Compelling and Staying Arbitration in Washington

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A Practice Note explaining how to request judicial assistance in Washington state court to compel or stay arbitration. This Note describes the issues counsel should consider before seeking judicial assistance, and explains the steps counsel must take to obtain a court order compelling or staying arbitration in Washington state court.

SCOPE OF THIS NOTE

When a party commences a lawsuit in defiance of an arbitration agreement, the opposing party may need to seek a court order to stay the litigation and compel arbitration. Likewise, when a party starts an arbitration proceeding in the absence of an arbitration agreement, the opposing party may need to seek a court order staying the arbitration. This Note describes the key issues counsel should consider when requesting a court to compel or stay arbitration in Washington state court.

This Note does not address:

- Mandatory arbitration of civil actions under Chapter 7.06 of the Revised Code of Washington (RCW) (RCW 7.06.010 to 7.06.910).
- Arbitration of personal injury or wrongful death actions under Chapter 7.70A of the RCW (RCW 7.70A.010 to 7.70A.900).
- Agreements between employers and employees or employee associations.

For information on compelling or staying arbitration in federal courts, see Practice Note, Compelling and Enjoining Arbitration in US Federal Courts (6-574-8707).

PRELIMINARY CONSIDERATIONS WHEN COMPELLING OR STAYING ARBITRATION

Before seeking judicial assistance to compel or stay arbitration, parties must determine whether the Federal Arbitration Act (FAA) or Washington law applies to the arbitration agreement (see Determine the Applicable Law). Parties must also consider:

- The threshold factual issues courts consider when evaluating a request to compel or stay arbitration (see Threshold Issues for the Court to Decide).
- The issues specific to requests to compel arbitration (see Considerations When Seeking to Compel Arbitration).
- The issues specific to requests to stay arbitration (see Considerations When Seeking to Stay Arbitration).
- Whether to make an application for provisional remedies when seeking to compel or stay arbitration (see Considerations When Seeking Provisional Remedies).

DETERMINE THE APPLICABLE LAW

When evaluating a request for judicial assistance in arbitration proceedings, the court must determine whether the arbitration agreement is enforceable under the FAA or Washington arbitration law.

The FAA

An arbitration agreement falls under the FAA if the agreement:

- Is in writing.
- Relates to a commercial transaction or maritime matter.
- States the parties' agreement to arbitrate a dispute.

(9 U.S.C. § 2.)

The FAA applies to all arbitrations arising from maritime transactions or to any other contract involving "commerce," a term the courts define broadly. Parties may, however, contemplate enforcement of their arbitration agreement under state law (see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008)).

If the agreement falls under federal law, state courts apply the FAA, which preempts conflicting state law only "to the extent that [state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-77 (1989) (there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy behind the FAA is simply

to ensure that arbitration agreements are enforceable); see also *Wiese v. Cach, LLC*, 358 P.3d 1213, 1218 (Wash. Ct. App. Div. 1 2015) ("In determining whether to enforce an arbitration provision [under the FAA], we engage in a limited two-part inquiry: first, whether the arbitration agreement is valid, and if so, whether the agreement encompasses the claims asserted.")).

For more information on compelling arbitration when an arbitration agreement falls under the FAA, see Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Agreement Must Fall Under Federal Arbitration Act (6-574-8707).

Washington State Law

The Washington statutory scheme governing arbitration is set out in Title 7 of the RCW. Washington's arbitration statutes include:

- The Washington Uniform Arbitration Act (WUAA) (RCW 7.04A.010 to 7.04A.903).
- The Washington International Commercial Arbitration Act (WICAA) governing international commercial arbitration (RCW 7.05.010 to 7.05.470).

Because there are so few cases construing the recently enacted WICAA, this Note does not address the WICAA.

The WUAA is based on the Revised Uniform Arbitration Act (RUAA), which includes a provision promoting the uniform application and construction of the statutes among the states that adopt it (RCW 7.04A.901). For more information on the Revised Uniform Arbitration Act and a list of states that have adopted it, see Practice Note, Revised Uniform Arbitration Act: Overview (W-004-5167).

INTERSECTION OF THE FAA AND WASHINGTON LAW

Because the FAA only preempts state law to the extent that state law contradicts federal law, the FAA does not prevent Washington state courts from, among other things, applying state contract law to determine whether the parties have entered into a valid arbitration agreement (see *McKee v. AT&T Corp.*, 191 P.3d 845, 851 (Wash. 2008)).

If an agreement falls under the FAA, the Washington state court applies the federal standard for arbitrability when determining whether to compel or stay arbitration, rather than evaluating these threshold questions under Washington state law (see *Southland v. Keating Corp.*, 465 U.S. 1, 12-13 (1984); see also Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Arbitrability (6-574-8707)).

Washington state courts apply state law to determine enforceability of the arbitration agreement if, for example, the agreement:

- Does not affect interstate commerce in a substantial way (see *Satomi Owners Ass'n v. Satomi, LLC*, 225 P.3d 213, 224 (Wash. 2009); Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Agreements Covered by Chapter 1 of the FAA (6-574-8707)).
- Contains a choice of law provision specifying that state law governs the agreement and its enforcement (see *McKee*, 191 P.3d at 851).

For a further discussion of various states' procedural rules relating to arbitration, see Practice Note, Choosing an Arbitral Seat in the US (1-501-0913).

THRESHOLD ISSUES FOR THE COURT TO DECIDE

When deciding an application to stay or compel arbitration, the court may not rule on the merits of the claims underlying the arbitration (see *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc.*, 200 P.3d 254, 255 (Wash. Ct. App. 2009); RCW 7.04A.070(3)). Instead, the court plays a gatekeeping role that is limited to determining whether there is a written arbitration agreement that:

- Is valid and enforceable (see Valid Arbitration Agreement).
- Covers the parties' disputes (see Scope of Arbitration Agreement).

(RCW 7.04A.060.)

In addition, the court may refuse to enforce an arbitration agreement that violates Washington's public policy, for example if the agreement is unconscionable (see *Gandee v. LDL Freedom Enter., Inc.*, 293 P.3d 1197, 1199 (Wash. 2013); see also Public Policy).

A party may raise any of these issues as a basis for the application to compel or stay arbitration or as a defense in opposition to an application. Once the court has ruled on these issues, all remaining questions in the dispute are for the arbitrator to decide (RCW 7.04A.150; see *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 924 P.2d 13, 19 (Wash. 1996)).

Courts leave the question of arbitrability to the arbitrators if the parties' agreement:

- Expressly states that the arbitral tribunal has the power to rule on its own jurisdiction, including objections to the arbitration agreement's:
  - existence;
  - scope; or
  - validity.
- Impliedly states that the tribunal has this power by referring "all disputes" to arbitration.
- Incorporates by reference institutional arbitration rules that grant this power to the tribunal.

(See *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 2017 WL 2839782, at *2-3 (Wash. Ct. App. July 3, 2017); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).)

VALID ARBITRATION AGREEMENT

Courts, not arbitrators, determine whether an arbitration agreement is valid and enforceable (see *Saleemi v. Doctor's Assocs., Inc.*, 292 P.3d 108, 112 (Wash. 2013)). Although the courts presume arbitrability, the court may find an arbitration agreement invalid or unenforceable based on general contract defenses, such as fraud or unconscionability. The party opposing arbitration bears the burden of showing that the arbitration clause is invalid or unenforceable. (See *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 759 (Wash. 2004); see also *McKee*, 191 P.3d at 851 ("General contract defenses such as unconscionability may invalidate arbitration agreements.").)

SCOPE OF ARBITRATION AGREEMENT

An arbitration agreement only applies to those issues the parties have agreed to arbitrate (see *Satomi Owners Ass'n*, 225 P.3d at 229).

The court makes the threshold determination of whether a dispute falls within the scope of the parties' arbitration agreement, unless the parties delegate this determination to the arbitrator (see *Raven Offshore Yacht*, 2017 WL 2839782, at *1; *Harwood v. First Am. Title Ins. Co.*, 2017 WL 1655741, at *3 (Wash. Ct. App. May 3, 2017)).

PUBLIC POLICY

Washington courts may refuse to enforce an arbitration agreement if it violates public policy, such as if the agreement is substantively or procedurally unconscionable. Courts may deem agreements unconscionable and therefore void as a matter of public policy if:

- The agreement makes it economically impossible to exercise a statutory right (see *Gandee*, 293 P.3d at 1199.
- A confidentiality requirement disproportionately burdens only one of the parties (see *Zuver*, 103 P.3d at 765).
- Fee-splitting provisions bar a party from bringing claims due to his financial situation (see *Adler v. Fred Lind Manor*, 103 P.3d 773, 786 (Wash. 2004) (remanding for trial court to determine if fee-splitting provision in arbitration agreement results in prohibitive costs that strip party of ability to vindicate its rights in arbitration)).

ARBITRABILITY ISSUES FOR THE ARBITRATOR TO DECIDE

Compliance with Arbitration Agreement

Whether the parties are in compliance with WUAA's procedural requirements is a question for the arbitrator, not the courts (see *Verbeek Props., LLC v. GreenCo Envt'l, Inc.*, 246 P.3d 205, 208 (Wash. Ct. App. 2010)).

Statute of Limitations

Arbitration claims are subject to the same time limitations for commencement of actions as civil claims asserted in court (RCW 7.04A.090(3)). The arbitrator decides whether a claim is time barred (see *Leibsohn Prop. Advisors Inc. v. Colliers Intern. Realty Advisors (USA), Inc.*, 2013 WL 5806722, at *14 (Wash. Ct. App. Oct. 28, 2013); *Yakima County v. Yakima Cty. Law Enf't Officers Guild*, 237 P.3d 316, 325 (Wash. Ct. App. 2010)).

CONSIDERATIONS WHEN PREPARING THE APPLICATION

Before applying to compel or stay arbitration in Washington, counsel should take into account several factors.

CONSIDERATIONS WHEN SEEKING TO COMPEL ARBITRATION

A party may move the court to compel arbitration when the opposing party commences a lawsuit or otherwise expresses the intention to avoid arbitration of a dispute that the moving party believes is subject to a valid arbitration agreement (RCW 7.04A.070(1)).

The party seeking to compel arbitration must determine the appropriate court in which to file the motion. If there is no arbitration-related lawsuit already pending between the parties, the party files an initial motion in any proper venue under the WUAA (RCW 7.04A.070(4) and 7.04A.270 (governing venue)).

If there is already an arbitration-related lawsuit pending between the parties, the party seeking to compel arbitration files a motion in the pending litigation (RCW 7.04A.070(4)). In that instance, the practitioner should consider also asking the court to stay the litigation pending the court's determination of the motion to compel arbitration (RCW 7.04A.070(5)). If the court grants the motion to compel arbitration, the court must stay the court proceedings. If the arbitrable claims are severable, the court may sever and stay the court proceedings of only the arbitrable claims (RCW 7.04A.070(6)).

CONSIDERATIONS WHEN SEEKING TO STAY ARBITRATION

A party may only ask a court to stay arbitration if an arbitration claimant threatens or demands arbitration against a party not bound to arbitrate the dispute. The party resisting arbitration makes the request by filing a motion and must show that:

- The other party initiated or threatened an arbitration proceeding.
- There is no valid agreement to arbitrate covering the dispute.

(RCW 7.04A.070(2).)

In deciding a motion to stay arbitration, if the court finds there is a valid and enforceable arbitration agreement, the court must order the parties to arbitrate, even if no party moved to compel arbitration (RCW 7.04A.070(2)).

CONSIDERATIONS WHEN SEEKING PROVISIONAL REMEDIES

A party seeking to compel arbitration should consider whether to ask the court for a provisional remedy, such as:

- An order of attachment (Wash. R. Civ. P. 64).
- Temporary restraining order or preliminary injunction (Wash. R. Civ. P. 65).
- Appointment of a receiver (Wash. R. Civ. P. 66).

The WUAA provides for the court to issue provisional remedies in connection with an arbitration before the arbitrator's appointment (RCW 7.04A.080(1)). After the appointment of an arbitrator, the arbitrator must decide the propriety of a provisional remedy (RCW 7.04A.080(2); see RUAA § 8 cmt. 3).

A party making a motion for provisional remedies under the WUAA does not waive the right to arbitrate (RCW 7.04A.080).

For more information on seeking interim relief in aid of arbitration, see Practice Note, Interim, Provisional, and Conservatory Measures in US Arbitration: Seeking Interim Relief Before Courts and Arbitrators (0-587-9225).

ADDITIONAL PROCEDURAL CONSIDERATIONS

Before commencing litigation related to an arbitrable dispute in a Washington court, counsel should also consider other factors that may affect the contents of the request for judicial assistance, the manner in which to bring it, and the likelihood of obtaining the desired relief.

These factors include:

- Whether the court has subject matter jurisdiction and personal jurisdiction (see Court Jurisdiction).
- The proper venue in which to bring the request (see Venue).
- The proper time to bring the request (see Timing).
- Whether any party has waived the right to the relief it requests (see Waiver).

Court Jurisdiction

Washington courts have subject matter jurisdiction over an application to compel or stay arbitration if the court has jurisdiction over the underlying dispute (RCW 7.04A.260). Parties to an arbitration agreement affirmatively invoke the jurisdiction of Washington courts to enforce the agreement and facilitate the arbitration (see *Godfrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617, 622 (Wash. 2001); *Everett Shipyard, Inc. v. Puget Sound Envtl Corp.*, 2010 WL 1031008, at *3 (Wash. Ct. App. Mar. 22, 2010)).

If there is no litigation between the parties already pending, the party starting an action to compel or stay arbitration must ensure the court has a basis to exercise personal jurisdiction over the other party. Proper bases of personal jurisdiction include:

- General jurisdiction, which is based on the other party transacting substantial and continuous business to the extent it gives rise to a legal obligation, regardless of whether the cause of action is related to the other party's contacts with Washington.
- Specific jurisdiction under Washington's long-arm statute, which is based on the other party's limited Washington contacts giving rise to the cause of action.

(See *Gorden v. Lloyd Ward & Assoc., P.C.*, 323 P.3d 1074, 1080-81 (Wash. Ct. App. 2014).)

Venue

Under the WUAA, a party must file a motion to compel or stay an arbitration in the Superior Court of the county:

- That the parties' arbitration agreement specifies for the arbitration hearing.
- Where the arbitration hearing is taking place, if a party has already started the arbitration.

If the agreement does not specify the location for the arbitration, a party must file the motion in any Washington county in which an adverse party either resides or has a place of business. If no adverse party resides or has a place of business in Washington, a party may file the motion in any county in Washington. (RCW 7.04A.270.)

Under Washington law, forum selection clauses are prima facie valid (see *Dix v. ICT Grp., Inc.*, 161 P.3d 1016, 1020 (Wash. 2007)).

Timing

The WUAA does not specify a time within which a party must apply to stay or compel arbitration. For motions to compel arbitration and stay court litigation, the best practice is for counsel to submit the motion as soon as possible to avoid the possibility of waiver (see Waiver).

Waiver

A party's failure to compel arbitration in a timely manner may constitute waiver of the party's right to arbitrate (see *Otis Hous. Ass'n, Inc. v. Ha*, 201 P.3d 309, 311-12 (Wash. 2009); *Ives v. Ramsden*, 174 P.3d 1231, 1238 (Wash. App. Ct. 2008)).

Unless the parties agree otherwise, the arbitrator decides whether a party has waived its right to arbitrate by delaying in demanding arbitration or failing to comply with a contractual time limitation or precondition to arbitration (see *Heights at Issaquah Ridge*, 200 P.3d at 256-57; see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 81 (2002) (holding that a party's compliance with contractual six-year time limitation was question for the arbitrator)). However, under Washington law, the court decides whether a party's conduct in court litigation is a waiver of its right to arbitrate, for example, by:

- Initiating a suit in superior court, rather than filing for arbitration.
- Contesting a motion to compel rather than bringing a motion to stay arbitration.
- Participating in the discovery process.
- Producing a witness list for trial.
- Participating in a case scheduling conference.
- Substantially delaying the filing of a motion to compel arbitration.

(See *River House Dev. Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289, 296–98 (2012).)

To constitute waiver, the conduct must be inconsistent with any other intention than to forego the party's right to arbitrate (see *Schuster v. Prestige Senior Mgmt LLC*, 376 P.3d 412, 421-22 (Wash. App. Ct. 2016)).

MOTION TO COMPEL OR STAY ARBITRATION

A party seeking to compel arbitration must file a motion that shows an agreement to arbitrate and alleges the other party's refusal to arbitrate under the agreement (RCW 7.04A.070(1)). Conversely, a party seeking to stay arbitration must file a motion showing that the other party has threatened or started an arbitration and the absence of an arbitration agreement (RCW 7.04A.070(2)).

If the responding party opposes the motion, the court decides the issue summarily by reviewing the motion papers, supporting documentation, and any affidavits. If necessary, the court may conduct an expedited hearing to resolve the issue. (See *Marcus & Millichap Real Estate Inv. Services of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 369 P.3d 503, 505-06 (Wash. Ct. App. 2016).)

When moving to stay or compel arbitration, counsel should be familiar with:

- The procedural and formatting rules relevant to case-initiating documents (see Procedural and Formatting Rules for Motion).
- The documents necessary to bring the application to compel or stay arbitration (see Documents Required for Motion).
- How to file and serve the documents (see Filing the Motion and Serving the Motion).

PROCEDURAL AND FORMATTING RULES FOR MOTION

When preparing a motion to compel or stay arbitration, counsel should be familiar with the Washington courts' procedural and formatting rules. Counsel also should check county court websites for additional information and guidance, including any applicable local and rules.

Procedural Rules

A party applies to compel or stay arbitration by filing a motion in the Superior Court in the same way and on the same notice as a motion in any civil action. If there is no court action already pending between the parties, the movant files an initial motion that starts the action, and must serve it in the same manner as a party serves a summons in a civil action. (RCW 7.04A.050; see Serving the Motion.)

The rules for filing a motion in Washington courts include that:

- The motion must be filed in the applicable Superior Court.
- The movant must serve the motion on each of the parties (Wash. Super. Ct. Civ. R. 5(b)).

Counsel also should consult the local rules of the applicable Superior Court for any additional procedural requirements. For example, in King County Superior Court, a motion may not exceed 4,200 words without the court's authorization and must include certain additional documents (WA R KING SUPER CT LCR 7(b)(5); see Documents Required for Motion).

Formatting Rules

Washington State court rules outline the technical requirements for motions in Washington courts. Generally, a motion must:

- Be in writing.
- State with particularity the grounds for the motion.
- Specify the relief or order the movant seeks.
- Be signed in accordance with Washington Rule of Civil Procedure Rule 11.
- Specify the affidavits or other evidence the moving party is submitting.

(Wash. Super. Ct. Civ. R. 7.)

DOCUMENTS REQUIRED FOR MOTION

A party makes a motion in the Washington Superior Court by submitting a written motion to the applicable Superior Court. The Washington Superior Court Civil Rules do not specify that any additional documents are required, but counsel should consult the local rules of the applicable Superior Court, which often provide for the filing of additional documents with the motion.

For example, in King County Superior Court, a moving party must submit with the motion:

- A Note for Motion, which specifies:
  - the moving party;
  - the title of the motion (for example, Motion to Compel Arbitration);
  - the name of the hearing judge;
  - the trial date, if applicable; and
  - the date and time for the hearing, if the court holds oral argument.
- Copies of any cited non-Washington authorities on which the motion substantially relies, which the movant sends to the hearing judge and parties, but does not file electronically.
- A certification of compliance with the word limits.
- A proposed order.

(WA R KING SUPER CT LCR 7(b).)

The WUAA does not address any specific materials a movant should attach to the motion. However, a party seeking to compel arbitration must show an agreement to arbitrate (RCW 7.04A.070). Therefore, at a minimum, counsel should attach a copy of the parties' arbitration agreement to a motion to compel arbitration.

Counsel should consult local Superior Court rules to determine what additional documents should accompany the motion.

FILING THE MOTION

A party files a motion with the Superior Court clerk, unless the judge permits the party to file the motion directly with the judge. Parties may file papers by facsimile transmission if permitted elsewhere in court rules.

Each county court follows its own filing procedures, including electronic filing rules. Counsel should refer to local court rules and any judge's individual rules for additional information and instructions regarding electronic and traditional paper filing methods.

SERVING THE MOTION

The Washington Superior Court Civil Rules govern the service of motions (Wash. Super. Ct. Civ. R. 5); however, county courts may supplement these rules with their own. For example, King County Superior Court requires a party to serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered.

Generally, when a party is represented by an attorney, the moving party must serve the attorney unless the court directs otherwise (Wash. Super. Ct. Civ. R. 5(b)(1)). The court deems service by mail to be complete three days after the moving party places the papers in the mail. Counsel may demonstrate proof of service by:

- Written acknowledgement of service.
- Affidavit of the person who mailed the papers.
- Attorney certification.

(Wash. Super. Ct. Civ. R. 5(b)(2).)

APPEALING AN ORDER TO COMPEL OR STAY ARBITRATION

In federal court, federal law, such as the prohibition on interlocutory appeals (28 U.S.C. § 1291), the final judgment rule (28 U.S.C. § 1292), and the FAA limit appeals of orders compelling FAA governed arbitration (see Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Appealing an Order to Compel or Enjoin Arbitration (6-574-8707)). An order granting or denying a request to compel arbitration is not considered a final judgment. Under the FAA, however, litigants may immediately appeal federal court orders denying arbitration, but not orders favorable to arbitration. US appellate courts therefore have jurisdiction over orders:

- Denying requests to compel and stay litigation pending arbitration (9 U.S.C. § 16(a)(1)).
- Granting, continuing, or modifying an injunction against an arbitration (9 U.S.C. § 16(a)(2)).

Under the WUAA, a party may appeal an order denying a motion to compel arbitration as a matter of right.

Like the FAA, the WUAA also permits appeals of orders denying arbitration but not orders favorable to arbitration. In Washington state court, a party may appeal an order:

- Denying a motion to compel arbitration.
- Granting a motion to stay arbitration.

(RCW 7.04A.280.)

The appellate court reviews de novo a trial court decision on a motion to compel arbitration (see *Otis Hous. Ass'n*, 201 P.3d at 311; *Romney v. Franciscan Med. Grp.*, 349 P.3d 32, 36 (Wash. App. Ct. 2015)).

09-17