

IBA ARBITRATION COMMITTEE

Recognition and Enforcement of Arbitral Awards Subcommittee

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

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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.

São Tomé and Príncipe			
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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	See comment on question I.2 below for the reference to the applicable provisions.

I.2	<p>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.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	NA	<p>In São Tomé and Príncipe, the validity of international arbitration agreements is subject to Article II(1) and (2) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) or to Article 2 of the Law on Voluntary Arbitration (Law no. 9/2006 of 2 November 2006) (“LVA”), depending on whether the arbitration is seated outside or inside São Tomé and Príncipe, respectively. In substance, Article II(1) and (2) of the New York Convention provides that the arbitration agreement must be in writing and that an arbitration agreement contained in an exchange of letters, telegrams or similar communications meets the written form. No decision from local courts was readily available as at the date of writing. However, the decisions on this provision from the courts of other New York Convention’s Contracting States are just as relevant. These courts have construed Article II(1) and (2) expansively. For instance, it is now firmly established that the circumstances described in Article II(2) are not exhaustive. Further there is a long and growing line of decisions from numerous Contracting States’ courts that have considered the written form to be met in circumstances where the arbitration clause was included (i) in a document referred to in the main contractual document, (ii) in a contractual document that was never signed but nevertheless accepted, or (iii) in an exchange of electronic communications. In turn, pursuant to Article 2(1) LVA, the arbitration agreement must be in writing. Article 2(2) LVA provides in translation that “[a]n arbitration agreement shall be deemed to be reduced to writing if it is contained in a document signed by the parties, or in an exchange of letters, telex, fax or other means of telecommunications of which written evidence has been kept, whether these instruments contain the agreement directly or whether they contain a clause referring to a document in which an agreement is contained.” Article 2(3) LVA further provides that the arbitration agreement must identify precisely the subject matter of the dispute if it was entered into <i>after</i> the dispute arose. If the arbitration agreement was entered into <i>before</i> the dispute arose, then it must “specify the legal relationship to which the disputes relate”. No decision of local courts or arbitral tribunals under Article 2 LVA was readily available as at the date of writing.</p>
I.3	<p>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?</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>	NA	
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	
I.4	<p>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.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	NA	<p>Both the LVA and the New York Convention are silent on the issue of who gets to decide <i>first</i> whether the parties agreed to arbitrate. Nor was any decision thereon from local courts readily available as at the date of writing. However, judicial decisions of other New York Convention’s Contracting States are just as relevant. The majority view in the jurisprudence under the New York Convention is that, at the early stage of a dispute, the courts’ scrutiny of an arbitration agreement that a party contends is null and void, inoperative or incapable of being performed is limited to self-evident defects (<i>prima facie</i> review). This was also the majority view of Portuguese courts ruling on this issue under the Portuguese 1986 arbitration law (which is the basis for the LVA) – see e.g. Court of Appeal of Lisbon, ruling of 24 November 2011 in case no. 1615/10.4TVLSB.L1-8, in which the court held that “[i]n order for a request for remission of the parties to arbitration to be upheld, it is sufficient to allege and prove in court the existence of an arbitration agreement that is not manifestly null and void or ineffective and that is merely likely to bind</p>

		<p>the parties to the dispute and that contains such a dispute in its subject matter.”). Portuguese case law is considered persuasive by the courts in São Tomé and Príncipe. Therefore, it is likely that a court in São Tomé and Príncipe would only assume jurisdiction over a dispute arising out of an agreement containing an arbitration clause if this clause is <i>manifestly</i> null and void, inoperative or incapable of being performed. This would hold true irrespective of the location of the arbitration seat (i.e. whether inside or outside São Tomé and Príncipe). Accordingly, an arbitral tribunal is likely to have the first say as to whether the parties agreed to arbitrate. However, the arbitral tribunal’s decision in this respect is always subject to a set aside application on the grounds that it lacked jurisdiction (Article 26(1)(b) LVA or Article V(1)(c) of the New York Convention (please note that a partial award on jurisdiction can only be challenged after the final award has been issued, in accordance with Article 21(4) of the LVA). The state courts are likely to decide this issue <i>ex novo</i>. Therefore, it is the courts rather than the arbitral tribunal that <i>ultimately</i> decide whether the parties agreed to arbitrate.</p>
1.5	<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>No</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>	NA	
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>	No	Sadly, no domestic arbitral or court ruling addressing this matter was readily available as at the date of writing.
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>	NA	
II. Specific Legal Theories Concerning Non-Signatories		(Yes/ No /NA)	Additional comments, if any.
II.1	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>you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	
<p>II.1.a</p>	<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>Neither the New York Convention nor the LVA deal with the personal scope of the arbitration agreement in case of assignment or assumption of contract. To the best of our knowledge, neither has there been any ruling on this issue from local courts and arbitral tribunals as at the date of writing. However, the Civil Code of São Tomé and Príncipe (“CC”) provides that the assignment of a credit claim or debt entails the assignment of all accessory obligations (Articles 582 and 599 CC, respectively). Article 424 CC in turn allows for the assignment of an entire agreement. Portuguese courts ruling on identical provisions in the Portuguese Civil Code – which is the basis for São Tomé and Príncipe’s Civil Code – have held that when a contract or a specific debt or credit claim is assigned, the associated arbitration agreement goes on to bind the assignee. For instance, the Court of Appeal of Porto (in Portugal) ruled that “[t]he arbitration agreement contained in a contract is valid between the parties who signed the contract, but in cases of assignment of the contractual position, assignment of the credit claim, assumption of debt, subrogation, the third party, who was not a party to that contract, is also subject to such arbitration agreement by effect of that assignment/transfer, provided that it has not been entered into <i>intuitu personae</i>.” (Case no. 1433/21.4T8MAI.P1, ruling of 21 June 2022; see also the ruling of 7 March 2019 by Portugal’s <i>Supremo Tribunal de Justiça</i> in case no. 13688/16.1TBPR.T.P1.S1). Portuguese doctrine and case law are sometimes cited in São Tomé and Príncipe’s judicial decisions (especially the former). Therefore, it is fair to assume that under São Tomé and Príncipe’s law the assignment or assumption of a contract containing an international arbitration agreement would commit the non-signatory assignee to international arbitration.</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. 		
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>		
II.2.a	<p>If your answer to question <u>II.2</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>	NA	<p>The New York Convention is silent on this matter. In turn, Article 2(2) LVA permits incorporation by reference of an arbitration clause (provided the seat of the arbitration is in São Tomé and Príncipe). This would be enough to commit the signatory of the main contract to international arbitration. However, this is unlikely to hold true for a non-signatory of the main contract. Sadly, no ruling on this issue from local courts or arbitral tribunals was readily available as at the date of writing.</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. 	NA	

	<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.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>	No	
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>	NA	
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>Articles 443 <i>et sequ</i> CC enshrine the notion of contracts for the benefit of third parties, as an exception to the doctrine of privity of contracts (enshrined in Article 406(2) CC). Article 444(1) CC in particular states that the third party is entitled to such benefit irrespective of whether they have agreed to it. To the best of our knowledge, there has been no ruling from local courts or arbitral tribunals on this matter to date. However, the Portuguese courts have dealt with this issue under identical provisions in the Portuguese Civil Code (which is the basis for the São Tomé and Príncipe’s Civil Code), in relation to third-party beneficiaries of insurance policies. Some Portuguese courts have ruled that the third party is bound by the arbitration agreement in the insurance policy. However, they have so ruled on the basis that the third party was in a situation akin to a party in that they were directors of the company that had entered into the insurance policy (Court of Appeal of Lisbon, rulings of 22 February 2018 in case No.</p>

	<p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	<p>22574/16.4T8LSB.L1-8 and ruling of 7 June 2018 in case No. 20854/16.8T8LSBL1-8). In two more recent cases, the Court of Appeal of Lisbon ruled that the arbitration agreement in the insurance policy did not bind the third-party beneficiary on the grounds that the insurance policy did not concern them except for the benefit that is bestowed on them thereunder, unless the third-party beneficiary had “somehow adhered to that arbitration clause” (Court of Appeal of Lisbon, ruling of 7 March 2019 in case No. 7459/16.2T8LSB-A.L1-2; ruling of 5 May 2020 in case No. 6036/17.5T8LSB.L1-7). As stated above, Portuguese doctrine and case law are sometimes cited in São Tomé and Príncipe’s rulings (especially the former). In sum, this case law shows that a non-signatory beneficiary is unlikely to be bound by the arbitration clause under São Tomé and Príncipe’s law, unless very specific circumstances are met.</p>
<p>II.4</p>	<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>	
<p>II.4.a</p>	<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>[Please provide your response in the comments column and limit it to one paragraph.]</p>	

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>		
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>		
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>		
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. • 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>		
II.6.a	<p>If your answer to question <u>II.6</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>		
II.6.b	<p>If your answer to question <u>II.6</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. 	NA	

	<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.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 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>		
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>		
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. 	NA	

	<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.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>		
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>		
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>	No	No such case was readily available as at the date of writing.

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>	NA	
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>	NA	
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>	No	No such case was readily available as at the date of writing.
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>	NA	

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>	NA	
IV. Miscellaneous		(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 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	