

# Compelling and Staying Arbitration in Oregon

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A Practice Note explaining how to request judicial assistance in Oregon 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 Oregon 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 Oregon and describes the procedures and forms applicable to applications to stay or compel arbitration under the Oregon Uniform Arbitration Act (OUAA) or the Oregon International Commercial Arbitration and Conciliation Act (OICACA).

This Note does not address mandatory, court-ordered arbitration (ORS 36.400 to 36.425).

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 to do so under the Federal Arbitration Act (FAA) or the OUAA (see Determine the Applicable Law). Parties should 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, 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 governed by the FAA or Oregon 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)).

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* ([6-574-8707](#)).

### Oregon Arbitration Law

Oregon state law recognizes a presumption in favor of arbitrability and the enforcement of arbitration agreements (see *Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796, 803 (Or. Ct. App. 2010)). Oregon has two arbitration statutes, both contained in Chapter 36 of the Oregon Revised Statutes:

- The OUAA, which governs domestic arbitration.
- The Oregon International Commercial Arbitration and Conciliation Act (OICACA), which governs international arbitrations that take place in Oregon (Or. Rev. Stat. §§ 36.450 to 36.558).

The OUAA is based on the model Revised Uniform Arbitration Act (RUAA). For more information about the RUAA and the jurisdictions that have adopted it, see Practice Note, *Revised Uniform Arbitration Act: Overview* ([w-004-5167](#)).

The OICACA is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Or. Rev. Stat. § 36.526). There are few reported cases construing the OICACA, so this Note does not discuss the OICACA except where noted.

Chapter 36 also provides for court-ordered arbitration of certain civil cases (Or. Rev. Stat. §§ 36.400 to 36.425; OR R UNIF TRIAL CT UTCR 13.010 to 13.300). Because arbitration of these cases is mandatory, this Note does not discuss court arbitration.

The OUAA applies to all Oregon arbitration agreements, including agreements that predate the statute's 2003 enactment (2003 Or. Laws Ch. 598 §3(3); see *Snider v. Prod. Chem. Mfg., Inc.*, 191 P.3d 691, 694 (Or. Ct. App. 2008); *Martin v. Comcast of Cal.*, 146 P.3d 380, 384 (Or. Ct. App. 2006); *JELD-WEN, Inc. v. PacifiCorp.*, 245 P.3d 685, 686 (Or. Ct. App. 2010)).

The OUAA provides that a written agreement to arbitrate a dispute is presumptively valid, enforceable, and irrevocable except where there are legal or equitable grounds for the revocation that apply to any contract (Or. Rev. Stat. § 36.620(1)).

However, the OUAA provides that an employment arbitration agreement is voidable and may not be enforced unless the agreement contains a boldface notice that:

- The employee agrees to resolve all employment disputes in arbitration rather than in court.
- The employee specifically acknowledges the notice in writing. (Or. Rev. Stat. § 36.620(5), (6).)

The federal district court in Oregon has held that the FAA preempts this OUAA provision on employment arbitration agreements as contrary to the FAA's mandate to place arbitration agreements on equal footing with other contracts (see *Olson v. MBO Partners, Inc.*, 2017 WL 2726696, at \* 2 (D. Or. June 15, 2017); *Bettencourt v. Brookdale Senior Living Communities, Inc.*, 2010 WL 274331, at \* 7 (D. Or. Jan 14, 2010)). The continuing viability of this provision in FAA-governed cases may be in further question following the US Supreme Court's decision in *Kindred Nursing Centers Limited Partnership v.*

*Clark*, which held that the FAA preempts a Kentucky rule requiring an explicit statement in a power of attorney that the attorney-in-fact has authority to waive the principal's state constitutional rights to access the courts and to a jury trial, because the Kentucky rule disfavors arbitration agreements (2017 WL 2039160 (U.S. May 15, 2017)).

### INTERSECTION OF THE FAA AND OREGON LAW

If an agreement falls under the FAA, the Oregon state court applies the federal standard for arbitrability when determining whether to compel or stay arbitration, rather than evaluating these threshold questions under Oregon 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](#))). Even if an agreement falls under federal law, however, Oregon state courts follow Oregon procedural rules (see *Marr v. Smith Barney, Harris Upham & Co., Inc.*, 842 P.2d 801, 803 (Or. Ct. App. 1992); *Geris v. Burlington Northern, Inc.*, 561 P.2d 174, 176 (Or. 1977)).

Because the FAA only preempts state law to the extent that state law contradicts federal law (see The FAA), the FAA does not prevent Oregon state courts from, among other things, applying state contract law to determine whether the parties entered into a valid arbitration agreement (see *Martin*, 146 P.3d at 384; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (courts apply state contract law to determine whether parties agreed to arbitrate under the FAA); *Hamrick v. Aqua Glass, Inc.*, 2008 WL 2853992, at \*2 (D. Or. Feb. 20, 2008); *Robert Briede & Vantage Point Fitness v. 24 Hour Fitness, USA, Inc.*, 2010 WL 4236929, at \*2 (D. Or. Oct. 21, 2010)).

For example, Oregon state courts apply state law to determine the enforceability of the arbitration agreement 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 Oregon law governs the agreement and its enforcement (see *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 142 P.3d 1044, 1050 (Or. 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 Oregon court may not rule on the merits of the claims underlying the arbitration (Or. Rev. Stat. § 36.625(4)). The court instead plays a gatekeeping role that is limited to determining whether:

- There is a valid arbitration agreement.
- The dispute falls within the scope of the arbitration agreement. (Or. Rev. Stat. § 36.620(1), (2).)

In determining the validity and scope of an arbitration agreement, the court applies ordinary principles of state contract law and employs a presumption in favor of arbitrability (see *Industra/Matrix*, 142 P.3d at 1051; *Gemstone Builders, Inc. v. Stutz*, 261 P.3d 64, 66-67 (Or. Ct. App. 2011)). The court determines whether the dispute falls within the scope of the arbitration agreement by deciding whether

the arbitration clause is susceptible to an interpretation that covers the parties' dispute (see *Livingston*, 227 P.3d at 803).

The court may also make a threshold determination on unconscionability and may deny a petition to compel arbitration on public policy grounds if it finds the arbitration agreement or the contract containing it is either procedurally or substantively unconscionable under Oregon law (see *Hinman v. Silver Star Grp., LLC*, 380 P.3d 994, 998 (Or. Ct. App. 2016); *Sprague v. Quality Rest. Nw., Inc.*, 162 P.3d 331, 333 (Or. Ct. App. 2007)).

Once the court rules on the threshold issues, the arbitrator determines all other issues, including:

- Time limits.
- Notice.
- Laches.
- Estoppel.
- Waiver.
- Any other conditions precedent to arbitration.

(Or. Rev. Stat. § 36.620(3); see *Livingston*, 227 P.3d at 802-03.)

### CONSIDERATIONS WHEN PREPARING THE APPLICATION

Before making an application to compel or stay arbitration in Oregon courts, counsel should take into account several factors.

#### CONSIDERATIONS WHEN SEEKING TO COMPEL ARBITRATION

A party may request that the court compel arbitration when the opposing party commences a lawsuit or otherwise expresses the intention to avoid arbitration of a dispute even though the dispute is subject to a valid arbitration agreement.

If there is no lawsuit pending, a party asks a court to compel the other party to arbitrate the dispute by starting an action with a petition (Or. Rev. Stat. §§ 36.615, 36.625). If the other party has already started a lawsuit, the party seeking to compel arbitration makes the request by submitting the petition in the court in which the litigation is pending (Or. Rev. Stat. § 36.625(5)). Despite the statute's language, parties sometimes mistakenly make the request by submitting a motion in the pending litigation, instead of a petition, and the courts do not appear to reject the request based on the incorrect form (see, for example, *Gozzi v. W. Culinary Inst., Ltd.*, 366 P.3d 743, 749 (Or. Ct. App. 2016)).

Counsel should consider also applying to stay the pending litigation. The court must stay any pending litigation of an arbitral claim if:

- A party moves to compel arbitration.
- The court orders the parties to arbitration.

(Or. Rev. Stat. § 36.625(6).)

If the arbitral claim is severable, the court may limit the stay to the arbitrable claim and allow the litigation of non-arbitrable claims to proceed (Or. Rev. Stat. § 36.625(7)).

The court must decide all issues raised in the petition except for any issue a party has a constitutional right to try before a jury. If any party has the right and requests a jury trial, the court must hold a jury trial on the issue (Or. Rev. Stat. § 36.625(8)).

For international arbitrations under the OICACA, a party must ask a court to stay judicial proceedings and order the parties to arbitration no later than when submitting the party's first statement to the court on the substance of the dispute. The court must stay the court proceedings and refer the parties to arbitration unless the court finds the arbitration agreement is:

- Null.
- Void.
- Inoperative.
- Incapable of being performed.

(Or. Rev. Stat. § 36.468(1).)

Under the OICACA, the court may not order the parties to arbitration unless a party requests it (Or. Rev. Stat. § 36.468(3)).

#### CONSIDERATIONS WHEN SEEKING TO STAY ARBITRATION

Under the OUAA, if an arbitration claimant threatens or demands arbitration against a party that does not have an obligation to arbitrate the dispute (see Threshold Issues for the Court to Decide), the party may petition the court to stay arbitration. The court must summarily decide the petition. If the court finds that there is an enforceable arbitration agreement, the court must order the parties to arbitration, even though the petition seeks to stay, not compel, arbitration (Or. Rev. Stat. § 36.625(2)).

The OICACA does not provide for a stay of arbitral proceedings. However, a party seeking to avoid arbitration may move the court for a temporary restraining order (TRO) or preliminary injunction to enjoin the other party from engaging in arbitration under Rule 79 of the Oregon Rules of Civil Procedure.

#### CONSIDERATIONS WHEN SEEKING PROVISIONAL REMEDIES

Both the OUAA and the OICACA provide for the arbitrator to decide whether to grant interim or provisional relief (Or. Rev. Stat. §§ 36.630, 36.486). However, a party may need interim or provisional relief before the arbitrator is appointed. When moving to compel arbitration, therefore, a party should consider whether to request provisional relief from the court.

Under the OUAA, before an arbitrator is appointed, the court may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding. The court may provide the same relief, to the same extent, and under the same conditions as if the dispute were the subject of a civil action (Or. Rev. Stat. § 36.630(1)).

The OICACA provides for the court to grant interim measures of protection either before or during an arbitration, including:

- An attachment to ensure an eventual award to the applicant is effectual.
- A preliminary injunction to:
  - protect trade secrets; or
  - conserve goods that are the subject of the arbitration.

(Or. Rev. Stat. § 36.479(3).)

A party does not waive a right to arbitration by also seeking provisional remedies from the court (Or. Rev. Stat. §§ 36.630(3), 36.470(1)).

For more information on provisional remedies in Oregon, see State Q&A, Provisional Remedies: Oregon ([w-000-3222](#)). For more 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 an Oregon court, counsel should also consider other procedural factors that may affect the contents of the request for judicial assistance, including:

- The proper venue in which to file the request to stay or compel (see Venue).
- Whether the court has subject matter jurisdiction over the dispute and personal jurisdiction over the respondent (see Court Jurisdiction).

#### Venue

Under both the OUAA and OICACA, a party seeking to compel or stay arbitration files a petition in the circuit court (Or. Rev. Stat. §§ 36.600(3), 36.464). The proper venue for the petition is:

- The specific county:
  - the arbitration agreement specifies for the arbitration hearing to take place; or
  - where the arbitration hearing occurred or is occurring, if the arbitration has already started.
- Any county, if:
  - the arbitration agreement does not specify a location;
  - the arbitration has not started; and
  - no adverse party resides or has a place of business in Oregon.

(Or. Rev. Stat. §§ 36.725, 36.464.)

#### Court Jurisdiction

Before starting a court proceeding to compel or stay arbitration, petitioner's counsel should confirm there is a basis for the court's subject matter jurisdiction and exercise of personal jurisdiction over the respondent.

Under the OUAA, the Oregon circuit court has jurisdiction to enforce an arbitration agreement if it has jurisdiction over the controversy and the parties (Or. Rev. Stat. § 36.720(1)). As courts of general jurisdiction, the circuit courts generally have no monetary threshold for commencing an action (Or. Const. art. VII (original), § 9).

The OICACA does not address the court's jurisdiction, but under Oregon's general jurisdiction statute, the circuit court has jurisdiction regarding any cause of action if it has personal jurisdiction over the parties (Or. Rev. Stat. § 14.030).

Oregon courts have personal jurisdiction over:

- Any natural person:
  - present in the state when served; or
  - domiciled in the state.
- Any corporation created by or existing under the laws of Oregon.

- Any party engaged in substantial, non-isolated activities in Oregon.

(Or. R. Civ. P. 4(A).)

The court may also exercise personal jurisdiction over the parties outside of Oregon through Oregon's long-arm statute (Or. R. Civ. P. 4(C), (D), and (E)).

### PETITION TO COMPEL OR STAY ARBITRATION

Under the OUAA, a party asks a court to compel or stay arbitration in Oregon state court by filing a petition. If there is no court action already pending between the parties, the petition to compel or stay arbitration starts an action. If there is a court action already pending between the parties, the party seeking to compel or stay arbitration files the petition in that action. (Or. Rev. Stat. §§ 36.615, 36.625.)

The OICACA does not specify the form for a request to stay or compel arbitration.

For information on commencing an action in Oregon, see State Q&A, Commencing an Action: Oregon ([w-001-6305](#)).

When preparing a petition to stay or compel arbitration, counsel should be familiar with:

- The procedural rules relevant to case-initiating documents (see Procedural Rules for Petition).
- The formatting rules for filings in Oregon (see Formatting Rules for Petition).
- How to file and serve the documents (see Filing the Petition and Serving the Petition).

### PROCEDURAL RULES FOR PETITION

Counsel should be familiar with applicable procedural and formatting rules for applications in the Oregon courts, including:

- Uniform Trial Court Rules (UTCR) Chapter 2 (Standards for Pleadings and Documents).
- UTCR Chapter 5 (Proceedings in Civil Cases).
- Oregon Rules of Civil Procedure, including:
  - Rule 3 (Commencement of Action);
  - Rule 4 (Jurisdiction);
  - Rule 9 (Service and Filing of Pleadings and Other Papers);
  - Rule 15 (Time for Filing Pleadings or Motions);
  - Rule 16 (Form of Pleadings); and
  - Rule 17 (Signing of Pleadings, Motions and Other Papers; Sanctions).
- Court-specific rules (for example, Supplementary Local Rules for the Circuit Court for the State of Oregon for Multnomah County).
- Judges' individual rules.

Counsel also should check the relevant court website for additional information and guidance on procedural rules.

### FORMATTING RULES FOR PETITION

UTCR Chapter 2 sets out the technical requirements for a petition in Oregon state court. The papers generally must:

- Have a caption.
- Be double-spaced and prepared with numbered lines.
- Have a two inch blank space on the first page of each pleading.
- Have a one-inch margin on each side of each page of each document, except exhibits.
- State the name of the party or attorney signing any pleading or motion typed or printed immediately below the signature.
- Date all signatures.
- Include the author's contact information and, if prepared by an attorney, the attorney's:
  - name;
  - email address; and
  - bar number.
- Consecutively number all paragraphs in the center of the page with Arabic numerals, beginning with the first paragraph of the document and continuing through the last.
- State the name of the document and the page number in Arabic numerals at the bottom left-hand side of each page of each document.

(OR R UNIF TRIAL CT UTCR 2.010(1)-2.010(11))

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

## FILING THE PETITION

### Electronic Filing

Electronic filing is available in all Oregon circuit courts. The rules for Oregon state court electronic filing can be found in UTCR Chapter 21. A filer may access the electronic filing system using the Oregon Judicial Department's website. A party filing documents electronically should:

- Ensure that each file:
  - is in a text-searchable PDF format or text-searchable PDF/A format; and
  - does not exceed 25 megabytes.
- If submitting separate files, include in the Filing Comments field for each submission a description that clearly identifies the part of the document that the file represents; for example, "Petition to Compel Arbitration, Pt. 2."
- If submitting a proposed order or any other document that requires court signature, include a blank space and blank line for the judge's signature and date.

(OR R UNIF TRIAL CT UTCR 21.010 to 21.140.)

### Traditional Paper Filing

Although electronic filing is available, all circuit courts still accept traditional paper filings. The rules for paper filings are set out in the Oregon Rules of Civil Procedure:

- Rule 9C, which covers filing and proof of service.
- Rule 9E, which defines filing with the court.

## SERVING THE PETITION

Under the OUAA, if a petition to compel or stay arbitration starts a court proceeding, the petitioner must serve the petition in the same manner as a summons under Oregon Rule of Civil Procedure 7. If there is already an action pending between the parties, the petitioner serves the petition in the same manner as other non-case initiating papers under Oregon Rule of Civil Procedure 9 (Or. Rev. Stat. § 36.615(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. 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)).

For more information on appealing orders to compel or enjoin arbitration in federal court, see Practice Note, *Compelling and Enjoining Arbitration in US Federal Courts: Appealing an Order to Compel or Enjoin Arbitration* ([6-574-8707](#)).

In Oregon state courts, the OUAA similarly only permits appeals of orders unfavorable to arbitration. Therefore, a party may appeal an order:

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

(Or. Rev. Stat. § 36.730(1); see also *Snider*, 230 P.3d at 4.)

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