13. Syndikusanwaltstag 9 November 2006
Erfolgshonorar Pro & Contra

Speaker: Jeroen Brouwer,
ehem. Präsident der niederländischen Kamer und
Vorsitzender der niederländischen CCBE Delegation, Apeldoorn

Ladies and Gentlemen,

This year, the German Institute in Amsterdam is celebrating its 10 year anniversary. The institute's mission is to increase knowledge about your country and to modify Germany's image; the emphasis being on modern Germany. Things are going well between our countries, say recent surveys. Germans have now become the most well-liked neighbours. Along with the Americans, the Dutch think the most positive about you. And I, of course, would like to second that!

Exactly one week ago, our good relationship was seriously put to the test because of a power failure caused by a ship on the River Ems that pulled a high-tension cable loose. Immediately, the power supply in large parts of Germany and the Netherlands was cut off. You, of course, had nothing to do with this. However, I can use this event in two ways.
First, as a metaphor for the mutual dependency between European countries, including the Bars and Law Societies, and second: what is the position of the people affected by this event, with their modest individual damages and access to justice? Class action? Who will pay that? Could the no-cure-no-pay system bring any relief here?

COMPETITION
The NMa (the Dutch Competition Authority) is not just able to apply national legislation, but European regulations too. It can do this in co-operation with the European Commission and the Competition Authorities in other EU Member States. The German Authority is now also part of the European Competition Network (ECN). The European Commission works closely with the ECN to uphold the Cartel Ban and to combat the abuse of dominant economic positions. The mission is to promote market forces and to safeguard healthy competition. At my local chemist I noticed a Euroclaim brochure next to brochures about colds and

headaches. Ladies and gentlemen, there are more providers of legal assistance than there are lawyers. In recent years, there has been a lot of movement in the legal markets. Examples of this are England, Denmark and France, but solicitors in both of our own countries can also boast about getting increased attention from the Competition Authority and the legislator. Up to a few years ago, a no-cure-no-pay arrangement was simply *not done* in the Netherlands and was absolutely forbidden. An Amsterdam lawyer, who specialises in personal injury cases and is also the managing director of a personal injury agency, refused to accept this and filed a complaint with the Nma (the Dutch Competition Authority). The Nma decided that an *absolute* ban could be considered contrary to the Competitive Trading Act. The introduction of no-cure-no-pay would promote mutual competition between lawyers. The threshold for consumers would consequently be lowered. Think back to my local chemist. The Netherlands Bar Association set out the absolute ban in a rule of conduct. Such a rule indicates a standard which – according to common opinion amongst lawyers' circles – should be observed in practice. This rule of conduct is a guideline and lacks the binding nature of a regulation. The Bar Association immediately responded and issued a regulation with the same contents – i.e. a ban – in the same way as the rule of conduct did. Our 'lawyer parliament' did not accept this without further examination. The demand was raised for a discussion about whether maintaining a complete ban was still desirable.

This also included examining the position of personal injury agencies where non-lawyers have no difficulty handling cases with payment systems such as, for example, the no-cure-no-pay scheme. They are not bound by any constraints, but they do compete with the Bar Association. It goes without saying that the ruling made on the 9th of February 2002 by the European Court of Justice in the Wouters case had to be taken into consideration as well. Very concisely stated, the European Court decided that regulations, like those adopted by institutions such as the Bar Association, are permitted, even when such regulations limit competition. However, the precondition is that these regulations are necessary to ensure proper professional practice. When applied to the no-cure-no-pay scheme, it is clear that a ban such as this limits competition, but it is not so easy to argue why an absolute ban would be necessary under all circumstances.

To supplement this discussion within its own ranks, the Bar Association carried out a comparative legal study, which owes a great deal of gratitude to Dr. M. Killian. All of the specialist lawyer associations, the ANWB (the Dutch ADAC), the Consumers' Association

and the business community were canvassed and their point of view noted. The most important result was that, for certain people seeking legal redress, access to the law may be restricted.

ACCESS TO THE LAW

"The Hague is not London or Berlin", as I read recently in a newspaper about five-star hotels. This branch of industry is having difficulty as room prices are slowly diminishing but occupancy is on the increase. This is called *yield*; the *yield* per available room was increasing. Once again, this is a useful metaphor. What about the law and, in particular, access to the law? Will the law be exclusively available to only a well-to-do public and, if so, will you and I only be interested in increasing the *yield*, the turnover per room? It appears that legal assistance insurance companies are increasingly behaving like international hotel chains. Soon, the European market will be dominated by three or four large players, with all the monopoly risks that come with it. This will, no doubt, inflate the premiums. The spokesman of a luxurious hotel in Amsterdam was once quoted as saying: "We only have one criterion: you come to us to be pampered. We'll worry about the bill later." Is, or will this be, the (hidden) reality of the legal profession?

In my country, about 50% of all Dutch households can avail themselves of subsidized legal assistance. The 'means limit' is set at a joint income of € 31,000 for married people and a capital exemption of € 39,000. Depending on the individual's income, a one-off personal contribution must be paid of no more than € 677 per case. The research and legal study that I mentioned earlier, made it clear that for certain people seeking legal redress, who find themselves just above the limit for subsidised legal assistance, access *may* be restricted. This prompted the Netherlands Bar Association to allow an experiment with the use of a regulation. With what content? The ban on no-cure-no-pay was lifted for damage claims caused by personal injury and death, provided that a number of conditions were met. An experiment with a duration of five years, and an evaluation after four. This term was chosen, because 80% of all personal injury claims are handled within four years. We were aware that the liberalisation could result in an increase in the number of claims. That risk has been considered to be an acceptable one, and the increase as manageable. An increase in claims with a poor chance of a successful outcome is not likely, as the lawyers would to have to bear the financial consequences themselves. The risk of intruding on the lawyer's independence has also been considered manageable. I will return to this later.

Summarising: The starting point was (a) to expand access, (b) to limit no-cure-no-pay to personal injury damages, (c) to make adequate arrangements with specialised associations, and (d) to monitor the practice properly, and to evaluate after a few years. Participation in the experiment was subject to certain conditions. For example, there was a condition laid down that a result-related fee could only be permitted if liability had not been acknowledged, or reasonably established, right from the start. Example: if a motorist runs over a cyclist, the motorist is generally liable. It would not be appropriate, in that case, to assist the cyclist to claim damages on a no-cure-no-pay basis. The lawyer costs, in a claim such as this, would simply be compensated for as part of the damages. No-cure-no-pay is also only permitted for problems which have at least some substance in terms of damages or causality. In the written order confirmation, things need to be set out in clear and simple language. Without limiting myself, I will give you a number of points:

- A description of the expected course of the case and an estimate of the result to be achieved, including a minimum sum that would entitle the lawyer to a fee.
  Explanation: a claim of € 100,000 which eventually dwindled down to € 1000 would not merit a fee.

- The lawyer must provide the client with written information about the various remuneration possibilities. The usual hourly rates and types of result-dependant fees other than no-cure-no-pay, for example, no-win-less-fee, or an hourly rate plus success fee. This is about *informed consent*.

- The lawyer must draw up a risk assessment and provide an indication about labour and costs.

- An arrangement must be included about the interim withdrawal of the instruction, and the transfer of the case to another lawyer.

- A stipulation must be included to the effect that the lawyer cannot agree to a settlement without securing the client's written permission. A copy of the anonimised

order confirmation, including an anonimised notice about the outcome, must be sent to the Bar Association for monitoring and evaluation purposes.

After intense discussion within their own ranks, a regulation to this effect was adopted in March 2004. Six months later, this regulation was suspended by the Minister and eventually – in March 2005 – it was overturned. An important objection that the Minister raised was that lawyers will have their own self interest in the case's outcome, and that this need not automatically be the same as the client's interest. The Minister also saw the social drawbacks of the no-cure-no-pay scheme and was afraid that the number of claims, and consequently insurance premiums, would increase (American scenario). The Minister apparently did not seem to mind that the same drawbacks as these also apply to the services offered by legal service providers, other than the lawyers. The Bar Association placed more confidence in the integrity and independence of the lawyer. With the customary 'pay per hour' system, there is also – immanently and conceptually – a certain friction between independence and the lawyer's wallet. Do you settle or do you continue to litigate? The choice will have consequences for the lawyer's wallet, even with the 'pay per hour' system. Another objection raised by the Minister was *cherry picking*: lawyers would be inclined to pick the best cases. The Bar Association acknowledged this objection, but also trusts in the lawyer's integrity. Even without changing the ban, nothing is being done to promote access to the law. *The proof of the pudding is in the eating*, and not just the *cherries on the top*, but also the pudding itself. And this is precisely the purpose of the experiment. It was remarkable that the professional association of judges expressed a moderately positive opinion on the proposed experiment.

In March 2005, the Bar Association found itself on the horns of a dilemma - with a regulation that had been cancelled by the Minister on the one hand, and an imminent measure from the Competition Authority, which included a fine, on the other hand. Furthermore, there is tangible and increased attention being paid to the consumer's position at both European and national levels. *What consumers want is to get something for their money*, said a speaker on the *Legal Affairs Committee* of the European Parliament. The discussion was about the deregulation of free professions, including the legal profession. In mid June of this year, a *European Day of Liberal Professions* was organised. Dr. Ulrich Oesingmann, President of the Federal Association of Liberal Professions in Germany, was one of the speakers there. In his words: *I think it is important that today's event should help to make Europe more aware again of the other aspects of the liberal professions: their social importance and their role in*

the liberal democratic system, such as safeguarding citizens' rights. He is right, but I'm afraid that his opinion about the professional as a *guardian of citizens' rights* is not shared by policy-makers and legislators.

Ladies and gentlemen,
The English psychiatrist Theodoor Dalrymple is angered by the hypocrisy of intellectuals who fail to tackle the lower classes about taking their own responsibility. An example by way of illustration: "Why did you join that street gang and start robbing people? I'm rather suggestible, doctor. Is that so? Would you be equally suggestible if people were to say that you should take a course on metalworking?" Shouldn't people simply take more and more of their own responsibility?

Dear colleagues,
A recent study in the Netherlands showed that 1 in 10 people do nothing about a legal problem. Of the other nine, a half do something about it on their own. The other half turn to the experts. The legal profession only makes up a small proportion of these experts. In other words: citizens are already solving their own legal problems to an incredible extent. However, *if* they have an average income and have to cancel legal assistance because of the high costs of a lawyer, then the no-cure-no-pay scheme *can* offer them a solution.

Back to the predicament in which the Bar Association found itself a year and a half ago. At that time, the Minister had instituted the Legal Profession Committee, a sort of *Dutch Clementi*, which had been asked, amongst other things, to advise on result-related billing methods. In April of this year, the Committee advised – remarkably enough – that they were going to conduct an experiment for the cases in which there was a structural hiatus. However, this was to take place in a new form, namely the no-win-no-fee scheme. The fee could not consist of a part of the proceeds. The bill continued to be based on the number of hours worked, but making the final bill result-dependent was allowed. I will give you two possibilities:

- If the case is lost, no fee. If it is won, a surcharge of a maximum 100%.
- Another option: If the case is lost, a certain discount on the fee. If it is won, a certain surcharge over the fee.

Writing down hours worked allows verification afterwards and protects the person seeking legal redress against excessive billing. According to the Committee, the lawyer's independence and impartiality are less threatened in this way than in a pure percentage deal (after all, the lawyer does not have a claim on the claim of the person looking for justice).

Every manner of remuneration involves a certain degree of direct involvement by the lawyer. In response to this advice, the Bar Association indicated that the hiatus in the access to the administration of justice had been the experiment's sole basis at all times. Every remuneration variant involves a certain degree of direct involvement by the lawyer. This is part of free enterprise. The Bar Association expects that, in the event of no-win-no-fee, as advised by the Committee, there would be few lawyers who would be willing to take on the extra risks in a case that does not look favourable from the start. No-cure-no-pay is still preferable in that event, as this variant offers more compensation for the risks taken by the lawyer than no-win-no-fee does.

In the meantime, the government responded to the advice and did not adopt this part. The intention is to impose a statutory ban on result-related billing.

The Netherlands Bar Association, therefore, is back to square one and still finds itself on the horns of a dilemma. To avoid any misunderstandings: no-cure-no-pay is forbidden.

Using micro credit, the business operations of Noble price winner Muhammad Yunus saved poverty-stricken people from their misery, and opened the door to self-confidence and self-sufficiency. Yunus was awarded the Nobel Peace Price and not the one for Economics. His income is listed in the audit report on his Grameen bank's website. In 2005, it amounted to 408,420 taka. This is € 4,825. A year. Maybe we need a German or Dutch Yunus who can promote access to the law using micro credits for people who are now trapped because they cannot afford the lawyers' steep hourly rates.

Ladies and gentlemen, dear colleagues,
Unless one of you wants to help me on a no-cure-no-pay basis, I will accept the financial responsibility myself for any damage caused to my computer and freezer by the power failure. A good, friendly neighbour is worth more than a distant friend!

JB Nov.2006