



Mutual Agreement – Recent Developments and Case Law



Mutual Agreement – The Panel

- ▶ Malcolm Gammie (UK – Chairman)
- ▶ John Owen (Canada)
- ▶ Massimo Scuffi (Italy)
- ▶ Caroline Vanderkerken (Belgium)
- ▶ Ange Beukers van Dooren (The Netherlands)



Outline of the session

- ▶ MG will set the scene on growth of international tax disputes and some of the measures taken to promote effective dispute resolution.
- ▶ Panel members will then discuss particular decisions in their jurisdictions that relate to the mutual agreement procedure or treaty arbitral issues:
 - ▶ Canada – re-assessment by Revenue Canada contrary to previous MAP agreement
 - ▶ The Netherlands – memorandum of understanding between Dutch and German Revenues contrary to Dutch Supreme Court decision
 - ▶ Italy – denial of access to EU Arbitration Convention and MAP
 - ▶ Belgium – can MAP be disregarded if more than interpretation of treaty?
 - ▶ Denmark – denial of access to EU Arbitration Convention and MAP
- ▶ Followed by Q&A and open discussion of treaty dispute resolution issues and interaction with jurisdiction of domestic courts and domestic appeal procedures



The Mutual Agreement Procedure (MAP)

- ▶ Article 25 OECD MTC:

“Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident ... The competent authority shall endeavour ... to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. The competent authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention”

- ▶ UN and US Model Treaties include similar provision
- ▶ 2,509 new MAP cases for OECD countries in 2015 and the 6,176 cases outstanding at the end of 2015 (OECD 5 December 2016: later statistics not yet available)



BEPS Action 14 and the Multilateral Instrument

- ▶ BEPS Action 14 Report – “Making Dispute Resolution Mechanisms More Effective”
 - ▶ Strengthen the MAP process by ensuring effective and timely resolution of disputes
 - ▶ Establishing minimum standards (17 measures) and best practices (11 recommendations) for MAP resolution
 - ▶ Peer-based monitoring, with an assessment methodology and MAP statistics framework
- ▶ Multilateral Instrument Part V Improving Dispute Resolution
 - ▶ Article 16 Mutual Agreement Procedure
 - ▶ Article 17 Corresponding Adjustments



Mandatory Binding Arbitration

- ▶ Article 25(5) OECD MTC
 - ▶ Case presented by taxpayer for mutual agreement by competent authorities
 - ▶ No agreement within 2 years
 - ▶ Unresolved issues submitted to arbitration unless a decision on the issues rendered by a court or tribunal of either State
 - ▶ Arbitral outcome binding on both States and to be implemented unless not accepted by a person directly affected
 - ▶ States to settle the mode of application of the arbitration
- ▶ Multilateral Instrument Part VI implementing mandatory binding arbitration for those States that choose to apply Part VI
 - ▶ Currently 26 of 71 signatories have adopted Part VI
 - ▶ Articles 18 to 26



Mandatory Binding Arbitration – MLI

Part VI

- ▶ Basic Article 19 provision similar to Article 25(5) MTC
- ▶ If no Competent Authority (CA) agreement, taxpayer can instigate mandatory binding arbitration
- ▶ Part VI provides greater detail of the arbitral process to allow opting States a choice of method and so that Part VI is as close to operational as possible without the need for separate agreement on arbitral method
- ▶ Baseball arbitration is the default method but a country can opt for reasoned opinion unless other country refuses (then no arbitration unless they can agree on a method). Decisions have no precedential value
- ▶ CAs can reject reasoned opinion but must agree on something



EU Arbitration Convention

- ▶ Operative for 20+ years but still very few arbitrations actually undertaken (less than 20?)
- ▶ Principal benefit has been to encourage MAP agreement (but numbers of new MAP cases still exceed number resolved)
- ▶ Supported by work of the EU Joint Transfer Pricing Forum; see https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en
- ▶ There is a Code of Conduct for the effective implementation of the Arbitration Convention laying down procedural rules. These are relatively flexible and lay down a time limit for the decision (6 months)
- ▶ Each Member State nominates 5 individuals qualified to act as independent arbitrators.
- ▶ An arbitral panel comprises 3 independent members + one or two representatives of each CA



Proposed EU Arbitration Directive

- ▶ A Directive for been agreed for resolving disputes involving double taxation to be implemented from 1 July 2019
- ▶ Extending beyond transfer pricing may be good in theory but how many other potential cases are there?
- ▶ Includes a proposal for an ADR Commission
- ▶ Allows publication of decisions
- ▶ Unclear how the Directive interacts with domestic dispute resolution and appeal procedures; in particular, relationship with CJEU
- ▶ Contrasts with baseball arbitration under MLI Part VI
 - ▶ Is the better approach a judicial appeal process or an effective way of reaching agreement on issues that are not easily justiciable?



Practical issues with EU arbitration

- ▶ MG has been on the UK's list of nominated arbitrators since 2002 and has been selected for 3 cases: one resolved without arbitration and two undertaken
- ▶ CAs have little or no experience of arbitration and do not necessarily have any experience of domestic dispute resolution or appeal processes
- ▶ Practical issues include:
 - ▶ Language of proceedings and document translation
 - ▶ Administrative assistance provided by 'host' CA
 - ▶ CA members essentially 'argue their case' rather than act as arbitrators
 - ▶ CAs may agree that independent members can meet separately to discuss issues
 - ▶ Taxpayer presentation a valuable part of the process
 - ▶ Timescale for decision (6 months) is challenging and co-ordinating diaries for meetings can be very difficult