

Compelling and Staying Arbitration in New Hampshire

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A Practice Note explaining how to request judicial assistance in New Hampshire 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 New Hampshire 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 New Hampshire, including the standards under New Hampshire arbitration law, the court's inquiry on an application to stay or compel arbitration, and the form of applications to compel or stay arbitration.

This Note does not address arbitration of domestic relations disputes under the New Hampshire arbitration statute.

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 New Hampshire state law applies to the arbitration

agreement (see Determine the Applicable Law). Parties should 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).
- Whether to seek discovery (see Discovery When Seeking to Compel or Stay Arbitration).

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 New Hampshire 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 arbitration agreements 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); *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 121 N.H. 344, 347 (1981)).

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 *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 136 (2016)).

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](#)).

New Hampshire State Law

New Hampshire’s arbitration statute, set out in chapter 542 of the New Hampshire Revised Statutes Annotated (N.H. RSA § 542:1 to 542:11), governs arbitration in New Hampshire, including applications to stay or compel arbitration (the statute also provides the procedure for arbitrating domestic relations disputes (N.H. RSA § 542:11), which this Note does not discuss). The statute is based in part on the FAA. Unlike the arbitration law of many states, the New Hampshire arbitration statute is not based on either the Uniform Arbitration Act or the Revised Uniform Arbitration Act.

The New Hampshire arbitration statute presumptively deems any written arbitration agreement valid, enforceable, and irrevocable except where there are grounds for the revocation of any contract. However, the statute does not apply to a written arbitration agreement between an employer and employees or a union unless the agreement specifically provides for the application of the New Hampshire arbitration statute. (N.H. RSA § 542:1.)

INTERSECTION OF THE FAA AND NEW HAMPSHIRE LAW

If an agreement falls under the FAA, the New Hampshire state courts apply the federal standard for arbitrability when determining whether to compel or stay arbitration, rather than evaluating these threshold questions under New Hampshire 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](#))).

Because the FAA only preempts state law to the extent that state law contradicts federal law, the FAA does not prevent New Hampshire state courts from, among other things, applying traditional principles of state contract law to determine whether the parties have entered into a valid arbitration agreement (see *Demers Nursing Home v. R.C. Foss & Son*, 122 N.H. 757, 760 (1982); *Aetna Life & Cas. Co. v. Martin*, 134 N.H. 90, 93 (1991); *Brennan v. King*, 139 F.3d 258, 264-65 (1st Cir. 1998)).

For example, New Hampshire law applies to the determination of the arbitration agreement’s enforceability if the agreement:

- Does not affect interstate commerce (see 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 New Hampshire law governs the agreement and its enforcement (see generally *CIGNA Health Corp. v. Lencki*, 2006 WL 1424453, at *2 (D.N.H. May 18, 2006)).

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 *In re City of Manchester*, 144 N.H. 386, 387-88 (1999)). Instead, the court plays a gatekeeping role that is limited to determining:

- The substantive arbitrability issues of whether:
 - there is a valid, enforceable arbitration agreement (see *Valid Arbitration Agreement*); and
 - the scope of the arbitration clause covers the parties’ dispute (see *Scope of Arbitration Agreement*).
- Whether the party seeking arbitration is in default in proceeding with the arbitration (N.H. RSA §§ 542:2 and 642:3; see *Waiver and Delay*).

A party may raise any of these questions as a basis for the application to compel or stay arbitration or as a defense in an opposition to an application. If the court rules in favor of arbitration on these gateway issues, the arbitrator decides all remaining questions in the dispute (see *Appeal of Hillsborough Cty. Nursing Home*, 166 N.H. 731, 734, 736 (2014); see *Procedural Arbitrability*).

Although the court usually decides the gateway questions of substantive arbitrability, New Hampshire courts leave these gateway questions to the arbitrator if the parties’ agreement:

- Clearly and unmistakably states that the arbitrator has the power to rule on its own jurisdiction, including the agreement’s:
 - existence;
 - scope; and
 - validity.
- (See *AT&T Techs. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986); *In re Town of Durham*, 149 N.H. 486, 487-88 (2003).)
- Implicitly confers this power to the arbitrator with an arbitration clause broad enough to cover the issue of arbitrability, for example by agreeing to arbitrate any disputes arising under the parties’ contract (see *State v. Philip Morris USA, Inc.*, 155 N.H. 598, 604 (2007)).

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](#)).

SUBSTANTIVE ARBITRABILITY

Substantive arbitrability refers to whether the parties have a valid arbitration agreement that covers their dispute. It is an issue the courts decide unless the parties’ agreement delegates this issue to the arbitrator. (See *Hillsborough Cty. Nursing Home*, 166 N.H. at 734.)

Valid Arbitration Agreement

To be enforceable under New Hampshire law, an arbitration agreement must be in writing (N.H. RSA § 542:3). New Hampshire courts apply the traditional principles of contract formation and

interpretation to determine whether the parties have a valid arbitration agreement (see *Aetna Life*, 134 N.H. at 93; *Demers Nursing Home*, 122 N.H. at 761).

In construing the arbitration agreement, the court also determines the viability of contract defenses a party asserts in seeking to avoid enforcement of the arbitration agreement, including fraud and unconscionability (see *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 121 N.H. 344, 346-47 (1981)).

Scope of Arbitration Agreement

Once a court determines there is a valid arbitration agreement, it must determine whether the agreement covers the parties' dispute (N.H. RSA § 542:2). The court presumes arbitrability unless it cannot discern any interpretation of the agreement that covers the dispute (see *John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352, 355-56 (2001)). If the court cannot read the contract in any way that covers the parties' dispute, the court refuses to compel arbitration (see *J. Dunn & Sons, Inc. v. Paragon Homes of New England, Inc.*, 110 N.H. 215, 218-19 (1970)).

WAIVER AND DELAY

Although many states define the question of a party's waiver or delay in seeking arbitration as an issue of procedural arbitrability the arbitrator decides (see Procedural Arbitrability), the New Hampshire arbitration statute expressly requires the court to find that the applicant is not in default in proceeding with arbitration to stay litigation and compel arbitration (N.H. RSA §§ 542:2 and 542:3).

Waiver of the right to arbitrate requires a finding that the waiving party knew of its right and deliberately relinquished it (see *Demers Nursing Home*, 122 N.H. at 761; *Logic Assocs.*, 124 N.H. at 571). The court may infer waiver from the party's conduct, such as delay in seeking arbitration, actively pursuing court litigation, or other conduct inconsistent with an intention to arbitrate. Delay alone does not constitute a waiver. (See *Second Congregational Soc'y v. Hugh Stubbins and Assocs.*, 108 N.H. 446, 448-49 (1968)).

A party seeking to arbitrate may apply to the court for provisional relief without risking a waiver (see *Pine Gravel, Inc. v. Cianchette*, 128 N.H. 460, 465 (1986); Considerations When Seeking Provisional Remedies).

PROCEDURAL ARBITRABILITY

Under New Hampshire law, the arbitrator decides procedural arbitrability issues, which are preliminary and procedural matters relating to the processing of the parties' claims (see *Southwestern New Hampshire Trans. Co. v. Durham*, 102 N.H. 169, 178 (1959)). Procedural arbitrability issues may include:

- The satisfaction or excuse of any conditions precedent to arbitration.
- Notice.
- Time limits.
- Estoppel.

(See *Hillsborough Cty. Nursing Home*, 166 N.H. at 734; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).)

CONSIDERATIONS WHEN PREPARING THE APPLICATION

Before making an application to compel or stay arbitration in New Hampshire state court, counsel should take into account several factors.

CONSIDERATIONS WHEN SEEKING TO COMPEL ARBITRATION

A party seeking to compel arbitration must not be in default of the arbitration proceedings (N.H. RSA §§ 542:2 and 542:3). Therefore, when preparing to ask a court to compel arbitration, the applicant should ensure it makes the request promptly and does not take any action inconsistent with an intention to arbitrate, such as starting a lawsuit over the underlying dispute. (See Waiver and Delay.)

Depending on whether there is already a court action pending between the parties, a party to a valid arbitration agreement may ask the court to compel arbitration through:

- An initial pleading.
- A responsive pleading.
- A motion.

If there is no lawsuit pending, a party seeking to compel arbitration starts an action by filing a petition seeking specific performance of the arbitration agreement (N.H. RSA § 542:3). If there is already a lawsuit pending, for example because another party started a lawsuit over the underlying dispute, the party seeking to compel arbitration may file either:

- A motion to compel arbitration and to stay the court proceedings (N.H. RSA § 542:2).
- A motion to dismiss the action, if the parties' agreement requires arbitration as a condition precedent to court litigation (see *Pine Gravel*, 128 N.H. at 463-64).

A dismissal is without prejudice and has the same effect as a stay (see *Pine Gravel, Inc. v. Cianchette*, 128 N.H. 460, 464 (1986)).

CONSIDERATIONS WHEN SEEKING TO STAY ARBITRATION

If a party threatens or demands arbitration against a party not bound to arbitrate the dispute, the aggrieved party may seek temporary injunctive relief to stay arbitration until the court decides the gateway issue of whether the parties' dispute is arbitrable (see *Aetna Life*, 134 N.H. at 93; *Brampton Woolen Co. v. Local Union 112*, 95 N.H. 255, 256-57 (1948); Threshold Issues for the Court to Decide).

CONSIDERATIONS WHEN SEEKING PROVISIONAL REMEDIES

Along with a request to compel or stay arbitration, a party may seek a provisional remedy, such as:

- An attachment or lien (N.H. Super. Ct. Civ. R. 47; see *Pine Gravel*, 128 N.H. at 465 (1986); Attachment and Lien).
- A temporary restraining order (TRO) or preliminary injunction (N.H. Super. Ct. Civ. R. 48; see *Brampton Wollen Co.*, 95 N.H. at 256-57; Preliminary Injunction and TRO).

A party seeking to arbitrate may apply to the court for provisional relief without risking a waiver (see *Pine Gravel*, 128 N.H. at 465; Waiver and Delay).

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).

Attachment and Lien

A party that seeks to arbitrate a claim may protect its interest in the eventual arbitral award by obtaining a prejudgment attachment or lien from the New Hampshire court (N.H. RSA §§ 511-A:1 to 511-A:12; N.H. Super. Ct. Civ. R. 47; see generally *Williams v. Beyer*, 455 F. Supp. 482, 483 (D.N.H. 1978)). In practice, a defendant that moves to compel arbitration of the dispute may be unable to attach the other party's property unless the defendant asserts an affirmative claim for damages.

Preliminary Injunction and TRO

In cases subject to arbitration, courts frequently entertain motions for a TRO or preliminary injunction. The party seeking this provisional relief seeks either to:

- Maintain the status quo pending the conclusion of the arbitration.
- Obtain some interim, temporary relief, such as a stay of the arbitration proceedings until the court decides the gateway issue of arbitrability (see Threshold Issues for the Court to Decide).

(See *Aetna Life*, 134 N.H. at 93; *Brampton Woolen Co.*, 95 N.H. at 256-57.)

A party may file a request for a TRO ex parte, and the court may decide the request without notice to the other party, if the requesting party establishes by affidavit or verified petition that it will suffer immediate and irreparable injury, loss, or damage before the other party can submit an opposition. (N.H. Super. Ct. Civ. R. 48(a).)

A TRO the court grants without notice is valid for up to ten days. The court may extend it for an additional ten days if:

- The court finds good cause.
- The adverse party consents to the extension.

(N.H. Super. Ct. Civ. R. 48(a).)

If the court converts a TRO into a preliminary injunction, the court may extend it for an indefinite period. A preliminary injunction and a TRO the court issues after notice to the adverse party may extend for any amount of time the court determines. (N.H. Super. Ct. Civ. R. 48(b).)

Unless the court orders otherwise, the party obtaining a preliminary injunction or TRO must post a bond as security for any damages the restrained party incurs from a wrongful restraint (N.H. Super. Ct. Civ. R. 48(c)).

DISCOVERY WHEN SEEKING TO COMPEL OR STAY ARBITRATION

New Hampshire law and court rules are silent on the availability of discovery pending a motion to stay or compel arbitration. In civil cases subject to mandatory alternative dispute resolution (ADR), the ADR proceedings do not automatically stay, alter, suspend, or delay pre-trial discovery (N.H. Super. Ct. Civ. R. 32(b)(1)). Discovery is therefore presumptively available to a party seeking to compel or stay arbitration, including:

- Interrogatories, which a party may serve any time after service of the moving papers (N.H. Super. Ct. Civ. R. 23).

- Depositions, which may not be taken less than 30 days after service of the initial pleading on the other party (N.H. Super. Ct. Civ. R. 26).
- Requests for admissions, which may not be served until 30 days after service of the initial pleading upon the defendant (N.H. Super. Ct. Civ. R. 28).

Although not directly addressed by the New Hampshire arbitration statute or court rules concerning discovery, a party seeking to compel or stay arbitration should refrain from serving requests for discovery about issues other than arbitrability, or risk waiving its right to arbitrate (see Waiver and Delay).

ADDITIONAL PROCEDURAL CONSIDERATIONS

Before seeking judicial assistance concerning an arbitration in a New Hampshire state court, counsel should also consider other factors that may affect the contents of the request, 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 application 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).

Court Jurisdiction

Under the New Hampshire arbitration statute, the superior court has subject matter jurisdiction to determine an application to compel or stay arbitration (N.H. RSA § 542:3). The superior court is New Hampshire's court of general jurisdiction.

Before commencing a petition to compel or stay arbitration, counsel should confirm there is a basis for the court to exercise personal jurisdiction over the other party. Proper bases of personal jurisdiction over nonresident defendants under New Hampshire's long-arm statute, N.H. RSA § 510:4, include:

- General jurisdiction, which means the other party's continuous and systematic contacts with New Hampshire render the party available to the jurisdiction of New Hampshire courts for all claims.
- Specific jurisdiction, which means the cause of action arises out of or relates to the other party's New Hampshire-based contacts.

(See *State of New Hampshire v. North Atlantic Refining Limited*, 160 N.H. 275 (2010).)

A court may also exercise personal jurisdiction over any party to a valid arbitration agreement that selects New Hampshire as the place of arbitration (N.H. RSA § 508-A:2).

Venue

Unless the parties' arbitration agreement specifies a particular venue, a party may file an application to stay or compel arbitration in the same venue as in any other action. Under New Hampshire law, an arbitration-related proceeding is a "transitory" cause of action in which venue is proper:

- In the county or judicial district either:
 - designated in the parties' agreement; or
 - where at least one party resides.

- In any county or judicial district, if no party is an inhabitant of the state.

(N.H. RSA § 507:9.)

The parties may agree to venue at the Business and Commercial Dispute Docket at the Merrimack County Superior Court if:

- At least one party is a business entity.
- The dispute does not involve a consumer.
- The amount in controversy exceeds \$50,000.

(N.H. RSA § 491:7-a; N.H. Super. Ct. Civ. R. 207.)

APPLICATION TO COMPEL OR STAY ARBITRATION

Under the New Hampshire arbitration statute, a party submits an application to ask a New Hampshire state court to compel or stay arbitration (N.H. RSA § 542:2). Although the statute expressly refers to an “application,” this term is not used in modern litigation practice, so practitioners should caption the document based on its procedural posture, as follows:

- If there is already a lawsuit pending between the parties, the party seeking to compel arbitration files a motion in the New Hampshire state court where the action is pending.
- If the parties agree to arbitrate a civil case pending in the New Hampshire Superior Court before trial, they may file a stipulation, which stays the proceedings until the arbitration concludes (N.H. RSA § 542:3-a).
- If there is no lawsuit pending between the parties, a party aggrieved by another party’s failure, neglect, or refusal to arbitrate files a petition in the New Hampshire superior court (N.H. RSA § 542:3). New Hampshire’s court rules refer to a pleading that starts a case as a complaint (N.H. Super. Ct. Civ. R. 6), but the arbitration statute and courts continue to use the term petition to describe case-initiating application in an arbitration-related case (N.H. RSA §§ 542:2 and 542:3; see, for example, *Unifirst Corp. v. Cloutier*, 2016 WL 6472226, at *1 (N.H. Sept. 15, 2016)).
- A defendant in a pending lawsuit in which the other party seeks an order compelling arbitration may file either:
 - a responsive court pleading, such as an answer or motion, asking for a stay of arbitration; or
 - a motion to dismiss the request for arbitration.

(N.H. Super. Ct. Civ. R. 9.)

- If there is no pending case, any party aggrieved by an opposing party’s demand to arbitrate may petition a New Hampshire superior court for a TRO or preliminary injunction to stay arbitration pending the court’s determination of the gateway arbitrability issues (N.H. Super. Ct. Civ. R. 48; see *Aetna Life*, 134 N.H. at 93; *Brampton Woolen Co.*, 95 N.H. at 256-57; Preliminary Injunction and TRO).

When bringing an application 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 Application).
- The documents necessary to bring the application to compel or stay arbitration (see Documents Required for the Application).

- How to file and serve the documents (see Filing the Application and Serving the Application).

PROCEDURAL AND FORMATTING RULES FOR APPLICATION

Counsel should be familiar with applicable procedure and formatting rules for filing initial pleadings in the New Hampshire state courts. Counsel also should check the relevant court websites for additional information and guidance on procedural and formatting rules.

Procedural Rules

New Hampshire’s procedural rules governing a request to compel or stay arbitration are set out in:

- The New Hampshire arbitration statute, N.H. RSA §§ 542:1 to 542:11.
- The Rules of the Superior Court of the State of New Hampshire (N.H. Super. Ct. Civ. R.), especially rules:
 - 7 (pleadings, motions, and objections);
 - 8 (complaints and other claims for relief);
 - 9 (answers, defenses, and forms of denials);
 - 11 (motions generally);
 - 12 (specific motions); and
 - 33(b) (arbitration by agreement).
- The rules and standing orders of individual judges, available on the New Hampshire Judicial Branch website.

Formatting Rules

New Hampshire Superior Court Civil Rule 7 sets out the technical formatting requirements for initial and responsive pleadings, motions, and objections in New Hampshire court. Generally, the papers must:

- Have a caption.
- Be printed or typewritten double spaced, on one side of the 8-1/2 by 11-inch paper.
- Be signed by either:
 - counsel for a party;
 - an authorized non-attorney representative of a party; or
 - a self-represented party.
- Have typed or stamped under the signature the signer’s:
 - name;
 - street address;
 - mailing address;
 - New Hampshire Bar Association identification number, if applicable; and
 - telephone number.

(N.H. Super. Ct. Civ. R. 7.)

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

DOCUMENTS REQUIRED FOR THE APPLICATION

The New Hampshire arbitration statute does not specify any particular document a party must attach to an application to compel or stay arbitration. However, because an arbitration agreement must be in writing for the court to enforce it (N.H. RSA § 542:1), a party

seeking to compel arbitration should attach a copy of the arbitration agreement to the initial pleading, motion to compel arbitration, or motion to dismiss.

FILING THE APPLICATION

If a party seeks to compel or stay arbitration while a court action is already pending, the party files the motion in the pending action (N.H. Super. Ct. Civ. R. 11). The New Hampshire Superior Court does not accept electronic filings.

If there is no lawsuit pending, the applicant files a petition to compel or stay arbitration with the clerk of the superior court. The applicant must pay the requisite filing fee at the time of filing. The clerk furnishes the applicant with orders of notice, including a summons, for the applicant to serve process on the other party.

SERVING THE APPLICATION

If there is a lawsuit between the parties already pending, the party moving to compel or stay arbitration serves the motion in that case as it serves any other document in the case.

If there is no lawsuit pending, a party filing a petition to compel or stay arbitration must satisfy the service of process requirements applicable to initiating any other action under New Hampshire law (N.H. Super. Ct. Civ. R. 4; see also N.H. RSA § 542:1 (directing where process is returnable)). The petitioner must serve the other party either:

- Personally.
- At the party's abode.
- Through alternative service (including publication) as ordered by the court.

(N.H. RSA §§ 510:2 and 510:5-9.)

Under New Hampshire's long-arm statute, the petitioner may serve the New Hampshire Secretary of State if the defendant is a non-resident, natural person who either:

- Transacts business in New Hampshire.
- Commits a tortious act in New Hampshire.
- Owns, possesses, or uses any real or personal property situated in New Hampshire.

(N.H. RSA § 510:4.)

Once service is complete, the petitioner files returns of service or consent to service with the clerk of the court (N.H. RSA § 510:1).

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 (see Practice Note, *Compelling and Enjoining Arbitration in US Federal Courts: Appealing an Order to Compel or Enjoin Arbitration* (6-574-8707)) limit appeals of 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)).

In New Hampshire state court, orders compelling or staying arbitration on the gateway issues of arbitrability are not final decisions on the merits subject to mandatory interlocutory appeal. Counsel wishing to seek interlocutory review of an order compelling or staying arbitration must first obtain the consent of the trial court to bring an interlocutory appeal by filing an interlocutory appeal statement (N.H. Super. Ct. Civ. R. 46(a)).

Under the New Hampshire Supreme Court rules, the interlocutory appeal statement must annex the trial court order and contain:

- A list of all parties of record and their counsel, including
 - the addresses of all parties and counsel; and
 - counsel's New Hampshire Bar identification numbers.
- A statement of the facts necessary to an understanding of the controlling question of law as determined by the order or ruling of the trial court.

(N.H. R. S. Ct. 8(1), (2).)

Even if the trial court grants its consent to an interlocutory appeal by signing an interlocutory appeal statement, the New Hampshire Supreme Court retains discretion whether to hear an interlocutory appeal (N.H. R. S.Ct. 8(1)).

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