
Kluwer International Tax Blog

The Contents of Intertax, Volume 47, Issue 8-9, 2019 – Special Issue on International Tax Arbitration

Ana Paula Dourado (General Editor of Intertax) · Monday, August 5th, 2019

I am happy to inform you that the latest issue of the journal is now available and is mainly dedicated to International Tax Arbitration, where ground-breaking and complementary perspectives on Tax Arbitration are covered.

My editorial is dedicated to the topic, and John Avery Jones wrote a guest editorial on the Types of Arbitration Procedure. You may read the abstracts of the articles, policy manuscripts and two notes below.

Readers will also find a new section, entitled “Tax in History”. Lawrence Zelenak shares with us some interesting details on the creation of the US Federal Income Tax and its relationship to World War I.

Moreover, this double issue includes: a country note on the implementation of CFC Rules in the Netherlands, by I.M. de Groot; and three case-law notes on (i) Sale and Lease Back Transactions and VAT, by W. Panis and C.A. Herbain; (ii) the Thirteenth Directive on VAT Refunds to Non-EU Persons, by S.L. Fedele; and (iii) the Danish Anti-Abuse Cases, by L.C. van Hulst and J.J.A.M. Korving.

Finally, two literature reviews are available: on Studies of International Taxation, by Saunders et al; and on the Tax Sparing Mechanism and FDI, by N. Li.

Enjoy and we welcome your feedback!

Abstracts of the editorial, articles, and of some of the other manuscripts are available below:

Sophia Piotrowski, Roland Ismer, Philip Baker, Jérôme Monsenego, Katerina Perrou, Raffaele Petrucci, Ekkehart Reimer, Fernando Serrano Antón, Lukasz Stankiewicz, Edoardo Traversa & Jasna Voje, *Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation*

The European Union Tax Dispute Resolution Directive 2017/1852 requires Member States to introduce mandatory arbitration for tax treaty disputes. In addition to the standard arbitration procedure laid down in the directive, Member States may also provide for dispute resolution by a Standing Committee. This contribution presents proposals for the implementation of such a Standing Committee.

Nathalie Bravo, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*

Part VI of the MLI establishes the mandatory binding arbitration procedure. Since no consensus was reached among the participants in the BEPS Project on the adoption of the mandatory binding arbitration procedure as a mechanism to ensure the timely resolution of MAP cases, the treaty makers of the MLI designed flexible provisions for its implementation. Part VI of the MLI combines the use of optional provisions, alternative provisions and reservations. Thus, the question arises whether the MLI achieves a coordinated effect in regard to the implementation of the mandatory binding arbitration procedure, in spite of the high level of flexibility offered to its parties and signatories.

For answering this question, the article provides an in-depth analysis of the mandatory binding arbitration procedure adopted in the MLI and the policy reasons behind the decisions taken by the treaty makers to design the procedure in the form it is found in the MLI. Additionally, it illustrates how the mandatory binding arbitration procedure of Part VI of the MLI works with a focus on the effects of the reservation clauses and optional provisions that allow parties to customize the mandatory binding arbitration procedure. And, it explains how parties and signatories have availed themselves of the flexibility provided by the MLI in connection with the mandatory binding arbitration procedure.

Katerina Perrou, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*

The article examines the compatibility of the provisions of the Dispute Resolution Directive with the fair trial guarantees provided by the EU Charter of Fundamental Rights and the impact that the recent case law of the CJEU on the extent of its own competence may have on the design of the dispute resolution mechanism that the Directive provides for.

Jérôme Monsenego, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*

In this article the author investigates whether, and if so to what extent, the Achmea case may have an impact on the resolution of disputes involving tax treaties through arbitration. It is concluded that both tax treaty arbitration under Article 25(5) of the 2017 OECD Model and the dispute resolution mechanisms included in the Dispute Resolution Directive are compatible with the Achmea case.

Hans Mooij, *Arbitration Institutes: An Issue Overlooked*

Tax treaty arbitrations to date have only been rare. With the MLI and the Dispute Resolution Directive, however, numbers of arbitrations may reasonably be expected to go up. Authorities will have to face the question, whether they want to administer arbitrations themselves, or prefer to instead call on facilitation by professional arbitration institutes as is customary practice in such important areas as commercial or investment arbitration. Proper and effective administration will be a significant factor to the eventual success of tax treaty arbitration. Absent any guidance in either the MLI or the Dispute Resolution Directive, the issue requires careful consideration from authorities.

H.M. Pit, *The Changed Landscape of Tax Dispute Resolution Within the EU: Consideration of the Directive on Tax Dispute Resolution Mechanisms*

With the Council's adoption of the Directive on Tax Dispute Resolution Mechanisms on 10 October 2017, the resolution of tax disputes among Member States enters a new phase. What originally started in 1976 with a proposal for a directive to settle transfer pricing disputes by means of arbitration has led to the adoption of a directive in 2017 for all disputes among Member States on the interpretation and application of their mutual tax treaties on income and capital. This Directive aims at improving existing dispute resolution mechanisms contained in these tax treaties and the EU Arbitration Convention. To that end, four specific objectives have been defined in the directive's preamble, which are (1) broadening the scope of application of the EU Arbitration Convention to all disputes concerning the application and interpretation of tax treaties between Member States; (2) ensuring legal certainty for taxpayers; (3) ensuring effectiveness and efficiency; and (4) ensuring transparency. This article examines whether each of these objectives is attained in light of the experiences gained with the EU Arbitration Convention.

Nuno Garoupa, *Domestic Tax Arbitration: Some Economic Considerations*

In this article, we discuss the economic arguments for and against domestic tax arbitration. Beyond the standard benefits and costs widely discussed by the literature on private arbitration, we emphasize two additional concerns: agency costs (because there is a significant principal-agent problem within the government) and fast lane effect (less public investment in improving tax courts). We conclude that the skepticism echoed by legal economists contrasts with the more optimistic view shared by other legal scholars and policymakers.

I.M. de Groot, *Implementation of the Controlled Foreign Company Rules in the Netherlands*

The Anti-Tax Avoidance Directive requires EU Member States to implement Controlled Foreign Company (CFC) rules. In this article the author addresses the implementation of these rules in the Netherlands.

L.C. van Hulten & J. J. A. M. Korving, *Svig og Misbrug: The Danish Anti-Abuse Cases*

'Svig og misbrug', Danish for fraud and abuse, is the focus of attention in tax circles. In the Danish cases T Danmark and N Luxembourg 1, the Court of Justice of the European Union recently further concretized the concept of anti-abuse. This is but the most recent of a series of developments in anti-abuse. In this article, we try to shed some light on the question of how these judgments relate to other developments relating to the prevention of tax abuse.

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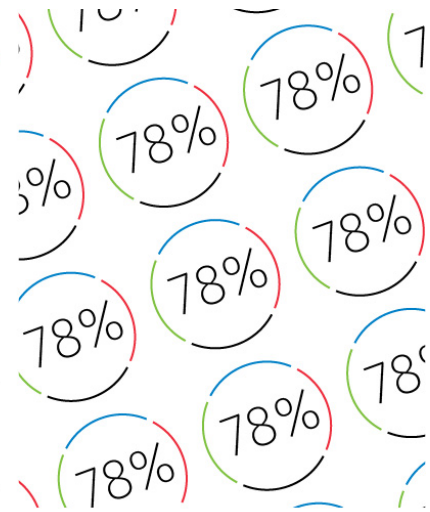
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