

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.

Romania			
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	Under Article 548 Civil Procedure Code (“CPC”) arbitration agreements must be made in writing under pain of nullity. The condition of having a written agreement is deemed fulfilled if the submission to arbitration was agreed by an exchange of correspondence, or by an exchange of procedural acts.
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.]		According to Article 1113 CPC, the international arbitration agreement must be in writing and is deemed valid if it fulfils the validity requirements stipulated under one of the following laws: the law agreed by the parties, the law governing the subject matter

			of the dispute, or the law applicable to the contract comprising the arbitration clause.
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>		<p>Romanian jurisprudence on the issue is scarce, with few arbitration cases where the issue was raised; the relevant arbitral awards were not published.</p> <p>However, from the information at our disposal, it appears that the arbitral tribunals accepted in some cases arguments for the extension of the arbitration clause to a non-signatory based on either the “group companies” doctrine or on the “group of contracts” doctrine, inspired by the French or Swiss jurisprudence. Lacking access to the actual awards, we do not have information on the concrete basis for such decisions, but we may assume they considered both the applicable law and the factual analysis of the case.</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	<p>As mentioned, we do not have concrete information regarding the basis for such arbitral decisions. We assume, however, that the law taken into consideration was the governing law of the contract (i.e., not the procedural law – the law of the seat of arbitration) as the arbitral tribunals applied the “group companies” / the “group of contracts” doctrine.</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>	Yes	<p>According to Article 1120 CPC, the arbitral tribunal must apply the law chosen by the parties or, if the parties did not choose the applicable law, the law it deems adequate, considering the</p>

			customs and professional rules. Arbitration in equity is only possible with the express agreement of the parties.
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>	Yes	<p>According to Article 553 CPC the conclusion of the arbitration agreement excludes the jurisdiction of State courts. Once a dispute has been referred to arbitration, the arbitral tribunal is competent to decide on jurisdiction. The arbitral tribunal's ruling on jurisdiction may not be challenged before the State courts during the arbitral proceedings, but only by means of a subsequent motion to set aside the arbitral award.</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	

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>		<p>As a rule, under Romanian law, the contract is binding only for the parties, unless the law provides otherwise. Also, Article 1203 Civil Code provides that any proposed arbitration clause or other clause derogating from the rule that competence belongs to State courts must be expressly accepted in writing by the other party. From a procedural point of view, Article 581 CPC provides that third parties may be allowed to participate to arbitration (acquiring positions similar to those of the claimant/respondent) on their own accord, but only with the agreement of the parties.</p>
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>	NA	<p>Romanian legal system is a civil law system where jurisprudential precedent is not binding.</p>
I.6a	<p>If your answer to question <u>I.6</u> is yes, please cite and describe the applicable tests or rules applied by the courts of the country for which you are reporting.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	NA	
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	

II.1.a	<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>According to the civil law rules governing assignment of contract, once the assignment is complete, the assignee acquires all the rights and obligations provided under the contract. In 2012, an arbitral tribunal decided that the assignee of a receivable had also acquired the accessories of the receivable, including the arbitration agreement included in the contract from which the receivable was born.</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. 	NA	
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.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>		<p>Romanian law is silent on this issue. However, legal scholars recognize the “group of contracts” doctrine developed in French jurisprudence, in the sense that when it is demonstrated that the parties to the accessory or subsidiary contract, knowing about the existence of the arbitration agreement comprised in the main contract, agree to its application and assume the possibility of arbitration, the tribunal may grant extension of the arbitration clause. Also, an arbitral tribunal maintained (in an interlocutory decision issued in 2013) that the arbitration clause may be</p>

			extended based on the “group of contracts” doctrine but only if the arbitration clauses contained in such contracts are compatible, i.e., they refer the dispute to the same arbitration institution.
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>	NA	
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>	Yes	
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>		Romanian law is silent on the issue. Legal scholars discussing the issue, by reference mainly to the French and Swiss jurisprudence, are rather favorable to its application by the arbitral tribunals in certain cases, in relation to “group of contracts” doctrine (see our answer to II.2.a above) or “group of companies” doctrine, i.e., where the third party (e.g., the mother company of one of the parties) participated actively to the conclusion, execution or even termination of the contract comprising the arbitration clause.
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. 		

	<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.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.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>		<p>According to the general rules of the Civil Code (Article 1296), the contract concluded by the representative, within the limits of the power of attorney, on behalf of the represented party, produces effects directly between the represented party and the other party. The Civil Code (Article 1309 (2)) also recognizes the theory of the apparent mandate; the contract concluded by the representative lacking powers of representation, or acting beyond the limits of those powers, produces effects between the represented party and the other party, if the represented party reasonably believe that the representative acted according to the power of attorney.</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>	Yes	
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>		<p>The principle of good faith is a guiding principle in Romanian Civil Code (Article 14), which also forbids abuse of right (Article 15). In line with these principles, legal scholars maintain that the arbitral tribunal should extend the arbitration clause to a non-signatory in certain cases. The classical example – in relation to the “group of companies” doctrine – is that of a subsidiary, signatory of an arbitral agreement, and controlled by the mother company, which is afterwards liquidated in bad faith. Also, the refusal to participate in the arbitral proceedings may be abusive in those cases where the non-signatory effectively participated to the negotiation and conclusion of the agreement, thus adhering to the arbitral clause included therein. However, we were not able to identify any arbitration case where the extension of an arbitration clause to a non-</p>

			signatory party was granted based solely on such principles.
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>	Yes	
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>		Romanian legislation is silent on the issue. Romanian legal scholars deem the arbitration clause may be extended to a non-signatory depending on the role played on the negotiation or execution of the agreement. We have identified two arbitral awards (only short excerpts were published) where it seems that the “implied consent” was taken into consideration as one of the arguments supporting the extension of the arbitral clause to the non-signatory.
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>		

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.7.a	<p>If your answer to question II.7 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>Romanian doctrine recognizes the fictive company doctrine, which is built on the legal concept of simulation as provided by the Civil Code (Article 1289 et seq.). Based on this doctrine, the appearance of autonomy of, for instance, the mother-company acting as de facto manager of the signatory company, may be removed, and the creditors may file a direct claim against the mother-company. We were not able to identify any arbitration where the extension of an arbitration clause to a non-signatory party was granted based on the fictive company doctrine. In relation to good faith and abuse of right principles, see also our answer to II.5.a above.</p>
II.7.b	<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.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>	NA	<p>We were not able to identify any public information on court cases where a party objected to the enforcement of an award on grounds that the arbitral tribunal extended the arbitration clause to one or more non-signatories.</p>
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>	NA	<p>We were not able to identify any public information on the enforcement of an arbitral award against a non-signatory third party.</p>

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>	NA	
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>	NA	

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