Supreme Court of Western Australia

KNM PROCESS SYSTEMS SDN BHD -v- MISSION NEWENERGY LTD FORMERLY KNOWN AS MISSION BIOFUELS LTD [2014] WASC 437 (30 January 2015)

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JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CIVIL

CITATION : KNM Process Systems SDN BHD -v- MISSION NEWENERGY LTD FORMERLY KNOWN AS MISSION BIOFUELS LTD [2014] WASC 437

CORAM : MARTIN CJ

HEARD : 14 OCTOBER 2014

DELIVERED : 14 OCTOBER 2014

PUBLISHED : 24 NOVEMBER 2014

FILE NO/S : CIV 1906 of 2014

BETWEEN : KNM Process Systems SDN BHD

Plaintiff

AND

MISSION NEWENERGY LTD FORMERLY KNOWN AS MISSION BIOFUELS LTD

Defendant

Catchwords:

Arbitration - Arbitration agreements - Party claiming cause of action or defence 'through or under' arbitration agreement - Meaning of 'through or under'

Arbitration - Stay of court proceedings - Conditions attached to stay

Legislation:

International Arbitration Act 1974 (Cth), s 2D, s 7, s 39

Result:

Application for stay of proceedings granted
Matter referred to arbitration

Category: B

Representation:

Counsel:

Plaintiff : Mr S Penglis

Defendant : Mr S R Luttrell & Ms S Hill

Solicitors:

Plaintiff : Bennett & Co

Defendant : Clifford Chance

Case(s) referred to in judgment(s):

MARTIN CJ: (This judgment was delivered extemporaneously on 14 October 2014 and has been edited from the transcript.)

1 By an agreement dated 25 July 2007, **KNM Process** Systems Sdn Bhd (KNM) agreed with Mission Biofuels Sdn Bhd (Mission Biofuels) to design, engineer, procure, manufacture, supply, erect, construct, install, complete, test and commission a Continuous Acid Conditioning and Silica Pre-treatment, FFA pretreatment and Methyl Ester Transesterification Plant with certain specified outputs at Kuantan Port in Malaysia (EPCC Agreement).

2 Clause 2 of the Agreement provides that the purchaser was to make a payment of RM2,000,000 as a deposit upon the execution of the agreement, constituting part payment of the contract price. There was also an obligation upon the purchaser, Mission Biofuels, to make an advance payment to the contractor, being an amount equal to 25% of the contract price,[1] within 20 days of execution of the agreement and further payments by Mission Biofuels were to be made by

drawdown on a letter of credit to be established by Mission Biofuels within 10 business days of the date of making the advance payment to which I have referred.

3 Clause 2(e) refers to the letter of credit to be provided by Mission Biofuels taking the form provided in appendix 15. However, it seems clear that there has been some kind of drafting error, because appendix 15 contains a form of guarantee from a bank in favour of Mission Biofuels, not by Mission Biofuels, and the guarantee covers the return of part of the advance payment to be made by Mission Biofuels to KNM.

4 That error, however, does not appear to be material and it is common ground that, in due course, a letter of credit acceptable to KNM was provided by Mission Biofuels from a reputable bank. The EPCC Agreement contains a clause headed Disputes and Arbitration, being cl 50. By cl 50.1, it is provided that:

If any dispute or difference of any kind whatsoever including for the avoidance of doubt a dispute or difference in relation to a decision or approval given by the Engineer (a 'Dispute') shall arise between the Parties in connection with, or arising out of, this Contract, or the breach, suspension, termination or validity hereof, the parties shall attempt, for a period of thirty (30) days (or such shorter period as the Parties may agree) after the receipt by one Party from the other Party of notification of a Dispute to settle such Dispute in the first instance by mutual discussions between the Parties.

5 There is no cl 50.2. Clause 50.3.1 provides:

If the Dispute cannot be settled within thirty (30) days by mutual discussions as contemplated by Clause 50.1, the Dispute shall finally be settled by an arbitral tribunal (the 'Tribunal') under the auspices and in accordance with the rules of the Singapore International Arbitration Centre ('SIAC') in effect on the date of this contract (the 'Arbitration Rules'), which rules are deemed to be incorporated by reference into this Clause. The Tribunal shall consist of three arbitrators who shall be appointed in accordance with the Arbitration Rules. Both Parties undertake to implement the arbitration award. The venue of the arbitration shall be Singapore and the seat of the arbitration shall be Singapore. The language of the arbitration shall be English.

6 There are other provisions of cl 50.3 which relate to the arbitration. Appendix 2 contains a number of provisions referring to, in particular, certain important terms defined in cl 1.1 of the Conditions to the EPCC Agreement. One of the terms defined in cl 1.1 of the Conditions to the EPCC Agreement is the expression 'Purchaser Letter of Credit' to which reference is made in cl 2 of the agreement.

7 That term is defined to mean:

[T]he letter of credit to be issued to the Contractor by an international first class bank on behalf of the Purchaser for an amount equal to the Contract Price less the Advance Payment and less the Deposit, have validity as provided in Appendix 2 hereunder and, to be issued within ten (10) days of the payment of Advance Payment which is to be in the form provided in Appendix 15.

8 I digress to observe that the same drafting error appears in this definition in that the reference to appendix 15 appears misplaced, because appendix 15 is quite a different form of guarantee. Nevertheless, as I have mentioned, it seems that the parties overcame that error by mutual agreement, and a letter of credit acceptable to KNM was provided by Mission Biofuels.

9 The other provisions of the EPCC Agreement that are relevant are appendix 8 and appendix 16.

10 Appendix 8 specifies the payment schedule in respect of the amount to be paid by Mission Biofuels to KNM for the works to be performed under the EPCC contract. Under appendix 8 as it was at the time the agreement was signed, there are five milestone payments. The first milestone payment was the payment of RM2,000,000 as deposit upon execution. The next milestone payment was the provision of the performance bond, the advance payment guarantee and the corporate guarantees. Upon occurrence of those events, 25% of the contract price less the deposit was to be provided by way of advance payment. Milestone 3 was achieved when all piling works for the process plant were complete or upon the expiry of five months from the execution date, whichever was the later. Upon the occurrence of that milestone, another 25% of the contract price was to be paid. Milestone 4 was achieved upon the achievement of mechanical completion, and another 25% of the contract price then had to be paid. Milestone 5 was achieved upon final performance acceptance of the plant, and provision of the retention bond equal to 5% of the contract price. Upon the achievement of that milestone, the last 25% of the contract price was to be paid. As I have already noted, the scheme of the contract was that payment was to be by way of drawdown under the letter of credit provided by Mission Biofuels.

11 Appendix 16 of the EPCC Agreement specifies a form of parent company guarantee in certain terms. When the EPCC Agreement was executed, there was no requirement for such a parent company guarantee.

12 The only reason I refer to appendix 16 is that, in the events which transpired, it seems clear that this appendix was used as the drafting template for the guarantee that was entered into between KNM and Mission NewEnergy Ltd. In particular, the arbitration provision in that deed is identical to the equivalent provision in appendix 16.

13 Following execution of the EPCC Agreement, it seems clear that work commenced and certain payments were made. A deed of variation was entered into between Mission Biofuels and KNM, apparently on or about 19 June 2008 to record certain agreed variations to the EPCC Agreement.

14 It was agreed by that deed of variation that the time for completion was to be extended from 14 months after the commencement date to a period of 15 months after the commencement date, and appendix 8 of the contract, to which I have already referred, was to be varied, in effect, to split the fourth milestone into two separate milestones, upon achievement of each of which 12.5% of the contract price was to be paid. The first of those two milestones was the delivery of four storage tanks for biodiesel storage, complete with all instrumentation required and in a fully commissioned state, ready for use by the purchaser, and the second milestone was the achievement of mechanical completion. The net result then was that final performance acceptance of the plant became milestone 6, rather than milestone 5.

15 The deed of variation also recorded that the parties had agreed to vary the arrangements with respect to the provision of the purchaser's letter of credit and, in particular, provided that the amount under the purchaser's letter of credit would be reduced to 25% of the contract price, with validity as provided in appendix 2 of the contract. That reference is a little curious, because there does not appear to be any express reference to the purchaser's letter of credit in appendix 2 of the contract. That gives rise to a contention in the dispute between the current parties.

16 I digress to observe that the deed of variation records that payment for milestones 1, 2 and 3, totalling 50% of the contract price, had been paid to KNM, with the result that only 50% of the contract price remained outstanding. Consequently, the agreement to vary the reduction of the letter of credit had the effect of reducing the amount available under the letter of credit from 50% of the contract price to 25% of the contract price.

17 Other provisions of the deed of variation required the parties to agree to the release of some of the funds deposited in support of the letter of credit to Mission Biofuels for use for specified purposes. The deed of variation also provided that, upon the expiry of 90 days from the date of the release of those funds, the amount under the purchaser's letter of credit was to be reinstated either to 37.5% of the contract price, if by then the first of the two payments of 12.5% had been made, or if not, to the amount of 50% of the contract price.

18 The deed of variation also provided:

The purchaser shall procure that Mission Biofuels Limited, Australia, the parent company of the Purchaser, shall provide a Corporate Guarantee to the Contractor in the form and substance attached in Annexure 1 of this Deed of Variation. Such Corporate Guarantee shall be issued simultaneous to the release of the amounts held under lien and shall only have effect upon such release. Provided further that the Corporate Guarantee shall lapse forthwith when the Purchaser has reinstated the Purchaser's Letter of Credit as provided in subclause 'f' hereinabove.

19 Mission Biofuels Ltd is the former name of Mission NewEnergy Ltd (Mission NewEnergy), the applicant in this matter.

20 The deed of variation contained a form of the deed of guarantee as an annexure, and in fact, a deed of guarantee in that form was executed by each of KNM and Mission NewEnergy on 19 June 2008.

21 The recitals to the deed refer to it being supplemental to the EPCC Agreement, and also recite that the guarantor, Mission NewEnergy, is the holding company of Mission Biofuels, and refers to the establishment of the purchaser's letter of credit and to the agreement between KNM and Mission Biofuels to reduce the amount of the purchaser's letter of credit by an amount of RM30.5 million for a period of 90 days from the date of that agreement, and further records that upon expiry of that date, the purchaser's letter of credit is to be reinstated to 37.5% of the contract price if the first payment of 12.5% of the contract price has been made, or alternatively to 50% of the contract price.

22 The recitals also record that Mission NewEnergy has agreed to guarantee the performance of Mission Biofuels' obligation to reinstate the purchaser's letter of credit, and in the event of default by the purchaser, that is, Mission Biofuels, within 10 days of the written notice by the contractor, that is, KNM, at the contractor's option, must either establish the purchaser's letter of credit by itself on behalf of Mission Biofuels or directly make any payment due under the contract when due.

23 There are a number of representations and warranties contained in the guarantee, but the operative provision of the guarantee, consistent with the recital, provides that in consideration of KNM agreeing to reduce the amount of the purchaser's letter of credit, Mission NewEnergy absolutely, unconditionally and irrevocably guarantees to and agrees with KNM and its successors and assigns that upon failure of Mission Biofuels to properly and punctually reinstate the purchaser's letter of credit, Mission NewEnergy would reinstate the purchaser's letter of credit within 10 days of written demand by KNM to Mission NewEnergy.

24 The other provisions that are relevant include cl 2.6, which provides:

Without prejudice to the Contractor's rights against the Purchaser as principally responsible for reinstating the Purchaser's Letter of Credit, the Guarantor shall, as between the Contractor on the one hand and the Guarantor on the other, be deemed principally responsible for reinstating the Purchaser's Letter of Credit in respect of its obligations under this guarantee, and not merely surety. Accordingly, the Guarantor shall not be discharged, nor shall its liability be affected, by any act, thing, omission or means whatsoever whereby its liability would not have been discharged, if it had been principally responsible for reinstating the Purchaser's Letter of Credit, including, but without prejudice to the generality of the foregoing, by reason of any provision of the Purchaser's Letter of Credit being or becoming void, unenforceable or otherwise invalid under any applicable law and notwithstanding that such disability may have been known to the Contractor.

25 The deed of guarantee also provides in cl 4.1:

The construction validity and performance of this Guarantee shall be governed by Australian law. In the event of any breach, differences or disputes of whatever nature arising out of or relating to this Guarantee, the Parties irrevocably agree that any suit, action or proceedings may be brought in the Australian Court, and the Guarantor hereby irrevocably submits to the non-exclusive jurisdiction of such Courts. Any such proceedings before the Australian Court shall take place in Australia. The Parties irrevocably waive any objections which they may have now or hereafter to either the venue of any proceedings brought in the Australian Court, or that such proceedings have been brought in a non-convenient forum.

The Parties irrevocably agree that any final judgment (after appeal or expiration of time for appeal) entered by such Court shall be conclusive and binding upon the Parties, and may be enforced in the courts or any jurisdictions to the fullest extent then permitted by law.

26 Clause 7 provides:

If called upon to perform hereunder it is expressly agreed that the Guarantor's obligations to perform in accordance with this Guarantee shall be co-extensive with the Purchaser's obligations to the Contractor under the Purchaser's Letter of Credit, and it is expressly agreed that the Guarantor under this Guarantee shall be entitled to assert to the fullest extent all of those rights, limitations of liabilities and defences which the Purchaser might assert under the Contract.

27 Clause 8 provides:

The Guarantor hereby agrees, with respect to this Guarantee, to be bound by the Dispute Resolution procedures set forth in Clause 50 of the Conditions of the contract, including without limitation the choice of arbitration procedures set forth therein, in the same manner and with the same effect as if the Guarantor were named in lieu of the Purchaser therein.

28 Clause 9 provides that the guarantee shall expire upon the reinstatement of the purchaser's letter of credit, as per recital D of the agreement, 90 days subsequent to when the deed of guarantee was executed on behalf of both parties.

29 The evidence establishes that there has been at least a dispute, and perhaps a series of disputes, between KNM and Mission Biofuels. Those disputes have resulted in court proceedings in Malaysia which have been stayed in favour of an arbitration which is on foot between KNM and Mission Biofuels at the Kuala Lumpur Regional Centre for Arbitration.

30 The reason the arbitration is on foot in that seat is because KNM and Mission Biofuels agreed to vary the provisions of cl 50 of the EPCC Agreement for that purpose so that the arbitration is conducted in Kuala Lumpur under the UNCITRAL Rules rather than in Singapore under the SIAC Rules. The evidence establishes, however, that there is no issue in that arbitration with respect to the obligation of Mission NewEnergy to provide a guarantee, or to perform the guarantee, and in particular to provide a purchaser's letter of credit.

31 There are, it seems, issues with respect to whether or not KNM was entitled to an extension of time for completion of the works, and it is suggested by Mission NewEnergy that those issues may be relevant to the ascertainment of the extent of Mission NewEnergy's obligation to provide a purchaser's letter of credit, although it is conceded properly on behalf of Mission NewEnergy that the issues with respect to extension of time to be resolved in the Malaysian arbitration will not resolve the question of Mission NewEnergy's obligation to provide the purchaser's letter of credit, which obligation is of course the subject of the proceedings in this court, to which the stay application relates. The evidence also establishes that the Malaysian arbitration has been set down for a hearing to commence on or about 2 February 2015.

32 It is also established that the current dispute arises from the failure of Mission Biofuels to reinstate the full purchaser's letter of credit after the expiry of 90 days, and that prior to the commencement of these proceedings, KNM made demand upon Mission NewEnergy for the performance of the guarantee by the provision of a letter of credit in lieu of that which was to be provided by Mission Biofuels.

33 It is also clear on the evidence that Mission NewEnergy is not a party to the Malaysian arbitration and that neither KNM nor Mission Biofuels seek any form of relief in relation to the purchaser letter of credit in the Malaysian arbitration or in any of the court proceedings that have been commenced in Malaysia.

34 The application for stay is brought on three alternative grounds. The first is the proposition that there is an arbitration agreement within the meaning of s 7(2) of the *International Arbitration Act* (the Act) for the conduct of an arbitration in Malaysia to which Mission NewEnergy is effectively a party by virtue of the operation of s 7(4) of the Act. The second ground upon which a stay is sought is that there is an arbitration agreement to which s 7(2) of the Act, applies in the form of the agreement contained within cl 8 of the deed of guarantee. The third basis upon which a stay is sought is said to arise in what is asserted to be the inherent jurisdiction of the court to stay proceedings before the court.

35 The first two grounds require consideration of s 7 of the Act. It is common ground between the parties that each of the arbitration agreement which has resulted in arbitral proceedings in Kuala Lumpur or the arbitration agreement which would result in arbitral proceedings in Singapore are foreign arbitration agreements to which s 7 of the Act applies. It is because of that agreement between the parties that there is no need to enunciate the reasons why s 7(1) of the Act applies to either, and indeed both, of those agreements.

36 Section 7(2) provides:

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

37 Subsection (3) of the section makes provision for interim orders in the event that an order is made under subsection (2), although neither party seeks to invoke that power in this case. Section 7(4) provides that:

For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

38 I turn then to the first proposition advanced in support of the stay, which is to the effect that a stay should be granted because of the existence of the arbitral proceedings in Malaysia by virtue of the operation of s 7(2) read in conjunction with s 7(4). The first point to note in relation to that issue is the obvious point that Mission NewEnergy is not a party to the EPCC Agreement, and s

7(2) does not, by itself, apply to the agreement that has given rise to the arbitral proceedings in Kuala Lumpur.

39 It follows that the only basis upon which s 7(2) could apply in relation to the EPCC Agreement and the Malaysian arbitration is by virtue of the operation of s 7(4), which would require it to be established that Mission NewEnergy is a 'person' claiming through or under a party within the meaning of that subsection.

40 The proper meaning to be attributed to that expression has been considered in a number of authorities, most significantly for present purposes by the High Court of Australia in ***Tanning Research Laboratories Inc v O'Brien***.[2] In that case, a question arose as to whether a liquidator was a person claiming through or under the company in liquidation for the purposes of obtaining a stay under s 7(2) of the Act. In that context, Brennan and Dawson JJ observed:[3]

Of course, a liquidator is not the company and legal title to the assets of the company is not vested in him. Nor is the liquidator in the present case a party to the arbitration agreement contained in cl 10 of the agreement of 24 June 1975. But s 7(4) of the Act brings within the ambit of sub-s (2) a person who claims 'through or under a party'. Although a person who was not a party to the arbitration agreement is not bound by the contract to submit to arbitration, a person who claims 'through or under a party' is so bound by force of the statute. In statutes similar to s 7 of the Act, the phrase 'through or under a party' or its equivalent has been construed to apply to, inter alios, a trustee of a bankrupt's estate, an assignee of a debt arising out of a contract containing an arbitration clause, a company being a subsidiary of a parent company which is party to an arbitration agreement and a company being a parent of a subsidiary company which is party to an arbitration agreement when claims are brought against both companies based on the same facts. (authorities omitted)

41 A little later in the judgment, their Honours went on to observe that:[4]

The meaning of the phrase 'through or under a party' must be ascertained not by reference to authority but by reference to the text and context of section 7(4).

In the first place, as subsection (2) speaks of both parties to an arbitration agreement, a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt.

A liquidator who defends his rejection of a proof of debt on the ground that, under the general

law, the liability to which the proof relates is not enforceable against the company takes his stand on a ground which is available to the company. A liquidator who resists a claim made by a creditor against the assets available for distribution on the ground that there is no liability under the general law thus stands in the same position vis-à-vis the creditor as does the company. If the creditor and the company are bound by an international arbitration agreement applicable to the claim, there is no reason why the claim should not be determined as between the creditor and the liquidator in the same way as it would have been determined had no winding up been commenced.

42 Their Honours went on:

But it is otherwise if the liquidator supports his rejection of a proof of debt in reliance on a ground which allows him, and him alone, to go behind the judgment, account stated, covenant or estoppel on which the company's liability is founded.

43 So in other words, their Honours drew a distinction between a claim or a defence which was derived from the party to the arbitration agreement and a claim or defence enjoyed by a party in its own right for the purposes of ascertaining the proper ambit of s 7(4).

44 Another authority that is relevant to this question is the decision of Finkelstein J in the Federal Court of Australia in the case of ***BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd***.[5] . It is unnecessary for present purposes to relate the facts of that case. They involved a claim brought against shipbrokers arising from an alleged breach of an agreement relating to the charter of a cargo vessel. The question was whether the shipbrokers could invoke s 7 of the Act to resist the claim on the basis that there was an arbitration agreement between the applicant and the charterer of the cargo vessel. In that context, Finkelstein J observed:

The first question that arises is whether Cosco can invoke s 7. According to s 7(2) there must be a proceeding by one party to an arbitration agreement against another party to the agreement. And then only 'a party to the [arbitration] agreement' may apply for a stay of curial proceedings brought in defiance of that agreement and obtain an order referring the dispute or part of the dispute to arbitration. It is common ground that Cosco is not a party to the charterparty or to clause 42 in the sense that it is not, as a matter of contract law, a person who is bound by the charterparty generally, or clause 42 in particular. Cosco says, however, that it is deemed to be a party, relying on s 7(4).[6]

45 His Honour then referred to ***Tanning Research Laboratories v O'Brien*** and to other authorities, including ***Mangion v James Hardie & Co Pty Ltd***,[7] in which reference was also made to the nature of the claim being derivative from the party to the arbitration agreement. Finkelstein J summarised the effect of these authorities in these words:[8]

In other words, these cases show that there are two somewhat overlapping criteria that must be met to trigger the operation of s 7(4). The first is that there is a relationship of sufficient proximity between the party to the arbitration agreement and the person claiming to prosecute or defend an action through or under that party. The second is that the claim or defence is derived from the party to the arbitration agreement.

46 I come now to apply those principles to the circumstances of this case. As I have already mentioned, the first point is that Mission NewEnergy is not a party to the EPCC Agreement. Applying the approach of Finkelstein J, the first question is whether there is a relationship of sufficient proximity between Mission Biofuels and Mission NewEnergy? It seems to me the answer to that question in this case must be in the affirmative. Mission NewEnergy is the holding company of Mission Biofuels, which is its subsidiary.

47 The second question is whether Mission NewEnergy's defence is derived from Mission Biofuels. In support of the proposition, that the defence to which Mission NewEnergy would rely in defence of KNMs claim for the provision of a purchaser's letter of credit is derived from Mission Biofuels, in other words, in support of the proposition that Mission NewEnergy advances its defence through or under Mission Biofuels, cl 7 of the deed of guarantee is relied upon. I have set out the terms of that clause above.

48 That clause provides that the obligation of Mission NewEnergy is coextensive with the obligation of Mission Biofuels under the EPCC Agreement. There is a very real question as to whether the description of an obligation as being coextensive with another obligation means that the ambit of, in this case, the guarantor's obligation is derived through or under the obligation of its subsidiary, Mission Biofuels. That question is to be assessed in the context that the claim for the provision of the purchaser's letter of credit by Mission NewEnergy is separate and distinct to the claim against Mission Biofuels, which has a separate and independent obligation to provide a purchaser's letter of credit, and which has separate and independent obligations under the EPCC Agreement.

49 The cause of action between KNM and Mission NewEnergy arises under the deed of guarantee, not under the EPCC Agreement, and that cause of action is governed by the terms of the guarantee. To the extent that the terms of the guarantee incorporate by reference provisions of the EPCC Agreement, there will be a degree of overlap between the obligations of Mission NewEnergy and Mission Biofuels. However, the existence of overlap or, as cl 7 refers, coextensive obligations, is not conceptually the same as an obligation which is derived through or under Mission Biofuels – that is to say, an obligation which can only be advanced through or under an obligation owed by Mission Biofuels.

50 It is unnecessary to resolve the interesting question of whether the defence which Mission NewEnergy would advance in opposition to KNMs claim for the provision of a purchaser letter of credit is derivative in the sense to which reference is made in the authorities for the purpose of resolving these proceedings. That is because, if there is any force in that contention, the consequence would be that Mission NewEnergy is claiming through or under Mission Biofuels as a party to an arbitration agreement falling within the scope of s 7(2) of the Act.

51 That arbitration agreement is the arbitration agreement embodied in cl 50 of the EPCC Agreement. So the effect of s 7(4) consistently with the observations made in the High Court in ***Tanning Research Laboratories***, to which I have referred, would be to bind Mission NewEnergy to an arbitration agreement in those terms. That arbitration agreement requires the conduct of an arbitration in Singapore pursuant to the rules of the Singapore International Arbitration Centre in force at the time the agreement was entered into in 2007.

52 The fact that KNM and Mission Biofuels have entered into a subsequent agreement - that is, an agreement subsequent to the execution of both the EPCC Agreement and the deed of guarantee - whereby some of the disputes between them which would otherwise have been referred to arbitration under cl 50, have been referred to arbitration at the Kuala Lumpur Regional Centre for Arbitration under the UNCITRAL Rules, does not have any impact upon Mission NewEnergy's obligations as identified under s 7(4).

53 So, in other words, even if Mission NewEnergy's contention is correct, and it is a party to the arbitration agreement embodied in the EPCC Agreement by virtue of the operation of s 7(4), that does not make it a party to the separate agreement which has resulted in arbitral proceedings being conducted in Kuala Lumpur, and could, therefore, only result in a stay pending reference of the dispute between KNM and Mission NewEnergy to arbitral proceedings to be conducted in accordance with cl 50 - that is, in Singapore under the 2007 rules.

54 Because I have concluded and as KNM concedes, there is a valid arbitration agreement for an arbitration in Singapore on those terms, the first proposition raised in support of the stay adds nothing to the second proposition advanced. Therefore, whether or not there is a derivative entitlement to be a party to an arbitration agreement under s 7(4) makes no difference to the ultimate outcome of these proceedings.

55 There is also a difficulty that would stand insurmountably in the path of the proposition that underpins the application for a stay pending the resolution of the arbitration of Kuala Lumpur, and that is that s 7(2) and s 7(4) have to be read in the context of the Act as a whole and, in particular, in the context of the objectives identified in s 2D of the Act, and the requirements imposed upon a court in exercising powers under the Act specified in s 39 of the Act.

56 It is clear that those powers are, generally speaking, all to be exercised in aid of international commercial arbitration.[9] That objective is only achieved if the stay is granted to enable international commercial arbitration to resolve the dispute to which the stay relates. That proposition is implicit in the terms of s 7(2) itself, which requires a court granting a stay under that section to refer the dispute the subject of the stay to arbitration. Of course, that power can only be exercised if there is an arbitration agreement to which the party seeking the stay is a party, and which can result in arbitral proceedings involving that party.

57 In this case the basis upon which Mission NewEnergy asserts that it is a party to an arbitration agreement, through which it can become a party to an arbitration derives entirely from a provision of Australian law and, in particular, s 7(4) of the Act. It is very doubtful - indeed, it seems to me to be incorrect – to conclude that such a provision would enable Mission NewEnergy to be joined as a party to the proceedings that are on foot in Kuala Lumpur. The first reason for that is that on no view of the facts is Mission NewEnergy a party to the subsequent agreement between KNM and Mission Biofuels to resolve particular aspects of their dispute by arbitration in Kuala Lumpur, and so it cannot be said that it is, on any view, a party to that agreement.

58 The second problem, of course, is that s 7(4) of the Act is part of Australian law, and although the deed of guarantee is governed by Australian law, the EPCC Agreement and the arbitration

between KNM and Mission Biofuels is governed by Malaysian law, and there is no evidence to suggest that, under Malaysian law, there is a provision equivalent to s 7(4), or that the applicable rules of the Kuala Lumpur Regional Centre for Arbitration would enable Mission NewEnergy to be joined as a party to the Malaysian proceedings.

59 It follows that the objective evident in s 7, and in the Act as a whole, could not be achieved by the grant of a stay under s 7(2) unless Mission NewEnergy could be joined as a party to the Malaysian proceedings, or separate arbitral proceedings could be commenced in Kuala Lumpur which would resolve the dispute which is the subject of the proceedings in this court. As that is not the case, construing the Act in accordance with its objects, in accordance with general principle and s 39 of the Act, the conclusion that must be drawn is that s 7 properly construed would not result in the grant of a stay in these circumstances.

60 I turn then to the second issue which concerns whether there is an agreement for the conduct of an arbitration in Singapore pursuant to the provisions of cl 50 of the EPCC Agreement incorporated by reference into the deed of guarantee by cl 8. In the written submissions initially lodged on behalf of KNM, there are a number of grounds of opposition to that proposition. They included reference to the non-exclusive jurisdiction clause to which I have referred, and to the proposition that the arbitration agreement contained in cl 8 is unilateral, in the sense that, properly construed, it only obliges Mission NewEnergy to commence arbitration proceedings, and does not oblige KNM to commence arbitration proceedings in the event that a dispute arises under the deed of guarantee.

61 There is, I think, an open question as to whether cl 8 should be so construed. It is cogently arguable that when regard is had to cl 50 and, in particular, the fact that cl 50 commences with a mutual obligation to attempt to resolve the dispute by discussions, that cl 8, properly construed, is bilateral in operation, rather than unilateral in the sense for which KNM originally contended. That view of cl 8 would be supported by the long line of authority which establishes that the court takes a liberal approach to the proper construction of arbitration agreements aimed at encouraging parties to the agreement to enable all their disputes to be resolved in a single forum.[10]

62 Leaving to one side for the moment the variation agreed between KNM and Mission Biofuels to conduct their arbitration in Kuala Lumpur rather than Singapore, and to which Mission NewEnergy is not a party, the objective to which I have referred - namely, the objective of construing the agreements between the parties in such a way as to provide a single forum for the resolution of all relevant disputes - would be best achieved by construing cl 8 as imposing mutual obligations upon each of the parties to the deed of guarantee, to refer any dispute to arbitration in the event that such a dispute arises and is not resolved by mutual discussion in accordance with cl 50.1 of the EPCC Agreement.

63 But it is unnecessary for me to resolve that question, because KNM concedes that, even if cl 8 is construed as unilateral, it nevertheless constitutes an arbitration agreement for the purposes of s 7(2) of the Act. Counsel for KNM quite properly drew the court's attention to the decision of the High Court to that effect in ***PMT Partners Pty Ltd (in liq) v The Australian National Parks and Wildlife Service***[11] and which makes good that proposition.

64 In short, the proposition is that s 7(2) applies if a dispute is capable of settlement by arbitration. Even if an arbitration agreement within the meaning of the Act is unilateral, in the sense that only one party is obliged to go to arbitration, there is still an agreement that enables any dispute to be capable of settlement by arbitration - in this case, an arbitration commenced at the suit of the party who is obliged to proceed to arbitration which, on any view of cl 8, is Mission NewEnergy. It follows that because there is an arbitration agreement within s 7(2), there must be a stay of the proceedings to enable arbitration to be conducted in Singapore.

65 I will come back to the question of any conditions that should be attached to the stay after briefly referring to the third issue raised by Mission NewEnergy in support of its application for a stay, which is the invocation of what is said to be an inherent jurisdiction of the court to stay proceedings in the court where the dispute is capable of resolution by arbitration.

66 Assuming, without being taken to decide, that there is such a jurisdiction, and noting that Finkelstein J in ***BHPB Freight*** concluded otherwise,[12] it does not seem to me that there is any basis upon which this would be a proper case for the exercise of that jurisdiction if it does, in fact, exist. If there are no arbitration agreements to which s 7(2) applies, it follows that there will be no arbitration to which Mission NewEnergy is a party, which would resolve the existing dispute with respect to its obligation to provide a letter of credit to KNM under the deed of guarantee which it executed.

67 As I have mentioned, it is common ground that although there may be issues resolved in the pending proceedings in Kuala Lumpur which could have a bearing upon that question, there is no dispute between the parties to those proceedings as to whether a letter of credit should be provided. There is no dispute in those proceedings as to whether Mission Biofuels is to provide a letter of credit for the outstanding balance of purchase price or whether Mission NewEnergy is obliged under the deed of guarantee to provide such a letter of credit.

68 It seems to me that in those circumstances, it would be quite improper to exercise any inherent jurisdiction to stay proceedings in aid of an arbitration when there is no arbitration that would resolve the dispute. That is sufficient to dispose of reliance upon any inherent jurisdiction.

69 I return, then, to the conditions which should be attached to the grant of the stay which, I think, must be granted pursuant to s 7(2). The first point I note is that the power to attach conditions to the grant of a stay under the subsection is broad, expressed in terms of the conditions, if any, which the court thinks fit. It seems to me that the exercise of that discretion with respect to the imposition of conditions requires the court to take account of the general objects of the Act, including, in particular, the objects specified in s 2D, and also to take account of the obligations imposed upon the court when exercising powers under the Act and which are specified in s 39 of the Act. Of course, the court must also take into account the particular facts and circumstances of the case before it.

70 The circumstances of the present case that seem to me to be relevant to the conditions, if any, which should be attached to the stay are the commercial objectives which are evident from the terms of the deed of guarantee which lies at the heart of the dispute which is to be referred to arbitration in Singapore. It is clear from the terms of the deed of guarantee itself that the

guarantee was to be provided as an additional form of security to KNM as a consequence of KNM's agreement to release some of the funds that were the subject of the letter of credit that had been provided by Mission Biofuels.

71 That is evident from the structure of the agreement, which provides that in the event that Mission Biofuels fails to restate the purchaser's letter of credit in an amount equal to the full amount outstanding at the expiration of the 90day period referred to in the deed of guarantee, that obligation is to be performed by Mission NewEnergy.

72 So the commercial objective evident in the agreement was that in return for Mission Biofuels receiving the advantage of the release of funds the use of which was constrained by the letter of credit provided by its bank, its parent, Mission NewEnergy, agreed to restore Mission Biofuels to the position of security which it enjoyed after the expiration of 90 days. Put another way, the objective of the agreement evident from its terms, at least arguably, was that after 90 days, KNM would be restored to the position of having a purchaser's letter of credit equal in amount to the outstanding balance of the purchase price under the EPCC Agreement from Mission NewEnergy, if not from Mission Biofuels.

73 The underlying commercial advantage of that agreement, of course, arises when there is an entitlement to payment of some of the outstanding purchase price due under the EPCC Agreement. It seems a fair inference that the arbitration which is on foot in Malaysia will determine the extent to which KNM does have an existing entitlement to further payment under the EPCC Agreement.

74 Consistently with the commercial objective evident from the terms of the deed of guarantee, it seems to me to be consistent with the objectives of the Act to impose conditions that would best enable the dispute with respect to the provision of the purchaser letter of credit to be resolved, if possible, prior to the point in time at which KNM establishes an entitlement to payment.

75 As the Kuala Lumpur proceedings have been listed to commence in early February 2015, and without knowing anything about those proceedings or the likely length of time which it might take to generate an award, it might be expected that an award, which might include an obligation on the part of Mission Biofuels to pay money to KNM, might be made at some point during the first half of 2015.

76 It therefore seems to me that, consistently with the objectives of the Act and the particular circumstances of this case, I should exercise my power to impose conditions so as to best facilitate the resolution of the dispute which the parties have agreed to refer to arbitration within a timeframe which is consistent with the commercial objectives evident in the deed of guarantee.

77 It also seems to me that I must take account of the terms of the dispute resolution clause, which requires 30 days to be allowed for the dispute to be resolved by mutual discussion, and I am told by counsel that no such discussions have taken place. It also seems to me to be consistent with the objectives of the Act to avoid unnecessary disputation and to encourage the expeditious resolution of the substantive dispute between the parties to direct that any arbitral proceedings in Singapore should be commenced by the current applicant, Mission NewEnergy.

78 I make that observation for two reasons. First, it is the applicant for the stay, Mission NewEnergy, which seeks the current dispute before the court to be resolved by arbitration rather than by litigation in this court. It is, therefore, appropriate for that reason alone that Mission NewEnergy accept the obligation of commencing the arbitral proceedings which it seeks to invoke as a means of resolving this dispute.

79 Secondly, in this particular case, a direction of that kind would avert any issue as to whether KNM can, in fact, be an initiating party under the arbitration agreement in cl 8 on the basis that the arbitration agreement is, as was contended at some point at least, unilateral, with the result that it is only Mission NewEnergy which can invoke the arbitration agreement processes.

80 A question about whether or not such an arbitration agreement would properly be invoked if KNM was the moving party in Singapore would be a distraction from the real issues in dispute between these parties and inconsistent with the fact that it is Mission NewEnergy which seeks to invoke arbitration as a means of resolving the dispute.

81 Bringing all these considerations to bear, it seems to me to be appropriate to order that there be a stay of these proceedings pursuant to s 7(2) of the Act; to further order that the dispute the subject of these proceedings be referred to arbitration to be conducted pursuant to cl 50 of the EPCC Agreement, that is to say, an arbitration conducted by the Singapore International Arbitration Centre under the rules in force at the time the EPCC Agreement was entered into; and to make the stay conditional upon the commencement of arbitral proceedings in accordance with those provisions by Mission NewEnergy within a period of 35 days from today.

82 That will enable the time for mutual discussions to occur and for a short period within which to enable Mission NewEnergy to commence the Singapore arbitration proceedings, I would further impose a condition that the stay be conditional upon the parties taking all reasonable steps to conduct and conclude the arbitration as expeditiously as possible.