

Comments on Proposed Establishment of a “Large Complex Case List” in the Commercial Division

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #2

July 19, 2017

The Commercial and Federal Litigation Section of the New York State Bar Association (“Section”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, Counsel, to Chief Administrative Judge Lawrence K. Marks, dated June 8, 2017 (“Memorandum”), proposing the establishment of a “Large Complex Case List” in the Commercial Division. As stated in the Memorandum, this proposal submitted by the Commercial Division Advisory Council (“CDAC”) creates “essentially a special docket limited to matters in which a minimum of \$50 million (exclusive of punitive damages, interest, costs, disbursements, and counsel fees) is at issue.” *Id.* The Memorandum advises that a pilot program would be established “in New York County and expanded as appropriate.” *Id.* The formal proposal by CDAC (“CDAC Memorandum”) is attached as Exhibit A.

I. EXECUTIVE SUMMARY

For over two decades, New York’s Commercial Division has stood at the apex as the preferred court “for the resolution of high-stakes, complex commercial disputes.” *CDAC Proposal at 1.* However, because of competition from other venues both domestically and internationally (specifically, the establishment by the London Commercial Court of a docket “for financial claims of £50 million or more, that concern certain complex financial products” *id.*), the CDAC believes that New York should offer a comparable alternative, albeit much broader, for the resolution of complex commercial disputes. CDAC’s proposal would have the “advantage of making available to the Commercial Division enhanced procedures and tools that would not only benefit litigants qualifying large complex cases and in facilitating the efficient and just resolution of these cases, also benefit the Commercial Division as a whole in enabling large cases to be resolved more quickly.” *Id. at 2.*

II. SUMMARY OF PROPOSAL

Cases which would otherwise qualify for inclusion within the Commercial Division and where the amount in controversy “exceeds \$50 million, exclusive of punitive damages, interest, costs, disbursements, and counsel fees claimed” or “present issues of sufficient complexity and importance that the enhanced case management available to the Large Complex Case List would be of material benefit” would be part of the pilot program. *Id.* Designation could be based upon venue provisions included in business agreements which expressly provide that the Large Complex Case List within the Commercial Division act “as the exclusive forum for resolution of disputes arising under contract in which the \$50 million monetary threshold is met.” *Id. at 3.* In addition, a party may designate a case to the Large Complex Case List based upon the criteria set forth above or a court in its discretion may so designate a case based upon the “complexity and the importance of the interests and issues at stake.” *Id. at 4.*

Cases on the “Large Complex Case List” would have access to enhanced case management procedures, including, but not limited to “special referees with expertise in resolving discovery disputes in large commercial cases,” “special mediators,” “dedicated ‘back-up’ settlement judges...with expertise in handling large, complex commercial cases,” “[t]echnological receptivity” relating to digital issues, “hyperlinked briefs,” and fast-tracked case management. *Id. at 4-5*. As the CDAC Memorandum acknowledges, the above “is simply a further step in the continuing evolution of enhanced case management in the New York Courts.” *Id. at 12*.

III. COMMENTS

The Section views the concepts raised in the CDAC Memorandum to be well-thought out and it fully endorses the CDAC’s proposal for the creation of a “Large Complex Case List” within the Commercial Division.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution (“Subcommittee”)

DATE: March 3, 2017

RE: Proposal for a “Large Complex Case List” for Complex, High-Stakes Matters in the Commercial Division

INTRODUCTION

One of the mandates of the Commercial Division Advisory Council is to increase awareness of the Commercial Division as an attractive forum for the resolution of high-stakes, complex commercial disputes. In attracting those cases, the Commercial Division faces competition not only from other state courts (*e.g.*, the Delaware Chancery Court) but also from the Commercial Court in London. In the financial services sector in particular, many institutions have a major presence in both of the world’s two leading financial centers, New York and London, and thus may have a choice of forum in either place (whether negotiated pre-dispute by contract or after a dispute has arisen).

The London Commercial Court promotes itself as a leading forum for the resolution of large, complex commercial disputes. In that connection, on July 8, 2015, the Lord Chief Justice of England and Wales announced the creation of a “Financial List” (a “list” being equivalent to our “docket”) for financial claims of £50 million or more, or that concern certain complex financial products. Thereafter, the Chief Judge of the Commercial Court, the Honorable Mr. Justice Blair, came to New York on September 22, 2016 to promote the advantages of the Financial List. This presentation, which received substantial attention in the New York bar, including in the attached article from the *New*

York Law Journal, raises the question whether the Commercial Division ought to respond to London's competitive challenge by establishing its own version of the "Financial List," tailored to the needs of the New York business and legal community.

The proposal set forth below is modest, but would confirm that the London Commercial Court is not entitled to a monopoly on large lawsuits. If adopted, the proposal would have the additional advantage of making available to the Commercial Division enhanced procedures and tools that would not only benefit litigants in qualifying large complex cases and in facilitating the efficient and just resolution of these cases, but also benefit the Commercial Division as a whole in enabling large cases to be resolved more quickly.

PROPOSAL FOR A "LARGE COMPLEX CASE LIST"¹
WITHIN THE COMMERCIAL DIVISION

We propose the creation of a specialized "Large Complex Case List" within the Commercial Division in New York County,² as described below.

Eligibility for the Large Complex Case List. Like the Financial List, the Large Complex Case List would have a monetary threshold for eligibility, intended as a measure (albeit an imperfect one) to identify those matters where the parties have so much at stake, and the issues are likely to be sufficiently complex, that they have a heightened interest (even more so than in the ordinary Commercial Division case) in the

¹ The working name for the proposed list is the "Large Complex Case List," because that name conveys the rationale for the proposal, but the name is not intended to convey any concomitant value judgment. The Subcommittee fully appreciates that cases not meeting the proposed monetary threshold may be every bit as complex as cases that do. Suggestions for alternative names that might be more neutral (*e.g.*, simply "Large Case List") are welcome.

² This proposal assumes that the Large Complex Case List would be piloted in New York County, where the greatest concentration of qualifying cases are filed. There is no reason, however, that the Large Complex Case List concept could not be rolled out to other Commercial Division jurisdictions as appropriate to their respective dockets.

most effective and efficient case management. Unlike the Financial List, however, the Large Complex Case List would not be limited to “financial” cases. Rather, any matter otherwise within the jurisdiction of the Commercial Division in which the amount in controversy exceeds \$50 million, exclusive of punitive damages, interest, costs, disbursements, and counsel fees claimed, would be eligible to be designated for the Large Complex Case List.

There may also be cases that do not meet the monetary threshold, but nonetheless present issues of sufficient complexity and importance that the enhanced case management available to the Large Complex Case List would be of material benefit. In such cases, the presiding Justice may, in his or her discretion, designate the case for the Large Complex Case List if appropriate to facilitate the speedy and just resolution of the matter.

Designation of Cases for the Large Complex Case List. Cases may be designated as Large Complex Cases by any party, subject to judicial review, or by the Court:

- a. *Pre-suit by Parties.* Parties may elect by contract to designate the Large Complex Case List of the Commercial Division as the exclusive forum for resolution of disputes arising under the contract in which the \$50 million monetary threshold is met.
- b. *Post-suit by Parties.* Any party may designate a case as appropriate for the Large Complex Case List, provided that the \$50 million monetary threshold is met. (The precise mechanisms for doing so, such as by checking a box on the Commercial Division RJI Addendum, are to be determined by the Office of Court Administration.)
- c. *Court Sua Sponte Designation.* If neither party has designated a case as appropriate for the Large Complex Case List, notwithstanding that the \$50 million monetary threshold is met, the presiding Justice may, in his or her discretion, designate the case for the Large Complex Case List if appropriate to facilitate the enhanced speedy and just resolution of the matter.

- d. Court De-Designation. If the Court determines that the \$50 million monetary threshold is not met, the case will be removed from the Large Complex Case List, subject to e. below. The Court may make such a determination on motion of a party or on its own motion.
- e. Designation as a “Large Complex Case” Without Meeting Monetary Threshold. As noted above, a case that does not meet the \$50 million monetary threshold may nonetheless be appropriate for handling in the Large Complex Case List because of its complexity and the importance of the interests and issues at stake. Upon making such a determination, the presiding Justice may, in his or her discretion, designate the case as a Large Complex Case. The Court may make such a determination on motion of a party or on its own motion.

Assignment of Large Complex Cases. Cases that have been designated as Large Complex Cases will be assigned to Justices of the Commercial Division in the ordinary course (*i.e.*, at random through the wheel), except that if a Justice believes that his or her Part cannot appropriately handle an additional Large Complex Case at that time, the Justice may decline the assignment (subject to review by the Administrative Judge), in which event the Large Complex Case will be reassigned at random to another Justice pursuant to Uniform Civil Rule § 202.3(c)(5).

Enhanced Management of Cases on the Large Complex Case List. Cases on the Large Complex Case List will have access to enhanced case management procedures proportional to and tailored to the needs of large complex commercial cases. These may include:

- a. If desired by the assigned Justice, special referees with expertise in resolving discovery disputes in large complex commercial cases and who, at the discretion of the assigned Justice, may assume a case management role equivalent to that of a Magistrate Judge in the United States District Court.
- b. Special mediators with expertise in handling large, complex, commercial cases.

- c. Dedicated “back-up” settlement judges (*see* Commercial Division Rule 3(b)) with expertise in handling large, complex, commercial cases.
- d. Technological receptivity to / interface with extranets and electronic document depositories created by the parties to streamline the exchange of documents between parties as well as when filing records with the court.
- e. Hyperlinked briefs.
- f. Active case management to reduce delays at all stages, including promoting accelerated treatment available under Commercial Division Rule 9, and encouraging parties to stipulate to perfect interlocutory appeals within 60 days.

THE FINANCIAL LIST

The Financial List was announced by the Lord Chief Justice of the Courts of England and Wales in July 2015. According to the Financial List website (<https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/financial-list/history/>), this specialized docket is designed to:

- “promote access to the courts and the expertise of trial judges, for market actors in an area that is of significant importance to the development of both the domestic economy, and to open markets internationally”;
- “help to avoid costly and time consuming litigation, through providing a mechanism for authoritative guidance before disputes have arisen,” including through a “test case” procedure;
- “promote the rule of law both nationally and internationally,” including “through acting as a beacon,” because the “courts and the judiciary of this jurisdiction are widely respected throughout the world, for their expertise, knowledge of the markets, their incorruptibility and their independence”; and
- “set an international benchmark. The new list will not only encourage international litigants to continue to use our courts, the principles they embody and their jurisprudence, but in doing so they will help to raise standards. Setting the bar high here will help to raise the bar high across the world.”

The jurisdiction of the Financial List, which is jointly administered by the Commercial Court and the Chancery Court of the High Court of England and Wales, is limited to any claim that

“(a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than £50 million or equivalent;

(b) requires particular expertise in the financial markets; or

(c) raises issues of general importance to the financial markets.”

“Financial markets” is defined to “include the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets.” Civil Rules and Practice Directions, Part 63A – Financial List, § 63A.1(2)-(3).

The Financial List is thus clearly designed by the U.K. Courts to promote London as the premier jurisdiction for the resolution of financial disputes, both to benefit the English judiciary and bar and to enhance the attractiveness of London as a global financial center.

Brexit has, of course, raised questions about the future primacy of London as Europe’s financial center. This past September, after the Brexit vote, the Chief Judge of the London Commercial Court, Sir William Blair (former Prime Minister Tony Blair’s older brother), traveled to New York to discuss the advantages of the Financial List. Some members of the Subcommittee attended his presentation, at which he stressed the expertise of the twelve designated Financial List judges and the quick and definitive

resolution of disputes, including through expedited appeals. Justice Blair also contrasted the needs of the U.K. courts to those in the U.S., noting that whereas London is a financial center, “here [in the U.S.] you have a vast economy that is generating commercial disputes right across the board whereas ours tend to be more specialized.”

The New York Law Journal featured a story about Justice Blair’s visit (a copy of which is attached). The first sentence of the article asked, “As business disputes grow in size and complexity, would a specialized court with judges who are expert in the matters, and who could speed up rulings and appeals, be a good idea in the United States?” That is the question that this proposal seeks to answer in the affirmative. The Financial List is fairly considered a shot across the bow in the international competition for the most interesting, most complex, most high-stakes litigation. We believe it is in the best interest of the Commercial Division, the New York judiciary more broadly, and the New York business community to respond. We believe the Commercial Division can do so in a tailored, low-cost, and low-risk way.

THE COMMERCIAL DIVISION IN THE 21st CENTURY

With the creation of the new Large Complex Case List, the Commercial Division will be fully equipped to provide an efficient and cost-effective forum to handle the large complex cases which are increasingly being instituted in the Commercial Division. The Large Complex Case List is simply one additional step in the evolution of the Commercial Division to meet the needs of the business community in resolving its largest and most challenging disputes.

The Commercial Division officially opened its doors for business on November 6, 1995. The creation of the Commercial Division was the product of an extraordinary

collaboration among the bench, the bar, and the business community, led by the Commercial Courts Task Force appointed by former Chief Judge Judith S. Kaye. Over the next 15 years, the Commercial Division grew from the original six court parts in two counties (New York and Monroe Counties) to a total of 29 parts in ten counties and judicial districts. During that time, the Commercial Division was widely acclaimed by the business community, the bar, and the media, and became a model for many other jurisdictions interested in creating commercial courts.

In early 2012, seeking to build on the success of the Commercial Division and to ensure its continued vitality and desirability as a forum for resolving complex commercial disputes, former Chief Judge Jonathan Lippman created the Chief Judge's Task Force on Commercial Litigation in the 21st Century, chaired by former Chief Judge Kaye and Martin Lipton. The Task Force was charged with evaluating ways that the Commercial Division could be strengthened, at a time when other states had begun to compete with New York for commercial business and the resulting economic growth for their states.

In June 2012, the Task Force issued a comprehensive report containing more than 20 recommendations, endorsing a wide range of rule changes and procedural reforms. The Task Force also recommended that the Chief Judge appoint a permanent statewide Advisory Council on the Commercial Division to facilitate further review of the Commercial Division's needs and goals and to advise the Chief Judge on implementing the Task Force's recommendations and on matters relating to the Commercial Division on an ongoing basis. Thereafter, Chief Judge Lippman created the Commercial Division Advisory Council to advise him about all matters involving and surrounding the

Commercial Division. The Chief Judge also charged the Advisory Council to keep him apprised of developments in the business world that may affect the court system. Since then the Commercial Division Advisory Council has been hard at work. For example:

- The bench, the bar, and the business community have devoted extraordinary efforts during the last five years to improve the Commercial Division's rules, procedures, and operations. During that period, the Advisory Committee has proposed, and the Administrative Board of the Courts has adopted, approximately 30 changes to the Commercial Division's Rules.
- These improvements have been designed to be responsive to the needs and concerns of the business community and business litigants.
- The ultimate goal of these changes is to make the business litigation process in New York more cost-effective, predictable, and expeditious, and to thereby provide a more hospitable and attractive environment for business litigation in New York State.
- All of these efforts have helped to make the Commercial Division a modern, efficient court and an attractive forum for domestic and international litigants in our increasingly global economy.

There is a strong connection between the quality of our court system and the state's business climate. It is not in the court system's interest for businesses to take their disputes to London or other countries. That does nothing to enhance the courts' status in the public eye or to attract and keep businesses in this state. New York is a world

business capital. New York should continue building on the success of the Commercial Division and ensuring that the New York courts continue to flourish as a national and international center of litigation.

The proposed Large Complex Case List is the next step in this evolutionary process.

DISCUSSION AND ANALYSIS

The proposed Large Complex Case List does not seek to replicate the Financial List. Instead, the Large Complex Case List seeks to provide additional tools to facilitate the Commercial Division's resolution of particularly large and complex commercial disputes. The principal differences between the Financial List and the Large Complex Case List are four-fold:

1. Relationship to Commercial Division. The proposed Large Complex Case List is not a separate docket, part, or component of the Commercial Division. Instead, it is literally a list of the cases in the Commercial Division which will be eligible for the deployment of enhanced procedures and tools because of the magnitude and complexity of the cases. Every Commercial Division Justice in New York County now has large and complex cases and each Justice will have cases on the Large Complex Case List.

2. Subject Matter. The Large Complex Case List has broader jurisdiction. As Justice Blair observed, large, complex commercial cases in New York, and in the U.S. more broadly, are not limited to the financial services sector, as in London. Moreover, in the U.S., important categories of cases that arise frequently in the financial markets are subject to the exclusive jurisdiction of the federal courts (*e.g.*, claims under the Securities Exchange Act and the Commodity Exchange Act). The Commercial Division cannot as a

practical matter compete for many of those cases. Accordingly, any case within the jurisdiction of the Commercial Division, if it meets the monetary threshold or the presiding Justice determines that it is sufficiently complex and important, is eligible for the Large Complex Case List, regardless of subject matter.

3. Judicial Selection. The proposal does not contemplate a defined pool of judges assigned to the Large Complex Case List. Rather, cases would be assigned to the various Parts in the Commercial Division as in the ordinary course, thus enabling all Commercial Division Justices, who already have the necessary skills, to take advantage of the procedures necessary to manage and adjudicate large, complex commercial cases effectively. The premise is that, by virtue of being assigned to the Commercial Division in the first place, a Justice necessarily has the expertise that these cases require, and conversely that each Justice, and the stature of the Commercial Division as a whole, will benefit from experience in handling these “mega-cases,” supported by the enhanced procedures of the Large Complex Case List.

4. Judicial Procedures. The procedures available to the Large Complex Case List are adapted to the characteristics of the New York judicial system. It is not feasible, for example, to expedite appeals here in the same manner as provided for in the Financial List. Rather, the proposal contemplates that the presiding Justice would encourage parties to perfect appeals on an accelerated timetable and, through active case management with enhanced procedures, would streamline aspects of the litigation process. These enhanced procedures may include, for example, the assignment of special referees to play a role in discovery similar to that of a U.S. Magistrate Judge, and special

mediators and dedicated “back-up” settlement judges to facilitate a negotiated resolution of these matters.

The proposed creation of the Large Complex Case List is simply a further step in the continuing evolution of enhanced case management in the New York Courts. Beginning with the creation of the Individual Assignment System, then Differentiated Case Management, and continuing through the “faster, cheaper, smarter” Commercial Division Rules, the New York Courts have long sought to bring active case management to bear in all cases and to scale that management to the needs of each case to promote just, fair, and efficient resolution. The Commercial Division is appropriately renowned for its success in active case management and that success has led to the presence in the Commercial Division of many large and complex cases. The proposed Large Complex Case List extends these concepts of *proportional* active case management to the largest and most complex matters in the Commercial Division.

We note also that the Financial List has actually seen relatively little activity (unlike the substantial caseload of large complex cases currently pending in the Commercial Division which would be eligible for the Large Complex Case List). In its first 14 months, the Financial List heard a grand total of 21 cases. It is a fair guess that the Commercial Division handles at any given time far more large complex cases that would qualify for the Large Complex Case List under our proposal. The proposal would thus meet both the challenge posed by the Financial List in the international competition for complex commercial cases and an actual need of the Commercial Division for enhanced procedures and tools to streamline the handling of such cases.

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the proposed creation of a Large Complex Case List within the Commercial Division.

British Judge Discusses New London Business Court During NY Visit

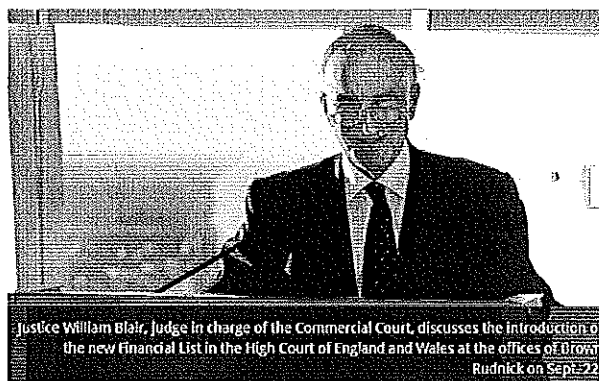
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REPRINTS



As business disputes grow in size and complexity, would a specialized court with judges who are experts in the matters, and who could speed up rulings and appeals, be a good idea in the United States?

That was among the topics at a discussion given last week by Sir William Blair, known in the courts as The Hon. Mr. Justice Blair, at the Times Square offices of Brown Rudnick.

Blair, the older brother of former United Kingdom Prime Minister Tony Blair, explained the origin and the need for the Financial List, a new judicial venue that was established in the High Court of England and Wales last year. Blair serves as the judge in charge of the Commercial Court in the new Financial List.

The Financial List began in 2015 to hear and rule on complex business cases exceeding values of 50 million GBP, or about \$64.9 million. It hears and rules on cases that deal with equities, fixed income, foreign exchange, derivatives, and commodities markets, as well as complex banking transactions and sovereign debt.

Its creation was spurred by the complexity of cases that take place in London, Blair told the estimated 30 attendees of the Sept. 22 event.

"We thought it was right for us because we get a disproportionate number of financial disputes because we [London] are a financial center," he said. "It's natural for us to think particularly of financial disputes, because here you have a vast economy that is generating commercial disputes right across the board whereas ours tend to be more specialized."

Another hallmark of the Financial List is the fact that the judges are experienced in complex business cases, such as derivatives and sovereign debt, and that the appeal process can be expedited. Often in cases, an appeal can be heard within days of the first ruling by a two-judge panel.

"The aim is to resolve disputes quickly and definitively," Blair said.

David Molton, a litigation and arbitration partner for Brown Rudnick, doubted that a Financial List in New York would work in the same way that it does in London— or would even be necessary.

"Our federal judges who get these cases all the time in handle them quite competently and expertly," he said. "Also, the commercial bench of the New York State Supreme Court does a terrific job dealing with these sort of cases. I think that likely the need for a specialized financial bench is less and less apparent here than it would be in England."

The Financial List meets at the Rolls Building in London, and its bench consists of a total of 12 judges with five from the Commercial Courts, who are led by Blair and five judges from the Chancery Division. According to the Financial List website, the leader of the Chancery Division and its judges is the Rt. Hon. Sir Terence Etherton.

"So far, the cases range from derivatives to sovereign debt to the rights of trustees in financial transactions," Blair said. "I wouldn't say there is a theme [to Financial List cases], but there are quite a number of derivatives cases in our courts and in yours, with interest rates coming down to zero in 2008, we had a number of such cases. But we see a wide range of cases."

Despite the vote that took place this summer for the United Kingdom to leave the European Union, Blair said he doesn't think the so-called "Brexit vote" will have an impact on the Financial List and its future docket. He said he believes London will remain a global financial capital and that new business disputes will continue to arise.

Since its creation in 2015, the Financial List heard eight cases in its first year and has ruled on 13 cases so far this year. "These are cases that demand a high degree of specialization to decide," Blair said.

During a Q&A, Blair was asked if the Financial List could encourage "judge shopping" to find the most sympathetic jurist. He said the number of judges working on the Financial List—12 at the moment—would preclude this from happening. "That is something that all courts are very astute to avoid."

Neil Micklethwaite, a litigation and arbitration partner at Brown Rudnick's London and Paris offices, said the discussion was not meant to promote the idea of a Financial List in New York.

"I think [the meeting was inspired by] the connection between New York and London," Micklethwaite said. "Cooperation and exchange of knowledge is a very important part of that. It's for New York decide whether it wants to say" it would work for them.

Molton said the event was a way for New York to learn about jurisprudence in London, and vice versa.

"In terms of what Mr. Justice Blair said about the fact that London has a more particularized need for a sophisticated specialized financial court, I think is probably true and less apparent here and less needful here," he said.

The event was cosponsored by the firm William Fry, which is based in Dublin and has offices in New York, London and California.