SUMMARY

The main research question in this report is if the core values of the rule of law are sufficiently upheld in current forms of out-of-court or 'alternative' dispute resolution (ADR), and which benchmarks or indicators may be identified to determine whether these guarantees need to be strengthened. These last decades, ADR has become an important part of the Dutch justice system. Arbitration, the oldest form of ADR, has long been a part of corporate dispute resolution. Both other types of ADR – mediation and binding third party ruling – have emerged more recently, pressing the need for this very research. The question how the core values of the rule of law are guaranteed for those who make use of these non-governmental forms of ADR is asked more often and more urgently. At the same time, it is clear that the strength of these alternatives is that they are less formalistic and therefore faster and offer better possibilities to tailor the procedure to a specific case. One must however fear that providing for more 'rule of law safeguards' will lead to formalisation and will reduce the effectiveness of ADR. Hence, there is an obvious tension between the classic rule of law safeguards incorporated in the (public) judicial system, and the effectiveness and efficiency of the (private) alternatives. Finding an appropriate balance between these interests is the focus of this research.

The first step of this research consists of identifying and setting out the framework of rule of law safeguards and how these are relevant in the specific context of ADR, by conducting a literary and case law research. The outcome of this research has subsequently been presented to and discussed in expert meetings and focus groups, both consisting of experts from the ADR-field and academics, in order to validate the results and further explore the issues that had come up during these meetings. At the same time the current field of ADR in the Netherlands – arbitration, binding third party ruling, and mediation – has been described with a specific focus on the rule of law safeguards that had previously been identified. With regard to binding third party ruling and mediation, three case studies have been conducted to get a more detailed picture of the safeguards these variants of ADR currently offer: A case study into Kifid (the Dutch Financial Services Complaint Tribunal), divorce mediation, and ADR in disputes with the government.

The results of the research show that in general, the rule of law seems sufficiently safeguarded in alternative dispute resolution. The relevant safeguards are often enshrined in the law (which is especially the case in arbitration), regulations, rules of procedure or are guaranteed otherwise. In the most important institutional variants of ADR – such as Kifid or so-called 'disputes committees' for consumer cases – government interference already occurs. Therefore, it appears that there is at present no need to provide for additional safeguards. As was said, further formalisation and legalisation could be at the expense of the desirable qualities and advantages of ADR, and should thus be done reservedly. For the future however, it is important to monitor the developments.

The various forms of ADR are simply too divers to precisely indicate when government interference does become opportune. The researchers therefore developed a framework that takes this diversity into account and provides a sufficient basis for assessing the necessity and the type of interference. For this purpose, two paradigms are placed on opposite sides of a sliding scale. On one side, the paradigm of the safeguards, that is incorporated in the judicial system which can be characterized as highly formal. On the one hand this has led to a reliable system and subsequent confidence in the system. On the other hand, it has led to a rather inert system that is known to be relatively slow, costly, and does not leave much room for a tailor-made approach to cases. The second paradigm concerns autonomy and self-determination. It revolves around the freedom of choice and self-determination of parties' own interpretation on how to solve their conflict. It is not self-evident that this should involve some sort of government interference or regulation. Similar to parties' freedom of contract, which entails that in principle the contracting parties determine the contents of the agreement themselves, parties may also shape the solution to or resolution of their conflicts.

Both paradigms can be viewed as 'ideals' on either side of a scale on which the various forms of ADR could be placed. The research shows indicators with which the paradigm that is applicable to these various types of ADR could be determined. The perspective of the ADR consumer and the legitimate expectations on constitutional safeguards he reasonably may have, are essential. These expectations

are more justified if one (or more) of the following situations occur: When more government interference occurs and the government stimulates ADR; when the actual freedom of choice regarding the use of ADR is smaller; when the provider of ADR provider can be considered to be more professional and/if the role of the ADR provider is to resolve the conflict, as opposed to a role of a more procedural nature. These criteria could be used as indicators for government regulation or control, after which could be discussed how such regulation or control could be shaped or formalised. The report describes four options, two of which already exist in the current system: self-regulation and supervision of the 'products' of ADR (for example arbitral awards or settlement agreements) by the judiciary. The two other possibilities are of a more theoretical nature: administrative supervision by the central government or by specific decentralised authorities. Though far-reaching and not (yet) necessary, they do occur in specific sectors of the legal domain, such as the notarial and legal profession, and are thus mentioned in this research.