Residence of Companies under Tax Treaties and EC Law

edited by
Prof. Guglielmo Maisto

Vol. 5
EC and International Tax Law Series
Table of Contents

Acknowledgements v

Foreword vii

Part One
Companies and Private International Law

Chapter 1: General principles of residence of companies 3

_Peter Behrens_

1.1. The function of connecting factors 3

1.2. Categories of connecting factors 5
   1.2.1. Indeterminate connecting factors 5
   1.2.2. Determinate connecting factors 7
     1.2.2.1. Factors relying on the creation of the company as a legal person 7
     1.2.2.2. Factors relying on the internal governance structure and decision-making 8
     1.2.2.3. Factors relying on the business activities of a company 10

1.3. The legislative or jurisprudential use of connecting factors 11
   1.3.1. Determination of the proper law of companies (private international law) 11
     1.3.1.1. Preliminary observations 11
       1.3.1.1.1. Grouping of connecting factors 11
       1.3.1.1.2. Relevant distinctions 13
     1.3.1.2. Autonomous conflict rules 13
       1.3.1.2.1. Internal conflicts within the EC/EEA 13
       1.3.1.2.2. External conflicts outside the EC/EEA 15
       1.3.1.2.3. Divergence of “legal seat” and “real seat” (legal consequences) 19
     1.3.1.2.4. Proof of connecting factors 20
     1.3.1.2.5. Connecting factors as applied to groups of companies 21
     1.3.1.2.6. Pseudo-foreign companies 22
   1.3.1.3. Treaty rules 23
### Table of Contents

1.3.2. Determination of the proper laws outside company laws  
1.3.2.1. Judicial jurisdiction  
1.3.2.2. Insolvency proceedings  
1.3.2.3. Corporate taxation  
1.3.3. Conclusion

Chapter 2: Conflict of law rules on companies in the EU  
*Susanne Kalss*

2.1. Incorporation doctrine and seat doctrine  
2.2. European Court of Justice  
2.2.1. Development of the ECJ’s case law to date  
2.2.2. *Cartesio*  
2.3. Conflict of law rules post *Centros, Überseering* and *Inspire Art*  
2.3.1. Company law  
2.3.1.1. Does the location of the central administration affect the applicable company law?  
2.3.1.2. Scope of the lex societatis  
2.3.2. Law fields closely related to company law  
2.3.2.1. Contracts  
2.3.2.2. Corporate insolvency  
2.3.2.3. Non-contractual obligations  
2.3.2.4. Takeover bids  
2.4. Domicile of supranational companies  
2.4.1. Societas Europaea  
2.4.2. Societas Europaea Privata  
2.5. Corporate mobility in Europe  
2.5.1. Meaning of corporate mobility  
2.5.2. Status quo of European regulation  
2.5.2.1. History  
2.5.2.2. No further EU legislation on transfer of registered office to come in the near future  
2.5.2.3. Societas Europaea  
2.5.2.4. Directive on cross-border mergers  
2.5.2.5. Draft regulation on Societas Europaea Privata  
2.6. Conclusion
### Part Two
Company Residence and EC (Non-Tax) Law

#### Chapter 3: EC law and residence of companies
*Jan Wouters and Philip De Man*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1. Introduction</td>
<td>61</td>
</tr>
<tr>
<td>3.2. The “system” of Article 48 EC</td>
<td>61</td>
</tr>
<tr>
<td>3.2.1. Notion of “establishment”</td>
<td>62</td>
</tr>
<tr>
<td>3.2.2. Freedom to provide services</td>
<td>64</td>
</tr>
<tr>
<td>3.2.3. Free movement of capital</td>
<td>65</td>
</tr>
<tr>
<td>3.2.4. International agreements</td>
<td>66</td>
</tr>
<tr>
<td>3.3. Residence as “corporate seat”: Connecting factor for EC entitlement</td>
<td>68</td>
</tr>
<tr>
<td>3.3.1. Meaning</td>
<td>68</td>
</tr>
<tr>
<td>3.3.2. Analogy with nationality</td>
<td>73</td>
</tr>
<tr>
<td>3.3.3. Relationship to private international law</td>
<td>75</td>
</tr>
<tr>
<td>3.4. Residence restrictions</td>
<td>78</td>
</tr>
<tr>
<td>3.4.1. Residence as discrimination</td>
<td>79</td>
</tr>
<tr>
<td>3.4.1.1. General</td>
<td>79</td>
</tr>
<tr>
<td>3.4.1.2. Overt and covert discrimination</td>
<td>80</td>
</tr>
<tr>
<td>3.4.1.3. Application in tax cases</td>
<td>82</td>
</tr>
<tr>
<td>3.4.2. Residence as non-discriminatory restriction</td>
<td>85</td>
</tr>
<tr>
<td>3.4.2.1. Measures with discouraging effect</td>
<td>85</td>
</tr>
<tr>
<td>3.4.2.2. Restrictive measures imposed by State of origin</td>
<td>87</td>
</tr>
<tr>
<td>3.5. Concluding remarks</td>
<td>90</td>
</tr>
</tbody>
</table>

#### Part Three
Tax Residence of Companies under Domestic Tax Laws

#### Chapter 4: Corporate tax residence in civil law jurisdictions
*Luc De Broe*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1. Introduction</td>
<td>95</td>
</tr>
<tr>
<td>4.2. Criteria applied to determine corporate tax residence in the domestic laws of civil law jurisdictions</td>
<td>95</td>
</tr>
<tr>
<td>4.2.1. General rules</td>
<td>95</td>
</tr>
<tr>
<td>4.2.2. Deemed residence rules</td>
<td>97</td>
</tr>
</tbody>
</table>
Table of Contents

7.3.2.5. Criteria of attachment 233
7.3.2.6. Legal entities covered 234
7.3.2.7. Tie-breaker for legal entities 235
7.3.3. OECD 1963–2008 238
  7.3.3.1. The second sentence 238
  7.3.3.2. Treaty shopping 240
7.4. Interpretation 243
  7.4.1. Treaty benefits for third-country residents 244
    7.4.1.1. Commerzbank 244
    7.4.1.2. Crown Forest Industries 246
    7.4.1.3. Should PEs get treaty benefits in the source country? 248
  7.4.2. Company residence, treaty shopping and worldwide taxation 251
    7.4.2.1. Dual residents 252
    7.4.2.2. Conduit companies 254
    7.4.2.3. Policy purposes of company residence test and worldwide taxation 259
    7.4.2.4. Giving substance to the company residence test 263
7.5. Conclusions 270

Chapter 8: The expression “by reason of his domicile, residence, place of management ...” as applied to companies 273
Marcel Widrig

8.1. Introduction 273
8.2. Role of domestic law in connection with connecting factors 274
  8.2.1. Defining residence 274
  8.2.2. Relevance of the criterion “domicile” 275
  8.2.3. Relevance of the criterion “place of management” 276
    8.2.3.1. Difference in scope to Article 4(3) OECD MC 278
    8.2.3.2. Difference in scope to Article 5(2)(a) OECD MC 279
  8.2.4. Meaning of “other criteria of similar nature” 280
8.3. Approach taken in the US Model tax treaty 282
  8.3.1. Residence rule in Article 4(1) US MC 282
  8.3.2. Place of management according to Article 5 US MC 284
8.4. Compatibility of domestic deemed residence rules 284
8.5. Conclusion 286

xiv
<table>
<thead>
<tr>
<th>Chapter 9: The meaning of “place of effective management”</th>
<th>287</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Jacques Sasseville</em></td>
<td></td>
</tr>
<tr>
<td>9.1. Introduction</td>
<td>287</td>
</tr>
<tr>
<td>9.2. The Mexico and London Models</td>
<td>288</td>
</tr>
<tr>
<td>9.3. The OEEC: A different approach but the same problem</td>
<td>288</td>
</tr>
<tr>
<td>9.4. The 1963 Draft, the 1977 Model and the 1992 Update</td>
<td>292</td>
</tr>
<tr>
<td>9.5. The 2000 Update</td>
<td>293</td>
</tr>
<tr>
<td>9.6. The 2008 Update</td>
<td>294</td>
</tr>
<tr>
<td>9.7. Different views as to the meaning of “place of effective management”</td>
<td>297</td>
</tr>
<tr>
<td>9.8. The American concept of “primary place of management and control”</td>
<td>300</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 10: Article 4(3) of the OECD Model Convention: An inconvenient truth</th>
<th>303</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Stef van Weeghel</em></td>
<td></td>
</tr>
<tr>
<td>10.1. Introduction</td>
<td>303</td>
</tr>
<tr>
<td>10.2. Article 4(3) MC: An inconvenient truth</td>
<td>303</td>
</tr>
</tbody>
</table>

Part Six
Country Reports

<table>
<thead>
<tr>
<th>Chapter 11: Australia</th>
<th>311</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Michael Dirkis</em></td>
<td></td>
</tr>
<tr>
<td>11.1. Companies and private international law</td>
<td>311</td>
</tr>
<tr>
<td>11.1.1. Conflict of laws rule</td>
<td>311</td>
</tr>
<tr>
<td>11.1.2. Corporate governance rules</td>
<td>313</td>
</tr>
<tr>
<td>11.1.2.1. Powers of the directors of a company</td>
<td>313</td>
</tr>
<tr>
<td>11.1.2.2. Independence of directors from shareholders</td>
<td>314</td>
</tr>
<tr>
<td>11.1.2.3. Whether persons participating in the management of a company may be considered directors thereof, even absent a formal appointment to such office</td>
<td>315</td>
</tr>
<tr>
<td>11.1.2.4. Allocation of corporate governance between managing directors and supervisory directors</td>
<td>316</td>
</tr>
</tbody>
</table>
11.1.2.5. Allocation of corporate governance between shareholders and directors 316
11.1.2.6. The rights (if any) of a parent company to interfere with the decisions taken by directors of a subsidiary 316

11.2. Residence of companies under Australian tax law 317
   11.2.1. Overview 317
   11.2.2. Incorporation test 318
   11.2.3. Central management and control test 319
      11.2.3.1. Two- or one-tier test 319
      11.2.3.2. The first element: "Carries on business" test 320
      11.2.3.3. The second element: Central management and control 320
   11.2.4. Voting power control test 324
      11.2.4.1. Overview 324
      11.2.4.2. The first element: Carries on business in Australia 325
         11.2.4.2.1. Defining a business 325
         11.2.4.2.2. Is there a business in existence being carried on? 326
         11.2.4.2.3. Is the business in Australia? 327
      11.2.4.3. The second element: Voting power controlled by shareholders who are residents of Australia 327
         11.2.4.3.1. Voting power 328
         11.2.4.3.2. Control 328
         11.2.4.3.3. Resident in Australia 329

11.3. Residence of companies under tax treaties 329
   11.3.1. Criteria applied in determining residence of companies in Australia’s tax treaty practice 329
      11.3.1.1. Overview 329
      11.3.1.2. Consistency with Art. 4(1) OECD Model Convention 332
   11.3.2. The tie-breaker provisions for companies’ residence in Australia’s tax treaty practice 332
   11.3.3. Effects of a tax treaty tie-breaker rule on the company’s resident status under both domestic corporate (income) tax law and other tax treaties 335
      11.3.3.1. Overview 335
      11.3.3.2. "Dual resident investment company" test 336
### Chapter 12: Austria

*Karin Simader*

12.1. Companies and private international law

12.1.1. Conflict of law rules

12.1.1.1. Connecting criteria

12.1.1.2. Implications of the real seat theory and its compatibility with Community law

12.1.1.3. General Austrian treaty practice

12.1.2. Company law rules on governance of companies

12.1.2.1. Private limited company

12.1.2.2. Public limited company

12.2. Residence of companies under domestic company tax law

12.2.1. Connecting criteria

12.2.2. Interaction between private international law and corporate tax law

12.2.3. Corporate tax liability of foreign corporations

12.3. Residence of companies under tax treaties

12.3.1. Relevant criteria for determination of residence

12.3.1.1. The expression “liable to tax”

12.3.1.2. Connecting criteria

12.3.1.3. Article 4 paragraph 1 second sentence

12.3.2. Tie-breaker provisions

12.3.3. Effects of a tie-breaker rule

12.4. Compatibility of domestic company tax law provisions with tax treaties and Community law

12.4.1. General remarks

12.4.2. Particular provisions of domestic company tax law

### Chapter 13: Belgium

*Niels Bammens*

13.1. Companies and private international law

13.1.1. Conflict of law rules

13.1.2. Company law rules on governance of companies
Table of Contents

13.2. Residence of companies under domestic company tax law 382
  13.2.1. Connecting factors in corporate income tax law 382
  13.2.2. Case law on the determination of the company’s residence 387
  13.2.3. Other entities 390
13.3. Residence of companies under tax treaties 390
  13.3.1. Criteria applied in determining the residence of companies in tax treaty policy 390
    13.3.1.1. Meaning of the expression “liable to tax” 391
      13.3.1.1.1. Tax treaty practice 391
      13.3.1.1.2. Interpretation 393
    13.3.1.2. Connecting criteria relevant to establish the resident status 394
      13.3.1.2.1. Tax treaty practice 394
      13.3.1.2.2. Interpretation 395
    13.3.1.3. Companies liable to tax in a State in respect only of income from sources located therein 396
  13.3.2. The tie-breaker provisions for companies’ residence 397
    13.3.2.1. Tax treaty practice 397
      13.3.2.1.1. Interpretation 399
  13.3.3. Effects of a tax treaty tie-breaker rule on the company’s resident status under both domestic corporate income tax law and other tax treaties 401
13.4. Compatibility of domestic company tax law provisions with tax treaties and Community law 405

Chapter 14: Canada

Kim Brooks 407

14.1. Residence of corporations in Canada 407
14.2. An introduction to Canadian corporate law 408
  14.2.1. Forming a Canadian corporation 408
  14.2.2. Corporate governance 410
    14.2.2.1. Powers and privileges 410
    14.2.2.2. Shareholders 411
    14.2.2.3. Directors 411
14.3. Residence of companies under Canadian tax law 411
  14.3.1. Tax consequences resulting from Canadian corporate residence 412
14.3.2. Central management and control test and the perceived need for a statutory test 413
14.3.3. The statutory place of incorporation test 415
14.3.4. Continued role for central management and control 417
14.3.5. Continuances 422
14.3.6. Tax residence of other entities 422
14.4. Residence of companies under Canada’s tax treaties 424
14.4.1. Article 4(1) in Canada’s tax treaties 425
  14.4.1.1. Liable to tax 425
  14.4.1.2. Connecting criteria for residence 434
  14.4.1.3. Liable to tax in a State in respect only of income from sources located therein 435
14.4.2. Article 4(3) in Canada’s tax treaties 436
14.5. Compatibility of Canada’s domestic company tax law provisions with tax treaties 438
  14.5.1. Conclusion: Continued avoidance concerns 439

Chapter 15: France 441
Nicolas de Boynes

15.1. Companies and private international law 441
  15.1.1. Conflict of law rules 441
  15.1.2. Company law rules on governance of companies 443
15.2. Residence of companies under domestic company tax law 446
  15.2.1. Residence and source 446
    15.2.1.1. Consequences of a strict territoriality principle 447
    15.2.1.2. The French approach to territoriality 448
  15.2.2. Definition of the “seat” 450
15.3. Residence of companies under tax treaties 452
  15.3.1. Criteria applied in determining residence of companies in French tax treaty practice 452
    15.3.1.1. Meaning of the expression “liable to tax” 453
    15.3.1.2. Companies liable to tax by reason of their residence 454
  15.3.2. Tie-breaker provisions for companies’ residence in French tax treaty practice 456
  15.3.3. Effects of tax treaty tie-breaker rule on company’s resident status 458
15.4. Compatibility of domestic company tax law provisions with tax treaties and Community law 458
Chapter 16: Germany

Joachim Englisch

16.1. Preliminary questions of company law

16.1.1. Rules on governance of corporations in company law

16.1.1.1. Aktiengesellschaft (public limited company)

16.1.1.2. Gesellschaft mit beschränkter Haftung (private limited company)

16.1.1.3. Konzern (corporate group)

16.1.2. Conflict of law rules in international company law

16.1.2.1. The (r)evolution of German international company law

16.1.2.1.1. Unilateral rules

16.1.2.1.2. Bilateral agreements

16.1.2.2. The concept of “actual centre of administration” as connecting factor

16.2. Residence of companies under domestic corporate tax law

16.2.1. The company as a taxable person

16.2.1.1. Corporation tax

16.2.1.2. Local business tax

16.2.2. Tax effects of residence and non-residence

16.2.2.1. Corporation tax

16.2.2.2. Local business tax

16.2.3. Criteria applied to determine the place of residence

16.2.3.1. Seat

16.2.3.2. Place of management

16.2.3.2.1. Substantive dimension: Performance of chief business management

16.2.3.2.2. Personal dimension: Attribution to the actual manager(s)

16.2.3.2.3. Functional dimension: Localizing the centre of management

16.3. Residence of companies under tax treaties

16.3.1. Criteria applied in determining the place of residence

16.3.1.1. Liability to tax

16.3.1.2. Connecting criteria relevant to establish resident status
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.3.1.2.1. Relationship to the corresponding criteria in domestic tax law</td>
<td>498</td>
</tr>
<tr>
<td>16.3.1.2.2. “Place of management” as standard criterion</td>
<td>499</td>
</tr>
<tr>
<td>16.3.1.2.3. “Seat”/“place of incorporation” as alternative criterion</td>
<td>500</td>
</tr>
<tr>
<td>16.3.1.2.4. Concurrence of treaty and domestic criteria</td>
<td>501</td>
</tr>
<tr>
<td>16.3.1.3. Criteria expressly excluding resident status</td>
<td>503</td>
</tr>
<tr>
<td>16.3.2. Tie-breaker provisions</td>
<td>505</td>
</tr>
<tr>
<td>16.3.3. Effects of a tax treaty tie-breaker rule on the company’s resident status</td>
<td>515</td>
</tr>
<tr>
<td>16.4. Compatibility of domestic corporation tax law provisions with tax treaties and Community law</td>
<td>515</td>
</tr>
</tbody>
</table>

**Chapter 17: Italy**

*Mario Tenore*

17.1. Companies and private international law                             | 519  |
| 17.1.1. Italian company law: a brief overview                           | 528  |
| 17.2. Residence of companies under domestic company tax law             | 530  |
| 17.2.1. Rebuttable presumptions                                         | 540  |
| 17.3. Residence of companies under tax treaties                          | 544  |
| 17.4. Compatibility of domestic company tax law provisions with Community law | 547  |

**Chapter 18: Netherlands**

*Reinout de Boer*

18.1. Introduction and summary                                           | 551  |
| 18.2. Companies and private (international) law                         | 552  |
| 18.2.1. Conflict of law rules                                           | 552  |
| 18.2.2. Governance of companies (NV and BV)                            | 556  |
| 18.3. Residence of companies under domestic company tax law            | 560  |
| 18.3.1. Introduction                                                   | 560  |
| 18.3.2. The all-facts-and-circumstances test (Art. 4(1) GSTA)          | 561  |
| 18.3.2.1. General                                                      | 561  |
18.3.2.2. Place of effective management is generally decisive 562
18.3.2.3. Effective management of a company is deemed to be performed by its (executive) board 563
18.3.2.4. Relation of the all-facts-and-circumstances test with conflict of law rules under private international law 572
18.3.2.5. Distinction between “place of effective management” and “place of management” 572
18.3.3. Incorporation fiction 574
18.3.4. Minimum substance requirements in administrative guidelines 576
18.4. Residence of companies under tax treaties 578
18.4.1. Criteria applied in the tax treaty practice of the Netherlands 578
18.4.1.1. The meaning of the expression “liable to tax” 582
18.4.1.1.1. Exemptions in respect of income 583
18.4.1.1.2. Exempt companies/entities 584
18.4.1.1.3. Companies/entities resident for domestic tax purposes that are only partially liable to tax 586
18.4.1.1.4. Companies/entities resident for domestic tax purposes that are not liable to tax at all 587
18.4.1.2. The connecting criteria relevant to establish the resident status 589
18.4.1.3. Companies liable to tax in a State in respect only of income from sources located therein 591
18.4.2. Tie-breaker provisions in tax treaty practice in the Netherlands 591
18.4.2.1. Provisions in tax treaties 591
18.4.2.2. Interpretation of “effective management” in tie-breaker provisions 595
18.4.3. Effects of a tax treaty tie-breaker rule on the company’s resident status under both domestic tax law and other tax treaties 595
18.4.3.1. Domestic tax law 595
18.4.3.2. Tax treaties (triangular cases) 597
18.4.3.2.1. BNB 2001/295 597
18.4.3.2.2. BNB 1992/379 600

18.4.4. Compatibility of domestic company tax law provisions with tax treaties and EC law in respect of residence 600

Chapter 19: South Africa
Johann Hattingh

19.1. Introduction 603
19.1.1. The legal conception of “residence” 603
19.1.2. The legal conception of a “company” 604
19.1.3. Chapter overview 606

19.2. Companies and private international law 607
19.2.1. Conflict or choice of laws 607
19.2.1.1. Residence as a jurisdictional connecting factor 612
19.2.1.1.1. South African incorporated companies 615
19.2.1.1.2. Foreign incorporated companies 625
19.2.1.1.3. Property as connecting factor: Movable incorporeal things and “residence”-based fictions 635
19.2.1.2. Connecting criteria located in two or more States in respect of the same dispute 637
19.2.1.2.1. Connecting criteria transferred from or to South Africa 640

19.2.2. Concluding remarks concerning jurisdictional law 641

19.2.3. Investment protection treaties 643

19.3. Corporate governance of companies 644
19.3.1. The general meeting of a company as far as management is concerned 647
19.3.2. The board of directors and the management of a company 649
19.3.2.1. Who is a director? 649
19.3.2.2. Different classes of directors 653
19.3.2.3. Acting collectively 654
19.3.2.3.1. Acting collectively only at board meetings? 654
# Table of Contents

19.3.2.4. Directors acting as managers ........................................ 658
19.3.3. The managing director .................................................. 662
19.3.4. The chairman of the board of directors ............................... 664
19.3.5. The influence of directors’ fiduciary duties on the management of a company ........................................ 665
19.3.6. The effect of liquidation on the management capacity of directors .................................................. 667
19.3.7. Other functionaries of a company ...................................... 667
  19.3.7.1. Employees .................................................................. 667
  19.3.7.2. Secretary .................................................................. 668
  19.3.7.3. Managers of a company ............................................... 668
19.3.8. Sole shareholder also director .......................................... 673
19.3.9. Dominant shareholder or directors .................................... 673

19.4. Residence of companies under domestic income tax law ............. 679
  19.4.1. Statutory residence definition ......................................... 679
    19.4.1.1. Companies ............................................................. 679
    19.4.1.2. Entities other than companies and natural persons ........ 680
  19.4.2. The place of effective management criterion under South Africa’s domestic income tax law ......................... 681
    19.4.2.1. Interpretive approach ............................................... 681
    19.4.2.2. The approach of the South African Revenue Service .... 685
    19.4.2.3. Questionable aspects of Interpretation Note 6 in the light of South African law .......................... 689
  19.4.3. “Effective” management of a company as opposed to “management of a company” ........................................ 693
  19.4.4. “Place” of effective management ...................................... 694
  19.4.5. Guidance from related tax case law .................................. 695
    19.4.5.1. Robinson v. COT: The contextual scene of tax residence .................................................. 696
    19.4.5.2. Rhodesia Railways v. COT: Dual corporate tax residence and tax policy considerations .................. 698
    19.4.5.3. Estate Kootcher v. CIR: A return to the analogue of human residence ................................... 702
    19.4.5.4. A Company v. COT and ITC 1054: The role of dominant shareholders ...................................... 703
    19.4.5.5. South African commentators’ views on the meaning of “place of effective management” .................. 707
    19.4.5.6. Guidance from foreign tax case law ............................ 711
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.5. Residence of companies under tax treaties</td>
<td>714</td>
</tr>
<tr>
<td>19.5.1. The meaning of the expression &quot;liable to tax&quot;</td>
<td>714</td>
</tr>
<tr>
<td>19.5.2. The connecting criteria to establish resident status</td>
<td>716</td>
</tr>
<tr>
<td>19.5.3. Companies liable to tax only in respect of income from sources within South Africa</td>
<td>719</td>
</tr>
<tr>
<td>19.5.4. &quot;Place of management&quot; for purposes of Art. 5(2) of the OECD Model</td>
<td>720</td>
</tr>
<tr>
<td>19.5.5. Tie-breaker provisions for companies under South Africa’s tax treaty network</td>
<td>721</td>
</tr>
<tr>
<td>19.5.6. Does the meaning of “place of effective management” differ under South African tax treaty law as opposed to domestic tax law?</td>
<td>725</td>
</tr>
<tr>
<td>19.5.7. Overview of international sources on the meaning of “place of effective management”</td>
<td>726</td>
</tr>
<tr>
<td>19.5.7.1. Historical tax treaty development</td>
<td>726</td>
</tr>
<tr>
<td>19.5.7.2. Common tax treaty meaning?</td>
<td>730</td>
</tr>
<tr>
<td>19.5.7.3. Guidance from the Commentary on the OECD Model before the 2008 amendments</td>
<td>731</td>
</tr>
<tr>
<td>19.5.7.4. Guidance from the Commentary on the OECD Model after the 2008 amendments</td>
<td>733</td>
</tr>
<tr>
<td>19.5.7.5. Foreign case law of the tax treaty meaning of “place of effective management”</td>
<td>737</td>
</tr>
<tr>
<td>19.5.7.5.1. Wensleydale’s case: The place “where the shots are called”</td>
<td>737</td>
</tr>
<tr>
<td>19.5.7.5.2. Wood v. Holden</td>
<td>738</td>
</tr>
<tr>
<td>19.5.7.5.3. The Indofood case</td>
<td>740</td>
</tr>
<tr>
<td>19.5.7.5.4. The Smallwood case</td>
<td>742</td>
</tr>
<tr>
<td>19.5.8. The South African effect of a tie-breaker for a dual tax resident company</td>
<td>750</td>
</tr>
<tr>
<td>19.5.9. The relationship between tax treaty law and domestic tax law</td>
<td>752</td>
</tr>
<tr>
<td>19.5.10. South Africa and the European Union</td>
<td>752</td>
</tr>
</tbody>
</table>

**Chapter 20: Spain**

*Luis A. Martinez Giner*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>20.1. Spanish companies and private international law</td>
<td>753</td>
</tr>
<tr>
<td>20.1.1. “Nationality” of Spanish companies</td>
<td>753</td>
</tr>
<tr>
<td>20.1.2. Special rule for “pseudo foreign corporations”</td>
<td>755</td>
</tr>
</tbody>
</table>
## Table of Contents

20.1.3. International transfer of company headquarters 756  
20.1.4. Spanish companies in the reciprocal investment promotion and protection treaties 758  
20.2. Organizational structure of companies in Spain 758  
20.3. Residence of legal persons in Spanish corporate tax legislation 764  
  20.3.1. Residence as a criterion defining taxable persons for company tax purposes 764  
  20.3.2. Criteria determining the residence of companies 765  
    20.3.2.1. Incorporation of a company under Spanish law 766  
    20.3.2.2. Location of the registered office of the company 767  
    20.3.2.3. Place of effective management 769  
  20.3.3. Presumption of tax residence of companies in Spain 775  
20.4. Tax treaties and the residence of companies 778  
  20.4.1. Residence of companies for tax treaty purposes according to Spanish treaty practice 778  
    20.4.1.1. Scope of tax liability: Worldwide tax liability 778  
    20.4.1.2. Criteria determining residence in tax treaties signed by Spain 780  
    20.4.1.3. Exclusion of persons with territorial tax liability 784  
  20.4.2. Tie-breaker rules and dual residence of companies in Spanish treaties 786  
  20.4.3. Effects of the tax treaty tie-breaker rule on a company's resident status 790  
20.5. Compatibility of domestic company tax law with tax treaties and community law 792  

### Chapter 21: Switzerland  

Jean-Frédéric Maraia  

21.1. Companies and private international law 795  
  21.1.1. Conflict of law rules 795  
  21.1.2. Company law rules on governance of companies 796  
    21.1.2.1. Corporations 796  
      21.1.2.1.1. In general 796  
      21.1.2.1.2. Shareholders' meeting 797  
      21.1.2.1.3. Board of directors 797
# Table of Contents

21.1.2.1.4. Relation between shareholders and directors 798
21.1.2.1.5. New rules improving the corporate governance 799
21.1.2.2. Limited liability company 799
21.1.2.3. Comment 800

21.2. Residence of companies under domestic company tax law 801
   21.2.1. Federalism system 801
   21.2.2. Scope 801
   21.2.3. Tax residence 802
      21.2.3.1. Criteria 802
      21.2.3.2. Relation between the two criteria (conflict) 802
      21.2.3.3. Registered office in Switzerland 803
      21.2.3.4. Effective management in Switzerland 804
         21.2.3.4.1. Introduction of the effective management criterion and first definition 804
         21.2.3.4.2. Interpretation of the effective management concept in the intercantonal context 805
         21.2.3.2.3. Application of the jurisprudence related to intercantonal double taxation to international situations 806
         21.2.3.4.4. Importance of the criteria depending on the specific circumstances of the case 807

21.3. Residence of companies under tax treaties 808
   21.3.1. Criteria applied in determining the residence of companies under Swiss tax treaties 808
   21.3.2. Meaning of the expression “liable to tax” 810
   21.3.3. Companies liable to tax in a State in respect only of income from sources located therein 811
   21.3.4. Tie-breaker provisions for companies’ residence
      21.3.4.1. OECD Model and treaties concluded by Switzerland 812
      21.3.4.2. Concept of effective management in the treaties 812
   21.3.5. Effects of a tax treaty tie-breaker rule on company’s resident status 815

21.4. Compatibility of domestic company tax law provisions with tax treaties 815
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>22.1. Companies and private international law</td>
<td>817</td>
</tr>
<tr>
<td>22.1.1. Domicile, residence and other connecting factors for companies</td>
<td>817</td>
</tr>
<tr>
<td>22.1.1.1. Domicile of companies</td>
<td>817</td>
</tr>
<tr>
<td>22.1.1.2. Residence of companies</td>
<td>818</td>
</tr>
<tr>
<td>22.1.1.3. Other connecting factors under non-tax instruments</td>
<td>819</td>
</tr>
<tr>
<td>22.1.2. Rules on corporate governance</td>
<td>820</td>
</tr>
<tr>
<td>22.1.2.1. The powers of directors</td>
<td>820</td>
</tr>
<tr>
<td>22.1.2.2. Delegation of the powers of directors</td>
<td>821</td>
</tr>
<tr>
<td>22.1.2.3. De facto and shadow directors</td>
<td>822</td>
</tr>
<tr>
<td>22.1.2.4. The interaction between directors and shareholders</td>
<td>823</td>
</tr>
<tr>
<td>22.1.2.5. Group companies and the piercing of the corporate veil</td>
<td>824</td>
</tr>
<tr>
<td>22.2. Residence of companies under domestic company tax law</td>
<td>825</td>
</tr>
<tr>
<td>22.2.1. Introduction</td>
<td>825</td>
</tr>
<tr>
<td>22.2.2. The common law test: Central management and control</td>
<td>826</td>
</tr>
<tr>
<td>22.2.2.1. The old cases: De Beers Consolidated and Unit Construction</td>
<td>827</td>
</tr>
<tr>
<td>22.2.2.2. Statement of Practice 1/90</td>
<td>830</td>
</tr>
<tr>
<td>22.2.2.3. Recent cases: Wood v. Holden and News Datacom</td>
<td>832</td>
</tr>
<tr>
<td>22.2.2.4. The place of effective management</td>
<td>835</td>
</tr>
<tr>
<td>22.2.3. The statutory test: The incorporation rule</td>
<td>836</td>
</tr>
<tr>
<td>22.2.4. Residence of other non-corporate entities</td>
<td>837</td>
</tr>
<tr>
<td>22.3. Residence of companies under tax treaties</td>
<td>839</td>
</tr>
<tr>
<td>22.3.1. Company residence criteria under UK DTCs</td>
<td>839</td>
</tr>
<tr>
<td>22.3.2. The tie-breaker rule</td>
<td>841</td>
</tr>
<tr>
<td>22.3.2.1. The tie-breaker rule under the OECD Model</td>
<td>841</td>
</tr>
<tr>
<td>22.3.2.2. The tie-breaker rule in UK DTCs: The place of effective management</td>
<td>844</td>
</tr>
<tr>
<td>22.3.2.3. Effects of the tie-breaker rule</td>
<td>848</td>
</tr>
<tr>
<td>22.3.3. Corporate immigration</td>
<td>849</td>
</tr>
<tr>
<td>22.4. Compatibility of domestic tax law provisions with tax treaties and Community law</td>
<td>850</td>
</tr>
<tr>
<td>22.4.1. Compatibility with tax treaties</td>
<td>850</td>
</tr>
<tr>
<td>22.4.2. Compatibility with Community law (primary and secondary)</td>
<td>851</td>
</tr>
</tbody>
</table>
Chapter 23: United States

Yariv Brauner

23.1. Companies and private international law 855
   23.1.1. Private international law of the United States 855
   23.1.2. Corporate governance law of the United States 860

23.2. Residence of companies under domestic company tax law 865

23.3. The residence of companies under tax treaties 875
   23.3.1. Criteria applied in determining the residence of companies in the State’s tax treaty practice 875
       23.3.1.1. The meaning of the expression “liable to tax” 876
       23.3.1.2. The connecting criteria relevant to establish the resident status 877
       23.3.1.3. Companies liable to tax in a State in respect only of income from sources located therein 881
   23.3.2. The tie-breaker provisions for companies’ residence in the State’s tax treaty practice 882
       23.3.2.1. The tie-breaker rules 882
   23.3.3. Effects of a tax treaty tie-breaker rule on the company’s resident status under both domestic corporate (income) tax law and other tax treaties 883
   23.3.4. Denial of treaty benefits for certain payments through hybrid entities 884
   23.3.5. Conduit financing regulations 884

23.4. Compatibility of domestic company tax law provisions with tax treaties and Community law 885
   23.4.1. Compatibility of the domestic tax provisions with tax treaties 885
   23.4.2. Compatibility of the domestic tax provisions with Community law 885

Part Seven
Round-Table Discussion

Chapter 24: Round Table: The issues, conclusions and summing-up

Augusto Fantozzi, Jean Pierre Le Gall, Kees van Raad, Yariv Brauner, Angelo Nikolakakis

24.1. Is it possible to avoid conflicts of companies’ tax residences? 889
   24.1.1. Domestic provisions 890
   24.1.2. What about treaty provisions? 892
# Table of Contents

24.2. A brief analysis of the operation and effect of the application of Art. 4.1 OECD Model in dual residence cases 895

24.3. Concluding thoughts 900

24.4. The unbearable lightness of being incorporated: The diminishing relevance of corporate residence 903

24.4.1. The taxation of corporations 903

24.4.2. Corporate taxation in theory and in practice 905

24.4.3. Conclusions 923

24.5. Summing-up and conclusions 928

**Contributors** 935