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## Second Circuit Invokes Standard Contract Provisions to Limit the Use of Agency and Estoppel to Bind Non-Signatories to Arbitration

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The United States Court of Appeals for the Second Circuit has long recognized five bases for binding non-signatories to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. See *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). On April 2, 2020, the Second Circuit issued a decision that may significantly curtail the ability of parties to utilize at least two of these theories.

In *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd*, --- F.3d ---, 2020 WL 1592487 (2d Cir. Apr. 2, 2020), the Court reversed the confirmation of an arbitration award against a non-signatory corporate parent, reasoning that the district court incorrectly applied an agency theory and a direct benefits theory of estoppel. In so holding, the Second Circuit clarified that fairly typical contractual provisions (such as a third-party beneficiary clause) might “explicitly exclude” from the scope of an arbitration clause related parties that were specifically mentioned in the contract and that admittedly participated in the underlying contractual relationship.

Given the prevalence of the types of standard clauses invoked by the Second Circuit, parties seeking to apply arbitration provisions in contractual agreements to non-parties would be wise to familiarize themselves with the factors considered by the Second Circuit in *Trina*.

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