Commercial Division Rule Changes Will Foster Efficiency and Predictability

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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 Commercial 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, proposals 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.”

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(c)-(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 party 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 continuous 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. Contention interrogatories may be served only after the conclusion of other discovery. The rule is intended...
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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 consider about a 14-day closure 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 earlier, meaningful opportunity to evaluate 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 in a matter must confer about voluntarily exchanging information in an effort to aid early settlement. The rule is intended to provide early resolution of discovery disputes. 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. Gal 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 Division. In fact, the changes will produce greater efficiency and cost predictability, which will in turn make the Commercial Division a more desirable forum for business litigants.

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. These Special Masters will be graduates of the program. 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 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 this court 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.