

**DRAFTING AN ARBITRATION AGREEMENT
UNDER THE COLORADO REVISED
UNIFORM ARBITRATION ACT©**

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I. INTRODUCTION

The rules that govern an arbitration are defined by the agreement of the parties, by applicable arbitration statute (Federal Arbitration Act (“FAA”) 9 U.S.C. § 1, *et seq.* or Colorado Revised Uniform Arbitration Act (“CRUAA”) C.R.S. § 13-22-201, *et seq.*) and common law; by any rules incorporated into arbitration agreements (*e.g.*, American Arbitration Association Commercial Industry Arbitration Rules); and by the orders of the arbitrator. In addition, ethical codes, such as Colorado Rules of Professional Conduct and ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes may be applicable. Often in drafting elaborate arbitration agreements, the scrivener fails to recognize the applicability of an arbitration statute and incorporated rules, and ends up with an unnecessarily lengthy arbitration provision in essence containing “nearly” duplicate and often contradictory and confusing provisions.

This article will discuss the clauses that are a part of the arbitration agreement by reason of the CRUAA being incorporated by law into the agreement. In addition, it will review those provisions of the CRUAA incorporated into the agreement which may be altered or revised by agreement of the parties. This article is written with regard to drafting an arbitration provision for future disputes (as distinguished from existing disputes) under the CRUAA. The same

general concepts are applicable to drafting an agreement for submission of an existing dispute to arbitration and for drafting an agreement under the Federal Arbitration Act.

II. WHICH STATUTE GOVERNS THE ARBITRATION: FAA OR CRUAA?¹

The FAA applies and governs arbitration of disputes which arise out of a contract evidencing a transaction involving interstate commerce,² in both federal court proceedings, and, in part, in state court proceedings. If the dispute does not arise out of interstate commerce – if the FAA does not apply – state law applies: in Colorado, the CRUAA.

However, the parties may supersede this choice of law by agreement. The parties may agree that the arbitration shall be governed by the CRUAA, even if the dispute arises out of a transaction in interstate commerce.³ Perhaps the parties can agree that the FAA governs, even if the transaction in issue does not involve interstate commerce.⁴

This article is based upon the applicability of the CRUAA, either because the disputes do not arise out of a transaction in interstate commerce, or because the parties have agreed to its application to the arbitration proceeding.

III. THE BASIC ARBITRATION PROVISION

The starting point in drafting an arbitration provision is the agreement of the parties to arbitrate:

¹ Benson, Colorado Arbitration Law and Practice, (Third Ed.) (CLE in Colo. 2013) Chp. 4.

² Benson, §§ 3.7 and 4.2.2; 9 U.S.C. §§ 1 and 2.

³ Benson, § 4.5.

⁴ Benson, § 4.5. But, *see* § 13-22-204 (3)(a) with respect to § 203.

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, [. . .] and judgment may be entered in any court having jurisdiction thereof.⁵

This provision is a basic agreement of the parties to arbitrate future disputes arising out of or relating to the contract in which it is contained. Without more, it is enforceable. The “detail” as to how the arbitration proceeds with a very basic agreement is defined by the applicable arbitration statute and common law, and by the arbitrator, once appointed. However, many parties in agreeing to arbitration, also want to define, or at least know, the specifics of the arbitration law and procedures that will be followed, should a dispute arise.

If rules are to be incorporated into the arbitration agreement, in the above clause where the “. . .” appears, one might insert “by the American Arbitration Association under its Commercial Arbitration Rules.” (or, “by Judicial Arbiters Group under its applicable arbitration rules” or “by JAMS under . . .”). Such a clause makes those incorporated rules as much a part of the arbitration agreement as if set forth in full.⁶

The applicable statute need not be specifically “incorporated by reference,” as it “applies” either by its terms or by the fact that the parties agreed to its applicability. Conflict of law rules cover what state arbitration act applies.⁷

IV. STATUTORY PROVISIONS THAT ARE PART OF THE ARBITRATION AGREEMENT BY REASON OF BEING THE APPLICABLE LAW

For purposes of this article, it is assumed the Colorado Revised Uniform Arbitration Act is applicable. *See* Section II *supra*.

⁵ Except for the omitted words, this is the standard arbitration language suggested by the American Arbitration Association.

⁶ Benson, § 5.7.1.

⁷ Benson, § 4.4. *See, Goodyear Tire & Rubber Co.*, 168 P.3d 507 (Colo. 2007).

A. Provisions of the CRUAA that cannot be changed.

The CRUAA defines the basic procedure for an arbitration. However, many of the sections apply only if the parties do not otherwise agree. Other sections of the statute may be superseded by agreement only after an actual dispute arises. In drafting an arbitration clause for future disputes, one need not include in the agreement provisions of the statute that cannot be altered, or can only be altered by agreement after an actual dispute arises: They are already incorporated into the contract by operation of law.⁸

CRUAA, C.R.S. § 13-22-204 (3)(a) provides:

Except as otherwise provided in paragraph (b) of this subsection (3), a party to an agreement to arbitrate . . . may not waive, or the parties may not vary the effect of, the requirements of this section or section 13-22-203 (1), 13-22-207, 13-22-214, 13-22-218, 13-22-220 (4) or (5), 13-22-222, 12-22-223, 13-22-224, 13-22-225 (1) or (2), or 13-22-229.

These statutory provisions which may not be waived or varied by the parties under Section 204 (3)(a) in brief are:

§ 204. Effect of agreement to arbitrate — non-waiveable provisions.

§ 203 (1). Applicability [of the CRUAA].

§ 207. Motions to compel or stay arbitration.

§ 214. Immunity of arbitrator – competency to testify – attorneys fees and costs.

§ 218. Judicial enforcement of pre-award ruling by arbitrator.

§ 220 (4) and (5). Change of award by arbitrator: (4) certain motions to modify or correct award may be submitted by court to

⁸ See Williston on Contracts § 30.19; *First National Bank of Northampton v. Arthur*, 50 Pac. 738 (Colo. App. 1897), quoted with approval, in *Cochrane v. Pacific States Life Ins. Co.*, 27 P.2d 196 (Colo. 1933).

arbitrator; (5) a modified or corrected award is subject to defined statutory provisions.

§ 222. **Confirmation of award.**

§ 223. **Vacating award.**

§ 224. **Modification or correction of award.**

§ 225 (1) and (2). **Judgment on award — attorneys fees and litigation expenses:** (1) Judgment upon confirmation; (2) Award of costs of motion to confirm.

§ 229. **Uniformity of application and construction.**

All of these provisions are “the law” and may not be waived or the effect varied by agreement of the parties. Therefore, there is no reason to insert provisions covering those points in the arbitration agreement, since the law is automatically incorporated into the agreement. However, these provisions may be supplemented in the agreement, so long as the supplement does not vary the effect of the statute.

B. Provisions of the CRUAA that cannot be waived or effect varied until a dispute actually arises.

The CRUAA defines certain of its provisions that may be waived or varied in effect by the parties only once an actual dispute arises. C.R.S. § 13-22-204 (2) provides:

(2) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(a) Waive or agree to vary the effect of the requirements of section 13-22-205 (1), 13-22-206 (1), 13-22-208, 13-22-217 (1) or (2), 13-22-226 or 13-22-228;

(b) Agree to unreasonably restrict the right under section 13-22-209 to notice of the initiation of an arbitration proceeding;

(c) Agree to unreasonably restrict the right under section 13-22-212 to disclosure of any facts by a neutral arbitrator; or

(d) Waive the right under section 13-22-216 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this part 2, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

The “theory” of not allowing certain statutory provisions to be waived, or the effect varied is based upon each party being able to better analyze what is needed in the arbitration once the specific dispute to be resolved is known. Also, this limitation prevents important provisions from being altered by contractual fine print that may constitute a contract of adhesion.

Thus, in drafting the arbitration agreement for future disputes, the provisions defined in Section 13-22-204 (2)(a) and (d) may not be waived or varied in effect by the parties and should be treated in the same manner as those in Section A: these provisions need not and should not be covered in the arbitration agreement, except to supplement them.

The specific statutory sections that may not be waived or varied in effect by the parties until a controversy arises that is subject to agreement to arbitrate. These provisions as set out in section 13-22-204 (2) (a) *supra* are:

§ 205 (1). **Application for judicial relief.** (1) Made by motion to court.

§ 206 (1). **Validity of agreement to arbitrate.**

§ 208. **Provisional remedies.**

§ 217 (1) and (2). **Witnesses — subpoenas — depositions — discovery.** (1) Subpoenas. (2) Depositions.

§ 226. **Jurisdiction** (of courts).

§ 228. **Appeals.**

The parties cannot waive or vary the effect of these provisions in an agreement to arbitrate future disputes. Hence, the arbitration agreement should not cover these provisions in the arbitration agreement, unless to supplement them, these provisions are deemed a part of the agreement.

These specific statutory provisions of CRUAA that may not be unreasonably restricted.

As set out in Section 13-22-204 (2) (b) and (c), above there are two provisions that pre-controversy cannot be “unreasonably” restricted:

§ 209. **Initiation of the arbitration.** The agreement cannot unreasonably restrict the right to notice of the initiation of an arbitration proceeding. Notice is defined in Section 13-22-202. Thus, “reasonable” restrictions on the right to receive notice of the initiation of an arbitration may be included in the arbitration agreement. Probably the ultimate test is whether the restriction does not decrease the likelihood of the respondent “knowing” an arbitration has been commenced.

§ 212. **Disclose by the arbitrator.** The parties cannot agree to unreasonably restrict the right under 13-22-212 to disclosure of any facts by a neutral arbitrator. In essence, the parties may not “unreasonably” restrict what information a neutral arbitrator shall or may disclose with respect to his or her impartiality. For example, a restriction that the arbitrator in disclosures shall not disclose facts or events that occurred more than 30 years ago usually would seem reasonable.

Lastly, under § 204 (2)(d) the right to representation by a lawyer under C.R.S. § 13-22-216 cannot be waived or the effect varied prior to the controversy arising, except that a union and employer may waive that right.

C. Provisions of the CRUAA that may be waived or altered by agreement of the parties.

Section 13-22-204 (1) defines sections or subsections of the CRUAA that may be waived or varied by the parties in arbitration agreements for future disputes:

(1) Except as otherwise provided in subsections (2) and (3) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or, the parties may vary the effect of, the requirements of this part 2 to the extent permitted by law.

After deleting the sections referred to in subsections (2) and (3) [Subsection IV, A and B of this article], the remaining provisions of CRUAA may be waived or varied in effect by the arbitration agreement:

§ 201. **Definitions.**

§ 202. **Notice.**

§ 203 (2). **Applicability.** (2) Parties may agree to apply to arbitration agreements made prior to August 4, 2004.

§ 205 (2). **Application for judicial relief:** (2) Notice.

§ 206 (2) – (4). **Validity of agreement to arbitrate.** (2) Court decides whether agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable. (4) If party in judicial proceeding challenges the existence of, or claims that a controversy is not subject to an agreement to arbitrate, arbitration proceeds unless court orders otherwise.

§ 209. **Initiation of arbitration.** (Cannot unreasonably restrict right to notice.)

§ 210. **Consolidation of separate arbitration proceedings.**

§ 211. **Appointment of arbitrator — service as neutral arbitrator.**

§ 212. **Disclosure by arbitrator.** (May not be unreasonably restricted.)

§ 213. **Action by majority.**

§ 215. **Arbitration process.**

§ 216. **Representation by attorney.** (May be waived by union and employer.)

§ 217 (3) – (7). **Witnesses — subpoenas — depositions — discovery.** (3) – (7) Discovery, subpoena, fees, court enforcement of subpoenas.

§ 219. **Award.**

§ 220 (1) – (3). **Change of award by arbitrator.** (1) Grounds for modification or correction. (2) Notice and timing. (3) Notice of objections.

§ 221. **Remedies – fees and expenses of arbitration proceeding.**

§ 225 (3). **Judgment on award – attorney fees and litigation expenses.** (3) Attorneys' fees and expenses after award is made.

§ 227. **Venue.**

§ 230. **Savings clause.**

As to these provisions, in drafting the arbitration clause, the scrivener may chose to do nothing — and these provisions will be part of the arbitration agreement, or the scrivener may delete, modify, or vary the effect of any or all of the provisions— this law is subject to change by agreement of the parties.

For example, § 206 (2) provides that the court shall decide whether an agreement to arbitrate exists or whether a specific controversy is subject to an agreement to arbitrate. Instead, the parties may provide these issues shall be determined by the arbitrator.

Similarly, § 217 provides that the arbitrator may allow discovery: However, the parties can provide that there shall be no discovery, or limit the discovery.

On the other hand, if these provisions are satisfactory to the parties, it is unnecessary to insert them in the agreement. They are a part of the agreement unless the parties agree to delete, waive or vary the effect. Indeed, it is submitted that in most instances these provisions provide for a sound arbitration and should not be altered.

Caution. The last words of Section 13-22-204 (1) permitting certain provisions of the CRUAA to be waived or the effect of varied by the parties are: “to the extent permitted by law.” This phrase maintains the law that a contract provision is void even if agreed to by the parties, if it is *e.g.*, unconscionable. So too, an agreed clause allowing recovery of punitive damages might be void under C.R.S. § 13-21-102(5).

V. INCORPORATION OF RULES: GENERALLY

When arbitration rules such as AAA rules are incorporated into the arbitration agreement, they are a part of the arbitration agreement as if written out in the arbitration agreement. They may not waive or alter the statutory provisions that under C.R.S. § 13-22-204 may not be waived or varied, or not waived or varied until an actual dispute arises. Of course, incorporated rules can supplement these statutory provisions. Incorporation of rules merely means the parties have agreed to them.

Generally, any incorporated rules may be deleted, modified or varied by the parties. However, in some instances where an organization is identified to serve as the administrator of the arbitration, that organization may have certain rules that it will not allow to be deleted, altered or waived if it is to serve as the administrator.

AAA Commercial Arbitration Rule R-1, Agreement of the Parties, provides:

. . . The parties, by written agreement, may vary the procedures set forth in these rules.

Incorporated rules that provide that the AAA or any other organization shall administer the arbitration, probably incorporates that organization's rules. Hence, the AAA rules may be incorporated, but also these specific rules may be deleted, altered, or modified by agreement of the parties. Each such incorporated rule should be considered for deletion, alteration or modification in the arbitration agreement. Again, however, particular consideration should be given before altering or varying incorporated rules, as they generally are a part of a well thought out scheme.

Some of these AAA rules cover the same subject as CRUAA provisions which may not be waived or varied in effect. Others simply "supplement" the CRUAA provisions. Lastly, some of the rules cover subjects of the CRUAA that may be waived or varied in effect, or subject matters simply not covered by the CRUAA.

VI. AAA RULES VERSUS THE CRUAA

The AAA Rules of Commercial arbitration are designed for nationwide application: they are not designed to correlate with the Revised Uniform Arbitration Act, the Uniform Arbitration Act, the Federal Arbitration Act, or other arbitration statutes. Earlier forms of the AAA rules predate Colorado's adoption of the Revised Uniform Arbitration Act. These rules are more detailed and fill in gaps in the statutes.

Generally, however, the AAA rules mesh very well with the various arbitration statutes. However, it is worth briefly comparing a few of the AAA rules to the CRUAA.

As discussed in Section IV, C most of the provisions of the CRUAA may be waived or varied in effect by agreement of the parties. Thus, if the parties adopt/incorporate AAA rules into their arbitration agreement and those rules waive or vary the effect of a CRUAA statute that can be waived or varied in effect, that rule is the governing rule. Most of the AAA rules in fact only waive or vary CRUAA provisions that can be waived or varied. Other AAA rules can be viewed as simply detailing/supplementing provisions of the CRUAA that cannot be waived or varied in effect.

There are, however, a few provisions of the AAA rules which may, in certain circumstances, be viewed as waiving or varying the effect of CRUAA sections that cannot be waived or varied by effect. Brief discussion of a few examples follows.

Section 207 of the CRUAA provides for Motions to Compel or Stay Arbitration. This section applies to a motion to the court of a party to compel or to stay arbitration, and provides in essence for the court to determine all issues. There is no provision for referring issues relevant to the motion to the arbitrator.

AAA Commercial Rule R-7, Jurisdiction, provides that the arbitrator shall have the power

- to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- to determine the existence or validity of a contract of which an arbitration clause forms a part.

If a motion to compel or stay arbitration is filed in a court, if the AAA rules have been adopted/incorporated as part of the arbitration agreement, does the court decide the issues as

provided by section 207 or refer them to the arbitrator pursuant to Rule 7? Suppose instead of filing a motion with the court to stay the arbitration for lack of an enforceable arbitration agreement, the respondent files the motion with the arbitrator? There are no clear answers, but in many circumstances, if a party wants the court to decide these issues, and takes the issues to the court, the court is the proper tribunal to decide.

Similarly, Rule 4 provides that the Demand for Arbitration must state the name of each party and any representative, the address for each party and representative (including telephone and fax numbers and email addresses), a statement of the nature of each claim including the relief sought and the amount involved, and the locale requested if the agreement is not specific.

On the other hand, CRUAA, C.R.S. § 13-22-209 (1) provides only that the notice of initiation of arbitration shall describe the nature of the controversy and the remedy sought. If a claimant complied with section 209 (1), but not with Rule 4, could a court or arbitrator dismiss the Demand/Notice? Certainly Rule 4 requires more than section 209 (1) which cannot be waived or the effective varied. Nevertheless, the requirements of Rule 4 seem to supplement (additional information required) and does not vary the effect of the Rule.

In sum, with a few possible exceptions, the AAA rules, (1) fill in gaps in the CRUAA, (2) varies the effect of CRUAA sections that may be varied, and (3) supplements and provides details to CRUAA sections that may not be altered, or not altered until a dispute arises.

VII. PRIORITY OF STATUTES, INCORPORATED RULES, AND THE ARBITRATION AGREEMENT

As to provisions of the arbitration act that cannot be altered or amended, *see* Section IV *supra*, of course, CRUAA takes precedence over any agreement of the parties, including

incorporated rules. As to sections of the CRUAA that can be altered or varied, if there is an incorporated rule that waives or varies the statutory provision, that rule takes precedence. Lastly, if there is a written provision in the arbitration agreement that waives or alters a statutory provision which may be altered or waived, or an incorporated provision, that provision in the arbitration agreement governs, and also supercedes any incorporated rule.

VIII. DRAFTING THE ARBITRATION AGREEMENT

At this point, you have the basic agreement to arbitrate. *See* Section III. You must decide whether to broaden or narrow the scope of application of the arbitration agreement. “Any controversy or claim arising out of this contract, or the breach thereof . . .” has been interpreted by the court very broadly.⁹ In some instances, you may want to narrow the clause, by providing exceptions. For example:

except that claims as to the scope and validity of the patents which are the subject of this agreement shall not be subject to arbitration.

except that claims as to loss damage or injury to third parties shall not be subject to arbitration.

Clauses excepting certain claims must be drafted very carefully, as courts will tend to construe exceptions very narrow.

Or, the clause can be re-written to have a narrower scope. For example:

Any controversy or claim arising out of or relating to the solely performance of the product as specified in the contract, or breach thereof, shall be settled by arbitration . . .

Again, narrow clauses should be drafted carefully.

⁹ Benson, § 7.5.

Second, you know what provisions of the CRUAA are automatically incorporated into the agreement, which can or cannot be waived or varied in effect until a subject to the agreement dispute arises. *See* Section IV, A and B. They need not be repeated, however, you should consider whether any of these clauses can be supplemented in a manner to meet your objectives without constituting a waiver or variation of the effect of the statutory provision.

Third, you know the provisions of the CRUAA which may be waived or altered. Section IV, C. You should carefully consider each provision and add any desirable revisions of such provisions to your arbitration agreement.

Fourth, if you have provided that the arbitration shall be conducted under the auspices of the AAA, JAMS, etc., you know what rules have been incorporated by reference into your agreement. Most of these rules and procedures can be waived, deleted, or varied. Consider these rules, and if changes are desired, draft such provisions and add them to your agreement.

Lastly, are there any additional provisions not covered by the foregoing provisions that you wish to add? Draft these provisions carefully so that they fit into the agreement along with incorporated law and incorporated rules. Examples of subjects for clauses that you may want to add include: number of arbitrators, mediation as condition precedent, manner of selection of arbitrators, arbitrator qualifications, location of the arbitration hearing, governing arbitration law, limitations on discovery, remedies, attorney fees, form of opinion, and confidentiality.¹⁰

At last, the completed arbitration agreement.

IX. ARBITRATOR PROMULGATED RULES

¹⁰ *See* AAA, Drafting Dispute Resolution Clauses, found at www.adr.org.

The arbitration agreement, either the simple form discussed in Section III, or the more extensive form discussed in Sections IV and V, may not provide all the rules for which a need may arise. In that case, the arbitrator defines by order the additional rules to be followed as the need arises.¹¹

X. THE CASE AGAINST MORE THAN THE BASIC ARBITRATION CLAUSE

As noted above, with the basic arbitration clause, the CRUAA and rules (if administered by the AAA, etc.) are automatically incorporated. It is suggested that in most instances, it is not desirable to have much more.

The most important provision is the qualifications for and selection procedure for the arbitrator. Aside from all the “procedures” to determine “justice,” the arbitrator will decide “justice” — make the award. Any loopholes in the agreement, statute and rules will be filled in by the arbitrator. The key to arbitration is always to have an excellent arbitrator.

XI. CONCLUSION/SUMMARY

In drafting an arbitration agreement for future disputes under the Colorado Revised Uniform Arbitration Act, the parties must first agree upon the basic agreement to arbitrate. *See* § III.

Second, the parties should note which provisions of the Act may be waived or altered in effect or amended prior to a dispute arising: If revisions are desirable, and not provided by incorporated rules, those revisions should be drafted, and inserted into the agreement.

Third, any incorporated rules should be reviewed. Any rules that modify or vary CRUAA provisions that cannot be varied or altered should be deleted in the agreement.

¹¹ Benson, § 3.11.

(However, leaving them probably causes no harm if the conflict arises, the statute prevails.) Any desired modification or variation to the rules should be drafted.

Lastly, are there any desired provisions for the arbitration agreement that are not contained in the CRUAA or incorporated rules that should be drafted? Upon completion of that step, the agreement should be complete.

Is there any harm in drafting arbitration clauses that are covered in the statute and incorporated rules? Generally, no. The order of precedence is (1) CRUAA (and common law thereunder) non-waiveable provisions; (2) the arbitration agreement; (3) incorporated rules; and (4) CRUAA waiveable provisions. Thus, if a conflict arises, generally it can be easily resolved.

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