Qualification Conflicts - Global Tax Treaty Commentaries

Author

Michael Lang[*]

0. Abbreviations and Terms

BFH	Bundesfinanzhof (Federal Fiscal Court)
CFC	Controlled foreign company
ECJ	Court of Justice of the European Union
FCA	Federal Court of Appeal
FTT (TC)	First-Tier Tribunal (Tax Chamber)
GTTC	Global Tax Treaty Commentaries
HCA	High Court of Australia
OECD/UN Commentary/ies	Commentary/ies on the OECD Model and/or the UN Model
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
SCC	Supreme Court of Canada
VCLT	Vienna Convention on the Law of Treaties
VwGH	Verwaltungsgerichtshof (Supreme Administrative Court)

1. Qualification Conflicts and Other Types of Interpretation Conflicts in General

1.1. Qualification conflicts in international private law and in tax treaty law

Though the term "qualification" is borrowed from international private law, it involves conflict-of-law rules.[1] As a rule, this field of law deals with the question of whether domestic or foreign law should be applied in a particular situation. In tax treaty law, the issues are completely different: in cross-border situations, at least two different tax law systems are usually applicable. Tax treaties cannot change this. They merely modify the legal consequences foreseen by domestic tax law by avoiding taxation in one of the two states in their scope of application or by obliging one of the two states to reduce the tax payable under its domestic law by the tax levied in the other state. As a result, tax treaties allocate taxation rights between the two states.[2] It is therefore essential that the same meaning is attributed to the treaty provisions in the two states and that the same treaty rule is applied to the same situation. The tax authorities, and subsequently the courts, of the two states sometimes apply different rules to the same situation or hold different opinions as to whether a certain treaty rule should apply. Such interpretation conflicts are often also referred to as qualification conflicts.[3]

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1. *See already* K. Vogel, *Doppelbesteuerungsabkommen und ihre Auslegung*, 12 StuW 2, p. 292 (1982); K. Vogel, *Probleme der Auslegung von Doppelbesteuerungsabkommen*, 10 SWI 3, p. 111 (2000); and W. Haslehner, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* para. 136 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
2. M. Lang, *Introduction to the Law of Double Taxation Conventions*, para. 46 (Linde 2021).
3. M. Lang, *Introduction to the Law of Double Taxation Conventions*, at para. 129; and W. Haslehner, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* at para. 137 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).

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1.2. Qualification conflicts in treaty law: Allocation rules

The term "qualification conflicts" is mostly used to describe interpretation issues over allocation rules in tax treaties. In a more extensive use of this term, it is hardly or not possible to differentiate qualification conflicts from other interpretation conflicts. A classification as a qualification conflict would then make little sense. Yet, except in a few rare cases (*see* article 28(1)(a) of the Austria-Germany Income and Capital Tax Treaty (2000)),[4] the term "qualification conflict" is not a legal term.[5] Therefore, it is not very productive to waste a great amount of effort on exactly defining this term and distinguishing it from other interpretation conflicts. The primary focus must be on interpretation conflicts about allocation rules. One should not ignore the fact that allocation rules, for instance, use the term "resident" and that this term is also the prerequisite for personal treaty entitlement and thus also significant beyond allocation rules.[6]

When an allocation rule or one of its constituent elements is interpreted in different manners, this usually leads to a situation where the two interpreters apply different allocation rules to the same situation. In these cases, there is no doubt as to the applicability of the tax treaty: when the personal and substantive requirements for the application of the tax treaty are met, it is undisputed that one of the allocation rules will definitely apply. When all other allocation rules are ruled out, the treaty provision modelled on article 21 of the OECD Model[7] will be relevant (*see* Article 21: Other Income section 1.1.).[8] The legal consequences foreseen in the allocation rules – in correlation with the method article – are often divergent. Therefore, cases of double taxation or double non-taxation are possible when such qualification conflicts arise.[9]

1.3. Other types of conflicts: Personal treaty entitlement

In addition, there are other types of interpretation conflicts, which are mostly not referred to as qualification conflicts. These include, for instance, interpretation issues resulting from treaty provisions modelled on article 1 and article 4(1) of the OECD Model. When the tax authorities or courts in the two states hold diverging views as to which criteria define similarity in respect of the "other criterion of a similar nature" clause in article 4(1) of the OECD Model (*see* Article 4: Resident section 1.1.2.2.), this may result in the tax authorities or courts in one state assuming that one person is entitled to treaty benefits while the tax authorities or courts in the other state deny such benefits.[10]

1.4. Material scope of application

Similarly, the question may arise as to whether a certain type of tax is even covered at all by the material scope of application of the tax treaty. For instance, the tax authorities or courts of the two states may hold diverging views as to how the term "taxes on the total amounts of wages or salaries paid by enterprises" in treaty provisions modelled on article 2 of the OECD Model should be understood (*see* Article 2: Taxes Covered section 3.5.). The tax authorities of the source state may, for example, assume that a charge levied from the tax on the total amounts of wages or salaries paid by enterprises is nonetheless not covered by the tax treaty and that therefore its collection is not merely limited to salaries of employees whose activity is connected to a domestic permanent establishment. If the tax authorities of the residence state assume, however, that the tax treaty applies to such taxes, they will allow – in the case of the credit method – the crediting of the tax levied in the source state to their own tax, albeit limited to the taxes on salaries of employees whose activity is connected to the permanent establishment situated in the source state.[11]

1.5. Method article

The application of the method article often depends on which allocation rule is applicable. Depending on the allocation rule, different methods for the avoidance of double taxation are applied in the tax treaty. In each case, the method article determines which method should be applied for which item of income or capital, establishing a link to the different allocation rules. When, for instance, the tax authorities of the state in which the activity is performed apply the allocation provision modelled on article 19 of

4. Art. 28(1)(a) *Austria-Ger. Income and Capital Tax Treaty* (2000), Treaties & Models IBFD.
5. For a discussion regarding art. 28 *Austria-Ger. Income and Capital Tax Treaty* (2000), Treaties & Models IBFD, *see* M. Stefaner, *Art 28 DBA Österreich* paras. 1-18, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
6. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, p. 4 (F. Wassermeyer ed., Beck Verlag 2015).
7. Art. 21 *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
8. *See* M. Lang, *Introduction to the Law of Double Taxation Conventions*, at para. 382 et seq. (Linde 2021).
9. In general, *see* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at p. 187 (F. Wassermeyer ed., Beck Verlag 2015).
10. For further information about "any other criterion of a similar nature", *see* R. Ismer & K. Blank, *Article 4*, in *Klaus Vogel on Double Taxation Conventions*, paras. 60-67 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
11. *See* R. Ismer & A. Blank, *Article 2*, in *Klaus Vogel on Double Taxation Conventions* para. 47 (E. Reimer & A. Rust eds., Kluwer Law International 2022). *See* R. Ismer & C. Jescheck, *The Substantive Scope of Tax Treaties in a Post-BEPS World: Article 2 OECD MC (Taxes Covered) and the Rise of New Taxes*, 45 Intertax 5, p. 382 (2017). For further details, *see* M. Lang, *"Taxes Covered" – What is a "Tax" according to Article 2 of the OECD Model?* , 59 Bull. Intl. Taxn. 6, p. 216 (2005), Journal Articles & Opinion Pieces IBFD. For further details, *see* G. Kofler et al, *Taxes Covered under Article 2 of the OECD Model*, WU - Tax Law and Policy Series vol. 19 (2020).

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the OECD Model to income from employment, and thus exempt such income, while the tax authorities of the residence state regard the allocation rule similar to article 15(1) of the OECD Model as relevant, and thus do not consider themselves entitled to taxation, the result is double non-taxation.[12]

1.6. Non-discrimination provision

Differing interpretations of the rules on non-discrimination may also give rise to conflicts: When, for instance, the corporation tax is 25% and the income of permanent establishments is generally taxed with a 30% income tax, the question arises as to whether domestic permanent establishments of foreign corporations may only be subject to a 25% tax due to the permanent establishment discrimination prohibition in the tax treaty. If the tax authorities and courts of the state of the permanent establishment reject this interpretation, the 30% income tax will apply. When, however, the tax authorities and courts of the residence state of the corporation identify an application scenario for the discrimination prohibition in such a scenario and the tax treaty foresees the credit method, the residence state will merely accept the crediting of a 25% income tax.

1.7. Article 9 of the OECD Model

Although article 9 of the OECD Model is placed in between the allocation rules, it was placed there only because – similarly to articles 7 and 8 of the OECD Model – it also governs business profits. However, its purpose is not to allocate taxation rights between two states. Instead, it addresses cases of economic double taxation – in contrast to the other rules of the OECD Model (*see* Article 9: Associated Enterprises section 1.1.2.).[13] Its impact is similar to that of a non-discrimination provision: Provisions in line with article 9 of the OECD Model put limits on domestic tax authorities insofar as they allow for profit adjustments to be made in cross-border relationships between affiliated enterprises only on the basis of the arm's length principle.[14] Domestic provisions allowing for profit adjustments on the basis of other standards are replaced by treaty provisions similar to those of article 9(1) of the OECD Model. Article 9(2) of the OECD Model now requires the other contracting state to make an appropriate adjustment. The tax authorities and courts of the two states, however, may hold diverging opinions as to whether the application of article 9(1) of the OECD Model in the first state was actually justified. If the tax authorities and courts do not agree with the interpretation of the tax authorities and courts of the other state, they will not make an appropriate adjustment (*see* Article 9: Associated Enterprises section 2.1.2.).

1.8. Mutual assistance

Similar interpretation conflicts may arise in the case of mutual assistance: For instance, the tax authorities of a contracting state requesting exchange of information or assistance in the collection of tax could assume that "taxes of every kind and description" according to article 26(1) or article 27(2) of the OECD Model are concerned and therefore the requirements of those provisions are met while the tax authorities of the other contracting state takes the view that the levy at stake is not such a "tax".

2. Causes of Qualification Conflicts

2.1. Different determination of the facts of the case by the tax authorities of the two states

2.1.1. Error by one or both tax authorities

In order to apply the laws, it is necessary, on the one hand, to identify the facts of the case and, on the other hand, to interpret the legal provisions to establish which provision is applicable to the identified facts of the case. Therefore, qualification conflicts may arise not only because legal provisions are interpreted differently by the tax authorities of the two states but also because different facts of the case are assumed in the two states.

12. *See*, in more detail, M. Lang, *Die Vermeidung der Doppelbesteuerung und der doppelten Nichtbesteuerung als DBA-Auslegungsmaxime?*, 11 IStR 18, pp. 609-613 (2002).
13. *See* M. Lang, *Introduction to the Law of Double Taxation Conventions*, at para. 466 (Linde 2021); and G. Kofler & J. Wittendorff, *Article 9*, in *Klaus Vogel on Double Taxation Conventions* para. 7 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022) with further references in n. 26.
14. G. Kofler & J. Wittendorff, *Article 9*, in *Klaus Vogel on Double Taxation Conventions* at para. 3 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022). *See also* J.S. Wilkie, *Reflecting on the "Arm's Length Principle": What is the "Principle"? Where Next?*, in *Fundamentals of International Transfer Pricing in Law and Economics* pp. 137, 144 et seq. and 152 et seq. (W. Schön & W. Konrad eds., Springer 2012).

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The actual facts occurred only once, so that, in the case of differing presentations of the facts of the case, it may be that one or even both tax authorities took an incorrect approach and based their legal evaluation on the "wrong" facts. If the tax authorities of the two states assume different facts, they may subsequently apply different legal provisions as well.[15]

2.1.2. Different identification of the facts of the case in the light of different legal provisions considered

This does not necessarily mean, however, that one of the two tax authorities is "wrong". As a matter of fact, the determination of the facts of the case is never completely independent of the legal provisions envisaged for application. It is never possible to fully identify the complete situation, which consists of countless elements. The domestic tax authorities usually establish the facts from the perspective of the legal provisions taken into consideration. They identify the facts that can be significant in view of the legal provisions and the determining factor as to why a specific legal provision is ultimately applied or its application ruled out. Other facts which also actually occurred, however, are not taken into account if the tax authorities do not even envisage the application of the specific provision that would be applicable. Where the tax authorities of the two states are considering the application of different provisions, it will not be possible to establish the facts of the case in an identical manner, which may in turn lead to qualification conflicts.[16]

This may be better explained by way of an example: When the tax authorities of a state primarily assume, under application of the tax treaty to remunerations of an individual, that this income may fall under the provisions modelled on either article 7 or article 15 of the OECD Model, the identification of the facts of the case will already focus mainly on the question of whether the taxpayer was self-employed or not. Therefore, the tax authorities will pay attention to the content of the employment agreement, the integration in the employer's organization and the type of remuneration. But if the tax authorities of the other state also envisage the application of the treaty provision modelled on article 19 of the OECD Model, it will examine more closely whether, for instance, the hospital in which the person carries out the activity belongs to the municipality or is an independent legal entity. In this case, the two tax authorities investigate different facts of the same actual events and base their legal assessments on these. In each of the two cases, the facts reflect a relevant part of the actual events and do not contradict each other. Nevertheless, it is possible that the two tax authorities ultimately apply different legal provisions because they picked out different facts from the actual events.

2.1.3. Different identification of the facts of the case as a result of different procedural rules

The two tax authorities, however, may also establish the facts of the case differently – and even in contradiction to each other – for another reason, without one of the two authorities being wrong. After all, establishing the facts of a situation is not an exclusively cognitive process that takes place independently of the legal system; instead, the tax authorities are bound to the procedural rules in the process. As a rule, the point of departure is that it is impossible to establish the "true" facts with absolute certainty. The investigation procedure is always characterized by an effort to establish the "true" facts as accurately as possible. In doing so, however, the tax authorities must observe rules and prohibitions which may differ from state to state. Different regulations may exist as to, for example, whether the tax authorities may evaluate unlawfully obtained evidence. It may also be that the evidence to be considered – or its significance – is subject to differing regulations. These procedural rules, which all tax authorities must observe and which may differ from one legal system to another, may also result in the tax authorities of the two states determining the facts of the case in different manners. This may lead to the application of different legal provisions.

2.2. Diverging legal opinions of the tax authorities and courts of the two states

2.2.1. Diverging legal opinions of the tax authorities

A qualification conflict may also arise, however, when the tax authorities of the two states completely agree on the underlying situation, since one and the same legal provision may actually be interpreted in different manners. This does not necessarily mean that one of the two authorities is wrong. After all, interpretation must take different viewpoints into account. The wording is merely the beginning of interpretation, but there are also teleological, systematic and historical arguments. These arguments can lead in different directions. The results one achieves will then depend on the emphasis put on each of these arguments. There are often equally convincing arguments for two – or several – different opinions. Ultimately, the tax authorities or a court must choose

15. *See also* H. Jirousek, *Methodische Ansätze zur Konfliktvermeidung bei der Anwendung von Doppelbesteuerungsabkommen*, in *Praxis des Internationalen Steuerrechts: Festschrift für Helmut Loukota zum 65. Geburtstag* pp. 180-191 (M. Lang & H. Jirousek eds., Linde 2005).
16. On the taxation of employment income in international tax law in general, *see* several contributions in *Taxation of Employment Income in International Tax Law* (D. Hohenwarter & V. Metzler eds., Linde 2009).

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to adhere to a specific opinion, yet this does not necessarily mean that the arguments in favour of the other opinion(s) are less convincing.[17]

2.2.2. Stages of appeal

In most cases, a legal system provides for mechanisms to ensure that, in the end, a legal opinion is applied comprehensively in cases of diverging opinions. This is usually guaranteed by judicial stages of appeal, with a supreme court as the final stage. Its decision is often binding for the subordinate courts and the other authorities. Scenarios may also arise on a domestic level in which diverging opinions continue to exist in practice and individual cases are solved in different manners. This can be the case, for instance, when two or several senates within the supreme court hold diverging opinions and this split in the case law cannot be solved, when differences exist between equal supreme courts, when access to supreme courts is blocked by threshold regulations or other limits or when diverging case law or administrative practices are not harmonized. As a rule, however, in domestic settings, it is possible to develop a consistent opinion and enforce it.

In treaty cases, it is only natural that two tax authorities or two courts in two states decide on the interpretation of one and the same legal provision.[18] As a rule, no superordinate, supranational court exists. Moreover, mutual agreement or arbitration procedures cannot harmonize legislation either. Even the Court of Justice of the European Union (ECJ) is not a supreme court within the European Union but is merely responsible for deciding on EU law. For it to take the role of an arbitration body in treaty matters constitutes an exception.[19] The courts in two states can – often quite legitimately – maintain their diverging opinions.

2.2.3. No binding effect

The principle of harmonizing decisions is often mentioned in this context.[20] The idea behind it is that courts should be guided by the case law in other states as far as possible. This may help minimize qualification conflicts, as well as other types of interpretation conflicts. None of the authors supporting this principle, however, goes as far as to suggest that the decisions of supreme courts should have a binding effect in other states. After all, no legal basis exists for something like this. Actually, there is not even a legal obligation to follow the decisions of other courts at all. Instead, this principle mainly involves considerations of intellectual integrity: a conscientious civil servant or judge who has to interpret a law will carefully examine the literature and case law on the provision he is asked to interpret, so as not to overlook any of the arguments which may play a role in the interpretative process. Therefore, taking into account the considerations of other individuals – either authors or judges – can prove useful. In treaty cases, especially, this includes foreign authors and foreign judges. However, the domestic court is also completely free to reject arguments verified in this manner where it finds them to be unconvincing. It is not the authority of the court or the author that counts, but solely the persuasiveness of the argument used.

2.3. The interpretation rule of article 3(2) of the OECD Model

2.3.1. Relevance of domestic law?

Article 3(2) of the OECD Model is often cited as a particularity of treaty law and as a main reason for the emergence of qualification conflicts. The provision contains a reference to the domestic law of the applying state for interpretation purposes. If treaty provisions are interpreted in the light of the domestic law of the two contracting states, such conflicts could indeed prove inevitable.

The meaning of this reference to domestic law is highly controversial.[21] In any event, the reference is restricted and applies only "unless the context otherwise requires". Nonetheless, administrative practice (and sometimes the literature) attaches great

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17. W. Haslehner, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* at para. 139 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022), with further references in nn. 209-221; regarding the interpretation of the international taxation of members of the supervisory board, administrative board and directors' board, *see* M. Gruber, *Aufsichtsrats- und Verwaltungsratsvergütungenimösterreichischen DBA-Netzwerk*, 20 SWI 8, pp. 354-362 (2010); regarding the interpretation of "immovable property", *see*, for example, M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* pp. 57-76 (G. Maisto ed., IBFD 2015), Books IBFD; regarding the interpretation of art. 13(4) OECD Model, *see* M. Lang, *Der Begriff der "shares" in Art 13 Abs 4 OECD-MA, in Estudos de DireitoTributárioemHomenagemao Prof. Gerd Willi Rothmann* pp. 267-285 (L.E. Schoueri & J.F. Bianco eds., Quartier Latin 2016).
18. For a comprehensive overview of important tax treaty case law around the globe, *see Tax Treaty Case Law around the Globe 2021* (G. Kofler et al. eds., Linde 2022); *Tax Treaty Case Law around the Globe 2020* (E. Kemmeren et al. eds., Linde 2017); and *Tax Treaty Case Law around the Globe 2019* (M. Lang et al. eds., Linde 2020).
19. *See*, for example, *art. 25(5) Austria-Ger. Income and Capital Tax Treaty* (2000), Treaties & Models IBFD. *See also* AT: ECJ, 12 Sept. 2017, Case C-648/15, *Republic of Austria v. Federal Republic of Germany*, [2017] ECLI:EU:C:2017:664, Case Law IBFD.
20. *See*, for example, K. Vogel, *Über Entscheidungsharmonie, in Unternehmen Steuern – Festschrift für Hans Flick* pp. 1043-1056 (F. Klein, H.P. Stihl & H. Schaumburg eds., Dr. Otto Schmidt 1997); and M. Lehner, *Grundlagen des Abkommensrechts* paras. 115-119, in *Doppelbesteuerungsabkommen*, with further references (R. Ismer ed., 7th ed., C.H. Beck 2021).
21. *See*, for example, J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model I, 19 British Tax Review 1*, pp. 14-54 (1984); J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model II, 19 British Tax Review 2*, pp. 90-108 (1984); I. Sinclair et al., *Interpretation of Tax Treaties*, 40 Bull. Intl. FiscalDocn. 2, p. 75 (1986); M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* p. 21 et seq. (Orac 1991); J.F. Avery Jones, *The 1992 OECD Model Treaty: Article 3(2) of the OECD Model Convention and*

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importance to domestic law in the interpretation of treaty provisions.[22] Indeed, occasionally, the phrase "unless the context otherwise requires" is almost ignored.[23] The argument presented in favour of this approach is that it makes administrative practice easier when local authorities can resort to their accustomed understanding from domestic law in the interpretation of the tax treaty.[24]

2.3.2. Meaning of context

On the other hand, the opposite opinion, i.e. that the interpretation of tax treaties must primarily be based on the context of the treaty, also exists.[25] According to article 3(2) of the OECD Model, one can resort to the domestic law of the relevant applying state only when it is absolutely impossible to reach a solution from the context of the treaty.[26]7 Pursuant to this opinion, the reference to the "context" in article 3(2) of the OECD Model emphasizes the importance of an autonomous interpretation (*see* Treaty Interpretation section 5.1.).[27] Therefore, this opinion holds that article 3(2) of the OECD Model does not invalidate international-law interpretative principles but rather confirms these.

Another opinion attempts to reconcile these two positions: Klaus Vogel attributes great significance to the term "requires" in article 3(2) of the OECD Model.[28] In his opinion, the reference to domestic law in article 3(2) of the OECD Model is indeed subject to the context of the tax treaty, which must be given priority. This context of the treaty, however, should be given such priority only when the context "requires" this. Vogel draws the conclusion that the arguments in favour of the context of the treaty must be particularly convincing.[29] Therefore, not every argument obtained from the context of the treaty can already prevent the use of domestic law.

In fact, article 3(2) of the OECD Model should be given a prevailing function, and a solution should be reached by primarily considering the context of the treaty[30]. Under this approach, article 3(2) of the OECD Model underlines the necessity of an autonomous interpretation. Considering the domestic law of the relevant applying state is only admissible where the context of the treaty fails to provide any solution. These cases, however are extremely rare – if they occur at all – since the context of the treaty not only includes the systematics of the treaty but also its object, its purpose and the developments of law.[31] Just as the interpreter does not usually fail in the interpretation of other legal provisions when he considers systematic, teleological and historical arguments in addition to the wording, there is no reason to assume that he will fail in the interpretation of the treaty and will thus have to resort to domestic law.

Instead, the object and purpose of the treaty provisions suggest an autonomous interpretation, i.e. one obtained from the tax treaty itself. In fact, when the two contracting states interpret the treaty provisions on the basis of their domestic laws, this will almost

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the Commentary to It: Treaty Interpretation, 33 Eur. Taxn. 8, p. 252 (1993), Journal Articles & Opinion Pieces IBFD; E. van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties* , 43 Eur. Taxn. 5, pp.142-156 (2003), Journal Articles & Opinion Pieces IBFD; and A. Dourado et al., *Article 3* para. 115 et seq., in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).

22. *See* J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model I, 19 British Tax Review 1*, at p. 30 et seq. (1984); and J.F. Avery Jones, *Qualification Conflicts: The Meaning of Application in Article 3(2) of the OECD Model*, in *Festschrift für Karl Beuschzum 68. Geburtstag am 31. Oktober 1993* p. 52 (H. Beisse, M. Lutter & H. Närger eds., Walter de Gruyter 1993); *see also* UK: FTT (TC), 9 Mar. 2016, *Martin Frederick Fowler v. the Commissioners*, [2016] UKFTT 234 (TC).
23. *See*, for example, H. Loukota, *Internationale Steuerfälle: Handbuch für die Praxis*, paras. 714 et seq. (Orac 1989), outlining the opinion of the Austrian tax administration, according to which art. 3(2) OECD Model enshrines the "principle of the relevance of national law" in the interpretation of tax treaties. For further details, *see* H. Loukota et al., *Z 0*, in *Internationales Steuerrecht* (H. Loukota et al eds., Manz, Jan. 2022) rdb.at.
24. *See* H. Loukota, *Über das Verhältnis zwischen internationalem und nationalem Recht*, 15 Finanzjournal 7/8, p. 107 (1976); H. Loukota, *Der Ministerialentwurf für ein DBA-Durchführungsgesetz*, 7 SWI 7, pp. 285-293 (1997); *see also* A. Dourado et al., *Article 3* para. 139, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
25. *See* H. Debatin, *System und Auslegung der Doppelbesteuerungsabkommen*, 38 Der Betrieb (Beilage 23/85) 39, p. 5 (1985); C. Gloria, *Die Doppelbesteuerungsabkommen der Bundesrepublik Deutschland und die Bedeutung der Lex-Fori-Klausel für ihre Auslegung*, 32 RIW 12, p. 978 (1986); M. Lang, *Die Einwirkung von Doppelbesteuerungsabkommen auf das innerstaatliche Recht*, 28 Finanzjournal 4, pp. 72-77 (1988); and M. Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht: Die Einordnung von Doppelbesteuerungsabkommen in die österreichische Rechtsordnung* p. 109 (Orac 1992).
26. M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 290 (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997). *See* Y. Brauner, *OECD/International - The True Nature of Tax Treaties* , 74 Bull. Intl. Taxn. 1, p. 36 (2019), Journal Articles & Opinion Pieces IBFD. *See* C. Pleil & S. Schwibinger, *Australia/Belgium/Canada/Germany/United Kingdom/United States/OECD/International – Confronting Conflicts of Qualification in Tax Treaty Law: The Principle of Common Interpretation and the New Approach Revisited* , 10 WTJ 3, p. 430 (2018), Journal Articles & Opinion Pieces IBFD.
27. B. Gröhs & C. Herbst, *Die Interpretation von Doppelbesteuerungsabkommen als Problem der Auslegung von völkerrechtlichen Verträgen im nationalen Recht*, 11 ZfV 1, p. 24 (LexisNexis 1986).
28. *See* K. Vogel & R. Prokisch, *General Report: Interpretation of Double Taxation Conventions*, in *Cahiers de Droit Fiscal international*, vol. 78a, p. 81 (Kluwer International, IFA 1993); *see also* J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model II, 19 British Tax Review 2*, at p. 108 (1984).
29. K. Vogel, *Probleme der Auslegung von Doppelbesteuerungsabkommen*, 10 SWI 3, pp. 119-124 (2000).
30. *See*, in more detail, M. Lang, *Tax Treaty Interpretation – A response to John F. Avery Jones* , 76 Bull. Intl. Taxn. 11, p. 662 et seq. (2020) Journal Articles & Opinion Pieces IBFD.
31. M. Lang, *Introduction to the Law of Double Taxation Conventions*, at p. 667 (Linde 2021).

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inevitably lead to different interpretations in the two states.[32] When the treaty provisions are understood differently in the two states, however, tax treaties cannot achieve their purpose, i.e. consistently defining the states' taxation powers. This purpose can only be fulfilled when legal practitioners and tax authorities in both contracting states endeavour to reach a consistent interpretation based on the context of the treaty.

This position gets additional support under the 2017 Update of the OECD Model Convention: Reference to domestic law may only be made "unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of article 25". Domestic law has now even less relevance, because even mutual agreements prevail over domestic law. Moreover, it is even clearer that the phrase "unless …" has a lot of relevance: If one cannot assume that a mutual agreement may be ignored because domestic law prevails, one cannot assume that the context of the treaty may be ignored for that reason. Finally, it is also clear from that wording that the context of the treaty, which is mentioned first, prevails over a mutual agreement.[33]

2.3.3. Reference to the law of the applying state?

This result can also be achieved when both contracting states have a common understanding of which is to be considered the applying state. Along these lines are the considerations of Avery Jones, who believes that the source state should always be treated as the applying state.[34] He assumes that it is only or primarily the source state that applies the tax treaty and that the other state – the residence state – would then be bound to the qualification of the source state.[35] However, an approach under which only the source state applies the allocation rules of the tax treaty is not really convincing. When the residence state applies the method article of the treaty (article 23 of the OECD Model), it must also resort to the allocation rules of the treaty and ultimately apply the allocation rules of the treaty.[36] As a result, both states apply the treaty. Whenever the qualification in the two applying states becomes a decisive element, this may lead to diverging treaty interpretations. This cannot be reconciled with the object and purpose of tax treaties. Treaty systematics also confirm the conclusion that article 3(2) of the OECD Model must be understood as emphasizing the autonomous interpretation of the tax treaty: Several treaty provisions do indeed contain references to the domestic law of the applying state or the applying states.

Such references are included, inter alia, in article 6(2) and article 10(3) of the OECD Model. The OECD Draft (1963)[37] also contained such a reference to domestic law in article 11(3). Such references would be unnecessary had the relevance of domestic law already generally resulted from article 3(2) of the OECD Model. Therefore, these explicit references to the domestic law of the applying states can only be understood as implying that article 3(2) of the OECD Model demands autonomous interpretation in all other cases. In addition, historical arguments support the opinion that article 3(2) of the OECD Model must be understood within the meaning of an autonomous interpretation, and therefore great importance must be attributed to the phrase "unless the context otherwise requires". According to the literature, a treaty provision similar to that of article 3(2) of the OECD Model was first found in the United Kingdom-United States Income Tax Treaty (1945).[38] When this provision was introduced into this tax treaty, the object was obviously not to change the other principles of interpretation applicable to it. The fact that this provision was tacitly introduced into the treaty suggests that no great significance was attached to it.[39] For this reason, nothing suggests that the introduction of such a provision into the OECD Model disrupted the underlying postulates of autonomous treaty interpretation. All these factors lead to the conclusion that article 3(2) of the OECD Model allows recourse to domestic law only in rare, exceptional cases.[40]

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32. In that regard, *see also* M. Lang, *Die Maßgeblichkeit des innerstaatlichen Rechts für die DBA-Auslegung in der jüngsten Rechtsprechung des VwGH*, 17 SWI 5, pp. 199-206 (2007).
33. *Die Bedeutung von Verständigungsvereinbarungen nach Art. 3 Abs 2 OECD-Musterabkommen 2017*, *Territorialität und Personalität, Festschrift für Moris Lehner zum 70. Geburtstag* p. 209 et seq. (R. Ismer et al. eds., ottoschmidt 2019).
34. J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model I, 19 British Tax Review 1*, (1984); J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model II, 19 British Tax Review 2*, pp. 90-108 (1984); J.F. Avery Jones, *Qualification Conflicts: The Meaning of Application in Article 3(2) of the OECD Model*, in *Festschrift für Karl Beuschzum 68. Geburtstag am 31. Oktober 1993* p. 47 (H. Beisse, M. Lutter & H. Närger eds., Walter de Gruyter 1993); and J.F. Avery Jones, *A Fresh Look at Article 3(2) of the OECD Model* , 74 Bull. Intl. Taxn.11, pp. 654 et seq. (2020), Journal Articles & Opinion Pieces IBFD.
35. J.F. Avery Jones, *Qualification Conflicts: The Meaning of Application in Article 3(2) of the OECD Model*, in *Festschrift für Karl Beuschzum 68. Geburtstag am 31. Oktober 1993* p. 47 (H. Beisse, M. Lutter & H. Närger eds., Walter de Gruyter 1993). *See* C. Pleil & S. Schwibinger, *Australia/Belgium/Canada/Germany/ United Kingdom/United States/OECD/International – Confronting Conflicts of Qualification in Tax Treaty Law: The Principle of Common Interpretation and the New Approach Revisited* , 10 WTJ 3, p. 429 et seq. (2018), Journal Articles & Opinion Pieces IBFD.
36. K. Vogel, *Doppelbesteuerungsabkommen als Anwendungsgebiet des allgemeinen Völkerrechts*, in *Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt*, p. 1155 et seq. (U. Beyerlin et al. eds., Springer 1995); and M. Lehner, *Grundlagen des Abkommensrechts* at para. 65 et seq., in *Doppelbesteuerungsabkommen*, with further references (R. Ismer ed., 7th ed., C.H. Beck 2021).
37. *OECD Draft Tax Convention on Income and on Capital* (30 July 1963), Treaties & Models IBFD.
38. *UK-US Income Tax Treaty* (1945), Treaties & Models IBFD; *see* J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model I, 19 British Tax Review 1*, (1984).
39. M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 35 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994).
40. M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 290 (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997); on this point, *see also* AT: ECJ, 12 Sept. 2017, Case C-648/15, *Republic of Austria v. Federal Republic of Germany*, [2017] ECLI:EU:C:2017:664, Case Law IBFD.

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3. Possibilities of Avoiding or Solving Qualification Conflicts

3.1. Autonomous interpretation

3.1.1. Relevance of VCLT

One possibility for avoiding qualification conflicts beforehand is that legal practitioners of the two contracting states choose identical approaches for the interpretation of the treaty provisions. When the tax authorities and courts in the two contracting states base their interpretations on the same methodological principles, they are more likely to have a similar understanding of treaty provisions and, hence, arrive at the same conclusion. A major advantage lies in the fact that articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT)[41] outline principles on the interpretation of international conventions which are recognized worldwide (*see* Treaty Interpretation section 3.).

The VCLT is itself an international agreement. Several provisions it contains are accepted as international customary law. It is only of minor relevance whether a state has ratified the VCLT or not. Although the VCLT has not been ratified by all states, even states that are not parties to the VCLT regard it as relevant. Neither as an international agreement nor in its significance as international customary law does the VCLT constitute a peremptory norm (*jus cogens*) of international law. In the hierarchy of the international legal system, the VCLT is thus not superordinate to other international-law treaties. Instead, the interpretative rules it contains are at the same level as the treaty itself.

As a result, apart from the tax treaties themselves, there is no international law principle which requires that they be interpreted in accordance with the principles laid down in the VCLT. Instead, the contracting states should be free to ignore the interpretative rules of the VCLT. Therefore, it is primarily the tax treaties themselves that determine how the tax treaties should be interpreted. The question to be asked here is whether there is an explicit or implicit provision in tax treaties that governs their interpretation. Those modelled on the OECD Model do contain an explicit provision: article 3(2) of the OECD Model (2017). This provision focuses, inter alia, on interpretation with regard to the “context” of the treaty. This must be understood as an implicit reference to the international law interpretative principles included in the VCLT. In the absence of evidence to the contrary, it can be assumed that states that have concluded a tax treaty with full knowledge of the interpretative rules of the VCLT have also implicitly assumed that the provisions contained therein are also relevant for the interpretation of that treaty.

3.1.2. The wording of the treaty

According to article 31(1) of the VCLT, a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Article 31(2) of the VCLT states clearly that the “context” mentioned in article 31(1) of the VCLT also covers “the text, including its preamble and annexes”. The meaning of terms is also established in article 31(4) of the VCLT, since special meaning shall be given to a term “if it is established that the parties so intended”. For the interpretation of international-law treaties, and hence of tax treaties, the wording of a provision is therefore not the sole means of interpretation, and does not even necessarily set the limits of interpretation; however, it must certainly be taken into consideration and is a useful point of departure for every interpretation.[42]

3.1.3. Object and purpose

Article 31(1) of the VCLT also clearly states that each treaty shall be interpreted “in the light of its object and purpose” (*see* Treaty Interpretation section 3.4.10.). The teleological interpretation is hereby mentioned in a very prominent position. Therefore, the provisions of tax treaties must also be interpreted in the light of their object and purpose. Certainly, the objective of tax treaties is to avoid double taxation.[43] This, however, does not necessarily imply that each provision of a tax treaty must in any event be interpreted to avoid double taxation. After all, the object and purpose of the treaty is to avoid double taxation of income which falls within the scope of the individual provisions. This scope of application, however, is yet to be determined by way of interpretation.[44]

41. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD.
42. W. Hummer, *“Ordinary” versus “Special” Meaning*, 26 ZÖR 26, p. 97 (1975); I. Sinclair, *The Vienna Convention on the Law of Treaties*, p. 115 (Manchester Univ. Press 1984); and B. Gröhs & C. Herbst, *Die Interpretation von Doppelbesteuerungsabkommen als Problem der Auslegung von völkerrechtlichen Verträgen im nationalen Recht*, 11 ZfV 1, p. 23 (LexisNexis 1986).
43. W. Haslehner, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* at para. 29 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); and M. Lang, *Introduction to the Law of Double Taxation Conventions*, para. 15 et seq. (Linde 2021).
44. M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 296 (G. Burmester & D. Endres eds., C.H. Beck’sche Verlagsbuchhandlung 1997).

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It is even less reasonable to generally assume that every treaty provision also serves the purpose of avoiding double taxation.[45] The exemption method, in particular, often allows for cases of double non-taxation.[46]

3.1.4. Context

Article 31(1) of the VCLT also mentions the “context” to be taken into consideration during interpretation in a prominent position (*see* Treaty Interpretation section 3.4.5.). Although the wording of the treaty and other documents are also regarded as context for the purposes of the VCLT, this list is not exhaustive and does not rule out broad considerations of the treaty’s systematics also being taken into account.

3.1.5. Historical aspects

Prima facie, the development of law is only mentioned in article 32 of the VCLT as a “supplementary means of interpretation” in connection with the interpretation of treaties (*see* Treaty Interpretation section 3.5.). The article also cites, for example, the “preparatory work of the treaty and the circumstances of its conclusion”. These, however, are aspects that usually play a role in historical interpretation. According to the wording of article 32 of the VCLT, these aspects can only be taken into account “in order to confirm the meaning resulting from the application of article 31” or when the interpretation according to article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable”.[47] This conveys the impression that recourse may be had to historical arguments only as an exception.

Nevertheless, one must not forget to consider article 31(4) of the VCLT, which constitutes a central part of the provisions on treaty interpretation. According to this provision, a special meaning can be given to a term “if it is established that the parties so intended” (*see* Treaty Interpretation section 3.4.11.). This intention of the contracting parties may also result, in particular, from the development of law.[48] Therefore, one must not assume that, pursuant to the VCLT, less importance has a priori to be attributed to historical arguments. Instead, the weighting of the historical arguments – just as the weighting of all other arguments to be considered in the interpretation – must be established individually on the basis of their persuasive power.[49] From this perspective, the interpretation of international treaties, and thus of tax treaties, does not differ from the interpretation of other provisions.[50]

3.1.6. Subsequent agreement and subsequent practice

One should also note, however, the interpretative rule of article 31(3)(a) of the VCLT. According to this provision, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” should be taken into account together with the context in the interpretation (*see* Treaty Interpretation section 3.4.11.). In the case of tax treaties, what first comes to mind here are mutual agreements concluded between the high administrative authorities of the contracting states.

It appears that courts in many states are extremely reluctant to have recourse to mutual agreements for the interpretation of tax treaties or completely reject such an approach.[51] In Austria, the *Verwaltungsgerichtshof* (Supreme Administrative Court, VwGH) has already expressed the view that it feels bound to mutual agreements only under certain conditions.[52] In Germany, the *Bundesfinanzhof* (Federal Fiscal Court, BFH) has already repeatedly pointed out that a mutual agreement does not have a normative power.[53]

There are convincing arguments in favour of such an attitude: on the one hand, one must distinguish between the treaty interpretation method addressed in article 31 of the VCLT and an amendment to the tax treaty. The difficulty of this distinction

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45. W. Haslehner, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* para. 29 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); and K. Vogel, *Das oberste österreichische Steuergericht erklärt Verluste bei DBA-Freistellung für abzugsfähig*, 11 IStR 3, p. 93 (2002); for a different view, *see* N. Zorn, *Die Verwertung von Auslandsverlusten bei DBA mit Befreiungsmethode*, 11 SWI 11, p. 461 (2001).
46. M. Lang, *General Report: Double non-taxation*, in *Cahiers de Droit Fiscal international*, vol. 89a, p. 86 (Kluwer Law International, IFA 2004).
47. M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 16 (W. Gassner, M. Lang & E. Lechner eds., Linde 1994); regarding the supplementary means of interpretation under art. 32 VCLT, *see*, in more detail, H. Koeck, *Vertragsinterpretation und Vertragsrechtskonvention: Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969* p. 92 et seq. (Duncker & Humblot 1976).
48. H. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, in *Essays on International Taxation: In Honour of Sidney L. Roberts* p. 65 (H. Alpert & K. van Raad eds., Kluwer International 1993).
49. W. Karl, Vertragsauslegung – *Vertragsänderung, in Autorität und internationale Ordnung* p. 14 (C. Schreuer ed., Duncker & Humblot 1979).
50. *See also* A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* p. 89 (Alber 1982); W. Karl, *Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffes*, in *The Dynamics of EC-Law* p. 83 (R. Bieber & G. Ress eds., Nomos 1987); and M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* p. 25 (Orac 1991); *see also* F. Wassermeyer, *Die Auslegung der Doppelbesteuerungsabkommen in der Rechtsprechung des Bundesfinanzhofs*, 2 SWI 6, p. 172 (1992).
51. *See also* D. Gosch, *Über die Auslegung von Doppelbesteuerungsabkommen*, 2 ISR 3, pp. 87-95 (2013).
52. *See*, for example, AT: VwGH [Supreme Administrative Court], 27 Aug. 1991, 90/14/0237, Case Law IBFD; *see also* AT: VwGH [Supreme Administrative Court], 20 Sept. 2001, 2000/15/0116, Case Law, IBFD. *See also* AT: VwGH [Supreme Administrative Court], 30 Mar. 2006, 2002/15/0098, Case Law IBFD.
53. *See*, for example, DE: BFH [Federal Fiscal Court], 1 Feb. 1989, I R 74/86, Case Law IBFD; DE: BFH [Federal Fiscal Court], 21 Aug. 1996, I R 80/95, Case Law IBFD; DE: BFH [Federal Fiscal Court], 15 Sept. 2004, I R 67/03, Case Law IBFD; and DE: BFH [Federal Fiscal Court], 11 Nov. 2009, I R 15/09, Case Law IBFD.

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does not in any way affect its necessity.[54] An amendment to the tax treaty would no longer be covered by the interpretation under article 31 of the VCLT.[55] Moreover, the reference to the individual interpretation aspects of articles 31 and 32 of the VCLT rules out the possibility that – depending on the subject matter – a different significance may be attributed to these aspects.[56] In the field of international tax law, it must be taken into account that, in most legal systems, tax provisions are regarded as interference by public authorities and are thus subject to particularly strict legal requirements.[57] In addition, the separation of powers often plays a pivotal role and in several constitutions does not allow tax administrations to take the place of the legislature and issue or amend rules that fall within the jurisdiction of the legislature. In several states, the conclusion of tax treaties requires the approval of the legislators and thus touches on their competence.[58] Against this background, much suggests that, a priori, only a very limited importance must be attached to the rule of article 31(3) of the VCLT in the field of tax law.[59] In addition, the question arises as to who is to be considered a party for the purposes of article 31(3)(a) of the VCLT. The parties to a tax treaty are the contracting states themselves. When, however, the conclusion of a treaty requires approval by the legislature, one cannot in any way assume beforehand that the administrative authorities have to be considered a party to a tax treaty.

While article 31(3)(b) of the VCLT stipulates that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must also be taken into account, this aspect may for the same reasons play only an extremely limited role in the interpretation of tax treaties (*see* Treaty Interpretation section 3.4.7.).[60]

In this context, the question also arises as to how such a practice can be established. A mutual agreement does not qualify as “practice” simply because, under most legal systems, the high administrative authorities who conclude such agreements do not have the authority to enforce treaty provisions.[61] In most cases, the relevant authorities are the local tax offices and the courts. Therefore, in order to establish a consistent practice, an observation of the practice of the local tax offices and the courts is necessary. Such an examination would have to be guided by a common understanding of the law in order to be relevant at all.[62]

3.1.7. Relevance of the OECD Model and the Commentary on the OECD Model

Against the background of the considerations presented here, the rules of the OECD Model are in any event relevant for the interpretation of those treaty provisions that are based on the OECD Model (*see* Treaty Interpretation section 3.10.). Most states base their treaty negotiations either on the OECD Model itself or a different Model that largely corresponds to the OECD Model,[63] like the UN Model.[64] The importance of provisions of the OECD Model available to the treaty negotiators at the time of the treaty negotiations and the conclusion of the treaty can be based on different provisions of the VCLT: Article 31(1), article 31(2) and article 31(4) of the VCLT can be used as a basis, as can article 32.[65] The rules of the OECD Model available at the time of the

54. W. Karl, *Vertrag und spätere Praxis im Völkerrecht – zum Einfluss der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge* p. 45 et seq. (Springer 1983); *see also* G. Ress, *Die Bedeutung der nachfolgenden Praxis für die Vertragsinterpretation nach der Wiener Vertragsrechtskonvention (WVRK)*, in *The Dynamics of EC-Law* p. 62 (R. Bieber & G. Ress eds., Nomos 1987).
55. M. Lang, *Introduction to the Law of Double Taxation Conventions*, para. 87 (Linde 2021); for further information on the highly restricted boundaries of an extension of law, *see also* K. Friauf, *Möglichkeit und Grenzen der Rechtsfortbildung im Steuerrecht, in Grenzen der Rechtsfortbildung durch Rechtsprechung und Verwaltungsvorschriften im Steuerrecht* p. 54 et seq. (K. Tipke ed., Schmidt 1982).
56. F. Wassermeyer, *Die Auslegung der Doppelbesteuerungsabkommen in der Rechtsprechung des Bundesfinanzhofs*, 2 SWI 6, p. 172 (1992); and M. Lang, *Introduction to the Law of Double Taxation Conventions*, at para. 85 (Linde 2021).
57. M. Lang, *Die Einwirkung von Doppelbesteuerungsabkommen auf das innerstaatliche Recht*, 28 Finanzjournal 4, p. 86 et seq. (1988) and M. Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht: Die Einordnung von Doppelbesteuerungsabkommen in die österreichische Rechtsordnung* p. 109 (Orac 1992).
58. For a review of the Austrian legal system, *see* M. Lang, *Die Einwirkung von Doppelbesteuerungsabkommen auf das innerstaatliche Recht*, 28 Finanzjournal 4, (1988) and M. Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht: Die Einordnung von Doppelbesteuerungsabkommen in die österreichische Rechtsordnung* p. 109 (Orac 1992); regarding the German legal system, *see* F. Wassermeyer, *Diskussionsbeitrag*, in *Doppelbesteuerungsabkommen und nationalesRecht* p. 85 et seq. (J. Mössner et al. eds., Beck 1995); for the Italian legal situation, *see* G. Bizioli, *Tax Treaty Interpretation in Italy*, in *Tax Treaty Interpretation* p. 218 et seq. (M. Lang ed., Linde 2001).
59. M. Lang, *Diskussionsbeitrag*, in *Doppelbesteuerungsabkommen und nationales Recht* p. 87 (J. Mössner et al. eds., Beck 1995).
60. F. Wassermeyer, *Diskussionsbeitrag*, in *Doppelbesteuerungsabkommen und nationalesRecht* p. 85 et seq. (J. Mössner et al. eds., Beck 1995); *see also* W. Barfuß, *Rechtsstaat und völkerrechtlicher Vertrag, in Staatsrecht in Theorie und Praxis – Festschrift für Robert Walter zum 60. Geburtstag.* p. 25 et seq. (H. Mayer et al. eds., Manz 1991); and M. Thaler, *Enthält das Wiener Übereinkommen über das Recht der Verträge verfassungsändernde Bestimmungen?*, in *Staatsrecht in Theorie und Praxis – Festschrift für Robert Walter zum 60. Geburtstag*, p. 683 et seq. (H. Mayer et al. eds., Manz 1991). According to Thaler, art. 313(b) VCLT is unconstitutional on the basis of the Austrian Federal Constitutional Act.
61. M. Lang, *Österreichischer Verwaltungsgerichtshof zur Auslegung von Doppelbesteuerungsabkommen*, IWB 12, p. 679 (2006).
62. *See* C. Pleil & S. Schwibinger, *Australia/Belgium/Canada/Germany/United Kingdom/United States/OECD/International – Confronting Conflicts of Qualification in Tax Treaty Law: The Principle of Common Interpretation and the New Approach Revisited* , 10 World Tax J. 3, p. 427 et seq. (2018), Journal Articles & Opinion Pieces IBFD.
63. H. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, in *Essays on International Taxation: In Honour of Sidney L. Roberts* p. 65 (H. Alpert & K. van Raad eds., Kluwer International 1993); regarding Austrian treaty practice, *see Österreichischer Abkommensentwurf*, in *Die Zukunft des Internationalen Steuerrechts – 100 Jahre Doppelbesteuerungsabkommen Österreich – Deutschland* p. 109 et seq. (W. Gassner et al. eds., Linde 1999). *See* H. Jirousek, *Die österreichische Position beim Abschluss von DBA*, in Die österreichische DBA Politik p. 15 et seq. (H. Jirousek ed., Linde 2012).
64. *UN Model Tax Convention on Income and on Capital* (1 Jan. 2011), Treaties & Models IBFD.
65. C. Gloria, *Das steuerliche Verständigungsverfahren und das Recht auf diplomatischen Schutz* p. 90 et seq. (Duncker & Humblot 1988); M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 17 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994); M. Lang, *Die Bedeutung der 1995 erfolgten Änderung des*

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treaty negotiations and the conclusion of the treaty are most notably relevant in those cases in which the contracting parties intentionally adopted these formulations in a tax treaty. In such cases one must – in the absence of other evidence – assume that they intended to attach the meaning to these rules attributed to them in the OECD Model version available at the time of the conclusion of the treaty.[66]

For the same reasons, the Commentary on the OECD Model,[67] written by the OECD Committee on Fiscal Affairs, must be used for treaty interpretation. The version of the OECD Commentary available at the time of the treaty negotiations and the conclusion of the treaty provides clues as to the intentions of the authors behind the individual rules of the OECD Model and the meaning they attached to them.[68] Hence, the explanations in the OECD Commentary constitute important historical materials that need to be taken into account in the process of treaty interpretation. The admissibility of their use is especially confirmed in article 31(4) and article 32 of the VCLT. However, the explanations in the OECD Commentary are not the only elements to be taken into account in the interpretation of a tax treaty. Equally important are the wording of the treaty, teleological considerations and the context. In individual cases, it may be necessary to attribute greater significance to these other elements, and they may supersede the opinions given in the OECD Commentary.[69]

In any event, a strict distinction must be made between the version of the Commentary on the OECD Model available at the time of the treaty negotiations and the conclusion of a treaty provision and later versions of the OECD Commentary (*see* Treaty Interpretation sections 3.11. and 3.12.).[70] A later version of the OECD Commentary cannot be of any importance for the interpretation of already concluded tax treaties.[71] After all, a more recent version of the OECD Commentary cannot give any clues as to the intention of the parties at the time. Neither article 31(1), article 31(2), article 31(4) nor article 32 of the VCLT provide any basis for using subsequent versions of the OECD Commentary.[72] Recourse to a later version of the OECD Commentary cannot be justified by article 31(3) of the VCLT either, since neither is the OECD Commentary a “subsequent agreement” between the parties nor do any of the opinions held in the Commentary necessarily provide any clues as to the “practice” of the contracting parties.[73] Rather, an opinion subsequently introduced into the OECD Commentary is intended to contribute to the development of such a practice. Therefore, the subsequent OECD Commentaries cannot be considered as evidence of such a practice already existing.[74]

One must also reject a “reconciling view” recurrently introduced into the discussion.[75] Under this view, later versions of the Commentary on the OECD Model should be relevant at least when the opinion described therein is of a “clarifying” nature.[76] In

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OECD-Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Doppelbesteuerungsabkommen, in *Die Weiterentwicklung des OECD-Musterabkommens* p. 29 et seq. (M. Lang, H. Loukota & D. Lüthi eds., Linde 1996); R. Prokisch, *Does it Make Sense if We Speak of an “International Tax Language”?*, in *Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany* p. 105 et seq. (K. Vogel ed., Kluwer International 1998); H. Jirousek, *Kritische Anmerkungen zur Auslegung von Doppelbesteuerungsabkommen*, 8 SWI 3 p. 112 et seq. (1998); K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation* , 54 Bull. Intl. Taxn. 12, p. 614 (2000), Journal Articles & Opinion Pieces IBFD; and M. Waters, *The Relevance of the OECD Commentaries in the Interpretation of Tax Treaties*, in *Praxis des Internationalen Steuerrechts: Festschrift für Helmut Loukota zum 65. Geburtstag* p. 678 et seq. (M. Lang & H. Jirousek eds., Linde 2005).

66. M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 19 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994); and M. Lang & F. Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 Australian Tax Forum 2, p. 98 (2008).
67. *OECD Model Tax Convention on Income and on Capital: Commentary* (21 Nov. 2017), Treaties & Models IBFD.
68. M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 22 (W. Gassner, M. Lang & E. Lechner eds., Linde 1994).
69. I. Sinclair, *The Vienna Convention on the Law of Treaties*, p. 117 (Manchester Univ. Press 1984); and M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 22 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994).
70. J.F. Avery Jones, *The 1992 OECD Model Treaty: Article 3(2) of the OECD Model Convention and the Commentary to It: Treaty Interpretation*, 33 Eur. Taxn. 8, p. 255 et seq (1993), Journal Articles & Opinion Pieces IBFD; M. Lang, *Grundsatzerkenntnis des VwGH zur DBA-Auslegung*, 6 SWI 10, p. 427 et seq. (1996); K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation* , 54 Bull. Intl. Taxn. 12, p. 615 (2000), Journal Articles & Opinion Pieces IBFD; and J.F. Avery Jones, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded* , 56 Bull. Intl. Taxn. 3, pp. 102-109 (2002), Journal Articles & Opinion Pieces IBFD.
71. M. Lang, *Later Commentaries of the OECD Committee on Fiscal Affairs not to Affect the Interpretation of Previously concluded Tax Treaties*, 25 Intertax 1, pp. 7-9 (1997); M.J. Ellis, *The Influence of the OECD Commentaries on Treaty Interpretation – Response to Prof. Dr. Klaus Vogel* , 54 Bull. Intl. Taxn. 12, pp. 617-618 (2000), Journal Articles & Opinion Pieces IBFD; and M. Lang, *Wer hat das SagenimSteuerrecht*, 59 ÖStZ 10, p. 208 (2006); for a different view, *see* H. Jirousek, *Kritische Anmerkungen zur Auslegung von Doppelbesteuerungsabkommen*, 8 SWI 3 p. 116 (1998).
72. *See*, for example, T. Vetter, *Die normative Bedeutung der OECD Verrechnungspreisrichtlinien*, in *Die neuen Verrechnungspreisrichtlinien der OECD*, p. 25 (A. Lahodny-Karner et al. eds., Linde 1996); E. Reimer, *Interpretation of TaxTreaties* , 39 Eur. Taxn. 12 p. 468 (1999), Journal Articles & Opinion Pieces IBFD; K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation* , 54 Bull. Intl. Taxn. 12, p. 614 (2000), Journal Articles & Opinion Pieces IBFD; and F. Wassermeyer, *Vor Art. 1 OECD-MA* para. 60, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
73. M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 25 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994); and M. Lang & F. Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 Australian Tax Forum 2, p. 103 et seq. (2008).
74. *See*, for example, T. Vetter, *Die normative Bedeutung der OECD Verrechnungspreisrichtlinien*, in *Die neuen Verrechnungspreisrichtlinien der OECD*, p. 24 (A. Lahodny-Karner et al. eds., Linde 1996).
75. M. Lang, *Wer hat das SagenimSteuerrecht*, 59 ÖStZ 10, p. 209 (2006).
76. *See*, for example, H. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, in *Essays on International Taxation: In Honour of Sidney L. Roberts* p. 67 (H. Alpert & K. van Raad eds., Kluwer International 1993); H. Loukota, *Zur Bedeutung der neuen OECD-Verrechnungspreisgrundsätze für die*

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order to establish whether an opinion is of a “clarifying” nature, one would need to examine the treaty provision without taking into account the more recent version of the OECD Commentary.[77] When a certain understanding can be gained from the treaty provision itself, the later version of the OECD Commentary is no longer of need. If the later version of the OECD Commentary also reflects this understanding, it becomes equally as important as an academic paper that accurately describes the substance of a provision but has in itself no normative significance.[78]

3.1.8. Consequence

These considerations demonstrate that an examination of the interpretation principles laid down in the VCLT represents a foundation upon which tax authorities and courts of the contracting states can determine the substance of the treaty rules under identical principles. The condition for achieving this is that the tax authorities abandon premises that seemingly offer a simplification for the application of tax treaties by allowing legal practitioners to “read” their domestic law into them. In reality, considering domestic law significantly complicates the entire matter: if legal practitioners apply their domestic law to interpret tax treaties, interpretation conflicts and thus, in particular, qualification conflicts will be inevitable. The tax authorities must equally reject power claims of international organizations disguised as indispensable special methods for the application of tax treaties.[79] In systems characterized by the rule of law, courts will never bow to any provisions according to which amendments to the Commentary on the OECD Model approved only by the tax authorities would also have to be taken into account in the interpretation of existing tax treaties approved by the legislative authorities. Documents adopted by the OECD can only be taken into account in the version available at the time of the conclusion of the tax treaty. Further, while the views expressed in those documents can be taken into account, they do not represent the only admissible interpretative material.

The interpretative principles laid down in the VCLT are highly likely to be recognized at an international level, since, to a large extent, articles 31 et seq. of the VCLT only outline what is otherwise widely acknowledged in the interpretation of legal texts: that the wording is the starting point for every interpretation, but its meaning can be better determined in the light of the other aspects to be considered. These aspects include the object and purpose, context and history of the provision. Interpretation is not a process that can be formalized. Its objective is always to determine what can be assumed the relevant legislator had in mind, which might differ from what the legislator had actually in mind.

Though observance of these principles increases the likelihood that legal practitioners in both states will arrive at the same conclusion, it does not in any way guarantee this. Interpretation requires balancing the different arguments, and the outcome can diverge. The valuations that must be derived from the legal provisions and taken into account in the assessment are often colourful and allow for different interpretations. All this can lead to tax authorities and courts interpreting one and the same treaty provision in different manners.

3.2. Exchange of information

3.2.1. Exchange on the facts of the case

Another possibility for achieving consistent application of a tax treaty by the tax authorities of both states – and thus avoiding, inter alia, qualification conflicts – is the exchange of information stipulated in article 26 of the OECD Model. According to this provision, the competent authorities also exchange information “foreseeably relevant for carrying out the provisions of this Convention” (*see* Article 26: Exchange of Information section 2.1.4.). This also covers issues regarding the facts of an individual case. The authorities, however, are not completely free to disclose any information on the given situation to the authorities of the other state. Such an exchange is subject to the foreseeable relevance. This means that the authorities may exchange at least such information on the situation as is “relevant” from the legal point of view of said authorities.[80] However, they must not limit themselves to that: they can also exchange information on those elements of the situation which, though irrelevant for the legal position of the competent authorities of one contracting state, may become relevant when they decide to base their view on the opinion of the competent authorities of the other contracting state. This, however, does not necessarily cover any legal opinion. For acceptability reasons, there must be arguments sufficiently strong so as not to rule out the possibility that the competent authorities may be persuaded by this legal view in the course of the proceedings.

österreichische Besteuerungspraxis, 7 SWI 8 p. 342 (1997); and H. Jirousek, *Kritische Anmerkungen zur Auslegung von Doppelbesteuerungsabkommen*, 8 SWI 3 p. 116 et seq. (1998).

77. M. Lang, *Wer hat das SagenimSteuerrecht*, 59 ÖStZ 10, p. 209 (2006).
78. *See*, in that regard, M. Lang, S. Siller & S. Zolles, *Austria: Termination Payments*, in *Tax Treaty Case Law around the Globe 2020* p. 231 et seq. (E. Kemmeren et al. eds., Linde 2017).
79. *See also* D. Gosch, *Bedeutung des OECD-Kommentars für die Auslegung des. DBA Österreich – Deutschland*, 25 SWI 11 p. 512 (2015).
80. For more details, *see* E. Traversa & F. Cannas, *Exchange of Information (Art 26 OECD Model Convention)*, in *The OECD-Model-Convention and its Update 2014* (M. Lang et al. eds., Linde 2015).

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3.2.2. Exchange on legal issues

An exchange on legal issues as such is also possible. This, however, does not require a separate legal basis: irrespective of a specific case, governmental representatives can always enter into an exchange of their views on the interpretation of a particular provision. It is often not possible, however, to completely separate legal issues from those regarding a specific situation. In order to prevent the exchange of ideas from dwelling on an abstract level, it is useful to have a separate legal basis established via the treaty provisions modelled on article 26 of the OECD Model. This enables an independent examination of aspects of a particular case and provides for a legal basis even in cases where, for instance, tax secrecy would otherwise prevent such an exchange of information.

The exchange on issues regarding the situation and on legal issues does not in any way guarantee that the competent authorities of the two states will arrive at a common assessment of the situation or the legal issues. It does, however, increase the likelihood of reaching a common result, since one of the authorities can obtain additional insight into the situation which it previously did not have. Even on a legal level, this exchange on the respective arguments in favour of the diverging views may result in one authority being persuaded by the arguments of the other.

3.2.3. Mutual agreement

Another possibility of avoiding qualification conflicts is the conclusion of mutual agreements between the two contracting states in which they agree on a common interpretation of one and the same treaty rule.[81] Such a general agreement may be the result of a specific case in which the issue became subject to a dispute (*see* Article 25: Mutual Agreement Procedure section 2.). It is also possible that, even without a specific case, the competent authorities may merely wish to express their common understanding of the interpretation of treaty provisions (*see* Article 25: Mutual Agreement Procedure section 4.1.).

This can have an effect in practice: taxpayers who are in favour of the interpretation agreed upon between the competent authorities will choose to focus on this interpretation. In many cases, the agencies subordinate to the competent authorities will also choose to apply this interpretation. This can be the case either because the competent authorities have the power to issue instructions to the subordinate authorities and actually exert this right or because the subordinate authorities follow this interpretation on a voluntary basis.

The tax treaty itself, however, does not contain an obligation for the competent authorities to adhere to an opinion laid down in a mutual agreement. Even if the competent authorities comply, the taxpayer is free to challenge this view by way of appeal.[82] As a rule, courts do not consider themselves bound to an arrangement reached in a mutual agreement (*see* Article 25: Mutual Agreement Procedure section 2.7.4.).[83]

There are good arguments in support of such an approach: on the one hand, a court would not fulfil its legal protection mandate if it considered itself bound to agreements reached between administrative authorities. The administrative authorities would have the power to immunize a certain interpretation against judicial scrutiny by making this interpretation subject to a mutual agreement. In systems characterized by the rule of law, it is not acceptable for areas of tax law to be outside judicial control.[84] Furthermore, accepting mutual agreements as binding would equal a self-renunciation for courts. This is a further reason why several states are sceptical toward accepting a binding character for mutual agreements.

In fact, however, there is no legal basis for accepting such a binding effect either: although the first sentence of article 25(3) of the OECD Model encourages the competent authorities of the contracting states to endeavour to resolve any difficulties or doubts arising from the interpretation or application of the tax treaty by mutual agreement, this does not suggest a binding character for any mutual agreement.[85] The normative significance of this provision is questionable altogether, since the competent authorities could also communicate with each other without express authorization to attempt to come to an agreement over the interpretation or implementation of the tax treaty.

Article 31(3) of the VCLT can also be ruled out as a legal basis.[86] According to this provision, "subsequent agreements" must also be taken into account in the interpretation of international treaties. The provision does not, however, grant them priority in

81. For an in-depth analysis of the ECJ case law and mutual agreement procedures, *see* M. Lang, *ECJ and Mutual Agreement Procedures*, 42 Intertax 3, pp. 169-172 (2014).
82. On this topic, *see also* Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, art. 4, OJ L265 (2017) [hereinafter EU Dispute Resolution Directive (2017)].
83. AT: VwGH [Supreme Administrative Court], 27 Aug. 1991, 90/14/0237; AT: VwGH [Supreme Administrative Court], 20 Sept. 2001, 2000/15/0116; DE: BFH [Federal Fiscal Court], 2 Sept. 2009, I R 90/08; *see also* M. Lang, *Introduction to the Law of Double Taxation Conventions*, at para. 110 et seq. (Linde 2021).
84. M. Lang, *Aussagen des VfGH zur Auslegung von Doppelbesteuerungsabkommen*, 25 SWI 12, p. 569 (2015); *see also* M. Lehner, *Die Umsetzung von abkommensrechtlichen Konsultationsvereinbarungen zur Vermeidung von Doppelbesteuerung und Doppelnichtbesteuerung durch Rechtsverordnungen*, 20 IStR 19, p. 739 (2011).
85. R. Ismer & S. Piotrowski, *Art. 25* para. 154, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
86. M. Lang, *Introduction to the Law of Double Taxation Conventions*, para. 66 et seq. (Linde 2021).

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the interpretation. Instead, it allows for a distinction according to legal areas in such subsequent agreements.[87] A high level of restraint is advisable in the field of tax law. This is because treaty provisions usually not only apply between states but are also significant, at least indirectly, for individuals. The rule of law and, in particular, legal certainty and the separation of powers have a major role to play here.[88] Tax administrations must not just change the interpretation of a particular provision from one day to the next. The same is also suggested by the fact that, as a rule, tax treaties are based on model conventions used worldwide. Whenever such provisions are implemented in a treaty, they should be understood with the meaning already attributed to them in the model provisions. Taking only bilateral agreements into consideration when interpreting such provisions would contradict this principle. This is also consistent with the fact that, though the interpretation provisions of the VCLT belong to international customary law, they do not take precedence over other international law rules. Therefore, they are on an equal footing with the treaty provisions. In view of the object and purpose of treaty law, it is primarily the contracting states themselves that must decide whether and which interpretative provisions laid down in the VCLT are relevant. Against this background, treaty law, which is particularly focused on the principles of clarity and predictability in view of its indirect impact on third parties, dictates restraint toward "subsequent agreements". The same conclusion will be reached if one bears in mind that treaty law already contains an interpretative provision in article 3(2) of the OECD Model, which focuses on the context of the tax treaty.

3.3. Possibilities for a posteriori solution of qualification conflicts

3.3.1. Article 23A(1) of the OECD Model?

3.3.1.1. The position of the OECD

The OECD Partnership Report[89] offers a possible solution for qualification conflicts: when the source state is bound to a certain understanding of a tax treaty due to its domestic law, the residence state should be bound by this qualification.[90] According to the opinion expressed in the report, this obligation of the residence state to comply with this qualification results from article 23A(1) of the OECD Model:[91] the residence state may only exempt income or capital from tax when "this income or capital is taxed in the other state". When the qualification is not possible under any allocation rule that grants the source state the right of taxation, the residence state is not obliged to exempt either. When the qualification in the source state is subject to an allocation rule that grants it the right of taxation, the residence state is obliged to exempt from taxes. In this manner, double taxation and double non-taxation can be eliminated in cases of qualification conflicts. Similar wording is used in respect of the scope of the credit method, so the same should apply there.[92]

This opinion was made widely known through the OECD Partnership Report. It was not established there for the first time, however.[93] It had already been expressed by Dery & Ward (1993) in their Canadian Branch Report for the IFA. In 2000, this opinion was also included in the Commentary on the OECD Model.[94]

3.3.1.2. Criticism of this position

This position, however, is not consistent with the wording of article 23 of the OECD Model: the requirement laid down in article 23, according to which the income or capital may be taxed in the other state, does not suggest that it must be assessed according to the law of the other state whether taxes may be imposed there.[95] On the contrary, the decisive issue is whether taxes may be imposed in the other state "in accordance with the provisions of this Convention". The method article must be applied by the competent authorities of the residence state. One could now also discuss whether these authorities may only apply treaty standards in doing so or whether they may also resort to those of their own domestic law.[96] The wording of the tax treaty,

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87. M. Lang, *Die Bedeutung der Änderungen im OECD-Kommentar 2010 zum Begriff des Arbeitgebers nach Art. 15 Abs 2 OECD-MA*, 21 SWI 3, p. 110 (2011).
88. *See*, in more detail, M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Aktuelle Entwicklungen im internationalen Steuerrecht* p. 27 (W. Gassner, M. Lang & E. Lechner eds., Linde 1994); and K. Vogel & R. Prokisch, *General Report: Interpretation of Double Taxation Conventions*, in *Cahiers de Droit Fiscal international*, vol. 78a, p. 33 et seq., (Kluwer International, IFA 1993).
89. OECD, *The Application of the OECD Model Tax Convention to Partnerships* (OECD 1999), Primary Sources IBFD [hereinafter OECD Partnership Report].
90. OECD, *The Application of the OECD Model Tax Convention to Partnerships* (OECD 1999), at paras. 102-105, Primary Sources IBFD.
91. OECD, *The Application of the OECD Model Tax Convention to Partnerships* (OECD 1999), at paras. 104-105, Primary Sources IBFD.
92. For a critical discussion of this approach, *see*, for example, M. Lang, *The Application of the OECD Model Tax Convention to Partnerships* pp. 40-42 (Kluwer International and Linde Verlag 2000), Primary Sources IBFD.
93. J.M. Dery & D. Ward, *National Report – Canada: Interpretation of double taxation conventions*, in *Cahiers de Droit Fiscal International*, vol. 78a., pp. 259 and 281 et seq. (Kluwer International, IFA 1993); this is further elaborated on by J.F. Avery Jones et al., *Credit and Exemption under Tax Treaties in Cases of Differing Income Characterization*, 36 Eur. Taxn. 4, p. 118 and 151 et seq. (1996).
94. *OECD Model Tax Convention on Income and on Capital: Commentary* (29 Apr. 2000), Treaties & Models IBFD. For a critical discussion, *see*, for example, J. Schuch & J. Bauer, *Die Überlegungen des OECD-Steuerausschusses zur Lösung von Qualifikationskonflikten*, in *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* p. 32 et seq. (Gassner et al. eds., Linde 2000), Books IBFD.
95. M. Lang, *General Report: Double non-taxation*, in *Cahiers de Droit Fiscal international*, vol. 89a, p. 95 et seq. (Kluwer Law International, IFA 2004).
96. *See already* M. Lang, 2008 *OECD Model: Conflicts of Qualification and Double Non-Taxation*, 63 Bull. Intl. Taxn. 5, p. 205 (2009), Journal Articles & Opinion Pieces IBFD.

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however, does not suggest that they should apply the standards of the domestic law of the other state.[97] Still less does the wording of the treaty suggest that the interpretation chosen by the competent authorities of the source state is relevant.

Moreover, the OECD limits its opinion, in that, according to article 23 of the OECD Model, the residence state would be bound by the qualification of the source state only in those cases in which this qualification results from the reference in article 3(2) to domestic law.[98] In all other qualification conflicts resulting from diverging interpretations of the competent authorities of the two states, no such binding effect applies.

This distinction, however, is problematic in many ways:[99] on the one hand, the wording of article 23 of the OECD Model does not suggest in any way that a distinction must be made between those qualification conflicts attributed to article 3(2) and other qualification conflicts; on the other hand, the content of article 3(2) is itself highly controversial. Opinions range from the position maintained here, according to which the reference to domestic law made therein is irrelevant because of the reservation in favour of the context,[100] to the diametrically opposite position, according to which this provision generally postulates a principle of relevance of domestic law for the interpretation of the tax treaty, so that domestic law should almost always be used whenever a term is not defined in the treaty itself.[101] All these controversies would then have an effect on article 23 of the OECD Model. In addition to that, even those authors who maintain that the reference to domestic law in article 3(2) of the OECD Model should have a scope of application often argue, when it comes to the solution of specific interpretation issues, that they arrive at the same conclusion through reference to domestic law as they do via autonomous interpretation. The residence state, however, would only be bound if a specific interpretative result were to emerge exclusively from the reference in article 3(2) of the OECD Model to domestic law.[102]

The fact that this opinion has been included in the Commentary on the OECD Model since 2000 does not change the fact that article 23 of the OECD Model does not provide a basis compelling the authorities of the residence state to follow the qualification in accordance with the law of the source state.[103] According to the opinion acknowledged here as correct, an opinion adopted in the OECD Commentary can only be relevant at all for tax treaties concluded ever since.[104] Yet even for these treaties, nothing changes as a result of the fact that the OECD has tried to attach greater importance to its view by integrating its opinion into the Commentary. The wording of article 23 of the OECD Model does not contain even the slightest backing for the position held in the OECD Commentary. Therefore, even if one were to claim that, since 2000, at least in those cases in which no observation was issued, the intention of the treaty negotiators was to have the understanding expressed in the OECD Commentary integrated into their tax treaties, the treaty text itself does not provide any basis for this whatsoever.[105]

3.3.1.3. Criticism from a legal policy point of view

Prima facie, the concept favoured by the OECD seems convincing, at least from a legal policy point of view. Even if the treaty law currently in force does not provide any reason to already apply this opinion, it seems logical from a legal policy perspective to try to avoid double taxation or double non-taxation in the case of qualification conflicts.

However, a closer analysis gives rise to doubts: source states may see this as an invitation to expand their source taxation right and then expect the residence states to exempt the income or capital taxed by the source states or credit the tax pertaining to such income or capital. In this manner, the OECD's position may even result in qualification conflicts becoming more frequent.[106]

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97. M. Lang, *Qualifikationskonflikte im Recht der Doppelbesteuerungsabkommen, in Staaten und Steuern: Festschrift für Klaus Vogel* pp. 907-924 (P. Kirchhof et al. eds., C.F. Müller Verlag 2000), with reference to H. Loukota, *Grundsätze für die steuerliche Behandlung international tätiger Gastprofessoren*, 8 SWI 10, p. 459 (1998).
98. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at para. 104 (OECD 1999), Primary Sources IBFD.
99. *See*, for example, M. Lang, *The Application of the OECD Model Tax Convention to Partnerships* p. 41 (Kluwer International and Linde Verlag 2000), Primary Sources IBFD; and M. Lang, 2008 *OECD Model: Conflicts of Qualification and Double Non-Taxation* , 63 Bull. Intl. Taxn. 5, pp. 205-206 (2009), Journal Articles & Opinion Pieces IBFD.
100. *See* M. Lang, *Der Rechtsanspruch auf Einleitung des Verständigungsverfahrens*, Juristische Blätter, p. 368 (1989); M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB 8, p. 294 (2011); and M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 283 et seq. (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997).
101. *See*, for example, J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model II, 19 British Tax Review 2*, p. 107 (1984); and H. Loukota et al., *Z 0*, in *Internationales Steuerrecht* (H. Loukota et al eds., Manz 2022) rdb.at, who describe the opinion of the Austrian tax administration, according to which art. 3(2) OECD Model enshrines the "principle of the relevance of domestic law" in the interpretation of tax treaties; *see also* H. Loukota, *Der Ministerialentwurf für ein DBA-Durchführungsgesetz*, 7 SWI 7, p. 285 et seq. (1997). For further details, *see* H. Loukota et al., *Z 0*, in *Internationales Steuerrecht* at para. 59 et seq. (H. Loukota et al eds., Manz 2022) rdb.at.
102. M. Lang, *The Application of the OECD Model Tax Convention to Partnerships* p. 81 (Kluwer International and Linde Verlag 2000), Primary Sources IBFD.
103. M. Lang, 2008 *OECD Model: Conflicts of Qualification and Double Non-Taxation* , 63 Bull. Intl. Taxn. 5, pp. 204-207 (2009), Journal Articles & Opinion Pieces IBFD.
104. M. Lang & F. Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 Australian Tax Forum 2, pp. 106-107 (2008).
105. *See*, in more detail, M. Lang, 2008 *OECD Model: Conflicts of Qualification and Double Non-Taxation* , 63 Bull. Intl. Taxn. 5, pp. 204-207 (2009), Journal Articles & Opinion Pieces IBFD.
106. M. Lang, *Qualifikationskonflikte im Recht der Doppelbesteuerungsabkommen, in Staaten und Steuern: Festschrift für Klaus Vogel* at p. 924 (P. Kirchhof et al. eds., C.F. Müller Verlag 2000), with reference to D-A-CH-Steuerausschuß, *Stellungnahme zum Thema "Qualifikationskonflikte"*, 8 SWI 12, p. 580 (1998).

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Conversely, there are limits to the willingness of the authorities of those residence states that have a positive attitude towards the current OECD position to follow the qualification of the authorities of the source state.[107] This is illustrated by an example from Austrian treaty practice: a contracting state had amended its domestic law to declare gambling machines immovable property, obviously hoping to be able to thus tax the income derived from them and expecting at the same time that the Austrian authorities would be willing to exempt this income from taxation. The mutual agreement procedure introduced for this purpose never ended up as a mutual agreement.

3.3.2. Article 23A(4) of the OECD Model

In 2000, paragraph 4 was added to article 23A of the OECD Model, and this provision is closely linked to the aforementioned interpretation of article 23A(1) (*see* section 3.3.1.1.).[108] Since 2000, article 23A(4) of the OECD Model has read as follows: "The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 or 11 to such income." The obvious intention of this provision is to cover those cases of divergent application in the two states that are not already covered by article 23A(1). The Commentary on Article 23A(4) of the OECD Model makes this clear and regards paragraph 4 as applicable only in those scenarios that are not already covered by article 23A(1), as understood within the meaning of the Commentary.[109]

The considerations presented above (*see* section 3.3.1.2.) have demonstrated that it is highly questionable whether the opinion expressed by the Commentary on the OECD Model actually reflects the meaning of this provision. If the OECD Commentary on Article 23A(4) were taken seriously, however, one would have to exempt the cases assumed by the OECD Commentary on Article 23A(1)(c) from article 23A(4). Article 23A(4) of the OECD Model, however, does not contain any indications for such a distinction either. Therefore, much suggests that article 23A(4) should be understood as being applicable to all kinds of disagreements between the tax authorities of the two contracting states.[110]

Yet another problem arises: article 23A(4) of the OECD Model refers to "the other Contracting State" that "applies" this convention. According to the wording, this formulation does not make any sense, since contracting states do not apply tax treaties at all. Those applying a tax treaty are the taxpayers, the administrative authorities and the courts. The provision obviously refers to those bodies that act on behalf of the state. Hence, if the taxpayers themselves held a certain opinion on the content of one of the allocation rules, this would lead to a qualification conflict if the administrative authority of the residence state were to take a different view. Therefore, the taxpayers' legal point of view must be an opinion that is at least maintained by an administrative authority of the source state or that is known to be held by an administrative authority of the source state in similar cases.

One presumably does not expect the taxpayer, however, to use legal remedies in the source state against the interpretation favouring him there in order to challenge these opinions before the courts. Conversely, it will not be possible to attribute a certain legal opinion to the source state when court decisions exist there according to which the opinion held by the administrative authority would prove unlawful.

It will be interesting to see whether a taxpayer who in the case of the qualification conflict is now unexpectedly subject to taxation in the residence state because article 23A(1) of the OECD Model ceases to apply there will be able to introduce a mutual agreement procedure in the residence state to try to still have his income or capital in the residence state exempt from tax and taxed in the source state instead. Strictly speaking, this situation does not constitute taxation in violation of the tax treaty, since the residence state rightly refuses to apply article 23A(1) of the OECD Model. The question arises as to whether, in this scenario in particular, the object and purpose of the rules would be better served if the taxpayer were not given the possibility of having the legal opinions reviewed again by both administrative authorities.

It is also important to note that mere non-taxation in the source state does not suffice to apply article 23A(4) of the OECD Model. It must be the application of the tax treaty that results in the source state not being able to tax.

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107. M. Lang, *Qualifikationskonflikte im Recht der Doppelbesteuerungsabkommen, in Staaten und Steuern: Festschrift für Klaus Vogel* at p. 924 (P. Kirchhof et al. eds., C.F. Müller Verlag 2000), with reference to D-A-CH-Steuerausschuß, *Stellungnahme zum Thema "Qualifikationskonflikte*", 8 SWI 12, p. 580 (1998). *See also* M. Lang, *Die Auslegung von Doppelbesteuerungsabkommen als Problem der Planungssicherheit bei grenzüberschreitenden Sachverhalten*, in *Handbuch der internationalen Steuerplanung*, pp. 1865-1880 (3rd edn., S. Grotherr ed., Neue Wirtschafts-Briefe 2011).
108. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at para. 112 (OECD 1999), Primary Sources IBFD.
109. Para. 56.3 *OECD Model Tax Convention on Income and Capital: Commentary on Articles 23A and 23B* (15 July 2014), Treaties & Models IBFD.
110. *See already*, in that regard, M. Lang, *General Report: Double non-taxation*, in *Cahiers de Droit Fiscal international*, vol. 89a, p. 50 (Kluwer Law International, IFA 2004).

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3.3.3. Arbitration

In recent years, the OECD Model has foreseen an arbitration rule in article 25(5), which could also contribute to resolving all kinds of interpretation conflicts, and thus also qualification conflicts (*see* Article 25: Mutual Agreement Procedure section 3.1.).[111] One must primarily emphasize the effect of arbitration rules on mutual agreement procedures. As a general rule, the competent authorities of the two contracting states lose their competence to implement or continue a mutual agreement procedure once arbitration proceedings have been introduced. As a result, they are no longer "masters of the procedure". The "spectre" of arbitration often motivates tax authorities to try to agree on a solution themselves. In that respect, the most effective arbitration rule is the one that does not have to be applied at all.

If arbitration proceedings are nevertheless introduced, the decisions reached are usually binding for the contracting states. Their tax authorities must implement them. In contrast to mutual agreements, arbitration decisions are generally not subject to any judicial review. Whether these arbitration decisions will have a law-developing significance beyond the concrete case will depend on several factors. First, the arbitration decision must also contain a legal justification in order to become relevant to other cases. Unfortunately, this is not the case in the system of "baseball arbitration" favoured in the United States' tax treaties and also in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).[112] In this system, each of the two parties submits a "final offer", and the arbitration board only has the possibility of deciding in favour of one of the two proposals, not of submitting a proposal itself. Therefore, a justification – if one is issued at all – can only state why the arbitration board opted in favour of one and against the other decision proposal, but not what the arbitration board itself considered to be the most convincing solution. Second, such a decision may evidently assume a more general significance if the entire decision, or at least its essential elements, become publicly accessible. Formally, such decisions do not have a binding effect beyond the specific case. They will, however, attract attention in practice, in particular by courts, in those cases in which the arbitration decision was convincingly justified. Of course, the composition and status of the arbitration body might also play a role.[113] Therefore, decisions taken by the ECJ according to the arbitration clause of the Austria-Germany Income and Capital Tax Treaty (2000) have a greater chance of becoming relevant in other cases as well.[114]

The MLI also foresees the inclusion of arbitration rules by the signatories in their tax treaties. This may in itself be an opportunity to increase the number of arbitration clauses in tax treaties.[115] It is regrettable, however, that arbitration is not part of the MLI's minimum standards and that signatories to the MLI can choose not to include arbitration rules in their tax treaties. This may even result in a step backwards: while article 25(5) of the OECD Model is at least an integral part of the model convention and in this respect expresses the "standard" of international tax law, the fact that these rules are not included in the minimum standard of the MLI could be misconceived as a signal pointing in the opposite direction.[116]

4. Distinction from Allocation Conflicts

4.1. Allocation of income to different persons

A distinction must be made between qualification conflicts understood as interpretation conflicts or as a subcategory thereof, and allocation conflicts, since the latter involve issues of personal treaty entitlement. In articles 1 and 4(1) of the OECD Model, tax treaties are based on the allocation of income according to domestic tax law: only those to whom income is allocated under domestic law are considered to be covered by the treaty at all.[117] Therefore, contrary to qualification conflicts, allocation conflicts are not necessarily conflicts about the interpretation of a treaty. Domestic tax law systems often allocate the same income to different individuals. The most prominent scenario is the one resulting from the different treatment of partnerships: When the tax law system of one state "looks through" partnerships and allocates income to their partners, while the tax law system of the other state regards the partnership itself as the relevant tax subject, this will result in an allocation conflict: the first state taxes the income with the taxpayer, while the second state taxes the income with the partnership.

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111. *See*, in general, R. Ismer & S. Piotrowski, *Article 25*, in *Klaus Vogel on Double Taxation Conventions* para. 2 et seq. (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
112. *OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties & Models IBFD. *See*, in general, J. Kollmann & L. Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges, in International Arbitration in Tax Matters*, p. 16 et seq. (M. Lang & J. Owens eds., IBFD 2016), Books IBFD; and R. Petruzzi, P. Koch & L. Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration, in International Arbitration in Tax Matters*, p. 145 et seq. (M. Lang & J. Owens eds., IBFD 2016), Books IBFD.
113. *See*, in more detail, R. Petruzzi, P. Koch & L. Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration, in International Arbitration in Tax Matters*, p. 147-150 (M. Lang & J. Owens eds., IBFD 2016), Books IBFD.
114. *See* *art. 25(5) Austria-Ger. Income and Capital Tax Treaty* (2000), Treaties & Models IBFD; and AT: ECJ, 12 Sept. 2017, Case C-648/15, *Republic of Austria v. Federal Republic of Germany*, [2017] ECLI:EU:C:2017:664, Case Law IBFD.
115. *See already* M. Lang, *Die Auslegung des multilateralen Instruments*, 27 SWI 1, pp. 11-24 (2017).
116. On this topic *see* Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, art. 4, OJ L265 (2017) [hereinafter EU Dispute Resolution Directive (2017)].
117. *See*, for example, M. Lang, *Income Allocation Issues under Tax Treaties*, 74 Tax Notes Intl. 3, p. 292 (2014).

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In addition, there are other scenarios in which allocation conflicts may arise: one state, for instance, may allocate income to a foundation, while the other state may tax the founders or the beneficiaries.[118] A similar situation may arise in the case of mutual funds: under the law of one state, income may be allocated to the fund, while the other state may allocate such income to the investors.[119] Finally, tax law systems may even apply completely different criteria in the allocation of income: one state may follow civil law, while the relevant question for the tax law system of the other state may be who operates on the market to generate such income.[120] The application of abuse provisions may also lead to different income allocations: one state may apply its general abuse provision and allocate the income not to the legal entity but to the partner or shareholder behind it, while the tax law system of the other state may still see the legal entity as the relevant subject to tax.[121] A look-through approach may also be taken in one state based on a controlled foreign company (CFC) regime, while the other state may continue to allocate the income to the company.[122] Another example is a specific taxation regime for company groups, under which income generated in other group companies is allocated to the entity at the head of the group. If the other state does not apply such a taxation regime, the income will be allocated in a different manner.[123]

The OECD Partnership Report dealt with the first category of allocation conflicts. In it, the OECD concluded that the allocation in the state that is currently not the source state should be relevant.[124] For the purposes of the tax treaty, the source state would then be bound to the allocation in this other state. These considerations subsequently found their way into the Commentary on the OECD Model (2000).[125] Therefore, when a partnership is considered a taxpayer in its residence state, from which the income derives but the other state considers the partners resident there as allocation subjects for that income, the tax treaty concluded between the two states should be considered relevant for the income as a result of the residence of the partners in this other state.[126] If necessary, there may be limitations imposed on the taxation in the first state. If this theory had proven right, the same should then apply to the other cases of allocation conflicts – even if the OECD does not admit this.[127] Therefore, when a corporation derives income from its residence state, the shareholders are resident in the other state and this state taxes the income of the corporation in the hands of the shareholders due to a CFC regime, the shareholders would then have to be able to claim protection under the tax treaty in the residence state of the corporation. This approach is diametrically opposed to that of the OECD in respect of qualification conflicts: As is generally known, at least in the view of the OECD, the assessment by the tax authorities of the source state is relevant in the case of qualification conflicts.[128]

One cannot find a convincing justification for a result according to which the allocation in the state that is not the source state prevails in the case of allocation conflicts. Instead, in such cases, much suggests that, in each of the two states, allocation must be based on the allocation decision under each domestic tax law.[129] One must accept the fact that not all cases of double taxation can be solved by a treaty, since in those cases in which income is allocated to different individuals in the two states, cases of economic double taxation will ultimately arise. The tax treaties, however, are not designed for such scenarios.

118. *See*, in more detail, M. Lang, Die Besteuerung von Einkünften bei unterschiedlichen Personen aus dem Blickwinkel des DBA-Rechts, 10 SWI 11, p. 528 (2000).
119. *See*, in more detail, J. Schuch & C. Willvonseder, *Einkünftezurechnung im DBA-Recht und Investmentfonds*, in *Einkünftezurechnung im Internationalen Steuerrecht* p. 146 (M. Lang, J. Schuch & C. Staringer eds., Linde 2012).
120. *See*, for example, M. Lehner, *Grundlagen des Abkommensrechts* para. 5 et seq., in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
121. *See*, in more detail, G.W. Kofler, *National Report – Austria: Tax treaties and tax avoidance: Application of anti-avoidance provisions*, in *Cahiers de Droit Fiscal International*, vol. 95a, pp. 99-125 (Kluwer Law International, IFA 2010).
122. *See*, in more detail, H.J. Aigner, U. Scheuerle & M. Stefaner, *General Report*, in *CFC Legislation* p. 17 (M. Lang et al. eds., Linde and Kluwer 2004).
123. *See*, in more detail, C. Marchgraber, *Einkünftezurechnung im DBA-Recht und Gruppenbesteuerung*, in *Einkünftezurechnung im Internationalen Steuerrecht* pp. 204-205 (M. Lang, J. Schuch & C. Staringer eds., Linde 2012).
124. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at paras. 33-46 (OECD 1999), Primary Sources IBFD; for an analysis, *see* J.F. Avery Jones et al., *Characterization of Other States' Partnerships for Income Tax* , 56 Bull. Intl. Taxn. 7, pp. 316-320 (2002), Journal Articles & Opinion Pieces IBFD.
125. Paras. 32.1-32.7 *OECD Model: Commentary on Article 23* (2000).
126. *See*, however, example 17 of the OECD, *The Application of the OECD Model Tax Convention to Partnerships* at para. 131 (OECD 1999), Primary Sources IBFD, according to which a majority was of the view that the partnership state would not be obliged to apply the convention between the partner state and the partnership state because this situation is seen as a purely domestic matter from the perspective of the partnership state.
127. *See*, for example, M. Lang, *Einkünftezurechnung im Lichte des Entwurfs zu Art 1 Abs 2 OECD-MA*, 25 SWI 4, p. 155 (2015); and A. Schnitger & M. Oskamp, *Empfehlungen der OECD zur Neutralisierung von "Hybrid Mismatches" auf Abkommensebene*, 23 IStR 11, p. 388 (2014).
128. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at para. 103 (OECD 1999), Primary Sources IBFD.
129. For a critical discussion of this approach, *see* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, pp. 47-48 (IFA 2014); M. Lang, *Qualifikationskonflikte bei Personengesellschaften*, IStR 5, pp. 132-134 (2000); M. Lang, Die Besteuerung von Einkünften bei unterschiedlichen Personen aus dem Blickwinkel des DBA-Rechts, 10 SWI 11, p. 532 (2000); M. Lang, *The Application of the OECD Model Tax Convention to Partnerships* pp. 37-42 (Kluwer International and Linde Verlag 2000), Primary Sources IBFD; M. Lang, *Taxation of Income in the Hands of Different Taxpayers from the Viewpoint of Tax Treaty Law* , 55 Bull. Intl. Taxn. 12, pp. 599-600 (2001), Journal Articles & Opinion Pieces IBFD; S. Gündisch, *Analoge Abkommensanwendung zur Überwindung von Qualifikationskonflikten*, 14 IStR 24, pp. 829-835 (2005); and F. Wassermeyer, *Die abkommensrechtliche Behandlung von Einkünften einer in einem Vertragsstaat ansässigen Personengesellschaft*, 20 IStR 3, p. 90 (2011).

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4.2. Allocation of income to different individuals on the basis of different qualifications

If one takes the opinions held by the OECD, it makes a big difference whether the conflict in question is a qualification or allocation conflict. It is often hardly possible, however, to distinguish between the two kinds of conflicts. After all, allocation conflicts can be the consequence of a different qualification. The following example may illustrate this:

Austrian investors have a shareholding in a Croatian financing *komanditnodruštvo*, which is treated as a corporation under Croatian law. Under Austrian law, however, it is more like a partnership and is therefore treated as fiscally transparent. The Croatian company does not operate an undertaking but merely obtains interest income from Croatian sources. Under Croatian tax law, the interest is taxed with the Croatian company; under Austrian tax law, it is taxed with the Austrian shareholder. This results in an allocation conflict.

At the same time, however, there is also a conflict of qualification: from the Austrian investor's point of view, the treaty provision modelled on article 11 of the OECD Model is applicable. From the Croatian company's point of view, the treaty provision modelled on article 21 of the OECD Model is relevant, since there is no cross-border relationship. The interest is derived from Croatia and is received by a Croatian tax subject. Therefore, the treaty provision modelled on article 11 of the OECD Model cannot be applied.[130]

The OECD's solution proposals for allocation and qualification conflicts vary. If this is identified as an allocation conflict, the treatment in the recipient state must be relevant for the other state, at least according to the OECD.[131] The tax treaty between Austria and Croatia would then be applicable, and if this treaty contains a provision modelled on article 11 of the OECD Model, Austria would then be allowed to tax such interest and Croatia would be prevented from doing so: article 11 of the OECD Model rules out the taxation right of the source state.

If this is identified as a qualification conflict, according to the OECD, the residence state must accept the qualification of the source state.[132] If Austria were to assume taxation in Croatia based on the treaty provision modelled on article 21 of the OECD Model, it could be deduced from article 23 that Austria would be obliged to either credit or exempt. In the case of crediting, however, such crediting would be "indirect", since the tax in Croatia is levied with the company and thus with a different tax subject. If, in the case of a qualification conflict, one were to make the application of article 23 of the OECD Model, as the OECD does, subject to the question of whether the cause of the qualification conflict lies in article 3(2), the application of article 23 would not be suitable at all, and one would have to accept the qualification conflict. After all, the reason for the qualification conflict lies in the allocation conflict, and this has nothing to do with article 3(2). If one regards article 23 of the OECD Model as relevant, however, one may just as well consider Croatia to be the residence state. The application of article 23 would mean that Croatia would then have to apply the relief measure, either crediting or exemption. The question as to which state has priority here cannot be answered based on logical criteria.[133]

4.3. Allocation of income to different individuals in the light of article 1(2) of the OECD Model

In 2017, the OECD published a separate provision for the solution of allocation conflicts as the new article 1(2) of the OECD Model (2017). According to the Commentary on Article 1 of the OECD Model (2017), this provision is to have the following effect:[134] "[T]he paragraph not only serves to confirm the conclusions of the Partnership Report but also extends the application of these conclusions to situations that were not directly covered by the report." On several occasions, the OECD Commentary on Article 1 clearly spells out the reference to the OECD Partnership Report.[135] This must also be taken into account in the interpretation of the new provision.[136] The task, however, is not to interpret the OECD Commentary or the OECD Partnership Report, but only the provision of the relevant treaty itself. The OECD Commentary and the Partnership Report referred to therein can only provide clues for the interpretation of the provision, similar to the legal materials found in domestic law. Depending on the case, however, they can be superseded by the wording itself, or even by teleological or systematic arguments. The fact that the wording of the new

130. *See*, in more detail, M. Lang, *Qualifikations- und Zurechnungskonflikte im DBA-Recht*, 19 IStR 4, pp. 114-117 (2010).
131. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at paras. 33-46 (OECD 1999), Primary Sources IBFD.
132. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at para. 103 (OECD 1999), Primary Sources IBFD; for a critical discussion, *see* F. Wassermeyer & K.D. Drüen, *Art 3 OECD-MA* para. 73, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
133. *See* M. Lang, *Qualifikations- und Zurechnungskonflikte im DBA-Recht*, 19 IStR 4, pp. 117-118 (2010).
134. Para. 4 *OECD Model: Commentary on Article 1* (2017).
135. *See also* paras. 2-3 *OECD Model: Commentary on Article 1* (2017).
136. Also supported by A. Schnitger & M. Oskamp, *Empfehlungen der OECD zur Neutralisierung von "Hybrid Mismatches" auf Abkommensebene*, 23 IStR 11, p. 388 (2014).

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provision seems unmistakably to be modelled on the US Model[137] may prove to be particularly relevant for the interpretation of the provision of article 1(2) of the OECD Model.[138] Those who borrow a certain provision almost completely from another context of rules create the impression that they have also adopted the meaning of this provision.[139] Conversely, those interpreting the provision will also trace the few derogations from the model in question and the relevant incentives behind the decision not to borrow the rule completely.[140]

The provision itself reads as follows:[141] "For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State."

This is the first time that the term "fiscally transparent" has become a legal term in the OECD Model and thus itself a subject of interpretation. The General Report presented by Le Gall in 1995 at the IFA Congress in Cannes on the topic of partnerships has shown that the classification of legal entities must be done within a bandwidth, and that it is not immediately clear which criteria should be used to distinguish between opaque and transparent entities.[142] For example, profits are often determined at the level of the company, tax is often determined at the level of the shareholder and sometimes even tax is determined with the company and levied only with the shareholder. The Commentary on the OECD Model tries to provide indications for the clarification of these questions. Again, the OECD Commentary can only shed some light on the intention of the authors of the rule, but is not itself the subject of interpretation. The authors of the OECD Commentary themselves are concerned that these explanations are only of limited value, since they mention that states that believe there is a need to clarify the meaning of the term "fiscally transparent" can include a definition in their tax treaties.[143] This, however, would result in a complete legal fragmentation.

The new rule of article 1(2) of the OECD Model (2017) is formulated in a manner that, albeit granting treaty benefits to the transparent entity – though unsystematically and obviously only for the purposes of income taxes[144] – limits these benefits to those elements of income that must be treated as the income of a resident under the tax laws of the state in question. Therefore, this provision allows those who have already interpreted the OECD Model based on the opinion expressed in the OECD Partnership Report to see their interpretation expressly established in the text of the OECD Model. This rule will result in a limitation for those who – like, for instance, the Austrian VwGH [145] – assess treaty entitlement according to whom the source state allocates the income to and do not take exception to the other state's assessing the relevant entity as transparent, as long as the entity is established there or has some other close relationship to that state which would allow it to subject the entity to a comprehensive tax obligation:[146] in future, it will only be possible to grant treaty benefits insofar as the relevant income is treated there for tax purposes as income of a resident person. The decisive question will be as to when one can assume that this condition is met and whether, for instance, tax-exempt corporations can also be covered by the tax treaty according to this provision. However, this restriction can only be relevant for those tax treaties that will include a rule similar to that of the new article 1(2) of the OECD Model (2017). Nothing changes for all other tax treaties. The amendment of a particular tax treaty cannot in any way have a future impact on the previously existing legal situation or even on the interpretation of other tax treaties in which article 1(2) of the OECD Model (2017) was not or not yet introduced. The proponents of the various positions previously held by the OECD and, for instance, by the VwGH will feel vindicated by article 1(2) of the OECD Model (2017): having already interpreted the legal situation in this manner in the past, they will feel assured by the current "clarification". Supporters of the opposing position, however, can now be more certain that the theories of the OECD Partnership Report cannot be implemented without a separate legal basis. Neither of

137. *United States Model TaxConvention on Income* (15 Nov. 2006), Treaties & Models IBFD; see, for example, H. Jochum, *Die Behandlung hybrider Gesellschaften nach dem neuen DBA Deutschland – Niederlande*, 23 IStR 1, p. 3 (2014).
138. *See*, for example, A. Schnitger & M. Oskamp, *Empfehlungen der OECD zur Neutralisierung von "Hybrid Mismatches" auf Abkommensebene*, 23 IStR 11, pp. 387-388 (2014).
139. For an analysis, *see* A. Linn, *DBA USA Art. 1* at para. 48-79, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023), which will also be useful in the interpretation of art. 1(2) OECD Model. *See also* the considerations of H. Jochum, *Die Behandlung hybrider Gesellschaften nach dem neuen DBA Deutschland – Niederlande*, 23 IStR 1, pp. 1-10 (2014); and M. Reinert, *§ 50d Abs 3 EStGimRahmen des neuen DBA-Niederlande: wirksameVerhinderung des treaty-shopping?*, 23 IStR 15, pp. 553-558 (2014), on the parallel provision of art. 1(2) Ger.-Neth. Income and Capital Tax Treaty (2016), Treaties & Models IBFD, which may also become relevant in the interpretation of art. 1(2) OECD Model.
140. *See*, in more detail, A. Schnitger & M. Oskamp, *Empfehlungen der OECD zur Neutralisierung von "Hybrid Mismatches" auf Abkommensebene*, 23 IStR 11, pp. 387-388 (2014).
141. Art. 1(2) OECD Model (2017).
142. *See*, in more detail, J.P. Le Gall, *General Report: International Income Tax Problems of Partnerships*, in *Cahiers de Droit Fiscal International*, vol. 80a (Kluwer Law International, IFA 1995).
143. Para. 9 *OECD Model: Commentary on Article 1* (2017); also maintained by A. Schnitger & M. Oskamp, *Empfehlungen der OECD zur Neutralisierung von "Hybrid Mismatches" auf Abkommensebene*, 23 IStR 11, p. 389 (2014).
144. According to art. 2(1) *OECD Model*, the OECD Model applies to taxes on income and on capital.
145. AT: VwGH [Supreme Administrative Court], 18. Oct. 2006, 2003/13/0052, VwSlg 8168 F/2006, Case Law IBFD.
146. *See* M. Lang, *Tendenzen in der Rechtsprechung des österreichischen Verwaltungsgerichtshofs zu den Doppelbesteuerungsabkommen*, in *IFF Forum für Steuerrecht* 1, p. 29 (Inst. für Finanzwissenschaft und Finanzrecht an der Univ. St. Gallen 2012).

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the two arguments is legally relevant for the interpretation of the legal situation that previously existed in the absence of article 1(2) of the OECD Model (2017).[147]

5. Avoiding Qualification Conflicts for Allocation Rules for Different Kinds of Income Based on Examples

5.1. The system of allocation rules

The allocation rules require that a tax treaty is applicable both from a personal and a substantive point of view. Article 1 of the OECD Model states that only those who are resident in at least one of the contracting states are covered by the tax treaty. Article 2 of the OECD Model decides which taxes are covered under the treaty. The allocation rules mostly repeat these requirements. By referring to the resident and by using the term “income” (or a similar term) or the term “capital”, they emphasize that the substantive scope of the tax treaty must be met. Even in those cases in which an allocation rule does not use the term “resident” itself (e.g. articles 8 and 19 of the OECD Model), this requirement for the application arises from article 1.[148]

The term “income” is relevant for all allocation rules – with the exception of the rule of article 22 of the OECD Model, which is applicable for taxes on capital. It constitutes a generic term:[149] In some allocation rules, it is mentioned as such; in others, it is referred to as “profits”, “payments”, “remunerations” or other similar terms. The fact that these terms also mean income can be derived from article 21(1) of the OECD Model (Other income) and from the method article, which also refers to income and thus establishes a link to the allocation rules. All these terms refer to the tax bases in accordance with the relevant domestic law.[150] Accordingly, it is left open whether they mean a gross or net figure. Instead, the result under domestic law is decisive. According to the OECD Model, the domestic legislators are free to choose whether and to what extent they will allow the deduction of expenses. Only articles 10(2) and 11(2) of the OECD Model point out that the highest admissible tax of the source state must be based on a percentage of the gross amount.[151]

Article 22 of the OECD Model also requires that a tax treaty is applicable both from a personal and a substantive point of view. Three of the four paragraphs of article 22 of the OECD Model directly or indirectly refer to the notion of “resident”, yet the requirements of article 1 must also be met for the purposes of article 22(3). In the context of article 22 of the OECD Model, the task of the term “capital” is that of the term “income” in the other allocation rules. For the purposes of the taxes on capital covered by the OECD Model, the terms “capital” and “elements of capital” used in the four paragraphs are linked to the tax base of the relevant domestic law.[152]

The relationship between the connection to the tax base of the domestic law, expressed through the term “income” and similar terms and capital, on the one hand, and the relevant tax source under the tax treaty, on the other, is paraphrased differently in the allocation rules: article 7 of the OECD Model simply refers to the profits “of an enterprise”, and article 8 to profits “from the operation” of certain ships or aircraft. Articles 10, 11, and 12, as well as articles 18 and 19 of the OECD Model use the word “pay”. Articles 15, 16, and 17 of the OECD Model refer to “remunerations”, “payments”, or income “derived” by a person from an activity. In all these cases, one should not attach too much importance to the wording and its variations. What these terms have in common is that they illustrate that the persons to whom the income is attributed under domestic tax law are also the relevant allocation subjects for the purposes of the tax treaty. This is because tax treaties do not contain any separate allocation provisions, but rather intend to identify the persons who are obliged under domestic tax law.[153]

Just like the OECD Model, allocation rules generally do not require that double taxation has occurred. Therefore, they can also be applied if one of the two states does not tax under its domestic law. They often do not even require a cross-border activity of the taxpayer in relation to the other contracting state. Therefore, it is not necessary for the application of article 7 of the OECD Model that a permanent establishment is situated in the other state. This allocation rule is already applicable if the taxpayer only has individual business relationships with persons resident in the other contracting state. Article 7 of the OECD Model is applicable even if the activity of the company exclusively refers to the residence state or third countries. In all these cases, according to article

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147. *See*, in more detail, M. Lang, *Einkünftezurechnung im Lichte des Entwurfs zu Art 1 Abs 2 OECD-MA*, 25 SWI 4, pp. 153-163 (2015).
148. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 4 (F. Wassermeyer ed., Beck Verlag 2015).
149. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 4 (F. Wassermeyer ed., Beck Verlag 2015); *see also* K.D. Drüen, *Vor Art 6-22 OECD MA* para. 3, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
150. *See*, for more detail, M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 5 (F. Wassermeyer ed., Beck Verlag 2015); *see also* K.D. Drüen, *Vor Art 6-22 OECD MA* para. 3 et seq. in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); J. Schuch, *Der Anrechnungshöchstbetrag*, in *Die Methoden zur Vermeidung der Doppelbesteuerung: Anrechungs- und Befreiungsmethode* p. 19 (W. Gassner et al. eds., Linde 1995).
151. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at p. 187 (F. Wassermeyer ed., Beck Verlag 2015).
152. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 6 (F. Wassermeyer ed., Beck Verlag 2015).
153. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 7 (F. Wassermeyer ed., Beck Verlag 2015); *see also* K.D. Drüen, *Vor Art 6-22 OECD MA* at para. 15, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).

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7 of the OECD Model, the exclusive right of taxation of the residence state remains – in relation to the other contracting state. Article 7 of the OECD Model grants the other state a taxation right if a permanent establishment is situated there and the income has to be attributed to this permanent establishment. Neither does the application of articles 8, 15, 18, or 21(1) of the OECD Model require that the income be derived from the other state.[154]

Other allocation rules, however, require a cross-border relationship between the two contracting states: article 6 of the OECD Model, for instance, requires that the income be derived by a resident of a contracting state from immovable property situated in the other contracting state. Similarly, dividends, interest and royalties must be derived from the one state and have their beneficial owner in the other state. In the case of directors' fees, it is also required that the company is resident in one state and the person receiving the payments is resident in the other state (article 16 of the OECD Model). Similarly, entertainers and sportspersons must be resident in one state and exercise their activity in the other state (article 17(1) of the OECD Model). When this income is derived from the residence state itself or a third country, it is covered by the scope of application of the tax treaty, but not by these allocation rules. In such cases, article 7 or 21 of the OECD Model often applies.[155]

Interpretation of the allocation rule: individual constituent elements of the allocation rules make a reference to the domestic law of the relevant contracting state. This applies to the term "resident", as well as to the terms "income", "profits" and similar terms or to the term "capital". The term "resident" is defined in article 4(1) of the OECD Model, and its interpretation must take place in consideration of domestic law (*see* Article 4: Resident section 2.). The same is true for the treaty terms linked to the tax bases of domestic law.[156]

All other constituent elements of the allocation rules must be understood within the treaty context. However, if they are not defined, it does not mean in any way that one should immediately refer to domestic law. Instead, the context of the tax treaty mentioned in article 3(2) of the OECD Model requires the provision's development of law, as well as its systematics and teleology, to be taken into account, and thus requires having recourse to the plethora of the methods admissible for interpretation to achieve an interpretation in the context of the tax treaty. This leaves hardly any room for recourse to domestic law.[157] If, for instance, the term "employment" (article 15 of the OECD Model) is not defined in a tax treaty, this does not mean an obligation to have recourse to the domestic law of the two states and thus to have to accept, for example, different meanings of the same treaty term in the application of the tax treaty in the two states – and thus the possibility of double taxation or double non-taxation.[158]

There are also definitions in the OECD Model for some individual constituent components of allocation rules, something that further facilitates the autonomous interpretation of the tax treaty. This is the case, for instance, with the phrases "enterprise of a Contracting State" and "international traffic" (article 3(1) of the OECD Model). Some of these treaty definitions contain, at least in part, references to domestic law (e.g. articles 6(2) and 10(3) of the OECD Model). In these cases, however, the law of one of the contracting states is binding for both states. Therefore, qualification conflicts are not likely to emerge.[159]

All income covered by the personal and substantive scope of application of the OECD Model also falls under one of the allocation rules. Article 21(1) of the OECD Model must be understood as a catch-all provision. This provision covers income that is not covered by any other allocation rule (*see* Article 21: Other Income section 1.1.1.1.).[160] Therefore, article 21(1) of the OECD Model is of great significance – not only, but also – for several types of income from third countries or from the residence state.[161]

Within the allocation rules, however, a few provisions exist that form a self-contained system: income from employment, for instance, falls under article 15(1) of the OECD Model when none of the other, more special, provisions of the other paragraphs of article 15 or articles 17, 18, or 19 apply (*see* Article 15: Income from Employment section 6.1.1.). In a similar manner, article 7 of the OECD Model has a catch-all character for business profits – *see*, however, article 21(2) of the OECD Model (*see* Article 7: Business Profits section 6.1.1.1.). In addition, all gains from the alienation of property are covered by article 13 of the OECD Model.

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154. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 8 (F. Wassermeyer ed., Beck Verlag 2015).
155. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 9 (F. Wassermeyer ed., Beck Verlag 2015).
156. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 10 (F. Wassermeyer ed., Beck Verlag 2015).
157. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 11 (F. Wassermeyer ed., Beck Verlag 2015); *see also* M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 283 (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997); dissenting, F. Wassermeyer & K.D. Drüen, *Art 3 OECD-MA* para. 71a, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
158. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 11 (F. Wassermeyer ed., Beck Verlag 2015); *see also*, in more detail, M. Lang & U. Zieseritsch, *Der Begriff der unselbständigen Arbeit nach Art. 15 OECD-MA*, in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, p. 34 (W. Gassner et al. eds., Linde 2003); dissenting, F. Wassermeyer & M. Schwenke, *Art 15 OECD MA* para. 65, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
159. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 12 (F. Wassermeyer ed., Beck Verlag 2015); *see also* DE: BFH (Federal Fiscal Court), 24 Oct. 1984, I R 228/81 (on the *Ger.-Ire. Income and Capital Tax Treaty* (1962), Treaties & Models IBFD); and J.F. Avery Jones et al., *The Origins of Concepts and Expressions Used in the OECD Model and Their Adoption by States*, 51 British Tax Review, p. 734 (2006), with n. 245.
160. *See*, for example, M. Lang, *Introduction to the Law of Double Taxation Conventions*, para. 174 (Linde 2021).
161. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 13 (F. Wassermeyer ed., Beck Verlag 2015).

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Article 13(5) of the OECD Model is a catch-all provision for all gains from the alienation of property that are not covered by any other provision of article 13 (*see* Article 13: Capital Gains section 2.1.7.).[162]

In the area of taxation of capital, article 22(4) of the OECD Model has a function similar to article 13(5) in the case of capital gains and article 21(1) in the case of income in general. Capital not covered by any other paragraph of article 22 falls under article 22(4) of the OECD Model.[163]

The areas of application of the individual allocation rules exclude each other, since their legal consequences are different, with the result that these provisions can only live up to their task if it is ensured that each situation falls under one single allocation rule only.[164] Accordingly, the OECD Model contains a series of express priority provisions in case of conflict. Article 6(4) of the OECD Model, for instance, provides for a priority of article 6 of the OECD Model over article 7 and article 8.[165] Article 7(4) of the OECD Model makes clear that all other provisions relevant for business profits take precedence over the provisions of article 7. This priority relation, however, is reversed in favour of article 7 of the OECD Model in specific cases due to the permanent establishment provisos of articles 10(4), 11(4), and 12(3). Article 15(1) of the OECD Model establishes the priority of articles 16, 18, and 19 over these general provisions for employment. The introductory phrase of article 17(1) of the OECD Model makes clear that article 17 takes precedence over article 15. Within article 15 of the OECD Model, the introductory phrases of paragraphs 2 and 3 make clear that article 15(3) is the more special provision compared to article 15(2), and the latter in turn is the more special provision compared to article 15(1). With regard to pensions, the introductory phrase of article 18 of the OECD Model clearly shows that article 19(2) takes precedence over it.[166]

However, priority provisions are not always in place: This applies, for instance, to the relation between article 17 and article 18 of the OECD Model, and hence to the question as to whether pensions of an employed entertainer or sportsperson are covered by article 17 or article 18. There are equally few express provisions as to whether the entertainer or sportsperson employed by a political subdivision or a local authority should be covered by the provisions for entertainers and sportspersons (article 17 of the OECD Model) or by those for civil servants (article 19(1) of the OECD Model). In all these cases, priority must be awarded to one of the provisions by way of interpretation. To clarify the relation between article 17 and article 19 (1) of the OECD Model, the mention of article 17 in article 19(3) suggests that article 19(1) may otherwise take precedence over article 17.[167]

Not all of the priority provisions, however, belong to the provisions placed in article 6 to article 21 of the OECD Model. Article 9 of the OECD Model is a provision that was placed in the immediate proximity of articles 7 and 8 presumably because it is also relevant for business profits. Contrary to the allocation rules, it does not govern cases of juridical double taxation but aims at providing relief from economic double taxation instead. Article 9(1) of the OECD Model requires contracting states to formulate their provisions for relations between associated enterprises in a manner modelled on the arm's length principle. Domestic provisions conflicting with this principle and which lead to taxation in excess of this principle will be replaced by article 9(1) of the OECD Model in the scope of this provision. Since article 9(1) of the OECD Model does not form part of the allocation rules,[168] there is no objection to applying article 9 next to article 7 or article 8, without giving priority to either article 9 or to the other provisions mentioned.[169]

Article 20 of the OECD Model is another provision that does not fit into the system of allocation rules (*see* Article 20: Students, Teachers and Professors section 1.1.2.1.2.).[170] This provision prevents the state in which a student or business apprentice is present from taxing these when the payments are derived from sources outside that state. Especially when this state has meanwhile become the residence state, the previous residence state will often have no possibility to impose taxes under its domestic law. Therefore, the consequence is often double non-taxation. Article 20 of the OECD Model is thus similar to a mere tax exemption provision that would better suit domestic law,[171] since allocation rules divide taxation rights in a manner that gives the state to which the taxation right was allocated a realistic possibility of actually exercising this right. Article 20 of the OECD Model is

162. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 14 (F. Wassermeyer ed., Beck Verlag 2015).
163. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 15 (F. Wassermeyer ed., Beck Verlag 2015).
164. M. Lang, *Introduction to the Law of Double Taxation Conventions*, paras. 176-177 (Linde 2021).
165. *See* E. Reimer, *Art. 6* para. 199 et seq., in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
166. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 16 (F. Wassermeyer ed., Beck Verlag 2015).
167. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 17 (F. Wassermeyer ed., Beck Verlag 2015); and M. Schwenke & F. Wassermeyer, *Art 17 OECD MA* para. 17, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
168. M. Lang, *Introduction to the Law of Double Taxation Conventions*, paras. 472-482 (Linde 2021).
169. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 18 (F. Wassermeyer ed., Beck Verlag 2015).
170. M. Lang, *Does Art. 20 of the OECD Model Convention Really Fit into Tax Treaties?*, in *Tax Polymath: A Life In International Taxation: Essays in Honour of John F. Avery Jones*, p. 257 (P. Baker & C. Bobbett eds., IBFD 2010), Books IBFD.
171. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 18 (F. Wassermeyer ed., Beck Verlag 2015); and, in more detail, M. Lang, *Does Art. 20 of the OECD Model Convention Really Fit into Tax Treaties?*, in *Tax Polymath: A Life In International Taxation: Essays in Honour of John F. Avery Jones*, p. 257 (P. Baker & C. Bobbett eds., IBFD 2010), Books IBFD; *see also* P. Baker, *Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and on Capital*, loose-leaf, Art. 20 B1 (Sweet & Maxwell Tax Library 2001).

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not such an allocation rule. Against this background, it is unclear whether article 20 of the OECD Model actually takes precedence over the application of 15, or whether the two provisions can be applied next to each other.[172]

Allocation rules are mostly structured in such a manner that they either leave the taxation right of the residence state unaffected, or even expressly confirm it. In that regard, they are not constitutive. Their decisive importance applies to the source state: they determine, for instance, that the source state may tax only to the extent that a permanent establishment is situated there and the profits are attributable to this permanent establishment (article 7 of the OECD Model), that an employment is exercised there (article 15 of the OECD Model) or that the income is derived from there (article 11 of the OECD Model). In some cases, they also limit the taxation right of the source state with regard to the amount (articles 10 and 11 of the OECD Model), though they regularly refer to a percentage of the gross amount.[173]

But there are also exceptions to this: article 19(1)(a) and (2)(a) of the OECD Model grants the paying state the exclusive right of taxation for salaries, wages and other similar remuneration, as well as for pensions that are paid in respect of services rendered to that state or one of its subdivisions or authorities. If this state is not also the residence state, the taxation right of the residence state is thus ruled out. The income must be exempt in the residence state. In these cases, the application of the method article is no longer required to avoid double taxation. Nevertheless, the residence state retains the right to foresee the progression provision.[174]

5.2. Business profits

5.2.1. Article 7 of the OECD Model

One of the central allocation rules of the OECD Model is article 7. Time and again, scholars have claimed that recourse must be taken to the domestic law of the contracting states for the interpretation of the term "enterprise" (*see* Article 7: Business Profits section 5.1.2.). This would be an application scenario of article 3(2) of the OECD Model: in the absence of a definition and the possibility of interpretation from the context, there would be no other alternative but to resort to domestic law.[175] Accordingly, this would render qualification conflicts inevitable: if the term "enterprise" is to be interpreted according to domestic law, it is evident that different meanings of this term may cause article 7 of the OECD Model to have a different scope of application in the two contracting states.

The qualification conflicts resulting from the application of domestic law, however, can be avoided. For several reasons, the term "enterprise" must be interpreted from the context of the tax treaty. On the one hand, the term can be found not only in article 7 of the OECD Model and other allocation rules but also in article 24(3), (4) and (5). Assuming that this term has the same meaning in all these provisions, it would be questionable which legal areas of domestic law would have to be primarily used: according to article 24(6) of the OECD Model, the provisions of this article shall, "notwithstanding the provisions of article 2, apply to taxes of every kind and description". Therefore, when the term "enterprise" in domestic law is also used in VAT law, the understanding of the term there would in any event not be given priority for the purposes of allocation rules according to article 3(2) of the OECD Model. However, there would be no objection to this for the purposes of article 24.[176] In addition, this term does by no means appear in all tax law systems. Most tax law systems that apply common law have absolutely no notion of this term.[177] Therefore, a reference to domestic law would often be pointless. Moreover, the phrases "enterprise of a Contracting State" and "enterprise of the other Contracting State" have been defined in article 3(1) of the OECD Model from the very beginning. Though the object of this definition is only to attribute an enterprise to a contracting state through the person carrying on the enterprise, at least a definition exists. Therefore, according to the wording of article 3(2) of the OECD Model, it is impossible to take recourse to

172. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 19 (F. Wassermeyer ed., Beck Verlag 2015); and, in more detail, M. Lang, *Does Art. 20 of the OECD Model Convention Really Fit into Tax Treaties?*, in *Tax Polymath: A Life In International Taxation: Essays in Honour of John F. Avery Jones*, p. 257 (P. Baker & C. Bobbett eds., IBFD 2010), Books IBFD.

173. *See already* M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 20 (F. Wassermeyer ed., Beck Verlag 2015).

174. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at para. 21 (F. Wassermeyer ed., Beck Verlag 2015); *see also* F. Wassermeyer & K.D. Druen, *Art. 19 OECD-MA* para. 58, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); FR: ECJ, 12 May 1998, Case C-336/96, *Gilly v. Directeur des services fiscaux du Bas-Rhin*, Case Law IBFD (accessed 31 Mar. 2023), at para. 31; para. 2 OECD Model Tax Convention on Income and Capital: Commentary on Article 19 (Condensed Version) (2017), Treaties & Models IBFD; P. Pistone, *Articles 19(1), 19(3) and 28: Government Service and Members of Diplomatic Missions and Consular Posts - Global Tax Treaty Commentaries*, Global Topics IBFD (accessed 31 Mar. 2023); for a critical perspective, *see* M. Lang, *Article 19(2): The Complexity of the OECD Model Can Be Reduced*, Bull. Intl. Taxn. pp. 17-22, (2007), Journal Articles & Opinion Pieces IBFD, at ch. 4.1; for a different approach, *see* P. Schoueri, *Comparison of the OECD and ILADT Model Conventions*, 68 Bull. Intl. Taxn. 9 (2014), Journal Articles & Opinion Pieces IBFD, who underlines that the ILADT Model provides for exclusive taxation in the residence state.

175. *See*, for example, H. Loukota et al., *Art 7 Unternehmensgewinne* para. 6, in *Internationales Steuerrecht* (H. Loukota et al eds., Manz 2022) rdb.at; F. Wassermeyer, *Art. 7 OECD-MA* para. 14, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and F. Wassermeyer, *Die Auslegung von Doppelbesteuerungsabkommen durch den Bundesfinanzhof*, 67 StuW 3, p. 406 (1990).

176. *See* M. Lang, *Der Begriff "Unternehmen" und Art. 24 OECD-Musterabkommen*, 21 SWI 1, pp. 16-18 (2011).

177. *See* J.F. Avery Jones et al., *The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States*, 60 Bull. Intl. Taxn. 6, p. 223 (2006) Journal Articles & Opinion Pieces IBFD.

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domestic law under this provision (*see* Treaty Interpretation section 5.1.2.4.2.5.).[178] Although, since 2000, paragraph 1 of the Commentary on Article 3 of the OECD Model has pointed out that the term "enterprise" is to be defined according to domestic law,[179] at the same time, the term "enterprise" was also defined in article 3(1)(c) as the carrying on of any business.[180] This definition is closely linked to the explanation of the term "business" in article 3(1)(h) of the OECD Model, which thus also includes the exercise of a freelance or other independent activity.[181] The objective was to make clear that, based on the 2000 version of the OECD Model, the income previously covered by article 14 now falls under article 7. At least, there has been an additional definition in the OECD Model ever since, and hence an additional argument for ruling out the use of domestic law under article 3(2) of the OECD Model.[182]

The term "enterprise" can be interpreted from the context of the OECD Model: the term is used not only in article 7 but also in articles 8, 13, and 22; therefore, its meaning by all means extends beyond article 7. The priority rules in article 6(4) and article 17(1) of the OECD Model demonstrate that the term "enterprise" also covers parts of these allocation rules, since these rules would otherwise become meaningless.[183] It is deduced from article 7(4) of the OECD Model that dividends, interest and royalties can also be part of the profits of an enterprise.[184] Ultimately, it is evident that all kinds of independent activity are covered and that this term must above all be distinguished from employment, mostly referred to in article 15 of the OECD Model.[185] Coulombe (1982) had already pointed out that dependence is the most important element for article 15 of the OECD Model.[186] The term "carried on", used in connection with "enterprise" in article 3(1) of the OECD Model, also suggests that "enterprise" is also linked to the responsibility and risk of the person to whom the enterprise is attributed.[187] By applying autonomous interpretation in *Thiel v. Federal Commissioner of Taxation*, the Australian High Court has shown that even individual activities can qualify as enterprises within the meaning of the tax treaty.[188]

According to article 7 of the OECD Model, the taxation right of the source state depends on whether a permanent establishment is situated there and whether profits must be attributed to this permanent establishment. In the case of the term "permanent establishment", it is undisputed that the meaning of the term under the tax treaty is not based on domestic law. The definition of article 5 of the OECD Model is relevant for the purposes of the treaty (*see* Article 5: Permanent Establishment section 2.1.).[189] The context of the treaty also requires that terms used in article 5 of the OECD Model for the definition of permanent establishment must also be interpreted autonomously, since a definition of permanent establishment detached from domestic law would be useless if these terms were again not understood consistently in both contracting states, because the terms used for definition purposes would have to be understood according to domestic law.[190] Therefore, qualification conflicts cannot emerge when article 5 of the OECD Model is interpreted correctly.

5.2.2. Article 8 of the OECD Model

The application of article 8 of the OECD Model also requires the existence of an enterprise. The interpretation of this term, relevant for the purposes of article 7 of the OECD Model, is also relevant for article 8. Article 8 of the OECD Model is the special rule vis-à-vis article 7.[191] Article 7(4) of the OECD Model confirms the priority of article 8.[192]

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178. *See* M. Lang, *DBA und Personengesellschaften – Grundfragen der Abkommensauslegung*, 16 IStR 17, p. 609 (2007).
179. Para. 1 *OECD Model: Commentary on Article 3* (2000).
180. *See OECD, Issues Related to Article 14 of the OECD Model Tax Convention*, pp. 27-28 (OECD 2000).
181. *See*, for example, E. Reimer, *Article 7* para. 65, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
182. *See* M. Lang, *DBA und Personengesellschaften – Grundfragen der Abkommensauslegung*, 16 IStR 17, at p. 609 (2007); and M. Lang, *Der Begriff "Unternehmen" und Art. 24 OECD-Musterabkommen*, 21 SWI 1, pp. 16-17 (2011).
183. *See* M. Lang, *Der Begriff "Unternehmen" und Art. 24 OECD-Musterabkommen*, 21 SWI 1, p. 14 (2011).
184. *See*, for example, A. Hemmelrath, *Art. 7* para. 17, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
185. *See* M. Lang, *Der Begriff "Unternehmen" und Art. 24 OECD-Musterabkommen*, 21 SWI 1, p. 15 (2011).
186. *See* G. Coulombe, *General Report: Taxation of payments to non-residents for independent personal services*, in *Cahiers de Droit Fiscal International*, vol. 67b, p. 64 (IFA 1982).
187. *See* M. Lang, *Der Begriff "Unternehmen" und Art. 24 OECD-Musterabkommen*, 21 SWI 1, p. 16 (2011).
188. AU: HCA, 22. Aug. 1990, *Thiel v. Federal Commissioner of Taxation* , 90 ATC 4717, Case Law IBFD.
189. *See*, for example, M. Görl & C. Gradl, *Art. 5* para. 7, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
190. *See* M. Lang, *Der sachliche Anwendungsbereich der Doppelbesteuerungsabkommen auf dem Gebiet der Steuern vom Einkommen und vom Vermögen, in Praxis des Internationalen Steuerrechts: Festschrift für Helmut Loukota* pp. 269-270 (H. Jirousek & M. Lang eds., Linde 2005).
191. *See* G. Kofler, *Article 8 OECD Model: Time for a Change?* , in *Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties* p. 129, with further references (G. Maisto ed., IBFD 2017), Books IBFD; G. Kofler, *Art. 8*, in *Klaus Vogel on Double Taxation Conventions* para. 17 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); M. Lang, *The Definition of International Traffic under Article 3(1)(e) of the OECD Model Convention* , in *Practical Problems in European and International Tax Law* p. 216 (H. Jochum et al. eds., IBFD 2016), Books IBFD; J. Rieß & S. Kreutziger, *Art. 8 OECD-MA* para. 2, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); A. Hemmelrath, *Art. 8* para. 8b, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); H. Wolter, *Internationale Besteuerungsprobleme bei Luftfahrtunternehmen*, in *Handbuch der International Steuerplanung*, p. 1361 (3rd ed., S. Grotherred., NWB Verlag 2011); and G. Maisto, *Shipping, Inland Waterways Transport and Air Transport (Article 8 OECD Model Convention)*, in *Source versus Residence* pp. 27-28 (M. Lang et al. eds., Kluwer Law International 2008).
192. Para. 10 *OECD Model: Commentary on Article 7.*

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The essential constituent element of article 8(1) of the OECD Model is international traffic. This term is defined in article 3(1)(e). It means any transport by a ship or aircraft, except when the ship or aircraft is operated solely between places in ta contracting state, and the enterprise that operates the ship or aircraft is not an enterprise of that state. [193]

The terms "ship" and "aircraft" are also constituent elements of article 8 of the OECD Model itself. Though they are not defined in the OECD Model, they must be interpreted autonomously.[194] This also results from the definition in article 3(1)(e) of the OECD Model. For the purposes of this definition, these terms can only be interpreted from the context of the tax treaty, because if the domestic laws were relevant, the definition would be meaningless. When, however, the same terms are also used in article 8 of the OECD Model, it must be assumed that they will have the same meaning as in article 3(1)(e) of the OECD Model.

5.2.3. Article 6 of the OECD Model

In relation to article 7 of the OECD Model, article 6 is a special provision as well. This results explicitly from article 6(4) of the OECD Model.[195] In contrast to article 8 of the OECD Model, however, the term "enterprise" is not a constituent element of article 6. Therefore, article 6 may also cover income that could not otherwise be attributed to article 7.

It is often pointed out in connection with article 6(2) of the OECD Model that the term "immovable property" results from reference to the domestic law of the applying state.[196] Upon closer scrutiny, however, it becomes clear, on the one hand, that the reference to the domestic law is only part of the definition of article 6(2) of the OECD Model.[197] The definition of immovable property also includes a positive and a negative list, which must be interpreted solely based on the tax treaty.[198] On the other hand, the reference to domestic law is embedded in treaty terms that define limits for this reference – as will be demonstrated below (*see also* Article 6: Immovable Property section 5.1.1.).

According to sentence 1 of article 6(2) of the OECD Model, the term "immovable property" has the meaning "which it has under the law of the Contracting State in which the property in question is situated".[199] Therefore, domestic law is relevant only to the extent it involves "property" at all. This term is of central importance in article 13 of the OECD Model. Article 13(1) of the OECD Model itself refers to "immovable property", while article 13(2) covers "movable property". Although article 13(3) and (4) mention "property" only in passing or not at all, the backup clause of article 13(5) indicates that this provision applies to the "alienation of any property".[200] Therefore, along with immovable and movable property, as well as ships and aircraft and shares, "property" is also considered everything else that can be subject to "alienation".[201]

As a result, the term "property" sets limits for reference to the domestic law of the source state: To address a case that was the subject of an eventually unsolved mutual agreement procedure between Austria and Belarus several years ago,[202] when a state considers gambling machines as immovable property under domestic law, this will be reflected in treaty law, leading to the application of article 6 of the OECD Model. If, for instance, income of employees operating or situated within the state were to become income from immovable property by way of legal fiction under domestic law, this cannot affect treaty law, since people cannot be considered to be "property".

The property must also be "situated" in a specific contracting state. This term can be found in several other passages in the OECD Model. The permanent establishment prerogatives of article 10(4), article 11(4), and article 12(3) demonstrates that a permanent establishment can in any case be "situated". This term, however, goes far beyond that: "situated" is also often used in connection with "place of effective management", as, for instance, in the tiebreaker rule of article 4(3) of the OECD Model, but also in connection with shipping and air transport enterprises in article 8, article 13(3), and article 15(3). This term does not result in a

193. *See* M. Lang, *Triangular Cases – Das vernachlässigte Problem des DBA-Rechts*, 29 SWI 9, p. 420 et. seq. (Linde 2019).
194. M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 75 (G. Maisto ed., IBFD 2015); dissenting, A. Hemmelrath, *Art. 8* at para. 12, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); J. Rieß & S. Kreutziger, *Art. 8 OECD-MA* at para. 15, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and G. Kofler, *Art. 8*, in *Klaus Vogel on Double Taxation Conventions* para. 27 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
195. Para. 4 *OECD Model: Commentary on Article 6*; and M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* at pp. 57-58 (G. Maisto ed., IBFD 2015), Books IBFD; *see also See* E. Reimer, *Art. 6* para. 8 et seq., in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
196. M. Lang, *Verteilungsnormen*, in *Doppelbesteuerung: Festgabe für Franz Wassermeyer*, at p. 190 (F. Wassermeyer ed., Beck Verlag 2015).
197. *See See* E. Reimer, *Art. 6* para. 67, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
198. *See* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 48 (2015).
199. Art. 6(2) *OECD Model*.
200. *See* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 48 (2015), at p. 44.
201. E. Reimer, *Art. 6* para. 89, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
202. *See* W. Gassner & M. Lang, *Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna, in Liber amicorum Luc Hinnekens* p. 226 (F. Vanistendael ed., Bruylant 2002); *see also* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 44 (2015); and M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB 8, p. 293 (2011).

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further limitation of the term “property”, since “place of effective management” refers to the place where decisions are taken, and this can also be done in places that are not the “property” of the enterprise.[203]

The term “situated”, however, may also result in other convention limits for references to domestic law. Were a state to generally declare all gambling machines to be immovable property, regardless of where a device is located, income from immovable property would exist only to the extent that the source of this income is situated in this state.[204] Even if this state were to declare income from all gambling machines ever produced in its territory as income derived from its state, pursuant to article 6(2) of the OECD Model, this state would have the taxation right only for those gambling machines situated there at the time relevant for the establishment of the tax liability.

An additional limitation of reference to domestic law may result from the systematics of the OECD Model. Article 13(4) of the OECD Model covers gains derived from the alienation of shares in real estate companies, described in detail.[205] It is conceivable that, under domestic law, certain shares – especially those in real estate companies – are themselves considered immovable property. In recent years, however, article 13(4) of the OECD Model has provided a separate provision in the case of alienation.[206] This could lead to the conclusion that the treatment of certain shares as immovable property under domestic law would otherwise not have an impact on treaty law. If this is the case for gains from the alienation of shares, this will constitute an argument in favour of assuming the same consequence for current income from shares, covered by article 10(3) of the OECD Model.[207] It is equally conceivable, however, to interpret the relation of article 6(2) of the OECD Model to article 13(4) and to the positive list of article 6(2) in this manner, and to assume that the taxation right of the *situs* state in the scope of article 13(4) exists regardless of whether the shares are subjected to the same taxation treatment as immovable property under domestic law.

Sentence 1 of article 6(2) of the OECD Model refers to the right of the contracting state in which the property is situated. Therefore, the qualification of this state is also binding for the other contracting state. The reference in article 6(2) of the OECD Model thus distinguishes itself from that in article 3(2), which refers to the applying state, and hence looks at the source state for the purposes of the source state and at the residence state for the purposes of the residence state.[208] This, however, also delivers a strong counterargument against the aforementioned opinion of Avery Jones.[209] if one were to conclude – as he does – from article 3(2) of the OECD Model, on the one hand, and from article 23, on the other, that the right of the source state is relevant for the residence state, this would render obsolete the reference in sentence 1 of article 6(2), which results in precisely this legal consequence. It would make little sense to allege that the authors of the OECD Model declared the right of the source state to be relevant for a narrowly delimited scope of the immovable property in sentence 1 of article 6(2) when this legal consequence would already generally result from article 3(2).[210]

The reference to domestic law in sentence 1 of article 6(2) of the OECD Model does not contain an express provision as to whether it primarily refers to tax law. This distinguishes it from article 3(2) of the OECD Model, where the precedence of tax law over other legislative areas has been expressly stipulated since 1995.[211] The differences in the wording of the two provisions, however, do not suggest that, pursuant to sentence 1 of article 6(2) of the OECD Model, the focus should not be primarily on tax provisions. On the one hand, the purpose of the amended wording of article 3(2) of the OECD Model was to expressly enshrine a result obtained by then through systematic and teleological interpretation.[212] On the other hand, the context in which article 6(2) of the OECD Model is set already suggests, without any express regulation, that tax law should be primarily used, while other areas of legislation

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203. *See* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 45 (2015).
204. *See* M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkomme*n, IWB 8, p. 293 (2011).
205. M. Pietrek, *Unbewegliches Vermögen im Abkommensrecht*, in *Doppelbesteuerung Festgabe*, p. 229 (F. Wassermeyer ed., Beck 2015).
206. F. Wassermeyer, *Art. 13 OECD-MA* para. 123c, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and C. Gradel & J. Kleinhans, in *Außensteuergesetz-Doppelbesteuerungsabkommen*, para. 39 (1st ed., G. Strunk, B. Kaminski & S. Köhler eds., Stollfuß 2016).
207. F. Wassermeyer, *Art. 6 OECD-MA* para. 22b, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
208. P. Baker, *Article 6 – Income from Immovable Property*, in *Double Taxation Conventions* para. 6B.04 (P. Baker ed., Sweet & Maxwell 2005); *See also Praxis des Internationalen Steuerrechts: Festschrift für Helmut Loukota zum 65. Geburtstag* at p. 66 (M. Lang & H. Jirousek eds., Linde 2005); M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 870 (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997); M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* pp. 288-289 et seq. (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997); and H. Loukota, *Grundsätze für die steuerliche Behandlung international tätiger Gastprofessoren*, 8 SWI 10, p. 459 (1998).
209. J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model I, 19 British Tax Review 1*, p. 50 (1984).
210. W. Kessler & N. Arnold, *Gedanken zur Behandlung von unbeweglichem Vermögen in der deutschen DBA-Verhandlungsgrundlage*, 3 ISR 1, p. 10 (2014).
211. .F. Avery Jones et al., *The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States* , 60 Bull. Intl. Taxn. 6, p. 229 (2006) Journal Articles & Opinion Pieces IBFD.
212. M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* pp. 288, 293-294 (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997); *see also* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 45 (2015).

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should be used only as an alternative.[213] Within tax law, in view of article 2 of the OECD Model, there is a strong case in favour of giving precedence to taxes on income and capital.[214] It is not convincing, however, to differentiate so much as to apply only the terminology used in the area of taxes on income for the purposes of articles 6 and 13(1) of the OECD Model, and only the terminology used in the area of taxes on capital for the purposes of article 22(1).[215] After all, the object of the definition of article 6(2) of the OECD Model is to establish, for the purposes of implementing a tax treaty, a common understanding of the expression “immovable property” for property situated in a contracting state.

It may also be questioned whether the reference in article 6(2) of the OECD Model should be understood in a static or dynamic manner.[216] The express regulation of the dynamic importance of this reference laid down in article 3(2) of the OECD Model since 1995 does not, however, justify a contrary conclusion. It should not be overlooked here either that article 3(2) of the OECD Model was almost unanimously understood as dynamic even before the change in its wording.[217] The reason is the same as the one in favour of understanding sentence 1 of article 6(2) of the OECD Model in a dynamic manner: article 2(4) indicates that any changes made to the domestic law after the date of signature of the tax treaty shall be relevant in the application of the treaty. This dynamic understanding radiates upon both article 3(2) and sentence 1 of article 6(2) of the OECD Model.[218]

It cannot be ruled out, however, that courts may draw the conclusion that this provision is now based on a static understanding (*see* Treaty Interpretation section 4.8.), considering the amended wording of article 3(2) of the OECD Model and since sentence 1 of article 6(2) of the OECD Model has remained unchanged. The VwGH has fallen victim precisely to his temptation, since it now interprets tax treaties which contain the earlier version of article 3(2) of the OECD Model in a static manner due to the different wording.[219] This opinion, however, is just as insufficiently substantiated as a reverse conclusion that would lead to a static understanding of sentence 1 of article 6(2) of the OECD Model.[220]

In interpreting the term “immovable property” under sentence 1 of article 6(2) of the OECD Model, one must resort to the law of the *situs* state, as it is understood according to the case law of this state.[221] Administrative practice may only be considered with caution: administrative opinions that have not yet been confirmed by courts do not represent a secure source of legal reference on the law of the *situs* state.[222] Therefore, it cannot suffice for the assessment in the residence state that the competent authority of the *situs* state believes – and informs the authority of the residence state thereof – that a specific property is considered immovable under the law of the *situs* state. Instead, the authority can only contribute to the clarification of this issue by providing the authority of the residence state with the relevant documents, such as legal provisions or high court rulings.

Another question is how to proceed when the domestic law does not even contain the term “immovable property”. Similar questions also arise in the context of article 3(2) of the OECD Model when the term, which is not defined in the tax treaty, is not used in domestic law in this form. There, however, it is not necessary to extend the reference to domestic law beyond the wording to also include similar domestic terms: according to the opinion held by the author, article 3(2) of the OECD Model serves to emphasize the importance of an interpretation in the context of the tax treaty, and any recourse to domestic law is only necessary – if at all – in rare, exceptional cases.[223] In the case of sentence 1 of article 6(2) of the OECD Model, this part of the definition

213. *See* E. Reimer, *Art. 6* para. 67, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
214. E. Reimer, *Art. 6* para. 67, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
215. E. Reimer, *Art. 6* para. 67, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
216. *See* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 46 (2015).
217. M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen* (Art. 3 Abs. 2 OECD-MA), in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburtstag* p. 291 (G. Burmester & D. Endres eds., C.H. Beck'sche Verlagsbuchhandlung 1997); and M. Lang, *Verfassungsrechtliche Bedenken gegen die Verweisungsnormen in Doppelbesteuerungsabkommen*, Österreichische Steuerzeitung, p.13 (1989).
218. *See also See* E. Reimer, *Art. 6* para. 69, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); and W. Kessler & N. Arnold, *Gedanken zur Behandlung von unbeweglichem Vermögen in der deutschen DBA-Verhandlungsgrundlage*, 3 ISR 1, p. 10 (2014).
219. AT: VwGH [Supreme Administrative Court], 19 Dec. 2006, 2005/15/0158, VwSlg 8193 F/2006, Case Law IBFD. For the Canadian Supreme Court deciding in favour of a static interpretation, *see* A.P. Dourado et al., *Art. 3* para. 125, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); *see also* CA: SCC, 28 Sept. 1982, *R v. Melford Developments Inc.* , 82 DTC 6281 (1982); and CA: FCA, 15 Jan. 1981, *R v. Melford Developments Inc.* , 81 DTC 5020 (1981). The Supreme Court argued that Canada may not unilaterally amend the tax treaty by redefining domestic law.
220. Regarding the criticism of the case law of the VwGH, *see* M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 72 (G. Maisto ed., IBFD 2015); *see also* M. Lang, *Die Maßgeblichkeit des innerstaatlichen Rechts für die DBA-Auslegung in der jüngsten Rechtsprechung des VwGH*, 17 SWI 5, p. 199 (2007); H. Loukota, *Der Einfluss des österreichischen Ertragsteuerrechts auf die Auslegung von Doppelbesteuerungsabkommen*, in *Ertragsteuern in Wissenschaft und Praxis: Festschrift für Doralt*, p. 272 (R. Beiser et al. eds., LexisNexis 2007).
221. *See* E. Reimer, *Art. 6* para. 68, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); *See also* W. Kessler & N. Arnold, *Gedanken zur Behandlung von unbeweglichem Vermögen in der deutschen DBA-Verhandlungsgrundlage*, 3 ISR 1, p. 10 (2014); and H. Flick et al., *Art. 6* para. 43, in *Doppelbesteuerungsabkommen Deutschland-Schweiz* (41st ed., H. Flick et al. eds., Dr. Otto Schmidt KG, 2014); dissenting, F. Wassermeyer, *Art. 6 OECD-MA* para. 27, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
222. *See* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 46 (2015). *See* E. Reimer, *Art. 6* at para. 68, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
223. *See* P. Baker, *Article 6 – Income from Immovable Property*, in *Double Taxation Conventions* para. 6B.04 (P. Baker ed., Sweet & Maxwell 2005).

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geared towards domestic law may be of no use if the domestic law contains a similar but not identical term. The definition of article 6(2) of the OECD Model as a whole would nevertheless have a scope, to the extent it covers the positive list in sentence 2.

Nevertheless, there are convincing arguments in favour of extending the reference to similar terms in the context of sentence 1 of article 6(2) of the OECD Model when the domestic law does not contain the term used in the tax treaty.[224] According to some tax treaties, the relevant domestic language is not even the authentic language of the treaty, so that, in those cases, one must not seek an identical term but one that matches "immovable property" in substance. The "property accessory to immovable property" mentioned in the positive list also further illustrates the close connection between sentence 1 and sentence 2 of article 6(2) of the OECD Model. Therefore, this phrase would also be of no avail if there were no "immovable property" under sentence 1 of article 6(2) of the OECD Model. The assets mentioned in the positive list, however, above all discernibly define the periphery of "immovable property" and require that the core area be covered by the definition of sentence 1 of article 6(2), which refers to domestic law. In practice, however, all this raises very difficult questions as to by which criteria a similar term is eligible for the purposes of sentence 1 of article 6(2) of the OECD Model and how to proceed, for instance, when the tax law of the *situs* state only contains a similar term, and, however, an identical term can be found in private law or trade law, or in another area of public law.

The aforementioned case of gambling machines that were declared immovable property by the Belarusian legislature subsequently became the object of a mutual agreement procedure between Austria and Belarus (*see* section 3.3.1.3.). The Austrian authorities refused to accept the Belarusian opinion, according to which Belarus would now have the taxation right as the *situs* state and Austria would have to exempt that income from tax.[225] The arguments discussed so far support the position of the Belarusian authorities. Such devices constitute property, and when they are situated in Belarus, a Belarusian provision that declares these machines to be immovable property must be accepted under treaty law. The fact that this domestic provision did not yet exist on the date of the signature of the tax treaty does not matter either.

The Austrian authorities had claimed that the Belarusian side had amended domestic law exclusively or primarily with the intention of bringing about consequences under treaty law. From a legal point of view, however, nothing can be obtained in this manner: The OECD Model and the tax treaties modelled on it do not contain any written or unwritten rules prohibiting the contracting states from "abusing" the allocation rules of a tax treaty.[226] The question as to the – in any case hardly verifiable or easily concealable – intention of a domestic legislature is irrelevant for the assessment under treaty law. Whether the attempt of a contracting state to circumvent a treaty provision succeeds or fails must be resolved solely by way of interpretation of the actually or allegedly circumvented rule.[227] The tenor of the treaty provision obtained through interpretation cannot be limited by any unwritten abuse principle whatsoever. If and when the *situs* state has the opportunity to shape the contents of the tax treaty through reference of the treaty to its legal system, this must be accepted. It is irrelevant whether the domestic legislature changes its domestic law because it wishes to exploit precisely this power conferred on it or for other reasons.

Similarly, one cannot restrict the power of the *situs* state to make amendments to domestic law that affect treaty law by invoking general legal principles such as good faith.[228] According to article 31 of the VCLT, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". This provision summarizes the principles that are relevant for the interpretation of international treaties – and probably of all other rules. If, based on these interpretative principles, a provision of an international treaty must be understood as meaning that its provisions refer to a certain extent to domestic law, this result can no longer be corrected by referring to the mention of "good faith".[229]Therefore, the only relevant question is whether the wording of sentence 1 of article 6(2) of the OECD Model, the development of law, the object and purpose of this provision or the context in which it is embedded result in other limitations on the reference to the law of the *situs* state than those postulated herein. In any case, this result cannot be further restricted by invoking the mention of "good faith" in article 31(1) of the VCLT. Although the interpretation of sentence 1 of article 6(2) of the OECD Model

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224. *See* E. Reimer, *Art. 6* para. 72, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
225. *See* M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB 8, p. 293 (2011); M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 69 (G. Maisto ed., IBFD 2015); W. Gassner & M. Lang, *Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna, in Liber amicorum Luc Hinnekens* p. 226 (F. Vanistendael ed., Bruylant 2002); and M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 47 (2015).
226. *See* W. Gassner & M. Lang, *Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna, in Liber amicorum Luc Hinnekens* p. 226 (F. Vanistendael ed., Bruylant 2002); and M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 47 (2015).
227. M. Lang, *BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties*, 74 Tax Notes International 7, pp. 663-664 (2014).
228. *See* E. Reimer, *Art. 6* para. 70, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021). Reimer maintains that the "bona fide concept in international law" sets limits to an "excessive widening" of the national law definition, referring to article 26 of the VCLT.
229. Reimer maintains a different view in *Seminar I: Unbewegliches Vermögen und DBA*, 20 IStR 17, p. 678 (2011). There, he maintains that the "bona fide clause" in article 31(1) of the VCLT sets "limits to an arbitrary or surprising broadening of the national law definition by the respective state of situs". According to Reimer, these limits would be reached "when the state of situs – already at the date of the signature of the convention – for fiscal reasons subjects assets to the same treatment as immovable property which are practically not linked to territory: when luxury objects, cultural goods, or vehicles are collectively treated as immovable property under national law, this should not be reflected on the level of the convention, despite the wording of Article 6 para.2 sentence 1 OECD MC".

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has demonstrated that reference to domestic law has its limits, these cannot rule out the possibility that gambling machines can be qualified as immovable property by an amendment to domestic law that affects treaty law.

Furthermore, the principle of *pacta sunt servanda* mentioned in article 26 of the VCLT can do little to change this interpretative result.[230] Article 26 of the VCLT reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This rule merely states that treaties in force must be performed. The requirement for compliance with international treaties, however, would be immanent in these provisions even if it were not explicitly regulated in article 26 of the VCLT. Article 26 of the VCLT therefore states the obvious and is of no independent normative significance. Just as article 26 of the VCLT is not required to convince states to comply with the international treaties they conclude, this provision does not deprive a state of the power to exercise its rights under an international treaty, nor does it grant another state the right to refuse compliance with a treaty provision in a particular case. Therefore, to the extent that the interpretation of sentence 1 of article 6(2) of the OECD Model suggests that the term "immovable property" must be understood based on the law of the *situs* state, that state cannot be denied the power to shape its domestic law in view of this treaty law rule by the invocation of article 26 of the VCLT, nor can the residence state, by invoking article 26 of the VCLT, evade the obligation to recognize the qualification under the law of the *situs* state, which it accepted by way of sentence 1 of article 6(2) of the OECD Model.

Sentence 2 of article 6(2) of the OECD Model contains a positive and a negative list of assets which either definitely or by no means qualify as immovable property. Of course, these two lists are also suitable for setting additional limits to the primarily relevant domestic law of the *situs* state in accordance with sentence 1 of article 6(2) of the OECD Model. The assets included in the positive list qualify as immovable property, even if the *situs* state does not regard them as immovable property under its domestic law. Conversely, the assets excluded in the negative list do not qualify as immovable property for the purpose of the tax treaty, even if they are qualified as such by the domestic law of the *situs* state.

The positive and negative lists distinguish themselves from the first-mentioned part of the definition of immovable property in that they are not defined by reference to domestic law (with a few exceptions to be described below). According to the opinion held by the author concerning article 3(2) of the OECD Model, it is clear that these list rules must be interpreted in the context of the tax treaty and that recourse to domestic law is inadmissible.[231] Even if one does not subscribe to this view and interprets article 3(2) of the OECD Model as a reference to domestic law, there are good arguments in favour of not using domestic law, at least in these cases:[232] article 6(2) of the OECD Model must undoubtedly be understood as a definition, and immovable property is thus a term defined under the tax treaty. The precise wording of article 3(2) of the OECD Model excludes terms defined in the tax treaty from any reference to domestic law. Although it would be conceivable to consider the individual terms themselves used in the definition as "not defined" and then interpret these terms according to the domestic law of the applying state by invoking article 3(2) of the OECD Model, this would probably not be compatible with the object and purpose of the treaty rules.[233] If the authors of the tax treaty decide to define a term in the treaty, they undoubtedly indicate that they want this term to be understood independently of the domestic law of each of the contracting states. This intention would be ignored if the words forming part of this definition were not interpreted in the context of the treaty but on the basis of the domestic law of the relevant contracting state.

It is equally unconvincing to follow the proposal of Reimer and, in case of doubt, interpret the terms used in these lists according to the law of the *situs* state.[234] This view may – contrary to the use of the domestic law of the relevant applying state – at least avoid differing assessments under the tax treaty in the two contracting states. It ignores, however, the fact that only sentence 1 of article 6(2) of the OECD Model refers to the law of the *situs* state and that, by using the phrase "in any case" in sentence 2 of article 6(2) of the OECD Model, the authors indicated that sentence 2 contrasts with sentence 1.[235] There is no reason for an analogous application of the reference to sentence 1 of article 6(2) of the OECD Model. The fact that the expressions used in sentence 2 of article 6(2) of the OECD Model are abstract legal terms, the content of which is sometimes not immediately deduced based on their "ordinary meaning",[236] constitutes no reason to abandon their interpretation on the basis of the tax treaty.[237] In other cases, interpretation is not limited to the wording of a provision but uses object and purpose and context, as well as legal development. Just as it is not justifiable to interrupt the interpretative process in domestic law when encountering abstract legal terms if the content cannot be immediately deduced from their wording, it is not justifiable to do so in the area of treaty law either.

230. *See* the reference to art. 26 VCLT in *See* E. Reimer, *Art. 6* at para. 70, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021), which seeks to "put limits ... to the "excessive widening of the national law definition" – to whatever extent this is defined.
231. *See* M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 72 (G. Maisto ed., IBFD 2015); dissenting, F. Wassermeyer, *Art. 6 OECD-MA* para. 16, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
232. F. Wassermeyer & Schwenke, *Art. 6 OECD-MA* para. 53, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
233. *See* E. Reimer, *Art. 6* para. 76, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); the same opinion is taken by W. Kessler & N. Arnold, *Gedanken zur Behandlung von unbeweglichem Vermögen in der deutschen DBA-Verhandlungsgrundlage*, 3 ISR 1, p. 10 (2014).
234. E. Reimer, *Art. 6* para. 75, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
235. E. Reimer, *Art. 6* para. 75, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); and H. Flick et al., *Art. 6* para. 43, in *Doppelbesteuerungsabkommen Deutschland-Schweiz* (41st ed., H. Flick et al. eds., Dr. Otto Schmidt KG, 2014).
236. *See* E. Reimer, *Art. 6* para. 76, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
237. F. Wassermeyer, *Art. 6 OECD-MA* para. 53, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).

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The task of the present chapter is not to present a commentary on the individual phrases in the positive list but to provide only a few hints on how to avoid an interpretation that will lead to qualification conflicts. The considerations presented so far have shown that the positive list in sentence 2 of article 6(2) of the OECD Model must be generally interpreted in the context of the tax treaty. There are, however, certain exceptions that need to be addressed: according to sentence 2 of article 6(2) of the OECD Model, the term "immovable property" definitely includes "property accessory to immovable property". Prima facie, it is not clear at this point what the treaty means by "immovable property". The definition seems circular, since "immovable property" is explained using precisely this term. A meaningful interpretation understands the term "immovable property" at the beginning of the positive list of sentence 2 of article 6(2) of the OECD Model as a reference to the use of this term up to this point – in the preceding sentences and phrases – and thus to the definition of sentence 1 of article 6(2) of the OECD Model, referring to the right of the *situs* state.[238]

Therefore, the treaty rule combines the autonomous treaty interpretation with the relevance of the domestic law of the *situs* state. The term "immovable property" builds on sentence 1 of article 6(2) of the OECD Model and thus again indirectly refers to the domestic law of the *situs* state, though within the treaty law limits described above. The term "property" itself is identical with the conforming term of sentence 1 of article 6(2) of the OECD Model, which in turn is the central term in the five paragraphs of article 13 of the OECD Model and refers to all assets subject to "alienation". Such an asset must be "accessory" to immovable property to fall within the scope of sentence 2 of article 6(2) of the OECD Model. This term also constitutes a treaty term that must be interpreted solely on the basis of the tax treaty. Therefore, based on valuations under treaty law, one must establish how close the connection must be between the asset and the immovable property pursuant to sentence 1 of article 6(2) of the OECD Model.

Domestic law is also relevant in a second item: "Rights to which the provisions of general law respecting landed property apply" also necessarily constitute immovable property. In this context, civil law, not tax law, must be taken into account.[239] In this case, however, in contrast to sentence 1 of article 6(2) of the OECD Model, no particular state is expressly mentioned. Therefore, it would be possible to follow the evaluation contained in article 3(2) of the OECD Model and use the law of the relevant applying state. Alternatively – similarly to sentence 1 of article 6(2) of the OECD Model – it would be possible to consider the right of the *situs* state as relevant. It is more convincing, however, to understand the reference to the private law as within the meaning of the *situs* state.[240] This is favoured not only by the objective proximity to sentence 1 of article 6(2) of the OECD Model but also by the fact that the assessment according to the *situs* state will also be relevant for the residence state, and the use of domestic law will thus not provoke qualification conflicts and, subsequently, cases of double taxation or non-taxation.

The phrase "livestock and equipment used in agriculture and forestry" is closely linked to the bracketed term of article 6(1) of the OECD Model, according to which income from immovable property also includes "income from agriculture or forestry". Oddly enough, this formulation is not included in the definition of article 6(2) of the OECD Model itself. Prima facie, this could raise the question as to whether "agriculture and forestry" belong to immovable property only for the purposes of article 6 of the OECD Model, but not for the purposes of other treaty provisions using the term "immovable property", and to this extent implicitly tie in with the definition of article 6(2) – like article 13(1) or article 22(1). However, said phrase of sentence 2 of article 6(2) of the OECD Model illustrates that no particular significance should be attached to the fact that "agriculture and forestry" was used in article 6(1) of the OECD Model and not only in article 6(2). When even "equipment used in agriculture and forestry" is regarded as immovable property, this must all the more apply to "agriculture and forestry". Therefore, the phrase "agriculture or forestry", just as "equipment used in agriculture and forestry" must be interpreted on the basis of the treaty, and "agriculture" and "forestry" thus definitely belong to immovable property, regardless of the understanding of the term "immovable property" in the *situs* state according to sentence 1 of article 6(2) of the OECD Model.[241]

The negative list is relatively short: "ships and aircraft" never constitute immovable property, even if they qualify as immovable property under the domestic law of the source state. Therefore, this negative list further limits the references contained in sentence 1 of article 6(2) of the OECD Model, and partly also those in the positive list of sentence 2.[242] The last sentence is formulated in a manner that definitely grants it precedence over references to domestic law in the previous sentences.

The terms "ships" and "aircraft" correspond to those of article 8 of the OECD Model: "Ships" and "aircraft" are covered by article 8(1) of the OECD Model. Therefore, it must be assumed that the identical expressions in sentence 3 of article 6(2) of the OECD Model and in article 8(1) also have the same meaning.[243] They must be interpreted in the context of the treaty. For the reasons mentioned above, recourse to domestic law according to article 3(2) of the OECD Model is not admissible in the context of

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238. Supported by C. Strasser, *Die Auslegung von Quellenstaatsregelungen*, in *Doppelbesteuerungsabkommen* p. 115 (M. Lang ed., Linde 2005); *see also* F. Wassermeyer & Schwenke, *Art. 6 OECD-MA* para. 60, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
239. F. Wassermeyer, *Art. 6 OECD-MA* para. 60, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
240. Art. 6(4) *OECD Model*; *see also* M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 74 (G. Maisto ed., IBFD 2015); and E. Reimer, *Art. 6* para. 88, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
241. Dissenting, *See* E. Reimer, *Art. 6* para. 66, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); and F. Wassermeyer, *Art. 6 OECD-MA* para. 16, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).
242. E. Reimer, *Art. 6* para. 13, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
243. *See also* E. Reimer, *Art. 6* para. 113, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).

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sentence 2 of article 6(2). Due to the parallels between sentence 2 of article 6(2) of the OECD Model and article 8, this also applies to article 8.

Therefore, sentence 2 of article 6(2) of the OECD Model also serves to emphasize the precedence of article 8 over article 6.[244] Were the application of the first two sentences of article 6(2) of the OECD Model to cause overlaps with article 8, article 6 would have to recede. However, "ships" and "aircraft" are only covered by article 8(1) of the OECD Model if they are engaged in "international traffic". Sentence 2 of article 6(2) of the OECD Model does not demand this additional requirement. Article 8 of the OECD Model is narrower than article 6 also to the extent that it requires the "operation" of these means of transport, while "use in any ... form of immovable property" will suffice for article 6(3). Therefore, income from these means of transport is also excluded from article 6 of the OECD Model if it is not covered at all by article 8. Overlaps between the two allocation rules are possible, however, when immovable property directly pertains to the operation of ships or aircraft in international traffic.[245]An express provision governing precedence is missing here. However, article 6(4) of the OECD Model could also be applied to this case.[246]

5.3. Dividends, interest, royalties and capital gains

5.3.1. Article 10 of the OECD Model

The term "dividends" and the previously discussed term "immovable property" (*see* section 5.2.3.) have in common that both terms are defined in the OECD Model and that the definition of the term "dividends" also partly refers to domestic law. As will be shown below, even in the case of article 10(3) of the OECD Model, this reference to domestic law does not necessary lead to qualification conflicts, especially considering that the scope of reference to domestic law has its limits and that the convention clearly identifies the legal system to which reference is made.

The definition of article 10(3) of the OECD Model reads as follows: "The term 'dividends' as used in this Article means income from shares, 'jouissance' shares or 'jouissance' rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident."[247]

At the centre is the term "corporate rights", (*d'autres parts sociales*) as the common aspect of the term "dividends" (*see* Article 10: Dividends section 5.1.2.4.). The reference to domestic law only becomes relevant when corporate rights are involved. This means that the term "corporate rights" itself is not the subject of the reference and must therefore be understood in an autonomous manner. As a result of the reference to the domestic law of the residence state of the enterprise, the definition only covers the income from corporate rights that is subjected there to the same taxation as dividends.[248] Dividends do not usually reduce the tax base of the enterprise, so these involve non-deductible payments to the investors. If the payment is deductible, it certainly cannot be covered by the last part of the dividend definition.

The term "corporate rights" is associated with the term "company", also used in article 3 of the OECD Model. This term is in turn defined in article 3(1) of the OECD Model: "the term 'company' means any body corporate or any entity that is treated as a body corporate for tax purposes".[249] This suggests that each entity taxable under the law of at least one of the two contracting states qualifies as a company.[250] The residence requirement is met when the corresponding close relationship to the contracting state is given. The state may well treat the entity as fiscally transparent, and it does not need to be taxable there if it is taxable at least in the other contracting state.[251]

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244. Art. 6(4) *OECD Model*; *see also* S. Galke, *Art. 6*, in *Außensteuergesetz Doppelbesteuerungsabkommen*, para. 16 (2nd ed., F. Haase ed., C.F. Müller 2012); and M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 75 (G. Maisto ed., IBFD 2015), Books IBFD.
245. B.J. Arnold, *At Sixes and Sevens: The Relationship between the Taxation of Business Profits and Income from Immovable Property under Tax Treaties* , 60 Bull. Intl. Taxn. 1, p. 11 (2006), Journal Articles & Opinion Pieces IBFD.
246. B.J. Arnold, *At Sixes and Sevens: The Relationship between the Taxation of Business Profits and Income from Immovable Property under Tax Treaties* , 60 Bull. Intl. Taxn. 1, p. 11 (2006), Journal Articles & Opinion Pieces IBFD; *see also* M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 50 (2015).
247. Art. 10(3) *OECD Model*.
248. *See* M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* pp. 90-91 (Orac 1991); F. Wassermeyer & C. Kaeser, *Art. 10 OECD-MA* paras. 140 & 149, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* p. 63 (G. Maisto ed., IBFD 2015); and M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, p. 44 (2015). For a different view, *see* R. Pöllath & A. Rädler, *Die vorgeschlagene Erweiterung des § 8 Abs 3 KStG – Voraussetzungen und Wirkungen nach innerstaatlichem und Abkommensrecht*, 33 DB 21 Beilage 8, p. 17 (1980); and J.F. Avery Jones et al., *The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?* ,1 World Tax J. 1, sec. 2.1. (2009), Journal Articles & Opinion Pieces IBFD.
249. Art. 3(1) *OECD Model*.
250. M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* pp. 117-119 (Orac 1991); and B. Gröhs, *Die Gewinnbesteuerung der Personengesellschaften im internationalem Steuerrecht*, pp. 96-97 (Wirtschaftsverlag Dr. Anton Orac 1986).
251. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p.51 (IFA 2014).

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The fact that the reference to domestic law is clearly limited in the third part of the dividend definition suggests that the other parts of the definition must be interpreted autonomously.[252] Therefore, the phrase "other rights, not being debt-claims, participating in profits" must be interpreted autonomously, just as the examples mentioned prior to this phrase. A recourse to domestic law is ruled out. Therefore, non-deductibility is not relevant. The examples cited clearly outline the definition, just as the positive requirement of "participating in profits" and the negative distinction from "debt-claims", and thus from article 11(3) of the OECD Model. It is also important that the "other rights" must also be "corporate rights" in order to fall under the dividend definition.

5.3.2. Articles 11 and 12 of the OECD Model

Interest and royalties are defined in article 11(3) of the OECD Model (*see* Article 11: Interest section 5.1.1.) and in article 12(2) of the OECD Model (*see* Article 12: Royalties (OECD and UN Models) section 5.1.1.), respectively, and this without any recourse to domestic law. Accordingly, the words contained in the definition must also be interpreted autonomously. These terms cannot be understood according to domestic law, since the fact that the tax treaty contains an independent definition is meant to ensure that interest[253]and royalties[254] are understood independently of the relevant domestic law.

However, the question is whether the interpretation of the source rule, contained in article 11(5) of the OECD Model, could lead to qualification conflicts: "Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated." Its application in triangular cases – where interest is paid by a taxpayer residing in one state, the interest is borne by a permanent establishment in the other state and the person receiving the interest resides in a third state – is already challenging. The application of the treaty the state of the recipient of the income has concluded with the other state may lead to a double tax credit. Furthermore, in situations where the entity paying the interest is characterized differently in the states involved, solutions are even more complex.[255] This is also illustrated by the fact that branch reporters, when engaged in discussions in preparation for the IFA's General Report (2004), took completely different positions.

Figure 1. Interest (1)

252. *See* M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* pp. 90-91 (Orac 1991); K. Daxkobler & E. Pamperl, *Der Dividendenbegriff im OECD-Musterabkommen*, 21 SWI 11, pp. 474 and 477 (2011); F. Wassermeyer & C. Kaeser, *Art. 10 OECD-MA* para. 108, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); J. Schuch & E. Pinetz, *The Definition of Dividends, Interest, Royalties and Capital Gains, in The OECD Model Conventionandits Update* 2014, p. 7 (M. Lang et al. eds., Linde Verlag 2015); M. Six, *Hybride Finanzierung im Internationalen Steuerrecht – am Beispiel von Genussrechten*, p. 108 (Linde Verlag 2008); M. Helminen, *The International Tax Law Concept of Dividend*, p. 67 (Wolters Kluwer 2017); C. Staringer, *Liquidation, Kapitalrückzahlung und Aktienrückkauf im Recht der Doppelbesteuerungsabkommen*, in *Praxis des Internationalen Steuerrechts, Festschrift für Helmut Loukota*, p. 483 (H. Jirousek & M. Lang eds., Linde Verlag 2005); and W. Tischbirek & G. Specker, *Art. 10* paras. 184 & 199, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021). For a different view, *see* W. Haslehner, *Art. 10* para. 94, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); and J. Sasseville, *The Definition of "Dividends"* in *the OECD Model Tax Convention, in Taxation of Intercompany Dividends under Tax Treaties and EU Law* sec. 5.1. (G. Maisto ed., IBFD 2012), Books IBFD.

253. *See* M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* p. 92 (Orac 1991); C. Strasser, *Die Auslegung von Quellenstaatsregelungen*, in *Doppelbesteuerungsabkommen* p. 152 (M. Lang ed., Linde 2005); W. Haslehner, *Art. 11* para. 7, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); A. Lohbeck & J. Ruß, *Art. 11* para. 56, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); F. Wassermeyer, *Art. 11 OECD-MA* paras. 25 & 71, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); H. Loukota et al., *Art. 11 Zinsen*, in *Internationales Steuerrecht* (H. Loukota et al. eds., Manz 2022) rdb.at; M. Helminen, *Article 11: Interest - Global Tax Treaty Commentaries* , Global Topics IBFD (accessed 31 Mar. 2023); *see also* DE: BFH, 20 Dec. 2006, I B 47/05, Case Law IBFD, in which the BFH pointed out that interest is interest for the purposes of the relevant tax treaty even though it would be treated as business profits for domestic tax law purposes; *compare* OECD Draft (1963) and OECD Model (1977), (*while the first still included a reference to domestic law classification as the result of a compromise, instead, the reference was removed from the latter and from that version onwards it has always remained the same*); *see*, however, para. 44 *OECD Model Tax Convention on Income and Capital: Commentary on Article 11* (Consolidated Version) (2017), Treaties & Models IBFD, for the reservations of Greece and Spain widening the definition of interest by including a reference to domestic laws.

254. M. Valta, *Art. 12* para. 71, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); A. Lohbeck & M. Schwarz, *Art. 12* para. 54, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); and F. Wassermeyer, *Art. 12 OECD-MA* para. 55, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023).

255. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 52 (IFA 2014).

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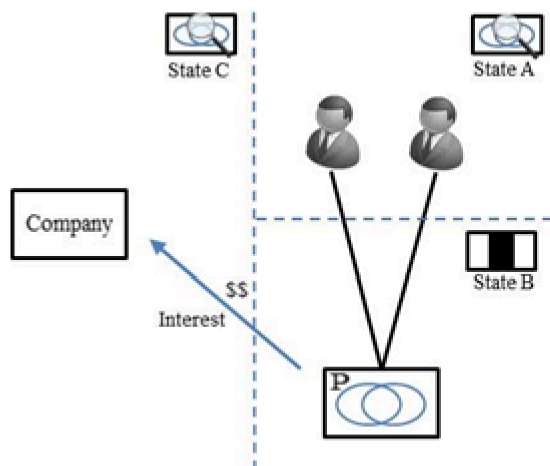

Let us assume that an entity which is located in State B and whose shareholders reside in State A is paying interest to a taxpayer residing in State C. States A and C treat the entity as transparent, whereas State B treats it as opaque. The tax treaties which are applicable are those concluded by State C, hence the treaties between States A and C, on the one hand, and States B and C, on the other. It is therefore not in dispute that the tax treaties concluded by State C are applicable; however, the interesting issue is whether these situations fall within the scope of the interest articles of these treaties. The application of article 11 of the OECD Model, in contrast, for example, to articles 7 and 21 of the OECD Model, requires a cross-border relation between the two contracting states. The interest article of these tax treaties is only applicable if the interest has its source in State A or State B, or in both states, under the equivalent of article 11(5) of the OECD Model of these treaties. If the interest article in one of these tax treaties is not applicable, the income may only be taxed in the residence state (State C), under article 7 or article 21 of these treaties.[256]

If the states involved in this case look at the treaty provisions from their domestic perspectives, we would end up with the following result: under the tax treaty between State A and State C, it seems to be obvious that the persons paying the interest are the individuals who are resident in State A. However, under the tax treaty between State B and State C, it is the entity that is treated as a resident taxpayer in State B. Therefore, both States A and B seem to be entitled to levy source taxation. From the perspective of State C, the interest is sourced in State A, since State C looks through the entity and therefore treats the individuals as the payers of the interest. Unless the entity constitutes a permanent establishment in State B, the tax treaty between State B and State C does

256. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 52 (IFA 2014).

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not put State B in the position of a source state if seen from the perspective of State C. Therefore, one could argue that State C is only obliged to grant a credit for the taxes levied in State A, and, in respect of State B's taxes, double taxation would remain.[257]

According to the principles advocated in the OECD Partnership Report (1999), the treatment in the source state should be relevant for the residence state.[258] Therefore, one could argue that State C should grant a credit for State B's taxes as well. However, all the arguments against these principles speak also against this solution. Moreover, article 11(5) of the OECD Model requires that the payer be a "resident of that State". Therefore, this is not a case where a treaty term is undefined and where, for that reason, domestic law might come into play to fill the gap. The tax treaty rather uses a term which it defines itself in article 4 of the OECD Model. According to this definition, the term "resident of a Contracting State" means "any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof". Therefore, there are good reasons to conclude that State C has to grant a credit for the tax levied in State B, even if one disagrees with the principles developed by the OECD Partnership Report (1999). There is no conflict, and therefore there is no need to consider whether the relevance of the qualification in the source state follows from article 23 of the OECD Model.[259]

Figure 2. Interest (2)

257. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, at p. 53 (IFA 2014).

258. OECD, *The Application of the OECD Model Tax Convention to Partnerships* at para. 102 et seq. (OECD 1999), Primary Sources IBFD. For an Austrian perspective, *see* M. Lang, *Conflicts of Income Allocation in Tax Treaty Law: The Differing Opinions of the Austrian Federal Ministry of Finance and the OECD* , 67 Bull. Intl. Taxn. 2, pp. 106-109 (2013), Journal Articles & Opinion Pieces IBFD; and M. Lang, *Qualifikations- und Zurechnungskonflikte im DBA-Recht*, 19 IStR 4, pp. 857-896 (2010); A. Rust, *The New Approach to Qualification Conflicts has its Limits* , Bull. Intl. Taxn. pp. 45-50 (2003), Journal Articles & Opinion Pieces IBFD: "*As Art. 3(2) allows the source state to interpret a term in light of its domestic law, the source state's interpretation is indirectly relevant for the residence state in the context of Art. 23*"; para. 32.3 *OECD Model Tax Convention on Income and Capital: Commentary on Article 23A* (Condensed Version) (2017), Treaties & Models IBFD.

259. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 54 (IFA 2014).

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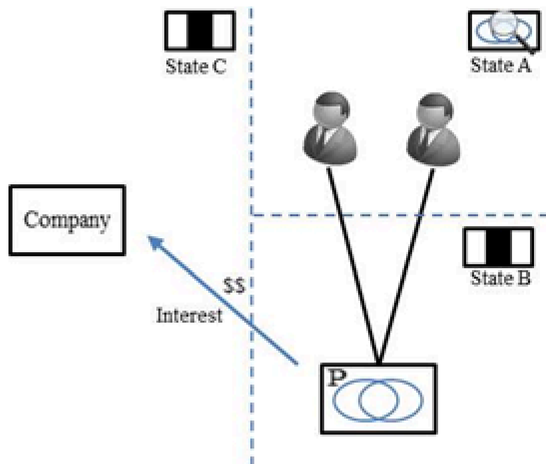

According to the view just developed, the qualification of the entity in State B by State C should not matter. Therefore, State C should also grant a credit for the taxes levied in both State A and State B if State B treats the entity as opaque.[260]

Figure 3. Interest (3)

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260. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 54 (IFA 2014).

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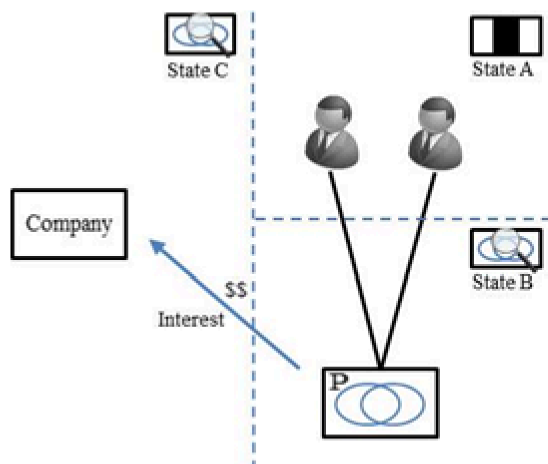

It is more interesting to discuss the case if we reverse the approaches taken by States A and B: If State A assumes that the entity is opaque, then, from its perspective, it is a resident of another state that pays the interest. Although the individuals are residents of State A, they are not the ones paying the interest. Article 11(5) of the OECD Model therefore does not apply, and State A has to refrain from levying withholding taxes. From State B's perspective, the individuals residing in State A are paying the interest, unless the entity also constitutes a permanent establishment in State B. State B therefore may not claim taxation rights either, since either article 7 or article 21(1) of the OECD Model[261] is applicable. Since neither state may levy a withholding tax, State C does not have to grant a credit for any tax levied abroad. Even if State A or State B, despite the reasoning just developed, levies such a tax, State C can refuse to grant a credit, since such a tax is not levied in accordance with the tax treaties. However, one might end up at a different solution if one assumes that the entity established in State B, although treated as transparent there, may be treated as a resident taxpayer for treaty purposes, since it has local attachment that would apply if the partnership were a taxable entity in that state. Under this view, State B is the source state under article 11(5) of the tax treaty between State B and State C and has taxation rights, and State C has to grant a credit.[262]

This illustrates that qualification conflicts could be avoided through a careful interpretation of the relevant provisions of article 11(5) of the OECD Model. Similar issues could occur in the context of article 12 if such a provision deviates slightly from the OECD

261. I.e. the articles of the OECD Model applicable to "Business profits" and "Other income", respectively.
262. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, pp. 54-55 (IFA 2014).

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Model and permits source taxation. In such cases, clauses similar to article 11(5) of the OECD Model are usually included in tax treaties. However, it is not at all guaranteed that tax administrations and courts will share the positions argued here. Therefore, the possibility of qualification conflicts due to different interpretations of the treaty provisions is not excluded.

5.3.3. Article 13 of the OECD Model

Article 13 of the OECD Model covers all types of capital gains. Those capital gains that are not covered by the first four paragraphs fall under article 13(5) of the OECD Model. The common constituent element of all paragraphs of article 13 of the OECD Model is the term "alienation". This term has a clear meaning and can therefore be interpreted autonomously from the context of the convention, without a definition: "alienation" requires that the allocation of the property changes. After alienation, the property must be attributed to someone other than it was previously.[263] The frequently asked question as to whether a change of residence to another state that triggers an exit tax falls under article 13 of the OECD Model must therefore be answered in the negative: in the case of a change of residence, the person who holds the share or other property remains the same. Therefore, there is no alienation.[264]

Another common requirement is that there must be a "property". This term is already known from article 6(2) of the OECD Model and must also be interpreted autonomously.[265]

Individual paragraphs of article 13 of the OECD Model refer to other allocation rules. This must also be taken into account for interpretation purposes. Article 13(1) of the OECD Model, for instance, refers to article 6 with regard to the term "immovable property". As a result, the definition of article 6(2) is relevant. The same applies to the connection between article 13(2) and article 7, and between article 13(3) and article 8. This also implies, however, that partial reference must be made to the domestic law of the *situs* state for the purposes of article 13(1) of the OECD Model, while article 13(2) and (3) must be interpreted autonomously so as to avoid qualification conflicts.

5.4. Employment income

5.4.1. Article 15 of the OECD Model

Several allocation rules qualify for "employment income". Articles 18 and 19 of the OECD Model govern specific types of employment, i.e. pensions and remuneration paid by public funds. The central rule, however, is article 15 of the OECD Model, which, in addition to the general provision of article 15(1), contains the 183-day rule in article 15(2) and a special provision based on article 8 for employees working aboard ships or aircraft in international traffic. The requirement of employment, however, applies to all these provisions.

If one introduces the corresponding term of the relevant domestic law into a tax treaty, qualification conflicts become inevitable. This can be demonstrated via a practical case: in Austria, first the tax administration and subsequently the domestic legislature amended the income allocation under domestic law for 1-day or 2-day lectures of foreign academics in Austria, so that income from such activities was no longer treated as independent but as income from employment. The tax administration also introduced this understanding into Austrian tax treaties. In the case of an activity for private universities, this meant that, under article 15(1) of the OECD Model, the income could now be taxed in Austria, whereas previously Austria could not exercise a taxation right in accordance with article 7 due to the absence of a permanent establishment. Since not all residence states played along with this sleight of hand by the Austrian tax administration and maintained their previous opinion, there was a risk of double taxation in such cases. The opinion held by the OECD, according to which article 23 of the OECD Model should in these cases oblige the residence state to avoid double taxation by crediting or exempting in the case of taxation by the source state, had little chance of being enforced. The change of opinion in Austria, which led to the expansion of Austrian taxation rights, was met with suspicion.[266]

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263. *See* F. Wassermeyer, *Art. 13 OECD-MA* para. 3, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); E. Reimer, *Art. 13* para. 11, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); and E. Reimer, *Art. 13* paras. 10-11, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).

264. M. Lang, *Zweifelsfragen der Wegzugsbesteuerung*, 16 SWI 12, pp. 567-573 (2006); F. Brugger, *Wegzugsbesteuerung und Abkommensrecht*, 17 SWI 11, pp. 516-517 (2007); G. Toifl, *Austrian Branch Report: Einkommensbesteuerung von Auswanderern und Einwanderern nach dem inländischen Recht*, in *Cahiers de Droit Fiscal International*, vol. 87b p. 130 (IFA 2002); G. Toifl, *General Report: Einkommensbesteuerung von Auswanderern und Einwanderern nach dem inländischen Recht*, in *Cahiers de Droit Fiscal International* pp. 159-164 (IFA 2002); A. Kolb, *Das schweizerisch-österreichische Doppelbesteuerungsabkommen im Lichte der aktuellen Entwicklungen*, in *Praxis des Internationalen Steuerrechts: Festschrift für Helmut Loukota* pp. 247-248 (H. Jirousek & M. Lang eds., Linde Verlag 2005).

265. *See* M. Lang, *The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model, in Immovable Property under Domestic Law, EU Law and Tax Treaties* pp. 64-66 (G. Maisto ed., IBFD 2015); and M. Lang, *Das Verhältnis zwischen Abkommensrecht und innerstaatlichem Recht in der Definition des unbeweglichen Vermögens nach Art. 6 Abs. 2 OECD-MA*, 4 ISR 2, pp. 44-45 (2015). For a different view, *see* J. Sasseville, *Definition Issues Related to Article 13 (Capital Gains)* , in *Taxation of Companies on Capital Gains on Shares under Domestic Law, EU Law and Tax Treaties*, p. 78 (G. Maisto ed., IBFD 2012), Books IBFD.

266. For more detail, *see* W. Gassner & M. Lang, *Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna, in Liber amicorum Luc Hinnekens* pp. 219-224 (F. Vanistendael ed., Bruylant 2002).

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Vogel did not consider it correct to base the assessment of whether employment is involved completely on domestic law. According to him, the term is based on a common international preconception. Pursuant to this conception, employment would apply if a person – the employee – provides his work services to another person – the employer – and is thus obliged to comply with the instructions of the employer. Vogel, however, obviously left it to the domestic law of the applying state to specify this term. Whenever classification is ambiguous, the domestic law of the applying state may be used. Only arbitrary exceptions from the term "employment" would be inadmissible.[267] A similar line is followed in the considerations by Loukota, according to whom the qualification of the domestic legislature should not be followed only in the case of an "act of violence" by the latter or in "extreme situations".[268]

When, however, the term "employment income" is based at least on an "international preconception", the question arises as to why it cannot be interpreted on the basis of a tax treaty alone. In domestic law, too, the fact that the wording remains vague does not prevent one from interpreting a term from the context and in the light of its objectives. In particular, the distinction from article 7 of the OECD Model and the criterion contained in article 3(1)(c), according to which an enterprise must be "carried on" provide useful indications.[269] In its report concerning the hiring-out of labour, the OECD has tried to develop criteria that are also relevant in such scenarios.[270] Therefore, income from employment can apply when the person assigned with the provision of the services does not bear any risk and does not have any responsibility for his work results, when the employer has a right of instruction and when the work is carried out in places that are subject to the supervision and responsibility of the employer. Moreover, it is crucial that the remuneration is calculated on the basis of the working hours and that the materials are for the most part made available.[271]

However, qualification conflicts in the context of article 15 of the OECD Model could also arise in respect of article 15(2). In particular, the qualification of entities could differ from state to state, and this could have implications for article 15. However, a thorough interpretation of the provision can avoid such conflicts.[272] The main rule of article 15(1) of the OECD Model allocates the exclusive taxation rights to the residence state, unless the employment is exercised in the other contracting state. In that situation, the other contracting state may levy taxes. Article 15(2) of the OECD Model, as an exception to this rule, gives exclusive taxation rights to the residence state, even if the employment is exercised in the other contracting state, under certain conditions (*see* Article 15: Income from Employment section 1.1.1.). One of them is that the remuneration is paid by, or on behalf of, an employer "who is not a resident of the other State".

Figure 4. Income from employment (1)

267. *See* K. Vogel, *Art. 15* para. 16, in *Doppelbesteuerungsabkommen* (K. Vogel ed., 3rd ed., C.H. Beck 1996) (current version: R. Prokisch, *Art. 15* para. 57 et seq., in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021)).
268. H. Loukota, *Vermeidung von Irrwegen bei der DBA-Auslegung*, 8 SWI 12, p. 563 (1998).
269. For more detail, *see* M. Lang & U. Zieseritsch, *Der Begriff der unselbständigen Arbeit nach Art. 15 OECD-MA*, in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, p. 46 (W. Gassner et al. eds., Linde 2003).
270. *See* E. Lechner, *Arbeitskräfteüberlassung, in Aktuelle Entwicklungen im Internationalen Steuerrecht* pp. 223-235 (W. Gassner, M. Lang & E. Lechner eds., Linde 1994).
271. M. Lang & U. Zieseritsch, *Der Begriff der unselbständigen Arbeit nach Art. 15 OECD-MA*, in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, p. 47 (W. Gassner et al. eds., Linde 2003).
272. *See also* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, pp. 58-61 (IFA 2014).

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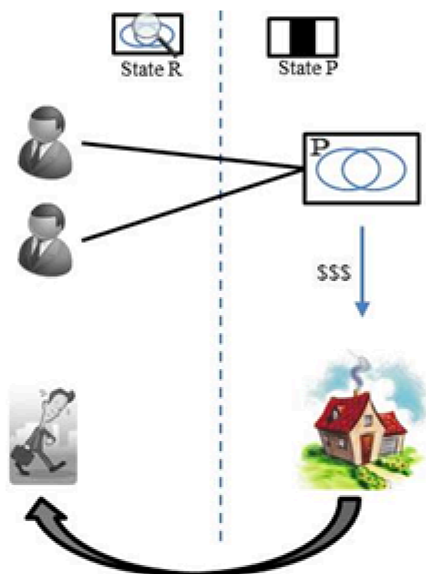

If State R treats the entity which is the employer as transparent and State P treats it as opaque, such a qualification conflict will arise. From the perspective of State P, it is clear that the employer is a resident of that state. Therefore, the requirement of article 15(2)(b) of the OECD Model, according to which the employer is not a resident of the other contracting state, is not met.[273] Article 15(2) of the OECD Model is therefore as a whole not applicable and, according to the general rule of article 15(1), State P may levy taxes if the employment is exercised in that state. This view is clearly supported by the wording of article 15(2)(b), where the phrase "resident of the other State" is used.[274]

The view is divided as to whether the qualification of the entity in the residence state of the employees should be decisive for the application of article 15(2)(b) of the OECD Model in the residence state, or whether the residence state should just follow the source state's qualification.[275] The case study illustrates that double taxation might be the consequence if the residence state's qualification prevails. In the view of State R's tax law, the entity is not a resident of State P, and therefore State R would have, if

273. *See also* L. De Broe et al., *Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State* ", 54 Bull. Intl. Taxn. 10, p. 515 (2000), Journal Articles & Opinion Pieces IBFD; F. Pötgens, *Article 15(2)(b) of the OECD Model: Problems Arising from the Residence Requirement for Certain Types of Employers* , 42 Eur. Taxn. 6/7, p. 216 et seq. (2002), Journal Articles & Opinion Pieces IBFD; B. Peeters, *Article 15 of the OECD Model Convention on "Income from Employment" and its Undefined Terms* , 44 Eur. Taxn. 2/3, p. 81 (2004), Journal Articles & Opinion Pieces IBFD; and F. Pötgens, *Income from International Private Employment* p. 216 et seq. (IBFD 2007), Books IBFD.

274. *See also* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, pp. 58-59 (IFA 2014).

275. *See also* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, at p. 59 (IFA 2014), referring to the branch reports.

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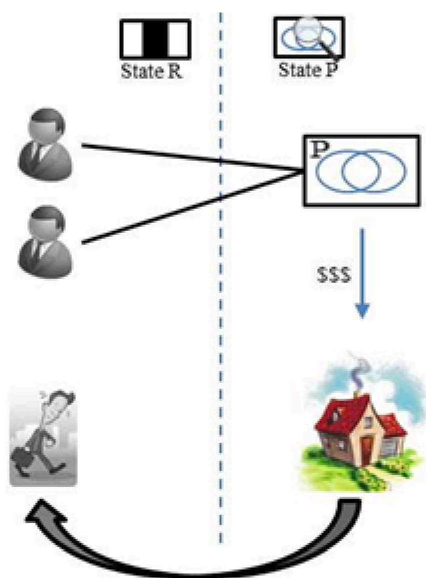
the other requirements are met, exclusive taxation rights. However, article 15(2)(b) of the OECD Model clearly points to the source state and the qualification of the entity under its tax law. The wording indicates that State P's qualification is also relevant for State R. Therefore, there is no need to accept a result which could lead to double taxation. Article 23 of the OECD Model does not come into play to solve a qualification conflict, since such a conflict can be avoided by assuming that the qualification in the state in which the entity has been established is already relevant under article 15(2)(b) for both states.

Figure 5. Income from employment (2)



If we reverse the situation, the solutions are more controversial.[276] If the entity is established in State P but is treated there as transparent, one could conclude that the entity is not a "resident of the other State". However, since the entity is established in State P and may have its seat or place of management there, it meets the requirements that could lead to worldwide taxation. It has already been mentioned that it was Vogel who pointed out that "all it requires is that the person concerned has that personal attachment to at least one of the contracting States – the 'State of residence' – which might result in him becoming subject to full tax liability" and that the "question whether a person ... may be a taxable entity under the law of the State concerned, is not a condition for treaty entitlement".[277] Dziurdź explained that these ideas are also convincing in the context of article 15(2)(b)

276. *See also* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, pp. 59-61 (IFA 2014).
277. K. Vogel, *Art. 4*, in *Klaus Vogel on Double Taxation Conventions*, para. 24a (3rd ed., Kluwer Law International 1997).

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of the OECD Model.[278] Since tax-exempt entities may qualify as "residents", it seems consistent that non-taxable entities be treated alike: it is just a question of drafting technique whether an entity is tax exempt or not treated as a taxable entity at all. The substantive result is the same, and therefore differences in drafting techniques should not have any impact on article 15(2)(b) of the OECD Model either. Therefore, the entity should be treated as a "resident of the other State", and State P has taxation rights. This approach should be followed by the residence state, which has to provide relief from double taxation by either granting a credit or exempting the foreign income.

An entity which is established in a third state is, unless it has its seat or place of effective management there, definitely not a resident of one of the two contracting states. Therefore, the criteria of article 15(2)(b) of the OECD Model are met, and State P is able to levy a tax. State R has to provide relief from double taxation.

5.4.2. Article 18 of the OECD Model

One of the more special provisions compared to article 15 of the OECD Model is article 18.[279] The distinction from article 15 of the OECD Model is significant, because the legal consequence of article 18 is diametrically opposed to that of article 15(1) second sentence of the OECD Model: "Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State." (*see* Articles 18 and 19(2): Pensions section 1.1.1.) The distinction, however, is not easy, since the term "pension" is not defined (*see* Articles 18 and 19(2): Pensions section 5.1.1.1.)).[280] The phrase "in consideration of past employment" delivers further indications (*see* Articles 18 and 19(2): Pensions section 5.1.1.3.).[281] In most cases, emphasis is placed on the welfare character of such payments falling under article 18 of the OECD Model.

Therefore, it is not immediately clear how "severance payments" should be assessed (*see* Articles 18 and 19(2): Pensions section 5.1.1.2.). In Austria, the VwGH had to assess a situation[282] in which the employment contract of a long-standing employee was terminated and yet it was agreed that the employee would be on leave during the final months preceding the end of the contract and would receive a severance payment thereafter. The court concluded that the salary received for the time on leave and the subsequent severance payment would have to be assessed according to the same principles. From an economic point of view, it makes little difference whether the severance payment is higher and the period of leave shorter or vice versa. The court applied sentence 2 of article 15(1) of the OECD Model and held that the state in which the employee previously worked has the right of taxation, at least proportionally.[283]

In a similar case of a severance payment in Germany, the BFH decided that article 15(1) of the OECD Model is relevant and that the residence state can levy taxes. Where the activity was previously carried out is irrelevant.[284]

Neither of the two courts applied article 18 of the OECD Model, although this provision also applies especially for payments after the termination of employment.[285] According to the argument of the VwGH, salary payments for a period of leave before the termination of employment and severance payments are somehow interchangeable.[286] An application of article 18 of the OECD Model to payments prior to the termination of employment, however, cannot be readily reconciled with the wording of the article. The connection to article 18 of the OECD Model, however, does suggest that such payments should also be subsumed under article 15(1) and, accordingly, the residence state should be granted the right of taxation, since a distribution of the right of taxation on the basis of principles other than those applying, for instance, to a pension payoff would be anything but obvious.

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278. K. Dziurdź, *Article 15 of the OECD Model: The 183-Day Rule and the Meaning of "Not a Resident" in Cases of Hybrid Partnerships*, 41 Intertax 10, pp. 492-498 (2013).
279. *See* S. Dommes, *Pensionen im Recht der Doppelbesteuerungsabkommen* p. 146 (Linde 2012); F. K.D. Drüen, C. Kaeser & M. Schwenke, *Art. 18 OECD-MA* para. 12, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and R. Ismer, *Article 18* para. 9, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
280. *See* R. Ismer, *Article 18* para. 9, in *Klaus Vogel on Double Taxation Conventions* at para. 17 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022). A proposal is made by E. Kemmeren in *Source versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives* (M. Lang et al. eds., Taxmann 2008), at p. 296.
281. *See also* R. Ismer, *Article 18* para. 9, in *Klaus Vogel on Double Taxation Conventions* at paras. 34-50 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
282. AT: VwGH [Supreme Administrative Court], 26. Feb. 2016, no. 2012/15/0128.
283. AT: VwGH, [Supreme Administrative Court], 23 Feb. 2017, Ro 2014/15/0050; M. Lang, S. Siller & S. Zolles, *Austria: Termination Payments*, in *Tax Treaty Case Law around the Globe 2020* p. 228 (E. Kemmeren et al. eds., Linde 2017); C. Marchgraber, *Austria: Severance Payments and Subject-to-Tax Clauses*, in *Tax Treaty Case Law Around the Globe 2018*, (E. Kemmeren et al. eds., Linde 2017), at ch. 28.1.
284. DE: BFH [Federal Fiscal Court], 10 June 2015, I R 79/13, IStR 2015, 785, Case Law IBFD; *see* A. Rust, *Germany: Taxing Rights for a Golden Handshake and the Effect of a Mutual Agreement between the Competent Tax Authorities*, in *Tax Treaty Case Law Around the Globe 2016*, (E. Kemmeren et al. eds., Linde 2017), at p. 219.
285. *See* R. Ismer, *Article 18* para. 9, in *Klaus Vogel on Double Taxation Conventions* at para. 35 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
286. M. Lang, S. Siller & S. Zolles, *Austria: Termination Payments*, in *Tax Treaty Case Law around the Globe 2020* p. 232 (E. Kemmeren et al. eds., Linde 2017).

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5.4.3. Article 19 of the OECD Model

Article 19 of the OECD Model is a special provision in relation to articles 15 and 18. This provision governs both remunerations that "a Contracting State or a political subdivision or a local authority thereof" pay to an individual in respect of services rendered to that subdivision or authority and the corresponding retirement pensions (*see* Articles 19(1), 19(3) and 28: Government Service and Members of Diplomatic Missions and Consular Posts section 1.1.1.).[287]

Regarding the question as to what "a Contracting State or a political subdivision or a local authority thereof" is, it is necessary to observe the domestic law – and in particular the constitutional law – of the state in which the corresponding subdivision or authority was established.[288] Nevertheless, the provision does not contain a reference to domestic law, since the political subdivisions or local authorities of the contracting state must be assessed according to treaty standards. The exhaustive list of article 19 of the OECD Model clearly indicates that these are political subdivisions and local authorities with a territorial jurisdiction, such as provinces and municipalities. Other public-law subdivisions or authorities do not fall under these provisions.[289] One of the contracting states, however, may have such extensive powers of intervention with regard to a public-law subdivision or authority established by the same that, in reality, the activities and thus the employments of that subdivision or authority are attributable to that state. As a result, that subdivision or authority will also qualify as a contracting state (*see* Articles 19(1), 19(3) and 28: Government Service and Members of Diplomatic Missions and Consular Posts section 5.1.2.).

5.5. Other allocation rules

5.5.1. Article 16 of the OECD Model

There are also allocation rules, such as articles 16 and 17 of the OECD Model, which may have priority over article 7 or article 15, depending on the case. What is meant by "a member of the board of directors" in article 16 of the OECD Model is a highly controversial interpretation issue. Diverging opinions exist on this question, some of which suggest that only fees of members with supervision duties should be subsumed under this provision and others of which suggest that fees of executive members should also be attributed to this allocation rule. Some of the interpretation problems are due to the fact that article 16 of the OECD Model, already in its 1963 version, was not properly translated into the German language, and terms that are declared authentic in Austrian and German treaties do not reflect the phrase "member of the board of directors" appropriately.[290] Yet this may lead to qualification conflicts, the cause of which, however, does not lie with domestic law.

Entity qualification is also important in the context of article 16 of the OECD Model.[291] If the entity of which the recipient of the fee is a member of the board of directors is a taxable entity treated as transparent in one contracting state and as opaque in the other, the consequences for the application of article 16 of the OECD Model might be questionable. It is decisive under which circumstances an entity may be regarded as a "company which is a resident of the other Contracting State".

Figure 6. Directors' fees (1)

287. F. Wassermeyer & K.D. Drüen, *Art. 19 OECD-M*, para. 1, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and R. Ismer & M. Blank, *Art. 19* para. 10, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022).
288. F. Wassermeyer & K.D. Drüen, *Art. 19 OECD-M*, para. 49, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and F. Haase, *Art. 19* para. 18, in *Außensteuergesetz Doppelbesteuerungsabkommen* (F. Haase ed., 2nd ed., C.F. Müller 2012).
289. F. Wassermeyer & K.D. Drüen, *Art. 19 OECD-M*, para. 49 et seq., in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and D. Dürrschmidt, *Art. 19* para. 21 et seq., in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021).
290. *See*, in detail, M. Lang, *Art 16 OECD Model Convention and Board Members with Managerial Tasks*, in *Taxes Crossing Borders (and Tax Professors Too): Liber Amicorum Prof. Dr. R.G. (Rainer) Prokisch* p. 189 et seq. (J. Korving, N. Kerinc & F. Souza de Man eds., Maastricht University Press 2022).
291. *See also* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 61 (IFA 2014).

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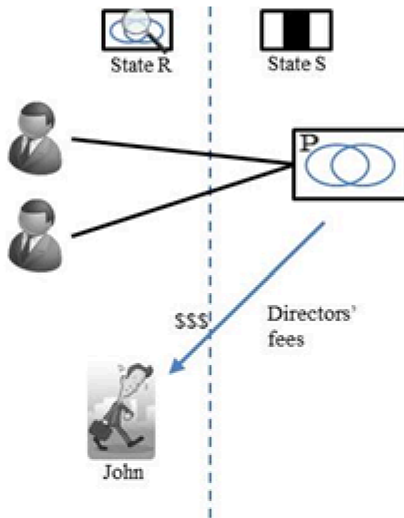

If the state in which the entity has been established treats it as opaque, many authors agree that state S should apply article 16 of the OECD Model.[292] In this case, there should not be any doubt that the entity is taxable in state S and is therefore a "company"; it also meets the requirements there which usually lead to worldwide taxation. It is more controversial whether the residence state of the board member may apply its own qualification or whether it has to follow the qualification of State P: Since article 16 of the OECD Model requires that the company "is a resident of the other Contracting state", it seems to be convincing to assume that the qualification in State S is also relevant in State R and that State R has to apply article 16 as well.

Figure 7. Directors' fees (2)

292. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 61 (IFA 2014), referring to the branch reporters.

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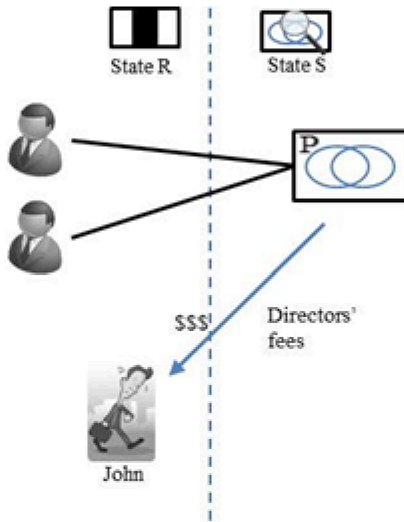

Again, the reverse situation is more interesting: Most authors take the view that State S should not apply article 16 of the OECD Model, since State S treats the entity as transparent.[293] However, this deserves a more detailed analysis: article 16 of the OECD Model requires a "company" which is "a resident of the other contracting State". Therefore, both the terms "company" and "resident" are relevant. The term "company" is defined in article 3(1)(b) of the OECD Model. Although this definition is ambiguous, one can assume that taxable entities fall under the definition of "company".[294] If at least one of the two states treats the entity as

293. M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 62 (IFA 2014), referring to the branch reporters.

294. G. Toifl, *Internationales Steuerrecht*, in *Handbuch Personengesellschaften*, paras. 17/42-17/43 (2nd ed., S. Bergmann & T. Ratka eds., Linde 2016); C. Marchgraber, *Der Begriff "Gesellschaft" im Recht der Doppelbesteuerungsabkommen*, 21 SWI 8, pp. 338-342 (2011); T. Day, *Article 3(1) Definitions, in History of Tax Treaties: The Relevance of the OECD Documents for the Interpretation of Tax Treaties*, p. 157 (T. Ecker & G. Ressler eds., Linde 2011); J.F. Avery Jones, *Understanding the OECD Model Tax Convention: The Lessons of History*, 10 Florida Tax Review 1, p. 8 (2009); M. Lang, *Die Ansässigkeit als das Kriterium für die Besteuerung im Quellenstaat nach den Verteilungsnormen des OECD-Musterabkommens, in Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, p. 233 (M. Lang, J. Schuch & C. Staringer eds., Linde 2008); E. Burgstaller, *Mitarbeiter-Stock-Options im Recht der Doppelbesteuerungsabkommen* p. 223 (Linde 2006); E. Burgstaller, *Die Kriterien für die Festlegung des Quellenstaats nach den Doppelbesteuerungsabkommen bei Dividenden, in Die Verteilung der Besteuerungsrechte zwischen Ansässigkeits- und Quellenstaat im Recht der Doppelbesteuerungsabkommen*, p. 227 (Gassner et al. eds., Linde 2005); G. Toifl, *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* pp. 49-51 (Linde 2003); M. Lang, *Die abkommensrechtliche Behandlung vor ausländischen Personengesellschaften mit Steuersubjektivität im Ausland, in Unternehmenspolitik und internationale Besteuerung – Festschrift für Lutz Fischer*, p. 720 (H.-J. Kleineidam ed., Erich Schmidt Verlag 1999); M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* pp. 112-117 (Orac 1991); and K. Van Raad, *General Report: Recognition of foreign enterprises as taxable entities*, in *Cahiers de Droit Fiscal International*, vol. 73a, p. 34 (IFA 1988).

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taxable, this requirement is met.[295] Since the entity is taxable in State R, this is sufficient to treat it as a "company" in both states, and therefore also in State S. Whether the company is also a resident of State S depends on whether it has the links to State S which can lead to worldwide taxation. If the entity is established in State S, this seems to be the case. Factual taxation is not required.[296] Therefore, there are also good reasons to assume that article 16 of the OECD Model is applicable, although this view is not generally shared.[297]

Since article 16 of the OECD Model refers to the "other Contracting State" for the purpose of residence of the company, the residence state of the board member should follow this approach of the source state, and article 16 is applicable. However, in this case, this does not seem to be difficult, since State R itself treats the entity as opaque.[298]

5.5.2. Article 17 of the OECD Model

Article 17 of the OECD Model also gives rise to a series of interpretation issues, which can only be discussed here by way of example. The term "entertainer" is certainly of central importance. This term is extremely dependent on social value judgements, which may vary from state to state, may be controversial within one state, and may also change over the course of time.[299] In many states – and in tax law – the term "entertainer" is a legal term.

Nevertheless, there is no reason to interpret the term "entertainer" on the basis of domestic law,[300] since article 17(1) of the OECD Model contains an exemplary explanation as to which type of entertainers it refers to: the theatre, motion picture, radio or television artistes mentioned therein provide valuable indications for the interpretation of the term "entertainer". Already from a formal point of view, recourse to domestic law can be ruled out in accordance with article 3(2) of the OECD Model. The exemplary list in article 17(1) of the OECD Model is tantamount to a definition, which could be also included in article 3(1) or any other part of the OECD Model so as to stipulate that theatre, motion picture, radio or television artistes are in any event entertainers. Yet the numerous other examples found in the Commentary on Article 17 of the OECD Model also suggest that the OECD Model uses a definition of entertainer that can be derived from the context of the convention (*see* Article 17: Entertainers and Sportspersons section 5.1.1.).[301]

5.5.3. Article 21 of the OECD Model

Article 21(1) of the OECD Model is a catch-all provision (*see* Article 21: Other Income section 1.1.1.1.). It includes all income covered by the personal and substantial scope of application of the convention that is not attributable to any other allocation rule.[302]03 Therefore, it is possible to find numerous examples in which the meaning of article 21 of the OECD Model is also

295. G. Toifl, *Internationales Steuerrecht*, in *Handbuch Personengesellschaften*, para. 17/43 (2nd ed., S. Bergmann & T. Ratka eds., Linde 2016); E. Burgstaller, *Mitarbeiter-Stock-Options im Recht der Doppelbesteuerungsabkommen* p. 224 (Linde 2006); E. Burgstaller, *Die Kriterien für die Festlegung des Quellenstaats nach den Doppelbesteuerungsabkommen bei Dividenden, in Die Verteilung der Besteuerungsrechte zwischen Ansässigkeits- und Quellenstaat im Recht der Doppelbesteuerungsabkommen*, p. 228 (Gassner et al. eds., Linde 2005); F.P. Sutter, *Die abkommensrechtliche Stellung der atypisch stillen Beteiligung, in Personengesellschaften im Recht der Doppelbesteuerungsabkommen*, pp. 216-217 (W. Gassner, M. Lang & E. Lechner eds., Linde 2000); M. Lang, *Hybride Finanzierungen im internationalen Steuerrecht* p. 119 (Orac 1991); H. Debatin, *Das neue Doppelbesteuerungsabkommen mit den USA*, 43 DB 12, p. 600 (1990); and B. Gröhs, *Die Gewinnbesteuerung der Personengesellschaften im Internationalen Steuerrecht Österreichs*, pp. 95-97 (Orac 1986).

296. K. Dziurdź, *Kurzfristige Arbeitnehmerüberlassung im Internationalen Steuerrecht*, pp. 233-235 (Linde 2013); M. Lang, *Art. 24 OECD-Musterabkommen, Ansässigkeit und Umsatzsteuer*, 21 SWI 11 pp. 472-473 (2011); M. Lang, *Steuerlich transparente Rechtsträger und Abkommensberechtigung*, 20 IStR 1, p. 1 (2011); H.-J. Aigner & M. Züger, *Die Lösung des OECD Steuerausschusses für Qualifikationskonflikte bei Personengesellschaften, in Personengesellschaften im Recht der Doppelbesteuerungsabkommen*, p. 49 (W. Gassner, M. Lang & E. Lechner eds., Linde 2000).

297. *See* M. Lang & C. Staringer, *General Report: Qualification of taxable entities and treaty protection*, in *Cahiers de Droit Fiscal International*, vol. 99b, p. 63 (IFA 2014), referring to the branch reporters.

298. Id.

299. *See*, for example, M. Lang, S. Siller & S. Zolles, *Austria: Entertainers under Article 17* , in *Tax Treaty Case Law around the Globe 2016*, pp. 245-255 (P. Essers et al. eds., IBFD and Linde 2016), Books IBFD; N. Löser, *Let me entertain you…*, 69 ÖStZ 9, pp. 246-247 (2016); M. Mayer & S. Zolles, *Austria* , in *Taxation of Entertainers and Sportspersons Performing Abroad*, pp. 309-311 (G. Maisto ed., IBFD 2016); and B. Renner, *Werbeauftritt als künstlerische Tätigkeit nach dem DBA Österreich-USA*, 25 SWI 10, pp. 474-477 (2015).

300. A. Cordewener, *Art. 17* para. 31, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); J. Roeleveld & K. Tetlak, *Article 17: Entertainers and Sportspersons- Global Tax Treaty Commentaries* , sec. 5.1.1.1., Global Topics IBFD (accessed 31 Mar. 2023); *see also* M. Lang, S. Siller & S. Zolles, *Austria: Entertainers under Article 17* , in *Tax Treaty Case Law around the Globe 2016*, p. 245 (P. Essers et al. eds., IBFD and Linde 2016), Books IBFD; M. Schwenke & F. Wassermeyer, *Art. 17 OECD-MA* para. 21, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); F. Stockmann, *Art. 17* para. 24, in *Doppelbesteuerungsabkommen* (R. Ismer ed., 7th ed., C.H. Beck & Linde 2021); P. Pistone & E. Schaffer, *Entertainers According to Art 17 OECD Model Convention*, in *The OECD-Model-Convention and its Update 2014*, pp. 72-73 (M. Lang et al. eds., Linde 2015); and K. Daxkobler, *Künstler und Sportler in den österreichischen DBA (Art 17 OECD-MA)*, in *Die österreichische DBA-Politik*, p. 274 (M. Lang, J. Schuch & C. Staringer eds., Linde 2013).

301. Para. 3 *OECD Model: Commentary on Article 17.*

302. A. Rust, *Art. 21* para. 2 et seq., in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); F. Wassermeyer & C. Kaeser, *Art. 21 OECD-MA* para. 1, in *Doppelbesteuerungsabkommen* (F. Wassermeyer ed., C.H. Beck 2023); and L. Schoueri, *Article 21: Other Income - Global Tax Treaty Commentaries* , sec. 1.1.1.1., Global Topics IBFD (accessed 31 Mar. 2023).

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ambiguous. In many cases in which the interpretation issues touch upon the limits of another allocation rule, the meaning of article 21 of the OECD Model also becomes questionable.[303]

The following scenario demonstrates this: in the case of a holding company without a foreign permanent establishment, the activity of which is limited to the administration of one or several shareholdings, it may prove unclear whether the term "enterprise" applies. If, in the case of an individual, the administration of one or even several shareholdings is not considered to be an enterprise, this may suggest article 7 of the OECD Model should not be used with corporations either. In this case, article 21 of the OECD Model must be used where domestic shareholdings are involved whose dividends do not fall under article 10. In this scenario, however, the legal consequences are identical, at least according to OECD Model: the exclusive right of taxation lies with the residence state.

5.6. Final remarks

Qualification conflicts are often presented as unavoidable and are attributed to differences in the domestic laws of the two contracting states. In order to prevent the resulting double taxation or double non-taxation, the OECD has published proposals on how article 23 of the OECD Model can be understood in a new manner. The observations in this chapter have shown not only that these considerations on the interpretation of article 23 of the OECD Model are not convincing, but that they are even highly problematic: domestic law plays a role in the interpretation of a tax treaty only in a few cases, and in these cases it is possible, on the one hand, to limit the actual importance of domestic law and, on the other hand, to determine each time which state's law is relevant and to what extent the other state is bound. In the overwhelming majority of scenarios, the OECD Model requires an interpretation based on itself, without any recourse to domestic law. If this is heeded in the application of a tax treaty, and the tax authorities and courts intensify their efforts to reach solutions from the context of the tax treaty, the number of qualification conflicts will drop significantly. Qualification conflicts, however, will not disappear, since treaty interpretation – and this is shown by several examples – may arrive at different results on the basis of similarly good reasons. In that sense, however, treaty law is not different from domestic law. In domestic law as well, many interpretation issues that arise in practice cannot be clearly resolved by making use of the complete toolbox of interpretation methods. In those cases, however, a court subsequently exercises its authority and not only decides on the specific contentious case in a binding manner but also directly or indirectly sets out guidelines on how identical or similar cases should be decided in the future. Treaty law, however, must usually be applied in at least two states. Even courts of last instance in the two states may arrive at different results. Therefore, it is urgently necessary to introduce arbitration in all tax treaties in order to solve those qualification conflicts that continue to arise and to provide the authorities of the contracting states with the corresponding guidelines that they can use in other similar cases to render qualification conflicts even less frequent in the future.

6. Relationship to Other Articles

6.1. Express relationships

There are no explicit relationships.

6.2. Implicit relationships

6.2.1. Article 1 of the OECD Model

Qualification issues may arise in relation to article 1(2) of the OECD Model. *See* Article 1: Persons Covered section 2.2.2.

6.2.2. Article 3 of the OECD Model

Qualification issues may arise in relation to article 3(2) of the OECD Model. *See* Treaty Interpretation section 4.

6.2.3. Article 6 of the OECD Model

Qualification issues may arise in relation to article 6 of the OECD Model. *See* Article 6: Immovable Property section 5.

6.2.4. Article 7 of the OECD Model

Qualification issues may arise in relation to article 7 of the OECD Model. *See* Article 7: Business Profits section 5.1.2.3.

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303. A. Rust, *Art. 21* para. 2 et seq., in *Klaus Vogel on Double Taxation Conventions* at paras. 9-20 (E. Reimer & A. Rust eds., 5th ed., Kluwer Law International 2022); F. Wassermeyer & C. Kaeser, *Art. 21 OECD-MA* para. 1, in *Doppelbesteuerungsabkommen* at para. 2 (F. Wassermeyer ed., C.H. Beck 2023); and L. Schoueri, *Article 21: Other Income - Global Tax Treaty Commentaries* , sec. 5.1.1.1., Global Topics IBFD (accessed 31 Mar. 2023).

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6.2.5. Article 8 of the OECD Model

Qualification issues may arise in relation to article 8 of the OECD Model. *See* Article 8: International Transport and Other Operations section 5.1.1.

6.2.6. Article 10 of the OECD Model

Qualification issues may arise in relation to article 10 of the OECD Model. *See* Article 10: Dividends section 5.1.1.

6.2.7. Article 11 of the OECD Model

Qualification issues may arise in relation to article 11 of the OECD Model. *See* Article 11: Interest section 5.1.1.1.

6.2.8. Article 12 of the OECD Model

Qualification issues may arise in relation to article 12 of the OECD Model. *See* Article 12: Royalties (OECD and UN Models) section 5.1.

6.2.9. Article 13 of the OECD Model

Qualification issues may arise in relation to article 13 of the OECD Model. *See* Article 13: Capital Gains section 5.1.

6.2.10. Article 15 of the OECD Model

Qualification issues may arise in relation to article 15 of the OECD Model. *See* Article 15: Income from Employment section 5.1.3.

6.2.11. Article 16 of the OECD Model

Qualification issues may arise in relation to article 16 of the OECD Model. *See* Article 16: Directors' Fees section 5.1.

6.2.12. Article 17 of the OECD Model

Qualification issues may arise in relation to article 17 of the OECD Model. *See* Article 17: Entertainers and Sportspersons section 5.1.1.1.

6.2.13. Articles 18 and 19 of the OECD Model

Qualification issues may arise in relation to articles 18 and 19 of the OECD Model. *See* Articles 18 and 19(2): Pensions section 5.1.

6.2.14. Article 21 of the OECD Model

Qualification issues may arise in relation to article 21 of the OECD Model. *See* Article 21: Other Income section 5.1.1.

6.3. Terms defined elsewhere

Not applicable.

6.4. Meta topics

Relevant issues regarding interpretation of the OECD and UN Models are addressed in Treaty Interpretation.

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