Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution

KADNER GRAZIANO, Thomas
SOLVING THE RIDDLE OF CONFLICTING CHOICE OF LAW CLAUSES IN BATTLE OF FORMS SITUATIONS: THE HAGUE SOLUTION

Thomas Kadner Graziano*

"The battle of the forms that resulted from the exchange of standard form contracts has gone on for over one hundred years. Yet every attempt to end the battle has proven only to inflame it."

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* Professor of Law at the University of Geneva (thomas.kadner@unige.ch). Dr. iur. (Goethe-Univ. Frankfurt), habil. (Humboldt-Univ. Berlin), LL.M. (Harv). The author is member of the Swiss delegation to the Special Commission on Choice of Law in International Contracts at the Hague Conference on Private International Law. He was in charge of the Working Group on Art. 6 at the Commission’s November 2012 meeting at The Hague. The views expressed in this article are those of the author.

1 C.A. Stephens, Escape from the Battle of the Forms: Keep it Simple, Stupid, [2007] Lewis & Clark L. Rev. 233. See also M.J. Shariff/K. Marechal de Carteret, Revisiting the Battle of the Forms: a Case Study Approach to Legal Strategy Development, [2009] Asper Rev. Int’l Bus. & Trade L. 21: “The area of contract law described as the battle of forms is a perfect example of an area of law where the legal rules and their application are complex, contradictory, and/or inconsistently applied. Indeed, the battle of forms problem has been recognized as among the most «difficult problems for contract doctrine to resolve» and in some jurisdictions, has been described as «chaos» […]”.

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I. Introduction

During contract formation parties frequently try at some stage of the negotiations to include their own standard terms in the contract. When the contract is transnational, these standard terms often contain choice of law clauses. More often
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than not, the standard forms will designate different laws: for example, one party having its place of business in Denmark provides for the application of Danish law to the contract in his standard forms; the other party, established in New York, respectively provides for the application of the law of New York. The question then is: Which law governs the contract? And, first of all, which law is applicable to the question of whether an agreement on the applicable law has been reached? Given that both parties preferred choosing the applicable law rather than leaving its determination to the application of objective connecting factors, should at least one of the choice of law clauses be respected, and if so, which one? Which law applies to decide the conflict of the choice of law clauses?

The issue of conflicting standard terms is widely discussed under the succinct expression battle of forms. At the substantive law level, different contract law systems give different answers to the question as to which party wins the battle. The outcome of the battle of forms will thus depend on the applicable law. The following contribution first provides a short overview of the solutions to battle of forms situations in a number of national legal systems, the CISG, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), the Principles of European Contract Law (PECL), and the European Commission’s Proposal of a Common European Sales Law (CESL) (II). In a second step, the proposals to solve the battle of forms issue at the Private International Law level, to be found in legal doctrine and national case-laws, will be set out (III). In November 2012, the Hague Conference on Private International Law proposed, in its Hague Principles on Choice of Law for International Contracts, a solution to the problem of conflicting choice of law clauses in standard terms in transnational situations. The Hague solution will be presented, then illustrated using a series of transnational case scenarios involving battle of forms situations, and finally evaluated in comparison with the alternative solutions suggested in legal doctrine (IV). The contribution then addresses the further situation in which the conflicting choice of law is between domestic law regimes and the CISG (V) before drawing conclusions (VI).
II. The Battle of Forms: A Short Survey of the Solutions under Different National Legal Systems, the CISG, the UNIDROIT Principles, PECL and CESL

In domestic laws, there are basically four fundamentally different solutions for dealing with battle of forms situations. In most countries, these solutions are judge-made. Code provisions or other statutory rules on the battle of forms are still rare, but examples are to be found in the Dutch Civil Code of 1992, the Polish Civil Code, the recent codifications of two of the three Baltic States as well as in the Uniform Commercial Code (UCC). The UNIDROIT Principles, the PECL and the CESL also provide for explicit rules on the battle of forms.

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4 One could consider adding yet another solution according to which there is no agreement and consequently no contract if the standard forms differ, see G. DANNEMANN, The “Battle of Forms” and the Conflict of Laws, in F.R. ROSE (ed.), Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds, London 2000, p. 200 et seq. with reference to a German case. However, once the parties have started executing the contract, this solution seems to be no option anymore and recourse to the law of restitution is in practice extremely rare in these situations, see also G. DANNEMANN, op. cit., at 201 and fn. 6; E.A. FARNSWORTH, Contracts (4th ed.), New York 2004, para. 3.21: “Performance by both parties makes it clear that there is a contract”; C. KEATING, Exploring the Battle of the Forms in Action, [2000] 98 Mich. L. Rev. 2678, 2683: once both parties have started executing the contract, “[o]n the formation question, almost anyone would agree that there was a valid contract at some time”; A.D.M. FORTE, The Battle of Forms, in H.L. MACQUEEN/ R. ZIMMERMANN (eds), European Contract Law: Scots and South African Perspectives, Edinburgh 2006, 98 at 102: “the risk that no contract may be found to exist [is] a risk that a court faced with a dispute between two commercial parties might be reluctant to run”.


6 See infra, II.C. No such explicit rules exist in the Civil Code of Latvia or the Russian Civil Code of 1994.
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A. Last-Shot Rules

In two leading cases, the English courts have solved battle of forms situations by applying the rule of general contract law according to which offer and acceptance must match (and the acceptance is required to be the "mirror image" of the offer). If a declaration purported to be an acceptance refers to standard terms differing from those of the offer, it constitutes a new offer which is regarded as being accepted at the latest when the party receiving it starts performing the contract. It is thus, in principle, the last set of forms which prevails and which becomes part of the contract (last-shot rule). The last-shot rule can also be found in a leading Scottish court decision. Decisions in Australia have referred to the English precedents when discussing battle of forms issues and in Australian legal doctrine it is assumed that the courts might be willing to apply the last-shot rule. It seems that the courts in South Africa also tend to apply a last-shot rule to battle of forms scenarios. The Chinese Contract Act 1999 arguably provides a last-shot rule.


9 Uniroyal Ltd v. Miller & Co Ltd, 1985 SLT 101 (Outer House), according to M. HOGG and G. LUBBE the "classic Scots authority" on battle of forms situations, in R. ZIMMERMANN/ D. VISSE/ K. REID (eds), Mixed Legal Systems in Comparative Perspective, Oxford 2004, p. 58, para. 159. See however A.D.M. FORTE (note 4), with reference to a second Scottish case, Roofcare Ltd v. Gillies, 1984 SLT 8 (Sh Ct) (applying a first-shot rule), and with the conclusion: "the best that can be said is that it is presently unclear in Scots law which party's form, first or last, will win that battle", at 106 et seq.

10 N.C. SEDDON/ M.P. ELLINGHAUS, Cheshire and Fifoot's Law of Contracts (8th Australian ed.), LexisNexis Butterworths Australia, 2002, para. 3.28: "Australian courts will probably follow the more traditional "matching" approach [i.e. require, like English courts, the precise matching of acceptance to offer] which has the merit of ease of application"; see also J. GOOLEY/ P. RADAN, Principles of Australian Contract Law, LexisNexis Butterworths Australia, 2006, paras 4.87 et seq., 4.89, 4.91 (leaving the answer open).

11 Ideal Fastener Corporation CC v. Book Vision (Pty) Ltd t/a Coulour Graphic 2001 (3) SA 1028 (D), cited according to R. SHARRICK, Business Transactions Law (7th ed.), Cape Town 2007, p. 64. See however L.F. VAN HUYSSTEEN/ S.W.J. VAN DER MERWE/ C.J. MAXWELL, Contract Law in South Africa (2nd ed.), Alphen aan den Rijn 2012, para. 147: "The practical problem that arises when parties accept that there is a contract despite the absence of a final agreement as to incidental terms (e.g., in the so-called battle-of-forms situation) which has not received much attention in South African law"; in the same sense A.D.M. FORTE (note 4), at 107: "The South African law of contract seems to have tended to ignore the battle of forms debate"; M. HOGG/ G. LUBBE (note 9), at 58-59.

12 See its Art. 30 and 31 and BING LING, Contract Law in China, Hong Kong et al. 2002, para. 3.039.
Last but not least, Art. 19 of the CISG is understood as a last-shot rule in some court decisions as well as by many commentators, notably, but not exclusively, in Common Law jurisdictions.\textsuperscript{13}

If the standard terms that were last referred to contain different or additional terms that \textit{do not materially alter} the terms of the offer when compared to the terms first employed, in a certain number of yet other contract law systems the contract is also concluded with the modifications of the terms last referred to (\textit{i.e.} a last-shot rule is then applied).\textsuperscript{14} However, in practice very few standard terms will contain only non-material modifications when compared to the terms used by the other party. In most, if not almost all situations the standard terms will differ with respect to substantial modifications (such as, \textit{e.g.}, the law applicable to a transnational contract).\textsuperscript{15}

Under last-shot rules, the forms that were last referred to prevail \textit{in total} over any other forms that were previously referred to. Previous references to other standard terms are without effect and to be disregarded.

\textbf{B. First-Shot Rules}

According to another approach, it is in principle the first set of standard forms used during the contract negotiations that will prevail. The main representative in Europe for a \textit{first-shot rule} is Art. 6:225(3) of the Dutch Civil Code. According to this provision, if both the offer and the acceptance refer to different standard terms, the second set of standard terms are to be disregarded except if the party submitting the second set of terms expressly rejects the terms of the offer. According to the


\footnotesize{\textsuperscript{14} Art. 2.1.11(2) UNIDROIT Principles, Art. 2:208(2) PECL, § 2-207(2)(b) UCC, Art. 6:225(2) of the Dutch Civil Code, Art. 6:178(2) of the Lithuanian Civil Code. See also Art. 19(2) CISG, Art. 31 of the Chinese Contract Act. – Art. 39 of the CESL, on the other hand, does not distinguish between terms materially altering the terms of the contract and terms concerning issues of minor importance. The CESL thus avoids the difficult task of drawing a line between the two categories of terms, which is certainly a good idea. For the “vast amount of litigation [in the USA] devoted to determining whether particular terms result in such «surprise or hardship» as to materially alter the contract”, see E.A. FARNSWORTH (note 4), at para. 3.21.}

\footnotesize{\textsuperscript{15} See for the CISG \textit{e.g.:} W.A. STOFFEL, \textit{La formation du contrat, in The 1980 Vienna Convention on the International Sale of Goods, Lausanne Colloquium of November 19-20 1984, Zürich 1985, p. 73: “des conditions générales qui ne concernent pas au moins un ou plusieurs, sinon tous les points, énumérés dans l’art. 19 al. 3 n’existent guère en pratique”}; E.A. FARNSWORTH (note 4), at para. 3.21; for the UCC \textit{e.g.} C.A. STEPHENS (note 1), at 246; for Chinese law: BING LING (note 12), at para. 3.037.}
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dominant opinion in the Netherlands, the requirement in Art. 6:225(3) of the Dutch Civil Code that the refusal be “express” excludes that it is made only in standard terms. Ideally, this rule shall lead to an explicit exchange between the parties as to which standard terms will eventually prevail.

In the USA, under certain circumstances the UCC can also lead to the integration of the first standard forms employed. Under first-shot rules, the forms that were first referred to prevail in total over the forms that were subsequently referred to. Later references to other standard terms are in principle to be disregarded. Art. 6:225(3) of the Dutch Civil Code, i.e. the main representative of this solution in European private law, explicitly confirms this result by stating: “Where offer and acceptance refer to different general conditions, the second reference is without effect […].”

C. Knock-Out Rules

According to a third approach, conflicting standard terms knock each other out and standard terms are to be disregarded when, and as far as, they contradict each other. Knock-out rules are applied by the French Cour de cassation, the German Federal Court, and the Supreme Court of Austria. The largely dominant opinion in Swiss legal doctrine also advances the proposal of a mutual knock-out of


17 See § 2-207(1) in conjunction with Sect. (2)(a), (b) or (c) of the UCC and under the further condition that the acceptance is not “expressly made conditional on assent to the additional or different terms”, Sect. (1) in fine.

18 Cour de cass. (comm.) 20.11.1984 (Société des constructions navales et industrielles de la Méditerranée c. Société Freudenberg), Bull. 1984 IV No. 313; see also F. TERRÉ/ Ph. SIMLER/ Y. LEQUETTE, Droit civil, Les obligations (9th ed.), Paris 2009, para. 122: “En cas de contradiction entre les clauses contenues dans les conditions générales de chacune des parties - par exemple entre les conditions générales de vente et les conditions générales d’achat - les deux stipulations s’annulent”.


contradicting standard terms.\textsuperscript{21} The new Estonian Code of Obligations\textsuperscript{22} as well as the new Civil Code of Lithuania\textsuperscript{23} both explicitly adopt knock-out rules for battle of forms scenarios, as well as, since the year 2000, the Polish Civil Code (for contracts concluded between companies).\textsuperscript{24} The UCC uses a knock-out rule as a fall-back solution.\textsuperscript{25} The UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the proposed Common European Sales Law all solve battle of forms situations using knock-out rules.\textsuperscript{26} Last but not least, many authors on the European continent, but also in other parts of the world, suggest applying a knock-out rule under the CISG.\textsuperscript{27}


\textsuperscript{22} § 40 (Conflicting standard terms) of the Estonian Code of Obligations provides (in English translation): “(1) If, upon entering into a contract, the parties each refer to their own standard terms, the contract is deemed to have been entered into under the terms which are not in conflict with each other. The provisions of law concerning the type of contract concerned apply in lieu of any conflicting terms. (2) In the case of conflicting standard terms, the contract is not deemed to have been entered into if one party has explicitly indicated before the contract is entered into or without delay thereafter and not by way of the standard terms that the party does not deem the contract to have been entered into. A party does not have this right if the party has performed the contract in part or in full or has accepted performance by the other party”.

\textsuperscript{23} Art. 6.179 of the Civil Code of Lithuania (in English translation): “Conflict of standard conditions. Where a contract is concluded by an exchange of standard conditions between both parties, it shall be considered that the contract is concluded on the basis of the standard conditions which are common in substance unless one party clearly indicates in advance a disagreement with the standard conditions proposed by the other party, or informs the other party without delay that it is opposed to the other party’s standard conditions.” On this provision V. MIKELĖNAS et al., Lietuvos Respublikos civilinio kodekso komentaras. 6 knyga. Prievolių teisė. I dalis, Vilnius 2003 (V. MIKELĖNAS et al., The Commentary of the Civil Code of the Republic Lithuania. Book 6. Law of Obligations. Part I, Vilnius), Art. 6.179, paras 1-3.

\textsuperscript{24} § 385 of the Polish Civil Code.

\textsuperscript{25} § 2-207(3) of the UCC.

\textsuperscript{26} Art. 2.1.22 UNIDROIT Principles, Art. 2:209 PECL, Art. 39 CESL.

Chinese Civil Code also contains a knock-out rule28 (instead of the last-shot rule in Art. 30 and 31 of the Contract Act 1999 which is currently in force).

Under knock-out rules, the standard terms of neither party prevail. The existing black letter rules establishing knock-out rules thus provide that “the contract is deemed to have been entered into under the terms which are not in conflict with each other”29 or “that the contract is concluded on the basis of the standard conditions which are common in substance”30 or that “the contract may be concluded according to the agreed clauses of contract and those standard-form clauses with substantially similar content”.31 Under knock-out rules “[t]he general conditions form part of the contract to the extent that they are common in substance”.32

D. Hybrid Solutions

§ 2-207 of the UCC combines elements of first-shot, last-shot and knock-out rules, the precise solution depending on the circumstances of the case.33 In other jurisdictions, the above-mentioned general rules may be displaced by different solutions under certain circumstances. In Dutch law, for example, if a party expressly rejects the application of the standard forms to which the first reference


29 § 40(1) of the Code of Obligations of Estonia.

30 Art. 6.179 of the Lithuanian Civil Code, see also Art. 385 § 1 of the Polish Civil Code.

31 Art. 867 of the Draft Civil Code of the People’s Republic of China, see also Art. 2.1.22 of the UNIDROIT Principles.

32 Art. 2:209(1)2 PECL, Art. 39(1) CESL (emphasis added).

33 § 2-207(1) abandons, in principle, the last-shot rule and “marked the end to the common law’s mirror image rule”, see e.g. C. KEATING (note 4), at 2684. However, a last-shot rule still applies if “acceptance is expressly made conditional on assent to the additional or different terms”, Sect. (1) in fine, and under the further conditions that the offer does not “expressly limit acceptance to the terms of the offer”, Sect. (2)(a), that the terms of the acceptance do not “materially alter” those of the offer, Sect. (2)(b), or that no notification of objection to the terms of the acceptance is given in due time, Sect. (2)(c). On the other hand a first-shot rule applies under Sect. (1) in conjunction with Sect. (2)(a) if “the offer expressly limits acceptance to the terms of the offer”, or (b) the terms of the acceptance “materially alter” those of the offer or (c) “notification of objection to them” is given, unless the “acceptance is expressly made conditional on assent to the additional or different terms”, Sect. (1) in fine. Finally, a knock-out rule applies if the contract is not formed under Sect. (1) or (2) but conduct of both parties “recognizes the existence of a contract”, in particular if they start executing the contract; see e.g. E.A. FARNSWORTH (note 4), at para. 3.21; C.A. STEPHENS (note 1), at 237 (for the “Pre-Code-Situation”), 246, 250 (for the use of “the old last-shot rule), and 251 (for the knock-out rule in Sect.(3)). For § 2-207 of the UCC in practice, see C. KEATING (note 4).
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was made and if the standard terms differ with respect to major points of the contract, a knock-out rule will apply instead of the first-shot rule; if there is an express refusal and if the alterations in the second set of standard terms are of minor importance, a last-shot rule applies instead of the first-shot rule. 34

Under hybrid solutions, but also in some jurisdictions providing first-shot or last-shot rules, the rule that eventually applies may thus very much depend on the circumstances of the case. 35

III. The Battle of Forms in Private International Law: Diversity of Opinions and Much Legal Uncertainty

A. Introduction

If a transnational contract contains a choice of law clause, the first question is whether the choice of law is permitted and whether it needs to meet special requirements at the Private International Law level (for example that "[t]he choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case" 36). These questions are to be decided according to the PIL of the forum.

The second question is whether the parties have actually agreed on the applicable law. Nowadays, it is well established that an agreement on the applicable law constitutes a second contract, to be analysed separately from the main (for example construction or sales) contract. 37 The question then is: if the law

34 C.B.P. MAHE (note 16), at 123-124, paras 2 and 3.

35 Further complications may arise if one or both of the parties explicitly state in their standard forms that they refuse to accept standard terms differing from their own terms (so-called Abwehrklausein, "rejection clauses"). Some contract law systems, such as the PECL and the CESL regard such declarations as relevant only when made explicitly and not by way of standard terms, Art. 2:209(2)(a) PECL, Art. 39(2)(a) CESL; see for German law BGH 20.3.1985, NJW 1985, 1838, 1839 et seq. and BGH 23.1.1991, NJW 1991, 1604, 1606: applying the knock-out rule if there are rejection clauses in standard terms. See for English law e.g. E. PEEL (note 8), 2-021: "The most that the draftsmen can be certain of achieving is the stalemate situation in which there is no contract at all. Such a situation will often be inconvenient [...]". – For a "Canadian battle of the forms case-law summary", see M.J. SHARIFF/ K. MARECHAL DE CARTERET (note 1), at 30 et seq. It seems that the courts in Canada are reluctant to follow any of the theories vigorously and are sceptical in particular with regard to strict first- or last-shot rules.

36 See, e.g., Art. 3(1) 2nd sent. of the Rome I Regulation; Art. 2 of the 1955 Hague Convention; Art. 4(1) of the Hague Principles, etc.


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applicable to the main contract was purportedly designated during the contract negotiations, which law applies to the question of whether an agreement on the applicable law has actually been formed and whether this agreement is valid?

If, during the contract negotiations, only one law was purportedly designated as the law applicable to the contract, it is recognized in international choice of law instruments that “consent is to be determined by reference to the law that would apply if such consent existed”. In other words the putatively chosen law applies in order to determine whether the parties agreed on the applicable law and whether the agreement is valid. For example Art. 10(1) of the Rome I Regulation (on “Consent and material validity”) states that “[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.” 40

The issue is much more complicated and controversial when the parties designate in their respective standard forms not one but different laws to govern the contract, which is frequently the case when both parties use standard terms in transnational contracts. 42 If both parties to a transnational contract 43 use standard


40 The Convention was drawn up in French only. See also Art. 10 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (not in force): “(1) Issues concerning the existence and material validity of the consent of the parties as to the choice of the applicable law are determined, where the choice satisfies the requirements of Article 7, by the law chosen. If under that law the choice is invalid, the law governing the contract is determined under Article 8.”

41 See in particular Art. 116(2) of the Swiss Act on PIL: “L’élection de droit […] est régie par le droit choisi”; “Die Rechtswahl […] untersteht […] dem gewählten Recht”.

42 See e.g. the Austrian case OGH 7.6.1990, IPRax 1991, 419 (Austrian and German choice of law clauses); the German case Amtsgericht (AG) Kehl 6.10.1995, NJW-RR 1996, 565 (Italian and German choice of law clauses); or the English case O.T.M. Ltd. v. Hydranautics 2 Lloyd’s Rep. 211 (Q.B. Com.: Parker, J.) cited according to G. DANNEMANN (note 4), at 206.

43 For the question as to when a contract is to be regarded as “international”, see e.g. Art. 1(1) and (2) of the Hague Principles: “1. These Principles apply to choice of law in international contracts […].” 2. For the purposes of these Principles, a contract is international unless the parties have their establishments in the same State and the
forms, and if these standard terms designate different laws to govern the contract, which law then applies to decide the battle of forms and, consequently, which law applies to the choice of law agreement and – if this agreement is valid – to the main contract? 44

This issue has so far never been explicitly addressed in a black letter rule, neither in the Rome I Regulation 45 nor the 1955 Hague Sales Conventions nor the 1986 Hague Convention on the Law applicable to Contracts for the International Sale of Goods, 46 nor in any national PIL statute. Given the complexity of the issue, the courts have so far often tried to avoid or circumvent the issue of the law applicable to the choice of law agreement or they simply applied the *lex fori*.

B. Proposals for a Solution

I. Applying the *lex fori*

A first solution could be found in solving the battle of conflicting choice of law clauses in standard forms according to the *lex fori*. This approach was eventually applied by some courts confronted with complex issues of choice of law in diverging standard forms, 47 and it has also been suggested by a minority opinion in the UK and Switzerland. 48

In order to support this solution, it has been argued that both parties preferred to choose the applicable law rather than have it determined through relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State". 44

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44 See on this issue: G. DANNEHMANN (note 4), at 206 et seq.; A. DUTTA, Kollidierende Rechtswahll Klauseln in Allgemeinen Geschäftsbedingungen, ZVglRWiss 2005, 461; L. MÖLL (note 5), at 153 et seq., 188 et seq.; S. MAIRE, Die Quelle der Parteiautonomie und das Statut der Rechtswahlvereinbarung im internationalen Vertragsrecht, Basel 2011, p. 151 et seq. For an overview of the case-law, see e.g. L. MÖLL (note 5), at 201 et seq.

45 Dicey, Morris and Collins on the Conflict of Laws, Vol. 2 (15th ed.), London 2012, para. 32-165: "if both sets of standard terms contain choice of law clauses, but choose different laws, then the Rome [Regulation] provides no solution".

46 The 1986 Hague Convention is not yet in force.

47 However, the *lex fori* was often applied without stating this explicitly, for references see L. MÖLL (note 5), at 203 and n. 777; see also the court decisions presented by M.J. SHARIFF/ K. MARECHAL DE CARTERET (note 1).

48 J. FAWCETT/ J. HARRIS/ M. BRIDGE, International Sale of Goods in the Conflict of Laws, Oxford 2005, paras 13.60-13.61 with references; the application of the *lex fori* is also considered in Dicey, Morris and Collins on the Conflict of Laws (note 45), at para. 32-103: "In these circumstances the only laws which could provide an answer are the *lex fori* or the law which would govern the contract in the absence of an express choice of law", see also para. 32-165; ibid, at para. 32-164: "English and Australian courts have tended to apply the *lex fori* to determine what the terms of the contract were"; M. KELLER/ J. KREN KOSTKIEWICZ, in Zürcher Kommentar zum IPRG (2nd ed.), Zürich 2004, Art. 116, para. 43; see also the references in A. DUTTA (note 44), at 464.
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objective connecting factors. Instead of ignoring the choices altogether, the law of the forum may play “a residual and mediating role”. Applying the lex fori is however an “imperfect solution” even in the eyes of its proponents, “and reliance on the law of the forum raises an obvious forum shopping objection” (in the same case, depending on the forum chosen by the claimant, English courts would, for example, apply a last-shot rule, whereas French, German or Swiss courts, for example, a knock-out rule.) The forum is often chosen for procedural reasons and there is not necessarily a link between the contract and the lex fori. What is more, since the lex fori is unknown when the contract is formed, this approach results in considerable uncertainty until a case is eventually brought before the courts. Last but not least, modern PIL instruments very much suppress the role of the forum in determining the consent to a choice of law, and rightly so. For example, under Art. 3(5) and 10(1) of the Rome I Regulation “invoking the lex fori is no longer an option”.

2. Knock-Out Rule at the PIL Level. Using Objective Connecting Factors Instead

According to a second opinion dominant in English legal doctrine and, in the past, also in Germany, if the parties use conflicting choice of law clauses in their standard terms the choice will be ineffective and the applicable law be determined according to objective connecting factors.

In support of this solution, it has been argued that there is no agreement on the applicable law, and not even the appearance of an agreement, if both parties

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49 See the second proposal, infra 2.
52 S. MAIRE (note 44), at 155.
54 G. DANNEMANN (note 4), at 210; see also A. DUTTA, (note 44), at 464; L. MÖLL (note 5), at 207; D. MARTINY, in Münchener Kommentar, Band 10 (note 53), Art. 3 Rom I-VO, para. 13.
want to have different laws applied. This solution also has the advantage of being simple, clear and its results are easily foreseeable for the parties. 56

However, if one party designates the law of A to govern the contract and the other the law of B, “rejecting both choices may defeat the expectation of both parties, and any third parties relying upon the contract. In other words, the fact that both parties cannot have their preferences respected is not obviously a sound reason for saying that we should respect neither.” 57

3. Use of the Law Applicable in the Absence of a Choice to Determine the Prevailing Choice of Law Clause

According to a third approach, the battle of forms shall be decided under the law that would be applicable in the absence of choice. This law then decides whether any standard forms prevail, or whether the conflicting choice-of-law clauses knock each other out. If one set of standard forms prevails, the law chosen in these terms shall then apply to the choice-of-law agreement 58 (and – if the choice is valid under this law – eventually also to the main contract).

This approach has been criticized for splitting the applicable law between a first law applicable to the battle of forms in general (first step) and a second law, determined in the first step, and then applicable to analysing the existence of an agreement on the applicable law (second step); 59 the battle of forms is then decided (in the first step) by a law that may eventually not be applicable since, in the end, a choice of the applicable law may be accepted and this law applied (in the second step). 60

4. Analysing the Choice of Law under the Laws Chosen Respectively. Solving Potential Conflicts by Way of a Knock-Out Rule

Following a fourth opinion, the inclusion of each respective set of standard terms (including the choice of law clause) shall be analysed separately under the law designated in those terms. If neither of the terms passes this test, objective connecting factors apply. If one of the terms passes it, the law chosen in these

56 See also L. Möll (note 5), at 207.
57 J. Fawcett/ J. Harris/ M. Bridge (note 48), at para. 13.61 (p. 675); for further arguments against this approach, see A. Dutta (note 44), at 465 et seq.
58 O. Lando, Int. Enc. Comp. L., Vol. III: Private International Law, Ch. 24: Contracts, Sect. 84; W.-H. Roth, Internationales Versicherungsvertragsrecht, Tübingen 1985, p. 578; following a comprehensive analysis, this solution has recently again been suggested by L. Möll (note 5), at 219 et seq., 232 et seq. with a well-argued proposal. This approach is also partially used under the solution suggested by A. Dutta (note 44).
60 D. Martiny, in Münchener Kommentar, Band 10 (note 53), Art. 3 Rom I-VO, para. 106; R. Hausmann (note 53), Art. 10 Rom I-VO, para. 36.
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terms shall apply to the choice of law agreement. Should, on the other hand, both designated laws reach the conclusion that the respective terms were included in the contract (and the respective laws validly chosen), the choice of law clauses will knock each other out, or the conflict could be solved by taking inspiration from the rule governing the battle of forms under the \textit{lex fori}, in particular if it applies a knock-out rule; in this case, objective connecting factors should then be applied.\textsuperscript{61}

This approach is complicated and its results may be fortuitous.\textsuperscript{62} It has also been said that it favours parties referring to jurisdictions using a first- or last-shot approach (as opposed to parties designating a law using a knock-out rule).\textsuperscript{63} When some of the proponents of this approach suggest having recourse to the \textit{lex fori}, all the above mentioned arguments against applying the \textit{lex fori}\textsuperscript{64} apply here as well. It has further been argued, and rightly so, that this approach tends to ignore that either there is a choice of law agreement or there isn't; to apply two laws in parallel in order to determine whether there is consent would lead to the existence (or the non-existence) of two rather than one contract on the applicable law.\textsuperscript{65} Last but not least it is hardly convincing that the choice of law in one of the standard terms should be respected if the other standard terms do not form part of the contract under the law they designate, whereas recourse to objective connecting factors should be made if under both of the designated laws the standard terms (and the choice of law clauses they contain) are validly integrated into the contract.\textsuperscript{66}

\section{Comparing the Rules on the Battle of Forms under the Chosen Laws. Knock-Out as Residual Rule}

According to a fifth proposal, regard should be had to the solutions to battle of forms situations under the laws designated in the standard forms of both parties.\textsuperscript{67} The situation is uncomplicated, according to this proposal, if both designated laws provide the same solution to the battle of forms. If under both laws, conflicting standard terms knock each other out, the choice of law clauses would annul each other and the applicable law would be determined by objective connecting factors.

\begin{itemize}
\item \textsuperscript{62} S. MAIRE (note 44), at 155.
\item \textsuperscript{63} A. DUTTA (note 44), at 471, 478.
\item \textsuperscript{64} Supra, 1.
\item \textsuperscript{65} F. VISCHERI/ L. HUBER/ D. OSER (note 37), at para. 156; A. DUTTA (note 44), at 470; S. MAIRE (note 44), at 155; L. MOLL (note 5), at 214 et seq.
\item \textsuperscript{66} A. DUTTA (note 44), at 470.
\item \textsuperscript{67} A. BONOMI, in \textit{Commentaire Romand – Loi sur le droit international privé, Convention de Lugano}, Bâle 2011, Art. 116, para. 49.
\end{itemize}
If on the contrary both designated laws applied last-shot rules, the choice of law clause in the standard terms of the party who fired the last shot should prevail. The situation is more complicated if both laws designate different rules when it comes to dealing with the battle of forms. The only solution to this situation would be a mutual knocking out of the contradictory choice of law clauses. In the case of a knock-out of the choice of law clauses, the applicable law is to be determined by objective connecting factors. When looking for support for this recourse to a knock-out rule as a residual rule, reference to the UNIDROIT Principles and the PECL is made, both of them providing knock-out rules (though at a substantive law level).

This approach achieves very reasonable results in all kinds of battle of forms situations without giving preference to any of the parties or any of the laws designated. If this rule is phrased as a specific PIL rule, it is possible to avoid any recourse to the lex fori. – When it comes to actually applying this approach, the challenge lies in determining the precise solutions that foreign laws provide for the battle of forms situation for the case under examination.

6. Combining the above Solutions No. 5 and No. 3

A sixth approach combines the above solutions No. 5 and No. 3: If both designated laws use a last-shot rule, the choice of law clause in the standard forms introduced last shall prevail. If both laws use knock-out rules, the choice of law clauses knock each other out. So far, the approach is similar to the one presented supra, 5.

If both laws designate different rules for dealing with the battle of forms, the law that decides the battle of forms shall, according to this approach, be determined through objective connecting factors, i.e. according to the rules applicable in the absence of a choice (first step). The law thereby determined shall then decide the battle (second step). If this law uses a last-shot rule, the law designated in the last shot shall prevail. If it uses a knock-out rule, there is no choice of law and objective connecting factors apply instead (compare the solution supra, 3.).

To give an example: A German company submits a request for services to a service provider established in England. Both parties use standard terms designating the law of their respective jurisdictions to govern the contract. The English party fires the last shot. English law uses a last-shot, German law a knock-out rule. Both laws thus designate different rules when it comes to dealing with the battle of forms. At this stage it is suggested to use objective connecting factors (instead of the knock-out rule which is suggested under the approach presented supra, 5.). Under many PIL systems (such as, e.g. Art. 4(1)(b) of the Rome I Regulation), this would lead to the application of the law of the service provider, in

68 A. BONOMI (note 67), Art. 116, para. 49. This solution coincides with the solution at the substantive law level in the jurisdiction for which Bonomi made this proposal.
69 A. BONOMI (note 67), Art. 116, para. 49.
70 A. DUTTA (note 44), at 475.
71 A. DUTTA (note 44), at 476 et seq.
the example: English law. Under English law a last-shot rule applies and the service provider’s standard terms prevail. The choice of law agreement would thus be governed by English law.

This solution achieves very reasonable results indeed.\textsuperscript{72} It is, however, complex to the extent that not every judge, not being particularly trained in private international law, might be capable, and willing, to follow its complexity,\textsuperscript{73} let alone parties who are not trained in law at all. A black letter rule trying to adopt this approach would necessarily have to be complex.

IV. The Hague Solution

A. Introduction

The above analysis shows the high degree of uncertainty that currently exists when the parties designate different laws in their standard terms. Court decisions on this issue are rare and the doctrine is divided. When comparing laws it is a frequent experience to discover three, sometimes four fundamentally different solutions for solving a precise legal problem. With regard to the battle of form in PIL, six\textsuperscript{74} different solutions, some of considerable complexity, could be identified. For parties to international contracts in this situation, it is highly unpredictable which law will ultimately govern their contract.

In November 2012, a Special Commission of the Hague Conference of Private International Law approved the \textit{Hague Principles on Choice of Law for International Contracts} (in the following: “the Hague Principles”).\textsuperscript{75} One of the main aims of this instrument is to promote party autonomy and legal certainty with respect to the law governing transnational contracts. Given the uncertainty in battle of forms situations, the Special Commission decided in its November 2012

\textsuperscript{72} U. SPELLENBERG, in \textit{Münchener Kommentar, Band 10} (note 53), Art. 10 Rom I-VO, para. 169; see also the overall positive evaluation by S. MAIRE (note 44), at 157.

\textsuperscript{73} S. MAIRE (note 44), at 157: “sehr kompliziert”.

\textsuperscript{74} In legal doctrine, even more proposals can be found: (7.) A. BOGGIANO, International Standard Contracts – A comparative study, \textit{Recueil des Cours} 170 (1981), 9, 41: analogous application of Art. 19 of the CISG, interpreted as a knock-out rule. (8.) D. UNGNADE, Die Geltung von Allgemeinen Geschäftsbedingungen der Kreditinstitute im Verkehr mit dem Ausland, \textit{Wertpapier-Mitteilungen} 1973, 1130, 1132: preference to the choice of law clause of the party required to effect the characteristic performance of the contract. For arguments against these proposals see L. MÖLL (note 5), at 208-210.

meeting to include this issue in its considerations and to introduce a specific provision addressing this problem. It states:

“Article 6 – Agreement on the Choice of Law and Battle of Forms
1. Subject to paragraph 2,
a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;
b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.”

Art. 6(1)(b) of the Hague Principles addresses, for the first time in black letter rules, the issue of the law applicable to choice of law in battle of forms situations. When deliberating the provision that eventually became Art. 6 of the Hague Principles, the Special Commission used a series of case scenarios. The following chapter adopts the same approach using scenarios in order to illustrate the functioning of Art. 6 of the Hague Principles.

B. Case Scenarios

1. Scenario 1: Choice of Law Clause in the Standard Forms of One Party Only [Art. 6(1)(a) of the Hague Principles]

Scenario 1: One of the parties to an international service contract designates the law of the Canadian Province Quebec as the law applicable to the contract in its standard forms. The other party’s standard terms do not provide a choice of law clause.

The starting point for the analysis of the first scenario is Art. 6(1)(a) of the Hague Principles: If the law applicable to the contract was designated during the negotiations, the question of whether a valid agreement on the applicable law was is “determined by the law that was purportedly agreed to”. “Once the consent is confirmed by that law, all issues relating to the remainder of the main contract are then assessed under the chosen law as the lex causae, not as the putatively applicable law.” The Principles do not establish a formal requirement as to the

76 For international sales contracts with respect to which the CISG enters into consideration, see infra, V.
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choice of the applicable law.\textsuperscript{78} The choice can very well be made in standard forms, just as in scenario 1.\textsuperscript{79}

This first case thus falls within the scope of application of Art. 6(1)(a) of the Hague Principles. Given that only one law was designated during the contract negotiations, this law \textit{purportedly agreed to} determines whether there was an \textit{actual agreement} on the choice of law clause. The special provision on battle of forms in lit. (b) of Art. 6(1) of the Hague Principles does not apply since it is limited to situations in which both “parties have used standard terms designating different laws”. In the first scenario, “whether the parties have agreed to a choice of law is [thus] determined by the law that was purportedly agreed to”, Art. 6(1)(a), \textit{i.e.} the law of Quebec.

2. \textit{Scenario 2a: Both Designated Laws Apply Last-Shot Rules [Art. 6(1)(b) 1st alt. of the Hague Principles]}

\textit{Scenario 2a:} A makes an offer designating in its standard terms a Common Law jurisdiction (other than English law) containing a last-shot rule;\textsuperscript{80} B declares acceptance providing in its standard terms the application of English law. B fires the last shot.

In legal doctrine it has been argued that in a scenario such as case 2a, there is no consensus on the applicable law. The choice of law clauses in both parties’ standard terms should thus be disregarded and the law governing the contract were to be determined by way of objective connecting factors.\textsuperscript{81}

The Hague Principles choose a different approach to deal with this situation. In its November 2012 Meeting, the Special Commission assumed that in transnational contracts, choice of law (and choice of jurisdiction) clauses are

\textsuperscript{78} \textit{Supra} (note 38) Prel. Doc. No 1, October 2012, para. 65.

\textsuperscript{79} See for the similar approach under the Rome I Regulation: Dicey, Morris and Collins on the Conflict of Laws (note 45), at para. 32-165: “If one only of the sets of terms contains a choice of law provision, then the law purportedly chosen will be the putative applicable law”; F. FERRARI in Internationales Vertragsrecht (note 37) Rom I-VO, Art. 3, para. 24: “auch die in Formularen oder allgemeinen Geschäftsbedingungen erfolgte Bestimmung des anwendbaren Rechts stellt eine ausdrückliche Rechtswahl dar, und dies selbst dann, wenn die allgemeinen Geschäftsbedingungen ihrerseits stillschweigend vereinbart worden sind” (with numerous further references); R. HAUSMANN (note 53), Art. 10 Rom I-VO, para. 36; for Switzerland M. AMSTUTZ/ N.P. VOGT/ M. WANG, in Basler Kommentar IPR (note 53), Art. 116, para. 47: “Richtiger Auffassung nach ist [...] die Frage der Rechtswahlübernahme nach dem in den AGB gewählten Recht zu beurteilen.” – CONTRA: Against the application of “bootstrap-rules” in situations where the applicable law was designated in the standard terms of only one party: Benjamin’s Sale of Goods (note 39), at para. 25-034 (for Rome I): “In such circumstances, it does not seem possible to conclude that a choice of law has been expressed or demonstrated with reasonable certainty for the purposes of Article 3(1) of the Convention”; Chitty on Contracts (note 8), at para. 30-059.

\textsuperscript{80} See \textit{supra}, II.A.

\textsuperscript{81} References \textit{supra}, III.B.2.
frequently included in standard terms. The Commission further assumed that most parties prefer to have their own law applied and thus have a tendency to choose their own law in their standard terms. There is much evidence today to support these assumptions which were also confirmed by representatives of the international lawyers' associations present at the Hague meeting. If this is so, the potential for conflicting choice of law clauses in standard terms is enormous.\(^{82}\) If in these situations the choice of law in the parties' standard terms were always deprived of their effect, the scope of application for a choice of the applicable law by the parties would be considerably reduced, even though – in situations such as scenario 2a – both parties prefer a choice of the applicable law rather than having the applicable law determined through objective connecting factors.

Given the high degree of uncertainty that currently reigns in battle of forms scenarios, the Special Commission decided to explicitly address such situations and to adopt a solution that respects party autonomy as much as possible, while, at the same time, avoiding needless complexities. According to Art. 6(1)(b) 1\(^{st}\) alt. of the Hague Principles "if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies". This is exactly the situation in scenario 2a: Both parties have designated jurisdictions applying last-shot rules to the battle of forms. Under both laws, the standard forms that were submitted last prevail, i.e. B’s standard terms designating English law. Pursuant to Art. 6(1)(b) 1\(^{st}\) alt. of the Hague Principles, this result is respected and English contract law applies.

Since both laws designated by the parties solve the battle of forms in favour of the forms submitted by the same party (in the above scenario: B), the apparent conflict is in fact a false conflict. The choice of law clause in B’s standard forms is thus respected and no recourse to objective connecting factors is needed.

3. **Scenario 2b: Both Designated Laws Apply First-Shot Rules [Art. 6(1)(b) 1\(^{st}\) alt. of the Hague Principles]**

**Scenario 2b:** A makes an offer designating in its standard terms Dutch law as the law governing the contract. B responds declaring acceptance but providing in its standard forms the application of another law applying a first-shot rule to the same scenario.

Given that from a comparative perspective first-shot rules are much rarer than last-shot or knock-out rules,\(^{83}\) scenario 2b will much less frequently appear in practice than any other scenario. The approach of the Hague Principles to this situation is basically the same as in scenario 2a: Once again "the parties have used standard terms designating different laws [Dutch law and another law applying a first-shot

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\(^{82}\) This does not necessarily mean that these conflicts are frequently resolved in litigation before courts. For reasons not to go to courts in battle of forms situations, and arguably in contract cases in general, see C. Keating (note 4); see also G.G. Murray, A Corporate Council’s Perspective of the “Battle of Forms”, [1979-1980], 4 Can. Bus. L. J. 290.

\(^{83}\) See supra, II.B.
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rule] and under both of these laws the same standard terms prevail [i.e. the standard term first referred to]", so that it is governed by Art. 6(1)(b) 1st alt. of the Hague Principles. Since in scenario 2b the first-shot was fired by A designating Dutch law in its standard terms, Dutch law applies and no recourse to objective connecting factors is to be made.

4. **Scenario 3: One Designated Law Applies a First-Shot Rule, the Other a last-shot rule [Art. 6(1)(b) 2nd alt. of the Hague Principles]

Scenario 3: A makes an offer designating Dutch law in its standard terms as the applicable law; B, established in the UK, declares acceptance providing in its standard terms the application of English law.

In scenario 3, both parties designate different laws in their standard terms. These laws apply different rules when it comes to dealing with battle of forms situations (Dutch law applies a first-shot rule contrary to the last-shot rule prevailing in English law). This scenario thus addresses the situation not of a false but of a true conflict: The parties have designated different laws under which the battle of forms is won by different parties.

This scenario is governed by Art. 6(1)(b) 2nd alt. of the Hague Principles: “if the parties have used standard terms designating different laws and [...] if under these laws different standard terms prevail, [...] there is no choice of law”. In such situations, the choice of law clauses in the parties’ standard terms thus knock each other out, no standard terms prevail, there consequently is no choice of law, and the law applicable to the contract is to be determined by way of objective connecting factors. In the following procedure, the choice of law clauses in the standard terms are then to be disregarded.

5. **Scenarios 4a and b: At Least One of the Designated Laws Applies a Knock-Out Rule [Art. 6(1)(b) 3rd alt. of the Hague Principles]

Scenario 4a: One party makes an offer designating Chinese law in its standard terms. The other party declares acceptance providing in its standard terms the application of French law.

Scenario 4b: A German, Swiss, or Austrian party makes an offer designating German, Swiss, or Austrian law respectively as the law applicable to the contract. The other party, established in France, Poland, Estonia, or Lithuania, declares acceptance providing in its standard terms the application of the French, Polish, Estonian, or Lithuanian law.

Scenario 4a addresses the situation in which both parties designate different laws in their standard terms, one of these laws applying a last-shot rule (the Chinese Contract Act of 1999, e.g. 84), the other a knock-out rule (French law, e.g. 85).

84 See supra (note 12).
85 Supra (note 18).
Scenario 4b finally addresses the scenario which is in practice arguably rather frequent that both parties designate different laws, both of them applying knock-out rules.

Once again we are dealing with a true conflict without being in a position to determine consent of the parties as to the applicable law. These scenarios are addressed by Art. 6(1)(b) 3rd alt. of the Hague Principles: “the parties have used standard terms designating different laws and under one or both of these laws no standard terms prevail”. Consequently “there is no choice of law” (3rd alt. in fine) and objective connecting factors are needed in order to determine the law applicable to the contract.

C. Level of Precision of the Comparison under Art. 6(1) of the Hague Principles

As seen above, some laws give a different answer to the battle of forms depending on the circumstances. In Dutch law, e.g., a first-shot rule applies in principle. If however the other party rejects the first standard terms explicitly in a separate statement (i.e. not only in its own standard terms) and if the standard forms in the second shot differ only with respect to minor points when compared to the terms referred to in the first-shot, a last-shot rule applies instead. If, on the contrary, the other party rejects the first standard terms explicitly and the second terms differ considerably from those in the first-shot, a knock-out rule may apply. Given that in some jurisdictions different rules may apply depending on the circumstances of the case, the question is whether Art. 6(1) of the Hague Principles refers to the outcome under the respective domestic law in general or to the outcome in the specific case under examination.

Under Art. 6(1)(b) of the Hague Principles, in a given case it needs to be established whether under both designated laws “the same standard forms prevail [...] , different standard terms prevail, or [...] no standard terms prevail”. It thus needs to be shown that, under each law designated respectively, the standard terms of the party designating this law meet, in principle, the conditions set for the inclusion of standard terms (i.e. that there definitely is a battle of forms), and that, under both laws, in the battle of forms situation under examination the same standard terms prevail. The terms definitely need to prevail which is to be established for the precise case under examination.

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86 For the more and more widespread use of knock-out rules, see supra, II.C.
87 II.D.
88 Dutch Civil Code, Art. 6:225(3) 1st alt.
89 Dutch Civil Code, Art. 6:225(3) 2nd alt. and (2); C.B.P. MAHÉ (note 16), at para. 3.
90 C.B.P. MAHÉ (note 16), at para. 3.
91 Emphasis added.
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D. An Evaluation of the Hague Solution when Compared with Possible Alternatives

1. Benefits of the Principles with Respect to their Competitors

The above scenarios show that the Hague Principles provide an explicit solution for all possible choice of law scenarios in battle of forms situations. Contrary to the first of the alternative solutions presented above, under the Principles no recourse to the lex fori is necessary. In contrast with the second proposal, the Principles respect the parties’ desire to avoid objective connecting factors and to have their choice respected as much as possible and notably in situations of a false conflict with respect to the choice of the applicable law. Contrary to the third of the above solutions, the Principles avoid proceeding in a two-step approach (i.e. determining the applicable law first by way of objecting connecting factors and then respecting the choice in the prevailing standard forms) and they thus avoid deciding the battle of forms under a law that is eventually not applicable. The Principles’ approach to the battle of forms is less complex than the fourth of the above proposals and, contrary to the fourth approach, the Principles analyse the choice of law for one single contract (instead of presuming the existence of two agreements for the sake of the analysis). The Hague solution is very much in line with the fifth of the above proposals and shares the same benefits: They do not systematically give preference to any of the parties or any of the laws designated and they achieve very reasonable results in the different battle of forms situations; the knock-out rule is applied only when there is a true conflict between the solutions to the battle of forms under the laws designated by the parties in their respective forms; in situations of false conflicts the parties’ choice eventually prevails. Compared to the sixth of the above approaches, the Hague solution is at a lower level of complexity while still achieving very reasonable results.

2. Challenge: Determining the Solutions to the Battle of Forms Situation under Foreign Laws – a Duty of the Parties to Co-operate?

When applying Art. 6(1) of the Hague Principles the challenge lies in determining the precise solutions for the battle of forms situation under examination in the laws designated by the parties. This challenge is twofold: first of all, there is an information problem. According to Art. 6(1)(b) it needs to be established whether, under both of the designated laws, “the same standard terms prevail”. For the court it might be difficult to determine the content of the applicable foreign law and to determine whether, in the case at hand, it applied a first-shot, last-shot or knock-out rule.

Consequently, during the meeting of the Special Commission at The Hague in November 2012, the delegation of the European Union suggested providing a

92 Supra, III.B.
duty of the parties to co-operate with regard to finding and comparing the applicable law under Art. 6 of the Hague Principles.93

In fact, the parties to the contract (or their lawyers), having designated the respective laws in their standard forms, should well be able to co-operate with regard to finding the applicable rule to battle of forms scenarios under the law designated in their forms. For the courts a duty of the parties to co-operate would certainly be helpful and make the solution easier to apply. The duty could be created, as the case may be, when the Principles are adopted by national or international legislators. When looking for inspiration, Art. 16(1) of the Swiss Federal Act on Private International Law (on the “Establishment of foreign law”) might be taken into consideration94 stating that “[t]he content of the applicable foreign law shall be established ex officio. [However] [t]he assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties.”

A second challenge lies in the fact that, at the substantive law level, some laws are still unclear when it comes to solving battle of forms situations, even for lawyers trained in the respective jurisdiction. In these situations it will be impossible to establish that “under both of these [designated] laws the same standard terms prevail”. The consequence for the purpose of Art. 6 of the Hague Principles should then be that since an agreement on the applicable law cannot be established “there is no choice of law”, Art 6(1)(b) in fine.

V. Conflicting Choice of Law between Domestic Laws and the CISG

A. Introduction

In the situations analysed so far, choices were to be made between domestic legal systems in areas of law where no uniform laws apply. The following chapter addresses situations of possibly conflicting choices when the uniform sales law of the United Nations Convention on Contracts for the International Sale of Goods (CISG) enters into consideration. The CISG is currently in force in almost 80 countries worldwide, including the USA, Canada, Russia, China, Japan, most South American States (apart from Brazil and Bolivia), Australia, Singapore, most

93 The drafters of the Commentary to Art. 6 are invited to address this issue, see: Draft Hague Principles as approved by the November 2012 Special Commission meeting on choice of law in international contracts and recommendations for the commentary, Agreed additions, Art. 6, in <www.hcch.net/upload/wop/contracts2012principles_e.pdf> (last consultation: 30.6.2013).


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EU Member States (except the UK, Ireland, Portugal and Malta) and Switzerland. The possible interactions between the CISG and the Hague Principles are again illustrated using case scenarios.

B. Case Scenarios

I. Scenario 5: Choice of Law Clause in the Standard Forms of One Party Only; the Designated Law is the Law of a Contracting State to the CISG

Scenario 5: Party A to a transnational sales contract designates in its standard forms the law of Contracting State A to the CISG; party B’s standard forms do not contain a choice of law clause. The case is to be analysed from the perspective of a Contracting State to the CISG.

In Contracting States to the CISG, judges are treaty-bound to apply the CISG provided that the conditions of application of Art. 1(1) of the CISG are met. According to its Art. 1(1), the CISG “applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law [of the forum] lead to the application of the law of a Contracting State”. If, in scenario 5, the places of business of both parties are in different Contracting States to the CISG, the CISG applies by virtue of its Art. 1(1)(a) unless the parties have excluded the application of the CISG (Art. 6 CISG). The choice of the law of a Contracting State to the CISG (in scenario 5: the choice of law A in A’s standard terms) is not regarded as an exclusion of the CISG.

If one of the parties does not have its place of business in a Contracting State, the CISG still applies if the PIL of the forum designates the law of a Contracting State, Art. 1(1)(b) of the CISG. Whether the parties to an international contract can choose the applicable law, and if so, under which conditions, is determined by the PIL of the forum. In EU Member States e.g., Art. 3 of the Rome I-Regulation establishes (or confirms) the parties' freedom to choose the applicable law.


96 For the application of the CISG in non-Contracting States if the PIL of the forum designates the law of a Contracting State, see Th. KADNER GRAZIANO, The CISG Before The Courts Of Non-Contracting States? - Take foreign sales law as you find it, YPIL 2011, 165.


98 L. MISTELIS, in S. KRÖLL/ L. MISTELIS/ P. PERALES VISCASILLAS (eds), (note 2), Art. 6, para. 18 with numerous references; SCHWENZER/ HACHEM, in P. SCHLECHTRIEM/ I. SCHWENZER (eds) (note 13), Art. 6, para. 14 et seq. with many references.
law. In scenario 5, A has explicitly designated in its standard forms the law of State A. The question then is whether the parties have validly agreed on the application of this law.

According to, for example, Art. 10(1) of the Rome I Regulation “[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.” The existence of the choice of law agreement is thus governed by the law that would govern it if the agreement were valid.99 If the standard terms of only one party contain a choice of law clause, the existence and validity of a choice of law agreement is thus to be determined according to the law designated in these standard terms, in case 5: A’s forms designating the law of State A. The Hague Principles arrive at the same conclusion: According to Art. 2(1) of the Principles the parties are free to choose the law applicable to their contract. Under Art. 6(1)(a) of the Hague Principles, the question of whether a valid agreement on the applicable law has been formed is to be examined according to the law that the parties have purportedly agreed to. The agreement on the choice of law is thus to be analysed under the law designated in A’s standard terms, i.e. the law of State A.100

Consequently, if party A designated in its standard terms the law of Contracting State A to the CISG, the choice of law agreement is governed by the law of State A. Is this then the CISG (being an integrated part of the law of Contracting State A) or, as the case may be, the civil code of State A, its code of obligations or its general case-law on contracts?

There are arguably two reasonable answers to this question: One possible answer is that the CISG (in particular Art. 14 et seq.) applies not only to the formation of the sales contract but also to the formation of the choice of law agreement101 (with respect to the issues covered by the CISG102). If the choice of law agreement is valid under the CISG, the sales contract then is governed by the CISG.

Another possible answer is that the starting point for the solution is to be found in Art. 4 of the CISG. Art. 4 states that: “This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”103 The CISG thus applies with respect to the contract of sale only. The choice of law agreement, being a separate contract, is

99 Art. 3(5) and 10 of the Rome I-Regulation; see supra, III.A. and IV.B.1.
100 Compare supra, IV.B.1.
101 This is currently the dominant opinion, see e.g. A. DUTTA (note 44), at 463 fn. 12: “Statut des CISG-Abwahlvertrages sind hinsichtlich des rechtlichen Zustandekommens die Vertragsabschlussregeln der Art. 14 ff. CISG”; F. FERRARI, Zum vertraglichen Ausschluss des UN-Kaufrechts, ZEuP 2002, 737, 742; R. HAUSMANN (note 53) Art. 10 Rom I-VO, para. 36 in fine (opting for an “entsprechende Anwendung” of the CISG); S. MAIRE (note 44), at 104 et seq. and 152 et seq.; L. MÖLL (note 5), at 183 et seq.; AG Kehl 6.10.1995, CISG-online 162.
102 For important the limits of the CISG with respect to issues concerning the validity of the contract, see Art. 4(a) of the CISG.
103 Emphasis added.
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not governed by the CISG but by country A’s (non-unified) general contract law. If, in scenario 5, the choice of law agreement is valid under the general contract law of State A (a Contracting State to the CISG), the CISG then applies to the sales contract. – Given that the CISG only governs some issues of contract formation (notably consent in general) while leaving others out (such as the validity of the contract or any of its provisions, notably specific conditions and requirements with respect to standard terms), this solution would have the benefit of applying one single law (even though a non-unified one) to the formation and to the validity of the choice of law agreement. This solution would further avoid the application of Art. 19 of the CISG with regard to the choice of law clause. Given that the interpretation of Art. 19 of the CISG is currently highly controversial, this might be seen as a further benefit of the second approach.

2. Scenario 6: Exclusion of the CISG in the Standard Terms of one Party

Scenario 6: Party A to a transnational sales contract designates in its standard forms the law of CISG Contracting State A as the law applicable to the contract. Party B designates the law of Contracting State B but explicitly excludes the CISG. The general contract law of State B provides a knock-out rule.

According to Art. 6 of the CISG, the parties may exclude the application of the CISG. B provides an exclusion of the CISG in his standard terms whereas A does not. With respect to the battle of forms, the case falls under Art. 6(1)(b) 3rd alt. of the Hague Principles: A’s standard terms designate the CISG (providing either a first-shot or a knock-out rule, according to the interpretation of the CISG); B’s standard terms exclude the CISG (which is possible under Art. 6 of the CISG) and designate the non-unified domestic law of B instead, providing a knock-out rule. In this scenario, under one (or both) of the designated laws no standard terms prevail, and “there is no choice of law.”

3. Scenario 7: One Party Designates in its Standard Terms the Law of a Contracting State to the CISG, the Other the Law of a Non-Contracting State

Scenario 7: Seller A has its place of business in non-Contracting State A to the CISG (e.g. England). He designates in his standard terms the law of A. The courts of A apply a last-shot rule. Buyer B’s place of business is in Contracting State B (e.g. Switzerland). He designates in his standard forms the law of B. The general contract law of B provides a knock-out rule. Seller A fires the last shot. The case is brought before the courts of a Contracting State

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104 See Art. 4 of the CISG: “This Convention governs only the formation of the contract of sale […]. It is not concerned with: (a) the validity of the contract or of any of its provisions […].”

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State to the CISG (e.g. Switzerland). Under the PIL of the (e.g. Swiss) forum the parties may choose the applicable law.\textsuperscript{105}

The court in a Contracting States to the CISG (e.g. Switzerland)\textsuperscript{106} is treaty-bound to analyse the conditions of application of Art. 1(1) of the CISG. Since the seller has its place of business in a non-Contracting State to the CISG (e.g. England), the conditions of Art. 1(1) lit. (a) of the CISG are not fulfilled. The CISG still applies to the sales contract if the PIL of the forum designates the law of a Contracting State, Art. 1(1)(b) of the CISG. Under the PIL of the Forum, the parties may choose the applicable law (e.g. Art. 116 of the Swiss PIL Act). A has designated in its standard terms the law of a non-Contracting State to the CISG (English law), B the law of a Contracting State (Swiss law). The question is how to decide the battle of forms with respect to the choice of law clauses (and, consequently, which law to apply to the choice of law agreement and – if the choice of law agreement is valid – to the main contract).

With respect to the choice of law clause, scenario 8 is a battle of forms situation. So far, neither the Rome I Regulation, nor Swiss PIL, nor any other existing black letter rule on PIL addresses the issue of the law applicable to the choice of law in battle of forms situations. The Hague Principles, on the contrary, state in Art.6(1)(b)\textsuperscript{1st alt.} that “if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies”. The question then is whether under both designated laws the same standard terms prevail.

In case 8, A has designated the law of a non-Contracting State to the CISG applying a last-shot rule (e.g. English law). – B has designated the law of a Contracting State (e.g. Swiss law). With respect to the law applicable to the sales contract, the choice of the law of a Contracting State comprises also the CISG (in particular its Art. 19). The question is, however, whether this is also the case with respect to the choice of law agreement. Under the CISG, there are two possible answers to this question\textsuperscript{107}:

(a) If the law of a Contracting State to the CISG is designated, the CISG applies both to the sales contract and to the choice of law agreement.\textsuperscript{108} The battle of forms is then decided under Art. 19 of the CISG. Art. 19 of the CISG may be understood as a last-shot rule (which is most controversial),\textsuperscript{109} just as English law. Consequently then, under both designated laws (English law and the CISG), the same standard terms prevail: i.e. the standard terms of the English seller firing the last shot. According to Art.6(1)(b)\textsuperscript{1st alt.} of the Hague Principles the law designated in the prevailing terms (English law) thus applies. If under English law the choice of law agreement is valid, the sales contract is governed by English law.

\textit{Issues not covered by the CISG}: For issues not covered by the CISG (such as questions regarding the validity of the contract, Art. 4 lit. b) of the CISG), under

\textsuperscript{105} Art. 116 of the Swiss Federal Act on Private International Law.

\textsuperscript{106} For the perspective of a non-Contracting State, see the reference supra (note 96).

\textsuperscript{107} See supra, 1.

\textsuperscript{108} See supra, 1.

\textsuperscript{109} See the references supra (note 13) on the one hand, and (note 27) on the other.
English law a last-shot rule prevails whereas under Swiss general contract law a knock-out rule applies. In this case, under one of the designated laws “no standard terms prevail”, “there is no choice of law” (Art. 6(1)(b) 3rd alt. of the Hague Principles), and the law applicable to the contract is determined by way of objective connecting factors.

Variation: If under the CISG a knock-out rule applied (instead of a last-shot rule), the case would be governed by Art. 6(1)(b) 3rd alt. of the Hague Principles. There would be “no choice of law”, and objective connecting factors would be needed to determine the law applicable to the contract.

(b) The second possible interpretation argues as follows: The choice of the sales law of a Contracting State to the CISG includes, in principle, the CISG. However, the choice of law agreement itself (being a separate contract, not governed by the CISG) is governed by the general contract law of the designated State.

English law applies a last-shot rule, Swiss general contract law a knock-out rule. According to Art. 6(1)(b) 3rd alt. of the Hague Principles, if “under one or both of [the chosen] laws no standard terms prevail, there is no choice of law”. The law applicable to the contract is then to be determined by way of objective connecting factors.

When the CISG enters into consideration, the outcome thus much depends on several disputes concerning the interpretation of the CISG. Ambiguities of the CISG and uncertainties concerning its interpretation can unfortunately, but obviously, not be solved by the Hague Principles.

VI. Conclusions

Currently, in basically every jurisdiction analysed, there is very much uncertainty as to how to solve the problem of conflicting choice of law clauses in standard terms. The issue has so far never been explicitly addressed in a black letter rule, neither in the Rome I Regulation nor the Hague Sales Conventions nor in any other international instrument or national PIL statute. Case-law on this issue is rare and the law is complicated to the point that the courts try to avoid the problem, they bypass the issue at the PIL level or they simply apply the lex fori without even addressing the problem. The international legal doctrine currently suggests six different solutions to the problem, some of considerable complexity.

As long as the solution to the battle of forms with regard to choice of law is unclear, it is wholly unforeseeable for the parties which law governs their contractual relationship. They then lack the most fundamental basis for their

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108 For references supporting this view, see supra (note 27).
111 See the numerous references by M.J. Shariff/ K. Marechal de Carteret (note 1); L. Möll (note 5), at 202 with references; see e.g. OLG Frankfurt, IPRax 1988, 99.
112 Supra, III.B.1-6. When trying to teach the issue of conflicting choice of law clauses in standard terms, one might quickly be tempted to abandon the idea of mentioning it at all, given that the issue is so controversial and the outcome so vague.
negotiations should a problem in their contractual relations arise.\(^{113}\) With respect to a solution to the problem of conflicting choice of law clauses, the law currently leaves the parties alone.

During the negotiations leading to the Hague Principles on Choice of Law for International Contracts in November 2012, the experience was that by addressing case scenarios on conflicting choice of law clauses in standard terms, it was possible to find consensus with respect to a reasonable solution for any of them. Based on the solutions agreed upon, a rule achieving these solutions was drafted. This procedure eventually resulted in Art. 6 of the Hague Principles. The purpose of this provision is to promote party autonomy on the one hand and, on the other, to enhance legal certainty and foreseeability with respect to the law applicable to choice of law clauses in battle of forms situations.

In a first comment it was argued that Art. 6 of the Hague Principles is too complicated when compared with competing solutions suggested in legal doctrine?\(^{114}\) It would possibly be easier to apply a knock-out rule on the PIL level and to entirely disregard choice of law clauses when the parties point to different laws in their standard terms.\(^{115}\)

There is, however, a widespread discomfort in international legal doctrine with respect to such a solution,\(^{116}\) and arguably rightly so. Art. 6(1)(b) of the Hague Principles thus upholds party autonomy when the conflict is only a false conflict, i.e. in cases in which, under the laws chosen by the parties, the same standard terms prevail. The Principles will be accompanied by an official commentary that will facilitate their use. In order to further facilitate the application of Art. 6, comparative legal doctrine might help clarifying the solutions in force at the substantive law level in as much jurisdictions as possible with respect to battle of forms scenarios.\(^{117}\)

\(^{113}\) A. BOGGIANO (note 74), at 40: “Conflicts arising out of choice-of-law clauses are particularly embarrassing”; L. MÖLL (note 5), at 188: “Die Kollision vorformulierter Rechtswahlklauseln ist das paradoxe Ergebnis einer umsichtigen und vorausschauenden Vertragsgestaltung international agierender Handelspartner. In der Praxis wird den Unternehmen regelmäßig empfohlen, ihren AGB eine Rechtswahlklausel hinzuzufügen, um die Unwägbarkeiten der Anwendung eines fremden Rechts zu vermeiden. Diese Empfehlung schlägt fehl, wenn ihr beide Parteien folgen.” Im Ergebnis wird dann “das Rechtsanwendungsergebnis unvorhersehbar.”

\(^{114}\) See the critical appreciation by O. LANDO (note 75), at 314 et seq.

\(^{115}\) If one day the knock-out rule has become the prevailing rule worldwide at the substantive law level, the proposal of a knock-out rule at the PIL as the only rule to follow will have to be reconsidered. The above comparative overview (supra, II) shows however that such uniformity is far from being achieved. Should such uniformity be achieved one day, the Hague Principles’ Art. 6(1)(b) 2\(^{nd}\) and 3\(^{rd}\) alt. will apply containing a knock-out rule at the PIL level.

\(^{116}\) See the proposals and solutions presented supra, III.B.3.-6.

\(^{117}\) The author of this contribution is currently preparing such a comparative overview at the substantive law level.
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By suggesting a black letter rule addressing the issue, the Hague Principles make a substantial contribution to solving the riddle of conflicting choice of law clauses in battle of forms situations. In a first commentary, Ole LANDO has suggested to address this issue also in the next revision of the Rome I Regulation.\(^{118}\) Hopefully the Hague Principles will prevent the battle of the forms in transnational scenarios from continuing for yet another “hundred years” and they will not just be another “attempt to end the battle” proving “only to inflame it”.\(^{119}\)

\(^{118}\) O. LANDO (note 75), at 316: “I have mentioned a few points – rules of law and battle of forms [...] where, in my view, the Principles may give rise to consider a revision of Rome I.”

\(^{119}\) See supra, p. 1 and fn. 1.