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# **CAN NEW YORK'S NEW COMMERCIAL DIVISION RESOLVE BUSINESS DISPUTES AS WELL AS ANYONE?\***

**Robert L. Haig\*\***

## **INTRODUCTION**

A Division of the New York State Supreme Court dedicated to commercial litigation commenced operations on November 6, 1995.<sup>1</sup> As The Wall Street Journal reported on October 11, 1995, "[w]hile several other states have been pushing for trial courts devoted exclusively to business litigation, New York is the first in which a general trial court has implemented such a program."<sup>2</sup>

On June 13, 1996, the Board of Directors of the American Corporate Counsel Association [hereinafter ACCA] unanimously approved a statement endorsing the concept of specialized business courts. The ACCA statement discusses the Commercial Division and concludes that "New York has demonstrated that broad-based commercial courts are feasible and beneficial and that the support of the business community is valuable in creating them."

How did New York do it? What were the issues? What were the political and other obstacles? What are the features of the Commercial Division and the rationale for their design? Can the

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\*\* Haig is a partner at Kelley Drye & Warren in New York City and the Co-Chair of the Commercial Courts Task Force appointed by New York's Chief Judge to create the Commercial Division of the New York State Supreme Court. His answers to the questions posed in this article are unofficial and subjective.

1. *Court for Business Disputes*, WALL ST. J., Oct. 11, 1995, at B8.

2. *Id.*

Commercial Division resolve business disputes as well as anyone? What are the implications for other states?

New York's experience may help other states decide whether to proceed and in what directions. I also focus on New York's experience because an excellent article in the January/February 1995 issue of *Business Law Today* discusses many of the philosophical issues presented by business courts and the efforts other states are making to develop them.<sup>3</sup> In addition, the Spring 1995 issue of the *Brooklyn Law Review* contains four articles on the role of specialized courts in resolving business disputes.<sup>4</sup>

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3. R. Franklin Balotti & Roland E. Brandel, *Business Bench: Are Special Courts the Future?*, *BUS. LAW TODAY*, Jan.-Feb. 1995, at 25. With record numbers of complex business cases, some states have formed business courts, reasoning that such specialized courts will be better able to deal with the inherent complexity and possible effects on society of business cases. *Id.* at 26. The authors point out that many American businesses are dissatisfied with the lack of expertise in the judiciary and are increasingly seeking to resolve disputes outside the courts. *Id.*

4. See Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 *BROOK L. REV.* 1 (1995). Using Delaware's Chancery Court as the model, the author discusses the issues raised by the current trend toward the establishment of specialized business courts. *Id.* at 2. Although its success is largely the result of historical accident, the Delaware Chancery Court is renowned for the quality of law it creates and its efficiency. *Id.* at 4. Duplication of its success, in the business realm as well as other areas of law, is far from assured. *Id.* Pennsylvania's current proposal, for example, while procedurally welcomed, has not been sufficiently thought out. *Id.* at 44. Similarly, the competition among states for business litigation raises the possibility that business interests will predominate over those of unseen and unheard entities. *Id.*;

John J. Gibbons, *The Quality of the Judges Is What Counts in the End*, 61 *BROOK L. REV.* 45 (1995). Examining Professor Dreyfuss' article, several criticisms are discussed. *Id.* at 45. First, a study of specialized courts should be more inclusive, including both family and bankruptcy courts. *Id.* at 46. Second, a court's quality of decisionmaking is less a product of specialization than of the high caliber of its jurists. *Id.* at 47. Delaware retained its process of appointment, rather than direct election, ensuring the selection of high quality judges. *Id.* at 47-48. Conversely, Pennsylvania chose direct election and its judiciary suffered accordingly. *Id.* at 48-49. Third, the establishment of divisions within unitary court systems provides many of the advantages of specialization without the attendant disadvantages. *Id.* at 51.;

The Commercial Division followed an experiment begun several years earlier. On January 1, 1993, four Justices of the New York State Supreme Court were assigned to hear commercial cases in New York County (Manhattan). Their courtrooms were referred to as Commercial Parts.

The experiment was a success. In January, 1995, the New York Law Journal published the results of an extensive survey it had conducted of lawyers who had practiced in the Commercial Parts.<sup>5</sup> Of the more than 300 respondents, eighty-six percent said that more commercial parts should be created in other areas of the State.<sup>6</sup> Seventy-eight percent said that more commercial parts should be created in Manhattan.<sup>7</sup>

The judges and other court personnel assigned to the four Commercial Parts quickly refined their expertise in processing and resolving commercial cases. The judges employed pro-active case management familiar to litigators in federal and many state

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Pauline Newman, *The Sixth Abraham L. Pomerantz Lecture: Commentary on the Paper by Professor Dreyfuss*, 61 BROOK L. REV. 53 (1995). Offering the Court of Appeals for the Federal Circuit as an example, the establishment of specialized courts is discussed approvingly. *Id.* at 53. Beneficial results to industry and the public arise from the consistency and efficiency of specialized dispute resolution. *Id.* The demands of commerce on government recommend a receptive attitude toward structural change where appropriate. *Id.* at 54. The pursuit of specialized commercial courts in New York and Pennsylvania acknowledges those demands. *Id.*;

Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK L. REV. 67 (1995). Building on Professor Dreyfuss' analysis of the issues involved in specialized business courts, additional views on specialized dispute resolution are offered. *Id.* at 68. Issue is taken with the characterization of Delaware's Chancery Court as a "litigation nirvana." *Id.* at 70. The chancery court's "semi-specialized" function must be understood in light of the Supreme Court's "semi-generalist" function. *Id.* at 127. Generally, formulaic approaches to specialization are rejected as being of dubious value in highly nuanced areas. *Id.* at 70. However, the success of other specialized adjudication forums, combined with the existence of a heavy caseload in generalist courts, argues well for the continued expansion of this system of commercial dispute resolution. *Id.* at 128.

5. Daniel Wise, *Lawyers Praise Commercial Part Judges*, 213 N.Y. L.J. 1 (1995).

6. *Id.*

7. *Id.*

courts but not to New York State courts. Seemingly intractable cases were dealt with head on.

Despite the bar's enthusiasm for the Commercial Parts, there was room for improvement. Seventy-four percent of the respondents in the New York Law Journal survey said that they would still prefer to litigate in federal court.<sup>8</sup> The Commercial Parts were an experiment. They lacked operating rules, uniformity, technology, alternative dispute resolution and many other resources. The Commercial Parts, like the rest of the New York State court system, suffered from crushing caseloads and inadequate funding. It was time for the next step.

In January, 1995, the Commercial and Federal Litigation Section of the New York State Bar Association issued a comprehensive report recommending establishment of a commercial court.<sup>9</sup> The report included the results of a survey of in-house counsel indicating support in the business community for the concept. The Section concluded that such a court would benefit New York State.<sup>10</sup>

### *Creation of the Commercial Division*

In February, 1995, the Chief Judge of the State of New York established the Commercial Courts Task Force to create the Commercial Division. Bar leaders, judges, commercial litigators, and business leaders were recruited as members. The Co-Chair of the Task Force was New York's Chief Administrative Judge, E. Leo Milonas. Thus, the court system's commitment to the project was manifest.

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8. *Id.*

9. N.Y. ST. B. ASS'N, A COMMERCIAL COURT FOR NEW YORK, REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION, (1995). The Committee was chaired by Mark H. Alcott. Other Committee members included Vincent C. Alexander, P. Kevin Castel, William J. Dreyer, Lesley K. Friedman, Richard F. Griffin, Bernice K. Leber, Michael S. Oberman, Gerald C. Paul, S. Robert Schrager, Warren N. Stone, and Mark C. Zauderer. (This report details the Committee's findings and recommendations with respect to the need for a Commercial Division in New York.) *Id.* at 3.

10. *Id.* at 11.

The nineteen members of the Task Force served on nine committees devoted to such matters as case management, technology, Alternate Dispute Resolution [hereinafter ADR], jurisdiction, staffing, locale, facilities, and funding.<sup>11</sup>

The Task Force undertook substantial efforts to elicit and consider the views of the bar, the judiciary, and the business community. The Task Force considered the results of several major surveys and studies on commercial courts, and elicited additional information during a series of public meetings which it convened in different locations around the State. Several thousand judges and bar leaders were invited to attend these meetings. The Task Force met and otherwise communicated with bar association groups, judges, the leaders of other court task forces, court employees, law firms, and business groups. Finally, the Task Force was advised of the strong support for the concept of commercial courts by the Business Council of New York State, to which 6,000 businesses belong. In particular, the Task Force was advised that the General Counsels' Committee of the Business Council strongly supports the concept.

The Commercial Division rapidly took shape. It began operating on November 6, 1995. More than 4,000 new cases were filed in the Commercial Division in New York County between that date and June 30, 1996 (in addition to the several thousand pending cases transferred from the Commercial Parts). Here are some of the key issues considered by the Task Force:

### *Should New York Create a Commercial Division?*

The Task Force was aware that businesses in New York have increasingly turned to other forums to resolve their disputes, to avoid the difficulties often encountered in overburdened New York State courts. Businesses which had a choice often preferred

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11. The other members of the Task Force were Mark H. Alcott, Hon. Myriam J. Altman, Thomas D. Barr, A. Vincent Buzzard, Barry H. Garfinkel, William F. Kuntz II, Nathan Leventhal, Elizabeth D. Moore, Michael S. Oberman, Anthony R. Palermo, Bettina B. Plevan, Roy L. Reardon, Jerome G. Shapiro, Jeffrey G. Stark, Justin L. Vigdor, Daniel B. Walsh, Hon. John F. Werner, and Mark C. Zauderer.

to litigate in federal court, in the courts of other states such as Delaware and in private dispute resolution forums provided by such entities as the American Arbitration Association. The experimental Commercial Parts had shown that a state court could provide efficient, cost-effective and timely processing of commercial cases and an improvement in the quality of dispositions. A Commercial Division would foster a more favorable environment for attracting and maintaining business in New York, and would as a result enhance the economic well-being of the State.

It seemed clear that a Commercial Division would benefit the business community. But would it do so at the expense of other parts of the court system? The answer was no. The Commercial Division would ease pressure on an overcrowded court system. Removing complex commercial cases from other parts of the State Supreme Court would allow those parts to function more efficiently and would reduce the possibility that a few complicated commercial cases will displace the time and attention that the many other cases pending in those parts should receive.

### *Should There Be a Separate Statutory Court?*

One significant decision made early in the Task Force's deliberations was not to pursue the enactment of legislation creating a separate statutory court. Arguably, the prognosis for such legislation was good: New York had installed a new Governor on January 1, 1995 and there seemed to be increasing recognition that New York needed to improve its relationships with the business community. There was also an argument that enactment of a statute was necessary to insure that the new court was a serious enterprise, not merely a cosmetic gesture.

Nevertheless, the Commercial Division could be created by the Court's rule-making power, without invoking the time-consuming and uncertain legislative process. Under the circumstances, there seemed to be no need to pass a statute.

New York is also wrestling with the issue of court merger or unification. The State currently has a patchwork of courts with overlapping jurisdictions. Court merger is a significant goal of

many lawyers in New York. It appeared that a separate statutory commercial court would contribute to the proliferation and complexity of the New York court system. A commercial division of the existing State Supreme Court seemed to be the way to go.

*What Should the Court's Jurisdiction Be?*

Another significant issue was the nature and scope of the Commercial Division's jurisdiction. Should there be a jurisdictional threshold or minimum? (\$100,000 was a frequently mentioned number). Should the Division accept complex cases of all types (for example, should complex tort cases be accepted)? Was a detailed definition of "commercial case" appropriate and, if so, what should it be? If there was no detailed definition, would litigants be able to predict with reasonable accuracy whether a case would be accepted by the Commercial Division? The Commercial Courts Task Force wrestled with all of these issues. Here are the Task Force's answers and the reasons for them.

The Task Force decided that a jurisdictional threshold would be inappropriate. Such a threshold was likely to provoke complaints that the Division was elitist or primarily for large companies or major cases. The reality was that the Commercial Division would improve the handling of small business cases as well as large ones and that small businesses need prompt and efficient resolution of business disputes even more urgently than larger companies. Large companies are better able to afford years of litigation, although they rightfully deplore the cost. A small business in a garage owed money by a customer sometimes is destroyed if it cannot obtain prompt justice.

The question of what types of cases would be accepted was resolved in substantial part by recognition that the Commercial Division would be unable to accept all of the cases which might be described as commercial and that there was a need for flexibility, responsiveness to local conditions and caseloads, and the exercise of judicial discretion. The Task Force considered and rejected a detailed definition of "commercial" and a lengthy list



of the kinds of cases which should be considered commercial. In doing so, the Task Force sought to avoid ancillary litigation over whether a case belongs in the Commercial Division. On the other hand, litigants seek predictability. A party deciding whether to bring its action in federal court or in the State Supreme Court wants to know whether the case will remain in the Commercial Division if it is filed there.

At the present time, any party may request that an action be designated a Commercial Division case.<sup>12</sup> One of the Commercial Division judges thereafter determines whether or not the case is suitable for adjudication in the Division.<sup>13</sup> In general, the more complex a business case is, the more likely it is to be adjudicated in the Commercial Division. In addition, future expansion of the Division should result in greater certainty that a case will remain in the Commercial Division if it is initially filed there.

#### *Where Should the Court Be Located?*

The question of where to locate the Commercial Division might seem simple. Presumably, you locate facilities for resolution of commercial disputes in places where there are large numbers of commercial disputes which need resolution. It wasn't quite that simple, however. In New York, the question is complicated by imperfect statistics, political questions and existing venue requirements.

The Task Force first focused on where the business cases were being brought. Statistics were available which indicated the number of "contract" actions pending in the Supreme Court in each of New York's sixty-two counties in which the parties had filed a form requesting judicial intervention. However, there are many kinds of "commercial" cases which do not involve contracts. In addition, the available statistics did not differentiate between a simple case seeking \$25,000 for goods sold and

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12. N.Y. RULES OF COURT app. F; app. G (McKinney 1996).

13. *Id.*

delivered and complex litigation over a billion dollar corporate acquisition.

In addition, receptivity toward the Commercial Division by those affected in a particular locale inevitably made a difference. In one county, the business community and the bar were generally supportive of the concept. In another county which had even more contract cases and thus seemed a good candidate, there was less support.

The decision was ultimately made that the Commercial Division should commence operations in New York County<sup>14</sup> and in upstate Monroe County where Rochester is located.<sup>15</sup> Litigants whose actions are properly venued in those two counties could file their cases in the Commercial Division as of right.<sup>16</sup> Other litigants may obtain access to the Commercial Division only upon consent of all parties and the court.<sup>17</sup> Consideration is being given to adding Commercial Division judges to other counties.

#### *What Role Should Alternate Dispute Resolution Play?*

ADR should be available to commercial litigants. Some of them are willing to pay for it. Some commercial cases are so complex that most judges do not have the time to resolve the many problems they present. Some commercial cases which are litigated for years at great expense could have been settled at their inception if only a vehicle had existed to facilitate a settlement.

It was clear that ADR should play a role in the new Commercial Division. Yet, there are many different types of binding and non-binding ADR which can be either mandatory or voluntary. The Task Force's goal was to create an ADR model which suited the needs of commercial litigants.

Additional questions were presented by the potential complexity of ADR. The process of recruiting, screening, training, and monitoring the providers can be time-consuming. Questions arise

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14. N.Y. RULES OF COURT app. G (McKinney 1996).

15. N.Y. RULES OF COURT app. F (McKinney 1996).

16. N.Y. RULES OF COURT app. F; app. G (McKinney 1996).

17. *Id.*

as to reports by and liability of the neutrals, confidentiality, conflicts of interest and evaluation of the program. ADR should be available but it should not impede the progress of the case.

The Task Force's answer to these issues was to provide litigants with a menu of ADR options and to encourage them to take advantage of appropriate options. Many of the options required payment of substantial fees to private providers. For those unable or unwilling to pay such fees, the Commercial Division provides a panel of volunteer mediators. Mediation is mandatory in appropriate cases unless the court believes that no useful purpose would be served by it (for example, if a party plans to move to dismiss or for summary judgment and there appears to be a substantial basis for the motion). The Task Force asked bar associations to solicit volunteer mediators: a panel of more than 150 was assembled within a few weeks.

Rather than create an elaborate ADR administrative superstructure which might have to be significantly modified soon after it began operating, the mediation program has been kept deliberately simple. The court has not yet established detailed criteria for qualification as a mediator, nor has it impeded the progress of the mediation program by requiring mediators to participate in training programs. In adopting this approach, it was apparent that many volunteer mediators were likely to have participated in mediation training programs presented by various organizations or to have other mediation experience. In addition, many volunteers were members of the ADR practice groups established by law firms in recent years.

Finally, not all efforts at dispute resolution would be provided through ADR options. The Task Force concluded that mandatory settlement conferences with the court were also a good idea.<sup>18</sup>

### *What Kinds of Technology Should Be Involved?*

Commercial cases often involve large volumes of documents and numerous witnesses. Law firms and their corporate clients are increasingly using technology to achieve more cost-effective

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18. N.Y. RULES OF COURT app. F; app. G (McKinney 1996).

litigation results. The Task Force knew that courts in other jurisdictions had improved case processing through technology. The question was what technology was appropriate for the Commercial Division.

Technology also presents broader issues. Is it fair to provide technological innovations to commercial litigants without doing the same for other kinds of cases? Are there distinctions in the extent to which technology can facilitate the management and disposition of different types of cases?

The Task Force asked a New York State Bar Association group to conduct a technology survey of law firms which handle commercial cases. The firms surveyed were asked to indicate whether they wanted the Commercial Division to make available various specified types of technology. Virtually all of the respondents requested the ability to file documents and access case information electronically.

The initial technological innovation in the Commercial Division is the installation of networked personal computers in all chambers, courtrooms and clerk's offices which will enable the Division to use uniform case management software. Other planned technology initiatives include a new civil case database system that will provide the public with instant on-line access to case information and increased availability of Commercial Division opinions "on-line."

The fairness question was troubling to some tort lawyers. The answer in New York is that the technological innovations planned for the Commercial Division are being tried on an experimental basis and their use will be expanded if they are successful. The Commercial Division appears to be the best place to experiment with these innovations. Complex computer systems should be developed on an incremental basis and adjusted in accordance with experience. Instantaneously converting an entire state court to a new computer system is a prescription for disaster.

Commercial cases are a good place to start. The large volume of documents can be handled efficiently by new technology in ways that many tort cases do not require. In addition, many of the law firms specializing in commercial cases already have the new technology in place. Since much of the technology is

intended to facilitate communications between the courts and their users, it makes sense to experiment with and learn from the law firms which currently have the technology. Hopefully, the lessons which are learned may be applied to other parts of the courts.

*What Kinds of Case Management Techniques Should Be Employed?*

The basic approach to case management in the Commercial Division is for the court to aggressively manage cases. This may seem unremarkable to lawyers in many jurisdictions; in New York, it is revolutionary.

The bar in New York has traditionally controlled the pace of pre-trial proceedings. Judicial participation in such proceedings usually occurred only at the request of a party. New York has historically not scheduled cases for trial until one party voluntarily files a certificate that it is ready and the other parties do not object. Thus, cases could lie dormant for many years. Finally, New York courts have generally not required pre-trial stipulations and lists of trial witnesses and exhibits. Although consideration has been given to more pro-active case management, the extraordinary volume of cases has been perceived as presenting insuperable obstacles.

The Commercial Division utilizes advanced case management techniques, including close judicial oversight of each stage of litigation and case tracking by type and complexity. The Division requires a preliminary conference in each case, which permits the court to lay out a road map for the entire lawsuit, including timetables and a target trial date.<sup>19</sup> The court will also order the parties to do the following before trial: stipulate to undisputed facts; identify fact and expert trial witnesses; identify trial exhibits and deposition testimony to be introduced at trial and objections thereto; and exchange trial briefs and requests to charge.<sup>20</sup>

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19. N.Y. RULES OF COURT app. F; app. G (McKinney 1996).

20. *Id.*

*What Obstacles Did The Commercial Division Encounter?*

Various individuals and groups expressed concerns about the Commercial Division. However, the Task Force anticipated the concerns and structured the Division to obviate potential objections.

The greatest single concern was that the Commercial Division would be elitist and would provide a better quality of justice for one class of litigants at the expense of another. Tort lawyers particularly raised this concern.

The quick answer is that New York has not spent a lot of money on the Commercial Division nor has it shifted significant resources to it. No new courthouses or even courtrooms have been constructed. Most of the modest expenditures have been for technology (about \$100,000 in a \$980 million court budget). In addition, the Commercial Division judges have been selected from among the judges who have the greatest interest, aptitude and experience in handling commercial cases. In other words, the tort cases continue to receive the attention of judges best able to deal with them.

A number of factors reduced the likelihood of significant opposition. First, the Commercial Division as it exists in 1996 is a step in an evolutionary process. Commercial Parts in New York County began in 1993 and operated successfully for nearly three years. The Commercial Division builds upon the success of the Commercial Parts but still operates in only two out of sixty-two counties and is staffed by only six State Supreme Court Justices. Further steps are likely to take place only upon a showing that the Commercial Division is a proven success and that it is needed in other counties.

Second, the Commercial Division was created through the Court's rule-making powers, not by creation of a separate statutory court.

Third, the Task Force made extraordinary efforts to consult with affected constituencies and to address their concerns.

Fourth, the Task Force has worked hard to communicate its conviction that the success of the Commercial Division will benefit other areas of the Court. Many aspects of the Commercial

Division such as ADR, case management, and technology will serve as the bases for improvements in other areas of the New York State courts. You have to start someplace, and the Commercial Division is as good a place as any.

#### CONCLUSION

The Commercial Division offers hope of innovation and positive change to those who are skeptical about the judicial system. It shows that the bar, the bench, and the business community can work together to benefit all citizens. It offers hope that public courts can resolve business disputes promptly and efficiently.

One year after the creation of the Commercial Division the New York Law Journal reported that the Division is a success.<sup>21</sup> George Frazza, who heads the American Bar Association's Business Law Section stated that "corporate lawyers now make New York courts their forum of choice, even writing that choice into their contracts."<sup>22</sup> Mr. Frazza hailed the Commercial Division as "a 'magnificent accomplishment' . . . that is being used as 'our poster child' in efforts to get other jurisdictions to adopt specialized commercial courts."<sup>23</sup>

According to court administrators, the increased efficiency in the processing of commercial cases has been dramatic. The average resolution time for contract disputes has been reduced by twenty-nine percent.<sup>24</sup> In addition, the number of pending contract cases in New York County has been lowered by twenty-six percent.<sup>25</sup> Whereas the number of pre-trial settlements has increased by eighty-five percent.<sup>26</sup>

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21. Daniel Wise, *Commercial Division Hails Year's Progress*, 216 N.Y. L.J. 92 (1996). (reporting on the success of the Commercial Division on its one year anniversary.) *Id.* at 1.

22. *Id.*

23. *Id.*

24. *Id.* at 4.

25. *Id.*

26. *Id.*

The success of the Commercial Division is evident. The Division is good for New York State and its citizens, and good for businesses, lawyers and judges. It is clear that New York's new Commercial Division can resolve business disputes as well as anyone. In light of the numerous handicaps and resource shortages confronting New York courts every day, if a Commercial Division can work in New York, it can work anywhere else where business cases need resolution.



