Global Tax Alert: DLA Piper hosts TRIBUTE event discussing developments in international tax arbitration and dispute resolution mechanisms

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DLA Piper hosted "An Evening with Tribute" during IFA week in London. The event brought together the most highly regarded experts in their field to discuss the latest developments in international tax arbitration and other dispute resolution instruments. Discussions were moderated by Hans Mooij, Chair of the Tribute Foundation; and Joel Cooper, Co-Head of International Transfer Pricing at DLA Piper and also a Tribute expert.

The panel of speakers at the event included:

- Philip Baker QC, Field Court Tax Chambers, Tribute expert
- Paolo Valerio Barbantini, Deputy Director General, Italian Revenue Agency
- Nikki Oberholzer, Head of Tax, Coca-Cola Beverages Africa
- Jonathan Peacock QC, Chambers of John Gardiner QC, Tribute expert
- H. David Rosenbloom, Caplin & Drysdale Attorneys, New York University, Tribute expert
- Jonathan Schwarz, Temple Tax Chambers, Tribute expert
- Ana Claudia Akie Utumi, Utumi Advogados (Brazil), Tribute expert

The panelists engaged in lively debate, covering topics such as the Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the EU (the Dispute Resolution Directive), the merits and drawbacks of baseball arbitration versus reasoned opinion arbitration and they also touched on aspects of international tax arbitration and dispute resolution in the developing world.

Key takeaways

Dispute Resolution Directive

Prior to the Dispute Resolution Directive (which entered into force on 1 July 2019), taxpayers that had standing to request the mutual agreement procedure (MAP) under the double taxation agreements (DTAs) between EU Member States were only able to access arbitration in limited circumstances, for instance:

- if the parties to these DTAs had included an arbitration clause into the DTA;
- if both contracting states had implemented the optional part of the Multinational Instrument (MLI) that introduces arbitration into their DTAs (which, in reality, is not the case for most EU Member States); or
- via the EU Arbitration Convention, the scope of which is limited to transfer pricing disputes.

The Dispute Resolution Directive, on the other hand, covers tax treaty disputes on any issues, and since it has come into effect, many more taxpayers operating in the EU have access to arbitration if MAP does not lead to any results within the designated timeframe.

Certain differences between arbitration provided under DTAs, and DTAs amended through the MLI (MLI arbitration), were highlighted by the panelists. The Dispute Resolution Directive is more effective than the MLI in that it provides for a refusal to accept a case to be tested by an Advisory Commission (or by a local court in case of refusals to accept cases by both competent authorities). The problem highlighted about this eventuality, however, is that, depending on the jurisdiction, the length of time that the considerations may take at a domestic court could mean that the time constraints for a resolution prescribed under the Dispute Resolution Directive may well be breached. The Dispute Resolution Directive is very prescriptive, and Competent Authorities are required to adhere to detailed procedural requirements. On the other hand, it was noted that MLI arbitration provides the taxpayer little safeguards over their legal rights in relation to the arbitration process.

Permanent versus ad hoc arbitration board

The Panelists also discussed whether a permanent or ad hoc arbitration body would be the most effective for the purposes of providing an arbitration forum for cases brought via the Dispute Resolution Directive. While the Directive envisages the possibility for both, the Directive itself prescribes an ad hoc Advisory Commission.

Numerous advantages of having a permanent arbitration body were expressed by the panelists. A permanent arbitration body would enjoy actual and perceived independence. It would build on the concept of an "international common law of tax," with greater respect from the parties that are subject to its proceedings and ultimately bound by its decisions. A permanent arbitration board would arguably bring about quicker dispute resolution, it would sidestep disputes between the parties about appointing arbitrators, and the administrative tasks behind the arbitration process would be sped up, as the infrastructure and logistics would already be in place.

On the other hand, a permanent arbitration board might come with some negative consequences. These include the possibility that the arbitration procedure could become too rigid, or too rules based. It could encourage "procedural warfare," be expensive, not necessarily speedier, and create conflict of laws disputes.

Baseball arbitration versus reasoned arbitration

The panelists also debated the merits and the drawbacks of both baseball arbitration (an arbitration decision taken by choosing one party's argument over the other, and not providing any reasoning for doing so), and reasoned arbitration (an arbitration decision made which is supported by written reasons disclosed to the parties of the dispute at a minimum, or made publicly available). This issue generated the most heated debate of the evening.

In relation to baseball arbitration, some panelists argued that those opposed to decisions being made without being

supported by written reasons were overthinking what was required in the context of MAP dispute resolution. Baseball arbitration works more effectively as a deterrent for protracted MAP. By the time MAP cases get to arbitration, in some cases negotiations between the tax administrations involved could have been continuing for up to a decade. The arbitration panel are not starting from scratch on a dispute, they come in at a starting point whereby respective parties present their own position, and a resolution needs to be found. The arbitration decision is supposed to bring a final resolution to such long-running disputes as a last resort. There were also arguments made that having written and published reasons for a decision could make the arbitration procedure more of a drawn-out process, and place greater emphasis on the composition of the arbitration panel.

Experiences in the US appear to offer some evidence in support of the effectiveness of baseball arbitration. Using the US baseball arbitration procedure as a model, the merits to the procedure were said to be that the process to follow for deadlines imposed on filing submissions, the receipt of responses, rule on the contents of the submissions, etc. are all decided in abstract before the substantive arbitration has commenced. One arbitrator is appointed by each side, and a third neutral arbitrator is appointed (normally a former Revenue officer from either one of the jurisdictions involved in the dispute or from outside these jurisdictions). The arbitration panel is often able to decide within a matter of weeks which side to take. This approach involved very little intrusion into sovereignty. This is because the arbitrators cannot come up with their own decision to impose on the parties to the dispute; rather they must make a decision between one or the other.

In contrast, some panelists did not see why arbitrators should not publish their reasoning behind choosing one party's submission over another – baseball arbitration with reasoning. For instance, there might have been dissent among the arbitrators on the panel, and although the reasons would not become binding precedent, they could serve as a way by which the development of international common law could advance, and become helpful guidance in future disputes.

Panelists were in agreement that for certain disputes, such as where the disputes are highly factual, or there are sensitive issues that parties to the dispute would prefer not to have in the public domain, baseball arbitration is more appropriate than the reasoned arbitration.

International tax arbitration and dispute resolution in the developing world

Panelists also discussed international tax and dispute resolution in the developing world, including various issues under MAP implementation and access on the African continent; treaty interpretation, MAP, arbitration and resolution tools from a Brazilian perspective; and how tax authorities can support developing countries in implementing effective dispute resolution tools.

An interesting point that came out of the discussion among the panelists was that difficulty with access to MAP was not just a problem that was prevalent in developing countries, but that it was common among countries in the developed world and OECD member states. The difficulties tend to stem from a lack of competence and experience in dealing with the cases that arise under MAP, and a lack of resources allocated to addressing this deficiency.

The panelists concluded the event on an optimistic note: while implementing international tax dispute resolution mechanisms effectively is a slow process, eventually an ecosystem will develop globally whereby MAP, and in turn arbitration, are tools that are far easier to access for taxpayers that find themselves in a position where they are or will be subject to double taxation under a DTA. And for competent authorities they are far more effective and therefore attractive to use far more often to resolve such double taxation.

For more information on Tribute, its objectives and activities, visit its website: tribute-arbitration.org

For more information about international tax dispute resolution, contact one of the authors or your usual DLA Piper advisors.

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