Receiverships and Arbitrations

BY JACK TANNER

This article discusses how and why receiverships and arbitrations are used in litigation and considers the potential benefits and obstacles to merging the two proceedings.

An old brainteaser from childhood asks: "What happens when an unstoppable force meets an immovable object?" The playground response was "an explosion," but the correct answer was that the question is flawed. If an unstoppable force exists, then by definition an object it meets cannot be immovable (and vice versa).

In the law, arbitration tends to be an unstoppable force. Courts are supposed to affirm arbitration awards, even if known to be contrary to law, absent a scant handful of statutory exceptions. Receiverships appear to be the immovable objects—only the court that appointed a receiver can instruct it what to do; other courts must not interfere. So, the new question is: Can receiverships and arbitrations effectively meet and coexist in the same matter?

Receiverships and arbitrations are fundamentally different proceedings, each having good reasons for its respective attributes. Trying to merge the two would be difficult (and perhaps impossible). If it can be done successfully, the combined result could provide a powerful and useful remedy. However, if and how it can be done remain open questions under Colorado law.

This article considers several issues that might arise when a situation calls for a receivership or an arbitration, or perhaps both. It is primarily intended for creative litigators who seek elegant and unusual solutions to problems that may not fit in the usual "round hole" of plaintiff versus defendant litigation.

A Brief History of Receiverships

First, a note on terminology: The term "receiver" is used in many ways. Numerous statutes create and give various powers and duties to quasi-judicial officers called "receivers." This article is not about them. Rather, it is about true equity receiverships—where a court of equity takes certain assets under its supervision and appoints a receiver to preserve the assets on behalf of the court, generally until the assets can be sold or the underlying litigation is resolved. "Preservation" can include not only operation, but also expansion. Appointing a receiver is inherently within the powers of a court that sits in equity.[1]

In essence, when a court appoints a receiver, it creates an estate (which can be specific assets, an entire company, or almost anything else). Those assets become a *res* that is *in custodia legis* ("in the custody of the law"). The *res* is under the exclusive control of the receiver, as supervised by the appointing court. As part of the appointment, the entire world is effectively enjoined from interfering with the receiver or the *res* except via proper motions filed in the appointing court.

Receiverships are court-created remedies. The first receiverships began in England in the late 1600s.[2] At that time, creditors' rights law allowed creditors to hold a ship in port if a debt was attached to the ship or its owner. But a ship in port did nobody any good, so the English Chancery created a "receiver." A receiver was a court officer who would board the ship as it left port, "receive" (and thus control) the money the ship earned in commerce, pay the receiver and the ship's crew, and then turn the excess funds back to the court to pay down the debt. That way, the creditor was protected, the debt could be repaid, and commerce could continue (which was good for both the economy and the Crown, since it taxed the commerce).

Over time, receivers began to be appointed over other *res* beyond ships—notably entire companies or certain assets that had been pledged as collateral.

Modern Receivership Practice

Today, receiverships are not limited to ships, and the *res* can be a company, pledged assets, a trust, a marital estate, or many other things. Most commercial deeds of trust provide for appointment of a receiver (often *ex parte*) in the event of default. The flexibility of the provisional remedy of a receivership is limited only by the creativity of the counsel and judge involved. Almost any asset can be put into a receivership, allowing the court to supervise the *res* while it sorts out the underlying dispute.

Receivership courts routinely resolve disputes affecting the *res* on summary procedures that would otherwise require plenary attention of a court.[3] In a receivership, a claimant with a claim against the *res* has a right to notice and an opportunity to be heard, but not a right to all the procedures set out in the Federal Judicial Center's 800-page *Manual for Complex Litigation*.[4] A large receivership may resolve thousands of disputed claims in summary fashion. This greatly reduces the burden on the court system as a whole, but likely increases it for the specific receivership court. One responsibility that comes from all this power is that receiverships must have substantial transparency to satisfy the constitutional requirement of due process.

An equity receivership is necessarily an interim remedy.[5] Because a receiver is a neutral officer of its appointing court, there must be an ongoing court proceeding for a receiver to exist. Once the case is over, a receiver is necessarily discharged.[6]

A Brief History of Arbitrations

In complete contrast to the judicially created remedy of receiverships, arbitrations were not created by courts and indeed cannot be created by courts. An arbitration's sole purpose is to resolve a dispute outside the court system.

Originally, arbitrations were used by nations to negotiate disputes where neither nation had complete jurisdiction.

In the last century, arbitrations began to be used in commercial disputes. In 1921, the Colorado legislature passed an act recognizing the validity of arbitrations. This law has been amended several times and is now codified as the Colorado Uniform Arbitration Act (the Act).[7] Generally, arbitration is a contractually created process, and only parties to the arbitration contract can be compelled to arbitrate.[8]

Modern Arbitration Practice

Currently under the Act, parties can agree to any form of arbitration rules. The largest arbitration organization in the United States is the American Arbitration Association (AAA), and its Commercial Rules provide that an agreement to arbitrate is "not incompatible" with a court entering interim remedies.[9] While this certainly invites injunctions to preserve the status quo pending arbitration, it could also be interpreted to allow receiverships.

Significantly, many parties seek arbitration because they desire confidentiality. Arbitrations are generally conducted completely confidentially, and only the final award is presented to a court for affirmance (if even that is necessary). In most cases, the court must affirm an arbitration award even if it is contrary to law.[10] The handful of exceptions to this rule generally turn on arbitrator bias.[11]

There is, however, a lesser-used aspect of the Act—under Section 208 of the Act,[12] courts have the authority to enforce an arbitrator's provisional order. In theory, this could include the provisional remedy of appointment of receiver.

The Interaction of Arbitration and Receivership Law

Not much law exists on the interaction of receiverships and arbitrations (perhaps because they are so fundamentally different). One of the few Colorado cases that appears to have at least tangentially involved the relationship between a receiver and an arbitrator is *Oberto v. Moore*.[13] In *Oberto*, the partnership agreement at issue contained an agreement to arbitrate. One party had a receiver appointed essentially *ex parte* (the parties were given less than one day's notice for a hearing in Telluride, when defense counsel was in Grand Junction). Equally disturbing was that the plaintiff was appointed receiver (contrary to the well-established requirement that a receiver be neutral). The Colorado Supreme Court reversed the appointment as an abuse of discretion:

> The appointment of the plaintiff copartner as temporary receiver was improvident. As a general rule, a receivership should not be created unless upon notice that gives ample time for all interested parties to attend and be heard. If there be exceptional cases that require *ex parte* action, they are limited to momentous emergencies which manifestly threaten dire destruction of health, safety, or irretrievable estate. There was no such exigency here . . . . The evidence at the *ex parte* hearing was plainly insufficient. . . .[14]

The Court was careful not to go beyond the quoted holding:

> In view of the conclusions we have above expressed, it is unnecessary at this time to decide whether Oberto is right in claiming that he can demand arbitration under the contract, or whether Moore is right in contending the contrary on the ground that the partnership agreement failed to name specifically the arbitrators who would represent the respective partners. What we might say on that subject would be mere dictum. That issue may be litigated in the main case if the parties so desire.[15]

No significant Colorado cases have been decided on this issue since *Oberto*, though courts in other jurisdictions have been addressing questions regarding the interaction of receiverships and arbitrations more frequently in recent years, as discussed below.

Can a Court Appoint a Receiver Where There Is a Binding Arbitration Clause?

Given *Oberto* is essentially the only Colorado appellate jurisprudence on the interaction of receivership and arbitration law, the question of whether and how a receiver can be appointed when there is an arbitration clause is unanswered under Colorado law. Some jurisdictions outside Colorado have expressly approved a court's appointment of a receiver pending an arbitration.[16] Other courts, however, have held that where there is a controlling arbitration clause, the court lacks jurisdiction to appoint a receiver.[17]

Can a Court-Appointed Receiver Be Forced to Arbitrate?

If a Colorado court appoints a receiver over a company, can the receiver be required to arbitrate pursuant to preexisting company contracts? Again, there is no controlling law in Colorado on this point, and out-of-state authorities are split. The court in *Greenblatt v. Ottley*[18] held that a receiver appointed over a health-care facility in New York was not bound by an arbitration agreement contained in the collective bargaining agreement, stating:

> It is utterly incompatible with the jurisdiction of the court over a receivership of a health care facility pursuant to the Public Health Law and with the duties of the Commissioner of Health as a receiver to require the Commissioner to be bound, without his consent, to a pre-receivership arbitration agreement.

While *Greenblatt*'s language is stronger than most taking this position (perhaps because it is based on a state statute), other cases reach similar conclusions.[19] But there are several other authorities to the contrary.[20]

Can an Arbitrator Appoint a Receiver?

Numerous out-of-state courts have held that an arbitrator can appoint a receiver.[21] In *Stone v. Theatrical Investment Corp.*, the district court affirmed an arbitrator's appointment of an officer denominated "a receiver."[22] However, the court noted that the receiver's "limited duties . . . are functionally more akin to those of a collection agent."[23] The court further held that because no New York or federal law prohibits an arbitrator from appointing a receiver, an arbitrator acting under either of those laws could do so.

At the other end of the spectrum is *Marsch v. Williams*,[24] where the California Court of Appeals held that an arbitrator cannot appoint a receiver even if the arbitration agreement expressly says the arbitrator has that power. Part of *Marsch*'s analysis was that although a California statute allows courts to enter interim relief pending

an arbitration, that statute does not appear to permit the appointment of a receiver as a remedy.

Somewhere in between *Stone* and *Marsch* are authorities such as *Ravin & Rosen, P.C. v. Lowenstein Sandler, P.C.*,[25] which held that an arbitrator could not appoint a receiver because neither the arbitration agreement nor the AAA Rules (which were incorporated by reference) could be read to fairly provide that authority.

What Value Would an Arbitrator-Appointed Receiver Provide?

In addition to the challenge of maintaining transparency and confidentiality, appointment of a receiver by an arbitrator could also create practical problems. Receivers routinely deal with entities that are not parties to the litigation in which the receivers were appointed. For example, when a receiver is appointed over a company, one of the first things the receiver usually does is go to the company's bank and get the bank accounts turned over to the receiver. If the bank refuses, the receiver can and will obtain contempt orders (another inherent power of a court in equity) from the appointing court against the uncooperative third party. This can coerce the bank to cooperate with the receiver.

No such power is directly available to an arbitrator-appointed receiver. If a bank refuses to cooperate with an arbitrator-appointed receiver, neither the receiver nor the arbitrator has any apparent remedy because the bank never contractually agreed to let the arbitrator resolve disputes.[26]

Another limitation on arbitrator-appointed receivers involves the claims process. As noted above, a court-appointed receiver can resolve claims against the *res*, often on summary procedures. But unless the claimants also agreed to have their disputes resolved via arbitration, an appointee of an arbitrator would not likely have authority over those claimants or their claims. So, one of the most powerful aspects of receiverships (the ability to resolve claims on a summary basis) would not be available to an arbitrator-appointed receiver.

Even where the third party is cooperative and not adverse to the receiver, an arbitrator-appointed receiver may run into problems. When a receiver sells property, it typically cannot and does not give the usual warranties and representations of a seller. Rather, the receiver obtains a court order stating that the receiver has authority to sell and that the buyer is obtaining good title.[27] This court order "runs with" the property sold, and thus is good against the whole world. The buyer can therefore be confident it is receiving good title, even without the usual seller's warranties and representations. An arbitrator, however, has no ability to provide

such an order. It would not "run with" the property and be good against the whole world. In a better-case scenario, this would result in a lower sale price because the buyer would take the uncertainty into account. In a worst-case scenario, it might scare off all buyers entirely.

Although a receiver may be the most powerful remedy known at civil law, an arbitrator-appointed receiver would not be nearly as powerful nor as useful. The limited powers that an arbitrator alone could provide would greatly reduce the value of such a receiver.

Are Joint Appointments Possible?

One possible solution to the "either/or" situation described above is found in CRS § 13-22-208, which provides that a court can confirm certain "provisional" relief of arbitrators as follows:

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

So perhaps an arbitrator could appoint a receiver, and the order of appointment could be confirmed by a trial court while the arbitration is ongoing. This would likely give the receiver the option of court action if, for example, a recalcitrant third party refuses to cooperate or if a sales order that runs with the *res* (and is good against the whole world) is needed.

The issue of a summary claims process operated by the arbitrator-appointed receiver is somewhat more complicated. Though the threat of contempt against uncooperative banks might happen only once or twice, a full-blown claims resolution process would take up a good amount of time. If the claimants do not consent to the arbitrator's jurisdiction, the court would have to do this process itself.

The court conducting the claims process while the arbitrator supervises all other aspects of the receivership raises another issue: the familiar notion that no one can serve two leaders. A receiver, being supervised both by an arbitrator and a judge, could face a terrible dilemma if given conflicting instructions. Hopefully, the arbitrator and the trial court would find common ground and not put the receiver in such a conflict.[28]

Not all states have this option. In *Reserve Recycling v. East Hoogewerff*, the arbitrator's order appointing an "overseer" (who had the powers of a receiver) pending resolution of separate litigation over appointment of a receiver was not a "final order," and the court therefore lacked jurisdiction to review it under Ohio's version of the Uniform Arbitration Act.[29] Therefore, this type of "overseer" could not, for example, resolve a claim by a third party against the *res* without that claimant consenting to the jurisdiction of the arbitrator.

Another solution might be to have a court appoint a receiver either prior to or during the arbitration. Colorado law already recognizes that even in the face of an arbitration clause, a court can enter interim equitable relief (such as injunctions) without disturbing the arbitrator's jurisdiction.[30] Because arbitrations are not instantaneous, without injunctive relief there could be nothing left to arbitrate by the time the arbitration process is finished.

Perhaps a court could appoint a receiver and direct the receiver to follow the direction of the arbitrator, only coming back to the court if some power beyond that of the arbitrator (such as orders involving third parties) were needed. As noted above, however, this approach would be clumsy and awkward (and hence expensive)

and could be perilous if the receiver received conflicting instructions from its two supervising bodies.

Conclusion

The procedures of receivership and arbitration are fundamentally different. Trying to combine them is like pointing a truly unstoppable force at a truly immovable object: fraught with peril. The conflicting goals of transparency in a receivership and confidentiality in an arbitration alone may prevent any simultaneous process. Further, the contractually given powers of an arbitrator would have no effect on a third party absent that party's consent. But if some form of joint appointment could be accomplished and the appointing court and arbitrator can work cooperatively, the resulting remedy could be powerful and useful to the parties and the courts. CL

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NOTES

1. *E.g., Johnson v. El Paso Cattle Co.*, 725 P.2d 1180 (Colo.App. 1986) (appointing a receiver in equity inherent power of district court). That is, if a legislature gives a court equity powers, then that court has the authority to appoint a receiver even if the legislature has not expressly granted the court that authority. *E.g.*, *Grayson v. Grayson*, 352 P.2d 738, 743 (Or. 1960) (when Oregon legislature gave divorce courts equity powers, it necessarily gave them the power to appoint receivers).

2. For a fuller discussion of the history of receiverships, *see generally* 1 Clark, *Clark on Receivers*, §§ 4 to 7 (3d ed. 1959).

3. A fuller discussion of modern receivership practice can be found in Tanner, "The ABCDs of Equity Receiverships," 48 *Colo. Law.* 24 (June 2019).

4. *Manual for Complex Litigation, Fourth* (2004).

5. In federal courts and most state courts, a receivership must be sought as a remedy ancillary to another claim for relief. That is, appointment of a receiver cannot be the sole claim for relief in a complaint. Colorado law differs, however, because of Colorado's rare-if-not-unique non-judicial foreclosure process. *See* CRCP 120. Rule 66, CRCP, expressly allows appointment of a receiver as the sole claim for relief. If Colorado instead followed the majority rule, then the non-judicial foreclosure process would rarely be used because a receiver could not be appointed to protect the property during the pendency of the foreclosure process. As it is, however, such "foreclosure receivers" are the most common type of receivers in Colorado.

6. One exception to this rule is that a receiver can be appointed post-judgment to help the judgment creditor satisfy the judgment if the more common methods of judgment collection have not worked. CRCP 66(a)(2). But even with a post-judgment appointment, there must be some court supervision; once the judgment is fully satisfied, the receiver would be discharged.

7. CRS §§ 13-22-201 et seq.

8. *E.g.*, *Santich v. VCG Holding Corp.*, 443 P.3d 62 (Colo. 2019).

9. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule R-37(c), https://adr.org/sites/default/files/CommercialRules_Web-Final.pdf.

10. *E.g.*, *Coors Brewing Co. v. Cabo*, 114 P.3d 60 (Colo.App. 2004) (arbitrator's "manifest disregard" of the law is not grounds to vacate an award).

11. The grounds to vacate an arbitration award include corruption, partiality, refusing to take evidence, refusing reasonable requests for postponement, an arbitrator exceeded its authority, no agreement to arbitrate, or the arbitration was conducted without notice. CRS § 13-22-223. Generally, an arbitrator is not bound to follow the law. *See id.*

12. CRS § 13-22-208.

13. *Oberto v. Moore*, 23 P.2d 578 (Colo. 1933).

14. *Id.* at 580.

15. *Id.*

16. *E.g.*, *Syphers v. Scardino*, No. 85-3696, 1985 U.S. Dist. LEXIS 13161 at 17–18 (E.D.Pa. Dec. 5, 1985) (appointing a receiver over partnership pending arbitration of the partners' disputes); *Shribman v. Miller* 158 A.3d 432 (N.J.Super. Ct.App.Div. 1960) (unless arbitration clause is worded so that arbitration is a condition precedent to any relief from court, a party may seek a receiver from a court without violating the arbitration clause); *Mitchell v. Murphy*, 43 P.2d 424 (Okla. 1935) (arbitration clause in partnership agreement did not preclude equity court from appointing receiver pending arbitration); 3 Clark, *Clark on Receivers*, § 916 (3d ed. 1959) ("If the arbitration is along legal lines, the court has ample power to say that the matters in question ought to go to arbitration as the parties have agreed, but that pending the arbitration a receiver should be appointed or an injunction granted for the purpose of protecting the property."). Ironically, *Ellington & Guy, Inc. v. Currie*, 137 S.E. 869 (N.C. 1927), held that a refusal to arbitrate constituted grounds for a court to appoint a receiver.

17. *E.g.*, *Sun Valley Ranch 308 Ltd. P'ship v. Robson*, 294 P.3d 125 (Ariz.Ct.App. 2012) (demand for a receiver had to be arbitrated, and the arbitrator had authority to appoint a receiver pursuant to the arbitrator's authority to order "interim measures").

18. *Greenblatt v. Ottley*, 430 N.Y.S.2d 958 (1980).

19. *See also Riker v. Browne*, 204 N.Y.S.2d 60 (1960) (receiver's authority to reject a contract is well-established receivership law, and it stood to reason a receiver could reject the requirement of arbitration); *S.E.C. v. Stanford Int. Bank Ltd.*, No. 10-10335, 424 F.App'x. 338 (5th Cir. 2011) (a federal court supervising receiver had authority to stay all actions that concerned the *res*, including the demand for arbitration).

20. *E.g.*, *Thiesing v. ISP.com, LLC*, 805 N.E.2d 778 (Ind. 2004) (receiver bound by arbitration clause in promissory note the receiver was trying to enforce); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755 (Tex.App. 2016) (receiver bound by arbitration clause in contract binding on company over which receiver was appointed); *Wiand v. Schneiderman*, 778 F.3d 917 (11th Cir. 2015) (no inherent conflict between Federal Arbitration Act and receiver; receiver could be compelled to arbitrate its "clawback" claims in Ponzi scheme case).

21. *E.g.*, *Sun Valley Ranch 308 Ltd. P'ship*, 294 P.3d at 132; *Stone v. Theatrical Inv. Corp*, 64 F.Supp.3d 527 (S.D.N.Y. 2014).

22. *Stone*, 64 F.Supp.3d at 539.

23. *Id.*

24. *Marsch v. Williams*, 23 Cal.App.4th 238, 245–47 (Cal.Ct.App. 1994).

25. *Ravin & Rosen, P.C. v. Lowenstein Sandler P.C.*, 839 A.2d 52, 54 (N.J.Super.Ct.App.Div. 2003).

26. *See Santich*, 443 P.3d at 65.

27. For a fuller description of why a receiver does not give warranties and representations but instead delivers a court order, *see* Tanner, "The ABCDs of Equity Receiverships," 48 *Colo. Law.* 24 (June 2019), at n. 32 and accompanying text.

28. There is at least some precedent for such cooperation between two courts when a state court-appointed receiver locates property in another state. An original state appointing court's jurisdiction over property stops at the state line, so a receiver finding out-of-state property will seek to have itself appointed in ancillary fashion in the state where the property is located. *See generally*, 1 Clark, *Clark on Receivers*, at §§ 318 and 320.1; *Farm & Home Sav. & Loan Ass'n of Mo. v. Breeding*, 115 S.W.2d 615, 616–17 (Tex. 1938) (affirming authority of Texas ancillary receiver over property of Missouri defendant found in Texas). Such ancillary appointments have not created notable jurisdictional conflicts because the two judges tend to be cooperative and respectful of one another.

29. *Reserve Recycling v. East Hoogewerff*, No. 84673, 2005 WL 315376 (Ohio Ct. App., Cuyahoga County Feb. 10, 2005).

30. *See Merrill Lynch v. District Court*, 672 P.2d 1015, 1018 (Colo. 1983) (court had authority to enter a preliminary injunction to preserve status quo pending the outcome of arbitration).