

Loss with exchange-traded leverage products

Topic: **Investment advice** Case number: **2021/21**

The client suffered losses in the mid six-figure range in connection with the market turmoil during the Corona crisis with exchange-traded leverage products. He accused the bank of not informing him about the risks of trading in such products. In addition, contrary to the information on its website, the bank had not complied with relevant EU regulations which protect private clients from the obligation to make additional payments in connection with such transactions. Furthermore, it had not complied with the minimum margins of the EUREX exchange, which had increased its loss. Finally, the decisive conversation in connection with the margin call had not been conducted in the correspondence language agreed with him. He had therefore not understood what it was about and had mistakenly deposited further money. He asked the bank to compensate him in full for his loss. The bank refused to do so in a detailed statement of reasons. The client submitted the case to the Ombudsman and maintained his claim. The Ombudsman did not see any convincing arguments to persuade the bank to make concessions and closed the case with a notice to the client.

In its response to the client's complaint, the bank argued that the trading agreement concluded with him provided detailed information about the risks of the transactions he had carried out. In addition, he had received the standard brochures "Special Risks in Securities Trading" and "Risks in Trading with Financial Instruments". The EU rules cited by the client, the so-called ESMA rules, were not applicable and no such assurances had been given by it. The EUREX minimum margins had been complied with at all times. The margin call, on the basis of which he had injected additional money and closed his positions, had been made correctly.

In his submission to the Ombudsman, the customer repeated his arguments without addressing the main points in the bank's response. As a first step, the Ombudsman invited him to do so and asked him supplementary questions about his complaint. Unfortunately, the answers given by the client, who worked professionally as a lecturer at a university in the field of economics, were somewhat evasive. Among other things, he claimed that he had never signed the trading agreement quoted by the bank. He had not received by post the brochures from which he had quoted in connection with his argument that the EUREX minimum margins had not been observed.

The Ombudsman then contacted the bank and asked it to comment on the customer's allegation that it had not complied with the EUREX minimum margins. He also asked the bank to comment on the allegation that the margin call did not take place in the language agreed with the client. In its reply to the Ombudsman, the bank stated that it had complied with the EUREX margins and had also documented this to the client with corresponding tables. The calculations submitted by the client were not comprehensible to the bank. Employees of its Legal & Compliance Department had listened to the recorded margin call with the client again. The employee of the Trading Department had explicitly asked him whether he wanted to have the conversation in German. He replied that a conversation in English was fine. The bank employees judged his English to be impeccable. No comprehension problems were apparent during the entire conversation.

The Ombudsman issued an explanatory notice to the customer based on the complaint documents

and the additional information obtained from the parties. In this case, the Ombudsman again found that the parties had presented the essential elements of the case differently with regard to the individual objections and drew the customer's attention to the fact that the ombudsman's proceedings do not involve any taking of evidence. For the sake of completeness, he nevertheless pointed out to the client that, as a matter of principle, the party who wishes to derive rights from the facts of the case must provide the necessary evidence.

Without wishing to assess this conclusively, there was little doubt in the Ombudsman's mind that the bank would be able to prove that it had concluded the trading agreement it had cited, and thus also that a thorough risk disclosure had taken place. It was not necessary to sign the agreement for it to be valid. It was sufficient to acknowledge the provisions in electronic form.

The ESMA rules cited by the client do not automatically apply in Switzerland and would have to form part of the contractual arrangement to be applicable to the case. However, this was not the case. The statements that these rules would apply, which the client quoted, came from a subsidiary of the bank based in the EU, which was subject to other rules and which also conducted its business on the basis of different contracts. In the Ombudsman's view, this was clearly evident from the website mentioned by the client. It would be for the client to prove that the bank had promised to respect the ESMA rules.

With regard to the allegation that the bank had not respected relevant margin rules, the Ombudsman had to inform the client that, according to the Swiss case law known to him, such rules primarily served to protect the bank from losses and that a client could only derive claims from a breach of them if the interpretation of a relevant provision suggested a duty to protect in favour of the client. However, the relevant provision of the contract considered by the bank to be authoritative expressly stated that it served exclusively the interests of the bank.

With regard to the disputed margin call conversation, a recording was available. The Ombudsman recommended that the client reconsider his argument that he did not understand the bank employee because he spoke English. In addition to the bank's comments on this point, he should also take into account the fact that scientific publications which he had written in English could be found on the internet.

In conclusion, the Ombudsman noted that he regretted the losses suffered by the client and was aware that other jurisdictions went much further in protecting clients in relation to the type of transactions they had entered into. However, he did not see any convincing arguments that could serve to motivate the bank to make concessions and ended his mediation efforts.