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LITIGATION

CLIENT PUBLICATION

May 5, 2104

New York Adopts Rule Allowing Parties to Agree to "Accelerated Adjudication" of Lawsuits in the Commercial Division of New York State Supreme Court

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The New York state court has adopted a rule that will allow parties to agree to have a Commercial Division lawsuit heard on an expedited basis. The rule permits parties to agree in a contract that any lawsuit arising out of or related to the contract will be heard under the Commercial Division's new "accelerated adjudication" process. The accelerated adjudication rule sharply limits discovery and requires that a case be ready for trial within nine months. The rule also deems both parties to have waived important rights (including the right to any interlocutory appeal and the right to a jury trial).

Companies entering into a contract that provides for a New York state court forum for any dispute should give serious consideration to having the forum selection clause in their contract specify that the new accelerated adjudication process will apply to any lawsuit.

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Application of the Rule

Rule 9 of the Rules of Practice for the Commercial Division, which becomes effective June 2, 2014, provides that in all Commercial Division actions (other than class actions) the parties can expressly consent in writing to authorize the Court to apply the new accelerated adjudication procedure. While parties can negotiate their own language, the rule provides a model forum selection clause that parties can put into their contracts agreeing to use the accelerated adjudication procedure.

Where the parties agree to accelerated adjudication, all pre-trial proceedings, including all discovery, pre-trial motions and mandatory mediation, must be completed and the parties ready for trial within nine months from the date of filing of a Request of Judicial Intervention (RJI). (There is no requirement, however, that the Court actually hold the trial within a certain time frame.)

Accelerated adjudication actions will have dramatically limited discovery. Unless the parties agree otherwise, discovery is limited to seven interrogatories, five requests to admit and seven depositions per side. Document requests must be "restricted in terms of time frame, subject matter and persons or entities to which the requests pertain," and electronic discovery must be "narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute." Additionally, "where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or the amount in controversy, or to the relevance of the materials requested, the court will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment."

Parties that agree to have disputes heard as accelerated actions are "deemed . . . to have irrevocably waived":

- Any objections based on lack of personal jurisdiction or forum non conveniens;
- The right to a jury trial;
- The right to recover punitive damages; and
- The right to interlocutory appeal.

This means that a defendant cannot appeal from the denial of a motion to dismiss and neither party can appeal from a temporary restraining order, preliminary injunction, or other interim relief.

Important Considerations

The decision whether to seek a forum selection clause that provides for the accelerated adjudication procedure will need to be made on a case-by-case basis after considering the possible disputes that could arise from a given contract. A party to a contract that sees itself as likely being a plaintiff in any lawsuit will want the accelerated procedure in some situations (*e.g.*, a lender in a

collection action that wants to keep a delinquent borrower from dragging out a lawsuit) and not want the procedure in other situations (*e.g.*, where the plaintiff would want a jury trial, the threat of punitive damages, or full discovery). Similarly, a party to a contract that sees itself as likely being a defendant in a lawsuit will need to decide whether the pros of the accelerated procedure (*e.g.*, no jury, no punitive damages, and limited discovery) are outweighed by the loss of the right to any interlocutory appeal (which could have the effect of increasing rather than limiting the time and expense of litigation).

It is obviously important that anyone signing a contract with a New York state court forum selection clause realize that, if the clause mentions "accelerated procedures" or similar words, the party is agreeing to a process that waives several important, substantive rights. Indeed, some parties will no doubt try to insert these words into a contract's forum selection clause as a backdoor way of eliminating the right to a jury or punitive damages.

This new rule is intended to allow parties to agree in advance that a Commercial Division lawsuit would be put on that Court's "rocket docket." It provides an alternative to the choice between arbitration and full-blown litigation. And it is a choice that may be particularly attractive to foreign companies that hesitate to agree to a U.S. forum because of a fear of juries, punitive damages, and extensive discovery. Time will tell if the New York Commercial Division's new accelerated adjudication procedure will cause more companies to elect a New York forum for contract disputes. And the ultimate test of this new procedure will be how the Judges of the Commercial Division interpret the limitations on discovery and how quickly they actually schedule trials.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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