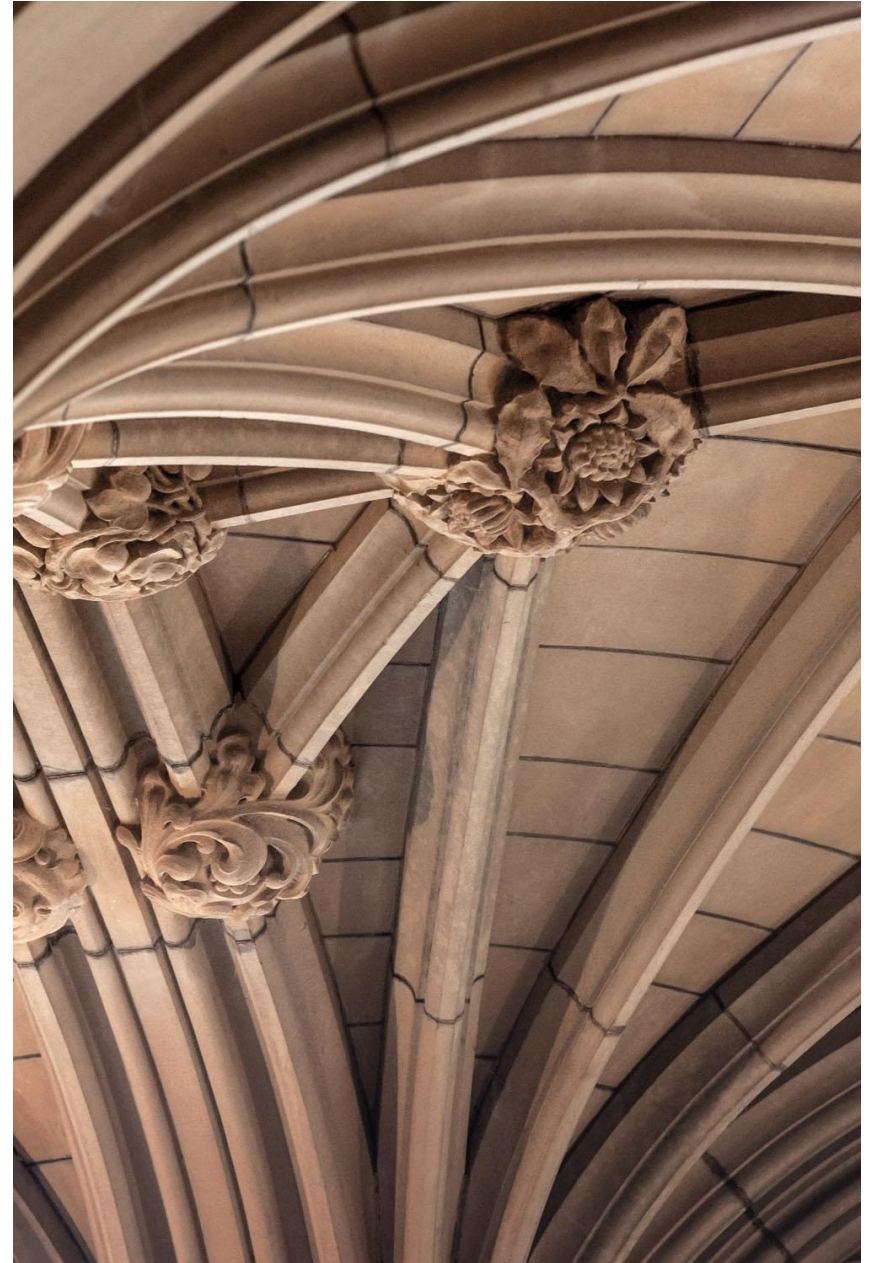


**Minimising and Resolving
International Tax Disputes
post-BEPS**

**Foundation for
International Taxation
Jubilee Conference**

**Professor Richard Vann
Sydney Law School**



Topics

- **Will BEPS increase international tax disputes?**
- **Action 14 Dispute Resolution**
- **Arbitration**
- **Wider picture on dispute resolution**
- **One of the relative successes of BEPS?**

Will BEPS increase international tax disputes?

- Action already underway in many countries to challenge MNE structures under existing law
- BEPS inspired amendments to domestic law already enacted in some countries
- Increased uncertainty in many areas of international taxation
 - Treaty abuse, PE, transfer pricing
- Increased aggression by tax authorities
 - Political and voluntary compliance necessity?
Compare FATCA, CRS for individuals/privately held entities

Action 14 Dispute Resolution

- **India et al took mandatory arbitration off the BEPS table**
- **October 2014 announcement of FTA MAP Forum**
- **December 2014 Discussion Paper read as a fairly unexciting list of nuts and bolts, not perhaps realising potential of FTA MAP Forum**
- **2015 Final Report maintains much of same list but FTA MAP Forum to provide rigorous peer review process**
 - **See comparison of 2014 and 2015 details**
 - **But vague aspirations have been turned into more specific and measurable minimum standards**
- **Model of Global Forum on Transparency for peer review**
 - **Though peer review has stalled in the past**

Measuring MAP

– From 2014

OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

OPTION 20 – Ensure a principled approach to the resolution of MAP cases

– To 2015

1.1 Countries should include paragraphs 1 through 3 of Article 25 in their tax treaties, as interpreted in the ... they should provide access to MAP in transfer pricing cases and should implement the resulting mutual agreements

– Terms of reference by Q1 2016

– Reviews commence in 2016, first reports by end 2017

Level of agreement

- **Best practice section of 2015 report represents failure to get agreement on some important issues?**

Including Article 9(2)

Invigorating Article 25(3)

APA programs

Multiyear MAP resolution

Suspension of collection

Taxpayer initiated adjustments

Guidance on penalties and interest

Arbitration

- **Group of 20 to proceed with mandatory arbitration via option in multilateral treaty**
 - **Main issue seems to be scope of arbitration provision, ie all MAP cases or subset**
- **Likely to produce “higher” standard than would have occurred if all involved**
 - **Group of 20 all OECD countries**
 - **Is it wise for BRICS not to take part?**
- **Not clear what has become of policy and procedural issues in 2014 draft**

Wider picture on dispute resolution

- **Is tax dispute resolution moving away from litigation generally?**
 - **Eg Australia general decline in tax litigation with ATO focusing on resolving disputes early and ADR**
- **Transfer pricing**
 - **Litigation not an effective method to resolve cases?**
 - **Eg Chevron case on interest rate and currency of loan: 19 experts, 45 reports, 5 weeks of hearings, year for 206 page judgment, long round of appeals**
- **Many fewer TP cases than MAPs/APAs?**
 - **Eg Australia 4 court cases 06-15, 79 MAPs completed 06-13, 39 APAs in 2010 including 21 renewals, compare India**

Transfer pricing is major issue?

- **Transfer pricing main MAP issue and significant domestic dispute resolution issue in many countries**
- **As transfer pricing continues after BEPS to be all facts, circumstances (and discretion) litigation is increasingly inefficient mechanism**
- **Need some shortcut like baseball arbitration**

One of relative successes of BEPS?

- Minimum standard achieved which initially seemed unlikely**
- Arbitration likely to advance significantly**
- Rigorous follow-up process in train**
- Naming and shaming has proved effective in other procedural areas**

BUT

- Substantive standards have gone backwards in area of certainty**
- Failure to agree on some important issues**
- Significant political and geo-political divisions**