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Ole Lando and Choice of Law for Contracts

Peter Arnt Nielsen *

Abstract: The author represents the content of Ole Lando's doctoral dissertation from 1961 on the choice of law for contracts. The dissertation examined the evolution of the choice of law rules for contracts in France, Germany, England, the US and the Scandinavian countries. It is concluded that Ole Lando in his dissertation proposed choice of law rules for contracts that in general were adopted two decades after his dissertation in the Rome Convention on Choice of Law for Contractual Obligations.

Zusammenfassung: Der Autor des Beitrags stellt den Inhalt der Dissertation von Ole Lando aus dem Jahr 1961 über die Rechtswahl bei Verträgen dar. Die Dissertation untersuchte die Entwicklung der Rechtswahlvorschriften für Verträge in Frankreich, Deutschland, England, den USA und den skandinavischen Ländern. Es wird die Conclusio gezogen, dass Ole Lando in seiner Dissertation Rechtswahlvorschriften für Verträge vorgeschlagen hat, die in ihren Linien zwei Jahrzehnte nach seiner Dissertation in das **Übereinkommen von Rom über das auf vertragliche Schuldverhältnisse anzuwendende Recht** aufgenommen wurden.

1. Ole Lando as a Visionary Scholar

1. On 5 April 2019, Professor Ole Lando passed away at the age of 96. He was the greatest Danish legal academic in modern times, and he earned his world-wide fame on his work with 'The Principles of European Contract Law', a project he started up in 1976, which was and still is exceptionally visionary. Ole Lando received several international research awards for this work, for instance the German Alexander von Humboldt Research Award for Foreign Humanists, the Nordic Lawyers' Prize and the Danish Ørsted's Gold Medal, a medal that has been given only 22 times since 1851. He was also Honorary Professor at the Stockholm Business School and at the Universities of Osnabrück, Fribourg, and Würzburg.

2. Until Ole Lando obtained recognition for his work on 'The Principles of European Contract Law' he had been best known as a scholar specialized in Private International Law, especially choice of law for contracts. However, as will be shown below in section 2, his doctoral dissertation from 1961 was in fact also visionary, as his suggestions in the thesis became law almost twenty years after its publication. In 1963,

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Ole Lando became Professor at the Copenhagen Business School (CBS), and he retired in 1992 after 30 years of service at CBS. As Full Professor, he wrote ten books including 'The Conflict of Laws of Contracts. General Principles' (1985) at the Hague Academy of International Law and a very large number of articles in national and international journals. In Denmark, Ole Lando created and developed International and Comparative Commercial Law as a discipline. His textbooks in Danish on 'Comparative Contract Law' (first ed. 1972, sixth ed. 2006) ('Komparativ kontraktret') and 'Choice of Law for Contracts' (first ed. 1974, third ed. 1981) are legendary for Scandinavian students and lawyers.

Ole Lando was a very active Professor Emeritus as he continued to work on the Principles of European Contract Law and other projects such as a Restatement of Nordic Contract Law published in 2016. Indeed, as *Emeritus*, he published more than 90 articles, edited four books, including the Principles of European Contract Law, Part 1 (1995), Part I and III (2000) and Part III (2003), and he wrote or updated five textbooks. He received two 'Festschrifts', one in 1997 on his 75 birthday ('Festskrift til Ole Lando – Papers dedicated to Ole Lando'), and one at his 90th birthday in 2012 ('Liber Amicorum Ole Lando')

2. Ole Lando's Doctoral Dissertation

3. As a law student in 1943, Ole Lando had to flee to Sweden following the Nazis' attempt to round up the approximately 8,000 Jews living in Denmark. Less than 500 were caught. While studying Law at the University of Uppsala, Ole Lando found a book on English Conflicts of laws, and his interest in the subject was immediately aroused. In 1947,

Ole Lando graduated, and in 1955, while working for the Danish Ministry of Justice and while being a Teaching Assistant at CBS, he wrote a paper on qualification in Private International Law for which he received '*accessit*'. After this experience Ole Lando decided to write a doctoral thesis on choice of law for contracts, a work he finalized in 1961 after research stays at the University of Michigan, at the Max Planck Institute in Hamburg, and in Paris. He received his doctoral degree in 1962 from the University of Copenhagen, and in the following year he left the Ministry of Justice in order to become Professor at CBS.

4. Ole Lando's doctoral dissertation from 1962 was on choice of law for contracts ('Kontraktstatuttet').[1] The dissertation was restricted to the general part, and he focused on party autonomy and the choice of law in absence of an agreed choice. Ole Lando applied the comparative method. After a presentation of the subject in Chapter 1, Ole Lando examined in Chapter 2 the evolution of the law on choice of law for contracts in French, German, English and US law.

1 O. Lando, *Kontraktstatuttet, Hovedpunkter af den internationale kontraktrets almindelige del* (København: Juristforbundets Forlag 1962).

He then turned to Scandinavian law (Norway, Sweden and Denmark) in Chapters 4–6.

2.1. From Strict Rules to Party Autonomy

5. Originally, the choice of law rules for contracts were fixed or strict rules subjecting the contract to the law of the State where the contract was entered into. This was a logical solution, because generally at that period contracts were made and performed by both parties at one time and at one place, as merchants owned the ships and were on board when the ships called at ports and bought and sold the goods. However, already in the 16th and 17th centuries, writers like Dumoulin and Huber proposed to look at the intention of the parties as an exception to the strict rules. Ole Lando found that the law of the place where the contract was entered into lost its significance in the 19th century due to technological and economic developments. Shipping became a business of its own, the merchants stayed at home, the mail service became more efficient and the telegraph was invented, so contracts could be entered into at a distance without the buyer and seller being present at the marketplace at the same time.

6. Ole Lando first examined French law. Mailher de Chassat, and Henry Batiffol representing the view of the clear majority of the French doctrine, were certainly opposed to party autonomy, because in their views the parties could logically not select the law governing the contract as no legal system could give effect to the parties' intention. However, courts were more open to party autonomy, and in 1910 the Cour de Cassation recognized party autonomy.

As far as German law was concerned, Ole Lando found that a similar disagreement as the one in France between the doctrine and the courts existed in Germany from around 1880 to 1930. The German doctrine, for instance represented by Ludwig von Bar and Ernst Zitelmann, used the same arguments against party autonomy as their French colleagues. The German courts, on the other hand, ignored this criticism and accepted an express choice of a law as the governing law of the contract. And in 1931, Wilhelm Haudek gave party autonomy its theoretical foundation when he showed that party autonomy can be derived from a choice of law rule of the forum allowing the parties to choose the governing law.

In English law, Ole Lando found that party autonomy since 1865 had been accepted by the courts under the influence of the *laissez-faire* philosophy, but the doctrine was split on the question. John Westlake, G.C. Cheshire and J. H.C. Morris were against party autonomy, whereas A.V. Dicey favoured the will of the parties.

Also American courts, according to Ole Lando, accepted party autonomy. However, Joseph Beale was a strong opponent of this principle and proposed the *lex loci contractus* as the governing law, because in his opinion the parties could not select the law as they had no legislative power to do so. Indeed, the First Restatement of the Conflict of Laws from 1934 did not mention party autonomy at all.

In respect of Scandinavian law, in the 1940s and 1950s, the Danish author O.A. Borum and the Swedish author Håkan Nial recommended party autonomy. The Scandinavian courts also accepted the will of the parties.

7. Ole Lando concluded that party autonomy should be accepted for two reasons. First, a choice of law clause would ensure certainty in commercial transactions. Second, contractual parties need freedom to choose, for instance a law that dominates the relevant market they operate in, a law which is neutral instead of the law of one of the parties, a law that is particular fit for the type of contract in question, or the law that has a close relationship with an earlier contract between the parties. On the other hand, Ole Lando also recognized that unrestricted party autonomy would be unacceptable in certain types of contract, especially employment and insurance contracts as well as contracts for lease of immoveable property.

2.2. Choice of Law in Absence of an Agreed Choice

8. In respect of choice of law in absence of an agreed choice, Ole Lando found that both France, Germany and England in the 19th century abandoned the rigid rule of applying the *lex loci contractus.* Instead, in France and England courts gave weight to the presumed intention of the parties as well as the place of performance of the contract. Germany also used the presumed intention of the parties, but through a hierarchy of rules or presumptions. However, in the 1950s a trend to apply the most real connection based on objective criteria could be seen in all three countries.

In US case law, Ole Lando found that the trend in the 19th century was to apply the law of the place of contracting and the law of the place of performance of the contract, where the parties had not agreed on the law governing the contract. However, after the First Restatement of the Conflict of Laws in 1934, most courts applied a more sophisticated approach under which the formation, the interpretation and the validity of the contract were governed by the law of the place of contracting, whereas the performance of the contract was governed by the law of the place of performance.

In Scandinavia, Danish courts abandoned the *lex loci contractus* around 1883 and so did the Swedish courts in the beginning of the 20th century.

Instead, the Scandinavian courts generally applied the law of the domicile of the debtor as a main presumption. However, Ole Lando found that around 1937, all Scandinavian courts finally established the center of gravity approach as the guiding principle.

9. Ole Lando was a great proponent of the center of gravity principle. He suggested that it should be supplemented with presumptions relying almost exclusively on the contacts of the contract in order to create the necessary degree of predictability. For sale of goods contracts, insurance contracts, agency contracts, contracts for provision of services and contracts for hire of movables, Ole Lando proposed a presumption in favour of the law of the business domicile of the 'seller'. And he suggested that the business domicile should be where the principal business and the administration is carried on.

10. In conclusion, in his doctoral dissertation from 1961 on choice of law for contracts, Ole Lando argued in favour of wide party autonomy with certain restrictions in order to protect weaker parties such as employees. If the parties had not agreed on the law governing the contract, Ole Lando proposed the center of gravity principle combined with presumptions in favour of the law of the 'seller'. Thus, he proposed rules that approximately 20 years after his dissertation were adopted in Articles 3, 4 and 6 of the EEC Rome Convention of 19 June 1980 on the Choice of Law for Contractual Obligations.