Jurisdiction and Choice of Law for Pure Economic Loss


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1 Introduction

1.1 The Problem

The purpose of this thesis is to examine how the rules governing jurisdiction and choice of law in tort are applied to pure economic loss under Norwegian law.

Already 400 years B.C. Aristotle\(^1\) noted that legal proceedings should be engineered to be both fair and expedient. These two objectives are often at odds with each other. However, both objectives speak to a legal venue closely connected to the circumstances of the case. The rules of private international law are attempted harmonised and made predictable in Europe. This is to ensure that cases may be settled fairly and swiftly in the courts and by the law best suited to achieve this.

The conflict of law rules concerning tort have relied on the place of damage as a tool to provide jurisdiction and choice of law rules that secure these objectives. The place of damage is usually the location of most of the factual circumstances. To appoint choice of law and attribute jurisdiction to this location will for ordinary damage often provide a base for expedient and fair proceedings.

However, the non-physical nature of pure economic loss paired with these rules results in jurisdictions and choices of law that are not connected to the other circumstances of the case. In effect, the objectives are not achieved if the rules are applied in the same manner to this kind of loss.

For jurisdiction in general, the main principle is that the claimant may sue at the legal venue of the defendant’s domicile. This is thought to provide a fair balance between the claimant and the defendant. The principle prevents lawsuits in jurisdictions where the defendant has little opportunity to defend himself. However, under tort an alternative to that rule is to sue at the place of damage. It may be more convenient for the party that suffers a loss to use legal remedies in the jurisdiction where the loss occurred. Pursuing the alleged tortfeasor in the jurisdiction of his domicile can be less convenient. This is not considered unfair on the defendant due to his opportunity to foresee the places where his actions may result in damage.

Pure economic loss is a financial loss that is not consequential upon any physical damage to property or person. It is intangible in nature and can be difficult to locate. As a result, it can be

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\(^1\) Aristotle (2012) *The Art of Rhetoric*
much harder to foresee where such loss may occur. As an example, the claimant’s loss may materialise in a bank account. It is not uncommon for companies to have accounts in numerous jurisdictions. For the defendant, it may be difficult to predict where his actions may cause such loss. The principle of the place of damage applied to pure economic loss could designate a jurisdiction that has few or no other factors connecting it to the case. To attribute jurisdiction to where the pure economic loss occurs could therefore skew the balanced interests of the claimant and the defendant.

The discrepancy between the objectives of the jurisdiction rules and their application to pure economic loss warrants a closer examination. How are the rules construed when applied to pure economic loss? Are they interpreted differently to avoid jurisdictions without any other connections to the case?

Contrary to jurisdiction, for choice of law there can only be one applicable law and no alternatives. The claimant can only consider the validity of his claim if the rule is clear-cut and predictable. Choice of law in tort is decided by the rule of *lex loci delicti or damni* – where the damage occurred. The incidental locations of pure economic loss leave the application of that principle unsuitable. This raises questions of how choice of law is and should be applied to pure economic loss. Are the exceptions to the main principle, i.e. the common domicile rule or the closest affiliation rule better suited? This would entail that a separate rule applies to pure economic loss. Or, are these cases decided on the merits of the facts, without predictable outcomes?
1.2 Pure Economic Loss

This section aims to describe what typical pure economic loss is and some of the criteria that must be met in order for the claimant to be able to successfully claim compensation. Subsequently, the main challenges of locating pure economic loss in order to apply the place of damage rule are addressed. Finally, the intersection of the properties of pure economic loss and the objectives behind the place of damage rule are briefly considered.

1.2.1 What is Pure Economic Loss

Most losses incurred in tort are per definition economic in nature. However, a distinction is made for losses that are purely economic. Pure economic loss is a term reserved for “financial loss which is not consequential upon either personal injury or property damage…” There is no preceding damage to a physical object or person. The only loss suffered is an economic one. The difference is marked by the use of pure to separate this type of loss from ordinary economic loss in tort.

Ordinary economic loss has been the most common loss in tort, but pure economic loss has eventually become more relevant. The former dominance of ordinary economic loss has resulted in tort law rules tailored to the traditional types of damage and loss. As a result, tort rules have not considered the particular properties of pure economic loss.

Pure economic loss occurs more frequently today and is increasingly international. The development of modern society has advanced with an ever increasing flow of information. The information age facilitates situations where pure economic loss may more frequently occur. An example is where a person relies on information produced by negligent misrepresentation and incurs a pure economic loss. The services were offered by an investment bank acting as a financial intermediary in another country. This scenario is more common today than it was a century ago.

An international dimension is added to the relationship when the parties and the loss are situated in different countries. This is when jurisdiction and choice of law issues arise for pure economic loss.

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2 Mulheron (2016) p.170
3 Thorson (2010) p. 17
4 Thorson (2010) p. 17
The following account of pure economic loss under Norwegian tort law is done with situations as the one above, in mind.

There are different types of pure economic loss. They can be categorised by the how they occur. The following will focus on two typical categories of actions that may cause such loss and is not exhaustive. One category is loss caused by misrepresentation, which is negligently provided information. There is a legal basis for liability for faulty information outside of contract. An illustration of how this may play out under English law, is in Chaudhry v Prabhakar where the latter was held liable after failing to find a used car for his friend. He was tasked with finding a car that had not been in a previous collision. The car he found was later discovered to be unroadworthy due to a previous collision and his friend sued him for the cost of replacing the car. This type of situation would probably not incur liability under Norwegian law. The private sphere falls outside of liability for pure economic loss when only regular negligence has been shown.

A second category is the negligent provision of services. Liability can be imposed on professionals for negligent service, often towards a third party with whom he does not have contractual relationship. An example is when an institution makes a statement or a prospectus which is later relied upon by a third party. Due to errors in the prospectus, a pure economic loss is incurred by the third party.

1.2.2 Pure Economic Loss under Norwegian Law

Compensation for pure economic loss was previously found to be somewhat uncertain. However, this uncertainty was later reduced by the Norwegian Damages Act of 1969 no. 26 through the amendment of Act of 1985 no. 81 adding chapter 4 titled Compensation for Damage to Property and Other Financial Loss. There is also jurisprudence providing examples where a party was held liable for pure economic loss outside of contract. In one Supreme Court judgement dating back to 1955 – (Tippedom) - a commissioner was held liable after negligently causing the claimant to miss a lottery prize. A more recent example is a judgement of 2006 (Lillestrøm), where a collision between trains resulted in an evacuation because of fear of explosion. The carrier, NSB, was found strictly liable and the pure economic losses following the evacuation were found sufficiently proximate to warrant compensation.

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5 1989 1 WLR 29 (CA)
6 Hagstrøm (1989) p. 200
7 The Damages Act 1969 no. 26
8 The Amendment Act of 1985 no. 81
9 Rt. 1955 p. 1132 (Tippedom)
10 Rt. 2006 p. 690 (Lillestrøm)
Regarding the criteria for compensation, Thorson maintains that by analysing the line of argument in favour of recovery for pure economic loss, the overarching problem is whether there are legitimate expectations that should be protected. This may be divided into two questions: whether a duty of care is owed to the claimant and what such a duty of care entails.\(^\text{11}\) To examine these problems he analyses factual circumstances that may support the argument of protection for such loss. Some of the more important factors are the role of the tortfeasor and the interests he pursues, what position the claimant is in and the non-contractual relationship between the parties. Also, the breach of trade standards and codes of ethics is relevant to the duty of care assessment. This is supported by jurisprudence and evident in cases concerning violation of integrity.\(^\text{12}\)

On the basis of liability for misrepresentation Hagstrøm notes that pure economic loss is not differentiated from damage to property or persons under tort law. The threshold for imposing liability is negligence under Norwegian law. He argues that a threshold of qualified negligence has not been properly considered because the problems of pure economic loss have only been addressed at an overarching level. Regular negligence, he maintains, cannot incur liability for misrepresentation through mainstream media, in a private sphere or in written material later distributed to an indefinite circle. The objections to require only ordinary negligence have been addressed in contract law where liability towards a third party is considered to require gross negligence.\(^\text{13}\)

Another factor in determining liability is the communication between the parties. If the factual circumstances are similar to a contractual relationship, the threshold of imposing a duty of care is lower. This can be seen as the requirement in tort law of a sufficiently proximate correlation between act and loss. Under English law this consideration is addressed in the requirement of predictability for the tortfeasor. He should have realised that such a loss may be inflicted on the claimant due to his negligence.\(^\text{14}\)

Foreseeability is central to recovery of pure economic loss. A requirement of reasonable predictability helps prevent what is often referred to as \textit{opening the flood gates}. An action’s consequences should not open the tortfeasor up to unlimited liability to an indefinite number of claimants. For liability to be imposed for pure economic loss there is a strong argument in favour of requiring the possible claimants to be of a limited group. Hagstrøm also argues for

\(^{11}\) Thorson (2010) p. 65
\(^{13}\) Hagstrøm (1989) p. 196-220
\(^{14}\) Mulheron (2016) p. 171, 174
limiting liability towards a defined group.\textsuperscript{15} When a consultant provides information that a third party may rely on, it should be foreseeable to the consultant what group of persons could rely on that information. Anyone that are not foreseeable to the consultant, is arguably too remote for his interests to be protected. For example, if a prospectus is made available to third parties upon request only, and with a promise of confidentiality, that would more easily make a defined group to the consultant, enabling him to predict liability if the prospectus has incorrect information. To impose a duty of care to those requesting the prospectus would seems a fairer distribution of risk than if the consultant was liable to anyone who relied on an openly available document. The legal implications of disclaimers in these situations will not be addressed here.

Two examples are set out in the following. They illustrate situations in which pure economic loss may occur. One situation may be where an investment bank enters into contract with company A to make a prospectus to attract investors to invest in company A. Incorrect data has been negligently incorporated which makes the prospectus more appealing than it would otherwise have been. Had the prospectus had the correct data, the investors would have invested in another company that would have yielded higher profits. Because of this mistake, the investors invest in company A and consequently suffers a pure economic loss. The parties are all situated in different countries.

Second, an advisor in a consulting firm, situated in one country, gives information to a person while he has a stopover abroad when on a business trip. This information is received by that person whilst he is also on a business trip outside of the country where his company is situated. He acts on that information during his trip. The information was incorrect and his company later suffers a loss. There is no contractual relationship between the two; the consultant is acting in the interests of his client.

In both examples there are no locations with physical damage and there is no contractual relationship between the parties. The two situations have in common that the place of damage can be difficult to locate and have little to do with the other circumstances of the case.

1.2.3 The Problems of Pure Economic Loss

Traditional economic loss is often an indirect and related loss. Indirect loss falls outside of the scope of the place of damage rule. Pure economic loss cannot be disqualified in the same manner because the loss is a direct one. For pure economic loss, the rule of the place of dam-

\textsuperscript{15} Hagstrøm (1989) 196-220
age means the place of pure economic loss. Which in turn brings the question of where to locate pure economic loss.

The problem is how to define the place of damage for pure economic loss. The localisation of pure economic loss poses several challenges. The loss is non-material and can often be proved only mathematically. In example one above, the damage inflicted upon C is not material and may only “appear” in the absence of a higher valuation of the position he took in company A.

Furthermore, financial instruments can be very complex. Pure economic loss that stem from the use of such instruments can be challenging to locate. As Lehmann points out, by application of finance law one could try to dissect the transaction in order to allocate which asset that has sustained the loss. This would be possible because shares, bonds and money exist by the virtue of law only, and are not physical objects. In order to locate them, one must apply legal methods.\footnote{Lehmann (2011)p. 532} To this there are disadvantages. It is not always possible to separate the affected asset from the investor’s other assets. One cannot always pinpoint to which bank account the loss has materialised in. Sometimes, it is the wealth of the investor as a whole that is affected. However, to locate the loss it is necessary to find the affected part of the assets, because the location of the wealth of the investor is not where the loss occurred, c.f. subchapter 3.2 below.

One may start with the simplest of instruments – money. Money has gone from being coins and banknotes to dematerialise and become “electronically-held units of value”\footnote{Hudson (2013) p. 50}. Aristotle identified three principal uses for money; namely a means of exchange, a store of value, and a measure of value.\footnote{Aristotle, Politics, Book 1 Ch. 9} For the purposes of this thesis, money as a measure of value for loss and remedy is the most important. The current intangibility of money impedes the localisation that would have been more simple when money was still something physical. One can argue that money is located in the account in question and the law governing the bank. But what if the account is in a branch of a bank in another country? Or if the transfer of money is done through several accounts, which account should the money or loss be localised to? This shows that the localisation of book money does not easily give a location to be used for the place of damage rule.

Present-day money, together with shares, derivatives and obligations are intangible. There cannot be a geographical criterion to determine their location.\footnote{Lehmann (2011) p. 533} As Lehmann argues, a location could be attached to the place of register, but this is complicated when multiple interme-
diaries are used.\textsuperscript{20} The Securities Convention\textsuperscript{21} has avoided this problem by refraining from addressing the location problem. The reluctance to acknowledge a location under the Convention stems from the realisation that such location would impose insurmountable problems, rendering the Convention ineffective\textsuperscript{22}. Instead, the Convention states that the applicable law is the one stated in the agreement for the account in question.\textsuperscript{23}

The problems discussed above show that there is no easy way to locate pure economic loss and that applying the rule of place of damage to this loss is often impractical. Another observation is that the considerations behind the place of damage as a rule, are arguably not as important for pure economic loss. Where damage to a physical object occurs there is a stronger connection to the legal venue where the damage occurred compared to pure economic loss. There are benefits to a legal venue close to where the substantial parts of the evidence are located.

Also, the place of damage to physical objects is more foreseeable. The potential physical consequences of actions can be examined in advance. This allows the defendant to predict where his actions may have consequences. However, for pure economic loss, there is not always a connection between the loss and the place it is located.

The argument that the place of damage strikes a fair balance between the interests of the claimant and the defendant does not apply to the same extent to pure economic loss. It is not foreseeable to the defendant where the loss materialises. In addition, the proximity between the legal venue and the place of damage is mainly of importance for the collection of evidence.\textsuperscript{24} Where there is no physical damage, there will not be any collection of physical evidence at the location of the loss. As a result, the rule of the place of damage is not well suited to pure economic loss. This thesis looks to examine whether the rules are construed differently before they are applied to pure economic loss or whether exception rules are applied, thus creating different rules for pure economic loss.

\begin{thebibliography}{99}
\bibitem{20} Lehmann (2011) p. 534
\bibitem{21} The Hague Securities Convention
\bibitem{22} Goode (2005) p. 66-67
\bibitem{23} The Hague Securities Convention art. 4 (1)
\bibitem{24} See case law in chapter 3.2
\end{thebibliography}
1.3 Distinguishing Between Pure Economic Loss in Tort and Contractual Damages

The conflict of law rules are distinct to each area of the law. According to the methodology of private international law, classification is a prerequisite in order to apply the correct rules governing jurisdiction and choice of law. Gaarder’s definition of classification is: “to subject the fact of the matter to a certain rule of law or a certain area of law”.²⁵

Economic loss in contract and tort are classified under two different legal regimes. Nevertheless, pure economic loss in tort may occur in factual circumstances that are similar to, but do not qualify as, a contractual relationship. One example is *culpa in contrahendo*. Where the conflict of law rules for tort do not take into account the peculiarities of pure economic loss, there may be valuable guidance found in the conflict of law rules of contract law. Pure economic loss is the norm in contract law and there is an argument to be made that the conflict rules of contract law may provide a useful analogy to pure economic loss in tort.

Most often, distinguishing between loss in tort and contract cause little or no problem. Although both types of loss need a legal basis and an adequate proximity between loss and action, their legal basis sets them apart. In tort, the legal basis is with the exceptions of strict liability, negligence-based under Norwegian law. The parties involved have no prior connection and are usually brought together by an unfortunate event where one party sustain a damage due to the actions of the other. In contract, the legal basis is found in the contractual relationship, as a remedy for breach of contract.

For certain types of loss, the boundary between tort and contract becomes blurred. This can be illustrated by professional liability, where damage caused by the professional is sometimes considered to be outside of contract, governed by tort rules. This is particularly a problem when injury is caused to a third party, and the action performed is subject to a contractual obligation. Typically, this happens when the obligation to provide information is later relied upon by a third party.²⁶

Pure economic loss in tort is closely related to the liability of negligently providing wrongful information or services. As such, pure economic loss lies closer to the loss suffered in contract, than the traditional injuries to person or property in tort. This can arguably underpin an increased relevance of contractual conflict of law rules, because the considerations behind the

²⁵ Lundgaard (2000) p. 121
²⁶ Lødrup (2012) p. 56
rules have more in common with pure economic loss suffered in tort, than traditional tort losses.

Contractual damages are in part engineered to maintain pressure to fulfil the contractual obligations. In comparison, the considerations behind liability in tort are founded on public interest and the objective of repairing the damage sustained by the injured party. The different reasoning behind the two types of loss is an argument in favour of keeping the classification boundary and refraining from using an analogy from contract law.

In some situations that incur pure economic loss, the factual circumstances may qualify for making a direct claim against a third party. Under Norwegian law these instances may have a basis in contract or tort or both. It is outside the scope of this thesis to address the application of conflict of law rules to situations of direct claims against third parties. However, it should be noted that pursuing damages through contract can be a preferable alternative of legal basis for such claims.

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27 Hagstrøm (2013) p. 466
29 Hagstrøm (2011) p. 814, 840
30 Mulheron (2016) p. 172
1.4 Method and Sources

The problems that arise for pure economic loss are not directly addressed in Norwegian legislation or legal literature.

Private international law is inherently international despite each country having its own private international law. In order to properly examine the problems discussed in this thesis, an account and discussion of EU legislation and case law is required. The EU has recognised the need for harmonisation in its Member States’ conflict of law rules. By way of the Lugano Convention, Norway has joined in the quest for harmonisation of jurisdictional rules.

The Court of Justice of the European Union (hereinafter the ECJ) and its application of the Brussels I Regulations\(^\text{31}\) are dominant in interpreting the relevant provisions and its mirror provisions in the Lugano Convention.

The Norwegian Supreme Court\(^\text{32}\) has stated that EU case law bears weight in interpretation of Norwegian conflict of law rules, also when not directly binding. The solutions sought by the EU on choice of law are to be thoroughly considered when there are no clear-cut Norwegian rules in an area.\(^\text{33}\) The relevance of EU law is also partially based on the pronounced quest for European harmonisation and predictability in the area of private international law.

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\(^{31}\) EU Reg. 44/2001 (Brussels I), EU Reg. 1215/2012 (Brussels I recast)

\(^{32}\) Rt. 2009 p. 1537 (Bokhandler), Rt. 2011 p. 531 (Krigsforbryter) and HR-2017-1297-A

\(^{33}\) HR-2017-1297-A para. 71-75
1.5 Outline of Thesis

In chapter two the legal basis and scope of the main principles for the determining jurisdiction and choice of law in tort are examined. This lays the foundation for addressing the problems of application to pure economic loss. The Lugano Convention\textsuperscript{34} and the Norwegian Disputes Act\textsuperscript{35} govern choice of jurisdiction under Norwegian law. For choice of law, there is no statutory law that appoints the applicable law in tort. The current rule has been developed in judgements by the Norwegian Supreme Court.

The third chapter seeks to examine how the provisions accounted for in chapter two are applied to pure economic loss. The case law of the ECJ is discussed and compared to how the Norwegian courts have applied the equivalent rule. Further, the chapter seeks to clarify whether the provisions of the Disputes Act provide a different solution to pure economic loss for the cases that fall outside of the scope of the Lugano Convention. Finally, the question of whether the rules protect the objectives when applied to pure economic loss is attempted answered.

Chapter four accounts for how the choice of law rules are applied to pure economic loss and how these instances often deviate from the main rule of place of damage. In addition, the choice of law rules for contract are considered to see if the rules would better ensure predictability compares to applicable tort rules. Lastly, the expediency of the current law is treated to a de lege ferenda discussion.

\textsuperscript{34} The Lugano Convention (2007)

\textsuperscript{35} The Disputes Act (2005)
2 Main Principles

2.1 Introduction

This chapter will examine further the main principles of jurisdiction and choice of law in tort under Norwegian law. For both jurisdiction and choice of law the main rules are derived from the place of damage. Nevertheless, the place of damage is construed differently under the two sets of rules. The purpose of this account is to lay the groundwork for the application of the main principles to pure economic loss in the subsequent chapters.

The rules governing jurisdiction and choice of law are intended to provide the legal venue(s) and the choice of law best equipped to decide the matter fairly and expediently. These objectives are thought best achieved by harmonisation of the jurisdiction rules within Europe. The common rules on jurisdiction limit the number of possible venues. Harmonisation entails that a party cannot take advantage of different jurisdictional rules. He may not seek a legal venue in a country that has no connection to the case. In effect, this reduces the incentive to initiate a race for legal proceedings in a preferred jurisdiction. Harmonisation of choice of law rules would thereby help to avoid a race to choose an advantageous forum. Arguably of greater importance to choice of law, is the predictability of the appointed law. A party initiates legal proceedings and the chosen forum applies its choice of law rules. If these rules are clear-cut and predictable, the party may from the outset be certain of the law that governs his case. This enables him to predict the possible outcome(s) of his case under the applicable law. However, if the choice of law is determined on the merits of the facts without clear-cut criteria, he may not predict the law nor possible outcomes. In turn, this can prevent parties that should and would have achieved compensation to abstain from pursuing their interests. Also, the uncertainty may lead to litigation that a party would otherwise have refrained from initiating, because the rules could appoint a favourable law. As a result, unpredictable choice of law rules may increase uncertainty and by that produce unnecessary litigation and prevent some claimants from achieving a fair outcome.

In the following the main principle for jurisdiction in tort will be discussed under both the Lugano Convention\footnote{The Lugano Convention (2007)} and the Norwegian Disputes Act\footnote{The Disputes Act (2005)}. Under choice of law the main rule of lex loci delicti and the exception of the closest affiliation will be compared to the EU rules\footnote{Reg. (EC) no. 864/2007 (Rome II)}, in particular lex loci damni\footnote{Reg. (EC) no. 864/2007 (Rome II)}. 
2.2 Jurisdiction

2.2.1 The Legal Sources for Jurisdiction under Norwegian Law

Jurisdiction for matters relating to tort is under Norwegian law governed by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters of Lugano 2007 (hereinafter the Lugano Convention) and the Norwegian Disputes Act of 2005 (hereinafter the Disputes Act). The Convention and its 1988 predecessor\(^{40}\) are a parallels to the European Union’s 1968 Brussels Convention\(^{41}\) later replaced by the Brussels Regulation No. 44/2001 and subsequently the Brussels I recast Regulation no 1215/2012\(^{42}\).

As pointed out in literature\(^{43}\), the instruments should be viewed as a system when interpreting their parallel provisions\(^{44}\). This complies with the objective of providing a free flow of judgements in the European community. Due consideration shall be taken of the jurisprudence of the European Court of Justice and the national courts in their interpretation of the Brussels Convention provisions that are reproduced in the Lugano Convention. This follows from Protocol 2 Article 1\(^{45}\) of the Lugano Convention. Case law from the European Court of Justice’s interpretation of the Brussels Convention and the Brussels Regulation are thereby relevant for the interpretation by Norwegian courts of the Lugano Convention.

Further, this was followed by the Norwegian Supreme Court, which states in Rt. 2011 p. 897 that when the provisions are identical, the jurisprudence from the ECJ has great bearing in determining how the Lugano provisions are to be applied\(^{46}\).

2.2.2 The Scope of the Legal Sources and the Principal Rule of Jurisdiction

The Disputes Act section 1-2 limits the scope of the Act and gives primacy to public international law and agreements with foreign states. The Lugano Convention is one such multilat-
eral agreement. As a result, the Dispute Act does not apply to matters that fall within the scope of the Lugano Convention and the two do not overlap.

In Rt. 2012 p. 1951\(^\text{47}\) a majority of three justices stated that the Lugano Convention could not be construed to provide persons from a third country a right to sue under the provisions of the Convention. Whether or not there is such access was considered uncertain under the current international practise. Further, it was stated that current Norwegian law provides satisfying solutions of access to legal venue that are not in conflict with the Convention. To support this argument, the court referred to the provisions setting a high threshold for when a Norwegian company with ordinary legal venue in Norway cannot be sued at its seat, see 2.2.4 below.

The Lugano Convention\(^\text{48}\) governs in Article 1 the scope of the Convention, limiting in the first paragraph its scope to civil and commercial matters, excluding revenue, customs and administrative matters.

The principal jurisdiction rule is the legal venue at the domicile of the defendant. The legal basis for this rule is found in Article 2 of the Lugano Convention and section 4-4 of the Disputes Act. However, this rule does not preclude jurisdiction being attributed to alternative venues under other rules in the two instruments.

Article 3 of the Lugano Convention allows for exceptions or options to Article 2. Also of importance is that Article 23 of the Convention enables the parties to come to an agreement on a choice of jurisdiction, but only after the event has occurred. It shall not be possible to waive the right of jurisdiction before the tortious damage has occurred. This rule protects the claimant from agreeing to something before becoming fully aware of the consequences.

In Article 5 third paragraph there is a special rule for matters relating to torts, delict and quasi-delict. In the Norwegian wording of Article 5 no. 3 of the Convention, the term “outside of contract” is used as the equivalent of “tort, delict and quasi-delict”.

This is understood to contain all civil tort cases that fall outside of the definition of contract in Article 5 no. 1. It follows from the Kalfelis judgement\(^\text{49}\) that the term is an independent and autonomous term covering all cases for reparation of damages that are not covered under Article 5 no. 1. Being an autonomous term, it is irrelevant how these terms are construed under national law. The definition of the scope of Article 5 no. 3 thereby includes recourse claims

\(^{47}\) Rt. 2012 p. 1951 (Trico Subsea)
\(^{48}\) The Lugano Convention (2007)
\(^{49}\) EU C-189/87 para. 18
and direct action, even if national laws qualify these matters as contractual. As Cordero-Moss points out, the interpretation of what is considered outside of contract under Article 5 no. 3 also impacts the choice of law in that it is to be interpreted likewise\(^{50}\). The scope of what is outside of contract therefore needs no second examination under choice of law.

\subsection{2.2.3 The Place of Damage as the Basis for Jurisdiction}

The principle of the place of damage is the foundation for the special jurisdiction rules in tort in both the Lugano Convention Article 5 no. 3 and the Disputes Act section 4-5 (3). The two provisions are worded slightly differently. This begs the question of whether they are construed to give the same meaning.

The Lugano Convention Article 5 no. 3 allows for lawsuit to be brought “in the courts for the place where the harmful event occurred or may occur”. The phrasing of the provision is according to literature\(^{51}\) a codification of jurisprudence from the European Court of Justice previously providing the claimant of the option of suing where the effect occurred and not only the place where the act causing the damage took place. That was the case in the \textit{Bier} decision\(^{52}\) where the Court attributed jurisdiction in the Netherlands where the effect of pollution occurred, despite that the act causing damage took place in France. This provides the claimant with up to three different jurisdictions to bring a lawsuit in – where the alleged tortfeasor is domiciled, where the act happened and where the effect occurred. A more thorough analysis of the relevant ECJ case law is done in chapter 3.2 below.

Pursuant to section 4-5 (3) in the Dispute Act proper venue in matters outside of contract is the place where: “\textit{the damage occurred or where the effect occurred or could occur. If the effect has occurred in several places, the lawsuit can be established where the main effect of the damage has occurred}”\(^{53}\).

This wording begs the question of the meaning of “where the damage occurred”. It implies that it is the location of the act that caused the damage. If it was the place where the damage occurred, it would be superfluous due to “where the effect occurred or could occur” as Cordero-Moss\(^{54}\) also argues. According to the preparatory works\(^{55}\) of the Dispute Act\(^{56}\), sec-

\begin{footnotesize}
\begin{itemize}
\item \(^{50}\) Cordero-Moss 2013 p. 322
\item \(^{51}\) Cordero-Moss 2013 p. 323
\item \(^{52}\) EU C-21/76
\item \(^{53}\) The Norwegian Dispute Act sec. 4-5(3)
\item \(^{54}\) Cordero-Moss 2013 p. 323
\end{itemize}
\end{footnotesize}
tion 4-5 (3) is based on Article 5 no. 3 of the Lugano Convention and despite some differences in wording, it is to be interpreted to have the same scope in terms of possible jurisdictions. This is in favour of the above understanding of the phrase. Another argument supporting that conclusion is that the provision is similar to its predecessor in the preceding Disputes Act section 29 (1) which states that both the places of the action and the immediate consequences can provide basis for jurisdiction.

Section 4-5 (3) in fine also allows for damages to be sought where the “main effect” occurred. This is contrary to ECJ case law. In the Shevill case the claimant was given the choice of suing for all damages in the jurisdiction of the tortious action or pursue the separate injuries in their respective jurisdictions.

The ensuing question is the limitation of where the effect occurred. If any effect is sufficient to establish a jurisdiction to bring a lawsuit, this would completely remove predictability as the most derived of effects would provide a perhaps more favourable jurisdiction. This would probably incur chaos and total lack of predictability.

It has been established that it is the immediate effect the provisions appoint. If there are derived effects elsewhere, such as economic loss, they should not be considered relevant. The Norwegian Supreme Court has in Rt. 2011 p. 897 addressed the boundary between direct and derived effects. The legal basis was the old Lugano Convention of 1988, but its relevance is undiminished as the applicable provision was kept for the present convention. The judgement, which will be more closely examined in chapter 3, settles on a more stringent line compared to the current EU interpretation for the distinction between direct and indirect consequences. Also under the Disputes Act it is only the immediate effects that qualify. Section 29 of the former Disputes Act stated this explicitly. It is not believed that the legal situation has changed under the present Disputes Act.

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55 NOU 2001:32B Rett på sak p. 697
56 The Norwegian Dispute Act (2005)
57 The Lugano Convention (2007)
58 The Disputes Act (1915) sec. 29
59 C-68/93 (Shevill)
60 Rt. 2011 p. 897
61 The Disputes Act (1915) sec. 29 (1) i.f.
62 Torp (2017) note 135
2.2.4 Does Section 4-3 (1) Constitute an Ancillary Requirement to Section 4-5 (3)

Section 4-3 of the Dispute Act states that lawsuits with international implications can only be admitted if the matter has an adequate connection to Norway.

The provision is according to preparatory works\textsuperscript{63} considered a codification of the legal situation under the former Dispute Act\textsuperscript{64}. Case law under the former act may therefore provide guidance. According to Rt. 2015 p. 1040\textsuperscript{65} the provision has a dual function. With reference to the preparatory works\textsuperscript{66} and Rt. 2010 p. 1197\textsuperscript{67} the court states that the provision may preclude a case from being admitted despite jurisdiction rules providing a legal venue. Second, the provision may be a legal basis for jurisdiction in the absence of other Norwegian jurisdiction rules governing the matter. In Rt. 2010 p. 1197 the court notes that whether jurisdiction follows from other provisions could have an impact on the assessment under section 4-3 (1), but it is not decisive\textsuperscript{68}.

A question is whether this provision constitutes an ancillary requirement which can prevent jurisdiction in Norway despite the place of damage being in Norway. This requires an examination of the content of this \textit{forum non conveniens} rule under Norwegian law.

In Rt. 2015 p. 1040\textsuperscript{69} the court states that there is a high threshold for dismissing a case if there is legal basis for jurisdiction in cases concerning private law. An example where a case was dismissed is Rt. 1998 p. 1647\textsuperscript{70} where a Russian airplane crashed on Svalbard. The bereaved of the Russian passengers filed suit in Norway, where the only connection was the place of the accident. This was found to be insufficiently connected to Norway and dismissed, partly reasoned on the grounds that a Norwegian judgement would hardly be enforceable for anyone but the reassurance companies based in London and would not be recognised in Russia. Further, the need for the claimant to have their suit tried in the Norwegian courts was not obvious.

\textsuperscript{63} NOU 2001:32B p. 692
\textsuperscript{64} The Disputes Act (1915)
\textsuperscript{65} Rt. 2015 p. 1040 para. 35
\textsuperscript{66} NOU 2001:32B p. 693
\textsuperscript{67} Rt. 2010 p. 1197 para. 42
\textsuperscript{68} Rt. 2010 p. 1197 para. 42
\textsuperscript{69} Rt. 2015 p. 1040 para. 45
\textsuperscript{70} Rt. 1998 p. 1647 Svalbard
The specific circumstances of the Svalbard case suggest that the threshold to deny jurisdiction when Norway is the place of damage is high. This is corroborated by the preparatory works\textsuperscript{71} and it seems it was never the intention to open up to a \textit{forum non conveniens} rule like the one in countries governed by common law. However, the preparatory works\textsuperscript{72} also state that if the connection Norway is very weak and the case has a strong connection to another jurisdiction these factors may be decisive. In sum, section 4-3 (1) should not be regarded as an additional criterion to section 4-5 (3), but as a safety valve for the very few cases where the connection to Norway is so insignificant that despite being the place of damage, jurisdiction should not be attributed. Situations which entail both a weak connection and the place of damage are very difficult to imagine, except for the Svalbard decision, that in practice the provision does not hinder the result of application of section 4-5 (3).

\textsuperscript{71} NOU 2001:32B p. 693
\textsuperscript{72} NOU 2001:32B p. 692
2.3 Choice of Law

2.3.1 Introduction

Norway has no statutory law prescribing choice of law in tort.

Legal theory has steadfastly maintained that the rule of lex loci delicti governs choice of law in tort.\textsuperscript{73} However, older case law often based its reasoning on the rule of closest affiliation. The rule has developed from the Irma Mignon judgement of 1923\textsuperscript{74} despite it stating that lex loci delicti was the rule. This was a rule that often allowed the courts to apply Norwegian law and has been widely applied.\textsuperscript{75} The cases were decided by an assessment of the circumstances to determine which law the case was most closely connected to.

In literature, the present understanding of lex loci delicti has been narrowed down to the lex loci damni.\textsuperscript{76} This rule appoints the place where the immediate harmful effects occurred. That interpretation has been supported by more recent case law.\textsuperscript{77} The case law also refers to EU law and the objective of harmonisation. Under EU law the lex loci damni is the main rule with two exceptions. One is the common domicile and the other is for a manifestly closer connection.\textsuperscript{78}

The recent case law has\textsuperscript{79}, despite confirming the lex loci damni rule, mostly applied the rule of closest affiliation. The Court has considered the circumstances and for various reasons found the lex loci damni rule inadequate. As a result, there has been a wide exception to the rule under Norwegian law. This has prompted some\textsuperscript{80} to argue that the lex loci delicti rule is a point of departure, but that the rule of closest affiliation is also important when determining choice of law in tort.

A methodological problem is the casuistic approach taken in case law when deciding choice of law in tort. This is not conducive to producing general rules. Also, the primary purpose is not to develop the law, but to settle the dispute the court has before it. One should therefore be wary of adopting a rule which is tailored to a specific situation.

\textsuperscript{73} Lundgaard (2000) p. 265, Egge (1959) p. 8
\textsuperscript{74} Rt. 1923 II p. 58 (Irma Mignon)
\textsuperscript{75} Rt. 1957 s. 246 (Turbuss)
\textsuperscript{76} Cordero-Moss (2013) p. 327
\textsuperscript{77} Rt. 2009 p. 1537 (Bokhandler), Rt. 2011 p. 531 (Krigsforbryter)
\textsuperscript{78} EU Reg no. 864/2007 art. 4
\textsuperscript{79} Rt. 2009 p. 1537, Rt. 2011 p. 531, LB-2012-167075
\textsuperscript{80} Alvik (2005) p. 299
2.3.2 The Irma Mignon Judgement and its Significance

The Irma Mignon judgement\(^{81}\) concerned two Norwegian ships, the Irma and the Mignon which collided in the English Channel due to actions on Irma’s part. The question of interest was whether the liability of Irma was to be decided under English law or Norwegian law.

The first voting justice stated that the applicable rule must be found in general principles of law in conjunction with the specifics of the case at hand. Further, he acknowledged that there may be differences in opinion regarding which principles to apply. He then decides that in the present case a natural point of departure is to look to which country the case has the strongest affiliation or connection to the facts. To underpin his argument, he references the Augusta judgement of 1906\(^{82}\) where a collision between a Norwegian ship and a Russian ship in German waters was found to be governed by German law. The majority of justices based their choice on the specifics of the case and did not apply the rule of place of damage like the minority of three argued in favour of.

The scope of the principle of strongest connection is limited by the justice in the Irma Mignon judgement in a subsequent remark. The principle is emphasised as not being a universal solution, but apt in the present case. He also states that the place of damage advocated in literature\(^{83}\) is not suitable in the present circumstances. As mentioned above, this statement illustrates the fallacy of construing general principles from a case which is decided on the merits of the facts. The limitation in the applicability of the principle, is somewhat lost in ensuing case law. In the Rt. 1957 p. 246\(^{84}\) a Norwegian bus was involved in an accident in Sweden, causing injury to a Norwegian passenger. These circumstances were found to be more connected to Norway than Sweden, hence the application of Norwegian law by the Norwegian Supreme Court. The caveat regarding restriction of application mentioned in the Irma Mignon was not addressed. Arguably the scope of the rule was thereby expanded and generalised.

2.3.3 Choice of Law for Tort under EU Law

The European Union has strived to achieve harmonisation of choice of law rules outside of contract. This objective was met through EU legislation, namely the EU regulation no. 864/2007, called Rome II\(^{85}\). Article 4 no. 1 gives “…the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage oc-

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\(^{81}\) Rt. 1923 II p. 58
\(^{82}\) Rt. 1906 p. 165 (Augusta)
\(^{83}\) Rt. 1923 II p. 58, p. 61
\(^{84}\) Rt. 1957 p. 246
\(^{85}\) Reg. (EC) no. 864/2007
...as the applicable law in tort. Also indirect consequences are excluded c.f. Article 4 i.f.

To the rule set out in Article 4 no. 1 there are two exceptions in the subsequent paragraphs. The first is in Article 4 no. 2 where both claimant and alleged tortfeasor are domiciled in the same state. Two examples under Norwegian law are the *Irma Mignon* and *Turbuss* decisions. But the two were not reasoned on a set rule like Article 4 no. 2. The other exception is in no. 3 and a discretionary rule where the case has a *manifestly* closer connection to another state.

The exception in the third paragraph is interesting by comparison to the Norwegian rule of strongest affiliation. This rule is understood to be an exception both from the main rule of place of damage and an exception from the exception in paragraph two. For the exception in Rome II to qualify, there must be a *manifestly* closer connection to another state. The requirement of a manifestly greater connection implies that there is a high threshold that must be exceeded before application. This provides predictability and prevent erosion of the main rule of place of damage. However, the exception also encases the flexibility that may be necessary in specific cases where neither the place of damage nor the common country of the parties provide a satisfying choice of law for a just outcome. It can be argued that Article 4 attempts to balance predictability and flexibility.

### 2.3.4 Harmonisation with EU Law

The main bulk of Norwegian legal literature argues that the rule of strongest affiliation has given way to a rule similar of that in the EU. Alvik agrees that the place of damage is the main rule, but argues that it merely provides a point of departure. This was supported by a lack of case law applying the place of damage rule to appoint choice of law.

Subsequently, in 2009 and 2011 two Supreme Court judgements stated that the rule now was the place of damage. But again, due to specific circumstances, the law of the place of damage was not chosen. In the 2009 judgement this was partially founded on the near impossible task of clarifying the applicable Afghan law and other connecting factors linking the case to Norway. It appears that the rule of the place of damage still gives way to the application of closest affiliation, as Alvik argued.

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86 Hill (2011) p. 278  
87 Cordero-Moss (2013) p.327  
88 Alvik (2005) p. 298  
89 Rt. 2009 p. 1537  
90 Rt. 2011 p. 531
Nevertheless, the court stated that in shortage of rules under Norwegian law for choice of law in tort, harmonisation to the EU should be a consideration. Further, the Rome II Regulation was referenced and notice was taken of the rule of the place where the effect of the damage materialised. Thereby it provides a rule similar to Article 4 no. 1 even if the rule was not applied. In 2011, Norwegian law was applied in order to prevent the defendant from not being held accountable for damages to victims of war crimes in Bosnia. This was reasoned on the crimes being subject to universal jurisdiction. The statutes of limitations in Bosnia would contradict the sense of justice, which made it a matter of \textit{ordre public} to prosecute in Norway and apply Norwegian law. It is generally accepted that despite the criminal nature of the case, it has transfer value to the Norwegian choice of rule law in tort.

The Centrebet judgement\textsuperscript{91} in the Court of Appeal regarding choice of law is the only decision at the appellate level to apply choice of law rules in tort after the two Supreme Court judgements of 2009 and 2011\textsuperscript{92}. The two judgements stated that the place of damage is the main rule developed from the Irma Mignon doctrine of closest affiliation. To support the obiter dictum of 2009 the court in the Centrebet case also referenced Lundgaard\textsuperscript{93} to illustrate that the same view is taken in legal literature. Further, the court argued that the considerations of fairness and predictability support such a rule. In part because said rule would enable the potential tortfeasors to prevent liability by avoiding negligence. In addition, if liability is imposed, the tortfeasor has the opportunity to insure against potential losses.

As to the place of damage, the court quotes the paragraphs in the 2009 judgement\textsuperscript{94} where the Supreme Court addressed the significance of EU rules as a way to ensure harmonisation and predictability. The appellate court then drew the conclusion that like the EU, the place of damage was the place of the direct damage as construed in the Rome II regulation.

At present, there is case law stating that the current rule in Norwegian tort law is that of the place of damage. However, it is yet to be applied in a case. It can be argued that this implies that Alvik´s grounds for scepticism are not fully eradicated and there is hardly sufficient material to argue that Norwegian law has completely aligned with the EU. As mentioned above, the threshold for the exception in Rome II Article 4 para 3 to be applied there has to be a \textit{manifestly} closer connection to another country. It is difficult to argue that Norway´s rule is identical, as the threshold seems lower. The main rule is after all yet to be applied.

\textsuperscript{91} LB-2012-167075
\textsuperscript{92} Rt. 2009 p. 1537 and Rt. 2011 p. 531
\textsuperscript{93} Lundgaard p. 268
\textsuperscript{94} Rt. 2009 p. 1537 para. 31-34
To conclude, there has been a shift from the Irma Mignon rule and there may now be a clearer rule of place of damage, and more specifically the place of where the effect occurred, as the main rule. That is in line with the EU main rule, but until the Norwegian Supreme Court follows this rule, there will perhaps still remain some uncertainty. Further clarification was offered in a very recent decision by the Supreme Court\textsuperscript{95}. The case did not concern tort, but it addressed the method to be applied. The courts should first examine if a set rule had developed and for tort, this would be the \textit{lex loci delicti} or \textit{damni}. In the assessment of whether such a rule existed in the absence of statutory law, the rules applicable under EU law were said to be of significant value, even when not directly binding. If, after also looking to EU law, no clear rule is found to exist, only then is the Irma Mignon rule of closest affiliation applied.

However, there is not yet sufficient legal basis to ascertain that the threshold for applying the principle of a closer affiliation equals that of the exception in Rome II of Article 4 no. 3 of manifestly greater connection. That can only be settled by the Supreme Court applying the same standard as the ECJ does or through legislation. But with the recent decision from the Supreme Court compared to former case law, it is likely that the exception of the closest affiliation rule may be applied more hesitantly.

2.3.5 A Future Full Alignment to the EU Rule?

One reason in favour of adopting the rule of the EU is that as noted above, the rule is constructed so that the two considerations of predictability and flexibility are met. As the Norwegian practice stands at present, it is similar but still not as clearly cut. The flexibility ensures that the court is able to reach just outcomes in the cases put before it. The downside is that the uncertainty may incur litigation costs as both parties in a dispute may find their preferred choice of law to be reasonable. A clear cut rule would prevent this, a good example being Article 4 of Rome II.

The Norwegian Supreme Court has shown reluctance to develop the conflict of law rules. The EU Regulation is an example of legislation and perhaps that is what is necessary under Norwegian law. A clear cut a rule like the EU’s, is difficult to develop for the Norwegian Supreme Court. But the gap between the practice of the two sets of rules have been partially bridged by the 2017 decision. It is likely that the court when next presented with choice of law in tort will align further with the EU rule and use the method developed in the 2017 judgement.

\textsuperscript{95} HR-2017-1297-A para. 71-75
3 Jurisdiction for Pure Economic Loss

3.1 Introduction to The Problem

The purpose of this chapter is to examine how the rules governing jurisdiction apply to pure economic loss. In particular how the place of damage is construed to fit pure economic loss.

How are the provisions of the Lugano Convention and the Disputes Act construed when applied to situations like the two examples in chapter one? The first example concerned misrepresentation in a prospectus which inflicted a loss on a third party. The second example illustrated the random locations of both the tortfeasor and the employee of the claimant at the time of the actions causing the loss. How is the place of damage construed to fit the locations where the acts took place in these situations?

The main considerations behind the jurisdiction rules is harmonisation within the EU and the European Economic Area (EEA), and to ensure jurisdictions that are connected to the circumstances of the case. In order to understand the application of Article 5 no. 3 of the Convention, the relevant ECJ case law will be accounted for. That jurisprudence will be compared to Norwegian case law. Also, the Disputes Act is considered to see if there are any differences from the Lugano Convention for pure economic loss.

3.2 EU Case Law on Place of Damage in Tort for Pure Economic Loss

3.2.1 Introduction

The EU regulation applicable today is EU Regulation 1215/2012\(^96\). However, most of the recent case law from the ECJ is based on the preceding regulation, EU Regulation 44/2001\(^97\). As it follows from the preambles of the former\(^98\), the objective is among other considerations to achieve legislative harmonisation, which implies that the legal instruments of the EU and the Lugano Convention should be construed to encompass the same requirements.

\(^96\)Reg. (EC) 1215/2012 (Brussels I recast)  
\(^97\) Reg. (EC) 44/2001  
\(^98\) Preamble of Regulation no. 44/2001 para. 12
The significance of EU case law is evident in Norwegian jurisprudence. In Rt. 2011 p. 897 *Marin Alpin*, ECJ case law was referenced to determine the meaning of the Article 5 no. 3 of the Lugano Convention in regard to pure economic loss. The case concerned a Norwegian company, Marin Alpin AS, which designed and produced outerwear. The company sued a Swiss company, Wurth International AG in the jurisdiction of Marin Alpin’s seat in Larvik for damages on the basis of culpa in contrahendo. Wurth International contested that jurisdiction could be attributed to that court under Article 5 no. 3. The Supreme Court had to decide where the economic loss occurred. To locate the loss, the court relied heavily on case law from the European Court of Justice.

### 3.2.2 A Strict Interpretation to Prevent Dilution of the Rule of the Defendant’s Domicile

In the *Dumez* case\(^{99}\), a subsidiary company in Germany went bankrupt due to a shutdown of financing by German banks. The French parent company sued the German banks in France claiming that the parent company suffered its losses there. However, the ECJ found that the effect of the damage shall be understood as the place where the direct loss is suffered by the directly injured party. And in this case that loss was felt by the subsidiary in Germany that went bankrupt, and not the financial impact its bankruptcy had on the French parent company.

The content of the provision was further determined in *Marinari*\(^{100}\). The court held that the place where the effect of the damage was felt, is not to be expanded to contain every place where an effect occurs. In paragraph 15 the court applied this to the facts and stated: “*The term cannot therefore be interpreted as covering the place where the injured party, as in the main proceedings, claims to have suffered a loss of capital as a result of an injury originally incurred and suffered by him in another Contracting State.*”

In the *Kronhofer* case\(^{101}\), a pure economic loss was suffered and the claimant, domiciled in Austria, sued the German investment managers in the courts of his domicile. The account used for the transactions that resulted in loss to the claimant was in Germany. The ECJ held that the claimant’s loss was incurred and suffered in another state. As a result, Austria could not be the correct legal venue under the Brussels Convention.

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\(^{99}\) EU C-220/88  
\(^{100}\) EU C-364/93 para. 14  
\(^{101}\) EU C-168/02
The decision by the ECJ in the Zuid-Chemie case also stated that the place where the effect occurred is where the initial damage occurred and not where the product was delivered.\textsuperscript{102} If this reasoning is applied to example no. two, the random place where the information was received becomes irrelevant.

In the Supreme Court judgement referred to above, Rt. 2011 p. 897\textsuperscript{103}, the ECJ case law up until that date is summarized as being restrictive and reluctant to deviate from the rule of jurisdiction in the domicile of the defendant. Further, that the exception in Article 5 no. 3 of the Brussels Convention and the Lugano is the place of direct damage, interpreted rather strictly. However, a reservation is made that the court cannot decisively determine that the domicile of the claimant can never be the legal venue if an economic loss is suffered there, even if the act causing the loss took place in another contracting state.

The EU case law suggests that erosion of the rule of jurisdiction in the domicile of the defendant should be avoided. The tort rule in Article 5 no.3 should be stringently interpreted to achieve this. For pure economic loss this entails that if possible, the loss will not be located in the domicile of the claimant if the loss is connected to another jurisdiction. However, that is without prejudice to instances where the place of damage is so closely linked to the domicile of the claimant that jurisdiction may be attributed.

3.2.3 Cases in which the Domicile of the Defendant is not Decisive
The stance the ECJ took in Kronhofer was challenged in the Kolassa case\textsuperscript{104} in 2015. Mr. Kolassa, an Austrian consumer, acquired securities through a financial intermediary and later sued the issuer, seated in the UK, for damages in Austria. The issuer contested that the court seized by the claimant had jurisdiction to rule on the matter.

The ECJ interpreted Article 5 no. 3 of Regulation no. 44/2001 and stressed that the provision is based on a particularly close linking factor between the courts of the place where the harmful event occurred or may occur and the dispute. Further, the linkage is what justifies attribution of jurisdictions to the relevant courts. The reasoning for this is the need for "sound administration of justice and the efficacious conduct of proceedings".\textsuperscript{105}

The Court referenced the Kronhofer ruling, stressing that financial damage felt in the domicile of the claimant is not sufficient, when the loss originated in another state. The Court then dif-
ferentiated between Kronhofer and the Kolassa cases by emphasising that in Kronhofer, both the event giving rise to the damage and the loss itself happened in another state, not in the state of the claimant’s domicile. Finally, the Court stated that the “...attribution of jurisdiction is justified if the applicant’s domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred.”

The ECJ found that the place of the event giving rise to the damage is not in Austria and refused jurisdiction based on that legal basis. But, the loss is where the investor suffered it, which was found to be in Austria, allowing for jurisdiction on the basis of where the effect occurred. To support its reasoning, the Court pointed to the prospectuses that the claimant argued were insufficiently informative under Austrian law. The prospectuses caused his loss and the distribution in Austria was known to the issuer, Barclays. The Court concluded that liability for misrepresentation in Austria was foreseeable to the bank because it knew of the distribution. That predictability maintains the balance between the parties despite attributing jurisdiction to the domicile of the claimant. The decision also entails that the provision is not so strictly interpreted that pure economic loss cannot be attributed to the jurisdiction of the claimant’s domicile. However, the Kronhofer decision was not invalidated by the ECJ in Kolassa. This implies that the loss must not originate in the state where the event giving rise to the damage occurred. The connection to the domicile of the claimant for financial loss will not be strong enough if the loss first can be allocated to another state.

Further clarification on the localisation of pure economic loss was provided by the Universal Music International decision. Universal Music International sued its Czech lawyers after a drafting mistake resulted in an inflated price that Universal was obligated to pay to a Czech contracting party. The work was carried out in Czech Republic, the contract containing the mistake was signed there and Universal transferred its funds from an account in the Netherlands to a Czech account. The Czech defendants contested that the Dutch courts had jurisdiction to try the case. The question of jurisdiction was by the Dutch Supreme Court referred to the ECJ for a preliminary ruling.

The question of relevance posed to the ECJ was if financial damage, being a direct consequence of an unlawful act causing the damage in another state, was sufficient to attribute jurisdiction to the state where the financial loss materialised. The ensuing question was if one could construe the place where harmful event occurred to be the place of such damage c.f. Article 5 no. 3 of Regulation 44/2001.

\(^{106}\) EU C-375/13 para. 50
\(^{107}\) C-12/15 Universal Music
The Court refers to case law and the same considerations behind Article 5 no. 3 as in the Kolassa case. It also cites the CDC case\textsuperscript{108} and the proximity to the dispute and ease of taking evidence are factors to support the reasoning behind Article 5 no. 3 as an additional basis for jurisdiction to Article 2. After accounting for the current case law, the Court distinguished the Kolassa case from the present. It stressed that there were other circumstances in Kolassa in addition to the loss materialising directly in the account in the jurisdictions of the claimant’s domicile. The Court concludes that pure economic loss that occurs directly in the bank account of the claimant cannot be qualified as a “relevant connecting factor” pursuant to Article 5 no. 3. The Court then adds that this can be illustrated by the option of Universal Music to choose one of several bank accounts in different jurisdiction which shows that the considerations emphasised above are not met if such a wide interpretation is allowed.

The two cases provide some guidance for jurisdiction and pure economic loss. Such loss which only materialises in a bank account is not sufficient in itself to attribute jurisdiction to the courts there. There were additional circumstances in Kolassa that allowed for the Austrian courts to be seized. This may be explained by the aforementioned basis of the provision; of the particularly close linking factor between the place where the loss occurred and the dispute. A close linking factor, it may be argued, does not exist if the only connection factor is the account where the loss materialises. But, paired with other circumstances, a sufficient linking factor may be found to exist. This is in essence what distinguished the Kolassa decision from Universal Music.

Whether the place of the domicile of the claimant as an alternative jurisdiction is available to the claimant depends on two criteria. If the account in the domicile of the claimant was the only place the loss materialised and this was foreseeable to the alleged tortfeasor, jurisdiction may be attributed to that location. This illustrates that foreseeability on the part of the alleged tortfeasor is a result of linking factors stronger than what pure economic loss in a bank account solely can provide. In turn, this indicates that for pure economic loss the threshold that must be exceeded before jurisdiction can be attributed to the place where the loss occurred, is higher than for damage to property or person. The requirement for additional linking factors is a result of the absence of physical properties of pure economic loss. Also, the required linking factors have the implication that a connection between the place where the pure economic loss occurs and the other aspects of the dispute is more easily trumped by other factors connecting the dispute and loss to other jurisdictions.

\textsuperscript{108} EU C-352/13 (CDC)
3.3 Application of the Lugano Convention by Norwegian Courts

Under Norwegian law the Lugano Convention Article 5 no. 3, the counterpart of Regulation no. 1215/2012, is the current law and takes primacy over the provisions of the Dispute Act. As follows from above, the provision of the Lugano Convention is to be construed to ensure harmonisation with the EU rules. This has been clearly stated in jurisprudence for both the preceding Lugano and Brussels Conventions and the current legislation\(^{109}\). The following account of Norwegian law will focus primarily on the Lugano provision as its provisions enjoys primacy over the equivalent provisions of the Dispute Act.\(^{110}\)

The leading case on the application of Article 5 no. 3 of the Lugano Convention under Norwegian law is Rt. 2011 p. 897 *Marin Alpin* mentioned above in 3.2.1. The case was decided under the older Lugano Convention of 1988, but the relevant provision is verbatim of the present one and construed to give the same application.

The Supreme Court examined the ECJ case law to shed light on how Article 5 no. 3 of the Regulation 44/2001 and in effect Article 5 no. 3 of the Lugano Convention should be construed. After reciting the *Bier, Dumez and Kronhofer* decisions the first voting justice notes that the case law is restrictive in its interpretation of where the harmful consequences occurred in order to avoid erosion of the rule in Article 2 of jurisdiction in the domicile of the defendant. He further emphasised the considerations behind the additional legal venue in Article 5 no. 3. However, the justice then stressed that he cannot conclude from the present case law that economic loss by its nature cannot be attributed to the place of domicile of the claimant.

*Marin Alpin*’s argument that the loss is suffered in Norway was not recognised by the majority of judges. On the contrary, the court found that the loss was suffered in Switzerland where Wurth International AG has its seat. The lack of earnings caused to Marin Alpin by Wurth’s choice to copy and produce clothing in China materialised in Switzerland, alternatively in the countries where Wurth International distributed its company jackets. The contract, which was negotiated but not entered into, stated Norway as the place of payment. The court majority considered that irrelevant. The economic loss that would affect Marin Alpin, situated in Norway and without other offices abroad, was deemed indirect and not providing the claimant with a legal venue in Norway. The minority argued that jurisdiction could be attributed to Norwegian courts. This was reasoned on the facts that Marin Alpin had no offices abroad or


\(^{110}\) Rt. 1996 p. 25, p. 36, Rt. 2011 p. 897 Marin Alpin para. 33
other representation outside of Norway. The business was run from Norway and no asset belonging to the company had suffered loss abroad. This, it was argued, separated the facts of the case from the EU case law of Kronhofer and Dumez.

Marin Alpin predates the Kolassa and Universal Music cases of the ECJ. Interestingly, the case contrasts the more recent ECJ jurisprudence. Compared to the Kolassa judgement, one could argue that the Norwegian Supreme Court’s application of Article 5 no. 3 of the Lugano Convention is even more restricted than the corresponding provision in Regulation no. 44/2001. Like in Kolassa, the purely economic loss materialised directly in the balances of the company´s assets in its domicile. The only action that took place in Switzerland was the decision to copy the design and produce it in China. Marin Alpin had no account in Switzerland where the loss could materialise. Which distinguishes it from the Kronhofer decision.

It can be argued that the facts in Marin Alpin provided stronger linking factors compared to Universal Music´s connection to the Netherlands as legal venue. The ECJ is yet to rule as strictly as the Norwegian Supreme Court did in Marin Alpin. The reluctance in the Norwegian court system to widen the application of Article 5 no. 3 can be viewed as a cautious approach to development of international law. Expansive interpretation should be left to the international judicial body in order to ensure harmonisation. The court may therefore be right in applying a strict interpretation at a time when the ECJ was yet to further develop the content of the rule. The restraint exercised by national courts to avoid deviant development of the rule when practised nationally will occasionally lead to decisions that are not in line with subsequent ECJ decisions. This should not be mistaken for a narrower interpretation of the Lugano Convention. Instead, it shows that the consideration of harmonisation weighs heavily on the national courts and they dare not anticipate the course the ECJ will take. Such cautiousness supports a harmonised development lead by the ECJ. The cost however, is that national courts will have to readjust their course when the ECJ clarifies nuances of interpretation.
3.4 Any Difference Under the Disputes Act?

The Dispute Act section 4-5 (3) with the accessory requirement in section 4-3 (1) of a sufficiently strong connection may be applied differently from Article 5 no. 3 in the Lugano Convention.

The first notable difference is that in contrast to Article 5 no. 3, the Dispute Act section 4-5 (3) only allows for jurisdiction to be attributed where the main effect occurs. As opposed to practise under the Lugano Convention and EU Regulation 1215/2012, there is no access to legal venue in a place where only a lesser part of the effect occurred. In the Shevill decision\textsuperscript{111} by the ECJ, legal venue for all losses suffered was found to be at the place of the action causing the loss. The losses could only be used to attribute jurisdiction for the specific part of the loss that occurred in that jurisdiction. In effect the claimant had the option of trying to recover all loss in the jurisdiction of the tortfeasor’s actions or pursue several legal venues for each separate loss. Section 4-5 (3), on the other hand only allows for jurisdiction in the place where the main effect was felt.

For pure economic loss, this may entail that only loss which is easily identified and localised to a certain venue, can provide a sufficient linkage for jurisdiction to be attributed. In comparison to pollution damage which can be easily mapped to locate affected places, pure economic loss can be difficult to locate due to its non-physical properties. In addition, the loss must be considered the main effect of the act giving rise to liability. A consequence is perhaps that jurisdiction may not be attributed to pure economic losses occurring evenly distributed over several jurisdictions. Or at best, that finding the place of the main effects prevents predictability in that it will not be certain that the legal venue will accept jurisdiction until the claimant attempts to sue. The only option remaining available to the claimant would be to sue at the domicile of the tortfeasor or where the act was committed.

The threshold of denying attribution of jurisdiction according to section 4-3 (1) despite qualifying under the place of damage rule is high, as described in 2.1.5 above. Held together with the difficulty of documenting pure economic loss, this may result in the requirement of a sufficiently strong connection not being met as easily as when the damage is physical. This may make it more challenging to be awarded compensation for pure economic loss under the Disputes Act.

\textsuperscript{111} EU C-68/93 (Shevill)
3.5 Conclusion

The attribution of jurisdiction for pure economic loss can from the accounts above arguably be said to be somewhat different compared to loss stemming from damage to property or person.

In the ECJ case law it is evident that the connection between the dispute and the location of the loss sustained, is the foundation of Article 5 no. 3. This provides guidance in application to pure economic loss. In instances where pure economic loss is difficult to locate, any such connection would probably not be deemed sufficiently strong. There will most likely be an absence of linking factor, meaning the location of pure economic loss cannot attribute jurisdiction.

In this assessment, the domicile of the claimant is not in itself a linking factor between the loss and the dispute. Barring the claimant’s domicile contributing to locating loss prevents dilution of the main rule of jurisdiction in the domicile of the defendant.

As the cases above illustrate, jurisdiction can be attributed to the location of pure economic loss. This applies even when that location is coinciding with the domicile of the claimant and different from where the act causing the damage was committed. The strict application of the Norwegian Supreme Court in *Marin Alpin* is likely a result of caution based on the ECJ case law present at the time. A correction in a future case is not unlikely after the ECJ further developed the content of the rule in *Kolassa*. The majority in the Norwegian decision ignored several other linking factors in order to avoid attributing jurisdiction to the domicile of the claimant. To construe Article 5 no. 3 in order to avoid the domicile of the claimant for pure economic loss is arguably no longer in accordance with the current interpretation of the rule.

Foreseeability for the alleged tortfeasor was one linking factor recognised in *Kolassa*. This criterion is useful to pure economic loss because it compensates for the potential remoteness to the dispute that the non-physical nature of pure economic loss may create. The consideration of predictability is not as strong for the determination of jurisdiction as opposed to choice of law rules, but it is a valid concern that the defendant is aware of the jurisdictions in which he may be sued.

The Disputes Act section 4-3 (1) has a requirement of sufficient connection which also prevents any remote pure economic loss that occurs in Norway to establish grounds for jurisdic-

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112 EU C-375/13
tion. The provision thereby also compensates for the issues that are particular to pure economic loss. The threshold that must be exceeded for jurisdiction of Norwegian courts may be harder to surpass for cases concerning pure economic loss than for loss from damage to property or person.

In conclusion, the place of damage for pure economic loss is construed so that it requires a linking factor between the case and the place where the loss occurred. This is in line with the objective of attributing jurisdiction to a legal venue well equipped to rule on the dispute. Furthermore, this compensates for the unpredictability of the location of pure economic loss and prevents circumvention of the main rule of the defendant’s domicile. These factors can be seen as examples that the rule is construed somewhat differently for pure economic loss. It can hardly be argued that there is a special rule for pure economic loss, but the application of the rule differs and is more focused on the linkage between place of the loss and other circumstances.


4 Choice of Law for Pure Economic Loss

4.1 Introduction
The objective of this chapter is to examine how the current choice of law rules apply to cases concerning pure economic loss. As opposed to jurisdiction where the claimant can pursue claims for damages in several legal venues, choice of law requires the determination of only one applicable law. How the place of damage is decided is thus fundamental to appoint the correct law.

The main principle of choice of law in tort under Norwegian law is the lex loci delicti. In recent literature and jurisprudence that is further narrowed down to lex loci damni when the place of the act and the loss are different. The lex loci damni is construed to give a narrow interpretation appointing only the law of where the direct harmful effect occurred. The interpretation entails that the places of where the act causing the damage took place and more indirect consequences were felt, fall outside of the rule. To this main principle there are exceptions, as has been shown in jurisprudence, allowing for other circumstances to be considered. Both the main rule and the exceptions and their application to pure economic loss will be addressed below. Also, a comparison to the choice of law under contract is made to evaluate how such a rule would maintain the objectives which the rules are supposed to govern. The chapter is finished off with a few de lege ferenda remarks on the aptitude of the current rules and potential development.

4.2 Lex Loci Damni
The method of appointing the applicable choice of law was clarified in a recent decision. The court stated, with reference to the 2009 and 2011 Supreme Court judgements, that the first step is to consider if there is a clearly developed rule in place. In this assessment of national law, EU law has relevance even if not directly binding. If, after also looking to EU law for guidance, no clear rule can be determined, a choice of law based on the strongest connection must be made. This is a clear development from the pragmatic application of the Irma

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114 HR-2017-1297-A para 71-
115 Rt. 2009 p.1537 (Bokhandler), Rt. 2011 p. 531 (Krigsforbryter)
116 HR-2017-1297-A para. 73
Mignon rule to a more structured method. It is only when there are no clear rules that the Irma Mignon rule of closest affiliation is applied.

From the case law and legal literature accounted for in chapter 2, the starting point in Norwegian law is the lex loci damni rule. The application of this rule to pure economic loss would require a localisation of such loss. In cases where the loss can easily be identified in a specific location, the appointment of the applicable law is fairly straightforward. But, in allowing the rule to be applied to pure economic loss the objectives behind the rule, of predictability are not necessarily fulfilled. The loss has no physical connection to the place where the act causing the damage took place. It is not always within the alleged tortfeasor’s capability to predict where such loss materialises. The exception is places that have another additional connection to the circumstances of case. The rule inadequately ensures predictability in situations both were the loss can be located and when it cannot due to the complexity of the instruments used.

For the instances when the place where pure economic loss materialised is used to appoint the choice of law, should there be an additional connection requirement for the place to be recognised? Despite meagre case law on the topic there is one decision by the Court of Appeal that may provide guidance on how this problem is addressed.

The Centrebet judgement¹¹⁷ in the Court of Appeal regarding choice of law is the only decision at the appellate level to apply choice of law rules in tort on pure economic loss after the two Supreme Court judgements of 2009 and 2011.¹¹⁸ Attribution of jurisdiction in the case had been previously decided by the Norwegian Supreme Court.¹¹⁹

In the Centrebet judgement a Norwegian citizen claimed that an Australian online betting company was liable for the losses he had incurred through betting on their website. Specifically, losses incurred due to the betting company’s negligence in detecting his addiction to playing and allowing him to continue to play. The website had a Norwegian version, the claimant had created a Norwegian profile and transferred money from his Norwegian bank account. Also, the betting site offered Norwegian customer service by way of hired Norwegian consultants. While placing the bets the claimant mostly lived in Germany and the Czech Republic.

After laying out the applicable rules and the Irma Mignon rule as an exception, the appellate court examines whether the place of direct damage can be located. The court then assesses the

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¹¹⁷ LB-2012-167075
¹¹⁸ Rt. 2009 p. 1537 and Rt. 2011 p. 531
¹¹⁹ Rt. 2010 p. 1197 (Centrebet)
circumstances of the case and notably rule out the place the claimant transferred to money to from his Norwegian bank account. That place being the UK and the location of the transfer service Moneybookers, which had no other connection to the case. The dismissal of the place where the money was transferred to is of interest to pure economic losses because the loss is often incurred by transfer of money through one or more bank accounts. The Court of Appeal also found the location of the claimant to be inessential to where the direct effect of the damage occurred. This was reasoned on the notion that the place where the claimant acted could be very random and should not decide the choice of law. The judgement eliminates the random locations that pure economic loss may lead to. Furthermore, it dismissed such locations as irrelevant for the choice of law without other circumstances to support it.

This illustrates that the mere existence of a pure economic loss in a location cannot in itself be sufficient to appoint the choice of law in tort. The court of appeal ended up building its argument on the approach of the rule of closest affiliation. The court addressed the circumstances of the case and found them, combined, to make up the place of damage to appoint Norwegian law as the applicable law.

Due regard was given to the alleged tortfeasor’s efforts to reach the Norwegian market in its marketing. The targeted marketing made appointment of Norwegian law predictable to the betting company. This can be construed to impose a requirement of predictability for the location of pure economic loss to appoint the choice of law. The court did not find it sufficient to solely base its decision on the fact that the claimant’s bank account was in Norway. The other circumstances helped create a reasonable proximity to Norway in keep with the alleged tortfeasor’s need for predictability.

It seems judicious that the place of damage should not be construed to mean places with a random or possibly fleeting connection. Such places do not provide predictability. The Centrebet case shows a reluctance to let such places be decisive when determining choice of law for pure economic loss. This is an argument in favour of a narrow interpretation of the place where the damage occurred. The case also indicates that the lex loci damni cannot unreservedly be applied to the place of pure economic loss. The assessment of where the loss materialised has a broader approach for pure economic loss. Of importance is whether other circumstances also indicate that the loss is in the same location. In particular, if these circumstances support the likelihood of a loss materialising there and the tortfeasor may foresee this. The interpretation of the lex loci damni rule for pure economic loss can arguably be said to deviate somewhat from the straightforward way of localising other damage. In effect, the rule requires a broader assessment of where the effect occurred, which makes the application of the rule very similar to the rule of closest affiliation, see 4.5 below.
4.3 Lex Loci Delicti Commissi

The lex loci delicti is, when interpreted rigidly, where the act causing the damage took place. When the act and the loss are in the same place, the application of lex loci damni and lex loci delicti would appoint the same choice of law. One question is if the lex loci delicti could be a better rule for pure economic loss when the act and the damage occur in two different places. This would remove the difficulties in locating pure economic loss and the loss being in an unpredictable location.

However, the main objection to applying the rule is that it would create a lacuna in the tort law of the country where the damage occurred. If the lex loci delicti rule appoints the choice of law and this is where the act was committed, that country’s tort law is applied. If that country’s liability rules are less strict than where the loss occurred, the result may very well be that the claimant cannot recover his loss because it is not protected under the applicable law. This would result in different compensation depending of where the tortfeasor acted. In effect, the rule would circumvent the tort law applicable in one country by giving the rules of another country application.

Also, such a rule can arguably be said to skew the balanced interests of the parties much to the advantage of the tortfeasor. The purpose of tort law is to right a wrong and favouring the tortfeasor by applying this rule does not appear to properly balance the parties’ interests and attain that objective.

Despite the rule solving the challenges of pure economic loss and offering a predictable solution, it cannot be said to fully satisfy the objectives such a rule must safeguard.
4.4 The Exception of the Common Domicile

When both the claimant and the defendant are from the same country that country most often appoints the choice of law.

Norwegian jurisprudence\(^{120}\) shows a pattern of using the common domicile as an argument to apply the law of that country. However, as pointed out in chapter 2, the courts have not relied on an explicit rule, but considered the circumstances of the case. This is in contrast to the Rome II Article 4 no. 2 which sets out the common domicile as an exception to the main rule of lex loci damni c.f. art. 4 no. 1.\(^{121}\)

Regardless of its legal basis, is the rule of common domicile suitable for application to pure economic loss?

When applying the domicile principle to pure economic loss, the only matter that is not predictable is whether a case will qualify under the common domicile rule before the event happens. The tortfeasor cannot predict with certainty that the party sustaining damage in an international tort case is domiciled in the same jurisdiction. This is hardly an objection to apply the rule to pure economic loss. On the contrary, it is predictable to the tortfeasor that the law of the country he operates in is applied to a case caused by his actions.

With both parties domiciled in the same jurisdiction the connection to the case is strong and appointment of the law there is a rule that ensures predictability. The fact that the domicile of the claimant is not in itself sufficient to appoint the choice of law in other circumstances is unlikely to alter that conclusion.

Another objection is that it unfair that a different rule applies depending on the domicile of the claimant. Should the legal obligations of compensation of the tortfeasor be dependent on where the other party is domiciled? In effect, two persons who sustain pure economic loss from the same act may have different cover under the applicable law. However, it can be argued that the alleged tortfeasor does not deserve protection from being held accountable under the law of his domicile or any other where he causes loss, which partially invalidates the argument. Also, claimants in different jurisdictions will have different protection under national tort law because tort law is not internationally harmonised. The variations between tort law in jurisdictions cannot and should not be attempted harmonised through choice of law rules.

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\(^{120}\) Rt. 1923 II p. 58 (Irma Mignon), Rt. 1957 p. 246 (Turbuss)
\(^{121}\) Reg. (EC) no. 864/2007 Article 4
With the different aspects above in mind, a clear-cut rule of common domicile would ensure predictability when the parties have joint domicile. There are no strong arguments in favour of refraining from application of that rule.

Also, the jurisprudence shows the courts’ inclination to apply the principle. With the importance of EU law recognised and the common domicile frequently applied in case law, there is hardly any need for a statutory basis for the principle to maintain predictability.

4.5 The Rule of Closest Affiliation

The Irma Mignon judgement\(^{122}\), despite being a case of common domicile, fathered the aforementioned rule of closest or strongest affiliation or connection. How this rule should be applied to pure economic loss is more uncertain.

Contrary to EU law, the Norwegian Supreme Court has not based its decisions in the above-mentioned cases on a set rule, but on the merits of the facts.\(^{123}\) This brings up the exception in Rome II\(^{124}\) Article 4 no. 3 of the *manifestly closer connection* prevailing over the foregoing alternatives. This is a counterpart to the Irma-Mignon rule often applied in Norwegian law in tort as well in other areas of the law short of clear rules.

The structure of Article 4 will likely inspire a similar method of application of the Norwegian rules. This can be seen in the recent development in case law\(^{125}\) and the importance given to the EU rules even when not directly binding.

In the Centrebet judgement\(^{126}\), the Court juxtaposes the exception in Rome II Article 4 no. 3 with the exception of the Irma Mignon rule. However, the Court does not address any difference in the required thresholds before applying the two exceptions. As the court does not mention such a problem at all, it cannot be taken to mean that the thresholds are of the same height, only that the issue is not relevant to that case. Unfortunately, the case law therefore

\(^{122}\) Rt. 1923 II p. 58 *(Irma Mignon)* \(^{123}\) Rt. 1923 II p. 58 *(Irma Mignon)*, Rt. 1957 p. 246 *(Turbuss)* \(^{124}\) Reg. (EC) 864/2007 \(^{125}\) HR-2017-1297-A para. 72-75 \(^{126}\) LB-2012-167075
does not shed any light of a possible difference, but serves as an illustration to how often the courts apply the exception of Irma Mignon. Compared to the sparingly existing case law and the overwhelming number of judgements resorting to apply the Irma Mignon rule under Norwegian law, it can nevertheless be argued that the Irma Mignon rule often applies under Norwegian law. Much more so that what seems to follow from EU case law, implying that the threshold for the exception of Article 4 no. 3 in Rome II is higher and found applicable on a more infrequent basis.

As an appellate judgement, the Centrebet case is to some extent normative in the absence of any Supreme Court decisions. It may serve as an illustrative example of how the law is practised based on the guidelines set out in law and jurisprudence from the Supreme Court. Also, it may indicate how the Supreme Court may apply the guidelines it has developed thus far in the future.

To summarise, the Court’s practise of the choice of law doctrine is still a frequent application of the exception of the greatest affiliation. In trying to locate the place where the damage occurred, the court disregards the place where the injured party is residing and other connections that are deemed random such as where an intermediary is situated.

If these factors are considered for other pure economic loss, one may argue it is of little relevance where a person giving a negligent statement is if that location is not connected to the case. The same is valid also regarding where the injured party receives such information. That means that people exchanging information during stopovers on their travels can consider their location at the time as irrelevant to the choice of law.

For jurisdiction, case law has determined that it is not sufficient to use the domicile of the party sustaining loss to locate where the loss occurred.\textsuperscript{127} This was reasoned on the domicile not providing a close connection to the case in itself, and must be supported by the loss actually materialising there.\textsuperscript{128} This argument is valid also in determining the closest affiliation. The domicile of one party cannot be decisive in determining the closest affiliation, but may serve as an additional connecting factor.

This leads to the conclusion that for pure economic loss the domicile is not a decisive factor, and neither is the place where the claimant received the information, if these locations do not

\textsuperscript{127} EU C-168/02

\textsuperscript{128} EU C-168/02
have other connecting factors. In addition, the Centrebet case also disregards a location where the money was transferred to as a last stop before placing the bets that incurred the loss.

In sum, the method of locating pure economic loss is based on a survey of the circumstances under the Irma Mignon rule. There are few indicators of which connecting factors that will overrule others. In Centrebet, the initial bank account the money was transferred from in Oslo was considered the place where the loss occurred. This was partially due to the fact that potential prizes would be paid out to that account. But, the Court relied heavily on the other factors of direct marketing towards the Norwegian market on the part of the betting company. The predictability of loss occurring in Norway must be clear to the company and that was not because of the bank account, but the marketing. Therefore, it cannot be ascertained that the location of a bank account itself would be decisive if it stood alone. The case does however, support the idea that the closest affiliation will be the place where the damage was deemed to have materialised if, and only if, other circumstances made that location predictable.

This may lead to the conclusion that the place of damage for pure economic loss will be applied to appoint the choice of law if other connecting factors make that place a predictable location. This makes the objective of predictability a principal factor in applying the closest affiliation rule.

4.6 A Useful Analogy from Contract Law?

In determining the place of damage for choice of law for pure economic loss, many of the connecting factors applicable are similar to those that are used in choice of law for contract when finding the place of closest affiliation. This was assumed in the Court of Appeal judgement of the choice of law in the Centrebet case. The court argued that tort cases with potentially global implications are connected to countries much in the same way as claims arising out of contract. One can observe that loss comparable to the Centrebet case has similarities to claims in contract, such as online purchases. When a gambling company or retailer has an

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online presence in many countries, judicial proceedings being pursued in the states where such presence is found, is foreseeable to the tortfeasor.

Under EU Regulation no 593/2008\textsuperscript{131} Rome I Article 4 (1) a, the choice of law rule for contracts in the absence of an agreed choice of law is the habitual residence of the seller. From this there are two exceptions in subsections (3) and (4). In (3) for a manifestly closer connection to another country and in (4) if the applicable law cannot be determined pursuant to (1) and (2), to \textit{“the country with which it is most closely connected”}.

Under Norwegian law in the absence of an agreed choice of law, the applicable rule is found in the Act on Private International Law Rules for Sale of Goods of 1964 (hereinafter the Act on Choice of Law for Sale of Goods) section 4.\textsuperscript{132} The provision appoints the choice of law of the habitual residence of the seller at the time the order was placed. Unlike the EU legislation, the act does not contain any provision allowing for a manifestly closer connection to take priority over the main rule.

However, for contract law in general, jurisprudence has previously used the Irma Mignon rule as a point of departure. This has changed gradually over the last two decades. Cordero-Moss\textsuperscript{133} cites a 2006 ruling\textsuperscript{134} where the Appeals Committee of the Norwegian Supreme Court interpreted the Irma Mignon rule. The Court found that it entailed that the habitual residence of the party performing the characteristic obligation is the main connecting factor. The starting point under current law is thereby the habitual residence of the party that provides the product or service.

The question is how the rule of the habitual residence would apply if adjusted to the tortfeasor’s residence for pure economic loss.

For such a rule to be applied, the obstacles of locating pure economic loss would be eliminated because such a rule is not based on the physical properties of damage. The choice of law would be appointed regardless of where the pure economic loss occurred. It would also provide predictability bordering on certainty as locating the habitual residence of the alleged tortfeasor would rarely pose any difficulties.

\textsuperscript{131} EU Regulation (EC) no.593/2008 sec. 4
\textsuperscript{132} Act of 1964 April 3 no. 1 Act on Choice of Law Rules for Sale of Goods
\textsuperscript{133} Cordero-Moss (2013) p. 240-242
\textsuperscript{134} Rt. 2006 p. 1008 para. 17
On the other hand, the tortfeasor would only be liable under the law of his habitual residence. This would leave claimants without the protection of the law of where the pure economic loss occurred when that is in a jurisdiction different from that of the tortfeasor. This would create a lacuna in the protection national tort law is supposed to provide. That is because the claimant would not be protected if the action was not deemed liable under the law of the tortfeasor’s country. Ultimately, the right to compensation would depend on grounds for liability in another country. The rule would also discriminate between tortfeasors inflicting pure economic loss on persons in the same state. These concerns arguably favour the tortfeasor to the detriment of the claimant. By doing so it offers a predictable rule at the expense of protection of the interests of the claimant. This suggests that one should refrain from applying an analogy from contract law choice of law for pure economic loss.

4.7 Conclusion: A Differentiated Approach?
The Norwegian application of choice of law rules is likely to be heavily influenced by the EU secondary legislation, namely the Rome II Regulation Article 4. For pure economic loss, this means that the method of finding the applicable rule would be to first examine if the place where the damage occurred can be determined and is predictable, and if so it appoints the choice of law. Pursuantly, to apply the common domicile if applicable. Lastly, if the place is not predictable and cannot be located an assessment of the closest affiliation will be necessary. That situation will occur more frequently for pure economic loss.

As the account and discussions above show, the rules in place to appoint the choice of law for pure economic loss in tort do not adequately protect the main objectives behind choice of law. The lex loci damni rule does not provide a predictable result for the instances of pure economic loss that are difficult to locate. And for those that may be located, the location may often be unpredictable due to the intangible nature of the losses. A lex loci damni rule without an additional criterion of a predictable location does not satisfyingly provide a suitable choice of law rule for pure economic loss in tort.

135 HR-2017-1297-A para. 71-75
136 Reg. (EC) no. 864/2007
The exception rule of the common domicile, however, relieves the applicant of determining the location of pure economic loss. For the situations where the claimant and the defendant have joint domicile, there are no significant obstacles that prevent the application of the rule to pure economic loss. The exception rule does unfortunately not provide any further assistance for cases that fall outside this category.

The other exception rule of closest affiliation does not at the outset offer a solution in keep with the objective of predictability. An assessment based on the overall strongest connection will not ensure adequate foreseeability. However, if an assessment of the closest affiliation is governed by the consideration of predictability, the rule would be better tailored to pure economic loss. Fortunately, there has been a reluctance to allow for random locations to influence the assessment. For pure economic loss this is indicative of the need for predictability. A method of distinguishing the case on the merit of the facts is perhaps the most adequate way of appointing choice of law for such loss. And the tool best equipped to counteract the possibly unfortunate outcomes of locating pure economic loss is due consideration given to the necessity of predictability.

If the rules are in line with the EU legislation whilst safeguarding predictability, a harmonisation in European choice of law in tort may be achieved. In turn, this would enable the parties to evaluate the validity of their claims. Also, when the rules are applied similarly, forum shopping will be of less significance because the same choice of law rules would be applied regardless of chosen jurisdiction within the harmonised area.

4.8 **De Lege Ferenda**

To compensate for the lack of physicality in pure economic loss, predictability should govern the application of the choice of law rules in tort. This may be done by adding predictability as a criterion when applying the rules of lex loci damni and closest affiliation. It may be done by construing the rules to contain this requirement when applied to pure economic loss. Or, the rules could apply with an appendix of predictability, in effect creating special rules for pure economic loss. The latter may inadvertently complicate the choice of law rules, while the former risks overlooking the importance of predictability in securing rules fit to pure economic loss.

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137 LB-2012-167075 (*Centrebet*)
### Legislation, Treaties and Preparatory Works

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