

OUTSIDE COUNSEL

Commercial Division Rules Poised for Additional Business-Oriented Changes

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As part of its mission to be an efficient, effective and fair forum for complex business disputes, the Commercial Division of the New York Supreme Court consistently reviews and revises its rules. In fact, there have been over 40 changes to the Commercial Division rules in their 11-year history. Several significant Commercial Division rule changes are scheduled to go into effect on Jan. 1, 2018, and comments are currently being sought on a rule designed to mitigate the risk associated with inadvertent privilege waiver disclosure. This article provides an overview of the recent and potential



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additional rule changes, how they complement previous changes, and how they further the Commercial Division's aim of providing an attractive and hospitable forum for the fair and timely resolution of complicated commercial disputes from around the globe.

The Commercial Division Is Designed to Be Business Friendly. Starting in 1993, Chief Judge Judith S. Kaye and Administrative Judge Stanley S. Ostrau spearheaded the launch of the

Commercial Division in New York County as part of an effort to improve confidence among the business community about the ability of New York state courts to handle complex commercial disputes. From the beginning, the Commercial Division focused on increasing efficiency in case processing and improving the quality and consistency of judicial decision-making in commercial litigation. The approach worked. After launching on an experimental basis in 1993 and officially

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opening its doors in November 1995, the Commercial Division has grown from a handful of justices to 29 justices presiding in 10 jurisdictions statewide, handling some of the most complex international business disputes.

The Commercial Division's success can largely be attributed to adherence to its core mission of making business courts in New York more efficient and user-friendly. A significant development came in February 2012 when then-Chief Judge Jonathan Lippman created a Task Force and challenged stakeholders to reinvigorate the Commercial Division by taking a "fresh look" at how to foster an even more hospitable environment for business. The message was clear: to ensure that New York remains at the cutting edge of commercial dispute resolution, the Commercial Division must be proactive in responding to the ever-evolving nature of business litigation.

The Commercial Division Will Enact Five Rule Changes on Jan. 1, 2018 and Has Requested Comment on an Additional Proposal in Further Support of Its Goals.

In January 2006, the Administrative Board of the Courts enacted a new set of procedural rules for the Commercial Division (the Rules). See 22 NYCRR § 202.70. Since the creation of the Task Force in 2012, over 30 rule changes have been approved and the Commercial Division Advisory Council, headed by

Robert L. Haig, continues to cast a critical eye upon the Division to ensure that it is responsive to the needs and concerns of the global business community.

For example, in April 2015, the Rules were amended to include a preamble, which makes clear that the Commercial Division's aim is to "promote efficient resolution of matters, and increase respect for the integrity of the judicial process." Other notable,

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recent business-oriented rule changes include:

- a stated preference for categorical privilege logs, rather than the traditionally costlier document-specific logs (Rule 11-b);
- a requirement that, if requested, a corporate representative be prepared to testify not only to information known but also reasonably available to the corporate entity, akin to Federal Rule of Civil Procedure 30(b)(6) (Rule 11-f);
- the creation of a specialized track to get non-class action cases trial-ready within nine months, upon written consent of the parties (Rule 9); and

- a special jurisdictional waiver of the monetary threshold for matters arising out of international arbitration disputes (§ 202.70(b)(12)).

More recently, effective July 1, 2017, the Rules now require a party seeking a temporary restraining order to provide adversaries with advance copies of papers supporting the application (Rule 20), and authorize Commercial Division justices, in their discretion, to impose trial time limitations upon different phases of trial, with the goal of promoting shorter, more efficient trials (Rule 26).

The trend has continued, with five additional rule changes scheduled to go into effect on Jan. 1, 2018, all of which are consistent with the Commercial Division's goal of providing a client-friendly forum that allows businesses to litigate in a cost-effective and predictable way. (The Administrative Order pertaining to each change is identified in parentheses for reference.)

Alternative Dispute Resolution (AO202): Counsel will be required to submit a statement at the preliminary conference, and each compliance or status conference, certifying that they have discussed the availability of ADR with their client. Rules 10 and 11 will be updated.

Large Complex Case List (AO203): The Commercial Division will implement a pilot of a special docket in New York

County for especially high stakes cases—the “largest and most challenging disputes,” generally where at least \$50 million is at stake, exclusive of punitive damages, interest, and costs. Cases on this special docket will have access to “enhanced case management procedures,” including a “special referee” akin to U.S. Magistrate Judges, special mediators, dedicated back-up settlement judges, “technological receptivity” to external document depositories, hyperlinked briefs, and active case management. This special docket is in response to a similar initiative implemented by the London Commercial Court—in line with the New York Commercial Division’s goal to remain the forum of choice for adjudication of complex business disputes.

Sample Choice of Law Clause (AO204): On the heels of approving a sample forum selection clause on June 14, 2017, Rule 202.70(d) will be amended to include reference to a complementary choice of law clause and a new Appendix D containing the sample clause.

Model Status Conference (SC) and Compliance Conference (CC) Stipulation and Order Forms (AO205 & 206): The Commercial Division’s Model Preliminary Conference Order was overhauled (effective August 2016) to sharpen its focus on efficient resolution of matters from the very inception of a

case and has met with great success. Similar forms will now be updated for greater consistency throughout the lifespan of a case. Like the preliminary conference model, the revisions to the SC and CC are precatory, not mandatory.

Finally, on Nov. 15, 2017, the Administrative Board of Courts requested public comment to amend Commercial Division Rule 11-g to include sample “privilege claw-back” language for use in the standard form of stipulation and order for the production

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of confidential information in matters before the Commercial Division. The proposal is based on Federal Rule of Evidence 502 and aims “to mitigate the risks of inadvertent disclosure associated with voluminous document production in major commercial actions.” Notably, the proposal states that the most efficacious approach to address the issue of privilege waiver is via amendment to the Civil Practice Law and Rules; accordingly, the proposal bills itself merely as an “interim measure” and provides language for the standard

form of confidentiality order utilized by many of the justices in the Division. The proposed language, however, does not permit so-called “quick peek” arrangements—where a party produces documents without first conducting any privilege review, the receiving party takes a “quick peek” to identify documents it wants to use, and the producing party then asserts or foregoes the privilege—because such arrangements are inconsistent with New York law. The comment period is open until Jan. 16, 2018.

Conclusion. Since its official opening in 1995, the Commercial Division has grown to become a model for business courts around the world. It is able to maintain this position as one of the top forums for resolution of business disputes only through continued examination of how its Rules mesh with how business litigation gets done. The rule changes detailed in this article—five scheduled to go into effect on Jan. 1, 2018 and one open for public comment—are consistent with making the Commercial Division a business-friendly forum, and will only further bolster the Commercial Division’s reputation as an efficient, effective and fair forum for the most complex business disputes.