

## **PRIVATISING CONSUMER COMPLAINTS**

### **An Analysis of a Patient's Complaints Procedure in the Netherlands**

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#### **ABSTRACT**

*This article analyzes a type of ADR seeking to resolve complaints of consumers and in particular of hospital patients. In doing so, it aims to establish how this type of procedure differs from "normal" litigation and why it proves to be successful. It aims to show that its success is not only due to practical considerations, such as time, money and informality but that there is also a more principled reason. This reason relates to the appeal of the citizen's self-empowerment in an age where individuals constantly move from the public realm as citizens towards the private realm as consumers.*

#### **ÖZET**

*Bu makale, Hollanda'daki tüketicilerin, özellikle de hasta şikâyetlerinin çözümlenmesinde uygulanmakta olan bir alternatif anlaşmazlık çözümü (ADR) türünü incelemektedir. Bunu yaparken, bu tarz anlaşmazlıkların nasıl diğer "normal"*

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*anlaşmazlıklardan farklı olduğunu ve de neden başarılı olduğunu göstermeyi amaçlamaktadır. Ayrıca, uygulanan yöntemin başarısının sadece uygulanmasındaki zaman, para ve gayri resmiyetten kaynaklanan kolaylıktan dolayı olmadığını, aynı zamanda başarının daha temel bir sebepten kaynaklandığını ispatlamayı amaçlamaktadır. Günümüzde, anlaşmazlıkların çözümünde dikkatin, kamusal çözümlerden çok, kişilerin kendileri adına bireysel girişimde bulunmalarına yönelmekte olmasıyla açıklanabilir. Bunun nedeni, bireylerin biteviye kamu dünyasının vatandaşları olmaktan özel dünyaların tüketicileri olmaya geçtikleri bir çağda, güçlenme istekleriyle bağlantılıdır.*

### **KEYWORDS**

*Private law, Consumer rights, ADR, Mediation, Medical law.*

### **ANAHTAR KELİMELER**

*Özel Hukuk, Tüketici Hakları, Uyuşmazlıkların Alternatif Çözümü, Arabuluculuk, Sağlık Hukuku.*

### **Introduction**

The past decade or so has seen an increasing development in the use of alternative dispute mechanisms, commonly referred to as ADR. This development has also taken place in the Netherlands. ADR includes arbitration, mediation, binding advice and all kinds of private complaints and dispute procedures. What they have in common is that they operate in the shadow of law and the judicial process.<sup>1</sup> It makes them private dispute mechanisms that often deal with conflicts that have been traditionally regarded to be of a legal nature that would normally be resolved in public courts.

This article analyzes a particular private initiative that facilitates resolution of consumer conflicts in the Netherlands: The Dispute Commissions for Consumer Affairs Trust. The Trust facilitates the establishment of forums in which consumer conflicts may be resolved. These forums are referred to as

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<sup>1</sup> The law may have set up regulatory frameworks for some, such as, for example, arbitration; the Dutch Code of Civil Procedure outlines in Book 4 the arbitration procedure, including rules on the arbitration agreement, the procedure and the arbitral decision. In respect of binding advice procedures, see: DUTCH CODE ON CIVIL PROCEDURE, art. 7:900. Both are analysed in detail in H.J. SNIJDERS, M. YNZONIDES & G.J. MEIER, *Nederlands Burgerlijk Procesrecht* (Dutch civil procedure), Kluwer, Deventer, 2002, 2<sup>nd</sup> ed, p. 341-359. Or the law provides non-binding guidelines, for example: COMMISSION RECOMMENDATION 98/257 of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes O.J. (L115) 31-34.

dispute commissions and have been set up for some 30 services and products sectors. This article focuses on the Dispute Commission for Hospitals in particular, although most of the observations here apply equally to other dispute commissions.<sup>2</sup>

The analysis includes an examination of the possible reasons why people resort to ADR. A review of the Dutch literature and other empirical research<sup>3</sup> shows that the question of why people resort to ADR has a practical argument – ADR is regarded as cheap, quick, private, informal and relatively undemanding – and a more principled argument. The article develops this latter argument. It suggests that ADR is perhaps an expression of new ways of governance where an emphasis is put citizen self-empowerment: citizens seeking for themselves different forums within which they search for solutions or resolutions of conflicts that would traditionally be described as conflicts of a legal nature that would normally be resolved in judicial forums. Citizens now move from the traditional public realm (that of the state and its courts) to the private realm (that of society with its alternative dispute resolution forums). The state, of which the court system is a most vivid element, has become one structure among many others in society, as much as people act out different roles in society: citizen, consumer, worker, family member, neighbour, etc. The state's function should to be to facilitate people acting out their roles: people are not free from government interference but are free, through state interference, to give shape to their own lives.<sup>4</sup>

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<sup>2</sup> One reason for this choice is that this procedure has been subject to prior research that includes empirical data; see N. DOORNBOS & P.P.M. VAN REIJSEN, *De Geschillencommissie Ziekenhuizen – Een eenvoudige procedure voor schadeclaims* (The Conflicts Commission for Hospitals – A Simple Procedure for Damage Claims), Koninklijke Vermande, Lelystad, 2000. Another reason is that the procedure also raises questions about other procedures, such as the quasi-judicial disciplinary procedure of the medical profession, and the use of internal hospital protocols, which may be seen as an example of the privatisation of law. It may, subsequently, give some indication about the status of the medical profession. These are questions though for further research and will not be addressed in this article.

<sup>3</sup> The empirical research includes the recent study by the WODC (Centre for Scientific Research and Documentation) on the “conflict resolution delta”. See: B.C.J. VAN VELTHOVEN & M.J. TER VOERT, *De Geschillenbeslechtingdelta* (The Conflict Resolution Delta), Boom Juridische Uitgevers, Den Haag, 2004. The research results were subject of a special of the *Nederlands Juristenblad* (Dutch Law Times); see: “Over Rechtshulpgolven – De geschillenbeslechtingdelta en juridische problemen”, *Nederlands Juristenblad* Vol. 80 Nr. 1, 2005.

<sup>4</sup> See also H. BOUTELLIER, *De Veiligheidsutopie* (The Utopia of Security), Boom Juridische Uitgevers, Den Haag, 2004, p. 2-3.

The article first sets out the role and function of the Dispute Commissions for Consumer Affairs Trust. It emphasizes its facilitating role and its place, as a private initiative, within the shadow of the law and state authority. The article then examines the operation of the Dispute Commission for Hospitals. Relying, in part, on empirical data, it seeks to sketch a picture as to how the commission operates and how it differs from litigation. The examination provides the context within which the more general question can be answered as to why people resort to ADR, what its perceived advantages are, and what this means for the operation and function of the law and legal procedures in the Netherlands.

The article is written from a Dutch perspective and intends to be informative about developments in that jurisdiction.<sup>5</sup>

### *The Dispute Commissions for Consumer Affairs Trust*

The Dispute Commissions for Consumer Affairs Trust was set up in 1970 as a private initiative of the Dutch Consumers' Association and the Royal Dutch Touring Club, together with representative organisations of services and products sectors.<sup>6</sup> The Trust facilitates the creation of forums to resolve conflicts that arise from complaints of consumers about the delivery of products or services in particular sectors of enterprise. The aim is to come to a resolution of the conflict in a speedy, inexpensive and undemanding fashion. These forums

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<sup>5</sup> It must be borne in mind that the Dutch legal system is a civil law legal system (as opposed to a common law system). It is akin to the French and German systems. Thus, it knows a codified system of laws, supplemented by case law as the two primary sources of law. It also means that the rules of precedence carry less formal authority, although practice shows that decisions of the Dutch Supreme Court are considered to be authoritative statements of law; lower courts feel bound by them.

The court system (in respect of civil matters) knows three levels. The first level consists of the District Court, which has full jurisdiction to hear civil disputes. The District Court usually sits with a panel of three judges. However, within its structure a small claims tribunal is incorporated, which has a jurisdictional limit of €5.000,00 and is presided over by a single judge. The second level is the appellate level, the Courts of Appeal, hearing cases *ab initio*. Finally, the Supreme Court is the court of final appeal and is concerned solely with points of law and procedure.

Accessible literature on the Dutch legal system and its culture include: FRED J. BRUINSMA Dutch Legal Culture, *Ars Aequi*, Nijmegen, 2003, 2<sup>nd</sup> ed. and S. TAEKEMA (ed.) *Understanding Dutch Law*, Boom Juridische Uitgevers, Den Haag, 2004.

<sup>6</sup> These and other details are taken from the Trust's 2002 Annual Report; see STICHTING GESCHILLEN-COMMISSIES CONSUMENTENZAKEN, *Jaarverslag 2002*, Den Haag, 2003. (Hereinafter: Annual Report 2002).

are referred to as dispute commissions and have been set up in relation to complaints arising out of the delivery of, among others, legal services, postal services, public transport services, recreational services and hospital services.<sup>7</sup>

The Trust will establish a specific dispute commission if certain criteria are met. The first is that the representative organisation expects the commission to entertain at least 25 complaints per annum. Furthermore, the representative organisation must be properly organised and willing to share the financial costs. It must provide consumers with proper terms and conditions in respect of the delivery of goods and products.<sup>8</sup> A typical dispute commission sits as a panel of three members. The chairman or chairwoman is a lawyer,<sup>9</sup> proposed by the Trust. The other members are proposed by, respectively, the Dutch Consumers' Association and the representative organisation of the service sector involved.<sup>10</sup> These members need not have any formal qualifications but are required to be individuals of good standing.<sup>11</sup> The members are usually people with relevant experience and expertise.

### **OPERATING IN THE SHADOW OF THE LAW**

Although the Trust and the dispute commissions are private initiatives of dispute resolution, it cannot be said that the state has no control over their operations. Indeed, the Trust and the commissions operate within the shadow of the law and state authority in respect of (i) the legal status of decisions of the dispute commission, (ii) the interest of the Department of Justice in the Trust, and (iii) the interest at European Union level in ADR generally.

#### *The binding advice procedures*

The decisions of a commission are referred to as 'binding advice'. Binding advice procedures are incorporated in the Dutch Civil Code, art. 7:900. A

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<sup>7</sup> A full list of commissions (36 in total now) is available at/ <http://www.sgc.nl/Documenten/afbeeldingen/Jaarverslag%202006%20def.pdf> (last visited Jun. 12, 2007).

<sup>8</sup> Ideally, these terms and conditions are formulated after consultation with the representative and consumer organisations, which may take place under the auspices of the Socio-Economic Council's coordination group on self-regulation consultations, which has drafted a guiding protocol (Protocol Algemene Voorwaarden (Protocol General Terms and Conditions)). See Annual Report 2002, p. 9.

<sup>9</sup> This person need not to be a practitioner but must hold a law degree.

<sup>10</sup> In three Dispute Commissions, the second member is proposed by the Royal Dutch Touring Club. These are Dispute Commissions address the automobile, travel and recreation sectors.

<sup>11</sup> A Dispute Commission can draw on more members to set up a commission of three.

binding advice is regarded as a specific contract in which the parties accept the binding nature of the determination of a dispute, either made by themselves or a third party. In this sense, the term advice may be misleading; the decision is a contractually-binding determination.<sup>12</sup> Binding advice, such as given by dispute commissions under auspices of the Trust, are regarded as *institutional* binding advice rather than binding advice *ad hoc*. Submission by parties to institutionalized binding advice procedures is often part of a standard form contract that governs the relationship between the parties.<sup>13</sup>

#### *The Minister's enthusiasm*

When the Trust was set up in 1970, it operated in the absence of any formal governmental participation or control. In the last decade or so, this has changed. The Department of Justice has shown an increasing interest in ADR and in the operation of the dispute commissions in particular. Thus, the Trust receives a subsidy from the Department of Justice, allowing it to keep the complaint fees low, thereby enabling easy access to a dispute commission for consumers.<sup>14</sup> The Department of Justice has also issued "Recognition Rules for Dispute Commissions Consumer Complaints" listing criteria commissions must fulfill to obtain subsidy and official (but non-statutory) recognition. Furthermore, the Department is considering carrying out an evaluation of the Trust's operations.<sup>15</sup>

#### *European dimension*

Consumer protection is an essential part of European Union law and policy. ADR is regarded as a consumer issue and has prompted the drafting of the EC recommendation on the principles applicable to bodies responsible for out-of-court settlement of consumer disputes.<sup>16</sup> The recommendation sets out

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<sup>12</sup> See also SNIJDERS, YNZONIDES & MEIER, 2002, p. 359.

<sup>13</sup> Cf. DUTCH CIVIL CODE, art. 6:236 *sub n*.

<sup>14</sup> See Annual Report 2002, p. 10.

<sup>15</sup> However, at the time of writing this article, it remains unclear if and when the evaluation of the Trust will take place. Individual dispute commissions have been evaluated such as the Dispute Commission for Hospitals; see/DOORNBOS & VAN REIJSEN, *supra* note 2.

<sup>16</sup> See COMMISSION RECOMMENDATION 98/257 of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes O.J. (L115) 31-34 [hereinafter the RECOMMENDATION]. A recommendation is a non-binding instrument, which may provide a basis for further legislation. Member states may choose to be guided by its contents, transposing it into national law and policy. The relevant recommendation arose out of a European Parliament resolution of 14 November 1996 on a Commissions communication regarding an action plan on consumer access to justice and the settlement of consumer disputes in the internal market OJ (C 362) 275. This communication was later finalized in a "Communication From the

minimum criteria that refer to the independence of the dispute settlement body, the transparency of the procedure, the adversarial principle, effectiveness, legality, liberty and representation.

The independence of this body will guarantee impartiality, according to section I of the Recommendation, such as the selection of members that possess the requisite ability, experience, competence, and duration of office. If the body is a collegiate body, its members must be representative of both consumer and professional organizations. In respect to transparency, the availability of relevant information to any person that requests such information is deemed vital.<sup>17</sup> Furthermore, it is recommended that the body publish the decisions in an annual report, to allow easy evaluation.<sup>18</sup> The procedure must be effective; that means that the procedures should not impose an *obligation* of legal representation,<sup>19</sup> should be free of charge or subject to only a moderate fee, and should be speedy. Furthermore, the body should be able to play an active role in settling the dispute.<sup>20</sup>

The hearing must be based on the basic principles of natural justice and fair procedure. The procedure must follow the adversarial principle, allowing both parties to state their case, including expert statements.<sup>21</sup> The procedural rules

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Commission on the Widening of Consumer Access to Alternative Dispute Resolution” (COM/2001/0161/FINAL (not published in O.J.)). It was drafted considering the apparent need for out-of-court dispute settlement due to the discrepancy between the economic value at stake and the cost of judicial procedures (as well as the complexity of such procedures). These factors may deter consumers from enforcing their rights. The above-mentioned “Recognition Rules” were in part inspired by the RECOMMENDATION.

<sup>17</sup> This information refers to the description of the dispute which may be referred to the dispute settlement body, the rules governing this referral as well as the rules governing the procedure, the possible costs, the type of rules that serve as basis for the body's decisions, such as for example legal provisions, codes of conduct, etc., the decision-making arrangements and the legal force of the decision that will be made.

<sup>18</sup> See section II of the RECOMMENDATION.

<sup>19</sup> In the Netherlands, and some other EU Member States, the principle exists that litigants must avail of legal representation in civil procedures. The argument goes that the “equality of arms” principle demands this. On mandatory legal representation, see: SNIJDERS, YNZONIDES & MEIER, 2002, p. 101. This principle is regulated under the DUTCH CODE OF CIVIL PROCEDURE, art. 79 section 2. The parties in out-of-court settlement procedures cannot be prevented from obtaining (legal) representation; see section IV of the RECOMMENDATION.

<sup>20</sup> See section IV of the RECOMMENDATION.

<sup>21</sup> *Ibid.*, section III.

cannot deprive the consumer of the protection afforded by mandatory provisions of the law.<sup>22</sup> This also means that the decision of the body is binding only insofar that the parties have been properly informed of the binding nature of any decision and have accepted this.<sup>23</sup>

### THE DISPUTE COMMISSION FOR HOSPITALS

The analysis of the procedure before the Dispute Commission for Hospitals shows that the criteria as set out in the Recommendation have been followed. However, this is not what will be central in the analysis of the procedure. Rather, the analysis emphasizes how the procedure itself is conducted within the framework of fair procedure. The procedure illustrates some of the practical advantages of ADR, demonstrates how it differs from litigation and how these differences must be evaluated, leading to a discussion of the principal argument, as introduced above. The analysis in this paragraph looks at the submission of a complaint, the nature of the oral hearing, the use of in-house skill and expertise, and the manner how decisions are reached.

#### *Jurisdiction*

Under the Trust's auspices, the Dispute Commission for Hospitals was established in 1996.<sup>24</sup> About 90% of all general hospitals, as well as more specialised health care centers, including dental care centers, have subscribed to the commission, accepting its jurisdiction.<sup>25</sup> The Trust appoints the members to the commission, including a chairperson. Although generally a dispute panel of three persons usually hears a complaint, the Dispute Commission for Hospitals sits with five members. The members are proposed by the relevant interest groups; in this case the Dutch Consumers' Association, the NVZ Society of Hospitals and the Royal Dutch Medical Association.<sup>26</sup> Thus, the panel sits with five persons: a lawyer as chairperson, two members who usually have relevant medical experience and expertise, and two lay members. The imbalance of

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<sup>22</sup> *Ibid.*, section V. (Consumers cannot be barred from taking legal proceedings.)

<sup>23</sup> *Ibid.*, section VI.

<sup>24</sup> It was initially set up as an experiment. After an evaluation of the operations of the commission, conducted upon the request of the Department of Health, the commission was set up on a permanent basis; see: DOORNBOS & VAN REIJSSEN, 2000.

<sup>25</sup> Academic hospitals are as of yet excluded from membership. See Annual Report 2002, p. 109.

<sup>26</sup> Since the commission consists of five persons, the commission draws from a large pool of persons who may sit on a commission panel. One aim is to retain expertise within the commission rather than having to rely on outside expertise. See: DOORNBOS & VAN REIJSSEN, 2000, p.74.

specialist knowledge, which the constitution of the panel implies, will be addressed later.

The jurisdiction of the commission is limited to complaints valued at no more than €5,000.00 and concerns either personal injury or damage to property.<sup>27</sup> The monetary limit corresponds to the jurisdictional limit of the small claims division of the district court, the court of first instance in the Netherlands.<sup>28</sup> This makes the commission very large in comparison to the small claims division that sits with a single judge, and even in comparison to normal civil litigation in first instance, where there is usually a panel of three judges. The reason for the existence of such a large panel is, according to Doornbos & Van Reijssen, that the Trust thought it important that each time all the relevant interest groups should be represented.<sup>29</sup> The commission does not entertain complaints that are, or have been, subject to civil litigation.<sup>30</sup> In addition, the commission will only entertain a complaint after an internal settlement procedure between patient and hospital has failed. Consequently, the procedure facilitates, or forces, the parties to first deal with the complaint/conflict by themselves.<sup>31</sup>

#### *The procedure – submitting a complaint*

The procedure commences with the patient notifying the commission of his intention to start a procedure.<sup>32</sup> The patient will be asked to submit relevant

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<sup>27</sup> See Rule 3 of REGLEMENT GESCHILLENCOMMISSIE ZIEKENHUIZEN (RULES OF THE DISPUTE COMMISSION FOR HOSPITALS) [hereinafter THE RULES]. THE RULES can be accessed through Internet: <<http://www.sgc.nl/print.asp?cat=Ziekenhuizen&commissie=29>> 12.06.2007.

<sup>28</sup> Cf. DUTCH CODE ON CIVIL PROCEDURE, art. 93.

<sup>29</sup> See DOORNBOS & VAN REIJSEN, 2000, p. 43. The authors note that practical experience has taught the commission members that cases should and could be heard by a commission of three.

<sup>30</sup> See Rule 6 of THE RULES.

<sup>31</sup> *Id.*, Rule 5

<sup>32</sup> The commission will not entertain a complaint if it has not been submitted in writing to the hospital within a period of five years from the day the patient has become aware of the damage or injury. The idea is that the hospital will first deal with the complaint itself. It is expected to do so within a period of three months. If this period has elapsed the complaint is deemed to have been unsatisfactorily resolved and the patient can submit the complaint to the commission. He must do so within a period of three months. (*See*: rule 5 of THE RULES.)

details,<sup>33</sup> and to pay the complaint fee.<sup>34</sup> He must do so within a month.<sup>35</sup> The patient either indicates the amount of damages he seeks, or requests the commission to determine this. The patient must consent to the binding nature of the decision as well as to the disclosure by the hospital of all relevant information to the commission.<sup>36</sup> Having received the relevant information, the commission will notify the hospital, requesting it to respond within a month to the complaint and requesting it to notify the relevant doctor or other health care provider of the complaint. This response is communicated to the patient who is asked to react to it within two weeks.<sup>37</sup> The commission may seek relevant information itself, appointing an expert for example to draw up a report.<sup>38</sup> All relevant information is shared between the parties and the commission.

The Rules seem to imply, in particular Rule 14, that the complaints procedure is conducted predominantly in writing.<sup>39</sup> An oral hearing would not seem to be the general rule. Indeed, the Rules do not give any guidance as to how to conduct such a hearing. Rule 14 merely states that the commission will determine date, time and location, that parties may be represented or assisted by others and that they may call upon witnesses and/or experts. However, the empirical research done by Doornbos & Van Reijssen shows that in practice the oral hearing occupies a central position in the procedure. From their findings the manner in which the oral hearing is conducted can be outlined.<sup>40</sup>

### *The oral hearing*

The oral hearing usually takes up to about 40 minutes. The commission's secretary brings in the parties from the waiting room. The chairperson introduces the parties and they all sit at an oval table. The chairperson summarises the complaint and the state of affairs chronologically. The

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<sup>33</sup> Rule 8 section 1 of THE RULES. Relevant details include details about the parties, the nature of the event or procedure that caused the damage, the nature of the damage, costs incurred and how the hospital has initially dealt with the complaint.

<sup>34</sup> *Id.*, Rule 9, Section 1.

<sup>35</sup> *Id.*, Rule 10.

<sup>36</sup> *id.*, Rule 8, Section 2.

<sup>37</sup> *Id.*, Rule 13.

<sup>38</sup> *Id.*, Rule 15.

<sup>39</sup> *Id.*, Rule 14, Section 2. It states that "if the Commission deems it necessary" an oral hearing may be held.

<sup>40</sup> *See*: DOORNBOS & VAN REIJSEN, 2000, p. 61.

chairperson maintains strict control over the procedure and, in particular, who talks when. The aim is for the parties to enter into a dialogue. This idea of dialogue is crucial to the operation of the commission.<sup>41</sup> The inquisitive nature of the hearing facilitates this. All commission members, particularly those with medical knowledge, ask questions. The manner of questioning is meant to clarify as much as possible any difficulty the complainant may have. It explains the preference of the commission to have the parties speak for themselves rather than through their representatives. The commission wants to avoid jargon or have the hearing be transformed into a legal, adversarial debate.<sup>42</sup> This corresponds to the idea that, although the complaint is based on a pecuniary remedy, the hearing facilitates other goals complainants may have when starting the procedure, such as reconciliation, clarity, transparency, apology, etc.

### *Skill and expertise*

As stated *supra*, the commission sits with five members, two of whom have medical skill and expertise. The commission can, consequently, rely on in-house expertise, which facilitates the aim of the procedure. If necessary, and the in-house expertise is not sufficient, the commission may resort to external experts who may be asked to report on the matter. Research, though, suggests that the use of external experts is minimal.<sup>43</sup>

It is valid to suggest that there is a risk that the medically-trained members of the commission are continuously expected to be able to evaluate the medical aspects of the complaint and, by implication, dominate the procedure and the contents of the binding advice. It may make the other lay members, including the chairperson, too dependent on the medically-skilled members. In practice, the lay members consider this not to be a problem.<sup>44</sup> Another problem may be that, since they are usually retired doctors, the expert members may not be up-to-date with new developments in medicine and health care. The empirical research shows that this is not perceived as problematic either. The specialist members appear to maintain a wide informal network, members of which they consult, without disclosing the details of the complaint.<sup>45</sup>

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<sup>41</sup> Indeed, non-appearance, particularly by the hospital, works against the hospital; see DOORNBOS & VAN REIJSEN, 2000, p. 87-88.

<sup>42</sup> The commission members also come to the aid of the parties (in particular the patient) if need be. In this sense, they may even take the role as if they were legal representatives of either of the parties.

<sup>43</sup> See DOORNBOS & VAN REIJSEN, *supra* note 2, p. 74.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

It is suggested here that the availability of in-house expertise is one of the characteristic features of any dispute commission set up by the Trust, crucial to the aim: the speedy, cheap and undemanding resolution of a complaint. So long as these members are aware of their position and are confronted with constructive critique by their fellow members, it is an efficient and welcome characteristic, often absent in the courts, where judges usually rely on one or two court-appointed expert witnesses.

### *The decision*

The decision is a majority decision and must be justified. The commission decides the matter in a “fair and reasonable” fashion, taking into account the official law and the contractual agreement between the parties.<sup>46</sup> It means that the commission must, in its decision, have regard for the rules of fair procedure and substantive legal rules that follow from statute and case law. Nevertheless, the “fair and reasonable” yardstick provides an element of discretion, which is favored by the commission members, allowing it to take a more pragmatic approach.<sup>47</sup> Indeed, the Trust emphasizes that the commission has its own responsibility, which allows it to deviate from established case law. Thus, for example, in one case it reversed the burden of proof. It also allows itself to give directions to hospitals through *obiter dicta*. These non-binding rulings or statements are usually of a normative nature. Particularly, the medical members of the commission can be harsh on their fellow professionals.<sup>48</sup> In one case it was even suggested that the absence of a hospital protocol about how to handle a patients’ property after admission might lead to liability on the part of the hospital if property goes missing, implying that it would accept to be guided by what may be termed private legislation.<sup>49</sup>

The commission generally deals with the complaint on the grounds for which it was initially submitted. This may suggest that the commission takes a passive approach in this respect but this is not the case. In one case, the commission upheld the complaint on grounds other than those found in the complaint itself. In the case, the doctor was held to be wrong in not providing all relevant information prior to a peeling treatment, although the patient had not complained about the information provision but rather about the treatment

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<sup>46</sup> See Rule 16 of THE RULES. Any patient who received hospital care enters into a medical treatment agreement, which is regulated in law; see DUTCH CIVIL CODE, art. 7:446 (Book 7 of the Code deals with certain special contractual agreements).

<sup>47</sup> See DOORNBOS & VAN REIJSEN, *supra* note 2, p. 88-89.

<sup>48</sup> *Id.*, p. 76.

<sup>49</sup> *Id.*, p. 89.

itself.<sup>50</sup> In another case, also involving informed consent, the commission decided that it could not expect the complainant to draft the complaint in terms of making visible the connection between the injury and the issue of informed consent; this would defeat the very purpose of the procedure, which was to allow patients to complain in a simple manner without legal representation.<sup>51</sup> The autonomy and active stance of the commission are also expressed in the manner it uses Section 3 of Rule 17, which allows it to impose as binding, any previous settlement the hospital offered to the patient.

Each decision is written and contains the admissibility of the complaint, the jurisdiction of the commission and the binding advice. The decision also determines the amount of damages, if damages are awarded, and any other measure it sees fit to make to address the complaint.<sup>52</sup> The decision may also bind the complainant to the initial solution proposed by the hospital prior to the procedure before it and declare the complaint inadmissible. Furthermore, any friendly settlement that is reached during the procedure can be made binding to the parties through the decision.<sup>53</sup> The secretary of the commission takes note of the decisions produced by the commission in order to achieve unity in its decisions. Research shows that this unity is preserved. Doornbos & Van Reijssen note that some of the decisions of the commission are transposed into the operation of hospitals and medical insurers, through incorporation in, for example, hospital protocols on medical treatment.<sup>54</sup>

### **ADR: PRACTICAL CONSIDERATIONS**

The literature shows that many practical considerations exist why people prefer submitting conflicts or complaints to alternative, private dispute mechanisms. These considerations are, among others: time, money, complexity, formality and privacy. These considerations, though, must be viewed from the standpoint of the parties to the conflict. In most alternative dispute mechanisms, such as in the procedure before the Dispute Commission for Hospitals, the person complaining is more often than not a natural person (a patient) who initiates the procedure on his own account against, more often than not, a legal

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<sup>50</sup> *Id.*, p. 90.

<sup>51</sup> *Id.*

<sup>52</sup> *See* Rule 16 Section 2 of THE RULES.

<sup>53</sup> *See Id.* Rule 18. It must be noted that the oral hearing is not merely a hearing with the aim to resolve the dispute--it also aims to explore the possibilities of a friendly settlement, which is, after all, the main aim of the commission. If such a settlement is reached, the commission may declare it binding upon the parties.

<sup>54</sup> *See* DOORNBOS & VAN REIJSEN, *supra* note 2, p. 92-94.

person who can draw upon experience, expertise, money and other resources (the hospital). In lego-sociological terminology, the initiative lies with a “one-shotter”, and the defense is in the hands of a “repeat-player.”<sup>55</sup> With respect to the Dispute Commission for Hospitals, the complainant is usually a middle-aged woman with low education and a monthly income of about €1.200,00. The other party is usually a hospital which must be regarded as a repeat player.<sup>56</sup>

The Annual Report of the Trust shows that in 2002, the commission dealt with 64 complaints.<sup>57</sup> It is difficult to conclude whether this small number indicates that the procedure is successful. The number must be analyzed within the overall context of how medical errors are handled through litigation, settlements, internal procedures, jurisdictional limits, or other procedures. What can be said is that there is a steady increase of complaints finding their way to the commission.<sup>58</sup> This may provide some indication that the procedure has risen in popularity. It merits the question whether the practical advantages apply to the procedure before Complaints Commission for Hospitals.<sup>59</sup>

#### *Time is of the essence*

Alternative procedures are usually regarded as speedy. Contrary to many court procedures, they seem to achieve results in a relatively short space of time. Indeed, the longer a conflict lingers, is it not the more difficult to resolve? A dispute imposes a psychological burden on many litigants – “one shotters” in particular – when procedures are drawn out over many months or even years. Time is of strategic value to exhaust the one-shotter or as a means to close a book and get on with life. Statistics from the 2002 Annual Report of the Dispute Commissions for Consumer Affairs Trust show that the various dispute commissions succeed in delivering in what seems to be a speedy procedure and subsequent decision. In 2002, all the dispute commissions received a total of 11,371 complaints.<sup>60</sup> Of all the cases that could be processed in 2002, about

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<sup>55</sup> Cf. M. GALANTER “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Social Change”, *Law & Society Review*, Vol. 9, Nr. 1, 1974, p. 95-160.

<sup>56</sup> See DOORNBOS & VAN REIJSEN, *supra* note 2, p. 61-62.

<sup>57</sup> See Annual Report 2002, p. 109.

<sup>58</sup> *Id.*

<sup>59</sup> All the commissions together that operate under the auspices of the Trust dealt with about 11.000 cases in 2002; see Annual Report 2002, p. 19. This number would certainly merit the question.

<sup>60</sup> This is an increase of about 1,000 from 2001. Indeed, since 1996 there has been a steady increase. See Annual Report 2002, p. 19.

46% ended without a final judgment of a Dispute Commission. Reasons for this were that parties could settle the dispute themselves, formal rules were not complied with,<sup>61</sup> the counter-party was not a member of the representative organization or the dispute was settled after analysis by external experts.<sup>62</sup> In the remainder of the cases, a commission entered a final judgment. The length of time within which a complaint was processed – from receiving the complaint to final judgment – averaged 6,5 months.<sup>63</sup>

Whether this period is a speedy period can only be determined when compared to similar procedures in litigation, most notably the procedure in the small claims division of the district court. It seems that first instance court procedures take on average one year to complete. However, the small claims division is quicker; in 2003 the average duration was about four months.<sup>64</sup>

The length or duration of a procedure must be placed in its proper perspective. Litigation is perceived as drawn-out, partly due to the bureaucratization of the administration of justice, which is usually absent or at least not as pervasive in alternative dispute mechanisms. The small claims procedure at the district court seems to defy this perception. However, time not only relates to the speed in which a complaint or dispute is processed (process time or “bureaucratic” time) but also to the length of time actually spent on the complaint (spent time or quality time). Thus, that time is of the essence does not necessarily indicate that *speed* is of the essence. A judge, an arbitrator or mediator may think it appropriate that parties first try to seek a resolution themselves or that a cooling-off period is fitting or that he or she takes time for (preparing for) the oral hearing and the subsequent deliberation before reaching a judgment. Hence, what can be suggested here is that alternative procedures are not so much quicker in processing the complaint but are, instead, able to take their time to consider the merits. Whereas the civil litigation system may pride itself on the amount of cases processed per annum (process time – the

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<sup>61</sup> Consumers failed to pay the requisite complaints fee, failed to return documents or failed to adhere to the statute of limitations.

<sup>62</sup> Here, the Dispute Commission retains an outside expert, instructing him to mediate between the parties as to the nature of the complaint, which is often technical in nature. In most cases, the conflict is resolved adequately as a result of the work of the expert. *See* Annual Report 2002, p. 12.

<sup>63</sup> In 2006 this was reduced to 4,3 months; *see*:<http://www.sgc.nl/index.asp?cat=8> (last visited on Jun. 12, 2007).

<sup>64</sup> *See* DE RAAD VAN DE RECHTSPRAAK, Jaarverslag 2003, (Annual Report 2003 of the Council for the Judiciary), Den Haag, 2004, p. 18.

bureaucracy works efficient),<sup>65</sup> a dispute commission, for example, may pride itself of the fact that it is able to advise and resolve complaints all in its own good time (spent time).<sup>66</sup> This practical consideration may be rooted in the more principled consideration, which is that the judicial process prevents parties, in particular the “one-shotter,” to play an active part in the procedure, thereby alienating him from the procedure and the system. This will be addressed later in a little more detail.

### *Money rules*

Litigation is regarded as expensive and when damages are relatively low, many litigants do not find it worth their while to go ahead with the procedure. In addition to court fees and summons fees, which vary between €100 and €200, the financial burden also consists of lawyers' fees.<sup>67</sup> Although one considers access to courts to be a fundamental right, litigants may be inhibited when confronted with these fees, since most litigants would not be able to navigate the court system and its procedures on their own account. Indeed, “the man who represents himself has a fool for a client.”<sup>68</sup> Furthermore, many civil procedures in the Netherlands are subject to mandatory legal representation by a Bar Association member.<sup>69</sup> Legal aid is not always available for small claims where

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<sup>65</sup> This is emphasized as a positive development by the Minister for Justice in his letter to Parliament on the state of the civil justice system and the role of ADR; *see* Letter to Parliament from the Minister of Justice of 9 July 2004; TK 2003-2004, 29279-10 [Parliamentary Debates (Second Chamber), parliamentary year 2003-2004, no. 29279-10]. The letter is in part a response to the extensive report by the Wetenschappelijke Raad voor het Regeringsbeleid (WRR – Academic Council for Government Policy) on the future of the Dutch *Rechtsstaat*. (WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID, *De Toekomst van de Nationale Rechtsstaat*, Den Haag, 2002). The letter will be addressed in more detail later.

<sup>66</sup> The time discussed here does not inform us about the length of time that has preceded prior to the submission of a claim. Indeed, with respect to the Dispute Commission for Hospitals, the parties are obliged to try resolving the case among themselves. In addition, it would be interesting to find out how much time is spent on an individual case by a judge in the small claims division, compared to the time spent on a complaint by the Dispute Commission. No data exists to the knowledge of this author.

<sup>67</sup> *See* <http://www.rechtspraak.nl/Naar+de+rechter/Kosten+van+een+procedure/Griffierechten/> (last visited Jun. 12, 2007).

<sup>68</sup> This quote is an old saying in the common law tradition. The exact source is unknown but the saying appears many times on internet sites; *see* for example <http://www.theoclawyer.com/criminal-terminalogy.html>. (last visited: August 24, 2007.)

<sup>69</sup> *See* DUTCH CODE ON CIVIL PROCEDURE, art. 79. An exception is the procedure in the small claims division of the District Court. Nevertheless, court fees here amount to more than €100 in personal injury and damage to property cases.

damages are sought or some other civil remedy such as specific performance. In addition, the concept of “no cure, no fee” and contingency fee systems are not yet allowed in the Dutch jurisdiction,<sup>70</sup> and it may be doubted whether such a system will enhance access to the courts in respect of small claims.

ADR claims to be less expensive. In respect to the Trust, this is true. The procedure before the dispute commissions is cheap. This is partly due to the subsidy the Trust receives from the Department of Justice. It enables the Trust to charge a low complaint fee. The consumer who files a complaint will have to pay a complaint fee to the relevant dispute commission. The amount of the fee is dependent upon the value of the service or product that has been delivered. These fees differ per commission. Thus, in respect of say, laundry services, the fee is €25 for a service worth up to €100, €35 for a service up to €200 and €45 for services worth €500 or more. In respect to hospital services, the Trust has set a fixed fee of €25 (irrespective of the value of the services or damages suffered). It shows that the procedure is cheaper than normal litigation. In addition, contrary to most civil court proceedings, consumers are allowed to entertain complaints themselves in front of a dispute commission and need not rely on legal representation.<sup>71</sup> Finally, the constitution of the commission shows the availability of direct relevant expertise and experience, which tempers the need for, often costly, expert reports.

#### *Complexity and formality: why?*

Civil litigation is both complex and formal. There seems to be a correlation between these two elements. It may be suggested that this is connected to the *public* function of adjudication. The dispute is stripped of all its emotions and intricacies, and is translated into a legal question, to be answered in an open court to allow justice to be done for the common good.<sup>72</sup> This refers to justice in a narrow sense, in that the question is answered by reference to the available legal rules and precedents. The manner in which this is done, consists of, at first sight, archaic, formal and symbolic elements. These elements are not merely a facade but form an integral part of the resolution of the conflict. Procedural

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<sup>70</sup> The Dutch Bar Association had decided to carry out an experiment with no cure, no pay (also called “contingency fees”). However, this decision has been suspended by the Minister for Justice; see STAATSBLAD 2005, 100 (Ministerial Decision of 15 February 2005 on the continuation of the suspension of the Decision of the Dutch Bar Association amending the Decision on Legal Practice (Result-related Remuneration)). However, a new proposal is expected to be considered.

<sup>71</sup> With respect to the Dispute Commission for Hospitals, see Rule 14, Section 1 of THE RULES.

<sup>72</sup> ANTHONIUS M. HOL & MARC LOTH, *Reshaping Justice – Judicial Reform and Adjudication in the Netherlands*, Intersentia, Maastricht/Oxford, 2004, p. 89. Hol & Loth refer to the image of justice in this context. Instructive is Chapter 5

rules, rules of evidence and legal argument all fulfill a purpose and, more often than not, are used strategically. Outsiders (one-shotters) are overwhelmed with this as well as with the complexity of law itself; they must rely upon legal representation. Although the legal question is eventually resolved, and parties may get on with life, dissatisfaction may linger, since the emotions and intricacies – the conflict’s “undercurrent” – are not addressed or acknowledged. The formal nature of the procedure does not allow for it--the procedural and other rules are all geared towards resolving the *legal* question (adjudication), not the underlying dispute (this may be called reconciliation). Analysis of the procedure before the Dispute Commission for Hospitals showed an informal and less complex procedure: the rules are relatively straightforward and the commission enjoys a large element of discretion to decide (procedural) matters in a “just and reasonable” fashion;<sup>73</sup> the oral hearing is situated around an oval table; and the commission avoids using jargon and takes an emphatic approach.<sup>74</sup> This is one important reason why the commission discourages the use of legal representatives. The commission seeks to prevent a legal debate in an adversarial manner and seeks to promote a dialogue instead, promoting reconciliation.<sup>75</sup>

A final observation here is that in litigation, the remedy that is sought consists usually of damages; it is a pecuniary remedy. This remedy underpins the answer to the legal question. Nevertheless, in many cases this not what litigants seek. Rather, they often seek recognition and empathy or accountability, an apology or an acknowledgement; they seek answers to those questions of the dispute that have not been translated into the legal question – the undercurrent. One example illustrates this. In a recent wrongful birth case,<sup>76</sup> the woman became pregnant after sterilization and sued the doctor because of the way he had treated her as a person. He had replied on the comment that she had not wanted the child considering the size of her family, with “Don’t nag, be happy you have a healthy child.” Vranken, who criticizes the judicial system for being too “distant,”<sup>77</sup> commented that the woman got recompense by suing the doctor. However, she could only get it by *not* saying what had concerned her the

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<sup>73</sup> See Rule 25 of THE RULES.

<sup>74</sup> See DOORNBOS & VAN REIJSEN, *supra* note 2, p. 74.

<sup>75</sup> *Id.*

<sup>76</sup> Nederlandse Jurisprudentie [N.J.] [Supreme Court] 1999, 145 (The Netherlands).

<sup>77</sup> A criticism that may equally apply to other sectors of health care.

most (the rude and crude treatment). Had she said it, the law would not be able to provide her with an answer. Vranken jests: "who is fooling who?"<sup>78</sup>

This aspect of conflict resolution has generally no priority either in procedures before the many other dispute commissions that operate under the auspices of the Trust. One reason for this is that the complaints are often about the delivery of a product, like a gasoline tank, or a service, such as a garden renovation project.<sup>79</sup> Usually there is a direct financial loss triggering the complaint. Nevertheless, with respect to health services, the Dispute Commission for Hospitals is aware of what complaining patients seek. The pecuniary remedy, which is available, is seen as a means to facilitate this: conciliation, clarity, transparency and apology, and what patients want to say, can be said. Doornbos & Van Reijssen cite one commission member, who says:

*In my view it is about the understanding the patient receives for what has actually gone wrong. Because, that damages, in a country like the Netherlands, the few euros is not generally what is at stake. It is more about the understanding that is behind it, that people have received a willing ear.*<sup>80</sup>

*Privacy: hanging out the dirty laundry*

The previous observations make the private nature of many alternative dispute mechanisms an attractive option for both parties. In addition to keeping the conflict and all the attended emotions within private quarters, the dispute is transformed and dealt with differently. The questions can be addressed differently, as the answers need not necessarily be bound by law. Although (legal) certainty is important in litigation, the argument may be valid that in disputes that are resolved privately, the quality of the resolution and the form of the procedure are more important than the certainty of the contents (whether the correct law is applied correctly). One seems not to be concerned that the absence of public scrutiny may impact on the fairness of the procedure. This seems strange since we regard it as a fundamental right in litigation. The reason

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<sup>78</sup> See: J.B.M. VRANKEN, *Springen met lemen voeten – Preadvies voor de Vereniging voor Wijsbegeerte van het Recht (Jumping with Clay Shoes – An Opinion for the Association of Legal Theory and Jurisprudence)*, Den Haag, 2003, p. 46. (A "preadvies" is a report written by a member upon invitation of the association in order to take a common position on social and legal developments.) It has now also been published as a book; see J.B.M. VRANKEN *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht – Algemeen Deel: een vervolg [Mr. Asser's guide to the practice of Dutch private law – General Part – a continuation]*, Kluwer, Deventer, 2005.

<sup>79</sup> See Annual Report 2002, p. 31 & 49.

<sup>80</sup> See DOORNBOS & VAN REIJSEN, *supra* note 2, p. 75. (Author's translation)

perhaps is that an ADR is a private initiative and not a public forum in which the state meddles with our lives: after all, the state adjudicates. The parties to ADR may regard themselves as able to determine the fairness of the procedure, as they take an active stance in the procedure, more so than in litigation. (Being active is perhaps the driving force behind the latest development in ADR: ODR, or online dispute resolution.<sup>81</sup>) Finally, most ADR operates in the shadow of law, which means that a party may always fall back upon the public forum to vindicate his rights.<sup>82</sup>

### A MORE PRINCIPLED ARGUMENT

In addition to the practical advantages discussed above, there is, according to this author, a more principled argument that follows from these advantages to explain the increasing development of ADR, of which the Dispute Commission for Hospitals is but one example. A tentative development of this argument concludes this article.

The practical advantages discussed above may be rooted in a more principled argument of participation. The private and informal nature of ADR illustrated here, its use of time and costs enable parties to a dispute, particularly the claimant, to play an active role towards resolving the dispute. Emancipated from the intricacies of law and the legal procedural framework, they are able to strive to resolve conflicts more independently and creatively. It also suggests that they have a choice as to how to resolve conflicts through third-party interference; they are no longer exclusively bound by the state and the legal profession.

Indeed, the principled argument suggests that law and the legal systems traditionally made an exclusivity claim as to how to resolve or address conflicts. This exclusivity claim has created, consequently, a monopoly of lawyers in which the lay person (the citizen, the litigant, etc.) does not participate but is a mere subject in the system. The system has now alienated the citizen from itself. This alienation is fed by the circumstance that the law is “overdressed” and too distant from those it seeks to serve, confronting citizens with obstacles to participate. That the law is overdressed not only refers to the fact that there is a

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<sup>81</sup> For developments in the Netherlands, see A. LODDER “De Toekomst van geschillenoplossing – aandachtspunten en de onstuitbare opkomst van ODR” (The Future of Dispute Resolution – Points of Attention and the Unstoppable Course of ODR) *Nederlands Juristenblad*, Vol. 80, 2005, p. 832-838. A general analysis of ODR is that of E. KATSH & J. RIFKIN, *Online Dispute Resolution: Conflict Resolution in Cyberspace*, Josey Bass, San Francisco, 2001.

<sup>82</sup> In respect of the Dispute Commission for Hospitals, access to the court is guaranteed in Art. 24, Section 1 of THE RULES.

lot of it, both in absolute terms and in the quality of law--the tendency to specify general rules in detailed rules. Although law is inclusive in that it affects all of us, it is also exclusive in that it demands specialized knowledge. Law is accessible only to the specialist. This inhibits participation.

When it comes to the judicial process, the conflict or complaint is transformed into an abstract legal principle and the individual litigant becomes generalized into either plaintiff or defendant. Law reduces reality to a legally relevant reality, as Vranken puts it.<sup>83</sup> It leads lawyers, as well as the courts, to alienate themselves from the individual litigant (the "one-shotter" in particular), which may imply also a degree of alienation from the currents of society. Reasons for this are, among others, the lack of a sociological perspective in the judicial process as well as the pretension of lawyers to know things better (fed by the exclusivity of the legal framework). What is meant here is that the lawyer's frame of mind usually is shaped exclusively by law and precedence, preventing different perspectives as to how resolve conflicts to come to the fore. The exclusivity in the judicial process is a monopoly. The judicial process is operated solely by legal entrepreneurs. There is no place for lay people, neither at the Bar nor on the Bench; they are merely the subjects of the process.<sup>84</sup> (It must be noted that the Dutch legal system does not entertain a jury system for adjudication.)

Another consequence is that emotions and feelings fit uncomfortably within the system.<sup>85</sup> This is partly due to how conflicts are "translated" into a legal question: "the circumstances of the case," to which lawyers often refer, are really the *legally* relevant circumstances: circumstances relevant to answer the legal question, not always the underlying problem or conflict; the "undercurrent." Thus, litigation is not always able to facilitate claimants. This has two aspects. The first is that the judicial process exists by virtue of its power to adjudicate upon a conflict rather than providing a solution. It has only eye, out of necessity, for answering the *legal* question and is bound, as a result, to legislation and precedent. The second is that the remedy – or the cause of action – is pecuniary: damages. The conflict is not only translated into a legal question but also into a financial question. Personal injury has a tort (say negligence) as a

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<sup>83</sup> See VRANKEN, *supra* note 2, p. 44.

<sup>84</sup> This is not to say that distance (or alienation) does not provide a function. On the contrary, it legitimises to a large extent the status of law. It helps to translate a concrete problem between identifiable individuals into a general problem between members of society, with which others may be able to identify themselves. The adjudication, then, is not for the sole benefit of the two parties but for us all: through the judicial process we may now better what the law is.

<sup>85</sup> The example that Vranken provided, *see* note 78, about the rude treatment of a doctor, is illustrative.

cause of action and damages as remedy, but is this what the litigant really wants? Research shows that although many litigants seek financial compensation and are helped by the remedy of damages, many other litigants do not achieve the goal they envisaged at the start of a judicial procedure.<sup>86</sup>

Litigants no longer recognize themselves in the legal conflict, which makes resolving the non-legal part all the more difficult. No wonder that the citizens may shy away from litigation, exploring other alternatives that meet their objectives. Law and litigation no longer make up the exclusive realm of conflict resolution. We do realize that the court option is but an option. The citizen's emancipation as a differentiated person (individuals are no longer solely citizens, which makes them political persons, but are also consumers (economic persons), neighbors, patients, etc.) makes him realize that he can perform many different roles and can choose which role he wants to fulfill: citizen, consumer, neighbor, patient, etc. He can rely on other options or forums in which he can participate. This realization gives rise to the development of private law, either supplementing or complementing the official law, and to the development of ADR, in which he claims an active part. The court has become a means of service provision, alongside other conflict resolution services. This is not to say that citizens no longer *trust* the judicial system.<sup>87</sup> It is rather that citizens are better able to make a choice as to who to turn to.<sup>88</sup> This may be indicative of why alternative and private mechanisms have come into existence, other than for the obvious reasons of efficiency, speed and simplicity, which were addressed above.

If this is accepted, the function of law and the judicial process may change to facilitate this choice. Indeed, there are signs that this is the case. Most striking is the letter from the Minister of Justice to Parliament.<sup>89</sup> In the letter, the Minister states that the Dutch judicial system has always been small in comparison to systems elsewhere in Europe. The reason for this is that the system appears to be able to operate effectively and speedily but also because

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<sup>86</sup> See VAN VELTHOVEN & TER VOERT, p. 187. The authors found out that 23% of litigants do not meet the goal they had set at the outset of legal proceedings. They refer to justice, a change of behavior of the counter party and avoidance of repetition of the problem.

<sup>87</sup> Recent research showed that about 70% have faith in the judiciary; see M. L.M. HERTOOGH, "Vertrouwen in de Rechtspraak – Harde Cijfers met een Flinke Korrel Zout" [Faith in the Judiciary – Hard Facts with a Pinch of Salt] *Nederlands Juristenblad*, Vol. 79, 2004, p. 1164-1168.

<sup>88</sup> See VAN VELTHOVEN & TER VOERT, *supra* note 2, p. 188.

<sup>89</sup> See Letter to Parliament from the Minister of Justice of 9 July 2004; TK 2003-2004, 29279-10. See also note 64.

the Dutch jurisdiction knows, traditionally, a large body of extrajudicial arrangements.<sup>90</sup> The Minister feels the need to invest into these arrangements. The rationale for this, according to the Minister, is that today's modern society demands less action from government and more action of citizens themselves. The Minister favors strengthening individual responsibility in the area of dispute resolution through facilitating measures, allowing people to resolve conflicts among themselves instead of appealing to state-organized and state-controlled dispute mechanisms. This emphasis on self-empowerment is typical for the post-welfare state, such as the Dutch state, in the twenty-first century.

### *Conclusion*

This article reported on both practical advantages and principled considerations that may explain the development of ADR in the Netherlands. It did so by reference to a particular private dispute mechanism: the Dispute Commission for Hospitals, operating under the auspices of the Dispute Commissions for Consumer Affairs Trust.

This development is connected to the changing function and status of law and the legal system. Stripped of its mythical proportions, the judicial system is but one option among others to have conflicts resolved and complaints addressed. The practical aspects included the notion of time, money and complexity, as well as privacy. The procedure before the Dispute Commission was found to be cheap and undemanding, stressing the need for dialogue rather than legal argument in an informal environment. Although the commission seems quick to process a complaint, important was also that sufficient time could be spent on the complaint. These practical advantages are rooted in a more principled consideration, which is that the law has created a distance, which inhibits people from participating in conflict resolution. The procedure of Dispute Commission for Hospitals shows how the commission achieved at bridging this gap, allowing participants to take an active stance.

If this argument is accepted and may be regarded as one of the explanations of the rise in ADR, it may also indicate an additional new role and function of law and the legal system, which is to facilitate people's own responsibility and self-empowerment, with ADR operating in the shadow of the law.

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<sup>90</sup> See also FRED J. BRUINSMA, 2003, p. 43-55.