DAVID DOBLE
SOLICITORS

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Institutions that traded in the international financial markets in the past decade are likely to be entitled to share in damages paid by the global banks in relation to various benchmark manipulation and market abuse activities.

But institutions that (unknown to them) may have suffered loss are required to be pro-active in order to ensure that they receive the compensation to which they are entitled. There will continue to be important registration deadlines in many of these cases: one such deadline - to participate in the court-approved distribution of US$1.865 billion is **FRIDAY 27 MAY 2016.**

David Doble Solicitors provides advice exclusively to institutions in Europe and beyond that are investors and counterparties in the global financial markets. The firm advises investors and buy-side counterparties on transactions in the structured finance and derivatives arena and also in relation to potential disputes arising from investments in complex structured transactions.

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FINANCIAL BENCHMARK AND MARKET MANIPULATION - COMPENSATION DUE TO INSTITUTIONAL MARKET PARTICPANTS

1

Introduction

Manipulation of international financial benchmarks (such as LIBOR) and markets (such as the global foreign exchange markets) has resulted in national regulators imposing huge fines on the world's largest banks. Regulatory investigations have been followed by class action claims for damages in the United States.

Increasingly, institutional investors (including those outside of the US) are being compensated for their financial losses as a result of successful class action claims. However, as some cases move towards settlement, institutional investors should ensure they are not barred from claiming their entitlement to a share of the settlement in respect of damages suffered. For example, the settlement in the Credit Default Swap market anti-trust suit (see below) will result in the distribution of some US$1.865 billion to market participants. Institutional investors who may have suffered loss have until Friday 27 May 2016 to register their election to participate.

2

The origins of these civil actions

In 2010, the US Department of Justice and Commodities Futures Trade Commission (CFTC) and in the UK, the Financial Services Authority, amongst others, commenced investigations into alleged manipulation of the London Interbank Offered Rate (LIBOR). Those investigations have resulted in a sequence of multi-billion dollar fines for a number of the LIBOR panel banks. They have triggered investigations of the apparent manipulation of other internationally-used financial benchmarks (such as ISDAfix) and the abuse of major financial markets (such as the Credit Default Swap market and others mentioned below). In turn, civil cases have followed – as we discuss below.

3

Immediate relevance of the CDS case for non-US investors

In April 2016, the US courts approved the settlement that had been reached in September 2015 with the defendant banks in the case of re Credit Default Swaps Antitrust Litigation. The case involved allegations that twelve major global banks conspired to ensure that Credit Default Swaps continued to be traded in the opaque “over-the-counter” market that they dominate. It was alleged that they collectively blocked the emergence of new trading platforms that would, for instance, have allowed buy-side institutions to trade CDS with each other rather than having to always go through a dealer.

The settlement in the CDS anti-trust suit that was officially approved on 18 April 2016 will result in the distribution of some US$1.865 billion to market participants. The individual allocations from the settlement fund have been determined by a fund administrator and those entitled have been notified. Entitled institutions have until Friday 27 May 2016 to file a claim. Those institutions have the right to request that additional transactions be taken into account – leading to a possible increase in the amount of their awards. However, notified institutions should understand that, in order to receive their entitlements, they must in any event file the claim in accordance with the prescribed procedures; see CDS Anti-Trust Settlement

> According to a Stanford University study, historically only some 30 per cent (by value) of class members take the steps necessary to share in any class settlement. For whatever reason, significant numbers of class members entitled to share in the compensation to which they are entitled, fail to take the actions necessary to receive those payments.

4

Other current cases

Foreign exchange market: The global FX market is the largest financial market in the world, with daily average turnover of US$5.3 trillion. Amongst other manipulative behaviour, US regulators have discovered that manipulation was achieved through excessive currency trading at around the point of the daily “4pm fix”. Regulators around the world have already levied fines of more than US$10 billion against several defendant banks for their conduct with respect to foreign exchange. These investigations remain ongoing.

In re Foreign Exchange Benchmark Rates Antitrust Litigation, an anti-trust suit in the New York Courts, a putative class of participants in the foreign exchange markets allege violation of federal antitrust laws against some of the world’s largest banks arising from their manipulation of bid/ask spreads and key global FX benchmark rates. To date, the lawsuit has resulted in more than US$2 billion in settlements on behalf of market participants in the US. The plaintiffs in that case are continuing to pursue their claims against seven major global banks

ISDAfix benchmark: ISDAfix is a benchmark interest rate routinely incorporated into certain types of derivatives contracts (e.g. swaptions and constant maturity swaps), and which also has an impact on many other types of financial instrument. Major global banks allegedly colluded to manipulate the interest rate for their own benefit. In May 2015, the CFTC ordered Barclays to pay a US$115 million penalty for attempted manipulation and false reporting. Fines against other banks are expected. Criminal investigations have also been instigated. In May 2016, seven of the defendant banks agreed to pay some US$324 million in a settlement with plaintiffs. Those banks have also agreed to cooperate with counsel for the plaintiffs in further investigation of manipulation of ISDAfix.

US Treasuries auction market: in June 2015 it was reported that the US Department of Justice had commenced an investigation into the possible manipulation of the US Treasuries auction market. In the ensuing months a succession of class action claims were filed in the US Courts alleging that the 22 primary dealers in the US Treasuries auction market manipulated Treasury security prices both during the auctions and in the “when-issued” market.

Global interest rate swap pricing: This case relates to a class action complaint in the US federal court in New York, alleging that a group of global banks conspired to block the exchange trading of interest rate swaps in violation of the antitrust laws. The complaint alleges that the dealer defendants used their power as interest rate swap market makers to boycott platforms that would have allowed for the exchange trading of interest rate swaps. It is alleged that the result of this conspiracy was an artificial widening of bid-ask spreads on interest rate swaps, meaning that investors who traded with the defendant banks paid more, or were paid less, than in a competitive marketplace.

5 A new era of large scale manipulation and abuse cases against the global banks

Since the onset of the global credit crisis, the majority of cases in which institutional investors have sought damages from global banks have related to mis-selling of structured finance investments such as Mortgage Backed Securities (MBS) and Collateralised Bond Obligations (CDOs). This new procession of benchmark-rigging and market abuse litigation has quite different characteristics. Most cases have been brought as anti-trust suits in the US courts and have invariably followed closely after the launch of an investigation by one or more national regulators.

In this new type of financial benchmark manipulation and market abuse case, there has been a greater onus on potential claimants to "self-identify"; in other words for institutions to recognise themselves as having traded in markets that are relevant to the specific case. Any such self-identification might be followed by an internal data collection exercise and an assessment of that data to determine loss caused by the alleged manipulation or abuse. In a securities mis-selling cases, it is usually clear which investors have suffered loss. In this new type of benchmark manipulation and financial market abuse case, the loss is often hidden – e.g. in reduced income, greater outgoings or higher transactional charges. Institutional investors will often need independent expert help to understand whether they have suffered loss and how to quantify any such loss.

Interestingly, a cultural shift appears to be underway. Historically non-US institutional investors (particularly those in Europe and Asia) have tended to avoid litigation and its attendant publicity as a matter of policy. Further, there have been concerns about damaging what is often an on-going relationship with the defendant bank(s). However, the sheer number of instances of financial benchmark manipulation and market abuse appears to be persuading an increasing number of institutional investors that litigation is essential to encourage the relevant major global banks to change their business practices.

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