

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

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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.

Sweden		
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? No	
I.2	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. [Please provide your response in the comments column and limit it to one paragraph.]	An arbitration agreement becomes valid the same way as would any other type of agreement. Swedish law recognizes several ways of entering into an agreement, e.g. by written contract, oral agreement or by way of actions of a contracting party.
I.3	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	Generally, it would be a combination of both specific applicable law and a factual analysis of the claims. Courts/arbitral tribunals will aim to get an understanding of (i) the invoked factual grounds for the claims in dispute, as well as (ii) the invoked arbitration agreement

	<p>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>and its scope under the law applicable to the arbitration agreement. That would comprise both an understanding of applicable law and the facts relating to the arbitration agreement's execution.</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>Generally, in determining who the parties to the arbitration agreement are, the agreed choice of law specifically applicable to the arbitration agreement is the point of departure, and, in the absence of such a provision, the law of the seat of the arbitration. Note however that determining whether a party had legal capacity to enter into the arbitral agreement is likely determined by the personal law applicable to the corporation/individual (see Section 48 of the Swedish Arbitration Act).</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>Yes, see question I.3a above.</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 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>Section 2 of the Swedish Arbitration Act stipulates that the arbitrators may rule on their own jurisdiction to decide the dispute, which includes determining whether the parties have agreed to arbitrate. If the arbitrators conclude that they do have jurisdiction, the disagreeing party may request that the decision is reviewed by a Court of Appeal. The Court of Appeal (and potentially the Supreme Court) will ultimately decide whether or not the arbitrators have/had jurisdiction to decide the dispute. Furthermore, a pending court case where the issue of arbitral jurisdiction is argued, does not in itself prevent the arbitrators in subsequently initiated arbitral proceedings from proceeding with its own determination</p>

			<p>on jurisdiction in parallel with the court. The court's decision will however, as it becomes final, be binding in respect of factual circumstances forming the basis upon which jurisdiction is, or is not, at hand. By way of contrast, if an arbitral proceeding is already pending, public courts in subsequently opened court proceedings are prevented from deciding on the arbitrators' jurisdiction until the arbitrators have rendered their decision (this does however not apply in respect of certain consumer disputes) (see Section 4a of the Swedish Arbitration Act).</p>
I.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>	No	<p><i>This response does not take into account statutory arbitration and arbitration pursuant to company articles of association.</i></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>	N/A	
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>Although the general outset in Sweden is that arbitration agreements are not binding upon others than the parties who have directly agreed on an arbitration clause, jurisprudence has acknowledged certain situations where an arbitration clause can be extended to non-signatories. This could e.g. apply where contractual rights/obligations have been assumed, assigned or granted to a non-signatory, or where a non-signatory has committed itself towards a party on the basis of a separate contract between that party and a third party (e.g. where the non-signatory has guaranteed one party's obligations), or where the non-signatory party is deemed to be the <i>de facto</i> contracting party by way of its actions and/or influence over the signing party.</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 you</p>	Yes	

	are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?		
II.1a	<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>Swedish law differentiates assignments/assumptions resulting from so-called (i) universal succession and (ii) singular succession. Universal succession is at hand where a party is, for all intents and purposes, replaced by a different legal entity (e.g. by a bankruptcy trustee, or when a company is merged with another). Singular succession is at hand when a contract (or rights/obligations therein) is by way of agreement transferred from one party to another. In case of universal succession, a non-signatory assignee is bound by the arbitration agreement (see e.g. Supreme Court judgments in NJA 1997 s. 866 and NJA 2016 s. 288). Hence, a bankruptcy trustee would e.g. be bound by an arbitration clause that the bankrupted company has agreed to prior to the bankruptcy. In case of singular succession, the general view is that a non-signatory assignee is bound by the arbitration agreement contained in the contract the assignor previously has entered into, although there may be exceptions in particular cases (cf. Supreme Court judgment in NJA 1997 s. 866). Hence, a non-signatory assignee would likely be committed to arbitration.</p>
II.1b	<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.2a	<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>		<p>Generally, incorporation of contract terms by reference requires that the referenced terms have been made available to the other party before entering into the agreement. This is especially the case in respect of arbitration clauses, and where a consumer or individual business operator is a contracting party. The primary issue would be whether the referenced terms which a party wants to enforce were burdensome and unexpected for the other party. Factors of relevance in this regard may e.g. be the professional experience of the parties, as well as general trade practices. If referenced terms have not been made available to the other party before entering into the agreement, there is fairly strong likelihood that such referenced terms (such as an arbitration clause) would not apply (cf. e.g. Supreme Court judgments in NJA 1949 s. 609, NJA 1980 s. 46 and NJA 2011 s. 600, as well as the Court of Appeal decision in RH 2012:8). Also, there are a few appellate court judgments (albeit not considered legal precedent) which indicate that a non-signatory guarantor can be forced to participate in arbitration against the creditor, if e.g. the guarantee is silent on applicable dispute resolution mechanism, the non-signatory guarantor knew or ought to have known that the guaranteed contract contained an arbitration clause, the non-signatory guarantor itself could have invoked the arbitration clause against the creditor, and/or there is a close relationship between the non-signatory guarantor and the debtor (cf. Court of Appeal cases RH 1985:137 and RH 2003:61). Provided that the arbitration agreement is binding upon the original contracting parties, it would likely also commit a non-signatory party to arbitration, if the party has assumed, assigned or guaranteed rights/obligations under the agreement from/of an original contracting party (cf. NJA 1997 s. 866).</p>
II.2b	<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>	N/A	
II.3	Can an arbitration clause commit a non-signatory third-party beneficiary of a	Yes	

	<p>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>		
II.3a	<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>Contracts which confer rights to a third-party beneficiary are accepted in Sweden (cf. e.g. Supreme Court judgment in NJA 1994 s. 359). As mentioned in questions <u>II.1a</u> and <u>II.2a</u>, arbitration clauses would generally bind a non-signatory universal or singular successor. It is likely that a third-party beneficiary of a contract would need to commit to arbitration if it were to pursue the rights conferred to it under the contract in which the arbitration clause has been incorporated (see Stefan Lindskog’s commentary to the Swedish Arbitration Act, <i>Skiljeförfarande – En kommentar</i>, Section 5.5.2).</p>
II.3b	<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.4a	<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>		<p>Provided that the agent has acted within its authority to represent the principal, and in such capacity entered into the agreement on the principal’s behalf (expressly or impliedly), the principal would very likely be considered to be the actual contracting party. As such, the principal would not be considered to fall within the category of a “non-signatory”, even though the agreement was not actually signed by the principal. Hence, the arbitration agreement would in that case be directly applicable to the principal (cf. e.g. Supreme Court judgment in NJA 1955 s. 500). Also, there are a few appellate court judgments (albeit not considered legal precedent) which indicate that a non-signatory guarantor (as would the signatory) can be forced to participate in arbitration against the creditor, if e.g. the guarantee is silent on applicable dispute resolution mechanism, the non-signatory guarantor knew or ought to have known that the guaranteed contract contained an arbitration clause, the non-signatory guarantor itself could have invoked the arbitration clause against the creditor, and/or there is a close relationship between the non-signatory guarantor and the debtor (cf. Court of Appeal cases RH 1985:137 and RH 2003:61). If bound by the arbitration agreement, a non-signatory party would be committed to arbitration.</p>

II.4b	<p>If your answer to question II.4 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.5a	<p>If your answer to question II.5 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>Legislation and jurisprudence are silent as to whether a theory of estoppel, good faith, or abuse of right commit a non-signatory party to arbitration. That said, provided that the non-signatory party is deemed bound by the arbitration clause in the contract from which the party is benefitting and acting in accordance with (see questions II.1a, II.2a and II.3a), the non-signatory party would be committed to arbitration. Note also that in Sweden, the arbitration agreement is, legally technically, considered independent/separate from the contract in which it is included (cf. Section 3 of the Swedish Arbitration Act). Breaches of e.g. good faith relating to substantive provisions in a contract would therefore not affect the validity of the arbitration clause in itself.</p>
II.5b	<p>If your answer to question II.5 is no, please:</p>	N/A	

	<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>	Yes	
II.6a	<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>		<p>As mentioned in question <u>I.2</u>, an agreement can be entered into not only orally or in writing, but also through the actions of a party (cf. Section 1 of the Swedish Arbitration Act). Thus, a party's implied consent through active participation e.g. in respect of the execution, performance and/or termination of a contract which contains an arbitration clause, could suffice in order for the party to be considered bound by the arbitration agreement. Hence, a non-signatory party would be committed to arbitration.</p>
II.6b	<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. 	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.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>	Yes	
II.7a	<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>		<p>The general outset is that each legal entity operates on its own accord and is liable only for its own actions. The outset is e.g. that a parent company is not liable for its subsidiary nor is a corporate representative personally liable for the actions/omissions of the company (unless such parties have contractually agreed to take on such liability or if statutes expressly places such liability on such parties). However, jurisprudence recognizes, in exceptional cases, the piercing of the corporate veil (cf. e.g. Supreme Court judgments in NJA 1947 s. 647, NJA 1982 s. 244, NJA 1992 s. 375, and NJA 2005 s. 608). It is however not clear whether the piercing of the corporate veil or alter ego doctrine would also entail that the respondent is bound by the arbitration agreement contained in the underlying contract between the claimant and the subsidiary. That said, presumably, if it can be substantiated that the parent company/alter ego entity is the <i>de facto</i> contracting party, it is possible that the arbitration clause contained in the underlying contract would be construed to also bind the parent/alter ego entity (cf. Supreme Court judgment in NJA 1955 s. 500). If so, the non-signatory party would be committed to arbitration.</p>

II.7b	<p>If your answer to question II.7 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.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.8a	<p>If your answer to question II.8 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>III. Enforcement of an Arbitral Award against a Non-Signatory</p>		(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</p>	Yes	

	arbitration clause to one or more non-signatories?		
III.1a	<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>In Supreme Court case NJA 2003 s. 379, the defendant in the exequatur proceedings concerning enforcement of a French arbitral award <i>inter alia</i> argued that there was no arbitration agreement between the defendant and the claimant, and therefore the award should not be declared enforceable. The position was based primarily on Section 53 of the Swedish Arbitration Act, in short stating that arbitral awards which are based on an arbitration agreement shall be enforced, which largely corresponds to Articles II-III of the New York Convention.</p>
III.1b	<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>	N/A	<p>The Supreme Court granted enforcement of the award. The Supreme Court reasoned that the arbitrators are usually best suited to determine their jurisdiction, and that the point of departure is that the arbitrators' interpretation and assessment of evidence relating to the jurisdictional issue is correct. In order to refuse enforcement, the defendant to the exequatur proceedings would need to show that the arbitrators' determination on jurisdiction was incorrect, or that other grounds for refusal of an award are at hand. The Supreme Court concluded that the defendant had not achieved in proving this. Therefore, the award was declared enforceable (similarly, see Supreme Court judgment in NJA 2009 Not N 9).</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>	Not to our knowledge	
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	

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	
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	

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