

TO: Office of Court Administration

FROM: New York State Bar Association's Commercial and Federal Litigation Section

DATE: June 10, 2015

RE: The Advisory Council's Proposal Concerning Eligibility Criteria For Matters That May Be Heard In The Commercial Division

The Commercial and Federal Litigation Section ("**Section**") is pleased to submit these comments in response to the Commercial Division Advisory Council's Memorandum dated April 14, 2015, proposing an amendment of Section 202.70 (b) and (c) of the Rules of the Commercial Division relating to three aspects of the eligibility criteria for cases that may be heard in the Division (the "**Proposal**").

I. EXECUTIVE SUMMARY

A. Arbitrated Matters

The Section agrees that a commercial dispute that is subject to arbitration should not be treated differently than other commercial disputes for purposes of eligibility for assignment to the Commercial Division, and the monetary threshold should apply to such disputes. The Section, therefore, enthusiastically welcomes the Advisory Council's Proposal as it pertains to the application of the Commercial Division monetary threshold to arbitrated matters. The Section respectfully suggests, however, that there is no basis upon which to treat disputes subject to arbitration outside the United States differently from those subject to arbitration within the United States with respect to application of the monetary threshold.

B. Yellowstone Matters

The Section agrees that crafting a rule to differentiate among *Yellowstone* injunction cases appropriate and inappropriate for Commercial Division assignment is impractical. Accordingly, the Section agrees with the Advisory Council that no change to the current rule in this regard is advisable.

C. Home Improvement Matters

Finally, the Section agrees that disputes concerning home improvement contracts for single family residences (or individual residential units) should not be heard in the Commercial Division even if they meet the monetary threshold. In order to avoid unintended consequences of the proposed amendment; however, the Section respectfully suggests that the amendment should make clear that in the case of a condominium or cooperative unit, the exemption applies when the subject home improvement contract applies solely to an individual unit, since construction contracts involving common areas of a building can be deemed to "involve[e] . . . individual units", as well.

II. SUMMARY OF PROPOSAL

A. Arbitrated Matters

As set forth in the Proposal, in the Taskforce Report of Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century it was recommended that the Commercial Division Advisory Council "remov[e] . . . the exemption to the monetary threshold for actions involving arbitration -- these matters should be subject to the same monetary threshold as are all other non-exempt categories." The Taskforce Report also noted that the Commercial Division policies should encourage New York as a venue for international arbitrations because "New York's economy benefits from the business that hosting international arbitrations can provide." (Taskforce Report at 29). Accordingly, the Taskforce recommended that specific justices be designated with lead responsibility for such matter. The Taskforce also recommended that the Advisory Council "periodically examine the categories of cases eligible for the Commercial Division." The Advisory Council, recognizing the demands placed on the Commercial Division, has recommended that the exemption from the monetary threshold applicable to arbitrations be eliminated, but only with respect to proceedings involving arbitrations held in the United States. Pursuant to the Proposal, therefore, the monetary threshold will apply to arbitrations conducted in the United States, but not to matters involving arbitrations conducted abroad.

B. Yellowstone Injunction Matters

The Proposal recommends that no change be made to the rules which permit matters involving *Yellowstone* injunctions to be assigned to the Commercial Division.

C. Home Improvement Contract Matters

The Proposal recommends that disputes concerning home improvement contracts that involve one to four family dwellings or individual units in a condominium or cooperative building should not be assigned to the Commercial Division; however, disputes involving renovations affecting residential buildings generally (as opposed to individual units) shall be eligible to be heard in the Commercial Division if they satisfy the monetary threshold.

III. RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL

A. The Section Agrees That Arbitrated Matters Should Be Subject To The Division's Monetary Threshold

The Section concurs with the Proposal's decision to apply the monetary threshold to arbitrated matters except under limited circumstances. The Section believes, however, that the Advisory Council's proposal is unclear as to whether it is proposing to continue to apply the exemption from the monetary threshold only to those international arbitrations held outside the United States or whether to apply the exemption also to international arbitration matters heard within the United States. The Section supports the policy of encouraging international arbitrations to take place in New York. As a threshold matter, it appears somewhat unlikely that where New York courts are selected as a venue to resolve issues concerning arbitrations held

abroad, the amount in controversy would be below the Commercial Division threshold. Nevertheless, the Proposal can be read to apply different Commercial Division eligibility criteria to international arbitrations held outside New York and those held in New York, by applying a monetary threshold only to the latter. It is unclear whether the Advisory Council intended to treat international arbitrations held in New York different from those outside New York and potentially give the latter greater access to the Commercial Division. Accordingly, the Section recommends that this be sent back to the Advisory Council for further study.

B. The Section Agrees That *Yellowstone* Matters Should Be Eligible For Assignment To The Commercial Division

The Section strongly agrees with the Advisory Council that the current rule should not be revised in an attempt to differentiate between matters appropriate and inappropriate for the Commercial Division. The Section agrees that the practical difficulties of adopting and implementing such a rule are likely outweighed by the negligible burden that *Yellowstone* cases have on the Commercial Division docket.

C. The Section Agrees That Matters Involving Home Improvement Contracts For Individual Residential Units Should Not Be Eligible For Assignment To The Commercial Division

The Section agrees with the Proposal's position that home improvement contracts involving one to four family dwellings and individual units in condominium or cooperative residential buildings are not true commercial cases and should not be eligible for Commercial Division assignment. In order to avoid precluding the assignment to the Commercial Division of cases that involve home improvement contracts affecting numerous units in a condominium or cooperative residential building, the Section recommends that the text of the amendment be revised to insert the word "solely" before the word "individual" in the second line.