Oslo Law Review

SPECIAL ISSUE: CSR AND TRANSPARENCY ACT
SCIENTIFIC PUBLICATION

Universitetsforlaget

Volume 10, No. 2-2023, p. 1–14
ISSN online: 2387-3299
DOI: https://doi.org/10.18261/olr.10.2.7

Corporate Social Responsibility and the Norwegian Transparency Act: the Importance of Choice of Law

Giuditta Cordero-Moss
Professor, Department of Private Law, Faculty of Law, University of Oslo
giuditta.cordero-moss@jus.uio.no

Abstract

Various avenues are pursued to ensure responsible international business activity. Increasingly, domestic law imposes on companies active on the relevant country's territory duties of vigilance or of diligence regarding the companies' subsidiaries and suppliers, including their activity abroad. The Norwegian Transparency Act is an example of such law. However, to benefit the victims of harm that occurred abroad, this legislation must be applicable to their claims. According to the conflict rule generally applicable to tort claims, Norwegian tort law does not apply to harm or damage that occurred abroad. Following the example of a conflict rule already existing in Norwegian law and in EU law for liability relating to environmental damage, this article argues for the introduction of a special conflict rule for selecting the law applicable to torts liability based on breaches of the Transparency Act.

Keywords

Transparency Act, law applicable to torts, place of damage, overriding mandatory rules, environmental damage

1. Introduction

Corporate social responsibility is an area that is rapidly gaining attention. The traditional approach, according to which a company can isolate itself from liability deriving from the activity of third parties (be it the company's subsidiaries or its suppliers or contract parties), is increasingly challenged. Companies are increasingly deemed to owe third parties a duty of care, or to have to exercise due diligence to prevent infringement of third-party rights in areas such as labour law, environmental law or human rights.

As this article shows, these duties may be based on international sources of soft law, on domestic legislation, on regional codifications or even on public international law. They may be inserted into the contracts, and thus become binding on the parties as contract terms; they may be based on general tort law or on specific sources establishing civil liability for violations in this area; to a lesser extent, they may be based on company law mechanisms. In particular, the construct that bases liability on the parent company's (or, in the case of outsourcing or supply agreements with third parties, the principal's) breach of a duty of care or of a duty of diligence is being increasingly encountered in case law as a basis for civil liability claims of torts law.

Increasingly, states codify duties of diligence in their domestic law, meant to be applicable to parent companies or principals active on their territory. The Norwegian Transparency Act is an example of such codification. This creates the illusion that those legal systems are well equipped to ensure a responsible international business activity.

However, a regulation can only achieve its purpose if it is applicable. That a country such as Norway enacts a statute on transparency applicable to Norwegian companies and to companies offering their goods and services on the Norwegian territory, does not necessarily mean that Norwegian law on civil liability for torts will apply to a claim against any such company. In an international setting, the applicability of Norwegian tort law depends on where the damage occurred. If the activity of the subsidiary or supplier has given rise to damage outside of Norway (let us say, in Ruritania), it will be the foreign local law of Ruritania that regulates the question of civil liability in torts. It does not matter that Norwegian tort law imposes liability on the Norwegian parent company or principal; what matters is that the applicable tort law does so.

It must, then, be ensured that Norwegian tort law is applicable, if this is deemed instrumental to the efficacy of the Transparency Act. Bringing a claim before a Norwegian court is not sufficient to render Norwegian tort law applicable.

Norwegian courts apply Norwegian private international law (conflict rules or choice of law rules). The current Norwegian conflict rule for torts identifies the law of the place where the damage occurred as applicable. This will lead Norwegian courts to selecting the tort law of Ruritania as applicable.

This article analyses different bases upon which a Norwegian court may select the law applicable to civil liability for breach of duties of care or of diligence that gave rise to damage abroad. It concludes that a new conflict rule should be introduced in Norwegian law, that permits the victim to choose between the law of the place of damage and the law of the place where the event giving rise to the damage occurred.

2. The Issue

The issue of companies' accountability for the whole value chain is raised with increased frequency,[1] particularly as far as concerns violation of human rights, labour- or environmental law incurred abroad by subsidiaries or suppliers. One of the effects of the (at least, until recently) ever-increasing internationalisation of business since the middle of last century has been a growing openness to each other of the world's economies, cultures and populations. The increased international cooperation has numerous and important positive aspects, but turned out to have also consequences that are not desirable—which is reflected in the growth of a wide-spread political criticism against globalisation.

One of the effects of globalisation is that enterprises increasingly move their production or part of their activity to countries with a lower cost level. This race to cost reduction is

1. Literature on the issue is vast, and there is a growing case law in various countries. For an overview and references, see Catherine Kessedjian and Humberto Cantú Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Springer Cham 2020); Lise Smit and others, Study on due diligence requirements through the supply chain – Final report, European Commission, Directorate-General for Justice and Consumers (Publications Office 2020) <https://data.europa.eu/doi/10.2838/39830> accessed 30 October 2023; Anne Peters and others, 'Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law', Max Planck Institute for Comparative Public Law and International Law Research Paper Series No 2020-06; Hans van Loon, 'Strategic Climate Litigation in the Dutch Courts: A Source of Inspiration for NGO's Elsewhere?' (2020) 66(4) *Acta Universitatis Carolinae. Iuridica* 69 <https://doi.org/10.14712/23366478.2020.32>.

mainly dictated by the need to remain competitive in a market in which low-cost products threaten the survival of enterprises which are subject to higher production costs. Enterprises thus reduce their activity in their home country, and move it to low-cost countries (such as, in our example, Ruritania).

Among other consequences, this implies that their activity no longer needs to comply with the home country's standards—for example, in the field of labour law, safety or environmental protection. The activity is to comply with Ruritania's local standards instead. If the local standards are less stringent than those prevailing in the home country, this would be reflected in correspondingly lower production costs: employees would work longer hours for less pay, payments to welfare and social security would be lower, procedures and practices ensuring safety at work would be less demanding, investment to ensure environment protection would be modest, etc. While all this ensures low production costs and thus the possibility to remain competitive on the home market, it does not contribute to improving the local social and environmental conditions in Ruritania.

For a long time, this has been deemed to be perfectly in compliance with the legal structure applied to organise commercial activity. A company would establish local subsidiaries in Ruritania, these would be independent legal entities with limited liability, and the subsidiaries' activity would be treated as separate from the parent company's own activity. Alternatively, a company might have outsourced parts of its activity to third parties in Ruritania, thus enhancing even more the separation from its own activity and that of third part-suppliers.

The principle of limited liability is one of the pillars of economic activity. It permits to circumscribe within the local subsidiary or the supplier any liability for the respect of labour, safety or environmental standards. The parent company or the principal cannot be blamed for having breached its home country's standard, because the activity is not carried out directly by that entity, and, furthermore, the home country's standards do not apply outside of the home country's territory. Therefore, companies can take advantage of the low level of costs in Ruritania, without being held to be in breach of standards that are not applicable there. Increasingly, this state of things has been found to be unsatisfactory.[2]

3. From Soft Law to Hard Law

Instruments have been developed to induce a responsible corporate and commercial activity, in particular specifying expectations of due diligence when a company relies on a production chain or value chain.[3] Among the instruments that received considerable international attention are the UN Global Compact[4] and Ruggie principles,[5] which were followed by the OECD Guidelines for Multinational Enterprises[6] and the OECD Due Diligence

2. For an early emphasis on the advisability to take into consideration sustainability in the corporate and commercial law discourse, see the work of Beate Sjåfjell: <www.jus.uio.no/ifp/english/people/aca/beatesj/> accessed 30 October 2023. All subsequent references to URLs were accessed on the same date.
3. For an overview, see Peters and others (n 1).
4. An initiative launched in 2000 and supported by the UN, based on the voluntary commitment by CEOs to implement sustainability: see United Nations Global Compact, 'About the UN Global Compact' <www.unglobalcompact.org/about>.
5. United Nations Guiding principles on business and human rights 2011 (HR/PUB/11/04). For an introduction, see Business & Human Rights Resource Centre, 'UN Guiding Principles' (2023) <www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/>.
6. OECD, *Guidelines for Multinational Enterprises* (OECD 2011) <www.oecd.org/daf/inv/mne/48004323.pdf>. The Guidelines were last updated in June 2023 (for the 2023 version, see <https://doi.org/10.1787/81f92357-en>), but the update does not introduce any significant changes for the purposes of the analysis in this article.

Guidance for Responsible Conduct.[7] National Plans have been adopted to implement these guidelines in a number of countries,[8] including Norway.[9]

All these initiatives are legally non-binding instruments relying primarily on a voluntary compliance. They represent, therefore, an example of soft law.

However, as briefly explained below, soft law is hardening: in part through its codification by the national legislator or at the regional or international level; in part by operation of commercial parties who refer to soft law standards in their contracts, thus agreeing to be bound by them; in part through case law that increasingly recognises that breach of duties of care and diligence may be a basis for tort liability.

Regarding the first-mentioned method to harden soft law, it can be pointed out that the OECD Guidelines and Guidance are increasingly being implemented in domestic legislation, among others in France and in Germany.[10] In Norway, the Transparency Act was enacted in 2021 with the purpose of imposing on companies which are based in Norway or which offer their goods or services in Norway duties of diligence, transparency and information relating to their entire value chain (including activity outside of Norway) in the areas of fundamental human rights and decent working conditions.[11]

The EU is working on an extensive regulation of the matter. Most recently, on 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence.[12]

Additionally, public international law is sometimes taken into consideration as directly applicable to corporate activity, notwithstanding that, traditionally, companies are not deemed to be subject to obligations of public international law.[13] As a result, an emerging duty of care deriving from international human rights law has been observed.[14]

Turning to contracts, the hardening of soft law through contractual means was initially promoted by multinational companies which imposed duties of diligence on their contractual parties and requested that these in turn imposed corresponding duties on their contractual parties.[15] Increasingly, these contractual mechanisms rely not only on the parties' voluntary compliance with soft law, but on the necessity to comply with the abovementioned applicable legislation.

Regarding courts, the hardening of soft law through case law has in recent years moved away from the traditional approach, which was based on company law mechanisms, towards

---

7. OECD, *Due Diligence Guidance for Responsible Business Conduct* (OECD 2018) <www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.
8. For an overview, see UN Human Rights, 'National action plans on business and human rights' (OCHR) <www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>.
9. Utenriksdepartementet, *Næringsliv og menneskerettigheter Nasjonal handlingsplan for oppfølging av FNs veiledende prinsipper* (regjeringen.no 2019) <www.regjeringen.no/globalassets/departementene/ud/vedlegg/naringsliv/ud_naeringsliv_og_menneske_uu-versjon2.pdfNorway (ohchr.org)> .
10. See the article by Fabienne Jault-Seseke elsewhere in this special issue of Oslo Law Review.
11. Original title: Lov 2021-06-18-99 om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven); in force 1 July 2022.
12. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM (2022) 71 final). For an analysis of the legislative process, see Groupe Européen de droit international privé (GEDIP), *Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability]* (GEDIP 2021) 19ff <https://gedip-egpil.eu/wp-content/uploads/2021/02/Recommandation-GEDIP-Recommendation-EGPIL-final-1.pdf>.
13. *Nevsun Resources Ltd v Araya* (2020) SCC 5 (Supreme Court of Canada); *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* 2007 ICSID Case No ARB/07/26.
14. Van Loon (n 1) 12ff.
15. Peters and others (n 1) 12ff.

an approach based on tort liability. Considering the parent company liable for the subsidiaries' activity as a matter of company law, implies the so-called piercing of the corporate veil—that is, setting aside the traditional limitation of liability of legal entities. However, this runs against the whole fundament of economic activity. Therefore, the threshold for allowing to consider that a parent company, in its capacity as a shareholder, is liable for the subsidiary's activity, is very high.[16]

Gradually, a new approach is being developed, aiming at permitting to hold the parent company or the principal liable, not for the activity of the subsidiary or the supplier, but for its own breach of a duty to control that activity, or for its own contribution to their activity by adopting a company strategy, business plans or the like. Holding the parent company or the principal accountable for their passivity or for their independent activity does not infringe the principle of limitation of liability that is so important in the corporate structure and in commercial law. Courts are increasingly accepting the theoretical idea that a parent company or a principal may be held liable, as a matter of civil tort liability, for breach of duties of care or of diligence.[17] These duties may be based on the above-mentioned legislation,[18] on general tort law,[19] on a specific tort liability for parent companies[20] or for specific torts,[21] or even on international human rights law.[22]

4. The Need to Consider Conflict of Laws Rules

Holding the parent company or the principal liable for its own independent contribution to the subsidiaries' or the suppliers' activity assumes that the applicable tort law gives a basis to establish that the parent company or the principal were under a duty that they have breached, that the breach caused a damage, and that the damage be quantified.

The mechanisms described in section 3 above establish a duty for the parent company or the principal to take measures necessary to ascertain that the subsidiaries' or the suppliers' activity do not infringe labour law standards, human rights or the other standards covered by the respective instruments, as well as a duty to report and to give information if so requested.

---

16. ibid 8ff. In Norway, the importance of preserving the limitation of liability in company law was emphasised in the Norwegian Supreme Court's judgment in the Hempel case: Rt 2010 p 306. Recently, the Supreme Court affirmed the theoretical possibility of piercing the corporate veil, but did not examine its applicability in the specific case because it applied independent tort liability instead: see HR-2022-1148-A.
17. *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3; *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20; *Milieudefensie et al V Royal Dutch Shell PLC*, Hague District Court judgment of 26 May 2021 (ECLI:NL:RBDHA:2021:134).
18. The French Act has a provision creating tort liability: see Jault-Seseke (n 10).
19. The English Supreme Court, in the context of a decision on jurisdiction on connected claims, ascertained the theoretical possibility to hold a parent company liable for breach of a duty of care: *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3. Neither the German nor the Norwegian Acts contain an explicit basis for tort liability. Therefore, liability for breach of the duties contained in the Acts follows the general rules of tort law. See, for Germany, Jault-Seseke (n 10); Marc-Philippe Weller, Luca Kaller and Alix Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' (2016) 216 *Archiv für die civilistische Praxis* 387. For Norway, see the article by Margrethe B Christoffersen elsewhere in this special issue of Oslo Law Review.
20. Norwegian Company Act (Original title: LOV-1997-06-13-44 om aksjeselskaper (aksjeloven))) § 17-1 and the Norwegian Supreme Court decision in case HR-2022-1148-A (n 16).
21. See Norwegian Supreme Court judgment in the Hempel case (n 16).
22. Van Loon (n 1) 12ff.

Under some of these instruments, breach of these duties is explicitly sanctioned with civil liability,[23] whereas other instruments are silent, thus leaving the consequences of a breach to the applicable tort law.

In particular, the Norwegian Transparency Act is silent on the issue of liability, thus leaving the decision of whether there is a liability, and what its consequences are, to the general tort law (or to the specific tort law for shareholders enshrined in the Companies Act). As a matter of fact, under Norwegian tort law, liability is presumed, when a duty is breached.[24] This can give the impression that the Norwegian system provides an efficient legal framework to ensure that business activity with links to Ruritania is carried out in the respect of Norwegian standards.

The Norwegian Transparency Act may be praised for striking a satisfactory balance between, on the one hand, the burden it imposes on companies offering their products or services in Norway and, on the other hand, an effective protection of local interests in Ruritania; alternatively, the Norwegian Transparency Act may be criticised for not striking this balance. However, the substance of the Act will be relevant only if Norwegian law is applicable to a claim brought by the victims who suffered damage as a consequence of an activity that does not meet the required standards. It is accordingly essential to verify whether Norwegian law is applicable to that claim.

In an international setting, a plurality of laws are potentially applicable: in our example, Norwegian law and the law of Ruritania. The court will need to determine which of these two laws is applicable. Courts select the applicable law on the basis of so-called private international law rules, also known as conflict of laws rules or choice of law rules. Notwithstanding its name, private international law is a part of each country's own legal system. It is called 'international' not because it stems from international sources, but because it has international legal relationships as its object. That said, within the EU, large parts of the private international law have been codified in EU Regulations, and there are some international conventions giving uniform conflict rules in specific areas. These rules have a European or an international source. Furthermore, it is strongly desirable to harmonise the various domestic private international laws. However, this does not change the structure of private international law, which is part of each country's own legal system.

A court always applies its own private international law. Therefore, Norwegian courts will apply Norwegian private international law to determine whether the law applicable to the claim is Norwegian law or the law of Ruritania.

Below, I examine how Norwegian private international law determines which law is applicable to the issue of whether a Norwegian parent company or principal (or a parent company or a principal offering its goods or services in Norway) may be held liable in tort for having breached their duty of care or of diligence, and this breach has caused damages in Ruritania. As will be seen, under the current status of Norwegian private international law, Norwegian courts would have to apply the tort law of Ruritania to the claim. The Norwegian Transparency Act, therefore, is irrelevant to the Ruritanian victims of damages following its breach.

23. For France, see Jault-Seseke (n 10). See also Article 22 of the European Commission's proposal for a Directive on corporate sustainability due diligence (n 12), requiring Member States to lay down rules governing the civil liability of companies for damages arising due to their failure to comply with the due diligence process.
24. HR-2022-1148-A (n 16).

5. Choice of Law Under Norwegian Private International Law

Here, we will assume that Norwegian courts have jurisdiction; indeed, to put it briefly, Norwegian courts always have jurisdiction in respect of claims brought against a Norwegian company.[25] We turn therefore to investigating what Norwegian conflict rules say on the law applicable to liability for breach of duties of care or of diligence, when the damage occurs outside Norway.

In practice, the question is whether the victims in Ruritania have remedies, against the Norwegian parent company or principal, for the damages in Ruritania that followed the Norwegian company's breach of its duties. The victims can bring an action before the Norwegian courts. Yet, will they be able to invoke liability under Norwegian law? Or will they have to rely on the law of Ruritania?

5.1 Competence of Norwegian Courts is Not a Basis to Apply Norwegian Law

A first observation to be made is that Norwegian courts do not necessarily apply Norwegian law to the disputes that they resolve. Norwegian courts do, indeed, apply Norwegian private international law (conflict rules); but Norwegian conflict rules, as elaborated below, do not necessarily determine that Norwegian substantive law is applicable to the merits of a dispute.

It seems that sometimes the Norwegian legislator has considered that giving to Norwegian courts the jurisdiction on an issue is equivalent to rendering Norwegian law applicable to that issue: however, as the Norwegian Supreme Court observed, a rule according to which Norwegian courts are competent is not the same as a rule determining that those courts need to apply Norwegian law.[26] Jurisdiction does, indeed, automatically lead to applying Norwegian conflict rules; but the conflict rules may or may not designate Norwegian law as the law applicable to the substance of the dispute.

5.2 Objective Conflict Rules

Norwegian private international is mainly not codified, but the Ministry of Justice is working on a statute on choice of law for contractual and non-contractual obligations.[27] As for EU private international law, this is not formally applicable in Norway, because Norway is not a EU member and private international law is excluded from the scope of the EEA Agreement. However, EU private international law is given significant consideration not only

25. This follows from the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3) which is applicable whenever an international dispute is brought before a party in Norway (with the exception of the rules on exclusive forum, which are not relevant here). A controversial decision from the Supreme Court of Norway (Rt 2012 p 1951), according to which the Lugano Convention does not always apply when the claimant does not belong to a Lugano country, has lost its relevance after a decision by the Court of Justice of the European Union (Case C-175/15, *Taser International*, judgment of 17 March 2016 (ECLI:EU:C:2016:176)) on the parallel provision of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1. CJEU decisions have to be taken into consideration when applying the Lugano Convention: see, for references, Giuditta Cordero-Moss, *Internasjonal privatrett* (2nd ed, Universitetsforlaget 2021) section 7.2.

26. HR-2018-869-A (Supreme Court of Norway) paras 96 and 102. For more references, see Cordero-Moss (n 25) section 16.11.

27. The work is based on a draft, written by myself, which was sent to public consultation in 2018: see Justis- og beredskapsdepartementet, *Høring – enpersonsutredning om formuerettslige lovvalgsregler* (2018) <www.regjeringen.no/no/dokumenter/horing---enpersonsutredning-om-formuerettslige-lovvalgsregler/id2611666/>. For comments on the responses to the public consultation, see Giuditta Cordero-Moss, 'Norsk arbeid med en lovvalgslov på formuerettens område' in Torsten Iversen, Susanne Karstoft and Lars Henrik Gam Madsen (eds), *Festskrift til Bent Iversen* (DJØF Forlag 2019) 373-409.

by the Norwegian legislator[28] and by legal doctrine,[29] but also by the Norwegian Supreme Court.[30] Basically, the traditional discretionary approach[31] to choosing the applicable law was abandoned more than a decade ago, and the objective method was embraced. The Norwegian Supreme Court consistently makes explicit reference to the conflict rules of the EU as a basis for Norwegian objective conflict rules.[32]

The objective method of private international law is based on conflict rules which localise the claim in a certain country. It will be the law of that country that is applicable to that claim. The localisation of the claim is based on so-called connecting factors. Connecting factors are elements of the claim that are deemed to be particularly significant for that kind of legal relationship. Localising the claim in the country where that significant element is located, permits to apply the law of the country that is deemed to be most closely connected with that type of claim.

The main difference between the objective and the traditional discretionary method is that, in the objective approach, the connecting factor applies to categories of claim, and not to a specific claim. Therefore, it is objective and general, instead of being discretionary and based on the circumstances of a specific case.

Often, both the objective and the discretionary method end up determining the same applicable law.[33] This can be seen as a confirmation that the objective connecting factor is capable of identifying the country with the closest connection. It can also be seen as a confirmation that the discretionary method does not lead to arbitrary results. However, the objective method is to be preferred because it is more predictable. It permits to generalise what is typical for a certain category of claim (claims relating to torts, to contracts, to property, etc), rather than considering what is specific in a certain case (the nationality of the parties, the language that they speak, the size of the damage, etc). This gives, in turn, objective and predictable criteria that can be applied to all claims belonging to the same category. Predictability is important for the parties, who must be in a position to evaluate their legal position before deciding to bring an action to court. If the applicable law is unknown until the court has exercised its discretion to determine it, the parties are doomed to start a court proceeding without having been given the possibility to evaluate their respective legal position.

Examples of connecting factors are: for tort claims, the place where the damage occurred; for company law issues, the place where the company is registered; for contract law claims, the country chosen by the parties or, failing a choice, the habitual residence of the party making the characteristic performance; for property law claims, the place where the property is registered; etc.

---

28. The mentioned work on a statute on choice of law for contractual and non-contractual obligations is openly based on the EU Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6 and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. For further references, see Cordero-Moss (n 25) section 1.5.
29. Cordero-Moss (n 25) section 1.5.
30. For references, see n 32 below.
31. The traditional approach goes under the name 'individualising method', and is based on a case-by-case discretionary evaluation of the circumstances of the case. The method is also known as the 'Irma Mignon method', from the name of a Supreme Court decision which is (in my opinion wrongfully) deemed to have initiated the discretionary approach. For an analysis, see Cordero-Moss (n 25) section 2.4.2.
32. That EU conflict rules, where available, have to be considered as a basis to determine the applicable law was affirmed in every Supreme Court decision which dealt with choice of law in the past nearly two decades, see Rt 2006 p 1008; Rt 2009 p 1537; Rt 2011 p 531; Rt 2011 p 1034; HR-2016-1251-A; HR-2017-1297-A; HR-2018-869-A; HR-2018-1265-A; HR-2019-231-A; HR-2019-1929-A; HR-2019-2420-A; HR-2021-955-A.
33. Cordero-Moss (n 25) section 2.4.2.

5.3 Classification (Qualification) of the Claim as the First Step

As conflict rules are based on connecting factors that vary depending on which category the claim falls into, the first step in the selection of the applicable law is to classify the claim. Within private international law, this step is often called qualification, or also categorisation.[34] If a claim for reimbursement of damages following the parent company's or the principal's breach of their duty of care or of diligence is qualified as a claim of tort law, the connecting factor of the place of damage will apply; if it is qualified as a claim of company law, the connecting factor of the company registration will apply.

Qualification is carried out on the basis of the court's own legal categories.[35] However, if the conflict rules stem from European or international sources, the scope of application of the rule (and thus the qualification) has to be interpreted autonomously. Under Norwegian private international law, there are formally no European rules selecting the law applicable to torts or to companies which should be interpreted autonomously, but the Lugano Convention contains rules selecting the forum for claims in these areas. It is highly desirable that forum rules and choice of law rules are harmonised, at least as far as concerns the qualification as tort or as a company law matter. Article 22 of the Lugano Convention defines as company law claims those claims having 'as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs'. It is, therefore, advisable to adopt the same definition when qualification is made for the purpose of determining the applicable law.

This means that questions relating to the constitution of a company, arguably also those relating to the effects and scope of such constitution (thus including issues of piercing the corporate veil), would be qualified as issues of company law. This implies that the applicable law is chosen on the basis of the connecting factor for company law: ie the place in which the company is registered.[36] However, as was seen above, liability for breach of a duty of care or of diligence is not the result of piercing the corporate veil: the parent company is deemed liable for its own, independent activity or passivity. Thus, we are in the presence of an independent liability due to the parent company's or the principal's breach of a duty that lies upon them. This is not a liability founded on company law, but a liability in torts.

Even when such a liability is laid down in company law statute, as it is in the Norwegian Companies Act,[37] it remains a liability in tort. The Norwegian Companies Act contains a provision in a chapter titled 'Reimbursement, etc.'. Under the title 'Tort liability', according to this provision the company or third parties may claim that (among others) the shareholders reimburse damages that these willfully or by negligence have caused or contributed to cause. As was recently confirmed by the Norwegian Supreme Court, this is a provision creating tort liability.[38] That the provision is included in a statute regulating the constitution and organisation of companies does not influence the qualification: it is a claim for reimbursement of damages due to the willful or negligent activity or passivity of the shareholder—therefore, it is a tort claim.

---

34. The Norwegian Supreme Court has been qualifying claims since it embraced the objective method: see HR-2019-2420-A; HR-2018-1265-A (Vik). For more references, see Cordero-Moss (n 25) section 2.3.
35. Rt 1995 p 1415 (Supreme Court of Norway); HR-2019-2420-A (Supreme Court of Norway); Ot prp nr 15 (1963-64) 4.
36. This is a preferable connecting factor to the place in which the company has its main seat: see Cordero-Moss (n 25) section 12.5.
37. Norwegian Companies Act (n 20) § 17-1.
38. HR-2022-1148-A (n 16).

If this provision is applicable, its combination with the Transparency Act is a sufficient basis for liability, as negligence is presumed when a duty (such as those laid down in the Transparency Act) has been breached.[39] However, as the next section shows, the provision is not applicable if the damage occurred outside of Norway (in Ruritania). This is because the connecting factor for tort law is the place where the damage occurred. Thus, Norwegian courts would apply Norwegian conflict rules that in turn determine that the torts law of Ruritania is applicable.

5.4 Place of Damage as the Connecting Factor for Torts

As seen in section 5.2, EU conflict rules are deemed applicable by the Norwegian Supreme Court when there is no clear Norwegian rule of private international law. In the fields of torts, Norwegian case law has established a clear conflict rule: questions of tort liability are subject to the law of the place where the damage occurred. This is established in a long string of Supreme Court decisions.[40]

In the situations examined here, the place of the event that gave rise to the damage and the place where the damage occurred are not the same. The event is the parent company's or the principal's activity or passivity, that normally is carried out in Norway or at the place in which the parent company or the principal have their main activity. The damage occurs in Ruritania. In these situations, it is the place of damage that is relevant: Ruritania.[41] This connecting factor coincides with the connecting factor laid down in EU law.[42]

The above shows that, notwithstanding the duties established by the Norwegian Transparency Act and notwithstanding the contributory tort liability established by the Companies Act or principles on contributory liability in the general tort law, Norwegian parent companies or Norwegian principals would not be deemed liable by Norwegian courts on the basis of these sources. Their liability would be determined under the laws of Ruritania. If Ruritanian law does not have a basis for the tort liability of the parent company or the principal as a consequence of their breach of Norwegian duties, the victims of these breaches do not have satisfactory remedies—even though they bring their claims to Norwegian courts.

Accordingly, in the following sections, I examine possible ways to ensure the applicability of Norwegian law.

5.5 The Transparency Act as Overriding Mandatory Rule

A way to ensure applicability of the duties laid down in the Transparency Act is to assume that its provisions are so-called overriding mandatory rules. These are rules that are so important that they are applied by courts irrespective of which law is applicable to the claim.

The possibility to apply certainly rules directly and irrespective of the applicable law has long been recognised as a general feature of private international law.[43] It is codified in EU law, and the Norwegian Supreme Court,[44] as well as Norwegian literature,[45] consider the EU legal framework to be applicable also here.

---

39. ibid.
40. The first decision is the already mentioned Irma Mignon decision, Rt 1923 II p 58 that was followed by consistent decisions. Among the most recent decisions from the Supreme Court are Rt 2009 p 1537, Rt 2011 p 531 and HR-2019-231-A (Genfoot).
41. Rt 2009 p 1537, making reference to EU law, which in turn clearly identifies the place of damage and excludes the place of the event giving rise to the damage: see Rome II (n 28) preamble para 16.
42. Rome II (n 28) Article 4.
43. Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (Berlin 1849) Band VIII.
44. Rt 2009 p 1537 and HR-2016-1251-A.
45. Cordero-Moss (n 25) section 4.2.1.

This notwithstanding, a court has to be restrictive in applying overriding mandatory rules. Application of such rules is an exception from the applicable law, and considerations of predictability necessitate reducing exceptions to the extent possible. Therefore, it is mainly rules protecting the public interest that can override the applicable law:[46] when the interest that they protect is deemed to be more important than the parties' interest in predictability, they can be applied directly, notwithstanding that the claim otherwise is subject to a different law. It is specific provisions that are directly applicable; the rest of the claim is still subject to the applicable law.

It seems justified to assume that the duties laid down in the Transparency Act are overriding. Additionally, Article 22 of the draft EU Directive on Corporate Sustainability Due Diligence requires Member States to ensure that the transposition into national law of the Directive's provisions on civil liability for breach of the Directive's obligations is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.

That the duties laid down in the Transparency Act are overriding means that a Norwegian parent company or a principal cannot avoid them by invoking a different law—for example, a law that they may have chosen to regulate any internal agreements on corporate organisation, or to govern the outsourcing or supply agreement. However, this does not also imply the applicability of Norwegian tort law.

The mechanism of overriding mandatory rules cannot be invoked to render a whole area of law applicable. If the Transparency Act had contained, along the lines of Article 22 of the proposed EU Directive, a provision creating liability for breach of the duties stipulated by the Act, that provision might have been deemed to be overriding. As long as liability is subject to the general tort law, however, the Transparency Act will restrict its overriding effect to its provisions. The (rest of the) claim will continue being subject to the tort law of Ruritania.

If it is desirable to render Norwegian tort law applicable in its entirety, therefore, the proper way is not to apply the mechanism of overriding mandatory rules in a manner that conflicts with the framework for this mechanism. The proper way is to apply a connecting factor that designates as applicable the tort law of the place of the event giving rise to the damage. This, however, requires a change to the current conflict rule—a change that is canvassed in section 6 below.

5.6 A Presumption of Equivalence?

In recent international case law, it has been possible to see the court applying its own law (or a third law) to the question of tort liability, notwithstanding that the applicable tort law was the law of the place of damage. Would this be a viable avenue for Norwegian courts?

This approach can be observed in English[47] and in Dutch[48] case law. The decision of the Dutch court determined that the claim was subject to the law of Nigeria, and applied this law in light of English law. The application of English law was justified because Nigerian law belongs to the common law family, and thus could be assumed to correspond to the same principles upon which English law is based. While the reasoning may suffer of an oversimplification, it is undeniable that a system of common law has strong ties to English law, which is the law from which the common law systems developed.

---

46. However, it is not excluded that private law rules can be deemed to be overriding: ibid section 4.2.2.
47. *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3; *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20.
48. *Akpan et al v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD* [2015] Court of Appeal, The Hague.

This reasoning may be used to integrate or interpret the local applicable law in light of a law within the same legal family, particularly the law from which the legal family developed, and which until recently had the Privy Council as the highest court. However, it is doubtful that this reasoning could justify applying Norwegian law instead of the law of Ruritania, as long as Norwegian law cannot be deemed the progenitor of the law of Ruritania.

The decision of the English court is based on a rule of English procedural law, according to which English courts apply foreign law only to the extent that it is sufficiently proven by the parties. Failing sufficient evidence of the content of foreign law, the courts operate on the presumption that foreign law is equivalent to English law. Hence, they apply English law on the assumption that it has the same content as the applicable law.

This reasoning has some correspondence to a provision in the Norwegian Disputes Act,[49] according to which Norwegian courts apply Norwegian law, if it is impossible to ascertain the content of the applicable law. The main difference to English law is that it is up to the court to ascertain the content of the applicable law, as opposed to the parties having to prove it. Furthermore, the Norwegian provision openly directs to apply Norwegian law, rather than imposing a fiction of equivalence of the applicable law with the law of the court. This provision is sporadically used;[50] its use, however, assumes that efforts have been made to ascertain the content of the applicable law, with no avail. If the law of Ruritania can be ascertained, and it does not give a basis for tort liability, this provision does not permit to apply Norwegian law instead.[51]

In conclusion, it does not seem that a presumption of equivalence could make Norwegian tort law applicable; and impossibility to ascertain the content of the applicable law is a high threshold.

6. Recommendation

The above presentation demonstrates that the current status of Norwegian private international law does not ensure that Norwegian courts apply Norwegian tort law to damages in Ruritania following breach of duties established in the Transparency Act. To give the victims of these breaches effective remedies, it is accordingly necessary to introduce a new connecting factor for torts that occurred within the scope of application of the Transparency Act.

The new conflict rule could provide that, for tort liability in this area, the victims can invoke the law at the place where the event giving rise to the damage occurred (ie, the breach of duties of diligence, Norway). This connecting factor would be available to the victims as an alternative to the current connecting factor of the place of damage (Ruritania). This additional connecting factor would give the victims the possibility to choose the law that gives them the best protection. The possibility to choose Norwegian law would give the Transparency Act effective remedies; and the possibility to choose the law of Ruritania would comply with the general expectations within private international law.

---

49. Norwegian Disputes Act (Original title: LOV-2005-06-17-90 om mekling og rettergang i sivile tvister (tvisteloven)) § 11-3.
50. Rt 2009 p 537. For criticism, see Torstein Frantzen, 'Anvendelse av utenlandsk rett i norske domstoler' (2010) *Lov og Rett* 371.
51. In an older decision (Rt 1992 p 796) the Supreme Court had to apply the laws of New York. Without any further explanation, it affirmed that New York laws were not different from Norwegian law, and proceeded to develop an argumentation without reference to any of these laws. This quite surprising reasoning, however, was not the result of a presumption of equivalence; it was rather presented as an observation of facts. For further comments, see Cordero-Moss (n 25) section 3.8.2.b.

Generally, it is not advisable to have alternative connecting factors for determining the applicable law. As noted above, predictability is one of the most important interests in private international law, and alternative connecting factors create uncertainty as to which law is applicable. Therefore, they should be avoided—as opposed to connecting factors for the competence of courts, for which considerations of efficiency prevail.[52] The desire to protect the victim led EU law, in the abovementioned Regulation Rome II, to designate the law of the place where damage occurred as applicable as the general conflict rule for torts. The rationale is that the victim has a legitimate expectation to be protected by the legal system in which it is located. The party who caused the damage may also have an expectation to be held liable in accordance with the legal system in which it carried out its activity; however, having to balance these two opposed interests, desire to protect the victim led to privileging its interests, and thus prioritising the rule on place of damage.[53]

There may be a discrepancy between the protection afforded in the place of the event and that afforded in the place of the damage, but, generally, this is not deemed to represent a considerable detriment, and the interest in predictability is therefore given precedence. However, in some areas there may be interests that are more important than predictability. In the field of pollution, both Norwegian law[54] and EU law[55] give the victims the choice between invoking the law of the place of the event giving rise to the damage (for example, Norwegian law if the pollution is due to an oil spill in Norwegian waters), and the law of the place where the damage occurred (for example, the English law if the spill reached English waters and caused damage there). The area of CSR seems to be another area in which the victims' interests may be deemed to override the interest in predictability.

Therefore, introducing an alternative connecting factor for the benefit of the victims of damage following breach of CSR duties may be an appropriate way of ensuring that the duties contained in the Transparency Act are accompanied by effective remedies. A similar recommendation has been suggested, for EU law, also by the Group Européen de Droit International Privé (GEDIP),[56] a group of academics studying the interactions of private international law and European law, and actively engaged in the EU's legislative process.

7. Conclusion

This article is not concerned with the substance of Norwegian legislation on transparency; it is about the applicability of Norwegian law to the consequences of a breach of the Transparency Act. A key finding is that Norwegian private international law as it currently stands, does not give Norwegian courts a basis to apply Norwegian tort law to breaches of the duties laid down in the Transparency Act.

The Transparency Act is probably directly applicable and overrides any conflicting rules in the applicable law. This means that the duties imposed in the Transparency Act are over-

52. The Lugano Convention (n 25) gives the claimant the possibility to choose between the two places. Considerations of efficiency justify the possibility to have alternative fora, whereas reasons of predictability require only one applicable law – unless important interests justify a different approach.
53. See Rome II (n 28) para 16 of the Preamble.
54. Norwegian Pollution Act (Original title: LOV-1981-03-13-6 1981 om vern mot forurensninger og om avfall (forurensningsloven)) § 54.
55. Rome II (n 28) Article 7.
56. GEDIP/EGPIL (n 12). The recommendation was updated in 2022 to reflect the European Commission's proposal for a Directive on corporate sustainability due diligence (n 12). A similar recommendation is made by Peters and others (n 1) 26ff.

riding mandatory rules and will be applied by Norwegian courts. However, the Transparency Act does not contain a rule on civil liability as a consequence of breaching these duties. It is under Norwegian tort law that breach of duties may be presumed to be a basis for tort liability.

The conflict rule that Norwegian courts have to apply to select the law applicable to tort claims, however, does not designate Norwegian law as the law applicable to torts, if the damage occurs outside Norway. It designates the law of the place of damage. Hence, in our example, Norwegian courts would apply the law of Ruritania to the issue of liability as a consequence of breach of the duties laid down in the Transparency Act. This may or may not be favourable to the victims who suffered damages as a consequence of such breaches—depending on the content of tort law in Ruritania. To ensure the effectiveness of the Transparency Act, however, it is advisable that the consequences that Norwegian law attaches to breaches are applicable also when the damage occurs outside Norway.

Therefore, I recommend the introduction of a special conflict rule for selecting the law applicable to torts liability based on such breaches. Following the example of a conflict rule already existing in Norwegian law and in EU law for liability relating to environmental damage, I recommend here to give the victim the possibility to choose between the law of the place of damage (Ruritania) and the law of the place where the event which gave rise to the damage took place (Norway). This recommendation corresponds to a recommendation made for EU law.