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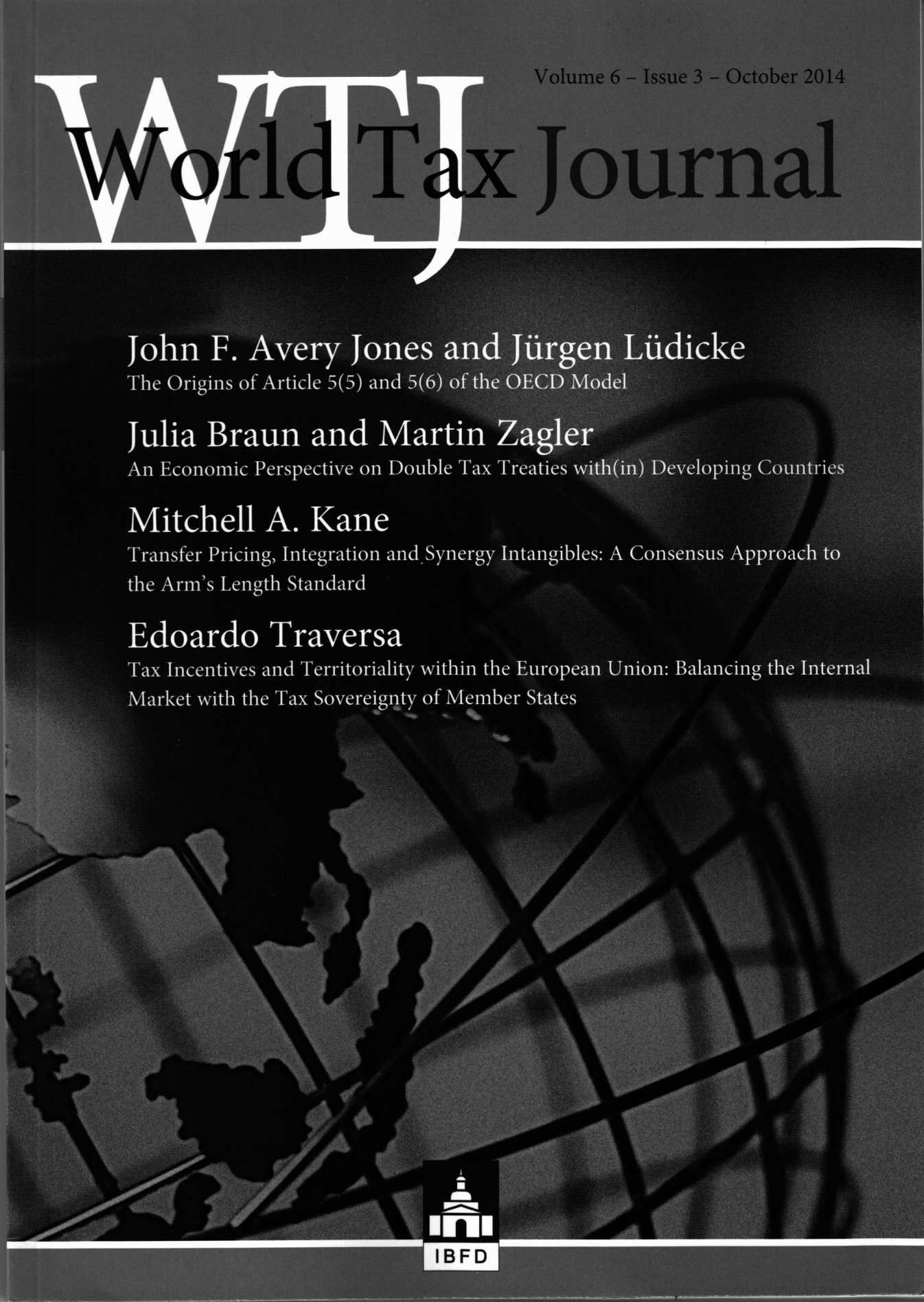

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The Origins of Article 5(5) and 5(6) of the OECD Model

This article by authors from the two countries which comprised the OEEC working party that originally drafted the permanent establishment article considers the history of the agency permanent establishment provisions from their respective legal perspectives in order to try to understand what was in the minds of the members of the Working Party. This approach is assisted by the fact that two years before their work for the OEEC the United Kingdom and Germany had concluded a tax treaty. The authors have drawn on material in their respective national archives about the negotiations of that treaty to show the understanding that the working party members brought to the OEEC. One of the conclusions is that they never appreciated the differences in their respective laws of agency which has led to an unsatisfactory result caused by the two legal systems approaching article 5(5) of the current OECD Model in different ways and the exceptions in article 5(6) having different effects in each system.

1. Introduction

The permanent establishment article of the OECD Model was originally drafted by OEEC Working Party 1 ("WP1") comprising representatives from Germany and the United Kingdom.[1] This article, by authors from those two countries, takes advantage of the fact that the OECD is working on the development of changes to prevent the artificial avoidance of

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1. Their first report (FC/WP1(56)1), which contains a draft of the PE article and Commentary, is dated 17 September 1956. WP1 had been set up by the Fiscal Committee on 24 May 1956 (FC/M(56)1(Prov.). OEEC and OECD papers up to 1977 are available on www.taxtreatieshistory.org. It appears from the Questionnaire of 4 February 1957 in TFD/FC/12 that the rapporteurs of WP1 were Mr Mersmann (who had led the German negotiating team for the United Kingdom-Germany Income and Capital Tax Treaty (1954)) and Mr Norman Leach (who was not involved with the negotiations for that treaty). The WP1 working language was English, in which it appears from the minutes of the United Kingdom-Germany negotiations, Mr Mersmann was fluent; the only time an interpreter is mentioned is in the drafting committee. We deduce that if Mr Leach had spoken German he would have been involved in the negotiations with Germany, which he was not.

PE status in relation to BEPS, including through the use of commissionnaire arrangements,[2] and considers the origins of the agency permanent establishment provisions, aiming to understand what was in the minds of the members of WP1 based on what the members from those countries would have understood about their respective laws, particularly the law of agency. It is also a useful coincidence that only two years earlier, in 1954, those countries had negotiated a treaty between them for which we are fortunate in having a detailed record of the negotiations in both the UK National Archives and the German *Bundesarchiv*.[3]

2. The Differences between Civil Law and Common Law of Agency

In this article the authors shall use the term "agent" to include all persons who are within article 5(5) and 5(6) of the OECD Model[4] in both civil law and common law regardless of the technical meaning of that term in either system of law. When we use the term in a narrower technical sense we shall make this clear.

Before considering the development of what became article 5(5) and 5(6) of the OECD Model we should note the significant different approaches of civil law and common law to agency.

In civil law the term "agency" has two very different meanings: agency as a technical term refers to a way of contracting, i.e. contracting with a legally binding effect on someone else; only in a broader, less technical sense the term describes the relationship between a principal and a person which acts on account of that principal.[5] To contract as an agent in the technical sense requires the acting person to have been given by the principal an authority to perform legal acts on the principal's behalf, in particular to conclude contracts binding on him (a *Vollmacht* in German civil law terms). But this authority is not sufficient. In order to conclude a contract binding on the principal the person endowed with a *Vollmacht* has also to disclose the principal to the third party in the process of contracting.[6] This principle of

2. OECD Ctr. for Tax Policy and Admin., *Action Plan on Base Erosion and Profit Shifting*, (OECD 2013), Action 7, International Organizations' Documentation IBFD.
3. UK National Archives, file IR40/9629A and *Bundesarchiv*, file B 126/6034 and 6035. Some of the Notes were exchanged (e.g. the UK Notes of discussions 14-21 July 1952, which were translated into the German language by the German Federal Ministry of Finance. In the *Bundesarchiv* there are also Notes of the same meeting as prepared by the German delegation ("*Niederschrift*"). There is no English translation in the *Bundesarchiv*. The UK National Archives contains an English translation of the German Notes *Niederschrift über die Besprechung des deutsch – englischen Doppelbesteuerungsabkommens in London vom 14. – 21.7.1952*; it seems that the main purpose of these notes was to inform the German Minister of Finance about the negotiations which, according to the internal covering letter of 8 August 1952, took place on good terms. JFAJ is grateful to the UK National Archives for opening up this file as a result of a Freedom of Information request. The file was correctly closed for 75 years, counting as diplomatic material, and was accordingly not available. However, the files on tax treaty negotiations with all other European countries were in fact (incorrectly) closed for the normal 30 years, and were accordingly available. The National Archives agreed to open the UK-Germany file to achieve parity with the other treaty material.
4. I.e. a person acting on behalf of an enterprise who has, and habitually exercises an authority to conclude contracts in the name of the enterprise; and general commission agent/*Kommissionär/commissionnaire* and broker/*Handelsmakler/courtier*.
5. In this broader sense an agent may well also act as an agent in the technical sense, meaning he may conclude contracts legally binding his principal to the third party (such as particular kinds of commercial agents in German law), but in many cases the agent does not (such as the *commissionnaire*). For the latter group the term indirect representation has been coined to distinguish it from agency in the technical sense (also termed direct representation).
6. Disclosing the principal does not require an agent to explicitly mention the principal to the third party, if the circumstances of the contract clearly point to the principal the agent is acting on behalf of (e.g. a sale in a

disclosure seeks to protect the third parties' interest in knowing who his contractual partner will be.[7] If the contracting person fails to disclose the principal, the *Vollmacht* is not properly exercised and the concluded contract will not bind the principal.[8] In German law the principle of disclosure condenses in the phrase: *acting in the name of the principal*.[9] Given this legal and terminological background it is obvious that to a civil law reader phrases such as *exercising an authority* (translated in German as *Vollmacht*) *to conclude contracts* as well as *concluding contracts in the name of a principal* almost unambiguously mean the conclusion of contracts by an agent binding on the principal.

A *commissionnaire* in a civil law system (in German Commercial Law: *Kommissionär*) does not act as an agent in the technical sense. The German Commercial Code states this in its definition of a *Kommissionär* by referring implicitly to the way of contracting:

> A Kommissionär is one who […] buys and sells goods […] in his own name for the account of the principal.[10]

By merely using the phrase "in his own name" the definition excludes the *Kommissionär* from exercising an authority to conclude contracts that bind the principal.

Common law also uses agency in two senses. The term agent in its legal sense[11] denotes a person who can represent the principal in such a way as to affect the principal's legal position.[12] The term agent is often used in a non-legal sense with the wider meaning that we are adopting. No specific types of agency contract exist in common law; instead there is freedom of contract, that the parties are free to make a contract with any terms they wish so long as it is not prevented by the law.[13] Common law analyses the contract apparently made between

store by an employee with *Vollmacht* binds the customer to the store owner, not to the employee, regardless of whether the employee explicitly mentioned the store owner or not).

7. *See* Schilken, in: Staudinger, BGB, Vorb. para. 164 et seq. Rn. 35, 2009.
8. Since the main purpose of this principle is to protect the third party, it is suspended in cases where the third party is presumably not interested in who the contractual partner is (Schramm, in: Münchener Kommentar, BGB, para. 164 Rn. 48-50, 6th ed. 2012). This for example applies to everyday sales which are paid for at once, so the third party is not concerned about the possibility of the contracting person acting for an insolvent principal. It should be noted, however, that such cases are narrow exceptions which do not put the principle in question.
9. Sec. 164, para. 1 German Civil Code.
10. Sec. 383, para. 1 German Commercial Code.
11. In most common law jurisdictions the law of agency is almost entirely judge-made law, with occasional statutory additions (*see* text at *infra* n. 101 for an example). One common law jurisdiction will look to (but is not bound by) decisions of other common law jurisdictions on a particular topic. For this reason, in general the statements here are true in all common law jurisdictions.
12. Although one of the parts of the definition of agency in P.G. Watts, *Bowstead & Reynolds on Agency*, 19th ed, Sweet & Maxwell, 2010 ("Bowstead"), is: "A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent" i.e. someone who merely introduces the parties, in a similar way to the civil law broker (*courtier*). The US common law tends to define an "agent" for purposes of an action that has legal consequences in different terms but to similar effect, as a person who acts on a principal's behalf and subject to the principal's control by mutual agreement or understanding. *See* generally American Law Institute, Restatement (Third) of Agency (2006). It would appear that control may be inferred.
13. This is not to imply that there is no such freedom in civil law, for example in relation to innominate contracts (those falling outside the categories defined in civil law), and even certain default features of the civil law on nominate contracts may be modified by the parties. The important point is that, in common law, rather than having a number of contracts named in the civil code each with generally defined legal consequences, there is potentially an infinite variety of types of contract, none of which have pre-defined legal consequences. It should also be mentioned that even the notion of "contract" is different in the two legal systems. Common law requires consideration for the existence of a contract, so that a promise by A to

the agent and the third party, as one in fact made between the principal and the third party through the medium of the agent. This is so whether or not the principal is disclosed to the third party.[14] A consequence of this difference is that, unless the contract provides otherwise, in common law only one legal result is possible namely that all such contracts bind the third party to the principal; and only the principal (and not the agent) is liable on the contract. Contracting "in the name of" the principal (or the agent) has no meaning in common law because whether the principal is disclosed or not, the result is the same so far as whether the principal is bound. The expression "in the name of" is not found in common law in either general or tax law[15] and its meaning is unknown to the law. For present purposes, we equate it with meaning legally binding. In common law since virtually all agents' contracts bind the principal one can effectively equate "on behalf of" and "in the name of." The different civil law results of contracts made in the name of the principal (direct representation), which bind the principal, and contracts made in the name of the agent (indirect representation, as is the case with a *commissionnaire/Kommissionär*), which do not, are accordingly a natural distinction on which to base tax rules in civil law. The same distinction does not arise in common law unless the interpretation of the contract is such that only the agent is liable to the third party, something that is uncertain in practice as it depends on all the facts, which makes it an unsuitable distinction on which to base tax rules.

It should be mentioned that in the 19th century the English (and other common law) courts applied a strong presumption of fact that an agent for a foreign principal did not bind the principal. Such contracts looked exactly like *commissionnaire* contracts, and may have existed for the same commercial reasons. They may originally have arisen because the foreign principal expressly appointed the local agent on similar terms to a *commissionnaire*. But it applied equally to foreign principals from common law countries. Seen from the point of view of the third party purchaser, he wanted someone in the jurisdiction he could sue, rather than having to take action abroad against the foreign principal.[16] Being a presumption of fact it could be rebutted by reference to the surrounding facts and it was therefore very different from that of a legal type of civil law agent, the *commissionnaire*. The Courts finally abandoned this presumption in 1968, one of the judges stated:

do something for B is not a contract and cannot be enforced by B in the absence of consideration from B, whereas it would be in civil law. And if A and B contract to do something for the benefit of C, in principle (subject to exceptions) C cannot enforce this in common law because C is not a party to the contract (i.e., the doctrine of privity), but civil law is more flexible in this regard.

14. But not so as to override the intentions of the parties, so that if the parties intend only the agent to be bound by the contract, this is not overridden by the third party having the ability to sue the undisclosed principal. Watts, *supra* n. 12 at para. 8-073 states: "the application of the doctrine is quite narrow, and confined to two types of case. The first occurs where the principal wishes to be a party to a contract, but wishes also to conceal that fact, perhaps because he does not wish it to be known that he has entered the market. The second is that where the agent has authority, but does not disclose the existence of his principal, perhaps because he does not wish the third party on the next transaction to bypass him and go direct to the principal; and the principal either acquiesces in this or makes no inquiry as to the agent's practice". It notes that there are other views to the contrary and no clear support for this view but the majority of dicta support it directly or by implication. There can be other differences according to whether or not the principal is disclosed, apart from whether the principal is bound; an example of a difference is given in the text at *infra* n. 101.

15. One can probably find exceptions where the expression is derived from the Model, such as US Internal Revenue Code, para. 864(5)(A).

16. By implication, the liability of the foreign principal as an undisclosed principal was necessarily excluded, *see supra* n. 14. and *infra* n. 17.

> I do not think that usage of one hundred years ago applies today. Overseas business is conducted very differently now from what it was then…. In the light of modern usage I think that an undisclosed foreign principal can sue and be sued on a contract, just as an undisclosed English principal can, save, of course, when the contract on its true construction limits it to the English intermediary and excludes a foreign principal. The fact that the principal is a foreigner is an element to be thrown into the scale on construction, but that is all.[17]

While, until it was abandoned by the courts, there may have been people who assumed it was still valid,[18] the better view seems to have been that it was effectively dead, although it may have contributed to a small degree of uncertainty about the law at the time the OEEC were working on the agency PE provisions.[19] The approach of the courts in the 20th century was on the lines of the last sentence of the quotation, that the fact the principal was foreign was merely a factor to be taken into account. Whether the foreign principal was liable depended on the terms of the contract and the intention of the parties to be ascertained from the facts, one of which was that the principal was foreign.[20] This was a fact that would be likely to be

17. *Teheran-Europe Co. Ltd v. S.T. Belton (Tractors) Ltd.* [1968] 2 Q.B. 545, 553 (CA) *per* Lord Denning MR. Diplock LJ also said at 558: "I agree with Donaldson J. that the fact that the principal is a foreigner is one of the circumstances to be taken into account in determining whether or not the other party to the contract was willing, or led the agent to believe that he was willing, to treat as a party to the contract the agent's principal, and, if he was so willing, whether the mutual intention of the other party and the agent was that the agent should be personally entitled to sue and liable to be sued on the contract as well as his principal. But it is only one of many circumstances, and as respects the creation of privity of contract between the other party and the principal its weight may be minimal, particularly in a case such as the present where the terms of payment are cash before delivery and no credit is extended by the other party to the principal." And Sachs LJ said at 561-2: "I agree that in determining whether the exclusion can be established the courts ought to take into account, as part of the totality of the circumstances, the fact that the principal was a foreign one, but that no presumption of exclusion can be founded on that fact alone. The presumption which at one time existed no longer exists, because, as Donaldson J. said, the usages of the law merchant are not immutable."
18. For example, *Weiss, Biheller and Brooks ltd v. Farmer* (1922) 8 TC 381, at 406, 407 where it was assumed that the presumption that the foreign principal was not bound applied, even though this was contrary to the earlier decision in *Miller, Gibb & Co v. Smith & Tyrer Ltd* [1917] 2 QB 141 (*see infra* n. 20). The decision in *Weiss, Biheller* was that whether or not the principal was bound was not relevant to the tax liability in the United Kingdom.
19. Interestingly, there was a significant change in Bowstead, the leading textbook on the law of agency, between the 11th edition (1951) and the 12th (1959 – just after WP1 had finished work on the draft article). In the former edition the presumption is stated to apply unless a contrary intention plainly appears from the terms of the contract or the surrounding circumstances (at 195, 247, 254-5). In the latter edition, the status of the presumption was said to be doubtful, a change in its significance having occurred as a result of changed circumstances of modern international commerce; and that it had been doubted (*see* the cases *infra* n. 20) whether there was any distinction between English and foreign principals. It stated that the safer view appeared to be that where the intention of the parties was clear from the contract there was no room for the operation of any presumption (at 201-2).
20. *See,* e.g., *Miller, Gibb & Co v. Smith & Tyrer Ltd* [1917] 2 QB 141, CA (contract "by which our principals [unnamed] sell through the agency of Smith & Tyrer Ltd…", signed by the agents "by authority of our principals" was as a matter of constructing a contract between the (unnamed) principals and the third party (Miller, Gibb & Co); excluding liability of the principals and imposing liability on the agents would be to contradict the contract); *J S Holt & Moseley (London) Ltd v. Sir Charles Cunningham & Partners* (1949) 83 Ll L R 141, 145 (facts showing that the parties never contemplated that the agents should become personally liable; in the circumstances there was no room for the presumption that they were personally liable because the principal was foreign: "Since the decision of the Court of Appeal in *Miller, Gibb & So v. Smith & Tyrer Ltd* [1917] 2 KB 141, the so-called presumption or trade usage to this effect cannot, I think, be regarded as existing as part of the law governing commercial contacts, and the true view seems to be merely this—that when a question is raised as to the legal position of an agent contracting for a foreign principal, it is in each case a question as to what the parties intended."); *Maritime Stores Ltd v. H P Marshall & Co Ltd* [1963]1 Lloyd's Rep 602, 608 (personal liability of agent based on the evidence of what happened at the meeting when the contract was concluded; the fact that the principal was foreign was no more than a fact which had to be taken into account "and too much weight should not be attached to that"); *Rusholme & Bolton & Robert Hadfield Ltd v. Read & Co (London) Ltd* (1955) 1 All ER 180, 183. *N&J Vlassopulos Ltd v. Ney*

determinative only if there was doubt or ambiguity. By the time that the OEEC were working on the liability of the foreign principal was therefore highly dependent on the whole facts, and was essentially no different from a domestic principal.

In common law the fact that it was possible for the contract, read in the light of all the facts, to provide that the agent (and not the principal) was liable would have been regarded as of interest to the parties alone, for example if the principal became insolvent. It had no tax implications in the United Kingdom. UK tax law depended on whether the agent contracted at all and, if he did, whether the contract was made in the United Kingdom (in which case the United Kingdom taxed under domestic law).[21] In contrast to civil law, whom the contract bound was not therefore in the English member of WP1's mind, and therefore contracting "on behalf of" carried no implications about who was bound, although in practice in most cases the principal was bound. It follows that the approach of the OEEC of building article 5(5) on the foundation of whether the principal was bound was one that would work in common law only if one assumed that all agents' contracts bound the principal, in which case the only purpose it served was to eliminate those agents who did not contract at all.[22]

It will be apparent that, in the absence of the law specifying types of agency contracts in common law, there can be no legal definition of the terms "broker" and "general commission agent" used in article 6(6). These are therefore commercial expressions whose meaning is somewhat uncertain today and we shall deal with their meaning in section III below in connection with article 5(6). At this point we should say that they seem to have no connection with *commissionnaire/Kommissionär* and *courtier/Handelsmakler*. The English expressions "broker" and "general commission agent" seem to have had a similar meaning to each other, comprising independent agents who did bind their principal when contracting.[23]

Shipping Ltd (The Santa Carina) [1977] 1 Lloyd's Rep. 478 (contract between two members of the Baltic Exchange; since the third party know he was dealing with an agent, even though it did not know the identity of the principals, it was up to the third party to show there were facts from which it could be concluded that the agents were personally liable).

21. This rule about the place of contracting was developed almost entirely in case law concerning French wine merchants. The place of contracting is in the United Kingdom if the agent accepts the offer. Contract made in the United Kingdom: *Werle & Co v. Colquhoun* (1888) 2 TC 402 (Veuve Clicquot), *Pommery & Greno v. Apthorpe* (1886) 2 TC 182 (Pommery), *Tischler v. Apthorop* (1885) 2 TC 89 (Claret). For a contract made outside the United Kingdom: *Grainger & Son v. Gough* (1896) 3 TC 462 (Louis Roederer) (acceptance by conduct in France by fulfilling the order). An example giving rise to tax of contracts being made by an agent in the United Kingdom which did not bind the principal because of the presumption that foreign principals were not bound is *Weiss, Biheller and Brooks ltd v. Farmer* (1922) 8 TC 381, at 406, 407. The point was raised in *FL Smidth & Co v. Greenwood* (1921) 8 TC 193 at 204 that there could be cases where activity in the United Kingdom other than concluding the contract could give rise to tax: "I can imagine cases where the contract of resale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here." This is an interesting contrast as it demonstrates the lack of a permanent establishment way of thinking derived from impersonal taxes (or *impôts réels*) which would have caught manufacture. The United Kingdom thinks in terms of trade and therefore has difficulty if there is no income in the United Kingdom. *See infra* n. 36 for a suggestion that a change in domestic law in 1915 had changed the effect of the place of contracting.

22. Had the 19th century presumption about foreign principals continued, the result could have been that very few agents' contracts on behalf of a foreign principal bound the principal, which would have had a disastrous effect on the OEEC proposals.

23. The authors shall deal with this aspect in section 3. *The origin of what is now article 5(6).*

We hope we have said enough without going into more details that there was little or no common ground between the Englishman, Mr Leach, who was not a lawyer,[24] and the German, Mr Mersmann, who was a lawyer, on the law of agency. What is even more important is that the available documents demonstrate that they were unaware of the existence of such a difference.

3. The Origin of What is Now Article 5(5)

We shall look separately at the origins and development of what are now article 5(5) and 5(6) even though this has the disadvantage of our having to split up the discussion of single treaty articles.[25]

We start with what is now article 5(5). The wording of the OEEC WP1 first draft was:

> 4. An agent acting in one of the territories on behalf of an enterprise [*pour le compte d'une entreprise*] of the other territory – other than an agent of an independent status to whom paragraph 5 applies – shall be deemed to be a permanent establishment in the first-mentioned territory if the agent:
>
> (a) has and habitually exercises a general[26] authority to negotiate and enter into[27] contracts on behalf of the enterprise [*pour le compte de l'entreprise*] unless the agent's activates are limited to the purchase of goods or merchandise; or
>
> (b) habitually maintains in the first-mentioned territory a stock of goods or merchandise belonging to the enterprises from which he regularly delivers goods or merchandise on its behalf.

24. We mention this because it is doubted by Hans Pijl in *Agency Permanent Establishments:* in the name of *and the Relationship between Article 5(5) and (6)*, ("Pijl") Part 2, 67 Bulletin Intl. Taxn. 2, p. 74, (2013), Journals IBFD, in relation to a number of persons from the United Kingdom he names. The reason we can be sure that none of the persons he names (although Mr Smallwood should be Ms Smallwood) were lawyers is that in the United Kingdom the legal professions (barristers and solicitors) do their own training, then lasting (JFAJ believes) 2½ years (with a law degree, which Messrs Leach and Lord did not have), and rather longer without, and it is by no means unusual, and is often desirable, for a prospective lawyer to take a first degree in a different subject. The people we are considering would have been recruited by the Revenue (strictly by the civil service and allocated to the Revenue, probably for only part of their careers) in the fast stream straight from university (then probably meaning Oxbridge, but not necessarily only after a first degree). If he had taken the time out to become a lawyer he would no longer have been eligible. Mr Leach read English, and Mr Lord, the other member of the Fiscal Committee from the United Kingdom, read classics, both at Cambridge. Mr Leach moved to become Under-Secretary at the Ministry of Pensions and National Insurance in 1958; Mr Lord later became a member of the Board of Inland Revenue and Deputy Chairman, moved to the Department of Trade and Industry in 1971, then the Treasury, leaving to become Deputy Chairman and Chief Executive of Lloyd's of London. (Who's Who and Who Was Who). A very small number of people reached this grade starting from Inspector of Taxes. JFAJ is aware of only one example of a legally qualified person in this position: Barry Pollard, whom he knew. He had become a barrister through taking a correspondence course, while an Inspector (Obituary, The Times, 9 August 2012).

25. Where we have done this we have cross-references where the rest of the draft or treaty article is set out.

26. The OEEC Model Commentary explains "general" as follows: "Where the agent is, for example, merely allowed to enter into contracts at prices and terms fixed by the enterprise, thus having no discretionary power at all, the authority held by such agent cannot be deemed to be a *general* authority to negotiate and enter into contracts. In this connection, however, the fact must be pointed out that, under the provisions of the London and Mexico Drafts (Article V, paragraph 4A, of the Protocol) as well as under the provisions of a number of conventions would appear to be sufficient to constitute that agent [has] a permanent establishment, such authority not necessarily having to be a *general* one.' (FC/WP1(56)1 (17 September 1956)). Later, the *general* was dropped on the ground that 'in all cases the authority must be to some extent circumscribed." (FC/WP1(57)2, 29 August 1957).

27. Changed from *conclude* in the United Kingdom-Germany Income and Capital Tax Treaty (1954). It reverted to *conclude* in TFD/FC/25 (2 October 1957) and FC(58)1 (31 January 1958). There does not appear to be any difference in meaning.

> An employee of the enterprise shall be deemed to be a permanent establishment of the enterprise if he also satisfies the further conditions of (a) and (b)….[28]

We shall look at its predecessors, starting with the earliest League of Nations 1927 and three 1928 Drafts.[29] These drafts included "agencies" in the definition of permanent establishment without any further explanation such as a requirement about contracting in the name of the principal.

UK agency profits treaties in the 1930s

Similar wording to paragraph 4(a) of the WP1 draft ("the agent has and habitually exercises a general authority to negotiate and conclude contracts"), together with the equivalent to paragraph (b), had been in use in the United Kingdom in ten treaties relating to agency profits since the early 1930s,[30] though Germany was not one of the ten countries with which there was a treaty. Germany was one of the countries that gave rise to the 1930 legislation giving authority to make these treaties, but in 1937 it amended its interpretative guidelines on the law to stop taxing foreign enterprises if they acted through a commercial agent or commissionnaire.[31] As of 1955 the interpretation was again changed to exclude *Kommissionäre* and *Makler* not acting outside their ordinary business as well as *Handelsvertreter* without a general authority to conclude contracts binding on the principal (*allgemeine Vollmacht*),[32] so a

28. FC/WP1(56)1 (17 September 1956). The quotation is continued in the text at *infra* n. 129.
29. C,216 M 85; C.562 M 178. All these documents are available on http://setis.library.usyd.edu.au/oztexts/parsons.html under Legislative History of US Tax Conventions vol. 4 Part 1 (League of Nations) and Part 2 (OEEC) ("Legislative History"). All these documents are set out by Pijl (*see supra* n. 24) and we refer to their contents only when relevant to our argument.
30. Pursuant to enabling legislation in the Finance Act 1930 section 17, the United Kingdom concluded treaties with: Sweden (1931), Switzerland (1932) (the only one of the countries which were the cause of this legislation, *see* below), Finland (1935), Canada (1936), Newfoundland (1936), Netherlands (1936), Greece (1937), Norway (1939), South Africa (1939), New Zealand (1942). Their purpose was recorded in the 1930 League of Nations report as being to enable the United Kingdom to conclude double taxation agreements to avoid double taxation resulting from the divergent definitions of the term autonomous agent (http://setis.library.usyd.edu.au/oztexts/parsons.html under Legislative History of US Tax Conventions vol 4 Part 1 (League of Nations) and Part 2 (OEEC) at 4206; the clause is set out at 4212)). The Revenue's briefing to Ministers, however, disclosed that Germany, Switzerland and Belgium had started to retaliate for the UK legislation that had been changed in 1915 to tax the principal even when the UK agent did not receive the proceeds from the transaction (though little tax was collected because contracts were made abroad) and to tax UK residents doing business through agents in those countries, so the treaties were really made on account of self-interest (UK National Archives file IR 63/125).
31. Before 1937, Germany taxed foreign enterprises – in the absence of a PE – if a permanent agent/representative was appointed in Germany (*im Inland … ein ständiger Vertreter bestellt ist*). Under domestic law it was not relevant whether or not that person could conclude contracts; mere factual work was sufficient (para. 3 Income Tax Act 1925, later para. 49 Income Tax Act 1934). Since 1937 the amended interpretative guidelines (Veranlagungsrichtlinien 1937 para. 49 Ziff. 2, renewed by EStR 1941 Abschn. 148) provided that in a non-treaty context taxation would be suspended upon application if the permanent agent/representative was a *Großhändler*, *Handelsagent* or *Kommissionär* who was registered in the German trade register.
32. EStR 1955 Abschn. 222 (still similar now R 49.1 Abs. 1 EStR 2005). A *Handelsvertreter* who had no *allgemeine Vollmacht*, however, did constitute a PE if he maintained a stock of merchandise belonging to that enterprise from which he regularly filled orders on behalf of the enterprise (*see* the text around *infra* n. 79).

treaty in this form would not have had any different effect.[33] This is an example of one of the UK 1930s agency profits treaties:[34]

> The profits or gains to which this Article relates are any profits or gains arising, whether directly or indirectly, through an agency in the United Kingdom to a person who is resident in Switzerland and is not resident in the United Kingdom, unless the profits or gains either—
> (i) arise from the sale of goods from a stock in the United Kingdom; or
> (ii) accrue directly or indirectly through any branch or management in the United Kingdom or through an agency in the United Kingdom where the agent has and habitually exercises a *general*[35] *authority to negotiate and conclude contracts*.[36]

It may be asked why the last sentence stopped there without the addition of "on behalf of" or "in the name of."[37] The reason is that what mattered from the UK point of view was merely whether there was a contract at all. If there was, the United Kingdom could then analyse whether it was made in the United Kingdom, in which case it would tax under domestic law and the treaty did not prevent this, or whether it was made elsewhere, in which case it did not tax in domestic law and the treaty had no effect.[38] The wording had the advantage that the other country could read it as it wanted (and probably did). We have not found any earlier treaties than this series of UK agency profits treaties which use this wording.

33. While the change in 1955 apparently tried to adapt the national term of permanent agent to the term "agency PE" in then recent German tax treaties (such as the art. II(L)(bb) UK (1954), *Schlussprotokoll* zu art. 4 no. 10 Austria (1954), art. 2(C) US (1954); *see* Blümich, EStG, 8. Aufl. 1960, para 49, sec. 1871; Heining, *Besteuerung der Ausländer*, 1956, sec. 43, Hidien, in: Kirchhof et al., EStG, para 49 Rn. 1645 et seq.) it is difficult to link the treaty practice to the restrictions of the national term in 1937 (and 1941), because – as far as JL can see – no treaty at that time contained a definition of the agent PE which excluded independent agents by their ordinary course of business (*Schlussprotokoll* no. 4 DTT-Sweden (1928) excluded "entirely independent agents").
34. The Relief from Double Income Tax on Agency Profits (Switzerland) Declaration 1932 (SR&O 1932 No. 925) (emphasis added).
35. *See infra* n. 126 for an explanation of the meaning of *general* in the later OEEC Model Commentary.
36. This wording has some similarities with earlier UK domestic law in F(No. 2)A 1915: "A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under section forty-one of the Income Tax Act, 1842, as amended by this section, in the name of [*see infra* n. 86] the branch, factor, agent, receiver, or manager." This treats agency in the same way as branches etc and does not deal with contracting. The Revenue's evidence to the 1920 Royal Commission stated that the effect of the word "indirectly" was that "the non-resident became liable if he derived any profits or gains indirectly as well as directly through or from any branch, agency, etc, thereby surmounting the difficulty which arose where the contract and delivery were made abroad." (Minutes of Evidence q 10,309(c) (Mr F L Mace, Assistant Chief Inspector of Taxes)). JFAJ is not aware of any authority supporting this, which seems to put more weight on one word than is justified.
37. An example where "on behalf of" was added to a treaty otherwise in similar form to the UK agency profits treaties is Southern Rhodesia-South Africa (1939) (In 1939 South Africa made an agency profits treaty with the United Kingdom which is the obvious source of the drafting).
38. In view of UK tax law it is surprising that the draft did not refer to where the contract was made. However, a later (1957) draft (FC/WP1(57)3 (12 November 1957), previously TFD/FC/25 (2nd October, 1957)) did so (the reference to *general* authority had been dropped in FC/WP1(57)2 (29 August 1957), and negotiate *and* conclude was first changed to negotiate *or* enter into in FC/WP1(57)2, and then *negotiate* was dropped in FC/WP1(57)3):

    > 4. A person acting in one of the territories on behalf of an enterprise of the other territory –other than an agent of an independent status to whom paragraph 5 applies – shall be deemed to be a permanent establishment in the first- mentioned territory if he has and habitually exercises *in that territory* an authority to contract on behalf of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise.

The League of Nations 1929 Draft on the definition of autonomous agent

In 1929 the League of Nations Fiscal Committee issued a Report defining Autonomous Agent and Permanent Establishment.[39] The Report starts by setting out four criteria that were used by countries: (a) dependent agents were those who had power to conclude contracts, which they described as "admissible but was not applicable to every case," (b) there is no "permanent establishment" unless the agent has a fixed depot, (c) that the only agents regarded as not autonomous were those in receipt of fixed emoluments, and (d) continuity of the relations between the agent and the enterprise. From this they concluded:

> The fundamental principle is:
>
> When a foreign enterprise regularly has business relations in another country through an agent established there, who is authorised to act on its behalf, it shall be deemed to have a permanent establishment in that country. A permanent establishment may be presumed to exist:
>
> (1) When the agent carries out the whole or part of his activities in an office or other premises placed at his disposal by the enterprise;
>
> (2) When the office or premises where the agent carries out the whole or part of his activities are designated by outward signs as being an establishment of the enterprise itself;
>
> (3) When the agent is habitually in possession, for the purposes of sale, of a stock of goods belonging to the enterprise, exclusive of samples;
>
> (4) When the agent, having a business headquarters in the country, is a duly accredited agent *(fondé de pouvoirs)* who habitually enters into contracts on behalf of the enterprise for which he works;
>
> (5) When the agent is an employee who habitually transacts commercial business on behalf of the enterprise in return for remuneration….
>
> …
>
> *Commentary*. The essential elements of the relationship between the agent and the foreign enterprise which constitutes a permanent establishment are:
>
> (1) The authorisation given the agent to *act for* the foreign enterprise;[40]
>
> (2) The fact of his carrying out these transactions *regularly*; and
>
> (3) The fact of his carrying them out in an *establishment*.
>
> In connection with the application of such a principle, it is immaterial where the contract is concluded, or where title to property passes.[41]

The Committee started by seeing what states did in practice and then tried to find a common solution. Interestingly for what happened later they rejected the idea of using the power to conclude contracts as the main test, saying that it was "admissible but was not applicable to every case." If one excludes the first two of their four cases which are essentially ones where there is a fixed establishment rather than an agency, one is essentially left with what the original WP1 draft adopted of an agent with power to contract or a stock of goods.

39. C516.M.175.1929II on the website *supra* n. 29.
40. Originally the draft had the following words at the end "(that is to say in the name and on behalf of that undertaking)." During the discussion this was deleted on the proposal of the Dutch and Italian representatives.
41. C516.M.175.1929II on the website *supra* n. 29. The latter part of the quotation is in the text at *infra* n. 109.

The League of Nations Mexico and London Drafts

The League of Nations Mexico (1943) and London (1946) Drafts contained the following:

> 1. The term "permanent establishment" includes head offices, branches, mines and oil-wells, plantations, factories, workshops, warehouses, offices, agencies, installations, professional premises and other fixed places of business having a productive character.
>
> 2. A building site (*chantier de construction*) constitutes a "permanent establishment" when it is destined to be used for a year at least or has been in existence for a year.
>
> …
>
> 4. When an enterprise of one of the contracting States regularly has business relations in the other State through an agent established there who is authorised to act on its behalf, it shall be deemed to have a permanent establishment in that State.
>
> A permanent establishment shall, for instance, be deemed to exist when the agent:
>
> A. Is a duly accredited agent (*fondé de pouvoir*) and habitually enters into contracts for the enterprise for which he works; or
>
> B. Is bound by an employment contract and habitually transacts business on behalf of the enterprise in return for remuneration from the enterprise; or
>
> C Is habitually in possession, for the purpose of sale, of a depot or stock of goods belonging to the enterprise.
>
> 5. As evidence of an employment contract under the terms of B above may be taken, moreover, the fact that the administrative expenses of the agent, in particular the rent of premises, are paid by the enterprise….[42]

The Commentary provided:

> According to the above-mentioned provisions, there seem to be consequently four distinct criteria according to which a foreign enterprise may be deemed to have an establishment in the country where it deals through an agent:
>
> (a) Power of the local agent to bind the enterprise;
>
> (b) Existence of a contract of employment with a local agent;
>
> (c) Maintenance in the country of a stock of goods under the control of an agent for sales in that country;
>
> (d) Payment of the rent of the premises used by the agent and of his office expenses.
>
> Any of these four conditions is sufficient to render an enterprise liable to income tax in its own name in the country where an agent operates, provided that the condition which is fulfilled corresponds to a permanent state of things or an habitual practice.

This continues to contain the germs of the two aspects of the WP1 draft, contracting on behalf of the principals and being in possession of a stock of goods. That draft does not contain anything about employees, although this was included in the 1954 United Kingdom-Germany Income and Capital Tax Treaty[43] considered below.

42. C.88.M.88.1946.II.A on the website *supra* n. 29. The quotation is continued in the text at *infra* n. 115.
43. *Convention between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, Treaties IBFD.

German and UK treaties before the OEEC

Before considering the OEEC Working Party draft we should note the state of treaty provisions in Germany and the United Kingdom. The United States-United Kingdom Income and Capital Tax Treaty[44] (1945) was the UK's first comprehensive tax treaty. The agency provision included the following:

> The term "permanent establishment" when used with respect to an enterprise of one of the Contracting Parties means a branch, management, factory or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf….[45]

This followed closely the 1930 agency treaties wording, including the stock of goods and the general authority to negotiate and conclude contracts.

The United Kingdom then made a large number of treaties in the same form (with some minor variations, such as the treaty with Australia contained no reference to negotiation or *general* authority, and applied only where the prices were not fixed by the foreign enterprise) with its Dominions and dependencies. The same applied to treaties with other countries.[46] The treaty with Germany (1954) is dealt with under the next heading. Employees are also dealt with in it but without regard to whether they concluded contracts.

The pattern of German treaties of the time was similar, also using the equivalent of "on behalf of" ("*für ein Unternehmen*") but the equivalent of "exercises…an authority to… conclude contracts" ("*Vollmacht…zu Vertragsabschlüssen…ausübt*") means contracting "in the name of," that is that the principal is bound by the contract. In four treaties[47] the same wording about the general authority to negotiate and conclude contracts and the stock of merchandise provision, and an exclusion for commission agents, brokers and independent agents acting in the ordinary course of business, was used. A German unilateral but reciprocal ordinance for the avoidance of double taxation in relation to Greece (1944)[48] was worded differently, by including "permanent agencies," and excluding agents without any authority to conclude contracts. The stock of merchandise provision was included.

The United Kingdom-Germany Income and Capital Tax Treaty (1954)

The United Kingdom-Germany Income and Capital Tax Treaty (1954), signed only two years before the OEEC WP1 started work on the permanent establishment article, closely followed the pattern of the UK 1930s agency profits treaties in relation to agency permanent establishments but with the addition of contracting *on behalf of an enterprise/für ein Unternehmen*. We are fairly sure that the addition of the words contracting *on behalf of an enterprise/für ein Unternehmen* was understood differently in each country, when each read it through the spectacles of domestic law. As we have seen the focus of UK legislation was

44. *Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, Treaties IBFD.
45. Art. II(1)(l), the quotation is continued in the text at *infra* n. 120.
46. Including The Netherlands (1948), Denmark (1950), France (1950), Norway (1951), Finland (1951), Belgium (1953), Switzerland (1954) (no stock of goods provision), Germany (1954), Austria (1956) (exclusion specifying for Austria *Handelsmakler* and *Kommissionär*).
47. Treaties with Austria (1954) (limited to permanent agencies), Canada (1956), United States (1954) (the exclusion adding custodians), United Kingdom (1954).
48. In 1952 it was mutually agreed with Greece that the ordinance should remain in effect.

whether a contract was made and, if so, whether it was made in the United Kingdom; in Germany it was *whether the principal was bound* by the contract. Being bound was not an issue in the United Kingdom because all agents bound the principal, even if not disclosed.[49] Certainly whether the agent's contract bound the principal had no effect for tax purposes and it would have been impractical if treaties depended on whether the contract was binding. So nobody in the United Kingdom would originally have read "on behalf of" as meaning binding. In Germany, on the other hand, the term *Vollmacht…ausüben,…Verträge… abzuschließen* (exercise a general authority to conclude contracts) indicates strongly, from a German law point of view, the power to conclude contracts binding on the principal regardless of the meaning of "on behalf of."

The agency permanent establishment part of United Kingdom-Germany Income and Capital Tax Treaty (1954) read:

> (aa) … The term [permanent establishment] shall also be deemed to include –
>
> an employee who is permanently retained by an enterprise of one of the territories to work in the other territory, whether or not that enterprise has a fixed place of business in the other territory, if he is engaged in activities carried on with a view to obtaining profits for the enterprise in that other territory,[50] and
>
> in the United Kingdom an agent, in the Federal Republic a *Handelsvertreter* or other *selbständiger Vertreter*, who has and habitually exercises a general authority to negotiate and conclude contracts on behalf of an enterprise [*für ein Unternehmen*] of the other territory, or maintains a stock of merchandise belonging to that enterprise from which he regularly fills orders on its behalf….[51]

An interesting feature of this is that they were careful to specify by using the German terms what kinds of agents were being dealt with,[52] something that was not possible in a model for use by many countries.

49. Subject to the exception for agency contracts that expressly or by implication made only the agent liable, and the possible exception for agents of foreign principals, *see* the heading *The differences between the civil law and common law of agency*.

50. The inclusion of the employee seems to be based on a proposal made by Prof. Spitaler (18 April 1951, p. 14) which seems to have been sent to the UK delegation before the July 1952 meeting. The German version is: *Die dauernde Beschäftigung eines Angestellten im anderen Staat gilt als Betriebsstätte selbst dann, wenn dort keine Anlagen oder Einrichtungen des Unternehmens bestehen.* Free translation: The permanent engagement of an employee in the other country is a deemed PE, even if there are no sites or facilities of the enterprise. The final part seems to have evolved during the meeting: With regard to the discussion on 14 July 1952, the German Niederschrift, p. 4, says (authors' translation): UK delegation confirmed their agreement that the permanent engagement of an employee in the other country is a deemed PE, even if there are no sites or facilities of the enterprise, provided that the work of the employee is aimed at deriving income for the enterprise in the other country. This shows that *Bühring* (Betriebs-Berater 1954, 945/946) was incorrect in saying that this reflects UK treaty practice according to which every employee who permanently works for the benefit of his employer in the other state is deemed to be a PE even if his work is restricted to advertising or to supervising the delivery of goods, which is not a correct statement of UK treaty practice (or tax law). UK treaties do not make a distinction between agents and employees (often these are treated together, as in Austria-United Kingdom (1956), which is similar to Austria-Germany (1954), Canada-Germany (1956) and United States-Germany (1954)). We think this provision is found in UK treaties only in Germany-United Kingdom (1954).

51. The quotation is continued in the text at *infra* n. 124.

52. The German *Niederschrift über die Besprechung des deutsch – englischen Doppelbesteuerungsabkommensin London vom 14 .- 21.7.1952*, p. 5, indicates that it was Mr Mersmann who suggested to use both the original English and German terms: *Ministerialdirektor Mersmann führte aus, daß die englischen Begriffe „bona fide broker" und "general commissions agent" unübersetzt in Artikel II Abs.l Buchstabe k (i) übernommen werden, dass jedoch zur Berücksichtigung deutscher Verhältnisse die deutschen Begriffe Handelsmakler, Kommissionäre, Handelsagenten, soweit sie nicht unter Artikel II Abs.l Buchstabe k fallen, hinzugefügt werden sollen.*

3.1. The meaning of "agent"

We are fortunate in having detailed records of discussions during the negotiation of this treaty in the UK National Archives and the *Bundesarchiv*[53] in which the parties tried to understand the differences between the countries. This first extract taken from the UK archives and not sent to the German delegation is obviously written by an Englishman trying to interpret what Mr Mersmann is saying:

> In the German view, the test of the existence of an agency is whether the man is a permanently appointed representative[54] of his firm. The Germans impose taxes on finding that a firm has such a permanently appointed representative. For an agent to be a permanent establishment, therefore, (a) he must be an employee of the firm,[55] and (b) the firm must maintain a fixed place of business in the foreign country. The English view appears to be that the question of agency arises only where there is no fixed place of business, and the possession of general authority or the holding of a stock of goods then constitutes the man an agent. Herr Vogel[56] said that, in the United Kingdom, an agent is treated as a permanent establishment when he has general authority. In Germany, an agent with general authority is only a permanent establishment when the agent also administers the fixed place of business of the firm itself. The English term is therefore narrower,[57] and one of us should drop his view. The Germans think that a permanent establishment demands a fixed place of business on the part of the firm itself. In addition to the stock test, the agent must, under German law, have his firm's stock in order to be a permanent establishment. If the stock belongs to the agent himself, he is not a permanent establishment. Mr Willis [leader of the UK delegation[58]] said that, on the stock question, he would agree since, if the stock belongs to the agent, it must have been sold to him by the foreign firm and he is then selling for his own profit, i.e. he is not an agent in the strict sense of the word. On the question of administering a fixed place of the firm itself, this differs from our law, as we say, if a firm appoints someone to act for it and gives him general authority to sell goods, this is the same thing as a firm's setting up a branch here with its own employees. He would, therefore, not like to go further away from the United Kingdom general law that we have done already in the draft. Dr Mersmann [leader of the German delegation[59]]

53. *See supra* n. 3.
54. *See infra* n. 136.
55. *See* the reference to employee in the first paragraph of (aa) above.
56. Horst Vogel, not Klaus Vogel.
57. On the basis of the previous sentence that in the United Kingdom all agents with a general authority without a fixed place of business of the principal constitute a PE for the principal, while in Germany there must be a general authority and a fixed place of business which the agent administers, one would have thought that it was the German term that was narrower.
58. JFAJ had the privilege to have sat on two committees with Mr Robert Willis (1909-2001) after he had retired as Deputy Chairman of the Revenue in 1971: the major one being *The Structure and Reform of Direct Taxation, Report of a Committee chaired by Professor J E Meade* (IFS, George Allen & Unwin, London, 1978), and the other being C T Sandford, J R M Willis and D J Ironside *An Accessions Tax* (London, IFS, 1973). He was not a lawyer, though you would not know this from the impeccable answers below. He was a classical scholar, gentleman, superb administrator, and a man who did not need to raise his voice to win an argument; he had thought out every consequence of his argument, so one was forced to agree with him. He shared that last quality with Mr Mersmann (*see infra* n. 59), but in another respect they were opposites. While Mr Mersmann spent his working life in the field of international taxation Mr Willis may have been dealing with double taxation today but he might well be moved to something completely different, say death duty policy, tomorrow, to which he would bring the same acuteness of mind uncluttered by preconceptions. In fact he seems to have spent a considerable time on double taxation in the period we are considering.
59. Mr Mersmann was very much a tax professional, and matters of international taxation were a focal point of his administrative, judicial and scientific work. He was educated as a lawyer and entered the financial administration in 1930. After the war – before and during which he was denied promotion for his Jewish origins on his mother´s side (he was awarded, according to available sources, the title of a Dr h.c. only in 1967; it remains unclear why the UK minutes name him as Dr Mersmann, which seems deliberate because the minutes for 14 to 21 July 1952 list Mr (Horst) Vogel, Dr Bühring, Mr Schultze-Brachmann, Mr Wollenweber and Prof. Spitaler; *he is also named* Dr Mersmann *in* some letters sent to him until October 1952, whereas from January 1953 onwards such letters are correctly addressed to *Herr Mersmann*). We therefore refer to him as Mr Mersmann except in quotations from the English archives which refer to him

> agreed in principle, subject to approval, and accepted the English point of view. He suggested that later the draft should be amended so that instead of saying that a permanent establishment includes an agent with general authority, he would rather say that an agent with general authority shall be treated as if he were a permanent establishment.[60] Mr Willis agreed to this.
>
> Dr Mersmann wanted to know, further, what is meant by an agent in the United Kingdom, (a) is he always independent?, (b) does he contract exclusively in the name of others or in his own name? Mr Willis said that the main characteristic of an agent is that he holds himself out to be Mr X selling for the Y company, and not as an employee of Y. He is therefore independent, but has an arrangement with Y to sell their goods and is paid by them on commission. He pointed out that we can have a case of X selling on his own account and also as the agent for Y under conditions which show that he is really representing Y. It is further possible for one person to be an agent for two or more companies in such circumstances that all are regarded as liable to tax in the United Kingdom on what they are selling through it. He said that it was often difficult to say whether arrangements are such that the foreign company is taxable here. The connection between it and its agent must be reasonably close. Dr Mersmann said that the English term 'agent' was narrower[61] than the German term "Handelsagent,"[62] as the latter does not include a man carrying on business on his own account. Mr Willis said that in English law a man might carry on business on his own account and at the same time be an agent for someone else. Dr Mersmann tried to find a formula to do justice to both sides, and suggested "a person who has permanent general authority and carries on business on behalf of a foreign enterprise shall be considered as a permanent establishment." Herr Vogel asked whether we could include the words "belonging to the firm in [the definition of permanent establishment]. Mr Willis thought we could. He said, however, that we may find it awkward to get words bringing in the idea of agent without bringing in the word 'agent' itself. "We shall see what we can do, and wish to avoid the difficulty flowing from the fact that 'agent' has no German equivalent".[63]

The first paragraph shows quite a deep level of discussion but we suspect they never understood what was really meant by general authority. We think that Mr Mersmann meant that the principal was bound by the agent's contract, while Mr Willis meant that the agent made a contract, "binding" being an irrelevancy. This suspicion is supported by the second para-

as Dr Mersmann. He was appointed head of the tax department within the financial administration of the so called Unified Economic Area of post war Germany and contributed greatly to the reconstruction of a nationally functioning fiscal system. Starting early in the 1950s he represented the Federal Republic in tax treaty negotiations. He was active in the OECD and a leading member of the IFA. In 1962 Mr Mersmann was appointed president of the Federal Fiscal Court and presiding judge of its senate dealing with international and corporate taxation. He also published numerous scientific books and papers on international taxation and taught at university. If one met Mr Mersmann, as a former colleague and his successor as president of the Court once wrote, one could learn how persuasive a low voice can be, if it is an expression of thought-out conviction.

60. German domestic law distinguishes between a PE meaning a fixed place of business of the enterprise and a *ständiger Vertreter*. According to sec. 49 ITC both, if in Germany, render a foreign enterprise liable to German taxation. However, since 1937/1955 the effect is restricted by the decree of the tax administration, *see supra* n. 31 et seq. The fiction in article 5, paragraph 5 of the OECD Model of agents being treated as PE is not mirrored in German law. This has a practical consequence: if Germany can tax according to article 5(5) of the OECD Model, the foreign enterprise will be liable to income or corporate tax, but – in the absence of an own PE according to German tax law – not to trade tax. (However, the *Vertreter* may or may not be liable to trade tax depending on whether he carries on a business – and is not an employee of the foreign enterprise).
61. As before, this is puzzling. On the basis that a German *Handelsvertreter* cannot at the same time carry on business on his own account, but the UK agent can, this says nothing about the width of the term agent when the UK agent is acting as such (and not as a principal). This suggests that Mr Mersmann thought that in the United Kingdom the term agent included the situation where the person was acting as a principal.
62. The expression *Handelsagent* was formerly used in the German Commercial Code, but was not in general use. In 1953, it was replaced by the usual expression *Handelsvertreter*. Mr Mersmann informed the UK delegation (Mr Brookes, The Board Room, Inland Revenue, Somerset House) by letter of 27 March 1954 about this change. Later drafts and the final version of the treaty reflect this.
63. UK National Archives, file IR40/9629A, Minutes 14 July 1952 (afternoon) at 6.

graph which is a delightful example of misunderstandings piled on misunderstandings. Mr Mersmann starts by asking what he sees as a simple question: whether a UK agent contracted in the name of the principal or in his own name, showing what he really wanted to know was who the agent's contract bound: the relevant issue from his point of view. This was misinterpreted by Mr Willis by assuming that contracting in his own name meant acting as a principal (he could just as well interpreted it as meaning whether the principal was disclosed, but for some reason he did not). He adds that there is nothing to prevent a person being an agent for one transaction and a principal for another. The answer was further misinterpreted by Mr Mersmann to mean that in the United Kingdom the term "agent" includes a person who acts as a principal, which is wider than the German concept. They then proceed to try to draft something to cover this supposed difference. By then we were knee-deep in misunderstandings and drafting a treaty on the basis of them. All this because Mr Mersmann asked what to him was a perfectly ordinary question using technical vocabulary ("in the name of") that had no meaning in the United Kingdom. This is not to be critical of him; anyone in his position would have done the same. But it shows the dangers of assuming that your own legal system applies universally.

3.2. The meaning of "broker"

The following is an extract from the minutes about the meaning of "broker" taken by the United Kingdom, which is more helpful because it contains verbatim quotations:[64] Although this relates to what is now article 5(6) it is included here because the main focus of the discussion is about the authority of a broker to conclude contracts.

This started with a discussion of the term "bona fide broker" and "general commission agent." Mr Willis [leader of the UK delegation] pointed out that the broker as known in England, is a person interested in selling a particular class of goods. He is not specifically appointed as the agent of any producer, e.g. a tea grower, he merely sells this article. He has therefore to find both the buyer and the seller. The same applies to a broker on the stock exchange. His sales are usually made in the United Kingdom, therefore in principle there should be liability to tax on the part of an overseas seller. But as the broker is not the exclusive agent for any particular seller, and as London is an important commodity market, it is undesirable to tax such profits. There is, therefore, a special exemption in Income Tax Law for sales by a non-resident through a bona fide broker. Mr Willis also gave a general description of the United Kingdom concept of a general commission agent. Dr Mersmann [leader of the German delegation] asked whether a broker could have a general authority from a foreign enterprise. Mr Willis said that a broker almost always has a general authority because it is in the nature of a commodity exchange for it to be made at the ruling market price at the time of sale. Dr Mersmann asked whether a broker has the same type of general authority as an agent. Mr Willis: "No, as the broker acts on his own behalf, i.e. he does not buy first and then sell, instead the sale is made by the producer to the customer through the broker. On the other hand, the general authority of an agent is that of negotiating and concluding contracts." Dr Mersmann asked whether this authority is limited to certain classes of goods and whether the prices are limited. He also put forward two further points: – (1) What is the distinction between an agent and a broker? (2) What constitutes general authority? To take the second point first, he said that the "general authority" as used in (k) [the definition of

64. UK National Archives, file IR40/9629, 15 July 1952 (morning session).

permanent establishment] had been explained as the equivalent of "Generalformat" [(sic) it probably means *Generalvollmacht*]. The holder has authority not only to conclude contracts but to take charge of organisational matters, i.e. he has full powers to deal with his principal's business. Does "general authority" correspond to this concept, or is it confined to selling certain classes of goods? As to the first point, he has been told that [an *agent*, crossed out and a *broker* substituted] can act for several principals. Is the difference between an agent and a broker that the former acts on behalf of one principal and the latter on behalf of many? Mr Willis: "As to the distinction between an agent and broker, in principle an agent acts for a particular principal and a broker acts for several. More accurately, the agent is a person regularly appointed by an enterprise to act on its behalf as a separate part of the agent's business. A broker is a man who will act for any enterprise which wants business done in his commodity. In some cases, however, one man may have several agencies." Dr Mersmann asked whether a broker is free to sell in his own name. Mr Willis replied that the sale is not from broker to customer, but from producer to customer.

After discussion among themselves, the Germans said that they now understood that a "Markler" [(sic) it should be *Makler*, which sounds the same],[65] was more or less equivalent to a broker.[66]

It is difficult to see how the German delegation can possibly have reached the conclusion in the second paragraph that a *Makler* who merely brings the parties together, was more or less equivalent to a broker based on this exchange.

There was little discussion of commission agents and *Kommissionär* except that Mr Mersmann mentioned as one of the German types of agent:

> A commission agent carrying on business on account of his firm but in his own name.

One is full of admiration for the searching nature of Mr Mersmann's questions and for Mr Willis's answers, including the latter's impeccable explanations of the law of agency when he was not a lawyer. This is obviously a discussion between two intellectual giants searching for a meeting of minds that they never quite reach, simply because they failed to start with understanding the basics of each other's law of agency; indeed, there is no suggestion that they understood that there were differences. A good example is the last sentence of the first paragraph: Mr Mersmann is asking about the civil law concept of the broker selling in his own name, and the reply is given from point of view of the common law concept of agency as a single contract binding the principal to the third party made through the agent, rather than the broker acting as a principal. Similarly, Mr Willis was asked earlier whether the broker's general authority is the same as that of the agent and he replies "No, as the broker acts on his own behalf, i.e. he does not buy first and then sell, instead the sale is made by the producer to the customer through the broker," although we are not sure why the answer was not *yes* because the last words correctly describe a normal agency, and the UK broker is no different, but the rest is clear. The only point to come out clearly is that the broker normally acts for many principals, and the agent normally acts for one.

65. The civil code definition is: "Someone who undertakes commercially the solicitation of contracts concerning the purchase and sale of goods or securities, insurance, shipping and forwarding of goods, marine charter or other commercial matters for other persons, without being authorised to do so on a regular basis by contractual relationship, has the rights and duties of a *Handelsmakler*." It is limited to people who bring the parties together without contracting at all.
66. UK National Archives, file IR40/9629A, Minutes 15 July 1952 (morning) at 8.

Suppose, hypothetically, the final question and answer had been:

> Dr Mersmann asked whether a broker is free to sell in his own name, in other words: does he bind only himself and not the enterprise? Mr Willis replied that he had no idea because binding was not a consideration that had ever crossed his mind as it was irrelevant in UK tax law, but he would send for The Solicitor of Inland Revenue.[67]

On arrival The Solicitor would have said that while the question was meaningful in civil law with its defined categories of agency contract, it was difficult to apply to the potentially infinite variety of types of contract in common law, none of which has pre-defined legal consequences, as every case depended on its facts.[68] While the normal rule was that the principal, rather than the agent, was liable, it was perfectly possible to envisage particular cases where the facts pointed towards the agent, rather than the principal, being liable. But it was not possible to answer the question in principle.

One can imagine it taking only a fraction of a second before Mr Mersmann immediately saw the significance of this and would have said that they had been talking for some time at cross purposes because who was bound by the contract was of fundamental interest from the German point of view, so they better go back to the beginning. How different history might have been!

Because of these earlier discussions the members of WP1 may have not thought it necessary the go over the ground again. But it is clear that they never got to the bottom of the differences between the civil law and common law of agency, or even appreciated that there was a difference.[69] They are not likely to have corresponded about a difference that they did not appreciate existed.[70]

The OEEC draft

We repeat the wording of the OEEC first draft of the agency permanent establishment provision:

> 4. An agent acting in one of the territories on behalf of an enterprise [*pour le compte d'une entreprise*] of the other territory – other than an agent of an independent status to whom paragraph 5 applies – shall be deemed to be a permanent establishment in the first-mentioned territory if the agent:
>
> (a) has and habitually exercises a general[71] authority to negotiate and enter into[72] contracts on behalf of the enterprise [*pour le compte de l'entreprise*] unless the agent's activates are limited to the purchase of goods or merchandise; or
>
> (b) habitually maintains in the first-mentioned territory a stock of goods or merchandise belonging to the enterprises from which he regularly delivers goods or merchandise on its behalf.
>
> An employee of the enterprise shall be deemed to be a permanent establishment of the enterprise if he also satisfies the further conditions of (a) and (b)….[73]

67. The Revenue's senior in-house lawyer.
68. *See* the heading above *The differences between the civil law and common law of agency*. He might also have added the slight uncertainty about the continued existence of the presumption about the liability of agents for foreign principals (*see* the text around *supra* n. 16).
69. While Mr Leach was not a lawyer, Mr Mersmann was, but this made no difference; what was needed was a lawyer who was aware of the other system.
70. For the reason why we refer to corresponded, rather than discussed, *see* the text at *infra* n. 149.
71. *See supra* n. 26.
72. *See supra* n. 27.
73. FC/WP1(56)1 (17 September 1956). The quotation is continued in the text at *infra* n. 131

The final version, which was included in the OEEC First Report (1958) and then the OECD 1963 Draft, contained the important change from contracting "on behalf of" to "in the name of." How and why the change was made is something of a mystery for which no explanation is contained in the minutes. The draft went through the following changes:[74]

Document and date of minutes	**FC/WP1(56)1 17 September 1956**	**FC/WP1(57)1 5 January 1957**	**FC(58)2 13 February 1958**	**TFD/ FC/32rev 19 March 1958**	**FC(58)2rev1 19 April 1958**	**C(58)118 22 May 1958 (French); 28 May 1958 (English)**
Original language	English	English	French	English and French	French	French
First reference (in the opening line of paragraph 4 above)						
English	on behalf of	on behalf of	on behalf of	on behalf of	in the name of	on behalf of
French	pour *le* compte *de*	pour *le* compte *de*	pour *le compte de*	pour *le compte de*	*au* nom *de*	pour *le compte de*
Second reference (in paragraph 4(a) above)						
English	on behalf of	on behalf of	on behalf of	on behalf of	in the name of	in the name of
French	pour *le* compte *de*	au nom *de*	au *nom de*	pour *le compte de*	au *nom de*	*au* nom *de*

It is difficult at first sight to make sense of these changes. Although the UK and German members of the Working Party were working in English, on 5 January 1957 the person translating the original English minutes into French changed the second reference to *au nom de*, meaning binding the principal. The difference between the two languages was noticed on 19 March 1958 and the original was restored. But on 19 April 1958 in a revision to the 13 February 1958 Fiscal Committee report the opposite change was made so that both references were to in the name of/*au nom de*. It is unclear how we reached the final version in May 1958 but at the Fiscal Committee meeting from 5 to 7 May 1958 the minutes record that the committee "instructed the secretariat to incorporate certain drafting changes in the final text,"[75] and so the change was presumably one of these. What does seem to be clear is that from 5 January 1957 *au nom de* was constantly (with one aberration) in the second reference and in the end the English was made to conform. The first reference was constantly (again with one aberration) in its final version. One of the problems is that the Working Party were working in English and the Fiscal Committee's original minutes were in French.

If therefore, as we believe, the United Kingdom and Germany had been reading general authority to enter into contracts "on behalf of" differently, the German understanding had now prevailed.[76] All this was after WP1 had finished its work and so we do not know how seriously the changes were considered by Mr Leach although he was on the Fiscal Committee

74. We acknowledge that the research on this was done by Professor Richard Vann in "Travellers, Tax Policy and Agency permanent establishments" [2020] BTR 6 at 20. We have merely tabulated the changes.
75. FC/M(58)3, 16 June 1958.
76. We can assume that Mr Mersmann had no reason to object to the final wording which represented what was to be expected from a German point of view. In a speech given in October 1959 at the Fachkongreß der Steuerberater in Cologne he expressly referred to the requirement of a Vertreter having and habitually exercising an authority to conclude contracts *in the name of* the enterprise (*see* Steuerberater-Jahrbuch 1959/60, p. 35 (61)).

and would (or should) have seen the changes. We suspect that the United Kingdom woke up to the significance of the change to "in the name of" only much later, and since in principle all agent's contracts are binding on the principal it did no harm, except in those rare cases where on the true construction of the contract only the agent was liable. Apart from these cases, the only agents it excluded were those who did not contract at all. Mr Leach would never have agreed to a criterion that depended on whether the contract bound the principal as this depended on the facts of individual cases and would have been far too uncertain to be administered in the United Kingdom.

The OEEC Commentary

The Commentary needed to explain why it had departed from the Mexico and London approach which it did by referring back to the commentary to the 1928 Draft[77] (which is the same as the 1927 Draft) in stating that:

> 14. Persons who may be deemed to be permanent establishments must be strictly limited to those who are dependent, both from the legal and[78] economic points of view, upon the enterprise for which they carry on business dealings (Report of the Fiscal Committee of the League of Nations, 1928, page 12).

The removal of the stock of goods provision

The second alternative to concluding contracts in the WP1 proposal was that the agent: "habitually maintains in the first-mentioned territory a stock of goods or merchandise belonging to the enterprises from which he regularly delivers goods or merchandise on its behalf." This applied therefore in all cases where the agent did not conclude contracts, initially "on behalf of," and ultimately "in the name of," the enterprise. This provision was not used in UK domestic law but, as we have seen, derived from the 1930s agency profits treaties and was in use in all UK treaties and post-WWII German treaties. In the same WP1 draft, one might think somewhat inconsistently,[79] "the maintenance of a stock of merchandise, whether in a warehouse or not, merely for convenience of delivery" was excluded from constituting a permanent establishment except where the agency provision applied.[80] The reference to the stock of goods so far as the agent was concerned was deleted by WP1,[81] and the Fiscal Committee added this explanation to the Commentary:

> 16. During the drafting of the Article it was at one stage suggested that one of the tests that should be used to determine whether or not an agent is to be regarded as a permanent establishment should be the availability in the country in which the agent operates and at the disposal of the agent of a stock of goods or merchandise belonging to the enterprise. This is, of course, a

77. The drafts merely referred to "agencies" without any further explanation.
78. This should be "or" (and in consequence "both" should be deleted) as the 1928 Draft was defining independent agent as being independent on both counts, in which case dependency would be satisfied by only one of them, as the US court accepted in *The Taisei Fire and Marine Insurance Co., Ltd., et al v. Commissioner of Internal Revenue* 104 TC 535.
79. The UK delegate to the Fiscal Committee said he was unable to accept this provision and said it would make a formal reservation if it were approved, FC/M(57)1 (8 February 1957), *see* the correction to the minutes in FC/M(57)2 (3 July 1957). This is strange as it was UK treaty policy to include it. Presumably the explanation lies in the inconsistency, which did not arise in UK treaties.
80. FC/WP1(56)1 Appendix 1 (17 September 1956).
81. It was not contained in FC/WP1(57)2 (29 August, 1957), or the final draft adopted by the Fiscal Committee (TDF/FC/25, 2 October 1957), the Commentary stating that the reason was to give the same result as for non-agency permanent establishments.

> criterion commonly employed in bilateral Conventions for the avoidance of double taxation. For a number of reasons this suggestion was not pursued and in its present form paragraph 4 of the Article is founded on the view that the only real criterion is the nature of the authority entrusted to the agent; in brief, whether or not he has and habitually exercises an authority to enter into and conclude on behalf of the enterprise.[82]

The change is significant because those agents who did not contract (using the ultimate wording) "in the name of" the enterprise, such as the *Kommissionär/commissionnaire* and *Handelsmakler/courtier*,[83] were no longer relevant and could have been deleted from what is now article 5(6).[84]

4. The Origin of What is Now Article 5(6)

UK legislation of 1915 and 1925 and the meaning of broker and general commission agent in common law

The original source for what is now article 5(6) can be traced to the much earlier UK legislation of 1915:[85]

> Nothing in section forty-one of the Income Tax Act, 1842 (as amended by any subsequent enactment or by this section), shall render a non-resident person chargeable in the name of[86] a broker or general commission agent, or in the name of an agent, not being an authorised person carrying on the nonresident's regular agency or a person chargeable as if he were an agent in pursuance of this section, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent.

The context of this legislation was that the previous requirement for the agent to receive the proceeds of the transaction before he could be taxed was removed because tax was being avoided by the agent arranging not to receive it, which, as we have seen, led to the 1930s agency profits treaties.[87] This exception was provided for the removal of doubts because brokers, general commission agents and non-regular agents had not been regarded as agents in the sense of the legislation that led to the principal trading *in* the United Kingdom (which

82. FC(58)1 (31 January 1958). As we have seen, the final words later became '*in the name of* the enterprise.'
83. It may seem unlikely that a *Handelsmakler/courtier* would hold a stock of goods. Indeed, the business of a *Handelsmakler* (as described by the German Commercial Code) did not entail holding a stock of goods for the enterprise. However, this is recognised as a possibility by the Mexico and London Drafts: '6. The fact that a broker places his services at the disposal of an enterprise in order to bring it into touch with customers does not in itself imply the existence of a permanent establishment for the enterprise, even if his work for the enterprise is, to a certain extent, continuous or is carried on at regular periods, *and even if the goods sold have been temporarily placed in a warehouse* (our italics).' The business of a *Handelsmakler* did not entail holding a stock of goods for the enterprise.
84. The only reservation we have to this is that the current UN Commentary to Article 5 at paragraph 26 states that the former Group of Experts on International Cooperation in Tax Matters understood that if all the sales-related activities take place outside the host state and only delivery by an agent takes place there this would not lead to a PE, but if sales-related activities (for example, advertising or promotion) are also conducted in the state a PE may exist. It is considered that the original OEEC provision (and the UK 1930s agency profits treaties) did mean that there is a PE even if only deliveries were made from the stock of goods.
85. Finance (No. 2) Act 1915 section 31(6).
86. Another problem is the use of 'in the name of' here in the completely different sense of in whose name the assessment was made, but it may have meant that Mr Leach was not alerted to the change in article 5(5) because the words were vaguely familiar. Here the expression refers to the fact that a broker will or will not receive a tax assessment "in his own name" but for the account of the foreign enterprise, i.e. the latter is chargeable to tax but the assessment is not "in its name" but "in the name of" the broker. If assessed, the broker pays the tax and collects it from the enterprise.
87. *See supra* n. 30.

was the taxing criterion),[88] although it had the (probably unintended) effect that if the broker or general commission agent was an authorised person carrying on the foreign principal's regular agency the foreign principal became taxable.[89] This provision was the subject of some criticism to the 1920 Royal Commission[90] who made the point that the 1915 provision had not really been tested because of wartime conditions and they recommended that it should be kept under review. The 1925 Law, which is considered next, must have been the outcome. It now imposed conditions for the exclusion of transactions through brokers and general commission agents (even if they acted regularly for the principal), which seems to have comprised most independent agents, leaving the principal to be taxed on transactions carried on through a regular agent, whether or not the agent received the proceeds.[91] At the same time the "ordinary course of his business" requirement was introduced:

> (1) Where sales or transactions are carried out on behalf of a non-resident person through a broker *in the ordinary course of his business as such*, and the broker satisfies the conditions required to be satisfied for the purposes of this section, then, notwithstanding that the broker is a person who acts regularly for the non-resident person as such broker, the non-resident person shall not be chargeable to income tax in the name of that broker[92] in respect of profits or gains arising from those sales or transactions.
>
> (2) The conditions required to be satisfied for the purposes of this section are that the broker must be a person carrying on bona fide the business of a broker in Great Britain or Northern Ireland, and that he must receive in respect of the business of the non-resident person which is transacted through him remuneration at a rate not less than that customary in the class of business in question.
>
> (3) In this section the expression 'broker' includes a general commission agent.

One point of interest is subsection (3) defining broker to include a general commission agent, indicating that they are similar.[93] It is difficult to establish the meaning of them today

88. UK National Archives file IR63/55 at 97; 1920 Royal Commission on the Income Tax, 1920, Cmd.615, Minutes of Evidence q 10,307(a).
89. UK National Archives document IR63/112 at 133.
90. Report at 48, 49. The Special Commissioners were quoted in evidence to the 1920 Royal Commission as describing the section as "a rambling section of uncertain meaning". (Minutes of Evidence p. 288 at 289, para. 5833). The case referred to was almost certainly *Gavazzi v. Mace* (1926) 10 TC 698 (heard with *Boyd v. Stephen*), in which Rowlatt J (a very distinguished tax judge) was equally puzzled by the section (at 744): "I have great difficulty in understanding the fabric of this enactment. First of all, I do not quite see why you want the words 'broker or general commission agent' at all, because a broker or general commission agent is an agent who is not an authorised person carrying on a regular agency of the non-resident person, and therefore they would be protected without being mentioned at all. But they are put in, I suppose, as a sort of indication of the line on which the draftsman's mind is travelling before he comes to the phrase which supersedes these words, and expresses a larger idea which includes them." Scrutton LJ in *Wilcock v. Pinto & Co* (1924) 9 TC 111 at 136 said of another subsection of this section: "Now, I am disposed to agree that it is rather difficult to know what that clause exactly means."
91. Finance Act 1925, section 17.
92. *See supra* n. 86.
93. The difference seems to be that broker did not have possession of the goods and contracted (in the sense of describing what the contract said, which did not in any way affect the liability of the principal) in the name of the principal, and a general commission agent had possession of the goods, and might contract (again in a descriptive sense) either in his own name or in that of the principal. The Inland Revenue's briefing to Ministers in connection with the Finance Act 1925 said that non-residents used general commission agents for selling produce or raw materials, rather than manufactured goods (UK National Archives file IR 63/112, p. 204). However, the explanation of the difference was the other way round during the negotiations for the United Kingdom-Germany Income and Capital Tax Treaty (1954) (IR40/9629A) Minutes of the meeting on 14-21 July 1952 at 86. The German notes are to the same effect: *Der Unterschied zwischen broker und general commissions agent ist lediglich der, daß der general commissions agent in der Regel die Geschäfte von Halbwaren oder Fertigwaren vermittelt, während der broker in der Regel Geschäfte mit Naturprodukten*

as there is no legal definition of them since contracts are not categorised in common law as they are in civil law, and commercial practices have moved on. Jowitt's Dictionary of English Law[94] defines them in this way:

> Broker. An agent for the purchase and sale of goods, being employed by an intending seller to find a buyer, or by an intending buyer to find a seller. His remuneration consists of a commission or payment (called brokerage) proportionate to the price of the goods sold. Brokers differ from factors (q.v.) in the following respects: they generally contract in the name of their principal, while factors may buy and sell either in their own name or in that of their principal; they are merely negotiators between the parties, and are therefore not entrusted with the possession or control of the goods, while factors are. Stockbrokers are an exception to these rules.[95]
>
> Factor [commission agent]. Traditionally the term "factor" was associated with an agent employed for the sale or purchase of goods, often by a principal in another country, in return for remuneration termed factorage or commission…. Even in the 19th century, factors often played an important financial role in dealings in goods, whether acting as a commission agent (q.v.) or by extending credit to either or both of the principal and third party.
>
> Commission agent. An agent authorised by its principal to contract with third parties but so as to create privity of contract between only the agent and the third party and not between principal and third party.[96] However, the relationship in English law between such agency and the undisclosed principal doctrine is unclear,[97] resulting in doubt about possible rights and liabilities as between principal and third party.

It will be seen from the penultimate sentence of the definition of broker that brokers who bring the parties together in similar manner to the *Handelsmakler* exist in English law, such as estate agents today, but this is not the normal meaning of broker in the context we are considering. Brokers and commission agents must have been similar for the 1925 Act to have defined broker to include a general commission agent. A more practical explanation of the difference between them was given in the Inland Revenue's evidence to the 1920 Royal Commission on Taxation:[98]

> Then there is the general commission agent, who sells any goods consigned to him or takes orders for transmission to any trader with whom he can get into touch, although not regularly acting for him nor authorised to describe himself as the non-resident's agent. And there is the broker, who merely acts as salesman for goods, and has no other duties than to sell the goods at the market price and remit the proceeds, less his charges.[99]

vermittelt. (Niederschrift über die Besprechung des deutsch – englischen Doppelbesteuerungsabkommens in London vom 14. - 21.7.1952, p. 5).

94. Sweet & Maxwell, 3rd ed. 2009.
95. Another definition is contained in Stroud's Judicial Dictionary, Sweet & Maxwell, 8th ed, 2012: Brokers "are those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward" (Jacob, cited by Best C.J., *Gibbons v. Rule*, 4 Bing. 306; this definition is derived from the Act Against Brokers 1604 (c.21),…; *see also* the Bank of England Act 1697 (c.20), section 60, where the definition is, those who 'make or drive' bargains). A broker is not put into possession of the property to be sold, as a factor is (*Baring v. Corrie*, 2 B. & Ald. 143, cited Factor). *See Lake v. Simmons [1927] A.C. 487*." Also "As I understand that expression [broker], it is used technically, and is used in reference to a class of persons who, by the custom of certain markets, are entitled and recognised as being entitled, to act for both purchaser and seller." *Wilcock v. Pinto & Co* (1924) 9 TC 111, 129 *per* Bankes LJ.
96. This seems to refer to the 19th century agent for a foreign principal or to the civil law *commissionnaire* rather than the common law general commission agent in UK tax law.
97. *See supra* n. 14.
98. Cmd.615.
99. Mr F L Mace p. 506, at 508 para. 10,314.

Other evidence to the Royal Commission included that of a Liverpool solicitor, on behalf of 15 US packing houses who sold through commission agents, expressing concern about the uncertainty of the section's meaning.[100]

As the definition of broker above indicates, a distinction, although one with different consequences, also existed in English law concerning in whose name contracts were made: commission agents (or factors) contracting either in their own name or (in contrast to the *Kommissionär*) that of the principal; and brokers contracting in the name of the principal. It is important to emphasise that this is a statement of what the contract said; the method of contracting made no difference to whether the principal was bound by the contract made by the agent.

The expression "acting in the ordinary course of business" in this general context can be traced to the UK Factors Act 1889, which included this provision:

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him *when acting in the ordinary course of business of a mercantile agent*, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.[101]

Factors were similar to commission agents, who might or might not disclose the principal when contracting.[102] Where the principal was undisclosed the purchaser was protected by this provision when the factor had no right to sell, for example because the agency had been terminated. The requirement that the factor was "acting in the ordinary course of business as a mercantile agent" was interpreted to mean such things as that the transaction took place during business hours, at a proper place of business, and in other respects in the ordinary way one would expect a mercantile agent to act. One case decided that the sale of the entire stock in trade (inventory) of a business (an art gallery) was not in the ordinary course of business.[103]

In tax law, the agents in *Boyd v. Stephen*[104] did not qualify as general commission agents:

> I think [the agents] were doing something clearly outside the scope of general commission agents: and, if it is said that at Liverpool people, who are there called commission agents, do this work, I am afraid the only result of it is that I must hold that what is understood by 'general commission agents' by those people is not what the Act of Parliament means....[105]

The reason was:

> But it does seem to me that this fact of their accepting a bill by which these people [the foreign undisclosed principals] were entitled to get their money, in advance, differentiates them entirely, and must differentiate them, from the position of a general commission agent.

This shows that an agent who did something other than a straightforward sale or purchase did not qualify as a general commission agent and was akin to a regular agency; presumably

100. Evidence at 270 paras. 5473, 5474.
101. Section 2(1), (emphasis added).
102. The term factor (or *institor*) was also used in German law from the 14th century for an employee in the foreign country who concluded contracts in his own name.
103. *Mortimer-Rae v. Barthel* (1979) 105 DLR (3rd) 289.
104. (1926) 10 TC 698, 746.
105. At 746.

the 1925 Act imposed the ordinary course of business condition on such agents to clarify the situation.

The League of Nations 1927 and 1928 Drafts

The League of Nations 1927 and 1928 Drafts are clearly based on this UK legislation, a memorandum on which had been tabled before the League of Nations committee on 3 January 1927, and so the UK law was known to them at the time.[106] The following table compares the two.

Finance Act 1925, section 17	**League of Nations 1927 and 1928 Drafts**
(1) Where sales or transactions are carried out on behalf of a non-resident person through a broker in the ordinary course of his business as such, and the broker satisfies the conditions required to be satisfied for the purposes of this section, then, notwithstanding that the broker is a person who acts regularly for the non-resident person as such broker, the non-resident person shall not be chargeable to income tax in the name of that broker in respect of profits or gains arising from those sales or transactions. (2) The conditions required to be satisfied for the purposes of this section are that the broker must be a person carrying on bona fide the business of a broker in Great Britain or Northern Ireland, and that he must receive in respect of the business of the non-resident person which is transacted through him remuneration at a rate not less than that customary in the class of business in question. (3) In this section the expression "broker" includes a general commission agent.	The fact that an undertaking has business dealings with a foreign country through a *bona fide* agent of independent status (broker, commission agent, etc.), shall not be held to mean that the undertaking in question has a permanent establishment in that country.* The Commentary stated: The words "*bona fide* agent of independent status" are intended to imply absolute independence, both from the legal and economic point of view. The agent's remuneration must not be below what would be regarded as a normal remuneration.**

* Art. 5 (1927), art. 5 (1928 draft 1a), art. 2 B (draft 1b), art. 3 (draft 1c). The original of the 1928 Drafts is in English (confirmation obtained from the League's archivist). In the French version the words in brackets are courtier, commissionnaire etc. The Commentary to all of these Drafts explains that "'bona fide agent of independent status' are intended to imply absolute independence, both from the legal and economic point of view".

** This was contained in the League of Nations 1927 and 1928 Commentaries; and in the 1929, 1930, 1933 and Mexico and London Drafts themselves.

The same concepts (broker, commission agent, though not *general* commission agent,[107] *bona fide*, and, in the League of Nations Commentary, normal remuneration) are included in both, the main difference being that reference to the ordinary course of business[108] is missing from the League's draft. The League's draft also includes other independent agents subject to the same conditions, but the UK expressions probably comprise most independent agents.

106. League of Nations document D.T.82, Archives, Geneva. We are grateful to Sunita Jogarajan, Associate Professor, Melbourne Law School, University of Melbourne, for providing us with this document.

107. *General* commission agent in the UK legislation. A *general* commission agent has been interpreted in case law to mean that the agent holds himself out as ready to work for clients generally, in the manner of a broker, thus showing the similarity between them: *Fleming v. London Produce* (1968) 44 TC 582. However, in the US *Taisei* case (*supra* n. 78) the addition of any other agent of independent status was read as removing the need for the agent to offer its services publicly as held in the *London Produce* case, so that in this regard the UK law is not applicable.

108. This phrase may derive from "acting in the ordinary course of business as a mercantile agent" in Factors Act 1889, section 1(2), factors being commission agents, *see infra* n. 143.

The League of Nations 1929 Report on the meaning of autonomous agent

A different approach is found in the 1929 Fiscal Committee Report defining Autonomous Agent and Permanent Establishment.[109] Having set out the general principle (dealt with above) they deal with the exceptions:

> A broker who places his services at the disposal of an enterprise in order to bring it into touch with customers does not, in his own person, constitute a permanent establishment of the enterprise, even if his work for the enterprise is continuous or carried on at regular periods.
>
> Similarly, a commission agent *(commissionnaire)* who acts in his own name for any number of undertakings and receives the normal rate of commission does not constitute a permanent establishment of any of the undertakings he represents.
>
> Lastly, there cannot be held to be any permanent establishment in the case of commercial travellers not coming under any of the above-mentioned categories.
>
> *Commentary*.… This concept excludes:
>
> (1) Casual or even frequent transactions through a broker, because such an intermediary merely brings the parties together;
>
> (2) Sales through a commission agent who acts in his own name for any number of parties;
>
> (3) Travelling salesmen who have no establishment.
>
> It is important to distinguish the agent who constitutes a permanent establishment from the commission agent *(commissionnaire)* who acts in his own name and not in that of the party for whose account he acts. The commission agent is, under the law of many countries, an independent person in business for himself and is responsible to persons buying from him the products which the real vendor has shipped to him to sell.
>
> In most instances, the buyers do not know the real seller and the latter does not know the buyers. Each looks to the commission agent, whose primary role is that of a responsible intermediary between sellers and buyers who would otherwise have difficulty in entering into communication. He usually disposes in wholesale of consigned stocks and keeps no permanent stock on behalf of any one seller.
>
> The commission agent *(commissionnaire)* in this sense is not to be confused with the so-called commission agent *(agent à la commission)* who has a stock of goods belonging to a foreign enterprise on consignment and makes retail sales out of it continuously for the account of the foreign enterprise.
>
> Such a "commission agent" usually acts expressly, if not in fact, for the foreign enterprise, inasmuch as the contract of sale or invoice usually bears the name of the foreign enterprise and the agent usually signs on its behalf.

In contrast to the 1927 provision, these have a strong civil law flavour in spite of the United States (Thomas Adams) and the United Kingdom (Sir Percy Thompson) being represented on the Committee of only ten. This is particularly so in limiting the exclusion to "sales through a commission agent who acts in his own name for any number of parties," with the addition of "(*commissionaire*)" after references to commission agent, and the exclusion of "even frequent transactions through a broker, because such an intermediary merely brings the parties together", as well as the distinction drawn between a *commissionnaire* and *agent à la commission* (who is more like a common law commission agent) without referring to the common law types of agent. A common lawyer would not think that the effect of the 1927 provision had been covered because the meaning of *courtier* and *commissionnaire* is

109. C516.M.175.1929II on the website *supra* n. 29. The earlier part of the quotation is in the text at *supra* n. 41.

described in the civil law sense and cannot be read as applying to common law brokers (who do contract) and commission agents (who do not necessarily contract in their own name, even if they had read this literally without understanding its civil law implications).[110] The minutes of the discussion demonstrate that misunderstandings existed. In relation to the draft exclusion for agents who dealt in his own name the UK representative said that "a man who dealt in his own name could not be regarded as an agent" thus thinking that he was a principal, and that "he did not fully understand the signification of the words 'in his own name'".[111] As a result the exclusion was deleted but was later reinstated as the one in the text above, referring to "commission agents (*commissionnaires*)".

There seems to have been some confusion about the relationship between the 1927 (and 1928) and the 1929 provisions. The 1929 provisions were repeated in the 1930 Report, which represented a continuation of the discussion,[112] now with a statement about evidence of an employment contract (subsequently paragraph 5 of the Mexico and London Drafts set out below). More surprisingly, the 1931 Draft Plurilateral Conventions[113] reverted to the 1927 provision on its own. Then both the 1927 and 1929 provisions appeared together in the 1933 Report.[114] These changes suggest an unresolved disagreement between the civil law and common law under which the common lawyers must have realized by then that the 1929 provisions were insufficient, and the civil lawyers would have had no difficulty with including the 1927 provision as well if they read the references to broker and commission agent as meaning *courtier* and *commissionnaire*.

The Mexico and London Drafts

Both the 1927 and 1929 provisions were eventually contained in the Mexico (1943) and London (1946) Drafts,[115] the 1927 provision now being contained in paragraph 3 below, and the 1929 provision in paragraphs 4 and 6 (now with the addition of "even if the goods sold have been temporarily placed in a warehouse" for both *courtiers* and *commissionnaires*):[116]

> …
>
> 3. The fact that an enterprise established in one of the contracting States has business dealings in another contracting State through an agent of genuinely independent status (broker, commission agent, etc.) shall not be held to mean that the enterprise has a permanent establishment in the latter State.
>
> …
>
> 6. The fact that a broker places his services at the disposal of an enterprise in order to bring it into touch with customers does not in itself imply the existence of a permanent establishment for the enterprise, even if his work for the enterprise is, to a certain extent, continuous or is carried on at regular periods, and even if the goods sold have been temporarily placed in a warehouse.

110. But even so, limiting the exclusion to cases where he contracts in his own name makes no sense in common law. Also the description of broker is clearly different from the common law broker.
111. Minutes, First Session, October 1929, Annex 1, p. 14.
112. C.340.M.140.1930.II on the website *supra* n. 29. The 1929 Report states that the committee adopted the text on a first reading, which would be examined at the next session in the light of comments received. Legislative History at 4197.
113. C.415.M.171.1931.II.A on the website *supra* n. 29.
114. C.399.M.204.1933.II.A on the website *supra* n. 29.
115. C.88.M.88.1946.II.A on the website *supra* n. 29. The earlier part of the quotation is in the text at *supra* n. 42.
116. Cf. the 1929 provision: "He usually disposes in wholesale of consigned stocks and keeps no permanent stock on behalf of any one seller".

> Similarly, the fact that a commission agent *(commissionnaire)* acts in his own name for one or more enterprises and receives a normal rate of commission does not constitute a permanent establishment for any such enterprise, even if the goods sold have been temporarily placed in a warehouse….

The Mexico and London distinction was between dependent and independent agents, with the agent's power to enter into contracts for the enterprise (explained in the Commentary below, as meaning "acts in the name of the enterprise" and "power of the local agent to bind the enterprise") being only one of four ways to create dependence (*see* 4.A to D and 5 in the quotation above.)[117] Since *courtiers* and *commissionnaires* could fail to be independent on this basis because they held a stock of goods or (less probably) the principal paid the rent of premises or office expenses,[118] there was a free-standing exemption for them "even if the goods sold have been temporarily placed in a warehouse". The exception was subject to conditions, such as receiving the normal rate of commission for *commissionnaires* that was previously only in the commentary to the 1929 provision. The Mexico and London Commentary provided:

> According to Article V, paragraph 3, of the Protocol, a foreign enterprise is not, in principle, liable to income tax in a country if its operations in that country are exclusively carried out through a broker, commission agent, or other agent of a genuinely independent status in that country. *An agent, however, will not be considered as independent, according to Article V, paragraph 4, of the Protocol, and the enterprise for which he acts will be liable to income tax in the country where he is established in cases such as the following: the agent habitually acts in the name of the enterprise concerned as a duly accredited agent and enters into contracts on its behalf; the agent is a salaried employee of the enterprise and habitually transacts business on its account; the agent habitually holds, for the purpose of sale, a stock of goods that belong to the enterprise.*
>
> …
>
> On the other hand, paragraphs 6 and 7 of Article V of the Protocol stipulate that foreign enterprises doing business in a country through brokers and commissioned agents of a genuinely independent status, or through commercial travellers visiting customers or suppliers in a country, should not be liable to income tax in that country.

The Commentaries, which it is understood were prepared entirely by the secretariat without the Committee's approval, provided a somewhat unconvincing explanation for the coexistence of the 1927 and 1929 provisions: that paragraph 3 of the text (the 1927 provision) is a general statement about independent agents, and paragraph 6 (the 1929 provision) explains who is not independent (*see* the passage we have italicized), thus leaving scope for the existence of other independent agents who (a) are not employees (and the principal does not pay the rent or office expenses), (b) contract in their own name, and (c) do not hold a stock of goods.

The common lawyers on the committee were presumably content with the draft as it included the 1927 provision that they could read as excluding brokers and general commission agents in the same way as in the UK 1925 Law. Had the committee considered the Commentary, which it is understood that they did not, the common lawyers would presumably not have been satisfied by it as it effectively describes the effect of the 1929 provisions and leaves no scope for common law brokers and commission agents who might bind their principal. The effect would have been that the United Kingdom could no longer tax transactions where the

117. *See* text at *supra* n. 42.
118. Article V, paragraph 5 of the Protocol stated that such payments will be regarded as proof of a contract of employment, leading to the existence of a PE.

agent did not bind the principal, which might still have been the effect of the presumption that agents did not bind foreign principals.[119] But since the United Kingdom made no treaties following this draft the point is academic.

German and UK treaties before the OEEC

The part of the United States-United Kingdom Income and Capital Tax Treaty (1945) dealing with what was not a permanent establishment was:

> …An enterprise of one of the Contracting Parties shall not be deemed to have a permanent establishment in the territory of the other Contracting Party merely because it carries on business dealings in the territory of such other Contracting Party through a bona fide commission agent, broker or custodian acting in the ordinary course of his business as such.[120]

The exception for "a bona fide commission agent, broker or custodian acting in the ordinary course of his business as such" closely followed the UK 1925 Statute.

The United Kingdom then made a large number of treaties in the same form with its dependencies. The same applied to treaties with other countries.[121] The treaty with Germany (1954) is dealt with under the next heading.

The pattern of German treaties of the time was similar. In four treaties[122] an exclusion for commission agents, brokers and independent agents acting in the ordinary course of business, was used. The ordinance regarding Greece (1944) did not (yet) contain the ordinary course of business qualification in the exclusion for commission agents and independent representatives.

The United Kingdom-Germany Income and Capital Tax Treaty (1954)

The part of the article dealing with what is not a permanent establishment was:

> In this connexion –
>
> […]

119. *See* text around *supra* n. 16.
120. Art. II(1)(l). The earlier part of the quotation is in the text at *supra* n. 45.
121. Including the Netherlands (1948), Denmark (1950), France (1950), Norway (1951), Finland (1951), Belgium (1953), Switzerland (1954) (no stock of goods provision), Germany (1954), Austria (1956) (exclusion specifying for Austria *Handelsmakler* and *Kommissionär*). The most common variation was to omit *general* before commission agent (e.g. Austria-Germany (1954), Belgium-Sweden (1953), Canada-France (1951), Denmark-United States (1948), Finland-United States (1952), France-Norway (1953), Greece-United States (1950), Honduras-United States (1956), Indonesia-Netherlands (1954), Ireland-United States (1949), Italy-United States (1955), Japan-United States (1945), Netherlands-Norway (1950), Netherlands-Sweden (1952), Netherlands-United States (1948), South Africa-Netherlands (1946), Switzerland-United States (1951), United Kingdom-United States (1945)), suggesting that it meaning was not understood. Other less frequent variations were not to include "*bona fide*" (e.g. France-Norway (1953), Germany-United States (1954)) or "ordinary course of business" (e.g. Canada-France (1951), France-Norway (1953)).
122. Treaties with Austria (1954) (limited to permanent agencies) („*Ständige Vertretungen werden als Betriebsstätten behandelt, wenn…ein Kommissionär, Makler oder ein anderer unabhängiger Vertreter über den Rahmen seiner ordentlichen Geschäftstätigkeit hinaus…Geschäftsbeziehungen für ein Unternehmen des anderen Staates unterhält.*" [literally: Agent is a PE, if acting outside the scope of their ordinary course of business]), Canada (1956) („*Eine Betriebsstätte wird nicht…angenommen, weil ein Unternehmen… Geschäftsbeziehungen durch einen…unabhängigen Vertreter unterhält, der im Rahmen seiner ordentlichen Geschäftstätigkeit handelt.*" [literally: Agent is not a PE, if acting inside its ordinary course of business]), United States (1954) (the exclusion adding custodians) (the German is the same as in the treaty with Canada), United Kingdom (1954) (the German is the same as in the treaty with Canada).

(bb) A United Kingdom enterprise shall not be deemed to have a permanent establishment in the Federal Republic merely because it carries on business dealings in the Federal Republic through a *Handelsmakler*, *Handelsvertreter* (unless he is a *Handelsvertreter* of the type described in sub-paragraph (aa) above)[123] or a *Kommissionär*, where such persons are acting in the ordinary course of their business as such.

A Federal Republic enterprise shall not be deemed to have a permanent establishment in the United Kingdom merely because it carries on business dealings in the United Kingdom through a *bona fide* broker or general commission agent, where such persons are acting in the ordinary course of their business as such.[124]

We have included in section 3. extracts from the record of negotiations relating to the meaning of *broker* on the basis that the main thrust of the discussion was about whether a broker bound the principal.[125] However, the content is relevant to this section.

The OEEC WP1 draft on what is not a permanent establishment

The following is the part of the first draft of the OEEC WP1 draft on what is not a permanent establishment:

4. An agent acting in one of the territories on behalf of an enterprise [*pour le compte d'une entreprise*] of the other territory – other than an agent of an independent status to whom paragraph 5 applies – shall be deemed to be a permanent establishment in the first – mentioned territory if the agent:

(a) has and habitually exercises a general[126] authority to negotiate and enter into[127] contracts on behalf of the enterprise [*pour le compte de l'entreprise*] unless the agent's activates are limited to the purchase of goods or merchandise; or

(b) habitually maintains in the first-mentioned territory a stock of goods or merchandise belonging to the enterprises from which he regularly delivers goods or merchandise on its behalf.

An employee of the enterprise shall be deemed to be a permanent establishment of the enterprise if he also satisfies the further conditions of (a) and (b).

123. Meaning that he only solicits business and does not enter into transactions in the name of the principal, these being alternatives in the Commercial Code para. 84(1). Mr Mersmann gave the following explanation of the two types of *Handelsagent [Handelsvertreter]* during the negotiations: "(1) where the agent is authorised to mediate only and whose contracts must always be ratified by his principal. (2) where the agent has authority to conclude contracts of sale. This latter type of agent may be placed under certain restrictions e.g. as to price, but he acts viz-à-viz his customers as an independent trader." (UK National Archives IR40/9629A, Minutes, 15 July 1952 (morning session), p. 1) He explained that type (2) creates a PE and type (1) does not. This is correct in a non-treaty context based on the 1937 directive only; both types would be covered by the wording of the law.
124. The earlier part of the quotation is in the text at *supra* n. 51.
125. *See* text at *supra* n. 62.
126. The OEEC Model commentary explains this as follows: "Where the agent is, for example, merely allowed to enter into contracts at prices and terms fixed by the enterprise, thus having no discretionary power at all, the authority held by such agent cannot be deemed to be a *general* authority to negotiate and enter into contracts. In this connection, however, the fact must be pointed out that, under the provisions of the London and Mexico Drafts (Article V, paragraph 4A, of the Protocol) as well as under the provisions of a number of conventions would appear to be sufficient to constitute that agent a permanent establishment, such authority not necessarily having to be a *general* one." (FC/WP1(56)1 (17 September 1956)). Later, the *general* was dropped on the ground that "in all cases the authority must be to some extent circumscribed". (FC/WP1(57)2, 29 August 1957).
127. Changed from *conclude* in United Kingdom-Germany (1954). It reverted to *conclude* in TFD/FC/25 (2 October 1957) and FC(58)1 (31 January 1958). There does not appear to be any difference in meaning.

> 5. An enterprise in one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a broker [*un courtier*], general[128] commission agent [*un commissionnaire général*] or any other agent of a generally independent status where such persons are acting in the ordinary course of their business as such.[129]

Compared to Germany-United Kingdom Income and Capital Tax Treaty (1954) the draft suffers from the disadvantage of not being able to identify the types of agent concerned. There was, of course, an official French version from which we have added what seem to be the vital words. Pausing there, the French translation (it may be described as such because the original version was in English, the working language of the English and German members of WP1) made by the OEEC secretariat which used the apparently natural expressions is extremely significant and is the origin of some real problems of interpretation of article 5(6). There is no connection between the English broker[130] (who, in this sense,[131] does conclude contracts, which generally disclose the principal and were binding on the enterprise)[132], and the *Handelsmakler/courtier* who does not conclude contracts at all. And nor is there any connection between general commission agent (who also concludes contracts which may or may not disclose the principal and will be binding on the principal whether or not they do), and the *Kommissionär/commissionnaire* (who also concludes contracts, but binds only the agent to the third party). Again, this was not something the members of WP1 would have written to each other about; indeed, we do not know whether they understood French.

The members of WP1 may have thought that they had got to the bottom of understanding broker and general commission agent during the United Kingdom-Germany treaty negotiations and so they did not need to do it again. Following the deletion of the stock of goods provision Mr Leach still needed to exclude brokers and commission agents who (using the ultimate wording) did contract in the name of the enterprise. Mr Mersmann might have realised that his civil law *Kommissionär/commissionnaire* and broker/*Handelsmakler/courtier* no longer needed to be mentioned in what became article 5(6). The WP1 draft probably would not have been able to have different civil and common law provisions but, had Mr Mersmann pointed this out, it would have become clearer that the apparently linguistically similar common law and civil law terms general commission agent/*Kommissionär/commissionnaire* and broker/*Handelsmakler/courtier* refer to quite different types of agent, so that further discussion was needed.[133] They cannot have been corresponding or talking to each other about this.

128. Not to be confused with the "general" *supra* n. 126. In UK domestic law this has been interpreted to mean that the agent holds himself out as ready to work for clients generally, in the manner of a broker: *Fleming v.London Produce* (1968) 44 TC 582 at 596H.
129. FC/WP1(56)1 (17 September 1956). The earlier part of the article is in the text at *supra* ns. 28 and 73.
130. We should emphasise the common law difference, as it has no defined types of contract (like *Kommissionär/commissionnaire* in civil law) (*see* the heading *The differences between the civil law and common law of agency*) and so broker and general commission agent are commercial, not legal, terms, the meaning of which is uncertain today.
131. Broker is sometimes used in a similar sense to *courtier*, that of a person who introduces the parties to a contract without taking part in the contract, for example a mortgage broker. This cannot be the relevant sense here where the context is that of the agent entering into contracts.
132. Stockbrokers are an exception since by the rules of the Stock Exchange they contract as if they are principals.
133. This is now recognized by the OECD: "The Working Group noted that the term 'general commission agent' used in the English version of paragraph 6 of Article 5 does not appear to correspond to the term *commissionnaire* used in the French version". (Revised Proposals concerning the Interpretation and Application of Article 5 (Permanent Establishment) (19 October 2012) at paragraph 119.)

The OEEC Commentary on what is not a permanent establishment

The OEEC Commentary appears to have been written by Mr Mersmann without reference to Mr Leach. There are two reasons for saying this, the first specifically German, and the second, relating to civil law more generally, both of which indicate that it cannot have been written by Mr Leach.

The first is the following passage from the OEEC Commentary:

> 16. Where the enterprise carries on business dealings though an agent of a genuinely independent status, such enterprise cannot be taxed in the other contracting State (cf. the reasons given in the commentary on paragraph 4). Corresponding provisions are included in the Mexico and London Drafts (Article V, paragraph 3, of the Protocol) and in numerous other conventions for the avoidance of double taxation. In the Mexico and London Drafts and in the conventions, brokers and the commission agents are stated to be agents of a genuinely independent status. Business dealings carried on with the co-operation of any other independent person carrying on a trade or business (e.g. a forwarding agent)[134] do likewise not constitute a permanent establishment. However, such independent agents must be acting in the ordinary course of their business as such. Where, for example, a commission agent does not only sell the goods or merchandise of the enterprise in his own name but also acts, in relation to that enterprise, as a permanent agent having a general authority to negotiate and enter into contracts, such agent is deemed to be a permanent establishment since he is thus acting outside the ordinary course of his own trade or business (namely that of a commission agent). National legislation may necessitate a supplementation of the examples of independent agent quoted in paragraph 5.[135]

With regard to the example in the penultimate sentence, the term "permanent agent" [*ständiger Vertreter*] was then (and still is) used in German tax law to determine unilaterally whether a foreign business is taxable in Germany. A permanent agent as defined in the German tax code is an agent who consistently conducts business transactions on behalf of an enterprise and is committed to abide by the instructions of the enterprise.[136] The prerequisite for a permanent agent to abide by the instructions of the enterprise is not identical with dependence within the meaning of paragraph 4 and leaves room for a permanent agent being independent within the meaning of paragraph 5. Moreover, an independent agent had, by the contemporary interpretation of the term in German tax law, to act outside its ordinary course of business to qualify as a permanent agent.[137] This prerequisite has been dropped by court rulings after 1972,[138] but may very well be significant for what was, from a German perspective, the understanding of the example at the time of the Working Party. The German approach to determine, for domestic tax purposes, whether an independent agent acted outside his ordinary course of business was then to compare the agent's activities with the legal definition of the German Commercial Code that applied to the particular indepen-

134. Until 1998, section 407 of the German Commercial Code described the forwarding agent (*Spediteur*) as: "A forwarding agent carries out the transportation of goods by concluding transport contracts with freight carriers in his own name on behalf of the sender". (*Spediteur ist, wer es gewerbsmäßig übernimmt, Güterversendungen durch Frachtführer oder durch Verfrachter von Seeschiffen für Rechnung eines anderen (des Versenders) in eigenem Namen zu besorgen.*)
135. FC/WP1(56)1 Appendix 2 (17 September, 1956).
136. Today, section 13 *Abgabenordnung* 1977 (German Fiscal Code of 1977); this legal definition is consistent with the earlier interpretation of the term in case law as it was used in section 49, paragraph 1, subparagraph 2, lit. a of the Income Tax Code since 1934 [before Sec. 3, par. 3, subpar. 2 Income Tax Code 1925]. A permanent agent does not necessarily have the authority to conclude contracts binding on the principal which explains the description of the commission agent in the example as a permanent agent having that authority.
137. Administrative Directive EStR 1955 Abschn. 222; Blümich, EStG, 2. Aufl. 1937, para. 49, sec. 488 lit. b.
138. Ruling of the German Federal Fiscal Court: BFH 28th of June 1972, I R 35/70, BStBl II 1972, 785.

dent agent.[139] Since a *Kommissionär* did not act in the name of his principal according to the German Commercial Code,[140] doing so would be outside his ordinary course of business.

Against the background of this specifically German interpretation of the time, the example may have been intended to equate the legal definition of a particular independent agent with his ordinary course of business. It was thus probably not supposed to show that acting in the name of the enterprise (i.e., concluding contracts binding on the principal) necessarily meant acting outside the ordinary course of business of any independent agent. The example would otherwise even have extended to independent agents governed by the German Commercial Code which, by their legal definition, may have the authority to conclude contracts in the name of their principal and still be independent, such as the *Handelsvertreter*[141] (commercial agent). From this perspective it seems likely that contracting in the name of the enterprise was not meant to be the decisive factor in qualifying activities of any independent agent as, economically, belonging to the sphere of the enterprise, as the example in what is today paragraph 38.7 of the Commentary suggests, but was meant to be only narrowly applied to independent agents which, by their legal definition, act in their own name.

The example makes good sense in German tax law but it depends on the commission agent acting in his own name, a meaningless concept in the United Kingdom which makes no distinction between agents who do, or do not, bind the enterprise based on how they contract. Nor in the United Kingdom is there a commercial code against which to test the activities of the agent. Since a UK broker or general commission agent did bind his foreign principal (in civil law terminology: "act in the name of the principal") a particular broker or general commission agent doing so is obviously not acting outside the ordinary course of his business, and the example is inapplicable in the United Kingdom.[142]

Acting in the ordinary course of business had been in UK domestic tax law for more than 30 years and was well understood,[143] and so one would have expected Mr Leach to have queried the example trying to explain it which makes no sense in common law.[144]

The second reason for saying that the Commentary was written by Mr Mersmann is this passage, which was not in the original but was added in WP1's second draft:

> Although it stands to reason that such an agent [broker, general commission agent or any other agent of an independent status], representing a separate enterprise, cannot constitute a permanent

139. BFH 27th of November 1963, I 335/60 U, BStBl III 1964,76 (ruling on a case from 1955; interestingly, the presiding judge that ruled on this case was most likely Mr Mersmann).
140. Section 383, paragraph 1 of the German Commercial Code states that a commission agent (*Kommissionär*) buys and sells in his own name.
141. Sec. 84, para. 1 of the German Commercial Code.
142. We might add in passing that the example has in any case been wrong since the 1977 Model for the reason given in the text at *infra* n. 161.
143. Although Mr Leach, not being a lawyer, was probably unaware of it, the use of this phrase in the context may also derive from the UK domestic law "acting in the ordinary course of business as a mercantile agent" in Factors Act 1889 section 1(2), factors being commission agents. Because they might sell in their own name, the Act protected the purchaser from the factor selling when he had no right to do so, for example because the agency had been terminated. There is a wealth of case law on the meaning of "ordinary course of business" in this provision.
144. The US branch in a letter of 8 May 1963 signed by the great Stanley Surrey, as Assistant Secretary to the Treasury (*see* E in the Appendix) (TFD/FC/158 (22 May 1963)) also had difficulties with this example, so we are in good company.

> establishment of the foreign enterprise, paragraph 6 has been inserted in the Article for the sake of clarity and emphasis.[145]

Mr Leach certainly would not agree with this because article 5(6) had the important substantive effect of removing a whole class of agents from creating a permanent establishment, and was not something that "it stands to reason" was the case.

It is amazing how Mr Leach allowed both these passages to be in the Commentary. The only possible conclusion is that he cannot have read them. This leads to considering how WP1 must have worked. The WP1 minutes do not say that they actually met in Paris. The WP1 Reports are dated about a month before the Fiscal Committee meetings and were designed to go out with the agenda for those meetings.[146] Travelling to Paris for a meeting a month before the Fiscal Committee and then again for the Fiscal Committee meeting would have been impractical, as travel was by train. So far as Mr Mersmann was concerned the Paris-Ruhr connection had been set up in 1954 and covered the distance from Cologne (the station closest to Bonn) to Paris in less than 6 hours, leaving Cologne early in the morning around 7:00 and arriving in Paris at 12:45. The return journey left Paris at 17:40 reaching Cologne close to midnight. The schedule of the Paris-Ruhr was intended to enable travellers to have a short afternoon meeting in Paris, go back on the same day and have dinner on the train. Unfortunately this did not fit in with Mr Leach's trains. He needed to take the 10:30 Golden Arrow/*Flèsche d'Or* from Victoria which, after an often rough Channel crossing, arrived in Paris at 17:30, with the return train leaving the *Gare du Nord* on the other side of Paris from the OEEC at 12:15 and arriving in London at 19:30.[147] This would only allow a short morning meeting, allowing for the time to get across Paris to the *Gare du Nord.* In practice therefore Mr Leach would have needed to spend two days travelling and spend two nights in Paris and Mr Mersmann had to spend one night in Paris to have a full day's meeting.[148] It is inconceivable that they would do this twice within a month, particularly in view of the currency restrictions at that time. Both of them were members of the Fiscal Committee and they (and others from their countries) may well have discussed the draft a day before or after the meetings of the Fiscal Committee (or an afternoon during these meetings, which we understand was routinely used for advancing the work of the Working Parties). However, we also suspect that the focus of such meetings was on the changes discussed in the Fiscal Committee rather than the type of fundamental discussion that was required. The most likely method of working for WP1 was therefore by correspondence.[149] The problem about this has

145. FC/WP1(57)1 (5 January, 1957). This is still in the OECD Model Commentary as Article 5 Commentary paragraph 36.

146. The minutes have a date, such as "Paris, 17th September 1956" for the first report, so it could have been issued by the OEEC secretariat having received it by post. The dates of the WP1 minutes are always a month or so before the Fiscal Committee meetings so that it could be included with the Fiscal Committee agenda: WP1 17 September 1956, Fiscal Committee agenda containing the WP1 paper 18 October 1956, meeting 29-30 October 1956; WP1 5 January 1957, FC agenda with the WP1 minutes 10 January 1957, meeting 24-25 January 1957; WP1 29 August 1957, FC agenda with WP1 minutes 30 September 1957, meeting 1-3 October 1957; WP1 12 November 1957, FC agenda with WP1 minutes 13 November 1957, meeting 25-26 November 1957.

147. Source: Wikipedia.

148. Either Mr Mersmann arrived in Paris at lunchtime on day 1 and had to wait for Mr Leach to arrive that evening, followed by a full day's meeting on day 2 with Mr Mersmann returning that evening and Mr Leach returning at lunchtime on day 3; or Mr Leach arrived in the evening of day 1, waited for Mr Mersmann to arrive at lunchtime on day 2, meeting that afternoon and the morning of day 3 with Mr Leach returning at lunchtime and Mr Mersmann that evening.

149. JFAJ has looked at the UK National Archives file IR40/11993 ("OEEC: effect of differential tax treatment in various countries") but this contains only correspondence between the United Kingdom and the OEEC sec-

been illustrated in connection with what is now article 5(5): if one does not know that there is a difference between the underlying law of agency, one will not correspond about it. But even the method of working does not explain the apparent lack of UK involvement in the Commentary.

Later changes to the Commentary

Much later, in 1970 there was an interesting exchange in the OECD minutes relating to a question put forward by Germany on whether other independent agents could conclude contracts in the name of the enterprise without creating a permanent establishment:

> 56 Is an independent agent who has an authority regularly to conclude contracts in the name of another enterprise to be regarded as a PE? (German Delegation, TFD/FC/218, p. 18).[150]
>
> 57 The WP is in doubt as to how this question should be answered.
>
> – A *negative answer* is suggested by the definition according to which only dependent agents are deemed to constitute a PE.
>
> In fact, paragraph 4 expressly provides that it does not apply to the fully independent agents covered by paragraph 5. Likewise, paragraphs 14/16 of the Commentaries are based on the assumption that paragraph 4 is only applicable to dependent agents. Accordingly, fully independent agents would not be deemed to constitute a PE even if they are authorized to conclude contracts.
>
> – A *positive answer* is suggested by the fact that an authorized agent normally has to follow the instructions given by the enterprise he represents and that it is therefore doubtful whether he can be regarded as fully independent economically. This view is supported by the fact that the provisions of paragraph 5 covering independent agents are only applicable to the activities carried out by them in the "ordinary" course of their business, i.e., their own business. Paragraph 20 of the Commentaries is obviously based on the assumption that the activities of authorized agents never come under this category.
>
> 58 The WP is inclined to believe that it would be in line with the objective of the definition of the PE – namely, to facilitate international economic relations – if the *authorized independent agent were not deemed to constitute a PE, provided that he is independent of the enterprise "both from the legal and economic points of view*" (see paragraph 15 of the Commentaries).
>
> It appears that the agent is still independent even if the enterprise has given him general instructions on how to exercise his authority. However, he must be regarded as dependent if, for instance, he is required to obtain the approval of the enterprise for each transaction, if his operations as a whole are supervised or if he is subject to other additional controls. The WP thinks that this question should be clarified in the Commentary.[151]

The thought process is along the lines of the dependent/independent distinction, based on legal and economic independence, with economic independence depending on the type of approval, supervision and control exercised by the principal. However, this answer did not satisfy everyone in the Fiscal Committee:

> The Belgian, Portuguese and Turkish Delegations considered that the present interpretation should be kept and therefore were not in favour of the conclusions in paragraph 58, since an agent having authority regularly to conclude contracts effectively represented the enterprise, and, moreover, the criteria proposed in the report for determining the question were likely to be difficult to apply. The Portuguese Delegation added that for Portugal a permanent establishment existed in all cases.

retariat, not country-specific correspondence, so we doubt if any correspondence between WP1 members is available.

150. This refers to a consolidated list of outstanding points on the Draft.

151. FC/WP1(70)1 (17 August 1970).

> The Austrian and Netherlands Delegations, on the other hand, considered that the solution proposed in paragraph 58 was the correct one. The Luxembourg Delegation proposed that the test of independence should be whether the agent bore the financial consequences of the contracts he concluded [paragraph 26 – the Greek Delegation stated that for his country gaming and vending machines constituted permanent establishments].[152]

There seems to be a difference of view about the meaning of independence. The first group thought that the agent was not economically independent because he represented the enterprise, which was the former Mexico and London[153] approach that contracting in the name of the enterprise prevented an agent from being independent; and the second group agreeing with the Working Party, plus Luxembourg which considered that he was economically independent if he bore the financial consequences of the contracts.

Subsequently, Working Party No. 1, which had become Working Group No. 1, still comprising representatives from the United Kingdom and Germany, proposed a new version of the Commentary[154] including the following, of which the parts within square brackets were later deleted and their revised example reverted to its original form:

> 21a. A person will come within the purview of paragraph 5 – i.e., he will not constitute a PE of the enterprise on whose behalf he acts – only if
> – he is independent of the enterprise both legally and economically, and
> – acts in the ordinary course of his business when acting on behalf of the enterprise.
>
> Whether a person is *independent* of the enterprise he represents mainly depends on the extent to which he is required to follow the instructions given by the enterprise.[155] If he has to obtain the approval of the enterprise with respect to individual commercial operations, he cannot as a rule be regarded as independent of the enterprise; this will likewise apply where his overall commercial activities are subject to comprehensive control by the enterprise or where he answers to the enterprise in any other way.
>
> A person cannot be said to *act in the ordinary course of his business* if, in place of the enterprise, he performs activities which, economically, belong to the sphere of the enterprise rather than to that of his own business operations. [*The question as to which activities fall within the scope of the agent's own operations will be determined, among other things, by the (commercial) law of the State in which the agent does business. The agent clearly goes beyond the scope of his own operations if, by virtue of an authority given him by the enterprise, he concludes business transactions on behalf of the enterprise which are binding on the latter*. Another important criterion will be whether the economic and other consequences of a given transaction, i.e. the entrepreneurial risk, have to be borne by the agent or by the enterprise he represents.
>
> 21 b. In addition, paragraph 5 is designed to define the category of agents not covered by paragraph 4. A person who represents an enterprise and who does not satisfy the requirements laid down in paragraph 5 (see para. 19a, above) will have to be treated, by virtue of the parenthetical phrase in paragraph 4 ("other than an agent of an independent status to whom paragraph 5 applies"), in accordance with the principles laid down in the last-mentioned paragraph. Thus, he

152. DAF/CFA/WP1/72/3 (14 February 1972).
153. Since an independent agent within article 5(5) (now article 5(6)) is expressly excluded from article 5(4) (now article 5(5)) it cannot be the case that a person who contracts in the name of the principal is automatically legally independent. The United Kingdom has a domestic law provision referring to legal independence for agents (who do bind the principal): "For this purpose a person does not act in an independent capacity on behalf of X unless the relationship between them, having regard to its legal, financial and commercial characteristics, is a relationship between persons carrying on independent businesses dealing with each other at arm's length" ITA 2007, section 835Y.
154. DAF/CFA/2697 (18 May 1973).
155. This suggests the German permanent agent, *see* text at *supra* n. 136.

> constitutes a PE of the enterprise concerned only if he has, and habitually exercises, an authority to conclude contracts within the meaning of paragraph 4.][156]
>
> *A commission agent, for instance, who, outside the scope of his own commercial activities, concludes contracts on behalf of the represented enterprise after having been given authority to do so no longer falls under paragraph 5; in accordance with paragraph 4, he constitutes a PE if such contracts are concluded regularly and if they are not restricted to the purchase of goods or merchandise or the collection of information.*

Independence is explained in a similar way to the Working Group that the Belgian, Portuguese and Turkish Delegations in the Fiscal Committee thought was difficult to apply,[157] except that it is now drafted in terms of instructions rather than without any reference to supervision. There is an interesting reference to commercial law in the last part of paragraph 21a suggesting that the differences between common law and civil law were being discussed and appreciated. However, the next sentence is written from a civil law point of view with an obvious reference to *commissionnaires*, as in the example, but this is stated to apply generally rather than by reference to commercial law. The example itself has been clarified and improved by being less related to German law, no longer referring to a permanent agent. It is also more neutral in taking commercial law into account as it helpfully gives the starting point that concluding contracts on behalf of the principal is "outside the scope of his own commercial activities". Paragraph 21b is also interesting in accepting that a person who is not within paragraph 5 (now 6), for example by acting outside the ordinary course of business, does not automatically cause a PE, but only if he is falls within paragraph 4 (now 5) by contracting habitually.

The reason for the deletion of the parts between square brackets and the revised example not being adopted was because in the end WP1 decided:

> more generally, to simplify and appreciably shorten the paragraphs so as to depart as little as possible from the former Commentary and not raise discussion on subjects other than the text of the Article.

Among the other changes made by WP1 were that when an agent had authority to conclude contracts in the name of an enterprise, he was a permanent establishment for the purposes of all his activities on behalf of the enterprise (but not any of his other activities). At the same time the exclusion in paragraph 4 (now 5 because building sites were moved to a separate paragraph 3) for purchasing was widened to include all activities in what is now article 5(4).[158] These and some drafting changes (in italics) were incorporated into the Working Group's Third Report[159] which was the basis for the 1977 Model:

> 5. *Notwithstanding the provisions of paragraphs 1 and 2*, where a person – other than an agent of an independent status to whom paragraph 6 applies – is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, *that enterprise* shall be deemed to have a permanent establishment in that State *in respect of any activities which that person undertakes for the enterprise*, unless the activities of such person are limited to *those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.*

156. We have added the square brackets to indicate the passage later deleted, *see* below.
157. *See* text at *supra* n. 151.
158. DAF/CFA/WP1/75.8 (26 March 1975).
159. CFA/WP1(75)6.

> 6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

When the Commentary reverted to the original example based on German law it was not appreciated that it had now gained another problem. The amendment to the text of article 5(5) adding "in respect of any activities which that person undertakes for the enterprise" means that since the agent concludes contracts binding on the enterprise in his capacity as permanent agent there is a permanent establishment also in respect of his other activities as a *commissionnaire*.[160] The issue of whether the *commissionnaire* activities are in the ordinary course of business does not therefore arise, and the words "in respect of this particular activity" in the current Commentary were now wrong.[161]

The next proposed version of the Commentary was a simplified version on the lines of what became the 1977 Model Commentary.[162]

5. Fitting Article 5(5) and 5(6) Together

In spite of the fact that both paragraphs have a UK origin[163] they do not fit together well. This may be because the former was a treaty provision in the agency profits treaties which was not designed to have an equivalent to the latter (although they were found together in a few of those treaties).[164] The latter was a domestic law provision that had no equivalent to the former in domestic law. The problem arises from three principal reasons. First, the difference between civil law and common law, in particular that it is far more common for civil law agents not to contract in a way that binds the principal, which therefore affects the application of article 5(5). Secondly, the two legal systems approach the terms used in article 5(6) in a different way, being commercial terms in common law and legal terms in civil law. Thirdly, the translation problem that broker and general commission agent do not mean the same as *courtier/Handelsmakler* and *commissionnaire/Kommissionär*.

If the agent does bind the principal and is independent the result is the same: either the agent acts in the ordinary course of business and there is no permanent establishment, or he does not and there is a permanent establishment. The problem is that almost all common law agents (including brokers and general commission agents) do bind the principal, while in particular the *courtier/Handelsmakler* and *commissionnaire/Kommissionär* never do so. In other words, although the result is potentially the same it will in practice affect agents in the two legal systems differently.

160. The point of the change, although not in relation of the example, is first referred to in DAF/CFA/WP1/75.8 under the heading paragraph 14 (26 March 1975).
161. Para. 38.7 OECD Model: Commentary on Article 5 (1977).
162. CFA/WP1(75)6 of 13th October, 1975. One difference is that Article 5, paragraph 36 of the 1977 Model Commentary (currently para. 37) that had been the first part of paragraph 21a was not there. It was reinstated in DAF/CFA/WP1/76.19 (5 November 1976).
163. In J.F Avery Jones and D.A. Ward, *Agents as Permanent Establishments under the OECD Model Tax Convention*, [1993] BTR 341 at 379 (also published in J.F. Avery Jones & D.A. Ward, *Agents as Permanent Establishments under the OECD Model Tax Convention*, 33 Eur. Taxn. 5, p. 154, (1993), Journals IBFD) JFAJ deduced that article 5(5) had a civil law origin on the basis of the reference to contracting "in the name of". That was before the OEEC archives were available and can now be seen to be wrong, as Pijl (*see supra* n. 24) rightly stated at Part 2, p. 97.
164. Those with Norway (1939), South Africa (1939), New Zealand (1942) which referred to the 1925 UK Law exemption for brokers and general commission agents and the other country applied the same rule so long as the UK law remained in force.

Where the agent does not bind the principal, which is far more common in civil law than in common law and in particular this applies to the *courtier/Handelsmakler* and *commissionnaire/Kommissionär*, it is difficult to see the significance of the ordinary course of business requirement. It seems that so long as the agent does not bind the principal he is not within article 5(5) and so there is no permanent establishment whether or not he acts in the ordinary course of business. This is subject to his actions not taking him outside the definition in civil law of *courtier/Handelsmakler* and *commissionnaire/Kommissionär* or causing the independent agent to cease to be independent. This is likely to give rise to a different interpretation of "ordinary course of business" applying in common law to how the broker or general commission agent (being commercial terms not having a legal meaning) carries out his work, applying to such matters as whether the transaction took place during business hours at a proper place of business,[165] and in civil law to whether the *courtier/Handelsmakler* or *commissionnaire/Kommissionär* is within the legal definition which will not deal with matters such as whether the transaction took place during business hours or at a proper place of business.[166]

6. Conclusion

We set out to see whether considering the history from the point of view of the United Kingdom and Germany would shed any light about the intended meaning of the agency provisions of the OECD Model. One can see that different assumptions were made about the relevance of whether an agent's contract bound the principal, the German view being that this was important and clearly stated by the wording, and the UK view being that it was irrelevant and not stated or even implied by the wording. Fortunately in the United Kingdom by the time these provisions were being discussed by WP1 it was the case that almost all agents' contracts did bind the principal. The archive material from each country on the negotiations of the United Kingdom-Germany Income and Capital Tax Treaty (1954) is interesting in showing that neither side understood that there was a difference between their own and the other's law of agency. Knowledge of each country's approach has also enabled us to identify their contributions to the text and Commentary, with some surprising consequences, including that the United Kingdom did not appear to have reviewed the Commentary. In spite of all these, WP1 obtained a result that worked, or at least has enabled us to muddle through for a considerable time. While article 5(5) is fairly useless from the common law point of view, and article 5(6) is fairly[167] useless from the civil law point of view, together they manage to give a reasonably similar result under both systems[168] – at least so long as we read only the version in our own language and system of law without asking what it means in another language and system of law.

165. *See* the text around *supra* n. 101 on the analogy of the interpretation of "acting in the ordinary course of business as a mercantile agent" in the Factors Act 1889.
166. Article 5, paragraph 38.8 of the OECD Model Commentary (added in 2003 following the *Taisei* case (*supra* n. 78)) apparently recognizes this: to the extent there is a well-recognized category of agent, the category is applied as an objective criterion but this does not apply when there is no such relevant category for the agent in question.
167. It may serve the purpose of excluding some independent agents whose contracts do bind the principal.
168. The exception is when the agent is acting outside the ordinary course of business. If a civil law agent does not contract in the name of the principal he is excluded by article 5(5) alone and failing to satisfy the ordinary course of business requirement of article 5(6) has no effect; a common law agent is always within article 5(5) and so has to satisfy this requirement in article 5(6).