

## 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

**NOVEMBER 2020**

*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.*

KENYA		
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	(Yes/No /NA)	Comments, if any.
<b>I. General</b>		
I.1	<b>Yes</b>	Section 4 (2) of the Arbitration Act, 1995 requires arbitration agreements to be in writing.
I.2		Section 4 of the Arbitration Act provides that an arbitration agreement may be in the form of a clause in a contract or as a separate agreement and must refer to a defined legal relationship (Section 3 Arbitration Act). Further, the Act deems an agreement to be in writing if: <ul style="list-style-type: none"> <li>• it is in a document signed by the parties;</li> <li>• there is a communication which provides a record of the agreement, be it letters, email, or telegram; or</li> <li>• there is an exchange of pleadings and one party alleges the existence of an agreement and the other party does not deny the same.</li> </ul>
I.3	<b>No</b>	An arbitration agreement binds the parties to the agreement, under the privity of contract principle. Accordingly, the signatories to the agreement are usually the parties to such proceedings. Except under

	<p><b>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?</b></p>		<p>particular circumstances, an arbitral tribunal cannot assume jurisdiction over non-signatories.</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"> <li>• The law of the seat of arbitration.</li> <li>• The governing law of the contract.</li> <li>• The law of the place where the award might ultimately be sought to be enforced.</li> <li>• Transnational norms/international law.</li> <li>• 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> </li></ul>		<p>Section 3 of the Arbitration Act defines a “party” as a <i>party to an arbitration agreement and includes a person claiming through or under a party</i>. The applicable law is the governing law of the contract, if specified. If not specified, the applicable law is the governing law of the seat of arbitration. Accordingly, in <b><u>Tanzania National Roads Agency v Kundan Singh Construction Limited [2013] eKLR</u></b>, the court declined to recognize and enforce an arbitral award that had been issued with total disregard of the governing law of the contract. The court held that it was against public policy to recognize and enforce such an award, as it would be condoning a breach of a contract between the two parties.</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>		<p>Section 29 of the Arbitration Act requires the tribunal to apply the rules of the law chosen by the parties, or the law it considers appropriate in the event that the parties have not chosen the law to be applied, to the substance of the dispute.</p>
I.4	<p><b>Is the question of whether parties agree to arbitrate ultimately decided by arbitrators as opposed to courts in the country for which you are reporting? Please cite the relevant legislative, regulatory, or jurisprudential basis for your answer.</b></p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	<p>Yes</p>	<p>Pursuant to Section 10 of the Arbitration Act, courts will generally not interfere. The arbitrator will therefore decide on jurisdiction issues.</p> <p>However, the court has jurisdiction to set aside any award under section 35 of the Arbitration Act that does not comply.</p>
I.5	<p><b>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?</b></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</p>	<p>Yes</p>	<p>Section 3 of the Arbitration Act defines a “party” as a <i>party to an arbitration agreement and includes a person claiming through or under a party</i>.</p> <p>This section gives room for third parties claiming through a signatory.</p>

	<b>provide the reader with a more detailed discussion of relevant legal theories, jurisprudence, and examples.]</b>		
I.5a	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.  [Please provide your response in the comments column and limit it to one paragraph.]		An arbitration Agreement only binds parties to the Agreement, under the doctrine of Privity of Contract, except: <ul style="list-style-type: none"> <li>• an assignee or a successor (for example, a personal representative – <b>section 8 of the Arbitration Act</b>); or</li> <li>• a trustee in bankruptcy who adopts the contract containing the arbitration agreement (<b>section 38 of the Arbitration Act</b>).</li> </ul>
I.6	<b>Is there anything in the jurisprudence 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?</b>  [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.]	Yes	Case law reflects the position that a person cannot be bound by a contract to which they are not party, and therefore cannot be joined to arbitral proceedings except under certain circumstances.
I.6a	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.  [Please provide your response in the comments column and limit it to one paragraph.]		The court in <b>Kenya National Highways Authority v Masosa Construction Limited &amp; another [2015] eKLR</b> elaborated on instances of presumed agency as set out in responses to question II.4.
<b>II. Specific Legal Theories Concerning Non-Signatories</b>		(Yes/No /NA)	<b>Additional comments, if any.</b>
II.1	<b>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 you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</b>	Yes	A non-party claiming through a party to a contract has leeway. Section 3 of the Act defines a “party” as <b><i>a party to an arbitration agreement and includes a person claiming through or under a party.</i></b>
II.1.a	If your answer to question <u>II.1</u> is yes, please:		An assignee of a contract becomes a party to the contract including an arbitration clause / agreement.

	<ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		This is in accordance with case law on interpretation of section 3. See the court’s decision in <b>Kenya National Highways Authority v Masosa Construction Limited &amp; another [2015] eKLR.</b>
II.1.b	<p>If your answer to question <u>II.1</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul>		
II.2	<p><b>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?</b></p>	No	
II.2.a	<p>If your answer to question <u>II.2</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		

II.2.b	<p>If your answer to question <u>II.2</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		Pursuant to the doctrine of privity of contract, only the signatories to the agreement between the parties are bound by it.
II.3	<p><b>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?</b></p>	No	An agreement will define the parties to include successors and assigns. This is the limit to non-parties. The Arbitration Act does not directly address this issue beyond this.
II.3.a	<p>If your answer to question <u>II.3</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.3.b	<p>If your answer to question <u>II.3</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		The general position is that the doctrine of privity of contract applies thus only signatory parties are bound. With regard to third party beneficiaries in contracts generally, Kenyan courts have relied on the decision in <b>Agricultural Finance vs. Lengetia Ltd [1985] KLR 765</b> where it was stated that: ‘As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit... it does not entitle him to sue upon the contract.’ While the above provision refers to suing in court, the same would apply in arbitration. A beneficiary can only originate action in the name of the signatory party or as successor in title.

II.4	<p><b>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?</b></p>	Yes	The Arbitration Act is silent on this issue but courts have ruled on the same.
II.4.a	<p>If your answer to question <u>II.4</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>In <b>Kenya National Highways Authority v Masosa Construction Limited &amp; another [2015] eKLR</b> determined that a principal (as a third party) may be bound by an arbitration agreement where there are facts that could lead the court to conclude that the third party had either authorised the parties to the contract to join it to their contract or chosen to accept the terms of the agreement (ratified the agreement). Similarly, in <b>Provincial Construction Company &amp; another v Attorney General [1991]KLR</b>, it was held under a principal-agent relationship, the principal would be entitled to prosecute the dispute either alone or jointly with their agent.</p>
II.4.b	<p>If your answer to question <u>II.4</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.5	<p><b>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?</b></p>	Yes	The Arbitration Act is silent on this issue but courts have ruled on the same.

II.5.a	<p>If your answer to question <u>II.5</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Kenyan courts have applied the doctrine of estoppel to infer existence of an arbitration agreement between parties. In <b>Kenya Tea Development Agency Ltd &amp; 7 others v Savings Tea Brokers Limited [2015] eKLR</b>, the court found that an arbitrator was right in applying the law on estoppel upon the facts of the case before him on conduct of parties, where the agreements had not been executed.</p>
II.5.b	<p>If your answer to question <u>II.5</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		

II.6	<p><b>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?</b></p>	No	
II.6.a	<p>If your answer to question <u>II.6</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.6.b	<p>If your answer to question <u>II.6</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>While the Arbitration Act is silent on this issue, the principle of privity of contract applies. Only the signatories will be bound. However, there are exceptions to this principle such as instances of presumed agency.</p>
II.7	<p><b>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 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?</b></p>	Yes	<p>The Arbitration Act is silent on this issue. However, Kenyan courts have applied Common Law, which provides for lifting of the corporate veil. In most cases, piercing the corporate veil is applied at execution stage during enforcement of an award or judgment of court.</p>

II.7.a	<p>If your answer to question <u>II.7</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>In the case of <b>Githunguri Dairy Farmers Co-operative Society v Ernie Campbell &amp; Co. Ltd &amp; another [2018] eKLR</b>, the court upheld the lifting of the corporate veil noting that courts will disregard the veil of incorporation where it is apparent that the device of incorporation is used for some illegal, fraudulent or improper purpose.</p> <p>A respondent will not be allowed to hide under its corporate veil to escape the consequences of a judgment/award.</p>
II.7.b	<p>If your answer to question <u>II.7</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.8	<p><b>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?</b></p>	NA	

II.8.a	<p>If your answer to question <u>II.8</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
<b>III. Enforcement of an Arbitral Award against a Non-Signatory</b>		<b>(Yes/No /NA)</b>	<b>Additional comments, if any.</b>
III.1	<b>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?</b>	No	
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>		
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>		
III.2	<b>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)?</b>	No	

	<b>[Please provide your response in the comments column and limit it to one paragraph.]</b>		
III.2a	If the answer to III.2 is <u>yes</u> , please explain on what legal basis the enforcement was requested.  [Please provide your response in the comments column and limit it to one paragraph.]		
III.2b	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.  [Please provide your response in the comments column and limit it to one paragraph.]		
<b>IV. Miscellanea</b>		<b>(Yes/No/NA)</b>	<b>Additional comments, if any.</b>
IV.1	<b>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?</b>  [Please provide your response in the comments column and limit it to one paragraph.]	No	
IV.2	<b>Is there anything else that a party considering trying to enforce a foreign arbitral award against a non-signatory should take into account with respect to the country for which you are reporting?</b>  [Please provide your response in the comments column and limit it to one paragraph.]	No	

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