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International Arbitration Experts Discuss Transparency On Public Perception

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Commentary

International Arbitration Experts Discuss Transparency On Public Perception

Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts about transparency on the public perception of international arbitration. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Sonja Heppner, Trainee Solicitor, William Fry on behalf of Arbitration Ireland, Dublin
- Mark Kantor, Independent Arbitrator, Washington, D.C.
- Luis Perez, Chair, Latin America and the Caribbean Practice, Akerman, Miami
- David N. Cinotti, Partner, Pashman Stein Walder Hayden P.C., Hackensack, N.J.
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Mealey's: Do you believe that more transparency could improve public perception of international arbitration?

Heppner: Transparency is a hot topic in the arbitral world. Allowing for access to arbitral hearings and the publication of awards permits arbitrators to demonstrate the fairness of the process and thereby foster public confidence. As Brennan J noted on the related rationale for open court hearings in *Richmond Newspapers*, 448 US 555, at 595, "[s]ecrecy is profoundly inimical to this demonstrative purpose."

Paraphrasing what the Court of Appeals for the Third Circuit in *Delaware Coalition for Open Government v Strine,* 733 F 3d, at 519, in 2013, held in relation to the then Delaware Business Arbitration Programme, rendering arbitration more transparent would allow the public to better understand this dispute resolution mechanism, allay the public's concerns and expose all actors involved to public scrutiny. It is only natural that the public would be skeptical of international arbitration, a forum, by and large, that members of the public are precluded from observing. Some progress has been made in the field of investment arbitration, in particular the adoption of the UNCITRAL Rules on Transparency and the Mauritius Convention. There is also some evidence of movement by arbitral institutions — the ICC recently committed to a default award publication system.

Indeed, the need for more transparency is most pressing in investment arbitration, a field in which every arbitral award has the potential to be of public importance — not necessarily due to state involvement, but because of the relevance of arbitral awards for future arbitral hearings. It is because arbitrators are developing the law by which the conduct of states is judged that the rationale for more transparency is particularly strong in investment arbitration. The development of law is an issue of utmost public importance, a process

that if done behind closed doors seeds skepticism and mistrust. Openness, on the other hand, assures onlookers that the proceedings are fair and, in doing so, breeds confidence. Transparency has become a convenient focus for criticism by those who (for political or other reasons) oppose arbitration; the arbitral world should move quickly to address this issue.

Kantor: This question is too complex for a simple answer. The answer depends among other matters on (a) what would become transparent and what would not, (b) who gets access to the transparent information, (c) what type of international arbitration would be subject to the particular type of transparency (only arbitrations with State Parties or all international arbitrations and only publicly owned companies or also privately owned companies), (d) who pays, (e) what if a participant objects to a particular type of transparency and (f) if some arbitral jurisdictions mandate types of transparency and others do not, will private commercial arbitrations migrate to the arbitral jurisdictions without mandatory transparency?

In the remaining space, let me illustrate some of these points.

Is the award to become public? Other rulings? The transcripts? The exhibits? When? For each of these items, what is redacted, on what grounds and who does the redacting?

Is public access to the hearings contemplated? Personal or closed circuit video? Who pays?

Do the same transparency rules apply when a State entity is not a party to the arbitration?

In public securities laws in most countries, public companies are only required to disclose "material information." Private companies almost never have even those disclosure obligations. Is an international arbitration different from other non-material or non-public information?

Most countries do not have the same level of judicial transparency as the United States or even that of current ISDS proceedings. Should private international commercial arbitrations be held to a greater standard of transparency than exists in the home countries of the Parties?

Finally, why is transparency necessary in cases not involving State entities? In countries like the US, the EU and the UK, more than enough judicial cases arise every year for public scrutiny of the development of the law. And most international commercial arbitrations involve disputed facts in the contractual context. Why is there a public policy need (as opposed to scholarly or activist/interest group passion) for that type of arbitral information to become public? If private commercial disputing parties settle a dispute between themselves, that settlement generally remains confidential unless (but only for a publicly owned company) the consequence is "material" within the meaning of the securities laws.

I hope these questions has the effect of encouraging a more sober conversation about transparency in international arbitration.

Perez: Transparency in how the arbitration process works can change the public's perception of international arbitration. And by that, I mean transparency regarding how an arbitral tribunal reaches the award.

A majority of businesses in the world rely on arbitration to resolve their commercial disputes. Yet, most of these businesses do not understand how the process works due to the lack of transparency. Decisions by an arbitral tribunal mostly consist of a "black box" into which evidence is poured in and an award comes out. Although the final awards are generally reasoned and justified, in reality the parties do not know how much weight is placed upon the evidence presented.

This "black box" most often reveals itself in the questioning by the tribunal. Sometimes the tribunal asks questions, especially at the end of the final evidentiary hearing. Some parties interpret the topics of the questions asked as an indication of the issues that concern the tribunal. I agree that practitioners should carefully consider the questions asked by the tribunal, as they oftentimes provide a roadmap of the issues that should be addressed in the post-hearing memorials. However, many times the tribunal asks questions that are designed to "cover" their true reasoning and perception of the case. The arbitrators tend to "bend over backwards" to hide their motivations so as to not appear biased. This only makes the work of the practitioners more difficult as they are trying to "read the tealeaves." It becomes increasingly challenging

when proceedings are conducted virtually, as it is increasingly difficult to read the body language of the tribunal. In the end, many times the award reflects a total pivot from the issues the parties thought were important and thus the "black box" again reaps its ugly head.

Because of the lack of transparency in the decision-making process, the parties surmise that in most instances, the tribunal reaches a consensus award decision and then looks for ways to justify that decision. To put it simply, it seems to be a process that moves backwards from the moment the parties submit their final post hearing memorials (or briefs).

The largest frustration stems from the fact that, in most cases, the final award is not appealable. Some clerical modifications are allowed, but for the most part, the decision is not subject to review by arbitral panels or the courts. To put it simply, the parties are stuck with the award.

Because of the permanence of the award, the most important decision in the entire arbitration process is the selection of the tribunal. Although the selection is made in different ways, most institutions seem to favor the approach where each party makes an appointment to the tribunal and, in turn, those two appointed arbitrators then select the president. This process is also very important because the tribunal is granted a lot of discretion. There is a large divide in how that discretion is exercised by common law and civil law practitioners. Common law practitioners are more inclined to follow the Federal Rules of Civil Procedure and are more relaxed in terms of allowing liberal discovery, in stark opposition to the civil law practitioners. These are important considerations to account for when selecting a tribunal.

The bottom line is that although more reliance continues to be placed upon arbitration, it is very difficult to rationally understand how tribunals reach a final award. It is pure "alchemy" and in commercial disputes, it is not easy to understand how or why a final award comes about. We can only wish we were the perennial fly on the wall during deliberations.

Cinotti: U.S. Supreme Court Justice Louis Brandeis famously wrote that "sunlight is said to be the best of disinfectants." Public scrutiny may contribute to a more efficient and fair arbitration process and might help correct public misperception fostered by a lack of transparency. It is therefore possible that allowing the public more access to documents and awards in international arbitration will improve the public's confidence in arbitration as a system to resolve disputes. But there are different considerations when talking about transparency depending on what type of international arbitration is at issue. And it may be that allowing more public insight into the process will not change some criticisms of international arbitration.

International investment arbitration involves important public interests that support calls for transparency like what is available in some national judicial systems. Arbitrators in investor-State cases are called to review the exercise of sovereign power sometimes in ways that implicate important matters of public policy such as environmental, health, and other regulation and responses to economic and social crises. There is a heightened public interest in international investment arbitration as compared to purely private disputes. Allowing public access to hearings, submissions, and awards, and more amicus or non-party submissions, while still protecting sensitive information, would foster greater public understanding of and participation in the process. Whether that would improve public opinion of investment arbitration is unclear, however. Some of the systemic criticisms of investment arbitration, such as the lack of consistency in treaty interpretation, repeat arbitrators and arbitrator bias, and negative impacts on developing States, may persist despite increased transparency.

More transparency may also improve public perception of international commercial arbitration, but it needs to be balanced against the parties' expectation of confidentiality. At least up to the point of award enforcement, parties in international commercial arbitration can be reasonably assured that the specifics of their dispute and any award will remain confidential. That makes it difficult for the public to understand what decisions arbitrators have reached and why. More public access to documents and awards would compromise one of the reasons to choose commercial arbitration over litigation, but it might also lead to a greater public appreciation for arbitral decision-making. Granting public access (and thus to counsel, parties, and arbitrators in future cases) could also contribute to the development of procedural law,

including application of arbitral rules and practices of procedure and evidence, and even substantive law, for example on the interpretation of common types of contractual clauses.

Grubbs: Undeniably, transparency is desirable. But the public's interest in transparency must be weighed against parties' interests in fair processes. And "fairness" may militate toward keeping certain information, such as trade secrets, confidential.

Some of the calls for additional transparency in international arbitration seem to be motivated by antipathy to using arbitration instead of public courts. This antipathy appears to be derived from the view that all disputes should be resolved publicly and/or from conflating considerations more pertinent to domestic arbitration and/or the notion that arbitration tribunals are rivals to courts. In fact, international arbitration offers benefits not available in public courts and has developed, in part, as a reaction to concerns about subjecting the claims of foreign investors to local courts and to allow private parties to resolve their disputes without unlimited publicity.

How the balance between transparency and confidentiality is achieved will vary. In investor-state dispute settlement (ISDS), involving sovereign states and public funds, the public interest in transparency will typically be given greater weight. In an international commercial arbitration (ICA), a dispute between private parties not involving public funds, considerations of confidentiality and privacy may have more valence.

The last decade has seen new provisions governing how the appropriate balance is to be achieved. Responding to calls for additional transparency, the ISDS community has produced an international convention (the Mauritius Convention), the UNCITRAL Rules on Transparency and the 2022 amendments to the ICSID Rules. While these innovations have rightly tilted toward increased transparency, they have also given arbitral tribunals the discretion to protect proprietary and private interests where appropriate.

At ICA institutions, on the other hand, the 10-year trend is mostly toward confidentiality. Thus, institutional rules for ICA increasingly impose explicit obligations of confidentiality. And though some institutions are experimenting with the publication of ICA awards, party consent is required, and awards are "anonymized" before being published.

Disputes invariably arise in international business. Given concerns about "home cooking" in local courts, arbitration is frequently the best dispute resolution technique available for, and critical to, international commerce. Institutions should be active in explaining how the international arbitration regime balances public and private interests. Equipped with recent institutional developments and rule changes, however, the current regime appropriately strikes that balance.

Hunt: The question rests on the doubtful premise that there is a problem of public perception affecting international arbitration *as a whole*.

Yet there is scant evidence that the general public, or even the politically engaged part of it, cares about international commercial arbitration at all, let alone considers it as lacking in legitimacy. To the contrary, countries continue to accede to the New York Convention — most recently Turkmenistan in May 2022. Likewise, the number of arbitrations administered by major institutes remains consistently high. Far from being troubled by any lack of transparency, when surveyed in the 2018 a clear majority of users of commercial arbitration said that confidentiality was an important feature of arbitration.

The spectre of illegitimacy instead haunts investor-state arbitration. The long-standing resistance of states and elements of civil society to the use of arbitration to resolve investment disputes expresses itself in criticisms of "secret courts," whose decisions are said to be rendered illegitimate by their confidentiality. It is therefore unsurprising that attempts to meet these criticisms focus on increasing transparency, whether through publication of awards or — increasingly — by allowing wholesale public access to pleadings and arbitration hearings. But it is important not to confuse investment and commercial proceedings. An understandable desire to address criticisms of investment arbitration should not undermine the features of commercial arbitration that encouraged parties to consent to it in the first place.

Indeed, it is doubtful whether, even in the context of investment arbitration, increased publication of

awards or access to hearings will meet the critics. Much has already been done. More than a thousand investment awards have been published and are the subject of detailed academic and policy criticism. The Mauritius Convention on Transparency imposes transparency requirements on investment arbitrations conducted between its ratifying parties. And the new ICSID Rules increase transparency requirements by providing for publication of awards and written submissions.

All of these advances in transparency have failed to stem the tide of criticism of investment arbitration. Unsurprisingly so, because the source of that criticism was always more the *fact* of investment arbitration than any specific features of its confidentiality regime. While transparency in the investment context might be a virtue in its own right, it is unlikely to satisfy those who regard investment arbitration as inherently illegitimate.

Bates and Torres-Fowler: Confidentiality is a bedrock of private international commercial arbitration. Parties' ability to resolve their disputes in closed-door proceedings without the risk of having their dirty laundry aired in public is often among the reasons why parties choose arbitration. However, the benefits of confidentiality in arbitration are not without drawbacks and, in recent years, arbitration has received significant criticism for an alleged lack of transparency. While many of the concerns over transparency in arbitration are legitimate issues that institutions, legislatures, and users must grapple with, the question of whether "more transparency" — whether information presented within private arbitration proceedings should be made publicly available — will be enough to improve public perception of international arbitration may oversimplify the issue.

Confidentiality is a critically valuable feature for international arbitration and questions concerning transparency involve a difficult balancing test between party autonomy and public interest. In vast majority of cases, international arbitration practices and procedures strike the right balance between these two competing interests. While there is always be room to adjust applicable standards and rules under particular circumstances, it would be a mistake to assume that simply increasing "transparency" at the cost of confidentiality will aid public perception of international arbitration. Instead, it is our impression that a broader lack of understanding about international arbitration in general, rather than questions over transparency and confidentiality, feeds alleged public distrust of the system. To that end, a better approach may be for users and arbitral institutions to educate the public about the critical role international arbitration plays in connection with the efficient resolution of international disputes.

For example, a common criticism of the lack of transparency in international arbitration arises in the context of investor-state arbitration where investors (whether individuals or corporate entities) are permitted to sue sovereign governments in arbitration for alleged violations of international treaties that are intended, at least in part, to protect the investor from mistreatment by the foreign government. In these cases, critics commonly assert that the investor-state arbitration model permits well-heeled international corporations to sue sovereign governments over matters of public interest for large sums of money all behind closed doors. This narrative risks oversimplifying the purpose of investor-state arbitration and often fails to put this dispute resolution model into the proper context, but nevertheless contributes to public distrust of the system. Indeed, many (though not all) investor state arbitration proceedings — especially those operating pursuant to the ICSID Convention — are made publicly available, indicating that questions concerning transparency may not be the real driving force behind public distrust in investor-state arbitration.

In other instances, many also fail to appreciate that confidentiality protections within international arbitration proceedings are not ironclad. For example, in the United States, while an arbitration proceeding may be confidential, information collected during those proceedings may still be discoverable. So, for example, if issues involving the public interest (e.g., questions of corruption) arise in connection with a confidential arbitration proceeding, nothing would necessarily prevent investigators in the United States (as well as investigators from other jurisdictions) from securing that information as part of a broader civil or criminal investigation to further the public good.

This is not to say that that existing confidentiality requirements and disclosure obligations related to ar-

bitration are sufficient to address all concerns related to transparency — and indeed, users and institutions need to pay close attention to these matters. However, we are not necessarily convinced that the solution to assuaging public concerns over international arbitration is necessarily "more transparency."

Graham: The value of transparency for improving the public perception of international arbitration depends on the type of arbitration. For international *commercial* arbitration, the public has little interest in the resolution of disputes among private businesses. And, indeed, those parties have opted for arbitration, in part, to protect their own privacy interests. For international *investment* arbitration, however, transparency presents several possible benefits:

First, investment arbitrations typically involve the obligations of states as sovereign actors, rather than private commercial parties. The typical investor's claim will assert that the state used its sovereign power, or *puissance publique*, to impact adversely a foreign entity's investment within its territory—e.g., by enacting a law or issuing an executive decree. The public has an interest in the exercise of those public powers and their consequences, both as a matter of democratic will and financial impact. (Consider, for example, the public's interest in the USD 50 billion award in the *Yukos* arbitration.) Where the adjudication of sovereign acts occurs behind closed doors, the public tends to complain of "private courts" that lack impartiality and accountability. An obvious antidote to those complaints is transparency.

Second, although not binding as precedent, each incremental award in an investment arbitration tends to shape and clarify the obligations on states. For example, many bilateral investment treaties obligate states to provide "fair and equitable treatment" to foreign investments. From that simple phrase has emerged a complex, multi-factor analysis of standards applicable to state conduct. States and investors alike deserve to know the full contours of those obligations, and the only way to know them with certainty is for the jurisprudence defining them to be made public. As it stands, awards are disclosed haphazardly depending on the terms of the applicable treaty or the need for enforcement. Transparency can provide uniform disclosure and a more fulsome understanding of the relevant obligations. As one federal appellate court in the United States once observed, "the idea of secret laws is repugnant." *Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998).

That said, transparency must always be tempered by discrete needs for confidentiality. Confidential business terms or matters that touch on private government affairs can always be protected by separate undertakings while preserving the public-facing benefits of transparency in investor-state arbitrations. ■

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