A Global Market: Colorado Companies & International Arbitration Clauses

Parya Mahmoudi

INTRODUCTION

As Colorado continues to grow, and its economy integrates into the global market, regional companies increase their exposure to international disputes.¹ This Article examines legal and practical issues Colorado companies should carefully consider regarding potential international disputes, with a focus on international arbitration as a means to resolve those disputes.² While some industries are more exposed to international arbitration agreements and jurisdiction beyond Colorado, individual companies should evaluate whether such agreements are in the best interest of their business.

Arbitration is an alternative to litigation and can have potential benefits when consciously pursued.³ Arbitration considerations include: award enforcement, procedural flexibility, confidentiality of proceedings, and arbitrator selection.⁴ Colorado companies should consider whether to include an arbitration clause in a contract and whether to invoke it when a dispute arises.⁵

COLORADO’S GROWTH

In 2017, the Denver Business Journal ranked Colorado second in the country for the most attractive states for employment, and first for job opportunities.⁶ Among these thriving economic opportunities, the professional and business sector is predicted to contribute the largest percentage of new positions.⁷ With Colorado’s economic growth, businesses are exposed to unfamiliar methods of dispute resolution.⁸ While Colorado’s thriving economy is an asset, Colorado companies should carefully consider legal and practical issues concerning potential international disputes.

WHAT IS INTERNATIONAL ARBITRATION?

² Id.
⁵ Id.
⁷ Id.
Arbitration is any method of dispute resolution in which a neutral third party has authority to issue a binding decision.\(^9\) One method of dispute resolution is international arbitration, which involves disputes among companies or governments from different countries.\(^10\) International arbitration is the most common form of alternative dispute resolution (ADR).\(^11\) “It’s a system that is validated by both national and international law, but not run directly by any given state.”\(^12\) Arbitrations often arise from clauses included in commercial contracts.\(^13\) If a dispute arises between two parties, they are obliged to arbitrate their dispute rather than pursue traditional litigation.\(^14\) For Colorado businesses, this means they may consent to jurisdiction well outside the reach of the United States.

**ENGAGING IN FOREIGN TRANSACTIONS**

With Colorado’s growth, both consumers and the economy demand foreign services and products—opening up the playing field for dispute resolution to foreign jurisdiction. Cases heard in international arbitration are typically cross-border commercial disputes that occur in situations like joint ventures or corporate transactions.\(^15\) While disputes commonly originate in oil and gas, telecom, privatized public utilities, and construction industries, they are not limited to these circumstances.\(^16\) While a host of positive and negative considerations exist, whether a business pursues international arbitration may vary depending on its industry placement and interests.

**POSITIVE AND NEGATIVE CONSIDERATIONS OF INTERNATIONAL ARBITRATION**

While each individual business and industry has its own nuanced concerns, common considerations for international arbitration include: award enforcement, procedural flexibility, confidentiality of proceedings, and arbitrator selection.\(^17\)

**A. Award Enforcement**

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention),\(^18\) provides

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\(^10\) *Id.*


\(^12\) *Id.*

\(^13\) *Id.*

\(^14\) *Id.*

\(^15\) *Id.*

\(^16\) *Id.*

\(^17\) Owen, *supra* note 4 at 21.

for enforcement of international arbitral awards by courts in the majority of countries.\textsuperscript{19} Currently, over 150 countries are part of the New York Convention.\textsuperscript{20} This is a positive consideration of international arbitration and should provide Colorado businesses comfort, in that the likelihood of enforcing a judgement across international jurisdictions is high.

\textbf{B. Procedural Flexibility}

Procedural flexibility can be either positive or negative. International arbitration procedures offer participants more procedural flexibility than U.S. court rules.\textsuperscript{21} Parties can agree to procedures from the beginning of a transaction or contractual agreement—well in advance of any possible dispute arising during the course of business. Procedural flexibility can include the ability to waive certain hearings and disclosure requirements that often significantly increase costs in U.S. litigation.\textsuperscript{22} Further, “[a]n arbitrator can generally order whatever relief he or she thinks is right, regardless of whether such relief would be available in a court of law. This is an express part of arbitration law and procedure.”\textsuperscript{23}

Procedural flexibility, however, may include some risks. The tradeoff is that arbitration may not include the extensive protections U.S. court rules provide.\textsuperscript{24} This in turn, can present highly unreliable results.\textsuperscript{25} Arbitration does not have the procedural protections of litigation.\textsuperscript{26} Litigation has exhaustive discovery, careful evidentiary controls, a judicial officer experienced in applying the law, and a thorough appellate review process.\textsuperscript{27} Whereas in arbitration, many of these protections do not exist and arbitration decisions are unreviewable.\textsuperscript{28} This can lead to results that are not similar to the judicial process.\textsuperscript{29}

\textbf{C. Confidentiality of Proceedings}

Confidentiality of proceedings may be another positive consideration for Colorado businesses. Arbitration proceedings can be kept confidential, while litigation and U.S. court rules may require access and transparency to documents.\textsuperscript{30} For example, the U.S. District Court of Colorado requires that “the public shall

\begin{footnotesize}
\textsuperscript{19} Owen, \textit{supra} note 4, at 21.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} Brinson, \textit{supra} note 3 (citing AAA Commercial Arbitration Rule 47(a) ("[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.").
\textsuperscript{24} Owen, \textit{supra} note 3, at 21.
\textsuperscript{25} Brinson, \textit{supra} note 3.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} Brinson, \textit{supra} note 3.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} Owen, \textit{supra} note 4 at 21.
\end{footnotesize}
have access to all cases and documents filed with the court and all court proceedings.” 31 Colorado courts favor a presumption of public access. 32 While some mechanisms exist to limit disclosure and access to certain documents and testimony, rarely does litigation in Colorado provide complete confidentiality. Whereas, parties can agree to confidentiality in an arbitration clause, shielding private business disputes from the public sphere.

D. Arbitrator Selection

Arbitrator selection may also be another positive consideration for Colorado businesses. Most international arbitration organizations have mechanisms for identifying and agreeing on who will arbitrate the dispute. 33 “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 [knowledge].” 34

E. Policy Favors Arbitration

In case of a dispute, it is possible one party may refuse to arbitrate. Despite an opposing party’s refusal, a party can ask a court to enforce the parties’ international arbitration agreement and compel arbitration. Both Colorado and federal policy favor arbitration. The Federal Arbitration Act requires courts to enforce arbitration contracts and follow their previously agreed upon terms. Similarly, the New York Convention also requires “foreign courts to compel arbitration where the dispute is subject to a valid international arbitration clause.” The Tenth Circuit resolves any “doubts concerning the scope of arbitral issues . . . in favor of arbitration.” 35 Absent fraud or any other recognized grounds for defeating the underlying contract, federal courts will enforce arbitration clauses. As such, Colorado businesses should have comfort in that a contractual arbitration clause will be enforced if a dispute arises with an opposing party.

CLOSING THOUGHTS

With Colorado’s entrance into the global market, companies increase their exposure to international agreements and disputes. Arbitration is an alternative to litigation and can have potential benefits when consciously pursued. Among practical and legal considerations, Colorado companies should carefully evaluate whether using international arbitration agreements are in the best interest of their business.

31 D.C.COLO.LCR 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.
32 Id.
33 Owen, supra note 4 at 22.
34 Id.