Summary
The exercise-of-powers contract
The contract on the use of a public power

Introduction

The Dutch legal system consists of two general areas of law: private law and public law. Most legal acts can be classified as either private or public. Still, some acts because of their specific characteristics are more difficult to classify. When such an act is disputed problems may arise e.g. on jurisdiction. In the Dutch system, each area of law has its own set of procedural rules for dispute resolution. Research regarding juridical acts that are difficult to classify, not only helps clarifying the nature of these acts but also helps highlighting the differences between the two subsystems of law in the Netherlands.

This thesis focuses on one such "ambiguous" act: the contract between a public entity and private person(s) or another public entity, on the use of one of its specific public powers: the exercise-of-powers contract ('bevoegdhedenovereenkomst').

Most administrative authorities enjoy a measure of discretion in the use of their public powers. The margins of discretion can vary, however. Powers that have rather wide margins of discretion do not provide a lot of legal certainty. Administrative authorities may decide to set general policy rules on the use of such specific administrative power. Alternatively, they could also negotiate the use of a public power on a case by case basis, laying down the agreement in a contract. It is important to point out that this contract does not acquit the administrative authority from taking a final decision on the use of its public power. In Dutch administrative law this usually means the administrative authority will have to make an order ('besluit').

When using such an exercise-of-powers contract, in contrast to making policy rules, the act moves into the twilight zone between the areas of private and public law. It is private, because of its form: a contract, which is traditionally seen as an act of private law in the Dutch legal system. But its content is on the use of a public power, hence public law. This gives rise to practical legal questions on the legitimacy of the act, whether or not both parties are bound by it, and which court will have jurisdiction in case of dispute? Also, more fundamental questions arise: what area of law should the exercise-of-powers contract ideally be part of?

Therefore the main question of this thesis is:

> *What is the current and what is the preferred place of the exercise-of-powers contract in the Dutch legal system?*

The above question leads to three, more specific, questions:

1. What is the place, gist, and meaning of the exercise-of-powers contract in current Dutch law?
2. Considering the divide between private and public law, where should we position the exercise-of-powers contract?
3. Should there be general rules on exercise-of-powers contracts? If so, what would these entail and what would be the consequence for relevant existing rules?

Main findings

Current law and existing problems

The exercise-of-powers contract is an act of private law. It does not in itself qualify as an order ('besluit') under article 1:3 of the General Administrative Law Act (GALA). The decision to take an act of private

law could qualify as an order, provided article 1:3 GALA applies. Implementation of an exercise-of-powers contract requires an act of the administrative authority, which may qualify as an order under article 1:3 GALA.

The content of the exercise-of-powers contract concerns the use of a public power, this power will be exercised by an administrative authority. This administrative authority is part of a public legal entity, but the power to negotiate and enter into contracts lies with the public legal entity as such and not with its component parts. Therefore, the *party* to the contract is not also competent on the implementation of its promises.

The exercise-of-powers contract is *governed by rules* of private as well as administrative law. Both the Dutch Civil Code (DCC) and GALA contain rules on administrative law principles that are to be applied by analogy to acts by public entities outside administrative law (article 3:14 DCC and article 3:1, paragraph 2, GALA. Notably, the content of the exercise-of-powers contract is administrative in nature; therefore, it is strange that these rules apply only by analogy rather than directly.

The *juridical act required to enter into* an exercise-of-powers contract on the part of the government requires two acts. First, a decision to go ahead with the contract followed by a second act to actually enter into the contract (signing on behalf of the legal entity). The fact that this requires two separate acts complicates matters and raises many questions.

The *legitimacy* of exercise-of-powers contracts depends on both rules of private and administrative law that are both general in nature. There are no direct legal boundaries on the legitimacy of the content of the exercise-of-powers contract: this may be problematic for the non-governmental party to the contract.

The exercise-of-powers contract is *binding* on the government along two separate and distinct lines. The fact that these two lines exist tends to be overlooked in Dutch legal literature. Firstly, the contract is binding in administrative law because of the general principle of trust that acquires an administrative authority to act as promised at the decision-making-level. Secondly, it is binding in a private context because of the agreement it entails between the two or more parties who entered into the contract; non-compliance with the conditions of the contract can, ultimately, lead to breach of contract.

Compliance with the contract requires an order from the part of the government in accordance with the agreement. This, however, cannot always be guaranteed. Administrative law requires the administrative authority to weigh all relevant interests in decision-making on any prospective order. Consequently, it is possible that third party interests weigh more heavily in the final order than could have been predicted at the time of negotiations on the exercise-of-powers contract.

If the exercise-of-powers contract pertains to an order to be decided by an administrative authority, *jurisdiction* can become scattered. Most orders, not all, can be adjudicated in an administrative court. In those cases, disputes regarding the execution of the content of the contract on the part of the governmental party will be decided in an administrative court of law. If the governmental party wants to claim a breach of contract it will in turn have to file a complaint in a civil court of law. Disputes on the contract as such (e.g. legitimacy) are intended to be settled in a civil court of law. Unfortunately, to complicate matters even further, cases claiming damages can be filed in both courts of law (this, however, is a highly complicated matter). This makes for treacherous navigation along the various procedural routes, especially for non professional parties.

Exercise-of-powers contracts are generally not *disclosed* to the public at large. In spite of the fact that the content of the contract might infringe upon the interest of third parties.

Execution of the exercise-of-powers contract requires an administrative authority to make an order. Legally *the position of an interested third party* to that order is not affected by the existence of an exercise-of-powers contract. In practice, however, they can be at a disadvantage compared to the contracting parties, since the third party was not present at the negotiations.

Finally, current law shows a strong link between the specific administrative order, the administrative legal framework of the order and the exercise-of-powers contract on the order. The various types of exercise-of-powers contracts studied in this thesis show common denominators, but they equally show strong differences as well.

The exercise-of-powers contract in light of the divide between public and private law

In the debate in Dutch legal theory on the divide between public and private law I have taken the position of what is known as the 'gemeenschappelijke rechtsleer' combined with the concept of the 'bestuursrechtelijke rechtsbetrekking'. In short, I take the stance that there are fundamental principles of law that apply to all areas of law. Such general principles have the potential for creating rules within the various areas of law. Public and private law are and should remain fundamentally different areas of law with their own specific sets of rules. Nevertheless, unnecessary differences should be avoided. In addition, if public law does not provide an answer while private law does, the answer should, in principle, follow the rationale of the private rule. The 'gemeenschappelijke rechtsleer' departs from the principle that the nature of the legal relationship determines which area of law applies but it does not define the line between private and public law acts. The 'bestuursrechtelijke rechtsbetrekking' helps us find this line. An act is to be labeled public, if the power to act is also public in nature. This is the case if the power to act is granted exclusively by law to an administrative authority.

If we apply this stance to exercise-of-powers contracts, they should be classified as public law acts. Indeed, the content of the exercise-of-powers contract is on how an administrative authority will use its vested and exclusive public power. If the power to act was given with a margin of discretion, the use of this margin is a matter for the administrative authority. However, this does not mean that exercise-of-powers contracts (multilateral legal acts) should be classified as administrative orders (unilateral legal acts).

This position is contrary to current law. If the exercise-of-powers contract is to be classified as an act of public law, these contracts should be regulated by public law, and the applicable rules should be in line with concepts developed by public law. Classifying them as public, rather than private, also causes some concrete changes: government acts under administrative law in the shape of administrative authorities. Classifying the exercise-of-powers contract as a public law act, means that the contracting governmental party should be an administrative authority. This makes matters less complicated than they are under current law. A separate decision to enter into a private law act is no longer required, which is less complicated than under current law. Also, legitimacy issues become less complex. Still, some issues remain. The problems on jurisdiction are not yet solved, since, in my position, exercise-of-powers contracts, although public law acts, are not to be classified as orders, therefore disputes on the contracts as such still need to be adjudicated to a court of civil law. There are also still some unresolved issues in relation to binding aspects, disclosure of the contract and the position of interested third parties. As a result of these remaining issues, legislation on exercise-of-powers contracts could be considered as a solution.

General rules on exercise-of-powers contracts

Reclassification of the exercise-of-powers contract alone will not suffice. If we want sufficient legal certainty we also need to regulate some remaining issues. Regulation of exercise-of-powers contracts should provide general standards for conditions accepted by non-governmental parties. It should set standards concerning if, when, and how the governmental party will be bound by the contract, thus improving the legal certainty for the non-governmental party. There should be recognition and adjustment to correct the fact that interested third parties are at a factual disadvantage in the decision-making process, since they were not part of contract negotiations. Furthermore, rules on disclosure of the contract should be set in accordance with fundamental principles of democratic governance. Finally, jurisdiction issues also need to be resolved through legislation.

Regulating the exercise-of-powers contract can be achieved by amending GALA. A new chapter should be added to the latter containing substantive and procedural rules on exercise-of-powers contracts. It should give a clear definition of the concept of the exercise-of-powers contract, stressing that it is a public law act and stipulating that one or more of the contracting parties is an administrative authority. It should also contain an obligation on the administrative authority to hear interested third parties prior to entering into the contract. It should contain limitations on the conditions stipulated by the administrative

authority. It should state that the administrative authority is required to act in accordance with the contract, unless overriding interests prevail. If the administrative authority decides to disregard the contract, it should be required to compensate the other contracting parties. In addition, rules on disclosure of the contract should be adopted. Finally, if the final decision is in accordance with the exercise-of-powers contract, the administrative authority should be able to simply point at the contract, lifting the obligation to give reasons for the chosen decision. While it may also be possible to resolve the remaining issues on jurisdiction in such an amendment to GALA, I would advise against this, on the grounds that I would feel this to be premature, considering recent legislative decisions.

I would not suggest the regulation on exercise-of-powers contracts in GALA should necessarily be exclusive. I can imagine more specific rules on specific types of exercise-of-powers contracts in other parts of legislation. These rules could be complementary to the rules in GALA.

Concluding remarks

The main question of this thesis was what the current place is and what the preferred place should be of the exercise-of-powers contract in the Dutch legal system. I have made a distinction between current and preferred law. According to current law the exercise-of-powers contract is an act of private law. This classification has been shown to be problematic. In my opinion, the exercise-of-powers contract is best classified as an act of public law. This new classification, in combination with minimum standards set in GALA, makes for a better positioning of this special type of contract in the Dutch legal system.