

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

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*.

I. Background

Jasmin Solar Pty Ltd (“Jasmin”) is an Australian company founded in 2012 that provides solar power equipment and installation to Australian residents. In 2012, Jasmin commenced negotiations with the U.S.-based division of Trina Solar US, Inc. (“Trina”) to purchase solar panels. “Trina demanded that a United States-based company sign the Contract as a counterparty and submit the solar panel purchase orders.” 2020 WL 1592487, at *1. Accordingly, Jasmin authorized JRC-Services LLC (“JRC”) to act as Jasmin’s agent for all business dealings with Trina.

The contract, which was governed by New York law, referred “to Trina as the ‘Seller,’ JRC as the ‘Buyer,’ and Trina and JRC—but not Jasmin—collectively as the ‘Parties.’” *Id.* The contract referred to Jasmin “as JRC’s ‘parent company’ responsible for ‘guarantee[ing] payment’ for solar panel shipments under the Contract,” *id.*, but otherwise was silent regarding Jasmin. During the time period covered by the contract, Jasmin continued to communicate with Trina about deliveries, reviewed purchase orders before delivery, and confirmed that Jasmin would pay the relevant invoices. *Id.*

In 2014, JRC and Jasmin refused to pay Trina’s invoices, based upon their contention that Trina failed to deliver the correct model of solar panels on time. Relying on the contractual arbitration provision that provided “[a]ny dispute or controversy or difference arising out of or in connection with this Contract ... between the parties hereto ... shall be submitted to binding arbitration,” Trina commenced arbitration against both JRC and Jasmin. Jasmin objected to the arbitration, asserting that it was not a party to the contract, and moved to dismiss for lack of jurisdiction. The arbitrator rejected these arguments, denied Jasmin’s motion, and Jasmin declined to participate further in the arbitration to preserve its objection. Ultimately, the arbitrator awarded \$1,305,131 to Trina and ruled that JRC and Jasmin were jointly and severally liable, even though Jasmin had not participated in the substantive portion of the arbitration.

Trina sought to confirm the arbitration award in the United States District Court for the Southern District of New York (Caponi, J.). Jasmin contemporaneously moved to vacate the award, again arguing that it was not

a party to the contract. Applying *de novo* review, the district court denied Jasmin’s motion to vacate and granted the petition to confirm the award. The district court specifically invoked an agency theory, finding that Jasmin was bound by the contract as a principal, and also found that Jasmin was bound by the contract’s arbitration provision under the direct benefits theory of estoppel.

II. The Second Circuit Rejects Both Bases Invoked by the District Court

Rejecting both bases cited by the district court, the Second Circuit found that Jasmin was not a party to the contract, reversed the district court’s order confirming the arbitration award, and remanded the case to the district court with instruction to dismiss the case as to Jasmin. The Second Circuit’s decision focused primarily upon the agency theory, but the contractual provisions cited by the Second Circuit apply equally to the estoppel theory.

As an initial matter, neither Trina nor Jasmin disputed that “JRC had actual authority to act on Jasmin’s behalf in its business dealings with Trina” and that JRC was in some sense Jasmin’s agent. *Id.* at *3. The Court’s analysis of the agency theory instead centered upon whether the contract “explicitly exclude[d]” Jasmin as a party. The Court resolved this question by reference to the “language and structure of the Contract as a whole, without resorting to any extrinsic evidence of the parties’ intentions.” *Id.*

Although the contract nowhere explicitly stated that “Jasmin was not a party,” or words to that effect, the Court invoked several common contractual provisions to conclude that Jasmin could not be bound by the arbitration provision.

- First, and perhaps most intuitively, the Court reasoned that the “Contract explicitly lists Trina as the only ‘Seller’ and JRC as the only ‘Buyer’” and further defined “Parties” to include the Seller and the Buyer. *Id.* This was important, the Court found, because “the arbitration clause itself is expressly limited to ‘dispute[s] ... between the parties.’” *Id.*
- The Court also reasoned that interpreting the contract as a three-way agreement would deprive its provisions of coherence. For example, the contract provided that “Buyer’s parent company (Jasmin Solar Pty Ltd.) shall guarantee payment.” *Id.* The Court found that, “[a]lthough nothing in the abstract forecloses Jasmin from serving as both principal and guarantor, merging the two roles here would require that we read this clause in a practically unworkable way: ‘Jasmin’s parent company (Jasmin) shall guarantee payment [for Jasmin].” *Id.*
- The Court concluded that the contract’s termination provision also could not support a finding that Jasmin was an intended party to the contract. *Id.* (permitting termination “in writing by one Party to the other Party” would allow the contract to be terminated by a writing “sent between JRC and Jasmin” without any involvement of Trina); *see also id.* (“The Contract’s repeated references to ‘either’ or ‘neither’ party rather than ‘any party’ or ‘none of the parties’ only further reinforces our conclusion that the Contract is bilateral, not trilateral, in nature, binding Trina and JRC while excluding Jasmin from its terms.”).
- Finally, and perhaps most importantly, the Court cited to the contract’s standard third-party beneficiary clause as evidence that Jasmin was not bound by the arbitration provision. *Id.* at *4 (finding that the language “[n]othing in this Contract is intended to confer on any person who is not a party hereto any right to enforce any term of this Contract clearly supports our conclusion.”) (quotation marks omitted).

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The Second Circuit also dispensed with the direct benefits theory of estoppel analysis. Explaining that the “guiding principle” of this theory is “whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause,” the Court found dispositive the third-party beneficiary clause discussed above. *Id.* (citations omitted). The Court reached this conclusion despite its recognition that “Jasmin surely benefited from the contractual relationship between Trina and JRC, as it ultimately received solar panels sold by Trina to JRC.” *Id.*

III. Implications

The Second Circuit’s decision in *Trina* makes clear that care must be taken to articulate the parties’ intentions regarding the arbitrability of disputes involving non-signatories to a contract. Agency and estoppel theories may be undone by clear and unambiguous language that appears in many (if not most) commercial contracts. Prior to this decision, a party seeking to arbitrate a dispute may have taken comfort in the fact that the contract did not “explicitly exclude” a non-signatory related party, but *Trina* makes clear that even a basic third-party beneficiary provision may preclude arbitration of disputes involving guarantors, principals, and other entities not specifically defined as being a party to the underlying agreement.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Peter J. Linken at 212.701.3715 or plinken@cahill.com; G. Kevin Judy II at 212.701.3499 or kjudy@cahill.com; or email publications@cahill.com.