

# PAIRING INTERNATIONAL TAXATION AND CONFLICT OF LAWS: COMMON CHALLENGES AND RECIPROCAL LESSONS

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*This article explores the relationship between two legal fields that represent the legal backbone of contemporary cross-border and internet commercial activity: conflict of laws and international taxation. Despite the growing significance of the two fields of law, legal scholarship has yet to explore their intriguing relationship. Which state can levy tax on a multi-billion-dollar Delaware (US) corporation with headquarters in London (UK) that sells \$500,000,000 worth of products to Australian consumers each year? Which law should adjudicate an online contract between a NSW corporation and a German corporation, signed online and addressing the delayed delivery of goods in Brazil due to the coronavirus outbreak? Despite the paramount significance of both disciplines, their traditional underpinnings appear to be fundamentally challenged and pressed by the realities of COVID-19, dynamic commerce, and the digital environment. Our cross-disciplinary partnership aims to design a unifying conceptual framework that captures the essentials of both disciplines. Through reciprocal lessons, this framework will help address the uncertainty in both disciplines.*

## I INTRODUCTION

Will the government collect tax? How much tax will the government collect? Which law will govern a given commercial activity? These are pertinent questions for businesses, the general public, government and Australian society as a whole when engaged in daily trade and commerce. These questions are particularly important during the current unprecedented economic challenges of COVID-19, and they will become even more important during the post-COVID-19 economic recovery.

Our cross-disciplinary partnership — from the fields of international taxation and conflict of laws — offers an analysis of the contemporary challenges of international taxation from the perspective of conflict of laws.

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Correspondingly, the article examines the key uncertainties of international taxation from the intellectual perspective of conflict of laws.<sup>1</sup>

This is an ambitious goal. We do not deny that. The article aims to shed a different light on both fields and tackle their most acute puzzles and ambiguities. To the best of our knowledge, in the lengthy histories of international taxation and conflict of laws, no attempt has been made in the academic literature (whether in English or otherwise) to comprehensively consider the interplay between the two disciplines and suggest their intellectual combination as one conceptual whole.

The central thesis of this article is that conflict of laws and international taxation can provide each other with invaluable lessons and insights to cope with the challenges of the contemporary commercial reality. We develop our argument through the following two-stage process. *First*, we show the conceptual interconnectedness between the two fields. In contrast to comments in the literature<sup>2</sup> and case law<sup>3</sup> that draw a sharp line between international taxation and conflict of laws, we argue that the two are intimately interconnected through a set of underlying ideas and rationales. Despite addressing different aspects within the legal universe and targeting different objects, the two disciplines relate at a fundamental level. This stage of our analysis explains why drawing a conceptual parallel between the question of applicable law and international taxation is possible and, in fact, necessary.

*Second*, we provide detailed suggestions on how each discipline can benefit the other. We argue that both disciplines have been facing, more or less, a similar set of practical and conceptual problems, especially the challenges of digitalisation enhanced by the realities of COVID-19 and increasing cross-border commercial activity led by corporations. This all gives rise to our central point about the significance of the reciprocal lessons. Carefully conceptualised, qualified and analysed, conflict of laws and international taxation can teach each other a lot. We argue that the Australian public, business community and taxation

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<sup>1</sup> We would like to make two clarifications as to the scope and breadth of the article. First, a terminological point. 'Conflict of laws' here refers to the question of the applicable law to govern a given dispute that contains a foreign element. 'International taxation' here refers to the operation of states' income tax law in relation to a context with a foreign element as well as treaties altering this operation (see also below Part IV D). This means that the article does not engage with the potential interplay between the two disciplines on the point of recognition of foreign judgments and the question of jurisdictional authority. These important questions would require independent treatment. Second, the article has a global outlook and targets readers beyond the borders of Australia. The argument is generally a conceptual one, which explains the frequent reference to international literature and case law.

<sup>2</sup> See, eg, Paul Torremans and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 15<sup>th</sup> ed, 2017) 119 ('Cheshire & North'); Hans W Baade, 'Operation of Foreign Public Law' in Konrad Zweigert and Ulrich Drobnig (eds), *International Encyclopedia of Comparative Law* (Brill, 1970) 52.

<sup>3</sup> See, eg, *Holman v Johnson* (1775) 98 ER 1120, 1121 (Lord Mansfield); *Amner v Clark* (1835) 150 ER 202; *The Antelope* (1825) 23 US 66, 123 (Marshall CJ).

policy-makers, as well as the global community, will benefit from these reciprocal lessons.

This article is structured as follows. Part II outlines both disciplines: conflict of laws and international taxation. It elaborates on their nature and significance, and it discusses the confusion that presently surrounds major areas in both fields. Part III elaborates on our conceptual argument that pairs international taxation with conflict of laws. Part IV considers how the reciprocal lessons can greatly benefit each discipline and shed light on their most acute problems. This is sustainable and beneficial for the future of clear conflict of laws rules and the fair sharing of the tax burden. Part V offers some concluding remarks.

## II CONFLICT OF LAWS AND INTERNATIONAL TAXATION: NATURE, SIGNIFICANCE AND CONFUSION

### *A Nature and Significance*

The field of conflict of laws deals with cases involving a foreign element in their factual matrix.<sup>4</sup> Consider a contractual dispute between a UK and a NSW corporation in relation to a failure to deliver goods in Japan due to the coronavirus outbreak. Or consider a mistaken payment made by a New York bank to a Victorian resident's Swiss bank account. Given the persisting divergences in private and commercial law provisions among the jurisdictions,<sup>5</sup> which law should courts apply to adjudicate the above-mentioned cases?

The contemporary corporate context demonstrates the centrality of conflict of laws analysis. As business-oriented entities, corporations frequently operate on a cross-border basis. They target potential customers in different jurisdictions and rarely limit their activity exclusively to a single jurisdiction. The growing phenomenon of cross-border commerce and goods transportation further increases the likelihood of a foreign element in cases involving a corporation.<sup>6</sup> We see firms incorporating in one place, while locating their headquarters, conducting business, or both, in other places.<sup>7</sup>

Furthermore, in federal systems, such as Australia, the US and Canada, conflict of laws issues arise on a daily basis. Adjudicative tribunals around the world generally do not delineate between federal and international instances of

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<sup>4</sup> For further discussion on the traditional classification of the field according to presence of foreign element in the factual matrix of the case, see below nn 115–23 and accompanying text.

<sup>5</sup> See, eg, *Cheshire & North* (n 2) 8–15.

<sup>6</sup> See, eg, Sagi Peari, 'Challenging the Place of Incorporation Rule' (2019) 71(6) *Governance Directions* 305 ('Challenging the Place').

<sup>7</sup> See, eg, Sagi Peari, 'Which Law Governs Dispute Involving Corporations?' (2019) 34(2) *Australian Journal of Corporate Law* 252 ('Which Law Governs Dispute?').

cross-border interactions.<sup>8</sup> Thus, the same conflict of laws analysis applies to a contract signed in the UK between a Victorian resident and a German resident with respect to a delayed delivery of goods in Brazil, as it does to a contract signed between a NSW and a Victorian resident with respect to a delayed delivery of goods in Western Australia. In this way, the conflict of laws doctrine equalises between cross-federal and international levels of interaction. The frequent divergence between private law provisions at the federal level suggests the relevance of conflict of laws analysis even within the domestic federal context.<sup>9</sup>

Internet activity is another major factor that contributes to the significance of conflict of laws. The phenomenon of online contracts and online reviews has dramatically intensified the potential presence of a single foreign factor in private law litigation. COVID-19 has led to an unprecedented boom in online commerce and online contracts.<sup>10</sup> What law should govern an online contract between a NSW resident and an online seller, such as Amazon or Alibaba? Or which law would govern an Indonesian plaintiff's claim in relation to an online review posted by a NSW resident, when the plaintiff suffered significant damage to its reputation primarily in China, and also in Indonesia, Australia, the UK and Japan? The inherently transnational nature of the internet<sup>11</sup> suggests that an inherent foreign element is built into every online activity. It could be argued, for example, that even an online contract signed between two Victorian residents with respect to

<sup>8</sup> The conflict of laws doctrine generally does not delineate between cross-federal and international interactions. See, eg, Christopher A Whytock, 'Myth of Mess? International Choice of Law in Action' (2009) 84(3) *New York University Law Review* 719, 729, n 53; Mathias Reimann, 'Domestic and International Conflicts Law in the United States and Western Europe' in Patrick J Borchers and Joachim Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (Transnational Publishers, 2001) 109; Gerhard Kegel, 'The Crisis of Conflict of Laws' (1964) 112 *Collected Courses of the Hague Academy of International Law* 5; Ralf Michaels and Christopher A Whytock, 'Internationalizing the New Conflict of Laws Restatement' (2017) 27(3) *Duke Journal of Comparative and International Law* 349.

<sup>9</sup> Consider, for example, the doctrine of contract frustration. While the Australian state and territories follow the common law vision of the doctrine (see *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337), the consequences and effect of frustration are different. Thus, the states of Victoria and SA have adopted a flexible model of the effect of frustration (see, eg, *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Australian Consumer Law and Fair Trading Act 2012* (Vic)). See also Clive Turner, John Trone and Roger Gamble, *Concise Australian Commercial Law* (Thomson Reuters, 5th ed, 2019) 195, which signifies the significance of the conflict of laws analysis even within inter-Australian level.

<sup>10</sup> See, eg, 'Have You Deliberately Purchased Any of These Products or Services Online Instead of Offline because of the COVID-19/Coronavirus Pandemic?', *Statista* (Web Page, 31 May 2020) <<https://www.statista.com/statistics/1107859/shifting-to-online-purchases-because-of-the-covid-19-pandemic-by-category>>. See also Dan Jerker B Svantesson, *Private International Law and the Internet* (Kluwer Law International, 4<sup>th</sup> ed, 2021) 1.

<sup>11</sup> On the a-geographical nature of the internet see, eg, Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge University Press, 2010) 3, 87; Tobias Lutz, *Private International Law Online* (Oxford University Press, 2020) 14–38; Svantesson (n 10) ch 2.

delivery of goods in Victoria could trigger a conflict of laws analysis due to the fact that the contract was signed online.<sup>12</sup>

The field of taxation bears even greater significance for contemporary society. Tax plays a key role in the sustainability of the modern state. For millennia, various forms of taxation have supported the operation of domestic orders, including (but not limited to) financing such essential state activities as building schools, roads, supporting the judicial system and providing the much-needed safety net for disadvantaged members of society.<sup>13</sup> As Roberts J put it in *Bull v United States*, 'taxes are the life-blood of government'.<sup>14</sup> Holmes J characterised the tax system as 'what we pay for civilized society'.<sup>15</sup> Benjamin Franklin once sarcastically commented, '[i]n this world nothing can be said to be certain, except death and taxes'.<sup>16</sup> Through its evolution, fusion and sophistication, taxation has remained one of the cornerstones of the modern state. COVID-19 has led to revenue decreases and the need for economic stimulus.<sup>17</sup> This makes certain tax cuts and economic spending necessary. This situation means there is a greater need to collect revenue from available sources.<sup>18</sup>

Taxation faces very similar challenges to that of conflict of laws. The rapidly growing phenomena of cross-border commercialisation, multinational corporations, international direct investment, cross-border capital flow, digitalisation and, of course, the new COVID-19 reality, have all raised serious questions about the extraterritorial-taxation power of states.<sup>19</sup> To what extent

<sup>12</sup> For a discussion of this point, see Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018) 79–90, 273–95 ('*The Foundation of Choice of Law*'). Indeed, the growing significance of the conflict of laws has not gone under the radar of Australian legal educators. For the debate on whether conflict of laws should be incorporated as a compulsory subject within the Australian law school curricula see, eg, Michael Douglas, 'Integrating Private International Law into the Australian Law Curriculum' (2020) 44(1) *Melbourne University Law Review* 98.

<sup>13</sup> See, eg, Reuven S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) 113(7) *Harvard Law Review* 1573, 1632 (mentioning that the starting point of the contemporary social safety net financed through taxation started, perhaps, at the end of the 19<sup>th</sup> century. This was Bismarck's social insurance scheme, which was financed almost exclusively through a comprehensive income tax).

<sup>14</sup> *Bull v United States* (1935) 295 US 247, 259.

<sup>15</sup> *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* (1927) 275 US 87, 100.

<sup>16</sup> Benjamin Franklin in a letter to Jean-Baptiste Leroy, 1789, which was re-printed in *The Works of Benjamin Franklin* (GP Putnam's Sons, 1904). While nowadays we cannot imagine a state of not being sustained through taxes, some views in academic literature challenge the inherent necessity of taxation as one of the cornerstones of the modern state. See, eg, Arslan Aliev, 'State without Taxes' (Research Paper, October 2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2677060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2677060)>.

<sup>17</sup> Markus Mannheim, 'Australia's Coronavirus Spending to Protect Economy Dwarfs the GFC Stimulus Package', *ABC News* (online, 5 April 2020) <<https://www.abc.net.au/news/2020-04-05/coronavirus-data-stimulus-spending-dwarfs-gfc-chart/12115518>>.

<sup>18</sup> See, eg, Richard Krever, 'Tax Responses to a Pandemic: An Australian Case Study' (2020) 1(1) *Belt and Road Initiative Tax Journal* 52.

<sup>19</sup> See Michael J Graetz, *Follow the Money: Essays on International Taxation* (Columbia Law and Economics Working Paper No 538, 2016) vii <[https://scholarship.law.columbia.edu/faculty\\_scholarship/2543](https://scholarship.law.columbia.edu/faculty_scholarship/2543)>, (demonstrating the increasing significance of cross-border financial activity and the subsequent dramatic increasing significance of the discipline of international taxation).

and in which scenarios can states impose their tax laws? The extraterritorial scope of tax laws is indeed the principal object of inquiry of the field of international taxation.

While international taxation tends to be based on a common, foundational set of organising ideas developed in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, as articulated in fora such as the League of Nations in 1923,<sup>20</sup> detailed rules vary from place to place. The identification of domestic international tax laws is therefore necessary. Different tax laws could potentially govern any given factual scenario. Different rules of international taxation could potentially apply to determine the identity of the applicable tax law.<sup>21</sup>

Take, for example, the case of a Delaware corporation with headquarters in London (UK), which sells most of its products to Australian consumers. This corporation made a significant net profit during 2021 of, say, USD 70,000,000. Which country should levy tax on the income of this corporation: the United States? The UK? Australia? Or maybe even another country, such as the country where most of the intellectual property of the corporation originated and was developed? Might the answer change if an Australian resident owned a 35% share of that corporation? Which country or countries should tax a dividend distributed by the corporation? Similar to the field of conflict of laws, international taxation appears to be one of the foremost aspects of the contemporary commercial reality, business activity and state sustainability.

## **B The Confusion in Both Fields**

Despite the paramount significance of both disciplines, their doctrinal aspects are far from clear. This situation impacts the basic ability of Australians and Australian businesses to predict the legal outcomes of their potential activity. Such a situation is detrimental to equity and is counter-productive to business initiative and basic planning. Worse, in the area of international taxation, unpredictability leads to tax revenue loss as well as compliance costs. This reduces net revenue, which is essential for maintaining Australia's present position as one of the leading wealthy liberal democracies with a well-developed social system, particularly given the unprecedented financial challenges of COVID-19.

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<sup>20</sup> See generally W H Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professor Bruins, Einaudi, Seligman, and Sir Josiah Stamp' (1924) 87(1) *Journal of the Royal Statistical Society* 99. See also Sunita Jogarajan, 'Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action' (2011) 31(4) *Oxford Journal of Legal Studies* 679, 682–3.

<sup>21</sup> For an overview of technical differences see Roy Saunders, *International Tax Systems and Planning Techniques* (Thomson Reuters, 2<sup>nd</sup> ed, 2011).

Consider the present confusion in the field of conflict of laws. Representing at least 250 years of rich history,<sup>22</sup> conflict of laws doctrine represents a case of sophistication, continuously facing the challenges of technological innovation, the cross-border flow of goods and commercialisation. From its early days,<sup>23</sup> conflict of laws doctrine has focused on the so-called 'territorial' connecting factors, such as the place where the parties sign a contract, the place where the contract is to be performed, or the place where the tortious activity took place.<sup>24</sup> To illustrate, a territorial connecting factor of the place of tort would direct to the application of Indonesian law in the case of a tort committed by one Victorian resident against another in Indonesia.<sup>25</sup>

Later, many jurisdictions became supportive of the so-called 'closest connection' principle, which applies the law of that jurisdiction with the 'closest connection' to the parties and the event.<sup>26</sup> This process does not focus exclusively on the territorial connecting factors; it also takes into consideration the so-called personal connecting factors. The places of the parties' residence and business are examples of personal connecting factors.<sup>27</sup> For instance, under the closest connection principle, a contract between two NSW residents signed in Indonesia in relation to the transportation of goods to NSW should be governed by NSW law, as representing the closest connection to the parties and the event. As advocated by the founding father of the discipline, Friedrich Carl von Savigny,<sup>28</sup> this principle insists that every case of cross-border interaction should be carefully assessed as a whole, taking into account both connecting factors: territorial (such as the place of contractual performance and the place of tort) and personal (such as the place of the parties' business and their residence).

<sup>22</sup> *Robinson v Bland* (1760) 97 ER 717, 718–19 (where Lord Mansfield addressed the question of applicable law in a case where a bill of exchange was given in France by one English resident to another in relation to a gambling debt). Some would argue that the historical roots of conflict of laws go much deeper than that: see, eg, Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2019) 7–13.

<sup>23</sup> See, eg, Friedrich K Juenger, *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers, 1993) 47–69.

<sup>24</sup> On the predominance of the territorial connecting factors within conflict of laws doctrine: see, eg, Lea Brilmayer, *Conflict of Laws: Cases and Materials* (Little Brown, 2<sup>nd</sup> ed, 1995) 19–20; Lea Brilmayer and Raechel Anglin, 'Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger' (2010) 95(4) *Iowa Law Review* 1125, 1138; Symeon C Symeonides, 'Territoriality and Personality in Tort Conflicts', in Talia Einhorn and Kurt Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (TMC Asser Press, 2004) 401.

<sup>25</sup> *Tolofson v Jensen* [1994] 3 SCR 1022; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

<sup>26</sup> American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) §§ 145 ('most significant relationship'), 188 ('Second Restatement'); Mortensen, Garnett and Keyes (n 22) 448–51. In the context of tort law, Australia could be presented as an exception as its courts adopted a strict place of tort rule, with no exceptions. This position seems to be problematic, and thus integration of a flexible exception, based on the closest connection principle, is desirable. For a discussion of this point see Peari, *The Foundation of Choice of Law* (n 12) 105–6.

<sup>27</sup> See, eg, Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 123–4.

<sup>28</sup> Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time* (T&T Clark, 1880) 135, 196. See also Peari, *The Foundation of Choice of Law* (n 12) 31–69.

Alongside the closest connection principle, the so-called party autonomy principle has also been adopted by conflict of laws doctrine over the years. According to this principle, the parties have the ability to determine the identity of the applicable framework to adjudicate their rights and duties. Thus, NSW and Singapore residents can agree that their contractual rights and duties would be governed by English law in a contract between them.<sup>29</sup> While the party autonomy principle is primarily applied in the context of contract law,<sup>30</sup> various international instruments have recognised the validity of this principle beyond contract law.<sup>31</sup>

Despite its sophistication, conflict of laws doctrine is not free of difficulties.<sup>32</sup> Consider the traditional place of the tort rule, which favours the application of the law of the place where the tort took place.<sup>33</sup> It would appear that adjudicative tribunals have been struggling to accommodate some flexibility into the legal analysis in a quest to ‘escape’ the rigidity of this rule.<sup>34</sup> The quest for the place of the ‘tort’ seems to present a serious challenge in the online context, specifically in the context of online defamation. Where does the tort take place in the case of online defamation? Is it the place where the defamatory material was downloaded? Or, is it the place where the defendant suffered most damage to her or his reputation? Or is it some other place, such as the place of the defendant’s residence at the time of the defamatory event?<sup>35</sup>

The conflict of laws rules in the area of contract law is another example of the present confusion. While contract law doctrine warmly adopted the party

<sup>29</sup> Cf *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418. See also *Mendelson-Zeller Co Inc v T & C Provedores Pty Ltd* [1981] 1 NSWLR 366; *State Bank of New South Wales v Sullivan* [1999] NSWSC 596; Brooke Marshall, ‘Australia’ in Daniel Girsberger, Thomas Kadner Graziano and Jan L Neels (eds), *Choice of Law in International Commercial Contracts* (Oxford University Press, 2021) 715.

<sup>30</sup> See, eg, Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) ch 8 (mentioning the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, opened for signature 1 July 1985, The Hague No 30 (entered into force 1 January 1992), as the only exception to the contract law domain application of the party autonomy principle in Australia). See also Mortensen, Garnett and Keyes (n 22) 497–500.

<sup>31</sup> *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40, art 14; Mo Zhang, ‘Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law’ (2009) 39(3) *Seton Hall Law Review* 861, 864; «中華人民共和國涉外民事關係法律適用法» [Law of the People’s Republic of China on Choice of Law for Foreign-Related Civil Relationships] (People’s Republic of China) National People’s Congress, Order No 36, 28 October 2010, arts 47–8.

<sup>32</sup> The classical statement on confusion within conflict of laws was made by Prosser, who characterised the field as ‘a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon’: William L Prosser, ‘Interstate Publication’ (1953) 51(7) *Michigan Law Review* 959, 971.

<sup>33</sup> See above n 25.

<sup>34</sup> *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; Peari, *The Foundation of Choice of Law* (n 12) 105; Mortensen, Garnett and Keyes (n 22) 441–2. See also above n 26.

<sup>35</sup> Peari, *The Foundation of Choice of Law* (n 12) ch 6. Indeed, the Australian jurisprudence seems to depart from the rigid place of tort law in the case of cross-border defamation. See, eg, *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 515–20, 530–9; Mortensen, Garnett and Keyes (n 22) 479. See also Svantesson (n10) ch 4 [III.B], ch 9 [I.K.3].



autonomy principle during the 20<sup>th</sup> century,<sup>36</sup> there has been remarkable antagonism towards this principle in the 21<sup>st</sup> century.<sup>37</sup> Apparently, under this principle, the stronger party of the bargain frequently imposes the application of whichever law favours her or his interests. The parties' consent expressed under this principle is not a 'real' or a 'genuine' consent.<sup>38</sup> This criticism seems to be intensified in the online context, in which remote parties frequently have little or no knowledge of each other. Not surprisingly, there has been a strong call in the literature to move away from the party autonomy principle<sup>39</sup> and its broad scope of application.<sup>40</sup> In a similar vein, based on s 67 of the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*'),<sup>41</sup> the Australian Federal Court has recently invalidated a conflict of laws provision in the context of consumer contracts.<sup>42</sup>

The confusion is striking in the light of the paradigmatic centrality of online contracts and online defamation in contemporary society. Hundreds of millions of people worldwide shop online.<sup>43</sup> Online shopping seems to be convenient and cost-effective, and it is growing rapidly in popularity under COVID-19 restrictions. Online defamation is commonplace as well. People post reviews about their experiences with products and services on specially designed websites. These reviews frequently play a determinative role in other people's decisions to purchase a certain service or product.<sup>44</sup> Positive reviews can elevate and inflate a business. Negative reviews can destroy it overnight. It seems that the world belongs to the digital age, internet commerce and internet reviews. The era of COVID-19 has only escalated this reality and intensified the immanent need to clarify the conflict of laws rules.

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<sup>36</sup> On a remarkable adoption of party autonomy, see, eg, Mills (n 30) 313–16; John F Coyle, 'A Short History of the Choice-of-Law Clause' (2020) 91(4) *University of Colorado Law Review* 1147, 1166–72. See also the cases cited in above n 29.

<sup>37</sup> See, eg, Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar Publishing, 2020) ch 3.

<sup>38</sup> For further discussion on the point of genuineness of consent, see Symeon C Symeonides, 'The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar Publishing, 2019) 101 ('The Scope and Limits of Party Autonomy in International Contracts').

<sup>39</sup> Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2014) vi.

<sup>40</sup> See, eg, Symeonides, 'The Scope and Limits of Party Autonomy in International Contracts' (n 38). *Competition and Consumer Act 2010* (Cth) sch 2 s 67 ('*Australian Consumer Law*').

<sup>42</sup> *Australian Competition and Consumer Commission v Valve Corporation* (No 3) (2016) 337 ALR 647 ('*Valve Corp*'). The judgment in *Valve Corp* was delivered in the Federal Court of Australia in 2016. It was fully reaffirmed by the Full Court in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, and more recently, by denying leave to appeal, tacitly reaffirmed by the High Court in *Valve Corporation v Australian Competition and Consumer Commission* [2018] HCASL 99. It should be noted that the invalidation of the conflict of laws provision has been delivered in the context of the specific language of s 67 of the *Australian Consumer Law* (n 41), rather than a result of a reference to a general conflict of laws doctrine.

<sup>43</sup> Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart Publishing, 2009) 62.

<sup>44</sup> *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [25].

A similar difficulty arises in the field of international taxation. Similar to conflict of laws, international taxation struggles to accommodate the challenges of transnational corporations, international trade, the frequent mobility of financial resources, high daily volumes of cross-border transactions, digitalisation and, more recently, the challenges of COVID-19. At the heart of international tax practice is the allocation of income to various states. This is done through complex state laws and Double Tax Agreements ('DTAs'). DTAs are bilateral treaties in which the parties agree on taxing rights and restrictions as well as other tax related matters. Practical determination of the tax rights is therefore a complex exercise.<sup>45</sup>

In addition, the variety of possible allocations creates the possibility of a great variety of tax outcomes and creates the opportunity for professionals to seek the lowest tax possibilities through allocation choices. The question of the extent to which such strategic allocations are legitimate and legal is very difficult to ascertain.<sup>46</sup> The combination of this difficulty and the amount of money to be saved through advantageous, legitimate and legal allocations creates an incentive for significant investment in professional expert services. It similarly creates an incentive for states to invest in policing these practices.

The DTAs do not resolve the confusion within the field of international taxation. In fact, they may at times intensify it. Since one of the roles of the DTAs is to set meaningful dispute resolution mechanics,<sup>47</sup> they themselves require allocation of the tax authority. As is often the case, the devil is in the details. Even though DTAs use terms such as 'permanent establishment' and 'arms-length transfer pricing' as their guiding concepts, there is disagreement about their definition.<sup>48</sup> In fact, the disputes over these concepts are common and represent major pillars of international taxation dynamics.<sup>49</sup> Furthermore, Australia has only 48 DTAs out of 195 countries of the contemporary international order.<sup>50</sup>

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<sup>45</sup> See, eg, Kevin J Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application* (IBFD, 2<sup>nd</sup> ed, 2014); Robert Deutsch, Róisín M Arkwright and Daniela Chiew, *Principles and Practice of Double Taxation Agreements: A Question and Answer Approach* (BNA International, 2008).

<sup>46</sup> On the legitimacy and legality of strategic allocations see, eg, Nolan Sharkey, 'The Interests of Developing Countries in the Context of the OECD/G20 Led International Income Tax Initiatives' (2019) 3(2) *Bratislava Law Review* 47 ('The Interests of Developing Countries').

<sup>47</sup> See, eg, *Articles of the Model Convention with Respect to Taxes on Income and on Capital* (2017) art 25.

<sup>48</sup> For example, wage income is sourced where the work is done in many situations but also may be where the place of employment is. This place of employment is important in Hong Kong while the place the work is done is important in China. The actual definition of Permanent Establishment will vary in detail from one DTA to the next. For example, in the DTA between Singapore and Australia, the use of 'substantial equipment' can constitute a permanent establishment under article 4(3)(b). This inclusion is not found in the China-Singapore DTA or in most other DTAs internationally.

<sup>49</sup> Australia's right to tax capital gains related to business under certain DTAs was disputed by taxpayers and the government of the United States. See Robert Deutsch and Nolan Sharkey, 'Australia's Capital Gains Tax and Double Taxation Agreements' (2002) 56(6) *Bulletin for International Fiscal Documentation* 228.

<sup>50</sup> For the current list, see 'Australian Tax Treaties', *Australian Government: The Treasury* (Web Page) <<https://treasury.gov.au/tax-treaties>>.

Notably, in such a central sector as the resource sector in Africa, Australia has only one DTA.<sup>51</sup> Hence, while it is true that the international tax treaty network provides a widespread, consistent and familiar framework for international business, it is far from complete and harmonious.

### III THE CONCEPTUAL INTERCONNECTEDNESS BETWEEN THE FIELDS

At first glance, conflict of laws and international taxation look to be quite distinctive disciplines. Conflict of laws involves a dispute between two (or more) litigating parties with some 'foreign element' in the factual basis of the case.<sup>52</sup> It inquires into the identity of the applicable framework to adjudicate a dispute between the litigants. In contrast, international taxation focuses on a single person or business entity in relation to activities within a certain state or territory. It considers questions such as who should tax the person or business entity and how. Given this divergence between the two fields, a longstanding 'separation thesis' has challenged the very possibility of interaction between the disciplines.<sup>53</sup>

However, we challenge the separation thesis. Both disciplines involve a careful assessment by the adjudicative tribunal of the party's or parties' relevant actions and choices. Both disciplines are grounded in the fundamental premises of the contemporary international order, which are epitomised in the key doctrines, principles and concepts of the fields. Specifically, we argue that a common conceptual link between the normative foundations of conflict of laws and international taxation could be established through the following four interconnected pillars:

1. the nature of the disciplines is grounded in the notion of the 'most meaningful connection' to a certain authority;
2. the legal analysis under both disciplines must strive towards this connection;
3. the legal analysis under both disciplines is preoccupied with the questions of legitimacy and genuineness of choice; and

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<sup>51</sup> *Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 1 July 1999, [1999] ATS 34 (entered into force 12 December 1999) ('DTA South Africa').

<sup>52</sup> See below Part IV D.

<sup>53</sup> See, eg, *Planche v Fletcher* (1779) 99 ER 164, 165; Matthias Lehmann, 'Regulation, Global Governance and Private International Law: Squaring the Triangle' (2020) 16(1) *Journal of Private International Law* 1, 5–7. See also above nn 2–3 and accompanying text.

4. both disciplines accommodate the basic insights of the Westphalian order within their normative foundations.<sup>54</sup> The ensuing sections discuss each one of these pillars in turn.

### *A Most Meaningful Connection to a Certain Authority*

We argue that both disciplines involve the key question of *a most meaningful connection to a certain authority* at their fundamental level. International taxation allocates authority over a particular income based on the degree of connectedness between the income, the state and the taxpayer. This sort of nexus follows from the basic premise of taxation's role in the modern liberal democracy.<sup>55</sup> It represents a reciprocal relationship between the state and the taxpayer, under which a given act of levying tax must be justified in terms of the connectedness to a certain territorial authority and the activities that have taken place within that territory.<sup>56</sup> This fundamental reciprocity and the inherent fairness within the taxpayer–government relationship explains, for example, the principal objection of the international community to double taxation, which does not allow for the possibility of a taxpayer paying tax more than once for the same income.<sup>57</sup> The predominant connecting factors of the place of a taxpayer's residence (which is a personal connecting factor) and the source of income (which is a territorial connecting factor),<sup>58</sup> alongside the comprehensive body of literature and case law, precisely represents a sophisticated attempt to establish the most meaningful nexus between the authority and the taxpayer.

A similar point applies to conflict of laws. Similar to international taxation, this discipline is preoccupied with the process that assesses the interaction between the litigating parties.<sup>59</sup> This process ultimately looks for a territory that has the most meaningful connection with the parties and assesses the nature of their interaction. It can be argued that the above-mentioned closest connection principle<sup>60</sup> has not just played a key role in the writings of the founders of the

<sup>54</sup> See, eg, Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *International History Review* 569; Claire A Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27(2) *Review of International Studies* 133.

<sup>55</sup> Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) ch 7; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) chs 2, 4.

<sup>56</sup> Ibid.

<sup>57</sup> Reuven S Avi-Yonah, 'Tax Competition, Tax Arbitrage, and the International Tax Regime' (Working Paper No 73, University of Michigan Law School, January 2007) 1, 9 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=955921](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=955921)> ('Tax Competition'); Daniel Shaviro, 'The Two Faces of the Single Tax Principle' (2016) 41(3) *Brooklyn Journal of International Law* 1293, 1293.

<sup>58</sup> For further discussion of this point, see below nn 91–103 and accompanying text.

<sup>59</sup> Peari, *The Foundation of Choice of Law* (n 12) 79–125.

<sup>60</sup> See above nn 26–8 and accompanying text.

discipline,<sup>61</sup> but has also been fairly central to the foundations of the party autonomy principle,<sup>62</sup> and, apparently, to contemporary conflict of laws jurisprudence.<sup>63</sup>

## B *The Approximation Move*

The deep interconnectedness between the conceptual underpinnings of international taxation and conflict of laws goes even further. Within the normative structures of the disciplines, the quest for a most meaningful connection to a certain authority *must take place as a matter of principle*. For centuries, conflict of laws analysis has been engaged in assessing a wide range of potential connecting factors related to the parties and a particular event: the place of the parties' residence, the place of the parties' business, the place of the contractual performance, the place of contract formation and the place of tort.<sup>64</sup> While, traditionally, more focus has been attributed to territorial connecting factors, the research has shown that, even within the classical conflict of laws jurisprudence literature, personal connecting factors have played a central role.<sup>65</sup> This constant quest for a meaningful nexus between the parties, their interaction and the applicable law crystallizes such notions as the basic fairness between the litigating parties, approximates towards their reasonable expectations,<sup>66</sup> and above all is required by the essentials of modern liberal theory.<sup>67</sup> Locating this most meaningful nexus and an approximation towards it reflects one of the fundamental features of the conflict of laws analysis.

The normative structure of international taxation presents a similar pattern and follows related conceptual steps. Taxation plays an essential role in the

<sup>61</sup> Savigny (n 28) 196, 198, 202.

<sup>62</sup> Peari, *The Foundation of Choice of Law* (n 12) 106–25. See also G C Cheshire, *Private International Law* (Clarendon Press, 6<sup>th</sup> ed, 1961) 215.

<sup>63</sup> See, eg, Symeon Symeonides, *Choice of Law* (Oxford University Press, 2016) 33, 104–5; *Second Restatement* (n 24) §§ 145(1), 146–9, 152. See also Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (Oxford University Press, 5<sup>th</sup> ed, 2016) 12: '[t]he examples demonstrate the prevailing approach adopted by English law to the issue of choice of law: in the absence of party choice, the parties can be deemed reasonably to expect their relationships and transactions to be governed by the law with which those relationships and transactions are most closely connected.'

<sup>64</sup> See, eg, Benjamin Geva and Sagi Peari, *International Negotiable Instruments* (Oxford University Press, 2020) 73–80.

<sup>65</sup> Ibid; Sagi Peari, 'Savigny's Theory of Choice-of-Law as a Principle of "Voluntary Submission"' (2014) 64(1) *University of Toronto Law Journal* 106.

<sup>66</sup> For an argument regarding the primary centrality of the concept of 'parties' reasonable expectations' in choice-of-law thought, see Hill and Ní Shúilleabháin (n 63) 9–19; Peter E Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 251 *Rec Des Cours* 273, 294–6; Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017) 42, 44–6.

<sup>67</sup> For a discussion of this point, see Peari, *The Foundation of Choice of Law* (n 12) ch 2; Sagi Peari, 'The Choice-Based Perspective of Choice-of-Law' (2013) 23(3) *Duke Journal of Comparative and International Law* 477.

sustainability of the modern state and requires that a most meaningful connection to a certain authority must be found. This is as a matter of principle. Similar to conflict of laws, international taxation must approximate its quest for a most meaningful connection to a certain territorial authority. While the field of conflict of laws justifies this compulsory approximation on the grounds of liberal theory, international taxation requires it due to the special role that taxation plays in states' structure and sustainability. Without taxes, the state cannot support its basic structure and its essential services. The international taxation regime must approximate the tax allocation towards a certain territory. Certain states will receive the tax on the income. Indeed, this explains one of the central principles of international taxation, which alongside the principle of avoiding double taxation, requires that *tax jurisdiction must be allocated to at least one state*.<sup>68</sup> This means that, as a matter of principle, the international community should be able to levy tax on a given income at least once, but no more than once.

### C *The Legitimacy and Genuineness of Choice*

The foundational basis of both disciplines embraces an inherent inquiry into matters of choice. As we have seen,<sup>69</sup> during the 20<sup>th</sup> century the conflict of laws doctrine adopted party autonomy as a central principle in the area of contract law. Yet, this doctrine does not take this principle for granted and it is heavily preoccupied with the questions of the genuineness and legitimacy of a given choice. Some significant limits on the nature and scope of the parties' choice has been established.<sup>70</sup> Thus, as we have seen,<sup>71</sup> based on the language of the *Australian Consumer Law*, the Federal Court of Australia has determined that it is not legitimate to exercise party autonomy in cases of consumer contracts.<sup>72</sup> In a similar vein, most systems hold the view that it is not legitimate for the parties to choose a law that does not represent an official law of one of the states.<sup>73</sup> Further, some systems do not consider it to be legitimate when the parties' choice involves a law that does not have a connection to one of the parties or their transaction.<sup>74</sup>

<sup>68</sup> Avi-Yonah, 'Tax Competition' (n 57) 6 mentions the fundamental principle of international taxation according to which 'income from cross-border transactions should be subject to tax once (that is, not more but also not less than once)'. See also Shaviro (n 57) 1293.

<sup>69</sup> See above nn 29–31 and accompanying text.

<sup>70</sup> See, eg, Daniel Girsberger, Thomas Kadner Graziano, and Jan L Neels, 'General Comparative Report' in Daniel Girsberger, Thomas Kadner Graziano and Jan L Neels (eds), *Choice of Law in International Commercial Contacts* (Oxford University Press, 2021) 1, 22–3.

<sup>71</sup> See above nn 38–42 and accompanying text.

<sup>72</sup> Ibid.

<sup>73</sup> See, eg, Katharina Boele-Woelki, 'Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws' (2010) 340 *Rec Des Cours* 275, 401–19; Symeon C Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective' in Katharina Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law* (Eleven International Publishing, 2010) 513, 539–40.

<sup>74</sup> *Second Restatement* (n 26) § 187(2); Mo Zhang, 'Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome' (2015) 44(3) *Stetson Law Review* 831.

In this way, the inquiry into the legitimacy and genuineness of the choice seems inherent to the conflict of laws doctrine.

By its very nature, international taxation does not involve an interaction between two persons but rather an interaction between a taxpayer and the entire pool of regimes that could potentially claim a meaningful nexus between the taxpayer and their territories. Further, international taxation has a unique character in the sense that it serves as a primary vehicle for sustainability of the modern state. Under these circumstances, a 'direct' party autonomy (ie a situation where the party or parties can simply expressly specify the applicable law) is not possible.

This does not mean, however, that the notion of choice does not play a role within the foundations and the operational mechanics of international taxation. The opposite is true. A person may decide to move her or his residence to another territory. A company may decide to establish a subsidiary business entity when it operates in foreign territory. Such decisions would frequently lead to legal implications for international taxation (and, of course, conflict of laws)<sup>75</sup>. While parties cannot choose the governing law, the choices that they make when choosing their residence, transaction and operation shape the connecting factors that are then used to identify the governing tax law. In other words, those choices create a connection to a certain territory, which becomes relevant for grasping the applicable law under the most meaningful connection principle and its analysis of the various connecting factors.

For sure, it is legitimate for individuals and businesses to conduct their commercial activities and investments in the most efficient way to maximise their after-tax profits, subject to anti-tax avoidance rules. The taxpayer can make a perfectly legitimate choice as to the location of a certain business, the place of product development and manufacturing, and the place of residence. The taxpayer can exercise her or his choice. Yet, the parameters of legitimate and genuine tax planning must be known.<sup>76</sup>

Notably, the international taxation doctrine has developed mechanisms that, in certain circumstances, cast doubt on the legitimacy and genuineness of certain transactions and activities. In some cases, the law takes given activity, or a transaction as not taking place at all, as serving as a façade or masquerade for tax avoidance.<sup>77</sup> The rules of international taxation look at the situation as a whole

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<sup>75</sup> For a similar point on the relevancy of the parties' choices within the traditional conflict of laws doctrine of connecting factors, beyond the explicit choice under the party autonomy principle, see Mills (n 30) 14–17.

<sup>76</sup> See, eg, Nolan Sharkey, 'The Economic Benefits of the Use of Guanxi and Business Networks in a Jurisdiction with Strong Formal Institutions: Minimisation of Taxation' (2008) 6(1) *eJournal of Tax Research* 45.

<sup>77</sup> Reuven S Avi-Yonah and Gianluca Mazzoni, 'Taxation and Human Rights: A Delicate Balance' in Philip G Alston and Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford University Press, 2019) 259.

and apply an objective standard of assessment.<sup>78</sup> They sometimes ignore the independence of the legal entities and contractual labels, which seems to reflect the underlying premise of these rules that challenge the legitimacy and genuineness of the taxpayer's choice.

Consider two central examples within the contemporary international tax doctrine: Controlled Foreign Companies ('CFC') Rules and Transfer Pricing.<sup>79</sup> CFC rules originated in the US and were adopted by other countries during the 1970s and 1980s.<sup>80</sup> In Australia, they were introduced on the basis that they enforce capital export neutrality and prevent tax avoidance.<sup>81</sup> Thus, it may be asserted that these rules can challenge the genuineness and legitimacy of choices made by taxpayers.<sup>82</sup> Transfer Pricing demonstrates another angle of this position. To illustrate, consider an Australian company that extracts iron in Australia and sells it to a Chinese company in China. The Australian company decides to establish a subsidiary company in Singapore, which now acts as a hub of the iron selling and marketing to China. Should the law respect this choice? The mechanism of Transfer Pricing would carefully assess the situation as a whole and would determine the legitimacy and genuineness of the transaction made between parts of a multinational group.<sup>83</sup>

From this perspective, both disciplines are heavily preoccupied with the questions of the 'genuineness' and 'legitimacy' of a given choice, which suggests the approximation move under the most meaningful connection principle should take place based on an assessment of those actions of the party (or parties) that the law considers to be *genuine and legitimate*.

### D *The Basic Premise of Westphalian Order*

Finally, conflict of laws and international taxation are deeply interconnected on another level. The normative foundations of both disciplines accommodate the basic premises of the contemporary paradigm of Westphalian order.<sup>84</sup> This means that both disciplines accept the fundamental premise that the most meaningful

<sup>78</sup> See, eg, *Income Tax Assessment Act 1936* (Cth) pt IV.

<sup>79</sup> See, eg, OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017' (Web Page, 20 January 2022) <<https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>> ('OECD Transfer Pricing Guidelines').

<sup>80</sup> Reuven S Avi-Yonah, 'International Tax as International Law' (2004) 57(4) *Tax Law Review* 483, 488–90.

<sup>81</sup> Lee Burns, *Controlled Foreign Companies: Taxation of Foreign Source Income* (Longman Professional, 1992) 5–10.

<sup>82</sup> Ibid.

<sup>83</sup> See, eg, OECD, *Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS: Actions 4, 8–10* (Report, 11 February 2020) <<https://www.oecd.org/tax/beps/transfer-pricing-guidance-on-financial-transactions-inclusive-framework-on-beps-actions-4-8-10.htm>>; OECD, 'OECD Transfer Pricing Guidelines' (n 79).

<sup>84</sup> See above n 54.



allocation of authority should take place in a way that would be consistent with international order as comprising a multiplicity of states. The states may deeply diverge in their private law and commercial law provisions. While some systems are supportive of punitive damages in the tort law, others reject it.<sup>85</sup> While some systems approach the question of contractual interpretation based on the subjective intentions of the parties, others designate a significant role to objective aspects of the parties' interaction and business efficacy.<sup>86</sup> Similarly, various systems have a different degree of taxation. In some systems the corporate tax is high. In others it is low.<sup>87</sup> Australia and China have a wide tax base including amounts such as capital gains while others, such as New Zealand, Singapore and Hong Kong exclude most capital gains.<sup>88</sup>

The fundamental insight of the Westphalian order is that the states and their public legal institutions are situated in equal relation to each other.<sup>89</sup> This means, for example, that the conflict of laws process should not, as a matter of principle, accommodate a substantive assessment of the quality of the involved laws. An Australian judge, for example, should not take the question of the merit of the applied foreign law into account. The same point applies to the field of international taxation. As a matter of principle, the question of the most meaningful connection to a certain authority should not take into consideration the tax rates of the involved states. For Westphalian order, each state has its own prerogative on how to tax and how to allocate its resources.<sup>90</sup> This suggests that the process of allocating authority must be done in a way that would respect the equality of the international order. In other words, both disciplines are engaged in the exercise of the most meaningful connection to a certain territory *in the way that would respect and honour the equal structure of international order*.

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<sup>85</sup> See, eg, Gerhard Wagner, 'Comparative Tort Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2<sup>nd</sup> ed, 2019) 995.

<sup>86</sup> See, eg, Solene Rowan, 'Problems of Contractual Interpretation: English and French Law Compared' [2020] *Lloyd's Maritime and Commercial Law Quarterly* 273.

<sup>87</sup> Singapore's current company tax rate is 17% on a narrow base. Australia, on the other hand, uses 30%.

<sup>88</sup> Nolan Sharkey, 'Renovating the Tax Base: The Development of Selected International Aspects of The Income Tax Regime in Mainland China and Singapore with Reference to Hong Kong' (2016) 70(6) *Bulletin for International Taxation* 355, 361.

<sup>89</sup> See, eg, Ulrich K Preuss, 'Equality of States: Its Meaning in a Constitutionalized Global Order' (2008) 9(1) *Chicago Journal of International Law* 17; Thomas H Lee, 'International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today' (2004) 67(4) *Law and Contemporary Problems* 147; Steven R Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015) 221–64.

<sup>90</sup> This indifference to the substance of the involved laws is the rule of thumb. However, it could be argued that a careful review of international taxation and conflict of laws reveals that some exceptions apply to this formal structure of international order and the avoidance of the quality judgment of the involved provisions. Certain limitations in the areas of international taxation (such as instances of severe under taxation and the OECD discussion about harmful tax competition) and conflict of laws (such as public policy and international human rights exceptions applicable in national courts and arbitral tribunals) apparently represent exceptions to this rule of thumb. This point deserves independent treatment and goes beyond the scope of this article, which focuses on the basic structure of the fields, and not on the exception to it.

Armed with these insights as to the deep interrelation between the two disciplines, we are now in a position to move on to the second stage of our argument: the discussion, analysis and suggestions with respect to the reciprocal lessons. As we will see, these reveal how extensively the disciplines can assist each other in tackling their most pertinent challenges.

#### IV RECIPROCAL LESSONS: TACKLING THE MOST PERTINENT CHALLENGES OF THE DISCIPLINES

##### ***A The Operational Mechanics of the Most Meaningful Connection Principle: Presumptions, Connecting Factors and Flexibility***

We argue that conflict of laws and international taxation are both fundamentally grounded on the most meaningful connection principle and the continuous exercise of the approximation towards it. Representing the very essence of both fields, the quest for finding the most appropriate ‘nexus’ is inherent to the operational mechanics of their core legal doctrines, concepts and principles. Through providing this foundational basis for both disciplines, the suggested framework offers guidance to their deepest complexities and confusions. Which connecting factors are relevant within the quest of situating the ‘most meaningful connection’? Are some connecting factors more important than others? Is there a possibility of establishing some built-in presumptions for the operation of the legal doctrines?

Take, for example, the traditional bases of international taxation: ‘residence’ and ‘source’.<sup>91</sup> It could be argued that these can be explained through the lens of the suggested framework. Both traditional bases of international taxation represent a complex syllogism of presumptions and indicative connecting factors, which are both territorial and personal. Stated in different terms, ‘residence’ and ‘source’ should not be viewed as independent bases of taxation but rather represent two related aspects within the unifying concept of ‘most meaningful connection’.

This understanding, we suggest, will lead to more careful and coherent understanding and implementation of the international taxation rules. It would not focus on the formal definitions but on the careful assessment and relative weighting of the activities of persons and businesses. Setting pre-determined points of departure for judicial analysis is an important part of the adjudicative process, providing it with certainty, transparency and meaningfulness.<sup>92</sup> Conflict

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<sup>91</sup> See generally Holmes (n 45) ch 2; Deutsch, Arkwright and Chiew (n 45).

<sup>92</sup> See Peari, *The Foundation of Choice of Law* (n 12) chs 3, 6.

of laws' doctrine<sup>93</sup> could have learned from international taxation on the point of adoption of a set of pre-determined points of departure, or presumptions, for locating the territory with the most meaningful connection.

Conflict of laws, for its part, could teach international taxation that the formal strict territorial rule of the place of contract formation cannot play a central role in the determination of the most meaningful connection. When this rule played a central role in conflict of laws rules in the past,<sup>94</sup> it was heavily criticized as being arbitrary and overly formal.<sup>95</sup> Subsequently, the conflict of laws jurisprudence rejected this rule in favour of a much more comprehensive analysis of the factual scenarios in the cases.<sup>96</sup> While the relevance of the contract formation rule has been coined as a 'theoretical exercise',<sup>97</sup> unfortunately this is not the case for international taxation. In the latter, the place of contract formation still plays a fairly central role within the operational mechanics of the field, specifically as a guiding rule for 'source' basis determination.<sup>98</sup>

The connecting factor of 'residence' is another area of reciprocal learning. One of the puzzles of the contemporary conflict of laws doctrine is that it continues to adhere to fairly outdated concepts of 'residence' with unclear reference to a related concept of a 'domicile'.<sup>99</sup> It is really unfortunate that this uncertainty revolves around one of the key concepts of the subject. The situation is different in the area of international taxation. Many international taxation regimes have adopted a sophisticated range of tests for personal residence that operate together to create more certainty in taxing jurisdiction. This system includes tests that require a careful and substantive assessment of such factors as the 'principal abode' of the taxpayer and her or his family ties as well as mechanical aspects such as the number of days in the country.<sup>100</sup> With respect to private individuals, DTAs look at such concepts as 'permanent home' and

<sup>93</sup> For the lack of pre-set presumptions within the Australian jurisprudence of the closest connection principle see eg, Martin Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2020) 480–84.

<sup>94</sup> On the traditional centrality of contract formation see, eg, Stephen G A Pitel and Nicholas S Rafferty, *Conflict of Laws: Essentials of Canadian Law* (Irwin Law, 2<sup>nd</sup> ed, 2016) 285: '[t]he early English and American choice of law rule for contract was the *lex loci contractus* — the law of the place of contracting'; *Bondholders Securities Corp v Manville et al* [1933] 4 DLR 699, [38] (applying the proper law of that time — the place of contract formation — to the case of promissory notes).

<sup>95</sup> See, eg, Geva and Peari (n 64) 73–80, 173–5, 247–50.

<sup>96</sup> See, eg, Peari, *The Foundation of Choice of Law* (n 12) 235–72.

<sup>97</sup> Matthias Lehmann, 'Financial Instruments, Bonds & Loans, Cheques, Bills of Exchange and Guarantees in Private International Law' (Paper, 2016) 22 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2849363](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849363)>.

<sup>98</sup> See, eg, Robin Woellner et al, *Australian Taxation Law* (Oxford University Press, 30<sup>th</sup> ed, 2022) 24:100–24:160. Interestingly, in the field of international taxation, the adjudicative practice tends to refer to private law principles rather than principles of conflict of laws: *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404. In this article, we challenge this practice.

<sup>99</sup> For the classical debate in the conflict of laws literature on this point see, eg, Walter W Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press, 1942) 194–211; Willis L M Reese, 'Does Domicil Bear a Single Meaning?' (1955) 55(5) *Columbia Law Review* 589, 594.

<sup>100</sup> Avi-Yonah, 'International Tax as International Law' (n 80) 485.

‘closest personal and economic relations’.<sup>101</sup> There is no reason why the conflict of laws jurisprudence could not learn from the experience of international taxation in designing a meaningful test of residence.

The above-mentioned points about the decline of the place of contract formation rule and the rise of such factors as residence suggest a more general point about the possible declining significance of the traditional territorial factors, such as the place of contract formation and the place of manufacturing. While these factors could continue to play a role in both conflict of laws and international taxation analyses, one may pinpoint the growing significance of personal connecting factors, such as the place of business activity and residence.<sup>102</sup> The growing volume of cross-border commerce alongside the changes in the structure and form of the business under which these have frequently received highly complicated forms<sup>103</sup> would, perhaps, require reshaping the identity and structure of the possible presumptions or points of departure for the legal analysis. Within this reality, the territorial connecting factors become less attractive and the significance of personal factors increases. The important progress made in the area of international taxation with respect to such connecting factors as the place of residence could greatly benefit this exercise of reshaping.

This interconnected vision of the fields perceives the most meaningful connection principle as a unifying normative basis of grasping the nature and interrelation of the various connecting factors: ‘source’, ‘residence’, ‘domicile’, ‘permanent home’, ‘place of contract formation’, ‘principal abode’, ‘place of business’ and so on. Despite the multiplicity of names and titles, this common basis of connecting factors provides an invaluable opportunity to shed light on their operational mechanics, interconnection and future development in both disciplines.

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<sup>101</sup> Generally found in art 4 of the DTAs and used to allocate residence in the case of dual residents. See, eg, *DTA South Africa* (n 51) art 4(2).

<sup>102</sup> See, eg, Geva and Peari (n 64) 73–80. For international taxation, this would be the range of factors allowing taxation of business profits under the common law source rule and permanent establishment definition in DTAs.

<sup>103</sup> See, eg, Diane Ring, ‘International Tax Relations: Theory and Implications’ (2007) 60(2) *Tax Law Review* 83, 86.

## **B The Challenges of Digital Economy**

Dramatically enhanced by the realities of COVID-19,<sup>104</sup> the digital economy has become a central mode of commerce.<sup>105</sup> The digital economy challenges the geographical borders of the traditional state. Having no territorial borders or barriers between physical locations,<sup>106</sup> the internet presents a paramount challenge for the traditional doctrines of conflict of laws and international taxation, which have been based on the of territoriality of the Westphalian order.

Consider the field of international taxation. There is a strong call within this field to reconsider the traditional bases of taxation. Specific proposals have been made that aim to support the position that businesses within the digital economy do not sufficiently pay their 'fair share'.<sup>107</sup> It has been argued against the traditional bases of taxation of residence and source, contending that those are outdated and no longer reflect the contemporary digital reality.<sup>108</sup>

These concerns have been echoed by the OECD's Base Erosion and Profit Shifting (OECD BEPS) project in its work on taxation and the Digital economy, which recently resulted in the OECD's Pillar 1 and 2.<sup>109</sup> These pillars propose radical alterations to traditional source taxing rights in particular circumstances.<sup>110</sup> The core concern is that non-resident entities can make business profits through the internet without having sufficient presence to trigger a taxing right in a jurisdiction.<sup>111</sup> This means that the jurisdiction where the customers are will not be able to tax the non-resident entity as source or a

<sup>104</sup> On the dramatic increase in internet users during COVID-19 see, eg, 'How Covid-19 Will Drive a Rapid e-Commerce Revolution', *Inside Retail* (online, 14 April 2020) <<https://insideretail.com.au/news/how-covid-19-will-drive-a-rapid-e-commerce-revolution-202004>>; Andrew Birmingham, 'Huge Spike in Ecommerce once COVID-19', *Ecommerce* (Web Page, 22 June 2020) <<https://which-50.com/huge-spike-in-ecommerce-once-covid-19-hit>>. See also Herbert Smith Freehills, 'EP61 Catalyst: Exploring Opportunities: Digital Transformation', *Catalyst* (Web Page, 28 October 2020) <<https://www.herbertsmithfreehills.com/latest-thinking/catalyst-podcast-series>>.

<sup>105</sup> See, eg, Jinyan Li, 'Protecting the Tax Base in a Digital Economy' (Research Paper No 78, Osgoode Hall Law School, York University, 18 April 2018) 479, 481–2 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3164995](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164995), which mentions the dramatic increase of internet users.

<sup>106</sup> The point about the 'borderless' feature of the internet as challenging the traditional structure of private international law's territorial rules has been well noted in the literature. See above n 10. See also Roy Goode's related sarcastic comments on the adherence of the contemporary legal doctrine to the traditional quest that locates the physical location of the debt in 'The Assignment of Pure Intangibles in the Conflict of Laws' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing, 2014) 353, 355–6.

<sup>107</sup> There have been significant discussions in various initiatives of the OECD and G20.

<sup>108</sup> See, eg, Organisation for Economic Co-Operation and Development, Project on Base Erosion and Profit Shifting: BEPS Action Plan, 2013, Action 1: Tax Challenges Arising from Digitalisation; Organisation for Economic Co-Operation and Development, BEPS Action Plan 2, and Pillar 1 and 2.

<sup>109</sup> See the reports by the OECD here: OECD, 'Action 1: Tax Challenges Arising from Digitalisation', *BEPS* (Web Page) <<https://www.oecd.org/tax/beps/beps-actions/action1/>>; 2015 OECD, *Addressing the Tax Challenges of the Digital Economy*. Action 1:2015 Final Report, OECD/G20 BEPS Project (Paris). <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

permanent establishment are required before taxation is allowed. A clear and simple example of this is where goods are sold through an international website. This situation is thought to be a fundamental challenge to the concepts underlying traditional income tax jurisdiction. Consider the following objection made recently by Li:

Existing international tax rules are based on fundamental assumptions that include the following: tax laws are creatures of sovereign States and national tax laws interact via bilateral agreements; transactions are physical, involving goods and services; physical locations are necessary for carrying on business activities; and international income is allocated for tax purposes between the residence country and source country. These assumptions are disrupted by the digital economy, which is inherently borderless, intangible, characterized by an unparalleled reliance on intangible assets, massive usage of data (notably personal data) and widespread adoption of multisided business models capturing value from externalities generated by free products.<sup>112</sup>

Stated in these terms, the objection challenges the ability of the traditional international tax rules to properly address the challenges of digitalisation. According to this objection, the digital world is too complex, too different to be accommodated within the rationales of the existing tax rules.<sup>113</sup>

Interestingly, the above-stated objection applies directly to conflict of laws. The above passage could easily appear in the conflict of laws literature. Indeed, a related argument has been made about the need to reconsider and revolutionise the existing conflict of laws rules.<sup>114</sup> Similar to international taxation, it has been argued that new conflict of laws rules are needed to capture the unique nature of technological innovation.<sup>115</sup> According to this position, the digital economy presents an immensurable challenge for the traditional territorial structure of the field. Accordingly (and similar to the field of international taxation), proposals have been made for completely new conflict of laws rules that would capture the distinctive character of the internet.<sup>116</sup>

With all due respect, we disagree with the proposal to annihilate the traditional rules, either in the field of international taxation or in the field of conflict of laws. This is not the first time the law has faced serious technological challenges.<sup>117</sup> Recall that the Westphalian paradigm is still in place. Despite the clear advances in the phenomenon of globalisation (and perhaps some regression in it, such as Brexit 2020), the contemporary international order is still comprised of a multiplicity of states governed by different private, commercial and tax laws.

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<sup>112</sup> Li (n 105) 480.

<sup>113</sup> Ibid.

<sup>114</sup> See, eg, Philip A Davis, 'The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier' (2002) 54(2) *Federal Communications Law Journal* 339, 349–56. See also above nn 68–78 and accompanying text.

<sup>115</sup> Ibid. See also Svantesson (n 10) chs 11–12.

<sup>116</sup> Ibid.

<sup>117</sup> Peari, *The Foundation of Choice of Law* (n 12) 273–95.

The inherently flexible, a-geographical phenomenon of the internet still operates in this reality, which requires the adjustment of the existing legal rules to capture the formal structure of the Westphalian territorial paradigm.

Our position is that a re-statement of the underlying rationale of the existing conflict of laws and international taxation rules is required. As noted above, the normative imperative of tracking and approximating towards the most meaningful connection to a certain territory seems to stand at the heart of this rationale. The nature of digital transactions, interrelations and activities can very likely challenge the traditional operative mechanics of this rationale, such as the presumptions of the place of residence and source in the area of international taxation. The digital version of commerce would perhaps mean a broader and more substantive look at the nature of the parties' interaction (in the case of conflict of laws) or party activity (in the case of international taxation). Such connecting factors as the place of the internet server,<sup>118</sup> and the place of the website,<sup>119</sup> should perhaps be considered as less relevant for determining the most meaningful connection. A further decline of the traditional territorial connecting factors could be expected.

However, the underlying structure of the existing rules is still based on the premise of the state's territoriality as a reflection of Westphalian order.<sup>120</sup> The invention and advances of the internet do not mean that this structure is not in place. As long as the Westphalian order is in place, the underlying rationales of the fields must remain the same. No revolution is required.<sup>121</sup>

### C *The Case of Corporations*

Corporations and corporate activity are important for both conflict of laws and international taxation. They are at the heart of international business. The number of conflict of laws cases involved with corporations is only growing.<sup>122</sup> The same point applies to the field of international taxation as corporate taxation remains a key revenue source in most countries worldwide and is subject to significant dispute.

The traditional and contemporary conflict of laws doctrine could learn much from international taxation on the point of corporations. In Australia (as well as

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<sup>118</sup> *Valve Corp* (n 42) [163].

<sup>119</sup> Brian Fitzgerald et al, *Internet and E-Commerce Law: Business and Policy* (Thomson Reuters, 2011) 869–72.

<sup>120</sup> Li (n 105) 500.

<sup>121</sup> For comments along those lines, see Organisation for Economic Co-Operation and Development, *Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-Commerce?* (Final Report, 2004) (in the field on international taxation); Peari, *The Foundation of Choice of Law* (n 12) 273–95 (in the field of conflict of laws).

<sup>122</sup> Peari, 'Which Law Governs Dispute?' (n 7). See also Sagi Peari, 'An Assessment of the US Rules which Determine the Relevant Law Applicable to Corporations: A Suggestion for Reform' (2021) 45(3) *Delaware Journal of Corporate Law* 469, 479–86 ('An Assessment of the US Rules').

in the UK<sup>123</sup> and the US),<sup>124</sup> conflict of laws jurisprudence continues to attribute paramount significance to the connecting factor of the place of incorporation.<sup>125</sup> The centrality of this connecting factor is clear at both levels of corporate activity: within corporate internal affairs (ie in relation to disputes between corporate actors and between those actors and the corporation itself), and within corporate external affairs (ie in relation to disputes between a corporation and other individuals or business entities).<sup>126</sup> To illustrate, if the company wished its internal affairs to be governed by Canadian law, the company must incorporate in Canada. There is no other choice.

The problem is that, in the contemporary reality, the connecting factor of the place of incorporation seems to be quite arbitrary due to the remarkable ease with which a corporation may be set up anywhere. It has been argued that the traditional and almost exclusive focus on the place of incorporation reflects an outdated connecting factor that ignores such key values as basic fairness and reasonable expectations.<sup>127</sup> Another difficulty is that, in the US, for example, it has been demonstrated that this traditional rule is inefficient. It bears a significant cost to the company and affects its operative structure.<sup>128</sup> Recently, the US jurisprudence seems to have reconsidered this stringent rule.<sup>129</sup>

Here, we argue, the international tax doctrine can offer important insights to conflict of laws. In the corporate case, the field of international taxation appears to have coped much better with the task of approximation towards a certain authority. The systems of international taxation tend to take a more inclusive approach that carefully takes into account the connecting factor of the place of incorporation alongside other connecting factors.<sup>130</sup> Many DTAs use the concept of 'place of effective management'<sup>131</sup> to determine the residence of corporations. The CFC Rules have been designed to override the easiness and

<sup>123</sup> See, eg, Robert R Drury, 'The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome"' (1998) 57(1) *Cambridge Law Journal* 165, 170.

<sup>124</sup> See, eg, Deborah A DeMott, 'Perspectives on Choice of Law for Corporate Internal Affairs' (1985) 48(3) *Law and Contemporary Problems* 161, 162–3.

<sup>125</sup> Peari, 'Challenging the Place' (n 6).

<sup>126</sup> See, eg, Peari, 'An Assessment of the US Rules' (n 122) 494–7.

<sup>127</sup> Ibid.

<sup>128</sup> Jens Dammann, 'A New Approach to Corporate Choice of Law' (2005) 38(1) *Vanderbilt Journal of Transnational Law* 51; Jens Dammann, 'State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis' (2021) 80(1) *Maryland Law Review* 214; Peari, 'An Assessment of the US Rules' (n 122).

<sup>129</sup> See, eg, *Change Capital Partners Fund I, LLC v Volt Electrical Systems LLC* (Del Super, CA No N17C-05-290 RRC, 3 April 2018) where a Delaware choice of law clause was upheld between a Delaware Corporation headquartered in New York and a Texas Corporation headquartered in Texas; *ABRY Partners V, L.P. v F&W Acquisition LLC*, 891 A.2d 1032, 1049 (Del. Ch. 2006).

<sup>130</sup> Nolan Cormac Sharkey, 'China's New Enterprise Income Tax Law: Continuity and Change' (2007) 30(3) *University of New South Wales Law Journal* 833.

<sup>131</sup> See, eg, *DTA South Africa* (n 51) arts 4(1)(b), (3); Woellner et al (n 98) 1306.



arbitrariness imbedded in the establishment of a corporation.<sup>132</sup> Since the connecting factor of the place of incorporation is easy to manipulate, other connecting factors such as the place of management and control,<sup>133</sup> and the place of business,<sup>134</sup> are considered under the regime of international taxation. Along these lines, the case law has developed a fairly broad and comprehensive test that focuses on such issues as the 'effective' control of the company, rather than the place where the directors' meetings formally took place.<sup>135</sup>

In this way, it would appear that international taxation (in contrast to conflict of laws) has developed an effective assessment of the factual situation of any given corporate activity that goes beyond the formalistic view of connecting factors and looks at the most meaningful connection. At the end of the day, we argue, both disciplines should focus on the careful assessment of the company's operational activities and business. Both are grounded on the most significant connection principle. Hence, the time for reconsideration of the rigid connecting factor of the place of incorporation in conflict of laws is long overdue. The unifying basis of the disciplines and the position taken by international taxation provides a justification for such a reconsideration.

#### ***D The Nature of the 'Foreign Element' within the Very Definition of the Disciplines: How do we Define 'International Taxation' and 'Conflict of Laws' in the First Place?***

It seems to be clear that the discipline of conflict of laws is grounded on the insight that a so-called foreign element must be present in the factual basis of the case.<sup>136</sup>

<sup>132</sup> The Australian Controlled Foreign Company regime is found in Part X of the *Income Tax Assessment Act 1936* (Cth). It seeks to attribute particular types of income to Australian shareholders when they control a non-resident company. See also Avi-Yonah, 'International Tax as International Law' (n 80) 488.

<sup>133</sup> Avi-Yonah, 'Tax Competition' (n 68) 22.

<sup>134</sup> Woellner et al (n 98) [24:064].

<sup>135</sup> There has been a line of cases dealing with how best to locate true management and control in different circumstances. Key authorities are: *Malayan Shipping Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 156; *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177. Most recently, *Bywater Investments Ltd v Commissioner of Taxation* (2016) 260 CLR 169 reviewed the issues in locating central management and control.

<sup>136</sup> For the classical classification of the field according to foreign element, see, eg, Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15<sup>th</sup> ed, 2012) 3 (referring to a foreign element as 'simply a contact with some system of law other than English law'); Eugene F Scoles, Peter Hay and Patrick J Borchers, *Conflict of Laws* (West Publishing, 4<sup>th</sup> ed, 2005) 1 (referring to private international law cases as 'connected with more than one country'); Hill and Ní Shúilleabháin (n 63) 1 ('[i]n short, any case involving a foreign element raises potential conflict of laws issues'); *Cheshire & North* (n 2) 1 ('[p]rivate International law is that part of English law which comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when this element is present that private international law has a function to perform'); Symeonides, *Choice of Law* (n 63) 2 ('[t]he adjective *international* describes an important attribute of the disputes that fall within the scope of this subject — they are international (or interstate) in the sense that they have contacts with more than one country or state' (emphasis in original)).

Without this, a case cannot be considered a conflict of laws case. This is an important distinction between conflict of laws cases and others cases. Practically, this distinction is important as it triggers the operation of some of the conflict of laws doctrines.<sup>137</sup>

The same is true in the case of international taxation. International tax lawyers have intuitively recognised that the field fundamentally involves the question of tax authority allocation in ‘cross-border transactions’<sup>138</sup> in relation to transactions ‘involving, or potentially involving, two jurisdictions’.<sup>139</sup> They appreciate that international tax law has something to do with transactions which cross ‘national borders’<sup>140</sup> and ‘involves a question of intersections with other countries’ systems’.<sup>141</sup> And yet, scholars have acknowledged that ‘there is no formal or specific definition’ of international taxation.<sup>142</sup> This definition seems to be important, as it tackles the very nature of the field and raises its most preliminary question: when does the regime of international taxation first enter the picture?

Obviously, the question of the ‘foreign element’ is key for both disciplines. This is a conceptual question that defines the boundaries of both disciplines: how do we distinguish (if at all) cases of domestic taxation from international taxation? When should the conflict of laws analysis first arise? However, some of the contemporary conflict of laws literature has challenged the traditional adherence to the presence of a foreign element.<sup>143</sup> Furthermore, it has been argued that the contemporary practical reality of cross-border commerce and digitalisation represents a situation where some degree of ‘foreignness’ can be found in a large portion of the factual scenarios of the cases.<sup>144</sup> Perhaps we should rethink our vision of international taxation as many instances of human activity may raise issues pertinent to it. The same point applies to conflict of laws: perhaps commercial activity involves a much broader range of conflict of laws cases than we thought. The definition of both disciplines may not need to hinge on the presence of a foreign element. The serious doubts expressed in conflict of laws literature about the necessity of a ‘foreign element’ could be extended to international taxation.

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<sup>137</sup> The operation of party autonomy principle is a representative example of this point. Some conflict of laws provisions require a given case to be first classified as a ‘conflict of laws’ case to enable a choice of applicable law which differs from their own law. See, eg, *Hague Principles on Choice of Law in International Commercial Contracts* (approved on 19 March 2015), art 1(2) (‘*Hague Principles*’).

<sup>138</sup> Avi-Yonah, ‘Tax Competition’ (n 68) 16.

<sup>139</sup> Woellner et al (n 98) 1289.

<sup>140</sup> Ring (n 103) 83.

<sup>141</sup> *Ibid*, 84.

<sup>142</sup> *Ibid* 83 n 2.

<sup>143</sup> See, eg, Peari, *The Foundation of Choice of Law* (n 12) 85–90.

<sup>144</sup> See, eg, Matthias Lehmann, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws (2008) 41(2) *Vanderbilt Journal of Transnational Law* 381, 422: ‘[a]lmost all cases in the world have links to more than one state’. See also Peari, *The Foundation of Choice of Law* (n 12) 87.

### E *The Classification Step*

One of the essential aspects of the operational mechanics of classical conflict of laws doctrine has been the ‘classification’ step<sup>145</sup> and the inherent complexities that it involves. Consider the traditional tort law rule according to which a tort law dispute should be governed by the law of the place where the tort has taken place.<sup>146</sup> Which system’s law should determine that a given factual scenario is a ‘tort law’ dispute in the first place? This classification step has been recognised as a complex conceptual problem for conflict of laws thinking.<sup>147</sup> It follows the ‘chicken or the egg problem’: apparently one needs to first determine the identity of the applicable law before the classification step. Yet, the classification step needs to be performed according to certain law.<sup>148</sup>

Notably, the field of international taxation suffers from the same ‘classification’ problem. Presently, under the contemporary structure of international tax rules, the classification step is required to classify such key concepts and categories of the field as ‘residence’<sup>149</sup> and ‘company’<sup>150</sup> under the rules of the domestic system. This practice is puzzling, as it is at odds with the very nature of international taxation, which fundamentally acknowledges the plurality of tax orders and potential classification schemes.<sup>151</sup> This problem within the contemporary regime of international taxation needs to be addressed, as it presents a clear challenge to the very nature of the field.

On this point, the conflict of laws doctrine can offer much to international taxation doctrine. While acknowledging the complexity of the classification step, conflict of laws doctrine offers a set of solutions to the conceptual and practical puzzles that this step entails.<sup>152</sup> Notably, conflict of laws offers an important awareness of the ‘chicken or the egg problem’ of the classification step. This awareness of the problem and its complexity has provided the courts with an important point of departure for a more coherent, fair and predictable resolution of cross-border disputes.<sup>153</sup> This means, for instance, that the adjudicative tribunal should not automatically apply its own classification rules, but rather take into account the classification rules of the foreign system or systems as well.

<sup>145</sup> See, eg, Sagi Peari and Marcus Teo, ‘Justifying Concurrent Claims in Private International Law’ (2022) 81(2) *Cambridge Law Journal* (forthcoming).

<sup>146</sup> See above nn 30–1 and accompanying text.

<sup>147</sup> See, eg, Peari and Teo (n 145).

<sup>148</sup> See, eg, Ernest G Lorenzen, ‘The Qualification, Classification, or Characterization Problem in the Conflict of Laws’ (1941) 50(5) *Yale Law Journal* 743.

<sup>149</sup> For an example of the issues, see, eg, Nolan Sharkey, ‘Tax Treaties and Temporary Residence for Individuals: Tax Abuse?’ (2014) 69(2) *Bulletin for International Taxation* 67.

<sup>150</sup> Sharkey, ‘The Interests of Developing Countries’ (n 46).

<sup>151</sup> *Ibid.*

<sup>152</sup> See, eg, Karen Knop, Ralf Michaels and Annelise Riles, ‘From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style’ (2012) 64(3) *Stanford Law Review* 589, 634–6; Peari, *The Foundation of Choice of Law* (n 12) 201–4.

<sup>153</sup> See, eg, Peari and Teo (n 145); Peari, *The Foundation of Choice of Law* (n 12) 201–4.

There is no reason why international taxation could not learn from those lessons of experience and circumspection of conflict of laws.

## **F Foreign Law in Domestic Courts**

A related point applies with respect to another fairly central feature of the conflict of laws mechanics — the very possibility of applying a foreign law in a domestic court. Consider a tort committed by an Australian resident against an Indonesian resident in Indonesia. When the Indonesian resident submits the claim in an Australian court, under the conflict of laws rules the Australian court should apply Indonesian tort law.<sup>154</sup> Similar to the classification step, the conflict of laws doctrine has developed a sophisticated toolkit for such matters as the scope and proof of the foreign law in the domestic courts.<sup>155</sup> Above all, the conflict of laws doctrine has recognised that the application of foreign law cannot be ‘perfect’ — it is hard to apply ‘truly’ foreign laws in a domestic system.<sup>156</sup> The domestic courts do not really have the ability to apply ‘authentic’ foreign law. Despite the use of experts, the domestic courts frequently do not have the required expertise.<sup>157</sup> Yet, while acknowledging the inherent difficulty in such an exercise, the conflict of laws doctrine offers some important insights on this matter: for the sake of considerations of fairness and legal certainty, a reasonable approximation towards the ‘foreign law’ must be made.<sup>158</sup>

Contemporary international tax doctrine also faces the challenge of applying foreign law. Even though most tax disputes involve a tax office and a taxpayer dealing with domestic law, it is also possible that a foreign tax will need to be considered to settle the dispute. For example, the DTAs become part of the domestic law, yet they refer to whether a person is ‘resident’ under the foreign law. If that is being disputed, the domestic court will have to consider the application of the foreign law.<sup>159</sup> While the practice of applying foreign law is inherent to the operational mechanics of the field, this practice is relatively new and does not have the wealth of centuries of experience and self-balance guided by considerations of fairness, predictability and reasonableness. Conflict of laws

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<sup>154</sup> See above nn 34–5 and accompanying text.

<sup>155</sup> See, eg, *Cheshire & North* (n 2) 105–14.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* Relatedly, the emerging phenomenon of international commercial courts has relaxed the traditional requirements involved in proving the foreign law. For instance, under the rules of the Singapore International Commercial Court, the parties could prove the content of the foreign law through their submissions, without resorting to the opinions of experts. See, eg, Singapore International Commercial Court, ‘SICC Proceedings in General’ (Web Page) <<https://www.sicc.gov.sg/guide-to-the-sicc/sicc-proceedings-in-general>>.

<sup>158</sup> Knop, Michaels and Riles (n 152) 629–32.

<sup>159</sup> Nolan Sharkey, ‘The Correctness of the Chinese Position of Enterprise Residence in Chinese Law: The Institutional and Treaty Implications’ (2014) 68(11) *Bulletin for International Taxation* 617 (‘The Correctness of the Chinese Position’).

doctrine could supply the doctrine of international taxation with the benefit of its experience and internal balance and the process of learning from mistakes.

Hence, during the exercise of proving the content of foreign tax law, international taxation could focus on the values of legal certainty and fairness rather than engaging with frequently endless exercises of applying foreign law in the same way the foreign tribunal would have applied it. When it comes to the application of foreign law in domestic tribunals, 'perfection' could rarely (and should not) be reached. The emerging issue of international taxation could easily learn from conflict of laws on an acute point of rules' operation.

### *G The Harmonization Process*

Finally, there is room for reciprocal lessons on the point of the harmonisation process. While we reject the argument made in the literature about the existence of a customary international taxation law,<sup>160</sup> no one can ignore the sustainable global effort to harmonise the international tax rules across jurisdictions. Today, there are more than 2,000 bilateral treaties signed between states, which aim to create 'conflict of laws' rules and 'tie-breaker' rules between two states. The aim of these treaties is to avoid situations of double taxation through the means of tax exemptions and credits for foreign taxes.<sup>161</sup> Clearly, the treaties resemble, in language and in structure (and are mostly modelled on), the OECD and UN models.<sup>162</sup> Yet, as we have mentioned above,<sup>163</sup> it would be a fallacy to argue that international taxation has reached a point of harmonisation on the point of taxation 'conflict of laws' rules. While the double tax treaties may be identical in 75 per cent of wording,<sup>164</sup> the treaties still diverge on significant aspects. Further, they frequently refer to the domestic definition of such concepts as 'residence',<sup>165</sup> which underscores the deficiency in the contemporary harmonisation process. The devil is in the detail. And yet, clearly, the international community makes a significant effort to harmonise international tax rules.

Unfortunately, conflict of laws jurisprudence has not made the same effort to unify the rules. Despite some significant efforts made in the international community, and the hopes expressed by the foundational thinkers of the

<sup>160</sup> Avi-Yonah, 'International Tax as International Law' (n 80).

<sup>161</sup> Ibid 493–4; Avi-Yonah, 'Tax Competition' (n 68) 16.

<sup>162</sup> Avi-Yonah, 'Tax Competition' (n 68) 5–6. See also Li (n 89) 500 (commenting on the operation of OECD, OECD Model Convention and its Commentaries as *de facto* world tax organization); Shay Moyal, 'Back to Basics: Rethinking Normative Principles in International Tax' (2019) 73(1) *Tax Lawyer* 165, 173 (mentioning the hope of the American forefather of international taxation — Adams — and how his desire for international cooperation, administrative competence, and decreased tax avoidance were fulfilled as the vast majority of the countries adopted similar provisions to ensure tax payment and prevent tax overpayment).

<sup>163</sup> See above nn 48–52 and accompanying text.

<sup>164</sup> Reuven S Avi-Yonah, 'Double Tax Treaties: An Introduction' (Paper, 3 December 2007) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1048441](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1048441)> 1.

<sup>165</sup> Sharkey, 'The Correctness of the Chinese Position' (n 159).

disciplines,<sup>166</sup> the harmonisation processes in conflict of laws move very slowly. To illustrate, the *Convention on the Law Applicable to Contracts for the International Sale of Goods*,<sup>167</sup> which addresses applicable law in international sales contracts, has a limited scope and has never entered into force. The *Hague Principles on Choice of Law in International Commercial Contracts* ('Hague Principles')<sup>168</sup> did enter into force. However, the limited scope of this instrument is striking: it is only limited to cases that the *Hague Principles* define as 'international commercial contracts'; it does not extend to situations where the parties do not specify the applicable law; it does not address cases that involve consumer transactions; and, most importantly, it can be easily contracted out.<sup>169</sup>

In contrast to conflict of laws, the rules of international taxation represent a genuine effort on the part of the international community to harmonise the law. Conflict of laws can only learn from international taxation on the point of the immediate necessity of the harmonisation of its rules.<sup>170</sup>

## V SUMMARY

The central thesis of our argument is that conflict of laws and international taxation can provide each other with invaluable lessons and insights to cope with the contemporary challenges of COVID-19, cross-border commerce and digitalisation. Our argument developed through the following two-stage process. First, we showed the conceptual interconnectedness between the two fields. In contrast to the comments in the literature and case law that draw a sharp line between the issues of international taxation and conflict of laws, we argued that the two are intimately interconnected through a set of underlying ideas and rationales. By addressing different aspects within the legal universe and targeting different objects, the two disciplines relate at a fundamental level. This stage explained why the conceptual analysis between the question of applicable law and international taxation is possible, and in fact necessary. It included tackling the very origins of each discipline and making the necessary qualifications as to the

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<sup>166</sup> Savigny (n 28) 136–7.

<sup>167</sup> *Convention on the Law Applicable to Contracts for the International Sale of Goods* (concluded 22 December 1986) <<https://assets.hcch.net/docs/b4698bc5-9d42-4352-934f-5232a8dcb12c.pdf>>.

<sup>168</sup> *Hague Principles* (n 137).

<sup>169</sup> For a limited scope of the *Hague Principles* (n 137), see, eg, Symeon Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61(4) *American Journal of Comparative Law* 873; Giesela Rühl, 'Regulatory Competition and the Hague Principles of Choice of Law in International Commercial Contracts' in Thomas John, Rishi Gulati and Ben Koehler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar Publishing, 2020) 125.

<sup>170</sup> Indeed, the forefather of conflict of laws viewed harmonisation as one of the fundamental goals of the discipline. See Savigny (n 28) 136–7; Th M de Boer, 'Living Apart Together: The Relationship between Public and Private International Law' (2010) 57(2) *Netherlands International Law Review* 183, 196.

parameters of the relevancy of the arguments and debates in each one of the disciplines.

*Second*, we provided a detailed analysis of how each discipline can benefit the other. As we have shown, both disciplines have been facing a more or less similar set of practical and conceptual problems: the challenges of digitalisation and increasing cross-border commercial activity of corporations. This all supports our central point about the significance of reciprocal lessons: carefully conceptualised, qualified and analysed, conflict of laws and international taxation can teach each other a lot. Such reciprocal learning-exercises may involve adopting new interpretations of existing legal texts, the development of common law, the passing of new statutory law, the development of new aspects of international treaties or, perhaps, a combination of these things. We argue that the Australian public and the global community will potentially benefit greatly from those lessons.