

## 1. The Priority of Treaty Law over Domestic Law

In contrast to other countries,<sup>1</sup> the Belgian Constitution contains no explicit clause which provides for the priority of treaty law over domestic law. In the past, with regard to amendments to the constitution, various attempts were made to include such a principle in the constitution. But such a provision was never accepted.

Recently, a clause<sup>2</sup> was introduced into the Belgian constitution which, contrary to the general principle that all powers originate from the Nation,<sup>3</sup> provides by means of a law or by means of a treaty for transferring the exercising of certain powers to international legal institutions (e.g. EC institutions). However, in the framework of the double taxation conventions (concluded by Belgium) there is no question of such a similar transfer of fiscal sovereignty.

In Belgium the real effect of the relationship between treaty law and domestic law is mainly a consequence of jurisprudential interpretation of the rules of law.

Obviously, in practice there should be no problems if it appears that a treaty effective in Belgium is completely in accord with a national law. However, problems would arise if it appears that there is a conflict between a clause contained in a treaty and a national rule of law.

In general it is assumed that a number of conditions must be fulfilled for there to be a question of such a conflict:<sup>4</sup>

1. The treaty must have a so-called self-executing character: this means that the treaty or clauses therein is/are aimed directly at those subject to the law and do not merely impose rights or obligations on behalf of the State. Such a self-executing character will result in a person subject to the law being able to appeal to the court on matters arising from the clauses in the treaty.<sup>5</sup>

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<sup>1</sup> E.g. The Netherlands and France.

<sup>2</sup> Article 25bis of the Belgian Constitution.

<sup>3</sup> Article 25 of the Belgian Constitution.

<sup>4</sup> See *inter alia* Salmon J., "Le conflit entre le traité international et la loi interne en Belgique à la suite de l'arrêt rendu le 27 mai 1971 par la Cour de Cassation", *J.T.* 1971, 509; Hayoit de Termicourt R., "Conflit tussen het verdrag en de interne wet", *R.W.* 1963, col 73.

<sup>5</sup> It is assumed that double taxation conventions have a direct effect. (See *inter alia* Dumon F., "Les impôts directs, l'état de droit et la constitution", *J.D.F.* 1984, 5 (18); Denys L., "Over het *prima facie* parallelisme van sommige bepalingen in belastingverdragen en intern fiscaal recht", *Fiskofoon* 1978, 12.)

Before the judgment of the Court of Cassation dated 27 May 1971<sup>6</sup> (see below), in the context of the so-called dualistic principle, the direct effect of clauses in treaties was considered impossible.<sup>7</sup> For on account of this dualistic principle the legal rules which occur in a treaty were incorporated into the internal law only after that treaty had been converted into national law. In such a principle, the conflict that developed between an earlier internal rule of law, and a later treaty could then easily be resolved according to the principle "*lex posterior derogat priori*".<sup>8</sup>

Since the above-mentioned Cassation judgment, it has generally been accepted that Belgium leans towards the so-called monistic school, as a result of which the rules of international treaties and the provisions in national law are considered to belong to one and the same legal order.<sup>9</sup> As a result, the person subject to the law can, therefore, appeal to the courts on treaty clauses with direct effect without these having to have previously been converted into national law.

2. The treaty must have come into being lawfully. With regard to Belgium, this means that it must have complied with the procedure provided for in Article 68 of the constitution. This means that the King signs the treaties but that these treaties are effective only after they have received the approval of the Chambers.<sup>10</sup>

In addition, the treaty must have been made public in a lawful manner. It is true that Belgian law contains no obligation to announce treaties, but the Court of Cassation has decided that treaties which contain rights and obligations for the citizens have no binding power in Belgium if they have not been made public, even if the clauses of the treaty are beneficial for the people who would have had knowledge of them.<sup>11</sup>

3. There must be an incompatibility between a clause in the treaty and a rule of domestic law. In legal doctrine it is indicated that the establishment or question of such an incompatibility in point of fact already constitutes a reason for interpretation of the (double taxation) convention because this can only be established after the concrete meaning of a certain treaty rule has been determined.<sup>12</sup>

As a result of the fact that the number of treaties with direct effect increased sharply in the last few decades, one had to wait until 1971 before the Court of Cassation gave a clear judgment on the relationship between domestic law and

<sup>6</sup> Pas., 1971, I, 886.

<sup>7</sup> Alen .. "Algemene beginselen en grondslagen van het Belgisch publiek recht", *Story-Scientia*, 439.

<sup>8</sup> See *inter alia* Cass., 26 November 1925. Pas., 1926, I, 76.

<sup>9</sup> Alen .., *op. cit.*, 439; Lenaerts K., "De voorrang van verdragen bij fiscale normenconflicten. Trefzeker uitgangspunt of toevallige uitkomst?", *T.F.R.* 1984, 72 (75).

<sup>10</sup> At the time of preparation of this report, in the context of the preparation of the federal state of Belgium there was much work being carried out on reforming the treaty procedure, as a result of which in principle competence to conclude their own treaties will be granted to the regions.

<sup>11</sup> Cass., 11 December 1953, R.C.J.B., 1954, 85-99 and Cass., 19 March 1981, J.T., 1982, 565-567.

<sup>12</sup> Salmon J., *op. cit.*, 510.

treaty law. As early as 1948, this Court had stated that the power of international agreements predominates over that of domestic civil law, but no clear conclusion could be drawn from this judgment since it concerned a situation of a later treaty which came into conflict with an earlier law.<sup>13</sup>

But in 1971 the Court of Cassation plainly decided in favour of the priority of the treaty even in the situations in which a later national law was at variance with an earlier treaty. The Court stated “that the rule according to which a law nullifies the earlier law insofar as it contradicts it does not apply when a conflict exists between a standard of domestic law and an international legal standard which has direct consequences in the internal legal order, (as a result of which) the rule determined by the agreement must take priority; that this priority follows from the very nature of the international law determined by treaty”.<sup>14</sup>

Since this judgment, according to our highest court of law, there can, therefore, no longer be any doubt about the priority of treaty law over domestic law.

A problem which also still always gives rise to argument in Belgian jurisprudence and legal doctrine is the question whether the judgment of the Court of Cassation also applies to the priority of treaty law over the Belgian constitution in cases in which, according to Article 25bis of the Constitution, there has been no explicit transfer of competence to a supranational organ. Some authors are of the opinion that the principle advanced by the Court of Cassation also applies in the relationship between treaty and constitution, provided that the treaty came into being lawfully.<sup>15</sup>

If a treaty did not come into being in accordance with the rules of the constitution, according to these authors such a treaty can have no effect in Belgium simply because according to Belgian standards no treaty is considered to exist.

This standpoint is also qualified by some other authors by referring *inter alia* to Article 46 of the Vienna Agreement, which states that conflict with a national constitutional ratification procedure can only be invoked if the conflict is incontrovertible and affects a rule of fundamental importance in the national law of the state involved. Moreover, in this case the treaty would have to be considered to be questionable in the national legal order and not automatically considered to be invalid.<sup>16</sup>

The standpoint whereby a treaty which has come into being legitimately must have priority over the constitution is also argued in legal doctrine, *inter alia* on the basis of the argument that, as a result, competence would be given to the Legislative and Executive Power to change constitutional rules without appealing to the Constituent Assembly.<sup>17</sup>

A recent judgment by the Court of Arbitration which was set up only a few years ago, and which in tax matters has the purpose of examining whether the

<sup>13</sup> Hayoit de Termicourt R., *op. cit.*, 78.

<sup>14</sup> See also Cass., 14 January 1976, Pas. 1976, I, 538; Cass., 26 September 1978, Pas. 1979, I, 126.

<sup>15</sup> De Meyer J., “Staatsrecht”, K.U.L., 1985. 77; De Visscher P., “La constitution belge et le droit international”. *R.B.D.I.*, 1986, 5.

<sup>16</sup> Advocate-General Velu “Toetsing van de grondwettigheid en toetsing van de verenigbaarheid met de verdragen”, *R.W.*, 1992, to be published.

<sup>17</sup> Dumon F., “De verhouding internationaal recht-nationaal recht”, *T. B. P.*, 1981, 14 (23) ; Masquelin J., *R.P.D.B.*, “Traité internationaux”, No. 303.

constitutional principle of equality is respected, appears to confirm this position, since via the review of the law of approval the Court declared itself competent to examine whether a certain rule in the Belgian-Dutch double taxation convention was in accord with the above-mentioned principle of equality.<sup>18</sup>

The principle of the priority of the treaty over the constitution, except for the transfer of sovereignty provided for in Article 25bis of the constitution, is at present, therefore, very controversial in Belgium even though that Advocate-General Velu of the Court of Cassation only very recently argued in favour of such a priority, but with account taken of the above-mentioned limitation as included in Article 46 of the Vienna Agreement. In addition, the Belgian government has also recently argued in favour of such priority.<sup>19</sup>

The answer to the question of priority in the case of conflict between a treaty and a clause in the constitution, can, as will be seen below, be of importance in the interpretation of double taxation conventions, since the Belgian constitution limits the judge's freedom of interpretation in fiscal matters. (See below).

## 2. The Interpretation of Domestic (Fiscal) Regulations

### 2.1. Interpretation in Civil Law

The Belgian legislation contains no imperative rules which a judge must follow in interpreting a legal provision.<sup>20</sup> Nor is binding value assigned to precedents in Belgian law.

As a general rule, it is even stated that Belgian judges are in principle free to interpret a legal provision.<sup>21</sup>

But putting this principle in such general terms is clearly too broad, for account must be taken of the following restrictions:

- Clear wording does not have to be interpreted. This principle has been confirmed innumerable times by the Court of Cassation.<sup>22</sup> However, the application of this adage does not in fact constitute any real restriction on the judge's freedom to interpret, since with clear wording there is in principle no opportunity for interpretation.<sup>23</sup>

But in recent years the Court of Cassation has not always appeared to apply this principle so rigorously in its (fiscal) jurisprudence. For in a number of judgments the Court has let the intent and scope of a law prevail over

<sup>18</sup> Court of Arbitration, 16 October 1991, FJF 91/211. In the same sense Bergen, 2 November 1989, J.L.M.B., 1990,198. See also the judgment by the Rb., Brussels, 9 April 1990 (quoted by Advocate-General Velu. o.e.) that accepts the priority of the treaty.

<sup>19</sup> P.V. No. 603 dated 25 October 1990 by Mr. Simons, V & A Kamer, 1990-1991. No. 138, 11.612.

<sup>20</sup> Claeys-Bouuaert I., "De interpretatie van de fiscale wet". *Tijdschrift voor notarissen*, 1961, 115.

<sup>21</sup> De Page H., *Traite élémentaire de droit civil belge*, Bruylant 1939. Volume 1, 254.

<sup>22</sup> Cass., 10 June 1952, Pas. 19521, 656; Cass., 10 December 1959, Pas. 1960,1, 426; Cass., 4 January 1980, Pas., I, 1980,511.

<sup>23</sup> Cass., 22 November 1949, Pas. 1950, I, 179; Cass., 31 January 1950, Pas. 1950, I, 374; Cass., 10 June 1952, Pas. 1952, I, 656.

its nonetheless clear wording.<sup>24</sup> The Court thereby concurs with the viewpoint of some authors who in the past already warned about too strict application of the principle “*interpretatio legis cessat in claris*”. These authors were of the opinion that even in the case of (apparently) clear wording of a law its application had to be in accord with the intention of the legislator.<sup>25</sup> In other words, only if literal interpretation of the wording of a law also conforms with the intention of the legislator can it be stated that the wording of the law is clear.<sup>26</sup>

Although the above-mentioned evolution is not to be found in all recent judgments by the Court of Cassation, on the basis of the above-mentioned judgments it is accepted in legal doctrine that the jurisprudence of the highest court is at present undergoing great change.<sup>27</sup>

- On the other hand, if the wording of a law is unclear, and the judge is, therefore, obliged to interpret it, he must firstly always look for the intent of the legislator.<sup>28</sup> The judge may, therefore, not misuse the doctrine of interpretation in order to impose his personal views which are at variance with the legislator’s intent.

In order to seek the intent of the legislator in the case of unclear wording of a law, in legal doctrine reference is traditionally made to the following methods of interpretation:<sup>29</sup>

- a. the systematic method: according to this method, the clause to be interpreted is placed in the context of the whole of the measures in which this clause was introduced;
- b. the historical method: according to this method, the judge looks, *inter alia* on the basis of the preparatory activities, the advice of the Council of State, etc., at what circumstances prevailing before the introduction of the law the legislator wanted to rectify;
- c. the teleological method: according to this method, which has much in common with the analogical method, an attempt is made to “update” the legislator’s wishes and look at what the legislator would have decided if the law were to come into being now;
- d. the analogical method: according to this method, the intent of the legislator is examined by means of comparison with the clauses of the law which are applicable in similar cases.

Some authors have argued in favour of some order of application of these various methods of interpretation, with priority being given to the systematic method of interpretation.<sup>30</sup> In contrast, others are of the opinion that the

<sup>24</sup> Cass., 8 December 1988, FJF 89/100; Cass., 2 March 1989, FJF 90/147; Cass. 19 December 1988, T.R.V., 1989, 333; Cass., 23 March 1990, FJF 1990, 90/80; see also Van Crombrugge S., “Grondre-gels fiscaal recht”, Biblio 1991, 16.

<sup>25</sup> De Page H., *op. cit.*, 260; Claeys-Bouuaert I., *op. cit.*, 113.

<sup>26</sup> Claeys-Bouuaert I., *op. cit.*, 120.

<sup>27</sup> Van Crombrugge S., “Verantwoordelijkheid van burger en overheid inzake belastingen”, “Fiscaliteit 2000”, *De Tijd*, 1991, page 199.

<sup>28</sup> Claeys-Bouuaert I., *op. cit.*, 114.

<sup>29</sup> See *inter alia* Claeys-Bouuaert I., *op. cit.*; Krings E., “L’interprétation des lois fiscales”, *Revue fiscale*, 585; Tiberghien .., *Inleiding tot het fiscaal recht*, Kluwer, 1986, 38.

<sup>30</sup> Tiberghien .., *op. cit.*, 51.

legislator's intent must be examined as far as possible by the joint application of the various methods.<sup>31</sup>

- The principle that a judge is, in principle, free to give his interpretation gains in importance in the cases where the legislator appears not to have completely regulated a situation brought before the judge. However, in these situations, there will often be no question of interpretation at all. For in the absence of legal regulation there is in principle also no difficulty of interpretation. But this observation may not be accepted too categorically. In order to establish that a certain situation is not regulated by the law, it will not infrequently be necessary for a number of existing legal clauses to be interpreted.

In the case of such a silence from the legislator, the judge must give a judgment, otherwise he will render himself guilty of denial of justice (Article 5 Ger. Wetb.).<sup>32</sup> In the search for a solution to the dispute placed before him, a judge will in this case be able to take inspiration *inter alia* from the solutions which have been worked out by analogy in comparable cases by jurisprudence or from general legal principles or even fairness.<sup>33</sup>

- Article 28 of the constitution stipulates that only the legislator can give an authentic interpretation of the laws. This is aimed at the so-called interpretative laws. Although only very occasionally, it does happen that by means of a similar interpretative law the legislator himself gives a binding interpretation of a law which he promulgated earlier. Such an interpretation by means of a separate law has retroactive effect<sup>34</sup> and is binding *erga omnes*. In this, therefore, there is an important difference from interpretation by the judge, which applies only between the parties involved in the lawsuit.
- In accordance with law of 7 July 1865, a judge who is given a matter to deal with on reference to a second cassation is judicially bound by the Court of Cassation's interpretation.<sup>35</sup>
- Any differences between the Dutch and the French text are resolved according to the intent of the legislator, which is determined according to the usual methods of interpretation and without one text being given preference over the other.<sup>36</sup>
- For the interpretation of national provisions which are affected in the implementation of European directive, the European Court of Justice has already decided on various occasions that the national judge must interpret national regulations in accordance with the directives, i.e. taking account of the intent and the scope of the European directive.<sup>37</sup>

<sup>31</sup> Claeys-Bouaert I., *op. cit.*, 152.

<sup>32</sup> Van Crombrugge S., "Grondregels ...", *op. cit.*, 15.

<sup>33</sup> De Page H., *op. cit.*, 312.

<sup>34</sup> Cass., 5 October 1962, Pas. 1963 I, 157.

<sup>35</sup> De Page H., *op. cit.*, 306.

<sup>36</sup> Art. 7 of the law dated 21 June 1961 (B.S. 21 June 1961).

<sup>37</sup> See *inter alia* Court of Justice, 13 November 1990. TRV 1991, 36.

## 2.2. Interpretation in Fiscal Law

In legal doctrine it is pointed out that with regard to the interpretation of fiscal laws there can be no question of autonomy of fiscal law with regard to other branches of law. The methods of correctly analyzing the texts of laws and, therefore, knowing the correct content of the regulations cannot be different for fiscal law than for other branches of the law.<sup>38</sup>

This analysis also thus leads to the above-mentioned methods of interpretation in civil law being able to be extended to fiscal law although account must be taken of an important limitation which is imposed in accordance with constitutional provisions. What are meant are Articles 110 and 112 of the Belgian constitution:

Article 110 Para. 1 B.C. “*No tax for the benefit of the State can be introduced other than by a law*”.

Article 112 B.C.: “*With regard to taxes no privileges can be introduced. No exemption or reduction of tax can be introduced other than by a law*”.

This principle of legality, which constitutes an implementation of the general principle of equality as expressed in Article 6 of the Constitution, therefore means that the introduction of a tax or an exemption from tax comes under the exclusive competence of the legislator.<sup>39</sup>

This principle thus also brings an important limitation to bear on the judge’s freedom of interpretation in fiscal matters.

For a strict interpretation of fiscal law is derived from this principle. In legal doctrine, preference is given to the concept “strict interpretation” instead of “restrictive interpretation” because as a result of this constitutional principle of legality the judge is obliged to apply the fiscal law to its most extreme limits, but always within the area of application that the legislator had in mind.<sup>40</sup> The concept “restrictive interpretation” would on the other hand too much give the impression that the judge would always have to interpret the fiscal law to the advantage of the taxpayer.

Some authors are of the opinion that the application of this principle of legality is in fact foreign to the problem of interpretation because interpretation of the text of a law by definition always presupposes the effective existence of a text. The fact that there are problems of interpretation would then mean that it may be assumed that the principle of legality was respected.<sup>41</sup>

The majority of authors, however are, of the opinion – in our opinion justifiably – that the principle of legality does indeed influence the judge’s freedom of interpretation in fiscal matters.<sup>42</sup>

<sup>38</sup> Claeys-Bouuaert I., *op. cit.*. 124; Krings E., *op. cit.*. 592.

<sup>39</sup> Tiberghien .., *op. cit.*. 115; Mast A. and Dujardin J. “Overzicht van het Belgisch grondwettelijk recht”. *Story-Scientia*, 471; Van Istendael F.. “De rechtsbescherming van de belastingplichtige onder de Belgische grondwet: ‘het gelijkheidsbeginsel’”. *Liber Amicorum Tiberghien*. 381.

<sup>40</sup> Claeys-Bouuaert I., *op. cit.*. 128; Tiberghien .., *op. cit.*, 49; Van Crombrugge S., *op. cit.*. 14.

<sup>41</sup> Claeys-Bouuaert I., *op. cit.*. 127.

<sup>42</sup> Tiberghien .. *op. cit.*. 53; Krings E., *op. cit.*. 595.

In the interpretation of an (unclear) fiscal law the judge will not be able to extend its application to situations which are not definitely intended by the legislator. It is in this sense that the adage “*in dubio contra fiscum*”, which is based on the above-mentioned constitutional principle of legality, must be understood.<sup>43</sup> This principle can, therefore, only be applied in cases of remaining doubt.<sup>44</sup>

The application of this principle was expressly confirmed by the Court of Cassation *inter alia* in its judgment of 28 May 1942, in which the Court stated: “that in case of doubt regarding their application, the tax laws must be interpreted in the sense most favourable to the taxpayer”.<sup>45</sup>

But in the application of this adage account must be taken of the following restrictions:

- it can be deduced from the text of Article 110 of the constitution that the only thing meant is the fiscal law which introduces an effective tax. In other words, it is only the material fiscal law that is intended. In general, it is accepted that this constitutional regulation is not aimed at the fiscal law in the formal sense, namely the rules of fiscal procedure.<sup>46</sup>
- the second paragraph of Article 112 of the constitution stipulates that only the legislator can introduce an exemption from tax. This clause, therefore, forms the correlative of Article 110 of the Constitution. In the interpretation of an exemption from tax the judge will thus also have to employ the principle *in dubio pro fisco*.<sup>47</sup>

From the application of this principle of legality it is deduced that in fiscal matters, when interpreting an (unclear) fiscal law, the judge will not be able to make use of a number of methods of interpretation which are generally acceptable for application of civil law.

In the first instance, the analogical interpretation method is the target. On the basis of Cassation judgments in the matter,<sup>48</sup> it is generally accepted that the analogical method of interpretation is a contravention of the above-mentioned constitutional principle of legality.<sup>49</sup>

With regard to the teleological method of interpretation in fiscal matters, however, there appears to be less consensus in legal doctrine.<sup>50</sup> But this different view must apparently be explained by the different definition which different authors give to this method of interpretation.<sup>51</sup> To the extent that this method is understood as the seeking out of the legislator’s intentions from a social-economic line of approach, this method appears to us to be acceptable in fiscal matters also. To the extent, however, that this method leads to the judge putting himself

<sup>43</sup> See conclusions of Advocate-General Krings in Cass., 3 June 1976, Pas., 1976, I, 1056.

<sup>44</sup> Van Crombrugge S., “Grondregels ...”, *op. cit.*, 16.

<sup>45</sup> Cass., 28 May 1942, J.D.F., 1943, 45; Cass., 24 October 1938, Arr. Verbr., 1938, 219.

<sup>46</sup> Krings E., *op. cit.*, 599; Claeys-Bouuaert I., *op. cit.*, 129.

<sup>47</sup> Van Crombrugge S., “Grondregels ...”, *op. cit.*, 16.

<sup>48</sup> Cass., 13 April 1978, Arr. Cass., 1978, 928.

<sup>49</sup> Van Crombrugge S., “Grondregels ...”, *op. cit.*, 15; Claeys-Bouuaert I., *op. cit.*, 129; Tiberghien .. *op. cit.*, 54.

<sup>50</sup> *pro*: Claeys-Bouuaert I., *op. cit.*, 127; *contra*: Tiberghien .. *op. cit.*, 56.

<sup>51</sup> Van Crombrugge S., “Grondregels ...”, *op. cit.*, 14.

in the place of the legislator by updating the law out of socio-economic necessities and extending it to situations at which the legislator was not aiming with the judge thus making a judicial construction, it must be rejected.<sup>52</sup>

Moreover, for interpretation of certain general terms which are employed by the fiscal legislator, it is assumed that reference must necessarily be made to the meaning that these terms have in civil law, unless the fiscal legislator wanted to differ from them.<sup>53</sup>

### 3. The Interpretation of International Treaties

#### 3.1. General

The Belgian legislation neither contains imperative regulations which a judge must follow when interpreting international treaties. Here, too, it might also be stated as a general rule that the judge is in principle free to interpret international treaties.<sup>54</sup> But unlike the interpretation of *national* regulations, when applying this principle he must take the following restrictions into account:

- Also in the interpretation of international treaties it appears obvious that the judge must in the first instance keep to the text of the treaty.<sup>55</sup> But here, in our opinion, there must be much stronger argument for a not too rigorous application of this principle, as a result of which in the interpretation of an (apparently) clear treaty text there must always be examination of whether such a literal interpretation is in agreement with the intention of the parties to the treaty.<sup>56</sup> The principle applicable for the interpretation of the domestic law (but to be qualified), that a clear text is not open to interpretation, will, therefore, be able to be applied to the interpretation of treaties only if the text of the treaty unambiguously reproduces the intention of the parties to the treaty.

For the Court of Cassation has already decided innumerable times that a treaty is not open to unilateral interpretation by one of the treaty partners, and that in interpreting the text of a treaty a judge must, therefore, be guided by the intention of the parties to the treaty.<sup>57</sup> Although the judge of

<sup>52</sup> See *inter alia* Rb. Ghent, 11 February 1980, R.G.E.N., 22.638.

<sup>53</sup> Cass., 27 September 1956, Pas., 1957, I, 57; Dumon F., *op. cit.*, J.D.F., 1984, 17.

<sup>54</sup> Cass., 19 March 1842, Pas., 1842, I, 133; De Vissner P.

<sup>55</sup> In a judgment dated 8 November 1875 the Court of Appeal in Brussels decided that “Since the text of the treaty ... is sufficiently clear and precise, it is superfluous to order the preparatory work, notes and correspondence which preceded it to be brought to the Clerk’s Office of this court”. (Pas., 1876, II, 23). For an example concerning double taxation conventions see Antwerp, 29 June 1982, FJF 83/20.

<sup>56</sup> Claeys-Bouuaert I., *op. cit.*, 11. In his conclusion in the judgment of 27 January 1977, the Procurator-General at the Court of Cassation clearly made the link between a literal interpretation and the intention of the states concluding the treaty: “In order to interpret an international treaty establishing a uniform ruling, it is above all necessary to give full consideration to its text, which one has to presume to be the authentic expression of the common intention of the contracting parties”. (Cass., 27 January 1977, Pas., 1977, I, 574 (578).

<sup>57</sup> Cass., 27 January 1977, Pas., 1977, I, 574; Cass., 12 March 1968, Pas., 1968, I, 875; Cass., 16

the facts in Belgium is not bound by the jurisprudence of the Court of Cassation,<sup>58</sup> the important influence of the jurisprudence of the highest court of law on the judges of the facts *in concreto* cannot be denied, as a result of which the judge of the facts is *de facto* somewhat restricted in his freedom of interpretation.

For the seeking for the intention of the parties to the treaty, it is assumed in Belgian jurisprudence that a judge may be guided by the activities preparatory to the treaty, notes, reports, correspondence between the parties to the treaty, etc.<sup>59</sup>

The Court of Cassation thereby bases itself *inter alia* on Article 32 of the Vienna Agreement with regard to treaty law. Although Belgium has not yet signed this agreement, it is recognised in Belgian jurisprudence as the reflection of general rules of international law.<sup>60</sup>

But it will appear not infrequently that the intention of the parties concluding the treaty can be examined only with great difficulty because precise situations which the parties to the treaty have not thought of are concerned.<sup>61</sup> In this case the interpretation will, therefore, have to be in accord with the aim of the treaty as far as possible.

- According to the jurisprudence of the Court of Cassation,<sup>62</sup> in cases where some clauses of the treaty are unclear, the terms employed in the treaty must be understood in their usual (civil law) meaning, taking into account the context and the purpose of the treaty. This principle also accords with the provisions of the Vienna Agreement (namely Article 31).
- If a treaty contains regulations concerning the interpretation of terms not defined in the treaty,<sup>63</sup> a national judge will have to adhere to these regulations.
- If the parties to the treaty have later concluded interpretative accords for terms which are not defined or not defined clearly, a national judge will have to be bound by these accords, provided that they, like the treaties themselves, came into existence in accordance with the procedure provided

January 1968, Pas., 1968, I, 625; Claeyss-Bouuaert I., “Verdragen ter voorkoming van de internationale dubbele belasting: hoofdtrekken en leemten.”, *Liber Amicorum Dumon*, 1003; Com. . . . 0/15.

<sup>58</sup> Rigaux F., *op. cit.*, 1211; see also the comment made above in the event of the judge receiving a matter to handle on referral to second cassation.

<sup>59</sup> Cass., 8 July 1955, Pas., 1955,I,1220; Cass., 4 May 1972, Pas., 1972,I, 806; Brussels, 8 November 1875, Pas., 1876,II,23.

Although totally unusual, the hearing of a witness may possibly be considered. See Claeyss-Bouuaert I., “Het bewijs in fiscale geschillen en de bewijsregeling van het Burgerlijk Wetboek”, *T.F.R.* 1985,41 (52).

<sup>60</sup> Conclusions of the Procurator-General in the judgment by the Court of Cassation dated 27 January 1977.

<sup>61</sup> See *inter alia* Van Raad C., “Interpretatie van dubbelbelastingverdragen”, *M.B.B.*, 1978, 49.

<sup>62</sup> Cass., 4 May 1972, Pas., 1972, I, 806; Conclusions of the Procurator-General in the judgment by the Court of Cassation dated 27 January 1977.

<sup>63</sup> E.g. the reference to domestic law in Article 3 paragraph 2 of the OECD Model Convention and the reference to the double taxation conventions in Article 3 paragraph 2 of the European agreement for the abolition of double taxation in cases of corrections of profits between associated enterprises.

for in Article 68 of the Constitution<sup>64</sup> (see also 3.2.2 below for purely interpretative accords).

- For the sake of completeness, it must be mentioned that the settling of disputes concerning the application of a treaty, is in some treaties withdrawn from the jurisdiction of the national courts of law and transferred to a special international court of law. It is clear that in these cases there is no question of freedom for interpretation by the national judge, since in this case he is not competent to give a judgment.

In other treaties a national (competent) judge may be obliged<sup>65</sup> to submit a particular problem of interpretation concerning a treaty to an international court of law. The example for this is Article 177 of the EC treaty. Although it is assumed that such a judgment by the European Court of Justice is binding on the national judge, this Court gives no judgment *in concreto* in the dispute that is placed before the national judge. But in view of the possible liability<sup>66</sup> that an EC member state may incur as a result of one of its judicial organs not respecting such a judgment by the Court of Justice, the national judge will in *concreto* always so to speak follow it. It is clear that in this case the national judge's freedom for interpretation is greatly limited.

## 3.2. The Interpretation of Double Taxation Conventions

### 3.2.1. General

The general remarks made above on the interpretation of treaties in general are *mutatis mutandis* also applicable in cases of interpretation of double taxation conventions.<sup>67</sup> However, there are a number of special problems in the interpretation of these latter conventions:

- a. On examination of the judge's freedom for interpretation with regard to domestic fiscal provisions, it has become apparent that Articles 110 and 112 of the constitution considerably affect this freedom: namely the principle of interpretation *in dubio contra fisco* and *in dubio pro fisco* was derived from the constitutional regulation that no tax and no exemption from tax can be introduced other than by a law.

If the priority of the treaty over national constitutional rules is accepted (see above), it appears to us that the interpretation of a double taxation convention will not be influenced by these constitutional regulations.

<sup>64</sup> See *inter alia* Cass., 25 November 1955, Pas., 1955, I, 285.

<sup>65</sup> Art. 177 EC agreement, in fine: "If a question in this respect is raised in a matter before a national legal instance whose decisions according to national law are not open to higher appeal, this instance is obliged to turn to the Court of Justice".

<sup>66</sup> See *inter alia* the conclusions by Procurator-General F. Dumon in the judgment by the Court of Cassation dated 21 January 1982 (J.T.. 1982. 443); see also Rigaux F.. "L'interprétation judiciaire d'une norme empruntée à un autre ordre juridique". *Liber Amicorum Dumon*, Kluwer 1203.

<sup>67</sup> See for example the reference to the intention and scope of the Belgian-French double taxation convention in Cass.. 21 February 1979, Pas., 1979. I, 737.

In contrast, to the extent that priority of the constitution over treaty law is accepted, the question arises as to whether the above-mentioned principles also extend to interpretation of double taxation conventions.

In our opinion, application of Article 110 of the constitution, according to which article no tax can be *introduced* other than by force of a law, is not a matter for discussion with regard to double taxation conventions because such treaties do not *introduce* a tax. Double taxation conventions are limited to granting tax-levying competence to one of two states (or both), without constituting an autonomous reason for levying.<sup>68</sup>

If one accepts that the national constitution takes priority over the clauses of double taxation conventions, in our opinion the conclusion with regard to Article 112 of the constitution, according to which no exemption from tax can be introduced other than by force of a law, is necessarily different. If double taxation conventions grant one of the parties to the treaty the authority to levy taxes, this leads to an effective exemption in the other state, which results in national grounds for levying taxes being ruled out. Moreover, from recent jurisprudence from the court of arbitration there also appears to have been testing of treaty clauses against Article 112 of the constitution.<sup>69</sup> There, too, we are of the opinion that if the national constitution has priority, on account of the above-mentioned constitutional principle, exemption from tax in Belgium as a result of the application of a double taxation convention must be interpreted restrictively, as a result of which in cases of doubt the national law must have full effect.

In our opinion, such an analysis is not in dispute with the above-mentioned Cassation jurisprudence from which it appears that treaty clauses are not open to unilateral interpretation.

In this case it is not an *a posteriori* unilateral interpretation of a bilateral provision that is involved, but rather the respecting of a previously existing constitutional regulation which indicates the context in which a treaty can have effect.<sup>70</sup>

In this sense, a *bilateral*, not strict, interpretation of a treaty clause which results in an effective exemption with the ruling out of the national law, would in our opinion likewise meet with constitutional objections.

It should also be repeated that in our opinion the above analysis is not a matter for discussion if priority of the treaty over the national constitution is accepted. Moreover, this analysis is based on personal views since the question of the influence of Article 112 of the constitution on the interpretation of double taxation conventions in Belgian jurisprudence has not yet been the subject of in-depth analysis. Perhaps it could be argued in favour of the non-application of this constitutional regulation that double taxation conventions in principle divide the authority to levy taxes, and, therefore, primarily do not have the aim of introducing an “exemption” in the sense of Article 112 of the constitution.

<sup>68</sup> See in this spirit De Blaauwe R., “Trusts en inkomstbelastingen”, *T.F.R.*, 1990, 97 (110).

<sup>69</sup> Court of Arbitration, 16 October 1991, *FJF* 91/211.

<sup>70</sup> Masquelin J., *op. cit.*, 443.

With reference to the application of Article 112 of the constitution, there is also the question of whether a double taxation convention is a law in the sense of Article 112 of the constitution, since a treaty is in principle entered into by the King acting as *executive power*, and according to firm jurisprudence from the Court of Cassation the law of ratification for such a treaty has no legal character.<sup>71</sup>

From authoritative legal doctrine on the matter it can be deduced that a double taxation convention is indeed a law in the sense of Article 112 of the constitution, since for the application of this article the term “law” must be understood as “law in the material sense”, i.e. a legal rule with an abstract, general and impersonal nature, which for the duration of its validity is applicable to an unlimited number of cases, *irrespective of from which organ this law originated*.<sup>72</sup>

- b. In Belgian legal doctrine<sup>73</sup> it is mostly assumed that double taxation conventions must be interpreted restrictively since they mean an abdication of sovereignty of the states affected, whereas the autonomous authority to levy taxes is just one of the main expressions of this sovereignty.

It is not infrequently seen that on the basis of this consideration (Belgian) national judges switch over *in concreto* to a restrictive interpretation of double taxation conventions so as to concur as closely as possible with domestic law.<sup>74</sup>

A restrictive interpretation on the basis of such a consideration is also qualified by other authors – in our opinion justifiably. For treaties may not just be considered as exceptions to internal law, which would continue to constitute the “general rule”. They form an autonomous and connected set of rules which must be placed next to domestic law not as an exception but as a parallel order.<sup>75</sup>

### 3.2.2. *The Authority to interpret Double Taxation Conventions*

Article 92 of the Belgian constitution states that disputes concerning citizens’ rights come under the exclusive authority of the courts. Article 93 of the constitution, however, states that disputes concerning political rights come under the authority of the courts, *except for exceptions provided for by the law*.

It is assumed that the disputes concerning direct taxes must be considered as disputes concerning political rights,<sup>76</sup> as a result of which the authority to settle such disputes in law can also be transferred *stricto sensu* to instances other than courts.

<sup>71</sup> Cass., 27 May 1971, Pas., 1971. I. 886.

<sup>72</sup> Alen ., “Algemene beginselen en grondslagen van het Belgisch Publiek Recht”, *Story-Scientia*, 99.

<sup>73</sup> See *inter alia* Hinnekens L., *De territorialiteit van de Belgische belastingen in het algemeen en op de inkomsten in het bijzonder*, CED-Samsom, 1985. 21-22.

<sup>74</sup> Hinnekens L., “Velasquez, het arrest van de gemiste kans”. *AFT* 1984, 194 (200).

<sup>75</sup> Claeys-Bouaert I., “Verdragen tot voorkoming ...”, *op. cit.*, 1009.

<sup>76</sup> Dumon F., *op. cit.*, 5 (8).

The Belgian law has made use of this constitutional possibility. In Belgium, disputes concerning direct taxes – and thus also disputes concerning the application of double taxation conventions – are settled in the first instance via the appeal procedure by the regional director belonging to the tax administration, but acting in his jurisdictional capacity. If the taxpayer lodges an appeal against the decision of the regional director, the dispute is placed before the courts *strictu sensu*. However, in Belgium there are no specialised courts in fiscal matters. Only the Court of Arbitration has *inter alia* the specific competence to test tax laws against the constitutional principle of equality.

The authority to make binding statements *in concreto* in matters of double taxation conventions, therefore, belongs exclusively to the courts *sensu lato* (namely the regional director acting in his jurisdictional capacity and courts). Neither the legislator nor the executive power has the authority to interpret treaties in a manner that is binding.<sup>77</sup> Indeed, if the Belgian legislator were to include an interpretative order in the law of approval, this would, therefore, certainly not be binding on the other party to the treaty.

The question whether such an interpretative order would be binding in the internal legal order on the basis of the inviolability of national law is argued in legal doctrine.<sup>78</sup>

The fact that the authority to give a binding interpretation comes under the exclusive power of the courts (*sensu lato*) does not prevent the parties to the treaty from being able to conclude interpretative accords with regard to the application of a particular double taxation convention if such a possibility is provided for in the double taxation convention in question.<sup>79</sup>

In Belgian legal doctrine it is mostly assumed that such interpretative accords are not binding on a national judge. We are of the opinion that such a conclusion must be qualified. (See below).

Nor does this prevent a national judge from being able to take it into account if he is of the opinion that these are in accordance with an accurate interpretation of a clause in a treaty.<sup>80</sup>

### 3.2.3. *Belgian Jurisprudential Practice*

As already mentioned, it not infrequently occurs that a Belgian domestic judge very restrictively interprets double taxation conventions by giving preference to a solution which is closest to national law.<sup>81</sup>

<sup>77</sup> Cass., 16 March 1968, Pas., 1968, I, 625 and Cass., 12 March 1968, Pas., 1968, I, 874.

<sup>78</sup> Masquelin J., *Les droits des traités dans l'ordre juridique et dans la pratique diplomatiques belges*, Bruylant, 1980, 523.

<sup>79</sup> See *inter alia* interpretative accord between Belgium and France in B.S. 31 December 1965, 13561 or Circ. dated 12 February 1988, Bul. Bel. 671, 628 concerning the ruling on cross-border workers in the Belgian-Dutch convention.

<sup>80</sup> See *inter alia* Brussels, 10 March 1975, confirmed by the Court of Cassation in its judgment dated 18 June 1976 (*Bul. Bel.* 550, 813); Liège, 2 March 1989, *AFT* 1990, 165.

<sup>81</sup> See *inter alia* problems concerning Velasquez judgment. Cass., 29 June 1984, discussed by Hinnekens L., "Velasquez, het arrest van de gemiste kans", *AFT* 1984, 194 (195 + 196 + 200).

Moreover, in Belgian jurisprudence, for the interpretation of double taxation conventions reference is seldom or never made to the interpretation which is applied by the authorities of the other party to the convention or to foreign judgments. Also for the interpretation of double taxation conventions reference is very seldom made to the OECD commentary on the OECD Model Convention.

Despite the fact that the judicial value of such a commentary according to Belgian norms is limited to that of very authoritative legal doctrine,<sup>82</sup> it is argued in legal doctrine that these commentaries be taken into consideration more frequently by Belgian jurisprudence as a mean to interpretation.<sup>83</sup>

In a judgment by the Court of Cassation dated 12 October 1973, for the interpretation of a clause from the Belgian-German double taxation convention a comparison was made with a similar clause which occurred in two other double taxation conventions concluded by Belgium.<sup>84</sup>

### 3.2.4. *The Mutual Agreement Procedure provided for in Article 25 Para. 3 of the OECD Model Convention as a Means of Interpretation*

All double taxation conventions concluded by Belgium contain a clause in accordance with Article 25, Para. 3, first sentence of the OECD Model Convention, as a result of which the competent authorities of the parties to the treaty can consult each other with the aim of resolving in mutual harmony difficulties or points of doubt which may arise with regard to the application of the agreement between the parties to the convention.

Only a number of conventions (United States, Great Britain, Hungary, Italy, Norway, Ireland, Philippines) refer in the context of such a procedure explicitly to difficulties in the sphere of interpretation of treaty clauses. Yet in legal doctrine<sup>85</sup> it is assumed that it may not be deduced from the lack of such an explicit reference in the other conventions that the mutual agreement procedure may not be started for difficulties of interpretation in these treaties.

If the mutual agreement procedure came into being in response to a specific case, any agreement that the parties to the treaty reach in the context of such a consultation applies in principle only for this specific case. But nothing prevents the parties to the treaty from giving their agreement a more general scope, which, however, will always be limited to the double taxation convention in question and, therefore, cannot be extended to other conventions.

Any agreement that the parties to the convention thus reach is binding on both tax administrations.<sup>86</sup>

In Belgian legal doctrine it is mostly stated without any reservation that such interpretative agreements are not binding on the national judges.

<sup>82</sup> Tiberghien, *op. cit.*, 61.

<sup>83</sup> Claeys-Bouuaert I., "Verdragen ter voorkoming ...", *op. cit.*, 1010.

<sup>84</sup> Cass., 12 October 1973, Pas., 1974, I, 159. *See also* Cass., 21 February 1979, Pas., 1979, I, 737.

<sup>85</sup> Coremans, J., *Cahiers de droit fiscal international*, 1981, Kluwer, 213 (215).

<sup>86</sup> Com. Ov. 25/32.

A first argument that is used for this is the fact that the delegation of competences in accordance with Article 25 Para. 3 of the double taxation conventions would be insufficiently precise for the judge to be bound by such interpretative agreements.<sup>87</sup> However, in our opinion this argument is not convincing.

But the most important argument that is used is the reference to the above-mentioned national jurisprudence which states that later interpretative agreements which affect the Belgian State or bind the Belgians individually, e.g. because they extend the area of application of the accord in a way that cannot be considered to be in accordance with the intention of the parties to the treaty, must have come into being according to the procedure which is laid down in Article 68 of the Constitution.

But in our opinion it cannot be deduced from the above-mentioned jurisprudence that such interpretative agreements cannot be binding on a national judge if such accords are merely interpretative and thus in accordance with the intention of the parties to the treaty.

However, even in this case the national judge will always be able to apply a so-called marginal test in order to examine whether such interpretative agreements are in accordance with the intention of the parties to the treaty. As a result, the question of the binding value of such interpretative accords mostly threatens merely to be academic, especially in the cases where the difficulties in interpretation arise simply because the intention of the parties to the treaties can be ascertained only with difficulty.

On the other hand, account must be taken of the fact that the tax administrations of both countries will not infrequently be able to demonstrate more easily the intent of the parties to the treaty as a result of the fact that they negotiated the double taxation convention in question. Therefore, we are of the opinion, as already stated, that in such a case it could be defended that an interpretative agreement which corresponds to the intention of the parties to the treaty should be able to be binding on the national judge. But since a Belgian national judge in principle would have to interpret a treaty according to the intention of the parties to the treaty, the judicial value of such accords also appears to be limited to the imposition of such a method of interpretation on a national judge.

Remarkable, therefore, is the judgment by the Court of Appeal in Liège that the 45-day rule which was prepared in the scope of the mutual agreement procedure between Belgium and Germany for application of the rule on cross-border workers simply accepts it without examining this rule on its judicial merits.<sup>88</sup> Such a 45-day rule is in our opinion very arbitrary, and nowhere does the intention of the Parties to the treaty on the cross-border rule appear in the text of the treaty to apply in such a manner. The fact that in the above-mentioned judgment the Court of Appeal has not reacted to this is, however, perhaps due to the fact that the taxpayer has not availed himself of this path before the Court.

<sup>87</sup> Ellis M., a.o. "The legal nature of the mutual agreement procedure under the OECD Model Convention", *M.B.B.* 1980, 265 (274).

<sup>88</sup> Liège, 2 March 1989, *AFT* 1990, 165.

The Belgian administration does not in principle publish such accords which have come into being with regard to a specific case and of which the effect remains limited to this case.

However, if an accord with a general scope comes into being between two Administrations, it usually publishes these accords either in the *Belgisch Staatsblad* (Belgian Gazette) or in the *Bulletin der Belastingen* which is an official publication of the Ministry of Finance.

In general it is assumed that the Parties to the treaty have no obligation to reach an agreement in the framework of such a competent authority procedure.

However, as a result of the fact that it is stated in this article that the Parties to the treaty “shall try to reach an agreement” the question arises as to whether these States, if they are familiar with difficulties of interpretation, are not obliged at least to contact each other and try to reach agreement. In other words, may a State be held liable for the damage that a taxpayer possibly suffers (e.g. the negative consequences of a temporary double taxation) as a result of the Parties to the treaty remaining passive?

In our opinion, according to Belgian law such a liability on the part of the authority does not appear possible since such a position of liability, according to prevailing Belgian law, would necessarily have to occur via a civil law procedure, in which case the proof of the causal connection between the possible fault and the damage will be very difficult since the States have no obligation to reach an agreement.

The second section of Article 25, Para. 3 of the OECD Model Convention, however, which provides for the possibility of consultation with a view to the avoidance of double taxation for cases not provided for in the convention, was not included in the Belgian double taxation conventions. In Belgium such a provision encounters constitutional objections. In this connection, the Council of State decided that the approval of the legislative chambers is required in principle for each amendment which can affect the State to an extent not determined by the convention, can bind the Belgian individual or can deviate from national legislation and constitutes no normal implementation or interpretation of the convention.<sup>89</sup>

Finally, the Belgian double taxation convention contains no clause in accordance with Article 3(2) of the model convention of the United States, whereby reference to the domestic law (see Article 3, Para. 2 OECD Model Convention) is eliminated if the parties to the treaty reach agreement about a concept not defined in the treaty. Such a provision would also meet with constitutional objections in Belgium anyway.

<sup>89</sup> Opinion of the Council of State, Parl. St. 970. 1964-1965, No. 1, 22; Hinnekens L.. “De relatie- en interpretatieproblemen van onze dubbelbelastingsverdragen”. *AFT* 1986, 225.

### 3.2.5. *The Interpretation of Multilingual (Double Taxation) Conventions*

The approximately 45 double taxation conventions entered into thus far by Belgium can be divided into the following categories with regard to the treaty language(s) used:

- a. the treaties which were concluded only in one language. Philippines, Finland, Indonesia, Israel, Japan, Yugoslavia, etc.

It is clear that in this category of treaties there can be no difficulties of interpretation which are caused by differences between the treaty languages used.

- b. the treaties which were drawn up in different languages (mostly three) and where all versions are equally valid, but where one language prevails if there are discrepancies between the different treaty languages (Greece, Hungary, India, Romania, Sri Lanka, etc.).

Also in this category of treaties there will seldom be major problems of interpretation which are caused by discrepancies in the different treaty languages. In this case these treaties provide for one particular version having priority over the others.

But the wording of this provision in the various treaties can be of practical importance: for in most treaties this provision states that in the event of discrepancies one particular treaty language prevails. Since the majority of treaties concluded by Belgium are valid in three (or sometimes even four) different languages, this would mean that a discrepancy between two different versions is sufficient to give preference to one particular version. On the other hand, the agreement with Tunisia appears to assume that there is discrepancy between the three valid texts for the French text to prevail.<sup>90</sup>

- c. the treaties which are drawn up in different languages when all versions are declared equally valid without any one particular treaty language prevailing in the event of disagreement. (Australia, Brazil, Canada, China, Denmark, Germany, United States, etc.).

It is mainly in this category of treaties that difficulties of interpretation will occur if it appears that the different treaty languages used cannot be reconciled with each other.

In the Belgian jurisprudence known to me, no cases are known in which in a matter of double taxation conventions the judge had to give a judgment regarding difficulties of interpretation which arose as a result of discrepancies between the different valid treaty texts. More generally the Council of State decided that the interpretation of multilingual treaties must be based on all valid texts because only in this way can the intention of the parties to the treaty be ascertained.<sup>91</sup> Such a method is consistent with the provisions of Article 33, sections 3 and 4 of the Vienna Agreement.

<sup>90</sup> Art. 27: "For want of agreement between the texts in the Dutch, French *and* the Arabic language the French text is definitive."

<sup>91</sup> Opinion of the Council of State, Parl. St. 898, 1975-1976, No. 1, 8. The practical application of such a method will in practice, however, not infrequently give rise to great difficulties as a result of inadequate knowledge of the other treaty language on the part of the national judge.

In the meagre Belgian legal doctrine<sup>92</sup> on the subject, the following analysis is presented:

- if there are differences between the various valid treaty texts the judge must in the first instance try to resolve this discrepancy on the basis of the usual methods of interpretation, i.e. by seeking the intention of the parties to the treaty;
- if the differences cannot be resolved on the basis of the usual methods of interpretation, the judge must try, for example by considering the largest common denominator, to reconcile the two texts with each other, taking into consideration the objective of the treaty;
- finally, if the texts cannot be reconciled with each other even on the basis of the largest common denominator, the judge shall be free to turn to the original version of the treaty, i.e. the language of the version on which the parties to the treaty first reached an accord.

In his answer to a parliamentary question on the interpretation of the term “onderhoudsgeld” in the Belgian-American double taxation convention, the Minister for Finance based himself on the meaning of the term “alimony” as this occurs in the English-language text.<sup>93</sup>

For the sake of completion, it should also be noted that Article 8 of the law of 31 May 1961 (B.S. 21 June 1961) stipulates that if there is reason to announce a treaty, this is made in the Belgisch Staatsblad by publishing the original French or Dutch with a Dutch or French translation. If there is no original text in Dutch or French, the original text is published in the foreign language together with Dutch and French translations.

### 3.2.6. *Article 3, Para. 2 of the OECD Model Convention*

All double taxation conventions concluded by Belgium contain a clause in accordance with Article 3, Para. 2 of the OECD Model Convention. Such a reference to domestic law does not meet with constitutional objections in Belgium.

But this clause is not exactly the same in all conventions.<sup>94</sup> Mostly, however, little significance needs to be attached to the textual differences.

The cases in which a national judge had to give a judgment on the practical scope of this clause from the double taxation conventions concluded by Belgium are extremely limited. But on account of the sparse jurisprudence and legal doctrine on the matter, in our opinion the following principles can be deduced with regard to Belgium.

<sup>92</sup> Herbots J., *Meertalig rechtswoord, rijkere rechtsvinding*, 121.

<sup>93</sup> PQ No. 169 dated 22 February 1984 by Senator De Clippele discussed in *Fiskoloog Internationaal* dated 15 April 1984, 4.

<sup>94</sup> In addition differences appear to occur between the French and Dutch texts in three conventions concluded by Belgium. (Avery Jones J., “The interpretation of tax treaties with particular reference to Article 3 of the OECD Model”, *BTR* 1984. 14).

- In Belgium, too, it may be assumed that reference to domestic law in the first instance means the national tax law. For the application of the convention with the former USSR there can be no argument whatsoever about this because this principle is explicitly included in Article 3, Para. 2 of this treaty. Also in the convention with France reference is made to the meaning in domestic tax law (Article 22). From the lack of such an explicit provision in the other conventions, in our opinion it cannot be deduced that the reference must not be made in the first instance to fiscal law. Moreover, such a logical reference seems to us to be in accord with the above-mentioned Cassation judgment,<sup>95</sup> which states that a term not defined in a treaty must be understood in its usual civil law meaning, unless *from the context and the objective of the treaty it appears that the parties to the treaty have wanted to differ from this*. We believe that in the case of double taxation conventions there is a question of such a difference.
- The Belgian administration assumes that the consultation procedure provided for in Article 25 of the OECD Model Convention can also be applied to the problems of interpretation in the context of Article 3 Para.
- The reference to the context occurs, with the exception of the treaty with Yugoslavia and the French text of the treaty with the United States, in all double taxation conventions concluded by Belgium which contain a clause in accordance with Article 3 Para. 2 of the OECD Model Convention.

In Belgian jurisprudence no cases are known in which the judge has determined the precise scope of the term “context”. But in legal domestic law it is assumed that what is meant thereby in each case are preamble, protocols and other documents which are signed, possibly later, by the parties to the convention.

The problem with regard to the chronological priority between the reference to the domestic law on the one hand and the interpretation as a function of the context on the other hand, is not resolved either in jurisprudence or in legal doctrine.

- The question whether Article 3, Para. 2 of the double taxation conventions contains a so-called ambulatory interpretation – i.e. a reference to the valid (amended) national law – was recently under discussion in Belgium.<sup>97</sup> It concerned the interpretation of Article 7 of the Belgian-Dutch convention.

At the time that this convention came about, active in the Netherlands residing partners of Belgian partnerships were considered to come under Article 7 of the treaty because these active partners were also considered in national law to make operating profits. Later, however, the Belgian legislation was amended, as a result of which the income of active partners were no longer described as business profits.

The Court of Appeal in Antwerp, confirmed in this by the Court of Cassation, was of the opinion that as a result of the amendment in the

<sup>95</sup> Cass., 4 May 1972, Pas., 1972, I, 806.

<sup>96</sup> Com. Ov. 3/51.

<sup>97</sup> Cass., 21 December 1990, *T.R. V.* 1991, 83 with note by Van Crombrugge S.

domestic legislation, active partners residents of the Netherlands could henceforth no longer come under Article 7 (but under Article 22 of the treaty: the other income article).

From the considerations by the Court of Cassation,<sup>98</sup> it is deduced by some authors – in our opinion justifiably – that with regard to Article 3 Para. 2 of the double taxation conventions the Court of Cassation had finally had the opportunity to speak out in favour of an ambulatory interpretation. The application in Belgian law of the ambulatory method of interpretation with regard to double taxation conventions was previously the subject of argument in legal doctrine.<sup>99</sup>

However, in our opinion, the Court of Cassation had already opted much earlier, at least implicitly, for application of the ambulatory method of interpretation in the context of an article in a different convention, when it declared the Belgian-Dutch treaty (old) which did not contain any clause in accordance with Article 2 Para. 4<sup>100</sup> of the OECD Model Convention, to be applicable to a tax subsequently introduced by the Belgian and Dutch legislators, doing this on the basis of the intention of the Parties to the convention.<sup>101</sup>

From this Cassation jurisprudence, in our opinion the following principles can be deduced with regard to application of the ambulatory method of interpretation.

Each time the national law is amended or replaced by another law, the Court of Cassation appears to accept the effect of this at treaty level, provided that it does not come into conflict with the context of the treaty or with the intention of the parties to the treaty.<sup>102</sup> In the above-mentioned judgment concerning active partners the Court refers explicitly to the desire of the parties to the treaty to build the ambulatory nature into Article 3 Para. 2 of the treaty. Such a reference to the intention of the parties to the treaty also occurs in the above-mentioned judgment dated 20 February 1968.

As a result of this examination of the context or the intention of the parties to the treaty one could, therefore, speak of a limited ambulatory interpretation.

<sup>98</sup> “Considering that the clauses of Articles 2, especially Para. 4, 7 Para. 1, and 3 Para. 2, of the Belgian-Dutch taxation treaty show that, according to the intent of the parties to the convention, definition of the concept profits of enterprises from Belgium falls under the exclusive authority of the Belgian national legislator; that the convention thus leaves the authority of the Belgian legislator uncurtailed with regard to determining *or changing* the object of levying taxes, with the understanding that as a result there is no detraction from the clauses in other articles of the taxation treaty in which elements of income are treated separately.”

<sup>99</sup> Against: Lenaerts K., *op. cit.*; For: limited ambulatory method of interpretation: Hinnekens L. “Internationale leningen en het FBB”. *AFT* 1985. 199 (223).

<sup>100</sup> This is the clause which extends the application of the treaty to later similar taxes.

<sup>101</sup> Cass., 20 February 1968. *Revue Fiscale*. 1968, 396. In some doctrine (Avery Jones J., *op. cit.*. 36) for application of the ambulatory method of interpretation reference is also made to the judgment by the Court of Cassation dated 21 February 1979. Pas.. 1979.I. 737. However. we doubt whether this concerned a clear case of ambulatory interpretation of a treaty clause.

<sup>102</sup> Example why the ambulatory interpretation of a tax introduced later was. therefore, not accepted: Cass., 19 June 1975, *J.D.F.* 1975. 270 concerning moveable advance tax payment and tax on moveable assets.

In our opinion, however, it cannot simply be deduced from this judgment that the Court of Cassation would also accept an ambulatory interpretation for e.g. the term “dividend” as defined in Article 10 of the various treaties. From the reference to domestic law it seems not unambiguous that the Parties to the treaty intended an ambulatory interpretation of this term.

The above-mentioned Cassation jurisprudence which lays down that a state entering into a treaty may not extend a clause of a treaty by means of a later internal law if this term is defined sufficiently clearly in the treaty must then also be understood in this light.<sup>103</sup> Such an extension of a treaty clause would in this case be in conflict with the clear intent of the states entering into the treaty. In view of this, we believe that the numerous recent changes that the Belgian legislator has made to the foreign tax credit QFIE,<sup>104</sup> thereby in a lot of cases violating the clear intention of the states entering into conventions with Belgium, should find in those cases no approval in the eyes of the Court of Cassation.

In contrast, the application of the ambulatory method of interpretation in the Belgian-Indian double taxation convention appears to come from the text itself of Article 3 Para. 2 since reference is made to the *valid* laws.

Moreover, in some treaties,<sup>105</sup> it is stated that the phrase “according to the laws of the State” must be understood to mean the laws as amended or supplemented on the basis of international agreements.

For the sake of completion, it should be noted that the Court of Cassation accepted the application of the ambulatory method of interpretation for application of domestic tax law, namely in matters of transfer taxes, as long as a hundred years ago by deciding that the reference in those taxes to civil law meant the civil law in force.<sup>106</sup>

### 3.2.7. *Conflicts of Interpretation and Qualification*

From Belgian jurisprudence<sup>107</sup> it appears clear that the Belgian judge does not adhere to the principle defended by some authors<sup>108</sup> that the state of residence is in principle bound by the qualification of the source state. On the contrary, it appears from the judgments that on the basis of Article 3 Para. 2 the national judge applied an autonomous qualification which ran counter to the qualification of the source state.

<sup>103</sup> Cass., 16 January 1968, Pas., I,625; Cass., 12 March 1968, *Bul. Bel.*, 461; *see also* Hinnekens L., “Internationale leningen en het FBB, II”, *AFT*, 1985, 220 (223).

<sup>104</sup> This is a fixed credit mechanism for dividends, interests and royalties taxed abroad.

<sup>105</sup> *See* protocol with the Netherlands, Luxembourg, etc.

<sup>106</sup> Cass., 19 May 1892.

<sup>107</sup> *See inter alia* Ghent, 29 January 1982, FJF 82/25; Antwerp, 15 September 1985, FJF 85/129; Antwerp 23 April 1985, FJF 85/129.

<sup>108</sup> Avery Jones J., *op. cit.* To support this theory, reference is made *inter alia* to the above-mentioned Cassation judgment concerning Electroraal (Cass., 15 February 1967, Pas., 1967,I, 741). We doubt whether this reference is justified since the Court on account of the nature of the compensation decided that this did not constitute liquidation compensation in Belgian law either. Moreover, the Belgian-French treaty which had to be interpreted did not contain an Article 3 Para. 2 clause.

### 3.2.8. *Interpretation and Treaty Abuse (Treaty-Shopping)*

In various of the double taxation conventions entered into by Belgium there are explicit anti-treaty-shopping clauses. (Luxembourg, Switzerland, United States, etc.) In other treaties (Germany protocol, Luxembourg, etc.), it is explicitly stated that the treaty may not be interpreted in the sense that it would prevent a State from applying its national legislation against tax evasion.

There can be little doubt in these situations about the application of such anti-shopping clauses since the parties entering into the convention have expressly desired this.

In this connection it must also be noted that the Belgian administration, in accordance with the OECD commentary, is of the opinion in the context of the interpretation of Article 11 of the treaties entered into in accordance with the OECD Model Convention of 1963, that the term “beneficial owner” can also be applied as it occurs in the model treaty of 1977.<sup>109</sup>

However, the question of whether for want of explicit anti-shopping clauses in treaty law, the anti-shopping clauses or doctrines in domestic law can be applied to a treaty via interpretation of the treaty, appears to be somewhat more difficult.

The Belgian Administration is meanwhile of the opinion that no single treaty clause may be interpreted to mean that clauses from domestic law for the avoidance of tax evasion should no longer be able to be applied.<sup>110</sup>

Due *inter alia* to the fact that for the application of such anti-avoidance clauses from domestic law there are explicit clauses in some treaties entered into by Belgium,<sup>111</sup> doubt is cast in legal doctrine on this opinion on the basis of an *a contrario* argument.<sup>112</sup>

Moreover, *inter alia* on the basis of the above-mentioned Cassation jurisprudence which states that a double taxation convention is not open to unilateral interpretation by one of the parties to the treaty,<sup>113</sup> it is assumed in Belgian legal doctrine that an anti-avoidance rule of internal law cannot be regarded as a more precise statement of a treaty rule, unless it appears that the states entering into the treaty had the intention of disallowing the advantages of the treaty in the avoidance situations at which the internal law is aimed.<sup>114</sup>

Contrary to other countries, in fiscal matters Belgium does not recognise application of the *fraus legis* principle. On the basis of the so-called “Brepols doctrine” developed by jurisprudence, fiscal constructions can be set aside if it appears that the taxpayer has not accepted all judicial consequences of the chosen (least taxable) way. But even the uncurtailed application of this “simulation doctrine” in treaty situations encounters (comparable) objections in legal

<sup>109</sup> Com. Ov. 11/226.5.

<sup>110</sup> Com. Ov. 28/17.

<sup>111</sup> See the treaties with Germany, Austria, Luxembourg.

<sup>112</sup> Hinnekens L., “De relatie- en interpretatieproblemen van onze dubbelbelastingsverdragen”. *AFT* 1986. 225 (235).

<sup>113</sup> See footnote 56.

<sup>114</sup> Hinnekens L.. “Treaty shopping en anti-misbruikregels in België en elders”. *Actuele Problemen van Fiscaal recht*, Kluwer. 1989, 255 (274).

doctrine. In typical treaty-shopping situations it will appear that the taxpayer has very much wanted and accepted all the judicial consequences.<sup>115</sup> Moreover, here, too, the argument is invoked that application of such an anti-avoidance clause developed by one of the treaty states in domestic law is rather problematical unless such a thing can clearly be found in the intention of the parties to the treaty or such a principle is applied in a comparable way at least in domestic law of both states.<sup>116</sup>

However, in Belgian jurisprudence no cases are known which give a clear judgment concerning this problem. In legal doctrine there are also warnings about the fact that extreme cases of treaty-shopping would be able to be set aside by jurisprudence (which is still seeking and developing in the matter) on clear grounds of domestic law. But for the time being the legal grounds for this are unclear in each case.<sup>117</sup>

The analysis given above does not in our opinion prevent account still always having to be taken of the principle of reality for application of a treaty.<sup>118</sup> By way of example, reference may be made to the case in Belgian jurisprudence in which for treaty purposes the taxpayer had presented a termination of employment payment (falsely) as a pension award.<sup>119</sup> The reclassification applied by the judge – made via Article 3 Para. 2 of the treaty, on the basis of domestic law – is a pure application of the principle of reality which is in complete agreement with the intention of the states concluding the treaty.

### 3.2.9. *Article 3, Para. 2 of the OECD Model Convention and domestic Law Fictions*

A particular problem is that of the question of the application, on the basis of Article 3, Para. 2 of the OECD Model Convention, of domestic law fictions to treaty level.

Such a problem arose recently in Dutch jurisprudence and was answered negatively by the judge.<sup>120</sup>

Such a question is also under discussion in Belgium, although there are no legal judgments for it as yet.<sup>121</sup> As an example, reference may be made to Article 344 I.R.C. which introduces a fiction into Belgian fiscal law when the transfer of certain goods to foreign companies which benefit from a special tax regime is not taken into account, as a result of which the fiscal starting point is an unchanged situation.

<sup>115</sup> Hinnekens L., *op. cit.*, 280.

<sup>116</sup> Hinnekens L., *op. cit.*, 281.

<sup>117</sup> Hinnekens L., *op. cit.*, 281.

<sup>118</sup> Vanistendael F., “De werkelijkheid in het belastingrecht”, *Liber Amicorum F. Dumon*, Kluwer, II, 1063.

<sup>119</sup> Liège, 7 December 1983, *FJF*, 84/83.

<sup>120</sup> Court of Amsterdam, 11 April 1989, *Vakstudienieuws*, 30 May 1991, 1465.

<sup>121</sup> Peeters B.M., “De invloed van de verdragsrechtelijke woonplaats op de internrechtelijke toerekeningsregels van inkomsten tussen echtgenoten”, *T.F.R.* 1992, 123.

Let us take the concrete example of a Belgian company which transfers bonds of Brazilian origin to a Luxembourg holding company (1929). On account of the above-mentioned Article 344 I.R.C. such a transfer to the Belgian treasury is in principle not opposable.

However, on account of the double taxation convention two questions arise *in casu*. Firstly there is the question whether Brazil must grant the reduction of the withholding tax on the interest in accordance with the Belgian-Brazilian convention, or whether it may refuse any reduction on account of the Luxembourg-Brazilian convention.

We are of the opinion that in neither case a Belgian domestic law fiction can be invoked against Brazil because such an interpretation cannot be considered to be part of the clear intention of the parties to the treaty. *In casu* there will then be no question in Brazil of a reduction of withholding taxes.

However, more difficult is the question of whether Belgium itself in this case must respect the application of its domestic law fiction, since in the Belgian-Brazilian treaty there is a so-called tax-sparing clause with regard to interest of Brazilian origin. On account of the above-mentioned principle developed by Cassation jurisprudence, that treaties are not open to unilateral interpretation, we believe that in this case, too, the question must be answered in the negative.

## Résumé

1. Nonobstant le fait que la Constitution belge, à l'exception du cas où il s'agit d'un transfert de souveraineté à une entité supranational, ne contient pas de règle prévoyant la primauté du droit conventionnel au droit interne, le principe est de nos jours unanimement admis par la jurisprudence belge.  
Par contre, il existe actuellement dans la jurisprudence et la doctrine belge des doutes quant à la question si la convention prévaut également à la constitution.  
Si l'on accepte la primauté de la constitution, ceci a à notre avis, pour conséquence que l'interprétation stricte de la loi fiscale nationale, telle que prévue par les articles 110 et 112 de la Constitution, est également d'application en cas d'interprétation de dispositions conventionnelles dérogeant à la règle de droit national.
2. Selon la jurisprudence de la Cour de Cassation, les dispositions conventionnelles doivent être interprétées selon l'intention des États contractants.  
Cette intention peut être déduite des travaux préparatoires, de la correspondance entre les états contractants, etc.
3. En Belgique, il n'y existe pas de Cours spécialisées en matières fiscales. L'interprétation des conventions tenant à éviter la double imposition appartient exclusivement aux tribunaux *sensu lato*: c.à.d. en premier lieu le directeur régional, appartenant à l'administration mais agissant dans sa compétence juridictionnelle et ensuite aux tribunaux *sensu stricto*.

4. Les tribunaux belges ont souvent l'habitude d'interpréter des conventions tenant à éviter la double imposition d'une façon qui se rapproche le plus du droit national. Ce n'est que très exceptionnellement que référence est faite à l'interprétation pratiquée par d'autres pays contractants ou par l'OECD.
5. La Belgique a inclu dans toutes ces conventions tenant à éviter la double imposition la procédure amiable, qui prévoit explicitement ou implicitement la possibilité de se concerter avec l'autre État contractant au sujet des difficultés d'interprétation. Il est généralement admis que les accords qui sont obtenus dans le cadre d'une telle procédure amiable, ne lient pas les tribunaux. Or, nous croyons que ce point de vue doit être légèrement nuancé s'il s'avère que ces accords sont purement interprétatifs et sont censés être en concordance avec l'invention des parties contractantes.
6. Il n'existe dans la jurisprudence belge pratiquement pas de cas où les cours ont dû se prononcer sur des problèmes d'interprétation suite à des divergences entre les différentes versions authentiques d'une convention tenant à éviter la double imposition.
7. Il est admis par la plupart des auteurs en Belgique que la Cour de Cassation s'est prononcée en faveur d'une interprétation évolutive limitée à des conventions tenant à éviter la double imposition, à condition qu'une telle méthode soit en concordance avec l'intention des États contractants.
8. En Belgique il n'existe que très peu d'expérience quant à l'applicabilité de dispositions nationales anti-abus au niveau des conventions tenant à éviter la double imposition.
9. Une particularité qui existe à l'occasion de l'interprétation, est la question relative à l'applicabilité de fictions créées en droit interne au niveau de la convention. Référence peut être faite à l'article 344 C.I.R.

### Zusammenfassung

1. Zwar enthält die belgische Verfassung, ausser bei der Übertragung der Souveränität auf ein supranationales Gremium, keine Bestimmung, die den Vorrang des Vertragsrechtes über das innere Recht regelt, dennoch wird diese Rangfolge in der belgischen Rechtsprechung nicht mehr bestritten. Hingegen ist es in der belgischen Rechtsprechung und Rechtslehre noch unklar, ob das Vertragsrecht auch Vorrang vor der Verfassung hat.  
Sollte man den Vorrang der Verfassung akzeptieren, so hat dies unserer Auffassung nach zur Folge, dass die restriktive Auslegung des nationalen Steuerrechts (so wie von den Art. 110 und 112 der Verfassung vorgesehen), ebenso im Fall der Auslegung von Abkommensbestimmungen, die von Regeln des nationalen Rechts abweichen, Anwendung findet.
2. Nach der Rechtsprechung des belgischen Verfassungsgerichts müssen Abkommensbestimmungen nach dem Willen der Vertragsschliessenden Parteien ausgelegt werden. Der Wille lässt sich aus den vorbereitenden Arbeiten, dem Briefwechsel zwischen den verhandelnden Staaten, etc., entnehmen.

3. In Belgien gibt es keine speziellen Finanzgerichte. Die Auslegung der Doppelbesteuerungsabkommen obliegt ausschliesslich den Gerichten *sensu lato*: nämlich zunächst dem Regionaldirektor, der zur Steuerbehörde gehört, der aber in seiner rechtsprechenden Zuständigkeit handelt, und später den Gerichten *sensu stricto*.
4. Die belgischen Richter neigen sehr oft dazu, die Doppelbesteuerungsabkommen auf die Weise auszulegen, die dem nationalen Recht am nächsten kommt. Nur äusserst selten wird auf die Auslegung in anderen Ländern oder auf den OECD-Kommentar Bezug genommen.
5. Belgien hat in allen seinen Doppelbesteuerungsabkommen Regelungen über Verständigungsverfahren aufgenommen. Diese sehen explizit oder implizit die Möglichkeit vor, bei Auftreten von Auslegungsschwierigkeiten Verständigungsvereinbarungen zu treffen. Es ist allgemein anerkannt, dass die Übereinkünfte, die beide Steuerbehörden im Rahmen eines solchen Verständigungsverfahrens erreichen, für die nationalen Richter nicht rechtsverbindlich sind. Doch, so glauben wir, muss dieser Standpunkt leicht nuanciert werden, wenn es sich erweist, dass diese Übereinkünfte rein auslegenden Character haben und man annehmen kann, dass sie in Übereinstimmung mit den Absichten der Vertragsschliessenden Parteien sind.
6. Es gibt praktisch keine belgische Rechtsprechung über Auslegungsschwierigkeiten als Folge von Unterschieden zwischen gleichermassen rechtsgültigen Vertragstexten.
7. Der überwiegende Teil der belgischen Autoren geht davon aus, dass das belgische Verfassungsgericht sich für die Anwendung einer begrenzt evolutiven Auslegungsmethode entschieden hat, unter der Voraussetzung, dass eine solche Methode mit den Absichten der Vertragsschliessenden Parteien in Einklang steht.
8. Belgien hat hinsichtlich der Anwendbarkeit nationaler Anti-Missbrauchsbestimmungen im Bereich der Doppelbesteuerungsabkommen nur wenig Erfahrung.
9. Eine Besonderheit, die bei der Auslegung der Doppelbesteuerungsabkommen entsteht, ist die Frage, ob Fiktionen aus dem innerstaatlichen Recht auch auf Abkommensebene anwendbar sind. Artikel 344 Einkommensteuergesetzbuch wäre als typisches Beispiel zu nennen.

## Resumen

1. A pesar de que la Constitución belga, excepto en los casos de cesión de soberanía a una entidad supranacional, no contiene normas que prevean la primacía del derecho de los Convenios sobre el derecho interno, el principio resulta unánimemente admitido por la jurisprudencia belga.

Por el contrario, la doctrina y la jurisprudencia belgas mantienen dudas acerca de si el convenio prevalece también sobre la Constitución.

Si se acepta la primacía de la Constitución ello comporta, a nuestro juicio, que la interpretación estricta de la ley fiscal nacional, tal como prevén los artículos 110 y 112

de la Constitución, es también aplicable en la interpretación de disposiciones de los Convenios contra la norma de derecho nacional.

2. Según la jurisprudencia del Tribunal Supremo, las disposiciones de los Convenios han de ser interpretadas a la luz de la intención de los Estados contratantes.  
Esta intención puede ser deducida de los trabajos preparatorios, de la correspondencia entre los Estados contratantes, etc.
3. En Bélgica no existen Tribunales especializados en temas fiscales. La interpretación de los convenios para evitar la doble imposición corresponde exclusivamente a los Tribunales *sensu lato*, es decir, primero al Director regional, funcionario de la Administración pero actuando en su competencia jurisdiccional y, después, a los Tribunales *sensu stricto*.
4. Los Tribunales belgas tienen la costumbre de interpretar los convenios para evitar la doble imposición de la forma que se acerque más al derecho nacional. Sólo muy raramente se refieren a la interpretación practicada por otro país contratante o por la OCDE.
5. Bélgica ha introducido el procedimiento amistoso en todos los Convenios para evitar la doble imposición, que prevé explícita o implícitamente la posibilidad de ponerse de acuerdo con el otro Estado contratante respecto de problemas de interpretación. Por lo general, se admite que los acuerdos resultantes del procedimiento amistoso no vinculan a los tribunales. Ahora bien, creemos que este punto de vista ha de ser matizado si resulta que estos acuerdos son puramente interpretativos y concordantes con la intención de las partes contratantes.
6. No existen prácticamente casos en que los Tribunales se hayan pronunciado sobre problemas de interpretación por discrepancias entre las diferentes versiones auténticas de un Convenio para evitar la doble imposición.
7. La mayoría de autores admiten que el Tribunal Supremo se ha pronunciado en favor de una interpretación evolutiva limitada a los Convenios para evitar la doble imposición, con la condición de que dicho método concuerde con la intención de los Estados contratantes.
8. No existe apenas experiencia respecto a la aplicabilidad de normas nacionales contra el abuso en los Convenios para evitar la doble imposición.
9. Una cuestión particular en la interpretación es la relativa a la aplicabilidad de ficciones del Derecho interno en los Convenios. Nos referimos al artículo 344 C.I.R.