Conflict of Laws Without a Code: A Case Note on a Recent Norwegian Supreme Court Judgment Illustrating Contemporary and Historical Methodological Challenges in a European Non-EU State

Conflictos de leyes sin código: nota a una reciente sentencia del Tribunal Supremo noruego que ilustra los desafíos metodológicos contemporáneos e históricos en un Estado europeo no perteneciente a la UE

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Abstract: This case note deals with a recent Norwegian Supreme Court judgment on the law applicable to non-contractual obligations arising out of wrongful ship engines built in Germany in the early 2000's. Although the Rome II Regulation (Regulation 864/2007) is neither binding on Norway nor in force within the EU at the time, the Supreme Court paralleled its conclusions on analogous interpretations of the regulation, ruling out the application of Norwegian law. The case illustrates the strong impact that EU private international law thinking has also beyond the EU. In the principal and eternal conflict of laws issue of relying on either the law where the injury takes place (*lex loci delicti commissi*) or the place where the damage occurs (*lex loci damni*), the EU regulation marked a turn for most EU member States by prioritizing *lex loci damni*. In the Norwegian case, the EU solution seems to have influenced the Supreme Court's conclusion. It is remarkable that no analogies are being drawn to private international law instruments that actually are binding on Norway, such as the 1973 Hague Convention on the Law Applicable to Products Liability, where the default rule is *lex loci delicti commissi*.

Keywords: Private International Law; Non-Contractual Obligations; Rome II Regulation; Norway; Products Liability

Resumen: Este comentario trata una reciente sentencia del Tribunal Supremo de Noruega sobre la ley aplicable a las obligaciones extracontractuales derivadas de defectuosos motores de barco fabricados en Alemania a principios de los años 2000. Aunque el Reglamento Roma II (Reglamento 864/2007) no fuese vinculante para Noruega, ni tampoco estaba en vigor dentro de la UE en ese momento, el Tribunal Supremo adoptó conclusiones paralelas basadas en interpretaciones analógicas del reglamento, descartando la aplicación del derecho noruego. El caso ilustra el fuerte impacto que la lógica del Derecho internacional privado de la UE tiene incluso fuera de la UE. En el conflicto principal y eterno de la ley aplicable — entre la del lugar donde se cometió el hecho dañoso (*lex loci delicti commissi*) o la del lugar donde se produjo el daño (*lex loci damni*)—, el reglamento europeo impuso valorar la *lex loci damni*. En el caso noruego, la solución de la UE parece influir en la conclusión del Tribunal Supremo. Resulta notable que no se establezcan analogías con instrumentos de Derecho internacional privado que sí son

vinculantes para Noruega, como el Convenio de La Haya de 1973 sobre Ley Aplicable a la Responsabilidad por Productos, cuyo principio general es la *lex loci delicti commissi*.

Palabras clave: Derecho internacional privado; Obligaciones Extracontractuales; Reglamento Roma II; Noruega; Responsabilidad por Productos.

I. Introduction

1. A classic issue of private international law is to determine the law applicable to non-contractual obligations. Traditionally, that is determined based on either where the harmful event took place (*lex loci delicti commissi*) or where the injury occurs (*lex loci damni*). For most EU member States, the introduction of the EU Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation) in 2009 marked a principal shift from having had conflict of laws rules being based on *lex loci delicti commissi* to *lex loci damni*[1].

2. Although Norway is not an EU member State, much of EU law is applicable there under the agreement on the European Economic Area. For example, the2007 Lugano Convention extends the principles on jurisdiction and recognition and enforcement of judgments that in the EU primority follows from the Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation) to include also Norway. While EU conflict of laws regulations do not apply directly in Norway, Norwegian case law has since long drawn analogies from EU posvade international law to establish the law applicable.

3. In the Norwegian Supreme Court's judgment HR-2024-2330-A of December 17 2024, the analogous interpretation of EU private international law was put to the test in an issue concerning facts occurring long before the Rome II Regulation was even enacted. For the Norwegian Supreme Court, the case required a historical examination to determine what conflict of laws rule that was applicable at the time.

II. Background

4. In 2000, a Norwegian shipping company ordered six ships from a Chinese shipyard. In the contract with the Chinese shipyard, it was stated that the Norwegian shipping company had a right to choose what components that should be used. The Norwegian shipping company ordered the Chinese shipyard to use german MAN engines. A contract for the delivery of the engines was entered into between MAN and the Chinese shipyard. Before the ships were delivered to Norway, the engines underwent testing at MAN's factory in Germany. However, several years after the engines were delivered, it was discovered that these factory tests had been manipulated by MAN to show lower emission levels.

5. In 2012, MAN informed the Norwegian shipping company that the actual emission levels could be higher than originally promised. By this time, a criminal investigation had already been ini-

[1] See recital 15 to the Rome II Regulation.

tiated against MAN in Germany. In a 2013 German court ruling, MAN was ordered to pay an administrative fine of 8.2 million euros. Due to statutes of limitation under German law, the judgment only addressed events that had occurred after 2006.

6. In 2015, the Norwegian shipping company filed legal proceedings against MAN and its Norwegian subsidiary in the Oslo District Court. MAN lost the case in both the district court and the court of appeal. While both instances applied Norwegian law, they did so on different grounds. While the district court found that the parties had agreed to apply Norwegian law, the court of appeal reached the same conclusion by applying uncodified general conflict of laws rules.

7. MAN appealed the decision to the Norwegian Supreme Court, which agreed to hear the case, focusing on the conflict of laws issue.

III. The Supreme Court's Judgment

1. Characterization of the Legal Issue: Contractual or Non-Contractual?

8. In its judgment, the Supreme Court first held that there was no agreement between the parties on the application of Norwegian law. Thereafter, the Supreme Court turned to the issue of characterizing the claim as either contractual or non-contractual. For the court, MAN had claimed that the complaint concerned precontractual liability and that the conflict of laws rules for contracts therefore should be applied. This argument was dismissed by the Supreme Court, that held that the matter did not relate to any contractual obligations as the Norwegian shipping company had not been party to the contract for deliverance of the engines nor party to the contract for the construction of the ships.

9. Having concluded that the matter was non-contractual, the Supreme Court continued to seek to establish the applicable conflict of laws rule. This exercise is not that simple under Norwegian private international law, as most conflict of laws rules are uncodified and based on precedent cases and principles.

10. In the last decades, the Norwegian Supreme Court has repeatedly held that the interest of keeping track with the conflict of laws rules in the EU motivates a general presumption to take the conflict of laws solutions in the Rome I and the Rome II Regulations into consideration[2]. A problem in the issue at stake was that the harmful event occurred long before the Rome II Regulation was applicable or even drafted. Hence, the Norwegian Supreme Court made an analysis of what conflict of laws rules that were applicable in Norway in the early 2000's.

2. What Conflict of Laws Rule Was Historically Applicable?

11. In its analysis of the history of Norwegian conflict of laws rules, the Supreme Court was partially divided. Although both the majority and the minority agreed that the main principle of the Rome II Regulation conflicts with the traditional rule in earlier Norwegian conflict of laws, the Court could not reach consensus on when this traditional rule had shifted.

12. Historically, Norwegian conflict of laws relied heavily on an uncodified "centre of gravity" test, a principle that originated from the *Irma-Mignon* judgment of 1923[3]. That case, which concerned a ship collision, established that a legal relationship should be governed by the law of the country with

[2] See particularly the Norwegian Supreme Court judgment of 2 December 2009, Rt-2009-1537, "*The Bookseller of Kabul*", p. 32–34.

[3] Norwegian Supreme Court's judgment of 23 September 1923, Rt-1923–II-58, "*Irma-Mignon*".

which it has the closest connection. In contrast to the more clear-cut conflict of laws rules for non-contractual relations that entered into force in the EU with the Rome II Regulation in 2009, the earlier Norwegian approach allowed for more discretion.

13. The case at hand is not the first time the Norwegian Supreme Court has addressed the transition from the traditional centre of gravity test to the now-established presumption of alignment with EU conflict of laws regulations. In a 2011 judgment concerning non-contractual damages arising from war crimes committed during the Balkan wars of the 1990s, the Supreme Court held that the Rome II Regulation was not applicable and could not be viewed as reflecting a general principle of older Norwegian private international law[4]. In the case at hand, however, the primary issue revolved around whether the Supreme Court should prioritize the place where the damage occurred, consistent with the conflict of laws principle under the Rome II Regulation, or the place where the harmful event took place.

13. Citing again the 1923 *Irma-Mignon* judgment, the majority opinion of the Supreme Court observed that, although the outcome in that case was an exception, it had nonetheless established the principle that the place where the event giving rise to the damage (*lex loci delicti commissi*) took place should be considered the default rule[5]. In case law from the 20th century, the place where the damage occurred was also applied[6]. This is in contrast to the main rule in the Rome II Regulation that instead prioritizes the law of the country where the damage occurs (*lex loci damni*).

3. Distance Delicts

14. How the place of damage was to be determined in "distance delicts" (where the event giving rise to the damage and the place where the damage occurs in different States) was unsettled in old Norwegian case law. However, with reference to old Norwegian legal literature, the Supreme Court held that it was the place where the harmful event occurred that was decisive in such matters[7].

15. Noting that the place where the damage occurs is the main rule of the Rome II Regulation, the Supreme Court went on to remark that that rule in EU private international law makes a difference between direct and indirect damages. That issue had not been adjudicated in a conflict of laws context in Norwegian case law. Norway is however part to the 2007 Lugano Convention. In case law dealing with jurisdiction under that convention, the Norwegian Supreme Court had recognized the EU private international law difference between direct and indirect damages[8]. Therefore, the Supreme Court concluded that, in similarity with contemporary EU law, also the place where the direct damage occurred was decisive to determine the law applicable in old Norwegian private international law.

16. After this lengthy argument, the majority opinion applied the facts in the case to the established conflict of laws norm that the law in the place where the (direct) damage took place should be applied. Here, the majority opinion had to decide what moment that should be decisive for the conflict of laws application. The court held that it was the lack of information that constituted the non-contractual obligation.

17. For determining where the damage occurred, it was however insignificant to decide where the lack of information is given. Instead, it is where the direct damages took place that needs to be

[4] See the Norwegian Supreme Court's judgment of 13 April 2011, Rt 2011-531, "*War Crimes*", particularly p. 46.

[5] See p. 63–64 of the referred judgment.

[6] See p. 65 of the referred judgment with references to Rt-1938-691, Rt-1961-730 and Rt 1978-1062.

[7] See p. 70 of the referred judgment where the Supreme Court cites H. J. Thue, *Erstatning utenfor kontraktsforhold*, Oslo, Institutt for privatrett, Stensilserie 111, 1 ed., 1986, p. 28 and 2 ed., 2001, p. 24 as well as H. P. Lundgaard, *Gaarders innføring i internasjonal privatrett*, Oslo, Universitetsforlaget, 3 ed., 2000, pp. 267 f.

[8] See the Norwegian Supreme Court's judgment of 21 June 2011, Rt 2011-897, "*Marin Alpin*".

determined. As no such direct damages could have taken place in Norway, Norwegian law could not be applied. Therefore, the court held that the application in the lower court was partially wrongful. The wrongful parts of the appealed judgment were consequently annulled.

18. The partial annulment means that those issues are again to be decided by the lower court. Even if the majority opinion only negatively held that Norwegian law was not to be applied, it was also clearly indicated that German law could be applied. After having concluded that the Norwegian conflict of laws rule for non-contractual damages in the early 2000's was dependent on the place where the damage occurs (*lex loci damni*), the majority held that there are "clear indications" ("*klare holdepunkter*") that the place of damage in this case was in Germany[9]. However, the majority also held that the place of damage was not an absolute conflict of laws rule, but that what law that should be applied should be determined on basis of a centre of gravity test.

4. Are German Rules on Limitation Compatible with Norwegian Public Policy?

19. Continuing its hypothetical analysis of the conflict of laws issue, the majority also took position as to whether German rules on limitation could be incompatible with Norwegian public policy and if that in turn could affect what law that should be applied.

20. In the hypothetical, still quite likely, situation that German law will be pointed out by Norwegian conflict of laws rules in the new trial, the Supreme Court continued to assess whether German rules on limitation were compatible with Norwegian public policy. According to German law, the matter would already be precluded. Under Norwegian law it would not be precluded. The Norwegian Court concluded in this part that it is clear that the German limitation rules were shorter than the Norwegian, but held that the German limitation rules do not conflict with "Norwegian sense of justice" just for being shorter. Consequently, German law could still be applied.

21. The implications of the majority opinion is that the conflict of laws parts of the case will be taken up again by the court of second instance. In that trial, the court's conclusions will be limited to the Supreme Court's judgment. As the Supreme Court has concluded that Norwegian law cannot apply, that option must be regarded as excluded. The most likely option is therefore probably to apply German law, but as the issue is precluded according to German limitation rules, it has been noted in Scandinavian legal literature, that the Supreme Court judgment constitutes a victory for the defendant party[10].

IV. The Dissenting Opinion

22. The majority opinion presented above was advocates by three of five justices. The two justices in minority issued a dissenting opinion, disagreeing on what conflict of laws rules that were applicable in Norway for non-contractual matters in the early 2000's. The essence of the opinion is that it was not as clear that the conflict of laws rules should follow the jurisdictional rules in the early 2000's. An argument for this conclusion was that the link between jurisdictional rules and conflict of laws rules was not as strong in Norwegian private international law at the time. Conversely, the dissenting opinion held that jurisdictional and conflict of laws rules were described as "very different from each other" in Norwegian legal writing of the time[11]. Further, the dissenting opinion stressed that it must have been fo-

[9] See paragraph 93 of the referred judgment.

[10] T. Falkanger, *Lovvalg ved bestillers rett til å velge motorleverandør til nybygg*, in J. Herre et. al (ed.) *Festskrift till Svante O. Johansson* (forthcoming 2025). As the Swedish *Festschrift* book is forthcoming and not yet published, page indication for the source cannot be given. Nontheless, the conclusion referred to is to be found in the last section of the contribution.

[11] See paragraph 116 of the reffered judgment with reference to I. Alvik, "Lovvalg og jurisdiksjon for ikke-kontraktuelle erstatningskrav", *Jussens Venner*, no 5–6, 2005, p. 303.

reseeable for the tortfeasor that Norwegian law could apply. Concluding that the harmful effect occurred in Norway, the dissenting opinion meant that Norwegian law should be applicable.

V. Comments

1. What Motivates the Norwegian Conflict of Laws Method?

23. As a first comment, it can be worth assessing the general Norwegian approach to conflict of laws that is strongly expressed in the judgment. Even if the judgment can be described as primarily concerning legal history, the reasoning of the Supreme Court makes it clear that EU private international law is taken seriously. By strongly emphasising the importance of aligning Norwegian conflict of laws rules with the Rome II Regulation, the Supreme Court indeed affirmed its commitment to European harmonization of conflict of laws rules. Such an approach is principally valuable from a predictability point of view as it will strengthen legal coherence. After all, a strong rationale for private international law is to strive for "decisional harmony".

24. Decisional harmony is a value that can be described so that courts shall strive for letting a legal issue be settled in the same way regardless of where it is adjudicated. This idea was originally formulated by von Savigny and is strongly recognized in modern EU private international law[12]. As a private international law idea, decisional harmony can symbolize internationalist values.

25. For Norway, decisional harmony with the EU member States is particularly important as Norway is a party to the Lugano Convention. Therefore, Norwegian judgments are to be recognised and enforced in EU and vice versa. Every detour from EU conflict of laws rules means that Norway risks being either a "haven" or a place to avoid in forum shopping activities. From a private international law perspective, such a solution is unsatisfactory as it represents a type of formal injustice benefitting the plaintiff for having filed the lawsuit in the "right" jurisdiction.

26. The Norwegian parallelism with EU private international law is based on Supreme Court case law and can be described as a presumption rule. The Norwegian approach is flexible as it gives Norwegian courts a possibility to deviate from EU conflict of laws rules on a case-to-case basis. Such deviations have been made for non-contractual liability arising relating to a rape conviction on a cruise ship on international waters, for non-contractual damages related to a conviction on child marriages as well as for the law applicable to the employment contract of seafarers.[13] The uncodified conflict of laws rules situation makes Norwegian private international law dynamic and unforeseeable.

27. It has been proposed that the uncodified presumption should be codified. In 2018, the Norwegian professor Giuditta Cordero-Moss submitted an inquiry on this matter at the request of the Norwegian government[14]. The inquiry, proposing codification, was delivered on June 2, 2018 and sent for a

[12] For the historical origins of the idea, see C. F. von Savigny, *System des häutigen Römischen Rechts (Band 8)*, Berlin, Veit, 1849, p. 114 f. For the recognition in modern EU private international law, see recitals 7 to both the Rome I and the Rome II Regulations.

[13] In its judgment of 22 October 2020, HR-2020-2021-A, the Norwegian Supreme Court held that the private law compensation for damages caused by rape at international waters was to be decided under a centre of gravity test instead of under the Rome II Regulation. Similarly, in the judgment of 7 March 2024, HR-2024-2161-A, the Norwegian Supreme Court held that the interest of fighting child marriages motivatated the application of Norwegian law. Yet another example is the Supreme Court's judgment of 14 June 2016, HR-2016-01251-A, concerning the law applicable to a seafarer's employment contract. In this judgment, the Norwegian Supreme Court held that it was clear that the law of the flag state should be applied according to Norwegian conflict of laws.

[14] For a general comment on the codification initiative and procedure, see G. Cordero-Moss, "*Towards a Norwegian Codification of Choice-of-Law Rules*", Oslo Law Review, n. 1, 2019, p. 4–7.

consultation procedure shortly thereafter. However, seven years later no legislation has been enacted and the matter is still described as pending on the website of the government[15].

2. Did Norway Really Rely on Lex Loci Damini in the Early ?

28. A peculiarity of the case at hand is that it concerns facts that occurred several decades ago. While such historical circumstances are often irrelevant in the context of procedural law, private law rules typically rest on an assumption of foreseeability—namely, that the applicable law is that which was in force at the time the relevant facts arose. In this sense, conflict of laws rules generally follow the private law logic[16]. This led the Norwegian Supreme Court to research legal history to establish what conflict of laws rules that would have been applied in the early 2000's. As an exercise, this reminds much of researching foreign law, as the content of the law is a mix of law and fact which must be proven.

29. The most obvious difference between the contemporary Norwegian private international law situation and the situation back in the early 2000's is the now outspoken parallelism to EU private international law as well as the fact that the Rome II Regulation was not enacted. In the principally interesting issue of prioritizing the law where the injury took place (*lex loci delicti commissi*) or the place where the damage occurred (*lex loci damini*) a few remarks can be done.

30. A first remark is that it is recognized in the recitals to the Rome II Regulation that the introduction of *lex loci damni* as a default rule marks a change in relation to "virtually all Member States" that up until then had relied on variants of "*lex loci delicti commissi*" rules[17]. The statement in the regulation indicates at least that *lex loci damni* was a rare rule in the early 2000's.

31. A second remark is that even if much of Norwegian private international law was, and still is, uncodified, there are exceptions. One such exception is for product liability. Product liability is not only subject to special conflict of law rules in the Rome II Regulation, there is also the Hague Convention on the Law Applicable to Products Liability of 2 October 1973 (the 1973 Hague Convention). Norway is a party to this convention, and it entered into force in Norway in 1977.

32. Under Article 4 of the 1973 Hague Convention, the applicable law for product liability claims should be the law of the country where the injury occurred (*lex loci deliciti commissi*) - provided that this location is also either the habitual residence of the injured party, the main place of business of the alleged liable party, or the place where the injured party acquired the product.

33. Albeit the claim in question would not be subject to the conflict of laws rules in the Hague Convention as the convention excludes liability for damages on the product itself pursuant to Article 2 (b), it could be valuable to use it as point of reference for the choice of law issue at question. Even if the convention is not applicable to damages on the product itself, it could be reasonable to align claims to the closely related conflict of laws rules that actually were and still are applicable to product liability. Is it really reasonable to have different conflict of laws rules for damages on the product itself from damages it causes on persons and other objects? It might be, but there are also strong arguments for basing analogies on the 1973 Hague Convention. For interpreting the convention, not only case law from

[15] The Norwegian legislation procedure can be followed at: https://www.regjeringen.no/no/dokumenter/horing---enpersonsutredning-om-formuerettslige-lovvalgsregler/id2611666/ (accessed 13 June 2025).

[16] The different logics for procedural and private law aspects can be seen in e.g. Article 69 of Regulation 2016/1103 on matrimonial property regimes. This article makes it clear that the procedural rules of the regualation are applicable regardless of when a marriage has been entered, whereas the conflict of law rules are dependent on that an active choice has ben made after a certain date. (January 29, 2019).

[17] See recital 15 to the Rome II Regulation.

other convention States is of relevance, but also the explanatory report that was adopted by the Hague Conference's permanent bureau in 1974.

34. Even if the 1973 Hague Convention might have been a little forgotten when EU legislation has taken over, it is still standing and must be applied in Norway and other convention States. Therefore, closely related issues like the one at hand should probably primarily be aligned with the solutions of that convention.

VI. Concluding remarks

35. It is much welcome that Norway principally aligns its contemporary conflict of laws rules with EU private international law, especially as Norwegian judgments enjoy free movement in the EU under the Lugano Convention. Still, the 1973 Hague Convention on product liability is applicable in Norway and even if the case at hand is not subject to it, analogies in an uncodified legal landscape could be made from this closely related legal instrument. This is even more true for determining the law applicable to facts occurring in the early 2000's. It seems that the contemporary solution of relying on *lex loci damni* in the Rome II Regulation has had influence also for the historic determination of the law applicable in the opinion of the majority.

36. From a foreseeability perspective, the judgment illustrates the complexities of navigating conflict of laws in an uncodified landscape. Clear-cut and principal conflict of laws codes enable for national courts to grasp what the main principles of private international law are. In this perspective, one can only hope that the Norwegian legislator continues its pending project of codifying Norwegian private international law. Such a legislation could be a contribution to modern private international law like the Swiss private international law code of 1987 was when it came[18].

[18] The official name of the Swiss private international law act is *Bundesgesetz über das Internationale Privatrecht* (IPRG) of 18 December 1987. For the influence this act has had on private international law, see e.g. T. Kadner Graziano, "Codifying Euro pean Union Private International Law: The Swiss Private International Law Act – A Model for a Comprehensive EU Private International Law Regulation", *Journal of Private International Law*, no 3, 2015, pp. 585–606.