The Impact of Uniform Law on National Law: Limits and Possibilities.

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QUESTIONNAIRE ADDRESSED TO THE NATIONAL REPORTERS

1.From your national law perspective, would it be proper to include within the notion of "Uniform Law" usages of the trade or "customs", general principles of law, general principles of contract law or of the law of obligations, transnational law, lex mercatoria, general rules of procedure? Uniform Law below shall mean Uniform Law according to the meaning assigned to this expression in your reply to this Question 1.

There is in Norwegian law no standard definition of a non-national set of rules and principles that is held to apply to international contracts. The sources that are often mentioned, in international literature, as basis of such transnational law have different places in the system:

(i) *Usages of the trade or customs* are a source of law to all effects and, once proven, they are binding. A statutory confirmation of the quality of customs as sources of law can be found in the Norwegian Contract Act § 1 and in the Act on Contracts for the Sale of Goods § 90 (based on the CISG);

(ii) *General Principles of Law* are part of the law and, once established, they are applied and given effect to. There does not seem to be a consensus on the definition of these principles.[1] Generally recognized principles are usually identified by assessing a convergence among various legal systems, case law and scholarly works.

(iii) *Transnational Law* can be seen as a collection of different non-national sources, including the above mentioned customs and general principles, but also standard contract terms, contract practice and arbitration practice. According to some definitions, transnational law includes also international conventions.[2] Sometimes general principles of public international law, often as determined in state-investor arbitration, are deemed to be a source of transnational commercial law.[3] The effect varies according to the source:

[1] For an overview of the various theories see *F. De Ly*, International Business Law and Lex Mercatoria, T.M.C. Asser Institute, 1992, pp. 193 ff.
[2] *O. Lando*, The New Lex Mercatoria in International Commercial Arbitration, in 34 International and Comparative Law Quarterly 1985, p. 747
[3] For example, the CENTRAL Transnational Law Digest and Bibliography (www.tldb.net, last visited on 26 January 2008), uses investment awards to substantiate numerous of the principles listed therein as part of the "new Lex Mercatoria".

Standard contract terms may be taken into high consideration if they are drafted following negotiations by and between parties who institutionally represent the opposed interests (e.g. branch organizations) and according to a process that ensures a balanced result (usually the preparatory works or extensive commentaries are published). In Norwegian law they are referred to as "Agreed Documents", and they may even be given priority over general principles of Norwegian contract law, such as the duty of loyalty between the parties;[4]

Restatements of general principles of contract law (such as the UNIDROIT Principles or the Principles of European Contract Law), to the extent they can be deemed to reflect generally recognized principles, will be relevant in determining the content of the general principles of law; otherwise, they will be considered for their persuasive authority;

Contract practice and arbitration practice, if sufficiently proven and generalized, may be seen as a custom and as such part of Norwegian law;

International conventions are part of Norwegian law if they have been ratified and transformed or incorporated into the Norwegian legal system by statute. International conventions that were not transformed or incorporated by statute, and even less international conventions that were not ratified, are not considered as sources with binding force in Norwegian law;[5]

General principles of public international law are rather questionable as a source of obligations between private parties, considering that these principles are meant to regulate the conduct of states in the use of their sovereign powers (towards other states or towards investors from other states).

(iv) *Lex mercatoria* is another term to define the transnational law. Strictly speaking, the lex mercatoria covers trade usages and customs,[6] and is therefore a part of national law to the extent this latter refers to it as a source. However, a broader use of the term is widespread, that covers any spontaneous and non-national sources relating to international business activity (such as contract practice, standard documentation, restatements of general principles). An even broader

[4] Rt. 1994 s. 626
[5] *K.M. Bruzelius,* in *T. Frantzen, J. Giertsen, G. Cordero Moss* (eds.), Rett og toleranse – Festskrift til Helge Johan Thue, Gyldendal 2007, 38-48, 41ff.
[6] *R. Goode, H. Kronke, E. McKendrick*, Transnational Commercial Law – Texts, Cases and Materials, Oxford University Press, 2007, p. 50

definition covers, in addition, authoritative national and international sources (such as treaties and conventions), as long as they regulate international business activity.[7]

(v) *Soft law* is a term that recently started being used as a synonymous of transnational law.[8] Originally, the term is to be found in the field of public international law, and refers to sources that do not have binding force, but are taken into high consideration and often complied with voluntarily (such as codes of conduct or ethical rules). Hence, soft law in the strict sense does not cover fundamental principles or customary law, both sources of public international law with binding force. In the context of commercial law, however, soft law is used more loosely and refers also to general principles and customs. As seen above, general principles and customs have binding character to the extent that they are referred to as sources of law in national legal systems; they are nevertheless often listed in the number of elements of the transnational law, lex mercatoria or soft law, because their origin and application is not restricted to the borders of one state. As seen above, the terms transnational law, lex mercatoria and soft law seem to focus more on the cross-border scope of the sources, rather than on their binding or non binding character.

For the purpose of this questionnaire, Uniform Law shall have the meaning given above to the transantional law.

2.To which extent your country has incorporated Uniform Law as national law through treaty ratification, other enactments or court decisions?

Norway has ratified the Vienna Convention of 1980 on the Contract of International sale of Goods (CISG), and has transformed it into a statute, applicable both to domestic and to international sales.

Norway has also adopted the UNCITRAL Model Law on Arbitration (in the version of 1985), and has transformed it into a statute applicable to both domestic and international arbitration.

Some Supreme Court decisions have mentioned general principles, directly or indirectly, when deciding disputes relating to international contracts; in particular, an arbitral award that was

[7] *O. Lando*, The New Lex Mercatoria, cit., l.c.
[8] For example *T. Wilhelmson*, International Lex Mercatoria and Local Consumer Law: an Impossible Combination?, in Revue européenne de droit de la consummation, 3/2004, p. 238

based on general principles was recognized by the Supreme Court.[9] The Court did not elaborate on the notion of general principles or their assessment.

3.To which extent your national law should be considered as including Uniform Law when designated as proper law of the contract? the law governing the tort? When your country is designated as place (seat) of the arbitration?

Norwegian legal theory has developed a flexible system of sources of law, whereby there is not a fixed list of sources with a formal hierarchy, but an open system of factors that are going to be weighed against each other according to the relevance that they have in the specific case.[10]

This means that even sources that do not formally have binding force may be given a certain weight if they are particularly relevant; in particular, if the interests and function these sources are based on are persuasive, they may be taken into account as an inspiration for the argumentation that the decision will be based on.[11] This applies regardless of the nature of the dispute (contract or tort).

When Norway is the seat of an international arbitral process, Norwegian arbitration law applies. Norwegian arbitration law is based on the UNCITRAL Model law, therefore the (few) mandatory procedural rules and the system for challenging the validity of awards rendered in Norway are aligned with the UNCITRAL regime.

4.To which extent legal notions in your country applicable in the process of deciding a dispute by courts or arbitrators (including public policy and international mandatory rules or lois de police (national or foreign)) will accept Uniform Law incorporated in the foreign law (substantive or procedural) applicable, as the case may be, to the contract giving rise to the dispute/at the foreign arbitral place or seat?

[9] Rt. 1987 s. 1449
[10] See *T. Eckhoff*, Rettskildelære, 5.ed, Universitetsforlaget 2001, pp. 22ff.
[11] *J.E. Skoghøy*, Bruk av utenlandske rettsavgjørelser som argument ved rettsanvendelsen, in *T. Frantzen, J. Giertsen, G. Cordero Moss* (eds.), Rett og toleranse – Festskrift til Helge Johan Thue, Gyldendal 2007, pp. 564-574, 571ff.

If a Norwegian court is to apply a foreign law or to decide on the validity or enforceability of an award based on a foreign law, and this foreign law incorporates elements of Uniform Law, the Norwegian court will give effect to the foreign law.[12]

The limits are ordre public and lois de police (see item 8 below).

5.To which extent arbitral awards are officially published or informally disseminated in business and legal circles in your country? Is your country a stare decisis country? If so, to which extent stare decisis applies to arbitral determinations/awards? To which extent issue preclusion or collateral estoppel (if accepted in your legal system) is applicable in arbitration (from court of law to arbitral tribunal and viceversa / between arbitral tribunals)?

Norway is not a stare decisis country, and court decisions are traditionally written with the only purpose of solving the concrete dispute. However, the Supreme Court is increasingly writing decisions also with the more general purpose of clarifying and developing the law, and their force as binding precedent is increasingly being affirmed.[13]

Arbitral awards within certain branches (notably, maritime transportation) are generally published. Otherwise, the dissemination is informal and sporadic, mainly due to the small size of the legal environment.

Arbitral awards do not have any force as binding precedent, but, due to the flexible system of sources of law mentioned above, they may have in practice considerable influence on the development of the law, particularly if they are rendered in branches of the law where most of the disputes are submitted to arbitration.

Norway has ratified the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, therefore courts are obliged to decline jurisdiction on a dispute if the subject-matter is covered by an arbitration agreement.

6.To which extent national laws and state courts in your country are "arbitration friendly"? Does your answer change depending on whether a state party or a state interest are directly

[12] Rt. 1987 s. 1449
[13] *J.E. Skoghøy*, op.cit., 565ff.

involved in or affected by the resolution of the dispute or the contract may be labeled as "a public" or as an "administrative" contract under your legal system? Whether the arbitration is "international or domestic"? Whether its seat/place is within/without your country?

The legislative infrastructure in Norway may be defined as arbitration friendly: arbitration is regulated by a statute based on the UNCITRAL Model law (1985), and recognition and enforcement by a statute incorporating the New York Convention.

Generally, the courts apply the law accurately and are not biased.

There is a strong policy against inserting arbitration clauses in public contracts such as concessions. However, Norway has entered into some Bilateral Investment Treaties that provide for investment arbitration, thus it is not excluded that investment arbitration be initiated against Norway in spite of the absence of arbitration agreements. Under Norwegian law, the State has immunity against enforcement.

7.To which extent arbitral awards are subject to control on the merits (including from the outlook of private international law or choice-of-law methodologies, rules or principles applicable or accepted in your country) or in respect of procedural notions or matters (e.g., due process) when rendered in your country or (if rendered abroad) when brought for enforcement/recognition in your country?

Judicial control of awards rendered in Norway is aligned with the regime provided by the UNCITRAL Model Law, and recognition and enforcement of foreign awards are regulated by the New York Convention. Therefore, there is no possibility to review awards in the merits.

The question of the arbitral tribunal's power to apply a certain law, however, is different from the question of the accurate application of that law. Therefore, in principle an arbitral award could be set aside or refused enforcement if the arbitral tribunal has exceeded its power in respect of the applicable law or has committed a serious procedural irregularity not applying the appropriate choice of law rule. The judicial control, however, should not extend to examining the accuracy of the tribunal's application of choice of law rules.[14] In this respect it may be pointed out that the Norwegian arbitration act has specified that arbitral tribunals shall apply the choice

[14] For a more extensive analysis of this point see *G. Cordero Moss*, Can an Arbitral Tribunal Disregard the Choice of Law made by the Parties?, in Stockholm International Arbitration Review, 2005:1, pp. 1-21

of law rules of Norway (lacking a choice made by the parties); this is a restriction of the regime known in the UNCITRAL Model Law (1985), that leaves it to the tribunal to decide which conflict rules shall be applicable.

8.Which is the notion of and role played by public policy in the recognition or enforcement of arbitral awards rendered abroad? Of lack of arbitrability? international mandatory rules or lois de police (national or foreign)? To which extent any of these reservations/notions serve the purpose of advancing primarily local or domestic notions regarding both substantive law and procedural law matters?

Traditionally, the notion of ordre public in Norwegian law has not always clearly been kept apart from the notion of lois de police. Also, there is not always full awareness of the border between mandatory rules and lois de police.[15] There is thus a risk that the scope of ordre public is enlarged beyond the restricted application that it should have in respect of the validity or enforcement of arbitral awards.

In particular, a rule that is deemed to be a loi de police - and may thus be considered to be a principle of ordre public by those who do not differentiate between the two categories - is the rule contained in the Contract Act § 36, stating the principle of reasonableness and good faith in contracts. This could potentially be a limit to recognition of arbitral awards giving effect to contract mechanisms according to their wording and not taking into consideration questions of good faith in the interpretation or performance of the contract. Such a scenario seems, however, to be quite unlikely, and assumes a clear unbalance between the parties' interests.

Under Norwegian arbitration law, the disputes that are arbitrable are those on subject-matters that the parties may dispose on. Hence, arbitral awards on questions of private or contract law do not usually create problems of arbitrability. The Norwegian Arbitration Act specifies that the private law effects of competition law may be subject to arbitration.

9. Having in mind your answers to questions 3-8 above, to which extent arbitral awards or determinations influence, or may be considered as possibly influencing state court decisions or

[15] For a more extensive analysis of this point see *G. Cordero Moss*, Lovvalgsregler for internasjonale kontrakter: Tilsynelatende likheter og reelle forskjeller mellom europeiske og norske regler, in Tidsskrift for Rettsvitenskap, 2007/5, pp. 679-717.

legislative change in your country? To which extent courts of law in your country defer to determinations made by local or international arbitral institutions in charge of administering arbitrations? If no experience at hand, which would be the prospective answer to these questions? Please differentiate the areas of the law in which this influence exists or may potentially exist in the future.

Arbitral practice is in Norway generally not deemed to have a particularly important value as source of law. This may be due to the circumstance that disputes are mainly resolved by ad hoc arbitration and the awards are generally not published. Thus, the arbitral awards that are known are not necessarily representative of arbitral practice and cannot be considered as evidence of a custom. The flexible system of sources of law, however, does not exclude that the reasoning of an arbitral award influences courts and legislation, if the argumentation is compelling.

In the field of maritime law, where arbitral awards are often published, they clearly influence the development of the law.[16]

10.Having in mind your answers to questions 1-9 above, to which extent arbitral awards rendered in your country, enforced or enforceable in your country or concerning nationals of or residents in your country apply or may be deemed as based on Uniform Law? If no experience at hand, which would be your prospective answer to this question?

Some arbitral awards have interpreted contract terms on the basis of the effects that the terms have under the law that originally had inspired the contract, as opposed to the national law that had been chosen by the parties.[17] This approach, that aspires to harmonize the interpretation of international contracts, has been criticized and does not seem to be the leading approach.[18]

11.Having in mind your answers to questions 1-10 above), which has been the impact of arbitral awards and determinations in introducing, firming up or applying Uniform Law, including through legislative change or the action of the courts, in your country? Of foreign court

[16] See *S. Brækhus*, Voldgiftspraksis som rettskilde, in Sjørett, voldgift og lovvalg, Universitetsforlaget 1998, pp. 185-203.
[17] The known "Arica" decision is the best example for that: ND 1983 p. 309. The award is in the field of maritime law.
[18] See *E. Selvig*, Tolking etter norsk eller annen skandinavisk rett av certepartier og andre standardvilkår utformet på engelsk, in Tidsskrift for Rettsvitenskap 1986, pp. 1-26. See also *G. Cordero Moss*, Anglo-American Contract Models and Norwegian or Other Civilian Governing Law, in Publications Series of the Department of Private Law, Faculty of Law, University of Oslo, 2007, 169.

decisions regarding arbitral awards or determinations referring to or based on Uniform Law? If no experience at hand, which would be the prospective answers to these questions?

Norway has a long tradition in the field of harmonized legislation and uniform interpretation of the law, in connection with the Nordic legislative cooperation that started in 1872, to which also Denmark and Sweden participate. The Nordic cooperation is based primarily on the similarity and strong ties that exist among these countries, and cannot therefore unconditionally testify for a Norwegian eagerness towards unification on a more global basis.

In some fields , Norwegian courts are by statute assumed to take into consideration foreign court decisions so as to ensure a harmonized application of Uniform sources: for example, in respect of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters or the European Convention on Human Rights.

Also the Norwegian Act on Contracts for the Sale of Goods provides, in § 88, that the act shall be interpreted so as to ensure harmonization with the application of the CISG (which the Act is based on); however, it does not seem that courts or literature make an extensive use of foreign decisions to ensure such harmonization.

As mentioned, some Norwegian Supreme Court decisions have referred as their basis to general principles or principles common to a plurality of legal systems. However, from these decisions it does not appear in any way how the Supreme Court arrived at the acknowledgement that a certain principle was common to other countries' law or represented a generally recognized principle. No reference is made to any source or argument substantiating the mere statement that those principles are general. This gives the impression that the Supreme Court's starting point was a principle of Norwegian law, and that the Court deemed the Norwegian principle to be so fundamental that it believed it must have been shared also by other systems, thus it considered it as a general principle.[19]

In conclusion, foreign awards and foreign courts have theoretically the ability of influencing the introduction and development of Uniform Law in Norway. However, so far the legal

[19] In Rt. 1992 s. 796, for example, the Supreme Court had to interpret a contract governed by the law of New York. The contract contained an "entire agreement" clause, that has the purpose of restricting the parties' rights and obligations to those that are written in the contract and of preventing integration of the contract by external elements. This is a clause that relies on rules on contract interpretation and rules on evidence that are peculiar to the Common Law systems. Norwegian law has a rather different approach, yet the Supreme Court applied the Norwegian doctrine of interpretation and integrated the contract, affirming that the interpretation principles are assumed to coincide in Norwegian and American law (p. 801). Also in Rt. 1987 s. 1449 the Court mentioned a general principle, but did not express how it had come to the conclusion that a principle known in Norwegian law also reflected a general principle.

environment in Norway has been little receptive in practice, showing a rather municipal attitude (apart from harmonization of the Nordic law).

12.Having in mind your answers to questions 1-9 above which has been the impact on the fashioning of your national legislation on arbitration – domestic or international – or on arbitral awards rendered in your country or concerning nationals of or residents in your country of: (a) the action and rules of international arbitral institutions (e.g. the International Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA)); (b) the works of international organizations (e.g., UNCITRAL, UNIDROIT, the European Union, NAFTA, the Organization of American States); and (c) foreign court decisions or legislation reflecting the influence of the action or works of institutions or organizations like the ones mentioned in subparagraphs (a) or (b) above? If no experience at hand, which would be your prospective answers to these questions?

(a): International arbitral institutions exercise little or no effect on the fashioning of legislation on arbitration. Some of the publications issued by the ICC, such as the INCOTERMS or the UCP 500 (now 600), are widely referred to in international contract practice and may therefore be applied, if relevant, to the merits of the dispute.

(b): The Norwegian Arbitration Act is based on the UNCITRAL Model law, hence the impact of the UNCITRAL was significant. Other organizations have not influenced Norwegian arbitration law in any remarkable way. The European Union exercises a considerable influence on the content of arbitral awards, to the extent that the arbitral tribunals apply Norwegian substantive law to the merits of the dispute: though not a member of the European Union, Norway adopts numerous European rules via the Agreement on the European Economic Area.

(c) So far the impact of foreign court decisions has been little on arbitration rules. It cannot be excluded that Norwegian courts will take into consideration other European court's decisions on ordre public in connection with the validity or the enforceability of arbitral awards. This is likely particularly because Norwegian courts are bound by the Lugano Convention to apply uniformly the rule contained therein on recognition and enforcement of foreign judgments; therefore, the notion of ordre public in respect of enforcement of judgments will become autonomous. Once

established an autonomous notion of ordre public in respect of recognition and enforcement of judgments, it may be expected that this will be extended also to the validity and recognition and enforcement of arbitral awards.

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