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## American Arbitration Association's Commercial Arbitration Rules Revised

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The American Arbitration Association (“AAA”) has recently amended its AAA Commercial Rules (the “Commercial Rules”), which apply to thousands of U.S. domestic arbitrations annually. The amendments take effect for all arbitration claims filed on or after October 1, 2013, where the Commercial Rules apply. Unless otherwise indicated, citations to rules below are to the Commercial Rules. The main areas of revision are outlined below.

### 1. Management of the Arbitration Process

Several Commercial Rules amendments focus on the arbitrator's ability to effectively manage the arbitration process. The revised Commercial Rules address this concern in several areas.

**Preliminary Hearings:** New Rule R-21 addresses the preliminary hearing. Although literature published by AAA on the new rules advertises this rule as a significant change, the substance of the Commercial Rules on preliminary hearings have not changed that much. The new rules encourage the *parties* themselves to attend such preliminary hearings, in addition to the parties' legal representatives. The AAA believes that the presence of parties will promote a better understanding of the process and may encourage counsel for the parties to avoid unnecessary expense and delay. Perhaps the biggest rule change impacting preliminary hearings is that R-21(b) references a set of procedures (Sections P-1 and P-2 of the rules) that identify specific issues to be considered at the preliminary hearing. Thus, the new rules provide more guidance about the topics to be covered in preliminary hearings. This will codify practice for arbitrators who already use some form of preliminary hearing checklist and will promote a more unified approach to preliminary hearings practice among AAA Commercial Rules arbitrators. R-21(b) will certainly add more structure to preliminary hearings conducted by arbitrators who have historically not used an issues checklist.

**Pre-Hearing Exchange and Production of Information:** New Rule R-22, like its predecessor, affords the arbitrator great discretion in dictating what documents need to be exchanged and when. The general theme of the Commercial Rules remains: the arbitration process should be more efficient than litigation, and the arbitrator can make the exchanges much more restricted than Fed. R. Civ. P. 34 or its state counterparts would permit. It appears that new Rule R-22 provides more guidance to the arbitrator on such exchanges, while retaining the arbitrator's discretion.

**Enforcement Power of the Arbitrator:** New Rule R-23 provides arbitrators with specific enforcement authority and powers to issue orders necessary to accomplish the goals of a fair and efficient arbitration process. This is an area of significant clarification. Some commentators have suggested that R-23 puts some teeth into the Commercial Rules regarding the arbitrator's ability to manage discovery. R-23(a) addresses orders involving

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confidential documents and information. R-23(b) imposes reasonable search parameters for electronic and other documents. R-23(c) allows the arbitrator to allocate the document production costs. R-23(d) specifies the type of actions that the arbitrator may take in the case of willful non-compliance with any order. Finally, R-23(e) provides that applicable law may authorize the arbitrator to issue other types of enforcement orders.

**Discovery Decisions in Three-Arbitrator Panels:** New Rule R-44(b) states that, by default, the Chair of a three-arbitrator panel decides discovery issues. This was widely the practice already. Thus, this provision formally codifies current practice.

### 2. Dispositive Motions

New Rule R-33 specifically gives the arbitrator authority to make rulings on dispositive motions. While the rules were previously silent on the subject of dispositive motions, such motions have become more common in arbitration. The AAA has now authorized the use of such motions, but has attempted to limit their use to situations where the motion would be likely to advance the eventual resolution or limit the issues. For example, a motion raising a pure issue of law, such as statute of limitations, would be appropriate; a motion that seeks to negate issues of fact based on admissions in deposition or documents would presumably not.

The phrasing of Rule R-33 may create confusion. Rule R-33 states that “The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.” This appears to require a two-step process in which the arbitrator must determine that a dispositive motion is likely to succeed before even allowing the motion to be filed. While it might have been appropriate to require that the moving party satisfy some minimum standard of merit, requiring a finding that the motion is “likely to succeed” seems to go too far.

### 3. Emergency Measures of Protection

New Rule R-38 will enable parties to apply for emergency interim relief before an arbitrator that will be appointed within 24 hours of the AAA's receipt of the emergency relief request. Under the prior Commercial Rules, rules for emergency protection measures were optional, and had to be agreed to either post dispute or by specific reference in the parties' arbitration agreement.

### 4. Non-payment by a Party

New Rule R-57 is good news for arbitrators who are not getting paid and bad news for non-paying parties. R-57 was added to address situations where parties refuse to deposit their share of arbitrator compensation or administrative charges. This revised rule provides that any party may advance the fees of a non-paying party so that the arbitration may proceed. R-57(a) provides that, to the extent allowed by law (check your applicable arbitration statute), a party may request that the arbitrator take specific action relating to a party's non-payment. Pursuant to Rule R-57(b), an arbitrator may limit the non-paying party's ability to assert or pursue its claim. However, R-57 does not allow an arbitrator to preclude the non-paying party from *defending* a claim or counterclaim. R-57(c) provides that a party opposing a non-payment motion must be permitted to respond. R-57(d) confirms that, if the arbitrator takes

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action under R-57 for non-payment, the paying party claimant must submit whatever evidence the arbitrator deems necessary for an award. R-57(e) states that either AAA or the arbitrator may order suspension of the arbitration for non-payment. R-57(f) then provides that either the AAA or the arbitrator may terminate the proceedings if full payment is not made within the time specified following a suspension.

### 5. Objectionable or Abusive Conduct in Arbitration

New Rule R-58(a) gives the arbitrator authority, if requested by a party, to order sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator. If the sanction limits any party's participation in the arbitration or results in an adverse determination, the arbitrator must explain in writing the reason for the order and require the submission of evidence and legal argument prior to an award. The arbitrator may not enter a default award as a sanction. R-58(b) provides a potentially sanctioned party the right to respond before the arbitrator may enter a determination containing sanctions.

### 6. Mediation

New Rule R-9 introduces a mediation step in each case where a claim or counterclaim exceeds \$75,000, subject to the right of any party to unilaterally opt out. R-9 provides that, absent party agreement, the mediation shall take place concurrently with the arbitration, but should not delay the arbitration proceedings. This change is intended to promote mediation in AAA commercial cases by setting mediation as a default in cases above a certain monetary threshold. The AAA will supply a mediator to the parties and the mediator cannot also be the arbitrator absent agreement of the parties.

### 7. Additional, Less Substantive Changes

In addition to the revisions described above, some less significant changes were made to clarify or change slightly some of the Commercial Rules.

The new Commercial Rules can be accessed [here](#).

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