

# 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

Rapporteur: Marko V. Repić

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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.*

Montenegro			
	I. General	(Yes/ No /NA)	Comments, if any.
I.1	<p><b>Must international arbitration agreements be in writing under the law of the country for which you are reporting?</b></p>	<b>Yes</b>	<p>The written form should be understood flexibly – the condition of the written form is considered fulfilled (<b>art. 9</b>):</p> <p>1) when both parties sign it;</p> <p>2) by exchanging messages through the means of communication;</p> <p>3) in the situation when the agreement is orally concluded, if the party fails to object to the written notice it shall be deemed as an acceptance of the offer;</p> <p>4) if the parties refer in a written contract to another</p>

		<p>document containing the arbitration agreement;</p> <p>5) if a bill of lading contains an express reference to an arbitration clause in a charter party;</p> <p>6) if the claimant initiates arbitral proceedings in writing, and the respondent expressly accepts arbitration and agrees to it in writing or in the statement made on the record at the hearing or takes part in arbitral proceedings and does not deny the existence of the arbitration agreement or does not object to the jurisdiction of the arbitral tribunal before raising issues related to the substance of the dispute.</p>
I.2	<p><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></p> <p><b>[Please provide your response in the comments column and limit it to one paragraph.]</b></p>	<p>In principle, there are 4 conditions for arbitration agreement to be considered valid:</p> <p>1) dispute needs to have an international element (one of the parties is a natural person with domicile or habitual residence in another State or a legal person established under a foreign law whose seat is in another State) <b>art. 2 para. 1;</b></p> <p>2) it needs to be concluded in writing <b>art. 9 para. 3;</b></p> <p>3) it needs to be concluded by the parties, with necessary legal capacity <b>art. 9 para. 1;</b></p> <p>4) Arbitrability - arbitration cannot be conducted when the other act stipulates that the particular disputes may</p>

			not be resolved by arbitration ( <b>art. 3 para. 2</b> ).
I.3	<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>		
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>		Primarily, arbitral tribunals apply the governing law of the contract, but in the absence of a choice by the contracting parties, the arbitral tribunal shall apply the Montenegro law ( <b>art. 48</b> ).
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>		Apart from the above stated, there are no additional directives in this respect.
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>		It is decided by the arbitrators (the principle competence-competence), since the court is only competent for certain functions of arbitration assistance ( <b>art. 6</b> ).
I.5	<p><b>Is there anything in the <u>legislation</u> of the country for which you are reporting that (i) could preclude the extension of an arbitration clause to non-signatories, or (ii) could permit the extension of an arbitration clause to non-signatories?</b></p> <p>[Note that the answer to this question is designed to provide the reader with a quick yes or no answer, plus to flag the key legal criteria. The series of questions in Section II provide the reader with a more detailed discussion of relevant legal theories, jurisprudence, and examples.]</p>	No	

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>		
I.6	<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>	No	
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>		
<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>	Yes	As explained in II 1a.
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>		<p>The arbitration legislation and jurisprudence are silent on this issue.</p> <p>However, assignee of the contract assumes all rights and obligations of the related contract, which is the general rule in the contract law. Therefore, it could be argued that assignee is bound with provisions related to the arbitration clause as well.</p>

II.1.b	<p>If your answer to question <u>II.1</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul>		
II.2	<p><b>Can incorporation by reference (i.e., where a contract incorporates an arbitration clause contained in a separate document) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</b></p>	No	
II.2.a	<p>If your answer to question <u>II.2</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.2.b	<p>If your answer to question <u>II.2</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>According to the provisions in the Arbitration Law (<b>art. 9 para. 4 (3)</b>), incorporation by the reference can only commit a signatory party of an arbitration agreement.</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	

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>		<p>In accordance with the relevant national legislation, the beneficiary may enforce only certain rights granted under the agreement related to his particular claim.</p> <p>However, as beneficiary is not part of the agreement and will never be (contrary to assignee), in our opinion there is no mutual consent that could be construed as arbitration agreement.</p>
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	
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>We believe that in order answer to this question, is necessary to assess whether the form of representation is in accordance with the law. The form of representation should be valued according to the law that is applicable for the assessment of the arbitration agreement.</p> <p>If, according to the rules of private international law, the law of Montenegro is applicable, it would mean that the form of power of</p>

			<p>attorney is valid as long as it is in the same form required for drawing up an arbitration agreement (<b>art. 86 of the Law of Contract and Torts</b>).</p> <p>As stated above, the form of the arbitration agreement is flexible, which means that the form in which contractual representation is undertaken can also be interpreted flexibly - which potentially opens great possibilities for the theory of agency to penetrate and be accepted in the practice of arbitration from this area.</p> <p>Respectively, in terms of the general rules of contract law, it is difficult to imagine that the principal will not be bound by the signature of the agent if the principal himself has authorized him (in a flexible form) to sign the agreement on his behalf and for his account.</p>
II.4.b	<p>If your answer to question <u>II.4</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.5	<p><b>Can a theory of estoppel, good faith, or abuse of right (i.e., where a party benefitting from, and acting in accordance with, a contract containing an arbitration clause is estopped from claiming that it is not bound by certain provisions of the contract) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</b></p>	NA	<p>The arbitration legislation and jurisprudence are silent on this issue.</p>

<p>II.5.a</p>	<p>If your answer to question <u>II.5</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
<p>II.5.b</p>	<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>Although the essence and idea of these institutes is something that is very close to all law systems, the limited scope of these common law theories in Europe and in the practice of arbitral tribunals leaves a dilemma in which situations these theories will find a place as a regular basis for expanding arbitration agreements - especially in the practice of arbitration tribunals and courts in the region countries of continental law system.</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>	Yes	The arbitration legislation and jurisprudence are silent on this issue.
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>		<p>Although this theory is not widely accepted in the practice of arbitral tribunals, implications of this theory should be evaluated on case-to-case base.</p> <p>Thus, the greater the connection between the behavior of the non-signatory and the arbitration agreement (i.e. of the contract in which the arbitration clause is prescribed), the greater is the chance that the arbitration agreement will be extended towards the non-signatory.</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>		
II.7	<p><b>Can piercing the corporate veil or the alter ego doctrine (i.e., where, typically due to misuse or abuse of rights or fraud, the separate legal form of a non-signatory that uses its dominating authority over a signatory is disregarded so that both are treated as a single entity) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</b></p>	Yes	The arbitration legislation and jurisprudence are silent on this issue.

II.7.a	<p>If your answer to question <u>II.7</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>Since it is a theory that derives from continental legal system, it is conceivable that the piercing of the corporate veil theory could come to life in the practice of arbitration tribunals and courts in this region, but in very limited conditions (due to preserving the integrity of the arbitration procedure and adequate interpretation of the arbitration agreement).</p>
II.7.b	<p>If your answer to question <u>II.7</u> is no, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.8	<p><b>In the country for which you are reporting, are there any other legal theories that can be used to commit a non-signatory to international arbitration?</b></p>	No	<p>As mentioned above, only a few theories are conceivable as useful in relation to this matter, and our theory and practice do not yet recognize any other possibility.</p>

II.8.a	<p>If your answer to question <u>II.8</u> is yes, please:</p> <ul style="list-style-type: none"> <li>• Cite and describe the applicable rules contained in any relevant legislation or regulations.</li> <li>• Provide examples from your country's jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound.</li> </ul> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
<b>III. Enforcement of an Arbitral Award against a Non-Signatory</b>		<b>(Yes/No/NA)</b>	<b>Additional comments, if any.</b>
III.1	<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>	NA	The jurisprudence regarding arbitration is generally not developed, and we have not been able to identify any practice for this case at this time.
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>	NA	As explained above, there is not relevant court cases relevant to this question.
III.2a	<p>If the answer to III.2 is <u>yes</u>, please explain on what legal basis the enforcement was requested.</p>		

	[Please provide your response in the comments column and limit it to one paragraph.]		
III.2b	If the answer to III.2 is <u>yes</u> , please explain whether the enforcement was finally granted/refused and the court's reasons for reaching this result.  [Please provide your response in the comments column and limit it to one paragraph.]		
<b>IV. Miscellaneous</b>		<b>(Yes/ No /NA)</b>	<b>Additional comments, if any.</b>
IV.1	<b>Is there anything else that a party considering the issue of the extension of an arbitration clause to a non-signatory should take into account with respect to the country for which you are reporting?</b>  [Please provide your response in the comments column and limit it to one paragraph.]	No	
IV.2	<b>Is there anything else that a party considering trying to enforce a foreign arbitral award against a non-signatory should take into account with respect to the country for which you are reporting?</b>  [Please provide your response in the comments column and limit it to one paragraph.]	No	

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