Conference organized by the
Institute for Austrian and International Tax Law, Vienna

Tax Treaty Arbitration

RUST CONFERENCE 2018

QUESTIONNAIRE

GUIDELINES

Tax Treaty Arbitration

1. Tax Treaty Disputes: The Current Landscape

Commensurate with the increasing relevance of tax treaties, one often notes an increase in the practical relevance of tax treaty disputes (including transfer pricing disputes) and their satisfactory resolution. What is the actual practical relevance of such tax treaty disputes in your jurisdiction (or under tax treaties concluded by your jurisdiction)? Is there a noticeable trend as to the inventory of tax treaty disputes (i.e. how many cases) or to their size (i.e. disputed tax money at issue)?

The BEPS project has placed many tax issues, including tax treaty issues, in the spotlight of the public tax policy debate. Has BEPS had (or is it expected to have) an effect on the risk for taxpayers to end up in a tax dispute? Is that true due to anti-BEPS measures introduced in the law of your jurisdiction and/or due to a more intense scrutiny by the tax administration of BEPS-related topics? Are there examples for such BEPS-enhanced scrutiny also applied to "old" tax years (i.e. years preceding the BEPS project)? What about transfer pricing in this regard? Does the tax administration use the post-BEPS OECD Transfer Pricing Guidelines "retroactively", i.e. also for pre-BEPS periods?

What is the expected effect of country-by-country reporting on tax disputes? Will the number and/or likelihood of disputes increase due to the improved transparency of "how big the tax pie is"?

Are their main sources of cross-border tax disputes outside the BEPS context and even outside corporate income tax in general (e.g. VAT)?

What is your assessment of how well the current system for tax treaty disputes resolution is functioning in your jurisdiction? Is diligence and/or expertise of local authorities/courts in international tax matters (including transfer pricing) at an equal level with domestic law issues? Are there specialized bodies, authorities or courts dealing with such international tax matters? Are there particular examples

of bad case law" in international tax cases? Overall, is the dispute resolution system for international tax matters perceived as satisfactory?

2. Dispute Resolution under a Mutual Agreement Procedure: State of the Art or Fundamentally Broken?

How is the mutual agreement procedure (MAP) functioning in practice in your jurisdiction? Is it perceived as satisfactory (in particular, by taxpayers)? Are there sufficient resources invested by the competent authority in the conduct of a MAP? Is cooperation from and with taxpayers perceived as satisfactory?

Is there statistical information available on the number, duration, outcome, "win or lose" ratio, etc. of MAP cases? Is there information on the number/likelihood of a MAP being unsuccessful (i.e. ending up in double taxation for the taxpayer)? If such statistical information for your jurisdiction has been published by the OECD MAP Forum: Do these data accurately reflect the experience of taxpayers with the MAP? What message would you take from a particular high or low number of cases in your jurisdiction? What are the main areas of your tax system that generate MAP cases?

What is the approach of your competent authority towards a MAP? Is it run as a "behind closed doors" inter-governmental process (with little or no taxpayer involvement) or as a truly collaborative service of the competent authority for its taxpayers (with close interaction between competent authority and taxpayer)?

Improvements to the MAP were part of the "minimum standard" outcome of the OECD BEPS reports. Have these improvements been implemented in your jurisdiction (or were they in place even before the BEPS project)? Did these BEPS outcomes improve the MAP in practice?

Overall, is the MAP (with its post-BEPS improvements, but still in conventional form) seen as a sufficient and state-of-the-art tool for resolution of international tax disputes? If not, what are the main deficiencies of the MAP? What could be done to improve or resolve such deficiencies?

Or has the time come for a new system in tax treaty dispute resolution? Is arbitration the answer? Or is there experience with alternative dispute resolution (ADR) mechanisms, such as non-binding mediation? What is the experience with bilateral investment treaties or other non-tax agreements to resolve tax disputes?

3. The Experience with Arbitration in International Tax Disputes

Has your jurisdiction introduced arbitration clauses in its tax treaty network? Is this part of a general tax treaty policy? Do arbitration clauses in bilateral treaties follow the OECD Model? If not, what are significant differences and what is the reason for not following the OECD standard? Does your jurisdiction follow the UN Model for arbitration? Give a brief description of key elements of the standard approach of your jurisdiction to the design of an arbitration clause in tax treaties (e.g. on method of arbitration, process).

If your jurisdiction is not (or only exceptionally) using arbitration in its tax treaty network, what is the policy reason for this?

What is the practical experience with tax treaty arbitration (where applicable)? Is it perceived (by taxpayers and the competent authority) as an improvement over a conventional MAP? What are seen as key improvements? Is there a noticeable empirical effect on the likelihood that a tax treaty dispute will arises (i.e. does arbitration have a preventive effect on inter-governmental tax disputes)?

For EU Member States: What is the experience with the EU Arbitration Convention in your jurisdiction? How frequent is it in use? For which type of cases is it used (i.e. is there discussion regarding the scope of eligible transfer pricing disputes)? What are the lessons (to be) learned from the experience with the EU Arbitration Convention as a dispute resolution mechanism? Is it seen as good practice or as a failure? Are there key deficiencies or advantages?

Overall, how big is the step from arbitration under the OECD Model (or UN Model) and/or the EU Arbitration Convention to the "new" arbitration systems

under Chapter VI of the Multilateral Instrument and the EU Dispute Resolution Directive? Would you see it as a step forward or a step backward?

4. The New Framework for Arbitration in Tax Treaty Matters

The OECD Multilateral Instrument (MLI) includes in Chapter VI a new legal framework for tax treaty arbitration, although it is merely optional. If your jurisdiction did (or intends to) sign on to the MLI, did it opt in for arbitration under Chapter VI? If Chapter VI was not opted-in by your jurisdiction, what were the reasons for such decision? If the whole MLI was not signed up by your jurisdiction, is there political desire to have tax treaty arbitration (equivalent or similar as under Chapter VI) in place anyway?

What are the bilateral tax treaties for which MLI arbitration will become (or is expected to become) available? Is MLI arbitration applied for all covered tax agreements under the MLI or are some tax treaties specifically excluded from arbitration? If so, what is the policy consideration behind this? Is there a policy goal to extend an MLI-type arbitration also to bilateral tax treaties that are not covered by the MLI (e.g. where the other contracting state has not signed on to the MLI)? What is the relation between MLI arbitration and such bilateral tax treaties that already included an arbitration clause? What is the relation between MLI arbitration and the EU Arbitration Convention?

What is the general policy of your jurisdiction in relation to reservations to and/or options under Chapter VI of the MLI? Is there a general approach to such reservations or options (e.g. narrow or broad access to arbitration) and what are the policy consideration that govern such approach? Is such policy consideration published and/or publicly debated? Was there input from non-governmental stakeholders (e.g. taxpayers) in such debate? Which specific reservations were made by your jurisdiction under Chapter VI, e.g. under Article 19, paragraph 11 (mandatory duration of unsuccessful MAP); Article 19, paragraph 12 (interaction between arbitration and domestic legal remedies)?

What is the expected entry into force date for your jurisdiction for the MLI in general and Chapter VI arbitration (if opted-in) specifically? How quickly will MLI

arbitration become effective in practice in your jurisdiction? What is the approach of your jurisdiction (or your competent authority) in relation to making arbitration available even for "old" cases (i.e. where MAP has started before the entry into force of the MLI)? Is such an approach restrictive or in favour of a broad and quick access to arbitration under Chapter VI?

What is the actual scope of Chapter VI arbitration, as implemented in your jurisdiction? Are all tax treaty disputes (including transfer pricing) included? Or are specific categories of cases excluded? What about disputes concerning domestic abuse of law rules, doctrines etc. that are relevant for tax treaty purposes? Are only actual tax cases (i.e. concerning past periods) covered? Or also potential future cases (e.g. advance tax rulings, APAs)?

For EU Member States: What will be the interaction between arbitration under Chapter VI of the MLI (or under bilateral tax treaties) and the EU Directive on Tax Dispute Resolution Mechanisms? Will the two dispute resolution systems run in parallel or will they converge? What are potential differences? Potential similarities (or even redundancies)? What is the future role of the EU Arbitration Convention?

5. The Players in Arbitration: Arbitrators, Competent Authorities, Taxpayers and Their Advisers

What is the (expected) role of the various players in a tax arbitration case?

Who has the power to initiate arbitration? Is it only the taxpayer, or may competent authorities also initiate?

What is the role of the taxpayer (supported by its advisers) in the process? How can the taxpayer participate actively in "its" arbitration case, being technically an inter-governmental process? How open is the competent authority to such taxpayer involvement in your jurisdiction? Is there a right to be heard for the taxpayer? Can the taxpayer, for example, submit its own view in writing or propose a certain outcome?

How well prepared is the competent authority in your jurisdiction for arbitration? Are there sufficient resources and capacity? Is the competent authority sufficiently independent from the tax administration (e.g. from field auditors)? Can the competent authority use external resources (e.g. experts, advisers)? Does this actually happen in practice?

Arbitrators: How are they selected? Who is eligible? What is the attitude in relation to conflict of interests and independence? What is the attitude towards outside experts (judges, private practitioners, academics) as arbitrators? What about "international" experts (i.e. arbitrators coming from outside the contracting states)? Would a diversity requirement (e.g. on professional backgrounds, country of origin) improve acceptance of arbitrators? What is the required time commitment for arbitrators? How are they remunerated?

6. The Arbitration Method and Decision

How is the decision made in an arbitration in your jurisdiction? What is the general policy of your jurisdiction as to the choice of method between so-called baseball arbitration (also known as last-best-offer arbitration) and independent opinion arbitration? Which tax treaties concluded by your jurisdiction do (or will) provide for which alternative? Are there other decision systems in place under specific tax treaties?

Regarding baseball arbitration: What is the experience with this type of arbitration, allowing the choice only between either of the two submitted decision proposals? Is it efficient? How do the "parties" (competent authorities, but also the taxpayer) react to baseball arbitration? Does it influence their approach in the arbitration, i.e. urging them to present more reasonable claims rather than taking extreme positions?

Are there cases where baseball arbitration is unsatisfactory, for example where the issue is difficult to express in terms of the tax amount at issue (i.e. qualitative legal issues on interpretation)? What is the experience with the absence of stated reasoning for the decision in baseball arbitration cases? Would more principle-based decisions be seen as valuable?

Are arbitration decisions published in your jurisdiction? If so, is this mandatory or optional? Is the identity of the taxpayer disclosed? Do arbitration decisions have a precedential value (if precedence has legal relevance in your legal system)?

What is the system for the implementation of an arbitration decision? Is there always a binding effect of the arbitration decision for such implementation or is there room for alternative solutions (e.g. if either the two contracting states or one contracting state and the taxpayer agree otherwise)? May the taxpayer object to the implementation of the arbitration decision (and thereby declare it void)? How is the case then resolved?

7. Procedural Issues

What are the procedural rules relevant for an arbitration case? Are there rules in place that are specifically designed for arbitration, or is there an ad hoc agreement needed that defines such rules for the individual case? Or is there a default application of procedural rules under domestic law?

What are the rules on submitted papers (e.g. as to maximum length)? What are accepted languages? Deadlines for submission? What are the rules on evidence, including witnesses? Is new evidence (i.e. which was not presented in the underlying domestic dispute or in the MAP) accepted in arbitration? Is there an oral hearing or pleading, or is it a solely paper-based process? Will the taxpayer be heard (either orally or in writing)? Is there a legal remedy against a breach of procedural rules? Are "fair trial" principles applicable?

What is the interaction with domestic law legal remedies? May the taxpayer initiate an arbitration while simultaneously pursuing a conventional legal remedy (e.g. an administrative or judicial appeal)? If not, must the taxpayer first waive its other remedies before initiating arbitration? If so, how are the two proceedings done in parallel? What if there are conflicting outcomes?

Is there a legal remedy available against a received arbitration decision? May an arbitration decision be subsequently challenged in court? Or may the taxpayer

simply ignore it when pursuing its case before conventional courts? Will or can courts then take into account the outcome (or results, e.g. on evidence) of the arbitration?

Overall, is arbitration in tax matters to be seen as a "quick and dirty" option for dispute resolution which can be chosen before a case is taken to court? Or is it a mechanism to resolve disputes after they are lost in court?

8. Outlook: The Future of Arbitration in Tax Matters

What is your overall assessment of arbitration as a tool for tax dispute resolution? Is it a major breakthrough for the effective avoidance of double taxation, which has long suffered under ineffective dispute resolution mechanisms? Or is it merely a fig leaf that the OECD has presented in the MLI as a "pro-taxpayer" outcome of the BEPS project, so that OECD can claim that the BEPS project was not a strictly one-sided undertaking?

Are jurisdictions taking arbitration seriously in their practice, or did they accept it only to be politically correct, while not anticipating much real change? If such reluctance exists, how can arbitration nevertheless be made a success?

What is the anticipated practical impact of arbitration in, for example, 10 years? Will there be more or fewer international tax disputes? Will the nature of such disputes change? Will there be an impact on the court system and how it is used for international tax cases?

Will there be an impact on the behaviour of taxpayers? Will they be less aggressive in their tax planning? Or will they become even more aggressive, relying on the rule of law?

What will be the impact on contracting states? Can arbitration help smaller states (or states with little resources and capacity) in their disputes with strong and powerful states? Can, for example, developing countries benefit from arbitration (or will they suffer even more due to the lack of arbitration experts on their

side)? Will they develop more trust in arbitration under the UN Model? What could be done to improve confidence in the integrity of arbitration?

Will the system of ad hoc established arbitration panels evolve into an "international tax court", with permanent "international" judges or arbitrators and a fixed judicial organization?

Paper length: 20 pages, Times New Roman 12 pt.
Format: preferably Microsoft Word
Bibliographic references (footnotes) and quotations: Follow the attached guidelines.

The Questionnaire does not necessarily have to be followed question by question (e.g. where there is nothing to report from your jurisdiction). Rather, the Questionnaire should stimulate your thinking around the various topics outlined.
Deadline for delivery of the paper: 15 May 2018

Provide **a brief biographical statement** (3-5 lines) for the List of Contributors in the book, as well as a list of abbreviations used in your paper, by the above-mentioned deadline. Ensure that **graphics and charts** in the final version are **black-and-white** or **greyscale *only*** (*no* colour graphics are allowed for the book!), and email them as separate files in xlsx, docx, pptx, jpg or tif format. Resolution of images should be at least **300 DPI** to ensure good quality for printing.

The national reports (papers) will be made available for download on a password-protected conference website, so that the conference participants can be well prepared for the discussions.

On the basis of the national reports, we will identify the most relevant topics and select speakers who will present selected issues in a three-minute input statement to stimulate public debate.

After the conference, there will be a short period of time granted for authors to include the findings of the conference in their respective papers. We will organize linguistic editing of the final reports.

If you have any questions or concerns, do not hesitate to contact us at renee.pestuka@wu.ac.at. We will be happy to assist you.