

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

DECEMBER 2020

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.

Abbreviations

<i>Civil Code</i>	:	Turkish Civil Code No.4721
<i>Code of Obligations</i>	:	Turkish Code of Obligations No.6098
<i>CPC</i>	:	Civil Procedure Code No.6100
<i>IAC</i>	:	International Arbitration Code No. 4684
<i>IPPL</i>	:	Private International and Civil Procedure Law No.5718
<i>Law No.805</i>	:	Law No.805 on the Mandatory Use of Turkish in Economic Establishments dated 10.04.1926.
<i>TCA</i>	:	Turkish Court of Appeals
<i>TCC</i>	:	Turkish Commercial Code No.6102

TURKEY			
Kerem Seber, Berin Hikmet			
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	1. International arbitration agreements are only valid if they are concluded in writing

			<p>in: (i) an arbitration clause in the main contract; or (ii) a separate agreement.¹</p> <p>2. A written arbitration agreement is also deemed to exist where: (i) the agreement to arbitrate is recorded either: (a) in a document signed by the parties; or (b) by means of telecommunication, such as reciprocal exchange of letters, telegraph, telex and fax, or (c) electronic medium; or (ii) respondent does not object in its statement of defence to the existence of an arbitration agreement raised by claimant in its statement of claim; or (iii) a reference is made to a document containing an arbitration clause, with the intent to render such document as part of the main contract.²</p>
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>	NA	<p>There are three main validity requirements:³ (i) formal requirements⁴; (ii) substantive requirements;⁵ and (iii) legal capacity.⁶ In addition, the parties must agree to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a <i>defined legal relationship</i>.⁷ Invalidation of the main agreement does not affect the validity of the arbitration agreement and vice versa.⁸</p>
I.3	<p>In the country for which you are reporting, do courts/arbitral tribunals generally decide the issue of the</p>	NA	<p>The scope <i>ratione personae</i> of the arbitration clause, including the issue of extending the</p>

¹ IAC Arts.4(1) and 4(2); **NY Convention** Arts.II/1 and II/2. Turkey ratified the **NY Convention** in 1992; Please see *Question IV.1* on the implications of the **Law No.805** (i.e., mandatory use of Turkish language) to the arbitration agreements/clauses to be executed among Turkish individuals and legal entities.

² IAC Art.4(2); **NY Convention** Art.II/1.

³ **Şanlı I** pp.326-327; **Esen** p.79; **Tekin** p.63.

⁴ See, *Question I.1* above; **IAC** Art.4; **NY Convention** Art.II; **Model Law** Art.7; **CPC** Art.412; **Geneva Convention** Art.I/2(a); Turkey ratified the Geneva Convention in 1992.

⁵ **IAC** Art.4(3) provides that an arbitration agreement is valid if it conforms to the law chosen by the parties and in the absence of such a choice, it must comply with Turkish law (*lex arbitri*). The most important substantive validity requirement under Turkish law is arbitrability. Disputes relating to: (i) rights in rem over immovable properties in Turkey, cancellation of title deed and lease amount; (ii) criminal law; (iii) family law, (iv) labour law (except for termination of employment agreements); (v) administrative law (except for concession agreements for public services); (vi) some of the corporate law matters (e.g. cancellation of shareholders' meeting resolutions or corporate dissolution); (vii) competition law (except for compensation claims of a civil nature); and (viii) IP law (except for exercising IP rights or the violation of moral rights) are non-arbitrable.

⁶ **IPPL** Art.9; **NY Convention** Art.V/1(a); **Geneva Convention** Arts.II/1 and VI/2; **Model Law** Arts.34(2)(a)(i) and 36(1)(a)(i); **Şanlı I** pp.326 and 449-452; **Erdem II** pp.243-244; IAC is silent on legal capacity to conclude arbitration agreements. The issue of legal capacity is governed by the rules of conflicts of law under **IPPL** Art.9: "*Legal capacity is determined in accordance with the national law of the relevant party*".

⁷ **IAC** Art.4(1).

⁸ **IAC** Art.4(4); **Şanlı I** pp.357 and 461-462; **Akıncı** pp.163-164; **Erdem I** paras.1698-1701; **Esen** pp.51-52; If the main agreement, which contains an arbitration clause, is executed as a consequence of error, fraud or duress, then both the main agreement and the arbitration clause are invalid due to the defected consent.

	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?		arbitration agreement to non-signatories, is a matter of consent, which should be addressed under the law that governs the substantive validity of the arbitration agreement i.e., IAC Art.4(3): the law chosen by the parties and in the absence of such a choice, Turkish law. ⁹ Under Turkish law, for a valid arbitration agreement, consent to arbitrate must be clear and unequivocal. ¹⁰
I.3.a	<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	<u>Arbitral tribunals</u> decide the issue on the basis of the law chosen by the parties applicable to the substance of the arbitration agreement and in the absence of such choice, on the basis of Turkish law. ¹¹ <u>Courts</u> , on the other hand, may apply different laws depending on the nature of the court proceedings. In the event the issue is brought before the court: (i) for a determination on as to whether the non-signatory third party is bound by the arbitration agreement, or when an objection to the existence of arbitration agreement is raised by a non-signatory third party, the court must apply the conflict of laws rules of <i>lex fori</i> ; ¹² or (ii) at the enforcement stage, the court must apply the law chosen by the parties or, failing any indication thereon, the law of the country where the award was made; ¹³ or (iii) at the setting aside proceedings, the court must apply the law chosen by the parties or, failing any indication thereon, the law of the state where the setting aside is requested. ¹⁴
I.3.b	<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	See, our answers to <i>Question 1.3.a</i> above.

⁹ **Şanlı I** pp.453-454; **Şanlı II** p.780; **Esen** pp.54, 73 and 79-80; **Veziroğlu** p.30; Formal validity requirements are not sought for third parties, however, such requirements must have been met by the original parties while concluding the arbitration agreement at the outset.

¹⁰ **Akıncı** pp.133 and 143; **Esen** pp.9 and 17; **Unifying Decision of the General Assembly of TCA** numbered 776/198 and dated 05.05.1965 (**Akıncı** p.133); Although there is no express provision in Turkish legislation in this regard, there is an overwhelming consensus in case law and doctrine that consent to arbitrate must be clear and unequivocal.

¹¹ **IAC** Arts.4(3) and 15(1)(a); The same principles are stipulated in **IPPL** Art.62(e) as well as **NY Convention** Art.V.1(a) and **Geneva Convention** Art.IX/1(a), which are considered domestic law and *lex specialis*: The law chosen by the parties governing the arbitration agreement and in the absence of such choice, the law applicable at the seat of arbitration.

¹² **IAC** Art.4(3); **Erdem I** para.1706; **Akıncı** p.173. **Şanlı I** pp.356-357; **Esen** pp.67-70; **Tekin** pp.156-157, 161 and 164-165; **Işık I** paras.11-13.

¹³ **IPPL** Art.62(2); **NY Convention** Art.V(1)(a); **Esen** pp.71-72; **Erdem I** para.1705; **Tekin** p.169; **Işık I** paras.15-16.

¹⁴ **IAC** Arts.4(3) and 15; **Geneva Convention** Arts.I/2(a) and IX; **Model Law** Art.34(2)(a)(i); **Esen** p.72; **Tekin** pp.167-168; **Işık I** para.14.

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>The principle of <i>kompetenz-kompetenz</i> applies, i.e., arbitrators decide on the extent of their own jurisdiction, including matters of existence and validity of the arbitration agreement.¹⁵ However, decision of the arbitrators on the validity of the arbitration agreement is subject to review by the courts as part of the setting aside proceedings.¹⁶</p>
I.5	<p>Is there anything in the <u>legislation</u> of the country for which you are reporting that (i) could preclude the extension of an arbitration clause to non-signatories, or (ii) could permit the extension of an arbitration clause to non-signatories?</p> <p>[Note that the answer to this question is designed to provide the reader with a quick yes or no answer, plus to flag the key legal criteria. The series of questions in Section II provide the reader with a more detailed discussion of relevant legal theories, jurisprudence, and examples.]</p>	NO	<p>As a general rule, an arbitration agreement is only binding on the parties to the agreement. The arbitration legislation does not permit the extension of an arbitration clause to non-signatories (except for certain cases where mandatory arbitration is stipulated in specific legislation). Moreover, Art.6(2) of the IAC provides that an arbitral tribunal cannot award an interim injunction or an interim attachment with respect to non-signatory third parties.</p>
I.5.a	<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>	NA	
I.6	<p>Is there anything in the <u>jurisprudence</u> of the country for which you are reporting that (i) could preclude the extension of an arbitration clause to non-signatories, or (ii) could permit the extension of an arbitration clause to non-signatories?</p> <p>[Note that the answer to this question is designed to provide the reader with a quick yes or no answer, plus to flag the key legal criteria. The series of questions in Section II provide the reader with a more detailed discussion of the relevant legal theories, jurisprudence, and examples.]</p>	YES	<p>The overarching rule or test is whether there is a clear and unequivocal consent to the arbitration agreement. Implied consent can only be deduced from unambiguous conduct evidencing consent to arbitrate.</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>		<p>The legal doctrine and case law in the Turkish jurisprudence which may permit/preclude whether an arbitration agreement may be extended to non-signatories is considered in detail below under Questions between II.1 and II.7. Scholars discussed the legal theories under the following headings: (i) Assignment, (ii) Incorporation by Reference, (iii) Third-</p>

¹⁵ IAC Art.7(H).

¹⁶ IAC Art.15.

			Party Beneficiary, (iv) Agency, (v) Good Faith, (vi) Implied Consent, and (vii) Piercing the Corporate Veil, as well as other legal theories or circumstances identified in <i>Question II.8</i> below: (i) Universal Succession, (ii) Insurance, (iii) Guarantee, (iv) State, (v) Arbitration Clause in articles of association of a privately held joint-stock company (“ AOA ”), (vi) Group of Companies, and (vii) Procedural Law.
II. Specific Legal Theories Concerning Non-Signatories		(Yes /No /NA)	Additional comments, if any.
II.1	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?	YES	Legislation is silent on whether the assignee is committed to international agreement through assignment or assumption of a contract containing an international arbitration agreement. In jurisprudence there are two opposing schools of thought. See, <i>Question II.1.a</i> below.
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>The two opposing views are: (1) <u>The assignee can be committed</u>: (i) pursuant to Art.189 of the Code of Obligations which provides that assignment of a receivable includes all preferential and accessory rights except those that are inseparable from the person of the assignor. As the arbitration clause is an accessory right of the receivable, it is transferred to the assignee together with the receivable unless otherwise agreed by the parties, and (ii) as arbitration clause is within the economy of the agreement created by the main contract and therefore it binds the assignee;¹⁷ and (2) <u>The assignee cannot be committed</u> given that the arbitration clause is autonomous and independent from the main contract, and the assignee is only bound by the arbitration agreement if there exists explicit or</p>

¹⁷ **Akıncı** p.146; **Şanlı I** pp.467-471; **Şanlı II** p.785; **Köşgeroğlu** p.10; **Keskin** pp.258-260; **Eleventh Civil Chamber of TCA** dated 10.05.1994 and numbered 1993/5034E. – 1994/4082K.: In *Marmara Transport A.Ş.*, TPA extended the arbitration clause in the main agreement to the assignee. The dispute arose out of a vessel lease agreement between Party A (lessee/respondent) and Party B (lessor/seller of the vessel). Party B sold the vessel to Party C (claimant/new lessor). Party C initiated court proceedings against Party A for failing to perform the lease agreement. Party A objected to the jurisdiction of the Court of First Instance on the grounds that the lease agreement containing an arbitration clause was binding on Party A and Party C. The Court of First Instance held in favour of Party C. However, upon appeal by Party A, TCA reversed the judgment in favour of the Party A noting that the Court of First Instance should have dismissed the case for lack of jurisdiction and should have referred the dispute to arbitration (**Şanlı I** FN 573; **Esen** p.191).

			implied consent through unambiguous conduct evidencing consent to the arbitrate. ¹⁸
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	<p>As noted in <i>Question I.1.2(iii)</i> above, Article 4(2) of the IAC provides that <i>a party</i> may be committed to international arbitration through incorporation by reference i.e., where a reference is made to a document containing an arbitration clause, with the intent to render such document as part of the main contract.¹⁹ Incorporation by reference is widely considered in case law and doctrine within the context of commercial maritime law. Please see below for relevant discussions.</p>
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>There is no consensus on how the reference should be made in order to incorporate the arbitration agreement.²⁰ In doctrine and in practice, it is generally advised to include a clear and separate reference specific to the arbitration clause itself, e.g., “arbitration clause included”.²¹ Transfer of bill of lading (“B/L”) has become the main topic of discussion in this respect. Pursuant to Art.1237(1) and (2) of the TCC, disputes between carrier and holder of B/L are governed by the B/L and not by the contract of carriage drawn between the carrier and the shipper. It was the well-established position of</p>

¹⁸ **Erdem I** para.1745; **Esen** pp.194-195; *Esen* argues that if an arbitral award is rendered without establishing the consent of the assignee, then the setting aside court should annul the award in question or the enforcement court should refuse enforcement of such award due to the absence of a valid arbitration agreement.

¹⁹ **CPC** Art.412(3) provides the same rule applies to domestic arbitrations.

²⁰ **Şanlı I** pp.455-456 and 458; **Şanlı II** pp.773-775; **Erdem I** paras.1679-1680; **Esen** pp.162-163; **Keskin** pp.255-256; Some authors argue that a general reference to the document containing the arbitration agreement is sufficient as per **IAC** Art.4(2), while others argue specific reference is required. In relation to a dispute regarding sale of vegetable oil, TCA held that even though the contracts sent by the respondent (seller) were never signed by the claimant (buyer), the dispute is subject to arbitration on the basis of general reference made to FOSFA 54 in the purchase order sent by the respondent (**Nineteenth Civil Chamber of TCA** dated 08.05.1997 and numbered 1996/9619E. – 1997/4669K. which was also affirmed by the decision of the **General Assembly of TCA** dated 15.04.1998 and numbered 1998/19-256E. – 1998/279K., **Esen** p.163).

²¹ **Esen** p.164; **Şanlı I** p.458.

			TCA ²² and doctrine ²³ that in order for the holder of B/L to be bound by the arbitration clause in the contract of carriage, the arbitration clause must be clearly mentioned in the reference made thereto. However, by virtue of introduction of Art.1237(3) to the TCC in 2012, the above-mentioned requirement of specific reference was addressed. ²⁴ As per the said Article, if a reference to the voyage charter contract is made in the B/L, a copy of charter party should be submitted to the holder, in the course of transfer of the B/L. In this case, the holder of the B/L shall be bound by the provisions contained in the charter party to the extent such provisions permit. Subsequently, TCA, in its various decisions, held that a holder of B/L shall be bound by the charter party containing the arbitration clause provided that a copy of the charter party is submitted to the holder of B/L. ²⁵
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>	NO	A non-signatory third-party beneficiary of a contract does not automatically become a party to the arbitration clause in the contract, unless the said beneficiary consents to arbitration.

²² **Eleventh Civil Chamber of TCA** dated 23.05.1995 and numbered 1995/1903E. – 1995/4235K.; and **Eleventh Civil Chamber of TCA** dated 27.02.1997 and numbered 1996/6876E. – 1997/754 K. (**Esen** p.171); In this respect, future assignees of the B/L by endorsement would also be bound by the arbitration clause contained in the B/L; For further discussions, see **Eleventh Civil Chamber of TCA** dated 22.03.1999 and numbered 386E. – 2396K. (**Şanlı I** pp.458-459 and **Esen** FN 686).

²³ **Şanlı I** p.457; **Şanlı II** p.774; **Esen** p.171; For instance, a general reference such as “all other conditions as [expressed in the] charter party” will not suffice.

²⁴ **Şanlı I** p.459.

²⁵ **Eleventh Civil Chamber of TCA** dated 29.11.2017 and numbered 2016/8794E. – 2017/6687K. (TCA held that the burden of proof whether a copy of the charter party is submitted lies with the carrier); and **Eleventh Civil Chamber of TCA** dated 19.09.2017 and numbered No. 2016/1662E. – 2017/4494K. (www.lexpera.com)

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>	NA	
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>		<p>Consent of a non-signatory third-party beneficiary to the arbitration agreement may be explicit or implied. Consent may be implied through unambiguous conduct evidencing the beneficiary’s consent to the arbitration agreement.²⁶ Please refer to <i>Question III.1.b</i> below for the analysis of a decision of TCA on the issue of extension of arbitration agreement to non-signatory third-party beneficiaries at the setting aside proceedings.</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>	NO	
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>	NA	

²⁶ Esen pp.224-225; Keskin pp.263-264.

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>		<p>Pursuant to Art.504(3) of the Code of Obligations, an agent/representative cannot conclude an arbitration agreement without <i>special authority</i>.²⁷ Same requirement applies to legal representatives as per Art.74 of the CPC.</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>	NO	<p>Art.2 of the Civil Code provides that there is an obligation to abide by the rules of good faith when exercising rights and discharging obligations and further provides that the manifest abuse of right is not protected by the rule law. Good faith principle does not commit the non-signatory third party to international arbitration unless the party in question acted in accordance with/performed the arbitration clause itself and claimed invalidity subsequently at the enforcement stage.²⁸ In other words, a party benefitting from, and/or acting in accordance with the substantive provisions of the main agreement will not be bound, as a result, by the arbitration clause contained therein.</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. • 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	

²⁷ Erdem I para.1685; Şanlı p.450; Akıncı pp.391-394; Esen p.93; Keskin pp.262-263; Erdem I FN 1760: (i) **Decision of the Nineteenth Civil Chamber of TCA** dated 01.05.2003 and numbered 2002/3763E. – 2003/4764K., which was also affirmed by the **General Assembly of Civil Chambers of TCA** in its final judgment dated 18.10.2006 and numbered 2006/15-609E. – 2006/656K. This was a case where arbitration clause was deemed invalid as the representative who signed the sale agreement did not have special authority to sign an arbitration agreement; and (ii) **Decision of the Eleventh Civil Chamber of TCA** dated 23.03.2010 and numbered 2008/5901E. – 2010/3203K.: “*Before entering into any agreement on behalf of its principal, the agent must obtain specific approval of the principal in written form as per Art.121 of the Commercial Code. [.....] Moreover, Art.388(2) of the Code of Obligations and Art.63 of the CPC stipulate the circumstances in which special authority will be granted. As per these articles, special authority is required for a representative to execute an arbitration agreement. Otherwise, the arbitration agreement is null and void*”.

²⁸ Esen pp.33 and 236-237; Keskin p.267.

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>		<p>Good faith principle bites if a non-signatory party’s conduct is inconsistent with respect the arbitration agreement itself. If a non-signatory party participates in the arbitration proceedings and fails to object to the validity of the arbitration agreement in the arbitral proceedings, he/she will not be able to claim arbitration agreement is not valid at the setting aside/enforcement proceedings. In two separate enforcement proceedings, TCA rejected the objections raised with respect to the validity of the arbitration agreements by claimants on the grounds that the said claimants actively participated in the appointment process of the arbitrators.²⁹ According to some scholars an arbitration agreement may also be extended to a non-signatory third party in the event that the said third party signs the terms of reference, but does not raise objections with respect to the validity of the arbitration agreement in the arbitral proceedings.³⁰</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	<p>A typical example of implied consent is stipulated by Art.4(2) of the IAC which expressly provides that consent to arbitration is deemed to exist where respondent does not object in its statement of defence to the existence of an arbitration agreement raised by claimant in its statement of claim (see <i>Question I.1.2(ii)</i> above).³¹ Other examples of implied consent are discussed extensively in jurisprudence. Party’s active participation in the negotiation, execution, performance and/or termination of the main contract may not be sufficient to imply consent to the arbitration clause contained therein.</p>
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 		<p>For consent to arbitration agreement to be implied and a non-signatory party to be bound by the arbitration agreement, there has to be evidence of consent through unambiguous conduct with respect to the arbitration agreement itself.³² Performance of the substantive provisions of the main contract</p>

²⁹ **Eleventh Chamber of TCA** dated 02.10.1979 and numbered 3855E. – 4351K. **Chamber of Commercial Law of TCA** dated 08.06.1966 and numbered 1287E. – 1951K. (**Esen p.32**); Please also see other TCA decisions under *Question II.6* below (Implied Consent).

³⁰ **Akıncı** pp.280-283; **Şanlı I** FN 571; **Esen** pp.30 and 238.

³¹ **Esen** p.22; **Kocasakal** p.38; **Akıncı** pp.171-172.

³² **Şanlı I** pp.464-467; **Esen** pp.33 and 332.

	<p>the circumstances under which they are likely to be bound.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>will not suffice.³³ TCA held that even though the main contract was validated through performance, arbitration clause contained therein was not.³⁴ If consent to arbitration can be implied through conduct, validity of the arbitration agreement cannot then be challenged at the enforcement stage as it would be deemed to be contrary to good faith principle.³⁵ In various enforcement proceedings, TCA held that claimants were bound by the arbitration agreement they performed.³⁶</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>	NA	
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>	NO	<p>There are two opposing views regarding application of this doctrine to arbitration: (1) piercing the corporate veil doctrine arises out of the principle of prohibition of abuse of rights (Art.2 of the Civil Code). Only under very limited circumstances this principle may commit a non-signatory to arbitration;³⁷ and (2) the more dominant view is that, this doctrine is a norm of substantive law and therefore it only applies to substantive law agreements, and not to procedural law agreements such as arbitration agreements. For this reason, it is not possible to extend the arbitration agreement to a third party through piercing the corporate veil in the absence of</p>

³³ This view is based on two principles: (i) principle of separability of the arbitration clause; and (ii) the principle that the main agreement is a contract of substantive law, whereas the arbitration agreement is of procedural law nature (**Şanlı I** pp.462-464; **Esen** pp.33-34); For opposing and minority view, see **Kocasakal** p.39.

³⁴ **Nineteenth Chamber of TCA** dated 15.11.1995 and numbered 1995/9108E. – 9685K. (**Şanlı I** pp.462-463; **Esen** pp.31-32)

³⁵ **Esen** p.32.

³⁶ **Şanlı** pp.465-467: (i) *Parties Appointed Arbitrators*: **Eleventh Chamber of TCA** dated 02.10.1979 and numbered 3855E. – 4351K.; **Chamber of Commercial Law of TCA** dated 08.06.1966 and numbered 1287E. – 1951K.; and **Chamber of Commercial Law of TCA** dated 08.06.1966 and numbered 1287 E.- 1951 K., or (ii) *Failed to Object throughout Arbitral Proceedings*: **Nineteenth Chamber of TCA** dated 07.11.2002 and numbered 2249E./7219K.; and **Eleventh Chamber of TCA** dated 09.04.2004 and numbered 2003/6774E. – 2004/3751K.; Additionally, various scholars considered *signing the terms of reference* in arbitral proceedings without raising objection to the validity of the arbitration agreement to be in the same category (**Akıncı** pp.280-283; **Şanlı I** FN 571; **Esen** pp.30 and 238).

³⁷ **Erdem I** paras.1717-1719. **Kocasakal** pp.59-61. Kocasakal is of the opinion that **Civil Code** Art.2 is a fundamental legal principle, part of *lex mercatoria* and applicable to all fields of law, including substantial and procedural law agreements.

			consent to arbitrate, and therefore general venue for resolution of disputes is courts. ³⁸
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. • 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.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>		To our knowledge, there is no decision of TCA where a non-signatory is committed to the arbitration agreement through piercing the corporate veil doctrine, to date. ³⁹
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	In addition to the theories discussed above, other legal theories and circumstances are addressed in Turkish legislation and jurisprudence. These include: (i) Universal Succession, (ii) Insurance, (iii) Guarantee, (iv) State, (v) Arbitration Clause in AOA, (vi) Group of Companies, and (vii) Procedural Law. Amongst these ‘insurers’ and in some circumstances the ‘State’ can be committed 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 		<i>Insurers</i> are ordinarily bound by the contract containing arbitration clause as successor pursuant to Art.1472 of the TCC. ⁴⁰ In addition, an arbitration agreement signed by a <i>unit or enterprise of the State</i> may be extended to the non-signatory State where such unit or

³⁸ Şanlı I pp.471-472; Esen pp.255-256; Mekengeç pp.28-30.

³⁹ Köşgeroğlu p.11.

⁴⁰ Fourteenth Chamber of the Regional Courts of Appeal of Istanbul dated 10.09.2020 and numbered 2019/828E. – 2020/883K. (www.lexpera.com); Eleventh Civil Chamber of TCA dated 01.07.2008 and numbered 2007/1590E. – 2008/8780K., and Eleventh

	<p>the circumstances under which they are likely to be bound.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		enterprise do not have a separate legal personality. ⁴¹
<p>III. Enforcement of an Arbitral Award against a Non-Signatory</p>		<p>(Yes /No /NA)</p>	<p>Additional comments, if any.</p>
<p>III.1</p>	<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>	<p>YES</p>	<p>To our knowledge there is no court decision regarding enforcement of such an award. However, there is a relatively recent decision of TCA in relation to a setting aside proceedings under Art 15. of the IAC (see, <i>Question III.1.b</i> below)</p>
<p>III.1.a</p>	<p>If your answer to III.1 is <u>yes</u>, please explain which provision(s) of the New York Convention, or any other bilateral or multilateral convention on the enforcement of arbitral awards, was (were) relied upon as the basis for the application/objection.</p> <p>[Please provide your response in the comments column and limit it to one paragraph.]</p>		<p>There is no reference to a provision of the New York Convention, or any other bilateral or multilateral convention.</p>
<p>III.1.b</p>	<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>		<p>TCA has overruled the judgement of the Third Civil Court of First Instance of Ankara which refused to set aside the ICC tribunal’s decision to extend the arbitration agreement to non-signatory third-party beneficiaries (two state organs) of a concession agreement between a state entity (Information and Communication Technologies Authority) and a GSM operator. TCA disagreed with the Court of First Instance stating that the arbitration agreement did not conform with the “in writing” requirements of the IAC Art.4 and that even if the non-signatory state organs were to be deemed as beneficiaries under the concession agreement, such state organs had NOT provided explicit or implied consent to the arbitration agreement. For these reasons the third parties could not be said to be party to the arbitration</p>

Civil Chamber of TCA dated 04.10.2004 and numbered 2004/189E. – 2004/9234K. (**Erdem I** FN 1843); **General Assembly of Civil Chambers of TCA** dated 01.02.1995 and numbered 1994/11–765E. –1995/39K. (**Esen** FN 801); However, some scholars criticise the courts on the grounds that they are solely relying on the succession principle without sufficiently examining whether the rights (and obligations) which are transferred to the insurer by succession include the consent to arbitrate (**Erdem I** paras.1743-1744; **Esen** p.201. **Keskin** pp.260-261).

⁴¹ **Esen** pp.274-276 and 342; A State unit or enterprise without a separate legal personality is already an organ of the State and its signature of an arbitration agreement would bind the State directly.

			agreement merely on the grounds that the main contract contained various terms to their benefit. In conclusion, TCA was of the opinion that the arbitral tribunal acted outside of its jurisdiction by allowing the extension of the arbitration agreement to the non-signatory third parties and for this reason TCA held that arbitral decision should have been set aside by the Court of First Instance. ⁴²
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	To our knowledge, there is no court decision in which the enforcement of an award was requested against a non-signatory third party that was a non-signatory to the arbitration agreement and not a party to the arbitral proceedings/award.
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. Miscellanea		(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	Law No.805 requires all contracts between Turkish individuals, companies and enterprises to be executed in Turkish language, failing that the contract in question may be deemed invalid. TCA's position on arbitration agreements is contradictory, ⁴³ therefore due consideration should be given as to whether the contract complies with the Law No.805 when considering the issue of the extension of an arbitration clause to a non-

⁴² Eleventh Civil Chamber of TCA dated 25.06.2015 and numbered 2014/9538E. – 2015/8707K. (www.lexpera.com)

⁴³ Erdem I para.1668; Şanlı I pp.353-354; Akıncı pp.173-174.

			signatory. It should also be noted that if the non-signatory, within 30 days of receiving notice of the arbitral award, initiates a setting-aside proceeding against the award in question before the Regional Courts of Appeal, enforcement of the arbitral award shall automatically be suspended. ⁴⁴
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>	YES	Under Turkish law, there is no specific reference to the time-limitation period regarding the request for enforcement of an international arbitration award. However, the general consensus is that such request should be filed within 10 years after the finalization of the award as per Art.156(2) of the Code of Obligations and Art.39 of the Debt Enforcement and Bankruptcy Law No.2004.

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⁴⁴ IAC Art.15(A)(2).

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