# The German Insurance Ombudsman System

**Prof. Dr. Jens Gal,** *Maître en droit*

*Jens Gal* is entrusted with a Chair for European Insurance Law with a main focus on insurance supervisory law at the University of Frankfurt, Germany. Prof. Gal finished his legal studies in Frankfurt and Lyon, France and passed the First and Second States Exam in the state of Hesse. He has been a regular lecturer at the Institute for Law and Finance in Frankfurt since 2006 and at the University Lumière II in Lyon since 2007. Gal's scientific focus is largely on issues of insurance contract law and insurance supervisory law but also on the law of civil procedure with a main interest on arbitration matters. Gal is, *inter alia*, a member of the interdisciplinary International Center for Insurance Regulation (ICIR) and of the scientific advisory board of the Association for the Advancement of Teaching of Insurance Matters of the University of Frankfurt and he is the current secretary of the German chapter of the Association Internationale de Droit des Assurances (AIDA).

## I. Introduction

For many years the proliferation of new ombudsman systems in Germany has been met with almost universal acclaim by political and economic actors and the public at large. The development of the ombudsman idea took place in two very distinct spheres: On the one hand, ombudsmen were instituted in the political, public law sector.[1] Here the ombudsman is usually a state official appointed and entrusted with the task of serving as an advocate for the citizens' interests vis-à-vis political or administrative activities. On the other hand, ombudsman systems have also flourished in the private economic sector.[2] Here, ombudsmen are intended to remediate a disequilibrium that exists between an economic actor and its contractual partner – which is usually a consumer – by providing the latter with an efficient, yet inexpensive dispute resolution mechanism for complaints against the former.

---

[1] For an overview on some public sector ombudsmen, cp. *i.a.* Haas, Der Ombudsmann als Institution des Europäischen Verwaltungsrechts – Zur Neubestimmung der Rolle des Ombudsmanns als Organ der Verwaltungskontrolle auf der Grundlage europäischer Ombudsmann-Einrichtungen, Tübingen 2012.

[2] An overview on ombudsmen in the financial sector may be found in Brömmelmeyer, Der Ombudsmann im Finanzsektor, in: WM - Zeitschrift für Wirtschafts- und Bankenrecht 2012, pp. 337–342 at 337; for further sectors providing an ombudsman system cp. e.g http://www.galli-institut.de/vr_om.htm.

One of the most successful ombudsman procedures in Germany is the one provided by the German insurance undertakings, the *Versicherungsombudsmann*, which since its inception in 2001 has attracted an annual average of about 17,000 complaints[3] reaching a new peak in 2013 when almost 19,000 complaints were lodged.[4] At first sight one might be mystified as to how this institution managed to garner equal support from insurers and policyholders alike. One of the reasons can certainly be seen in the fact that unlike many other ombudsmen the *Versicherungsombudsmann* is not limited to making recommendations to the parties (in the sense of a reconciliation procedure) but in disputes up to an amount of € 10,000 is empowered to take decisions binding on the insurer (but not the complainant). This is, however, but one facet of the attractiveness of the German insurance ombudsman and to understand its success one needs to take a more detailed look at its structure.

## II. Historical Development

Whilst the creation of an insurance ombudsman had been under occasional discussion since the 1970s,[5] the foundation of the *Versicherungsombudsmann e.V.* by the German insurance industry in 2001 was rather belated[6] in comparison to the insurance sector of many neighbouring countries[7],

[3] Only during the first three years did the complaints average amount to a "mere" 10,000. Since then, the average has constantly remained between 17,000 and 19,000 complaints *per annum*; for the numbers in the first few years cp. e.g. Ombudsmann für Versicherungen, Jahresbericht 2007, p. 56.

[4] To compare, the German Private Banking Ombudsman – which, however, is only competent for disputes with private banks – has even in his most successful years never attracted even half the amount of complaints; cp. Ombudsmann der privaten Banken, Tätigkeitsbericht 2012, p. 40.

[5] Apel, Die Bedeutung staatlicher Politik für die moderne Privatversicherung, in: Versicherungswirtschaft 1977, pp. 1486–1491 at 1488; Büchner, Brauchen wir einen Ombudsmann?, in: Versicherungswirtschaft 1978, p. 1485–1490; Surminski, Versicherungswirtschaft und Verbraucherschutz, in: Zeitschrift für Versicherungswesen 1979, pp. 4–11; Hoeren, Der englische Versicherungs-Ombudsman – ein Modell auch für die deutsche Versicherungswirtschaft, in: Zeitschrift für die gesamte Versicherungswissenschaft 1992, pp. 487–498; Hohlfeld, Überlegungen zur Einführung eines Ombudsmanns im Versicherungsbereich, in: Basedow *et al.* (eds.), Anleger- und objektgerechte Beratung – Private Krankenversicherung – Ein Ombudsmann für Versicherungen: Beiträge der siebenten Wissenschaftstagung des Bundes der Versicherten, Baden-Baden 1999, pp. 223–230.

[6] Jürgen Basedow, the long-time chairman of the supervisory board, is of the opinion that Germany was not late but rather came to the adoption of the ombudsman procedure at the appropriate moment, see: Basedow, in: Versicherungsombudsmann e.V. (ed.), 10 Jahre Versicherungsombudsmann: 2001–2011, Berlin 2011, pp. 21 et seq.

[7] See e.g. Reichert-Facilides, The Insurance Ombudsman Abroad: A Comparative Survey, in: Basedow *et al.* (eds.), Anleger- und objektgerechte Beratung – Private Krankenversicherung

most notably in comparison to Switzerland, where the Swiss Insurance Association instituted the *Ombudsman der Privatversicherung* as early as 1972[8]. The reasons for this delay were manifold. Chiefly amongst them was the German insurance industry's rejection of an ombudsman as superfluous in light that at the time the German insurance supervisory authority – other than in many other countries – acted as a complaint point.[9] Catalyst for the development of an ombudsman procedure in the German insurance sector was the development of such a mechanism in the banking sector at the debut of the 1990s.[10] After the European Commission recommended to all Member States the establishment of a dispute resolution system, such as especially an ombudsman system, in 1990,[11] the German banking industry in 1992 – presumably also in an attempt to pre-empt any government movement on this point[12] – established the *Ombudmann der privaten Banken*.[13] Owing to the (albeit mixed) support that this institution garnered in the ensuing years,[14] the German insurance industry felt the time to

– Ein Ombudsmann für Versicherungen: Beiträge der siebenten Wissenschaftstagung des Bundes der Versicherten, Baden-Baden 1999, pp. 193–211.

8 Cp. Maurer, Ombudsmann der Privatversicherung, in: Faculté de droit et des sciences économiques et sociales de l'Université de Fribourg (ed.), Mélanges en l'honneur de Henri Deschenaux à l'occasion de son soixante-dixième anniversaire, Fribourg 1977, pp. 511–528; v. Hippel, Der Ombudsmann im Bank- und Versicherungswesen – Eine rechtsdogmatische und -vergleichende Untersuchung, Tübingen 2000, pp. 184 et seq.

9 Michaels, Die Unabhängigkeit des Ombudsmanns ist oberster Grundsatz, in: Versicherungswirtschaft 2000, p. 396; Lorenz, Der Versicherungsombudsmann – eine neue Institution im deutschen Versicherungswesen, in: Versicherungsrecht 2004, pp. 541–549 at 541; for a thorough historical overview v. Hippel (fn. 8), pp. 20 et seqq.

10 Scherpe, Der deutsche Versicherungsombudsmann, in: Neue Zeitschrift für Versicherungsrecht 2002, pp. 97–102 at 97; a major source of inspiration was also the pre-FOS British Insurance Ombudsman Bureau, cf. Römer, Der Ombudsmann im deutschen Privatversicherungsrecht, in: Basedow *et al.* (eds.), Lebensversicherung – Altersvorsorge – Private Krankenversicherung – Versicherung als Geschäftsbesorgung – Gentest – Der Ombudsmann im Privatversicherungsrecht – Beiträge zur 12. Wissenschaftstagung des Bundes der Versicherten, Baden-Baden 2004, pp. 199–208 at 202; Benkel/Hirschberg, in: *idem* (eds.), Lebens- und Berufsunfähigkeitsversicherung, 2nd ed., Munich 2011, part G para. 33.

11 Commission, Recommendation of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions (90/109/EEC), in: OJ/EC nº L 67/39 (cf. esp. sixth principle in the annex).

12 There had in fact been some pressure by the Federal Government on the banking sector to establish such a dispute resolution mechanism, cp. Gude, Der Ombudsmann der privaten Banken in Deutschland, Großbritannien und der Schweiz, Bonn 1999, pp. 24 et seq.; Höche, in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4th ed., Munich 2011, sec. 3 para. 22.

13 Scherpe, Der Bankenombudsmann – Zu den Änderungen der Verfahrensordnung seit 1992, in: WM – Zeitschrift für Wirtschafts- und Bankenrecht 2001, pp. 2321–2325 at 2321; Hoeren, Das neue Verfahren für die Schlichtung von Kundenbeschwerden im deutschen Bankgewerbe – Grundzüge und Rechtsprobleme, in: Neue Juristische Wochenschrift 1992, pp. 2727–2732 at 2727 et seq.

14 Cf. e.g. v. Hippel (fn. 8), pp. 15 et seqq.

be ripe and in February 2000 the *German Insurance Association (GDV)* decided that an ombudsman system was to be established.[15]

In April 2001 the *German Insurance Association (GDV)* founded the *Versicherungsombudsmann e.V.* in the form of a German registered association (*eingetragener Verein*) whilst establishing the articles of association and the ombudsman's rules of procedure.[16] Subsequently the members of the executive board of the association were commissioned and *Wolfgang Römer*, the former president of the insurance senate of the German *Bundesgerichtshof*, was elected to be the first *Versicherungsombudsmann*.[17] In October of the same year the Ombudsman took up his work. In parallel to this development under the aegis of the *German Insurance Association (GDV)*, the other German association of insurers – the *Association of [German] Private Healthcare Insurers (PKV)* – also set up an ombudsman system which equally took up its work on 1 October 2001.[18]

Both ombudsman systems are mutually exclusive, with the latter only dealing with disputes arising out of private health or long-term care insurance contracts. For the sake of clarity the present article will subsequently focus almost exclusively on the (practically more important) *Versicherungsombudsmann* while only sporadically mentioning the *Ombudsmann Private Kranken- und Pflegeversicherung* (hereinafter referred to as the *PKV-Ombudsmann*).

## III. Membership and Funding

Pursuant to sec. 3 of the articles of association both the *German Insurance Association (GDV)* and all its member undertakings may become member of

[15] Labes, Der Ombudsmann der Versicherungswirtschaft: Sachstand – Erwartungen – Perspektiven, in: Bähr/Labes/Pataki (eds.), Liber discipulorum für Gerrit Winter, Karlsruhe 2002, pp. 149–174 at 157; Knauth, Der Versicherungsombudsmann e.V. – Die Erwartungen der Versicherungswirtschaft, in: Kollhosser (ed.), Der Versicherungsombudsmann e.V., Karlsruhe 2002, pp. 7–18 at 9 et seq.; Michaels (fn. 9), p. 396. Michaels, the then president of the *German Insurance Association (GDV)* and first chairman of the executive board, however claims that the Ombudsman was in its precise form not inspired by any other institution, cp. Michaels, in: Versicherungsombudsmann e.V. (ed.) (fn. 6), p. 21.

[16] Brömmelmeyer (fn. 2), p. 337. Registration of the association occured in May, cf. Bultmann, Der Versicherungsombudsmann e.V. – Die Organisation, in: Kollhosser (ed.), Der Versicherungsombudsmann e.V., Karlsruhe 2002, pp. 1–6 at 2.

[17] Bultmann (fn. 16), p. 2. The association's supervisory board (*Beirat*) was constituted in February 2002.

[18] Cf. Kalis, Der Ombudsmann in der privaten Krankenversicherung (PKV), in: Versicherungsrecht 2002, pp. 292–294; v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.), Versicherungsrechts-Handbuch, 2nd ed., Munich 2009, § 23 paras. 438 et seqq.

the *Versicherungsombudsmann e.V.* by unilateral declaration of accession.[19] By becoming a member of the association the insurance undertakings accept to be bound to the rules of procedure and as such agree that their insured may petition the Ombudsman.[20] Currently the GDV and over 95 % of all insurance undertakings established in Germany are members.[21] Other than e.g. in the UK[22] membership at the *Versicherungsombudsmann e.V.* (and at the *PKV-Ombudsmann*) is completely voluntary.

Since the procedure before the Ombudsman is offered free of charge to the complainant (i.e. the policyholder, co-insured, beneficiary or other applicant, who all usually need to be consumers),[23] the Ombudsman and its supporting association need to be financed by other methods than the ones applicable to court procedures. The association, and as such the dispute resolution mechanism, is financed in a twofold manner. Firstly, all member undertakings of the association are required to pay an annual contribution based on the financial needs of the association (sec. 16 articles of association). The individual contribution of each undertaking is based on its gross premium income in comparison to that of the other members.[24] Secondly, every admissible complaint triggers a case-based lump sum which the insurance undertaking needs to pay irrespective if the complaint is later found to be justified.[25] Currently the lump sum is set to be € 111.75 if the procedure is concluded by decision or (non-binding) recommendation and € 74.50 if the procedure is concluded by any other means.[26]

---

19 Pursuant to sec. 3 subsec. 3 of the articles of association the membership of an association ends firstly *de iure* if the undertaking loses its membership of the *German Insurance Association (GDV)* or secondly if the undertaking declares its resignation.

20 Sec. 5 of the articles of association. Pursuant to subsec. 3 of the aforementioned provision, the undertakings, moreover, promise to inform their customers at the moment of contract conclusion or with the sending of the policy about the existence of the dispute resolution mechanism.

21 Cf. v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), § 23 para. 390; cf. also Ombudsmann für Versicherungen, Jahresbericht 2012, p. 68; for a comprehensive list of the member undertakings see *ibidem*, pp. 110 et. seqq.

22 Cf. e.g. Rühl, Außergerichtliche Streitbeilegung in Versicherungssachen im Vereinigten Königreich – Der Financial Ombudsman Service (FOS), in: Neue Zeitschrift für Versicherungsrecht 2002, pp. 245–251 at 246.

23 Sec. 14 subsec. 1 Rules of Procedure. Only in the case of a complaint directed against an insurance intermediary (not against its employing insurance undertaking) which is manifestly abusive, may the complainant be charged a fee, cp. sec. 7 subsec. 2 phrase 2 rules of procedure for complaints in connection with the mediation of insurance.

24 Hirsch, The German Insurance Ombudsman, in: Zeitschrift für die gesamte Versicherungswissenschaft 2011, pp. 561–569 at 564. The minimum contribution is set to be € 500, cf. Ombudsmann für Versicherungen (fn. 21), p. 76.

25 Hirsch (fn. 24), p. 564.

26 Ombudsmann für Versicherungen (fn. 21), p. 76.

## IV. Organisation

As already stated above, the German insurance ombudsman system was established in the form of a private law association.[27] While the most important function in connection with the legal person is held by the Ombudsman himself – since the whole association's reason for being is to enable the Ombudsman to do his work –, the organs, bodies and employees of the supporting organisation play vital roles as well.

### 1. General Meeting

As within every German registered association (*eingetragener Verein*) the *Versicherungsombudsmann e.V.*'s central organ is its general meeting. The general meeting is made up of all members, which all have – irrespective of seize or premium income – a single vote within the general meeting (sec. 10 subsec. 2 phrase 1 Articles of Association [subsequently referred to as AoA]).

The general meeting's particular competences include altering and adjusting the articles of association and the rules of procedure, electing the members of the executive board, electing certain members of the supervisory board and appointing the Ombudsman, receiving and consulting the reports of the Ombudsman and of the executive board, approving the annual budget and discharging the members of the executive board and the managing directors, appointing an auditor, setting up the business plan and fixing the annual contribution.[28]

The general meeting will usually make use of its powers in the course of the annual general meeting (sec. 8 AoA). Where the interests of the association are at stake or one fifth of the members so requests the executive board may, however, also convene an extraordinary general meeting (sec. 9 AoA). The articles of association do not stipulate a specific quorum.[29] For the most part decisions require a mere majority of the members present at the meeting, while some decisions – i.e. alteration of the articles of association or the rules of procedure, appointment of the Ombudsman and expulsion of members (sec. 10 subsec. 3 AoA) – require a majority of three quarters of the members present.

While it is only natural for any legal person that the owners ultimately decide

---

[27] See supra ch. II.

[28] Cp. in more detail sec. 11 AoA; see also Bultmann (fn. 16), p. 4.

[29] German law – other than for other legal persons – does not (in general) require the general meeting of a registered association to meet a statutory quorum, cp. sec. 32 German Civil Code. Insofar it is hypothetically possible for a general meeting composed of one member to pass binding resolutions, cp. Reuter, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 6th ed., Munich 2012, sec. 32 para. 46.

the course of the undertaking, it would appear – in theory – problematic if the members, i.e. the insurance undertakings, were to have the power to elect the Ombudsman, alter the articles of association and, even worse, alter the rules of procedure, since such could call into question the independence of the ombudsman procedure.[30] In an attempt to limit the insurance industry's sway over the Ombudsman and the procedure and as such create more trust in the procedure, the general meeting's powers were limited by requiring the approval of certain other actors or creating co-decision powers (which will be discussed at a later point). The general meeting's powers are insofar far less encompassing than they might first appear.

### 2. Executive Board and Management

While the general meeting is the support organisation's central organ, its other organ,[31] the executive board, is no less important, since it assumes all powers and duties which are not explicitly assigned to the general meeting, the supervisory board or the managing directors (sec. 7 subsec. 4 AoA).

The executive board consists of at least five and at most 11 members (sec. 7 subsec. 1 AoA). Currently the executive board comprises eight members.[32] The members are elected by the general meeting for a term of four years, with re-election being possible (sec. 7 subsec. 5 AoA). It is important to note that the articles of association do not allow for so-called *Fremdorganschaft* (literally translated "external organship"), meaning that only physical persons that at the time of the election are members of an organ of one of the member undertakings are eligible (sec. 7 subsec. 5 phrase 2 AoA). The executive board elects its chairman from its midst (sec. 7 subsec. 2 AoA).

The executive board's *catchall competence* is complemented by certain duties and powers that are explicitly stated. Most importantly, the executive board – which is itself represented by two members acting co-jointly – represents the association to the outside.[33] The executive board is also competent to recommend the person to be elected as Ombudsman, define

---

[30] Very critical on these points Tiffe, Eineinhalb Jahre Versicherungsombudsmann e.V., in: Verbraucher und Recht 2003, pp. 260–264 at 260 et seq.

[31] Interestingly enough, these two are pursuant to sec. 6 AoA the only organs of the *Versicherungsombudsmann e.V.* Insofar neither the Ombudsman nor, more surprisingly, the board of supervisors are regarded as organs.

[32] Ombudsmann für Versicherungen (fn. 21), pp. 69, 109.

[33] Cp. sec. 7 subsec. 4 lit. a AoA in connection with sec. 7 subsec. 2 AoA. All current members save two are chairmen of the executive boards of eminent German insurers. The two exceptions are *Frank von Fürstenwerth*, the chairman of the *German Insurance Association (GDV)*, and *Gutberlet*, who is a member – and not the chairman – of the executive board of Allianz.

the scope of competence of the Ombudsman (as long as such task is not reserved for the general meeting and the supervisory board), recall an Ombudsman (where such was agreed by the supervisory board), prepare and convoke general meetings, implement the decisions of the general meeting, prepare a business plan and finally appoint, supervise and recall managing directors (sec. 7 subsec. 4 AoA).

The current operations of the association are assumed by the managing director. As mentioned before, it is for the executive board to appoint one (or several) managing directors. This managing director is bound by the statutes for managing directors established by the executive board (sec. 7 subsec. 6 AoA). Currently – since 2003 – this office is assumed by *Horst Hiort*.[34] It is usually he who pre-prepares the preparation of general meetings, implementation of decisions of the general meeting and preparation of a business plan. He is, moreover, responsible for hiring and supervising[35] the employees and for organising the whole day-to-day operations of the association.[36]

### 3. Supervisory Board

One of the most dazzling features of the Ombudsman's supporting organisation is its supervisory board. Though not an organ proper of the association,[37] the supervisory board serves an important role in making certain that the Ombudsman can serve his function unharassed by the insurance industry and that the procedure remains fair and balanced. The supervisory board is, insofar, the guarantor of the Ombudsman's independence and as such the guarantor of the procedure's success with the general public.[38]

The supervisory board consists of 27 members: seven representatives of the member undertakings (amongst which the chairman of the executive board), seven representatives of consumer protection organisations, two representatives of the German Insurance Supervisor BaFin, two representatives of insurance mediator organisations, three representatives of the scientific world and six representatives of the parliamentary fractions. Amongst these only the representatives of the member undertakings are

[34] Ombudsmann für Versicherungen (fn. 21), pp. 67, 109.

[35] Staff members who are charged with tasks relating to the complaints handling are, however, under the technical supervision (including a power to give instructions) of the Ombudsman; see sec. 15 subsec. 3 AoA.

[36] Cp. sec. 7 subsec. 6 AoA; see also Ombudsmann für Versicherungen (fn. 21), p. 67; Hirsch (fn. 24), p. 564.

[37] See sec. 6 AoA, cp. also supra fn. 30.

[38] With a comparable interpretation Hirsch (fn. 24), p. 564; very critical of this assessment Tiffe (fn. 30), p. 261 who claims the supervisory board to be little more than a fig leave.

elected by the general meeting, while the representatives of the scholastic world are elected with a two-third majority of all members of the current supervisory board and all other representatives are delegated by the respective institution. What is obvious from this composition is that the insurance undertakings' influence over the supervisory board and its decisions is everything but commanding.

The tasks entrusted to the supervisory board include as follows: co-responsibility in the appointment and recalling of the Ombudsman, co-responsibility for the alteration of the procedural rules, right to a say on the nomination of the managing director, right to receive and consult the reports of the Ombudsman, right to make recommendations to improve the Ombudsman's work and the procedural rules, right to make recommendations for the agenda of general meetings and right to counsel and aid the Ombudsman concerning questions of public relation (sec. 12 subsec. 5 AoA). Decisions are taken, unless otherwise provided, with a majority of votes of the members present (sec. 12 subsec. 6 phrase 2 AoA).

In discharging of its duties the supervisory board makes a large contribution in keeping the Ombudsman independent and the procedure effective and fair.[39] One should insofar note that the powers (and the composition) of the supervisory board are for the most part intended to keep in check the influence of the insurance undertakings (and as such that of their main representative organ, the general meeting). This equilibrating effect of the supervisory board can be seen for example in its co-responsibility in nominating the Ombudsman. If such a power were not provided by the articles of association nothing would procedurally keep the general meeting (i.e. the insurance undertakings) from nominating a person as Ombudsman whom they know to be excessively insurer-friendly and thus turning the whole procedure into a farce. The same applies for the co-responsibility in modifying the procedural rules. If such power was exclusively entrusted to the general meeting – as it would be in the case of an ordinary registered association – the insurance undertakings would be able to manipulate the procedural rules to favour them unduly. The co-decision power of the supervisory board is insofar an eternal guarantee for the procedural rules to at least remain as fair as they were drafted at the time of the formation of the ombudsman office.

## 4. Ombudsman

The central institution within the *Versicherungsombudsmann e.V.* – and its sole *raison d'être* – is the Ombudsman, i.e. the person entrusted with

[39] Ombudsmann für Versicherungen (fn. 21), p. 64 regards the supervisory board – and its composition (especially the fact that it contains representatives of consumer protection organisations) – as one of the most distinguishing features of the *Versicherungsombudsmann*.

the power to adjudicate disputes between the member undertakings and its customers.[40]

In order to create trust with the public, which might be understandably suspicious of a dispute resolution mechanism financed by the opposing party, the success of the procedure turns on the quality of the person nominated as Ombudsman.[41] In his person and actions he should, if such is possible, be a manifestation of Lord Hewart's dictum that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[42] Other than this outer appearance of independence (and actual independence) the articles of association require the Ombudsman to meet several person-related criteria. He is required to possess the necessary abilities, qualifications and experience for his tasks (sec. 14 subsec. 1 phrase 1 AoA). In particular he should be qualified to exercise the functions of a judge (which in Germany means, he must not only have obtained a university degree in law but also successfully performed the *Referendariat* [form of clerkship] and the second state's exam) and possess special experience in insurance matters (sec. 14 subsec. 1 phrase 2 AoA).[43] He, furthermore, should have his legal residence in Germany.[44] More importantly, the Ombudsman may not have worked on a full-time basis for an insurance undertaking or an insurance lobbying organisation or as an insurance intermediary or insurance adviser during the three years that precede his accession to the office (sec. 14 subsec. 1 phrase 3 AoA).[45]

The *Versicherungsombudsmann e.V.* was lucky enough to find just the man

[40] Concerning the relationship between the Ombudsman and the supporting organization it seems feasible to regard the former as the special representative (regarding adjudication of disputes) in the sense of sec. 31 German Civil Code of the latter; in this sense Lorenz, Der Versicherungsombudsmann – eine neue Institution im deutschen Versicherungswesen, in: Versicherungsrecht 2004, pp. 541–549 at 545.

[41] Römer is of course correct in stating that the personality of the Ombudsman can never be sufficient to make up for institutional deficits; cited in Brömmelmeyer, Bericht über die Diskussion zum Vortrag von Fritz Reichert-Facilides, in: Basedow *et al.* (eds.), Anleger- und objektgerechte Beratung – Private Krankenversicherung – Ein Ombudsmann für Versicherungen: Beiträge der siebenten Wissenschaftstagung des Bundes der Versicherten, Baden-Baden 1999, pp. 188–191 at 189.

[42] *H.C. (King's Bench)*, Rex v. Sussex Justices, [1924] 1 K.B. 256 at 259 per Lord Hewart CJ.

[43] From the wording of the provision it is not completely clear if this requirement is compulsory, since the phrase applies the German word "*soll*" (depending on the context this may mean *shall* or *ought*) instead of the less ambiguous word "*muss*" (German for shall or must) in the first phrase of this section.

[44] Again it is unclear if this is compulsory or if the nominating actors are allowed to make an exception; cp. supra fn. 43.

[45] While these criteria regard only qualities before the assumption of the duties of the Ombudsman, sec. 14 subsec. 2 AoA sets out certain duties during the term: The Ombudsman must refrain from taking on any of the jobs enumerated above and must also refrain from any activity that might call into question his independence.

to fit this profile and in 2001 elected *Wolfgang Römer*, the former president of the insurance senate of the German *Bundesgerichtshof*, as its first Ombudsman.[46] Disapproving the proverb that lightning never strikes twice, the *Versicherungsombudsmann e.V.* was able to replace Prof. Römer – when he vacated the office in 2008 – with an equally distinguished insurance law expert: Prof. Günther Hirsch. Hirsch, a former judge of the European Court of Justice and the former president of the German *Bundesgerichtshof*, was elected in 2008 and is still acting as Ombudsman.[47] The extraordinary level of legal expertise and reputation of these personalities has been paramount in establishing the ombudsman procedure in the eyes of policyholders as a viable alternative for the resolution of disputes with their insurers.

Besides the individual office holder's willingness to act independently, other safeguards are necessary to guarantee the Ombudsman's independence. One of the most important procedural safeguards is enshrined in the nomination procedure. The Ombudsman is not single-handedly elected by a specific organ of the supporting association but through a co-decision process. The right of initiative is vested in the executive board whose duty it is to recommend a person to be elected as Ombudsman (secc. 7 subsec. 4 lit. b, 13 subsec. 1 AoA). It is then for the supervisory board to take a decision – with a majority of the votes of the members present – on whether or not to elect the person recommended (secc. 12 subsec. 5 lit. b, 13 subsec. 1 AoA). Finally the general meeting may appoint – with a three-quarter (!) majority of all members present (sec. 10 subsec. 3 AoA) – the person in question to the office (secc. 11 lit. b, 13 subsec. 1 AoA). Through this procedure it is made certain that only a person garnering support from all interested circles may be elected Ombudsman.[48]

Once the Ombudsman takes up his office he is bound by a duty and granted a guarantee of independence. This guarantee of independence encompasses his decisions, his directions of the proceedings and his administration of the office as a whole (sec. 15 subsec. 1 phrase 1 AoA). More precisely, he is under no duty to comply with any instructions (and no organ or body of the supporting association may give such instructions).

---

[46] Bultmann (fn. 16), p. 2. If anything, Römer was regarded by some insurers as policyholder-biased, but certainly no one would have thought him to be partial towards the insurer's interest; cp. Michaels, in: Versicherungsombudsmann e.V. (ed.) (fn. 6), p. 23.

[47] Prof. Hirsch was re-elected in 2012 and his second (and last) term has commenced in April 2013.

[48] That such an institutional safeguard for independence is necessary can be seen by the criticism attracted by former German Bank Ombudsman, Leo Parsch. Due to the fact of having been nominated solely by the industry – as was provided for by the articles of association – he was often decried as a "home referee" who adjudicated by fiat ("*nach Gutsherrenart*"), cp. v. Hippel (fn. 8), pp. 18, 240 with further references.

The independence of the Ombudsman is also safeguarded by the fact that the Ombudsman may only under very strict conditions be dismissed from office. Firstly, only flagrant and gross breaches of the Ombudsman's statutory or contractual[49] duties may serve as grounds for dismissal (sec. 13 subsec. 3 phrase 1 AoA). Secondly, in order for the Ombudsman to be dismissed there needs to be a decision to this end not only by the executive board but also by the (neutral) supervisory board and the latter's decision needs to be carried by a two-thirds majority of all members (sec. 13 subsec. 3 phrase 2 in connection with sec. 12 subsec. 5 lit. a AoA). Interestingly enough another safeguard for the Ombudsman's independence was previously provided by the articles of association[50] but was abandoned in 2005: Up until that time the term of office was – and still is – for (up to) five years but re-election was disallowed (sec. 16 subsec. 1 AoA 2002-version). The exclusion of a possibility to be re-elected was intended to avoid the appearance that the Ombudsman might be swayed to alter his decisions in a way to make his re-election more likely.[51] In 2005, however, the general meeting voted in a modification of the articles of association, obviously in an attempt to be able to keep the then Ombudsman, Prof. Römer, on for an additional period of time,[52] allowing for a one-time re-election (sec. 13 subsec. 2 phrase 2 AoA). In light of the fact that the Ombudsman – if he were to try to influence his re-election decision – would have to pander to the interests of the insurers and to that of the policy holders at the same time (since he needs to be re-elected by all bodies of the association) one can see why this safeguard was seen as superfluous. The Ombudsman's independence is amply protected by other means.

## 5. Other Employees

With an annual case load of over 17,000 complaints and being but one person – since the articles of association allow only for the election of a single person to act as Ombudsman[53] – the Ombudsman must heavily rely on the assistance of auxiliary staff. Other than the Ombudsman and the

[49] Regarding the service contract which the Ombudsman concludes with the association.

[50] For the old version of the articles of association see e.g. Neue Zeitschrift für Versicherungsrecht 2002, pp. 293–296.

[51] Bultmann (fn. 16), pp. 5 et seq. That this is not a merely hypothetical problem may be highlighted by the fact that the former Ombudsman of the English Insurance Ombudsman Bureau, Julian Ferrand, complained that some insurers had allegedly tried to influence the IOB Council to not re-elect him in view of his overly consumer-friendly decisions, cp. v. Hippel (fn. 8), pp. 138, 241 with further references.

[52] Versicherungsombudsmann e.V. (ed.) (fn. 6), p. 46.

[53] This was differently under the first version of the articles of association, where sec. 13 subsec. 2 AoA 2002 allowed for the election of several ombudsmen; cp. AoA 2002 reprinted in Neue Zeitschrift für Versicherungsrecht 2002, pp. 293–296 at 295.

managing director the supporting association currently employs another 39 persons.[54] Of these people 12 staff members are trained in the insurance business (*Versicherungskaufmann*) and are the integral part of the so-called service centre. Their tasks[55] consist in registering the complaints, creating the case file, helping the complainants in concretising their claims and, in general, making the case ready for legal scrutiny before turning the case over to the legal centre (or deciding on its inadmissibility).

The legal centre employs 19 persons who are lawyers (*Volljuristen*, i.e. people qualified to exercise the functions of a judge). These people correspond (with an emphasis on legal matters) with all parties in an attempt to make the case ready for decision, they sound out the possibility of an amicable arrangement and they often – the Ombudsman could not personally adjudicate 17,000 cases – take the decisions on behalf of the Ombudsman. Cases of greater importance or with more problematic bearing are, however, often decided by the Ombudsman in person.[56]

The rest of the staff of the support organisation is employed for secretarial or administrative work.

## V. Jurisdiction

The Ombudsman has jurisdiction over a vast array of disputes though not over all disputes that may arise between a policyholder (or insured or beneficiary) and his insurer (and insurance intermediaries). It is important to note that the term jurisdiction should not be understood to mean exclusive competence, since the presumably aggrieved party is at any stage free to bring its claim before the competent state court (or arbitral tribunal, where such applies).[57] It is the Ombudsman's duty to establish at the moment at which the complaint is lodged (and continuously throughout the course of the proceedings) if it is competent to hear the claim (sec. 5 subsec. 1 Rules of Procedure).

In doing so, the Ombudsman must establish if the complainant fulfils the person-related requirements to have standing to lodge a complaint, if the respondent has the standing to be made such, if the subject matter of the

[54] Ombudsmann für Versicherungen (fn. 21), p. 67.

[55] See in more detail infra ch. VI 1. and 2.

[56] In all other cases the Ombudsman has a power to instruct the lawyers, furthermore the lawyers will be obligated to render certain decisions for approval before being rendered and will in more general terms be under the constant supervision of the Ombudsman; cp. Ombudsmann für Versicherungen (fn. 21), pp. 66 et seq.

[57] *Argumentum e contrario* sec. 2 subsec. 3 lit. e RoP which declares the ombudsman procedure not to take place if the complainant petitions the courts during the ombudsman proceedings.

dispute enters into the competence of the Ombudsman, if the complainant has complied with the procedural requirements, if an exception to the jurisdiction of the Ombudsman might apply and finally if the Ombudsman should reject the complaint on grounds of it being unsuitable for adjudication within the ombudsman procedure.

## 1. Person-Related Requirements

The ombudsman procedure is only available where both complainant and respondent fulfil the person-related criteria required to have standing before the Ombudsman.

### *a) Complainant*

Pursuant to sec. 2 subsecc. 1 and 2 AoA it is the support organisation's corporate purpose "to advance the alternative resolution of disputes between insurance undertakings and consumers (policyholders)". It is insofar no surprise that the procedure is (in principle) only made available where the complainant is a consumer (sec. 2 subsec. 1 phrase 1 Rules of Procedure [subsequently referred to as RoP]). The latter provision defines a consumer to be a natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.[58]

While the bearing of this provision is clear in that only complaints by natural persons[59] having the status of consumer are admissible, it creates some uncertainty if only policyholders may lodge a complaint.[60] Under the application of the old rules of procedure one could make a strong argument to this effect since its preamble declared that „[t]he Versicherungsombudsmann is an independent institution of the German insurance industry for the reconciliation of disputes between insurance undertakings and consumers (policyholders) […]".[61] A strict reading of this provision would have hence excluded the co-insured and the beneficiary from making use of the ombudsman procedure. This was, however, not

[58] This definition is a direct transformation of the general definition of consumers in sec. 13 German Civil Code.

[59] The German civil law association (*Gesellschaft bürgerlichen Rechts* [*GBR*]) – though it may sue in its proper name – is not a legal person but a union of (natural) persons. Insofar there is a good argument to be made that if its associates are natural persons and the *GbR*'s purpose for entering into the transaction is outside its trade, business or profession it is a suitable complainant; cp. Hövel, in: Halm/Engelbrecht/Krahe (eds.), Handbuch des Fachanwalts Versicherungsrecht, 4th ed., Cologne 2011, ch. 3 para. 27.

[60] This problem of interpretation becomes more pressing, since sec. 2 subsec. 3 lit. d RoP explicitly declares as inadmissible any complaint regarding the claim of a "third party" to the insurance benefits; see infra ch. V. 4. d).

[61] RoP 2002 reprinted in Neue Zeitschrift für Versicherungsrecht 2002, pp. 296–298 at 296.

a reading favoured – even at that time – by the majority of scholars.[62] Since the preamble was subsequently altered – to now read that "„[t]he Versicherungsombudsmann is an independent institution of the German insurance industry for the reconciliation of disputes in connection with insurance contracts" – there now seems to be a universal understanding that the co-insured, beneficiaries and legal successors (resp. assignees) are also in principle permitted as complainants.[63] The admissibility of complaints lodged by these people is, however, contingent on their ability to individually demand performance under the insurance contract. In case of a complaint by a co-insured, for example, this requires that the co-insured is either in possession of the insurance policy or is acting with the policyholder's approval (sec. 44 subsec. 2 German Insurance Contract Act).[64]

The full-exclusion of all non-consumers from the procedure was regarded by many as a mistake. These scholars have continuously advocated the inclusion of such persons that may be regarded as consumer-like.[65] In reaction to this criticism, the rules of procedure were amended in 2007. They now explicitly provide in sec. 2 subsec. 1 phrase 2 that the Ombudsman "*may* handle complaints by tradesmen, if their trade is pursuant to its type, size and infrastructure to be considered a small trade [*Kleingewerbe*]" [emphasis added]. Insofar small traders – which are considered consumer-like – may now petition the Ombudsman. Their position as admissible complainants seems to be a little bit weaker, however, since the utilization of the verb "may" in the above provision implies that the Ombudsman enjoys a certain amount of discretion in admitting or rejecting one of their claims. All other tradesmen and professionals may not petition the Ombudsman.[66] In this context it is important to correctly assess if a specific insurance contract was taken out for business or for private purposes (e.g. car insurance for a vehicle used both for private and business purposes).[67]

---

62 Cp. e.g. Hövel/Leissner, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 paras. 46 et seqq.

63 Römer, Offene und beantwortete Fragen zum Verfahren vor dem Ombudsmann, in: Neue Zeitschrift für Versicherungsrecht 2002, pp. 289–293 at 290 (regarding beneficiaries); Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 paras. 46 et seqq.

64 Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 50. For more detail see infra ch. V. 2.

65 Cf. v. Hippel (fn. 8), p. 214; Scherpe (fn. 10), p. 99; Lorenz (fn. 40), p. 546; Römer, Der Ombudsmann für private Versicherungen, in: Neue Juristische Wochenschrift 2005, pp. 1251–1255 at 1253.

66 For an unpublished decision of the Ombudsman see Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 26.

67 The first Ombudsman pointed to the decision BGHZ 119, 252 concerning the demarcation between private and business related activities; see Römer (fn. 63), p. 289.

### *b) Respondent*

The complaint must be directed against an insurance undertaking which is a member of the *Versicherungsombudsmann e.V*.[68] Complaints against non-member undertakings are impermissible. The utilisation of the term "insurance undertaking" is not intended to exclude complaints against occupational pension funds. As long as they are members of the support organisation – which only very few are[69] – they have the standing to be a respondent in the procedure.[70]

Since 2007 the Ombudsman is also competent to hear complaints against insurance intermediaries (i.e. insurance agents and insurance brokers) and insurance consultants.[71] The support organisation was entrusted with this task by the Federal Ministry of Justice[72] and it altered its articles of association and enacted distinct rules of procedure to deal with such disputes[73]. The procedure is distinct to the one applied to complaints against insurance undertakings, described here, in that the insurance mediator does not need to be (in fact cannot be) a member of the support organisation and in that the Ombudsman's adjudication may never take on the form of a binding decision[74] but will always be a mere recommendation.[75] In light of the rather reduced practical significance of complaints against insurance mediators – in 2012 they made up roughly two percent of all complaints[76] – the present treaty will henceforth focus exclusively on complaints against insurance undertakings.

---

[68] For a list of the member undertakings see Ombudsmann für Versicherungen, Jahresbericht 2012, pp. 110 et seqq.

[69] Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 34 also correctly points out that the membership of an insurer at which the pension funds might have been instituted is insufficient. The pension funds itself needs to be a member.

[70] In general, uncertainty as to the membership of an undertaking may arise where not it but the concern to which it belongs has declared its accession to the support association. Here one has to interpret the declaration of accession whether or not it includes all daughter companies, cp. Römer (fn. 63), p. 290.

[71] See Hirsch (fn. 24), p. 564; Brömmelmeyer (fn. 2), p. 338 (fn. 11).

[72] Anonymus, in: FD-VersR 2007, [n°] 237433.

[73] See http://www.versicherungsombudsmann.de/Navigationsbaum/VermVo.jsp.

[74] Since there is never any binding effect, it was seen fit not to limit the amount in dispute up until which the Ombudsman may hear a claim; see Hirsch (fn. 24), p. 564. In this respect also, the procedure is distinct from the one regarding claims against insurers, see infra ch. V. 4. a).

[75] The reason for this can be seen in the fact that regarding insurance intermediaries the ombudsman procedure is not voluntary but rather prescribed by statute; a statutory ombudsman procedure which forces (at least) one of the parties to participate and renders binding decisions is, however, in Germany regarded as a violation of the constitutional right to the lawful judge; cp. v. Hippel (fn. 8), pp. 23, 203 et seq.

[76] Ombudsmann für Versicherungen, Jahresbericht 2012, p. 85.

## 2. Subject Matter within the Ombudsman's Jurisdiction

The Ombudsman is only competent to hear disputes that regard an own contractual claim of the complainant arising out of an insurance contract or another contract which displays an intricate economic connection with an insurance contract (sec. 2 subsec. 1 phrase 1 lit. a RoP). From this it follows that such persons invoking a claim for damages or having a so-called direct claim (cp. sec. 115 German Insurance Contract Act), which is a derivative of the policyholder's claim out of the insurance contract, may not petition the Ombudsman. This – in particular – excludes such claims raised by the injured party in a car accident from being adjudicated within the ombudsman system.[77]

There still remains some doubt whether the criterion "own claim" has some further limitative bearing.[78] While it seems evident that a beneficiary and a co-insured would not be excluded by this phrase, doubt may arise concerning a person to which the policyholder has contractually assigned his claim. Even more importantly, it raises the question whether the policyholder himself is excluded from bringing a claim before the Ombudsman where such claim is subject to an insurance for the account of another. While such a claim is in the strict sense not his own, to disallow the policyholder to bring the claim would seem inequitable. Under many general terms and conditions the insured is excluded from directly raising a claim against the insurer. Even if no such contractual exclusion exists, the insured is only allowed to make a direct claim when in possession of the insurance policy or acting with the approval of the policyholder.[79] In general it is for the policyholder to dispose of the claim in his proper name (sec. 45 subsec. 1 German Insurance Contract Act). It would thus be most reasonable – and such appears to be the practice[80] – to allow claims of the co-insured to be mutually exclusively brought either by the co-insured (if he is in possession of the policy or acting with approval) or by the policyholder.

*Prima facia* it might surprise that the Ombudsman is equally competent to hear claims arising from other contracts than insurance contracts. Such contracts must, however, exhibit a close economic connection to an insurance contract. It must firstly be noted that this extension is not meant to bring third party respondents into the fold – the claim out of the

[77] Some scholars have forwarded the idea to include such claims, see e.g. Scherpe (fn. 10), p. 99. However, since the ombudsman system is widely regarded by the industry as a special service for their customers (see e.g. Knauth, Versicherungsombudsmann – private Streitbeilegung für Verbraucher, in: WM – Zeitschrift für Wirtschafts- und Bankenrecht 2001, pp. 2325–2329 at 2328 [fn. 21]) such is rather unlikely to occur in the near future.

[78] See already the doubts of the first Ombudsman in Römer (fn. 63), p. 290.

[79] See supra ch. V. 1. a).

[80] Römer (fn. 63), p. 290.

connected contract must be against a member undertaking[81]. Otherwise it remains difficult to assess which kind of contract displays the necessary interconnectedness to an insurance contract to be encompassed by sec. 2 subsec. 1 phrase 1 lit. a RoP. Such a contract might for example be an independent consultancy agreement concluded at the time of the conclusion of the insurance contract.[82] Not encompassed would be a loan agreement even if the loan is intended to be paid off by a life insurance contract since this connection is not regarded as close enough.[83]

Pursuant to sec. 2 subsec. 1 phrase 1 lit. b RoP the complaint may, furthermore, regard claims arising against an insurance undertaking in connection with the mediation or pre-contractual negotiation of such contracts as encompassed by sec. 2 subsec. 1 phrase 1 lit. a RoP.[84]

### 3. Compliance with Procedural Requirements

Under the old rules of procedure a complaint was only permissible if the complainant lodged his complaint within eight weeks after having received the insurer's final declaration.[85] This rule of sec. 2 subsec. 3 lit. a RoP 2002 – which was akin to a special period of limitation – was, however, with good reason abdicated in 2004.[86]

The only procedural requirement that needs to be fulfilled in advance for a claim to be heard is provided by sec. 2 subsec. 2 RoP. Pursuant to said provision the Ombudsman may only hear a complaint after a complainant has raised such complaint against the undertaking in question and given the insurer six weeks time to take a final decision. This requirement is intended to give the insurer ample time and opportunity to resolve any dispute itself before being dragged before the Ombudsman.[87] Insofar

[81] This does in contrast not mean that all contracts concluded with member undertakings meet the threshold – in an unpublished decision the Ombudsman declined his jurisdiction to hear a claim out of a loan agreement concluded between the complainant and an insurance undertaking since there was no connection to an insurance contract; see Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 31.

[82] Römer (fn. 63), p. 290.

[83] Römer (fn. 63), p. 290; the assessment might be different for a so-called policy loan (*Policendarlehen*) which is fully financed out of a life insurance contract, see Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 31.

[84] This is not be confused with claims directed against the insurance intermediaries which are adjudicated under different procedural rules, see supra fn. 72. Insurance agents and insurance undertakings will often be jointly and severally liable under German law; cp. sec. 69 German Insurance Contract Act.

[85] There was an exception to this rule where the belated lodging of the claim was not caused by the policyholder's fault, see sec. 2 subsec. 3 lit. a RoP 2002, reprinted in Neue Zeitschrift für Versicherungsrecht 2002, pp. 296–298 at 296.

[86] For some difficult questions that this rule raised, see Römer (fn. 63), pp. 290 et seq.

[87] See v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 411; Hövel, in:

the complaint may regard two distinct variants: either the complainant is unhappy with the decision taken by the insurer or it wishes to have a decision which the insurer has not issued within the six weeks time period. Both kinds of complaint are admissible.[88]

## 4. Exclusions from Jurisdiction

For various reasons some claims are excluded from the jurisdiction of the Ombudsman. Such exclusions may be found in sec. 2 subsec. 3 RoP and will be addressed subsequently.

### *a) Amount in Dispute (lit. a)*

In an apparent attempt to limit the Ombudsman's caseload and to reserve financially more important disputes to the courts[89] the rules of procedure have since their enactment provided for an excess amount in dispute. Any complaint in which this amount is exceeded is inadmissible.[90] In 2002 this amount was set at € 50,000, was elevated to € 80,000 in 2007 and finally to € 100,000 in 2010.[91] While this current amount may appear generous enough in comparison to some other ombudsman procedures,[92] it certainly causes some problems, i.e. especially that (certain if not the totality of) claims pertaining to professional disability insurance and accident insurance are systematically removed from the authority of the Ombudsman. Considering that any "decision" by the Ombudsman regarding an amount in excess of € 10,000 would take the form of a non-binding recommendation, one could take the position that it would not cause the insurer any harm to submit all cases no matter what the amount in dispute to the Ombudsman's jurisdiction. On the contrary, it seems quite reasonable that the insurance undertakings only render such disputes (regarding the amount in dispute) to the jurisdiction of the Ombudsman with which they feel confident to be able to adhere to the recommendation in the majority of cases. There might be an amount in dispute where some insurers would as a general

Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 31.

88 Cp. v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 412.

89 Scherpe (fn. 10), p. 99 views this as an illustration that the insurance industry had too little faith in its "own" dispute resolution organization.

90 v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 449 is correct in ascertaining that this excess amount in dispute is binding and that the parties may not agree as to its inapplicability. It is the exclusive prerogative of the Ombudsman to assess *ex officio* if the excess amount in dispute is exceeded.

91 Cp. Versicherungsombudsmann e.V. (ed.) (fn. 6), pp. 46 et seq.

92 Though it should be noted that in the rules of procedure for claims against insurance intermediaries no such excess amount in dispute exists; the statutes (which incorporate the rules of procedure) of the *PKV-Ombudsmann* do equally not provide for such a limitation, see v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 449.

rule be unwilling to settle the claim (amicably) if not forced by a court of law. Here the ombudsman procedure would become moot since it would only postpone the inevitable. In this light, the excess amount in dispute of € 100,000 appears to be not fully unreasonable.

It is more difficult to assess how this amount in dispute is to be calculated. In this context the rules of procedure explain that the Ombudsman is to apply the principles of the German Code of Civil Procedure regarding the amount in dispute. *In concreto* this would for example mean that a complaint regarding a claim for the payments of benefits (e.g. € 80,000) would have an amount in dispute equal to the amount of the claimed benefits (i.e. € 80,000). If the complaint regards the right to an annuity, the amount in dispute is pursuant to sec. 9 phrase 1 German Code of Civil Procedure the amount of the annuity multiplied by three and a half.[93] While the general rules of procedure concerning the calculation of the amount in disputes insofar apply – unless they need to be adapted due to the specific nature of the ombudsman procedure – there is one manifest exception. Sec. 2 subsec. 3 lit. a RoP explicitly provides that the amount in dispute of a complaint which reveals that it regards only a part of the full claim (*offengelegte Teilbeschwerde*) is equal to the amount in dispute of the full claim.[94] This rule was included into the rules of procedure in order to prevent policyholders from limiting their complaint to an amount still admissible for adjudication by the Ombudsman (while safeguarding their right to raise the remaining part of the claim subsequently) in order to artificially create jurisdiction of the Ombudsman.[95]

### *b) Health, Long-Term Care and Credit Insurance Contracts (lit. b)*

Disputes concerning health and long-term care insurance contracts had to be excluded from the jurisdiction of the Ombudsman since the more specialised *Association of [German] Private Healthcare Insurers (PKV)* has established its own ombudsman procedure, the *PKV-Ombudsman*.[96] A complaint which regards the aforementioned contract types is not transmitted by the

---

[93] For a very thorough assessment of these matters see Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 paras. 37 et seqq.

[94] These aspects of when a *offengelegte Teilbeschwerde* is given are extensively treated by Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 40.

[95] Römer (fn. 63), p. 292.

[96] See supra ch. II. The first Ombudsman laments (since the existence of two ombudsmen is due to cause some confusion with policyholders) the fact that health insurers could not see fit to become members of the *Versicherungsombudsmann e.V.*, see Römer (fn. 10), p. 203. Such a confusion of the policyholders is still a reality with 12 % of all dismissals being caused by the fact that the complaint regards a health insurer, cp. Ombudsmann für Versicherungen (fn. 21), p. 88; for the reasons of this unilateralist approach of the health insurers see Labes (fn. 15), pp. 166 et seq.

Ombudsman to the PKV-Ombudsman.[97] It is, however, the Ombudsman's practice to inform a complainant about the existence of the alternative dispute resolution procedure and provide it with the address.[98]

Since credit insurance is usually not taken by consumers (or consumer-like tradesmen) the exclusion of claims pertaining to such contracts has little practical importance but is almost exclusively declaratory in nature.

***c) Actuarial Methods or Formulae (lit. c)***

Are moreover inadmissible such complaints which turn on the question if an actuarial method or formula is correct or lawful. This exclusion was presumably included since the Ombudsman would on the one hand be overburdened to decide such cases and on the other hand appear to be not the right venue[99] since such a complaint would be of overarching interest not limited to the complainant in question. Whilst the complaint may not turn on the correctness or lawfulness of actuarial methods and formulae, it may, however, regard the correct application of these methods and formulae to the complainant in question.[100]

***d) Third Party Claims (lit. d)***

A rather important exception from jurisdiction is provided by sec. 2 subsec. 3 lit. d RoP. According to this provision the Ombudsman may not hear any third party's claim regarding the insurance benefits. In some respects this exception might be regarded as only declaratory, since pursuant to sec. 2 subsec. 1 lit. a RoP the Ombudsman is only competent to hear complaints regarding *own* contractual claims out of an insurance contract.[101] Insofar third party claims would not enter into the jurisdiction of the Ombudsman in the first place and would thus not have to be excluded.[102] This notwithstanding it seems favourable to have included the exception if only for the sake of clarity. Furthermore there is good reason to believe this rule to have some constitutive effect as well.[103] It should, however, be clear that third party should not be understood to mean anybody but the policyholder. As was demonstrated above, co-insured persons and beneficiaries may not *per se*

[97] According to Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 44, on the one hand, one cannot assume the consent of the complainant for such a transmission to occur. Scherpe (fn. 10), p. 100, on the other hand, advocates an inclusion of a duty to remit into the procedural rules.

[98] Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 44.

[99] Scherpe (fn. 10), p. 100.

[100] Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 46.

[101] See supra ch. V 2.

[102] In this sense Scherpe (fn. 10), p. 101 who thinks this exception to be superfluous.

[103] For a list of such persons that might be encompassed by this exclusion see Labes (fn. 15), p. 170.

be excluded from the ombudsman procedure,[104] and should thus not be regarded as a third party (it is a different question altogether if they have an *own* claim in the case in question).

***e) Lis pendens (lit. e)***

The complaint is, furthermore, (at least temporarily) inadmissible if a case with the same subject matter is pending before a court, arbitral tribunal, dispute resolution institution or the insurance supervisory authority. In this respect the ombudsman procedure is not intended to take precedent as it is to leave the complainant the full autonomy as to where to lodge his claim. If, however, the complainant chooses to lodge the claim at any of the enumerated venues even after the complaint was registered at the ombudsman office the complaint becomes inadmissible. As soon as the case is no longer pending before one of the aforementioned venues – and if the matter was not decided (otherwise sec. 2 subsec. 3 lit. f RoP applies) – the complaint becomes admissible again.[105] It should be highlighted that the complaint is also inadmissible if the insurance undertaking has instigated court proceedings (e.g. in order to claim the payment of the premium) before the complaint (about the policyholder's perception that such a claim is inexistent) was lodged. The grounds for inadmissibility of sec. 2 subsec. 3 lit. e RoP do, however, not apply if the insurer were to lodge a claim at a later stage: a once admissible complaint of the consumer will not be turned into an inadmissible one. Otherwise the insurer could randomly deprive the consumer of his right of complaint before the Ombudsman. The insurer is rather regarded of having agreed to a *pactum de non petendo*[106] which would make its court claim inadmissible for the time being.

While most venues (i.e. state court, arbitral tribunal and other dispute resolution institution) are pretty self-explanatory, some words need to be said about the insurance supervisory authority, i.e. the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin). Pursuant to sec. 4b of the Act on the Financial Supervisory Authority (*Finanzdienstleistungsaufsichtsgesetz [FinDAG]*)[107] the customers[108] of financial institutions (such as *inter alia* insurance undertakings) may address a complaint to the BaFin. This

[104] See supra ch. V. 1. a) and 2.

[105] This is a positive difference to other ombudsman procedures in which pendency of a case will often result in permanent inadmissibility, cp. e.g. sec. 2 subsec. 2 lit. a Verfahrensordnung für die Schlichtung von Kundenbeschwerden im deutschen Bankgewerbe.

[106] Cp. e.g. v. Hippel (fn. 8), pp. 93 et seq.

[107] This section was introduced in 2012 by the Law on the Reinforcement of Financial Supervision (*Gesetz zur Stärkung der deutschen Finanzaufsicht*), in: BGBl. I-2012, pp. 2369. However the possibility to petition the BaFin has existed for a long time (cp. recently BaFin circular 1/2006) before.

[108] The complaint is also open to certain consumer protection organisations.

complaint is, however, not to be mistaken with a complaint in the sense of the ombudsman procedure but is more akin to a petition.[109] The procedure before the BaFin is restricted to supervisory aspects and is not intended to afford the complainant individual protection.[110] While the Ombudsman will not admit a complaint while the matter is pending before the BaFin – in order to avoid parallel work (and to avoid contradictory decisions) – the complainant may address the complaint to him after the proceedings before BaFin are concluded. In this respect the decision of BaFin, since it does not regard the individual position of the complainant, has no *res iudicata*-effect.

One finally needs to point out that the initiation of an order for payment procedure (*Mahnverfahren*) regarding the payment of the premium is not to be considered to have a *lis pendens*-effect. This procedure is a purely automated procedure in which the court order is issued without an evaluation of the underlying claim. The order, however, only becomes binding if the respondent (in this case the policyholder) does not object to the order in due time.[111] Insofar this procedure is not contradictory in the strict sense and it would be problematic if the insurer could render a complaint by the policyholder inadmissible by applying for an order for payment to be issued.[112]

### *f) Res Iudicata (lit. f)*

Certain decisions and agreements are afforded a *res iudicata*-effect and make a complaint permanently inadmissible within the ombudsman procedure. The Ombudsman may not hear a complaint if the same subject matter has already been conclusively addressed by the decision of a state court, arbitral tribunal or dispute resolution institution. The same applies where the parties have reached a formal out-of-court settlement and where an application for legal aid (*Prozesskostenhilfe*) is denied on the grounds of insufficient prospect of success.[113]

---

[109] Cp. Laars, Finanzdienstleistungsaufsichtsgesetz, 2nd ed., Munich 2013, sec. 4b para. 1.

[110] Laars (fn. 109), sec. 4b para. 1.

[111] To be clear, once the order has become binding (due to non-objection), it has a *res iudicata*-effect and the complaint becomes inadmissible pursuant to sec. 2 subsec. 3 lit. f RoP, and if the policyholder objects and the matter is transferred to the competent trial court, the complaint becomes inadmissible pursuant to sec. 2 subsec. 3 lit. e RoP. In practice the Ombudsman will request the undertaking to effect a stay of the order for payment proceedings (according to sec. 12 subsec. 2 RoP the undertaking has a duty to conform with this request).

[112] Cp. on the whole Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 57.

[113] See in more detail Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 58.

### *g) Criminal Proceedings (lit. g)*

A complaint is equally inadmissible if the complainant has pressed criminal charges (or presses criminal charges after the complaint has been lodged) regarding the occurrences that are also the subject of the complaint. Though this is not a *lis pendens*-matter, since the Ombudsman decides only civil law aspects of a complaint, he will nevertheless not admit the complaint. The rationale behind this rule is that the Ombudsman is intended to have a pacifying effect which is no longer possible once the law enforcement agencies are involved.[114] One exception is, however, made where the complainant has pressed only such criminal charges as he was required to do in order not to endanger his insurance cover. Here, the complainant's willingness to be reconciled is not called into question by his pressing of charges and the insurer is expected to understand such actions (which are caused by [its proper] contractual conditions).

### *h) Manifestly Unfounded Claim (lit. h)*

The rules of procedure, moreover, include an exception from jurisdiction of such claims which are manifestly without any prospect of success. This exclusion could have had a very severe effect if the ombudsman procedure would provide for an entry-stage instance without the Ombudsman's control as is the case in some ombudsman procedures.[115] Such an instance could overemphasis its role and be quick in assessing a complaint to be manifestly unfounded and in this way circumvent the particular ombudsman's authority. This problem is inexistent for the *Versicherungsombudsmann*. Though it is the employees of the so-called service centre[116] who receive the complaints and also make a first evaluation of whether or not the Ombudsman is competent and may dismiss a claim as inadmissible, they fulfil their task fully subordinated to the Ombudsman. For this and other reasons this exception has not gained any practical importance[117] but has been reserved to deal with the complaints of inveterate querulous persons.[118] In most other cases, instead of telling complainants that their complaint was inadmissible, the Ombudsman has regarded it as good

[114] Scherpe (fn. 10), p. 100 apparently mistakes the rationale behind this exception, when demanding that the ombudsman procedure should become available again after conclusion of the criminal proceedings.

[115] Pointed out by v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 395 (fn. 2). This was notably the case for the complaint center of the German Banking Ombudsman (cp. sec. 3 of its procedural rules until 1995).

[116] See supra ch. IV. 5 and infra ch. VI 1. and 2.

[117] The number of cases dismissed on these grounds is apparently so low that it does not even figure individually in the Ombudsman's statistics on inadmissible claims, cp. Ombudsmann für Versicherungen (fn. 21), p. 88.

[118] Cp. already Römer (fn. 63), p. 291.

policy (in order to re-establish good relations between the policyholder and his insurer) to explain to the complainants in a reasoned decision why their claim is unfounded.[119]

#### *i) Prescribed Claim (lit. i)*

Are finally inadmissible such complaints which regard a prescribed claim if the respondent raises the objection of prescription. This exception is systematically in contradiction to German law[120] since prescription is not regarded as a procedural question (as in common law jurisdictions) but as regarding the merits. If a respondent raises the objection of prescription the case is not turned inadmissible but rather becomes unfounded (since the claim is not enforceable). In case of the ombudsman procedure – which does not provide for a decision binding on the complainant and is free of charge for him – the differences between these two approaches will, however, be rather negligible.

### 5. Unsuitability

Even if a complaint is admissible, the Ombudsman may nevertheless decline jurisdiction if the complaint appears unsuitable for adjudication within the ombudsman procedure. The grounds on which such unsuitability may be based are enumerated in sec. 8 RoP.

It is to be stressed that all grounds for unsuitability – except for the one under subsec. 2 – by applying the term "may" (*kann*) grant the Ombudsman some leeway in deciding whether or not to decline jurisdiction. It is to be assumed that the Ombudsman when in doubt will rather assume jurisdiction than decline it. Concerning the possibility to decline jurisdiction because the relevant questions are controversial and have not been decided by the highest courts, matters appear differently. Here the rules of procedure apply the term "shall" (*soll*) indicating that the Ombudsman is to mandatorily decline jurisdiction.

#### *a) Scope of Proceedings (Subsec. 1)*

Jurisdiction may be declined during any stage of the proceedings if it becomes apparent that the taking of the documentary evidence (the only evidence admitted in the procedure) will attain such a scope as to unduly overburden the capacities of the Ombudsman and his staff. Such a complaint would be unsuitable to the Ombudsman procedure which is intended to be a swift and unbureaucratic assistance in insurance related disputes.[121] It is difficult to see how these grounds for dismissal would ever

[119] Römer (fn. 63), p. 291.

[120] Cp. v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 407; Römer (fn. 63), p. 291.

[121] Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 16.

become applicable in practice, since the procedure only allows for claims by consumers or consumer-like tradesmen.[122]

### *b) Controversial Legal Questions (Subsec. 2)*

Much more important are the subsequent grounds for dismissal. According to sec. 8 subsec. 1 RoP the Ombudsman shall (!) decline jurisdiction, if the complaint raises a legal question which is decision-relevant, controversial and has not been decided by the highest courts. Even though these grounds for dismissal have been criticised by some,[123] they cannot be described as exorbitant. The exception is intended to reserve legal questions whose importance go far beyond the individual case to the courts.[124] Considering the simplified procedure before the Ombudsman, his possibility to publish decisions and the finality of his decisions up to the amount of € 10,000, one may understand the reluctance of the insurance industry to have controversial questions settled in this procedure and a possible "precedent" created. It seems rather understandable that such cases should be left to the courts and in the end the *Bundesgerichtshof* should not be deprived of finally settling such controversial questions.[125]

According to the present Ombudsman's account he "routinely refrains from dealing with complaints which raise questions the importance of which goes far beyond the individual case, as is usually the case with questions concerning the effectiveness or ineffectiveness of a clause in general policy conditions".[126] Insofar there are a not-insignificant number of cases that the Ombudsman may (if not shall) dismiss on these grounds.[127]

### *c) Remote Fields of Law (Subsec. 3)*

Moreover the Ombudsman may decline jurisdiction if the complaint hinges on decision-relevant legal questions which regard the application of foreign law or special legal regimes (e.g. tax law). Again, the ombudsman procedure is intended to be a swift and unbureaucratic assistance in disputes with German insurers. As such, the Ombudsman and his staff are specialised in swiftly and correctly applying German insurance law. Dealing with cases under the application of foreign law or where untypical fields of law are

[122] In this sense already Scherpe (fn. 10), p. 100.

[123] Scherpe (fn. 10), p. 100.

[124] Hirsch (fn. 24), p. 565.

[125] The same result, one might add, would have been reached if one had disallowed the Ombudsman to publish decisions relating to such questions and prescribed them to be only passed in the form of a non-binding recommendation.

[126] Hirsch (fn. 24), p. 565.

[127] Overall, dismissal (on any of the given grounds) is not completely irrelevant in practice since about 4 % of the admissible complaints are terminated in this way, cp. Ombudsmann für Versicherungen (fn. 21), p. 89.

relevant would require outside assistance or very extensive occupation, for both of which the procedure is not equipped.[128]

***d) Model Case (Subsec. 4)***

Very unusual grounds for dismissal are provided for by sec. 8 subsec. 4 RoP. Pursuant to this provision the respondent (i.e. the insurance undertaking) may request that a complaint be dismissed without decision on the grounds that it is a model case.[129] The Ombudsman is to grant this request as long as the undertaking makes plausible that the complaint touches on a legal question of fundamental significance. The Ombudsman, however, only grants the request if the undertaking takes on the obligation to refund the court and lawyer fees borne by the complainant in relation to the first instance of court proceedings. It is to be noted that German civil procedure law is based on the rule that the party which did not prevail has to bear all costs of the legal dispute (i.e. also the costs of opposing party, though there are some limits) to the extent to which it did not prevail, sec. 91 Code of Civil Procedure. The significance of the obligation of the insurer is insofar that it has to refund any costs borne by the complainant even if the latter did not prevail with his lawsuit.

***e) Other Dispute Resolution Mechanism Available (Subsec. 5)***

Lastly, may be dismissed complaints for which the underlying (insurance) contract provides an appropriate dispute resolution mechanism which has not yet been made use of. The Ombudsman will for example dismiss a complaint concerning an insurance of property for which the general terms and conditions of insurance provide for an expert procedure. Where the dispute regards the amount of the benefits due or the existence of a specific cause of damage such an expert procedure seems more apt in dealing with the dispute than the ombudsman procedure which is mostly intended for the resolution of disputes over legal (and not factual) questions.[130]

## VI. Procedure

The procedure before the Ombudsman may be roughly divided into three stages: the entry stage, the remedial stage and the procedural (decision) stage.

---

[128] Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 18.

[129] It has been implied that these grounds for dismissal were modeled after the English pre-FOS insurance ombudsman procedure; cp. v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 429 (fn. 18). In any case, it is not easy to assess which cases – which are not to be dismissed under subsec. 2 (questions which are decision-relevant, controversial and have not been decided by the highest courts) – might benefit from these grounds for dismissal.

[130] See in more detail and with other examples Hövel, in: Halm/Engelbrecht/Krahe (eds.) (fn. 59), ch. 3 para. 18.

### 1. Entry Stage

The procedure before the Ombudsman is incepted with the receipt of the complaint by the Ombudsman (sec. 3 subsec. 1 phrase 1 RoP) who is to confirm receipt and inform the complainant about the ensuing procedural process (sec. 3 subsec. 2 RoP).[131] To avoid any unclarity it should be mentioned that the Ombudsman will be represented at this stage by the service centre staffed with people trained in the insurance business (*Versicherungskaufmann*).[132] In order to allow an easy excess to the procedure and to make certain that complaints must not be dismissed for purely formal reasons, the complaint may be transmitted by all prevalent means of communication, i.e. via phone, letter, fax or email (sec. 3 subsec. 1 phrase 2 RoP). In his complaint the complainant is expected to formulate a clear and unambiguous claim, to convey all essential facts and transmit all necessary documents (sec. 3 subsec. 3 phrase 1 RoP). Where the complaint is lacking in this respect, the service centre staff representing the Ombudsman will contact the complainant to aid him in formulating the claim, making clear the factual circumstances and identifying the necessary documents (sec. 3 subsec. 3 phrase 2 RoP). The staff members may even contact the insurance undertaking to clarify the facts of the case (sec. 3 subsec. 3 phrase 3 RoP). If all these affords are insufficient in bringing a clear and unequivocal text for a complaint to fruition, the complainant is informed that under these conditions proceedings may not be carried out and the procedure is terminated (sec. 3 subsec. 4 RoP).

With the receipt of the complaint the Ombudsman – represented by the service centre[133] – makes the first evaluation if the claim is admissible. If the answer is in the negative the complaint is dismissed. This evaluation of the Ombudsman's jurisdiction is, however, to take place during all stages of the proceedings (sec. 5 subsec. 1 RoP). If the Ombudsman wishes to dismiss a claim on these grounds, he is (in principle) held to give the parties the opportunity to make a statement and to issue a reasoned decision (sec. 5 subsec. 2 RoP).[134]

---

[131] This moment is also important since the period of limitation of the underlying claim is suspended from the moment at which the complaint is received; cp. sec. 12 subsec. 1 RoP.

[132] See supra ch. IV. 5.

[133] The service center is not independent in deciding if the complaint is inadmissible – as was for example the complaint center for the German Banking Ombudsman (Nr. 3 Procedural Rules) until 1995 – but is handling this task under the full authority of the Ombudsman.

[134] Slightly more than a third of all complaints are dismissed on the grounds of not falling within the Ombudsman's jurisdiction; cp. Ombudsmann für Versicherungen (fn. 21), p. 84. This appears more problematic than it actually is. Out of these cases dismissed, over 60 % regarded dismissal due to the fact that the insurer was not a member undertaking, that the complaint regarded private health insurance and that no previous complaint had been addressed to the insurer (or the insurer was not given ample time [6 weeks] to deal with the complaint); cp. *ibidem*, p. 88.

## 2. Remedial Stage

With admissibility established, the employee of the service centre forwards the complaint to the member undertaking in question.[135] In doing so the employee acting in the name of the Ombudsman request the undertaking to respond to the allegations[136] and sets a time limit, with the time for response being one month (cp. sec. 6 subsec. 1 phrase 1 RoP).[137] If the insurer does not respond within the established time limit the Ombudsman's decision will be based solely on the complainant's assertions (sec. 7 subsec. 1 phrase 1 RoP).[138]

In this regard the one month time limit is, one the one hand, intended to accelerate the procedure by incentivising swift responses of the insurer. On the other hand, one month is still regarded to be sufficient time for the insurer to rethink its decision in relation to the complaint. It is highly desired that the insurer under the "threat" of ombudsman proceedings re-evaluate its position and, if it seems fit, remedy the claim of the complainant.[139] In such a case there is no further need for the proceedings to move forward and the procedure is terminated. If, however, the undertaking decides to remedy the claim only in part, the question arises if the procedure can be terminated. Here it depends on the complainant's willingness to accept the decision and withdraw his complaint.[140] Otherwise the complaint would be altered to only cover that part of the claim that is still in dispute. About 20 % of all admissible complaints are terminated by the insurer's free decision to remedy the claim.[141]

If the insurer chooses not to remedy the claim but contest it, it will send its

[135] The complaint is transmitted to the contact point of the undertaking. All undertakings are under a duty to establish such a contact point and inform the Ombudsman about it, cf. sec. 6 subsec. 2 RoP.

[136] The Ombudsman may only forgo requesting a response by the insurer if two cumulative criteria are met: Firstly, the complaint may be sufficiently evaluated via the materials supplied by the complainant and secondly this evaluation leads to the result that the complaint is manifestly unfounded; cp. sec. 6 subsec. 4 RoP.

[137] The time limit may be extended for up to an additional month, where such seems beneficial (sec. 6 subsec. 1 phrase 2 RoP). Whilst most authors seem to think that this will only occur when requested by the undertaking (cp. Hövel, in: Halm/Engelbrecht/Krahe [eds.] [fn. 59], ch. 3 para. 12) the wording does not disallow for the Ombudsman to extend the time limit *ex officio*.

[138] If the insurer's response is belated, the Ombudsman may admit such response if it regards the delay to be excused under the circumstances, sec. 7 subsec. 1 phrases 2 and 3 RoP.

[139] v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 414; Römer (fn. 63), p. 292.

[140] Römer (fn. 63), p. 292.

[141] Ombudsmann für Versicherungen (fn. 21), p. 89. In an additional 5 % of the cases the parties conclude a settlement agreement, cp. *ibidem*.

response to the complaint. This response will in turn, usually, be transmitted to the complainant (sec. 6 subsec. 3 RoP).

### 3. Procedural Stage

With the remedial stage concluded, the service centre turns the complaint over to the legal centre with its fully-trained lawyers (*Volljuristen*).[142] The employee entrusted with the complaint corresponds (with an emphasis on legal matters) with all parties in an attempt to make the case ready for decision. They are equally expected to sound out the possibility of an amicable arrangement and aid the parties in coming to such a conclusion. If, however, no such arrangement can be brokered the employee will take the decisions on behalf of the Ombudsman.[143] In doing so, the employee of the legal centre is acting under the authority and supervision of the Ombudsman. In making certain that his views are followed, the Ombudsman has established guidelines for the employees of the legal centre, granted underwriting authority to certain persons for certain cases and established which questions have to be transmitted to his personal review.[144] According to these arrangements at least cases of greater importance or with more problematic bearing are usually decided by the Ombudsman in person.[145]

In coming to a decision, the Ombudsman (represented by the legal centre) is to establish the facts *ex officio*, sec. 7 subsec. 2 RoP. This means that the Ombudsman takes an active approach (and is not in the passive role of an English court judge). This active role even supersedes the amount of activity demanded of and allowed to a German court judge since the principle of production of evidence (*Beibringungsgrundsatz*) is not (fully) applicable. The Ombudsman may request the parties to produce certain documents and may commence own investigations.[146]

There is, however, a certain restriction. Even though the Ombudsman is free in his consideration of evidence (sec. 7 subsec. 6 phrase 1 RoP), it is not entrusted with the taking of evidence besides documentary evidence (sec. 7 subsec. 6 phrase 2 RoP). Other than under some old English ombudsman schemes and the new FOS[147] there is formally no

[142] See supra ch. IV. 5.

[143] This is regarded to be legal under the articles of association and the rules of procedure, see Lorenz (fn. 9), p. 548; in practice the decision has to be signed by two employees co-jointly, see *ibidem*, p. 547.

[144] Ombudsmann für Versicherungen (fn. 21), p. 66.

[145] Cp. Ombudsmann für Versicherungen (fn. 21), p. 66. For a description of how this was done at least during the formative years cp. Römer, in: Versicherungsombudsmann e.V. (ed.) (fn. 6), p. 26.

[146] Cp. v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 416.

[147] Cp. v. Hippel (fn. 8), pp. 126 et seq.

possibility for site inspections, expert opinions and oral hearings (though not even the English schemes allowed for witness testimony – but only allowed for the possibility to sound out the complainant's credibility and the plausibility of his complaint). The Ombudsman has, however, adapted a very broad understanding of documentary evidence. He will for example give consideration to written witness or party statements.[148] It was even held possible that where both parties introduce conflicting written expert opinions or one party introduces an expert opinion which is contradictory – such written expert opinions would also be freely assessed as documentary evidence by the Ombudsman – the Ombudsman might be allowed to mandate an independent expert opinion.[149] From all of the above one may take that the Ombudsman will always do his best to make a complaint ready for adjudication. There is, however, a limit: In the end the procedure is – as is claimed by current Ombudsman Günter Hirsch – a written procedure.[150] Insofar any claim that simply cannot be decided by the mere provision of documentary means is unfitting for the Ombudsman and should be left for the courts.

## VII. Decision

Once the Ombudsman has established the facts, and if the procedure was not terminated by the insurer having remedied the claim, by the conclusion of a settlement agreement or by the complaint being withdrawn by the complainant, the Ombudsman (either in person or represented by an employee of the legal centre) takes his decision. In light of the enormous case load it may only be considered a stellar performance that the Ombudsman is able to terminate admissible claims on average in less than four months.[151]

While the Ombudsman is very free in his appreciation of the evidence it does not enjoy the same freedom in his finding of the decision. Other than in some English ombudsman schemes of the past and present,[152] the Ombudsman is not empowered to base its decisions on what is fair and equitable (i.e. a decision *ex aequo et bono*), sec. 9 RoP. It is thus never appropriate for the Ombudsman to pass a decision as a goodwill gesture

[148] v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 417; Römer (fn. 63), p. 293.

[149] Römer (fn. 63), p. 293; in this direction also Scherpe (fn. 10), p. 101.

[150] Hirsch (fn. 24), p. 567.

[151] Ombudsmann für Versicherungen (fn. 21), p. 87. Inadmissible claims are dealt with in a matter of days rather than weeks, cp. *ibidem*.

[152] See v. Hippel (fn. 8), p. 127. For the Financial Ombudsman Service see sec. 8.2 of its Terms of Reference.

(so-called *Kullanzentscheidung*) – he may, at best, informally tell the insurer (this would not be a formal recommendation) that such a granting of the claim by the insurer as a goodwill gesture might be called for.[153] He must, on the contrary, base his decision solely on the applicable law. Insurance, capital investment, and sales and distribution practices (so-called *Wettbewerbsrichtlinien*) that may influence the insurance business shall, however, be given ample regard. The aforesaid should, however, not lead anyone to believe that considerations of fairness are irrelevant for the Ombudsman. The Ombudsman will, on the contrary, give due consideration to aspects of fairness and equity which he is allowed to do under many of the very broad blanket clauses (*Generalklauseln*) of German law (e.g. § 242 German Civil Code; 307 German Civil Code [concerning the interpretation of general terms and conditions]).[154]

The decisions of the Ombudsman may take on two forms, depending on the amount in dispute.

### 1. Binding Decision

If the amount in dispute[155] does not exceed € 10,000[156] the Ombudsman takes a binding decision (sec. 10 subsec. 3 phrase 2 alternative 1 RoP). It is to be noted that about 90 % of all complaints regard an amount in dispute that is below this threshold.[157] The decision is to be passed in writing, must contain reasons[158] and will be transmitted to all parties immediately (sec. 10 subsec. 4 phrases 1 and 2 RoP). The way the decision is written in practice depends to a certain degree on if it satisfies the complainant's claim in full (and is thus mostly addressed to the undertaking) or if the complainant has not been awarded at least part of his claim. In the latter case the Ombudsman will try to explain in accessible language to the layman why he could not prevail. In the former case the Ombudsman will

[153] The first Ombudsman, Römer, has indicated that he did act in such a way where appropriate; cited in: Nitschke, Diskussionsbericht, in: Basedow *et al.* (eds.), Lebensversicherung – Altersvorsorge – Private Krankenversicherung – Versicherung als Geschäftsbesorgung – Gentest – Der Ombudsmann im Privatversicherungsrecht – Beiträge zur 12. Wissenschaftstagung des Bundes der Versicherten, Baden-Baden 2004, p. 209.

[154] See v. Hippel (fn. 8), p. 251.

[155] For the calculation of the amount in dispute see supra ch. V. 4. a).

[156] Up until 2010 the Ombudsman could take binding decisions only in cases with an amount in dispute up to € 5,000; cp. Versicherungsombudsmann e.V. (ed.) (fn. 6), p. 47.

[157] Ombudsmann für Versicherungen (fn. 21), p. 87.

[158] Though not explicitly demanded by the rules of procedure, sec. 15 subsec. 2 AoA requires the Ombudsman, to present these reasons in a manner understandable (for a consumer). The Ombudsman has been particularly successful in adopting a very transparent and easy to understand mode of explaining the insurance law to complainants; cp. Römer, in: Versicherungsombudsmann e.V. (ed.) (fn. 6), pp. 26 et seq.

turn the focus on explaining to the legally proficient insurer the fine details of the rationale behind the decision.[159]

The decision – this is the special feature of many modern ombudsman procedures (as opposed to reconciliation procedures utilising the name of ombudsman) – is binding but on the respondent, i.e. the insurance undertaking (sec. 11 subsec. 1 RoP). The complainant, in return, is not at all bound by the decision but is free to bring his claim before the competent courts (sec. 11 subsec. 2 phrase 1 RoP). In Germany there is still some unclarity what this means in practice. Some authors have forwarded the idea that the decision of an Ombudsman might be regarded as an arbitral award – only binding on the insurance undertaking – thus granting the complainant the right to seek direct execution of the award if the insurer should not freely fulfil its obligation.[160] This interpretation – well founded or not – has, however, been rejected by the majority of scholars.[161] It appears to be the prevailing opinion that the decision of the Ombudsman is either to be qualified as a (positive or negative) acknowledgment of indebtedness – granted by the insurer by acceding to the support organisation under the condition that and to the extent to which the Ombudsman finds in favour of the complainant – or as a sui generis decision having the properties of an acknowledgement of indebtedness.[162] Should an insurer be unwilling to conform to a decision, the complainant could not directly enforce the decision but would first have to lodge a claim out of the decision[163] (i.e. the acknowledgment of indebtedness) before the competent court. The insurer's only means of defence would be to demonstrate the invalidity of the (pseudo) acknowledgment of indebtedness.[164] Concerning the grounds on which the insurer may base its allegation of ineffectiveness of the Ombudsman's decision most authors want to apply *per analogiam* the grounds on which an arbitral award may be set aside (cp. sec. 1059

[159] Ombudsmann für Versicherungen (fn. 21), p. 15.

[160] Schlosser, Alternative Streitbeilegung in der Kreditwirtschaft, in: Bankrechtliche Vereinigung (Hrsg.), Kartengesteuerter Zahlungsverkehr – Außergerichtliche Streitschlichtung: Bankrechtstag 1998, Berlin and New York 1999, pp. 185–209 at 208; Jordans, Der rechtliche Charakter von Ombudsmann-Systemen und ihren Entscheidungen, in: Verbraucher und Recht 2003, pp. 253–260 at 260 *et passim*.

[161] Hoeren (fn. 5), p. 497; *idem* (fn. 13), p. 2731; v. Hippel (fn. 8), pp. 46–89, 111 et seqq.; Lorenz (fn. 9), p. 545; v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 435; Prölss, in: *idem*/Martin (eds.), Versicherungsvertragsgesetz, 28th ed., Munich 2010, Vorbem. I para. 148; Berger, Schiedsgerichtsbarkeit und Bankengeschäft – Eine Zeitenwende, in: WM – Zeitschrift für Wirtschafts- und Bankenrecht 2012, pp. 1701–1707 at 1701 (fn. 2).

[162] Cp. *i.a.* v. Hippel (fn. 8), pp. 99 et seqq., 112 et seq.

[163] v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 435.

[164] v. Hippel (fn. 8), p. 114.

German Code of Civil Procedure).[165] To general knowledge there has thus far, however, not been a single insurer to disregard a binding decision of the Ombudsman.[166] Insofar the question of how a complainant should react in such a situation is more of a *glass bead game*[167] than a pressing need.

The decision will usually award the complainant a claim. In this decision will also be included a claim for interest with the interest rate being the statutory interest rate of sec. 288 of the German Civil Code and the claim bearing interest from the moment at which the complaint was received by the Ombudsman (sec. 13 RoP).[168] The decision can, however, also be a declaratory decision by setting out e.g. that the policyholder is not obligated to refund a certain amount of benefits received by the insurer. This decision would also be binding on the insurer, who would not be allowed to pursue the claim in court.[169]

If the decision only grants the complainant a part of his claim, he remains free to petition the courts to gain the rest. Other than in some foreign ombudsman schemes,[170] such action would not alter the fact that the decision regarding the partial success remains binding and must be observed by the insurer.[171] While one could think about applying the principle of *non venire contra factum proprium*, such does not seem to be the concept favoured by the rules of procedure. Sec. 11 subsecc. 1 and 2 RoP are adamant in their position that a decision is binding and remains binding on the respondent while leaving the complainant the possibility

[165] Cp. v. Hippel (fn. 8), pp. 109 et seq., 114 ; Lorenz (fn. 9), pp. 545 et seq.

[166] v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 435 (fn. 6). The picture is different in the UK, where one insurer petitioned the High Court to set aside a decision of the Insurance Ombudsman Bureau in 1992. In *Regina v. Insurance Ombudsman Bureau and the Insurance Ombudsmann ex parte Aegon Life Assurance Ltd.* [1995] CLC 88 it was held that the Ombudsman's decisions could not be reviewed at all. Under the new compulsory system of the FOS such is no longer true and limited judicial review is possible and scarcely made use of by insurers, cp. e.g. Summer, Insurance Law and the Financial Ombudsman Service, London 2010, para. 2.66.

[167] The invocation of the picture of Herman Hesse's *Glasperlenspiel* to describe the attempt to solve the problem of the Ombudman's decisions' binding effect was borrowed from Schlosser (fn. 160), p. 209.

[168] It is not entirely clear if this provision limits the complainant from claiming higher interest rates where applicable and proving that the insurer was in default at an earlier stage.

[169] According to the position of the prevailing opinion explained above, the insurer could in fact petition the court but the policyholder could object to the claim by raising the decision of the Ombudsman.

[170] E.g. sec. 8.8 of the Terms of Reference of the Australian FOS, which provides that for a determination (also for a recommendation) to have its binding effect on the insurer, the applicant has to declare a release from liability concerning all matters involved in the dispute.

[171] v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 423.

to always go before the courts. While one may have doubts if this is an equitable solution[172] it remains true: With the Ombudsman's decision the complainant may have his cake and eat it too!

### 2. Non-Binding Recommendation

In cases in which the amount in dispute exceeds € 10,000 (but is inferior to € 100,000[173]) the Ombudsman renders a non-binding recommendation. Such a recommendation conforms to the above described decision in all aspects save its binding effect. It also has to be passed in writing, must contain reasons and is to be transmitted to all parties immediately (sec. 10 subsec. 4 phrases 1 and 2 RoP). It, however, binds neither complainant nor respondent and here the undertaking is free to bring the case before the courts (sec. 11 subsec. 2 phrase 2 RoP) and to use all means of defence against a claim brought by the complainant in a court of law.

One could insofar believe this to be a rather dull blade. It nevertheless has proven to be quite an effective one – which will of course depend on the Ombudsman's persuasiveness and the industry's willingness to rather settle disputes than drag them out indefinitely. Insurers have almost without fail conformed their actions to such recommendations.[174]

### 3. Publication

In order to elude the reproach of practicing *closed-door* justice,[175] the Ombudsman should not only try to create transparency regarding its procedure, publish reports, seek out contact with the public but also publish his decisions and recommendations. Such a publication will also have the added benefit of providing new impulses for the development of the insurance law.[176] The Ombudsman is allowed to and does publish in an anonymised manner (such is also the norm for the publication of court decisions in Germany) selected decisions and recommendations on his website.[177]

---

[172] Esp. critical v. Hippel (fn. 8), p. 29.

[173] This is the excess amount in dispute above which the Ombudsman lacks jurisdiction; cp. supra ch. V. 4. a).

[174] Römer (fn. 65), p. 1254 (fn. 37).

[175] This was a reproach made against the Private Banking Ombudsman on a regular basis due to his reservation to publish any materials; cp. Scherpe (fn. 10), p. 102 (fn. 34).

[176] In this direction also Scherpe (fn. 10), p. 102.

[177] Ombudsmann für Versicherungen (fn. 21), p. 15. v. Rintelen, in: Beckmann/Matusche-Beckmann (eds.) (fn. 18), para. 394 has nevertheless stated that there is room for improvement, e.g. systematic publication of all decisions.

## VIII. Conclusion

With the establishment of the *Versicherungsombudsmann* the German insurance industry was able to square the circle, it being an institution that is cherished by both the undertakings and the customers. At first sight this might be surprising: Over a third of all complaints are dismissed as inadmissible[178] and of the remaining complaints only a rough third is decided (at least partially) in the complainant's favour.[179] This not overly impressive success rate for consumers is, however, also an indication for the success of the Ombudsman: Its mere existence has induced insurers to enhance their internal complaints handling which has in turn decreased the amount of "wrong" decisions.[180] Most importantly, the success of the Ombudsman cannot be measured by only turning to the hard numbers. Its most ambitious goal is to defuse disputes and ameliorate the relationship between insurers and their customers. As one complainant has put it in a letter of thanks: "even though my complaint against [...] was not met with success, my wife and I would like to thank you for your assiduous examination [of our case]. Your detailed reasoning has made us realise that my insurance was in the right to refuse".[181] If such a statement is indicative of the sentiments of only a portion of the complainants which were "unsuccessful", the Ombudsman is truly a success.

[178] Ombudsmann für Versicherungen (fn. 21), p. 84; for an explanation why this number is not as dramatic as it might appear see supra fn. 134.

[179] Ombudsmann für Versicherungen (fn. 21), pp. 81, 87.

[180] Cp. (albeit concerning the Banking Ombudsman) v. Hippel (fn. 8), p. 16 with further references.

[181] Taken from the correspondence in the case with the docket number 4618/2011-M reprinted in Versicherungsombudsmann e.V. (ed.) (fn. 6), p. 54.