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Towards a Norwegian Codification of Choice-of-Law Rules

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This issue of *Oslo Law Review* publishes some of the papers that were presented at a conference I organised at the University of Oslo on May 3rd and 4th, 2018.

The purpose of the conference was to ensure international state-of-the-art input to the on-going codification of Norwegian rules on the law applicable to contractual and tort obligations. The work originated in the mandate the Norwegian Ministry of Justice had given me to submit a proposal for a statute on the law applicable to obligations. The proposal was written, *inter alia*, taking into consideration the papers presented at the conference. The Ministry of Justice sent the proposal to public consultation. At the moment of writing this introduction, the public consultation is still on-going.[1]

Rules on the applicable law, also known as conflict rules or choice-of-law rules, are part of that branch of the law that goes under the name of Private International Law. They are rules that permit the identification of which law governs a certain legal relationship when the relationship has international elements. If a Norwegian party purchases some goods from Germany, for example, these rules determine whether the sale is governed by Norwegian or by German law. If a Greek ship causes environmental damage off the coast of Norway, they determine whether the liability is subject to Greek or Norwegian law. Conflict rules are, in brief, provisions that permit the determination of which law is applicable.

In Norway, conflict rules have traditionally not been codified. Exceptions include the Act on the law applicable to contracts of sale, implementing the 1955 Hague Convention on the Law Applicable to International Sale of Goods, and certain provisions or special statutes implementing obligations under international law, such as the Product Liability Act, implementing the 1973 Hague Convention on the Law Applicable to Products Liability.

Since Norway's accession to the EEA Agreement in 1994, various conflict rules have been incorporated into Norwegian law as part of implementing legislative acts with EEA rele-

1. The proposal and information on the public consultation may be found here: https://www.regjeringen.no/no/dokumenter/horing-–enpersonsutredning-om-formuerettslige-lovvalgsregler/id2611666/.

vance. While the EEA Agreement does not cover issues of private international law, conflict rules are found in certain directives and regulations that govern different aspects of the single market and therefore have EEA relevance. These conflict rules have been implemented in Norway, particularly in consumer legislation.

Further, Norway has ratified and incorporated into its law the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Lugano Convention contains rules on choice of forum and on enforcement of civil judgments, and mirrors the Brussels I Regulation. Brussels I applies to EU Member States and is part of an integrated system of EU private international law. Other important elements of this EU system are the EU Regulations on the law applicable to contractual obligations (so-called Rome I) and on the law applicable to non-contractual obligations (so-called Rome II).

The field of private international law is thus partly regulated by statute in Norway, mostly as a result of the implementation in Norwegian law of EU law or obligations under international law. However, choice of law is not regulated systematically in Norwegian law. In recent years, the Norwegian Supreme Court has based a number of decisions on principles corresponding to the conflict rules laid down in Rome I and Rome II. This represents a departure from earlier case law, which adopted the so-called individualising method. The individualising method prevailing earlier entailed discretionary assessment of each individual case on the basis of the circumstances as a whole.

The sources of Norwegian private international law are, thus, fragmented and difficult to ascertain. Where no conflict rules exist pursuant to statute or customary law, newer case law gives considerable weight to the provisions in Rome I and Rome II. This reduces the legal uncertainty, but only to a certain degree. If the detailed content of Norwegian conflict rules – or even their existence – is difficult to establish, uncertainty arises as to when and to what extent the courts should give weight to the EU regulations. Moreover, giving weight to the EU regulations on choice of law is also associated with some uncertainty, as the regulations are not binding in Norway. Their application is entirely at the court's discretion.

The fact that choice of law is associated with such significant uncertainty is unfortunate in today's society, in which an ever-increasing number of issues have an international dimension and thus necessitate a choice of law. In this context, it may be sufficient to mention increased population mobility – both private and professional – by way of illustration. Increased mobility is creating an ever-larger number of cross-border legal relations, for example in connection with purchases of goods andservices, transportation of goods and persons, insurance, financing, employment, residential leases and tort liability. Moreover, the number of commercial cross-border transactions is increasing steadily in both the consumer and commercial segments. When the need to assess parties' rights and obligations arises in such situations, it becomes necessary to determine which State's legal system is applicable.

The need to make a choice of law is thus increasingly important in today's society. It would be unfortunate if conflict rules were to be inaccessible, and their application unpredictable. If party rights and obligations are uncertain, this may have a deterrent effect and, at worst, restrict both international activity by Norwegian actors and interest among international parties in investing in Norway or in trading with Norwegian parties.

Further, unpredictability is a cost driver as it necessitates extensive investigations and may give rise to avoidable disputes. This hinders efficiency and unnecessarily increases transaction costs. As unpredictability makes it necessary to clarify the choice of law on an *ad hoc* basis, it also imposes an unnecessary burden on the Norwegian court system.

For all the reasons mentioned above, the first question posed by the Ministry of Justice – whether it is desirable that the field of choice of law be codified in Norway – was answered positively in my report.

The next question posed by the Ministry of Justice was which sources should be used as an inspiration for the Norwegian codification. In particular, the relationship with EU private international law needed to be examined.

As mentioned above, the EU Regulations Rome I and Rome II do not fall within the scope of the EEA Agreement and therefore are not binding in Norway. However, Norway has implemented various provisions on choice of law contained in the EU instruments that are relevant to the internal market. Also, through the Lugano Convention, Norway has implemented a system of choice of forum and recognition and enforcement of civil judgments that is parallel to part of the EU system of private international law. Moreover, in the past decade the Norwegian Supreme Court has given considerable importance to the provisions in Rome I and Rome II. For all these reasons, it is natural that the work on a proposal for a Norwegian statute on conflict rules starts from Rome I and Rome II.

However, the codification work should not be reduced to a translation of Rome I and Rome II, for several reasons. *First of all*, these instruments are not exhaustive, and in certain areas they open for the prospect of being revised. Such revision is on-going in some areas, such as assignment of claims. *Secondly*, certain provisions of these instruments may contradict existing rules in Norwegian law, be they codified (for example, in the Code of Maritime Law) or based on case law. *Thirdly*, experience with these instruments may have shown potential for improvement. *Fourthly,* developments in systems that do not have Rome I and Rome II can show alternative approaches to some matters. Of particular interest is the on-going work in the United States on a Third Restatement on Conflict of Laws.

The conference was therefore organised to discuss those aspects of Rome I and Rome II where there is potential for a more complete or better regulation, as well as those aspects that are not compatible with Norwegian law. The programme was carefully crafted to permit discussion of specific topics that needed clarification or showed potential for improvement.

Participants in the conference represented the highest level of expertise in important European countries that have implemented Rome I and Rome II and thus are able to testify about the application of these instruments, as well as in countries that have not implemented Rome I and Rome II and thus are able to contribute with the experience of not having an EU regulation. Participants from Nordic countries were able to give contributions particularly relevant to the compatibility of these instruments with the Nordic tradition. Participants from the United States gave important insight into possible different approaches.[2]

2. The detailed programme of the conference, as well as the list of contributors and the material relating to each of the presentations, may be found here: https://www.jus.uio.no/ifp/english/research/news-and-events/events/2018/03052018-giuditta.html.

The articles published here analyse some of the topics discussed at the conference.

The proposed statute is a unitary text covering the areas covered by Rome I and Rome II. The main aim of the proposal is to ensure harmonisation within the Norwegian private international law system. Because Norway has implemented, through the Lugano Convention, part of the EU system of private international law, internal harmonisation implies also harmonisation with the EU system and, in particular, with Rome I and Rome II. Hence, the proposal avoids unnecessary deviations from the structure and the content of the two regulations. However, it departs from the regulations where this is necessary or desirable. An example of the former is the rule on the law applicable to product liability, which in Norway is subject to the 1973 Hague Convention. An example of the latter is the rule on the law applicable to privacy, which is not regulated in Rome II, but is regulated in the proposal.