



New Rules in New York Mean Speedy Trials for Commercial Disputes (But at a Price)

The Commercial Division of the Supreme Court of New York State is the branch of the state's trial court system that adjudicates a large variety of commercial disputes.¹ In 2012, a "Task Force on Commercial Litigation" recommended changes to the Commercial Division rules to better serve the needs of the business community and the resolution of commercial disputes in New York state courts. As the Task Force recognized, the "judges of the Commercial Division adjudicate thousands of cases and motions that include some of the most important, complex commercial disputes being litigated anywhere."² Several recent amendments to the Rules for the Commercial Division of the State of New York are aimed at easing the burdens associated with complex commercial disputes and ensuring the state's courts remain an attractive forum for the resolution of business disputes.

The recent changes to the Commercial Division rules include (i) new procedures offering parties accelerated adjudication, and (ii) new rules drastically streamlining costly and time-consuming discovery procedures. While these rules have the potential to significantly reduce the cost, scope, and length of business litigation in New York, only time will tell whether they will actually transform New York's Commercial Division into a so-called "rocket docket" jurisdiction.

In the meantime, litigators and transactional lawyers alike should familiarize themselves with these new rules, as many come with significant strings attached. For example, parties who choose to proceed under the Commercial Division's new accelerated adjudication procedures—either at the onset of litigation or in contractual provisions—could be waiving significant rights, and they will therefore need to carefully weigh whether it is in their interest to agree to these procedures. Expediting and reducing costs in cases before New York's Commercial Division, it seems, comes at a price.

Agreeing to Accelerated Adjudication Procedures

Newly implemented Commercial Division Rule 9 offers parties accelerated adjudication procedures.³ The parties may agree to resolve any disputes, other than class actions, pursuant to these accelerated procedures. Under the new rule, parties agree to be *trial-ready within nine months*, effectively compressing all pretrial proceedings, including discovery, pretrial motions, and mandatory mediation, into a nine-month period.⁴ Rule 9 has several notable features and strings attached, however.

First, the parties must specifically choose to have these procedures apply to their dispute. They can so agree either at the onset of litigation or by including a specific provision in agreements where they agree that these procedures will apply to future disputes. Indeed, Rule 9 itself provides a sample choice of forum provision for parties to consider including in agreements if they wish for the accelerated adjudication procedures to apply to potential disputes, ensuring that transactional lawyers will encounter similar provisions during negotiations. Rule 9's sample choice of forum provision reads as follows:

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

Second, accelerated adjudication comes at a price. Parties who agree to Rule 9's accelerated adjudication process in the Commercial Division *irrevocably waive* certain important rights. Specifically, the parties in a Rule 9 accelerated action are deemed to have irrevocably waived:

- Any objections based on lack of personal jurisdiction or forum *non conveniens*.
- The right to trial by jury.
- The right to recover punitive or exemplary damages.
- The right to any interlocutory appeal (i.e., the appeal of nonfinal orders, such as orders relating to motions to dismiss) that are otherwise generally available in New York (unlike many other jurisdictions).

Moreover, parties who agree to the Commercial Division's accelerated adjudication procedures also agree to significantly restricted discovery. Unless the parties agree otherwise, discovery in accelerated adjudication procedures will proceed as follows:

- No more than seven interrogatories.
- No more than five requests to admit.
- No more than seven depositions per side (with no deposition exceeding seven hours).
- Targeted document discovery (document requests "shall be limited to those relevant to a claim or defense ... and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain.").
- E-discovery is restricted such that "electronic documents may be collected ... only [from] those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute."
- The costs and burdens of e-discovery cannot be "disproportionate to the nature of the dispute or the amount in controversy, or to the relevance of the materials requested." The rule allows for potential cost-shifting for e-discovery.

Transactional lawyers in particular should be on the lookout for any reference to "accelerated adjudication" (or similar language) in choice of forum provisions proposed during negotiations, as they could significantly affect a client's substantive rights. Moreover, because Rule 9's accelerated adjudication procedures may be amended, parties who choose to have accelerated procedures apply to potential disputes by including such provisions in agreements may want to specifically spell out the procedures and waiver of rights to which they are (or are not) agreeing.

Again, the Commercial Division's accelerated adjudication procedures are not intended to—and should not—apply in every commercial transaction or dispute. Given the significant trade-offs that come with these procedures (including waiver of important substantive rights), parties must think long and hard about whether they will be better served with accelerated adjudication in the Commercial Division. Foreign parties, in particular, may appreciate the benefits of agreeing to such accelerated procedures in order to contain the cost, burden, scope, and length typically associated with litigation in the United States.

New Privilege Log Rules Further Streamline Discovery

The Commercial Division also recently adopted a new rule designed to allow litigants to streamline the often costly and time-consuming practice of preparing privilege logs. Rule 11(b), which goes into effect in September 2014, changes the practice of preparing privilege logs in all cases before the Commercial Division.⁶ It seeks to “promote more efficient, cost-effective pretrial disclosure by establishing a ‘preference’ in the Commercial Division for the use of ‘categorical designations’ rather than document-by-document logging.”⁷ Unlike Rule 9’s voluntary accelerated adjudication procedures, Rule 11-b automatically applies in all cases litigated in the Commercial Division.

Like most jurisdictions, New York’s general rule on privilege logs, CPLR 3122(b), requires parties to prepare a log containing a separate entry for “each” document. This traditional document-by-document approach often means that parties in large business disputes must painstakingly prepare privilege logs that are hundreds of pages long, containing thousands of entries. As a result, the preparation of privilege logs has become a substantial expense, especially in complex commercial actions. The categorical approach preferred by the Commercial Division under Rule 11-b seeks to dramatically ease this burden.

Rule 11-b’s “preference” for “categorical designations” means that instead of generating thousands of document-by-document entries, the parties may now create one document describing categories of privileged documents and how they were identified and reviewed. Because the new rule indicates only a “preference” for categorical privilege logs, parties may still insist on logging “each document” as required by CPLR 3122. Where a party demands such a document-by-document privilege log, however, the producing party “may apply to the court for the allocation of costs, including attorneys’ fees, incurred with respect to preparing the document-by-document log.” The court may shift these costs (including attorneys’ fees) to the requesting party “upon good cause shown.”

The obvious (and understandable) concern is that although categorized privilege logs could save significant time and cost to litigants, classifying documents by category will not provide sufficient information for a party receiving the log to fully and meaningfully evaluate (and challenge) the adequacy of privilege assertions. Although parties may not object on the grounds that the privilege log does not itemize each individual document, there are several safeguards to guard against abuse of overdesignating (and therefore withholding) documents as privileged. First, parties who prepare categorized privilege logs must provide a party/attorney certification describing specific facts supporting the privileged status of the documents in each category and a description of the steps taken to identify those documents. Second, Rule 11-b specifically requires a “responsible attorney” to be involved in actively overseeing the privilege review. Still, the potential for abuse is significant.

Although there could still be good strategic reasons in certain cases to demand a traditional document-by-document log, they must be weighed against the significant costs that may be imposed under the Rule’s cost-shifting provision.

Lawyer Contacts

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Endnotes

- 1 New York's Commercial Division handles a broad spectrum of commercial disputes, including cases in which the principal claims involve at least one of a number of categories: (i) breach of contract, (ii) breach of fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), (iii) transactions governed by the Uniform Commercial Code, (iv) transactions involving commercial real property, (v) shareholder derivative actions, (vi) business transactions involving or arising out of dealings with financial institutions, (vii) certain professional malpractice, (viii) environmental and commercial insurance coverage, (ix) internal affairs of business organizations, and (x) dissolution of corporations, partnerships, limited liability companies/partnerships, and joint ventures. With certain exceptions (including actions seeking equitable or declaratory relief), assignment of a case to the Commercial Division requires meeting monetary thresholds. The thresholds vary, depending on the county or district in which the particular Commercial Division sits. For example, a case may currently be assigned to the Commercial Division in New York County only if the controversy is at least \$500,000 (this threshold was recently raised). See 22 NYCRR § 202.70 (Uniform Rules of the Supreme and County Courts, Rules of the Commercial Division of the Supreme Court).
- 2 "Report and Recommendations to the Chief Judge of the State of New York, The Chief Judge's Task Force on Commercial Litigation in the 21st Century," June 2012, <http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf>.
- 3 22 NYCRR §202.70(g).
- 4 Being "trial ready" within nine months does not mean the trial itself will be scheduled during that period; the court retains discretion in the scheduling of the trial.
- 5 This provision is just a sample. The parties could agree to other language, as long as it is clear that they intend to have Rule 9's accelerated adjudication procedures apply to a potential dispute.
- 6 22 NYCRR §202.70(g).
- 7 Memorandum from John W. McConnell to: All Interested Persons, Proposed Amendments to the Statewide Rules of the Commercial Division Regarding Privilege Logs, dated April 3, 2014, <https://www.nycourts.gov/rules/comments/PDF/PCPacketPrivilegeLogs.pdf>.