

International Arbitration in Tax Matters

Editors:

Michael Lang
Jeffrey Owens

Assistant editors:

Jasmin Kollmann
Laura Turcan



Volume 2

WU Institute for Austrian and International Tax Law
European and International Tax Law and Policy Series

Table of Contents

Preface		xxiii
Chapter 1: Introduction: Taking the Debate Forward		1
	<i>Jean-Pierre Lieb</i>	
1.1.	Background	1
1.2.	Arbitration models	3
1.2.1.	European Arbitration Treaty	4
1.2.2.	Arbitration process	4
1.2.3.	Effective use of arbitration	6
1.2.4.	Arbitration under the bilateral investment treaty framework	6
1.3.	The factors behind the underutilization of arbitration	6
1.4.	Courses of action to encourage the use of arbitration	8
1.4.1.	Improvements to the decision-making process	8
1.4.2.	Independence and quality of the arbitrators	9
1.4.3.	Transparency of the arbitral process	9
1.5.	Convincing the developing countries	9
1.6.	Tough times require tough choices	10
Part One		
Setting the Context: Overview of Dispute Resolution Mechanisms and Current Trends		
Chapter 2: Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges		15
	<i>Jasmin Kollmann and Laura Turcan</i>	
2.1.	Preliminary remarks	15
2.2.	The impact of BEPS on tax disputes	16
2.3.	Dispute resolution mechanisms in tax treaties	20

Table of Contents

2.3.1	Mutual agreement procedure	20
2.3.1.1.	OECD Model Convention	20
2.3.1.2.	UN Model Convention	25
2.3.1.3.	Concerns relating to the MAP	25
2.3.1.3.1.	Potential drawbacks for taxpayers	25
2.3.1.3.2.	Potential drawbacks for competent authorities	30
2.3.1.3.3.	The perspective of developing countries	31
2.3.2.	Arbitration	32
2.3.2.1.	Different types of arbitration	32
2.3.2.2.	Article 25(5) of the OECD Model	34
2.3.2.2.1.	Development of the arbitration clause	34
2.3.2.2.2.	Arbitration process pursuant to article 25(5) of the OECD Model	35
2.3.2.2.3.	Advantages of arbitration compared to MAP	37
2.3.2.3.	Article 25B(5) of the UN Model	38
2.3.2.4.	Arbitration provisions in other models	39
2.3.2.5.	Concerns relating to the arbitration of tax disputes	40
2.3.2.5.1.	Potential drawbacks for the taxpayer	40
2.3.2.5.2.	Potential drawbacks for the competent authorities	42
2.3.2.5.3.	The perspective of developing countries	45
2.3.2.6.	Arbitration clauses in practice	47
2.3.2.6.1.	Arbitration clauses per state and time period	47
2.3.2.6.2.	Referral of a case and scope of the arbitration clause	50
2.3.2.6.3.	Time period for referral	53
2.3.2.6.4.	Binding effect and implementation	53
2.3.2.6.5.	Procedural rules	54
2.4.	Dispute resolution outside the scope of double tax treaties	55
2.4.1.	Dispute resolution according to the EU Arbitration Convention	55
2.4.1.1.	Origin and adoption of the Convention	55
2.4.1.2.	Scope of the Convention	56
2.4.1.3.	Dispute resolution pursuant to the Convention	58
2.4.2.	Dispute resolution in bilateral investment treaties	64
2.4.3.	Alternate dispute resolution mechanisms: Mediation	67
2.4.4.	Cooperative compliance	68
2.5.	Conclusions	70
2.6.	Annex: Tax treaties with arbitration clauses	72
2.6.1.	Treaties between OECD member countries	73

2.6.2.	Treaties between OECD member countries and non-OECD member countries	75
2.6.3.	Treaties between non-OECD member countries	77
Chapter 3:	Alternative Dispute Resolution in International Tax Law – The View of Business	79
	<i>John Connors and Barbara Delputte</i>	
3.1.	Introduction	79
3.2.	Measures to avoid disputes	80
3.3.	Measures to resolve disputes	81
3.3.1.	Domestic measures for dispute resolution	81
3.3.2.	Dispute resolution at the international level	82
3.3.2.1.	MAP	82
3.3.2.2.	Arbitration	83
3.3.2.3.	Dispute resolution in BITs	84
Chapter 4:	Enhancing the Mutual Agreement Procedure by Adopting Appropriate Arbitration Provisions	85
	<i>Patricia A. Brown</i>	
4.1.	Introduction	85
4.2.	The current state of the MAP	86
4.2.1.	The purpose of the MAP	87
4.2.2.	Shortcomings of the MAP	89
4.2.2.1.	A “bleak picture”?	90
4.2.2.2.	The response by the OECD	97
4.2.2.2.1.	Ensuring that treaty obligations are fully implemented in good faith	99
4.2.2.2.2.	Ensuring that administrative processes promote the resolution of disputes	100
4.2.2.2.3.	Ensuring that taxpayers can access the MAP	101
4.2.2.2.4.	Ensuring that cases are resolved once in the MAP	101
4.3.	Enhancing, not replacing, the MAP	103
4.3.1.	Can governments be convinced?	103
4.3.2.	Why do countries agree to anything?	103
4.3.3.	Sovereignty, or something else?	105
4.4.	Conclusion	109

Part Two

Different Types of Arbitration and Scope of the Provisions,
Issues of Constitutionality and National Sovereignty

Chapter 5:	The Scope of Arbitration under Tax Treaties	113
	<i>Brian J. Arnold</i>	
5.1.	Introduction	113
5.2.	The scope of arbitration under the OECD and UN Models	114
5.2.1.	Introduction	114
5.2.1.1.	Arbitration as part of the mutual agreement procedure	114
5.2.1.2.	Article 25(5) of the OECD Model	115
5.2.1.3.	Article 25(5) (alternative B) of the UN Model	115
5.2.2.	The purpose of arbitration provisions in tax treaties	116
5.2.3.	Conditions for the submission of issues to arbitration under the OECD and UN Models	117
5.2.3.1.	Presentation of case to competent authorities for MAP	117
5.2.3.2.	Initiation of arbitration	119
5.2.3.3.	Time for competent authorities to reach agreement before submission of issues to arbitration	121
5.2.3.4.	Contrary domestic court decisions	122
5.2.3.5.	Other conditions	123
5.2.4.	The types of issues qualifying for arbitration	123
5.2.5.	Limitations on issues covered by arbitration	125
5.3.	Other questions	127
5.3.1.	Non-discrimination	127
5.3.2.	Double non-taxation	127
5.3.3.	The relationship between arbitration and domestic dispute-resolution remedies	128
5.4.	The scope of arbitration under the ILADT Multilateral Model Convention	130
5.5.	The scope of arbitration provisions under non-tax treaties	131
5.5.1.	Bilateral and multilateral trade and investment agreements	131

5.5.2.	Arbitration under the General Agreement on Tariffs and Trade (GATT)	133
5.5.3.	Energy Charter Treaty	134
5.5.4.	The General Agreement on Trade in Services (GATS)	135
5.6.	Conclusion	137
Chapter 6:	Baseball Arbitration in Comparison to Other Types of Arbitration	139
	<i>Raffaele Petruzzi, Petra Koch and Laura Turcan</i>	
6.1.	Introduction	139
6.2.	Baseball arbitration in tax treaties	140
6.2.1.	Historical development	140
6.2.1.1.	Salary arbitration in major league baseball	140
6.2.1.2.	Application of baseball arbitration in tax treaties	141
6.2.2.	Characteristics of final offer arbitration	142
6.2.2.1.	The “single choice” mechanism	142
6.2.2.2.	No written decisions	144
6.2.2.3.	Package versus issue-by-issue arbitration	145
6.2.2.4.	Timing of final offers	146
6.2.2.5.	Selection of arbitrators	147
6.2.2.6.	Criteria that may be taken into account by the arbitrator	148
6.3.	Arbitration pursuant to the OECD and UN Models	150
6.4.	A comparison of arbitration pursuant to the OECD and UN Models with baseball arbitration	153
6.4.1.	Commonalities of baseball arbitration and conventional arbitration	153
6.4.2.	Differences between the two approaches	154
6.4.3.	Preliminary findings	156
6.5.	Conclusions	158

Chapter 7:	Mandatory Arbitration of Disputes Pursuant to Tax Treaties: The Experience of the United States	159
	<i>H. David Rosenbloom</i>	
7.1.	Introduction	159
7.2.	Concerns about mandatory arbitration provisions	160
7.3.	The United States changes its course	162
7.4.	Some questions raised – The elements of the US formula	164
7.5.	Annex 1: US-Canada Treaty – The MAP	166
7.6.	Annex 2: US-Canada Treaty – Memorandum of Understanding and Arbitration Board Operating Guidelines	169
Chapter 8:	Arbitration and Constitutional Issues	187
	<i>Luís Eduardo Schoueri</i>	
8.1.	Introduction	187
8.2.	Arbitration in the OECD Model Convention	189
8.3.	Main constitutional concerns	195
8.3.1.	Principle of legality	196
8.3.2.	The prohibition of waiver of tax revenues	196
8.3.3.	Fiscal sovereignty	197
8.4.	Legitimacy of the adoption of arbitration clauses in tax issues	197
8.4.1.	Arbitration in domestic issues	197
8.4.2.	Arbitration in tax treaties: The jurisdictional approach	204
8.4.2.1.	Fiscal sovereignty	204
8.4.2.2.	The principle of legality and tax treaties	206
8.5.	Conclusion	208

Part Three
The Role of Existing Courts

Chapter 9:	Arbitration and International Institutions <i>Hugh J. Ault and Alicja Majdanska</i>	211
9.1.	Introduction	211
9.2.	Remarks on different arbitration procedures	212
9.2.1.	Different arbitration procedures	212
9.2.2.	International Chamber of Commerce	213
9.2.2.1.	Introduction	213
9.2.2.2.	Arbitration rules	215
9.2.2.2.1.	Arbitral proceedings	215
9.2.2.2.2.	Arbitrators and an arbitral tribunal	217
9.2.2.2.3.	Arbitral seat and language	219
9.2.2.2.4.	Confidentiality	219
9.2.2.2.5.	Costs	220
9.2.2.3.	Summary	220
9.2.3.	American Arbitration Association	221
9.2.3.1.	Introduction	221
9.2.3.2.	Arbitration rules	222
9.2.3.2.1.	Arbitral proceedings	222
9.2.3.2.2.	Arbitrators and an arbitral tribunal	224
9.2.3.2.3.	Arbitral seat and language	225
9.2.3.2.4.	Confidentiality	225
9.2.3.2.5.	Costs	226
9.2.3.3.	Summary	226
9.2.4.	The London Court of International Arbitration	227
9.2.4.1.	Introduction	227
9.2.4.2.	Arbitration rules	228
9.2.4.2.1.	Arbitral proceedings	228
9.2.4.2.2.	Arbitrators and an arbitral tribunal	230
9.2.4.2.3.	Arbitral seat and language	231
9.2.4.2.4.	Confidentiality	231
9.2.4.2.5.	Costs	232
9.2.4.3.	Summary	232
9.2.5.	Arbitration Institute of the Stockholm Chamber of Commerce	233
9.2.5.1.	Introduction	233
9.2.5.2.	Arbitration rules	234
9.2.5.2.1.	Arbitral proceedings	234

Table of Contents

9.2.5.2.2.	Arbitrators and an arbitral tribunal	235
9.2.5.2.3.	Arbitral seat and language	236
9.2.5.2.4.	Confidentiality	237
9.2.5.2.5.	Costs	237
9.2.5.3.	Summary	237
9.2.6.	Swiss Chambers' Arbitration Institution	238
9.2.6.1.	Introduction	238
9.2.6.2.	Arbitration rules	239
9.2.6.2.1.	Arbitral proceedings	239
9.2.6.2.2.	Arbitrators and an arbitral tribunal	240
9.2.6.2.3.	Arbitral seat and language	241
9.2.6.2.4.	Confidentiality	242
9.2.6.2.5.	Costs	242
9.2.6.3.	Summary	242
9.2.7.	China International Economic and Trade Arbitration Commission	243
9.2.7.1.	Introduction	243
9.2.7.2.	Arbitration rules	244
9.2.7.2.1.	Arbitral proceedings	244
9.2.7.2.2.	Arbitrators and an arbitral tribunal	246
9.2.7.2.3.	Arbitral seat and language	247
9.2.7.2.4.	Confidentiality	248
9.2.7.2.5.	Costs	248
9.2.7.3.	Summary	248
9.2.8.	Commercial Arbitration and Mediation Center for the Americas	249
9.2.8.1.	Introduction	249
9.2.8.2.	Arbitration rules	250
9.2.8.2.1.	Arbitral proceedings	250
9.2.8.2.2.	Arbitrators and an arbitral tribunal	251
9.2.8.2.3.	Arbitral seat and language	252
9.2.8.2.4.	Confidentiality	252
9.2.8.2.5.	Costs	252
9.2.8.3.	Summary	253
9.2.9.	The Inter-American Commercial Arbitration Commission	253
9.2.9.1.	Introduction	253
9.2.9.2.	Arbitration rules	254
9.2.9.2.1.	Arbitral proceedings	254
9.2.9.2.2.	Arbitrators and an arbitral tribunal	255
9.2.9.2.3.	Arbitral seat and language	256
9.2.9.2.4.	Confidentiality	256

9.2.9.2.5.	Costs	257
9.2.9.3.	Summary	257
9.2.10.	World Intellectual Property Organization Arbitration and Mediation Center	257
9.2.10.1.	Introduction	257
9.2.10.2.	Arbitration rules	259
9.2.10.2.1.	Arbitral proceedings	259
9.2.10.2.2.	Arbitrators and an arbitral tribunal	260
9.2.10.2.3.	Arbitral seat and language	261
9.2.10.2.4.	Confidentiality	262
9.2.10.2.5.	Costs	262
9.2.10.3.	Summary	262
9.2.11.	International Centre for Settlement of Investment Disputes	263
9.2.11.1.	Introduction	263
9.2.11.2.	Arbitration rules	264
9.2.11.2.1.	Arbitral proceedings	264
9.2.11.2.2.	Arbitrators and an arbitral tribunal	266
9.2.11.2.3.	Arbitral seat and language	267
9.2.11.2.4.	Confidentiality	267
9.2.11.2.5.	Costs	268
9.2.11.3.	Summary	268
9.3.	The overall conclusions on institutional arbitration procedures	269
9.3.1.	Balancing the principle of party autonomy and the need for established procedures	269
9.3.2.	Arbitrators and arbitral tribunals	270
9.3.3.	Arbitral proceedings	271
9.3.4.	Confidentiality	272
9.3.5.	Finality and enforcement of awards	273
9.3.6.	Costs	273
9.4.	Relevance of existing institutional arbitration mechanisms for the resolution of international tax disputes	274
9.5.	A possible institutional structure for tax arbitration?	276
9.6.	Annex: Overview of different arbitration procedures	277

Chapter 10: Pioneers in Tax Arbitration	281
<i>Bertil Wiman</i>	
10.1. Introduction	281
10.2. Background	281
10.3. Present-day relevance and impact	282
10.4. Concluding remarks	285

Part Four

Procedural Rules and the Qualification of Arbitrators

Chapter 11: Participation of the Taxpayer in MAP and Arbitration: Handicaps and Prospects	289
<i>Katerina Perrou</i>	
11.1. Introduction	289
11.2. Taxpayer participation under the international dispute resolution system	289
11.2.1. The OECD Model system	290
11.2.2. The EU Arbitration Convention	293
11.3. Current level of taxpayer participation: Handicaps	293
11.3.1. Impact of the absolute bar on individual access	294
11.3.2. Impact of the limited involvement of the taxpayer	296
11.4. Prospects: Is individual access to the international system required?	298
Chapter 12: Arbitrators, Qualifications and Features by Design	301
<i>Ricardo Escobar C.</i>	
12.1. Summary	301
12.2. The basics: Solving an international dispute concerning double taxation	301

12.3.	The objective: A thoughtful and balanced award that resolves the dispute in an effective manner	304
12.4.	Reverse engineering rules	305
12.4.1.	A thoughtful award	305
12.4.2.	An unbiased award	307
12.4.3.	A coherent award	308
12.5.	Conclusions	309
Chapter 13:	Some Thoughts on Procedural Rules in International Tax Arbitration	311
	<i>Daniel Gutmann</i>	
13.1.	Introduction	311
13.2.	Procedural rules as a reflection of the nature of international tax arbitration	312
13.3.	What kind of authority should be granted to arbitrators in international tax arbitration?	314
Part Five		
Implementation and Publication of Arbitration Decisions		
Chapter 14:	Implementation of Arbitration Decisions in Domestic Law	321
	<i>J. Scott Wilkie</i>	
14.1.	Arbitration and “applicable” domestic law	321
14.1.1.	What is the question?	323
14.1.2.	Reconsidering the accepted order – A process	327
14.1.3.	Why does it matter?	327
14.1.4.	“Barriers versus barriers”	328
14.2.	Arbitration and MAP	330
14.3.	The relevant legal environment and the effectiveness of arbitration	332

Table of Contents

14.4.	Effective implementation	333
14.5.	A question concerning the limits of article 25 and criticisms of arbitration	333
14.6.	Criticisms of arbitration affecting implementation	334
14.7.	Is arbitration novel but not new? Learning about MAP by remembering its beginning	335
14.7.1.	Article 25	335
14.7.2.	Vienna Convention on the Law of Treaties	338
14.7.3.	Summing up so far: The legality of MAP-based arbitration decisions and their implementation	341
14.8.	Giving practical effect to an arbitration decision	342
14.8.1.	The “national legal order”: MAP with arbitration is still MAP	342
14.8.2.	The preparation and presentation of the “case” provides (the) “control”	343
14.8.3.	“Issues” and “cases”	344
14.8.4.	Arbitration and administrative “notifications” or decisions of tax authorities and court decisions	345
14.8.5.	Publication	348
14.8.6.	Domestic administrative appeals	349
14.8.7.	Domestic judicial appeals	349
14.8.8.	Administrative agreements and rulings	350
14.8.9.	Costs	351
14.9.	Reviewing an arbitration decision	352
14.9.1.	Some basic considerations	352
14.9.2.	States’ interests	353
14.9.3.	Taxpayers’ interests	354
14.10.	Arbitration decisions outside traditional sources of laws of tax jurisdictions	356
14.10.1.	“Other supplementary dispute resolution” – Doing what needs to be done	356
14.10.2.	A “world tax organization”	357
14.11.	Observations and propositions: Contributing to guidance about “taking the debate forward”	358

14.12.	A closing comment	364
14.13.	Annex: Schedule A – Contributor’s Guide Topic 14	366
Chapter 15:	Arbitration and Publication of Decisions	369
	<i>John F. Avery Jones</i>	
15.1.	The issue in principle	369
15.2.	OECD views	370
15.3.	Issues of privacy	371
15.3.1.	Privacy for taxpayers	371
15.3.2.	Privacy for witnesses	372
15.3.3.	Privacy for competent authorities	372
15.3.4.	Privacy for arbitrators	373
15.3.5.	Conclusion on privacy	373
15.4.	Precedential value of decisions	374
15.4.1.	The effect of the taxpayer not accepting the arbitration decision on subsequent proceedings	374
15.4.2.	The position on publication in other arbitrations	374
15.5.	Enforcement of the arbitration award	375
15.6.	Recommendation	375
Chapter 16:	How Final Are Arbitration Decisions?	377
	<i>Alexander Rust</i>	
16.1.	Effect of the arbitration decision on competent authorities	377
16.2.	Effect of the arbitration decision on taxpayers	378
16.3.	Implementation of the arbitration decision	379
16.4.	Situations in which domestic courts will have to decide on the validity of arbitration decisions	381
16.5.	Situations in which international bodies could decide on the validity of arbitration decisions	382

16.6.	Grounds for nullity of an arbitration decision	384
16.7.	Conclusions	385

Part Six

A Comparison of Arbitration Provisions under Bilateral
Investment Treaties, Free Trade Agreements and Tax Treaties

Chapter 17:	Arbitration in Tax Treaty Law and Arbitration under Bilateral Investment Treaties	389
	<i>Julien Chaisse</i>	
17.1.	Introduction	389
17.2.	Restrictions on the scope of arbitral issues	392
17.2.1.	How to determine the “arbitrability” of an investment dispute – The subject matter of the agreement	393
17.2.1.1.	Definition of “investor”	393
17.2.1.1.1.	Natural persons	393
17.2.1.1.2.	Juridical persons	395
17.2.1.2.	Definition of “investment”	400
17.2.1.2.1.	Asset-based definition	400
17.2.1.2.2.	Enterprise-based definition	406
17.2.2.	Are there such restrictions on the scope of arbitral issues under IIAs?	408
17.3.	Award implementation/enforcement	410
17.3.1.	What are the differences in the implementation of awards in arbitration of investment disputes in this respect?	410
17.3.2.	What are the differences in the choice of applicable substantive law in the arbitration of investment disputes and tax treaty arbitration?	410
17.3.2.1.	Under BITs and other arbitral rules	411
17.3.2.2.	ICSID cases (investment tribunal discussions on choice of applicable law under article 42(1) of the ICSID Convention)	411
17.3.2.3.	Applicable law under the UNCITRAL arbitration rules	413
17.4.	Decisions of the national courts and arbitration	413

17.4.1.	How are the existing court decisions dealt with in investment disputes?	413
17.4.2.	Is a “fork in the road” provision common practice in IIAs?	414
17.4.3.	What are the different alternatives?	416
17.5.	Dispute initiation/state-to-state	416
17.5.1.	How does the initiation of an investment dispute differ from that of tax treaty arbitration?	416
17.5.2.	May state-state dispute settlement be considered as a similar mechanism in this respect even if there is not much experience with it?	419
17.6.	Costs of arbitration	419
17.6.1.	NAFTA	419
17.6.2.	Treatment of costs under the ICSID Convention	420
17.6.2.1.	Tribunal decisions in which it is noted that there has been no uniform practice with respect to the award of costs	420
17.7.	The “tax veto” mechanism – A viable formulation for tax-related investment disputes?	422
17.7.1.	Taxation exclusion provisions in certain BITs and FIPAs	423
17.7.2.	Effect of a taxation exclusion on investor-state dispute settlement	424
17.8.	Other issues	424
17.8.1.	Transparency	424
17.8.2.	Third-party funding in ISDS	425
17.8.3.	Treaty shopping	425
17.9.	Conclusion	430
17.10.	Article 25(5) OECD Model Convention	432
Chapter 18:	Preparing for Epochal Change in International Taxation: Developing a Consensus for Arbitration	433
	<i>Cym H. Lowell</i>	
18.1.	The coming reality	433

Table of Contents

18.2.	ICC Dispute Resolution Project	435
18.3.	Going forward	436
<p>Part Seven The Approach of Developing Countries and Emerging Economies</p>		
Chapter 19:	International Tax Arbitration and Developing Countries	439
	<i>Michael Lennard</i>	
19.1.	Introduction	439
19.2.	Costs	446
19.2.1.	Can the cost issues be addressed?	450
19.3.	The location of the arbitration	450
19.4.	Is tax arbitration inherently biased?	451
19.5.	Sovereignty issues?	453
19.6.	Lack of transparency	454
19.7.	The jurisdiction of arbitrators	457
19.8.	Enforceability	458
19.9.	Some possible elements of a variable geometry	459
19.10.	Multilateral possibilities?	462
19.11.	Conclusion	464

Part Eight
Looking Towards the Future:
Establishing a New International Framework

Chapter 20:	Establishing a New International Framework <i>Philip Baker</i>	467
20.1.	Introduction	467
20.2.	Human rights and the resolution of international tax disputes	467
20.3.	Human rights: Submission of issues to an international tribunal	471
20.4.	Expertise	472
20.5.	Impact of a multilateral instrument	473
20.6.	The future: An international tax tribunal	475
List of Contributors		477