Rules of Professional Conduct
   d.  Attorneys’ Fees Claims

(3) A party does not waive a right of arbitration by making a motion under subsection (1) or (2) of this section.

22 The rules of evidence in an AAA arbitration provide: “(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present; (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant; (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.” AAA Commercial Rule 34 (emphasis added).

23 When representing a client during alternative dispute resolution, the ethical considerations for the attorney do not differ markedly from those associated with the trial process. In fact, in many cases, mediation or a settlement conference of some kind will be a required preliminary step in the process. When the attorney becomes a mediator or arbitrator, however, entirely different ethical standards must be observed. Colorado R. Prof. Cond. § 2:4, 19 Colorado Practice 2:4. See Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards, Henry Gabriel & Anjanette H. Raymond, 5 Wyo. L. Rev. 453 (2005).

24 (1) An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. § 13-22-221. This means that a violation of C.R.S. §13-17-102 (maintaining an action without substantial justification) will be as applicable in arbitration as in litigation, and the same is true for costs. However, absent statutory or contractual authority, attorneys’ fees cannot be awarded by an arbitrator if not authorized by state law as the American Rule applies in Colorado. See Guaranty Trust Life v. Estate of Casper, 418 P.3d 1163, 1172 (Colo. 2018) (attorney’s fees not actual damages in the absence of contractual or
VI. USES AND PITFALLS OF MEDIATION/ARBITRATION (“MED-ARB”)

a. Conflicts of Interest
b. Conflicting Roles of the “Neutral”
c. Evidence Issues
d. Vacating Med/Arb Award

VII. ARBITRATION PROCEDURES TO IMPROVE EFFICIENCY

a. Clients to be Present at Scheduling Conference
b. Presetting regular status calls
c. Pre-Hearing Conference to focus presentation timing and opening and closing statements
d. Use of Joint Document Depository
e. Joint Exhibits and Separate Exhibits
f. Electronic exhibits and transcripts with embedded exhibits.
g. Written Stipulations
   i. Exhibits
   ii. Means to avoid discovery disputes
      a) Calls vs. motions
      b) Mandatory award of fees for disputes
   iii. Transcript of proceedings
   iv. Experts’ credentials
   v. Other
h. Pre- and Post- Hearing Briefs
   i. Oral vs. Written Closing Arguments

VIII. REALITIES OF ARBITRATION

a. Requesting Reasoned vs. Non-Reasoned Award: Costs and Benefits
b. Confirming the Award: Selective or Full Possibilities
c. Enforcing an Arbitration Award

statutory mandates to the contrary because they are not “the legitimate consequences of the tort or breach of contact sued upon and thus not recoverable”).
d. Lack of Appellate Remedies: Limited Grounds

25 C.R.S. § 13-22-223 provides:
“(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if the court finds that:
   (a) The award was procured by corruption, fraud, or other undue means;
   (b) There was:
      (I) Evident partiality by an arbitrator appointed as a neutral arbitrator;
      (II) Corruption by an arbitrator; or
      (III) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
   (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 13-22-215, so as to prejudice substantially the rights of a party to the arbitration proceeding;
   (d) An arbitrator exceeded the arbitrator's powers;
   (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 13-22-215(3) not later than the beginning of the arbitration hearing; or
   (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 13-22-209 so as to substantially prejudice the rights of a party to the arbitration proceeding.
(1.5) Notwithstanding the provisions of subsection (1) of this section, the fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.
(2) A motion made under this section shall be filed within ninety-one days after the movant receives notice of the award pursuant to section 13-22-219 or within ninety-one days after the movant receives notice of a modified or corrected award pursuant to section 13-22-220, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within ninety-one days after either the ground is known or by the exercise of reasonable care should have been known by the movant.
(3) If the court vacates an award on a ground other than that set forth in paragraph (e) of subsection (1) of this section, it may order a rehearing. If the award is vacated on a ground stated in paragraph (a) or (b) of subsection (1) of this section, the rehearing shall be held before a new arbitrator. If the award is vacated on a ground stated in paragraph (c), (d), or (f) of subsection (1) of this section, the rehearing may be held before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in section 13-22-219(2) for an award.
(4) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.”
BIBLIOGRAPHY


