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The Hague solution on choice-of-law clauses in conflicting standard terms: paving the way to more legal certainty in international commercial transactions?

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Abstract

During contract negotiation, parties often refer to their respective standard terms at some stage of the negotiations. When the contract is international, these standard terms often contain choice-of-law clauses. More often than not, each party will designate its own law as the law governing the contract in its respective standard terms. The question then is: do any of the standard terms prevail and which law applies to solve the battle of forms? The Hague Principles on Choice of Law in International Commercial Contracts, approved in March 2015, provide a solution for this issue. This contribution looks at recent academic commentary on the Hague solution and analyses whether Article 6 of the Hague Principles has helped, or may indeed help in the future, to increase legal certainty in international commercial transactions. The contribution examines the conclusions that national, interregional, and international legislators or courts may draw from the relevant academic discussion. It submits a proposal aiming to close the gap that exists in the Rome I Regulation with respect to choice of law in the battle of forms situations and also suggests applying the same solution to both conflicting choice-of-law clauses and conflicting choice-of-court clauses in standard forms.

I. Introduction

When negotiating the terms of their contract, parties usually refer to their respective standard terms at some stage of the negotiations.[1] Often, these standard

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[1] For a widely accepted definition of the notion of 'standard terms', see Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, parts 1 and 2 (Kluwer Law International 2003) art

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terms differ from each other. This issue is usually discussed under the succinct heading 'battle of forms'. In order to solve this conflict, some legal systems apply at the substantive law level a so-called last-shot rule, according to which the standard terms last referred to prevail, in principle. A few other jurisdictions apply a first-shot rule instead, according to which the standard terms first referred to prevail in principle over conflicting terms that are submitted later. A third group of jurisdictions applies so-called knock-out rules under which conflicting standard terms cancel each other out, and the standard terms are integrated into the contract only as far as they are common in substance. A fourth, hybrid solution combines elements of the first three approaches.[2]

2:209(3) (PECL): 'General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.' According to the *Unidroit Principles of International Commercial Contracts* (Unidroit 2010) art 2.1.19(2) (PICC), '[s]tandard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party'.

[2] For comparative overviews, see (in decreasing chronological order) T Kadner Graziano, 'Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution' (2012–13) 14 *Yearbook of Private International Law* 71, 74–80; LB Möll, *Kollidierende Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen im internationalen Vertragsrecht* (P Lang 2012) 87–152; Valerio Forti, 'La bataille des conditions générales contradictoires: étude comparative' (2008) 60 *Revue internationale de droit comparé* 729; EA Kramer, '"Battle of the Forms": Eine rechtsvergleichende Skizze mit Blick auf das schweizerische Recht' in *Gauchs Welt: Recht, Vertragsrecht und Baurecht, Festschrift für Peter Gauch zum 65. Geburtstag* (Schulthess 2004) 493ff; G Rühl, 'The Battle of the Forms: Comparative and Economic Observations' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 189; G Dannemann, 'The "Battle of Forms" and the Conflict of Laws' in FD Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (Lloyd's Commercial Law Library 2000) 200–6; EH Hondius and C Mahe, 'The Battle of Forms: Towards a Uniform Solution' (1998) 12 *Journal of Contract Law* 268; A Boggiano, *International Standard Contracts: The Price of Fairness* (Graham and Trotman 1991) 67ff; AT von Mehren, 'The Battle of the Forms: A Comparative View' (1990) *American Journal of Comparative Law* 265; EJ Jacobs, 'The Battle of the Forms: Standard Term Contracts in Comparative Perspective' (1985) 34 *International and Comparative Law Quarterly* 297.
For international sales contracts governed by the Convention on Contracts for the International Sale of Goods, 1980, 1489 UNTS 3 (CISG), the situation is unclear. Some authors and courts, notably but not exclusively in common law countries, understand art 19 of the CISG as a last-shot rule. See eg US District Court of Illinois, 7.12.199, 99 C 5153, OLG Linz (23 March 2005) CISG-online 1376 <http://www.unilex.info/case.cfm?id=423> accessed 1 May 2017; EA Farnsworth, *Contracts* (4th edn, Aspen 2004) n 3.21; ADM Forte, 'The Battle of Forms' in HL MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh University Press 2006) 98, 115; F Ferrari, in S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (CH Beck 2011) art 19, nos 15ff; LB Möll, in Kröll, Mistelis and Perales Viscasillas, ibid, 115ff, with numerous references in 123, 184, n 481. Other authors and courts as well as the CISG Advisory Council suggest applying a knock-out rule instead. See eg U Schroeter, in P Schlechtriem and I Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford University Press 2010) art 19, n 38, with numerous references in n 36, n 121–4; U Magnus, 'Last Shot vs. Knock Out: Still Battle over the Battle of Forms under the CISG' in R Cranston, J Ramberg and J Ziegel (eds), *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam* (Justus Forlag 2007) 200 (*in fine*); J Becker, in HG Bamberger and H Roth (eds), *Kommentar zum Bürgerlichen Gesetzbuch*, vol 1 (3rd edn, CH Beck 2012) para 305, nos 81ff; para 305, n 83; WA Stoffel, 'La formation du contrat' in *The 1980 Vienna Convention on the International Sale of Goods, Lausanne Colloquium of November 19–20 1984* (Schulthess 1985) 73, 75; CISG Advisory Council, *Opinion Number 13: Inclusion of Standard Terms under the CISG* (20 January 2013) Rule 10. The question was left open by the German Federal Court in Bundesgerichtshof (BGH), 9 January 2002, NJW 2002, 1651, 1652.

When the contract is international,[3] the standard terms frequently contain choice-of-law clauses. The following question then arises: which law applies to answer the question of whether an agreement on the applicable law has been reached and, in particular, which law applies to solve the battle of forms?

According to Article 6(1)(a) of the Hague Principles, as approved in March 2015, 'whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to'.[4] If the parties have designated one single law as the law applicable to their contract (in an explicitly negotiated choice-of-law clause or in one party's standard terms)[5], this law will thereafter decide whether an agreement on the applicable law has been reached.[6]

However, very frequently, each party designates in its respective standard terms its own law as the law applicable to the contract. Nowadays, following the principle of separability,[7] it is well established that an agreement on the applicable law constitutes a separate contract, to be analysed distinctly from the main contract (for example, a construction or sales contract). Standard clauses designating the applicable law therefore play a distinct and particularly fundamental role when compared to other clauses in the same set of standard terms. The question in such battle-of-forms situations is whether an agreement on the applicable law has been

[3] According to the Hague Principles on Choice of Law in International Commercial Contracts, 19 March 2015, art 1(2) <https://www.hcch.net/pt/instruments/conventions/full-text/?cid=135> accessed 1 May 2017 (Hague Principles), '[f]or the purposes of these Principles, a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State'.

[4] On the Hague Principles in academic literature, see eg S Symeonides, 'The Hague Principles on the Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 *American Journal of Comparative Law* 873; J Neels, 'The Nature, Objective and Purpose of the Hague Principles on the Choice of Law in International Contracts' (2013–14) 15 *Yearbook of Private International Law* 45; M Pertegás and BA Marshall, 'Party Autonomy and Its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts' (2014) 39 *Brooklyn Journal of International Law* 975; G Saumier, 'The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract' (2014) 40 *Brooklyn Journal of International Law* 1; for more references, see <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=135> and <https://assets.hcch.net/upload/draft_principles_bibl-e.pdf> accessed 1 May 2017.

[5] Hague Principles (n 3) Official Commentary, n 6.9. In academic opinion, see eg F Garcimartín Alférez, 'Batalla de formularios y cláusulas de elección de la ley: la solución de los principios de La Haya' in *Tratado de la compraventa: Homenaje al profesor Rodrigo Bercovitz* (Aranzadi 2013) 241, 244.

[6] Similar rules are to be found in many other international instruments and national codifications. See Hague Principles (n 3) Official Commentary, n 6.2, with reference to Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177, art 10(1) (Rome I Regulation); Inter-American Convention on the Law Applicable to International Contracts, 1994, 33 ILM 732 (1994) art 12(1) (Mexico Convention); for the Rome I Regulation, compare, eg, A Schwartze, 'New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on the Choice of Law in International Contracts in a Comparative Perspective' (2015) 12 *University of St Thomas Law Journal* 87, 98.

[7] See Hague Principles (n 3) art 7; eg, Rome I Regulation (n 6) art 3(5); Hague Convention on Choice of Court Agreements, 2005, 44 ILM 1294 (2005) art 3(d) (Hague Convention). The same applies with regard to choice-of-court agreements. See Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (recast), art 25(5) (Brussels I Regulation): 'An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.'

reached, despite the fact that each party opted for the application of its own law. Does the choice-of-law clause used by one of the parties prevail over the one submitted by the other (as may be the case if a first-shot or a last-shot rule is applied to solve the battle of forms)? Which law applies to solve the battle of forms in situations of conflicting choice-of-law clauses?

II. The mechanism of Article 6(1)(b) of the Hague Principles: a case scenario

If both parties have used conflicting choice-of-law clauses in their standard terms,[8] Article 6(1)(b) of the Hague Principles provides a solution to this conflict. The provision states that:

> if the parties have used standard terms designating two 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.

The mechanism in Article 6(1)(b) may be best illustrated by a case scenario taken from the Official Commentary to the Hague Principles.[9]

Scenario: Party A makes an offer and refers to its standard terms, which contain a clause designating the law of State X as the law applicable to the contract. Party B expresses acceptance of the offer, but refers to its own standard terms, which designate the law of State Y as the applicable law. With respect to battle-of-forms scenarios, the domestic laws of State X and of State Y both provide that the standard terms last referred to prevail (they both use a last-shot rule).

According to the first alternative of Article 6(1)(b) of the Hague Principles, 'if the parties have used *standard terms designating two different laws* and under both of these laws *the same standard terms prevail*, the law designated in the prevailing terms applies'.[10] In the scenario above, the parties have indeed designated different laws: Party A has designated the law of State X, and Party B the law of State Y. Both of these laws apply the last-shot rule, so that under both designated laws the same standard terms prevail: the standard terms last referred to – that is, those used by party B who has fired the last shot. The last-shot rule applies, for example, in English, Chinese and Russian contract law.[11]

[8] With respect to the definition of 'standard terms', the Official Commentary to the Hague Principles (n 3) refers to the definitions in the PECL (n 1) and the PICC (n 1).

[9] Hague Principles (n 3) Official Commentary, n 6.13, 'Scenario 1'.

[10] Ibid (emphasis added).

[11] For England: Court of Appeal, 5 December 1967, *British Road Services Ltd v Arthur V Crutchley & Co Ltd* [1968] 1 All ER 811; Court of Appeal, 25 April 1977, *The Butler Machine Tool Company Ltd v Ex-Cell-O Corp (England) Ltd* [1977] EWCA Civ 9; see eg G Treitel, *The Law of Contract* (14th edn by E Peele (Sweet and Maxwell 2014) n 2-019ff; Jill Poole, *Textbook on Contract Law* (11th edn, Oxford University Press 2012) 53ff. For China: Bing Ling, *Contract Law in China* (Sweet and Maxwell Asia 2002) n 3.039, with reference to arts 30 and 31 of the Contract Law of the People's

The rationale of this solution in the Hague Principles is that both parties preferred to choose the applicable law rather than to submit their contract to objective connecting factors. The parties designated different laws, but these laws reach the same outcome regarding the battle of forms. The first alternative of Article 6(1)(b) respects this choice and leads to the application of the law that prevails under both laws designated by the parties in their respective standard terms. The Hague rule hereby 'seeks to maximise party autonomy'.[12]

Other countries, such as France, Germany, Austria, Poland, Estonia, Lithuania, Romania, and most likely Switzerland, use knock-out rules instead.[13] The third alternative in Article 6(1)(b) of the Hague Principles addresses the situation in which at least one of the parties designates a law using a knock-out rule: '[I]f under one or both of [the laws designated by the parties] no standard terms prevail, there is no choice of law.' Objective connecting factors will then apply.

The following presentation analyses the question of whether Article 6 (1)(b) has helped, or may indeed help in the future, to increase legal certainty in international commercial transactions. It will look at recent academic commentary on this provision and ask which conclusions national and international legislators or courts may draw from the current academic discussion when it comes to solving the issue of conflicting choice-of-law clauses in standard terms and possibly also conflicting choice-of-jurisdiction clauses.

III. Recent developments

Before the adoption of Article 6(1)(b) of the Hague Principles, there was no black letter rule that explicitly addressed the issue of conflicting choice-of-law clauses in standard terms.[14] Courts often avoided addressing the issue and simply applied the *lex fori* to solve the battle of forms. Academic opinion was divided and suggested some six to eight different solutions to solve the issue, some of them of considerable complexity.[15] This has led to a great deal of legal uncertainty.

Republic of China (1999); compare Pertegás and Marshall (n 4) 992. For Russia: I Aladyev and F Aden, *Vertragsschluss, AGB und 'Battle of Forms' nach russischem Recht* (RIW 2016) 497.

[12] Hague Principles (n 3) Official Commentary, n 6.3.

[13] France: Cour de cass. (comm.), 20 November 1984 (*Société des constructions navales et industrielles de la Méditerranée c Société Freudenberg*), Bull 1984 IV No 313. The French legislator has recently adopted this solution in art 1119(2) of the Civil Code providing: '*En cas de discordance entre des conditions générales invoquées par l'une et l'autre des parties, les clauses incompatibles sont sans effet*'; translation: 'In the event of discrepancy between the general conditions invoked by either of the parties, the incompatible clauses shall have no effect.' Germany: BGH, 26 September 1973, BGHZ 61, 282, 286ff; BGH, 20 March 1985, NJW 1985, 1838, 1839ff; BGH, 23 January 1991, NJW 1991, 1604, 1606; BGH, 24 October 2000, NJW-RR 2001, 484. Austria: Oberster Gerichtshof (OGH), 7 June 1990, Juristische Blätter 1991, 120; Poland: Civil Code, § 385; Estonia: Code of Obligations, § 40; Lithuania: Civil Code, art 6:179; Romania: Civil Code, art 1202(4).

[14] Hague Principles (n 3) Official Commentary, n 6.11; compare, eg, D Girsberger, 'Die Haager Prinzipien über die Rechtswahl in internationalen kommerziellen Verträgen' (2014) *Schweizerische Zeitschrift für internationales und europäisches Recht* 545, 550; Garcimartín Alférez (n 5) 242.

[15] For more information with references, see Kadner Graziano (n 2) 80–7.

Following the adoption of Article 6(1)(b), one State, Paraguay, has already introduced the solutions of the Hague Principles into its national law, including Article 6(1)(b).[16] In international academic discussion, the solution proposed in Article 6(1)(b) appears to become the de facto starting point for a discussion of this 'difficult',[17] 'vexed',[18] and 'highly complicated legal issue'.[19] While some voices have expressly welcomed the new rule in Article 6(1)(b),[20] others are sceptical.[21] The following analysis focuses on those more critical voices, tries to respond to each concern, and suggests a number of conclusions.

IV. Critical comments in academic commentary

At the substantive law level, knock-out rules have become widespread in recent years.[22] In a critical response to the draft of what has become the Hague solution, which was published in: *A Commitment to Private International Law: Essays in Honour of Hans Van Loon* in 2013, Ole Lando suggests applying a knock-out rule also at the level of private international law. He advances three arguments to support his proposal:

- First, he argues that if the parties designated different laws in their standard terms, they did not agree on the applicable law.[23]

[16] Ley n° 5393 sobre el derecho aplicable a los contratos internacionales (14 January 2015) <https://assets.hcch.net/upload/contractslaw_py_es.pdf> accessed 1 May 2017 states: '*Artículo 8° - Acuerdo sobre la elección de derecho. (1) Para determinar si las partes acordaron una elección del derecho, se aplica el derecho presuntamente elegido por las partes. (2) Si las partes utilizaron cláusulas estándar o de adhesión que indican diferentes derechos y bajo ambos derechos prevalecen las mismas cláusulas estándar, se aplica el derecho indicado en esas cláusulas estándar; si bajo estos derechos prevalecen distintas cláusulas estándar, o si no prevalece ninguna de las cláusulas estándar, entonces no habrá elección del derecho. (3) El derecho del Estado en que una parte tiene su establecimiento determina si esa parte consintió con la elección de derecho si, en vista de las circunstancias, no es razonable determinar esta cuestión según el derecho mencionado en este artículo.*' English translation available at < https://assets.hcch.net/upload/contractslaw_py.pdf> accessed 1 May 2017.

[17] Symeonides (n 4) 877.

[18] Pertegás and Marshall (n 4) 992.

[19] Pertegás and Marshall (n 4) 993; M Pertegás and B Marshall, 'Intra-regional Reform in East Asia and the New Hague Principles on Choice of Law in International Commercial Contracts' (2014) 20 Korean Private International Law Journal 391, 412; see also Girsberger (n 14) 550: '*[I]n der Praxis schwer zu handhabendes Problem*'; translation: 'a problem which is difficult to handle in practice.'

[20] See eg Schwartze (n 6) 98: a 'necessary solution'.

[21] Even in critical comments, the fact that there now exists a black letter rule on this issue seems to be appreciated. See eg T Pfeiffer, 'Die Haager Prinzipien des internationalen Vertragsrechts: Ausgewählte Aspekte aus der Sicht der Rom I-VO' in P Mankowski and W Wurmnest (eds), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (Sellier European Law Publishers 2014) 501, 507 ('*[G]rundsätzlich verdienstvoll*'), 508 ('*[E]ine bemerkenswerte abweichende Lösung*' [a remarkable, different solution]); D Martigny, 'Die Haager Principles on Choice of Law in International Commercial Contracts: Eine weitere Verankerung der Parteiautonomie' (2015) 79 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 624, 643: '*Die Absicht, eine Rechtswahl auch bei einem 'battle of forms' zu begünstigen, ist an sich lobenswert*'; translation: 'The intention to detect a choice of law by the parties even in "battle of forms" situations is in itself praiseworthy'; see also Schwartze (n 6) 98.

[22] PECL (n 1) art 2:209; PICC (n 1) art 2.1.22; Christian von Bar and Eric Clive (eds), *Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law* (Oxford University Press 2010) art II – 4:209; European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Doc COM(2011) 635 final, art 39(1) (CESL).

- Second, applying the Hague solution requires knowledge of how the battle of forms is solved in the two laws designated by the parties. In many domestic laws, however, the response at the substantive law level would be unclear. According to Lando, a 'rule that relies on the substantive laws on the battle of forms is problematic when the law of … many countries is unsettled or unclear.'[24]
- Last but not least, a knock-out rule at the private international law level would be easier to apply for the parties.[25]

Thomas Pfeiffer, while recognizing the qualities of the Hague rule in tackling certain situations, also responds with scepticism.[26] He argues that the rationale behind applying the purportedly chosen law to examine the validity of the parties' choice lies in the fact that, even if the choice-of-law clause were ultimately ruled to be invalid under that law, it nevertheless gave the initial impression that there was a (valid) choice of applicable law. He further argues that, if the parties designate different laws in their respective standard terms, there is no such initial impression.[27] In this situation, it would be uncertain that any of the parties really relied on the validity of the choice-of-law clause in its standard terms. Only where the designation of law was invalid under one of the purportedly chosen laws, could the designation of the other law create the impression that there was a valid choice of law.[28] The fact that the Hague solution requires recourse to the content of the designated substantive laws might, according to Pfeiffer, be seen as a further weakness.[29] He admits though that introducing elements of substantive law at the level of private international law may be unavoidable when it comes to analysing whether the parties have agreed on the applicable law.[30] According to Andreas Schwartze, the Hague rule is 'a rather complicated solution', complication potentially being another weakness.[31]

[23] O Lando, 'The Draft Hague Principles on the Choice of Law in International Contracts and Rome I' in *A Commitment to Private International Law: Essays in Honour of Hans Van Loon* (Intersentia 2013) 305, 308. This argument was also put forward by several participants at the Lucerne conference in September 2016.

[24] Ibid 308–9; Martigny (n 21) 643.

[25] Lando (n 23) 309; Lando's counter-proposal has been approved, eg, by M Hook, 'The Concept of Modal Choice of Law Rules' (2015) 11 *Journal of Private International Law* 185, 211.

[26] Pfeiffer (n 21) 509: *Auf der einen Seite '[ist] die besagte Lösung … jedenfalls nicht unbesehen als Interpretationsleitlinie für die Rom I-VO heranzuziehen'. Auf der anderen und in manchen Situationen 'spricht also vieles dafür, der Haager Lösung bei der Auslegung der Rom I-VO zu folgen*'; translation: On the one hand, 'the Hague solution is not to be applied without scrutiny when interpreting the Rome I-Regulation.' On the other hand, in some situations, 'the Hague solution could well be used as guide for the courts when interpreting the Rome I Regulation'.

[27] Pfeiffer (n 21) 508.

[28] Ibid.

[29] Ibid; Martigny (n 21) 643.

[30] Pfeiffer (n 21) 508: '*Das ist indessen im Hinblick auf die Feststellung des Konsenses ohnehin unvermeidbar*'; translation: 'it is nevertheless probably inevitable in the scheme of things.'

[31] Schwartze (n 6) 87.

1. Responses

Most of the counter-arguments mentioned above were already discussed when Article 6(1)(b) of the Hague Principles was prepared and adopted.[32]

A. Too complicated?

Is the Hague solution indeed 'complicated' or even 'too complicated' to be understood and correctly applied by the courts? First experiences in the classroom seem to reveal, on the contrary, that most students quickly understand the basic idea as well as the precise functioning of Article 6(1)(b) of the Hague Principles, therefore calling into question whether the Hague rule really is too complicated or even complicated at all.[33]

B. No initial appearance of a valid choice of the applicable law?

Whether and to what extent there is the appearance of a valid choice when a contract is formed, as well as the expectations of the parties in a given case, will often depend upon the precise circumstances of that case. However, it is submitted that parties, when forming a contract, will often rely on the fact that (i) the contract will be performed without any legal issues being raised and (ii) should there be a dispute, their own choice-of-law clause may ultimately be respected or prevail, even if they may be aware of uncertainty in that respect.

C. Uncertainties at the substantive law level?

It is true that, in a certain number of jurisdictions, the solution to the question of battle of forms is still unclear even at the substantive law level. However, some uncertainties can be remedied by performing comparative research, exposing the solutions that are applied in different countries. This research is not only useful for the purpose of applying Article 6 of the Hague Principles. It is also crucial to have this information at hand wherever the relevant private international law rules designate the law of a foreign jurisdiction as the law applicable to a contract during the conclusion of which conflicting standard terms were used. There is thus a considerable interest in enhancing clarity and transparency with respect to the solution to the battle of forms at the substantive law level. At the Law Faculty of the University of Geneva, the varying solutions that are applied at the substantive law level are consequently currently being researched on a worldwide scale.

The Official Commentary to the Hague Principles explicitly acknowledges that '[a]t times it may be difficult to accurately determine a foreign law's precise rule

[32] For an early discussion of the pros and cons of the different approaches, including those of the knock-out rule at the private international law level, see Kadner Graziano (n 2) 80–7.

[33] Compare Garcimartín Alférez (n 5) 243: '*Aunque resulte aparentemente compleja, esta solución se puede entender fácilmente y … el resultado es muy sensato*'; translation: 'Though it may seem complex at first sight, the solution is easily understandable and … achieves very reasonable results.'

and position on the battle of forms'.[34] If the content of foreign law cannot be determined and uncertainty regarding the solution(s) to the battle of forms under one of the designated laws eventually remains, it will be impossible to establish whether 'under the designated laws the same standard terms prevail'. According to the Official Commentary, '[t]his case should be treated as one in which "no standard terms prevail", and consequently as a case in which "there is no choice of law"' under the Hague Principles.[35]

D. No agreement on the applicable law?

It has further been argued by the critics of the Hague rule that if both parties designated different laws, there would be no agreement on the applicable law. There are several responses to this argument. First, regarding the solution to the battle of forms, the disagreement of the parties is apparent rather than real. In fact, where under both laws designated by the parties the same standard terms prevail, the result under Article 6 of the Hague Principles is closer to the actual intention of the parties than the application of objective connecting factors, which both parties intended to replace. Second, whether the parties have indeed reached agreement, as well as the content of such agreement, depends eventually on the rule that is applicable for determining agreement. In situations in which conflicting standard terms are used, the methods for determining agreement vary from one jurisdiction to the other. As set out above, with respect to conflicting standard terms, some legal systems apply 'knock-out rules'. However, others apply the classic 'mirror image rule' of general contract law, according to which offer and acceptance must match for there to be a contract (that is, the acceptance is required to be the 'mirror image' of the offer). Under the mirror image rule, if a declaration purported to be an acceptance refers to standard terms differing from those of the offer, it constitutes a new offer that is regarded as being accepted at the latest when the party receiving it starts performing the contract.[36] It is thus, in principle, the last set of forms that prevails and becomes part of the contract. To imply that in the case of conflicting choice-of-law clauses no agreement on the applicable law has been reached therefore assumes that a knock-out rule applies, although many jurisdictions use a last-shot rule in their general contract law.

During the discussions at the Lucerne conference, Neil Cohen recalled that in many States the initial position as to the 'battle of the forms' was simply that when parties had apparently agreed by the exchange of forms or other communications, but the forms or communications of the parties were not identical as to their terms, the

[34] Hague Principles (n 3) Official Commentary, n 6.21. This comment mentions the option that the procedural rules of the forum may provide an obligation on the parties to contribute to determine the content of the applicable rule.

[35] Ibid n 6.22.

[36] The mirror image rule is to be found, eg, in the CISG (n 2) art 19(1): '(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.'

exchange of documents did not form an agreement and no contract was concluded.[37] This was eventually seen as unacceptable, in situations where both parties relied on having formed a contract and it was concluded that this perception should be respected notwithstanding differences in their standard terms. He aptly reminded us that the ultimate solution has in most jurisdictions two aspects: first, that the parties are being treated as having agreed on contract formation (notwithstanding the non-identical content of their terms), at least once both parties have started performing the contract and, second, that it needs a specific rule to determine what the terms of that agreement are. In some States, this rule is a last-shot rule; in others, a first-shot rule; still others apply a knock-out rule, while yet others use a hybrid approach.

Article 6(1)(b) of the Hague Principles (i) respects each State's choice to treat the parties as having agreed even though their forms do not exactly agree and (ii) respects and applies each State's rule, as far as possible, for determining the terms of the agreement with regard to their conflicting standard forms. Where the rules on battle of forms, as applied in the respective States, lead to the same result, the first alternative of Article 6(1)(b) upholds the decision of both States and effectuates it. Where the approaches of the respective States do not lead to the same result, the second and third alternatives of Article 6(1)(b) defers to that difference and concludes that there is no choice of law. If Article 6(1)(b) is rejected, then the choices that are identical in both relevant States as to the determination of the contract terms are rejected, and the conflict-of-laws theory is elevated over the rules of general contract law of both jurisdictions.

E. Drawbacks of the major competitor of the Hague rule

Last but not least, the knock-out rule, which now looks set to become the major competitor to the Hague rule in academic discussion, also has its drawbacks.[38] It has been said, for example, that if one party designates the law of State X to govern the contract and the other the law of State Y:

> rejecting both choices may defeat the expectation of both parties, and of 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.[39]

Schwartze comes to the conclusion that a knock-out rule would 'thwart even more choice of law attempts'. He eventually concludes that the Hague solution is 'necessary' to solve the issue.[40]

[37] The author is very grateful to Neil Cohen for his comments and for having continued the discussion in the aftermath of the Lucerne conference.

[38] In this respect, see also the contribution by J Neels, 'The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law' (2017) 22 *Uniform Law Review* 443, with regard to the situation in South Africa and India.

[39] J Fawcett, J Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2005) 675, n 13.61; for further arguments against this approach, see eg A Dutta, 'Kollidierende Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen' [2005] *Zeitschrift für Vergleichende Rechtswissenschaft* 461, 465ff.

[40] Schwartze (n 6) 98.

2. *The alternative: applying objective connecting factors instead—a critical evaluation*

If choice-of-law clauses knock each other out, objective connecting factors apply. Ideally, these objective connecting factors are modern, straightforward, and easy to foresee for the parties and to apply for the courts. On a worldwide scale, however, this is far from certain.

Some systems do indeed achieve legal certainty and reach easily foreseeable results. Pursuant to the Rome I Regulation, for example, the Act of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations, the Japanese Act on the General Rules of Application of Laws, the Private International Act of South Korea, the Swiss Private International Law Act, the Civil Code of Québec, the Civil Codes of Russia and Kazakhstan, and the Private International Law Act of Tunisia, a contract is governed by the law of the country where the party required to complete the characteristic performance of the contract has his habitual residence.[41]

[41] See Rome I Regulation (n 7) art 4(2); similarly, Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010) art 41 (English translation available at < http://www.wipo.int/wipolex/en/text.jsp?file_id=206611> accessed 1 May 2017): 'Absent any choice by the parties, the law of the habitual residence of a party whose performance of obligation is most characteristic of the contract or the law that most closely connected with the contract shall be applied'; Japanese Act on the General Rules of Application of Laws (2006) art 8 (In the Absence of a Choice of Applicable Law by the Parties) (English translation available at < http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_08.1_anderson.pdf> accessed 1 May 2017): '(1) Where there is no choice under the preceding Article, the formation and effect of a juristic act shall be governed by the law of the place with which the act is most closely connected at the time of the act. (2) For the purpose of the preceding paragraph, where only one party is to effect the characteristic performance of the juristic act, it shall be presumed that the juristic act is most closely connected with the law of his or her habitual residence (i.e., the law of his or her place of business where that place of business is related to the act, or the law of his or her principal place of business where he or she has two or more places of business related to the act and where those laws differ)'; Private International Act of South Korea (2001) art 26 (English translation available at < http://www.moleg.go.kr/english/korLawEng?pstSeq=52687> accessed 1 May 2017): '(1) . . . [T]he contract shall be governed by the law of the country which is most closely connected with the contract. (2) In case a party . . . is to effect any performance . . . the law of the country, where the habitual residence of the party is located at the time of the conclusion of the contract . . . shall be presumed to be the most closely connected'; Civil Code of Québec (1991) arts 3112, 3113 (English translation available at < http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991> accessed 1 May 2017): 'If no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the State with which the act is most closely connected in view of its nature and the attendant circumstances . . . . A juridical act is presumed to be most closely connected with the law of the State where the party who is to perform the prestation which is characteristic of the act has his residence'; Civil Code of Russia (1995/2016) art 1211 <http://www.wipo.int/wipolex/en/details.jsp?id=15809> accessed 1 May 2017; Civil Code of Kazakhstan (1994) art 1113(1) (English translation available at < http://adilet.zan.kz/eng/docs/K940001000> accessed 1 May 2017): '[T]he law of the country shall apply where a party defined as follows was found or has the place of residence or principal place of business: (1) seller—in a purchase and sale contract; (2) donator—in a donation contract'. PIL Code of Tunisia (2010) art 62 <http://www.droit-afrique.com/upload/doc/tunisie/Tunisie-Code-2010-droit-international-prive.pdf> accessed 1 May 2017: '[L]e contrat est régi par la loi de l'Etat du domicile de la partie dont l'obligation est déterminante pour la qualification du contrat'; translation: 'The contract shall be governed by the law of the State of the domicile of the party whose obligation is decisive for the qualification of the contract.'

Other private international law systems—in particular, in South America—use criteria such as the place where the contract was formed[42] or the place where it was, or should have been, performed or executed.[43] Many jurisdictions belonging to the common law tradition apply a 'proper law of contract', which the courts determine using a wide range of criteria. In the USA, for example, section 188 of the Restatement (Second) of Conflict of Laws (law governing in absence of effective choice by the parties) provides a particularly open-ended approach using a whole range of criteria:

[42] For the role of the place of contract conclusion in South African private international law, see below and n 46; several systems rely on this connecting factor while providing for an exception in favour of the law of the common domicile or habitual residence of the parties. See Civil Code of Angola art 42(1), (2); Civil Code of Costa Rica, art 27 <http://www.wipo.int/wipolex/en/details.jsp?id=9296> accessed 1 May 2017: '*Para la interpretación de un contrato y para fijar los defectos mediatos o inmediatos que de él resulten, se recurrirá a las leyes del lugar donde se hubiere celebrado el contrato; pero si los contratantes tuvieren una misma nacionalidad, se recurrirá a las leyes de su país*'; Civil Code of Egypt, art 19 (English translation available at <http://hrlibrary.umn.edu/research/Egypt/Civil%20Law.pdf> accessed 1 May 2017: 'Contractual Obligations are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile by the law of the place where the contract was concluded'; Civil Code of Iraq, art 25 (translation available at < http://landwise.resourceequity.org/record/750> accessed 1 May 2017: 'The contractual obligation shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied'; see also Civil Code of Gabon, art 55 <http://www.wipo.int/wipolex/en/details.jsp?id=8822> accessed 1 May 2017: '*[L]es contrats sont soumis à la loi de leur conclusion.*'

[43] See eg Civil Code of Mexico, art 13(4) <http://www.wipo.int/wipolex/en/details.jsp?id=11721> accessed 1 May 2017: '*[L]os efectos jurídicos de los actos y contratos se regirán por el derecho del lugar en donde deban ejecutarse*'; Civil Code of Peru, art 2095: '*Las obligaciones contractuales se rigen por la ley expresamente elegida por las partes y, en su defecto, por la ley del lugar de su cumplimiento. Empero, si deben cumplirse en países distintos, se rigen por la ley de la obligación principal y en caso de no poder ser determinada ésta, por la ley del lugar de celebración*'; Civil Code of Chile, art 16(3): '*Pero los efectos de los contratos otorgados en país extraño para cumplirse en Chile, se arreglarán a las leyes chilenas*'; Judicature Act of Guatemala, art 30 <http://www.oas.org/juridico/pdfs/mesicic4_gtm_org.pdf> accessed 1 May 2017: '*Si el acto o negocio jurídico, debe cumplirse en un lugar distinto a aquel en que se celebró, todo cuanto concierne a su cumplimiento, se rige de acuerdo a la ley del lugar de ejecución*'; the level of complexity reached by some of these systems can be quite high. See eg 2015 Civil and Commercial Code of the Argentine Republic, art 2652 <http://www.wipo.int/wipolex/en/details.jsp?id=15742> accessed 1 May 2017, which designates the law of the performance of the contract, the law of the habitual residence of the debtor of the characteristic performance, and the law of the conclusion of the contract: '*En defecto de elección por las partes del derecho aplicable, el contrato se rige por las leyes y usos del país del lugar de cumplimiento. Si no está designado, o no resulta de la naturaleza de la relación, se entiende que lugar de cumplimiento es el del domicilio actual del deudor de la prestación más característica del contrato. En caso de no poder determinarse el lugar de cumplimiento, el contrato se rige por las leyes y usos del país del lugar de celebración*'; similarly, see also Introduction to the Civil Code of Brazil, art 9 <http://www.wipo.int/wipolex/en/details.jsp?id=534> accessed 1 May 2017: '*Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituirem. § 1º Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato. § 2º A obrigação resultante do contrato reputa-se constituída no lugar em que residir o proponente*'; see also Civil Code of Iran, art 968 (English translation available at < http://www.wipo.int/wipolex/en/details.jsp?id=7731> accessed 1 May 2017): 'Obligation arising out of contracts subject to the laws of the place of the performance of the transaction except in cases where the parties to the contract are both foreign nationals and have explicitly or impliedly declared the transaction to be subject to the laws of another country.' Several systems rely on this connecting factor while including exceptions. See eg Civil Code of Afghanistan, art 27 (English translation available at < https://law.stanford.edu/publications/civil-law-of-the-republic-of-afghanistan/> accessed 1 May 2017): 'With respect to obligations arising from contracts, the law of the State wherein parties to the contract reside shall apply. If they do not reside in the same State, the law of the State wherein the contract is completed shall apply.'

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . . .
> (2) In the absence of an effective choice of law by the parties (see s 187), the contacts to be taken into account . . . to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189–199 and 203.[44]

What is more, in the USA, conflict of laws is within the competence of the States (as opposed to being federal law). In the different States of the federation, the connecting factors vary, thereby adding to the difficulty for foreign parties to foresee the law that may eventually be applicable. Some States in the USA still follow the traditional rule found in the Restatement (First) of Conflict of Law, which invariably designates the *lex loci contractus*.[45]

In South African private international law, in order to determine the 'proper law of the contract', the *locus solutionis* (place of performance) is the most important connecting factor. There are two approaches in this regard in case law: (i) the *locus solutionis* automatically indicates the proper law, unless another legal system is manifestly closer connected to the contract and the parties or (ii) the *locus solutionis* is used as the most important among several connecting factors. Other connecting factors that may play a role under either the first or the second approach include the *locus contractus* (the place of conclusion of the contract); the place of the offer; the place of the acceptance; the place of the agreed arbitration; the choice-of-court clause; the domicile of the parties; the habitual residence of the parties; the place of business of the parties; the form, terminology and

[44] American Law Institute, Restatement of the Law (Second) Conflict of Laws (1971) is followed by about 23 States of the Federation. Other States in the USA apply comparable proper law-of-the-contract approaches. For a critical evaluation, see eg R Weintraub, *Commentary on the Conflict of Laws* (5th edn, Foundation Press/Thomson Reuters 2006) para 73D.

[45] Namely, Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, and Wyoming. See American Law Institute, Restatement (First) of Conflict of Laws (1934) paras 332, 333; Supreme Court of the United States, 13 November 1882, *Pritchard v Norton*, 1 SCt 102; Supreme Judicial Court of Massachusetts, 4 October 1877, *Milliken v Pratt*, 125 Mass 374; Supreme Judicial Court of Massachusetts, 9 March 1895, *Emery v Burbank*, 28 LRA 57; see also P Hay, PJ Borchers and S Symeonides, *Conflict of Laws* (5th edn, West 2010) para 18.14ff; S Symeonides, 'Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey' (2016) 64 *American Journal of Comparative Law* 221, 291–3.

language of the contract; the currency; and the incorporation of a statute in a contract.[46]

In the private international law of India, pursuant to the leading case *National Thermal Power Corporation v Singe[r] Company*,[47] the relevant factors for determining the proper law of contract include 'the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and other links'.[48]

Having objective connecting factors applied may thus be a step into the dark for the parties to an international contract, depending on the precise case at hand, the potential fora, and the private international law rules of the forum and their (not always foreseeable) application to a given case. Therefore, the parties may indeed have a considerable interest in choosing the applicable law and avoiding the application of objective connecting factors. These potential uncertainties may be a further argument to respect party autonomy and the choice of the applicable law by the parties as far as possible.

V. Perspectives

1. Conflicting choice-of-law clauses

In the current state of academic discussion, it seems that the Hague Principles have helped whittle the discussion from around six to eight different competing approaches[49] down to just two: the Hague solution, on the one hand, and a knock-out rule at the private international law level, as suggested notably by Lando, on the other hand. If this perception is accurate, then the Hague Principles have already helped to decrease uncertainty considerably. Can a bridge be built between these two remaining competing approaches?

The solution in the first alternative of Article 6(1)(b) of the Hague Principles should be particularly attractive to regions, countries and jurisdictions in which both parties will likely designate different laws that both provide for first-shot or (much more frequent in practice) last-shot rules. If, for example, an English or Irish party designates its own law as the law applicable to the contract, and a Chinese partner to the contract designates Chinese law as the applicable law, both parties refer to jurisdictions that apply a last-shot rule. The party who fired the last shot thus wins the battle, and the law designated in its standard terms applies.

[46] Compare EA Fredericks and J Neels, 'The Proper Law of a Documentary Letter of Credit (Part 1)' (2003) 15 *South African Mercantile Law Journal* 63.

[47] [1992] 3 SCC 551.

[48] *National Thermal Power Corporation* (nos 13, 17). Compare J Neels, 'Choice of Forum and Tacit Choice of Law: The Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (An Appeal for an Inclusive Comparative Approach to Private International Law)' in *Eppur si muove: The Age of Uniform Law, Essays in Honour of Michael Joachim Bonell to Celebrate His 70th Birthday*, vol 1 (Unidroit 2016) 358, 365ff.

[49] Overview with references in Kadner Graziano (n 2).

On the European continent, however, more and more jurisdictions opt for knock-out rules at the substantive law level.[50] If this trend continues, the likelihood that both parties designate jurisdictions providing last-shot rules will further decrease in continental Europe in the future. In this case, the third alterative of Article 6(1)(b) of the Hague Principles applies and the choice-of-law clauses shall knock each other out.

With respect to a future rule on choice of law in conflicting standard terms in the Rome I Regulation or, for example the Swiss Private International Law Act, the conclusion could be to provide, in principle, a knock-out rule, as suggested by Lando and as found in the second and third alternatives of Article 6(1)(b) of the Hague Principles. In addition, an exception could be added for situations in which both parties refer to jurisdictions under which the same standard terms prevail, as stated in the first alternative of Article 6(1)(b). Such an amendment of Article 3 of the Rome I Regulation or of, for example, Article 116 of the Swiss Private International Law Act could read as follows:

> If the parties have designated different laws in their standard terms, there is no choice of law. However, if under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies.[51]

Regarding its content, this rule would be very similar to the Hague rule. Its slightly different drafting, however, would make clear that in the European Union (EU) the knock-out rule, corresponding to the second and third alternatives of Article 6(1)(b) of the Hague Principles, would be regarded as the principal rule. The second sentence of the suggested formula, as well as the corresponding rule in the Hague Principles, would be the exception in the EU with respect to the number of potential cases that may arise.[52]

It is submitted that it might even be possible to consider the second sentence of the above rule, as well as the first alternative of Article 6(1)(b) of the Hague Principles, as a precise application of a knock-out rule. In fact, the rule on the 'battle of forms' under the UNIDROIT Principles of International Commercial Contracts (PICC)—Article 2.1.22—states that '[w]here both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are *common in substance*'.[53] According to the rule on 'conflicting general conditions' of the Principles of European Contract Law—the second sentence of Article

[50] See the references in note 13 above.

[51] The further conditions for the inclusion of standard terms containing choice-of-law clauses could be similar to those existing for jurisdiction clauses according to the decisions of the European Court of Justice in the cases: Case C-24/76, *Estasias Salotti v RÜWA*, 14 December 1976; Case C-322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, 21 May 2015; Case C366/13, *Profit Investment SIM SpA v Stefano Ossi*, 20 April 2016; Case C222/15, *H ő szig Kft v Alstom Power Thermal Services*, 7 July 2016.

[52] Hague Principles (n 3) art 6(1)(b), 1st alternative.

[53] PICC (n 1) (emphasis added).

2:209(1)—'[t]he general conditions form part of the contract to the extent that they are *common in substance*'.[54]

If the parties have designated different laws in their standard terms and under both of these laws the same standard terms prevail, they have in fact agreed (i) that they prefer replacing objective connecting factors by a rule chosen by the parties and (ii) that they both have designated laws leading to the same outcome. In these two fundamental aspects, their contractual terms are indeed '*common in substance*'. In other words, and as outlined in the Official Commentary to the Hague Principles, '[b]ecause both laws designated by the parties solve the battle of forms in favour of the same standard terms, the apparent conflict is in fact a false conflict'.[55] Therefore 'the law designated in the prevailing terms' should be applied even under a precise application of the knock-out rule.[56]

2. Outlook: Conflicting jurisdiction clauses

During the Lucerne conference, the question was raised about how to deal with the issue of conflicting jurisdiction clauses in standard terms, which is equally frequent in practice. Having a clear-cut solution regarding the choice of the applicable law in battle-of-forms situations might also be helpful in this respect.

Parties often include in their standard terms both jurisdiction and choice-of-law clauses. Just as in the case of choice-of-law clauses, the parties often try to attribute jurisdiction to the courts of different countries in their respective jurisdiction clauses. The current version of the Rome I Regulation excludes jurisdiction agreements from its scope (see Article 1(2)(e) of the Rome I Regulation).[57] The Brussels I Regulation (recast) provides, in Article 25, that:

> 1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive

[54] PECL (n 1) (emphasis added). The proposal for a CESL (n 22) contained a very similar provision in the second sentence of art 39(1): 'The standard contract terms are part of the contract to the extent that they are common in substance.'

[55] Hague Principles (n 3) Official Commentary, n 6.14.

[56] Covering the relationship between the Hague Principles and the CISG would go beyond the scope of the present article. For thoughts on the relationship between the two instruments, see the Hague Principles (n 3) Official Commentary (n 4) nos 6.23–6.27; for further examples, see Kadner Graziano (n 2) 94–9. For critical comments and counter-proposals, see P Winship, 'The Hague Principles, the CISG, and the "Battle Of Forms"' (2015) 4 *Pennsylvania State Journal of International Affairs* 151.

[57] It provides: '(2) The following shall be excluded from the scope of this Regulation: . . . (e) arbitration agreements and agreements on the choice of court.' This rule has been copied into the Hague Principles (n 3) art 1(3)(b). The Official Commentary, n 1.24, makes clear, however, that 'the existence of a list of exclusions should not be interpreted as a policy decision against party autonomy in respect of the maters excluded'. The reason for the exclusion of (certain aspects of) choice-of-court agreements in the Hague Principles is that 'in some States, these matters are regarded procedural' whereas in others they are 'characterized as substantive issues to be governed by the law applicable to the . . . choice of court agreement itself. The Principles do not take a stance among these different views. Rather art 1(3)(b) excludes these issues from the scope of the Principles' (n 1.26).

validity under the law of that Member State . . . . The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing.[58]

However, the Brussels I Regulation does not explicitly address the conditions for agreement on a choice-of-court clause in battle-of-forms situations. The Hague Convention on Choice of Court Agreements, concluded in June 2005, does not address the issue of conflicting choice-of-court clauses in standard terms either.[59] Regarding the law applicable to solve the conflict-of-jurisdiction clauses in standard terms, the current situation is thus arguably as open and unresolved as it is with respect to conflicting choice-of-law clauses.

With respect to conflicting jurisdiction clauses, the reasoning may proceed as follows: the first question a court has to address is obviously whether it has jurisdiction. In case of conflicting jurisdiction clauses, the question is which law to apply for solving the issue of conflicting choice-of-court clauses in standard terms. If the parties have designated the applicable law in (conflicting) standard terms, this conflict thus needs to be solved first, for example, according to the lines set out above. Once this conflict is solved and an applicable law has been determined (be it a law designated by the parties or, if eventually there is no choice of law, by way of objective connecting factors), this law could then also apply to solve the battle of forms with regard to conflicting choice-of-court clauses.

The main contract, the choice-of-law agreement, and the choice-of-court agreement are three distinct contracts.[60] It should arguably be avoided to determine the law applicable to solve a conflict of choice-of-court clauses according to other standards than that applied to conflicting choice-of-law clauses. Otherwise, a further layer of complexity would be added to a question that is already highly complex. It is thus submitted that once a law is designated by the parties this same law should determine whether the parties have formed a valid agreement on both the applicable law and jurisdiction.[61] Thus, in case of conflicting choice-of-jurisdiction and choice-of-law clauses, the conflict regarding the choice-of-law clauses should first be solved according to one of the two competing solutions set out above. The Hague rule (or its current main competitor, the knock-out rule at the private international law level) could thus very well be applied for solving both the conflict of choice-of-law and the conflict of choice-of-court clauses in standard terms.

[58] Brussels I Regulation (n 7) (emphasis added).

[59] Hague Convention (n 7).

[60] See the references in note 7 above.

[61] German and Swiss authors have suggested applying a knock-out rule—that is, the rule that is used in German (and arguably Swiss) substantive law to solve the battle of forms, also to conflicting choice-of-court clauses under the Brussels I Regulation (n 7). See U Magnus, in U Magnus and P Mankowski, *Brussels I Regulation* (2nd edn, Sellier 2012) art 23, n 100; P Mankowski, in T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*, vol 1 (4th edn, O Schmidt 2015–16) art 25 Brüssel Ia-VO, n 94; A Stadler, in H-J Musielak and W Voit, *Zivilprozessordnung* (13th edn, Vahlen 2016) art 25 Brüssel Ia-VO nF, n 9; L Killias, in F Dasser and P Oberhammer (eds), *Lugano-Übereinkommen* (2nd edn, Stämpfli 2011) art 23, n 99; in the same sense, see F Garcimartin, in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) ch 9, n 9.42.

VI. Conclusions

Neither the Rome I Regulation in its current version, the Mexico Convention, the 1955 Hague Sales Convention, the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, nor any national private international law rules, give an answer to the question of how to solve the issue of conflicting choice-of-law clauses.[62] The Hague Principles, on the contrary, do provide a solution for this issue. In academic discussion, the prevailing opinion clearly appears to be that it is better to have a clear-cut solution for this difficult issue than steering in the fog. According to Lando, the issue addressed by Article 6 (1)(b) of the Hague Principles is therefore 'one of the few points on which an amendment to the Rome I Regulation may be considered'.[63] He concludes that with respect to the choice of 'rules of law and the battle of forms . . . the Principles may give rise to consider a revision of Rome I'.

At the current stage, a discussion has been launched as to whether:

- the rule in Article 6(1)(b) of the Hague Principles is the most appropriate approach to follow;
- a general knock-out rule at the private international law level would be preferable; or
- for some regions or jurisdictions, a combination of both approaches might be the best solution (starting with a knock-out rule and adopting the first alternative of the Hague solution by way of exception).[64]

It may currently not be certain as to whether the Hague rule on choice of law in battle-of-forms situations will ultimately prevail in future law reform or before the courts at the national, inter-regional, or international level. The voices cited herein seem to show that there is now one strong competitor.[65] What we can be certain of is that the Hague Principles have helped to put the issue on the agenda and that they have increased the likelihood that other international or national instruments will follow in addressing and solving this issue. The Hague Principles may also help create awareness that a similar issue is raised when there are conflicting choice-of-court clauses in standard forms and that such clauses and conflicting choice-of-law clauses may deserve a similar treatment. In the meantime, courts will hopefully start addressing this topic explicitly, discuss openly the different options that are available to solve the problem, and openly decide in favour of one of the available options. If the Hague solution provides a starting point for these discussions and contributes to creating much needed transparency when dealing with this issue, much would already be gained on the way towards more legal certainty for international commercial transactions.

[62] Rome I Regulation (n 6); Mexico Convention (n 6); Convention on the Law Applicable to the International Sale of Goods, 1955, 510 UNTS 147; Convention on the Law Applicable to Contracts for the International Sale of Goods, 1986, 24 ILM 1575 (1985).

[63] Lando (n 23) 309; see also Garcimartín Alférez (n 5) 242, n 2.

[64] See the proposal in section V.1. above.

[65] For confirmation of this conclusion, see the contribution by J Neels, 'The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law' (2017) 22 *Uniform Law Review* 443.