Commercial division update: Updated rules for New York's Commercial Division: Technology disputes and use of referees

The New York Commercial Division recently updated its procedural rules in two material respects: to reinforce its position as a go-to venue for technology-related litigation and to encourage the resolution of commercial disputes by the use of extrajudicial referees to hear and determine such disputes.

By Thomas J. Hall and Judith A. Archer, *New York Law Journal* — June 21, 2024

The New York Commercial Division recently updated its procedural rules in two material respects: to reinforce its position as a go-to venue for technology-related litigation and to encourage the resolution of commercial disputes by the use of extrajudicial referees to hear and determine such disputes. These amendments, which became effective Feb. 14, 2024, highlight existing capabilities of the Commercial Division and aim at strengthening the jurisdiction's attractiveness for complex business disputes.

Following a period of public comment in the fall of 2023, Chief Administrative Judge Joseph Zayas signed Administrative Order AO/77/24, amending Section 202.70 of the Uniform Rules for the Supreme and County Courts(Rules of the Commercial Division of the Supreme Court) by introducing an amendment to Section 202.70(b)(1)(technology disputes) and a new Rule 9-b to Section 202.70(g) (referees). 22 NYCRR § 202.70(b)(1) and §202.70(g).

While these additions constitute welcome reminders of the Commercial Division's jurisdiction over technology-related disputes and the existence of procedures to appoint extrajudicial referees, they do not directly impose any significant changes to the practice before the Commercial Division.

Technology disputes

Section 202.70(b) provides a list of the categories of actions over which the Commercial Division has jurisdiction,provided that the amount in controversy is satisfied. As in the past, actions eligible for Commercial Division assignment under that Section are ones in which the principal claims involve "[b]reach of contract or fiduciary duty,fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is alleged *to arise out of business dealings.*"

The rule then provides examples of the types of "business dealings" falling within the rule, such as corporate restructuring. The new amendment, as another example of such "business dealings," adds "technology transactions and/or commercial disputes involving or arising out of technology."

Notably, this amendment as adopted diverges from the text initially proposed in June 2023 by the Subcommittee on Procedural Rules to Promote Efficient Case Resolution. Proposed Amendment to Rule 202.70 (b)(1) – Reference to Technology In Description of Commercial Cases (June 23, 2023). The amendment as proposed used the phrase"technology transactions and/or *other matters* involving or arising out of technology."

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Instead, the actual amendment replaced the phrase "other matters" with "commercial disputes" to make clear that the amendment will not be interpreted as an extension of the Commercial Division's jurisdiction to non-commercial disputes.

The intention of the Subcommittee in proposing this amendment was to explicitly confirm that, "[w]ith technology playing an increasingly important role in the operation of businesses of all sizes, both inside and outside the state of New York," the Commercial Division has the capabilities and expertise to handle actions involving technology. While this amendment is not generally viewed as creating an entirely new category of cases over which the Commercial Division has jurisdiction, it is designed to highlight the Commercial Division's ability to handle technology disputes.

Indeed, in the past the Commercial Division has accepted jurisdiction over complex technology-related disputes. For example, in *BEC Capital, et al. v. Bistrovic*, 177 A.D.3d 438 (1st Dep't 2019), the First Department reversed a Commercial Division trial court order in a discovery dispute related to an high-frequency trading business agreement involving complex algorithms. In that case, the Appellate Division held that "the production of defendant's source code, which is trade secret… should have been ordered to be produced for 'attorneys and expert eyes only.'"

Likewise, Justice O. Peter Sherwood of the New York County Commercial Division oversaw a complex commercial technology dispute involving the "manufacturing process on 300mm wafers" of semiconductor chips. *Q Semiconductor v. GlobalFoundries U.S. 2 LLC*, 2019 N.Y. Slip Op. 30603 (N.Y. Co. Mar. 12, 2019). The Commercial Division Advisory Council proffered this amendment with the intention of signalling to practitioners the Commercial Division's familiarity with cases involving digital technologies, artificial intelligence, cybersecurity and data protection.

The Commercial Division is not the only business court in the country to explicitly reference technology-related disputes and cutting-edge sectors within its jurisdiction. Other states similarly point out their business courts' experience in resolving technology disputes, including Delaware, Georgia, Iowa, Maryland, Michigan, North Carolina,Tennessee, Utah and West Virginia. The Commercial Division Advisory Council referenced these jurisdictions when proposing to amend Section 202.70(b)(1).

Although the amendment does not expressly extend the scope of the New York Commercial Division jurisdiction, the absence of a definition for the term "technology" could lead to disagreements over the meaning of that term and the term "technology transactions." In comparison, the Delaware Chancery Court's jurisdiction over technology disputes is accompanied by a definition listing the types of agreements from which they may arise, including "the purchase or lease of computer hardware," or "the creation or operation of Internet web sites." 10 Del. C. §346(c).

Leading up to the adoption of this amendment to Section 202.70(b)(1), the Administrative Board of the Courts received several comments noting the potentially superfluous nature of this amendment. Some commentators argued that the addition of a reference to technology disputes was unnecessary considering that the new rule does not alter the Commercial Division's subject matter jurisdiction over commercial disputes involving technology and that cases such as *BEC Capital* and *GlobalFoundries U.S.* were already handled by the Commercial Division without the need for this amendment.

Additionally, commentators noted that methods other than this amendment would be available to remind parties and practitioners of the courts' abilities to adjudicate technology-related disputes, including continuing legal education programs and other presentations at industry-specific events.

Overriding these comments, the amendment was adopted.

Promoting use of referees

The other change that the new rules introduced relates to the enhanced use of referees. The amendment creates anew Rule 9-b to Section 202.70(g) intended to call practitioners' attention to their ability to seek appointment of referees to hear and determine (CPLR §4301), as contrasted with referees who only hear and report, and existing

court procedures aimed at improving the administration of justice through this efficient mechanism.

The rule does not establish any new procedures for the use of referees. Rather, new Rule 9-b simply references existing CPLR provisions by providing that "counsel should be aware that in accordance with CPLR sections 4301and 4317(a)" the parties can stipulate to the appointment of referees. 22 NYCRR §202.70(g).

Similar to the amendment promoting the Commercial Division's expertise with technology disputes, the Commercial Division Advisory Council submitted this new rule with the intention to raise awareness of practitioners regarding an"underutilized" mechanism of dispute resolution. Request for Public Comment on a Proposal for a New Commercial Division Rule to Encourage Use of Lawyers as Referees on Consent (Oct. 26, 2023).

Under CPLR provisions that pre-existed this addition, parties were and are authorized to designate a referee, with the approval of the court, who will have "all the powers of a court in performing a like function." CPLR § 4301. Parties can stipulate that "any issue shall be determined by a referee." CPLR §4317(a).

Importantly for parties turning to a referee to expedite the resolution of their dispute, the decision of the referee to hear and determine stands "as the decision of a court," with direct appeals to the Appellate Division following the same process as appeals from trial court orders. CPLR §4319. This characteristic distinguishes a referee who is appointed to hear and determine from one whose appointment is to hear and report, the former being equivalent to a decision by the trial judge and the decision of the latter being subject to review by the trial court.

The new Rule 9-b thus highlights a different form of adjudication responding to the needs of certain complex cases without burdening judges' dockets.

Resorting to a private referee to address all or part of a case was already an option in the Commercial Division before the inclusion of Rule 9-b. Parties deciding to appoint a referee tend to benefit from more prompt and potentially less onerous procedures to resolve their dispute. This efficiency is partly due to the increased expertise of experienced practitioners appointed as referees and that fact that they are not burdened by a large docket of other cases. Determinations made by a referee may avoid the prolonged decision process involved with formal motions in court.

Litigants can elect to designate certain specified issues to be resolved by the referee while the remainder of the case remains on the judge's docket. The Subcommittee on the Role of the Commercial Division in the Court System relied on the example of the appointment of a referee to oversee that dissolution of the law firm Napoli Bern Ripka to illustrate the value of referees, including in that case "many requiring emergency rulings." Proposal for a New Commercial Division Rule to Encourage Use of Lawyers in Private Practice as Referees On Consent (June 26,2023). There, the dissolution of the law firm led to the reassignment of thousands of clients and generated several trials under the supervision of the referee appointed by the parties.

However, much like the amendment to Section 202.70(b)(1), the revision of Section 202.70(g) to add Rule 9-b is aspirational and informational as it does not mandate or prohibit any action. The new rule merely states that "counsel should be aware" of the existence of the mechanisms to appoint a referee and does not alter the pre-existing procedural rules.

Some of the comments to the proposed rule noted that, while the Commercial Division Advisory Council's initiative was a welcomed reminder, the adoption of rules constituting suggestions or recommendations risk unnecessarily burdening the work of practitioners and the readability of other requirements in the statute.

Conclusion

Although the changes adopted by the Commercial Division are different in nature, they seek to inform both sophisticated business entities and practitioners about the Commercial Division's existing capabilities and procedures. These amendments are designed to advance the Commercial Division's long-stated primary goal of the cost-effective predictability and fair adjudication of complex commercial cases, and encourage resort to its jurisdiction.

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