Passing on legal fees for tax clarifications in the USA to the bank’s clients

Topic: **Fees and charges** Case number: **2020/31**

> The bank maintained account relationships in the names of a trustee and a company, both of which belonged to the same trust structure. The settlor of the trust was a US person. The beneficiaries were his undisclosed descendants. The trustee refused to disclose the names of the beneficiaries and to allow the bank to disclose client and account information to the IRS, the US tax agency. The bank then engaged an American law firm to clarify the legal situation with regard to tax issues and charged the costs to the company’s account. The clients’ lawyer demanded that the bank refund this amount, which the bank refused to do. The clients’ lawyer then submitted the case to the Ombudsman. No solution could be found in the Ombudsman proceedings.

The bank was involved in one of the well-known tax proceedings in the USA and had concluded a so-called “Non Prosecution Agreement” with the US authorities in order to end these proceedings. When the trustee refused to sign the form “Authorisation to disclose customer and account data to the IRS”, the bank decided to hire a large American law firm to clarify questions in connection with its tax risks and the risk of violating the non-prosecution agreement by managing the two client relationships concerned. It debited the legal bills totaling a low six-figure amount to the account of the company, the so-called “underlying company” of the trust, as there were insufficient assets in the account of the trustee to cover the costs.

The clients’ lawyer explained that his clients had not instructed the American law firm themselves and had not agreed to this mandate. The mandate had not been necessary and had not been in the interest of the clients, but in the interest of the bank. The invoices were drafted in a lump sum. The lawyers’ efforts were not detailed on them. The client advocate was of the opinion that the bank could have carried out a risk assessment itself with the help of its internal resources. Moreover, the so-called FATCA provisions would only provide for such a situation that the clients concerned would be classified as “recalcitrant” and that a withholding tax would be due on their income. He asked the bank to reverse the debit of the invoices in question. The bank, represented by a Swiss lawyer, refused to refund the debited amounts. When the clients failed to reach an agreement with the bank, they asked the Ombudsman to initiate mediation proceedings.

The Ombudsman asked the bank to re-examine the case and referred to a decision of the Zurich Commercial Court which had, in a comparable case, prohibited a bank from charging a client for the costs of legal clarifications in the USA. The bank’s lawyer told the Ombudsman that the clients’ conduct was in breach of trust because they had concealed the settlor’s US residence and had made false confirmations on the relevant forms. The bank was of the opinion that it was entitled to make the disputed debits on the basis of the right of lien and set-off contained in its general terms and conditions.

The Ombudsman then advised the bank that the right of lien and set-off did not constitute an independent basis for claims, but only enabled the bank to charge claims against clients to the assets held by them. The bank’s lawyer then argued that the claims could be asserted on the basis of Article 402 of the Swiss Code of Obligations. According to this article, the principal was obliged to reimburse

the agent’s expenses and was liable for damages incurred by the agent in the performance of the mandate. In addition, the clients had signed a form in which they undertook to indemnify the bank against claims and damages in connection with US tax rules or the so-called “Qualified Intermediary Agreement” and FATCA, which had arisen due to the late determination of the clients’ US person status. The bank insisted on debiting the legal costs to the client account and considered the judgement, to which the Ombudsman had referred to, to be irrelevant for the case.

Since it was evident that the bank was not prepared to make any concessions in the ombudsman procedure, the Ombudsman had to discontinue his mediation efforts, even though he was not convinced by the bank’s attitude. He informed the clients’ lawyer of this in a final notice.