

The concept of permanent establishment in the insurance business

Dissertation
der Rechtswissenschaftlichen Fakultät
der Universität Zürich

zur Erlangung der Würde eines Doktors der Rechtswissenschaft

vorgelegt von

Daniele Frescurato

von Italien

genehmigt auf Antrag von
Prof. Dr. Madeleine Simonek
und
Prof. Dr. Helmut Heiss

Table of contents

List of abbreviations

Bibliography

1 Preliminary remarks

- 1.1 Historical background
- 1.2 The current state of play
- 1.3 Research framework
- 1.4 Research aims and questions
- 1.5 Research outline and methodology

2 Overview of the insurance business

- 2.1 Overview of the regulatory framework
 - 2.1.1 The rationale for insurance regulation
 - 2.1.2 The EU single insurance market
 - 2.1.3 Demarcation between the right of establishment and the freedom to provide services
 - 2.1.4 The Swiss insurance regulation
- 2.2 Overview of the insurance value chain
 - 2.2.1 Background of the analysis
 - 2.2.2 The main functions of an insurance business
 - 2.2.2.1 Product development
 - 2.2.2.2 Sales and marketing
 - 2.2.2.3 Underwriting
 - 2.2.2.4 Risk management
 - 2.2.2.5 Contract and claims management
 - 2.2.2.6 Asset management
 - 2.2.2.7 Support functions
 - 2.2.3 KERT functions in the insurance industry

3 Analysis of the double tax treaty law

- 3.1 Background of the analysis
- 3.2 The evolution of the permanent establishment concept in the early years
 - 3.2.1 The emergence of the permanent establishment concept
 - 3.2.2 The period between the World Wars
 - 3.2.3 The aftermath of World War II
- 3.3 The concept of permanent establishment in the OECD Model

- 3.3.1 Historical overview
- 3.3.2 Elements of the current provision
 - 3.3.2.1 Wording of the provision
 - 3.3.2.2 Rationale of the provision
 - 3.3.2.3 The dependent agent provision
 - 3.3.2.3.1 The “person”
 - 3.3.2.3.2 The “activity”
 - 3.3.2.3.3 “On behalf of”
 - 3.3.2.3.4 The traditional test regarding the conclusion of contracts
 - 3.3.2.3.5 The supplementary test regarding the principal role leading to the conclusion of contracts
 - 3.3.2.3.6 Contracts in the name of the enterprise
 - 3.3.2.3.7 Contracts for the provision of property or services
 - 3.3.2.3.8 “Habitually”
 - 3.3.2.4 The independent agent provision
 - 3.3.2.4.1 Relationship with the dependent agent provision
 - 3.3.2.4.2 Persons covered
 - 3.3.2.4.3 The independence test
 - 3.3.2.4.4 The supplementary independence test regarding related parties
 - 3.3.2.4.5 The ordinary course of business test
 - 3.3.2.5 The special clause for insurance agents
 - 3.3.2.5.1 Rationale of the clause
 - 3.3.2.5.2 Elements of the special clause
- 3.4 The concept of permanent establishment in the UN Model
 - 3.4.1 Historical overview
 - 3.4.2 Overview of the current provision
 - 3.4.2.1 Introduction
 - 3.4.2.2 The dependent agent provision
 - 3.4.2.3 The insurance agent provision
 - 3.4.2.4 The independent agent provision
- 3.5 The concept of permanent establishment in the US Model
 - 3.5.1 Historical overview
 - 3.5.2 Overview of the current provision
 - 3.5.2.1 Introduction
 - 3.5.2.2 The dependent agent provision
 - 3.5.2.3 The independent agent provision
- 3.6 Final considerations
- 4 Analysis of the insurance business models**

- 4.1 Background of the analysis
- 4.2 Direct online business
 - 4.2.1 General overview
 - 4.2.1.1 Introduction
 - 4.2.1.2 Common variations
 - 4.2.1.3 Fact pattern
 - 4.2.2 Permanent establishment implications
 - 4.2.2.1 Analysis under the OECD Model
 - 4.2.2.1.1 The standard version
 - 4.2.2.1.2 The special clause for insurance agents
 - 4.2.2.2 Analysis under the UN Model
- 4.3 Price aggregator websites
 - 4.3.1 General overview
 - 4.3.1.1 Introduction
 - 4.3.1.2 Functioning
 - 4.3.1.3 Remuneration
 - 4.3.1.4 Fact pattern
 - 4.3.2 Permanent establishment implications
 - 4.3.2.1 Analysis under the OECD Model
 - 4.3.2.1.1 The standard version
 - 4.3.2.1.2 The special clause for insurance agents
 - 4.3.2.2 Analysis under the UN Model
- 4.4 Other online models
 - 4.4.1 General overview
 - 4.4.1.1 Introduction
 - 4.4.1.2 Ancillary insurance coverage
 - 4.4.1.3 Sharing economy platforms
 - 4.4.1.4 Cross-selling of insurance
 - 4.4.1.5 Peer-to-peer insurance
 - 4.4.1.6 On-demand insurance
 - 4.4.1.7 Fact pattern
 - 4.4.2 Permanent establishment implications
 - 4.4.2.1 Analysis under the OECD Model
 - 4.4.2.1.1 The standard version
 - 4.4.2.1.2 The special clause for insurance agents
 - 4.4.2.2 Analysis under the UN Model
- 4.5 Other distance selling means
 - 4.5.1 General overview
 - 4.5.1.1 Introduction
 - 4.5.1.2 The telephone
 - 4.5.1.3 Direct mail or e-mail

- 4.5.1.4 Other variations
 - 4.5.1.5 Fact pattern
 - 4.5.2 Permanent establishment implications
 - 4.5.2.1 Analysis under the OECD Model
 - 4.5.2.1.1 The standard version
 - 4.5.2.1.2 The special clause for insurance agents
 - 4.5.2.2 Analysis under the UN Model
- 4.6 Insurance brokers
 - 4.6.1 General overview
 - 4.6.1.1 Introduction
 - 4.6.1.2 Functions and activities
 - 4.6.1.3 Remuneration
 - 4.6.1.4 Fact pattern
 - 4.6.2 Permanent establishment implications
 - 4.6.2.1 Analysis under the OECD Model
 - 4.6.2.1.1 The standard version
 - 4.6.2.1.2 The special clause for insurance agents
 - 4.6.2.2 Analysis under the UN Model
- 4.7 Insurance agents
 - 4.7.1 General overview
 - 4.7.1.1 Introduction
 - 4.7.1.2 Functions and activities
 - 4.7.1.3 Remuneration
 - 4.7.1.4 Fact pattern
 - 4.7.2 Permanent establishment implications
 - 4.7.2.1 Analysis under the OECD Model
 - 4.7.2.1.1 The standard version
 - 4.7.2.1.2 The special clause for insurance agents
 - 4.7.2.2 Analysis under the UN Model
- 4.8 Bancassurance
 - 4.8.1 General overview
 - 4.8.1.1 Introduction
 - 4.8.1.2 Organizational models
 - 4.8.1.3 Distribution approach
 - 4.8.1.4 Fact pattern
 - 4.8.2 Permanent establishment implications
 - 4.8.2.1 Analysis under the OECD Model
 - 4.8.2.1.1 The standard version
 - 4.8.2.1.2 The special clause for insurance agents
 - 4.8.2.2 Analysis under the UN Model
- 4.9 Multinational business

- 4.9.1 General overview
 - 4.9.1.1 Introduction
 - 4.9.1.2 Program coordination
 - 4.9.1.3 Origination through producing entities
 - 4.9.1.4 Origination through regional offices
 - 4.9.1.5 Pooling arrangements
 - 4.9.1.6 Retrocession to captives
 - 4.9.1.7 Fact pattern
- 4.9.2 Permanent establishment implications
 - 4.9.2.1 Analysis under the OECD Model
 - 4.9.2.1.1 The standard version
 - 4.9.2.1.2 The special clause for insurance agents
 - 4.9.2.2 Analysis under the UN Model
- 4.10 The Lloyd's market
 - 4.10.1 General overview
 - 4.10.1.1 Introduction
 - 4.10.1.2 The governance structure
 - 4.10.1.3 The market structure
 - 4.10.1.3.1 Underwriting
 - 4.10.1.3.2 Intermediation
 - 4.10.1.3.3 Fact pattern
 - 4.10.2 Permanent establishment implications
 - 4.10.2.1 Analysis under the OECD Model
 - 4.10.2.1.1 The standard version
 - 4.10.2.1.2 The special clause for insurance agents
 - 4.10.2.2 Analysis under the UN Model
- 4.11 Final considerations
- 5 Analysis of the Swiss double tax treaty policy**
 - 5.1 Background of the analysis
 - 5.2 Swiss double tax treaty policy
 - 5.2.1 The definition of permanent establishment
 - 5.2.2 Considerations regarding the insurance business
 - 5.2.3 Prospective developments
 - 5.3 Policies of other countries
 - 5.3.1 Australia
 - 5.3.2 Belgium
 - 5.3.3 Chile
 - 5.3.4 Germany
 - 5.3.5 Italy
 - 5.4 Final considerations
- 6 Assessment of the existing rules and reform proposals**

- 6.1 Introduction
 - 6.2 A specific provision for the insurance business
 - 6.3 Appropriateness of the existing measures dealing with insurance agents
 - 6.4 Relationship between the definition of dependent agent permanent establishment and the attribution of profits thereto
 - 6.5 Relationship between tax and regulatory concepts
 - 6.6 Analysis of reform proposals
 - 6.6.1 Proposal for a new threshold
 - 6.6.1.1 Introduction
 - 6.6.1.2 Normative considerations
 - 6.6.1.2.1 Normative requirements
 - 6.6.1.2.2 Normative assessment
 - 6.6.1.3 Incorporation in model treaties
 - 6.6.1.4 The wording of the proposal
 - 6.6.1.5 Adjustments to commentaries
 - 6.6.1.6 Adjustments to the guidance on the attribution of profits
 - 6.6.1.7 Integration in DTAs
 - 6.6.1.8 Domestic law considerations
 - 6.6.2 An alternative proposal: a withholding tax on insurance premiums
 - 6.6.2.1 Introduction
 - 6.6.2.2 The absence of a threshold
 - 6.6.2.3 Normative assessment
- 7 Concluding remarks**
- 7.1 Outcome of the research
 - 7.2 Opportunities for future research