

International Tax and Tax Treaty Conflicts

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Framework of tax treaties

- **Tax treaties in the legal system:**
 - International treaties under public law
 - Part of domestic law
- **Application of tax treaties:**
 - Applied by (national) tax authorities and (national) courts
 - No world tax court
 - No uniformity in interpretation and application

How to achieve uniform interpretation

- **Mutual agreement procedures**
 - Lengthy procedure
 - No participation of taxpayers
 - Intransparent procedure („horse-trading“?)
 - No publication of results
 - No guarantee that there is agreement at the end

How to achieve uniform interpretation

- **Arbitration**
 - **Loss of sovereignty?**
 - **Sovereignty lost by conclusion of treaty**
 - **Other areas, e.g. investment protection**
 - **Preventive effect**
 - **Face saving**
 - **OECD Model Convention: Implementation in bilateral tax treaties?**
 - **Baseball arbitration?**
 - **Publication?**

How to achieve uniform interpretation

- **Alternatives**
 - **(Non-Binding) Opinion of independent experts**
 - **International organizations could provide lists for both parties to choose**
 - **International courts (e.g. ECJ)**
 - **Example: Tax treaty between Austria and Germany**

How to avoid qualification conflicts (OECD approach)

- **Art 23 OECD Model Convention**
 - **OECD Partnership Report: Residence state should follow qualification of state in source**
 - **Phrase „may be taxed in the other contracting state“ does not provide any legal basis for dependence on actual tax treatment in the other contracting state**
 - **OECD approach: only when domestic law is relevant (Art 3 par 2 OECD Model Convention)**
 - **Policy versus interpretation**
 - **Right Policy? Invitation for state of source to expand taxation right**

How to avoid qualification conflicts

- **OECD-Commentaries**
 - **Clarifying controversial issues by amending the OECD Commentaries?**
 - **OECD Commentaries can only be relevant for tax treaties concluded after the publication of a new version of the OECD Commentaries (travaux préparatoires)**
 - **No legal relevance of OECD Commentaries for previously concluded tax treaties**
 - **Convincing force**

How to avoid qualification conflicts

- **Interpretation rules**
 - **Art 3 par 2 OECD Model Convention**
 - **Reference to domestic law versus emphasising the context**
 - **Misleading rule**
 - **Link to Art 23 OECD Model Convention**
 - **Art 6 par 2 OECD Model Convention**

How to avoid qualification conflicts

- **Taking into account foreign court judgments**
 - **No binding effect**
 - **Explaining why a court follows or does not follow foreign decision**
 - **Availability of foreign decisions**

- **Solutions:**
 - **Arbitration Clauses**
 - **Expert opinions**
 - **Emphasis on autonomous interpretations of treaty (context of treaty)**



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