

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.

Mauritius			
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	Section 4(1) of the International Arbitration Act 2008 (“IAA”) states that an arbitration agreement must be in writing.
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 Section 4 of the IAA, the arbitration agreement may be in the form of an arbitration clause in a contract or other legal instrument or in the form of a separate agreement, and must be in writing. The requirement of writing is satisfied where its contents are recorded in any form (irrespective of whether the

		<p>contract has been concluded orally or by conduct) or concluded by an electronic form of communication or contained in an exchange of statements of claim and defence in which the existence of an agreement. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing where the reference is such as to make that clause part of the contract is alleged by one party and not denied by the other.</p>
<p>I.3</p>	<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>This specific question has not yet been considered by the Courts. As matters stand, there are two possible approaches found in Mauritian case law. In <i>Cruz City 1 Mauritius Holdings v Unitech Limited & Anor</i> [2014 SCJ 100], which was an enforcement case, the Supreme Court considered only the factual scope of a jurisdictional challenge in order to determine the common intention of the parties. However, in the case of <i>Flashbird Ltd v Compagnie de Securite Privee et Industrielle Sarl</i> [2021 UKPC 32], which decided an application to set aside an award, the Court applied legal provisions in order to interpret an arbitration clause. Therefore, the legal position on this point is not yet settled in Mauritius.</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>Section 39(2)(a)(i) of the IAA governs the parties' exclusive recourse against an award. Accordingly, it only applied applies when the juridical seat is in Mauritius, an arbitral award may be set aside by the Supreme Court only where the party making the application furnishes proof that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law. The corresponding provision for award made abroad is contained in Article V(1)(a) of the New York Convention, which has been incorporated in Mauritian law. The answer would therefore probably be the law of the seat of arbitration.</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>Please see the above comments on Section 39(2)(a)(i) of the IAA and Article V(1)(a) of the New York Convention.</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>Although the IAA contains the competence-competence principle and goes further in upholding its negative effect, it also provides for the exclusive recourse against an Award. The Supreme Court will have the power to set aside an award where a party furnishes proof that the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law. The Supreme</p>

			Court has the ultimate power to decide on whether parties agreed to arbitrate or not.
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>	<p>(i) No</p> <p>(ii) Yes</p>	A signature is not a requirement for the validity of an arbitration clause under the IAA.

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>Section 4 of the IAA states that an arbitration agreement is valid where it is in writing. The absence of the requirement of a signature leaves the door open for the extension of an arbitration clause to non-signatories. Further, as stated above, Section 4 of the IAA upholds an arbitration clause whose contents are recorded in any form even where the contract is entered into orally or by conduct.</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>	<p>(i) No</p> <p>(ii) No</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>		
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 IAA is silent on this matter. However, recent case law answers this question in the affirmative.</p>
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. 		<p>In the case of Galakha Enterprises Ltd v ECP Africa Fund IV A LCC & Anor [2023 SCJ 294], the</p>

	<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>		<p>Judge in Chambers of the Commercial Division had to determine whether an assignee was bound by an arbitration clause. The facts of that case concerned an individual who has assigned all his rights and obligations to the Applicant under a subscription agreement. The original contract provided for disputes to be resolved by arbitration. The Judge in Chambers held that the Applicant was bound by the arbitration clause.</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. 	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.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>Section 4(3) of the IAA states that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing where the reference is such as to make that clause part of the contract. In this context also, a signature is not a requirement to the validity of the arbitration agreement.</p>

II.2.b	<p>If your answer to question <u>II.2</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		
II.3	<p>Can an arbitration clause commit a non-signatory third-party beneficiary of a contract to international arbitration in the country in which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	Yes	This is an opinion.
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>		<p>The IAA does not specifically address this issue. Article 1121 of the Civil Code states that one may stipulate for the benefit of a third party and that he who made that stipulation may no longer revoke it if the third party has declared that he wishes to take advantage of it. Therefore, it may be arguable that an arbitration clause may commit a third party beneficiary provided that the non-signatory has declared that it wishes to take advantage of the clause.</p>
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>		

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>The IAA is silent on this matter, but the comparable concept of “mandat” is recognised in Mauritius under Articles 1984 <i>et seq.</i> of the Civil Code. Any act made on behalf of the non-signatory on behalf of the latter would accordingly bind the non-signatory, and this would include entering into an arbitration agreement on his behalf.</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>	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>	N/A	<p>The IAA is silent on these theories, but does provide that a contract can be entered by conduct or orally, as stated above.</p>
II.5.a	<p>If your answer to question <u>II.5</u> is yes, please:</p> <ul style="list-style-type: none"> ● Cite and describe the applicable rules contained in any relevant legislation or regulations. 	N/A	<p>Section 4 of the IAA upholds an arbitration clause whose contents are recorded in any form even where the contract is entered into orally or by conduct. Therefore, a non-</p>

	<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>	<p>signatory party who benefits from and acts in accordance with a contract could potentially be considered as being bound by it and any arbitration clause it contains. Further, in an exceptional case, <i>Hurry v Leedon</i> (2009 SCJ 270), the parties had initially submitted to the jurisdiction of the Bankruptcy Division of the Supreme Court and, following its decision, one of the parties had commenced arbitration in order to relitigate the same issue which had already been decided by the courts. This was not allowed on the basis that this would have been an abuse of the process of the Court and would have been vexatious and oppressive. Although, in that case, the parties were signatories to the arbitration agreement, the case indicates that abuse of process and vexatious and oppressive conduct are matters that could also be taken into account.</p>
II.5.b	<p>If your answer to question <u>II.5</u> is no, please:</p> <ul style="list-style-type: none"> • Cite and describe the applicable rules contained in any relevant legislation or regulations. • Provide examples from your country’s jurisprudence highlighting which parties are ultimately bound, and the circumstances under which they are likely to be bound. <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>	

II.6	<p>Can “implied consent” (i.e., where a party’s active participation in the negotiation, execution, performance and/or termination of a contract containing an arbitration clause provides evidence for its intent to consent to arbitration) commit a non-signatory party to international arbitration in the country for which you are reporting? Or is the legislation and jurisprudence in the country for which you are reporting silent on the issue?</p>	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>		<p>Section 4 of the IAA upholds an arbitration clause whose contents are recorded in any form even where the contract is entered into by conduct. Therefore, a non-signatory party who performs a contract could potentially be considered as being bound by it and any arbitration clause it contains. In the case of Galakha Enterprises Ltd v ECP Africa Fund IV A LCC & Anor [2023 SCJ 294], the Judge in Chambers relied inter alia on the fact that a party had acquiesced to the terms and conditions of an agreement in holding that it was bound by the arbitration clause it contained. However, the IAA and jurisprudence are silent on the situation where a non-signatory has only participated in negotiations.</p>
II.6.b	<p>If your answer to question <u>II.6</u> is no, please:</p> <ul style="list-style-type: none"> ● Cite and describe the applicable rules contained in any relevant legislation or regulations. ● 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>		The IAA is silent on this matter.
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>		
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>	Yes	

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>		<p>The principle of “subrogation” may operate to make:</p> <p>a. a non-signatory party acquire the rights of a creditor, and potentially including those flowing from an arbitration agreement, against the debtor upon payment being made by the non-signatory to meet the debt of the debtor (Articles 1249 <i>et seq.</i> of the Civil Code), and</p> <p>b. a non-signatory insurer acquire the rights and actions (including in arbitration) of the insured party against its contracting party upon payment by the insurer of the insurance indemnity to the insured (Article 1983-50 of the Civil Code).</p>
III. Enforcement of an Arbitral Award against a Non-Signatory		(Yes/ No /NA)	Additional comments, if any.
III.1	<p>Have there been court cases in the country for which you are reporting where a party has objected to the enforcement of an award, on the basis that the arbitral tribunal extended the arbitration clause to one or more non-signatories?</p>	No	
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>		

	[Please provide your response in the comments column and limit it to one paragraph.]		
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	
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>		
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>		
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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