

New Trends in the Norwegian Practice on the Choice of Law Applicable to Contracts

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1 Introduction

The interpretation and effects of a contract depend significantly on the applicable law.¹ It is, therefore, extremely important that the applicable law is easily identifiable by the parties concerned before they start a court or arbitral proceeding. Norwegian court practice in the field of private international law shows that, traditionally, courts have paid more attention to the requirements of the specific case, rather than focusing on providing an objective rule that may allow for the prediction of which law is applicable. There are, however, signs that this approach might, under the influence of European conflict rules, be moving towards a higher degree of attention being paid to legal certainty. Indeed, knowing which law actually governs may be essential in deciding whether or not to even bring a claim forward to the court or into arbitration – as is the case, for example, with a claim that is enforceable under one law but that is time-barred under another. If the choice of applicable law could be made in an objective and foreseeable manner then the parties would be able to assess in advance whether or not they should litigate.

In addition to the requirement for objectiveness and foreseeability, there is one more requirement relating to the choice-of-law rules: they should be harmonised. This is because the choice-of-law rules (also known as conflict rules or rules of private international law) are part of each domestic legal system and a court always applies its own conflict rules. It is possible that more than one court may have jurisdiction over the same case; for example, the courts in the country where the defendant is resident and the court in the country where the obligation in question needs to be fulfilled. In such a case, each of these courts will apply its own choice-of-law rules in order to determine which law governs the substance of the dispute. If the respective choice-of-law rules are not harmonised, they will determine two different laws as applicable, with the result that the parties will not be able to assess, for example, whether the claim is time-barred or not until a lawsuit is initiated. This affects predictability and is not desirable.

Within the European Union, the desired harmonisation has been achieved in the field of choice of law for contracts through the EU Regulation on the Law Applicable to Contractual Obligations (“Rome I”).² Norway is not part of the EU and private international law falls outside of the cooperation that it has with the EU: the EEA. Therefore, private international law in Norway is not subject to Rome I. This does not mean that Norwegian courts should not strive to harmonise choice-of-law rules, and there are indeed signs that Norwegian courts may be abandoning the peculiar approach that they have traditionally followed to embrace the method that underlies European private international law.

1 For an extensive review on how contract clauses with the same wording may have different effects depending on the applicable law, see Cordero-Moss, Giuditta (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge, Cambridge University Press, 2011).

2 Regulation (EC) No 593/2008.

2 Scarce Codification

In the field of choice of law for contractual obligations, the most important principle is that of party autonomy, according to which the parties to a contract may choose the law governing their legal relationship. This is codified in section 3 of the Act on the Law Applicable to the 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 the International Sale of Goods are deemed not to be applicable to choice-of-law clauses made in other contracts.³

Party autonomy is subject to limitations: not only is the parties' choice overridden in the case of particularly important policies, as seen in section 4.4 below, but 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, questions relating to company law, property law and 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.⁴

For contracts that do not contain a choice-of-law clause, the most important conflict rule is contained in article 4 of the Act on the Law Applicable to the International Sale of Goods. This article provides that the seller's habitual residence is to be used as a connecting factor.

Unless they are forced by legislation to apply a connecting factor, or unless they resolve to apply Norwegian law when a particularly important policy is involved, courts traditionally determine the governing law on the basis of the closest connection.

Private international law is mainly not codified in Norway, apart from some conflict rules in specific sectors that are mainly based on international conventions or European directives: the Act on the Law Applicable to the International Sale of Goods is based on the 1955 Hague Convention on the Law Applicable to the International Sale of Goods; the conflict rule in the Product Liability Act section 1–4 is based on the 1973 Hague Convention on the Law Applicable to Product Liability; the Choice of Law for Insurance Contracts is based on European directives on insurance;⁵ the conflict rule contained in the Commercial Agency Act section 3 is based on a European

3 Cordero Moss, G. *Lovvalgsregler for internasjonale kontrakter*, cit., p. 681ff.

4 For more detail on this matter, see Cordero Moss, G. *International Arbitration and the Quest for the Applicable Law*, (2008) *Global Jurist*: Vol. 8: Iss. 3 (Advances), Article 2 p. 1–42, p. 4ff.

5 88/357/EEC and 90/619/EEC.

directive on commercial agency;⁶ the conflict rule in the Consumer Sales Act section 3 is based on a European directive on consumer sales;⁷ the conflict rule in the Financial Contracts Act section 3 is based on a European directive on credit agreements for consumers;⁸ the conflict rule in the Right of Withdrawal Act section 5 is based on a European directive on distance selling;⁹ the conflict rule contained in the Contracts Act section 37 is based on a European directive on unfair consumer contract terms;¹⁰ the conflict rule contained in the Time Share Act section 5 is based on a European directive on timeshares;¹¹ 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.

In 1985, the Norwegian Ministry of Justice initiated a project on codification that was intended to bring about the adoption of a general act on private international law and was 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 has remained untouched ever since. The general tendency of the Norwegian legislator seems to have been 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 a conflict of laws, if at all mentioned, was traditionally solved with a laconic reference to future practice having to develop suitable conflict rules.¹²

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 relation to this is that the conflict rules contained in the EU directives, adopted in Norway because of the EEA Agreement, are, in turn, based on the general instruments on private international law prevailing in the European Union – until the year 2008 these were mainly codified in the Rome Convention and are now codified 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 form of codification. Therefore, in the Norwegian system it is possible to observe fragments of European private international law implemented with the directives, without,

6 86/653/EEC.

7 99/44/EC.

8 08/48/EC.

9 97/7/EC.

10 93/13/EEC.

11 94/47/EC.

12 *See*, for example, the preparatory works to the Prescription Act, Ot prp nr. 38 (1977–78), p. 79f., and to the old Securities Exchange Act, Ot prp nr. 29 (1996–97), p. 19f.

however, the private international law infrastructure being in place that usually follows those specific conflict rules.

In 2003, the Norwegian Ministry of Justice showed interest in the work that was then on-going 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 it would resume its work on a general codification of private international law. The Ministry affirmed that harmonisation of conflict rules was very important and that the European rules would, consequently, have a substantial bearing on the development of the Norwegian codification system.

The two European Regulations were issued in 2007¹³ and 2008,¹⁴ but the Norwegian Ministry has not yet resumed its codification work. Legal literature encourages the Ministry to revive its engagement in this area.¹⁵

3 Case Law: Traditional Approach in Favour of Flexibility

In the past, Norwegian courts have not been very keen to apply general connecting factors when determining the applicable law.

A decision from 1923, the “Irma-Mignon” case, has, until recently, set the standard for choice of law in Norway by introducing the so-called individualising method.¹⁶ 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 was applied irrespective of the nature of the claim; in the actual case, the claim was based on tort, as a consequence of a collision 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 same formula was also applied in disputes concerning other areas of the law, such as contract law.¹⁷

The rule of the closest connection is traditionally used for rendering ad hoc decisions based on varying or non-specified criteria – applying what is known as the individualising method. The few general connecting factors that are codified, on the contrary, are used very restrictively. Consequently, the already mentioned Act on the Law Applicable to the International Sale of Goods,

13 Rome II, 864/2007.

14 Rome I, 593/2008.

15 Cordero Moss, G., *Den nye europeiske internasjonale privatretten og norsk internasjonal privatrett*, Lov og Rett, 2009, p. 67–83.

16 Rt 1923 II 58.

17 *See*, for example, Rt1980 p. 243.

modelled on the 1955 Hague Convention, is used only selectively as a basis for analogy. The Act contains, among others, two conflict rules for the contract of sales: one is party autonomy, which gives the parties the power to choose the applicable law, and the other one – in case the parties have not exercised such autonomy – is the habitual 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 habitual residence. On the contrary, courts have openly affirmed that such a connecting factor is not to be extended analogically – without explaining the reason for this restriction.¹⁸ Lacking a choice made by the parties, Norwegian courts traditionally apply the individualising method and look for an ad hoc solution in each particular case, rather than relying on a connecting factor with general validity.

3.1 *Flexibility versus Legal Certainty*

This traditional approach is unfortunate. What matters most 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 or not it would actually be worthwhile going to court – or, alternatively, whether or not 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 other contractual situations, however, where there are no overriding policies to be taken into account, it may be indifferent for the parties 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 actually governs.

In contrast, the rationale traditionally applied by the Norwegian Supreme Court ensures that the judge has the amplest possible room for discretion so as to determine on a case-by-case basis the “most natural and fairest solution”.¹⁹ 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 (alas, ex post) whether filing the suit was worthwhile. 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 interests that are involved and come to a conclusion that is

18 Rt. 1980 p. 243, Rt. 1982 p. 1294.

19 Rt. 2002 p. 180.

tailored to that very case. However, as already mentioned, it can be questioned that the most important value from the point of view of the parties is to ensure application of the very law that has the deepest connection with the most important aspects that the case represents. 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 the 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.

3.2 Case Law

A Supreme Court decision rendered in 2002²⁰ may be mentioned as an illustration of the traditional flexible Norwegian approach to private international law.

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 of Crowns for cleaning and remediation of the damage caused by the oil spill. The Norwegian State filed a suit with the local court against the ship owner and the insurer in order to recover the clean-up costs. The ship owner accepted the forum; however, the insurer objected to the jurisdiction of the Norwegian courts. The Court of the First Degree resolved that the 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; consequently, there was no final decision for the case.

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 also contained a "pay-to-be-paid" clause, which is quite usual 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 injured party for the damage that it has caused. According to the pay-to-be-paid clause, therefore, the injured party does not have the right to direct action against the insurer, because the payment obligation of the insurer does not arise until the injured party has received payment from the insured party.

Under Norwegian law, however, the injured party has the right to direct action against the insurer under certain circumstances; in particular, if the ship owner is insolvent (as was the case here), the rules on direct action are mandatory.²¹

20 Rt. 2002 s 180 (Leros Strength).

21 Insurance Contracts Act, § 7-8.2, combined with § 3-1.2c.

Under Norwegian law, the forum for insurance claims is regulated by the Lugano Convention on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (at the time of the decision, the prevailing version was that of 1988, now superseded by the new Lugano Convention of 2007), articles 7 to 12a (8 to 14 in the new version). In particular, the forum for direct action against the insurer was then regulated in articles 9 and 10 (10 and 11 in the new version); 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 also extends that forum to 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 the 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, was a question of substantive law, and it was not necessary to consider it when deciding whether the court had jurisdiction or not. During 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) allowed for such direct actions. This is the reason why the Supreme Court quashed the appellate decision: the then article 10 (11 in the new version) of the Lugano Convention assumes, as mentioned above, a determination as to whether the direct action is allowed, and such a 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 or not direct actions are allowed under that law.

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 article 9 (now 10) of the Lugano Convention. If the claim is governed by English law, 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. Here we will not focus on any overriding aspects of the Norwegian rule on direct action that may lead to applying the Norwegian rules on direct action even if the governing law is English. This will be briefly examined in section 4.4 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 on the issue of the jurisdiction. However, the Supreme Court gave some guidelines to the Court of Appeal to follow when determining the governing law.

The first element that was analysed by the Supreme Court related to the overriding character of the policy that underpinned the rule on direct action, and this will be briefly examined in section 4.4 below.

A second element that the Supreme Court requested the Court of Appeal to consider was the connection of the case to Norway (in particular, the fact that the damage took place in Norway and that the injured party was Norwegian) and to England (in particular, the fact that the defendant was 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 also requested that the Court of Appeal consider the connection between the claim against the ship owner (over which the Norwegian courts held jurisdiction) and the direct claim against the insurer.

The first reference was linked to the already mentioned decision of 1923, the “Irma-Mignon” case, stating the theory of the closest connection.

The second reference related to a decision from 1957, also a case of tort, according to the prevailing Norwegian opinion:²² a Norwegian passenger on a Norwegian bus was a victim of 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 related to a decision from 1931 regarding contractual obligations of an intermediate (a 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 that was registered in Monaco. The Supreme Court applied the formula of the closest connection and, after having evaluated various circumstances, came to the conclusion that the claim has its closest connection with Norway.²³

The fourth reference was to a decision from 1980 regarding contractual obligations; more precisely, to the question of compensation upon the termination of an agency contract.²⁴ The contract was between a Danish principal and a Norwegian agent, and it assumed that the agent purchased the goods in its own name to sell in Norwegian territory. The Supreme Court observed that the single-purchase contracts would be governed by the law of the seller (Danish law), according to the Norwegian choice-of-law rules (article 4 of the 1964 Act on the Law Applicable to International Sales); however, there was, in the opinion of the Supreme Court, no basis for additionally extending such a choice of law 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 should be applied.

22 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 – Erstatning utenfor kontraktsforhold*, Institutt for Privatrekt, University of Oslo, publication No 111, p. 5.

23 Rt 1931 p. 1185.

24 Rt 1980 243.

Thus, the Supreme Court considered 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 and the choice of law made by the parties. In other words, the guidelines given by the Supreme Court are meant to highlight that the applicable law should reflect the actual closest connection in the individual case under consideration and that there are no general criteria that may help in 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".²⁵ Norwegian legislation is, as already mentioned, very thin on the ground 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 each specific case, rather than on 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 each specific case.

Specifically in the field of contract law, in one instance²⁶ 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 another case,²⁷ it gave particular 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 were to 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 exactly which circumstances were given more or less importance.

25 On page 186 (my translation).

26 Rt 1980 p. 243.

27 Rt 1982 p. 1924.

4 Case Law: Emerging Trends in Favour of Legal Certainty

4.1 *Objective Approach to the Rule of the Closest Connection*

The formula of the closest connection is well known in private international law; for example, in Europe. The Rome Convention had adopted it in article 4.1 in order to determine the law regulating contractual obligations when the parties have not chosen the governing law, and its successor, the Rome I Regulation, contains it article 4.4 as an escape clause for the eventuality that the governing law may not be determined pursuant to the other choice-of-law rules. However, the formula of the closest connection is given different content under Norwegian law and under the Rome Convention (and its successor, the Rome I Regulation).

The Rome Convention articles 4.2 to 4.4 contained a series of presumptions that constituted conflict rules with a general validity. The presumption contained in article 4.2 is of particular importance: the closest connection was presumed to be with the country in which the party effecting 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;²⁸ 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 served 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.²⁹

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,³⁰ and the final text of Regulation Rome I leaves no doubt as to the prevalence of legal certainty: article 4 in the Regulation contains a series of certain and specific conflict rules for specific contract types, and a certain and general conflict rule for the remaining contracts. All these conflict rules are based on the same connecting factor: the habitual residence of the party effecting the characteristic performance.

28 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 BOA*, 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).

29 Giuliano, M. and Lagarde, P., *Report on the Convention on the Law Applicable to Contractual Obligations*, OJEC, No C 282, 31.10.1980, p. 21.

30 COM (2002) 654 final.

Incidentally, this is the same connecting factor that was used in the 1955 Hague Convention on the Law Applicable to the International Sale of Goods and was codified in the corresponding Norwegian Act.

4.2 *Case Law*

European private international law seems to be gradually exercising a certain influence on Norwegian courts: in a recent decision,³¹ 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, referred to the courts in the place of the performance of the obligation in question. In the version of the convention prevailing at the time of the decision, the place of performance had to be determined according to the law applicable to the contract.³²

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 was the agent's place of business. As will be seen in section 5 below, this connecting factor is confirmed and even enhanced in article 4 of Rome I, the successor to the Rome Convention.

The Court carried on mentioning a series of other aspects that might have been considered as relevant in an ad hoc evaluation of a specific relationship, but that, it added, could not be applied under an evaluation based on the place of business of the party effecting 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.³³

The same connecting factor contained in article 4.2 of the Rome Convention and article 4 of Rome I is, incidentally, to be found in Norwegian legislation in respect to contracts of sale. Reasons of harmonisation, both with European private international law and with internal Norwegian legislation that is, as

31 Rt. 2006 p. 1008.

32 The new version of the Lugano Convention has introduced two rules to determine the forum: article 5.1(a) refers to sale contracts and determines the place of delivery and article 5.1(b) refers to service contracts and determines the place of performance of the service. For other types of contracts, article 5.1(c) confirms the old rule of the place of performance of the obligation in question (as opposed to the characteristic performance). The place of performance has to be determined under the law applicable to the contract.

33 The wording used by the Supreme Court (the place where the agent carries out its activity) could be interpreted as if the Court deemed the connecting factor to be the place of performance of the contract, rather than the habitual residence of the party effecting the characteristic performance, as in the Rome Convention. It would, however, be unreasonable of the Court to expressly refer to the rule in article 4.2 of the Rome Convention, but to apply a different connecting factor. In the specific case under consideration, the two places were identical, which may explain why the Court did not dwell on the details of the connecting factor.

seen above, largely influenced by European law, speak for the advisability of embracing the same connecting factor for all contractual obligations.

The same attention to European conflict rules is shown even more expressly in a newer decision of the Supreme Court in a case of defamation.³⁴ The case regarded a book published in Norway describing the life of a bookseller in Kabul and his family. The book was translated into numerous languages and became a bestseller in many countries, including Afghanistan. The bookseller and his family claimed that the description was defamatory and was capable of creating substantial harm for him and his family in Afghanistan and they sued the author and the publisher in Norway. The Supreme Court pointed out that it was not necessary to make a decision as to which law governed the case, because it had turned out to be very difficult to obtain sufficient information on the content of Afghan law, and consequently it was necessary to apply Norwegian law.³⁵ This part of the decision has been strongly criticised,³⁶ what interests us here, however, is that the Supreme Court made an extensive *obiter dictum* with general observations on the method that should be followed when choosing the applicable law. The Supreme Court criticised its own previous practice,³⁷ including the decision in the Leros Strength case discussed in section 3.2 above. In the Bookseller of Kabul decision, the Court underlined the importance of operating with general and predictable conflict rules. Furthermore, the Supreme Court affirmed that European conflict rules should also be taken into consideration in Norway when there are no codified Norwegian rules. The Supreme Court pointed out that the traditional individualising method should be abandoned in favour of general and predictable rules.³⁸ In clear contrast to its previous statement that “unless Norwegian legislation or judicial practice answer the question, it will be necessary to assess what would be the most natural and fairest solution”,³⁹ the Supreme Court now says: “unless we have differing legislation, in the interest of harmonisation when determining the applicable law we should take into consideration the solution that EU countries have chosen.”⁴⁰

34 Rt. 2009 p. 1537.

35 Para 41–44.

36 Frantzen, Torstein, *Anvendelse av utenlandsk rett i norske domstoler*, Lov og Rett, 2010, p. 371–391, Heimdal, Lars, *Norsk internasjonal privatrett og bokhandleren til besvær*, Lov og Rett 2010, p. 68–75, Lando, Ole, *Om lovvalget I internasjonale sager om krænklse af privatlivets fred*, Tidsskrift for Rettsvitenskap 2011, p. 87–95.

37 Para 38.

38 Para 32, particularly if read together with para 34.

39 See footnote 25 above.

40 My translation, para 34.

4.3 **Ordre Public and Overriding Mandatory Rules**

Application of the law designated by the relevant conflict rules will be limited if it results 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.⁴¹ Additionally, Rome I contains a similar provision in article 21, as did the previous Rome Convention in its article 16.

Legal doctrine agrees on the necessity to interpret the exception of *ordre public* very narrowly.⁴² The *ordre public* (or public policy) clause is not intended to be used whenever there is a discrepancy between the foreign governing law and the Norwegian legal system. The clause is to be used only under exceptional circumstances, when the result which the judge would come to by applying the rule of the foreign governing law would conflict with the basic principles upon which Norwegian society is based. Among other things, this entails that public policy may not be used as a basis to skip the process of finding the applicable law and to apply Norwegian law instead only because these rules are deemed to be important or preferable to the corresponding foreign rules. Public policy is a provision that is in place in order to prevent unacceptable results, not to achieve an accurate application of the court's own provisions or even to ensure full application of the court's law.

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 Lugano Convention), as well as the annulment of arbitral awards rendered in Norway and the recognition and enforcement of arbitral 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 the Recognition and Enforcement of Foreign Arbitral Awards). Being based on international instruments, these codified rules on *ordre public* have to follow the narrow interpretation that prevails at the international level.⁴³ For internal consistency, a similarly narrow interpretation of the *ordre public* exception should be applied in the field of choice of law.

A further limitation to the applicability of the law designated by the relevant conflict rules are the so-called overriding mandatory rules. These are rules implementing particularly important policies and they are directly applicable, notwithstanding that the conflict rules designate another law as the governing law. The direct applicability of overriding mandatory rules is also regulated in article 9 of Rome I, as it was in article 7 of its predecessor, the Rome Convention.

41 See Lundgaard, cit., p. 109ff.; H. Thue, *Internasjonal Privatrett*, cit., p. 180ff.; Cordero-Moss, G. *Lovvalsregler for internasjonale kontrakter*, cit., 709ff.

42 See the references made in the previous footnote.

43 See Cordero-Moss, G. *Lovvalsregler for internasjonale kontrakter*, cit., p. 712ff.

It is important to point out that the applicable law should be overridden only in exceptional situations. Far from all mandatory rules have an overriding character, as recital number 37 in Rome I expressly highlights.

The already mentioned Supreme Court decision in the Leros Strength case dealt with one of these overriding mandatory rules. Under Norwegian law, the injured party has the right to direct action against the insurer under certain circumstances; in particular, if the ship owner is insolvent (as was the case here), the rules on direct action are mandatory.⁴⁴ The preparatory work on the Norwegian Act on Choice of Law for Insurance Contracts specifically mentions 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.⁴⁵ The rule of article 5 originates from the European directives on insurance, which in this particular instance were based on article 7 of the (then prevailing) Rome Convention and is now incorporated in article 7 of Rome I.

The Supreme Court in Leros Strength instructed the lower court 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, some referring to overriding mandatory rules and some to *ordre public*.⁴⁶

In its decision on the Bookseller of Kabul, the Supreme Court later criticised its own reasoning in Leros Strength and affirmed that Norwegian courts should also consider the principles underlying European private international law in respect to the function of *ordre public* and overriding mandatory rules.⁴⁷ That some Norwegian rules are important may be used as a basis to override the applicable law or to avoid certain results, but it should not be invoked as an excuse to avoid choosing the applicable law. Legal literature had already criticised Leros Strength for having used the policy underlying the substantive rules of Norwegian law to skip the process of choosing the applicable law.⁴⁸

4.4 *Uncertainty in the Application of the Objective Method?*

Admittedly, the most extensive argumentation in favour of predictability was only made by the Supreme Court in an *obiter dictum* in the Bookseller of Kabul decision – and the *ratio decidendi* of that decision does not follow the principles that the *obiter dictum* argues for. The Supreme Court has, in the Bookseller of Kabul, explained how choice of law should be made on the basis

44 Insurance Contracts Act, § 7–8.2, combined with § 3–1.2c.

45 Ot prp nr 72 (1991–92) p. 66.

46 Rt 195 p. 3 1132, Rt 1931 p. 1185 and Rt 1934 p. 152.

47 Rt 2009 p. 1537, para 38.

48 See Cordero-Moss, G. *Direct action against the insurer: a recent decision by the Norwegian Supreme Court illustrates the Norwegian approach to private international law*, in Einhorn, T., Siehr, K. (eds.), *Intercontinental Cooperation through Private International Law – Essays in Memory of Peter Nygh*, TMC Asser Press, 2002, p. 55–67.

of objective criteria and how reasons of predictability and harmonisation render it advisable to consider the same criteria that are codified in European private international law. However, due to the difficulty in ascertaining the content of one of the potentially applicable laws, the particular case at hand was deemed by the Supreme Court to be inappropriate for applying the method of choice of law that the Court recommended.

The *obiter dictum* on the necessity to apply objective criteria and a predictable method seems, subsequently, to have received due attention: in a later decision,⁴⁹ the Supreme Court refers repeatedly to the argumentation of the Bookseller of Kabul.

Admittedly, also in regard to this case, the Court found that the particular case at hand was not appropriate for applying the objective connecting factor of the conflict rule that it deemed applicable, but this seemed to be more a question of applicability of that particular conflict rule, rather than a criticism of the method involved.

The claim regarded reimbursement of damages as a consequence of criminal actions committed abroad. Norwegian courts had jurisdiction on the basis of the principle of universal criminal jurisdiction for serious human rights violations; this particular case regarded crimes committed during the conflicts in Bosnia-Herzegovina in 1992. Connected with the criminal action was a civil claim for reimbursement of damages; here the Court referred to the *obiter dictum* in the Bookseller of Kabul decision and considered the objective criteria contained in both Norwegian and EU rules on choice of law for obligations arising out of non-contractual obligations. Both rules use, as a connecting factor, the place where the damage occurred, and this would have led to the application of Bosnian law. The Court, however, questioned the applicability of this conflict rule to this particular case, with a reasoning that can be shared only in part.⁵⁰

The Court expressed the criteria that, in its opinion, made it necessary to apply Norwegian law (primarily, the close connection between the claim and Norwegian criminal jurisdiction and criminal law). Unfortunately, the Court refrained from formulating this as a general conflict rule that would apply to claims for reimbursement of damages arising out of criminal actions; also, the Court underlined the necessity of applying a discretionary and ad hoc approach in this particular case and even affirmed that the individualising method has to be considered the main conflict rule in Norwegian law. However, the reasoning

49 Rt 2011 p. 531.

50 The Court affirmed that the choice-of-law rule for non-contractual obligations has, as a main purpose, to create predictability in the civil and commercial relationship, by permitting the adjustment of one's conduct to the applicable law and insuring against possible risks (para 44). The Court found that this interest was not relevant in the case of criminal actions. The Court also found that the conflict rules in Rome II seemed to be modelled for civil and commercial obligations but not for obligations connected with criminal actions (para 47). Both these observations can be supported. However, the Court made some comments that do not seem to be correct on Rome II not being applicable to situations where the event giving rise to the damage and the damage itself are located in the same state (para 45). Also some comments on the applicability of the connecting factor could be up for discussion (para 46).

developed by the Court was sufficiently clear to show which criteria were applied and should therefore be able to be easily used as a basis for similar decisions in the future. Therefore, the Court in reality did not apply the individualising method.

More interestingly, the Court followed and reaffirmed the reasoning of the Bookseller of Kabul *obiter dictum* in respect of the function and use of overriding mandatory rules or *ordre public*.⁵¹ Under Bosnian law, the claim would have been time-barred; moreover, the claim should have been directed against the State and not against the person who committed the crime. This would have prevented the Norwegian courts from ordering reimbursement of damages, which in turn would have violated the Norwegian sense of justice as well as the public international law standards in this field. If the Court had followed its traditional approach, it would have considered it redundant to carry out the connecting-factor evaluation and it would have used the importance of the involved policy and the unacceptability of the result if Bosnian law had been applied as the basis from which to apply Norwegian law. The Court, however, referred to the explanation made in the Bookseller of Kabul *obiter dictum* and confirmed that the *ordre public* exception should not be used to avoid the process of choosing the applicable law, but only to prevent unacceptable results after the applicable law has been designated.

5 Conclusion

Given the importance that the governing law has for the interpretation and application of the contract, it is highly recommendable to evaluate possible claims arising out of a contract in the light of the governing law. This is not possible if the governing law is determined on the basis of a discretionary evaluation of the judge and without applying objective criteria.

The necessity of a predictable choice of law has been pointed out in Norwegian legal literature and has been recognised by the Ministry of Justice. Additionally, Norwegian courts seem to be gradually embracing predictability by adopting objective criteria based on European private international law. This is a commendable development.

51 Para 52 ff.

