

Loss due to failure of the custodian bank to pass on essential information

Topic: **Stock exchange and custody accounts** Case number: **2019/12**

The bank informed the client of an offer to exchange a bond, which the client kept in his securities account with the bank. The client wanted to accept the offer, but found that he could not participate in the exchange procedure because he had not registered for it in advance. This requirement had been included in information issued by the issuer of the bond a few months earlier. This information had not been forwarded to the client by the bank. The client claimed that he had suffered a loss of EUR 12,000 because he was unable to participate in the exchange offer. The bank only wanted to compensate him for a fraction of this loss, and he turned to the Ombudsman. After conducting the ombudsman procedure, it was finally prepared to compensate the customer for half of the damage, which the customer accepted.

The bank claimed first of all against the client and later against the Ombudsman that its custodian, where it held the bonds for the client, had not forwarded to it the information that certain investors had to register before the actual exchange offer. It had only received general information about an upcoming restructuring process of the issuer. As this general information did not require any action on the part of the custodian clients, it did not forward that information. The Ombudsman then asked the bank for a copy of the respective general information. After reviewing it, the Ombudsman found that, contrary to what the bank had said, the registration obligation for certain bondholders was listed there. However, the procedure was extremely complex. Holders were therefore advised to contact a local lawyer at the issuer's registered office, which was located in an emerging market.

After the Ombudsman confronted the bank with the fact that it had received the essential information after all, it took the view that it had no obligation to pass on such information under its depository regulations, especially since the customer was an "execution-only" customer. The customer was himself responsible for obtaining the necessary information from the issuer. The Ombudsman was of a decidedly different opinion on this point. In his opinion, it is a clear duty of a custodian bank to pass on important information about so-called "corporate actions" that it receives to its custodian clients. The custody account regulations invoked by the bank did not contain any other information. These made no distinction as to whether the holder of the custody account was only an execution-only client or whether the bank had concluded an investment advisory or asset management agreement with him. In the Ombudsman's view, the bank had therefore breached the limited management obligations incumbent on it under the custody account regulations.

Another question was whether this breach of contract was adequately causal for the loss claimed by the client, i.e. whether his loss was reasonably related to the preceding breach of contract. In this context, it was probably necessary to take into account that the procedure which the customer would have had to go through was, as mentioned, very complex. He might have incurred legal fees and it could not be estimated beyond doubt that the steps would have been successful. The Ombudsman therefore suggested that the Bank resolve the case by way of settlement and compensate the customer for 50% of the damages claimed. Although the Bank insisted on its view of the factual and legal situation, it was nevertheless prepared to make the proposed offer to the customer without

acknowledging any legal obligation. The customer accepted the settlement offer.