

# **Claim for damages in connection with the purchase of structured products on currencies on the basis of an alleged de facto investment advisory agreement**

Topic: **Investment advice** Case number: **2023/17**

The client represented by the lawyer was a foreign domiciliary company. It had lost almost USD 3 million with an investment in structured products on currencies. It claimed that it had made the investments on the basis of a de facto investment advisory agreement and requested compensation from the bank. The bank categorically rejected any liability for damages. Due to the questions of evidence that arose and the lack of valid evidence for the allegations, as well as the obvious lack of willingness of the bank to compromise, the Ombudsman saw no basis for successful mediation and referred the client to the competent courts.

The allegations against the bank submitted to the Ombudsman in four large folders were indeed very serious. The client's lawyer claimed that the company's managing director, who had carried out the disputed investments, was neither linguistically nor intellectually capable of understanding the transactions and the respective contracts. The latter, as well as all transaction documents, were written in English, a language which, according to the managing director, he did not speak.

The parties already disagreed on the fundamental question of the contractual basis on which the transactions had been carried out. The bank assumed an execution-only relationship, while the client's lawyer claimed that it was a de facto investment advice-based relationship that had not been documented with a written contract. The bank had breached its duty to provide information by not informing the client in writing or verbally about the risks associated with the transactions. The bank had also breached its duty to check suitability and its duty to act in good faith and safeguard the client's interests. Finally, the bank had abusively invoked the assumption of approval.

After reviewing the extensive dossier, the Ombudsman came to the conclusion that the answers to disputed questions of fact were of central importance for the assessment of the dispute. In addition to the preliminary question of whether a de facto advice or rather an execution-only relationship existed, the main issues were the managing director's true knowledge and experience with regard to the loss-making transactions, his knowledge of English and the correctness of the minutes, reports and entries in the client history prepared by the client advisor as well as the completeness of the documents sent to the client's managing director via retained mail.

The aim of the Ombudsman procedure is to reach amicable solutions to disputes between clients and banks in a free of charge, simple and quick procedure. The Ombudsman acts as an intermediary who can try to persuade the bank to make concessions if there is sufficient evidence of misconduct on the part of the bank and if the client has suffered damage as a result. Unlike in court proceedings, however, it is not possible to conduct formal evidentiary proceedings or even forensic investigations in order to establish the facts of the case with binding effect. If there is a lack of cogent arguments or if questions of evidence are in the foreground and the parties show no willingness to compromise, so that mediation appears hopeless from the outset, the Ombudsman refrains from initiating a procedure on the basis of its rules of procedure and refers the parties to legal action. For these reasons, the

Ombudsman unfortunately saw no basis for a promising mediation in the present case.