

Summary

The filter effect of extrajudicial procedures - An exploratory study

Reason for this study

In the Netherlands, in addition to the judiciary, there is a wide range of provisions for settling disputes with a more or less 'legal' character. These *extrajudicial dispute procedures* can precede an appeal to the courts. Examples include the objection procedure in administrative law, the rent assessment committee, consumer complaint boards, arbitration, etcetera.

Extrajudicial procedures can contribute to disputes being settled in the most appropriate manner ('customized dispute settlement'), and can contribute to an adequate selection process with respect to cases to be submitted to the courts.

This exploratory study is aimed at a specific aspect of extrajudicial settlement of disputes: the further referral of such disputes to the courts. The objective of this study project is to obtain an insight into the extent to which and the manner in which dispute procedures limit appeals to the court (filter effect). This way the project can offer reference points to improve the filter effect of dispute procedures and ultimately produce a more effective judiciary.

Definition of the problem

Which explanations can be identified for the filter effect of extrajudicial dispute procedures in civil and administrative law, to what extent are these explanations supported by empirical data, and for which topics would a follow-up study be useful? Extrajudicial dispute procedures are procedures in which persons or institutions with advisory or decision-making authority or with a facilitating role in a dispute are called in by the litigant, whether or not on a voluntary basis, prior to or instead of an appeal to the courts.

Only bipartite and tripartite dispute procedures have been studied. *Bipartite* dispute behaviour implies that the parties involved seek to settle a dispute together; in the event of *tripartite* dispute behaviour, an independent third party is involved.

The *filter effect* relates to limiting the appeals to the courts in terms of quantity. Within this study, we define the concept to only include that percentage of cases which *still* ends up in court *after* having been subject to an extrajudicial dispute procedure. The filter percentage can be calculated as follows:

$$[(\text{extrajudicial procedures} - \text{judicial procedures}) / \text{extrajudicial procedures}] * 100.$$

The study approach

First of all, *potential explanatory factors* for the filter effect have been identified and catalogued on the basis of a (theoretical) literature study, both on the basis of Dutch and international sources. This inventory shall be published separately, but for the purpose of this Cahier it is illustrated using briefly introduced hypotheses.

Subsequently, the explanations have been studied by means of empirical data; consisting of (1) an inventory of knowledge using a maximum amount of available dispute procedures and (2) case studies of 2 types of procedures: objection procedures in administrative law (on the basis of secondary literature) and three civil dispute procedures in the building industry: the Arbitration Board, the National Home Warranty

Institute (GIW) and the so-called Dispute Resolution Boards in large infrastructural works.

In order to compile the wide empirical knowledge base, an overview has been prepared of Dutch civil and administrative dispute procedures via Internet sources supplemented by means of literature and suggestions from experts. Data has been gathered per dispute procedure on e.g.: the scope of the procedure, the judgement type, the costs of the procedure, average duration, numbers and types per case, the way in which cases were disposed of and of course the filter effect. The data gathered applies to the 2000-2004 period, where possible.

The two case studies (and the differences between them) serve as an addition to the wide exploration and include descriptions of exactly *how* the two selected types of procedures operate.

Explanations for the filter effect

The hypotheses regarding the filter effect are based on the rational choice model. This means that explanations for dispute conduct are formulated in terms of *costs and proceeds of alternative proceedings*. Also, the choice to whether or not to take a case to court is an assessment between costs and proceeds. Not only does this involve financial or tangible costs, but also social or psychological 'costs' and 'proceeds'. The basic hypothesis of this study reads as follows:

- *The filter effect of an extrajudicial procedure increases as the net additional proceeds (additional costs — additional proceeds) of a judicial procedure are lower.*

The following hypothesis serves as an alternative:

- *The higher the costs of extrajudicial procedures, the lower the filter effect.*

The latter hypothesis is based on the thought that parties include the costs already incurred in an extrajudicial dispute procedure in the assessment to whether or not commence a judicial procedure. This is because parties feel they have passed 'the point of no return': too much has already been invested in an extrajudicial procedure to stop now.

In line with the basic and alternative hypotheses, a number of sub-hypotheses have been formulated. As far as the institutional context is concerned, we aim at the *features of the extrajudicial dispute procedure*. Here it concerns mainly proceeds arising from how *fair* the parties consider the procedure to be. The filter effect of an extrajudicial procedure is, among other things, anticipated to increase to the extent that: the outcome of the procedure is binding to a higher degree; there is a better opportunity to exchange information; the proceedings are not obligatory; the parties can exercise greater control on the process, the outcomes, the decision-making rules; and finally to the extent that the neutral third party is considered reliable and neutral.

As far as the *characteristics of the parties* are concerned, the filter effect is anticipated to be higher to the extent that they have less income at their disposal, participate in society to a lesser degree and do not have legal aid insurance: as such they are more likely to "give in". Also when parties are so-called one-shotters (mostly citizens rather than businesses) the filter effect is expected to be higher. A business can sometimes be prepared to commence a judicial procedure if it can generate a favourable precedent for the future.

Within the *social context* of the dispute parties, the network within which the parties participate is considered to be influential: e.g. how much does one party depend on the other and does he want to prevent further 'confrontation' (e.g. in a court case)?

Inventory of the dispute procedures

The empirical study is aimed at national procedures. Local dispute procedures, such as local ombudsmen or complaint procedures of individual businesses or branches have been not been taken into consideration.

During 2005, basic information was collected on features of 33 extrajudicial dispute procedures in the Netherlands¹.

By far the largest number of cases ends up in the objection procedure: tens of thousands each year. In the second largest procedure, the Rent Assessment Committee, the annual influx is 65,012. At the Foundation for Consumer Complaints Boards the influx is 11,830 and at the National Ombudsman 9,817. The influx in the procedure of the Advertisement Code Committee is 2,523, in registered mediation 2,810, in the Arbitration Board for the Building Industry 1,139 and in the National Home Warranty Institute 910. As far as the *type of dispute settlement* is concerned, the majority of the procedures include arbitration whether or not in combination with a binding advice. However, when it comes to the number of cases received, binding advice is by far the type of settlement represented most, followed by special procedures by, amongst others, the Dutch Equal Treatment Commission or the Advertisement Code Committee, then mediation and only then arbitration. Most arbitration procedures are aimed at the housing and infrastructural building *sectors*, the transport sectors and the IT sector. However, with regard to the number of cases received, rent and consumer cases and complaints regarding the government are most common (binding and non-binding advice).

Filter effect and explanations

The comprehensive inventory has demonstrated that the filter effect is known in 10 of the 33 procedures. Two out of those ten are large, clustered procedures: the many objection procedures in administrative law and the Rent Assessment Committee. The remainder concerns small, single procedures with no more than a couple of hundred cases received. For many of the extrajudicial dispute procedures that have been studied, no records are kept as to how often parties decide to bring a matter before the courts after all. Therefore, we can conclude that our knowledge on the scope of the filter effect of dispute procedures in the Netherlands is limited. (Nevertheless, literature has already produced a lot of information on the filter effect of various types of objection procedures in administrative law — by far the largest category of extrajudicial dispute procedures we know).

The average filter effect of the dispute procedures appears to be more than 90%. The filter effect hardly varies between the procedures.

The consequences of these findings are that the explanations offered in hypotheses can, for the time being, not be empirically tested in terms of quantitative strength.

Nevertheless, partly on the basis of the case studies of the administrative objection procedures and the procedures in the building industry, empirical indications have been found which support the plausibility of some of the hypotheses.

With regard to the *financial costs of judicial procedures*, studies in the field of the objection procedure demonstrate that the filter effect of the objection procedure increases as the costs of judicial procedures are higher and their additional proceeds are lower. Also, the case in the building industry clarifies that ultimately consumers do not

¹ Some of the 'procedures', such as the Foundation for Consumer Complaints Boards (SGC) or the Rent Assessment Committee include a large number of smaller procedures which are either grouped by individual topic (SGC) or grouped by region (Rent Assessment Committee). Others are single procedures, such the Government Joint Sectoral Committee.

appeal to the courts as they feel it is futile or because it is too much of a hassle. In the case of constructors this is worsened due to the long average duration of a judicial procedure.

It was assumed that the *tangible outcome* of a procedure generates certain proceeds for a party, which partly determines whether or not the issue is submitted to the courts.

Research into the objection procedure in administrative law shows that the outcome only explains a small part of the filter effect. The filter effect for objections that are unfounded or dismissed is still 80%, meaning that in most objection procedures with unfavourable outcomes, no judicial procedures are commenced either. Similar findings emerge in the case of building industry disputes.

The alternative hypothesis does not receive any support thus far: the empirical material leaves the provisional impression that the costs of an extrajudicial procedure are indeed included in the consideration to whether or not continue proceedings, yet they increase rather than decrease the threshold for a court case (they are added to the costs of judicial procedures). Particularly the most expensive procedures (mostly arbitration), in Euros, appear to have a higher filter effect compared to relatively low-cost procedures for the Rent Assessment Committee, Equal Treatment Commission (CGB), National Home Warranty Institute (GIW) and the Foundation for Consumer Complaints Boards (SGC).

Currently, little can be said on the influence of intangible *proceeds* from an extrajudicial procedure (parties' degree of control of and satisfaction with the procedure).

The wide empirical study produced too little information on the degree of *fairness* perceived by the parties in an extrajudicial procedure, to be able to formulate a general statement. The case study does to a degree clarify the matter. It appears to confirm that extrajudicial procedures that offer greater opportunity for information exchange and in which a neutral third party offers advice, have an increased filter effect.

The case study into the objection procedure in administrative law offers some support for the assumed link between the mandatory character of the extrajudicial procedure and the (lower) filter percentage.

Arbitration institutes report a relatively high filter effect. A plausible explanation for this is that after arbitration the courts can review this decision merely in terms of proceedings rather than contents. Furthermore, the courts can only test on limited grounds. This strongly reduces the surplus proceeds produced by an appeal to the courts (e.g. in terms of satisfaction and justice). This would support the basic hypothesis that the filter effect increases as the surplus proceeds from judicial procedures fall.

It appeared that extrajudicial dispute institutes hardly collect any useful information on the features of the dispute parties, such as their income, social participation, the network in which they participate or their mutual dependencies. In cases where this information *is* collected, it has so far proven impossible to make a connection between these features and the filter effect.

What topics would qualify for additional study to be useful?

From a scientific and policy-based point of view, study into extrajudicial dispute settlement would be relevant in terms of its scope alone. Compared to the judiciary, we know little of the parties who appeal to extrajudicial dispute institutes, of the nature of their disputes, the outcome they reach and whether they are satisfied. In order to answer these questions, a link-up can be sought with the various ('paths-to-justice') studies that

map out the dispute behaviour of natural and legal persons in a systematic, yet as broadly as possible manner.²

Research is particularly desirable in the following:

- (a) Features of extrajudicial procedures such as the degree in which information can be exchanged between parties, and the neutrality of a third party;
- (b) The users of the various extrajudicial procedures (characteristics of the parties);
- (c) Research into the *motives* of dispute parties to whether or not appeal.

Further research into this can produce valuable insights with regard to the organisation of effective dispute procedures.

Policy recommendations

Finally, on the basis of this study, a number of policy recommendations can be made. Once an extrajudicial procedure has started, the percentage of disputes ending up in court is low. On the basis of these findings, it is advisable to continue current policy initiatives to increase access to extrajudicial procedures (e.g. referring to mediation) and to expand and include other forms of dispute settlement.

In order to increase the satisfaction and success rate of extrajudicial procedures, a greater degree of information exchange should take place in the initial phase, whilst sufficient neutrality and independence of 'a third party' in the settlement of a dispute (e.g. arbiter, mediator, binding advisor) must be promoted. This stimulates the sense of fairness among the parties.

For some extrajudicial procedures there may be room to improve the binding character of the decisions, so that the parties are to a greater degree bound to the outcomes and so that more final judgments are passed.

² These paths-to-justice studies (in Dutch: *Geschildbeslechtingdelta's*) provide a better understanding of the operation of dispute procedures from the parties' perspective. In addition to the studies on natural and legal persons, paths-to-justice-studies on persons of a foreign heritage and businesses are also currently being prepared.