



SVW Dispute Resolution Newsletter

Q3 2024

Dear reader,

The SVW Dispute Resolution team is excited to present the third edition of our quarterly newsletter. Our goal is to provide you with valuable insights on the latest trends and developments in litigation and arbitration.

In this issue, we present an overview of arbitration as a dispute resolution mechanism. This edition also includes some key takeaways from a recent debate in Stockholm on the relevance of Section 36 of the Contracts Act in commercial disputes.

Additionally, we provide an update on the proceedings before the Court of Appeal concerning the temporary injunction granted by the Oslo District Court in the Norwegian climate case. The update highlights both the progress of the case and its international implications.

Finally, our column on key decisions from the Supreme Court features two notable cases: one on the statute of limitations for compensation claims related to flight cancellations, and another on the distinction between general and specific disadvantages in compensation awards for expropriation.

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Arbitration as a dispute resolution mechanism



Arbitration as a dispute resolution mechanism

Expertise: Arbitration allows the parties to choose a tribunal of legal or technical experts with specialized knowledge relevant to the dispute, unlike generalist judges in courts.

Efficiency:

- Arbitration is typically a 'one-shot' process with no appeals, unless the award is void.
- The parties can negotiate terms to streamline the process, such as limiting the number of pleadings and scheduling submissions of evidence.
- Arbitrators cannot force disclosure of evidence, meaning that procedural disputes requiring such actions must sometimes be resolved in court alongside the arbitration process.

Costs:

- Arbitration may exceed the cost of one court instance but generally remains cheaper than multiple judicial instances.
- The parties can implement measures like a (partially) written process or cost caps to manage expenses effectively.

International disputes:

- Arbitral awards can be enforced in virtually every country in the world pursuant to the New York Convention 1958.
- In arbitration, it is possible to have proceedings in a common language, such as English.



Mediation: Arbitration does not routinely offer mediation with a judge as mediator, though it can be integrated by agreement.

Confidentiality: The entire arbitration process can be kept confidential, unlike public court hearings and judgments.

Summary

In our opinion, arbitration should be considered in:

- **Complex commercial contracts:** The specialized expertise of the tribunal increases the likelihood of correct outcomes.
- **International contracts:** Arbitration is preferable because enforcing court judgments in other countries could pose challenges.
- **Sensitive contracts:** Arbitration ensures privacy, making it ideal for sensitive matters.
- **Urgent disputes:** Arbitration offers a quicker resolution which is beneficial in scenarios requiring swift clarification.





**Is Section 36 of the
Contracts Act a relevant
legal basis in
commercial disputes?**



Is section 36 of the Contracts Act a relevant legal basis in commercial disputes?

- At a recent Young Arbitrators Sweden seminar in Stockholm, our senior lawyer Therese Sætre Løfsgaard alongside other Nordic lawyers debated the application of Section 36 of the Contracts Act in commercial contracts.
- Historically, there has been a shared understanding across the Nordic countries that the threshold for invoking Section 36 is high. However, recent legal developments in Sweden suggest a shift in this perspective.
- In a ruling from the Swedish Supreme Court, NJA 2022 p. 354, the question was whether a limitation of liability cap in a consulting contract could be set aside according to Section 36. The majority stated that the liability cap could be set aside if Section 36 was applicable, and established the following assessment criteria:

"In the assessment, the advisor's legitimate interest in protection against careless mistakes and oversight is relevant. The main factor here is the degree of negligence, but it is also relevant what opportunities the parties had to obtain insurance and whether the advisor has acted in breach of core commitments of the assignment. Another relevant factor may be the amount of the liability cap compared to the fee for the assignment."

- The majority concluded that the liability cap could be maintained. A minority opinion argued that the liability cap should be set aside. Somewhat surprisingly, they also noted that even ordinary negligence, not just gross negligence, could suffice to override the liability cap.



- No similar developments were reported from Denmark, Finland or Norway.
- The Norwegian Supreme court has never revised an agreement between professionals based on Section 36. In a judgement from 2022, the Supreme Court confirmed that the threshold for revision between professionals must be very high.
- The panelists agreed that Section 36 is invoked far more frequently in commercial disputes than the high threshold would suggest.
- There was also consensus that there is a growing trend toward favoring reasonableness in contract interpretation, which may reduce the need for courts to directly apply Section 36. The panelists had all observed court decisions where achieving a fair result was prioritized over strictly adhering to the contract's exact wording.
- It remains to be seen if the developments in Sweden will influence the other Nordic countries.





Injunction proceedings in Norwegian climate case



Injunction proceedings in Norwegian climate case

- On September 4th to 12th, 2024, the Norwegian State's appeal against a temporary injunction concerning three new oil fields (Breidablikk, Tyrving and Yggdrasil) was heard by Borgarting Court of Appeal, in the Norwegian climate case. SVW partner Jenny Sandvig, senior associate Camilla Hagelien and associate Carl Victor Waldenstrøm represent the environmental organizations, Greenpeace Nordic and Nature and Youth Norway.
- On January 18th, 2024, the Oslo District Court invalidated three permits for new oil fields and issued a temporary injunction forbidding the State from granting any new permits necessary to construct and operate the fields. The order was appealed by the State, and temporarily suspended by the Court of Appeal pending the appeal.
- At issue in the hearing in September was whether the enforceability of the temporary injunction should be put back into effect. The environmental organizations contend that the injunction is paramount, to avoid serious and irreversible harm from the oil fields. The state contends, inter alia, that economic considerations should carry more weight.
- A decision in the injunction case is to be expected in the coming weeks.



International dimensions of the climate case

- On July 5th, 2024, the Borgarting Court of Appeal decided to request an advisory opinion in the main case from the EFTA Court on the interpretation of the EIA Directive. The questions concern the duty to conduct environmental impact assessments of climate impacts from extracted petroleum, and the legal implications of a breach of said Directive. The main case has been suspended pending the EFTA Court's decision.
- On June 20th, 2024, the UK Supreme Court cited the Oslo District Court's judgement as "persuasive" authority, reaching the same conclusion that the EIA Directive requires environmental impact assessments of combustion emissions prior to an application for approval of a new extraction project.





Key decisions from the Norwegian Supreme Court



The Supreme Court clarifies the distinction between general and specific disadvantages when awarding compensation for expropriation

- Property owners impacted by expropriation are entitled to full compensation for land loss and subsequent disadvantages to remaining property pursuant to the Norwegian Constitution Section 105 and the Expropriation Compensation Act Section 3.
- Disadvantages are categorized as either general or specific. Specific disadvantages receive full compensation, while general ones are compensated only if they exceed certain thresholds.
- In a recent Supreme Court case, HR-2024-1195-A, it was ruled that the classification of a disadvantage as specific should be based on its nature, not its effects on the affected party.
- In this case, disadvantages from construction for a new water pipeline were considered general. Although the construction significantly affected the plaintiff's horse farm, the impact was linked to the business nature rather than the construction itself.



Supreme Court clarifies the statute of limitations for standard compensation for flight cancellations

- HR-2024-1200-A involved a dispute concerning whether compensation claims for flight cancellations should adhere to the general three-year statute of limitations under the Limitation Act or the specific two-year deadline from the Aviation Act.
- The majority favored the general limitation period of three-years, citing ambiguity in the Aviation Act regarding whether the two-year limit applies solely within its specific chapter or also to regulations derived from it.
- Based on the legislative history, purpose of the Act, and other substantive factors, the Court determined that the two-year limitation should be interpreted narrowly.
- This decision underscores the Supreme Court's cautious approach in extending the scope of limitation periods in specialized legislation beyond what is explicitly stated. It also reflects the emphasis on protecting consumer rights within Norwegian law.





SVW Dispute Resolution



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.



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