Supersizing the Commercial Division: Is It a Good Idea?

David B. Saxe and Danielle C. Lesser write: A meal can be supersized at McDonald's, but should New York County's Supreme Court, Commercial Division be supersized as well?

David B. Saxe and Danielle C. Lesser, *New York Law Journal* – January 25, 2018

A meal can be supersized at McDonald's, but should New York County's Supreme Court, Commercial Division be supersized as well? The Office of Court Administration has done just that through the creation of the Large Complex Case List (LCCL), a pilot program that became effective Jan. 1, 2018 and offers certain special features for commercial disputes that exceed $50 million in claimed damages. The intent behind the LCCL is to lure international disputes to the Commercial Division, away from other high profile venues such as London, the Delaware Chancery Court, and, of course, international arbitration tribunals. In our view, this sort of initiative, that appears largely cosmetic at this point, is not likely to improve the functioning of the Commercial Division and might impact the equilibrium and operation of the Commercial Division and other non-Commercial Division parts.

The Large Complex Case List

Under the new rules, any Commercial Division Justice may designate a case for the LCCL either sua sponte or upon application of a party if the case "(i) addresses commercial claims for an amount no less than $50 million (exclusive of punitive damages, interest, costs, disbursements, and counsel fees); or (ii) addresses matters of sufficient complexity and importance to warrant such designation." Administrative Order Establishing the Large Complex Case List (Oct. 23 2017). LCCL cases enjoy so-called special treatment with the addition of "special referees with expertise in discovery, special mediators, settlement judges, interface options with extranets and electronic document depositories, and hyperlinked briefs." Id. The Administrative Order creating the LCCL (the Order) offers no further details regarding how these enhanced services are to be administered or funded. Id.

London's Financial List

The LCCL "is designed to be an appropriate response" to the "Financial List" created by the London Commercial Court and the Chancery Division in 2015. Memorandum from John W. McConnell, Counsel at the Office of Court Administration, to All Interested Persons re: Request for Public Comment on Proposed Establishment of a Large Complex Case List in the Commercial Division (June 8, 2017). The London Commercial Court is considered to be a "leading competitor to the Commercial Division as a forum for adjudication of complex commercial cases." Id. The "objective of [London's] Financial List is to ensure that cases which would benefit from being heard by judges with particular expertise in the financial markets or which raise issues of general importance to the financial markets are handled by judges with suitable expertise and experience." HM Courts & Tribunals Service, Guide to the Financial List §1.2 (Oct. 1, 2015). Cases are eligible for the Financial List if they: (1) involve a financial claim of at least £50 million; (2) require particular experience in the financial markets; or (3) raise issues of general importance to the financial markets. Id. §2.2.

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There are three primary features of London's Financial List. First, cases on the Financial List will have one designated judge assigned to them, as opposed to the traditional practice in London by which each part of a case is overseen by a different judge. Id. §6.1. Second, cases within the Financial List will be heard by a subset of judges from the Commercial Court or the Chancery Division with special expertise in financial issues. Id. §3.1. There are currently 11 judges nominated to hear Financial List cases: five from the Commercial Court and six from the Chancery Division. Nominated judges of the financial list, Courts and Tribunal Judiciary. Third, the Financial List offers a pilot Financial Markets Test Case Scheme to facilitate the resolution of issues of particular commercial importance and which demand immediate authoritative English law guidance without the need for the filing of an actual case between the parties to the proceedings. HM Courts & Tribunals Service, supra at §9.1. The Financial Markets Test Case Scheme "provides a mechanism for the court to grant declaratory relief in a 'friendly action' because it is in the public interest to do so ... . Such actions will require there to be a set of facts against which the decision is to be made, which should, if possible, be agreed. The court will also need to be satisfied that all sides of the argument will be fully and properly put." Id. §9.2

New York's current Commercial Division protocols already provide many of the benefits offered by the UK's Financial List. First, cases within the Commercial Division are already heard by one judge. Second, since its creation, the Commercial Division has processed sophisticated and large business disputes, and its judges have the expertise to handle complex commercial matters. What the Commercial Division does not do, and never will, is offer anything akin to the "Financial Markets Test Case Scheme," as it has long been the law that the "courts of New York do not issue advisory opinions." *Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 354 (1988).

Concerns About the LCCL

The Supreme Court is already underfunded and overburdened and the LCCL may be an unwise allocation of resources. The various new features offered for cases that qualify for the LCCL—such as special referees, special mediators, or settlement judges, if they are actually supplied as advertised—will likely divert already limited resources away from non-Commercial Division cases and the many Commercial Division cases that seek less than $50 million, and additionally these special services are not necessarily directly related to a more efficient resolution of the case. Moreover, the overwhelming majority of cases within the Supreme Court, Civil Division which have in controversy far less than the $50 million threshold, and do not qualify for the LCCL, may be relegated to secondary status.

Neither the Order nor the Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution that initially proposed the LCCL (the Subcommittee Memorandum) explains where the special referees, special mediators, and settlement judges will come from. If the LCCL gets off the ground in a serious way, the parties should be required to utilize special masters from private practice, who have the requisite skill set, and whose fees are paid for by the parties themselves, which we have previously proposed. See David B. Saxe and Danielle C. Lesser, "Broader Use of Special Masters: A Proposal," N.Y.L.J., Aug. 4, 2017.

Further, while the establishment of the LCCL seems to signal some precatory budgetary support for LCCL cases at the Supreme Court level, the order is silent as to the provision of additional resources for our appellate courts. The Appellate Division is just as overburdened as the Supreme Court and will now be faced with additional cases that likely will contain extremely voluminous records and the requirement of

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addressing international law. This is especially true given the fact that most interlocutory orders in the Supreme Court can be and are appealed, and parties might not mind numerous round-trips to the Appellate Division if over $50 million is at stake. Neither the Order nor the Subcommittee Memorandum discusses the effect the LCCL will have on the Appellate Division. At a minimum, the Appellate Division should receive additional funding so that it can hire more court attorneys, particularly some with a background in international commercial law. Further, if the LCCL is going to result in more complex commercial cases being filed in the Supreme Court, the Appellate Division should consider instituting specialized benches within the Appellate Division to hear such cases. For more information on such a proposal, see David B. Saxe, "Improving Appellate Review of Commercial Division Litigation," N.Y.L.J., Jan. 23, 2013.

Given the real risk of stretching the court system's resources too thin for the paucity of cases that meet the LCCL's criteria, should the Supreme Court be taking expensive steps to attract parties away from other fora to litigate in New York? Our Commercial Division is already an attractive draw for litigants who specify it as a venue, especially where federal subject matter jurisdiction does not exist, as long as the parties have stipulated in their contract to have their disputes heard in a New York court. A plaintiff seeking over $50 million in damages can already bring such a case in the Commercial Division, provided that personal jurisdictional exists. (New York courts will enforce contractual consents to jurisdiction in New York. See, e.g., *Alfred E. Mann Living Tr. v. ETIRC Aviation S.A.R.L.*, 78 A.D.3d 137, 139 (1st Dep't 2010)). What is the logic in saddling the already-overburdened Commercial Division with *additional* cases of this sort that do not contain any nexus to New York, especially if they involve substantive issues of foreign law? Aside from potentially enriching a handful of New York lawyers,[1] we do not see the benefit in attracting such cases, especially if the special features of the LCCL are going to divert resources away from Commercial Division cases that do not qualify for the LCCL and the case law that results may not provide helpful guidance to the New York legal community for important points of New York commercial law.

The Supreme Court, New York County, regularly hears a multi-faceted variety of important civil litigation that is of a non-commercial nature. Important tort, matrimonial, discrimination, administrative law, products liability and other non-commercial cases are part of our judicial system, especially in New York County. While Delaware Chancery Court hears and decides important commercial cases (as does our Commercial Division), the Delaware state courts do not have the outsized judicial influence in non-commercial law areas that New York does. We should not give that up.

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[1] Local lawyers may very well not receive any anticipated benefits as out-of-state or foreign, English-speaking counsel may very well avail themselves of the benefits of pro hac vice status and comity to hold onto cases and clients.

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