

A Permanent Arbitration Tribunal for International Tax Disputes

*4th Meeting of the Platform for Tax
Good Governance, Aggressive Tax
Planning and Double Taxation*

Overview

- Current double tax dispute resolution issues
 - OECD MAP
 - EU Arbitration Convention
 - BEPS aspects
- A permanent arbitration tribunal for international tax disputes
 - Main features
 - Advantages
 - Challenges

Current Double Tax Dispute Resolution Issues: OECD Mutual Agreement Procedures (MAP)

- OECD Transfer Pricing Guidelines often lack clarity and acceptance
- Growing caseload: 4,073 pending MAP cases in 2012 (2,352 in 2006)*
- Long duration of MAP procedures: 25.5 months in 2012 (average 2006-2011: 23.2 months)*
- Allegation of abuse of law or non-compliance bars the route to MAP/arbitration

*Source: <http://www.oecd.org/ctp/dispute/mapstatistics2012.htm>

Current Double Tax Dispute Resolution Issues: EU Arbitration Convention

Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises ([link](#))

- In place since 1990
- ad-hoc tribunals
- no data available on cases decided (reportedly just four)
- „effective“ only as a deterrent, but not as a way to reach a solution
- limited taxpayer involvement, as witness only
- proceedings non-transparent to taxpayers

Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at 31 December 2012

Statistics on the functioning of the arbitration convention for reference year 2012

Member State	Opening inventory on 01/01/2012	Cases initiated in 2012	Cases completed in 2012	Ending inventory on 31/12/2012	Average cycle time for cases completed in 2012 (in months)
	B	C	D	E	F
BE	22	7	7	22	38
BG	0	0	0	0	
CZ	7	3	5	5	21
DK	30	10	8	32	25
DE ⁽¹⁾	192	77	40	229	
EE	0	0	0	0	
IE	13	1	4	10	
EL	2	1	0	3	
ES	57	19	15	61	47
FR	174	30	47	157	
IT ⁽²⁾	79	34	2	111	
CY	0	0	0	0	
LV	0	0	0	0	
LT	0	0	0	0	
LU	3	3	1	5	9
HU	5	0	0	5	
MT	0	0	0	0	
NL	37	14	18	33	33
AT	19	7	5	21	
PL	13	1	4	10	18
PT	16	2	1	17	27
RO	1	2	0	3	
SI	0	1	0	1	
SK	2	0	0	2	
FI	17	10	0	27	
SE	28	21	12	37	34
UK	63	16	22	57	26.4
TOTAL	780	259	191	848	

Source: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/tpf/2013/tpf_012_2013_en.pdf

Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at 31 December 2012

Analysis of pending cases 2 years after the date a case was initiated as at 31.12.2012

Member State	Number of cases	Reasons why cases are pending 2 years after initiation						
		2-year point not reached due to Coc 5 (b) (i)	cases pending before court	Time limit waived with taxpayer's agreement	To be sent to Arbitration	In Arbitration	Settlement agreed in principle, awaiting exchange of closing letters for MAP	Other reasons
	B	C	D	E	F	G	H	I
BE	12	3	1	3	1	0	3	1
BG	0	0	0	0	0	0	0	0
CZ	0	0	0	0	0	0	0	0
DK	4	0	2	2	0	0	0	0
DE ^(1,2)	91	7	13	4	0	0	23	44
EE	0	0	0	0	0	0	0	0
IE	6	0	0	5	0	0	0	1
EL ⁽³⁾	1	0	0	0	0	0	0	1
ES	32	0	4	0	0	0	4	24
FR	81	0	8	57	3	0	13	0
IT	21	0	13	0	0	0	0	8
CY	0	0	0	0	0	0	0	0
LV	0	0	0	0	0	0	0	0
LT	0	0	0	0	0	0	0	0
LU	2	0	2	0	0	0	0	0
HU	3	3	0	0	0	0	0	0
MT	0	0	0	0	0	0	0	0
NL	8	0	1	1	0	0	0	5
AT	8	0	2	1	0	0	0	5
PL	6	1	0	0	0	0	1	4
PT ⁽⁴⁾	12	3	2	0	0	0	0	7
RO	0	0	0	0	0	0	0	0
SI	0	0	0	0	0	0	0	0
SK	1	1	0	0	0	0	0	0
FI	0	0	3	0	0	1	0	5
SE	10	0	4	0	1	1	0	4
UK	21	0	6	0	0	0	1	14
TOTAL	328	19	61	73	5	2	45	123

Source: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/tpf/2013/tpf_012_2013_en.pdf

BEPS Aspects

Concerns of taxpayers:

- Countries' unilateral efforts to ensure taxation of profits and to limit base erosion will result in increased double taxation
- Double tax resolution has low/no priority in BEPS

A Permanent Arbitration Tribunal for International Tax Disputes: Main Features I

- Separate legal body, supported by the Permanent Court of Arbitration (PCA) of the Peace Palace in The Hague);
- Administration of cases provided by the PCA;
- Jurisdiction on any matters provided for by legal instrument, such as:
 - EU Arbitration Convention,
 - Bilateral and multilateral tax treaties,
 - Domestic law,
 - Contractual arrangements, e.g. compliance agreements;
- Arbitrators:
 - Lists of recognised tax and dispute resolution experts for parties to choose from,
 - PCA Secretary-General appoints arbitrators if no selection is/can be made,
 - Arbitrators' fees to be determined by PCA Secretary-General;

A Permanent Arbitration Tribunal for International Tax Disputes: Main Features II

- Sessions: The Hague or any other location agreed by the parties (video conference or by telephone)
- Four standard sets of alternative arbitration rules which parties can choose from:
 - rules of the European Arbitration Convention
 - OECD sample MoU on arbitration
 - „Baseball“ arbitration cf. MoU under the U.S.-Canada tax treaty
 - tribunal's own rules based on UNCITRAL rules used by the PCA (automatically applicable by default)
- Fees:
 - tribunal fees approx. 15,000 - 60,000 € + arbitrators' fees
- Other services offered by the tribunal to disputing parties:
 - Mediation and other techniques for collaborative dispute resolution
 - Tax expert assistance

Advantages of a Permanent Arbitration Tribunal

- Existing list of experts and infrastructure of tribunal
 - will save time for the setting-up of tribunal
 - will ensure smooth and effective operation, short deadlines and quicker decisions
 - will enhance consistency in approaches to and determinations of cases (development of an internal case law)
 - will be attractive for parties/countries that do not have/know qualified experts
- Flexible cost and fee rules applied on a case-by-case basis (in stead of such fixed principles as 50/50 sharing or „loser bears all“)
 - allow the financial strength of parties to be taken into account (developing countries)
- Appointment of arbitrators by the PCA Secretary-General and default arbitration rules
 - prevent parties from blocking the setting-up of tribunals
 - prevent procedural rules from becoming subject of dispute themselves
- Administration of arbitration proceedings by the independent and authoritative PCA (in stead of by the parties themselves) will encourage parties to live up to agreed rules and timelines and co-operate in good faith generally

Overcoming the Challenge of Acceptance by Countries

- Enabling taxpayers to reach quick tax dispute resolutions enhances countries' attractiveness for investors
- An established case-law will (eventually) make arbitration outcomes more predictable
- In MAP, authorities may be politically restricted in conceding their position in negotiations, thus barring agreements
- Where taxpayers are parties, the costs of the procedures may (partly) be carried by them, as beneficiaries of the arbitration

Items to be Discussed

- Governance and funding of the tribunal's organisation
- Taxpayer participation in arbitration proceedings
A more active role, especially if party on equal footing, will increase taxpayers' trust in arbitration and acceptance of its award
- Publication of arbitration proceedings and/or awards (subject to agreement of parties and in anonymous form, of course)
will further increase taxpayers' trust as well as contribute to the further development of international tax law generally
- A multilateral instrument
will accelerate the adoption of mandatory arbitration as well as the tribunal and its procedural rules, and provide proper setting for resolving multilateral cases