

Civil Litigation

Disclosure of records in arbitration

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(February 3, 2023, 9:02 AM EST) -- A party to an arbitration must assert its access to an opposing party's records clearly and promptly, as courts will not cure the party's failure to do so. *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2022 ABCA 206 (the *ENMAX* case) is an example of this.

In the *ENMAX* case, ENMAX Energy Corporation (ENMAX) and the Balancing Pool (collectively, the appellants) alleged that a gap in TransAlta Generation Partnership's (TransAlta) record disclosure led to the arbitration panel treating the appellants unfairly. The Alberta Court of Appeal disagreed, finding that the gap in record disclosure arose from the appellants' own inaction.

Unfairness under Alberta Arbitration Act

Section 45(1)(f) of the *Alberta Arbitration Act* (the Act) allows courts to set aside unfair arbitral awards. Among other things, s. 45(1)(f) provides that a court may set aside an award if "the applicant was treated manifestly unfairly and unequally," or "was not given an opportunity to present a case or to respond to another party's case." The Court of Appeal in the *ENMAX* case clarified that s. 45(1)(f) of the Act must be construed "narrowly and only to ensure the [arbitral] proceedings are not fundamentally or fatally flawed." Therefore, an applicant has been "treated manifestly unfairly and unequally" only when the unfairness is obvious or clear.



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Not every procedural breach during an arbitration will result in judicial intervention. If the alleged unfairness does not impact the proceedings in a meaningful way, then it cannot justify setting aside an award. Importantly, it is acceptable to have less robust procedures in arbitration compared to civil litigation.

Thus, where excluded evidence is at the root of the alleged unfairness, the arbitral award may not be set aside unless that evidence was crucial to the party's case. To make this assessment, reviewing courts must look at the arbitration panel's reasons and whether the lack of evidence affected the arbitration panel's conclusions. Further, courts may consult international arbitration decisions as helpful guidance when making their assessment.

You can't have it both ways — no unfairness arises from tactical choice to not request records

The appellants in the *ENMAX* case alleged that TransAlta failed to produce relevant and material records during the arbitration (the records), to the appellants' detriment. They made this complaint even though: (i) ENMAX chose to stop seeking the records during the arbitration; (ii) the arbitration panel advised the Balancing Pool that it could apply to a court for the records, and the Balancing Pool chose not to; and (iii) the appellants chose not to request the records when they were alerted to their potential existence through additional (surreply) evidence that TransAlta later provided.

Although the arbitration panel did not order production of the records, the court concluded that the arbitration panel did not foreclose such disclosure either. The appellants had the opportunity to request further disclosure, but chose not to do so. This was a tactical decision. Accordingly, there was no manifest unfairness in the process.

Stay on your toes — relevance and materiality of records can change over the course of an arbitration

The court acknowledged that records can become more relevant over the course of an arbitration. Consequently, as records become material and issues crystallize, parties must reassert their position on disclosure. Parties must exercise due diligence in pursuing issues and cannot later complain of perceived unfairness resulting from their failure to do so. That is true regardless of the disclosure procedure adopted in an arbitration.

Accordingly, it is critical for counsel to be proactive in asserting rights to record disclosure in an arbitration. Parties should voice concerns about record disclosure to arbitrators in a timely manner because, on a set-aside application, courts are unlikely to be sympathetic to a party that has failed to exhaust procedural requests for disclosure during the arbitration. Arbitral awards will only be set aside for unfairness in the most egregious of cases. A party's failure to contest record disclosure during an arbitral proceeding is not one of these cases.

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