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THE ENFORCEMENT OF CANNABIS-RELATED CONTRACTS & ARBITRATION AWARDS

by Todd A. Wells, Michael Reilly & Taylor Minshall

I. INTRODUCTION

Contracts and legal instruments of all types in cannabis-related¹ transactions are being signed across the United States (U.S.). The validity and enforceability of these contracts is an open question. Traditionally, contract law has provided for the defense of public policy or illegality – an illegal contract is not enforceable. A contract that cannot be enforced is not a contract at all. Are these cannabis-related contracts worth the paper they are written on?

Although a handful of Colorado state trial courts and courts in California, Arizona, and Texas have recently enforced cannabis-related contracts in the face of illegality arguments, other courts have not.² In this context, U.S. and Colorado arbitration law provide a unique forum for the enforcement of cannabis-related contracts.

The topic becomes even more important now as several additional states, including Arkansas, California, Florida, Maine, Massachusetts, and Nevada, among others, have also recently legalized cannabis for medical and/or recreational use. The cannabis market is developing, and the legal framework has not yet adapted to the new reality.

Cannabis-related contracts, which may be considered “illegal” due to federal law, may be enforced nationwide in the U.S. with the use of Colorado law, the Colorado arbitration forum, and the Full Faith and Credit Clause of the U.S. Constitution.³

The enforcement of these contracts is not an abstract problem. Notwithstanding U.S. federal drug laws, and recognizing the harsh reality they impose, the Denver District Court has stated that enforceability is paramount to the operation of cannabis-related business. The court stated:

With the privileges afforded the marijuana industry by the voters [of Colorado] come obligations, including all obligations

¹ This article uses the scientific name “cannabis” to refer to the American slang term “marijuana.”

² See *infra* § II.

³ U.S. CONST. art. IV, § 1.



inherent in operating in the legitimate commercial world. This includes business relationships and obligations such as contracts, operating agreements and corporate articles and bylaws, among many other things. These relationships must be enforceable so that this newly legitimate industry does not devolve into commercial anarchy.⁴

This Article examines the enforcement of contracts in this partially legalized industry from the perspective of Colorado and U.S. law in six parts. First, we will examine the court-based enforcement of cannabis-related contracts in the U.S.. Next, we will analyze the likelihood of enforcement of arbitration agreements in cannabis-related contracts. Following this, we will examine the role of the administering arbitral institutions, the arbitrators, and legal counsel, addressing the difficulties faced by these stakeholders when working with cannabis-related disputes. We will then explore the difficulties that may arise during the confirmation of the arbitration award, and especially during the confirmation of arbitration awards granting equitable relief to the prevailing party. Finally, we will inquire as to the availability of interstate enforcement for the confirmed arbitration award.

When reading this Article the reader must consider that the development of the law in this area is fast moving and any new actions or policy changes made by the U.S. federal government to enforce federal drug laws related to cannabis could shut down this entire industry at any moment. However, we believe this to be unlikely given the current trend, with many more states poised to legalize cannabis use.

II. COURT-BASED ENFORCEMENT OF CANNABIS-RELATED CONTRACTS IN THE UNITED STATES

The cannabis industry is booming in Colorado. How is this possible when cannabis remains a regulated substance under the U.S. Controlled Substances Act (the “CSA”)⁵ with no permitted uses under federal law?⁶ Colorado is now well-known internationally for a citizen referendum passed in November 2012, Amendment 64, which made limited home-growing, possession, consumption, and commercial sale of cannabis legal for those over 21 years old, including for recreational purposes,

⁴ North v. Wemhoff, No. 12CV3005, 2013 WL 8604042 (Colo. Dist. Ct. June 21, 2013) (Elliff, J.).

⁵ Controlled Substances Act, 21 U.S.C. § 801 et seq.

⁶ 21 U.S.C. § 841(a).



under the Colorado Constitution.⁷ Long before this, in November 2000, the citizens of Colorado approved Amendment 20 to the Colorado Constitution which legalized the use, possession, and sale of cannabis for medical purposes.⁸ Pursuant to Amendment 64, the first commercial sale of cannabis occurred in Colorado on the morning of January 1, 2014. The rest is history.

How can an industry flourish when the web of contracts supporting the industry are seemingly built upon questionable legal grounds? In the U.S., this unique dilemma is caused by the relationship between two sovereigns: the individual U.S. states and the U.S. federal government. A majority of U.S. states have now legalized and/or decriminalized and regulated the use and possession of cannabis for medical purposes, and many others have now done the same in regards to the use and possession of cannabis for non-medical (recreational) purposes. In response to this growing trend across the nation, the federal government has made the conscious decision to relax enforcement of federal drug laws related to cannabis.⁹ Although there has been increased uncertainty regarding federal policy under the Trump Administration, Congress reiterated its view on medical cannabis policy in March 2018 by renewing its ongoing ban, under the “Rohrabacher-Farr Amendment,” that prohibits the U.S. Department of Justice from using any funds to prevent the implementation of state medical cannabis laws.¹⁰ Since the legalization and regulation of medical and recreational cannabis in Colorado, a number of cases have come before Colorado state courts seeking the enforcement of cannabis-related

⁷ Amend. 64, incorp. as Colo. Const., Art. XVIII, § 16 (“Personal Use and Regulation of Marijuana”).

⁸ Amend. 20, incorp. as Colo. Const., Art. XVIII, § 14 (“Medical use of marijuana for persons suffering from debilitating medical conditions”).

⁹ James M. Cole, Guidance Regarding Marijuana Enforcement, U.S. Dep’t of Justice, Office of the Deputy Attorney General (Aug. 29, 2013) (The “Cole Memo” was rescinded by the U.S. Dep’t of Justice in a Memorandum dated Jan. 4, 2018 by U.S. Attorney General Jeff Sessions, available at <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>. In response to this rescission, the U.S. Attorney for Colorado, Bob Troyer, issued a statement on the same day stating that there would be no different approach to prosecutions related to marijuana due to the rescission, <https://www.justice.gov/usao-co/pr/us-attorney-bob-troyer-issues-statement-regarding-marijuana-prosecutions-colorado>. Colorado Attorney General, Cynthia Coffman, issued a similar statement on Jan. 4, 2018, available at <https://coag.gov/sites/default/files/contentuploads/ago/press-releases/2018/01/01-04-18/1-04-2018-statementagcoffmanonfederalchangestomarijuanapolicies.pdf>).

¹⁰ Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, a federal appropriations bill signed into law in December 2014).



contracts.¹¹ Colorado state court judges have not agreed on the extent to which these contracts are enforceable because of the continuing regulation of cannabis under the federal Controlled Substances Act.

The CSA states that it is illegal for anyone to knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance. Cannabis is listed in Schedule I of the CSA, a category reserved for “hallucinogenic substances.”¹² According to Schedule I, a substance is one that (1) has a high potential for abuse; (2) has no currently accepted medical use in treatment in the U.S.; and (3) lacks accepted safety for use of the drug under medical supervision.¹³

Despite the near total prohibition of cannabis under the CSA, the federal government has permitted U.S. states to experiment with different types of regulation, including state law systems that permit the use, possession, and sale of cannabis. The Colorado Federal District Court has noted that “[t]he Department of Justice has made a conscious, reasoned decision to allow the states which have enacted laws permitting the cultivation and sale of medical and recreational marijuana to develop strong and effective regulatory and enforcement schemes.”¹⁴

This relaxation of CSA enforcement by the federal government has left cannabis-related contracts in a twilight world of legality and enforceability. Even as the sun rises with the reformation of U.S. federal drug policy, large patches of legal darkness will likely remain in the distant future among individual U.S. states and in other countries. Issues of legality and enforceability will continue.

Long ago, the U.S. Supreme Court summarized the position of U.S. law on the enforceability of “illegal” contracts:

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In

¹¹ See *infra* § II.

¹² CSA, *supra* note 5, at § 812(c), Sch. I(c)(10) (Cannabis is listed in (c)10 as “marijuana” and through its chemical element in (c)17, Tetrahydrocannabinols).

¹³ *Id.*

¹⁴ *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, No. CV 15-00349-REB-CBS, at *11, 2016 WL 223815, at *5 (D. Colo. Jan. 19, 2016) (referring to *COLE*, *supra* note 9) *aff’d sub nom.* *Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017).



case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is, “Potior est conditio defendentis.”¹⁵

Loosely translated, the maxim *Potior est conditio defendentis* means: better is the condition of the defendant, than that of the plaintiff. However, simply declaring that a contract is “illegal” is not enough. The real analysis turns to public policy, not blanket assertions of illegality. The Colorado Federal District Court has stated that “[e]arly in this century [20th], the Colorado Supreme Court declared that ‘before . . . a contract can be declared illegal upon the ground that it is against public policy, it must clearly appear that it is obnoxious to the pure administration of justice, or manifestly injurious to the interests of the public.’”¹⁶ This hurdle comes with at least one express carve out: “[p]arties cannot by private contract abrogate statutory requirements or conditions affecting the public policy of the state.”¹⁷

The Colorado Supreme Court has warned against finding merely theoretical or “problematic” issues when considering public policy:

Before a court should determine a contract which has been made in good faith stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematic.¹⁸

The policy of respecting and enforcing the freedom to contract is also relevant to the analysis of public policy and contract enforceability:

Basic to our decision on the validity of the questioned clause is the proposition that one of the essential freedoms of citizenry is the right to bargain and contract. Our commercial society requires that each party be permitted to bargain in its own interest and that such bargains will be upheld by courts of law so long as they are founded upon relatively equal bargaining positions and are not manifestly unjust or injurious to the general welfare of the populace as a whole. Until fully and solemnly convinced that an existent public policy is clearly

¹⁵ McMullen v. Hoffman, 174 U.S. 639, 654 (1899).

¹⁶ Superior Oil Co. v. Western Slope Gas Co., 549 F. Supp. 463, 468 (D. Colo. 1982) (quoting Wood v. Casserleigh, 71 Pac. 360, 361 (Colo. 1902)).

¹⁷ University of Denver v. Industrial Com’n of Colo., 335 P.2d 292, 294 (Colo. 1959).

¹⁸ Mitchell v. Jones, 88 P.2d 557, 560 (Colo. 1939).



revealed, a court is not warranted in applying that principle of public policy to void a contract.¹⁹

In this public policy context, recent state and federal court cases in Arizona, California, Colorado, and Hawaii have tested the limits of enforceability, specifically, under the CSA:

1. In March 2012, in *Tracy v. USAA Casualty Ins. Co.*, the Federal District Court of Hawaii held that an insurance policy that purportedly covered the loss of cannabis plants was unenforceable under the CSA.²⁰
2. In April 2012, in *Hammer v. Today's Health Care II*, the Arizona Superior Court in Maricopa County held that loan documents related to a medical cannabis growing facility were unenforceable for illegality under federal law.²¹
3. In August 2012, in *Haeberle v. Lowden*, the Colorado District Court of Arapahoe County refused to enforce a contract for the sale of medical cannabis due to federal law and “preemption.”²²
4. In September 2013, in *Garcia v. Thomas*, the California Superior Court of Sacramento County refused to enforce a contract involving an investment in a medical cannabis business for illegality under federal law.²³
5. In two cases in the Colorado District Court of Denver County, one in June and one in December 2013, Judges Herbert L. Stern, III and J. Eric Elliff, in the cases of *West v. Green Cross* and *North v. Herbal Remedies*, respectively, relied on Colorado public policy to refuse to invalidate cannabis-related contracts despite the CSA.²⁴
6. In December 2013, in *Equity Trust v. Jones*, Judge David L. Shakes of the Colorado District Court of El Paso County analyzed the public policy defense

¹⁹ *Superior Oil*, 549 F. Supp. at 468 (referring to Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76 (1928)).

²⁰ *Tracy v. USAA Casualty Ins. Co.*, No. 1:11-cv-00487, 2012 WL 928186, at **11-13 (D. Hi. Mar. 16, 2012).

²¹ *Hammer v. Today's Health Care II*, No. CV2011-051310, 2012 WL 12874349 (Ariz. Super. Ct. Maricopa Cnty. Apr. 17, 2012) (McVey, J.).

²² *Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098, at *1 (Colo. Dist. Ct. Arapahoe Cnty Aug. 8, 2012) (Pratt, J.).

²³ *Garcia v. Thomas*, 34-2013-00138040-CU-BC-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 6, 2013).

²⁴ *West v. Portnoy*, No. 12CV5636, 2013 WL 7202143 (Colo. Dist. Ct. Denv. Cnty. Dec. 27, 2013) (Stern, J.); *North v. Wemhoff*, No. 12CV3005, 2013 WL 8604042 (Colo. Dist. Ct. Denv. Cnty. June 21, 2013) (Elliff, J.).



- under federal and Colorado state law in the most detailed opinion on the issue to-date and refused to invalidate contracts related to cannabis.²⁵
7. In February 2016, Chief Judge Marcia Krieger of the Federal District Court of Colorado enforced a cannabis-related insurance policy notwithstanding the insurance company's argument that coverage should be denied based on public policy even if the insurance policy would otherwise cover the insured's losses.²⁶
 8. In November 2016, the Federal District Court for the Northern District of California concluded that where a defendant failed to make payments under a contract for the sale of a consulting business related to the cannabis industry, the court "could grant relief in this case that does not require [defendant] to violate the CSA."²⁷
 9. In April 2017, the Court of Appeals of Arizona adopted the reasoning from *Mann and Green Earth Wellness*, and after applying the factors from the Restatement (Second) of Contracts § 178, held that a lease contract related to a cannabis business was enforceable notwithstanding federal law under the CSA.²⁸
 10. In November 2017, the Federal District Court for the Northern District of Texas concluded that a "black-and-white" allegation that a contract was illegal under the CSA was insufficient for purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, and that the court could enforce the agreement between the parties

²⁵ *Equity Trust v. Jones*, No. 13CV1545 (Colo. Dist. Ct., El Paso Cnty Dec. 9, 2013) (Shakes, J.).

²⁶ *The Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 832-35 (D. Colo. 2016).

²⁷ *Mann v. Gullickson*, No. 3:15-cv-03630, 2016 WL 6473215, at *7 (N.D. Cal. Nov. 2, 2016).

²⁸ *Green Cross Medical, Inc. v. Gally*, 395 P.3d 302, 309-310 (Ariz. App. 2017) ("In applying these factors, we recognize there is a tension between the CSA and the AMMA [Arizona Medical Marijuana Act] because the CSA still criminalizes the sale, use, or possession of medical marijuana whereas the AMMA offers immunity and protections for those persons operating in compliance with the AMMA. Nevertheless, refusing to enforce such contracts would undermine the medical marijuana program the voters approved. Enforcing such contracts leaves the federal government in the same position it has chosen with respect to medical marijuana in Arizona. If the federal government wishes to end such programs by enforcing the CSA, it has the power to do so provided Congress permits use of federal funds to conduct such prosecutions and the Department of Justice desires to bring such actions. We conclude the lease was enforceable at least for purposes of a damages action for its breach.").



without violating federal law.²⁹

Judge Shakes' opinion in *Equity Trust* is noteworthy among the early cases on the enforceability of cannabis-related contracts because of the depth of the public policy analysis and the application of both Colorado state law and federal law under a balancing test.³⁰ After analyzing the enforceability of the contract under the Restatement (Second) of Contracts § 178, the court concluded:

The argument that the public policy of Colorado must yield to the higher federal public policy as expressed in the [CSA] is not persuasive. [T]he pronouncements and actions of the federal government in this area indicate that there is no strong federal public policy to override Colorado's public policy in this area. Therefore, this court is not "fully and solemnly convinced" that an existing public policy is clearly revealed that directs that the contracts at issue be voided.³¹

Part of Judge Shakes' analysis includes a reference to an express public policy pronouncement by the Colorado legislature: "It is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by section 16 of article XVIII of the state constitution and article 43.4 of title 12, C.R.S."³²

Judge Shakes' opinion makes it clear that simply asserting the illegality of a contract under the CSA alone is not a sufficient reason to render the contract unenforceable.³³ The court must engage in a public policy analysis of the type envisioned in the Restatement (Second) of Contracts § 178.³⁴

Section 178 of the Restatement identifies a number of relevant factors:

- (2) In weighing the interest in the enforcement of a term, account is taken of
 - (a) the parties' justified expectations,
 - (b) any forfeiture that would result if enforcement were denied, and
 - (c) any special public interest in the enforcement of the particular term.

²⁹ Ginsburg v. ICC Holdings, LLC, 3:16-cv-02311, 2017 WL 5467688, at *9 (N.D. Texas, Dallas Division, Nov. 13, 2017).

³⁰ *Equity Trust*, at 4.

³¹ *Id.* at 11.

³² C.R.S. § 13-22-601.

³³ *Equity Trust*, at 11.

³⁴ RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).



- (3) In weighing a public policy against enforcement of a term, account is taken of
 - (a) the strength of that policy as manifested by legislation or judicial decisions,
 - (b) the likelihood that a refusal to enforce the term will further that policy,
 - (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
 - (d) the directness of the connection between that misconduct and the term.³⁵

Notwithstanding the Restatement (Second) of Contracts § 178, the cases listed above, with the exception of *Equity Trust*, demonstrate a trend that courts may not be willing to engage in a full public policy analysis of the kind envisioned in § 178. However, under existing Colorado common law, the countervailing public policy of enforcing contracts outweighs any interest in refusing to enforce the contract unless and until a party can fully convince the court that the contract should not be enforced as a matter of public policy.³⁶ Moreover, now that the Colorado Federal District Court has weighed in on the issue in favor of enforcement, public policy arguments against the enforcement of cannabis-related contracts *subject to Colorado law* are unlikely to be successful barring a change in current federal drug policy.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS IN CANNABIS-RELATED CONTRACTS

The addition of an arbitration clause to a cannabis-related contract would not, at first glance, seem to make much of a difference. An illegal contract is an illegal contract, right? What happens, however, when a court is asked to refuse enforcement of a cannabis-related contract containing an arbitration clause? In *Party Yards v. Templeton*, the Florida Court of Appeals described this dilemma in the context of a usury contract. The court stated:

A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state law, but also is criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time have unanimously held that no court will lend its assistance in any

³⁵ *Id.*

³⁶ *Equity Trust*, at 11.



way towards carrying out the terms of an illegal contract.³⁷

Legal authorities from the earliest time did not operate within the black hole gravity of the U.S. (Federal) Arbitration Act.³⁸ Six years after *Party Yards*, the U.S. Supreme Court ended any debate on the enforceability of arbitration clauses in allegedly illegal contracts in *Buckeye Check Cashing v. Cardegna*.³⁹ In an opinion authored by Justice Antonin Scalia, the Court held that where parties have agreed to arbitrate disputes in a contract it is the arbitrator and not a judge who determines the validity of the contract. The court stated: “[w]e reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”⁴⁰

Justice Scalia’s analysis applies the well-established doctrine of severability, sometimes also referred to as separability.⁴¹ Under this doctrine, state and federal courts should only look at the arbitration clause itself when considering whether to compel parties to arbitrate disputes falling within the scope of the arbitration clause. The arbitration clause is “separable” from the main contract.⁴² Essentially, the courts will not entertain allegations that the main contract was induced by fraud or that it is void for reasons of public policy.⁴³ This holding has fully preemptive effect at the state court level.⁴⁴

Almost all U.S. states have adopted some version of the Uniform Arbitration Act (UAA) into state law. Colorado adopted the Revised Uniform Arbitration Act (RUAA) in 2004.⁴⁵ Prior to 2004, the UAA was in effect.⁴⁶ A unique feature of Colorado law is that arbitration was enshrined in the Colorado Constitution from the date of its founding as a U.S. state in 1876. The Colorado Constitution states:

³⁷ *Party Yards, Inc. v. Templeton*, 751 So.2d 121, 123 (Fla. Ct. App. 2000) (citing *McMullen*, 174 U.S. at 654).

³⁸ Federal Arbitration Act, 9 U.S.C. §§ 1-16 [hereinafter “FAA”].

³⁹ *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006).

⁴⁰ *Id.* at 449.

⁴¹ *Id.* at 446; *Prima Paint v. Conklin*, 388 U.S. 395, 402 (1967).

⁴² *Buckeye*, 546 U.S. at 446.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Colorado Revised Uniform Arbitration Act, C.R.S. § 13-22-201, *et. seq.* (2004) [hereinafter “Colo. RUAA”].

⁴⁶ Colorado Uniform Arbitration Act, C.R.S. § 13-22-201, *et seq.* (1956).



It shall be the duty of the general assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by mutual agreement of the parties to any controversy who may choose that mode of adjustment. The powers and duties of such arbitrators shall be as prescribed by law.⁴⁷

U.S. state arbitration acts, particularly the RUAA, are generally intended to work alongside the FAA.⁴⁸ In other words, there is no particular reason to believe that the current RUAA itself conflicts with the FAA or would be rendered preempted in some way. The key holding in *Buckeye Check Cashing* is already codified in C.R.S. § 13-22-206(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.”⁴⁹ Due to the preemptive and precedential power of *Buckeye* under 9 U.S.C. § 2, C.R.S. § 13-22-206(3) should be interpreted to give arbitrators the exclusive power to determine challenges based on the alleged illegality of a contract.

In the event that a federal or state court is asked to void or otherwise render unenforceable an allegedly “illegal” contract containing an arbitration clause, the court is not in a position to make such a determination regardless of the court’s views on public policy or the legality of the contract. A main contract that contains allegedly “illegal” subject matter, and an arbitration clause, cannot be refused enforcement by a court at the arbitration agreement enforcement stage.

To make it clear that the parties want an arbitrator to apply Colorado state public policy to the main contract, consider adding language to that effect in the arbitration clause, for example:

Any dispute, claim or controversy arising out of or relating to this agreement or the breach, termination, enforcement, interpretation, *legality, issues of public policy or validity thereof*, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined exclusively by arbitration in Denver, Colorado, USA and shall be governed

⁴⁷ Colo. Const. Art. XVIII, § 3; see also *Byerly v. Kirkpatrick Pettis Smith Polan*, 996 P.2d 771, 773 (Colo. App. 2000) (“Colorado public policy strongly favors the resolution of disputes through arbitration.”); *Camelot Investments, LLC v. LANDesign, LLC*, 973 P.2d 1279 (Colo. App. 1999).

⁴⁸ See *Prefatory Note*, [Revised] Uniform Arbitration Act (2000), National Conference of Commissioners on Uniform State Laws.

⁴⁹ Colo. RUAA, *supra* note 45, at § 13-22-206(3).



exclusively by the Colorado Revised Uniform Arbitration Act, Colorado Revised Statutes Section 13-22-201, et seq. The laws of the state of Colorado, including the Colorado Revised Uniform Arbitration Act, shall apply *exclusively* as the laws governing this arbitration agreement without reference to any conflict of laws rules.

The decision whether to enforce a contract, based on the underlying subject matter of the contract, must be made by an arbitrator when the parties have agreed to arbitrate disputes. U.S. arbitration law may remove illegality arguments from the purview of a court. However, other issues, such as the willingness of administering arbitral institutes to administer the case, the willingness of an arbitrator to enforce the contract, and even the availability of legal counsel, may arise related to the enforcement of an arbitration agreement in a cannabis-related contract.

IV. ADMINISTRATORS, ARBITRATORS, & LEGAL COUNSEL

Once a dispute that is subject to resolution by arbitration has moved beyond any initial court challenges, several crucial issues exist within the arbitration process itself related to enforcement of the contract. First, if the parties have chosen “administered” arbitration, it is possible that the administrator could refuse administration of the case based on the alleged illegality of the contract. Second, the arbitrator is given the power to decide whether the contract is against public policy. Therefore, issues relating to the alleged illegality of the contract do not simply disappear because the court is not permitted to rule on the issue. Lastly, even if an administering arbitration organization is willing to administer a case and the arbitrator does not view the contract as against public policy, parties may still have difficulty finding legal counsel willing and able to litigate cannabis-related disputes even in the context of arbitration.

A. Administrators

Parties may or may not select the use of a specific arbitration organization for the administration of the arbitration. These administering organizations maintain their own arbitration rules and partially serve the same function as a court clerk by administering the case. These organizations include, among many others, long-standing organizations such as the American Arbitration Association and JAMS. The



opposite of administered arbitration is *ad hoc* arbitration where the arbitrator(s), or their assistants, essentially serve the administration function. Arbitration institutions are generally under no obligation to administer a case despite any agreement by the parties to use the administering organization.⁵⁰ For example, arbitration organizations are not regulated in the U.S. and, like arbitrators, generally receive the same kind of immunity from civil liability as state court judges.⁵¹

Administering arbitration organizations based in states where cannabis remains fully or partially illegal under state law may have particular concerns about administering cannabis-related cases. In particular, issues may arise related to quality disputes where samples may be handled during the arbitration. In other situations, an arbitrator may be requested to award specific performance relief involving a sale of cannabis. Such issues cause concerns as to whether an arbitration organization will be willing and able to administer a case where sensitive cannabis possession and testing issues arise. For arbitration organizations based in the states where cannabis remains fully illegal, or where prosecutions continue in full swing, the dangers of involvement in cannabis-related arbitration are very real. Moreover, for arbitration organizations acting as non-profit organizations under federal law, a common form of legal entity among arbitration service providers, additional concerns, such as the potential loss of non-profit status, may cause the organization to deny the administration of cannabis-related disputes.

The enforceability of unclear or uncertain contract terms is an additional factor which weighs in the favor of caution when choosing a specific administering organization. If the parties agree, in an arbitration clause, for a specific arbitration

⁵⁰ See AAA Commercial Arbitration Rules (2013), Rule 52(d):

Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

JAMS Comprehensive Arbitration Rules and Procedures (2014), Rule 30(c):

The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

⁵¹ Colo. RUAA, *supra* note 45, at § 13-22-214.



organization to administer the case, and that arbitration organization refuses to administer the case out of the illegality concerns, this may cause the arbitration clause to completely fail.

It has been frequently stated that arbitration is a creature of contract and generally applicable contract law applies to the formation, validity, and interpretation of arbitration agreements. In *United Steelworkers*, the U.S. Supreme Court stated that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.”⁵² Courts “apply ordinary state-law principles that govern the formation of contracts to determine whether a party has agreed to arbitrate a dispute.”⁵³ The Colorado Supreme Court has also stated that “[a] fundamental contractual requirement is that of certainty,”⁵⁴ and that “[t]he court can supply some elements in a contract, but they cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it.”⁵⁵ Therefore, “[a] court will not undertake to enforce a contract, unless by some lawful means it can ascertain and know just what the contract bound each party to do.”⁵⁶ In sum, the FAA’s “primary purpose” is to assure that:

[P]rivate agreements to arbitrate are enforced *according to their terms*. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.⁵⁷

Where an arbitration organization refuses administration of a dispute the parties will likely be left in a void as to the next steps for resolution of the dispute. At this point, the relevant arbitration law may serve as a backstop to save the arbitration

⁵² *U. Steelworkers Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

⁵³ *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1004 (10th Cir. 2013) (quoting *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006) (internal quotation marks omitted)).

⁵⁴ *Stice v. Peterson*, 355 P.2d 948, 952 (Colo. 1960) (internal citations omitted).

⁵⁵ *Newton Oil Co. v. Bockhold*, 76 P.2d 904, 908 (Colo. 1947).

⁵⁶ *Id.*

⁵⁷ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (emphasis added).



process, which will likely include the FAA or state arbitration law but many uncertainties will remain. Not only is this a situation where the parties' agreement may be insufficiently certain to enforce, but this may also be viewed as a situation where the performance of the parties' agreement has been rendered impractical or frustrated by a supervening event.⁵⁸

In the situation where an arbitration organization refuses administration of a case, the parties may be left without an enforceable arbitration clause and may be required to resolve their dispute in court. To prevent the types of failures indicated above, consider adding savings clause language to the arbitration agreement. For example:

If one or more provisions of this agreement is for any reason held to be unenforceable or invalid, then such provisions will be deemed severable from the remaining provisions of this agreement and will in no way affect the validity or enforceability of such other provisions or the rights of the parties hereunder.

If any provision of this agreement (or portion thereof, including the arbitration agreement) is determined by a court to be unenforceable as drafted by virtue of the duration, scope, extent, character or legality of any obligation contained herein, the parties acknowledge that it is their intention that such provision (or portion thereof) shall be construed in a manner designed to effectuate the purposes of such provision to the maximum extent enforceable under applicable law.

In the event the right to arbitrate any dispute, claim, or controversy arising out of or relating to this agreement is rendered invalid or unenforceable for any reason, the dispute, claim or controversy arising out of or relating to this agreement shall be subject to the exclusive jurisdiction of the state courts in the City and County of Denver, State of Colorado, USA.

Parties should carefully consider which arbitration organizations are most likely to accept administration of a cannabis-related dispute or carefully develop an *ad hoc* arbitration clause that removes administering organizations from the equation. Additionally, the parties should consider a savings clause in their arbitration agreement providing for either some type of fallback *ad hoc* arbitration or an alternative court-based forum where cannabis-related contracts have a higher

⁵⁸ RESTATEMENT, *supra* note 34, at §§ 261-72; *In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 559-61 (2nd Cir. 1995); *Ranzy v. Tijerina*, 393 Fed. Appx. 174, 176 (5th Cir. 2010).



probability of being enforced.

B. *Arbitrators*

Buckeye shifts any initial public policy determination related to the subject matter of the contract to the arbitrator.⁵⁹ To the extent that the parties have expressly chosen Colorado law as applicable to the contract, arbitrators should look to the recent Colorado state and Colorado Federal District Court public policy decisions related to cannabis.⁶⁰ These include the decisions addressed above enforcing cannabis-related contracts such as the Colorado Federal District Court's decision in *The Green Earth Wellness Center*.⁶¹ Nonetheless, one of the great advantages of arbitration is the ability of parties to choose their own destiny – party autonomy.⁶² When designing the arbitration clause, care should be taken to empower the arbitrators to enforce the contract as a matter of Colorado public policy, and, to the extent possible, attempt to limit the arbitrator's public policy viewpoint:

Notwithstanding any agreement by the parties to apply a different law or rules to the main contract containing this arbitration agreement, any principles of public policy applied by the arbitrators shall consist exclusively of Colorado state public policy, including, specifically, Colorado Revised Statutes Section 13-22-601(2015).

An arbitrator exceeds his or her powers by voiding or refusing to enforce any contracts or arbitration agreements between the parties based solely on the cannabis-related nature of the contract. An arbitrator does not exceed his or her powers by voiding or refusing to enforce any contracts or arbitration agreements between the parties based on violations of state and local laws regulating cannabis.

C. *Legal Counsel*

The ability of a party to use in-house or regular outside counsel may be a special concern for some parties involved in the cannabis industry. Many attorneys may be highly uncomfortable litigating a cannabis-related dispute in federal court or in any public court. Arbitration, with the lack of public filings and the ability to design strong

⁵⁹ *Buckeye*, 546 U.S. at 445-46.

⁶⁰ See Cindy G. Buys, *The Arbitrators Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59 (2012).

⁶¹ *The Green Earth Wellness Center*, 163 F. Supp.3d at 832-35.

⁶² BUYS, *supra* note 60.



confidentiality obligations, may alleviate some of these concerns.

Attorney ethics rules generally prohibit attorneys from helping their clients commit illegal acts. Model Rule of Professional Conduct 1.2(d) prohibits attorneys from knowingly facilitating criminal conduct:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.⁶³

In March 2014, the Colorado Supreme Court approved the following change to Comment 14 of the equivalent Rule 1.2 of the Colorado Rules of Professional Conduct permitting attorneys to provide regular legal services to cannabis businesses operating in compliance with Colorado state law:

A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII. secs. 14 & 16. and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.⁶⁴

The attorney ethics rules generally applicable to attorneys appearing in federal court are those of the state where the federal court resides. In November 2014, the Colorado Federal District Court expressly opted out of Comment 14.⁶⁵ Notably, this did not dissuade Green Earth Wellness Center's attorneys from bringing their client's claims against Atain Specialty Insurance in the Colorado Federal District Court.

Colorado recently adopted multi-jurisdictional practice of law rules that allow attorneys licensed outside Colorado to appear in arbitration proceedings taking place in Colorado.⁶⁶ This permissive and open environment in Colorado for foreign attorney practice is potentially a "honey pot" in the context of cannabis. Foreign attorneys practicing law in Colorado are still subject to the ethical rules from their

⁶³ ABA Model Rules of Prof'l Conduct R. 1.2(d) (Discussion Draft 1983).

⁶⁴ Colo. RPC 1.2.

⁶⁵ See Local Rule D.C. COLO. L. Atty. R. 2(b)(2).

⁶⁶ See C.R.C.P. 205.1 and 205.2.



“home” jurisdiction or anywhere they are licensed to practice law.⁶⁷ A foreign attorney practicing law in Colorado under C.R.C.P. 205.1 or 205.2 representing a cannabis business could very well violate ethical rules applicable to that attorney in other jurisdictions where they are licensed, particularly under ABA Model Rule 1.2(d).⁶⁸

V. CONFIRMATION OF THE ARBITRATION AWARD

In the U.S., once an arbitration award is rendered by an arbitrator, the standard procedure is to seek confirmation of the arbitration award in a court at the seat of the arbitration.⁶⁹ Confirmation converts the arbitration award into a court judgment and allows the winning party to seek enforcement of the award using common collections tools such as pattern asset interrogatories, the writ of execution, and writ of garnishment.⁷⁰

The confirmation procedure under the UAA is designed to achieve enforcement without delay or undue expense.⁷¹ The judgment debtor is entitled to notice of the confirmation proceeding, and certain defenses to confirmation may be raised in a motion for *vacatur* of the arbitration award.⁷² A persistent question arises here – to what extent does a court have the ability to review an arbitration award, and the associated arbitration proceedings, under a motion for *vacatur*? Does a court have the ability to review any public policy issues during arbitration award confirmation, or is the arbitrator’s public policy decision the end of the story?

The most commonly cited case referring to the review of arbitration awards on the grounds of public policy is the 1987 U.S. Supreme Court case *United Paperworkers Int’l Union v. Misco*:

A court’s refusal to enforce an arbitrator’s award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse

⁶⁷ Colo. RPC 8.5(a) (“**A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.**”).

⁶⁸ *Id.*

⁶⁹ Colo. RUAA, *supra* note 45, at § 13-22-222.

⁷⁰ *Judd Const. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982).

⁷¹ *See Kutch v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 93, 99 (Colo. 1998).

⁷² Colo. RUAA, *supra* note 45, at § 13-22-223.



to enforce contracts that violate law or public policy . . . That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. [citations omitted]. In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.⁷³

At this point, we have returned back to the issue of *who* decides public policy issues? Under *Buckeye*, the view was that public policy fell within the power of the arbitrator to decide, at least as it pertains to the main contract or subject matter of the contract.⁷⁴ Why would a court be permitted to review public policy concerns related to the main contract during a vacatur proceeding if the court was not permitted to do so at the outset of the case during enforcement of the arbitration agreement?

Generally, the grounds upon which arbitration awards can be vacated by a court are narrow and primarily involve misconduct by arbitrators or other serious procedural problems with the arbitration process.⁷⁵ The entire point of arbitrating is to remove court review of the merits. Both the FAA and the UAA contain limited enumerated grounds for a court to vacate an arbitration award.⁷⁶ Notwithstanding these enumerated grounds for court review, there are two traditional common law-based non-statutory grounds for a court to review an arbitration award: (1) manifest disregard of the law, and (2) public policy.⁷⁷ However, there is an ongoing debate about whether any independent non-statutory grounds for a court to vacate an arbitration award remain under both the FAA and U.S. state arbitration acts.⁷⁸

⁷³ U. Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987) (internal citations omitted).

⁷⁴ *Buckeye*, 546 U.S. at 445-46.

⁷⁵ *Judd Cons.*, 642 P.2d at 924-25.

⁷⁶ FAA, *supra* note 38, at § 10; Colo. RUAA, *supra* note 45, at § 13-22-223.

⁷⁷ Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial review of Commercial Arbitration Awards*, 51 DISP. RESOL. J. 22 (1996).

⁷⁸ See, e.g., Reid S. Manley & Zachary D. Miller, *Disregarding "Manifest Disregard": The Effect of Hall Street Associates, LLC v. Mattel, Inc. and Its Progeny on the Standard for Arbitral Review*, FDCC Quarterly/Summer 2010.



Although this debate extends back quite some time, *Hall Street Associates v. Mattel*, a 2008 U.S. Supreme Court case, brought the debate to the forefront.⁷⁹ In *Hall Street*, the Court appeared to hold that *all* non-statutory grounds for a court to vacate an arbitration award had been eliminated under the FAA stating that: “Sections 10 and 11 respectively provide the FAA’s exclusive grounds for expedited *vacatur* and modification of arbitration awards.”⁸⁰ *Hall Street* only addressed the “manifest disregard of the law” non-statutory ground for a court to vacate an arbitration award and since then U.S. courts have differed on whether some variation of manifest disregard of the law survives. Notably, the statutory grounds for *vacatur* under both the FAA and UAA do not include public policy and we are left with further questions about the extinction of public policy as a ground for court review as well.

In 2014, the Florida Supreme Court addressed the ability of a court to review an arbitration award for illegality or public policy.⁸¹ The court analyzed *Buckeye Check Cashing, United Paperworkers Int’l Union*, and *Hall Street* in determining that under the FAA the courts were foreclosed from reviewing an award on public policy grounds.⁸² The Florida Supreme Court surveyed the holdings of other courts since *Hall Street* noting that the Fifth, Seventh, Eighth, and Eleventh Federal Circuit Courts of Appeals have held that the FAA’s bases for vacating or modifying an arbitration award cannot be supplemented judicially after *Hall Street*.⁸³ The Florida Supreme Court held that “courts cannot review the claim that an arbitrator’s construction of a contract renders it illegal.”⁸⁴ Conversely, in June 2017, the Ninth Circuit Court of Appeals issued an unpublished opinion holding that a court may still vacate an arbitration award based on public policy in very narrow exceptions.⁸⁵

This purported end to the public policy ground for review under the FAA has not gone unnoticed. Shortly after *Hall Street*, at least one author has argued that courts

⁷⁹ *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁸⁰ *Id.* at 583.

⁸¹ *Visiting Nurse Ass’n v. Jupiter Med. Center*, 154 So.3d 1115 (Fla. 2014).

⁸² *Id.* at 1135.

⁸³ *Id.* at 1131-32.

⁸⁴ *Id.* at 1132.

⁸⁵ *DeMartini v. Johns*, 693 Fed.Appx. 534, 537 (9th Cir. 2017) (“While a court may vacate an arbitration award that is contrary to public policy, this is a very narrow exception.”)



“should adopt the public policy exception as an additional ground for *vacatur* under the FAA deriving from their inherent social contract powers.”⁸⁶

To steer clear of the ongoing dispute under federal law as to whether public policy and manifest disregard of the law exist as grounds for court review under the FAA, parties are free to agree upon the application of state arbitration law that provides for more narrow or wider grounds for *vacatur*.⁸⁷ The Colorado Court of Appeals has held: “[t]he parties may agree in certain circumstances that an arbitration dispute will be governed by a state arbitration law rather than the FAA.”⁸⁸ *Hall Street* itself echoes this important principle of party autonomy:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.⁸⁹

Colorado courts are strictly limited in their ability to review an arbitration award under the Colorado Uniform Arbitration Act.⁹⁰ Additionally, “there is a heavy burden on a party attacking an arbitration award.”⁹¹ Courts are prohibited from any sort of *de novo* review of an arbitration award.⁹² The Colorado Court of Appeals has also stated that “an arbitration award is not open to review on the merits [and that] the merits of the award include the arbitrators' interpretation of a contract.”⁹³

In this context, the Colorado courts have affirmed that “[p]ursuant to the express language of the UAA, the party seeking to set aside an arbitration award must assert one of the enumerated grounds for relief or the award will be affirmed.”⁹⁴ Under

⁸⁶ Jonathan A. Marcantel, *The Crumbling Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L., 597 (July 17, 2008).

⁸⁷ *Hall Street*, 552 U.S. at 590.

⁸⁸ 1745 Wazee LLC v. Castle Builders, Inc., 89 P.3d 422, 424 (Colo. App. 2003), cert. denied (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt Info. Scis. Inc. v. Bd. Of Trs. Of Leyland Stanford Junior Univ.*, 489 U.S. 468 (1989)).

⁸⁹ *Hall Street*, 552 U.S. at 590.

⁹⁰ *Judd Cons.*, 642 P.2d at 924.

⁹¹ *Farmers Ins. Exch. v. Taylor*, 45 P.3d 759, 761 (Colo. App. 2001).

⁹² See *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531, 527 (Colo. 1992).

⁹³ *Container Tech. Corp. v. J. Gadsden Pty., Ltd.*, 781 P.2d 119, 121 (Colo. App. 1989).

⁹⁴ *Byerly*, 996 P.2d at 775 (citing § 13-22-214, C.R.S. 1999; *Red Carpet Armory Realty Co. v. Golden West*



C.R.S. § 13-22-222, a “court *shall* issue a confirming order unless the award is . . . vacated pursuant to section 13-22-223.”⁹⁵ The grounds for *vacatur* under C.R.S. § 13-22-223 include:

- (1) ...
 - (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;
- ...
- (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.⁹⁶

The above passage is from Colorado’s current Revised Uniform Arbitration Act, which was adopted in 2004.⁹⁷ Interpreting the confirmation and *vacatur* provisions of the earlier Colorado Uniform Arbitration Act, the Colorado Supreme Court has held: “The meaning of this provision is clear. The *only permitted defenses* to a request for confirmation of an arbitration award are those outlined in sections 214 and 215, and they must be made within specified time limits.”⁹⁸

Parties occasionally attempt to fit manifest disregard of the law into the arbitrators “exceeded their powers” defense.⁹⁹ The Colorado Court of Appeals has rejected this approach holding that “[w]e decline to adopt an arbitrator’s manifest disregard of the law as a ground for vacating an arbitration award under the CUA,

Realty, 644 P.2d 93 (Colo. App. 1982)).

⁹⁵ C.R.S. § 13-22-222 (emphasis added).

⁹⁶ C.R.S. § 13-22-223(1), (1.5).

⁹⁷ 2004 Colo. Legis. Serv. Ch. 363 (H.B. 04-1080) (WEST).

⁹⁸ State Farm Mut. Auto. Ins. Co. v. Cabs, Inc., 751 P.2d 61, 65 (Colo. 1988) (emphasis added).

⁹⁹ Coors Brewing v. Cabo, 114 P.3d 60, 63 (Colo. App. 2004).



either as arising from former § 13-22-214(1)(a)(III) or as a non-statutory common law ground.”¹⁰⁰ Although *Coors Brewing v. Cabo* and *State Farm v. Cabs* were decided under provisions of Colorado’s earlier Uniform Arbitration Act,¹⁰¹ there is no reason to believe that these holdings would not apply equally to the new Colorado Revised Uniform Arbitration Act.

The arbitrators “exceeding their powers” defense is frequently cited by challenging parties as the ground upon which manifest disregard of the law or public policy may fall under,¹⁰² and therefore the question arises as to the meaning of this defense. Courts have interpreted this defense recognizing that “[t]he arbitrators do not exceed their powers by rendering a decision that is contrary to the rules of law that would have been applied by a court, so long as there is no violation of an express term of the agreement to arbitrate.”¹⁰³ 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.¹⁰⁴ In this context, “Colorado law affords an arbitrator great flexibility in fashioning appropriate remedies.”¹⁰⁵ Therefore, under Colorado arbitration law, an arbitrator’s failure to accurately apply facts to the law is not a ground for vacating an award.¹⁰⁶

This is not to say that public policy has never been applied by Colorado state courts during confirmation of an arbitration award. In the event the FAA applies, due to the lack of a specific agreement by the parties for state arbitration law to apply and an interstate commerce connection, then public policy review may still occur. Not long before *Hall Street*, the Colorado Court of Appeals held: “To be overturned on the ground that it violates public policy, an arbitration award must create an ‘explicit

¹⁰⁰ *Id.*

¹⁰¹ C.R.S. § 13-22-201 et seq. (1956).

¹⁰² Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137 (2011); Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009), <http://yalelawjournal.org/forum/the-mess-of-manifest-disregard>; See *Schafer v. Multiband Corp.*, 551 F. App’x 814, 819 n.1 (6th Cir. 2014); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *overruled on other grounds*, 559 U.S. 662 (2010).

¹⁰³ *Byerly*, 996 P.2d at 774 (citing *Giraldi v. Morrell*, 892 P.2d 422 (Colo. App. 1994)).

¹⁰⁴ C.R.S. § 13-22-223(1.5).

¹⁰⁵ *R.P.T. of Aspen, Inc. v. Innovative Commc’ns, Inc.*, 917 P.2d 340, 343 (Colo. App. 1996).

¹⁰⁶ See *Cabus v. Dairyland Ins. Co.*, 656 P.2d 54, 56 (Colo. App. 1982).



conflict with other laws and legal precedents,' keeping in mind the admonition that an arbitration award is not to be lightly overturned."¹⁰⁷ The court added that "[t]he public policy exception is narrow."¹⁰⁸

To the extent parties wish to remove federal court jurisdiction over the arbitration process in favor of state courts, language may be added to the arbitration agreement providing for exclusive jurisdiction by the state courts under the state arbitration act and include waivers of the right of removal to the federal courts:

The parties submit and consent to the *exclusive* jurisdiction of the state courts in the City and County of Denver, State of Colorado, USA to compel arbitration, to confirm an arbitration award or order, or to handle other court functions permitted under the Colorado Revised Uniform Arbitration Act. The parties expressly waive any right of removal to the United States federal courts, and the parties expressly waive any right to compel arbitration, to confirm any arbitral award, or to seek any aid or assistance of any kind in the United States federal courts.¹⁰⁹

Proving the public policy defense remains difficult.¹¹⁰ Even if a Colorado court considers public policy as an argument for *vacatur*, the Colorado state and Colorado Federal District Court decisions addressed in section II of this article persuasively hold that cannabis-related contracts, otherwise in compliance with Colorado state law, are enforceable and are not against public policy.¹¹¹ However, the aforementioned public policy decisions are all money judgments.¹¹² A different situation may present itself when considering the possible practical effects of an arbitration award that includes equitable relief. This is one key reason to seriously question whether public policy remains in some form as a ground for a court to vacate

¹⁰⁷ 1745 *Wazee LLC*, 89 P.3d at 425-26 (citing *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1024 (10th Cir. 1993) (quoting *U. Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987))).

¹⁰⁸ *Id.* at 426.

¹⁰⁹ See David S. Coale, Rebecca L. Visosky, & Diana K. Cochrane, *Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation*, 29 REV. LITIG. 2 (2010), available at <http://600camp.com/wp-content/uploads/2012/01/Right-to-Remove-Article.pdf>; William E. Marple & Andrew O. Wirmani, *Waiver of the Right to Remove in Forum Selection Clauses Subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 62 MERCER L. REV. (2011), available at <http://www2.law.mercer.edu/lawreview/getfile.cfm?file=62202.pdf>.

¹¹⁰ 1745 *Wazee*, 89 P.3d at 425-26.

¹¹¹ See *supra* § II.

¹¹² *Id.*



an arbitration award.

VI. CONFIRMATION OF ARBITRATION AWARDS GRANTING EQUITABLE RELIEF

In *United Paperworkers*, a union member, Mr. Isiah Cooper, worked the night shift at a Misco plant in Monroe, Louisiana where he “operated a slitter-rewinder machine, which uses sharp blades to cut rolling coils of paper.”¹¹³ Mr. Cooper was discharged by the company not long after he reported to the company that he had been arrested for possession of cannabis at home.¹¹⁴ The dispute was subject to arbitration under a collective bargaining agreement. Misco claimed that Mr. Cooper violated company policy by possessing cannabis on company property.¹¹⁵ During the arbitration hearing, a dispute arose related to when the company became aware of Mr. Cooper’s cannabis use on company property.¹¹⁶ Mr. Cooper argued that the company became aware of his possession of cannabis on company property only five days before the arbitration hearing.¹¹⁷ In other words, the cannabis use looked like a pretext for Mr. Cooper’s firing. The arbitrator found against Misco and ordered that Mr. Cooper be reinstated with full back-pay and seniority despite his known cannabis use.¹¹⁸

Misco sought to vacate the arbitration award on the basis that the “arbitrator committed grievous error in finding that the evidence was insufficient to prove that Cooper had possessed or used marijuana on company property.”¹¹⁹ The Fifth Circuit Court of Appeals affirmed the Federal District Court for the Western District of Louisiana vacating the arbitration award.¹²⁰ The appeals courts held that “the evidence of marijuana in Cooper’s car required that the award be set aside because to reinstate a person who had brought drugs onto the property was contrary to the public policy ‘against the operation of dangerous machinery by persons under the influence of drugs or alcohol.’”¹²¹ The U.S. Supreme Court reversed the decision of

¹¹³ *U. Paperworkers*, 484 U.S. at 32.

¹¹⁴ *Id.* at 33.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 34.

¹¹⁷ *Id.* at 33-34.

¹¹⁸ *Id.* at 34.

¹¹⁹ *Id.* at 39.

¹²⁰ *Id.* at 34-35.

¹²¹ *Id.* at 42 (quoting *Misco, Inc. v. U. Paperworkers Int’l Union, AFL-CIO*, 768 F.2d 739 (5th Cir. 1985)).



the Fifth Circuit by holding that “[h]ad the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.”¹²²

One notable case by the Colorado Supreme Court may have an impact on the enforcement of equitable relief in Colorado. In *People v. Crouse*, the court held that a provision of the Colorado Constitution requiring law enforcement to return medical cannabis to an acquitted defendant was in positive conflict with the CSA and could not be enforced.¹²³ Although this case was not decided on public policy grounds, it does demonstrate how the courts may be reluctant to require law enforcement to engage in any activities that directly conflict with the express provisions of the CSA, namely, the distribution of cannabis.

To the extent public policy remains as a ground for vacatur, *United Paperworkers* and *DeMartini* demonstrate that public policy will still be narrowly construed by the courts.¹²⁴ However, arbitration is still a creature of contract and, although an arbitrator obtains his or her authority from the consent of the parties, other third-parties have not consented to an arbitrator having any authority over them. In this sense, “public” policy remains in play. Ordering Misco to reinstate Mr. Cooper to his position operating a dangerous machine is one thing; Misco agreed to resolve such disputes in arbitration after all. But ordering third-parties to do something that is potentially illegal or unsafe is quite another. As demonstrated in *Crouse*, law enforcement may resist an order that they believe to be in conflict with federal law. Perhaps there is some room for public policy review still, but only within a specific context. Where an arbitration award contains equitable remedies, particularly injunctive or specific performance relief that affects third-parties not party to the arbitration, the justification for a court to simply accept an arbitrator’s determination on public policy issues crumbles.

¹²² *Id.* at 45.

¹²³ *People v. Crouse*, 388 P.3d 39 (Colo. 2017).

¹²⁴ *U. Paperworkers*, 484 U.S. at 42-43.



As demonstrated below, the rationale behind this idea is also reflected in the limits of interstate enforcement of state court judgments under the Full Faith and Credit Clause of the U.S. Constitution.

VII. INTERSTATE ENFORCEMENT OF THE CONFIRMED ARBITRATION AWARD (NOW A STATE COURT JUDGMENT) - THE FULL FAITH AND CREDIT CLAUSE

Once an arbitration award is confirmed by a state court at the “seat” of the arbitration, it is converted into a state court judgment.¹²⁵ Then, a party may seek to enforce the court judgment in a sister state under the Full Faith and Credit Clause of the U.S. Constitution, sometimes referred to as the “Iron Law.”¹²⁶ The U.S. Supreme Court has held that “[t]he full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.”¹²⁷ In other words, the clause is part of the glue that holds the U.S. states together.

Courts in an enforcing jurisdiction apply local procedure, but the confirmed award – a judgment – has full *res judicata* effect in enforcing states.¹²⁸ As the U.S. Supreme Court stated in *Baker by Thomas*, the enforcing state cannot meddle with the judgment:

As to judgments, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. A court may be guided by the forum State's “public policy” in determining the law applicable to a controversy, but this Court's decisions support no roving “public policy exception” to the full faith and credit due judgments ...¹²⁹

To what extent can a sister state court review another state court judgment under the Full Faith and Credit Clause? There are a few exceptions to the general rule of enforceability: foreign judgments affecting disposition of real property in an enforcing state and a few other areas such as the cross-border effect of injunctions.

¹²⁵ C.R.S. § 13-22-222; *Judd Const. Co. v. Evans Joint Venture*, 642 P.2d 922 (Colo. 1982).

¹²⁶ William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L. REV. 412 (1994).

¹²⁷ *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948).

¹²⁸ *Baker by Thomas v. Gen. Motors*, 522 U.S. 222, 233-35 (1989).

¹²⁹ *Id.* at 246.



State courts however cannot consider the *illegality* of the contract when considering whether to recognize and enforce the foreign sister state court judgment.¹³⁰

Although the Iron Law remains strong in the context of money judgment enforcement, the analysis changes when the relief sought to be enforced affects third-parties.¹³¹ In *Baker by Thomas*, a former General Motors engineering analyst agreed, during the settlement of employment claims, not to testify anywhere in the U.S. against General Motors in other cases.¹³² A Michigan state court adopted the stipulation between the employee and General Motors as an order of the court in the form of a permanent injunction.¹³³ The U.S. Supreme Court was asked whether such an injunction was binding on a Missouri state court involving third-parties.¹³⁴ The U.S. Supreme Court distinguished between the enforcement of money judgments, and the judgment's claim and issue preclusive effects *on the parties*, and other types of relief:

Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law . . . Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority.¹³⁵

Accordingly, an arbitrator's order commanding a party to specifically perform the contract and deliver a supply of cannabis, if confirmed and converted into a state court judgment in Colorado, may or may not be enforceable in sister states under the Full Faith and Credit Clause.¹³⁶ Ultimately, the court in the enforcing jurisdiction will have wider latitude to deny enforcement in accordance with the law of the enforcing jurisdiction.

¹³⁰ *Id.* at 236-37; *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

¹³¹ *Baker*, 522 U.S. at 248-49.

¹³² *Id.* at 227-28.

¹³³ *Id.*

¹³⁴ *Id.* at 231.

¹³⁵ *Id.* at 235.

¹³⁶ *Id.*



VIII. CONCLUSION

The enforceability of cannabis-related contracts will likely remain in a gray area for some time; however, effective contract enforcement techniques do exist for those willing to engage in this industry. As demonstrated above, the choice of law and choice of forum are significant parts of the enforceability analysis. Colorado state public policy and recent decisions from the state and federal courts in Colorado enforcing cannabis-related contracts demonstrate one promising forum for contract enforcement. The selection of arbitration as the forum for dispute resolution reduces the extent to which public courts can apply public policy and illegality arguments to defeat the contract. Where a money judgment is involved, as opposed to injunctive relief, the Full Faith and Credit Clause also provides a promising avenue for interstate enforcement of a state court judgment that confirms a cannabis-related arbitration award.



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