Chapter 8
European Union Public Procurement Remedies Regimes: The Nordic Experience

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ABSTRACT

The chapter explores the Nordic statutory EU-based remedy regimes. Due to the European Economic Area (EEA) agreement, the EU commitments do not vary between EU member states, Denmark, Finland, and Sweden and (non-members) Norway and Iceland. The legislation on procurement remedies is assumed to be EU/EEA compliant. There are however material differences in the set up for handling disputes and complaints—also subsequent to the 2010-2012 Nordic adaptation of EU Directive 2007/66/EC on enhanced procurement remedies. The pending issue is whether the EU "sufficiently serious breach" principle on treaty infringements applies on liability for procurement flaws. Loss of contract damage has been awarded in all Nordic countries, whereas cases on negative interest (costs in preparing futile tender bids) seem more favorable to plaintiffs. Per mid-2012, there are no Nordic rulings on the effect of the recent somewhat ambiguous EU Court of Justice Strabag and Spijkers 2010 rulings.

INTRODUCTION

The Swedish and Finnish dual court pillar systems distinguish between public administrative courts authorized to issue injunctions, impose penalties, and declare contracts ineffective as opposed to civil courts, which handle claims for damages and regular contract disputes between contracting authorities and private suppliers. The Danish public procurement remedies are placed with the semi-judicial fully authorized Danish Complaint Board as an optional alternative to court litigation. Adversely, competences on injunctions, penalties, ineffective contracts, and damages are in Norway handled by general civil courts, whereas the KOFA Complaint Board is only resorted to

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for advisory non-binding opinions. Questions on damage formal-procurement have been raised in all Nordic Supreme Courts, leaving a somewhat scattered picture both on the basis for liability.

Global Setting: UNCITRAL, WTO/GPA, EU, and IBRD

Award of public contracts has moved from domestic law into rapidly growing overarching transborder or regional comprehensive legal regimes. These vary in their structure and contents.

1. The UNCITRAL 2011 Model Law on Public Procurement is a suggested template for state legislation, whereas World Trade Organisation – Government Procurement Agreement (WTO GPA) agreement on government procurement (1996) is a multilaterally binding regime on EU and 13 member states.[1] The aim of the GPA is to ensure free trade transparency in relation to laws, regulations, and procurement practice, provide for well-functioning markets and better use of resources, by enabling international competition on deliveries to states and local authorities, and reduce corruption and other dubious business practices. Surveillance and dispute handling is dealt with within the general WTO umbrella. WTO Dispute Settlement Body – open to WTO/GPA Member States.[2]
2. The World Bank (IBRD) involvement in financial projects assumes receivers' acceptance of a set of guidelines (2011) on procurement under IBRD Loans and IDA Credits. Surveillance on compliance has as the primary remedy a withdrawal of financial resources from the recipient.
3. The EU regime on public procurement law is effective in all 27 (28) Member States (including Denmark, Finland, and Sweden) and the relevant directives on procedures and remedies extends also to the legislation in non-member states Iceland, Norway and Liechtenstein under the EEA (European Economic Area) Agreement.[3]

   The primary purpose of EU/EEA procurement law is to facilitate and enhance inner market regulated transparent non-discriminatory mobility for public supplies and services, but its anti-corruptive side effect is acknowledged as well.[4] The EU procurement regime has developed since the first procedural directives in the 1970s up until the comprehensive Directive 2004/18/EC (public "classical")[5] (plus Dir. 2004/17(utilities)[6] and Dir. 2009/81 (defense) as noted Kotsonis (2010).[7] A procurement law reform is scheduled 2012 by Commission Draft directives COM (2011) 896 and COM (2011) 895 (see Kotsonis, 2010). The Lisbon Teaty transition from EC/EU into the 2008 Treaty on the Functioning of the European Union (TFEU) changed the numbering of certain provisions relevant on procurement law, renamed the EU Court of Justice (EUCJ), and EU General Court (EUGC), but brought otherwise no amendments in substance with specific bearing on public contracting or—in the context of this chapter—remedies for infringements.

   Many EU/EA states such as the Nordic states have chosen to regulate sub-threshold contracts [8] and B-services[9] basically falling outside the scope of EU law, adopting remedies similar to the EU/EEA relevant provisions.
4. Domestic national regimes may apply in addition or—when appropriate—instead of supranational regimes. One such is the comprehensive US federal (1996) FAR (Federal Acquisition Regulation) regime on US federal acquisition with complementary GAO (Government Acquisition Office) surveillance apparatus for the monitoring and ruling out of un-authorized contracts (Robinson in Thai, 2009).