

# Small Claims Enforcement in a High Cost Country: The German Insurance Ombudsman

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## 1 Introduction

The scholarly search for Scandinavian peculiarities in the legal system can be undertaken from very different points of departure. It may start at a very abstract level and investigate into methodological preferences of Scandinavian practitioners and scholars. Thus, our inquiry would sooner or later focus on Scandinavian legal realism which has aroused considerable interest in Germany in the period following World War II. Sceptics would probably argue that such an approach is too general to grasp the contributions Scandinavian law has made to the legal development in Europe. A second approach would start from the specific areas of the law where Scandinavian influences can be ascertained. From my own experience gathered in several legal disciplines it follows that Scandinavian legal thinking and Scandinavian legal models have been particularly influential in areas such as transport and consumer law while the Scandinavian impact has been less articulate in competition law or private international law. In the light of these observations the bottom-up approach appears to provide a better insight into the particular features of Scandinavian law and the reasons for its reception in other countries.

The topic chosen for this exemplary study is the operation of the German Insurance Ombudsman, a private institution which started to operate in October 2001. It is a fairly new institution in the field of consumer protection. Germany has observed the Scandinavian development of consumer law with great attention for the last 30-40 years<sup>1</sup> and has in fact followed Scandinavian models in several areas of substantive consumer law. This has been different with regard to the enforcement of consumer claims. The development of alternative dispute resolution has taken hold of Germany only fairly recently. The second part of this paper will try to explain the reasons for that delay. Further parts will be dedicated to the organization of the Ombudsman Institution (infra 3.), to the procedure pursued (infra 4.) and to the experience gathered from the first years of its operation (infra 5.).

## 2 Consumer Rights and their Enforcement

### 2.1 *The Enforcement Deficit and its Reasons*

Ever since the beginning of the debates on consumer protection in the 1960s the insufficient enforcement of consumer rights has brought about numerous discussions and legal reform proposals.<sup>2</sup> There is general agreement that in

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1 See Friedrich Korkisch, *Verbraucherschutz in Schweden*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (hereinafter *RabelsZ*) 37(1973) 755; Ulf Bernitz, *Schwedisches Verbraucherschutzrecht*, *RabelsZ* 40 (1976) 593; Jan Hellner, *The Consumer's Access to Justice in Sweden*, *RabelsZ* 40 (1976) 727.

2 Cf. instead of many others von Hippel, Eike, *Besserer Rechtsschutz des Verbrauchers?* *RabelsZ* 37(1973) p. 268-283, revised in *idem*, *Verbraucherschutz*, 3rd ed., Mohr, Tübingen 1986, § 6. See also the contributions on "Zugang zum Recht" ("Access to Justice") of Rolf Bender, Mauro Cappelletti/Bryant Garth/Nicolò Trocker, Jan Hellner, Zhivko St. Stalev and Marcel Storme to the symposium celebrating the fiftieth anniversary of the Max Planck Institute for Comparative and International Private Law, *RabelsZ* 40(1976), p. 669-788; as

practice, consumers make use of their rights far too seldom. Their self-restraint is explained by several causes: In the early years the insufficient information of the average citizen, his or her sense of inferiority and a general fear of getting in touch with a judiciary as represented by private attorneys and judges were emphasized. Further motivations underlined in the debate related to a general distrust of the judiciary, a lack of incentives for consumer attorneys and the consumers' fear of the costs of litigation.<sup>3</sup>

Most of these explanations were inspired by an understanding of society in terms of poor and rich, weak and strong, bottom and top. The procedural reforms undertaken since the 1970s have taken account of this hierarchical view of society. As a consequence it has lost much of its explanatory significance. In accordance with an economically-minded *Zeitgeist* the consumers' attitude is at present rather described as a "rational indifference".<sup>4</sup> In this view, the filing of a lawsuit depends on whether the chance to win or the risk to lose prevails in the plaintiff's calculation. Because of the low amounts involved in consumer disputes the chance to win is usually perceived as rather insignificant. On the other hand, the risk to lose entails, in addition to the loss already sustained by the consumer, the obligation to refund the professional for its legal expenses. Since consumers often have few assets and low income they will often be risk averse and will therefore overweigh the risk of defeat as compared with the chance of winning; consequently they will refrain from going to court. Irrespective of its reasons the insufficient enforcement of consumer rights is generally considered as a deficit of the legal system. From an economic point of view this may impair the trust in the operation of consumer markets.

## 2.2 Remedial Measures in Comparative Survey

Numerous measures have been taken to remedy this situation. Comparative law points to a great variety of solutions:<sup>5</sup> The establishment of special courts and fast-track procedures for small claims, especially in some states of the US<sup>6</sup>; mediation procedures which may be voluntary or even compulsory like those in Argentina,<sup>7</sup> in Sweden, a special authority, the Konsumentverket is entrusted with the support of consumer interests and complaints,<sup>8</sup> and a similar institution

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of recently see Scherpe, Jens M., *Außergerichtliche Streitbeilegung in Verbrauchersachen*, Mohr Siebeck, Tübingen 2002, p. 8 seq.

3 von Hippel, Eike, above at fn. 2, *RabelsZ* 37(1973) p. 268.

4 Schäfer, Hans-Bernd, *Anreizwirkungen bei der Class Action und der Verbandsklage*, in Jürgen Basedow/Klaus J. Hopt/Hein Kötz/Dietmar Baetge (eds.), *Die Bündelung gleichgerichteter Interessen im Prozess*, Mohr Siebeck, Tübingen 1999, p. 67 seq.

5 See von Hippel, Eike, above at fn. 2, *Verbraucherschutz*, p. 159 seq.

6 Cf. von Hippel, Eike, above at fn. 2, *RabelsZ* 37(1973) p. 271 seq.

7 Sievers, Nadja, *Mediation als alternative Konfliktlösungsmöglichkeit auch in Deutschland? – Eine rechtsvergleichende Untersuchung am Beispiel der argentinischen mediación previa*, Lang, Frankfurt am Main 2001.

8 Cf. Hellner, Jan, above at fn. 2, *RabelsZ* 40(1976), p. 727 seq.; as to recent developments see von Hippel, Thomas, *Der Ombudsmann im Bank- und Versicherungswesen*, Mohr Siebeck, Tübingen 2000, p. 187 seq.

has been established in the United Kingdom;<sup>9</sup> in Denmark, state legislation has created a legal framework for consumer complaint institutions set up by the cooperation of business and consumer associations.<sup>10</sup> These short notes give evidence of the leading role of Scandinavian models in this field. They also demonstrate the great variety of solutions: There are state-run and private institutions; some of them have admonitory functions, others are conciliatory or even decision-making bodies; some of them are financed by the state, others by the service providers of the respective business sector; in some cases their involvement is optional, in others it is a compulsory precondition of a lawsuit filed in a state court.

They all purport to contribute to a more efficient enforcement of substantive law. The service function of procedure as against substantive law is stressed.<sup>11</sup> In the heyday of the consumer protection movement this purpose has been almost the sole objective; some authors went as far as suggesting, in accordance with medical check-ups, a regular screening of the citizens' rights in view of their enforcement.<sup>12</sup>

Against this background it does not come as a surprise that alternatives to traditional civil procedure have been implemented first in those countries where litigation in state courts is particularly expensive, especially in Scandinavia, in the United Kingdom and in the United States of America. It probably follows from the same economic background that the dispute resolution mechanisms introduced in these countries differ markedly from traditional civil procedure as conducted in those jurisdictions.

### 2.3 *The German Way*

Germany has initially taken a different path and has tried to integrate consumer disputes into the general court system. Access to justice which appeared as too expensive for the ordinary citizen and as a privilege of well-to-do people was meant to be made easier by state subsidies. Legal aid was transformed from a financial support for pauper plaintiffs into a tool designed to facilitate access to justice for large parts of the population; the name of this instrument was changed from "Armenrecht" which indicated that the recipient belonged to the lowest class, into "Prozesskostenhilfe", a rather neutral term.<sup>13</sup> For out-of-court costs incurred before court proceedings started, it was matched with another type of state subsidy called Advice Support (Beratungshilfe).<sup>14</sup> The German legislator

9 Cf. von Hippel, Thomas, above at fn. 8, p. 117 *seq.*

10 Scherpe, Jens M., above at fn. 2, p. 110 *seq.* and 171 *seq.*

11 The notion of "service function" (in German: "dienende Funktion") appears in Boehmer, Gustav, *Grundlagen der Bürgerlichen Rechtsordnung*, Volume 1, Mohr, Tübingen 1950, p. 95.

12 See, e.g., Izhak England at the symposium referred to above at fn. 2, *cf.* the discussion report of Basedow, Jürgen, *RabelsZ* 40(1976), p. 783, at 784.

13 Gesetz über die Prozesskostenhilfe of 13.6.1980, *Bundesgesetzblatt* (Federal Law Gazette; hereinafter *BGBI.*) I 677.

14 Gesetz über die Rechtsberatung und Vertretung für Bürger mit geringem Einkommen of 18.6.1980, *BGBI.* I 689.

therefore has basically considered the implementation deficit of consumer rights as a problem of social policy which had to be solved by a redistributive mechanism. In those years it was not realized that the legal protection of consumers in small-volume cases also raises issues of economic efficiency. The highly formalised and costly civil procedure in the general court system may not be appropriate in petty litigation.

Another tool which was developed by the insurance market is the legal costs insurance which is especially relevant for those parts of the population which are not eligible for the above-mentioned subsidies. In many areas it relieves the policyholder of the cost risk connected to litigation and thereby encourages his or her decision to litigate. Since the courts' costs in petty cases are usually not sufficient to cover the true costs caused by the litigation, the increase in number of small-value lawsuits has put the financial basis of the court system at risk. But in the 1970s and 1980s the general belief prevailed that the principle of cross-subsidisation of small-value by large-value cases which is inherent in the cost tariffs applicable in German civil procedure would save the whole court system from a financial collapse.

This expectation has turned out to be an illusion. The number of small-value cases has grown continuously throughout the last years. A huge crowd of more than 140,000 practicing lawyers admitted to the German bar has an incentive to increase the number of legal proceedings; the legal cost insurance has its share in the responsibility as well. For various reasons, the cross-subsidisation inherent in the courts' cost tariffs does not work anymore. The resulting procedural burden threatens the operation of the court system. In more recent years, a number of solutions have been tried: The value limit for the jurisdiction of the lowest courts where a single judge is sitting, has been raised several times; in the district courts where cases are decided by a panel of three judges, more and more tasks are conveyed upon a single judge; appeals from the lowest courts to the district courts require a certain minimum value of the litigation which has been raised in the course of time. These and other recent measures have essentially been dictated by economic considerations.

Next to the various legislative actions there are also private initiatives designed to improve access to justice while avoiding an overburdening of the courts. In 1992, the Association of German Banks set up an Ombudsman system which was roughly tailored on models that had existed in the Scandinavian countries many years before.<sup>15</sup> The designation of this institution as Ombudsman may be misleading to Scandinavians. In the German understanding the Ombudsman has nothing to do with Parliament, it is rather an alternative to the court system. The Banking Ombudsman was initially exposed to severe criticism from the side of consumer associations. But it also showed that similar

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15 Cf. Scherpe, Jens M., above at fn. 2, p. 149 *seq.*; *id.*, *Zum Problem der Neutralität in der außergerichtlichen Streitbeilegung im Bankgewerbe*, *RabelsZ* 64(2000) 614; see also the report of the first Ombudsman of the German Private Commercial Banks Karl-Dietrich Bundschuh, in Jürgen Basedow/Roland Donath/Ulrich Meyer/Dieter Rückle/Hans-Peter Schwintowski (eds.), *Anleger- und objektgerechte Beratung – Private Krankenversicherung – Ein Ombudsmann für Versicherungen*, *Versicherungswissenschaftliche Studien* (hereinafter *VersWissStud*), 11 (1999), p. 213 *seq.*

mechanisms may be useful for both sides of the market. The experience gained from the German Banking Ombudsman and from similar foreign dispute resolution bodies in the insurance sector have been the object of intense scholarly discussions which preceded the establishment of the Insurance Ombudsman.<sup>16</sup> Finally, the Association of German Insurers set up an own Ombudsman mechanism in 2001<sup>17</sup>.

### 3 Outline of the Organization

#### 3.1 *The Ombudsman Association*

The legal framework of the Insurance Ombudsman consists of the byelaws of the association, a non-profit organisation, which has been founded for the implementation of the institution<sup>18</sup>, and of its procedural rules.<sup>19</sup> The association serving as the legal platform of the Insurance Ombudsman has been established by insurance companies; membership is reserved for insurance companies and their business association. Insurers of all sectors can apply for membership; but the private insurance companies of the healthcare sector have refused to acknowledge the jurisdiction of an Ombudsman having decision-making competences; they have, therefore, set up a dispute resolution body of their own whose function is limited to a mediation between insurers and policyholders in case of complaint.<sup>20</sup> This conciliation system will not be discussed any further in this context. The costs generated by the operation of the general Insurance Ombudsman with competence for all insurance sectors but for healthcare insurance, are borne by contributions of the member undertakings.<sup>21</sup> Consumer complaints thus can be lodged free of charge.

According to the basic conception of the institution, the consumer is free to choose between a complaint lodged with the Ombudsman and a claim filed with a state court. If the consumer chooses to address the Ombudsman he or she will not lose the right to sue the insurer in a state court after the Ombudsman proceedings have come to an end. In order to avoid any indirect impairment of this right, the member companies of the Ombudsman Association have agreed,

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16 See Reichert-Facilides, Fritz, *The Insurance Ombudsman Abroad – A Comparative Survey*, in Jürgen Basedow *et al.*, above at fn. 15, *VersWissStud* 11 (1999), p. 193 *seq.*; Hohlfeld, Knut, *Überlegungen zur Einführung eines Ombudsmanns im Versicherungsbereich*, *ibid.*, p. 223 *seq.*

17 See Scherpe, Jens, *Der deutsche Versicherungsombudsmann*, *Neue Zeitschrift für Versicherungsrecht* 2002, 97.

18 Available at “[www.versicherungsombudsmann.de/Navigationsbaum/satzung.html](http://www.versicherungsombudsmann.de/Navigationsbaum/satzung.html)”; also to be found in Ombudsmann für Versicherungen (ed.), *Jahresbericht 2005* (Annual Report 2005), Berlin 2006, p. 56 *seq.* procurable through Versicherungsombudsmann e. V., P.O. Box 080632, D-10006 Berlin.

19 Available at “[www.versicherungsombudsmann.de/Navigationsbaum/Verfahrensordnung.html](http://www.versicherungsombudsmann.de/Navigationsbaum/Verfahrensordnung.html)” and also published in the *Jahresbericht 2005*, above at fn. 18, p. 50 *seq.*

20 More detailed information can be obtained at “[www.pkv-ombudsmann.de](http://www.pkv-ombudsmann.de)”.

21 See § 17 of the byelaws, above at fn. 18.

in the byelaws, to consider the prescription of the consumers' claims against the insurer as suspended while the Ombudsman proceedings are running.<sup>22</sup>

The purpose of the institution is the resolution of disputes<sup>23</sup>. This includes different forms of dispute termination: At the instigation of the Ombudsman the insurer may abide by the complaint; in cases involving complaints of up to 5,000 € the Ombudsman may decide the case and above that threshold may pronounce recommendations in disputes about claims of up to 50,000 €. <sup>24</sup> The asymmetric effect of decisions which has been tailored on an earlier Danish model is noteworthy: By their accession to the Ombudsman Association, insurance companies subject themselves to the decisions of the Ombudsman in all cases involving complaints of less than 5,000 €. Quite to the contrary, such decisions are not binding on the policyholder who will always have the possibility of taking his case to a state court.<sup>25</sup>

### 3.2 *Safeguards of Impartiality*

A dispute-settlement mechanism set up unilaterally by traders and professionals will often arouse the suspicion of biased decisions in the interest of the undertakings which finance the whole system. With such feelings, consumers will prefer to file their claims in state courts which would defeat the purpose of the Ombudsman scheme. Its success is dependent on the firm belief of all parties concerned that the Ombudsman performs its functions in a neutral, independent, and unbiased way.

Some institutional measures have been taken to attain this objective: The byelaws stress impartiality and independence of the Ombudsman,<sup>26</sup> his office is incompatible with certain activities in the insurance sector, whether during the term of office or in the three years preceding the appointment;<sup>27</sup> a re-appointment had originally been excluded altogether and is now allowed for a single time in the interest of a flexible transition to a successor.<sup>28</sup> The requirement of a consent of representatives of the insurance companies and of consumers is of particular relevance. The consent has to be found in the Advisory Council of the Ombudsman Association where insurers and consumer organisations are represented on equal terms; further members are coming from the supervisory authority, from academia, and from the parliamentary groups of

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22 See § 5 par. 1 sentence 2 of the byelaws, above at fn. 18; § 12 of the procedural rules, above at fn. 19.

23 Cf. § 3 par. 1 of the byelaws, above at fn. 18.

24 Cf. §§ 4 and 10 of the procedural rules, above at fn. 19; this threshold may soon be raised to 80,000.

25 Cf. § 5 par. 2 of the byelaws, above at fn. 18 and § 11 of the procedural rules, above at fn. 19.

26 §§ 14 par. 2 and 15 par. 1 of the procedural rules, above at fn. 19.

27 § 14 par. 1 of the byelaws, above at fn. 18.

28 § 16 par. 1 of the byelaws, above at fn. 18.

the political parties represented in the German Parliament.<sup>29</sup> Thus, insurance undertakings have no majority in the Advisory Council. For the election of the Insurance Ombudsman, concurring votes of the general meeting of the Ombudsman Association and of the Advisory Council are required<sup>30</sup>. The Advisory Council has the additional right of co-determination on amendments of the procedural rules and on the appointment of the Association's manager.<sup>31</sup>

## 4 The Procedure

The Ombudsman procedure differs in various respects from litigation in state courts. It is characterised by very flexible regulations and is restricted to simple issues which are liable to be solved in accelerated proceedings.

### 4.1 Competence for Consumer Claims

The Ombudsman is competent to consider complaints brought against insurers which are members of the Ombudsman Association insofar as they are filed by consumers. The procedural rules make explicit reference to the definition of the consumer known from Community law<sup>32</sup> and enshrined in § 13 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). Thus, only natural persons who conclude the insurance contract involved for a purpose which is outside their trade, business or profession, may lodge a complaint.<sup>33</sup>

The European Court of Justice has restricted this concept even further in respect of cases concerning contracts which have been concluded for mixed purposes related to both professional and private activities. In the context of the special rules on jurisdiction contained in the Brussels I Regulation, the Court decided that a person who has concluded such a mixed contract may not rely on the special rules on jurisdiction for consumer transactions “unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply.”<sup>34</sup> It is not unlikely that this precedent would also be applied to insurance. As a consequence, a farmer taking out fire insurance for his farmhouse which accommodates both a barn or stable and his own apartment would not be considered as a consumer by the European Court of Justice. The same could be said for household insurance of policyholders who exercise some professional activity at their homes. It is unclear whether the Insurance Ombudsman will admit complaints in such cases.

29 § 12 par. 1 of the byelaws, above at fn. 18.

30 § 13 par. 1 of the byelaws, above at fn. 18.

31 § 12 par. 3 of the byelaws, above at fn. 18.

32 Cf. , for instance, Art. 2 lit. b of Council Directive 93/13/EEC of 5.4.1993 on unfair terms in consumer contracts, OJ 1993 L 95/29. References to further similar provisions contained in EC legislative measures can be found in Prütting, Hanns, in *idem*/Gerhard Wegen/Gerd Weinreich (eds.), *BGB-Kommentar*, Luchterhand, Neuwied 2006, § 13 par. 2

33 § 1 par. 1 of the procedural rules, above at fn. 19.

34 ECJ 20.1.2005 case C-464/01 (*Gruber v. BayWa*), [2005] E.C.R. I-439 = *Europäische Zeitschrift für Wirtschaftsrecht* 2005, p. 241 with a case note by Norbert Reich.



It is doubtful whether the European case law provides an appropriate precedent in this context. The European judges had to demarcate the scope of application of the special rules on jurisdiction for consumer transactions from that of the general rules on jurisdiction provided by Regulation 44/2001<sup>35</sup>; in accordance with general principles they have restricted the scope of the exceptional rules on consumer transactions. The competence of the Insurance Ombudsman should not be restricted for such general reasons; its purpose is to provide an accelerated dispute settlement procedure for as many simple cases as possible. This procedure is well-suited for many insurance contracts which have been concluded by natural persons for predominantly private purposes irrespective of an additional business content.

#### **4.2 Exclusions**

The competence of the Ombudsman is limited by a long list of exceptions. Some of them purport to avoid conflicts of competence; this applies to complaints which relate to a healthcare insurance contract or which are already pending in the supervisory authority or in a court or arbitration tribunal.<sup>36</sup> Others are meant to keep those disputes away from the Ombudsman which are likely to be fairly complex and which may raise difficult issues in fact or in law. This applies to the upper complaint limit of 50,000 €, but also to cases which may require mathematical calculation, for example in the redemption of a life insurance policy.<sup>37</sup>

Similar considerations explain the exclusion of third-party claims against insurance companies.<sup>38</sup> This exemption essentially excludes direct claims filed by victims of traffic accidents against liability insurers of vehicles. Such claims will often focus on the liability of the car owner or driver, i.e. on tort law, and the relevant issues are not liable to being solved in the Ombudsman proceedings with their restricted availability of evidence. Issues relating to insurance contract law will often be of minor importance in these cases since the modern development of the law in this area is characterised by a growing independence of the victim's direct claim from the insurance contract concluded between the car owner and the liability insurer.

It should be mentioned that the exclusion of third-party claims has another unfortunate consequence: In group insurance the members of the insured group, e.g. employees cannot address the Ombudsman if a life insurance taken out by the employer on their behalf generates conflicts with the insurer. In such cases, the employer is the policyholder and therefore the only person who may lodge a complaint with the Ombudsman. But neither is the employer a consumer nor is he interested in disputes between (former) employees and the life insurer.

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35 Art. 15 *et seq.* of Council Regulation (EC) No 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

36 § 1 par. 3 lit. c, f and g of the procedural rules, above at fn. 19.

37 § 1 par. 3 lit. b and d of the procedural rules, above at fn. 19.

38 § 1 par. 3 lit. e of the procedural rules, above at fn. 19.

### 4.3 *Flexibility of the Procedure*

The Ombudsman procedure is very flexible. Applications can be made orally, in writing or in any other suitable form<sup>39</sup>. The complaint reception office will ask for a comment of the respondent within one month,<sup>40</sup> but the Ombudsman may accept excuses for the late delivery of such comments.<sup>41</sup> The Ombudsman and its staff will investigate the facts of the case at each stage of the proceedings *ex officio*.<sup>42</sup> Further procedural issues may be solved by internal regulations.<sup>43</sup> The limitation of admissible evidence is very important in this context as well: Only documentary evidence is admitted;<sup>44</sup> thus hearings of witnesses, expert evidence and inspections, i.e. the main sources of procedural delays are excluded. On the other hand, the restrictions of evidence limit the number of conflicts which may be submitted to a decision of the Ombudsman. Since even the production and assessment of written evidence may be very complex, the Ombudsman has the right to reject a complaint altogether if it threatens to overstrain its own resources.<sup>45</sup>

### 4.4 *Decisions on Legal Principle*

A very controversial but significant rule excludes the decision on legal principles.<sup>46</sup> It cannot be explained by the need for an accelerated procedure, but relates to the delicate relation between the Insurance Ombudsman and state courts. It is out of question that decisions on legal principles have finally to be taken by the supreme civil court of a country. This competence would not be affected if the Ombudsman himself decided such issues as well; they could still be carried to state courts. There is however a time factor to be considered. In general, several years will go by until lower court judgments have been appealed and the highest court can form a judgment on a legal principle. Suppose that, in the meantime, the Ombudsman has already made a decision on the matter in one or several similar cases and that these decisions are overruled by the highest court. It goes without saying that the reputation of the Ombudsman would suffer considerably and that consumers, instead of lodging their complaints with the Ombudsman, would rather file their claims with state courts. In later cases, consumers whose claims are dismissed by the Ombudsman, would go to court more frequently than they do now, and insurers might leave the Ombudsman Association.

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39 § 2 par. 1 of the procedural rules, above at fn. 19.

40 § 4 par. 1 of the procedural rules, above at fn. 19.

41 § 5 par. 2 sentence 2 of the procedural rules, above at fn. 19.

42 § 6 par. 1 of the procedural rules, above at fn. 19.

43 §§ 14 and 6 par. 2 of the procedural rules, above at fn. 19.

44 § 6 par. 5 of the procedural rules, above at fn. 19.

45 § 6 par. 6 of the procedural rules, above at fn. 19.

46 § 6 par. 7 of the procedural rules, above at fn. 19; *cf.* the criticism by Scherpe, Jens M., above at fn. 2, p. 247 *seq.* as to a parallel provision contained in the rules governing the proceedings before the Ombudsman of the German Private Commercial Banks.

Exaggerated as they may appear, such fears should be taken seriously. The authority of the Ombudsman is fragile. It can easily be imperilled by decisions which go beyond the settled state of the law. Such decisions must be left to higher authorities. Moreover, decisions on legal principles taken by the Ombudsman might establish a general legal opinion which will never be subject to a revision by the state courts. A different view might be taken where the Ombudsman has the power to refer preliminary questions of legal principle to the highest court of a country.<sup>47</sup>

## 5 The Experience of the First Years

### 5.1 *Rising Number of Complaints*

Since its inception in 2001, the Insurance Ombudsman has gained considerable reputation throughout Germany. It is reflected by a continuously growing acceptance from the sides of both insurers and consumers. At the end of 2005, not less than 268 insurance companies were members of the Ombudsman Association;<sup>48</sup> they equal 95% of the German market of consumer insurance.<sup>49</sup> In accordance with the commitment accepted in the byelaws of the Association, nearly all insurers inform their customers about the existence of the Ombudsman. Coverage in the media has made the institution known to many people. As a consequence, the number of complaints has risen continuously from 9,236 in 2002 to 10,888 in 2005 (2006: 18451) which amounts to a monthly average of 900 (2006:1500) complaints.<sup>50</sup>

In order to cope with the increase in complaints, the staff of the Ombudsman had to grow. For the screening of the complaints in the first phase of the proceedings, twelve commercially-trained insurance clerks are employed who have to assess the facts of the case and ask for the comments of the insurer involved. The number of lawyers who carry out the legal investigation in the second phase of the proceedings under the guidance of the Insurance Ombudsman has risen from nine in 2003 to eleven in 2005 AND 13 IN 2006.<sup>51</sup> Further efficiency gains have been accomplished by the intensive use of electronic data processing.

### 5.2 *Duration and Outcome of Proceedings*

These efforts have become manifest in a noteworthy shortening of the proceedings: While an average proceeding following an admissible complaint

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47 Cf. Schäfer, Hans-Bernd, *Kein Geld für die Justiz – Was ist uns der Rechtsfrieden wert?*, Deutsche Richterzeitung 1995, p. 461 at 464; Scherpe, Jens M., above at fn. 2, p. 249.

48 *Jahresbericht* 2005, above at fn. 18, p. 32.

49 Visit the homepage “[www.versicherungsombudsmann.de](http://www.versicherungsombudsmann.de)” → Wir über uns → Entwicklung der Schlichtungsstelle.

50 See *Jahresbericht* 2003, p. 35 and *Jahresbericht* 2005, above at fn. 18, p. 46. The numbers in brackets are taken from the recently published *Jahresbericht* 2006 at p. 48.

51 See *Jahresbericht* 2003, p. 25, *Jahresbericht* 2005, above at fn. 18, p. 34 and *Jahresbericht* 2006, p. 36.

would last 5.4 months in 2002 and 1.6 months in case of an inadmissible complaint, these numbers were reduced to 3.8 (2006:2.8) months for admissible complaints and 0.4 (2006:0.2) months for inadmissible complaints in 2005.<sup>52</sup> The average duration of proceedings in the lowest state courts clearly exceeds these numbers; the ombudsman procedure has established itself as a speedy alternative.

The amount involved in more than 80% of the complaints is below the upper limit of its decision-making competence. But the value in dispute of more than 15% of the cases exceeds 5,000 €; as a consequence the Ombudsman's powers are restricted to the issue of recommendations in these cases.<sup>53</sup>

Across the years about one-third of all complaints is dismissed for one of the following procedural reasons: The consumer has often not notified the claim to the insurer or may be a third party to the insurance contract and therefore not entitled to apply for protection; in other cases the insurer is not a member of the Ombudsman Association or is a company offering healthcare insurance.<sup>54</sup> The success ratio of the admissible complaints has decreased from 37.6% in 2002 to 32.2% in 2005, a fact that is explained in the annual report by the intransparent legal situation that has been created by judgments of the Federal Court in the field of life insurance.<sup>55</sup> For life insurance including pension schemes have by far the largest share of the complaints; it has risen from 30% in 2003 to 38% in 2005. Life insurance is followed at a clear distance by legal costs insurance and – with shares of less than 10% of the admissible complaints – by other sectors such as accident insurance, motor liability insurance, household insurance and insurance of buildings.<sup>56</sup>

### 5.3 *State Recognition*

To sum up, there is no doubt that the Insurance Ombudsman has been accepted with great approval by market actors from both sides. This may be surprising in a country where public interest has traditionally been pursued by state institutions and not by private initiative. It appears that the traditional order of public and private action is being reversed in Germany in this area.

In the meantime, several States of the Federal Republic have accorded recognition to the Insurance Ombudsman. Under special powers granted by the introductory law of the Code of Civil procedure (§ 15 a) they prescribe that certain claims can be filed with state courts only after a non-judicial mediation

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52 See *Jahresbericht 2003*, p. 36 and *Jahresbericht 2005*, above at fn. 18, p. 49; for 2006 see the *Jahresbericht 2006*, p. 52.

53 *Jahresbericht 2003*, p. 36: in the year 2003 85.4 % below 5,000 €; *Jahresbericht 2005*, above at fn. 18, p. 49: in 2005 82.6 % below 5,000 € and 17.4 % above 5,000 € but below 50,000 €.

54 *Jahresbericht 2003*, p. 35, 37 and *Jahresbericht 2005*, above at fn. 18, p. 47 and 48.

55 *Jahresbericht 2003*, p. 36 and *Jahresbericht 2005*, above at fn. 18, p. 49 and also p. 12-14; the *Jahresbericht 2006* provides two different success ratios for life insurance (14.9%) and for other types of policies (38.6%), see p. 52.

56 See *Jahresbericht 2003*, p. 37 and *Jahresbericht 2005*, above at fn. 18, p. 48.

body has tried in vain to settle the dispute.<sup>57</sup> Some of the Federal States treat the Insurance Ombudsman as an equivalent to such a mediation body.<sup>58</sup>

Further recognition has recently been given to the Insurance Ombudsman by federal legislation. When implementing the EC Directive on distance marketing of consumer financial services, the Member States have to identify a non-judicial dispute settlement body.<sup>59</sup> Under a provision of the Insurance Contract Act which explicitly allows to transfer dispute settlement to private bodies, the German government has endowed the Insurance Ombudsman with this task.<sup>60</sup>

At present, the EC Directive on insurance mediation<sup>61</sup> has to be implemented by the Member States. This directive, too, requires the creation of a non-judicial dispute settlement mechanism, and it is likely that the task will again be entrusted to the Insurance Ombudsman.<sup>62</sup> While this legislation still is fragmentary, it somehow appears to announce a development similar to that which took place in Scandinavia and particularly in Denmark, where state legislation has established a rather comprehensive framework for private dispute settlement.

## 6 Summary and Perspective

### 6.1 A Success Story

The Insurance Ombudsman can be characterised as an institution of dispute settlement which meets the interests of both market sides: Insurers rightly consider effective dispute settlement as a marketing advantage which may even cut their costs since the membership fees they pay to the Ombudsman Association will usually be lagging behind the fees of law firms which they otherwise would have to pay in civil proceedings. A certain effect on the corporate governance of insurance companies is sometimes mentioned as a third advantage: It is said to foster the discipline of insurers' employees who allegedly take much liberty in claims regulation; apparently the control exercised by the Insurance Ombudsman who will call the upper management to settle complaints is more effective than that by civil courts.

Consumers are served by an expeditious and less formalised procedure which grants them the chance to win without giving up any rights and running the risk to lose. Although only one-third of all admissible complaints are successful, the contribution of the procedure to the establishment of peaceful

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57 See the State laws in Schönfelder, *Deutsche Gesetze, Ergänzungsband*, loose-leaf, Beck, No. 104 *seq.*

58 *Jahresbericht 2005*, above at fn. 18, p. 33.

59 Directive 2002/65/EC of the European Parliament and of the Council of 23.9.2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002 L 271/16.

60 Verordnung über die Schlichtungsstelle für die Beilegung von Verbraucherstreitigkeiten bei Fernabsatzverträgen über Versicherungen of 16.2.2005, BGBl. I 257.

61 Directive 2002/92/EC of the European Parliament and of the Council of 9.12.2002 on insurance mediation, OJ 2003 L 9/3.

62 *Jahresbericht 2005*, above at fn. 18, p. 33.

relations between insurers and consumers should not be underestimated. First, many consumers who now call upon the Ombudsman most likely would not have initiated legal proceedings in a state court, but would simply have got annoyed and angry without any hope for a remedy. Second, the frequently informal and oral report on the legal situation by a neutral person may be a more effective means to foster the consumer's insight into the weakness of his or her position, a fact which may explain the comparatively high numbers of complaint withdrawals<sup>63</sup>.

It must however be stressed again that, similar to arbitration, the success of the institution depends very much on the respect and recognition awarded by the circles involved. Insurers must be prepared to comply with the Ombudsman's decisions, and policyholders must prefer a complaint lodged with the Ombudsman to a claim filed in a civil court. Thus, the authority of the institution is more unstable than that of the courts and must be reaffirmed from time to time. In this perspective, one should mention the merits of two persons who have contributed a lot to the success of the German Insurance Ombudsman: The former President of the Association of German Insurers, Dr. *Bernd Michaels*, has convinced the leading people of the insurance industry of the need of a shift in their attitude towards consumers. The prevailing view in the industry today considers consumer satisfaction as an important asset in the portfolio of every insurance company. The second person is the first holder of the office of the Insurance Ombudsman, Professor *Wolfgang Römer*, a former judge of the Federal Court, an independent mind and outstanding expert of insurance contract law who has used his great authority to the benefit of the institution.

## **6.2 A Model for Consumer Markets at Large?**

The success story of the Insurance Ombudsman will of course raise the question whether it wouldn't be possible to create a similar institution of general purview for all kinds of consumer disputes. Such a development is also suggested by the Scandinavian model. Both the Swedish Allmänna Reklamationsnämnd<sup>64</sup> and the Danish Forbrugerklagenævnet<sup>65</sup> have a basic competence for consumer disputes in general although some areas are specifically excepted.

But the Scandinavian model cannot simply be copied by extending the competence of the German Insurance Ombudsman to consumer disputes in general. First, it should be noted that the opinions of both the Danish and the Swedish institution are not binding on the professional whereas the German Insurance Ombudsman has decision-making powers as against the insurer. This decision-making power must be limited somehow, but it would hardly be conceivable to have one threshold for all sectors of the economy. Second, the different dimensions in Scandinavia and in Germany have to be considered. In

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63 *Jahresbericht 2005*, above at fn. 18, p. 47; thereafter the withdrawal rates in reference to admissible complaints were 19 % in 2003, 15 % in 2004 and after all still 11 % in 2005.

64 Peter Dopffel/Jens M. Scherpe, „*Grupptalan*“ – *Die Bündelung gleichgerichteter Interessen im schwedischen Recht*, in Jürgen Basedow *et al.*, above at fn. 4, p. 429, 437-439 with further references.

65 Scherpe, Jens M., above at fn. 2, p. 110 *seq.*

his outstanding dissertation on non-judicial settlement of consumer disputes, Jens Scherpe reports a number of about 2,500 insurance complaints and a little bit less than 5,000 general consumer complaints lodged in Denmark in 1999.<sup>66</sup> These disputes were settled by two separate bodies. As pointed out above, the German Insurance Ombudsman as a single organisation had to deal with about 11,000 complaints in 2005 and more than 18.000 complaints in 2006. We do not have precise knowledge of the number of consumer cases filed with German courts. But we know the number of civil proceedings initiated at the lowest level of the German court system; they amounted to 1.5 million in 2004.<sup>67</sup> Suppose that only one-third concerns consumer disputes; the handling of half a million cases would require an organisation that is probably entirely different from what we can find in the present models in Scandinavia or in the German Insurance Ombudsman.

Yet, the Scandinavian settlement mechanisms for consumer disputes have not only given guidance to the establishment of sectorial institutions in Germany, they will continue to serve as models in the future development of alternative dispute resolution in our country.

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<sup>66</sup> Scherpe, Jens M., above at fn. 2, p. 127 and 182.

<sup>67</sup> Bundesministerium der Justiz (German Federal Ministry of Justice), *Geschäftsentwicklung der Zivilsachen in der Eingangs- und Rechtsmittelinstanz*, available at “[www.bmj.bund.de](http://www.bmj.bund.de)” → Service → Statistiken → Geschäftsbelastungen bei Gerichten und Staatsanwaltschaften → Geschäftsentwicklung der Zivilsachen – Amts-, Land- und Oberlandesgerichte 1991-2004.