LIBOR Claims: a Silver Bullet or a Nuclear Assault?

Simon Twigden, Pietro Marino and Anjali Manek*

> *'If you know how to keep a secret I'll bring you in on it… we're going to push the cash downwards on the IMM day… if you breathe a word of this I'm not telling you anything else… I know my treasury's firepower… which will push the cash downwards… please keep it to yourself otherwise it won't work.'*
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> Instant message between two traders at panel banks, 12 February 2007

Press reports into the manipulation of LIBOR, and similar rates including EURIBOR, by banks across the international scene have been making headlines for many months. They have most recently included reports on the UK's Financial Services Authority's (FSA) fine of £87.5 million on the Royal Bank of Scotland, part of a £390 million fine levied by UK and US authorities together. There are no signs of the scandal abating: it is clear that the latest reports form part of a continuing theme of damning communications between bank employees deliberately designed to manipulate LIBOR submissions. The objective was to improve the profitability of their trading books or to intentionally mislead the market regarding the financial health of a bank. There have also been very significant acts of inter-bank collusion and instances of third parties being unlawfully commissioned to assist with rate manipulation. Recent reports confirm that the competition authorities in Brussels are turning up the pressure on banks involved in the LIBOR scandal. It is now generally accepted that the conduct of the banks involved in LIBOR-fixing falls well short of the requisite standards of integrity in financial markets.

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* Simon Twigden and Pietro Marino are both partners at Enyo Law, London. Anjali Manek is a managing associate at Enyo Law, London.

The ramifications of these findings in the regulatory sphere are being widely reported. However, of crucial importance to potential claimants is whether they have recourse in respect of unprofitable bargains contaminated by LIBOR manipulation, including whether loss suffered as a result of such bargains is actionable. As this article explores, while there is a great deal of speculation on the matter and there have been some developments in the private law arena in two cases currently before the High Court (*Deutsche Bank AG v Unitech* and *Graiseley v Barclays Bank* – see below), the way in which civil claims will finally play out in the English courts is still unknown. Further and inevitably, how the regulatory findings will affect the litigation and/or settlement strategy of each claimant will depend on those claimants' individual circumstances. What is clear is that the activities within and between the banks have the potential to generate significant litigation and merit careful investigation by their customers in conjunction with forensic experts and lawyers experienced in financial litigation. Some of the matters explored here will be ones that are of interest to the wider international market: notwithstanding the nuances in approach taken in different jurisdictions, this is a topic that has international impact. The developments here will be watched closely by the international legal community and many of the factors considered here might be common to litigation elsewhere.

Of crucial and immediate importance is the question: what should potential claimants concerned about LIBOR-linked agreements be doing?

The steps set out below should be considered to enable a business, a non-fixing bank, a fund or institution with a suite of agreements to focus on the key agreements in respect of which claims may be brought, the jurisdictions where legal advice is required and relevant risk factors, such as the threat of any imminent enforcement of security by banks. They will also focus minds on the potential expiry of limitation periods for bringing claims both with reference to potential LIBOR claims themselves (discussed further below) and related non-LIBOR claims that also merit investigation.

Steps for potential claimants to take now for the purpose of identifying potential claims relating to LIBOR manipulation

- With the aid of external counsel, establish a Special Committee (including internal and/or external counsel) to report to the Board on this issue. Obtain immediate advice on how to preserve legal privilege in any communications.
- The remit of the committee should be to produce an internal report listing LIBOR-linked agreements that have been entered into. In respect of each, the report should specify:

  - the parties to the agreements;
  - the date of the agreements;
  - the relevant LIBOR rate used (maturity period and currency);
  - any governing law and jurisdiction/arbitration clauses;
  - key dates on which LIBOR manipulation might have resulted in losses or gains;
  - key close-out or other payment dates and maturity dates;
  - an assessment of the headline position as to loss suffered; and
  - the repositories of key documents and the identity and whereabouts of witnesses.
- Either internally or with expert external help, potential claimants should use mathematical tools to calculate loss such as:
  - Extrapolation
    - take known samples based on certainties;
    - assess the variables applicable on these days;
    - arrive at a reasonable model linking cause to effect on known days; and
    - extrapolate over the relevant period.
  - Distribution
    - identify benchmarks;
    - identify high density communication periods; and
    - compare distribution patterns to benchmark data.
- Take steps to preserve documents (both hard copy and electronic) and halt any document deletion procedures that are in place.
- Prepare a 'witness list': a list of all persons who were engaged in discussions with the relevant bank at the time of negotiating and entering into the transactions in question. Ensure each individual's email accounts and any recordings of their communications with the bank are preserved with all other related documentation identified above.

What does a LIBOR claim look like?

The central basis of any claim is likely to be that LIBOR should be a measure of inter-bank borrowing rates based on genuine estimates submitted by panel banks to the rate-fixing body (the British Bankers Association – BBA). In fact, it has now become clear that it was based on submissions that were influenced by factors that were irrelevant to the establishing of a genuine measure, ie, what would benefit trading positions or convey a misleading impression of the stability of banks' positions. There are also likely to be claims based on collusion among banks in making false LIBOR submissions.

The above could translate to a claim for fraudulent misrepresentation and/or deceit (in other words, an aggravated form of mis-selling). To make out such a claim, the claimant would need to prove that: (1) the bank in question represented LIBOR to be a genuine, objective measure of inter-bank borrowing rates; (2) that representation was false and was made fraudulently or recklessly; (3) the claimant relied upon the representation in entering into the transaction in question; and (4) it suffered loss as a result. There are three crucial advantages to bringing a claim in fraud:

- Any terms and conditions of the bank that purport to exclude liability would be ineffective since a party cannot exclude liability for fraud. That is a major advantage in circumstances where banks frequently seek to shelter behind such terms in defending other claims (such as for the mis-selling of financial products) and have enjoyed significant success in UK litigation to date where fraud has not been alleged (although see below the significant adverse impact that the disclaimers and similar clauses in the *Deutsche Bank AG v Unitech* case had on the judge's willingness to allow a LIBOR manipulation claim).
- The clock for bringing claims (usually six years) does not start to run until the claimant discovers the fraud or could with reasonable diligence have discovered it.
- Recoverable damages are broader. They include all damage flowing directly from the fraud. Unlike actions in negligence, it does not matter whether or not such damage was reasonably foreseeable.

If, as appears to be the case in situations that have been the subject of recent regulatory sanctions, the manipulation was the product of coordinated activities between two or more entities, it is likely that an actionable conspiracy is in play (ie, a combination of persons who come together with the intention of harming the victim economically). This is another form of fraud claim, which will bring with it the advantages referred to above.

It may well be the case that a claim for breach of contract is also available: in other words, that it was an implied term of the transaction that the bank would not act in a way that might undermine LIBOR as an objective, genuine measure of inter-bank borrowing costs. Depending on the facts, there may also be claims for breach of statutory duty, and claims for negligent or innocent misrepresentation and/or mis-statement. Unlike fraud-based claims, these other claims are susceptible to being undone by exclusion or limitation clauses in the banks' terms and conditions or the expiry of limitation periods. They should nevertheless also be considered.

Competition law: another means of attack?

Claims are also available under competition law. The argument would be that the banks' collusion in the manipulation of LIBOR amounts to a breach of competition law because it flies in the face of the prohibition of agreements, decisions or concerted practices among businesses that have the object or effect of preventing, restricting or distorting competition, also known as cartels. This prohibition is enshrined both at European level (Article 101 of the Treaty for the Founding of the European Union) and at UK level (Chapter I of the Competition Act 1998). It may be possible to deploy a competition claim either as a standalone claim or in conjunction with another claim, such as the mis-selling of an interest rate swap.

Cartels are considered the most egregious form of illegal conduct under competition law. Practices such as price-fixing (whether directly or indirectly) or the rigging of trading conditions are always looked on by competition authorities and courts with great suspicion because they tend to suppress competition and have few countervailing effects – in other words, they do not have sufficient positive effects on the market or end-users to justify a departure from the key prohibition.

Potential claimants should note that the competition authorities are currently investigating potential collusion between the banks to fix LIBOR rates. The European Commission raided banks in the context of an investigation into LIBOR manipulation as early as October 2011 (which followed the beginning of the investigation in the Credit Default Swaps market, announced in April 2011). Although since then there has been no formal update from the Commission on the LIBOR scandal, its competition commissioner (Joaquín Almunia) made it clear in July 2012 that the Commission is investigating 'suspected cartels arrangements involving financial derivatives related to these benchmarks [LIBOR, EURIBOR and Tibor]' and that these investigations have 'top priority'. More recently, in February 2013, he also stressed that, for the first time since the manipulation came to light, the competition implications of the LIBOR scandal have been officially recognised in the deferred prosecution agreement between RBS and the US Department of Justice (one of the US authorities enforcing antitrust rules). Reports suggest that he is keen to wrap up the competition investigation as early as this year and certainly before his term as antitrust commissioner draws to a close in late 2014. However, he reminded that the Commission will only close a cartel investigation with all the participants: there is no room for individual settlements.

If these investigations were to find that the manipulation of LIBOR (as well as the other benchmarks) infringed competition law, it would open

the way for 'follow-on' or 'third-party' damages claims by victims of the infringement. Therefore, claimants would not need to establish liability on the part of the manipulating banks and could rely on the Commission's finding to sue the manipulating banks for damages in the High Court or in the Competition Appeals Tribunal. Since, in general, the liability of businesses involved in cartels is joint and several, claimants might also have the option of choosing their target bank (or banks).

As an aside, it is interesting to note how claims have been formulated in the US. A number have been brought by way of actions for violation of federal antitrust laws, racketeering conspiracy and breach of laws governing the free exercise of business and commerce. Some claims are also proceeding by way of shareholders' derivative actions alleging breaches of fiduciary duty by bank officers regarding their lack of oversight relating to LIBOR manipulation. Further developments there and also in Asian jurisdictions will no doubt continue to be watched closely by the international legal community.

A LIBOR claim is surely open and shut. Or is it?

At first glance, and leaving aside quantum issues, it may seem that a LIBOR-related claim should be one of the more straightforward claims, at least when it comes to proving liability against the likes of Barclays, UBS and RBS. That must surely flow from the very damaging communications that have been revealed as a result of the regulatory investigations: communications that show complete disregard for the need for honest and objective submissions. That is what is behind the record-breaking fines being levied by regulators.

The hurdles

However, a claim in misrepresentation would require additional factors to be established. That there was fraud relating to submissions by some rate-fixing banks regarding LIBOR is apparent. However, the true question is: in entering into any particular transaction, was the bank in question making representations about LIBOR? Assuming such a representation was made, did the party to whom it was made rely on it in entering into the transaction tainted by LIBOR rigging? LIBOR is merely a benchmark giving an indication of the average rate at which contributor banks can obtain unsecured funding in the London interbank market for a given period, nothing more and nothing less. The mere fact that certain calculations are pegged to LIBOR does not, on its own, necessarily imply that a representation was being made about it being based on genuine market factors. Another way of putting it is that there was no statement about the accuracy (or lack of it)

of LIBOR as an objective measure that induced the customer's decision to enter into the transaction. Did the parties' minds even turn to the accuracy of the LIBOR rate? The point is sure to be litigated and the outcome will turn on the particular facts of each case.

The recent judgment in *Deutsche Bank AG v Unitech* 2013 EWHC 471 (Comm) on 28 February 2013 is a case in point. Cooke J refused to allow a customer's application to amend its claim to include a claim in respect of LIBOR manipulation. The mere fact that a transaction referred to LIBOR (a rate said to be simply that which appeared on the Reuters or Telerate screens at a particular time), coupled with the fact that a bank was a member of the panel making submissions to the BBA, said nothing about the manner in which the LIBOR figure came to be calculated. In his words:

> 'What the parties had in mind was the LIBOR rate as it came to be shown on screen in the future, not what had been done in the past in setting that rate, nor how it would be done in the future, nor what any panel banks' intentions were at the time. Those thoughts would not have crossed their minds as being representations of existing fact being made by [the bank] simply by virtue of contracting by reference to LIBOR and by virtue of [the bank] being a panel bank'.

Cooke J highlighted the difficulty of finding an implied representation or representation by conduct where they did not arise in the context of any express representations or other surrounding circumstances, and where they did not fall into well-recognised categories of implied representation arising from existing case law (such as implied representations that are associated with statements of opinion). Cooke J also referred to the width and uncertainty of the representations alleged: as he said,

> 'The question arises as to what is meant by "undermining the integrity" of LIBOR... How many panel banks must be involved before integrity is undermined? How many submissions must be made, other than in good faith for that to occur? Does the conduct have actually to affect the published rate for it to undermine the integrity of LIBOR and would manipulation on a single day be sufficient? Furthermore, if a submission was made other than in good faith that related to yen LIBOR or Australian dollar LIBOR would that undermine the integrity of LIBOR for the purposes of the representation?'

These uncertainties militated against the finding of a representation.

Moreover, Cooke J also refused to countenance the implication of representations in the context of the disclaimers, entire agreement clauses and non-reliance clauses in the documentation. It appears (although there is little clarity on this point in his judgment) that he did not consider it

necessary to assess the impact of the dishonesty/fraud factor on those clauses, since one was not assessing their reasonableness as such but whether a representation could have been understood to have been made in the first place. If this was the basis for his finding (as we say, this is not clear from his judgment) then potential claimants who consider that a LIBOR manipulation claim might enable them to sidestep the hurdles arising out of banks' disclaimers and liability limitation clauses that they have faced on mis-selling claims (see below on the pro-bank trend of judgments on such claims) may find their LIBOR manipulation claims coming unstuck by virtue of the very same clauses.

As a result of these findings, Cooke J also held that the customer could not bring a claim for negligent mis-statement or breach of contract (whether the latter involved a claim for breach of an implied contractual term or a breach of a contractual warranty or breach of a collateral contract): essentially there was no basis for these alternative claims because there was no statement made by the bank about how LIBOR was calculated on which they could be based and the disclaimers and other contractual clauses militated against the implication of such a statement. Similarly, a claim that, because there was no genuine LIBOR rate, the interest claimed under the facility agreement was irrecoverable also failed because, again, no representation was being made as to how the rate was calculated. Cooke J found that in those circumstances, there was no reason why the screen rate should not be applied. The alternative basis on which this claim was advanced, in public policy, also failed to find favour with the judge.

In our view, there are aspects of Cooke J's ruling that are open to question. So, for example, the fact that it may be difficult to imply a representation because it does not fall within pre-existing categories of representations recognised in the case law or that it may be difficult to ascertain what amounts to 'undermining the integrity of LIBOR' should not in principle operate as a bar to a claim. These may be novel issues requiring a degree of judicial creativity or difficult forensic points. But those factors should not, of themselves, preclude the finding of an actionable claim.

The case is very likely to be appealed (in fact, as we understand it, the judge has already granted permission to appeal on the basis that very different views were reached by Flaux J in the *Graiseley v Barclays Bank* case, which involved a similar claim). Further, there will, of course, be situations where express representations were made by a particular bank or other pre-contractual conduct took place from which a representation regarding LIBOR could be implied. Cooke J recognised that *Graiseley* itself is such a case, citing representations made, inter alia, in drafts of

documentation, emails and at meetings. Such cases will allow potential claimants to avoid the pitfalls faced by the customer in *Deutsche Bank AG v Unitech*. Cooke J is repeatedly critical of the generality of the proposed amendments advanced by the defendants and a clear warning shot is passed to those who are forced to focus on the generic as opposed to being able to rely on specific evidence. There are also prospects of the pleading in *Deutsche Bank AG v Unitech* being made in a different way (Cooke J did say that a plea of an implied promise not to manipulate the LIBOR rate in the future might find favour – although he then cast doubt on the ability of the claimant to establish damages for such a claim). And, as we have said, alternative heads of claim, such as for unlawful conspiracy or breach of competition law, may be available depending on the particular facts. However, the effect of the judgment is undoubtedly to emphasise that each case will be decided on its own facts and serves as a timely reminder that some claims might stumble at very early stages of the litigation, well before trial, by failing to meet the requisite thresholds for bringing a claim.

In addition to these challenges, financial regulators have made findings of manipulation with regard to some currency denominations (eg, the SwissFfranc, the Japanese yen and the US dollar rates) and over some time periods (eg, three-month US dollar LIBOR). As was highlighted in the *Deutsche Bank v Unitech* case, taking into account LIBOR rates for ten different currencies and 15 different maturity periods for each, there are 150 different LIBOR rates in total. The fact that manipulation occurred on certain rates will not necessarily imply that sterling-linked (or other currency-linked) LIBOR contracts were affected, or that LIBOR set for different time periods was manipulated. Indeed, had this been the case, one would have expected the regulatory bodies to have highlighted this.

Finally, a claimant will have to attribute knowledge of LIBOR manipulation to the target bank. This may be challenged on the basis that such manipulation was being perpetrated without the knowledge of senior management. One should anticipate the usual plethora of arguments concerning 'rogue employees'.

In addition, a claimant will face the usual hurdles commonplace in disputes involving complex financial products relating to proving loss, quantifying damage and fashioning an appropriate remedy where wrongdoing has been established. The need to involve expert forensic accounting assistance at an early stage is clear.

The remedy

For some victims of LIBOR manipulation, the foremost priority is to know whether the wrongdoing gives them the ability to walk away from the contractual arrangement that is tainted by the manipulation. Conceptually, there are various routes by which an entitlement to walk away could be established. Rescission is the setting aside of a contract where it has been concluded as a result of a fraudulent misrepresentation. Alternatively, the manipulation may amount to a repudiatory breach of a term of the relevant contract, which entitles the wronged party to the agreement to treat itself as discharged from its ongoing obligations under the contract.

Applying these concepts to LIBOR-rigging cases is not straightforward. It remains to be seen whether unwinding complex contractual arrangements and the potential for domino effects with far-reaching consequences will be a step too far for the courts deciding these cases (see below). Since the remedy of rescission may be unavailable in certain circumstances (in particular, where it is found that the parties cannot be returned to their respective pre-transaction positions), there are those who will argue that there is scope for the courts to discard it as not being an appropriate remedy for LIBOR manipulation cases. This might be a particular concern where (as in the *Deutsche Bank AG v Unitech case*) third-party banks, not involved in the manipulation of LIBOR, might have acceded to the facility in question and whose rights might be affected by any attempt to rescind. Cooke J held in that case that the effect of novation was not simply to assign a right or liability but to extinguish the existing agreement and create a new contract. The corollary was that any right of rescission that the customer might have had in relation to the original credit facility agreement was lost when that agreement was extinguished and replaced by new, novated agreements. Of course, rescission may not be a palatable solution commercially for a claimant, for example in circumstances where it has a portfolio of contracts pegged to LIBOR with a particular bank. It may also not be palatable where, again as in the *Deutsche Bank AG v Unitech case*, rescission would involve the restitution of the loan sums, which might dwarf any possible damage that could be alleged by the claimant in respect of LIBOR manipulation. Nevertheless, it remains theoretically viable as a remedy, and its applicability to the facts of individual cases should be considered.

In place of seeking to unwind the LIBOR-tainted transaction, the claimant may seek damages for losses resulting from the transaction in question. To understand the question of damage, it is necessary to consider first principles: for example, in a claim for fraudulent misrepresentation, the purpose of any award of damages would be to put the claimant into the

position it would have been in had the representation not been made. The purpose of a damages award for the breach of contract claim would be to compensate for the difference between the liability actually being faced and that which would have been faced had the breach (ie, undermining LIBOR as a genuine measure of borrowing costs) not occurred.

In addition, therefore, to establishing (or achieving an admission) that banks attempted to manipulate LIBOR, a successful claimant would need to prove that those attempts succeeded so as to cause loss to the claimant. In order to establish that, a claimant would have to show:

1. which elements of the bank's submissions were false;
2. whether the submissions formed part of the 'middle' chunk of submissions based on which the LIBOR rate was averaged (note that even if they were excluded as being at either extreme of the submissions being made by panel banks, they may still have had an impact because of the influence on other banks' submissions, which were consequently included);
3. whether included or excluded in this way, exactly what influence they had on the rate ultimately set (whether they pushed LIBOR up or down and by how much);
4. what the counterfactual rate would have been had there been no manipulation; and
5. what the net effect was on the transaction on the particular days that payment calculations were made (calculating all the losses from, for example, LIBOR being pushed down and netting those against the gains made from it being pushed up).

It is likely to be argued that the regulatory findings do not provide real assistance to claimants here. It will of course be expected that claimants will not be able to rely on generic regulatory findings to the exclusion of a careful analysis and accurate presentation of their individual loss. In addition, attempts may be made to undermine the significance of the regulatory findings altogether. For example, it may be said that the FSA's report into RBS's conduct refers to the risk of harm, rather than actual harm having taken place: it states the misconduct gave rise to 'a risk' that the published LIBOR rates would be manipulated and their integrity undermined. It also states 'RBS's misconduct could have caused harm to institutional counterparties or other market participants'. There are those who will contend that there is little in the reports per se on which claimants can hook proof of loss. Indeed, the delay in the publication of the regulators' findings (and fines) in relation to Barclays, UBS and RBS is likely to be connected to the intensive negotiation by the banks' respective lawyers with the regulators over the precise words used in the written decisions of the regulators. The banks' lawyers will have focused initially on the potential

civil actions that will flow from the LIBOR issues and will have done all they can to limit the 'civil' damage from the regulators' 'criminal' findings.

Nevertheless, there are likely to be ways around these challenges. A number of financial firms have already prepared models to reconstruct what LIBOR should have been. Some legislation (for example, requiring sales of goods to be of satisfactory quality) allows for a reversal of the burden of proof, which would force banks to prove that the transaction as a whole was of satisfactory quality. Further, the English courts frequently quantify loss, even though the process of quantification is not foolproof; they will apply reasonable assumptions rather than deprive a claimant of a remedy and do their best in complex loss cases to arrive at a just conclusion.

Politics and policy

For obvious public policy and other reasons, the consequences of LIBOR manipulation on contractual arrangements are likely to come before the senior appellate courts. How a balance will be struck between a number of important public policy considerations pulling in opposite directions poses an intriguing question.

The rescission of trillions of dollars worth of transactions over the last decade and/or the ordering of damages across the board is likely to significantly impact the banking industry and potentially undermine financial stability. The generally pro-bank trend of decisions in claims coming before the English courts in recent years[1] may be argued to bode well for those who are likely to be sued in relation to LIBOR claims. The impact of adverse findings against banks on LIBOR-referenced transactions across the board appears to have held some sway on Cooke J in the *Deutsche Bank v Unitech* case (above), in which he expressed concern that 'as pleaded, every bank participating in any panel on any one of the 150 LIBOR rates would be taken as making this representation about the whole LIBOR system and the parts played by every bank within it'. That, he said, was 'unrealistic'. It has also been suggested that one can expect the courts to be wary of allowing an already embattled financial sector to become subsumed in all-consuming industrial scale litigation and it may well be that the government will, in any event, wish to step in and legislate in order to limit the potential for wide-ranging LIBOR-rigging civil litigation. It remains to be seen how

1 For example, decisions in recent mis-selling cases such as: *Springwell Navigation Corporation v JP Morgan Chase Bank & Ors* [2010] EWCA Civ 1221; *Titan Steel Wheels Limited v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm); *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm); *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm); and *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm).

such intervention is reconcilable with the outcome of investigations taking place at EU level.

Notwithstanding the above, the unprecedented denigration of the financial industry caused by LIBOR rigging represents uncharted territory, and may provide an appropriate context within which to find banks liable. The pro-bank cases determined to date and cited above were themselves decided on their own facts. Policy concerns that have traditionally held favour with the highest courts here have involved the promotion of commercial certainty and ensuring parties operate on fair terms and on a level playing field. If those concerns remain of primary importance, as they have done in the recent mis-selling cases, they are likely to result in courts ensuring that serious frauds do not go unpunished and that, in appropriate cases, losses suffered as a result of misleading practices in the market are actionable.

How does this impact on strategy and practicalities?

The scale of potential LIBOR claims and their ramifications for the financial markets are obviously huge. The recent regulatory findings of culpability will clearly assist potential claimants greatly. From a litigation perspective, the detailed findings of the regulatory decisions delivered to date, the evidence referred to therein and the likelihood of further such findings in the near future will all be heavily referred to in claimants' pleadings and will likely form the basis for wide-ranging disclosure applications. Allegations of fraud against certain banks, which would have been inconceivable before the financial crisis, will now be made and are likely to be upheld in many cases. Further banks are likely to be fined, more damaging revelations are likely to be made and many innocent parties will want to hold to account the banks culpable for such blatant wrongdoing.

From the perspective of a potential claimant, these are important developments in the right direction. But what else are potential claimants likely to factor in?

Time

A claimant wishing to pursue a LIBOR-rigging civil claim will need stamina and resources. It is likely to take some time for the matter to go through the courts in circumstances where (1) the quantum issues are so complex; and (2) the losing party at each stage in the court hierarchy will be likely to want to appeal.

In the meantime, a bank that holds security may be looking to enforce its security in order to protect its exposure to the counterparty's liabilities to that bank. It is essential for claimants to explore up front with their advisers

the prospects of obtaining interim injunctions to prevent such action pending final judgment on LIBOR-rigging defences and cross-claims. There may be scope for forum-shopping in order to identify a competent jurisdiction that is well-disposed to interim measures to 'hold the ring' pending determination of the claims. If claims are being brought against a number of banks, claimants will need to consider the impact of the action on ongoing banking relationships that will need to be managed and on other facilities that might be reaching maturity.

Funding

Claimants will need resources because most LIBOR-fixing banks have already dedicated very significant resources to defending their position. Resources will need to be allocated to cover legal, financial, accounting and economic experts. Where claims are being made against multiple banks for collusion or anti-competitive behaviour, the potential inequality in resources will be magnified. If resources are an issue, claimants could explore the possibility of obtaining litigation funding. Potential claimants may wish to maximise their resources by identifying generic issues in LIBOR-rigging claims around which to form an action group, which could be ideally placed to attract third-party funding and/or to share the costs of the initial fact-finding investigations.

Settlement

Until court decisions at UK appellate (and even ECJ) level demarcate the territory for actionable loss and remedies in LIBOR-rigging cases, the defendant banks may have strong incentives to resist these claims in preference to settling them. Essentially, the options posed by the prospect of being sued on a LIBOR claim can be likened to the prospect of a nuclear attack: banks either (1) face settling claims wholesale across the board and face up to the devastating cost of doing so; or (2) resist such claims, at least for the time being (and even at the expense of having to disclose potentially damaging documents), until an industry sector solution presents itself. Faced with these tactics, the party claiming to be the victim of LIBOR rigging will need to be resilient as the likelihood of a bespoke settlement of their claim may well recede as the banks seek to await developments and size up their options in search of a single, overarching strategy. Claimants with stamina may well be rewarded: claims may well come before the courts for redress before the banks have found their way out.

The litigation strategy

A number of the issues in any LIBOR claim may be suitable for determination by the courts on a preliminary issue basis. Parties may also explore the pros and cons of having split trials of liability and quantum. It may or may not be in claimants' interests to pursue these strategies: that will depend on a case-by-case analysis and the individual circumstances of each claimant.

It may also be worth exploring whether it is possible to mount a claim in another jurisdiction. There may be advantages to this in circumstances where it might allow for opting into a class action or where the law might allow a reversal of the burden of proof.

Letting the genie out of the bottle

In cases that involve a regulatory angle, a copy of the legal claim might have to be served on the relevant regulatory body. This is certainly the case with respect to competition claims in the UK. The reason this impacts the private lawsuit is that once the regulatory body is seized of the matter, the banks may have less incentive to settle since a claimant can no longer offer the advantages of confidentiality or finality in exchange for settlement. The genie is out of the bottle. This may of course be of less relevance at the moment since it is fair to say that the LIBOR 'scandal' is currently front, back and centre on the regulatory stage.

Conclusion

Trader: 'The big day [has] arrived... My NYK are screaming at me about an unchanged 3m LIBOR. As always any help wd be greatly appreciated. What do you think you'll go for 3m?'

Submitter: 'I am going 90 altho [sic] 91 is what I should be posting.'

Trader: 'when I retire and write a book about this business your name will be written in golden letters.'

Submitter: 'I would prefer this not be in any book!?'

Communication between traders, 10 June 2006

Claimants will need to consider carefully whom to appoint as their legal team: given the complexity of some of the products involved, they will be looking for firms with sufficient experience and know-how to take on the banks. A number of City law firms, which may historically have attracted a dispute of the complexity inherent in the LIBOR litigation, will be conflicted from acting against many of the defendant banks.

The revelations concerning the deliberate manipulation of LIBOR have generated outrage among banks who have not been implicated in the scandal, businesses, institutions and funds that have contracted on the basis of LIBOR, as well as regulators involved in ensuring both the stability and integrity of the financial markets. The story is unfolding, criminal prosecutions are expected, massive litigation is afoot in the US and LIBOR claims are now being formulated and advanced in this jurisdiction. These claims will be complicated and will involve allegations of fraud as well as contractual and other claims. The situation is fast moving and calls for those potentially affected to consider their own position with their advisers and to take a proactive approach to ensure that they are best placed to minimise risk and to seek redress.