

# EXPERT GUIDE

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## A Cautionary Tale: Regarding Arbitration Agreements in Professional Liability Retainers

*By Frances O'Meara and Jennifer Martin*

**T**oday, one of the most popular arbitration organisations in the world is the American Arbitration Association (“AAA”), with over 800 employees in 35 offices, comprised of over 8,000 arbitrators and mediators worldwide.

Many arbitration proponents argue that arbitration can be used to clear our overcrowded United States courtrooms by decreasing the use of our court system as a tool to resolve property disputes, divorces, wills, and other similar civil matters to allow the courts to handle mostly criminal cases. Arbitration advocates contend it is usually speedier and less expensive than litigation; can have simpler procedural and evidentiary rules; minimises hostility and is less disruptive of ongoing and future business dealings between the parties; preserves confidentiality; and may be more flexible with respect to scheduling, hearing dates, and discovery devices.

In practice, however, the cost savings and confidentiality benefits are not always realised. Before incorporating an arbitration provision identifying AAA as provider, consider how appli-

cation of *new* rules instituted by AAA may result in significant unanticipated costs and issues for professionals.

### The New Consumer Arbitration Rules vs. Commercial Arbitration Rules

A professional with a binding arbitration provision will typically file arbitration under AAA's Commercial Arbitration Rules (“Commercial Rules”). On the other hand, clients seeking to avoid filing costs and arbitrator's fees may seek to have these matters adjudicated under the New Consumer Arbitration Rules (“New Consumer Rules”), effective 1 September 2014. These rules replace the Supplementary Procedures for Consumer-Related Disputes (“Consumer Supplement”).

The New Consumer Rules apply to arbitrations where the parties have entered an agreement providing for arbitration by AAA and (1) have specified the New Consumer Rules will apply; (2) have specified the Consumer Supplement shall apply; (3) the arbitration agreement is within a “consumer agreement” that does not

specify particular rules; or (4) the arbitration agreement is within a consumer agreement that specifies a rules other than the New Consumer Rules.

Put simply, the New Consumer Rules will be applied by AAA if it determines, in its sole discretion, that the parties' agreement is a “consumer agreement,” notwithstanding whether the parties had a pre-existing agreement to arbitrate pursuant to an entirely different set of rules, such as the Commercial Rules.

### Commercial Rules vs. New Consumer Rules

Under the Commercial Rules, the initial filing fee is born by the party making the claim or counterclaim. The Commercial Rules do not prescribe any particular allocation for payment of the neutral's compensation, nor do they set forth any limits on the arbitrator's compensation. Both the initial filing fee and the arbitrator's compensation are subject to apportionment in the final award.

By contrast, the New Consumer Rules provide that the consumer will pay a

maximum \$200 filing fee, unless the agreement provides the consumer shall pay less, with the remainder payable by the business.

The New Consumer Rules further provide the business shall pay the full amount of the arbitrator's compensation unless the consumer, post-dispute, voluntarily elects to pay back a portion of the arbitrator's compensation. Save for limited exceptions, arbitrator compensation is not subject to reallocation by the arbitrator.

If an agreement is found to be a “consumer contract,” the New Consumer Rules advise businesses wishing to provide for application of these rules to: (1) notify AAA of the existence of such a consumer contract or of the business' intention to do so at least 30 days before the planned effective date of the contract; and (2) provide AAA a copy of the arbitration agreement.

AAA will then review the proposed arbitration agreement in exchange for a nonrefundable annual fee of \$500<sup>1</sup> and determine whether it complies with its standards for due. Additional fees are incurred if expedited

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review is required.

If the business refuses to pay, AAA will decline to administer consumer arbitrations arising out of that agreement and either party may submit their dispute to court. Once AAA finds a clause “compliant,” it will be included in a Consumer Clause Registry along with the business’ name, address, and related documents.<sup>2</sup>

**When Will AAA find a “Consumer Agreement” such that the New Consumer Rules must be applied?**

AAA defines a “consumer agreement” as one between individual consumers and businesses where the business has a standardised, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardised, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use.

The New Consumer Rules flesh out the term “consumer agreement” by giving a few specific examples. Credit card agreements, telecommunications contracts, and leases are all deemed “consumer agreements,” whereas home construction and remodeling contracts, real estate purchase and sale agreements, business insurance policies, and commercial guaranty agreements are not.

Notably absent are agreements for professional services. A review of AAA’s list suggests professional retainer agreements should not be deemed “consumer agreements,” as they are traditionally negotiated and individualised agreements, and not standard contracts of adhesion in which the client is in no position to debate the terms.

The New Consumer Rules provide that after AAA’s discretionary determination whether the New Consumer Rules will apply, any dispute regarding application of those rules will be adjudicated by the arbitrator. As

a result, if AAA mistakenly and arbitrarily determines a business professional’s retainer agreement is a “consumer agreement,” the professional will be forced to address the sensitive topic of the arbitrator’s compensation immediately upon the arbitrator’s assignment.

**Moral of the Story**

These New Consumer Rules come on the heels of the Consumer Financial Protection Bureau’s release of preliminary study results in December 2013 finding a relatively low number of arbitrations initiated by credit card-type consumers as compared to cases filed in federal court.<sup>3</sup> While the New Consumer Rules render arbitration more attractive for consumers, businesses may be discouraged from designating AAA in their retainer agreements as a result of the risk of increased costs (including filing fees, arbitrator’s fees, and annual registration fees), greater uncertainty in the application of rules (Consumer vs. Commercial), and loss of confi-

dentiality of arbitration clauses with the publishing of same in the Registry, if the agreement for professional services is deemed a “consumer contract.”

Professionals seeking to ensure application of the Commercial Rules may want to consider a few precautionary measures:

1. If you choose to designate AAA in your arbitration provision, be sure to articulate that the Commercial Rules should apply.
2. Try incorporating a contingency plan if AAA refuses to apply the Commercial Rules. For example, “Professional and Client agree to arbitrate all disputes before AAA under the Commercial Arbitration Rules. If AAA deems the Commercial Arbitration Rules inapplicable, Professional and Client instead agree to arbitrate before [Alternative Providers].”

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1. The review fee for arbitration clauses submitted at any time during 2014 will be \$650, which represents the cost of reviewing the clause and maintaining it on AAA's Registry of arbitration clauses through 2015.
2. The amount of awards and names of the parties will be included in quarterly reports issued by AAA. [https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat?\\_afLoop=240396513033200&\\_afWindowMode=0&\\_afWindowId=10bk08276z\\_198#%40%3F\\_afWindowId%3D10bk08276z\\_198%26\\_afLoop%3D240396513033200%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D10bk08276z\\_238](https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat?_afLoop=240396513033200&_afWindowMode=0&_afWindowId=10bk08276z_198#%40%3F_afWindowId%3D10bk08276z_198%26_afLoop%3D240396513033200%26_afWindowMode%3D0%26_adf.ctrl-state%3D10bk08276z_238)
3. "Arbitration Study - Section 1028(a) Study Results To Date." Consumer Financial Protection Bureau, 12 Dec. 2013. Web. 1 Sept. 2014

