

# An Overview of Commercial Division Innovations

## In the Commercial Division of the New York State Supreme Court

Since its creation in 1995, the Commercial Division of the New York State Supreme Court has transformed business litigation in New York and made the State a preferred venue for complex business disputes. Renowned as one of the world's most efficient venues for the resolution of commercial disputes, the Commercial Division has adopted in the past few years the following innovations proposed by the Commercial Division Advisory Council as part of its pursuit of continual improvement.

### Assignment to the Commercial Division

- **Earlier case assignments:** A party has 90 days from service of a complaint to seek assignment to the Commercial Division.
- **Increased monetary thresholds:** In New York County, the jurisdictional threshold is now \$500,000. In other regions, the threshold now ranges from \$50,000 to \$200,000.
- **Sample forum selection clause:** Contracting parties may use a sample forum selection clause that selects the Commercial Division as the choice of forum.
- **Sample choice of law clause:** Contracting parties may use a sample choice of law clause expressing their consent to having New York law apply to their contract, or any dispute under the contract.
- **Revised eligibility criteria:** Domestic arbitration actions must meet the applicable monetary threshold in order to be heard by the Commercial Division; disputes regarding home improvement contracts for residential properties were added to the list of matters ineligible to be heard by the Commercial Division.

### Efficient Discovery Procedures

- **Discovery proportionality:** The Preamble to the Commercial Division Rules was amended to confirm that principles of proportionality apply to discovery.
- **Optional accelerated adjudication:** Parties may consent to streamlined procedures designed to make the case trial-ready within nine months.
- **Limits on depositions:** The number of depositions taken by plaintiffs, defendants, or third-party defendants is presumptively limited to ten, and depositions are presumptively limited to seven hours per deponent.
- **Limits on interrogatories:** Interrogatories are presumptively limited to 25, including subparts, and are further limited during discovery to names of witnesses, computation of damages, and identification of documents. Contention interrogatories may be served only at the conclusion of discovery.
- **Simplified privilege logs:** Parties may use categorical designations rather than individual listings of privileged documents. A litigant who insists on a document-by-document listing may be ordered to bear the cost.
- **More robust expert disclosures:** Expert disclosures are to be accompanied by a written report and must be completed no later than four months after the completion of fact discovery. Experts are now expressly subject to deposition.
- **Entity depositions:** The deposition notice or subpoena issued to an entity may include a list of matters on which the entity will be questioned, and if the notice does not identify a specific individual to testify on the entity's behalf, the entity must designate the specific individual(s) no later than 10 days before the deposition. If the notice does identify a specific individual to testify, the entity can counter-designate someone else. The individuals designated must testify about information known or reasonably available to the entity, and such testimony shall be usable against the entity by any adverse party.

- **More tailored responses to document requests:** Boilerplate objections are not permitted. Parties must state whether their objections pertain to the specific documents requested and identify the types of documents being withheld.
- **Quick resolution of discovery disputes:** Prior to filing a discovery dispute motion, parties must consult in good faith, and each party may submit to the court a three-page letter outlining the dispute for immediate resolution.
- **Memorialization of discovery conference resolutions:** For in-court discovery conferences, parties may either prepare a writing incorporating the resolutions reached at the conference and submit it to the court to be so-ordered or arrange for all resolutions to be dictated into the record. For telephone discovery conferences, parties may submit a stipulated proposed order memorializing the resolution of the discovery issues.
- **Proportionality when seeking ESI from nonparties:** Before seeking electronically stored information (“ESI”) from nonparties, parties must consider proportionality factors including burden, cost, importance, and availability of the ESI.

## Model Forms

- **Model preliminary conference order form:** The presiding judge can utilize an optional preliminary conference order form, which contains a model confidentiality agreement, procedures for e-discovery preservation and production, and commitments to discuss expert disclosures and alternative dispute resolution.
- **Model compliance conference stipulation and order form:** The presiding judge can utilize an optional compliance conference order form, which includes discovery deadlines. If a deadline is missed, parties must explain why the deadline was not met and propose a new date for completion. The form was revised on January 1, 2018 to reflect recent Commercial Division rule changes relating to discovery and other matters.
- **Model status conference stipulation and order form:** The presiding judge can utilize an optional status conference order form designed to identify the final discovery matters that need to be completed before the Note of Issue is filed. The form also requires an explanation from counsel if alternative dispute resolution efforts have not begun by the time of the status conference. The form was revised on January 1, 2018 to incorporate recent changes in Commercial Division rules and practice. Among other changes, the form sets forth a new section on expert discovery and provides for greater specificity on a range of topics in the discovery process.
- **Standard form of confidentiality order:** At the election of the presiding judge, the standard form of confidentiality order will govern the parties’ exchange of confidential information, including the mechanism for e-filing confidential documents.

## Reduce Delay During Proceedings and Encourage Settlement Discussions

- **Direct testimony by affidavit:** The Court may require that direct testimony of a party’s own witness in a non-jury trial or evidentiary hearing be submitted in affidavit form.
- **Time limits on trials:** The Court may rule on the total number of trial hours permitted for each party after submission of requests by the parties.
- **Settlement conference before different judge:** A formal mechanism allows parties to jointly request that a justice other than the justice assigned to their case hear a settlement conference.
- **Summary jury trial stipulation:** Parties may stipulate to a binding jury trial with relaxed rules of evidence and limited time for jury selection and case presentation.
- **Staggered court appearances:** Judges will assign specific time slots for hearings to increase efficiency and decrease lawyers’ waiting time.

- **Temporary restraining orders:** An applicant for a temporary restraining order is now required to give notice, including copies of all supporting papers, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.
- **Bookmarks for e-filed documents:** Each electronically filed memorandum of law, affidavit, and affirmation must include “bookmarks” that list the document’s contents and facilitate easy navigation by the reader within the document.
- **Sanctions for attorney delay tactics:** The Preamble to the Commercial Division Rules was amended to caution attorneys that the Commercial Division will not tolerate dilatory tactics and may impose sanctions.
- **Settlement-related disclosures:** Parties must discuss a voluntary and informal exchange of information that would aid early settlement during their meet-and-confer prior to the preliminary conference.
- **Consultation regarding expert testimony:** The Court may direct that counsel for the parties consult to identify those aspects of their experts’ anticipated testimony that are not in dispute and to reduce any resulting agreements to a written stipulation.
- **Large Complex Case List:** A Commercial Division Justice in New York County may designate a case for the “Large Complex Case List” if the amount in controversy exceeds \$50 million or the case presents matters of sufficient complexity and importance. Justices presiding over such cases may, in their discretion, apply procedures and make available to the parties such court resources as may be available (including but not limited to special referees with expertise in discovery, special mediators, settlement judges, interface options with extranets and electronic document depositories, and hyperlinked briefs) commensurate with the requirements of active case management of the largest and most complex matters in the Commercial Division.
- **Certification relating to alternative dispute resolution:** Counsel for each party must submit to the Court at the preliminary conference and each subsequent compliance or status conference a statement certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms and stating whether the party is presently willing to pursue mediation at some point during the litigation. In all cases in which the parties are willing to pursue mediation, the preliminary conference order will provide a date by which a mediator will be identified by the parties.

*Prepared by the Commercial Division Advisory Council, which was formed by the Chief Judge of the State of New York in 2013 to advise on an ongoing basis about all matters involving and surrounding the Commercial Division of the Supreme Court of the State of New York. The Commercial Division Advisory Council expresses its profound gratitude to the judiciary, the bar, and the business community for their thoughtful consideration of these proposals as well as to the Administrative Board of the Courts for adopting the proposals.*

*Last updated: February 6, 2018.*