



Are Dissenting Opinions in Arbitration Useful *

Summary

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

The second panel of Washington Arbitration Week, moderated by Ian Laird, addressed the contentious topic of dissenting opinions in arbitration, specifically within the context of international investment arbitration. The panel featured prominent figures from the DC arbitration community, including Professor Charles Tebeau, Keisha Aisha, Mallory Silverman, and Dr. Todd Weiler, who debated whether dissenting opinions are beneficial to the arbitration process.

The discussion began with Laird acknowledging the contributions of co-chair Dr. Jose Antonio Rivas and emphasizing the growth and support for the conference since its inception. The panelists were assigned positions for a structured debate, with some advocating for the utility of dissenting opinions while others opposed them.

Key points included the legal permissibility of dissenting opinions, which varies between common law and civil law traditions. The panelists highlighted the cultural and procedural differences in arbitration, with some arguing that dissent could undermine the efficiency and authority of awards. Concerns were raised about the potential for dissenting opinions to lead to increased costs and challenges in the enforcement of awards.

The panelists debated the implications of dissenting opinions on the development of international law, with some asserting that dissent could contribute to legal evolution, while others argued that it detracts from the primary goal of resolving disputes efficiently. The dialogue also touched on the role of arbitrators, the importance of collegiality, and the pressures that might influence dissenting opinions, particularly in politically sensitive cases.

In conclusion, the panelists expressed differing views on the necessity and appropriateness of dissenting opinions in arbitration, with a consensus that while dissent can serve a purpose, it should be used judiciously to maintain the integrity and efficiency of the arbitration process. The session ended with appreciation for the panelists' insights and contributions to the ongoing discourse in the arbitration community.



Authors

Maira

Topics

Category

WAW

Full Transcript

00:00:09

Welcome everyone. To our second

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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



00:00:40
co-chairs Washington arbitration week along

00:00:44
with Dr. Jose Antonio Rivas

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strategy. I don't take the

00:00:51
opportunity enough to mention Jose

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Antonio, this this events this

00:01:02
week with something that many

00:01:06
of us in the Washington

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arbitration community. Talk about four

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years as something that we

00:01:12
should put together. You know,

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one of those things that

00:01:14
you just kind of talked

00:01:15
about it and no one



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ever. Grab the bull by

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the horns. And Jose, Antonio

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was certainly part of that

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discussion. And when Kota came

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along, we really thought that

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was a low entry opportunity

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to do a virtual conference.

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And we started off fairly

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ambitiously in that first year

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and people were desperate with

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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

00:02:02

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

00:02:35
firm which a plays a

00:02:37
major role in organizing along

00:02:39
with Maryam at the mouth

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and the whole team, a

00:02:42
text strategy. I think we

00:02:44
can't say enough to them

00:02:45
for their excellent work and

00:02:47
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

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and arbitration useful. How made

00:03:03

the Centre's contribute to move

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the law forward in International

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Investment, arbitration. Obviously the title

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has a few premises in

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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.

00:03:29
But this is a debate

00:03:32
that, of course, is one

00:03:35
that continues on in the

00:03:37
arbitration community and some have

00:03:41
very strong opinions, some sit

00:03:43
on the fence, as well

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as for again. And I

00:03:49
thought, you know, before we

00:03:51
get into our discussion and

00:03:53
we're going to organize it

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in a bit of a



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Format of a debate. We've,

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I've assigned positions to our

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four panelists and they've agreed

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to to play along. I

00:04:05

think at the end of

00:04:06

the day, you'll probably hear

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what their Real views are.

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But for the sake of

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making this interesting and entertaining,

00:04:14

I think that they were

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game and so we'll see

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how that works out. But

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to start the panel, I



00:04:20

wanted to just get a,

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maybe a show of hands

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about folks initial sense of

00:04:29

where they stand on this

00:04:31

issue. So those who think

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the sensor a good idea

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and are generally supportive of

00:04:39

that concept and you put

00:04:41

up your hands. So that's

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that's y'all just using my

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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

00:05:15
go along, there are course,

00:05:17
a lot of moving pieces

00:05:18
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

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Ian. Laird I am your

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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

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be a junior and Chuck

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as he is known to

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us is based here in

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Washington d.c. he's a council



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at three crowns and is

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practice as council is focused

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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

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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

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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

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paper, on topics related to

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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

00:07:50
R panel. We also have

00:07:51
next to Keisha, Mallory silver

00:07:55
silver, man. Mallory is described

00:08:00
in Who's Who as and

00:08:01
I quote this is great

00:08:02
quote one of the world's

00:08:03
most experienced young practitioners of

00:08:05
investment arbitration unquote. So I

00:08:07
think I just absolutely you

00:08:10
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

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very experienced, she recently left

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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



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recommend looking to Mallory if

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you need to bolster your

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bench and then fine. Next

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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

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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



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full-time. Arbitrator for well over

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20 years and I'm almost

00:09:17
25 years and 26. Okay?

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So you got to count

00:09:21
those. So he's well recognized

00:09:25
of course in Garner and

00:09:27
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

00:09:51
panel, moderators and as well.

00:09:58
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

00:10:07
those for you online. If

00:10:09
you are merely acting as

00:10:13
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

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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

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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,

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even? And I think of

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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

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placed on collegiality and fences

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and many rules. I actually

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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

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to the European court of

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justice. You don't see the

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sense but if you're I

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guess a common law lawyer,

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you know the cent store

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or hardly recognized and encouraged

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and you know, when exit

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was being negotiated in the

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stews, of course, Check the

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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

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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

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something that has being up

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fairly common practice. Now, going

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to kind of the principled

00:12:15

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

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quite distinct from litigation, efficiency

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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

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final and binding, generally, not

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a peelable. Subject, limited enforcement

00:12:46

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

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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



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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

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look at the idea of

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Defense, one could argue and

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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

00:13:57
see what, what are panel

00:13:58
say about that. I just

00:14:00
to give you a little

00:14:00
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

00:14:11
a very senior arbitrators in

00:14:14
the form of Albert. Ian,

00:14:17
Vandenberg, and Charles Brower and

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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

00:14:29
their camps. Vandenberg has a

00:14:33
hearty dislike of the sense

00:14:35
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

00:14:49
diametrically opposed used. So I'm

00:14:53
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

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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

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anything that I was going

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to stay as their personal

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view necessarily and the interests

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of the discussion. Unless they

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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

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for the purpose of the

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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

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getting not having to sense

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leads to 4. It will

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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

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bolster party confidence in the

00:16:19

process and not having defense

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and third and fourth Lee,



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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

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for the development of the

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law. So this sets out

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a few of the kind

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of touch points for this

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discussion. So let me start

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with a party autonomy. And

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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

00:16:59
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

00:17:36
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

00:17:41
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



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close the connection and that

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call them to mind that

00:18:00

there must be something in

00:18:02

in his estimation going wrong

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there. And of course John

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Paulson wade into that debate

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somewhat With his paper and

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and he was talking about

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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

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setting that issue forward, go

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to our folks who are

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in favor. So Chuck and

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Eisha. So Chuck, maybe we'll

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start with you right at

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the end. So, what do

00:18:46

you say about that? Are

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you again? So sorry, your

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again. So actually, let's start

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off the year again. Yeah,



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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

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I think really it's arbitration

00:19:18

vs. Litigation divided, right? In,

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what do you pay? This

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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,

00:19:38
I've done a lot of

00:19:39
litigation as well as arbitration

00:19:40
in my time. And I

00:19:41
can tell you that no

00:19:42
client loves the fact that

00:19:45
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



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have a really interesting brain

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tumor, right everyone. So, come

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and look. Right. That's what

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he get out of litigation

00:20:02

going to arbitration where you're

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paying for three individuals party.

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Autonomy to appoint someone to

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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 descent

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 descendants

00:26:50
are here. They haven't been

00:26:52
challenged over the past 10

00:26:53
years and if there is

00:26:55
Their statistics that show that



00:26:57

arbitrator is our, I guess

00:26:59

issuing opinions in favor of

00:27:02

the party. That point of

00:27:03

them, that may not be

00:27:05

something positive, it may just

00:27:07

be a correlation. It could

00:27:09

be that parties are doing

00:27:10

a very good job of

00:27:11

selecting arbitrators, that agree with

00:27:13

their views and in the

00:27:14

end, they're just not able

00:27:15

to persuade. The other arbitrators,

00:27:16

not necessarily some manifestation of



00:27:19

Faith or something. Improper, it

00:27:22

could be people doing a

00:27:23

good job. What is possible

00:27:26

would be possible to have

00:27:28

an arbitration Clause. Drafted that

00:27:30

says that the arbitrator's must

00:27:32

come to a consensus and

00:27:34

I mean, that might lead

00:27:36

to a stalemate in in

00:27:38

theory you could Say basically

00:27:41

say no to sense by

00:27:42

saying, they must come to

00:27:43

a consensus. But I mean,



00:27:46
essentially that's the Civil model

00:27:48
that they don't permit this

00:27:51
end so that that is

00:27:52
required. And there's a well

00:27:58
in and that goes to

00:27:59
the whole question of deliberations,

00:28:02
of course, and what goes

00:28:03
on behind the scenes and

00:28:05
how the three arbitrator panel

00:28:08
interacts in or out for

00:28:09
the assassins in the European

00:28:10
Court, how they interact, and

00:28:13
how they get to that



00:28:14

decision, that's a for another

00:28:16

discussion as to how that

00:28:18

works. But let me go

00:28:19

to the point that their

00:28:20

truck race just to get

00:28:21

your response from our produce.

00:28:24

And folks, I mean is

00:28:25

this a cultural issue or

00:28:27

is this really like those

00:28:30

of the argument that I

00:28:31

kind of served up initially?

00:28:32

Is this a litigation versus

00:28:34

arbitration kind of divided? How



00:28:37

do you view that issue?

00:28:40

I mean it's someone from

00:28:41

a common law jurisdiction. I

00:28:42

wouldn't say that on the

00:28:44

whole we're not collegial or

00:28:46

is that I am not

00:28:47

going to do because I'm

00:28:48

from a common law jurisdiction

00:28:50

and might have an individual

00:28:52

opinion but it is true

00:28:56

that your background and legal

00:28:59

training probably will have something

00:29:01

to do with what you



00:29:02
think about on this issue.

00:29:07
Can I respond quickly to

00:29:09
what was just said? And

00:29:11
I am a little bit.

00:29:17
What I actually think is

00:29:18
that at no point where

00:29:20
I think it should be

00:29:20
disallowed cuz I didn't go

00:29:22
to the threat of a

00:29:23
descent is a really good

00:29:25
one. I didn't the title

00:29:26
here is a dissenting opinions

00:29:28
useful. I think I actually



00:29:30

believe that there should be

00:29:31

some social pressure is the

00:29:34

social pressure by the best

00:29:35

way to put it against

00:29:36

the sense like we really

00:29:38

should as a regime try

00:29:39

to create a system where

00:29:41

descends are the Rarity we

00:29:43

only to send it to

00:29:44

absolutely have to can I

00:29:46

put your name to something

00:29:47

and need to say why?

00:29:49

They're they're they're going to



00:29:52

remain there? I think there's

00:29:53

a good that they remain

00:29:55

there because if they're not

00:29:57

there, I think they're not.

00:29:59

There you do, run the

00:30:01

risk which is equally problematic

00:30:02

in arbitration on seeing more

00:30:04

and more or split the

00:30:05

baby decisions, right? I think

00:30:08

it's actually better for justice

00:30:11

if the two arbitrator to

00:30:13

agree on a certain robust

00:30:15

decision. Feel like they can



00:30:18

issue that robust decision in

00:30:19

the face of a descent

00:30:20

as opposed to they both

00:30:22

get together and issue some

00:30:24

award both side to get

00:30:25

together. If you some award

00:30:27

that says you win, but

00:30:28

you get no money and

00:30:29

that's the only way that

00:30:30

we could get together and

00:30:31

and get some sort of

00:30:33

consensus. Right? I mean that's

00:30:34

actually worse. So I need



00:30:36

to send need to be

00:30:37

there to push that kept

00:30:39

the pressure on the arbitration

00:30:40

tribunal. However, I do think

00:30:42

that, we need to really

00:30:43

be thinking as arbitrators, that

00:30:46

this is the nuclear option

00:30:47

that, I think that's my

00:30:49

cue. I completely agree. And

00:30:53

I don't think it's, it's

00:30:55

this binary between a collegial

00:30:58

approach and purely individualistic approach

00:31:00

on the part of the



00:31:01

arbitrator's, there's certainly no strict

00:31:04

expectation of a consensus award,

00:31:07

but I think there is

00:31:08

an expectation that in the

00:31:10

deliberation process, the arbitrators from

00:31:12

whatever country they come from

00:31:13

will engage in a free

00:31:16

and An exchange of views

00:31:17

and even be open to

00:31:19

changing their minds and in

00:31:21

an ideal world. That. Good

00:31:23

fit process would result in

00:31:25

consensual results, more often, than



00:31:27

not. So, I think, I

00:31:28

think the answer lies somewhere

00:31:29

in between this collegial and

00:31:32

individualistic divide. Yeah, I don't

00:31:36

even understand the idea that

00:31:37

there's a bit. Individualism actually

00:31:39

has anything to do with

00:31:40

it. I think it's a

00:31:41

professional responsibility of the arbitrator

00:31:44

to come to in good

00:31:46

face. Come to a legitimate

00:31:50

as far as they're concerned

00:31:51

illegitimate. And the reason the



00:31:53

basis for their finding. So

00:31:56

if if that's the objective

00:31:58

of the arbitrator and the

00:31:59

two other opportunities share that,

00:32:01

and they all are operating

00:32:03

a good-faith collegiality will necessarily

00:32:06

exist. It's only individuality in

00:32:10

the sense that they're not

00:32:11

all one human. I mean,

00:32:13

because there were three different

00:32:14

humans, they want some individual

00:32:15

characteristics but didn't to say

00:32:17

that people who descend are



00:32:19

more individualistic, is it is

00:32:21

nylon Donnelly unsupported. It's also

00:32:25

Beside the point of a

00:32:27

woodchuck chuck said, which is

00:32:30

wholly agree with would be

00:32:32

with respect to only having

00:32:34

two descent when you really

00:32:35

need to. So, the first

00:32:38

time and the only time

00:32:39

I had to write at

00:32:40

this at Weston 2005-6. And

00:32:42

in that case, I really

00:32:45

had no other choice. I



00:32:47

just, I disagreed with the

00:32:48

finding and then, as I

00:32:50

studied, a lot of the

00:32:51

law written about it

00:32:52

and I thought they were

00:32:53

wrong. So I contacted Martin

00:32:56

Hunter like a mentor and

00:33:02

he basically said the same

00:33:04

thing that I found was

00:33:06

attributed to Redfern unsurprisingly in.

00:33:09

I think one of the

00:33:10

Vanderburgh articles which is that

00:33:12

you're going to just has



00:33:14

to be truly necessary and

00:33:17

then has to be polite.

00:33:19

And that has to be

00:33:19

short be concise, right to

00:33:22

the point. And so I

00:33:24

followed that The only question

00:33:26

I guess I would have

00:33:27

in retrospect is I felt

00:33:30

at the time that there

00:33:31

was very much a cultural

00:33:33

norm or a against one's

00:33:38

right in favor of consensus

00:33:40

against going off. Maybe. That's



00:33:43

because it was like, over

00:33:44

20 years ago, or maybe

00:33:46

it's just because we need

00:33:48

to remember that there is

00:33:49

a there's enough of us,

00:33:51

there's sufficient mass of us

00:33:54

at the international arbitration Community

00:33:57

level, that we have our

00:33:58

own more ice and one

00:33:59

of the mares which is

00:34:01

basically I'm a loan of

00:34:03

about this evil. And the,

00:34:04

and the anglo-american / Canadian



00:34:07

approach this where you get

00:34:10

this pressure that you definitely

00:34:11

do want to reach consensus

00:34:14

if it all possible. That's

00:34:18

part of built into the

00:34:19

rules to, you know, you

00:34:20

have the exit convention saying

00:34:22

what the tribunal needs to

00:34:24

do in respect of the

00:34:25

award. The tribunal needs to

00:34:27

draft his reasons and built

00:34:29

into, that is the notion

00:34:31

of this consensus. Three people



00:34:34

coming together to jointly draft

00:34:37

an award, but sometimes There

00:34:40

are going to be disagreements

00:34:41

when three different people come

00:34:42

together and look at issues

00:34:44

of Law and she's a

00:34:46

fact and I think that

00:34:48

having the possibility of Defense

00:34:50

creates this day. That doesn't

00:34:53

mean that in every single

00:34:54

situation, a particular to send

00:34:57

was something that I necessarily

00:34:59

would have done or what



00:35:01

if agreed with. But it's

00:35:03

still I think on the

00:35:05

basic level of a good

00:35:06

thing for the system to

00:35:07

have If I forgot another

00:35:10

idea, just came to mine

00:35:11

Thomasville to a friend of

00:35:15

many who are the who

00:35:16

are a little bit older

00:35:17

here. I had appointed him

00:35:20

as an arbitrator in a

00:35:22

Mexican case international Thunderbird gaming

00:35:24

and he was kind of



00:35:27

had a thing going with

00:35:28

him afterwards, cuz I went

00:35:29

represent the claimant, I'd say

00:35:30

I always say what your

00:35:31

descent, any my separate opinion

00:35:34

to call it at the

00:35:37

sent, you said no, it's

00:35:39

my separate opinion. So I

00:35:41

guess that we have to

00:35:43

color a dress that aspect

00:35:44

of it too because it's

00:35:45

really not just to send

00:35:47

or maybe it is. I



00:35:51

think of that case, Thomas

00:35:52

was very much disagree with

00:35:54

the majority, but yes, he

00:35:55

was a very well-mannered and

00:35:56

proper person and he just

00:35:58

couldn't swallow the word descent,

00:36:00

which goes to the more

00:36:02

of his character, but no

00:36:03

doubt he was contrary. Let

00:36:05

let me go to another

00:36:06

related issue. And and you

00:36:09

know what? We talked about

00:36:10

the values of arbitration efficiency



00:36:12
is obviously something we look

00:36:15
to find them final and

00:36:17
binding Awards, you know, the

00:36:25
the process is and I'll

00:36:29
give this back to the

00:36:31
the, the the empty the

00:36:33
center view point here for

00:36:36
your view. I mean, really,

00:36:37
I think I'm just laying

00:36:39
it in here, isn't this

00:36:41
isn't dissenting complicating. The process,

00:36:44
doesn't this lead to extra

00:36:47
cost time and then ultimately



00:36:49

serve The basis for a

00:36:52

challenge which again, goes to

00:36:53

Kosta and inefficiency. What, what

00:36:56

would what do you guys

00:36:57

say, Chuck and Kaia FIT

00:37:03

in a patient? Is not

00:37:06

because necessarily I'm worried about

00:37:09

using my party's resources to

00:37:11

pay for a dissenting opinion.

00:37:12

I mean I know that's

00:37:13

that's that's part of that,

00:37:14

we put in the cost

00:37:15

of this process could lengthen



00:37:19
the length of time to

00:37:21
get an award. But if

00:37:22
you have a strong chair,

00:37:23
the chair should be able

00:37:24
to say, hey we're not

00:37:25
going to just give you

00:37:26
another year to write a

00:37:27
large reward out, right? So

00:37:29
it requires a strong chair

00:37:31
to make sure that's not

00:37:31
the case. With the sense

00:37:34
is that your your appointed

00:37:39
the arbitrator becomes your lead



00:37:41

counsel in an annulment case

00:37:43

or a set aside a

00:37:44

sore about a case against

00:37:46

recognition and enforcement. So that

00:37:49

that person sort of starts

00:37:50

if we restart encouraging the

00:37:52

sense by the party appointed

00:37:54

arbitrators The ones who want

00:37:57

to get that job or

00:37:58

going to see themselves as

00:37:59

laying the groundwork for an

00:38:01

annulment Kaiser has set aside

00:38:02

Kate and they're going to



00:38:03

put forward. The case that

00:38:04

is going to be run

00:38:05

through into that process. If

00:38:07

you look at cases where

00:38:08

there was a set aside

00:38:09

or an annulment where there

00:38:12

was a dissent that dissent

00:38:14

is heavily cited, heavily quoted.

00:38:16

And are we getting into

00:38:18

a decision? If the sense

00:38:19

become more? More commonplace are

00:38:21

we getting into a system?

00:38:22

Are we building a shame?



00:38:23

We're annulments and set aside

00:38:25

just become par for the

00:38:26

course, which Unfortunately, they kind

00:38:29

of are right. And I

00:38:31

think as a regime we

00:38:32

need directions with whether that's

00:38:33

what we want or what

00:38:34

we don't want. Right? So

00:38:39

I don't think the sensor

00:38:41

illegitimate just because they may

00:38:43

add to time and cost

00:38:44

just because they may undermine

00:38:45

the authority of the award.



00:38:47

Because there may well be

00:38:48

awards that do you like

00:38:50

raisins or do suffer from

00:38:51

a serious procedural irregularity, in

00:38:54

which case there should be

00:38:55

a descent that undermines the

00:38:56

authority of that award, but

00:38:58

I see the problem is

00:39:00

being dead. Distance themselves have

00:39:03

come to lack Authority, because

00:39:05

they are always altered by

00:39:07

the losing parties appointee. And

00:39:10

so, while the Sun's can



00:39:11

play this important role in

00:39:13

policing irregular Awards, there is

00:39:16

fricassee, is diluted by their

00:39:18

ubiquity. And so there's there's

00:39:20

reason to be more restrained

00:39:21

in issuing descends and preserving

00:39:24

them only where there is

00:39:25

good reason to depart from

00:39:27

the majority. Produce produce answers.

00:39:34

What do you think about

00:39:35

the efficiency point? Is there

00:39:36

an answer to that? So

00:39:44

a couple things the first



00:39:46

woman be as regards, the

00:39:47

reputational value of a of

00:39:49

any decision or it is

00:39:51

persuasiveness, including a descent. I

00:39:53

think that's got a lot

00:39:54

to do with who the

00:39:55

person was who wrote it.

00:39:56

And if they have they

00:39:59

have a certain gravitas or

00:40:01

or a reputation for being

00:40:03

a team player but someone

00:40:07

who has his good ideas

00:40:09

and maybe there are ideas



00:40:10

will adjust and we'll be

00:40:13

successful at least in terms

00:40:15

of its quality and then

00:40:17

it's a potential for being

00:40:19

quoted. In other cases something

00:40:22

Chuck said which was interesting

00:40:24

is I certainly agree. Of

00:40:25

course that we set an

00:40:29

appointment is now just to

00:40:30

assume to happen. I think

00:40:33

that's mostly though because of

00:40:34

the kitchen sink approach to

00:40:35

litigation that originally song, Trade



00:40:38

law, but they cost Applied

00:40:41

pretty soon. Enter into industrial

00:40:43

at the end of the

00:40:44

young age, specially true on

00:40:48

the part of the respondent

00:40:49

because of the general, the

00:40:51

respondents council aren't actually on

00:40:54

a budget. They may be

00:40:55

on a budget to some

00:40:57

degree in some way. But

00:40:58

ultimately, if political Necessities require

00:41:01

more, they could get more

00:41:03

in besides is not. So



00:41:04

it's not there he's directly.

00:41:06

But the funny thing is

00:41:08

though that If there was

00:41:12

the kind of error that

00:41:14

would cause an annulment to

00:41:17

take place, then by dint

00:41:19

of logic, it was one

00:41:20

that had to be brought

00:41:21

up by the dissenting arbitrator,

00:41:25

right? Like if there was

00:41:26

a fundamental failure in in,

00:41:29

in due process or if

00:41:31

it is clear that they



00:41:32

went far beyond the remit

00:41:33

jurisdiction, what that would be.

00:41:35

It would be incumbent upon

00:41:37

the the other arbitrator if

00:41:39

they couldn't convince their their

00:41:41

colleagues at the time that

00:41:43

they would have to set

00:41:44

that out. So I wouldn't

00:41:45

say that that's setting a

00:41:46

course, you know, that's not

00:41:47

that's not playing Council for

00:41:50

the next case. That's just

00:41:51

saying what happened So, I



00:41:54

mean, ultimately, they'll all of

00:41:56

this goes back to could

00:41:58

face and professionalism, and the

00:42:02

self-aggrandizing arbitrator, who writes too

00:42:05

much, who who takes the

00:42:06

party's money to write a

00:42:07

law review article as much

00:42:09

less even published in her

00:42:10

log review, article, based on

00:42:11

it or the person who

00:42:13

is just grandstanding, or the

00:42:15

person who doesn't understand that

00:42:17

we are both players are



00:42:18
supposed to be independent. There

00:42:20
the anomalies, the actual standard

00:42:23
that we all presume to

00:42:25
live by think we all

00:42:26
do is Independence impartiality, acting

00:42:31
a good case and it

00:42:32
in a professional manner. And

00:42:35
if that's the Assumption, I

00:42:36
think a lot of these

00:42:37
critiques go away. One other

00:42:41
thing that might help is

00:42:43
if you know if someone

00:42:44
feels so strongly that they



00:42:46

need to descent. You need

00:42:48

to say something rather than

00:42:50

just sign an award is

00:42:51

that they don't believe in

00:42:52

in Siri they could decide

00:42:55

not to charge for that

00:42:57

time. It doesn't solve the

00:42:59

entire problem because then the

00:43:01

majority presumably still needs to

00:43:03

deal with the signs in

00:43:05

the body of the award.

00:43:06

But that's one way to

00:43:08

respond to the efficiency and



00:43:09

cost answer. But then it

00:43:14

encourages people to be short

00:43:15

and descent when when they

00:43:17

need to and not write

00:43:18

a letter. If you were

00:43:19

to go in that context,

00:43:22

you referring to be silly

00:43:23

Amore rather than an actual

00:43:25

rule. Can I add onto

00:43:28

something that I do? Understand

00:43:30

that Todd said, this is

00:43:30

the part where I eventually

00:43:32

agree with hot seat collegiality.



00:43:33

Right, right. We're not all

00:43:35

just just fighting up here.

00:43:36

I do think that there

00:43:38

is a dichotomy to on

00:43:40

whether to send us about

00:43:41

one thing you said about

00:43:42

due process and procedure. I

00:43:43

think that is something that

00:43:44

the party appointed arbitrators are.

00:43:46

Absolutely there to police, to

00:43:48

make sure that each side

00:43:49

had their due process right

00:43:50

to be heard. And if



00:43:51
something like that happened, then

00:43:54
that's an absolute obligation to

00:43:56
descend rather on, you know,

00:43:57
the scope of the fvt

00:43:58
obligation or something like that.

00:44:00
Could just, that could just

00:44:01
be better, put better put

00:44:04
into a, a large, you

00:44:08
article, and nothing is important.

00:44:13
I think it's mixed up

00:44:14
in. This is good. Faith

00:44:16
in collegiality here is doing

00:44:20
arbitration for about 20 years



00:44:21

and over there's 20 years.

00:44:24

I've seen a steep decline

00:44:25

in just professionalism amongst Council.

00:44:28

Right? I think there was

00:44:30

a point when I first

00:44:31

started in this practice where

00:44:32

it was a bit more

00:44:34

of a gentleman's game as

00:44:36

opposed to litigation, now it

00:44:38

is much more brass knuckles

00:44:41

as a matter of practice.

00:44:44

And I think that bleeds

00:44:45

over into some of the



00:44:46

more, you know, proclivity to

00:44:49

dissent among arbitrators because that's

00:44:51

what they feel that their

00:44:52

party wants. And other thing

00:44:54

is a bigger problem that

00:44:55

the institution needs to Grapple

00:44:56

with. So, before I go

00:45:00

on my next issue, I

00:45:01

still want to give our

00:45:03

for descent panelist. The chance

00:45:08

that on the efficiency of

00:45:09

shit. I think our ear

00:45:12

Copalis made a pretty good



00:45:14

case on that. What do

00:45:16

you say even just a

00:45:17

short response about the efficiency

00:45:19

and the opening to challenge

00:45:21

part? I think it's been

00:45:26

covered, there are circumstances where

00:45:29

it really does make sense

00:45:31

to descend because there have

00:45:33

been serious irregularities in the

00:45:35

issuance or the creation of

00:45:37

the award. And then it

00:45:39

didn't come in on the

00:45:40

dissenting arbitrator to bring these



00:45:41

to the parties attention and

00:45:43

that will come to light

00:45:45

during the course of the

00:45:46

set aside or annulment proceedings.

00:45:47

But I think it's a

00:45:49

very real concern that dissenting

00:45:52

opinions increase the time that

00:45:55

it takes station towards they

00:45:56

increase the car, For the

00:45:57

party is. Before you completed

00:46:01

the first part of the

00:46:02

case and not even including

00:46:04

the the cost of a



00:46:06

set aside or an all-night

00:46:07

proceeding to me. The one

00:46:10

thing I could think of

00:46:11

that might be an answer.

00:46:12

Is this idea of keeping

00:46:14

it short has an arbitrator

00:46:17

feels strong enough to issue

00:46:18

The Descent. Say, I feel

00:46:20

so strongly that I need

00:46:21

to do this but I'm

00:46:22

not going to charge you

00:46:23

for that time. There's still

00:46:26

some cost because as I



00:46:27
mentioned, the majority needs to

00:46:29
deal with The Descent but

00:46:31
that might explain some of

00:46:32
the concerns So again, I

00:46:38
might be just as it,

00:46:39
okay? If it's a sample

00:46:40
of One to begin with

00:46:42
but also is back in

00:46:43
time. But back in 2005,

00:46:46
after the case was heard

00:46:47
in which I just sent

00:46:48
it to my youth Stephan.

00:46:51
I felt Quite, I don't



00:46:56

know, quite how the Quaker

00:46:58

Junt to put my descent

00:47:01

in quickly and the chairman

00:47:05

he actually set times for,

00:47:07

is it. Okay, if you

00:47:08

ever just got two weeks,

00:47:09

and it's going to be

00:47:10

after we've already been our

00:47:11

first drop. And we will

00:47:12

have a final draft after

00:47:13

we see your descent? Boom,

00:47:15

boom, boom. And maybe it's

00:47:16

cuz of my youth that



00:47:17

I didn't go, hey, wait

00:47:18

a second, but I didn't.

00:47:19

I simply complied with that

00:47:21

schedule, and got my two

00:47:24

cents in. So, I mean,

00:47:26

I think this can be

00:47:28

handled simply by the chairperson.

00:47:31

I mean the I guess

00:47:32

the only problem that might

00:47:33

happen is egos but I

00:47:36

think another really admirable trait

00:47:38

about an arbitrator or a

00:47:39

lawyer is humility and therefore



00:47:42
being willing to serve lemonade

00:47:44
your ego sometimes when she

00:47:46
is strong. But you realize

00:47:48
that your primary Fidelity's to

00:47:50
doing a good service for

00:47:52
the people who appointed you

00:47:55
So, thanks for mentioning your

00:47:57
case and just to give

00:47:59
everyone a little background. I

00:48:00
think it's called a Shader

00:48:02
with a visit to the

00:48:06
plural for shaders and nfm

00:48:11
was the issues. So most



00:48:12

favored nation and twenty years

00:48:14

ago and granted it, there

00:48:16

still some convention but it

00:48:17

was a well discussed issue.

00:48:20

Certainly a lot of contrary

00:48:22

decisions and you know I

00:48:26

could argue that your contribution

00:48:27

was part of the the

00:48:28

kind of zeitgeist of the

00:48:30

time about. Where were you

00:48:32

going to one could come

00:48:33

down on the issue. Quite

00:48:34

legitimately based on case La



00:48:36

principal Etc. So I guess

00:48:39

it goes to the question

00:48:40

and maybe you can talk

00:48:42

to this. Since you're the

00:48:44

expert but did you feel

00:48:45

you were contributing to the

00:48:46

development of the law? And

00:48:48

you know this is all

00:48:49

on the contest. Did you

00:48:50

know there is no precedent

00:48:51

but there is this What's

00:48:55

that, you know, Awards, do

00:48:57

you know there, if they're



00:48:58
part of the, do, you

00:49:01
know, is arguably in part

00:49:02
of the interpretation of treaties

00:49:04
process, part of the, the,

00:49:06
you know, the is the

00:49:07
icj statue to you? What

00:49:09
international law is? I mean,

00:49:11
there is a role for

00:49:12
certainly decision, but you know

00:49:15
where to dispense play into

00:49:16
that, I just think I

00:49:18
was right. And I'd like,

00:49:21
I mean Dive by is



00:49:23
that without the closing sentence,

00:49:24
I mean, I've been working

00:49:26
out on my dissertation back.

00:49:28
Then we're non-discrimination an Enderman

00:49:33
What's the word equality of

00:49:35
treatment? Were, were big components,

00:49:37
and I had a lot

00:49:38
of research and found uncovered

00:49:40
this 1948 article by schwartzenberger,

00:49:43
that was Wonderful. Is that

00:49:46
it basically said that the

00:49:48
any idea, really sticks and

00:49:49
said that the purpose of



00:49:51

the mfn Clause is to

00:49:52

put the services of the

00:49:53

very best negotiators in the

00:49:55

world in your favor. Meaning

00:49:58

that you negotiate your deal.

00:49:59

You put the mfn clause

00:50:00

in now when somebody is

00:50:02

better and more talented is

00:50:03

better, you know, better power

00:50:05

relationship can get a better

00:50:06

deal. You get the upgrade,

00:50:08

you get the tablet that's

00:50:10

been in a nutshell and



00:50:12

I thought that it didn't

00:50:14

make much sense in that

00:50:15

particular case to basically a

00:50:17

come up with a default

00:50:19

that suggested unless this explicit.

00:50:21

But it says that it's

00:50:22

not bad because I thought,

00:50:24

well, know is it should

00:50:25

be the other way around

00:50:25

you and me in her

00:50:33

early cases, who I think,

00:50:35

developing ethos of as counsel

00:50:38

trying to move the law



00:50:40

at trying to build the

00:50:41

law. Arbitrator even then I

00:50:45

don't. I really wasn't interested

00:50:47

in building Lobby cuz I'm

00:50:48

not, I don't think so

00:50:51

because I don't want fundamentally

00:50:58

accept the idea that there

00:51:00

should be or can be

00:51:01

your ought to be president.

00:51:02

And in this field that

00:51:04

Ben is not really about

00:51:06

developing the law cuz there

00:51:07

is no the law to



00:51:08
begin with, but the problem

00:51:11
in already position, I still

00:51:15
have a hard time with

00:51:16
this idea that it is.

00:51:19
Or the arbitrators to look

00:51:20
beyond the case and think

00:51:22
about, I don't know if

00:51:23
that's an arbitration as a

00:51:24
whole or what the law

00:51:25
should be in the future.

00:51:27
It's the party's case and

00:51:30
they want for it to

00:51:32
be decided. As I said,



00:51:34
they don't really care what

00:51:35
happens beyond the four corners

00:51:38
of that case. But at

00:51:41
the same time, I have

00:51:42
started to see a lot

00:51:43
of awards that say, well,

00:51:45
we think that we really

00:51:48
need to adhere to the

00:51:51
consistent line of jurisprudence that

00:51:53
has developed on X or

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

00:51:58
jurisprudence of has developed on

00:52:00
that issue. Just doesn't seem



00:52:02

right. So I think there

00:52:05

is a concern that if

00:52:07

people are just sort of

00:52:08

rubber-stamping, what someone has done

00:52:10

previously, we're going to end

00:52:13

up at a point where

00:52:14

the principles that we have

00:52:16

in the system, no longer

00:52:17

makes sense. And I can

00:52:19

see in that context the

00:52:20

benefit of having someone write

00:52:23

a dissenting opinion and say

00:52:24

this was never logical in



00:52:26

the first place and I'm

00:52:27

not just going to rubber-stamp

00:52:28

it here again, you have

00:52:31

that question of whether you're

00:52:33

playing to The Spectator is

00:52:34

in the system or the

00:52:36

parties in your case. I

00:52:38

don't know how I feel

00:52:38

about that but I I

00:52:40

can see the value in

00:52:41

someone stopping and saying. I

00:52:43

don't agree with this one

00:52:45

more quick point. One more



00:52:50

perk points. I'm reminded of

00:52:52

a long time ago when

00:52:54

I was a clerk to

00:52:55

a federal court judge in

00:52:56

Canada. And he generally let

00:52:58

me do all those reserves

00:52:59

and get the first cut

00:53:00

and he agreed with me

00:53:02

on every single case. But

00:53:03

one is the one he

00:53:05

didn't disagree. Disagreement me on

00:53:07

it was like a First

00:53:08

Nations case involving Railways or



00:53:10
something and he looked at

00:53:11
it and he said you're

00:53:13
confused. This is not the

00:53:14
court of appeal. I'm a

00:53:16
trial judge. I apply the

00:53:18
law to the facts. If

00:53:20
you want to, if you

00:53:21
want to change the law,

00:53:22
that's what I feel does.

00:53:24
And I would argue the

00:53:26
probably those very same admonition.

00:53:28
Could be applied to arbitrators,

00:53:32
Well, hearing from our pro-camp



00:53:35
on this development of international

00:53:37
law Vanderburgh. Absolutely. He did

00:53:42
an analysis of the decisions

00:53:43
and he came to the

00:53:44
conclusion that if it wanted

00:53:46
to send but what do

00:53:49
you guys have to say

00:53:49
about that issue? Yes. So

00:53:52
I think it goes back

00:53:53
to the distinction between quartz

00:53:55
and arbitration because chords serve

00:53:58
a public purpose, they and

00:54:00
their funded as such. So



00:54:02
they they operate beyond the

00:54:04
resolution of a single dispute,

00:54:06
create binding precedent in a

00:54:09
lot of jurisdictions. And so

00:54:11
there's good reason for chords

00:54:12
to issue non-binding opinions, that

00:54:14
will develop the law, whether

00:54:16
it's a dissenting opinion, or

00:54:18
separate opinion, or concurring opinion,

00:54:20
or an advisory opinion. But

00:54:23
arbitral, tribunal is by contrast,

00:54:25
are constituted for a private

00:54:26
purpose and are privately funded



00:54:28

by the parties that constitute

00:54:30

them. And so they're their

00:54:32

focus should be on efficiently

00:54:34

and finally resolving that dispute.

00:54:37

And none of this is

00:54:38

to say that arbitral Awards,

00:54:40

do not contribute to the

00:54:41

development of international law just

00:54:44

said, any such contribution is

00:54:46

not the primary rule of

00:54:48

a tribunal, it might just

00:54:49

be an incidental effect. Off

00:54:51

their Awards. Yeah. I'm going



00:54:57
to roll is here to

00:54:58
be entertaining and and and

00:55:00
and provocative, right? So I

00:55:01
say some provocative it, but

00:55:03
it happens to be what

00:55:04
I believe is. If you

00:55:05
read most investor-state arbitration awards

00:55:09
are pretty lean on jurisprudence.

00:55:11
It's a pretty vanilla explication

00:55:14
of where the law is,

00:55:15
right? You don't clean too

00:55:17
much out of it and

00:55:20
then the disagreement in the



00:55:21
outcome of the case is

00:55:22
on a plant facts, how

00:55:24
the facts apply to it.

00:55:25
So my view is if

00:55:29
your kind of nut has

00:55:30
the law and want to

00:55:30
write for the ages, as

00:55:32
I think it was a

00:55:33
Chief Justice John Roberts use

00:55:35
in a case recently writing

00:55:36
for the ages article, not

00:55:40
in and sent more probably,

00:55:44
especially if it's not being



00:55:46

behind of a cloak of

00:55:47

confidentiality, it'll get read more

00:55:49

and you can actually write

00:55:50

for the ages. Untethered to

00:55:52

the facts of the case,

00:55:53

because that's what you're trying

00:55:55

to do here is is

00:55:56

is doing The facts of

00:55:57

the case and my G1

00:56:00

on the law here is

00:56:01

is also a bit societal

00:56:03

living we we are narcissistic.

00:56:07

I'm right where we all



00:56:08

have opinions with the Press

00:56:09

of a button. I can

00:56:10

screen my opinion from a

00:56:11

megaphone, right? Rather than trying

00:56:15

to get together and meet

00:56:16

consensus and coherence than with

00:56:18

a side that might have

00:56:20

a principal disagreement with me.

00:56:21

I actually think that the

00:56:23

law would develop better. If

00:56:26

arbitrators of different viewpoints will

00:56:27

come together and try to

00:56:28

put together a coherent thought



00:56:29

that they both agreed with.

00:56:32

You might have a more

00:56:33

balanced evolution of the law,

00:56:34

rather than a scattershot of

00:56:37

his my opinion. Cuz my

00:56:38

opinion is my opinion, is

00:56:39

my opinion, that doesn't really

00:56:41

doesn't really lead anywhere. That's

00:56:43

really, you know, putting my

00:56:44

academic at on, that's the

00:56:46

peer-review process, right? After reading

00:56:48

an article, get a peer-reviewed

00:56:49

by people who disagree with



00:56:50

you and tell you why

00:56:52

they disagree with you. And

00:56:53

then you adjust your opinion

00:56:54

to that disagreement that sort

00:56:58

of the process of writing

00:56:59

a in a war without

00:57:00

a descent. So, you know,

00:57:03

I think I think we

00:57:04

talked about the development of

00:57:05

law, you know, putting myself

00:57:07

out there with a dissenting

00:57:08

opinion. I don't know how

00:57:11

much it really really does.



00:57:12

Wait, wait, wait, you're saying

00:57:15

that. Your peer reviewers? Don't

00:57:17

agree with you. Wholeheartedly like

00:57:19

mine. Because you're always right.

00:57:27

Now, we have a few

00:57:28

minutes left and, you know,

00:57:30

we've been circling around issues

00:57:32

related to culture and legal

00:57:35

background, and those kinds of

00:57:38

things. Let me ask the

00:57:40

question about the sense in

00:57:42

industrial State arbitration, as distinct

00:57:45

say, from the commercial contacts,



00:57:48
that are or even litigation,

00:57:49
they're kind of a more

00:57:58
of an imperative, will stay

00:58:00
in investor-state arbitration because of

00:58:05
the states are in what

00:58:07
state is involved, International laws

00:58:11
involved that there be, you

00:58:16
know, an extra effort to

00:58:18
to arrive at an award

00:58:21
that will be viewed as

00:58:24
a strong Ward and that

00:58:27
Is no definitive and not

00:58:31
using all those words. But



00:58:32

you know that there's an

00:58:33

agreement between the three arbitrators

00:58:35

so that there can be

00:58:37

kind of a higher level

00:58:38

of competence. Is there something

00:58:41

about the ists million, which

00:58:44

is different from litigation or

00:58:45

commercial arbitration in that world

00:58:47

because of the steaks that,

00:58:49

that make it more important

00:58:50

and maybe, maybe I could

00:58:54

start with the check and

00:58:56

Eisha on this at, cuz



00:58:57

the premise here is that,

00:58:58

this is something different. Is

00:59:00

it different? Is it something

00:59:02

that that should be considered?

00:59:07

My view is that it

00:59:10

is in some it is

00:59:11

not something different cuz that's

00:59:12

the reason we chose. I

00:59:13

mean best start ever stayed

00:59:15

over tration historical, evolution of

00:59:18

the regime was trying to

00:59:19

lift these women size does

00:59:20

out of quartz and we



00:59:22

looked out, of course, we

00:59:24

had to paint against an

00:59:25

arbitral canvas, right? So the

00:59:27

arbitration model is what we

00:59:28

chose. We didn't want judges

00:59:31

who are arms of the

00:59:32

state deciding these cases. We

00:59:35

wanted individuals were chosen by

00:59:37

the parties to didn't have

00:59:38

a Reliance on the state

00:59:40

for their salary are there

00:59:42

or their safety excetera excetera.

00:59:44

So I think that trying



00:59:47

to start doing is dies

00:59:50

as, you know, more like

00:59:52

a court cuz you're dealing

00:59:53

with public issues. And the

00:59:54

development of the law is

00:59:56

is really wrong headed because

00:59:58

of One backwards or 1

00:59:59

backwards quickly from what we

01:00:01

tried to get away from.

01:00:03

And, and I think what

01:00:06

I said earlier really Rains,

01:00:08

even more true that you

01:00:09

need to find consensus here



01:00:11

in these Awards. Because investor-state

01:00:13

arbitration. Unlike commercial arbitration you

01:00:16

have two groups of arbitrators

01:00:18

out there. Right there. The

01:00:19

people who, you know, we're

01:00:20

going to be claiming investor-friendly

01:00:23

know. We're going to be

01:00:24

stayed friendly, right? Until you

01:00:26

have an even greater polarisation.

01:00:28

So if we have more

01:00:30

my very case, there's a

01:00:31

descent you really are going

01:00:33

to get a scattershot regime



01:00:35

rather than coming together and

01:00:37

find a consensus, which in

01:00:39

the realm of public policy

01:00:40

should be really where we're

01:00:42

trying to do that and

01:00:43

get a balanced view of

01:00:46

the law. So, I don't

01:00:47

think it's different and I

01:00:48

think there's a good reason

01:00:49

why it's not different, and

01:00:52

it's historical, and I think

01:00:53

by equating it more like

01:00:55

litigation, we're regressing. I generally



01:01:00

agree and I think if

01:01:01

anything the political undertones, if

01:01:04

isds should be a reason

01:01:07

to discourage to sense, even

01:01:08

more than in commercial arbitration

01:01:10

because they're there exists a

01:01:13

risk that that states for

01:01:15

example could pressure or even

01:01:17

course, they're pretty appointed. Arbitrator

01:01:21

is to rule in their

01:01:21

favor. And even even if

01:01:23

no such Express pressure exist,

01:01:27

surely the trend of issuing



01:01:29

dissenting opinions in favor of

01:01:31

the losing party creates an

01:01:33

implicit expectation that an arbitrator

01:01:36

will confirm with this practice.

01:01:38

And so by discouraging to

01:01:40

send her by making them

01:01:41

less ordinary you, you remove

01:01:43

some of that pressure that

01:01:44

may exist on a party

01:01:45

appointed. Arbitrator to descend in

01:01:48

favor of the party who

01:01:49

appointed him or her and

01:01:51

you also reduce the perception



01:01:54
that that these political factors

01:01:56
are influencing the issuance of

01:01:58
a descent which I think.

01:01:59
Is harmful to the legitimacy

01:02:01
of the is a SDS

01:02:02
system as a whole. So

01:02:06
let me ask Pro to

01:02:08
send cloudy is ISD of

01:02:12
something different. No, and no,

01:02:19
it shouldn't be. Shouldn't be

01:02:22
because that Pretenders, a potential

01:02:25
two to two weekends of

01:02:28
the fundamental and also special



01:02:31
nature of. This regime regime

01:02:35
based on. All these different

01:02:37
treaties that a state is

01:02:40
willing to the subject itself

01:02:43
to the decision-making up in

01:02:46
partial independent International arbitrators and

01:02:51
that they will generally and

01:02:53
Theory abide by that result,

01:02:55
that process that idea the

01:03:00
independence in partiality and International

01:03:02
Quality of it is arguably

01:03:04
the most essential part of

01:03:06
it because it without that



01:03:08

you're you're not, you don't

01:03:12

really have decision-making and it

01:03:13

said you have some sort

01:03:14

of, you know, but it's

01:03:16

really from Edmond to the

01:03:16

diplomats to take care of

01:03:17

rather than the lawyers. So

01:03:19

if you bring This idea

01:03:22

that there needs to be

01:03:22

some more deference and that

01:03:24

that deference in some way

01:03:25

should change the way the

01:03:26

decision-maker. They are before they



01:03:28

would do their job, you're

01:03:30

spoiling the whole point of

01:03:31

the mechanism, which is to

01:03:33

leave it in partial, independent

01:03:35

and international. You don't want

01:03:37

to talk about difference, which,

01:03:38

of course, is wise. We

01:03:39

know from the attempt to

01:03:40

get the case off the

01:03:41

top of my head, but

01:03:42

where was one of the

01:03:44

case? It's the Latin Maxim

01:03:47

that arguably is extinguished in



01:03:49

Vienna convention, but none the

01:03:50

less States occasionally used to

01:03:52

try to use you call.

01:03:54

It is can think of

01:03:55

off the top of my

01:03:55

head, it's where the states

01:03:57

and you only difference in

01:03:58

the way you can't decide

01:03:58

this. I just can't think

01:04:00

of the name enough arbitrators

01:04:02

who has said, no, that's

01:04:04

not true. That it's not

01:04:05

a thing anymore, but it



01:04:07

was an argument that we

01:04:08

made a fair bit. So

01:04:09

no difference on that basis.

01:04:11

Would be really bad, me

01:04:14

prep the final reference to

01:04:15

the Past for me. Is

01:04:19

the pressure that I felt

01:04:20

into not defend, but if

01:04:22

I had to do, send

01:04:23

it to do to follow

01:04:24

the hunter Redford model, was

01:04:27

that I knew that most

01:04:29

of these folks came from



01:04:31
a commercial background and that

01:04:33
it was well known that

01:04:34
in the commercial. Arbitration field,

01:04:36
consensus was the norm and

01:04:39
was very much preferred. So,

01:04:42
as long as the primary

01:04:44
feeds feeds into our arbitrator

01:04:47
class or group or Community

01:04:49
have a commercial a background,

01:04:51
I would assume that that

01:04:54
culture is going going to

01:04:55
remain the same, the only

01:04:58
have to worry, if it



01:04:59

turns out that more and

01:05:00

more of the people who

01:05:01

are appointed as arbitrators, don't

01:05:03

have that Moray in the

01:05:05

background because it's not with

01:05:07

what they learned, where they

01:05:08

were in between the public

01:05:11

international law originally or did

01:05:14

something something private that involved.

01:05:18

Those folks might not know

01:05:21

of this cultural taboo against

01:05:24

the Santa must really have

01:05:27

to but since I don't



01:05:29

think we have that world

01:05:29

still think that the community

01:05:31

is largely based on the

01:05:33

commercial model which was of

01:05:35

course has Chuck said the

01:05:36

model they chose. I don't

01:05:38

think that this is really

01:05:39

a problem. Can I just

01:05:42

add? I think one of

01:05:43

the most interesting comparisons isn't

01:05:45

necessarily investment arbitration to commercial

01:05:48

arbitration or arbitration to litigation

01:05:51

but Awards versus annulment decision



01:05:55

because you see him anymore

01:05:57

descends in awards for jurisdictional

01:05:59

decisions than you do in

01:06:01

the. Do you know my

01:06:03

contacts? So we've come to

01:06:07

the end of our time,

01:06:08

but any good panel I

01:06:13

in their deliberations on an

01:06:14

issue. I'd like to ask

01:06:16

for a quick response and

01:06:19

this can be your personal

01:06:20

view or playing along with

01:06:22

our game. But where do



01:06:25

you, where to where your

01:06:26

final views? If I've missed

01:06:28

anything here, and everything. Before

01:06:32

we finish off talking? We

01:06:33

know, Asia separate opinion. 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. Well, I think

01:06:48

that, then I fix this.

01:06:50

It's the end of this

01:06:51

panel and I want to

01:06:53

pick you up at 10:30

01:06:54

to thank everyone that you



01:06:58
shot shotgun Mallory and Todd

01:07:00
for taking the time and

01:07:02
putting your thoughts to this.

01:07:04
And on behalf of the

01:07:06
group here like this, indicate

01:07:07
our thanks and will finish

01:07:10
off here and look forward

01:07:12
to seeing you at the

01:07:12
next role of Washington, arbitration

01:07:16
week panel. Thanks very much.

00:00:09
Welcome everyone. To our second

00:00:13
panel here at Washington arbitration

00:00:17
weekday for it's a pleasure



00:00:20

to welcome everyone here. To

00:00:23

Crowell & moring. My name

00:00:25

is Ian Laird. I'm partner

00:00:29

here at Coral and co-chair

00:00:33

of our International dispute. Resolution

00:00:35

group, I also wear the

00:00:39

hat of one of the

00:00:40

co-chairs Washington arbitration week along

00:00:44

with Dr. Jose Antonio Rivas

00:00:47

strategy. I don't take the

00:00:51

opportunity enough to mention Jose

00:00:57

Antonio, this this events this

00:01:02

week with something that many



00:01:06

of us in the Washington

00:01:07

arbitration community. Talk about four

00:01:10

years as something that we

00:01:12

should put together. You know,

00:01:13

one of those things that

00:01:14

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.

00:01:32

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

00:01:42

to interact. And in 2020,

00:01:46

it was really a marvelous

00:01:48

success and that gave us

00:01:51

a great deal of momentum

00:01:52

as we came out of

00:01:55

covid and into in person

00:01:58

again the enthusiasm and take

00:02:02

up and the general Goodwill



00:02:07

and energy to continue. Going

00:02:09

to do the conference just

00:02:12

continue to to grow and

00:02:14

grow. And this year, I

00:02:15

think we've had really fantastic

00:02:19

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

00:02:35

firm which a plays a



00:02:37

major role in organizing along

00:02:39

with Maryam at the mouth

00:02:40

and the whole team, a

00:02:42

text strategy. I think we

00:02:44

can't say enough to them

00:02:45

for their excellent work and

00:02:47

and hurting all these arbitration

00:02:50

cats. So thank you to

00:02:52

them our second panel today.

00:02:56

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



00:03:06

Investment, arbitration. Obviously the title

00:03:10

has a few premises in

00:03:12

it and we are going

00:03:14

to unpack quite a bit

00:03:16

of that. We have an

00:03:18

excellent panel here today. A

00:03:21

real rose gallery of folks

00:03:23

in the DC arbitration Community

00:03:26

for the appreciate that description.

00:03:29

But this is a debate

00:03:32

that, of course, is one

00:03:35

that continues on in the

00:03:37

arbitration community and some have



00:03:41
very strong opinions, some sit

00:03:43
on the fence, as well

00:03:46
as for again. And I

00:03:49
thought, you know, before we

00:03:51
get into our discussion and

00:03:53
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

00:04:17

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

00:04:49

of a 40 to 50%

00:04:51

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.

00:04:58

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

00:05:12

changes that you as we

00:05:15

go along, there are course,

00:05:17

a lot of moving pieces

00:05:18

in this debate and if

00:05:21

we look back over the

00:05:23

last 10-15 years, there's been

00:05:25

some interesting academic discussion. Certainly,

00:05:29

a lot of articles on

00:05:31

this topic, it is just

00:05:33

one of those topics which



00:05:35

doesn't seem to be able

00:05:36

to get to a final

00:05:38

resolution because it really does

00:05:40

a go to some fundamental

00:05:43

issues. Cultural issues, legal background

00:05:47

issues, the predisposition of the

00:05:49

individual themselves, all sorts of

00:05:52

factors, which I do want

00:05:54

to get into. But before

00:05:56

that, let me introduce our

00:05:58

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.

00:06:08

We have professor Charles to

00:06:11

be a junior and Chuck

00:06:13

as he is known to

00:06:15

us is based here in

00:06:19

Washington d.c. he's a council

00:06:22

at three crowns and is

00:06:24

practice as council is focused

00:06:26

on International commercial and treaty

00:06:28

arbitration transnational litigation and public

00:06:31

international law. He was previously

00:06:33

another international law firm here



00:06:35
in DC Chuck is also

00:06:38
a full-time professor of practice

00:06:39
at the University of Pittsburgh,

00:06:41
Pittsburgh law school, school of

00:06:44
law. An honorary professor at

00:06:46
Durham law school and visiting

00:06:47
professor of law at the

00:06:50
Kiev School of economics. And

00:06:52
it goes up saying he

00:06:54
teaches courses in international arbitration

00:06:56
public international law and international

00:06:58
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

00:07:08

shocks on his right is

00:07:10

that you should Jane Isha

00:07:13

is a special legal consultant

00:07:15

based here in Washington DC

00:07:16

at three crowns also. So

00:07:18

we have three crowns team

00:07:20

here. She has experience in

00:07:22

international commercial and Industrial arbitrations

00:07:25

across a range of Industries,

00:07:27

including energy Construction in intellectual



00:07:30
property. She's a Harvard Law

00:07:33
School grad, where she received

00:07:36
the Rodger Fisher and Frankie

00:07:37
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

00:07:50
R panel. We also have

00:07:51
next to Keisha, Mallory silver

00:07:55
silver, man. Mallory is described

00:08:00
in Who's Who as and



00:08:01

I quote this is great

00:08:02

quote one of the world's

00:08:03

most experienced young practitioners of

00:08:05

investment arbitration unquote. So I

00:08:07

think I just absolutely you

00:08:10

know she's the person for

00:08:11

this time walk and she's

00:08:13

acting this Council and is

00:08:15

very interesting lady represented investors

00:08:17

and 17 different states. Send

00:08:21

over 50 treaty cases, so

00:08:22

very experienced, she recently left

00:08:25

private practice she was at



00:08:26
the Arnold importers of Porter

00:08:28
as a partner here and

00:08:30
she advises me that you'll

00:08:32
be able to hire her

00:08:33
in the new year as

00:08:34
an outside consultant coach for

00:08:36
your team. So I definitely

00:08:38
recommend looking to Mallory if

00:08:40
you need to bolster your

00:08:42
bench and then fine. Next

00:08:45
to me, is dr. Todd

00:08:47
J. Weiler not to be

00:08:49
confused with Congressman who's apparently



00:08:52

in Idaho, or Montana. I

00:08:54

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?

00:09:20

So you got to count

00:09:21

those. So he's well recognized

00:09:25

of course in Garner and



00:09:27

who's who legal as being?

00:09:31

I would say a Pioneer,

00:09:32

in many ways in the

00:09:35

isds field working with me,

00:09:38

actually in some of the

00:09:39

earliest, not the case has

00:09:40

the founder of Oxford University

00:09:44

press. Does the website investment

00:09:46

claims.com which a competitor of

00:09:49

our just Monday, our previous

00:09:51

panel, moderators and as well.

00:09:58

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

00:10:07

those for you online. If

00:10:09

you are merely acting as

00:10:13

a long-time contributor and writer

00:10:16

and I have been edited

00:10:18

the author and co-authored co-edited

00:10:21

dozens of books and articles

00:10:23

and it's always great to

00:10:25

have Todd on one of

00:10:26

these panels dealing with some

00:10:29

of the navel-gazing issues and

00:10:30

arbitration Todd. And I'm not



00:10:32

young anymore. Of the young

00:10:36

man, you started arbitration, when

00:10:40

he's 50. It could be

00:10:45

possible. So let's let's get

00:10:48

to our issue. We when

00:10:51

we talked about the sense

00:10:53

in international arbitration one, question

00:10:58

comes to mind. You ask

00:10:59

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



00:11:10

yeah, this isn't something that

00:11:11

I know about our. Our

00:11:13

courts generally don't encourage this.

00:11:14

There's a, there's a priority

00:11:16

placed on collegiality and fences

00:11:19

and many rules. I actually

00:11:22

don't allow for this. If

00:11:24

you look to the Hague

00:11:25

convention on the Pacific settlement

00:11:26

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

00:11:43

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

00:11:52

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

00:12:10

fairly common practice. Now, going

00:12:14

to kind of the principled

00:12:15

distinction between arbitration and litigation.

00:12:18

If you can start digging

00:12:21

down and asking yourselves a

00:12:23

few questions arbitration as a

00:12:25

number of values which are

00:12:27

quite distinct from litigation, efficiency

00:12:29

is pre-eminent. We had a



00:12:31

whole panel last night that

00:12:33

it said talking about efficiency

00:12:35

is as an important element

00:12:36

of exit. Arbitration awards are

00:12:40

final and binding, generally, not

00:12:43

a peelable. Subject, limited enforcement

00:12:46

challenge, consent and the party.

00:12:50

Autonomy play a very important

00:12:52

key issues. There's no Starry

00:12:54

decisis our president president. So,

00:12:57

I'm a very different Beast

00:13:00

than, say litigation, which, of

00:13:02

course, is not final final



00:13:04

and binding. There is continuous

00:13:06

ability to appeal, and to

00:13:09

challenge the objective in litigation

00:13:13

is much more on creating

00:13:15

ultimate certainty. It's not a

00:13:17

clearly about efficiency, and the

00:13:20

idea of consent of the

00:13:22

parties that kind of party.

00:13:24

Autonomy value is certainly not

00:13:25

at all part of the

00:13:27

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

00:13:44

more suited than more of

00:13:46

a civil law style dispute

00:13:48

resolution process. That it's much

00:13:51

more suited to a collegial

00:13:52

consensus-building exercise and I will

00:13:57

see what, what are panel

00:13:58

say about that. I just

00:14:00

to give you a little

00:14:00

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

00:14:11

a very senior arbitrators in

00:14:14

the form of Albert. Ian,

00:14:17

Vandenberg, and Charles Brower and

00:14:19

I both of them having

00:14:20

very distinct and contrary and

00:14:23

asserted and certain views as

00:14:26

to the value of \$0.02,

00:14:28

and Boots, put them in

00:14:29

their camps. Vandenberg has a

00:14:33

hearty dislike of the sense

00:14:35

coming from his civil law



00:14:38

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

00:14:49

diametrically opposed used. So I'm

00:14:53

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

00:15:20

to say as a caveat

00:15:22

that nothing of well, I

00:15:25

don't think you can take

00:15:26

anything that I was going

00:15:26

to stay as their personal

00:15:28

view necessarily and the interests

00:15:30

of the discussion. Unless they

00:15:32

actually say no, this is



00:15:33

my rear-view but that's up

00:15:34

to them. So this is

00:15:36

for the purpose of the

00:15:38

good academic fun and we'll,

00:15:42

we'll just Dive Right In,

00:15:43

then. So Dan Berg in

00:15:46

his article arguing in favor

00:15:49

of descent said it will

00:15:51

getting not having to sense

00:15:54

leads to 4. It will

00:15:57

lead to a better reward

00:15:58

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

00:16:10

interaction among the parties. Is

00:16:15

third point is it will

00:16:17

bolster party confidence in the

00:16:19

process and not having defense

00:16:20

and third and fourth Lee,

00:16:23

it will contribute to the

00:16:27

development of the law by

00:16:29

having consensual fully agreed, 33

00:16:33

member decisions. That is better

00:16:36

for the development of the

00:16:37

law. So this sets out



00:16:39
a few of the kind

00:16:40
of touch points for this

00:16:42
discussion. So let me start

00:16:45
with a party autonomy. And

00:16:48
consent, the fact that the

00:16:52
parties choose their arbitrators is

00:16:55
is clearly one of those

00:16:56
benefits of international arbitration that

00:16:59
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

00:17:14

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

00:17:36

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

00:17:41

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

00:18:16
famous, snap decision that went

00:18:19
kind of Dowry in his

00:18:21
argument for getting rid of

00:18:22
the party appointment and that

00:18:25
kind of flows into this

00:18:26
party at timing issues. So

00:18:27
let me go to then

00:18:29
setting that issue forward, go

00:18:34
to our folks who are

00:18:36
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

00:18:59

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,

00:19:20

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,

00:19:38

I've done a lot of

00:19:39

litigation as well as arbitration

00:19:40

in my time. And I



00:19:41
can tell you that no

00:19:42
client loves the fact that

00:19:45
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 law in 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 sully, 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 descent

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 descendants

00:26:50

are here. They haven't been

00:26:52

challenged over the past 10

00:26:53

years and if there is

00:26:55

Their statistics that show that

00:26:57

arbitrator is our, I guess

00:26:59

issuing opinions in favor of

00:27:02

the party. That point of

00:27:03

them, that may not be

00:27:05

something positive, it may just

00:27:07

be a correlation. It could



00:27:09

be that parties are doing

00:27:10

a very good job of

00:27:11

selecting arbitrators, that agree with

00:27:13

their views and in the

00:27:14

end, they're just not able

00:27:15

to persuade. The other arbitrators,

00:27:16

not necessarily some manifestation of

00:27:19

Faith or something. Improper, it

00:27:22

could be people doing a

00:27:23

good job. What is possible

00:27:26

would be possible to have

00:27:28

an arbitration Clause. Drafted that

00:27:30

says that the arbitrator's must



00:27:32

come to a consensus and

00:27:34

I mean, that might lead

00:27:36

to a stalemate in in

00:27:38

theory you could say basically

00:27:41

say no to sense by

00:27:42

saying, they must come to

00:27:43

a consensus. But I mean,

00:27:46

essentially that's the Civil model

00:27:48

that they don't permit this

00:27:51

end so that that is

00:27:52

required. And there's a well

00:27:58

in and that goes to

00:27:59

the whole question of deliberations,



00:28:02

of course, and what goes

00:28:03

on behind the scenes and

00:28:05

how the three arbitrator panel

00:28:08

interacts in or out for

00:28:09

the assassins in the European

00:28:10

Court, how they interact, and

00:28:13

how they get to that

00:28:14

decision, that's a for another

00:28:16

discussion as to how that

00:28:18

works. But let me go

00:28:19

to the point that their

00:28:20

truck race just to get

00:28:21

your response from our produce.



00:28:24

And folks, I mean is

00:28:25

this a cultural issue or

00:28:27

is this really like those

00:28:30

of the argument that I

00:28:31

kind of served up initially?

00:28:32

Is this a litigation versus

00:28:34

arbitration kind of divided? How

00:28:37

do you view that issue?

00:28:40

I mean it's someone from

00:28:41

a common law jurisdiction. I

00:28:42

wouldn't say that on the

00:28:44

whole we're not collegial or

00:28:46

is that I am not



00:28:47

going to do because I'm

00:28:48

from a common law jurisdiction

00:28:50

and might have an individual

00:28:52

opinion but it is true

00:28:56

that your background and legal

00:28:59

training probably will have something

00:29:01

to do with what you

00:29:02

think about on this issue.

00:29:07

Can I respond quickly to

00:29:09

what was just said? And

00:29:11

I am a little bit.

00:29:17

What I actually think is

00:29:18

that at no point where



00:29:20

I think it should be

00:29:20

disallowed cuz I didn't go

00:29:22

to the threat of a

00:29:23

descent is a really good

00:29:25

one. I didn't the title

00:29:26

here is a dissenting opinions

00:29:28

useful. I think I actually

00:29:30

believe that there should be

00:29:31

some social pressure is the

00:29:34

social pressure by the best

00:29:35

way to put it against

00:29:36

the sense like we really

00:29:38

should as a regime try



00:29:39

to create a system where

00:29:41

descends are the Rarity we

00:29:43

only to send it to

00:29:44

absolutely have to can I

00:29:46

put your name to something

00:29:47

and need to say why?

00:29:49

They're they're they're going to

00:29:52

remain there? I think there's

00:29:53

a good that they remain

00:29:55

there because if they're not

00:29:57

there, I think they're not.

00:29:59

There you do, run the

00:30:01

risk which is equally problematic



00:30:02
in arbitration on seeing more

00:30:04
and more or split the

00:30:05
baby decisions, right? I think

00:30:08
it's actually better for justice

00:30:11
if the two arbitrator to

00:30:13
agree on a certain robust

00:30:15
decision. Feel like they can

00:30:18
issue that robust decision in

00:30:19
the face of a descent

00:30:20
as opposed to they both

00:30:22
get together and issue some

00:30:24
award both side to get

00:30:25
together. If you some award



00:30:27

that says you win, but

00:30:28

you get no money and

00:30:29

that's the only way that

00:30:30

we could get together and

00:30:31

and get some sort of

00:30:33

consensus. Right? I mean that's

00:30:34

actually worse. So I need

00:30:36

to send need to be

00:30:37

there to push that kept

00:30:39

the pressure on the arbitration

00:30:40

tribunal. However, I do think

00:30:42

that, we need to really

00:30:43

be thinking as arbitrators, that



00:30:46

this is the nuclear option

00:30:47

that, I think that's my

00:30:49

cue. I completely agree. And

00:30:53

I don't think it's, it's

00:30:55

this binary between a collegial

00:30:58

approach and purely individualistic approach

00:31:00

on the part of the

00:31:01

arbitrator's, there's certainly no strict

00:31:04

expectation of a consensus award,

00:31:07

but I think there is

00:31:08

an expectation that in the

00:31:10

deliberation process, the arbitrators from

00:31:12

whatever country they come from



00:31:13

will engage in a free

00:31:16

and An exchange of views

00:31:17

and even be open to

00:31:19

changing their minds and in

00:31:21

an ideal world. That. Good

00:31:23

fit process would result in

00:31:25

consensual results, more often, than

00:31:27

not. So, I think, I

00:31:28

think the answer lies somewhere

00:31:29

in between this collegial and

00:31:32

individualistic divide. Yeah, I don't

00:31:36

even understand the idea that

00:31:37

there's a bit. Individualism actually



00:31:39

has anything to do with

00:31:40

it. I think it's a

00:31:41

professional responsibility of the arbitrator

00:31:44

to come to in good

00:31:46

face. Come to a legitimate

00:31:50

as far as they're concerned

00:31:51

illegitimate. And the reason the

00:31:53

basis for their finding. So

00:31:56

if if that's the objective

00:31:58

of the arbitrator and the

00:31:59

two other opportunities share that,

00:32:01

and they all are operating

00:32:03

a good-faith collegiality will necessarily



00:32:06

exist. It's only individuality in

00:32:10

the sense that they're not

00:32:11

all one human. I mean,

00:32:13

because there were three different

00:32:14

humans, they want some individual

00:32:15

characteristics but didn't to say

00:32:17

that people who descend are

00:32:19

more individualistic, is it is

00:32:21

nylon Donnelly unsupported. It's also

00:32:25

Beside the point of a

00:32:27

woodchuck chuck said, which is

00:32:30

wholly agree with would be

00:32:32

with respect to only having



00:32:34

two descent when you really

00:32:35

need to. So, the first

00:32:38

time and the only time

00:32:39

I had to write at

00:32:40

this at Weston 2005-6. And

00:32:42

in that case, I really

00:32:45

had no other choice. I

00:32:47

just, I disagreed with the

00:32:48

finding and then, as I

00:32:50

studied, a lot of the

00:32:51

lawn a written about it

00:32:52

and I thought they were

00:32:53

wrong. So I contacted Martin



00:32:56

Hunter like a mentor and

00:33:02

he basically said the same

00:33:04

thing that I found was

00:33:06

attributed to Redfern unsurprisingly in.

00:33:09

I think one of the

00:33:10

Vanderburgh articles which is that

00:33:12

you're going to just has

00:33:14

to be truly necessary and

00:33:17

then has to be polite.

00:33:19

And that has to be

00:33:19

short be concise, right to

00:33:22

the point. And so I

00:33:24

followed that The only question



00:33:26

I guess I would have

00:33:27

in retrospect is I felt

00:33:30

at the time that there

00:33:31

was very much a cultural

00:33:33

norm or a against one's

00:33:38

right in favor of consensus

00:33:40

against going off. Maybe. That's

00:33:43

because it was like, over

00:33:44

20 years ago, or maybe

00:33:46

it's just because we need

00:33:48

to remember that there is

00:33:49

a there's enough of us,

00:33:51

there's sufficient mass of us



00:33:54
at the international arbitration Community

00:33:57
level, that we have our

00:33:58
own more ice and one

00:33:59
of the mares which is

00:34:01
basically I'm a loan of

00:34:03
about this evil. And the,

00:34:04
and the anglo-american / Canadian

00:34:07
approach this where you get

00:34:10
this pressure that you definitely

00:34:11
do want to reach consensus

00:34:14
if it all possible. That's

00:34:18
part of built into the

00:34:19
rules to, you know, you



00:34:20

have the exit convention saying

00:34:22

what the tribunal needs to

00:34:24

do in respect of the

00:34:25

award. The tribunal needs to

00:34:27

draft his reasons and built

00:34:29

into, that is the notion

00:34:31

of this consensus. Three people

00:34:34

coming together to jointly draft

00:34:37

an award, but sometimes There

00:34:40

are going to be disagreements

00:34:41

when three different people come

00:34:42

together and look at issues

00:34:44

of Law and she's a



00:34:46

fact and I think that

00:34:48

having the possibility of Defense

00:34:50

creates this day. That doesn't

00:34:53

mean that in every single

00:34:54

situation, a particular to send

00:34:57

was something that I necessarily

00:34:59

would have done or what

00:35:01

if agreed with. But it's

00:35:03

still I think on the

00:35:05

basic level of a good

00:35:06

thing for the system to

00:35:07

have If I forgot another

00:35:10

idea, just came to mine



00:35:11

Thomasville to a friend of

00:35:15

many who are the who

00:35:16

are a little bit older

00:35:17

here. I had appointed him

00:35:20

as an arbitrator in a

00:35:22

Mexican case international Thunderbird gaming

00:35:24

and he was kind of

00:35:27

had a thing going with

00:35:28

him afterwards, cuz I went

00:35:29

represent the claimant, I'd say

00:35:30

I always say what your

00:35:31

descent, any my separate opinion

00:35:34

to call it at the



00:35:37

sent, you said no, it's

00:35:39

my separate opinion. So I

00:35:41

guess that we have to

00:35:43

color a dress that aspect

00:35:44

of it too because it's

00:35:45

really not just to send

00:35:47

or maybe it is. I

00:35:51

think of that case, Thomas

00:35:52

was very much disagree with

00:35:54

the majority, but yes, he

00:35:55

was a very well-mannered and

00:35:56

proper person and he just

00:35:58

couldn't swallow the word descent,



00:36:00

which goes to the more

00:36:02

of his character, but no

00:36:03

doubt he was contrary. Let

00:36:05

let me go to another

00:36:06

related issue. And and you

00:36:09

know what? We talked about

00:36:10

the values of arbitration efficiency

00:36:12

is obviously something we look

00:36:15

to find them final and

00:36:17

binding Awards, you know, the

00:36:25

the process is and I'll

00:36:29

give this back to the

00:36:31

the, the the empty the



00:36:33

center view point here for

00:36:36

your view. I mean, really,

00:36:37

I think I'm just laying

00:36:39

it in here, isn't this

00:36:41

isn't dissenting complicating. The process,

00:36:44

doesn't this lead to extra

00:36:47

cost time and then ultimately

00:36:49

serve The basis for a

00:36:52

challenge which again, goes to

00:36:53

Kosta and inefficiency. What, what

00:36:56

would what do you guys

00:36:57

say, Chuck and Kaia FIT

00:37:03

in a patient? Is not



00:37:06

because necessarily I'm worried about

00:37:09

using my party's resources to

00:37:11

pay for a dissenting opinion.

00:37:12

I mean I know that's

00:37:13

that's that's part of that,

00:37:14

we put in the cost

00:37:15

of this process could lengthen

00:37:19

the length of time to

00:37:21

get an award. But if

00:37:22

you have a strong chair,

00:37:23

the chair should be able

00:37:24

to say, hey we're not

00:37:25

going to just give you



00:37:26

another year to write a

00:37:27

large reward out, right? So

00:37:29

it requires a strong chair

00:37:31

to make sure that's not

00:37:31

the case. With the sense

00:37:34

is that your your appointed

00:37:39

the arbitrator becomes your lead

00:37:41

counsel in an annulment case

00:37:43

or a set aside a

00:37:44

sore about a case against

00:37:46

recognition and enforcement. So that

00:37:49

that person sort of starts

00:37:50

if we restart encouraging the



00:37:52

sense by the party appointed

00:37:54

arbitrators The ones who want

00:37:57

to get that job or

00:37:58

going to see themselves as

00:37:59

laying the groundwork for an

00:38:01

annulment Kaiser has set aside

00:38:02

Kate and they're going to

00:38:03

put forward. The case that

00:38:04

is going to be run

00:38:05

through into that process. If

00:38:07

you look at cases where

00:38:08

there was a set aside

00:38:09

or an annulment where there



00:38:12

was a descent that dissent

00:38:14

is heavily cited, heavily quoted.

00:38:16

And are we getting into

00:38:18

a decision? If the sense

00:38:19

become more? More commonplace are

00:38:21

we getting into a system?

00:38:22

Are we building a shame?

00:38:23

We're annulments and set aside

00:38:25

just become par for the

00:38:26

course, which Unfortunately, they kind

00:38:29

of are right. And I

00:38:31

think as a regime we

00:38:32

need directions with whether that's



00:38:33

what we want or what

00:38:34

we don't want. Right? So

00:38:39

I don't think the sensor

00:38:41

illegitimate just because they may

00:38:43

add to time and cost

00:38:44

just because they may undermine

00:38:45

the authority of the award.

00:38:47

Because there may well be

00:38:48

awards that do you like

00:38:50

raisins or do suffer from

00:38:51

a serious procedural irregularity, in

00:38:54

which case there should be

00:38:55

a descent that undermines the



00:38:56

authority of that award, but

00:38:58

I see the problem is

00:39:00

being dead. Distance themselves have

00:39:03

come to lack Authority, because

00:39:05

they are always altered by

00:39:07

the losing parties appointee. And

00:39:10

so, while the Sun's can

00:39:11

play this important role in

00:39:13

policing irregular Awards, there is

00:39:16

fricassee, is diluted by their

00:39:18

ubiquity. And so there's there's

00:39:20

reason to be more restrained

00:39:21

in issuing descends and preserving



00:39:24

them only where there is

00:39:25

good reason to depart from

00:39:27

the majority. Produce produce answers.

00:39:34

What do you think about

00:39:35

the efficiency point? Is there

00:39:36

an answer to that? So

00:39:44

a couple things the first

00:39:46

woman be as regards, the

00:39:47

reputational value of a of

00:39:49

any decision or it is

00:39:51

persuasiveness, including a descent. I

00:39:53

think that's got a lot

00:39:54

to do with who the



00:39:55

person was who wrote it.

00:39:56

And if they have they

00:39:59

have a certain gravitas or

00:40:01

or a reputation for being

00:40:03

a team player but someone

00:40:07

who has his good ideas

00:40:09

and maybe there are ideas

00:40:10

will adjust and we'll be

00:40:13

successful at least in terms

00:40:15

of its quality and then

00:40:17

it's a potential for being

00:40:19

quoted. In other cases something

00:40:22

Chuck said which was interesting



00:40:24

is I certainly agree. Of

00:40:25

course that we set an

00:40:29

appointment is now just to

00:40:30

assume to happen. I think

00:40:33

that's mostly though because of

00:40:34

the kitchen sink approach to

00:40:35

litigation that originally song, Trade

00:40:38

law, but they cost Applied

00:40:41

pretty soon. Enter into industrial

00:40:43

at the end of the

00:40:44

young age, specially true on

00:40:48

the part of the respondent

00:40:49

because of the general, the



00:40:51
respondents council aren't actually on

00:40:54
a budget. They may be

00:40:55
on a budget to some

00:40:57
degree in some way. But

00:40:58
ultimately, if political Necessities require

00:41:01
more, they could get more

00:41:03
in besides is not. So

00:41:04
it's not there he's directly.

00:41:06
But the funny thing is

00:41:08
though that If there was

00:41:12
the kind of error that

00:41:14
would cause an annulment to

00:41:17
take place, then by dint



00:41:19

of logic, it was one

00:41:20

that had to be brought

00:41:21

up by the dissenting arbitrator,

00:41:25

right? Like if there was

00:41:26

a fundamental failure in in,

00:41:29

in due process or if

00:41:31

it is clear that they

00:41:32

went far beyond the remit

00:41:33

jurisdiction, what that would be.

00:41:35

It would be incumbent upon

00:41:37

the the other arbitrator if

00:41:39

they couldn't convince their their

00:41:41

colleagues at the time that



00:41:43

they would have to set

00:41:44

that out. So I wouldn't

00:41:45

say that that's setting a

00:41:46

course, you know, that's not

00:41:47

that's not playing Council for

00:41:50

the next case. That's just

00:41:51

saying what happened So, I

00:41:54

mean, ultimately, they'll all of

00:41:56

this goes back to could

00:41:58

face and professionalism, and the

00:42:02

self-aggrandizing arbitrator, who writes too

00:42:05

much, who who takes the

00:42:06

party's money to write a



00:42:07

law review article as much

00:42:09

less even published in her

00:42:10

log review, article, based on

00:42:11

it or the person who

00:42:13

is just grandstanding, or the

00:42:15

person who doesn't understand that

00:42:17

we are both players are

00:42:18

supposed to be independent. There

00:42:20

the anomalies, the actual standard

00:42:23

that we all presume to

00:42:25

live by think we all

00:42:26

do is Independence impartiality, acting

00:42:31

a good case and it



00:42:32
in a professional manner. And

00:42:35
if that's the Assumption, I

00:42:36
think a lot of these

00:42:37
critiques go away. One other

00:42:41
thing that might help is

00:42:43
if you know if someone

00:42:44
feels so strongly that they

00:42:46
need to descent. You need

00:42:48
to say something rather than

00:42:50
just sign an award is

00:42:51
that they don't believe in

00:42:52
in Siri they could decide

00:42:55
not to charge for that



00:42:57

time. It doesn't solve the

00:42:59

entire problem because then the

00:43:01

majority presumably still needs to

00:43:03

deal with the signs in

00:43:05

the body of the award.

00:43:06

But that's one way to

00:43:08

respond to the efficiency and

00:43:09

cost answer. But then it

00:43:14

encourages people to be short

00:43:15

and descent when when they

00:43:17

need to and not write

00:43:18

a letter. If you were

00:43:19

to go in that context,



00:43:22

you referring to be silly

00:43:23

Amore rather than an actual

00:43:25

rule. Can I add onto

00:43:28

something that I do? Understand

00:43:30

that Todd said, this is

00:43:30

the part where I eventually

00:43:32

agree with hot seat collegiality.

00:43:33

Right, right. We're not all

00:43:35

just just fighting up here.

00:43:36

I do think that there

00:43:38

is a dichotomy to on

00:43:40

whether to send us about

00:43:41

one thing you said about



00:43:42

due process and procedure. I

00:43:43

think that is something that

00:43:44

the party appointed arbitrators are.

00:43:46

Absolutely there to police, to

00:43:48

make sure that each side

00:43:49

had their due process right

00:43:50

to be heard. And if

00:43:51

something like that happened, then

00:43:54

that's an absolute obligation to

00:43:56

descend rather on, you know,

00:43:57

the scope of the fvt

00:43:58

obligation or something like that.

00:44:00

Could just, that could just



00:44:01

be better, put better put

00:44:04

into a, a large, you

00:44:08

article, and nothing is important.

00:44:13

I think it's mixed up

00:44:14

in. This is good. Faith

00:44:16

in collegiality here is doing

00:44:20

arbitration for about 20 years

00:44:21

and over there's 20 years.

00:44:24

I've seen a steep decline

00:44:25

in just professionalism amongst Council.

00:44:28

Right? I think there was

00:44:30

a point when I first

00:44:31

started in this practice where



00:44:32

it was a bit more

00:44:34

of a gentleman's game as

00:44:36

opposed to litigation, now it

00:44:38

is much more brass knuckles

00:44:41

as a matter of practice.

00:44:44

And I think that bleeds

00:44:45

over into some of the

00:44:46

more, you know, proclivity to

00:44:49

dissent among arbitrators because that's

00:44:51

what they feel that their

00:44:52

party wants. And other thing

00:44:54

is a bigger problem that

00:44:55

the institution needs to Grapple



00:44:56

with. So, before I go

00:45:00

on my next issue, I

00:45:01

still want to give our

00:45:03

for descent panelist. The chance

00:45:08

that on the efficiency of

00:45:09

shit. I think our ear

00:45:12

Copalis made a pretty good

00:45:14

case on that. What do

00:45:16

you say even just a

00:45:17

short response about the efficiency

00:45:19

and the opening to challenge

00:45:21

part? I think it's been

00:45:26

covered, there are circumstances where



00:45:29

it really does make sense

00:45:31

to descend because there have

00:45:33

been serious irregularities in the

00:45:35

issuance or the creation of

00:45:37

the award. And then it

00:45:39

didn't come in on the

00:45:40

dissenting arbitrator to bring these

00:45:41

to the parties attention and

00:45:43

that will come to light

00:45:45

during the course of the

00:45:46

set aside or annulment proceedings.

00:45:47

But I think it's a

00:45:49

very real concern that dissenting



00:45:52
opinions increase the time that

00:45:55
it takes station towards they

00:45:56
increase the car, For the

00:45:57
party is. Before you completed

00:46:01
the first part of the

00:46:02
case and not even including

00:46:04
the the cost of a

00:46:06
set aside or an all-night

00:46:07
proceeding to me. The one

00:46:10
thing I could think of

00:46:11
that might be an answer.

00:46:12
Is this idea of keeping

00:46:14
it short has an arbitrator



00:46:17
feels strong enough to issue

00:46:18
The Descent. Say, I feel

00:46:20
so strongly that I need

00:46:21
to do this but I'm

00:46:22
not going to charge you

00:46:23
for that time. There's still

00:46:26
some cost because as I

00:46:27
mentioned, the majority needs to

00:46:29
deal with The Descent but

00:46:31
that might explain some of

00:46:32
the concerns So again, I

00:46:38
might be just as it,

00:46:39
okay? If it's a sample



00:46:40
of One to begin with

00:46:42
but also is back in

00:46:43
time. But back in 2005,

00:46:46
after the case was heard

00:46:47
in which I just sent

00:46:48
it to my youth Stephan.

00:46:51
I felt Quite, I don't

00:46:56
know, quite how the Quaker

00:46:58
Junt to put my descent

00:47:01
in quickly and the chairman

00:47:05
he actually set times for,

00:47:07
is it. Okay, if you

00:47:08
ever just got two weeks,



00:47:09
and it's going to be

00:47:10
after we've already been our

00:47:11
first drop. And we will

00:47:12
have a final draft after

00:47:13
we see your descent? Boom,

00:47:15
boom, boom. And maybe it's

00:47:16
cuz of my youth that

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

00:47:18
a second, but I didn't.

00:47:19
I simply complied with that

00:47:21
schedule, and got my two

00:47:24
cents in. So, I mean,

00:47:26
I think this can be



00:47:28

handled simply by the chairperson.

00:47:31

I mean the I guess

00:47:32

the only problem that might

00:47:33

happen is egos but I

00:47:36

think another really admirable trait

00:47:38

about an arbitrator or a

00:47:39

lawyer is humility and therefore

00:47:42

being willing to serve lemonade

00:47:44

your ego sometimes when she

00:47:46

is strong. But you realize

00:47:48

that your primary Fidelity's to

00:47:50

doing a good service for

00:47:52

the people who appointed you



00:47:55

So, thanks for mentioning your

00:47:57

case and just to give

00:47:59

everyone a little background. I

00:48:00

think it's called a Shader

00:48:02

with a visit to the

00:48:06

plural for shaders and nfm

00:48:11

was the issues. So most

00:48:12

avored nation and twenty years

00:48:14

ago and granted it, there

00:48:16

still some convention but it

00:48:17

was a well discussed issue.

00:48:20

Certainly a lot of contrary

00:48:22

decisions and you know I



00:48:26
could argue that your contribution

00:48:27
was part of the the

00:48:28
kind of zeitgeist of the

00:48:30
time about. Where were you

00:48:32
going to one could come

00:48:33
down on the issue. Quite

00:48:34
legitimately based on case La

00:48:36
principal Etc. So I guess

00:48:39
it goes to the question

00:48:40
and maybe you can talk

00:48:42
to this. Since you're the

00:48:44
expert but did you feel

00:48:45
you were contributing to the



00:48:46
development of the law? And

00:48:48
you know this is all

00:48:49
on the contest. Did you

00:48:50
know there is no precedent

00:48:51
but there is this What's

00:48:55
that, you know, Awards, do

00:48:57
you know there, if they're

00:48:58
part of the, do, you

00:49:01
know, is arguably in part

00:49:02
of the interpretation of treaties

00:49:04
process, part of the, the,

00:49:06
you know, the is the

00:49:07
icj statue to you? What



00:49:09

international law is? I mean,

00:49:11

there is a role for

00:49:12

certainly decision, but you know

00:49:15

where to dispense play into

00:49:16

that, I just think I

00:49:18

was right. And I'd like,

00:49:21

I mean Dive by is

00:49:23

that without the closing sentence,

00:49:24

I mean, I've been working

00:49:26

out on my dissertation back.

00:49:28

Then we're non-discrimination an Enderman

00:49:33

What's the word equality of

00:49:35

treatment? Were, were big components,



00:49:37

and I had a lot

00:49:38

of research and found uncovered

00:49:40

this 1948 article by schwartzenberger,

00:49:43

that was Wonderful. Is that

00:49:46

it basically said that the

00:49:48

any idea, really sticks and

00:49:49

said that the purpose of

00:49:51

the mfn Clause is to

00:49:52

put the services of the

00:49:53

very best negotiators in the

00:49:55

world in your favor. Meaning

00:49:58

that you negotiate your deal.

00:49:59

You put the mfn clause



00:50:00

in now when somebody is

00:50:02

better and more talented is

00:50:03

better, you know, better power

00:50:05

relationship can get a better

00:50:06

deal. You get the upgrade,

00:50:08

you get the tablet that's

00:50:10

been in a nutshell and

00:50:12

I thought that it didn't

00:50:14

make much sense in that

00:50:15

particular case to basically a

00:50:17

come up with a default

00:50:19

that suggested unless this explicit.

00:50:21

But it says that it's



00:50:22

not bad because I thought,

00:50:24

well, know is it should

00:50:25

be the other way around

00:50:25

you and me in her

00:50:33

early cases, who I think,

00:50:35

developing ethos of as counsel

00:50:38

trying to move the law

00:50:40

at trying to build the

00:50:41

law. Arbitrator even then I

00:50:45

don't. I really wasn't interested

00:50:47

in building Lobby cuz I'm

00:50:48

not, I don't think so

00:50:51

because I don't want fundamentally



00:50:58

accept the idea that there

00:51:00

should be or can be

00:51:01

your ought to be president.

00:51:02

And in this field that

00:51:04

Ben is not really about

00:51:06

developing the law cuz there

00:51:07

is no the law to

00:51:08

begin with, but the problem

00:51:11

in already position, I still

00:51:15

have a hard time with

00:51:16

this idea that it is.

00:51:19

Or the arbitrators to look

00:51:20

beyond the case and think



00:51:22

about, I don't know if

00:51:23

that's an arbitration as a

00:51:24

whole or what the law

00:51:25

should be in the future.

00:51:27

It's the party's case and

00:51:30

they want for it to

00:51:32

be decided. As I said,

00:51:34

they don't really care what

00:51:35

happens beyond the four corners

00:51:38

of that case. But at

00:51:41

the same time, I have

00:51:42

started to see a lot

00:51:43

of awards that say, well,



00:51:45

we think that we really

00:51:48

need to adhere to the

00:51:51

consistent line of jurisprudence that

00:51:53

has developed on X or

00:51:54

Y issue. I'm sometimes the

00:51:58

jurisprudence of has developed on

00:52:00

that issue. Just doesn't seem

00:52:02

right. So I think there

00:52:05

is a concern that if

00:52:07

people are just sort of

00:52:08

rubber-stamping, what someone has done

00:52:10

previously, we're going to end

00:52:13

up at a point where



00:52:14
the principles that we have

00:52:16
in the system, no longer

00:52:17
makes sense. And I can

00:52:19
see in that context the

00:52:20
benefit of having someone write

00:52:23
a dissenting opinion and say

00:52:24
this was never logical in

00:52:26
the first place and I'm

00:52:27
not just going to rubber-stamp

00:52:28
it here again, you have

00:52:31
that question of whether you're

00:52:33
playing to The Spectator is

00:52:34
in the system or the



00:52:36

parties in your case. I

00:52:38

don't know how I feel

00:52:38

about that but I I

00:52:40

can see the value in

00:52:41

someone stopping and saying. I

00:52:43

don't agree with this one

00:52:45

more quick point. One more

00:52:50

perk points. I'm reminded of

00:52:52

a long time ago when

00:52:54

I was a clerk to

00:52:55

a federal court judge in

00:52:56

Canada. And he generally let

00:52:58

me do all those reserves



00:52:59

and get the first cut

00:53:00

and he agreed with me

00:53:02

on every single case. But

00:53:03

one is the one he

00:53:05

didn't disagree. Disagreement me on

00:53:07

it was like a First

00:53:08

Nations case involving Railways or

00:53:10

something and he looked at

00:53:11

it and he said you're

00:53:13

confused. This is not the

00:53:14

court of appeal. I'm a

00:53:16

trial judge. I apply the

00:53:18

law to the facts. If



00:53:20

you want to, if you

00:53:21

want to change the law,

00:53:22

that's what I feel does.

00:53:24

And I would argue the

00:53:26

probably those very same admonition.

00:53:28

Could be applied to arbitrators,

00:53:32

Well, hearing from our pro-camp

00:53:35

on this development of international

00:53:37

law Vanderburgh. Absolutely. He did

00:53:42

an analysis of the decisions

00:53:43

and he came to the

00:53:44

conclusion that if it wanted

00:53:46

to send but what do



00:53:49

you guys have to say

00:53:49

about that issue? Yes. So

00:53:52

I think it goes back

00:53:53

to the distinction between quartz

00:53:55

and arbitration because chords serve

00:53:58

a public purpose, they and

00:54:00

their funded as such. So

00:54:02

they they operate beyond the

00:54:04

resolution of a single dispute,

00:54:06

create binding precedent in a

00:54:09

lot of jurisdictions. And so

00:54:11

there's good reason for chords

00:54:12

to issue non-binding opinions, that



00:54:14

will develop the law, whether

00:54:16

it's a dissenting opinion, or

00:54:18

separate opinion, or concurring opinion,

00:54:20

or an advisory opinion. But

00:54:23

arbitral, tribunal is by contrast,

00:54:25

are constituted for a private

00:54:26

purpose and are privately funded

00:54:28

by the parties that constitute

00:54:30

them. And so they're their

00:54:32

focus should be on efficiently

00:54:34

and finally resolving that dispute.

00:54:37

And none of this is

00:54:38

to say that arbitral Awards,



00:54:40

do not contribute to the

00:54:41

development of international law just

00:54:44

said, any such contribution is

00:54:46

not the primary rule of

00:54:48

a tribunal, it might just

00:54:49

be an incidental effect. Off

00:54:51

their Awards. Yeah. I'm going

00:54:57

to roll is here to

00:54:58

be entertaining and and and

00:55:00

and provocative, right? So I

00:55:01

say some provocative it, but

00:55:03

it happens to be what

00:55:04

I believe is. If you



00:55:05

read most investor-state arbitration awards

00:55:09

are pretty lean on jurisprudence.

00:55:11

It's a pretty vanilla explication

00:55:14

of where the law is,

00:55:15

right? You don't clean too

00:55:17

much out of it and

00:55:20

then the disagreement in the

00:55:21

outcome of the case is

00:55:22

on a plant facts, how

00:55:24

the facts apply to it.

00:55:25

So my view is if

00:55:29

your kind of nut has

00:55:30

the law and want to



00:55:30

write for the ages, as

00:55:32

I think it was a

00:55:33

Chief Justice John Roberts use

00:55:35

in a case recently writing

00:55:36

for the ages article, not

00:55:40

in and sent more probably,

00:55:44

especially if it's not being

00:55:46

behind of a cloak of

00:55:47

confidentiality, it'll get read more

00:55:49

and you can actually write

00:55:50

for the ages. Untethered to

00:55:52

the facts of the case,

00:55:53

because that's what you're trying



00:55:55
to do here is is

00:55:56
is doing The facts of

00:55:57
the case and my G1

00:56:00
on the law here is

00:56:01
is also a bit societal

00:56:03
living we we are narcissistic.

00:56:07
I'm right where we all

00:56:08
have opinions with the Press

00:56:09
of a button. I can

00:56:10
screen my opinion from a

00:56:11
megaphone, right? Rather than trying

00:56:15
to get together and meet

00:56:16
consensus and coherence than with



00:56:18

a side that might have

00:56:20

a principal disagreement with me.

00:56:21

I actually think that the

00:56:23

law would develop better. If

00:56:26

arbitrators of different viewpoints will

00:56:27

come together and try to

00:56:28

put together a coherent thought

00:56:29

that they both agreed with.

00:56:32

You might have a more

00:56:33

balanced evolution of the law,

00:56:34

rather than a scattershot of

00:56:37

his my opinion. Cuz my

00:56:38

opinion is my opinion, is



00:56:39

my opinion, that doesn't really

00:56:41

doesn't really lead anywhere. That's

00:56:43

really, you know, putting my

00:56:44

academic at on, that's the

00:56:46

peer-review process, right? After reading

00:56:48

an article, get a peer-reviewed

00:56:49

by people who disagree with

00:56:50

you and tell you why

00:56:52

they disagree with you. And

00:56:53

then you adjust your opinion

00:56:54

to that disagreement that sort

00:56:58

of the process of writing

00:56:59

a in a war without



00:57:00

a descent. So, you know,

00:57:03

I think I think we

00:57:04

talked about the development of

00:57:05

law, you know, putting myself

00:57:07

out there with a dissenting

00:57:08

opinion. I don't know how

00:57:11

much it really really does.

00:57:12

Wait, wait, wait, you're saying

00:57:15

that. Your peer reviewers? Don't

00:57:17

agree with you. Wholeheartedly like

00:57:19

mine. Because you're always right.

00:57:27

Now, we have a few

00:57:28

minutes left and, you know,



00:57:30

we've been circling around issues

00:57:32

related to culture and legal

00:57:35

background, and those kinds of

00:57:38

things. Let me ask the

00:57:40

question about the sense in

00:57:42

industrial State arbitration, as distinct

00:57:45

say, from the commercial contacts,

00:57:48

that are or even litigation,

00:57:49

they're kind of a more

00:57:58

of an imperative, will stay

00:58:00

in investor-state arbitration because of

00:58:05

the states are in what

00:58:07

state is involved, International laws



00:58:11

involved that there be, you

00:58:16

know, an extra effort to

00:58:18

to arrive at an award

00:58:21

that will be viewed as

00:58:24

a strong Ward and that

00:58:27

Is no definitive and not

00:58:31

using all those words. But

00:58:32

you know that there's an

00:58:33

agreement between the three arbitrators

00:58:35

so that there can be

00:58:37

kind of a higher level

00:58:38

of competence. Is there something

00:58:41

about the ists million, which



00:58:44

is different from litigation or

00:58:45

commercial arbitration in that world

00:58:47

because of the steaks that,

00:58:49

that make it more important

00:58:50

and maybe, maybe I could

00:58:54

start with the check and

00:58:56

Eisha on this at, cuz

00:58:57

the premise here is that,

00:58:58

this is something different. Is

00:59:00

it different? Is it something

00:59:02

that that should be considered?

00:59:07

My view is that it

00:59:10

is in some it is



00:59:11
not something different cuz that's

00:59:12
the reason we chose. I

00:59:13
mean best start ever stayed

00:59:15
over tration historical, evolution of

00:59:18
the regime was trying to

00:59:19
lift these women size does

00:59:20
out of quartz and we

00:59:22
looked out, of course, we

00:59:24
had to paint against an

00:59:25
arbitral canvas, right? So the

00:59:27
arbitration model is what we

00:59:28
chose. We didn't want judges

00:59:31
who are arms of the



00:59:32

state deciding these cases. We

00:59:35

wanted individuals were chosen by

00:59:37

the parties to didn't have

00:59:38

a Reliance on the state

00:59:40

for their salary are there

00:59:42

or their safety excetera excetera.

00:59:44

So I think that trying

00:59:47

to start doing is dies

00:59:50

as, you know, more like

00:59:52

a court cuz you're dealing

00:59:53

with public issues. And the

00:59:54

development of the law is

00:59:56

is really wrong headed because



00:59:58

of One backwards or 1

00:59:59

backwards quickly from what we

01:00:01

tried to get away from.

01:00:03

And, and I think what

01:00:06

I said earlier really Rains,

01:00:08

even more true that you

01:00:09

need to find consensus here

01:00:11

in these Awards. Because investor-state

01:00:13

arbitration. Unlike commercial arbitration you

01:00:16

have two groups of arbitrators

01:00:18

out there. Right there. The

01:00:19

people who, you know, we're

01:00:20

going to be claiming investor-friendly



01:00:23

know. We're going to be

01:00:24

stayed friendly, right? Until you

01:00:26

have an even greater polarisation.

01:00:28

So if we have more

01:00:30

my very case, there's a

01:00:31

descent you really are going

01:00:33

to get a scattershot regime

01:00:35

rather than coming together and

01:00:37

find a consensus, which in

01:00:39

the realm of public policy

01:00:40

should be really where we're

01:00:42

trying to do that and

01:00:43

get a balanced view of



01:00:46
the law. So, I don't

01:00:47
think it's different and I

01:00:48
think there's a good reason

01:00:49
why it's not different, and

01:00:52
it's historical, and I think

01:00:53
by equating it more like

01:00:55
litigation, we're regressing. I generally

01:01:00
agree and I think if

01:01:01
anything the political undertones, if

01:01:04
isds should be a reason

01:01:07
to discourage to sense, even

01:01:08
more than in commercial arbitration

01:01:10
because they're there exists a



01:01:13

risk that that states for

01:01:15

example could pressure or even

01:01:17

course, they're pretty appointed. Arbitrator

01:01:21

is to rule in their

01:01:21

favor. And even even if

01:01:23

no such Express pressure exist,

01:01:27

surely the trend of issuing

01:01:29

dissenting opinions in favor of

01:01:31

the losing party creates an

01:01:33

implicit expectation that an arbitrator

01:01:36

will confirm with this practice.

01:01:38

And so by discouraging to

01:01:40

send her by making them



01:01:41
less ordinary you, you remove

01:01:43
some of that pressure that

01:01:44
may exist on a party

01:01:45
appointed. Arbitrator to descend in

01:01:48
favor of the party who

01:01:49
appointed him or her and

01:01:51
you also reduce the perception

01:01:54
that that these political factors

01:01:56
are influencing the issuance of

01:01:58
a descent which I think.

01:01:59
Is harmful to the legitimacy

01:02:01
of the is a SDS

01:02:02
system as a whole. So



01:02:06

let me ask Pro to

01:02:08

send cloudy is ISD of

01:02:12

something different. No, and no,

01:02:19

it shouldn't be. Shouldn't be

01:02:22

because that Pretenders, a potential

01:02:25

two to two weekends of

01:02:28

the fundamental and also special

01:02:31

nature of. This regime regime

01:02:35

based on. All these different

01:02:37

treaties that a state is

01:02:40

willing to the subject itself

01:02:43

to the decision-making up in

01:02:46

partial independent International arbitrators and



01:02:51

that they will generally and

01:02:53

Theory abide by that result,

01:02:55

that process that idea the

01:03:00

independence in partiality and International

01:03:02

Quality of it is arguably

01:03:04

the most essential part of

01:03:06

it because it without that

01:03:08

you're you're not, you don't

01:03:12

really have decision-making and it

01:03:13

said you have some sort

01:03:14

of, you know, but it's

01:03:16

really from Edmond to the

01:03:16

diplomats to take care of



01:03:17

rather than the lawyers. So

01:03:19

if you bring This idea

01:03:22

that there needs to be

01:03:22

some more deference and that

01:03:24

that deference in some way

01:03:25

should change the way the

01:03:26

decision-maker. They are before they

01:03:28

would do their job, you're

01:03:30

spoiling the whole point of

01:03:31

the mechanism, which is to

01:03:33

leave it in partial, independent

01:03:35

and international. You don't want

01:03:37

to talk about difference, which,



01:03:38

of course, is wise. We

01:03:39

know from the attempt to

01:03:40

get the case off the

01:03:41

top of my head, but

01:03:42

where was one of the

01:03:44

case? It's the Latin Maxim

01:03:47

that arguably is extinguished in

01:03:49

Vienna convention, but none the

01:03:50

less States occasionally used to

01:03:52

try to use you call.

01:03:54

It is can think of

01:03:55

off the top of my

01:03:55

head, it's where the states



01:03:57

and you only difference in

01:03:58

the way you can't decide

01:03:58

this. I just can't think

01:04:00

of the name enough arbitrators

01:04:02

who has said, no, that's

01:04:04

not true. That it's not

01:04:05

a thing anymore, but it

01:04:07

was an argument that we

01:04:08

made a fair bit. So

01:04:09

no difference on that basis.

01:04:11

Would be really bad, me

01:04:14

prep the final reference to

01:04:15

the Past for me. Is



01:04:19
the pressure that I felt

01:04:20
into not defend, but if

01:04:22
I had to do, send

01:04:23
it to do to follow

01:04:24
the hunter Redford model, was

01:04:27
that I knew that most

01:04:29
of these folks came from

01:04:31
a commercial background and that

01:04:33
it was well known that

01:04:34
in the commercial. Arbitration field,

01:04:36
consensus was the norm and

01:04:39
was very much preferred. So,

01:04:42
as long as the primary



01:04:44

feeds feeds into our arbitrator

01:04:47

class or group or Community

01:04:49

have a commercial a background,

01:04:51

I would assume that that

01:04:54

culture is going going to

01:04:55

remain the same, the only

01:04:58

have to worry, if it

01:04:59

turns out that more and

01:05:00

more of the people who

01:05:01

are appointed as arbitrators, don't

01:05:03

have that Moray in the

01:05:05

background because it's not with

01:05:07

what they learned, where they



01:05:08

were in between the public

01:05:11

international law originally or did

01:05:14

something something private that involved.

01:05:18

Those folks might not know

01:05:21

of this cultural taboo against

01:05:24

the Santa must really have

01:05:27

to but since I don't

01:05:29

think we have that world

01:05:29

still think that the community

01:05:31

is largely based on the

01:05:33

commercial model which was of

01:05:35

course has Chuck said the

01:05:36

model they chose. I don't



01:05:38

think that this is really

01:05:39

a problem. Can I just

01:05:42

add? I think one of

01:05:43

the most interesting comparisons isn't

01:05:45

necessarily investment arbitration to commercial

01:05:48

arbitration or arbitration to litigation

01:05:51

but Awards versus annulment decision

01:05:55

because you see him anymore

01:05:57

descends in awards for jurisdictional

01:05:59

decisions than you do in

01:06:01

the. Do you know my

01:06:03

contacts? So we've come to

01:06:07

the end of our time,



01:06:08

but any good panel I

01:06:13

in their deliberations on an

01:06:14

issue. I'd like to ask

01:06:16

for a quick response and

01:06:19

this can be your personal

01:06:20

view or playing along with

01:06:22

our game. But where do

01:06:25

you, where to where your

01:06:26

final views? If I've missed

01:06:28

anything here, and everything. Before

01:06:32

we finish off talking? We

01:06:33

know, Asia separate opinion. 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. Well, I think

01:06:48

that, then I fix this.

01:06:50

It's the end of this

01:06:51

panel and I want to

01:06:53

pick you up at 10:30

01:06:54

to thank everyone that you

01:06:58

shot shotgun Mallory and Todd

01:07:00

for taking the time and

01:07:02

putting your thoughts to this.

01:07:04

And on behalf of the

01:07:06

group here like this, indicate

01:07:07

our thanks and will finish



01:07:10
off here and look forward

01:07:12
to seeing you at the

01:07:12
next role of Washington, arbitration

01:07:16
week panel. Thanks very much.