ALERT MEMORANDUM

Second Circuit Overturns Arbitration Award Against Non-Signatory Parent Company

April 3, 2020

On April 2, 2020, the Second Circuit held that an arbitration award could not be enforced against a parent company that was not a signatory to a contract's arbitration agreement, even though the parent company was listed in the contract as a guarantor and was involved in the purchase of goods pursuant to the contract. In so doing, the Court confirmed its commitment to a literal, textualist approach to contractual interpretation notwithstanding the commercial realities indicating that the parent company was involved in the parties' relationship and played a key role in the dispute from which the arbitration arose.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Howard S. Zelbo
+1 212 225 2452
hzelbo@cgsh.com

Jeffrey A. Rosenthal
+1 212 225 2086
jrosenthal@cgsh.com

Ari D. MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

Boaz S. Morag
+1 212 225 2894
bmorag@cgsh.com

Katie L. Gonzalez
+1 212 225 2423
kgonzalez@cgsh.com

One Liberty Plaza
New York, NY 10006
T: +1 212 225 2000

clearygottlieb.com

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Judicial Authority to Determine Obligations of a Non-Signatory to an Arbitration Agreement

The U.S. Supreme Court has held that whether a party has submitted its dispute to arbitration is a question that should be determined by courts independently, *i.e.*, applying a *de novo* standard of review without any deference to the arbitral tribunal's own determination.[1] Therefore, courts that typically have otherwise limited authority to vacate arbitration awards under the Federal Arbitration Act ("FAA") or other state arbitration laws may have largely unfettered authority to review an arbitration award where a non-signatory to an arbitration agreement claims that it is not bound by such an agreement.[2] Yesterday, the U.S. Court of Appeals for the Second Circuit addressed this circumstance, and vacated an arbitration award against a corporate parent that was not a signatory to an arbitration agreement, overturning the findings of the arbitral tribunal and the district court.

Background to *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*

In *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, Jasmin Solar Pty Ltd. ("Jasmin"), an Australian company providing solar power equipment and installation, negotiated a contract with a U.S.-based division of Trina Solar US, Inc. ("Trina"), a Chinese solar panel manufacturer, to arrange for the purchase of Trina solar panels (the "Contract").[3] After Trina demanded that Jasmin have a U.S.-based company execute the Contract, Jasmin authorized JRC-Services LLC ("JRC"), a Nevada-based company, to act on its behalf with respect to all dealings with Trina, and – pursuant to a 2012 Arrangement of Rights and Obligations – specifically certified that JRC would act as its agent to purchase solar panels from Trina and that Jasmin would guarantee such payments. Trina and JRC ultimately signed the Contract, governed by New York law, in order to facilitate the sale and purchase of solar panels. While Jasmin was described in the Contract as JRC's "parent company" responsible for "guarantee[ing] payment" for the shipment of solar panels under the Contract, Jasmin neither signed the Contract nor (apparently) executed a separate parent guarantee, and the Contract listed only JRC and Trina as the "Parties."[4] Although Trina disclaimed having any relationship with Jasmin in communications following the execution of the Contract, stating that Trina had "removed Jasmin Solar from the equation entirely," Jasmin remained involved in the parties' relationship, including through communications regarding the delivery schedules for solar panel purchases.[5] Jasmin also paid the invoices for the solar panels.

The Contract included an arbitration clause providing that "[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."[6] When Trina and JRC had a dispute over the delivery of particular models of solar panels, and JRC and Jasmin refused to pay invoices under the Contract, Trina initiated an arbitration with the International Centre for Dispute Resolution in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") against both JRC and Jasmin. Jasmin initially asserted that it was not a party to the Contract and moved to dismiss the arbitration for lack of jurisdiction. The arbitral tribunal denied Jasmin's motion on both agency and estoppel grounds. Thereafter, Jasmin refused to participate in the arbitration proceedings. JRC did participate. Despite Jasmin's lack of participation, the arbitral tribunal ultimately issued an award against JRC and Jasmin, jointly and severally.

Trina moved to confirm the arbitration award against both Jasmin and JRC. Jasmin moved to vacate the award, arguing that it was not a party to the Contract

[1] *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.").

[2] *See* 9 U.S.C. § 10(a) (listing four limited grounds for vacatur of an arbitration award).

[3] *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, No. 17-572-cv, slip op. at 3 (2d Cir. Apr. 2, 2020).

[4] *Id.* at 4.

[5] *Id.* at 4-5.

[6] *Id.* at 4.

and could not be required to arbitrate.[7] The District Court for the Southern District of New York denied Jasmin's motion to vacate and confirmed the award on the grounds that JRC acted as Jasmin's agent and also that Jasmin was estopped from arguing that it was a non-party to the Contract. Jasmin appealed.

The Second Circuit's Decision

In *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, the Second Circuit considered whether a parent corporation that was a non-signatory to the contract including the arbitration agreement could be bound by an arbitration award finding the corporate parent jointly and severally liable for damages.[8] Applying New York law pursuant to the Contract, the Court rejected the two theories under which the district court held that Jasmin, as a non-signatory, was bound by the arbitration agreement.[9]

Under the agency theory, the Court first considered whether JRC had entered into the Contract as principal or as agent on behalf of Jasmin. The Court noted that "New York courts have long held that '[u]nless the contract explicitly excludes the principal as a party,' a court may consider extrinsic evidence to identify an unnamed principal to the contract, or to determine, more specifically, whether a nonsignatory is bound by the contract [entered into by its agent] as a principal."[10] The Court determined that the Contract easily met the threshold question in the agency determination – namely, that the Contract "explicitly excludes" Jasmin as a party. Considering the "language and structure of the Contract as a whole," the Court noted that "several features" of the Contract supported the conclusion that Jasmin was explicitly excluded as principal.[11] These included the Contract's specific reference to only JRC and Trina as "Buyer" and "Seller," respectively, their collective definition as the "Parties" to the Contract, and the arbitration clause's express limitation to "dispute[s] . . . between the parties."[12] The Court noted that finding Jasmin to be a principal would render the guarantee clause (whereby Jasmin guaranteed the payments under the Contract) "practically unworkable;" additionally, the Contract's third-party beneficiary clause – which limits any rights and obligations conferred by the agreement to JRC and Trina as the two entities listed in the Contract – would be rendered "odd."[13] Given these provisions, the Court found that Jasmin was not bound as a principal to the Contract under the agency theory.

Considering next whether Jasmin could be bound by the Contract's arbitration agreement under the direct benefits theory of estoppel, which prevents a party from knowingly exploiting an agreement by avoiding arbitration,[14] the Court looked to whether "the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause."[15] Here, the Court adopted a textualist approach to the Contract to find that "the Contract itself does not provide Jasmin any direct benefit" and "[b]ecause Jasmin was not a party to the Contract . . . it could not enforce any rights or duties under the Contract."[16] The Court stated that there was "no record evidence that Jasmin ever invoked the Contract to demand delivery of the solar panels," "[n]or did Jasmin, on this record, ever invoke Trina's duties under the Contract to seek or obtain a benefit."[17] This conclusion appears somewhat at odds with the Court's previous acknowledgement in its background discussion that "Jasmin continued to communicate with Trina regarding delivery schedules and credit line issues and to review purchase orders prior to delivery" and "Jasmin

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[7] JRC separately and additionally filed a motion to vacate the award, claiming, among other grounds, that the arbitration proceeding was unfair and the award incomplete and ambiguous. The district court similarly dismissed JRC's motion to vacate and confirmed the arbitration award. JRC did not appeal that decision.

[8] *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, slip op. at 5-6.

[9] New York law recognizes five grounds as permissible bases under which an adjudicator can bind non-signatories to arbitration: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

[10] *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, slip op. at 8.

[11] *Id.* at 9.

[12] *Id.*

[13] *Id.* at 11-12.

[14] *Id.* at 13.

[15] *Id.* (quoting *Belzberg v. Versus Invs. Holdings, Inc.*, 21 N.Y.3d 626, 633 (2013)).

[16] *Id.* at 14.

[17] *Id.*

confirmed that it would pay the invoices for the solar panels delivered to JRC," although the Court also observed that Trina itself stated that "'Jasmin Solar is no longer a client'" of Trina shortly after the Contract was executed, "currently [Trina] do[es] not have any executed contracts with Jasmin," and that Trina had "removed Jasmin Solar from the equation entirely."[18]

Having found that neither theory of agency nor estoppel applied to bind Jasmin, the parent company and parental guarantor of JRC, as a party to the Contract containing an arbitration agreement, the Court held that Jasmin was not bound by the arbitration award.

Implications of the Case

This decision highlights a number of pitfalls that can occur when parent corporations are involved in, but are not expressly a party to, an arbitration agreement. The decision does not otherwise call into question, however, the ability of a party to an arbitration agreement to seek enforcement of an arbitration award from a parent company under other means.

First, the Court's treatment of Jasmin as a parental guarantor without any apparent connection to the arbitration agreement underscores the importance of a carefully constructed contract. Typically, a parental guarantor is required either to sign the contract or to execute a separate guarantee agreement with the same arbitration clause found in the primary contract. The outcome in *Trina Solar* suggests that, unless the parent guarantor has either signed the contract or executed a separate agreement with the same arbitration clause, the Court may be unwilling to find that the non-signatory parent guarantor is subject to the arbitral tribunal's authority, as was the case here. Such an outcome could likely otherwise be avoided by understanding how courts in the Second Circuit may treat arbitration awards involving non-signatories in the aftermath of the *Trina Solar* decision, and drafting the appropriate contractual provisions to clearly indicate the parent company's role and submission to the arbitration agreement.

It should be noted that the Court acknowledged that "the determination about whether parties have agreed to arbitrate their disputes" is "'often fact specific and differ[s] with the circumstances of each case.'"[19] Therefore, similarly-situated parties seeking to avoid the same result as in *Trina Solar* may be able to argue that the Court's disposition constitutes a more limited holding that cannot be extended beyond the specific facts of the particular case.

Second, notwithstanding the Court's decision to vacate the arbitration award against Jasmin, there still remain options by which a parent company could be liable for the damages awarded following an arbitration proceeding. As the Second Circuit noted in *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, "the question of whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments, is one left to the law of the enforcing jurisdiction."[20] *Trina Solar* does nothing to disturb this conclusion; thus, a parent company or other third party may still be liable for damages awarded pursuant to an arbitration award even if that entity is a non-signatory to the arbitration agreement and not a named party in the arbitration award.

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[18] *Id.* at 5.
[19] *Id.* at 6 (internal citation omitted).
[20] *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017).