

SVW Dispute Resolution Newsletter

Q4 2024

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Dear reader,

To wrap up this year, the SVW Dispute Resolution team is excited to bring you the latest edition of our quarterly newsletter. Our goal is to keep you up to date with insightful analysis on the latest trends and developments in litigation and arbitration. In this edition, we offer a diverse range of content:

First, we present an update on an upcoming case before the Supreme Court concerning section 36 of the Contracts Act. We will also provide some insights from a recent Supreme Court ruling on the insurance condition regarding sudden and unforeseen physical damage.

Additionally, we discuss significant takeaways from the appeals judgment in the Dutch Shell case.

We have also included an overview of Chapters 28 and 28A of the Norwegian Dispute Act, focusing on access to evidence in cases involving intellectual property infringement.

Finally, we provide an overview of the rules concerning exemption from disclosure for trade secrets.

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Christian Reusch
Partner



**Kristoffer Larsen
Rognvik**
Partner

12 December 2024

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The relevance of Section 36 of the Contracts Act in commercial disputes



The relevance of Section 36 of the Contracts in commercial disputes

In our Q3 newsletter, we discussed a ruling from the Swedish Supreme court (NJA 2022 p. 354) on the application of section 36.

A recent article in SvJT by professor Flodgren argues that courts should be more willing to adjust commercial contracts between equal parties, and that the previous reluctance to do so has been excessive.

In a judgment 28 June 2024, the Agder Court of Appeal found that a contract relating to sales of shares in a company should be set aside because it was “unreasonable” according to section 36.

The judgment has been appealed to the Supreme Court, which will hear the case in the beginning of January 2025. A judgment should be expected by end of January or early February, casting light on the threshold for use of section 36 outside business-to-customer contracts.

Lawyer / partner Christian Reusch will represent the sellers in the hearing before the Supreme Court.



The Supreme Court clarifies the insurance condition sudden and unforeseen physical damage



The Supreme Court clarifies the insurance condition sudden and unforeseen physical damage

- The Supreme Court ruling in HR-2022-2040-A concerns an incident involving a turbine breakdown at a power plant, which was caused by water infiltration at the rear of the chamber. This led to the gradual loosening and rusting of the fastening equipment. The plant's insurance policy covered instances of sudden and unforeseen physical damage.
- The Supreme Court established that the damage was unforeseen, as it could not be detected until shortly before the turbine failed.
- However, the damage did not meet the requirement for sudden physical damage as the breakdown resulted from a gradual deterioration that occurred over many years. The final phase of the damage, despite being short-term, was considered a continuation of this ongoing deterioration rather than a distinct, isolated incident.
- The Supreme Court concluded that the damage was not covered under the plant's insurance policy due to its gradual nature, thus not meeting the requirement that the damage be "sudden".





Takeaways from appeals judgment in Dutch Shell case



Takeaways from appeals judgment in Dutch Shell case

- On 14 November 2024, the Hague Court of Appeals overturned a ruling by the Dutch District Court from 2021, concerning a temporary injunction. The case was brought by the environmental organization Milieudefensie and more than 17 000 co-plaintiffs.
- The Appeals Court agreed with the District Court that Shell has a legal obligation to reduce greenhouse gas emissions across Scope 1, 2 and 3.
- While the District Court had mandated a 45% reduction by 2030, relative to 2019 levels, the Appeals Court found no imminent violation regarding Scope 1 and 2 emissions.
- However, the Appeals Court concluded that there is a legal duty for Shell to reduce Scope 3 emissions, though it stated that setting a specific percentage for this reduction obligation is not feasible.
- The judgment shows that:
 - Companies like Shell have a legal obligation to limit emissions to counter dangerous climate change above 1.5°C,
 - Compliance with the EU's sustainability directives (CSRD and CSDDD) does not suffice to meet this obligation, and
 - Planned new investments in new oil and gas fields may be at odds with this obligation.



- Despite Shell's victory in getting the injunction lifted:
 - The Appeals Court rejects the argument that Shell does not act unlawfully as long as its supply responds to the demand of fossil fuels ("This argument does not hold water").
 - The Appeals Court rejects the argument that an obligation on individual companies to reduce emissions is inconsistent with the system of the law (Legislative measures "are not exhaustive in and of themselves").
 - The Appeals Court implies a causal link between production limitations and emission reductions, even if it does not find the same causality with sales limitations.
- The judgment has already lead to codification of obligations in legal instruments such as the EU's sustainability directives (CSRD and CSDDD).
- It is not known at this point whether the environmental organizations will appeal the judgment to the Dutch Supreme Court.





Norwegian Dispute Act Chapters 28 and 28A



Norwegian Dispute Act Chapters 28 and 28A

Part 5 of the Dispute Act provides a comprehensive array of tools for obtaining evidence during the preparatory phase of a legal dispute. A significant limitation, is that such access generally necessitates initiating formal legal proceedings, typically by filing a claim with the district court. There are, however, exceptions to this rule.

Chapter 28 of the Dispute Act allows for disclosure of evidence through a petition to the relevant district court if:

1. The evidence is likely to be relevant to a specific dispute, and;
2. There is an immediate risk of the evidence being lost, significantly weakened, or is crucial to obtain before proceedings.

Chapter 28A extends these provisions for cases involving intellectual property infringement. In such cases, the rights holder may request the court to order the infringer or a third party to disclose details about the origin and distribution of the implicated goods or services.

The court may grant such an order if the information is pertinent for enforcing an intellectual property right and that the benefits of obtaining this information outweigh any potential harm or other conflicting interests.



Exemption from disclosure for trade secrets



Exemption from disclosure of evidence for trade secrets – Dispute Act Section 22-10

- In legal proceedings, parties are required to disclose any evidence relevant to the case. The Dispute Act Section 22-10 provides an exception for trade secrets. However, the court may require the disclosure of such information if deemed necessary after considering all relevant factors.
- The core area for this exemption is competitively sensitive information and other information that, if disclosed, could financially harm the business.
- A recent Supreme Court ruling, HR-2022-2386-F, has further clarified the criteria for what constitutes a trade secret. These criteria include:
 1. Information that is not commonly known nor easily accessible,
 2. Information that is crucial enough that its public disclosure could lead to financial loss or reduced profits,
 3. The potential for damage does not require actual use of the information by the recipient or others, but the information must have the capacity to cause harm,
 4. The timing of the disclosure may also be a significant factor.



- In another Supreme Court case, HR-2023-2281-U, agreements detailing sales volumes and prices were classified as trade secrets. It is crucial to recognize that such determinations are made on a case-by-case basis, considering the specific circumstances of each company and industry.
- Additionally, in a case from the Borgarting Court of Appeal (LB-2023-149747), a tax application containing trade secrets raised a significant legal question. The Court of Appeal had to decide whether the application should be disclosed under the exemption rule. Ultimately, the court determined that the potential benefits of using the tax application as evidence did not outweigh the adverse effects of disclosing the trade secrets it contained.
- This decision has been appealed, and leave has been given for the Supreme Court to hear the case. This ongoing legal discourse underscores the complex balance between transparency and the protection of sensitive business information in legal settings.





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