

JUDGMENT : Mr Justice Colman : Commercial Court. 11th October 2002

1. There are two applications before the court. The claimants' application is under CPR Rule 8 for a declaration as to the meaning of one provision (paragraph 5.3 of schedule 10) of a Global Framework Agreement ("the GFA") made between the claimants ("C&W") and the defendants ("IBM") on 20 December 2000. The defendant's application is for orders that pursuant to CPR, Rule 8.1(3) the claim continue as if the Part 8 procedure had not been used, that the claim should be stayed pending the dispute being referred to ADR or alternatively that directions be made for the future conduct of the claim under Part 7 of the CPR.
2. If the Defendants IBM succeeded in their application for a stay it would not be appropriate to make any further orders at this stage of the proceedings, much less to give judgment on the substantive issue of construction raised by the claimants, C&W. The application for a stay must therefore be considered first. It raises an issue of great importance, in particular as to the effect, if any, which should be given by the courts to agreements to refer disputes to ADR.

The Underlying Disputes

3. The GFA is an agreement under which were agreed the terms under which the IBM and IBM Local Party suppliers would supply to C&W and C&W Local Parties information technology services throughout the world. As provided for in the GFA, Local Services Agreements were entered into between IBM Local Parties and C&W Local Parties. One such Local Services Agreement was entered into for the supply of information technology in the UK. An important feature of the GFA was a series of provisions designed to maximise and monitor the quality and price competitiveness of the services provided by IBM. These are contained in Schedule 10 of the GFA under which the parties agree to a method of comparing the quality of the services being provided by IBM and the charges made for them with the services and charges then being provided and raised by others in the market. This process was known as "the benchmarking process". It was to be conducted by a qualified, independent third party selected from an agreed list of suitable benchmarkers. The GFA was to remain in force for 12 years and the procedure would be required by C&W no more frequently than annually, following an initial benchmarking to be required at any time after 20 December 2000.
4. The selected benchmarker was required to apply certain general principles in the course of conducting the Benchmarking Process. In particular the benchmarker was to gather data from the information technology industry and there was to be a representative, statistical sampling of a sufficient member of receivers of comparable services who had service environments similar to the Local C&W Parties' environment. The data was to be no more than 6 months old unless the Parties agreed to a longer period. In the present case, 12 months was agreed for the initial benchmarking.
5. By paragraph 4 of schedule 10 of the GFA it was provided that "*If the Benchmark Results demonstrate that the objective is not being achieved then IBM shall develop a plan acceptable to C&W, such acceptance not to be unreasonably withheld, to address these deviations (the "Benchmark Plan") at IBM's cost. The Benchmark Plan shall be prepared promptly, but in all cases no more than thirty (30) days from the date on which the Benchmark Results are received by the Parties. The Benchmark Plan shall specify the changes to the Charges or Service Levels, the Services solution and related policies and procedures, as appropriate, required to bring the Charges and Service Levels in-line with the Benchmark Results together with the criteria required to enable C&W or the Benchmarker to determine that the Benchmark Plan has been successfully implemented.*"
6. The objective was defined by paragraph 1 of Schedule 10 thus: "*'Objective' means the local IBM Parties providing the Local C&W Parties (as a whole) with technology, service levels and charges which are equal to or better than that received by the top 10% (or 20% in the case of Legacy AM, Legacy AD, Legacy Systems and Global Help Desk prior to transformation (all as defined in Schedule 1)) of other organisations similarly reliant on and receiving similar services.*"
7. Paragraph 5 of Schedule 10 gives rise to the issue which C&W's claim is designed to resolve. It provides:
"*Where IBM or a Local IBM Party has developed a Benchmark Plan in accordance with paragraph 4 above, IBM shall specify in such Benchmark Plan the time period in which the Benchmark Plan will allow the provision of the relevant Constituent Service to meet the Objective. After the expiration or thirty (30) Business Days from such date as specified in the Benchmark Plan the Benchmarker shall inform the Parties (or where relevant, the Local Parties) whether or not the Benchmark Plan has met its criteria for success.*
Where IBM or the relevant Local IBM Party fails to develop a Benchmark Plan within thirty (30) days or such other period as may be agreed between the Parties days from the date on which the Benchmark Results are received by the parties or where the Benchmark Plan fails to meet its criteria for success, then all relevant Local C&W Parties shall have the right either:
(a) *to terminate the relevant Local Services Agreement in respect of that Constituent Service in accordance with the provisions of Clause 28 as if for breach of the relevant Local Services Agreement by the relevant Local IBM party and the same consequences will apply; or*
(b) *to require the relevant Local IBM Party to continue to deliver the Services and to compensate the relevant Local C&W Parties for the actual loss which the Local C&W Parties suffer or have suffered as a result of the relevant Local IBM Party's failure to meet such criteria and (subject always to the relevant Local Parties' rights under Clause 40 (Problem Escalation and Resolution)) where applicable shall with immediate effect reduce the relevant Charges to a level of charges consistent with the Benchmark Results or as otherwise agreed in the Benchmark Plan for the period until the next Benchmark of the relevant Services. The amount of any payment due in accordance*

with this paragraph in respect of actual losses incurred by Local C&W Parties prior to the implementation of any reduction in the relevant Charges shall be agreed by the relevant Local Parties and, where such agreement is not reached within 10 Business Days then the matter shall be escalated in accordance with Clause 40. Such payment shall be subject to IBM's limit of liability as set out in clause 25.

Notwithstanding the other provisions of this Schedule 10, where a Local IBM Party fails to achieve the Objective, the relevant Local IBM Party shall compensate the relevant Local C&W Party for the actual loss which the Local C&W Party suffer or have suffered as a result of the relevant Local IBM Party's failure to meet the Objective. Such payment shall be subject to IBM's limit of liability as set out in Clause 25. The amount of any payment due in accordance with this paragraph shall be agreed by the relevant Local Parties and, where such agreement is not reached within 10 Business Days then the matter shall be escalated in accordance with Clause 40."

8. By an agreement dated 28 February 2002 IBM and C&W engaged Compass Management Consulting ("Compass") to carry out a benchmarking process. A report was produced by Compass which in substance indicated that IBM's charges were above those of the comparators. IBM challenges the validity of the Compass Reports and asserts that they are so fundamentally flawed as not to amount to "Benchmark Results" as defined by the GFA. IBM has therefore declined to produce a Benchmark Plan until that dispute has been determined.
9. C&W, however, have claimed compensation in the range £31.5 million to £45 million. They assert that such compensation is to be calculated under paragraph 5.3 of Schedule 10 as the difference between the Compass Benchmark Report comparable figure and the amounts actually charged by IBM – going back to the start of the GFA, that being the "actual loss" which C&W have suffered as a result of IBM's "failure to meet the Objective".
10. IBM, in addition to asserting the invalidity of the benchmarking report, disputes the method of calculating compensation relied on by C&W. In particular it submits that paragraph 5.3 of schedule 10 does not entitle C&W to compensation for loss sustained during any part of the period before the issue of a valid benchmarking report. It is argued that, given that the GFA imposes no general obligation on IBM to achieve the Objective, the effect of paragraph 5.3 is confined to compensating C&W for the actual loss sustained by them during the period after the issue of the benchmark results by the benchmarker due to IBM's failure to meet the Objective which is not compensated by paragraph 5.1(b).
11. In order to support their argument as to the effect of paragraph 5.3 IBM wish to rely on two areas of matrix evidence in order to demonstrate that both parties must have negotiated on the mutual assumption that paragraph 5.3 had that limited scope for which they contend. Firstly, they rely on what passed in the negotiations. Secondly, they wish to adduce evidence that the unlimited scope of paragraph 5.3 is not consistent with industry practice in relation to out-sourcing agreements of this type in the information technology industry. If they are wrong on construction – taking into account such matrix evidence as they adduce – IBM wish to rely on rectification arising out of the remarks and conduct of the C&W negotiators of the GFA or on an estoppel arising from the same words and conduct. IBM contend that in order for them to adduce their evidence on the contractual matrix it is necessary for the claim to proceed under part 7 as an ordinary claim and not under the part 8 procedure.

The Application to stay the proceedings

12. The application for a stay of the present proceedings is founded on clause 41 of the GFA. This provides as follows:

"The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.

If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings"
13. Clause 40, referred to in clause 41.1, provides as follows: "Any question or difference which may arise concerning the construction, meaning, effect or operation of this Agreement, any Local Services Agreement or any matter arising out of or in connection with this Agreement or any Local Services Agreement shall in the first instance be referred to the C&W Project Executive and the IBM Project Executive (both as defined in Schedule 13 (Governance)) for discussion and resolution at or by the next Review Meeting. If the matter is not resolved at such meeting, the matter shall be referred to the next level of C&W's and IBM's management who must meet within five working days or such other period as the Parties may agree to attempt to resolve the matter. If the matter is not resolved at that meeting, the escalation shall continue with the same maximum time interval through one more level of management. If the unresolved matter is having a serious effect on the Services, the Parties shall use every reasonable endeavour to reduce the elapsed time in completing the process. Neither Party nor any Local Party may initiate any legal action until the process has been completed, unless such Party of Local Party has reasonable cause to do so to avoid damage to its business or to protect or preserve any right of action it may have.
14. The levels of escalation referred to in Clause 40.1 above are:

IBM C&W

First Level – Regional Executive First Level – Global Executive

Second Level – Executive Sponsor Second Level – Executive Sponsor

If any of the above are unable to attend a meeting, a substitute may attend provided that such substitute has at least the same seniority or reasonably comparable managerial or directorial responsibility and is authorised to settle the unresolved matter.

If the dispute is not resolved by escalation in accordance with Clause 40.1 the parties shall seek to resolve disputes between them pursuant to Clause 41.2."

15. It is common ground that the so-called problem escalation procedures have failed to resolve the outstanding issues. It is therefore submitted by Mr Michael Crane QC on behalf of IBM that this court should give effect to clause 41.2 by ordering a stay of the proceedings while the parties comply with the ADR provision in that clause. C&W have declined to refer the issue identified in their claim to ADR.
16. Mr Crane submits that the court should approach this application analogously to its approach to the enforcement of an arbitration agreement. An application for a stay to give effect to such agreement, although now provided for in section 9 of the Arbitration Act 1996, was a remedy originally introduced by the Common Law Procedure Act 1854. The purpose of that legislation was to supply a means of enforcement of a contractual obligation where none had previously existed: see the explanation given by Lord Moulton in *Bristol Corporation v. John Aird & Co* [1913] AC 241 at page 256. It is submitted that since the disputes in the present case – not only that as to the proper construction of paragraph 5.3 of Schedule 10, but also that in relation to the alleged defects in the Compass Benchmark Report – both arise out of or relate to the GFA and/or the relevant Local Services Agreement, they are within the scope of the ADR clause and the Court should therefore stay these proceedings so that the ADR procedure can take its course.
17. Mr Timothy Dutton QC on behalf of C&W submits that clause 41.2 is unenforceable because it lacks certainty. It imposes no more than an agreement to negotiate and he submits on the authority of the judgment of Steyn J. in *Paul Smith Ltd v. H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 and the earlier decisions of the Court of Appeal on which it was based, *Courtney & Fairbairn Ltd v. Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297, that an agreement to negotiate is not enforceable in English law.
18. Secondly, it is submitted on behalf of C&W that, since the last sentence of clause 41.2 expressly contemplates the issue of proceedings where an ADR procedure is being followed, it could not have been the mutual intention that the reference to ADR should have binding effect for the facility to commence proceedings was inconsistent with the enforceability of the duty to submit the dispute to ADR procedure.
19. Mr Dutton further submits that in view of the fact that on 6 September 2002 IBM had commenced separate proceedings in this court directed to challenging the validity of the benchmarking report and had therefore failed to comply with the agreed reference to ADR, it would be inequitable for this court to enforce that reference in respect of C&W's claim upon the application of IBM.
20. Finally, Mr Dutton submits that, even if clause 41.2 contains an enforceable reference to ADR, IBM were guilty of delay in making this application and the court's discretion should therefore be exercised against the relief claimed since it is analogous to specific performance.

Analysis

21. The dispute resolution structure to be found in clauses 40 and 41 of the GFA leaves no doubt that when the parties negotiated that agreement it was the mutual intention that litigation was to be resorted to as a last resort in the event that negotiation by means of the escalation process so specifically set out in clause 40 or, failing that, ADR under clause 41 were unproductive. The reference in the last sentence of clause 41.2 does not qualify this conclusion. It is to be compared with the last sentence of clause 40.1 which excludes the commencement of proceedings until the escalation process "has been completed" which, in the context must mean that the parties have not resolved their dispute by negotiation. That provision contemplates that a party may initiate proceedings before the escalation process is complete if that party has reasonable cause to do so in order to avoid damage to its business or to protect or preserve any right of action. Although not expressly referred to, this provision appears to be designed to provide for such eventualities as the need to apply for injunctive or other preservative or interim relief in cases so urgent that they cannot await the outcome of the various stages of negotiation. Upon the failure of the escalation process to achieve a settlement of the dispute, clause 41.2 is triggered and the parties engage to refer the issue to ADR. However, the last sentence of clause 41.2 introduces a similar but now unqualified opportunity to commence litigation. That does not detract from the weight which the parties attached to the agreement to refer their dispute to ADR. That method of dispute resolution is usually speedier than litigation except where there is resort to the courts for pre-trial relief. The mere issue of proceedings is thus not inconsistent with the simultaneous conduct of an ADR procedure, such as mediation, or with a mutual intention to have the issue finally decided by the courts only if the ADR procedure fails. Accordingly, there is, in my judgment, no basis for the submission that the last sentence of clause 41.2 suggests that the parties did not mutually intend that clause 41.2 should be a binding agreement to refer disputes to ADR.
22. There is, however, another basis for the submission that the reference to ADR is of no binding effect. Essentially the question that arises is whether that reference is in substance nothing more than an agreement to negotiate and, as such, an agreement incapable of enforcement in English Law as decided by the Court of Appeal in *Courtney & Fairbairn Ltd v. Tolaini Brothers*, supra.
23. The starting point is the wording of the reference to ADR in clause 41.2. It is to be observed that the parties have not simply agreed to attempt in good faith to negotiate a settlement. In this case they have gone further than that

by identifying a particular procedure, namely an ADR procedure as recommended to the parties by the Centre for Dispute Resolution to which I refer as “CEDR”. That is one of the best known and most experienced dispute resolution service providers in this country. It has over the last 12 years made a major contribution to the development of mediation services including mediation methodology and consultative services available to parties to disputes who need advice on both a choice of mediator and on appropriate procedures for mediation. Indeed at the time when the GFA was entered into CEDR had published the 6th Edition of its “Model Mediation Procedure and Agreement”. This document sets out a model procedure which specifies the terms upon which the parties may proceed with a reference to mediation. This identifies (i) the functions of the mediator, including his power to chair, and determine the procedure for, the mediation, his attendance at meetings, his assistance in drawing up any settlement agreement, (ii) the duties of the participants, in particular that of providing to CEDR at least two weeks before the mediation a case summary and all documents referred to in it and others to be referred to; (iii) the entitlement of each party to send in confidence to the mediator documents or information which it wishes the mediator to have but not to disclose to the other party. There are also express provisions about the confidentiality of the proceedings and about how the fees, expenses and costs are to be borne. It is clear from the context that in the model procedure references to the “Mediation” are to the process of both parties attending a meeting with the mediator. The principle of voluntary participation is preserved in clause 14 of the model procedure:

“Termination

14 Any of the Parties may withdraw from the Mediation at any time and shall immediately inform the Mediator and the other representatives in writing. The Mediation will terminate when:

- a Party withdraws from the Mediation; or
- a written settlement agreement is concluded; or
- the Mediator decides that continuing the Mediation is unlikely to result in a settlement; or
- the Mediator decides he should retire for any of the reasons in the Code of Conduct.”

This provision clearly only provides for withdrawal after the mediator has been appointed and the mediation has commenced. It thus envisages a certain minimum participation in the procedure.

24. Although it is well established that an agreement to negotiate cannot be enforced in English law: see *Courtney & Fairbairn Ltd v. Tolaini Brothers*, supra, the explanation for this principle was expressed in that case by Lord Denning MR in the following passage: “If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, it is not a contract known to the law.”
25. There is an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement agreement, just as there is in an agreement to strive to settle a dispute amicably, as in *Paul Smith Ltd v. H&S International Holding Inc*, supra. That is because a court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision. No doubt, therefore, if in the present case the words of clause 41.2 had simply provided that the parties should “attempt in good faith to resolve the dispute or claim”, that would not have been enforceable.
26. However, the clause went on to prescribe the means by which such attempt should be made, namely “through an (ADR) procedure as recommended to the parties by (CEDR)”. The engagement can therefore be analysed as requiring not merely an attempt in good faith to achieve resolution of a dispute but also the participation of the parties in a procedure to be recommended by CEDR. Resort to CEDR and participation in its recommended procedure are, in my judgment, engagements of sufficient certainty for a court readily to ascertain whether they have been complied with. Thus, if one party simply fails to co-operate in the appointment of a mediator in accordance with CEDR’s model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement in clause 41.2.
27. This may seem a somewhat slender basis for distinguishing this type of reference from a mere promise to negotiate. However, the English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question. That this is a firmly established, significant and growing facet of English procedure is exemplified by the judgment of Brooke LJ. in *Dunnett v. Railtrack Plc* [2002] 1 WLR 2434 at page 2436-7: “Skilled mediators are now able to achieve results satisfactorily to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant’s precious horses are killed on a railway line, but which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.”

28. Further CPR 1.4 provides as follows:
 - (1) *The court must further the overriding objective by actively managing cases.*
 - (2) *Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.*
29. Indeed, the practice in this court of making non-mandatory ADR orders substantially in the words now set out in Appendix 7 to the Commercial Court Guide precedes the coming into force of the CPR. The making of such orders in appropriate cases is now commonplace, even where one party objects to such an order being made. Occasionally, the circumstances of a dispute may appear to the court so strongly to demand a reference to ADR that, even in the face of objections from both parties, such orders have been made and have led to settlements much to the surprise of the parties concerned.
30. For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v. Railtrack*, supra.
31. Accordingly, in the present case I conclude that clause 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements.
32. Reliance by C&W on the dictum of Steyn J. in *Paul Smith v. H&S International*, supra, at page 131L is, in my judgment, unhelpful. The passage in question was in these words: *"The plaintiffs rightly conceded that the provisions that the parties shall strive to settle the matter amicably, and that a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations."*
33. Investigation of the clause entitled Settlement of Disputes in that case shows it to have been in terms which, although providing that the parties should first "strive to settle the (dispute) amicably" and, upon their failure to do so, that it should be "adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce," contained nothing amounting to a reference to conciliation as distinct from arbitration. The ICC arbitration rules appear under the above title and have always included in addition to the arbitration procedure a facility for conciliation, but the clause in that case by its use of the words "adjudicated upon" could not conceivably be treated as a reference to the ICC conciliation facility. Accordingly, the concession by counsel on behalf of the plaintiff in that case was, in so far as it related to conciliation, entirely irrelevant to any matter in issue and the dictum of the judge was both obiter and irrelevant.
34. Before leaving this point of construction I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms or whether, as is the case with the standard form of ADR orders in this court, the duty to mediate was expressed in qualified terms – "shall take such serious steps as they may be advised". The wording of each reference will have to be examined with these considerations in mind. In principle, however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.
35. Accordingly, on the basis that clause 41.2 in the present case contains an enforceable obligation to participate in ADR procedures recommended by CEDR, what steps should this court take to enforce that obligation when proceedings are pending as in this case?
36. The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy. It is further a procedural tool provided for under CPR 26.4 to encourage and enable the parties to use ADR. In the Commercial Court it is rare for proceedings to be stayed. The normal practice in this court is to adjourn the proceedings or to extend time limits or, more usually, to space out the case management timetable to allow a limited period during which ADR can be attempted: see Commercial Court Guide, (2002 edition) section G7. However, the availability of the remedy whether of a stay or an adjournment or other case management order must be a matter for the discretion of the court.
37. How ought the discretion to be exercised in the present case?
38. On the face of it, there can be no doubt that C&W has declined to participate in any ADR exercise. As such it is in breach of clause 41.2. IBM is thus at least prima facie, entitled to the enforcement of the ADR agreement. However, given the discretionary nature of the remedy it is important to consider what factors might also be relevant to the way in which the court's discretion should be exercised. Analogously to enforcement of a reference to arbitration, strong cause would have to be shown before a court could be justified in declining to enforce such an agreement. For example, there may be cases where a reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcing the agreement. Even in such circumstances ADR would have to be a completely hopeless exercise. It is argued in the present case that because this dispute raises an issue of construction which, given that this is a long term contract, needs to be resolved by the courts as early as possible, the parties should be left to litigate it. Whereas, this would probably

be a highly relevant consideration if it arose in the context of a case management conference in the absence of an agreement to refer, it must carry very much less weight in the face of an agreement to refer to ADR. This is because parties who enter into an ADR agreement such as this must be taken to appreciate that mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are mutually commercially acceptable at the time of the mediation. If therefore they agree to a reference to ADR which, as in the present case, is wide enough to cover pure issues of construction, they have at best a weak basis for inviting the court to withhold enforcement, even in a case where on the face of it resolution by the courts would be likely to be beneficial to the parties' future operation of their contract.

39. However, in this case there is another very relevant consideration. As I have already explained, IBM disputes the fundamental validity of the Compass Benchmarking Report. If they are right, the issue of construction which C&W now wish this court to resolve will not arise. The present proceedings would in that event be rendered futile and of no immediate assistance to either party and possibly of no future assistance either. There are therefore extremely strong case management grounds for allowing the reference to ADR to proceed, for it will necessarily be brought to bear on both disputes and could not sensibly leave out of account IMB's position on the validity of the Benchmarking Report.
40. It is further submitted on behalf of C&W that IBM has delayed in making its application for a stay and should therefore be deprived of the remedy of enforcement of the ADR agreement. There may be cases where the applicant has been guilty of such delay that it would be unfair to impose ADR procedure on the opposite party. That is not this case. There will be no material prejudice to C&W if the ADR procedures now go forward. The probability is that those procedures will be completed in a few weeks which in the context of this litigation would at worst add very little to the period of time required to achieve the resolution of these disputes by litigation having regard to the fact that there would have to be a resolution of the issue as to the validity of the Report.
41. I therefore conclude that the appropriate course in the present case is for the hearing of the claim for declaratory relief to be adjourned until after the parties have referred all their outstanding disputes to ADR. In the event that this reference is unfruitful, the parties can re-instate this claim, provided that the issue of the validity of the Benchmarking Report is by that time the subject of further proceedings which this court can consider in the course of its overall responsibility to manage the existing proceedings. Hopefully this will prove unnecessary in view of a successful mediation.

Mr Timothy Dutton QC (instructed by Mayer Brown Rowe and Maw) for the Claimant
Mr Michael Crane QC (instructed by Freshfields Bruckhaus Deringer) for the Defendants