



Tools for Applying Tax Treaties: Arbitration

Hugh Ault

Professor Emeritus of Tax Law
Boston College Law School

UN-ITC Workshop on Administration of Tax Treaties
and Addressing Base-Eroding Payments

Berlin 1-3 December 2015

Background to Arbitration of MAP cases

- **UN Model presents two versions of Article 25 which are essentially identical except that Alternative A does not include a paragraph dealing with arbitration and Alternative B contains an arbitration provision which follows the OECD Model with some important differences.**
- **UN Commentary, Article 25, paragraph 4, sets forth the pros and cons of arbitration from the perspective of developing countries**
- **The decision of each country as to whether or not to include an arbitration provision in its treaties should be based on policy and administrative considerations and its actual experience with MAP**

“Voluntary” versus “Mandatory” Arbitration

- For countries who do not wish to include mandatory arbitration in their treaties, UN Commentary, paragraph 14 provides a “voluntary” arbitration provision
- Under voluntary arbitration, a case can go to arbitration if BOTH CAs and the TP agree to submit the case
 - Since both CAs must agree to submit the case, this approach gives less assurance than mandatory arbitration that a MAP will be produced
- In addition, it would be possible to provide for arbitration on a case-by-case basis through a special MAP

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Differences between OECD and UN Arbitration articles

- Under the OECD provision, arbitration can begin if the case has not been resolved within two years of the presentation of the case; the UN provision uses a three year period
- Under the OECD provision, it is the taxpayer who can require that the case be submitted to arbitration regardless of the views of the CAs. Under the UN provision, one competent authority can require that the case be submitted but if both CAs do not want arbitration, the case cannot be submitted
 - Under the UN provision, arbitration is not truly mandatory.

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Differences between OECD and UN Arbitration Articles

- Under the OECD Model Article 25(5), once the arbitration decision has been reached and communicated, the CAs are required to follow the decision in reaching a MAP. Under the UN provision, the CAs can deviate from the decision of the arbitrators if they can reach an agreement within 6 months of the arbitration decision.
 - This provision follows EU Arbitration Convention
- In general, the UN differences from the OECD approach are intended to keep more authority in the hands for the CAs but this is at the expense of insuring that a MAP will ultimately be achieved.

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Basic features of the UN Arbitration provision

- As authorized in Article 25(4), the UN Commentary provides a “Sample Mutual Agreement on Arbitration” which sets up the procedural rules and principles for applying the arbitration procedure
- Additional Commentary discusses the provisions of the Sample Mutual Agreement
- In most aspects, the UN Commentary on arbitration basically follows the OECD Commentary with the exception of the form of arbitration procedure

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“Last Best Offer” form of Arbitration

- **The OECD Sample Agreement provides as its basic or “default” rule, a procedure where the arbitrators must reach an independent and reasoned opinion on the issue at hand**
- **Under the UN Sample Agreement, the “default” option is “last best offer” arbitration. This form of arbitration limits the arbitrators to choosing between the two “last best offers” by the two CAs. The Arbitrators simply pick one or the other offer (and give no opinion or justification for the decision)**
- **The CAs can nonetheless choose to have an independent and reasoned arbitration opinion if they wish**

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Basic features of the UN Arbitration provision

- **Terms of Reference**
 - **The CAs shall establish the Terms of Reference (“TR”) which set forth the questions to be resolved by the arbitral panel**
 - **The TR must be established within three months of the request for arbitration**
- **Selection of Arbitrators**
 - **Each CA selects an arbitrator and the two selected chose a Chair**

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Basic features of the UN Arbitration provision

➤ Selection of Arbitrators (cont.)

- If no third arbitrator is selected within three months, the Chair of the UN Committee of Experts shall select the third arbitrator
- Rules are set forth for compensation of arbitrators
- Arbitrators must establish their independence and impartiality

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Basic features of the UN Arbitration provision

➤ Procedural and Evidentiary Rules

- To the extent not set forth in the Terms of Reference, procedural rules shall be adopted by the arbitrators

➤ Costs

- In general, each party bears the costs of its participation
 - Cost of the meetings and administration are borne by the CA to whom the case was presented

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Basic features of the UN Arbitration provision

➤ Independent opinion approach

- If the CAs so choose, the arbitrators may reach their own decision on the case
- The opinion must indicate the sources of law relied on and the reasoning of the decision
- With the parties' permission, an edited version of the opinion may be published
 - The published opinion has no precedential value as such but may be useful in increasing international awareness of existing practices

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Developments with respect to Arbitration

- **A number of bilateral treaties have some form of mandatory arbitration provision**
- **Some treaties have no current arbitration provision but require that if the treaty partner enters into a treaty with an arbitration provision, it must reopen the issue with the country**
- **In the Final Report on BEPS Action 14, 20 countries committed to mandatory binding arbitration to be developed under the proposed Multilateral Instrument.**
- **Proposed UN Subcommittee on Dispute Resolution will consider arbitration and other dispute resolution mechanisms such as mediation or conciliation**

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Thank you

Hugh Ault