I. Introduction

Private international law within contracts and torts is mainly not codified in Norway, apart from some conflict rules in specific sectors, mainly based on international conventions. There is no general codification of conflict rules. In 1964 the Act on the Law Applicable to International Sale of Goods transported into Norwegian law the 1955 Hague Convention on the same subject-matter. This Act was for decades the only general act on conflict rules in the field of obligations.

In 1985 the Norwegian Ministry of Justice initiated a work of codification meant to adopt a general act on private international law and largely based on the 1980 European Rome Convention on the Law Applicable to Contractual Obligations. However, the work never went beyond the stage of a draft and remained unattended ever since. The general tendency of the Norwegian legislator seems to be quite contrary to regulating the questions of choice of law on a general basis: by reading the preparatory works to various laws, for example, it is possible to see that the question of conflict of laws, if at all mentioned, is often solved with a laconic reference to future practice, to which is delegated the task of developing suitable conflict rules.

In 1992 Norway signed the Agreement on the European Economic Area (which entered into force in 1994), and in this framework it implemented the European rules relating to the four freedoms of movement within the internal European market. In that connection, some conflict rules contained in European directives have been implemented in the Norwegian system. The interesting feature in this connection is that the conflict rules contained in the EU directives, adopted in Norway because of the EEA Agreement, are in

* Giuditta Cordero Moss, Dr. juris (Oslo), PhD (Moscow), Professor at the Department for Private Law, University of Oslo; former corporate lawyer, she acts as arbitrator in international commercial and investment disputes.
turn based on the general instruments on private international law prevailing in the European Union - at that time mainly codified in the Rome Convention and now in its successor, the Council Regulation Rome I. However, Norway does not have a general codification comparable to the Rome Convention or Rome I, nor does it have the case law or the literature that might arise out of such a systematic codification. Therefore, in the Norwegian system it is possible to observe bits and pieces of the European private international law, implemented with the directives, without, however, the private international law infrastructure that usually follows those specific conflict rules.

In 2003 the Norwegian Ministry of Justice showed interest in the work then ongoing in Europe to convert the Rome Convention into a Regulation (Rome I), and it sent on public hearing the Green Paper issued by the European Commission in that connection. In its notice, the Ministry affirmed that it was awaiting the issuance of the two expected European Council Regulations on choice of law for contractual and for non-contractual obligations (respectively, Rome I and Rome II), before resuming its work on a general codification of private international law. The Ministry affirmed that harmonisation of conflict rules is very important, and that the European rules will consequently have great importance in the development of the Norwegian codification.

The two European Regulations have been issued in 2007\(^1\) and 2008\(^2\), but the Norwegian Ministry has not for the moment resumed its codification work. Legal literature encourages the Ministry to revive its engagement in this area.\(^3\)

### II. Legal Certainty and Flexibility

The Norwegian approach to private international law is, traditionally, one of flexibility rather than of desire to create legal certainty. The mere circumstance that conflict rules are mainly not codified, and that those rules that are codified are the result of international obligations of the State rather than of an internal process, testify that the legal system traditionally has not considered certainty of the law in this field as a main priority.

The few codified conflict rules, on the contrary, are based on international instruments that aim at achieving certainty for the applicable law: the Act on the Law Applicable to International Sale of Goods is based on the 1955 Hague Convention on the Law Applicable to International Sale of Goods; the conflict

\(^1\) Rome II, 864/2007
\(^2\) Rome I, 593/2008
\(^3\) G. Cordero Moss, Den nye europeiske internasjonale privatretten og norsk internasjonal privatrett, Lov og Rett, 2009, pp. 67-83
rule in the Product Liability Act section 1-4 is based on the 1973 Hague Convention on the Law Applicable to Products Liability; the Choice of Law in Insurance Act is based on European directives on insurance;\textsuperscript{4} the conflict rule contained in the Commercial Agency Act section 3 is based on a European directive on commercial agency;\textsuperscript{5} the conflict rule in the Consumer Sales Act section 3 is based on a European directive on consumer sale;\textsuperscript{6} the conflict rules indirectly contained in sections 43 and 46 of the Arbitration Act are based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.

As a result of this approach to codification, private international law within contracts and tort law consists of isolated conflict rules in specific sectors. Because general conflict rules do not reflect the traditional Norwegian approach to choice of law, these codified conflict rules are generally not used as a basis for analogical extension to other relationships beyond those directly falling within the scope of application of the rules, as will be seen in section X below.

Court practice shows that the main attention is to the requirements of the specific case, rather than to providing a general rule that may permit to choose the applicable law in advance. There are, however, signs that the approach might, under the influence of European conflict rules, be turning towards a higher degree of attention to legal certainty.

II.1 Flexibility as higher value

As an illustration of the traditional Norwegian approach to private international law, whereby flexibility prevails, a Supreme Court decisions rendered in 2002 may be mentioned.\textsuperscript{7} Leros Strength, a Cyprus registered bulk vessel, insured with an English P&I company, sank in February 1997 in Norwegian waters. Several kilometres of the Norwegian coast were polluted by the oil that was spilled, and the Norwegian state incurred costs of several millions Crowns to clean and remedy the damages caused by the oil. The Norwegian state filed a suit with the local court against the ship owner and the insurer, in order to recover the costs. The ship owner accepted the forum, however the insurer objected to the jurisdiction of Norwegian courts. The court of first degree resolved that Norwegian courts had jurisdiction, and so did the court of appeal. The Supreme Court quashed the court of appeal’s decision, and returned the case to the same court of appeal, for the reasons that we will see below. After that, the parties settled the matter out of court, therefore there is no final decision in the case.

\textsuperscript{4} 88/357 and 90/619
\textsuperscript{5} 86/653
\textsuperscript{6} 44/1999
\textsuperscript{7} Rt. 2002 s 180 (Leros Strength).
The insurance policy between the ship owner and the English insurer was governed by English law, according to a choice of law clause contained in the terms and conditions thereof. The terms and conditions contained also a “pay-to-be-paid” clause, which is quite customary in such situations and is acceptable under English law. According to this clause, the insured ship owner cannot claim payment from the insuring company before the ship owner has reimbursed the damages that it has caused. According to the pay-to-be-paid clause, therefore, the damaged party does not have a direct action against the insurer, because the payment obligation of the insurer does not arise until the damaged party has received payment by the insured.

Under Norwegian law, however, the damaged party has a direct action against the insurer under certain circumstances; in particular, if the ship owner is insolvent (as it was the case here), the rules on direct action are mandatory.8

Under Norwegian law the forum for insurance claims is regulated by the Lugano convention of 1988 on jurisdiction and enforcement of judgements in civil and commercial matters, articles 7 to 12a. In particular, the forum for the direct action against the insurer is regulated in articles 9 and 10; the former designates the courts of the place of the damage as the competent courts in cases relating to third party liability, and the latter extends that forum also to the direct action against the insurer, “when such direct actions are allowed”.

On the basis of these rules on choice of law and choice of forum, the court of first degree (and, in appeal, the court of appeal) had to decide whether the claim filed by the Norwegian state could be admitted or had to be dismissed. Both courts deemed that Norwegian courts had jurisdiction; however, interestingly, they did not consider it necessary at that preliminary stage to determine what law governed the claim, English law (chosen by the insured and the insuring parties) or Norwegian law (lex loci delicti). The issue of the law governing the claim, so affirmed the court of appeal, is a question of substantive law, and it is not necessary to consider it when deciding whether the court has jurisdiction or not. At the preliminary stage of deciding upon the question of jurisdiction, the court of appeal considered it sufficient to assess that the lex fori (Norwegian law) allows such direct actions. This is the reason why the Supreme Court quashed the appellate decision: article 10 of the Lugano convention assumes, as mentioned above, a determination whether the direct action is allowed and such determination, so affirmed the Supreme Court, has to be made on the basis of the law governing the claim. Hence, the issue of the jurisdiction cannot be resolved before having determined what law is governing, and whether direct actions are allowed under that law.

---

8 Insurance Contracts Act, § 7-8.2, combined with § 3-1.2c.
In the specific case examined here it is evident that the governing law has a
determinant influence on the question of jurisdiction: if the claim is governed by
Norwegian law, the direct action is allowed, and the competent forum is that of
the locus delicti (Norway), according to art. 9 of the Lugano convention. If the
claim is governed by English law, the direct action is not allowed, because the
parties to the insurance contract have excluded it, and the competent forum will
be the contractual forum or the forum of the defendant. For the moment we will
not focus on any overriding character of the Norwegian rule on direct action,
that may lead to apply the Norwegian rules on direct action even if the
governing law is English. This will be examined in section IV below.

The Supreme Court did not determine what law governed the claim: it decided
to return the case to the court of appeal, for it to remedy the irregularity and
determine the governing law before deciding the issue of the jurisdiction. However, the Supreme Court gave some guidelines to the court of appeal, that
should be followed in determining the governing law. The Supreme Court’s
main guideline is as follows: “Unless Norwegian legislation or judicial practice
answer the question, it will be necessary to assess what would be the most
natural and fairest solution in the choice between Norwegian and English law”.

The first element that was analysed by the Supreme Court regards the overriding
character of the policy that underlines the rule on direct action. This will be
examined in section IV below.

A second element that the Supreme Court requested to consider is the
connection of the case with Norway (in particular, the facts that the damage took
place in Norway and that the damaged party is Norwegian) and England (in
particular, the facts that the defendant is an English company and that the
insurance policy was regulated by English law according to its terms). In this
connection, the Supreme Court made reference to four Supreme Court decisions,
as well as to some Danish and Swedish literature. The Supreme Court requested
also to consider the connection between the claim against the ship owner (on
which Norwegian courts have jurisdiction) and the direct claim against the
insurer.

The first reference is to a decision of 1923, the “Irma-Mignon” case, which has
set the standard for choice of law in Norway by introducing the so-called
individualising method. According to this method, a relationship is governed
by the law of the country with which it has the closest connection. The “Irma-
Mignon” formula is applied irrespective of the nature of the claim; in the
specific case, the claim was based on tort, as a consequence of a collision

9 My translation.
10 Rt 1923 II 58.
between two Norwegian vessels in foreign waters. The Supreme Court resolved to apply Norwegian law, rather than the law of the country where the accident took place, because the common nationality of the vessels rendered the connection with Norway stronger than the connection with the country where the tort occurred.

The second reference is to a decision of 1957, also a case of tort, according to the prevailing Norwegian opinion: a Norwegian passenger on a Norwegian bus remained victim in an accident in Sweden, and the Supreme Court deemed the claim to be governed by Norwegian law, because of the closer connection with Norway than with Sweden.

The third reference is to a decision of 1931 regarding contractual obligations between an intermediate (resident in France, but of Norwegian nationality), who had been engaged by a Norwegian principal to purchase on his behalf certain shares in a company register in Monaco. The Supreme Court applied the formula of the closest connection and, after having evaluated various circumstances, it came to the conclusion that this country was Norway.

The fourth reference is to a decision of 1980 regarding contractual obligations, more precisely the question of compensation upon the termination of an agency contract. The contract was between a Danish principal and a Norwegian agent, and it assumed that the agent purchased the goods in its own name, for so selling them on the Norwegian territory. The Supreme Court observed that the single purchase contracts would be governed by the law of the seller (Danish law), according to Norwegian choice of law rules (article 4 of the 1964 Act on the Law Applicable to International Sale); however, there was in the opinion of the Supreme Court no basis for extending such choice of law also to the agency relationship as such. The conflict rule to be applied to the agency agreement, therefore, was the general Norwegian rule of the closest connection, and the Supreme Court concluded that it should be the law of the place where the Norwegian agent carried out its duties, therefore Norwegian law.

The Supreme Court, thus, considers the closest connection as a central criterion in identifying the applicable law; from the guidelines given by the Court, it seems that the closest connection may be ascertained on the basis of various circumstances, among others the nationality of the parties, the place of performance of the contract, the choice of law made by the parties. In other

11 Rt 1957 246. Not everyone agrees on the qualification of the claim as tort, because the relationship between the passenger and the bus operator was based on a contract of carriage, entered into by purchasing the ticket: see Thue, H., Norsk internasjonal obligasjonsrett – Erstaining utenfor kontraktsforhold, Institutt for Privatrett, University of Oslo, publication No 111, p. 5.
12 Rt 1931 s. 1185
words, the guidelines given by the Supreme Court are meant to highlight that the applicable law shall reflect the actual closest connection in the individual case, and that there are no general criteria that may help predicting which country a certain type of legal relationship is presumed to have its closest connection with. The rationale of the Supreme Court’s approach is actually clearly expressed in the main guideline given to the court of appeal, as mentioned above: “Unless Norwegian legislation or judicial practice answer the question, it will be necessary to assess what would be the most natural and fairest solution in the choice between Norwegian and English law”. Norwegian legislation is, as already mentioned, very thin in the field of private international law; from the overview of Supreme Court decisions made above (which lists most of the significant decisions rendered in matters of private international law during the last century), we have seen that judicial practice is not very extensive; moreover, we have seen that the decisions seem to be more directed towards finding a just solution in the specific case, rather than elaborating a conflict rule that may serve as a guideline for future cases. The nucleus of the Supreme Court’s guidelines, thus, lies in the quest for the most natural and fairest solution in the specific case.

II.2 Legal certainty is gaining in importance

European private international law, however, seems to gradually exercise a certain influence on Norwegian courts: in a recent decision, the Supreme Court was confronted with the question of jurisdiction in a dispute regarding an agency agreement. Jurisdiction for contract obligations is regulated in Norway by the already mentioned Lugano convention that, in article 5.1, refers to the courts in the place of performance of the contract. The place of performance has under the Lugano convention to be determined according to the law applicable to the contract.

Hence, the Supreme Court needed to designate the law applicable to the contract. The parties had not made a choice of law, and the Court expressly made reference to European private international law: The Court mentioned article 4.2 of the (then prevailing) Rome Convention, and underlined that the decisive factor is the place where the agent carries out its activity. The Court carried on mentioning a series of other aspects that might have been considered relevant in an ad hoc evaluation of a specific relationship, but that, it added, cannot be applied under an evaluation based on the place of business of the party making the characteristic performance. Thus, the Supreme Court seems to be abandoning the traditional individualising method and to be embracing a general connecting factor, at least in the field of contracts of agency.

---

14 Rt. 2006 s. 1008
The wording used by the Supreme Court could be interpreted as if the Court deemed the connecting factor to be the place of performance of the contract, rather than the residence of the party making the characteristic performance as in the Rome Convention. It would, however, be little reasonable of the Court to expressly refer to the rule in article 4.2 of the Rome Convention, for so applying a different connecting factor. The same connecting factor contained in article 4.2 of the Rome Convention is, incidentally, to be found in Norwegian legislation in respect of contracts of sale. Reasons of harmonisation, both with European private international law and with internal Norwegian law that is largely influenced by European law, speak for the advisability of embracing the same connecting factor for all contractual obligations.

III Issue-by-Issue Choice and Dépeçage

The possibility of choosing a different law for different issues in the same relationship is not addressed expressly in Norwegian legislation. However, indirectly this possibility seems to be confirmed. Of the few codified conflict rules, some refer to only certain aspects of the relationship, thus leaving it open to use other connecting factors for the other aspects, including also the party autonomy. For example, the Arbitration Act specifies that the legal capacity to enter into an arbitration agreement is regulated by the law of each of the parties. This does not prevent the rest of the arbitration agreement from being regulated by another law. Similarly, the Commercial Agency Act provides for the applicability of Norwegian law when it protects the interests of the agent. This does not prevent to apply to law chosen by the parties to the other parts of the agency agreement. The question of severability has not been analysed to any significant extent in judicial practice or legal literature in Norway, until recent scholarly writings have supported severability in connection with choice of law for contractual obligations.15

IV Conflicts Justice v Material Justice

The pragmatic, case-oriented approach of Norwegian courts tends to address the question of governing law from the point of view of the scope of applicability of Norwegian law, having in mind what would be the best solution under those particular circumstances. The question that the courts seem to have in mind is:

can Norwegian law be applied to this particular case, rather than: what conflict rule is applicable to this case, and what law does this conflict rule designate?

Irrespective of the approach taken to find the applicable law (the flexible individualising method or the more certain general connecting factor), Norwegian rules implementing particularly important policies will be directly applicable.

The already mentioned Supreme Court decision in the Leros Strength case dealt with one of these directly applicable rules, also called overriding mandatory rules. Under Norwegian law, the damaged party has a direct action against the insurer under certain circumstances; in particular, if the ship owner is insolvent (as it was the case here), the rules on direct action are mandatory. The preparatory works to the Norwegian Choice of Law in Insurance Act mention specifically this rule on direct action as one of the rules that, according to the Act’s section 5, are likely to have an overriding character, and thus have to be complied with even if the underlying situation is international and subject to a foreign law. The rule of article 5 comes originally from the European directives on insurance, which in turn were based, in respect of the applicability of overriding mandatory rules, on article 7 of the Rome Convention.

The Supreme Court instructed to consider, when assessing the question of the applicable law, the nature of the claim and the policy underlying Norwegian rules on the area. Here the Court made express reference to three Supreme Court cases.

The first reference is to the dissenting opinion rendered in a Supreme Court decision of 1953 regarding the question of recognition of paternity of a child born outside of marriage. The dissenting judge, Supreme Court Justice Bahr, extensively argued how Norwegian law must be given application irrespective of the connection that the specific case might have with other countries, when this is necessary in order to preserve the policies and interests that underlie Norwegian law in the relevant area.

The second reference is to a Supreme Court decision of 1931 in a matter of contractual obligations, more precisely regarding the fraudulent behaviour of an intermediate (resident in France, but of Norwegian nationality), who had been engaged by a Norwegian principal to purchase on behalf of the principal certain shares in a company registered in Monaco. After having observed that the

16 Insurance Contracts Act, § 7-8.2, combined with § 3-1.2c.
17 Ot prp nr 72 (1991-92) s. 66.
18 Rt 1953 1132, and the reference made by the Supreme Court starts on page 1139.
19 Rt 1931 1185.
matter had to be governed by Norwegian law on the basis of an evaluation of various circumstances, the Court mentioned another, independent reason for applying Norwegian law: at stake was the validity of a contract as a consequence of fraud by one of the contractual parties. The applicability of another law but Norwegian law to this question was out of the question for the Court, because it would not have been acceptable to apply a foreign law that might not have had the same serious legal consequences for such behaviour as Norwegian law.

The third reference is to a Supreme Court decision of 1934 regarding the applicability to contractual obligations of foreign monetary law, in particular German mandatory rules on the re-valuation of monetary obligations, issued as a consequence of the dramatic devaluation during the 1920s. In the part expressly referred to by the Supreme Court, Supreme Court Justice Alten underlines that the disputed matter was probably governed by German law, but the determination of a governing law would not be relevant because the result of the application of the foreign law would be in contrast with the Norwegian ordre public. In particular, the application of German law would have violated the Norwegian principle of non-retroactivity of law, since it would have created legal consequences for a relationship that was already expired.

The Supreme Court instructed the court of appeal to evaluate the Norwegian rules on direct action in light of these three Supreme Court cases, and underlined that the rule on direct action has been deemed likely to be an overriding mandatory rule in the preparatory works of the Choice of Law in Insurance Act, as mentioned above.

The reasoning made by the Supreme Court shows that the Norwegian legal system is well familiar with the idea of overriding mandatory rules, that have to be directly applied irrespective of the international character of the relationship and even if the applicable law is a foreign law. The codification made in the Choice of Law in Insurance Act and indirectly based on the Rome Convention, thus, did not introduce any new elements into the Norwegian private international law.

The preparatory works to the Choice of Law in Insurance Act mention, as rules that may be considered to have an overriding character, the already mentioned rule on direct action and section 36 of the Contracts Act, which provides that contract terms shall be reasonable and balanced.

20 Rt 1934 152.
In addition, overriding mandatory rules are codified in the Commercial Agency Act, section 3, stating that the parties may not, not even by choosing the applicable law, derogate from the rules that protect the agent’s interests. It must be noticed that this act implements a European directive.\(^{22}\)

There is also a Supreme Court decision assuming that rules of labour law protecting the employee have an overriding character and must be applied if the labour relationship;\(^{23}\) the Ministry of Justice affirms that the conflict rule restricting party autonomy for individual employment agreements contained in article 6 of the Rome Convention does not differ significantly from the principles that must be assumed in Norwegian private international law.\(^{24}\)

A recent Court of Appeal decision resolved that Norwegian law should be applied directly in a case regarding defamation that was brought against the Norwegian author and publisher of a book:\(^{25}\) conflict rules might have lead to applying the law Afghanistan, but the Court of Appeal did not verify the applicability of the conflict rule, on the assumption that the Afghan law would have restricted the principle of freedom of speech, which is fundamental in Norwegian law.

V Unilateral Rules and Rules of Immediate Application

Of the few codified conflict rules, there are some unilateral rules delineating the scope of application of Norwegian law: in addition to the mentioned overriding mandatory rules in the Commercial Agency Act and in the Consumer Sales Act, there is a rule in the Registry of Enterprises Act, section 1-2. This provision defines when an enterprise is considered to be Norwegian (when it has its main office in Norway), but it does not define whether the same criterion applies to determine the nationality of a foreign enterprise.

The criterion of the main office is not extended analogically to apply also to foreign enterprises, and Norwegian legal doctrine is divided between two schools: those who consider an enterprise to be governed by the law of the place of registration, and those who consider it governed by the law of the place where it has the main seat.\(^{26}\)

---

\(^{22}\) 1986/653

\(^{23}\) Rt 1985 s 1319

\(^{24}\) So in the notice dated 13 June 2003, with which the Ministry of Justice sent on public hearing the European Commission’s Green paper on the transformation of the Rome Convention into a Regulation.

\(^{25}\) LB-2009-28508

VI  International Uniformity and Protection of National Interests

The few codified conflict rules, as well as the case law that protect national interests rather than ensuring international uniformity, have been discussed under section IV above.

The protection of the interests of the forum is considered by Norwegian legal doctrine as an exception to the general aim of private international law - that might be necessary in some cases but needs to be applied restrictively.27

VII  Ordre Public and Mandatory Rules

In Norwegian law, a judge will not apply a foreign law if application thereof will result in an intolerable violation of the basic principles on which the Norwegian system is based. This is expressly set forth in section 6 of the Act on the Law Applicable to the International Sale of Goods, and is recognised as an underlying principle in all areas of law.28 Legal doctrine agrees on the necessity to interpret the exception of ordre public very narrowly.29 The ordre public clause is not intended to be used whenever there is a discrepancy between the foreign governing law and the Norwegian legal system. The clause it is to be used only under exceptional circumstances, when the result to which the judge would come by applying the rule of the foreign governing law would conflict with the basic principles upon which the Norwegian society is based.

This restrictive application of the ordre public exception is consistent with the restrictive use of public policy in related areas, namely the recognition and enforcement of civil court decisions (regulated by the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters entered into between Norway, the other EFTA countries and the member states of the European Union), as well as the annulment of arbitral awards rendered in Norway and the recognition and enforcement of arbitral


29 See the references made in the previous footnote.
awards (regulated, respectively, in sections 43 and 46 of the Arbitration Act, based on the UNCITRAL Model Law on International Commercial Arbitration and on the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards). Being based on international instruments, these codified rules on ordre public have to follow the narrow interpretation prevailing internationally.\textsuperscript{30} For internal consistency, a similarly narrow interpretation of the ordre public exception should be applied in the field of choice of law.

The concept of overriding mandatory rules is codified in the Choice of Law in Insurance Act, which again is based on European directives on insurance that implemented the principle contained in article 7 of the Rome Convention. It must be noticed, however, that this Act adopted only part of the rule contained in article 7 of the Rome Convention, namely the part that permits direct application of the overriding mandatory rules of the forum, in this case of Norwegian mandatory rules. This part corresponds to article 7.2 of the Rome Convention.

Article 7.1 of the Rome Convention permits to give effect to overriding mandatory rule of third countries, and this part is not reflected in the Norwegian legislation.\textsuperscript{31} It must be added that article 7.1 was so controversial, that the Rome Convention provided for the possibility to reserve against it; and the Rome I Regulation has considerably restricted its scope of application.

The few additional codified provisions regulating overriding mandatory rules have been discussed in section V above.

Occasionally, the concept of ordre public is used not only to designate a barrier against application of intolerable foreign rules, but also to characterise Norwegian rules that are to be applied irrespective of the governing law as overriding mandatory rules. This use of terminology is inaccurate and is criticised in legal literature.\textsuperscript{32}

\textbf{VIII Renvoi}

There is no codification of renvoi in the fields of choice of law for contractual or tort obligations.

\textsuperscript{30} See G.Cordero Moss, Lovvalgsregler for internasjonaler kontrakter, cit., pp. 712ff.
\textsuperscript{31} The preparatory works explain that the rule was excluded from the bill after numerous negative reactions during the public hearing.
\textsuperscript{32} See Lundgaard, cit., pp. 105ff and G. Cordero Moss, Lovvalgsregler for internasjonaler kontrakter, cit., pp. 710ff.
Legal literature is negative to the applicability of renvoi in these fields, whereas it is more open in the fields of family and inheritance law.

**IX Characterization or Qualification**

Norwegian Courts do not usually qualify a legal relationship for the purpose of applying the relevant conflict rule. This is because the rule of the closest connection is applied equally to obligations arising in contracts or in torts. This is evident in the guidelines on choice of law given by the Supreme Court in the already mentioned Leros Strength case. The Court does not mention the necessity to qualify the claim as based on tort or on contract, because the Court would not apply a different conflict rule according to the nature of the claim. As we have seen above, the cases referred to by the Court cover a wide range of claims: tort, contract and family law. These cases are all inspired by the same two principles: (i) a claim is governed by the law with which it is most closely connected, and (ii) Norwegian law should nevertheless be applied, even if there is a closer connection to other laws, when this is necessary to implement the policies that underlie the Norwegian system in the relevant areas.

This approach of the Norwegian Supreme Court is at odds with Norwegian literature on private international law, which considers the main conflict rule for tort claims to be the lex loci delicti. Since, however, the conflict rules that the Court is going to apply do not vary according to the nature of the claim, the whole process of qualification becomes pointless.

It seems that the Supreme Court proceeds to qualify a legal relationship not to identify which conflict rule is applicable, but, quite to the contrary, to avoid application of a general conflict rule and apply the individualising method instead. The main general conflict rule codified in Norway is article 4 of the 1964 Act on the Law Applicable to International Sale. In order to avoid application of the connecting factor contained in this rule, the Supreme Court has occasionally qualified the relationship and ascertained that it was not a contract of sale and thus the connecting factor of the residence of the party

---


36 On the irrelevance of a qualification see Lundgaard, cit., pp. 265ff., in response to an observation made by Thue, *Norsk internasjonal obligasjonsrett*, cit., p. 3, that the first edition of the book had analysed a Supreme Court decision (Rt. 1957 s. 246) under the chapter devoted to torts, whereas the facts indicated that the dispute arose out of a contract.

37 Rt 1980 s. 243, Rt 1982 s. 1294
making the characteristic performance was not applicable. Beyond this negative qualification, that excluded applicability of the relevant conflict rule, the Court did not need to proceed to a more specific qualification, since the choice of law would be made on the basis of the individualising method in all other types of relationship.

X Judicial Application

It was highlighted above that Norwegian courts have been little keen to apply general connecting factors. The rule of the closest connection is traditionally used for rendering ad hoc decisions based on varying or not specified criteria, and the general connecting factors that are codified are used very restrictively. So it is that the already mentioned Act on the Law Applicable to International Sale of Goods, modelled on the 1955 Hague Convention, contains, among others, two conflict rules for the contract of sale: party autonomy, giving the parties the power to choose the applicable law, and – in case the parties have not exercised such autonomy, the residence of the seller (i.e., of the party making the characteristic performance). Norwegian courts have repeatedly used the Act as a basis for extending the rule on party autonomy analogically to other contract types; however, they have never used the Act as a basis for extending the applicability of the connecting factor of the seller’s residence. Quite to the contrary, courts have openly affirmed that such connecting factor shall not be extended analogically – without explaining the reason for this restriction.38 Lacking a choice made by the parties, Norwegian courts traditionally apply the individualising method and look for an ad hoc solution in the particular case, rather than relying on a connecting factor with general validity.

This is unfortunate. What matters mostly to the parties, particularly if they are in a commercial relationship, is to be in a position to find out the governing law before they go to court, so that they are able to evaluate their respective rights and obligations in advance, and can make an assessment as to whether it is worthwhile to go to court at all - or rather to settle the dispute out of court. That the governing law has a close, closer or the closest connection with the disputed matter seems to be less important. In so far as it is of particular importance to ensure the applicability of a certain law, for example because it contains provisions protecting the weaker contractual party, special conflict rules permit the application of the appropriate connecting factors or the direct application of the relevant rules. In the other contractual situations, however, where there are no overriding policies to be taken into account, it may be the same for the parties

38 Rt. 1980 s. 243, Rt. 1982 s. 1294
whether the governing law is that of one or of the other party; what is crucial, is that the parties know which of these laws governs.

By contrast, the rationale set forth by the Norwegian Supreme Court in the already mentioned Leros Strength decision ensures that the judge has the ampest possible room for discretion, to determine on a case-by-case basis the “most natural and fairest solution”. The result might be just and fair, but it is a justness and fairness that can be assessed ex post, after the judge has exercised his discretion. The parties, in other words, have to file a suit in order to determine with certainty what law governs their rights and obligations, so that they can assess whether it was worthwhile to file a suit. This is an ideal tool from the point of view of the judge, who can observe the circumstances of a specific case, balance the various involved interests, and come to a conclusion that is tailored to that very case. However, as already mentioned, it can be questioned that the application of the very law that has the deepest connection with the most important aspects of the case represents the most important value from the point of view of the parties. If that law protects special interests or implements important policies, there should be special conflict rules that permit the application of that law (either on the basis of expressed connecting factors, or, exceptionally, directly); if, however, the choice between potentially applicable laws does not involve policy considerations, the most important value to the parties is the predictability of the governing law.

XI Any Other General Features that Deserve Note

The above mentioned closest connection is the pillar of Norwegian private international law and is used to solve conflicts of laws in all branches of the law. This formula is well known in private international law, for example in Europe. Already the Rome Convention adopted it in article 4.1 to determine the law regulating contractual obligations when the parties have not chosen the governing law. However, the formula of the closest connection is given a different content under Norwegian law and the Rome Convention.

A Norwegian judge has the full discretion to evaluate all circumstances of the case and weigh them against each other as he deems fit, for the purpose of identifying the law “to which the relationship belongs” in the specific case; the formula of the closest connection, therefore, is little more than an invitation to use common sense and find the best solution under the specific circumstances. The Rome Convention, on the contrary, contains in art. 4.2 to 4.4 a series of presumptions, that constitute conflict rules with a general validity. Particularly the presumption contained in article 4.2 is of importance: the closest connection is presumed to be with the country in which the party making the characteristic
performance has its habitual residence. Admittedly, the relationship between the flexible formula of the closest connection and the rigid presumptions has been interpreted in different ways by the courts of different European countries; therefore, the interpretation of the closest connection made by some countries might not differ significantly from the interpretation made by the Norwegian courts. It appears rather clearly from the Report on the Rome Convention, however, that the presumptions serve the function of giving specific form and objectivity to a concept, that of the closest connection, that otherwise would have been too vague and could not have been used as an objective criterion.

The Green Paper prepared by the European Commission in connection with the conversion of the Rome Convention into a Regulation addressed the diverging interpretations of this criterion, and the final text of the Regulation Rome I leaves no doubt as to the prevalence of legal certainty: article 4 in the Regulation contains a series of certain specific conflict rules for specific contract types, and a certain conflict rule for the remaining contracts, all based on the same connecting factor: the habitual residence of the party making the characteristic performance.


By contrast, the rationale set forth by the Norwegian Supreme Court in the decision analysed here ensures that the judge has the amplest possible room for discretion, to determine on a case-by-case basis the “most natural and fairest solution”.

Norwegian legal literature insists on the advisability of harmonising the approach to private international law, and also the Ministry of Justice underlines the importance of harmonisation with European sources. There is even one Supreme Court decision that expressly makes reference to European private international law, albeit the decision is quite ambiguous in its

---

39 While the Dutch and the German Supreme Courts have underlined that the presumptions must be interpreted strictly, so that the flexible rule becomes applicable only in exceptional cases (see, for example, the Dutch Hoge Raad decision Société Nouvelle des Papeteries de l’Aa Sa v. BV Machinenfabriek B0A, 1992, IPRax 1994, 243, and the German Bundesgerichtshof decision of 25 February 1999, NJW 1999, 2242), English courts deem the presumption to be a weak one, and apply the flexible criterion as a general rule (see, for example, Crédit Lyonnais v. New Hampshire Insurance Company [1997] 2 C.M.L.R. 610, CA.
41 COM (2002) 654 final
43 See the notice dated 13 June 2003, with which the Ministry sent on public hearing the Green paper on the conversion of the Rome Convention into a Council Regulation.
interpretation of the European connecting factor, as seen in sections II.2 and XIII. These circumstances seem to indicate a possible shift in the Norwegian approach, from the individualising method to a more general conflict method.

**XII Law Governing Torts**

There is no general codification on the law governing torts. Traditionally, obligations arising out of tort are governed by the law of the place where the harmful event occurred. Legal literature affirms that this the connecting factor for torts even today.44 Judicial practice, however, seems to have abandoned this connecting factor in favour of the closest connection.

As seen above, the rule of the closest connection was introduced in 1923 by the famous Supreme Court decision rendered in the Irma-Mignon case.45 In a dispute arising out of a collision between two Norwegian vessels in English water, the Supreme Court said that the traditional approach would have led to application of English law, since the damage occurred in England. However, in the specific case the involved parties were both Norwegian, and this circumstance spoke for application of Norwegian law. Since this decision, courts have disregarded general connecting factors and have looked for the closest connection under the circumstances of the specific case.

It is interesting to notice that the result obtained in the Irma-Mignon case is not different from the result that could be obtained in the same case under the Rome II Regulation: Rome II has the general connecting factor of the place where the damage occurred, and some exceptions to the general rule. Among the exceptions is the situation where both parties have the habitual residence in the same country at the time when the damage occurred. Therefore, the situation that was tackled in the Irma-Mignon by abandoning the general rule, is tackled in Rome II by a certain and predictable exception to the general rule. The Rome II, in other words, is able to obtain a certain degree of flexibility in the result while maintaining a general conflict rule and the predictability that follows with it.

There are no codified rules on the question of cross-border torts. Legal literature is quite brief on the matter, and does not seem to be unanimous.46 A recent Court of Appeal decision in a case of defamation affirmed that there is no clear

---

45 Rt. 1923 II s. 58
46 Thue, *Norsk internasjonal obligasjonsrett*, cit., p. 28, prefers the place where the damage occurred, and so does Lungaard, cit., pp. 267ff. Cordes, Stenseng, pp cit., 324ff., prefer the place where the event giving rise to the damage occurred. L. Heimdal, *Erstatning ved grenseoverskridende personlighetskrenkelser*, 2008, pp. 85 ff., proposes a composite rule for the case of defamation, based on the place where the largest damage occurred or, if it was not foreseeable that a damage would occur in that country the place where the event giving rise to the damage occurred.
The case regarded a book published in Norway and describing the life of a bookseller in Kabul and his family. The book was translated into numerous languages and became a bestseller, among others also in Afghanistan. The bookseller and his family claimed that the description was defamatory and capable of creating substantial harm for him and his family in Afghanistan, and sued the author and the publisher in Norway. Regarding the question of the governing law, the Court of Appeal observed that there is no clear conflict rule when the event giving rise to the damage takes place in a country and the damage occurs in another country; however, the Court of Appeal seemed to prefer the approach that favours the law of the place where the damage occurred, if it was foreseeable that damage would occur in that country. The Court of Appeal, however, concluded that it was not necessary to investigate to what extent the damage occurred in Afghanistan and whether it was foreseeable, because it found that application of Afghan law in this case could have represented a restriction of the freedom of speech, a principle fundamental in Norwegian law. To avoid restricting the Norwegian principle of freedom of speech, the Court decided that Norwegian law should be applied.

Norway has ratified the 1973 Hague Convention on the Law Applicable to Products Liability, but has reserved against the application of the convention in respect of limitation of rights for the lapse of time.

XIII Law Governing Contracts

The principle of party autonomy, according to which the parties to a contract may choose the law governing their legal relationship, is codified in section 3 of the already mentioned Act on the Law Applicable to International Sale of Goods. Party autonomy is largely recognised within contracts, either based on an analogical extension of this Act or as an expression of an underlying principle in Norwegian law. This latter basis seems to be preferable, because some of the limitations to party autonomy that are contained in the Act on the Law Applicable to International Sale of Goods are deemed not to be applicable to choice-of-law clauses made in other contracts.48

In particular, the limitations regarding the form in which the governing law may be chosen are not considered to be applicable to other contract types.49 The Act on the Law Applicable to International Sale of Goods provides that a choice of law must be expressed or demonstrated with reasonable certainty by the terms of

47 LB-2009-28508
48 G. Cordero Moss, Lovvalgsregler for internasjonale kontrakter, cit., pp. 681 ff.
49 Ministry of Justice’s notice of 13.06.2003 accompanying the public hearing regarding the Green Book on the Conversion of the Rome Convention. See also Lundgaard, cit., p. 243
the contract. This standard for a tacit choice of law is rather strict. In comparison, the Rome Convention and the Rome I Regulation add the words “or the circumstances of the case”. However, the Report to the Rome Convention shows that a tacit choice of law, to be valid, assumes that a choice of law was actually made by the parties.\(^{50}\) A hypothetical choice is not sufficient: the court must be satisfied that the parties did think about the matter and agreed on the chosen law, and cannot merely rely on what the parties most probably would have chosen if they had thought about the question. The Green Paper on the conversion of the Rome Convention into the Rome I Regulation does not give reason to assume that this approach has been changed in the Rome I. Norwegian legal literature argues that also Norwegian courts should have the same restrictive approach shown in European private international law.\(^{51}\) This approach is not significantly different from the treatment that Norwegian law gives to arbitration clauses. According to the Arbitration Act, there are no form requirements for arbitration clauses. In order for an arbitration clause to be valid, however, the parties must have actually agreed on arbitration. Both for choice-of-law and for arbitration clauses, thus, it is not necessary to have an expressed agreement in writing, but both assume that an agreement actually was reached.

The few codified rules on the law governing contracts that do not contain a choice-of-law clause have been discussed in section II above. The most important conflict rule is contained in the Act on the Law Applicable to International Sale of Goods, that provides the connecting factor of the seller’s residence.

Party autonomy is subject to limitations: not only is the parties’ choice overridden in case of particularly important policies, as seen in section IV above; there are also some areas where party autonomy is not allowed and the governing law is determined on the basis of specific conflict rules. For example, questions regarding the legal capacity of the parties, question of company law, of property law, encumbrances, are not within the scope of party autonomy. A contract having implications in these areas and containing a choice-of-law clause, thus, will have to be severed: the contractual obligations between the parties will be subject to the law chosen by the parties, whereas the matters that fall outside of the scope of party autonomy will be governed by the law identified according to the relevant connecting factor.\(^{52}\)

Unless they are forced by legislation to apply a connecting factor (i.e., the law of the seller in contracts of sale), or unless they resolve to apply Norwegian law

\(^{50}\) Giuliano-Lagarde Rapport, cit., comment to art. 3, par. 3.

\(^{51}\) G. Cordero Moss, Tacit choice of law, cit., pp. 374ff.

when a particularly important policy is involved, courts determine the governing law on the basis of the closest connection.

As already mentioned, the method applied by Norwegian courts to identify the closest connection is traditionally based on a discretionary evaluation of the circumstances of the specific case.

As an illustration, here follows a short overview of the main Supreme Court decisions that dealt with choice of the law governing in contracts.

In its decision Rt 1980 s. 243, the Supreme Court based its choice on the consideration that the relationship between the parties was a long term relationship, that the agent was Norwegian and that the contract regulated the agent’s obligations in Norway; in Rt 1982 s. 1924 it gave particularly importance to the circumstance that the agent used its goodwill to promote sales of the products in Norway; the Supreme Court upheld the decision of the Court of Appeal, that had considered where the contract was entered into, where the orders were sent from, where the products should be marketed, the long term character of the relationship, where the damage arose, and which country’s law regulated the separate sales concluded in the frame of the agency agreement. After having considered all these circumstances, the applicable law was chosen on the basis of “the circumstances as a whole”, without specifying which circumstances were given more or less importance.

In Rt. 2006 s. 1008, as already mentioned, the Supreme Court seems to abandon the individualising method and to embrace the European private international law method based on the residence of the party making the characteristic performance. The Supreme Court makes express reference to the connecting factor in article 4.2 of the Rome Convention, and this may be interpreted as the intention to adopt the principle underlying it. The reasoning made by the Court, however, is not completely consistent, as it seems that the Court has in mind the place of performance, and not the residence of the party making the characteristic performance (which is the connecting factor mentioned in article 4.2 of the Rome Convention). In the specific case, the two places were identical, which may explain why the Court did not dwell on the details of the connecting factor.