

**IMPLEMENTING ARRANGEMENT REGARDING PARAGRAPH 5 OF
ARTICLE 24 OF THE AGREEMENT BETWEEN THE GOVERNMENT OF
JAPAN AND THE GOVERNMENT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA
FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION
OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME**

The competent authorities of Japan and the Hong Kong Special Administrative Region of the People’s Republic of China have established this mode of application of the arbitration process provided for in paragraph 5 of Article 24 of the Agreement between the Government of Japan and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed at Hong Kong on 9 November 2010 (hereinafter referred to as “the Agreement”).

1. Request for submission of case to arbitration

A request for arbitration pursuant to paragraph 5 of Article 24 of the Agreement (hereinafter referred to as a “request for arbitration”) will be made in writing and sent to the competent authority referred to in paragraph 1 of that Article through:

- (a) in the case of Japan: Office of Mutual Agreement Procedures, National Tax Agency; and
- (b) in the case of the Hong Kong Special Administrative Region of the People’s Republic of China: Tax Treaty Section, Inland Revenue Department.

The request will contain sufficient information to identify the case.

The request will also be accompanied by a written statement by the person who made the request that no decision on the same issues has already been rendered by a court or administrative tribunal of either Contracting Party.

Within 10 days after the receipt of the request, the competent authority which received it will send a copy of the request and the accompanying statements, together with a translation of such request and statements in the English language, to the other competent authority.

2. Time for submission of the case to arbitration

A request for arbitration may only be made after two years from the date on which a case presented to the competent authority of a Contracting Party under paragraph 1 of Article 24 of the Agreement has also been presented to the competent authority of the other Contracting Party. For this purpose, a case will be considered to have been presented to the competent authority of the other Contracting Party only if the following information has been presented:

- (a) the full name and address of the person who presented the case to the competent authority;

- (b) the full name and address of any other person directly affected by the case;
- (c) the taxable years concerned;
- (d) the nature and date of the actions giving rise to the taxation not in accordance with the provisions of the Agreement and the related amounts in currencies of both Contracting Parties;
- (e) the following information provided by the person who presented the case to the competent authority with a copy of any supporting documents:
 - (i) an explanation of why the person considers that there is or will be taxation not in accordance with the provisions of the Agreement;
 - (ii) the relationship, situation or structure of the transactions and related parties involved; and
 - (iii) a copy of documents issued by the tax authority with regard to the taxation not in accordance with the Agreement;
- (f) a statement indicating whether the person directly affected by the case has filed a notice of objection, notice of appeal, or comparable documentation in either of the jurisdictions; and
- (g) any specific additional information requested by the competent authority referred to in paragraph 1 of Article 24 of the Agreement within 90 days after the receipt of the request for a mutual agreement procedure under that paragraph.

The competent authorities will confirm to each other the date on which all of the information referred to in this paragraph was presented.

The competent authority to which a case has been presented under paragraph 1 of Article 24 of the Agreement will notify the person who made the request for a mutual agreement procedure of the starting date of the two-year period for the mutual agreement procedure referred to in this paragraph.

3. Terms of Reference

Within 90 days after the request for arbitration has been received by both competent authorities, the competent authorities will decide on the issues to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the “Terms of Reference” for the case.

Notwithstanding the following paragraphs of this arrangement, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these paragraphs and deal with such other matters as are deemed appropriate.

4. Failure to communicate the Terms of Reference

If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph 3, that person and each competent authority may, within 30 days after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration panel. All the lists so communicated during that period will constitute the tentative Terms of Reference.

Within 30 days after all the arbitrators have been appointed as provided in paragraph 5, the arbitrators will communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms of Reference based on the lists so communicated.

Within 30 days after the revised version has been received by both competent authorities, they may decide on different Terms of Reference and to communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference will constitute the Terms of Reference for the case.

If no different Terms of Reference have been decided on by the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators will constitute the Terms of Reference for the case.

5. Selection of arbitrators

Within 90 days after the Terms of Reference have been received by the person who made the request for arbitration or, where paragraph 4 applies, within 120 days after the request for arbitration has been received by both competent authorities, the competent authorities will each appoint one arbitrator.

Within 60 days after the latter appointment, the arbitrators so appointed will appoint a third arbitrator.

If the appointment of the third arbitrator is not made within the required time period, the competent authorities will decide on the mode of the appointment in order to appoint the third arbitrator within 80 days after the latter appointment of the other two arbitrators.

The third arbitrator will function as the chair of the arbitration panel.

The procedures specified in the above subparagraphs of this paragraph will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun.

Each competent authority will determine the remuneration of its appointed arbitrator. The mode of remuneration for the third arbitrator will be decided on by the competent authorities before the appointment of the third arbitrator, taking the remuneration of the two other arbitrators into account.

6. Eligibility and appointment of arbitrators

The arbitrators to be appointed will be persons who satisfy the conditions set out in clauses (i) and (iii) of subparagraph (b) of paragraph 6 of the Protocol to the Agreement.

In addition, the chair of the arbitration panel will be a person who is regarded as neutral to the case by virtue of his nationality and residence.

An arbitrator will be considered to have been appointed when a letter confirming that appointment has been signed both by the person or persons who have the power to appoint that arbitrator and by the arbitrator himself.

7. Communication of information and confidentiality

The communication and the confidentiality of the information related to the case that results in the arbitration process are governed by clause (iv) of subparagraph (b) of paragraph 6 of the Protocol to the Agreement.

8. Failure to provide information in a timely manner and suspension of mutual agreement procedure

Notwithstanding paragraph 5, where both competent authorities decide that the failure to resolve an issue within the two-year period referred to in paragraph 5 of Article 24 of the Agreement is mainly attributable to the failure of the person directly affected by the case to provide relevant information in a timely manner, the competent authorities may postpone the appointment of the arbitrators for a period of time corresponding to the delay in providing that information.

Notwithstanding paragraph 5, if the failure to resolve an issue within the two-year period referred to in paragraph 5 of Article 24 of the Agreement is attributable to the fact that the mutual agreement procedure under paragraph 2 of that Article was suspended by a request from the person who presented the case, the competent authorities may postpone the appointment of the arbitrators for a period of time corresponding to the period of such suspension.

The competent authorities will determine the period of time corresponding to the delay and/or the suspension. The competent authority to which a case has been presented under paragraph 1 of Article 24 of the Agreement will notify the person who made the request for arbitration of the determined period of time.

9. Procedural and evidentiary rules

Subject to this arrangement and the Terms of Reference, the arbitrators will adopt those procedural and evidentiary rules that they deem necessary to resolve the issues set out in the Terms of Reference.

The provision of information, including confidential information, to arbitrators and their staff is governed by subparagraph (c) of paragraph 6 of the Protocol to the Agreement.

Unless the competent authorities decide otherwise, any information (including any information provided by the person who made the request for arbitration or his representatives in writing or orally under paragraph 10) that was not available to both competent authorities before the request for arbitration was received by both of them will not be taken into account for purposes of the arbitration decision.

10. Participation of the person who requested the arbitration

The person who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing to the same extent that he can do so during the mutual agreement procedure.

In addition, with the permission of the arbitrators, the person may present his position orally during the arbitration proceedings.

11. Logistical arrangements

Unless decided otherwise by the competent authorities, the competent authority to which the case giving rise to the arbitration was initially presented will be responsible for the logistical arrangements for the meetings of the arbitration panel and will provide the administrative personnel necessary for the conduct of the arbitration process. The administrative personnel so provided will report only to the chair of the arbitration panel concerning any matter related to that process.

12. Costs

The costs and expenses to be borne by each competent authority are governed by clause (v) of subparagraph (b) of paragraph 6 of the Protocol to the Agreement.

The term “other expenses associated with the conduct of the proceedings” in clause (v) of subparagraph (b) of paragraph 6 of the Protocol to the Agreement does not include indirect costs incurred for logistical arrangements under paragraph 11.

The person who made the request for arbitration will bear the costs related to his own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of his views).

13. Applicable legal principles

The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Agreement and, subject to these provisions, of those of the domestic laws of the Contracting Parties.

Issues of interpretation of the Agreement will be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 33 of the Vienna Convention on the Law of Treaties 1969, having regard to the Commentaries on the Articles of the Model Tax Convention of the Organisation for Economic Co-operation and Development (hereinafter referred to as “the OECD”) as periodically amended, as explained in paragraphs 28 to 36.1 of the Introduction to the Model Tax Convention on Income and on Capital of the OECD (July 2008). Issues related to the application of the arm’s length principle should similarly be decided having regard to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference.

14. Arbitration decision

The arbitration decision will be determined by a simple majority of the arbitrators.

The decision of the arbitration panel will be presented in writing in the English language and, where the competent authorities so decide, will indicate the sources of law relied upon and the reasoning which led to its result. When requested by either competent authority, the chair of the arbitration panel will present the summary of the discussion in the arbitration panel to the competent authorities.

With regard to the precedential value of the arbitration decision, subparagraph (e) of paragraph 6 of the Protocol to the Agreement applies. The decision will not be made public unless the person who made the request for arbitration and both competent authorities agree on the form and contents of the publication in writing.

15. Time allowed for communicating the arbitration decision

The arbitration decision will be communicated to the competent authorities and the person who made the request for arbitration within 180 days after the date on which the chair of the arbitration panel notifies in writing the competent authorities and the person who made the request for arbitration that he has received all the information necessary to begin consideration of the case.

Notwithstanding the first part of this paragraph, if at any time within 60 days or, where the appointment of the third arbitrator was not made within 60 days after the latter appointment of the first two arbitrators, 40 days after the date on which the last arbitrator was appointed, the chair of the arbitration panel, with the consent of one of the competent authorities, notifies in writing the other competent authority and the person who made the request for arbitration that he has not received all the information necessary to begin consideration of the case, then:

- (a) if the chair of the arbitration panel receives the necessary information within 60 days after the date on which that notice was sent, the arbitration decision will be communicated to the competent authorities and the person who made the request for arbitration within 180 days after the date on which the information was received by the chair of the arbitration panel; and
- (b) if the chair of the arbitration panel has not received the necessary information within 60 days after the date on which that notice was sent, the arbitration decision will, unless the competent authorities decide otherwise, be reached without taking into account that information even if the chair of the arbitration panel receives it later and the decision will be communicated to the competent authorities and the person who made the request for arbitration within 240 days after the date on which the notice was sent.

Where the arbitration decision is not expected to be communicated within the required period due to any unforeseen events, the periods in this paragraph may be extended by the period or periods agreed on by the competent authorities and the person directly affected by the case.

16. Failure to communicate the decision within the required period

In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 15, the competent authorities and the person directly affected by the case may agree to extend that period for a period not exceeding 180 days or, if they fail to do so within 30 days after the end of the period provided for in paragraph 15, the competent authorities will appoint a new arbitrator or arbitrators in accordance with paragraph 5. In the latter case, the newly constituted arbitration panel will proceed to make a decision in accordance with this arrangement in place of the originally constituted arbitration panel.

17. Final decision

The finality of the arbitration decision is governed by subparagraph (d) of paragraph 6 of the Protocol to the Agreement. The term “any procedural rule determined in accordance with this paragraph” in subparagraph (d) of paragraph 6 of the Protocol to the Agreement means any procedural rule in the Terms of Reference or in this arrangement.

If a decision is found to be unenforceable for one of those reasons as set out in subparagraph (d) of paragraph 6 of the Protocol to the Agreement, the request for arbitration will be considered not to have been made and the arbitration process will be considered not to have taken place, except for the purposes of paragraphs 7 and 12.

18. Implementing the arbitration decision

The competent authorities will implement the arbitration decision within the period of 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

The period may be extended by the period agreed on by the competent authorities and the person directly affected by the case.

19. Where no arbitration decision will be provided

Notwithstanding paragraphs 14, 15 and 16, where subparagraph (f) of paragraph 6 of the Protocol to the Agreement applies, the competent authorities will notify in writing the arbitrators and the person who made the request for arbitration that they have solved all the unresolved issues submitted to the arbitration.

This arrangement applies to any request for arbitration made pursuant to paragraph 5 of Article 24 of the Agreement after that provision has become effective.

The competent authorities may modify or supplement this arrangement by an exchange of letters between them.

Signed in duplicate, at Hong Kong this seventh day of December, 2010, in the English language.

For the Competent Authority of Japan

For the Competent Authority of the Hong
Kong Special Administrative Region of
the People's Republic of China