



## Are Dissenting Opinions in Arbitration Useful? How May Dissenters Contribute to Move the Law Forward in International Investment Arbitration? \*

### Summary

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

The panel discussion at Washington Arbitration Week, moderated by Ian Laird, focused on the utility of dissenting opinions in international investment arbitration. The panel included prominent figures from the arbitration community, including Professor Charles T. Bevan Jr., Keisha Jane Isha, Mallory Silverman, and Dr. Todd J. Weiler. The discussion was framed around whether dissenting opinions contribute positively to the legal landscape of arbitration or complicate it.

Laird acknowledged the contributions of various sponsors and organizers that made the event possible and highlighted the ongoing debate within the arbitration community regarding dissenting opinions. He noted the historical context surrounding this topic, referencing the differing perspectives of arbitrators like Albert Jan van den Berg and Charles Brower on the value of dissent.

The panelists were assigned positions to argue either in favor of or against the usefulness of dissenting opinions. The discussion revealed a split in opinions, with some panelists asserting that dissenting opinions enhance the legitimacy of the arbitration process by allowing for a more thorough examination of legal issues, while others contended that they could lead to inefficiencies, increased costs, and potential challenges to arbitration awards.

Key points made included the assertion that dissenting opinions can bolster party confidence, provide a platform for differing legal interpretations, and contribute to the development of international law. However, concerns were raised about the frequency of dissenting opinions favoring the losing party and the potential for dissent to undermine the finality of arbitration awards.

The panelists also debated the cultural implications of dissenting opinions, considering whether they should be more common in investor-state arbitration due to the public interest involved. Ultimately, the discussion underscored the complexity of the issue, with



no definitive resolution reached, reflecting the ongoing and multifaceted nature of arbitration practice. The session concluded with expressions of gratitude to the panelists for their insights and contributions to this significant topic in the arbitration community.

### **Authors**

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### **Topics**

WAW

### **Category**

WAW

### **Full Transcript**

00:00:09

Welcome everyone. To our second

00:00:13

panel here at Washington arbitration

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weekday for it's a pleasure

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to welcome everyone here. To

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Crowell & moring. My name

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is Ian Laird. I'm partner

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here at Coral and co-chair

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of our International dispute. Resolution

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group, I also wear the

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hat of one of the

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co-chairs Washington arbitration week along

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with Dr. Jose Antonio Rivas

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strategy. I don't take the

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opportunity enough to mention Jose

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Antonio, this this events this

00:01:02

week with something that many

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of us in the Washington

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arbitration community. Talk about four

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years as something that we

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should put together. You know,

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one of those things that

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you just kind of talked

00:01:15  
about it and no one

00:01:17  
ever. Grab the bull by

00:01:18  
the horns. And Jose, Antonio

00:01:21  
was certainly part of that

00:01:23  
discussion. And when Kota came

00:01:25  
along, we really thought that

00:01:27  
was a low entry opportunity

00:01:29  
to do a virtual conference.

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And we started off fairly

00:01:35  
ambitiously in that first year

00:01:37  
and people were desperate with

00:01:40  
the connection and content and

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to interact. And in 2020,

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it was really a marvelous

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success and that gave us

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a great deal of momentum

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as we came out of

00:01:55

covid and into in person

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again the enthusiasm and take

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up and the general Goodwill

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and energy to continue. Going

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to do the conference just

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continue to to grow and

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grow. And this year, I

00:02:15

think we've had really fantastic

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support from our sponsors from

00:02:22

our Law, Firm sponsors from

00:02:23

our experts from our institutions.

00:02:26

And thank you all as

00:02:29

well. But just back to

00:02:30

the doctor Revis and and

00:02:34

xstrata G which is his

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firm which a plays a

00:02:37

major role in organizing along

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with Maryam at the mouth

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and the whole team, a

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text strategy. I think we

00:02:44

can't say enough to them

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for their excellent work and

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and hurting all these arbitration

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cats. So thank you to

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them our second panel today.

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Is titled are dissenting opinions

00:02:59

and arbitration useful. How made

00:03:03

the Centre's contribute to move

00:03:05

the law forward in International

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Investment, arbitration. Obviously the title

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has a few premises in

00:03:12

it and we are going

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to unpack quite a bit

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of that. We have an

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excellent panel here today. A

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real rose gallery of folks

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in the DC arbitration Community

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for the appreciate that description.

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But this is a debate

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that, of course, is one

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that continues on in the

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arbitration community and some have

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very strong opinions, some sit

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on the fence, as well

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as for again. And I

00:03:49

thought, you know, before we

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get into our discussion and

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we're going to organize it

00:03:55  
in a bit of a

00:03:56  
Format of a debate. We've,

00:03:58  
I've assigned positions to our

00:04:00  
four panelists and they've agreed

00:04:02  
to to play along. I

00:04:05  
think at the end of

00:04:06  
the day, you'll probably hear

00:04:07  
what their Real views are.

00:04:09  
But for the sake of

00:04:12  
making this interesting and entertaining,

00:04:14  
I think that they were

00:04:16  
game and so we'll see

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how that works out. But

00:04:19  
to start the panel, I

00:04:20  
wanted to just get a,

00:04:22  
maybe a show of hands

00:04:24  
about folks initial sense of

00:04:29  
where they stand on this

00:04:31  
issue. So those who think

00:04:35  
the sensor a good idea

00:04:37  
and are generally supportive of

00:04:39  
that concept and you put

00:04:41  
up your hands. So that's

00:04:46  
that's y'all just using my

00:04:48  
prerogative as moderator. That's kind

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of a 40 to 50%

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and and I would get

00:04:54

to that. And so I

00:04:56

guess the counter point is

00:04:57

just to see your hands.

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Those who take the opposite

00:05:00

position, it would that be

00:05:02

the rest of the group

00:05:03

here who don't think much

00:05:06

of Defense? Okay, so so

00:05:09

we'll see if this group

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changes that you as we

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go along, there are course,

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a lot of moving pieces

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in this debate and if

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we look back over the

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last 10-15 years, there's been

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some interesting academic discussion. Certainly,

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a lot of articles on

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this topic, it is just

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one of those topics which

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doesn't seem to be able

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to get to a final

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resolution because it really does

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a go to some fundamental

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issues. Cultural issues, legal background

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issues, the predisposition of the

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individual themselves, all sorts of

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factors, which I do want

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to get into. But before

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that, let me introduce our

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panel. So my name is

00:06:02

Ian. Laird I am your

00:06:02

moderator. I told you a

00:06:04

bit about myself already at

00:06:07

the end of our table.

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We have professor Charles to

00:06:11

be a junior and Chuck

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as he is known to

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us is based here in

00:06:19

Washington d.c. he's a council

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at three crowns and is

00:06:24

practice as council is focused

00:06:26

on International commercial and treaty

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arbitration transnational litigation and public

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international law. He was previously

00:06:33

another international law firm here

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in DC Chuck is also

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a full-time professor of practice

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at the University of Pittsburgh,

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Pittsburgh law school, school of

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law. An honorary professor at

00:06:46



Durham law school and visiting

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professor of law at the

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Kiev School of economics. And

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it goes up saying he

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teaches courses in international arbitration

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public international law and international

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human rights. So this is

00:07:01

of course I think one

00:07:02

of the issues that Chuck

00:07:05

is always half of a

00:07:06

grapple with and next to

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shocks on his right is

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that you should Jane Isha

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is a special legal consultant

00:07:15

based here in Washington DC

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at three crowns also. So

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we have three crowns team

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here. She has experience in

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international commercial and Industrial arbitrations

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across a range of Industries,

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including energy Construction in intellectual

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property. She's a Harvard Law

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School grad, where she received

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the Rodger Fisher and Frankie

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sander prize for best student

00:07:39

paper, on topics related to

00:07:41



dispute resolution. She also has

00:07:43

an LLB from National Hospital

00:07:45

in India. So it's great

00:07:47

to have Easter here on

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R panel. We also have

00:07:51

next to Keisha, Mallory silver

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silver, man. Mallory is described

00:08:00

in Who's Who as and

00:08:01

I quote this is great

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quote one of the world's

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most experienced young practitioners of

00:08:05

investment arbitration unquote. So I

00:08:07

think I just absolutely you

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know she's the person for

00:08:11

this time walk and she's

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acting this Council and is

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very interesting lady represented investors

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and 17 different states. Send

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over 50 treaty cases, so

00:08:22

very experienced, she recently left

00:08:25

private practice she was at

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the Arnold importers of Porter

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as a partner here and

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she advises me that you'll

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be able to hire her

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in the new year as

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an outside consultant coach for

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your team. So I definitely

00:08:38

recommend looking to Mallory if

00:08:40

you need to bolster your

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bench and then fine. Next

00:08:45

to me, is dr. Todd

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J. Weiler not to be

00:08:49

confused with Congressman who's apparently

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in Idaho, or Montana. I

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don't know, whenever I pull

00:08:55

up your name. Some state

00:08:57

senator? Yeah, so this is

00:08:58

the arbitrator Todd Wyler. Not

00:09:01



the Republican state, senator so

00:09:06

Todd Council expert academic and

00:09:13

full-time. Arbitrator for well over

00:09:16

20 years and I'm almost

00:09:17

25 years and 26. Okay?

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So you got to count

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those. So he's well recognized

00:09:25

of course in Garner and

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who's who legal as being?

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I would say a Pioneer,

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in many ways in the

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isds field working with me,

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actually in some of the

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earliest, not the case has

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the founder of Oxford University

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press. Does the website investment

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claims.com which a competitor of

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our just Monday, our previous

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panel, moderators and as well.

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One of the co-founders of

00:10:00

the Society of international, economic,

00:10:01

law. I didn't do that.

00:10:04

No, tug, my ears for

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those for you online. If

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you are merely acting as

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a long-time contributor and writer

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and I have been edited

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the author and co-authored co-edited

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dozens of books and articles

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and it's always great to

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have Todd on one of

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these panels dealing with some

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of the navel-gazing issues and

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arbitration Todd. And I'm not

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young anymore. Of the young

00:10:36

man, you started arbitration, when

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he's 50. It could be

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possible. So let's let's get

00:10:48

to our issue. We when

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we talked about the sense

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in international arbitration one, question

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comes to mind. You ask

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questions. So where does this

00:11:01

stand legally is this permitted,

00:11:03

even? And I think of

00:11:05

you come from a European

00:11:05

perspective, perspective, you might say

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yeah, this isn't something that

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I know about our. Our

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courts generally don't encourage this.

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There's a, there's a priority

00:11:16

placed on collegiality and fences

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and many rules. I actually

00:11:22

don't allow for this. If

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you look to the Hague

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convention on the Pacific settlement

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of international disputes, you look

00:11:28

to the European court of

00:11:29

justice. You don't see the

00:11:31

sense but if you're I

00:11:33

guess a common law lawyer,

00:11:34

you know the cent store

00:11:36

or hardly recognized and encouraged

00:11:39

and you know, when exit

00:11:42

was being negotiated in the

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stews, of course, Check the

00:11:45

1965. There is a specific

00:11:47

reference to the allowance for

00:11:49

the Samsung touring decisions. And

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as well, we see them

00:11:53

of course in the icj

00:11:54

context the pcij and they

00:11:58

were common in the Iran,

00:11:59

us claims tribunal. So in

00:12:02

the is DS world of

00:12:04

investor-state dispute settlement, this is

00:12:08

something that has being up

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fairly common practice. Now, going

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to kind of the principled

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distinction between arbitration and litigation.

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If you can start digging

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down and asking yourselves a

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few questions arbitration as a

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number of values which are

00:12:27

quite distinct from litigation, efficiency

00:12:29

is pre-eminent. We had a

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whole panel last night that

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it said talking about efficiency

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is as an important element

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of exit. Arbitration awards are

00:12:40

final and binding, generally, not

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a peelable. Subject, limited enforcement

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challenge, consent and the party.

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Autonomy play a very important

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key issues. There's no Starry

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decisis our president president. So,

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I'm a very different Beast

00:13:00

than, say litigation, which, of

00:13:02

course, is not final final

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and binding. There is continuous

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ability to appeal, and to

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challenge the objective in litigation

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is much more on creating

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ultimate certainty. It's not a

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clearly about efficiency, and the

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idea of consent of the

00:13:22

parties that kind of party.

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Autonomy value is certainly not

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at all part of the

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litigation world. So when we

00:13:30

look at the idea of

00:13:34

Defense, one could argue and

00:13:38

we'll see what are R

00:13:40

panels have to say about

00:13:42

this that arbitration. Is much

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more suited than more of

00:13:46

a civil law style dispute

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resolution process. That it's much

00:13:51

more suited to a collegial

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consensus-building exercise and I will

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see what, what are panel

00:13:58

say about that. I just

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to give you a little

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bit of background on the

00:14:02

academic kind of discussion on

00:14:05

this. We saw about 10

00:14:06

years ago, interesting interaction between

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a very senior arbitrators in

00:14:14

the form of Albert. Ian,

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Vandenberg, and Charles Brower and

00:14:19



I both of them having

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very distinct and contrary and

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asserted and certain views as

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to the value of \$0.02,

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and Boots, put them in

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their camps. Vandenberg has a

00:14:33

hearty dislike of the sense

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coming from his civil law

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for tradition and Joe, Brower

00:14:41

believes that defense playing a

00:14:43

central role. In the adjudication

00:14:46

process, investor-state arbitration. So very

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diametrically opposed used. So I'm

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going to ask our panel

00:14:55  
to Channel A bit of

00:14:56  
that energy and enthusiasm if

00:14:59  
the if if they're so

00:15:00  
minded for defense on the

00:15:04  
on the side arguing that

00:15:06  
the sensor a good thing.

00:15:08  
I think we have Mallory

00:15:09  
and Todd and at the

00:15:11  
end of the table, we

00:15:12  
have the three crowns team

00:15:14  
of truck and Eisha arguing

00:15:18  
against sense. Now I have

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to say as a caveat

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that nothing of well, I

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don't think you can take

00:15:26

anything that I was going

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to stay as their personal

00:15:28

view necessarily and the interests

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of the discussion. Unless they

00:15:32

actually say no, this is

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my rear-view but that's up

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to them. So this is

00:15:36

for the purpose of the

00:15:38

good academic fun and we'll,

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we'll just Dive Right In,

00:15:43



then. So Dan Berg in

00:15:46

his article arguing in favor

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of descent said it will

00:15:51

getting not having to sense

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leads to 4. It will

00:15:57

lead to a better reward

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than going to Quality. The

00:16:01

majority will act more responsibly

00:16:03

the idea that the sense

00:16:06

create an unfavorable kind of

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interaction among the parties. Is

00:16:15

third point is it will

00:16:17

bolster party confidence in the

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process and not having defense

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and third and fourth Lee,

00:16:23

it will contribute to the

00:16:27

development of the law by

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having consensual fully agreed, 33

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member decisions. That is better

00:16:36

for the development of the

00:16:37

law. So this sets out

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a few of the kind

00:16:40

of touch points for this

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discussion. So let me start

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with a party autonomy. And

00:16:48

consent, the fact that the

00:16:52



parties choose their arbitrators is

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is clearly one of those

00:16:56

benefits of international arbitration that

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we all talked about and

00:17:00

we told it's very different.

00:17:02

The litigation there's an element

00:17:04

of form form shopping there

00:17:06

with you that you consider

00:17:07

that good or bad, that

00:17:08

is considered a benefit. But

00:17:11

this also raises the issue

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and this is a related

00:17:16

issue that that's certainly Brower

00:17:18



identified in his piece about

00:17:21

the kind of implicit relationship

00:17:28

between the parties that appointed

00:17:30

the wing arbitrators. And the

00:17:34

fact that when you look

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at the defense when they've

00:17:37

occurred and it just doesn't

00:17:39

happen frequently. I think, maybe

00:17:40

a quarter of the time

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depending on your stats, the

00:17:44

arbitrator doing. This is almost

00:17:47

always, I think it's all

00:17:49

always the person appointed by

00:17:51



the losing party and that

00:17:54

in Vanderburgh view was to

00:17:56

close the connection and that

00:17:58

call them to mind that

00:18:00

there must be something in

00:18:02

in his estimation going wrong

00:18:05

there. And of course John

00:18:07

Paulson wade into that debate

00:18:09

somewhat With his paper and

00:18:13

and he was talking about

00:18:15

the low in decision of

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famous, snap decision that went

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kind of Dowry in his

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argument for getting rid of

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the party appointment and that

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kind of flows into this

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party at timing issues. So

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let me go to then

00:18:29

setting that issue forward, go

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to our folks who are

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in favor. So Chuck and

00:18:41

Eisha. So Chuck, maybe we'll

00:18:44

start with you right at

00:18:45

the end. So, what do

00:18:46

you say about that? Are

00:18:48

you again? So sorry, your

00:18:49



again. So actually, let's start

00:18:51

off the year again. Yeah,

00:18:53

I got to get that

00:18:53

right. Yeah, I can bring

00:18:57

them up from closed cuz

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the Israel's but I personally

00:19:11

disagree with the de categorizing,

00:19:13

the civil law, law. Divide

00:19:15

I think really it's arbitration

00:19:18

vs. Litigation divided, right? In,

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what do you pay? This

00:19:21

is part of my my

00:19:22

junior. What are you paying

00:19:25



for it? You're paying for

00:19:27

nothing for the court. I'm

00:19:30

right. There is you're subjecting

00:19:35

yourself to being part of

00:19:36

the lawmaking process. Right now,

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I've done a lot of

00:19:39

litigation as well as arbitration

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in my time. And I

00:19:41

can tell you that no

00:19:42

client loves the fact that

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their case is going to

00:19:46

make law, right to go

00:19:48

to the circuit, is going

00:19:49



to the Supreme Court. It's

00:19:51

like being told that you

00:19:52

have a really interesting brain

00:19:54

tumor, right everyone. So, come

00:19:56

and look. Right. That's what

00:20:01

he get out of litigation

00:20:02

going to arbitration where you're

00:20:04

paying for three individuals party.

00:20:06

Autonomy to appoint someone to

00:20:08

decide your case, I'm sort

00:20:12

of against the notion that

00:20:13

one of them, one of

00:20:15

the parties appointees, as it

00:20:17



usually is decides that Porta

00:20:21

party autonomy as a right

00:20:22

to get a dissenting, a

00:20:23

decision, right is the right

00:20:25

to have your used vetted

00:20:27

publicly from it, as part

00:20:30

of the tribe as part

00:20:31

of the tribunals award. I

00:20:33

think that we're not in

00:20:35

arbitration necessarily to develop the

00:20:38

law in this way. That's

00:20:41

not what we're getting paid

00:20:42

for. We're getting paid to

00:20:43



settle the dispute and we

00:20:47

can talk more about this

00:20:48

later this spreads into what

00:20:50

we're going to talk about

00:20:50

with president. But you know,

00:20:53

if an arbitrator feels that

00:20:55

their decision Necessary to be

00:20:58

stated in order to move

00:20:59

the lawn a particular direction,

00:21:00

go read a lot of

00:21:02

international law puts judicial decisions

00:21:06

and scholarship on the same

00:21:08

level. I don't do it

00:21:10



on the party side work

00:21:12  
of the tribunal to get

00:21:13  
to a consensus consensus decision,

00:21:16  
and I'll leave it there

00:21:18  
and see if he has

00:21:19  
anything bad there. Yeah. Thank

00:21:22  
you Chuck. I agree with

00:21:23  
all of that and I'll

00:21:24  
just say that in the

00:21:25  
in the decade since Vandenberg

00:21:27  
publishes article a number of

00:21:29  
authors, have attempted to respond

00:21:31  
to it and none of

00:21:32



them have provided any good

00:21:34

reason why Almost 100% of

00:21:37

dissenting opinions and investment, arbitration

00:21:40

are altered by the arbitrator

00:21:43

who is appointed by the

00:21:44

losing party. Just for our

00:21:48

altered another article this year

00:21:50

suggesting that these two cents

00:21:52

are warranted because they provide

00:21:53

some sort of comfort to

00:21:55

the losing party and my

00:21:56

help them accept the outcome

00:21:58

of the arbitration and end.

00:22:00



Well it might be some

00:22:01

sort of beneficial effect of

00:22:04

these two cents. It certainly

00:22:06

can't form the basis for

00:22:07

issuing them because the only

00:22:09

principal basis for issuing a

00:22:11

descend is the existence of

00:22:13

a genuine disagreement on material

00:22:15

points of law or fact.

00:22:17

And so it's it's just

00:22:19

difficult to To believe that

00:22:21

all of these descendants have

00:22:23

been issued on this principled

00:22:25



basis, but still somehow all

00:22:28

happened to favor the losing

00:22:29

party. What's up there? so

00:22:33

two are affirmative, panelists here

00:22:40

in any reaction to that,

00:22:42

but physically party autonomy point

00:22:46

and vandenburgh point about, you

00:22:48

know, losing the losing appointed

00:22:51

arbitrator always seems to be

00:22:53

the the, the dissenter as

00:22:55

somehow sullyng, the whole idea

00:22:59

of Defense Supposed supposed to

00:23:03

go to me, I mean,

00:23:04



how else could you have

00:23:06

it this end or separate

00:23:09

opinion? If you have a

00:23:10

majority that does this, and

00:23:12

then anything that is not,

00:23:13

this must be that. So,

00:23:15

it doesn't make any sense

00:23:17

to Casting aspersion upon the

00:23:19

that, because it's not the

00:23:20

this, if it doesn't fit

00:23:22

it to see. So logical.

00:23:23

I mean, it's obviously that

00:23:26

has to happen. So it's

00:23:27



sort of like, complaining about

00:23:28

the fact that why is

00:23:29

it always at night when

00:23:31

things get dark Because they

00:23:33

do I think that's the

00:23:36

focus here should be on

00:23:38

what the arbitrator's role is

00:23:41

but specifically as to the

00:23:43

is to the statement, I

00:23:45

just heard a problem with

00:23:47

the the Vandenberg approach though

00:23:50

is that he rejects the

00:23:52

principal basis for a decision,

00:23:54



being a disagreement, and a

00:23:57

good-faith disagreement, he rejects that

00:23:59

has legitimate uses. That's not

00:24:00

a good reason to Josiah.

00:24:01

So what is I think

00:24:07

that I agree with chuck

00:24:09

on some points and Asia

00:24:11

as well, you know, I

00:24:12

don't think I'm sold on

00:24:13

the idea that arbitrators can

00:24:15

just grandstand that they can

00:24:17

make the parties foot the

00:24:19

bill for everything, that in

00:24:21



theory, might contribute to the

00:24:23

development of the law. If

00:24:25

they want to is Chuck

00:24:26

said, they can write a

00:24:27

book, write an article. They

00:24:29

don't need to write a

00:24:30

dissenting opinion just for this.

00:24:33

But at the same time,

00:24:34

it's still appropriate in some

00:24:37

circumstances to have a descent

00:24:39

and descends can still be

00:24:40

very useful. So I think

00:24:43

one of the the reasons

00:24:45



why in the past 10

00:24:47

years maybe no one has

00:24:48

come up with a response

00:24:51

is because this hasn't really

00:24:52

been a contested issue. You

00:24:54

just had a very lengthy

00:24:56

process for the amendment of

00:24:58

the exit arbitration rules and

00:25:00

in the thousands of pages

00:25:02

of working papers and in

00:25:04

the hundreds of pages of

00:25:05

compilations of comments from various

00:25:08

stakeholders, you don't see anyone

00:25:10



contesting the notion that in

00:25:12

principle, you can have a

00:25:14

descent It surprised anyone. Descendants

00:25:18

aren't in question. They are

00:25:20

not something outlandish. Separated pinions

00:25:23

are permitted. As in said,

00:25:25

in various four of their

00:25:27

reference in the icj Statue,

00:25:29

they are explicitly authorized by

00:25:32

the exit convention and we

00:25:35

don't see people dispensing on

00:25:37

the notion that a descent

00:25:38

can be useful or is

00:25:41



permitted, perhaps, because there is

00:25:43  
a way to opt out

00:25:45  
if you don't want to

00:25:46  
have a dissenting opinion, you

00:25:49  
don't have to have one.

00:25:50  
You can agree with the

00:25:52  
other party to appoint a

00:25:53  
sole arbitrator. But if you

00:25:56  
have a three-member tribunal, I

00:25:58  
think it's really difficult to

00:26:00  
say that there can't ever

00:26:01  
be any dissent whatsoever in

00:26:04  
any circumstances, just on a

00:26:07



personal level for an arbitrator.

00:26:08

I think it would be

00:26:09

really difficult. If you know

00:26:11

that, you essentially have to

00:26:14

sign an award and Siri

00:26:17

you can abstain from signing

00:26:19

the award. But what do

00:26:20

you really going to do

00:26:21

abstain from signing the award

00:26:23

and not provide? Any explanation,

00:26:26

as to why you're getting

00:26:27

from signing to me? That

00:26:30

would seem to throw the

00:26:31



award into more doubt than

00:26:33

just having someone explain. Why

00:26:35

they just agree with the

00:26:36

majority. So I think descends

00:26:39

can be useful. There obviously,

00:26:40

is some tension between the

00:26:42

parties want in a cage

00:26:43

and what The Spectator is

00:26:45

in the community and buy

00:26:46

one for the law to

00:26:47

be moved forward, but the

00:26:50

sense are here, they haven't

00:26:52

been challenged over the past

00:26:53



10 years and if there

00:26:55

is Their statistics that show

00:26:57

that arbitrator is our, I

00:26:59

guess issuing opinions in favor

00:27:02

of the party. That point

00:27:03

of them, that may not

00:27:04

be something positive, it may

00:27:07

just be a correlation. It

00:27:08

could be that parties are

00:27:09

doing a very good job

00:27:10

of selecting arbitrators, that agree

00:27:13

with their views and in

00:27:14

the end, they're just not

00:27:15



able to persuade. The other

00:27:16

arbitrators, not necessarily some manifestation

00:27:18

of Faith or something. Improper,

00:27:21

it could be people doing

00:27:23

a good job. What is

00:27:25

possible would be possible to

00:27:28

have an arbitration Clause. Drafted

00:27:30

that says that the arbitrator's

00:27:32

must come to a consensus

00:27:33

and I mean, that might

00:27:35

lead to a stalemate in

00:27:38

in theory you could Say

00:27:40

basically say no to sense

00:27:42



by saying, they must come

00:27:43

to a consensus. But I

00:27:46

mean, essentially that's the Civil

00:27:48

model that they don't permit

00:27:50

this end so that that

00:27:52

is required. And there's a

00:27:54

well in and that goes

00:27:59

to the whole question of

00:28:01

deliberations, of course, and what

00:28:03

goes on behind the scenes

00:28:04

and how the three arbitrator

00:28:07

panel interacts in or out

00:28:09

for the assassins in the

00:28:10



European Court, how they interact,

00:28:12

and how they get to

00:28:14

that decision, that's a for

00:28:16

another discussion as to how

00:28:17

that works. But let me

00:28:19

go to the point that

00:28:20

their truck race just to

00:28:21

get your response from our

00:28:23

produce. And folks, I mean

00:28:25

is this a cultural issue

00:28:27

or is this really like

00:28:29

those of the argument that

00:28:30

I kind of served up

00:28:31



initially? Is this a litigation

00:28:33

versus arbitration kind of divided?

00:28:37

How do you view that

00:28:38

issue? I mean it's someone

00:28:41

from a common law jurisdiction.

00:28:42

I wouldn't say that on

00:28:44

the whole we're not collegial

00:28:46

or is that I am

00:28:47

not going to do because

00:28:47

I'm from a common law

00:28:50

jurisdiction and might have an

00:28:51

individual opinion but it is

00:28:55

true that your background and

00:28:58



legal training probably will have

00:29:00

something to do with what

00:29:02

you think about on this

00:29:02

issue. Can I respond quickly

00:29:09

to what was just said?

00:29:11

And I am a little

00:29:16

bit. What I actually think

00:29:18

is that at no point

00:29:20

where I think it should

00:29:20

be disallowed cuz I didn't

00:29:22

go to the threat of

00:29:23

a descent is a really

00:29:25

good one. I didn't the

00:29:26



title here is a dissenting

00:29:27

opinions useful. I think I

00:29:30

actually believe that there should

00:29:31

be some social pressure is

00:29:34

the social pressure by the

00:29:35

best way to put it

00:29:35

against the sense like we

00:29:37

really should as a regime

00:29:39

try to create a system

00:29:40

where descends are the Rarity

00:29:43

we only to send it

00:29:44

to absolutely have to can

00:29:46

I put your name to

00:29:47



something and need to say

00:29:49

why? They're they're they're going

00:29:52

to remain there? I think

00:29:53

there's a good that they

00:29:54

remain there because if they're

00:29:57

not there, I think they're

00:29:59

not. There you do, run

00:30:01

the risk which is equally

00:30:02

problematic in arbitration on seeing

00:30:04

more and more or split

00:30:05

the baby decisions, right? I

00:30:08

think it's actually better for

00:30:10

justice if the two arbitrator

00:30:13



to agree on a certain

00:30:14

robust decision. Feel like they

00:30:17

can issue that robust decision

00:30:19

in the face of a

00:30:19

descent as opposed to they

00:30:22

both get together and issue

00:30:24

some award both side to

00:30:25

get together. If you some

00:30:26

award that says you win,

00:30:28

but you get no money

00:30:29

and that's the only way

00:30:29

that we could get together

00:30:30

and and get some sort

00:30:33



of consensus. Right? I mean

00:30:34

that's actually worse. So I

00:30:36

need to send need to

00:30:37

be there to push that

00:30:39

kept the pressure on the

00:30:40

arbitration tribunal. However, I do

00:30:42

think that, we need to

00:30:43

really be thinking as arbitrators,

00:30:45

that this is the nuclear

00:30:47

option that, I think that's

00:30:49

my cue. I completely agree.

00:30:53

And I don't think it's,

00:30:55

it's this binary between a

00:30:57



collegial approach and purely individualistic

00:31:00

approach on the part of

00:31:01

the arbitrator's, there's certainly no

00:31:03

strict expectation of a consensus

00:31:06

award, but I think there

00:31:08

is an expectation that in

00:31:10

the deliberation process, the arbitrators

00:31:12

from whatever country they come

00:31:13

from will engage in a

00:31:15

free and An exchange of

00:31:17

views and even be open

00:31:19

to changing their minds and

00:31:20

in an ideal world. That.

00:31:23



Good fit process would result

00:31:25

in consensual results, more often,

00:31:27

than not. So, I think,

00:31:28

I think the answer lies

00:31:29

somewhere in between this collegial

00:31:32

and individualistic divide. Yeah, I

00:31:35

don't even understand the idea

00:31:37

that there's a bit. Individualism

00:31:39

actually has anything to do

00:31:40

with it. I think it's

00:31:41

a professional responsibility of the

00:31:43

arbitrator to come to in

00:31:46

good face. Come to a

00:31:47



legitimate as far as they're

00:31:51

concerned illegitimate. And the reason

00:31:53

the basis for their finding.

00:31:56

So if that's the

00:31:57

objective of the arbitrator and

00:31:59

the two other opportunities share

00:32:00

that, and they all are

00:32:02

operating a good-faith collegiality will

00:32:05

necessarily exist. It's only individuality

00:32:10

in the sense that they're

00:32:11

not all one human. I

00:32:13

mean, because there were three

00:32:14

different humans, they want some

00:32:15



individual characteristics but didn't to

00:32:17

say that people who descend

00:32:19

are more individualistic, is it

00:32:21

is nylon Donnelly unsupported. It's

00:32:24

also Beside the point of

00:32:27

a woodchuck chuck said, which

00:32:30

is wholly agree with would

00:32:32

be with respect to only

00:32:33

having two descent when you

00:32:34

really need to. So, the

00:32:38

first time and the only

00:32:39

time I had to write

00:32:40

at this at Weston 2005-6.

00:32:42



And in that case, I

00:32:45  
really had no other choice.

00:32:47  
I just, I disagreed with

00:32:48  
the finding and then, as

00:32:50  
I studied, a lot of

00:32:51  
the law a written about

00:32:52  
it and I thought they

00:32:53  
were wrong. So I contacted

00:32:56  
Martin Hunter like a mentor

00:33:02  
and he basically said the

00:33:04  
same thing that I found

00:33:05  
was attributed to Redfern unsurprisingly

00:33:08  
in. I think one of

00:33:10



the Vanderburgh articles which is

00:33:12

that you're going to just

00:33:13

has to be truly necessary

00:33:16

and then has to be

00:33:17

polite. And that has to

00:33:19

be short be concise, right

00:33:22

to the point. And so

00:33:24

I followed that The only

00:33:26

question I guess I would

00:33:27

have in retrospect is I

00:33:29

felt at the time that

00:33:30

there was very much a

00:33:32

cultural norm or a against

00:33:37



one's right in favor of

00:33:39

consensus against going off. Maybe.

00:33:43

That's because it was like,

00:33:44

over 20 years ago, or

00:33:46

maybe it's just because we

00:33:48

need to remember that there

00:33:49

is a there's enough of

00:33:51

us, there's sufficient mass of

00:33:54

us at the international arbitration

00:33:56

Community level, that we have

00:33:58

our own more ice and

00:33:59

one of the mares which

00:34:01

is basically I'm a loan

00:34:02



of about this evil. And

00:34:04

the, and the anglo-american /

00:34:07

Canadian approach this where you

00:34:10

get this pressure that you

00:34:11

definitely do want to reach

00:34:13

consensus if it all possible.

00:34:18

That's part of built into

00:34:19

the rules to, you know,

00:34:20

you have the exit convention

00:34:22

saying what the tribunal needs

00:34:23

to do in respect of

00:34:25

the award. The tribunal needs

00:34:27

to draft his reasons and

00:34:29



built into, that is the

00:34:30

notion of this consensus. Three

00:34:33

people coming together to jointly

00:34:36

draft an award, but sometimes

00:34:39

There are going to be

00:34:40

disagreements when three different people

00:34:42

come together and look at

00:34:44

issues of Law and she's

00:34:46

a fact and I think

00:34:47

that having the possibility of

00:34:49

Defense creates this day. That

00:34:52

doesn't mean that in every

00:34:54

single situation, a particular to

00:34:56



send was something that I

00:34:59

necessarily would have done or

00:35:01

what if agreed with. But

00:35:02

it's still I think on

00:35:04

the basic level of a

00:35:06

good thing for the system

00:35:07

to have If I forgot

00:35:10

another idea, just came to

00:35:11

mine Thomasville to a friend

00:35:15

of many who are the

00:35:16

who are a little bit

00:35:17

older here. I had appointed

00:35:20

him as an arbitrator in

00:35:21



a Mexican case international Thunderbird

00:35:24

gaming and he was kind

00:35:27

of had a thing going

00:35:27

with him afterwards, cuz I

00:35:29

went represent the claimant, I'd

00:35:30

say I always say what

00:35:31

your descent, any my separate

00:35:34

opinion to call it at

00:35:37

the sent, you said no,

00:35:39

it's my separate opinion. So

00:35:41

I guess that we have

00:35:42

to color a dress that

00:35:43

aspect of it too because

00:35:44



it's really not just to

00:35:47  
send or maybe it is.

00:35:51  
I think of that case,

00:35:52  
Thomas was very much disagree

00:35:53  
with the majority, but yes,

00:35:55  
he was a very well-mannered

00:35:56  
and proper person and he

00:35:58  
just couldn't swallow the word

00:36:00  
descent, which goes to the

00:36:01  
more of his character, but

00:36:03  
no doubt he was contrary.

00:36:04  
Let let me go to

00:36:06  
another related issue. And and

00:36:09



you know what? We talked

00:36:10

about the values of arbitration

00:36:11

efficiency is obviously something we

00:36:15

look to find them final

00:36:16

and binding Awards, you know,

00:36:18

the the process is and

00:36:29

I'll give this back to

00:36:31

the the, the the empty

00:36:33

the center view point here

00:36:36

for your view. I mean,

00:36:37

really, I think I'm just

00:36:39

laying it in here, isn't

00:36:40

this isn't dissenting complicating. The

00:36:43



process, doesn't this lead to

00:36:46

extra cost time and then

00:36:49

ultimately serve The basis for

00:36:52

a challenge which again, goes

00:36:53

to Kosta and inefficiency. What,

00:36:55

what would what do you

00:36:57

guys say, Chuck and Kaia

00:37:03

FIT in a patient? Is

00:37:04

not because necessarily I'm worried

00:37:08

about using my party's resources

00:37:11

to pay for a dissenting

00:37:12

opinion. I mean I know

00:37:12

that's that's that's part of

00:37:14



that, we put in the

00:37:15

cost of this process could

00:37:18

lengthen the length of time

00:37:21

to get an award. But

00:37:22

if you have a strong

00:37:22

chair, the chair should be

00:37:24

able to say, hey we're

00:37:25

not going to just give

00:37:25

you another year to write

00:37:26

a large reward out, right?

00:37:29

So it requires a strong

00:37:30

chair to make sure that's

00:37:31

not the case. With the

00:37:34



sense is that your your

00:37:38

appointed the arbitrator becomes your

00:37:41

lead counsel in an annulment

00:37:42

case or a set aside

00:37:43

a sore about a case

00:37:46

against recognition and enforcement. So

00:37:48

that that person sort of

00:37:50

starts if we restart encouraging

00:37:52

the sense by the party

00:37:54

appointed arbitrators The ones who

00:37:57

want to get that job

00:37:58

or going to see themselves

00:37:59

as laying the groundwork for

00:38:01



an annulment Kaiser has set

00:38:02

aside Kate and they're going

00:38:03

to put forward. The case

00:38:04

that is going to be

00:38:05

run through into that process.

00:38:07

If you look at cases

00:38:08

where there was a set

00:38:09

aside or an annulment where

00:38:11

there was a descent that

00:38:13

dissent is heavily cited, heavily

00:38:15

quoted. And are we getting

00:38:18

into a decision? If the

00:38:19

sense become more? More commonplace

00:38:20



are we getting into a

00:38:21

system? Are we building a

00:38:23

shame? We're annulments and set

00:38:25

aside just become par for

00:38:26

the course, which Unfortunately, they

00:38:29

kind of are right. And

00:38:31

I think as a regime

00:38:32

we need directions with whether

00:38:33

that's what we want or

00:38:34

what we don't want. Right?

00:38:38

So I don't think the

00:38:40

sensor illegitimate just because they

00:38:42

may add to time and

00:38:44



cost just because they may

00:38:45

undermine the authority of the

00:38:46

award. Because there may well

00:38:48

be awards that do you

00:38:49

like raisins or do suffer

00:38:51

from a serious procedural irregularity,

00:38:53

in which case there should

00:38:54

be a descent that undermines

00:38:56

the authority of that award,

00:38:57

but I see the problem

00:38:59

is being dead. Distance themselves

00:39:02

have come to lack Authority,

00:39:04

because they are always altered

00:39:06



by the losing parties appointee.

00:39:09

And so, while the Sun's

00:39:11

can play this important role

00:39:12

in policing irregular Awards, there

00:39:16

is fricassee, is diluted by

00:39:17

their ubiquity. And so there's

00:39:19

there's reason to be more

00:39:21

restrained in issuing descends and

00:39:23

preserving them only where there

00:39:25

is good reason to depart

00:39:26

from the majority. Produce produce

00:39:33

answers. What do you think

00:39:35

about the efficiency point? Is

00:39:36



there an answer to that?

00:39:39

So a couple things the

00:39:45

first woman be as regards,

00:39:47

the reputational value of a

00:39:49

of any decision or it

00:39:50

is persuasiveness, including a descent.

00:39:53

I think that's got a

00:39:54

lot to do with who

00:39:55

the person was who wrote

00:39:56

it. And if they have

00:39:58

they have a certain gravitas

00:40:00

or or a reputation for

00:40:03

being a team player but

00:40:06



someone who has his good

00:40:08

ideas and maybe there are

00:40:10

ideas will adjust and we'll

00:40:12

be successful at least in

00:40:15

terms of its quality and

00:40:17

then it's a potential for

00:40:19

being quoted. In other cases

00:40:20

something Chuck said which was

00:40:23

interesting is I certainly agree.

00:40:25

Of course that we set

00:40:28

an appointment is now just

00:40:30

to assume to happen. I

00:40:33

think that's mostly though because

00:40:34



of the kitchen sink approach

00:40:35

to litigation that originally song,

00:40:38

Trade law, but they cost

00:40:39

Applied pretty soon. Enter into

00:40:43

industrial at the end of

00:40:44

the young age, specially true

00:40:48

on the part of the

00:40:49

respondent because of the general,

00:40:50

the respondents council aren't actually

00:40:53

on a budget. They may

00:40:55

be on a budget to

00:40:56

some degree in some way.

00:40:58

But ultimately, if political Necessities

00:41:01



require more, they could get

00:41:03

more in besides is not.

00:41:04

So it's not there he's

00:41:05

directly. But the funny thing

00:41:08

is though that If there

00:41:12

was the kind of error

00:41:14

that would cause an annulment

00:41:16

to take place, then by

00:41:18

dint of logic, it was

00:41:20

one that had to be

00:41:21

brought up by the dissenting

00:41:23

arbitrator, right? Like if there

00:41:26

was a fundamental failure in

00:41:29



in, in due process or

00:41:31

if it is clear that

00:41:32

they went far beyond the

00:41:33

remit jurisdiction, what that would

00:41:35

be. It would be incumbent

00:41:37

upon the the other arbitrator

00:41:39

if they couldn't convince their

00:41:40

their colleagues at the time

00:41:42

that they would have to

00:41:43

set that out. So I

00:41:45

wouldn't say that that's setting

00:41:46

a course, you know, that's

00:41:47

not that's not playing Council

00:41:49



for the next case. That's

00:41:51

just saying what happened So,

00:41:54

I mean, ultimately, they'll all

00:41:55

of this goes back to

00:41:56

could face and professionalism, and

00:42:00

the self-aggrandizing arbitrator, who writes

00:42:04

too much, who who takes

00:42:06

the party's money to write

00:42:07

a law review article as

00:42:09

much less even published in

00:42:10

her log review, article, based

00:42:11

on it or the person

00:42:12

who is just grandstanding, or

00:42:15



the person who doesn't understand

00:42:17

that we are both players

00:42:18

are supposed to be independent.

00:42:19

There the anomalies, the actual

00:42:22

standard that we all presume

00:42:25

to live by think we

00:42:26

all do is Independence impartiality,

00:42:30

acting a good case and

00:42:32

it in a professional manner.

00:42:35

And if that's the Assumption,

00:42:36

I think a lot of

00:42:37

these critiques go away. One

00:42:41

other thing that might help

00:42:42



is if you know if

00:42:44

someone feels so strongly that

00:42:46

they need to descent. You

00:42:48

need to say something rather

00:42:50

than just sign an award

00:42:51

is that they don't believe

00:42:52

in in Siri they could

00:42:55

decide not to charge for

00:42:57

that time. It doesn't solve

00:42:59

the entire problem because then

00:43:01

the majority presumably still needs

00:43:03

to deal with the signs

00:43:04

in the body of the

00:43:05



award. But that's one way

00:43:07

to respond to the efficiency

00:43:09

and cost answer. But then

00:43:14

it encourages people to be

00:43:15

short and descent when when

00:43:17

they need to and not

00:43:18

write a letter. If you

00:43:19

were to go in that

00:43:21

context, you referring to be

00:43:22

silly Amore rather than an

00:43:24

actual rule. Can I add

00:43:27

onto something that I do?

00:43:29

Understand that Todd said, this

00:43:30



is the part where I

00:43:31

eventually agree with hot seat

00:43:33

collegiality. Right, right. We're not

00:43:34

all just just fighting up

00:43:36

here. I do think that

00:43:38

there is a dichotomy to

00:43:39

on whether to send us

00:43:40

about one thing you said

00:43:41

about due process and procedure.

00:43:43

I think that is something

00:43:44

that the party appointed arbitrators

00:43:46

are. Absolutely there to police,

00:43:47

to make sure that each

00:43:49



side had their due process

00:43:50

right to be heard. And

00:43:51

if something like that happened,

00:43:53

then that's an absolute obligation

00:43:55

to descend rather on, you

00:43:57

know, the scope of the

00:43:58

fvt obligation or something like

00:44:00

that. Could just, that could

00:44:01

just be better, put better

00:44:04

put into a, a large,

00:44:08

you article, and nothing is

00:44:11

important. I think it's mixed

00:44:14

up in. This is good.

00:44:15



Faith in collegiality here is

00:44:18

doing arbitration for about 20

00:44:21

years and over there's 20

00:44:23

years. I've seen a steep

00:44:25

decline in just professionalism amongst

00:44:28

Council. Right? I think there

00:44:30

was a point when I

00:44:31

first started in this practice

00:44:32

where it was a bit

00:44:34

more of a gentleman's game

00:44:35

as opposed to litigation, now

00:44:38

it is much more brass

00:44:41

knuckles as a matter of

00:44:44



practice. And I think that

00:44:44

bleeds over into some of

00:44:46

the more, you know, proclivity

00:44:48

to dissent among arbitrators because

00:44:51

that's what they feel that

00:44:51

their party wants. And other

00:44:53

thing is a bigger problem

00:44:54

that the institution needs to

00:44:56

Grapple with. So, before I

00:44:59

go on my next issue,

00:45:01

I still want to give

00:45:02

our for descent panelist. The

00:45:08

chance that on the efficiency

00:45:09



of shit. I think our

00:45:12

ear Copalis made a pretty

00:45:14

good case on that. What

00:45:16

do you say even just

00:45:17

a short response about the

00:45:19

efficiency and the opening to

00:45:21

challenge part? I think it's

00:45:26

been covered, there are circumstances

00:45:29

where it really does make

00:45:30

sense to descend because there

00:45:32

have been serious irregularities in

00:45:35

the issuance or the creation

00:45:37

of the award. And then

00:45:39



it didn't come in on

00:45:40

the dissenting arbitrator to bring

00:45:41

these to the parties attention

00:45:43

and that will come to

00:45:45

light during the course of

00:45:46

the set aside or annulment

00:45:47

proceedings. But I think it's

00:45:49

a very real concern that

00:45:51

dissenting opinions increase the time

00:45:54

that it takes station towards

00:45:56

they increase the car, For

00:45:57

the party is. Before you

00:46:00

completed the first part of

00:46:02



the case and not even

00:46:04

including the the cost of

00:46:06

a set aside or an

00:46:07

all-night proceeding to me. The

00:46:10

one thing I could think

00:46:11

of that might be an

00:46:12

answer. Is this idea of

00:46:14

keeping it short has an

00:46:16

arbitrator feels strong enough to

00:46:18

issue The Descent. Say, I

00:46:20

feel so strongly that I

00:46:21

need to do this but

00:46:22

I'm not going to charge

00:46:23



you for that time. There's

00:46:25

still some cost because as

00:46:27

I mentioned, the majority needs

00:46:28

to deal with The Descent

00:46:30

but that might explain some

00:46:32

of the concerns So again,

00:46:38

I might be just as

00:46:39

it, okay? If it's a

00:46:40

sample of One to begin

00:46:41

with but also is back

00:46:43

in time. But back in

00:46:45

2005, after the case was

00:46:47

heard in which I just

00:46:48



sent it to my youth

00:46:51

Stephan. I felt Quite, I

00:46:56

don't know, quite how the

00:46:58

Quaker Junt to put my

00:47:00

descent in quickly and the

00:47:02

chairman he actually set times

00:47:07

for, is it. Okay, if

00:47:08

you ever just got two

00:47:09

weeks, and it's going to

00:47:10

be after we've already done

00:47:11

our first drop, and we

00:47:12

will have a final draft

00:47:13

after we see your descent?

00:47:14



Boom, boom, boom. And maybe

00:47:16  
it's cuz of my youth

00:47:17  
that I didn't go, hey,

00:47:17  
wait a second, but I

00:47:19  
didn't. I simply complied with

00:47:20  
that schedule, and got my

00:47:23  
two cents in. So, I

00:47:26  
mean, I think this can

00:47:28  
be handled simply by the

00:47:29  
chairperson. I mean the I

00:47:32  
guess the only problem that

00:47:33  
might happen is egos but

00:47:36  
I think another really admirable

00:47:38



trait about an arbitrator or

00:47:39

a lawyer is humility and

00:47:42

therefore being willing to serve

00:47:43

lemonade your ego sometimes when

00:47:45

she is strong. But you

00:47:47

realize that your primary Fidelity's

00:47:50

to doing a good service

00:47:52

for the people who appointed

00:47:53

you So, thanks for mentioning

00:47:57

your case and just to

00:47:59

give everyone a little background.

00:48:00

I think it's called a

00:48:01

Shader with a visit to

00:48:04



the plural for shaders and

00:48:10

nfm was the issues. So

00:48:12

most favored nation and twenty

00:48:14

years ago and granted it,

00:48:15

there still some convention but

00:48:17

it was a well discussed

00:48:19

issue. Certainly a lot of

00:48:22

contrary decisions and you know

00:48:25

I could argue that your

00:48:26

contribution was part of the

00:48:28

the kind of zeitgeist of

00:48:30

the time about. Where were

00:48:32

you going to one could

00:48:33



come down on the issue.

00:48:34

Quite legitimately based on case

00:48:36

La principal Etc. So I

00:48:39

guess it goes to the

00:48:40

question and maybe you can

00:48:42

talk to this. Since you're

00:48:44

the expert but did you

00:48:44

feel you were contributing to

00:48:46

the development of the law?

00:48:47

And you know this is

00:48:49

all on the contest. Did

00:48:49

you know there is no

00:48:50

precedent but there is this

00:48:55



What's that, you know, Awards,

00:48:57

do you know there, if

00:48:58

they're part of the, do,

00:49:01

you know, is arguably in

00:49:02

part of the interpretation of

00:49:03

treaties process, part of the,

00:49:06

the, you know, the is

00:49:07

the icj statue to you?

00:49:09

What international law is? I

00:49:11

mean, there is a role

00:49:11

for certainly decision, but you

00:49:15

know where to dispense play

00:49:16

into that, I just think

00:49:17



I was right. And I'd

00:49:21

like, I mean Dive by

00:49:22

is that without the closing

00:49:24

sentence, I mean, I've been

00:49:26

working out on my dissertation

00:49:28

back. Then we're non-discrimination an

00:49:31

Enderman What's the word equality

00:49:34

of treatment? Were, were big

00:49:36

components, and I had a

00:49:38

lot of research and found

00:49:39

uncovered this 1948 article by

00:49:42

schwartzberger, that was Wonderful. Is

00:49:46

that it basically said that

00:49:48



the any idea, really sticks

00:49:49

and said that the purpose

00:49:51

of the mfn Clause is

00:49:52

to put the services of

00:49:53

the very best negotiators in

00:49:55

the world in your favor.

00:49:57

Meaning that you negotiate your

00:49:59

deal. You put the mfn

00:50:00

clause in now when somebody

00:50:02

is better and more talented

00:50:03

is better, you know, better

00:50:04

power relationship can get a

00:50:06

better deal. You get the

00:50:08



upgrade, you get the tablet

00:50:09

that's been in a nutshell

00:50:12

and I thought that it

00:50:14

didn't make much sense in

00:50:15

that particular case to basically

00:50:16

a come up with a

00:50:18

default that suggested unless this

00:50:21

explicit. But it says that

00:50:22

it's not bad because I

00:50:23

thought, well, know is it

00:50:25

should be the other way

00:50:25

around you and me in

00:50:33

her early cases, who I

00:50:35



think, developing ethos of as

00:50:37

counsel trying to move the

00:50:39

law at trying to build

00:50:41

the law. Arbitrator even then

00:50:45

I don't. I really wasn't

00:50:46

interested in building Lobby cuz

00:50:48

I'm not, I don't think

00:50:51

so because I don't want

00:50:57

fundamentally accept the idea that

00:51:00

there should be or can

00:51:01

be your ought to be

00:51:02

president. And in this field

00:51:04

that Ben is not really

00:51:05



about developing the law cuz

00:51:07

there is no the law

00:51:08

to begin with, but the

00:51:10

problem in already position, I

00:51:15

still have a hard time

00:51:16

with this idea that it

00:51:17

is. Or the arbitrators to

00:51:20

look beyond the case and

00:51:22

think about, I don't know

00:51:23

if that's an arbitration as

00:51:24

a whole or what the

00:51:25

law should be in the

00:51:27

future. It's the party's case

00:51:30



and they want for it

00:51:32  
to be decided. As I

00:51:33  
said, they don't really care

00:51:35  
what happens beyond the four

00:51:37  
corners of that case. But

00:51:41  
at the same time, I

00:51:42  
have started to see a

00:51:43  
lot of awards that say,

00:51:44  
well, we think that we

00:51:47  
really need to adhere to

00:51:50  
the consistent line of jurisprudence

00:51:52  
that has developed on X

00:51:54  
or Y issue. I'm sometimes

00:51:58



the jurisprudence of has developed

00:52:00

on that issue. Just doesn't

00:52:02

seem right. So I think

00:52:04

there is a concern that

00:52:07

if people are just sort

00:52:08

of rubber-stamping, what someone has

00:52:09

done previously, we're going to

00:52:13

end up at a point

00:52:14

where the principles that we

00:52:16

have in the system, no

00:52:17

longer makes sense. And I

00:52:18

can see in that context

00:52:20

the benefit of having someone

00:52:22



write a dissenting opinion and

00:52:24

say this was never logical

00:52:26

in the first place and

00:52:27

I'm not just going to

00:52:28

rubber-stamp it here again, you

00:52:31

have that question of whether

00:52:32

you're playing to The Spectator

00:52:34

is in the system or

00:52:36

the parties in your case.

00:52:37

I don't know how I

00:52:38

feel about that but I

00:52:39

I can see the value

00:52:41

in someone stopping and saying.

00:52:43



I don't agree with this

00:52:44

one more quick point. One

00:52:50

more perk points. I'm reminded

00:52:52

of a long time ago

00:52:53

when I was a clerk

00:52:54

to a federal court judge

00:52:55

in Canada. And he generally

00:52:57

let me do all those

00:52:58

reserves and get the first

00:53:00

cut and he agreed with

00:53:02

me on every single case.

00:53:03

But one is the one

00:53:05

he didn't disagree. Disagreement me

00:53:06



on it was like a

00:53:07

First Nations case involving Railways

00:53:09

or something and he looked

00:53:11

at it and he said

00:53:12

you're confused. This is not

00:53:14

the court of appeal. I'm

00:53:16

a trial judge. I apply

00:53:17

the law to the facts.

00:53:20

If you want to, if

00:53:21

you want to change the

00:53:22

law, that's what I feel

00:53:23

does. And I would argue

00:53:26

the probably those very same

00:53:27



admonition. Could be applied to

00:53:29

arbitrators, Well, hearing from our

00:53:34

pro-camp on this development of

00:53:37

international law Vanderburgh. Absolutely. He

00:53:41

did an analysis of the

00:53:43

decisions and he came to

00:53:44

the conclusion that if it

00:53:45

wanted to send but what

00:53:48

do you guys have to

00:53:49

say about that issue? Yes.

00:53:52

So I think it goes

00:53:52

back to the distinction between

00:53:54

quartz and arbitration because chords

00:53:57



serve a public purpose, they

00:54:00

and their funded as such.

00:54:01

So they they operate beyond

00:54:04

the resolution of a single

00:54:05

dispute, create binding precedent in

00:54:09

a lot of jurisdictions. And

00:54:11

so there's good reason for

00:54:12

chords to issue non-binding opinions,

00:54:14

that will develop the law,

00:54:16

whether it's a dissenting opinion,

00:54:17

or separate opinion, or concurring

00:54:20

opinion, or an advisory opinion.

00:54:21

But arbitral, tribunal is by

00:54:24



contrast, are constituted for a

00:54:26

private purpose and are privately

00:54:28

funded by the parties that

00:54:29

constitute them. And so they're

00:54:31

their focus should be on

00:54:34

efficiently and finally resolving that

00:54:36

dispute. And none of this

00:54:38

is to say that arbitral

00:54:39

Awards, do not contribute to

00:54:41

the development of international law

00:54:43

just said, any such contribution

00:54:46

is not the primary rule

00:54:47

of a tribunal, it might

00:54:49



just be an incidental effect.

00:54:51

Off their Awards. Yeah. I'm

00:54:57

going to roll is here

00:54:58

to be entertaining and and

00:55:00

and and provocative, right? So

00:55:01

I say some provocative it,

00:55:03

but it happens to be

00:55:03

what I believe is. If

00:55:05

you read most investor-state arbitration

00:55:07

Awards, the pretty lean on

00:55:10

jurisprudence. It's a pretty vanilla

00:55:13

explication of where the law

00:55:15

is, right? You don't clean

00:55:17



too much out of it

00:55:18

and then the disagreement in

00:55:21

the outcome of the case

00:55:22

is on a plant facts,

00:55:24

how the facts apply to

00:55:25

it. So my view is

00:55:29

if your kind of nut

00:55:29

has the law and want

00:55:30

to write for the ages,

00:55:31

as I think it was

00:55:33

a Chief Justice John Roberts

00:55:34

use in a case recently,

00:55:35

writing for the ages article,

00:55:39



not in and sent more

00:55:44

probably, especially if it's not

00:55:45

being behind of a cloak

00:55:46

of confidentiality, it'll get read

00:55:49

more and you can actually

00:55:50

write for the ages. Untethered

00:55:52

to the facts of the

00:55:53

case, because that's what you're

00:55:55

trying to do here is

00:55:56

is is doing The facts

00:55:57

of the case and my

00:56:00

G1 on the law here

00:56:01

is is also a bit

00:56:03



societal living we we are

00:56:05

narcissistic. I'm right where we

00:56:08

all have opinions with the

00:56:09

Press of a button. I

00:56:10

can screen my opinion from

00:56:11

a megaphone, right? Rather than

00:56:14

trying to get together and

00:56:16

meet consensus and coherence than

00:56:18

with a side that might

00:56:19

have a principal disagreement with

00:56:21

me. I actually think that

00:56:23

the law would develop better.

00:56:25

If arbitrators of different viewpoints

00:56:27



will come together and try

00:56:28

to put together a coherent

00:56:29

thought that they both agreed

00:56:32

with. You might have a

00:56:32

more balanced evolution of the

00:56:34

law rather than a scattershot

00:56:37

of, here's my opinion. Cuz

00:56:38

my opinion is my opinion,

00:56:39

is my opinion. That doesn't

00:56:41

really doesn't really lead anywhere.

00:56:43

That's really, you know, putting

00:56:44

my academic at on, that's

00:56:46

the peer-review process, right? After

00:56:47



reading an article, get a

00:56:49

peer-reviewed by people who disagree

00:56:50

with you and tell you

00:56:51

why they disagree with you.

00:56:53

And then you adjust your

00:56:54

opinion to that disagreement that

00:56:57

sort of the process of

00:56:58

writing a in a war

00:57:00

without a descent. So, you

00:57:03

know, I think I think

00:57:04

we talked about the development

00:57:05

of law, you know, putting

00:57:07

myself out there with a

00:57:08



dissenting opinion. I don't know

00:57:10

how much it really really

00:57:12

does. Wait, wait, wait, you're

00:57:15

saying that. Your peer reviewers?

00:57:17

Don't agree with you. Wholeheartedly

00:57:18

like mine. Because you're always

00:57:21

right. Now, we have a

00:57:28

few minutes left and, you

00:57:30

know, we've been circling around

00:57:31

issues related to culture and

00:57:34

legal background, and those kinds

00:57:37

of things. Let me ask

00:57:40

the question about the sense

00:57:42



in industrial State arbitration, as

00:57:44

distinct say, from the commercial

00:57:47

contacts, that are or even

00:57:48

litigation, they're kind of a

00:57:54

more of an imperative, will

00:58:00

stay in investor-state arbitration because

00:58:05

of the states are in

00:58:07

what state is involved, International

00:58:10

laws involved that there be,

00:58:14

you know, an extra effort

00:58:17

to to arrive at an

00:58:21

award that will be viewed

00:58:24

as a strong Ward and

00:58:26



that is no definitive and

00:58:30

not using all those words.

00:58:32

But you know that there's

00:58:33

an agreement between the three

00:58:34

arbitrators so that there can

00:58:37

be kind of a higher

00:58:38

level of competence. Is there

00:58:40

something about the ists million,

00:58:43

which is different from litigation

00:58:45

or commercial arbitration in that

00:58:47

world because of the steaks

00:58:48

that, that make it more

00:58:50

important and maybe, maybe I

00:58:54



could start with the check

00:58:56

and Eisha on this at,

00:58:57

cuz the premise here is

00:58:58

that, this is something different.

00:59:00

Is it different? Is it

00:59:01

something that that should be

00:59:05

considered? My view is that

00:59:09

it is in some it

00:59:11

is not something different cuz

00:59:12

that's the reason we chose.

00:59:13

I mean best start ever

00:59:14

stayed over tration historical, evolution

00:59:17

of the regime was trying

00:59:19



to lift these women size

00:59:20

does out of quartz and

00:59:22

we looked out, of course,

00:59:24

we had to paint against

00:59:25

an arbitral canvas, right? So

00:59:27

the arbitration model is what

00:59:28

we chose. We didn't want

00:59:30

judges who are arms of

00:59:32

the state deciding these cases.

00:59:34

We wanted individuals were chosen

00:59:37

by the parties to didn't

00:59:38

have a Reliance on the

00:59:40

state for their salary are

00:59:42



there or their safety excetera

00:59:44

excetera. So I think that

00:59:46

trying to start doing is

00:59:49

dies as, you know, more

00:59:52

like a court cuz you're

00:59:53

dealing with public issues. And

00:59:54

the development of the law

00:59:55

is is really wrong headed

00:59:58

because of One backwards or

00:59:59

1 backwards quickly from what

01:00:01

we tried to get away

01:00:03

from. And, and I think

01:00:06

what I said earlier really

01:00:07



Rains, even more true that

01:00:09

you need to find consensus

01:00:11

here in these Awards. Because

01:00:13

investor-state arbitration. Unlike commercial arbitration

01:00:15

you have two groups of

01:00:17

arbitrators out there. Right there.

01:00:19

The people who, you know,

01:00:20

we're going to be claiming

01:00:21

investor-friendly know. We're going to

01:00:24

be stayed friendly, right? Until

01:00:26

you have an even greater

01:00:27

polarisation. So if we have

01:00:29

more my very case, there's

01:00:31



a descent you really are

01:00:32

going to get a scattershot

01:00:34

regime rather than coming together

01:00:37

and find a consensus, which

01:00:38

in the realm of public

01:00:39

policy should be really where

01:00:41

we're trying to do that

01:00:43

and get a balanced view

01:00:46

of the law. So, I

01:00:47

don't think it's different and

01:00:48

I think there's a good

01:00:49

reason why it's not different,

01:00:51

and it's historical, and I

01:00:53



think by equating it more

01:00:55

like litigation, we're regressing. I

01:01:00

generally agree and I think

01:01:01

if anything the political undertones,

01:01:04

if isds should be a

01:01:07

reason to discourage to sense,

01:01:08

even more than in commercial

01:01:10

arbitration because they're there exists

01:01:13

a risk that that states

01:01:15

for example could pressure or

01:01:17

even course, they're pretty appointed.

01:01:20

Arbitrator is to rule in

01:01:21

their favor. And even even

01:01:23



if no such Express pressure

01:01:26

exist, surely the trend of

01:01:29

issuing dissenting opinions in favor

01:01:31

of the losing party creates

01:01:33

an implicit expectation that an

01:01:36

arbitrator will confirm with this

01:01:37

practice. And so by discouraging

01:01:39

to send her by making

01:01:40

them less ordinary you, you

01:01:43

remove some of that pressure

01:01:44

that may exist on a

01:01:45

party appointed. Arbitrator to descend

01:01:47

in favor of the party

01:01:48



who appointed him or her

01:01:50

and you also reduce the

01:01:53

perception that that these political

01:01:56

factors are influencing the issuance

01:01:58

of a descent which I

01:01:59

think. Is harmful to the

01:02:00

legitimacy of the is a

01:02:02

SDS system as a whole.

01:02:05

So let me ask Pro

01:02:07

to send cloudy is ISD

01:02:12

of something different. No, and

01:02:18

no, it shouldn't be. Shouldn't

01:02:22

be because that Pretenders, a

01:02:25



potential two to two weekends

01:02:28

of the fundamental and also

01:02:30

special nature of. This regime

01:02:33

regime based on. All these

01:02:36

different treaties that a state

01:02:40

is willing to the subject

01:02:42

itself to the decision-making up

01:02:46

in partial independent International arbitrators

01:02:50

and that they will generally

01:02:53

and Theory abide by that

01:02:55

result, that process that idea

01:02:58

the independence in partiality and

01:03:01

International Quality of it is

01:03:03



arguably the most essential part

01:03:06

of it because it without

01:03:08

that you're you're not, you

01:03:12

don't really have decision-making and

01:03:13

it said you have some

01:03:14

sort of, you know, but

01:03:15

it's really from Edmond to

01:03:16

the diplomats to take care

01:03:17

of rather than the lawyers.

01:03:18

So if you bring This

01:03:21

idea that there needs to

01:03:22

be some more deference and

01:03:24

that that deference in some

01:03:25



way should change the way

01:03:26

the decision-maker. They are before

01:03:27

they would do their job,

01:03:28

you're spoiling the whole point

01:03:31

of the mechanism, which is

01:03:33

to leave it in partial,

01:03:34

independent and international. You don't

01:03:36

want to talk about difference,

01:03:38

which, of course, is wise.

01:03:39

We know from the attempt

01:03:40

to get the case off

01:03:41

the top of my head,

01:03:41

but where was one of

01:03:44



the case? It's the Latin

01:03:46

Maxim that arguing is extinguished

01:03:48

in Vienna convention, but none

01:03:50

the less States occasionally used

01:03:52

to try to use you

01:03:54

call. It is can think

01:03:55

of off the top of

01:03:55

my head? It's where the

01:03:56

states and you only difference

01:03:58

in the way you can't

01:03:58

decide this. I just can't

01:03:59

think of the name enough

01:04:01

arbitrators who has said, no,

01:04:04



that's not true. That it's

01:04:05

not a thing anymore, but

01:04:06

it was an argument that

01:04:07

we made a fair bit.

01:04:08

So no difference on that

01:04:11

basis. Would be really bad,

01:04:12

me prep the final reference

01:04:15

to the Past for me.

01:04:18

Is the pressure that I

01:04:19

felt into not defend, but

01:04:22

if I had to do,

01:04:23

send it to do to

01:04:24

follow the hunter Redford model,

01:04:26



was that I knew that

01:04:29

most of these folks came

01:04:30

from a commercial background and

01:04:33

that it was well known

01:04:34

that in the commercial. Arbitration

01:04:35

field, consensus was the norm

01:04:38

and was very much preferred.

01:04:41

So, as long as the

01:04:44

primary feeds feeds into our

01:04:46

arbitrator class or group or

01:04:48

Community have a commercial a

01:04:51

background, I would assume that

01:04:54

that culture is going going

01:04:55



to remain the same, the

01:04:58

only have to worry, if

01:04:59

it turns out that more

01:05:00

and more of the people

01:05:01

who are appointed as arbitrators,

01:05:02

don't have that Moray in

01:05:05

the background because it's not

01:05:06

with what they learned, where

01:05:08

they were in between the

01:05:10

public international law originally or

01:05:13

did something something private that

01:05:16

involved. Those folks might not

01:05:20

know of this cultural taboo

01:05:24



against the Santa must really

01:05:26

have to but since I

01:05:28

don't think we have that

01:05:29

world still think that the

01:05:31

community is largely based on

01:05:33

the commercial model which was

01:05:34

of course has Chuck said

01:05:35

the model they chose. I

01:05:38

don't think that this is

01:05:39

really a problem. Can I

01:05:42

just add? I think one

01:05:43

of the most interesting comparisons

01:05:45

isn't necessarily investment arbitration to

01:05:48



commercial arbitration or arbitration to

01:05:50

litigation but Awards versus annulment

01:05:55

decision because you see him

01:05:56

anymore descends in awards for

01:05:59

jurisdictional decisions than you do

01:06:01

in the. Do you know

01:06:03

my contacts? So we've come

01:06:07

to the end of our

01:06:08

time, but any good panel

01:06:13

I in their deliberations on

01:06:14

an issue. I'd like to

01:06:15

ask for a quick response

01:06:18

and this can be your

01:06:20



personal view or playing along

01:06:22

with our game. But where

01:06:25

do you, where to where

01:06:26

your final views? If I've

01:06:28

missed anything here, and everything.

01:06:31

Before we finish off talking?

01:06:33

We know, Asia separate opinion.

01:06:47

Well, I think that, then

01:06:49

I fix this. It's the

01:06:50

end of this panel and

01:06:52

I want to pick you

01:06:53

up at 10:30 to thank

01:06:55

everyone that you shot shotgun

01:06:59



Mallory and Todd for taking

01:07:02  
the time and putting your

01:07:04  
thoughts to this. And on

01:07:05  
behalf of the group here

01:07:06  
like this, indicate our thanks

01:07:08  
and will finish off here

01:07:10  
and look forward to seeing

01:07:12  
you at the next role

01:07:14  
of Washington, arbitration week panel.

01:07:17  
Thanks very much. Well, I

01:06:48  
think that, then I fix

01:06:49  
this. It's the end of

01:06:51  
this panel and I want

01:06:53



to pick you up at

01:06:53

10:30 to thank everyone that

01:06:58

you shot shotgun Mallory and

01:07:00

Todd for taking the time

01:07:02

and putting your thoughts to

01:07:04

this. And on behalf of

01:07:06

the group here like this,

01:07:07

indicate our thanks and will

01:07:09

finish off here and look

01:07:11

forward to seeing you at

01:07:12

the next role of Washington,

01:07:15

arbitration week panel. Thanks very

01:07:18

much. Welcome everyone. To our

00:00:12



second panel here at Washington

00:00:16

arbitration weekday for it's a

00:00:19

pleasure to welcome everyone here.

00:00:22

To Crowell & moring. My

00:00:25

name is Ian Laird. I'm

00:00:29

partner here at Coral and

00:00:32

co-chair of our International dispute.

00:00:35

Resolution group, I also wear

00:00:39

the hat of one of

00:00:39

the co-chairs Washington arbitration week

00:00:44

along with Dr. Jose Antonio

00:00:46

Rivas strategy. I don't take

00:00:51

the opportunity enough to mention

00:00:55



Jose Antonio, this this events

00:01:02

this week with something that

00:01:05

many of us in the

00:01:07

Washington arbitration community. Talk about

00:01:09

four years as something that

00:01:11

we should put together. You

00:01:13

know, one of those things

00:01:14

that you just kind of

00:01:15

talked about it and no

00:01:16

one ever. Grab the bull

00:01:18

by the horns. And Jose,

00:01:20

Antonio was certainly part of

00:01:22

that discussion. And when Kota

00:01:25



came along, we really thought

00:01:27

that was a low entry

00:01:29

opportunity to do a virtual

00:01:31

conference. And we started off

00:01:34

fairly ambitiously in that first

00:01:37

year and people were desperate

00:01:40

with the connection and content

00:01:42

and to interact. And in

00:01:46

2020, it was really a

00:01:48

marvelous success and that gave

00:01:51

us a great deal of

00:01:52

momentum as we came out

00:01:55

of covid and into in

00:01:58



person again the enthusiasm and

00:02:01

take up and the general

00:02:04

Goodwill and energy to continue.

00:02:09

Going to do the conference

00:02:10

just continue to to grow

00:02:14

and grow. And this year,

00:02:15

I think we've had really

00:02:18

fantastic support from our sponsors

00:02:22

from our Law, Firm sponsors

00:02:23

from our experts from our

00:02:25

institutions. And thank you all

00:02:28

as well. But just back

00:02:30

to the doctor Revis and

00:02:32



and xstrata G which is

00:02:35

his firm which a plays

00:02:37

a major role in organizing

00:02:39

along with Maryam at the

00:02:40

mouth and the whole team,

00:02:42

a text strategy. I think

00:02:44

we can't say enough to

00:02:45

them for their excellent work

00:02:47

and and hurting all these

00:02:49

arbitration cats. So thank you

00:02:52

to them our second panel

00:02:54

today. Is titled are dissenting

00:02:58

opinions and arbitration useful. How

00:03:03



made the Centre's contribute to

00:03:04

move the law forward in

00:03:06

International Investment, arbitration. Obviously the

00:03:09

title has a few premises

00:03:12

in it and we are

00:03:13

going to unpack quite a

00:03:16

bit of that. We have

00:03:17

an excellent panel here today.

00:03:20

A real rose gallery of

00:03:23

folks in the DC arbitration

00:03:25

Community for the appreciate that

00:03:28

description. But this is a

00:03:32

debate that, of course, is

00:03:34



one that continues on in

00:03:37

the arbitration community and some

00:03:40

have very strong opinions, some

00:03:42

sit on the fence, as

00:03:46

well as for again. And

00:03:49

I thought, you know, before

00:03:51

we get into our discussion

00:03:53

and we're going to organize

00:03:55

it in a bit of

00:03:56

a Format of a debate.

00:03:57

We've, I've assigned positions to

00:04:00

our four panelists and they've

00:04:02

agreed to to play along.

00:04:04



I think at the end

00:04:06

of the day, you'll probably

00:04:06

hear what their Real views

00:04:08

are. But for the sake

00:04:12

of making this interesting and

00:04:14

entertaining, I think that they

00:04:15

were game and so we'll

00:04:17

see how that works out.

00:04:18

But to start the panel,

00:04:20

I wanted to just get

00:04:22

a, maybe a show of

00:04:23

hands about folks initial sense

00:04:29

of where they stand on

00:04:30



this issue. So those who

00:04:35

think the sensor a good

00:04:37

idea and are generally supportive

00:04:39

of that concept and you

00:04:41

put up your hands. So

00:04:45

that's that's y'all just using

00:04:48

my prerogative as moderator. That's

00:04:49

kind of a 40 to

00:04:50

50% and and I would

00:04:53

get to that. And so

00:04:56

I guess the counter point

00:04:57

is just to see your

00:04:58

hands. Those who take the

00:04:59



opposite position, it would that

00:05:02

be the rest of the

00:05:02

group here who don't think

00:05:06

much of Defense? Okay, so

00:05:09

so we'll see if this

00:05:11

group changes that you as

00:05:14

we go along, there are

00:05:16

course, a lot of moving

00:05:18

pieces in this debate and

00:05:21

if we look back over

00:05:22

the last 10-15 years, there's

00:05:25

been some interesting academic discussion.

00:05:28

Certainly, a lot of articles

00:05:31



on this topic, it is

00:05:33

just one of those topics

00:05:35

which doesn't seem to be

00:05:36

able to get to a

00:05:37

final resolution because it really

00:05:40

does a go to some

00:05:42

fundamental issues. Cultural issues, legal

00:05:46

background issues, the predisposition of

00:05:49

the individual themselves, all sorts

00:05:52

of factors, which I do

00:05:54

want to get into. But

00:05:55

before that, let me introduce

00:05:58

our panel. So my name

00:06:02



is Ian. Laird I am

00:06:02

your moderator. I told you

00:06:04

a bit about myself already

00:06:05

at the end of our

00:06:08

table. We have professor Charles

00:06:10

to be a junior and

00:06:13

Chuck as he is known

00:06:15

to us is based here

00:06:19

in Washington d.c. he's a

00:06:21

council at three crowns and

00:06:24

is practice as council is

00:06:25

focused on International commercial and

00:06:27

treaty arbitration transnational litigation and

00:06:30



public international law. He was

00:06:32

previously another international law firm

00:06:35

here in DC Chuck is

00:06:37

also a full-time professor of

00:06:39

practice at the University of

00:06:41

Pittsburgh, Pittsburgh law school, school

00:06:43

of law. An honorary professor

00:06:46

at Durham law school and

00:06:47

visiting professor of law at

00:06:49

the Kiev School of economics.

00:06:51

And it goes up saying

00:06:54

he teaches courses in international

00:06:55

arbitration public international law and

00:06:58



international human rights. So this

00:07:01  
is of course I think

00:07:02  
one of the issues that

00:07:03  
Chuck is always half of

00:07:06  
a grapple with and next

00:07:08  
to shocks on his right

00:07:10  
is that you should Jane

00:07:11  
Isha is a special legal

00:07:14  
consultant based here in Washington

00:07:15  
DC at three crowns also.

00:07:18  
So we have three crowns

00:07:20  
team here. She has experience

00:07:22  
in international commercial and Industrial

00:07:24



arbitrations across a range of

00:07:26

Industries, including energy Construction in

00:07:29

intellectual property. She's a Harvard

00:07:33

Law School grad, where she

00:07:36

received the Rodger Fisher and

00:07:37

Frankie sander prize for best

00:07:39

student paper, on topics related

00:07:41

to dispute resolution. She also

00:07:43

has an LLB from National

00:07:45

Hospital in India. So it's

00:07:47

great to have Easter here

00:07:49

on R panel. We also

00:07:51

have next to Keisha, Mallory

00:07:55



silver silver, man. Mallory is

00:07:59

described in Who's Who as

00:08:01

and I quote this is

00:08:02

great quote one of the

00:08:03

world's most experienced young practitioners

00:08:05

of investment arbitration unquote. So

00:08:07

I think I just absolutely

00:08:09

you know she's the person

00:08:11

for this time walk and

00:08:13

she's acting this Council and

00:08:14

is very interesting lady represented

00:08:16

investors and 17 different states.

00:08:20

Send over 50 treaty cases,

00:08:22



so very experienced, she recently

00:08:24

left private practice she was

00:08:26

at the Arnold importers of

00:08:27

Porter as a partner here

00:08:29

and she advises me that

00:08:31

you'll be able to hire

00:08:32

her in the new year

00:08:33

as an outside consultant coach

00:08:35

for your team. So I

00:08:37

definitely recommend looking to Mallory

00:08:40

if you need to bolster

00:08:41

your bench and then fine.

00:08:44

Next to me, is dr.

00:08:46



Todd J. Weiler not to

00:08:49

be confused with Congressman who's

00:08:51

apparently in Idaho, or Montana.

00:08:53

I don't know, whenever I

00:08:55

pull up your name. Some

00:08:57

state senator? Yeah, so this

00:08:58

is the arbitrator Todd Wyler.

00:09:01

Not the Republican state, senator

00:09:02

so Todd Council expert academic

00:09:12

and full-time. Arbitrator for well

00:09:15

over 20 years and I'm

00:09:16

almost 25 years and 26.

00:09:19

Okay? So you got to

00:09:21



count those. So he's well

00:09:25

recognized of course in Garner

00:09:27

and who's who legal as

00:09:30

being? I would say a

00:09:31

Pioneer, in many ways in

00:09:34

the isds field working with

00:09:38

me, actually in some of

00:09:38

the earliest, not the case

00:09:40

has the founder of Oxford

00:09:43

University press. Does the website

00:09:45

investment claims.com which a competitor

00:09:48

of our just Monday, our

00:09:50

previous panel, moderators and as

00:09:58



well. One of the co-founders

00:09:59

of the Society of international,

00:10:01

economic, law. I didn't do

00:10:04

that. No, tug, my ears

00:10:07

for those for you online.

00:10:08

If you are merely acting

00:10:10

as a long-time contributor and

00:10:16

writer and I have been

00:10:17

edited the author and co-authored

00:10:19

co-edited dozens of books and

00:10:22

articles and it's always great

00:10:25

to have Todd on one

00:10:26

of these panels dealing with

00:10:28



some of the navel-gazing issues

00:10:30

and arbitration Todd. And I'm

00:10:32

not young anymore. Of the

00:10:35

young man, you started arbitration,

00:10:40

when he's 50. It could

00:10:45

be possible. So let's let's

00:10:48

get to our issue. We

00:10:50

when we talked about the

00:10:52

sense in international arbitration one,

00:10:57

question comes to mind. You

00:10:59

ask questions. So where does

00:11:01

this stand legally is this

00:11:03

permitted, even? And I think

00:11:05



of you come from a

00:11:05

European perspective, perspective, you might

00:11:09

say yeah, this isn't something

00:11:11

that I know about our.

00:11:12

Our courts generally don't encourage

00:11:14

this. There's a, there's a

00:11:15

priority placed on collegiality and

00:11:18

fences and many rules. I

00:11:22

actually don't allow for this.

00:11:23

If you look to the

00:11:24

Hague convention on the Pacific

00:11:26

settlement of international disputes, you

00:11:28

look to the European court

00:11:29



of justice. You don't see

00:11:30

the sense but if you're

00:11:33

I guess a common law

00:11:34

lawyer, you know the cent

00:11:36

store or hardly recognized and

00:11:39

encouraged and you know, when

00:11:41

exit was being negotiated in

00:11:43

the stews, of course, Check

00:11:44

the 1965. There is a

00:11:47

specific reference to the allowance

00:11:48

for the Samsung touring decisions.

00:11:51

And as well, we see

00:11:52

them of course in the

00:11:54



icj context the pcij and

00:11:57

they were common in the

00:11:59

Iran, us claims tribunal. So

00:12:01

in the is DS world

00:12:04

of investor-state dispute settlement, this

00:12:08

is something that has being

00:12:09

up fairly common practice. Now,

00:12:13

going to kind of the

00:12:14

principled distinction between arbitration and

00:12:18

litigation. If you can start

00:12:20

digging down and asking yourselves

00:12:22

a few questions arbitration as

00:12:25

a number of values which

00:12:27



are quite distinct from litigation,

00:12:28

efficiency is pre-eminent. We had

00:12:31

a whole panel last night

00:12:33

that it said talking about

00:12:34

efficiency is as an important

00:12:36

element of exit. Arbitration awards

00:12:40

are final and binding, generally,

00:12:43

not a peelable. Subject, limited

00:12:46

enforcement challenge, consent and the

00:12:50

party. Autonomy play a very

00:12:52

important key issues. There's no

00:12:54

Starry decisis our president president.

00:12:56

So, I'm a very different

00:12:58



Beast than, say litigation, which,

00:13:02

of course, is not final

00:13:03

final and binding. There is

00:13:04

continuous ability to appeal, and

00:13:09

to challenge the objective in

00:13:12

litigation is much more on

00:13:14

creating ultimate certainty. It's not

00:13:17

a clearly about efficiency, and

00:13:19

the idea of consent of

00:13:22

the parties that kind of

00:13:23

party. Autonomy value is certainly

00:13:25

not at all part of

00:13:27

the litigation world. So when

00:13:30



we look at the idea

00:13:33

of Defense, one could argue

00:13:38

and we'll see what are

00:13:39

R panels have to say

00:13:41

about this that arbitration. Is

00:13:44

much more suited than more

00:13:46

of a civil law style

00:13:48

dispute resolution process. That it's

00:13:50

much more suited to a

00:13:52

collegial consensus-building exercise and I

00:13:56

will see what, what are

00:13:58

panel say about that. I

00:14:00

just to give you a

00:14:00



little bit of background on

00:14:02

the academic kind of discussion

00:14:04

on this. We saw about

00:14:06

10 years ago, interesting interaction

00:14:10

between a very senior arbitrators

00:14:14

in the form of Albert.

00:14:15

Ian, Vandenberg, and Charles Brower

00:14:19

and I both of them

00:14:20

having very distinct and contrary

00:14:22

and asserted and certain views

00:14:26

as to the value of

00:14:27

\$0.02, and Boots, put them

00:14:29

in their camps. Vandenberg has

00:14:33



a hearty dislike of the

00:14:34

sense coming from his civil

00:14:38

law for tradition and Joe,

00:14:40

Brower believes that defense playing

00:14:43

a central role. In the

00:14:46

adjudication process, investor-state arbitration. So

00:14:49

very diametrically opposed used. So

00:14:52

I'm going to ask our

00:14:54

panel to Channel A bit

00:14:56

of that energy and enthusiasm

00:14:58

if the if if they're

00:15:00

so minded for defense on

00:15:04

the on the side arguing

00:15:06



that the sensor a good

00:15:07

thing. I think we have

00:15:08

Mallory and Todd and at

00:15:11

the end of the table,

00:15:12

we have the three crowns

00:15:14

team of truck and Eisha

00:15:16

arguing against sense. Now I

00:15:20

have to say as a

00:15:21

caveat that nothing of well,

00:15:25

I don't think you can

00:15:25

take anything that I was

00:15:26

going to stay as their

00:15:27

personal view necessarily and the

00:15:29



interests of the discussion. Unless

00:15:32

they actually say no, this

00:15:33

is my rear-view but that's

00:15:34

up to them. So this

00:15:36

is for the purpose of

00:15:37

the good academic fun and

00:15:41

we'll, we'll just Dive Right

00:15:43

In, then. So Dan Berg

00:15:45

in his article arguing in

00:15:49

favor of descent said it

00:15:51

will getting not having to

00:15:53

sense leads to 4. It

00:15:57

will lead to a better

00:15:58



reward than going to Quality.

00:16:01

The majority will act more

00:16:02

responsibly the idea that the

00:16:06

sense create an unfavorable kind

00:16:10

of interaction among the parties.

00:16:12

Is third point is it

00:16:17

will bolster party confidence in

00:16:18

the process and not having

00:16:20

defense and third and fourth

00:16:22

Lee, it will contribute to

00:16:27

the development of the law

00:16:28

by having consensual fully agreed,

00:16:32

33 member decisions. That is

00:16:36



better for the development of

00:16:37

the law. So this sets

00:16:38

out a few of the

00:16:39

kind of touch points for

00:16:42

this discussion. So let me

00:16:45

start with a party autonomy.

00:16:48

And consent, the fact that

00:16:51

the parties choose their arbitrators

00:16:53

is is clearly one of

00:16:56

those benefits of international arbitration

00:16:58

that we all talked about

00:17:00

and we told it's very

00:17:02

different. The litigation there's an

00:17:04



element of form form shopping

00:17:06

there with you that you

00:17:07

consider that good or bad,

00:17:08

that is considered a benefit.

00:17:10

But this also raises the

00:17:13

issue and this is a

00:17:16

related issue that that's certainly

00:17:17

Brower identified in his piece

00:17:21

about the kind of implicit

00:17:25

relationship between the parties that

00:17:29

appointed the wing arbitrators. And

00:17:34

the fact that when you

00:17:36

look at the defense when

00:17:37



they've occurred and it just

00:17:38

doesn't happen frequently. I think,

00:17:40

maybe a quarter of the

00:17:41

time depending on your stats,

00:17:43

the arbitrator doing. This is

00:17:47

almost always, I think it's

00:17:49

all always the person appointed

00:17:51

by the losing party and

00:17:53

that in Vanderburgh view was

00:17:55

to close the connection and

00:17:58

that call them to mind

00:18:00

that there must be something

00:18:02

in in his estimation going

00:18:05



wrong there. And of course

00:18:07

John Paulson wade into that

00:18:09

debate somewhat With his paper

00:18:12

and and he was talking

00:18:14

about the low in decision

00:18:16

of famous, snap decision that

00:18:19

went kind of Dowry in

00:18:21

his argument for getting rid

00:18:22

of the party appointment and

00:18:25

that kind of flows into

00:18:26

this party at timing issues.

00:18:27

So let me go to

00:18:29

then setting that issue forward,

00:18:33



go to our folks who

00:18:35

are in favor. So Chuck

00:18:41

and Eisha. So Chuck, maybe

00:18:44

we'll start with you right

00:18:45

at the end. So, what

00:18:46

do you say about that?

00:18:47

Are you again? So sorry,

00:18:49

your again. So actually, let's

00:18:51

start off the year again.

00:18:52

Yeah, I got to get

00:18:53

that right. Yeah, I can

00:18:57

bring them up from closed

00:18:58

cuz the Israel's but I

00:19:10



personally disagree with the de

00:19:12

categorizing, the civil law, law.

00:19:14

Divide I think really it's

00:19:16

arbitration vs. Litigation divided, right?

00:19:19

In, what do you pay?

00:19:20

This is part of my

00:19:22

my junior. What are you

00:19:24

paying for it? You're paying

00:19:27

for nothing for the court.

00:19:29

I'm right. There is you're

00:19:34

subjecting yourself to being part

00:19:36

of the lawmaking process. Right

00:19:38

now, I've done a lot

00:19:39



of litigation as well as

00:19:40

arbitration in my time. And

00:19:41

I can tell you that

00:19:42

no client loves the fact

00:19:45

that their case is going

00:19:46

to make law, right to

00:19:48

go to the circuit, is

00:19:49

going to the Supreme Court.

00:19:51

It's like being told that

00:19:52

you have a really interesting

00:19:53

brain tumor, right everyone. So,

00:19:56

come and look. Right. That's

00:20:00

what he get out of

00:20:02



litigation going to arbitration where

00:20:03

you're paying for three individuals

00:20:06

party. Autonomy to appoint someone

00:20:08

to decide your case, I'm

00:20:11

sort of against the notion

00:20:12

that one of them, one

00:20:15

of the parties appointees, as

00:20:17

it usually is decides that

00:20:20

Porta party autonomy as a

00:20:21

right to get a dissenting,

00:20:23

a decision, right is the

00:20:24

right to have your used

00:20:26

vetted publicly from it, as

00:20:29



part of the tribe as

00:20:30

part of the tribunals award.

00:20:32

I think that we're not

00:20:34

in arbitration necessarily to develop

00:20:38

the law in this way.

00:20:41

That's not what we're getting

00:20:42

paid for. We're getting paid

00:20:43

to settle the dispute and

00:20:46

we can talk more about

00:20:48

this later this spreads into

00:20:49

what we're going to talk

00:20:50

about with president. But you

00:20:52

know, if an arbitrator feels

00:20:54



that their decision Necessary to

00:20:57

be stated in order to

00:20:59

move the lawn a particular

00:21:00

direction, go read a lot

00:21:02

of international law puts judicial

00:21:05

decisions and scholarship on the

00:21:07

same level. I don't do

00:21:10

it on the party side

00:21:11

work of the tribunal to

00:21:13

get to a consensus consensus

00:21:15

decision, and I'll leave it

00:21:18

there and see if he

00:21:19

has anything bad there. Yeah.

00:21:22



Thank you Chuck. I agree

00:21:23  
with all of that and

00:21:24  
I'll just say that in

00:21:25  
the in the decade since

00:21:26  
Vandenberg publishes article a number

00:21:29  
of authors, have attempted to

00:21:31  
respond to it and none

00:21:32  
of them have provided any

00:21:34  
good reason why Almost 100%

00:21:37  
of dissenting opinions and investment,

00:21:39  
arbitration are altered by the

00:21:43  
arbitrator who is appointed by

00:21:44  
the losing party. Just for

00:21:47



our altered another article this

00:21:49

year suggesting that these two

00:21:51

cents are warranted because they

00:21:53

provide some sort of comfort

00:21:54

to the losing party and

00:21:56

my help them accept the

00:21:58

outcome of the arbitration and

00:22:00

end. Well it might be

00:22:01

some sort of beneficial effect

00:22:03

of these two cents. It

00:22:05

certainly can't form the basis

00:22:07

for issuing them because the

00:22:09

only principal basis for issuing

00:22:11



a descend is the existence

00:22:13

of a genuine disagreement on

00:22:15

material points of law or

00:22:16

fact. And so it's it's

00:22:19

just difficult to To believe

00:22:21

that all of these descendants

00:22:23

have been issued on this

00:22:24

principled basis, but still somehow

00:22:27

all happened to favor the

00:22:29

losing party. What's up there?

00:22:33

so two are affirmative, panelists

00:22:40

here in any reaction to

00:22:42

that, but physically party autonomy

00:22:45



point and vandenburgh point about,

00:22:48

you know, losing the losing

00:22:51

appointed arbitrator always seems to

00:22:52

be the the, the dissenter

00:22:55

as somehow sullyng, the whole

00:22:59

idea of Defense Supposed supposed

00:23:03

to go to me, I

00:23:04

mean, how else could you

00:23:06

have it this end or

00:23:08

separate opinion? If you have

00:23:10

a majority that does this,

00:23:11

and then anything that is

00:23:13

not, this must be that.

00:23:15



So, it doesn't make any

00:23:17

sense to Casting aspersion upon

00:23:18

the that, because it's not

00:23:20

the this, if it doesn't

00:23:21

fit it to see. So

00:23:22

logical. I mean, it's obviously

00:23:25

that has to happen. So

00:23:27

it's sort of like, complaining

00:23:28

about the fact that why

00:23:29

is it always at night

00:23:30

when things get dark Because

00:23:33

they do I think that's

00:23:36

the focus here should be

00:23:37



on what the arbitrator's role

00:23:41

is but specifically as to

00:23:43

the is to the statement,

00:23:45

I just heard a problem

00:23:47

with the the Vandenberg approach

00:23:49

though is that he rejects

00:23:52

the principal basis for a

00:23:54

decision, being a disagreement, and

00:23:57

a good-faith disagreement, he rejects

00:23:59

that has legitimate uses. That's

00:24:00

not a good reason to

00:24:01

Josiah. So what is I

00:24:07

think that I agree with

00:24:09



chuck on some points and

00:24:10

Asia as well, you know,

00:24:11

I don't think I'm sold

00:24:13

on the idea that arbitrators

00:24:15

can just grandstand that they

00:24:17

can make the parties foot

00:24:19

the bill for everything, that

00:24:21

in theory, might contribute to

00:24:23

the development of the law.

00:24:24

If they want to is

00:24:26

Chuck said, they can write

00:24:27

a book, write an article.

00:24:28

They don't need to write

00:24:30



a dissenting opinion just for

00:24:32

this. But at the same

00:24:34

time, it's still appropriate in

00:24:37

some circumstances to have a

00:24:38

descent and descends can still

00:24:40

be very useful. So I

00:24:42

think one of the the

00:24:44

reasons why in the past

00:24:47

10 years maybe no one

00:24:48

has come up with a

00:24:50

response is because this hasn't

00:24:52

really been a contested issue.

00:24:54

You just had a very

00:24:56



lengthy process for the amendment

00:24:58

of the exit arbitration rules

00:24:59

and in the thousands of

00:25:01

pages of working papers and

00:25:03

in the hundreds of pages

00:25:05

of compilations of comments from

00:25:07

various stakeholders, you don't see

00:25:10

anyone contesting the notion that

00:25:12

in principle, you can have

00:25:14

a descent It surprised anyone.

00:25:18

Descendants aren't in question. They

00:25:20

are not something outlandish. Separated

00:25:23

pinions are permitted. As in

00:25:24



said, in various four of

00:25:27

their reference in the icj

00:25:29

Statue, they are explicitly authorized

00:25:32

by the exit convention and

00:25:34

we don't see people dispensing

00:25:36

on the notion that a

00:25:38

descent can be useful or

00:25:40

is permitted, perhaps, because there

00:25:43

is a way to opt

00:25:44

out if you don't want

00:25:46

to have a dissenting opinion,

00:25:49

you don't have to have

00:25:50

one. You can agree with

00:25:51



the other party to appoint

00:25:53

a sole arbitrator. But if

00:25:56

you have a three-member tribunal,

00:25:58

I think it's really difficult

00:25:59

to say that there can't

00:26:01

ever be any dissent whatsoever

00:26:03

in any circumstances, just on

00:26:07

a personal level for an

00:26:08

arbitrator. I think it would

00:26:09

be really difficult. If you

00:26:11

know that, you essentially have

00:26:13

to sign an award and

00:26:16

Siri you can abstain from

00:26:19



signing the award. But what

00:26:20

do you really going to

00:26:21

do abstain from signing the

00:26:23

award and not provide? Any

00:26:25

explanation, as to why you're

00:26:27

getting from signing to me?

00:26:30

That would seem to throw

00:26:31

the award into more doubt

00:26:32

than just having someone explain.

00:26:34

Why they just agree with

00:26:36

the majority. So I think

00:26:38

descends can be useful. There

00:26:39

obviously, is some tension between

00:26:41



the parties want in a

00:26:43

cage and what The Spectator

00:26:45

is in the community and

00:26:46

buy one for the law

00:26:47

to be moved forward, but

00:26:49

the sense are here, they

00:26:52

haven't been challenged over the

00:26:53

past 10 years and if

00:26:54

there is Their statistics that

00:26:57

show that arbitrator is our,

00:26:59

I guess issuing opinions in

00:27:01

favor of the party. That

00:27:02

point of them, that may

00:27:04



not be something positive, it

00:27:07

may just be a correlation.

00:27:08

It could be that parties

00:27:09

are doing a very good

00:27:10

job of selecting arbitrators, that

00:27:12

agree with their views and

00:27:14

in the end, they're just

00:27:15

not able to persuade. The

00:27:16

other arbitrators, not necessarily some

00:27:18

manifestation of Faith or something.

00:27:20

Improper, it could be people

00:27:22

doing a good job. What

00:27:25

is possible would be possible

00:27:28



to have an arbitration Clause.

00:27:29

Drafted that says that the

00:27:31

arbitrator's must come to a

00:27:32

consensus and I mean, that

00:27:35

might lead to a stalemate

00:27:36

in in theory you could

00:27:40

Say basically say no to

00:27:42

sense by saying, they must

00:27:43

come to a consensus. But

00:27:45

I mean, essentially that's the

00:27:47

Civil model that they don't

00:27:50

permit this end so that

00:27:51

that is required. And there's

00:27:53



a well in and that

00:27:59

goes to the whole question

00:28:00

of deliberations, of course, and

00:28:03

what goes on behind the

00:28:04

scenes and how the three

00:28:06

arbitrator panel interacts in or

00:28:09

out for the assassins in

00:28:10

the European Court, how they

00:28:11

interact, and how they get

00:28:13

to that decision, that's a

00:28:16

for another discussion as to

00:28:17

how that works. But let

00:28:19

me go to the point

00:28:20



that their truck race just

00:28:21

to get your response from

00:28:22

our produce. And folks, I

00:28:25

mean is this a cultural

00:28:26

issue or is this really

00:28:28

like those of the argument

00:28:30

that I kind of served

00:28:31

up initially? Is this a

00:28:33

litigation versus arbitration kind of

00:28:36

divided? How do you view

00:28:38

that issue? I mean it's

00:28:41

someone from a common law

00:28:42

jurisdiction. I wouldn't say that

00:28:43



on the whole we're not

00:28:45  
collegial or is that I

00:28:46  
am not going to do

00:28:47  
because I'm from a common

00:28:50  
law jurisdiction and might have

00:28:51  
an individual opinion but it

00:28:55  
is true that your background

00:28:58  
and legal training probably will

00:29:00  
have something to do with

00:29:01  
what you think about on

00:29:02  
this issue. Can I respond

00:29:09  
quickly to what was just

00:29:11  
said? And I am a

00:29:14



little bit. What I actually

00:29:18

think is that at no

00:29:20

point where I think it

00:29:20

should be disallowed cuz I

00:29:22

didn't go to the threat

00:29:23

of a descent is a

00:29:25

really good one. I didn't

00:29:26

the title here is a

00:29:27

dissenting opinions useful. I think

00:29:30

I actually believe that there

00:29:31

should be some social pressure

00:29:33

is the social pressure by

00:29:34

the best way to put

00:29:35



it against the sense like

00:29:37

we really should as a

00:29:38

regime try to create a

00:29:40

system where descends are the

00:29:42

Rarity we only to send

00:29:44

it to absolutely have to

00:29:46

can I put your name

00:29:47

to something and need to

00:29:48

say why? They're they're they're

00:29:52

going to remain there? I

00:29:53

think there's a good that

00:29:54

they remain there because if

00:29:56

they're not there, I think

00:29:58



they're not. There you do,

00:30:01

run the risk which is

00:30:02

equally problematic in arbitration on

00:30:03

seeing more and more or

00:30:05

split the baby decisions, right?

00:30:07

I think it's actually better

00:30:09

for justice if the two

00:30:12

arbitrator to agree on a

00:30:13

certain robust decision. Feel like

00:30:17

they can issue that robust

00:30:18

decision in the face of

00:30:19

a descent as opposed to

00:30:21

they both get together and

00:30:24



issue some award both side

00:30:25

to get together. If you

00:30:26

some award that says you

00:30:28

win, but you get no

00:30:28

money and that's the only

00:30:29

way that we could get

00:30:30

together and and get some

00:30:32

sort of consensus. Right? I

00:30:34

mean that's actually worse. So

00:30:36

I need to send need

00:30:37

to be there to push

00:30:38

that kept the pressure on

00:30:40

the arbitration tribunal. However, I

00:30:42



do think that, we need

00:30:42

to really be thinking as

00:30:44

arbitrators, that this is the

00:30:47

nuclear option that, I think

00:30:49

that's my cue. I completely

00:30:53

agree. And I don't think

00:30:54

it's, it's this binary between

00:30:57

a collegial approach and purely

00:30:59

individualistic approach on the part

00:31:01

of the arbitrator's, there's certainly

00:31:03

no strict expectation of a

00:31:05

consensus award, but I think

00:31:07

there is an expectation that

00:31:09



in the deliberation process, the

00:31:11

arbitrators from whatever country they

00:31:13

come from will engage in

00:31:15

a free and An exchange

00:31:17

of views and even be

00:31:18

open to changing their minds

00:31:20

and in an ideal world.

00:31:22

That. Good fit process would

00:31:24

result in consensual results, more

00:31:27

often, than not. So, I

00:31:28

think, I think the answer

00:31:29

lies somewhere in between this

00:31:30

collegial and individualistic divide. Yeah,

00:31:35



I don't even understand the

00:31:37

idea that there's a bit.

00:31:38

Individualism actually has anything to

00:31:39

do with it. I think

00:31:41

it's a professional responsibility of

00:31:43

the arbitrator to come to

00:31:45

in good face. Come to

00:31:47

a legitimate as far as

00:31:51

they're concerned illegitimate. And the

00:31:53

reason the basis for their

00:31:55

finding. So if if that's

00:31:57

the objective of the arbitrator

00:31:59

and the two other opportunities

00:32:00



share that, and they all

00:32:02

are operating a good-faith collegiality

00:32:05

will necessarily exist. It's only

00:32:09

individuality in the sense that

00:32:11

they're not all one human.

00:32:12

I mean, because there were

00:32:13

three different humans, they want

00:32:15

some individual characteristics but didn't

00:32:17

to say that people who

00:32:18

descend are more individualistic, is

00:32:21

it is nylon Donnelly unsupported.

00:32:24

It's also Beside the point

00:32:26

of a woodchuck chuck said,

00:32:30



which is wholly agree with

00:32:31

would be with respect to

00:32:33

only having two descent when

00:32:34

you really need to. So,

00:32:38

the first time and the

00:32:39

only time I had to

00:32:39

write at this at Weston

00:32:40

2005-6. And in that case,

00:32:43

I really had no other

00:32:46

choice. I just, I disagreed

00:32:48

with the finding and then,

00:32:49

as I studied, a lot

00:32:51

of the lawn a written

00:32:52



about it and I thought

00:32:53

they were wrong. So I

00:32:55

contacted Martin Hunter like a

00:33:01

mentor and he basically said

00:33:04

the same thing that I

00:33:05

found was attributed to Redfern

00:33:07

unsurprisingly in. I think one

00:33:10

of the Vanderburgh articles which

00:33:12

is that you're going to

00:33:12

just has to be truly

00:33:16

necessary and then has to

00:33:17

be polite. And that has

00:33:19

to be short be concise,

00:33:22



right to the point. And

00:33:23

so I followed that The

00:33:26

only question I guess I

00:33:27

would have in retrospect is

00:33:28

I felt at the time

00:33:30

that there was very much

00:33:31

a cultural norm or a

00:33:36

against one's right in favor

00:33:39

of consensus against going off.

00:33:41

Maybe. That's because it was

00:33:43

like, over 20 years ago,

00:33:45

or maybe it's just because

00:33:47

we need to remember that

00:33:49



there is a there's enough

00:33:51

of us, there's sufficient mass

00:33:54

of us at the international

00:33:55

arbitration Community level, that we

00:33:58

have our own more ice

00:33:59

and one of the mares

00:34:00

which is basically I'm a

00:34:02

loan of about this evil.

00:34:03

And the, and the anglo-american

00:34:06

/ Canadian approach this where

00:34:10

you get this pressure that

00:34:11

you definitely do want to

00:34:13

reach consensus if it all

00:34:14



possible. That's part of built

00:34:19

into the rules to, you

00:34:20

know, you have the exit

00:34:21

convention saying what the tribunal

00:34:23

needs to do in respect

00:34:24

of the award. The tribunal

00:34:26

needs to draft his reasons

00:34:28

and built into, that is

00:34:30

the notion of this consensus.

00:34:32

Three people coming together to

00:34:35

jointly draft an award, but

00:34:37

sometimes There are going to

00:34:40

be disagreements when three different

00:34:42



people come together and look

00:34:44

at issues of Law and

00:34:46

she's a fact and I

00:34:47

think that having the possibility

00:34:49

of Defense creates this day.

00:34:51

That doesn't mean that in

00:34:53

every single situation, a particular

00:34:56

to send was something that

00:34:58

I necessarily would have done

00:35:00

or what if agreed with.

00:35:01

But it's still I think

00:35:04

on the basic level of

00:35:05

a good thing for the

00:35:06



system to have If I

00:35:10

forgot another idea, just came

00:35:11

to mine Thomasville to a

00:35:14

friend of many who are

00:35:16

the who are a little

00:35:17

bit older here. I had

00:35:20

appointed him as an arbitrator

00:35:21

in a Mexican case international

00:35:23

Thunderbird gaming and he was

00:35:26

kind of had a thing

00:35:27

going with him afterwards, cuz

00:35:29

I went represent the claimant,

00:35:30

I'd say I always say

00:35:31



what your descent, any my

00:35:33

separate opinion to call it

00:35:37

at the sent, you said

00:35:38

no, it's my separate opinion.

00:35:39

So I guess that we

00:35:42

have to color a dress

00:35:43

that aspect of it too

00:35:44

because it's really not just

00:35:47

to send or maybe it

00:35:48

is. I think of that

00:35:52

case, Thomas was very much

00:35:53

disagree with the majority, but

00:35:55

yes, he was a very

00:35:56



well-mannered and proper person and

00:35:58

he just couldn't swallow the

00:35:59

word descent, which goes to

00:36:01

the more of his character,

00:36:02

but no doubt he was

00:36:03

contrary. Let let me go

00:36:06

to another related issue. And

00:36:09

and you know what? We

00:36:10

talked about the values of

00:36:10

arbitration efficiency is obviously something

00:36:14

we look to find them

00:36:16

final and binding Awards, you

00:36:18

know, the the process is

00:36:29



and I'll give this back

00:36:30  
to the the, the the

00:36:31  
empty the center view point

00:36:35  
here for your view. I

00:36:37  
mean, really, I think I'm

00:36:39  
just laying it in here,

00:36:40  
isn't this isn't dissenting complicating.

00:36:43  
The process, doesn't this lead

00:36:46  
to extra cost time and

00:36:49  
then ultimately serve The basis

00:36:51  
for a challenge which again,

00:36:53  
goes to Kosta and inefficiency.

00:36:55  
What, what would what do

00:36:57



you guys say, Chuck and

00:36:58

Kaia FIT in a patient?

00:37:04

Is not because necessarily I'm

00:37:08

worried about using my party's

00:37:10

resources to pay for a

00:37:11

dissenting opinion. I mean I

00:37:12

know that's that's that's part

00:37:14

of that, we put in

00:37:15

the cost of this process

00:37:16

could lengthen the length of

00:37:20

time to get an award.

00:37:21

But if you have a

00:37:22

strong chair, the chair should

00:37:24



be able to say, hey

00:37:24

we're not going to just

00:37:25

give you another year to

00:37:26

write a large reward out,

00:37:28

right? So it requires a

00:37:30

strong chair to make sure

00:37:31

that's not the case. With

00:37:34

the sense is that your

00:37:37

your appointed the arbitrator becomes

00:37:40

your lead counsel in an

00:37:42

annulment case or a set

00:37:43

aside a sore about a

00:37:45

case against recognition and enforcement.

00:37:47



So that that person sort

00:37:50

of starts if we restart

00:37:51

encouraging the sense by the

00:37:53

party appointed arbitrators The ones

00:37:57

who want to get that

00:37:58

job or going to see

00:37:59

themselves as laying the groundwork

00:38:00

for an annulment Kaiser has

00:38:02

set aside Kate and they're

00:38:03

going to put forward. The

00:38:04

case that is going to

00:38:04

be run through into that

00:38:06

process. If you look at

00:38:07



cases where there was a

00:38:08

set aside or an annulment

00:38:10

where there was a descent

00:38:12

that dissent is heavily cited,

00:38:15

heavily quoted. And are we

00:38:17

getting into a decision? If

00:38:19

the sense become more? More

00:38:20

commonplace are we getting into

00:38:21

a system? Are we building

00:38:22

a shame? We're annulments and

00:38:24

set aside just become par

00:38:26

for the course, which Unfortunately,

00:38:28

they kind of are right.

00:38:31



And I think as a

00:38:31  
regime we need directions with

00:38:33  
whether that's what we want

00:38:34  
or what we don't want.

00:38:37  
Right? So I don't think

00:38:40  
the sensor illegitimate just because

00:38:42  
they may add to time

00:38:43  
and cost just because they

00:38:45  
may undermine the authority of

00:38:46  
the award. Because there may

00:38:48  
well be awards that do

00:38:49  
you like raisins or do

00:38:51  
suffer from a serious procedural

00:38:52



irregularity, in which case there

00:38:54

should be a descent that

00:38:55

undermines the authority of that

00:38:57

award, but I see the

00:38:59

problem is being dead. Distance

00:39:02

themselves have come to lack

00:39:04

Authority, because they are always

00:39:06

altered by the losing parties

00:39:08

appointee. And so, while the

00:39:11

Sun's can play this important

00:39:12

role in policing irregular Awards,

00:39:15

there is fricassee, is diluted

00:39:17

by their ubiquity. And so

00:39:19



there's there's reason to be

00:39:21

more restrained in issuing descends

00:39:23

and preserving them only where

00:39:24

there is good reason to

00:39:26

depart from the majority. Produce

00:39:32

produce answers. What do you

00:39:35

think about the efficiency point?

00:39:36

Is there an answer to

00:39:37

that? So a couple things

00:39:45

the first woman be as

00:39:46

regards, the reputational value of

00:39:49

a of any decision or

00:39:50

it is persuasiveness, including a

00:39:53



descent. I think that's got

00:39:54  
a lot to do with

00:39:55  
who the person was who

00:39:56  
wrote it. And if they

00:39:57  
have they have a certain

00:40:00  
gravitas or or a reputation

00:40:02  
for being a team player

00:40:06  
but someone who has his

00:40:08  
good ideas and maybe there

00:40:10  
are ideas will adjust and

00:40:12  
we'll be successful at least

00:40:15  
in terms of its quality

00:40:16  
and then it's a potential

00:40:19



for being quoted. In other

00:40:20

cases something Chuck said which

00:40:23

was interesting is I certainly

00:40:25

agree. Of course that we

00:40:28

set an appointment is now

00:40:30

just to assume to happen.

00:40:32

I think that's mostly though

00:40:34

because of the kitchen sink

00:40:35

approach to litigation that originally

00:40:38

song, Trade law, but they

00:40:39

cost Applied pretty soon. Enter

00:40:42

into industrial at the end

00:40:44

of the young age, specially

00:40:47



true on the part of

00:40:48

the respondent because of the

00:40:50

general, the respondents council aren't

00:40:53

actually on a budget. They

00:40:55

may be on a budget

00:40:56

to some degree in some

00:40:57

way. But ultimately, if political

00:40:59

Necessities require more, they could

00:41:03

get more in besides is

00:41:04

not. So it's not there

00:41:05

he's directly. But the funny

00:41:08

thing is though that if

00:41:11

there was the kind of

00:41:13



error that would cause an

00:41:16

annulment to take place, then

00:41:18

by dint of logic, it

00:41:20

was one that had to

00:41:21

be brought up by the

00:41:22

dissenting arbitrator, right? Like if

00:41:26

there was a fundamental failure

00:41:29

in in, in due process

00:41:30

or if it is clear

00:41:32

that they went far beyond

00:41:33

the remit jurisdiction, what that

00:41:35

would be. It would be

00:41:36

incumbent upon the the other

00:41:38



arbitrator if they couldn't convince

00:41:40

their their colleagues at the

00:41:42

time that they would have

00:41:43

to set that out. So

00:41:45

I wouldn't say that that's

00:41:46

setting a course, you know,

00:41:47

that's not that's not playing

00:41:48

Council for the next case.

00:41:50

That's just saying what happened

00:41:53

So, I mean, ultimately, they'll

00:41:55

all of this goes back

00:41:56

to could face and professionalism,

00:41:59

and the self-aggrandizing arbitrator, who

00:42:04



writes too much, who who

00:42:05

takes the party's money to

00:42:07

write a law review article

00:42:08

as much less even published

00:42:10

in her log review, article,

00:42:11

based on it or the

00:42:12

person who is just grandstanding,

00:42:13

or the person who doesn't

00:42:16

understand that we are both

00:42:18

players are supposed to be

00:42:19

independent. There the anomalies, the

00:42:21

actual standard that we all

00:42:24

presume to live by think

00:42:26



we all do is Independence

00:42:29

impartiality, acting a good case

00:42:32

and it in a professional

00:42:33

manner. And if that's the

00:42:36

Assumption, I think a lot

00:42:37

of these critiques go away.

00:42:40

One other thing that might

00:42:42

help is if you know

00:42:44

if someone feels so strongly

00:42:45

that they need to descent.

00:42:47

You need to say something

00:42:49

rather than just sign an

00:42:51

award is that they don't

00:42:52



believe in in Siri they

00:42:54

could decide not to charge

00:42:56

for that time. It doesn't

00:42:58

solve the entire problem because

00:43:01

then the majority presumably still

00:43:02

needs to deal with the

00:43:04

signs in the body of

00:43:05

the award. But that's one

00:43:07

way to respond to the

00:43:09

efficiency and cost answer. But

00:43:14

then it encourages people to

00:43:15

be short and descent when

00:43:16

when they need to and

00:43:18



not write a letter. If

00:43:19

you were to go in

00:43:21

that context, you referring to

00:43:22

be silly Amore rather than

00:43:24

an actual rule. Can I

00:43:27

add onto something that I

00:43:29

do? Understand that Todd said,

00:43:30

this is the part where

00:43:31

I eventually agree with hot

00:43:32

seat collegiality. Right, right. We're

00:43:34

not all just just fighting

00:43:35

up here. I do think

00:43:38

that there is a dichotomy

00:43:39



to on whether to send

00:43:40

us about one thing you

00:43:41

said about due process and

00:43:43

procedure. I think that is

00:43:44

something that the party appointed

00:43:45

arbitrators are. Absolutely there to

00:43:47

police, to make sure that

00:43:49

each side had their due

00:43:50

process right to be heard.

00:43:51

And if something like that

00:43:52

happened, then that's an absolute

00:43:54

obligation to descend rather on,

00:43:57

you know, the scope of

00:43:58



the fvt obligation or something

00:44:00

like that. Could just, that

00:44:01

could just be better, put

00:44:02

better put into a, a

00:44:06

large, you article, and nothing

00:44:11

is important. I think it's

00:44:14

mixed up in. This is

00:44:15

good. Faith in collegiality here

00:44:18

is doing arbitration for about

00:44:21

20 years and over there's

00:44:23

20 years. I've seen a

00:44:24

steep decline in just professionalism

00:44:27

amongst Council. Right? I think

00:44:29



there was a point when

00:44:31

I first started in this

00:44:32

practice where it was a

00:44:34

bit more of a gentleman's

00:44:35

game as opposed to litigation,

00:44:37

now it is much more

00:44:40

brass knuckles as a matter

00:44:43

of practice. And I think

00:44:44

that bleeds over into some

00:44:46

of the more, you know,

00:44:47

proclivity to dissent among arbitrators

00:44:50

because that's what they feel

00:44:51

that their party wants. And

00:44:53



other thing is a bigger

00:44:54

problem that the institution needs

00:44:55

to Grapple with. So, before

00:44:59

I go on my next

00:45:00

issue, I still want to

00:45:02

give our for descent panelist.

00:45:08

The chance that on the

00:45:09

efficiency of shit. I think

00:45:10

our ear Copalis made a

00:45:14

pretty good case on that.

00:45:15

What do you say even

00:45:17

just a short response about

00:45:19

the efficiency and the opening

00:45:21



to challenge part? I think

00:45:25

it's been covered, there are

00:45:28

circumstances where it really does

00:45:30

make sense to descend because

00:45:32

there have been serious irregularities

00:45:33

in the issuance or the

00:45:37

creation of the award. And

00:45:39

then it didn't come in

00:45:39

on the dissenting arbitrator to

00:45:41

bring these to the parties

00:45:42

attention and that will come

00:45:45

to light during the course

00:45:46

of the set aside or

00:45:47



annulment proceedings. But I think

00:45:49

it's a very real concern

00:45:50

that dissenting opinions increase the

00:45:54

time that it takes station

00:45:55

towards they increase the car,

00:45:57

For the party is. Before

00:46:00

you completed the first part

00:46:02

of the case and not

00:46:04

even including the the cost

00:46:06

of a set aside or

00:46:07

an all-night proceeding to me.

00:46:09

The one thing I could

00:46:11

think of that might be

00:46:12



an answer. Is this idea

00:46:13

of keeping it short has

00:46:16

an arbitrator feels strong enough

00:46:18

to issue The Descent. Say,

00:46:19

I feel so strongly that

00:46:21

I need to do this

00:46:22

but I'm not going to

00:46:22

charge you for that time.

00:46:24

There's still some cost because

00:46:27

as I mentioned, the majority

00:46:28

needs to deal with The

00:46:30

Descent but that might explain

00:46:32

some of the concerns So

00:46:37



again, I might be just

00:46:39

as it, okay? If it's

00:46:40

a sample of One to

00:46:41

begin with but also is

00:46:42

back in time. But back

00:46:45

in 2005, after the case

00:46:47

was heard in which I

00:46:47

just sent it to my

00:46:51

youth Stephan. I felt Quite,

00:46:54

I don't know, quite how

00:46:58

the Quaker Junt to put

00:47:00

my descent in quickly and

00:47:02

the chairman he actually set

00:47:06



times for, is it. Okay,

00:47:08  
if you ever just got

00:47:09  
two weeks, and it's going

00:47:10  
to be after we've already

00:47:11  
done our first drop, and

00:47:12  
we will have a final

00:47:13  
draft after we see your

00:47:14  
descent? Boom, boom, boom. And

00:47:16  
maybe it's cuz of my

00:47:16  
youth that I didn't go,

00:47:17  
hey, wait a second, but

00:47:18  
I didn't. I simply complied

00:47:20  
with that schedule, and got

00:47:23



my two cents in. So,

00:47:26

I mean, I think this

00:47:27

can be handled simply by

00:47:29

the chairperson. I mean the

00:47:32

I guess the only problem

00:47:33

that might happen is egos

00:47:34

but I think another really

00:47:37

admirable trait about an arbitrator

00:47:39

or a lawyer is humility

00:47:41

and therefore being willing to

00:47:43

serve lemonade your ego sometimes

00:47:45

when she is strong. But

00:47:47

you realize that your primary

00:47:49



Fidelity's to doing a good

00:47:51

service for the people who

00:47:53

appointed you So, thanks for

00:47:56

mentioning your case and just

00:47:58

to give everyone a little

00:48:00

background. I think it's called

00:48:01

a Shader with a visit

00:48:04

to the plural for shaders

00:48:08

and nfm was the issues.

00:48:12

So most favored nation and

00:48:13

twenty years ago and granted

00:48:15

it, there still some convention

00:48:17

but it was a well

00:48:18



discussed issue. Certainly a lot

00:48:22

of contrary decisions and you

00:48:25

know I could argue that

00:48:26

your contribution was part of

00:48:28

the the kind of zeitgeist

00:48:29

of the time about. Where

00:48:31

were you going to one

00:48:33

could come down on the

00:48:34

issue. Quite legitimately based on

00:48:35

case La principal Etc. So

00:48:39

I guess it goes to

00:48:40

the question and maybe you

00:48:42

can talk to this. Since

00:48:43



you're the expert but did

00:48:44

you feel you were contributing

00:48:46

to the development of the

00:48:47

law? And you know this

00:48:48

is all on the contest.

00:48:49

Did you know there is

00:48:50

no precedent but there is

00:48:55

this What's that, you know,

00:48:56

Awards, do you know there,

00:48:58

if they're part of the,

00:49:00

do, you know, is arguably

00:49:02

in part of the interpretation

00:49:03

of treaties process, part of

00:49:06



the, the, you know, the

00:49:07

is the icj statue to

00:49:08

you? What international law is?

00:49:10

I mean, there is a

00:49:11

role for certainly decision, but

00:49:14

you know where to dispense

00:49:15

play into that, I just

00:49:17

think I was right. And

00:49:19

I'd like, I mean Dive

00:49:22

by is that without the

00:49:23

closing sentence, I mean, I've

00:49:26

been working out on my

00:49:27

dissertation back. Then we're non-discrimination

00:49:31



an Enderman What's the word

00:49:34

equality of treatment? Were, were

00:49:36

big components, and I had

00:49:38

a lot of research and

00:49:39

found uncovered this 1948 article

00:49:41

by schwarzenberger, that was Wonderful.

00:49:46

Is that it basically said

00:49:47

that the any idea, really

00:49:49

sticks and said that the

00:49:50

purpose of the mfn Clause

00:49:52

is to put the services

00:49:53

of the very best negotiators

00:49:54

in the world in your

00:49:56



favor. Meaning that you negotiate

00:49:59

your deal. You put the

00:50:00

mfn clause in now when

00:50:01

somebody is better and more

00:50:02

talented is better, you know,

00:50:04

better power relationship can get

00:50:06

a better deal. You get

00:50:08

the upgrade, you get the

00:50:09

tablet that's been in a

00:50:12

nutshell and I thought that

00:50:13

it didn't make much sense

00:50:15

in that particular case to

00:50:16

basically a come up with

00:50:18



a default that suggested unless

00:50:20

this explicit. But it says

00:50:22

that it's not bad because

00:50:23

I thought, well, know is

00:50:25

it should be the other

00:50:25

way around you and me

00:50:33

in her early cases, who

00:50:35

I think, developing ethos of

00:50:36

as counsel trying to move

00:50:39

the law at trying to

00:50:41

build the law. Arbitrator even

00:50:44

then I don't. I really

00:50:46

wasn't interested in building Lobby

00:50:47



cuz I'm not, I don't

00:50:51

think so because I don't

00:50:57

want fundamentally accept the idea

00:50:59

that there should be or

00:51:00

can be your ought to

00:51:01

be president. And in this

00:51:03

field that Ben is not

00:51:05

really about developing the law

00:51:07

cuz there is no the

00:51:08

law to begin with, but

00:51:10

the problem in already position,

00:51:14

I still have a hard

00:51:16

time with this idea that

00:51:17



it is. Or the arbitrators

00:51:20

to look beyond the case

00:51:21

and think about, I don't

00:51:23

know if that's an arbitration

00:51:24

as a whole or what

00:51:25

the law should be in

00:51:27

the future. It's the party's

00:51:29

case and they want for

00:51:32

it to be decided. As

00:51:33

I said, they don't really

00:51:34

care what happens beyond the

00:51:37

four corners of that case.

00:51:40

But at the same time,

00:51:41



I have started to see

00:51:43

a lot of awards that

00:51:44

say, well, we think that

00:51:47

we really need to adhere

00:51:50

to the consistent line of

00:51:52

jurisprudence that has developed on

00:51:54

X or Y issue. I'm

00:51:57

sometimes the jurisprudence of has

00:51:59

developed on that issue. Just

00:52:01

doesn't seem right. So I

00:52:04

think there is a concern

00:52:07

that if people are just

00:52:08

sort of rubber-stamping, what someone

00:52:09



has done previously, we're going

00:52:13  
to end up at a

00:52:14  
point where the principles that

00:52:16  
we have in the system,

00:52:16  
no longer makes sense. And

00:52:18  
I can see in that

00:52:20  
context the benefit of having

00:52:21  
someone write a dissenting opinion

00:52:23  
and say this was never

00:52:25  
logical in the first place

00:52:27  
and I'm not just going

00:52:28  
to rubber-stamp it here again,

00:52:30  
you have that question of

00:52:32



whether you're playing to The

00:52:34

Spectator is in the system

00:52:35

or the parties in your

00:52:37

case. I don't know how

00:52:38

I feel about that but

00:52:39

I I can see the

00:52:41

value in someone stopping and

00:52:42

saying. I don't agree with

00:52:44

this one more quick point.

00:52:49

One more perk points. I'm

00:52:52

reminded of a long time

00:52:53

ago when I was a

00:52:54

clerk to a federal court

00:52:55



judge in Canada. And he

00:52:57

generally let me do all

00:52:58

those reserves and get the

00:53:00

first cut and he agreed

00:53:01

with me on every single

00:53:03

case. But one is the

00:53:04

one he didn't disagree. Disagreement

00:53:06

me on it was like

00:53:07

a First Nations case involving

00:53:09

Railways or something and he

00:53:11

looked at it and he

00:53:12

said you're confused. This is

00:53:14

not the court of appeal.

00:53:15



I'm a trial judge. I

00:53:17  
apply the law to the

00:53:19  
facts. If you want to,

00:53:21  
if you want to change

00:53:21  
the law, that's what I

00:53:23  
feel does. And I would

00:53:26  
argue the probably those very

00:53:27  
same admonition. Could be applied

00:53:29  
to arbitrators, Well, hearing from

00:53:34  
our pro-camp on this development

00:53:37  
of international law Vanderburgh. Absolutely.

00:53:40  
He did an analysis of

00:53:42  
the decisions and he came

00:53:43



to the conclusion that if

00:53:45

it wanted to send but

00:53:48

what do you guys have

00:53:49

to say about that issue?

00:53:51

Yes. So I think it

00:53:52

goes back to the distinction

00:53:54

between quartz and arbitration because

00:53:57

chords serve a public purpose,

00:53:59

they and their funded as

00:54:01

such. So they they operate

00:54:03

beyond the resolution of a

00:54:05

single dispute, create binding precedent

00:54:08

in a lot of jurisdictions.

00:54:10



And so there's good reason

00:54:11

for chords to issue non-binding

00:54:13

opinions, that will develop the

00:54:15

law, whether it's a dissenting

00:54:17

opinion, or separate opinion, or

00:54:19

concurring opinion, or an advisory

00:54:20

opinion. But arbitral, tribunal is

00:54:24

by contrast, are constituted for

00:54:26

a private purpose and are

00:54:27

privately funded by the parties

00:54:29

that constitute them. And so

00:54:31

they're their focus should be

00:54:33

on efficiently and finally resolving

00:54:36



that dispute. And none of

00:54:38

this is to say that

00:54:39

arbitral Awards, do not contribute

00:54:41

to the development of international

00:54:42

law just said, any such

00:54:45

contribution is not the primary

00:54:47

rule of a tribunal, it

00:54:48

might just be an incidental

00:54:50

effect. Off their Awards. Yeah.

00:54:57

I'm going to roll is

00:54:58

here to be entertaining and

00:54:59

and and and provocative, right?

00:55:01

So I say some provocative

00:55:02



it, but it happens to

00:55:03

be what I believe is.

00:55:05

If you read most investor-state

00:55:07

arbitration Awards, the pretty lean

00:55:10

on jurisprudence. It's a pretty

00:55:12

vanilla explication of where the

00:55:14

law is, right? You don't

00:55:17

clean too much out of

00:55:18

it and then the disagreement

00:55:21

in the outcome of the

00:55:22

case is on a plant

00:55:23

facts, how the facts apply

00:55:25

to it. So my view

00:55:28



is if your kind of

00:55:29

nut has the law and

00:55:30

want to write for the

00:55:31

ages, as I think it

00:55:32

was a Chief Justice John

00:55:34

Roberts use in a case

00:55:35

recently, writing for the ages

00:55:37

article, not in and sent

00:55:43

more probably, especially if it's

00:55:45

not being behind of a

00:55:46

cloak of confidentiality, it'll get

00:55:49

read more and you can

00:55:49

actually write for the ages.

00:55:51



Untethered to the facts of

00:55:53

the case, because that's what

00:55:55

you're trying to do here

00:55:55

is is is doing The

00:55:57

facts of the case and

00:55:59

my G1 on the law

00:56:01

here is is also a

00:56:02

bit societal living we we

00:56:05

are narcissistic. I'm right where

00:56:08

we all have opinions with

00:56:09

the Press of a button.

00:56:10

I can screen my opinion

00:56:11

from a megaphone, right? Rather

00:56:13



than trying to get together

00:56:16

and meet consensus and coherence

00:56:18

than with a side that

00:56:19

might have a principal disagreement

00:56:21

with me. I actually think

00:56:23

that the law would develop

00:56:24

better. If arbitrators of different

00:56:27

viewpoints will come together and

00:56:28

try to put together a

00:56:29

coherent thought that they both

00:56:31

agreed with. You might have

00:56:32

a more balanced evolution of

00:56:34

the law rather than a

00:56:36



scattershot of, here's my opinion.

00:56:38

Cuz my opinion is my

00:56:39

opinion, is my opinion. That

00:56:40

doesn't really doesn't really lead

00:56:43

anywhere. That's really, you know,

00:56:44

putting my academic at on,

00:56:45

that's the peer-review process, right?

00:56:47

After reading an article, get

00:56:49

a peer-reviewed by people who

00:56:50

disagree with you and tell

00:56:51

you why they disagree with

00:56:53

you. And then you adjust

00:56:54

your opinion to that disagreement

00:56:55



that sort of the process

00:56:58  
of writing a in a

00:57:00  
war without a descent. So,

00:57:02  
you know, I think I

00:57:04  
think we talked about the

00:57:05  
development of law, you know,

00:57:06  
putting myself out there with

00:57:08  
a dissenting opinion. I don't

00:57:10  
know how much it really

00:57:11  
really does. Wait, wait, wait,

00:57:14  
you're saying that. Your peer

00:57:16  
reviewers? Don't agree with you.

00:57:17  
Wholeheartedly like mine. Because you're

00:57:21



always right. Now, we have

00:57:28

a few minutes left and,

00:57:29

you know, we've been circling

00:57:31

around issues related to culture

00:57:34

and legal background, and those

00:57:37

kinds of things. Let me

00:57:39

ask the question about the

00:57:41

sense in industrial State arbitration,

00:57:43

as distinct say, from the

00:57:46

commercial contacts, that are or

00:57:48

even litigation, they're kind of

00:57:54

a more of an imperative,

00:57:59

will stay in investor-state arbitration

00:58:03



because of the states are

00:58:07

in what state is involved,

00:58:08

International laws involved that there

00:58:14

be, you know, an extra

00:58:16

effort to to arrive at

00:58:20

an award that will be

00:58:23

viewed as a strong Ward

00:58:25

and that is no definitive

00:58:29

and not using all those

00:58:31

words. But you know that

00:58:32

there's an agreement between the

00:58:34

three arbitrators so that there

00:58:37

can be kind of a

00:58:38



higher level of competence. Is

00:58:40

there something about the ists

00:58:43

million, which is different from

00:58:44

litigation or commercial arbitration in

00:58:46

that world because of the

00:58:48

steaks that, that make it

00:58:50

more important and maybe, maybe

00:58:53

I could start with the

00:58:55

check and Eisha on this

00:58:57

at, cuz the premise here

00:58:58

is that, this is something

00:59:00

different. Is it different? Is

00:59:01

it something that that should

00:59:05



be considered? My view is

00:59:09  
that it is in some

00:59:11  
it is not something different

00:59:12  
cuz that's the reason we

00:59:13  
chose. I mean best start

00:59:14  
ever stayed over tration historical,

00:59:17  
evolution of the regime was

00:59:18  
trying to lift these women

00:59:20  
size does out of quartz

00:59:22  
and we looked out, of

00:59:23  
course, we had to paint

00:59:24  
against an arbitral canvas, right?

00:59:26  
So the arbitration model is

00:59:28



what we chose. We didn't

00:59:29

want judges who are arms

00:59:32

of the state deciding these

00:59:34

cases. We wanted individuals were

00:59:36

chosen by the parties to

00:59:38

didn't have a Reliance on

00:59:40

the state for their salary

00:59:42

are there or their safety

00:59:43

excetera excetera. So I think

00:59:45

that trying to start doing

00:59:48

is dies as, you know,

00:59:51

more like a court cuz

00:59:53

you're dealing with public issues.

00:59:54



And the development of the

00:59:55

law is is really wrong

00:59:57

headed because of One backwards

00:59:59

or 1 backwards quickly from

01:00:01

what we tried to get

01:00:02

away from. And, and I

01:00:05

think what I said earlier

01:00:06

really Rains, even more true

01:00:09

that you need to find

01:00:10

consensus here in these Awards.

01:00:12

Because investor-state arbitration. Unlike commercial

01:00:15

arbitration you have two groups

01:00:17

of arbitrators out there. Right

01:00:19



there. The people who, you

01:00:20

know, we're going to be

01:00:21

claiming investor-friendly know. We're going

01:00:24

to be stayed friendly, right?

01:00:25

Until you have an even

01:00:27

greater polarisation. So if we

01:00:29

have more my very case,

01:00:30

there's a descent you really

01:00:32

are going to get a

01:00:33

scattershot regime rather than coming

01:00:36

together and find a consensus,

01:00:38

which in the realm of

01:00:39

public policy should be really

01:00:41



where we're trying to do

01:00:43

that and get a balanced

01:00:46

view of the law. So,

01:00:47

I don't think it's different

01:00:48

and I think there's a

01:00:49

good reason why it's not

01:00:51

different, and it's historical, and

01:00:53

I think by equating it

01:00:55

more like litigation, we're regressing.

01:00:59

I generally agree and I

01:01:01

think if anything the political

01:01:03

undertones, if isds should be

01:01:07

a reason to discourage to

01:01:08



sense, even more than in

01:01:09

commercial arbitration because they're there

01:01:12

exists a risk that that

01:01:15

states for example could pressure

01:01:16

or even course, they're pretty

01:01:20

appointed. Arbitrator is to rule

01:01:21

in their favor. And even

01:01:23

even if no such Express

01:01:25

pressure exist, surely the trend

01:01:29

of issuing dissenting opinions in

01:01:31

favor of the losing party

01:01:32

creates an implicit expectation that

01:01:36

an arbitrator will confirm with

01:01:37



this practice. And so by

01:01:39

discouraging to send her by

01:01:40

making them less ordinary you,

01:01:42

you remove some of that

01:01:44

pressure that may exist on

01:01:45

a party appointed. Arbitrator to

01:01:47

descend in favor of the

01:01:48

party who appointed him or

01:01:50

her and you also reduce

01:01:53

the perception that that these

01:01:55

political factors are influencing the

01:01:57

issuance of a descent which

01:01:58

I think. Is harmful to

01:02:00



the legitimacy of the is

01:02:01

a SDS system as a

01:02:03

whole. So let me ask

01:02:06

Pro to send cloudy is

01:02:11

ISD of something different. No,

01:02:18

and no, it shouldn't be.

01:02:21

Shouldn't be because that Pretenders,

01:02:25

a potential two to two

01:02:27

weekends of the fundamental and

01:02:30

also special nature of. This

01:02:33

regime regime based on. All

01:02:36

these different treaties that a

01:02:39

state is willing to the

01:02:42



subject itself to the decision-making

01:02:45

up in partial independent International

01:02:48

arbitrators and that they will

01:02:52

generally and Theory abide by

01:02:55

that result, that process that

01:02:58

idea the independence in partiality

01:03:01

and International Quality of it

01:03:03

is arguably the most essential

01:03:05

part of it because it

01:03:08

without that you're you're not,

01:03:11

you don't really have decision-making

01:03:13

and it said you have

01:03:14

some sort of, you know,

01:03:15



but it's really from Edmond

01:03:16

to the diplomats to take

01:03:17

care of rather than the

01:03:18

lawyers. So if you bring

01:03:21

This idea that there needs

01:03:22

to be some more deference

01:03:23

and that that deference in

01:03:25

some way should change the

01:03:26

way the decision-maker. They are

01:03:27

before they would do their

01:03:28

job, you're spoiling the whole

01:03:31

point of the mechanism, which

01:03:33

is to leave it in

01:03:34



partial, independent and international. You

01:03:36

don't want to talk about

01:03:37

difference, which, of course, is

01:03:38

wise. We know from the

01:03:40

attempt to get the case

01:03:41

off the top of my

01:03:41

head, but where was one

01:03:44

of the case? It's the

01:03:45

Latin Maxim that arguing is

01:03:48

extinguished in Vienna convention, but

01:03:50

none the less States occasionally

01:03:52

used to try to use

01:03:53

you call. It is can

01:03:55



think of off the top

01:03:55

of my head? It's where

01:03:56

the states and you only

01:03:57

difference in the way you

01:03:58

can't decide this. I just

01:03:59

can't think of the name

01:04:00

enough arbitrators who has said,

01:04:03

no, that's not true. That

01:04:05

it's not a thing anymore,

01:04:06

but it was an argument

01:04:07

that we made a fair

01:04:08

bit. So no difference on

01:04:10

that basis. Would be really

01:04:12



bad, me prep the final

01:04:15

reference to the Past for

01:04:16

me. Is the pressure that

01:04:19

I felt into not defend,

01:04:22

but if I had to

01:04:23

do, send it to do

01:04:24

to follow the hunter Redford

01:04:25

model, was that I knew

01:04:29

that most of these folks

01:04:30

came from a commercial background

01:04:32

and that it was well

01:04:34

known that in the commercial.

01:04:35

Arbitration field, consensus was the

01:04:38



norm and was very much

01:04:40

preferred. So, as long as

01:04:43

the primary feeds feeds into

01:04:46

our arbitrator class or group

01:04:48

or Community have a commercial

01:04:50

a background, I would assume

01:04:54

that that culture is going

01:04:55

going to remain the same,

01:04:56

the only have to worry,

01:04:59

if it turns out that

01:05:00

more and more of the

01:05:01

people who are appointed as

01:05:02

arbitrators, don't have that Moray

01:05:05



in the background because it's

01:05:06

not with what they learned,

01:05:08

where they were in between

01:05:10

the public international law originally

01:05:13

or did something something private

01:05:16

that involved. Those folks might

01:05:20

not know of this cultural

01:05:22

taboo against the Santa must

01:05:26

really have to but since

01:05:28

I don't think we have

01:05:29

that world still think that

01:05:31

the community is largely based

01:05:33

on the commercial model which

01:05:34



was of course has Chuck

01:05:35

said the model they chose.

01:05:37

I don't think that this

01:05:39

is really a problem. Can

01:05:41

I just add? I think

01:05:42

one of the most interesting

01:05:44

comparisons isn't necessarily investment arbitration

01:05:47

to commercial arbitration or arbitration

01:05:50

to litigation but Awards versus

01:05:54

annulment decision because you see

01:05:56

him anymore descends in awards

01:05:59

for jurisdictional decisions than you

01:06:00

do in the. Do you

01:06:03



know my contacts? So we've

01:06:07  
come to the end of

01:06:07  
our time, but any good

01:06:12  
panel I in their deliberations

01:06:14  
on an issue. I'd like

01:06:15  
to ask for a quick

01:06:18  
response and this can be

01:06:19  
your personal view or playing

01:06:22  
along with our game. But

01:06:23  
where do you, where to

01:06:26  
where your final views? If

01:06:27  
I've missed anything here, and

01:06:31  
everything. Before we finish off

01:06:32



talking? We know, Asia separate

01:06:44

opinion. Well, I think that,

01:06:48

then I fix this. It's

01:06:50

the end of this panel

01:06:51

and I want to pick

01:06:53

you up at 10:30 to

01:06:54

thank everyone that you shot

01:06:58

shotgun Mallory and Todd for

01:07:01

taking the time and putting

01:07:04

your thoughts to this. And

01:07:05

on behalf of the group

01:07:06

here like this, indicate our

01:07:08

thanks and will finish off

01:07:10



here and look forward to

01:07:12

seeing you at the next

01:07:13

role of Washington, arbitration week

01:07:16

panel. Thanks very much. Well,

01:06:47

I think that, then I

01:06:49

fix this. It's the end

01:06:50

of this panel and I

01:06:52

want to pick you up

01:06:53

at 10:30 to thank everyone

01:06:57

that you shot shotgun Mallory

01:07:00

and Todd for taking the

01:07:02

time and putting your thoughts

01:07:04

to this. And on behalf

01:07:06



of the group here like

01:07:07

this, indicate our thanks and

01:07:08

will finish off here and

01:07:11

look forward to seeing you

01:07:12

at the next role of

01:07:15

Washington, arbitration week panel. Thanks

01:07:18

very much.