

## Outside Counsel

## Expert Analysis

# Commercial Division's 'Rocket Docket' Provides for Accelerated Adjudication

**S**ensitive to the backlog of commercial cases in the New York state courts, the Chief Administrative Judge has adopted a new rule to provide for the accelerated adjudication of commercial disputes in the Commercial Division of the Supreme Court. Provided the parties agree in writing to proceed in this expedited manner, this new rule is likely to significantly limit discovery, shorten the time line for resolution of disputes and reduce the attendant legal costs. The rule, promulgated by Administrative Order of the Chief Administrative Judge on April 17, 2014, as Rule 9 of Section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division), became effective on June 2, 2014.

This article describes the new rule, the manner in which it can be used, the restrictions on discovery, the agreed-upon mutual waiver of important traditional rights and protections, certain potential strategies that may come into play, and the implications on the commercial case.

All practitioners in New York—especially transactional lawyers—should be aware of the new rule and its implications. That does not mean the rule should be utilized in every commercial transaction.

The rule is applicable to all actions to be heard, or that can be heard, in the Commercial Division (except class actions brought under Article 9 of the CPLR), in which the court is authorized by written consent of the parties to apply the accelerated adjudication procedures (which are described below). One way for the parties to express their consent is by containing a provision to such effect in their contract. Rule 9(a) contains a model accelerated adjudication

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forum selection clause 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.

While the form of the consent is suggested, the parties may evidence their consent to use these procedures, and the scope thereof, any way they would like, in any part of their operative contract, if applicable, or in any other document. A letter signed by the parties would seem to suffice.

Crucially, though, there may be many circumstances where the parties have not yet determined and/or are incapable of determining at the outset, to resort to, and to rest exclusive jurisdiction in, the Commercial Division. In such a case, the accelerated adjudication contract provision could read substantially as follows:

In an action filed in the Commercial Division, New York State Supreme Court, the parties hereby agree, subject to the requirements for a case to be heard in the Commercial Division, to apply the court's accelerated adjudication procedures as set forth in Rule 9 of the Rules

of Practice for the Commercial Division in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof.

In this context, the accelerated adjudication procedures would apply only if the plaintiff elects to file its case in the Commercial Division.

### The Process

Under Rule 9(b), in any litigation utilizing the accelerated adjudication process, "all pre-trial proceedings, including all discovery, pre-trial motions and mandatory mediation, shall be completed and the parties shall be ready for trial *within nine months* from the date of filing of a request for judicial intervention" (emphasis added).

The right to discovery—unless the parties subsequently agree otherwise—is extremely limited, and defined with particularity in Rule 9 subsections (b), (c) and (d). Thus:

(i) there shall be no more than seven interrogatories and five requests to admit;

(ii) absent a showing of good cause, there shall be no more than seven depositions per side with no deposition to exceed seven hours in length (such depositions can be taken either in person or by any electronic video device); and

(iii) document requests shall be limited 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.

Electronic discovery is also restricted substantially. Under Rule 9(d), unless the parties agree otherwise:

(i) the production of electronic documents shall "be made in a searchable format that is usable by the party receiving the e-documents",

(ii) "the description of custodians from whom electronic documents may be collected includes only those individuals whose electronic documents may

reasonably be expected to contain evidence that is material to the dispute”; and (iii) the costs and burdens of electronic discovery cannot be “disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested.” (If so, the court will either deny such requests or permit disclosure provided the requesting party advances the reasonable cost of production to the other side).

All of the foregoing modified discovery procedures are codified expressly in the new rule.

### Important Waivers

By consenting to the accelerated adjudication process in a case in the Commercial Division, the parties waive certain material rights that would otherwise be available to them in a non-accelerated case. These important waivers include the following:

1. Any objections based on lack of personal jurisdiction or the doctrine of forum non conveniens;
2. The right to trial by jury;
3. The right to recover punitive or exemplary damages;
4. The right to any interlocutory appeal.

See Rule 9(c).

In the commercial setting, the parties may agree—and frequently have agreed in their contract—to a waiver of all or some of the first three rights identified immediately above. However, the waiver of a right to file and pursue an interlocutory appeal is not generally sought or obtained.<sup>1</sup> This is a potentially important right (and waiver) especially in a contract dispute where either party (or both parties) may seek injunctive or other preliminary relief or make a motion for summary judgment or to dismiss the complaint or a counterclaim.

The denial of a temporary restraining order, a preliminary injunction, a motion for summary judgment or a motion to dismiss, for example, might—whether for tactical or substantive reasons (such as reversible error in the court below)—warrant an interlocutory appeal. This substantive and well-settled litigation right pertains and is available in cases filed in New York—except if the accelerated adjudication process is used.

More than a “rocket docket,” then, accelerated adjudication may change perceptibly the rights and remedies of the parties in a subsequent commercial dispute; and, this change takes place—for all cases ultimately filed in the Commercial Division—immediately when the parties consent to accelerated adjudication. Accordingly, all contracting parties, and their counsel, should evaluate carefully whether this change in rights is material to them in the context of their specific transaction.

### Contract Subtleties

A party to a contract likely to seek enforcement as a plaintiff—such as a lender under a loan agreement—might want to avail itself of the accelerated adjudication procedures. It is true that in most defaulted loan cases, the lender will endeavor to avoid (i.e., stay) discovery entirely when it moves for summary judgment. However, in the event summary judgment is not available, is denied, or (in a case brought in the Commercial Division) discovery proceeds while the motion is pending,<sup>2</sup> the accelerated adjudication process should provide more judicial economy and predictability than before.

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In any litigation utilizing the accelerated adjudication process, “the parties shall be ready for trial within nine months from the date of filing of a request for judicial intervention.”

In this light, accelerated adjudication may be advantageous to a mortgage lender—especially if the lender typically intends to pursue its (state court) remedies in the Commercial Division. As such, counsel to borrowers (and guarantors) should be on guard that lenders may well include, as boilerplate, a clause calling for use of the “accelerated adjudication” process in each of their contract documents.<sup>3</sup>

Conversely, where the claimant would benefit from either (i) a jury trial, (ii) the prospect of a punitive damages award, or (iii) fuller discovery, such party might seek to resist consenting to an accelerated adjudication clause. Further, the parties to a business transaction should try (if possible) to anticipate whether interim preliminary or provisional relief—such as an injunction—may be sought or resisted in the context of their contractual or other relationship. If so, a reservation of the right to pursue an interlocutory appeal may outweigh the benefits of limited expedited discovery.

### Conclusion

Counsel should scrupulously review the forum selection clause in every contract; typically the clause appears at the end of a lengthy document and looks like the proverbial “boilerplate.” A clause that merely mentions that enforcement of the contract shall occur under New York’s “accelerated adjudication” procedures appears to mean that the parties to the contract—in every

case filed in the Commercial Division—have agreed to waive the right to a jury trial, to seek punitive damages, and to file an interlocutory appeal, and they have consented to substantial restrictions to discovery as well as placement on a nine-month “rocket docket.” They may have done this unwittingly!

The coming months should shed light on how parties in the commercial setting, and the courts, deal with the accelerated adjudication process. Practitioners should monitor whether the state courts in New York—even before they render formal discovery orders or set their cases for trial—will enforce the severe limitations on discovery as written in the rule. Practitioners need to determine whether the courts in New York have the capacity, wherewithal and predilection to steer through a new rocket docket norm and move their cases through discovery and to trial as quickly as the new rule mandates.

And practitioners need to ascertain whether this new rule, laudatory as it may appear on first blush, can work in New York in a fair, balanced and effective way—and, perhaps most important of all, whether it is in their clients’ best interests in each case.

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1. An interlocutory (or interim) appeal is permitted under New York law (CPLR 5701) from any order of the lower court, even before all claims are resolved in the case. In particular, an interlocutory order “involves some part of the merits” (CPLR 5701(a)(2)(iv)) or “affects a substantial right” (CPLR 5701(a)(2)(v)). An interlocutory appeal can cover denial of a motion for summary judgment or a motion to dismiss or the issuance, continuation or denial of a preliminary injunction or other provisional remedy (CPLR 5701(a)(2)(i)).

2. Rule 11 (Discovery) of the Rules of the Commercial Division of the Supreme Court (NYCRR Section 202.70) provides that the court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion. Because the language of the rule may be unclear, approximately half of the judges in the Commercial Division have a specific rule that discovery shall not be stayed pending the determination of the motion, unless the court specifically so directs.

3. One important caveat to consider: there may be many times when a mortgage lender or other commercial claimant does not wish to avail itself of adjudication in the Commercial Division. Inasmuch as a motion for summary judgment in many Commercial Division cases does not “automatically” stay discovery under CPLR 3214(b), some lenders, and their counsel, may elect to file their mortgage foreclosure cases outside of the Commercial Division, thereby securing the benefits of a stay of discovery during the pendency of their motions for summary judgment. For this reason, the strategy to utilize the accelerated adjudication procedures may depend on the facts, the deal, the parties’ relationship and their respective litigation goals. Thus, the alternative contract provision suggested above (“In a case filed in the Commercial Division...”) may be preferable.