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Alternative Dispute Resolution and the Rule of Law

Alternative Dispute Resolution in International Taxation

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The Issue

The rule of law is similar to happiness, everyone knows what it is, but no one can define it

- (1) The rule of law depends on each specific legal traditions, *i.e. Staatsrecht, Stato di diritto* and the Anglo-American *rule of law*
- (2) In broad terms, it defines the degree of the legitimacy of the public authority (or the government)
- (3) Formalist view: law must set forth in advance, must be general, clear, publicized and stable
- (4) Substantive view: law must respect individual rights and fundamental principles (such as, equality, right to an effective remedy before a tribunal)

For the English *common law* system, see A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, London, 1915, 183 ff.



The Approach (1)

The minimum common standard of the *formalistic view* can be drawn as the principle of legality, which implies:

- (a) «**the law must be adequately accessible**», and
- (b) «**it is formulated with sufficient precision to enable the citizen to regulate his conduct**»
(ECtHR, 26 April 1979, *The Sunday Times v. The United Kingdom*, in Series A n. 30, para. 49)



The Approach (2)

Considered the topic, the common standard of the *substantial view* can be restricted to the individual right to an «*effective remedy*», which is labelled into the formula of a «*fair trial protection*»

- (1) Article 6 of the European Convention on Human Rights
- (2) Article 47 of the Charter of Fundamental Rights of the EU
- (3) Article 8 of the American Convention on Human Rights, but also
- (4) Article 14 of the International Covenant on Civil and Political Rights

The common content of these provisions is the right to a fair and public hearing by an independent and impartial tribunal established by law



The Approach (3)

The Fair Trial Protection entails:

- (a) court access
- (b) the right to effectively challenge the measure interfering with his/her right
- (c) public hearing
- (d) equality of arms
- (e) the right to a reasoned decision and the right of appeal
- (f) the right to be advised, defended and represented



A Preliminary Remark

The ADR system provided by the 2017 OECD MTC and by the EU Directive 2017/1852 is a MAP supplemented by arbitration-type procedures, therefore under the complete control of the tax authorities

This system is based on the basic foundations of international public law, where only States can act to protect their nationals (concurring, De Carolis, *European Taxation*, 2018, 495 (at 496), which refers to the idea of diplomatic protection)

In legal terms, ADR system

(a) is a pure interstate dispute

(b) the taxpayer has the right to initiate the MAP



Preliminary Conclusions Legality

- (1) Commentary on Article 25 OECD 2017 MTC states that the case should be resolved «*in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties*» (para. 5.1)
- (2) Article 14(2) of the Directive 2017/1852 provides that the Commissions «*shall base [their] opinion on the provisions of the applicable agreement or convention referred to in Article 1 as well as on any applicable national rules*»
- (3) The competent authorities and the various body have more freedom and discretion on the setting of the rules of the procedure (e.g., Commentary on Article 25, para. 6.)



Preliminary Conclusions

Fair Trial Procedure

Comparing the requirements of a fair trial procedure with ADR in international taxation, the gap is self-evident

- (1) taxpayers do not have the right to present the case during the proceedings
- (2) no guarantee of an adversary procedure

This outcome depends essentially on the philosophy behind the ADR in international taxation, aimed at fostering the balanced allocation of taxing rights encompassed by the treaties

The rights to a fair procedure remains in the shadows



Some further remarks (1)

ADR mechanisms have been defined as negotiations «*in the shadow of law and [the] negotiated outcomes are likely to reflect the legal endowments that legal rules provide*» (R.H. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, Yale Law Journal, 1979, 950 (at 950))

Accordingly, the procedure and outcome must necessarily not meet all requirements provided by the rule of law, *i.e.* by the fair trial protection

In principle,

- (1) the procedure is an *alternative*, and,
- (2) the taxpayer has the right to refuse the outcome



Some final remarks (2)

Which are the general interests balanced with the right to a fair trial?

- Efficiency
- Avoidance of economic distortions
- Avoidance of double taxation



Thank you!

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