



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

October 24, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Amendment of the Rules of the Commercial Division to Include a Sample Forum Selection Clause

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of the Rules of the Commercial Division (22 NYCRR §202.70), recently proffered by the Commercial Division Advisory Council, calling for inclusion of a "Commercial Division Sample Choice of Forum Clause" as a new Appendix C to the Rules. As the Council notes in its memorandum in support of this proposal (Exh. A), forum selection clauses are a well-established and important tool for minimizing uncertainty over venue and jurisdiction in commercial litigation. The proposed model language would facilitate this goal by providing contracting parties "a convenient and streamlined tool to assist them in crafting appropriate party-specific language, in a pre-dispute context, in selecting the Commercial Division as their choice of forum" (Exh. A, p. 1). The recommended model language is as follows:

THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF.

Parties employing this or other forum selection language would still be required to meet the monetary and other threshold jurisdictional requirements for assignment to the Commercial Division.

A proposed ancillary amendment of 22 NYCRR §202.70(d) to reference the model language is set forth on p. 3 of Exh. A.

Persons wishing to comment on the proposed rule should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than December 20, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

To: Commercial Division Advisory Council

From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

Re: Proposed Amendment to Assignment to Commercial Division Rule (Section 202.70 (d)) to Include Standard Forum Selection Clause

Date: September 9, 2016

In examining ways to enhance the efficient and timely resolution of commercial disputes, the Subcommittee on Procedural Rules to Promote Efficient Case Resolution considered an amendment to Section 202.70 (d) of the Rules of the Commercial Division of the Supreme Court, relating to "Assignment to the Commercial Division" to reference a new Appendix C which provides contracting parties with a convenient and streamlined sample forum selection clause in selecting, in a pre-dispute context, the New York Commercial Division as the choice of forum.

INTRODUCTION

Ordinarily, the initial venue of all litigation is where a plaintiff files suit. The selected location can significantly impact, among other things, the outcome and cost of the litigation. To alter the venue initially selected by plaintiff or transfer to a different jurisdiction, the issue is left to the uncertainty of a contested motion resolved by judicial intervention. Forum-selection clauses allow contracting parties to designate, as part of their agreement, the state or federal court in which all their disputes will be resolved. These clauses are viewed as a powerful tool which can eliminate or minimize the uncertainty in litigating the issue of venue and jurisdiction. See Haig, Commercial Litigation in New York State Courts, Enforcement of Forum Selection Clauses § 13:1 [4th ed]. Also, they are viewed as highly useful tools in reducing the threat of inhospitable foreign laws, judges, and/or juries in litigating commercial cases. Id. They have been held by the Supreme Court as presumptively valid (See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907 [1972]), a position which New York courts have adopted. See Brooke Group v. JCH Syndicate 488, 87 N.Y.2d 530 (1996); Union Bancaire Privee v. Nasser, 300 A.D.2d 49 (1st Dept. 2002); Best Cheese Corp v. All-ways Forwarding Int'l, 24 A.D.3d 580, 581(2d Dept. 2005); Seneca v. Seneca, 273 A.D.2d 56, 60 (4th Dept.2002). Thus, inclusion of forum-selection clauses in contracts has become a widely accepted practice among commercial contracting parties.

Despite their broad acceptance, agreements on where a dispute should be resolved are not always easily reached and "careful formulation of such clauses is needed to increase the probability that a forum selection clause will be enforced to its maximum effect." See, Haig, § 13:1. The proposed sample clause is designed to afford contracting parties a convenient and streamlined tool to assist them in crafting appropriate party-

specific language, in a pre-dispute context, in selecting the Commercial Division as their choice of forum.

PROPOSED AMENDMENT TO COMMERCIAL DIVISION RULE (d)

As between the two types of forum selection clauses – mandatory and permissive forum selection clauses – recognized by state and federal courts,¹ the proposed sample clause is styled as a mandatory forum selection clause so as to offer a greater degree of certainty. In enforcing a mandatory clause, New York courts are reluctant to grant a change of venue, absent a showing of fraud, undue influence, coercion, unequal bargaining power, or contravention of public policy. See Union Bancaire Privee v. Nasser, 300 A.D.2d 49 (1st Dept. 2002); Best Cheese Corp v. All-ways Forwarding Int'l, 24 A.D.3d 580, 581(2d Dept. 2005); D.O.T. Tiedown & Lifting Equip., Inc. v. Wright, 272 A.D.2d 290, 291 (2d Dept. 2000). Use of the words “exclusive” jurisdiction in indicating that the Commercial Division “shall hear” all disputes has been adopted in the proposed sample forum selection clause, in rejecting use of permissive words like “may” or “will” in consenting to the Commercial Division’s jurisdiction. See Micro Balanced Products Corp. v. Hlavin Industries Ltd, 238 A.D.2d 284, 285 (1st Dept. 1997); compare, Reliance Ins. Co. v. Six Star, Inc., 155 F. Supp.2d 49, 53 (S.D.N.Y. 2001).

With the inclusion of an optional sample forum-selection clause in an appendix to the Commercial Division rules, the Subcommittee desires to give parties the convenience of sample language that can be tailored appropriately by the parties to suit the parties’ particular needs, to select the New York’s Commercial Division as their choice of forum. Under the proposed amendment, the parties would continue to have to meet the threshold requirements of obtaining jurisdiction and satisfaction of the monetary and substantive criteria for assignment to the Commercial Division. They may also wish to consider including an alternative venue in the event the jurisdictional requirements for Commercial Division assignment have not been met. By using the sample provision, the parties would invoke the Commercial Division’s jurisdiction over all parties and all claims. The proposed contract provision essentially states: “the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, which shall hear any dispute, claim or controversy arising in connection with or relating to this agreement, including, but not limited to the validity, breach, enforcement or termination thereof.”

Thus, the Subcommittee on Procedural Rules to Promote Efficient Case Resolution recommends that the Advisory Council propose for inclusion in the existing Rules of the Commercial Division of the Supreme Court (Section 202.70 of the Uniform Civil Rules for the Supreme Court) the following amendment to Rule (d):

(d) Assignment to the Commercial Division

¹ Mandatory forum selection clauses provide that “the specified forum is the exclusive or sole forum in which the matter may be heard” and permissive clauses “confer jurisdiction on the specified forum to hear the matter but do not limit the parties’ rights to sue in another forum having jurisdiction over the defendants.” Haig, *Commercial Litigation in New York State Courts*, §13:4, p. 1134.

(1) Within 90 days following service of the complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention (RJI) that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section. Except as provided in subdivision (e) below, failure to file an RJI pursuant to this subdivision precludes a party from seeking assignment of the case to the Commercial Division.

(2) Subject to meeting the jurisdictional requirements of subdivisions (a), (b) and (c) of this section and filing an RJI in compliance with subsection (d)(1) above, the parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court by including such consent in their contract. A sample choice of forum provision can be found at Appendix C to these Rules of the Commercial Division.

APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSE

Purpose

The purpose of this sample forum-selection provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to confer jurisdiction on the Commercial Division.

This sample provision is not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court (the "Uniform Civil Rules"), the New York Civil Practice Law and Rules (the "CPLR"), or any other applicable rules or regulations pertaining to the New York State Unified Court System. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations.

The Sample Forum Selection Provision

To express their consent, parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION,

NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF.”