

Lost in translation: Federal Court of Australia dismisses application to set aside arbitral award

In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, the Federal Court of Australia dismissed an application to set aside an award for alleged technical difficulties and issues with translation.

The case concerned a contract between Sino Dragon Trading Ltd (**Sino Dragon**) and Noble Resources International Pte Ltd (**Noble Resources**) under which Noble Resources would supply and deliver 170,000 dry metric tonnes of iron ore to Sino Dragon.

A dispute arose between the parties which ultimately proceeded to arbitration under the UNCITRAL Arbitration Rules, the final hearing of which was heard in Sydney on 7 December 2015. The arbitral tribunal rendered an award on 12 May 2016, finding in favour of Noble Resources (the **Final Award**).

Noble Resources subsequently sought to register and enforce the Final Award, culminating in a winding up petition served on Sino Dragon on 22 July 2016.

On 11 August 2016, Sino Dragon sought an order from the Federal Court of Australia setting aside the Final Award asserting that, *inter alia*, technical and translation issues during the arbitration process gave rise to a lack of procedural fairness and lack of equality of treatment. In short, that the evidence of two key witnesses called by Sino Dragon in the arbitration via videoconference

was "*beset by technical difficulties*", such that the evidence could not be properly presented.

Sino Dragon submitted that the technical faults coupled with issues of mistranslation rendered it unable to present its case, amounting to a breach of natural justice, which it contended was contrary to Australian public policy. As part of its contention, Sino Dragon submitted that it was not "*treated with equality*" and not given a "*full opportunity of presenting*" its case within the meaning of Article 18 of the UNCITRAL Model Law. Under Article 18, a party is taken to have been given a *reasonable* opportunity to present its case.

In considering the substantive issues, the Court found that there were two principle questions to consider: whether there was a failure to give Sino Dragon a reasonable opportunity to present its case; and whether there was a lack of equality of treatment.

The Court found that the conduct of Sino Dragon as "*the party who complains of a lack of procedural fairness or a lack of equality is relevant to any asserted inability to present its case or any asserted lack of opportunity in that respect*". The

Key points

- Australian courts continue to display a pro-arbitration attitude, both when they act as supervisors of Australia-seated arbitrations and when they act as enforcers of foreign arbitral awards.
- This case shows that where a procedural error or imbalance arises from a party's conduct, that party will not be able to use that procedural defect to later set-aside the award.
- Practically, the case also serves as a reminder that, where there is a need for evidence in multiple languages, care must be taken to ensure that the quality of evidence is not jeopardised by the mode in which it is given.

Court perceived numerous opportunities for Sino Dragon to avoid the difficulties with the evidence in question, including by making arrangements for the relevant witnesses to travel to Australia.

The Court took into account that the mode used for the evidence of Sino Dragon's witnesses (audio via telephone and video via the WeChat application on an iPad) was that chosen by Sino Dragon, over the

objection (to some extent) of Noble Resources. There was no explanation as to why Sino Dragon did not make video-link arrangements through a recognised and experienced provider. Of particular significance was the fact that Sino Dragon made no efforts to change or ameliorate the mode used for the second day of the arbitration hearing, given the difficulties experienced on the first day.

As to the question of mistranslation, Sino Dragon engaged an interpreter who Sino Dragon represented to Noble Resources and the Tribunal as being a "*qualified interpreter in Australia*". In its application to set aside the award, Sino Dragon contended that the interpreter was only a level 2 registered interpreter, and was replaced on the second day of the hearing by a paralegal employed by the solicitors for Sino Dragon.

Further, Sino Dragon filed an affidavit of a nationally accredited translator to whom the tapes of the arbitral proceedings were provided. However, the Court noted that there were few amendments made to the transcript. The Court also noted authority that an interpreter uses expertise and an "*evaluative judgment*" in the exercise of his or her role, the point being that

there is no such thing as a perfect interpretation. Accordingly, the Court expressed confidence in the original translation/interpretation.

The Court was unimpressed by the fact that Sino Dragon did not raise the relevant technical difficulties or the mistranslation of evidence until after the Final Award was handed down. Indeed, the Court found it "*puzzling*" that Sino Dragon's own counsel perceived and said to the arbitral tribunal that, notwithstanding the technical difficulties, the evidence of the witnesses had come out "*clearly and consistently with their evidence in chief*". The Court considered it was entitled to infer from the absence of complaint *during* the arbitral proceedings that those "*charged with running the case for Sino Dragon did not perceive any lack of reasonable opportunity*" to object.

Finally, the Court held that Article 18 and the review powers under Article 34 of the UNCITRAL Model Law do not apply to unfairness caused by a party's own conduct, including forensic or strategic decisions. The Court found that Sino Dragon was "*largely [...] the author of its own misfortune*" and its conduct was "*not irrelevant or unimportant*", such that the Court found Sino Dragon's

"assertions of substantial injustice because of misunderstanding or mistranslation [...] puzzling to say the least."

Contacts

Ben Luscombe

Partner

T: +61 8 9262 5511

E: ben.luscombe@cliffordchance.com

Jenni Hill

Partner

T: +61 8 9262 5582

E: jenni.hill@cliffordchance.com

Dr Sam Luttrell

Counsel

T: +61 8 9262 5564

E: sam.luttrell@cliffordchance.com

Peter Harris

Senior Associate

T: +61 8 9262 5581

E: peter.harris@cliffordchance.com

Isuru Devendra

Associate

T: +61 8 9262 5528

E: Isuru.devendra@cliffordchance.com

Cameron Hassall

Partner

T: +852 2825 8902

E: cameron.hassall@cliffordchance.com

Tim Grave

Partner

T: +61 2 8922 8028

E: tim.grave@cliffordchance.com

Dr Romesh Weeramantry

Counsel

T: +852 2825 8938

E: romesh.weeramantry@cliffordchance.com

Nick Helm

Senior Associate

T: +61 8 9262 5554

E: nick.helm@cliffordchance.com

Nicola Birman

Graduate

T: +61 8 9262 5571

E: nicola.birman@cliffordchance.com

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Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia

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