

LEX MERCATORIA:
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Chapter 11

The “Battle of the Forms” and the Conflict of Laws

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INTRODUCTION

Most readers will know that “battle of the forms” denounces the situation where, during contractual negotiations, both parties keep on referring to their own set of standard terms and then go ahead with the performance without having actually resolved between them which one of these two sets should govern the contract. Scholars have devoted considerable attention to this topic. One gains the impression that the number of learned articles exceeds the number of reported cases where such a “battle” has occurred.¹ This somewhat unhealthy ratio may account for the fact that, to my knowledge, Francis Reynolds has never raised his voice in this lively academic debate.

Yet the reverse ratio between academic writing and jurisprudence emerges when one looks at cases where commercial law and conflicts of law—two areas of law to which Francis Reynolds has devoted much of his work—join up for a “battle of the forms” on questions of conflict of laws.² By this, I mean diverging provisions in standard terms which relate to choice of law, choice of jurisdiction (including arbitration clauses) or choice of place of performance.

If legal systems throughout this world could agree on one standard solution for the “battle of the forms”, which applied equally to substantive law, choice of

¹ The *Index to Legal Periodicals* alone lists 21 articles on the “battle of the forms” which have been published since 1981.

² Conspicuous silence as to the conflicts implications of a “battle of the forms” prevails in the literature, be it standard textbooks such as *Dicey & Morris on the Conflict of Laws*, 13th edn. (by L. Collins with Specialist Editors) (1999), Rule 173, 1222, and including the *Fourth Cumulative Supplement* 1997; *Cheshire and North’s Private International Law*, 13th edn. by P. M. North and J. J. Fawcett (1999), 560, 563, 587, or G. Kegel, *Internationales Privatrecht*, 7th edn. (1995), 487 *et seq.*; but also in a monograph on standard terms by a leading authority on conflicts law: A. Boggiano, *International Standard Contracts: the Price of Fairness* (1991) 155 *et seq.*

applicable law, and choice of jurisdiction, there would be no problem. But quite the reverse is true. In practice, we can distinguish at least four approaches towards the "battle of the forms". And, even within one legal system, different solutions may be applied for, e.g., substantive law and choice of jurisdiction. I will first outline the different approaches and then discuss particular problems which arise in relation to choice of substantive law, choice of jurisdiction, and choice of place of performance.

MAIN APPROACHES TOWARDS DECIDING THE "BATTLE"

There are four main approaches as to the fate and the content of a contract in the event of a "battle of the forms", namely (a) there is no agreement and thus no contract, (b) there is a contract on the terms of the party which was first to propose its standard terms, (c) there is a contract on the terms of the party which was last to insist on its standard terms, and (d) there is a contract on the individually negotiated terms, and any conflicting standard terms are replaced by the background law, i.e. the rules which apply if parties have made no specific provision in the contract.³

a. No contract

The notion that a contract is formed only if the acceptance is the "mirror image" of the offer is widespread. Most legal systems have a rule that a purported acceptance with alterations or modifications constitutes a rejection of the offer, coupled with a counter-offer.⁴ When strictly applied to the "battle of the forms", this will normally imply that there is no contract.

³ From the comparative literature, see in particular E. H. Hondius and Ch Mahé, "The Battle of Forms: Towards a Uniform Solution" (1998) 12 J.C.L. 268; A. T. von Mehren, "The Battle of the Forms: A Comparative View" (1990) 38 A.J.C.L. 265. It is interesting to note that the last three approaches were discussed as possible solutions under English law by Lord Denning, M.R. in *Butler Machine Tool Co. v. Ex-Cell-O Corp.* [1979] 1 W.L.R. 401 (C.A.), 404-405.

⁴ England: *Hyde v. Wrench* (1840) 3 Beav. 334; *Brogden v. Metropolitan Railway Co.* (1877) 2 App. Cas. 666. Germany: BGB, § 150(2) (if in doubt); France: Com. 17.6.1967, Bull. cass. 1967.III.299; Italy: C.C., Art. 1326(5); Czechia and Slovakia: Občanský zákoník, section 44(2); Netherlands: BW Art. 6:225(1) (but see also below); Vienna Convention on the International Sale of Goods 1980, Art 19(1) (C.I.S.G.); UNIDROIT Principles of International Commercial Contracts, Art. 2.11 (excluding terms which do not materially alter the offer). But see below for the Swiss OR (Code of Obligations), Article 2.

In a case decided by the *Landgericht* Bielefeld in 1988, the defendant was a German buyer who had ordered from the Italian plaintiff and seller clothing under "German conditions".⁵ The seller and subsequent plaintiff purported to accept by referring to standard terms of the German textile industry and asked for express confirmation. The buyer did not reply, but took delivery of the goods. The Court, applying the Hague Uniform Law for International Sales, Article 7(2), held that there was no contract. The reference to an entire set of standard terms was a counter-offer, which was never accepted, not even by taking delivery. The plaintiff's only remedy was therefore in the law of restitution.

This is a very rare example of a case where a court has held that there was no contract if parties performed on what they thought to be a contract after an exchange of standard forms.⁶ Although there has been some academic support for this type of solution,⁷ it is easy to see why courts are so hesitant to rule that the "battle" has prevented the conclusion of a contract. This solution will very frequently ignore the will of both parties who wanted to have a contract regardless of its precise terms.

b. Contract on the standard terms first referred to

The new Dutch Civil Code contains the following interesting rule. If parties refer to different standard terms in offer and acceptance, the second reference is without effect, and the contract is formed on the standard terms of the party which first referred to its standard terms. The second party can prevent this effect only by an express refusal to contract on the first party's terms (Article

⁵ LG Bielefeld 5.6.1987, *Praxis des Internationalen Zivil- und Verfahrensrechts* (IPRax) 1988, 229. For a critical view, see I. Schwenzer, "The Battle of the Forms' und das EAG", IPRax 1988, 212-214.

⁶ *Poel v. Brunswick-Balke-Colender Co.* (1915) 110 N.E. 619 (N.Y.) is occasionally quoted as an example of a strict application of the "mirror image rule" to a "battle of the forms", i.e. that there is only a contract if the acceptance is the mirror image of the offer (e.g., by H. D. Gabriel, "The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code", (1994) 49 Bus. Law. 1053, 1058; see also von Mehren (1990) 38 A.J.C.L. 265, 270. It should be mentioned, though, that in *Poel* it was only the buyer who had, in the last communication, referred to standard terms, and had also requested their express acceptance. When the seller did not respond and market prices fell, the buyer walked out of the contract *before* the seller had performed.

⁷ E. McKendrick, "The Battle of the Forms and the Law of Restitution" (1988) 8 O.J.L.S. 197.

6:225(3)).⁸ Much will, of course, depend on what is understood to be an "express" refusal, and whether a previous express refusal can become ineffective through subsequent conduct. In principle, however, Dutch law clearly saddles the second party with the risk of unresolved differences between standard terms. The U.S. Uniform Commercial Code, s. 2-207(1) and (2) favours the same approach.⁹ Gabriel notes that, in recent practice, it will normally be the offeror's terms which prevail in a "battle of the forms" under U.C.C., s. 2-207.¹⁰

This rule has some advantages. Commercially, it makes sense that there is a contract. It is also economically advantageous that the law will not encourage parties to delay the conclusion of a contract in the attempt to make the last reference to one's terms as under the "last shot rule" discussed below. And it will often be more easy to identify the first reference to standard terms rather than sorting out which party was the last to insist on its own terms.

c. Contract on the standard terms last referred to

The rule that, in a "battle of the forms", it is on the terms of the party which last referred to them that a contract is formed, is prevalent in England today (where it is called the "last shot rule"),¹¹ and used to be applied in Germany until some twenty-five years ago (where it was called the "theory of the last word").¹²

Three good things can be said about this rule: (a) it appears consistent with the mirror image rule, as the last offer is construed to be ultimately accepted in total by conduct; (b) it is commercially more sound than the rule that there is no

⁸ See Hondius and Mahé (1998) 12 J.C.L. 268, 269; J. Sperling, "Battle of the forms: een vergelijking tussen Amerikaans en Nederlands recht", *Nederlands Tijdschrift voor Burgerlijk Recht* 1995, 10. As a general rule, though, BW, Article 6:225(1) maintains that an acceptance which deviates from the offer is to be treated as a refusal coupled with a counter-offer. However, an insignificant deviation in the acceptance becomes part of the contract unless the offeror objects without delay (BW, Article 6:225(2)). One "battle of the forms" decision by the Hoge Raad (HR 18.3.1994, RvdW 1994, 76) is discussed by Sperling, but was unfortunately not accessible to me.

⁹ U.C.C., s. 2-207 is an elaborate provision with three subsections with a somewhat unclear meaning and a disputed relationship. Effectively, however, it is only deviations which do not materially alter the offer which can become part of the contract under subsection (2). Any significant deviations from the offer will therefore only become part of the contract if individually negotiated; but see also below for subsection (3). For comparative literature on this provision see, e.g. von Mehren (1990) 38 A.J.C.L. 265; Gabriel (1994) 49 Bus. Law. 1053; E. Jacobs, "The Battle of the Forms: Standard Term Contracts in Comparative Perspective" (1985) 34 I.C.L.Q. 297.

¹⁰ Gabriel (1994) 49 Bus. Law 1053.

¹¹ *British Road Services v. Arthur V. Crutchley & Co.* [1968] 1 All E.R. 811 (C.A.), 817; *Butler Machine Tool Co. v. Ex-Cell-O Corp.* [1979] 1 W.L.R. 401, (C.A.); *O.T.M. Ltd. v. Hydranautics* [1981] 2 Lloyd's Rep. 211 (Q.B.: Com.).

¹² RG 27.6.1916, RGZ 88, 377; RG 14.12.1928, RGZ 123, 97.

contract; and (c) it appears to have worked for English law, as is evidenced by the fact that, to my knowledge, there are no more than three reported cases in which the "battle of the forms" was a contested and relevant issue.¹³ On the negative side, it has to be mentioned that it may be far from obvious which party was the last to refer to its terms. In two out of these three cases, the last reference to one party's terms was ultimately unsuccessful and declared to be a mere reference to the goods, or alternatively as having come too late.¹⁴ Cynics might conclude that English law has, in fact, clandestinely been applying the "second last shot rule" for the last twenty years. It also encourages parties to delay the conclusion of the contract by keeping on insisting on their own terms in every communication or act of performance.

d. Contract excluding any conflicting standard terms

The fourth and final general approach is that there is a contract between the parties, but that the standard terms referred to during negotiations become part only in so far as they are specifically negotiated or uncontested. Any conflicting standard terms are ineffective and replaced by those rules which would apply to a contract which has made no specific provision for the legal issue which may be in question.

While this approach is often presented as the contemporary challenge to the "classical" rules (namely, the three other above-mentioned approaches),¹⁵ it is probably the oldest rule on the "battle of the forms". It was applied in three French cases decided in 1912, which, interestingly enough, all concerned conflicting (local) jurisdiction clauses in standard terms.¹⁶ The judgments by the Commercial Courts of Cambrai and of Cherbourg are most explicit on this issue. Taken together, they held that (a) if the parties have agreed on the essentials of the contract, the mere fact that conflicting ideas concerning non-essential points were not resolved do not prevent the conclusion of a contract; (b) if one of the terms was on a printed form and the other was

¹³ See above. "Battle of the forms" was a contested issue in *Muirhead v. Industrial Tank Specialities Ltd.* [1986] Q.B. 507, 530. Robert Goff, L.J. (as he then was) held that an action against the third defendant in tort for pure economic loss would have been defeated by a limitation clause in a contract between the third and the second defendant on the ground that the third defendant's terms constituted the "last shot"; however, he held that there was no liability for pure economic loss in the first place (at 530).

¹⁴ *Butler v. Ex-Cell-O* [1979] 1 W.L.R. 401, 404, 406, 408; *O.T.M. v. Hydranautics* [1981] 2 Lloyd's Rep. 211, 215.

¹⁵ von Mehren (1990) 38 A.J.C.L. 265, 268 *et seq.*, 272; Hondius and Mahé (1998) 12 J.C.L. 268, 269. However, Hondius and Mahé also refer to the French applications of the "knock out rule" in 1912 (see note 16).

¹⁶ Cass. req. 24.6.1912, *Jurisprudence Générale* (Rec. Dalloz) 1913 I 363; Trib. Comm. Cambrai 16.4.1912 and Trib. Comm. Cherbourg 6.9.1912, both Rec. Sirey 1914 II 49 with case note by R. Demogue.

handwritten, the handwritten one was more significant; (c) conflicting terms were to be replaced by the *droit commun*. The approving case note by R. Demogue observes that the rule (a) follows the same idea as Article 2 of the Swiss Code of Obligations.¹⁷ This Code, which had been enacted only months before the first of these French judgments, is probably the only European codification which had the foresight to formulate its general rules on formation of contracts in such a way that they can deal directly with a "battle of the forms".¹⁸

The Cour de Cassation was shorter in its reasoning than the two commercial courts. It held that, where, after an initial oral agreement, one party had introduced a standard jurisdiction clause within a written confirmation, a reply with a conflicting standard jurisdiction clause was sufficient to indicate refusal of the first jurisdiction clause.¹⁹ This rule was generally applied to conflicting standard jurisdiction clauses by the Cour de Cassation in 1934, on the ground that the attempted derogation from the *droit commun* did not demonstrate the necessary certain intention of the parties.²⁰ One could argue that this strict line on choice of forum agreements has found its successor in Article 17 of both the Brussels and the Lugano Conventions.²¹ A similar point can be made for the writing requirement for arbitration agreements which are subject to English law.²² We will examine below whether the same could be true for choice of applicable law under Article 3(1) of the Rome Convention.²³

There are, however, a number of legal systems which follow the same "knock out" approach for substantive law clauses as well. Two of the French 1912 cases

¹⁷ *Ibid.*

¹⁸ OR Article 2: (1) "If parties have agreed on all essential items, it is presumed that a reservation as to non-essential items will not prevent the contract from becoming effective. (2) If no agreement is reached on such reserved non-essential items, the judge will decide these in accordance with the nature of the contract."

¹⁹ Cass. req. 24.6.1912, *Jurisprudence Générale* (Rec. Dalloz) 1913 I 363.

²⁰ Cass. req. 5.2.1934, Rec. Sirey 1934.1.110; Gaz. Pal. 1934.1.638. Cass. civ.² 16.11.1961, Rec. Dalloz 1962 jurisprudence 420-421 (with case note by G. Pochon) confirms this view; in this case of a wine sale, however, both parties had referred to their "terms of sale", and the unfortunate buyer was ruled out with his choice of jurisdiction clause on the ground that he should instead have referred to his "terms of purchase".

²¹ Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968 and Lugano, 1988), enacted in the U.K. by the Civil Jurisdiction and Judgments Act 1982 (as amended).

²² While it was held in *Zambia Steel & Building Supplies v. James Clark & Eaton Ltd.* [1986] 2 Lloyd's Rep. 224 that an arbitration and English choice of law clause contained in a standard form used by the defendant (seller) did meet the requirements of the Arbitration Act 1950, section 32, it appears that the same question has not been decided for a "battle of the forms". Nor is the Arbitration Act 1996, sections 5 and 6 particularly clear on this issue.

²³ Rome Convention on the Law Applicable to Contractual Obligations, enacted in the U.K. by the Contracts (Applicable Law) Act 1990.

concerned also clauses which regulated payment and place of performance.²⁴ Likewise, the above-mentioned Article 2 of the Swiss Code of Obligations applies to all contractual clauses. In 1935, Raiser discarded the "theory of the last word" as then applied by German courts as "profusely primitive" and sought to replace conflicting provisions in unresolved "battles of the form" by statutory rules or trade usages.²⁵ It took German courts some forty years to heed this advice.²⁶ Austrian courts now follow the same approach.²⁷ In the U.S., the view has gained ground that a "battle of the forms" should be covered by subsection (3) rather than subsections (1) and (2) of U.C.C., s. 2-207, which would also lead to a "knock out" effect.²⁸ Simultaneously, there has been strong support for the proposition that the entire section be amended to incorporate the "knock out" rule.²⁹ Moreover, both the UNIDROIT and the European Principles of Contract Law have adopted the approach that in an unresolved "battle of the forms", conflicting provisions in standard terms are without effect.³⁰ On an international level, it can be said that this "knock out" approach has gained the upper hand, with the exception of the Vienna Sales Convention. Ironically, Article 19 of that Convention mimics rather than solves the problem: different

²⁴ Trib. Comm. Cambrai 16.4.1912 and Trib. Comm. Cherbourg 6.9.1912, both Rec. Sirey 1914 II 49.

²⁵ L. Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen*, 224, quoted from the unaltered 1961 reprint of the 1935 original.

²⁶ BGH 26.9.1973, BGHZ 61, 282: in a case where both parties had (partly) performed the contract, the Federal Court of Justice ruled that parties were estopped from relying on the invalidity of the contract, and held conflicting rules in standard terms to be without effect. OLG Köln 19.3.1980 Betriebs-Berater 1980, 1237 is probably the earliest clear application of the "knock out" rule and concerns a local jurisdiction clause which, although referred to in a "last shot", was held to be inoperative. The Federal Court of Justice completed the change to the new rule five years later: BGH 20.3.1985, NJW 1985, 1838. See B. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations, Vol. 1: The Law of Contracts and Restitution*, 61-63, with English translations of OLG Köln 19.3.1980 (case 13) and BGH 20.3.1985 (case 16).

²⁷ OGH 7.6.1990, IPRax 1991, 419.

²⁸ See von Mehren (1990) 38 A.J.C.L. 265, 282 *et seq.*

²⁹ See T. J. McCarthy, Ending the "Battle of the Forms": A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code. An Introduction: The Commercial Irrelevancy of the "Battle of the Forms" (1994), 49 Bus. Law. 1019.

³⁰ UNIDROIT, Principles of International Commercial Contracts (1994), provide in "Art. 22.2 (battle of the forms)" as follows: "Where 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 unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract." (See e.g. M. J. Bonell, *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts*, 2nd edn. (1997), 124.) Similar, but with some more detail, Principles of European Contract Law, Article 2:209; see Hondius and Mahé (1998) 12 J.C.L. 268, 271.

ideas were presented at the conference, no agreement could be reached, and the High Contracting Parties went ahead without having resolved which of the proposed solutions should be followed.³¹

While this “knock out” approach flies in the face of the mirror image rule, the case can be made that it does the most to turn the intentions of the parties into legal reality, namely that (a) there is a contract, and (b) on all terms on which parties have actually agreed, and (c) not on any particular terms on which parties have not agreed.³² The main disadvantage of this approach is that, given the frequency of general rejection clauses in standard terms, it may be difficult and time consuming to find out what exactly parties have agreed upon. It also does less to discourage parties from delaying agreement by continuous insistences on their terms than the “first shot” approach.

“BATTLE” BETWEEN CONFLICTS CLAUSES

In an international agreement, the “battle of the forms” can easily involve two legal systems which differ in their solutions for the “battle”. Even more confusingly, in one and the same case, the “battle” may involve conflicting choice of law clauses, conflicting choice of jurisdiction clauses, and perhaps even conflicting choice of place of performance clauses.

One such case is *O.T.M. Ltd. v. Hydranautics*.³³ In this case, the seller’s standard terms contained a Californian choice of law clause, an arbitration clause with the seller’s Californian seat as the place of arbitration, and a clause which stipulated delivery f.o.b. at seller’s seat. The buyer’s standard terms, on

³¹ C.I.S.G., Article 19 treats any material alteration of an offer as counter-offer, regardless of whether or not the deviations are negotiated explicitly or contained in standard terms. See P. Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods* (C.I.S.G.), 2nd edn., transl. by G. Thomas (1998), Article 19, para.19–20. Schlechtriem argues that parties which go ahead after an unresolved “battle of the forms” are presumed to have waived Article 19 with the effect that conflicting provisions are replaced by C.I.S.G. rules. This view is shared by J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd edn. (1999), Article 19, paras. 170.2–170.4, whereas the “last shot rule” should apply under Article 19 according to E. A. Farnsworth, in: C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law: the 1980 Vienna Sales Convention* (1987), Article 19, at 3.1. Both solutions have been adopted by different German courts: see Oberlandesgericht München, 11.03.1998, Case 7 U 4427/97, C.I.S.G. online (<http://www.jura.uni-freiburg.de/ipr1/cisg/default.htm>) case no. 310 (“last shot”), A G Kehl 6.10.1995, NJW-RR 1996, 565 (“knock out”).

³² See also H. Kötz, *Europäisches Vertragsrecht, Band I: Abschluß, Gültigkeit und Inhalt des Vertrags. Die Beteiligung Dritter am Vertrag* (1996) 47–48. Kötz also argues that it would make very little economic sense to force parties to negotiate every last detail where their standard terms disagree; similar Honnold (*supra*, n. 31), para. 165.

³³ *O.T.M. Ltd. v. Hydranautics* [1981] 2 Lloyd’s Rep. 211 (Q.B. Com.: Parker, J.).

the other hand, contained a clause for arbitration to "be held in the U.K. and conducted in accordance with U.K. law". Apparently, the buyer's counter-offer also stipulated the place of performance to be in the U.K.³⁴ The following three questions can arise: (a) Has an effective choice of substantive law been made? (b) Has there been an effective choice of jurisdiction (including arbitration)? If one of these questions is answered in the negative, one may need to examine whether (c) there has been an effective choice of place of performance, as this can influence both applicable law and jurisdiction.

a. Choice of applicable substantive law

The validity and effectiveness of a choice of law clause combines substantive contract law with particular conflict of laws aspects.³⁵ In principle, conflicts law could leave this question entirely to the proper law which allegedly has been chosen, thus treating choice of law provisions the same as any other contractual stipulations. Frequently, however, conflicts rules will contain additional requirements for a choice of law clause to be effective. This implies that not everybody who would succeed in a "battle of the forms" under substantive law rules will at the same time have succeeded with a choice of law clause contained in this party's form.

The Rome Convention contains such a combination of contract and conflict rules for a choice of law. Article 3(1) provides that a choice of law "must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case". On the other hand, Article 3(4) in conjunction with Article 8(1) provide that the existence of a choice of law clause is to be determined by the law which would govern it under the Convention if it existed. The relationship between these two provisions is not entirely clear.³⁶ *Dicey & Morris* suggests that a choice of law clause is not a question of existence, but a question of interpretation,³⁷ but that does not hold true for choice of law clauses contained in diverging standard forms: here the very question is if they have become part of the contract.

No particular problems arise if only one of the conflicting standard terms contains a choice of law clause, whereas the other just generally rejects all other clauses. Let us assume that in *O.T.M. v. Hydranautics*, the Californian seller's

³⁴ This is not mentioned explicitly in the judgment, but can be taken from Parker, J.'s argument that "the initial simple f.o.b. contract offered, and of which Californian law might well have been the proper law, . . . had become a contract the most real connection of which was . . . with England."

³⁵ See, generally, H. Stoll, "Das Statut der Rechtswahlvereinbarung—eine irreführende Konstruktion", in: *Rechtskollisionen. Festschrift für Anton Heini zum 65. Geburtstag*" (ed. by I. Meier and K. Siehr) (1995), 429.

³⁶ See *Dicey & Morris*, Rule 173, 1222.

³⁷ *Ibid.*

standard terms had contained no choice of law clause. In this case, there is only one law which could govern the contract by way of party choice, namely the buyer's clause whereby arbitration was to "be held in the U.K. and conducted in accordance with U.K. law". We take it from the judgment that, under English substantive law, this amounts to an effective choice of English law. It is then up to Article 3(1) of the Rome Convention (and not quite without doubt) whether a provision whereby *proceedings* were to be *conducted* in accordance with *U.K. law* should be interpreted as an express or reasonably certain choice whereby *English substantive law* should govern the contract.

But what if both standard forms seek to choose their own substantive law, as happened in *O.T.M. v. Hydranautics*, but also in one Austrian³⁸ and one German case?³⁹ The Austrian Supreme Court overlooked the conflicts issue and decided this "battle" between standard choice of law clauses on purely contractual arguments by applying the "knock out" rule, which—certainly not by coincidence—is the solution adopted by Austrian substantive law. No harm was done in this case, as the alternatively chosen German law follows the same approach, so that in this case the result—neither choice of law clause being effective—must be right. In the German case—decided at the lowest (i.e., Amtsgericht) level—both Italian and German law lead to the application of the Vienna Sales law, which, however, left to domestic law one of the contested issues, namely the level of interest to be paid on outstanding money. As the Vienna Convention was applicable regardless of any choice of law, it was C.I.S.G., Article 19 which had to sort out the "battle" between two diverging choice of law clauses. The Court held that parties had agreed that the contract was "on", that they had thus derogated from C.I.S.G., Article 19 via C.I.S.G., Article 6(1) and that conflicting standard terms had thus not become part of the contract. To cut a long story short, there was no party choice, and German conflicts law invoked Italian law to determine the rate of interest payable.

O.T.M. v. Hydranautics is the most complicated amongst these "battle of choice of law terms" cases. For, whatever interpretation is given to the Californian version of U.C.C., section 2-207, it will not invoke the "last shot" rule. It might either uphold the "first shot" choice of law under its subsections (1) and (2), or knock out both choice of law clauses under subsection (3). Thus, there would be either a valid choice of Californian law, or no choice of law at all under Californian "battle of the forms" rules. English law, on the other hand, would of course uphold the choice made in the "last shot".

It is only by a combination of extraordinary circumstances, possibly poor pleading, but most certainly great argumentative skill that, in *O.T.M. v. Hydranautics*, Parker, J. could avoid the most difficult question whether

³⁸ OGH 7.6.1990, IPRax 1991, 419 (Austrian and German choice of law clauses).

³⁹ AG Kehl 6.10.1995, NJW-RR 1996, 565 (Italian and German choice of law clauses).

Californian, English, or a combination of both rules should decide the "battle of standard choice of law terms". In this case, the U.K. buyer had answered the Californian seller's offer by instructing them to go ahead with the production while they were preparing a formal purchase order "subject to our usual terms and conditions". Although the seller apparently did go ahead as requested, Parker, J. held that this was no acceptance under either English or Californian law.⁴⁰ Shortly afterwards, the buyer sent the purchase order with the aforementioned arbitration clause and its reference to "U.K. law". The sellers, after expressing their amazement that they were now facing "*ex post facto* contract terms", negotiated on a number of new items in the purchase order, but not the arbitration clause. Finally, the last of these items was resolved between the parties, and the buyer wrote to the seller asking whether they wished to receive a new purchase order to reflect the negotiations. Parker, J. held that the contract was concluded at that time, and that it included the buyer's arbitration clause under both English and Californian law.⁴¹

The seller replied to this communication two months later by a "conditional order acceptance", declined to have a fresh purchase order issued, referred to the number and the goods description of its first offer, and, in a standard clause, made its acceptance conditional to the same as the original conditions (i.e., including the Californian choice of law and arbitration clause). Shortly later, the buyer signed a copy of this letter and sent it back to the seller. Parker, J. held that, under English law:⁴²

"[t]here was nothing left to accept. The contract was made and the document was not, and was not intended to be anything more than a mere formality. The reference to the original offer was for identification only as in *Butler Machine Tool* ..."

As to whether this written agreement was significant under Californian law, Parker, J. held:⁴³

"No special provision of Californian law is relied on here, and I reject the suggestion for the same reasons as I reject it in English law."

We therefore end up with the extraordinary case of a written agreement, signed by both parties, including standard terms, being superseded by different standard terms which were never expressly agreed, let alone signed. Given standard commercial practice, I would also be greatly surprised if the buyer's first purchase order had not contained a clause according to which any deviations negotiated between the parties were ineffective unless confirmed in an amended purchase order. At any rate, the position adopted in the judgment relieved Parker, J. from answering what may be the most difficult question,

⁴⁰ *O.T.M. Ltd. v. Hydranautics* [1981] 2 Lloyd's Rep. 211, 214 and 216 respectively.

⁴¹ *Ibid.*

⁴² *Ibid.*, 215.

⁴³ *Ibid.*, 216–217.

namely which law is to decide an unresolved “battle” between two different standard choice of law clauses.

Of course, Parker, J. must be applauded for naming the conflicts issue and for examining the case under both English and Californian law. But what if both laws do disagree, as is very likely in a conflict between U.C.C., section 2-207 and the English “last shot” rule? Invoking the *lex fori* is no longer an option under Articles 3 and 8 of the Rome Convention. There is, in my view, only one solution. Under Article 8, the purportedly chosen law must decide for each choice of law clause whether it has emerged victorious in a “battle of the forms”. If neither one of the two clauses passes this test, the normal conflicts rules in Article 4 apply. If both clauses are effective according to their own substantive law, Article 3(1) would, in my view, rule both of them out, as two different choices of law within the same contract cannot be considered “expressed” or “certain”. If only one choice of law clause is upheld by its own law, it will still have to pass the hurdle of Article 3(1), as would any other choice of law clause. It has been suggested above that a clause which calls for arbitration in the U.K. to be *conducted* in accordance with U.K. laws, as in *O.T.M. v. Hydranautics*, might not pass this second hurdle of an express choice of English substantive law. It can equally be doubted whether a reference in one of two conflicting sets of standard terms, even if it emerges victorious under English “battle of the form” rules, can be considered a “reasonably certain” choice of law for the purposes of the Rome Convention, Article 3(1). The additional requirements which Article 3(1) of the Rome Convention places on a choice of law clause in order to be effective are not easily met in a “battle of the forms”. Much will depend on the individual circumstances of the case, though. If in *O.T.M. v. Hydranautics*, the court had upheld the Californian choice of law clause by the virtue of the buyer’s signature on the seller’s document, this would, in my view, have been sufficient as an expressed choice of law for the purpose of the Rome Convention, Article 3(1).

b. Choice of jurisdiction

Choice of jurisdiction issues arise within a “battle of the forms” if these contain one or several clauses which seek to regulate which instance is to settle disputes arising from the contract, be it by choosing a particular local court within a given domestic system, the courts of a particular legal system in an international case, or arbitration proceedings. We may again have two different sets of rules which compete when determining whether or not a choice attempted in conflicting standard forms will be effective, namely (1) the substantive contract rules which apply to the agreement according to the conflict rules of the forum, and (2) particular requirements by the forum law which must be satisfied in order for the forum’s jurisdiction to be either derogated or prorogated. As will be shown below, each forum may also have to consider the particular

requirements which the potential other forum establishes for an effective choice of jurisdiction.

Even more than for choice of law, the trend appears to be that requirements for an effective choice of jurisdiction are stricter than requirements for the stipulation of a substantive contractual clause. For one, the Brussels Convention (Articles 16, 12 and 15) generally prohibits choice of jurisdiction in a variety of situations. More importantly, Article 17 of the Brussels Convention (which, however, does not apply to arbitration proceedings) provides that a choice must be made in writing, or be confirmed in writing after an oral agreement, or correspond with a form requirement established by custom between the parties, or by an international trade usage. Although in particular the addition of the last option in the 1989 revision has considerably facilitated a choice of jurisdiction in international trade, the Brussels Convention, Article 17 nevertheless adds a form requirement which not every standard terms clause which should apply under the applicable contract law rules will necessarily meet.⁴⁴

For the first option of a written agreement, the E.C.J. requires that both parties have actually signed a contract which contains the jurisdiction clause or makes an express reference to those standard terms which contain the clause.⁴⁵ Again, the Californian jurisdiction clause in *O.T.M. v. Hydranautics* would have passed this test, but this is exceptional. Most "battle of the form" jurisdiction clauses will fall at this hurdle.

The second option requires that an oral agreement was reached which includes the jurisdiction clause, and that this agreement was then confirmed by one of the parties in writing, without the other party having raised an objection.⁴⁶ If, on the other hand, parties have agreed orally on a contract, and it is only the written confirmation which introduces the jurisdiction clause, this is not good enough for Article 17.⁴⁷ So jurisdiction under this option is very unlikely to give rise to a "battle of the forms" case.

Under the third option, if parties have established between themselves a custom concerning the form of a jurisdiction agreement, observation of that form is sufficient. This could apply in a "battle of the forms" case if parties already have an established business relationship, although one wonders how

⁴⁴ See also T. Rauscher, "Gerichtsstandsbeeinflussende AGB im Geltungsbereich des EuGVÜ", *Zeitschrift für Zivilprozeßrecht* (1991), 271.

⁴⁵ *Estasis Salotti v. Rüwa Polstereimaschinen* (Case C-24/76), [1976] E.C.R. 1831.

⁴⁶ *F. Berghoefter GmbH & Co. K.G. v. A.S.A. S.A.* (Case C-221/84), [1985] E.C.R. 2699, 16.

⁴⁷ *Galerias Segoura S.P.R.L. v. Société Rahim Bonakdarian* (Case C-25/76), [1976] E.C.R. 1851; BGH 9.3.1994, NJW 1994, 2699. Similar: Cass. 13.1.1978, *Giustizia Civile* (1978) 1506.

likely it is that they will then enter into a "battle of the forms" on jurisdiction clauses.⁴⁸

The fourth option may be the most promising for establishing jurisdiction in a "battle of the forms" situation. It is sufficient if parties observe a form which is established by international trade practice. This option relates to form requirements, such as an international trade usage to acknowledge oral agreements, or written clauses not signed by the other party, etc.⁴⁹ Furthermore, the E.C.J. has recently held that, where particular jurisdiction clauses constitute an international trade usage, consent on such a jurisdiction agreement is presumed if both parties were, or ought to have been, aware of this practice.⁵⁰ This would imply that a choice of jurisdiction clause could survive a "battle of the forms" if it corresponded in substance and form to an international trade practice. But the Court held in the same judgment that, in these circumstances, silence or payment of bills could be construed as consent to a standard jurisdiction clause. In a "battle of the forms" situation, however, there will always be some form of objection, be it specific (by a divergent jurisdiction clause) or general. So even this most promising amongst the four options presents an uphill struggle for anyone wishing to rely on a jurisdiction clause in a "battle of the forms".

Many choice of jurisdiction rules outside the Brussels Convention will likewise place requirements of written form (e.g., the Arbitration Act 1996, section 5), or of actual consent, or certain prohibitions on choice of jurisdiction (including arbitration) agreements. Again, some of the stricter requirements will rarely be met in a "battle of the forms" situation.⁵¹ This can frequently lead to the situation where a clause which stipulates e.g. English law and English jurisdiction might pass the hurdles of being "expressed" under the Rome

⁴⁸ Nevertheless, this amended version of Article 17 could have made a difference in OLG München 28.9.1989, IPRax 1991, 46 (decided under the previous version). In this German-Canadian case, more than a hundred individual contracts had previously been concluded on the seller's terms, which included a German jurisdiction clause; in the case in question, however, the form had not been signed by the buyer and thus failed the writing requirement. See R. Geimer, "Ungeschriebene Anwendungsgrenzen des EuGVÜ: Müssen Berührungspunkte zu mehreren Vertragsstaaten bestehen?", IPRax 1991, 31. However, this is again not a "battle of the forms" case. Additionally, it can be doubted whether there was the consent which is required under Article 17.

⁴⁹ An international trade practice concerning the "battle of the forms" itself is therefore not required. If there is any such practice (which presently can be doubted), it would, in the light of what has been said above, most likely be the "knock out" approach.

⁵⁰ *Mainschiffahrts-Genossenschaft v. Les Gravières Rhénanes S.A.R.L.* (Case C-106/95) [1997] I E.C.R. 932, at para. 19.

⁵¹ For example, Article II (2) of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 requires the arbitration agreement to be either signed by both parties, or to be contained in written communications exchanged by both parties. Again, though, the Californian arbitration clause in *O.T.M. Ltd. v. Hydranautics* [1981] 2 Lloyd's Rep. 211 would have met this requirement. *In re Marlene Industries*

Convention, Article 3(1) and being the "last shot" under English law, but be invalid for lack of form as far as choice of jurisdiction is concerned. The unwanted consequence of such discrepancies may well be that the competent court will have to apply a foreign rather than its own substantive law.

Rather than combining general contract law and particular choice of jurisdiction requirements, one could instead leave the existence and validity of a choice of jurisdiction clause entirely to the procedural law of the forum. Some have argued that the Brussels Convention, Article 17 has this effect of superseding contractual rules for choice of jurisdiction clauses.⁵² There is, however, one E.C.J. judgment which is difficult to reconcile with this view.⁵³ Furthermore, one can doubt the wisdom of such a rule, as this will increase the likelihood that only one half of a joint choice of law and jurisdiction clause is valid. For the main difference which this approach would make in practice is that a choice of jurisdiction clause, which would fail on contractual grounds, can nevertheless be effective under procedural rules. For example, in an English-German "battle of the forms", an English choice of law clause might fail under English law because it was not the "last shot". However, the corresponding choice of English jurisdiction could, in principle, succeed on the ground that it conformed with an international trade usage. Rather than having an English court hear an English law case on the offeror's terms, or a German court a German law case under the offeree's terms, we might end up with a German court hearing a case governed by English law, which, it is normally fair to assume, neither one of the parties will initially have wanted.⁵⁴ This somewhat unfortunate result is likely to occur whenever the rules for the validity of standard choice of law clauses differ from the rules for the validity of

Corp. and Carnac Textiles Inc. (1978) 380 N.E.2d 239, involved two sets of standard terms, one containing an arbitration clause, the other a general rejection clause. The court (at 242) held that the arbitration clause "must be clear and direct, and must not depend upon implication . . .", and failed on this ground, but also on the "first shot" approach effectively favoured by U.C.C., s. 2-207(2).

⁵² E.g. by H. Schack, *Internationales Zivilverfahrensrecht*, 2nd edn., para. 472. See also Rauscher (*supra*, n. 44), 278-282 and 296-299.

⁵³ *Iveco Fiat SpA v. Van Hool N.V.* (Case C-313/85) [1986] E.C.R. 3337, at para. 7. This case concerned the validity of an orally agreed extension of a written jurisdiction clause with a time limitation. The E.C.J. left it to the applicable domestic law to decide whether such an extension could be agreed orally; if that was the case, the extension was also valid for the purpose of Article 17.

⁵⁴ But see OLG Frankfurt 17.10.1995, IPRax 1998, 35, where one party's terms combined a German choice of law with a Turkish choice of jurisdiction clause (although the latter was held not to be intended as exclusive).

jurisdiction clauses,⁵⁵ but leads to particularly confusing situations in a "battle of the forms".

Such an outcome is inconvenient, because it is likely to lead to unnecessary costs, delay and complications. Other results of a "battle of standard jurisdiction clauses" may be more serious. The different rules which are applied for solving the "battle" may lead to different courts or tribunals competing for jurisdiction, or even to the situation where no court or tribunal is willing to hear the case.

Again, *O.T.M. v. Hydranautics* is a case in point. The plaintiff (buyer), on 29th July 1980, sued the defendant (seller) at the High Court for damages.⁵⁶ (This court should, incidentally, have been incompetent under either one of the party's standard terms, as the buyer's terms had sought to stipulate arbitration in the U.K. However, this defence was not raised.⁵⁷) The writ was served on the defendant on 30th July. On 7th August, the defendant commenced proceedings in the Superior Court of California, requesting this court to order the plaintiff to arbitrate their claim in California. Proceedings in California were contested by the plaintiff and, after a temporary injunction against the plaintiff was first issued and then dissolved, the Superior Court of California, on 7th November, concluded its judgment with a request to the English High Court that it should stay further proceedings in this action. The plaintiff, however, entered judgment in default in England on 11th November without notice to the defendant's solicitors, and without informing the High Court of the request by the Californian court. At the end of the day, Parker, J. did not adhere to the Californian request, on the ground that "it had been overtaken by events" due to the fact that the defendant was forced to admit that any decision by the High Court on the effectiveness of the Californian arbitration clause would have to be final.⁵⁸ This somewhat unsavoury race between two jurisdictions as to who is first to sue, to serve, to obtain an injunction, a judgment on jurisdiction and finally on the merits of a case is an unfortunate consequence of different standards being applied on the question of the "battle of the forms".

But the reverse case can happen just as easily, i.e. that a choice of jurisdiction clause contained in one standard form threatens to leave a case without a court or tribunal to hear it. No actual case of such a "battle" involving two divergent choice of jurisdiction clauses is known to me. However, there are some cases involving the disputed incorporation of a jurisdiction clause by reference to one set of standard terms where the threat of a case without court to hear it was either raised or imminent.

A recent German-Dutch case decided by the *Oberlandesgericht Celle*

⁵⁵ BGH 9.3.1994, NJW 1994, 2699: standard terms used by one party, choice of German law valid, choice of German jurisdiction not valid for failure to meet form requirements of Article 17.

⁵⁶ *O.T.M. Ltd. v. Hydranautics* [1981] 2 Lloyd's Rep. 211, 213.

⁵⁷ *Ibid.*, 214.

⁵⁸ *Ibid.*, 214.

concerned a bill of lading which contained standard terms on the reverse, including a clause worded: "To be used with Charter-Party". The charterparty, a copy of which was not attached to the bill of lading, contained a Dutch choice of law and jurisdiction clause. The court, without further ado (but wrongly, as I respectfully submit) applied German law to the question whether the Dutch jurisdiction clause had thus become part of the contract, and held that this choice of Dutch jurisdiction met both German substantive contract law and the Brussels Convention, Article 17 form requirements, the latter on the ground that such a clause conformed with international trade practice.⁵⁹ More importantly, when the plaintiff raised the possibility that the Dutch courts might equally decline jurisdiction, the court not only failed to examine whether the same clause was valid under Dutch substantive law, but also held—rather daringly, I suggest—that Dutch courts were bound by its decision and were, under the Brussels Convention, Article 17, not entitled to re-examine their own jurisdiction!⁶⁰ There is a somewhat more complicated English-German case involving a charterparty where the *Landgericht* Düsseldorf declined its jurisdiction in favour of an allegedly stipulated London tribunal, and where that tribunal subsequently also held that it could not hear the case. At the time of the second decision, the case was still on appeal in Germany. The *Oberlandesgericht* Düsseldorf then held that, regardless of whether or not the arbitration clause should cover the litigation according to the applicable English law, the bottom line was that this case would either be heard by the German courts or not at all, so that, whatever the right interpretation of the clause, German courts must be competent to hear the case.⁶¹ But such happy endings cannot be guaranteed. Therefore, in any case involving conflicting or doubtful choices of jurisdiction, a certain amount of investigation into the potential other forum's jurisdiction rules may be required, and perhaps even some form of co-ordination appropriate, as attempted (although with limited success) by the Superior Court of California in *O.T.M v. Hydranautics*.

c. Choice of place of performance

Standard clauses which stipulate the place of performance gain particular importance if there is no or no effective choice of either law or jurisdiction. "Battle of the forms" cases where diverging choice of place of performance

⁵⁹ OLG Celle 1.11.1995, IPRax 1997, 417; see H. Koch, "AGB-Klauseln über Gerichtsstand und Erfüllungsort im europäischen Zivilrechtsverkehr: Größere Gerechtigkeit ohne Parteivereinbarung?", IPRax 1997, 405–407.

⁶⁰ OLG Celle 1.11.1995, IPRax 1997, 417, at 418, *verbatim*: "Eine erneute Zuständigkeitsprüfung nach niederländischem Recht ist nicht zulässig."

⁶¹ OLG Düsseldorf 17.11.1995, IPRspr. 1995 Nr. 189 S. 384 = RIW 1996, 239. That "London tribunal" is not further specified in the judgment.

clauses each sought to establish jurisdiction have a long tradition.⁶² Nowadays, the same question arises under the Brussels Convention, Article 5(1). Although this is not an exclusive jurisdiction, Article 5(1) nevertheless allows one party to sue the other at the contractually stipulated place of performance. This allows a non-exclusive choice of jurisdiction which, according to the E.C.J., is not subject to the requirements for a choice of jurisdiction in Article 17.⁶³ This implies that if the applicable substantive law under Articles 3, 4 of the Rome Convention provides that a standard choice of place of performance emerges victorious in a "battle of the forms", this will establish jurisdiction at this place under Article 5(1) Brussels Convention. We can therefore have "last shot" jurisdiction under e.g. English law, or "first shot" jurisdiction under e.g. Dutch law. However, a recent E.C.J. judgment places some limitations on this indirect choice of jurisdiction. If a place of performance is stipulated at which the obligations arising under the contract cannot be actually performed, and with the sole aim of giving jurisdiction, then such a clause must meet the requirements of Article 17.⁶⁴ However, such a restriction will only affect contracts where performance is clearly limited to one certain place or region. Most contracts contain an element of performance at more than one place, in particular where goods are sold and transported.

The effect of a chosen place of performance on the applicable law is far less straightforward. Within the Rome Convention, the chosen place of performance can only become relevant as one factor in determining whether a contract is more closely connected to the place of the one or of the other party under Article 4(1) or (5) of the Rome Convention. In particular, this may concern cases where there is no "characteristic performance" under subsections (2) and (5), or where the place of performance is to be used as an indicator that the contract is not most closely connected to the place of the party whose performance is characteristic. However, it does take a particular applicable law in order to find out whether parties have agreed on a place of performance. If the choice of place of performance clause is part of a "battle of the forms", we seem to end up with the legal equivalent of Catch 22: without applicable law, we do

⁶² The earliest case known to me is OLG Dresden 15.2.1918, Seuff. Archiv 73 Nr. 174 (283). In this peculiar case, two "last shots" were exchanged simultaneously, and the court upheld the choice contained in the terms which the seller had last insisted on before the final, simultaneous exchange of communications. Nowadays, German courts would "knock out" both choice of place of performance clauses.

⁶³ *Zelger v. Salintri* (Case C-56/79), [1980] E.C.R. 89; BGH 28.3.1996, IPRax 1997, 416, 417 (English-French-German case concerning standard forms in auction catalogues).

⁶⁴ *Mainschiffahrts-Genossenschaft v. Les Gravières Rhénanes* (Case C-106/95), [1997] I E.C.R. 932. The contract was for the charter of a vessel to be used for the transport of gravel on the Rhine, predominantly between French ports, but which stipulated Würzburg (which is situated on the Main rather than on the Rhine) as the place of performance.

not know whether there is a choice of place of performance, but without knowing whether a place of performance has been chosen we may not know the applicable law. Perhaps one can distinguish as follows.

If both legal systems involved apply the same rule for the "battle of the forms", we should know whether the choice of place of performance is valid, regardless of the applicable law. If it is valid, it may tilt the balance under Article 4(1) or (5); if not, it is irrelevant. On the other hand, if e.g. Dutch law would uphold the Dutch offeror's choice of performance clause as the "first shot", but English law the English offeree's choice of performance clause as the "last shot", these clauses must be entirely irrelevant for determining the applicable law under the Rome Convention, Article 4. There remains the situation where one of the potentially applicable laws would uphold the choice of place of performance: e.g., as the "last shot" under English law, but not the other (e.g., under German "knock out" rules). This might be seen as a slight advantage for the law under which the choice of performance clause is valid, but in my view it would have to be a very rare case indeed where this should be able to tilt the balance between these two laws.

CONCLUSIONS

As concerns the relationship between substantive law and conflicts law aspects of the "battle of the forms", the following observations can be made in conclusion.

First, a strict application of the "mirror image" rule to offers and acceptances which refer to conflicting standard terms seems commercially inappropriate and overly conceptual as a matter of legal doctrine. Ultimately, it must be up to the parties to agree that there is a contract, even if they have not sorted out which of their conflicting standard terms should prevail.

Second, thus discarding the "no contract" approach to the "battle of the forms", one can analyse as follows the effects which the three other principal approaches exert on conflicts of law issues. Both the "first shot" and the "last shot" approach favour a choice of law and of jurisdiction (be it directly, or via a chosen place of performance), whereas the "knock out" approach makes it unlikely that there will be a choice of either law or jurisdiction in an international "battle of the forms". Some might wish to argue that this marks a weakness of the "knock out" approach, as, at the turn of the millennia, the view prevails firmly that it is best left to the parties to agree which law should govern their contract. However, the "knock out" rule does in no way prevent parties from agreeing on applicable law and jurisdiction. It only prevents the construction of a choice where parties have in fact failed to agree. So there seems to be little force behind this argument.

On the other hand, the approach which is chosen does make a considerable

difference as concerns the different implications for choice of law and choice of jurisdiction in particular. As shown above, different standards applied to these two issues make it likely that only one half of a joint choice of law and jurisdiction clause is valid, which will often imply that the case will be tried by a court which has to apply a foreign rather than its own substantive law. Under both the "first shot" and the "last shot" rules, this likelihood is far greater than under the "knock out" approach. For under both the "first shot" and "last shot" approach, a choice of law will succeed without any actual agreement being reached between the parties either orally or in writing. If the same victorious standard form contains a choice of jurisdiction, this is unlikely to pass the additional form or other requirements established by rules such as the Brussels Convention, Article 17. On the other hand, under the "knock out" rule, a choice of law will only be upheld if parties have actually agreed to it. An agreement on jurisdiction—be it signed by both parties, or orally agreed and repeated in writing in one set of standard forms—will also normally pass the test of Article 17. On an overall appreciation, the "knock out" rule is most likely to achieve consistent results for standard contract terms, be they simple contract law clauses, choice of place of performance, of law, or of jurisdiction clauses.

Third, as discussed, a "battle of the form" can lead to a choice of jurisdiction being effective in one forum but not in another, or even to two different choices of jurisdiction which are each effective in one forum but not the other. There is the danger of jurisdictions competing for the same case, or even of both jurisdictions declining their competence. It is mostly the fact that the two legal systems involved follow a different approach towards the "battle of the forms" which is to blame for these discrepancies, rather than any individual approach in itself. However, it is nevertheless fair to point out that one of these problems, namely that each forum upholds its own choice of jurisdiction, is unlikely if at least one of them follows the "knock out" approach. More generally, these problems can only occur if a questionable choice of jurisdiction is upheld by one forum. The "knock out" rule generally weeds out questionable choices, whereas both the "first shot" and the "last shot" approach tend to uphold questionable choices of jurisdiction. On overall, from a conflicts view, the "knock out" rule appears to be the preferable approach towards the "battle of the forms".