

National Patent Board™

Non-Binding Arbitration Rules



AMERICAN ARBITRATION ASSOCIATION®

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Rules Amended and Effective June 1, 2014

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National Patent Board™ Non-Binding Arbitration Rules



Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our Web Site at **www.adr.org**.

Introduction

The National Patent Board Non-Binding Arbitration Rules provide parties with procedures for resolution of a dispute involving a U.S. patent that result in a non-binding award that is advisory in nature. A non-binding award is rendered by an impartial arbitrator after hearing and considering arguments and evidence from the parties. The non-binding arbitration process may be used to assess parties' respective positions. A non-binding award may assist such parties during informal settlement discussions or a subsequent mediation.

These rules are not intended for binding arbitration of disputes involving a U.S. patent. Cases filed with AAA seeking binding arbitration of a U.S. patent dispute shall not be administered under the *National Patent Board Non-Binding Arbitration Rules*. Parties seeking final, binding arbitration of a U.S. patent dispute should reference in their arbitration agreement, demand or submission agreement AAA's Commercial Arbitration Rules or International Arbitration Rules as modified by AAA's *Supplementary Rules for the Resolution of Patent Disputes*.

Standard Clause

The parties can provide for non-binding arbitration of future disputes involving a U.S. patent by inserting the following clause into their contracts:

Any controversy or claim involving a U.S. patent arising out of or relating to this contract, or the breach thereof, shall be submitted to non-binding arbitration administered by the American Arbitration Association® under its National Patent Board Non-Binding Arbitration Rules prior to initiation of litigation.

Submission Agreement

The parties can submit existing disputes involving a U.S. patent to non-binding arbitration by executing an agreement that states the following:

We, the undersigned parties, hereby agree to submit to non-binding arbitration administered by the American Arbitration Association under its National Patent Board Non-Binding Arbitration Rules the following U.S. patent-related controversy: (describe briefly).

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses.

Mediation

The parties might wish to pursue mediation before or after the issuance of a non-binding award. In mediation, a neutral mediator assists the parties in negotiating a settlement. The mediator may be either the same individual selected by the parties to serve as the non-binding arbitrator or a different individual mutually selected by the parties. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures.

If the parties wish to have a mediator assist with settlement discussions before or after the issuance of a non-binding award, the parties can enter into the following agreement:

"The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures." (In addition to contact information for the parties and their legal representatives and a brief description of the dispute, the submission agreement may also either direct that the neutral who issued the non-binding award serve as the mediator or include qualifications for selection of a different individual to serve as the mediator, specify method of payment, the locale of meetings, deadline for completion, or any other issue of concern to the parties.)

National Patent Board Rules

R-1. Agreement of Parties

- (a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for non-binding arbitration by the American Arbitration Association (hereinafter AAA) under its *National Patent Board Non-Binding Arbitration Rules* or for non-binding arbitration by the AAA of a U.S. patent dispute without specifying particular rules. These rules and any amendments of them shall apply in the form in effect at the time the administrative requirements are met for a demand for non-binding arbitration or submission agreement received by the AAA.
- (b) The parties, by written agreement, may vary prior to arbitrator appointment the procedures set forth in these rules except for the procedure specifying issuance of a non-binding award. Disputes involving a U.S. patent for which a final, binding award is sought shall be administered by AAA in accordance with either the AAA's Commercial Arbitration Rules or the International Centre for Dispute Resolution's International Arbitration Rules, as modified by the *Supplementary Rules for the Resolution of Patent Disputes*.
- (c) After appointment of the arbitrator, modifications to these rules may be made only with the consent of the arbitrator.
- (d) The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and arbitration is initiated under these rules, they thereby authorize the AAA to administer the non-binding arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign administration of arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrators ("National Roster") and within it, a panel of arbitrators having experience in patent law ("National Patent Panel"). AAA shall appoint an arbitrator as provided in these rules or as agreed to by the parties.

R-4. Initiation under Arbitration Provision in a Contract

- (a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:
- (i) The initiating party (the “claimant”) shall, within the time period, if any, specified in the contract(s), give to the other party (the “respondent”) written notice of its intention to demand non-binding arbitration. The demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested. Claimant may also request that the non-binding arbitration be conducted on documents only or telephonically.
 - (ii) The claimant shall file at any office of the AAA a copy of the demand and the relevant arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.
 - (iii) The AAA shall confirm notice of such filing to the parties.
- (b) A respondent may file an answering statement with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included in these rules.
- (c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.
- (d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute involving a U.S. patent may commence non-binding arbitration under these rules by filing at any office of the AAA a copy of a written submission to arbitrate under these rules, signed by the parties. The written submission shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought, the hearing locale requested, a request for documents only or telephonic hearing, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final non-binding award.

R-7. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator may be either the same individual selected by the parties to serve as the non-binding arbitrator or a different individual mutually selected by the parties. Where the parties to a pending non-binding arbitration agree to mediate under the AAA's rules, no additional filing fee is required to initiate the mediation.

R-8. Administrative Conference

The AAA shall conduct an administrative conference by telephone with the parties and/or their representatives. The conference shall address such issues as arbitrator qualifications and selection, preference for documents only or telephonic hearing, initial disclosures, a timetable for hearings, and any other administrative matters.

R-9. Fixing of Locale

For arbitrations that will not be conducted solely on documents or by means of telephonic hearings, if a locale was not specified in the contract or the submission the filing party may request a hearing locale. If the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and the AAA's decision shall be final and binding.

R-10. Number of Arbitrators

Disputes heard under these Rules will be heard and determined by one arbitrator unless the parties agree otherwise.

R-11. Appointment from the National Roster

- (a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. If the agreement specifies a period of time for appointment of the arbitrator and any party fails to make the appointment within that period, the AAA shall make the appointment. If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.
- (b) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party an identical list of five proposed arbitrators drawn from its National Patent Panel. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
- (c) If the parties are unable to agree upon an arbitrator, each party may strike two names from the list, number the remaining names in order of preference, and return the list to the AAA by the date specified. If a party does not return a list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment of an arbitrator cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Patent Panel without submission of additional lists.

R-12. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

- (c) In order to encourage disclosure by arbitrators, disclosure information pursuant to this Section R-12 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to effect impartiality or independence.

R-13. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
 - (i) partiality or lack of independence,
 - (ii) inability or refusal to perform his or her duties with diligence and in good faith, and
 - (iii) any grounds for disqualification provided by applicable law.
- (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-14. Communication with Arbitrator

No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration.

R-15. Vacancies

- (a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled by direct appointment made by the AAA from the National Patent Panel.
- (b) In the event of the appointment of a substitute arbitrator, the arbitrator shall determine in his or her sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-16. Preliminary Hearing and Scheduling Order

- (a) As promptly as practicable after the selection of the arbitrator, a preliminary hearing shall be held among the parties and/or their representatives and the arbitrator. Unless the parties agree otherwise the preliminary hearing shall be conducted by telephone.
- (b) The arbitrator shall issue a scheduling order setting forth the matters addressed during this hearing. The arbitrator shall have the authority to resolve any differences between the parties and/or their representatives over the issues addressed during this hearing.

- (c) At the preliminary hearing the matters to be considered may include, without limitation:
- (i) whether the parties wish to enter into a confidentiality agreement to require each party to maintain the confidentiality of information and documents disclosed during the course of the arbitration;
 - (ii) whether the hearing shall be conducted on documents only, telephonically or in person and the extent to which telephonic or in person hearings will proceed on consecutive days;
 - (iii) the necessity for injunctive relief;
 - (iv) the designation of substantive law(s) or rules of law;
 - (v) issues related to the exchange of information and exhibits.

R-17. Exchange of Information or Exhibits

- (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of non-binding arbitration, the arbitrator may direct
- (i) the production of documents and other information, and
 - (ii) the identification of any witnesses to be called.
- (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-18. Date, Time, and Place of Hearing

After consulting with the parties, the arbitrator shall set the date and time for submission of documents for a documents only hearing, the date and time for a telephonic hearing, or the date, time and place for an in-person hearing. The parties shall respond to requests for telephonic or in person hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date and adhere to the established hearing schedule.

R-19. Attendance at Hearing

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary or the parties agree otherwise. The arbitrator shall have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representative.

R-20. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is to first participate by telephone or appear in person. When such a representative initiates arbitration or responds for a party, notice is deemed to have been given.

R-21. Oaths

Before proceeding with the first hearing, an arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-22. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time and place determined by the arbitrator.

R-23. Language

If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the arbitrator to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The arbitrator may order that any documents delivered in another language shall be accompanied by a translation into the language of the arbitration. The arbitrator may apportion the cost of the translation among the parties.

R-24. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-25. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-26. Absence of a Party or Representative

- (a) The non-binding arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. A non-binding award shall not be made solely on the default of a party. The arbitrator will require the party who is present to submit such evidence as the arbitrator may require for rendering a non-binding award.
- (b) Where a party, after notice, is not participating in the arbitration, the participating party may request in writing that the AAA or the arbitrator close the case with a written notice to both parties, so the parties may pursue other dispute resolution methods available to them.

R-27. Conduct of Proceedings

- (a) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the rendering of a non-binding award and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on specific issues.
- (b) The parties may agree to conduct the proceeding as either a documents only hearing or as a telephonic hearing in lieu of an in-person hearing.

R-28. Evidence

- (a) The parties may offer such evidence as is relevant and material to an understanding of the dispute and shall produce such evidence as the arbitrator may deem necessary to render a non-binding award. Conformity to the legal rules of evidence shall not be necessary unless the parties agree otherwise. The parties must exchange any documentary evidence to be used at the hearing at least five business days prior to either a telephonic or an in-person hearing.
- (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
- (c) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.
- (d) When ordering the production of evidence the arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

- (e) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objections raised by a party.

R-29. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If evidence by affidavit or post-hearing filing of documents or other evidence has been ordered and the date set for their receipt is later than that set for the receipt of briefs, the latter date shall be the closing date of the hearing. The time limit within which the arbitrator is required to render a non-binding award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-30. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-31. Extension of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the non-binding award. The AAA shall notify the parties of any extension.

R-32. Serving of Notice

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to a party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax) or electronic mail (e-mail) to give the notices required by these rules. The parties shall also accept notice by telephone.

- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-33. Time of Non-Binding Award

Unless agreed otherwise by the parties, a non-binding award shall be rendered no later than 30 calendar days from the date of closing the hearing, or, if oral arguments have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-34. Form of Non-Binding Award

The non-binding award shall be in writing, shall be signed by the arbitrator, and shall provide very brief reasons for the non-binding award unless the parties agree otherwise.

R-35. Delivery of the Non-Binding Award to Parties

Parties shall accept as notice and delivery of the non-binding award the placing of the non-binding award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service.

R-36. Release of Documents For Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

R-37. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a non-binding proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to the arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

- (d) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employee as a witness in a litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-38. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-39. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise.

R-40. Arbitrator's Compensation

- (a) The arbitrator shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
- (b) If there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
- (c) Any arrangement for compensation of the arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-41. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-42. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-43. Suspension or Closure for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment, if proceeding to a non-binding award is desired. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

Administrative Fee Schedule

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT
www.adr.org/feeschedule.

