Neutral Citation Number: [2020] EWHC 3375 (Comm)

Case No: CL-2020-000264

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 9 December 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

IS PRIME LIMITED	**Claimant**
- and -	
(1) TF GLOBAL MARKETS (UK) LIMITED	**Defendants**
(2) TF GLOBAL MARKETS (AUST) PTY LIMITED	
(3) THINK CAPITAL LIMITED	

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Adam Al-Attar (instructed by **Harbottle & Lewis LLP**) for the **Claimant**
Jeff Chapman QC & Marianne Butler (instructed by **Keystone Law Ltd**) for the **Defendants**

Hearing date: 1 December 2020

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Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 9 December 2020.

Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The claimant is an English financial services company, part of the ISAM Capital Markets group. The defendants are associated companies that used the claimant for matched principal brokerage services. The first defendant is incorporated in this jurisdiction, the second defendant in the State of Victoria, Australia, and the third defendant in Bermuda.

2. IS Prime Risk Services Inc, now known as IS Risk Analytics Inc ("ISRA"), and Think Liquidity LLC ("Think") are companies incorporated in the State of Delaware, USA. By a sale and purchase agreement dated 18 January 2017 ("the Sale Agreement"), ISRA agreed to buy and Think agreed to sell certain business assets, including the domain name thinkliquidity.com and proprietary software related to it, software and content databases, customer email lists and databases, and intellectual property rights. By Section 7.8 of the Sale Agreement, it is governed by Delaware law and the parties submitted to the exclusive jurisdiction of the courts of the State of Florida, sitting in Palm Beach County, in respect of it. Section 7.7 provides that any dispute, controversy or claim between the parties to the Sale Agreement arising out of or relating to it "*shall first be submitted to non-binding arbitration*" in Palm Beach County, under and in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("the AAA"; "the AAA Rules").

3. Neither the claimant nor any of the defendants was or is party to the Sale Agreement. However, the Sale Agreement contemplated that there would be contracts between them for the provision of services, and the claimant says contracts were concluded on the basis of its primary terms of business, FX terms of business and trading conditions for index swaps and spot FX, and an exclusivity agreement dated 19 January 2017 entitled "Liquidity Addendum". The claimant says that these are all governed by English law with provision for the courts of England and Wales to have jurisdiction (non-exclusively, in the case of the Liquidity Addendum).

4. In this Claim, the claimant alleges that from about 18 September 2018, in breach of the Liquidity Addendum, the defendants used the services of another broker or brokers for business they were obliged to give exclusively to the claimant until 17 January 2020. The claimant says it suffered loss of c.US$15 million as a result, and it claims damages, an account and inquiry as to damages, and/or declaratory relief.

5. The defendants applied for a stay of the Claim pursuant to either s.9 of the Arbitration Act 1996 or s.49(3) of the Senior Courts Act 1981.

6. I heard the applications, sitting remotely via MS Teams, on 1 December 2020. By my Order of that date, I dismissed the applications and gave directions for the exchange of statements of case and the scheduling of a case management conference. Since the application under s.9 of the Arbitration Act 1996 gave rise to a point of general application and importance, I stated only brief conclusions at the hearing and said I would take some time to prepare and hand down a fuller written judgment. This is that judgment.

Section 7.7 of the Sale Agreement

7. By Title V, Chapter 44 of the 2020 Florida Statutes, "*Mediation Alternatives to Judicial Action*", provision is made for the reference of claims to various forms of procedure other than simply litigation to judgment before the Florida State Courts. For that purpose, by section 44.1011(1), "*"Arbitration" means a process whereby a neutral third party or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding as provided in this chapter*" (my emphasis). There is a definition of mediation in section 44.1011(b). Section 44.102 provides for mandatory reference to mediation in certain cases, if requested by one of the parties and if certain other conditions are satisfied; section 44.103 gives a general discretion in the court to "*refer any contested civil action filed in a circuit or county court to nonbinding arbitration*"; and section 44.104 provides for deferral in favour of "*voluntary binding arbitration, or voluntary trial resolution*", with some management or supervision of the process, in the case of an agreement in writing between parties involved in a civil dispute to submit their controversy thereto.

8. Mr Chapman QC said he understood that this Floridian regime for alternative dispute resolution procedures is not new in 2020 but has been part of Florida State law for some time, and would have been when the Sale Agreement was concluded. After the hearing, Ms Butler kindly furnished a link to the Florida Statutes 2016, and Chapter 44 indeed appears to have been the same then. It is tempting to speculate that this Floridian legislation might have been known to those responsible for drafting Section 7.7 of the Sale Agreement, given that it refers, in a contract subject to the exclusive jurisdiction of the Florida State Courts, to "*non-binding arbitration*". However, Section 7.7 did not provide for something akin to the 'nonbinding arbitration' of section 44.103 of the Florida Statutes. The latter is a creature of court order, not agreement, and is in fact conditionally binding, despite the terminology.

9. The 'nonbinding arbitration' provided for by section 44.103 is one in which any hearing must be conducted informally, with presentation of testimony and evidence kept to a minimum, and matters being presented primarily through statements and arguments of counsel; and then by section 44.103(5), the resulting "*arbitration decision*", "*shall be final if a request for a trial de novo is not filed within the time provided by rules promulgated by the Supreme Court*"; and "*If no request for trial de novo is made within the time period, the decision shall be referred to the presiding judge in the case who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court, and for which judgments execution shall issue on request of a party*".

10. Chapter 44 of the Florida Statutes, though interesting, was a distraction.

11. Returning to Section 7.7, as I have said already it provided for submission to 'non-binding arbitration' under and in accordance with the AAA Rules. The AAA Rules do not provide for non-binding arbitration (in name or substance). They are rules designed and drafted for use pursuant to what on any view would be an arbitration agreement within s.6(1) of the Arbitration Act 1996, namely an agreement that claims or controversies be determined by an arbitrator or panel of arbitrators, binding the parties to the outcome expressed in an arbitration award.

12. An issue raised in this case was, effectively, whether Section 7.7 is an arbitration agreement within the meaning of s.6(1). It was common ground (and I agree) that the fact the parties called the agreed process 'arbitration' rather than (say) 'evaluation' cannot determine that question (just as if they had called it 'evaluation', that could not determine that it was not arbitration within s.6(1)). Nonetheless, the fact that the word used in Section 7.7 is 'arbitration' means that in the main, the AAA Rules could be, and in this case have been, applied or operated meaningfully in a reference of disputes to 'arbitrators' under Section 7.7.

13. However, as was also common ground, any 'award' generated by a reference of disputes to 'arbitrators' under Section 7.7 will not be binding on the parties and so will not resolve the disputes. Provisions in the AAA Rules suggesting otherwise have to yield to that primary agreement. Thus, for example:

    (i) In applying Rules R-21(b), R-23 and R-32(b), referring to the "*resolution of the dispute*" or "*resolution of the case*", it would have to be understood that the 'arbitrators' would not be resolving the dispute, but issuing only a non-binding evaluation; or again the reference in Rule R-32(b) to a focus upon issues "*which could dispose of all or part of the case*", or the reference in Rule R-34(a) to evidence "*necessary to an understanding and determination of the dispute*", would not have its ordinary connotation, since the 'arbitrators' would not be disposing of any part of the case, respectively would not be determining the dispute.

    (ii) Rule R-47(a) provides that "*The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract*" (my emphasis). On one view, that is still capable of application, because of the emphasised limitation; but on the facts that is a very great limitation. The agreement of the parties under Section 7.7 limits the 'arbitrators' to the provision of a non-binding opinion as to what should happen, so *ex hypothesi* they are not able, for example, to order a party to pay damages, or perform a contract, or desist from acting in breach of a contract.

    (iii) Similarly, a provision in Rule R-50, dealing with modifying an award to correct clerical, typographical or computational error, that says an arbitrator is not empowered "*to redetermine the merits of any claim already decided*", is still literally true (no such power is conferred on Section 7.7 'arbitrators', by Rule R-50), but more properly it is surely just inapposite, because no claim can have been "*already decided*" since no claim will be decided by the Section 7.7 'arbitration' process.

    (iv) Rule R-52(c) cannot apply under Section 7.7. It deems the parties to an arbitration to have consented to judgment being entered upon the arbitration award. That is flatly contrary to the express agreement that there is no obligation to honour any 'award'.

14. Thus, a process conducted pursuant to Section 7.7 of the Sale Agreement might look quite like a process conducted under what would without doubt be an arbitration agreement, *viz* a reference of a dispute to arbitrators for it to be determined by them. For example, in the present case, the AAA Process (as I define it below) has involved

an exchange of written pleadings, case management hearings, scheduling orders with directions as to timetable and any number of other procedural matters, and document discovery, and is about to move on to witness depositions, an exchange of written expert evidence, and a 5-day final hearing. But a Section 7.7 process, and in this case the actual AAA Process, will not determine anything; any 'award' will not be binding. Does that mean it is not an arbitration (for the purposes of s.9 of the Arbitration Act 1996), the procedural trappings and terminology of arbitration notwithstanding?

15. I shall assume in the defendants' favour without deciding that the meaning and effect of the agreement between Think and ISRA, by Section 7.7 of the Sale Agreement, that any dispute between them arising out of or relating to the Sale Agreement "*shall first be submitted to non-binding arbitration under … the [AAA Rules]*", which is a matter governed by Delaware law, is that each was obliged not to commence court proceedings until the 'non-binding arbitration' process was completed. Given Section 7.8 of the Sale Agreement, any court proceedings in respect of any such dispute should be in Florida State Court. Absent evidence that Florida law is any different to English law on this, I am entitled then to proceed on the basis that principles materially similar to those set out in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145 and *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC), [2020] 1 AER (Comm) 7786 would be applied if, contrary to Section 7.7, ISRA had brought suit against Think, or Think had done so against ISRA, upon a claim falling within the scope of Section 7.7 without first completing a non-binding arbitration process in relation to it, and Think, respectively ISRA, had then applied to the Florida State Court for a stay.

16. The question arises whether there is an equivalent agreement (to complete the actual AAA Process before pursuing proceedings here) between the claimant and the defendants.

Procedural Chronology

17. The procedural chronology begins with a letter before action dated 17 December 2018 from Sachs Sax Caplan ("Sachs"), Florida attorneys acting for the claimant and ISRA (and their affiliated entities), to the first defendant, giving notice of *inter alia* the claimant's contention that the Liquidity Addendum had been breached and indicating that proceedings in the United States District Court for the Southern District of Florida would follow in short order if that contention was disputed. The evidence before me did not explain why Sachs referred to that US Federal Court rather than to the Florida State Court, but perhaps the explanation would involve US Federal Courts' 'diversity jurisdiction', applied to what would have been a multi-party case with one claimant and one defendant that had agreed to Florida State Court jurisdiction (*viz.* ISRA and Think) and jurisdictionally diverse co-litigants, *viz.* an English co-claimant and English, Australian and Bermudan co-defendants.

18. Sachs' letter received a reply dated 21 December 2018 from Taft Stettinius & Hollister LLP ("Taft"), Chicago attorneys acting for Think and the defendants. It asserted that some of the matters raised by Sachs' letter had been resolved previously between the parties, and continued that, assuming *arguendo* that any of the claims asserted were not covered by the prior release, the threat of US Federal Court litigation was baseless and violated the Sale Agreement since Section 7.7 of the Sale

Agreement required first a submission to non-binding arbitration. That was wrong as regards any claim by the claimant against the defendants (or *vice versa*), since none of them was party to the Sale Agreement.

19. Taft sent a further response letter dated 23 January 2019, focusing on the merits of the claims indicated in Sachs' letter, and also intimating possible cross-claims by the second defendant, against the claimant for alleged breaches of the Liquidity Addendum said to have caused loss of c.US$6 million, and against ISRA for alleged breaches of the Sale Agreement said to have caused loss of c.US$225,000.

20. By letter dated 11 February 2019 to the AAA, Sachs enclosed a demand for arbitration on the AAA's standard form for requesting the commencement of arbitration under the AAA Rules. The letter and enclosed form named Think as intended respondent and named the intended claimant as "*IS Prime Risk Services, Inc. n.k.a IS Risk Analytics, Inc., et al*". It did not identify any co-claimant intended to be indicated by "*et al*". The form cross-referred to an "*attached letter dated December 21, 2018*" for a "*Brief Description of the Dispute*", and Mr Chapman QC said on instructions that the form had in fact attached Sachs' letter before action (actually dated 17 December 2018). That to my mind does not mean that Sachs identified which entities, if any, other than ISRA were intended to be claimants, and I note that the AAA in response opened Case No.01-19-0000-4711, ISRA (only) vs. Think (only).

21. That AAA acknowledgment, assigning Case No.01-19-0000-4711 to the file, was dated 14 February 2019. On 27 February 2019 Sachs served on Taft a Statement of Claim before the AAA, with that Case No. This now made clear, by naming them as such, that the intention was for ISRA and the claimant to be claimants, and for Think and all three defendants to be respondents. The responsive "ARBITRATION ANSWERING STATEMENT AND COUNTERCLAIM OR JOINDER/CONSOLIDATION REQUEST" form, and accompanying Counterclaim, filed by Taft dated 20 March 2019, followed suit as regards who was party to the process and raised no objection concerning the parties.

22. I shall call AAA Case No.01-19-0000-4711, thus constituted as proceedings between, on the one hand, ISRA and the claimant, and, on the other hand, Think and the defendants, "the AAA Process". To the extent it has covered disputes, controversies or claims between ISRA and Think arising out of or relating to the Sale Agreement, the AAA Process can be seen to have been commenced pursuant to Section 7.7 of the Sale Agreement. To the extent, if at all, that it has covered other matters as between ISRA and Think, and in any event as regards the involvement of the claimant and the defendants, the AAA Process was *ad hoc*, coming into existence by the process of those matters and parties, respectively, being included in the process, with no prior agreement or obligation.

23. The Statement of Claim in the AAA Process opened with, "*This is an action seeking damages … arising from breach of the provisions of certain Agreements entered into between the Claimants and the Respondents*" and concluded with a demand for the "*entry of final judgment for damages in favor of the Claimants and against the Respondents [Think and the Defendants were then named], jointly and severally, plus an award of attorney's fees, arbitration fees and costs incurred in any arbitration or trial court proceedings pursuant to Florida law and pursuant to the provisions of the Agreements entered into between the parties to this action*".

24. That is inapt language for a statement of case before arbitrators, even if they were arbitrators whose award would be determinative. All the more so since the AAA Process was never intended to be and will not be determinative. I infer it was a Statement of Claim prepared by Sachs for the bringing of proceedings in the name of ISRA and the claimant against Think and the defendants in court in Florida, re-titled so as to be served instead in the AAA Process. That use of language notwithstanding, I repeat that it was common ground before me that the AAA Process was agreed to be, and will be, non-binding in its outcome. This was confirmed and accepted by the 'arbitrators' in the AAA Process; for example in paragraph 1) of their Scheduling Order #1 after a first preliminary hearing on 23 April 2019, they recorded that "*This panel has jurisdiction based on the parties' arbitration clause and … the applicable arbitration rules are the [AAA Rules]. Pursuant to the parties' arbitration agreement, this arbitration is non-binding.*"

25. Under Scheduling Order #1, a final hearing in the AAA Process was fixed for 27-30 April 2020, to be followed by a 'reasoned award' within 30 days, i.e. by 30 May 2020.

26. By letter dated 2 September 2019, Reed Smith LLP, as solicitors for the second defendant, wrote to the claimant saying they were in the process of preparing court proceedings to be issued in this jurisdiction against the claimant. It is obvious even from the brief, general description of the nature of the proposed proceedings that the intention was to pursue matters that were by then already within the scope of the AAA Process. Harbottle & Lewis LLP, the claimant's solicitors, replied dismissively the following day, describing Reed Smith's letter as 'vexatious and embarrassing' because of its want of particularity and failure, therefore, to comply with any relevant pre-action protocol. They did not, however, object to the idea that if the second defendant did commence litigation here, it would be doing so while the AAA Process continued in parallel. Harbottle & Lewis closed with an invitation to Reed Smith to address future correspondence to them, "*when and if you are ready to articulate any claim on behalf of your client*".

27. In an exchange with the AAA in mid-September 2019, Sachs confirmed that ISRA and the claimant did not wish to engage in mediation. (The AAA Rules make provision for mediation, but only if all parties wish it, where the sums at stake exceed US$75,000.)

28. The AAA Process suffered delays, the detail of which does not matter. By Scheduling Order #6 in the AAA Process, dated 5 February 2020, a revised timetable was set leading to a final hearing on 14-16, 21-22 October 2020, with a 'reasoned award' again to follow within 30 days, i.e. by 21 November 2020.

29. By letter before action dated 17 April 2020 sent to the claimant, Stephenson Harwood LLP, as solicitors for all three defendants, set out their intended claims against the claimant, to be pursued by court proceedings in this jurisdiction. Stephenson Harwood were explicit that the proposed proceedings would cover ground being covered in the AAA Process. They offered that "*to prevent any jurisdictional tensions arising, upon the commencement of any UK court proceedings, our client [sic.] will be seeking a stay of the Non-Binding Arbitration, pending formal determination of the issue by the courts of England and Wales*", and proposed that the reasonable time for a response to their letter under the pre-action protocol should be

28 days, "*Given the extensive correspondence on these issues, in addition to the exchange of evidence in the Non-Binding Arbitration*".

30. Those conclusions followed this description and assessment of the AAA Process, after an acknowledgment that the claims the defendants proposed now to litigate here had been raised in their Counterclaim there:

> "*… we understand that the Non-Binding Arbitration was intended as an advisory process, allowing the parties to gather information and evidence prior to receipt of an unenforceable award. Following submission of the parties' Statement of Claim and Amended Counterclaim our client has been able to analyse the strengths and weaknesses in the parties' positions, and believe the parties are in a position where the issues have crystallised.*
>
> *As the culmination of the Non-Binding Arbitration would be an unenforceable award, without formal judgment being entered against any party, our client believes that it would be more advantageous to pursue the more formal UK court process. This will result in a binding judgment, if agreement in relation to our client's claim cannot be reached.*"

31. In a joint status report to the AAA Process 'arbitrators', submitted by Taft, the parties noted *inter alia* that "*a letter has been sent by a law firm in London to Respondents and their counsel in London claiming that the UK Courts may have jurisdiction over the Liquidity Addendum which Addendum is one of the documents in issue in the pending AAA proceeding. Respondents have indicated that a Motion to Stay the AAA proceedings may be filed in the future. Respondents acknowledge that Claimants may oppose such a Motion to Stay if filed in the future and that the matter will need to be briefed and ruled upon by the AAA Panel.*"

32. In response to Stephenson Harwood's letter before action, this Claim was issued on 30 April 2020, then by email dated 4 May 2020 Harbottle & Lewis replied to Stephenson Harwood as follows, so far as material:

> "*As you will be aware, your clients' allegations are denied, and it is your clients who are liable to ours for very substantial damages.*
>
> *In the circumstances, we agree that issues under the [Liquidity Addendum] can be dealt with by the English court. We make no further comment at this stage about the ongoing Non-Binding Arbitration, and our clients' US advisors will respond to any application which your clients are advised to make in that context.*
>
> *Given that our respective clients have been attempting to deal with this matter for over a year, we do not at present see anything to be gained from alternative dispute resolution.*
>
> *Our clients have therefore issued High Court proceedings against yours. Please confirm by return that you are instructed to accept service of proceedings electronically on their behalf.*"

33. Harbottle & Lewis sent Stephenson Harwood a copy of the Claim Form as issued the following day, 5 May 2020. Highly regrettably, given the terms of Stephenson

Harwood's letter proposing proceedings in this jurisdiction, the defendants refused to instruct them to accept service, requiring the claimant to serve each defendant directly, and separately. That necessitated, in relation to the second and third defendants, applications for permission to serve out of the jurisdiction, which were duly made and which were successful, inevitably so in the circumstances. There can have been no purpose behind the defendants' tactics other than to foster delay, although in the event a sole sufficient cause of the delay that has now occurred has been the applications by the defendants that followed, in that the court did not give any earlier date than 1 December 2020 for the hearing of the first defendant's application, and in the event that came well after service on and acknowledgments of service by the second and third defendants, and the issue of their equivalent applications, so that all three applications could be heard together.

34. For acknowledging service, and all subsequent conduct of this Claim to date, the defendants changed solicitors again, to Keystone Law Ltd.

35. The defendants did not make an application to stay the AAA Process, proceedings here having been commenced, as Stephenson Harwood's letter before action said they would, and to date they have still made no such application. The claimant has stated through its solicitors, in their evidence to this court, that an application to stay the AAA Process as regards matters to be litigated here would not be resisted, but it has not chosen to make any such application itself.

36. The AAA Process has therefore continued. There has been further slippage, and pursuant to Scheduling Order #7 dated 2 June 2020, the final hearing is now set for 10-14 May 2021, to be followed within 30 days by a 'reasoned award', i.e. by 13 June 2021. Various pre-hearing processes remain, including witness depositions now set for this month (December 2020) and an exchange of written expert evidence now set for January 2021.

37. The applications before me, then, were by Application Notices dated 16 June, 21 September and 23 September 2020, by which the defendants, having stated an intention to contest jurisdiction when acknowledging service, applied for the Claim to be stayed in favour of the AAA Process, pursuant to either s.9 of the Arbitration Act 1996 or s.49(3) of the Senior Courts Act 1981. By their evidence in reply, a second witness statement of Alessandro Ferrari of Keystone Law, the Defendants changed the order sought from an order staying the Claim in favour of the AAA Process (i.e. permanently staying the Claim) to an order staying the Claim until 28 days after receipt of a "*final written award*" issued in the AAA Process.

The s.9 Applications

38. The applications under s.9 of the 1996 Act turned on whether there was between the parties an arbitration agreement as defined by s.6(1) of that Act, namely "*an agreement to submit to arbitration present or future disputes …*". That is because if in respect of the AAA Process there was between the parties an agreement of that kind, it was common ground that (a) it was sufficiently in writing to satisfy s.5(1) of the Act, (b) these are proceedings brought in respect of matters all of which have been referred to the AAA Process, and (c) none of the exceptions under s.9(4) of the Act apply, so that by s.9(4) the court would have been obliged to grant a stay.

39. The claimant said that by commencing and pursuing the AAA Process, it did not submit or agree to submit any dispute to arbitration within the meaning of s.6(1) of the 1996 Act, because the AAA Process will lead only to a non-binding or advisory opinion. Mr Al-Attar submitted for the claimant that the AAA Process "*is not binding and is incapable of producing a final and binding resolution of the Dispute. The case law in respect of section 6 of the Arbitration Act establishes (i) that the label 'arbitration' is not determinative of whether an agreement to arbitrate is an "arbitration agreement"; and (ii) that a non-binding process which is capable of producing an advisory award only is not an "arbitration agreement". The [AAA Process] is, therefore, a form of ADR, albeit one which uses the label 'arbitration'.*"

40. When the present application was launched, the defendants' position was, on the face of things, that the commencement and exchange of pleadings in the AAA Process created an *ad hoc* agreement that the claims on which the claimant now sues would be determined by that process. Mr Ferrari's first statement, in support of the first of the Application Notices, asserted as much in terms; and it was therefore logical that the relief sought was a permanent stay and the costs of the Claim generally (not just of the stay application).

41. Mr Ferrari's second statement, in reply, conceded that the product of the AAA Process will not be a binding determination, and clarified that the relief sought was only a stay until 28 days after that process has concluded. Mr Ferrari's second statement nonetheless also persisted in the inconsistent assertion that there was an agreement to have claims determined in the AAA Process, which I think is explicable only on the basis that he did not appreciate the inconsistency and that by "*determined*" he meant "*looked at but not determined*". Be that as it may, Mr Chapman QC for the defendants stood by and reconfirmed the concession as to the nature of any 'award' generated by the AAA Process – it will not be binding on the parties, it will not determine anything.

42. Mr Chapman QC submitted nonetheless that the AAA Process has the hallmarks of an arbitration, and is an arbitration, so that the claimant's invocation of it and participation in it gives rise to an agreement to submit to arbitration for the purpose of s.6(1) of the 1996 Act. He submitted that "*(i) the 1996 Act authorities have not considered the special position of non-binding arbitrations (including those which, when appointed by the court, are a recent creation of Florida statute); and (ii) section 58 of the 1996 Act expressly preserves the right of the parties to agree that an award made by a tribunal pursuant to an arbitration agreement should be non-binding*".

43. The Arbitration Act 1996, in common with all of its English statutory predecessors, does not attempt to define 'arbitration'. Likewise, in the seminal "*Commercial Arbitration*", *Mustill and Boyd* (2nd Ed., 1988) ("*Mustill & Boyd*"), there is no definition. There is, however, the elegant and persuasive Chapter 2, "**What is an arbitration?**", addressing "A. WHY DOES IT MATTER?", "B. DEFINING AN ARBITRATION" and "C. WHICH ARBITRATIONS ARE SUBJECT TO THE ACTS?". In Part B of Chapter 2, the authors identify on p.41 the seven "*Attributes which must be present*", that is to say "*those qualities which are necessary, although not in themselves sufficient, if the process is to be considered an arbitration*". The first of those is this, namely that: "*(i) The agreement pursuant to which the process is, or is to be, carried on ('the procedural agreement') must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to*

the procedural agreement."; and the second: "*(ii) The procedural agreement must contemplate that the process will be carried on by those persons whose substantive rights are determined by the tribunal.*"

44. Explaining the first of those, and to some extent also the second, *Mustill & Boyd* say this, on p.42: "*The essence of a submission to arbitration is that it comprises a contract to honour the decision of the arbitrator, and a mandate to the arbitrator to make a binding determination of the legal rights of the parties. The converse proposition must also be true, although not so well supported by direct authority, that a procedure which is not intended to result in a decision, or which is intended to result in a decision not enforceable by legal process, is not an arbitration governed by the statutory and common law principles which constitute the English law of arbitration.*"

45. I regard that as stating an orthodox understanding of what in English law is meant by submitting a dispute to arbitration. Furthermore, there is now direct authority precisely establishing *Mustill & Boyd*'s 'converse proposition', which is of course sufficient for the present case. The AAA Process is not intended to result in a decision, binding the parties so as to determine their legal rights in respect of the claims, controversies or disputes referred. It is therefore not an arbitration governed by the statutory and common law principles which constitute the English law of arbitration, if *Mustill & Boyd*'s converse proposition is good law.

46. The direct authority in question is *Berkeley Burke SIPP Administration LLP v Charlton et al.* [2017] EWHC 2396 (Comm), [2018] 1 Lloyd's Rep 337. In that case, Teare J dismissed an application for leave to appeal under s.69 of the 1996 Act against a decision of the Financial Ombudsman, on the ground that there was no arbitration agreement within the meaning of s.6(1) of the 1996 Act, *because* the Ombudsman was not clothed with jurisdiction by the parties to resolve, i.e. determine so as to bind the parties, the dispute between them.

47. The *ratio* of *Berkeley Burke* is that that lack of determinative jurisdiction was sufficient to mean that there was no arbitration agreement, whatever similarities there may have been between the procedure adopted by the Ombudsman and the procedure that might be adopted by an admitted arbitrator under an admitted arbitration agreement. That is *Mustill & Boyd*'s converse proposition. The law established by the *ratio* of *Berkeley Burke* is that the conferring by agreement of such determinative jurisdiction is a necessary ingredient of arbitration. Just as *Mustill & Boyd* said, the very essence of arbitration, as English law and the 1996 Act understand it, is the consensual submission of a dispute to an individual or individuals by parties bound by contract to abide by and honour its determination by that individual or individuals pursuant to that submission.

48. Mr Chapman QC did not invite me to decline to follow Teare J's decision, and I see no reason to do so. He submitted only that it was confined to, and therefore authority only for, the proposition that the Financial Ombudsman Scheme did not amount to or give rise to an arbitration agreement between the parties to any dispute referred to the Ombudsman thereunder. I regard that as an impossible reading of Teare J's judgment. The pivot point driving the decision is in the judgment at [14]: "*It follows that the Ombudsman is not clothed with jurisdiction by the parties to resolve the dispute between them. If the complainant chooses not to accept the decision of the*

Ombudsman he is free to pursue his legal remedy, if any, against the respondent in court, notwithstanding the decision of the Ombudsman. The question is whether an agreement with that feature is an arbitration agreement." Teare J answered that question in the negative, and that is the *ratio* of the decision.

49. Although the 1996 Act does not define 'arbitration', it does state at the outset three general principles upon which Part I of the Act is founded, the first of which (s.1(a)) is that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*". Obviously, the "*impartial tribunal*" is the arbitral tribunal. But the object of the AAA Process is not the resolution of the disputes between the claimant and the defendants by the AAA 'arbitrators'. Their 'award', if the AAA Process runs its full course, may or may not influence the parties so as to facilitate an agreed resolution of their disputes. If it does, there will have been an amicable resolution by the parties, facilitated by the 'arbitrators'. That is not resolution by the arbitrators; a process that has no more than that as its object is not, in my judgment, arbitration.

50. This is not to say it is not a beneficial by-product of an arbitral process that it may, in any given case, assist or encourage the parties towards an amicable resolution. No doubt, arbitrators may properly have in mind, when conducting a reference, the capacity of the process so to assist or encourage, just as a court should have in mind during case management the equivalent capacity of the litigious process to assist or encourage the parties towards settlement. But that assistance or encouragement is not the object and *raison d'être* of the process, which is the determinative resolution of the parties' dispute by the arbitrators' award, if it is not settled, just as the object and *raison d'être* of litigation is the determinative resolution of a dispute that has not been settled, by judgment and order of the court after a trial (or more summary process, where proper).

51. Indeed, it is that equivalence of object between arbitration and litigation that sets arbitration apart, within the field of dispute resolution, and has singled it out for a special regime of supervisory jurisdiction by the courts of the seat. The freedom of choice that in the modern law is given particular prominence (for example, by s.1(b) of the 1996 Act) is the freedom of parties in dispute with each other (or contemplating the possibility of future dispute) to choose that such dispute should be decided by a private individual or panel of individuals appointed by or pursuant to agreement between them, rather than by any court that might have jurisdiction to decide it. It is the fact that an arbitration will, by definition, have as its object the determination of a dispute about legal rights and liabilities by the arbitrators, rather than by a court, that drives the policy choices that are made, primarily by Parliament nowadays, concerning the fundamental duties of arbitrators (s.33 of the 1996 Act), their immunity from suit (s.29 of the 1996 Act), the nature and extent of the court's powers to intervene during or after the reference (e.g. s.24, s.44 or s.45 of the 1996 Act during, ss.66-69 after), and indeed the way in which their decision must be made and communicated to the parties (ss.46-58 of the 1996 Act).

52. It does not help the defendants in the present case that the language of Section 7.7 is that of 'submission' to 'arbitration', just as it would not have been sufficient for the claimant that the term used in Section 7.7 is 'non-binding'. What matters is the substance, not the terminology used. It is the fact that the AAA Process is, as to its substance, a non-binding process, that prevents it from being an arbitration within the

meaning of s.6(1) of the 1996 Act, notwithstanding that the language of 'submission' and 'arbitration' is used. Similarly, if upon closer examination the AAA 'arbitrators' were in fact charged by the parties with determining their dispute so as to bind them to the outcome, such that 'non-binding' was either a misnomer or had reference to something other than whether their 'award' was to bind the parties so as to determine their rights and finally resolve their dispute, the AAA Process could have been an arbitration despite the use of that label.

53. Aside from that point on the language used, Mr Chapman QC relied on:

(i) s.58(1) of the 1996 Act; and

(ii) a *dictum* of Mostyn J in *J v B (Family Arbitration Award)* [2016] EWHC 324 (Fam), [2016] 1 WLR 3319,

for the proposition that an agreement to submit a dispute for a decision that will not bind the parties can be an arbitration agreement.

54. *Mustill & Boyd* describes the predecessor to s.58(1) of the 1996 Act, which was s.16 of the Arbitration Act 1950, as an "*obscure and difficult provision*" (*ibid*, p.414). It provided that:

> "*Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the parties claiming under them respectively.*"

55. That applied only if, first, there was an arbitration agreement, and served primarily to ensure that – unless otherwise agreed – it bound successors in title and not only original parties. The DAC Report advised that s.58(1) of the 1996 Act only restated the existing law, although the language is somewhat different, namely that:

> "*Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.*"

56. The 1996 Act goes on to provide, by s.58(2), that s.58(1) "*does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part*". Thus, it is also within the purview of the 'contracting out' language of s.58(1) that parties can agree that an award of arbitration will not become final and binding until after any such process of appeal or award. But in my judgment, it reads too much into s.58(1) to say that parties can agree that the product of their consensual process will not resolve their dispute and will neither be nor ever become binding upon them and yet their agreement still be an arbitration agreement. That was also the view taken by Teare J in *Berkeley Burke*, *supra*.

57. In *J v B*, *supra*, a divorcing couple referred the question of financial remedies to an arbitrator pursuant to the Family Law Arbitration Scheme, using its Form ARB1. The husband, content with the resulting award, gave notice for the wife to show cause why it should not be made an order of the court. The wife having asserted cause why not,

Mostyn J considered *inter alia* an argument that the wife was limited, in showing cause, to grounds that would amount to grounds for challenging an arbitration award under the 1996 Act. Mostyn J accepted that argument but with a qualification that it would also be sufficient to show that, had there been a financial remedies order in the terms of and on the date of the award, it would have been liable to be set aside for mistake or supervening event. He held that the qualification did not arise on the facts, and therefore granted the husband's application.

58. The Form ARB1 considered by Mostyn J provided *inter alia* as follows:

> "*5.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following: (a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part I of the [1996] Act; (b) in so far as the subject matter of the award requires it to be embodied in a court order (see 6.5 [sic.] below), any changes which the court making that order may require . . .*
>
> *5.5 If and so far as the subject matter of the award makes it necessary, we will apply to an appropriate court for an order in the same or similar terms as the award all the relevant part of the award . . . We understand that the court has a discretion as to whether, and in what terms to make an order and we will take all reasonably necessary steps to see that such an order is made.*"

59. Mostyn J said of these provisions at [22], [2016] 1 WLR at 3326H-3327B, that "*It can therefore be seen that the parties have agreed in writing that challenges to an arbitral award would not be confined only to those available under the 1996 Act. In addition they specifically agreed that the court would retain an overriding discretion, and inferentially the parties agreed that they would each be enabled to argue that the court should not exercise its discretion to incorporate the award for reasons outwith those stated in the 1996 Act. In so doing they were agreeing, pursuant to section 58(1), an exception to the award being final and binding. In making such an agreement the parties were of course, doing no more than recognising what the general law already provided.*" (emphasis added to the sentence particularly relied on by Mr Chapman QC).

60. The effect of paragraphs 5.4(b) and 5.5 of Form ARB1, taken together, was, in substance, to provide that the court's discretion not to grant a court order in terms of the award, in cases falling within paragraph 5.4(b), was an agreed means of review of the award. Paragraph 5.4(a) was therefore required to prevent s.58(1) of the 1996 Act from rendering the award immediately binding prior to that process of review. Hence the characterisation of the Form ARB1 process, so far as material, in *Hayley v Hayley* [2020] EWCA Civ 1369 at [67] as one "*where the parties have agreed to nominate a third party to determine fair terms intended to be final and binding, but subject to the court's ultimate discretion*".

61. In *Hayley v Hayley*, the Court of Appeal disapproved *J v B*, as regards the grounds upon which the court could, on review, differ from the award issued under a Form ARB1 process, but that is not what matters for my purposes. What matters for my purposes is that the Form ARB1 award was characterised as binding, but subject to court review, which is in substance true of any arbitration award worthy of the name.

62. The Court of Appeal concluded, *ibid* at [71], that "*[since] orders determining the enforceable legal rights of the parties following divorce are made under the [Matrimonial Causes Act] 1973 and not under the [Arbitration Act] 1996, there is no requirement for the discontented party first to make an application under s.57, s.68 or s.69 AA 1996 before asking the Family Court to decline to make an order under the MCA 1973 in the terms of the arbitral award.*" If that means that an award under a Form ARB1 arbitration does *not* create, even contingently, legally enforceable rights, then there is a nice question whether the agreement created by signing Form ARB1 falls to be treated between the parties as an arbitration agreement within s.6(1) of the Act only because it includes a provision stating in terms that by signing the form the parties "*are entering into a binding agreement to arbitrate (within the meaning of s.6 of the Arbitration Act 1996)*", creating a contractual estoppel to that effect.

63. That possible point was not raised or considered, let alone decided, in either *J v B* or *Hayley v Hayley*, nor would it have any effect on the family law point actually decided, *viz.* the impact of a Form ARB1 award on the exercise by the court of its jurisdiction under the 1973 Act.

64. In the light of that analysis, in my judgment *J v B* and *Hayley v Hayley* do not assist the defendants in their contention that there is in the present case an arbitration agreement between the claimant and the defendants requiring this Claim to be stayed under s.9 of the 1996 Act in favour of the AAA Process.

65. In my judgment, it is a necessary requirement, before an agreement between commercial parties relating to disputes between them as regards their rights and liabilities *inter se* can be an arbitration agreement within the meaning of s.6(1) of the Arbitration Act 1996, that it provide for them to submit those disputes *to be determined* by an individual or panel of individuals, *by whose decision and consequent award the parties will, by their agreement, be bound* (leaving aside for that purpose the impact of any process of review or appeal as referred to in s.58(2) of the Act). There is no such agreement in this case as regards the AAA Process. For that reason, the applications for a stay under s.9 of the 1996 Act failed.

The s.49(3) Applications

66. The applications under s.49(3) of the 1981 Act, made only if the application under the Arbitration Act failed, therefore arose for consideration. They proposed that, although *ex hypothesi* the AAA Process is not an arbitration process to which the court was obliged to defer, it is a process the parties had agreed should be undertaken and completed before proceeding to litigation. That process, Mr Chapman QC submitted, "*is entering a critical phase with the start of depositions*", so that these proceedings should be stayed "*to allow the [AAA Process] to proceed to a final hearing in May 2021 so that the parties would then have the benefit of a reasoned award. While the award will not be binding on the parties, it will have been rendered after a full hearing on the merits of all the disputes between them (including those in issue in these proceedings); after comprehensive discovery of documents and (by deposition) witnesses; and after cross-examination and legal submissions at [a] final hearing. Litigating in this court at the same time as preparing for, and taking part in, the final hearing of the [AAA Process] would involve expensive duplication and run contrary to the parties' agreed dispute resolution procedure. The court should uphold the parties' contractual agreement as a matter of public policy.*"

67. Mr Chapman QC cited, in relation to the court's approach to agreements to engage in pre-litigation processes, the decisions of Teare J in *Emirates Trading Agency* and of O'Farrell J in *Ohpen Operations*, both *supra*. He said there were multiple factors present that strongly reinforced the presumption that the parties' bargain should be upheld, if this be an *Emirates Trading* / *Ohpen Operations* case, or that were sufficient to amount to "*rare and compelling*" circumstances justifying a stay, if that were the test in the absence of any agreement that the AAA Process should be completed before litigation (*Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173).

68. Mr Al-Attar submitted that the Claim is not tainted with abuse, oppression or any vexatious quality, and therefore it should be stayed under s.49(3) only if there are "*rare and compelling*" circumstances, citing *Reichhold*, *supra*. He contended that there was and is no agreement between the parties that the AAA Process should run to its conclusion before litigation here, and that in the absence of such an agreement the case is simply one in which the parties are engaging consensually in a form of ADR (albeit a rather lengthy, formal and very expensive form of ADR), with which the early stages of this Claim may fairly and reasonably proceed in parallel. With the AAA Process set to culminate in a hearing in May 2021 and an 'award' within 30 days thereafter, all that will have happened in the Claim meanwhile, absent a stay, is the completion of Statements of Case and the listing of a first CMC.

69. The argument of duplication or wasted cost was exaggerated, Mr Al-Attar argued, and insufficient to warrant the injustice of delay. In short, he said there was nothing here to justify an enforced deferral of the claimant's right to litigate before this court its claims against the defendants.

70. Mr Al-Attar also contended that it would be inappropriate to stay the Claim, as brought by the claimant, since it was commenced in response to the letter before action sent by Stephenson Harwood, which in turn followed the Reed Smith letter in early September 2019. The Stephenson Harwood letter offered a fair and accurate appraisal of the AAA Process, namely that it was only ever to be an advisory process allowing the parties to gather information and evidence prior to receiving a non-binding, unenforceable award, it had allowed the parties to analyse the strengths and weaknesses of their respective cases and crystallise the dispute, and the time had come when it was sensible for litigation in this court to be pursued. The claimant had agreed, had issued the Claim Form herein on that basis, and had communicated that agreement to the defendants through Harbottle & Lewis' reply to Stephenson Harwood's letter in early May 2020. The defendants' subsequent game-playing over service and the non-staying of the AAA Process should not be rewarded.

71. The basic facts are these, namely that:

    (i) as between ISRA and Think (or so I have assumed in the defendants' favour) Sections 7.7 and 7.8 of the Sale Agreement, taken together, amounted to a contract for 'non-binding arbitration' to be completed prior to the pursuit of litigation, which was to be Florida State Court litigation, in respect of any dispute, controversy or claim arising out of or relating to the Sale Agreement;

    (ii) there was no contract for any pre-litigation process to be pursued first in respect of disputes between the claimant and the defendants or any of them;

(iii) what was threatened in December 2018, by Sachs on behalf of ISRA and the claimant, was US Federal Court litigation in Florida, against Think and the defendants;

(iv) on behalf of Think and the defendants, Taft objected to that threat on the basis that there was supposed first to be 'non-binding arbitration' in accordance with Section 7.7 of the Sale Agreement;

(v) the AAA Process was then set in motion, as I have described above, and the threatened US Federal Court claim was not brought;

(vi) there was no discussion of, and therefore no explicit agreement as to, whether the claimant would not commence and pursue litigation (if at all) against the defendants or any of them (either in general, or in this jurisdiction in particular) until after the AAA Process was completed;

(vii) there was no discussion of, and therefore no explicit agreement as to, the basis upon which the AAA Process was commenced and was therefore to be pursued as regards claims and cross-claims between the claimant and the defendants notwithstanding that Section 7.7 did not apply.

72. Pausing there for initial analysis, as with any agreement the question is what, if any, mutual promises did each party by its communications and conduct, viewed objectively, convey to the other that it was making. That requires unequivocal signalling; the communications and conduct must be consistent only with the proposition that the posited promise was being made.

73. Assessed on that basis, in my judgment it is not possible to spell out here any promise by the claimant to the defendants or *vice versa* that no litigation would be commenced, or (in particular) that no suit would be brought in this jurisdiction relying on the English law and jurisdiction provision of the Liquidity Addendum, until after the AAA Process had been completed. Even assuming (as I am) that Section 7.7 of the Sale Agreement obliged ISRA and Think not to sue each other in Florida State Court pursuant to Section 7.8 without first completing a 'non-binding arbitration' procedure, that says nothing as to when any litigation between the claimant and the defendants, in particular when any such litigation between them here, might be pursued. That Section 7.7 had that effect would mean, of course, that the parties should be taken to have understood that, unless ISRA and Think chose to bring the AAA Process to an end sooner, as between themselves, it would continue until the 'arbitrators' issued their 'award', with no litigation between ISRA and Think for however long that took. The inclusion by the claimant, unilaterally so far as concerns its dealings with the defendants, of its claims against the defendants, amongst the matters referred to the AAA Process, conveys a willingness to have the AAA 'arbitrators' consider and provide a non-binding assessment of those claims, since they were going to be looking at those of ISRA against Think. The defendants' response conveys the same willingness, as regards the claimant's claims and as regards their cross-claims against the claimant.

74. But that does not convey, in my judgment, because it is not rationally required to explain the parties' behaviour, any promise that there would be no litigation between the claimant and the defendants, separate from and independent of any eventual

litigation between ISRA and Think, until the AAA Process had fully run its course. As is well known, so that (for example) it is reflected in the questions asked by this court's standard Case Management Information Sheet, it is not necessary to put litigation on hold while effort is made, of whatever kind, to see if the dispute can be resolved short of a trial and consequent judgment. It is thus a routine case management discussion to consider whether the parties have begun, or wish to undertake an alternative dispute resolution effort, which may be more or less formal from case to case, and whether, if so, the litigation should be stayed for some period, or at least the litigation timetable should be tailored or adjusted to take the actual or proposed ADR timing into account, or whether, rather, the litigation should just take its normal course. The fact, in this case, that ISRA and Think had (as I am assuming) agreed in advance to a particular approach to that sort of issue, as regards Florida State Court litigation between them, really says nothing as to what the claimant and the defendants might wish to do as regards English Commercial Court litigation between them.

75. The defendants' case, which was that a relevant agreement was constituted "*by issuing the Florida Arbitration Proceedings [i.e. by commencing the AAA Process] and/or filing the Arbitration Statements of Case responding to the claims and/or advancing counter-claims in those proceedings*", was not made out.

76. Were that wrong, nonetheless the defendants' case that some relevant agreement existed when the claimant commenced this Claim and/or exists now cannot overcome the difficulty that by Stephenson Harwood's letter before action, the defendants offered to depart from any such agreement, and the claimant accepted that proposal. The defendants did not make it a pre-condition that the AAA Process be terminated; their proposal was that they would apply for it to be stayed, and they did not ask for the claimant's agreement to any such application at all, let alone as a pre-condition of litigating here now. (As it happens, on the evidence I conclude that the answer would have been yes if they had asked.)

77. Whether or not it is right to regard the defendants' *volte face* and consequent tactics after this Claim was issued as game-playing, as Mr Al-Attar had it, it was a *volte face* and not one the claimant agreed to. So any analysis of what consensus there was concludes with the approach advocated by the Stephenson Harwood letter, accepted and acted upon by the Claimant.

78. *Ex hypothesi*, the defendants' further participation in the AAA Process since April has been in the knowledge that the claimant did *not* wish that process to delay further the litigation of its claims in court, or agree to its doing so. Since April, the defendants cannot reasonably have understood that the claimant's continued participation in the AAA Process was intended or agreed by the claimant to be *in lieu*, *pro tem*, of litigating, rather than a process to be continued, if at all, in parallel with litigation. If the defendants were unhappy with that, and the consequent possibility that the AAA Process and this Claim might proceed in parallel for (up to) a year or so, the remedy was in their hands, namely to make the application they said they would make, to stay the AAA Process, rather than an application to stay the Claim they had effectively just invited the claimant to bring. Whatever the truth behind the defendants' *volte face*, I have sympathy with the claimant as to how it will have appeared to it and to its solicitors here and its attorneys in Florida, and therefore with the decision taken on the claimant's side to leave it to the defendants to apply to stop the AAA Process, if

that is what they wanted because they did not want the two separate processes to be running in parallel.

79. That means that I agree with Mr Al-Attar that this was *not* an *Emirates Trading* / *Ohpen Operations* case. There was no relevant bargain, to complete the AAA Process prior to any litigation proceeding here, presumptively to uphold. That does not mean, however, that this was a *Reichhold* case either. In that case the court was concerned with a claimant suing here who had also commenced an arbitration against a different party in relation to the same underlying events, and the Court of Appeal considered that "*rare and compelling circumstances*" were required before the action here should be stayed in favour of the arbitration with which the defendant had nothing to do.

80. On analysis, this case merely raised, albeit in an unusual way or by a rather circuitous route, the decision, by nature the staple diet of case management before this court as I said in paragraph 74 above, whether the Claim should be stayed pending completion of what has become a very protracted and expensive ADR process, where the parties now express different preferences as to that.

81. The ten features of the case upon which Chapman QC relied in favour of the application for a s.49(3) stay still fell to be considered, therefore, but on the basis that there was neither the presumption in favour of a stay created by some extant bargain nor the particularly high hurdle of 'rare and compelling circumstances' imposed in a case where the stay sought is in favour of some process not involving the parties before the court.

82. Those factors were as follows:

(i) The claimant proposed the AAA Process.

(ii) The defendants participated and brought their cross-claims within the AAA Process.

(iii) The parties asked the AAA panel for a reasoned 'award', meaning they would get an informed independent assessment of the merits, even if it would be advisory only.

(iv) The parties have exchanged substantial documentary discovery within the AAA Process, including discovery on the Liquidity Amendment claims.

(v) The parties have spent c.US$750,000 between them pursuing the AAA Process.

(vi) The parties have taken advantage of the powers of the AAA panel, e.g. to require witnesses to attend to be deposed, and are now set for the imminent commencement of witness depositions.

(vii) The parties are preparing expert evidence within the AAA Process, for exchange in January 2021.

(viii) The parties have taken advantage of the confidentiality of the AAA Process. A separate confidentiality agreement was signed to confirm or reinforce the confidentiality of that process.

(ix) It would be unfair to make the defendants plead a Defence and Counterclaim here in relation to the Liquidity Amendment dispute while simultaneously having to deal in the AAA Process with witness depositions and expert evidence.

(x) It would not be unfair to the claimant to make it await the outcome of the AAA Process before allowing this Claim to take off, if it proves to be necessary. There would be, proportionately, only a moderate delay if there is a stay and then no settlement, and during the period of the stay the final stages of the AAA Process, even if *ex hypothesi* it would not have facilitated a resolution of the dispute, should further inform the parties as to the evidence likely to be available to them and further enhance their ability to assess the strengths and weaknesses of their respective positions.

83. Although broken out into so many individual propositions, factors (i)-(viii) do no more than state the reality that the parties have chosen, in their wisdom, to spend a lot of money over a substantial period of time 'pre-litigating' their dispute in a process that will not resolve it, although it might help them to settle it. Factors (ix) and (x) merely state the assessments the defendants said the court should reach as to the balance of fairness or unfairness arising if there was or was not a stay (and assuming, either way, that the AAA Process continues).

84. There is no *a priori* reason to prefer letting the AAA Process complete before doing anything further in this Claim, in case a settlement does result, to letting this Claim get going so that it is further advanced by the time that process completes and no settlement results, if that is what happens. The 'pre-litigation' time and money the parties have invested will not be substantially wasted (and any wastage there may be, the parties must be taken to have been happy to incur), as it should be possible to streamline and expedite the Claim, taking advantage of what the parties have learned from and exchanged with each other in the AAA Process.

85. I had sympathy with the defendants that it would be burdensome and not very convenient to deal simultaneously with pleading out this Claim and the witness depositions and expert evidence processes scheduled in the AAA Process for December 2020 and January 2021. It would not have been unfair to impose that burden and inconvenience on the defendants, however, since in truth they brought it upon themselves by (a) bringing these applications, rather than getting on with pleading out this Claim months ago now, and (b) not making any application to stay the AAA Process. However, given that we are where we are, I saw only marginal additional prejudice to the claimant if the initial stages in the Claim were scheduled to dovetail with what was scheduled to be happening imminently in Florida.

86. In short, I fixed directions for the Claim to be pleaded out (there are Particulars of Claim already), if there are now fresh Acknowledgments of Service stating an intention to defend on the merits, between mid-February and mid-April 2021, with a CMC to follow not before 24 May 2021. Thus, that CMC will come after the final hearing in the AAA Process, and I left it with the parties to consider as part of the

process of agreeing (hopefully) a hearing date, or if necessary coming back for a further direction, whether it should come only after the AAA panel should have produced its 'award' in mid-June 2021 (say, an early July CMC).

87. Considering that is how I could and would wish to manage the Claim, factoring in the short-term pinch points created by the AAA Process timetable even whilst taking the view that the defendants had brought those pinch points upon themselves, I agreed with Mr Al-Attar that the relevant equation was whether the contingent disadvantage of additional cost being incurred over the next six months getting the Claim ready for case management proving to be unnecessary, because the AAA Process provokes a settlement, outweighs the contingent disadvantage of delaying justice by at least six months, by not requiring the Claim to be pleaded out in the very convenient dovetailing window in early 2021 when the parties and their wider legal teams will be so very much on top of the case, if the AAA Process does not generate a settlement. As regards the latter, I say 'at least' six months because the AAA Process may suffer slippage as it has previously (and substantially so), because there is the particular opportunity now for the efficiency of 'striking while the iron is hot' in pleading the Claim out now that will dissipate if it is left until the summer or autumn of 2021, and because if the Claim comes before the court for case management only in (say) December 2021 rather than June or early July 2021, I fear that may make more than six months' difference in the court's lead time for a trial, for a case in which the parties ought to be ready for a trial so soon as the court can accommodate them.

88. I was not persuaded that the former contingent disadvantage did outweigh the latter, even if Mr Al-Atter were wrong in a submission he made that on the evidence as it stands it is very unlikely that the AAA Process will result in a settlement. I therefore prefer not to express any view on that submission.

89. For that reason, ultimately one of ordinary case management once the claim that the parties had an extant bargain under which they had promised each other to complete the AAA Process before litigating here fell away, the alternative applications for a stay under s.49(3) of the 1981 Act also failed.