



New York Commercial Division Adopts New Rule Allowing Contracting Parties to Agree to Accelerated Adjudication

BY [SHAHZEB LARI](#) & [DOUGLAS H. FLAUM](#)

The Commercial Division of the Supreme Court of New York (the “Commercial Division”)—the branch of the New York state trial court that handles complex commercial disputes—recently adopted a new rule, effective as of June 2, 2014, that should be considered by parties drafting contractual choice of forum provisions, particularly those designating New York as the forum of choice.

The new rule, Commercial Division Rule 9 (“Rule 9”), provides that parties may consent in writing to resolve any disputes, except for class actions, pursuant to the Commercial Division’s accelerated adjudication procedures. Rule 9 also provides a sample choice of forum provision to be included in contracts if the parties wish for the accelerated adjudication procedures to apply.

Accelerated Adjudication Procedures. The accelerated procedures allowed by Rule 9 significantly shorten the length of potential litigation, curtail the scope of permissible discovery, and impact certain substantive rights—all with the intent of reducing the costs of litigation and streamlining the dispute resolution process. In particular:

- **Waiver of Substantive Rights.** Parties submitting to the accelerated adjudication procedures waive (i) any objections based on personal jurisdiction or *forum non conveniens*; (ii) the right to a jury trial; (iii) the right to recover punitive or exemplary damages; and (iv) the right to any interlocutory appeals (*i.e.*, the appeal of any non-final orders, such as a denial of a motion to dismiss).
- **Length of Proceedings.** All pre-trial proceedings (discovery, mediation, dispositive motions) must be completed and the parties must be prepared for trial within nine months of a request for judicial intervention being filed.¹ This is much shorter than the typical period for preparing a case for trial-readiness in New York state court, which is usually measured in years, not months. However, trial-readiness does not equate to an actual trial. The scheduling of trial would still be subject to the discretion of the presiding judge.
- **Limited Discovery.** Unless the parties otherwise agree, discovery will be limited to (i) seven interrogatories; (ii) five requests to admit; (iii) absent good cause, seven depositions for each side, each not to exceed seven hours; and (iv) focused document discovery. Rule 9 also allows for potential cost-shifting for electronic document discovery. This is far more

restrictive than the discovery typically allowed in New York courts, including the Commercial Division. For instance, outside of the accelerated adjudication procedures, there are no specific limits on the number of depositions allowed.

Choice of Forum Provision. To the extent parties wish to make use of Rule 9 to resolve disputes arising out of a contractual relationship, they can so specify in the underlying contract. Rule 9 provides the following sample choice of forum provision to achieve that end:

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.

It should be noted that this sample provision is merely a suggestion, not a requirement to invoke Rule 9. The parties can agree on other language tailored to their specifications, as long as it makes clear that the parties intend for Rule 9 and its accelerated adjudication procedures to govern. In fact, even if the underlying contract does not specify the application of Rule 9, the parties can later agree to abide by its requirements—although, as a practical matter, it would likely be difficult to reach agreement on this issue once litigation is pending or on the horizon.

Issues To Consider. The inclusion of a choice of forum provision specifying the application of Rule 9's accelerated adjudication procedures is worth considering in the contract-drafting process for a number of reasons. The accelerated procedures greatly reduce uncertainty about the length, scope, and cost of litigation. In particular, they reduce the concerns that non-U.S. parties frequently have regarding U.S.-based litigation: expansive discovery, punitive damages, and potentially very high legal costs. They do, however, extinguish the ability to argue that jurisdiction is improper in New York, a defense that non-U.S. parties may not wish to abandon.

For parties that are likely to be defendants in litigation arising out of the contract, Rule 9 has the benefit of barring both jury trials and punitive/exemplary damages, as well as reducing the ability of a plaintiff to engage in harassing discovery. Those benefits, however, have to be balanced against the loss of the right to interlocutory appeals—there is no appellate review if a motion to dismiss or a motion for summary judgment is denied. Conversely, if a party expects to be a plaintiff in the event of litigation, Rule 9's accelerated procedures offer a fairly speedy resolution (although at the expense of certain tactical advantages).

Regardless of whether a party is interested in submitting to Rule 9, any choice of forum provision designating New York should be carefully reviewed to determine whether it would subject the contracting parties to Rule 9—particular attention should be paid to any mention of terms such as “accelerated adjudication,” “accelerated proceedings,” or, of course, Rule 9. Choice of forum provisions are frequently glossed over as boilerplate, but under Rule 9 they can significantly impact a contracting party's substantive rights.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings New York lawyers:

Shahzeb Lari
1.212.318.6098

shahzeblari@paulhastings.com

Douglas H. Flaum
1.212.318.6259

douglasflaum@paulhastings.com

¹ As a matter of New York state court practice, a judge is not assigned to a case until a request for judicial intervention is filed. This usually occurs shortly after a complaint is filed but is not generally simultaneous with the commencement of litigation.