

INSIGHTS

Expedited Procedures in New York Courts Guarantee Trial in Just Nine Months

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Earlier this month, New York's Commercial Division, a department within the New York State court system designed to handle complex commercial disputes, established new procedures that provide a voluntary, alternative track to shortcut the standard discovery and pre-trial process. The goal: cases will be trial-ready within just nine months. Dubbed "accelerated adjudication," the procedures severely curtail the traditional discovery process and eliminate numerous procedural and substantive rights in an attempt to streamline litigation and drive faster resolution of commercial disputes. Specifically, in order to guarantee such a short window to trial, under the expedited procedures parties can waive the right to a jury trial, interlocutory appeals, fulsome discovery and punitive damages. While the purpose behind these streamlined procedures is laudable, businesses must proceed with caution because these waivers will not be appropriate for every party, contract or potential dispute.

The accelerated adjudication procedures, contained in new Rule 9 of the Rules of the Commercial Division, *see* Uniform Civil Rule 202.70(g)(Rule 9), represent a significant deviation from typical New York trial court practice. For example, New York County's staggering case load – the nine Commercial Division judges in New York City have between 300 and 400 active cases each – and the peculiarities of New York practice (e.g., the automatic right to an interlocutory appeal of any trial court ruling) routinely cause years to pass before trial.¹ Such protracted litigation can be beneficial or exasperating, depending on the circumstances. But it is undoubtedly expensive, and for many, prohibitively so. Indeed, the new rules arise out of the Commercial Division's recognition that the cost and uncertainty of prolonged litigation has driven many businesses away from the courts and toward private arbitrations that skip the drawn out procedural structure of the courts. Thus, the accelerated procedures are designed to compete with commercial arbitration by matching its primary benefit (speed and efficiency) while still protecting the parties' rights in a manner unique to the judiciary.

Under the new rules, parties may consent to the accelerated adjudication procedures either by including language to that effect in their underlying contracts or by accepting the procedures after a lawsuit has been filed. The rules themselves contain model contract language through which the parties can agree to the use of the expedited procedures long before a dispute arises.² And therein lies a trap for the unwary. The innocent use of the term "accelerated" or "expedited" in a New York choice of forum clause could be deemed to constitute a comprehensive adoption of the procedures (and waivers) set forth in Rule 9. Parties therefore

should be aware that they are not required to waive *all* such rights or to use the model language set forth in the rule itself. To the contrary, under the well-established legal principle that parties may contract as they wish, businesses are free to draft language that incorporates pieces of the accelerated procedures and even adds other procedures of the parties' own making. Businesses should thus give close consideration to New York forum selection clauses in order to avoid inadvertently accepting these procedures.

While not comprehensive, the following illustrates some of the more meaningful rights that "the court *shall* deem the parties to have *irrevocably* waived" if the parties agree to use the accelerated adjudication procedures. Rule 9(c) (emphasis added). Some of the waivers include rights typically guarded by the plaintiff's bar, such as the right to trial by jury and the right to seek punitive or exemplary damages. Also waived are substantial rights typically embraced by the defense bar, such as the right to move to dismiss for lack of personal jurisdiction or due to the inconvenience of the forum, as well as the right to file an interlocutory appeal of any court order. In this way, Rule 9 manifests a compromise of interests.

Other aspects of the rules impose severe limitations on discovery. For example, the new rule limits interrogatories to seven per side, requests to admit to five per side, depositions to seven per side (capped at seven hours each) and document requests to "those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain." Rule 9(c). While the federal rules have been recently revised to impose constraints on discovery as well, the limits of Rule 9 are significantly narrower and will be strictly imposed.

Moreover, Rule 9(d) contains discoverability limits specifically focused on electronically stored information ("ESI"). In particular, the parties are expected to identify the custodians from whom ESI may be collected in a manner "narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute[.]" Perhaps most importantly, Rule 9(d) contains an express cost-shifting mechanism permitting the court to shift the costs of, or outright deny, document requests where the costs and burdens of e-discovery are "disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested."

Thus, in order to achieve the nine-month-to-trial deadline, the Commercial Division's accelerated adjudication procedures force the parties to carefully craft their discovery requests and focus their case strategy, something all parties should but often do not do under the traditional rules.

Conclusion

On their face, the new accelerated procedures adopted by the New York Commercial Division may be appealing to parties who want to avoid being mired in years-long litigation, but also are not comfortable with the lack of recourse and structure inherent in the arbitral system. Businesses and their counsel, however, must be aware of the potential pitfalls of agreeing to the new procedures. In a world in which contractual waivers of the right to a jury trial are typically embodied in bolded, capitalized, unequivocal text, uninformed parties will surely be surprised to learn that the same jury trial waiver can be achieved irrevocably simply by agreeing to "accelerated procedures" (no bold, no capitalization).

¹ In order to control the docket, the Commercial Division's jurisdiction is limited to only certain subject matters (e.g., contract actions, business torts, securities claims, shareholder disputes, and injunctive relief), some of which require meeting a recently increased monetary threshold of \$500,000 (exclusive of punitive damages, interest, costs, disbursements and counsel fees).

² Rule 9(____) states: "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."