SQUIRE PATTON BOGGS

Silence Is Golden: I Don't Have to Tell You Why You're Wrong

CIM v CIN [2021] SGHC 75

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Is a party obliged to correct another party's misunderstanding of its case?

In *CIM v. CIN* [2021] SGHC 75, the Singapore High Court held that there is no duty to intervene and correct an opponent's incorrect understanding of your case in an arbitration.

Simplified, a losing side tried to set aside an arbitral award partly because the winner's counsel did not correct the loser's counsel's misunderstanding of the winner's case expressed during the hearing. The winner had made vague references to a certain argument in its written submissions, and during the hearing the loser's counsel stated her understanding of the argument, which was wrong. The winner's counsel did not correct her but made the argument plainly in final written submissions, which the tribunal accepted. The loser applied to set aside the award, arguing that it was denied procedural fairness in not being properly informed of its opponent's case.

The court declined to set aside the award, effectively holding that the loser's failure to appreciate the argument was of its own doing. The court said:

- It is wrong to treat silence from a party in that situation as a formal confirmation of its position. A party should invite the tribunal to seek a formal confirmation or clarification of another party's position.
- It would be overly burdensome for a party to read the mind of the other party and infer that there was a genuine misunderstanding of its case.
- A duty of intervention and correction should not be imposed on a party because not every expression of misunderstanding can be taken at face value, since it could have been done for rhetorical purposes, such as to deliberately mischaracterise a party's case to make it seem weaker.
- Counsel (and parties) are responsible for arguing their own case, not for ensuring that the other side meets their case.
- Where a party should have reasonably known that an issue was in play but failed to address it, the court will not come to its rescue.

Parties might be encouraged by the decision to disguise their arguments in the early and hearing stages of an arbitration, only to make them clear in final written submissions when the opponent has little or no opportunity to rebut them or craft its case to meet them. This is risky, as the tribunal might not perceive the argument, and would be an unfortunate development for arbitration, requiring parties to be on their guard against ambiguous submissions and formally ask their opponents for clarification where there is any doubt.

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