

Legal & Governance

Monday 2 November 2015, **9:00 – 12:30** hours

Responsible lecturers: **F.A.M. Hobma** and **P.J. Klok**

The subject matter is in accordance with the blackboard.

This exam consists of open questions.

Total number of pages (including this page): **6**

Maximum number of points to be obtained for Law part: **100**

Maximum number of points to be obtained for the governance part: **67**

The weight of the questions is stated in the exam.

Additional remarks:

- Answer the questions in **English**
- **Write clearly**
- Please motivate your answers. Answers that are not motivated will not be accepted (unless stated otherwise). Do not copy-paste irrelevant text from the literature in your answer.
- This exam has three parts: PART 1 private law, PART 2 public law and PART 3 governance.
- **Please start answering PART 2 and PART 3 *each* on a new sheet of paper**

This is an **open book** exam
You can use all materials you like

PART 1: Private law

A. Which alternative is correct? Do not motivate your choice.

1. A has put his antique car, a Bugatti, up for sale. The Louwman Museum in Holland is interested and reaches an agreement with A. Before this agreement is executed A gets and accepts an offer from the Getty Museum that exceeds the price the Louwman Museum will pay. Then A calls the agreement with the Louwman Museum off. (3 points)
 - a. A is not allowed to do so, because the Louwman Museum is entitled to fulfilment of the contract.
 - b. A is not allowed to do so, because that is a form of fraud described in art. 3:44 (2) DCC.
 - c. A is not allowed to do so, because this would constitute a violation of the obligation to take the justified interest of the Louwman Museum in the pre-contractual stage into account.

Correct alternative is a: contracts are binding and give the creditor the right to fulfilment art. 6:74 DCC, p. 17/18, p. 2; b is wrong because art. 3:44 (2) DCC has nothing to do with this problem, but is about the formation of contract; c is wrong because the issue is not a pre-contractual issue.

2. A and B are the two competing main suppliers of medicines against high blood pressure. They enter into an agreement on the price for which to sell the medicines: from now on they will sell the medicines for € 100 instead of € 50. A is not very happy with this agreement, because he would like to ask € 125. So he goes to court to ask for annulment of the agreement on the basis of misrepresentation by B. (3 points)
 - a. The court will grant this request, because this agreement is null and void.
 - b. This court will not grant this request, because an agreement that is null and void cannot be annulled.
 - c. The court will only grant this request (annulling a valid agreement) if and when A proves that B lured A into the agreement with the help of misrepresentation.

Right answer is b: this agreement is incompatible with the law, good morals and public policy and they are in principle null and void, and what is null and void cannot be annulled which is what happens in case of misrepresentation (p. 7 and 8). A and c are both wrong because the answers assume there is valid agreement with only vitiated consent, which is not the case.

B. Answer the following questions and motivate your answer

3. Employer A and contractor B have entered into a contract. Once in a while a representative of A visits the site. Within a month after take over, A complains to B about the fact that the windows are made of single glass instead of double glass, which should have been according to the design. A holds B liable for this. B defends himself by saying that during visits of representative of A he could have seen what kind of windows were being installed and also he could have noticed this during the take over procedure. Since nothing was said about this, B assumed that this was OK. If A wanted to complain he should have done so during or right after the visits of the representative, now he has lost that right.

Question: A holds B liable. Is the defence of B successful? (15 points)

Answer this question assuming that the UAC 2012 are applicable and the representative of A is a supervisor.

Answer: Par. 12 (2) UAC 2012 governs the question on liability after final completion. There is a defect in this case (single glass instead of double glass which was part of the agreement), this defect is the responsibility of the contractor (the defect is attributable to the contractor, p. 70). Could the defect reasonably not have been detected in spite of careful supervision during execution of take over? Here a discussion has to take place: what kind of supervisor was sent: capable, experienced? How often did he come and how did the inspection at the take over procedure take place? This will determine whether or not the defect could reasonably have been detected. Assuming this could not have been seen B will be liable if one more demand has been met: has he been notified in time (c of par. 12, 2 UAC 2012). This took place within a month after take over, if the defect could only have been detected at take over then this is in time, but if it could have been discovered earlier during construction then this is too late. So the success of the defence of B depends upon these elements.

4. Answer the same question (text for question 3) assuming that the UAC-IC 2005 are applicable (15 points).

Answer: Liability after take over is the topic of par. 28 UAC-IC 2005. A sharp distinction has to be made between the construction phase and the take over phase. In the construction phase the only thing that matters is if the representative of A actually saw something (p. 115). If B cannot prove that something was seen (not: that something could have been seen!!), then B is liable. But B's position is different if he can show that during take over this could reasonably have been seen (par. 28 1 sub c, UAC-IC, p. 115, The client could not reasonably have been expected to detect the defects at the time of accepting the works.). This is a normative criterion just like with par. 12, 2 UAC 2012 and the success of the defence of B will again depend upon the quality of the person who did the inspection at the take over and the way this took place. The contractor further has to be 'blamed' for the defect and the complaint must be done in time. It can be assumed that those demands are met just like with question 1 of this part.

C. Which alternative is correct? Motivate your choice.

5. The following criterion is used in tender documents: "The award criterion is the most economically advantageous offer. This consists of several sub-criteria: the price, the delivery date, the technical ability of the persons working for the tenderer, after-sales service."

This criterion is properly described. Right or Wrong. (7 points).

Wrong: the sub criterion on the technical ability is not an award (sub) criterion but suitability criterion, p. 143. And mixing up the criteria is not allowed since we have a strict separation between the selection phase and the award phase (sheets class 3).

6. The city of Delft has called for reactions to a job on levelling a terrain; soil has to be dug up and removed. In the tender procedure it is required that the tenderer has a BRL-SIKB 7500-certificate; this certificate is applicable to process removed soil.

The city is allowed to ask for this certificate. Right or Wrong. (7 points).

Wrong: requirements have to be substantively related to the job. The job at hand is on digging up and removing the soil and not on processing soil. P. 143.

Please start answering PART 2 on a new sheet of paper

PART 2: Public law

Section 2.1: Planning law

Case for all planning law questions:

The city of Delft wants to replace an old bridge over the Delftse Schie canal. The old bridge is a swing bridge (turn bridge). The city wants to replace it by an arched bridge. This allows small boats to pass without opening the bridge.

7. Is it only the client (in this case: municipality of Delft) who under private law makes demands on the technical quality of the design of the new bridge, or do demands under public law on the technical quality of the design of the new also exist? Please explain. (6 points)

There are demands under public law on the technical quality of the design of the new bridge as well. These demands are laid down in the Building Decree.

8. a. Which permit does the municipality of Delft need for the construction of the bridge? (3 points)

The municipality needs the environmental permit to build.

- b. Which body will grant or refuse the permit? (3 points)

Mayor and Alderman of the municipality of Delft.

9. At a certain moment in time, a newspaper in Delft publishes some drawings of the future bridge. Many citizens feel that the new bridge will look ugly. They do not like the color and choice of materials.

Can these citizens (legally) do anything against the color and materials? If no, why not? If yes, when and under which conditions? (12 points)

The issue the citizens raise is an issue of aesthetics (or: external appearance). The test of building design against aesthetics is a test in the framework of the environmental permit for building a construction.

When: The citizens can raise their issue, once the municipality submitted an application for an environmental permit to build. They can appeal against environmental permit decisions with the court and with the Administrative Jurisdiction Division of the Council of State.

Conditions: They will only be successful if they can demonstrate that the materials are in conflict with the 'policy document on external appearance'. See Planning and Development Law, Sections 3.2.6 'Legal protection' and 3.6 'Regulations concerning external appearance'. Another condition is that the citizens will have to be an interested party. Only interested parties have legal standing.

10. The new bridge will cost a lot of money. That is why the city of Delft wants to make some money. On another spot in the city, the municipality owns a plot of land. The land-use objective

for this area, according to the land-use plan, is 'residential'. The municipality wants to sell this plot of land. The municipality will enter into an agreement with the project developer who does the highest bid and meets some other requirements.

Will this be a public-private partnership? If yes, which model? (8 points)

This is not ppp. This is plain sale of land after a tender. We can call this: public land development, but it is not ppp. See Planning and Development Law, Section 5.5 'Sale' and Section 5.7.4 'Public-private partnership models'.

However, it could be a ppp, particularly the 'concession model'. If the 'requirements' the bidder has to meet form a comprehensive set of conditions, within which the buyer/developer has freedom to act, the agreement can be characterised as concession and thus ppp. See powerpoint lecture 'PPP in Urban (re)development'.

Section 2.2: Environmental law

11. In Dutch environmental law we distinguish between several vulnerable or sensitive functions or objects. Project developer SBC ("Sustainable Building Company") wants to develop a new educational center close to a highway. This center offers studies and courses for people in the age of 9 to 99 (a lifelong learning). SBC asks for your advice.

Question: explain the difference(s) between a new educational center in an external safety zone (10^{-6} contour) and a new educational center in an acoustic zone. (9 points)

Educational center = school. School = vulnerable/sensitive object/function.

See PDL 119-120 (noise: acoustic research has to be conducted) and PDL 127 (external safety: new vulnerable objects as schools are forbidden).

12. A non-governmental organization that aims to protect children (and their health) protests against the plan of the aforementioned project developer. Assume: the highway is part of the Basic Transport Network. This NGO asks for your advice.

Question: which legal arguments can be used against the plan for a new educational center close to the highway? Mention at least one argument you derive from the Spatial Planning Act and at least three arguments you derive from specific Dutch environmental legislation. (9 points)

SPA > Good Spatial Planning; See PDL 121 (good spatial planning and Noise Abatement Act); PDL 124 (good spatial planning and air quality) PDL 125 (Good spatial planning and external safety);

Specific env.legislation: arguments derived from Noise Abatement Act, Environmental Management Act (includes Air Quality Act), External Safety etc.

Please start answering PART 3 on a new sheet of paper

PART 3: Governance

13.

- a. The 'structure' approach to network governance includes the idea that the processes of network formation and change can be seen as a result of structural factors. Describe a number of structural factors that can explain why **market** governance is more likely to appear and thrive in the construction sector than its alternatives (networks and hierarchies)? (8 points)

*Possible factors: legal rules (procurement), adaption to local circumstances (uncertainty in production), availability of identical providers of services in submarkets, macro-culture (community of practice) in task specialization, design as autonomous discipline. Be sure to describe structural factor that **explain** market governance, do **not** describe the characteristics of the market relations themselves.*

- b. Once network governance is used, the members develop 'embedded relations'. These relations enable the use of social mechanisms that will facilitate coping with governance problems. Give two examples of these social mechanisms and for each explain how they reduce problems of 'coordination' and 'safeguarding against opportunism' (12 points)
- Social mechanisms are in Jones, Hesterly and Borgatti (second part of the paper), where it is also indicated how they influence both coordination and safeguarding against opportunism. Make sure to indicate the influence of each mechanism to both coordination **and** opportunism. If one of the mechanisms influences only one of these two, indicate explicitly that this is the case.*

- c. Explain how the use of a DBFO contract (design, build, finance, operate), will increase the likelihood that building (=production) and operating cost will be minimised in the design of the building (as compared to the situation where all four tasks have separate contracts). (8 points)

*Two main arguments: combining expertise and other resources for later stages in the design process and an increased motivation to optimize design in terms of building and operating costs, as these will bear on the same actor (or combination of actors). Be aware that the question is on building and operating costs, **not** on transaction costs!*

- d. Explain what we mean with the expression 'the building sector is mainly building prototypes'. (5 points)

Each building is unique, so there is no production of large series of the same product. So regular production can be compared to making a prototype for larger series in other production sectors (like the car industry)

14. Voordijk, de Haan and Joosten provide an example of a network cooperation in the construction sector that is dominated by a **supplier**.

- a. For this specific example, describe how the building process is different from a process that would have been using market governance. (8 points)

Refer to the example of Unidek volumebouw in the paper, as this is the example where the manufacturer (supply firm) is dominating the process (not the construction or the design firm). Refer to specific differences in terms of network relations instead of market relations (the paper provides several).

- b. Describe what the likely effect of this form of network cooperation is on the **price level** of the buildings that they build. Explain your answer and indicate the influence on both **transaction cost** and **production costs**. (8 points)
Most transaction cost will be lower (name a few, see slides session 2), but asset specific investments are likely to be higher (between partners), likelihood of switching will be lower, but costs higher if switching occurs. Production cost will be lower due to series production (same materials used over and over again) in 'more similar' buildings, prefabrication, integrated and simple design. Some of this should be mentioned, however it is not wrong to indicate that lack of competition could increase production costs
15. In many processes of citizen participation in city development we find that little attention is given to the explicit formulation of the basic rules for the arena. This has also been labelled as 'under-institutionalization'.
- a. Describe three factors that contribute to this under-institutionalization and describe three possible consequences. (6 points)
Slides session 6, nr 10, for both contributing factors (be open, adaptive; creativity; setting rules is complex) and consequences: result in...
- b. Describe, which subjects should be covered in a set of rules that contains a proper formulation of the rules of the arena. (8 points)
Slides session 6, nr 6. Not just name the type of rules (as in the Ostrom model), but indicate what they are about (as in the slide)
- c. Describe how the development of a set of 'standard conditions for public private partnerships' could contribute to an increase in the use of network governance. (4 points)
Standard conditions reduce transaction costs, most notably bargaining costs of making legal arrangements for PPP. As PPP can be seen as network governance, reducing these transaction costs make network governance more attractive.

- End of the exam -