

IBA ARBITRATION COMMITTEE

Subcommittee on Recognition and Enforcement of Arbitral Awards

COUNTRY REPORT ON LOCAL REQUIREMENTS FOR THE EXTENSION OF AN ARBITRATION CLAUSE TO, AND ENFORCEMENT OF AN ARBITRAL AWARD AGAINST, A NON-SIGNATORY

JANUARY 2021

In completing this survey, we ask the respondents to consider the question of non-signatories in a broad manner. That is, please consider situations where (i) a party applies to a court to compel arbitration against a non-signatory, (ii) the arbitral tribunal extended the arbitration clause to a non-signatory, and the non-signatory, or another party to the arbitration, seeks to resist enforcement, or to set aside the award, on the basis that the arbitration clause should not have been extended to the non-signatory, and (iii) where the award creditor attempts to enforce the award against a non-signatory that was not a party to the arbitral proceedings and the award.

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I. General		(Yes /No /NA)	Comments, if any.
I.1	Must international arbitration agreements be in writing under the law of the country for which you are reporting?	Yes	Arbitration agreements are governed by Article 9 of Law 60/2003, of 23 December, on Arbitration (the “Arbitration Law”) : there must be written evidence of a will of the parties to submit a dispute to arbitration (i.e. contract, signed document, exchanged correspondence)
I.2	Please describe the basic requirements for a valid international arbitration agreement in the country for which		An international arbitral agreement will be deemed valid if said agreement complies with

	<p>you are reporting and cite the relevant legislative, regulatory, or jurisprudential basis for these requirements.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>the legal regime chosen by the parties to govern the agreement, the merits of the dispute or Spanish law. Art. 9.6 of the Arbitration Law.</p>
I.3	<p>In the country for which you are reporting, do courts/arbitral tribunals generally decide the issue of the scope <i>rationae personae</i> of the arbitration clause (or, in other words, the issue of who are the parties to the arbitration agreement, including the issue of extending the arbitration agreement to a non-signatory) on the basis of a specific applicable law or on the sole basis of a factual analysis of the case without reference to an applicable law?</p>		<p>The issue will be assessed through factual analysis and specific applicable law when required (i.e. references to other legal regimes when dealing with recognition of foreign awards)</p>
I.3a	<p>If courts/arbitral tribunals generally decide the issue on the basis of a specific applicable law, what law do they apply to decide the issue?</p> <p>[For example, the applicable law could be:</p> <ul style="list-style-type: none"> • The law of the seat of arbitration. • The governing law of the contract. • The law of the place where the award might ultimately be sought to be enforced. • Transnational norms/international law. • The law reached at through a conflict of laws analysis.] <p>[Please provide your response in the comments column, provide any citation to relevant legislation or jurisprudence, and limit your response to one paragraph.]</p>		<p>Spanish courts have based their decisions on the law of the seat of arbitration. Specifically, they have referred to the Explanatory Memorandum and Article 9 of the Arbitration Law. Examples are the decisions of the Supreme Court 404/2005, dated 26 May, and the Supreme Court of Justice of Madrid 20/2018, dated 24 April.</p>
I.3b	<p>Does the legislation of your jurisdiction contain any directive in this respect?</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	No	<p>There is no specific directive. Yet, Article 1257 of the Spanish Civil Code, that regulates privity of contract must be taken into account.</p>
I.4	<p>Is the question of whether parties agree to arbitrate ultimately decided by arbitrators as opposed to courts in the country for</p>	Yes	<p>Spanish Courts generally defer <i>kompetenz-kompetenz</i> questions to arbitral tribunals.</p>

	<p>which you are reporting? Please cite the relevant legislative, regulatory, or jurisprudential basis for your answer.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	<p>However, Spanish courts may exercise judicial control over awards through the request to set aside an award provided for in Title VII of the Arbitration Law. Art.41.(a) of the Arbitration Law expressly provides that an award may be set aside if the arbitral agreement is found to be non-existent or null and void. Additionally, when deciding on set-aside actions, Spanish courts have declared they have jurisdiction to ascertain whether a person was properly held to be a party to an arbitration, as jurisdiction standing is an element of procedural public order (Superior Court of Justice of the Balearic Islands Decision 3/2016, dated 26 October).</p>
<p>I.5</p>	<p>Is there anything in the <u>legislation</u> of the country for which you are reporting that (i) could preclude the extension of an arbitration clause to non-signatories, or (ii) could permit the extension of an arbitration clause to non-signatories?</p> <p>[Note that the answer to this question is designed to provide the reader with a quick yes or no answer, plus to flag the key legal criteria. The series of questions in Section II provide the reader with a more detailed discussion of relevant legal theories, jurisprudence, and examples.]</p>	<p>Legal provisions may be used both to extend or to preclude extension of arbitration clauses.</p> <p>Yes</p>

I.5a	<p>If your answer to question <u>I.5</u> is yes, please cite and describe the applicable rules contained in any relevant legislation or regulations.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Civil Code:</p> <p>Arts. 7 (<i>bona fides</i>);</p> <p>1257 (Privity of contract and contract in favour of a third party);</p>
I.6	<p>Is there anything in the <u>jurisprudence</u> of the country for which you are reporting that (i) could preclude the extension of an arbitration clause to non-signatories, or (ii) could permit the extension of an arbitration clause to non-signatories?</p> <p>[Note that the answer to this question is designed to provide the reader with a quick yes or no answer, plus to flag the key legal criteria. The series of questions in Section II provide the reader with a more detailed discussion of the relevant legal theories, jurisprudence, and examples.]</p>	Yes	
I.6a	<p>If your answer to question <u>I.6</u> is yes, please cite and describe the applicable tests or rules applied by the courts of the country for which you are reporting.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Spanish courts have used <i>bona fides</i>, abuse of rights, and <i>non venire contra factum proprium</i> (estoppel) doctrines to enforce arbitral agreements in respect of third parties. They assess the conduct of the relevant party and how it has created an appearance of being a party to the underlying contract.</p> <p>Supreme Court Decision 404/2005, dated 26 May.</p> <p>Superior Court of Justice of Madrid Decision 20/2018, dated 24 April 2018.</p>
II. Specific Legal Theories Concerning Non-Signatories		(Yes /No /NA)	Additional comments, if any.
II.1	<p>Can the assignment or assumption of a contract containing an international arbitration agreement commit the non-signatory assignee to international arbitration in the country for which</p>	Yes	<p>Although the law is silent on this point, the courts have been favourable to the extension of arbitral clauses to non-signatory assignees of a</p>

	<p>you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>		<p>contract. Both the assignor and the assignee are bound by the arbitral clause. The conditions are the following: (i) the assignee must have consented to the assignment; and (ii) the contract has been assigned in its entirety, i.e. it is not merely an assignment of certain rights.</p>
II.1.a	<p>If your answer to question <u>II.1</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Spanish courts have repeatedly stated that arbitral clauses may be extended to non-signatory assignees. This position is particularly common regarding insurance companies that have assumed the main contract (Supreme Court Decision 1097/2008, dated 20 November and Supreme Court of Justice of Madrid Decision 14/2017, dated 28 February).</p> <p>The courts have also taken this stance regarding assumption of the contract through mergers and acquisitions (Decisions of the Supreme Court of Justice of Madrid 3981/2018, dated 24 April and 6/2013, dated 13 February).</p>
II.1.b	<p>If your answer to question <u>II.1</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. 	N/A	
II.2	<p>Can incorporation by reference (i.e., where a contract incorporates an arbitration clause contained in a separate document) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	
II.2.a	<p>If your answer to question <u>II.2</u> is yes, please:</p>		<p>Supreme Court Decision of 29 February 2000. Deciding on recognition of foreign award. The Court focused on the communications</p>

	<ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>between the parties’ respective agents, which included an agreement to be subject to the same terms set forth in a previous contract between the parties (which contained the arbitral agreement). The Court confirmed that i) the defendant had acknowledged the agency relationship; and hence ii) incorporation by reference had taken place. It therefore confirmed the existence of the arbitral agreement. Similarly, the Supreme Court Decision 404/2005, dated 26 May, extended the validity of the arbitral clause to the Defendant’s guarantor, given that the guarantee contract had been concluded in reference to the main contract.</p>
II.2.b	<p>If your answer to question <u>II.2</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.3	<p>Can an arbitration clause commit a non-signatory third-party beneficiary of a contract to international arbitration in the country in which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	

II.3.a	<p>If your answer to question <u>II.3</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>The Supreme Court has acknowledged that a beneficiary of a contract is party to an arbitral agreement therein. In its Decision 404/2005, dated 26 May, the Supreme Court justified the extension of an arbitration clause to the defendant’s guarantor on the basis of (i) incorporation by reference and (ii) the rights conferred on the guarantor in the main contract. The third-party beneficiary must accept the benefit, pursuant to Art. 1257 of the Civil Code.</p>
II.3.b	<p>If your answer to question <u>II.3</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	
II.4	<p>Can a theory of agency (i.e., where an agreement containing an arbitration clause has been entered into by a person who expressly or impliedly did so as a representative of a non-signatory) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	
II.4.a	<p>If your answer to question <u>II.4</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. 		<p>The Supreme Court of Justice of the Valencian Autonomous Community has allowed the extension of an arbitral clause within a group of companies, where the clause has been signed by the parent company (Decisions 14/2014, dated 19 November, and 13/2015, dated 5 May), applying <i>obiter dicta</i> the theory of agency. The arbitration clause may extend to other companies within the group on the basis of (i) representation or agency (where the non-</p>

	[Please provide your response in the comments column and limit it to one paragraph.]		signatory represents the signatory), (ii) third-party beneficiaries (where the non-signatory benefits from the contract) and (iii) the non-signatory's active or passive involvement in the disputed transaction.
II.4.b	<p>If your answer to question <u>II.4</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	
II.5	<p>Can a theory of estoppel, good faith, or abuse of right (i.e., where a party benefitting from, and acting in accordance with, a contract containing an arbitration clause is estopped from claiming that it is not bound by certain provisions of the contract) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	
II.5.a	<p>If your answer to question <u>II.5</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		The Supreme Court of Justice of Madrid established in its Decisions 3981/2018, dated 24 April, and 79/2015, dated 3 November , that a party who exercises rights under a contract cannot claim that it has not given its consent to the arbitral clause it contains (<i>non venire contra factum proprium</i>)
II.5.b	<p>If your answer to question <u>II.5</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. 	N/A	

	<ul style="list-style-type: none"> Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.6	<p>Can “implied consent” (i.e., where a party’s active participation in the negotiation, execution, performance and/or termination of a contract containing an arbitration clause provides evidence for its intent to consent to arbitration) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	
II.6.a	<p>If your answer to question II.6 is yes, please:</p> <ul style="list-style-type: none"> Cite and describe the applicable rules contained in any relevant legislation or regulations. Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Several courts have declared that the arbitral clause may be extended to non-signatories on the basis of implied consent. However, the concept of “implied consent” is construed in a restrictive manner (Decision of the Supreme Court of Justice of the Basque Country 277/2018, dated 7 November and Decision of the Supreme Court of Justice of Madrid 41/2017, dated 6 June).</p>
II.6.b	<p>If your answer to question II.6 is no, please:</p> <ul style="list-style-type: none"> Cite and describe the applicable rules contained in any relevant legislation or regulations. Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	
II.7	<p>Can piercing the corporate veil or the alter ego doctrine (i.e., where, typically due to misuse or abuse of rights or fraud, the separate legal form of a non-signatory that uses its dominating authority over a signatory is disregarded so that both are</p>	No	<p>Spanish Courts are reticent to use the <i>alter ego</i> doctrine widely. It has not been the explicit basis to submit a non-signatory to international arbitration in Spain. Reference has been made to</p>

	<p>treated as a single entity) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>		<p>this doctrine <i>obiter dicta</i> by some courts (e.g. Decisions of the Superior Court of Justice of the Valencian Community 14/2014, dated 19 November and 13/2015, dated 5 May).</p>
II.7.a	<p>If your answer to question <u>II.7</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	
II.7.b	<p>If your answer to question <u>II.7</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Spanish Courts consider the <i>alter ego</i> doctrine to be an exception that must be used restrictively, and such doctrine is only accepted when its use involves tortious and abusive use of corporate structures (see, e.g. Supreme Court Decisions: 756/2011, dated 27 October, 422/2011, dated 7 June and 475/2008, dated 26 May)</p>
II.8	<p>In the country for which you are reporting, are there any other legal theories that can be used to commit a non-signatory to international arbitration?</p>	No	

II.8.a	<p>If your answer to question <u>II.8</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	
III. Enforcement of an Arbitral Award against a Non-Signatory		(Yes /No /NA)	Additional comments, if any.
III.1	<p>Have there been court cases in the country for which you are reporting where a party has objected to the enforcement of an award, on the basis that the arbitral tribunal extended the arbitration clause to one or more non-signatories?</p>	Yes	<p>Supreme Court Decision of 23 April 2003, (see also Decision of 29 February 2000 discussed in point II.2)</p>
III.1.a	<p>If your answer to III.1 is <u>yes</u>, please explain which provision(s) of the New York Convention, or any other bilateral or multilateral convention on the enforcement of arbitral awards, was (were) relied upon as the basis for the application/objection.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>New York Convention: Art. IV.1.(a), IV.1(b) and Art.V.2.(b).</p>
III.1.b	<p>If your answer to III.1 is <u>yes</u>, please explain whether set-aside/enforcement was finally granted or refused, and the court's reasons for reaching this result.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Enforcement was granted. The Court found evidence of agency . The opposing party could not prove that arbitral agreement could be deemed inexistent under the applicable law of such contract.</p> <p>Cfr. Supreme Court Decision of 31 July 2000. Denied recognition as the Court found that none of the parties had signed the contract giving rise to the arbitration, rather it was only signed by the intermediary agency.</p>

III.2	<p>Have there been court cases in the country for which you are reporting in which the enforcement of an award was requested against a non-signatory third party (a company/individual/state that was a non-signatory to the arbitration agreement and not a party to the arbitral proceedings/award)?</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	Yes	
III.2a	<p>If the answer to III.2 is <u>yes</u>, please explain on what legal basis the enforcement was requested.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	<p>There is a case underway, in which the Claimant is seeking to enforce an investment arbitration award against a sovereign State. The Claimant has acknowledged that the execution of the award is intended to be directed against assets owned by a State-owned enterprise of the respondent State.</p>
III.2b	<p>If the answer to III.2 is <u>yes</u>, please explain whether the enforcement was finally granted/refused and the court's reasons for reaching this result.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	<p>As the case is pending, no reasoning is currently available.</p>
IV. Miscellanea		(Yes /No /NA)	Additional comments, if any.
IV.1	<p>Is there anything else that a party considering the issue of the extension of an arbitration clause to a non-signatory should take into account with respect to the country for which you are reporting?</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	No	
IV.2	<p>Is there anything else that a party considering trying to enforce a foreign arbitral award against a non-signatory</p>	No	

	<p>should take into account with respect to the country for which you are reporting?</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
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