

Summary

Mihkel Mugur, Carri Ginter

Restrictions on the Freedom of Choice of Legislators Arising from Principles of European Law The Example of Negotiated Public Procurement Procedure with Prior Publication of a Contract Notice

Freedom of contract is restricted in public procurement procedure for a number of reasons that are given higher or lower priority depending on the region or country. One such consideration is the most effective use of a contracting authority's funds. At the European Union level, priority is given to the effective functioning of the internal market. At the national level the need to minimize corruption is emphasized. A suitable balance must be struck to ensure that public procurement procedure is transparent but that it does not become overly expensive or cumbersome.

One area in which the authors see a risk of abuse is selection of the type of procurement procedure to be used. The greatest transparency is guaranteed by procedures in which the terms of the contract are announced in advance and the tenderers submit their offers within the framework of these terms without negotiations. In certain cases, the needs of a particular procurement procedure may require that negotiations are permitted. As the possibility of negotiations decreases transparency and increases the risk of manipulation, use of such procedures is strictly regulated in European Union law. Yet as an exception, subsection 27 (3) of the Estonian Public Procurement Act allows a contracting authority to organise procurement as a negotiated procedure with prior publication of a contract notice, if the estimated value of the public procurement is below the international threshold. In the opinion of the authors, this exception is arbitrary and should be amended.

Mari Ann Simovart

Freedom to Amend a Public Procurement Contract in the Light of General Principles of Public Procurement

The legal regulation of public procurement in Estonia is traditionally divided into two parts: pre-contractual relations are subject to rules governing public law, in particular the Public Procurement Act and underlying European Union law, while the contract itself is upon entry into the contract a private law contract without special exceptions.

Yet a significant shift has taken place in European procurement law. The European Court of Justice has in its recent judgments in *Pressetext* and *Commission vs. Germany* reaffirmed the position that private law disputes relating to public procurement must be resolved in the light of the general principles of public procurement. Where a conflict arises, general principles of public procurement must have priority over private law norms. Consequently, the legal regulation of public procurement contracts is within the competence of the Member States, but the enactment and application of these rules must take into account the general principles of procurement provided for by the directives and the general principles arising from the Treaty on the Functioning of the European Union. Private law relationships relating to public procurement must also recognize that even at the national level, public procurement contracts involve a significant public interest (e.g. interest to avoid corruption) and that the interests of the parties to a contract may in some circumstances be subordinated to the public interest.

In this article the author examines the criteria by which freedom to amend a procurement contract and restrictions imposed by the public interest might be balanced in order to ensure compliance with the general principles of European public procurement.

Piia Kalamees, Kalev Saare, Karin Sein

Acceptance of Work and the Liability of Contractors for Construction Faults

Inexpensive and favourable loans lead to an economic boom in Eastern Europe, resulting in a remarkable increase in construction volume between 2005-2008. The global economic downturn that followed and which hit the construction industry particularly hard has led to a significant increase in disputes arising from contracts for construction services. Among other issues, the courts have tried disputes regarding when the obligation to accept work arises and the liability of contractors. In this article, the author focuses on when the obligation to accept work arises for the customer, the legal meaning of the completion and acceptance of work and the implications thereof for the liability of the contractor toward the customer, the extent of the liability of the contractor and differences in various liability models. The authors seek to determine how to define when work has been completed, whether the liability of a contractor must be deemed to be such that the contractor is liable unless non-performance is excused, and the effect of a customer's instructions and owner supervision on the contractor's liability. The authors compare Estonian and German law and court practice as well as the provisions of the Draft Common Frame of Reference for a European Private Law (DCFR).

Due to the limited length of this article, the authors do not specifically address the legal remedies available to customers in case of violation of a contract for services by a construction contractor. The obligation of a customer to examine the work and give notice of any deficiencies is also omitted.

Priit Manavald

The Economic Effectiveness of Bankruptcy Procedure An Empirical Study

This article is based on an empirical study conducted by the author that is part of a broader study and focuses on a specific economic aspect of bankruptcy procedure, as one of the many objectives of bankruptcy procedure. The purpose of the study was to evaluate the amount of resources spent in Estonia on bankruptcy proceedings, the amount of resources that are redistributed through insolvency proceedings and the economic benefit or effectiveness of these activities. The study was based on the hypothesis that the current regulation of bankruptcy procedure is economically ineffective and fails to ensure the maximum use of resources. As the majority of bankruptcy proceedings conducted in Estonia have concerned companies, the study focused on the bankruptcy of companies. The study included undertakings that were declared to be insolvent in 2004. The study was based on the sample used in the study "Panel Study. Bankruptcies in Estonia. 2004". This sample consisted of 97 of the 436 undertakings that were declared bankrupt in 2004, for which the annual reports for the previous two years were available in the commercial register. For the purposes of the study, it was not required that the bankruptcy proceedings were completed. The study reflects cases in which the proceedings were terminated immediately by abatement, in which they were terminated by abatement after bankruptcy was declared and which were conducted in full.

In this article, the author provides an overview of the results of the study and makes recommendations to improve the effectiveness of insolvency procedure.

Lauri Mälksoo

The Russo-Georgian War of 2008 and International Law Inaugural Lecture. Tartu, 12 May 2010

This article focuses on international law issues relating to the Russo-Georgian war, with analysis of two in-depth sources relating to the normative aspects of the war, of which one is official and the other journalistic. The first is the so-called Tagliavini Report. The European Union established and funded the Independent International Fact-finding Mission on the Conflict in Georgia, led by Swiss diplomat Heidi Tagliavini. The Tagliavini mission compiled a report on the mechanisms leading to the outbreak of the war and violations of international law committed during the war. The other main source is the recently published polemic book "A Little War that Shook the World" authored by former US diplomat and current think tank member Ronald Asmus. The article focuses on key issues relating to *jus ad bellum* discussed in these sources. The author also analyses what we should expect from international law generally, and the international law lessons to be learned from the Russo-Georgian war.

Marianne Paimre

Representations of Drug Issues in the Estonian Print Media and Drug Policy

Illegal drugs and related issues such as drug crime, the spread of HIV, etc., are social problems in all advanced Western societies. In Estonia, these problems became public issues after the restoration of independence and have grown considerably in the past two decades. This article studies representations of drug issues in the Estonian press from the 1980s up to the present day, and provides an overview of drug issues and the reaction of the state to these growing problems. It is important to study press representations since the media both informs the public and simultaneously forms the public's understanding about these issues. In this article, the author examines the main shifts in representations of drug issues in the Estonian press and whether these changes reflect Estonian drug policy. Based on empirical data on the Estonian drug discourse, it is possible to distinguish three significant shifts in the press, each with a different main focus. During the Soviet occupation illegal drugs was a neglected topic in the Estonian media, and drugs were perceived as a problem of capitalist societies, not "ours". The first change took place after the collapse of the Soviet regime when the topic of drugs was reflected in the hedonistic frame of the newly established yellow press. The second shift was initiated in the media when four young Estonian drug smugglers were arrested at Bangkok Airport in 1995 and nearly faced the death penalty under Thai law. The drug problem now fell into a criminal concern frame. The third shift was initiated after HIV started to spread quickly in Eastern Estonia among intravenous drug users, mainly among the Russian speaking population. Drug consumption was associated with AIDS, and it caused people to fear for their lives. An active drug policy emerged as a result of these fears. Whereas drug policy has shifted slightly towards measures to reduce harm (e.g. helping drug addicts), in press representations this human aspect is overshadowed by police and court news.

Sten Lind

Is Post-Sentence Detention Incompatible with the Rule of Law?

During the past year, post-sentence detention has been analysed in two articles published in "*Juridica*". Both articles have been highly critical of this new institution for Estonian criminal law. R. Maruste concludes in his article that the European Court of Human Rights has in its judgment in *M. vs. Germany* declared that this institution, which is used in Germany and is similar to the one provided for under Estonian penal law, violates the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In this article the author once again analyses the judgment in *M. vs. Germany* and the issue of whether post-sentence detention is indeed in conflict with the rule of law. In the opinion of the author, the ECHR has not, in either *M. vs. Germany* or *Guzzardi vs. Italy*, explicitly stated that post-sentence detention is not permissible under the Convention. The violation of both Article 5 and Article 7 of the European Convention on Human Rights consisted in the fact that the post-sentence detention of the applicant was extended for a period in excess of the period permissible under law in force at the time the offence was committed. The European Court of Human Rights has only found one aspect of the system to be in violation of the European Convention on Human Rights. This is also a point on which German and Estonian law differ. The judgment nevertheless provides food for thought: the European Court of Human Rights has stated that post-sentence detention must provide more than just the detention of a person. During this period, the person must be guaranteed access to support services that will allow for him or her to be released as quickly as possible.

Oliver Nääs

Some Remarks Concerning Procedural Law: Judgment of the Criminal Chamber of the Supreme Court in Case 3-1-1-22-10

With its judgment of 26 May 2010 in Case 3-1-1-22-10, the Criminal Chamber of the Supreme Court upheld the judgment of the Tallinn Circuit Court, by which the conviction of V. Reiljan, T. Sild and A. Pärn of the crimes of demanding, arranging and promising gratuities, respectively, entered into force. This judgment is noteworthy for more than marking the end of a scandalous trial involving top politicians, an attorney and a respected businessman that had been the focus of media attention for years. At least as much attention should be paid to some of the legal opinions expressed in the judgment.

This article examines some of the opinions expressed by the Supreme Court in judgment No 3-1-1-22-10 and questions their justification based on both previous court practice and procedural law theory. The article addresses evaluation of the credibility of witness testimony, determining when a witness has refused to give testimony and establishment of the facts of the case by the Supreme Court.