Strategic urban projects in Amsterdam and New York:

Incomplete contracts and good faith in different legal systems

Menno van der Veen, Willem K. Korthals Altes, OTB Research Institute for Housing, Urban and Mobility Studies, TU Delft, Jaffalaan 9, 2628 BX Delft.
m.vanderveen@tudelft.nl and w.k.korthalsaltes@tudelft.nl

Abstract Contracts between local government and private investment agencies play an important role in strategic urban projects. Real estate cycles provide only a narrow window of opportunity within which to draft such contracts. A legal system should therefore not impede the possibility of reaching an agreement quickly; instead, it should facilitate efficient ways of reaching an agreement. Lengthy contracting may contribute to the persistence of real estate market cycles. This paper explores the question of whether the civil-law principle of good faith facilitates the drafting of incomplete contracts, which may be efficient in situations of high uncertainty and complexity, as was the case with two strategic inner-city projects: the South Axis in Amsterdam and Battery Park City in New York City. The paper further establishes that good faith does play a considerable role in the differences in contracting practice.

1. Introduction

Contracting practices in the United States of America differ from those in continental Europe. It is almost a cliché that the typical American contract is extensive and strives for completeness in relation to future contingencies, while the typical continental European contract is rather thin, and maybe even sloppy (at least

from the American perspective). Negotiating contracts that cover all contingencies costs both time and effort. Although the thick American contracts do consist for a large part of 'boilerplate' language (i.e. lists of definitions or other standard texts that appear in many contracts), the ideal of complete contracting is still very much alive.

In a study of projects in New York, London, Boston and Toronto, Gordon (1997a) shows that the time that is available for designing a plan and negotiating a contract between local government and developers in complex urban projects is short, as real estate cycles leave only a limited window of opportunity for contracting. Because private investors are not willing to contract during periods of declining local property markets, plans must be designed and contracted during the few years in which the real estate market is in an upward swing. Plans that were made in an earlier cycle must be redesigned to fit the new situation of the next cycle; many projects have required more than one cycle to close their contracts. Drafting incomplete contracts that allow more room to use future knowledge and that include fewer details about the urban design of the project may help local governments to 'ride the cycles' (Gordon 1997a) in complex urban projects. This practice can therefore be instrumental for studying the fundamental differences in law and legal practice that may cause such differences in practice.

Long construction time and "the virtual inability to reverse a construction decision made under a considerable degree of uncertainty" (Grenadier, 1995, p. 99) add to the persistence of real estate cycles. The ability to 'ride the cycle' may therefore be

influenced by the amount of time that is needed for contracting and by the possibility that closed contracts contain provisions for changing the agreements; these factors may also affect the cycles themselves.

One notable difference between continental Europe and the Anglo-American world is that, with a few exceptions (e.g. the state of Louisiana in the USA and Quebec in Canada), Anglo-American legal systems are based upon the principles of common law, while the legal systems in the states of continental Europe are based upon the principles of civil law. All civil law systems have adopted civil codes that codify the general principles of private law. Although statutes obviously exist in common law countries as well, European-style civil codes do not. Although this difference alone could constitute a subject of study, this paper focuses on the principle of good faith. In civil law, the principle of good faith specifies that contract parties are bound to a canon of objective norms, even in pre-contractual negotiations. In some cases, these norms urge them to behave as partners and to share information and opinions, rather than being adversaries that play their cards close to their chests. This situation is explained in more detail below.

Other key differences between common and civil law include distinctions between open and closed systems of property law, between the doctrines of efficient breach (damages) and specific performance and between the roles of case law and statute law (Zwalve, 2000). Differences also exist within these legal systems, as illustrated by the differences between the French and German traditions of civil law (Zweigert and Kötz, 1998). From this perspective, the Dutch system can be regarded as a

mixed legal system, as it has roots in both German and French tradition. Cross-national differences can also be observed among countries that have common-law systems. For example, American law and English law differ quite sharply in some respects, even though they are rooted in the same tradition.

Differences between legal systems have been addressed in the literature on 'new comparative economics' (Djankov et al., 2003). This literature emphasises protecting the rights of private investors (La Porta et al., 2000) and property rights (Levine, 2005). The question of whether endowment (Beck et al., 2003) or cultural value orientation (Licht et al., 2005) may provide an alternative explanation for differences in economic development is a topic of discussion. A lively debate exists as to which system is most efficient (Mahoney, 2001; Posner, 2004a; Hatzis, 2002). This article contributes to this debate by reflecting on contracting practices in strategic urban projects.

This article also contributes to the literature concerning the relationship between law and urban development. Most of the existing studies on this relationship, however, focus on administrative law, particularly with regard to the influence of planning systems and building regulations (Brueckner and Lai, 1996; Cheshire and Sheppard, 2002; 2004; Turnbull, 2005). Private law is not usually a subject of research in this field, with the exception of research on land administration in relation to property rights and land markets (Miceli et al., 2000; Sadjadi, 2004). Contract law is often taken for granted, as it includes *only* the rules that govern contracts. We aim to fill this gap by focussing on the principle of good faith. We argue that rules of contract

law have a considerable impact on the ways in which parties deal with each other and therefore on the entire process of project realisation. We focus on the legal practice of contracting, given that court decisions occur only rarely, as parties tend to settle most disputes amongst themselves.

In civil law, the principle of good faith determines the entire body of private law (i.e. the law makes the principle operational), whereas the good-faith principle is applied only in specific circumstances in common-law contexts. In this paper, we emphasise the ways in which legal professionals in different legal systems use these different principles because, as we argue, their usage determines the ways in which parties deal with contracts. Under civil law, contracts may be less specified or incomplete, as parties trust that the general principle of good faith provides a solid foundation for fair and reasonable behaviour towards each other. This paper explores the question of whether a general provision of good faith (i.e. the civil-law principle) may be more efficient for the drafting of contracts in strategic urban projects, which are complex because of many uncertainties and changes in values. In the sections that follow, we (2) present the economic theory of incomplete contracts, asserting that they may be more efficient in certain cases, (3) analyse the principle of good faith in a civil law state (the Netherlands) and a common law state (New York), (4) analyse the role that good faith plays in a strategic city project and (5) discuss the results of this confrontation.

2. Incomplete Contracts

Complete contracts provide a complete description of all possible contingencies and explicit responses for each of these contingencies. Such contingencies may include developments that are external to the contract parties, as well as developments with regard to the contract parties themselves (Cohen, 2000; Hart and Moore, 1988). The ideal of complete contracting encourages the creation of contracts that are specified in considerable detail. Nonetheless, "no real-world contracts are fully complete in this sense" (Cohen, 2000, p. 80). Posner (2004b, p. 34) illustrates this with the case of *S.A. Healy C. v. Milwaukee Metropolitan Sewerage District*, in which even a contract of 2,000 pages failed to ensure that it covered the issue at stake.

The discipline of transaction-cost economics acknowledges that all contracts are unavoidably incomplete, given that we live in a complex, often unpredictable, reality (Foss, 1996). As Coase (1937) asserts, "…owing to the difficulty of forecasting, the longer the period of the contract is (…), the less possible, and indeed, the less desirable it is (…) to specify what the other contracting party is expected to do". In such situations, details concerning what a contracting party is expected to do are "not stated in the contract but (are) decided later" (Coase, 1937). The reason is that high transactions costs are involved in making all kinds of minor contracts for transactions that can be overseen. The effect of making a detailed long-term contract, however, is that transaction costs are associated with both drafting and maintaining the contract. Provisions in long-term contracts should therefore be easily adaptable to a changing environment. In other words, they should be more general.

With regard to the transaction costs of contracts, Foss (1996) observes that a common presumption is that, although it is possible to include the relevant information in a contract, the costs of collecting and processing the necessary information are too high. Moreover, the exact amount of resources that are needed to reduce uncertainty is also highly uncertain (Knight, 1921). It is quite possible that some information either does not exist or cannot be obtained for a given price. Some contingencies may be unforeseen, and there is residual uncertainty (Foss and Foss, 2002).

Making a complete contract involves incurring the costs of drafting provisions for contingencies that do not take place (Tirole, 1999). Based on an analysis of industrial relations, Lorenz (1999) adds the dimension of trust: "…the purpose of incomplete contracts is not so much to enforce commitments as to provide a framework agreement within which on-going discussion and negotiations can facilitate their sequential adaptation" (1999, p. 313). This principle of trust is consistent with the relational nature of incomplete contracting (see also Table 1).

Trust and contract may be negatively related (Klein Woolthuis et al., 2005). Trust diminishes the need for formal control by contract. Moreover, parties who seek to specify or enforce a contract may create an atmosphere of distrust. According to Klein Woolthuis and colleagues (2005), however, the evidence that exists to date on this question shows that the relationship is complex and cannot be analysed along a one-dimensional scale.

In the ‘mainstream theory of economic organisation’ (Foss, 1996) contractual incompleteness has a negative dimension, as it may cause opportunism and morally hazardous behaviour. Nevertheless, Foss (1996) points to the positive effect of the incomplete contract as an instrument of adaptation: ‘it allows a firm to adapt to and exploit partly unanticipated learning which the firm itself generates (…)’. Future learning cannot be fully anticipated; if it could, it would not be future learning. ‘Thus, rather than being a problem (…), the incompleteness of contracts is a distinct virtue because it provides room for knowledge accumulation and for experimentation. It is precisely the incompleteness of contracts that allows the firm to function as an adaptive, cognitive system’ (Foss, 1996; see also Foss and Foss, 2002).

When parties have no opportunity to use new knowledge about actual developments, uncertainty reduces the value of certain positions by increasing the risks. According to real-options theory, however, uncertainty increases value when parties are able to choose whether and when they will exercise a particular option (Titman, 1985; Grenadier, 1995). Parties do not exercise an option when the expected result is negative; in this way, they risk losing only the initial investment. Parties exercise an option only when they expect that it may be profitable. Contract parties may fail to foresee some of these options. Over-specified contracts that prescribe all actions that must be taken in particular contingencies may therefore reduce the possibility of exercising real options.

The argument stated above is consistent with the Hayek's (1945) assertion that specific knowledge of the particular circumstances of time and place is relevant and that '…ultimate decisions must be left to the people who are familiar with these circumstances'. Although Hayek intended this statement as an argument against comprehensive planning, it can also be used to argue against comprehensive contracting. In the later stages of a complex relationship, decision makers have better knowledge about the actual situation (Hayek's time dimension); it is therefore advisable to include gaps in a contract when the level of uncertainty is high.

On the other hand, incompleteness in a contract may provoke parties to interpret the contract solely according to their own interests and to behave in ways that could be characterised as shirking (i.e. exerting little effort) in relation to labour contracts. Courts therefore tend to deter opportunistic behaviour (Cohen, 2000; Overby, 1993), and implied terms (e.g. good faith) play a role in governing incomplete contracts.

3 Good faith

Good faith has a different meaning under civil law than under common law. Just as there are variations within these two types of legal systems, the meaning of good faith also varies within each type of system. The analysis in this paper focuses on Dutch law and American law (in this case, within the state of New York).

The literature commonly distinguishes between objective and subjective good faith. The latter is a principle of honesty and fair dealing, referring to what a person knew or should have known (Rijken 1994, Hartkamp, 1996). This principle is accepted in

all legal systems, whether it is specifically mentioned as good faith (e.g. American law, Dutch law) or applied through similar principles (e.g. English law). With the exception of consumer law and insurance law, English law has been reluctant to incorporate good faith into its legal system (Brownsword, 1999; Zimmermann and Whittaker, 2000). The difference between civil law and common law (and, in this article, between American and Dutch law) is that the latter system accepts that good faith is not only the opposite of bad faith and a principle of honesty; it is also an independent legal category, which can be used to create rules. The most important conclusion for the purposes of this article is that the Dutch good-faith principle encourages parties to consider each other's interests, even before a contract is signed.

3.1 Good faith in the Netherlands

As suggested above, good faith in civil-law countries refers to the general principles that are used to address situations for which the law (as it stands) either provides no clear answer for a concrete case or does not provide the desired solution. Dutch law is no exception to this rule. Good faith is a complex concept, with multiple meanings that embody a number of legal principles. It involves fairness, honesty and a general notion that abstract laws cannot do justice in every concrete case. Good faith also involves an awareness of an uncertain future that cannot be fully foreseen.

As stated previously, legal doctrine draws a distinction between subjective good faith and objective good faith. In addition to subjective good faith, every European

civil-law country (Hesselink, 1999) has accepted a general principle of good faith. This principle, which is known as 'objective good faith', refers to the obligation that parties have to behave in a particular way. Even if they do not know and are not obligated to know that their behaviour is contrary to good faith, their behaviour could still be unlawful if it is contrary to an objective norm. Objective good faith is an open standard (general clause), meaning that legislators are aware that neither the content nor the legal consequences of a principle can be foreseen when it is first codified, and that it must be determined in concrete cases. The principle has a gate function. It is through the (codified) objective good faith principle that general norms of justice enter the field of private law. The principle is autonomous; legal actions can be based upon it without referring to another provision in the code.

Rijken (1994) identifies two functions of good faith. On the one hand, it is a general principle of law, together with other sources of unwritten law. On the other hand, judges or legislators apply the implications of good faith to the case at hand. The principle of good faith is thus both general and concrete.

Frame 1: Reasonableness and equity may override the law

Article 6:2 '1. A creditor and debtor must, as between themselves, act in accordance with the requirements or reasonableness and equity. 2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and equity' (Haanappel and Mackaay, 1990, p. 235)

The *Plas-Valburg* case (HR 18 June 1982; see also Hesselink, 2002) is a case in point, which demonstrates the spectacular results to which the good faith principle has led. Plas Bouwonderneming, a development company, had legitimate reason to expect that the Dutch municipality of Valburg would grant them a project to build a communal swimming pool. The situation worked out differently. The community used the proposal that had been developed by Plas to make a better deal with a third party. No contract was ever signed between the municipality and Plas. The Supreme Court of the Netherlands (*Hoge Raad*), however, ruled that, under these circumstances, the municipality was not only liable for the damages that Plas had incurred (e.g. the time and effort that had been invested in the plan, the 'negative damages'). The municipality was also required to compensate the company for the profits that they would have made (i.e. the 'positive damages'). The court's reasoning centred on the municipality's decision to award the project to a third party; at that point, the municipality was no longer able to end the negotiations in good faith.

The example above shows that, under Dutch law, parties must always take the position (i.e. the legitimised interests) of their counterparties into account, as the formal argument that 'no contract was signed' will not help them in situations like the one in the *Plas-Valburg* case. If their counterparties have legitimate reason to trust that negotiations will result in a contract, parties may be liable for positive damages even though it was not illegal (e.g. there was no deceit) for them to break off the negotiations (see also Schoordijk, 1984; compare Grosheide, 1998).

The value of a signed contract is therefore relative to other sources of obligations. Courts may rule that a municipality that starts negotiations with a third party must compensate ‘positive damages’ (Rotterdam District Court, 2001). The relative value of the contract in relation to behaviour in good faith also has an impact on legal behaviour in relation to letters of intent or similar matters. If a letter of intent states that it will be valid until a certain date although the parties usually work beyond that date, they cannot simply ignore this practice and appeal to the provisions from the original contract. Moreover, a subsequent phase may occur in which parties do not carry their own costs and can stop negotiating at any time, unlike during the period of the letter of intent. In this phase, the party that ends the relationship must compensate the counterparty for the costs that they incurred, as the counterparty had a lawful expectation to receive some type of contract. Ending the negotiations in such situations constitutes bad faith.

In conclusion, under civil law, good faith functions as an open norm that must be elaborated with notions of fairness that stem from society (gate function), as shown by the Dutch example. In Dutch law, good faith is used to bridge the gap that the adversary model of contract law assumes to exist between parties by stipulating that parties must attend to each other’s interests. The good-faith principle is also used to determine the interests of third parties with regard to contracts, as well as the obligations that parties have towards each other during the negotiating phase. Every provision in contract law can be set aside by the good-faith principle.

3.2 Good faith in American law

Although the civil-law principle of good faith has no counterpart in common law countries, good faith does play an important role in American law. Numerous good-faith obligations can be found in contracts, and a good-faith principle was codified in the Uniform Commercial Code that all states have adopted (sometimes in different forms). The general obligation of good faith stems from the 1960s, when the UCC was issued, although there was no official acknowledgment of a widespread general obligation of good faith in American contract law until 1979, when the Restatement (Second) of Contracts was issued (Summers, 2000). Five conceptualisations of good faith appear within American law: the concepts of honesty in fact and fair dealing that are contained in the trade conceptualisation of the UCC and the Restatement (Second) of Contracts, and the conceptualisations of Summers (excluder), Burton (foregone opportunities) and Farnsworth (implied terms). Because they have found their way into courtrooms and influenced statutes, we will focus on these conceptualisations.

According to Farnsworth (1995), the American concept of good faith can be regarded as an intermediary between civil and common law. Karl N. Llewellyn, who was the main writer of the UCC, was highly influenced by the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) (Minuth, 2000). Nonetheless, good faith is not applied in the United States in the same way that it is applied in the Netherlands and other civil-law countries, where it is a general concept that influences every part of the law of obligations.

Two conceptualisations of good faith can be found in the UCC. The first refers to honesty in fact in the conduct or transactions concerned (1-201). A broader definition is found in 1-203, which refers to honesty in fact and the observance of reasonable commercial standards of fair dealing in trade, although this article applies only to merchants. The interpretation of honesty in fact tends to be quite narrow; for example, it does not rule out carelessness, recklessness, openly taking unfair advantage, abusing a power to specify terms or undercutting another's performance (Summers, 2000; Overby, 1993). The official comment ensures that Section 1-203 '(…) does not support an independent cause of action for failure to perform or enforce in good faith. (…) [T] he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached' (UCC, 2003). The good-faith principle is thus interpreted quite narrowly in the UCC.

The principle of good faith is defined more broadly in the Restatement (Second) of Contracts than in the UCC. The Restatement represents an attempt by the American Law Institute (ALI, 1981) to formulate the leading principles and rules of American law, although it does not provide statute law. Section *205 provides that 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'. The section applies only to the performance and enforcement of contracts, and not to the negotiation phase. The comment specifies three purposes for the duty of good faith and fair dealing: faithfulness to an agreed

common purpose, consistency with the justified expectations of the other party and consistency with 'community standards of decency, fairness or reasonableness' (ALI, 1981, Section *205). Good faith and fair dealing may thus involve more than honesty. Nonetheless, the definitions still rely on subjective good faith (the reasonable expectations of the parties involved), and American law is unwilling to impose a canon of objective norms on contracting parties, as is the case in the Netherlands. In addition, good faith does not give rise to independent actions, as discussed above. Similar to practises in the Netherlands, however, it does function as an objective standard of fairness that parties can invoke in the courts.

In civil-law countries, an obligation to act in good faith also exists in pre-contractual relations (see also Section 3.1). Although common law has always refused to accept this type of general obligation, some scholars (e.g. Summers, 1968) have proposed doing just that. Both the UCC and the Restatement (Second) of Contracts, however, firmly reject the notion of a general obligation of good faith and fair dealing. Nonetheless, this does not prevent a party that breaks off negotiations from being held liable for the damages incurred by the counterparty. American law has upheld liability in cases of unjustified enrichment, misrepresentation and cases in which specific promises had been made. Whether the general norms of civil law leads to uncertainty (concerning the status of the contract), thereby increasing transaction costs, remains an open question. Conversely, such norms could lower transaction costs by creating procedural legal certainty about the behaviour of contract parties and the possibility of going to court should their behaviour cross a line.

The concept of good faith in the Restatement (Second) of Contracts was inspired by the conceptualisation of good faith developed by Summers (1968; see also 2000). Summers refers to this as the 'excluder' conceptualisation, as it '…serves to exclude a wide range of heterogeneous forms of bad faith' (Summers, 1968, p. 195 op cit. Summers, 2000, pp. 126-127). It may rule out behaviour that was not dishonest or otherwise immoral, but which would nonetheless be regarded as contrary to good faith.

Burton (1980) defends another conceptualisation: 'Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting – when the discretion-exercising party refuses to pay the expected cost of performance. Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation – to capture opportunities that were preserved upon entering the contract, interpreted objectively' (Burton, 1980, pp. 372-373). A party that performs is acting in good faith, while a party that does not perform is trying to recapture a foregone opportunity. Burton states that the 'cost perspective' is essential for a proper understanding of this conceptualisation and that good faith limits the exercise of discretion. A party that has discretion with regard to the way it will perform deprives the contracting party of an anticipated benefit. This deprivation can be in either bad faith or good faith. It is in bad faith, and can justify an action for damages, if the party tries to recapture an opportunity, as the entire purpose of making a contract is to commit (i.e. to rule out certain options).

American judges often use the good-faith doctrine as a gap-filling instrument (Farnsworth, 1995). In other words, the doctrine is applied to fill gaps when a contract is inconclusive on the disputed matter. Farnsworth (1995) also emphasises, however, that American judges tend to use all conceptualisations of good faith (excluder, foregone opportunity, implied term).

3.3 Some concluding remarks on good faith

Farnsworth (1995, pp. 60-61) opposes the civil-law concept of good faith as a 'cloak with which to envelope other doctrines' (i.e. as an umbrella term). A common-law attorney separates the doctrines of unconscionability or frustration of purpose from the doctrine of good faith. In civil law, 'many contract doctrines can be subsumed under a single amorphous doctrine of good faith' (Farnsworth, 1995, p. 61). In line with the Farnsworth's prejudice, we hold that Article 2-302 on unconscionability does resemble the good-faith principle as applied under Dutch law, particularly given that a court may set aside or strike articles or entire contracts if they are contrary to the essential purpose of the contract or public policy. This implies that the article grants broad power to the courts (in sale contracts; for leases, the provision is found in 2A-108). The restriction is that 'the principle is one of prevention and oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power' (Restatement [Second] of Contracts 1981, Official comment, under 1). The basic test is whether a provision in the contract is so one-sided as to have been unconscionable under the circumstances that existed when the contract was made.

The core of the matter is that common-law attorneys are not accustomed to working with general principles. Common law is based on specific obligations and specific actions. The civil-law system of general principles and obligations is often rejected by common-law attorneys as contrary to the principle of legal security and excessively interfering with the autonomy of contracting parties (Brownsword, 1999). Critics argue that these principles do not recognise the need for flexibility and adaptability in contracts. According to the classic *Chitty on Contracts*, common law favours contracts that are complete when they are closed, and it does not like modifications (Beale, 2004). Macneil (1978) points out that the autonomy principle is not necessarily protected by a legal system that focuses on the legal security of contracts. Suppose that, after a contract has been closed, the parties start performing their obligations in ways that differ from those specified in the contract. The autonomy principle would not be served if a court were to uphold the provisions of the contract instead of the rule that emerged between parties.

In a paper on construction contracts, Dagenais (2007) draws on experiences in Quebec to claim that an objective good-faith principle promotes more flexible and more adaptable contracts by moving away from the adversarial contract model. It promotes a model in which the other party becomes a partner. In this way, it fosters a system that puts more emphasis on cooperation. According to Dagenais (2007), a contract that is characterised by flexibility is less likely to be breached. Because it also promotes the contractual relationship, given that the principle of good faith promotes flexibility.

Courts are not the only entities that enforce contracts; commercial parties also self-enforce contracts in order to avoid potential damage to their reputations (Harrison, 2004). Informal rules of conduct and other forms of 'soft law' are thus also relevant, in addition to the differences in legal court judgement. Studies in the US have shown that relational sanctions are often preferred over contractual remedies (Macaulay, 1963, 1985). It is logical to assume that the concept of good faith urges parties to solve their problems in informal settings first, as the outcome in court is likely to involve some compromise between their interests. It is therefore not in the interest of either party to gamble on the outcome of a procedure in the courts.

The goal of the following section is to assess whether the different conceptualisations of good faith are reflected in agreements of parties in strategic urban projects.

4. Strategic Urban Projects

Strategic inner-city projects play a role in the project-led urban regeneration initiatives of cities, in which government agencies often perform an entrepreneurial role (Swyngedouw, 2005; Kreukels, 2005). For investors, such projects offer a chance to realise high-quality real estate as an extension of the central business district. Strategic projects are often unique within a given city: 'Strategic projects are a specific class of projects so grand that each one is considered in its own right'

(Faludi and Van der Valk, 1994, p. 3). Although strategic projects are not the outcome of strategic planning, they do set the context in which planning takes place.

The characteristics of strategic urban projects that are relevant to this paper are as follows: they tend to be complex, their development takes time and inter-project relations often exist amongst their constituent parts, thereby usually requiring the government to contract with market parties. The fact that neighbourhood characteristics have a major impact on the value of the real estate is also relevant. Partners may benefit from each other's investments in the quality of the area. They are also in competition with each other, however, as the capacity of the real estate market to absorb new high-price additions to the property stock is limited. Examples of strategic projects include waterfront developments (Gordon, 1997a; 1997b; Wigmans, 2001) and projects near railway stations (Bertolini and Spit, 1999).

4.1 General characteristics of Battery Park City and South Axis: Mahler 4

The case studies in this paper, Battery Park City in New York City and the South Axis in Amsterdam, have been introduced in various books and scientific articles. This paper therefore provides a relatively brief introduction, and the analysis focuses on contractual practice in relation to completeness and the role of good faith.

Battery Park City in New York City is known as one of the most successful planning projects ever to have been realised in the United States (Gordon 1997b, Fainstein 2001). It can be sketched as a waterfront project. When it was initiated in the late 1960s, the project had a slow start, and it suffered from the failure of government

agencies to set it in motion. The Battery Park City Authority was close to bankruptcy in 1979 (Gordon, 1997a). In the 1980s, the project eventually became very successful. The forty-hectare site includes both residential and commercial neighbourhoods, along with parks, an esplanade along the Hudson River and museums. The Battery Park City Authority (BPCA) manages the site. The project was chosen for this analysis because, as in Amsterdam, the local government owns and manages the site, and because it involves a form of integral planning that resembles Dutch practice with regard to the intended results. Finally, the project was developed with long leasehold contracts, as was the project in Amsterdam.

The Mahler 4 project is set within the context of the Amsterdam South Axis (*Zuidas)*. The Zuidas project is situated near important infrastructure and has some of the characteristics of a complex project near a railway station. With the Zuidas project, the city hopes to create a new prestigious neighbourhood that will generate a central business district (CBD) (Kreukels, 2005; Louw and Bruinsma, 2006; Majoor, 2006). Since the 1970s, the monumental 17th century city centre has gradually lost its function as central business district. After a failed government plan to develop a CBD (the IJ Axis or *IJ-as*) at the waterfront location along the IJ (a former sea arm), close to the historical city centre, the South Axis, located in the prosperous south radius of the city and close to Amsterdam Airport, gradually became the focus for the development of a new CBD. The Mahler 4 project involves mostly prestigious, high office towers and apartment buildings, and it is constructed as a public private partnership. The government owns the land and leases it, in emphyteusis, to private parties. Although the south-axis area received considerable pressure from private

investors for a number of years, the city of Amsterdam succeeded in launching the project relatively simply during the first upswing of the real estate market. Decision-making proceeded much more slowly, however, due to the involvement of the national government regarding tunnelling infrastructure and the fact that the project was financed with proceeds from office development (as analysed by Majoor, 2006). The background of this situation exceeds the scope of this paper.

The following section addresses the question of whether the different private-law environments of Amsterdam and New York influenced the planning processes and the ways in which parties cooperated in the two projects.

4.2 Interviews in Amsterdam[1]

Several of the actors that were involved in the construction of the Mahler 4 project were interviewed, as were two of the three private parties that were involved and the project manager for the private parties. The private parties work together on the project, for which they established a specific legal entity (VOF Mahler4). The project manager for the local government and the employees that were involved in the drafting of the leasehold contracts were interviewed as well, as were the lawyers that worked in the field of urban renewal projects. The largest private party involved, who was among those interviewed, wrote the cooperation contract.

[1] Records of the interviews in Amsterdam and New York are available from the authors.

The private parties identified good faith as the leading legal principle in their relationship with the government. Because they had such great trust in the principle, they all expressed the desire to keep the cooperation contract as small as possible. The parties preferred to negotiate details during the construction of the project, and not when the contract was made, as it was impossible to foresee all of the problems that could arise. They valued the option of making specific, problem-based solutions as problems occurred. They relied upon good faith as the principle that would ensure that such solutions would reflect a careful balance between their interests and those of the government.

The good-faith principle thus had several meanings for these parties:

1. It referred to small contracts.
2. Parties refrained from going to court in situations in which they might have had a chance to win.
3. With regard to negotiating, the parties emphasised the initial and construction phases, but not negotiation regarding the (cooperation) contract.
4. Parties did not feel the need to deal extensively with every problem that might arise, as they believed that good faith would lead to fair solutions to actual problems as they arise.
5. The principle ensured that the cooperation contract could be described as a non-legal, legal contract.

Ad 1) Because parties trusted that the application of the good-faith principle would lead to a balanced, fair result, they did not feel it necessary to address every issue in the contract.

Ad 2) Parties preferred to maintain a good-faith relationship rather than engaging in legal disputes over minor issues. Although this preference could be a sign of trust (or even of good sense), they also emphasised that they would not expect to have achieved better results by going to court than they would have through negotiation, as the courts would also have applied the principle of good faith to mitigate fines for non-compliance.

Ad 3) Because the contract was small and parties trusted the good-faith principle, the contract was not the core of their relationship. The initial phase (in which parties decided whether to work together) and the construction phase (in which they addressed all specific problems, as the solutions were not contained in the contract) were of more importance. We argue below that this is one of the most important differences between the American case and the Dutch case.

Ad 4) The parties trusted good faith to ensure the identification of fair solutions to problems. As shown above, the difference in trust in this respect is that the parties emphasised that it was simpler to negotiate amongst themselves, as the courts would have applied the same principles.

Ad 5) Parties did not feel a need to be very precise about all issues; contracts that all actors can understand were preferable to technically formulated documents.

The civil-law system and the principle of good faith thus facilitate the making of incomplete contracts such that the parties trust the principle and consider the transaction costs attached to making complete contracts excessive.

4.3 Interviews in New York

For the New York case study, interviews were conducted with New York City employees that were involved with the BPCA, employees of the BPCA and a number of experts who had studied Battery Park City. Interviews were also conducted with developers and several Dutch lawyers that had practiced American law in New York together with lawyers who had been involved with the BPCA on behalf of either the BPCA or one of the private parties.

The people who were interviewed in New York emphasised the fact that they were living in a very litigious country. Whenever a party fails to fulfil the established obligations, the counterparty conducts a cost-benefit analysis with regard to the costs of a lawsuit.

An expert described the American contract as consisting of three parts. The first part, which can be a very short document, comprises the actual deal, and the second part consists of business issues. The third part, which concerns risks, is the reason that Anglo-American contracts are so long. Parties specify every risk and every contingency that comes to mind, as well as how each situation is to be solved.

The primary emphasis is on the contracting phase. Parties take as long as necessary to negotiate the contract, as they do not wish to deal with each other once the contract has been written, except in extraordinary circumstances. As one expert described, 'The contract between professional businessmen is made by lawyers. As soon as it's made, a businessman wants to start building, he doesn't have time to negotiate'. One of the reasons is that the developer's lenders require sufficient certainty in the contract, given that the BPCA is able to annul the lease, leaving the lenders without collateral, should the developers fail to comply with the guidelines.

The practice in the New York case was to aim for complete contracts. The parties did not rely on the principle of good faith to guide their relationships, striving instead for a central contracting moment, separate relationships between parties and no mutual cooperation or collaboration throughout the process. Although the last conclusion can be derived from the texts of the contracts and the drafting process, the private parties in New York also emphasised that they held the cooperative and non-formal attitude with which the representatives of the BPCA addressed them in high esteem. They maintained that these kinds of projects cannot be properly developed without such an attitude. Nonetheless, the legal process does not seem to facilitate such informal attitudes and forms of collaboration. Finally, a comparison of the outcomes of the interviews in Amsterdam and those of the interviews in New York yields the following result.

The information that was obtained from the interviews in New York differs along each of the five points that were presented for the Amsterdam case.

Ad 1) As stated earlier, the contracts in New York were long. Rather than shortening them, the good-faith principle increased their length.

Ad 2) Private parties emphasised that they conducted cost-benefit analyses in cases of non-compliance, but they also emphasised that they would only start a lawsuit as a last resort. They identified the high costs and insecure outcomes of trials together as the main reason, and the value of a good relationship with the BPCA as a sub-reason, that they never appealed to the principle of good faith (or other principles, like equity or reasonableness).

Ad 3) During the negotiating phase of the BPC, the emphasis was on the contracting phase; the absence of a good-faith principle was one of the main reasons, as explained above.

Ad 4) As described above, the parties specified every issue that came to mind, as there was no general principle of good faith to serve as a source of obligations in which it was possible or desirable to trust.

Ad 5) The contracts in BPC were technical, as they were intended as 'watertight' legal documents.

4.4 Comparison of contracts

Respondents in Amsterdam said that, if everything went well, they never opened the contract. In contrast, the respondents in New York said that they almost never looked into their statutes and casebooks. A Dutch lawyer practising American law in New York referred to the good-faith principle as 'a bad excuse for sloppy drafting'. In American practice, negotiation takes place before the contract is signed. After the

signing, the parties never have to meet again (at least in theory); they just have to perform the contract. If completeness is the goal, Dutch contacts do indeed fall far short.

Compared to the lease between the city and the developers regarding Plot 18b of the North Residential Neighbourhood of Battery Park, the contracts in the Mahler 4 project say almost nothing about risk allocation. They state only that the risks for changes in the design of the project (*stedenbouwkundig ontwerp*) are assumed by the local government (Article 26) and that the parties will try to negotiate on every unforeseen circumstance (Articles 32.2, 34.1 and 2.2).

A second noteworthy point involves the forums in which the parties meet; these forums include the Mahler 4 steering committee (*stuurgroep*), the Zuidas *atelier* (design of the Zuidas project), the Mahler 4 design team *(ontwerpteam)* and the supervising team (*beheeroverleg*), the purpose of which was to fine-tune the work under construction. The local government had a say in the parties with which the private parties wished to enter contracts, and the private parties were able to prevent the launch of the (possibly competing) Goldstar project (Articles 15.4 and 15.6 and Art. 24.3). The parties had a duty to inform each other (Article 1 and 29) whenever situations occurred that could influence the project. Finally, the realisation of more houses than the specified number, the fulfilment of strict environment norms, the obligation of the local government to provide the necessary permits and similar obligations were all considered effort duties, meaning that they were not binding with regard to their results.

The lease regarding Plot 18b in the North Residential Neighbourhood differs sharply from the Dutch contract. It is much longer and more detailed. Although good faith is mentioned in many places, its meaning shows no resemblance to the concept of good faith as applied in Dutch law. This difference is a source of fascination for O'Connor (1999), who observes that, although good faith and such words as 'fair' and 'reasonable' are constantly mentioned in common law statutes and contracts, the meaning of good faith is much more limited, as it is intended only to prevent the lessee from starting a procedure with the wrong intent. An additional difference is that American contract law operates according to an adversary model, in which parties have obligations towards each other. American law revolves around liability; the central question upon which private law is based concerns the specification of who will be liable under which circumstances. Despite the fact that good faith is specifically mentioned in the article, it does not bridge the interests of parties as it does in Dutch law.

The practice in Amsterdam can best be described as a practice of unspecificity; in other words, parties do not address specific problems in their contracts. In contrast, the culture in New York could be described as one of over-specificity; provisions are made for every problem that the parties can think of while drafting the contract. It can be argued that the differences between the two practices are (at least partly) caused by the differences in the interpretation of the principle of good faith in the two countries.

5. Discussion and Conclusion

The case studies from Amsterdam and New York can serve as ideal types for relational, incomplete contracting (Mahler 4) and working towards a complete, highly specified, contract (Battery Park City), respectively. These projects are not caricatures; they are real-life cases. Based on the analysis of this paper, we submit that the differences in these practices are rooted in differences in legal systems. The American legal system does not include the same provisions for good faith that are found in the Dutch system. We have argued that good faith provides a focal point for analysing differences in transaction costs. We have argued that the rationality of striving for complete contracts is related to the function of good faith in the prevailing legal system. The most important (but not all) differences between these functions can be explained by the distinction between common law and civil law systems.

In light of this argument, it might be rational to strive for a complete contract in New York, given that the principle of good faith is less developed within the legal system and that it would be more costly to make an incomplete contract, as the perceived liability risks are high. As suggested by our analysis of good faith in American law, however, more elements of good faith may be introduced in contracts on strategic urban projects than is presently customary. We expect that moving away from blueprint contracts and introducing provisions to re-negotiate in good faith could improve the practise of strategic urban projects in contexts of uncertainty and in light of changes in the valuation of urban qualities.

The high costs of making a complete contract are not only due to the costs of the actual drafting of the contract; complete contracts prevent learning processes from taking place after a contract has been signed. The transactions costs of altering a contract are relatively high. In the Battery Park case, few changes were made in the project after the contract was signed. In Amsterdam, the flexibility to respond to developments was greater, and the project included more changes and refinements. Another possible explanation for this difference is that common law specifies that a contract exists only in cases where there is mutual consideration. A promise to provide a gift is not a binding contract, as nothing is given in exchange for this promise. Changing a contract to make it easier for one party to meet market demands without providing a benefit to the counterparty is thus not a binding agreement; in such a case, legal advice would be needed to make a binding agreement. On the other hand, in a civil-law context, parties who refuse to make contract changes that are not contrary to their own interests but that are in the interest of the counterparty may be in violation of good faith. A contractual relation involves considering the interests of the contract partner.

In the Amsterdam case, major changes have been made (e.g. in the combination of functions within a building), and the process of cooperation has led to a more funnel-shaped process. Because the civil-law interpretation of good faith makes it possible to back out of obligations only in exceptional cases, and because it is more commonly used as a means of interpreting an open situation, it can be said that, in a civil-law system, parties may deliberately choose incomplete contracting over complete contracting. It remains to be seen whether a different kind of specific

remedies in common law would add up to the same result. At least in contracting practice, complete contracts are preferable.

An objective good-faith principle facilitates the practice of incomplete contracting, promoting both efficiency and flexibility in long-term projects. It promotes efficiency, as incomplete contracts address only problems that actually rise. It promotes flexibility, as incomplete contracts do not dictate but merely facilitate the layout of projects. It is therefore unnecessary to postpone investment until all possible contingencies have been considered.

Real-option theory provides a foundation upon which to base the choice for open contracts; according to this theory, parties that are able to choose whether and when they will exercise particular options are in a better position to cope with uncertainty. In cases that involve uncertainty about exogenous developments, it may be wise to renegotiate according to specific knowledge concerning the particular circumstances of time and place; this knowledge becomes available only at a later stage in the process.

One apparent consequence of expending less effort making a complete contract before investments starts is that it becomes easier to 'ride the cycle' of real estate development, as Gordon (1997a) has indicated. This is apparently because less complete contracts are easier to make within the short window of opportunity that the real estate cycle provides. The idea that, during a bust, it may be valuable to have a complete contract to bind private investment to investments, does not hold in

practice, as authorities are ‘reluctant to drop recalcitrant developers, since nobody else could obtain financing during a bust’ (Gordon, 1997a, 261). Development companies reserve room in their contracts for the contingency that property does not sell.

It is apparently just as unwise to strive for complete contracting for complex urban projects as it is to follow a model of comprehensive, blueprint planning within an environment of uncertainty.

It is possible to introduce some elements of good faith (e.g. the duty to inform or renegotiate if new issues arise; cf. Dagenais, 2007), but it is obviously not possible to introduce objective good faith in the pre-contractual phase. Even if two contract parties were willing to do so, a less specified, more incomplete contract would be difficult to use. The contracting parties themselves, as well as financial institutions, insurance companies and other essential stakeholders in complex urban projects rely upon highly specified contracts based on an adversarial model for defining liabilities. Changing practise demands broader institutional change in the realm of property development and the transactions around it.

Because both projects were successful, it is unclear which system is likely to contribute the most to the success of projects. Nonetheless, the Americans pay a high price for their legal certainties, which may ultimately prove less certain in the courts. The Dutch pay a price for their incompleteness as well. When problems arise, the parties have no recourse to a document, and this often results in endless

conversations. This is a problem of incompleteness or underspecificity, however, and not a problem inherent to the principle of good faith.

Contracting, legal systems, legal culture and large-scale urban projects are possible themes to be included in a new research agenda concerning the relationship between legal systems and interpretations of good faith. Other themes on the agenda could include the relationship between contracting practice, the ability to 'ride the real estate cycle' and, more importantly, the impact of contracting practice on specific real estate cycles themselves. Real estate cycles can be modelled simply as a function of supply-side behaviour (Geltner and Miller, 2001) in relation to 'time to build' (Kydland and Prescot, 1982). Higher transaction costs in making a complete contract theoretically increase the costs of exercising an option, thereby raising the hurdle price and creating a situation in which it is rational to exercise the option (Grenadier, 1995). According to this model, increasing the time between market development and building activities strengthens the cycle and may make it more difficult to engage private investment in strategic urban projects. Investment may therefore turn to less complex projects, as can be found on greenfields.

References

ALI (1981) *Restatement of the Law Second, Contracts.* Philadelphia: The American Law Institute. http://www.ali.org/ali/contract.htm

BEALE, H.G. (Ed. 2004). *Chitty on contracts, Volume 1*, 29th edition, Sweet & Maxwell, London.

BECK, T. DEMIRGÜÇ-KUNT, A and LEVINE, R. (2003) Law endowments, and finance, *Journal of Financial Economics*, 70, pp. 137-181.

BECK, T. and LEVINE, R. (2005) Legal Institutions and Financial Development, in: C. Ménard and M. Shirley (Eds.) *Handbook of New Institutional Economics*, pp. 251-278. Dordrecht: Springer.

BERTOLINI, L. and SPIT, T. (1999) *Cities on Rails. The Redevelopment of Railway Stations Areas*. London: E & FN Spon.

BROWNSWORD, R. (1999). *Positive, Negative, Neutral : the reception of good faith in English contract law,* in : Brownsword, R., Hird, N.J., Howells, G. (Eds.) *Good faith in contract : concept and context,* Ashgate, Aldershot, pp. 13-40.

BRUECKNER, J.K. and LAI, F.-C. (1996) Urban growth controls with resident landowners, *Regional Science and Urban Economics*, 26, pp. 125-143.

BURTON, S.J. (1980) Breach of Contract and the Common Law Duty to Perform in Good Faith, *Harvard. Law Review*, 94, pp. 369-404.

CHESHIRE, P. and Sheppard, S. (2002) The welfare economics of land use planning. *Journal of Urban Economics*, 52, pp. 242-269.

CHESHIRE, P. and SHEPPARD, S. (2004) Land markets and land market regulation: progress towards understanding, *Regional Science and Urban Economics*, 34, pp. 619-637.

COASE, R.H. (1937) The Nature of the Firm, *Economica*, 4, pp. 386-405.

COHEN, G.M. (2000) Implied Terms and the Interpretation in Contract Law, in: B. Bouckaert and G. De Geest (Eds.) *Encyclopedia of Law and Economics 3*, pp. 78-99. Cheltenham: Edward Elgar.

DJANKOV, S., GLAESER, E., LA PORTA R., LOPEZ-DE-SILANES, F. and SHLEIFER, A. (2003) The New Comparative Economics, *Journal of Comparative Economics*, 31, pp. 595-619.

DAGENAIS, D.A. (2007). Introduction to good faith in construction contracts, *Construction management and economics*, 25, 715-721

FAINSTEIN, S.S. (2001, original 1994) *The City Builders, property development in New York and London 1980-2000.* Lawrence (Kansas): Kansas University Press.

FALUDI, A. and A.J. Van der Valk (1994) *Rule and Order: Dutch Planning Doctrine in the Twentieth Century*. Dordrecht: Kluwer Academic Publishers.

FARNSWORTH, A. (1995) Duties of good faith and fair dealing under the unidroit principles, relevant international conventions, and national laws, *Tulaware Journal of International Law*, 3, pp. 47-63.

FOSS, N.J. (1996) Firms, Incomplete Contracts, and Organizational Learning, *Human Systems Management,* 15, pp. 17-26.

FOSS, K. and FOSS, N.J. (2002) Organizing Economic Experiments: Property Rights and Form Organization, *The Review of Austrian Economics*, 14, pp. 297-312.

GELTNER, D.M. and MILLER, N.G. (2001) *Commercial Real Estate Analysis and Investment*. Cincinatti: South-Western College Publishing Company.

GORDON, L.A. (1997a). Financing Urban Waterfront Redevelopment, *Journal of the American Planning Association,* 63, pp. 244-265

GORDON, D.L.A., (1997b) *Battery Park City, Politics and Planning on the New York Waterfront*. Amsterdam: Gordon and Breach Publishers.

GRENADIER, S.R. (1995) The Persistence of Real Estate Cycles, *Journal of Real Estate Finance and Economics*, 10, pp. 95-119.

GROSHEIDE, F.W. (1998) The Gentleman's Agreement in Legal Theory and in Modern Practice – The Dutch Civil Law Perspective, in: E.A. Hondius (Ed.) *Netherlands Reports to the Fifteenth International Congress of Comparative Law,* pp. 91-114. Antwerpen/Groningen: Intersentia Rechtswetenschappen.

HAANAPPEL, P.P.C. and E. MACKAAY (Eds.1990) *New Netherlands Civil Code Patrimonal Law*. Deventer/Boston: Kluwer Law and Taxation.

HARRISON, D. (2004) Is a Long-term Business Relationship an Implied Contract? Two Views of Relationship Disengagement, *Journal of Management Studies*, 41, pp. 107-125.

HART, O. and MOORE, J. (1988) Incomplete Contracts and Renegotiation, *Econometrica*, 56, pp. 755-785.

HARTKAMP, A.S. (1996) *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, verbintenissenrecht [Handbook for the practice of Dutch civil law, law of obligations]*. Zwolle: W.E.J. Tjeenk Willink.

HATZIS, A.N. (2002) Having the Cake and Eating it Two: Efficient Penalty Clauses in Common and Civil Contract Law, *International Review of Law and Economics*, 22, pp. 381-406.

HAYEK, F.A. (1945), The use of knowledge in society, *American Economic Review,* 35**,** pp. 519–530.

HESSELINK, M.W. (1999) *De redelijkheid en billijkheid in het Europese privaatrecht [Reasonableness and fairness in European private law]*. Deventer: Kluwer rechtswetenschappelijke publicaties.

HESSELINK, M. (2002) Pre-contractual Good Faith, in: H. Beale, H. Kötz, A. Hartkamp and D. Tallon (Eds) *Cases, Materials and Text on Contract Law*, pp. 237-294. Oxford: Hart Publishing.

HR (1982) Plas Valburg case (Hoge Raad 18 juni 1982) [Supreme Court of the Netherlands, 18 June 1982], NJ 1983, no 726)

JOHNSTON, J.S. (1993) Default rules/mandatory principles: a game theoretic analysis of good faith and the contract modification problem, *South Californian Interdisciplinary Law Journal*, 3, pp. 335-388.

KLEIN WOOLTHUIS, R., HILLEBRAND, B. and NOOTEBOOM, B. (2005) Trust, Contract and Relationship Development, *Organization Studies*, 26, pp. 813-840.

KNIGHT, F.H. (1921) *Risk, Uncertainty, and Profit*. Boston and New York: Houghton Mifflin.

KREUKELS, A. (2005) The Development Strategy for a New Urban Form, in: W. Salet and S. Majoor (Eds.) *Amsterdam Zuidas European Space*, pp. 150-166. Rotterdam: 010 Publishers.

KYDLAND, F.E. and PRESCOTT, E.C. (1982) Time to Build and Aggregate Fluctuationsm, *Econometrica*, 50(6), pp. 1345-1370.

LA PORTA, R., LOPEZ-DE SILANES, F., SHLEIFER, A and VISHNY, R.W. (2000) Investor protection and corporate governance, *Journal of Financial Economics*, 58, pp. 3-27.

LEVINE, R. (2005) Law, Endowments and Property Rights, *Journal of Economic Perspectives*, 19, pp. 61-88.

LICHT, A.N., GOLDSCHMIDT, C. and SCHWARTZ, S.H. (2005) Culture, Law, and Corporate Governance, *International Review of Law and Economics*, 25, pp. 229-255.

LORENZ, E. (1999) Trust, contract and economic cooperation, *Cambridge Journal of Economics*, 23, pp. 301-315.

LOUW, E. and BRUINSMA, F. (2006) From mixed to multiple land use, *Journal of Housing and the Built Environment*, 21, pp. 1-13.

MAHONEY, P.G. (2001) The Common Law and Economic Growth: Hayek Might Be Right, *Journal of Legal Studies*, 30, pp. 503-525.

MAJOOR, S. (2006) Conditions for multiple land use in large-scale urban projects, *Journal of Housing and the Built Environment*, 21, pp. 15-32.

MICELI, T.J., SIRMANS, C.F. and TURNBULL, G.K. (2000) The Dynamic Effects of Land Title Systems, *Journal of Urban Economics*, 47, pp. 370-389.

O`CONNOR, J.F. (1999, first edition 1990) *Good faith in English law*, Aldershot: Dartmouth

OVERBY, A.B. (1993) Bondage, Domination, and the Art of the Deal: An Assessment of Judicial Strategies in Lender Liability Good Faith Litigation, *Fordham Law Review*, 61, pp. 963-1032.

POSNER, R.A. (2004a). Law and Economics in Common-Law, Civil-Law, and Developing Nations, *Ratio Juris*, 17, pp. 66-79.

POSNER, R.A. (2004b) The Law and Economics of Contract Interpretation. John. M. Olin Law & Economics Working Paper 229, The Law School, University of Chicago, Chigago.

RIJKEN, G.J. (1994) *Monografieën Nieuw BW A-5, Redelijkheid en Billijkheid, [Monographs in New Civil Code A-5, Reasonableness and Fairness]*. Deventer: Kluwer.

ROTTERDAM DISTRICT COURT (2001) Vonnis ROGOM Projecten BV tegen de gemeente Hellevoetsuis *(Judgement ROGOM Projecten BV versus the municipality of Hellevoetsluis)*, zaak/rolnummer 117000/HA ZA 99-850, 15-03-2001. (unpublished judgement of the Arrondissementsrechtbank Rotterdam, Postbus 50950 NL 3007 BL Rotterdam).

SADJADI, N.J. (2004). The Implementation Framework of Legal Systems, in: M. Deakin, R. Dixon-Gough, and R. Mansberger (Eds.) *Methodologies, Models and Instruments for Rural and Urban Land Management*, pp. 49-58. Aldershot: Ashgate.

SCHOORDIJK, H.C.F. (1984) *Onderhandelen te goeder trouw [Negotiating in good faith]*. Deventer: Kluwer.

SUMMERS, R.S. (1968) "Good Faith" in general contract law and the sales provisions of the Uniform Commercial Code, *Virginia Law Review*, 54, pp. 195-267

SUMMERS, R.S. (2000) The conceptualisation of good faith in American contract law: a general account, in: R. Zimmermann and S. Whittaker (Eds.) *Good faith in European Contract law*, pp. 118-145. Cambridge: Cambridge University Press.

SWYNGEDOUW, E. (2005) A New Urbanity? The ambiguous politics of large-scale urban development projects in European cities, in: W. Salet and S. Majoor (Eds.) *Amsterdam Zuidas European Space*, pp. 61-79. Rotterdam: 010 Publishers.

TIROLI, J (1999) Incomplete contracts: Where do we stand?, *Econometrica*, 67, pp. 741-781.

TITMAN, S. (1985). Urban Land Prices Under Uncertainty, *American Economic Review*, 75(3), pp. 505-514.

TURNBULL, G.K. (2005) The Investment Incentive Effects of Land Use Regulations, *The Journal of Real Estate Finance and Economics*, 31, pp. 357-395.

UCC (2003) Uniform Commercial codes, Ithaca NY: Cornell Law School http://www.law.cornell.edu/uniform/ucc.html

VALK, W.L. (2003) Algemeen gedeelte van het verbintenissenrecht [General section of the law of obligations], in: J.H. Nieuwenhuis, C.J.J.M. Stolker and W.L.Valk (Eds.) *Burgerlijk Wetboek Tekst & Commentaar [Civil Code Text and Commentary]*, pp. 2023-2450. Deventer: Kluwer.

VAN ARK, R. (2005) *Planning, contract en commitment: Naar een relationeel perspectief op gebiedscontracten in de ruimtelijke planning* [Planning, contract and commitment: Towards a relational perspective on area contracts in spatial planning], (PhD Wageningen University), Delft: Eburon.

WIGMANS, G. (2001) Contingent governance and the enabling city: The case of Rotterdam, *City*, 5, pp. 203-223.

ZIMMERMANN, R., WHITTAKER, S. (Eds. 2000) *Good faith in European Contract law*, Cambridge University Press, Cambridge

ZWALVE, W. J. (2000). *C.E. Uniken Venema's common law & civil law; inleiding tot het Anglo-Amerikaanse vermogensrecht*, W.E.J. Tjeenk Willink, Deventer

ZWEIGERT, K. and KÖTZ, H. (1998) *Introduction to comparative law*, Clarendon press, Oxford

Table 1: Contracts in Neoclassical Economics and New Institutional Economics, according to Van Ark (2005, p. 55)

Neoclassical Economics Classic contract	New Institutional Economics Relational contract
• Comprehensive contract concluded in advance for the full duration of the project	• Acknowledgement that contracts are incomplete because the transaction costs of drafting a complete contract would be too high
• Beginning and ending dates of the contract are established.	• Contracts are part of an ongoing process.
• No loose ends	• Continuous negotiation, involving additional transaction costs at a later time
• Arbitration by third parties	• Negotiation amongst contract parties