



BIGSTOCK

Commercial Division Rule Changes Will Foster Efficiency and Predictability

BY MARGARET A. DALE
AND DAVID M. JACOBSON

Several recently adopted changes to the rules of New York's Commercial Division highlight the broad impact that Chief Judge Jonathan Lippman's June 2012 Task Force Report has made, and continues to make, on the state's business courts. These changes, which include increased monetary thresholds, limits on depositions and interrogatories, and a mandatory mediation program in New York County, are designed to make New York's commercial courts more business friendly and to reduce the time and expense of litigation. Some of the rule changes bring Com-

mercial Division practice in line with existing federal court practice. This article surveys the new rules that have been adopted and other potential changes outlined in the Task Force Report that would, if adopted, further reform the Commercial Division. We anticipate that the changes will produce greater efficiency and cost predictability, which will in turn make the Commercial Division a more desirable forum for business litigants.

The Task Force Report

In June 2012, the Chief Judge's Task Force on Commercial Litigation in the 21st Century issued a report (the Task Force Report) that recommended wide-ranging changes to the rules, practices, and structure of the Commercial Division. The recommendations focused on docket reform, judicial support and engagement, procedural reforms, propos-

als to facilitate early case resolution, procedures to support international arbitration, and long-term strategic goals. Recognizing the important role that the rule of law and efficient, high quality commercial courts play in maintaining New York's status as a world-leading financial and commercial center, Lippman declared the goal of the Task Force to "make sure that New York remains at the cutting edge of how commercial disputes are resolved [...] and set a new vision for how we in the New York State court system might better serve the needs of the business community and our state's economy." State of the Judiciary, Feb. 14, 2012. Task Force co-chair and former Chief Judge Judith S. Kaye underscored the need for more efficient case resolution procedures to satisfy the needs of litigants when she commented that the Commercial Division is "overburdened" by a "burgeoning, increasingly complex workload".

The first reforms went into effect in September 2013. Several more have gone into effect between June and September 2014, and other reforms are currently proposed and open for public comment before adoption. Still other proposals recommended in the Task Force Report have not yet progressed to rulemaking but may be coming in the near future.

Increased Monetary Threshold

In January 2014, the monetary threshold for obtaining a Commercial Division judicial assignment in New York County increased from \$150,000 to \$500,000. Monetary thresholds in several other counties doubled in July 2014. Nassau County's \$200,000 threshold is the highest threshold outside of Manhattan; several other counties now have thresholds of \$100,000 or \$150,000. These increased thresholds are intended to reduce the size of the Commercial Division's docket and make it easier for the Commercial Division to handle the larger and more complex commercial cases with greater speed and efficiency.

Early Assignment of Cases

Effective Sept. 2, 2014, parties must seek the early assignment of cases to the Commercial Division. Under newly amended §§202.70(d)-(e) of the Uniform Civil Rules for the Supreme Court and the County Court, Rules of the Commercial Division of the Supreme Court (the Rules), a party seeking assignment to the Commercial Division must file a Request for Judicial Intervention (RJI) designating the case as "commercial" within the 90 days following service of the complaint. If this does not occur, the parties will be precluded from seeking a Commercial Division judge assignment later except by letter application to the administrative judge showing good cause to transfer the case. That said, a non-Commercial Division judge to whom a case is assigned may sua sponte request the administrative judge to transfer a case provided that jurisdictional requirements are met. The rule change is intended to promote early and continued judicial involvement with the goal of facilitating prompt resolution of discovery disputes and monitoring compliance with discovery obligations. Given the tight time frame, litigants should immediately consider whether a newly-filed case warrants assignment to the Commercial Division and make the request within the deadline or face being precluded from seeking transfer.

Limiting Discovery

Several new rules impose real limits on discovery. Rule 11-a, effective June 2, 2014, imposes a maximum of 25 interrogatories per party and, unless otherwise ordered by the court or consented to by the parties, limits the scope of interrogatories to defined topics such as names of witnesses with material knowledge, the computation of damages, and the location and existence of relevant documents and other physical evidence. Contentious interrogatories may be served only after the conclusion of other discovery. The rule is intended

MARGARET A. DALE is a partner and DAVID M. JACOBSON is an associate at Proskauer Rose, where they practice in the litigation department.

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to minimize unnecessary burdens that come from excessive interrogatories and acknowledge the benefits of obtaining information directly from witnesses at deposition rather than from interrogatory responses carefully drafted by counsel. The Task Force Report also recommended a similar rule imposing limits on document demands, but as of this writing that recommendation has not progressed to rulemaking.

A proposed rule open for public comment through Aug. 19, 2014, would impose a limit of 10 depositions per party and a durational limit of seven hours per deposition. The rule mirrors Federal Rules of Civil Procedure 30(a)(2)(A)(i) and 30(d)(1). Under the proposed rule, the parties could agree to alter the limits or alternatively a party could seek leave of court to alter these limits upon a showing of good cause. The new proposed rule responds to concerns voiced by in-house counsel about the enormous expense (and undue delays) that unlimited depositions can impose.

Rule 11-b, effective Sept. 2, 2014, modifies privilege log practice to reduce the time and expense involved in the preparation of the logs. The Task Force Report noted that the cost of privilege logs often outweighs their value because logs are frequently “not reviewed or used in any way by the parties.” Rule 11-b requires parties to meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the logs and methods that can streamline the process, including logging documents by category instead of individually. Rule 11-b expresses the Commercial Division’s preference for categorical designations, which save time and expense, and provides that if a requesting party demands a document-by-document privilege log, the producing party may apply to the court for the allocation of costs, including attorney fees, incurred in preparing the itemized log. To the extent that parties continue to request document-by-document logs, the rule provides that such logs will now include only a single entry for each email chain, as opposed to separate entries for each email within the chain. Additionally, the rule encourages parties with complex cases to hire a Special Master to assist with discovery issues, including to review documents withheld as privileged that are being challenged by the non-disclosing party. With these changes, the new rule seeks to preserve the ability of parties and the court to monitor improper withholding or redaction of documents at a significantly reduced cost.

E-Discovery Guidelines

New Rule 11-c introduces precatory guidelines with respect to the discovery of electronically stored information (ESI) from nonparties, with the purpose of improving the efficiency of e-discovery and reducing the burdens and costs imposed on nonparties. The guidelines instruct parties seeking ESI discovery from a nonparty to reasonably limit discovery requests and to take into consideration several “proportionality factors,”

including the importance of the issues at stake in the litigation, the amount in controversy, the expected importance of the requested ESI, the availability of the ESI from another source, and the expected burden and cost to the nonparty. Because the guidelines are not mandatory, it remains to be seen what impact they will have.

Expert Discovery Reforms

Rule 13(c), in effect since September 2013, requires parties to confer about expert disclosure within 30 days after the close of fact discovery and to set a schedule for expert discovery that will conclude no later than four months after the close of fact discovery. The rule requires the exchange of expert reports and specifies the information those reports must include. The rule also provides for depositions of testifying experts and requires that expert discovery be completed before a note of issue may be filed. This rule change is intended to provide parties with an earlier, meaningful opportunity to evaluate the strengths and weaknesses of claims, which is expected to lead to the earlier resolution of some cases.

New Accelerated Adjudication Procedures

Rule 9, in effect since June 2, 2014, allows Commercial Division judges to initiate accelerated adjudication procedures (akin to a “rocket docket”) in a given case with the consent of the parties. These procedures require parties to conclude all pre-trial proceedings within nine months of the RJI filing. To opt into these accelerated procedures, parties must agree to waive certain rights and objections, including objections based on lack of personal jurisdiction or forum non conveniens, the right to a jury trial, the right to recover punitive or exemplary damages, and the right to an interlocutory appeal. The parties also must agree to limit discovery substantially, with default limits set at seven interrogatories, five requests to admit, and seven depositions per side. Notably, however, these limits may be changed by agreement of the parties. Paired with the new requirement that parties seeking a Commercial Division assignment file an RJI within 90 days of service of the complaint, the combined effect is that parties that agree to accelerated procedures can expect to begin trial no later than one year after the complaint is served.

Obligation to Confer

Newly amended Rule 8(a), effective Sept. 2, 2014, mandates that prior to a preliminary conference parties must confer about voluntarily exchanging information in an effort to aid early settlement. The rule is intended to promote early, cost-effective settlement discussions. In order to avoid disputes, however, the rule stops short of imposing an obligation to exchange information. It remains to be seen how useful this reform will be given the voluntary nature of the exchange.

Staggered Court Appearances

In August 2014, Chief Administrative Judge A. Gail Prudenti approved a proposal for staggered court appearances, where attorneys are

scheduled to appear in court at specific times. Staggered court appearances avoid “cattle calls” that can cause attorneys to waste significant time in court before their case is called, and, therefore, should reduce attorneys’ fees. Staggered appearances are a regular practice in federal court and had become increasingly common in Commercial Division practice prior to their recent adoption.

Mandatory Mediation Pilot Project

By administrative order effective July 28, 2014, the Commercial Division established a New York County-only mandatory mediation pilot project that will last 18 months. The program sends to mediation every fifth case that is newly assigned to a Commercial Division judge. The procedures governing the pilot project are set forth in the Rules and Procedures of the Alternative Dispute Resolution

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Program of the Commercial Division. If all parties to a case referred to mediation agree that the case is not suitable for mediation, they can opt out. Otherwise, a party that does not want its case to go to mediation has 30 days to petition the court and make a showing of good cause why mediation would be ineffective, unduly burdensome, or unjust.

After a case is referred to mediation, counsel for the parties are instructed to confer and attempt to agree upon a mediator. Within 120 days of the RJI filing, counsel for the parties must jointly inform the court’s Alternative Dispute Resolution Coordinator that they have selected a mediator or, alternatively, request that the Coordinator provide a list of neutrals. The parties must then agree upon a mediator or rank the mediators in order of preference. If the parties are unable to agree and the ranking process does not produce a preferred mediator, the Coordinator will designate a mediator. The mediator may allow discovery as necessary to assist in the resolution of the case. The parties have up to 210 days from the time that the RJI is filed to complete the mediation process. If they need more time, the Coordinator can request court authorization to continue the process beyond that date. The mediators will serve at no charge during preparation for the mediation and for a total of four hours during actual mediation sessions. After that, the parties will share responsibility for fees of \$300 per hour.

The program is intended to help parties resolve disputes faster and at a lower cost and, therefore, has garnered support from, among others, in-house corporate counsel. It can also be expected to reduce stress on the courts, which may help the Commercial

Division handle the cases that remain on its docket with greater speed.

Some have criticized the pilot program for its arbitrariness. Critics argue that parties may waste time and resources mediating a case to no resolution and then, months later, be forced to return to square one and litigate. However, defenders note that even if mediation fails to completely resolve a case, it can narrow the issues or provide parties with a better understanding of their adversary’s position, which can assist in resolving cases faster. If the pilot program is a success, it could lead to a more permanent mediation program, perhaps across multiple counties.

Special Masters Pilot Program

Under a new “Special Masters” pilot program, adopted in August 2014 and beginning Sept. 2, 2014, one or more Commercial Division judges will refer complex discovery issues to a pool of seasoned former practitioners who are no longer in active practice. The Special Masters will serve pro bono. The pilot program is scheduled to last 18 months. As of this writing, Chief Administrative Judge Prudenti and the courts had yet to decide which counties will test the pilot.

Possible Future Proposals

The Task Force Report contains numerous recommendations that have yet to progress to rulemaking. Suggestions worth considering include:

- The creation of a searchable database of Commercial Division decisions. This would help counsel in researching and briefing arguments before the Commercial Division and would help the Commercial Division develop its own body of case law, which ultimately provides predictability to litigants that appear before it.
- Strict rules requiring parties to meet and confer regarding discovery disputes and to provide advance notice of discovery motions.
- Letter briefing for discovery motions and conducting discovery conferences by telephone. Letter briefing for discovery motions is regular practice in federal court and reduces time and expense where more formal briefing is not necessary. Many discovery conferences do not need to be handled in person, and allowing telephone conferences would increase efficiency and reduce attorney fees.

Overall Assessment

On balance, the recent changes are important measures to keep the Commercial Division robust and allow it to meet the needs of the business community. Counsel practicing in these courts need to be aware of the new rules and the sometimes serious consequences of failing to abide by them. We expect that the new measures will improve efficiency and cost predictability and will lead to the earlier resolution of some cases. Corporations and their in-house counsel will welcome many of these changes, and as the changes take effect, the expectation is that litigants will find the Commercial Division an increasingly appealing forum for resolving complex business disputes.