



## MEMORANDUM

TO: Commission on Connecticut's Leadership in Corporation

FROM: DLA Piper LLP (US)

DATE: May 14, 2015

RE: New York State Commercial Division

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### **I. Overview**

In 1995, the Commercial Division of the Supreme Court of New York (the “Commercial Division” or the “Division”) was established in New York and Monroe (Rochester) Counties, two years after a successful pilot program in Manhattan.<sup>1</sup> The goal of the Commercial Division—which has been widely recognized as achieved—was to elevate the quality of judicial treatment of complex commercial litigation by providing judicial expertise, active case management, and pragmatic rules tailored to the swift disposition of cases. The Commercial Division has since expanded to over twenty counties in New York and now possesses jurisdiction over a wide number of actions arising from business dealings, including fraud, business torts, securities transactions, business contracts, and more.<sup>2</sup>

This memorandum will briefly trace the genesis, evolution, and jurisdiction of the Commercial Division, as well as analyze its effectiveness in adjudicating large commercial disputes. The rationale behind recent reforms—many of which were implemented in 2014 and 2015—will also be addressed.

### **II. Genesis & History**

The Supreme Court of the State of New York in New York County established four experimental commercial parts in 1993 under the guidance of Administrative Judge Stanley S. Ostrau (the “commercial parts”). The pilot program was originally created in an effort to address declining confidence in the ability of the State’s trial courts to efficiently adjudicate complex commercial cases.<sup>3</sup> The significant delay, expense, and insufficient business expertise of Supreme Court justices had caused many

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<sup>1</sup> The Commercial Division of the State of New York, *A Brief History*, at <https://www.nycourts.gov/courts/comdiv/history.shtml> (last visited Mar. 26, 2015) (“A Brief History”).

<sup>2</sup> See 22 NYCRR §§ 202.70(a–b) (enumerating the Division’s jurisdiction over twelve types of business actions).

<sup>3</sup> A Brief History, *supra* note 1; M. Bach and L. Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW 147, 152 (Nov. 2004).

commercial practitioners to avoid New York State courts, preferring instead to file suit in the federal courts or the state courts of Delaware.<sup>4</sup> The pilot program had a quick impact, as a thirty-five percent increase in the rate of dispositions in 1993 was attributed to the efficiencies of the commercial parts.<sup>5</sup>

A 1995 task force of the Commercial and Federal Litigation Section of the New York State Bar Association (the “1995 Task Force”) formally recommended the development of a commercial court and provided suggestions concerning technology, case management, and methods to promote the expedient disposition of commercial cases.<sup>6</sup> In November 1995, the Commercial Division opened in New York and Monroe Counties and continued the success achieved in the pilot program. Commentators noted that “[s]ince its inception, the Commercial Division has helped stem the flight of commercial litigants from New York’s courts, and to maintain New York’s status as the premier state for the conduct of business.”<sup>7</sup>

A 1997 State-wide judicial restructuring plan by Chief Justice Judith S. Kaye proposed expanding the Commercial Division into additional counties. By 2002, Commercial Division Judges were also adjudicating cases in Albany, Suffolk, Kings, Nassau, Erie (Buffalo), and Westchester Counties—areas of the state containing substantial business litigation.<sup>8</sup>

### **III. Recent Developments**

In 2012, Chief Judge Jonathan Lippman established the Chief Judge’s Task Force on Commercial Litigation in the 21st Century (the “2012 Task Force”). The 2012 Task Force—composed of leading practitioners, academics, and New York Supreme Court Justices—noted that it “could not overstate the importance to New York State[‘s] . . . economy and its vitality [] of maintaining . . . a successful, highly regarded Commercial Division.”<sup>9</sup> Charged with “taking a fresh look at ways to enhance” the Division,<sup>10</sup> the 2012 Task Force identified six categories for potential improvement: (1) revising the Commercial Division’s docket; (2) enhancing the support available to Commercial Division Justices; (3) reforming the procedures by which cases are assigned to the Commercial Division; (4) facilitating early case resolution; (5) providing further support for international arbitration; and (6) continuously monitoring the long term strategic goals of the Commercial Division.<sup>11</sup>

These suggestions have been recently implemented and illustrate that New York State is committed to constantly improving the efficiency of its commercial courts, especially in light of the need to adjudicate cutting-edge legal issues following the financial crisis and address the growing burdens of e-discovery. Many of the following reforms, in particular, are aimed at reducing delay, managing the cost of litigation, and ensuring the Commercial Division is an appealing venue for litigants:

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<sup>4</sup> M. Bach and L. Applebaum, *supra* note 3, at 152.

<sup>5</sup> ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards A More Efficient Judiciary*, 52 BUS. LAW. 947, 957 (1997).

<sup>6</sup> A Brief History, *supra* note 1.

<sup>7</sup> The Association of the Bar of the City of New York, The Council on Judicial Administration, *Report on the Chief Judge’s Restructuring Plan*, available at [http://www2.nycbar.org/Publications/reports/show\\_html\\_new.php?rid=46](http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46).

<sup>8</sup> A subsequent expansion created the Commercial Division throughout New York’s entire 7th Judicial District (Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne, and Yates Counties) and 8th Judicial District (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming Counties).

<sup>9</sup> The Chief Judge’s Task Force on Commercial Litigation in the 21st Century, Report and Recommendations to the Chief Judge of the State of New York, June 2012, available at <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> (“2012 Task Force Report”).

<sup>10</sup> A Brief History, *supra* note 1.

<sup>11</sup> 2012 Task Force Report, *supra* note 9.

- Allowing letter briefing of discovery disputes (effective Apr. 1, 2015);
- Limiting the number of depositions and interrogatories (effective Apr. 1, 2015);<sup>12</sup>
- Replacing itemized privilege logs with categorical privilege logs (effective Sept. 2, 2014);<sup>13</sup>
- Developing a pilot program for appointment of “Special Masters” with expertise in complex discovery disputes (effective Aug. 4, 2014);
- Providing an accelerated adjudication option (effective June 2, 2014); and
- Introducing mandatory mediation in certain cases (effective July 28, 2014).

#### **IV. Composition & Jurisdiction**

Today, there are over 25 judges in the Commercial Division serving over twenty counties in New York State. Nine of those justices serve Manhattan—the state’s center of commerce. The Division has jurisdiction over cases that meet the monetary and subject matter thresholds explained in Section 202.70 of the Rules of the Commercial Division (the “Rules”). Plaintiffs must be seeking monetary damages ranging from a minimum of \$50,000 in Albany County to \$500,000 in New York County (recently raised from \$150,000).<sup>14</sup> Provided the monetary threshold is met, or equitable or declaratory relief is sought, the Rules provide that the Commercial Division has jurisdiction over twelve enumerated areas of business dealings ranging from breach of contract to shareholder derivative suits to environmental insurance coverage actions.<sup>15</sup>

Once an action is commenced by service of a complaint, a party can seek assignment of the case to the Commercial Division by completing a Request for Judicial Intervention (“RJI”) certifying that the case meets the Division’s monetary and jurisdictional rules.<sup>16</sup> If a party files an RJI without the “commercial” designation, any other party to the action may make a letter application to the Administrative Judge to transfer the case into the Commercial Division.<sup>17</sup> Non-Commercial Division justices to whom an action is assigned may also petition the Administrative Judge for transfer.<sup>18</sup>

#### **V. Effectiveness & Influence**

The Commercial Division has been praised for its ability to efficiently adjudicate complex commercial actions—and for good reason. Statistics released by the New York Supreme Court’s Office of Court Administration illustrate that in the Division’s first year in New York County, the average disposition time in contract cases dropped by 29 percent and the total number of pending actions dropped by 26 percent.<sup>19</sup> By 2002, the average disposition time for contract cases within the Division was reduced

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<sup>12</sup> 22 NYCRR § 202.70(g)(11-a) (interrogatories); 22 NYCRR § 202.70(g)(11-d) (depositions).

<sup>13</sup> 22 NYCRR § 202.70(g)(11-b).

<sup>14</sup> 22 NYCRR § 202.70(a).

<sup>15</sup> 22 NYCRR § 202.70(b). The Rules also specifically provide types of action deemed “non-commercial cases,” which cannot be heard in the Commercial Division even if the monetary threshold is met. *See* 22 NYCRR § 202.70(c).

<sup>16</sup> 22 NYCRR § 202.70(d).

<sup>17</sup> 22 NYCRR § 202.70(e).

<sup>18</sup> 22 NYCRR § 202.70(e).

<sup>19</sup> M. Bach and L. Applebaum, *supra* note 3, at 154 n.27.

to 364 days, a 44 percent improvement from a decade earlier.<sup>20</sup> Moreover, the average caseload for Commercial Division justices is significantly lower than that of the rest of New York County's civil Supreme Court Justices. The former average 270 cases while the latter routinely juggle over 1,000—a disparity which allows the Commercial Division justices to more actively monitor their dockets.<sup>21</sup>

The success in New York has influenced other jurisdictions to emulate the Commercial Division in developing business and commercial courts of their own. Florida, Maryland, Philadelphia, and Massachusetts have all relied on the Commercial Division to some degree.<sup>22</sup> Robert Hague, a member of the early 1990s task force charged with developing the Commercial Division, has served as an advisor to at least nine states and five countries regarding the formation of specialized commercial courts.<sup>23</sup>

## **VI. Further Reading**

- New York State Unified Court System, Commercial Division – NY Supreme Court, *A Brief History*, <https://www.nycourts.gov/courts/comdiv/history.shtml>.
- The Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York*, June 2012, available at <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf>.
- Section 202.70 of the Uniform Rules for N.Y.S. Trial Courts: Rules of the Commercial Division of the Supreme Court, available at <https://www.nycourts.gov/rules/trialcourts/202.shtml#70>.
- Commercial Division Request for Judicial Intervention Addendum, <https://www.nycourts.gov/forms/rji/UCS-840C-fillable.pdf>.

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<sup>20</sup> M. Bach and L. Applebaum, *supra* note 3, at 154.

<sup>21</sup> Ben Bedell, 'User-Friendly' Judge Pleased by New Post With 'Crown Jewel,' *New York Law Journal*, available at <http://www.newyorklawjournal.com/printerfriendly/id=1202723257030>.

<sup>22</sup> M. Bach and L. Applebaum, *supra* note 3, at 159.

<sup>23</sup> M. Bach and L. Applebaum, *supra* note 3, at 159 n.73.