

# 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

DECEMBER 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.*

GHANA			
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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	
I.2	<b>Please describe the basic requirements for a valid international arbitration agreement in the country for which you are reporting and cite the relevant legislative, regulatory, or jurisprudential basis for these requirements.</b>  <b>[Please provide your response in the comments column and limit it to one paragraph.]</b>		Section 2(3) of the Alternative Dispute Resolution Act, 2010 (Act 798 or “ADR Act”) requires an arbitration agreement to be in writing, including electronic means of communication.

I.3	<p><b>In the country for which you are reporting, do courts/arbitral tribunals generally decide the issue of the scope rationae personae 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?</b></p>	Yes, by reference to an applicable law.	
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.]</li> </ul> <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>		The governing law of the contract, either as expressly provided in the contract or through a conflict of laws analysis.
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>		Pursuant to section 54 of the Courts Act, 1993 (Act 459) as amended, an issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction. The laws of Ghana include its private international law (or conflict of laws) rules. See section 54(3) of Act 459.
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>		Under section 24 of the ADR Act, unless otherwise agreed by the parties, the arbitral tribunal may rule on matters of its jurisdiction particularly regarding matters of the existence, scope and validity of an arbitration agreement. However, under section 26

			<p>of the ADR Act, the question whether the parties agree to arbitrate may ultimately be decided by the courts as a party dissatisfied by the arbitrators' decision on that question may apply to the High Court or appointing authority for a determination of the question. In the event that a party is dissatisfied with the decision of the High Court or appointing authority on the question, they may appeal to the Court of Appeal or apply for judicial review with leave of the High Court.</p>
<p>I.5</p>	<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><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 relevant legal theories, jurisprudence, and examples.]</b></p>	<p>(i) Yes (ii) Yes</p>	

<p>I.5a</p>	<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>(i) The requirement for writing under section 2 of the ADR Act is mandatory and would therefore generally preclude the extension of an arbitration clause to a non-signatory party.</p> <p>(ii) Section 31(6) of the ADR Act permits consolidation of arbitration proceedings which could result in the extension of an arbitration clause to a non-signatory party.</p>
<p>I.6</p>	<p><b>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?</b></p> <p><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.]</b></p>	<p>(i) Yes</p> <p>(ii) Yes</p>	

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>(i) Except as modified by section 5(1) of the Contracts Act, 1960 (Act 25), the doctrine of privity of contract which provides that only a party to a contract can acquire rights or be subjected to liabilities under it may preclude the extension of an arbitration clause to a non-signatory.</p> <p>(ii) Legal principles such as assignment, agency, incorporation by reference, and succession may permit the extension of an arbitration clause to a non-signatory.</p>
<b>II. Specific Legal Theories Concerning Non-Signatories</b>		<b>(Yes/No /NA)</b>	<b>Additional comments, if any.</b>
II.1	<p><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></p>	The assignment may commit a non-signatory assignee to arbitration if the consent of the non-assigning party is obtained.	
II.1.a	<p>If your answer to question <u>II.1</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>		Section 7 of the Contracts Act, 1960 (Act 25) prescribes the rules for assignment of legal rights to another person. The assignment of the benefit of a contract does not automatically assign the obligations contained in it. Obligations under a contract cannot be assigned without the consent of the non-assigning party to the contract. (See Chitty on Contract, 33 <sup>rd</sup> Edition, Vol. 1 para 19-079) The

			assignment or assumption of a contract containing an international arbitration agreement is unlikely to commit the non-signatory assignee to international arbitration unless the consent of the non-assigning party was obtained for the assignment of obligations under the arbitration agreement. There is as yet no case law dealing with this point in the context of arbitration.
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>	Yes, an incorporation by reference may commit a non-signatory party to arbitration.	
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>		An incorporation by reference of an arbitration clause contained in a separate document may commit a non-signatory party to arbitration since as between the non-signatory party and the counterparty to the subsequent agreement, it constitutes an agreement in writing to submit to arbitration as required by section 2(3) of the ADR

			Act. There is as yet no case law on this point.
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>		
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, a non-signatory third-party beneficiary of a contract is unlikely to be bound by an arbitration clause contained in the contract.	
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>		Although under section 5(1) of the Contracts Act (referred to above), a provision in a contract which purports to confer a benefit on a person who is not a party to the contract may be enforced or relied on by that person as though that person was a party to the contract, the parties cannot enforce obligations under the contract against the third-

			party beneficiary. There is currently no case law that specifically addresses this question.
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 theory of agency may commit a non-signatory party to arbitration.	
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>Provided the agent is acting within the limits of its authority, an agent has the power to create, change or terminate the principal's legal relations with third parties. Therefore , an agent has the power to bind and give rights to its principal when dealing with a third party in an arbitration agreement.</p> <p>Although there are many cases which apply broadly the principles of agency, there are none that specifically apply it in the context of an arbitration agreement.</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</b></p>	No, neither the theory of equitable estoppel nor that	

	<p><b>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>	<p>of good faith is likely to commit a non-signatory party to arbitration. There is no doctrine of abuse of right in Ghanaian law.</p>	
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>		
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>		<p>That a person benefits from and acts in accordance with a contract containing an arbitration clause may be insufficient basis for invoking estoppel against that person. Such a person may claim that it is not bound by the arbitration clause on the basis that the arbitration clause is a distinct agreement from the main contract and that by acting in accordance with the terms of the main contract the non-signatory has not necessarily consented to the arbitration agreement. There is no case or other authority of which we are aware in which this matter has been discussed.</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>	<p>No, the principle of implied consent is unlikely to commit a non-signatory party to arbitration.</p>	
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>The principle of implied consent is not part of Ghanaian law. The closest theory in our jurisprudence is equitable estoppel and as indicated above, the theory of separability may be invoked to the effect that the main agreement in which the non-signatory has participated is separate from the arbitration clause to which he has not consented.</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>	<p>No, the doctrine of piercing the corporate veil is unlikely to commit a non-signatory to arbitration.</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>		
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>		<p>In the case of Republic v High Court (Commercial Division, Accra) Ex parte Ghacem Ltd. (J5/29/2018), the Supreme Court quashed the order of the High Court joining a non-signatory party to arbitration proceedings. The Court rejected an attempt to apply the alter ego doctrine to a non-signatory party. It observed that “arbitration agreements are voluntary decisions which are entered into by consenting persons or corporate entities.”</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>	Yes	

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>		<p>Section 4 of the ADR Act provides that an arbitration agreement is not discharged by the dissolution or merger of a body corporate which is a party to that agreement, and it is enforceable by or against the liquidator or successor of the party. The position of the ADR Act on the succession to agreements by virtue of merger is backed by sections 249 (4) and (5) of the Companies Act, 2019 (Act 992) which provide that rights, liabilities, and obligations of the transferor company “shall continue to be” rights, liabilities, and obligations of the transferee company.</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	<p><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></p>	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	<p><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></p> <p><b>[Please provide your response in the comments column and limit it to one paragraph.]</b></p>	No	
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><b>[Please provide your response in the comments column and limit it to one paragraph.]</b></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><b>[Please provide your response in the comments column and limit it to one paragraph.]</b></p>		
<b>IV. Miscellanea</b>		<b>(Yes/No /NA)</b>	<b>Additional comments, if any.</b>
IV.1	<p><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></p> <p><b>[Please provide your response in the comments column and limit it to one paragraph.]</b></p>	No	
IV.2	<p><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></p> <p><b>[Please provide your response in the comments column and limit it to one paragraph.]</b></p>	No	

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