

## David Cinotti Contributed to Mealey's International Arbitration Report

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News

*Mealey's International Arbitration Report*

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David N. Cinotti, Partner at Pashman Stein Walder Hayden, contributed to *Mealey's International Arbitration Report* on the topic of "International Arbitration Experts Discuss Transparency on Public Perception." Cinotti is experienced in international commercial and investment arbitration, and was one of several contributors who shared his thoughts on this important issue. Mealey's is a leading publication on international arbitration.

*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.*

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