Compelling and Staying Arbitration in North Carolina

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

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 asking a court to compel or stay arbitration in North Carolina, including North Carolina statutes governing arbitration, factors the North Carolina courts consider in assessing motions to compel or stay arbitration, and procedural issues counsel should consider in bringing a motion to compel or stay arbitration.

For information on compelling or staying arbitration in federal courts, see Practice Note, Compelling and Enjoining Arbitration in US Federal Courts (6-574-8707). For information on enforcing arbitration awards in North Carolina, see Practice Note, Enforcing Arbitration Awards in North Carolina (w-003-7483).

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 North Carolina state law applies to the arbitration agreement (see Determine the Applicable Law). Parties must also consider:

- The threshold 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 such as an attachment or preliminary injunction 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 North Carolina arbitration law. The court must determine whether the FAA or North Carolina law applies before addressing any other legal issue (see *Epic Games, Inc. v. Murphy-Johnson*, 785 S.E.2d 137, 142 (N.C. Ct. App. 2016)).

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 arbitration 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 *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 104 (N.C. Ct. App. 2007)).

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).

North Carolina Arbitration Law

North Carolina public policy strongly favors the resolution of disputes through arbitration (see *Miller v. Two State Constr. Co.*, 455 S.E.2d 678, 680-81 (N.C. Ct. App. 1995)). The state has two arbitration statutes:

- The North Carolina Revised Uniform Arbitration Act (NCRUAA), which governs domestic arbitration (N.C.G.S. §§ 1-569.1 to 1-569.31).
- The North Carolina International Commercial Arbitration and Conciliation Act (NCICACA), which governs international commercial arbitration (N.C.G.S. §§ 1-567.30 to 1-567.68).

The NCRUAA is North Carolina's version of the Revised Uniform Arbitration Act (RUAA) and requires courts to construe it uniformly with other states that enacted the RUAA (N.C.G.S. § 1-567.88). For a list of states that have adopted the RUAA, see Practice Note, Revised Uniform Arbitration Act: Overview (w-004-5167).

The NCICICA is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. Because there are few reported decisions construing the NCICACA, this Note does not discuss the NCICACA.

North Carolina also has a court-ordered arbitration program providing for non-binding arbitration of civil cases involving claims for $15,000 or less (N.C.G.S. § 7A-37.1). This Note does not discuss that program.

INTERSECTION OF THE FAA AND NORTH CAROLINA LAW

The FAA only preempts state law to the extent that state law contradicts federal law. For example, the FAA preempts North Carolina statutes that invalidate on public policy grounds certain forum selection clauses requiring dispute resolution outside North Carolina (N.C.G.S. §§ 22B-2 and 22B-3; see *T.G.K. Enter., Inc. v. Clayco, Inc.*, 978 F. Supp. 2d 540, 548 (E.D.N.C. 2013); *Goldstein v. Am. Steel Span, Inc.*, 640 S.E.2d 740, 743 (N.C. Ct. App. 2007)).

However, the FAA does not prevent North Carolina state courts from, among other things, applying state contract law to determine whether the parties have entered into an arbitration agreement (see *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015); see Valid Arbitration Agreement).

Where both the FAA and North Carolina law may apply, North Carolina courts apply:

- The NCRUAA or the NCICACA, as applicable, if the arbitration provision itself, as opposed to the contract as a whole, provides for the application of the North Carolina law.
- The FAA, if the arbitration clause does not specify the applicable law and the contract involves a commercial transaction.

(See *Burke Co. Pub. Schs. Bd. of Ed. v. Shaver P'ship*, 279 S.E.2d 816, 825 (1981); *King v. Bryant*, 737 S.E.2d 802, 805 (N.C. Ct. App. 2013).) Parties may not use a choice of law clause to avoid application of the FAA (see *King*, 737 S.E.2d at 806).

If an agreement falls under the FAA, the North Carolina courts apply the federal standard for arbitrability when determining whether to compel or stay arbitration, rather than evaluating these threshold questions under North Carolina state law (see *Southland v. Keating Corp.*, 465 U.S. 1, 12-13 (1984); *Ragan v. Wheat First Sec., Inc.*, 531 S.E.2d 874, 877 (N.C. Ct. App. 2000), disc. rev. denied, 546 S.E.2d 129 (2000); see also Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Arbitrability (6-574-8707)).

North Carolina state courts apply state law to determine enforceability of the arbitration agreement if the contract does not affect interstate commerce (see *Bryant-Durham Elec. Co. v. Durham Co Hosp. Corp.*, 256 S.E.2d 529, 532 (N.C. Ct. App. 1979); Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Agreements Covered by Chapter 1 of the FAA (6-574-8707)).

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, North Carolina courts do not rule on the merits of the claims underlying the arbitration. Instead, the court plays a gatekeeping role that is limited to determining substantive arbitrability issues, which include issues of the arbitration agreement's:

- Validity (see Valid Arbitration Agreement).
- Scope (see Scope of Arbitration Agreement).

(N.C.G.S. § 1-569.6(b); see *Emmanuel African Methodist Episcopal Church v. Reynolds Const. Co., Inc.*, 718 S.E. 2d 201, 203 (N.C. Ct. App. 2011); *Jeffers v. D'Alessandro*, 681 S.E.2d 405, 415 (N.C. Ct. App. 2009).)

The court may also rule on whether a party waived its right to arbitration (see Waiver).

Once the court has ruled on these issues, any additional issues, including procedural arbitrability questions, are for the arbitrator to decide (see *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002); *Ragan*, 531 S.E.2d at 876; Arbitrability Issues for the Arbitrator to Decide).

VALID ARBITRATION AGREEMENT

In North Carolina, the court determines the validity of an arbitration agreement itself, while the arbitrator determines the validity and enforceability of the agreement containing an arbitration provision (N.C.G.S. § 1-569.6(b) and (c)). In considering whether the parties' arbitration agreement is valid, the court applies general principles of North Carolina contract law (see *T.M.C.S.*, 780 S.E.2d at 597; *Brown v. Centex Corp.*, 615 S.E.2d 86, 89 (N.C. Ct. App. 2005)).

Because of North Carolina's strong public policy in favor of arbitration, North Carolina courts must resolve any doubt concerning the existence of a valid arbitration agreement in favor of arbitration. Where there is no dispute over the existence or validity of an arbitration agreement, the court must compel the parties to arbitrate. (See *Revels v. Miss N.C. Pageant Org., Inc.*, 627 S.E.2d 280, 283-84 (N.C. Ct. App. 2006).)

SCOPE OF ARBITRATION AGREEMENT

If the court concludes there is a valid arbitration agreement, the court next determines whether the specific dispute falls within the substantive scope of that agreement (see *Edwards v. Taylor*, 643 S.E.2d 51, 53 (N.C. Ct. App. 2007)). Because the court may only compel parties to arbitrate claims they agreed to arbitrate, the court considers the relationship between the claim and the subject matter of the arbitration agreement (see *Raspet v. Buck*, 554 S.E.2d 676, 678 (N.C. Ct. App. 2001); *Epic Games*, 785 S.E.2d at 143; *Fontana v. S.E. Anesthesiology Consultants, P.A.*, 729 S.E.2d 80, 86 (2012)).

WAIVER

Because of North Carolina's strong public policy in favor of arbitration, courts closely scrutinize any allegation that a party waived its right to arbitrate (see *Cyclone Roofing Co. v. Lafave Co.*, 321 S.E.2d 872, 876 (N.C. 1984); *Town of Belville v. Urban Smart Growth, LLC*, 796 S.E.2d 817, 821 (N.C. Ct. App. 2017)). A party asserting the other party waived arbitration must demonstrate both that:

- The other party took action inconsistent with the intent to arbitrate.
- The party suffered prejudice by the other party's delay in seeking arbitration.

(See *Town of Belville*, 796 S.E.2d at 821; *Sturm v. Schamens*, 392 S.E.2d 432, 433 (N.C. Ct. App. 1990).)

The courts find waiver where a party:

- Takes advantage of discovery methods unavailable in arbitration (see *Prime S. Homes, Inc. v. Byrd*, 401 S.E.2d 822, 826 (N.C. Ct. App. 1991)).
- Forces the opposing party to incur significant expense participating in litigation procedural processes (see *Town of Belville*, 796 S.E.2d at 821-22 (N.C. Ct. App. 2017)).

A party does not necessarily waive arbitration by:

- Filing court pleadings (see *Cyclone Roofing*, 321 S.E.2d at 877).
- Engaging in discovery (see *Servomation Corp. v. Hickory Constr. Co.*, 342 S.E.2d 853, 854 (1986)).

ARBITRABILITY ISSUES FOR THE ARBITRATOR TO DECIDE

Under the NCRUAA, the arbitrator decides whether:

- The parties satisfied any condition precedent to arbitrability.
- The contract containing the parties' arbitration agreement is enforceable.

(N.C.G.S. § 1-569.6(b).)

The arbitrator determines issues of procedural arbitrability, which are prerequisites to arbitration such as:

- Time limits.
- Notice.
- Laches.
- Estoppel.
- Other conditions precedent to arbitration.

(See *Howsam*, 537 U.S. at 84-85; *WMS, Inc. v. Alltel Corp.*, 647 S.E.2d 623, 627-28 (N.C. Ct. App. 2007).)

Courts also leave to the arbitrator any substantive arbitrability issues, including objections to the arbitration agreement's scope or validity, if the parties' agreement shows their clear and unmistakable intent to have the arbitrator decide these issues (see *AT & T Techs. v. Comm'ns Workers*, 475 U.S. 643, 649 (1986); *Bailey v. Ford Motor Co.*, 780 S.E.2d 920, 925 (N.C. Ct. App. 2015)).

Parties can delegate substantive arbitrability issues to the arbitrator by including in their agreement language that:

- 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.
- Incorporates by reference institutional arbitration rules that grant this power to the tribunal, such as the rules of the American Arbitration Association.

(See *Bailey*, 780 S.E.2d at 927; *Epic Games*, 785 S.E.2d at 144.)

For more information about the roles of the courts and arbitrators in determining arbitrability issues, see Practice Note, Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator (w-005-0556).

CONSIDERATIONS WHEN PREPARING THE APPLICATION

Before moving to compel or stay arbitration in North Carolina court, counsel should take into account several factors.

CONSIDERATIONS WHEN SEEKING TO COMPEL ARBITRATION

A party may ask the court to compel arbitration when the opposing party commences a lawsuit or otherwise expresses the intention to avoid arbitrating a dispute even though the dispute is subject to a valid arbitration agreement. The party seeking arbitration makes the request by filing and serving a motion, whether or not there is a lawsuit already pending between the parties. (N.C.G.S. § 1-569.5.)

If there is no lawsuit pending between the parties, the party seeking to compel arbitration files an initial motion and serves it in the manner provided for the service of a summons (N.C.G.S. § 1-569.5(b)).

If there is a lawsuit already pending between the parties, for example because the other party started a lawsuit over the dispute, the party seeking to compel arbitration makes the request by motion in the pending litigation (N.C.G.S. § 1-569.5(b)).

The court must compel the parties to arbitrate if either:

- The other party does not oppose the motion to compel arbitration.
- The court grants the motion to compel arbitration.

(N.C.G.S. § 1-569.7(a).)

On any motion to compel arbitration, the court must stay any judicial proceeding pending the court's ruling on the arbitrability of the dispute (N.C.G.S. § 1-569.7(f)). If the court grants the motion to compel arbitration, the court must stay the court proceedings involving the arbitrable dispute. If the arbitrable claims are severable, the court may sever and stay the court proceedings of only the arbitrable claims. (N.C.G.S. § 1-569.7(g).)

CONSIDERATIONS WHEN SEEKING TO STAY ARBITRATION

If an arbitration claimant threatens or demands arbitration against a party not bound to arbitrate the dispute, the party may move the court for a stay of arbitration.

If there is no lawsuit pending between the parties, the party seeking to stay arbitration files an initial motion and serves it in the same manner as party serves a summons (N.C.G.S. § 1-569.5(b)).

If there is a pending lawsuit, for example because the other party started an action to compel arbitration, the party seeking to stay arbitration files and serves the motion in that lawsuit (N.C.G.S. § 1-569.5). The party resisting arbitration must show that:

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

(N.C.G.S. § 1-569.7(b).)

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 (N.C.G.S. § 1-569.7(b)).

CONSIDERATIONS WHEN SEEKING PROVISIONAL REMEDIES

Along with a request to compel or stay arbitration, a party may seek provisional remedies from the court. Under the NCRUAA, a party may ask the court for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the dispute were the subject of a civil action (N.C.G.S. § 1-569.8(a)).

The court may provide provisional relief until an arbitrator is appointed and able to act (N.C.G.S. § 1-569.8(a)). After the arbitrator's appointment, a party must ask the arbitrator for provisional relief, unless the matter is urgent and the arbitrator is unavailable or cannot provide the relief (N.C.G.S. § 1-569.8(b)).

Provisional remedies available to litigants in North Carolina state courts include:

- Prejudgment attachment (N.C.G.S. §§ 1-440.1 to 1-440.46).
- Garnishment (N.C.G.S. §§ 1-440.21 to 1-440.32).
- Claim and delivery in actions to recover the possession of personal property (N.C.G.S. §§ 1-472 to 1-484.1).
- Appointment of a receiver (N.C.G.S. §§ 1-501 to 1-507).
- Temporary restraining order (N.C.G.S. §§ 1-485 to 1-500; N.C. R. Civ. P. 65(b)).
- Preliminary injunction (N.C.G.S. §§ 1-485 to 1-500; N.C. R. Civ. P. 65(a)).
- Lis pendens (N.C.G.S. §§ 1-116 to 1-120.2).
- Deposits in court (N.C.G.S. §§ 1-508 to 1-510).

Under the NCRUAA, a party does not waive its right to arbitration by asking the court for provisional relief (N.C.G.S. § 1-569.8(c)).

For more information on provisional remedies in North Carolina, see State Q&A, Arbitrators and Provisional Remedies: North Carolina (w-000-5472). For information on seeking interim relief in aid of arbitration generally, 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 a litigation related to an arbitrable dispute in a North Carolina 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 over the action and a basis to exercise personal jurisdiction over the other party (see Court Jurisdiction).
- The proper venue in which to bring the request (see Venue).
- The proper time to bring the request (see Timing).

Court Jurisdiction

Before starting an action to compel or stay arbitration, counsel should confirm the court has subject matter jurisdiction over the application. The General Courts of Justice of North Carolina are divided into two divisions and their jurisdiction depends in part on the amount in controversy.

- The district court division has original jurisdiction for actions with $25,000 or less in controversy.
- The superior court division has original jurisdiction for actions with more than $25,000 in controversy.

(N.C.G.S. § 7A-243.)

A court may also designate a matter as a "complex business" case (N.C. Super. Ct. & Dist. Ct. R. 2.1). The business court judge assigned to a case designated as a complex business case presides over all motions in the case, including any motions to compel or stay arbitration (NC R BUS CT Rule 7).

Counsel should also confirm the court has personal jurisdiction over the other party. Proper bases of personal jurisdiction include:

- General jurisdiction, which is based on the other party being present in North Carolina or 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 North Carolina contacts (see *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *Skinner v. Preferred Credit*, 638 S.E.2d 203, 210 (N.C. 2006)).
- Specific jurisdiction under North Carolina's long-arm statute, which is based on the other party's limited North Carolina contacts giving rise to the cause of action (see *Skinner*, 638 S.E.2d at 210).

- Jurisdiction by consent, where the parties expressly agree to the jurisdiction of North Carolina for the enforcement of their arbitration agreement (see *Strategic Outsourcing, Inc. v. Stacks*, 625 S.E.2d 800, 803 (N.C. Ct. App. 2006)).

For more information on starting an action in North Carolina, see State Q&A, Commencing an Action: North Carolina (w-000-3306).

Venue

A party may move to compel or stay arbitration in the district or superior court, as applicable, in:

- The county:
  - the arbitration agreement specifies for the arbitration hearing; or
  - where the adverse party resides or has a place of business.
- Any North Carolina county, if no adverse party has a residence or place of business in North Carolina.

(N.C.G.S. § 1-569.27.)

Timing

The NCRUAA does not specify a time within which a party must move to stay or compel arbitration. For motions to compel arbitration and stay court litigation, the movant should avoid engaging in litigation conduct that the court may construe as a waiver of the right to compel arbitration (see Waiver). The best practice is for counsel to file the motion as soon as possible.

MOTION TO COMPEL OR STAY ARBITRATION

A party asks a court to compel or stay arbitration in North Carolina state court by filing a motion, whether or not there is a lawsuit already pending between the parties. If the application starts the action, the party files an initial motion. (N.C.G.S. § 1-569.5.)

When bringing a motion 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 the 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 THE MOTION

Counsel should be familiar with applicable procedure and formatting rules for motions in the North Carolina state courts. Counsel also should check the relevant court websites for additional information and guidance on procedural and formatting rules.

Procedural Rules

North Carolina's procedural rules governing motions and the commencement of actions in state courts are set out in:

- The North Carolina Rules of Civil Procedure (N.C.G.S. § 1A-1), including:
  - Rule 3 (commencement of action);
  - Rule 4 (process);
  - Rule 5 (service and filing of pleadings and other papers);
  - Rule 7 (pleadings and motions);
  - Rule 8 (general rules of pleadings);
  - Rule 10 (form of pleadings); and
  - Rule 11 (signing and verification of pleadings).
- The General Rules of Practice for the Superior and District Courts, including:
  - Rule 5 (governing the form of pleadings); and
  - Rule 6 (governing motions in civil action).
- The General Rules of Practice and Procedure for the North Carolina Business Court, if the case is designated a complex business matter.
- Any local county rules.

Formatting Rules

A motion in the North Carolina courts generally must:

- Be bound on 8-1/2 by 11-inch letter sized paper, unfolded, and without a cover (N.C. Super. Ct. & Dist. Ct. R. 5).
- Have a caption stating the:
  - division of the court; and
  - title of the action, including the names of the parties.

(N.C. R. Civ. P. 10(a).)

- Identify the rule number applicable to the motion (N.C. Super. Ct. & Dist. Ct. R. 6).
- Be signed by an attorney of record (N.C. R. Civ. P. 11; N.C. Super. Ct. & Dist. Ct. R. 5).
- Include a Certificate of Service that shows:
  - the date and method of service; and
  - the name and address of each party served.

(N.C. R. Civ. P. 5(b).)

Counsel should check the local court rules and the judge's individual preferences for any additional formatting requirements.

DOCUMENTS REQUIRED FOR THE MOTION

Supporting Documents

Although the NCRUAA does not requires a party to file a complaint when starting an action to compel or stay arbitration (N.C.G.S. § 1-569.5(b)), the North Carolina Rules of Civil Procedure require parties to start a civil action by filing a complaint (N.C. R. Civ. P. 3). Practice varies across the state's counties, so counsel should consult the local clerk of court to determine whether the court requires a party to file a complaint with the motion.

The NCRUAA does not address any specific materials a movant should attach to the motion. However, a party moving to compel arbitration must show an agreement to arbitrate (N.C.G.S. § 1-569.6). Therefore, at a minimum, counsel should attach a copy of the parties' arbitration agreement to a motion to compel arbitration.

If the moving party wants the court to hear the motion before trial, the party must file with the motion a notice of hearing requesting a hearing date (N.C. R. Civ. P. 5(c)(2)).

The rules do not require affidavits, but if the movant wants to support the motion with an affidavit, the party must serve and file the affidavit with the motion (N.C. R. Civ. P. 6).

The rules do not permit the filing of briefs or other memoranda unless the court orders it (N.C. R. Civ. P. 5(d)). A party may present briefs or other memoranda to the court and serve them on the other party before the hearing (N.C. R. Civ. P. 5(a1)). Because the timing for submitting briefs and supporting memoranda to the court varies by county, counsel should consult the local court rules and any notices stating the judge's individual preference.

Proposed Order

After the court rules on a motion, North Carolina judges often ask the prevailing attorney to draft an order for the court's consideration. An attorney drafting a proposed order should be careful to include sufficient findings of fact and conclusions of law to specify the basis for the court's ruling. At a minimum, the proposed order should including a finding concerning the existence and scope of a valid arbitration agreement (see *Cornelius v. Lipscomb*, 734 S.E. 2d 870, 871-72 (N.C. Ct. App. 2012); *Ellis-Don Const., Inc. v. HNTB Corp.*, 610 S.E.2d 293, 296-97 (N.C. Ct. App. 2005)).

FILING THE MOTION

Traditional Paper Filing

A party files a motion in North Carolina state court with either:

- The clerk of court for the county where the action is pending.
- The presiding judge, with the judge's permission.

(N.C. R. Civ. P. 5(e)(1).)

Counsel should check the local court rules for any additional requirements when filing the motion.

Electronic Filing

In actions pending before the North Carolina Business Court, parties must file papers electronically through the Business Court's electronic filing system. No other North Carolina state court permits electronic filing. (NC R BUS CT Rule 3.)

SERVING THE MOTION

Whether or not a complaint accompanies a motion that starts an action (see Documents Required for the Motion), if there is no court action pending between the parties the movant must serve the motion in the same manner as a party serves a summons (N.C.G.S. § 1-569.5(b); see also N.C. R. Civ. P. 4 (governing service of process)).

If the moving party files the motion in a pending civil action, it must serve the motion on the opposing counsel by either:

- Hand delivery.
- Facsimile transmission.
- Regular first class mail.

(N.C. R. Civ. P. 5(b)(1).)

North Carolina does not permit service by email, although it is common practice to provide a courtesy copy to opposing counsel by email.

If there is no opposing counsel, a party may serve the opposing party by hand delivery or regular first class mail (N.C. R. Civ. P. 5(b)(2)).

The moving party must serve the motion and any supporting papers at least five business days before the hearing (N.C. R. Civ. P. 6(d)).

APPEALING AN ORDER TO COMPEL OR STAY ARBITRATION

In federal court, federal law, such as the prohibition on interlocutory appeals (28 U.S.C. § 1292), the final judgment rule (28 U.S.C. § 1291), and the FAA (see Practice Note, Compelling and Enjoining Arbitration in US Federal Courts: Appealing an Order to Compel or Enjoin Arbitration (6-574-8707)), limits a party's right to appeal court orders compelling FAA-governed arbitration. 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)).

The North Carolina courts deem orders on motions to compel or stay arbitration as interlocutory orders (see *Prime S. Homes, Inc.*, 401 S.E.2d at 825 (N.C. Ct. App. 1991)). However, like the corresponding orders in federal court, orders denying motions to compel arbitration or granting motions to stay arbitration are immediately appealable in North Carolina because, although they are interlocutory, they affect a substantial right (N.C.G.S. § 1-569.28(a); see *Gemini Drilling and Found., LLC v. Nat'l Fire Ins. Co. of Hartford*, 665 S.E.2d 505, 508 (N.C. Ct. App. 2008); *Ellis-Don Constr.*, 610 S.E.2d at 295).

In contrast, as in federal court, parties in North Carolina state court may not immediately appeal orders compelling arbitration or denying motions to stay arbitration proceedings because the court retains the ability to confirm or vacate the arbitration award (see *N.C. Elec. Membership Corp. v. Duke Power Co.*, 381 S.E.2d 896, 899 (N.C. Ct. App.), disc. rev. denied, 388 S.E.2d 461 (N.C. 1989); *C. Terry Hunt Indus. V. Klausner Lumber Two, LLC*, 803 S.E.2d 679, 682-83 (N.C. Ct. App. 2017)).