

Losses related to unexecuted securities sale orders

Topic: **Investment advice** Case number: **2021/18**

The client privately held two securities portfolios with different investment objectives at the bank, for which he had concluded written investment advisory agreements. He also had a commercial business relationship with the bank. He expressed dissatisfaction with the bank's services in various respects, whereby the majority of his accusations were made in very general terms. Only the accusation that he had wanted to reduce the risks in his portfolios in February 2020 and had instructed the bank to sell his shares was substantiated. However, the bank had only executed a small part of the sell orders. As a result, he had incurred a high six-figure loss. After the bank categorically rejected responsibility for this loss, he submitted the case to the Ombudsman. The ombudsman issued a notice to the client indicating the main problems he had identified in the dispute and informed him that he bore the burden of proof for placing the sales orders disputed by the bank. The Ombudsman did not see any prospects for a successful mediation.

A relative of the client, who works as a lawyer, had already confronted the bank on the client's behalf with various allegations, which the bank categorically and flatly rejected. The client did not submit the corresponding letter of complaint to the Ombudsman. The Ombudsman drew the client's attention to the fact that in his function as a neutral mediator, he must know the positions of both parties so that he can form an independent opinion regarding a dispute and decide on any steps to be taken in a mediation procedure. In addition, the client must have exhausted the possibilities to settle the issue in direct contact with the bank. This includes that he confronts the bank with his concrete allegations and a comprehensibly calculated claim before submitting the case to the Ombudsman. Unfortunately, it was not possible to see whether these requirements were met in the case submitted.

The bank categorically denied the client's concrete accusation that the bank had not executed the order given by telephone in February 2020 to sell all shares except for three positions. A problem of proof was evident in this regard. The Ombudsman therefore drew the client's attention to the fundamental rule of evidence set out in Article 8 of the Civil Code. According to this rule, the person who derives rights from an alleged fact must prove its existence. Accordingly, in a dispute, it would be up to the client to prove the existence of the sales order he claims. The ombudsman procedure is a pure mediation procedure. Unlike in civil proceedings, no evidentiary proceedings are conducted to establish a disputed fact in a binding manner. Since there was no apparent willingness to compromise on the part of the parties in the present case, mediation efforts on this point had to be judged as futile from the outset.

The Ombudsman also drew the client's attention to the fact that the bank's detailed contact summary for his client relationship, a copy of which the client had submitted to him, did not show any such order on the alleged date in February 2020. From the document, it could be concluded that the client was an experienced and active investor, given his numerous and regular contacts in connection with investment transactions. On the alleged date of the sale order, a telephone conversation of the client was recorded, on the occasion of which he expressed the intention to reduce risks due to the current market situation. Finally, an order to sell three positions was noted. A further sales order was not recorded until mid-March 2020. According to the contact overview, the client's allegation that he had already placed a sell order for all of his shares in February 2020 was first made at the end of May

2020, although around 20 contacts were recorded in between. In his notice to the client, the Ombudsman therefore doubted that a positive outcome could be reached in favour of the client on the disputed issue if he did not have evidence of a timely complaint about the non-execution of the alleged sell order.

For the sake of completeness, the Ombudsman finally pointed out to the client that, in accordance with the principles of general contract law, banking contracts usually impose a duty on the client to check and complain. Accordingly, a transaction or a statement of account is deemed to have been approved by the client if the client does not object to it within a certain period of time, usually within 30 days.

Based on the discernible circumstances regarding the facts of the case and the legal questions that arose, the Ombudsman did not consider the conditions for a promising mediation to be met. He expressed the hope that the remarks in his notice could serve as guidance for the client.