

John Caher: Welcome to “Amici,” news and insights from the New York Judiciary and Unified Court System. Today, we are joined by Robert L. Haig, a partner at Kelley Drye & Warren in Manhattan and Chairman of the Commercial Division Advisory Council, a panel of lawyers, current and former judges and in-house counsel. The Advisory Council was a key recommendation of Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century. It is tasked with fashioning the long-term goals of the Commercial Division.

First, can you just give us a very brief history of the Commercial Division, what it is, when it was established and why it was established.

Robert L. Haig: The Commercial Division is New York's Business Court. It is a division of the New York State Supreme Court which is the state's trial court of general jurisdiction. The Commercial Division was created to resolve business and commercial disputes. It opened its doors for business on November 6th, 1995 which is almost 20 years ago. It was established to enable the New York state courts to be more responsive to the needs of business litigants and also to enable the entire New York State court system to function more efficiently.

John Caher: Is it fair to say that before the Commercial Division came into existence, there was a climate where businesses were increasingly resorting to other forums — federal courts, private mediation, the courts of Delaware?

Robert L. Haig: Yes, I think that's true. New York does have a rich and distinguished history of commercial litigation. That really is not very surprising because New York has been a center of finance and commerce for more than 200 years. The historians indicate that the courts in New York have been well regarded for much of that period for their ability to handle commercial litigation. However by the early 1990s, the state court dockets had shifted away to a substantial extent from commercial cases and more towards family, tort and criminal litigation. The courts were confronting a lot of new challenges in a period of rapid social change.

John Caher: Why was that the case? Why were businesses going outside New York to resolve disputes, and has that changed?

Robert L. Haig: Twenty years ago, many businesses really tried to avoid having to litigate in the New York state courts. They viewed our state courts as inefficient and in some cases, as almost hostile to business.

Businesses were concerned that many of the judges seemed to have little experience or background in commercial litigation and sometimes didn't really understand it fully. Businesses thought that it cost too much to resolve disputes and that it was very hard to predict the results. They were particularly concerned that they sometimes encountered inexplicable results. For example, a very large verdict in a case that didn't seem to involve substantial damages, or liability when they shouldn't have been liable at all.

Now, you asked also whether that's changed and it has, a lot.

The Commercial Division is now the first choice of many businesses when they want to resolve a business dispute. The Commercial Division now sends a message that New York is interested in and responsive to the needs of the business community. The Commercial Division also demonstrates that New York wants to create an environment in which businesses can flourish and also can resolve disputes without wasting their time and money.

John Caher: Let's back up a moment. Where are these courts, these Commercial Division courts?

Robert L. Haig: The Commercial Division was first located in New York and Monroe counties in 1995. It subsequently expanded to Kings and Queens counties in New York City, to Nassau and Suffolk counties on Long Island, to Westchester County, and to Erie, Onondaga and Albany counties. Erie County now encompasses the entire 8th Judicial District and Monroe County, which was one of the two original counties, is now the entire 7th Judicial District.

John Caher: Who are the judges that are assigned to the Commercial Division and who assigns them?

Robert L. Haig: There are 29 judges now assigned to the Commercial Division. That includes nine judges in New York County, four in Queens, three in Nassau, Suffolk and Kings in each of those counties, two in Westchester and one in the 7th and 8th Judicial Districts, Albany and Onondaga. The judges are assigned, generally, by the administrative judge in each judicial district or county, in consultation with the Chief Administrative Judge.

John Caher: How does a case even end up in the Commercial Division?

Robert L. Haig: A party seeking assignment to the Commercial Division has to indicate on its request for judicial intervention, the so-called "RJI." The party does

that by checking the box on the RJI that says "commercial" and also by attaching a Commercial Division RJI Addendum. Parties have to do that within 90 days following service of the complaint.

The party seeking assignment also has to submit a signed statement justifying the Commercial Division designation together with a copy of the pleadings.

Generally, what happens next is that the clerk will review the pleadings to determine whether the amount in issue meets the monetary threshold for the Commercial Division in that county. If it does, the clerk assigns the case, at random, to a Commercial Division judge who reviews the substance of the case and its claims in order to make sure it belongs there. There are also procedures that are available if a party wishes to challenge the designation as a Commercial Division case and to seek its transfer out of the Commercial Division.

John Caher: From a business perspective, why is it important to have this specialty forum to resolve complex commercial cases?

Robert L. Haig: In a nutshell, it's cost and predictability. The Commercial Division judges are generating a comprehensive body of New York commercial law which businesses can look to in deciding whether or not to pursue various business strategies and transactions. The familiarity of the Commercial Division judges with that body of law results in more uniform quality and enhanced predictability of judicial decisions. Also, it is more cost effective for businesses to have a judge who has expertise in the subject matter and knows what he or she is doing.

John Caher: What about from the lawyer's perspective? You've been litigating complicated commercial cases for decades. From that perspective, why is it important, from a legal viewpoint, to have this forum?

Robert L. Haig: Lawyers are motivated by many of the same considerations and concerns that motivate their business clients. Lawyers don't want to waste time and money. They know that their business clients will be unhappy if they receive bills from the lawyers for legal work which does not produce a meaningful result, even if the fault is not entirely the lawyer's fault and partly the court systems. Lawyers want to be able to argue their case before judges who understand the applicable principles of law. They also want to be able to tell their clients what is likely to happen and to ensure that their predictions are in the ballpark and the Commercial Division is delivering on all of those considerations.

John Caher: With that record, has the New York Commercial Division become a forum of choice for particular types of cases?

Robert L. Haig: The Commercial Division in many cases is the first choice for businesses. Some businesses now have a presumption that their business disputes will be resolved in the Commercial Division. Many other businesses, which previously would have avoided the New York state courts, are at least willing to consider them and much of the reason is the judges, because they are immersed in commercial cases, rapidly develop an ability to understand them and to manage them. It's really similar in some respects to learning a language. If you do it all day, every day, you learn to do it better and faster. That's particularly true for complex commercial litigation.

John Caher: Has the Commercial Division changed the way business cases are litigated in New York?

Robert L. Haig: It has to a substantial extent. Business cases are now proactively managed by judges who understand the case. It's a hands-on type of case management. The judge establishes a time table and tries to understand the case at the very beginning. There has been a lot of specific changes in the Commercial Division rules over the last couple of years. Examples are limits on the number of depositions and interrogatories, changes to the privilege log rules, preliminary conference and compliance conferences and orders, earlier assignment of cases to the Commercial Division, optional accelerated adjudication procedures and mandatory mediation. All of these things are new within the last couple of years.

John Caher: It sounds like it's been very successful in New York. Has this model been followed or replicated in other states?

Robert L. Haig: This has been a great success story for New York. The Commercial Division is leading an emerging national and international trend toward the creation of business courts. There are many other states and other countries which have now studied the Commercial Division and a number of states have modeled their business courts after the Commercial Division. When I say a number, it's a substantial number. It's approximately 21 other states that have created business courts since 1995 and have modeled them in significant respect after the Commercial Division.

One interesting aspect of this is that there are delegations of judges from different countries from all over the world who visit the New York State Supreme Court at 60 Centre Street in downtown Manhattan to talk with

the Commercial Division judges and to learn about what the Commercial Division is doing. Those visits are arranged sometimes by the United States State Department and by the Commerce Department and many times, they are motivated by a recognition that the courts in these other countries need to deliver fair and predictable and cost-effective resolution if they are to attract foreign investment.

John Caher: I would imagine that as business has changed and grown over the past 20 years, so has the Commercial Division in response.

Robert L. Haig: It has, a lot. One significant change is that there are now more counties. We started in 1995 with two counties and there are now 10. There are also many more Commercial Division judges. We started in 1995 with five Commercial Division judges and there are now 29. Also, in 2006, the Commercial Division, after much hard work, adopted uniform rules that would apply to the divisions statewide and that enabled businesses to have confidence that they wouldn't have to deal with a separate set of rules in each one of the counties that they had their commercial cases in.

Then in 2012, Chief Judge Lippman appointed a Task Force on Commercial Litigation in the 21st Century to take the Commercial Division to the next step. That task force was chaired, co-chaired by former Chief Judge Judith Kaye and Martin Lipton, a distinguished transactional lawyer at the Wachtell Lipton Firm. That task force laid out a vision for the Commercial Division for the future. One of its recommendations was the creation of a permanent advisory council which has, in the most recent two years, proposed many new rules which have been adopted and higher jurisdictional limits in virtually all counties in the Commercial Division.

John Caher: How do you see the Commercial Division changing in the next few years?

Robert L. Haig: Well, those changes will be done under the guidance and the direction of the Administrative Board of the Courts which makes decisions on such matters, working with the Chief Judge and the Chief Administrative Judge. I think though, although I can't predict with certainty, it's logical to expect that with this many new rules, there inevitably will be a period as the new rules are implemented where they will be examined and improved and I see a period of implementation of the new rules, of monitoring them, of evaluating their effectiveness and fine tuning. In addition, the Commercial Division Advisory Council is continuing to make new proposals. For example, within the last couple of months, four of the Advisory Council's proposals have been distributed for public comment and are under consideration right now.

John Caher: You mentioned the Advisory Council which, of course, you chair. How do you envision its role going forward?

Robert L. Haig: Well, the Advisory Council serves at the pleasure of the Chief Judge and focuses on the issues that he would be concerned about. The Chief Judge's charge to the Advisory Council is to advise him as to matters affecting the Commercial Division and matters in the business world that may affect the court system and I think that has worked out well so far and I hope it will continue.

John Caher: Thanks for the insight and perspective. It sounds like the commercial court has been a very successful experiment. Is there anything I neglected to ask or anything more you'd like people to know about the Commercial Division?

Robert L. Haig: I think we've been talking primarily about the Commercial Division itself but there's a broader issue here and that is what impact does the Commercial Division have on the entire New York State Court System and for that matter, what impact does it have on the state and its citizens? In my view, the Commercial Division benefits the entire court system. It removes complex business cases from other parts of the court system and it allows those other parts and the entire system to function more efficiently.

The Commercial Division is really a re-allocation and a re-assignment of cases among judges which enables all judges to do the work that they are most interested in and skilled at. The Commercial Division is also a laboratory for the development of innovative, new procedures and technologies which can be tried out in the Commercial Division and then expanded to other parts of the court system after the kinks have been worked out. I think in the view of many people, the Commercial Division is good for everyone. It's good for all constituencies involved with the state courts. It's good for the judges, the lawyers, the parties, the business community and the public.

John Caher: Sounds like a wonderful innovation. Thank you for your time and for sharing your knowledge and expertise on this topic with us today.

Robert L. Haig: Thank you for the opportunity.

John Caher: Thank you for listening to this edition of Amici. If you have a suggestion for a topic on "Amici," call John Caher, 518-453-8669 or send him a note at jcaher@nycourts.gov. In the meantime, stay tuned.