

# International Arbitration

Resolving Collateral  
Colorado Business Disputes

BY BRENT OWEN

*As Colorado continues to grow and its economy integrates into further reaches of the world market, regional companies increase their exposure to international disputes. This article examines legal and practical issues that Colorado companies should carefully consider concerning potential international disputes, with a focus on international arbitration as a means to resolve those disputes.*

In the middle of the 19th century, Horace Greeley implored Civil War veterans, immigrants, and all other ambitious readers of his newspaper: “Go West . . . and grow up with the country.”<sup>1</sup> And the West grew up.

As Colorado’s economy integrates deeper into the global market, Colorado companies face new opportunities to partner with foreign companies. To best manage those opportunities, Colorado companies should understand how international arbitration operates—particularly when it intersects with collateral litigation in Colorado. This article discusses international arbitration and identifies several practical considerations for Colorado companies considering, or already involved in, international arbitration and collateral court litigation.

### **What is International Arbitration?**

Arbitration is any method of dispute resolution in which a neutral third party has the authority to issue a binding decision.<sup>2</sup> International arbitration involves disputes among companies (or governments) from different countries. Numerous international arbitral institutions operate around the world, including:

- The International Court of Arbitration of the International Chamber of Commerce (ICC). The ICC touts its role as the “world business organization, enabling business to secure peace, prosperity and opportunity for all.”<sup>3</sup>
- The International Centre for Dispute Resolution (ICDR). The

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ICDR is the international division of the American Arbitration Association and advertises itself as “the world’s leading provider of dispute resolution services to businesses in matters involving cross-border transactions.”<sup>4</sup>

- The London Court of International Arbitration (LCIA). This London-based arbitration institution is celebrating its 125th anniversary this year. The organization notes that “over 80% of parties in pending LCIA cases are not English nationality.”<sup>5</sup>

### **Why Agree to International Arbitration?**

A Colorado company entering into a transaction where the parties, assets, services, or products will involve foreign jurisdictions should carefully consider agreeing to international arbitration to resolve future disputes. Particularly where a dispute will span multiple jurisdictions, the benefits of international arbitration include:

- **Award enforcement.** The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>6</sup> provides for enforcement of international arbitral awards by courts in the vast majority of countries around the world. No similar treaty exists for the enforcement of foreign court judgments. It follows that international arbitration for multijurisdictional disputes may increase the likelihood that a Colorado company can enforce any award it obtains. Over 150 countries are parties to the New York Convention.
- **Procedural flexibility.** International arbitration procedures offer participants more procedural flexibility than U.S. court rules.

Parties generally agree on the procedure at the outset, including the ability to waive certain hearings and disclosure requirements that often (exponentially) increase costs in U.S. litigation.<sup>7</sup> The corollary tradeoff is that arbitration will not always include the extensive procedural protections built into U.S. court rules, which may lead to uncertainty.

- **Confidentiality of proceedings.** In Colorado, courts favor public access to proceedings and documents. The U.S. District Court for the District of Colorado requires that “the public shall have access to all cases and documents filed with the court and all court proceedings.”<sup>8</sup> Although mechanisms exist to protect certain documents or testimony, a Colorado company involved in federal or state litigation will almost never keep the

entire proceeding confidential. In contrast, international arbitration offers extensive protections for keeping a dispute and its eventual resolution confidential. And parties can agree to confidentiality in an arbitration clause, keeping any dispute out of the public sphere from the outset.

- **Arbitrator selection.** Most international arbitration organizations have mechanisms for identifying and agreeing on who will arbitrate the dispute. This gives a Colorado company greater control over the decision maker to ensure not just neutrality, but also subject matter expertise, technical experience, or industry know-how—thus increasing the likelihood that the dispute will be resolved in a fair and expeditious manner.

Because arbitration is a creature of contract, parties entering into transactions with foreign

companies retain significant latitude to craft arbitration clauses that fit their business needs. For instance, a party entering into a highly technical contract, such as one involving the sale of a volatile chemical compound with precise shipping requirements, may provide for certain arbitrators or procedures to ensure the company is best able to resolve any technical dispute. Likewise, a company worried about costs can normally agree prospectively to expedited procedures, waiving a hearing, or significantly limiting discovery.<sup>9</sup>

Colorado companies should consider working with one of the international dispute organizations listed above. These organizations, and other similar organizations, provide guidance on how a party can invoke that organization’s procedures. For instance, the LCIA recommends that the parties’ agreement “stat[e] that the LCIA Arbitration Rules will apply,” and address in the



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arbitration clause the number of arbitrators, how the parties will choose the arbitrators, the “seat” (the legal place) of the arbitration, the law governing the dispute, and the language in which the arbitration will be conducted.<sup>10</sup>

A company should identify the organization it wishes to work with, consistent with that organization’s guidance as provided in its rules. And, as much as possible, a company that seeks to use a certain organization should coordinate contracts with all vendors or service providers in a particular subject matter area to increase the likelihood that a single arbitration organization can address any dispute. For example, if a Colorado company wishes to use the LCIA to resolve all disputes for shipments of ball bearings to Qatar, the company should carefully coordinate its agreements at each point in the supply chain to designate the LCIA as the organization for resolving any dispute about the ball bearings.

#### **What if the Other Side Refuses to Arbitrate?**

Despite the benefits of international arbitration, a party may refuse to arbitrate. How can a party obtain the refusing party’s compliance with the procedure?

Both Colorado and federal policy favor arbitration. The Federal Arbitration Act requires courts to enforce arbitration contracts according to their terms.<sup>11</sup> The Colorado statutes and case law both encourage resolving disputes through arbitration.<sup>12</sup> So, where a party resists engaging in international arbitration, another party can ask a court to enforce the parties’ international arbitration agreement and compel arbitration. Absent fraud or some other grounds for defeating the underlying contract, federal courts will enforce arbitration clauses. The Tenth Circuit resolves any “doubts concerning the scope of arbitral issues . . . in favor of arbitration.”<sup>13</sup> The New York Convention also requires foreign courts to compel arbitration where the dispute is subject to a valid international arbitration clause.

The U.S. Supreme Court recently clarified that courts cannot address the threshold arbitrability question if the contract delegates that issue to an arbitrator.<sup>14</sup> Indeed, all major international arbitration institutions have promulgated rules

that allow the arbitration tribunal to decide its own jurisdiction. For example, the LCIA rules state: “The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.”<sup>15</sup>

In certain situations, a company can face arbitration even if it did not sign a contract agreeing to that arbitration. “Under Colorado law, both signature and nonsignatory parties may be bound by an arbitration agreement if so dictated by ordinary principles of contract law.”<sup>16</sup> A company facing an arbitration demand should understand Colorado law and controlling contract principles to identify circumstances that may compel that company into an arbitration it did not expressly agree to. For example, a Colorado court may use equitable estoppel to bind a party to an arbitration agreement in

at least two situations. First, a signatory to an arbitration agreement may compel arbitration of a claim brought against it by a nonsignatory plaintiff, if the claim arises from the agreement containing the arbitration provision.<sup>17</sup> This makes sense: A nonsignatory party cannot seek the benefit of an agreement containing an arbitration provision, while at the same time attempting to avoid the arbitration provision of that agreement.<sup>18</sup>

Second, though less common, a nonsignatory may compel arbitration if the signatory to an agreement that includes an arbitration clause asserts a claim against a nonsignatory to that contract. In that case, a nonsignatory may estop the signatory from avoiding an arbitration provision as a matter of both contract principles and basic fairness.<sup>19</sup> In 2015, the Colorado Court of Appeals upheld arbitration against a nonsignatory investor where the investor’s

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claims presumed “the existence” of a valid agreement (which included an arbitration clause) and involved “interconnected and concerted misconduct” among parties to a contract that contained an arbitration clause.<sup>20</sup>

Colorado parties in a dispute that implicates an international arbitration clause must carefully consider both the language of all agreements and the positions they take in the litigation.

### Navigating Collateral Litigation

In addition to enforcement proceedings to compel a company that agreed to arbitrate to do so, international arbitration may lead to or implicate litigation. Because certain aspects of a dispute may not fall within the scope of an arbitration clause, a Colorado company may face an arbitration dispute and a correlated court fight about the same subject matter.

Facing collateral litigation, a Colorado company should carefully coordinate dispute resolution efforts to avoid taking a step before one tribunal that causes harm to its client before the other. For example, companies and their attorneys must guard against waiving attorney-client privilege, disclosing work product, or disclosing trade secrets or other confidential information to the public.

And international arbitration usually involves less onerous discovery methods, so a company cannot treat discovery in related international arbitration disputes and court litigation the same. For instance, the International Bar Association Rules on Taking of Evidence in International Arbitration (IBA Rules), which often apply in international arbitration, generally limit a party to obtaining documents “relevant to the case and material to its outcome.”<sup>21</sup> Thus, a party might make a more limited document production in an international arbitration than it would under, for instance, CRCP 26, which permits discovery “regarding any matter, not privileged, that is relevant to the claim or defense of any party, and proportional to the needs of the case . . . .”<sup>22</sup>

### In Sum: Plan Your Dispute Resolution Strategy

As Colorado companies enter the global market, they will benefit from a thoughtful approach to

dispute resolution. International arbitration is one tool for managing risk with international transactions. A company that agrees to international arbitration at the outset—and carefully understands the agreed-upon procedure—will likely realize a significant competitive advantage in the world market over its less sophisticated competitors. 



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### NOTES

1. Cross, *Go West, Young Man! Horace Greeley's Vision for America* (University of New Mexico Press 1995).
2. Garner, *Garner's Dictionary of Legal Usage* at 74 (3d ed. Oxford University Press 2009) (“arbitration”). Bryan Garner explains that an arbitration is not “tried” because it is not “a public tribunal”; rather, he instructs that “an arbitration is heard or conducted.” *Id.* at 75.
3. ICC, Who we are, <https://iccwbo.org/about-us/who-we-are>.
4. ICDR, About ICDR, [www.icdr.org/about\\_icdr](http://www.icdr.org/about_icdr).
5. LCIA, Introduction, [www.lcia.org/LCIA/introduction.aspx](http://www.lcia.org/LCIA/introduction.aspx).
6. Visit [www.newyorkconvention.org](http://www.newyorkconvention.org) for information about the New York Convention, including access to the text of the convention.
7. For instance, Article 22 of the International Court of Arbitration Rules (Mar. 1, 2017) provides for the “Conduct of the Arbitration,” instructing: “The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute,” <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf>.
8. D.C.COLO.LCrR 47.1 (explaining the court’s policy favoring public access to court documents), [www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2017\\_Final\\_Local\\_Rules.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2017_Final_Local_Rules.pdf).
9. See, e.g., ICDR, “International Dispute Resolution Procedures (Including Mediation and Arbitration Rules),” Article 20 (“Conduct of Proceedings”) (giving the arbitral tribunal significant latitude in managing the prosecution of a case so long as “each party has the right to be heard and is given a fair opportunity to present its case”), [https://www.adr.org/sites/default/files/ICDR%20Rules\\_0.pdf](https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf).
10. LCIA, Frequently Asked Questions, No. 16 (“What do parties need to record in an arbitration agreement or arbitration clause?”), [www.lcia.org/Frequently\\_Asked\\_Questions.aspx#16](http://www.lcia.org/Frequently_Asked_Questions.aspx#16).
11. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010); 9 USC § 2 (“A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such

contract . . . shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.”).

12. E.g., CRS §§ 13-22-201 et seq. (Colorado Revised Uniform Arbitration Act). See *Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928, 930 (Colo. 1990) (“The public policy of this state encourages the resolution of disputes through arbitration.”).

13. *Nat’l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004) (citation omitted).

14. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272, slip op. at 2 (Jan. 18, 2019) (“When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”).

15. LCIA, Arbitration Rules 2014, Article 23.1, [www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article%201](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%201).

16. *Meister v. Stout*, 353 P.3d 916, 920 (citing *Smith v. Multi-Financial Secs. Corp.*, 171 P.3d 1267, 1272 (Colo.App. 2007)).

17. *Smith*, 171 P.3d at 1270-72. (“Courts should not permit creative legal theories to undermine [the presumption favoring arbitration]. Therefore, we look beyond the legal cause of action and consider the factual allegations upon which the claims are premised.”). *Id.* at 1270.

18. See *id.* at 1271-74.

19. See *GATX Mgmt. Servs., LLC v. Weakland*, 171 F.Supp.2d 1159, 1165-67 (D.Colo. 2001) (collecting cases) (holding that a nonsignatory may estop a signatory from avoiding an arbitration provision under certain circumstances and compel arbitration).

20. *Meister*, 353 P.3d at 921-22. (Because investor’s “claims all arise from the underlying operating agreement . . . [he] is estopped from avoiding the arbitration provision in the operating agreement”).

21. IBA Rule, Article 3, 3(b) (requiring a “statement as to how Documents requested are relevant to the case and material to its outcome”), [www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx).

22. CRCP 26(b)(1) (Discovery Scope and Limits).