

Strategic city projects, legal systems and professional effectiveness

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Abstract

Differences between the legal systems of common law and civil law have attained attendance in the economic literature of “the new comparative economics” (Djankov et al, 2003) A relevant difference between these legal systems is in the principle of good faith, which has a specific meaning in private law. It does not only refer to a principle of honesty and fair dealing (subjective good faith) but the good faith provisions in the civil code are also a basis for a judge to interpret, supplement or even set aside contract provisions parties have agreed on (objective good faith). Whereas the principle of good faith is accepted in civil law (the law of the European continent), the common law (Anglo-American law) has until now not accepted a general (objective) good faith principle.

This paper will relate this aspect of difference of these legal systems both the principle of incomplete contracts as to two different models of professional practice that are developed by Argyris and Schön (1974) in the classical work “Theory in practice: increasing professional effectiveness”. The paper shows that common law system fits better with a model 1 of professional behavior and the civil law system with model 2. Relevant is that according to Argyris and Schön these models are not equally effective, i.e., “double-loop learning” would not occur in model 1, unless through revolutionary change.

The paper investigates whether these theoretical insights come to the ground in strategic city projects. Two case studies are analyzed, i.e. the Mahler 4 project in the South Axis of Amsterdam and Battery Park City, New York City. It shows that the relationships between agents in these projects reflect the differences in legal systems, and that this has also consequences for professional competences.

The paper proposes research questions to develop further insights in the practical meaning, to strategic urban projects, of the different doctrines of good faith in common law and civil law.

Keywords: Strategic city projects, incomplete contracts, legal systems, professional effectiveness, good faith

JEL-codes: K12, R50, O17

Introduction

In the western legal world two major systems exist: the common law that is the law of the Anglo- American world and the civil law: the law of the European continent. Not much is known about the influence of the differences between the private law systems on strategic city projects.

Most studies on the relationships between law and urban development are focused on administrative law, i.e. on the influence of planning systems, building regulations (Cheshire and Sheppard, 2002). Private law is often considered for granted as it are “only” the rules that govern private contracts.

On other fields, in the “new comparative economics” differences between legal systems attained attendance in the economic literature (Djankov et al. 2003a) Emphasis is than on protecting the rights of private investors (Beck et al. 2003; La Porta et al, 1998; 2000). Legal systems are complex and have different fields, e.g. property law, tort law and have different proceedings e.g. compulsory liquidation. The aim of this paper is not to make a comparison on all this fields, but to focus on contract law, in relation tot strategic city projects.

Incomplete Contracts

Transaction Costs Economics acknowledges that all contracts are unavoidable incomplete (Foss, 1996), because the complexity of the world. Or as Coase (1937) has formulated that “...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 these kind of situations, the details of what a contracting party is expecting to do “is not stated in the contract but is decided later” (Coase, 1937). The reason is that there are large transactions costs in making all kinds of small contracts for transactions that can be overseen, and at the moment that the transactions can be overseen. The effect of making a long-term contract is that there are not only transaction costs in drafting a contract, but also in the maintenance of the contract.

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

Neo Classical Economics Classic contract	New Institutional Economics Relational contract
<ul style="list-style-type: none"> • Comprehensive contract concluded in advance for the full duration of time • Beginning and ending contract are established • No loose ends • Arbitration by third parties 	<ul style="list-style-type: none"> • Acknowledgement that contracts are incomplete, because transaction costs to draft a complete contract will be to large • Contracts are part of an ongoing process • Continuous negotiations, so also later transaction costs • Negotiation of contract parties

In the dealing with the transaction costs of contracts, there is, (according to Foss, 1996) often the presumption that in principle the relevant information could be included in the contract,

but the costs of information collecting and processing are too high. Others, however, consider that there are unforeseen contingencies, and that there are degrees of unexpectedness. Some information is not out there and can be obtained against certain costs, but there is residual uncertainty (Foss and Foss, 2002).

Another aspect is that costs are made to write contracts about contingencies that do not take place (Tirole, 1999, 772), by making an incomplete contract; renegotiation can only go about contingencies that do take place. 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, 313). This principle of trust fits into the relational nature of incomplete contracting (see also Table 1).

In "mainstream theory of economic organization" (Foss, 1996) contractual incompleteness has a negative dimension as it may cause opportunism and morally hazardous behaviour. Foss (1996) however, points to the positive effect that incomplete contracts are an instrument to adaptation: "...it allows a firm to adapt to and exploit partly unanticipated learning which the firm itself generates..." Future learning cannot be fully anticipated as otherwise it is no 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)

This makes a good fit with the ideas of Hayek (1945) that specific knowledge of the particular circumstances of time and place is relevant and "...ultimate decisions must be left to the people who are familiar with these circumstances". Although Hayek wrote this as an argument against comprehensive planning, it also can be held against comprehensive contracting. Decision makers in later stages of a complex relationship have better knowledge on the actual situation (the time dimension of Hayek), hence it is a good thing to have openings in a contract when there is a large amount of uncertainty.

Professional learning

In their influential book *Theory in Practice: Increasing Professional Effectiveness*, Argyris and Schön (1974) distinguish two models of theories-in-use by professionals (Table 2). Model

1 fits more with professionals that strive for complete contracts, and do so form a fixed insight in their own interest. In Model 2 there is more room for taken the values of other actors into account and it makes a better fit with relational, incomplete contracting.

Table 2: The Models of Theories-in-Use (cited from Argyris and Schön, 1974, 68-69, 87)

Model 1			
Governing variables	Action strategies	Consequences for the behavioral world	Consequences for learning
1. Define goals and try to achieve them	1. Design and manage the environment unilaterally (be persuasive, appeal to larger goals)	1. Actor seen as defensive, inconsistent, incongruent, competitive, controlling, fearful of being vulnerable, manipulative, withholding of feelings, overly concerned about self and others or under concerned about others	1. Self-sealing
2. Maximize winning and minimize losing	2. Own and control the task (claim ownership of the task, be guardian of definition and execution of task)	2. Defensive interpersonal and group relationship (dependence upon actor, little additivity, little helping others)	2. Single-loop learning
3. Minimize generating or expressing negative feelings	3. Unilaterally protect yourself (speak with inferred categories accompanied by little or no directly observable behavior, be blind to impact on others and to the incongruity between rhetoric and behavior, reduce incongruity by defensive actions such as blaming, stereotyping, suppressing feelings, intellectualizing)	3. Defensive norms (mistrust, lack of risk-taking, conformity, external commitment, emphasis on diplomacy, power-centered competition, and rivalry)	3. Little testing of theories publicly. Much testing of theories privately.
4. Be rational	4. Unilaterally protect others from being hurt (withhold information, create rules to censor information and behavior hold private meetings)	4. Low freedom of choice, internal commitment, and risk taking	
Model 2			
1. Valid information	1. Design situation or environments where participants can be origins and can experience high personal causation (psychological success, conformation, essentiality)	1. Actor experiences as minimally defensive (facilitator, collaborator, choice creator)	1. Disconfirmable processes
2. Free and informed choice	2. Tasks is controlled jointly	2. Minimally defensive interpersonal relations and group dynamics	2. Double-loop learning
3. Internal commitment to the choice and constant monitoring of its implementation	3. Protection of self is a joint enterprise and oriented toward growth (speak in directly observable categories, seek to reduce blindness about own inconsistency and incongruity)	3. Learning-oriented norms (trust, individuality, open confrontation in difficult issues)	3. Public testing of theories
	4. Bilateral protection of others		

In complete contracts ownership and control of tasks is already divided over agents, all kind of risks are defined, and there are no open norms used, there is no trust in renegotiations that

must take place to fine tune the contract in a new situation. There is a preference for single-loop learning about how to handle within the contact on separate tracks of the contract parties.

Using incomplete contracts involves that the task is still controlled jointly by different agents who trust that renegotiation will lead to a good solutions for now unforeseen circumstances, that norms are learning-oriented.

Following Model 2 has according to Argyris and Schön more positive than negative consequences for quality of life and will be effective in problem solving and decision making for difficult problems and will also enhance long run effectiveness.

Below will be shown that model 1 fits better with complete contracts and common law, and that model 2 fits better with civil law and incomplete contracts. Relevant is that the common law and civil law legal systems have other practises in relation tot the completeness of contracts. Legal systems form so a lock-in, a sunk cost, for specific behaviour between actors. The relational principle of good faith plays a crucial role.

Good Faith in civil law

In civil law countries, the general principle to deal with situations the law (as it stands) does not provide a clear answer of desired solution for, is known as good faith. Good faith is a complex concept, with multiple meanings that embodies several legal principles. It has to do with fairness, with honesty, with a general notion that abstract laws cannot do justice in every concrete case they apply to. Legal doctrine makes a distinction between subjective good faith and objective good faith. In the present paper the Dutch civil code will be used to illustrate this principle (see Haanappel and Mackaay, 1990 for an English and French translation of the patrimonial law provisions of this code).

The obligation that stems from subjective good faith is in Dutch law described in the article 3:11 of the Dutch Civil Code (Haanappel and Mackaay, 1990, 5). Subjective good faith sees to what a person knew or should have known. Suppose a debtor pays someone else than the creditor, if he did so in good faith (because he did not know, and did not have to know that the one he paid had no right to the payment), he has paid his debt (Rijken 1994, Hartkamp, 1994). The term subjective good faith is somewhat misleading since it regards an objectified

subjectivity; it is not about what a person really knew, it is about what he should have known sometimes even if it is clear that it was impossible for him to know it (Hesselink, 1999).

Hesselink (1999) notes that every European civil law country has accepted a general principle of good faith. Objective good faith sees to the obligation of parties to behave in a certain way. Even when a party did not know and did not have to know that his behaviour was contrary to good faith, his behaviour could still be unlawful because it was contrary to an objective norm. Objective good faith is seen as an open standard (general clause) meaning that the legislator when he codified the principle knew that both its content as its legal consequences could not be foreseen and had to 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. Authors differ on the question whether the rules of the constitution also enter the private law by means of the good faith principle or that they work directly. The principle is autonomous. This means that legal actions can be based on it (without using another article).

As article 3:12 shows for Dutch law, the principle of good faith has to be objectified in a certain way. The principle is not easy to define. In the Dutch civil code, three articles deal specifically with objective good faith that under Dutch law is known (since 1992 when the new Civil Code replaced the old one of 1838) as “redelijkheid en billijkheid” (standards of reasonableness and equity or fairness) A difference in meaning between objective good faith and *redelijkheid en billijkheid* does not exist (Rijken, 1994).

Rijken (1994) names 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 it is used in concrete cases when a judge or legislator uses the principle. Therefore the principle is both general and concrete. Valk (2003, 2405) remarks that a judge will have to take a remote attitude with regard to the principle the law speaks of unacceptability according to standards of reasonableness and fairness and that is not the same as contrary to reasonable and equity. The latter would mean that every time a judge finds a rule unreasonable, he would have to set it aside (see Frame 1) but this is not what the legislator meant to do since he wanted the article to be applied only as a last resort.

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, 235)

Asser-Hartkamp (Hartkamp, 1996), the standard commentary on Dutch civil law, refers to the opinion of some writers that good faith works in every field of the law. Hartkamp (1994) agrees with their opinions as long good faith is substituted by the term unwritten law, and then he states that there are other sources. Rules of unwritten law regarding proper social conduct, usage, the good manners, the principles of fair trial and the general principles of good government are therefore some of the most important other sources of unwritten law. Therefore, good faith controls the law of property and the law of obligations where other principles have the same function in different fields of the law and (therefore) have other names. But, good faith is not just one of the sources, since it has the power to set aside every rule of the law and to rule a conflict between sources (see frame above).

Suppose a contract needs to be completed by a judge since it misses an important provision (for instance about damages). The first source, the judge would look at in order to find out how he has to rule the case now that the contract does not provide him with the answer, is statutory law. But it is possible that one of the parties states that a usage exists contrary to the statutory provision that has to be followed. The judge would, in a case like that, use the principle of good faith in order to determine if he will employ the statutory provision or the usage. But if both of the primary sources do not supply him with an answer to the problem, he would have to rely on good faith as an independent source of law. Finally, even if only a usage or only a statutory rule existed, he would still have to look if it was not contrary to good faith to use the rule in this concrete case, and if it was he would have to use good faith as the independent source of law to provide him with a different solution.

Article 3:12 makes clear that good faith is an unwritten source of law that has to be filled in with other (written and unwritten) sources. Rijken (1994) emphasizes that the article urges a judges to make clear how he came to his verdict, which interests he thought to be important and which principles. The meaning of article 3:12 is to make the formation of judgment with regard to good faith subject to an objective method.

In Asser-Hartkamp it is said that creditor and debtor are obliged to act in accordance with the principles of reasonableness and fairness: a circumscription that does not differ from the article 6:2 of the Dutch civil code – the principles of reasonableness and fairness refer to the unwritten objective laws that control the legal relationship between contracting parties.

A case in point is the Plas-Valburg case (HR 18 juni 1982; see also Hesselink, 2002) that shows to which spectacular results the principle has led. Plas Bouwonderneming was a developer that had reason to trust that a project from the Dutch municipality Valburg to build a communal swimming pool would be granted to him. But things worked out differently, the community used the proposal of Plas to make a better deal with a third party. A contract between the municipality and Plas was never signed. The Supreme Court of The Netherlands (*Hoge Raad*) ruled however that in these circumstances the municipality was not only liable for the damages of Plas (time and effort he invested in the plan, so-called negative damages) but also had to pay the profits he would have made (so-called positive damages). The reason was found in the moment the municipality had decided to grant the project to a third party, because the municipality could at that stage not end the negotiations in good faith.

The example shows that under Dutch law parties always have to take the position for their counterparty (his legitimized interests) into account since the formal argument ‘no contract was signed’ will not help them in cases like Plas-Valburg. If their counterparty had reason to trust a contract would rise, they might be liable to pay his positive damages even though it was not illegal for them to break of the negotiations (as in the Plas-Valburg case). (Schoordijk, 1984; compare Grosheide, 1998)

Another open norm in the Dutch civil code is provided by article 6:258 that deals with so-called unforeseen circumstances, i.e. circumstances for which the contract does not provide a solution, i.e. incomplete contracts. The article gives the court (on request of one of the contracting parties) the right to modify a contract or even set it aside in whole or in part. Most importantly, the court can only do so if the unforeseen circumstances are of such a nature that the other party, according to standards of reasonableness and equity, may not expect the contract to be maintained. This provision seems sound with the remarks made on incomplete contracts above. The provision of the Dutch civil code provides an open norm, stating that parties have a right to have the contract changed in case of unforeseen circumstances. The fact that the legislator made this provision subject to standards of reasonableness and equity,

provides the judge with a high amount of discretion power since the principle of good faith has to be filled in with other norms and therefore the provision is made subject to the dynamics of society. The article on unforeseen circumstances provides therefore a non-formal open norm, encouraging parties to find practical solutions for situations they did not foresee. However, in the travaux préparatoires (1982) it is said that a judge may not easily conclude that a party according to standards of reasonableness and equity cannot expect the other party to maintain the contract since the core of their obligations is to be found in the contract. In addition, if a party offers the other party to take away his disadvantage, the latter will not have case in court.

In conclusion, good faith fulfils in civil law as the Dutch example shows, as an open norm that has to be filled in with notion of fairness that stem from society (gate-function). In Dutch law, good faith was used to bridge the gap the adversary model of contract law presupposes between parties when it was ruled that parties had to take care of each other's interests. In addition, the interests of third parties with regard to the contract are determined via the good faith principle, as are the obligations parties have towards each other in the negotiating phase. Every provision in contract law can be set aside by the good faith principle.

Good faith in the common law

In an article that deals with the legal transplant of good faith in English law and with the place of the good faith principle in American law Teubner (2001) quotes the famous *Walford v. Miles* case (HL, 1992; see also Tetley, 2004) wherein it was emphasized that good faith was “inherently repugnant to the adversarial position of the parties” and “unworkable in practice.”

The principle of good faith was formerly introduced in English law when it implemented the European direction on unfair terms in Consumer Contracts in 1999 (Schulze, 2005). American law names the principle in the UCC (Uniform Commercial Code) and in the Restatement 2d. In the comment on the UCC a distinction is made between subjective good faith that refers to a state of mind (honesty in fact) and objective good faith that sees to reasonable commercial standards of fair dealing in the trade (Article 2-103). But, as O'Connor (1996) points out good faith is not supposed to play a role in negotiable instruments. In other words, when a contract is being negotiated objective commercial standards of fair dealing should not play a role (Article 1-304 of the UCC (2004)). The official comment to the UCC points out, there is no specific duty of good faith that could lead to an independent action in case of a failure to perform or enforce in good faith. “That the 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, 2004, Official comment article 1, paragraph 1-304, under 1).

Article 2-302 on unconscionability shows some resemblance with the good faith principle under Dutch law especially since the court may set aside or strike articles or whole contracts when they are contrary to the essential purpose of the contract or to public policy. Meaning that the article seems to give a very broad power to the courts (in sale contracts). 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.” (Official comment, under 1.) The basic test is whether the provision in the contract is so one sided that it became unconscionable under the circumstances existing when the contract was made. The provision also exists for leases (2A-108)

The crucial point we are making is not that good faith does not play a role in common law countries like the United States but that it is never interpreted in the way it is interpreted in a civil law state as the Netherlands: as a principle that urges a party to take the (justified) interests of his counterparty into account.

If contracts would be a perfect balance between the interests of parties wherein every detail was taken care of, the principle of good faith would not be needed.

The principle of good faith is necessary to supplement incomplete contracts. As incompleteness is inevitable feature of contracts – as uncertainty is inevitable (compare Coase 1937) –, also common law does have equivalences for civil law principle of good faith, which are based on case law. Specific actions like hardship, unconscionability, estoppel, frustration or misrepresentation all cover aspects that civil lawyers associate with good faith. In American law detrimental reliance can even (under exceptional circumstances) lead to the award of so-called positive damages. But these cases are all best regarded as incidents; they do not interfere with the general approach of a contract (see also Tetley, 2004).

American (and English) law has adopted principles to mitigate unjust effects of contracts but it has not left the adversary model that characterizes contract law. Dutch law (as many other

civil law countries) on the other hand, has explicitly left the adversary model when it accepted that negotiating parties should take each other's interest into account.

A following question is whether these differences in legal systems in relation to the rules used to handle the incompleteness of contracts play a role in case studies of strategic city projects.

Strategic city projects: Battery Park City and Mahler 4

Battery Park City in New York City is known as one of the most successful planning projects that took place in the United States (Gordon 1997, Fainstein 2001). The project knew a slow start when it started off in the late 1960s but became very successful in the 1980s. The 90-acre site involves both residential and commercial neighbourhoods together with parks, an esplanade along the Hudson River and museums. The Battery Park City Authority (BPCA) manages the site. The project is chosen, because the local government owns the site and manages it, and because it involves a form of integral planning that shows some similarities with the Dutch practices, as too the aimed results. Finally, the project is as the project in Amsterdam developed via long leasehold contracts.

The Mahler 4 project is a project within the context of the Amsterdam South Axis (*Zuidas*). The Zuidas project wants to create a new prestigious neighbourhood that will bring the city a central business district. The monumental 17th century city centre gradually lost its function as central business district since the 1970s, and after a failed government plan to develop a CBD at the waterfront location along the former sea arm the IJ: the IJ-axis (*IJ-as*) close to historical the city centre, gradually the South-axis, in the prosperous south radius of the city and close to Amsterdam Airport became the focus for the development of a new CBD. The Mahler 4 project involves mostly prestigious, high office towers and is constructed in a public private partnership. The government owns the land and leases it, in emphyteusis, to the private parties.

Do the different private law environments of Amsterdam and New York would influence the planning process and the way in which parties cooperated? The Dutch private law can be broadly sketched as European-Continental law (civil law) whereas the law of the state New York can be characterized as Anglo-American law (common law). Therefore the confrontation between the Dutch and American private law system is also a confrontation between civil law and common law.

Interviews in Amsterdam

Several actors that are all involved in the construction of the Mahler 4 project are interviewed as well as two of the three private parties that are involved, and with the project manager for the private parties. The private parties work together on the project for which they started a specific legal entity (VOF Mahler4). In addition the project manager for the local government and the employees that were involved in the drafting of the leasehold contracts are interviewed, just as the lawyers that worked in the field of urban renewal projects. The lawyers that were specifically involved in the Mahler 4 project are not yet interviewed; the largest private party involved, who was interviewed, wrote the cooperation contract.

The private parties named good faith as the leading legal principle in their relationship with the government. Because they had such great trust in the principle they all stated that they wanted the cooperation contract to be as small as possible. Parties wanted to negotiate on the details during the construction of the project and not when the contract was made because they couldn't foresee all the problems that could rise. They wanted to keep the freedom to make specific problem based solutions. They trusted on good faith as the principle that made sure that those solutions would be a careful balance between their interests and the interest of the government.

The good faith principle therefore leads to five results in the eyes of the contracting parties:

- It leads to small contracts,
- Parties do not go to court in situations where they might have had a chance to win.
- With regard to negotiating: emphasis is put on the initial and the construction phase but not on the negotiations with regard to the (cooperation) contract.
- Parties do not feel a need to deal with every problem that might rise extensively because they believe that good faith will lead to a fair solution when the problem really rises.
- The principle makes sure that the cooperation contract can be described as a non-legal, legal contract. Meaning that parties made sure that non-legal actors understand what it says.

The civil law system and the principle of good faith in this systems facilitates the making of incomplete contracts in such a way that agents trusts this principle, an consider the transactions costs attached to making compete contracts unnecessary large.

Interviews in New York

For the New York case study interviews are conducted with employees of the city of New York that dealt with the BPCA, with employees of the BPCA, with some experts that studied Battery Park City and with some Dutch lawyers that worked in New York, practicing American law together with lawyers that were involved in dealing with the BPCA either on behalf of the BPCA or on behalf of a private party. Despite numerous efforts, and e-mail conversations, an interview with developers has not taken place.

The people interviewed in New York emphasized that they live in a very litigious country. The core source for their obligations is the contract and not so much the law. Whenever a party does not fulfil his obligations, his counterparty will (at least consider to) sue him.

One expert said that an American contract consists of three parts: the first part is the actual deal, this can be a very short document, the second part consists of business issues and the third part is about risks. It is the third part that makes Anglo-American contracts so long. Parties write down every risk, every contingency, they can think of, and how the situation is to be solved.

Emphasis is put on the contracting phase. Parties take as long as necessary to negotiate the contract because as soon as it is written, they do not want to deal with each other anymore except for exceptional circumstances. As one expert put it: “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.”

The practice in New York aims at making complete contracts. Parties do not trust in good faith as principle to guide the relationship between parties, but were striving for one central; contracting moment and for the rest separate relationships between parties, no mutual co-operation, or collaboration through the process.

Comparison of contracts

Respondents in Amsterdam said that, if everything went well, they never opened the contract. Whereas the respondents in New York said that they almost never looked into the law. From the American perspective the Dutch good faith principle was by a Dutch lawyer, practising

American law in New York referred to as “a bad excuse for sloppy drafting.” When a complete contract is the goal, Dutch contracts are indeed far from complete.

A comparison of the contracts that were made in the Mahler 4 project and the lease between the city and the developers with regard to development of plot 18b in the North residential neighbourhood of Battery Park City, shows that the Dutch contract says almost nothing about risk allocation. It only says that changes in the design of the project (*stedenbouwkundig ontwerp*) are for the risk of the local government (article 26) and that parties will try to negotiate every situation they did not foresee (articles 32.2, 34.1 and 2.2).

A second point that comes to notice are all the forums parties will meet in such as the steering committee (*stuurgroep*) Mahler 4, the *atelier* Zuidas (design of the Zuidas project), the design team (*ontwerpteam*) Mahler 4, and the supervising team (*beheeroverleg*), which was fine-tuning of the work under construction. The local government has a say in the parties the private parties want to contract and the private parties can prevent the (possibly concurring) Goldstar project from starting of (article 15.4 and 15.6 and art. 24.3). Parties have a duty to inform each other (article 1 and 29) whenever a situation occurs that could influence the project. Finally, obligations such as the realisation of more houses than the named number, the fulfilment of strict environment norms and the obligation of the local government to provide the necessary permits are all effort duties, meaning that they are not binding as to their results.

The lease with regard to plot 18b in the North Residential Neighbourhood is very different from the Dutch contract. A good example thereof is article 28 that deals with street widening (see frame 2). Firstly, in a Dutch contract there would be no need to deal specifically with this problem. It would not be considered to be a problem at all especially not since a street widening can be a partial condemnation meaning that the base rent for the lease will be lowered. Secondly, there is no mentioning of any duty or intent to include the Tenant in the plans with regard to street widening whereas in the Dutch situation, the Tenant would have a say somewhere with regard to the plans. Finally, good faith is mentioned in the article but its meaning shows no resemblance with the good faith of Dutch law.

Frame 2: Provision on street widening (article 28) in lease contract in Plot 18b

“If at any time during the Term any proceedings are instituted or orders made by any Governmental Authority (other than Master Landlord or Landlord acting solely in its capacity as and not as a Governmental Authority) for the widening or other enlargement of any street contiguous to the premises requiring removal of any projection or encroachment on, under or above any such street, or any changes or alterations upon the Premises, or in the sidewalks, vaults (other than vaults which are under the control of, ore maintained or repaired by, a utility company), gutters, curbs, or appurtenances, Tenant, with reasonable diligence (subject to unavoidable Delays) shall comply with such requirements, and on Tenant’s failure to do so, Landlord may comply with the same in accordance with the provisions of Article 21. Tenant shall be permitted to contest in good faith any proceeding or order for street widening instituted or made by any Governmental Authority, provided that during the pendency of such contest Tenant deposits with Landlord or a Mortgagee that is an Institutional Lender security in amount and form reasonably satisfactory to Landlord for the performance of the work required in the event that Tenant’s contest should fail. In no event shall Tenant permit Landlord to become liable for any civil or criminal liability or penalty as a result of Tenant’s failure to comply with reasonable diligence (subject to Unavoidable Delays) with any of the foregoing orders. Any widening or other enlargement of any such street and the award or damages in the respect thereto shall be deemed a partial condemnation and be subject to the provisions of Article 9.”

To start with the last point: this is exactly the fascination of O’Connor when he states that good faith and words like fair and reasonable are constantly mentioned in common law statutes and contracts. However, good faith does not have the meaning it has in Dutch law, as it is only meant to make sure that the lessee will not start a procedure with from wrong intention. The first two points can be interpreted from the same principle. American contract law works with an adversary model wherein parties have obligations towards each other. American law is about liability; the central question private law is based on is who will be liable in which circumstances. Therefore, despite the fact that good faith is specifically mentioned in the article is does nut fulfil the bridge function between the interests of parties it fulfils in Dutch law.

Thanks to the good faith principle the concept of a network perfectly fits an analysis of the cooperation contract in the Dutch case whereas it makes no sense for analyzing the American contract. It might be that in the contract-drafting period the network could also be in America a valuable approach. In the Dutch practice emphasis is put on the construction phase, as the phase where parties negotiate specific points, in the American practice negotiating takes place before the contract is signed. After the signing parties never have to meet again (as a matter of speak), they just have to perform the contract.

Discussion and Conclusion

The Amsterdam and New York case studies are a kind of ideal types for relational incomplete contracting (Mahler 4), and working towards a complete contract in Battery Park City. These

different practices are rooted in differences in legal systems. The American legal system has not the same provisions for good faith as the Dutch one, so the differences between transactions cost in making complete contracts and incomplete contracts is different. Consequently, it might be rational to strive for a complete contract in New York taken that the good faith principles has less developed in the legal system, and it will be more costly to make an incomplete contract as the liability risks are perceived to be high. Relevant is that court formalism and time that it takes to get a court order is very common between Dutch and American legal practice. (Djankov et al, 2003b)

The costs of making a complete contract is not only that the drafting of the contract itself is higher, but also that it prevents learning processes after the signing of the contract. The transactions costs to alter a contract are relatively high. The practice in the Battery Park-case shows that there are not so many changes after the contract was made in the project. In Amsterdam the flexibility to respond to developments was larger, and the project has more changes and refinements.

The Amsterdam case shows that large changes has been made, e.g. in the mixture of different functions in one building, and that the process of corporation works leads to a more funnel-shaped process. As good faith in civil law makes it only in exceptional cases possible to back out of ones obligations, but is more often used as means to interpret a still open situation, it can be said that in the civil law system parties may choose between complete contracting and incomplete contracting and deliberately choose for incomplete contracting. As in common law the good faith principle is less developed, the choice here is more limited. When agent in both systems acts within limits of bounded rationality, it may be that incomplete contracting is considered to be superior by agents who have a choice.

The New York case shows a setting which fit with Model 1, “which consists of competitive, win/lose, rational, and diplomatic behavior” of Argyris and Schön (1974, 86). The civil law case shows more Model 2 behaviour in which actors provide other actors with the relevant data to create conditions for a joint operation of tasks. Based on actual valid information the agents take informed choices; they will feedback information to correct errors and to detect unintended consequences.

It also shows that model 2 learning processes are much more difficult to achieve around strategic city projects in common law systems as in civil law systems. The good-faith principle supports that tasks are controlled jointly, and that there is room for learning processes of parties according to Model 2 of Argyris and Schön (1974). The New York case shows more a model 1 behaviour. With other words, the sunk costs of the legal system may, not only have an influence on the choice for more complete or more incomplete contracts, it will also influence professional learning towards model 1 or model 2 learning behaviour.

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