



Alternative approaches to valuing damages in Investor-State Arbitration *

Summary

*** Please note that this summary of the panel was AI-generated and therefore has not been fully vetted for accuracy.**

During the Washington Arbitration Week session, co-founder Jose Antonio Rivas opened the panel discussion on alternative approaches to damage valuation in international arbitration. He emphasized the complexities involved in determining damages, particularly in investment treaty arbitration, where the characterization of the investment—whether operational or merely a permit—can significantly influence the valuation approach taken by experts.

The panel featured moderator Ian, a partner at PwC, alongside experts Judy, Melissa, and Mark, who brought diverse perspectives from their extensive backgrounds in economic consulting, law, and arbitration. They discussed the recent PwC International Arbitration Damages Study, which highlighted trends in how damages are quantified in arbitration cases, revealing that tribunals often award about 40% of the claimed damages.

Key points raised included the predominant use of the income approach by claimants, while respondents often employ the cost approach. The panelists noted the challenges of presenting credible damage claims, particularly for startups with limited operational history. They emphasized the importance of robust, substantiated evidence to support damage claims and the necessity for experts to act independently, pushing back against unrealistic expectations from counsel.

The discussion also touched on procedural suggestions, such as the potential for earlier expert conferencing to narrow issues and improve the efficiency of the arbitration process. The panelists expressed a desire for greater clarity in how tribunals assess speculative damages and the need for a more standardized approach to expert testimony.

Overall, the session underscored the evolving landscape of damage valuation in arbitration, highlighting the importance of credible methodologies and the role of expert testimony in ensuring fair outcomes.

Authors

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Topics

Investor-State Arbitration, Arbitration, Damages, Valuation

Category

WAW

Full Transcript

00:00:12

picnic Good afternoon, everyone. This

00:01:58

is at Washington arbitration week.

00:02:00

We are incredibly excited of

00:02:06

having our fourth day and

00:02:12

Is there any Echo there?

00:02:16

Everyone has their mics off.

00:02:32

my my name is Jose

00:02:34

Antonio Rivas and I am

00:02:36

one of the co-founders of

00:02:37

Washington arbitration week and a

00:02:41

partner at which is a



00:02:45

boutique Law Firm that does

00:02:47

both the investment treaty arbitration

00:02:50

International commercial arbitration and the

00:02:52

public international law here in

00:02:55

Washington DC and in in

00:02:56

Bogota and I also teach

00:02:59

at Georgetown law as an

00:03:01

adjunct faculty and it is

00:03:03

with great pleasure that that

00:03:07

we're having this panel on

00:03:09

alternative approaches to volume down

00:03:11

much as I must say

00:03:12

that that one in in



00:03:15

a past life where I

00:03:17

I was a very much

00:03:19

involved in litigation Finance in

00:03:22

one of the most challenging

00:03:23

Parts when analyzing cases was

00:03:27

the question of of Damages

00:03:28

and and trying to understand

00:03:35

and tractor is the investment

00:03:37

the type of investment that

00:03:39

that had been done and

00:03:42

whether they were operations or

00:03:44

not a Tetra and and

00:03:47

and and the question came



00:03:49

to what type of approach

00:03:54

would wood would be taken

00:03:57

eventually by the damage experts

00:03:59

and and eventually accept it

00:04:02

or Not by the tribunal

00:04:03

the weather would be at

00:04:05

this year. So let's Okay.

00:04:12

Yes. Thank you. So how

00:04:18

many event? Somebody is being

00:04:23

needed urgently. Soak and wet

00:04:29

weather the investment has been

00:04:30

he's a going concern. We're

00:04:32

the investment has been there



00:04:34
for for a number of

00:04:36
years whether it's operational whether

00:04:39
it's simply a permit a

00:04:40
piece of paper that was

00:04:41
given an old those factors

00:04:43
are are are crucial to

00:04:44
determine what what type of

00:04:46
of of Damages valuation approach

00:04:50
the experts my take the

00:04:52
tribunal eventually would what would

00:04:54
accept it is it is

00:04:56
fascinating how to determine characterize

00:05:00
the investment and then eventually



00:05:03

share with with the with

00:05:05

clients and and eventually to

00:05:08

do with the tribunal at

00:05:10

why is is why was

00:05:12

Odysseus analysis were comparable comparable

00:05:14

analysis or Suncoast shows in

00:05:17

and and in this panel

00:05:20

that we actually have the

00:05:24

That they did the tents

00:05:26

and then we're very lucky

00:05:27

to have or being discussing.

00:05:31

This is very very topic

00:05:33

with a study that was



00:05:38

produced by PWC that is

00:05:42

called International arbitration damages study.

00:05:45

Here it is and it

00:05:47

was actually published. Yesterday so

00:05:51

this is right out of

00:05:52

the oven is hot and

00:05:54

that's what we want to

00:05:55

do in Washington arbitration week

00:05:57

that that people who publish

00:05:59

damages analysis or or Publications

00:06:02

in investor-state arbitration or International

00:06:04

commercial arbitration. Bring it here

00:06:06

first, then you can bring



00:06:08
it to the rest of

00:06:09
the world. So we're very

00:06:10
happy to have it. Again.

00:06:12
Thank you for or for

00:06:14
bringing it first here to

00:06:15
Washington arbitration week and now

00:06:17
also with great pleasure. I

00:06:20
would like to introduce you

00:06:21
as moderator. Ian is a

00:06:25
partner of pwc's london-based forensic

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Services practice or he is

00:06:30
responsible for leading a range

00:06:33
of valuation litigation dispute an



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investigation cases yet holds a

00:06:38
degree in economics from the

00:06:39
University of Duran. He has

00:06:43
over 20 years of experience

00:06:47
in corporate finance investigation Financial

00:06:51
modeling report writing and statistical

00:06:54
analysis experiment. He has managed

00:06:56
the production of over 150

00:06:58
expert reports focus on a

00:07:00
range of issues across multiple

00:07:03
Industries and territories often with

00:07:06
a particular focus on energy

00:07:08
oil and gas and construction



00:07:10
including claims arising out of

00:07:12
investment treaties has been appointed

00:07:15
as expert in on a

00:07:17
number of matters or litigation

00:07:19
and arbitration and given oral

00:07:21
evidence on a number of

00:07:23
occasions. And most recently he

00:07:26
has been testifying in a

00:07:29
nice Easter with radiation. And

00:07:31
in fact is is is

00:07:32
also currently testifying here in

00:07:34
DC and makes it matter

00:07:36
that we were happy to



00:07:39

call him as part of

00:07:40

our International arbitration Washington d.c.

00:07:43

Community and you have the

00:07:45

store and welcome. Thank you.

00:07:48

Thank you. Thank you. Thank

00:07:56

you. I'm glad this week

00:08:02

is the sessions for lunch.

00:08:09

So I'm sorry that got

00:08:11

to come back from lunch

00:08:11

outside section on the East

00:08:16

Coast action news about fantastic

00:08:24

panel today. So let me

00:08:25

move on to introduce our



00:08:27

panel to you starting to

00:08:30

my left immediately next to

00:08:31

me is at Judy cabin.

00:08:32

It was a senior managing

00:08:34

director at Nera economic Consulting

00:08:36

experience providing energy my consultation

00:08:43

related International arbitration on others

00:08:46

people music Jimmy frequently advice

00:08:50

expert evidence of damage is

00:08:51

a relations and friends with

00:08:54

Mark its competition regulations and

00:08:57

policies is a Oktoberfest at

00:09:01

Georgetown University at when she



00:09:03

teaches a course and energy

00:09:05

comics. Next to Judy that

00:09:09

we have multiple accounts on

00:09:11

my nerves as a occupation

00:09:13

in Investments commercial disputes and

00:09:19

they escaped Milbank Tweed Hadley

00:09:23

& McCloy a member of

00:09:25

the board of directors of

00:09:26

the American Arbitration Association of

00:09:29

the DC bar and is

00:09:33

a fellow of the chartered

00:09:35

Institute of arbitrators and buy

00:09:39

an international reputation and international



00:09:41

business transactions as not to

00:09:43

Georgetown University Law Center. Text

00:09:47

Mark Mike left that we

00:09:49

will see you then have

00:09:50

to see a ghost named.

00:09:51

Melissa is a partner at

00:09:53

Wednesday in Washington and 11

00:10:10

in the late 1990s that

00:10:14

you are a sec commissioner

00:10:30

and a deal of the

00:10:34

State Board of Education at

00:10:41

the University of Maryland and

00:10:42

American University. I'm in finally



00:10:45

but by no means least

00:10:47

till we have chatted with

00:10:48

a silver. It is a

00:10:50

vice president at Charles River

00:10:51

Associates in treaty and Commercial

00:10:55

disputes has been retained as

00:10:57

in over 150 disputes 82

00:11:01

is Boston College fight song

00:11:09

Melissa. And so you shall

00:11:10

go as well. Looking to

00:11:21

say we have a fantastic

00:11:22

panel here today. It will

00:11:25

go through you on The



00:11:27

View today all of the

00:11:34

PWC down to survey the

00:11:36

Beachwood today. Is a QR

00:11:46

code at the top of

00:11:47

the screen for those that

00:11:48

would like to download to

00:11:50

sleep so you can be

00:11:51

the full study found some

00:11:54

hard copies here old fashioned

00:11:57

wife. Versace back in 2015

00:12:02

and we wanted to undertake

00:12:03

would analyze publicly-available arbitration Awards

00:12:07

to look specifically at the



00:12:09

parties and damages on the

00:12:12

price of complication. I need

00:12:14

water, just released yesterday and

00:12:19

all of us are coming

00:12:24

others about the mid-1990s and

00:12:28

currently 132 December 2022. The

00:12:36

average being just like the

00:12:37

\$200 you see 7 South

00:12:42

Governors that have time today

00:12:46

to them that we could

00:12:46

easily have hosted any one

00:12:49

of these regions South Americans

00:12:55

surprised when he comes up



00:12:56
when I can leave it

00:12:56
in knots. What's the New

00:12:58
York Mets recently asked about

00:12:59
the Lord given the Solo

00:13:00
arbitrations in Spain and seawide

00:13:05
some supplies make an oil

00:13:06
and gas utilities are common

00:13:08
areas. We see these Awards

00:13:09
coming out to an expense

00:13:18
as well. If the ward

00:13:19
size would have been interested

00:13:20
in it. As I say

00:13:21
any of these topics topics



00:13:22

we could spend a lot

00:13:25

of time on what is

00:13:29

the name of the survey

00:13:31

shows us about approaches to

00:13:33

identifying damages and international arbitration.

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With a lot this week

00:13:37

already about some of the

00:13:39

challenges about with heard about

00:13:40

how does one quantify damaged

00:13:43

areas such as Ukraine situation.

00:13:51

That was why don't we

00:13:52

want to see if it

00:13:53

dies panel was just a



00:13:55

slight leaving look like between

00:14:01

next before I even if

00:14:02

it's a question, but what

00:14:04

we see in the woods

00:14:05

about how hot is inside

00:14:06

your nose are going to

00:14:07

find out with his friends

00:14:10

so we can see what

00:14:12

important events that leave us

00:14:14

going forward. And what more

00:14:16

can we ask this in

00:14:17

this area that help with

00:14:19

the development of the contraction



00:14:21
of damages? The song today

00:14:25
is to cross on the

00:14:27
slide. The one on the

00:14:29
left looks at on average.

00:14:32
How much does a respondent

00:14:33
quantify damages compare the climates

00:14:35
what's going on with your

00:14:37
kotel wholesale 180 Awards 10%

00:14:43
to 10% of the amount

00:14:44
of the claimants call Stephen

00:14:48
averaged 23, 25 years time

00:14:53
of 190 cases. We see

00:14:55
the between by descendants. When's



00:15:03

our alarm set to go

00:15:04

off on the right looks

00:15:06

that wet wet if I

00:15:07

can do stand up in

00:15:08

this position. Let me see

00:15:09

you then. When I reach

00:15:10

by pianos end up awarding

00:15:12

around 40% in value their

00:15:15

moms playing by the claimants.

00:15:20

So how do you do

00:15:21

the policies go about doing

00:15:23

this complication of Damages in

00:15:24

this is a slightly busy



00:15:26

girl from Save apologies, but

00:15:28

I spend a minute just

00:15:28

shows the different methodologies used

00:15:35

by claimants to the biggest.

00:15:38

The red bar is the

00:15:40

income approach the station lost

00:15:44

all the pipes. Let me

00:15:46

see that and was two-thirds

00:15:48

of the cases. That's the

00:15:49

primary method for by claiming

00:15:51

to quantify. In contrast, we

00:15:54

see that it was fun

00:15:56

to use a methodological my



00:15:58

Sophos much around one-third of

00:16:00

the case is just one

00:16:02

of them to use the

00:16:02

discounted cash-flow the income approach

00:16:04

as its primary investment costs

00:16:18

as the primary method to

00:16:19

buy. pain in the bottom

00:16:27

Bob tribunal was Maybe unsurprisingly

00:16:31

for Tribune will end up

00:16:32

in the middle grounds of

00:16:34

the case is tribunal except

00:16:37

on a dog's the income

00:16:39

approach people would a big



00:16:41

decision a big basis of

00:16:43

awards? Just very quickly and

00:16:58

we went focus on this

00:16:59

too much today, but just

00:17:00

as interesting to look at

00:17:02

the time. How come you

00:17:03

know supposed to accept? Every

00:17:07

time if an issues can

00:17:09

come to you since we

00:17:11

all the traits in. Kind

00:17:13

of tight some of the

00:17:14

approaches but there's a time

00:17:17

about sending increased acceptance by



00:17:19

five units all think message

00:17:21

saying for 2000 to just

00:17:24

19% of the damages will

00:17:26

we see that sitting around

00:17:32

50% at 50% in the

00:17:34

most recent. Somebody tribunals except

00:17:41

to overjet, just pulled in

00:17:45

front of them. When I

00:17:52

was this we did to

00:17:52

look up the common reasons

00:17:55

of the coming of the

00:17:55

damages interpretations put in front

00:17:59

of them was evidence unsubstantiated



00:18:08

information except for my puppy

00:18:16

knows that there is a

00:18:17

lack of evidence underlying assumptions

00:18:20

of these calculations in front

00:18:29

of them. And finally think

00:18:31

this final grow just as

00:18:33

well. That means the population

00:18:36

sets slide. It is never

00:18:37

the point B in the

00:18:38

top three categories be unsubstantiated

00:18:44

the volume of the unconvincing

00:18:46

assumptions lower portion of amateur

00:18:53

claims being wielded dropping to



00:18:55
about 30% or 55% Then

00:19:03
we would like to sit

00:19:05
down and discuss as a

00:19:07
penile today and will get

00:19:08
back to you some of

00:19:10
those. I guess I want

00:19:13
to start really with the

00:19:15
discussion today was going back

00:19:16
to the very first one

00:19:17
I put up. Which is

00:19:20
this graph about how play

00:19:22
mansionz on Spotify. I guess

00:19:28
it'd be good to have



00:19:29

an extra phone to be

00:19:31

fast and Council as well.

00:19:33

I guess you can tell

00:19:35

him to you to solve

00:19:36

expense all meant to be.

00:19:42

Independence with the juices of

00:19:43

my being on that page

00:19:44

to quantify damages to use

00:19:54

what I've observed increasingly are

00:19:59

examples of what our fridge

00:20:00

was more stretched expert opinions

00:20:03

on Damages and and I've

00:20:04

seen that on on both



00:20:05

sides of from to high

00:20:08

damage has from a claimant

00:20:11

expert that can be in

00:20:13

my view potentially disconnected or

00:20:16

taking outlier markets at Market

00:20:19

viewpoints. I've also seen to

00:20:22

load damages that posed by

00:20:24

respondents that can be disconnected

00:20:26

with what I'll do is

00:20:28

economic incentives or business practices

00:20:31

and expectations on both sides.

00:20:36

If it does seem consistent

00:20:37

with the viewpoints of the



00:20:39

last time you came up

00:20:41

with with Conceited lack of

00:20:43

evidence of the very large

00:20:45

percentage of that could lead

00:20:48

to a wider wider range

00:20:50

and expert numbers. Now. My

00:20:54

observations are a really into

00:20:56

the shoes of the expert.

00:20:57

It's it's not in regard

00:20:59

to Legal mandates and instructions.

00:21:04

If you will it's more

00:21:05

or less what I'll call

00:21:06

the meat and potatoes of



00:21:08

what an expert is doing

00:21:09

to develop the supporting work

00:21:12

for the analysis. I'm not

00:21:15

going to speculate in terms

00:21:16

of whether or not other

00:21:17

experts are being independent in

00:21:19

that you're contagious or looking

00:21:23

at numbers. When I reflected

00:21:26

on the industry's I work

00:21:28

on which are are are

00:21:29

dramatically changing Industries. And I

00:21:32

think about the twenty years.

00:21:34

I've been testifying I do



00:21:36

find a wider range of

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Market viewpoints existing in the

00:21:43

marketplace Dynamic time. More viewpoints

00:21:48

more range and data that

00:21:50

experts can draw upon to

00:21:52

use for their supporting their

00:21:53

opinion now, that's that's going

00:21:58

to continue and and if

00:22:00

it doesn't address where where

00:22:01

we go with with with

00:22:04

best practices to the narrow

00:22:07

it to make it easier

00:22:08

for for arbitrators, but but



00:22:12

offer a suggestion that trying

00:22:15

to to limits that that

00:22:17

Divergent range could couldn't Park

00:22:20

be accomplished by allowing depositions

00:22:24

of experts. Dance of of

00:22:26

hearings. So can you can

00:22:28

you can you put more

00:22:30

more time from a lawyer

00:22:33

cross-examination perspective than just during

00:22:36

the hearing which are limited

00:22:39

time and in a tight

00:22:42

hearing to test the the

00:22:44

assumptions at in the process.



00:22:46

These couldn't couldn't do that.

00:22:48

But but I definitely see

00:22:49

a large range in in

00:22:53

results that are current. I

00:22:57

guess the other side. You

00:23:02

see if you see this

00:23:02

is a expert driven issue

00:23:04

or other of the foxes

00:23:06

and in passing are the

00:23:08

EC playing out schools. This

00:23:09

is Ranger difference comes up.

00:23:12

In first, thank you for

00:23:16

the very flattering introduction, which



00:23:18

I wrote and also thanks

00:23:21

to the sponsors of this

00:23:22

program including in particular Crowell

00:23:25

morning morning and its staff

00:23:27

are really the excellent facilities

00:23:29

all around turning back to

00:23:32

your question. It's not a

00:23:34

surprise just as Julie said

00:23:37

it's not a surprise and

00:23:39

the reason why it isn't

00:23:41

attributable primarily to The Experts.

00:23:45

Is several points first and

00:23:47

most obviously particularly at the



00:23:50

beginning of a case, which

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is what your numbers measure.

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An expert takes the instructions

00:23:57

and assumptions given to them

00:23:59

by the party at moongates

00:24:01

than the council was advising.

00:24:04

Counsel for claimant will say

00:24:07

we win on every single

00:24:08

point. There's jurisdiction on every

00:24:11

single point respondents who will

00:24:15

say they lose on every

00:24:17

single point and not only

00:24:19

do they get thrown out



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on jurisdiction on everything but

00:24:23

there are particular items they

00:24:25

be at thrown out for

00:24:26

on jurisdiction, even if they

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might have overall jurisdiction on

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some of their claims it

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is no surprise that the

00:24:35

respondent number at the beginning

00:24:38

of the case assumes a

00:24:41

far lower number result for

00:24:44

lower Quantum result than the

00:24:46

claimant or if they lose

00:24:49

on some of those point



00:24:50
the ultimate award. There are

00:24:53
other reasons not just the

00:24:55
assumptions at the beginning but

00:24:58
instructions of counsel on a

00:25:00
variety of issues that are

00:25:02
embedded inside an expert repair.

00:25:04
And once again Council appropriately

00:25:08
are giving instructions to reflect

00:25:09
the case that their client

00:25:11
has engaged them to run

00:25:13
is also different positions on

00:25:16
legal issues relating to Quantum

00:25:18
is a DCF calculation. You're



00:25:22

reasonably certain on quote or

00:25:25

is it quote speculative unquote

00:25:27

unsurprisingly clean of council take

00:25:30

the view which reasonably certain

00:25:31

if their client is their

00:25:33

expert is running a DCF

00:25:34

case and respond. It will

00:25:36

say no. No, it's much

00:25:37

too speculative that flows into

00:25:40

the damages positions. They're all

00:25:43

so different commercial regulatory political

00:25:47

micro and macro economic assumptions

00:25:50

embedded into each position of



00:25:54

an expert and unsurprisingly. They

00:25:58

reflect the views of the

00:26:01

client one example of that

00:26:03

might be macro causation issue

00:26:06

something like pandemic perhaps or

00:26:10

supply chain problems that affect

00:26:12

the computation of Damages different

00:26:16

sources of data at the

00:26:18

beginning of a case. Each

00:26:21

side is relying on different

00:26:23

bodies of data and giving

00:26:26

different embassies to the data.

00:26:28

They have on the basis



00:26:30
of which the experts provide

00:26:31
their reports. And finally I'd

00:26:34
also say design and complexity

00:26:36
of models there were certainly

00:26:38
times where one side has

00:26:40
a very complex model the

00:26:42
other I may not even

00:26:43
have a DCF model. They

00:26:46
may choose to look the

00:26:47
comprable transaction or comprable companies

00:26:50
or in the invested capital

00:26:51
or all of those things

00:26:53
play out into huge differences



00:26:56

at the beginning of the

00:26:58

case before all of those

00:27:00

assumptions instructions and data are

00:27:04

tested in the adversarial process.

00:27:07

Just think about it. This

00:27:14

comes after this a range

00:27:15

of issues and points and

00:27:17

instructions and other factors that

00:27:21

impact how an calculation can

00:27:24

play out Melissa Neal point

00:27:26

of view Council. Do you

00:27:30

agree with that juicy that

00:27:31

is in this town Buckley



00:27:38
to try and place it

00:27:41
together as well. Thanks, Ian.

00:27:44
And also thank you for

00:27:46
that. Very kind. Perhaps overly

00:27:48
kind introduction. I agree with

00:27:51
much of what Mark is

00:27:53
just said and I think

00:27:54
that the yes, you do

00:27:55
see a huge Divergence, you

00:27:59
know in my twenty-five years

00:28:01
or so with practice. I

00:28:03
agree that those divergences are

00:28:04
getting better bigger better bigger,



00:28:06

but I think it is

00:28:10

frankly inherent in the adversarial

00:28:12

process that you see these

00:28:14

differences is lawyers. We have

00:28:16

a duty of zealous advocacy

00:28:18

to our client. Candor to

00:28:20

the tribunal and our job

00:28:22

is to take the available

00:28:23

evidence and with credibility and

00:28:27

Candor make the best possible

00:28:29

case that we can for

00:28:30

our clients. So it's no

00:28:32

surprise that the parties are



00:28:34

going to have different positions

00:28:36

different arguments usually on all

00:28:39

material issues in the case

00:28:41

and that includes quantum Now

00:28:45

many times again as as

00:28:48

Mark discussed. There are legitimate

00:28:52

difference is particularly at the

00:28:54

beginning of the case. Very

00:28:57

rarely. Do we see a

00:28:58

case where all these trees

00:29:00

are cut and dried there's

00:29:01

one set of documents that

00:29:02

just lays out exactly what



00:29:05
happened makes it really easy

00:29:06
for the tribunal and you're

00:29:08
just quit playing at the

00:29:09
margins usually tribunals are presented

00:29:12
with massive amounts of evidence.

00:29:15
You can drop multiple different

00:29:18
stories or themes from those

00:29:20
volumes and volumes of evidence.

00:29:22
And each side is taking

00:29:24
the evidence that is best

00:29:26
for their case and highlighting

00:29:27
that and building a narrative

00:29:28
around it and you often



00:29:30

get two different versions of

00:29:33

events that they're very little

00:29:35

resemblance to each other those

00:29:37

different factual narrative lead to

00:29:39

different legal conclusion on things

00:29:42

like that evaluation or the

00:29:44

applicable legal standard that should

00:29:46

be applied in a particular

00:29:47

case and depending on the

00:29:50

factual scenario with marks. Claim

00:29:52

it may say this treaty

00:29:54

was violated in five six

00:29:56

seven different ways. Where's respond?



00:29:58

It was a it was

00:29:58

never violated at all and

00:30:00

all of that when it

00:30:02

comes together, if you have

00:30:05

buried the vergent views on

00:30:08

Quantum, especially early in the

00:30:09

case. Now, what can we

00:30:11

do about that? I think

00:30:14

Julie suggestion of depositions was

00:30:15

interesting. I think the non

00:30:18

us lawyers and arbitrators would

00:30:20

probably grown at the idea

00:30:23

that we are trying to



00:30:24

further americanize the arbitration process

00:30:27

which they are already significantly

00:30:29

opposed to I tend to

00:30:32

think that the way One

00:30:35

Way Forward might be to

00:30:37

utilize expert conferencing or hot

00:30:40

tubbing but to do it

00:30:42

in much earlier in the

00:30:43

process, I think in my

00:30:45

experience usually when it comes

00:30:47

up it's raised by the

00:30:48

tribunal no earlier than perhaps

00:30:50

a week before the and



00:30:53

the parties are hesitant to

00:30:55

suggest it in part because

00:30:59

lawyers don't really want it

00:31:00

frankly and also because it

00:31:05

is extra expense. If it's

00:31:07

something the tribunals not interested

00:31:08

in it could cause irritation

00:31:10

that could derail the process

00:31:11

when tribunals raise it. It

00:31:15

is often at a stage

00:31:17

where the differences are huge.

00:31:19

Everyone is firmly entrenched in

00:31:21

their own opinions. And at



00:31:23

that point, I think you're

00:31:24

you're less likely to see

00:31:26

movement. So personally, I think

00:31:29

the best way forward is

00:31:30

to to do expert conferencing

00:31:33

will regularly more as a

00:31:34

standard has them and to

00:31:36

do it earlier in the

00:31:36

case. Probably after the first

00:31:38

round of expert reports have

00:31:40

been exchanged. curious to see

00:31:42

what Mark thinks about that

00:31:45

Why would I would I



00:31:46
guess? I see if I

00:32:01
came in litigation some arbitration.

00:32:03
We sit on his phone

00:32:04
so I can see you

00:32:07
would like to come by,

00:32:09
you are such a nut.

00:32:17
My personal view is the

00:32:21
easiest way to bring things

00:32:23
closer together is to find

00:32:26
a way early on to

00:32:28
reduce the material items in

00:32:31
dispute. There are a whole

00:32:33
host of mechanism some I



00:32:35

do that a witness conference

00:32:37

expert witness conference in advance

00:32:39

might do that. Ian's experience

00:32:43

is probably different from mine

00:32:44

because it derives from a

00:32:45

small community where purepressure plays

00:32:49

in the enormously important role.

00:32:51

My experience comes out of

00:32:53

the New York Market or

00:32:54

the California Market or the

00:32:56

Washington Market where there are

00:32:58

so many lawyers in so

00:32:59

many experts a pressure plays



00:33:02

a very small role. So

00:33:04

the rule 35 approach that

00:33:07

an expert closed primary duty

00:33:10

to the tribunal and must

00:33:12

give evidence regardless of who

00:33:15

instructs them and must also

00:33:17

provide a negatives as well

00:33:20

as the possible options to

00:33:22

work very well in the

00:33:23

London community. I would be

00:33:25

astounded if it worked for

00:33:27

example in the New York

00:33:28

Community different cultures. So what



00:33:32

do I suggest doing about

00:33:35

that will come two more

00:33:36

specific proposals later on but

00:33:40

in general I would want

00:33:43

to get the expert to

00:33:45

identify as early as possible

00:33:47

a list of material disagree.

00:33:51

Experts and Council will disagree

00:33:54

about an enormous number of

00:33:56

things and some of them

00:33:58

are material somewhere not if

00:34:00

I get early on in

00:34:01

a case a list of



00:34:02

material disagreements between the experts

00:34:05

I then have a checklist

00:34:07

of the things that I'm

00:34:08

really going to have to

00:34:09

decide in order to make

00:34:11

the case resolved. So that's

00:34:14

the first step and I

00:34:16

would just point out. This

00:34:17

is a number that I

00:34:18

really love the If we

00:34:23

have the last word oblique

00:34:25

20 major issues in dispute,

00:34:28

the number of combinations number



00:34:32

of scenario among all of

00:34:35

those 20 items number one

00:34:37

against two three, four five

00:34:38

cetera. Number one plus two

00:34:39

against two three, four five

00:34:41

number nine against 123 etcetera

00:34:44

etcetera. If you have 20

00:34:46

items you end up with

00:34:49

variations that could be as

00:34:51

high as six hundred million

00:34:55

variations. So just doing scenario

00:34:58

analysis without narrowing. The issues

00:35:02

is impossible for the parties



00:35:05

in the expert-level loan for

00:35:07

poor little arbitrator like me.

00:35:10

Can I just want one

00:35:13

comment about that is witness

00:35:16

conference in a few times?

00:35:17

And so what I think

00:35:18

is really important is at

00:35:21

least from the perspective of

00:35:22

Damages expert is less. Disagreements

00:35:28

on the valuation methods and

00:35:31

more on how can the

00:35:33

damages experts mandate in Narrows

00:35:36

by things such as can



00:35:39

you use an exam key

00:35:40

valuation method. Can you use

00:35:42

an exposed? What is the

00:35:44

valuation date and I think

00:35:46

after we get to that

00:35:47

then the technical people can

00:35:50

come to agreement tomorrow. Technical

00:35:58

aspect I want to spend

00:35:59

some time in the line

00:36:00

damages calculations when you approach

00:36:03

is a methodology as well.

00:36:05

I guess just if I

00:36:08

do that one one thing



00:36:10
that sticks in my mind

00:36:10
on what is used for

00:36:11
those in the Moon? If

00:36:15
I do shaving show the

00:36:17
temperature with the quantification. tribunals

00:36:22
awarding on average 40% of

00:36:24
the amount claimed the question

00:36:28
of how are they doing

00:36:31
some calculations all day using

00:36:36
an expert to reach a

00:36:38
conclusion. Are they taking so

00:36:40
bad about someone besides constipation

00:36:43
tribunals doing in your experience



00:36:53

when faced with this massive

00:36:54

ranger station? Thanks for the

00:37:00

invitation and the introductions. So

00:37:03

what one thing to the

00:37:06

way I normally think about

00:37:07

this is less about the

00:37:08

40% and it's really about

00:37:11

two things when I can't

00:37:12

look at the inverse of

00:37:13

these percentages. So I tend

00:37:15

to think more like the

00:37:17

tribunal is right. Let's see

00:37:19

how much the parties were



00:37:20

wrong. And so for example,

00:37:22

the 40% translates into two

00:37:24

and a half times. So

00:37:26

you can think of we

00:37:27

were worried for the percent

00:37:28

or they asked for two

00:37:29

and a half times more

00:37:30

than they should get you

00:37:32

out that even that percentage

00:37:36

I think is Hard to

00:37:41

understand because of Mark and

00:37:44

Melissa explained there's so many

00:37:45

different variations in that percentage.



00:37:48

Right so you can have

00:37:50

for example different claims that

00:37:52

survived position that we're almost

00:37:53

to be correct in the

00:37:56

in the claimant side and

00:37:57

in the laboratory decided that

00:37:59

only 40% of them were

00:38:02

were right and then you're

00:38:04

looking at is a hundred

00:38:05

percent. So all of them

00:38:07

were where were they so

00:38:08

I think we need a

00:38:10

little more and now it



00:38:11

is on that before we

00:38:13

can just say they get

00:38:14

40% of what they are

00:38:16

and that's a diversion and

00:38:18

evaluation side. What I see

00:38:22

tribunals asking often is a

00:38:27

joint extra big board special

00:38:30

in commercial case not so

00:38:31

much an investor 3-D case

00:38:33

that I don't think I've

00:38:34

ever seen best 3D cases

00:38:35

with with a joint report

00:38:38

also hot. The more like



00:38:43

terms what is called concurrent

00:38:45

concurrent the conference and concurrent

00:38:47

or expert conference is something

00:38:51

that has worked well as

00:38:52

more in the Commonwealth in

00:38:54

litigation and then willing in

00:38:56

arbitration, but I think it

00:38:58

works quite well, and I

00:38:59

think it should be used

00:39:00

more often to see in

00:39:03

3D cases including commercial cases

00:39:07

as well is tribunal after

00:39:10

the marriage hearing coming back



00:39:13

to the parties insane. We

00:39:16

now have more. Certainty about

00:39:20

the damages in the house.

00:39:21

So can you please resubmit

00:39:25

your pleadings with respect to

00:39:29

the damages? If you assume

00:39:31

X Y and Z which

00:39:32

was the kinds of things

00:39:33

that were saying would be

00:39:34

helpful before the witness conference

00:39:36

or before the joint extra

00:39:37

report because that narrows the

00:39:39

the scenarios from 600000654 million



00:39:44
+ 32 x 31 to

00:39:46
be precise to maybe 20,

00:39:49
so that's that helps stables

00:39:53
in in those trinkets for

00:39:54
report. So things that Dragon

00:39:58
was having recently asked for

00:39:59
damages expert to follow in

00:40:01
terms of guidance has been

00:40:02
such as you can use

00:40:04
an example of elevation and

00:40:06
I was so badly was

00:40:07
the date of the breach

00:40:09
and tell us what is



00:40:11

the date of the bridge

00:40:11

is opposed to us having

00:40:12

the gears 4 days and

00:40:14

if you need another one,

00:40:14

just let us know which

00:40:18

valuation date which method also.

00:40:22

So for example, we are

00:40:25

finished here. Do you need

00:40:26

three years of operations for

00:40:28

the case for to have

00:40:30

sufficient certainty that that the

00:40:34

project was really have enough

00:40:36

respect. For example, I was



00:40:42

only one last month at

00:40:44

the hearing in the tribunal

00:40:45

visibly agree that a hydrocarbons

00:40:48

project that has off take

00:40:49

agreements the Lockport certain than

00:40:51

say a retail operation with

00:40:52

two years of operation, right?

00:40:54

So it's That's that sophistication

00:40:59

is is welcomed. Also things

00:41:02

like which causation argument that

00:41:04

succeeded if you're going to

00:41:05

use an income approach which

00:41:06

forecasts can be used. And



00:41:08

so overall what I would

00:41:12

say to you ran this.

00:41:13

I think we're going in

00:41:14

the right direction and I

00:41:16

welcome that tribunals are more

00:41:18

and more getting narrowing the

00:41:20

654 million options to to

00:41:23

a few. If I pass

00:41:28

inspection and to get an

00:41:30

answer from someone, what do

00:41:33

you do before we do

00:41:41

that? It's a little bit

00:41:43

of background information. I think



00:41:45

it's very important for any

00:41:46

confirmation conservation conversation conversation about

00:41:53

whether damages numbers are or

00:41:56

are not exaggerated pro and

00:41:58

con in international arbitration. The

00:42:02

US Department of Justice Bureau

00:42:05

of Justice statistics keeps a

00:42:07

record of what goes on

00:42:08

in US federal courts the

00:42:11

difference between the mean and

00:42:17

the media in contract damages

00:42:21

in US federal courts is

00:42:25

more than 11 times huge



00:42:29

difference. There are some cases

00:42:31

that produce very large damages

00:42:34

Awards just as there are

00:42:36

some cases the prettiest multibillion-dollar

00:42:37

Awards investor-state dispute. What is

00:42:42

the median? Nothing mean not

00:42:45

the average with the median

00:42:47

where you come out is

00:42:50

much much smaller. And that's

00:42:53

a point that many Studies

00:42:56

have drawn to our attention

00:42:57

looking at the 40% average

00:43:00

is very valuable, but it



00:43:03
doesn't distinguish how to deal

00:43:05
with the outliers outliers on

00:43:07
both sides because I waive

00:43:10
example, you have the rosin

00:43:12
best decision from a number

00:43:13
of years ago a case

00:43:15
where the tribunal held that

00:43:17
Russia had engaged in unlawful

00:43:19
expropriation and nevertheless granted something

00:43:23
like four million dollars in

00:43:24
Damages and ordered the claimants

00:43:27
to Bear their own that

00:43:28
legal fees. So the net



00:43:30

result was a loss to

00:43:31

the point. Now that may

00:43:34

have been a correct legal

00:43:35

decision personally. I think it

00:43:36

was but the point I'm

00:43:38

making is you have big

00:43:40

numbers way over on the

00:43:42

right side you have big

00:43:43

numbers. 0 numbers are close

00:43:45

to it way over on

00:43:47

the left side. You're trying

00:43:48

to judge what's really going

00:43:50

on in particularly investor-state arbitration.



00:43:53

You have to look not

00:43:56

just at the beginning but

00:43:57

also the media to get

00:43:58

an honest analysis of what's

00:44:00

going on. Now, what would

00:44:01

I do? I'm very idiosyncratic

00:44:04

the end but I do

00:44:06

like tiago's idea and I

00:44:08

have used it in a

00:44:09

number of cases. We think

00:44:12

about bifurcation somehow jurisdiction and

00:44:16

mirax when those are done

00:44:17

then we turn to a



00:44:19

Quantum sex. That's a little

00:44:21

too simplistic. You can certainly

00:44:23

include in the first phase

00:44:26

a number of issues that

00:44:29

are quantum oriented but don't

00:44:31

require running the numbers quite

00:44:34

so much. The first one

00:44:36

is the point of Thiago

00:44:37

already made. What is the

00:44:39

underlying legal principle of compensation?

00:44:44

Three choices Realty in most

00:44:46

cases. You have the principle

00:44:49

of putting the injured party



00:44:50

in the position. They would

00:44:52

have been in if the

00:44:54

transaction had continued and the

00:44:56

unlawful conduct already concluded by

00:44:59

this because of Mara the

00:45:01

unlawful contact had not occur.

00:45:02

That's the choice of principle

00:45:04

and it's also principle you

00:45:06

find an English law and

00:45:08

in most US legal jurisdiction

00:45:10

and many other countries throughout

00:45:11

the world in the position.

00:45:16

They would have been in



00:45:17

if the transaction had never

00:45:20

occurred. That's the net invested

00:45:24

Capital. No problem, or you

00:45:26

give him back the money

00:45:27

that they invested - Howard

00:45:31

whatever they got by way

00:45:32

of dividends up to the

00:45:33

awards and you give him

00:45:34

an interest some from that

00:45:36

day forward to the award

00:45:38

day. The third principle which

00:45:40

could be applied to both

00:45:41

of those ideas is unjust



00:45:44
enrichment either the claimant might

00:45:46
be unjustly enriched by one

00:45:48
of those formulas or the

00:45:49
respondent might be unjustly enriched

00:45:52
by one of those formulas

00:45:53
and you have seen investor-state

00:45:55
cases their public using that

00:45:58
kind of principal driver alter

00:46:00
the valuation date or alter

00:46:02
the foreign currency exchange rate

00:46:04
indeed. Sometimes you see that

00:46:08
International courts, the Golden State's

00:46:11
decision of the House of



00:46:12

Lords in England or the

00:46:14

Sinclair refinery in case of

00:46:16

the US Supreme Court in

00:46:17

the United States are examples

00:46:19

of applying an unjust enrichment

00:46:21

principle to alter the sum

00:46:24

that otherwise would have been

00:46:26

awarded in both of those

00:46:27

cases to reduce. It would

00:46:30

have been other cases to

00:46:32

increase the amount so that

00:46:34

the respondent doesn't benefit from

00:46:36

their unlawful contact. So that's



00:46:39

the first and most important

00:46:40

thing. You can decide in

00:46:42

Phase 1 second thing you

00:46:44

can decide to valuation date

00:46:46

that has a huge consequence

00:46:48

and there's no reason you

00:46:49

can't decide it in phase

00:46:51

one. Third is ex-ante versus

00:46:54

Exposed and has a huge

00:46:57

impact on valuation. Once again,

00:47:00

you can decide they're at

00:47:01

the end of the first

00:47:04

Worthpoint does the reasonable certainty



00:47:07

test that we talked about

00:47:08

apply to both the facts

00:47:12

of damage and to the

00:47:14

Quantum of damage or does

00:47:16

it only apply to the

00:47:18

facts of damage most of

00:47:21

the international law Awards apply

00:47:24

it to both steps in

00:47:26

National courts. There are a

00:47:28

number of cases that applied

00:47:29

only to the first step

00:47:31

the fact of damage the

00:47:33

argument there is whether or



00:47:35

not you impose the uncertainty

00:47:38

on the claimant because it's

00:47:40

appointments burden to prove or

00:47:42

you impose it on the

00:47:43

party who created the uncertainty

00:47:45

through their unlawful conduct and

00:47:48

you find cases on both

00:47:49

sides. The reliability of the

00:47:54

cash flows is part of

00:47:55

whether or not you. Reasonable

00:47:57

certainty or speculation. There are

00:48:00

other issues causation foreseeability Mitigation

00:48:05

Of damages the applicable discount



00:48:07

rate how you take account

00:48:10

of country and political risk

00:48:11

the inflation rate whether or

00:48:14

not there's a terminal value

00:48:16

and if so how you

00:48:19

deal with the growth rate

00:48:20

inside that terminal value and

00:48:22

inside the basic TCF calculation.

00:48:26

principles of prewar and postwar

00:48:28

interest simple compound commencement date

00:48:35

choice of currency for compensation

00:48:37

interest or exchange rate should

00:48:41

there be scenarios or not?



00:48:42

And if they do, please

00:48:44

not on a 654 million

00:48:46

of them remaining disputed material

00:48:51

damages issues exist and get

00:48:54

a checklist of them. And

00:48:57

then you want to instruct

00:48:58

the experts to give you

00:49:00

new reports. If you are

00:49:03

trying to control costs, but

00:49:05

I know this is a

00:49:06

point for Melissa. You don't

00:49:08

want Phase 2 in this

00:49:10

approach to be a full



00:49:12
hearing with new factual evidence

00:49:15
new Witnesses new Council submissions.

00:49:20
You want to control them

00:49:21
so you can and I

00:49:23
have instructed the experts to

00:49:25
use the existing record. No

00:49:28
new facts no new Witnesses,

00:49:30
but I've been reports based

00:49:32
on what was decided in

00:49:34
Phase 1 including all of

00:49:36
quantum steps and invite Council

00:49:39
to offer their views on

00:49:40
that in written submissions that's



00:49:43

less expensive than a full

00:49:44

Phase 2. It's still expensive.

00:49:47

And that's how I would

00:49:49

manage it and sometimes it's

00:49:50

a complete failure. And if

00:49:55

I may I can't help

00:49:56

myself. I actually like a

00:49:59

lot of what you're saying

00:50:01

mark from the council perspective

00:50:03

flattery will get you everywhere

00:50:04

most have to explain to

00:50:11

my clients how long the

00:50:13

arbitration is going to last



00:50:14

as I'm sure everyone knows

00:50:18

arbitrations are lasting longer and

00:50:20

longer particularly investor-state arbitration. I

00:50:22

have one that's going on

00:50:24

10 years so clients but

00:50:29

expediency and they want to

00:50:32

control class that's you already

00:50:33

mentioned. I think there are

00:50:37

a couple of things that

00:50:37

I would add to your

00:50:38

list. I almost think there

00:50:41

has to be a liability

00:50:43

finding in your face one.



00:50:45

And the reason is because

00:50:46

it's claimant has raised multiple

00:50:49

violations of the treaty. And

00:50:52

particularly when you throw in

00:50:54

the causation defense that's very

00:50:56

very popular among respondents right

00:50:58

now you end up with

00:51:00

the situation if the tribunal

00:51:02

finds liability on anything less

00:51:05

than all of the claims

00:51:06

raised. You have a a

00:51:08

very common argument Now by

00:51:11

respondents States and it is



00:51:12

not without Merit that we

00:51:15

didn't get to put forward

00:51:16

a case on Quantum and

00:51:18

causation with respect to the

00:51:19

breaches as opposed to the

00:51:22

cumulative data breaches alleged and

00:51:25

it gets even more complicated

00:51:26

when you consider that all

00:51:28

of those liability findings are

00:51:29

based on specific factual by

00:51:31

me, you know, one of

00:51:32

those 654 million / stations

00:51:35

that are out there. And



00:51:37

so unless there is only

00:51:40

one claimed violation of the

00:51:43

treaty in other words. There's

00:51:44

only one claim a lesbian

00:51:46

expropriation r a p t

00:51:47

whatever I think he gets

00:51:49

very hard. To do an

00:51:52

efficient second round of quantum

00:51:55

analysis without knowing what the

00:51:57

liability findings are. Everything I

00:52:00

say is that if we're

00:52:01

going to do this and

00:52:02

I do think it's a



00:52:02

good idea. We have to

00:52:04

revise how we do these

00:52:05

cases from the outset because

00:52:07

as all of you who

00:52:09

are Council no Quantum experts

00:52:11

don't come cheap, especially the

00:52:13

good ones and it's a

00:52:15

huge part of the cost

00:52:17

that my clients and all

00:52:20

clients are putting up and

00:52:22

your first comprehensive Quantum expert

00:52:25

report is going in with

00:52:26

your Memorial. So I think



00:52:29

we need to you need

00:52:30

to know what the outside

00:52:31

of the case what the

00:52:32

tribunal has expectations are for

00:52:34

the reports that are going

00:52:35

to follow I do agree

00:52:37

with you on all of

00:52:38

those points Melissa. The only

00:52:40

comment I would make in

00:52:42

that regard is if you

00:52:43

only have a phase one

00:52:45

everything installed base one, you

00:52:47

have all of those problems



00:52:48
about causation and multiple claims

00:52:50
and no means that all

00:52:52
of slicing and dicing among

00:52:54
them. So that problem is

00:52:56
inherent in a multiple claim

00:52:58
issue. It doesn't get worse

00:53:00
by virtue of having a

00:53:02
face to think I I

00:53:05
want to go into some

00:53:06
of the methodologies beneath how

00:53:08
we going to find out

00:53:09
if I think just the

00:53:11
all different. Excuse and well



00:53:14

go trying different things trying

00:53:16

to dress some of these

00:53:16

issues that they are just

00:53:17

happening. I'm going to stop

00:53:20

by think this to the

00:53:21

right hand side. I think

00:53:22

you've got the stuff back

00:53:23

to you to the biggest

00:53:25

criticisms of the arbitration process

00:53:26

time and cost and to

00:53:30

remain and continue being attractive

00:53:32

for them to dispute resolution

00:53:33

or these issues need to



00:53:35

be addressed with the points

00:53:36

of ma and others raised

00:53:38

need to be addressed within

00:53:39

the consideration of making is

00:53:41

unappealing dispute resolution. How many

00:53:47

more would like the same

00:53:48

methodology? What are the points

00:53:58

I made at the sub

00:53:58

was the authority between the

00:54:01

claimants who primarily most frequently

00:54:04

used the income approach \$25

00:54:07

Jets and respondents to use

00:54:11

unless so and use something



00:54:13

called stole the cost approach

00:54:14

often. I went to work

00:54:18

off some of the factors

00:54:19

that the dry bouncing back

00:54:21

to me down. So you

00:54:22

a whole list of instructions

00:54:25

assumptions uncertainty. quickly now was

00:54:37

Think about yourself and while

00:54:39

we are here in Washington

00:54:41

and thinking about in particular

00:54:43

say expectation cases of new

00:54:49

startup businesses that have limited

00:54:51

financial data available limited operational



00:54:56
date available times or the

00:55:03
fight to the mall has

00:55:05
listed out that the crate

00:55:06
and send it to you

00:55:06
today. With the feedback. We

00:55:09
saw them by being all

00:55:10
those top three reasons for

00:55:11
rejecting the claimants primary is

00:55:17
speculation. Uncertainty Etc. Why do

00:55:22
not leave you as a

00:55:23
claimant to the startup investor?

00:55:26
Are you almost are we

00:55:28
leaving to Willie by D



00:55:29

Foods deep issues. I'm interested.

00:55:35

I guess the song from

00:55:36

Ninjago your views are not.

00:55:41

I'm certain I was astounded

00:55:46

by the criticisms unsubstantiated lack

00:55:49

of evidence speculative me in

00:55:53

terms of that the wide-ranging

00:55:55

and values but also the

00:55:57

deference to to the cost

00:55:59

approach which I've also seen

00:56:01

references restitution damages because you're

00:56:04

giving them something to put

00:56:06

them in the shoes that



00:56:07

they would be at. They

00:56:08

not Endeavour done on the

00:56:09

on the Venture but the

00:56:11

challenges with those circumstances when

00:56:13

you have a business that

00:56:16

has not operated is is

00:56:17

a heavier lift. It's not

00:56:20

an impossible one, but it's

00:56:21

not going to get you

00:56:22

over the Finish Line unless

00:56:23

you have the substantial evidence

00:56:25

to make the case. So

00:56:27

first understand the unique pattern



00:56:30

understand a company's historical experience

00:56:33

directly in the end of

00:56:35

project or otherwise industry-specific

00:56:38

considerations degree. Complications and risks,

00:56:43

you know, I sort of

00:56:44

Envision a very carefully coming

00:56:47

back and recreating the bus

00:56:49

whole world of down to

00:56:51

the competitive Dynamics and a

00:56:54

supply curve in my head.

00:56:57

Sorry the geek Economist of

00:56:58

how the positioning of this

00:57:00

competitor would have fit. Can



00:57:02

you make a case that

00:57:03

they they would have in

00:57:06

a demonstration been been able

00:57:08

to be able to compete

00:57:10

in and do so to

00:57:11

show that they have it

00:57:13

is that our trailer needs

00:57:14

to take, you know, you

00:57:16

can do if I'm Different

00:57:17

approaches the damages along with

00:57:19

supplemental income do need to

00:57:20

come in a market market

00:57:22

approach. If you're doing it



00:57:23

on an apples-to-apples like-for-like basis,

00:57:26

you know really my view

00:57:29

is more support for input.

00:57:30

So your inputs have to

00:57:32

be steady. They have to

00:57:34

be showing additional support amongst

00:57:37

and not not picking as

00:57:38

I said The Wider range

00:57:40

of input Market prices Dynamics

00:57:44

not picking an outlier, but

00:57:45

trying to show a consensus

00:57:47

than and the stability of

00:57:49

of your of your input



00:57:51

assumptions your key ones tomorrow

00:57:53

be able to show that

00:57:55

yeah, it's in may be

00:57:57

off by 10% or so,

00:57:59

but there's additional reaffirming normal

00:58:02

course of business information. I

00:58:04

like to understand non-litigation documents

00:58:07

documents anything from Discovery that

00:58:09

shows something is not tainted

00:58:11

for litigation to support. So

00:58:13

those those are my suggestions

00:58:15

best practices help moving to

00:58:18

more reasonable certainty so that



00:58:20

so that you don't have

00:58:22

a long list of unsubstantiated

00:58:23

lack of evidence and I'm

00:58:24

convinced that should filter out

00:58:27

the project that really are

00:58:30

are more reliable and and

00:58:33

those that aren't too and

00:58:34

I should have said that,

00:58:35

you know contracts and not

00:58:38

not as susceptible to markets

00:58:40

those those Agreements are more

00:58:43

helpful from less risk perspective,

00:58:45

but greater demonstration greater supporting



00:58:49

evidence to make the case

00:58:51

to to move to a

00:58:53

demonstration of income or income

00:58:55

/ market value protein support.

00:59:01

So just a couple of

00:59:03

this joint thoughts but I

00:59:06

was inside your is the

00:59:09

need to work each expert

00:59:12

to enhance his or her

00:59:13

own credibility before the tribunal

00:59:16

by doing a few things

00:59:17

first, even before filing an

00:59:20

expert report. It is important



00:59:21

that the expert push back

00:59:24

on their own representing council's

00:59:27

opinions. And I find that

00:59:30

it's almost like a professional

00:59:32

responsibility to avoid a lot

00:59:34

of heartbreak on the road.

00:59:36

So it's important that experts

00:59:39

push back and say this

00:59:41

is likely going to fail

00:59:42

instead of saying sure I'll

00:59:44

do anything to increase this

00:59:46

to be two and a

00:59:47

half times more than the



00:59:48

tribunal Belk Bill Awards. And

00:59:51

so what or are 0%

00:59:53

of what the one thing

00:59:58

that is important to do

00:59:59

and In consonance with what

01:00:02

Julie just said is good

01:00:06

knowledge of the industry is

01:00:07

really important because often there

01:00:10

will be forecasts that are

01:00:11

still that are not of

01:00:14

what thing is being exactly

01:00:15

valid here. So good knowledge

01:00:18

of the industry competitive Dynamics



01:00:20

and so on is essential

01:00:21

to words for casting and

01:00:24

that's that's like 101 on

01:00:26

valuation. It's but I keep

01:00:28

shaved at the start of

01:00:29

every course. I'm going to

01:00:30

wish so it's important that

01:00:32

the experts support adequately the

01:00:36

forecast for the income approach

01:00:38

with documents that are not

01:00:41

prepared for the dispute that

01:00:43

are out in the public

01:00:44

domain and support their appearance.



01:00:47

And related to that I'm

01:00:50

always almost professional it is

01:00:52

a point is when I

01:00:53

see extra reports that have

01:00:56

here's my methods and all

01:00:58

other methods are wrong. So

01:01:00

I'll just use the income

01:01:01

approach. There's nothing that is

01:01:03

even remotely comparable to this.

01:01:05

So you're here in my

01:01:07

forecast was just use them

01:01:09

and Tribune. Hope you will

01:01:10

agree and that that is



01:01:11

almost always doomed to failure.

01:01:13

It's mostly the the claimants

01:01:22

used this year for income

01:01:23

approach, but it's really like

01:01:25

both sides using it and

01:01:26

crossing their fingers and saying

01:01:28

my forecast for the work

01:01:29

and my discount rate will

01:01:31

work. Even when there is

01:01:34

cross-checking I've seen examples even

01:01:38

in recent years or someone

01:01:39

says here's my income approach

01:01:41

and here's the market multiples



01:01:44
and they're all different because

01:01:47
different growth so so don't

01:01:50
multiples are different because I

01:01:51
have higher all over the

01:01:52
road. So that's almost like

01:01:53
I'm assuming my conclusion, right?

01:01:56
So if you have his

01:01:57
right ye are most clothes

01:01:58
are not compatible because I

01:02:00
have to come girls. So

01:02:01
what I mean by this

01:02:03
is even when you are

01:02:04
in in like evaluate your



01:02:07

issue shares of a company

01:02:09

you want to do a

01:02:10

night and m&a transaction. No

01:02:12

Bankers going to say this

01:02:14

valuation that it's the one

01:02:15

we going to use with

01:02:16

this one better. You have

01:02:17

to cross-check or triangulate like

01:02:20

the same things. I guess

01:02:25

that's what he may or

01:02:28

may not too. If I

01:02:29

didn't pay back up, just

01:02:31

calculations are speculative unsupported unjustified



01:02:34
except in formal formally is

01:02:39
an income a page out

01:02:40
of the window in this

01:02:41
world. Let me offer you

01:02:45
not my Approach, but the

01:02:48
approach of the fasil damages

01:02:51
task force. Most of you

01:02:53
may be familiar with that

01:02:55
task force. But if you're

01:02:57
not familiar with it, I

01:02:58
really commend you go to

01:03:00
the web pull up their

01:03:01
damages in the NFL arbitration



01:03:03

tool and extraordinary really valuable

01:03:06

tool particularly. If you are

01:03:10

seeking to understand either procedure.

01:03:15

Legal or Quantum for common

01:03:18

law civil law or International

01:03:20

and it goes through all

01:03:21

of them for you in

01:03:23

a form that frankly makes

01:03:25

any book on that has

01:03:26

written the irrelevant much more

01:03:27

use. Let me tell you

01:03:29

what they have to say

01:03:31

on this point from an



01:03:34
economic standpoint the reliability of

01:03:36
a DCF for other income-based

01:03:38
nothing to valuation hinges on

01:03:41
whether sufficient information exists to

01:03:44
develop reliable expected cash flow

01:03:47
projections and history may or

01:03:49
may not be used in

01:03:51
this forecasting exercise. It would

01:03:54
therefore be incorrect from an

01:03:56
economic point of view to

01:03:58
reject a DCF valuation or

01:04:00
other income-based method evaluation, simply

01:04:04
because of a lack of



01:04:05
historical information rather the issue

01:04:08
should be whether there is

01:04:09
sufficient reliable information on which

01:04:13
to base the expected cash

01:04:14
flow. Directions of which historical

01:04:17
performance is just one factor.

01:04:20
I think the reason why

01:04:25
I talk to you for

01:04:26
the task force is because

01:04:29
it is a validation of

01:04:31
that point from a set

01:04:33
of 20 or so. Mostly

01:04:35
well respected experts. I was



01:04:37
on the task force is

01:04:38
not entirely off well-respected, but

01:04:41
it validates the point they're

01:04:44
making and it was a

01:04:45
collection of people who represent

01:04:47
the investors who represents States

01:04:50
represent institutions were Scholars or

01:04:54
arbitrators. It's not just one

01:04:57
side offering a partisan opinion.

01:05:00
Let me give you two

01:05:02
examples of when it might

01:05:06
be appropriate to use a

01:05:07
DC or a startup which



01:05:10
is obviously the most controversial

01:05:11
of these questions. Decades ago

01:05:15
when I was a project

01:05:17
Finance lawyer, I routinely represented

01:05:21
clients usually lenders in a

01:05:23
kind of project financing. We're

01:05:26
at the time of financial

01:05:29
close before material construction out

01:05:33
of cards. Let alone the

01:05:35
power plant was operating years

01:05:37
later. We had a turnkey

01:05:39
Construction contract in place in

01:05:41
which the contractor supported by



01:05:44
performance bond from other parties

01:05:47
had committed to build something

01:05:49
on a fixed price within

01:05:52
a fixed period of time

01:05:53
and they were credible credit-worthy

01:05:56
an expert. We had an

01:05:58
off taker who agreed to

01:06:00
provide revenue on a take-or-pay

01:06:03
basis and that off taker

01:06:06
was either credit-worthy itself or

01:06:10
guaranteed by the host state.

01:06:13
We had lenders who had

01:06:15
committed. For the entire lending



01:06:18

amount required we have Equity

01:06:21

investors who had committed for

01:06:23

the entire amount required and

01:06:26

we have an operating contract

01:06:28

with an experienced operator to

01:06:31

operate the thing. Once the

01:06:33

power plant had passed performance

01:06:36

tests that were pre-agreed and

01:06:38

consistent with the technology that

01:06:40

existed the circumstance like that.

01:06:44

You can use a DCF

01:06:47

to calculate on day one

01:06:49

before you dig in the



01:06:50

dirt at all because you

01:06:52

basically allocated construction risk operating

01:06:55

risks financing risk political risk

01:06:58

permitting risk. It's all allocated

01:07:01

contractual. Does that mean that

01:07:04

you got a guarantee it'll

01:07:05

work of course not all

01:07:07

of project financing as I

01:07:08

did in the 1980s, they

01:07:10

disintegrated. So no, we didn't

01:07:15

reach completion on all of

01:07:16

that. But could we have

01:07:18

calculated if there was a



01:07:21

breach of contract in those

01:07:23

cases where someone had repudiated

01:07:25

their contractual obligation? Could we

01:07:28

have calculated on a VCF

01:07:29

basis the damage to the

01:07:32

company? Yes, we could have.

01:07:34

Second example is very common

01:07:36

even now. Resource transactions like

01:07:40

the dreaded oil project if

01:07:44

you've got confirmed resources proven

01:07:47

resources. If you have skilled

01:07:51

development company if you have

01:07:55

off-takers agreed or a deep



01:07:59

liquid market so you can

01:08:01

determine pricing for the oil

01:08:03

and you have transportation from

01:08:07

the site of the oil

01:08:09

to a market. You're left

01:08:11

with price volatility, which is

01:08:14

a very serious issue in

01:08:16

natural resources contract but is

01:08:19

a serious issue regardless of

01:08:21

whether it's a startup or

01:08:23

a company that's been operating

01:08:25

for several years. You can

01:08:27

form of you and indeed



01:08:29

Washington arbitration. We have an

01:08:31

entire program on it moderated

01:08:33

by Jose Antonio earlier this

01:08:35

week about how to deal

01:08:37

with price fluctuations. You can

01:08:39

use the UCF obviously their

01:08:42

risks involved. But it's the

01:08:45

same risk, whether it's a

01:08:47

project has been operating for

01:08:48

several years or project that

01:08:50

hasn't even really drilled yet.

01:08:51

Those are two examples where

01:08:54

a startup is still capable



01:08:56

of being valued on an

01:08:58

income valuation approach. One thing

01:09:02

you said that history may

01:09:05

or may not be relevant

01:09:08

dates of the documentation. It's

01:09:15

available contact me when its

01:09:20

operation was looking to get

01:09:21

off the ground. I guess

01:09:22

it's better to go to

01:09:38

my liability of that type

01:09:39

of thing to help with

01:09:40

this situation as well. I

01:09:44

absolutely think there's a role



01:09:46
for the experts to play

01:09:48
there, you know. in my

01:09:52
experience, I suspect Mark will

01:09:54
agree with this tribunal 10

01:09:56
to Discount somewhat fact witness

01:10:01
testimony if it is not

01:10:03
supported by contemporaneous document. So

01:10:06
I think the contemporaneous documents

01:10:08
end up being the key

01:10:10
piece and then You always

01:10:15
have questions about what somebody

01:10:18
meant when they said ex

01:10:19
right when you look at



01:10:20
the contemporaneous documents. And of

01:10:23
course you're going to have

01:10:24
usually competing Witnesses on each

01:10:26
side. They are of course

01:10:28
going to have different conclusions

01:10:30
about what X-Men in the

01:10:32
document at the time it

01:10:33
was written and so I

01:10:34
think the experts and in

01:10:38
particular industry experts can play

01:10:41
a valuable role in helping

01:10:44
a tribunal to understand the

01:10:46
contemporaneous record in a way



01:10:49
that perhaps Fact witness is

01:10:52
either can't or simply are

01:10:54
not going to be as

01:10:56
persuasive to a tribunal because

01:10:58
let's face it in arbitration.

01:11:00
We don't have the power

01:11:01
to compel witness testimony. And

01:11:03
so even Witnesses who are

01:11:05
not financially interested usually have

01:11:08
some type of interest in

01:11:10
the dispute. And so to

01:11:12
me if you if you

01:11:14
have an expert who can



01:11:16

come in and give their

01:11:17

objective view based on industry

01:11:20

standards or the the macroeconomic

01:11:23

climate at the time to

01:11:25

help interpret that factual record.

01:11:27

I think that would go

01:11:28

a long way. I'm going

01:11:32

to stop at that there's

01:11:34

a lot of cool will

01:11:42

do Mondays. Yes, and when

01:11:44

he called simulations and they

01:11:46

said the calculations of Time

01:11:49

by Justin the final couple



01:11:57
of minutes. I think this

01:12:05
one question just the pack

01:12:07
time for one or two

01:12:08
quick questions. There was a

01:12:10
microphone just coming to you.

01:12:21
Hello, I'm lawyer Mike Maria.

01:12:23
I'm I want to thank

01:12:25
you for this session and

01:12:27
I want to ask which

01:12:29
is the limit one way.

01:12:30
I can put in discussion

01:12:34
speculative approach. So I said

01:12:39
just make sure. What's the



01:12:40

limit? When we can stop

01:12:50

at the party and her

01:12:52

in a speculative approach. Thank

01:13:03

you myself. I will say

01:13:14

that I think it's the

01:13:16

tribunal and that is why

01:13:19

in almost every case. You

01:13:21

have a claimant advancing and

01:13:23

DCF and arguing that it

01:13:25

isn't as well supported and

01:13:27

not speculative and you have

01:13:29

responded either not advancing its

01:13:34

own valuation, but criticizing the



01:13:36

DCF on the basis of

01:13:37

being speculative an unsupported or

01:13:40

favoring is some cost approach

01:13:42

on on the ground that

01:13:44

it is the only approach

01:13:45

that isn't speculative and I

01:13:47

think every tribunal I've seen

01:13:49

in recent memory has had

01:13:51

to decide on that issue

01:13:52

where that line is. I

01:13:55

think absolutely depends on the

01:13:57

the three arbitrator sitting on

01:13:59

your panel. I think if



01:14:00

it was clear an established

01:14:02

where that line is we

01:14:03

wouldn't have that fight in

01:14:04

every case, but perhaps my

01:14:06

colleagues have a different View

01:14:11

How many different assumptions and

01:14:18

invitations will be one specific

01:14:24

minimum line? You have to

01:14:27

go to a dance of

01:14:36

the speculative or not speculative

01:14:38

nature of Damages when they

01:14:40

were presented with a Monte

01:14:42

Carlo analysis and you see



01:14:47
how what percentage of them

01:14:49
lie. Below zero so that

01:14:53
can give him an indication.

01:14:55
Of course fit in all

01:14:56
the boundaries of what cycle

01:14:58
session argument or celebration date.

01:15:00
And what's the probability that

01:15:02
there is damage and then

01:15:04
whether that line is at

01:15:05
50% or not. It's it's

01:15:07
a question. That doesn't really

01:15:09
pertain to choose a mattress

01:15:11
experts. You have to bring



01:15:13

in the I would like

01:15:15

to the Bisons open up.

01:15:16

I think we all pretty

01:15:18

much that with time now

01:15:20

for today. So I think

01:15:23

we maybe have one more

01:15:24

question before asking the question.

01:15:29

I would really like to

01:15:30

to thank crawling morning for

01:15:33

hosting us today for hosting

01:15:35

a Washington arbitration week. It

01:15:37

has been Splendid in terms

01:15:39

of communication everything worked. So



01:15:43

thank you crawling morning and

01:15:45

also for all the support

01:15:46

that the question really goes

01:15:48

to everyone but the starting

01:15:50

with With with Mark II

01:15:52

I listen as truthful as

01:15:57

I could to your example

01:15:58

of of of addressing every

01:16:01

risk possible in in your

01:16:04

startup analysis and and or

01:16:08

in your startup question and

01:16:11

and and yet how how

01:16:15

comfortable would would the damages



01:16:19
experts feel if you have

01:16:21
a start-up no just like

01:16:23
really start up. Let's say

01:16:24
six months you have assessed

01:16:28
every risk possible off of

01:16:31
used to using at this

01:16:32
year. And this is a

01:16:35
world where we could be.

01:16:38
Tomorrow a financial crisis Could

01:16:41
Happen anytime. Yes banking. Banking

01:16:51
crisis could happen any time

01:16:52
and I understand the old

01:16:56
risk. Management issue. I understand



01:17:01
that everything would be serve

01:17:02
bulletproof, but By the same

01:17:05
time I feel that some

01:17:06
some tribunal members might be

01:17:10
very uncomfortable saying well, this

01:17:12
is a start-up. I will

01:17:13
we're going to use addition.

01:17:14
Of course. There are examples

01:17:16
on we have remaining examples

01:17:18
in each case against Venezuela

01:17:20
where where there wasn't an

01:17:24
ounce of gold pulled out

01:17:25
of the earth Etc. But



01:17:27
but a DCF was was

01:17:29
was successful. So that that's

01:17:30
that's my first question. The

01:17:32
other one is to everyone.

01:17:33
How would you are are

01:17:37
we getting into a world

01:17:38
and perhaps that is the

01:17:39
case work? damages expert report

01:17:43
my b Slimmer at the

01:17:47
beginning of the proceedings and

01:17:48
hopefully and then and then

01:17:50
after the Library part, they

01:17:55
they the real game really



01:17:57

starts in terms of input

01:18:00

for the tribunal to decide

01:18:01

I would like to hear

01:18:04

your thoughts because this is

01:18:06

perhaps the second or third

01:18:07

panel work where that trend

01:18:09

is being put on the

01:18:11

floor. So thank you same

01:18:15

as the child would be

01:18:20

just given time if you

01:18:22

happy Melissa and tell her

01:18:23

you want to share your

01:18:25

views from an additional question



01:18:26

one, and I'm Julie. I'm

01:18:28

out. Do you want to

01:18:29

share your views on question

01:18:30

2? Duggar don't don't start.

01:18:39

Yeah, so as I recall

01:18:42

question one was or trade

01:18:46

you most likely to have

01:18:47

concern about awarding the DC

01:18:50

FIU a Shinto a startup

01:18:53

in your example with six

01:18:55

months. Look, I think absolutely

01:18:58

yes, which is why if

01:19:01

I were in that situation



01:19:01

and I was claiming the

01:19:03

council. I would never run

01:19:04

a DCF alone would have

01:19:07

alternative methodologies to fall back

01:19:11

on. I personally think that

01:19:14

the best alternative, you know,

01:19:17

they're there are angry with

01:19:18

Mark there are situations where

01:19:21

tribunals have found that a

01:19:25

DCF is appropriate a particularly.

01:19:28

I think the one that

01:19:29

comes up the most us

01:19:30

marks that is the situation



01:19:31

where you have a mining

01:19:33

asset. It's not an exploration

01:19:36

property. It has is a

01:19:38

production ask that there are

01:19:40

proven resources. So perhaps not

01:19:43

with respect to this particular

01:19:45

investment, but there are there

01:19:47

are his stairs historical data,

01:19:49

you know, there's value in

01:19:51

the ground. It's a much

01:19:53

shorter thing, but I think

01:19:54

even in that scenario. Yes,

01:19:57

there are tribunal-2 with have



01:19:59
absolute heartburn of awarding a

01:20:02
DCF in that situation. And

01:20:03
and the one that I

01:20:04
think is putting on the

01:20:06
claimants counsel hat which is

01:20:08
the hat I wear most

01:20:09
of the time. I personally

01:20:11
like the sun cost plus

01:20:13
plus lots of opportunity as

01:20:16
the alternative to DCF in

01:20:17
that case. You're still using

01:20:20
that DCS in the loss

01:20:22
of opportunity evaluation and then



01:20:24

giving the tribunal the discretion

01:20:26

to take a percentage of

01:20:27

that as the loss of

01:20:28

opportunity tribunals have very wide

01:20:31

discretion when it comes to

01:20:32

a loss of opportunity valuation

01:20:34

at least that gets to

01:20:37

a point where you are

01:20:38

recognizing the potential value of

01:20:42

of a startup that goes

01:20:44

beyond just sunk cost. I

01:20:46

also think it acts as

01:20:48

a disincentive, you know, if



01:20:49

we stay if your business

01:20:51

hasn't Operating for three years

01:20:53

and it's expropriated. You can

01:20:55

never get a DCF violation

01:20:57

or effectively incentivizes dates to

01:21:00

appropriate expropriate early on and

01:21:03

I don't necessarily think that

01:21:04

is the incentives we want

01:21:07

to be creating. So that's

01:21:09

my two cents. Small thing

01:21:18

is to answer. Your question

01:21:20

was Anthony I encourage people

01:21:21

to look at the award



01:21:22

in Reykjavik focused on mine.

01:21:28

Stephen copper versus Pakistan that

01:21:31

has an interesting analysis of

01:21:34

a large mining operation that

01:21:35

hadn't really started and where

01:21:38

there were studies that as

01:21:42

detailed analysis of every possible

01:21:43

risk and what the tribunal

01:21:45

decided in the end that

01:21:46

respect is illustrative or for

01:21:48

other situations. I'm more into

01:21:51

news, but Mark was saying

01:21:52

regarding the risks being accounted



01:21:55
for the 6 price insulin.

01:21:59
Mach I saw you think

01:22:01
I have Ivan talking about.

01:22:01
No, actually, I'm sorry going

01:22:03
to let you answer the

01:22:04
question is all apologies. It

01:22:13
was I think about it

01:22:15
you would have let me

01:22:16
see show of support from

01:22:18
and people like that. Maybe

01:22:22
try and fix it on

01:22:23
some of the issues and

01:22:24
bacon is Old Country. I



01:22:26

guess we try to you

01:22:29

know, a specific issues without

01:22:41

going through more complex places

01:22:43

first to flush out the

01:22:44

issues that need to come

01:22:45

out. There are a limited

01:22:51

number of arbitrations in where

01:22:55

the actual hard crunching of

01:22:59

quantum occurs. Not at the

01:23:02

beginning of the case, but

01:23:04

after a tribunal has resolved

01:23:08

those issues that we talked

01:23:11

about. That's attractive but what



01:23:18

it leaves unresolved is the

01:23:22

Quantum issues that can be

01:23:26

resolved in the first face.

01:23:28

I am that typically requires

01:23:31

an adversarial testing of expert

01:23:35

evidence one example being a

01:23:37

discount rate another example being

01:23:39

political political risk a risk-taking

01:23:42

account though. So I'm not

01:23:44

sure that you can eliminate

01:23:47

the first set of detailed

01:23:52

expert reports. What you can

01:23:55

do though is narrow the



01:23:58

field in a second phase

01:24:01

by making decisions in the

01:24:03

first stop matters that are

01:24:05

integrated into the initial reports.

01:24:09

Sorry, Jose Antonio. But generally

01:24:24

speaking bubbling up all of

01:24:27

the issues happens midstream. I

01:24:30

don't think you look we

01:24:31

are when I went to

01:24:32

thank you. Everyone have a

01:24:35

blessed thing and we could

01:24:43

have been a lot longer

01:24:44

than Q for all of



01:24:45

your inputs today as well.

01:24:53

And thank you Julianne for

01:24:54

properly moderating. And thank you

01:24:54

Julianne for properly moderating. picnic

00:01:56

Good afternoon, everyone. This is

00:01:58

at Washington arbitration week. We

00:02:03

are incredibly excited of having

00:02:07

our fourth day and Is

00:02:13

there any Echo there? Everyone

00:02:17

has their mics off. my

00:02:33

my name is Jose Antonio

00:02:34

Rivas and I am one

00:02:36

of the co-founders of Washington



00:02:38

arbitration week and a partner

00:02:43

at which is a boutique

00:02:45

Law Firm that does both

00:02:48

the investment treaty arbitration International

00:02:51

commercial arbitration and the public

00:02:53

international law here in Washington

00:02:55

DC and in in Bogota

00:02:57

and I also teach at

00:02:59

Georgetown law as an adjunct

00:03:01

faculty and it is with

00:03:04

great pleasure that that we're

00:03:07

having this panel on alternative

00:03:09

approaches to volume down much



00:03:11
as I must say that

00:03:12
that one in in a

00:03:16
past life where I I

00:03:17
was a very much involved

00:03:19
in litigation Finance in one

00:03:22
of the most challenging Parts

00:03:24
when analyzing cases was the

00:03:27
question of of Damages and

00:03:30
and trying to understand and

00:03:35
tractor is the investment the

00:03:37
type of investment that that

00:03:39
had been done and whether

00:03:43
they were operations or not



00:03:44

a Tetra and and and

00:03:47

and the question came to

00:03:50

what type of approach would

00:03:54

wood would be taken eventually

00:03:58

by the damage experts and

00:04:00

and eventually accept it or

00:04:02

Not by the tribunal the

00:04:04

weather would be at this

00:04:05

year. So let's Okay. Yes.

00:04:12

Thank you. So how many

00:04:18

event? Somebody is being needed

00:04:24

urgently. Soak and wet weather

00:04:29

the investment has been he's



00:04:31

a going concern. We're the

00:04:32

investment has been there for

00:04:35

for a number of years

00:04:36

whether it's operational whether it's

00:04:39

simply a permit a piece

00:04:40

of paper that was given

00:04:41

an old those factors are

00:04:43

are are crucial to determine

00:04:45

what what type of of

00:04:46

of Damages valuation approach the

00:04:50

experts my take the tribunal

00:04:53

eventually would what would accept

00:04:54

it is it is fascinating



00:04:57

how to determine characterize the

00:05:01

investment and then eventually share

00:05:04

with with the with clients

00:05:06

and and eventually to do

00:05:08

with the tribunal at why

00:05:10

is is why was Odysseus

00:05:12

analysis were comparable comparable analysis

00:05:15

or Suncoast shows in and

00:05:18

and in this panel that

00:05:20

we actually have the That

00:05:25

they did the tents and

00:05:26

then we're very lucky to

00:05:28

have or being discussing. This



00:05:31

is very very topic with

00:05:35

a study that was produced

00:05:38

by PWC that is called

00:05:42

International arbitration damages study. Here

00:05:46

it is and it was

00:05:47

actually published. Yesterday so this

00:05:51

is right out of the

00:05:52

oven is hot and that's

00:05:54

what we want to do

00:05:55

in Washington arbitration week that

00:05:57

that people who publish damages

00:06:00

analysis or or Publications in

00:06:02

investor-state arbitration or International commercial



00:06:05
arbitration. Bring it here first,

00:06:07
then you can bring it

00:06:08
to the rest of the

00:06:09
world. So we're very happy

00:06:11
to have it. Again. Thank

00:06:12
you for or for bringing

00:06:14
it first here to Washington

00:06:16
arbitration week and now also

00:06:19
with great pleasure. I would

00:06:20
like to introduce you as

00:06:22
moderator. Ian is a partner

00:06:25
of pwc's london-based forensic Services

00:06:29
practice or he is responsible



00:06:31

for leading a range of

00:06:33

valuation litigation dispute an investigation

00:06:36

cases yet holds a degree

00:06:38

in economics from the University

00:06:39

of Duran. He has over

00:06:44

20 years of experience in

00:06:48

corporate finance investigation Financial modeling

00:06:51

report writing and statistical analysis

00:06:54

experiment. He has managed the

00:06:57

production of over 150 expert

00:06:59

reports focus on a range

00:07:01

of issues across multiple Industries

00:07:03

and territories often with a



00:07:06

particular focus on energy oil

00:07:08

and gas and construction including

00:07:11

claims arising out of investment

00:07:14

treaties has been appointed as

00:07:16

expert in on a number

00:07:17

of matters or litigation and

00:07:19

arbitration and given oral evidence

00:07:21

on a number of occasions.

00:07:23

And most recently he has

00:07:26

been testifying in a nice

00:07:29

Easter with radiation. And in

00:07:31

fact is is is also

00:07:32

currently testifying here in DC



00:07:34

and makes it matter that

00:07:38

we were happy to call

00:07:39

him as part of our

00:07:40

International arbitration Washington d.c. Community

00:07:44

and you have the store

00:07:45

and welcome. Thank you. Thank

00:07:51

you. Thank you. Thank you.

00:07:57

I'm glad this week is

00:08:07

the sessions for lunch. So

00:08:10

I'm sorry that got to

00:08:11

come back from lunch outside

00:08:12

section on the East Coast

00:08:16

action news about fantastic panel



00:08:24
today. So let me move

00:08:25
on to introduce our panel

00:08:27
to you starting to my

00:08:30
left immediately next to me

00:08:31
is at Judy cabin. It

00:08:33
was a senior managing director

00:08:34
at Nera economic Consulting experience

00:08:40
providing energy my consultation related

00:08:44
International arbitration on others people

00:08:47
music Jimmy frequently advice expert

00:08:50
evidence of damage is a

00:08:51
relations and friends with Mark

00:08:54
its competition regulations and policies



00:08:57

is a Oktoberfest at Georgetown

00:09:01

University at when she teaches

00:09:03

a course and energy comics.

00:09:08

Next to Judy that we

00:09:10

have multiple accounts on my

00:09:11

nerves as a occupation in

00:09:14

Investments commercial disputes and they

00:09:20

escaped Milbank Tweed Hadley &

00:09:23

McCloy a member of the

00:09:25

board of directors of the

00:09:27

American Arbitration Association of the

00:09:29

DC bar and is a

00:09:33

fellow of the chartered Institute



00:09:35

of arbitrators and buy an

00:09:39

international reputation and international business

00:09:41

transactions as not to Georgetown

00:09:44

University Law Center. Text Mark

00:09:48

Mike left that we will

00:09:49

see you then have to

00:09:50

see a ghost named. Melissa

00:09:52

is a partner at Wednesday

00:09:54

in Washington and 11 in

00:10:12

the late 1990s that you

00:10:23

are a sec commissioner and

00:10:31

a deal of the State

00:10:35

Board of Education at the



00:10:41
University of Maryland and American

00:10:42
University. I'm in finally but

00:10:46
by no means least till

00:10:47
we have chatted with a

00:10:48
silver. It is a vice

00:10:50
president at Charles River Associates

00:10:52
in treaty and Commercial disputes

00:10:56
has been retained as in

00:10:58
over 150 disputes 82 is

00:11:01
Boston College fight song Melissa.

00:11:09
And so you shall go

00:11:10
as well. Looking to say

00:11:21
we have a fantastic panel



00:11:23

here today. It will go

00:11:26

through you on The View

00:11:33

today all of the PWC

00:11:35

down to survey the Beachwood

00:11:37

today. Is a QR code

00:11:46

at the top of the

00:11:48

screen for those that would

00:11:49

like to download to sleep

00:11:51

so you can be the

00:11:51

full study found some hard

00:11:54

copies here old fashioned wife.

00:11:59

Versace back in 2015 and

00:12:02

we wanted to undertake would



00:12:04
analyze publicly-available arbitration Awards to

00:12:07
look specifically at the parties

00:12:09
and damages on the price

00:12:12
of complication. I need water,

00:12:14
just released yesterday and all

00:12:19
of us are coming others

00:12:24
about the mid-1990s and currently

00:12:29
132 December 2022. The average

00:12:36
being just like the \$200

00:12:38
you see 7 South Governors

00:12:42
that have time today to

00:12:46
them that we could easily

00:12:46
have hosted any one of



00:12:49
these regions South Americans surprised

00:12:55
when he comes up when

00:12:56
I can leave it in

00:12:56
knots. What's the New York

00:12:58
Mets recently asked about the

00:12:59
Lord given the Solo arbitrations

00:13:01
in Spain and seawide some

00:13:05
supplies make an oil and

00:13:06
gas utilities are common areas.

00:13:08
We see these Awards coming

00:13:09
out to an expense as

00:13:18
well. If the ward size

00:13:20
would have been interested in



00:13:21

it. As I say any

00:13:22

of these topics topics we

00:13:23

could spend a lot of

00:13:25

time on what is the

00:13:30

name of the survey shows

00:13:31

us about approaches to identifying

00:13:33

damages and international arbitration. With

00:13:37

a lot this week already

00:13:37

about some of the challenges

00:13:39

about with heard about how

00:13:41

does one quantify damaged areas

00:13:43

such as Ukraine situation. That

00:13:51

was why don't we want



00:13:52
to see if it dies

00:13:53
panel was just a slight

00:13:56
leaving look like between next

00:14:01
before I even if it's

00:14:03
a question, but what we

00:14:04
see in the woods about

00:14:05
how hot is inside your

00:14:07
nose are going to find

00:14:07
out with his friends so

00:14:10
we can see what important

00:14:13
events that leave us going

00:14:14
forward. And what more can

00:14:16
we ask this in this



00:14:18
area that help with the

00:14:19
development of the contraction of

00:14:21
damages? The song today is

00:14:27
to cross on the slide.

00:14:28
The one on the left

00:14:29
looks at on average. How

00:14:32
much does a respondent quantify

00:14:34
damages compare the climates what's

00:14:36
going on with your kotel

00:14:37
wholesale 180 Awards 10% to

00:14:44
10% of the amount of

00:14:45
the claimants call Stephen averaged

00:14:50
23, 25 years time of



00:14:54

190 cases. We see the

00:14:55

between by descendants. When's our

00:15:03

alarm set to go off

00:15:04

on the right looks that

00:15:06

wet wet if I can

00:15:07

do stand up in this

00:15:08

position. Let me see you

00:15:09

then. When I reach by

00:15:11

pianos end up awarding around

00:15:13

40% in value their moms

00:15:15

playing by the claimants. So

00:15:20

how do you do the

00:15:22

policies go about doing this



00:15:23
complication of Damages in this

00:15:25
is a slightly busy girl

00:15:26
from Save apologies, but I

00:15:28
spend a minute just shows

00:15:34
the different methodologies used by

00:15:35
claimants to the biggest. The

00:15:39
red bar is the income

00:15:40
approach the station lost all

00:15:45
the pipes. Let me see

00:15:46
that and was two-thirds of

00:15:48
the cases. That's the primary

00:15:49
method for by claiming to

00:15:51
quantify. In contrast, we see



00:15:54
that it was fun to

00:15:56
use a methodological my Sophos

00:15:58
much around one-third of the

00:16:00
case is just one of

00:16:02
them to use the discounted

00:16:03
cash-flow the income approach as

00:16:05
its primary investment costs as

00:16:18
the primary method to buy.

00:16:26
pain in the bottom Bob

00:16:28
tribunal was Maybe unsurprisingly for

00:16:31
Tribune will end up in

00:16:32
the middle grounds of the

00:16:35
case is tribunal except on



00:16:37
a dog's the income approach

00:16:39
people would a big decision

00:16:42
a big basis of awards?

00:16:56
Just very quickly and we

00:16:58
went focus on this too

00:16:59
much today, but just as

00:17:01
interesting to look at the

00:17:02
time. How come you know

00:17:03
supposed to accept? Every time

00:17:07
if an issues can come

00:17:09
to you since we all

00:17:11
the traits in. Kind of

00:17:13
tight some of the approaches



00:17:14

but there's a time about

00:17:17

sending increased acceptance by five

00:17:19

units all think message saying

00:17:22

for 2000 to just 19%

00:17:25

of the damages will we

00:17:31

see that sitting around 50%

00:17:33

at 50% in the most

00:17:34

recent. Somebody tribunals except to

00:17:42

overjet, just pulled in front

00:17:45

of them. When I was

00:17:52

this we did to look

00:17:53

up the common reasons of

00:17:55

the coming of the damages



00:17:58

interpretations put in front of

00:17:59

them was evidence unsubstantiated information

00:18:08

except for my puppy knows

00:18:16

that there is a lack

00:18:17

of evidence underlying assumptions of

00:18:20

these calculations in front of

00:18:29

them. And finally think this

00:18:31

final grow just as well.

00:18:33

That means the population sets

00:18:36

slide. It is never the

00:18:37

point B in the top

00:18:41

three categories be unsubstantiated the

00:18:45

volume of the unconvincing assumptions



00:18:47

lower portion of amateur claims

00:18:53

being wielded dropping to about

00:18:55

30% or 55% Then we

00:19:04

would like to sit down

00:19:05

and discuss as a penile

00:19:07

today and will get back

00:19:08

to you some of those.

00:19:12

I guess I want to

00:19:13

start really with the discussion

00:19:15

today was going back to

00:19:16

the very first one I

00:19:17

put up. Which is this

00:19:20

graph about how play mansionz



00:19:23

on Spotify. I guess it'd

00:19:28

be good to have an

00:19:30

extra phone to be fast

00:19:31

and Council as well. I

00:19:35

guess you can tell him

00:19:35

to you to solve expense

00:19:40

all meant to be. Independence

00:19:42

with the juices of my

00:19:43

being on that page to

00:19:44

quantify damages to use what

00:19:55

I've observed increasingly are examples

00:19:59

of what our fridge was

00:20:00

more stretched expert opinions on



00:20:03

Damages and and I've seen

00:20:04

that on on both sides

00:20:06

of from to high damage

00:20:09

has from a claimant expert

00:20:11

that can be in my

00:20:13

view potentially disconnected or taking

00:20:17

outlier markets at Market viewpoints.

00:20:20

I've also seen to load

00:20:22

damages that posed by respondents

00:20:25

that can be disconnected with

00:20:26

what I'll do is economic

00:20:28

incentives or business practices and

00:20:32

expectations on both sides. If



00:20:36

it does seem consistent with

00:20:38

the viewpoints of the last

00:20:40

time you came up with

00:20:41

with Conceited lack of evidence

00:20:43

of the very large percentage

00:20:46

of that could lead to

00:20:48

a wider wider range and

00:20:51

expert numbers. Now. My observations

00:20:55

are a really into the

00:20:56

shoes of the expert. It's

00:20:57

it's not in regard to

00:20:59

Legal mandates and instructions. If

00:21:04

you will it's more or



00:21:05

less what I'll call the

00:21:06

meat and potatoes of what

00:21:08

an expert is doing to

00:21:10

develop the supporting work for

00:21:12

the analysis. I'm not going

00:21:15

to speculate in terms of

00:21:16

whether or not other experts

00:21:17

are being independent in that

00:21:19

you're contagious or looking at

00:21:24

numbers. When I reflected on

00:21:26

the industry's I work on

00:21:28

which are are dramatically

00:21:30

changing Industries. And I think



00:21:33

about the twenty years. I've

00:21:34

been testifying I do find

00:21:37

a wider range of Market

00:21:40

viewpoints existing in the marketplace

00:21:43

Dynamic time. More viewpoints more

00:21:48

range and data that experts

00:21:50

can draw upon to use

00:21:52

for their supporting their opinion

00:21:53

now, that's that's going to

00:21:58

continue and and if it

00:22:00

doesn't address where where we

00:22:02

go with with with best

00:22:05

practices to the narrow it



00:22:07

to make it easier for

00:22:08

for arbitrators, but but offer

00:22:13

a suggestion that trying to

00:22:15

to limits that that Divergent

00:22:18

range could couldn't Park be

00:22:20

accomplished by allowing depositions of

00:22:24

experts. Dance of of hearings.

00:22:27

So can you can you

00:22:28

can you put more more

00:22:31

time from a lawyer cross-examination

00:22:34

perspective than just during the

00:22:37

hearing which are limited time

00:22:40

and in a tight hearing



00:22:42
to test the the assumptions

00:22:45
at in the process. These

00:22:46
couldn't couldn't do that. But

00:22:48
but I definitely see a

00:22:50
large range in in results

00:22:53
that are current. I guess

00:22:58
the other side. You see

00:23:02
if you see this is

00:23:02
a expert driven issue or

00:23:04
other of the foxes and

00:23:06
in passing are the EC

00:23:08
playing out schools. This is

00:23:10
Ranger difference comes up. In



00:23:13

first, thank you for the

00:23:16

very flattering introduction, which I

00:23:18

wrote and also thanks to

00:23:21

the sponsors of this program

00:23:23

including in particular Crowell morning

00:23:25

morning and its staff are

00:23:28

really the excellent facilities all

00:23:30

around turning back to your

00:23:32

question. It's not a surprise

00:23:35

just as Julie said it's

00:23:37

not a surprise and the

00:23:39

reason why it isn't attributable

00:23:41

primarily to The Experts. Is



00:23:46

several points first and most

00:23:48

obviously particularly at the beginning

00:23:50

of a case, which is

00:23:52

what your numbers measure. An

00:23:56

expert takes the instructions and

00:23:58

assumptions given to them by

00:23:59

the party at moongates than

00:24:01

the council was advising. Counsel

00:24:05

for claimant will say we

00:24:07

win on every single point.

00:24:09

There's jurisdiction on every single

00:24:11

point respondents who will say

00:24:15

they lose on every single



00:24:17

point and not only do

00:24:20

they get thrown out on

00:24:21

jurisdiction on everything but there

00:24:23

are particular items they be

00:24:25

at thrown out for on

00:24:27

jurisdiction, even if they might

00:24:29

have overall jurisdiction on some

00:24:31

of their claims it is

00:24:33

no surprise that the respondent

00:24:36

number at the beginning of

00:24:38

the case assumes a far

00:24:41

lower number result for lower

00:24:44

Quantum result than the claimant



00:24:47
or if they lose on

00:24:49
some of those point the

00:24:50
ultimate award. There are other

00:24:53
reasons not just the assumptions

00:24:56
at the beginning but instructions

00:24:59
of counsel on a variety

00:25:01
of issues that are embedded

00:25:02
inside an expert repair. And

00:25:05
once again Council appropriately are

00:25:08
giving instructions to reflect the

00:25:10
case that their client has

00:25:12
engaged them to run is

00:25:14
also different positions on legal



00:25:17

issues relating to Quantum is

00:25:19

a DCF calculation. You're reasonably

00:25:23

certain on quote or is

00:25:25

it quote speculative unquote unsurprisingly

00:25:28

clean of council take the

00:25:30

view which reasonably certain if

00:25:32

their client is their expert

00:25:33

is running a DCF case

00:25:35

and respond. It will say

00:25:36

no. No, it's much too

00:25:37

speculative that flows into the

00:25:40

damages positions. They're all so

00:25:44

different commercial regulatory political micro



00:25:48
and macro economic assumptions embedded

00:25:52
into each position of an

00:25:54
expert and unsurprisingly. They reflect

00:25:59
the views of the client

00:26:01
one example of that might

00:26:03
be macro causation issue something

00:26:08
like pandemic perhaps or supply

00:26:10
chain problems that affect the

00:26:13
computation of Damages different sources

00:26:17
of data at the beginning

00:26:19
of a case. Each side

00:26:21
is relying on different bodies

00:26:24
of data and giving different



00:26:26

embassies to the data. They

00:26:29

have on the basis of

00:26:30

which the experts provide their

00:26:32

reports. And finally I'd also

00:26:35

say design and complexity of

00:26:36

models there were certainly times

00:26:38

where one side has a

00:26:40

very complex model the other

00:26:42

I may not even have

00:26:43

a DCF model. They may

00:26:46

choose to look the comprable

00:26:47

transaction or comprable companies or

00:26:50

in the invested capital or



00:26:52

all of those things play

00:26:54

out into huge differences at

00:26:57

the beginning of the case

00:26:58

before all of those assumptions

00:27:00

instructions and data are tested

00:27:04

in the adversarial process. Just

00:27:09

think about it. This comes

00:27:14

after this a range of

00:27:15

issues and points and instructions

00:27:19

and other factors that impact

00:27:21

how an calculation can play

00:27:24

out Melissa Neal point of

00:27:27

view Council. Do you agree



00:27:30

with that juicy that is

00:27:31

in this town Buckley to

00:27:38

try and place it together

00:27:41

as well. Thanks, Ian. And

00:27:45

also thank you for that.

00:27:46

Very kind. Perhaps overly kind

00:27:48

introduction. I agree with much

00:27:52

of what Mark is just

00:27:53

said and I think that

00:27:54

the yes, you do see

00:27:56

a huge Divergence, you know

00:27:59

in my twenty-five years or

00:28:02

so with practice. I agree



00:28:03
that those divergences are getting

00:28:05
better bigger better bigger, but

00:28:08
I think it is frankly

00:28:11
inherent in the adversarial process

00:28:13
that you see these differences

00:28:14
is lawyers. We have a

00:28:16
duty of zealous advocacy to

00:28:18
our client. Candor to the

00:28:20
tribunal and our job is

00:28:22
to take the available evidence

00:28:23
and with credibility and Candor

00:28:28
make the best possible case

00:28:29
that we can for our



00:28:30

clients. So it's no surprise

00:28:32

that the parties are going

00:28:34

to have different positions different

00:28:36

arguments usually on all material

00:28:40

issues in the case and

00:28:41

that includes quantum Now many

00:28:47

times again as as Mark

00:28:49

discussed. There are legitimate difference

00:28:53

is particularly at the beginning

00:28:55

of the case. Very rarely.

00:28:57

Do we see a case

00:28:59

where all these trees are

00:29:00

cut and dried there's one



00:29:01

set of documents that just

00:29:03

lays out exactly what happened

00:29:05

makes it really easy for

00:29:06

the tribunal and you're just

00:29:09

quit playing at the margins

00:29:10

usually tribunals are presented with

00:29:13

massive amounts of evidence. You

00:29:16

can drop multiple different stories

00:29:19

or themes from those volumes

00:29:21

and volumes of evidence. And

00:29:22

each side is taking the

00:29:24

evidence that is best for

00:29:26

their case and highlighting that



00:29:27

and building a narrative around

00:29:29

it and you often get

00:29:30

two different versions of events

00:29:33

that they're very little resemblance

00:29:35

to each other those different

00:29:37

factual narrative lead to different

00:29:40

legal conclusion on things like

00:29:42

dat evaluation or the applicable

00:29:45

legal standard that should be

00:29:46

applied in a particular case

00:29:47

and depending on the factual

00:29:50

scenario with marks. Claim it

00:29:52

may say this treaty was



00:29:54

violated in five six seven

00:29:56

different ways. Where's respond? It

00:29:58

was a it was never

00:29:58

violated at all and all

00:30:01

of that when it comes

00:30:03

together, if you have buried

00:30:05

the vergent views on Quantum,

00:30:08

especially early in the case.

00:30:10

Now, what can we do

00:30:12

about that? I think Julie

00:30:14

suggestion of depositions was interesting.

00:30:16

I think the non us

00:30:18

lawyers and arbitrators would probably



00:30:21

grown at the idea that

00:30:23

we are trying to further

00:30:25

americanize the arbitration process which

00:30:28

they are already significantly opposed

00:30:30

to I tend to think

00:30:33

that the way One Way

00:30:35

Forward might be to utilize

00:30:38

expert conferencing or hot tubbing

00:30:40

but to do it in

00:30:42

much earlier in the process,

00:30:43

I think in my experience

00:30:45

usually when it comes up

00:30:47

it's raised by the tribunal



00:30:49

no earlier than perhaps a

00:30:51

week before the and the

00:30:54

parties are hesitant to suggest

00:30:56

it in part because lawyers

00:30:59

don't really want it frankly

00:31:01

and also because it is

00:31:05

extra expense. If it's something

00:31:07

the tribunals not interested in

00:31:09

it could cause irritation that

00:31:10

could derail the process when

00:31:13

tribunals raise it. It is

00:31:15

often at a stage where

00:31:17

the differences are huge. Everyone



00:31:20

is firmly entrenched in their

00:31:21

own opinions. And at that

00:31:23

point, I think you're you're

00:31:24

less likely to see movement.

00:31:26

So personally, I think the

00:31:29

best way forward is to

00:31:30

to do expert conferencing will

00:31:33

regularly more as a standard

00:31:35

has them and to do

00:31:36

it earlier in the case.

00:31:37

Probably after the first round

00:31:39

of expert reports have been

00:31:40

exchanged. curious to see what



00:31:43

Mark thinks about that Why

00:31:45

would I would I guess?

00:31:49

I see if I came

00:32:01

in litigation some arbitration. We

00:32:03

sit on his phone so

00:32:06

I can see you would

00:32:07

like to come by, you

00:32:13

are such a nut. My

00:32:18

personal view is the easiest

00:32:21

way to bring things closer

00:32:24

together is to find a

00:32:26

way early on to reduce

00:32:29

the material items in dispute.



00:32:32

There are a whole host

00:32:33

of mechanism some I do

00:32:35

that a witness conference expert

00:32:38

witness conference in advance might

00:32:40

do that. Ian's experience is

00:32:43

probably different from mine because

00:32:44

it derives from a small

00:32:46

community where purepressure plays in

00:32:49

the enormously important role. My

00:32:52

experience comes out of the

00:32:53

New York Market or the

00:32:55

California Market or the Washington

00:32:56

Market where there are so



00:32:58

many lawyers in so many

00:33:00

experts a pressure plays a

00:33:02

very small role. So the

00:33:05

rule 35 approach that an

00:33:08

expert closed primary duty to

00:33:10

the tribunal and must give

00:33:12

evidence regardless of who instructs

00:33:16

them and must also provide

00:33:18

a negatives as well as

00:33:20

the possible options to work

00:33:22

very well in the London

00:33:23

community. I would be astounded

00:33:26

if it worked for example



00:33:27
in the New York Community

00:33:28
different cultures. So what do

00:33:33
I suggest doing about that

00:33:35
will come two more specific

00:33:37
proposals later on but in

00:33:41
general I would want to

00:33:43
get the expert to identify

00:33:45
as early as possible a

00:33:48
list of material disagree. Experts

00:33:52
and Council will disagree about

00:33:54
an enormous number of things

00:33:56
and some of them are

00:33:58
material somewhere not if I



00:34:00
get early on in a

00:34:01
case a list of material

00:34:03
disagreements between the experts I

00:34:06
then have a checklist of

00:34:07
the things that I'm really

00:34:08
going to have to decide

00:34:10
in order to make the

00:34:11
case resolved. So that's the

00:34:14
first step and I would

00:34:16
just point out. This is

00:34:17
a number that I really

00:34:19
love the If we have

00:34:24
the last word oblique 20



00:34:26

major issues in dispute, the

00:34:30

number of combinations number of

00:34:32

scenario among all of those

00:34:35

20 items number one against

00:34:37

two three, four five cetera.

00:34:38

Number one plus two against

00:34:40

two three, four five number

00:34:42

nine against 123 etcetera etcetera.

00:34:44

If you have 20 items

00:34:46

you end up with variations

00:34:49

that could be as high

00:34:51

as six hundred million variations.

00:34:55

So just doing scenario analysis



00:34:59

without narrowing. The issues is

00:35:03

impossible for the parties in

00:35:05

the expert-level loan for poor

00:35:07

little arbitrator like me. Can

00:35:11

I just want one comment

00:35:13

about that is witness conference

00:35:16

in a few times? And

00:35:17

so what I think is

00:35:18

really important is at least

00:35:21

from the perspective of Damages

00:35:23

expert is less. Disagreements on

00:35:29

the valuation methods and more

00:35:31

on how can the damages



00:35:33

experts mandate in Narrows by

00:35:37

things such as can you

00:35:39

use an exam key valuation

00:35:41

method. Can you use an

00:35:42

exposed? What is the valuation

00:35:44

date and I think after

00:35:46

we get to that then

00:35:47

the technical people can come

00:35:51

to agreement tomorrow. Technical aspect

00:35:58

I want to spend some

00:35:59

time in the line damages

00:36:01

calculations when you approach is

00:36:03

a methodology as well. I



00:36:06

guess just if I do

00:36:08

that one one thing that

00:36:10

sticks in my mind on

00:36:10

what is used for those

00:36:11

in the Moon? If I

00:36:15

do shaving show the temperature

00:36:18

with the quantification. tribunals awarding

00:36:23

on average 40% of the

00:36:24

amount claimed the question of

00:36:28

how are they doing some

00:36:34

calculations all day using an

00:36:36

expert to reach a conclusion.

00:36:38

Are they taking so bad



00:36:41
about someone besides constipation tribunals

00:36:51
doing in your experience when

00:36:53
faced with this massive ranger

00:36:55
station? Thanks for the invitation

00:37:01
and the introductions. So what

00:37:04
one thing to the way

00:37:06
I normally think about this

00:37:07
is less about the 40%

00:37:09
and it's really about two

00:37:11
things when I can't look

00:37:12
at the inverse of these

00:37:13
percentages. So I tend to

00:37:15
think more like the tribunal



00:37:17

is right. Let's see how

00:37:19

much the parties were wrong.

00:37:21

And so for example, the

00:37:22

40% translates into two and

00:37:24

a half times. So you

00:37:26

can think of we were

00:37:27

worried for the percent or

00:37:28

they asked for two and

00:37:29

a half times more than

00:37:31

they should get you out

00:37:32

that even that percentage I

00:37:37

think is Hard to understand

00:37:42

because of Mark and Melissa



00:37:44
explained there's so many different

00:37:46
variations in that percentage. Right

00:37:49
so you can have for

00:37:50
example different claims that survived

00:37:52
position that we're almost to

00:37:54
be correct in the in

00:37:56
the claimant side and in

00:37:58
the laboratory decided that only

00:37:59
40% of them were were

00:38:02
right and then you're looking

00:38:04
at is a hundred percent.

00:38:05
So all of them were

00:38:07
where were they so I



00:38:09

think we need a little

00:38:10

more and now it is

00:38:11

on that before we can

00:38:13

just say they get 40%

00:38:15

of what they are and

00:38:16

that's a diversion and evaluation

00:38:19

side. What I see tribunals

00:38:23

asking often is a joint

00:38:29

extra big board special in

00:38:30

commercial case not so much

00:38:32

an investor 3-D case that

00:38:33

I don't think I've ever

00:38:34

seen best 3D cases with



00:38:36

with a joint report also

00:38:39

hot. The more like terms

00:38:43

what is called concurrent concurrent

00:38:46

the conference and concurrent or

00:38:47

expert conference is something that

00:38:51

has worked well as more

00:38:53

in the Commonwealth in litigation

00:38:55

and then willing in arbitration,

00:38:56

but I think it works

00:38:58

quite well, and I think

00:38:59

it should be used more

00:39:00

often to see in 3D

00:39:03

cases including commercial cases as



00:39:07

well is tribunal after the

00:39:10

marriage hearing coming back to

00:39:13

the parties insane. We now

00:39:16

have more. Certainty about the

00:39:20

damages in the house. So

00:39:22

can you please resubmit your

00:39:27

pleadings with respect to the

00:39:30

damages? If you assume X

00:39:31

Y and Z which was

00:39:32

the kinds of things that

00:39:33

were saying would be helpful

00:39:34

before the witness conference or

00:39:37

before the joint extra report



00:39:38

because that narrows the the

00:39:40

scenarios from 600000654 million +

00:39:44

32 x 31 to be

00:39:46

precise to maybe 20, so

00:39:50

that's that helps stables in

00:39:53

in those trinkets for report.

00:39:56

So things that Dragon was

00:39:58

having recently asked for damages

00:40:00

expert to follow in terms

00:40:01

of guidance has been such

00:40:03

as you can use an

00:40:05

example of elevation and I

00:40:06

was so badly was the



00:40:08

date of the breach and

00:40:10

tell us what is the

00:40:11

date of the bridge is

00:40:12

opposed to us having the

00:40:13

gears 4 days and if

00:40:14

you need another one, just

00:40:15

let us know which valuation

00:40:19

date which method also. So

00:40:22

for example, we are finished

00:40:25

here. Do you need three

00:40:27

years of operations for the

00:40:28

case for to have sufficient

00:40:31

certainty that that the project



00:40:35
was really have enough respect.

00:40:36
For example, I was only

00:40:43
one last month at the

00:40:44
hearing in the tribunal visibly

00:40:46
agree that a hydrocarbons project

00:40:48
that has off take agreements

00:40:49
the Lockport certain than say

00:40:51
a retail operation with two

00:40:53
years of operation, right? So

00:40:54
it's That's that sophistication is

00:40:59
is welcomed. Also things like

00:41:02
which causation argument that succeeded

00:41:04
if you're going to use



00:41:05

an income approach which forecasts

00:41:07

can be used. And so

00:41:09

overall what I would say

00:41:12

to you ran this. I

00:41:14

think we're going in the

00:41:14

right direction and I welcome

00:41:17

that tribunals are more and

00:41:19

more getting narrowing the 654

00:41:21

million options to to a

00:41:23

few. If I pass inspection

00:41:29

and to get an answer

00:41:30

from someone, what do you

00:41:33

do before we do that?



00:41:41

It's a little bit of

00:41:43

background information. I think it's

00:41:45

very important for any confirmation

00:41:47

conservation conversation conversation about whether

00:41:54

damages numbers are or are

00:41:56

not exaggerated pro and con

00:41:59

in international arbitration. The US

00:42:03

Department of Justice Bureau of

00:42:05

Justice statistics keeps a record

00:42:07

of what goes on in

00:42:08

US federal courts the difference

00:42:12

between the mean and the

00:42:17

media in contract damages in



00:42:22

US federal courts is more

00:42:25

than 11 times huge difference.

00:42:29

There are some cases that

00:42:32

produce very large damages Awards

00:42:34

just as there are some

00:42:36

cases the prettiest multibillion-dollar Awards

00:42:38

investor-state dispute. What is the

00:42:42

median? Nothing mean not the

00:42:45

average with the median where

00:42:47

you come out is much

00:42:50

much smaller. And that's a

00:42:54

point that many Studies have

00:42:56

drawn to our attention looking



00:42:58

at the 40% average is

00:43:01

very valuable, but it doesn't

00:43:03

distinguish how to deal with

00:43:06

the outliers outliers on both

00:43:08

sides because I waive example,

00:43:11

you have the rosin best

00:43:12

decision from a number of

00:43:13

years ago a case where

00:43:16

the tribunal held that Russia

00:43:17

had engaged in unlawful expropriation

00:43:21

and nevertheless granted something like

00:43:23

four million dollars in Damages

00:43:25

and ordered the claimants to



00:43:27

Bear their own that legal

00:43:28

fees. So the net result

00:43:30

was a loss to the

00:43:32

point. Now that may have

00:43:34

been a correct legal decision

00:43:35

personally. I think it was

00:43:36

but the point I'm making

00:43:38

is you have big numbers

00:43:41

way over on the right

00:43:42

side you have big numbers.

00:43:44

0 numbers are close to

00:43:46

it way over on the

00:43:47

left side. You're trying to



00:43:49

judge what's really going on

00:43:51

in particularly investor-state arbitration. You

00:43:55

have to look not just

00:43:56

at the beginning but also

00:43:57

the media to get an

00:43:58

honest analysis of what's going

00:44:00

on. Now, what would I

00:44:02

do? I'm very idiosyncratic the

00:44:05

end but I do like

00:44:07

tiago's idea and I have

00:44:09

used it in a number

00:44:10

of cases. We think about

00:44:12

bifurcation somehow jurisdiction and mirax



00:44:16

when those are done then

00:44:18

we turn to a Quantum

00:44:19

sex. That's a little too

00:44:21

simplistic. You can certainly include

00:44:24

in the first phase a

00:44:26

number of issues that are

00:44:29

quantum oriented but don't require

00:44:32

running the numbers quite so

00:44:34

much. The first one is

00:44:36

the point of Thiago already

00:44:38

made. What is the underlying

00:44:40

legal principle of compensation? Three

00:44:44

choices Realty in most cases.



00:44:46

You have the principle of

00:44:49

putting the injured party in

00:44:51

the position. They would have

00:44:52

been in if the transaction

00:44:54

had continued and the unlawful

00:44:57

conduct already concluded by this

00:44:59

because of Mara the unlawful

00:45:01

contact had not occur. That's

00:45:03

the choice of principle and

00:45:05

it's also principle you find

00:45:06

an English law and in

00:45:08

most US legal jurisdiction and

00:45:10

many other countries throughout the



00:45:12

world in the position. They

00:45:17

would have been in if

00:45:18

the transaction had never occurred.

00:45:22

That's the net invested Capital.

00:45:24

No problem, or you give

00:45:26

him back the money that

00:45:27

they invested - Howard whatever

00:45:31

they got by way of

00:45:32

dividends up to the awards

00:45:33

and you give him an

00:45:35

interest some from that day

00:45:37

forward to the award day.

00:45:39

The third principle which could



00:45:40

be applied to both of

00:45:41

those ideas is unjust enrichment

00:45:44

either the claimant might be

00:45:46

unjustly enriched by one of

00:45:48

those formulas or the respondent

00:45:50

might be unjustly enriched by

00:45:52

one of those formulas and

00:45:53

you have seen investor-state cases

00:45:56

their public using that kind

00:45:58

of principal driver alter the

00:46:00

valuation date or alter the

00:46:02

foreign currency exchange rate indeed.

00:46:06

Sometimes you see that International



00:46:09
courts, the Golden State's decision

00:46:11
of the House of Lords

00:46:12
in England or the Sinclair

00:46:15
refinery in case of the

00:46:16
US Supreme Court in the

00:46:17
United States are examples of

00:46:19
applying an unjust enrichment principle

00:46:22
to alter the sum that

00:46:24
otherwise would have been awarded

00:46:26
in both of those cases

00:46:28
to reduce. It would have

00:46:30
been other cases to increase

00:46:33
the amount so that the



00:46:34
respondent doesn't benefit from their

00:46:37
unlawful contact. So that's the

00:46:39
first and most important thing.

00:46:41
You can decide in Phase

00:46:42
1 second thing you can

00:46:44
decide to valuation date that

00:46:47
has a huge consequence and

00:46:48
there's no reason you can't

00:46:50
decide it in phase one.

00:46:51
Third is ex-ante versus Xposed

00:46:55
and has a huge impact

00:46:58
on valuation. Once again, you

00:47:00
can decide they're at the



00:47:02

end of the first Worthpoint

00:47:04

does the reasonable certainty test

00:47:08

that we talked about apply

00:47:10

to both the facts of

00:47:12

damage and to the Quantum

00:47:15

of damage or does it

00:47:17

only apply to the facts

00:47:19

of damage most of the

00:47:21

international law Awards apply it

00:47:24

to both steps in National

00:47:27

courts. There are a number

00:47:28

of cases that applied only

00:47:29

to the first step the



00:47:32

fact of damage the argument

00:47:34

there is whether or not

00:47:35

you impose the uncertainty on

00:47:39

the claimant because it's appointments

00:47:40

burden to prove or you

00:47:43

impose it on the party

00:47:43

who created the uncertainty through

00:47:46

their unlawful conduct and you

00:47:48

find cases on both sides.

00:47:52

The reliability of the cash

00:47:54

flows is part of whether

00:47:56

or not you. Reasonable certainty

00:47:57

or speculation. There are other



00:48:01
issues causation foreseeability Mitigation Of

00:48:05
damages the applicable discount rate

00:48:08
how you take account of

00:48:10
country and political risk the

00:48:12
inflation rate whether or not

00:48:15
there's a terminal value and

00:48:16
if so how you deal

00:48:19
with the growth rate inside

00:48:21
that terminal value and inside

00:48:23
the basic TCF calculation. principles

00:48:28
of prewar and postwar interest

00:48:30
simple compound commencement date choice

00:48:36
of currency for compensation interest



00:48:38
or exchange rate should there

00:48:41
be scenarios or not? And

00:48:43
if they do, please not

00:48:44
on a 654 million of

00:48:46
them remaining disputed material damages

00:48:52
issues exist and get a

00:48:54
checklist of them. And then

00:48:57
you want to instruct the

00:48:59
experts to give you new

00:49:01
reports. If you are trying

00:49:04
to control costs, but I

00:49:05
know this is a point

00:49:07
for Melissa. You don't want



00:49:08

Phase 2 in this approach

00:49:10

to be a full hearing

00:49:12

with new factual evidence new

00:49:17

Witnesses new Council submissions. You

00:49:20

want to control them so

00:49:21

you can and I have

00:49:23

instructed the experts to use

00:49:25

the existing record. No new

00:49:28

facts no new Witnesses, but

00:49:31

I've been reports based on

00:49:32

what was decided in Phase

00:49:34

1 including all of quantum

00:49:36

steps and invite Council to



00:49:39

offer their views on that

00:49:40

in written submissions that's less

00:49:43

expensive than a full Phase

00:49:45

2. It's still expensive. And

00:49:48

that's how I would manage

00:49:49

it and sometimes it's a

00:49:50

complete failure. And if I

00:49:55

may I can't help myself.

00:49:58

I actually like a lot

00:50:00

of what you're saying mark

00:50:01

from the council perspective flattery

00:50:03

will get you everywhere most

00:50:04

have to explain to my



00:50:11

clients how long the arbitration

00:50:14

is going to last as

00:50:17

I'm sure everyone knows arbitrations

00:50:19

are lasting longer and longer

00:50:20

particularly investor-state arbitration. I have

00:50:23

one that's going on 10

00:50:24

years so clients but expediency

00:50:30

and they want to control

00:50:32

class that's you already mentioned.

00:50:33

I think there are a

00:50:37

couple of things that I

00:50:38

would add to your list.

00:50:40

I almost think there has



00:50:42

to be a liability finding

00:50:43

in your face one. And

00:50:45

the reason is because it's

00:50:47

claimant has raised multiple violations

00:50:50

of the treaty. And particularly

00:50:53

when you throw in the

00:50:55

causation defense that's very very

00:50:57

popular among respondents right now

00:50:58

you end up with the

00:51:00

situation if the tribunal finds

00:51:03

liability on anything less than

00:51:05

all of the claims raised.

00:51:07

You have a a very



00:51:08

common argument Now by respondents

00:51:11

States and it is not

00:51:12

without Merit that we didn't

00:51:15

get to put forward a

00:51:16

case on Quantum and causation

00:51:18

with respect to the breeches

00:51:20

as opposed to the cumulative

00:51:22

data breaches alleged and it

00:51:25

gets even more complicated when

00:51:27

you consider that all of

00:51:28

those liability findings are based

00:51:29

on specific factual by me,

00:51:31

you know, one of those



00:51:33

654 million / stations that

00:51:35

are out there. And so

00:51:37

unless there is only one

00:51:40

claimed violation of the treaty

00:51:43

in other words. There's only

00:51:44

one claim a lesbian expropriation

00:51:47

r a p t whatever

00:51:48

I think he gets very

00:51:49

hard. To do an efficient

00:51:52

second round of quantum analysis

00:51:56

without knowing what the liability

00:51:57

findings are. Everything I say

00:52:00

is that if we're going



00:52:01

to do this and I

00:52:02

do think it's a good

00:52:02

idea. We have to revise

00:52:04

how we do these cases

00:52:05

from the outset because as

00:52:08

all of you who are

00:52:09

Council no Quantum experts don't

00:52:12

come cheap, especially the good

00:52:13

ones and it's a huge

00:52:16

part of the cost that

00:52:18

my clients and all clients

00:52:20

are putting up and your

00:52:22

first comprehensive Quantum expert report



00:52:25

is going in with your

00:52:26

Memorial. So I think we

00:52:29

need to you need to

00:52:30

know what the outside of

00:52:31

the case what the tribunal

00:52:32

has expectations are for the

00:52:34

reports that are going to

00:52:35

follow I do agree with

00:52:37

you on all of those

00:52:38

points Melissa. The only comment

00:52:41

I would make in that

00:52:42

regard is if you only

00:52:44

have a phase one everything



00:52:45
installed base one, you have

00:52:47
all of those problems about

00:52:48
causation and multiple claims and

00:52:51
no means that all of

00:52:53
slicing and dicing among them.

00:52:54
So that problem is inherent

00:52:57
in a multiple claim issue.

00:52:59
It doesn't get worse by

00:53:01
virtue of having a face

00:53:02
to think I I want

00:53:05
to go into some of

00:53:06
the methodologies beneath how we

00:53:08
going to find out if



00:53:09

I think just the all

00:53:11

different. Excuse and well go

00:53:14

trying different things trying to

00:53:16

dress some of these issues

00:53:16

that they are just happening.

00:53:19

I'm going to stop by

00:53:20

think this to the right

00:53:21

hand side. I think you've

00:53:22

got the stuff back to

00:53:23

you to the biggest criticisms

00:53:25

of the arbitration process time

00:53:27

and cost and to remain

00:53:30

and continue being attractive for



00:53:32

them to dispute resolution or

00:53:34

these issues need to be

00:53:35

addressed with the points of

00:53:36

ma and others raised need

00:53:38

to be addressed within the

00:53:39

consideration of making is unappealing

00:53:41

dispute resolution. How many more

00:53:47

would like the same methodology?

00:53:56

What are the points I

00:53:58

made at the sub was

00:53:59

the authority between the claimants

00:54:02

who primarily most frequently used

00:54:04

the income approach \$25 Jets



00:54:07
and respondents to use unless

00:54:12
so and use something called

00:54:13
stole the cost approach often.

00:54:18
I went to work off

00:54:18
some of the factors that

00:54:19
the dry bouncing back to

00:54:21
me down. So you a

00:54:22
whole list of instructions assumptions

00:54:26
uncertainty. quickly now was Think

00:54:38
about yourself and while we

00:54:40
are here in Washington and

00:54:41
thinking about in particular say

00:54:43
expectation cases of new startup



00:54:50
businesses that have limited financial

00:54:53
data available limited operational date

00:54:57
available times or the fight

00:55:03
to the mall has listed

00:55:05
out that the crate and

00:55:06
send it to you today.

00:55:07
With the feedback. We saw

00:55:09
them by being all those

00:55:10
top three reasons for rejecting

00:55:12
the claimants primary is speculation.

00:55:18
Uncertainty Etc. Why do not

00:55:23
leave you as a claimant

00:55:24
to the startup investor? Are



00:55:26

you almost are we leaving

00:55:28

to Willie by D Foods

00:55:30

deep issues. I'm interested. I

00:55:35

guess the song from Ninjago

00:55:39

your views are not. I'm

00:55:41

certain I was astounded by

00:55:47

the criticisms unsubstantiated lack of

00:55:49

evidence speculative me in terms

00:55:54

of that the wide-ranging and

00:55:56

values but also the deference

00:55:58

to to the cost approach

00:56:00

which I've also seen references

00:56:02

restitution damages because you're giving



00:56:04

them something to put them

00:56:06

in the shoes that they

00:56:07

would be at. They not

00:56:08

Endeavour done on the on

00:56:10

the Venture but the challenges

00:56:12

with those circumstances when you

00:56:13

have a business that has

00:56:16

not operated is is a

00:56:18

heavier lift. It's not an

00:56:20

impossible one, but it's not

00:56:22

going to get you over

00:56:22

the Finish Line unless you

00:56:24

have the substantial evidence to



00:56:26

make the case. So first

00:56:28

understand the unique pattern understand

00:56:31

a company's historical experience directly

00:56:34

in the end of project

00:56:35

or or otherwise industry-specific considerations

00:56:40

degree. Complications and risks, you

00:56:44

know, I sort of Envision

00:56:45

a very carefully coming back

00:56:47

and recreating the bus whole

00:56:49

world of down to the

00:56:51

competitive Dynamics and a supply

00:56:55

curve in my head. Sorry

00:56:57

the geek Economist of how



00:56:59

the positioning of this competitor

00:57:01

would have fit. Can you

00:57:02

make a case that they

00:57:03

they would have in a

00:57:06

demonstration been been able to

00:57:08

be able to compete in

00:57:10

and do so to show

00:57:12

that they have it is

00:57:13

that our trailer needs to

00:57:14

take, you know, you can

00:57:16

do if I'm Different approaches

00:57:18

the damages along with supplemental

00:57:20

income do need to come



00:57:21

in a market market approach.

00:57:23

If you're doing it on

00:57:24

an apples-to-apples like-for-like basis, you

00:57:27

know really my view is

00:57:29

more support for input. So

00:57:31

your inputs have to be

00:57:32

steady. They have to be

00:57:34

showing additional support amongst and

00:57:37

not not picking as I

00:57:39

said The Wider range of

00:57:40

input Market prices Dynamics not

00:57:44

picking an outlier, but trying

00:57:46

to show a consensus than



00:57:47

and the stability of of

00:57:49

your of your input assumptions

00:57:52

your key ones tomorrow be

00:57:54

able to show that yeah,

00:57:56

it's in may be off

00:57:57

by 10% or so, but

00:57:59

there's additional reaffirming normal course

00:58:02

of business information. I like

00:58:04

to understand non-litigation documents documents

00:58:08

anything from Discovery that shows

00:58:10

something is not tainted for

00:58:12

litigation to support. So those

00:58:14

those are my suggestions best



00:58:16

practices help moving to more

00:58:18

reasonable certainty so that so

00:58:21

that you don't have a

00:58:22

long list of unsubstantiated lack

00:58:24

of evidence and I'm convinced

00:58:25

that should filter out the

00:58:28

project that really are are

00:58:30

more reliable and and those

00:58:34

that aren't too and I

00:58:35

should have said that, you

00:58:36

know contracts and not not

00:58:39

as susceptible to markets those

00:58:40

those Agreements are more helpful



00:58:43

from less risk perspective, but

00:58:46

greater demonstration greater supporting evidence

00:58:49

to make the case to

00:58:51

to move to a demonstration

00:58:53

of income or income /

00:58:56

market value protein support. So

00:59:02

just a couple of this

00:59:04

joint thoughts but I was

00:59:06

inside your is the need

00:59:09

to work each expert to

00:59:12

enhance his or her own

00:59:14

credibility before the tribunal by

00:59:17

doing a few things first,



00:59:18
even before filing an expert

00:59:20
report. It is important that

00:59:22
the expert push back on

00:59:25
their own representing council's opinions.

00:59:29
And I find that it's

00:59:30
almost like a professional responsibility

00:59:33
to avoid a lot of

00:59:34
heartbreak on the road. So

00:59:37
it's important that experts push

00:59:40
back and say this is

00:59:41
likely going to fail instead

00:59:43
of saying sure I'll do

00:59:44
anything to increase this to



00:59:46
be two and a half

00:59:47
times more than the tribunal

00:59:49
Belk Bill Awards. And so

00:59:51
what or are 0% of

00:59:53
what the one thing that

00:59:58
is important to do and

01:00:00
In consonance with what Julie

01:00:03
just said is good knowledge

01:00:06
of the industry is really

01:00:07
important because often there will

01:00:10
be forecasts that are still

01:00:12
that are not of what

01:00:14
thing is being exactly valid



01:00:16

here. So good knowledge of

01:00:18

the industry competitive Dynamics and

01:00:20

so on is essential to

01:00:21

words for casting and that's

01:00:24

that's like 101 on valuation.

01:00:27

It's but I keep shaved

01:00:28

at the start of every

01:00:29

course. I'm going to wish

01:00:30

so it's important that the

01:00:33

experts support adequately the forecast

01:00:37

for the income approach with

01:00:39

documents that are not prepared

01:00:41

for the dispute that are



01:00:44

out in the public domain

01:00:45

and support their appearance. And

01:00:48

related to that I'm always

01:00:51

almost professional it is a

01:00:53

point is when I see

01:00:54

extra reports that have here's

01:00:57

my methods and all other

01:00:58

methods are wrong. So I'll

01:01:00

just use the income approach.

01:01:01

There's nothing that is even

01:01:03

remotely comparable to this. So

01:01:06

you're here in my forecast

01:01:08

was just use them and



01:01:09

Tribune. Hope you will agree

01:01:10

and that that is almost

01:01:12

always doomed to failure. It's

01:01:15

mostly the the claimants used

01:01:22

this year for income approach,

01:01:24

but it's really like both

01:01:25

sides using it and crossing

01:01:27

their fingers and saying my

01:01:28

forecast for the work and

01:01:30

my discount rate will work.

01:01:33

Even when there is cross-checking

01:01:35

I've seen examples even in

01:01:38

recent years or someone says



01:01:40

here's my income approach and

01:01:42

here's the market multiples and

01:01:45

they're all different because different

01:01:47

growth so so don't multiples

01:01:51

are different because I have

01:01:52

higher all over the road.

01:01:53

So that's almost like I'm

01:01:54

assuming my conclusion, right? So

01:01:56

if you have his right

01:01:58

ye are most clothes are

01:01:59

not compatible because I have

01:02:00

to come girls. So what

01:02:02

I mean by this is



01:02:03

even when you are in

01:02:04

in like evaluate your issue

01:02:07

shares of a company you

01:02:09

want to do a night

01:02:10

and m&a transaction. No Bankers

01:02:12

going to say this valuation

01:02:14

that it's the one we

01:02:15

going to use with this

01:02:16

one better. You have to

01:02:18

cross-check or triangulate like the

01:02:20

same things. I guess that's

01:02:27

what he may or may

01:02:28

not too. If I didn't



01:02:29

pay back up, just calculations

01:02:31

are speculative unsupported unjustified except

01:02:35

in formal formally is an

01:02:39

income a page out of

01:02:40

the window in this world.

01:02:44

Let me offer you not

01:02:46

my Approach, but the approach

01:02:48

of the fasil damages task

01:02:52

force. Most of you may

01:02:53

be familiar with that task

01:02:55

force. But if you're not

01:02:57

familiar with it, I really

01:02:58

commend you go to the



01:03:00

web pull up their damages

01:03:02

in the NFL arbitration tool

01:03:03

and extraordinary really valuable tool

01:03:06

particularly. If you are seeking

01:03:10

to understand either procedure. Legal

01:03:16

or Quantum for common law

01:03:18

civil law or International and

01:03:21

it goes through all of

01:03:22

them for you in a

01:03:23

form that frankly makes any

01:03:25

book on that has written

01:03:26

the irrelevant much more use.

01:03:28

Let me tell you what



01:03:30
they have to say on

01:03:31
this point from an economic

01:03:34
standpoint the reliability of a

01:03:37
DCF for other income-based nothing

01:03:39
to valuation hinges on whether

01:03:41
sufficient information exists to develop

01:03:45
reliable expected cash flow projections

01:03:48
and history may or may

01:03:50
not be used in this

01:03:51
forecasting exercise. It would therefore

01:03:54
be incorrect from an economic

01:03:56
point of view to reject

01:03:58
a DCF valuation or other



01:04:01
income-based method evaluation, simply because

01:04:04
of a lack of historical

01:04:06
information rather the issue should

01:04:08
be whether there is sufficient

01:04:10
reliable information on which to

01:04:13
base the expected cash flow.

01:04:15
Directions of which historical performance

01:04:17
is just one factor. I

01:04:21
think the reason why I

01:04:25
talk to you for the

01:04:26
task force is because it

01:04:29
is a validation of that

01:04:31
point from a set of



01:04:33

20 or so. Mostly well

01:04:36

respected experts. I was on

01:04:37

the task force is not

01:04:39

entirely off well-respected, but it

01:04:43

validates the point they're making

01:04:44

and it was a collection

01:04:46

of people who represent the

01:04:48

investors who represents States represent

01:04:51

institutions were Scholars or arbitrators.

01:04:55

It's not just one side

01:04:57

offering a partisan opinion. Let

01:05:02

me give you two examples

01:05:04

of when it might be



01:05:06

appropriate to use a DC

01:05:08

or a startup which is

01:05:10

obviously the most controversial of

01:05:12

these questions. Decades ago when

01:05:16

I was a project Finance

01:05:17

lawyer, I routinely represented clients

01:05:21

usually lenders in a kind

01:05:24

of project financing. We're at

01:05:28

the time of financial close

01:05:30

before material construction out of

01:05:33

cards. Let alone the power

01:05:35

plant was operating years later.

01:05:37

We had a turnkey Construction



01:05:39

contract in place in which

01:05:42

the contractor supported by performance

01:05:45

bond from other parties had

01:05:48

committed to build something on

01:05:49

a fixed price within a

01:05:52

fixed period of time and

01:05:53

they were credible credit-worthy an

01:05:56

expert. We had an off

01:05:59

taker who agreed to provide

01:06:01

revenue on a take-or-pay basis

01:06:04

and that off taker was

01:06:07

either credit-worthy itself or guaranteed

01:06:11

by the host state. We



01:06:13

had lenders who had committed.

01:06:17

For the entire lending amount

01:06:19

required we have Equity investors

01:06:21

who had committed for the

01:06:23

entire amount required and we

01:06:27

have an operating contract with

01:06:29

an experienced operator to operate

01:06:31

the thing. Once the power

01:06:33

plant had passed performance tests

01:06:36

that were pre-agreed and consistent

01:06:39

with the technology that existed

01:06:43

the circumstance like that. You

01:06:45

can use a DCF to



01:06:47

calculate on day one before

01:06:49

you dig in the dirt

01:06:50

at all because you basically

01:06:53

allocated construction risk operating risks

01:06:55

financing risk political risk permitting

01:06:59

risk. It's all allocated contractual.

01:07:01

Does that mean that you

01:07:04

got a guarantee it'll work

01:07:05

of course not all of

01:07:07

project financing as I did

01:07:08

in the 1980s, they disintegrated.

01:07:11

So no, we didn't reach

01:07:15

completion on all of that.



01:07:16

But could we have calculated

01:07:19

if there was a breach

01:07:21

of contract in those cases

01:07:23

where someone had repudiated their

01:07:25

contractual obligation? Could we have

01:07:28

calculated on a VCF basis

01:07:30

the damage to the company?

01:07:32

Yes, we could have. Second

01:07:35

example is very common even

01:07:36

now. Resource transactions like the

01:07:40

dreaded oil project if you've

01:07:44

got confirmed resources proven resources.

01:07:49

If you have skilled development



01:07:53

company if you have off-takers

01:07:56

agreed or a deep liquid

01:08:00

market so you can determine

01:08:02

pricing for the oil and

01:08:04

you have transportation from the

01:08:07

site of the oil to

01:08:09

a market. You're left with

01:08:11

price volatility, which is a

01:08:14

very serious issue in natural

01:08:17

resources contract but is a

01:08:20

serious issue regardless of whether

01:08:22

it's a startup or a

01:08:24

company that's been operating for



01:08:25

several years. You can form

01:08:28

of you and indeed Washington

01:08:30

arbitration. We have an entire

01:08:32

program on it moderated by

01:08:33

Jose Antonio earlier this week

01:08:36

about how to deal with

01:08:37

price fluctuations. You can use

01:08:40

the UCF obviously their risks

01:08:43

involved. But it's the same

01:08:45

risk, whether it's a project

01:08:47

has been operating for several

01:08:48

years or project that hasn't

01:08:50

even really drilled yet. Those



01:08:53

are two examples where a

01:08:54

startup is still capable of

01:08:57

being valued on an income

01:08:59

valuation approach. One thing you

01:09:04

said that history may or

01:09:05

may not be relevant dates

01:09:14

of the documentation. It's available

01:09:16

contact me when its operation

01:09:20

was looking to get off

01:09:21

the ground. I guess it's

01:09:25

better to go to my

01:09:38

liability of that type of

01:09:39

thing to help with this



01:09:40

situation as well. I absolutely

01:09:45

think there's a role for

01:09:46

the experts to play there,

01:09:49

you know. in my experience,

01:09:53

I suspect Mark will agree

01:09:54

with this tribunal 10 to

01:09:59

Discount somewhat fact witness testimony

01:10:02

if it is not supported

01:10:04

by contemporaneous document. So I

01:10:06

think the contemporaneous documents end

01:10:09

up being the key piece

01:10:11

and then You always have

01:10:15

questions about what somebody meant



01:10:18
when they said ex right

01:10:20
when you look at the

01:10:20
contemporaneous documents. And of course

01:10:24
you're going to have usually

01:10:25
competing Witnesses on each side.

01:10:27
They are of course going

01:10:28
to have different conclusions about

01:10:30
what X-Men in the document

01:10:32
at the time it was

01:10:33
written and so I think

01:10:35
the experts and in particular

01:10:38
industry experts can play a

01:10:41
valuable role in helping a



01:10:44
tribunal to understand the contemporaneous

01:10:47
record in a way that

01:10:49
perhaps Fact witness is either

01:10:52
can't or simply are not

01:10:54
going to be as persuasive

01:10:56
to a tribunal because let's

01:10:58
face it in arbitration. We

01:11:01
don't have the power to

01:11:02
compel witness testimony. And so

01:11:04
even Witnesses who are not

01:11:06
financially interested usually have some

01:11:08
type of interest in the

01:11:10
dispute. And so to me



01:11:12

if you if you have

01:11:15

an expert who can come

01:11:16

in and give their objective

01:11:18

view based on industry standards

01:11:21

or the the macroeconomic climate

01:11:23

at the time to help

01:11:25

interpret that factual record. I

01:11:27

think that would go a

01:11:28

long way. I'm going to

01:11:32

stop at that there's a

01:11:35

lot of cool will do

01:11:42

Mondays. Yes, and when he

01:11:44

called simulations and they said



01:11:46

the calculations of Time by

01:11:56

Justin the final couple of

01:11:57

minutes. I think this one

01:12:06

question just the pack time

01:12:08

for one or two quick

01:12:09

questions. There was a microphone

01:12:10

just coming to you. Hello,

01:12:21

I'm lawyer Mike Maria. I'm

01:12:24

I want to thank you

01:12:25

for this session and I

01:12:27

want to ask which is

01:12:29

the limit one way. I

01:12:31

can put in discussion speculative



01:12:36

approach. So I said just

01:12:39

make sure. What's the limit?

01:12:49

When we can stop at

01:12:51

the party and her in

01:12:53

a speculative approach. Thank you

01:13:03

myself. I will say that

01:13:14

I think it's the tribunal

01:13:17

and that is why in

01:13:19

almost every case. You have

01:13:21

a claimant advancing and DCF

01:13:23

and arguing that it isn't

01:13:25

as well supported and not

01:13:27

speculative and you have responded



01:13:30

either not advancing its own

01:13:34

valuation, but criticizing the DCF

01:13:36

on the basis of being

01:13:37

speculative an unsupported or favoring

01:13:41

is some cost approach on

01:13:43

on the ground that it

01:13:44

is the only approach that

01:13:45

isn't speculative and I think

01:13:47

every tribunal I've seen in

01:13:49

recent memory has had to

01:13:51

decide on that issue where

01:13:53

that line is. I think

01:13:55

absolutely depends on the the



01:13:58

three arbitrator sitting on your

01:13:59

panel. I think if it

01:14:01

was clear an established where

01:14:02

that line is we wouldn't

01:14:03

have that fight in every

01:14:04

case, but perhaps my colleagues

01:14:07

have a different View How

01:14:15

many different assumptions and invitations

01:14:20

will be one specific minimum

01:14:25

line? You have to go

01:14:27

to a dance of the

01:14:36

speculative or not speculative nature

01:14:38

of Damages when they were



01:14:40

presented with a Monte Carlo

01:14:42

analysis and you see how

01:14:48

what percentage of them lie.

01:14:51

Below zero so that can

01:14:54

give him an indication. Of

01:14:55

course fit in all the

01:14:56

boundaries of what cycle session

01:14:58

argument or celebration date. And

01:15:00

what's the probability that there

01:15:02

is damage and then whether

01:15:04

that line is at 50%

01:15:06

or not. It's it's a

01:15:07

question. That doesn't really pertain



01:15:09

to choose a mattress experts.

01:15:11

You have to bring in

01:15:13

the I would like to

01:15:16

the Bisons open up. I

01:15:17

think we all pretty much

01:15:18

that with time now for

01:15:20

today. So I think we

01:15:23

maybe have one more question

01:15:24

before asking the question. I

01:15:29

would really like to to

01:15:31

thank crawling morning for hosting

01:15:34

us today for hosting a

01:15:35

Washington arbitration week. It has



01:15:38
been Splendid in terms of

01:15:39
communication everything worked. So thank

01:15:43
you crawling morning and also

01:15:45
for all the support that

01:15:47
the question really goes to

01:15:48
everyone but the starting with

01:15:51
With with Mark II I

01:15:54
listen as truthful as I

01:15:57
could to your example of

01:15:58
of of addressing every risk

01:16:02
possible in in your startup

01:16:05
analysis and and or in

01:16:08
your startup question and and



01:16:11
and yet how how comfortable

01:16:16
would would the damages experts

01:16:19
feel if you have a

01:16:21
start-up no just like really

01:16:23
start up. Let's say six

01:16:25
months you have assessed every

01:16:28
risk possible off of used

01:16:31
to using at this year.

01:16:32
And this is a world

01:16:36
where we could be. Tomorrow

01:16:39
a financial crisis Could Happen

01:16:43
anytime. Yes banking. Banking crisis

01:16:51
could happen any time and



01:16:52

I understand the old risk.

01:16:59

Management issue. I understand that

01:17:01

everything would be serve bulletproof,

01:17:02

but By the same time

01:17:06

I feel that some some

01:17:07

tribunal members might be very

01:17:10

uncomfortable saying well, this is

01:17:12

a start-up. I will we're

01:17:13

going to use addition. Of

01:17:15

course. There are examples on

01:17:16

we have remaining examples in

01:17:18

each case against Venezuela where

01:17:20

where there wasn't an ounce



01:17:24
of gold pulled out of

01:17:25
the earth Etc. But but

01:17:27
a DCF was was was

01:17:29
successful. So that that's that's

01:17:31
my first question. The other

01:17:32
one is to everyone. How

01:17:34
would you are are we

01:17:37
getting into a world and

01:17:38
perhaps that is the case

01:17:39
work? damages expert report my

01:17:44
b Slimmer at the beginning

01:17:47
of the proceedings and hopefully

01:17:49
and then and then after



01:17:52
the Library part, they they

01:17:55
the real game really starts

01:17:57
in terms of input for

01:18:01
the tribunal to decide I

01:18:03
would like to hear your

01:18:04
thoughts because this is perhaps

01:18:06
the second or third panel

01:18:07
work where that trend is

01:18:09
being put on the floor.

01:18:11
So thank you same as

01:18:16
the child would be just

01:18:20
given time if you happy

01:18:23
Melissa and tell her you



01:18:24

want to share your views

01:18:25

from an additional question one,

01:18:26

and I'm Julie. I'm out.

01:18:28

Do you want to share

01:18:29

your views on question 2?

01:18:32

Duggar don't don't start. Yeah,

01:18:40

so as I recall question

01:18:42

one was or trade you

01:18:46

most likely to have concern

01:18:48

about awarding the DC FIU

01:18:51

a Shinto a startup in

01:18:53

your example with six months.

01:18:56

Look, I think absolutely yes,



01:18:58
which is why if I

01:19:01
were in that situation and

01:19:02
I was claiming the council.

01:19:03
I would never run a

01:19:05
DCF alone would have alternative

01:19:08
methodologies to fall back on.

01:19:11
I personally think that the

01:19:15
best alternative, you know, they're

01:19:17
there are angry with Mark

01:19:19
there are situations where tribunals

01:19:22
have found that a DCF

01:19:25
is appropriate a particularly. I

01:19:28
think the one that comes



01:19:29

up the most us marks

01:19:30

that is the situation where

01:19:32

you have a mining asset.

01:19:34

It's not an exploration property.

01:19:37

It has is a production

01:19:39

ask that there are proven

01:19:41

resources. So perhaps not with

01:19:44

respect to this particular investment,

01:19:46

but there are there are

01:19:47

his stairs historical data, you

01:19:49

know, there's value in the

01:19:51

ground. It's a much shorter

01:19:53

thing, but I think even



01:19:55

in that scenario. Yes, there

01:19:57

are tribunal-2 with have absolute

01:20:00

heartburn of awarding a DCF

01:20:02

in that situation. And and

01:20:04

the one that I think

01:20:05

is putting on the claimants

01:20:07

counsel hat which is the

01:20:08

hot I wear most of

01:20:09

the time. I personally like

01:20:12

the sun cost plus plus

01:20:14

lots of opportunity as the

01:20:16

alternative to DCF in that

01:20:18

case. You're still using that



01:20:21

DCS in the loss of

01:20:22

opportunity evaluation and then giving

01:20:25

the tribunal the discretion to

01:20:26

take a percentage of that

01:20:27

as the loss of opportunity

01:20:29

tribunals have very wide discretion

01:20:31

when it comes to a

01:20:32

loss of opportunity valuation at

01:20:35

least that gets to a

01:20:37

point where you are recognizing

01:20:40

the potential value of of

01:20:42

a startup that goes beyond

01:20:44

just sunk cost. I also



01:20:46
think it acts as a

01:20:48
disincentive, you know, if we

01:20:50
stay if your business hasn't

01:20:52
Operating for three years and

01:20:53
it's expropriated. You can never

01:20:55
get a DCF violation or

01:20:58
effectively incentivizes dates to appropriate

01:21:01
expropriate early on and I

01:21:03
don't necessarily think that is

01:21:05
the incentives we want to

01:21:07
be creating. So that's my

01:21:09
two cents. Small thing is

01:21:18
to answer. Your question was



01:21:20

Anthony I encourage people to

01:21:21

look at the award in

01:21:23

Reykjavik focused on mine. Stephen

01:21:29

copper versus Pakistan that has

01:21:31

an interesting analysis of a

01:21:34

large mining operation that hadn't

01:21:36

really started and where there

01:21:38

were studies that as detailed

01:21:42

analysis of every possible risk

01:21:44

and what the tribunal decided

01:21:46

in the end that respect

01:21:47

is illustrative or for other

01:21:49

situations. I'm more into news,



01:21:51
but Mark was saying regarding

01:21:53
the risks being accounted for

01:21:55
the 6 price insulin. Mach

01:22:00
I saw you think I

01:22:01
have Ivan talking about. No,

01:22:02
actually, I'm sorry going to

01:22:03
let you answer the question

01:22:04
is all apologies. It was

01:22:13
I think about it you

01:22:15
would have let me see

01:22:16
show of support from and

01:22:20
people like that. Maybe try

01:22:22
and fix it on some



01:22:23
of the issues and bacon

01:22:24
is Old Country. I guess

01:22:27
we try to you know,

01:22:29
a specific issues without going

01:22:42
through more complex places first

01:22:43
to flush out the issues

01:22:45
that need to come out.

01:22:50
There are a limited number

01:22:52
of arbitrations in where the

01:22:56
actual hard crunching of quantum

01:22:59
occurs. Not at the beginning

01:23:02
of the case, but after

01:23:05
a tribunal has resolved those



01:23:09

issues that we talked about.

01:23:15

That's attractive but what it

01:23:18

leaves unresolved is the Quantum

01:23:23

issues that can be resolved

01:23:27

in the first face. I

01:23:29

am that typically requires an

01:23:33

adversarial testing of expert evidence

01:23:35

one example being a discount

01:23:38

rate another example being political

01:23:39

political risk a risk-taking account

01:23:42

though. So I'm not sure

01:23:45

that you can eliminate the

01:23:48

first set of detailed expert



01:23:52
reports. What you can do

01:23:55
though is narrow the field

01:23:58
in a second phase by

01:24:01
making decisions in the first

01:24:03
stop matters that are integrated

01:24:07
into the initial reports. Sorry,

01:24:10
Jose Antonio. But generally speaking

01:24:24
bubbling up all of the

01:24:27
issues happens midstream. I don't

01:24:30
think you look we are

01:24:32
when I went to thank

01:24:33
you. Everyone have a blessed

01:24:36
thing and we could have



01:24:43
been a lot longer than

01:24:44
Q for all of your

01:24:45
inputs today as well. And

01:24:53
thank you Julianne for properly

01:24:55
moderating. And thank you Julianne

01:24:54
for properly moderating.