

## The Questionable Polish-German Pandemic Mutual Agreement


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### ABSTRACT

The outbreak of the coronavirus (COVID-19) pandemic in 2020 prompted countries around the world to take countermeasures. One was to restrict the movement of citizens between countries for employment purposes amongst others. As a result, some employees were forced to continue working remotely in their resident states for employers in other states. In this paper, the authors focus on international tax issues related to the situation of cross-border Polish employees working for German employers. They critically analyse the Polish-German Pandemic Mutual Agreement, adopted on 27 November 2020 by the competent authorities of Poland and Germany, which introduced a legal fiction of performing work in the previous country of employment to maintain the taxation rules in force before the outbreak of the COVID-19 pandemic. The authors argue, mainly from the perspective of the Polish legal system, that the legal basis for the Polish-German Mutual Agreement, its content, and its legal effects are questionable. In addition to that entered into by the Polish competent authority, nearly identical mutual agreements were successfully initiated and concluded by the German authorities and those in Austria, Belgium, France, Luxembourg, the Netherlands, and Switzerland. Thus, although this note focuses on the Polish-German Mutual Agreement, the ramifications and impact are, by analogy and mutatis mutandis, much broader.



KEYWORDS

*Interpretation of tax treaties; Mutual Agreement Procedure; Employment Income; COVID-19 cross border restrictions; O.E.C.D..*

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INTRODUCTION

Poland and Germany are closely linked by economic and social ties. This link is due not only to cooperation between companies but also to the free movement of people. The circumstances are favourable for such movement, as major cities are located on both sides of the Polish-German border. Berlin (Germany) is less than an hour's drive from Szczecin (Poland) on a motorway, and the old towns were divided by the border in 1945, but they now function in harmony. For example, Gubin and Guben, Słubice and Frankfurt (along the Oder River), and Zgorzelec and Görlitz, in Poland and Germany respectively. The considerably higher level of earnings in Germany has led many Poles to seek work in Germany.<sup>1</sup> The ease of cross-border movement of workers between Poland and Germany, such as that between other countries in the world, was significantly restricted by the coronavirus [hereinafter COVID-19] pandemic in 2020.

The actions of Polish authorities aimed at controlling the COVID-19<sup>2</sup> pandemic did not differ significantly from those taken by other Member States of the European Union. In the situation relevant to our study, in the first year of the pandemic before mass vaccination began, any employee who lived in one country (in the case of Polish-German relations, most often an employee living in Poland) could not commute regularly to work in another country (here, most often Germany). As a result, Polish

<sup>1</sup> Salaries in Germany are, on average, three times higher than those in Poland. See Reinis Fisher, *Average Monthly Salary in European Union 2020*, (June. 16 2022), <https://www.reinischfischer.com/average-monthly-salaryeuropean-union-2020>; See also EUROSTAT, *Wages and Labour Costs*, [https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Wages\\_and\\_labour\\_costs](https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Wages_and_labour_costs).

<sup>2</sup> "COVID-19" refers to a specific coronavirus disease caused by severe acute respiratory syndrome coronavirus, <https://en.wikipedia.org/wiki/COVID-19>.

employees had to choose between staying in Germany for a longer period or leaving their jobs in Germany and living with family in Poland. For some employees, a third option was available: to continue working, but remotely, from their homes in Poland. In this paper, we focus on international tax issues related to this situation of cross-border Polish workers.<sup>3</sup>

In principle, this situation is regulated by the Polish-German Tax Treaty signed in 2003<sup>4</sup> [hereinafter Polish-German Tax Treaty] which is largely based on the Organisation for Economic Co-operation and Development [hereinafter O.E.C.D.] Model Tax Convention on Income and on Capital [hereinafter O.E.C.D. Model Tax Convention].<sup>5</sup> In line with Article 15(1) of the Polish-German Tax Treaty, a Polish resident who works for an employer in Germany (source state) may be taxed in both states for work performed in Germany.<sup>6</sup> A problem arises when the work is not performed in Germany – for example due to restrictions imposed during the COVID-19 pandemic. In this case, employment income should be taxable only in Poland.

This causes practical problems particularly in relation to taxation in the source state. The employer, who usually made the advance income tax payments to the tax authority, is not a resident of the state to which these payments must be made. Thus, the employees are required to make such tax settlements on their own. Associated problems were highlighted by the O.E.C.D., inter alia, in § 60 of the Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic from 21 January 2020<sup>7</sup> [hereinafter O.E.C.D. Pandemic Guidance of 21 January 2021] as follows:

Employers may have withholding obligations, which are no longer underpinned by a substantive taxing right. These would therefore

<sup>3</sup> This is a situation strictly caused by the pandemic and thus should be distinguished from the situation of so-called “digital nomads”, who perform work remotely with the mutual consent of employees and employers. The expression “digital nomad” refers to a person who is not limited to one geographic location for work, study, or leisure and whose mobility, particularly in remote working, has been enabled by new information technologies and the Internet, Tsugio Makimoto & David Manners, *DIGITAL NOMAD* (1997). For analysis of an application of tax treaties to digital nomads, Svetislav V. Kostic, *In Search of the Digital Nomad: Rethinking the Taxation of Employment Income under Tax Treaties*, 11 *WORLD TAX J.* 189 (2019).

<sup>4</sup> Agreement between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, Ger.-Pol., May 14, 2003, (entered into force Jan, 2015) (*Journal of Laws [Dziennik Ustaw]* 2005, item 90) [hereinafter Polish-German Tax Treaty].

<sup>5</sup> That is, the 2003 version of the O.E.C.D.’s Committee on Fiscal Affairs, O.E.C.D. Model Tax Convention on Income and on Capital, Jan. 28, 2003. For the various versions of the model, see [https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version\\_9a5b369e-en](https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en) (last visited Aug. 23, 2022).

<sup>6</sup> To avoid double taxation in Poland, the exemption with progression will be applied according to Polish-German Tax Treaty, *supra* note 4, art. 24(29)(a).

<sup>7</sup> O.E.C.D., Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic from 21 January 2020 [hereinafter O.E.C.D. Pandemic Guidance of 21 January 2021] § 60. Available online at: [https://www.oecd-ilibrary.org/social-issues-migration-health/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic\\_df42be07-en](https://www.oecd-ilibrary.org/social-issues-migration-health/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en) (last visited Aug. 23, 2022).

have to be suspended or a way found to refund the tax to the employee. The employee would have a new or enhanced liability in their jurisdiction of residence, which would result in new filing obligations.

Another problem arises where an employee's remuneration is to be taxed in Poland and, at the same time, deducted from the employer's income in Germany. This contradicts the logic of the O.E.C.D. Model Tax Convention and Polish-German Tax Treaty. Article 15 of the O.E.C.D. Model Tax Convention was created in accordance with the principle<sup>8</sup> that an employee's income would be taxed in the state in which the remuneration was deductible from the employer's income.

The governments of Poland and Germany have made efforts to resolve this concern. These efforts have resulted in a specific solution with respect to the application of articles 15(1) and 19(1) to cross-border workers and government officials, respectively. The agreement was adopted on 27 November 2020 by the competent authorities of Poland and Germany on the basis of Article 26(3) of the Polish-German Tax Treaty which regulates the mutual agreement procedure [hereinafter M.A.P.] initiated by the competent authorities of the contracting states [hereinafter Polish-German Pandemic Mutual Agreement].<sup>9</sup> This agreement introduced a legal fiction of performing work in the previous country of employment to maintain the taxation rules that were in force before the outbreak of COVID-19.<sup>10</sup> The aim of the present study is to critically analyse the Polish-German Pandemic Mutual Agreement, mainly from the perspective of the Polish legal system, to demonstrate that the legal basis for the mutual agreement, its content, and its legal effects are questionable. The legal form of the solution adopted by the Polish and German governments is so doubtful that it may entail a complete lack of binding force for taxpayers and tax agents (employees and employers), tax authorities, and courts. It is astonishing that such a solution appears to be endorsed by the O.E.C.D.- as is evident in the following statement:

<sup>8</sup> However, it is not explicitly formulated in any provision, so its legal significance in the interpretation of the tax treaty is limited.

<sup>9</sup> Available online at: <https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf> (last visited Aug. 5, 2022).

<sup>10</sup> The Polish-German Pandemic Mutual Agreement does not apply to a situation where a Polish employee worked in Germany for a Polish employer, as that problem can be solved by applying § 5 of the commentary to Article 15 of the model, as suggested by the O.E.C.D. Pandemic Guidance of 21 January 2021, *See* O.E.C.D. Pandemic Guidance of 21 January 2021, *supra* note 7, §§ 54-57, that is, if the days of sickness "prevent the individual from leaving and he would have otherwise qualified for the exemption", they exceptionally do not count towards the days-of-presence test in Article 15(2)(a). The O.E.C.D. argued that this exception may cover many situations driven by the COVID-19 pandemic, such as banning travelling by governments and cases where it is, in practice, impossible to travel due, for example, to cancellation of flights. Wojciech Morawski & Błażej Kuźniacki, *The German-Polish Tax Problems of Cross-Border Workers in the COVID-19 Pandemic - When the Remedy is Worse than the Problem*, BIAŁOSTOCKIE STUDIA PRAWNICZE, Nov. 2021, at 98, 100.

Exceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed. Where relevant, *MAP should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic*. Jurisdictions have issued useful guidance and administrative relief to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 pandemic. A sample of that guidance is included in Box 4.<sup>11</sup>

Although we agree with the O.E.C.D. that the “M.A.P. should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic”, we can hardly subscribe to the arguments that “efficiency and pragmatism” may derogate international and constitutional laws. It is noteworthy that, in Box 3, the O.E.C.D. listed, *inter alia*, mutual agreements initiated by German authorities with those in Austria, Belgium, France, Luxembourg, the Netherlands, Poland, and Switzerland.<sup>12</sup> Hence, even though this study focuses on the bilateral solutions between Poland and Germany, the ramifications of the study and its impacts are, by analogy and *mutatis mutandis*, much broader. It is true that the Polish-German Pandemic Mutual Agreement deals with the taxpayer’s right, rather than his or her obligation, to use the option of taxation of income in the country of the employer’s registered office. However, once they opt for that legal fiction, documentational obligations are imposed on them. Taxpayers must be able to become aware of their rights and obligations. This matrix of rights-obligations may raise doubts as to the legality and validity of the Polish-German Pandemic Mutual Agreement, as discussed below.

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<sup>11</sup> O.E.C.D. Pandemic Guidance of 21 January 2021, *supra* note 7, § 62. From the point of view of the O.E.C.D., the Polish-German Pandemic Mutual Agreement and other German-style Pandemic Mutual Agreements seem like a good solution because they reflect the logic of rules for the taxation of worker income; that is, such remuneration should be taxed in the state in which it constitutes a deductible tax cost and therefore reduces the tax base of the employer. LYNNE OATS ET AL., *PRINCIPLES OF INTERNATIONAL TAXATION* 175 (Bloomsbury Professional, 6th ed., 2017).

<sup>12</sup> O.E.C.D. Pandemic Guidance of 21 January 2021, *supra* note 7, § 62, at 19-20.

## 1. THE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT

The solution under the Polish-German Pandemic Mutual Agreement is based on the legal fiction of performing work in a place where it is not physically performed, as it stipulates that

days of work for which wages are received and during which the employment was exercised at home (home-office-day) solely due to the measures taken to combat the COVID-19 pandemic by the German or Polish Government or their local subdivisions, may be deemed as day of work spent in the Contracting State where the cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic.<sup>13</sup>

The competent authorities of Poland and Germany clearly expressed a will to apply this solution only to situations caused specifically by the COVID-19 pandemic, following the caveat according to which the mentioned legal fiction “does not apply to working days that would have been spent either as home-office-days or in a third State, independent from these [anti-COVID-19 pandemic] measures”. They added that this fiction “does not apply to cross-border workers insofar as they are exercising their employment at home according to their employment contract”.<sup>14</sup> The latter situation is typical for so-called “digital nomads”.<sup>15</sup>

As mentioned, the legal fiction functions as a right rather than as an obligation; thus, employees who acquire the right to make use of it must initiate its application in accordance with the suggestion that it “*may be deemed as a day of work spent in the Contracting State*”.<sup>16</sup> However, once its application is chosen by the employee, the employee is “obliged to apply this fiction consistently in both Contracting States and to keep appropriate record (i.e., written confirmation of the employer stating which parts of the home-day-office were solely due to the COVID-19 pandemic related measures)”.<sup>17</sup>

The Polish-German Mutual Agreement, in Section 3, also envisages the rule as aimed at the prevention of the misuse of the legal fiction, according to which it

shall only apply to the extent that the respective wages for the days spent working at home are usually taxed by the Contracting State in

<sup>13</sup> Mutual Agreement between the Competent Authorities of Germany and Poland according to paragraph 3 of Article 26 of the Polish-German Tax Treaty, *supra* note 4, § 1, 2021.

<sup>14</sup> See 6. the Polish-German Pandemic Mutual Agreement § 1.

<sup>15</sup> See MAKIMOTO & MANNERS, *supra* note 3.

<sup>16</sup> See *supra* note 14.

<sup>17</sup> Mutual Agreement between the Competent Authorities of Germany and Poland according to paragraph 3 of Article 26 of the Polish-German Tax Treaty, *supra* note 4, § 2, 2021.

which cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic. The cross-border worker accordingly agrees that these items of income will be actually taxed in the Contracting State where he would have exercised the employment without the measures taken to combat the COVID-19 pandemic. These items of income shall be regarded as “actually taxed” when they are included in the assessment basis used to calculate the tax.

Finally, after the mutual agreement was enforced on 28 November 2020, it was applied “to days in the period from 11th March 2020 until 31st December 2020” and, later, “[would] automatically be extended, unless it is terminated by either Competent Authority of a Contracting State”.<sup>18</sup> Hence, although its retroactive application is precisely indicated, its prospective application is actually unknown, as it depends on a unilateral decision by the competent authorities of Poland or Germany.

## 2. LEGAL BASIS FOR THE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT AND INTERPRETATIVE DOUBTS

In general, a mutual agreement is not unusual in the treaty practice of O.E.C.D. Member States.<sup>19</sup> However, the Polish-German Pandemic Mutual Agreement appears to have a shaky legal basis considering the situation that it purported to regulate and the method of its regulation. In essence, the Polish-German Pandemic Mutual Agreement is based on Article 26(3) of the Polish-German Tax Treaty, which states that “[t]he Competent Authorities of the Contracting States shall endeavour by mutual agreement to *remove any difficulties or doubts [that] may arise in the interpretation or application of the Agreement.*” This raises the fundamental question of which doubts or difficulties must be resolved in the M.A.P.

In principle, the place where work is performed will determine the place of employment income taxation. The commentary to Article 15(1) of the O.E.C.D. Model Tax Convention in Section 1 clearly indicates that “work is exercised in the place *where the employee is physically present when performing the activities* for which the employment

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<sup>18</sup> *Id.* §§ 5 - 6.

<sup>19</sup> Qiang Cai & Pengfei Zhang, *A Theoretical Reflection on the O.E.C.D.’s New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring*, 21 J. INT’L. ECON. L. 867 (2018); Hugh J. Ault, *Improving the Resolution of International Tax Disputes*, 7 FLA. TAX REV. 137 (2005).

income is paid.” A deviation from the above-mentioned principle of taxation of remuneration for cross-border work would require change in the tax law at both the international and national levels.

In spite of some hesitations in the case law, the prevailing view of courts is also consistent with the aforementioned principle according to which employment income may be taxed only in the country in which the work is actually performed. For example, in a judgement delivered on 22 December 2006, the Dutch Supreme Court (*Hoge Raad*) held that, in relation to standby fees, the place of work performance is where employees are present during the period for which they are paid, not where the employee would potentially perform the work.<sup>20</sup> In this specific case, which involved editorial and television presentation activities, an application of the principle meant splitting the taxation of remunerations between two countries, as the taxpayer in question was in the Netherlands for a few days as well as in their place of residence (Mexico) also for a few days.<sup>21</sup>

A similar interpretative approach was taken by the Supreme Administrative Court in Poland (*Naczelny Sąd Administracyjny* [hereinafter N.S.A.]) in respect to the Polish-German Tax Treaty. In a judgement delivered on 13 May 2011,<sup>22</sup> the N.S.A. made the following statement:

The right to tax income in N. [an abbreviation from pol. *Niemcy*, Germany] is not determined, as a rule, by the place where the employer is located, nor by the place where the results of the work are used, nor by the place where the remuneration is paid, nor by the place where the entity paying the remuneration is located. The only criterion is the place where the work is performed. Thus, the Court of First Instance correctly interpreted Article 15(1) of the Tax Treaty by assuming that the place of taxation of salary, wages [,] and similar remuneration from paid employment *depends on the place where the work is performed* (emphasis added).

Individual interpretations by the Polish tax authorities have emphasised the place of the physical presence of an employee during the performance of their duties as the determinant of the place of work performance.<sup>23</sup> However, these have raised concerns

<sup>20</sup> See Hoge Raad der Nederlanden [HR] [the Dutch Supreme Court] Dec. 22, 2006, BNB 2007, 97 (Neth.).

<sup>21</sup> See Frank P.G. Pötgens, *Stand-By Fee Taxable in Residence State Under Art. 15 of the O.E.C.D. Model*, 48 EUR. TAX'N 85 (2008); see also FRANK P.G. PÖTGENS, *INCOME FROM INTERNATIONAL PRIVATE EMPLOYMENT* 304 (2007).

<sup>22</sup> Naczelny Sąd Administracyjny [Polish Supreme Administrative Court] May. 13, 2011, see Poland: Case No. II FSK 2165/09 (Pol.).

<sup>23</sup> The Director of National Tax Information, *Against the Background of Article 14 of the Polish-Czech Double Taxation Convention: Interpretation of 9 October 2018* (0115-KDIT2-2.4011.336.2018.1.HD), <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/pisma-urzedowe/0115-kdit2-2-4011-336-2018-1-hd-opodatkovanie-185028845>.



regarding situations wherein performing work in a given place has been the result of the free decision of the person concerned - not an effect of restrictions on cross-border movement. In the Polish tax law literature, none of the different views have negated the reference to the employee's place of residence as the place of work performance.<sup>24</sup>

Contrary to the assertions of the competent authorities, the Polish-German Pandemic Mutual Agreement does not therefore, remove doubts in the interpretation of the Polish-German Tax Treaty. Nor does it confirm a particular understanding of the treaty. In fact, the Polish-German Pandemic Mutual Agreement has proposed an interpretation of the provisions of Article 15 in the Polish-German Tax Treaty that is completely different from the prevailing view in tax jurisprudence and academia. Moreover, the view presented by the competent authorities does not stem from the wording of the Polish-German Tax Treaty. It is a change in the wording thereof. In fact, the Polish-German Pandemic Mutual Agreement confirms this finding, as the Agreement uses the concept of "legal fiction" and makes it available to only some taxpayers. The interpretation of Article 15 of the Polish-German Tax Treaty does not allow its application under such a legal fiction, since it is not included in the wording of the Treaty.<sup>25</sup>

The competent authorities misapplied the interpretative guidance included in Section 5 of the commentary to Article 15 of the O.E.C.D. Model Tax Convention. As mentioned in the Introduction above, Section 5 applies to a situation wherein a Polish employee works in Germany for a Polish employer. In such a situation, the commentary reads that days of sickness count for calculation of the 183-day period, in Article 15(2)(a) of the O.E.C.D. Model Tax Convention, being the "days of physical presence" method, "unless they prevent the individual from leaving and he would have otherwise qualified for the exemption". This is clearly an exception from the principle that days of sickness count for the purposes of the "days of physical presence" method under Article 15(2)(a). This exception should be interpreted strictly,<sup>26</sup> and not be applied by analogy to situations that are not covered by Article 15(2)(a) in contradiction with the ordinary meaning of terms used in other treaty provisions.<sup>27</sup> In particular, this exception should by no means be extended to situations covered by Article 15(1) of the O.E.C.D. Model Tax Convention insofar as they concern employment which is exercised in the other

<sup>24</sup> See W. Morawski, *Opodatkowanie Dochodów z Pracy Najemnej w Świetle Umów o Unikaniu Podwójnego Opodatkowania (Cz. 1)* [Taxation of Income from Employment in the Light of Double Taxation Conventions (Part 1)], 9 PRZEGLĄD PODATKOWY [TAX L. REV.] 7 (2006).

<sup>25</sup> See Morawski & Kuźniacki, *supra* note 10, at 95, 102.

<sup>26</sup> Joined Cases C-283 & C-291 C-292/94, *Denkavit Int'l B.V., VITIC Amsterdam B.V. and Voormeer B.V. v. Bundesamt für Finanzen*, 1996 E.C.R. I-5063 §27.

<sup>27</sup> See also U. LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 286 (Springer Sci. & Bus. Media, 2007). See generally LORAND BARTELS & FEDERICA PADDEU, *EXCEPTIONS IN INTERNATIONAL LAW* (Oxford University Press, 2020).

Contracting State rather than the days of presence in the other State. Both authoritative scholarship<sup>28</sup> and international case law<sup>29</sup> confirm such an interpretation by arguing that work is performed under Article 15(1) where the individual is actually present for that purpose - either actually performing the work or being ready to do so. Whereas the term “is present” under Article 15(2)(a) has to be interpreted autonomously and literally, meaning the period of physical presence in the source state of work. Again, the only exception, solely for purposes of Article 15(2)(a), is included in Section 5 of the commentary to Article 15 of the O.E.C.D. Model Tax Convention and relates to sickness days that prevent the individual from leaving the source state of work, and said individual would have otherwise qualified for the exemption from taxation in the source state of work pursuant to Article 15(2) of the O.E.C.D. Model Tax Convention.

Furthermore, the Polish-German Pandemic Mutual Agreement clearly states that it is a legal fiction and not a particular way of interpreting a tax agreement. A “legal fiction” is, after all, something quite different from the interpretation of a tax treaty. The phrase “legal fiction” entails an acceptance that “reality” is different from the result of its application.

Consequently, the legal fiction introduced by the competent authorities in the Polish-German Mutual Agreement<sup>30</sup> stems from an interpretation *contra legem* of Article 15(1) of the Polish-German Tax Treaty. It is an example of extensive interpretation *per analogiam* of the “sickness’s exception” under Section 5 of the commentary to Article 15(2)(a) of the O.E.C.D. Model Tax Convention to revise the meaning of treaty terms used in Article 15(1) of the Polish-German Tax Treaty.<sup>31</sup> Interestingly, such interpretation is not even supported by Sections 54-57 of the O.E.C.D. Pandemic Guidance of 21 January 2021, since they refer to the mentioned exception solely for purposes of Article 15(2)(a) of the O.E.C.D. Model Tax Convention, rather than to Article 15(1). Moreover, there are

<sup>28</sup> See, e.g., Luc De Broe, *Income from Employment*, in KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS 1164-76 (Wolters Kluwer Law & Business eds., 4th ed., 2015).

<sup>29</sup> See also Bundesfinanzhof [BFH] [German Fiscal Court] Aug. 27, 2002, Case No. BStBl. II 883 (2002); BFH Oct. 17, 2004, Case No. I B 98/03 and NV 161 (2004); Amsterdam Court of Appeal Sep. 4, 2003, Case No. 01/1655, VN 2003/49.1.1; Hoge Raad [HR] [the Dutch Supreme Court] Feb. 21, 2003, Case Nos. 37011 and 7004, BNB 2003/177 and 178; Court of Appeals Brussels, Jun. 14, 2000, Case No. 197 TFR 258. De Broe, *supra* note 26, 1166-72.

<sup>30</sup> I.e., the assumption that

days of work for which wages are received and during which the employment was exercised at home (home-office-day) solely due to the measures taken to combat the COVID-19 pandemic by the German or Polish Government or their local subdivisions, may be deemed as day of work spent in the Contracting State where the cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic.

See *supra* Section 1.

<sup>31</sup> It must be admitted, however, that this interpretation does appear to be reasonable, to an extent, even if we consider it to be going too far.

critical contextual and factual differences between the situations covered by the juxtaposed Treaty provisions and the “sickness exception” vis-a-vis the COVID-19 pandemic cross-border restrictions, as follows:

1. The exception applies to derogate from the principle in a situation in which sickness prevents the individual from leaving the source state of work (e.g., Germany) to enter their residence State (e.g., Poland), whereas the COVID-19 pandemic cross-border restrictions prevent the individual from leaving their residence state (e.g., Poland) to perform work in the source state of work (e.g., Germany).
2. The sickness prevents the individual from actually performing work for their employer, whereas the pandemic restrictions do not (i.e., work is still actually performed by the individual, but it is done in their residence state instead of the state of the source of work).
3. The “sickness exception” works in favour of taxation only in the residence State of the individual, while the legal fiction in the Polish-German Mutual Agreement works in favour of the taxation of the individual in both Contracting States in accordance with Article 15(1) of the Polish-German Tax Treaty. Apparently, these differences were entirely ignored by the competent authorities while designing and introducing the legal fiction to Article 15(1) of the Polish-German Tax Treaty via the Polish-German Mutual Agreement.

Finally, it is noteworthy that the very fact that the legal fiction under the Polish-German Mutual Agreement is an option/right rather than an obligation does not change the above observations. The key observation remains untouched: the legal fiction, irrespective of its legal mechanism of functioning (right instead of obligation), does not find support in an appropriate interpretation of Article 15 of the Polish-German Tax Treaty. Also, it is not obvious that the use of the option to rely on legal fiction will always work in favour of the individual, as, in some cases, it may cause more problems instead of fewer practical problems.<sup>32</sup>

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<sup>32</sup> See *infra* Section 6.

### 3. IGNORANCE OF THE STATUTORY FORM FOR SHAPING TAXPAYER RIGHTS AND OBLIGATIONS

The preamble of the Polish-German Pandemic Mutual Agreement indicates that the COVID-19 pandemic “is a situation of *force majeure*” and that “the measures taken in response to the pandemic can lead to substantial uncertainty with respect to the tax position of cross-border workers”. This altogether justifies the introduction of the legal fiction via the mutual agreement pursuant to Article 26(3) of the Polish-German Tax Treaty. This solution, the preamble continues, has been agreed upon by the competent authorities of Germany and Poland, “with prudence and deliberation, to *minimise the personal burden* on cross-border workers”. Two circumstances were crucial to the introduction of the mutual procedure, namely (i) the pandemic, considered a *force majeure*, and (ii) the desire to minimise (taxpayer) problems caused by the pandemic.

Despite the clearly good intentions and seemingly compelling reason for the Polish-German Pandemic Mutual Agreement, the introduction of the legal fiction appears to be at odds with the constitutional principle of legalism- according to which a public authority may act only on the basis of statutory provisions.<sup>33</sup> Facilitating the taxpayer’s compliance with personal tax settlements, as in the case at hand, does not seem to be a goal meriting the disrespect of this constitutional principle, which is fundamental to the functioning of public authorities (such as the competent authorities).

Hypothetically, we could even argue that the Polish-German Pandemic Mutual Agreement does not give taxpayers the right to opt for their income to be taxed in Germany, rather than at their actual place of work performance. This follows from the requirements concerning the creation of such rights. Under Polish law, the determination of the amount of tax and its payment must have its basis in statutory law, that is, an act adopted by Parliament, such as a domestic tax act or an international agreement ratified with the consent of the Parliament (e.g., a tax treaty),<sup>34</sup> which means no taxation without representation (an emanation of the rule of law in the tax domain).<sup>35</sup> Neither the Polish Income Tax Act [P.I.T.A.]<sup>36</sup> nor the Polish-German Tax Treaty mention such a choice in dealing with tax settlements as that under the Polish-German Pandemic Mutual Agreement. Of course, it is difficult to expect tax

<sup>33</sup> See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ[CONSTITUTION OF THE REPUBLIC OF POLAND] Apr. 2, 1997, art. 7 (Dziennik Ustaw [Journal of Laws], no. 78, item 483) [hereinafter “Polish Constitution”].

<sup>34</sup> See Polish Constitution, art. 217.

<sup>35</sup> See P.J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, 71 BULLETIN INT’L TAX’N 5, (2017). See generally TOM BINGHAM, *THE RULE OF LAW* (Allen Lane, 1st ed. 2010).

<sup>36</sup> See *Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych* [Personal Income Tax Act (1991)], 1128 JOURNAL OF LAWS (consolidated version of 24 June 2021) (Pol.).

authorities to disregard the content of the Polish-German Mutual Agreement.<sup>37</sup> The taxpayer should retain a favourable position under the Mutual Agreement on the basis of the principle of protection of legitimate expectations, which is generally accepted in various legal systems.<sup>38</sup>

#### 4. INTERNET WEBSITE INSTEAD OF OFFICIAL PROMULGATOR, ENGLISH INSTEAD OF POLISH

We also argue that introducing implied changes to the law through the Polish-German Pandemic Mutual Agreement may violate taxpayer rights. The Polish-German Tax Treaty (like any international agreement) was published appropriately in the official journal of promulgation, which in Poland is the *Journal of Laws (Dziennik Ustaw)*. Mutual agreements are not published in Poland in the *Journal of Laws* or in any other official promulgating journal. The Polish-German Pandemic Mutual Agreement was published solely on the website of the Polish Ministry of Finance. Without having the exact location of this Polish-German Pandemic Mutual Agreement,<sup>39</sup> one must have excellent navigation skills in using the website. An ordinary person in Poland with knowledge of the Polish legal system knows that to consult the law, the generally accessible *Journal of Laws* must be consulted. To this end, people are not obligated to regularly search the website of the Ministry of Finance, which would, in any case, be quite troublesome.

Laws are published in the official language of the State in which they have binding force. Obviously, in Poland and in respect to Polish tax law, the official language is Polish. The position of the Polish language as the official language of the law is guaranteed by the Constitution. Article 27 of the Polish Constitution indicates that “[i]n the Republic of Poland, the official language is Polish”. Moreover, Article 6 of the Polish Language Act of 7 October 1999<sup>40</sup> provides that “international agreements concluded by the Republic

<sup>37</sup> However, in some situations, even an administrative court has refused to protect a taxpayer when it acted on the basis of a position of the Minister of Finance which had no relevant legal basis, for example, a judgement of the N.S.A. on 10 October 1994, Case No. II SA 1836/93.

<sup>38</sup> See, e.g., Gavin Barrett, *Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law*, 20 Y.B. EUR. L. 191 (2001).

<sup>39</sup> Mutual Agreement between the Competent authorities of Germany and Poland according to paragraph 3 of Article 26 of the Agreement Between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital signed at Berlin on 14 May 2003 with respect to the application of Paragraph 1 Article 15 on cross-border workers and of paragraph 1 Article 19 on government officials working cross-borders, Ger.-Pol., Nov. 12-Nov. 27, 2020, available at <https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf>.

<sup>40</sup> USTAWA z dnia 7 października 1999 r. o języku polskim [The Polish Language Act (1999)] *Journal of Laws*, item 1480 (consolidated version from 7 August 2019).

of Poland should have the Polish language version as the basis for their interpretation, unless specific provisions provide otherwise”. Through these provisions, Polish legislators attempt to guarantee Polish citizens access to the law in a language they know. Even the case law of the Court of Justice of the European Union underscores that the basic condition for imposing obligations on individuals is the ability to be acquainted with law in their first language - as stated in the following:<sup>41</sup>

Article 58 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, *precludes the obligations contained in Community legislation which has not been published in the Official Journal of the European Union in the language of a new Member State*, where that language is an official language of the European Union, from being imposed on individuals in that State, *even though those persons could have learned of that legislation by other means* (emphasis added).

Shockingly, the Polish-German Pandemic Mutual Procedure was drafted and published only in English on the website of the Polish Ministry of Finance.<sup>42</sup> In comparison, the German government’s website published information on the mutual agreement, including its content, in German, the official language of Germany.<sup>43</sup>

<sup>41</sup> See judgement of the Court (Grand Chamber) of 11 December in Case C-161/06, *Skoma-Lux sro v. Celní ředitelství Olomouc*, 2007 E.C.R.

<sup>42</sup> No version of the Polish-German Tax Treaty was ever drafted in English; it was drafted solely in Polish and German, available at <https://www.podatki.gov.pl/media/1836/niemcy-konwencja-tekst-polski-niemiecki.pdf>.

<sup>43</sup> Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und der Republik Polen vom 12./27. November 2020 [Consultation Agreement between the Federal Republic of Germany and the Republic of Poland of 12/27 November 2020], available at [https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales\\_Steuerecht/Staatenbezogene\\_Informationen/Laender\\_A\\_Z/Polen/2020-12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html](https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerecht/Staatenbezogene_Informationen/Laender_A_Z/Polen/2020-12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html).

## 5. ALLEGED FORCE MAJEURE AS A KEY ARGUMENT TO DISRESPECT THE FUNDAMENTAL PRINCIPLES OF LAW

The competent authorities indicated that the COVID-19 pandemic constitutes a *force majeure*. Indeed, a pandemic is an event that is not, from a human point of view, something ordinary and routine. However, absolutely no consensus has been reached in legal circles, neither nationally nor internationally, as to whether the COVID-19 pandemic can be considered a *force majeure* in every case and for every subject (i.e. *erga omnes* and *in abstracto*).<sup>44</sup> None of Polish nor German law nor the Polish-German Tax Treaty defines COVID-19 as a “*force majeure*”. In civil law, a *force majeure* is accepted as an event that is beyond the control of the parties in question, one that could not have been foreseen at the time the contract was concluded, and that has consequences that could not have been prevented by taking normal precautions.<sup>45</sup> The question as to whether the COVID-19 pandemic constitutes a *force majeure*, therefore, does not have a clear answer even in the area of contract law, as the pandemic has affected various individuals, including employees and employers in extremely different ways. Many have had, and continue to have, opportunities to take countermeasures, and some professionals should have been prepared for it. Thus, whether a COVID-19 pandemic constitutes a *force majeure* which is case-specific and varies by situation. This is widely accepted by legal communities in both Germany and Poland.<sup>46</sup>

There is no reason to treat the situation of employees from Poland working for German employers differently, as the legislation applicable to them does not make it clear whether the COVID-19 pandemic should be regarded as a *force majeure* - with all its consequences. Furthermore, neither Poland nor Germany has decided to impose a state of emergency due to the COVID-19 pandemic, while the Czech Republic, Slovakia, and

<sup>44</sup> See Carter B. Casady & David Baxter, *Pandemics, Public-Private Partnerships (PPPs), and Force Majeure | COVID-19 Expectations and Implications*, 38 CONSTR. MGMT. & ECON. 1077 (2020); Ş. Esra Kiraz & Esra Y. Üstün, *COVID-19 and Force Majeure Clauses: An Examination of Arbitral Tribunal's Awards*, 25 UNIF. L. REV. 437 (2020); see also Vasudha Luniya & Ankita Mehra, *Analysing the Concept of Force Majeure, Especially During the COVID-19 Pandemic*, LEXOLOGY (Apr. 19, 2021), <https://www.internationallawoffice.com/Newsletters/Corporate-Commercial/India/Clasis-Law/Analysing-the-concept-of-force-majeure-especially-during-the-COVID-19-pandemic#Conclusion>.

<sup>45</sup> See T. Hauss, M. Distler, & L. Nassi, *Germany: Force Majeure*, Legal 500 §§ 11-12 (2021), available at <https://www.legal500.com/guides/chapter/germany-force-majeure/>; C. Rapallo, *Kiedy Pandemia Wpływa na Zdolność do Wykonywania Zobowiązań: Siła Wyższa, Nadzwyczajna Zmiana Stosunków* [When a Pandemic Affects the Ability to Perform Obligations: Force Majeure, Extraordinary Change in Relations], Garrigues (Mar. 20, 2020), available at <https://www.garrigues.com/pl/pl-PL/news/kiedy-pandemia-wplywa-na-zdolnosc-do-wykonywania-zobowiazan-sila-wyzsza-nadzwyczajna-zmiana>.

<sup>46</sup> Hauss et al., *supra* note 43; Rapallo, *supra* note 43.

Estonia have decided to do so.<sup>47</sup> Similarly, neither Polish nor German tax authorities, unlike tax authorities in Ireland<sup>48</sup> and Finland,<sup>49</sup> have published official positions recognising the COVID-19 pandemic as a *force majeure*. Thus, the most important reason for the actions of the competent authorities of Poland and Germany, which is the elimination of the negative tax consequences of a *force majeure* on cross-border workers, has dubious justification. It is difficult to consider the unreflective identification by the competent authorities of the COVID-19 pandemic as a *force majeure* as an action of *prudence and deliberation* in the context of cross-border taxation.

Even if one recognises the pandemic as a *force majeure*, the proportionality of the measures taken in relation to the achievement of their purpose in the given circumstances remains questionable. As was demonstrated earlier, the Polish-German Pandemic Mutual Agreement undermines principles contained in the Polish Constitution. Some difficulties are related to the tax settlements of a certain group of employees, while other difficulties are related to constitutional standards. These standards were treated as less important than the tax difficulties.

## 6. MORE INSTEAD OF FEWER PRACTICAL PROBLEMS UNDER THE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT

The intention of the competent authorities was undoubtedly to ease the lives of some taxpayers (i.e., cross-border workers) during the difficult times of the pandemic. Paradoxically however, the legal fiction under the Polish-German Pandemic Mutual Agreement may generate more problems than solutions. This pertains, for example, to workers who partially worked remotely from the territory of Poland before the outbreak of the COVID-19 pandemic (this income was taxed in Poland) and then opted for the legal fiction under the mutual agreement. And, now it must be determined which days spent

<sup>47</sup> See K. Grzęda-Łozicka, *Koronawirus w Polsce. Stan Wyjątkowy. Co to Oznacza dla Mieszkańców?* [Coronavirus in Poland. A State of Emergency. What Does it Mean for the Inhabitants?], PORTAL ABCZDROWIE (2020), <https://portal.abczdrowie.pl/koronawirus-w-polsce-stan-wyjatkowy-co-to-oznacza-dla-mieszkanow> (last visited Aug. 21, 2022); A. Pokrywczyński, *Stan klęski żywiołowej czarnym scenariuszem pandemii koronawirusa?* [State of Disaster Black Scenarios of Coronavirus?], INFO SECURITY 24 (Oct. 12, 2020), <https://infosecurity24.pl/stan-kleski-zywiolewej-czarnym-scenariuszem-pandemii-koronawirusa>.

<sup>48</sup> See *COVID-19 Information and Advice for Taxpayers and Agents*, REVENUE - IRISH TAX AND CUSTOM, <https://revenue.ie/en/covid-19-information/index.aspx> (last visited Aug. 21, 2022).

<sup>49</sup> See Vero Skatt, *Effects of the Coronavirus Pandemic on Taxes on Income Received Under an Employment Contract in a Foreign Country (the Six-Month Rule and Forces Majeures)*, VERO (Sept. 10, 2020), <https://www.vero.fi/en/detailed-guidance/statements/82178/effects-of-the-coronavirus-pandemic-on-taxes-on-income-received-under-an-employment-contract-in-a-foreign-country-the-six-month-rule-and-forces-majeures2/>.



outside the territory of the country of usual employment (Germany) are to comply with the new rule in accordance with the legal fiction. Problems also arise from the retroactive implementation of the Polish-German Pandemic Mutual Agreement. It was enforced on 28 November, but according to its § 5, it “shall apply to days in the period from 11th March 2020 until 31st December 2020”. Certainly, it accounted for monthly advance payments of personal income taxes by persons who performed remote work for German employers from the territory of Poland during the year and, with respect to this work, for advances on personal income taxes in accordance with the principles of the Polish-German Tax Treaty.<sup>50</sup>

In this context, it is worth noting that, in its final provisions, the Polish-German Pandemic Mutual Agreement vaguely indicates that it “shall apply to days in the period from 11th March 2020 until 31st December 2020,” and then “[f]rom 31st December 2020 onwards, the application of this Mutual agreement will automatically be extended, unless it is terminated by either Competent Authority of a Contracting State”. How can taxpayers determine whether this mutual agreement has been renewed?<sup>51</sup> If this were “normal law”, an individual would learn about it from the *Journal of Laws* in the Polish language. However, in relation to the Polish-German Pandemic Mutual Agreement, individuals must search for it on the website of the Polish Ministry of Finance and attempt to interpret and understand rules based on a legal fiction written in a language that is not the official language in Poland.

In addition, pursuant to § 6 of the mutual agreement, either competent authority may terminate it unilaterally at any time without providing a reason. If the taxpayer (or the tax remitter-employer) did not notice its implementation or the extension of the possibility of using the solutions contained in the Polish-German Pandemic Mutual Agreement, this will not have negative consequences – only a missed option for (alleged) simplification of tax settlements. It would be worse if the taxpayer had opted to follow the legal fiction and then did not notice termination of the mutual

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<sup>50</sup> See J. Chorążka & K. Rzeźnicka, *Nowe Polsko-Niemieckie Porozumienie Wpływa na Opodatkowanie Pracy Zdalnej Pracowników Transgranicznych* [New Polish-German Agreement Affects Taxation of Remote Work of Cross-Border Workers], PwC STUDIO (Dec. 4, 2020), <https://studio.pwc.pl/aktualnosci/alerty/polsko-niemieckie-porozumienie-wplywa-na-opodatkowanie-pracy-zdalnej-pracownikow-transgranicznych>.

<sup>51</sup> The agreement was valid until 30 June 2022. This follows from a further agreement “Mutual termination agreement of 12 and 27 November” (“the Mutual Agreement”) between the Competent Authorities of German and Poland according to paragraph 3 of article 26 of the Agreement between the Federal Republic of Germany and Republic of Poland for the Avoidance of double Taxation with respect on Income and Capital signed at Berlin on 14 May 2003”, available: <https://www.podatki.gov.pl/media/8194/mutual-termination-kopia.pdf>.

agreement. In this case, the taxpayer still does not pay tax in Poland and thus incurs tax arrears - with all the consequences thereof.

This shows that the requirement to publish “law” and, in general, to regulate the rights and obligations of the taxpayer by means of legislation (and not through interpretative acts such as a mutual agreement) through an official promulgation in the *Journal of Law* is not formalistic but rather a guarantee of protection of the taxpayer’s rights. When an authority amends an international agreement published in the *Journal of Laws* by publishing the text of a mutual agreement on the website of the Ministry of Finance, this unfortunately results in problems for the taxpayer.

Moreover, from the perspective of employers, their cross-border employees following the legal fiction means that it is necessary to prepare appropriate documentation that enables the application of the new, special taxation rules for these employees. The Polish-German Pandemic M.A.P. imposes a requirement on employees to acquire written confirmation from employers of the impossibility of performing work in the employer’s state of residence due to the COVID-19 pandemic.

The imposition of an obligation to document the fact of working at home due to the pandemic is obviously a rational solution. The problem is that the Polish-German Mutual Agreement is not an appropriate legal basis for imposing any obligation on a taxpayer. The rules on imposing obligations on taxpayers are clear in Poland. The principle of legalism applies, which has its basis in both the Polish Constitution<sup>52</sup> and the provisions of tax statutes.<sup>53</sup> This means that if a tax authority demands any action from a taxpayer, the authority must indicate its legal basis. The legal basis must be a provision of law. The formal confirmation that “something” is a “law” is actually a publication in the *Journal of Laws*.

Therefore, even if taxpayers did not have the relevant documentation required by the Polish-German Mutual Agreement, they could still otherwise prove (e.g. through witness testimony) that the conditions for benefiting from the agreement were met.

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<sup>52</sup> Polish Constitution, art. 7.

<sup>53</sup> USTAWA z dnia 29 sierpnia 1997 r. Ordynacja podatkowa [Act of 29 August 1997 - Tax Ordinance], art. 120 (*Journal of Laws of 2020*, item 1325, as amended) (Pol.).

## CONCLUSION

*Prima facie*, the Polish-German Pandemic Mutual Agreement appears rational because it was created to simplify tax settlements, thus facilitating the functions of both taxpayers and tax administrations (even if this intention may in some cases bring about the opposite effect - as explained in Section 5). However, actions with benevolent intentions are not always legal. The following proverb applies to the Polish-German Pandemic Mutual Agreement: “The road to hell is paved with good intentions”. Many principles of national and international laws have been trampled underfoot.

Certainly, difficulties in the application of the Polish-German Tax Treaty have arisen owing to the pandemic, but they are hardly problems that could be resolved by the introduction of the legal fiction in the Polish-German Pandemic Mutual Agreement. The mechanism contained in the O.E.C.D. Model Tax Convention was created in a different time - when the employee was present at the place of work. So, the principle of taxation of remuneration at the place of work was adopted. During the pandemic, the link between the employee and the workplace, understood as the place held by the employer, was broken, giving rise to problems concerning the application of tax treaties. However, this problem can only be solved by amending the Polish-German Tax Treaty, and not through a free interpretation of it.

The problem lies in the fact that a rational solution has been “dressed up” in a legal form, which is not appropriate for addressing the problem in question. Of course, one must be aware that the application of a “correct” legal formula, that is, an amendment to the Polish-German Tax Treaty limited to pandemic duration, would probably be both quite difficult to agree during the pandemic and certainly take additional time. In brief, the scope of the Polish-German Pandemic Mutual Agreement is not overly wide, but the extent of its impact is questionable. Does it herald the end of a solution adopted for the taxation of income from paid employment, one based on the link between the place where income is taxed and the place where the work is performed and therefore where the employee is a resident? The pandemic has clearly shown that, at present, this reasoning does not at all correspond to economic reality. Of course, this question involves “another story”.

*THE QUESTIONABLE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT*