SVW Litigation and Arbitration Newsletter

Q1 2024

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Dear reader,

The SVW Litigation and Arbitration team is excited to present this first edition of our quarterly newsletter. Our aim is to keep you up informed with insightful analysis on the latest trends and developments in litigation and arbitration. In this edition, we offer a diverse range of content.

First, in our era of heightened environmental awareness, our newsletter provides insight into the surge of climate litigation. We give you the details of the first climate court case where environmental organizations achieved a significant victory against the Norwegian government. The legal team for the environmental organizations included several of our lawyers.

In addition, we shed light on maritime arbitration in London, and concerns regarding associated costs. We also look at the courts' increased scrutiny on costs in Norwegian civil cases.

Finally, we make sure that you're up-to-date with the most recent legislative amendments and judgments from the Norwegian Supreme Court.

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12 April 2024

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01 Overall Climate Litigation Trends

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Overall Climate Litigation Trends

- 2024 is a turning point for climate litigation. Our lawyers pleaded the two most recent cases to make headlines.
- On April 9th, the Grand Chamber of the European Court of Human Rights (ECtHR) issued a landmark judgment (Verein KlimaSeniorinnen et al. v. Switzerland) where it held that Switzerland had violated the right to physical integrity under Article 8 and the right to access to court under Article 6 of the European Convention of Human Rights.
- The Court held that Switzerland had failed cut emissions as required by consensual climate science through binding and specified climate regulation. Importantly, Switzerland had failed to cut emissions according to a national portion of the remaining global carbon budget for limiting warming to 1.5 degrees.
- The ECtHR's judgment is binding for Switzerland, and authoritative for all other Contracting States, including Norway. The judgment implies that the Norwegian Climate Act must be revised. Large companies must also assess and prevent contributions to potential negative consequences on climate rights, as Article 8 of the Convention is part of the obligations stemming from the Norwegian Transparency Act Section 4.
- SVW Partner Jenny Sandvig litigated the Klimaseniorinnen case on behalf of all national human rights institutions in Europe (ENNHRI). She also led interventions in two other cases decided by the ECtHR on April 9th (Duarte et al. and Carême et al.), in addition to the pending Greenpeace Nordic et al. v. Norway, which is expected to be handed down shortly.

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- On January 18th, the Oslo District Court invalidated three permits for new oil fields (Breidablikk, Tyrving and Yggdrasil) and issued a temporary injunction forbidding the Norwegian State from granting any new permits necessary to construct and operate the fields.
- The District Court held that the permits violated the duty to conduct environmental impact assessment of climate impacts from the petroleum to be extracted, further to the Petroleum Act and the EIA Directive. This duty has been clarified by the Norwegian Supreme Court in HR-2020-2472-P, on which the District Court relied.
- Appeal proceedings are scheduled for August 28th 2024.
- SVW Partner Jenny Sandvig and associates Camilla Hagelien and Ida Werenskiold represent the plaintiffs, Greenpeace Nordic and Nature and Youth Norway.

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02 Exploring Trends within the Norwegian Supreme Court

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Does The Norwegian State Continue to Come Out on Top?

The Supreme Court's annual report for 2023 shows that the Court dealt with a total of 53 civil cases. The government was a party in 19 cases, winning 11. This corresponds to a success rate of 62%. In comparison, the Supreme Court dealt with 56 civil cases in 2022. The state was a party in 17, winning 13. This constitutes a success rate of 76.5%.

Although the government still succeeds in most of the cases where it is involved, these statistics from 2022 and 2023 could suggest that this trend may be in reverse.

HR-2023-2432-A is an important case exemplifying this. A father who applied for deferred parental leave benefits in 2019, had his benefit period reduced by just over 13 weeks. The basis for the reduction was that the Norwegian Labour and Welfare Administration ("Nav") interpreted the National Insurance Act in such a way that if the father's leave did not commence immediately after the last day of the mother's leave period, he had to apply for deferral no later than the last day of the mother's leave period. If the father did not apply within this deadline, he lost the right to parental benefits for a period corresponding to the delay.

The National Insurance Court upheld the decision. The case was appealed to The Parliamentary Ombud, who concluded that Nav's practice had no legal basis in the National Insurance Act. Nonetheless, Nav maintained its decision. The Supreme Court reached the same conclusion as The Parliamentary Ombud. According to the Supreme Court, there was no basis in the wording of the Act to establish such a deadline resulting in loss of benefits. Other legal sources could not justify this deadline either.

The case was argued in the Supreme Court by partner, and Head of the Litigation and Arbitration team, Christian Reusch.

The Lack of Cases relating to the Business and Commerce Sectors

Concerns have recently emerged concerning the lack of Supreme Court cases relevant to the business sector. It has been claimed that the Supreme Court’s apparent reluctance to admit cases relevant to the business area undermines its significance. Former Supreme Court Justice, Jens Edvin A. Skoghøy, has even raised questions about the Supreme Court's current level of expertise. Increased reliance on arbitration has been put forward as a possible consequence.

Insurance, Tort and Tax

In 2023, the Supreme Court heard two tax cases, maintaining the consistent trend of a low proportion of tax-related cases that seems to continue into 2024. In 2024, the Court is set to deliberate a case involving the restriction of interest deduction between affiliated companies, as well as another case concerning the limitation of interest deduction on loans from foreign branches.

Within the area of insurance and tort law, the Supreme Court heard a total of eight cases in 2023, signaling a sustained trend expected to last into 2024. These cases cover a wide spectrum of issues, including occupational injury, insurance coverage, and legal recourse.

One notable upcoming case involves our partner, Anette Fjeld. On June 11, 2024, she is scheduled to argue the issue of whether a homeowner's insurance company can claim recourse from a tenant. The case is expected to have significant implications for both the insurance industry and municipalities.

03

Maritime Arbitration in London – Are the Cost Concerns Always Valid?

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Maritime arbitration in London – Are the cost concerns always valid?

The London Maritime Arbitrators Association (LMAA)

The London Maritime Arbitrators Association is the world's most popular international arbitral body for maritime arbitration and is particularly popular as an arbitration venue for maritime disputes within shipping, offshore energy and international trade. It is estimated that about 80% of the world's international institutional maritime arbitrations are held in London, the vast majority of which are conducted under the LMAA rules.

Cost-reducing Measures under LMAA-arbitration

Despite the popularity of London arbitration, many parties are hesitant to accept clauses agreeing on LMAA-arbitration or other international arbitration in London, due to cost concerns. London solicitors are expensive, and the English tradition typically involves a barrister to argue the case, which becomes an additional expense. In particular, there is some hesitancy to accept such clauses in contracts with lower value potential claims, where the upside in winning an award might not be worth the costs and the risks associated with obtaining the award.

In order to mitigate the potentially high costs, the LMAA provides several options to reduce costs, including:

- Constitute the tribunal with a sole arbitrator.
- Resolve the matter based on papers (documents and written submissions) only.
- Implement simplified rules for disclosure of evidence.
- Implement caps on recoverable costs.

Such measures are increasingly popular. For instance, newly published caseload statistics from the LMAA indicate that an increasing number of cases before the LMAA are resolved on papers only.

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Small Claims Procedure and Intermediate Claims Procedure

The LMAA provides alternative procedural tracks for claims that are under USD 100,000 (Small Claims) and USD 400,000 (Intermediate Claims) respectively (excluding interest and costs). Both procedures include cost saving measures such as:

- A main rule of no oral hearing (documents and written submissions only)
- A cap on recoverable costs.
  - Small Claims Procedure: A fixed cap of GBP 5,000.
  - Intermediate Claims Procedure: A cap of 30-50 % of the claimants claim.
- A simplified regime for disclosure of evidence.

For the Small Claims Procedure, the main rule is to have a sole arbitrator. This can also be agreed between the parties under the Intermediate Claims Procedure, but the standard is a tribunal of three arbitrators.

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Cost Saving Measures Under Standard LMAA-arbitration

Under the standard terms of procedure for LMAA arbitration, the starting point is that:

- The tribunal is to consist of three arbitrators.
- It is up to the tribunal to decide whether and to what extent there should be oral or written evidence or submissions.
- Reasonable costs are recoverable in full, meaning that the successful party can usually recover 70-80 % of actual legal costs

It is, however, possible for the parties to agree on cost saving measures along the lines of the Small Claims Procedure and the Intermediate Claims Procedure, such as agreeing on a sole arbitrator, papers only, limited disclosure, or a cap on recoverable cost. It is also possible to agree to apply the Small Claims Procedure or the Intermediate Claims Procedure to claims of any size. Agreeing on some of the measures above might be beneficial even in larger disputes, in order to achieve better cost control.

One thing to keep in mind, however, is that while it is possible to reach agreements on cost saving with the opponent in the event of a dispute, this might be difficult once the dispute is a fact. As such, it might be beneficial to consider agreeing on such measures already when negotiating the arbitration clause in the contract.

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Costs in Civil Cases – Increased Scrutiny from the Courts

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Costs in Civil Cases – Increased Scrutiny from the Courts

In many cases, legal costs are an important factor when assessing whether a potential claim should be pursued or contested. This is particularly true in commercial disputes where the financial implication of a case often will be a decisive factor. This topic has received increased attention in recent years as the cost of litigation in civil cases before the courts has increased.

This attention has resulted in various initiatives and measures to reduce the level of costs in the courts. Among other things, some amendments to the Dispute Act came into force as of July 1, 2023, with the aim of lowering the litigation costs. More than seven months later, we are seeing some effects of the changes.

The changes to the Dispute Act imply that, pursuant to section 20-5 (5) of the Dispute Act, the court shall examine the statement of costs that the opposing party has approved, without the party being given the opportunity to comment before the claim is reduced. In light of this change, the Dispute Act was also amended so that the party, on its own initiative, must not only specify the expense items, but also justify the claim for legal costs.

The observation after the amendments came into force is that the courts are reviewing the legal costs to a greater extent than before the amendment. In addition, the courts appear to have gradually adopted a stricter control of the level of legal costs than before. The court's assessment of the necessary costs is therefore relatively often not consistent with the actual costs.

In the short term, this means that the parties must be aware to a greater extent than before that their legal costs may not necessarily be fully covered, even if the claim is successful and the opposing party does not object to the level of costs. It can be useful to be aware of this when using or considering using the courts as adispute settlement mechanism.
If you are unsuccessful, you can also expect the court to review the opposing party's claim for legal costs, so that the liability for the opposing party's legal costs does not go beyond what has been necessary.

In the longer term, it is conceivable that the rules, together with other measures and initiatives, will lead to a lower level of legal costs in the Norwegian courts.
The Norwegian parliament has asked the government to investigate how the parties' legal costs in civil cases can be reduced. At present it is not clear what this initiative will lead to.

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05 Key Judgements from the Norwegian Supreme Court

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HR-2024-411-U

Valid Reasons to Present a New Claim in an Appeal. Section 30-7 of the Dispute Act

In this case, the Supreme Court addressed the introduction of a new claim in accordance with section 30-7 of the Dispute Act. The question was whether sufficient grounds existed to justify the submission of the new claim.

The Supreme Court concluded that there were insufficient grounds for submitting the claim. It was underlined that the new claim introduced legal and factual complexities distinct from the main claim. Moreover, the timing of its submission, just one week prior to the appeal hearing, was taken into account.

This ruling serves as a reminder of the importance of procedural diligence. Parties involved in disputes must carefully consider the implications of introducing new claims, particularly in terms of timing and potential complications.

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HR-2024-124-A

Impartiality of judges. Section 108 of The Courts of Justice Act

Prior to presiding over a case in the Supreme Court, one of the judges, in his capacity as a board member of the Norwegian Judge Association, engaged in discussions concerning the association's position on the matter to be decided by the Court. The subject at hand involved the employment conditions for two judges. The question to be considered by the Supreme Court was whether this judge's involvement disqualified him from adjudicating the case.

In its assessment, the Supreme Court emphasized the significance of how the judge’s involvement might be perceived externally. The critical evaluation lies in determining whether specific circumstances give rise to justified, reasonable, and material doubts regarding the judge's impartiality, both for the parties involved and the public.

The Supreme Court put substantial weight to the fact that the judge publicly expressed an opinion aligned with one party's arguments in the case. Such an opinion could reasonably raise doubts about the judge's impartiality. Additionally, objections from both the appellant and the appellee concerning the judge's participation were considered.

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06 Changes to the Dispute Resolution Act

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Several changes to the Dispute Resolution Act were adopted by the Norwegian Parliament in 2023. Some changes came into force on July 1, 2023, while further changes came into force on January 1, 2024. The most significant changes from January 1, 2024, are summarized below:

- The wording in section 6-2 (2) letter d has been revised to clarify that the exception is not only applicable to claims or parties introduced to the case after the service of summons, but applies when, pursuant to the provisions of sections 15-1 to 15-3, a new claim or party is brought into the proceedings. New claims or parties may be introduced as early as in the summons to the district court, provided that the conditions for cumulation are met.
- As a main rule, the case preparation shall now be completed three weeks prior to the main hearing, instead of two cf. section 9-10 (1). When the case preparation period is completed, the parties cannot present new claims, evidence, or arguments to the court. The purpose of the amendment is to ensure that the case is sufficiently clarified well in advance of the main hearing, thereby ensuring efficient case handling.
- It is now specified that the court must act to ensure that the disputed issues are clarified during the case preparation, cf. section 9-4 (1) new second sentence. The court’s duty to take an active part in the management of the case during the case preparation stage I thus emphasized, and the provision also clarifies the court’s duty to provide guidance to the parties in section 11-5 (3).
- Section 18-1 second paragraph now specifies that when a case is suspended from the conciliation board pursuant to section 6-11, the lis pendens effect ceases when one month has passed from the conciliation board's suspension if the case has not been submitted to the courts.
- A new rule on prohibition of evidence has been adopted in section 22-6, which states that evidence regarding the police and prosecution authorities' internal case preparation in criminal cases cannot be admitted.

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

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