The Appropriate Existence of the Third Non-signatory Party in the International Commercial Arbitration

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Abstract: Arbitration is an agreement between the contractual parties. Without this agreement, the parties cannot handle the disputes to the arbitral tribunal. However, it always happens when the third non-signatory is involved into the contract which includes an arbitration term, the question arising from whether the non-signatory party could be compelled to the arbitration. This article thus attempts to answer the core research question. The obstacles from the characteristics of arbitration which includes party autonomy, contractual by nature and confidentiality for the non-signatory to be involved will be described. In the second part, the existence of the involvement in both national and international laws will be analyzed. The last part is intended to present the appropriate existence of this involvement.

Key words: International Commercial arbitration, Third Non-signatory party,Agreement.

Introduction

It is undeniable that arbitration agreement is the "cornerstone of the arbitration process".[1] Arbitration could only be possible where the parties have consented. It is essential for one party to demonstrate that the other was aware of and accepted arbitration terms. If there was to be a valid arbitration, there must be a valid clause firstly. This is recognized not only by national laws but also by international treaties.[2]

Arbitration is the creature of a contract between the parties.[3] No party will be bound to the proceedings if he has not agreed. In many arbitration awards, however, particularly the ICC arbitral tribunals extended the scope and effects of their jurisdiction to non-signatory companies within the group that the signatory company belongs, such as in the case of Dow Chemical France v. Isover Saint Gobain (hereinafter "Dow Chemical"). In that case, the ICC Tribunal affirmed in its Interim Award the complete

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[1] Tibor S. Varady, John J. Barcelo III, & Arthur T. von Mehren, International Commercial Arbitration: A Transnational Perspective 83 (1999)

[2] Alan Redfern &Martin Hunter, Law and practice of International Commercial Arbitration, 1-06 (3d ed. 1999)

[3] Stewart McClendon & R.E. Goodwin, International Commercial Arbitration in New York 3 (1986)

autonomy of the arbitration clause and the power conferred on the arbitrator to take any decision as to his own jurisdiction without obliging him to apply any national law in order to do so on the basis of the former and then current ICC rules.[4] Moreover, the tribunal recognized the "undivided economic reality" of the group of companies as well as the "mutual intentions of all parties".[5] However, together with the other two characteristic of the arbitration – confidentiality and party autonomy, the traditional approach objects to the involvement of non-signatory party into arbitration proceedings.[6] The topic of the extension of the arbitration clause to non-signatory party, therefore, probably is not only one of the most arguable topics in international arbitration, but also a topic nowadays which gains more and more importance as a consequence of the globalization of international business and trade transactions.

A signatory to an arbitration agreement is someone who has signed the form of an arbitration agreement such as arbitration agreement, or other agreements which contained arbitration clause, while a non-signatory is someone who has not. This article tries to reflect the existence of the third non-signatory party problem in practice and is intended to find an approach to deal with the problem in the International Commercial Arbitration.

1. In opposition to the existence of the Third Non-signatory Party

§1.1 Party autonomy

"The French Civil Code notoriously recognized that the contract is the law which the parties give to themselves. To the extent that a legal order recognizes the non-state contract as an institution, some measure of party autonomy is therefore necessary."[7]

It is widely held that the basis of arbitration is the intentions of the parties. One of the reasons for choosing arbitration is that the parties have a free right to choose the governing rules or laws.[8] It is truly to say party autonomy is certainly a significant characteristic of arbitration. The principle of party autonomy permits contractual parties freely to choose the arbitrators, the substantive law governing their disputes, the procedural proceedings, the place of arbitration and so on with relative ease.

The crucial difference between the arbitration and the court is that the basis of the jurisdiction of an arbitral tribunal is the intention of the parties since arbitration is a

[4] Interim Award in Case No. 4131 in 1982, Dow Chemical France v. Isover Saint Gobain
[5] Id.
[6] James M. Hosking, The third party non-signatory's ability to compel international commercial arbitration: doing justice without destroying consent, Pepperdine Dispute Resolution Law Journal, 2004
[7] Xu Hui, the law governing contractual relations, www.iolaw.org.cn, in April, 2015
[8] Helena Carlquist, Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration, 2007

voluntary dispute resolution mechanism, whereas courts owe their competence from the power of sovereignty or of an international convention.[9] In the courts, a third party could bring an action against the contractual parties if she has connected interest from the contract or the judicial awards, and also the court or the contractual party could compel the third party to join the proceeding if necessary. None of the situations involve the "will" to the jurisdiction of the court. On the contrary, consensual is the nature of the arbitration. No one could be compelled to arbitrate if he does not have this "will". Even the contractual party could contend that he did not intend to arbitrate or his intent was induced by fraud or otherwise imperfect, if this is proved to be true, then the contractual party also cannot be compelled to the arbitration proceeding which manifests the important of the "will" in arbitration.

Furthermore if the arbitral tribunal violated the party's consensual intentions about arbitration procedure, contractual parties could also contend that the award was void. For example, in the declaration of Sudargo Gautama to the case Karaha Bodas v. Perusahaan, he stated that party autonomy is one of the key foundations of arbitration so that the tribunal consolidated two separate arbitrations into a single proceeding without the agreement of the parties is grounds for annulment.[10]

Therefore, according to the nature of party autonomy of the arbitration, opponents held the view that the third non-signatory party could not be compelled by the arbitrator or by the contractual parties because the third party does not intend to and she does not have this "will" either. Also the contractual parties are not definitely willing to be involved into the arbitration proceedings with the third non-signatory party. If the arbitrator or the contractual parties compel the third non-signatory party to arbitrate, it violates the spirit of the arbitration which is knows as contractual nature.

§1.2 Contractual by nature

Arbitration is a matter of contract. Only the contractual parties could be bound to it.[11] This is to say only the parties who signed the contract could be bound to the arbitration clause. No other party will be involved if he has not signed such a contract. The arbitration agreements are generally divided into two types: (1). Agreements which provide that, if a dispute arises, it would be resolved by arbitration. This arbitration clause is generally contained in the normal contracts. (2). Agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration which was also called "submission agreement". The party seeking to compel the

[9] Varady, Barcelo, & Von Mehren, supra note 5, at 61
[10] Sudargo Gautama, Declaration of Karaha Bodas v. Perusahaan, 2002,
[11] Intergen N.V. v. Eric F. Grina, Alstom Limited and Altom Power NV, United States court of Appeals for the First Circuit, 2003

arbitration must establish the existence of an enforceable arbitration clause and that the parties intended to arbitrate the dispute issue.

Arbitration implies a contractual obligation in itself. In the same manner, the notion of "privity" has always held a fundamental place in our understanding of arbitration. The principle of Privity of Contract is that a third party cannot sue for damages on a contract to which he is not a party. It is a process where the same persons are the parties to the procedural agreement, the parties to the process whose rights and obligations are at issue, and those who are bound by the decision.[12] It is widely accepted that only a person, who is a party to an agreement or in privity with a party to an arbitration agreement, has the right to invoke the arbitration provisions.

"A majority of international commercial contracts include an arbitration clause which in the event of a contractual dispute directs the parties to apply arbitral proceeding."[13] And the contractual nature has generally been accepted as one of the advantages of International Commercial Arbitration. Hence, strict contractualists argue that the third non-signatory party should not be bound to the arbitration clause and the arbitral tribunal has no right to compel her to hear the arbitration proceedings unless the party either expressly or impliedly agreed to arbitrate. Moreover, they argued that if we involve the third non-signatory party into the international commercial arbitration, it will violate the contractual nature of arbitration.

§1.3 Confidentiality

Confidentiality has long been touted as one of the most important advantages of arbitration.[14] Documents and information produced in and for the purposes of arbitral proceedings were regarded as confidentiality, this is to say they do not have to disclose their information or documents to the public. In fact, many parties choose to arbitrate their disputes rather than litigate them precisely because they do not want certain information, such as trade secrets, revenue, and other sensitive information to become public.

In the international business transactions, more and more legal persons even do not want others to know there is a dispute between them, because it may be harmful to their reputation which may decline their profits, or their disclosure information including some secrets, while court proceedings are not confidential and trials are usually open to the public. Whereas in arbitration, there is a widely-held view that arbitration is confidential. If you choose it, all your information and documents do not have to be

[12] Braun Equipment Co., Inc. v. Meili Borelli Associates
[13] Helena Carlquist, Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration, 2007
[14] Hans Smit, Confidentiality, American Review of International Arititration, 1998

disclosed to the public, and only the arbitrators and arbitration parties could see the documents, which was seen as a significant advantage of arbitration.

We could find the provisions about the confidentiality not only in national legislations but also in international regulations. For example, in Arbitration Rules of The London Court of International Arbitration (1998):

"Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."[15]

Also we could find this kind of provisions in other rules, such as the Article 21 of ICC rules provides: persons not involved in the proceedings shall not be admitted to the hearings except with the approval of the tribunal and the parties.[16] Therefore, opponents to third non-signatory party participation in International Commercial Arbitration often argue that if the third non-signatory party is allowed to be established in the International Commercial Arbitration, it will destroy the confidentiality of arbitration which the parties thought so important and many commercial secrets will be public.

2. The existence of the Third Non-signatory Party

Although the involvement of the Third Non-signatory Party in International Commercial Arbitration has been widely argued, some national laws and international arbitration regulations as well as practices have some legislation about the existence of third parties or some arbitral tribunals involve the third non-signatory party into arbitration proceedings.

§2.1 The existence in National Law

In some countries there exists legislation about the involvement of the third non-signatory party. The widely known provision is article 1045 of the Code of Civil Procedure of Netherlands 1986, is about the third non-signatory party in arbitration: *"At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the*

[15] Article 30 (1), Arbitration rules of the London court of international arbitration (1998).
[16] Article 21, ICC rule

proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties".[17] According to this provision, the arbitral tribunal could involve the third non-signatory party in the arbitration on the condition of obtaining all parties' consent in writing. Not only in Dutch civil code, but also in Belgian arbitration law we could find similar provisions. And in the Japan Commercial Arbitration Association Commercial Arbitration Rules, the third non-signatory party could be involved in the arbitration under the condition that the third party intends and all of the parties and arbitrators agree. *"Any interested person who is not a party to a particular arbitration may, with the consent of all the parties to such arbitration, participate in such arbitration as a claimant or be allowed to participate therein as a respondent".*[18]

Moreover in the United States, international arbitration is addressed at the federal level through the Federal Arbitration Act (FAA), the second chapter of which implements the New York Convention. Various states have also passed their own international arbitration measures, which apply to the extent that they do not conflict with the FAA. Although the FAA is silent on the issue of the third party problem, some state statutes appear to be permitted to fill the gap, for example, South Carolina and Utah have passed legislation providing for involving necessary third parties to an arbitration, especially in the practice of some states, the courts are more likely to involve the third non-signatory party to the arbitration if the third party has "a close relationship" or will receive "direct interest" from the contract. Another example, in the case Intergen N.V. v. Eric F. Grina, Alstom Limited & Alstom Power NV, the United States of Appeals decided that the non-signatory party should be bound by the arbitration agreement by applying the grounds of Judicial Estoppel, Equitable Estoppel, Third-party beneficiary, Agency and Alter Ego.[19] Also in the current case of Smith v. Mark Dodge, the court also concluded under the theory of equitable estoppel, a non-signatory can enforce an arbitration agreement when the claims against the non-signatory are intimately founded in and intertwined with the underlying contract obligations.[20]

Therefore, the existence of the third non-signatory party not only exists in the common Law system but also in civil law system which we could say it does widely exist.

§2.2 The existence in International Practice

As stated in the Arbitration rules of the London court of International Arbitration (1998), if the third party agreed, the arbitration tribunal could involve the third party to

[17] Ariticle 1045, Code of Civil Procedure of Netherlands 1986.
[18] Article 43(1), Japan Commercial Arbitration Association Commercial Arbitration Rules.
[19] Intergen N.V. v. Eric F. Grina & Alstom Power NV,, United States Court of Appeals for the First Circuit, 2003.
[20] Obligations and rights of persons who are not parties to arbitration agreement, commercial arbitration contracts

the arbitration despite one of the contractual parties disagreed. *"To allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;"*[21] Also in the 1992 Geneva Chamber of Commerce and Industry Arbitration Rules under Scrutiny and Rules of London Maritime Arbitrators' Association, we could find the provisions about the existence of the third party.

Furthermore, in some cases of International Commercial Chamber, the arbitral tribunal also involves the third non-signatory party into their arbitration proceedings, for example, the case of Dow Chemical, *"the ICC tribunal affirmed in its interim Award the complete autonomy of the arbitration clause and the power conferred on the arbitrator to take any decision as to his own jurisdiction without obliging him to apply any national law in order to do so on the basis of the former and then current ICC rules."*[22] This award was considered as a precedent case law in the ICC cases and after this award, the Group of Companies doctrine was widely accepted in ICC awards. Also in the case of Peterson Farm, the tribunal also involved the third non-signatory into arbitration proceedings and followed the approach of Dow Chemical to adopt the Group of Companies doctrine.

Therefore, the existence of the third non-signatory party not only exists in national laws but also in international rules and practice although the involvement is hotly arguable. Moreover, we could find the trend that the involvement of the third non-signatory party into commercial arbitration is accepted by more and more states and arbitration organizations, and also exists in more arbitration awards.

3. Necessary involvement

The practice of the third party problem not only arises in arbitration proceedings in which the arbitrators must decide if the third party was bound to the arbitrate, but also it is an issue in international commercial transactions, for example, parties require confirmation that whether the arbitration agreement was transferred if they transfer contractual rights, and also in a great deal of areas, such as construction industry, distribution agreement, reinsurance agreement ect. How to deal with the third parties problem becomes a hot potato which the commercial legal persons must confront with.

An conflict of recognitions about the third party problem arises in the case Sarhank v. Oracle, the three-member panel of arbitrators in Egypt deemed Oracle which is a parent corporation in United States should be bound by the arbitration agreement between

[21] Article 22(1), Arbitration Rules of the London court of International Arbitration (1998).
[22] John P. Gaffney, The Group of Companies Doctrine and the Law Applicable to the Arbitration Agreement, Mealey's International Arbitration Report, June 2004

Sarhank Group Corporation, which exists under the laws of Egypt and has its principal place of Business in Egypt, and Oracle Systems Incorporation which exists in Egypt and is the subsidiary of Oracle in United States. Because the subsidiary was a shell corporation and it had paid nothing towards the award. So Sarhank Corporation has to seek for the enforcement to its parent company in United States. When enforcing in United States, the judge in the court of Appeals held that the parent company Oracle didn't sign the agreement, and "arbitration agreement did not evidence a clear and unmistakable intent by parent to arbitrate or to permit the arbitrator to decide the issue of arbitrability"[23].

In this case, the arbitral tribunal held that despite the fact that Oracle and its subsidiary Oracle System have separate juristic personalities, "subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed."[24] However, the court of Appeals in United States held that agreement to arbitrate must be voluntarily made. Oracle had never signed a contract with Sarhank and the agreement between foreign corporation and foreign subsidiary of United States Parent Corporation didn't mention the parent corporation had a clear and unmistakable intention to arbitrate or permit the arbitrators to decide the issue of arbitrability. So the arbitrators lacked jurisdiction to determine arbitrability. Furthermore, while the Egyptian arbitral tribunal determined that in the agreement, the parties agreed to govern the present arbitration in all respects in accordance with Egyptian Law and under Egyptian law, Oracle was bound by the arbitration clause by the signature of its wholly owned subsidiary. The court of Appeals in United States held that under American federal arbitration law, "an American non-signatory party cannot be bound to arbitrate in the absence of a full showing the facts supporting an articulable theory based on American contract law or American agency law."[25] Last but not least, the Egyptian arbitral tribunal concluded that agreement was binding upon the parent company in United States by virtue of a partnership relationship between Oracle and its subsidiary, which was a matter of contract interpretation that the court would not review. Also the district court of United States held that it did not need to determine whether Oracle consented to arbitrate because it was simply being asked to enforce a foreign arbitration award in which arbitrability was previously determined. On the contrary, the court of Appeals held that whether a party has consented to arbitrate is an issue which should be decided by the court where enforcement of the award is sought. Based on article V. (2) of the New York convention, a United States court is not required to enforce the award if its subject matter is not capable of arbitration in the United States, so the court of United States was required to determine whether Oracle had agreed to arbitrate as arbitrability is not

[23] Sarhank v. Oracle, United States court of Appeals, 2d Circuit.
[24] Id
[25] Interbras Cayman Co. v. Orient Victory Shipping Co., S.A. (2d, Cir. 1981)

arbitrable in the absence of the agreement. Moreover, according to the article II of New York convention, the court could refuse the enforcement because of lacking of "agreement in writing". Therefore, above these reasons, the court of Appeals in United States held the Egyptian award against the parent of a corporate group in United States that had not signed the arbitration agreement was not enforced against the parent.

In my opinion, I think the arbitration clause should be bound to the parent company although the parent company had not signed the contract. Because the subsidiary has a close commercial legal relationship with Oracle, we could consider them as "undivided economic reality" as well as the "mutual intentions of all parties". In some circumstances, the corporate relationship between the parent and its subsidiary are sufficiently close as to justify piercing the corporation veil. Regarding to the opinion about "agreement in writing" expressed by court of Appeals, according to the interpretation of Albert Jan van den Berg, the requirement of "agreement in writing" in New York convention is maximum requirement.[26] "Agreement in writing" includes "an arbitral clause in a contract or an arbitration agreement, signed by the parties", but not the definition of the "agreement in writing" is "an arbitral clause in a contract or an arbitration agreement, signed by the parties". The standard is flexible according to different national laws. In this case, the judge interpreted "agreement in writing" in a minimum scope and he believes "agreement in writing" in New York convention is "an arbitral clause in a contract or an arbitration agreement, signed by the parties" which violates the spirit of New York convention. The agreement between Sarhank and Oracle System should be considered as agreement between Sarhank, Oracle System and Oracle because of the principle of exceptions of privity of contract, which I will analysis in detailed below.

From the case, we could see the different jurisdiction to the third party problem made the arbitration award impossible to be enforced which declines the efficiency of arbitration. Moreover, sometimes it is unnecessary or difficult for the arbitral tribunal to continue the arbitration proceeding in the case of non-signatory party's absent.

Another conflict arises between the case of Dow Chemicals and currently case of Peterson Farms. In the case of Dow Chemicals, the arbitrators had found in an interim award of 1982 that the several companies involved constituted "one and the same economic reality" and that the other non-signatory companies of the same group had been the veritable parties to the contract. The tribunal considered the circumstances that surrounded the conclusion and characterized the performance and termination of the contracts in dispute, then concluded that the parent company both had and exercised absolute power over its subsidiaries who ere signatory to the arbitration agreement and those subsidiaries which effectively and individually participated in the conclusion,

[26] The New York arbitration convention of 1958: towards a uniform judicial Interpretation, Albert Jan van den Berg.

performance and termination of the contracts.[27] The award was affirmed by the Paris Court of Appeals in 1983 which again relied on the "common intent of the parties" as demonstrated by their behavior and conduct.[28] On the contrary, in the case of "Peterson Farms", the ICC arbitration with a London seat and Arkansas substantive Law which are not clear the parties were prepared to treat the same as English Law.[29] The arbitral tribunal determined the non-signatory should be bound by the arbitration agreement based on the intention of the parties and the manner in which the contract had been concluded, the approach adopted by ICC Tribunal in Dow Chemical.[30] But when applied to the High Court, the judge rejected the reasoning of the arbitration awards and found it to be "seriously flawed at law" by adopt a contrary approach, "first, emphasizing the essential role played by the law applicable to the merits of the dispute and second, seemingly dismissing the autonomy of the arbitration agreement as the basis for the Tribunal to determine its own jurisdiction where the parties have expressly chosen a governing law".[31] This case evidences the rejection by the English Courts of non-signatory parties in International Commercial Arbitration which is contrary to the decision of the case of Dow Chemicals.

From these cases, we could see the different recognitions of the third non-signatory party which would cause the problem of non-enforcement. But effectiveness and fairness are the most significant characteristic of arbitration. The non-enforcement of arbitration awards would waist the time and cost of both legal parties. Moreover, it is also unfair if the third party would not be involved into the arbitration. Therefore, the uniform establishment of the third party becomes an urgent topic in International Commercial Arbitration.

4. The approach to the involvement

§4.1 The approach to "tradition problems"

As discussed above, it is necessary to involve the third non-signatory party into the International Commercial Arbitration either in theory or in practice. After accepted the involvement of the third non-signatory party into the arbitration, there arises some problems. One of the apparent advantages of arbitration is "party autonomy" that contractual parties could choose the procedural proceedings, the arbitrators and so on.

[27] John P. Gaffney, the group of companies doctrine and the law applicable to the arbitration agreement, Mealey's international arbitraton report, 2004
[28] Christian Camboulive, why us? We never signed the Arbitration Agreement! Binding Non-signatories to Arbitration Agreements and Awards, International Dispute Resolution Centre, 2005
[29] Christian Camboulive, Why us? We never signed the arbitration agreement! Binding Non-signatories to arbitration agreements and awards, International Dispute Resolution Center, 2005
[30] Peterson Farms Inc v C&M Farming Ltd, Queen' Bench Division, 2004
[31] John P. Gaffney, the group of companies doctrine and the law applicable to the arbitration agreement, Mealey's international arbitraton report, 2004

Some opponents claim in the three arbitrators' tribunal with each party appointing one arbitrator and a neutral third being appointed by any other methods, there is a lack of equality among the parties if the third party is not allowed to appoint its own arbitrator.[32] If this claim is true, it destroys the notion that arbitration can provide any sort of objective, non-biased resolution of disputes which is based on the fairness and effectiveness. We must believe that choosing arbitrators on their will just manifests the nature of party autonomy and the arbitrator will not have any interest connection with the party who chosen him. Most of the time, contractual parties have to select the arbitrator from a list of names supplied to them by the institution administering the arbitration[33]. Many of these arbitrators will be personally unknown to contractual parties. If we believe that arbitrators are required to decide on the basis of law and facts, there is no need for the third party to appoint an arbitrator.

Moreover, the opponents argue that it is unfair for the third party to join the arbitration proceedings following the procedural laws which had been chosen by the contractual party. To resolve this problem, we must give discretionary power to the arbitrators. In international commercial arbitration, there is an increasing trend that more discretionary power has been given to arbitrators. "Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings. This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute."[34] Sometimes, the arbitrators have widest discretion to determine the applicable rules and discharge the duties. We could find this in the Arbitration rules of the London court of International Arbitration (1998), "the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration."[35] In this situation, we could give discretionary power to the arbitrators and the arbitrators could apply the most appropriate procedural law and substantive law based on the principle of fairness, efficient and expeditious conduct. The contractual parties choose arbitration which manifests the contractual parties believe the arbitral tribunals and request the arbitrators to solve their disputes. We could consider that the contractual parties waive some of their rights to the arbitrators to resolve their arbitrators. They choose arbitration because it is an efficiency mechanism to resolve their disputes and the purpose of the arbitrators to involve the third non-signatory party to the arbitration is solving the problems more efficiency.

[32] Redfern & Hunter, supra note 5, at 186-7, 292-93.
[33] Redfern & Hunter, supra note 5, at 210-11.
[34] Article 4, UNCITRAL Notes on Organizing Arbitral Proceedings.
[35] Article 13, Arbitral rules of the London court of International Arbitration (1998)

As to the other problem of “confidentiality”, if the third non-signatory party was involved into the arbitration proceedings, and then the arbitral tribunal should require the third non-signatory party to afford the obligation of confidentiality which includes all the commercial secrets and hearing proceedings. The third party should be obliged to afford the civil liability or even criminal liability if they disobeyed the obligation. It is not like the court proceedings which should be held public if it did not refer to the secrets. As in the commercial arbitration, all the parties should keep the obligation of “confidentiality”. The arbitral tribunal could also require the third non-signatory to afford the same obligations as the signatory party in the proceedings. In this way, the involvement of the third non-signatory party could avoid the damage to the characteristic of confidentiality.

§4.2 The approach to the involvement

The issue of how to deal with the third party non-signatory was described in 1992 as being “among the most delicate and critical aspects in international arbitration.” Any approach to the third non-signatory party into the arbitration proceedings should be operated within the context of party autonomy respecting the contractual nature of arbitration. Therefore:

Firstly, if the arbitrator believes the third non-signatory party has a “directive interest” as to the contract or the award, in order to increase efficiency, save costs and avoid inconsistent awards for business transactions, the arbitrator could compel the third non-signatory party to arbitrate. But arbitration is a voluntary mechanism to resolve disputes and the basis of arbitration is intention, so the arbitrator should compel the third party to arbitrate on the condition that the third party has intended. In international commercial transactions, more and more persons wish to resolve their disputes through the way of arbitration, as this mechanism is not only effective but also costs saving. The advantages of arbitration become apparent in modern transactions. Hence, if the arbitrator believes it is necessary to involve the third non-signatory party in the arbitration proceedings, some of the third parties have reason to agree.

Secondly, if the third party agreed to be involved in the tribunal on the condition of changing the applicable law or regulation rules and so on which the signatory parties agreed, the arbitrator could adopt more appropriate applicable law or regulation rule ect when considering the interests of all parties based on that “the power conferred on the arbitrator to take any decision as to his own jurisdiction without obliging him to apply any national law” as stated in the ICC award of “Dow Chemical”.

Conclusion

As to the difference jurisdictions arising from the case of Sarhank v. Oracle, we could see the problem of the third non-signatory party involvement does exist in practice. With regard to the characteristic of arbitration— party autonomy, contractual by nature, there are some arguments against the involvement of non-signatory into arbitration proceedings. In order to make the awards efficiency and fairness, however, it is necessary to involve the third non-signatory party into the arbitration.

The approach to the involvement is indeed a problem requiring to be uniformed. From the case of Dow Chemical and Peterson Farms, we could see the different approaches to the involvement would cause different recognition for the enforcement. Therefore, in my viewpoint, if the arbitrator believes the third non-signatory party has a "directive interest" as to the contract or the award, the arbitrator could compel the third non-signatory party to arbitrate. If the third party disagrees with the procedural rules or applicable substantive law which were chosen by the contractual parties, based on the principle of fairness and efficiency, the arbitrators could apply the most appropriate rules.