

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.

Denmark		
I. General	(Yes/ No /NA)	Comments, if any.
I.1	No	<p>There is no general requirement under the Danish Arbitration Act or other general sources on arbitration that arbitration agreements be in writing.</p> <p>However, under the special legislation on certain areas, arbitration agreements must be in writing. For example, Section 311 (1) of the Danish Maritime Act sets out a writing requirement for arbitration agreements in contracts on the transportation of general cargo.</p> <p>Despite the absence of a general writing require-</p>
		<p>Must international arbitration agreements be in writing under the law of the country for which you are reporting?</p>

			ment, it is highly recommended to make arbitration agreements in writing in order to avoid disputes on the existence and scope of the agreement and in order to ensure compliance with the formal requirements under the New York Convention.
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>	N/A	Under Section 7 (1) of the Danish Arbitration Act, an arbitration agreement must concern a specific legal matter under the disposition of the parties.
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>	NA	<p>Decisions on the scope of arbitration agreements to non-signatories are typically made without reference to specific applicable laws. In practice, the scope rationae personae is therefore typically decided on the basis of a factual analysis.</p> <p>The approach is arguably based on an assumption that Danish contract law applies to the issue because (i) Denmark is the seat of arbitration and (ii) no party has invoked foreign contract law.</p> <p>If a party to the dispute invokes foreign contract law, the court or tribunal will have to determine the applicable contract law and its requirements in order to determine the scope rationae personae of the arbitration clause.</p> <p>Accordingly, the scope rationae personae of the arbitration clause is determined on the basis of a specific</p>

			applicable law <i>and</i> a factual analysis.
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>		Courts and arbitral tribunals generally decide the issue on the basis of the law of the seat of arbitration.
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.	Neither the Danish Arbitration Act nor the institutional rules of the Danish Institute of Arbitration sets out provisions on the law applicable to the scope rationae personae of the arbitration clause.
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>	Both	<p>Questions of scope and validity of arbitration agreements are typically decided by arbitrators if arbitration is commenced before litigation and by courts if litigation is commenced before arbitration.</p> <p>The tribunal's competence to decide on such issues is set out in Section 16 (1) of the Danish Arbitration Act. As set out in Section 16 (3), the decision may be brought before court if the tribunal finds that it is competent.</p> <p>Under Section 8 of the Danish Arbitration Act, a court dismisses a lawsuit governed by a valid arbitration</p>

			<p>agreement if a party requests the court to do so.</p> <p>For example, in a judgment of 11 April 2014 by the Supreme Court of Denmark in Case No 216/2013, the court dismissed an insurance company's lawsuit against a consultant because the dispute was governed by an arbitration agreement between the insured building owner and its consultants.</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>	Yes	<p>Danish legislation does not generally regulate the extension of an arbitration clause to non-signatories.</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	<p>Section 27 of the Danish Act on Instruments of Debt allows for the succession of rights and obligations thereby allowing some degree of succession of arbitration agreements.</p>
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I.6

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?

[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.]

Under the principle of relativity, a contract only binds its parties, so an arbitration agreement does not generally bind any third-parties.

As explained below, the principle is subject to exceptions. These exceptions include instances of succession, assignment, assumption and recourse to a prior party.

The tendency towards extending arbitration agreements to non-signatories is particularly prevalent in succession, insurance and construction cases.

In disputes on construction agreements governed by the general conditions for building and construction works and supplies or by the general conditions for consultancy services for building and construction work, the parties may join other parties involved in the same construction project and governed by the same general conditions despite the absence of an arbitration agreement between the original parties and the joined party. The practice builds on a rationale that (i) a construction project is a coherent set of agreements and that (ii) the individual agreements contain the exact same arbitration clause.

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>	N/A	<p>See (i) judgment of 22 September 2014 by the High Court of Western Denmark in Case No 3301-12; (ii) the abovementioned judgment of 11 April 2014 by the Supreme Court of Denmark in Case No 216/2013; and court order of 25 April 2013 by the High Court of Eastern Denmark in Case No B-890-13.</p> <p>In these decisions, the courts did not apply or elaborate on any specific tests or rules. The decisions are based on specific factual circumstances in each case.</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 are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	<p>The extension of arbitration agreements to non-signatories by virtue of assignment or assumption is not explicitly regulated under Danish law, but courts have extended such agreements in certain cases.</p> <p>Firstly, courts have extended arbitration agreements to non-signatories in bankruptcy cases in which the estate succeeds in the rights and obligations of the bankrupt.</p> <p>Secondly, courts have extended arbitration agreements to non-signatories in insurance cases thereby binding insurance companies by arbitration agreements made by the insured.</p>

			<p>Thirdly, courts have extended arbitration agreements to non-signatories as a consequence of valid debtor substitution.</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>N/A</p>	<p>In the abovementioned judgment of 11 April 2014 of the Supreme Court of Denmark in Case No 216/2013, the court held that a building owner’s insurance company was bound by an arbitration agreement between the building owner and its consultants.</p> <p>The court emphasized the fact that the insurance company’s claim would have been covered by the arbitration agreement if the claim were raised by the building owner itself.</p> <p>The outcome is in line with the general principle set out in section 27 of the Danish Act on Instruments of Debt, according to which an acquirer or assignee obtains the same rights and obligations as the transferor or assignor.</p> <p>The principle was applied in a judgment of 21 June 2002 by the High Court of Western Denmark in Case No B-0528-02 on the sale of a house. The court held that the buyer was bound by the arbitration agreement despite being unaware of the arbitration agreement between the seller and the original owner.</p> <p>In a judgment of 22 September 2014 by the High Court of Western Denmark in Case No B-3301-12, the</p>

			court extended an arbitration agreement between a creditor and an original debtor to cover a new debtor who succeeded in the rights and obligations of the original debtor.
II.1.b	<p>If your answer to question <u>II.1</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. 	N/A	
II.2	<p>Can incorporation by reference (i.e., where a contract incorporates an arbitration clause contained in a separate document) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	No	Danish legislation and jurisprudence is silent on the matter.
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>	N/A	N/A
II.2.b	<p>If your answer to question <u>II.2</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	N/A

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	Danish legislation and jurisprudence is silent on the matter.
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>	N/A	N/A
II.3.b	<p>If your answer to question <u>II.3</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	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>	No	Under general Danish principles of agency, an agent can make agreements on behalf of the principal thereby binding the principal as if the principal made the agreement itself.
II.4.a	<p>If your answer to question <u>II.4</u> is yes, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	The general Danish principles of agency are set out in Sections 10 to 27 of the Danish Contracts Act. The provisions clarify the requirements under different types of agency as well as the consequences of the agent’s acceptance of an offer.

II.4.b	<p>If your answer to question <u>II.4</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	
II.5	<p>Can a theory of estoppel, good faith, or abuse of right (i.e., where a party benefiting 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>	No	Danish legislation and jurisprudence is silent on the matter.
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>	N/A	N/A
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>	N/A	N/A

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/ no	Under the Danish Arbitration Act, a non-signatory may be bound by an arbitration agreement if the non-signatory does not object to the competence of the arbitral tribunal.
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>	N/A	Under Section 16 (2) of the Danish Arbitration Act, a challenge against the tribunal’s competence shall be made no later than the submission of the statement of defense, unless the tribunal considers the delay justified.
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. • 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	N/A
II.7	<p>Can piercing the corporate veil or the alter ego doctrine (i.e., where, typically due to misuse or abuse of rights or fraud, the separate legal form of a non-signatory that uses its dominating authority over a signatory is disregarded so that both are 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	The access to pierce the corporate veil, which is set out in Section 1 (2) of the Danish Companies Act, is very limited under Danish law, but under certain circumstances, a non-signatory may become bound by an arbitration agreement.
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. 		In a judgment of 28 October 2013 by the High Court of Western Denmark in Case No. B-0008-132013, the court extended an arbitration clause in a shareholders’

	<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>		agreement to cover a shareholder's claim against the company. In a court order of 3 December 1996 by the Supreme Court of Denmark in Case No 325/1996, the court extended an arbitration agreement made by a subsidiary to cover the subsidiary's parent company because the parent company had been closely engaged in the negotiation and effectuation of the contract.
II.7.b	<p>If your answer to question <u>II.7</u> is no, please:</p> <ul style="list-style-type: none"> Cite and describe the applicable rules contained in any relevant legislation or regulations. Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		N/A
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	To our knowledge, no other theories can be used to commit a non-signatory to international arbitration.
II.8.a	<p>If your answer to question <u>II.8</u> is yes, please:</p> <ul style="list-style-type: none"> Cite and describe the applicable rules contained in any relevant legislation or regulations. Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	N/A	N/A
<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 arbitration clause to one or more non-signatories?</p>	No	There are no known Danish court cases in which 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.
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>	N/A	
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>	N/A	
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	There are no known Danish court cases in which the enforcement of an award was requested against a non-signatory third party.
III.2.a	<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.2.b	<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>	Yes	The number of Danish legal sources on the extension of arbitration agreements to third-parties is limited, so the law on the issue is not set in stone. This provides parties with an opportunity to think outside the box and raise arguments for or against extension in a variety of instances despite the importance and scope of the general principle of relativity.
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	N/A

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