Judicial Encounters with International Commercial Arbitration in the US and Australia

ABSTRACT

Arbitration clauses are increasingly standard in contract formation, including in international business. In 1985, the United Nations Commission on International Trade Law promulgated its Model Law on International Commercial Arbitration. Since then, it has been adopted in various forms in 118 jurisdictions worldwide. In today's globalized economy the Model Law's adoption and use in local judicial enforcement and interpretation of contracts between international parties presents an important consideration and choice of law issue .

This note considers two examples of judicial interpretation of international commercial arbitration law, one case from Australia and another from the United States. First, this note lays out a brief history of international commercial arbitration and its legal development, focusing on the development and adoption of the Model Law. Then, it examines the legal opinions of Oracle Am., Inc. v. Myriad Grp. A.G. and Dialogue Consulting Pty Ltd v Instagram, Inc and analyses how these opinions illustrate diverse views by courts as interpreters and enforcers of international commercial arbitration contracts. As a litmus test for the status of the Model Law's incorporation, the cases suggest that Australia is a more receptive forum for arbitration enforcement litigation and depicts the flexible judicial perspective required to interact with the Model Law and other international standards of arbitration law.

INTRODUCTION

Arbitration is a common form of alternative dispute resolution.[1] The Federal Arbitration Act ("FAA"), enacted in 1925, established the foundation of United States ("US") arbitration law with the purpose of encouraging contracting parties to agree to arbitration as an alternative to traditional litigation to solve contractual disputes.[2] It is twenty-seven years older than the Uniform Commercial Code ("UCC"), which was enacted in 1951 and is now central to American contract and commercial law.[3] Since the US Supreme Court's decision in *Mitsubishi v. Soler* in 1985, the FAA's influence has expanded, fostering a favorable view towards the enforcement of arbitration, including in international commercial agreements.[4] For better or worse, arbitration clauses are virtually ubiquitous in American contracts today, from employment agreements to the purchase of a cell phone.[5]

Arbitration, however, has not only grown in influence as a choice for dispute resolution in American domestic law over the past forty years. It has also become ubiquitous in the international business contracts context.[6] International commercial arbitration has developed into its own area of law, particularly through the United Nations Commission on International Trade Law ("UNICITRAL")[7] Model Law on International

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1 *Expert Forum: Arbitration in the Americas*, CORP. DISPS., Jan.-Mar. 2016, at 5.

2 31 MOORE'S FEDERAL PRACTICE, § 904.02 (MB 3d ed. 2023) (argues that under Supreme Court interpretation, "the FAA was passed with two related primary objectives: (1) to overrule the widespread judicial hostility to arbitration agreements at common law; and (2) to place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.").

3 *Uniform Commercial Code*, UNIF. L. COMM'N, https://www.uniformlaws.org/acts/ucc (last visited Jan. 14, 2024).

4 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). *Accord* PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS 30-37 (2009).

5 Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (arguing that "the consequences of arbitration clauses can be seen far beyond the financial sector. . . . Taking [after] Wall Street's lead, businesses—including obstetrics practices, private schools and funeral homes—have employed arbitration clauses to shield themselves from liability . . . ."). *See also* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 1 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf (a study of the use of mandatory arbitration agreements by American employers found that "since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now exceeds 55 percent.").

6 Jennifer Bagwell, *Enforceability of Arbitration Agreements: The Severability Doctrine in the International Arena*, 22 GA. J. INT'L & COMP. L. 487, 504 (1992) ("[T]he inclusion of an arbitration clause in an international commercial contract . . . [has been] almost universal practice" for the last thirty years).

7 UNICITRAL has operated under a mandate since 1966 "to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law." U.N. Comm'n on Int'l Trade L., *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law* 1 (2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf.

Commercial Arbitration ("Model Law"). In 1985, UNICITRAL introduced the Model Law with the following purpose:

> The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects *worldwide consensus* on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[8]

The Model Law is still active today, with its most recent amendment in 2006.[9] Today, 123 jurisdictions worldwide (consisting of ninety States) have laws of international commercial arbitration based on the Model Law.[10] Three US states legislated the Model Law in the 1980s, a relatively early adoption.[11] However, many other states which are important parties in the global commercial market, such as China, Australia, and the United Arab Emirates, adopted the Model Law more recently, after 2010.[12]

In this note, I will utilize comparative law methods to contrast the use of the Model Law in diverse legal systems to illustrate and ask questions about the current state of international commercial arbitration. What is the relationship between the growth of the Model Law adoption and use and the growth of international commercial activity especially in the age of advanced internet technology, global pandemic, and potential recession? In Section I of this note, I will set out a brief history of international commercial arbitration and its origins, before turning to the Model Law to consider its provisions, adoption, and history as a convention of international commercial arbitration. I will then narrow focus to the Model Law's adoption in two countries: the US and Australia, to set up a case study on the current issues surrounding the Model Law. Specifically, Section II will consider two cases: one from the US and one from Australia. It will brief each case, and then analyze them comparatively. Both countries exist within the common law legal family, which informs their views of judicial interpretation and dialogue around any law, including the Model Law. However, the policies and considerations differ between the cases in their attitude towards comparative interpretation and the goals of arbitration law. The US case, despite the US's long

8 U.N. Comm'n on Int'l Trade L., *UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006* (emphasis added), https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (last visited Mar. 9, 2024).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

history with the FAA and the Model Law, does not exhibit the most flexible and forward-thinking reasoning. Rather, the Australian decision seems to better acknowledge the need to actively contribute to a "worldwide consensus"[13] on arbitration enforcement to stay current with the economic needs of a globalized hypercompetitive market. If the Model Law's goal is to harmonize and unify arbitration laws in a world of globalizing commercial trade, then the comparison can serve as a litmus test for how far that goal has progressed. The US case exhibits the long history of judicial interpretation of commercial arbitration law, both the FAA and the Model Law in the US serve as examples. Yet, UNICITRAL's goals are better reflected in the Australian judge's willingness to engage in judicial dialogue[14] and flexible interpretation.

SECTION I: HISTORY AND BACKGROUND OF THE MODEL LAW

Arbitration in commercial trade markets was popularized in Europe during the industrial growth of the Nineteenth Century, particularly in the economically dominant England.[15] British trade organizations standardized arbitration contracts and procedural rules, such as the arbitrator panel,[16] and the law developed in response.[17] In 1889, England codified its arbitration common law and created a legal framework and set of rules for arbitration practice.[18] International arbitration also developed as a solution to conflicts between states in the Nineteenth Century,[19] highlighting arbitration's potential for international law theory and peaceful international dispute resolution.[20] The modern institution of international commercial arbitration first began with the International Chamber of Commerce ("ICC"), founded in 1920, which opened a Court of Arbitration in 1923.[21] The ICC influenced states to ratify international arbitration treaties, foreshadowing the Model Law: the 1923 Geneva Protocol on Arbitration Clauses, which set out the first international arbitration

13 *See supra* note 8 and accompanying text.

14 The term judicial dialogue refers to judges' engagement in comparative law by utilizing other countries' caselaw as a persuasive source. *See* Amrei Müller & Hege Elisabeth Kjos, *Introduction*, *in* JUDICIAL DIALOGUE & HUMAN RIGHTS 2-4 (Amrei Müller & Hege Elisabeth Kjos eds., 2017) (describing judicial dialogue as "facilitated by increased cross-border communication in most regions of the world, which has also become possible through technological advances. . . . Dialogue can help courts [with] . . . interpretation and application . . . . [and] can [also] be seen as a tool for . . . incremental development.").

15 MIKAEL SCHINAZI, THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION 44-49 (2021).

16 *Id.* at 57-58.

17 *Id.* at 49-50.

18 *Id.* at 50.

19 *Id.* at 50-57.

20 *Id.* at 61-62.

21 *Id.* at 89.

enforcement rules,[22] and the 1927 Geneva Convention on the Execution of Foreign Awards, which created mutual enforcement of arbitral awards amongst participating countries.[23] The ICC has held longstanding influence at the United Nations ("UN") since 1946.[24] Both the ICC and the UN Economic and Social Council worked on creating a new international arbitration agreement for UN member countries, the 1958 New York Convention (the "NYC").[25] Today the NYC has at least 168 signatories and is a "universal constitutional charter for the international arbitral process."[26] Since then, international arbitration has developed into its own professional field, serving as a more autonomous and supranational discipline in comparison to traditional legal specializations and valuing "party autonomy, 'the service of business,' neutrality, and internationalism."[27]

International arbitration's growth and success is attributable to the control it affords contracting parties, in contrast to the downsides of traditional litigation.[28] Arbitration offers parties neutrality rather than national bias, a choice of experienced and specialized arbitrators, control over cost, speed, clear procedural rules, and confidentiality.[29] And under the NYC and the Model Law, any arbitration agreement with an international element qualifies for coverage,[30] a broad category in today's

22 *Id.* at 117-21.

23 *Id.* at 121.

24 *Id.* at 94-95.

25 *Id.* at 127-31.

26 *Id.* at 131 (quoting GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 99 (2d ed. 2014)).

27 *Id.* at 196-01.

28 GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 7 (2d ed. 2016) (arbitration "affor[ds] parties more practical, efficient and neutral dispute resolution than available in other forums."). *See also* MARTINEZ-FRAGA, *supra* note 4, at 151 (arguing that "the New York Convention has rendered global alternative dispute resolution possible. Accordingly, it has spared entrepreneurs, captains of industry, and merchants engaged in cross-border transactions from having to submit to the perils and uncertainties endemic to litigation pursued in foreign jurisdictions against persons or entities residing in those jurisdictions and serving political and economic functions that redound to the benefit of political systems that do not necessarily value the virtues of an independent judiciary.").

29 BORN, *supra* note 28, at 7. For legal practitioners' recent perspective on international commercial arbitration over litigation, see, e.g., *What is International Arbitration?,* COOLEY LLP (Jan. 31, 2023), https://www.cooley.com/news/insight/2022/2022-12-31-what-is-international-arbitration, and Liam Prescott & Austyn Campbell, *Doing Business in Australia: Why International Commercial Arbitration is an Attractive Option to Resolve Disputes*, DLA PIPER (Feb. 10, 2023), https://www.dlapiper.com/en-jp/insights/publications/2023/02/doing-business-in-australia-why-international-commercial-arbitration-is-an-attractive-option. On the specific factor of efficiency, see generally *Comparing Timelines: What do Statistics Reveal About the Length of International Commercial Arbitration vs. U.S. Federal Litigation?*, HUGHES HUBBARD & REED LLP (Nov. 21, 2023), https://www.hugheshubbard.com/news/comparing-timelines (while litigation may be quicker when it settles pretrial, "for matters [that] run their course, the median length of an arbitration in each of the major international arbitral institutions is significantly shorter than litigation in the U.S. federal courts.").

30 *Id.* at 6-7.

globalized economy. Both the NYC and the Model Law promote easy, broad enforcement of arbitration agreements, and adopting legislation has created a similar "pro-enforcement regime" in much of the world, whereas treaties for enforcing foreign litigation judgments remain rare.[31]

Much of the Model Law's principles connect to modern American arbitration law, whose growth parallels and arguably greatly influences international commercial arbitration[32] through case law development.[33] The broad scope of American arbitration enforcement, built by Supreme Court decisions on the FAA since the 1960s,[34] utilizes legal principles apparent in the Model Law such as severability and limited judicial intervention[35] to promote the value of party autonomy and control, and puts arbitration on par with judicial decisions.[36] While arbitration remains inextricably linked to the traditional court system—an award's legal power relies on domestic judicial enforcement—American law has provided it as much independence as possible to give it a "juridic globalization" power in a contemporary global economy.[37] However, not all American common law principles help arbitration's growth. *Forum non conveniens* and its emphasis on local domestic procedure,[38] in particular, stands in opposition to the global, choose-your-forum nature of international arbitration, producing a challenge for American courts.[39]

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31 *Id.* at 9-10.

32 MARTINEZ-FRAGA, *supra* note 4, at 5.

33 *Id.* at 3 ("Only international arbitration may serve as the conceptual historical dispute resolution bridge until international civil and commercial tribunals come into being to administer justice equitably in transnational disputes of this ilk."). *Id.* at 5 ("Scholars, judges, arbitrators, and captains of industry cannot help but detect a uniquely, or almost uniquely, American influence that doctrinal development in these discrete areas has exercised on international commercial arbitration.").

34 *Id.* at 129-30.

35 *Id.* at 150. *See also* Bagwell, *supra* note 6, at 500-04 (discussing the separability doctrine, which "provides that an arbitration clause is an agreement independent of its container contract," through its US Supreme Court development in the *Prima Paint* case); Gary Born, *The Principle of Judicial Non-Interference in International Arbitration Proceedings*, 30 U. PA. J. INT'L L. 999, 1000-07 (2009) (discussing the principles of non-interference and party autonomy in the NYC and Model Law).

36 MARTINEZ-FRAGA, *supra* note 4, at 148.

37 *Id.* (arguing that American arbitration has developed and expanded because "if arbitration is to fill the void that economic globalization created by giving rise to a both parallel and intercepting 'juridic globalization' pursuant to which the cross fertilization of procedural laws from multiple legal cultures are adopted to maximize party-autonomy, uniformity, predictive value, transparency, and party expectation, discernible criteria must be crafted to render glaring the boundaries and contours of judicial and arbitral processes.").

38 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (describing that under the *forum non conveniens* doctrine "[a] plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may in the exercise of its sound discretion dismiss the case." (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947))).

39 MARTINEZ-FRAGA, *supra* note 4, at 167-70, 189.

After the NYC, states began implementing its main principles.[40] These principles include creating parties' rights to include arbitration clauses in their contracts, as well as procedures and rules for reviewing and enforcing arbitral awards, all with the goal to "facilitate international trade and investment by providing more secure means of dispute resolution."[41] Most arbitration laws favor party autonomy, allowing for choice of law and procedure and limiting national courts' judicial intervention and review.[42] In civil law countries, legislating arbitration was typically done by adding a chapter on arbitration to civil procedure codes, whereas common law jurisdictions chose to adopt distinct arbitration laws.[43] The Model Law's introduction in 1985, approved by the UN General Assembly, provided a comprehensive version of these principles for adoption and implementation.[44]

The Model Law was drafted by UNICITRAL, which seeks to "promote unification and harmonization of international trade law" through promulgating several model laws and rules, including the Model Law and the [UNICITRAL] Arbitration Rules ("Rules").[45] UNICITRAL began in 1966, after the NYC, but designed its arbitration models (and later revisions) to be consistent with the NYC's principles.[46] It continued the spirit of the NYC and prior international efforts[47] in its mandate to "change the direction of the international economic order, to open it up to more actors."[48] Somewhat ironically in light of that mandate, UNICITRAL has much more limited membership than the UN: it began with only thirty-six member countries, and has only sixty members as of 2012.[49] In 1976 UNICITRAL introduced its Rules, which were officially recommended by the UN for use "in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the [UNICITRAL] Arbitration Rules in commercial contracts."[50] The Rules created a comprehensive procedural framework for the arbitration

40 For a comprehensive list of contracting states (and the dates of their ratification, accession, or succession to the NYC), see *Contracting States – List of Contracting States*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/list+of+contracting+states (last visited Jan. 12, 2024).

41 BORN, *supra* note 28, at 22.

42 *Id.* at 22.

43 *Id.* at 21.

44 *Id.* at 23.

45 PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 5 (2000).

46 THE UNCITRAL ARBITRATION RULES: A COMMENTARY 2-3 (David D. Caron & Lee M. Caplan eds., 2d ed. 2012) [hereinafter UNICITRAL ARBITRATION RULES].

47 As discussed earlier, several international treaties provided frameworks for international arbitration starting in the 1920s. *See supra* notes 19-25 and accompanying text.

48 UNICITRAL ARBITRATION RULES, *supra* note 46, at 2.

49 *Id.* at 3.

50 *Id.* at 4.

process.[51] Opt-in availability to contracting parties was key: they were designed to be adopted freely by parties "as an alternative to private institutions [e.g. the ICC] that were seen by some as providing their service at too great a cost or which were possibly biased in subtle ways towards the western developed world."[52] The Rules have been successful in this sense, becoming widely used not only in commercial arbitration but in other international disputes, including those with states as parties.[53] They began to gain success and recognition for UNICITRAL even before the adoption of the Model Law, when they were adopted in 1982 in the Iran-US Claims Tribunal to help peacefully resolve a tense economic and political dispute.[54]

The Model Law introduced the substantive arbitration law to follow the Rules' procedural framework.[55] The Model Law creates a

51 PETER BINDER, IMPLEMENTATION OF THE UNCITRAL ARBITRATION FRAMEWORK IN ASIA AND THE PACIFIC 18 (2013) [hereinafter IMPLEMENTATION IN ASIA AND THE PACIFIC] (The Rules "provid[e] a model arbitration clause, set[] out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings as well as establish[] rules in relation to the form, effect and interpretation of the award.").

52 UNICITRAL ARBITRATION RULES, *supra* note 46, at 4.

53 *Id.* at 11.

54 *Id.* at 4-6.

55 *Id.* at 1-2 ("The evolution of an effective and trustworthy private international arbitration system over the last half a century has had three major strands . . . .The first strand [the NYC] . . . . allows private parties to use the coercive power of national courts to implement private dispute settlement arrangements. The second strand [the Model Law] seeks the harmonization of national arbitration statutes, that is, the national law within which the private arbitral arrangement operates and, in a sense, is regulated. . . . [T]he third strand [the Rules] sought to provide a model for the process of arbitration itself.").

presumption of validity for arbitration agreements,[56] a separability presumption,[57] and vests authority in arbitrators to decide jurisdiction.[58] It

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56 U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, art. 7-8, U.N. Doc. A/61/17 (July 7, 2006) [hereinafter UNICITRAL Model Law].

> Article 7. Definition and form of arbitration agreement (As adopted by the Commission at its thirty-ninth session, in 2006)
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing.
>
> (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
>
> (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
>
> (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.
>
> Article 7. Definition of arbitration agreement (As adopted by the Commission at its thirty-ninth session, in 2006)
>
> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> Article 8. Arbitration agreement and substantive claim before court
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

See also BORN, *supra* note 28, at 23.

57 UNICITRAL Model Law, *supra* note 56, art. 16:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The

promotes judicial non-intervention[59] and parties' autonomy to contract for procedures and rules.[60] It provides narrow grounds for courts to dismiss awards,[61] and it requires courts to recognize and enforce foreign

arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

See also BORN, *supra* note 28, at 23.

58 BORN, *supra* note 28, at 23.

59 UNICITRAL Model Law, *supra* note 56, art. 5 ("In matters governed by this Law, no court shall intervene except where so provided in this Law."). *See also* BORN, *supra* note 28, at 23.

60 UNICITRAL Model Law, *supra* note 56, art. 18-19:

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

See also BORN, *supra* note 28, at 23.

61 UNICITRAL Model Law, *supra* note 56, art. 34:

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

awards.[62] It has been widely adopted, resulting in a growing "reasonably uniform" body of cross-border case law, and significantly influenced

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

See also BORN, *supra* note 28, at 24.

62 UNICITRAL Model Law, *supra* note 56, art. 35-36.

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language (footnote omitted).

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said 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; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where

arbitration statutes even where it has not been adopted.[63] It has been adopted using one of two methods: incorporation by reference with alterations by addendum, which arguably "best serves [UNICITRAL's] goal of uniformity and harmonization in international trade law, as the whole law is adopted verbatim;" or direct adaptation and insertion of the Model Law's articles into the existing national arbitration law.[64] Australia adopted the Model Law verbatim, under the first method.[65] In contrast, the majority of American states adopted the Model Law with adaptation rather than verbatim–adopting some provisions verbatim but others with added material.[66]

Important factors to consider when judging the success of a jurisdiction's adoption of the Model Law include (1) the clarity of the arbitration procedure and the civil procedure of the enforcing courts, (2) a "clear and flexible regime for judicial assistance, which withstands the temptation of (negative) judicial interference in the process," (3) the independence of the arbitration from domestic governmental interference by the courts and other bodies, (4) the effective enforcement of awards, and (5) the education and sophistication of the local business and legal community to promote use and acceptance.[67] In sum, these factors all seem to revolve around the party autonomy principle apparent in UNICITRAL models and the American influencing law, which in combination with the British influence on the historical development of arbitration suggests a potential link between positive integration of international arbitration and the common law legal family.

Common law jurisdictions' leadership in international arbitration's development supports this proposition. Canada, a leader in international arbitration case law,[68] adopted the Model Law in most of its provinces in the 1980s,[69] although in different formats.[70] The Model Law is accepted to the extent that it has a significant influence on Canada's domestic

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> recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

See also BORN, *supra* note 28, at 24.

63 BORN, *supra* note 28, at 24. *See also* BINDER, *supra* note 45, at 228 ("The adoption of the Model Law is probably the easiest way for any jurisdiction to obtain respect and credibility in international commercial arbitration.").

64 BINDER, *supra* note 45, at 11.

65 *Id.* at 241-13.

66 *Id.* (articles adopted verbatim by all US adopting states: 2, 4, 6, 7, 11, 13, 14, 16, 17, 18, 19, 21, 22, 23, 25, 26, 29, 31, 33).

67 IMPLEMENTATION IN ASIA AND THE PACIFIC, *supra* note 51, at 14-15.

68 HENRI C. ALVAREZ ET AL., MODEL LAW DECISIONS: CASES APPLYING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985-2001) xiv (2003).

69 U.N. Comm'n on Int'l Trade L., *supra* note 8. *See also* ALVAREZ ET AL., *supra* note 68, at 3-4.

70 ALVAREZ ET AL., *supra* note 68, at 3-4.

arbitration law, not just on the handling of international disputes.[71] In Asia, Singapore is a leading jurisdiction for international commercial arbitration, having adopted the NYC in 1985 and the Model Law in 1995 (both implemented in the International Arbitration Act).[72] Singapore, as a former British colony, has a legal system influenced by British common law, which it formally incorporated into its law in 1993.[73] Hong Kong, another former British colony in Asia, first implemented the Model Law in 1989; in 2011, a new law came into effect implementing the Model Law for all Hong Kong arbitrations, domestic and international.[74]

In the US, eight states have formally adopted the Model Law: California in 1988, Connecticut and Texas in 1989, Oregon in 1991, Illinois in 1998, Louisiana in 2006, Florida in 2010, and Georgia in 2012.[75] Forty-two states have not adopted the Model Law, and while the US acceded to the NYC in 1970,[76] there has been no federal adoption of the Model Law. This is despite the strength of the FAA, which as discussed earlier has positively influenced international commercial arbitration development. The FAA simply incorporates the NYC by extending US law to cover cases under it.[77] And while US federal case law has placed arbitration and litigation on equal ground,[78] tension remains between state and federal law over control of arbitration.[79] State law continues to maintain relevance in international arbitration disputes.[80] Therefore, since the US has incorporated the NYC such that the FAA governs international arbitration, and since the case law on the FAA puts state law in control when chosen by the parties, American interpretation of the Model Law circles back to party autonomy. The parties will be subject to the Model Law if

71 *Id.* at 4.

72 IMPLEMENTATION IN ASIA AND THE PACIFIC, *supra* note 51, at 67, 70.

73 Eugene K B Tan & Gary Chan, *Ch. 01 The Singapore Legal System*, SING. L. WATCH (Feb. 7, 2019), https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-01-the-singapore-legal-system.

74 Shahla F. Ali, *The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong*, *in* THE UNCITRAL MODEL LAW AND ASIAN ARBITRATION LAWS: IMPLEMENTATION AND COMPARISONS 9 (Gary Bell ed., Cambridge Univ. Press 2018). Hong Kong formally returned to Chinese sovereignty in 1997, but still maintains British common law as a source of law in its legal system. Charles Mo & Joanne Mok, *Legal Systems in Hong Kong: Overview*, THOMSON REUTERS PRAC. L. (Jan. 1, 2023), https://uk.practicallaw.thomsonreuters.com/w-007-8233.

75 U.N. Comm'n on Int'l Trade L., *supra* note 8.

76 Mark R. Joelson, *The Interplay of International, Federal and State Law in US Arbitration*, 24 J. INT'L ARB. 379, 381 (2007).

77 *Id.* at 382.

78 *See supra* notes 33-38 and accompanying text.

79 Joelson, *supra* note 76, at 383-84 ("The states have exhibited a suspicion that arbitration has been used oppressively by powerful commercial interests to preclude access to the state courts" using the Supremacy Clause and federal preemption).

80 *Id.* at 386 ("[W]hile state law has a limited ability to *curtail* the validity of such arbitration agreements, the *content* of the arbitration process may well be driven by a particular state's law. . . . [P]arties desiring to have their contractual relationship governed by US law must choose the law of a particular state or other US local jurisdiction . . . .").

their contractual choice of law state is one of the jurisdictions to have adopted it.[81]

Australia, like the US (and other former British colonies), has a federal system; it has six states and two territories.[82] Unlike the US, all have adopted the Model Law: New South Wales in 2010, Northern Territory, South Australia, Tasmania, and Victoria in 2011, Western Australia in 2012, Queensland in 2013, and Australian Capital Territory in 2017.[83] While at first glance Australia is a late adopter of the Model Law in comparison to the adopting US jurisdictions, it actually has a long history with the Model Law principles. Australia adopted the NYC in 1975,[84] only a few years after the US.[85] It was a participant in the UNICITRAL Working Group on the Model Law, and the Model Law was first proposed for adoption in Australia in 1986 on an opt-out basis (similar to Canada's)[86] to make Australia a center for international arbitration and to supplement existing arbitration law using the principles of party autonomy and limited judicial intervention.[87] Its adoption in 2010 was not a novel event but an update and improvement of federal law[88] to further

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81 I.e., if the state law chosen in the parties' contract is one of the states to have adopted the Model Law: see *supra* note 75 and accompanying text.

82 *Introduction to Australia and Its System of Government*, AUSTL. GOV'T: DEP'T OF FOREIGN AFFS. & TRADE, https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines/1-introduction-to-australia-and-its-system-of-government (last visited Mar. 24, 2023). *See also* Ronald A. Finlay, *An Overview of Commercial Arbitration in Australia*, 4 J. INT'L ARB. 103, 103-04 (1987).

83 U.N. Comm'n on Int'l Trade L., *supra* note 8.

84 Finlay, *supra* note 82, at 105.

85 Joelson, *supra* note 76, at 381.

86 Finlay, *supra* note 82, at 106-07. Five states and territories adopted the proposed version between 1985 and 1987. *Id.* at 109.

87 Finlay, *supra* note 82, at 106-07:

> The recommendation of the Working Group [of the Australian Commonwealth Attorney-General] to the Standing Committee of Attorneys-General was that the Model Law should be adopted for the following reasons:
>
> (a) It provides an internationally agreed legal framework for the conduct of commercial arbitrations;
> (b) It could assist Australia's efforts to establish itself as a viable center for international commercial arbitration;
> (c) It complements the [UNICITRAL] Arbitration Rules, which are becoming increasingly used in Australia in the conduct of international *ad hoc* arbitrations;
> (d) It compliments and expands on parts of existing Australian commercial arbitration laws;
> (e) In a more general context, party autonomy is respected and facilitated by the Model Law so that parties to international arbitration, who may be unfamiliar with the law in Australia, are not frustrated by unknown provisions of national laws which may conflict with their intentions in respect of their arbitration; and
> (f) While the Model Law recognizes the supportive and corrective role to be played by the Courts, it limits judicial intervention and supervision of an arbitration.

Id.

88 Luke Nottage & James Morrison, *Accessing and Assessing Australia's International*

promote arbitration.[89] Australia's interpretation of the Model Law is contained in Part III Division 2 Provisions 16-21 of the International Arbitration Act 1974.[90] Historically, commercial arbitration is an area of state law in Australia, but the constitution contains a preemption principle,[91] and the states began unifying the arbitration law under the Commercial Arbitration Act in 1984.[92] With the adoption of the Model Law, federal arbitration law has preemptive control.[93] Since 2010, Australia has become a more significant forum for international commercial arbitration, challenging the popularity of other Asian common law jurisdictions, such as Singapore and Hong Kong,[94] largely through pro-arbitration decisions in the Federal Court of Australia.[95]

SECTION II: COMPARATIVE ISSUES IN TWO CASE STUDIES

1. The US Case – *Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069 (9th Cir. 2013)*

Oracle Am., Inc. v. Myriad Grp. A.G. ("Oracle") shows an example of the party autonomy principle's prominence in both UNICITRAL arbitration models and US arbitration law. While the case involves a suit in California, which is one of the US states to have adopted the Model Law,[96] the case focuses not on the Model Law but on the parties' choice of the Rules in their arbitration clause.[97] The court ultimately defers to

Arbitration Act, 34 J. INT'L ARB. 963, 964 (2017) (noting that the 2010 IAA amendment was a reform based on the 2006 UNICITRAL reforms, Australian case law, and "in light of new developments in other Model Law jurisdictions.").

89 *Id.* at 965 ("In particular, Section 39 [of the IAA] requires a court when exercising certain powers under the IAA, including to refuse enforcement of a foreign award, to have regard to the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and awards are intended to provide certainty and finality.").

90 *International Arbitration Act 1974* (Cth) regs 16-21 (Austl.).

91 *Australian Constitution* s 109 ("When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."). *See also* Finlay, *supra* note 82, at 104.

92 Finlay, *supra* note 82, at 109.

93 *International Arbitration Act 1974* (Cth) reg 21(1) (Austl.) ("If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration."). This also binds parties to follow the Model Law. *See* Nottage & Morrison, *supra* note 88, at 978 (arguing section 21 is "comparatively unusual" to other Model Law jurisdictions in Asia and the Pacific for requiring Model Law application).

94 Nottage & Morrison, *supra* note 88, at 1004. For an analysis of Australia's "pros and cons" in comparison to other seats such as Singapore and Hong Kong, see *Id.* at 974-77.

95 Nottage & Morrison, *supra* note 88, at 1005. The Australian decision considered in this note is from the Federal Court of Australia as well.

96 Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1069 (9th Cir. 2013); U.N. Comm'n on Int'l Trade L., *supra* note 8.

97 724 F.3d at 1073.

the parties' choice and sends the dispute to arbitration, consistent with other circuits' general judicial deference to arbitration.[98]

Myriad Group A.G., a Swiss software company, entered into agreements for software licensing in 2002 with Oracle America Inc., a software company incorporated in Delaware.[99] A dispute arose over Myriad's royalty payments; Myriad alleged the agreements allowed use without payment, while Oracle alleged Myriad breached the contract and violated its intellectual property rights by such use without payment.[100] Oracle sued Myriad in the Northern District of California alleging breach of contract and other claims, and Myriad sued Oracle in the District of Delaware alleging breach of contract by Oracle.[101] In response to Oracle's suit in the Northern District of California, Myriad moved to compel arbitration based on the agreement's arbitration clause, which provided in relevant part:

> Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive), with respect to any dispute relating to such party's Intellectual Property Rights or with respect to your compliance with the TCK license. Arbitration shall be administered: (i) by the American Arbitration Association (AAA), (ii) in accordance with the rules of the United Nations Commission on International Trade Law . . . in effect at the time of arbitration as modified herein; and (iii) the arbitrator will apply the substantive laws of California and United States.[102]

The District Court agreed to compel arbitration of Oracle's breach of contract claim, but refused to compel arbitration on the other claims; it subsequently issued an injunction preventing arbitration on the other claims.[103] The District Court did so by reasoning that the arbitration clause's incorporation of the UNICITRAL rules "did not constitute clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator."[104] Myriad appealed the partial ruling,[105] arguing that the incorporation of the UNICITRAL rules was in fact "clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator."[106]

Upon review, the Ninth Circuit reversed the partial denial, holding that the parties did agree to delegate all arbitrability questions to the

98 *Id.* at 1071.
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.* at 1071-72.
104 *Id.* at 1072.
105 *Id.*
106 *Id.* at 1070-71.

arbitrator.[107] This holding was consistent with previous judgments in the Second and DC Circuits, finding incorporation of UNICITRAL rules to be "clear and unmistakable evidence" of delegation.[108] The Court first considered whether incorporating the Rules in the arbitration agreement constituted "clear and unmistakable evidence" delegating all questions of arbitrability[109] to arbitration.[110] Since the parties' agreement spanned both the 1976 and 2010 editions of the Rules, the Court examined both to determine whether the 1976 edition's more narrow phrasing on the arbitrator's power to make jurisdictional rulings materially altered the parties' agreement.[111] However, the Court found that both editions were broad enough to "vest the arbitrator with the apparent authority to decide questions of arbitrability,"[112] allowing the Court to proceed from statutory interpretation to considering judicial precedent. The Court considered holdings from the Second Circuit[113] and the D.C. Circuit[114] as persuasive. Finally, the Court reviewed the AAA rules, which are widely held as a form of "clear and unmistakable evidence," and found its jurisdictional provision substantially similar to the UNICITRAL provision at issue, showing by analogy why the Rules should be treated as equivalent.[115] Based on its readings of other circuits' precedent, the Rules, and the AAA rules, the Court concluded that "as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the [UNICITRAL] rules delegates questions of arbitrability to the arbitrator."[116]

The Court then refuted Oracle's arguments against sending the arbitrability question to arbitration. First, Oracle argued that UNICITRAL's mention of court challenges to arbitrator jurisdiction created concurrent

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107 *Id.* at 1071, 1073.

108 *Id.* at 1070-71, 1073-75.

109 *Id.* at 1070-71. In American federal arbitration law, the Supreme Court has held that delegation of arbitrability issues to arbitration requires clear and unmistakable evidence in the parties' agreement. Specifically, arbitrability is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* at 1072 (citing Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79, 83 (2002)).

110 *Id.* at 1072-73.

111 *Id.* at 1073.

112 *Id.*

113 *Id.* at 1073-74 (considering the Second Circuit's holdings in *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) and *Schneider v. Kingdom of Thai.*, 688 F.3d 68, 73 (2d Cir. 2012), which concluded that issues of arbitrability were arbitrable given the parties' clear and unmistakable incorporation of the UNICITRAL rules).

114 *Id.* at 1074 (considering the D.C. Circuit's holding in *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2011), which likewise concluded that incorporating UNICITRAL rules "grant the arbitrator the power to determine issues of arbitrability.").

115 *Id.* at 1074-75.

116 *Id.* at 1074-75 & 1075 n.2 (restricting this holding on incorporation to business-to-business commercial arbitration cases, noting in Footnote 2 a reservation for consumer contracts).

authority, rather than delegation.[117] But the Court disagreed, finding delegation regardless of UNICITRAL's inclusion of potential concurrent authority in other jurisdictions.[118] Next, Oracle argued that the carveout provision in the arbitration clause allowing TCK license claims to be brought to court prevented those claims from going to arbitration by creating exclusive jurisdiction in the Court.[119] The Court refused this argument as well, finding that the parties chose to delegate the applicability of the carveout provision, along with all other claims, to arbitration by incorporation of the Rules.[120] Oracle also argued that the Court must decide questions of arbitrability because the arbitration clause modified the Rules by its carveout provision and its modification language.[121] The Court found that the stipulated modification rules did not concern questions of arbitrability, and that the carveout provision remained within the delegation scope.[122] Therefore, none of Oracle's objections succeeded, and the Court reversed the partial denial of Myriad's motion and remanded the case to be referred to arbitration.[123]

2. The Australia Case – *Dialogue Consulting Pty Ltd v Instagram, Inc [2020] FCA 1846*

Like Oracle, this case exhibits the common law principle of party autonomy within arbitration law. However, unlike the American decision, it shows more willingness to participate in judicial dialogue and comparative legal analysis, especially of American law, with a focus on forming a flexible solution around efficiency and economy.

Dialogue Consulting Pty Ltd v Instagram, Inc ("Dialogue") was a Federal Court of Australia case[124] that was brought by Dialogue Consulting Pty Ltd, an Australian company[125] against the various corporate parties behind the social media platforms Instagram and Facebook.[126] Dialogue

117 *Id.* at 1075.

118 *Id.*

119 *Id.* at 1075-76.

120 *Id.* at 1076 (noting that Oracle's only cited federal case, *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 511 (6th Cir. 2011), was an example of a narrow, issue-specific arbitration clause rather than a broad arbitration clause containing a carveout provision).

121 *Id.* at 1077.

122 *Id.*

123 *Id.*

124 *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA (22 December 2020) 1846 (Austl.).

125 *Id.* at 1 (Petitioner is termed "principal applicant.").

126 *Id.* at 6-7. The respondents include Instagram, Inc., Instagram's no longer active corporate identity; Instagram LLC, Instagram's corporate identity during the main events of the case, incorporated in Delaware with headquarters in California; Facebook, Inc., which acquired Instagram, LLC in 2012, incorporated in Delaware with headquarters in California; and Facebook Ireland Limited, a subsidiary of Facebook, Inc., incorporated in Ireland. *Id.*

owned a product that clients used to plan and schedule their marketing content on Instagram for their businesses. This involved clients' Instagram accounts and user contracts and Dialogue's own accounts and user contracts.[127] Instagram had two Terms of Use regulating contracts: the "original Terms of Use," effective January 2013, and the "revised Terms of Use," effective April 2018.[128] The "original Terms of Use" contained an arbitration clause requiring disputes to be resolved under the AAA rules and providing an opt-out option allegedly unexercised by Dialogue.[129] The "revised Terms of Use" did not have any arbitration clause.[130] Dialogue also entered into an agreement with Facebook in 2018 after a rebrand to offer their clients service on that platform as well.[131] At several points since 2014, Dialogue, Instagram, and Facebook disputed whether Dialogue's business was bound by or violated Instagram's Terms of Use, culminating in 2019 when Facebook cut off Dialogue's access to its platforms and Dialogue filed this lawsuit in response.[132]

Dialogue filed its suit in April 2019[133] in the Federal Court of Australia before Justice Beach,[134] the author of this opinion.[135] Dialogue asked the Court to prevent Facebook from terminating its access, an injunction Justice Beach granted.[136] More applications followed concerning Dialogue's access to Facebook's platforms.[137] Then in April 2020, Facebook filed for a stay of the proceeding under S 7(2) of the IAA,[138] which sends a case to arbitration,[139] alleging a valid arbitration agreement with Dialogue that required all issues, including jurisdiction, to be sent to arbitration[140] in California.[141] The following month Dialogue cross-claimed breach of contract, deceptive conduct, unconscionability, and anticompetition under Australian law.[142] With respect to arbitration, it argued three separate

127 *Id.* at 8-12.
128 *Id.* at 9.
129 *Id.* at 10.
130 *Id.* at 20.
131 *Id.* at 14-15.
132 *Id.* at 11-16.
133 *Id.* at 16.
134 Hon. Justice Jonathan Beach was appointed a Federal Court of Australia Judge in Melbourne in 2014. *The Hon Justice Jonathan Beach*, FED. CT. OF AUSTL., https://www.fedcourt.gov.au/about/judges/current-judges-appointment/current-judges/beach-j (last updated Feb. 2022).
135 *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA (22 December 2020) 1846, i, i (Austl.).
136 *Id.* at 16.
137 *Id.* at 17-20.
138 *Id.* at 20.
139 *Id.* at 3.
140 *Id.*
141 *Id.* at 23.
142 *Id.* at 1, 19.

defenses: (1) that the arbitration agreement did not exist, (2) that it was void or unenforceable, and (3) that Facebook had waived its right to arbitrate under s 7(5) of the IAA.[143]

Justice Beach's opinion, in his framing, addresses the following issues of arbitration law:

> (a) The competence-competence principle;[144]
>
> (b) The relevant choice of law . . . 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;
>
> (c) Whether, applying the relevant law, an arbitration agreement was formed, and determining the parties and its scope;
>
> (d) 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;
>
> (e) Whether the conditions under s 7(2) of the IAA have been satisfied;[145] and
>
> (f) 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).[146]

On issue (a), while Beach held that the competence-competence principle did apply, he chose to not refer the case to arbitration in California but decided it within judicial discretion.[147] On issue (b), he held that the law governing whether there was a valid arbitration agreement

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143 *Id.* at 3.

144 *Id.* at 24: The competence-competence principle in Australian arbitration law holds that "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." Justice Beach notes that this principle also exists in American arbitration law as relevant to the case, citing the AAA rules and the Californian Arbitration Act. *Id.* at 25.

145 *Id.* at 2. § 7(2) of the IAA establishes conditions upon which a matter must be sent to arbitration. Specifically, it provides:

> (2) Subject to this Part, where:
>
> (a) Proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) The proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;On the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as it involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

Id.

146 *Id.* at 3-4. § 7(5) of the IAA states, "[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."). *Id.*

147 *Id.* at 4.

was Australian and Victorian law, not US and California law.[148] On issue (c), he found that Dialogue and Instagram did form an arbitration agreement subject to s 7(2), thereby answering issue (e), but that the arbitration agreement was subject to the s 7(5) exception.[149] On issue (d), he found no reason to find for Dialogue on its unconscionability and void and unenforceable arguments.[150] Finally, Justice Beach determined on issue (f) that s 7(5) did apply to the arbitration agreement, and Instagram had waived its right to compel arbitration under both US and Australian law (disagreeing with Instagram's expert, a former US federal judge).[151] Given each of these issue holdings, the overall holding of the opinion was a dismissal of both Instagram and Dialogue's claims and the case was not sent to arbitration in the US.[152] The holding is built on a rationale of over seventy-five pages, which carefully analyzes not only Australian arbitration law based on the Model Law but practices judicial dialogue with the relevant US and California law to produce a harmonious result,[153] while also considering public policy.[154]

SECTION III: ANALYSIS AND CONCLUSION

Both the US and Australia are within the common law legal family, sharing principles such as federalism, judicial review, etc.[155] The common law heritage, specifically in the development of the American judiciary, bears significant influence on the interpretation of federal court authority over international arbitration proceedings.[156] Yet even given two cases discussing similar issues in the party autonomy principle, Oracle and Dialogue diverge, suggesting divergence between the US and

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at 4-5. Instagram had called as an expert witness a retired Chief Judge of the Northern District of California, who Beach found "provided valuable assistance in laying before me the smorgasbord of US jurisprudence on relevant topics from which I have made a selection," but who was unpersuasive on the "heterogenous" foreign law of waiver as it applied to this case. *Id.* at 5.

152 *Id.* at 5.

153 *Id.* at 96-99.

154 *Id.* at 104-05 (Justice Beach utilized public policy considerations in his holding, particularly efficiency, arguing that prejudice could derive from inefficient arbitration because "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. . . .[T]o 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.").

155 For the US, see *supra* notes 33-36 and accompanying text. For Australia, see *supra* notes 82-95 and accompanying text.

156 *See supra* notes 31-38 and accompanying text discussing the connections between American common law and the international commercial arbitration conventions of the NYC and Model Law.

Australia as models of international commercial arbitration forums. One supposed purpose and benefit of arbitration to commercial parties is efficiency and ease.[157] Yet the Australian judge finds it strange that referring the case to arbitration could allow an already years old case to drag out much longer, finding it more efficient to resolve via judicial opinion[158] and refusing to refer the case. The American case does not discuss efficiency as a factor, instead it illustrates how byzantine much of arbitration law can be especially with the delegation doctrine: extended litigation that will only send the entire case to an arbitrator to review and that will potentially come back to the courts if the arbitrator decides some issues are not arbitrable. However, the Australian judge's willingness to choose efficiency over deference could actually be more in line with the initial purposes of arbitration law, especially on the global stage. International commercial arbitration's success could be endangered if it continues to become protracted, defeating the efficiency that is meant to distinguish it from traditional litigation.[159]

The cases also illustrate the importance of acknowledging the economic context of arbitration disputes. Both cases involve business-to-business contracts between corporate entities. Specifically, both involve online technology, an industry which by its very nature is international and flexible, as well as increasingly powerful and needing legal regulation. The US case makes no mention of the companies' size or respective power, even though one is a well-known American software company, and the other is a smaller customer business.[160] Yet the Australian judge sympathizes with the Australian company as a small business relative to the huge power of Facebook.[161] It perhaps shows more awareness of the influence of large American corporations on the global market, paralleling the longstanding influence American law has had on international arbitration development. The Dialogue case exhibits how American influence is not only historical, but ongoing, as the decision is built on judicial dialogue with American arbitration law and case law. Yet in its

157 *See supra* notes 28-31 and accompanying text.

158 *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA (22 December 2020) 1846, 104-05 (Austl.).

159 One of the major critiques of current international commercial arbitration is maintaining efficiency. See generally FELIX DASSER, SOFT LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (2021), which looks at the current reliability and public impression of international commercial arbitration since its rise to prominence. Dasser identifies several issues with international arbitration in contemporary use including ethical doubts, judicialization, costs/duration, and transparency. *Id.* at 23-26. The Australian opinion reflects some of these concerns in its critique of costs and duration to arbitration and its choice to judicialize the arbitration process of the case by resolving it without sending it to arbitration. *See supra* notes 124-54 and accompanying text.

160 Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1071 (9th Cir. 2013).

161 *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA (22 December 2020) 1846, 57 (Austl.).

willingness to approach judicial dialogue, Dialogue is a more inventive, forward-thinking case, bringing international arbitration law forward and advancing the efficiency goal in a way Oracle does not. Oracle is brief and does not participate in judicial dialogue, but focuses purely on intra-federal judicial comparison and takes no note of the interpretation of UNICITRAL on the global scale or the nature of this contract as an international one. In contrast, the Australian case is ten times longer, in large part because the judge is painstaking about analyzing the US law and its potential application to the case at hand, even though this does not ultimately affect his decision. The case exhibits the desire and willingness of the Australian judiciary and legal culture to become a leading forum for international commercial arbitration.[162] Perhaps it is motivated by the necessity to be efficient and inventive in a competitive market, giving it an advantage over the US.[163]

In the absence of international business courts, international commercial arbitration meets an important need in today's economy, but like other areas of law must continue to improve and address concerns.[164] In considering the future of the Model Law and international commercial arbitration, Australia would be the better model. Dialogue and Australian adoption generally exhibits active judicial participation and openness, consistency across jurisdictions, and a willingness to engage in judicial dialogue rather than static reliance on preexisting domestic legal principles. Perhaps the positive influences on UNICITRAL are not American-specific but more broadly from the party autonomy principle in the common law family. Indeed, it is American law that can learn from and catch up with its peers in the legal family, in applying the party

162 *See supra* notes 82-95 and accompanying text.

163 Australia has sought to compete with other successful arbitration forums with common law heritage in the Asia and Pacific region, including Singapore and Hong Kong. *See supra* notes 94-95 and accompanying text. For Hong Kong and Singapore's international commercial arbitration and Model Law adoption, see *supra* notes 72-74 and accompanying text.

164 Efforts exist to promote international commercial courts. For an analysis of such efforts, see S.I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*, 115 AJIL UNBOUND 28, 28-33 (2021) (looks at whether Australia and the US can pitch themselves to the international commercial market as forums for in-court commercial litigation by creating an "international commercial court" and argues that such a court is too idealistic and not feasible); Pamela K. Bookman & Matthew S. Erie, *Experimenting with International Commercial Dispute Resolution*, 115 AJIL UNBOUND 5 (2021) (explores the rise of experimental international commercial and "arbitral courts," courts that seek to combine elements of international commercial arbitration and other dispute resolution methods such as traditional litigation. These courts are seeking to draw business and be an option for forum selection to draw away from the arbitration market, but the article concludes they are still too untested and untrustworthy to contracting parties to be very successful). The most pragmatic path forward for commercial disputes is the growth of international commercial arbitration. The policy reasons behind developing international commercial courts are the same as international commercial arbitration, so the desire for such courts gives existing arbitration systems a chance to grow. Unlike a purely international commercial court, the framework for the international arbitration system via the Model Law is already being built and becoming successful, so it overcomes that initial hurdle that a court would face.

autonomy principle to effectuate the harmonious application of the Model Law. Adopting the principles of judicial dialogue used in Dialogue will advance international commercial arbitration's potential for efficient dispute resolution.[165]

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165 *See* MARTINEZ-FRAGA, *supra* note 4, at 151 ("[I]nternational commercial arbitration today serves as a historical temporal bridge until transnational courts of civil procedure with jurisdiction to adjudicate private commercial disputes become a functional reality rather than an aspirational academic exercise.").

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