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The Lando Method

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Abstract: In this contribution I try to describe the 'Lando method' for harmonization or model rules, based on the writings of Ole Lando himself and my own experience in the Lando Commission.

Zusammenfassung: In diesem Beitrag versuche ich, die "Lando-Methode" für Harmonisierung oder Modellregeln zu beschreiben, gestützt auf die Schriften von Ole Lando selbst und meine eigenen Erfahrungen in der Lando-Kommission.

Keywords: Harmonization, contract law, European private law, restatements

1. Purposes: An Imperfect Code

1. The original purpose of Ole Lando when proposing Principles or harmonized rules was to have an alternative for conflict of law rules in the case of business contracts, thus uniform rules for international business contracts. But contrary to the Unidroit Principles for International Commercial Contracts (UPICC), the project was not limited to this original purpose (see Article 1:101 Principes of European Contract Law (PECL)[1]) and intended to draft a model contract law for the whole of the European Union, including non-business contracts and including domestic contracts. This had implications that I will mention later; it meant i.a. that it was already inherent in the broader purpose that the Principles would have to be complemented with as well consumer law rules as rules on specific contracts. There were, however, good reasons to start with general contract law.

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1 *Article 1:101 Application of the Principles* (1) These Principles are intended to be applied as general rules of contract law in the European Communities.
(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.
(3) These Principles may be applied when the parties:
(a) have agreed that their contract is to be governed by 'general principles of law', the 'lex mercatoria' or the like; or
(b) have not chosen any system or rules of law to govern their contract.
(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

2. Secondly, Ole Lando strongly believed in the advantages and necessity of some form of codification, the creation of a common text consisting at least of rules.[2] He did not believe that a European contract law could come about and function without such an instrument e.g. merely on the basis of teaching or case law. In several articles, he stressed that he was in our age on the side of an Anton Thibaut in such a *Kodifikationsstreit*.

According to Lando, a perfect Code would meet three requirements that cannot be fulfilled at the same time, which means there are only imperfect Codes, but nevertheless useful and even necessary. These three requirements are:

- certainty or predictability;
- accessibility for the addressees, and for Ole Lando these were the citizens, and more specifically the businessmen and educated citizens, not just lawyers;
- not too rigid or to detailed, leaving some room for development by the courts based on the needs of practice.

The Code will thus have to find a compromise, which, according to Ole Lando, would consist of a sufficiently large number of sufficiently detailed rules, combined with some general clauses,[3] such as the good faith and fair dealing clause.

As to substance, the aim was clearly to try to formulate the 'best' rule and not necessarily the 'most common' one. See also *infra*, 5.

2. People

3. Now, in order to do such work, you need a team. Ole Lando rightly believed that there was and is in Europe sufficient common ground to make such an enterprise feasible. Who could do it? He believed it could only be done by professional lawyers independent from governments and interest groups[4] and learned in more than only their own legal system. I will deal with especially the last requirement under 3. Governmental delegates were not a good idea; the reason he mentioned was not so much that they have to follow government instructions, but that too often they had insufficient expertise compared to academics, and too often they are unable, either by their limited expertise

2 For Ole Lando on the need for legislation, see i.a. 'Why codify the European law of contract', 5. *ERPL* 1997, 525 ff. at 534.

3 O. Lando, 'Is codification needed in Europe? Principles of European Contract Law and the Relationship to Dutch law', 1. *ERPL* 1993, p (157) at 162.

4 O. Lando, 'How the Principles of European Contract Law (pecl) were Prepared', 8. *EJLR (European Journal of Law Reform)* 2006, p (477) ff.; O. Lando, 'Comparative Law and Lawmaking' 75. *Tulane LR* 2011, p (1015) at 1016.

(knowledge) or by their state of mind as civil servants, to think out of the box of their own legal system.[5] He needed people willing to set aside their own rules when they could be convinced that other rules were better.

4. But do, or did, such independent lawyers share common values?

At least in the field of general contract law, Lando believed that this was the case. General contract law was for Lando a matter of ethics, economics and some legal technique, not a matter of culture, or folklore as he sometimes said. He believed that in this respect, lawyers did share common values and that contract law in Europe was based on these common values: Christian ethics and a market economy corrected by requirements of solidarity and fairness.[6]

A common contract law was possible because such lawyers shared an education that translates middle class bourgeois values. As he wrote in 'Homo iudicans':

> *"The degree to which these values are shared by lawyers belonging to the different legal systems of European origin is truly remarkable. This, it is submitted, has to do with two main factors.*
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> *The first of these is the environment in which homo judicans is raised and lives. Most of the guardians of our law and justice grew up in well-to-do middle class homes upholding traditional moral values. Novelists and dramatists have lampooned the upper middle class for its hypocrisy and bad morals, and this has led many to believe that the bourgeoisie is depraved. In fact, the middle class has everywhere been the guardian of morality and by extension so, in general, have been our judges' parents. At school and at university the judges in spe were good and relatively virtuous students with solid home ties.*
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> *Most judges have a strong sense of responsibility. They are confronted with people who often find themselves in a critical situation, and they feel that they must 'do justice'.*
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> *Second: the common roots of the laws of Europe and of those other countries whose laws are of European origin. Everywhere, the impact of Roman law, Christian ethics, the great European moralists and in modern times, the democratic institutions, the market economy of the industrial state"*[7]

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5 Lando, 75. *Tulane LR* 2011, p (1015) at 1016.

6 Lando, *EJLR* 2006, p (477) at 479; Lando, *ERPL* 1997, p (525 ff.) at 529–530; Lando, 'Can Europe build unity of civil law whilst respecting diversity', 1. *Europa e diritto privato* 2006, p (1 ff.) at 5; Lando, 'The Structure and the Legal Values of the Common Frame of Reference (CFR)' *ERCL* 2007, p (245 ff.) at 251.

7 Lando, 'Homo iudicans', *ULR (Uniform law review)* 1998, p (535 ff.) at 537.

3. Balancing the Values

3.1. Balancing the Values and Principles in Rules

5. It is true, as Lando also wrote, that the members of the Commission on European Contract Law (CECL) shared similar values. It is also true, that they did not always believe in exactly the same rules, i.e. in the same outcome of the balancing of these values.

Lando was evidently aware of the fact that choices between alternative solutions in rules are often also political choices, and that a balance had to be found.[8]

He tended to see these differences in a classical opposition between liberal in the sense of free market and social in the sense of protective rules. Although there is more than this opposition, it is true that for general contract law this was and probably still is the main dividing line: how far goes freedom of contract and how much do you protect people against freedom of contract?

3.2. Cultural Differences?

6. According to Ole Lando, the main differences relevant for the exercise where thus political differences rather than national ones.[9] Evidently there were also differences in legal culture, but Lando considered them differences in legislative technique rather than what he called folklore; he did not believe that culture in that more popular sense made the real difference in the field of contract law. He was convinced that such differences could also be overcome and would have less impact on the exercise.

Did he underestimate the political choices and balancing behind the national differences? I think he was right in not overestimating the substantive differences, because in the field of general contract law, we could find sufficient common ground. But he may have underestimated their political character in the sense of questions that matter for the political body as a whole, the people. If you go back to the national audiences, lawyers may not have sufficient democratic legitimacy to make the law in a democracy. Lando tried to broaden the support base by testing the rules in a few meetings with mainly business stakeholders, and found that the result was acceptable for them.

3.3. Common Values in an Age of Diversity?

7. So, in this exercise, I believe we did more or loss overcome the political problem. I am not sure whether this would still be the case today. Do we still have sufficient common values today in Europe, do we have them among the

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8 Lando, 'Liberal, social and 'ethical' justice in European contract law', 43. *CMLR* 2006, p (817 ff.)

9 Lando, *CMLR* 2006, p (817) at 826; Lando, *Tulane LR* 2001, p (1015) at 1024.

lawyers even? Are the values that were the substratum of the common solutions still common? Do the lawyers still share the same values in an age with new forms of polarization, in an age of identity politics of the left and identity politics of the right? Is it even possible to speak about common values in a world where diversity is promoted as the supreme value? How can they be common if everything is about diversity? And is this not especially a problem for vague standards such as good faith and fair dealing, which more than precise rules require some common understanding[10]?

4. Instrument and Style to Be Reached

4.1. Format

8. Let's now move to the instrument itself, the so-called Principles. They have a specific format, and it is the format of the so-called Restatements of the law, as developed by the American Law Institute. Such a Restatement contains blackletter rules, comments, examples and sources. This was a good format, especially because comments make the rules more accessible and compensate in part the brevity of the rules (See however 5.), and sources enhance the authority of the draft.

4.2. Structure

9. The rules on general contract law were ordered according to a structure that is classical for contract law, a so-called 'chronological' order, the so-called lifeline of the contract. Contrary to what some have said, this order has also been preserved in the DCFR, which has the chapters of the PECL in the same order. This classical presentation is a little bit dangerous, because it creates the impression that a contract is something like a living animal, that is born at some point in time, dies at some point, and has a life in between. This image has given rise to some wrong doctrines, but fortunately not in the PECL.

4.3. Language

10. Secondly, the rules had to understandable for prospective users. Lando often referred to Eugen Huber's comments on the style of 'his' ZGB (Swiss *Zivilgesetzbuch*).[11] Lando was, however, well aware that it is not always possible

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10 On the other hand, vague rules may be deemed necessary or at least useful precisely because some aspects must be left to local differences. See in the respect my 'Good Faith and the Content of Contracts in European Private Law', in S. Espiau Espiau & A. Vaquer Aloy (eds), *Bases de un derecho contractual europea/Bases of European Contract Law* (Valencia: Tirant lo Blanch 2003), p (17 ff.) also in *EJCL* 2003 = https://www.ejcl.org/71/abs71-1.html

11 For example in Lando, *ERPL* 1993, p (157) at 163; Lando, ' Salient Features of the Principles of European Contract Law: A Comparison with the UCC', *Pace ILR* 2001, p (339) at 342; Lando, 'On

to have good rules that are perfectly understandable for average educated people and businessmen. I'll come back to this question below, when mentioning the test of translatability.

4.4. Level of Generality

11. He was also aware of another paradox: in order to avoid discussions, it is a good technique to avoid having the same or more or less identical rules in different places; we thus have to generalize the rules to some extent to avoid redundancies, even if this makes them less close to the concrete questions.[12] There evidently can be different opinions on how far to go in avoiding redundancy: and indeed, as to the DCFR, Lando would have preferred to repeat the rules for non-performance by stating them twice, once for contractual and once for non-contractual obligations; not because they are different, but for pedagogical reasons. It is one of the relatively few choices where we disagreed.

5. The Way to Reach It

5.1. Practical Usages

12. We have the people, now the method. It evidently consisted mainly of dialogue and debate. But this worked because it was well prepared, and also with the help of some practical usages. At the start of the meeting, we made a list of documents and numbered them, so that we could easily refer to a document without confusion. It was also a habit to have extensive Minutes of the meetings.

5.2. Reason Based on Comparative Experience

12. I said that it was the aim to formulate the 'best' rule and not necessarily the most common one. Ole Lando has often expressed his wish to improve the law in the exercise of harmonization.[13] But this absolutely did not mean that he believed to have a hold on the truth. Finding the truth, or rather the best rule, was a collective exercise to be based on the wisdom of many. Maybe not the wisdom of the crowds, but the wisdom of many lawyers, many legal systems. The best rule had to be found on the basis of comparative law through

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Legislative Style and Structure', *ERPL* 2006, p (475) at 484; LANDO, *Tulane LR* 2001, p (1015) at 1031.

12 LANDO, 'Principles of European Contract Law: A First Step Towards a European Civil Code?', *IBLJ* 1997, p (189) at 198–199.

13 LANDO, 'Making the Principles of European Contract Law: Theoretical and Methodological Aspects', in Antonina Bakardjieva Engelbrekt Joakim Nergelius (eds), *New Directions in Comparative Law*, p. 165 ff.

a functional method,[14] showing the effects of the different solutions found. In practice, each topic was entrusted to a single reporter who had or was able to get a comparative view and had to write first a position paper indicating the main questions and choices, already trying to strike a balance.

Lando stressed the importance of having also an external view on a legal system, a view by an outsider, however to be controlled by an insider.[15]

13. Comparative law is thus the instrument to find the rules that have been tested, and it is the experience of nations with these tested rules that shows us the better law. This also implies that most practices and rules that have been kept over time can be presumed to have some wisdom. And although Ole Lando was certainly not a political conservative, I even dare to refer to Edmund Burke who, in his *Reflections* on the revolution in France describes 'the science of jurisprudence' as 'the collected reason of ages combining the principles of original justice with the infinite variety of human concerns'.[16]

I believe the use of the term 'principles' has to be understood in this sense, as those rules that do express the collective wisdom of lawyers, a shared heritage, and not in the sense of abstract values, as the latter are always in contradiction with each other and need rules in which they are balanced with each other.

14. The way to find these rules was clearly, as said, the functional approach. The functional approach looks for the alternative solutions for typical cases, and compares these solutions, i.e. the concrete effects given to typical cases. It often starts with a question. In his own contributions, Lando often used questions as subtitles.[17] Rules were drafted by trying 'to visualize how concrete cases would be solved on one's own country'.[18] Often the concrete solutions are closer to each other than general statements and concepts. It was our conviction that at the level of general contract law, this largely works, and it was our experience that it did work. This combination of this functional comparative method with the wisdom of a shared heritage was the secret of Ole Lando.

15. When preparing this lecture, I visited the Design Museum in Copenhagen; it gives a central role to Kaare Klint as 'founder of the Danish design DNA'. And this DNA of Klint was summarized on a poster (Figure 1) as being at the same time functionalist and traditionalist:

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14 Lando, 'The Common Core of European Private Law and the Principles of European Contract Law', *Hastings International and Comparative Law Review* 1998, p (809 ff.) at 815.

15 Lando, *Hastings International and Comparative Law Review* 1998, p (809 ff.) at 815.

16 *Reflections on the Revolution in France*, § 163 in the Harvard classics edition.

17 e.g. Lando, *ERPL* 1997, p (525 ff.)

18 For example Lando, *CMLR* 2006, p (817) at 825; Lando, 2006, p (477 ff.); 478-479, Lando, *Tulane LR* 2001, p (1015 ff.) at 1024.

Figure: 1

I do not consider Ole Lando as a traditionalist, but nevertheless it fits. In line of this quote 'A chair should come from a good old family', meaning that the quintessential form of older types can be used as a model for the future, there was some traditionalism in Ole Lando's ideas, too.

5.3. Examples of Common Solutions despite Diverging Traditions

16. Let me now turn to some examples of problem solving in the Lando commission where common rules were found despite traditional divergences.

A first example concerns the remedy of specific performance. This is one of the problems where according to received wisdom common and civil law fundamentally diverge. Contrary to the Vienna conference adopting Convention on International Sale of Goods (CISG), the Lando Commission did find common ground. It was expressed in PECL article 9:102:

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.

(2) Specific performance cannot, however, be obtained where:

(a) performance would be unlawful or impossible; or

(b) performance would cause the obligor unreasonable effort or expense; or

(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or

(d) the aggrieved party may reasonably obtain performance from another source.

(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

Here the solution was found by distinguishing different cases; although formally speaking there is a rule with exceptions, it really is a rule distinguishing different situations and having separate rules for these situations. It is also clear that a single big 'Principle' would not work here, we needed a rule concretely distinguishing different cases.

17. The second example concerns the Authority of agents. In Article 3:201: *Express, implied and apparent authority*, paragraph 3 states:

> *'(3) A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it*'.

And 3:209: *Duration of Authority*

> *(1) An agent's authority continues until the third party knows or ought to know that:*
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> *(a) the agent's authority has been brought to an end by the principal, the agent, or both; or*
>
> *(b) the acts for which the authority had been granted have been completed, or the time for which it had been granted has expired; or*
>
> *(c) the agent has become insolvent or, where a natural person, has died or become incapacitated; or*
>
> *(d) the principal has become insolvent.*

The initial difficulty was here that members from different countries were unaware of the fact that they each used a different perspective on the problem. The common rule could only be made by introducing the explicit use of an external perspective as

differentiated from the internal relationship. The rule in the external relationship is not formulated in terms of the internal relationship, but in terms of knowledge or constructive knowledge of it by the third party. Authority is a notion of the external relationship, and where it deviates from the internal one, the authority is nevertheless real and not merely apparent authority.

5.4 Style of the Rules

18. Another important feature of the drafting in the Lando Commission was to avoid definitions and draft operative rules instead.[19] I remember having heard many times: 'we do not define, we draft rules'. And where we really do need definitions in order to shorten the rules, they should appear where we need them and not in front, in some kind of list of definitions, as in many EU instruments.

These operative rules are mostly more remedy oriented than duty oriented, with some exceptions, such as the good faith and fair dealing rule. In the DCFR, this rule was reformulated from a duty-oriented to a remedy-oriented rule. It must be said that in this case, Ole Lando was not very happy with it. But in general, PECL rules were also remedy oriented. A good example can be found in the rule on mistake. The rule does not define mistake; it spells out in which case a party can avoid a contract for mistake. See PECL 4:103.

The functional view on definitions may not make us forget that words also have connotations in daily language, and that we should especially not use restrictive definitions of common words with a wider connotation simply in order to limit the scope of a rule. This is a very bad legislative technique nevertheless found in some EU instruments.

19. The terminology should be able to be 'common', the 'system' of concepts should be fit for the rules of the system, which means that terminology that is too much linked to a different system should be avoided. Thus, e.g. the Lando Commission preferred, as Ole Lando explained several times, . 'non-performance' over 'breach of contract'.

20. Ole Lando also often expressed his preference for simple and short rules, '*féconde en conséquences*'. But for the reason already mentioned, the PECL could not consist of only short and simple rules. There was often a discussion whether we should have a more elaborate rule, or a rule with less details but further explanations in the Comments. In most cases, we decided that, as most users would not read the Comments, the rules had to be capable to be understood basically on the basis of their wording and should not state a single rule where the comments would distinguish several rules. Vague rules were accepted where they were necessary in

19 i.a. LANDO, *Pace ILR* 2001, p (339) at 343 .

create a margin for adaptation to the concrete circumstances, but not accepted where they would merely make the rules look simpler, giving in to lazyness.

5.5. Paying Attention to Acceptability

21. Although Ole Lando has often been dismissing national differences as not relevant, even prejudice or folklore, he nevertheless paid quite some attention to the question of acceptability of draft rules in different legal orders, or at least he understood why some members had a problem of this kind.[20] He was certainly not willing to leave out the duty to act in good faith because it could be a 'legal irritant' (to use Gunther Teubner's famous 1998 paper[21]) in some countries like England, but was aware that some formulations of a rule could find a wider support among national audiences than other formulations.

This also explains some of the rules in the DCFR that were not in PECL, such as the statement on the binding force of contracts to please inter alia the French, although the article as a rule is superfluous. I honestly do not know what Lando thought of this specific example. As far as I remember more generally, he would agree with redundant rules only when they have a *pedagogical* function, to use a famous expression in the CECL. A redundant rule could be useful in order to guide the readers, especially as a signpost.

But Lando did not believe in, or was not willing to take into account, the expressive character or function of law, to use an expression relative to divisions among comparative lawyers. On a personal note, I consider myself clearly a functionalist, too, but law can also have an expressive function next to its operative functions. This is, however, not be understood as an argument in favour of a less operative style of legal rules.

22. Where the sensitivity for national legal culture was not very big, the attention for *translatability* was on the contrary high.[22] We all remember the cry for help by Denis Tallon 'cela ne se traduit pas en français'. It was always taken seriously; Ole Lando and most members of the Commission believed that a rule which could not be translated in other languages was not fit for PECL. I also believe that it is essential for any good international instrument to be made in several languages before finalizing it. The exercise very often reveals some weaknesses in the draft. Ole Lando has written that is has helped to simplify the language and make the rules more comprehensible. I would add that it has also helped a lot to have more consistency.

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20 Lando, *Tulane LR* 2001, p (1015) at 1022.

21 G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences', *MLR* 1998, p (11) = https://papers.ssrn.com/sol3/papers.cfm?abstract_id=876950

22 Lando, *ERPL* 1993, p (157) at 166; Lando, *IBLJ* 1997, p (189) at 201.

6. Follow-up

23. The Lando Commission was followed by the Study group on a European Civil Code, developing restatements for specific contracts, for non-contractual obligations (torts, unjustified enrichment, ...) and aspects of property law. Finally, the *acquis communautaire* (mainly consumer law) was integrated in general and specific contract law, and the Lando principles thus integrated, as the first building block in the DCFR. Although the Study group was no longer 'him' Commission, Ole Lando from the beginning supported the work of the Study Group.

He was especially interested in the work on specific contracts and the need for such a supplement. Let us remind that in continental law, the rules of general contract law are clearly insufficient for most contracts: we believe there should be default rules instead of leaving everything to negotiations by the parties and standard terms. In international business law, too, the first need was for rules on specific contracts, such as sales, carriage, lease, factoring, etc. Ole Lando was thus glad that Christian v. Bar continued the work with the Study Group focussing especially on specific contracts, and he cooperated loyally. Evidently, he may – as virtually any other member – have disagreed with some of the rules. One could say that Ole Lando believed that the DCFR shifted the balance a bit too much towards freedom of contract and had restricted the good faith clause. I believe he was in fact wrong as to the good faith clause, as the good faith clause in the DCFR does not have more limited application than in the Lando Principles. But it is true that in some other respects the final version of the DCFR is probably a bit more 'liberal' in B2B contracts. One could refer to PECL 4:110 on unfair terms, PECL 6:101 on statements giving rise to contractual obligations, or PECL 6:102 on implied obligations. These rules have indeed been slightly restricted in the DCFR. On the other hand, the development of default rules for specific contracts made the unfair terms rule much more effective. It is very difficult to review the fairness or unfairness of terms in contracts if there is no set of default rules for that type of contract, and more specifically relatively precise default rules. The importance of relatively specific default rules in this context was stressed recently in the judgment of the European Court of Justice (ECJ) in *Dziubak.*[23] In would conclude that on the one hand, the DCFR would not have been possible without the work of Ole Lando and his principles, but that on the other hand it was in no way a betrayal of the legacy of the Lando Commission but its natural continuation.

23 ECJ 3 October 2019, *Dziubak/Raiffeisen (Polska)*, curia.europa.eu/juris/documents.jsf?num=C-260/18, no. 53-54.