Introduction

(1) Pursuant to the Norwegian Dispute Act (the “NDA”) Section 5-4, and notwithstanding any mediation contract, disputing parties are obliged to investigate the possibility of, and attempt, reaching an amicable settlement of the dispute before an action is brought before the court, if necessary through conciliation before the Conciliation Board, non-judicial mediation or by bringing the dispute before a non-judicial dispute resolution board. If a party resists adequate attempts of reaching an amicable settlement, this may inflict on a later court decision regarding the legal costs in connection with the dispute. A party’s non-compliance with the provision will however not be a ground for dismissal of the case.

(2) This outline will focus on the mechanisms established in the Norwegian Dispute Act to promote mediation agreements, out-of-court mediation, (non-judicial) mediation before the ordinary courts and judicial mediation before the ordinary courts.

Out-of-court mediation

(3) In respect of legal disputes, the parties may agree to out-of-court mediation pursuant to the NDA Chapter 7. If the parties have gone through out-of-court mediation pursuant to chapter 7, but not reached a settlement, the dispute may be brought before the District Court directly – instead of first bringing the dispute before the Conciliation Board.

(4) The mediation contract shall be in writing and shall specify the application of the provisions on out-of-court mediation in the NDA. The term “in writing” is not interpreted strictly. The contract shall be deemed to be “in writing” when it is clear that the parties have proceeded to out-of-court mediation pursuant to the NDA, e.g. when the parties jointly have requested the District Court to appoint a mediator, or when the parties have agreed on using electronic communication and the mediation contract appear from such communication.

(5) Mediation contracts made prior to legal disputes, e.g. in a purchase agreement, shall not be binding on consumers. Nevertheless, as stated above under para (1), all disputing parties are obliged to attempt reaching an amicable settlement of the dispute before an action is brought before the court.

(6) Further, the parties may at any time demand that the out-of-court mediation shall be adjourned. Accordingly, the enforceability of a mediation contract is limited – resolving a dispute out of
court (by mediation) is subject to both of the parties’ willingness.

(7) The parties may agree on who shall act as mediator or on the procedure for appointing the mediator. At the request of the parties, the District Court shall appoint a mediator from the court’s panel of judicial mediators. The request shall be made in writing and signed by both parties, and state what the subject-matter of the dispute is. If the court declines to appoint a mediator, the decision may be appealed by the parties acting jointly. Mediators may engage an assistant with the consent of the parties. The parties may require the court to appoint the assistant (not necessarily from the court’s panel of judicial mediators).

(8) Both mediators and assistants shall be impartial and independent of the parties and qualified for the task. The mediator and assistant shall on their own motion provide information about circumstances that could cast legitimate doubt on their impartiality or independence.

(9) Mediators and assistants are entitled to remuneration for their work. Unless otherwise agreed, the parties are accountable for the remuneration in equal shares. The District Court can be required to determine the remuneration of mediators and assistants appointed by the court. Mediators and assistants may make their participation in out-of-court mediation conditional upon an advance payment or security for their claim for remuneration. The court shall determine the amount and form of the security. As a main rule, the security for the remuneration claim shall be made by an advance payment within a reasonable time-limit set by the court.

(10) The parties shall participate in out-of-court mediation in person or be represented by a person authorized to enter into an amicable settlement agreement. The mediator shall adhere to the parties’ agreement concerning the procedure to be followed in the out-of-court mediation as long as this enables a proper conduct of the mediation. In the absence of an agreement on the procedure to be followed, the mediator shall determine the procedure in consultation with the parties.

(11) Meetings with the parties may be held jointly or separately. Mediators shall act impartially and promote an amicable settlement. He may present proposals for a solution to the matter and may express his views on the strengths and weaknesses of the parties’ legal and factual arguments.

(12) A record shall be kept of the mediation stating who has participated. The identity of any third party who gives testimony shall be recorded. A party who makes an offer of settlement may demand that the offer be recorded. As mentioned above, this may inflict on a later court decision regarding the legal costs in connection with the dispute.

(13) Out-of-court mediation shall be concluded by the conclusion of an amicable settlement, a declaration by the mediator that further mediation is pointless or a declaration by one or both of the parties that they do not wish further mediation. The record shall state that mediation has been closed. There are no special requirements for the validity of settlement agreements signed in the context of mediation or following on from such a procedure.

(14) The parties cannot, in the same or in another case, testify as a party or a witness about what emerged at the out-of-court mediation. However, they are not precluded from providing information about specific evidence that was referred to and which has not emerged in another manner, or about proposals for an amicable settlement that is recorded. In all other contexts, the parties shall refrain from disclosing matters that were conveyed to them on condition of confidentiality. Other persons than the parties, e.g. the mediator, witnesses etc., shall maintain confidentiality about what took place during the mediation. However, they may testify as to whether a written agreement is in accordance with what was agreed during the mediation.

Mediation before the ordinary courts

(15) The District Court shall at each stage of the case consider the possibility of a full or partial amicable settlement to the legal dispute through (non-judicial) mediation or judicial mediation, unless the nature of the case or other circumstances suggests otherwise.

(16) Mediation pursuant to the NDA Section 8-2 takes place by the court attempting to provide a basis for an amicable settlement, either at a court hearing or through other forms of contact with the parties. During
mediation, the court shall not hold separate meetings with each party nor receive information that cannot be communicated to all parties involved. The court may not present proposals for a solution, offer advice or express points of view that could impair confidence in the impartiality of the court. The confidence in the impartiality of the court is important, as the same judge will hear and decide the case if the parties do not succeed in reaching an amicable settlement.

(17) If the parties reach an agreement, it may be concluded as an in-court settlement pursuant to the NDA Section 19-11. Pursuant to the provision, in-court settlements shall be recorded in the court record and signed by the parties and the members of the court. The court shall ensure that the settlement states precisely what the parties have agreed, and that the settlement is not contrary to considerations of public policy that limit the parties’ right of disposition in the legal action. If the settlement is to be enforceable, the court shall ensure that a time-limit for performance is fixed. Before entering into the in-court settlement, the parties shall be informed of its effect. If the settlement does not include provisions on the allocation of costs, the court shall at the request of the parties determine such allocation at its discretion.

(18) In-court settlements shall have legal effect, but may be declared invalid or amended by judgment pursuant to the rules for invalidity and amendment of contracts. Such an invalidity or amendment action shall be brought before the District Court, and within six months of the date when the party became aware or ought to have obtained knowledge of the alleged grounds for invalidity. The court may grant reinstatement pursuant to the provisions of Chapter 16 III if the time-limit is exceeded. An action for invalidity of an in-court settlement based on circumstances that prevailed at the time it was entered into cannot be brought more than ten years after it was entered into.

Judicial mediation before the ordinary courts

(19) The District Court may decide that judicial mediation pursuant to Sections 8-4 to 8-6 shall take place instead of or in addition to mediation pursuant to Section 8-2. In making its ruling, the court shall have regard to the parties’ view to judicial mediate and the likelihood of reaching a settlement or simplifying the case. The court shall also have regard to whether judicial mediation may be inappropriate due to differences in the relative strength of the parties, the costs of judicial mediation, previous attempts at mediation or other circumstances. Judicial mediation shall only take place against the will of the parties in special circumstances, e.g. in disputes between close relatives where the dispute only will cement the clash of interests.

(20) The preparatory judge in the case, one of the other judges of the court or a person from the court’s panel of judicial mediators may act as the judicial mediator. The court may with the consent of the parties appoint a judicial
mediator who is not from the court’s panel of judicial mediators. The court may also with the consent of the parties appoint an assistant to the judicial mediator.

(21) Judicial mediators and assistants are subject to the same requirements as to impartiality as judges. An appointment of a judicial mediator or an assistant may be appealed on the grounds of partiality.

(22) An assistant or a judicial mediator who is not a judge at the District Court shall be entitled to remuneration determined by the court. The remuneration shall be determined according to legal aid rates unless the court, the parties and the judicial mediator or assistant have agreed otherwise.

(23) Judicial mediation shall take place outside court hearings. The judicial mediator shall determine the procedure to be followed in consultation with the parties. Meetings with the parties may be held jointly or separately. The parties shall attend the judicial mediation in person and may be accompanied by counsel.

(24) The judicial mediator shall act impartially and seek to clarify the parties’ interests in the dispute with a view to reaching an amicable settlement. He may identify proposals for a solution and may discuss the strengths and weaknesses in the parties’ legal and factual arguments. Further, he shall determine whether and to what extent evidence shall be presented at judicial mediation. Evidence shall not be presented without the consent of the parties and any third party by whom evidence or testimony is to be given.

(25) The judicial mediator shall maintain a record of mediation meetings, which shall state the name of the court, the time and place of the mediation meeting, the case number, the names of the mediator, parties and counsel, whether the parties attend in person and, if applicable, the names of representatives. The record shall state whether witnesses or experts have been examined and their identity. A party who makes an offer of settlement may demand that the offer be recorded. The record shall form part of the case documents.

(26) If the parties reach an agreement, the settlement may be concluded as an in-court settlement, which shall be recorded in the judicial mediation record. In all other respects, Sections 19-11(2) to (4) apply correspondingly, see para (17).

(27) Section 8-6 on prohibited evidence and the duty of confidentiality following judicial mediation, is given account for above, see para (14).

(28) If the case is not concluded at mediation, it shall continue to be heard before the District Court. The court shall, as far as possible, seek to ensure that unsuccessful judicial mediation does not cause delay in the progress of the case. A judge who has acted as judicial mediator in the case may only participate in the further hearing of the case at the request of the parties and if the judge does not consider it imprudent.

Writer:

Tage Brigt A. Skoghøy
Senior associate, Oslo
D +47 22 31 32 39
M +47 975 27 279
tas@svw.no

Tage Brigt A. Skoghøy has considerable expertise in pleading cases before the Norwegian courts, and has litigation and dispute resolution experience within a number of fields, including real estate, maritime, transportation and general law of torts and contract.
**Simonsen Vogt Wiig**

Simonsen Vogt Wiig is a full service law firm covering all aspects of business law. We have the skills and capacity to solve the most challenging problems and the largest assignments. Our dispute resolution and litigation team cooperates closely with lawyers having key expertise, which ascertains that the team dedicated to your case always has first-hand knowledge of your industry and relevant law through every part of the process.

Disputes and litigation can be costly and time-consuming. At Simonsen Vogt Wiig we work to avoid dispute situations, and we advise and assist in negotiations and contribute to strategic positioning prior to what may evolve to a legal dispute. Should a legal dispute occur, our dispute resolution and litigation team will provide the strongest advice and representation throughout, so you can get back to business.

The lawyers of the dispute resolution and litigation team have considerable experience in comprehensive and complex disputes before all Norwegian courts and national and international arbitration institutions. 19 of Simonsen Vogt Wiig’s lawyers have the right to practice before the Supreme Court of Norway. Some of our lawyers have authored textbooks regarding litigation and negotiation techniques, and are often used as lecturers for Juristenes Utdanningssenter (Center for Continuing Legal Education), the National Court Administration’s unit for competence training and other institutions, within related topics.

**SVW Contact person:**

Peter Simonsen
Partner, Oslo
Head of Dispute resolution and litigation, Oslo

D +47 21 95 56 15
M +47 934 90 653
psi@svw.no

Peter Simonsen is admitted to the Supreme Court and has extensive dispute resolution and litigation experience before the ordinary courts and arbitration tribunals.