Federal Court of Australia

Dialogue Consulting Pty Ltd v Instagram, Inc [2020] FCA 1846

|  |  |
| --- | --- |
| File number: | VID 369 of 2019 |
|  |  |
| Judgment of: | **BEACH J** |
|  |  |
| Date of judgment: | 22 December 2020 |
|  |  |
| Catchwords: | **ARBITRATION** – stay of proceedings – s 7(2) of *International Arbitration Act 1974* (Cth) (IAA) – arbitration agreement – proper law of agreement – scope of arbitration clause – US federal law – Californian state law – whether waiver of right to arbitrate – s 7(5) of IAA – choice of law concerning waiver – application of US law – application of Australian law – waiver established – stay refused  **CONTRACTS** – internet contracts – standard form contracts – formation of contract – notice of terms – choice of law for contract formation – lex forum – application of Australian law – “clickwrap” agreement – “browsewrap” agreement – “sign-in wrap” agreement – application of US law – actual or putative proper law of agreement – unfair contract terms – statutory unconscionable conduct – application of ss 21, 22, 23 and 24 of Australian Consumer Law (sch 2 to *Competition and Consumer Act 2010* (Cth)) – arbitration agreement formed – no basis for statutory voidability – declaratory relief refused |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 45, 46, 47; sch 2 (Australian Consumer Law) ss 21, 22, 23, 24, 25  *International Arbitration Act 1974* (Cth) ss 2D, 3, 7, 8, 16, 39; sch 1; sch 2  *California Arbitration and Conciliation of International Disputes Act* (Cal Civ Proc Code § 1280 et seq.) §§ 1281.2(a), 1297.161  *Federal Arbitration Act* (9 USC §1et seq.) § 3  *International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (as adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting) Art II  *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) Arts 1, 7, 8, 16, 34 |
|  |  |
| Cases cited: | *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896  *Arena v Intuit Inc* (ND Cal, No 19-cv-02546-CRB, 12 March 2020)  *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245  *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57  *Be In Inc v Google Inc* (ND Cal, No 12-CV-03373-LHK, 9 October 2013)  *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169  *Cabinetree of Wisconsin Inc v Kraftmaid Cabinetry Inc,* 50 F 3d 388 (7th Cir, 1995)  *Colgate v JUUL Labs Inc*, 402 F Supp 3d 728 (ND Cal, 2019)  *Cooper v Asset Acceptance LLC*, 532 Fed Appx 639 (7th Cir, 2013)  *Cox v Ocean View Hotel Corporation*, 533 F 3d 1114 (9th Cir, 2008)  *Cullinane v Uber Technologies Inc,* 893 F 3d 53 (1st Cir, 2018)  *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649  *Douez v Facebook, Inc.* [2017] 1 SCR 751  *Feldman v Google Inc*, 513 F Supp 2d 229 (ED Pa, 2007)  *Fisher v A.G. Becker Paribas Inc*, 791 F 2d 691 (9th Cir, 1986)  *Fleming Distribution Co v Younan*, 49 Cal App 5th 73 (2020)  *Fteja v Facebook Inc*, 841 F Supp 2d 829 (SD NY, 2012)  *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133  *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442  *Hoover v American Income Life Insurance Co,* 206 Cal App 4th 1193 (2012)  *In re Facebook Biometric Information Privacy Litigation*, 185 F Supp 3d 1155 (ND Cal, 2016)  *Kawasaki Heavy Industries Ltd v Bombardier Recreational Products Inc*, 660 F 3d 988 (7th Cir, 2011)  *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1  *Long v Provide Commerce Inc*, 245 Cal App 4th 855 (2016)  *Marin Storage & Trucking Inc v Benco Contracting and Engineering Inc,* 89 Cal App 4th 1042 (2001)  *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559  *Meyer v Uber Technologies Inc*, 868 F 3d 66 (2d Cir, 2017)  *Murakami v Wiryadi* (2010) 268 ALR 377  *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC)  *National Australia Bank Ltd v Dionys as Trustee for the Angel Family Trust* [2016] NSWCA 242  *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958  *Newirth v Aegis* *Senior Comty LLC*,931 F 3d 935 (9th Cir, 2019)  *Nguyen v Barnes & Noble Inc*, 763 F 3d 1171 (9th Cir, 2014)  *Paper Express Ltd v Pfankuch Maschinen GmbH*, 972 F 2d 753 (7th Cir, 1992)  *Paramasivam v Flynn* (1998) 90 FCR 489  *Peterson v Shearson/American Express Inc*, 849 F 2d 464 (10th Cir, 1988)  *Richards v Ernst & Young* *LLP*, 744 F 3d 1072 (9th Cir, 2013)  *Rinehart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635  *Saint Agnes Medical Center v PacifiCare of California*, 31 Cal 4th 1187 (2003)  *Segal v Amazon.com Inc*, 763 F Supp 2d 1367 (SD Fla, 2011)  *Sharif v Wellness International Network Ltd,* 376 F 3d 720(7th Cir, 2004)  *Sobremonte v Superior Court,* 61 Cal App 4th 980 (1998)  *Specht v Netscape Communications Corp*, 306 F 3d 17 (2d Cir, 2002)  *Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd* [2016] 2 Qd R 194  *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1  *Uber Technologies Inc v Heller*, 2020 SCC 16  *Windsor Mills Inc v Collins & Aikman Corp*, 25 Cal App 3d 987 (1972)  *Zaltz v JDate*, 952 F Supp 2d 439 (ED NY, 2013)  *Zamora v Lehman,* 186 Cal App 4th 1 (2010)  *Z.I. Pompey Industrie v ECU-Line N.V.* [2003] 1 SCR 450  *Zuckerman Spaeder LLP v Auffenberg*, 646 F 3d 919 (DC Cir, 2011) |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Number of paragraphs: | 603 |
|  |  |
| Date of hearing: | 23 and 24 July 2020 |
|  |  |
| Counsel for the Applicant: | Dr O Bigos QC with Mr Z De Kievit |
|  |  |
| Solicitor for the Applicant: | Phi Finney McDonald |
|  |  |
| Counsel for the Respondents: | Mr A Bannon SC with Dr R Garnett, Mr C Bannan and Ms N Oreb |
|  |  |
| Solicitor for the Respondents: | Corrs Chambers Westgarth |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 369 of 2019 |
|  | | |
| BETWEEN: | DIALOGUE CONSULTING PTY LTD (ACN 153 007 259)  Applicant | |
| AND: | INSTAGRAM, INC.  First Respondent  FACEBOOK INC  Second Respondent  FACEBOOK IRELAND LIMITED (and another named in the Schedule)  Third Respondent | |

|  |  |
| --- | --- |
| order made by: | BEACH J |
| DATE OF ORDER: | 22 DECEMBER 2020 |

THE COURT ORDERS THAT:

1. The respondents’ interlocutory application seeking a stay of the proceeding under s 7(2) of the *International Arbitration Act 1974* (Cth) be dismissed.
2. The applicant’s cross application seeking declarations and other relief be dismissed.
3. All parties’ costs of the interlocutory applications referred to in orders 1 and 2 be their costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1. The principal applicant (Dialogue) seeks injunctive and other relief concerning Dialogue’s access to the social media platforms Instagram and Facebook, although for present purposes I need only concern myself with the Instagram platform.
2. Dialogue alleges that the respondents:
3. by restricting Dialogue’s access to Instagram, breached various implied terms of Instagram, LLC’s Terms of Use (Terms of Use);
4. made various representations to Dialogue, thereby estopping the respondents from terminating Dialogue’s access to Instagram; it is also said that the respondents engaged in misleading or deceptive conduct in contravention of ss 18 and 29 of the Australian Consumer Law (ACL) (sch 2 to the *Competition and Consumer Act 2010* (Cth) (CCA));
5. engaged in statutory unconscionable conduct in contravention of s  21 of the ACL; and
6. engaged in anti-competitive conduct that contravened ss 45(1), 46(1) and 47(2) to (3) of the CCA.
7. Contrastingly, the respondents assert that Dialogue has engaged in the unauthorised access and collection of user data from the Instagram platform, including Instagram users’ posts and related media; the jargon used to describe this process is “scraping”. Further, they say that Dialogue has stored that user data on a publicly accessible and unsecured cloud server, thereby subjecting users’ information to potential security breaches. The respondents say that by engaging in this conduct Dialogue has repeatedly breached the Terms of Use. Accordingly, on various occasions, the respondents have revoked Dialogue’s licence to access the relevant website or to use the associated services.
8. In summary, one of the main issues in this proceeding is whether Dialogue is entitled to access and use the Instagram platform, which depends upon whether Dialogue has breached the Terms of Use or whether the respondents were otherwise entitled to revoke Dialogue’s licence.
9. The present proceeding was issued on 11 April 2019. Since that time until April 2020, the respondents have submitted to this Court’s jurisdiction and have actively participated in case management procedures and various interlocutory applications in the proceeding.
10. But the respondents now, belatedly, seek a stay of the proceeding under s 7(2) of the *International Arbitration Act 1974* (Cth) (IAA) by reason of an arbitration agreement between Dialogue and Instagram, LLC. The respondents seek to have the proceeding referred to arbitration, with the exception of Dialogue’s claims concerning ss 45, 46 and 47 of the CCA (the competition claims). Predictably, Dialogue opposes that application. Indeed, it denies the existence of a valid arbitration agreement.
11. It is convenient at this point to set out s 7 of the IAA which provides:

**Enforcement of foreign arbitration agreements**

(1) Where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

this section applies to the agreement.

(2) Subject to this Part, where:

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

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

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

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

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

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

1. The respondents say that prima facie there is a valid arbitration agreement that covers the matters in dispute in the proceeding before me save for the competition claims, and therefore the matter should be referred to arbitration. They say that according to the competence-competence principle, it is for the arbitrator to resolve any questions of jurisdiction, including any challenge to the existence of the arbitration agreement, as well as any dispute as to the scope of the arbitration agreement. But in any event they say that even if I were to finally decide whether an arbitration agreement exists, the conditions of s 7 of the IAA are satisfied and therefore I am obliged to refer the parties to arbitration under s 7(2).
2. As I say, Dialogue opposes the application, principally denying the existence of any arbitration agreement. Further, Dialogue has brought a cross-application asserting that if there is an arbitration agreement, then it should be declared void or unenforceable as in essence involving an unfair contract term or on the basis of statutory unconscionability. If these arguments fail, Dialogue then says that there has been a waiver of the right to arbitrate, and it seeks to invoke s 7(5) of the IAA.
3. Now these competing contentions of the parties require me to address:
4. the competence-competence principle;
5. the relevant choice of law applicable to determining the formation of what I will loosely describe as an internet-formed contract in terms of whether, on the one hand, Victorian law and Australian law should apply to that determination or, on the other hand, whether US federal law or Californian law should apply;
6. whether, applying the relevant law, an arbitration agreement was formed, and determining the parties and its scope;
7. whether, if an arbitration agreement was formed, I should accede to Dialogue’s contentions on its cross-application and declare the arbitration agreement (or the relevant term of the principal contract) as being void or unenforceable as an unfair contract term or unenforceable by reason of conduct amounting to statutory unconscionability;
8. whether the conditions under s 7(2) of the IAA have been satisfied; and
9. whether, if there is an arbitration agreement and the conditions under s 7(2) have been otherwise satisfied, Instagram, LLC particularly and the respondents generally have waived their rights to rely upon it, so triggering the exception under s 7(5).
10. It is convenient at this point to say that I have reached the following views in summary.
11. First, although I accept that generally speaking the competence-competence principle applies, nevertheless I have taken the view that I should go further than just forming a prima facie view as to the existence of the arbitration agreement. I have decided to finally determine that matter now rather than leaving the issue for a Californian arbitrator to decide.
12. Second, in terms of the choice of law to determine whether an arbitration agreement came into existence, the relevant law is Australian law generally and Victorian law in particular. I am bound by a Full Federal Court authority of which I was a member to so choose.
13. Third, applying that law, an arbitration agreement was formed between Dialogue and Instagram, LLC such that s 7(2) applies, but subject to s 7(5). Moreover, the scope condition in s 7(2)(b) is satisfied.
14. Fourth, I reject Dialogue’s cross-application which was premised on my otherwise finding that there was an arbitration agreement. Although the premise is correct, the cross-application nevertheless fails. The relevant provisions of the ACL have not been triggered such as to entitle Dialogue to the relief that it seeks.
15. I should say here that my second and fourth propositions explain why I have put the competence-competence principle to one side.
16. Now my conclusions would usually entail that I should order a stay of relevant parts of the proceeding and refer the matter to arbitration under s 7(2).
17. But in my view Instagram, LLC particularly and the respondents generally have waived their rights to have the matter or relevant parts thereof referred to arbitration. Accordingly, s 7(5), which covers what I will describe as the strong form of waiver, applies. Therefore, no order for a stay under s 7(2) is mandated. But again, in this context I have had to determine the choice of law. Does Australian law and Victorian law apply to determining the question of waiver? If so, in my view there was a clear waiver. Or does US law apply? Now in my view US law applies to determining the waiver question. I will put to one side for the moment whether US federal law applies or Californian state law applies or both. Indeed, on that aspect I have had to embark upon a voyage of discovery which ended up in a sea of contestable propositions concerning which Circuit of the US Court of Appeals was controlling and the tension between US federal law, the different Circuit approaches and Californian state law; perhaps counter-intuitively, the Ninth Circuit is not necessarily controlling in my context. I will return to this topic later. But applying US law, in my view there was a waiver, although my conclusion is less strong than if I was applying Australian law. I should also note that on this latter question I have departed from the expert opinion evidence of the retired United States District Court Judge James Ware, who at one stage had been the Chief Judge, US District Court, Northern District of California; I will use his US courtesy title given his distinguished career. Judge Ware, who was cross-examined before me, could only express admissible views on what the relevant foreign law was concerning waiver, which was quite heterogeneous, rather than its application to the facts of my case. He provided valuable assistance in laying before me the smorgasbord of US jurisprudence on relevant topics from which I have made a selection. But in the application of US law, it was for me to decide how one might deal with the question of waiver, applying US federal law and/or Californian state law.
18. In summary, and given that I have found against the respondents on the waiver question, their application for a stay under s 7(2) will be dismissed. I should also say that in the way the case was put, if the mandatory stay failed, then there was no independent basis for a discretionary stay; the discretionary stay argument was only put derivatively concerning the competition claims if I otherwise granted a mandatory stay of the balance of the claims. Dialogue’s cross-application must also be dismissed.
19. For convenience, I have divided my reasons into the following sections:
20. Background – [23] to [154];
21. The existence, validity and scope of the arbitration agreement – [155] to [464];
22. Waiver – [465] to [600]; and
23. Conclusion – [601] to [603].
24. Let me also record at the outset my appreciation for the assistance of counsel and their instructing solicitors on these tricky questions; their competing suggested solutions were well thought through and researched.
25. Let me turn then to the background to the present applications, starting with a discussion of the parties and their pre-litigation dealings.

# BACKGROUND

1. Dialogue is an Australian proprietary company with its registered office in Melbourne, Victoria. Mr Hugh Stephens is the sole director of Dialogue and the sole director, secretary and shareholder of the company that is Dialogue’s sole shareholder.
2. Although registered in Australia, Dialogue is an international business that targets and has customers all over the globe, including in the United States and in the State of California. Indeed in evidence before me is material demonstrating that Dialogue has publicly represented that it works with about 10,000 customers globally, ranging from small businesses to larger global brands. Moreover, it has represented that its global clients include Disney, E! News, UFC, AMC Networks, MTV, Business Insider, Wish (an American online e-commerce platform) and Voice of America (a US multimedia agency).
3. Further, in public interviews and news articles, Dialogue has represented that the majority of its customers are located in the US and Europe, its account management team is located in the US, and only at most 15 to 20% of its customers are located in Australia.
4. Notwithstanding Dialogue’s public pronouncements and marketing paraphernalia, Dialogue sought to portray itself before me as a small business located in Melbourne, with few employees, and with its sole director and shareholder based in Melbourne. It is said that its business is conducted from Australia. Further, it uses the Instagram service on physical Android devices located in its office in Melbourne. Further, it uses a local server. Further, its products are registered as business names in Australia. This more humble description is perhaps closer to reality.
5. Between 2013 and 2018, Dialogue’s product was called “Schedugram”. In November 2018, Dialogue changed the name of its product to “Sked Social”. Dialogue provides to clients a social media management tool that manages its clients’ planning and publishing of marketing content on Instagram and Facebook. Each client, an Instagram account holder, engages Dialogue to interact with Instagram (or Facebook) on its behalf. As I say, this product is now called Sked Social.
6. Let me say something about the respondents to the proceeding.
7. The first respondent is Instagram, Inc. But Instagram, Inc is no longer an active company. On 31 August 2012, Instagram, Inc merged with an acquisition subsidiary of Facebook, Inc that is now known as Instagram, LLC.
8. The fourth respondent is Instagram, LLC, a company incorporated under the laws of the State of Delaware, which has its principal place of business in California.
9. The second respondent is Facebook, Inc, which is also incorporated under the laws of the State of Delaware with its principal place of business in California. On or around 7 April 2012, Instagram, LLC was acquired by Facebook, Inc.
10. The third respondent, Facebook Ireland Limited, is a company incorporated under the laws of the Republic of Ireland. Since about 6 October 2008, Facebook Ireland Limited has been a subsidiary of Facebook, Inc.
11. The Instagram service was provided by Instagram, LLC until about 14 July 2018. Since that time it has been provided by Facebook, Inc to users in Australia.
12. In the context of these corporate changes, I will return later to the question of the relevant respondent party to any arbitration agreement with Dialogue, although it would seem to be Instagram, LLC.

## (a) The background to the proceeding

1. Let me now discuss some background to the proceeding.
2. There are many social media platforms, but the most well-known are Facebook, Instagram and Twitter. A user signs up to the terms and conditions of the relevant platform, and obtains an account and login details. Each of these platforms enable users to publish content to their individual page or profile.
3. Apparently, the past few years have seen an increase in the use of social media platforms by businesses in order to market their brands and products. In this regard, businesses’ social media activity is generally split into either organic content or paid use of a marketing channel.
4. Organic content is content that the business does not pay the platform owner in order to post to the platform; examples are a Tweet, a post to its Facebook page or a post to its Instagram profile and feed. Organic content on Instagram appears in the user’s feed as a regular post. Organic content involves some cost to the business, including hiring an individual in-house to create content and manage the channel(s) or paying an agency to manage it on the business’ behalf.
5. Paid content is similar to organic content but can have extra features. Paid content is advertising that businesses pay the social media platform for, and can take various forms, with the most popular being “in-feed advertisements”, which appear the same as an organic post, with a “sponsored” or “promoted” tag, in consumers’ feeds alongside content from friends or other organisations that they follow.
6. Now in late 2013, Mr Stephens of Dialogue noticed an increase in demand from Dialogue’s clients to use Instagram as a marketing channel for the clients’ brands and products. Prior to this time, Facebook and Twitter had been the more prominent marketing channels, but he noticed that Instagram was gaining prominence. He also noticed that larger corporate clients were becoming frustrated with the time and effort that they had to invest in order to manage the planning and publishing of organic marketing content on Instagram over a 24-hour period.
7. Corporate clients sought to publish marketing content on Instagram over a 24-hour time period, because their Instagram feeds were being accessed across the world at all times of the day. Planning and publishing over a 24-hour cycle required the clients to engage many junior staff and to use multiple smartphones and login details. Apparently, corporate clients had been setting alarms on their smartphone at certain times of the day to publish the marketing content manually on their own phones or outsource this to an advertising agency to do by providing login details for the relevant platform on which it wished to publish. Consequently, he considered that there was a commercial opportunity for automation to assist in this process.
8. In December 2013 and January 2014, Dialogue developed a “software-as-a-service” product to efficiently manage a company’s planning and publishing of organic marketing content on Instagram. The product was initially called “Schedugram”.
9. The product was comprised of a web-based client “dashboard” and software, smartphones and IT infrastructure, in order to assist clients to advertise and publish content on Instagram. It worked as follows. A client would have an existing Instagram account. The client would engage Dialogue as its agent to interact with Instagram. The product would use the client’s login details to log in to Instagram, select the client’s chosen content, for example, a photo or video and accompanying caption which has been uploaded to the Dialogue’s cloud based storage via the dashboard, and then publish this content on Instagram.
10. Clients would provide their Instagram login details to Dialogue on a confidential basis, and the details would be kept confidential by Dialogue. The product utilised the client’s Instagram login details to manage the publishing and planning of the customer’s organic marketing content. Instead of the client publishing the content itself, Dialogue did it on its behalf through an automated process, such that content could be published at all times of the day at the client’s choosing.
11. The product did not involve any reverse engineering of the Instagram application, and it did not use any Android emulator operating on cloud-based servers.
12. Dialogue first went to market with an initial version of Schedugram in January 2014. The go to market strategy was focused on providing an innovative and unique product to manage the planning and publishing of businesses’ organic marketing content on Instagram.
13. Dialogue did not target specific industries for its product. However, given that the product was aimed at businesses and brands that used Instagram as their core marketing channel, industries like fashion and retail, media, e-commerce and advertising agencies comprised a significant part of Dialogue’s customer base and revenue.
14. Dialogue’s product was one of the first products to allow businesses to manage the planning and publishing of organic marketing content on Instagram. The product offered innovative functionality that clients found attractive. Since its inception in early 2014, Dialogue’s user base had grown to approximately 8,500 companies.
15. To access the product, clients signed up to a standard-form agreement with Dialogue. Dialogue’s clients would pay subscription fees for usage of the product on a recurring monthly or annual basis.
16. Now prior to engaging Dialogue, the client accepted the terms and conditions of Instagram, and obtained an account and login details. In order to access or use the Instagram service, or to register to use the service or create an account, a user was required to confirm at the point of registration that he or she agreed to the Terms of Use. Instagram published Terms of Use effective on 19 January 2013 (original Terms of Use) and Terms of Use effective on 19 April 2018 (revised Terms of Use).
17. The original Terms of Use prohibited, inter-alia, Dialogue from soliciting, collecting, or using the login credentials of other users. They prohibited Dialogue from crawling, scraping, caching or otherwise accessing any content on the Instagram service via automated means. Further, they prohibited Dialogue from violating Instagram’s Community Guidelines and encouraging or facilitating others to violate the Terms of Use.
18. The original Terms of Use required disputes to be determined by arbitration under the American Arbitration Association’s Consumer Arbitration Rules (AAA Rules). The arbitration notice in the original Terms of Use was conspicuous according to the respondents, being set out in all-capital, bold letters at the top of the original Terms of Use in a shaded text box. According to the respondents, every user, including Mr Stephens and Dialogue, who opened various accounts which I describe below, was given an opportunity to opt out of the arbitration provision.
19. The respondents say that Dialogue agreed to the original Terms of Use when it accessed and used the Instagram service, and did not opt out of arbitration. Contrastingly, Dialogue says that it did not agree to the original Terms of Use.
20. I will return to discuss the arbitration clause in the original Terms of Use in more detail later. Was there an agreement between Dialogue and Instagram, LLC on the original Terms of Use? If so, did it contain a binding arbitration clause? If so, did such a provision constitute an “arbitration agreement” within the meaning of ss 3(1) and 7(1) of the IAA? I will answer these questions later, although in doing so I may from time to time slip between descriptions of “arbitration term”, “arbitration clause” and “arbitration agreement”. Further, for conceptual purposes, it may also be necessary from time to time to refer to the arbitration agreement as being something distinct from the principal agreement, although the former is of course encompassed within and forms part of the latter.
21. On 7 October 2010, Mr Stephens created an Instagram account @hughstephens, which was registered to an email address. This was prior to the original Terms of Use.
22. On 12 January 2014, Dialogue created an Instagram account @schedugram, which was registered to an email address. This was during the period of currency of the original Terms of Use.
23. On 14 January 2014, an engineer employed to work on Instagram’s developer platform sent an email to Dialogue asserting that it was violating the original Terms of Use by accessing Instagram’s private application programming interface (API) without consent. On that same date, Mr Stephens replied, indicating that Dialogue did not use Instagram’s private API and only used Instagram’s public API for the limited purpose of capturing a link to its clients’ latest post on the platform.
24. Since at least 14 January 2014, the respondents say that Dialogue had actual knowledge of the Terms of Use, quoting their specific provisions and discussing them at length in correspondence with Instagram’s counsel relating to Dialogue’s alleged violations.
25. On 17 January 2014, the engineer replied indicating that there was no issue with Dialogue’s use of Instagram’s public API, but that Instagram did have concerns regarding Dialogue’s collection of users’ login information. On that same date, Mr Stephens replied that login information sharing was already commonplace.
26. On 18 January 2014, the business name “Schedugram” was registered to Dialogue and Schedugram used the domain schedugram.co to provide its service. The @schedugram account made at least six posts between January 2014 and May 2014.
27. On 25 January and 28 January 2014, the engineer and Mr Stephens further corresponded.
28. On 2 April 2014, external US counsel for Facebook, Inc and Instagram, LLC, Perkins Coie, wrote to Dialogue stating that its activities were unauthorised under the original Terms of Use, were illegal and must be stopped immediately. Perkins Coie advised that Instagram and Facebook had taken steps to deactivate Mr Stephens’ Instagram and Facebook accounts and that his licence to access Instagram and Facebook was revoked.
29. On 3 April 2014, the personal Instagram and Facebook accounts of Mr Stephens were deactivated. The Facebook page “Schedugram”, which was linked to Mr Stephens’ Facebook account, was also deactivated.
30. Between 3 April and 25 June 2014, there was a series of correspondence between Perkins Coie and Dialogue.
31. On 24 April 2014, further enforcement action was taken against additional Facebook accounts operated by Dialogue or Mr Stephens.
32. On 2 March 2015, Perkins Coie wrote to Dialogue indicating that, as had been explained in correspondence in 2014, “Schedugram” violated the original Terms of Use by collecting user credentials and Dialogue had no permission to access Instagram or Facebook. Perkins Coie advised that Instagram and Facebook had taken steps to disable Mr Stephens’ accounts, the accounts of Dialogue and its employees.
33. Now despite those letters Dialogue’s operations were not blocked and its product was able to continue to operate. There were threats of revocation but no actual revocation of its licence. Dialogue heard nothing further after the March 2015 letter. In 2018 the parties’ representatives met to discuss ways of collaborating together, and Dialogue was given approval to access the Facebook API.
34. Between 3 April 2016 and 24 May 2018, Dialogue published terms of service for the use of Schedugram that provided, inter-alia, that:

You acknowledge and agree that … any access to Instagram (including via the [Dialogue] Service) is governed by Instagram’s Terms of Use.

1. Dialogue also used the domains schedugr.am and skedsocial.com to provide its service.
2. On 31 July 2017, Dialogue created the Instagram account @BenSchedugram, which was registered to two email addresses; again, this was during the currency of the original Terms of Use. This account was associated with Dialogue’s primary IP address. The @BenSchedugram account made at least 17 posts between 29 October 2017 and 5 July 2018.
3. On 31 January 2018, Dialogue created the Instagram account @getskedsocial, which was registered to three email addresses; again, this was during the currency of the original Terms of Use. This account was associated with Dialogue’s primary IP address.
4. On 11 June 2018, Dialogue created the Instagram account @sked\_social, which was registered to an email address. This was during the currency of the revised Terms of Use, which had commenced use by Instagram, LLC on 19 April 2018. I should note that the revised Terms of Use did not contain an arbitration provision.
5. Now the respondents refer to a number of Instagram accounts created by Dialogue. They were not used for the provision of services to clients, but rather for marketing and testing activities.
6. In January 2018, Instagram launched its content publishing API (Instagram Content Publishing API) with selected app developers (described as Instagram marketing “partners”). Initially Instagram selected only six partners who were given access to the Instagram Content Publishing API. Since then the number of partners with access to the Instagram Content Publishing API has increased. Many of these partners compete with Dialogue.
7. Dialogue was never given access to the Instagram Content Publishing API despite expressing a willingness to use it. Dialogue’s product was excluded from the preferred providers who had been selected by Instagram.
8. The functionality of the Instagram Content Publishing API has evolved since its inception. Initially the Instagram Content Publishing API supported publishing images but did not support videos, locations, user tags, shopping tags, branded content tags, filters or multi-image posts. In contrast, Dialogue’s product supported many of those additional functions.
9. In February and March 2018, Mr Stephens prepared a product plan to expand beyond Instagram. Initially the product plan was for a series of products/versions in different industries. Later it was revised to be a product plan that remained having one main “interface” that different customers could use. Post the launch of the Instagram Content Publishing API, part of Dialogue’s strategy was to rebuild its core product to support multiple platforms, for example, Facebook, Twitter and Pinterest, which involved rewriting of the original code.
10. In March 2018, having developed a new product plan and seeing an ongoing opportunity in the market, Dialogue started to further develop the product. Dialogue hired a head of engineering to spearhead the product redesign and develop a range of new features such as its first version of the Instagram analytics module of the product and rewrite of the code to lay the ground work for other social networks. In August 2018, Dialogue commenced work rebranding the product as Sked Social, instead of Schedugram. Mr Stephens thought that dropping “gram” from the product’s name was necessary in order to be seen as a broader tool than merely use with Instagram.
11. On 29 September 2018, Dialogue received an email from external US counsel for Instagram, LLC, Kilpatrick Townsend & Stockton LLP. The email requested that Dialogue cease use of the name Schedugram because it infringed on Instagram’s trademark. By that time, Dialogue was in the process of rebranding to Sked Social in any event.
12. On 4 December 2018, Dialogue’s team completed the rebrand to Sked Social. Since then Dialogue has been trading under the name Sked Social. Dialogue published terms of service for Sked Social which provided, inter-alia, that:

You acknowledge and agree that … any access to Instagram (including via the [Dialogue] Service) is governed by Instagram’s Terms of Use.

1. I should pause here and note the following.
2. Dialogue’s Terms of Service for Schedugram in effect from 3 April 2016 to 24 May 2018 and produced by Dialogue to the Facebook entities pursuant to a notice to produce (Schedugram Terms), under the heading “Terms of Service” provided that “These Terms of Use (Terms) govern your use of our website located at http://schedugr.am (including subdomains), the Schedugram service, and any applications provided by us (collectively Service)”. Under the heading “The Service” term 4 provided “You acknowledge and agree that the Service is not affiliated with or authorised by Instagram, and any access to Instagram (including via the Service) is governed by Instagram’s Terms of Use.”
3. Dialogue’s terms of service for Sked Social in effect from 25 May 2018 to 25 February 2020 and produced by Dialogue to the Facebook entities pursuant to a notice to produce (Sked Social Terms), under the heading “Terms of Service” provided that, “These Terms of Use (Terms) govern your use of our website located at https://skedsocial.com (including subdomains), the Sked Social service, and any applications provided by us (collectively Service)”. Under the heading “The Service” term 4 provided “You acknowledge and agree that the Service is not affiliated with or authorised by Instagram, and any access to lnstagram (including via the Service) is governed by Instagram’s Terms of Use.”
4. Now a common request from Dialogue’s clients was to offer products for both Instagram and Facebook. In order to offer access to Facebook to Dialogue’s clients, Dialogue went through Facebook’s usual process for obtaining access in October 2018 (app review process). On 24 October 2018, Dialogue submitted its product to Facebook’s app review process.
5. On 26 October 2018, Dialogue completed providing information to Facebook as part of the app review process. This involved verifying Dialogue’s business entity and the business name “Sked Social”, and providing Facebook access to the Sked Social product so a Facebook developer could login and manually test the system to ensure that Dialogue was using specific permissions and protecting information appropriately.
6. As part of the app review process, Dialogue accepted Facebook’s Supplemental Terms for Extended Platform Products and its Technology Provider Amendment to Supplemental Terms for Extended Platform Products.
7. At the conclusion of the app review process, Facebook gave approval to Dialogue for the Sked Social product, and Dialogue was permitted access to the Facebook API.
8. After approval, Dialogue could post to Facebook pages using the Facebook API. Through the Facebook API, a client would give Dialogue access, via an authorisation process with Facebook instead of providing their login details directly to Dialogue. As Dialogue did not have access to the Instagram Content Publishing API, it was unable to use a similar process for Instagram, so Dialogue continued to use the process of logging in as an agent of the client for Instagram.
9. On 10 December 2018, Dialogue launched “Sked Link”, a service that let clients build a link into their Instagram bio so that they could direct customers to access relevant information about their posts.
10. In January 2019, Dialogue requested some additional permissions from Facebook to support location tagging in Facebook posts. On or around 25 January 2019, that additional permission was approved by Facebook after completing another app review process.
11. In early 2019, the Instagram Content Publishing API was relaunched and included additional features. But it still did not support stories, multi-image posts or shopping tags. Sked Social, by contrast, supported these functions and was a unique feature of Dialogue’s product offering.
12. On 12 February 2019, without any warning to Dialogue, the domains used for the Sked Social product were banned from Facebook and Instagram. Mr Stephens’ personal Facebook account was also deactivated. This ban initially did not affect Sked Social’s access to the Facebook API for existing customers or Instagram, however Dialogue could not direct new clients to its product as the domains had been banned.
13. On 13 February 2019, Dialogue received a letter dated 12 February 2019 from Perkins Coiethat asserted:

As we explained during our prior correspondence [in 2014], your service violates Instagram’s terms by collecting user credentials and automating access to the Instagram platform without permission. We also explained that, as a result of your violations of the terms, Facebook has revoked your license to access Facebook and Instagram for any purpose.

1. The letter also stated:

Facebook has deactivated your accounts. We remind you that you have no permission to access Facebook’s or Instagram’s websites and/or to use any of their services, including Facebook’s and Instagram’s APIs. This means that you, your agents, employees, affiliates, or anyone acting on behalf of Skedsocial, or you personally ... may not access Facebook’s and Instagram’s websites, services, platforms, or networks for any reason whatsoever.

1. On 27 February 2019, Dialogue’s Facebook API access reverted to the mode that had appeared prior to the app review process. All Facebook posts, both past and scheduled, disappeared. Dialogue was able to partially fix this error and was able to access the Facebook API on behalf of some existing customers, but errors persisted and Dialogue’s domains remained blocked.
2. On 12 March 2019, Dialogue’s Facebook API access again reverted to “development mode” and all Facebook posts, past and scheduled, disappeared for all customers.
3. Between 13 February 2019 and 9 April 2019, there was a series of correspondence between the parties about the self-help action that had been taken by the respondents, described as enforcement.

## (b) The proceeding

1. On 11 April 2019, Dialogue filed an originating application and an interlocutory application. Those applications named Instagram Inc., Facebook Inc. and Facebook Ireland Limited as respondents (the Facebook entities). Dialogue sought interim and interlocutory injunctions restraining the Facebook entities from terminating the access of Dialogue to Instagram and Facebook.
2. On 15 April 2019, I heard the application for injunctive relief ex parte. Dialogue had attempted unsuccessfully to effect service of these documents before 15 April 2019. I ordered that the Facebook entities be restrained from taking any action to terminate or suspend Dialogue’s access to Facebook and Instagram (first injunction) until 17 May 2019 or further order. That same day, the Facebook entities became aware that the first injunction had been issued and restored the de-activated accounts to comply with that order.
3. On 26 April 2019, White & Case, external counsel for the Facebook entities (excluding Instagram, LLC at that time), wrote to the Australian solicitors for Dialogue, Phi Finney McDonald (PFM), reserving all of the Facebook entities’ rights, including in relation to jurisdiction, venue and service.
4. In parallel, the Facebook entities instructed an Australian law firm, Gadens, to appear in the proceeding. On 16 May 2019, Gadens filed a notice of address for service.
5. On 3 May 2019, Instagram, LLC was added as the fourth respondent.
6. On 17 May 2019, the Facebook entities (now including Instagram, LLC) appeared at a case management hearing and consented to orders being made that included that the first injunction would continue until further order, on the condition that the phrase “without any admission on the part of the Respondents” was added to the terms of the injunction. Further, a timetable for the filing of pleadings and for discovery was agreed to.
7. On 23 May 2019, Dialogue filed an amended originating application and an amended interlocutory application. I will return to say something about pleadings and discovery later. For the moment let me say something about the various interlocutory applications that have been made before me.

#### Further interlocutory applications

1. On 18 October 2019, Gadens wrote to PFM to advise that it had recently been ascertained that Dialogue was using automated means to collect user information without Facebook’s permission and storing it in a manner which failed properly to secure and protect the user information. By that letter, Gadens sought confirmation in writing by 22 October 2019 that Dialogue had:
2. properly secured all user information held on the servers, including the dataset containing user content and Instagram media files;
3. stopped accessing, and would not in the future access, Instagram and collect media from Instagram without Facebook’s express consent;
4. maintained a record of, for the purpose of the proceedings, and then deleted media improperly collected from Instagram; and
5. complied with its obligations under applicable Australian law, including the CCA and the *Privacy Act 1988* (Cth).
6. Dialogue did not provide these confirmations and PFM and Gadens engaged in further correspondence about these matters on 22 October 2019, 28 October 2019, 30 October 2019, 31 October 2019, 4 November 2019, 8 November 2019 and 11 November 2019. The matters were not resolved.
7. On 14 November 2019, Gadens sent to PFM a copy of a proposed order to vacate or vary the first injunction on the basis of the matters above. PFM did not respond.
8. On 14 November 2019, the Facebook entities filed an interlocutory application seeking orders to the effect that the first injunction be discharged or that the first injunction be varied to allow the Facebook entities to terminate or suspend Dialogue’s access to Instagram only, leaving in place the injunction in respect of Dialogue’s access to Facebook.
9. On 14 November 2019, the Facebook entities filed an affidavit of Mr Michael Owens, the solicitor on the record for the Facebook entities, in support of the Facebook application.
10. On 15 November 2019, case management orders were made in respect of the Facebook application, and subsequently varied to extend the dates into 2020.
11. Between 18 November 2019 and 16 January 2020, Gadens and PFM engaged in further correspondence about the matters above.
12. On 19 and 20 February 2020, the Facebook entities filed affidavits of Mr Ryan Tierney and Mr Alistair Agcaoili in support of the Facebook application. These affidavits spoke to the Facebook entities’ concerns relating to Dialogue:
13. engaging in unauthorised automated data collection from Instagram;
14. storing its clients’ information, including scraped information, on an unsecured and publicly accessible server; and
15. not deleting this stored information when a client deletes the information from their account or changes its account settings to “private”.
16. The hearing of the Facebook application presently stands adjourned.
17. On 22 January 2020, PFM wrote to Gadens to allege that the Facebook entities had been blocking Dialogue’s clients from accessing their Instagram accounts and informing Dialogue’s clients that sharing their account with a service that “helps them get more likes or followers goes against the Respondents’ Community Guidelines”. On that basis, PFM asserted that the Facebook entities were engaging in misleading or deceptive conduct and in unconscionable conduct. In the same letter, PFM demanded that the Facebook entities, by 23 January 2020, undertake that users’ access to Facebook and Instagram would not be blocked as a consequence of using Dialogue’s product and that the Facebook entities would not inform users, directly or indirectly, that using Dialogue’s product violated or contravened Instagram Community Guidelines. Gadens responded on the same day and requested identifying details of the allegedly blocked Instagram accounts so that the Facebook entities could investigate and respond.
18. On 23 January 2020, PFM responded that Dialogue would not provide the Facebook entities with details identifying Dialogue’s clients. Gadens responded on the same day, repeating that the Facebook entities could not investigate without the identifying information and that it would be premature for Dialogue to file an application without allowing for a reasonable opportunity to investigate.
19. On the basis of these matters, on 24 January 2020, Dialogue filed a second interlocutory application, for an order restraining the Facebook entities from terminating, suspending, refusing or limiting the access of their clients to Instagram and Facebook by reason only of the clients’ use of Dialogue’s services (second Dialogue application).
20. On 28 January 2020, Gadens replied to PFM reiterating the request for identifying information to permit the Facebook entities to investigate.
21. On 29 January 2020, the second Dialogue application was listed for hearing. The Facebook entities filed an affidavit of Mr Owens in support of their submission that the hearing of the second Dialogue application be adjourned to allow time for technical evidence to be adduced. Dialogue submitted that an interim injunction be in place up to and until the hearing of the second Dialogue application. On 29 and 30 January 2020, Dialogue and the Facebook entities made submissions relating to the grant of an interim injunction. On 30 January 2020, I made orders restraining the Facebook entities until 13 February 2020 or further order from taking enforcement action against Dialogue’s clients (second injunction).
22. On 19 February 2020, the Facebook entities filed two affidavits in response to the second Dialogue application.
23. The second injunction has been extended by consent until the hearing and determination of the Facebook entities’ stay application.
24. On 11 March 2020, Corrs Chambers Westgarth was appointed by the Facebook entities in place of Gadens and filed a notice of appearance.
25. On 9 April 2020, the Facebook entities filed an interlocutory application seeking a stay of the proceeding pursuant to s 7(2) of the IAA. This is the stay application that I am presently dealing with.
26. On 24 April 2020, I ordered that the stay application and any cross-application that might be made by Dialogue be heard on 23 and 24 July 2020.
27. On 25 May 2020, Dialogue filed its cross-application that I have referred to earlier.

#### The pleadings

1. Let me now say something about the pleadings in this matter.
2. Dialogue filed a statement of claim on 28 June 2019, an amended statement of claim on 6 September 2019 and a further amended statement of claim on 3 April 2020.
3. The Facebook entities filed a defence on 23 August 2019 and an amended defence on 30 September 2019. Notably, their pleadings were silent on the question of any challenge to jurisdiction, reliance on any arbitration clause or the question of any stay. But at this point let me note something else of significance. As I have said, the original Terms of Use, which applied from 19 January 2013 to 19 April 2018, contained an arbitration provision. And as I have said, this was notified in capital letters at the commencement of the Terms of Use and there was a detailed clause set out later. Notably in both the respondents’ defence and amended defence there are express references to the original Terms of Use. Indeed, various clauses are pleaded (see the pleadings at [12]). But there is no reference to or reliance on the arbitration clause. The various versions of the defence are silent. Was that clause overlooked? Or was a choice made not to plead it? The direct evidence is silent. But a natural inference that could be drawn was that a decision was made by the respondents not to plead it. I will return to solve this puzzle later. I should also note here for completeness and again, that the revised Terms of Use, operative from 19 April 2018, contained no arbitration clause. Again, the various versions of the defence pleaded various terms of the revised Terms of Use.
4. The Facebook entities have not filed any cross-claims in the proceeding against Dialogue or any other person. Now although allowance had been made for such a pleading in my orders of 17 May 2019, that option was not availed of.
5. Dialogue filed a reply to the amended defence on 15 October 2019.
6. On 30 August 2019, the Facebook entities issued a request for further and better particulars of Dialogue’s statement of claim filed on 28 June 2019.
7. Dialogue, having filed an amended statement of claim on 6 September 2019, provided further and better particulars of the amended statement of claim on 17 October 2019.
8. On 15 November 2019, I ordered that the Facebook entities were to communicate to Dialogue any request for further and better particulars by 22 November 2019 and Dialogue was to respond by 13 December 2019. On 22 November 2019, the Facebook entities wrote to PFM that certain allegations in Dialogue’s pleading remained inadequately particularised. On 13 December 2019, PFM provided further and better particulars. The court dates relating to further and better particulars were extended on 7 February 2020 to 13 March 2020 and 27 March 2020 respectively. No additional particulars were sought by 27 March 2020 by the Facebook entities.
9. Let me now say something about document requests.

#### Document production and discovery

1. On 27 August 2019, PFM wrote to Gadens and requested copies of nine documents referred to in the defence. On 11 September 2019, Gadens produced the documents to PFM.
2. On 30 August 2019, the Facebook entities issued a notice to produce to Dialogue seeking the production of 36 documents referred to in:
3. the affidavit of Mr Stephens affirmed on 11 April 2019;
4. Dialogue’s amended concise statement filed on 23 May 2019; and
5. Dialogue’s statement of claim filed on 28 June 2019.
6. On 5 September 2019, PFM responded that Dialogue would require additional time in order to collate the requested documents, and that some of the requested documents were not in Dialogue’s control or had been previously provided to the Facebook entities. PFM and Gadens engaged in further correspondence about these matters on 23 September 2019, 26 September and 11 November 2019.
7. Let me say something about discovery.
8. On 17 May 2019, I made case management orders relating to discovery. The dates for compliance were extended on 17 September 2019, 15 November 2019, 19 December 2019, 30 January 2020 and 7 February 2020. These orders required that the parties use their best endeavours to agree the categories of documents for discovery.
9. On 21 October 2019, the parties exchanged proposals as to the categories of discovery.
10. On 25 October 2019, Gadens responded to PFM’s letter of 21 October 2019 that the Facebook entities did not agree to several of Dialogue’s proposed categories.
11. On 31 October 2019, PFM responded, seeking to explain the relevance of several of the discovery categories that they proposed.
12. On 1 November 2019, Gadens sent a letter to PFM, seeking a response to Gadens’ letter of 21 October 2019. On 4 November 2019, PFM responded that Dialogue did not agree to several of the Facebook entities’ proposed categories.
13. On 12 November 2019, the Facebook entities issued a further notice to produce to Dialogue seeking the production of three documents referred to in Dialogue’s amended statement of claim dated 6 September 2019 and reply dated 15 October 2019.
14. On 15 November 2019, I ordered that the Facebook entities file and serve any application for the production and inspection of the documents sought in the first notice to produce and second notice to produce by 7 February 2020.
15. On 18 November 2019, Dialogue responded to the first and second notices to produce and produced some of the requested documents and made others available for inspection. Dialogue did not produce documents that Dialogue said were not in its control, or in respect of which Dialogue made a claim for confidentiality.
16. On 7 February 2020, I extended to 15 May 2020 the date by which the Facebook entities may file and serve any application for production. The Facebook entities have not filed any such application.
17. On 16 March 2020, the orders as to discovery were vacated. The parties have not produced any documents on discovery.

#### Other matters

1. On 15 November 2019, I ordered that the proceeding be referred to mediation. On 6 February 2020, the parties participated in a mediation, although they were unable to reach a resolution.

#### General

1. In summary, since the commencement of this proceeding, the respondents have taken numerous steps in the proceeding, including filing a defence, an amended defence and an interlocutory application for the discharge of an injunction, opposing an interlocutory application for injunction, filing numerous affidavits, appearing at numerous Court hearings, submitting to various Court orders for discovery and filing of a counter-claim, issuing notices to produce and requests for particulars and attending a Court-ordered mediation. Indeed, for over a year the respondents participated in the proceeding without expressing any intention to rely upon any arbitration agreement. Nor did the respondents make any appearance before the Court conditional upon any arbitration agreement. These matters are all relevant to the waiver question which I will discuss later.
2. On 9 April 2020, over 12 months after the commencement of the proceeding, the respondents filed an interlocutory application seeking an order to stay the proceeding under s 7(2) of the IAA.
3. The respondents propose to arbitrate in California by reference to a draft demand for arbitration. The draft demand for arbitration specifies that, if an in-person hearing is to be held, the respondents request that it be held in San Francisco or San Jose, California. The AAA Rules at R-21 allow administrative and case management hearings in the arbitration to be conducted telephonically. R-26 and R-32(b) also permit the arbitration to be conducted remotely, and the arbitrator may allow the parties to present evidence by web conferencing, internet communication, and telephonic conferences. The AAA has published a “Model Order and Procedures for a Virtual Hearing via Videoconference” including guidance for an arbitration to be conducted entirely virtually.
4. Further, the Consumer Due Process Protocol, which is a statement of fairness principles that applies to all arbitrations under the AAA Rules, requires that in the case of any in-person proceedings, the proceedings should be conducted at a reasonably convenient location for the parties after considering the positions and circumstances of the parties and the dispute.
5. Principle 7 of the Consumer Due Process Protocol provides:

In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the [arbitrator].

1. Further, the “Costs of Arbitration” section in the AAA Rules and the accompanying fee schedule require that, where a business files a demand for arbitration, the business (in this case, the respondents) must pay all administrative fees which includes filing fees, case management fees and hearing fees, the arbitrator’s compensation and expenses, hearing room rental, any AAA expenses, and costs relating to witnesses and evidence produced at the direction of the arbitrator.

# THE EXISTENCE, VALIDITY AND SCOPE OF THE ARBITRATION AGREEMENT

## (a) The competence-competence principle

1. The competence-competence principle is a tenet of faith amongst the arbitration set: simply stated, an arbitrator usually has the power to determine his own jurisdiction including any challenge to the validity or existence of the arbitration agreement. So, if prima facie there is a valid arbitration agreement which appears to cover the matter in dispute, then this principle would ordinarily dictate that the matter should be referred to arbitration including any challenges to the existence, validity or scope of the arbitration agreement. And in that eventuality, no finding by the Court on the balance of probabilities that a valid arbitration agreement exists is necessary.
2. Now praying in aid this principle, the respondents say that any issues regarding the formation, validity or scope of the arbitration agreement should be resolved by the arbitrator and that for present purposes all that I need find on such matters is a prima facie case.
3. Now *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 deals with this point, although it concerned a stay application under the *Commercial Arbitration Act 2010* (NSW) (CAA). I should note that the decision went on further appeal (*Rinehart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635) but that does not affect what I am about to say.
4. The relevant provisions of the CAA were identical to those under the IAA. Section 8(1) of the CAA provided:

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

1. Section 16 of the CAA provided:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract.

(3) A decision by the arbitral tribunal that the contract is null and void does not of itself entail the invalidity of the arbitration clause.

1. Sections 8 and 16 of the CAA are enactments of Arts 8 and 16 of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006 (the Model Law). Now each of those provisions is expressly adopted in the IAA and has the force of law pursuant to s 16 of the IAA; sch 2 to the IAA sets out the Model Law. In addition, ss 7(2) and (5) of the IAA are similar to s 8(1) of the CAA.
2. As stated in *Hancock*, an applicant for a stay need only show on a prima facie basis that a valid arbitration agreement exists (at [141] per Allsop CJ, Besanko and O’Callaghan JJ):

Under this approach, the Court does not reach a final view on the balance of probabilities in respect of the matters in s 8, including the scope of the arbitration agreement. If there appears to be a valid arbitration agreement which *prima facie* covers the matters in dispute, the matter should be referred to the arbitrator to deal with questions of jurisdiction, including the scope of the arbitration agreement.

1. *Hancock* affirmed that the competence-competence principle in s 16 is wide enough to encompass an objection to jurisdiction on the basis that no arbitration agreement existed.
2. I should also say that the competence-competence principle exists under the AAA Rules (R-14(a)); see also the *California Arbitration and Conciliation of International Disputes Act* (Cal Civ Proc Code § 1280 et seq.) § 1297.161 (Californian Arbitration Act).
3. Now *Hancock* has been applied in the context of s 7 of the IAA in *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649. *Degroma* applied the principles of *Hancock* to the context of a stay application under s 7 of the IAA in respect of an agreement to arbitrate in a foreign country, similar to the situation here. The claimant opposed a stay in favour of arbitration in a foreign jurisdiction, arguing that no valid arbitration clause existed. O’Callaghan J held that the effect of the competence-competence principle was that a court should only take a prima facie view of the existence or validity of an arbitration agreement on a stay application under s 7 of the IAA. And once the court was satisfied on a prima facie view that an arbitration agreement exists, then a stay should normally be granted, particularly where the attack on the arbitration clause is intertwined with the challenge to the existence of the principal contract. O’Callaghan J concluded that the proceeding should be stayed, because the question of whether the arbitration agreement existed was intrinsically related to and intertwined with the issue of whether the principal contract (containing the arbitration clause) was binding on the parties. It was therefore appropriate that the arbitrator resolve both such issues. The respondents say that the same reasoning applies here and that I should stay the proceeding and allow the arbitrator to decide whether an arbitration agreement was brought into existence in the first place.
4. The respondents say that the following features of this proceeding support the position that I should follow the approach in *Hancock* and *Degroma* in this case and grant the stay application.
5. First, a valid arbitration agreement exists which prima facie covers the matter in dispute.
6. Second, the claims pleaded by Dialogue fall within the scope of the arbitration agreement in the original Terms of Use. Further, the arbitration claims contemplated in the “Statement of Claim & Relief Sought” attached to Instagram’s draft demand for arbitration would for the most part appear to fall within the scope of the arbitration agreement in the original Terms of Use.
7. Third, whether an arbitration agreement was formed between the parties is a matter within the scope of the arbitration agreement. In any event, to the extent that there is a dispute as to its scope, the competence-competence principle requires the question to be referred to arbitration. Further, because the question of whether the arbitration agreement existed is intrinsically related to the issue of whether the Terms of Use were binding on the parties, it is appropriate that both matters be referred to arbitration.
8. Fourth, the allegation in Dialogue’s cross-application that the arbitration agreement is invalid because it was procured by unconscionable conduct or amounted to an unfair contract term is also intertwined with the issue of the broader application of both the original and revised Terms of Use and the broader claim of unconscionability. The respondents say that these questions should be resolved pursuant to the arbitration agreement, noting that the IAA should be construed so as to facilitate, rather than impede, the process of arbitration. Consequently, it is appropriate that all such questions be resolved by the arbitrator.
9. Accordingly, the respondents say that all of the claims but for the competition claims should be referred to arbitration, and the proceeding should be stayed pending resolution of that arbitration.
10. Now Dialogue says that I should proceed to determine the existence and validity of the arbitration agreement, and it denies the application of the competence-competence principle in the present context.
11. According to Dialogue, critical to *Hancock’s* reasoning about the construction of s 8 of the CAA was the existence of the competence-competence provision in s 16 of the CAA, both provisions being derived from Arts 8 and 16 of the Model Law respectively.
12. But in the present case, the respondents seek to invoke s 7 of the IAA, rather than Art 8 of the Model Law. According to Dialogue, no doubt their reason for not seeking to invoke Art 8 is their recognition that such an application would be out of time, because they did not seek a stay before submitting their “first statement on the substance of the dispute”.
13. But Dialogue says that s 7 of the IAA was not derived from the Model Law. It was derived from Art II(3) of the International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting (the Convention); see sch 1 to the IAA. But Dialogue says that neither the Convention nor s 7 contains any indication that the competence-competence principle applies.
14. Further, Dialogue says that the Model Law states in Art 1(2), in effect, that Art 16 is a provision which applies “only if the place of arbitration is in the territory of this State”. But Dialogue says that on the respondents’ case, the seat of the arbitration would be in California, such that Art 16 is inapplicable on any view.
15. In summary, Dialogue says that *Hancock*, which dealt with s 8 of the CAA in the context of a domestic arbitration, is distinguishable and I should put it to one side.
16. Further, Dialogue says that in *Degroma* the arbitration agreement resulted from lengthy negotiations. In considering whether to stay the proceeding under s 7 of the IAA, O’Callaghan J treated s 8 of the CAA as analogous to s 7 of the IAA and on this basis proceeded to apply the competence-competence principle to an application under s 7. But Dialogue says that there was no discussion of the differences between the provisions, or of the absence of a competence-competence provision in the Convention, or of the limitation under Art 1(2) of the Model Law of the competence-competence principle to arbitrations with a seat in Australia. Accordingly, Dialogue says that *Degroma* is distinguishable. Alternatively, Dialogue says that if *Degroma* is authority for the proposition that the competence-competence principle under Art 16 applies under s 7 of the IAA, I should decline to follow it.
17. As a further fall back position, Dialogue says that even if *Hancock* is applied, that decision does not stand for the proposition that an applicant for a stay need only show on a prima facie basis that a valid arbitration agreement exists. *Hancock* rejected any rigid taxonomy of labels or approaches. In this respect, it says that how I ought deal with a stay application will depend significantly upon the issues and the context. Now this is a more attractive proposition. Dialogue says that if I were to ask myself the practical question of whether to hear a separate attack on the arbitration agreement or allow the arbitrator to deal with it, then the answer is that I should hear the attack, for the following reasons.
18. First, Dialogue says that its attack on the arbitration agreement is on specific grounds that relate only to the arbitration agreement, and is not part of a broader attack on the contract. I must say that such a characterisation is more accurate than the respondents’ characterisation.
19. Second, Dialogue says that the bases for its attack on the arbitration agreement include that it is an unfair contract term under s 23 of the ACL and that reliance on it constitutes unconscionable conduct under s 21 of the ACL. It says that these are matters which classically should be determined by me rather than any foreign arbitral tribunal. I must say that I find this submission attractive.
20. Dialogue says that I am better placed than a foreign arbitral tribunal to determine the question of unconscionability, which may require, inter-alia, an assessment of standards in Australia and the values and norms recognised by the ACL (see my observations in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq)* (2020) 275 FCR 57 at [362] to [379]). That is true.
21. Further, Dialogue says that if the arbitral tribunal were to decide the validity of the arbitration agreement, then the respondents would urge it to apply Californian law. Dialogue says that it may then be deprived of the opportunity to run its arguments under the ACL that the arbitration agreement is void as an unfair contract term and/or unconscionable. Further, Dialogue says that the arbitral tribunal’s failure to apply the ACL could render any award unenforceable under s 8(7)(b) of the IAA or Art 34(2)(b) of the Model Law as manifestly contrary to Australian public policy. I doubt these submissions. I will come back to the “Governing Law & Venue” provision in the original Terms of Use later and discuss the phrase “without giving effect to any principles of conflicts of law”.
22. Further, Dialogue says that a hearing before me on the existence of the arbitration agreement and on the “proviso question” under s 7(5) will be more efficient. All the evidence is in relating to the existence and validity of the arbitration agreement and on the issue of waiver. I agree with this point as a matter of practicality.
23. In summary, Dialogue says that I should proceed to determine the existence and validity of the arbitration agreement and the question of waiver because:
24. the competence-competence principle does not apply;
25. alternatively, even if the competence-competence principle applies, in the present case the circumstances are such that I should decide the relevant questions finally rather than merely on a prima facie basis.
26. Let me begin by saying that I would reject some aspects of Dialogue’s submissions as to the application of the competence-competence principle. I can invoke it. But whether I should is a different question. Let me begin by discussing whether I can invoke it.
27. Now Dialogue argues that the prima facie test, as applied in *Hancock*, does not apply to stay applications under s 7 of the IAA. Specifically, Dialogue argues that, unlike Art 16 of the Model Law, the Convention does not contain a competence-competence provision, and so there can be no basis for application of the prima facie test to a stay application under s 7. Further, Dialogue also argues that the prima facie test cannot apply in the present case because Art 16 of the Model Law as enacted in Australian law under s 16(1) of the IAA does not apply to foreign-seated arbitrations.
28. But I reject Dialogue’s arguments.
29. First, the absence of a competence-competence provision from the Convention is irrelevant. The Convention relates only to the recognition and enforcement of arbitration agreements and awards. It contains no rules on the powers and duties of arbitrators because the Convention is not a law of arbitral procedure, unlike the Model Law. In any event, the object and purpose of the Convention is to maximise enforcement of arbitration agreements, which is consistent with the purpose of the prima facie test.
30. Second, the fact that Art 16 of the Model Law does not apply to foreign-seated arbitrations is also irrelevant. The key requirement under *Hancock* for application of the prima facie test is whether a competence-competence provision exists under the procedural law of the seat of arbitration. If such a provision exists, then the foundation for the prima facie test is established.
31. Here the seat of the arbitration is California, which has adopted a competence-competence provision substantially similar to Art 16 of the Model Law. As stated in the Californian Arbitration Act § 1297.161 “The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement”.
32. Further, the arbitral rules that the parties have chosen to govern the arbitration, namely, the AAA Rules, also contain a competence-competence provision (R-14(a)):

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

1. Accordingly, the fact that Art 16 of the Model Law as enacted in the IAA does not apply to the arbitration in the present case is immaterial given that the identical provision applies to the arbitration under Californian law.
2. Further, *Hancock* held that in the context of a stay application under the CAA for domestic arbitrations, the stay provision in s 8 of the CAA must be read together with the competence-competence provision in s 16 of the CAA. So too in the context of international arbitrations. The stay provision in s 7 of the IAA should also be read together with the competence-competence provision that would apply to any arbitration in the present case, which is in Art 16 of the Model Law, which has been incorporated in Californian law.
3. Further, in *Hancock* the Full Court held that the word “finds” in the stay provision in s 8 of the CAA, that is, the court must “refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”, must be read together with the competence-competence principle. Now the same should hold true for the word “finds” in the stay provision in s 7(5) of the IAA, that is, the court must refer the parties to arbitration unless it “finds that the arbitration agreement is null and void, inoperative or incapable of being performed” (s 7(5)).
4. Further, *Degroma* treated s 7 of the IAA as analogous to s 8 of the CAA, and on that basis applied the prima facie test to the stay application under s 7 of the IAA. Moreover, *Degroma* is analogous to this case because there the competence-competence principle existed under the law of the seat of arbitration (s 30 of the *Arbitration Act 1996* (UK)). Similarly, in the present case the competence-competence principle exists under the law of the seat of arbitration.
5. In summary, I accept the respondents’ argument that the competence-competence principle applies, and reject Dialogue’s submissions to the contrary. But the fact that I could apply the principle does not entail that I should. There are no hard and fast rules. Context is everything. I do not propose to apply the principle for the following reasons shortly put.
6. First, there are tricky choice of law questions. What law should be applied to determine the existence of the arbitration agreement? I am best placed to answer this. Further, whatever choice is made I now have all bases covered in terms of being fully informed on Australian law, and by Judge Ware on US law, in order to determine (under whichever law applies) whether there is an arbitration agreement.
7. Second, I now have all the evidence in to make a final assessment on the merits as to the existence of the arbitration agreement. To leave any decision at the lower threshold of the prima facie stage would be a limp effort.
8. Third, I do not accept all dimensions of the respondents’ arguments on their intertwining point, but it is unnecessary to elaborate further at this point.
9. Fourth, I am better placed than a Californian arbitrator to deal with Dialogue’s cross-application concerning unfair contract terms and the question of Australian statutory unconscionability.
10. Fifth, I am better placed to deal with s 7(5) questions including the relevant choice of law on the question of waiver. I will return to these matters much later.
11. In summary, I propose to decide finally, on the balance of probabilities, whether an arbitration agreement exists between Dialogue and Instagram, LLC.

## (b) Is there an arbitration agreement to which s 7(2) applies?

1. I should say at the outset that in my view the conditions of s 7 of the IAA have been satisfied in the present context.
2. Section 7 of the IAA requires that:
3. there is an arbitration agreement (ss 3(1) and 7(2)(a));
4. the arbitration agreement is in writing (s 3(1));
5. the procedure in relation to arbitration is governed by the laws of a Convention country, or a party to the arbitration agreement was, at the time when the agreement was made, ordinarily resident in a Convention country (ss 3(1) and  7(1)); and
6. the proceeding involves determination of a matter capable of settlement by arbitration (s 7(2)(b)).
7. Section 3(1) of the IAA defines “arbitration agreement” to mean “an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention.” Section 3(1) also gives “agreement in writing” the same meaning as in the Convention.
8. Art II(1) of the Convention (see sch 1 of the IAA) provides that an “arbitration agreement” is:

… an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

1. Article II(2) of the Convention provides:

The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

1. Let me note some other provisions.
2. Section 3(4) of the IAA provides that: “for the avoidance of doubt and without limiting subsection (1), an agreement is in writing if” (relevantly):

(a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or

(b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference …

1. Section 3(5) of the IAA provides that: “[f]or the avoidance of doubt and without limiting subsection (1), a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract”.
2. An “electronic communication” is defined in s 3(1) of the IAA to mean “any communication made by means of data messages”. Section 3(1) of the IAA defines “data message”, in turn, as “information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), email, telegram, telex or telecopy”.
3. The arbitration agreement contained in the original Terms of Use satisfies the “writing” requirement. Both sections 3(4)(a) and (b) of the IAA are satisfied, given that, first, the content of the arbitration agreement has been recorded and, second, the arbitration agreement is “contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference”; for completeness I should say that I have looked at s 9 of the *Electronic Transactions Act 1999* (Cth) but it is doubtful that it applies, and even if it did apply it would not add anything meaningful to the present analysis.
4. Now by the original Terms of Use, Dialogue and Instagram, LLC in my view have undertaken to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship. As I discuss and analyse below, Dialogue has agreed to the original Terms of Use including the arbitration clause, and so it is bound by them.

#### Is there an arbitration agreement?

1. I must apply Australian law, as the law of the forum, to determine the question of formation of the arbitration agreement. And under Australian law, arbitration agreements in contracts formed on the internet are valid and enforceable. As I say, on the evidence, an arbitration agreement was under Australian law formed.
2. In *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, the Full Court of which I was a member held that the existence of a contract is a matter for the law of the forum and not the putative law of the contract; see my observations at [128] to [152], Dowsett J agreeing at [1]. So, the law of the forum applies to the question of formation.
3. In this context, the law of the forum, namely, Victorian law, which incorporates the common law of Australia including equity, applies to the question of formation of the arbitration agreement in this proceeding.
4. Now under Australian law, what needs to be considered are questions of reasonable notice and manifestation of assent.
5. For example, in *Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd* [2016] 2 Qd R 194, Lyons J accepted that the real issue was whether a contracting party had a reasonable opportunity to consider the terms and, by its conduct, indicated that it had accepted the terms, even in a situation where the contract was unsigned.
6. Further, in *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133, Ms Gonzalez had used the website “Agoda” to reserve hotel accommodation. The payment details page contained a link to Agoda’s standard terms and conditions. Ms Gonzalez was required to click on a button marked “Book Now”. Above that button were the words “I agree with the booking conditions and general terms by booking this room…”. Ms Gonzalez clicked on that button and Agoda accepted her booking. Button J found that an exclusive jurisdiction clause in favour of Singaporean law was accordingly incorporated by signature and by reference. His Honour then said (at [123] to [125]):

In particular, I consider that the signature on the digital document provided by Ms Gonzalez clicking the “Book Now” button (by virtue of s 9(1) of the ETA), the location of the linked terms (above the signature on the digital document), and the standard nature of the terms used by Agoda are significant factors, and that on an objective analysis of the intentions of Agoda and Ms Gonzalez as contracting parties, the terms were indeed incorporated.

Explaining my view above in more detail, in terms of incorporation by signature, the terms were readily available to Ms Gonzalez, and Agoda did not seek to conceal the terms. The general rule expressed in *Alphapharm* at [185] applies, such that Ms Gonzalez, having provided her signature, is bound by the terms …

Moreover, the ability readily to access the terms, and their location (directly above the “Book Now” button), as features of the standard digital document used by Agoda support incorporation by reference, according to the test in *Smith* [170]–[171].

1. Now although Australian law applies, it may be noted that the jurisprudence of the United States, which contains a large body of case law regarding the formation of contracts on the internet, as drawn to my attention by Judge Ware, also supports the application of the themes of reasonable notice and manifestation of assent. To be clear here, I am not adopting US law, but rather saying that the Australian common law contains and applies similar principles.
2. It is convenient that I set out some of Judge Ware’s exposition which I have adopted but adapted having regard to my own analysis of the principal authorities cited.
3. US courts have recognised that an electronic “click” may suffice to signify the acceptance of a contract, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.
4. A website satisfies the reasonable notice standard if it provides a person with a legitimate opportunity to learn that his or her use is subject to terms of use, even if the person does not take the opportunity.
5. Accordingly, US courts have consistently found that the terms of contracts formed over the internet are valid and enforceable when the terms are made available via a hyperlink near a “Sign Up” or “Register” button on an account registration page such that “A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not” (*Meyer v Uber Technologies Inc*, 868 F 3d 66, 79 to 80 (2d Cir, 2017)).
6. In the US, to determine that a party’s entry into any contract has been validly undertaken, US courts require proof of two essential elements, namely, reasonable notice and a manifestation of assent (*In* *re Facebook Biometric Information Privacy Litigation*, 185 F Supp 3d 1155, 1164 (ND Cal, 2016)). Such proof is fact intensive; so for example in *Cullinane v Uber Technologies Inc*, 893 F 3d 53 (1st Cir, 2018), there was held not to be reasonable notice of an arbitration clause.
7. In my view, the Australian common law incorporates and applies similar themes.

#### Reasonable notice

1. As I have said, US courts have recognised that an electronic “click” can suffice to signify the acceptance of a contract. US courts define “reasonable notice” as notice sufficient to communicate to a reasonably prudent person that an offer to enter into a contract is being made. This objective standard is also applied to determine whether an offeree received reasonable notice of a clause or provision of a contract.
2. A person is regarded by US courts as having had reasonable notice of a contractual provision when he or she had actual notice or constructive notice of it. Actual notice is notice which consists of express information of a fact. Constructive notice is notice which is imputed by law.
3. US courts hold that a person had “constructive notice” of a provision when notice of the existence of the provision was presented so as to put “a reasonably prudent user on inquiry notice of the provision” (*Nguyen v Barnes & Noble Inc*, 763 F 3d 1171, 1177 (9th Cir, 2014)).
4. In *Meyer* (at 77 to 80) the court explained:

Turning to the interface at issue in this case, we conclude that the design of the screen and language used render the notice provided reasonable as a matter of California law. The Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to connect the user’s pre-existing PayPal account or Google Wallet to the Uber account, and the warning that “By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.” The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined.

…

In addition to being spatially coupled with the mechanism for manifesting assent -- i.e., the register button -- the notice is temporally coupled. As we observed in *Schnabel*,

inasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her.

…

That the Terms of Service were available only by hyperlink does not preclude a determination of reasonable notice. See *Fteja* 841 F. Supp 2d at 839… Moreover, the language “[b]y creating an Uber account, you agree” is a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms. As long as the hyperlinked text was itself reasonably conspicuous -- and we conclude that it was -- a reasonably prudent smartphone user would have constructive notice of the terms. While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice.

1. Accordingly, a person who has actual notice of the existence of a hyperlink to terms of use has notice that is sufficient to place a reasonably prudent person on inquiry notice of those terms. The person has constructive notice of the contents of the terms because by pursuing the inquiry he or she would have learned the contents.
2. Whether a website puts a reasonably prudent user on inquiry notice of the existence of terms is based on the design and content of the site. In *Specht v Netscape Communications Corp*, 306 F 3d 17 (2d Cir, 2002), internet users sued Netscape for invasion of privacy. The terms of use contained an arbitration agreement. Netscape sought to stay the court proceedings and to compel arbitration. The court denied the motion and Netscape appealed. The Second Circuit affirmed the denial as the website did not meet the standard for placing “a reasonably prudent Internet user” on inquiry notice. Internet users had downloaded free software from a webpage by clicking a hyperlinked “Download” button. If they had scrolled down further, past the “Download” button, on the next screen they would have encountered text stating “review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software”. The Second Circuit held that the downloaders were not bound to the license agreement’s terms.
3. In summary, as a threshold matter, US courts require proof of reasonable notice. Likewise do Australian courts applying similar themes. Further, US courts require manifestation of assent, as do Australian courts.

#### Manifestation of Assent

1. A manifestation of assent is an offeree’s outward expression of assent to an offer. In determining whether an offeree has manifested assent, US courts apply an objective standard. In *Colgate v JUUL Labs Inc*, 402 F Supp 3d 728, 762 (ND Cal, 2019) (quoting *DeLeon v Verizon Wireless LLC,* 207 Cal App 4th 800, 813 (2012)) it was said:

Whether the mutual consent necessary for contract formation exists “is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.”…

1. An offer may prescribe a particular method of acceptance; to constitute a valid acceptance, the offeree must adhere to that method. If reasonable notice has been given to an offeree that a particular act signifies acceptance of the offer, if the offeree knowingly performs that method, by his knowing conduct, the offeree has accepted all of the terms of the offer, even if he does not know them all. In *Windsor Mills Inc v Collins & Aikman Corp*, 25 Cal App 3d 987, 992 (1972) it was said:

[A]n offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains.

1. Under US law, it is a principle of contract law that a person who signs a contract is “presumed to know its terms and consents to be bound by them” (*Paper Express Ltd v Pfankuch Maschinen GmbH*, 972 F 2d 753, 757 (7th Cir, 1992)).
2. These principles apply to contracts of adhesion, being a standardised contract that is imposed on a subscribing party without an opportunity to negotiate the terms. Under US law a contract of adhesion is validly formed when there has been reasonable notice and manifestation of assent (*Marin Storage & Trucking Inc v Benco Contracting and Engineering Inc,* 89 Cal App 4th 1042, 1052 (2001)).
3. The Australian common law recognises and applies similar themes.

#### The elements of notice and manifestation of assent apply to internet contracts

1. US courts have found that the terms of contracts formed over the internet are valid and enforceable on proof that the person had actual or constructive notice that the contract is subject to terms of use and that the person had done an affirmative act where a reasonably prudent user would understand that the act would be understood as manifesting assent to the terms of use. In *Long v Provide Commerce Inc*, 245 Cal App 4th 855, 861 (2016) it was said:

While Internet commerce has exposed courts to many new situations, it has not fundamentally changed the requirement that “[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract”. (*Nguyen v Barnes & Noble Inc.* (9th Cir. 2014) 763 F.3d 1171, 1175).

1. US courts have articulated three types of internet contracts and developed standards for judging reasonable notice and manifestation of assent as to each type.
2. US courts place internet contract forms in one of three basic categories: “clickwrap”, “browsewrap”, or “sign-in wrap” agreements. US courts place the three forms of internet contracts on a spectrum of validity, with “clickwrap” and “sign-in wrap” agreements on one end of the validity spectrum and “browsewrap” agreements on the other. *In* *re Facebook Biometric Information Privacy Litigation* (at 1165) it was said:

Although there is no per se rule of validity or invalidity on either end, our Circuit has recognized that the closer digital agreements are to the clickwrap end of the spectrum, the more often they have been upheld as valid and enforceable.

1. First, websites are categorised by US courts as “clickwrap” agreements where the site requires a user to scroll through the terms of use and to affirmatively click a dialogue box labelled “I agree” or similar words of assent before the user is able to further use the site’s services. In *Feldman v Google Inc*, 513 F Supp 2d 229, 235 to 237 (ED Pa, 2007) it was said:

To determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement. … Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms.

…

A reasonably prudent internet user would have known of the existence of terms in the AdWords Agreement. Plaintiff had to have had reasonable notice of the terms. By clicking on “Yes, I agree to the above terms and conditions” button, Plaintiff indicated assent to the terms. Therefore, the requirements of an express contract for reasonable notice of terms and mutual assent are satisfied. Plaintiff’s failure to read the Agreement, if that were the case, does not excuse him from being bound by its express agreement.

1. US courts have held that provisions, such as restrictions on access, forum selection clauses, or arbitration agreements are validly entered into when they are included in the terms of use of an internet contract that complies with the “clickwrap” standard (see *Segal v Amazon.com Inc*, 763 F Supp 2d 1367, 1369 (SD Fla, 2011)).
2. Second, websites are categorised by US courts as “browsewrap” agreements when the site contains a notice that by accessing or using the services of the website, the user is agreeing to be bound by the site’s terms of service. Characteristically, a site that presents a “browsewrap” does not have an “I agree” button or its equivalent. A user is able to use the website’s services without being required to take any affirmative action to indicate his or her knowledge of or agreement to terms of use. The notice states that use of the site, something that the user is already doing when the notice is displayed, is a manifestation of assent.
3. In *Be In Inc v Google Inc* (ND Cal, No 12-CV-03373-LHK, 9 October 2013), the court rejected the plaintiff’s argument that a valid contract was formed based on a link on the homepage on its website to its terms of service, which, if followed, led to a page titled “Terms of Service”. The Terms of Use page stated, “by using and/or visiting this Website … you signify your agreement to these Terms of Use”. The court held that this “browsewrap” form was not sufficient to establish contract formation. The plaintiff had failed to show that beyond the mere existence of the link, the defendants had reason to know that their mere use would be so interpreted.
4. In *Nguyen* at 1177, the Ninth Circuit gave examples of “browsewrap” agreements found by US courts to be invalid and unenforceable:

Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement’s webpage. … Where the link to a website’s terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement.

See, e.g., *Specht*, 306 F.3dat 23 (refusing to enforce terms of use that “would have become visible to plaintiffs only if they had scrolled down to the next screen”); In *re Zappos, Inc*., 893 F. Supp. 2d 1058, 1064 (“The Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use.”); [*Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 792-93 (N.D.Ill. 2011)] (refusing to enforce arbitration clause in browsewrap agreement that was only noticeable after a “multi-step process” of clicking through non-obvious links); *Hines v. Overstock.com, Inc.,* 668 F. Supp. 2d 362, 367 (plaintiff “could not even see the link to [the terms and conditions] without scrolling down to the bottom of the screen—an action that was not required to effectuate her purchase”).

1. The Ninth Circuit then went on to give examples of “browsewrap” agreements found by US courts to be valid and enforceable:

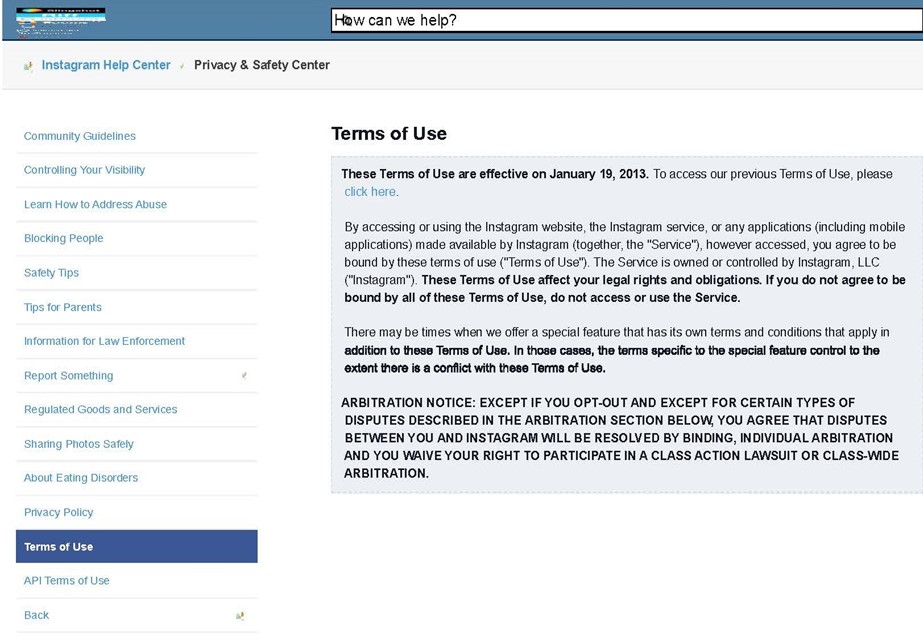
On the other hand, where the website contains an explicit textual notice that continued use will act as a manifestation of the user’s intent to be bound, courts have been more amenable to enforcing browsewrap agreements. See, e.g., *Cairo, Inc. v. Crossmedia Services, Inc*., 2005 U.S. Dist. LEXIS 8450, at \*4-5 (N.D. Cal. Apr. 1, 2005) (enforcing forum selection clause in website’s terms of use where every page on the website had a textual notice that read: “By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site”). But see *Pollstar v. Gigmania, Ltd*., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (refusing to enforce browsewrap agreement where textual notice appeared in small gray print against a gray background). In short the conspicuousness and placement of the “Terms of Use” hyperlink, other notices given to users of the terms of use, and the website’s general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement.

1. US courts have enforced “browsewrap” agreements when the user has actual notice, when the user is a business that repeatedly accesses a website for competitive purposes, and when there is evidence that the user had constructive notice of the terms of use.
2. Third, the other form of internet contracts recognised by US courts is a “sign-in wrap” agreement. I am satisfied that I have that scenario in the present case.
3. Websites that notify users that there are terms of use, that make the terms available on a page accessible by hyperlink, and that require the user to do some act, such as click a “sign-in” button, are categorised by US courts as “sign-in wrap” agreements (*Zaltz v JDate,* 952 F Supp 2d 439, 451 to 452 (ED NY, 2013) and *Fteja v Facebook Inc*, 841 F Supp 2d 829, 835 (SD NY, 2012)).
4. In *Fteja v Facebook Inc* (at 835) the court enforced a forum selection clause in Facebook’s terms of service. A notice below a “Sign Up” button stated, “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service,” and a user had clicked “Sign Up”. The court held that a valid agreement had been formed:

The phrase “Terms of Service” is underlined, an indication that the phrase is a hyperlink, a phrase that is “usually highlighted or underlined” and sends users who click on it directly to a new location—usually an internet address or a program of some sort. ...

In order to have obtained a Facebook account, Fteja must have clicked the second “Sign Up” button. Accordingly, if the phrase that appears below that button is given effect, when Fteja clicked “Sign Up,” he “indicat[ed] that [he] ha[d] read and agree[d] to the Terms of Policy.”

1. In *Zaltz v JDate* the defendant operated a paid subscription service over the internet called JDate. JDate’s terms of service were accessible on the website via a hyperlink. A user was required to click on a check box next to text that notified the user that clicking the box was confirmation that the user had read and agreed to the terms of service. The user could click the box without actually following the link and reading the terms of service. The terms of service included a forum selection clause agreeing to California as the venue for any or all claims. The plaintiff filed a lawsuit against the defendant in New York. Based on the forum selection clause, the defendant moved to dismiss the complaint or, in the alternative, to transfer venue to California. The plaintiff declared that she could not recall agreeing to the terms. Uncontroverted evidence showed that she could not have become a member without clicking the box. The court enforced the forum selection clause, holding that the terms of service were reasonably communicated to the plaintiff.
2. In *Arena v Intuit Inc* (ND Cal, No 19-cv-02546-CRB, 12 March 2020), Intuit’s website required each person wishing to use its online tax preparation service to keypunch in personal identification and a password on a “Sign-In” page and click a button labelled “Sign In”. Immediately below the button was the following text: “By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use and have read and acknowledged our Privacy Statement”. The phrase “TurboTax Terms of Use” was a hyperlink to the “Terms”. A consumer who clicked on the link and read the Terms would have arrived at an arbitration provision. The court categorised the Intuit website as having a “sign-in wrap” agreement. The court stated that the terms of a “sign-in wrap” agreement are validly undertaken when the evidence shows that the user was placed on inquiry notice of the existence of terms of use, such as by hyperlinked text, and manifests assent by clicking on a “sign-in” button. But the court found that TurboTax’s site did not reasonably communicate the existence of terms to a reasonably prudent user because the hyperlinks were in a significantly lighter font and the page contained multiple confusingly similar hyperlinks.
3. A website containing a “sign-in wrap” form of agreement will satisfy the inquiry notice standard if it provides the person with a legitimate opportunity to learn that his or her use is subject to terms of use, even if the person does not take the opportunity. A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not. Whether a user actually reads the terms is considered by US courts to be irrelevant to formation of a valid contract (*Fteja v Facebook Inc* at 839).
4. I accept on the facts before me that a US court would find that the Instagram website offered a “sign-in wrap” form of agreement to users. The Instagram website pages contained hyperlinks to its original Terms of Use. The design of the website required users to perform an affirmative manifestation of assent by clicking a “Register” button. A US court would likely find that Instagram’s “sign-in wrap” website met the objective standards. It provided notice to a reasonably prudent user that there were original Terms of Use. And it required the user to knowingly perform an affirmative act that a reasonably prudent user would understand to be a manifestation of assent to the original Terms of Use.
5. Of course, I would similarly conclude based upon Australian law which in my view embraces analogous notions and is what I must apply given the choice of law principles applicable to contract formation. Let me at this point then turn to some facts.
6. It is appropriate that I set out various provisions of the original Terms of Use as they appeared on Instagram’s website.
7. At the top, in a shaded box, appeared the following included as a notification of the arbitration clause.



1. Then there were set out “Basic Terms”. There were 17 of these. For present purposes I do not need to set them out, save for clauses 13 to 17 which provided:

13. You must not interfere or disrupt the Service or servers or networks connected to the Service, including by transmitting any worms, viruses, spyware, malware or any other code of a destructive or disruptive nature. You may not inject content or code or otherwise alter or interfere with the way any Instagram page is rendered or displayed in a user's browser or device.

14. You must comply with Instagram’s Community Guidelines, available here: https://help.instagram.com/customer/portal/articles/262387-community-guidelines.

15. You must not create accounts with the Service through unauthorized means, including but not limited to, by using an automated device, script, bot, spider, crawler or scraper.

16. You must not attempt to restrict another user from using or enjoying the Service and you must not encourage or facilitate violations of these Terms of Use or any other Instagram terms.

17. Violation of these Terms of Use may, in Instagram’s sole discretion, result in termination of your Instagram account. You understand and agree that Instagram cannot and will not be responsible for the Content posted on the Service and you use the Service at your own risk. If you violate the letter or spirit of these Terms of Use, or otherwise create risk or possible legal exposure for Instagram, we can stop providing all or part of the Service to you.

1. Later, there was set out an arbitration clause which provided:

**Arbitration**

Except if you opt-out or for disputes relating to: (1) your or Instagram’s intellectual property (such as trademarks, trade dress, domain names, trade secrets, copyrights and patents); (2) violations of the API Terms; or (3) violations of provisions 13 or 15 of the Basic Terms, above (“Excluded Disputes”), you agree that all disputes between you and Instagram (whether or not such dispute involves a third party) with regard to your relationship with Instagram, including without limitation disputes related to these Terms of Use, your use of the Service, and/or rights of privacy and/or publicity, will be resolved by binding, individual arbitration under the American Arbitration Association’s rules for arbitration of consumer-related disputes and you and Instagram hereby expressly waive trial by jury. As an alternative, you may bring your claim in your local “small claims” court, if permitted by that small claims court’s rules. You may bring claims only on your own behalf. Neither you nor Instagram will participate in a class action or class-wide arbitration for any claims covered by this agreement. You also agree not to participate in claims brought in a private attorney general or representative capacity, or consolidated claims involving another person’s account, if Instagram is a party to the proceeding. This dispute resolution provision will be governed by the Federal Arbitration Act. In the event the American Arbitration Association is unwilling or unable to set a hearing date within one hundred and sixty (160) days of filing the case, then either Instagram or you can elect to have the arbitration administered instead by the Judicial Arbitration and Mediation Services. Judgment on the award rendered by the arbitrator may be entered in any court having competent jurisdiction. Any provision of applicable law notwithstanding, the arbitrator will not have authority to award damages, remedies or awards that conflict with these Terms of Use.

You may opt out of this agreement to arbitrate. If you do so, neither you nor Instagram can require the other to participate in an arbitration proceeding. To opt out, you must notify Instagram in writing within 30 days of the date that you first became the subject to this arbitration provision. You must use this address to opt out:

Instagram, LLC ATTN: Arbitration Opt-out 1601 Willow Rd. Menlo Park, CA 94025

You must include your name and residence address, the email address you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement.

If the prohibition against class actions and other claims brought on behalf of third parties contained above is found to be unenforceable, then all of the preceding language in this Arbitration section will be null and void. This arbitration agreement will survive the termination of your relationship with Instagram.

1. Then there was a governing law and venue provision in the following terms:

**Governing Law & Venue**

These Terms of Use are governed by and construed in accordance with the laws of the State of California, without giving effect to any principles of conflicts of laws AND WILL SPECIFICALLY NOT BE GOVERNED BY THE UNITED NATIONS CONVENTIONS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, IF OTHERWISE APPLICABLE. For any action at law or in equity relating to the arbitration provision of these Terms of Use, the Excluded Disputes or if you opt out of the agreement to arbitrate, you agree to resolve any dispute you have with Instagram exclusively in a state or federal court located in Santa Clara, California, and to submit to the personal jurisdiction of the courts located in Santa Clara County for the purpose of litigating all such disputes.

If any provision of these Terms of Use is held to be unlawful, void, or for any reason unenforceable during arbitration or by a court of competent jurisdiction, then that provision will be deemed severable from these Terms of Use and will not affect the validity and enforceability of any remaining provisions. Instagram’s failure to insist upon or enforce strict performance of any provision of these Terms will not be construed as a waiver of any provision or right. No waiver of any of these Terms will be deemed a further or continuing waiver of such term or condition or any other term or condition. Instagram reserves the right to change this dispute resolution provision, but any such changes will not apply to disputes arising before the effective date of the amendment. This dispute resolution provision will survive the termination of any or all of your transactions with Instagram.

1. On the evidence, an arbitration agreement was, in fact, formed. Let me elaborate.
2. The evidence establishes that any person who wished to open an Instagram account was presented with an initial registration or sign up screen where there were hyperlinks allowing them to view the original Terms of Use prior to creating an Instagram account. If a user chose to proceed to create an Instagram account, the user was required to confirm at the point of registration that he or she agreed to the original Terms of Use. For example, one of the screenshots in evidence states “By clicking Register you are indicating that you have read and agreed to the Terms of Service and Privacy Policy”. The wording sometimes differed slightly. For example, as seen in the second example in evidence, the language was not “By clicking Register” but “By tapping to continue”. But throughout the period, there were always words by which the user recognised that by proceeding to create an Instagram account, he or she was agreeing to the original Terms of Use and privacy policy. This was the case for users in all jurisdictions around the world, even though the sign up page may have appeared in languages other than English in some locations. There were always words by which the user recognised that by proceeding to create an Instagram account, he or she was agreeing to the original Terms of Use and privacy policy.
3. After they had opened an account in this way, Instagram users were also able to access the original Terms of Use in various ways on the Instagram website and the Instagram app. In particular, the original Terms of Use were published via:
4. a “Terms” hyperlink that appeared in the footer of the Instagram website www.instagram.com when viewed from an internet browser on a computer or mobile device; and
5. on screens within the Instagram app for mobile devices, accessible by navigating through the Settings menus.
6. I have set out the relevant terms earlier. But it is worth repeating that the original Terms of Use stated in a text box that appeared in a different colour to the colour of the surrounding webpage and prominently displayed at the top of the page under the heading “Terms of Use” that:

By accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications) made available by Instagram (together, the “Service”), however accessed, you agree to be bound by these terms of use (“Terms of Use”). The Service is owned or controlled by Instagram, LLC (“Instagram”). **These Terms of Use affect your legal rights and obligations. If you do not agree to be bound by all of these Terms of Use, do not access or use the Service.**

…

**ARBITRATION NOTICE: EXCEPT IF YOU OPT-OUT AND EXCEPT FOR CERTAIN TYPES OF DISPUTES DESCRIBED IN THE ARBITRATION SECTION BELOW, YOU AGREE THAT DISPUTES BETWEEN YOU AND INSTAGRAM WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.**

1. In my view, the structure and content of the “sign-in wrap” agreement on the Instagram website placed a reasonably prudent person on notice that his or her use was subject to the original Terms of Use.
2. First, the notice of the existence of the original Terms of Use on the Instagram website was conspicuous. As I have said, the Instagram website required users to register by clicking a button. Immediately above the “Register” button, a user was presented with the following text: “By clicking Register you are indicating that you have read and agreed to the Terms of Service and Privacy Policy”. The notice that clicking the “Register” button signified agreement to the “Terms” was conspicuous and was not obscured or hidden. The Instagram website placed a reasonably prudent user on notice of the consequences of clicking the “Register” button. And clicking was the relevant affirmative act.
3. Second, the notice provided users with a means to satisfy their inquiry. A valid contract may be formed where a reasonably prudent user is placed on constructive notice of the existence of terms of use. The content of the Instagram website placed a reasonably prudent user on notice that there were the original Terms of Use. Moreover, the website provided hyperlinks that enabled a reasonably prudent user to access the original Terms of Use and satisfy his or her inquiry should he or she have so desired.
4. Third, although the standard is just a reasonably prudent user, Dialogue was a highly sophisticated user of internet websites. The text, “By clicking Register you are indicating that you have read and agreed to the Terms of Service and Privacy Policy,” with its hyperlinks, would surely be understood by a sophisticated user of internet websites to mean, “Click here to signify your agreement to the Terms of Use”. Let me delve more into the detail.
5. Dialogue, by its employees, servants or agents, created numerous Instagram accounts including, relevantly, @schedugram on 12 January 2014, @BenSchedugram on 31 July 2017, and @getskedsocial on 31 January 2018, which were opened during the currency of the original Terms of Use. Mr Stephens accepted that these three accounts were created by Dialogue’s agents.
6. The process of creating those accounts required Dialogue to confirm, at the point of registration, that it agreed to the original Terms of Use and privacy policy. Clearly, Dialogue had been provided with the original Terms of Use at the point of registration, had been given a reasonable opportunity to consider those original Terms of Use, and confirmed its acceptance of the original Terms of Use.
7. Now Mr Michael Duffey, an eDiscovery / litigation case manager at Facebook, Inc gave the following evidence which I accept, partly based on business records; I have rejected Dialogue’s admissibility challenges.
8. In order to access or use the Instagram service, or to register to use the service or create an account, a user had to agree to the Terms of Use. The original Terms of Use applied to all users in the United States and Australia.
9. Throughout 19 January 2013 to 19 April 2018, being the period during which the original Terms of Use were operative, it was always the case that any person who wished to open an Instagram account was presented with an initial registration or sign up screen where there were hyperlinks allowing them to view the original Terms of Use prior to creating an Instagram account. The original Terms of Use, via those hyperlinks, were publicly and freely accessible. I have just described the process for creating an account and accessing the original Terms of Use.
10. Further, Mr Duffey gave evidence that the basic subscriber information (BSI) for various Instagram accounts created by Dialogue or its agents showed that they were associated with Dialogue’s primary IP address, inter-alia, as follows:
11. the BSI for @BenSchedugram contained Dialogue’s primary IP address 328 times; and
12. the BSI for @getskedsocial contained Dialogue’s primary IP address 550 times.
13. Further, Dialogue used some of the accounts at least in the following ways:
14. for @schedugram, to make at least six posts between January 2014 and May 2014; and
15. for @BenSchedugram, to make at least 17 posts between 29 October 2017 and 5 July 2018, inclusive.
16. Further, Mr Duffey said that the three accounts @schedugram, @BenSchedugram and @getskedsocial could only have been created by the user following the process described earlier which required confirmation, at the point of registration, that Dialogue agreed to the original Terms of Use. Let me deal with some other evidence.
17. In my view Dialogue has behaved in a manner that manifested its acceptance of the original Terms of Use. Since at least 14 January 2014, Dialogue had actual knowledge of the original Terms of Use, quoting their specific provisions and discussing them at length in correspondence with Instagram’s representatives. And indeed, with this actual knowledge of the Terms of Use, Dialogue continued to access and use the Instagram platform.
18. Now Mr Stephens gave evidence as to the five Instagram accounts and the dates on which they were created. The first account was created before Dialogue’s incorporation and outside the relevant period during which the original Terms of Use were operative. The other four accounts, to the extent they are or were active, have been used by Dialogue for testing and marketing activities. Three of these accounts were created during the currency of the original Terms of Use. Let me just focus on these three accounts.
19. Mr Stephens did not recall if he created, or directed Dialogue’s contractors to create, these three accounts. The accounts appear to have been created by Dialogue’s contractors. But he said that if any of the accounts were created by him, he did not recall if he consented to the terms, and if so, which terms they were. He said that any arbitration provisions were not brought to his attention, and he was not aware of them.
20. He said that none of the three accounts have been or are being used by Dialogue to provide services to clients. Dialogue provides services to clients by interacting with Instagram on behalf of the clients. Any interaction by or through Dialogue’s product with a client’s Instagram account is done by Dialogue as agent for the client and not by Dialogue in its own right. Clients provide their Instagram login details to Dialogue on a confidential basis, and Dialogue’s product uses the login details to manage the publishing and planning of the client’s organic marketing content. Instead of the client publishing the content itself, Dialogue does it on the client’s behalf through an automated process. When accessing clients’ accounts by using their login details, Dialogue does not see and is not required to acknowledge or accept any terms of use. Dialogue had clients whose Instagram accounts were created during the relevant period in which the original Terms of Use were operative.
21. Now Mr Stephens appeared to indicate in his evidence that in 2014 and thereafter at the time that the various accounts that I have referred to earlier were opened, that he was not aware of the original Terms of Use.
22. But on the preponderance of the evidence I am satisfied that he or his agents had knowledge of or at least adequate notice of the original Terms of Use at the time such accounts were opened and thereafter.
23. Indeed, emails sent between Mr Stephens and Mr Stephane Crozatier of Facebook in January 2014 well indicate that Mr Stephens was aware of the original Terms of Use including the basic terms at this earlier time.
24. Moreover, even if he did not have knowledge before the accounts were opened, he had knowledge later, and with such notice continued to use them. Accordingly, there was relevant ratification.
25. Further, Dialogue, by its employees, servants or agents, accessed and used the accounts @schedugram, @BenSchedugram and @getskedsocial and in my view can be taken to have had knowledge or notice of the original Terms of Use at the time of such activities.
26. Let me move to another matter. Dialogue expressly referred to the Terms of Use in its own terms of service from 3 April 2016 to 24 May 2018 in respect of Schedugram and 25 May 2018 to 25 February 2020 in respect of Sked Social, in a manner that confirmed the application of both the original Terms of Use and the revised Terms of Use to the use of those Instagram accounts.
27. In Dialogue’s terms of service for Schedugram applying between 3 April 2016 and 24 May 2018 it was expressly stated:

**2 The Service**

1. We grant you a non-exclusive, worldwide, non-transferable, revocable right to use the Service in accordance with these Terms.

2. You may access and use the Service (including any incidental copying that occurs as part of that use) in accordance with these Terms. You may also print one copy of any page within the Service for your own personal, non-commercial use.

3. By logging into the Service and inputting your Instagram account details into the Service, you grant us the right and appoint us as your agent to use any information or content provided by you to conduct actions on your behalf, at your direction (such as posting that content to Instagram) in providing you the Service.

4. *You acknowledge and agree that the Service is not affiliated with or authorised by Instagram, and any access to Instagram (including via the Service) is governed by Instagram’s Terms of Use.*

5. The Service contains links to other websites as well as content added by people other than us. We do not endorse, sponsor or approve any such user generated content or any content available on any linked website.

…

1. Dialogue’s terms of service for Sked Social between 25 May 2018 and 25 February 2020 contained similar wording. Other wording, albeit similar was used in Dialogue’s terms of service after 25 February 2020.
2. Clause 2, sub-clause 4, which I have set out above, is notable. Moreover, there were other provisions requiring Dialogue’s customers to comply with the Terms of Use.
3. Finally, it is ironic that Dialogue’s *own* terms of service contained stipulations such as (see the form from 25 May 2018):

**Terms of Service**

These Terms of Use (Terms) govern your use of our website located at https://skedsocial.com (including subdomains), the Sked Social service, and any applications provided by us (collectively Service), and form a binding contractual agreement between you, the user of the Service and us, Dialogue Consulting Pty Ltd ACN 153 007 259 (trading as Sked Social). These Terms should be read in conjunction with our Privacy Policy.

For that reason these Terms are important and you should ensure that you read them carefully and contact us with any questions before you use the Service. You can contact us on 1300 846 768 (Australia) or +61 1300 846 768 (International).

By registering to use or using the Service you acknowledge and agree that you have had sufficient chance to read and understand the Terms and you agree to be bound by them. If you do not agree to the Terms, you must not use the Service.

1. Dialogue sought to enter into internet contracts with its own customers by a mode similar or perhaps less secure to what Instagram, LLC was using, which Dialogue now challenges.
2. Dialogue says that the question of what amounts to a reasonable opportunity to consider the terms depends on the circumstances. It says that the alleged arbitration clause was not one reasonably to be expected when creating an Instagram account. Accordingly, something more was required by way of provision of information about the clause to the acceptor before the contract was formed. It says that according to *Maxitherm Boilers Pty Ltd v Pacific Dunlop* *Ltd* [1998] 4 VR 559, special steps must be taken to bring an unusual term to the attention of the other party, as otherwise it may not be reasonable to assume assent to the term.
3. I must say that Callaway JA’s observations (at 562) are worth setting out. He said:

It is not uncommon to enter into a transaction on another party’s standard terms and conditions without enquiring what they are. It is often not worth doing so and a sensible commercial risk to run. The law reflects commercial reality by holding the party who does not enquire to such of the other party’s standard terms and conditions as may fairly be regarded as within the risk the first party took. Some terms are outside the risk and the first party is not bound by them. A term may be contrary to industry practice or, however appropriate to other contracts into which the other party regularly enters, unsuited to the particular contract. It is rarely, if ever, sufficient that a term is onerous, but its onerous quality or some other feature may show that it was not reasonably to be expected.

1. In my view these observations are not helpful to Dialogue. Either Dialogue knew of the original Terms of Use or chose not to enquire. Further, the arbitration clause was not that unusual. Further, its existence was specifically highlighted at the top of the original Terms of Use and in capitals. If special steps were required, these were undertaken.
2. Further, Dialogue says that the present case is distinguishable from *Gonzalez*, which considered, in the context of a personal injury claim, an exclusive jurisdiction clause in an online travel agency’s standard term. Button J said that the absence of a “tick a box” step with regard to the exclusive jurisdiction clause was significant but not determinative, and observed that the statement requiring the user’s agreement to the standard terms appeared before the “book now” button and the user had been emailed a booking confirmation. In contrast, in the present case, Dialogue says that the Instagram account creation process did not provide sufficient notice to Dialogue of the original Terms of Use, let alone the alleged arbitration agreement or the right to opt out of it within 30 days. I would say now that I disagree. Contrary to Dialogue’s submissions, *Gonzalez* cannot be relevantly distinguished from the present case. In both cases, a user who wished to “Register” or “Book Now” was informed that by doing so he or she agreed to the terms and conditions, and was presented with a link to the relevant terms and conditions. The link to the terms in *Gonzalez* appeared on the “Payment Details” page, which appeared before the “Book Now” button appeared. The important question was whether the terms were readily available to Ms Gonzalez. They were. In the context that I am considering, the original Terms of Use were readily available to Dialogue, and Dialogue objectively assented to them. Clearly, it is not the subjective beliefs of the parties about their rights and liabilities that govern their contractual relations. Rather, the question is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.
3. Finally, and even assuming admissibility, Dialogue criticised aspects of Mr Duffey’s evidence concerning the opening of Instagram accounts. But I do not need to set out the detail. In my view its criticisms were flimsy.
4. In my view, by its conduct, Dialogue accepted and agreed to abide by the original Terms of Use. Dialogue thereby under Australian law, alternatively under US law, formed an agreement to arbitrate with Instagram, LLC, the terms of which were set out in the original Terms of Use. Moreover, Dialogue did not opt out of the arbitration agreement.
5. So, Dialogue and Instagram, LLC are parties to an arbitration agreement within the meaning of s 3(1) of the IAA. Dialogue and Instagram, LLC are parties to an “agreement in writing” of the kind referred to in Art II(1) of the Convention and s 3(1) of the IAA.
6. Let me now deal with some technical arguments of Dialogue. Dialogue points out that s 7 of the IAA applies only where there is an “arbitration agreement”. Section 3(1) defines “arbitration agreement” as an agreement in writing of the kind referred to in Art II(1) of the Convention. Article II(1) of the Convention refers to “an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”. Article II(2) defines “agreement in writing” as including an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Section 3(4) of the IAA states that an agreement is in writing if its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means, or it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference.
7. Dialogue says that the arbitration agreement on which the respondents rely was not contained in any exchange of relevant documents. First, there was no “bilateral” recognition of the arbitration agreement. Second, Dialogue did not “sign” the original Terms of Use. Third, there is no “written proof” or “written acceptance” of Dialogue’s assent to the “arbitration agreement”, nor is there any other form “recording” the content of the agreement. Fourth, there was no “clear mutual documentary exchange as to the terms of, or assent to, the arbitration agreement”. Rather, Dialogue says that any assent by it, if there was any, was in the realm of tacit approval or acquiescence only.
8. Further, Dialogue says that the question is not whether a contract has been formed just under Australian common law, but rather whether there is an agreement in writing for the purposes of the Convention. Dialogue says that this standard of formation of an agreement may be more exacting than the requirements for the formation of a contract under Australian common law.
9. In summary, it says that no arbitration agreement was formed because there was no agreement in writing for the purposes of Art II(2) of the Convention as there was no arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.
10. But I agree with the respondents that the consequence of Dialogue’s submissions would be surprising. It would follow that an arbitration agreement could only be achieved by a traditional written agreement signed by both parties, or by an exchange of letter or telegrams. But in my view the arbitration agreement satisfies Art II(2) of the Convention because it is an “exchange of letters or telegrams”. The concept of an “exchange” encompasses more modern, electronic methods of electronic communication. Accordingly, where the arbitral clause has been contained in an exchange of “electronic communications” at the time of registration, as in this case, that will suffice.
11. Further, it is significant that Art II(2) gives a non-exhaustive meaning to the term “agreement in writing”. The text of Art II(2) was drafted in 1958, at a time when the concept of formation of contracts by digital technology, including over the internet, was unknown although perhaps not unforeseen by some. Further, in 2006 UNCITRAL considered the “wide use of electronic commerce” and recommended that Art II(2) of the Convention be “be applied recognizing that the circumstances described therein are not exhaustive” (Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 (UN Doc A/6/17)).
12. This conclusion is also consistent with both the objects and purposes of the Convention and the IAA. Relevantly, ss 2D and 39 of the IAA require me to interpret the IAA, which applies the Convention, to facilitate:
13. international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
14. the use of arbitration agreements made in relation to international trade and commerce.
15. Accordingly, Art II(2) should be construed flexibly and non-exhaustively in light of modern methods of communication; sclerotic textualism should be eschewed. Art II(2) applies to “sign-in wrap” or “clickwrap” agreements. Indeed, it could hardly be doubted that the term “include” in the text of Art II(2) was designed to allow national courts to add additional types or categories of agreements in writing to the catalogue of those listed in Art II(2). I should say for completeness that Art 7(2) to (4) of the Model Law have similar if not broader amplitude.
16. In summary, Dialogue accepted and is bound by the original Terms of Use and the arbitration agreement in them. Therefore, a valid arbitration agreement was formed. There is an arbitration agreement within the meaning of s 3(1) of the IAA.

#### Other matters

1. Let me now deal with some other conditions.
2. Sections 7(1)(a) and (d) of the IAA provide that s 7 applies where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

...

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

1. Let me say something about s 7(1)(a). It is well-accepted that the procedural law of an arbitration is usually the law of the seat of the arbitration. Now the seat of the arbitration is not expressed in the arbitration agreement in the original Terms of Use and so there is no express choice of the procedural law. Now in determining the seat in such circumstances, I must objectively discern the intention of the parties as expressed in the wording of the parties’ agreement and relevant objective facts.
2. Now the original Terms of Use specify that the parties agree to arbitration that will be administered by the AAA and that “[t]his dispute resolution provision will be governed by the [US] Federal Arbitration Act”.
3. Further, the original Terms of Use are expressed to be “governed by and construed in accordance with the laws of the State of California”, and that “[f]or any action at law or in equity relating to the arbitration provision of these Terms of Use, the Excluded Disputes or if you opt out of the agreement to arbitrate, you agree to resolve any dispute you have with Instagram exclusively in a state or federal court located in Santa Clara, California, and to submit to the personal jurisdiction of the courts located in Santa Clara County for the purpose of litigating all such disputes”.
4. In my view, those features in combination indicate that the procedural law of the arbitration is the law of the State of California. Specifically, the procedural rules of the arbitration are the AAA Rules, the law governing the arbitration agreement is the Federal Arbitration Act (9 USC § 1 et seq) (FAA) and the law governing the original Terms of Use is California. Contrastingly, there is no connection or reference to Australia or Australian law in the arbitration provision at all. California was therefore the intended seat.
5. Further, the United States is a “Convention country” within the meaning of s 3(1) of the IAA. And the law of California, as the law of the United States, is the law of a “Convention country” within the meaning of s 7(1)(a) of the IAA. Accordingly, s 7(1)(a) of the IAA is satisfied.
6. And as for s 7(1)(d), Instagram, LLC was, at the time the arbitration agreement was made, incorporated in the United States so as to be domiciled in the United States for the purposes of s 7(1)(d). Accordingly, s 7(1)(d) of the IAA is also satisfied.
7. In summary then, by operation of s 7(1) there is an arbitration agreement to which ss 7(2) and (5) apply. Now the condition in s 7(2)(a) is clearly satisfied. So the next question that needs to be determined is that under s 7(2)(b). But before doing so, I need to deal with two other arguments.
8. Now I have rejected Dialogue’s assertion that no arbitration agreement was made. But its fall back position was to say that the arbitration provision in the principal contract(s) was an unfair contract term which I should declare to be void. Its further fall back position was to say that such a term was unconscionable at inception or its enforcement by the respondents was unconscionable. It is convenient to deal with these arguments now before I deal with the scope question under s 7(2)(b). It is also convenient to deal with them here rather than separately as s 7(5) questions which for present purposes I will confine to the waiver question. Having said that, I could have dealt with them as s 7(5) questions.
9. Further, there is a doubt as to whether a Californian arbitrator can deal with these matters. The governing law clause of the original Terms of Use states that they are “to be governed by and construed in accordance with the laws of the State of California without giving effect to any principles of conflicts of law.” I am not sure what that latter part really means. Further, I am not sure of the efficacy or operation of such a provision before a Californian arbitrator. It seems to be over-reach. But does it mean that a Californian arbitrator cannot apply the ACL whether to the challenge to the arbitration provision as being an unfair contract term or unconscionable or to the broader ACL claims in the proceeding? I think not. The jurisdiction or powers of a Californian arbitrator to determine choice of law could not be literally confined by the four corners of the original Terms of Use. In any event, it is convenient for me to deal with these matters.

## (c) Is the arbitration term void as an unfair contract term?

1. Dialogue says that if and to the extent that there was an arbitration clause incorporated as a term of the principal contract(s) between Dialogue and Instagram, LLC, it is an unfair term within the meaning of s 24 of the ACL, given that it limits one party’s right to sue another party (s 25(k)).
2. Let me set out s 24 which provides:

(1) A term of a consumer contract or small business contract is unfair if:

(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

(3) A term is transparent if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

1. The sanctity of freedom of contract, which usually presupposes individual negotiation, must be respected, particularly between commercial players and even if there is a disparity between their size or negotiating power. But where standard form contracts have been used and abused by one of the parties, closer scrutiny may be required. So, the legislature has enshrined an unfair contract terms regime to deal both with consumer contracts and small business contracts which are in standard form. But this regime is to be applied carefully and its text is not to be glossed over with moralistic sentiment. Further, the term “unfair” is not to be inflated with imprecision or subjectivity. Section 24(1) clearly sets out the three factors which cumulatively must be satisfied for a term to be “unfair”. But there is no scope to interlard other feel good factors or niceties in order to remedy any perceived disparity between the parties.
2. Let me turn to Dialogue’s case.
3. Now it may be accepted that the principal contract(s) between Dialogue and Instagram, LLC is a “small business contract” within the meaning of s 23(4), as it is a contract for the supply of services, and at the time the relevant contract(s) was entered into, Dialogue was a business that employed fewer than 20 persons. Moreover, the upfront price payable under the contract(s) did not exceed $300,000.
4. Further, if there were contracts entered into between Dialogue and Instagram, LLC resulting from Dialogue’s creation of some of the accounts that I have previously referred to, then the relevant contracts were entered into after 12 November 2016, when Pt 2-3 of the ACL was extended to unfair terms in small business contracts, or the relevant term being the arbitration provision was varied after that date by the introduction of the revised Terms of Use. In either case, the relevant ACL provisions apply. Further, the unfair contracts regime applies not only to the accounts created after 12 November 2016, but also to the @schedugram account, which was created before 12 November 2016, because the terms of any contract governing that account were varied after that date by the revised Terms of Use.
5. Now as regards the application of the unfairness factors stipulated in s 24(1), Dialogue submits the following.
6. Dialogue says that the arbitration agreement has caused or would cause a significant imbalance in the parties’ rights and obligations arising under the contract (s 24(1)(a)).
7. Dialogue says that it is a small business located in Melbourne with few employees. Mr Stephens, Dialogue’s sole director and shareholder, lives in Melbourne. On the other hand, the Facebook entities are a global conglomerate with a market capitalisation of around USD655 billion, and with annual revenue in excess of USD70 billion. They have enormous resources, offices in 70 cities worldwide, including in Melbourne and Sydney, and approximately 50,000 employees. The respondents’ headquarters are in California.
8. Dialogue says that the respondents’ proposal to arbitrate in California gives the respondents an unfair benefit over Dialogue. It says that the respondents have already retained a law firm in California (White & Case) to conduct the arbitration on their behalf. That firm has been acting for the respondents. On the other hand, Dialogue is a small company which has limited resources, and has no office or other presence in California. Accordingly, arbitrating there would require Dialogue to retain lawyers in California to prepare for and participate in arbitration hearings as well as other costs.
9. Further, Dialogue says that the arbitration agreement is not reasonably necessary in order to protect the legitimate interests of Instagram, LLC (s 24(1)(b)). The respondents have offices all over the world, including in Australia. They have litigated in Australia. They have engaged three major Australian law firms for this proceeding, and have been able to participate in it for many months and have raised arguments both in their defence and various interlocutory applications. Moreover, Dialogue says that the arbitration agreement is presumed under s 24(4) not to be reasonably necessary in order to protect the legitimate interests of Instagram, LLC, and Instagram, LLC has not displaced that presumption.
10. Dialogue says that it is illegitimate for Instagram, LLC to shield itself from suits in countries in which it actively operates but yet to require all disputes to be arbitrated in its home jurisdiction. That is particularly so where this would give Instagram, LLC the ability to avoid the operation of laws in countries in which it operates, such as the ACL in Australia. In that regard, Dialogue says that the original Terms of Use are stipulated to be “governed by and construed in accordance with the laws of the State of California, without giving effect to any principles of conflicts of laws”.
11. Further, Dialogue says that the arbitration agreement would cause detriment, whether financial or otherwise, to Dialogue if it were to be applied or relied on (s 24(1)(c)). And even if Dialogue does not physically need to travel to California for the arbitration, there is the financial burden of engaging lawyers who specialise in US arbitration. Further, Dialogue would also incur the costs of litigating the remainder of the proceeding in this Court for the claims that are outside the arbitration. Accordingly, there would be two sets of lawyers engaged and two sets of legal costs. There is also the inconvenience of Dialogue having to be a part of an arbitration overseas rather than prosecuting its proceeding in the court of its choice in Australia, with its choice of Australian lawyers. Further, if as the respondents seek, the arbitration proceeds in California with the arbitrator applying Californian law as the substantive law of the arbitration, there is at least a risk that Dialogue will not be able to bring the ACL claims, or will face Californian law claims which it would not face in an Australian court proceeding. Further, Mr Stephens is heavily involved in the day-to-day operation of Dialogue’s business, and having to arbitrate in California would be disruptive to and place risks on that operation. In addition, the delay in its Australian proceeding, which includes matters that sit outside the alleged arbitration agreement, would involve an irreparable element of unfair prejudice.
12. Further, Dialogue says that the respondents’ payment of the administrative fees does not alleviate the detriment that Dialogue would suffer if forced into arbitration. A reference to arbitration would split the proceeding into two. There would be the arbitrated claims dealt with by arbitration in the US and the remainder of the issues in the proceeding being dealt with in Australia. Dialogue says that it has already taken many steps in the present proceeding, at significant cost. Dialogue would need to incur the practical expense and inconvenience of engaging a new team of lawyers that specialise in arbitration under the AAA Rules, something that the respondents have already done (with their engagement of White & Case). This would be an additional cost (and therefore detriment) beyond what Dialogue would need to incur if the entire proceeding remained in this Court. In addition, Dialogue would suffer a detriment to the extent that it loses the ability to bring the ACL claims in any arbitration. Moreover, it says that any theoretical ability of an arbitral tribunal to apply the ACL would be of little comfort to Dialogue. Further, the arbitral tribunal may select alternative AAA rules, which may result in the loss of any cap on Dialogue’s costs.
13. Further, Dialogue says that the arbitration agreement was not transparent (ss 24(2)(a) and 24(3)). Dialogue says that it was not displayed on the sign up page, it was not provided to Dialogue either before or after the creation of any of its Instagram accounts, and it was not readily available to Dialogue.
14. Dialogue referred to *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172, where it was found that an arbitration term in a consumer contract was an unfair term under the *Unfair Terms in Consumer Contracts Regulations 1999* (UK). Ramsey J considered that a term must be regarded as potentially vulnerable to being unfair where it excluded or hindered a consumer’s right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration, together with the requirement for a mandatory stay. Ramsey J found that the arbitration clause was a requirement which barred Mrs Buck, the consumer, from having access to the courts and caused an imbalance between her and the builder, to her detriment. It was found that whilst the box signed by her properly drew her attention to the existence of terms, the impact of the arbitration clause would not be apparent to a layperson and was not apparent to Mrs Buck who was not aware of its effect. I will return to this case later.
15. Dialogue says that the alleged arbitration agreement was not transparent. Further, it was found in the original Terms of Use which were not shown on any sign up page. Further, the availability of a link to the Terms of Use did not achieve transparency. And in the Terms of Use, whilst there was an introductory arbitration notice in bold, the text of the clause itself was not in bold, but rather in smaller font found towards the end of the document. It was also drafted in legal language and not in plain English.
16. Further, Dialogue says that the opt out right was mentioned only within the text of that long clause. And it required a user to opt out by sending a letter to Instagram, LLC’s mailing address within 30 days of first becoming subject to the arbitration agreement. Dialogue says that the likelihood of a user of the online Instagram platform going to the trouble of sending a physical letter to Instagram’s head office in the US is extremely low. Generally, it says that the opt out right did not temper the significant imbalance between the parties.
17. Further, Dialogue says that whilst theoretically the arbitration procedure was available to be invoked by both parties, the arbitration agreement was intentionally one-sided in favour of Instagram, LLC. It provided for arbitration in accordance with the FAA, being the law of the country where Instagram, LLC is based. It did not provide for arbitration under the laws of any other country, for example, the country where the account holder was based or some third country in which neither party is based. Further, any action relating to the arbitration provision was required to be resolved exclusively in a Californian court, again giving Instagram, LLC a home ground advantage. Further, although the account holder was given a limited right to opt out in writing within 30 days of first becoming subject to the arbitration agreement, the account holder otherwise remained indefinitely bound by the arbitration agreement, and even after the termination of the relationship with Instagram, LLC.
18. Dialogue seeks a declaration that the arbitration agreement is void as an unfair contract term and an injunction preventing Instagram, LLC from relying on it. It says that the effect of granting such relief would be that there is no “arbitration agreement” within the meaning of the IAA. Alternatively, any “arbitration agreement” would be void, inoperative or incapable of being performed within the meaning of s 7(5) of the IAA.
19. But in my view, the arbitration agreement is not an unfair term of contract. And in this respect it is important to note that the appropriate point in time to assess unfairness is the time at which the contract was formed.
20. First, the arbitration agreement does not cause a significant imbalance in the parties’ rights and obligations (s 24(1)(a)).
21. Moreover, the arbitration agreement was transparent because it was stated prominently in bold, all-capital letters at the top of the original Terms of Use. It was clearly presented and readily available to Dialogue. A term is transparent if the term is expressed in reasonably plain language, legible, presented clearly, and readily available to any party affected by the term. In my view in this case the relevant term was transparent.
22. Further, the terms in the arbitration agreement did not operate only in favour of the respondents. Either party had the ability to invoke the arbitration agreement. And once invoked, both parties would obtain the benefits and would be bound by the obligations of the arbitration agreement embodied in the original Terms of Use. The arbitration agreement applied equally to both parties. As Mr Anthony Bannon SC for the respondents floated, there was symmetry rather than asymmetry.
23. Further, one has to be precise as to what is meant by whether a term causes a significant imbalance in the parties’ rights and obligations. Significant imbalance relates to the substantive unfairness of the contract, and requires consideration of the relevant term, together with the parties’ other rights and obligations arising under the contract. Whether a term causes significant imbalance is a question of fact. The word “significant” means significant in magnitude or sufficiently large to be important. A significant imbalance may exist if the term is so weighted in favour of one party as to tilt that parties’ rights and obligations significantly in its favour. This may be by granting to that party a beneficial option or discretion or power. But a term does not cause a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that relationship is reasonably foreseeable at the time of contracting. And that is the case with the arbitration agreement here.
24. In the present case, in my view there is no significant imbalance in the parties’ rights and obligations.
25. Further, the arbitration agreement gave both parties an equal right to refer a dispute to arbitration.
26. Further, Dialogue’s reference to s 25(k) is unhelpful to it. First, the prefatory words of s 25 refer to the kinds of terms that *may* be unfair. Moreover, to rely on s 25(k), being that it is “a term that limits, or has the effect of limiting, one party’s right to sue another party”, is superficial. Dialogue can sue. Further, the arbitration term is symmetric.
27. Finally, the respondents placed considerable emphasis on the reasonableness of the opt out provision in the arbitration clause which stated:

You may opt out of this agreement to arbitrate. If you do so, neither you nor Instagram can require the other to participate in an arbitration proceeding. To opt out, you must notify Instagram in writing within 30 days of the date that you first became subject to this arbitration provision. You must use this address to opt out:

Instagram, LLC ATTN: Arbitration Opt-out 1601 Willow Rd. Menlo Park, CA 94025

1. I do not think that too much emphasis should be given to this given the 30 days restriction and how it had to be triggered. But nothing much turns on this as in my view, even if there was no opt out provision, the arbitration clause would still not be an unfair term or its enforcement unconscionable.
2. Dialogue has not established that the arbitration agreement causes a significant imbalance in the parties’ rights and obligations arising under the contract. Its unfair contract terms argument must fail for this reason alone.
3. Second, the arbitration agreement was reasonably necessary to protect Instagram, LLC’s legitimate interests at the time the contract was formed (s 24(1)(b)).
4. Now “legitimate interests” may be of a business or a financial nature. And a party may have interests in contractual performance that are intangible and unquantifiable; they do not need to reflect or be quantifiable in monetary form. The meaning of “legitimate interest” will depend on the particular business of the supplier, including the circumstances of the business and the context of the contract as a whole. Further, what is “reasonably necessary” involves an analysis of the proportionality of the term against the potential loss sufferable, and other options that might be available to the respondent in terms of protecting its business and which are less restrictive to the other party to the contract.
5. In *Gonzalez* it was recognised that the avoidance of litigation in multiple jurisdictions is a legitimate business interest worthy of protection, and that inconvenience and cost alone are not likely to be sufficient to establish that submitting to a foreign jurisdiction would be unfair. Button J there held that an exclusive jurisdiction clause in a contract should be given substantial weight, that there was nothing “unfair about an international corporation seeking to protect itself from claims being litigated in the courts of countless countries applying countless different substantive and procedural laws” (at [126]) . Further, well before the advent of the COVID-19 pandemic and remote hearings becoming far more prevalent Button J said (at [138]) that:

inconvenience and expense were foreseeable outcomes of Ms Gonzalez (objectively) agreeing to the exclusive jurisdiction of Singapore. And in any event, in light of the technology that has developed over the past twenty years (not least the ability to communicate conveniently and cheaply by audio visual link both in and out of court), whilst I accept that it will be more difficult for Ms Gonzalez to pursue her claim in Singapore, the problems will not be enormous.

1. In the present case Instagram has operated globally since its launch on 6 October 2010. The number of Instagram users has increased steadily to date. As at January 2014, only approximately 2% of Instagram’s 199.4 million monthly active users were located in Australia. And Dialogue can be taken to have known all of this. As in *Gonzalez*, the avoidance of litigation in multiple jurisdictions around the world is a legitimate business interest worthy of protection. In my view and consistently with the protection of party autonomy and freedom of contract, the arbitration agreement here should be recognised and enforced.
2. Dialogue asserts that the arbitration agreement is not reasonably necessary to protect the legitimate interests of Instagram, LLC because the Facebook entities have offices in several jurisdictions and have had the resources to participate in the present litigation in Australia. But this is not the relevant test. At the time the arbitration agreement was formed, Instagram, LLC had a legitimate interest in avoiding litigation in multiple jurisdictions around the world, and enabling a more efficient way to manage disputes with users.
3. Further, *Mylcrist Builders* is also distinguishable. There, the costs of the arbitrator were likely to outweigh the size of the small claim involved. But in the present case there is no such concern because the respondents would be required to pay all administrative fees, the arbitrator’s compensation and expenses, hearing room rental, as well as the costs relating to witnesses and evidence produced at the direction of the arbitrator. Even if Dialogue commences the arbitration, Dialogue’s filing fee and administrative costs would be capped at USD200, and generally, the respondents would be required to pay the other costs of arbitration stipulated by the AAA Rules including the arbitrator’s compensation and expenses.
4. Further, in *Mylcrist* *Builders* it was found that had Mrs Buck’s attention been drawn to the arbitration clause, it is likely that she would have been surprised by it and objected to its inclusion. Contrastingly, Dialogue had actual knowledge of the original Terms of Use and the arbitration agreement was conspicuously set out in all capital, bold letters at the top of the original Terms of Use. Further, it could hardly be said that Dialogue was a consumer of the flavour of Mrs Buck.
5. In my view, the respondents have satisfied their burden of showing a legitimate interest. Accordingly, Dialogue’s unfair contract term argument must also fail for this reason.
6. Given these conclusions, I do not need to proceed further to deal with the third factor of detriment stipulated under s 24(1)(c). As satisfaction of all three factors is required under s 24(1), and as Dialogue has failed on the first two factors (ss 24(1)(a) and 24(1)(b)), it would be supererogation on my part to discuss s 24(1)(c) further. Detriment though is a question that I will come back to later, particularly when discussing waiver and s 7(5) of the IAA.
7. For the foregoing reasons, in my view Dialogue’s unfair contract term argument fails. Let me turn to the next argument of Dialogue concerning statutory unconscionability.

## (d) Statutory unconscionable conduct

1. Dialogue says that if and to the extent that there was an arbitration clause incorporated as a term of the contract between Dialogue and Instagram, LLC, by including the term in the contract or by seeking to enforce that term, Instagram, LLC was and is, in trade or commerce, in connection with the supply or possible supply of services to Dialogue, engaging in conduct that was and is, in all the circumstances, unconscionable, in contravention of s 21 of the ACL.
2. Dialogue seeks an order declaring the term to be void or an order that the term is unenforceable.
3. And if such relief be granted, Dialogue says that there is no “arbitration agreement” within the meaning of the IAA. Alternatively, it says that any “arbitration agreement” is null and void, inoperative or incapable of being performed within the meaning of s 7(5) of the IAA.
4. Now as explained by me in *AGM Markets (No 3)*, it is not necessary for Dialogue to establish any special disadvantage or exploitation of disadvantage, although some cases have proceeded on that factual foundation.
5. Let me distil some principles based upon what I said in *AGM Markets (No 3)* at [362] to [378]. It is not necessary to set out the statutory provisions.
6. First, one is referring to a statutory standard rather than invoking the alchemy of equity. The context of s 21 makes this clear; s 20 deals with unconscionable conduct within equity’s embrace. Further, both the lens “in all the circumstances” (s 21(1)) and the non-exhaustive list of matters to which the Court may have regard (s 22(1) in this case) indicate that neither the boundaries nor content of the equitable doctrine are defining or limiting features. Nevertheless, equitable doctrine provides some background against which the statutory concept may be appreciated, albeit that the statutory concept is less restrictive (*Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1 at [279] and [295] per Edelman J).
7. Second, the evaluation of the conduct in all the circumstances requires “close consideration of the facts” (*Thorne v Kennedy* (2017) 263 CLR 85 at [41], citing *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [14]). Now such an observation was made when applying the equitable doctrine, and is particularly apposite in that context when considering the parties’ relationship, one party’s relative special disadvantage vis-à-vis another, whether situational or constitutional, and the conduct said to constitute the unconscientious taking advantage thereof. Necessarily such matters are fact specific. But equally, if not more so, such close consideration of the facts is necessary in the context of s 21. And s 22 elaborates on the factual matters and circumstances that are to be considered.
8. Further, assessing whether conduct in all the circumstances is to be characterised as unconscionable involves an evaluative judgment. Moreover, to say that unconscionability is to be assessed in all the circumstances is to deny the legitimacy of an atomistic approach which takes each of the factors in s 22(1) and considers them only separately.
9. Third, one cannot simply align the statutory concept of unconscionable with something not done in good conscience in the sense in which equity has so treated the matter. It is clear from s 21 and the factors that may be taken into account under s 22(1) that one is dealing with a broader notion. But reference to intellectual ideas of customary morality and societal values without further delineation and ready identification may be at too high a level of abstraction to be an objective touchstone. Further, such general themes may distract attention from the values that need to be considered, namely the values explicitly or implicitly enshrined in the text, context and purpose of the ACL and any other relevant statutory framework applicable to the activities in issue. But in identifying and applying those values, and indeed in considering the relevant matters under s 22(1) applicable to the particular case, societal or community values may also be implicitly satisfied. For example, in considering conduct affecting a particular sub-group, for example an indigenous community, the application of each relevant matter under s 22(1) may take into account and may need to be tailored to the characteristics of that sub-group and the alleged contravener’s interaction therewith, consistent implicitly with community standards. But if unconscionable conduct is found, it will not be because of some characterisation of it as being against community values without more. Rather, it will be so characterised as being against the statutory construct informed by the values that I have identified and which I will partly expand upon in a moment, as applied to the characteristics and conduct of the participants involved in the commerce in question.
10. Fourth, let me say something on the question of “conscience”. In the context of equity, *Kakavas* explained the matter by reference to the appellant’s submissions in that case in the following terms (at [15] and [16]):

In advancing a claim based on the principle expounded by Mason J in *Amadio*, the appellant relies upon the standards of personal conduct compendiously described as the conscience of equity. According to Pomeroy’s Treatise on Equity Jurisprudence:

“the ‘conscience’ which is an element of the equitable jurisdiction came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors, - a juridical and not a personal conscience.”

*The conscience spoken of here is a construct of values and standards against which the conduct of “suitors” - not only defendants - is to be judged*.

(My emphasis, citations omitted.)

1. As I said in *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [239], in the present context dealing with the element of “conscience” in statutory unconscionability, the “construct of values and standards” is extended beyond the boundaries and content of what equity would normally embrace. The metaphorical term of “conscience” in the present context has an enhanced dimension. Moreover, it is not just a juridical conscience to use Pomeroy’s description. It is a statutorily created or recognised conscience with its construct of values and standards informed by the explicit and implicit values enshrined in the text, context and purpose of the ACL. It is a “statutory norm of conscience” (*Kobelt* at [47] per Kiefel CJ and Bell J). And if that be the case, the qualifying epithet “good” in the phrase “good conscience” is otiose. The relevant conduct is either against the statutory construct of conscience or it is not; the qualifier of “good” in opposition to “bad” may have made sense when dealing with a moralistic version of conscience that had that implicit duality, but it is misconceived to suggest that the statutory construct so requires. Now any description of values even within the statutory construct of conscience will have attendant imprecision in terms of their boundaries and content. But it would be an exaggeration to say that they are so indeterminate as to be little more than a pretext to facilitate condemning conduct that is disapproved of simply on moral grounds.
2. Fifth, in terms of any requirement to demonstrate “moral obloquy” or “a high level of moral obloquy”, the use of such labels is a gloss on the statutory text. As has been explained in numerous authorities in this area, the statutory language should not simply be restated by substituting words or a phrase that Parliament did not choose. At most, the statutory concept of unconscionable may accommodate a *flavour* of moral obloquy in the sense that it means more than “unjust”, “unfair” or “unreasonable” (*Kobelt* at [118] per Keane J), but it is to divert the relevant normative inquiry to specifically seek to identify its existence or to clothe the relevant conduct with such a conclusory label.
3. Sixth, as may be distilled from Allsop CJ’s discussion in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [259] to [306]:
4. fairness and equality are values and conceptions underpinning s 22(1)(a), (b), (d) to (f) and (i) to (k); more particularly, s 22(1)(a), (j)(i) and (k) recognise asymmetry of power;
5. a lack of understanding or ignorance of a party is the conception underpinning s 22(1)(c);
6. the risk and worth of the bargain are the conceptions underpinning s 22(1)(e) and (i); a broader and related although not explicit concept is the question of asymmetry of information; and
7. good faith and fair dealing are values and conceptions underpinning s  22(1)(l).
8. Seventh and more generally, although honesty and fairness in dealing with consumers is relevant including acting without deception, it is wrong to say that unfair conduct in and of itself amounts to unconscionable conduct. After all, s 21 regulates commerce where acting to one’s “own advantage is an omnipresent feature of legitimate commerce” (*Kobelt* at [117] per Keane J). But establishing unfair conduct may be a step along the way to showing unconscionable conduct if it ultimately amounts to an illegitimate exploitation of a person’s vulnerability and therefore amounts to an unjustifiable pursuit of self interest. It is also wrong to say that because hardship may be caused to a consumer by conduct, such an actual or likely consequence in and of itself establishes that the conduct was unconscionable. But again, establishing actual or likely hardship may be a step along the way to showing unconscionable conduct, although it is not a necessary condition.
9. Eighth, statutory unconscionability does not require only focusing on the alleged wrong doer’s or its officers’ or employees’ state of mind, whether actual intention or knowledge or what it ought to have known. It is a broader objective evaluation of behaviour including the causes and reasons for such behaviour and its effect or likely effect. But the subjective state of mind of the alleged contravener whether actual or constructive is relevant to the broader sense. Although I am concerned with a normative notion of conscience, the boundaries and content of which are informed by the explicit and implicit values previously identified, state of mind is relevant.
10. Ninth, industry practice is a relevant consideration. To the extent that this is formalised in an industry or other code, express recognition is given thereto in s 22(1)(g) and (h). But acting consistently or otherwise with industry practice has broader relevance to the unconscionability question as Keane J explained in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 at[290].
11. The standards, norms and practices of the relevant sector are relevant to the assessment of statutory unconscionability albeit not confined thereby. But I should also stress that conduct consistent therewith does not necessarily entail that such conduct is not unconscionable.
12. Tenth, the boundaries and content of any applicable statutory regime beyond the ACL is also important context within which to assess statutory unconscionability.
13. Eleventh, it is not necessary to show that a person is under a disadvantage or that any particular person has been disadvantaged by conduct (s 21(4)(b)). But in any event, a person is not treated as being in a position of substantial disadvantage merely because there is an inequality of bargaining power. And in any event as Keane J said (*Paciocco* at [293]) on the ultimate question:

While a disparity in bargaining power may be necessary to attract the operation of the provision, the mere existence of the disparity is not sufficient to do so. The existence of a disparity in bargaining power, which is an all-pervading feature of a capitalist economy, does not establish that the party which enjoys the superior power acts unconscionably by exercising it.

1. Twelfth, in terms of the technical operation of s 22(1), it is necessary to consider each of the non-exhaustive list of matters set out in s 22(1) if relevant. The word “may” in s 22(1) is conditional rather than permissive. If any matter in the list is potentially relevant to the conduct under consideration, it must be considered. Further, it is inappropriate to focus on one or more of the applicable matters listed in s 22(1) to the exclusion or unjustifiable expense of others.
2. Dialogue repeats many of its arguments that it advanced concerning its unfair contract terms point. I would answer if not reject them in similar terms. They go nowhere close to establishing statutory unconscionability.
3. Dialogue says that the respondents are in a much stronger bargaining position than it. True, but where does this really go?
4. Further, it says that the arbitration agreement requires Dialogue to comply with a condition as to where disputes are to be heard that is not reasonably necessary for the protection of the legitimate interests of the respondents. I disagree.
5. Further, it says that the arbitration agreement was not displayed on the sign up page, it was not provided to Dialogue either before or after the creation of any of its Instagram accounts, and it was not readily available to Dialogue. Further, it says that the arbitration agreement referred to the AAA Rules, but the rules were not attached to the original Terms of Use. Further, it says that the arbitration agreement was not negotiable, apart from a right to opt out within 30 days of the creation of the account, which was not displayed on the sign up page, and was not provided to Dialogue either before or after the creation of any of its Instagram accounts. Now some of this is literally true, but none of it separately or together with other matters goes anywhere close to establishing statutory unconscionability.
6. Further, it says that unfair tactics have been used by the respondents in seeking to rely on the arbitration agreement at this late stage. But its arguments in my view do little more than identify the procedural steps in the present litigation which are then sought to be characterised as “unfair tactics”. I would say now that this miscellany of so called “unfair tactics” may be relevant to any waiver argument which I will discuss later. But they have precious little to do with, let alone, establish statutory unconscionability.
7. Further, Dialogue says that the respondents’ intended referral of the disputes to arbitration will affect the interests of Dialogue, in causing it detriment, and depriving it of its chosen forum for the resolution of disputes. Even if Dialogue does not physically need to travel to California for the arbitration, there is the financial burden of engaging lawyers who specialise in US arbitration. Dialogue would also incur the costs of litigating the remainder of the proceeding in this Court (for the claims that are outside the arbitration), so there would be two sets of lawyers engaged and two sets of legal costs. There is also the inconvenience of Dialogue having to be a part of an arbitration overseas rather than prosecuting its proceeding in the court of its choice in Australia, with its choice of Australian lawyers. Further, if the arbitration proceeds in California with the arbitrator applying Californian law as the substantive law of the arbitration, there is at least a risk that Dialogue will not be able to bring the ACL claims, or will face Californian law claims which it would not face in an Australian court proceeding. In addition, the delay in its Australian proceeding, which includes matters that sit outside the alleged arbitration agreement, involves an irreparable element of unfair prejudice.
8. I would say now that some of these points may be legitimate concerns, but they hardly amount to establishing statutory unconscionability.
9. Now there are two decisions of the Supreme Court of Canada which have been drawn to my attention in this context. But only one of them is really on point.
10. In *Douez v Facebook, Inc* [2017] 1 SCR 751, the Court dealt with a forum selection and governing law clause in Facebook’s standard terms, which required that disputes be resolved in California according to Californian law. Ms Douez was a Canadian resident. She was a member of the social network Facebook. She claimed that Facebook, Inc had infringed her privacy and that of more than 1.8 million British Columbians. The majority found “strong cause” not to enforce the clause; I will explain this concept in a moment. The joint reasons of Karakatsanis, Wagner and Gascon JJ referred to the inequality of bargaining power between a consumer and Facebook, and the absence of any choice for consumers other than acceptance of Facebook’s terms. Their Honours observed that “in today’s digital marketplace, transactions between businesses and consumers are generally covered by non-negotiable standard form contracts presented to consumers on a “take-it-or-leave-it” basis” (at [55]). Their Honours continued that “unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach” (at [56]), thus contributing to the large difference in bargaining power between the parties.
11. Now contrary to Dialogue’s assertions, *Douez* did not conclude that the clause was unconscionable. The joint reasons rather disposed of the matter under the common law test for forum selection clauses expounded in *Z.I. Pompey Industrie v ECU-Line N.V.* [2003] 1 SCR 450. This is a Canadian test separate from a plain vanilla *forum non conveniens* scenario. The test is a two-step. The first step is that the party seeking a stay based on the forum selection clause must establish that the clause is “valid, clear and enforceable”. If the first step is satisfied, the second step shifts the onus to the plaintiff to show strong cause why the forum selection clause should not be enforced. Facebook established the first step. But on the joint reasons, Ms Douez established the “strong cause” second step. And on the joint reasons, she succeeded in establishing this without showing unconscionability (see [39] and [53]). The other majority judge, Abella J, found for Ms Douez but under the first step, finding the clause to be unconscionable. The minority judges, McLachlin CJ and Moldaver and Côté JJ, did not find unconscionability. Indeed, they pointed out that it was not argued by Ms Douez and there was no evidence. So, only one of seven judges found unconscionability. In the circumstances I can put *Douez* to one side.
12. In *Uber Technologies Inc v Heller*, 2020 SCC 16, the court considered an arbitration clause providing for arbitration in the Netherlands in a standard form contract between Uber and a Canadian driver. The majority observed that there was a clear inequality of bargaining power between Uber and the driver. The arbitration agreement was part of an adhesion contract and the driver was powerless to negotiate its terms with his only contractual option being to either accept or reject it. Further, there was a not inconsiderable disparity in sophistication between the driver and Uber, a large multinational corporation. Further, the arbitration agreement contained no information about the costs of mediation and arbitration in the Netherlands. Further, a person in the driver’s position could not be expected to have appreciated the financial and legal implications of agreeing to arbitrate under the relevant rules or Dutch law; indeed, the relevant rules were not attached to the contract and the driver would have had to search them out for himself. Further, the arbitration agreement designated the law of the Netherlands as the governing law and Amsterdam as the “place” of the arbitration, giving a driver the clear impression that he had little choice but to travel at his own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber’s home jurisdiction. The majority went so far as to observe that the arbitration clause, effectively, made the substantive rights given by the contract unenforceable by a driver against Uber and that no reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it (at [95]). Their Honours concluded that based on the disadvantages faced by the driver in his ability to protect his bargaining interests and on the unfair terms that had resulted, the arbitration clause was unconscionable and therefore invalid. But in *Uber* there was no ability to opt out of the arbitration agreement. Further, in *Uber* the filing fees and administrative costs for the arbitration were USD14,500. This figure was close to Mr Heller’s annual income and the value of any claim brought by Mr Heller was likely to be less than CAD100. But that is not my case.
13. Now *Uber* is interesting, but I am not sure what I can really draw from it. The Canadian concept of unconscionability appears to derive from Canadian equitable doctrine and is far more generous to those seeking to invoke it than under the ACL or under Australian equitable doctrine. All that seems to be required is the conjunction of “inequality of bargaining power” and a “resulting improvident bargain” (see [54], [62], [65] and [79]). The first factor is not just limited to a person under a disability in its broad sense. And the second factor embraces a fluid notion of improvidence, being undue advantage to the stronger party or undue disadvantage to the more vulnerable party.
14. In summary, I reject Dialogue’s case on statutory unconscionability. The respondents’ reliance on the arbitration agreement is not unconscionable.
15. Let me turn then to the question that I postponed.

## (e) What is the matter capable of settlement by arbitration?

1. Section 7(2)(b) of the IAA prescribes when the court will stay an arbitration agreement to which the section applies. It is convenient to set out s 7(2) again:

Subject to this Part, where:

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

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

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

1. Now s 7(2)(b) states that there be “the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration”. The word “matter” is not defined in the IAA. But it is not in doubt that the term “matter”, as referred to in s 7(2)(b), is a word of wide import. I must consider the substance of the controversy as it appears from the circumstances in evidence and not just the pleadings.
2. Further, it is not in doubt that in interpreting an arbitration clause including its scope, considerable amplitude should be given.
3. Let me say something about the application of these themes to the present case.
4. The matter is a dispute between Dialogue and Instagram, LLC with regard to Dialogue’s relationship with Instagram. That matter is “capable of settlement by arbitration” under Australian law.
5. The arbitration clause in the original Terms of Use provides relevantly that “…all disputes between you and Instagram (whether or not such dispute involves a third party) with regard to your relationship with Instagram, including without limitation disputes related to these Terms of Use, your use of the Service, and/or rights of privacy and/or publicity, will be resolved by binding, individual arbitration …”.
6. The present arbitration agreement is in broad terms. It applies in respect of all disputes “with regard to” the relationship between Dialogue and Instagram, LLC. That phrase is similar to the phrases “with respect to”, “in respect of” or “in relation to”. The phrase “relates to” is one of wide import.
7. Indeed, the arbitration agreement in the present case is in some respects broader than in other cases. The original Terms of Use do not refer to a dispute relating to “the agreement”. Instead, the arbitration agreement applies in relation to the relationship between Dialogue and Instagram, LLC.
8. In the present case, many of the claims the subject of the present dispute concerns or relates to the relationship between Dialogue and Instagram, LLC; but I should note that the relationship being referred to is during the *currency* of the original Terms of Use.
9. Further, many of Dialogue’s claims in this proceeding, and the matter as a whole, fall within the example in the arbitration agreement of “disputes related to these Terms of Use, [or] [Dialogue’s] use of the Service”.
10. So, many of the claims that the respondents seek to be referred to arbitration are capable of settlement by arbitration.
11. Now Dialogue has put contrary submissions.
12. First, Dialogue says that the claims in this proceeding fall outside any agreement relating to end-client Instagram accounts.
13. The claims in this proceeding, insofar as they relate to the Instagram platform, relate to Dialogue’s use of the Instagram platform through the product that it provides to its clients, Sked Social. Each client, an Instagram account holder, engages Dialogue to interact with Instagram on its behalf, and through its product, Sked Social, Dialogue uses the client’s login details (provided to Dialogue confidentially) to log in to the client’s Instagram account, selects the client’s chosen content, being either a photo or video and an accompanying caption which has been uploaded to Dialogue’s cloud-based storage, and publishes the content on the client’s Instagram profile or feed.
14. When Dialogue interacts with Instagram on a client’s behalf, it does so as agent for the client, with that client’s express permission given by their acceptance of Dialogue’s terms of service.
15. The parties to any contract relating to an Instagram account are the account holder, that is Dialogue’s client, and Instagram, LLC; Dialogue is not a party. Therefore, to the extent that the arbitration agreement in the original Terms of Use is incorporated, it is incorporated into a contract between the client and Instagram, LLC to which Dialogue is not a party and by which it is not bound. Those terms are expressed to govern “your” use of Instagram, which is a service that is provided to “you”. Instagram is used through an account, with a username. They apply only to users that hold an account, for the use of that particular account.
16. The arbitration agreement is expressed to cover “disputes between you and Instagram (whether or not such dispute involves a third party) with regard to your relationship with Instagram”. The matters the subject of the proceeding are not disputes between an end-client and Instagram, LLC with respect to the end-client’s relationship with Instagram, LLC. Therefore, so Dialogue contends, they are not the subject of any contract formed with respect to the end-client’s Instagram account. Rather, this proceeding concerns disputes between Dialogue and Instagram, LLC with respect to Dialogue’s delivery of services to its clients via its product, Sked Social. Dialogue’s contentions are interesting, but in my view too narrow.
17. Second, Dialogue says that the claims in this proceeding fall outside any agreement relating to Dialogue’s Instagram accounts.
18. The respondents point to evidence of three Instagram accounts which are said to have been created by Dialogue during the currency of the original Terms of Use. The three accounts were created on 12 January 2014, 31 July 2017 and 31 January 2018. Those three accounts have not been used by Dialogue for the delivery of services to its clients, but rather for marketing or testing purposes. Therefore, to the extent that with respect to each of those accounts Dialogue is bound by a contract incorporating the original Terms of Use, the contract is confined to the use of that account, and does not extend more widely to Dialogue’s use of its clients’ accounts.
19. Therefore, so Dialogue says, the arbitration agreement, which is said to be incorporated into a contract for each account, does not cover the matters in this proceeding, which relate to the use of Dialogue’s product in delivering services to its clients.
20. Accordingly, Dialogue says that the matters in this proceeding are not, in pursuance of the arbitration agreement, capable of settlement by arbitration. But again, in my view Dialogue’s contentions are too narrow.
21. Third, Dialogue says that the Facebook-related claims are outside the scope of the arbitration agreement, and Facebook, Inc is not a party to it.
22. The respondents’ stay application seeks to rely on an arbitration agreement between Dialogue and Instagram, LLC, arising out of the original Terms of Use.
23. Dialogue says that insofar as Dialogue’s claims relate to its use of the Facebook platform, rather than its use of Instagram, those claims fall outside the respondents’ stay application. The Facebook claims are relevantly:
24. claims about the proper interpretation of the Facebook terms;
25. claims about implied terms in the Facebook terms;
26. some aspects of the unfair contract terms claims as they relate to the Facebook terms;
27. some aspects of the unconscionable conduct claims as they relate to the Facebook terms.
28. Dialogue says that these claims do not form part of the dispute between Dialogue and Instagram, LLC and are not with regard to the relationship between them. Indeed, they concern a different respondent, namely, Facebook, Inc which provides the Facebook platform services, and is not said to be a party to the arbitration agreement.
29. Accordingly, the above claims would remain in the proceeding and would not form part of any arbitration even if the respondents’ stay application were successful. And any stay under s 7 of the IAA would therefore result in the vice of a multiplicity of proceedings.
30. In summary, I would agree with Dialogue that the Facebook-related matters in this proceeding are not, in pursuance of the arbitration agreement, capable of settlement by arbitration.
31. Fourth, Dialogue says that the disputes relating to creating accounts by unauthorised means are excluded from the scope of the arbitration agreement.
32. The arbitration agreement relevantly excludes from its scope:

disputes relating to… (3) violations of provisions 13 or 15 of the Basic Terms.

1. They are described as “Excluded Disputes”.
2. I have set out these Basic Terms earlier. Clause 15 prohibits the creation of accounts through unauthorised means, including using an automated crawler or scraper. I would agree with Dialogue that to the extent that the claims in this proceeding relate to such allegations, they are outside the arbitration agreement.
3. In my view the matters relating to the creation of accounts by unauthorised means are not, in pursuance of the arbitration agreement, capable of settlement by arbitration.
4. Fifth, Dialogue says that the arbitration agreement does not apply to disputes arising after 19 April 2018.
5. It points out that the original Terms of Use, which contain the alleged arbitration clause, were effective from 19 January 2013 to between 19 April 2018 and 14 July 2018. At that time, which appears to have coincided with when Facebook, Inc took over from Instagram, LLC as the provider of Instagram services, the revised Terms of Use commenced.
6. Now the original Terms of Use envisaged that the terms would be updated from time to time, and that Instagram would notify users by posting the terms on the Instagram service. The updated terms would be “effective as of the time of posting… and will apply to your use of the Service from that point forward”. The original Terms of Use would “govern any disputes arising before the effective date of the Updated Terms”.
7. Dialogue points out that the effective date of the revised Terms of Use is 19 April 2018, and accordingly says that any disputes arising after that date are governed by those terms, and not the original Terms of Use on which the respondents rely as the foundation of their stay application. Moreover, since around 14 July 2018 any Instagram services were provided by Facebook, Inc, which is not a party to the original Terms of Use in any event.
8. I agree with Dialogue that the original Terms of Use do not apply to the following claims, which arose after 19 April 2018:
9. the claims relating to the assertions in the respondents’ letter dated 12 February 2019 that Dialogue’s conduct violated the Terms of Use insofar as the conduct arose after 19 April 2018;
10. the claims relating to the assertions that Dialogue’s conduct violated the revised Terms of Use;
11. the unfair contract terms claims in relation to the revised Terms of Use;
12. the estoppel and misleading conduct claims relating to the No Concern Representation, as defined in Dialogue’s further amended statement of claim, insofar as the conduct arose after 19 April 2018;
13. the estoppel and misleading conduct claims relating to the Instagram Block Representation, as defined in Dialogue’s further amended statement of claim; and
14. the unconscionable conduct claims insofar as the conduct arose after 19 April 2018.
15. Nor could the original Terms of Use apply to any claims relating to Dialogue’s activities in respect of accounts of clients whose Instagram accounts were created after 19 April 2018.
16. In my view the post-19 April 2018 matters in this proceeding are not, in pursuance of the arbitration agreement, capable of settlement by arbitration, and irrespective of any words referring to the relationship between Dialogue and Instagram, LLC; that is, referring to the relationship during the currency of the original Terms of Use.
17. Sixth, Dialogue says, which is accepted by the respondents, that the competition claims fall outside the scope.
18. Let me make some more general points.
19. Contrary to Dialogue’s contentions, a number of cases have recognised that claims under Australian statutory laws may be capable of resolution in foreign arbitration. The application of Australian law to the claims in issue may be able to be determined by the arbitrator. And it may be for the arbitrator to decide, applying relevant principles of conflict of laws, what part the ACLallegations and claimed relief will play in the arbitration. Further, arbitration of ACL claims is not fundamentally inconsistent with the object of the CCA. Further, in other cases, claims under the ACL or analogues have been stayed in favour of foreign arbitration.
20. Further, on any view there are claims in this proceeding which fall within the arbitration agreement.
21. Now Dialogue argues that the arbitration agreement does not apply because the original Terms of Use only apply to the extent that Dialogue uses Instagram for its own purposes, and not to the extent that it uses Instagram for the purpose of providing services to its clients. But the arbitration agreement expressly provides that it applies to “all disputes between you and Instagram (whether or not such dispute involves a third party) with regard to your relationship with Instagram, including without limitation disputes related to these Terms of Use, your use of the Service, and/or rights of privacy and/or publicity”. Therefore, the arbitration agreement must be interpreted in broad terms.
22. Further, Dialogue’s acquiescence to the original Terms of Use is not negated merely because it logged into another account to use the Instagram platform.
23. Further, Dialogue concedes that it used its own Instagram accounts “for its testing or marketing activities” during the relevant period and, “[i]n the course of marketing or testing, [the] Instagram accounts were used many (sometimes hundreds of) times, and were sometimes used for posting”. Indeed, the evidence demonstrates that Dialogue regularly used its accounts. The substantive dispute between Dialogue and the respondents is clearly “with regard to its relationship with Instagram”, and so the arbitration agreement applies.
24. Further, Dialogue’s alleged conduct commenced and continued during the period in which the original Terms of Use applied. The dispute between Dialogue and Instagram, LLC arose because of Dialogue’s alleged breaches of the original Terms of Use before 2 April 2014, and those alleged breaches allegedly continued. The substance of the dispute between the parties relates to whether Dialogue is entitled to access and use the Instagram platform, which depends on whether Dialogue has breached the original Terms of Use and whether the respondents were entitled to revoke Dialogue’s licence pursuant to the original Terms of Use.
25. Now as I have said, the competition claims and the claims relating to the use of the Facebook platform, rather than the Instagram platform, are not subject to the arbitration agreement. Further, many of the post 19 April 2018 claims are also not caught by the arbitration agreement. But the fact that some matters may fall outside the arbitration agreement does not change the relevant fact that a stay of some of the claims under s 7(2) is mandated, subject to what I say later concerning the waiver question under s 7(5).
26. In summary, in my view the condition under s 7(2)(b) of the IAA has been satisfied. Because of the mandatory nature of s 7(2), if s 7(5) does not operate (an issue that I will come to shortly), some of the claims in the proceeding are required to be stayed. But I do not need to address the precise ambit of this further given the views that I have reached on waiver and s 7(5).

## (f) Miscellaneous

1. Before moving to the question of waiver and s 7(5), it is convenient here to deal with a number of miscellaneous points.
2. First, the respondents say that where certain matters are the subject of a mandatory stay in favour of arbitration under s 7 of the IAA and others are not to be resolved by arbitration, the Court has a discretion to impose conditions on the stay “as it thinks fit” under s 7(2). One such condition is the power to order, in conjunction with the mandatory stay, a temporary stay of the matters that are not to be arbitrated pending the outcome of the arbitration.
3. In the present case, the respondents seek both the mandatory stay of claims other than the competition claims, and a temporary stay of the competition claims.
4. The respondents say that the competition claims are ancillary to the claims that are the subject of the mandatory stay. In particular, the substance of the various competition claims derives from the respondents’ termination of Dialogue’s access to Instagram.
5. In addition, the respondents say that if Dialogue succeeds on any one of the claims the respondents are seeking to have referred to arbitration and obtains the relief it seeks, litigation of the competition claims would become unnecessary, such that granting a temporary stay in relation to the competition claims may result in substantial efficiencies in terms of the overall conduct of the dispute. The respondents say that this is particularly so in circumstances where the competition claims are complex and likely to require detailed economic evidence to be led by the parties.
6. Further, the respondents say that even if the arbitration does not resolve the entire dispute, the issues remaining for me to determine are likely to be substantially narrowed and the risk of inconsistent findings between the arbitral tribunal and my findings should be minimised by a temporary stay. Consequently, the respondents say that a temporary stay will have the effect of promoting and enforcing rather than undermining the arbitration agreement between Dialogue and Instagram, LLC.
7. I do not propose to rule on these questions at this time given that in my view there has been a waiver under s 7(5), such that no stay under s 7(2) is mandated in any event. Given that conclusion, the scenario positing a temporary stay simply does not arise. Further, such a scenario would have to embrace other claims within the temporary stay and not just the competition claims. But I will not linger further as the scenario is hypothetical given my waiver findings.
8. Second, Dialogue says that the respondents are out of time to enforce the alleged arbitration agreement because they have submitted a statement on the substance of the dispute by reason of the filing of their defence or amended defence in the proceeding before me.
9. Dialogue refers to the express time limit found in Art 8 of the Model Law: the party must request a stay “not later than when submitting his [the party’s] first statement on the substance of the dispute”. Dialogue says that there is no reason why that time limit should not apply, by analogy, to stay applications under s 7.
10. Dialogue says that s 7 was inserted in the IAA (previously the *Arbitration (Foreign Awards and Agreements) Act* *1974* (Cth)) as originally enacted. In that Act, Parliament implemented only parts of the Convention. Section 7 is derived from Art II of the Convention.
11. In 1989, Parliament enacted the *International Arbitration Amendment Act 1989* (Cth), which gave the force of law to the Model Law. This included Art 8 of the Model Law, whereby a request for a stay may be made “not later than when submitting his [the party’s] first statement on the substance of the dispute”.
12. Article 8 is modelled on Art II(3) of the Convention. Dialogue says that there are thus two separate provisions in the IAA which are modelled on Art II(3), namely, s 7 (enacted in 1974) and Art 8 (enacted in 1989). Now s 7 makes no reference to a time limitation for a stay application, whereas Art 8 does.
13. Dialogue says that giving legislative force to Art 8, the Parliament impliedly repealed s 7. It says that there is actual contrariety between the imposition of a time limit on the right to bring a stay application and an unlimited right. Alternatively, Dialogue says that if Art 8 and s 7 both sit side-by-side, then the two provisions should be construed such that they both impose an identical time limit, as this best achieves a harmonious result. Dialogue says that on either approach, the requirement in Art 8 that the party requesting arbitration must do so “not later than when submitting his first statement on the substance of the dispute” applies to the respondents’ stay application.
14. Dialogue says that in the present case, the filing of the defence and the amended defence by the respondents was a “statement on the substance of the dispute”, and accordingly the stay application is out of time.
15. Alternatively, Dialogue says that even if that time limit does not strictly apply to an application for a stay under s 7, it ought to be used as a guiding principle or an analogue in considering whether a party has waived its right to seek a stay under s 7.
16. But in my view, Dialogue’s assertion that Art 8 of the Model Law operates together with s 7 of the IAA, should be rejected. Art 8 operates independently of s 7 of the IAA.
17. Article II (3) of the Convention does not impose a time limitation on stay applications. And because s 7 of the IAA implements Art II (3), I should not imply a time limitation into s 7 of the IAA.
18. Further, the enactment of Art 8 of the Model Law into the IAA also suggests that s 7 of the IAA should prevail if there is conflict between s 7 of the IAA and Art 8 of the Model Law. No authority supports the suggestion that an arbitration agreement is inoperative under s 7(5) of the IAA based on the time limitation specified in Art 8 of the Model Law.
19. I reject Dialogue’s argument.
20. Third, Dialogue says that the arbitration agreement is inoperative or incapable of being performed. It says that the arbitration agreement provides for arbitration under the AAA Rules. But the rules are designed to apply to arbitration in the context of “consumer agreements”, namely agreements between an individual consumer and a business relevantly relating to the purchase of a product or service for personal or household use. Dialogue says that the rules are inapt for the business-to-business dispute between Dialogue and Instagram, LLC. Accordingly, it says that the arbitration agreement is inoperative or incapable of being performed, for the purpose of s 7(5) of the IAA. And this is a sufficient reason to dismiss the stay application. I reject this argument.
21. The AAA Rules apply whenever parties specify, as they have here, in their arbitration agreement that those rules apply; they can, if the parties have incorporated them, apply to business-to-business disputes, notwithstanding their title of “Consumer Arbitration Rules”. The parties’ objectively ascertained intention can easily be given effect to; these Rules are adaptable to suit the occasion.

# WAIVER

1. Section 7(5) of the IAA provides that a court shall not make an order under s 7(2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. An arbitration agreement may not be enforceable and may therefore be inoperative for the purposes of s 7(5) because the party seeking a stay has waived its rights to arbitrate, that is, to enforce the arbitration agreement.
2. Now before turning to what law governs the waiver question or the application of the relevant law to the facts, I should deal with a preliminary matter. The respondents say that regardless of which law applies to the question of waiver, waiver questions should be resolved by the arbitrator; again they seek to invoke the competence-competence principle.
3. According to the respondents I have a discretion as to whether I should decide waiver questions or whether I should allow the arbitrator to determine the challenge in accordance with the prima facie test.
4. Now I accept that a court might desirably refer any challenge under s 7(5) to the arbitrator if findings made in resolving the challenge are relevant to the substantive matters in dispute between the parties. But on the other hand, a court should determine s 7(5) questions if the hearing can be confined to a narrow area of investigation which will not extend to the substantive matters in dispute.
5. The respondents say that in the present case the questions relating to waiver are not confined and may become entangled with the substantive dispute.
6. The respondents point out that Dialogue argues that the respondents failed to invoke the right to arbitrate in protracted correspondence with Dialogue for several years before this proceeding. That correspondence concerned Dialogue’s alleged breaches of the various Terms of Use and the respondents’ revocations of Dialogue’s licences to use the Instagram platform. According to the respondents, an important part of this dispute is whether, by that same correspondence, Dialogue is entitled to access and use the Instagram platform, which depends on whether the respondents were entitled to revoke Dialogue’s licence to access and use the Instagram platform for allegedly breaching the various Terms of Use. Accordingly, the respondents say that the question of waiver is not a discrete point that can be readily and efficiently determined by me. So they say that the question of waiver should be determined by the arbitrator.
7. But I disagree. I do not accept the intertwining argument. And the matter can be efficiently dealt with as a discrete exercise. It is appropriate for me to decide this question, and irrespective of whether Australian law or US law applies. Let me then turn to the first important issue. What law applies to determine the waiver question?

## (a) Choice of law

1. The respondents say that I should apply US law, in particular, the FAA to the question of waiver. I agree with their contentions for the most part.
2. First, the FAA is the governing law of the arbitration agreement.
3. Now under Australian choice of law rules, the governing law is found by considering whether the parties have made an express or implied choice of law in the agreement or where no choice has been made, by seeking the legal system with which the agreement has its closest and most real connection.
4. In the present case, under the original Terms of Use the parties agreed that all disputes would be resolved by arbitration “under the American Arbitration Association’s rules for arbitration of consumer-related disputes” and that “[t]his dispute resolution provision will be governed by the Federal Arbitration Act”. Further, under the heading “Governing Law & Venue”, the parties agreed that the original Terms of Use “are governed by and construed in accordance with the laws of the State of California” and that “[f]or any action at law or in equity relating to the arbitration provision of these Terms of Use … you agree to resolve any dispute you have with Instagram exclusively in a state or federal court located in Santa Clara, California, and to submit to the personal jurisdiction of the courts located in Santa Clara County”.
5. Accordingly, the parties have expressly chosen the FAA as the governing law of the arbitration agreement. Further, even if the laws of California are in part applicable, on any view one is talking about foreign law, whether pure (US federal law only) or hybrid (a mixture of US federal law and Californian state law).
6. Second, applying US law whether pure or hybrid to the question of waiver in this case is consistent with the approach that I took in *Trina Solar*. The respondents have prayed in aid my observations in that case where I said that the enforceability of a contractual term is a matter to be determined by the proper law of the agreement. And as I have indicated, enforceability should be understood as including not only the operability of an arbitration agreement, but also questions such as waiver.
7. In *Trina Solar* I said (at [126] to [132]):

Trina US contended that Jasmin was a party to the arbitration agreement constituted by cl 11.1 of the Supply Agreement.

For present purposes, I will put to one side s 7(2) of the IA Act and consider the question of what law applied to determine the question of whether Jasmin was a party to the arbitration agreement, applying common law choice of law principles. …

I consider there to be a distinction between two types of scenarios: (a) the choice of law to determine whether there is a consensus ad idem between the parties; and (b) the choice of law to apply where one is dealing with the validity and interpretation of the contract, mode of performance and consequences of breach. As to the second scenario, it is not in doubt that the law to apply is that which the parties have chosen or purported to choose, alternatively the law which would be the putative proper law in the absence of express choice. As to the first scenario, I consider that the appropriate choice of law is the law of the forum.

First, questions concerning whether the parties have reached consensus ad idem are different to questions of validity. The latter concept assumes that an agreement has been made and looks at issues as to whether the same is, inter alia, enforceable, voidable or void.

Second, it is counter-intuitive to suggest that the choice of law to assess consensus ad idem should be that set out in an agreement that an entity says it is not a party to because there was no consensus ad idem. That would be to assume what was to be proved.

Third, and by analogy, it is counter-intuitive to apply a putative proper law, ie the proper law of the contract that the parties would have chosen if there had been a consensus ad idem, where one entity says that there has been no consensus ad idem.

Fourth, no relevant distinction is to be made between, on the one hand, asking whether person X has manifested consent to agree with person Y (ie displayed a consensus ad idem with person Y) and, on the other hand, asking whether person X has manifested consent to agree with persons Y and Z, where persons Y and Z had previously agreed with each other. In the present case, X is Jasmin, Y is Trina US and Z is JRC.

1. Now the law governing the arbitration agreement is the FAA. Therefore, the FAA with or without a soupcon of Californian law should apply to the determination of waiver. And given that Dowsett J (at [1]) agreed with my reasons, the respondents say that I am bound to follow myself. I have no difficulty with that proposition.
2. Third, there is a close connection between issues of validity and inoperativeness under or contemplated by s 7(5). Therefore, the most consistent approach would be to apply the law governing questions of validity of the contract to questions of its inoperativeness. Here, the law governing the validity of the arbitration agreement is the FAA. Accordingly, it would be most consistent to apply this same law to the inoperativeness of the contract, including waiver. I should also state here for completeness that US federal law (the FAA) and Californian state law (the Californian Arbitration Act) may both potentially apply. But I have accepted Judge Ware’s view that in the present context the FAA would pre-empt the Californian Arbitration Act to the extent of any inconsistency or conflict. But in any event this is all academic given that there is no relevant difference that need concern me as to the *statutory* provisions and my other views on waiver.
3. Fourth, the relevant law to be applied to the “validity, operation or performance of an arbitration agreement” should be the same at the stay stage under Art II of the Convention as would be applied at the time of enforcement of the award under Art V of the Convention. Article V(1)(a) of the Convention provides that recognition and enforcement of a foreign award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. This indirectly supports the view that the law governing the arbitration agreement should be applied to the issue of waiver. Further, there is no indication to the contrary in s 7 of the IAA or the Convention more widely.
4. Now Dialogue says that the question of waiver should be determined by reference to Australian law under the lex forum.
5. Dialogue accepted that I made a distinction in *Trina Solar* between the question of whether there is a consensus ad idem between the parties, which is to be determined by the lex forum, and the question of the validity and interpretation of the contract, mode of performance and consequences of breach, which questions are to be determined by the law that the parties have chosen or purported to choose, alternatively the law which would be the putative proper law in the absence of express choice. But Dialogue says that my views were based upon common law principles of choice of law, without having regard to s 7 of the IAA. Dialogue says that when discussing s 7 of the IAA, I observed that the provision was silent on choice of law. Now that is true. And it will be recalled that s 7(5) of the IAA provides:

A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

1. Dialogue emphasises that the court to which the subsection refers (twice) is an Australian court. And it is that court that is being asked to “find” that the arbitration agreement is “null and void, inoperative or incapable of being performed”. Now all of this is true, but this goes nowhere. Of course reference is being made to an Australian court, because it is that court that is being asked to stay the proceeding. But clearly s 7(5) is silent on what choice of law the Australian court must make. It seems to me that coherence with common law choice of law principles is desirable in circumstances where s 7(5) is silent.
2. Dialogue then falls back on an argument to say that there is economy and efficiency in an Australian court applying Australian law to answer those questions, particularly where one is applying equitable notions which generally operate in personam and on conscience.
3. In this regard, Dialogue made reference to *Paramasivam v Flynn* (1998) 90 FCR 489 at 502 where the Full Court referred to *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982, where Holland J said:

The Equity Court has long taken the view that because it is a court of conscience and acts in personam, it has jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders in rem in the particular matter. In short, if the defendant is here, the equities arising from a transaction to which he is a party are ascertained by New South Wales law and the equitable remedies provided by that law will be applied to him.

The Equity Court determines according to its own law whether an equity exists, its nature and the remedy applicable...

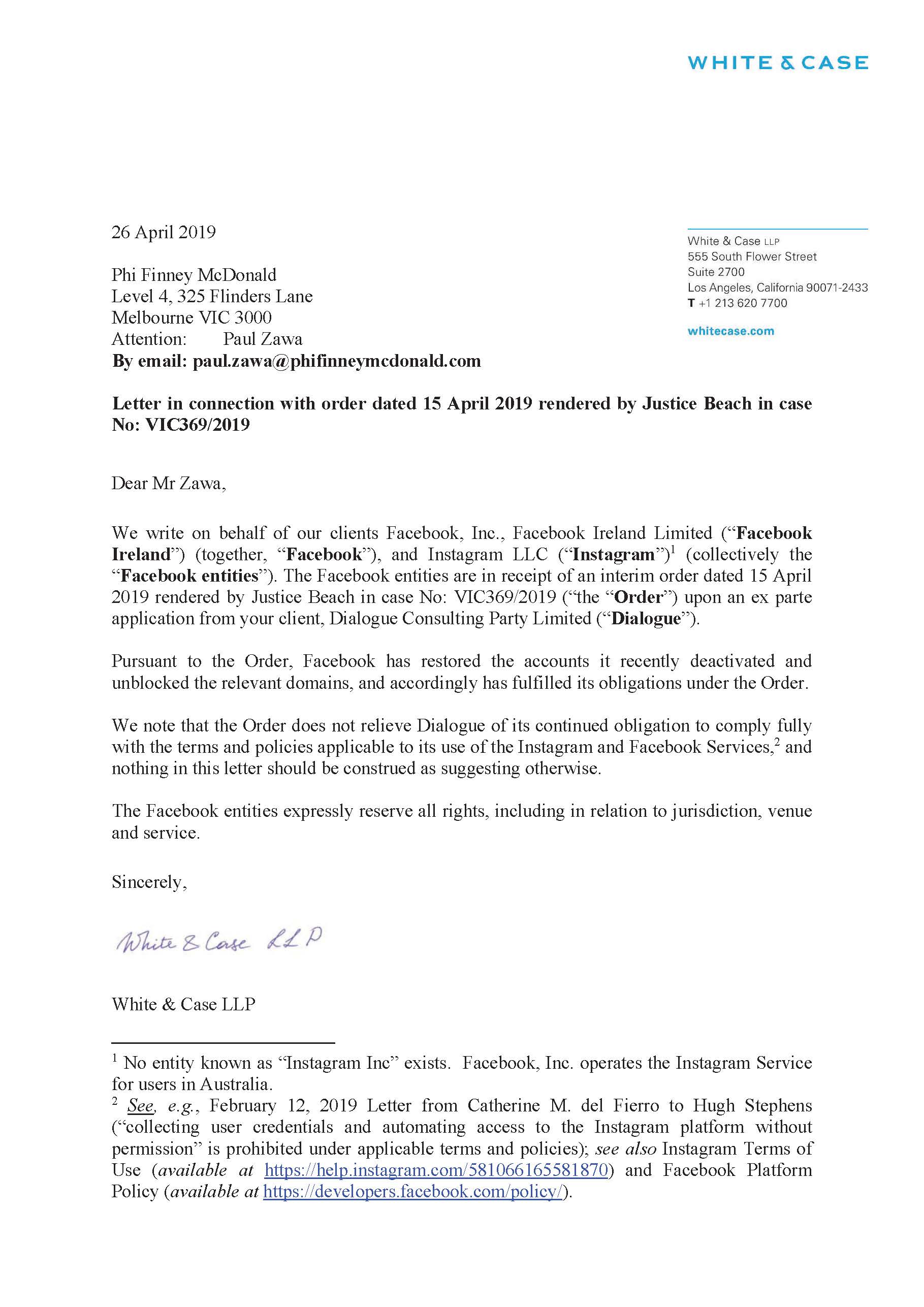
1. Dialogue says that if the lex forum is applicable to an equitable doctrine such as estoppel, then there is no reason to apply a different choice of law rule to its conjugate.
2. But I reject Dialogue’s arguments.
3. Dialogue says that the law of waiver is analogous to the doctrine of estoppel, and equitable rights and obligations have been traditionally governed by the lex forum in Australian conflicts of law.
4. But in my view accepting this argument may lead to the inconsistent and impractical result that different choice of law rules would apply to different grounds (equitable versus non-equitable) for refusing to enforce arbitration agreements under s 7(5). Indeed, it is an unattractive proposition to suggest that some aspects of s 7(5) require different choice of law considerations than other aspects.
5. But in any event even if an analogy can be drawn between waiver and estoppel, it is incorrect to say that equitable rights and obligations are always determined by the lex forum. Indeed, *Paramasivam* indicated that this was not an absolute rule, and that other laws may apply (at 503):

Particular considerations may arise where the source of a fiduciary relationship is a contract the governing law of which is not that of the forum. It may be that in such a case principles, such as those for which *Augustus* is authority, will apply.

1. *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245 held that the governing law of an express trust of movable property was the proper law of the trust, not the lex forum.
2. More recently, even in the NSW Court of Appeal in *Murakami v Wiryadi* (2010) 268 ALR 377 there has been acceptance (see at [128] to [143] per Spigelman CJ) that even where equity might intermeddle, if there is a contractual relationship then the governing law including any seat at the table for equity relating to that relationship should be the proper law of the contract, not the lex forum.
3. Indeed, if the lex forum were to be inflexibly applied in the area of equitable rights and obligations that would just incentivise the vice of forum shopping (M. Davies, A. Bell, P. Brereton and M. Douglas, *Nygh’s Conflict of Laws in Australia* (10th ed, 2020) at 554 to 559).
4. In my view, and consistently with the reasoning in *Paramasivam* and *Murakami*,the question of waiver should be governed by the proper law of the arbitration agreement. Here, the arbitration agreement is governed by inter-alia the FAA.
5. In summary, US law applies to determining the waiver question, whether it be the FAA or Californian law or a hybrid. Let me then deal with US law and its application. I will discuss the alternative approach of applying Australian law later.

## (b) Application of US law to the question of waiver

1. As I have said, the respondents led evidence from Judge Ware, who served as the Chief Judge, US District Court, Northern District of California. He had also been a Judge of the California Superior Court. Judge Ware’s expert report addressed both the FAA and the laws of the State of California. As I have said, the original Terms of Use specified that the arbitration agreement would be governed by the FAA.
2. Judge Ware expressed the following views.
3. Under US federal law and Californian law, which he said that I could treat as relevantly the same for present purposes, there is a strong policy in favour of enforcing arbitration agreements. A party who contends that a contractual right to arbitrate has been waived bears a heavy burden. He said that a party opposing arbitration must prove waiver by clear and convincing evidence. To meet the “clear and convincing” evidence standard, a Californian court must find that the party claiming waiver has presented evidence that is clear, explicit and unequivocal and leaves no substantial doubt that the right has been waived. He said that a party is deemed to have waived the right to enforce an arbitration agreement only upon clear and convincing evidence that it had engaged in an accumulation of substantial, voluntary and deliberate uses of the judicial forum, and that such voluntary uses of the machinery of litigation caused prejudice to the party opposing arbitration such that the opposing party had been deprived of the benefits of arbitration, namely, the expedient, efficient and cost effective resolution of the dispute.
4. In considering whether a party had voluntarily used the machinery of litigation, Judge Ware expressed the view that relevant factors that US federal courts and Californian courts consider include the following.
5. The first factor was the initiation of the litigation by the moving party. Now I note that in the present case the litigation was initiated by Dialogue rather than the respondents.
6. The second factor was the nature of the respondents’ participation in the litigation before moving to compel reference to arbitration. I note here that in the present case the respondents say that their conduct has been defensive in nature. They seek refuge in the argument that their actions were taken in response to applications for interlocutory and final relief brought by Dialogue, and that such steps have been concerned with defending and attempting to limit the force and effect of the injunctions sought. In addition, they point out that they have not filed any cross-claim against Dialogue. I should say now that the second factor weighs heavily in favour of Dialogue given the respondents’ conduct in the proceeding before me.
7. The third factor was the state of the pleadings. Now here Judge Ware expressed the view that not raising the right to arbitrate as an affirmative defence is not sufficient, by itself, to establish waiver. Now I note that it may not be sufficient of itself. But nevertheless it is one of the significant matters in my view weighing in favour of Dialogue. In this respect I note that the respondents have filed two versions of their defence and have not raised the arbitration question; they have not filed a further pleading to the further amended statement of claim, but that hardly assists the respondents for present purposes.
8. The fourth factor was the duration of litigation before a motion to compel was filed. Here Judge Ware opined, in my view surprisingly, that if the facts and circumstances of this proceeding were presented to a US federal court or Californian state court, the court would not deem the duration of the civil litigation here as so inconsistent with a right to arbitrate that it should be deemed to be a waiver of that right. But I note Judge Ware’s emphasis on *so* inconsistent, suggesting that it would be accepted that there was some inconsistency. In any event, it is one thing for Judge Ware to opine on US law. It is another thing for him to apply it to my facts. That can only be a matter for me. His evidence is admissible as to the former, but hardly the latter. And on the fourth factor, in my view this weighs heavily in favour of Dialogue.
9. The fifth factor was the question of prejudice. Judge Ware expressed the view that under US federal law and Californian law, to prove waiver, the party opposing arbitration must also prove by clear and convincing evidence that it was prejudiced by the litigation conduct of the moving party. And prejudice must be more than the expenditure of money to pursue the civil case before a motion to compel arbitration is made.
10. The respondents say that the mere fact that a party has incurred legal costs and expenses is insufficient, by itself, to show prejudice. For example, in *Richards v Ernst & Young* *LLP*, 744 F 3d 1072, 1075 (9th Cir, 2013), the Ninth Circuit held that the plaintiff was a party to an agreement making arbitration of disputes mandatory, and therefore any extra expense incurred as a result of the plaintiff’s deliberate choice of an improper forum, in contravention of their contract, could not be charged to the defendant. Here, according to the respondents, Dialogue has not suffered prejudice merely because it has expended costs in the litigation.
11. Further, the respondents say that a US federal court or Californian court would not only regard a party in Dialogue’s position as not having suffered prejudice because of the expense it incurred in its efforts to obtain interim prohibitory and mandatory injunctive relief from the Court, but would find that such a party was benefited by those injunctions. The respondents ambitiously rely upon an argument that Dialogue has not suffered relevant prejudice because it has obtained injunctions in this proceeding that have maintained the status quo with respect to its access to the Instagram platform. But in my view you can flip this the other way in favour of Dialogue. Dialogue needed to resort to litigation to obtain such relief expeditiously. And this is the more so when some of the respondents at an early stage were playing ducks and drakes on the question of service.
12. More generally, I should say now that I am not at all convinced as to the respondents’ analysis of the US cases on prejudice or their application to the facts, which is a matter for me. I will return to this later.
13. The sixth factor concerns public policy benefits. Judge Ware opined that a US court would not find that the conduct of the respondents during the proceeding had deprived Dialogue of the public policy benefits of an expeditious, efficient and cost-effective arbitration. But as I say, that question is more a matter for me. Indeed, it seems to me to be difficult to see why the public policy question is not now heavily in favour of Dialogue given the very substantial delays that have occurred before the respondents belatedly took the arbitration point. There could hardly be said to be anything expeditious or efficient in now accepting the respondents’ arbitration point.
14. The seventh factor is the use of the judicial process to gain something unavailable in arbitration. Judge Ware opined that the respondents did not use the judicial discovery process in this proceeding to gain information that they could not have gained in arbitration. But again, the application of US law to my facts is only a matter for me, although having said that, this is perhaps one of the few points in the respondents’ favour.
15. The eighth factor is whether the court has ruled in part or whole on the merits of the case. US courts examine whether a party opposing arbitration has suffered prejudice because there have been substantial rulings going to the merits of a case during the litigation. Judge Ware opined that under the facts and circumstances of this proceeding, a US federal court or Californian court would find that there have been no judicial determinations on the merits of arbitrable issues in the present proceeding. Again, whether that is so is a question for me to decide although I am inclined to agree with Judge Ware on this aspect.
16. Finally, I note that Judge Ware expressed the view that the analysis under Californian law and the FAA would be similar. I am prepared to accept that proposition in the generality with which it has been expressed, subject to some matters that I will discuss later concerning the case law.
17. Now I accept Dialogue’s case on waiver. But before discussing the boundaries and content of US law and its application, I should deal with some facts.
18. In the absence of direct evidence to the contrary from the respondents, I am inclined to draw the inference that the respondents chose at or close to the inception of this proceeding not to plead or rely upon the arbitration term. In other words, there was a deliberate or intentional waiver of the contractual right. Indeed, if I was to apply what was said by Chief Judge Posner in the Seventh Circuit, as I would usually unhesitatingly do, I would not need to proceed further. But I have to consider, inter-alia, the Ninth and Tenth Circuits as well, including choices made by Californian state courts that seem, in terms of US federal law, to have more closely followed the Tenth Circuit than the Ninth Circuit, surprisingly, on waiver questions. The following six matters separately or collectively justify a deliberate or intentional waiver.
19. First, the respondents’ lengthy participation in the present proceeding before making the stay application is supportive of this.
20. Second, the first version of the respondents’ defence filed as early as 23 August 2019 indicated a detailed familiarity with the original Terms of Use. Indeed the defence pleaded express terms thereof. Moreover, and perhaps ironically, as the respondents now stridently assert against Dialogue that Dialogue could not have failed to notice the arbitration notice (in capitals) and the detailed arbitration provision when Dialogue opened various Instagram accounts or dealt with Instagram, one could say the same thing back against the respondents and their lawyers when they drafted the various elaborate and no doubt expensive versions of their defence; and this is all in the context where the arbitration term was drawn by Instagram, LLC. If Dialogue can be said to have known of the arbitration term, so too the respondents and their lawyers, particularly when they took the trouble to plead the original Terms of Use in each version of their defence.
21. Third, it would appear from the material that at one stage the respondents were quite happy to justify their position against Dialogue based upon the revised Terms of Use. It would seem that they perceived that the terms thereof when compared with the original Terms of Use better placed the respondents to argue that Dialogue was in breach, more easily justifying revocation; in other words the revised Terms of Use contained broader prohibitions against Dialogue and in favour of Instagram, LLC than the original Terms of Use. Further, there is another aspect to this. The principal position of the respondents at and shortly after the inception of the proceeding was to try and justify their revocation, blocking or deactivation of Dialogue’s use directly or indirectly of inter-alia the Instagram platform. But at that time only the revised Terms of Use were currently operative. And it was these Terms that were current in terms of the then need to justify any then asserted revocation. So, as they perceived it, reliance on the revised Terms of Use and Instagram LLC’s rights thereunder, which did not contain an arbitration clause, were the real Terms to rely on.
22. Fourth, the respondents made much play of White & Case’s letter of 26 April 2019 to Dialogue’s lawyers which they have asserted was a relevant reservation of rights. Let me set out an image thereof given its structure and the use of footnotes:



1. Now there are real difficulties for the respondents in saying that this letter reserved their right to arbitrate.
2. The first point is that there is simply no reference to arbitration.
3. The second point is that footnote 2, if one had checked the link on 26 April 2019 or shortly thereafter, only referred to the revised Terms of Use, not the original Terms of Use. This is made plain from the hyper-linked documents. The revised Terms of Use, as I have said, contained no arbitration clause.
4. What then was the reservation of rights in the letter all about? Well clearly that related to the jurisdiction clause in the revised Terms of Use which stated:

**How We Will Handle Disputes.**

If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms (“claim”), and you may resolve your claim in any competent court in that country that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.

1. This reservation by White & Case on 26 April 2019 had nothing to do with arbitration; at this time the respondents did not perceive Dialogue to be a “consumer”. The reservation in relation to “jurisdiction” and “venue” as referred to in White & Case’s letter was about the jurisdiction of *courts* and the venue being *California*. It was problematic to say the least for the respondents to assert that this was a reservation about arbitration. In any event such a proposition was inconsistent with a later assertion by Mr Bannon SC from the bar table, who had only been recently briefed, that the earlier lawyers had “overlooked” the arbitration question; I should say that I was not blessed with any evidence to that effect, although I accept that counsel made such a statement based upon instructions from the new solicitors. I will return to this in a moment.
2. But assume I am wrong about all of this. Let it be assumed that the respondents were by this letter reserving their rights to arbitrate. On that foundation, the letter does not help them. For as early as August 2019 when their first defence was filed, they chose not to raise the point. In other words, knowing of their rights they deliberately chose not to invoke them and so represented by their conduct to Dialogue.
3. Fifth, by the time of the general use of the revised Terms of Use and thereafter, the respondents as part of their corporate strategy had generally abandoned using arbitration clauses in the relevant standard form contract(s). That being so, why am I not entitled to assume that consistently with that corporate strategy, the respondents had deliberately chosen not to bother relying on any historical arbitration clauses under earlier agreements?
4. Sixth, for all I know, the respondents might have also considered that because of the breadth of Dialogue’s pleaded claims and the entities involved, too much of Dialogue’s claims would have been left outside the scope of any arbitration proceeding to justify bifurcating the dispute resolution process between two continents and two modes of adjudication.
5. In my view the above matters support the inference that I have suggested of a deliberate or intentional waiver. Now as I have touched on, I raised with Mr Bannon SC the absence of direct evidence from the respondents as to the reasons for the delay in bringing the stay application and the delay in raising the arbitration provision, and the absence of any explanation. And he contended that the prior lawyers for the respondents had inadvertently over-looked the arbitration provision in the original Terms of Use. But I reject such a fairy dust explanation. In the absence of direct evidence from the respondents or their past or present lawyers, the more probable inference, based upon what I have already said, is that the respondents and their prior lawyers knew of but chose not to rely on the arbitration clause.
6. But if I am wrong on a deliberate choice having been made not to take the arbitration point, in my view that does not assist the respondents. Even if I accept the “cock up” scenario, which is usually not a bad explanation for many scenarios of an analogous type, this takes the respondents nowhere. In addition to the matters that I have referred to above supporting an inference of intentional waiver, the steps taken by the respondents during this proceeding lead to the conclusion that there has been an implied waiver of their rights to rely on the arbitration agreement under US law in the sense that with knowledge of the arbitration right the respondents have taken intentional acts inconsistent with that right. I have set out a detailed description of the steps taken in this proceeding earlier in my reasons. Relevant highlights for present purposes include the following:
7. The respondents filed an unconditional appearance;
8. The respondents appeared at several hearings, including contested hearings;
9. The respondents consented to extensive timetabling orders both on 17 May 2019 and on 15 November 2019;
10. The respondents filed a defence dated 23 August 2019 and an amended defence dated 27 September 2019 which set out their substantive responses to Dialogue’s claims and although pleaded both the original Terms of Use and the revised Terms of Use did not plead or assert the arbitration right. At the case management hearing on 17 May 2019, I even allowed for the filing of a cross-claim and this was provided for in the consent orders that were made;
11. The respondents sought documents through notices to produce and exchanged categories of discovery;
12. The respondents made an application for a discharge of Dialogue’s first injunction, and they opposed Dialogue’s second injunction; and
13. The parties attended a court-ordered mediation on 6 February 2020.
14. More generally, the respondents participated in this proceeding for 12 months before raising the arbitration question for the first time in their solicitors’ email dated 9 April 2020, serving the stay application.
15. Moreover, and I will return to this, the respondents’ intentional inconsistent acts caused relevant prejudice to Dialogue.
16. In summary, and I would say this at the outset, the respondents waived their rights to rely on the arbitration agreement under US law. And the “no waiver” clause in the original Terms of Use does not help them. That is limited to acts of omission, in particular “Instagram’s failure to insist upon or enforce strict performance of any provision of these Terms …”. Instagram, LLC’s conduct that in my view amounts to a waiver under both US law and Australian law goes well beyond pure omissions or merely such a failure. In any event, the contractual terms cannot foreclose broader equitable principles applying to determine the question of waiver as a matter of substance.
17. Let me now descend into the depths of US law on waiver.
18. Under § 3 of the FAA, a court is required to stay a proceeding pending arbitration “providing the applicant for the stay is not in default in proceeding with such arbitration”. This is similar to the principle of waiver under the California Arbitration Act § 1281.2(a), which provides that the court is required to stay a proceeding pending arbitration, “unless it determines that … [t]he right to compel arbitration has been waived by the petitioner” (*Saint Agnes Medical Center v PacifiCare of California*, 31 Cal 4th 1187, 1196 (2003)). So far so good.
19. Now there is no single test for determining the nature of conduct that will constitute a waiver(*Saint Agnes Medical Center* at 1196). And the determination of waiver is a question of fact (*Saint Agnes Medical Center* at 1196; *Hoover v American Income Life Insurance Co,* 206 Cal App 4th 1193 (2012)). Again, this can all be accepted. But now things get interesting.
20. There seem to be various tests in dealing with waiver under the FAA. Some are three pronged. Some are six pronged.
21. The Ninth Circuit, for the most part, seems to apply a three pronged test (*Fisher v A.G. Becker Paribas Inc*, 791 F 2d 691, 694 (9th Cir, 1986) but cf *Cox v Ocean View Hotel Corporation*, 533 F 3d 1114 (9th Cir, 2008)) such that what needs to be demonstrated is:
22. knowledge of an existing right to compel arbitration;
23. intentional acts inconsistent with that existing right; and
24. prejudice to the person opposing arbitration from such inconsistent acts.
25. Another variant of the three pronged test looks at:
26. the time elapsed from the commencement of litigation to the request for arbitration;
27. the amount of litigation (substantive motions and discovery); and
28. prejudice.
29. The Seventh Circuit does not apply prejudice as a necessary condition (see *Cabinetree of Wisconsin Inc v Kraftmaid Cabinetry Inc,* 50 F 3d 388, 390 per Chief Judge Posner (7th Cir, 1995)). Rather, the focus has been on choice and manifest intent; the language of presumptive waiver has also been used. But it has been suggested that the Seventh Circuit is an outlier on this aspect. This is surprising to me as the Seventh Circuit’s position in terms of choice and manifest intent resonates harmoniously with the requirements for waiver of a contractual right that I would understand under Australian law. I will return to this later.
30. The Tenth Circuit seems to apply a six pronged test (*Peterson v Shearson/American Express Inc*, 849 F 2d 464, 467 to 468 (10th Cir, 1988)). I will come to this in a moment. The significance of this is that, interestingly, perhaps for me only, Californian state courts even when considering the FAA seem to apply the Tenth Circuit approach rather than the Ninth Circuit. And Judge Ware in his expert evidence focused on the six pronged test. What then is it?
31. When determining waiver under the six pronged test, the following factors are required to be considered:
32. whether the party’s actions are inconsistent with the right to arbitrate;
33. whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;
34. whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
35. whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
36. whether important intervening steps, such as taking advantage of judicial discovery procedures not available in arbitration, have taken place; and
37. whether the delay affected, misled or prejudiced the opposing party.
38. Relevant authority that applies such a test include *Sobremonte v Superior Court,* 61 Cal App 4th 980, 992 (1998), *Saint Agnes Medical Center* and *Hoover*. These six factors are applied by Californian state courts when determining the question of waiver under the FAA (*Zamora v Lehman,* 186 Cal App 4th 1 (2010); *Fleming Distribution Co v Younan*, 49 Cal App 5th 73, 81 to 83 (2020)).
39. Let me say something about these six factors.
40. As regards the first factor, a party acts inconsistently with exercising the right to arbitrate when it makes an intentional decision not to move to compel arbitration, and actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court (*Newirth v Aegis* *Senior Comty LLC*,931 F 3d 935 (9th Cir, 2019)). Moreover, if the defendant has engaged in acts that are inconsistent with its rights to arbitrate, and the plaintiff incurs costs as a result, then the plaintiff suffers prejudice (*Newirth*). In my view, as I have said, there is evidence to support an inference that such a decision was made not to move to compel arbitration.
41. As regards the second factor, no further explanation is required. Of course this is all context dependent, but on any view the second factor is made out in the present case.
42. As regards the third factor, there comes a point where continuation with litigation of a dispute justifies a finding of waiver (*Saint Agnes Medical Center*; *Fleming Distribution*; *Hoover*)*.* In my view that is clearly the present case.
43. Now there is no fixed stage of a lawsuit beyond which further litigation waives the right to arbitrate. Rather, the US courts view the litigation as a whole in determining whether the parties’ conduct is inconsistent with a desire to arbitrate. But a demand for arbitration must not be unreasonably delayed. An arbitration must be demanded within a reasonable time, although what constitutes a reasonable time is a question of fact, which depends on the circumstances of the case (*Sobremonte*; *Hoover*; *Fleming Distribution*). A party that seeks arbitration must in a timely fashion seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation.
44. Diligence or a lack thereof weighs heavily in the decision as to whether there is a waiver (*Cabinetree* at 391; *Kawasaki Heavy Industries Ltd v Bombardier Recreational Products Inc*, 660 F 3d 988, 994 (7th Cir, 2011)). A party must do all that it can reasonably be expected to do to determine as early as possible whether to proceed through arbitration or the courts (*Cabinetree* at 391; *Kawasaki* at 996). But a party may waive the right by an untimely demand even without any intent to forgo the procedure.
45. Indeed, some US courts frame the discussion in terms of forfeiture. Forfeiture is the failure to make a timely assertion of a right. A party who fails in a timely fashion to invoke his right to arbitrate is necessarily in fault when he later attempts to proceed with arbitration. A defendant seeking a stay pending arbitration under the FAA who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing his first responsive pleading or motion to dismiss, has presumptively forfeited that right (*Zuckerman Spaeder LLP v Auffenberg*, 646 F 3d 919, 922 to 923 (DC Cir, 2011)).
46. As I have already indicated, and notwithstanding that I had not fixed a trial date in this matter, the third factor heavily favours Dialogue. The respondents delayed for an unreasonably long period before the right to arbitrate was asserted.
47. As regards the fourth factor, I gave the respondents the opportunity to file a cross-claim, but they did not exercise that option.
48. As regards the fifth factor, the chronology that I have set out earlier indicates that important intervening steps have been taken in the litigation.
49. As regards the sixth factor, according to Judge Ware’s evidence, prejudice is an essential element of waiver in Californian courts. But as I have said, there are differences between how federal courts in some other parts of the US would determine the question of waiver.
50. In the Seventh Circuit, prejudice is not an essential element for a finding of waiver (*Cabinetree* at 390). Rather, prejudice is a relevant factor to be considered in all the circumstances.
51. In the DC Circuit, the court takes account of the totality of the circumstances, including any potential prejudice to the non-moving party. Prejudice is a relevant factor in the analysis (*Zuckerman Spaeder* at922 to 923).
52. Now to the extent that prejudice is relevant, the following non-exclusive factors are helpful to the assessment of prejudice (*Hoxworth v Blinder, Robinson & Co Inc*, 980 F 2d 912, 926 to 927 (3d Cir, 1992)):
53. the timeliness or lack thereof of the motion to arbitrate;
54. the extent to which the party seeking arbitration has contested the merits of the opposing party’s claims;
55. whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to seeking to enjoin the court proceedings;
56. the extent to which a party seeking arbitration engaged in non-merits motion practice;
57. the requesting party’s acquiescence to the court’s pre-trial orders; and
58. the extent to which the parties have engaged in discovery.
59. I should also say here that the sixth factor is not just expressed as prejudice. Importantly it is expressed in terms of whether “the delay ‘affected, misled or prejudiced’ the opposing party”. I will return to the significance of this later, but there is little doubt in my mind that the respondents by their conduct “affected [or] misled” Dialogue.
60. Before moving on I should note the following. If the Seventh Circuit approach applies, Dialogue succeeds on waiver as no prejudice need be shown. But in my view, in any event Dialogue has shown relevant prejudice or that it has been affected or misled as I will discuss later. Therefore, on either the three pronged test or the six pronged test, Dialogue succeeds in establishing waiver.
61. Now because Dr Oren Bigos QC for Dialogue relied upon *Cabinetree*, I should say something further about it.
62. The respondents say that Dialogue’s reliance on *Cabinetree* is misplaced. They say that that decision is an outlier, and its facts are distinguishable. Further, it is said that the Seventh Circuit itself later distinguished *Cabinetree* in three cases based on facts similar to those of the present proceeding. But in one sense that last proposition is incomplete. On my reading none of these cases rejected *Cabinetree*. Rather they just dealt with different factual scenarios.
63. Now the respondents say that *Cabinetree* was distinguished by the Seventh Circuit in *Sharif v Wellness International Network Ltd,* 376 F 3d 720(7th Cir, 2004).The Seventh Circuit held that a defendant’s participation in litigation in response to a lawsuit, including filing a motion to dismiss for failure to state a claim, as well as a motion to dismiss for lack of proper venue, did not amount to waiver under *Cabinetree*. The Seventh Circuit explained (at 726 to 727):

… [I]t is well-established that a party does not waive its right to arbitrate merely by filing a motion to dismiss. … Likewise, a motion to transfer venue does not constitute waiver of the right to arbitrate.

1. But none of this is a rejection of *Cabinetree* or its approach as such.
2. Now the respondents say that like in *Sharif*, the respondents in the present case did not remove the case to another judicial forum for resolution, no discovery has been given, there is no trial date, and the respondents did not file the stay application when the date of trial on the merits was imminent. Nor have the respondents filed a motion to dismiss the action here. Thus, it is said that *Sharif* does not assist Dialogue. Now that may be so on the facts. But how it is said that *Sharif* somehow diminishes *Cabinetree* in terms of principle is not explained by the respondents.
3. Further, the respondents say that *Cabinetree* was distinguished by the Seventh Circuit in *Kawasaki*. In that case the Court held that a defendant waiting two years before requesting arbitration was not sufficient to waive its right to arbitrate because, inter-alia, the defendant merely responded to the plaintiff’s litigation actions, “which cannot be characterized as a choice for judicial resolution of the dispute”.
4. The Seventh Circuit explained (at 996 to 998):

… As Kawasaki rightly points out, we stated in *Cabinetree* that a party must do all that it can reasonably be expected to do to determine as early as possible whether to proceed through arbitration or the courts. But in *Cabinetree*, the defendant “dropped a bombshell” by invoking its right to arbitration after significant delay, *Cabinetree*, 50 F.3d at 389, for which the defendant had no explanation. Similarly, we found in *St. Mary’s* that the defendant’s ten-month delay between the plaintiff's filing of a claim and the defendant’s motion to stay for arbitration was inconsistent with the intent to arbitrate, especially since the defendant “never even mention[ed] arbitration until after it lost its motion [to dismiss or for summary judgment].”

…

We stated in *Cabinetree*, “A defendant who wants arbitration is often content with a stay, since that will stymie the plaintiff’s effort to obtain relief unless he agrees to arbitrate”. 50 F.3d at 389. Similarly, an appropriate motion to dismiss (or an argument against jurisdiction, as the case may be) stymies a plaintiff’s attempt at judicial relief and is consistent with the intent to arbitrate, especially when that motion includes an argument that the case belongs in arbitration. The waiver determination is not based on whether a party has jumped through the proper technical hoops, but rather is a totality-of-the-circumstances analysis that aims to ascertain whether a party intended to abandon the right to arbitrate by submitting a dispute to the courts, or at least acted in such a way.

…

Finally, Kawasaki correctly asserts that in this Circuit, “waiver may be found absent a showing of prejudice”, though prejudice is a relevant consideration. *St. Mary’s*, 969 F.2d at 590 , quoting *Nat’l Found. for Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772 , 777 (D.C.Cir.1987). Prejudice is only considered, however, when it results from “the conduct allegedly constituting waiver”. ... Here, BRP’s actions were wholly consistent with the intent to arbitrate. There was therefore no conduct constituting waiver which could have prejudiced Kawasaki, so prejudice is a non-factor in this case.

1. *Kawakasi* does not reject the approach in *Cabinetree*. Rather it applies it, but of course to a different set of facts. Indeed it expressly affirms that waiver can be found absent prejudice.
2. Further, the respondents say that in *Cooper v Asset Acceptance LLC*, 532 F Appx 639 (7th Cir, 2013), the Seventh Circuit again rejected a plaintiff’s reliance on *Cabinetree*, which the respondents say was based on facts similar to those here. The Court explained (at 641 and 642):

Cooper’s reliance on *Cabinetree* is likewise unavailing. In *Cabinetree*, the defendant removed the case to federal court and participated in extensive discovery. Considering both the removal and the extensive participation in discovery, we held that the defendant chose to proceed in litigation, which triggered a presumption of waiver. The defendant could not overcome that presumption, and we ruled that it had waived its right to arbitrate. While Asset did remove the case to federal court, its participation in discovery was not as extensive as that of the defendant in *Cabinetree*. Furthermore, Asset moved to stay discovery while its motion to dismiss was pending, which evinced its desire *not* to participate in litigation. It only did so because the district court denied its motion to stay.

Moreover, in *Cabinetree* the defendant waited to file its motion to compel arbitration until six months before the trial date, effectively “dropp[ing] a bombshell” into the proceedings. Here, Asset filed its motion to compel arbitration fourteen months prior to the trial date, but immediately after the district court declined to grant its motion to dismiss. As another district court cogently observed, this “modest delay [in filing a motion to compel arbitration] certainly is nothing extraordinary amid the delay endemic to the world of the law and does not shock the Court’s conscience”. … Here, there was no “bombshell” dropped into the litigation, and any delay in Asset’s filing of its motion to compel arbitration resulted from waiting for the district court’s ruling on its motion to dismiss. Finally, any presumption of waiver due to Asset’s removal of the case to federal court is rebuttable where a party’s activities did not “signify an intention to proceed in a court to the exclusion of arbitration”. *Cabinetree*, 50 F.3d. at 390. We see no clear error in the district court’s determination that Asset did not commit to a non-arbitral resolution of its dispute with Cooper, particularly in light of the fact that Asset attempted to stay discovery and only participated in discovery because the district court declined to do so.

1. But again, none of this undermined the approach in *Cabinetree*. All that occurred, unremarkably, was that different facts resulted in different outcomes.
2. Let me deal with some other points made by the respondents.
3. First, the respondents say that Dialogue has incorrectly relied on Californian cases to argue that a single, objective time limit exists for invoking the right to arbitrate. But I did not understand Dialogue so to argue. And if it did, it is incorrect. The question is what is a reasonable time in the context and circumstances presented (see *Hoover* at 1203 to 1205).
4. Second, the respondents say that Dialogue’s reliance on *Fleming Distribution* is misplaced. And unlike *Fleming Distribution*, the respondents say that they reserved the right to arbitrate. But in my view this is incorrect as I have previously discussed. But I do accept that *Fleming Distribution* is distinguishable from the facts before me.
5. Let me at this point then draw out some broader themes.
6. If I was sitting in California as an arbitrator applying US federal law, I see no reason not to apply what was said in the Seventh Circuit in *Cabinetree*, namely, that although prejudice was a relevant factor, it was not a necessary condition. Moreover, I do not see *Cabinetree* as an outlier in terms of the Seventh Circuit; none of *Kawasaki*, *Sharif* and *Cooper* disapprove of *Cabinetree*. Is *Cabinetree* an outlier as between other Circuits? It would seem that it may be. The Ninth Circuit in *Newirth* discussed prejudice, and in *Richards* seemed to indicate that it was a necessary condition. Clearly, there are different Circuit approaches. Let me then move to California where *Cabinetree* seems to be perceived by Californian state courts to be a minority view.
7. What does the appellate authority in the Californian state courts say?
8. *Saint Agnes Medical Centre* would suggest a number of propositions.
9. First, there is little difference between Californian law and US federal law.
10. Second, “no single test delineates the nature of the conduct that will constitute a waiver.”
11. Third, there seems to be a spectrum of conduct that could constitute waiver “ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration to instances in which the petitioning party has unreasonably delayed in undertaking the procedure.”
12. Now just stopping here, in my view, Instagram, LLC in the present context would fit within either possibility.
13. Fourth, *Saint Agnes Medical Centre* referred to the six factors set out in *Sobremonte*, the sixth factor being “whether the delay ‘affected, misled, or prejudiced’ the opposing party.” But I note that in *Fleming Distribution*, it was emphasised that there was no single test and that when applying the *Sobremonte* and *Saint Agnes Medical Centre* factors, no one factor was predominant. Indeed, unreasonable delay may be considered a significant and determinative issue.
14. But if prejudice is a necessary condition, what needs to be shown? It seems to me that the concept of prejudice in the Californian state court cases has some degree of flexibility.
15. It would seem that prejudice may be inferred from undue or unreasonable delay in taking the arbitration point such that a party’s ability to use the otherwise efficiencies of arbitration has been significantly impaired. So too in the proceeding before me.
16. Further, and related thereto, prejudice may flow from wasted valuable resources on ordinary litigation. So too is that established in the proceeding before me.
17. Further, prejudice may flow as described by *Sobremonte*. It is worth setting out some of the passages (at 994 to 997):

In our case, Sobremonte and Esperidion were prejudiced by the Bank’s delay and corresponding activities. As a result, they spent 10 months preparing their case for a full trial at a considerable expenditure of time and money. To prove their claim, Sobremonte and Esperidion engaged in judicial discovery procedures that were more expansive than those available through arbitration. They participated in hearings, status conferences and opposed the Bank’s various motions and ex parte applications.

…

Sobremonte and Esperidion have been further prejudiced by their now inability to take advantage of the benefits of arbitration. Arbitration is an expedient, efficient and cost-effective method to resolve disputes. If we consider the amount of time and money they have already spent in the judicial system, any benefits they may have achieved from arbitration have been lost.

…

A consideration of all factors leads to the conclusion that the Bank waived its right to compel arbitration. We acknowledge that arbitration is the preferred method of resolving disputes. However, the benefits it can provide, to both the parties and an already overburdened judicial system, become illusory when there is a failure to timely and affirmatively implement the procedure. Mere announcement of the right to compel arbitration is not enough. To properly invoke the right to arbitrate, a party must (1) timely raise the defense and take affirmative steps to implement the process, and (2) participate in conduct consistent with the intent to arbitrate the dispute. Both of these actions must be taken to secure for the participants the benefits of arbitration.

(Citations omitted)

1. Let me make some other points on the sixth factor referred to in *Saint Agnes Medical Centre* and *Sobremonte*.
2. As I have said, the sixth factor does not just use the language of prejudice. It is more broadly expressed. Either the sixth factor goes beyond prejudice or uses an expanded notion of it. The sixth factor is expressed in terms of “whether the delay ‘affected, misled or prejudiced’ the opposing party”.
3. And as to prejudice, there seems to be a distinction between substantive prejudice and prejudice in terms of expense and delay. An example of substantive prejudice is where the moving party has lost an application on the merits and then seeks to relitigate by invoking arbitration. That is not my case. The other type of prejudice is where a party has postponed for too long invoking its contractual right to arbitration and accordingly causes unnecessary delay or expense to the other party. That is my case. And as to this other type of prejudice, there are no bright lines concerning the period of delay or the expense involved. This is all context dependent.
4. Now it has been said that investment in time and money in litigation is not sufficient to produce prejudice. Expense wasted by delay in seeking to arbitrate is not sufficient. In other words “self inflicted” expense is not evidence of prejudice. So, expense incurred as a result of a deliberate choice of an improper forum is not prejudice. But here, some claims had to be litigated by Dialogue in Australia. Further, adopting the respondents’ position entails multiple proceedings in Australia and California. In other words, I am not dealing with a case where all claims of Dialogue could have been arbitrated. So in my view I am not dealing with a plain vanilla case of the deliberate choice by Dialogue of an improper forum.
5. In my view there is or will be prejudice to Dialogue. The respondents’ deliberate and inconsistent acts in the proceeding before me will have caused unnecessary expense, delay and inefficiency to Dialogue if I now accede to the respondents’ application. Further, the respondents by their conduct including unreasonable delay have misled Dialogue into thinking that the proceeding was the appropriate forum for the parties to resolve their disputes, not Californian arbitration and then only for part of the claims.
6. Finally, I should say something about public policy in light of the fact that at best for the respondents it could be said that they sat on their hands for 12 months. Their belated assertion of their arbitration right is wholly inconsistent with the objects of the IAA and the public policy objectives behind promoting international commercial arbitration. Indeed to my way of thinking, to now force Dialogue to arbitrate would be contrary to public policy. Such a course would not be expedient, efficient or cost-effective for the resolution of the disputes between the parties.
7. In summary, whatever US test is applied, in my view Instagram, LLC has waived its arbitration right. Therefore, s 7(5) of the IAA applies and no mandatory stay under s 7(2) is triggered.
8. But if I am wrong on choice of law and Australian law applies to the question of waiver, then there has been a waiver under Australian law.

## (c) Application of Australian law to the question of waiver

1. Under Australian law it would seem that there are two different standards of waiver, namely, waiver in the stronger sense and waiver in a weaker sense (see *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [53] to [63] per Austin J, referred to in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169 at [52] and [53] per Finkelstein J). But only waiver in the stronger sense is embraced by s 7(5).
2. Waiver in the stronger sense is an abandonment of a right whether expressly or implied from intentional acts with knowledge. In my opinion that has been established on the facts before me.
3. By contrast, waiver in the weaker sense applies when the grant of a stay is discretionary. Such a weaker sense embraces matters going to the exercise of the court’s discretion, rather than a firm substantive doctrine. As Austin J noted in *Tridon*, that form of waiver can be relevant in connection with applications for leave to amend or to strike out a pleading. And it can be relevant to an application for a stay, but only when the grant of the stay is a discretionary matter.
4. But under the IAA, the grant of a stay under s 7(2) is mandatory. Accordingly, matters going to the exercise of the Court’s discretion including waiver in the weaker sense are irrelevant to ss 7(2) and (5); to the extent that *Cosco* suggests otherwise, I doubt it. With respect to a stay application under s 7(2) either there is waiver in the stronger sense or there is no waiver.
5. Now the respondents say that under this standard of waiver, there has been no waiver. They say that there has been no election between inconsistent rights because the respondents have not made any unequivocal or final choice between alternative procedures. But I am dealing with waiver, not election as such. Waiver can be an intentional act with knowledge not to rely upon but to abandon a contractual right. It is not necessarily predicated on a choice between inconsistent rights. But in any event, as I have said, the respondents have acted inconsistently concerning the right to arbitrate by its conduct in the proceeding.
6. Now the respondents say that they expressly reserved their rights as to jurisdiction, venue and service shortly after commencement of this proceeding. But I have already set out my views concerning that so called reservation; it did not reserve the right to arbitrate.
7. Further, the respondents say that under the original Terms of Use, neither party was bound by a time limitation for invoking the arbitration agreement. Further, the respondents also took refuge in the argument that under the heading “Governing Law & Venue” it was said that “Instagram’s failure to insist upon or enforce strict performance of any provision of these Terms will not be construed as a waiver of any provision or right. No waiver of any of these Terms will be deemed a further or continuing waiver of such term or condition or any other term or condition”. I have already disposed of that argument.
8. In my view, under Australian law, the respondents waived their rights to rely on the arbitration agreement. I am referring here to waiver in the stronger form. That waiver leads to the conclusion that the arbitration agreement is inoperative or incapable of being performed under s 7(5), and the stay should be refused.
9. Finally, for completeness, I should again make the point that my finding on waiver under s 7(5), whether applying US law or Australian law, entails that there is no mandatory stay under s 7(2). And in the way the parties argued the case, no discretionary stay question now arises. The respondents only ever argued for a discretionary stay of the competition claims if I had accepted their argument for a mandatory stay under s 7(2) of the other claims. But I have rejected that premise. But in any event, if there had been any residual argument for a discretionary stay, I would have rejected such an argument by reason of waiver in the weaker sense; all of the matters put by Dialogue which I have accepted within a different conceptual framework would provide substantial reasons to reject such a discretionary stay.

# CONCLUSION

1. For all the above reasons, the respondents’ stay application should be dismissed.
2. Further, Dialogue’s cross-application should also be dismissed.
3. As to the question of costs, I would normally award costs to Dialogue. But it failed on most of its arguments including its cross-application, albeit that that application was reactive. In my view the appropriate order is that I should treat the parties’ costs on both applications as being their costs in the cause. I will make orders accordingly.

|  |
| --- |
| I certify that the preceding six hundred and three (603) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach. |

Associate:

Dated: 22 December 2020

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | VID 369 of 2019 |
| Respondents |  |
| Fourth Respondent: | INSTAGRAM, LLC |