

Het komt zelden voor : beheersing van klachten en geschillen in relaties tussen bedrijven

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SUMMARY

Where legal steps are rare: controlling complaints and disputes in business relations.

Introduction

This project builds on the author's earlier research that revealed the existence of methods used to control the frequency of debt-enforcement and related civil litigation. These methods were used by mail-order firms and other 'customer-processing' firms such as banks, in order to select 'desirable' (i.e. solvent and loyal) customers and functioned by means of customer profiles, that were constructed on the basis of statistical data that were either routinely derived by the companies themselves from their sales experience or bought from other firms that were in the business of selling statistical data on customer populations. It was rather eerie witnessing an interviewee of a mail-order firm whom I provided with my home address, zooming in on my data and within seconds hearing his verdict on my status as a reliable prospective customer.

These findings prompted the question, whether or not this kind of preventive methods would also be used by firms with regard to inter-business relations. In theory the use of these methods seemed feasible, assuming that much business involves repeated deals. But were they actually used in practice? And if so, how were they related to the frequency of problems, disputes and civil litigation in business relations? In fact, I was going out on a limb to research this question, because the answer might well have been negative. Luckily, the first interviews brought some practices to my attention, that were unknown to me, but that turned out to be very relevant to the initial question, and justified further travels into business land.

The most surprising finding was the use of quality-systems such as the ISO-standards, elaborate organisational practices used to increase customer satisfaction by fine-tuning production processes in order to minimise the occurrence of defaults and defects. These and similar methods are interpreted as instances of

a wider phenomenon, that Giddens referred to as 'reflexivity' and which he considered an important characteristic of contemporary society. In the present report these methods are indicated as 'reflexive methods'. They can be regarded as a kind of organisational 'learning processes', that make use of the collection of statistical data about the organisation and the relevant context in which it operates. In the organisation the data are used to direct, and if necessary redirect, organisational practices. Reflexive methods can be found in private as well as public organisations. The expanding capacity and declining costs of information technology are responsible for the fast diffusion of these methods.

Questions

Thus, the first research topic concerned the existence, characteristics and effectiveness of 'reflexive methods' meant to prevent recurring problems (such as defaults and defects) in inter-business relations. This begged the question, how problems and disputes that nevertheless occurred are dealt with and, more particularly, whether or not they serve as grounds for litigation. These research questions refer to a prominent field of socio-legal study, namely the dispute and litigation studies. It seemed worthwhile to analyse some assumptions of this literature, especially about the nature of courts. In Chapter 2 I argue that the images of courts implicit in this literature emphasise their function for 'society', either conceived as the 'social system' (conflict resolution, social control) or the general citizenry (protection of rights). What is neglected are the ambitions and interests that are inherent in the state, such as in the positions of administrators, political actors or the judiciary itself. These ambitions and interests have been very important in shaping courts into what they are. Ignoring this element results in a truncated image of what courts are about. I suggest that courts should be regarded as institutions that have been shaped by the formation process of the modern state. I do not suggest the replacement of one biased perspective of courts by another. Instead, a perspectivist approach to courts is suggested, in which they are conceived as institutions that can perform a multitude of functions for various groups and factions on the 'demand side' as well as on the 'supply side'. The assumption of over-determination seems more adequate than a limited set of functions. The demands made on courts by actual litigation constitute only one of the forces that shape the formation of courts, although on occasion their influence may be decisive. As historical studies show, other forces on the 'supply side' have had an important impact too.

An inquiry into the aspects of business relations mentioned earlier, can also serve to contribute to two other socio-legal themes. The second research topic ta-

kes its cue from reports of increased business litigation since the 1980's, that was supposedly rooted in the decline of 'long-term continuous' relations in international business. The question for this project is whether or not continuous relations still exist in business relations, and whether they might be related to the reflexive methods of problem-prevention described.

The third research topic concerns a debate about the causes of the different national litigation rates. The different levels of civil litigation can, according to Kawashima, be explained from cultural peculiarities of the countries involved. These cultural differences result in differences in demand for litigation. According to others, such as Haley and Blankenburg, the differences are not the outcome of demand but mainly of supply. It is the existing legal infrastructure that makes people accommodate to the claims it encourages or discourages. The importance of the legal infrastructure for the use of reflexive methods and the resort to legal steps in dealing with disputes constitutes the third research topic. These topics are listed in the introductory Chapter 1 and further developed in the first part of Chapter 3.

The research

As described in Chapter 3 the collected data provide the basis for tentative answers to the research questions. The data have been gathered by means of extensive interviews with owners or chief managers of small and medium sized Dutch, Belgian and German corporations. These data allow for the reconstruction of the conditions (relational or otherwise) that can explain the use and effect of reflexive methods to control complaints and disputes. These conditions, combined of course with the wish to stay in business in the long run, constitute the 'logic' of a particular entrepreneurial position. An important element of this position is the network of relations with suppliers, clients, staff and many others that has to be mobilised. This network enables the enterprise to function effectively, for its success depends to a large extent upon the co-operation of this relational network. But it also restricts the enterprise, because the wishes of the suppliers, clients, staff etc. have to be taken into account. For this reason the main focus of the interviews was upon business relations: with suppliers and customers. Also the relations with competitors were selected in order to investigate how these might affect continuous business relations. Information was collected about the firm, its products and production process, and about the incidence of legal steps in disputes with suppliers, clients and competitors. Most attention was directed to addressing the nature of these three relationships and how complaints and disputes in these relations were prevented or dealt with. To detect the relevance of legal infrastruc-

ture for the use of reflexive methods and dealing with complaints and disputes, an element of international comparison had to be included.

The first step in the project was confined to The Netherlands, to the area around Maastricht. It concerned the selection of branches of industry that showed some relevant variation: (a) in the frequency of trouble and disputes in business relations, and (b) in the scope of activity (national/regional or international). There was no easy way to decide whether industries showed this variation for the first criterion, so a combination of expert opinion and trial and error had to do the trick. The report covers three branches of industry selected for research. The strongest contrast appeared in the 'plastics' industry and the 'construction' industry, the first being almost free of friction in business relations and internationally active, the latter rife with friction and operating regionally or nationally. The road transport industry appeared to take a position in between these extremes of friction, and to operate chiefly internationally. To allow a sufficiently reliable reconstruction of the various entrepreneurial positions, a small number (6) of firms from each selected branch of industry had to be interviewed. A second step in the project was to provide for variation in legal infrastructure, to fathom its importance in deciding about the use of a quality-system and about taking legal steps in disputes. This has meant the inclusion of interviews with firms of the most contrasting branches (plastics and construction) in the area around Aachen (in German Northrhine-Westphalia) and around Hasselt (Belgium).

Answers

Chapters 4 and 5 give a detailed account of the research findings and in Chapter 6 the conclusions are drawn. They can be summarised as follows. The first research question concerned the use and character of reflexive methods to prevent complaints and disputes. The prevention of complaints - especially coming from customers - is implemented by a variety of methods, some of which fit the definition of reflexive methods. Traditional methods mentioned included the selection of reliable business partners, written and detailed contractual agreements, and the implementation of delivery controls. The ISO-quality-systems came to the fore as the most widely used reflexive methods in the branches under investigation. The plastics industry appeared to be especially quality minded. Not only most Dutch but also most of the German and Belgian companies in this branch had acquired one of the ISO-certificates. Some examples of quality-systems were found that were operated by large customer-corporations, e.g. in the computer industry and the automotive industry.

The exploration of the effectiveness of these methods is discussed in connection with an explanation of the different levels of friction that the three industrial branches reported. With this explanation also the second research question about the existence of continuous relations is answered. The interviews revealed several conditions that can make a contribution to a low level of friction in business-to-business relations. The first set of conditions consists of the technical qualities of the product and the production process. The characteristics of products can influence the risk of defaults, as is reportedly the case with e.g. wood, rubber and concrete. Production technology can also limit the possibilities for 'organisational learning' when the products are produced, not as series of identical items (as in the plastics industry) but as individualised products. A second condition is the possibility of, or choice for, the maintenance of long-term continuous relations with business partners. Long-term relations facilitate the tracking and removal of sources of nonconformity. Moreover, continuous relations appeared much favoured in general for a variety of reported advantages. But sometimes continuous relations are simply an impossibility, e.g. when individualised products are sold to one-time customers, like in the construction industry. These two elements are to a large extent 'given' circumstances that define the possibilities and impossibilities of efforts to prevent trouble in business-to-business relations. This brings us to the third condition: the degree of motivation to actually prevent nonconformity. Strong motivation seems essential for a low level of nonconformity. Motivation seems strongest when either customers are in the position to demand a high standard of conformity (such as a particular default limit per million parts) and are known to 'enforce' them, or the firms take a high conformity standard seriously for other reasons (such as a reduction of production costs). This implies that quality certificates do not necessarily guarantee an effective complaint and dispute prevention. Prevention must be backed by a strong motivation (self-directed or other-directed) to make it work.

These conditions provide the elements of the entrepreneurial logic for the different branches of industry that have been studied. In the plastics industry all conditions facilitate a high level of conformity: favourable technical conditions and a context of continuous relations with demanding customers and capable suppliers. As a consequence of this logic, the use of reflexive methods is general, serious and effective; and the reported level of complaints is relatively low. The complaints that nevertheless emerge, are dealt with in mutual consent, often according to a set routine. Disputes, especially with customers, are avoided whenever possible in order to avoid damage to the relationship. Litigation is rare in all three relations, and limited to cases where co-operation is not to be expected (as in debt-enforcement and bankruptcy) or when a threatening situation arises (as in the case of violation of a patent by a competitor). This branch of industry provides a strong contrast with the construction industry: there the technical conditions are

unfavourable, continuous relations are rare, as are dominant customers. Here, the effective implementation of a quality-system is mostly dependent on the resolution of the entrepreneur. This different logic results in a relatively high level of complaints, especially in relations with subcontractors and principals. In particular in the relation with the principals, disputes and also arbitration are not uncommon. They often concern payment for additional work (during the process of construction) and complaints about defects when the building is delivered up as finished. In between these extremes the road transport industry occupies an intermediate position. Production conditions are not completely under control, continuous relations with customers are prominent, and these customers seem only a little less demanding than customers in the plastics branch. Defaults and defects are, despite all planning and precautions, not completely avoidable, due to weather and traffic conditions and hurried drivers. Most of the complaints concern insured risks and are forwarded to the agents of the insurance companies.

The interviews revealed the presence of a considerable preference for long-term continuous relations in the branches of industry operating internationally. Considering the importance of the industrial sectors supplied by firms interviewed (e.g. automotive industry, computer industry, food industry), it seems beside the mark to proclaim the decline of long-term continuous relations in business. In fact, they appear to be vigorously alive today, at least as much as in the days of Macaulay's famous article of the sixties. The difference might be that these relations have become less personal, that trust has acquired a bureaucratic aspect, due to the reflexive methods that have become the fashion.

The last research questions concerned the importance of legal infrastructure for (a) the adoption of reflexive methods for the prevention of complaints, and (b) decisions to take legal steps in disputes, or to deal with them in another way. It is safe to state that the adoption of reflexive methods by the firms involved in this research appears to be not primarily inspired by considerations about the costs and benefits of legal enforcement of nonconformity. As the principle motives for this decision emerged the demands of dominant customers and the expectation of a reduction of production costs. The desired rewards are profitable business partnerships and cost reductions. These motives suggest that an effect of reflexive methods on the likelihood of disputes and perhaps even civil litigation is mainly unintended, and that legal infrastructure is not all-decisive. Changing social practices such as those described here can independently affect demand. But when disputes do emerge, the configuration of legal facilities does matter, although not always in a clear-cut way. Complex calculation can be involved. Especially the comparison of the three groups of construction companies was revealing in this respect. The Dutch building contractors generally use a standard-form contract that provides for arbitration in the case of a dispute. So if any legal steps are taken, they are directed at arbitration. This seems hardly a matter of choice. The time

needed to conclude an arbitration procedure, which is estimated about a year, is reported to be acceptable. Still, some contractors say they prefer a settlement because of the costs that arbitration involves, and also because they know that a settlement is often the outcome of the arbitration procedure anyway. In Germany court litigation is the standard option for contract enforcement in construction disputes. Some German construction firms report a preference for settlement because of the long duration of court proceedings (which is about three years, including appeal), but evidently the amounts of money at stake prevent an easy decision. On the other hand one contractor seemed quite satisfied with the facilities to enforce contracts and reported more litigation than the others on e.g. debt, bankruptcy and the liability for defects. Also in Belgium court litigation is the standard option in the construction sector. Here, court delay is known to be prohibitive: some contractors even report periods of 5 to 10 years (including appeal) before a final decision is reached. No wonder they prefer a settlement. But despite all this, some professed to be quite prepared to litigate in some cases that they assumed they would win, because the official interest rates were considerably higher than the interest rates of the average savings account.

Further research

The research project has revealed considerable variation in litigation 'needs' in the context of business relations. The variation is more in volume than in substance. On the one hand, the demands made by the plastics industry were reported to be very modest, and concerned bankruptcy, patent protection and debt-enforcement. On the other hand the needs of the construction industry were substantially larger and chiefly concern debt-enforcement relating to disputed additional work and alleged defects, and also bankruptcy. The firms in the plastics industry and road transport do not complain about how these needs are met. But the contractors in the construction industry seem considerably less satisfied, and with reason. The delay Belgian and German court proceedings makes enforcement of rights an illusion. There appeared to be some satisfaction among Dutch contractors about the time involved in deciding construction disputes, but it has to be noted that these disputes are settled in arbitration and not in court.

Complaints about delay are old, and apparently 'unmet needs' are not automatically translated into some kind of institutional adaptation. The relation between 'demand' and 'supply' in this context, and especially the dynamics of supply, are research topics to be recommended.