
July 9, 2014

Accelerated Adjudication and New Assignment Procedures Adopted for New York Commercial Division

The Commercial Division Advisory Council was created in 2013 as a follow up to Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century.¹ The Council's goal is to advise the Chief Judge on an ongoing basis about matters concerning the Commercial Division of the Supreme Court of New York, to consider how the Commercial Division can better serve the needs of the business community and the changing economy, and to implement the recommendations of the Task Force's 2012 comprehensive report.² Roberta Kaplan, a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, serves on the Advisory Council and as the Co-Chair of the Advisory Council's Subcommittee on Best Practices for Judicial Case Management.

This memorandum is the first in a series of client memoranda explaining changes to the rules that apply to cases in the New York Commercial Division. This memorandum will address (a) a new rule offering parties in the Commercial Division accelerated adjudication procedures and (b) amendments limiting the amount of time that parties have to request that their litigation be assigned or transferred to the Commercial Division. In the future, we will be issuing memoranda on additional pending or contemplated changes to the Commercial Division Rules, including changes to the discovery rules, new practices designed to encourage settlement, and modifications to the rules regarding court appearances and sanctions.

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On April 17, 2014, New York State Chief Administrative Judge Gail Prudenti signed Rule 9 of section 202.70(g) of the Uniform Rules for the Supreme and County Courts, titled Accelerated Adjudication Actions.³ Rule 9, which went into effect on June 2, created new accelerated adjudication procedures for cases eligible for New York's Commercial Division. These procedures were adopted as part of the Commercial Division Advisory Council's efforts to update and improve practice in the Commercial Division and to ensure that New York courts remain an attractive forum for the resolution of business disputes.

¹ For more information on the Council, see http://www.nycourts.gov/press/PDFs/PR13_05.pdf.

² The Task Force's report can be found at
<https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21st.pdf>.

³ For the full text of the rule, see <http://www.nycourts.gov/rules/comments/orders/AO-77-14.pdf>.

The accelerated procedures are only available to those cases which already meet the threshold requirements for the Commercial Division and cannot be used in class actions.⁴ Generally speaking, such cases include those involving claims of breach of contract or fiduciary duty, fraud, misrepresentation, business tort, or other statutory or common law violation arising out of business dealings; transactions governed by the Uniform Commercial Code; transactions involving commercial real property; shareholder derivative actions; business transactions with financial institutions; internal affairs of business organizations; malpractice by accountants, actuaries, or lawyers in commercial matters; environmental insurance coverage; commercial insurance coverage; dissolution of businesses; or applications to stay or compel arbitration. (In addition, there is a monetary threshold for the amount in controversy exclusive of punitive damages, which in New York City is \$150,000.)

Like alternative dispute resolution methods, the accelerated adjudication procedures seek to streamline and reduce the costs of litigation.

Opting In

Parties can adopt the accelerated adjudication procedures in two ways. First, to guarantee that any potential future disputes arising under a contract will be governed by these procedures (so long as they otherwise qualify for the Commercial Division), parties may include in the contract a provision so stating, such as the following sample provision:

- “Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, and to the application of the Court’s accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof.”⁵

Such a provision has the benefit of eliminating the need for protracted negotiations over the specific procedures that will apply to disputes relating to the agreement.

Second, the parties may agree at the outset of a litigation that otherwise comes within the requirements for Commercial Division cases to adopt Rule 9’s accelerated procedures.

⁴ For the rule governing the threshold requirements for the Commercial Division, revised as of February 17, 2014, see <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>.

⁵ See <http://www.nycourts.gov/rules/comments/orders/AO-77-14.pdf>.

The Terms of Accelerated Adjudication

Under the newly-adopted Rule 9, parties who have agreed to accelerated adjudication are deemed by the Court to have irrevocably waived:

- any **objections based on lack of personal jurisdiction or forum non conveniens**,
- the right **to trial by jury**, and
- the right **to recover punitive or exemplary damages**.

The parties also agree to **limited discovery**, particularly:

- no more than **seven interrogatories** and **five requests to admit**, and
- no more than **seven depositions** per side with each deposition no more than seven hours in length.

Further, parties agree to limit their document requests to those documents relevant to a claim or defense in the action, and to restrict requests to the relevant time frame, subject matter, and persons or entities.

In addition, unless otherwise specified, the parties agree to the following rules for **electronic discovery**:

- the production of electronic documents should normally be made in a searchable format;
- the description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose documents may reasonably be expected to contain evidence material to the dispute; and
- where the costs and burdens of e-discovery are disproportionate to the nature of the dispute, the amount in controversy, or the relevance of the materials requested, the Court will deny the request or require the requesting party to advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

Additionally, under accelerated adjudication, parties agree to be **ready for trial within nine months** from the date of filing of a Request of Judicial Intervention, and therefore to limit all pre-trial proceedings, including discovery, pre-trial motions, and mandatory mediation, to a nine-month period.

The parties also agree to waive the right **to any interlocutory appeal**.

Factors to Consider

There are several factors counsel should consider before agreeing to accelerated adjudication procedures:

- *Whether to waive interlocutory appeals.* New York state courts, unlike federal court and most state courts, allows repeated interlocutory appeals to the Appellate Division as of right of any order that, among other things, “involves some part of the merits” or “affects a substantial right.” N.Y. C.P.L.R. § 5701 (McKinney 1999). These repeated interlocutory appeals can cause unnecessary expense and delay. In terms of a party’s right to appeal, the accelerated adjudication procedures therefore fall somewhere between a conventional alternative dispute resolution (ADR) process and traditional Commercial Division practice. Unlike in ADR, the final decision in any case using the new accelerated adjudication procedures can be appealed. Unlike traditional Commercial Division practice, however, interlocutory decisions in any case using accelerated adjudication cannot be appealed. Counsel should consider whether it will ultimately save or cost money to forego the right to interlocutory appeals. In some cases, for example, a business litigant would prefer to seek a definitive ruling on the meaning of a contract through interlocutory appeal prior to a full trial.⁶
- *Whether to waive a jury trial.* As one commenter on the proposed draft of the rule pointed out,⁷ jury trials do not *necessarily* take more time or require more costly preparation than a bench trial so counsel should consider the possible value of a jury trial. However, it is already common for parties in the Commercial Division to waive trial by jury, even before the advent of Rule 9.
- *Whether to limit discovery.* In cases with extensive out-of-town witnesses, parties should consider expanding the number of depositions each side can take, as more extensive discovery could potentially clarify the factual issues in dispute and expedite the trial.⁸ However, such alterations to the Rule 9 procedures would likely require the approval of the Commercial Division judge assigned to the case.

⁶ For more information about the factors to consider in waiving interlocutory appeal, see Suevon Lee, Experts: Consider Value of Interlocutory Appeal Before Waiving, The Am. Lawyer (May 14, 2014), <http://www.americanlawyer.com/id=1202655120072/Experts-Consider-Value-of-Interlocutory-Appeal-Before-Waiving?slreturn=20140602161752>.

⁷ Steve Susman, Proposed Adoption of Rule 9 for accelerated adjudication procedures in Commercial Division, New York Courts (Dec. 8, 2013 7:26 AM), <http://www.nycourts.gov/rules/comments/PDF/received/CommDivAccAdjud.pdf>.

⁸ Paul Frohman, New York Courts (Dec. 20, 2013), <http://www.nycourts.gov/rules/comments/PDF/received/CommDivAccAdjud.pdf>.

Note also that the rule lacks a specific enforcement mechanism for the nine-month deadline for trial, so it is possible that an opposing party could attempt to exceed the deadline. It is unclear in such a situation what the available remedy would be.⁹

It may be difficult for parties to assess whether it would ultimately be in their best interest to agree to these procedures at the outset of a contractual relationship, before parties know the nature of a possible dispute.¹⁰ Counsel should nonetheless consider, when entering into a contract or when litigation is ultimately commenced, the kinds of disputes that are likely to arise under a given contract and whether these procedures would likely save time and money and otherwise work to their benefit.

Accelerated Trial Procedures Elsewhere

Other courts have adopted procedures intended to accelerate trial. For example, in 2010, Delaware County established the Complex Commercial Litigation Division, which, like its New York counterpart, handles cases that meet a monetary threshold requirement. The Division requires the early consideration of electronic discovery, intended to promote efficient case management.¹¹ Furthermore, the so-called “rocket dockets” used in the United States District Court for the Eastern District of Virginia and the Eastern District of Texas, among others, are known for their compressed pre-trial schedules, briefing regimes, and trials. However, unlike the accelerated procedures that New York’s Commercial Division now offers, neither Delaware nor these “rocket docket” states ask parties to give up substantive procedural rights in favor of a speedier trial. New York is thus on the forefront in adopting these ADR-like procedures for litigation.

Time Limit on the Assignment and Transfer of Cases to the Commercial Division

In addition to adopting the new rule on accelerated adjudication procedures, on July 1, 2014, New York State Chief Administrative Judge Gail Prudenti signed amendments to sections 202.70(d) and (e) of the Uniform Rules for the Supreme and County Courts, titled Assignment to the Commercial Division and Transfer into the Commercial Division.¹² These amendments, which will go into effect on September 2, limit the amount of time that a party has to seek assignment of a case to the Commercial Division to

⁹ New York State Bar Ass’n Commercial and Fed. Litig. Section, New York Courts (Jan. 27, 2014),
<http://www.nycourts.gov/rules/comments/PDF/received/CommDivAccAdjud.pdf>.

¹⁰ Paul Frohman, New York Courts (Dec. 20, 2013),
<http://www.nycourts.gov/rules/comments/PDF/received/CommDivAccAdjud.pdf>.

¹¹ For more information about the Delaware Complex Commercial Division and its procedures, see
<http://courts.delaware.gov/Superior/complex.stm>

¹² For the full text of the rule, see http://pdfserver.amlaw.com/cli_editorial/CaseAssignmentRule.pdf.

ninety days following service of the complaint. Previously, parties had no time limitation in seeking assignment or transfer to the Commercial Division.

To seek such assignment, a party should file a Request for Judicial Intervention (RJI) with a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for the Commercial Division set out in sections 202.70(a), (b) and (c) of the Uniform Rules for the Supreme and County Courts.¹³ If a RJI is filed within the ninety-day period but the case is not assigned to the Commercial Division because the party did not designate the case as “commercial,” any other party may apply by letter application to the Administrative Judge (with a copy to all parties), within ten days after the receipt of a copy of the RJI, for a transfer to the Commercial Division.

Past this ninety day period, a case cannot be assigned or transferred to the Commercial Division unless either (a) a party seeks a transfer to the Commercial Division by letter application to the Administrative Judge (with a copy to the other party/parties) showing good cause for the delay, or (b) a non-Commercial Division Justice to whom a case is assigned requests *sua sponte* that the Administrative Judge transfer a case to the Commercial Division that meets the Division’s threshold requirements. In either case, the determination of the Administrative Judge regarding the transfer is final and non-appealable.

The goal of these amendments, like the goal of the accelerated adjudication procedures, is to make the resolution of business disputes more efficient and less expensive. It aligns the practice of the judicial assignment system in the Commercial Division with the practice in federal court, giving Commercial Division judges earlier authority over their cases.

Interestingly, the New York City Bar opposed this proposal, commenting that “if the parties are content to conduct discovery without such involvement [of a Commercial Division Justice] and do not have any issues that actually require judicial resolution, we do not see a reason to penalize them by making a Commercial Division unavailable . . .”¹⁴ The amendments, however, do provide a safety hatch: they allow an application for transfer after ninety days if the party is able to show good cause.

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¹³ See <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>, setting out these requirements.

¹⁴ See <http://www.nycourts.gov/rules/comments/PDF/received/Rule202-7od.pdf>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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