Re-evaluating the Revenue Law Rule and the Non-Enforcement of Foreign Tax Claims

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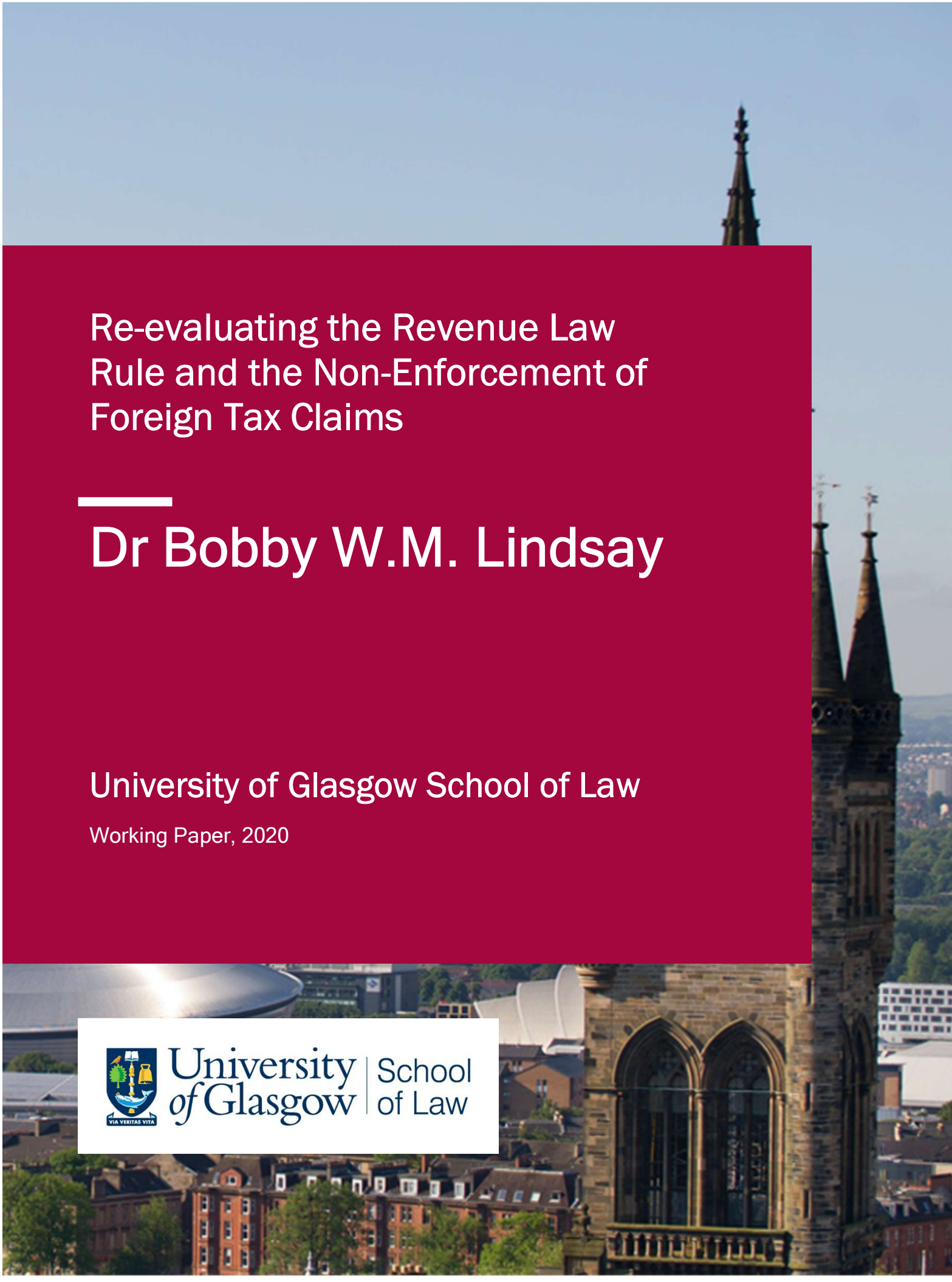

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I: Introduction

Rule 3(1) of *Dicey, Morris and Collins on The Conflict of Laws* boldly proclaims that:[1]

> English courts have no jurisdiction to entertain an action… for the enforcement, either directly or indirectly, of a… [revenue law]… of a foreign state.

This "revenue law rule" – which precludes the enforcement in State A of claims which arise under the revenue law of a foreign state – was recently applied, without question, by the Judicial Committee of the Privy Council in *Webb v Webb*,[2] wherein it was described as a "long-standing principle of the common law".[3]

This paper, however, argues against the unthinking continued application of the rule. It conducts a re-examination which, it shall be argued, demonstrates that the rule is bereft of a justified policy basis and is beset with doctrinal complications and contradictions. This suggests that the rule's abrogation is overdue. This analysis forms part of a wider project, which analyses the 'exclusionary rules' of private international law. Alongside foreign revenue laws, these prohibit the enforcement of foreign penal laws and 'other public laws', but, on a long-overdue focussed critical examination of those rules, there is little to be said for their justification. These insights have implications beyond private international law; they raise questions and may have consequences for the enforcement of domestic tax law,[4] public international law, the practice of foreign relations, and the regulation of international trade. As the 'revenue law rule' is the most developed of the three 'exclusionary rules', it is an appropriate starting point for such an examination.

The paper begins by tracing the development of the revenue law rule, observing that initially it was grounded in a chauvinistic and insular predilection to further British trading interests at all costs, with no desire evinced for international cooperation. Despite the anachronism of those notions, the rule has received constant reaffirmation. Next, the definitional problem of what amounts to a "revenue" law is confronted. It will be demonstrated that there is no conceptual clarity on the subject-matter

[1] Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell, 2012) ("Dicey (15th: 2012)"), [5-019].
[2] [2020] JCPC 22 (Cook Islands).
[3] ibid, [32].
[4] See e.g. *R (Jimenez) v First Tier Tribunal* [2019] 1 WLR 2956.

scope of the rule, i.e. on what characterises a law as a 'revenue' one. It will be suggested that the indicia of a revenue law are that it: imposes liability on persons falling, by reason of status or conduct, within its scope; makes payment of that liability compulsory; and is imposed for the purpose of collecting funds to finance the apparatus of the state, rather than as reimbursement for benefits conferred on a specified class of beneficiaries.

The paper then tackles the application of the enforcement/recognition distinction in the revenue context. The concept of enforcement has been defined broadly, to encompass claims of "indirect enforcement". This has been held to include claims which have been formulated in private law but nevertheless have the effect, through compensation or restitution, of making up for unpaid tax. This extension will be criticised, and it will be shown that the expansive common law approach is inconsistent with the approach adopted under EU private international law. Therefore, it will be submitted that, if the revenue law rule has any claim to operate at all, it should be restricted to cases of direct enforcement, i.e. where a foreign government purely founds its claim on provisions of its tax law. However, even in this heavily circumscribed form, it will be argued that the fact that the rule is inapplicable if the debtor is placed into insolvency proceedings robs it of much of its practical operation and removes the force of any supposed justification. From this, the paper concludes that there is little merit in the rule's retention.

II: The Historical Development of the Revenue Law Rule

(a) Origins and the "Smuggling" Cases

The revenue law rule is "an ancient dogma, still of unbelievable vigor…."[5] Although axiomatic, its history is "not easy to ascertain".[6] In 1834, Story could state that the rule had "long been laid down" and was even then "firmly established in the actual practice of modern nations".[7]

[5] AT Trautman and DT Trautman, *The Law of Multistate Problems* (Little Brown and Co, 1965), 209.

[6] *Government of India v Taylor* [1955] AC 491, 504 (Viscount Simonds). For a general history of the rule, see DA Machum, 'The Enforcement of Foreign Revenue Laws', LL.M Paper, Harvard University (1954), 4-10; JG Castel, 'Foreign Tax Claims and Judgments in Canadian Courts', (1964) 42 *Canadian Bar Review* 277, 283-291; H Cohen, 'Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy', 11 *Harvard Journal of International Law* 1, 4-13l BA Silver, 'Modernising the Revenue Rule: The Enforcement of Foreign Tax Judgments', 22 *Georgia Journal of International and Comparative Law* (1992) 609, 613-619; WS Dodge, 'Breaking the Public Law Taboo', 43 *Harvard International Law Journal* (2002) 161, 170-172; B Mallinak, 'The Revenue Rule: A Common Law Doctrine for the Twentieth Century', 16 *Duke Journal of Comparative and International Law* (2006) 79, 80-83.

[7] J Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray & Co, 1834), §257. In the second edition (J Story, Commentaries on the Conflict of Laws (2nd edn, Hilliard, Gray & Co, 1841)), the same section read that the revenue law rule was now "too firm, perhaps, to be shaken except by some Legislative Act abolishing it".

Despite the rule's baldness, its history is not one of the unequivocal refusal to give effect to foreign revenue laws. Furthermore, the early authorities do not display any principled basis for the rule's existence. They date from an era where comity was at a low ebb and the parochial solipsism of nation states discriminated against foreign trade through taxation. Alongside well-documented animosity between Britain and France at the turn of the 19th Century, there existed contemporaneous total prohibitions of British imports by Spain[8] and Prussia.[9] Self-serving dedication to the sustenance of British trade, however justifiable at the time, renders these cases frail authority upon which to found a rule appropriate for modern conditions.

The identity of the progenitor of the rule is unclear. Lord Mansfield often receives credit.[10] However, as shall be seen, his *dictum* in *Holman v Johnson*[11] does not live up to its foundational status, and is not even the earliest reference to the revenue law rule. Some judges nominate Lord Hardwicke's judgment in *Boucher v Lawson*,[12] but an earlier reference can be found in *Attorney General v Lutwydge*.[13]

In *Lutwydge,* the defendants imported tobacco into Scotland and gave a bond at Dumfries for outstanding duties. The Attorney General sought payment in the English Court of Exchequer, but Lutwydge contended that the sole court competent was its Scottish equivalent. The Lord Chief Baron referred the question to the full Exchequer Chamber, but no record exists of their consideration of the issue. Of present interest[14] is the judge's unequivocal statement that "[b]efore the [1707 Union] this court had no jurisdiction of the revenues in Scotland".[15]

This resembles the traditional formulation of the exclusionary rules in terms of a jurisdictional limitation.[16] Nevertheless, *Lutwydge* is of limited assistance: Lord Pengelly's *dictum* is mere assertion, and it is unclear in which sense – personal, subject matter, or by dint of rules of procedure – the English court lacked jurisdiction.

[8] *Matthie v Potts* (1802) 3 Bos & P 23, 127 ER 14.
[9] *Simeon v Bazett* (1813) 2 M&S 94, 105 ER 31.
[10] See Cheshire (15th: 2017) 116; *Her Majesty the Queen v Gilbertson* 597 F 2d 1161 (9th Cir. 1979) 1164; *Stewart v Gelot* (1871) 9 M 1057 1064.
[11] (1775) 1 Cowper 341, 98 ER 1120.
[12] (1734) Cunn 144, 94 ER 1116. See *James v Catherwood* (1822) 3 Dow & Ry 190; *Re Visser* [1928] Ch 877 882.
[13] *Attorney General v Lutwydge* (1729) Bunbury 281, 145 ER 674.
[14] Intra-UK enforcement raises distinct issues.
[15] *Lutwydge* (n 13) 282/674.
[16] Cf Lord Mansfield's axiom, discussed below, which speaks of 'no notice' being taken of such laws.

Boucher v Lawson[17] is even less instructive. The plaintiff sought delivery of a cargo of Portuguese gold. To resist this, the defendant relied on a Portuguese prohibition on the export of gold. That defence failed, with Lord Hardwicke CJ opining that denial of a remedy to the plaintiff would "cut off all benefit of such trade from this kingdom" which would be detrimental to "the principal and most beneficial branches of our trade".[18] Not only was this commercial activity lawful under English law, but it was also to be "very much encouraged".[19] The Portuguese law was ignored simply to avoid the ossification of English trade; the term 'revenue' appears nowhere in the judgment.

Protectionism similarly colours Lord Mansfield's judgment in *Holman v Johnson*.[20] Johnson bought tea at Dunkirk from Holman, a Frenchman, who was aware of Johnson's intention to smuggle the tea into England. Johnson failed to pay, and argued that Holman's awareness of his scheme barred recovery of the contract price. In rejecting this argument, Lord Mansfield proclaimed that "no country ever takes notice of the revenue laws of another".[21] However, the only revenue law involved was English, and it is surely true that a country takes notice of its own revenue laws. The only way to make sense of Lord Mansfield's *dictum* lies in the fact that, being made at Dunkirk, the contract was governed by French law. At best, this renders His Lordship's statement redundant: not only would French law take no notice of the revenue laws of England, it would take no notice of *any* provision of English law. It was solely the French law of contract which fell to be applied. Moreover, evidence of French law was not led, so Lord Mansfield's claim is either speculation, or assimilation with English law in the absence of such proof.

Four years later, Lord Mansfield decided *Planché v Fletcher.*[22] To circumvent excessive duties imposed by English and French authorities, papers would be doctored to make it appear to the English authorities that goods being exported were destined for a European port outside France, which then would be fabricated as the port of origin to dupe the French authorities. In *Planché,* underwriters alleged that this conduct amounted to fraud. Lord Mansfield disagreed, as "what has been practised in this case was proved to be the constant course of the trade, and notoriously so to everybody".[23] The underwriters were aware surely of the practice, and thus no fraud had been visited upon them. There was no plea that the contract contravened English or French revenue laws, and it is unclear why Lord Mansfield repeated his "no notice" proclamation.[24]

[17] (1734) Cunn 144, 94 ER 1116.
[18] ibid, 148/1118.
[19] Remarks reported in (1735) Cas T Har 194 198.
[20] (1775) 1 Cowper 341, 98 ER 1120.
[21] ibid 343/1121.
[22] (1779) 1 Douglas 251, 99 ER 164.
[23] ibid, 253/165.
[24] ibid.

The driving force behind these decisions was the preservation of English trade. Lord Mansfield did not let the tax laws of England, never mind those of another state, pose an obstacle. This is implied by his observation in *Planché* that it may have been in the interests of the French authorities to turn a blind eye to the scheme, since insisting on the imposition of the prohibitory tax on English goods could stultify trade. Clearly the 'no notice' proclamation was motivated by "a very questionable subserviency to mere commercial gains."[25]

It is submitted that too much weight has been placed on Lord Mansfield's "extravagant *dictum*".[26] Neither case involved the enforcement of a foreign revenue claim. They do not, therefore, offer any foundation for a wider principle compelling the absolute refusal of such claims. Moreover, subsequent cases construe the 'no notice' concept not as a restriction on jurisdiction, but as a rule depending on the nationality of the parties involved.

For example, in *Biggs v Lawrence,*[27] Lord Kenyon CJ noted that *Holman* concerned "foreigners, bound by no allegiance to this country".[28] Buller J was more explicit, distinguishing it on the basis that it "went on the ground of plaintiffs being foreigners".[29] as "the subjects of one country residing there are not bound to take notice of the revenue laws of any other".[30] *Biggs*, however, involved "one of the King's subjects making a contract directly against the statute laws of this country".[31] This 'allegiance' interpretation subsequently was adopted in lace smuggling cases, it being held that the assistance proffered by the foreign subjects was substantial enough to bar their action.[32] This, however, was formulated as an exception to the rule of non-allegiance. As stated by Lord Abinger CB in *Pellecatt v Angell:*[33]

> ...the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this country; except… where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act.

[25] Story (1841) (n 7), §245.
[26] AR Albrecht, 'The Enforcement of Taxation Under International Law', (1953) 30 British Yearbook of International Law 454, 461.
[27] (1789) 3 TR 454, 100 ER 673.
[28] ibid 456/675.
[29] ibid 457/675.
[30] ibid.
[31] See too *Clugas v Penaluna* (1791) 4 TR 466, 100 ER 1122, distinguishing *Holman* on this same basis.
[32] *Bernard v Reed* (1794) 1 Esp 92, 170 ER 290; *Waymell v Reed* (1794) TR 599, 101 ER 335; *Rotche v Edie* (1795) 6 TR 413, 101 ER 623.
[33] (1835) 2 CM&R 312, 150 ER 135.

It is seldom appreciated that *Holman* initially was perceived to hinge on the filiation of the parties.[34] Nationals of State A must respect the revenue laws of State A, but they need not respect the revenue laws of State B, or any other state of which they are not a national. This may not have been limited to nationality, but may also include the flag of a ship. In *Christie v Secreton*,[35] Lord Kenyon indicated that, if a sentence was passed by a French court on an American ship for breach of a navigational treaty between France and the United States then, because the ship owed obedience to US law, the English court "should not have been able to extricate [itself] from the effect of such a sentence".[36] This suggests no inherent repugnancy in recognising a foreign revenue judgment.

Even at this time, doubts were entertained as to the policy merits of the revenue law rule. In 1818, Story J opined that:[37]

> It has appeared to me more consonant with national comity, sound morals, and public justice, that courts of all countries should lend their aid to discountenance frauds upon the revenue laws of other countries, and decline to enforce any agreements entered into for the purpose of evading those laws.

Similar doubts were expressed as to the width of the rule by Lord Denman CJ in *Spence v Chodwick,*[38] who also opined that:[39]

> If, indeed, the contract appeared to have been made for the purpose of defrauding the Revenue laws of a foreign country, a question might arise as to whether we give effect to it.

(b) Exceptions to 'no notice': The Stamp Duty Cases

Indeed, there is a stream of cases which holds it is permissible to give effect to a foreign revenue law if non-compliance with that law under the applicable law of a contract rendered the contract unenforceable. For instance, in *Alves v Hodgson*,[40] the defendant employed the plaintiff on a voyage from Jamaica to London, with payment to be made by a promissory note drawn in Jamaica. The

[34] Although, contrary to the normal common law preference for domicile, the connecting factor employed is that of nationality. This may emphasise the political origins of the revenue law rule.
[35] (1799) 8 TR 191, 101 ER 1340.
[36] ibid 196/1342. Lawrence J considered navigational laws as analogous to revenue laws: 197/1343. See too *Sharp v Taylor* (1849) 2 Ph 801, 41 ER 1153: contravention of US navigation laws did not bar recovery between two English subjects.
[37] *The Anne* 1 F Cas 955 (CCD Mass 1818) 956.
[38] (1847) 10 QB 517, 116 ER 197.
[39] Ibid, 527/201.
[40] (1797) 7 TR 241, 101 ER 953.

defendant resisted the plaintiff's claim for payment on the basis of non-payment of Jamaican stamp duty. Lord Kenyon CJ, in accepting that argument, noted that resort must be had "to the laws of the country in which the note was made: and unless it be good there, it is not obligatory in a Court of Law here".[41] Substantive effect, therefore, was given to the Jamaican tax law.

Following this, Lord Ellenborough held in *Clegg v Levy*[42] that, if the *lex loci contractus* mandated a stamp, a lack thereof would prevent the agreement being received into evidence in England. In contrast, in *James v Catherwood,*[43] Lord Abbot CJ referred to the "prodigious inconvenience" which would flow from an English court having to require evidence of foreign tax law. This clearly is overbroad, for the same inconvenience is encountered whenever one must refer to any provision of a foreign law to determine the validity of a contract.[44]

These cases fail to articulate a distinction between whether the absence of a stamp affects the validity of the contract, or whether it simply means the document cannot be accepted as evidence. The admissibility of evidence cannot be dictated by the *lex loci contractus*: this is a procedural matter exclusively within the preserve of the law of the forum. This distinction was teased out in *Bristow v Sequeville,*[45] where it was applied by Rolfe B.[46] Nevertheless, applying the foreign revenue law as part of the *lex loci contractu*s still amounts to its enforcement.

The Scottish courts took a more robust line.[47] *Stewart v Gelot*[48] concerned an unstamped bill of exchange drawn in Paraguay, where a stamp was mandatory. Lord Justice Clerk Moncrieff first considered that Scots law was applicable.[49] His Lordship opined that any violation of Paraguayan revenue law would be irrelevant. He was "not aware" of a Scottish court ever giving effect to foreign revenue law, noting that "[t]he authorities to the contrary are uniform".[50] The distinction drawn in *Bristow v Sequeville*[51] was adverted to, with the Lord Justice Clerk describing it as based on "rather hasty observations" which had "certainly never been sanctioned by practical decision".[52] Similarly,

[41] ibid, 244/955.
[42] (1812) 3 Camp 166, 167, 170 ER 1343.
[43] (1822) 3 Dow & Ry 190. See also *Wynne v Jackson* (1826) 2 Russell 351, 38 ER 368.
[44] *Catherwood* has been described as "an unjustified application" of the revenue law rule (*Government of India v Taylor* [1955] AC 491 505 (Viscount Simonds)).
[45] (1850) 5 Ex 275 278, 155 ER 118 119-120.
[46] ibid, 279/120.
[47] Which now is reflected in the Bills of Exchange Act 1882, s72(1)(a) (foreign stamp law irrelevant to material validity).
[48] (1871) 9 M 1057. See too *Count Joseph Valery v John Scott* (1876) 3 R 965 967.
[49] ibid 1060.
[50] *Clements v Macauley* (1866) 4 M 583 was cited as an instance where a Scottish court 'gave effect' to a contract violating a foreign revenue law. However, the decision was one on personal jurisdiction only, and the Lord Ordinary had rejected an analogy with the revenue law rule.
[51] (n 45)
[52] *Gelot* (n 48) 1062.

Lord Benholme speaks vaguely of "a whole host of decisions" which apparently reject that distinction.[53] Lord Neaves' concurrence is more colourful:[54]

> In either case it is a sanction or penalty for breach of revenue laws and for us to interfere in one way or another would be making us what we are not – the tax gatherers of a foreign country. Let them look after their own affairs; we have enough to do…

This can be contrasted with the *dicta* of Willes J in *Phillips v Eyre.*[55] While surveying objections to a retrospective Jamaican decree, His Lordship considered other instances where foreign laws had been rejected. One such example was: [56]

> …revenue laws … which, for some reason not very obvious, have been put out of consideration except in instances where they affect the essential form of contract.

This is a rare, and perhaps the first, instance of an English judge questioning the basis of the revenue law rule. This is clearly at variance with the views of the Scottish judges. It is fair to say that *Gelot* pays insufficient regard to *Bristow v Sequeville*: rather than being hasty passing observations, the decision to give effect to a revenue law of the *lex loci contractus,* where this has the effect of invalidating the contract under examination, was central to the outcome of that case, and is consistent with the substance/procedure divide.

(c) The Rule Finds a Foothold: The Road to *Government of India v Taylor*

No reported revenue law rule case appears from 1871 until the publication of Dicey's first edition of *The Conflict of Laws* in 1896. It is nowhere mentioned in that edition; only the penal law rule appears.[57] This may be because of the patchiness of the authorities, as discussed above. The only foreign fiscal laws which had been at issue were customs laws, navigational laws, and those imposing stamp duties. The stamp duty cases show, for the most part, willingness to give effect to the revenue laws of a foreign nation, at least where this was material to the validity of the contract. As for custom and navigational laws, the cases involved only nations with which Britain's relations were strained at best. There was no instance of a foreign government actually seeking recovery of unpaid tax.

[53] ibid 1065.
[54] ibid 1067.
[55] (1870–71) LR 6 QB 1.
[56] Ibid, 27.
[57] AV Dicey, *Digest of the Law of England with Reference to the Conflict of Laws* (Stevens & Sons/Sweet and Maxwell, 1896), 220.

Further, a backdrop of the Napoleonic wars, Prussian trade embargos, and the primacy of the nation state devalue whatever can be gained from these early cases. Scrutton LJ recognised this in *Ralli Brothers v Compania Naviera Sota Y Aznar.*[58] His Lordship reserved liberty to assess the value of the revenue law rule in 1920, stating that "[t]he early authorities on this point require reconsideration, in view of the obligations of international comity as now understood".[59] Lord Reid made the same point in *Regazzoni*:[60]

> I think it must be borne in mind that they date from a time when international relationships were somewhat different and when theories of political economy now outmoded were generally accepted.

Lord Somervell of Harrow put the point more pithily: the 'no notice' formulation "seems to have been based on the principle that freedom and smuggling 'gang thegither'".[61]

Additionally, up to *Ralli Brothers*, there was no case where the revenue law rule was pivotal to the final outcome. *Spiller v Turner*[62] concerned the effect of a foreign revenue law on an English contract. Kekewich J decided that case by reference to choice of law principles: the contract was governed by English law, and Queensland tax legislation could not affect entitlements which had accrued as a matter of English law. There was no need to invoke Lord Mansfield's mantra. The Court of Session was faced with the matter of the recognition of a judgment procured by the Canadian tax authorities in *Attorney General for Canada v William Schulze,*[63] but Lord Stormont-Darling proceeded, correctly, on the basis that the sum was a penalty, referring solely to *Huntington v Attrill*.[64]

It was on the authority of *Sydney Municipal Council v Bull*[65] that the revenue law rule was added to the third edition of *Dicey* in 1922.[66] At first sight, the case appears to remedy the frailty of earlier authority: not only did the revenue law rule bar an action by a foreign state to enforce a compulsory liability for street repairs, but the claim was pursued by a fellow Commonwealth state. However, no British authority was referred to in argument or in the judgment. Counsel relied on an American case

[58] [1920] 2 KB 287.
[59] ibid 300.
[60] *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 324.
[61] ibid 329, invoking Burns's 'Freedom and Whisky gang thegither'. What Burns would have made of the decision in *Foster v Driscoll* [1929] 1 KB 470 (see n 95) is not evident.
[62] [1897] 1 Ch 911.
[63] (1901) 9 SLT 4.
[64] [1893] AC 150.
[65] [1909] 1 KB 7.
[66] AV Dicey and A Berridale Keith, *The Conflict of Laws* (3rd edn, Stevens & Sons/Sweet and Maxwell, 1921), 230.

considering its intra-state application,[67] and *Huntington v Attrill*.[68] Grantham J gave no authority for his assertion that in revenue cases "it has always been held that an action will not lie outside the confines" of the enacting state.[69]

Moreover, the court's rejection of the claim on the basis of the revenue law rule is *obiter*:[70] *Bull* was decided on the ground that the Australian legislation expressly empowered only the Sydney Municipal Council to bring the claim for improvement charges in New South Wales.[71] Further, the effect of that legislation was to create a charge over the affected land and, as that land was not located in England, the English courts would have no jurisdiction over enforcement of that charge.[72]

Other cases referencing the revenue law rule prior to Scrutton LJ's comments in *Ralli Brothers* either did so in passing,[73] or only in *obiter* comments.[74] *The Eva*,[75] decided after *Ralli Brothers*, concerned a claim by the Finnish government under legislation which entitled them to 2.5% from every sale of a Finnish vessel. Hill J rejected that claim by applying the *lex situs* rule: the ship was sold in England, and so Finnish law could not have governed.[76] The revenue law rule was not mentioned, but the case nevertheless is cited as authority for the rule in the footnotes to *Dicey*.

Scrutton LJ's calls for reassessment were at last heeded in *Re Visser*,[77] where the Queen of the Netherlands sought to recover succession duty from the estate of a Dutch national. Tomlin J agreed with counsel that few of the prior decisions were of direct assistance, but opined that:[78]

> …the absence of authority for what … is called an elementary proposition, may indicate that the proposition is not well founded in principle, but it also may merely indicate that it is so well recognized that it has never been put to the test.

[67] *Henry v Sargeant* (1843) 13 New Hamp 321.
[68] [1893] AC 150.
[69] *Bull* (n 65), 12.
[70] And itself can be doubted: see text to (n 130)-(n 135).
[71] *Bull* (n 65), 12.
[72] ibid, 13.
[73] *In Re Duchess of Manchester* [1912] Ch 540 (citing *In re Tootal's Trusts* (1883) 23 Ch D 532); *R v Cotton* [1914] AC 176 195; *King of the Hellenes v Brostrom* (1923) 16 Lloyd's List Reports 190 193.
[74] *Indian and General Investment Trust v Borax Consolidated* [1920] 1 KB 539, a case on all fours with *Spiller v Turner;* and cf *London and South American Investment Trust v British Tobacco Company (Australia) Ltd* [1927] 1 Ch 107 (where an identical decision is reached without mention of the revenue law rule).
[75] [1921] P 454.
[76] Ibid, 457-8.
[77] [1928] Ch 877.
[78] ibid, 882.

His Lordship followed this latter inclination, holding that he was bound by the decision in *Bull*, despite, as was submitted above, the fact that the observations therein were *obiter*. However, even if he were not so bound, his own opinion was that the revenue law rule was "well recognized".[79]

(d) The Rule Affirmed: *Government of India v Taylor*

Perhaps unsurprisingly given his subsequent elevation to a Lord of Appeal in Ordinary, Tomlin J's judgment in *Re Visser* proved influential in the decision of the House of Lords in *Government of India v Taylor*.[80] Taylor was the liquidator of an English company with Indian operations, being wound up in England. The Indian Government, to which the company was liable for various taxes, recovered very little from the company's remaining assets in India. A proof for the tax owing was submitted to the English liquidation, which was rejected by the liquidators on the basis of the revenue law rule. This was challenged by the Indian Government, which not only argued that the rule had no application in the context of insolvency, but that the rule itself was not so well-established as earlier cases had supposed. They argued that the exclusion of foreign law could only be limited to laws which were characterised as penal, and most foreign tax legislation would not attract this characterisation.[81] The House of Lords rejected this challenge and, in so doing, provided clear affirmation of the rule's existence. Lord Somervell thought the rule was self-evident,[82] and Viscount Simonds described the rule – despite the frailty of the authority explored above – as a "strong fortress"[83] which was founded on a "formidable array of authority".[84] Lord Keith founded the rule – in a passage which has been cited as the basis for each of the exclusionary rules of private international law – on the basis that:[85]

> enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.

[79] ibid, 884.
[80] [1955] AC 491, 503-504.
[81] See the argument for the appellant (including, as counsel, Dr JHC Morris, of *Dicey, Morris and Collins*) at ibid, 494.
[82] ibid, 514.
[83] ibid, 506.
[84] ibid, 504.
[85] ibid, 511.

As will be seen later in this paper,[86] whatever force this reasoning has,[87] it is undermined considerably by the fact of the revenue law rule's disapplication in the insolvency context.

Leaving aside the theoretical quagmires, the application of the revenue law rule as confirmed by *Government of India v Taylor* raises two, distinct, practical questions:

(1) What types of foreign law engage the subject matter scope of the rule? In other words, what is a 'revenue' law?
(2) What degree of connection between the claim before the forum and the foreign revenue law is required to trigger the operation of the rule.

These questions often are bound up together under the rubric of 'characterisation'. However, it is submitted that they must be kept analytically distinct. It is incorrect to suggest that the British court's interrogation into the application of the exclusionary rules to the case before it is a mere exercise in characterisation. Admittedly, the first question is a pure exercise in characterisation: it involves an examination of the foreign 'background law' by the forum to determine whether or not it falls within the particular category of laws proscribed by the exclusionary rules. This exercise is discussed in **Section III**. The second question, however, requires analysing the claim which the claimant has advanced before the forum to ascertain its connection with the excluded background law. This, however, is not an analysis which is effected on a sliding scale; instead, the cases approach the question in a binary fashion. Claims which amount to the *enforcement* of the foreign revenue law are prohibited, whereas claims which merely seek *recognition* of the foreign revenue law are permitted. The expansive approach of the courts to the definition of what constitutes enforcement – extending the revenue law rule to preclude as *indirect* enforcement ordinary private law claims brought for compensation or restitution – will be examined and criticised in **Section IV**.

III. Characterising the Background Law: What is a Revenue Law?

The question of what amounts to a 'revenue law' is surprisingly underexplored.[88] The 'revenue' nature of a particular law usually is conceded, with the argument focussing on the 'enforcement' issue.[89] This may be because it sometimes is obvious that the law in question pertains to tax matters.

[86] See **Section V.**
[87] Forthcoming work by the author will sustain the argument that this is an inadequate and insufficient explanation for the exclusionary rules of private international law.
[88] See A Briggs, 'The Revenue Rule in the Conflict of Laws: Time for a Makeover', [2001] *Singapore Journal of Legal Studies* 280, 281-284.
[89] See **Section IV.**

The primacy of the principle of "no taxation without legislation" means that tax laws usually are ensconced in legislation,[90] with self-characterising titles such as the "[Indian] Income Tax Act 1922".[91] This usually gives little room for argument to the contrary. But not every case is clear-cut, and it is important to demarcate the precise limits of this exclusionary class, especially as revenue claims enjoy specific exceptions to non-enforcement in the insolvency context. This section will examine the few cases to consider this question and will extract three indicia of what constitutes a "revenue" law.

(a) Function: Protection v Wealth Generation?

Early revenue law rule cases concerned few laws which would be considered to be quintessentially 'revenue' in nature. A large and disparate class of laws was subsumed under the revenue heading. Laws imposing customs and tariffs on goods, and stamp duty legislation, obviously are revenue ones. Export and import restrictions,[92] and navigational laws, on the other hand, do not appear so evidently analogous as to justify exclusion on the same basis. Both are designed to protect the commercial trading interests of the enacting state, not to exact monies from their subjects. It is on that basis, it is submitted, that they should not be classed as revenue laws.[93]

Two cases support this conclusion. *Foster v Driscoll*[94] concerned an abortive shipment from Glasgow of whisky which was bound for prohibition-era USA. It was argued that the US prohibition was a 'revenue law', and that precluding the action for recovery of the contract price was barred by the revenue law rule. Sankey LJ held that the US prohibition was "not a mere revenue law".[95] This was because the American law "was intended to prevent a *malum in se* rather than a *malum prohibitum*".[96] With respect, it is submitted that this is not the correct distinction. One can imagine a tax being imposed to encourage moral rectitude and combat a well-acknowledged evil, a *malum in se*: an obvious example would have been if Prohibition took the form of a heavy tax burden. The logic of *Foster* is that, because there is a strong public policy component justifying the law, then that law can be enforced even if it extracts tax. But the question is not one of the turpitude of the conduct against which the sanction is directed, or whether or not defiance of its provisions is merely technical in the grander scheme of the foreign legal system.

[90] This may ease the difficulties of characterisation and proof of foreign law.
[91] Enforcement of which was sought in *Government of India v Taylor* (n 80).
[92] See also *King of Italy v De Medici* (1918) 34 TLR 623.
[93] They may constitute 'other public laws'.
[94] [1929] 1 KB 470.
[95] ibid, 515.
[96] ibid, 518.

The true question is hinted at by *Regazzoni v KC Sethia (1944) Ltd,*[97] concerning an English contract to export jute from India to South Africa via Genoa, in defiance of an Indian law. When repudiated by the respondents, the appellant invoked the revenue law rule as a defence, claiming that refusal to give effect to the contract would involve giving effect to Indian revenue law. The result in *Foster v Driscoll* was approved, but with no discussion of Sankey LJ's *malum in se/malum prohibitum* distinction, which solely appears in the argument of counsel for the appellant.[98] Lord Keith of Avonholm[99] and Lord Somervell of Harrow[100] thought the revenue law rule had no application. There is, however, little explanation as to why this is so. Lord Reid, however, more insightfully compared the Indian law to the exchange control case of *Kahler v Midland Bank*,[101] stating that neither could be described as a revenue matter.[102]

Foreign revenue laws and foreign exchange control legislation are treated similarly by the courts, in that an action for the enforcement of either will be precluded. However, in *Kahler,* the House of Lords refused to conflate the two.[103] Lord Radcliffe viewed Czechoslovakian currency regulations as "more than the 'penal or revenue laws' of another State the existence of which our courts are traditionally disposed to ignore",[104] a view shared by Lord Normand.[105] *Dicey* is more tentative in excluding such rules from the domain of 'revenue laws',[106] but it is submitted that *Kahler* is correct. As was observed in *Frankman v Prague Credit Bank,*[107] foreign exchange controls are "financial restrictions and have to do with the financial position and internationally the financial relationship[s]"[108] of the country enacting those laws. They perform a protective function by maintaining the integrity of the financial resources of the enacting state, restricting the abilities of non-residents to prey upon the relative volatility of the currency in place there.[109] Foreign exchange control therefore may form part of the residual 'other public law' category.[110]

Revenue laws, on the other hand, are not predominantly concerned with maintaining economic integrity, but rather with actively levying the funds which finance the apparatus of the state. One

[97] [1958] AC 301.
[98] ibid, 306.
[99] ibid, 328.
[100] Ibid, 329; cf 330 where His Lordship thought such a characterisation arguable.
[101] [1950] AC 24.
[102] *Regazzoni* (n 97), 324.
[103] cf *King of the Hellenes v Brostrom* (1923) 16 Lloyd's List Reports 190.
[104] *Kahler* (n 101), 57.
[105] ibid, 36.
[106] Dicey (15th: 2012), [5-030].
[107] [1948] 1 KB 730 (not discussed on appeal).
[108] ibid, 746.
[109] See Proctor (2012) Intro.IV.
[110] See C Proctor, *Mann on the Legal Aspect of Money* (7th edn, OUP, 2012), ch 16.

essential feature is that they create a liability for the taxable person to pay tax, and a correlating power on the part of the tax authorities to enforce that liability. Another feature is that they are enacted for the purpose of generating revenue for the enacting state. Taking these together, it is easy to see why export/import restrictions or foreign exchange controls are not revenue laws: first, they are enacted for a protective, rather than generative, purpose. Secondly, they do not create a liability on the part of a taxable person to pay. They may create a liability to pay if breached, but that merely supports a penal characterisation. The liability under a tax is established by falling within the scope of chargeable persons, not by breaching a legal requirement.

(b) State as Beneficiary?

Perhaps the most in-depth treatment of characterisation in the revenue context is *Metal Industries (Salvage) Ltd v Owners of The ST "Harle"*.[111] This case concerned a claim by the French government to the proceeds of the sale of a ship to satisfy payments owed by the ship's owners, *qua* employers, to a state health insurance scheme for seamen.[112] In applying the revenue law rule to bar the claim, Lord Cameron noted the definitional difficulty: [113]

> There is practically nothing in the world which is not or may not be taxed and few, if any, human activities which at one time or another have not been the subject of fiscal imposition. At the same time as the complexity and scope of the activities of the state expand, so too increase the number and variety of its agencies, and the number and variety of those entrusted with the assessment and collection of its revenues.

Nevertheless, his Lordship identified certain features of the background law which supported a revenue characterisation. The body claiming entitlement to the payment was a governmental organisation, the entitlements were backed by governmental authority, the contributions were compulsory, and the schemes which they funded were state-administered.[114] Thus, a charge levied to generate revenue for a particular purpose, rather than to inflate the consolidated fund, still will be a revenue law.

A number of Irish cases explore these requirements and illustrate both the need for a revenue-generative purpose and for the state to be the ultimate beneficiary. *Byrne v Conroy*[115] concerned a

[111] 1962 SLT 114.
[112] Cf *The Acrux (No 3)* [1965] P 391 where the point was not taken in respect of a similar claim by the Italian state.
[113] *ST Harle* (n 111) 116.
[114] ibid 117.
[115] [1998] 3 IR 1.

request to extradite an Irish farmer who allegedly was involved in a scheme to import grain from Northern Ireland without paying an agricultural levy due under the EC's Common Agricultural Policy. The farmer's defence was that this was a "revenue offence", for which extradition would not lie under the legislation. The British legislation under which he was charged referred to it being a "tax" offence, but Kelly J concluded that that was a misnomer. The essence of a tax law was one enacted to raise revenue, but the levy here was enacted to ensure the free movement of cereal goods throughout the Community.[116] The Irish Supreme Court upheld this judgment, adding that the revenue law rule did not apply to the levies. This was because the charge was not imposed by the UK as a sovereign state, but merely was the result of the implementation of an EC-wide charge. Therefore, it was not a tax in the sense of a law promulgated with the purpose of raising revenue for a particular nation state.[117]

It had been argued in a previous Irish case that the EC origins of VAT meant that the revenue law rule would not apply to an action seeking its payment.[118] The court did not deal with this argument, but, it is submitted, it is misguided. Although some of the monies raised through VAT are passed onto EU institutions, the vast majority is retained by the collecting Member States, which retain some discretion to vary the rate of taxation and exclude certain items from its scope. Furthermore, excluding EU VAT on this ground would draw an unprincipled distinction in the treatment of EU VAT and similar sales taxes imposed by other countries. It is important to emphasise that, at core, EU VAT is clearly imposed for the purposes of raising revenue for Member States.

In *Transportstyrelsen v Ryanair Ltd*,[119] the Swedish Transport Authority sought to recover security charges levied pursuant to EU law.[120] While these charges were to be borne by customers from the beginning of 2005, many passengers due to fly after that date had booked beforehand, and Ryanair refused to charge them the additional amount. The authority brought a claim in Ireland, which Ryanair defended on the basis that this was a claim to recover a foreign revenue debt. Ryanair argued that the charges were "non-voluntary pecuniary sums paid to a state agency by members of the public for the purposes of ensuring the security of the Swedish state"[121] which were set at a flat rate and thus clearly were a revenue charge. Transportstyrelsen countered that the purpose of the charges was not to raise funds for the benefit of the Swedish government, but to fund the security controls

[116] ibid 20.
[117] Ibid, 39.
[118] *Bank of Ireland v Meeneghan* [1994] 3 IR 111.
[119] [2012] IEHC 226. Cf Case C-302/13, *flyLAL-Lithuanian Airlines AS v Starptautiska lidosta Riga VAS* [2015] ILPr 2 – such charges would not be a "civil and commercial matter".
[120] Regulation (EC) No. 2320/2002 of the European Parliament and of the Council.
[121] *Ryanair* (n 119), 4.1.

mandated by EU law. Hedigan J refused to apply the revenue law rule, as the funds received from the charge were passed onto the airport operators, who had to implement the security measures, and were therefore those actually prejudiced by non-payment.[122]

Raised to the level of principle, this could be formulated thus: in order to count as a payment pursuant to a revenue law, the ultimate beneficiary must be a foreign government. But that is not precise enough: as Briggs notes,[123] it can be argued that it is the citizen who is the ultimate beneficiary of the income collected pursuant to a tax, for it is used to fund various initiatives and maintain the continuing functions of state. Briggs's preferred criterion is that, if the payer has no opportunity to disclaim the benefit for which the charge is levied, it will be a tax.[124] In this instance, Ryanair had no such opportunity to disclaim the security measures that the charge was intended to fund, and on that view, this was a claim to enforce a revenue law. It is perhaps worth noting that the role of the Swedish Authority was purely one of collection in order to pass it onto the airport owners to compensate them for their outlays. If *Ryanair* is to be supported (and it is submitted that it should be), it may be on the basis that the charge was not designed to raise funds for the Swedish state, but as a statutory quasi-indemnity for expenditure that otherwise would have to be incurred by a private party.

This reasoning is supported by *Weir v Lohr*.[125] The plaintiff, who had been injured by the negligence of the defendant, had his medical bills paid out of a Saskatchewanian scheme of compulsory health insurance. The legislation creating that scheme provided that the beneficiaries were to account to the government for any recovery in respect of medical fees. Weir sought recovery of the medical fees in Manitoba, and Lohr responded by raising the application of the revenue law rule. Tritschler CJQB rejected this defence, holding that the claim was not a revenue one, even if the fund to which the sums would enure were part of the consolidated sums of the state.[126] This approach was followed in New Zealand in *Connor v Connor*,[127] which involved a claim for unpaid legal costs by the defendant to an Australian divorce action. The plaintiff had been funded by legal aid and, in effect, it was the Legal Aid Committee of Victoria which was seeking to recover the costs in New Zealand. Roper J suggested that it would be "quite unreal" to regard the action before him as a revenue one simply because it "may result in the reimbursement of a fund which has the blessing, or even the financial support, of a foreign state".[128]

[122] ibid, 6.3.
[123] A Briggs, *Private International Law in the English Courts* (OUP, 2014), [3.21].
[124] See also A Briggs, 'The Revenue Rule in the Conflict of Laws: Time for a Makeover', [2001] *Singapore Journal of Legal Studies* 280.
[125] (1967) 65 DLR (2d) 717.
[126] ibid, 720-21.
[127] [1974] 1 NZLR 632.
[128] ibid, 636-637.

It is not clear, however, how these cases square with the decision in *Sydney Municipal Council v Bull*.[129] It will be recalled that the revenue law rule precluded a claim brought by a local council in respect of compulsory payments levied to cover the cost of repairs to a particular street in Sydney. Just as in *Weir, Connor*, and *Ryanair,* the sums of which recovery was sought effectively constituted payment for specific benefits rendered to the debtor: medical treatment in *Weir*; legal representation in *Connor*; the security services in *Ryanair;* and the street repairs in *Bull*. It has been noted that the contrary decision in *Bull* may not "accord with the growing practice of States and their subordinate bodies to furnish services in return for payment".[130] Further, FA Mann argued for a "quasi-contractual" characterisation of these 'specific benefit' cases, for the payments or performances are rendered on the footing of statutory terms and thus should not fall within the parameters of the revenue law rule.[131]

This argument was supported by Leslie[132] who suggested that it undermines Mann's support of the decision in *Metal Industries (Salvage) Ltd v ST "Harle*".[133] Leslie suggested that the distinction between "a state's claim to be reimbursed by those benefitting from social security services rendered to them" (which will be enforceable) and "claims for contributions paid in advance for such benefits, contributions rather like insurance payments" (which are not enforceable) is "surely not sound".[134]

However, the different results can be explained if the distinction is between whether or not a reasonably specific beneficiary, or class of beneficiaries, was envisaged at the point which the liability was called in. In *ST Harle,* the sums were to be paid into a fund which would make various disbursements relating to health insurance and family benefits for those employed as seamen. This is a broader class of beneficiaries than those residents of Moore Street who would have benefited from the improvements in *Bull;* the patient and litigant for whom services were paid by the state in *Weir* and *Connor*; and the Swedish airport which paid for the security arrangements in order that Ryanair could use it for arrivals and departures. Moreover, while in those cases the benefit provided to the beneficiaries had crystallised, in *ST Harle* the discretionary nature of the fund meant that there was no guarantee that a member of the class of beneficiaries would receive a particular benefit in a particular form.

[129] [1909] 1 KB 7.
[130] P Torremans (ed), *Cheshire, North & Fawcett: Private International Law* (15th edn, OUP, 2017), 117-118.
[131] FA Mann, 'Conflict of Laws and Public Law', 132 *Recueil des Cours* 107 (1971-I), 173.
[132] RD Leslie, *Aspects of Public Policy in the Conflict of Laws* (Unpublished PhD Thesis, University of Edinburgh, 1979), 69-71.
[133] (n 111).
[134] Leslie (n 132), 71.

The more tightly drawn the class of beneficiaries is, and the more definite the fact and nature of the benefit is, the closer the analogy becomes between the claim to enforce the particular law and an ordinary private law action of restitution, subrogation, or indemnification. Removing such instances from the scope of the revenue law rule reflects the multifaceted ways in which services may be performed by a modern state, and realistically appreciates that these cases do not involve the exertion of sovereign authority, but are more akin to a contractual or unjust enrichment claim for (re)payment in respect of benefits received by the defendant.

(c) Conclusion

Pulling these threads together, it is submitted that the indicia of revenue laws are that:

a) they impose liability on persons who come, by reason of status or conduct, within their scope;

b) liability must be compulsory for those falling within the taxable scope; and;

c) the purpose of creating that liability is to raise income for the enacting state, to exact contributions to the consolidated funds or funds for the benefit of specific classes of persons or particular governmental/civic functions. If the state acts as a mere collector, which passes on that sum to a private person to recoup expenditure, or if the state uses that sum to indemnify itself in respect of specific benefits conferred upon a specific party or a reasonably identifiable class of beneficiaries, then the law in question should not be held to be a revenue one.

It is this final point which may create the most difficulty in practice. But precision is important, given that the effect of a revenue characterisation is to raise the spectre of non-enforceability. However, that characterisation is only the first hurdle. The next stage – of determining whether the claim which has been brought is one for the *enforcement* of that law – is attended with just as much, if not more, complexity.

IV. Recognition and Enforcement: The Connected Claim

(a) Introduction

Lord Mansfield's "no notice" formulation from *Holman v Johnson* would be so broad as to bar any claim which happened to have any connection to a foreign revenue law. This has been long doubted,[135] and in *Re Visser* it was stated that: [136]

> …however unwilling the Courts may be to recognise foreign law, there are certain cases in which, although they do not enforce the foreign revenue law, they are bound to recognise some of the consequences of that law….

The preclusive effect of the revenue law rule clearly is directed only at attempts to *enforce* a foreign revenue law, with its *recognition* viewed as permissible. After the background law is characterised as falling within an excluded category, the enforcement/recognition distinction is the fulcrum upon which the exclusionary rules hinge. It is, therefore, vital to arrive at a precise definition of the two concepts, and of the distinction between them. However, that is no easy task. *Dicey* recognises that the line between enforcement and recognition may well be a fine one;[137] and as has been rhetorically enquired: is it "not true to say that, in recognising, we give effect?"[138] This paper will endeavour to provide a more precise definition of the two concepts. However, it is suggested that their essence, and the distinction between them, is well captured by Briggs:[139]

> **Enforcement**: where a party "asks the court to make an order which decrees performance of a right or duty created by [the foreign background law]".[140]

> **Recognition**: where a party "[asks] the court to make an order based on some other legal right, albeit that that right may have derived, at some point in the past, from a law which fell into [an excluded category]".[141]

[135] e.g.the stamp duty cases at **Section 2(a).**
[136] [1928] Ch 877, 888.
[137] Dicey (15th: 2012) [5-023].
[138] EB Crawford and JM Carruthers, 'Kuwait Airways Corporation v Iraqi Airways Company', (2003) 52(3) International and Comparative Law Quarterly 761, 771.
[139] A Briggs, 'Public Policy in the Conflict of Laws: a Sword and a Shield?', (2002) 6 *Singapore Journal of International and Comparative Law* 953, 953-954.
[140] Ibid, 954.
[141] ibid.

In other words, *enforcement* involves an attempt to obtain satisfaction of a claim created by the foreign background law, whereas *recognition* merely involves the court treating the foreign background law as *datum*: an observable factual or legal construct which may be taken into account. Maintaining this distinction, however, is no easy task. This can be demonstrated by contrasting two cases.

In *Rossano v Manufacturers' Life Insurance Co*,[142] the plaintiff was an Egyptian customer of the defendant insurance company who sought payment after the maturation of three policies. The defendant resisted this action *inter alia* by observing that the Egyptian government had served garnishee orders upon them in respect of tax owed by the plaintiff. If the English court ordered the premiums to be paid over to the plaintiff, the defendant would be subject to penalties. McNair J was unmoved by the hardship this would impose, and rejected the defence as "to allow the defendants to set up in diminution or extinction of the plaintiff's claim a foreign garnishee order … served upon them by the Egyptian tax authorities would clearly…"[143] run counter to the revenue law rule. Despite repeated erroneous references to "recognition" in the judgment,[144] *Dicey* cites the case, without critique, as an example of indirect enforcement.[145]

Rossano may be contrasted with *Scottish National Orchestra Society Ltd v Thomson's Executor.*[146] Mrs Thomson died in Stockholm, having executed trust directions in Scotland that sums be paid over to several legatees "all free of government duties". The trustees remitted sums to Sweden so that death duties could be satisfied in order for Swedish residents to receive their legacies. The pursuer, a residual legatee which saw its entitlement substantially reduced by the payment of the Swedish tax, raised an action against the trustees for breach of trust. It was contended that, as a claim for Swedish inheritance tax would not be enforceable in Scotland, the Scottish trustees acted improperly in remitting funds to Sweden for its satisfaction. Lord Robertson dismissed the action, accepting expert evidence to the effect that, under Swedish law, non-payment of death duty would leave the legatees open to an action by the Swedish government to recoup the unpaid tax. Allowing the remission to stand, therefore, was the only way in which full effect could be given to the wishes of the testatrix.

[142] [1963] 2 QB 352.
[143] ibid, 377.
[144] ibid, 376.
[145] Dicey (15th: 2012) [5-026] fn117.
[146] 1969 SLT 325.

Thomson is consistent with previous authority[147] and was approved in a subsequent English decision.[148] It is difficult, however, to see how it is compatible with the result in *Rossano*. In both decisions, the party prejudiced by the potential operation of the revenue law rule would be placed in a situation of double distress. In *Rossano*, if the revenue law rule argument succeeded, the defendant would have had to pay (i) the sum which was the subject of the garnishee order to the Egyptian government and (ii) the contractual payment due to the plaintiff under the insurance contract. Similarly, in *Thomson*, if the revenue law rule applied, the trustees would be liable for (i) the legacies that the Swedish legatees would have been entitled to without making deductions for the payment of Swedish death taxes[149] and (ii) the legacies which the Scottish legatees would have been entitled to if the Swedish death tax had not been paid. In *Thomson*, the court removed the trustees from this difficulty, but, in *Rossano*, the court's ordering the defendant to pay the contractual sum to the plaintiff placed the defendant in breach of the Egyptian garnishee orders, which, if pursued, no doubt would have rendered the defendant liable to the Egyptian government for the same sum.

The decision in *Thomson* obviously is the fairer one, and that in *Rossano* the more egregious. However, it is not clear that the Egyptian government in *Rossano* would have benefitted from the 'indirect enforcement' of its revenue law more than the Swedish government did from the 'recognition' of its law in *Thomson*. This is the difficulty that the slightness of the distinction between enforcement and recognition can visit upon parties. It is important, therefore, to establish a precise definition of these concepts in this context.

(b) Direct Enforcement

A: The Need for an Unsatisfied Claim

Lord Mackay of Clashfern defined 'enforcement' in *Williams and Humbert Ltd v W&H Trademarks (Jersey) Ltd*.[150] Counsel for the appellant sought to distil, from *Peter Buchanan v McVey,*[151] a broad principle that any action brought at the instigation of a foreign state where, in the event of success, the proceeds would be applied towards the purposes of a foreign penal, revenue or other public law, would amount to enforcement of such a law. Lord Mackay denied that *McVey* supported such a conclusion. The crucial factor in *McVey* was that the proceeds of the action would enure solely for the benefit of the Inland Revenue, which would use the funds to satisfy the outstanding tax owed by

[147] *Re Reid* (1970) 17 DLR (3d) 199 (BCCA).
[148] *Re Lord Cable* [1977] 1 WLR 7, 25-26. See also a full examination of the authorities in *HSBC Trustee (Hong Kong) v Alexander Laufer* [2016] HKCFI 1764.
[149] Otherwise, in not paying over these sums as instructed, the trustees would have acted in breach of trust.
[150] [1986] AC 368.
[151] [1954] IR 89.

the debtor.[152] If there was no outstanding claim to be satisfied, then the action in question could not be said to be one amounting to enforcement of the foreign revenue law.[153]

This spirit was followed by the Eastern Caribbean Supreme Court,[154] holding that the revenue law rule was not infringed simply because a foreign state could apply the proceeds of such an action towards a revenue debt. Bannister J noted that the logical conclusion of such an argument was that a claimant heavily indebted to a foreign tax authority would be precluded from recovering property or pursuing a claim in the forum state because of the risk that this would include the likelihood of the authority recovering a tax demand.[155]

Of course, a foreign tax authority never would pursue an action in another jurisdiction unless an unsatisfied tax claim was owed to them. The point, however, may be important to private parties, as demonstrated by *Air India Ltd v Caribjet Inc*.[156] An arbitral tribunal ruled in favour of the respondents, but, before the award could be enforced, the Indian Revenue made a demand that the award in favour of the respondents be paid to them, to go towards satisfying a provisional tax liability. The applicants sought to stay the enforcement of the award, arguing that a set-off existed in their favour, for previously they had made a payment to the Indian Revenue on behalf of the respondents. The respondents argued that permitting a stay of the execution of the award to allow that set-off would be tantamount to enforcement of the Indian revenue law. Judge Chambers QC disagreed, rejecting the argument that Lord Mackay's remarks in *Williams and Humbert* were *obiter*.[157] As the prior payment had satisfied the tax owing in this instance, no question of enforcement was involved.[158]

B: Revenue Authority as Sole Creditor

The foreign revenue authority may be one of a number of creditors standing to benefit from the recovery action. Does the fact that some benefit may enure to a foreign tax authority preclude the claims of the other creditors? This question arose in *Ayres v Evans*.[159] A New Zealand citizen was rendered bankrupt there, owing over half of his debts to the New Zealand tax authorities. The debtor

[152] *Williams and Humbert* (n 150) 440F-G.
[153] ibid 441A.
[154] *First Nevis Trust Company Ltd v Grossberg*, Unreported, 15th January 2014 (BVI).
[155] ibid [100] (Bannister J). See similarly *160088 Canada Inc v Socoa International* (1997) CILR 409 (recognizing the jurisdiction of a foreign court over tax-exempt Cayman company does not amount to the enforcement of the revenue laws of the foreign state).
[156] [2002] All ER (Comm) 76.
[157] ibid [52].
[158] ibid. Cf the German decision of the Bundesgerichtshof of 17th December 2015: Az. I ZR 275/14: argument that set-off arising from payment of Russian tax not admissible in German proceedings.
[159] (1981) 56 FLR 235.

was entitled to inherit from his father's estate in New South Wales, so a letter of request was directed to the Australian court to ingather the estate and remit it to New Zealand. When challenged, the Federal Court recognised that previous cases[160] involved the tax authority as sole creditor. It was conceded that it would be practically impossible to pay the inheritance to the non-revenue creditors to the exclusion of the revenue creditors. Fox J held that the revenue law rule did not apply, as its application would prejudice non-revenue creditors just as much as revenue creditors and, as a result, "public policy would rebound".[161]

Ayres was applied in England in *Teletalk Mobil Engineers v Jyske Bank*,[162] to the effect that the revenue law rule has no application where the tax authorities are one among a group of creditors. The practical desirability of such a decision is clear, but neither in *Ayres* nor in *Teletalk* is a principled basis given for the conclusion. It is obvious in both that the result would be the satisfaction of an otherwise unsatisfied revenue claim, a naked instance of enforcement. It is possible to say that allowing the claim in such circumstances would not *solely* amount to the enforcement of the foreign revenue law.[163] If there is a mixed purpose to the claim, or if another, non-sovereign, creditor would stand to benefit,[164] then the revenue law rule should not apply, for its application would needlessly prejudice other creditors.

C: Reciprocal Arrangements

The notorious baldness of the rule against direct enforcement makes it unlikely that foreign states will attempt that course. However, direct enforcement of tax is readily countenanced by numerous international mechanisms which have been transposed into UK law. HMRC, in many circumstances, must give assistance to requests from EU Member States under the Mutual Assistance in Recovery Directive.[165] This applies to "all taxes and duties of any kind" levied by an authority of a Member State.[166] The authorities of one Member State may make a request to the authorities of another to recover tax owing to it in that latter state.[167] The effect of such a request, if the debtor does not

[160] Namely *Peter Buchanan v McVey* [1954] IR 8 and *In re Gibbons* (1960) IJR 60.
[161] *Ayres* (n 159) 239.
[162] Unreported, QBD, July 17, 1998 (Clarke J) cited by PStJ Smart, 'The Rule Against Foreign Revenue Laws' (2000) 116(3) *Law Quarterly Review* 360.
[163] See too C McLachlan, *Foreign Relations Law* (CUP, 2014), [11.95].
[164] In South Africa, it has been held that 6% of non-foreign tax authority creditors precluded the application of the revenue law rule: *Priestley v Clegg* (1985) 3 SA 995. In *Wahr-Hansen v Compass Trusts Co Ltd* (2007) ITLR 283 (Cayman Islands Grand Court), it was held at [103]-[104] that non-tax debts of 1% were *de minimis* and would not preclude the operation of the revenue law rule. Cf *In re Williams* 2009 Jersey Law Reports *N* [16] (0.2% of non-revenue debts sufficient to preclude the application of the rule.)
[165] Directive 2010/24/EU, enacted in Finance Act 2011 s 87, Schedule 25, and the Mutual Assistance and Recovery Regulations (SI 2011/2931). For the Brexit implications on this regime, see *Haskell v Haskell* [2020] EWFC 9, [56].
[166] Article 2.1(a)
[167] Article 11.

successfully dispute it,[168] is that the foreign tax debt shall be treated as if it is a domestic debt, allowing HMRC to use all powers which it would use to recover analogous domestic taxes.[169] While, in form, this proceeds on the counterfactual that the tax is a domestic one, in substance it amounts to the enforcement of a foreign revenue law.

Beyond the EU, double taxation treaties between the UK and other states may contain provisions relating to collection assistance, usually based on Article 27 of the OECD Model Convention. Authority to conclude such agreements was affirmed by the Finance Act 2006.[170] To date, the UK had entered into double taxation treaties with 134 states.[171] Twenty-six of these contain collection assistance provisions modelled on the OECD provisions,[172] but, since the Finance Act 2006 conferred authority to make such provisions, roughly twice this number of treaties have been entered into, or amended, without such provisions being included, suggesting that the mechanisms are not universally attractive.

Nevertheless, these recovery provisions represent a further stripping back of the revenue law rule. There are signs that the courts do not lament this, and thus will interpret these provisions liberally. In *Revenue and Customs Commissioners v Ben Nevis (Holdings).*[173] HMRC brought a claim to recover tax in England on behalf of the South African tax authority. The tax became due before the treaty with South Africa was amended to include the mutual assistance provisions, and the taxpayer argued that giving such retrospective effect to its provisions would be contrary to public policy. Lloyd Jones LJ dismissed this challenge and forcefully brought home the minor status of the revenue law rule:[174]

> …the Revenue [Law] Rule did not exist for the benefit or protection of taxpayers… whatever its precise basis, it seems clear that it lies in relationships between sovereign States and that its abrogation, therefore, cannot be regarded as an injustice to a party seeking to resist enforcement

[168] Article 14.
[169] Article 13.
[170] s173.
[171] See https://www.gov.uk/government/collections/tax-treaties (although not all countries listed have a double taxation treaty with the UK).
[172] Albania, Algeria, Austria, Bulgaria, Canada, Colombia, Cyprus, Faroe Islands, Germany, Gibraltar, Iceland, India, the Isle of Man, Japan, Kosovo, Lesotho, Liechtenstein, Mexico, The Netherlands, New Zealand, Norway, Oman, Senegal, South Africa, Uzbekistan and Zambia.
[173] [2013] EWCA Civ 578. Followed by *Commissioner for the South African Revenue Service v Krok* (2015) 18 ITLR 42.
[174] ibid [53]. Cf *Chua v MNR* 2000 DTC 6527 (challenge to retrospective application of assistance provisions in Canada-US Convention under Canadian Charter of Fundamental Rights successful).

of a tax liability. From a taxpayer's point of view, the Revenue Rule is a collateral benefit and he cannot complain of injustice if he is deprived of it.

(c) Indirect Enforcement

A: Introduction

The revenue law rule has been extended to cover instances of 'indirect' enforcement, which encompasses claims which, though not founded upon a foreign revenue law, substantively would have the effect of satisfying a foreign tax claim if permitted. This may occur where a third party raises a claim, and may apply even to block a claim which solely is founded in private law doctrine. For example, a settlement agreement may be reached between the debtor and the tax authority, creating a contractual liability alongside the public law liability. The Supreme Court of Canada has held that enforcement of a judgment enforcing such a contractual obligation will be barred by the revenue law rule on grounds of indirect enforcement.[175]

Furthermore, a claim may be formulated in delict, unjustified enrichment, or breach of fiduciary duty, craving compensation or restitution, the effect of which in substance will be to recover the unpaid tax, if successful. On one view, this could have been viewed simply as recognition of the foreign tax law, by reference to which the remedial amount would be quantified. However, another – less satisfactory – approach has been adopted.

B: Private Law Actions by Liquidators

The first case extending the revenue law rule to bar a private law claim was the Irish case of *Peter Buchanan v McVey*.[176] A liquidator appointed by HMRC sought to recover tax owed by a Scottish company by bringing a claim against its director in Ireland alleging breach of fiduciary duties. Kingsmill Moore J held that the revenue law rule would bar the liquidator's action, and this was upheld by the Irish Supreme Court.[177]

This decision was relied upon by Lord Keith of Avonholm in his speech in *Government of Taylor v India*.[178] However, it is crucial to observe the precise use which His Lordship made of *McVey*. First, as *Taylor* concerned a situation of obvious direct enforcement, any approval given to *McVey* strictly

[175] *United States of America v Harden* [1963] SCR 366.
[176] [1954] IR 89.
[177] ibid.
[178] [1955] AC 491.

would be obiter. Secondly, despite describing it as "an admirable judgment"[179] and "able and exhaustive",[180] Lord Keith nowhere approves the actual result in that case. All that he presses *McVey* into service for is to quote from Kingsmill Moore J's exploration of the rule's rationale; Lord Keith was not concerned with the rule's application. Therefore, as was observed by Lord Mackay in *Williams and Humbert*:[181]

> It cannot be said that any approval was given by the House to the decision in the *Buchanan* case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state.

This was overlooked when the first instance of private law 'indirect enforcement' came before the English courts in *QRS 1 ApS v Frandsen*.[182] Counsel for the liquidator conceded that the case was indistinguishable from *McVey,*[183] concerning as it did an action by a liquidator, on behalf of the Danish tax authorities, for compensation for breach of a director's duties under Danish and English law. It was not argued that the result in *McVey* had not actually been approved in *Taylor*. Rather, Simon Brown LJ discusses *McVey* under the heading of "*binding* authority in point",[184] which, as stated above, is incorrect. Moreover, His Lordship states[185] that approval was given to *McVey* in *Re State of Norway's Application,*[186] but there is no discussion, never mind approval, of *McVey* to be found within that case. It does not feature in the list of cases referred to by the House of Lords, the Court of Appeal, or counsel.[187] Nevertheless, the Court of Appeal applied *McVey* by analogy, barring the claim of the Danish liquidator.

McVey and *Frandsen* were followed in Singapore in *Relfo Ltd v Varsani*.[188] A director of Relfo Ltd, heavily indebted to HMRC, transferred £500,000 to a Latvian company, rendering Relfo insolvent. On the same day, a payment of the dollar equivalent was made by a Lithuanian company to Varsani, a family friend of that director. The liquidator alleged that Varsani was liable in unconscionable receipt as he was aware the funds were paid in breach of fiduciary duty. Varsani defended the claim, not only on the merits, but on the basis that, as HMRC were the sole creditor of Relfo Ltd, and it was their chosen liquidator bringing the claim, this was an indirect attempt to enforce the tax laws of the

[179] ibid 510.
[180] ibid 511.
[181] [1986] AC 368 440.
[182] [1999] 1 WLR 2169.
[183] ibid 2173.
[184] ibid 2172.
[185] ibid 2173.
[186] [1990] 1 AC 723
[187] ibid 724-728.
[188] [2008] SGHC 105l, [2008] 4 SLR 657.

UK. After finding that the defendant was in unconscionable receipt of the payment, [189] Judith Prakash J, following *McVey* and *Frandsen,* held that any remedy would be barred by the revenue law rule.[190]

C: A Different Approach?

One may doubt whether this line of authority is sustainable in light of the decision of the House of Lords in *Revenue Customs Commissioners v Total Network*.[191] The defendants allegedly conspired with others to perpetuate a carousel VAT fraud of a value of around £2 million. The Value Added Tax Act 1994 provided some means of recovery against persons assisting such fraud, but did not allow a claim to be brought against foreign parties who were not UK VAT-registered. The defendants were outside the reach of those provisions, and HMRC, therefore, brought a tortious claim against them for unlawful means conspiracy.

Article 4 of the Bill of Rights 1689 provides that parliamentary authority is required for the Crown to claim monies from its subjects: no taxation without representation.[192] Total Network alleged that the claim in tort contravened this, amounting to an exaction without the legitimising imprimatur of Parliament. Each of their Lordships disagreed with this in principle: a claim for damages would not fall foul of the prohibition on exaction based on prerogative alone.[193] The majority of their Lordships considered there to be no constitutional bar to the Revenue Commissioners' pursuit of a private law claim, even where an express statutory mechanism exists for recouping the tax which that action is designed to recover.[194] The suggestion, therefore, is that, for the purposes of domestic law, such claims are to be classified as ordinary private law ones. They do not amount to an attempt to exact tax without proper democratic legitimacy. Why then should that not be the approach in private international law? If characterisation is a matter for English law, as the law of the forum, it would seem inconsistent to have one view as to what amounts to enforcement of revenue law in domestic law, thereby allowing HMRC to recover, and another in international private law, which would preclude a foreign tax authority from recovering.

[189] The logic of this sequencing is not evident.
[190] *Relfo* (n 188) [58]; [71].
[191] [2008] UKHL 19, [2008] 1 AC 1174.
[192] See also *Congreve v Home Office* [1976] QB 529; *Woolwich Equitable Building Society v IRC* [1993] AC 70.
[193] Even the minority agreed: *Total* (n 191), [26] (Lord Hope); [170] (Lord Neuberger).
[194] Ibid, [59] (Lord Scott); [105]-[110] (Lord Walker); [127]-[139] (Lord Mance).

There are signs that the spirit of *Total Network* is seeping through to private international law.[195] Even prior to that decision, a Manx court expressed doubts as to whether or not it would follow the result in *McVey*.[196] More recently, HMRC sought to buttress English worldwide freezing injunctions by obtaining an interim Mareva injunction from the Hong Kong courts. The respondents sought for the claim to be struck out as falling foul of the revenue law rule. It was contended that HMRC were trying to recover the output tax paid to the company that was a front for the first respondent, and was plainly an attempt at extraterritorial enforcement, albeit indirectly. This was rejected at first instance.[197] Influenced heavily by the sham nature of the entire scheme, the judge agreed with HMRC that the English action in the tort of unlawful means conspiracy was merely a private law claim, and thus enforceable.[198]

The judge distinguished *McVey* and *Frandsen* on the basis that both concerned a genuine commercial operation, where the tax debts had been incurred in the ordinary operation of a normal business, whereas the instant case concerned a fraudulent scheme to defraud HMRC.[199] The Hong Kong Court of Appeal upheld this decision,[200] with Hon Tang VP noting:[201]

> I find it difficult to accept that enforcement of a judgment to recover the loot should fail on the ground that it amounts to an indirect enforcement of foreign revenue law. I do not believe that *Government of India* compels such a conclusion. If it does, I am respectfully of the view that our courts may wish to consider whether *Government of India* should be followed.

In related proceedings in Singapore,[202] the Court of Appeal did not reach so definite a conclusion. It merely held that the case was not a "plain and obvious case for striking out". However, this still demonstrates that the approach to indirect enforcement cannot be assumed to be obviously correct.

D: Unjust Enrichment Claims for Overpayment

A claim brought against a party allegedly unjustly enriched at the expense of another may bear some connection with a tax law claim. This may arise in a dispute between the state and the citizen, such

[195] See too *Skatteforvaltningen v Solo Capital Partners* [2020] EWHC 1624 (Comm), where no revenue law rule argument was mounted against the Danish tax authority's attempts to sue Danish taxpayers in negligence, deceit, unjust enrichment, and knowing receipt in respect of losses of £1.5bn in relation to fraudulent refund applications.
[196] *In re Tucker* [1988] LRC (Comm) 995, 1007.
[197] *Her Majesty's Revenue & Customs v Shadadpuri & Ors* [2010] HKCFI 962.
[198] ibid, [20]
[199] ibid, [24].
[200] [2011] HKCA 150.
[201] Ibid, [47].
[202] *Her Majesty's Revenue & Customs v Shadadpuri & Ors* [2011] SGCA 30, [2011] 3 SLR 967.

as where a taxpayer has paid tax that was not due, or receives an undue benefit.[203] It also may arise in a dispute between two private parties, such as where C pays tax that was payable by D, and seeks to recover the outlay from D. Assuming that the enriched party is sued before a Scots or English forum, would the revenue law rule preclude either type of claim?

It is suggested that such claims would not be precluded. Not only is there no unsatisfied tax claim in the background, but also the tax authority never had a tax claim in respect of the sum that was paid over – hence why the enrichee's retention of the money is unjustified. Although there is some debate as to the extent to which the ground rendering the enrichment unjust is furnished by private or public law,[204] it is the private law mechanisms of unjust enrichment which effects recovery. The only liability on the part of the enrichee is one which arises from the principle that one should not be unjustly enriched at the expense of the other. The foreign revenue law does not enter into it.

This reasoning, it is submitted, also holds true in those cases where one private party satisfies the tax claim owed by another and seeks to be indemnified for this.[205] This situation was discussed by the Court of Appeal in the unreported case of *Yakeley v Sir M Macdonald Partnership.*[206] When the plaintiff brought an action in contract for unpaid fees, the defendants raised, as a set-off, the fact that they had paid tax on the plaintiff's behalf. The plaintiff moved for summary judgment, on the basis that allowing the set-off would violate the revenue law rule.

Eveleigh LJ's judgment, albeit relating to only a summary judgment, is interesting. His Lordship clearly did not favour the application of the revenue law rule. One reason for this was that it would deny recovery even where a party had expressly agreed to indemnify the counterparty, a conclusion which Eveleigh LJ described as "surprising".[207] His Lordship also observed that the "no notice" formulation would bar recovery of the price paid for goods wherever that included a VAT component.[208] An appeal against the granting of summary judgment was allowed, but there is no record of a final determination.

[203] Such as a tax credit, or an exemption.
[204] See R Williams, Unjust Enrichment and Public Law (Hart, 2010); S Elliot, B Hacker, C Mitchell (eds), *Restitution of Overpaid Tax* (Hart, 2013), chs 2 and 5.
[205] cf the decision of the High Court of Brunei in *DSG Dillinger Stahlbau v Chong* [1988] BNHC 8 which precluded an action in restitution brought by the plaintiffs who had satisfied the defendant's outstanding liabity to a foreign tax authority. For reasons that appear below, this seems incorrect.
[206] 5 April 1984. Westlaw transcript 1984 WL 989065.
[207] ibid, 2.
[208] See *Minera Las Bambas v Glencore Queensland* [2019] EWCA Civ 972, where an indemnity clause in relation to the payment of Peruvian VAT seemingly was enforced. See also, in relation to customs taxes, *Zhejiang Province Garment Import and Export Company v Siemssen & Co (Hong Kong) Trading* [1992] HKCFI 174, where a sum of damages for breach of contract which included a sum paid over as customs tax was held to be enforceable and outside the scope of the revenue law rule in Hong Kong.

Re CJ CGV,[209] a decision of the Supreme Court of Victoria, supports this reasoning. A Korean company obtained a judgment from the Korean courts holding an Australian company liable for unjust enrichment after its tax liability had been satisfied by the Korean party. The judgment creditor thereafter sought enforcement of that judgment in Victoria.

The judgment debtor argued that such a judgment was plainly one relating to a revenue law, and thus could not be enforced. After discussing *McVey,*[210] Landsdowne JA distinguished the case before her on the basis that the Korean revenue authorities were not "propelling" or "participating in" the Korean proceedings in any way.[211] Furthermore, the liability was a matter of private law, based on unjust enrichment, not public law.[212] It was irrelevant that the Korean parties had paid the tax liability voluntarily.[213] Her Honour relied on an earlier, unreported Victorian case, which had held that a judgment providing for the satisfaction of a contractual indemnity relating to local municipality rates should be enforced, in spite of "some remote connection with taxation or charges".[214] This confirms the validity of Eveleigh LJ's observations regarding express indemnities,[215] and suggests that a similar unjust enrichment claim should succeed in Scotland and England.

A shortcut to the same result is to apply Lord Mackay's speech in *William & Humbert*.[216] In each of the cases, there could be no question of enforcement, as there was no unsatisfied revenue debt owing.[217] This had been discharged by the payment for which the action sought restitution. This point was alluded to in *CJ GCV*: "[o]nce the tax was paid by the plaintiff, revenue collection ceased".[218]

(d) Recognition and Assistance

Where a party attempting to evade foreign tax founds upon the revenue law rule to benefit from his delinquencies, the fact that that party's conduct would be contrary to a foreign revenue law can be

[209] [2013] VSC 656, 16 ITLR 814.
[210] Which is referred to erroneously as a "United Kingdom authority": ibid [49].
[211] ibid [68].
[212] ibid [71].
[213] ibid [80]-[81].
[214] *Re Reciprocal Enforcement of Judgments Act 1959 and the High Court of Borneo (Proceedings No 487/1984)* (7 January 1986, unreported) Qld SC 9.
[215] It was held in *Pinegar v iSoftstone Holding Limited* (Cayman Islands Grand Court, 7 March 2014, Smellie CJ, unreported) that it was arguable that an action seeking indemnification in relation to the payment of foreign taxes was outside the scope of the revenue law rule.
[216] [1986] AC 368.
[217] cf the facts of *Cido Car Carrier Service v Woori Bank (Hong Kong Branch)* [2011] HKCFI 380, where the foreign tax debt had not been satisfied at the point where proceedings were brought to enforce a clause which allegedly provided for the indemnification of any payment to the tax authorities.
[218] *Re CJ* (n 209) [80].

taken into account to bar their success. In *Re Emery's Investment Trusts*,[219] US tax law was taken into account when barring a husband from rebutting the presumption of advancement to show that a transfer to his wife was not a gift. The transfer was made to evade US tax, and the court observed the requirements of the US Tax Code in holding that this turpitude meant he did not come to equity with clean hands, and thus he was barred from rebutting the presumption.[220]

The opposite conclusion was reached, without reference to *Re Emery*, by the New South Wales Court of Appeal in *Damberg v Damberg*.[221] A father had transferred land in Germany to his children in order to evade German capital gains tax. In an ensuing divorce action, the children claimed that the German properties did not form part of the matrimonial assets, but instead were owned outright by them. The father sought to rebut the presumption of advancement to demonstrate that the land was not transferred as a gift, but was held by his children on resulting trust for him. Heydon JA held that allowing the presumption to stand would be to enforce the German tax law, because such a decision would in effect impose a condition that the father pay the amount of German tax which should have been paid. It is respectfully submitted that this is incompatible with the definition of 'enforcement' adopted in this paper:[222] at the time of the trial, there was no legal obligation under the German tax law to pay the amount which, but for the transfer to his children, the father would have had to pay. There was no unsatisfied German tax claim: as far as the authorities there were concerned, the tax liability had been satisfied by the payments made by the children. The effect of *Damberg* is to extend the concept of enforcement to include cases where the court's decree may give rise to tax liability under a foreign law, and thereafter demand the satisfaction of that liability. It is submitted that that is too remote a situation to fall within the mischief of the revenue law rule, and that the approach in *Re Emery*, allowing the recognition of the foreign tax law in those circumstances, is to be preferred.

Another instance of recognition of foreign revenue law may arise when determining the personal law of a legal or natural person. It has been held relevant for determining where the centre of main interests of a company is located that the jurisdiction of the registered office is one which has obvious tax incentives, for this may point away from it being the real place where business is conducted.[223] Similarly, where an individual has effected a change of residence in order to avoid incurring higher taxes, or an investigation by foreign tax authorities, the English courts have generally been willing

[219] [1959] Ch 410.
[220] ibid 421.
[221] [2001] NSWCA 87.
[222] See also A Briggs, 'The Revenue Rule in the Conflict of Laws: Time for a Makeover', [2001] *Singapore Journal of Legal Studies* 280, 294.
[223] *Re Kaupthing Capital Partners* [2010] EWHC 836 (Ch), [2011] BCC 338 [15].

to take this into account in assessing the extent of the *propositus*' connection to England.[224] Further, a court may take into account the existence of heavy foreign tax liabilities when permitting an executor to abandon foreign property where those liabilities exceed the assets located in the foreign jurisdiction.[225]

In *Re State of Norway's Application (No 2)*,[226] the House of Lords also held that giving assistance to a foreign tax authority was not precluded by the revenue law rule. This was not categorised as "recognition" of a foreign tax law, and instead the term "assistance" seems to be more apposite. But the distinction between enforcement, recognition, and assistance may not always be easy to draw. This was recognised by Leggatt J in *X AG v A Bank*.[227] A subpoena was served on a corporation's London bank compelling the production of documents to assist the US authorities in conducting a tax investigation, which was to go before a Grand Jury. When the bank evinced an intention to comply with that subpoena, the corporation sought to prevent disclosure. The bank contended that permitting disclosure would not amount to enforcement of the revenue laws of the US. It was submitted that comity required the English court not to impede the tax investigation. Leggatt J opined that this submission was unrealistic:[228]

> The fact is that the gamekeeper is invited to turn a blind eye whilst the poacher takes a brace of pheasants, or three pheasants. In this context, it appears to me that not impeding involves a measure of assistance, and, indeed, approbation….

Yet, following *Re State of Norway's Application*, it is clear that such assistance now would not be caught by the revenue law rule. The starkest example of this fact is that the rule will not preclude an authority from acceding to the request of a foreign state for the extradition of a person in Britain in connection with foreign revenue offences. This theoretically is tantamount to enforcement, and, in practice, has far more severe consequences than ever could flow from a money judgment against the taxpayer. However, provisions of the Extradition Act 1870, which made no express mention of revenue offences, were held to have implicitly displaced the rule by vague language.[229] The

[224] *Sinclair v Sinclair* [1968] P 189; *Chai v Peng* [2014] EWHC 3518 (Fam), [2015] Fam Law 37 [33]-[39].
[225] *Re Estate of the Late Evelyn Mary Dempsey* [2016] NSWSC 159 [225]-[230].
[226] [1990] 1 AC 723.
[227] [1983] 2 All ER 464; distinguished in *FDC and others v Chase Manhattan Bank* [1984] HKCFI 63.
[228] ibid 479D.
[229] *R v Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department* [1988] 1 WLR 1204. This concerned the same debtor as *Norway* (n 226).

Extradition Act 2003[230] and the European Arrest Warrant system[231] contain language which make it clear that revenue offences are extraditable, and thus the revenue law rule cannot be prayed in aid to block an extradition; if the statutory criteria are established, extradition will follow.

(e) Conclusion

It is suggested that the above analysis shows that the enforcement/recognition distinction is productive only of confusion and injustice. The distinction is confusing because the line between the two often shades into the imperceptible, and it is not evident why all instances of recognition should be *prima facie* permissible, while no instance whatsoever of enforcement can be countenanced. It is unjust because the exclusion of cases of even indirect enforcement may allow a wrongdoer to benefit by using the revenue law rule as a shield, to the detriment of the foreign tax authority and its other taxpayers. Indirect enforcement easily may be explicable as cases of recognition: the foreign tax law merely provides data, normally for the purposes of computation of loss, which is then inputted into the mechanics of recovery furnished by the applicable private law. Moreover, a foreign court merely is being asked to redress the norm of corrective justice which the taxpayer's actions have upset; it is not itself involved in the distributive process of collecting tax.

A more precise formulation may be supplied by the judgment of Lord Denning MR in *Brokaw v Seatrain UK Ltd*.[232] The US government purported to impose a levy on a ship travelling to the UK as it was on the high seas to recover a tax debt owed by its owners. The Court of Appeal refused to enforce this because of the revenue law rule,[233] but the decision may be explained more simply as an application of the *lex situs* rule. His Lordship, however, opined that things may have been different if the US tax authorities had obtained title to the goods while they were in US territory, and proceedings were brought in England to recover them after removal from US jurisdiction.[234] This is because the tax authorities could plead their claim simply relying upon their possessory title, without reference to the revenue law. In other words, they would be founding on a right granted by private law, and not the foreign tax law. This is in line with the approach to 'other public laws' taken by the Court of Appeal in *Republic of Iran v Barakat Galleries*.[235] The distinction advanced there was between claims based on private law, which are enforceable, and those pleaded with reliance on the

[230] S64(8)(a); s65(8)(a).
[231] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, 2002/584/JHA, Article 4(1); see *RM v Her Majesty's Advocate* [2011] HCJAC 98 (evasion of £10,000 of Latvian taxes).
[232] [1971] 2 QB 476.
[233] ibid 483C-D.
[234] ibid 483B.
[235] [2007] EWCA Civ 1374, [2009] QB 22.

foreign public law alone, which are not.[236] It is not clear why a similar distinction is not operable in the revenue context.

This especially given the case that the distinction finds an analogue in the EU concept of 'civil and commercial matters'. This is the concept which determines the positive scope of most EU private international law instruments. In *Revenue and Customs Commissioners v Sunico,*[237] the Revenue issued proceedings in England alleging that Sunico was complicit in a carousel fraud, and claimed compensatory damages quantified at a sum commensurate with the amount of unpaid tax. Supporting proceedings were launched in Denmark, which required the Danish court to ascertain whether or not the English judgment would be within the scope of "civil and commercial matters" for the purposes of Article 1 of the Brussels I Regulation. The matter was referred to the CJEU.

Advocate General Kokott opined that the relationship between HMRC and Sunico was essentially a private law one. Sunico was a third party not directly liable for VAT, so it could not be said that the action was brought in exercise of HMRC's public powers.[238] Furthermore, the only power exercised by HMRC was the power to invoke the adjudicatory jurisdiction of a court to settle a dispute between two litigants. HMRC was acting in the same capacity as any private litigant, and was subject to ordinary rules of civil procedure and execution.[239] As to the subject matter of the action, the right of HMRC to recover tortious damages did not stem from the exercise of public powers, but from the violation of HMRC's rights which the tort of conspiracy protected. As AG Kokott put it, this right did not "accrue to the state in its capacity as an organ of sovereign power" but rather stemmed from HMRC's being harmed by a tortious act "whose victim can in principle be anyone".[240] The fact that the sums claimed by way of compensation were exactly the same as the output VAT lost by HMRC was said to be of merely background importance.[241] The damages which HMRC would be entitled to claim would not be reduced *pro tanto* by any payment of tax by the directly taxable person. This demonstrated that the object of the action was not to recover lost tax, but to vindicate the infringement of HMRC's right. The claim in tort thus was legally independent of the power to recover the tax, even if, factually, they achieved the same aim. Therefore, the conspiracy claim was a civil and commercial matter within the scope of the Regulation.[242]

[236] ibid [149].
[237] Case C-49/12 [2014] QB 391.
[238] ibid AG[43].
[239] ibid AG[44].
[240] ibid AG[49].
[241] ibid AG[50].
[242] Nowhere did the Advocate General consider the definition of 'revenue' matters.

The Court followed the Advocate General's reasoning, and its judgment essentially tracks her opinion. HMRC's claim amounted to a civil and commercial matter: Sunico was not directly liable for VAT,[243] the claim was brought under the English law of tort[244] and was not subject to any special procedure,[245] and it was irrelevant that the damages corresponded with the output tax liability of the absconding party.[246]

The reasoning in *Sunico* is striking. A clear attempt at indirect enforcement of British tax law was held to be a civil and commercial matter for the purposes of the Brussels Regime. The analysis is very broad. The Advocate General described HMRC's action as a claim in respect of an act "whose victim can in principle be anyone".[247] While it is true that, in principle, anyone can sue for the tort of unlawful means conspiracy, it is only HMRC which could sue for the particular type of conspiracy in that case. It had, at its core, an allegation that the tortfeasor conspired to commit the crime of defrauding the revenue; a crime of which clearly only HMRC may be a victim. This suggests that the analysis operates at a very high level of generality. It appears that it is only the general cause of action which is relied upon by the public authority – in *Sunico,* the tort of unlawful means conspiracy – which the court should take into account when assessing whether or not the matter is a civil and commercial one. If that cause of action is one which is open to private parties generally, then it is irrelevant that the particular loss visited upon the public authority, or the means used to inflict that loss, is of a nature to which only a public authority could fall victim. This runs in direct opposition to the caselaw discussed above[248] on the domestic revenue law rule, providing yet another reason for doubting the breadth of 'enforcement' in this context.

In the next section, we will consider the most substantial exception to the revenue law rule: even if the claim is one for the enforcement for foreign tax law, then that claim will be enforced if it is lodged as a claim in the debtor's insolvency. As shall be seen, this exception has the clear potential to swallow the rule as a whole.

[243] *Sunico* (n 237), [38]
[244] ibid [37].
[245] ibid [39].
[246] ibid [41]. The Court and Advocate General were troubled by the fact that HMRC had used powers conferred on it by an EU Directive to request information from other EU tax authorities to assist its pursuit of the claim: AG[45]; CJEU at [42]-[43]. With respect, it is submitted that the use of public powers in the pre-action recovery of evidence is too remote a consideration to affect the classification of the subsequent action.
[247] ibid AG[49]. See also the Court at [37].
[248] See **Section IV(c)B.**

V. The Revenue Law Rule and Cross-Border Insolvencies

(a) Introduction

The revenue law rule may be of paramount significance in the cross-border insolvency context. A recalcitrant tax debtor may be wound up in the jurisdiction where that tax is due, in which case the revenue law rule forms no barrier to its recovery. But practical reasons may compel the tax authority to lodge its claim in a foreign liquidation, or even to initiate foreign proceedings.

Government of India v Taylor[249] concerned this situation. The decision there may be justifiable on grounds of consistency, for this was nothing other than an attempt at direct enforcement, relying upon the entitlement created by foreign tax legislation. But there are real reasons to query the desirability of such a rule. It directly contradicts what has come to be seen as the guiding philosophy of cross-border insolvency.[250] The principle of unity of bankruptcy provides that, for evident economic reasons, it is preferable to have a single bankruptcy proceeding in one jurisdiction, to deal with the entirety of the insolvent's estate. The application of the revenue law rule in *Taylor* ruptures this unity. Instead, the insolvency of a debtor who has incurred liability to tax in numerous states necessarily must be fragmented. Tax authorities will be able only to prove locally, possibly resulting in a number of independent insolvency processes, subject to the local law, with little to no chance of coordination. This obviously inefficient situation inevitably entails greater expense, with correspondingly diminishing returns for the creditors. It is no doubt to militate against such detrimental practical consequences that the operation of the revenue law rule has been curtailed in these circumstances. This paper has previously noted the judicial disapplication of the rule where a tax authority is one of a number of creditors;[251] now it will consider the specific legislative abrogation of the rule in the insolvency context.

(b) The European Insolvency Recast Regulation

The first incursion into *Government of India v Taylor* was made by the European Insolvency Regulation ("EIR"),[252] which since has been recast.[253] Article 7(2)(h) provides that the law of the place where proceedings have been opened will determine the admission of claims against the

[249] [1955] AC 491: see **Section II(d)**.
[250] See e.g. LA Bebchuk and AT Guzman, 'An Economic Analysis of Transnational Bankruptcies', 42 *The Journal of Law and Economics* (1999) 775; cf F Tung, 'Is International Bankruptcy Possible?', 23(1) *Michigan Journal of International Law* 31 (2001).
[251] See **Section IV(b)B.**
[252] Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings.
[253] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

insolvent's estate. That rule is subject to Article 2(12), which defines those "creditors" having a right to lodge a claim under Article 53[254] as encompassing "the tax authorities… of Member States". Therefore, where a debtor has its centre of main interests ('COMI') within an EU Member State, the revenue law rule cannot operate to preclude the lodging of proof by the tax authorities of another Member State[255] for insolvencies falling within the scope of the Regulation.

Article 53 simply refers to the right of such creditors to lodge claims, and does not speak of the satisfaction of such claims. However, it would wholly denude Article 53 if liquidators could go on to rely on the revenue law rule to refuse to make a distribution to such creditors. The Article does not explicitly address the question of whether such a creditor is able to petition for the winding up of a debtor, which will be most pressing where the tax authorities are the main or sole creditor. However, the Irish High Court has held very sensibly in *Re Cedarlease*[256] that HMRC, *qua* tax authority of another Member State, could petition for the winding up of a company having its COMI in Ireland.[257]

This rightfully has been described as "a considerable advance" over the common law position.[258] Its great benefit is that total reciprocity is ensured: it abrogates the revenue law rule only in respect of those Member States which also apply the EIR, which are bound to afford the same courtesy to proofs submitted by HMRC. It could be observed, legitimately, that abrogation of the revenue law rule in this context owes much to the aims of European integration and single market considerations. Therefore, once one moves outside of the European context, there is, short of a treaty, no guarantee of reciprocity, and therefore may be no political impetus mandating the permissive treatment of foreign revenue claims.

(c) Cross-Border Insolvency Regulations 2006

Beyond the geographical confines of the EU, the 1997 UNCITRAL Model Law on Cross-Border Insolvency also has some implications for the revenue law rule. The model law contains two versions of Article 13, relating to the powers of foreign creditors. One contains no reference to revenue creditors, but an alternative explicitly reaffirms the exclusion of claims "concerning tax and social

[254] Ex Article 39.
[255] Excluding Denmark: *The Commissioners for Customs and Excise v The Arena Corporation Limited* [2003] EWHC 3032 (Ch) [41]-[47] (Lawrence Collins J).
[256] [2005] IEHC 67, [2005] 1 IR 470.
[257] The same result can be achieved under the MARD (see **Section IV(b)C**) by HMRC presenting a bankruptcy petition on behalf of another Member State: *Revenue and Customs Commissioners v Smart* [2016] All ER (D) 158 (Jun).
[258] G Moss, I Fletcher, and S Issacs (eds), The EU Regulation on Insolvency Proceedings (3rd edn, OUP, 2016), [8.443]. The authors opine that the inclusion of tax authorities in Article 2(1) means that foreign tax claims cannot be challenged under Article 26 on grounds of public policy, but surely that exception still can be invoked where, for instance, the discriminatory nature of the foreign tax law offends public policy.

security obligations". It is unclear whether this means that the default position, silent as to the position of revenue creditors, was intended to remove the barrier to submitting a proof of debt for foreign revenue creditors. The implementation of the Model Law by states does little to resolve this ambiguity.

To date, the Model Law has been enacted in forty-five jurisdictions.[259] Twenty-eight of those jurisdictions adopted the alternative reading, or otherwise provided that tax claims are unenforceable.[260] Five of the enactments do not contain an Article 13 equivalent,[261] and one enactment imports the Model Law wholesale without indicating which formulation is adopted.[262] One enactment seems to countenance the enforcement of foreign revenue claims, but not in terms which reflect of Article 13.[263] Eight states adopted the wording in the text which does not expressly exclude revenue claims,[264] but this does not necessarily mean that those states will permit the enforcement of foreign tax claims in an insolvency. Such claims may still be excluded by that system's version of the revenue law rule, or by the operation of the Model Law's public policy provision.[265]

Only two enactments of the Model Law definitively remove the application of the revenue law rule. The first to do so was the UK enactment:[266] the Cross-Border Insolvency Regulations 2006 ("CBIR 2006").[267] Articles 13(1) and 13(2) reflect the text of the Model Law without the footnote alternative, but paragraph (3) is added:

> A claim may not be challenged solely on the grounds that it is a claim by a foreign tax or social security authority but such a claim may be challenged—
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> (a) on the ground that it is in whole or in part a penalty, or
>
> (b) on any other ground that a claim might be rejected in a proceeding under British insolvency law.

[259] See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.
[260] Australia, Benin, the British Virgin Islands, Burkina Faso, Cameroon, the Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Gibraltar, Guinea-Bissau, Kenya, Mali, Mauritius, New Zealand, Niger, Poland, Senegal, the Seychelles, Togo, and the United States.
[261] Canada, Japan, Serbia, South Africa, and South Korea.
[262] The Philippines enactment incorporates the whole of the Model Law by reference. This may be a selection of the 'default' rule in the main text, with no express exclusion.
[263] The Slovenian enactment.
[264] Chile, Columbia, the Dominican Republic, Greece, Mexico, Romania, Montenegro, and Uganda.
[265] Article 6.
[266] Upon which the subsequent Malawian provisions are based.
[267] SI 2006/1030 Schedule 1.

The extent of this attenuation is unclear: Article 13(3) refers to "A claim" no longer being open to challenge simply because it is made by a foreign tax authority, but Article 13(1) refers to the rights of foreign creditors "regarding the commencement of, and participation in" the insolvency. Does Article 13(3) also apply to remove the revenue law rule as a bar to a foreign tax authority petitioning for the insolvency of a debtor, even though it does not extend textually beyond "participation"? A negative conclusion, it is submitted, would be overly technical, and frustrate the purpose of that abrogation.

There seems to have been very little fanfare around Article 13(3) of the CBIR 2006 and its implications for the continuing relevance of the revenue law rule.[268] On one level, the development may be unwelcome. Unlike the EIR, the removal of the revenue law rule is not premised on the notion of reciprocity: any and all foreign tax creditors may benefit, regardless of how their legal system would treat claims by HMRC.[269] Nevertheless, it is submitted that Article 13(3) is a brave, if underappreciated, move forward, stripping back the worst excesses of the revenue law rule in a manner consonant with modern conceptions of comity and universalism. It is to be hoped that this move will encourage more jurisdictions to adopt a permissive approach to foreign tax claims in the insolvency context.

Substantial inroads have been made into the revenue law rule within the insolvency context, which may strike a more fundamental blow to the modern viability of the revenue law rule. It is a cardinal principle of insolvency law that the onset of insolvency should not affect pre-existing rights. But, by dint of insolvency, a previously unenforceable claim is made enforceable, through the vehicle of submitting a proof in that insolvency. This may emasculate the rule against direct enforcement of taxes. Scots and English insolvency law both operate a test of insolvency which is premised on demonstrating an inability to pay debts.[270] One instance is where a demanded debt of £750 has gone unpaid for three weeks.[271] The other is to prove that the debtor is unable to pay its debts. It has been held that refusal to pay an undisputed debt of £1154 would be sufficient grounds to wind up an otherwise solvent large insurance company on this basis.[272] While there may be some dispute as to the existence or extent of a debt under the foreign tax regime, it is unlikely that proceedings would

[268] Dicey (15th: 2012) does not even mention Article 13 in its discussion of the revenue law rule: that provision, and Article 53 of the EIR, only appear in the chapter on cross-border insolvency ([30-089], [30-219]).
[269] Of course, the whole of the CBIR's implementation of the Model Law proceeds on the basis of leading by example, eschewing the need for reciprocity.
[270] Insolvency Act 1986 s122(1)(f) (corporate insolvency in Scotland and England); s267 (personal insolvency in England).
[271] Insolvency Act 1986 s123(1)(a), s267-268; Bankruptcy (Scotland) Act 2016 s16(1)(i) (£1500 minimum for personal insolvency, but a revenue debt below this would not be worth pursuing abroad.)
[272] *Cornhill Insurance Plc v Improvement Services Ltd* [1986] 1 WLR 114.

be instituted in the UK if the foreign tax authority were not confident that such a tax debt could be established.

The terms of the CBIR 2006 are clear: a foreign creditor cannot be discriminated against by applying a different test of entry into insolvency,[273] and so it would be open to that foreign authority to commence proceedings based upon the unpaid tax debt. In practice, this may mean that Article 13(3) denudes the revenue law rule in the case of direct enforcement by a foreign state. Instead of suing the solvent debtor in the UK for the tax debt, which would fall foul of the revenue law rule, a foreign tax authority with a well-established claim can simply petition for the debtor's insolvency, whereupon its claim will be converted into an enforceable one. While the court has discretion to refuse winding-up, and while the tax authority's ability to prove for the foreign tax debt is subject to both the court having jurisdiction over the debtor and the general public policy exclusion, it is submitted that this undermines any case for the continued operation of the rule.

VI. Conclusion

Of private international law's three exclusionary rules, the revenue law rule has been subject to the most litigation. The author shares the view of Collier that "[the] rule hardly serves the interests of international comity and seems to have no merit whatsoever".[274] It is of doubtful foundation, exorbitant scope, and the exceptions which exist render its application readily avoidable.

Its foundation is doubtful as its founding authority stems from an era where the notion of co-operating with a foreign state to ensure the satisfaction of its taxes was an alien one. Not only has the relationship between states moved on from this standoffish position, but the very nature of the state has altered radically since then. Taxes are no longer predominantly the concern of the enterprising classes, but are payable by the vast majority of a state's citizens in order to fund, among other things, the growing welfare state. As Castel observed:[275]

> With the tax burden becoming increasingly heavy due to the tremendous responsibilities incurred by modern States in all areas of human activity and in the light of prevalent conceptions with respect to the justice of taxation, it is absolutely necessary to eliminate all possibilities of tax evasion or avoidance.

[273] Article 13(1).
[274] J Collier, *Conflict of Laws* (3rd edn, CUP, 2001), 369.
[275] JG Castel, 'Foreign Tax Claims and Judgments in Canadian Courts', (1964) 42 *Canadian Bar Review* 277, 306.

Its scope is exorbitant as the expansive definition adopted of what amounts to the 'enforcement' of a foreign revenue law cannot be justified by any of the rationales commonly asserted to be the basis for the exclusionary rules. The lodging of a private law claim by a state cannot be said to involve territorial overreach into the exclusive domain of a foreign sovereign. Such a claim involves no more difficulty than any of the other private law claims which may be brought by a government in a foreign state, and denying effect to such a claim on grounds of public policy is productive of just as much – or as little – embarrassment as the potential operation of public policy to bar any private law claim brought by the state. Nor do such claims encroach into the legitimate sphere of the legislature: private law adjudication, even where the sum sought by way of compensation or restitution is commensurate with an amount of unpaid tax, is a matter within the preserve of the judiciary.

Lastly, the exceptions which have been constituted to the revenue law rule make it of doubtful practical relevance. The fact that it does not apply where the debtor has creditors alongside the foreign tax authority, and that it does not apply at all in insolvency proceedings, means that the rule has no application in a large number of circumstances. It is therefore inaccurate to continue to refer to the non-enforcement of foreign taxes as a totem of private international law,[276] and the approach taken in insolvency cases should be extended to all instances of enforcement: the foreign tax *prima facie* should be enforceable, subject only to public policy. As was put by the editor of the section on the validity of contracts in the 10th edition of *Dicey*, in a tone in direct opposition to the section on the exclusionary rules:[277]

> Revenue laws cannot nowadays be viewed in isolation from the remainder of the legislation of a country. They often serve economic as well as financial purposes. Abuses can always be checked by the doctrine of public policy.

There are signs that this sentiment is chiming with the judiciary in some jurisdictions. In *Re A's Application*,[278] the Manx High Court of Justice held that the rule did not apply to prohibit a trustee from paying foreign tax liabilities of the trust. In the course of the decision, the judge made the following *obiter* comments:

[276] Cf P Baker, 'The Transnational Enforcement of Tax Liabilities', (1993) 5 *British Tax Review* 313, 318, suggesting that the rule has been stated in "terms which are too absolute…."
[277] L Collins (ed), *Dicey and Morris on the Conflict of Laws* (11th edn, Sweet & Maxwell, 1987), 1223-1224.
[278] [2018] WTLR 353.

> "[the revenue law rule]… is … now being informed, if not transformed, by recent inter-governmental moves designed to ensure international cooperation in the enforcement of domestic taxation in which the Isle of Man has participated…[279]
>
> Whether the principle still amounts to good Manx law may be for the Appeal Division and the Judicial Committee of the Privy Council to determine in due course. Another rule in Dicey may bite the dust in due course, or at least its potential impact may be much reduced by legislative intervention and the increasing cooperation between civilised countries in respect of tax matters."[280]

Unfortunately, when the Privy Council considered the application of the revenue law rule subsequently in *Webb v Webb*, it did not hear any argument relating to the continuing viability of the revenue law rule, instead applying it without deeper reflection. It is submitted, however, that, were such a review to be undertaken, the days of the revenue law rule may be numbered and that, for the reasons presented in this paper, this would be the correct approach.

[279] ibid, [35] (approving of report by legal adviser).
[280] ibid