SVW Dispute Resolution Newsletter

Q2 2024

Dear reader,

The SVW Dispute Resolution team is excited to present the second edition of our quarterly newsletter. Our aim is to keep you updated with insightful analysis on the latest trends and developments in litigation and arbitration.

Since our last edition, our team hosted a seminar regarding ad hoc and institutional arbitration. In this edition we present some of the key takeaways from this event. This edition also include an analysis of the use of limitation of liability clauses, based on guidelines set out in the most recent case law.

Further we follow up on the latest climate litigation trends. We give you the details on the UK Supreme Court's ruling concerning environmental impact assessments of combustion. Additionally, we have provided a short analysis on the ECHR KlimaSeniorinnen's impact on the ESG area.

In our column Key Decisions from Supreme Court, we present three different cases affecting insurance companies' right to recourse, land- and mineral ownership.

Finally, we shed light on the new guidelines for handling of civil cases. These guidelines may impact the amount of time spent and legal expenses in future cases.

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28 June 2024

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Ad hoc versus Institutional Arbitration

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Ad hoc vs. Institutional Arbitration

- Despite the apparent benefits of institutional arbitration, ad hoc arbitration remains the most popular form of arbitration in Norway. On 17 April, Simonsen Vogt Wiig hosted a seminar with the title: *Ad hoc arbitration: time to part ways with an old friend?*
- Institutional arbitration is generally considered more time- and cost-efficient than ad hoc arbitration. Institutions provide administrative support and can ensure a timely award, even if one party is uncooperative. Institutional arbitration brings experience and predictability to the process, and the awards may also be easier to enforce in local courts.
- However, some argue that institutional arbitration can be more time-consuming and costly than ad hoc arbitration due to a certain level of bureaucracy. While the institutions allow a significant degree of party autonomy, parties must still adhere to institutional rules, potentially limiting their freedom to appoint arbitrators or otherwise agree on the most optimal procedure for the case.

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- Ad hoc arbitration generally offers greater flexibility than institutional arbitration. The parties are to a large extent free agree on the procedural rules, choose their arbitrators, and negotiate the arbitrators' fees. Ad hoc arbitration also avoids the administrative fees charged by arbitral institutions. However, the freedom may lead to time-consuming negotiations concerning procedural matters, which in turn can make the proceedings more expensive overall.
- The tendency to choose ad hoc arbitration in Norway appears to stem from tradition and familiarity. We believe parties to arbitration in Norway would benefit from exploring and considering the services offered by arbitral institutions, either in Norway or one of the other Nordic countries.

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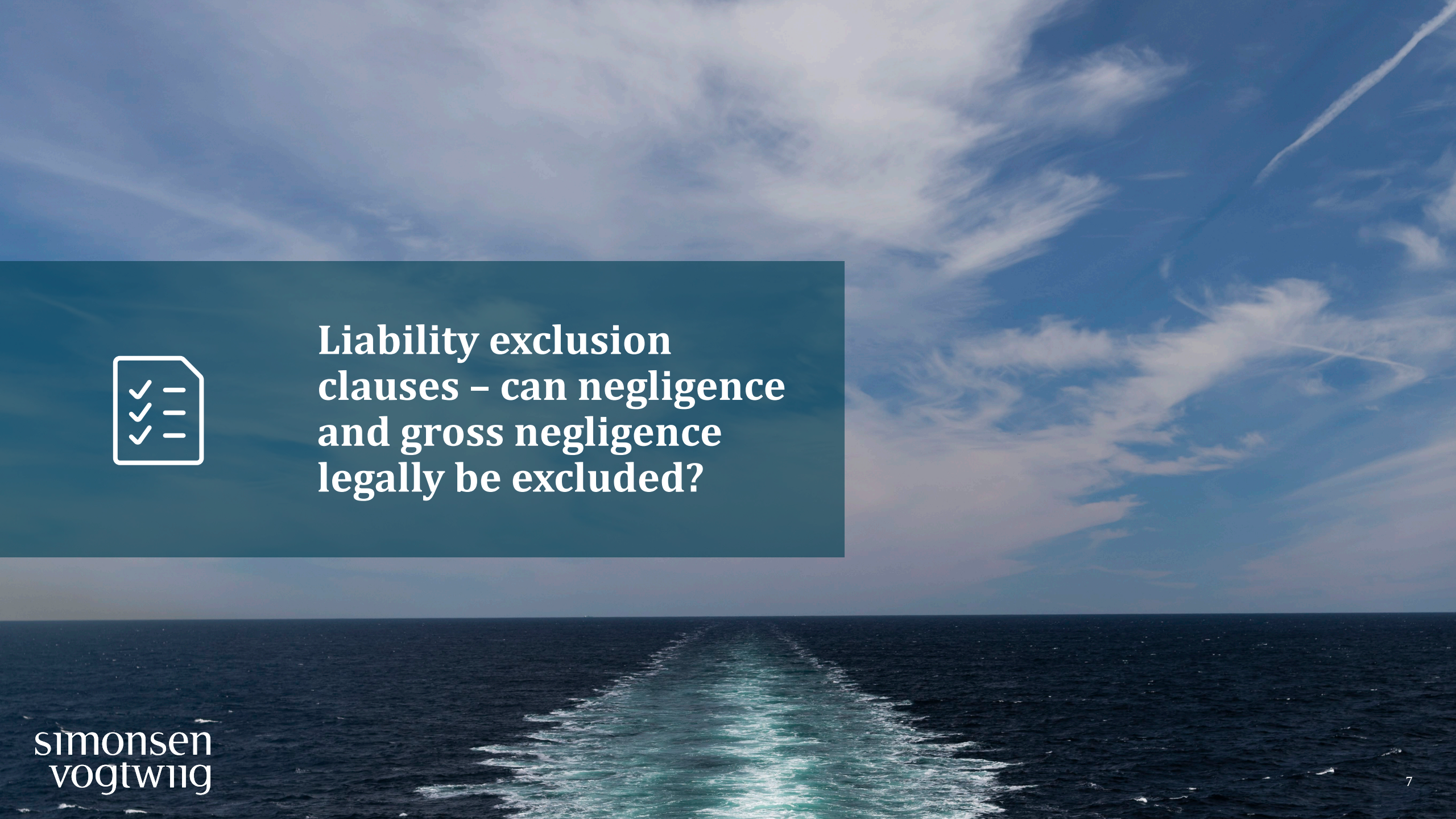

Liability exclusion clauses – can negligence and gross negligence legally be excluded?

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Liability exclusion clauses – can negligence and gross negligence legally be excluded?

- In a recent Norwegian court dispute, the seller of a German tankship faced claims from a Norwegian buyer for damages and price reduction due to alleged misrepresentation. Represented by lawyers Bjarte Grønlien and Håkon Høysæter Lyngbø, the seller relied on a limitation of liability clause from Saleform 2012. This clause limits liability for misrepresentation unless it amounts to fraud.

- However, according to the same clause, liability may only be excluded 'to the extent that such exclusion can legally be made'. This prompted a dispute on whether Norwegian Contract Law permits the exclusion of liability for grossly negligent misrepresentation.

- Most legal experts generally agree that it is possible to legally exclude liability for negligence, but not for willful breach of contract. As for gross negligence, there is no clear consensus. The most common opinion is that a party cannot exclude liability for its own gross negligence, however the Supreme Court has yet not ruled on this issue.

- In this case, the District Court found that the seller had legally excluded liability for negligent misrepresentation, but not for gross negligence. The court did not, however, find the alleged misrepresentation to be grossly negligent, hence ruled in favor of the seller. The Court of Appeal also decided in favor of the seller, but on different grounds, i.e., that the buyer had not substantiated a financial loss.

- In April 2024, the Supreme Court declined to hear the case. The judgements of the District Court and the Court of Appeal can be found on Lovdata.no, published as THOD-2021-154455 and LG-2023-47746 respectively.

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Overall Climate Litigation Trends

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Climate Litigation's impact on ESG

- A European Court of Human Rights' ruling on climate has implications for companies.
- In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the Court's Grand Chamber held that Switzerland violates fundamental human rights by failing to cut greenhouse gas emissions to protect vulnerable citizens against harm.
- The Court derived the obligation to cut emissions to net zero with progressive and intermediate emissions cuts in compliance with a national carbon budget to limit warming to 1.5 degrees, from Articles 2 and 8 of the European Convention on Human Rights.
- Large Norwegian companies must report on its contributions to potential negative effects on said Convention rights under the Transparency Act, and implement measures to prevent, cease or reduce its contributions to harm.
- Similar obligations follow may from the EU's Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive.

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Finch v. Surrey County Council

- The case involved whether greenhouse gas emissions from burning extracted oil shall be subject to an environmental impact assessment prior to the allowance of an oil extraction project.
- In June 2024, the UK Supreme Court ruled that the decision to grant planning permission for the project was unlawful because the failed to access the effect on climate of the combustion of the oil to be produced.
- The failure to consider these emissions was in breach of UK's obligations, pursuant to Directive 2011/92/EU.
- The Supreme Court relied inter alia on a judgement from the Oslo District Court, which ruled in favour of SVW's clients – Greenpeace and Natur og Ungdom.
  The case before Oslo District Court was litigated by lawyers Jenny Sandvig and Camilla Hagelien.

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Key decisions from the Norwegian Supreme Court

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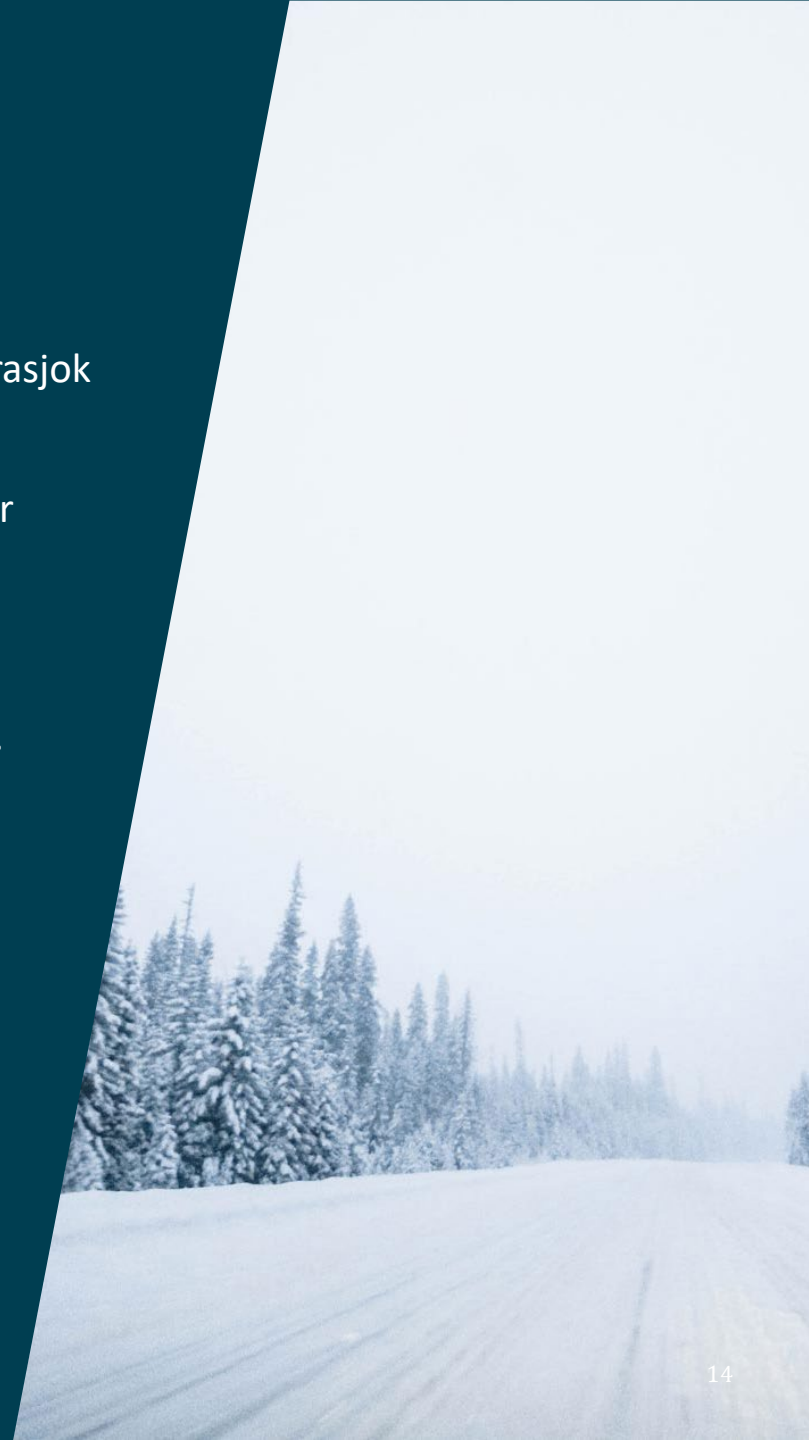
Land Ownership in Karasjok Municipality

- HR-2024-982-S involved a dispute regarding the ownership of unregistered land in Karasjok municipality, Finnmark.
- Two groups claimed collective property rights: one for the entire population, the other for the Sami population.
- The Finnmark Estate, which manages the land, argued against local ownership.
- The Supreme Court ruled that the local population does not collectively own the land.
- The majority found that the State acquired ownership in 1751, while the local population had usage rights.
- The minority argued for collective ownership based on immemorial usage and the ILO Convention no. 169 on Indigenous Peoples.
- This ruling has significant implications for land management and resource allocation in Finnmark.
- Read more about the case here.



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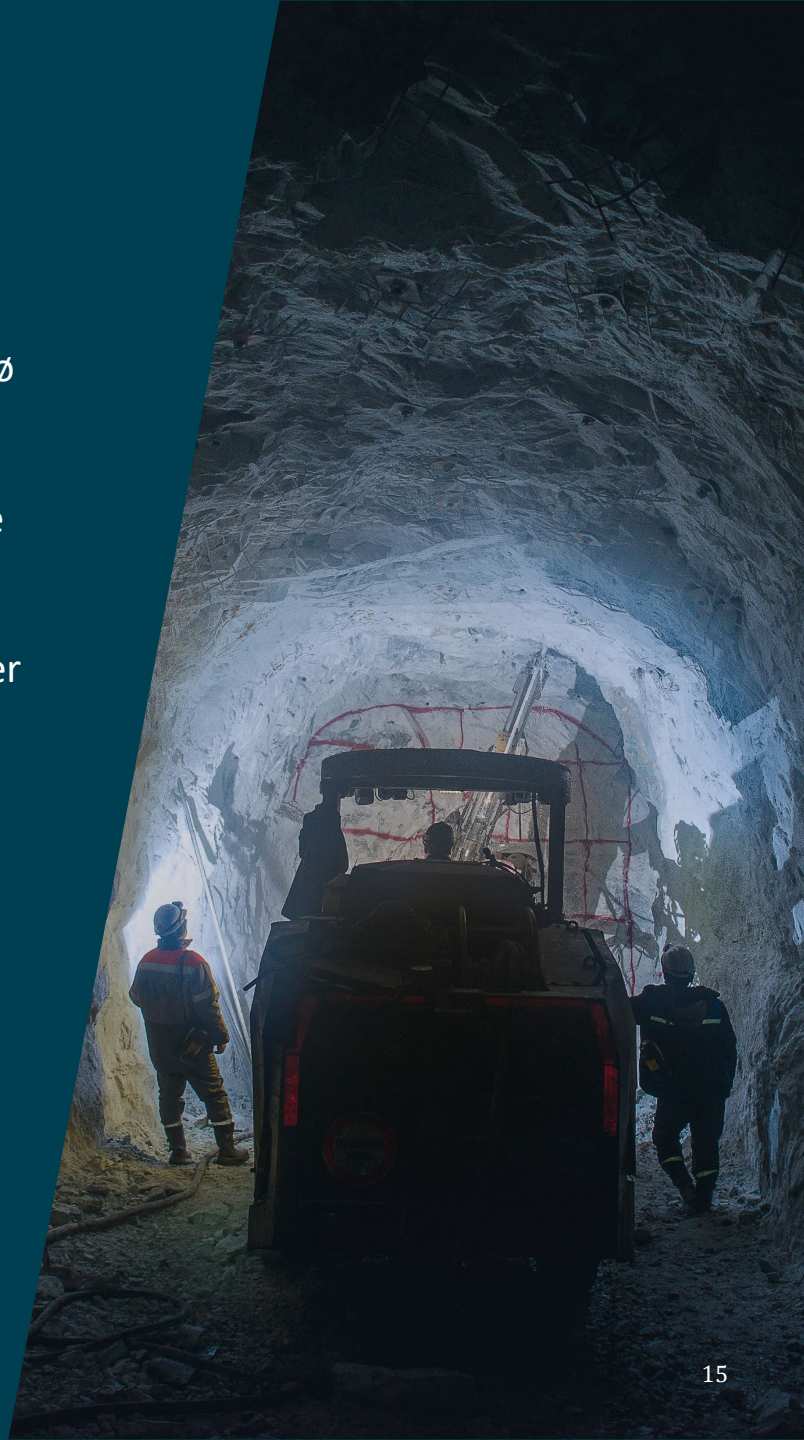
Mineral Ownership in Norway

- HR-2024-550-A involved a dispute concerning the ownership of minerals in the Engebø deposit in western Norway.
- According to Norwegian Mining law, the ownership of minerals is divided between the State (state minerals) and the landowners (landowners' minerals).
- The Engebø deposit is a complex deposit containing both state minerals and landowner minerals.
- Two mining companies claimed ownership of the landowner mineral garnet. One company derived its rights from the landowners, the other from the State.
- The Supreme Court ruled that the State mineral ownership, in a complex deposit, includes landowners' minerals.
- The landowner side was represented by inter alia SVW-partners Øystein Nore Nyhus and Christian Reusch.



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Insurance companies' right to claim recourse from Municipalities

- HR-2024-1146-A involved a dispute concerning whether an insurance company was entitled to claim recourse from the municipality for expenses to rebuild a fire-damaged house. Rana municipality was represented by lawyer Anette Fjeld and assisted by associate Ida Werenskiold.
- One of the questions raised was whether section 4-3 cf. 4-2 first paragraph of the Tort Act that limits insurance companies' right of recourse, applied for a municipality's liability based on contract.
- According to the Supreme Court, the respective provisions did not apply in this case, since the municipality's liability arose exclusively from contract. However, the Supreme Court did not preclude the application of these provisions in other cases, even if the claim arises from a contract.
- Hence, the provisions of the Tort Act did not limit the right to claim recourse and the Supreme Court found no grounds for excluding recourse on the basis of system- and policy considerations.
- The ruling from the Supreme Court may affect how municipalities procure housing when settling refugees and we anticipate that renting and further subletting for this purpose now may be considered less attractive.

New guidelines for handling of civil cases

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New guidelines for handling of civil cases

- A working group presented a set of new guidelines and associated templates for the District Court and Court of Appeal on 2 May 2024.
- The working group was composed of judges from district and appellate courts, lawyers appointed by the Norwegian Bar Association (incl. partner Christian Reusch from SVW), and representatives from the National Courts Administration.
- The new guidelines aims to enhance proportionality in the handling of civil cases, and thus keep costs down.
- Key elements in the guidelines are front loading of cases and strengthened case management by the courts.
- The set of templates aim to simplify the work for lawyers and judges and clarify the expectations for, among other things, petitions and responses.

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Leading Norwegian Law Firm Within Litigation and Arbitration

Our team has experience from all domestic courts, EFTA and EU courts, as well as Norwegian and international arbitration.

13
Partners Admitted to the Supreme Court

18
Dedicated Litigation Lawyers

Top ranked
By Legal 500 and Leaders League

"The team has outstanding capabilities in court. Individual strengths are used collectively in the team."

- Legal 500

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Simonsen Vogt Wiig Dispute Resolution Team

Since our last edition, our team has increased with two new resources working dedicated with litigation and arbitration.

- Øystein Nore Nyhus joined Simonsen Vogt Wiig as a partner as of May 2024. Øystein specializes in real estate disputes and real estate law. He is an experienced litigator, and has argued a large number of court cases, included before the Supreme Court of Norway. In addition, Øystein has considerable experience in mining law and mining development.

- Carl Victor Waldenstrøm joined the dispute resolution team in June 2024 as an associate. He graduated in June 2024 and during his time as a student, Carl Victor won ELSA Norway's national moot court competition, and published a book on tort law.

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