P.R.I.M.E. Finance
Panel of Recognized International Market Experts in Finance

Misselling of Derivatives: the Dutch approach

Presentation by Prof. Pim Rank, Leiden University/NautaDutilh
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Introduction

- Many Dutch SMEs have entered into derivative transactions with banks to hedge themselves against a possible increase of interest rates
- However, interest rates dropped and SMEs have suffered extensive financial losses
- SMEs consider banks liable, in most cases on the ground that the information on the risks was insufficient and sometimes on the ground that there is a mismatch between the derivative and the underlying loan

Voluntary re-assessment of interest rate derivatives

- In October 2015, the large Dutch banks committed themselves to re-assess 17,600 interest rate derivatives with 14,316 SMEs

- This was under pressure of the AFM, the Dutch supervisory authority for the financial markets

- This re-assessment process entailed a review of all client files and a possible compensation on a case-by-case basis

- In December 2015, the AFM suddenly took the position that clients were not receiving sufficient compensation and that the re-assessment process would need to be reconsidered

Voluntary re-assessment of interest rate derivatives

- On 1 March 2016, the AFM announced from out of the blue that the large Dutch banks had committed themselves to another plan
- According to this plan:
  - there will be a uniform compensation framework, drawn up by three independent experts
  - all customers will be compensated equally
  - settlements already reached may need to be reconsidered if they are not in line with the framework
- Theoretically, the banks could have refused to co-operate back in October 2015 and in March 2016 or could have withdrawn from this at a later stage. However, it is an open secret that the Minister of Finance exercised a certain amount of pressure on the banks to participate.

Voluntary re-assessment of interest rate derivatives

- On 5 July 2016 the Committee of Experts presented its preliminary Uniform Compensation Framework Interest Rate Derivatives SME to the Minister of Finance.
- The following banks have agreed in advance to participate in the Uniform Compensation Framework.
  - ABN AMRO Bank
  - ING Bank
  - SNS Bank (since 1 January 2017: de Volksbank)
  - Van Lanschot
  - Rabobank
  - Deutsche Bank
- The Committee of Experts has consulted with these banks in setting up the Uniform Compensation Framework

Uniform Compensation Framework

This document sets forth what is required of the banks to compensate the SMEs:

- Compensation for highly complex ('exotic') derivatives unsuitable for SMEs
- Compensation for derivatives that do not match with the underlying loans
- Ex-gratia payment of maximum 20% of the interest payable by the SME under an interest rate swap with a maximum amount of EUR 100k
- Compensation for unexpected raise of interest surcharges on loans in combination with an interest rate swap

Uniform Compensation Framework

- The Uniform Compensation Framework applies only in case of non-professional parties and parties lacking the relevant expertise
- SMEs that were a party to an interest rate derivative 1 April 2011 and 1 April 2014 will be re-assessed and awarded compensation at the banks' initiative
- SMEs with interest rate derivatives that came to an end before 1 April 2011 will have to apply for compensation themselves
- On 19 December 2016 the Uniform Compensation Framework was published in final form

Pros and Cons

- Refusal or withdrawal could result in fines, a second suitability check of the bank’s management, naming & shaming etc.

- This voluntary re-assessment of interest rate derivatives is therefore effectively a forced re-assessment with no formal possibility to object or file an appeal with the appropriate administrative court

- The idea is to deal with the matters at hand in an efficient and pragmatic way and to avoid mass litigation with respect tot complex financial products

- The one-size-fits-all outcome conflicts with the general principles underlying the law of damages

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