

M E M O R A N D U M

TO: Administrative Board of the Courts
FROM: Commercial Division Advisory Council
DATE: April 12, 2017
RE: Proposed Amendment to Assignment to Commercial Division Rule (Section 202.70(d)) to Include Standard Forum Selection Clauses

Introduction

The Commercial Division Advisory Council has previously proposed an amendment to the Commercial Division Rules to reference a new Appendix which would provide contracting parties with a convenient sample forum selection clause, designating the Commercial Division as the choice of forum. In response, the Administrative Board of the Courts requested public comment on the Advisory Council's proposed amendment. The Office of Court Administration received no public comments on the proposed amendment. Thereafter, the Chief Administrative Judge issued an Administrative Order amending the Commercial Division Rules in the manner the Advisory Council had proposed.

After the Administrative Order was issued, a concern was expressed that the sample forum selection clause might deprive parties of access to a federal court forum and might therefore not enhance the comity between the federal and state courts in New York. The Advisory Council appreciates and respects the federal courts in New York State and is strongly supportive of federal and state judicial comity. Accordingly, the Advisory Council now proposes the revision to the Administrative Order which is set forth in this memorandum.

Procedural History

At its meeting on September 15, 2016, the Commercial Division Advisory Council voted to approve a memorandum dated September 9, 2016 prepared by the Advisory Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution. That memorandum proposed an amendment to Section 202.70(d) of the Rules of the Commercial Division of the Supreme Court, relating to "Assignment to the Commercial Division," to reference a new Appendix C which contained a "Commercial Division Sample Choice of Forum Clause." A copy of the Advisory Council's memorandum dated September 9, 2016, which sets forth the proposed amendment to Section 202.70(d) of the Commercial Division Rules and the proposed Appendix C, is attached to this memorandum as Exhibit A.

The Advisory Council's memorandum dated September 9, 2016 discussed the reasons that "inclusion of forum-selection clauses in contracts has become a widely accepted practice among commercial contracting parties." That memorandum noted that "[d]espite their broad acceptance, agreements on where a dispute should be resolved are not always easily reached and 'careful formulation of such clauses is needed to increase the probability that a forum selection clause will be enforced to its maximum effect.'" Finally, the Advisory Council's memorandum dated September 9, 2016 stated that "[t]he proposed sample clause is designed to afford contracting parties a convenient and streamlined tool to assist them in crafting appropriate party-specific language, in a pre-dispute context, in selecting the Commercial Division as their choice of forum."

The Advisory Council's memorandum dated September 9, 2016 explained the reasons why the Advisory Council's "proposed sample clause is styled as a mandatory forum selection clause so as to offer a greater degree of certainty" that courts will enforce the parties' agreement to litigate disputes in the Commercial Division. The memorandum also noted that

contracting parties “may also wish to consider including an alternative venue in the event the jurisdictional requirements for Commercial Division assignment have not been met.”

The Advisory Council’s memorandum dated September 9, 2016 was submitted to the Office of Court Administration on September 16, 2016, the day after the Advisory Council voted to approve the memorandum at the Advisory Council’s meeting on September 15, 2016. Thereafter, the Administrative Board of the Courts sought public comment on the Advisory Council’s proposed amendment of the Commercial Division Rules. The Administrative Board’s request for public comment was set forth in a memorandum dated October 24, 2016 to “All Interested Persons” from John W. McConnell, Counsel to the New York State Office of Court Administration. A copy of Mr. McConnell’s memorandum is attached to this memorandum as Exhibit B. Mr. McConnell’s memorandum stated that “Comments must be received no later than December 20, 2016.”

After the expiration of the public comment period on December 20, 2016, the Commercial Division Advisory Council was advised that no bar associations or other entities and no individuals had submitted comments to the Office of Court Administration in response to the request for public comment. In this connection, there are approximately 180 bar associations and more than 200,000 lawyers in New York State.

Thereafter, the Chief Administrative Judge of the Courts issued an Administrative Order dated March 6, 2017 “amend[ing] section 202.70 of the Uniform Rules for the Supreme and County Courts (Rules of the Commercial Division of the Supreme Court) by adding a new section 202.70(d)(2) and a new Appendix C, addressing consent to the jurisdiction of the Commercial Division, effective April 1, 2017.” A copy of the Administrative Order dated March 6, 2017 is attached to this memorandum as Exhibit C.

For the convenience of readers, the amendment to the Commercial Division Rules and Appendix C are set forth below (new matter is underlined):

(d) Assignment to the Commercial Division

(1) Within 90 days following service of the complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention (RJI) that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section. Except as provided in subdivision (e) below, failure to file an RJI pursuant to this subdivision precludes a party from seeking assignment of the case to the Commercial Division.

(2) Subject to meeting the jurisdictional requirements of subdivisions (a), (b) and (c) of this section and filing an RJI in compliance with subsection (d)(1) above, the parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court by including such consent in their contract. A sample choice of forum provision can be found at Appendix C to these Rules of the Commercial Division.

APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSE

Purpose

The purpose of this sample forum-selection provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to confer jurisdiction on the Commercial Division.

This sample provision is not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the “Commercial Division Rules”), the Uniform Civil Rules for the Supreme Court (the “Uniform Civil Rules”), the New York Civil Practice Law and Rules (the “CPLR”), or any other applicable rules or regulations pertaining to the New York State Unified Court System. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations.

The Sample Forum Selection Provision

To express their consent, parties may include specific language in their contract, such as: “THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF.”

After the Administrative Order dated March 6, 2017 was issued, a concern was expressed about the possible impact of the amendment on litigation in the federal courts in New York. The Administrative Board has asked the Advisory Council to consider that concern. In that connection, the description on the New York State Courts’ website of the amendment to the Commercial Division Rules relating to the sample forum selection clause now states:

“This measure was adopted on March 6, 2017, effective April 1, 2017. On March 16, 2017, the effective date of the measure was delayed until further order.”

The Current Concern

Following the issuance of the Administrative Order dated March 6, 2017, a concern was expressed that the forum selection clause set forth in Appendix C might be perceived as an effort to require contracting parties to waive federal jurisdiction in commercial cases. A related concern was that one result of the forum selection clause might be to deprive the federal courts in New York of the opportunity to contribute to the development of federal commercial law.

It was never the intention of the Commercial Division Advisory Council in developing this sample forum selection clause to provide an incentive for contracting parties to waive access to federal courts in commercial cases. In general, the members of the Advisory Council believe that parties which will be best served by litigating commercial cases in federal

court should bring their cases in federal court, particularly when they have access to courts like the federal courts in New York which have extraordinary experience and expertise in resolving commercial disputes. The Commercial Division Advisory Council looks for opportunities to bring commercial cases to New York State, but is just as happy to see those cases litigated in the federal courts in New York as in the Commercial Division.

The Advisory Council drafted its proposed sample forum selection clause as a “mandatory” clause providing for submission “to the exclusive jurisdiction of the Commercial Division.” In doing so, the Advisory Council recognized the distinction between mandatory and permissive forum selection clauses which is discussed in the Advisory Council’s memorandum dated September 9, 2016. The Advisory Council recommended a mandatory clause because the Advisory Council was seeking to maximize the probability that the clause would be enforced. In other words, the Advisory Council was attempting to insure that contracting parties would end up in the forum they had selected at the time they agreed to the clause. Thus, the sample forum selection clause was designed to provide a service to parties which had decided to litigate their disputes in the Commercial Division but which did not have immediate access to a forum selection clause which effectively expressed that decision.

The Revised Proposal

New York’s Chief Judge established the Commercial Division Advisory Council to make recommendations to improve and enhance the Commercial Division of the New York State Supreme Court. Inclusion of a convenient and effective sample forum selection clause in the Commercial Division Rules is just one of many recommendations the Advisory Council has made to achieve that objective. Even though the Chief Judge’s charge to the Advisory Council focuses its attention on the Commercial Division, the Advisory Council has great respect and admiration for the capabilities and experience in commercial litigation of the federal courts in

New York and does not want to do anything which would deprive parties of access to a federal court forum. In addition, the Advisory Council believes strongly in the importance of comity between the federal and state courts in New York.

Accordingly, the Advisory Council now proposes a modification to the amendment to the Commercial Division Rules and the sample choice of forum clause which are set forth in the Chief Administrative Judge's Administrative Order dated March 6, 2017. The Advisory Council's proposed modification consists of adding an alternative choice of forum provision in Appendix C which could be used by parties which wish to litigate in New York State but do not want to limit themselves to the Commercial Division. Thus, the revised Appendix C first sets forth the sample choice of forum clause contained in the Administrative Order dated March 6, 2017 to assist parties which want to consent to the exclusive jurisdiction of the Commercial Division. As in the Administrative Order dated March 6, 2017, the first choice of forum clause in the Advisory Council's revised proposal is designed to maximize the likelihood that the parties to a contract will end up in the forum which they have chosen in their contractual choice of forum clause.

In addition, the revised Appendix C now also sets forth an alternative sample choice of forum clause. This alternative sample choice of forum clause provides that the parties agree to submit to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State. The alternative sample choice of forum clause is designed for the convenience of parties which wish to litigate in New York State and are willing to proceed in either the federal or the state courts. The presence of the alternative sample clause within a New York State court rule is also designed to reflect respect for the federal courts in New York State as well as support for comity between federal and state courts in New York.

Thus, the Commercial Division Advisory Council now recommends that Section

202.70(d) of the Rules of the Commercial Division be amended as follows:

(d) Assignment to the Commercial Division

(1) Within 90 days following service of the complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention (RJI) that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section. Except as provided in subdivision (e) below, failure to file an RJI pursuant to this subdivision precludes a party from seeking assignment of the case to the Commercial Division.

(2) Subject to meeting the jurisdictional requirements of subdivisions (a), (b) and (c) of this section and filing an RJI in compliance with subsection (d)(1) above, the parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court by including such consent in their contract. A sample choice of forum provision can be found at Appendix C to these Rules of the Commercial Division. Alternatively, subject to meeting the jurisdictional and procedural requirements applicable to the Commercial Division and the federal courts, the parties to a contract may consent to the exclusive jurisdiction of either the Commercial Division of the Supreme Court or the federal courts in New York State by including such consent in their contract. An alternative sample choice of forum provision to that effect can also be found at Appendix C to these Rules of the Commercial Division.

APPENDIX C. COMMERCIAL DIVISION SAMPLE
CHOICE OF FORUM CLAUSES

Purpose

The purpose of these sample forum-selection provisions is to offer contracting parties streamlined, convenient tools in expressing their consent to confer jurisdiction on the Commercial Division or to proceed in the federal courts in New York State.

These sample provisions are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the

“Commercial Division Rules”), the Uniform Civil Rules for the Supreme Court (the “Uniform Civil Rules”), the New York Civil Practice Law and Rules (the “CPLR”), the Federal Rules of Civil Procedure, or any other applicable rules or regulations pertaining to the New York State Unified Court System or the federal courts in New York. These sample provisions should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, the Federal Rules of Civil Procedure, and any other applicable rules and regulations. Parties which use these sample provisions must satisfy all jurisdictional, procedural, and other requirements of the courts specified in the provisions.

The Sample Forum Selection Provisions

To express their consent to the exclusive jurisdiction of the Commercial Division, parties may include specific language in their contract, such as: “THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF.”

Alternatively, in the event that parties wish to express their consent to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State, the parties may include specific language in their contract, such as: “THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, OR THE FEDERAL COURTS IN NEW YORK STATE, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF.”

Commercial Division Advisory Council
Subcommittee on Best Practices for Judicial Case Management

Proposed New Rule re: Sanctions

The Chief Judge's Task Force on Commercial Litigation in the 21st Century recognized that the Commercial Division needs to make reasonable efforts to better accommodate clients who are understandably unhappy with the wasted time and resources expended in getting parties and their counsel to comply with case management orders and deadlines. The perception that the Commercial Division may be too lenient toward misconduct by parties and counsel frustrates clients.

In its June 2012 report, the Chief Judge's Task Force on Commercial Litigation in the 21st Century concluded that sanctions were often underutilized in Commercial Division cases and issued the following recommendation regarding "*Imposition of monetary and non-monetary sanctions for failure to adhere to case management orders and other deadlines[:]*"

While sanctions have long been available in New York State courts, they are often underutilized. The integrity of the judicial process is compromised when litigants and counsel ignore or defy case management orders or other deadlines. Further erosion of judicial trust occurs when the court fails to sanction a litigant or counsel who incessantly engages in behavior of this type. The Task force recommends that Commercial Division Justices be encouraged to consider monetary and non-monetary sanctions already provided for where parties fail to comply with case management orders or other deadlines.

The Task Force also notes the importance of how orders imposing sanctions are viewed by appellate courts, and suggests that stronger pronouncements from the Appellate Division will result in the imposition of more meaningful sanctions orders and, in turn, reduce frivolous practice." (Report at p. 24).

In light of the fact that there is already substantial authority to allow judges to impose sanctions in the Commercial Division rules to allow judges to impose sanctions, we believe the best way to facilitate the Task Force's recommendation and objective is to reinforce the existing rules with an appropriate and new rule urging judges to avail themselves of their existing authority to impose sanctions where necessary. Accordingly, the following proposed rule would be an addition to the Rules of the Commercial Division of the Supreme Court (Section 202.70 of the Uniform Rules for N.Y.S. Trial Courts), inserted at the end of the current text of §202.70(g), before Rule 1.

* * *

Proposed rule to 22 NYCRR 202.70 (Uniform Rules for N.Y.S. Trial Courts)

In consideration of the need to conserve client resources, to promote efficient resolution of matters, and to increase respect for the integrity of the judicial process, judges in the Commercial Division are hereby encouraged to avail themselves of the remedies provided in 22 NYCRR 202.70 (Uniform Civil Rules for the New York State Trial Courts: Rules of the Commercial Division of the Supreme Court) Rules 12 (Non-Appearance at Conference,) 13(a) (Adherence to Discovery Schedule,) and 24(d) (Counsel Fully Familiar with Case to Appear) when

necessary and appropriate to deter improper conduct. These provisions expressly authorize Commercial Division judges to impose sanctions where necessary and appropriate against parties (or counsel) who fail to comply with case management deadlines and other discovery orders of the court. Consideration of these provisions as a viable option in appropriate circumstances will permit the Commercial Division to function more efficiently and effectively, and with less wasted time and expense for the court, parties and counsel.

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Rule Would Require Lawyers to Certify Early Discussion of ADR

BY JEFF STOREY

ATTORNEYS in New York's Commercial Division would have to assure the court early on that they had talked with their clients about the availability of alternate dispute resolution (ADR), under a proposed regulation by state court administrators.

The proposal by the Commercial Division Advisory Council would require attorneys for each party to certify at the preliminary conference and each compliance or status conference that they had

discussed ADR options with clients and state whether their client is willing to pursue mediation at some point in the litigation.

If the parties are willing to mediate, they would be required to jointly propose a date by which a mediator would be identified.

Christopher Palermo, a partner at Bleakley Platt & Schmidt, predicted that businesses and in-house counsel would "strongly support" the recommended amendment to court rules, which mirrors procedures in some federal courts.

"They want mediation, and they want mediation early on in

the case," said Palermo, a member of the advisory council's ADR subcommittee.

He said the certification "is intended to provide guidance to the court as to whether raising mediation will be more likely to be effective and whether the clients are open to the process since client interest or willingness to participate tends to make mediation more effective."

A 2012 state courts task force found that cases can be resolved more quickly and less expensively with mediation, but was "substantially underutilized in New York."

That is still true, said Robert Haig, a partner at Kelley Drye & Warren, who chairs the advisory council.

"The message we're getting [from businesses and outside counsel] is that they want more and better mediation than is being supplied," he said.

Existing Commercial Division rules already require counsel to consult prior to a preliminary or compliance conference about the use of ADR to resolve all or some issues in the litigation. The proposed rule does not set a deadline for mediation to begin. » Page 2

ADR

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According to the advisory council, its proposal "is an appropriate next step that will help further institutionalize the use of ADR in Commercial Division cases, and ensure that ADR options are specifically considered early on, before substantial legal fees have been incurred in discovery and motion practice, and clients' position have further hardened."

The council said that in-house counsel it polled "have indicated a desire to signal an interest to mediation to the court without appearing weak" and Commercial Division judges have said they "want to know whether clients are willing to entertain mediation notwithstanding the typical concerns raised by outside counsel that mediation will not be effective early in a case."

Persons wishing to comment on the proposed rule change can email rulecomments@nycourts.gov or write to John McConnell, Counsel, Office of Court Administration, 25 Beaver St., 11th Floor, New York, NY 10004. Comments must be received no later than June 5.

Since the establishment of the advisory council, 30 of its proposed rules have been adopted by the courts. Two are pending: the ADR proposal and a revised model compliance conference stipulation and order form. Comments on the second proposal are due by May 30.

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