Summary

Dispute resolution behaviour

An overview of explanations

The Ministry of Justice aims to provide a sufficient offer of accessible possibilities for solutions and also provides information regarding those possibilities. In the endeavour to achieve a workable and decisive legal system, citizens are encouraged in various ways to take personal responsibility during the process of settling civil law and administrative law disputes. This is evident in the implementation of such policy measures as the promotion of (the referral to) mediation and the increase of court fees. The line of reasoning underlying these measures is that, in the event of a (potential) legal dispute, parties will make their own assessment of costs and benefits.

The '*Geschilbeslechtingsdelta 2003*' [Disputes Settlement Delta 2003], among other sources, has shown that the financial costs and benefits are but one aspect of the individual assessment on which the choice for a certain kind of dispute settlement is based. It is evident that the socio-psychological resources that are available to the parties play an important part in the initiation of and successful conclusion of consultations.

Despite the knowledge gained from the Disputes Settlement Delta and other research, there is currently no overall image of the relevant aspects of the assessment. Not because so little is known, but rather because the available theoretical and empirical knowledge has not yet been integrated into an overall overview. This study addresses this lack of knowledge by bringing together, in a structured manner, an inventory of the existing expertise of the legal sciences concerning aspects that are of influence on dispute behaviour.

At the basis of this inventory lie the *individual* terms of reference. In the same manner as is presented in the Disputes Settlement Delta study, it is assumed that individual parties to proceedings, weigh up – more or less consciously – the *costs and benefits* when determining their behaviour in the dispute settlement, in which they not only include material factors, but also social and emotional ones. 'Fragments' of statements from three different disciplines were integrated with the aid of these terms of reference. These three disciplines are: economics of law, sociology of law and psychology of law.
We subsequently applied the identified factors to the following three 'decision moments' – inspired by the Disputes Settlement Delta study – that the individual parties could face during the dispute proceedings:

1 engaging legal aid or 'do it yourself' (DIY);
2 entering into consultation with the other party and/or reaching agreement – either or not through the services of a mediator;
3 leaving the decision to an independent third party.

From the literature, we then identified the relevant factors for each decision moment. In doing so, a distinction was made between macro and micro factors:

procedural factors on the one hand, and dispute and individual characteristics on the other hand. The annex to the investigation contains an outline overview, in which a '+' or '-' indicates the general direction of the factors expected in theory and/or proven empirically. No statements, however, can be made with respect to the precise direction of some influences on specific decision moments.

1 Engaging legal aid

The decision as to whether parties engage legal aid depends first and foremost on the associated cost, and the reimbursement of those costs that they will be able to collect. These costs include information gathering and lawyer's fees. It appears that these costs do, to some extent, have a limiting effect on the number of times legal aid is engaged. Allowances or compensations in respect of those costs include legal aid grants and reduction of the personal contribution. The more citizens are provided with more – and better – information on available legal assistance, the more they will be able to call upon the legal aid facilities.

In addition to these system characteristics, characteristics at the dispute and individual levels also play a role. The appeal to legal aid increases as the importance of the case for a party increases. Parties from higher occupational groups and with a higher income engage legal aid more often. However, parties from lower income groups also do so because of their right to assignment of counsel. In addition, access to legal expenses insurance has a positive influence on the appeal to legal aid. It is unclear whether social skills contribute to a person's choice to appeal to legal aid; a higher socio-economic status does mean that better use is made of legal aid.

According to the literature, it may very well be that major companies and organisations will engage legal aid less frequently in the future, because they often – to an increasing degree – have in-house legal expertise in the form of, for example, a legal department.

Finally, legal aid can be of influence with respect to the further course of the dispute. Persons who engage the services of lawyers or other means of legal aid more often start official proceedings than DIY-ers. A selection effect may be at work here as legal aid is more often engaged if the case is of great importance to the parties.

2 Mutual consultation/ mediation and reaching agreement

The initiation and successful conclusion of consultations is first and foremost influenced by the so-called *deterrent effect* of the courts. Parties in general choose a certain and short-term solution rather than expensive – and hard to control – proceedings at a later stage. Parties choose mediation for similar reasons: they place great value on the assumption that it would better for the future relationship with the other party. The choice of engaging a third party to supervise the consultations is promoted by the accessibility and affordability of the mediation *offer* (for example: referrals, duration and rates) at system level. Many of the factors that influence consultations and/or their successful conclusion, however, lie at the *dispute* level. There is often an inequality of information between the parties: one party does not have complete knowledge of the strength of the other party's position. As more information is exchanged during the consultation phase, the chances of agreement increase, according to

the literature. This is because the parties are better able to assess their chances, which reduces exaggerated optimism and bluffing. The mediator can also stimulate the exchange of information between the parties. In socio-economic literature, a further expectation is expressed; this concerns the theory that the more the relationship between the parties becomes firmly embedded in a network of interested parties or organisations, the more they will want to prevent damage to their reputation in official proceedings – a so-called 'reputation effect'. In such a case the parties will want to settle the matter in mutual consultation and without drawing any attention. These network effects, however, have not (yet) been empirically confirmed. It is not entirely clear whether setting a deadline for the solution of a dispute helps to trigger and successfully conclude consultations. Deadlines that are too strict could stifle consultations, but reasonable deadlines *can* bring parties together. Differences between parties to a dispute – for example differences of a cultural nature – have a restricting effect on the initiation of and successful conclusion of consultations. According to the literature, the nature of the relationship between the parties is also of importance. If there is greater interdependency with respect to resources, such as friendship or turnover, parties will more often attempt to reach agreement jointly. This is mainly because the chances of maintaining or repairing the relationship become significantly smaller after the parties have engaged in legal proceedings. Moreover, it is expected that, as the importance of the case increases, consultation will less often lead to agreement. Parties will make more efforts to win the case as its importance increases.
Factors at the level of individual *parties* are also quite important to initiating and successfully concluding consultations. Persons with a higher socio-economic status and more social skills are better able to reach agreement during consultations with the opposing party. Personality features also play a role. Consultation takes place more often and is more often successful if one or both parties adopt a cooperative attitude, and, moreover, wish to make cognitive efforts to reach agreement.

3 Starting or refraining from legal proceedings

Only a small percentage of disputes result in legal proceedings, as is shown by the Dispute Settlement Delta study. Which factors play a role in the determination to start proceedings? At the *procedural level,* the *cost* factor is the first and foremost consideration; this involves the gathering of information, furnishing of proof, (lead) time and energy that have to be invested in legal proceedings. These costs have a restrictive effect on demand. Costs are related to the accessibility of the offer of procedures. Economic insights confirm that an ample and accessible offer of procedures actually leads to an increased use of those procedures. Allowances or compensation in the shape of subsidies and insurances help in that respect. On the grounds of recent psychological insights, however, doubts are raised concerning this increased use: are parties sufficiently familiar with the procedures to be confident enough to start them? In addition, procedures can involve costs related to the loss of reputation, the loss of a business relation and emotional costs. Such factors can play a role in the considerations that are weighed up in the decision to start legal proceedings. These immaterial costs will be higher for procedures such as arbitration or a court hearing than for mutual consultation and mediation.

The possible *benefits* of legal proceedings are to be found in the extent to which the parties' sense of justice is satisfied, among other things. This is related to the extent to which legal proceedings can offer a measure of control, for example by allowing parties to substantiate their positions. Other benefits are enforceable orders and the creation of case law for similar cases in the future.
In addition to the many factors involved at the level of the procedure, the characteristics at the *level of the dispute* also play a role in the decision to start legal proceedings. The importance of a number of these dispute characteristics has been substantiated by the research into actual case studies from legal practice. According to the Dispute Settlement Delta study, official proceedings are more often started when the issue concerns family matters or real estate. The importance of a case also plays a role: the greater the importance of the case and the interests involved, the more often proceedings will be initiated. Other factors at dispute level have been derived mainly from theoretical insights; the empirical evidence is rather limited in this respect. Parties that are firmly embedded in a supportive social network will sooner choose mutual consultation and mediation rather than extrajudicial procedures or court proceedings. The more close-knit the network, the less likely that the case will become 'juridified'. This assumption is derived from, among other things, the reputation mechanism: the results of official proceedings and decisions may attract publicity, which many parties would rather avoid. Secondly, differences of interpretation between the parties regarding the interpretation of a dispute – for example because of cultural backgrounds – will lead to a greater demand for legal proceedings. Thirdly, a shared history between the parties is of importance: the more the parties depend upon each other for matters such as trade or friendship, the less likely they will be to choose court or other proceedings, and the more likely they will be to choose consultation or mediation. As a final factor that is evident at the dispute level, the consideration is presented that the success of extrajudicial procedures or of reaching agreement can be promoted by setting reasonable deadlines. These would trigger parties to avoid legal proceedings.
The final level of characteristics that play a (potential) role in the initiation of procedures is the *level of individual characteristics* of the parties involved. There are a wide range of factors that clearly induce people to start legal proceedings: so-called 'competitive' motivation, being middle-aged, overoptimism and a preference for justice. Factors that, on the other hand, may inhibit the use of procedures are: insecurity and an aversion to risk, and a cooperative motivation towards the solution of the dispute.

The factors that parties take into account in their assessments of whether or not to start court proceedings are highly similar to the factors that determine the appeal to *extrajudicial* procedures. The factors that entail costs (such as time, energy, loss of reputation, losing business relations) and the ones that generate benefits (verification, treatment by the arbitrator or the court) are relevant to extrajudicial procedures as well as to formal court proceedings. The difference mainly lies in the relative weight of these factors. The costs of court proceedings in terms of representation and loss of reputation will, thus, be higher than the costs of extrajudicial procedures.

The question, which of the above-mentioned factors influences dispute behaviour most strongly cannot be answered satisfactorily on the basis of the litera-

ture. It is clear that the relative weight of the factors will vary strongly between the individual parties.