



Bifurcation (or trifurcation?) in Investment Arbitration – a success story? What have been the impacts on efficiency and costs? *

Summary

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

Washington Arbitration Week (WAW) held its fourth day of sessions, featuring a panel discussion on bifurcation and trifurcation in international investment arbitration. The session was co-chaired by Ian, a co-founder of WAW and chair of Crowell & Moring's dispute resolution group. Key participants included Rafael Boza, Jeffrey Commission, Jennifer Galbraith McCandless, Ken Rainey, and Lindsay Schmidt, all distinguished professionals with extensive experience in international arbitration.

The panel focused on the evolving rules concerning bifurcation, where issues are separated into distinct phases for resolution, and the implications of these changes on efficiency and costs. The discussion highlighted that while bifurcation can potentially expedite proceedings, it may also lead to increased duration and costs if not managed effectively.

Key statistics from a study indicated that approximately 57% of bifurcation requests were rejected, suggesting a balanced approach to their application. The panelists emphasized the importance of efficiency in arbitration, discussing various procedural rules that have been introduced to facilitate expedited resolutions, including those that allow objections to claims deemed manifestly without legal merit.

Jennifer provided insights on recent changes to expedited procedures, while Raphael elaborated on recent amendments to rules that allow tribunals to bifurcate issues autonomously. Lindsay discussed the Glamis test, a three-factor analysis used to determine the appropriateness of bifurcation, focusing on the seriousness of the objection, its potential to dispose of part or all of the proceedings, and whether it can be resolved without prejudging the merits.

The conversation also touched on the tactical advantages of bifurcation, particularly for respondents, and the need for careful consideration regarding the timing and grounds for bifurcation requests. Ken raised concerns about the risks associated with bifurcation, including potential delays and the impact on the overall efficiency of arbitration.



The session concluded with a call for a more cautious approach to bifurcation, suggesting that a presumption against it might be warranted unless clear benefits can be demonstrated. The panelists acknowledged the complexity and evolving nature of arbitration practices, emphasizing the need for ongoing dialogue and adaptation within the international arbitration community.

Authors

Ian A. Laird, Jennifer Haworth McCandless, Jeffery Commission, Rafael Boza, Lindsey D. Schmidt, Kenneth B. Reisenfeld

Topics

Investment Arbitration, Impacts, Efficiency, Costs, Bifurcation, Arbitration

Category

WAW

Full Transcript

00:00:11

Can you show me the

00:00:15

welcome to Washington arbitration week?

00:00:18

This is our fourth day.

00:00:20

And I believe that we're

00:00:22

gone over half of our

00:00:25

program and we we still

00:00:27

have a incredible panels and



00:00:29

kind of this for you.

00:00:30

I see my many friends

00:00:33

in the room experts Council

00:00:36

how it is with great

00:00:37

pleasure that I would willing

00:00:41

to do it in there

00:00:42

who is co-chair of Washington

00:00:46

arbitration week and he's also

00:00:48

chair of the Crowell &

00:00:52

moring a dispute resolution group

00:00:54

here in Washington DC and

00:00:57

Ian Ian has has many

00:01:00

things and he will allow



00:01:02
me to to say a

00:01:03
couple of things about him.

00:01:05
Not only is he a

00:01:06
co-founder of Washington arbitration week,

00:01:09
but he is somebody who

00:01:10
who is at incredible supporter

00:01:12
of the international arbitration Community

00:01:15
many Council of many and

00:01:20
very much concerned about the

00:01:22
international rule of law. He

00:01:25
has been the editor of

00:01:26
o u p lunch adventures

00:01:29
in terms of online editorial



00:01:33
project and many other things

00:01:36
that we have the pleasure

00:01:38
of co-teaching with him or

00:01:40
investment treaty arbitration public international

00:01:43
law and icj judgment Georgetown.

00:01:49
And that's of course I

00:01:50
have been going on for

00:01:51
now 10 years and under

00:01:54
there. So there's way more

00:01:55
more more than that, but

00:01:57
I know that that he

00:01:59
would appreciate if I keep

00:02:00
on learning or sharing his



00:02:04
uncle With with with everyone.

00:02:06
So today's topic is on

00:02:09
a bifurcation or trifurcation. Is

00:02:12
it by now a success

00:02:14
story as you know, that

00:02:16
the rules have changed quite

00:02:18
a few times on that

00:02:19
topic, but I'll let him

00:02:22
share the story that were

00:02:27
ongoing story with you. So

00:02:28
you have the story and

00:02:30
thank you. Thanks very much

00:02:33
Jose Antonio for that generous



00:02:36
introduction. It's a pleasure to

00:02:39
be back here in Washington

00:02:42
burn other Washington arbitration week.

00:02:44
This is our fourth edition

00:02:46
and the momentum has kept

00:02:49
growing and and we're really

00:02:50
very appreciative of the support

00:02:52
that the international arbitration Community

00:02:56
has given and making this

00:02:59
year is certainly the best

00:03:00
yet. Everyone next year. It

00:03:08
is a pleasure to do

00:03:08
this panel this morning as



00:03:12

we have a fantastic group

00:03:13

of practitioners who know their

00:03:18

stuff about the procedural stance

00:03:21

than the organization International Investment

00:03:25

tribunals. Let me let me

00:03:27

get into some introductions and

00:03:30

then we'll get into the

00:03:31

discussion. We have to my

00:03:34

left Rafael Boza is the

00:03:38

special counsel with Pillsbury Winthrop

00:03:40

Shaw Pittman. He focuses his

00:03:42

practice in all aspects of

00:03:44

international arbitration resolution litigation. He



00:03:47

also practices and transactions and

00:03:49

corporate matters Raphael has over

00:03:51

20 years experience advising local

00:03:54

and multinational companies litigating in

00:03:57

arbitrating to his left. We

00:04:00

have Jeffrey commission who is

00:04:02

a director based here in

00:04:03

Washington DC with Burford Capital,

00:04:05

he has 20 years of

00:04:07

experience representing and funding claimants

00:04:09

and investment treaty disputes and

00:04:11

international commercial arbitration. He was

00:04:14

previously at Fresh fields and



00:04:16

London New York and Washington.

00:04:17

He is co-author of the

00:04:20

oup book procedural issues in

00:04:23

International Investment arbitration with Rahim

00:04:25

Aloo, and he has a

00:04:27

forthcoming o u t a

00:04:28

book titled third-party funding in

00:04:32

international arbitration law and practice

00:04:34

to look forward to that

00:04:35

to Jeffrey's just left. We

00:04:40

have Jennifer Galbraith McCandless, and

00:04:45

she is an international disputes

00:04:47

partner partner at Baker Botts



00:04:49

here in Washington DC and

00:04:51

she served as legal counsel

00:04:52

complex high-stakes International arbitration cases

00:04:56

focusing in particular on investor-state

00:04:58

arbitration. She has advised and

00:05:01

represented both private-sector investors claimants.

00:05:04

And sovereigns international arbitral proceedings

00:05:08

before it said it's additional

00:05:11

facility the icct CIA and

00:05:13

other institutions around the world

00:05:15

and thank you very much

00:05:17

Jennifer for coming today. And

00:05:21

then we have to her



00:05:23

left can ride themselves. Who's

00:05:27

the global leader of bakerhostetler

00:05:28

investor-state arbitration team is the

00:05:32

chambers and legal 500 Bank

00:05:33

lawyer. He's among the world's

00:05:35

leading Advocates and arbitrators and

00:05:37

cross-border contract commercial license and

00:05:41

investment treaty disputes and with

00:05:43

over 40 years of experience

00:05:45

can have successfully represented global

00:05:47

companies were Sovereign Sovereign controlled

00:05:50

entities before the most prominent

00:05:52

International and Regional arbitration centers



00:05:55
around the world and you

00:05:56
know the list it said

00:05:57
l c i a i

00:05:58
c c i c e

00:05:59
r and so forth as

00:06:02
well as before I thought

00:06:03
tribunals So thank you Ken

00:06:06
for for taking time today

00:06:07
very much. Appreciate it. Last

00:06:09
but not least. We have

00:06:11
Lindsey Schmidt who is a

00:06:12
partner in the New York

00:06:14
office of Gibson Dunn &



00:06:16

Crutcher and a member of

00:06:18

Gibson Dunn International arbitration in

00:06:20

and judgment and arbitral award

00:06:23

enforcement practice groups. She's being

00:06:25

recognized by Leading Publications and

00:06:27

putting in a 2023 14

00:06:29

under list while 360 Rising

00:06:32

Stars best lawyers your own

00:06:34

money and so far. It's

00:06:35

very very great honour. She

00:06:40

was also part of the

00:06:41

team named International arbitration team

00:06:43

of the year that the



00:06:44

British legal awards for her

00:06:46

work in and then I

00:06:47

guess is around 2020 on

00:06:49

obtaining a groundbreaking interim measures

00:06:52

award and very relevant for

00:06:55

today related to a bifurcated

00:06:57

jurisdictional proceeding. That's a good

00:07:00

introduction to our topic today

00:07:02

as Jose Antonio mention. We've

00:07:05

called this panel bifurcation or

00:07:07

trifurcation in industrial investment arbitration

00:07:10

in our basic question. Today

00:07:14

is his being a success



00:07:15

story and what of the

00:07:17

impacts being on the fish

00:07:18

Scentsy and costs. So, of

00:07:23

course one of the primary

00:07:24

benefits of international arbitration that

00:07:28

that that are touted and

00:07:30

certainly the principles that tribunals

00:07:33

Council operate on his to

00:07:35

make the processes of efficient

00:07:38

as possible and inefficiency. You

00:07:43

would think and hope would

00:07:45

come with lower costs, but

00:07:47

there's always that balance as



00:07:49
it occurs in and I

00:07:51
was like take the opportunity

00:07:52
of reflecting on the story.

00:07:53
I think Rusty park over

00:07:55
that one conference years ago

00:07:58
about that the cobbler who

00:08:00
had to sign in the

00:08:01
window that said cheap low-cost

00:08:07
to know if you reflect

00:08:11
on that the balancing of

00:08:13
quality work with a quick

00:08:16
process and keeping that low

00:08:17
cost because that's hard to



00:08:19

balance and so bifurcation kind

00:08:23

of comes into that equation

00:08:25

in that sometimes it would

00:08:29

seem the taking the opportunity

00:08:30

to address issues early could

00:08:35

have the benefit of ending

00:08:37

the procedure getting to it

00:08:39

as positive results quickly and

00:08:41

saving cost. Of course the

00:08:43

flip side of that if

00:08:44

that bifurcation or early procedure

00:08:47

doesn't work. It could have

00:08:48

the effect of dramatically increasing



00:08:50
the length of time and

00:08:52
the cost of the proceedings

00:08:53
as well. So it is

00:08:55
a tricky equation and and

00:08:57
sometimes hard to get to

00:08:59
that point. And so I

00:09:01
want to do put up

00:09:03
a slide and if if

00:09:06
you could share with me

00:09:07
just asking. Maria is here

00:09:10
who's here and she can

00:09:12
share the screen. I have

00:09:15
one slide, but I wanted



00:09:17

to put up. which actually

00:09:20

said that send data which

00:09:23

was prepared actually buy Jeff

00:09:30

commission as part of a

00:09:32

presentation. I should have let

00:09:33

Jeff have the privilege of

00:09:34

putting this out. But I

00:09:35

want to steal his Thunder.

00:09:37

This is the latest on

00:09:41

bifurcations and it this was

00:09:43

a sample of three years

00:09:44

from 2017 to 2020 basically

00:09:48

taking in the whole world



00:09:49

decisions at the time and

00:09:54

72 decisions on bifurcation were

00:09:56

identified in that. A large

00:09:58

percentage of them simply the

00:10:00

the logic and the reasoning

00:10:02

we're just not available, but

00:10:04

they were able to analyze

00:10:06

what was available and as

00:10:08

we see 57% of the

00:10:10

applications for bifurcation were rejected.

00:10:13

So we're looking at kind

00:10:14

of a 50/50 scenario analyzing

00:10:18

those decisions. They found out



00:10:20

the what what has become

00:10:22

known as the Glamis goals

00:10:23

doctors were applied in pretty

00:10:26

much 80% 78 % Those

00:10:30

decisions so there seems to

00:10:32

be a trend least up

00:10:33

the 2020 of. Kind of

00:10:36

application and the question of

00:10:39

cost and duration was also

00:10:40

noted there. There's some other

00:10:42

stops available but it's not

00:10:45

unsurprising that in those cases

00:10:48

where jurisdiction was decided early



00:10:53
that those were short of

00:10:55
proceedings, but we're bifurcation occurred

00:10:58
and you ended up with

00:10:59
two phases that those cases

00:11:01
went on for much longer.

00:11:02
If it doesn't take a

00:11:04
genius to see that Dynamic

00:11:07
a little bit of the

00:11:10
and I'll stop sharing. Get

00:11:20
out of here. Can you

00:11:23
stop showing me but it's

00:11:25
all back on the screen?

00:11:28
So I think that provides



00:11:32

a little bit of context.

00:11:33

So in the world of

00:11:36

trying to save time, you

00:11:39

know in The Domestic Court

00:11:43

contact sweet, we've seen some

00:11:45

very. Very concerned considered and

00:11:51

significant regimes like in the

00:11:53

US contact summary summary judgment

00:11:55

is well-known and we have

00:12:00

seen a little bit more

00:12:00

of those types of that

00:12:03

type of thinking of working

00:12:05

its way into International arbitration



00:12:07
and we seen this in

00:12:10
the new exhibit rules under

00:12:11
new treaties particularly us grafted

00:12:15
trees like after and even

00:12:18
in commercial arbitration context. So

00:12:20
before we get into kind

00:12:22
of the investor-state scenario, I

00:12:25
wanted to call on Jennifer

00:12:26
to give us a bit

00:12:28
of commentary and contests for

00:12:30
for where we are in

00:12:32
the the arbitration World more

00:12:34
generally, so I'll pass it



00:12:36
over to to Jennifer. Thank

00:12:42
you, and I will focus

00:12:44
in part on a different

00:12:47
rules and which process exists

00:12:50
to have an early resolution.

00:12:51
So it's not so much

00:12:52
a bifurcation or is that

00:12:53
could be but it's basically

00:12:55
an expedited proceedings do in

00:12:56
a situation. We're trying to

00:12:58
get rid of a claim

00:13:00
really quickly and focusing in

00:13:02
particular on a provision that



00:13:04
exists in the end of

00:13:06
the extreme rules and kind

00:13:08
of focus of the early

00:13:10
resolution is manifestly without legal

00:13:12
marriage and that concept is

00:13:14
something that is in the

00:13:15
Friday that makes the rules

00:13:17
and was initially introduced in

00:13:18
2006 rules and it under

00:13:22
rule 41 5 and it

00:13:24
says the same component of

00:13:25
41 and according to the

00:13:27
exit Secretariat when that was



00:13:28

being put into place and

00:13:30

the thought was it was

00:13:31

provided in order to address

00:13:33

concerns about limited screening power

00:13:36

of the secretary-general's provide. Registering

00:13:38

a request for arbitration. So

00:13:41

the idea was to be

00:13:43

able to jump in and

00:13:44

be able to get rid

00:13:45

of it quickly of a

00:13:47

claim or claimed if their

00:13:49

manifest without legal marriage and

00:13:51

our similar Provisions within the



00:13:53

Expedition facility rules Focus initially

00:13:56

on them on real 14

00:13:57

15 and then go into

00:13:59

a little bit of the

00:14:00

changes that have been introduced

00:14:01

in the 2022 rules rule

00:14:05

41 5 basically says agreed

00:14:09

to another expedited procedure for

00:14:11

making preliminary objections party May

00:14:13

no later than 30 days

00:14:14

after the constitution of the

00:14:16

tribunal and in any event

00:14:17

before the first session of



00:14:19
the tribunal file an objection

00:14:20
that I claim as manifestly

00:14:22
without legal Merit. So that

00:14:23
is a couple of points

00:14:25
to it to make your

00:14:25
one is referring to parties

00:14:27
could be either either party

00:14:29
and other rules have a

00:14:30
distinction as between which party

00:14:31
can bring such a an

00:14:33
objection and it has to

00:14:35
happen quickly no later than

00:14:37
30 days. The constitution of



00:14:38

the tribunal and an event

00:14:40

before the first session of

00:14:41

the tribunal and then an

00:14:43

in a force that argument

00:14:44

is it is manifestly without

00:14:46

legal Merit. Obviously without legal

00:14:48

Merit something that is evident

00:14:51

on his face and in

00:14:53

the tribunal needs to according

00:14:55

to the rule and make

00:14:56

a determination at its first

00:14:58

session or promptly thereafter. So

00:15:00

it's intended to be resolved



00:15:01

very quickly and efficiently. And

00:15:07

tribunals had interpreted that provision

00:15:09

to apply to the situations

00:15:11

in which it's lacking. The

00:15:14

tribunal is lacking in confidence

00:15:15

like an interest diction or

00:15:17

the where they're at. The

00:15:18

the claim itself is lacking

00:15:20

in Merit and it tribunals

00:15:24

have also found that that

00:15:25

can occur in front of

00:15:26

the main claim an initial

00:15:28

payment also and other proceedings



00:15:29

I can And the proof

00:15:32

that is required in such

00:15:34

a circumstance is there's a

00:15:37

legal impediment to a claim.

00:15:38

So it's not a factual

00:15:39

issue but it's a legal

00:15:40

issue must establish that it's

00:15:42

clearly and obviously that's such

00:15:44

legal impediment exist. It can't

00:15:46

be something in which there

00:15:47

is a debate or discussion

00:15:48

about it or they rely

00:15:50

heavily on the facts and



00:15:52

to take facts as well

00:15:54

as true. What changes were

00:15:58

made with a 2022 rules

00:16:01

will now it's rule 41.

00:16:03

The entire rule itself is

00:16:05

Manifest lack of legal Merit.

00:16:07

They're focusing on that particular

00:16:08

right at a party May

00:16:12

objects and still a party

00:16:13

either party may have Jack

00:16:15

that I claim as manifestly

00:16:16

without legal Merit the objection

00:16:18

and expressly States as opposed



00:16:20
to being something may relate

00:16:23
to the substance of the

00:16:24
claim the jurisdiction of the

00:16:26
center or the confidence of

00:16:27
the Tribunal. Again, also expedited

00:16:31
saying the following procedure to

00:16:33
apply a party shall file

00:16:34
a written submission no later

00:16:36
than 45 days after the

00:16:37
constitution of the tribunal. So

00:16:39
it's a little it's a

00:16:40
little bit more time for

00:16:41
the party who is making



00:16:42
the motion to file but

00:16:43
still very quick and then

00:16:46
there's certain Provisions in which

00:16:47
to What what the party

00:16:51
needs to provide written submission,

00:16:53
so I shall specify grounds

00:16:55
on which the objections based

00:16:56
in contain the statement of

00:16:57
relevant facts law and arguments

00:16:59
and the tribunal done. It

00:17:02
says specifically the tribunal shall

00:17:04
render its decision or award

00:17:05
on the objection within 60



00:17:07

days after the latter of

00:17:09

the Constitution of the tribunal

00:17:11

or the last mission on

00:17:12

the objection. So again, it's

00:17:14

also expedited very specific time

00:17:16

frame provided for the tribunal

00:17:18

to issue a decision or

00:17:19

an award and a it's

00:17:21

intended to be a specific

00:17:24

time frame after the issuance

00:17:26

of the Constitution of the

00:17:28

tribunal or the last mission

00:17:29

on the objection. Whereas prior



00:17:31

it has been more General

00:17:33

and it was the first

00:17:36

session or promptly after which

00:17:38

doesn't give a specific time

00:17:39

frame. In any case so

00:17:45

there are few few differences,

00:17:46

but more or less. It's

00:17:47

a little bit more clear.

00:17:48

There's a little bit more

00:17:49

time after the moving party

00:17:51

to prepare their objection. The

00:17:53

tribunal has a specific time

00:17:55

frame in which issue its



00:17:56
decision or award. Any question

00:18:00
is is it used often

00:18:01
has it been used often

00:18:03
and a looking at the

00:18:05
Ford E-150 objections in One

00:18:09
Source indicated. There were about

00:18:10
40 cases that have been

00:18:12
brought and of those cases

00:18:14
at about 10 have been

00:18:16
successful in getting rid of

00:18:17
the entire claim and four

00:18:20
have been successful in getting

00:18:22
rid of portion to query



00:18:25

whether or not that is

00:18:26

something that is is it

00:18:28

about 25% then be successful

00:18:30

in getting rid of the

00:18:31

same entirely. So it is

00:18:33

is useful, but obviously not

00:18:35

a guarantee that that will

00:18:36

happen. And so it can

00:18:38

have an effect of potentially

00:18:40

prolonging the arbitral dispute if

00:18:42

that is unsuccessful and I'll

00:18:45

talk about one case in

00:18:46

particular in a few minutes



00:18:47
under under pasta. But I

00:18:51
kind of was looking I

00:18:52
had looked specifically at 22

00:18:53
because that's what I was

00:18:54
able to get quickly and

00:18:56
and delve into easily to

00:18:59
look to see whether or

00:18:59
not something that the same

00:19:01
parties are raising the same

00:19:02
countries or the same claimants.

00:19:04
I didn't really see a

00:19:06
pattern of the 22 that

00:19:08
I that I saw there



00:19:09

were three cases that were

00:19:11

raised by Panama to buy

00:19:13

Venezuela to buy hungry and

00:19:15

then one each Jordan, Ukraine

00:19:17

Croatia Italy Spain Korea Germany,

00:19:19

Albania Bulgaria, Kuwait Bangladesh and

00:19:22

Rec no particular pattern there.

00:19:24

I looked at party Council

00:19:26

perhaps there are some councillors

00:19:28

were more aggressive about using

00:19:29

the objections and others. I

00:19:31

didn't really find a pattern

00:19:32

there either. It seemed to



00:19:34

be across the board and

00:19:36

then 1010 were granted in

00:19:40

full and four for impart.

00:19:42

So it seems it can

00:19:43

be and I can be

00:19:45

helpful if you can be

00:19:47

successful as a claimant. There

00:19:51

are also potential downsides one

00:19:53

obviously can prolong the proceeding

00:19:55

if if it's not granted

00:19:58

to their potential costs that

00:20:00

could be awarded against the

00:20:01

moving party which can serve



00:20:02

as a deterrent to not

00:20:04

bring frivolous motions. And then

00:20:08

there's also risk of potentially

00:20:09

prejudicing the tribunal if you're

00:20:11

making certain arguments, but you

00:20:12

can't make them. They may

00:20:15

be prejudiced against hearing Amor.

00:20:17

Morgan going forward. Other areas

00:20:21

in which other rules that

00:20:22

have similar provisions and had

00:20:24

mentioned that with respect to

00:20:26

some of the US agreement.

00:20:28

So create a u.s. Free



00:20:30
trade agreements Panama ustpa and

00:20:33
crew ustpa all contain similar.

00:20:36
Although not exactly the same

00:20:37
and we're eating at Provisions

00:20:39
to take one quick focus

00:20:42
on kafta, which does also

00:20:44
have a similar provision In

00:20:47
Articles 10.24 and 10.25 in

00:20:51
that case is specific to

00:20:52
responded as the moving party

00:20:54
and as the spawning can

00:20:56
make a claim as a

00:20:57
matter of law that I



00:20:58

claim submitted is not a

00:20:59

claim for which an award

00:21:00

in favor of the claimant

00:21:01

may be made under article

00:21:03

10.26. It's to be brought

00:21:06

before the tribunal as soon

00:21:08

as possible after the tribunal

00:21:09

has constituted and a new

00:21:10

event later than the date

00:21:12

the tribunal fixes for the

00:21:13

respondent to submit the counter

00:21:15

Memorial that's with respect to

00:21:16

the objection in 5 in



00:21:20
the event that the respondent

00:21:21
so request within 45 days

00:21:23
after the tribunal is constituted

00:21:25
the tribunal shall decide on

00:21:26
an expedited basis and injection

00:21:29
under paragraph for any objection

00:21:31
to the part of speech

00:21:31
is not within the tribunals

00:21:33
confidence. So it's required again,

00:21:36
that's the expedited proceeding needs

00:21:37
to happen quickly the tribunal

00:21:40
specifies in after the tribunal

00:21:42
is to suspend that any



00:21:45

person get on the merits

00:21:46

and issue a decision or

00:21:47

an award on the objections

00:21:49

stay in the grounds there

00:21:50

for no later than 150

00:21:52

days after the date of

00:21:53

the request was tied to

00:21:54

their request. So the intent

00:21:56

is to be an expedited

00:21:58

process. And just to talk

00:22:02

about 11 case in particular

00:22:04

with respect to Pacific Rim

00:22:08

versus El Salvador for a



00:22:11

whether or not this created

00:22:13

a quick resolution of the

00:22:15

dispute. Otherwise, I have the

00:22:24

dates to just see if

00:22:26

this works for a quick

00:22:28

resolution options were filed under

00:22:31

Articles 10.24 and 10.25 in

00:22:35

January 2010 at a decision

00:22:37

by the tribunal at rejecting

00:22:39

the respondents objections were at

00:22:42

was issued in August 2010.

00:22:44

So eight months eight months

00:22:45

for that process to happen,



00:22:47

then they responded filed a

00:22:49

non expedited jurisdictional objections. And

00:22:51

apparently there is a bifurcation

00:22:53

in this situation and that

00:22:55

was under article 41 one

00:22:56

of the 20 2006 rolls.

00:22:59

Filed in August of 2010

00:23:01

and decision on jurisdiction was

00:23:03

issued in June of 2012.

00:23:05

So almost two years later

00:23:07

and that was also rejected.

00:23:09

The objections were rejecting. It

00:23:11

went forward claimant file. No



00:23:13

more on the merits in

00:23:14

March of 2013. And the

00:23:15

resolution of the award was

00:23:17

issued in October of 2016

00:23:19

to initial three and a

00:23:20

half years. So very long

00:23:22

not very quick resolution about

00:23:25

dispute so it can it

00:23:28

is obviously a potential having

00:23:30

these types of quick resolution

00:23:31

of disputes happened at can

00:23:34

expedite obviously if it's successful

00:23:36

and that is the benefit



00:23:38

but it can also Force

00:23:40

add to the whole process

00:23:42

and lengthen the entire process

00:23:43

overall and just add that

00:23:45

this isn't exclusive to investor-state

00:23:48

arbitration in England, the law

00:23:52

commission's final review of arbitration

00:23:54

Act of 1996 in England

00:23:57

are considering introduced. The same

00:24:00

type of proceeding introduce an

00:24:01

expressed power of Summer disposal

00:24:03

which reflects desire for arbitration

00:24:06

proceedings to move swiftly when



00:24:08

a claim or defense lacks

00:24:09

Merit, so it is kind

00:24:11

of put it in other

00:24:12

areas as well. Thanks for

00:24:15

the shout-out Jennifer ended up

00:24:19

being and incidentally the objections

00:24:24

that we did say send

00:24:26

me the initial liminary without

00:24:30

an injection. We're very similar

00:24:32

to what we faced in

00:24:34

the jurisdiction face and that

00:24:35

it was repeated again in

00:24:37

the marriage stays. So it



00:24:38

really beg the question. If

00:24:39

you could have had your

00:24:40

time machine a look ahead

00:24:41

if we're just going to

00:24:42

deal with it in there.

00:24:43

Anyways, you know why I

00:24:44

have so yeah. I know

00:24:49

very interesting comment on the

00:24:51

the the kind of did

00:24:52

this movement to what what

00:24:55

what I guess you can

00:24:55

call the court affrication. Are

00:24:59

the litigation of defecation if



00:25:01
that's the word of arbitration

00:25:02
and we saw some of

00:25:04
that debate actually in our

00:25:06
Monday session when we were

00:25:07
talking about that the Nigeria

00:25:08
p&id case and chief judge

00:25:10
Knoll critique of kind of

00:25:13
the weaknesses of arbitration, which

00:25:15
some would say ours are

00:25:16
some of its strength but

00:25:17
you can end up and

00:25:19
you know corruption cases with

00:25:21
a desire to kind of



00:25:22

coordinate processes, but this is

00:25:25

one of those situations where

00:25:26

again it's brings up complications.

00:25:29

So I think right into

00:25:33

that the topic of today's

00:25:36

session I think Raphael is

00:25:37

going to kick us off

00:25:38

and yesterday we had a

00:25:39

great session excited about the

00:25:42

new rules and I think

00:25:44

a really good place to

00:25:45

start sort of where the

00:25:46

modern practice is going. It



00:25:48
is with the it's a

00:25:49
rule. So maybe a Raffaele

00:25:51
you could you could take

00:25:53
us through some of that.

00:25:54
First I want to thank

00:25:57
you for hosting and for

00:25:59
moderating sancos Antonio for inviting

00:26:02
me to this panel and

00:26:03
think Michael panelist right people

00:26:07
in steam table. what Ian

00:26:12
is referring to is a

00:26:13
few rules related specifically to

00:26:16
buy furcation specifically rule 42,



00:26:19

which I think compliments with

00:26:22

Jennifer was just mentioning which

00:26:24

is the summary disposition and

00:26:27

it's all related to Efficiency

00:26:31

procedural economy and the ability

00:26:35

to dispose of certain issues

00:26:39

of all the wall or

00:26:40

the whole case in a

00:26:41

single and normally early procedure.

00:26:46

So the div of the

00:26:48

bifurcation of the price for

00:26:49

patient is simply is simply

00:26:51

that you know, it's separating



00:26:53
into smaller pieces that can

00:26:56
be disposed quickly for you

00:27:00
in the whole picture and

00:27:01
viewing the certain issues and

00:27:04
viewing the certain issues need

00:27:05
to be either disposed completely

00:27:08
and and the case is

00:27:10
done rule 42 is a

00:27:14
new addition to the exit

00:27:16
rules in the 2022 version

00:27:18
and eat addresses to specifically

00:27:21
the bifurcation of merits or

00:27:23
it's not the early procedural



00:27:25

issues, but the merits of

00:27:27

the dispute I think exit

00:27:32

included this to try to

00:27:37

to try to unify Aviation

00:27:39

and try to further that

00:27:42

goal of economy of procedural

00:27:44

economy This was already happening.

00:27:47

I mean, I I was

00:27:49

looking at some research or

00:27:51

I was doing some research

00:27:51

and there are cases as

00:27:52

early as 2010 likely bendy

00:27:55

versus Argentina when the bifurcation



00:27:58

of marriage was was done

00:28:00

base and procedural economy and

00:28:03

efficiency for the case in

00:28:04

that particular occasion 2010 the

00:28:07

tribunal bifurcated liability for damages,

00:28:10

for example And glencore versus

00:28:13

believe it would just be

00:28:14

a case in 2018 for

00:28:17

Kaden jurisdiction liability and damages

00:28:19

as a try for caitian

00:28:21

and effect also based on

00:28:24

judicial economy. There were cases

00:28:27

also very early on that



00:28:29
evaluated request for bifurcation of

00:28:32
the merits and decided that

00:28:34
it was not economically to

00:28:35
do it and not efficient

00:28:36
for the parties for Temple

00:28:38
and church mining vs. Indonesia

00:28:39
in 2014. This was already

00:28:42
happening very early on in

00:28:44
the in the practice of

00:28:46
investor arbitration. However, You have

00:28:52
to have a tribunal that

00:28:53
is willing to to do

00:28:54
with number one answer. You



00:28:56

know, that is righteous enough

00:28:57

to say well this is

00:28:58

this is good for the

00:29:00

efficiency of the case, but

00:29:02

I think the overall the

00:29:06

overall system was not necessarily

00:29:08

taking it on. So excited

00:29:11

has consider it appropriate. for

00:29:13

a sender isolation purposes and

00:29:15

for managing expectations to introduce

00:29:20

his rule 42 Also is

00:29:24

g a Tribune of the

00:29:25

ability for the first time



00:29:27
to do it on its

00:29:28
own because before the tribunal

00:29:29
has had to rely on

00:29:32
the parties request. So now

00:29:34
you have the ability for

00:29:35
30 to do a Swiss

00:29:36
Bounty and decide with this

00:29:38
issue doesn't sound like he

00:29:41
needs to go all the

00:29:42
way into the marriage phase

00:29:44
of the case. We can

00:29:45
maybe resolve it early or

00:29:46
dispose of the whole case



00:29:49

based on on the fact

00:29:51

that the tribunal sees that

00:29:52

perhaps the case doesn't have

00:29:54

doesn't have enough married. Then

00:29:56

the parties are not doing

00:29:57

or not or not. We're

00:30:00

not requesting it. So I

00:30:02

think he clarifies to a

00:30:04

large extent the power of

00:30:06

the tribunal and it's standardized

00:30:08

the rules. So will the

00:30:09

Trevino's in the future. We'll

00:30:11

we'll have clear guidelines as



00:30:14

to how to approach this

00:30:16

request reminder for patient in

00:30:18

the merits face of the

00:30:19

case. Then we have a

00:30:21

couple of rules that are

00:30:22

break out from former rule

00:30:26

41 and that's a dozen

00:30:27

six set of exit rules,

00:30:30

and they have been developed

00:30:32

further for temple Route 43

00:30:34

related to preliminary objections and

00:30:40

Route 43 44 45 Old

00:30:42

deal with preliminary objections, but



00:30:44
in different in different ways.

00:30:46
So Route 43 is basically

00:30:50
Route 41 one of the

00:30:52
rule 41 to that has

00:30:54
been separated its own roof.

00:30:56
I need it relates to

00:30:58
the objections were returning with

00:31:00
Syria and Russia new persona.

00:31:01
That normally comes back from

00:31:03
article 25 of the convection

00:31:06
the convention. Again, the issue

00:31:09
of a Cinderella station and

00:31:11
manager of expectations was very



00:31:13

high. I think in the

00:31:15

in the exit intentions of

00:31:17

creating this new rule and

00:31:19

giving it to the viewing

00:31:19

of the ability to do

00:31:20

it again, sua sponte so

00:31:22

that the tribunal could decide

00:31:24

even when the parties are

00:31:25

not requesting this this bifurcation

00:31:31

of the preliminary objections 40

00:31:37

44 lemonade have Jackson's with

00:31:39

a request for bifurcation. This

00:31:42

is a specifically, you know,



00:31:44
when the parties are requesting

00:31:45
the bifurcation the tribunal again

00:31:47
looking at the economy and

00:31:49
the efficiency of the case

00:31:51
if it's necessary to separate

00:31:53
that face or take it

00:31:55
all the way down to

00:31:55
the merits which can sometimes

00:31:57
takes a lot of time.

00:32:03
One point that interested me

00:32:05
in Route 43 and 44

00:32:06
is that the tribunal when

00:32:10
bifurcating has 180 days after



00:32:14
the last admission on the

00:32:16
bar for caitian to decide

00:32:18
whether his number for Kate

00:32:19
or not? And 240 days

00:32:23
since I last mission on

00:32:24
the merits or combined submissions

00:32:26
to the side as well

00:32:27
on the on the merits

00:32:29
of those submissions. So I

00:32:32
was wondering and I percent

00:32:34
this I never send this

00:32:36
question to do you all

00:32:38
on the panel whether there



00:32:40

is an incentive there for

00:32:42

a tribunal to bifurcate because

00:32:43

if we're not having no

00:32:44

more time, what seems to

00:32:46

be more time, although I

00:32:48

haven't done the exact math

00:32:50

to try to determine whether

00:32:51

various in fact more time

00:32:53

for the tribunal but I

00:32:55

think there is an effective

00:32:56

incentive there. So just regular

00:32:58

to bifurcate because of the

00:33:01

80 180-day. He's going to



00:33:04

be added to the face

00:33:06

in the marriage that is

00:33:07

going to that is going

00:33:09

to follow so all these

00:33:11

rules again and I'll have

00:33:12

the the intent of provide

00:33:15

efficiency economy and an to

00:33:17

make the process more efficient

00:33:19

to some extent as well

00:33:21

to to cut on the

00:33:23

time but I don't know

00:33:24

if that is specifically accomplish

00:33:26

based on these statistics said



00:33:27

that we're going to see

00:33:29

we're going to see through

00:33:30

this fan. Thanks. Thanks very

00:33:34

much for FAL that that

00:33:35

was a great introduction to

00:33:38

many of you actually read

00:33:40

all of the new exit

00:33:41

rules in detail on some

00:33:43

of the innovations. That exit

00:33:46

is attempting to try to

00:33:47

Marriott these objectives for procedural

00:33:51

Efficiency. Do I know it's

00:33:57

been a lot of time



00:33:57

thinking about bifurcation and some

00:34:01

of the test that have

00:34:02

developed and as we see

00:34:04

new looks of rules if

00:34:05

it is kind of set

00:34:05

up its own version of

00:34:07

the past, but do you

00:34:09

know if the benefit of

00:34:11

folks are 11 Time by

00:34:12

furcation, maybe if you give

00:34:13

it a little bit of

00:34:14

a an introduction describing the

00:34:17

test and then, you know



00:34:19
a little bit of an

00:34:20
assessment what you what you

00:34:21
think of the test whether

00:34:22
it's being practical and you

00:34:25
know, how is that actually

00:34:26
work so Lindsay? Thank you,

00:34:30
and I'm really happy to

00:34:31
let me see if I

00:34:32
can make a 3 Factor

00:34:34
test for bifurcation as fascinating

00:34:36
as likely the most well-known

00:34:41
case regarding the application for

00:34:44
bifurcation on the criteria to



00:34:45

be applied as gram of

00:34:47

gold versus USA which that's

00:34:49

out. That's three factors test.

00:34:51

So the first question is

00:34:54

whether the objection is 3

00:34:56

months. She's serious and substantial.

00:34:58

So in other words is

00:35:00

the objection entirely for Bliss

00:35:02

or excitement. That's the first

00:35:04

part of the past the

00:35:06

second part of the pasta

00:35:07

if successful would the objection

00:35:10

do away with at least



00:35:12

some part or an essential

00:35:14

part or all of the

00:35:15

preceding right? So will the

00:35:16

proceedings go away if the

00:35:19

objection is successful and finally

00:35:22

can the objection be determined

00:35:24

without prejudging the merits which

00:35:26

of course would be inappropriate

00:35:27

to do. Now out of

00:35:30

score application of all of

00:35:32

these three factors is aimed

00:35:35

at and intended to achieve

00:35:36

as both Ian and Raphael



00:35:38
mentioned earlier today efficiency. That's

00:35:41
the goal at the hope.

00:35:43
That's what the factors are

00:35:44
designed to push it. Right.

00:35:46
So if the objection is

00:35:48
not serious or substantial it's

00:35:50
going to be a waste

00:35:51
of everyone's time to buy

00:35:52
for Kate that issue. If

00:35:54
the objection will not dispose

00:35:56
of any part of the

00:35:57
key again. It's a waste

00:35:58
of time then he buy



00:36:00
for kit and if the

00:36:01
injection is so intertwined with

00:36:04
the merits that you're going

00:36:05
to have to assess the

00:36:07
evidence Twice first and that

00:36:09
bifurcated part of the proceedings

00:36:11
and again at the marriage

00:36:12
then of course. The opposite

00:36:14
of efficient so that's really

00:36:17
what the goal of those

00:36:18
three factors are to obtain

00:36:20
efficiency a slightly different approach

00:36:26
Glamis. So for exam 1



00:36:30
tribunal aniki case against Croatia

00:36:33
expressly stated that it refused

00:36:36
to be placed in the

00:36:37
straitjacket of Klamath that there

00:36:39
should be a whole host

00:36:40
of other factors that the

00:36:41
tribunal should consider on a

00:36:43
case-by-case basis. Some of those

00:36:46
factors are weather bifurcation might

00:36:49
result in Prejudice or unfair

00:36:52
advantage to one party. Another

00:36:55
factor is whether by 40

00:36:57
and would significantly reduce the



00:37:00

complexity of the case. Whether

00:37:03

bifurcation is the requested premature

00:37:07

or there comes too early

00:37:08

and actually whether the bifurcation

00:37:10

request has come too late

00:37:12

have there been dilatory tactics

00:37:14

on on the part of

00:37:16

the party bringing the request

00:37:17

is it just too late

00:37:19

in the proceedings for bifurcations

00:37:21

make any sense and at

00:37:23

the end of the day

00:37:24

with tribunals do is apply



00:37:25

some of these factors on

00:37:28

a case-by-case basis focusing on

00:37:30

some may be others depending

00:37:32

on the facts and circumstances

00:37:33

of the particular case. Now

00:37:38

what I think is is

00:37:39

most interesting is which of

00:37:42

these factors is most important

00:37:45

which are the key ones

00:37:47

in terms of going ahead

00:37:48

and implementing that procedure efficiency.

00:37:52

Just we'll talk about the

00:37:53

data later today. He'll talk



00:37:55
about the Hard Rod data.

00:37:56
I what I tried to

00:37:58
do before this panel is

00:38:00
go back and canvas the

00:38:02
last 15 bifurcation request that

00:38:05
have been in proceedings that

00:38:07
I've been a part of

00:38:07
an admittedly that's not a

00:38:09
huge sample size but and

00:38:12
undergoing that exercise and reviewing

00:38:14
the last 15 times. I've

00:38:15
seen this a few things

00:38:17
but out to me. Earth



00:38:20

is bad as cleaning. We

00:38:22

actually consented to the bifurcation

00:38:24

request most of the time

00:38:26

so of the 15, I

00:38:28

think more than ten of

00:38:29

those we said sure we

00:38:31

will book him fenced bifurcation

00:38:33

and strategically, why would you

00:38:36

can send the bifurcation and

00:38:39

almost all cases and almost

00:38:41

all the times that we

00:38:42

agree to consent? It's because

00:38:44

they're requesting party presented a



00:38:46
very narrow discreet legal issue

00:38:50
that would dispose of the

00:38:51
case. So really that factor

00:38:53
to of the Glamis test

00:38:55
is this the easy discreet

00:38:58
legal issue that a tribunal

00:39:00
to look at it doesn't

00:39:01
have to know what the

00:39:02
rest of the keys and

00:39:03
must be dealt with quickly

00:39:04
and efficiently and if the

00:39:07
answer is that what ya

00:39:08
been in our view there



00:39:09

was no point opposing bifurcation

00:39:12

because we thought the tribunal

00:39:13

would likely accept that bifurcation

00:39:15

request. So it didn't make

00:39:17

sense to plead the issue.

00:39:19

Argue the issue and rather

00:39:22

we moved rate right to

00:39:24

actually dealing with on as

00:39:25

a separate phase of the

00:39:26

proceedings. And of course, there's

00:39:28

a real cost issue when

00:39:29

you're deciding whether to or

00:39:32

or eject the bifurcation request.



00:39:35

The second thing that I

00:39:36

noticed is where we objected

00:39:38

a bifurcation and were successful

00:39:40

which was in all cases

00:39:43

except one. It was on

00:39:45

the basis that the objection

00:39:47

was intertwined with the Merit

00:39:49

that was that third factor

00:39:50

of the Glamis test. That's

00:39:52

where we've been most successful

00:39:53

in objecting to a bifurcation

00:39:57

request. And what we would

00:39:58

all we argued is that



00:40:00
the tribunal gun would have

00:40:01
to look at the same

00:40:02
evidence twice. They might have

00:40:04
to see the same fact

00:40:05
witness more than once they

00:40:07
might have to have more

00:40:08
than once having an expert

00:40:10
come before than the expert

00:40:12
and so the scope of

00:40:14
the objection that we was

00:40:16
simply too broad. So it's

00:40:19
when my view that was

00:40:20
the one in my experience.



00:40:22

That was the objection that

00:40:24

that one before a tribunal

00:40:25

most often. We were also

00:40:31

successful an opposing bifurcation where

00:40:33

the request was delayed. We're

00:40:36

simply came to wait in

00:40:38

the proceedings to make any

00:40:40

sense. I'm in one case

00:40:43

it was the bifurcation request

00:40:45

came days before the statement

00:40:47

of Defence was due and

00:40:50

the other party said we

00:40:51

simply can't I want to



00:40:54

buy for kids and then

00:40:55

it it it was on

00:40:57

a discrete legal issues to

00:40:59

be spare. But that legal

00:41:01

issue was known to the

00:41:03

other side since probably even

00:41:05

before our request for arbitration.

00:41:07

So they waited until after

00:41:08

the statement of claim months

00:41:10

after the game and shortly

00:41:11

before they will actually know

00:41:15

if I forget it and

00:41:17

we stumble that simply doesn't



00:41:18

make sense this time because

00:41:20

when you put in your

00:41:20

statement of Defence, that's when

00:41:22

you would have raised the

00:41:23

jurisdictional ejections anyway, and to

00:41:25

carve out a separate bifurcation.

00:41:28

About to going to Discovery

00:41:29

requests and all the rest

00:41:30

would only delay proceedings that

00:41:31

wouldn't be efficient. And we

00:41:34

also argue that it was

00:41:35

plainly a delay tactic. So

00:41:38

that's that's kind of another



00:41:39
way where we've been losing

00:41:41
by 4 kitchen. I'm so

00:41:43
in my experience the two

00:41:45
key factors than to consider.

00:41:47
Our when is the objection

00:41:49
made does it make sense

00:41:50
to be efficient? And what

00:41:54
is the scope of the

00:41:55
objection? If it's that narrow

00:41:57
legal issue that separate and

00:41:59
apart from having to decide

00:42:01
the facts of the case

00:42:02
then in my view.... The



00:42:04

key factor for a tribunal

00:42:06

to look at I've actually

00:42:08

rarely in this is done

00:42:09

trust me. I've rarely encountered

00:42:11

a tribunal being persuaded by

00:42:15

that first chapter of the

00:42:17

Glamis test, which is that

00:42:18

the objection itself is frivolous

00:42:21

and I suspect that's because

00:42:22

I'm eating. Objection. You kind

00:42:25

of have to get into

00:42:26

the merits of the objection.

00:42:27

So, You're arguing the merits



00:42:28
and you're coming dangerously close

00:42:30
to just saying, okay, let's

00:42:31
deal with that issue. But

00:42:32
that's my guess it's a

00:42:34
bit redundant but that's not

00:42:36
been as persuasive as the

00:42:37
other two factors have been

00:42:38
in my experience. So the

00:42:42
question then becomes is that

00:42:44
right is the test on

00:42:46
these factors being used correctly

00:42:48
and I know an earlier

00:42:51
today on your slide that



00:42:53

you put off rightly pointed

00:42:55

out that if the separate

00:42:56

fees of the preceding terminate

00:42:58

proceeding. Well, then of course

00:43:00

the preceding concludes more quickly

00:43:02

and painfully obvious and it's

00:43:04

a challenge is unsuccessful. And

00:43:06

of course, it takes longer

00:43:08

to conclude. So the key

00:43:11

question then is that the

00:43:12

key issue was that bifurcation

00:43:14

10 the efficient really only

00:43:17

if a person goes away



00:43:18

or substantial part of the

00:43:20

preceding goes way. How do

00:43:22

you know if that will

00:43:23

happen in my Buick sits

00:43:24

two of the three key

00:43:26

factors, of course twitch? Thanks

00:43:31

very much. Lindsay that really

00:43:33

sets out to test. Well,

00:43:35

you know when it when

00:43:37

I hear this is called

00:43:38

a three-part test all a

00:43:42

part of it really is

00:43:43

the efficiency of the underlined



00:43:46
in which you could almost

00:43:47
say, that would be the

00:43:48
fourth element, even though it's

00:43:50
not stated exactly in that

00:43:53
manner as you mentioned it

00:43:56
and it is I could

00:43:56
use earlier a lot of

00:43:58
this can be a pretty

00:43:59
dire consequences on schedule and

00:44:02
the cost and how the

00:44:05
arbitration will proceed. I'm what

00:44:07
what is your sensitive tribunals

00:44:10
are handling a dull moment,



00:44:11

you know mindful of the

00:44:14

impact of their decisions. I

00:44:19

mean, I I think that

00:44:20

is the key driving force

00:44:22

and essentially when we're setting

00:44:24

out our objections to usually

00:44:27

in a sections bifurcation on

00:44:28

on claim inside not always

00:44:30

but when we're sending out

00:44:32

our objections to the tribunal

00:44:34

it's it's with that piece

00:44:36

front and center. So if

00:44:37

you think about when you're



00:44:38
writing your briefs objecting to

00:44:39
the bifurcation, the intro is

00:44:42
that none of this makes

00:44:44
sense. It will not be

00:44:45
efficient on any keys and

00:44:47
here are the factors that

00:44:49
support it right and that

00:44:50
you emphasized, you know, one

00:44:52
or two of the three

00:44:53
or more depending on the

00:44:54
facts and circumstances of your

00:44:56
kids always driving home. But

00:44:58
the whole point of it



00:44:59

is is whether it will

00:45:00

be efficient or not. And

00:45:02

I think if you can

00:45:03

practically demonstrate and again those

00:45:05

of the arbitrator in the

00:45:07

room will know better than

00:45:08

me, but if you can

00:45:09

practically demonstrate to a tribunal

00:45:12

but actually the calendar will

00:45:14

be expended more likely than

00:45:16

not for for no reason

00:45:18

and I think that Hopefully

00:45:20

is that is the driving



00:45:21
force of the decision-making? Select

00:45:24
let's drill drill drill down

00:45:26
to this a little bit

00:45:27
more and you know Ken

00:45:29
I'll call on you next

00:45:30
we seen, you know, the

00:45:35
development of the rules, you

00:45:36
know, starting back kind of

00:45:38
in the old Den social

00:45:39
rules. And as we now

00:45:41
developed with a new exit

00:45:42
rules that there is a

00:45:43
real focus on this question



00:45:46

and you know from a

00:45:48

tribunal perspective and I'm not

00:45:51

asking you to tip anyone

00:45:54

off I do you do

00:45:55

ever try to work but

00:45:56

maybe more with your your

00:45:57

Council had on. You know,

00:45:59

how should we all be

00:46:01

looking at Council arbitrators users

00:46:03

at the role of bifurcation.

00:46:06

Is this something that should

00:46:08

become kind of people sumption

00:46:12

in favor of or should



00:46:14

we be looking, you know

00:46:15

towards kind of single-phase arbitration

00:46:18

does the model or I

00:46:19

mean, how are you saying

00:46:20

this as well? We saw

00:46:24

Raphael talk a bit about

00:46:25

kind of this idea that

00:46:27

developing sense that you no

00:46:30

tribunal can do this to

00:46:32

respond to this kind of

00:46:33

this inherent power string all

00:46:37

those kind of into the

00:46:38

mix. Give us some of



00:46:40
your thoughts again. Thanks very

00:46:42
much Ian and Liberty First

00:46:44
Bank of Jose Antonio when

00:46:46
you for inviting me on

00:46:47
to the Stellar panel, and

00:46:49
I want to say Hello

00:46:49
to friends and colleagues and

00:46:52
adversaries who are the audience

00:46:54
is Lowe's on the chat

00:46:56
of this is a great

00:46:57
opportunity. Thank you in terms

00:47:00
of the history and the

00:47:02
evolution the it was for



00:47:04
the longest time the presumption

00:47:06
that if it was a

00:47:08
challenge to jurisdiction that a

00:47:11
tribunal should take care of

00:47:12
that first before it looks

00:47:15
at the merits and before

00:47:17
heading full engagement on the

00:47:19
facts and that is reflected.

00:47:21
For example in the 1976

00:47:23
concert Road Rules, which says

00:47:26
that the tribunal should rule

00:47:29
on a plea concerning jurisdiction

00:47:31
as a preliminary questions. I



00:47:34

think the part that was

00:47:35

because at that time jurisdictional

00:47:38

objections were pretty discreet. We

00:47:41

now know that jurisdiction and

00:47:44

admissibility objections are very complex

00:47:49

multi-layered. And so if this

00:47:52

idea that you presumptively stop

00:47:54

the arbitration and resolved that

00:47:56

plumbing. Our question is is

00:47:57

not as realistic in today's

00:48:00

world show in 2010. The

00:48:03

answer to rules were in

00:48:04

fact changed and if they



00:48:06
made it such that it

00:48:09
strictly amazing as opposed to

00:48:11
a should as on the

00:48:13
question of whether a tribunal

00:48:15
they fight for cake and

00:48:18
that's important also reflects. The

00:48:22
tribunal has its own sua

00:48:24
sponte powers as was mentioned

00:48:26
and it's Abboud with the

00:48:28
flexibility to be able to

00:48:30
determine the best course of

00:48:31
action. Efficiency furnace equal treatment

00:48:34
of the parties are squarely



00:48:36

within the Mandate of the

00:48:37

Tribune. from the exit convention

00:48:41

point of view will 40

00:48:42

article 41 it says that

00:48:46

the dispute If there's the

00:48:50

question is whether the dispute

00:48:51

is not within the jurisdiction

00:48:52

then it shall be considered

00:48:55

by the parties by the

00:48:57

tribunal whether to deal with

00:48:58

it as a preliminary question

00:49:00

or to join it with

00:49:01

the marriage. So there's already



00:49:03
authorization in the in the

00:49:05
in the convention and that

00:49:07
is also reflected in the

00:49:10
2022 rules in both rule

00:49:12
42 and Rule 43 and

00:49:15
essentially says that you could

00:49:17
you may address a plenary

00:49:19
objection in a separate phase

00:49:21
or join it as rejection

00:49:24
to the parents. So that's

00:49:28
the state has the question

00:49:29
is is that the right

00:49:31
policy and is that what



00:49:32

Advocate want and I think

00:49:34

that really depends on whether

00:49:36

you're claiming were representing claimant

00:49:38

respondent or whether you're a

00:49:40

tribunal number in there have

00:49:43

been some commentators including Lucy

00:49:45

bring would have made a

00:49:46

pretty persuasive case that there

00:49:49

should be a presumption against

00:49:52

bifurcating on efficiency ground which

00:49:57

is mentioned as the principal

00:49:59

reason unless the tribunal can

00:50:02

be convinced that the determination



00:50:04

of the bifurcated issue will

00:50:06

result in the termination of

00:50:08

the entire proceeding. Because if

00:50:12

you fail and you make

00:50:13

a heavy we saw a

00:50:14

57% of these requests for

00:50:17

arbitration fail, then you're putting

00:50:20

the parties to the task

00:50:21

of having a much more

00:50:22

elongated entirety of the preceding

00:50:26

that usually will increased by

00:50:28

18 months to two years

00:50:29

and posing a huge burden



00:50:31
on payments. For example who

00:50:33
may have limited resources. So

00:50:35
as to why from the

00:50:41
different points of view people

00:50:42
bring these cases and we

00:50:43
saw all it in the

00:50:45
study the Burford study all

00:50:47
but one was brought by

00:50:49
a respondent. So think about

00:50:51
that it's clearly is there

00:50:54
to get them. Is that

00:50:55
a truly a technique to

00:50:57
delay, but it's part of



00:51:00

it to book for responded

00:51:02

and they want some things

00:51:04

that are not self-evident. They

00:51:06

want the tribunal from the

00:51:07

get-go to be focusing on

00:51:10

the facts. That make the

00:51:12

claimant look bad as opposed

00:51:15

to the facts of Cleveland's

00:51:17

playing which makes the respondent

00:51:19

look better. So, you know,

00:51:20

there's often defenses of corruption

00:51:22

the illegal to abuse of

00:51:24

process all of which the



00:51:25
respondent once you get before

00:51:27
the tribunal as early as

00:51:28
possible and it also it

00:51:33
can be used as a

00:51:35
tactical. Do I take a

00:51:36
tribunal if it's so obvious

00:51:38
that will be concerned about

00:51:39
that. What's interesting is that

00:51:46
because the first test looks

00:51:49
at whether you made a

00:51:50
substantial or a non-frivolous of

00:51:53
plane or objection? It really

00:51:58
requires parties to brief the



00:52:00

request for bifurcation with rape

00:52:03

granularity. Well before the tribunal

00:52:08

has seen the memorial sometime

00:52:10

will be for the parties

00:52:12

themselves really know with the

00:52:14

opposing parties facts are going

00:52:16

to be so it is

00:52:17

is it in that respect?

00:52:19

I don't think it's very

00:52:20

helpful one case where I

00:52:26

was representing claimant the respondent

00:52:28

brought corruption and fraud offences.

00:52:31

And in the request for



00:52:34

bifurcation, they brought in all

00:52:37

sorts of evidence. They brought

00:52:39

in evidence of experts they

00:52:40

brought trying to Sully the

00:52:44

centrally the claimant and I

00:52:47

personally think when I look

00:52:48

as a hindsight to what

00:52:50

happened in the case, which

00:52:51

hopefully was dismissed them really

00:52:55

did affect the Mind's Eye

00:52:57

of the tribunal in how

00:53:00

they should be receiving the

00:53:02

claims of the of the



00:53:03
climate So I responded obvious.

00:53:05
Mike might not Street Fighter

00:53:09
for caitian if Lindsay Mansion

00:53:13
if questions are intertwined with

00:53:17
the facts and that's often

00:53:19
the what's the strongest objection

00:53:21
it wanted May and also

00:53:25
if they feel that they

00:53:26
could make a more persuasive

00:53:28
case on these objections. Once

00:53:32
they have the whole case

00:53:33
before the tribunal the holistic

00:53:36
approach. A claimant will almost



00:53:40
always oppose bifurcation and they

00:53:44
want them to focus on

00:53:45
the measures of the respondent

00:53:47
not on any of the

00:53:49
claimant of but there are

00:53:52
rare instances as it once.

00:53:54
He has mentioned where if

00:53:55
there's a discreet legal issue.

00:53:57
It actually served all parties

00:53:59
interest and if there's a

00:54:00
fundraiser and bomb it may

00:54:02
serve the funders interest in

00:54:04
having a dispute legal issue



00:54:06

B of A separated and

00:54:08

resolved before moving forward. So

00:54:11

tribunals try to get it

00:54:13

right. It's in many ways.

00:54:15

They want to get the

00:54:16

Goldilocks of response, you know,

00:54:18

they've been wanted they don't

00:54:20

want to spend one way

00:54:21

or the other but it

00:54:22

does create quite a beating

00:54:24

Prius with a lot of

00:54:25

unknown risks. Such as a

00:54:29

risk of parallel proceedings if



00:54:31

a partial award is challenging

00:54:33

Court while the arbitration continues.

00:54:36

There's that that risk of

00:54:39

the risk of the tribunal

00:54:41

having been seen a portion

00:54:44

of the facts are already

00:54:45

having prejudge the issue. Before

00:54:49

getting even the memorial or

00:54:51

certainly before getting the carnival

00:54:52

board. There's also a risk

00:54:58

of abusing The Briefing on

00:55:00

the Flesh and the showcasing

00:55:01

their cases in the marriage.



00:55:03

So they're my personal view

00:55:08

is that it has to

00:55:10

be a very the scope

00:55:11

is very important. What's your

00:55:13

question? And it it it

00:55:15

is a special proceeding from

00:55:18

a plane's point of view.

00:55:19

If you along at a

00:55:20

sitting by two years 18

00:55:22

months to two years you

00:55:23

could have been best for

00:55:24

fatigue you could have exhaustion

00:55:26

of limited resources is all



00:55:28

sorts of harm that could

00:55:30

result in those will not

00:55:35

be recovered in a class

00:55:36

later cost award if there's

00:55:41

the intangible. So for that

00:55:44

reason it seems to be

00:55:46

there should be a presumption

00:55:47

against bifurcation unless the special

00:55:50

circumstances. Thanks very much for

00:55:53

that. Can't just following up

00:55:55

on on one of the

00:55:56

points you made, you know,

00:55:58

it seems to be an



00:56:01

accepted practice. You want to

00:56:03

hear earlier or later. And

00:56:06

do you get to look

00:56:07

at Lindsay's experience? It makes

00:56:10

sense that he's aware. Potential

00:56:17

challenge coming down the pike.

00:56:19

What do you think about

00:56:21

the timing of resolving a

00:56:24

bifurcation challenge? Not the jurisdictional

00:56:28

you early as possible after

00:56:34

the Memorial after the counter

00:56:35

Memorial with which was kind

00:56:37

of the preferred timings. Juliander



00:56:41
obviously are million scenarios that

00:56:45
one could paint as to

00:56:46
when a request for bifurcation

00:56:48
they arrived, but generally you

00:56:50
may think of it before

00:56:52
the filing of the claimants

00:56:55
Memorial. At the time or

00:56:58
after the Memorial has been

00:57:00
submitted or after the counter

00:57:03
Memorial. So those are three

00:57:04
discrete. I've been involved in

00:57:07
many cases where they're done

00:57:08
almost from the outset because



00:57:10

you you when you come

00:57:11

to that first session and

00:57:13

there's you're dealing with the

00:57:16

tribunal trying to ascertain what's

00:57:18

the strength of the case

00:57:19

or otherwise, there may be

00:57:21

a request for bifurcation raised

00:57:23

at that first session. It

00:57:26

may actually be argued that

00:57:28

the first session of these

00:57:29

at some level of generalities

00:57:32

the tribunal could then ask

00:57:33

for a briefing. I'm worried



00:57:35
substitute briefing on the question.

00:57:37
So that is well before

00:57:39
the parties are filed their

00:57:41
substantiv memorial it's were coming

00:57:44
and I will say that

00:57:45
it's dissipated in the exit

00:57:48
row 44 that it take

00:57:50
place after that time. It

00:57:52
may take place. Once the

00:57:54
plane lands Memorial is on

00:57:56
file. And the respondent has

00:57:58
had a chance to really

00:57:59
understand what the position is



00:58:02

and they therefore could couldn't

00:58:04

they could put forth with

00:58:07

their objection objections are in

00:58:10

Route 44 says that it

00:58:12

would have to be filed

00:58:13

within 45 days after the

00:58:15

Memorial in the mirror to

00:58:16

file is that if there

00:58:22

is no identified. There's no

00:58:25

possibility at least in the

00:58:26

rule or filing it after

00:58:28

the counter claim is submitted.

00:58:30

Is it is it Lindsay



00:58:31
has shown that example, you

00:58:34
can't wait to hear about

00:58:35
to buy your statement. It

00:58:36
depends to file. So I've

00:58:41
also seen by the way

00:58:42
at the at the first

00:58:44
living room conference one, once

00:58:46
a party has raised the

00:58:47
prospect of a filing for

00:58:50
bifurcation the tribunal may ask

00:58:52
the parties to propose to

00:58:54
separate procedural schedule one on

00:58:57
the contingency of having a



00:58:58
bifurcated proceeding and one of

00:59:01
their constancy of a unified

00:59:02
Force. So that that happened

00:59:06
I should mention that the

00:59:08
new rules add a feature

00:59:10
to which is that it

00:59:11
says that we're 40 41st.

00:59:13
It says that once this

00:59:16
has been raised the proceeding

00:59:18
on the merge going to

00:59:19
be suspended. So it's kind

00:59:22
of limited the unless the

00:59:25
parties agree, but I think



00:59:26

it's limited somewhat the creativity

00:59:28

of the tribunal to say.

00:59:29

Okay, we have these discreet

00:59:31

pulmonary objections are questions to

00:59:34

be resolved. We can still

00:59:35

go through disclosure. On the

00:59:39

Mariner of the fences and

00:59:41

have them happen simultaneously. The

00:59:43

new rules really don't have

00:59:44

a design proficiency looked at

00:59:47

one path of One path

00:59:49

only. Extra much. Can our

00:59:54

time is limited. We we



00:59:56

have saved the best for

00:59:58

last no sense the other

00:59:59

apology to Jennifer perhaps that

01:00:05

being up against our our

01:00:06

time limit, but you know

01:00:08

how to put it. Mildly

01:00:09

Jeff kind of wrote the

01:00:10

book on this subject and

01:00:12

has a deep knowledge and

01:00:14

it's been a lot of

01:00:15

time analyzing cost and efficiency

01:00:17

issues because this is part

01:00:20

of his business in the



01:00:21
third-party funding business that at

01:00:23
Burford. I think one of

01:00:24
the questions and goes to

01:00:26
the title of the panel

01:00:28
is the impact of trifurcation.

01:00:31
We talked about different forms

01:00:33
of trifurcation in the kind

01:00:34
of the cap that context

01:00:35
is typically the question of

01:00:38
whether damages shouldn't that be

01:00:40
separate off and address in

01:00:43
the separate stays comes up

01:00:45
to eat in many cases,



01:00:45
but I'll leave that to

01:00:47
Jeff and if you have

01:00:48
any other comments Jeff certainly

01:00:50
your Welcome to jump. It

01:00:52
will give him a time.

01:00:54
I'll just try to a

01:00:55
couple people in the front

01:00:57
of the chapter that we

01:00:59
rode on chapter 5 concerned

01:01:06
bifurcation and Fabrication. It was

01:01:07
by far the hardest chapter

01:01:09
two, right and I say

01:01:10
that because it's hard to



01:01:11
get a hold of the

01:01:12
actual decision because very few

01:01:14
of these decisions are made

01:01:15
publicly available at the time

01:01:16
that rendered so you may

01:01:18
get them after the fact

01:01:19
I'm increasingly these days you

01:01:21
make it I mean as

01:01:22
I looked this morning to

01:01:23
see how many publicly available

01:01:27
to students this year. But

01:01:30
there's only three you can

01:01:31
find often times you'll find



01:01:34
out about that when they

01:01:34
were comes out and will

01:01:36
be one paragraph that says

01:01:37
in procedure for the number

01:01:39
to the tribunal decided to

01:01:40
bifurcate or not. And that's

01:01:43
really not helpful from address

01:01:44
potential to put together at

01:01:48
the time, but I do

01:01:50
think And the dad about

01:01:52
that and finally laid out

01:01:54
hasn't really changed. I mean

01:01:55
if you look at Lucy



01:01:56

Greenwoods data in 2011, or

01:01:59

data and 2019 are they

01:02:01

that in 2020, up until

01:02:03

now our internal data I

01:02:05

need these applications of the

01:02:07

average rate of success is

01:02:09

similar to the average rate

01:02:10

of success in investor-state arbitration.

01:02:11

Generally, it's between fifty and

01:02:14

sixty percent. What's interesting now

01:02:17

is increasingly it's not just

01:02:20

questions of these are manifest

01:02:21

lack of legal Merit or



01:02:23

is there flaming arrow issue

01:02:24

3 or 6 in it's

01:02:26

a Quantum. So what we're

01:02:28

seeing is parties seeking either

01:02:32

either Buy application to separate

01:02:34

out issues of quantum either

01:02:35

in addition to an application

01:02:37

to buy forget jurisdiction or

01:02:38

on its own. I'm in

01:02:40

the same tribunal. Sua sponte.

01:02:43

I think sometime before there

01:02:46

was a rule that so

01:02:47

provided themselves separating. The case



01:02:51
and often times in many

01:02:53
of these cases. You don't

01:02:53
know that they're going to

01:02:54
do it. So while you're

01:02:55
waiting three years for years

01:02:57
five years for an award

01:02:58
instead what you get and

01:03:00
you see this increasingly in

01:03:01
the Renewables is a decision

01:03:03
on liability and principles of

01:03:05
one that you waited for

01:03:08
5 years. You have a

01:03:09
decision that leads to another



01:03:11
12 to 18 months of

01:03:12
wrangling because the tribunal says,

01:03:14
okay. Well, we don't accept

01:03:15
the claimants usually don't accept

01:03:17
the respondents DCF. So why

01:03:19
we want the experts to

01:03:20
get together and have some

01:03:21
of the mission and that

01:03:22
increases with the time and

01:03:24
the cops, which is unfortunate

01:03:26
that there are good examples

01:03:29
of tribunals bifurcating issues of

01:03:32
quantum and one of the



01:03:34
three that was rendered and

01:03:36
you could find or earlier

01:03:37
this year that makes the

01:03:39
face in Serbia and Sir

01:03:42
Daniel Bethlehem was really the

01:03:43
driving force behind this procedure

01:03:45
order number for was rendered

01:03:47
on the 21st of August

01:03:48
2023, but instead of Sua

01:03:51
sponte by forgetting damages three

01:03:54
years and four years some

01:03:55
of that notice to the

01:03:56
party's here at the first



01:03:57
session. So Daniel said look

01:03:59
at once the volume. Once

01:04:04
they leave the decision on

01:04:05
liability is Rich and there's

01:04:07
a finding of viability of

01:04:08
the tribunal is left with

01:04:09
the unenviable position of trying

01:04:11
to make sense of quantum

01:04:12
submissions expert reports that have

01:04:14
been put in at the

01:04:15
beginning of that any appreciation

01:04:17
of how the liability face

01:04:18
is going to fall out.



01:04:19

We are increasingly seeing circumstances

01:04:21

in which tribunals ever admitting

01:04:23

matters back to the parties

01:04:24

for further submissions on Quantum,

01:04:26

which goes to be issue

01:04:27

of delay has to be

01:04:28

super-efficient see go to the

01:04:30

Quantum of the tribunal and

01:04:34

this is why this is

01:04:39

so that this case was

01:04:40

registered last year. He raised

01:04:42

it at the first session

01:04:42

as I as an issue



01:04:44
seeing as he is quite

01:04:45
active and then the following

01:04:51
Father requests to bifurcate and

01:04:53
it was successful at the

01:04:55
reasons make a lot of

01:04:56
sense. But frankly, I wrong

01:04:59
and I live in September

01:05:02
of this year the response

01:05:03
plan ahead and filed this

01:05:04
it's kind of more on

01:05:05
the Merritt and what this

01:05:06
does is it prevents increasing

01:05:08
challenges two words that are



01:05:13

defective on issues of Damages

01:05:14

increasingly. If you look at

01:05:16

the number of opposed to

01:05:17

what application for their rectification

01:05:19

applications and almond applications where

01:05:21

tribunals get it wrong is

01:05:23

in Damages there. They they

01:05:25

don't think the interest what

01:05:27

they say the wrong interest

01:05:28

rate. What were they don't

01:05:29

specify between pre and post

01:05:30

awarded trip where they were

01:05:33

where were they take the



01:05:33
wrong country risk premium or

01:05:35
they used the wrong exhibit

01:05:36
in the claimants depending on

01:05:41
fire and monetize Awards. We

01:05:46
have to assess the likelihood

01:05:47
of a moment. I'm so

01:05:49
easy these grounds irregularly. Take

01:05:51
me to doing what's what's

01:05:53
today in Bethlehem did here

01:05:54
helps minimize the risk of

01:05:58
that because you have parties

01:06:01
that are able to put

01:06:03
together Quantum that is in



01:06:04

line with the decision my

01:06:05

liability because in this in

01:06:07

this procedure or he goes

01:06:08

on to say, well we

01:06:15

still haven't yet figured out

01:06:16

where we're going to come

01:06:16

out of liability. There's quite

01:06:18

a sensible approach and I

01:06:19

quite recommended that's really point

01:06:22

one. What one is abused

01:06:24

as soon as they're hard

01:06:25

to find going to this

01:06:26

is a good decision, which



01:06:27

I think we should do.

01:06:28

What is Sir Daniel Bethlehem

01:06:30

does and point three World

01:06:31

close is mutual cost. I'm

01:06:35

in the sea green with

01:06:36

data. She quite rightly shows

01:06:38

that when cases are when

01:06:40

cases are bifurcated and the

01:06:44

name of the case continues

01:06:45

after that decision. I'm here

01:06:47

at 18 months to two

01:06:48

years. So it increased the

01:06:51

cost and time from dependency



01:06:57

the duration and some tribunals

01:06:59

have stabbed in rendering decision

01:07:01

on bifurcation of that cost

01:07:02

can be awarded in the

01:07:04

award. Unfortunately those same tribunals

01:07:07

when it comes time for

01:07:08

the word don't actually work.

01:07:10

I'm so you know, I

01:07:12

think tribunal should be a

01:07:13

bit more aggressive in his

01:07:14

unsuccessful applications because it's some

01:07:17

cases party seek bifurcation one

01:07:19

of the one time in



01:07:20
the case or more than

01:07:21
one kind of bifurcation or

01:07:23
if they're unhappy with how

01:07:24
that works out. They'll file

01:07:26
an application for reconsideration not

01:07:28
in the rules, but it

01:07:29
happened a challenge to the

01:07:31
tribunal because You don't want

01:07:36
to be more aggressive on

01:07:36
cost of words and also

01:07:38
interim cost to make it

01:07:39
payable within 30 days that's

01:07:41
going to increase proper use



01:07:45
of of the procedural application

01:07:47
the Natural Pawz 1143 your

01:07:53
timeliness accuracy to the numbers

01:07:56
is great. We do have

01:07:57
a couple of more minutes.

01:07:58
So I'd like to see

01:08:00
if they're there any questions

01:08:02
in the audience or comments.

01:08:05
I know this is an

01:08:06
issue that the address by

01:08:10
Midian. microphone Dr. Rivas a

01:08:23
q in it and thank

01:08:24
you everyone for introducing some



01:08:28
of the changes in and

01:08:30
helping to explain the development

01:08:33
of of Articles 41 and

01:08:35
and subsequent articles in the

01:08:36
new rules. I would like

01:08:39
to to be a little

01:08:40
bit in a weight challenge

01:08:45
the notion of of of

01:08:47
a presumption against bifurcation between

01:08:54
jurisdiction and and and and

01:08:57
the marriage reliability. I was

01:08:59
looking at the at the

01:09:00
18 of of the latest



01:09:04
statistics of addiction statistics this

01:09:08
year and the the the

01:09:11
breakdown of Old Country Road

01:09:18
exit arbitrations is 48% of

01:09:23
holding claims. No, that's That's

01:09:26
the one said that were

01:09:27
one and then those that

01:09:29
that were the remaining ones

01:09:32
are 21% + 2% I

01:09:36
were dismissing. Sorry. I weren't

01:09:38
the kind of jurisdiction. That's

01:09:40
21% and I were deciding

01:09:43
that the claims are manifestly



01:09:44
without legal marriage. So that's

01:09:46
that's 24%. 23% of the

01:09:50
remaining ones 29% are those

01:09:53
were the tribunal dismissed all

01:09:55
claims? So so so my

01:09:57
logic is more like if

01:09:59
if if you didn't have

01:10:02
a real basis for for

01:10:05
bifurcation, then perhaps that number

01:10:09
the number between the number

01:10:11
of awards declined jurisdiction on

01:10:14
towards deciding that the claims

01:10:16
are are manifested without legal



01:10:18

Merit might be is smaller,

01:10:21

but close to 25% This

01:10:24

is 23% Seems to be

01:10:26

a fairly significant number 222

01:10:31

have not to have a

01:10:32

presumption and I know that

01:10:34

there is of course, but

01:10:35

with my my my thinking

01:10:37

on this is well. Their

01:10:40

attorneys also to be on

01:10:42

the porch and you weren't

01:10:42

where I think that there's

01:10:43

a very strong argument is



01:10:45

is is on the suggestion

01:10:46

that that the the test

01:10:48

a three-part test Bebe re

01:10:50

grossly applied but the presumption

01:10:54

against the bifurcation I'm I'm

01:10:56

still struggling with that especially

01:11:00

if if you do take

01:11:03

the the road of counsel

01:11:05

for States. Does anyone want

01:11:07

to respond to Jose Antonio

01:11:10

in that Ken since you

01:11:12

raised originally? Thank you, Jose

01:11:17

Antonio and what what I



01:11:18

don't know is whether the

01:11:19

statistics you're reading encompasses partial

01:11:22

Awards. Because the partial award

01:11:25

could dismiss the claims on

01:11:29

the basis of arbitration our

01:11:31

jurisdiction and it might be

01:11:33

considered part of that 23%

01:11:40

I'm not entirely sure that

01:11:41

I know that the 4848

01:11:43

% that I read at

01:11:45

the beginning of our Awards

01:11:47

upholding claim in Port Orange.

01:11:49

But from the statistics. I



01:11:52

know I don't know. I

01:11:56

don't know. Do you want

01:12:01

to have a full proceeding

01:12:03

on very challenged of jurisdictional

01:12:10

objections based upon the full

01:12:13

record because that's really the

01:12:15

difference is that you do

01:12:17

it a based upon the

01:12:18

partial record, but in a

01:12:20

bifurcated proceeding or do you

01:12:22

really need to Antietam before

01:12:23

respondent has put forth its

01:12:26

kind of Memorial and before



01:12:28
work. Sometimes you can before

01:12:30
the claimant has put forward

01:12:31
its from world and I

01:12:33
think there's a lot of

01:12:34
risks and doing that. So

01:12:37
the ghetto And we see

01:12:41
that with a high percentage

01:12:43
of denial of these bifurcated

01:12:45
bifurcations. If there's a real

01:12:47
risk you go through the

01:12:48
process 18 months go by

01:12:50
and then they say no

01:12:52
we're not going to bifurcate



01:12:54
or we're not going to

01:12:55
dismiss the entire case. So

01:12:58
you now have to proceed

01:12:59
forward and then you have

01:13:00
the real risk of having

01:13:01
the same evidence has been

01:13:03
presented to the tribunal. We

01:13:04
have the risk of the

01:13:06
prejudgment by the tribunal having

01:13:08
seen it at least one

01:13:09
cut on those dishes so

01:13:11
I can get the matter

01:13:12
of risk assessment and I



01:13:16

am sure that there's some

01:13:19

economic way of working out

01:13:20

of formula of depending on

01:13:23

what the bait jurisdictional basis

01:13:24

is working out whether it's

01:13:26

better for the purposes of

01:13:28

cost and and the final

01:13:30

of finality of the decision,

01:13:32

but I haven't been through

01:13:35

that. I know that there

01:13:37

have been some comments that

01:13:39

says 2 Go through that

01:13:40

undertaking and it doesn't justify



01:13:44
having a presumption in favor.

01:13:46
And it may not have

01:13:47
a chance to support even

01:13:50
having a no presumption. In

01:13:53
fact the presumption against maybe

01:13:55
the better course would be

01:13:57
more realistic. I think he

01:14:05
needs to be very active

01:14:07
in making this a termination

01:14:10
with the party. So I

01:14:11
think the tribunal needs to

01:14:14
try to understand the case

01:14:15
early on to determine whether



01:14:18
there's going to be a

01:14:19
justification for not only separate

01:14:21
into Jersey Channel face, which

01:14:23
I tend to agree that

01:14:24
needs to be addressed early

01:14:26
and addressed quickly. For the

01:14:29
purposes of disposing of the

01:14:31
whole case may be a

01:14:32
very early stage. However, if

01:14:36
you is a Torino can

01:14:37
perceive or see the potential

01:14:40
risk of route 41 Motions

01:14:43
like new Route 31 wishes



01:14:44
as explained by you Jennifer

01:14:46
for subsequent rule 42 bifurcation

01:14:51
of the merits. You you

01:14:53
have to as a centurion.

01:14:55
Remember you have to really

01:14:57
be kindness and of those

01:14:59
possibilities in order to avoid

01:15:01
extending the case, that could

01:15:04
be I mean if it

01:15:06
passes the jurisdictional test. It

01:15:08
could be 18 to 24

01:15:10
months. Let's take to to

01:15:12
get an award in the



01:15:13

relatively simple case. But if

01:15:16

you start bifurcating issues and

01:15:22

discrete issues that at the

01:15:24

end of the day are

01:15:25

not going to accomplish the

01:15:27

benefits of efficiency and procedural

01:15:30

economy. Long and I took

01:15:33

the opportunity to end our

01:15:36

session there. I just wanted

01:15:39

to thank our panel of

01:15:41

just a great group with

01:15:43

lots of insights, and I

01:15:44

know I learned a lot.



01:15:45

So thanks for Raphael Jeff

01:15:47

Jennifer Ken and Lindsay for

01:15:50

their excellent contributions at the

01:15:53

thank you. We're going to

01:15:55

take a break for 20

01:15:59

minutes and we will have

01:16:00

our next battle alternative approaches

01:16:03

to value in Damages in

01:16:04

investor-state arbitration about 12:15 or

01:16:08

so. So looking forward to

01:16:09

seeing everyone there and let's

01:16:11

thank our panel for their

01:16:12

excellent birthday. music Can you



00:00:13

show me the welcome to

00:00:16

Washington arbitration week? This is

00:00:19

our fourth day. And I

00:00:21

believe that we're gone over

00:00:23

half of our program and

00:00:26

we we still have a

00:00:28

incredible panels and kind of

00:00:30

this for you. I see

00:00:32

my many friends in the

00:00:33

room experts Council how it

00:00:37

is with great pleasure that

00:00:38

I would willing to do

00:00:41

it in there who is



00:00:43

co-chair of Washington arbitration week

00:00:47

and he's also chair of

00:00:50

the Crowell & Moring a

00:00:53

dispute resolution group here in

00:00:55

Washington DC and Ian Ian

00:00:59

has has many things and

00:01:00

he will allow me to

00:01:02

to say a couple of

00:01:03

things about him. Not only

00:01:05

is he a co-founder of

00:01:07

Washington arbitration week, but he

00:01:09

is somebody who who is

00:01:11

at incredible supporter of the



00:01:12
international arbitration Community many Council

00:01:19
of many and very much

00:01:21
concerned about the international rule

00:01:23
of law. He has been

00:01:25
the editor of o u

00:01:26
p lunch adventures in terms

00:01:30
of online editorial project and

00:01:35
many other things that we

00:01:37
have the pleasure of co-teaching

00:01:38
with him or investment treaty

00:01:41
arbitration public international law and

00:01:44
icj judgment Georgetown. And that's

00:01:50
of course I have been



00:01:51

going on for now 10

00:01:52

years and under there. So

00:01:55

there's way more more more

00:01:56

than that, but I know

00:01:58

that that he would appreciate

00:01:59

if I keep on learning

00:02:03

or sharing his uncle With

00:02:05

with with everyone. So today's

00:02:07

topic is on a bifurcation

00:02:10

or trifurcation. Is it by

00:02:13

now a success story as

00:02:15

you know, that the rules

00:02:17

have changed quite a few



00:02:18

times on that topic, but

00:02:20

I'll let him share the

00:02:25

story that were ongoing story

00:02:27

with you. So you have

00:02:29

the story and thank you.

00:02:31

Thanks very much Jose Antonio

00:02:34

for that generous introduction. It's

00:02:38

a pleasure to be back

00:02:40

here in Washington burn other

00:02:42

Washington arbitration week. This is

00:02:44

our fourth edition and the

00:02:48

momentum has kept growing and

00:02:50

and we're really very appreciative



00:02:51
of the support that the

00:02:54
international arbitration Community has given

00:02:57
and making this year is

00:02:59
certainly the best yet. Everyone

00:03:05
next year. It is a

00:03:08
pleasure to do this panel

00:03:09
this morning as we have

00:03:12
a fantastic group of practitioners

00:03:15
who know their stuff about

00:03:19
the procedural stance than the

00:03:21
organization International Investment tribunals. Let

00:03:27
me let me get into

00:03:28
some introductions and then we'll



00:03:31

get into the discussion. We

00:03:33

have to my left Rafael

00:03:37

Boza is the special counsel

00:03:39

with Pillsbury Winthrop Shaw Pittman.

00:03:40

He focuses his practice in

00:03:43

all aspects of international arbitration

00:03:44

resolution litigation. He also practices

00:03:48

and transactions and corporate matters

00:03:50

Raphael has over 20 years

00:03:52

experience advising local and multinational

00:03:55

companies litigating in arbitrating to

00:03:59

his left. We have Jeffrey

00:04:00

commission who is a director



00:04:03

based here in Washington DC

00:04:04

with Burford Capital, he has

00:04:07

20 years of experience representing

00:04:08

and funding claimants and investment

00:04:10

treaty disputes and international commercial

00:04:12

arbitration. He was previously at

00:04:15

Fresh fields and London New

00:04:16

York and Washington. He is

00:04:19

co-author of the oup book

00:04:21

procedural issues in International Investment

00:04:24

arbitration with Rahim Aloo, and

00:04:27

he has a forthcoming o

00:04:28

u t a book titled



00:04:30
third-party funding in international arbitration

00:04:33
law and practice to look

00:04:34
forward to that to Jeffrey's

00:04:39
just left. We have Jennifer

00:04:42
Galbraith McCandless, and she is

00:04:46
an international disputes partner partner

00:04:48
at Baker Botts here in

00:04:49
Washington DC and she served

00:04:52
as legal counsel complex high-stakes

00:04:54
International arbitration cases focusing in

00:04:57
particular on investor-state arbitration. She

00:05:00
has advised and represented both

00:05:02
private-sector investors claimants. And sovereigns



00:05:05
international arbitral proceedings before it

00:05:09
said it's additional facility the

00:05:11
icct CIA and other institutions

00:05:14
around the world and thank

00:05:17
you very much Jennifer for

00:05:19
coming today. And then we

00:05:22
have to her left can

00:05:25
ride themselves. Who's the global

00:05:27
leader of bakerhostetler investor-state arbitration

00:05:30
team is the chambers and

00:05:32
legal 500 Bank lawyer. He's

00:05:34
among the world's leading Advocates

00:05:36
and arbitrators and cross-border contract



00:05:39

commercial license and investment treaty

00:05:42

disputes and with over 40

00:05:44

years of experience can have

00:05:46

successfully represented global companies were

00:05:49

Sovereign Sovereign controlled entities before

00:05:52

the most prominent International and

00:05:53

Regional arbitration centers around the

00:05:55

world and you know the

00:05:57

list it said l c

00:05:58

i a i c c

00:05:59

i c e r and

00:06:00

so forth as well as

00:06:02

before I thought tribunals So



00:06:05

thank you Ken for for

00:06:06

taking time today very much.

00:06:08

Appreciate it. Last but not

00:06:10

least. We have Lindsey Schmidt

00:06:12

who is a partner in

00:06:13

the New York office of

00:06:14

Gibson Dunn & Crutcher and

00:06:17

a member of Gibson Dunn

00:06:18

International arbitration in and judgment

00:06:21

and arbitral award enforcement practice

00:06:24

groups. She's being recognized by

00:06:26

Leading Publications and putting in

00:06:28

a 2023 14 under list



00:06:30

while 360 Rising Stars best

00:06:33

lawyers your own money and

00:06:34

so far. It's very very

00:06:38

great honour. She was also

00:06:40

part of the team named

00:06:41

International arbitration team of the

00:06:43

year that the British legal

00:06:45

awards for her work in

00:06:47

and then I guess is

00:06:48

around 2020 on obtaining a

00:06:50

groundbreaking interim measures award and

00:06:53

very relevant for today related

00:06:56

to a bifurcated jurisdictional proceeding.



00:06:59

That's a good introduction to

00:07:01

our topic today as Jose

00:07:03

Antonio mention. We've called this

00:07:05

panel bifurcation or trifurcation in

00:07:08

industrial investment arbitration in our

00:07:12

basic question. Today is his

00:07:14

being a success story and

00:07:17

what of the impacts being

00:07:18

on the fish Scentsy and

00:07:19

costs. So, of course one

00:07:23

of the primary benefits of

00:07:27

international arbitration that that that

00:07:28

are touted and certainly the



00:07:30
principles that tribunals Council operate

00:07:34
on his to make the

00:07:36
processes of efficient as possible

00:07:38
and inefficiency. You would think

00:07:44
and hope would come with

00:07:45
lower costs, but there's always

00:07:47
that balance as it occurs

00:07:49
in and I was like

00:07:51
take the opportunity of reflecting

00:07:53
on the story. I think

00:07:54
Rusty park over that one

00:07:56
conference years ago about that

00:07:59
the cobbler who had to



00:08:00

sign in the window that

00:08:02

said cheap low-cost to know

00:08:10

if you reflect on that

00:08:11

the balancing of quality work

00:08:14

with a quick process and

00:08:17

keeping that low cost because

00:08:19

that's hard to balance and

00:08:21

so bifurcation kind of comes

00:08:23

into that equation in that

00:08:26

sometimes it would seem the

00:08:30

taking the opportunity to address

00:08:32

issues early could have the

00:08:35

benefit of ending the procedure



00:08:38

getting to it as positive

00:08:39

results quickly and saving cost.

00:08:42

Of course the flip side

00:08:43

of that if that bifurcation

00:08:45

or early procedure doesn't work.

00:08:47

It could have the effect

00:08:49

of dramatically increasing the length

00:08:51

of time and the cost

00:08:52

of the proceedings as well.

00:08:54

So it is a tricky

00:08:55

equation and and sometimes hard

00:08:58

to get to that point.

00:09:00

And so I want to



00:09:02
do put up a slide

00:09:04
and if if you could

00:09:06
share with me just asking.

00:09:09
Maria is here who's here

00:09:10
and she can share the

00:09:12
screen. I have one slide,

00:09:15
but I wanted to put

00:09:17
up. which actually said that

00:09:20
send data which was prepared

00:09:29
actually buy Jeff commission as

00:09:31
part of a presentation. I

00:09:33
should have let Jeff have

00:09:33
the privilege of putting this



00:09:35
out. But I want to

00:09:37
steal his Thunder. This is

00:09:39
the latest on bifurcations and

00:09:43
it this was a sample

00:09:44
of three years from 2017

00:09:46
to 2020 basically taking in

00:09:49
the whole world decisions at

00:09:52
the time and 72 decisions

00:09:55
on bifurcation were identified in

00:09:57
that. A large percentage of

00:09:59
them simply the the logic

00:10:01
and the reasoning we're just

00:10:03
not available, but they were



00:10:05

able to analyze what was

00:10:06

available and as we see

00:10:08

57% of the applications for

00:10:11

bifurcation were rejected. So we're

00:10:13

looking at kind of a

00:10:14

50/50 scenario analyzing those decisions.

00:10:18

They found out the what

00:10:20

what has become known as

00:10:22

the Glamis goals doctors were

00:10:25

applied in pretty much 80%

00:10:27

78 % Those decisions so

00:10:31

there seems to be a

00:10:32

trend least up the 2020



00:10:34
of. Kind of application and

00:10:38
the question of cost and

00:10:39
duration was also noted there.

00:10:41
There's some other stops available

00:10:44
but it's not unsurprising that

00:10:46
in those cases where jurisdiction

00:10:50
was decided early that those

00:10:54
were short of proceedings, but

00:10:55
we're bifurcation occurred and you

00:10:58
ended up with two phases

00:11:00
that those cases went on

00:11:02
for much longer. If it

00:11:03
doesn't take a genius to



00:11:05

see that Dynamic a little

00:11:09

bit of the and I'll

00:11:12

stop sharing. Get out of

00:11:20

here. Can you stop showing

00:11:24

me but it's all back

00:11:26

on the screen? So I

00:11:31

think that provides a little

00:11:32

bit of context. So in

00:11:35

the world of trying to

00:11:37

save time, you know in

00:11:41

The Domestic Court contact sweet,

00:11:44

we've seen some very. Very

00:11:48

concerned considered and significant regimes



00:11:53

like in the US contact

00:11:54

summary summary judgment is well-known

00:11:56

and we have seen a

00:12:00

little bit more of those

00:12:02

types of that type of

00:12:04

thinking of working its way

00:12:05

into International arbitration and we

00:12:09

seen this in the new

00:12:10

exhibit rules under new treaties

00:12:13

particularly us grafted trees like

00:12:16

after and even in commercial

00:12:19

arbitration context. So before we

00:12:21

get into kind of the



00:12:22

investor-state scenario, I wanted to

00:12:26

call on Jennifer to give

00:12:28

us a bit of commentary

00:12:29

and contests for for where

00:12:31

we are in the the

00:12:32

arbitration World more generally, so

00:12:35

I'll pass it over to

00:12:36

to Jennifer. Thank you, and

00:12:43

I will focus in part

00:12:45

on a different rules and

00:12:48

which process exists to have

00:12:50

an early resolution. So it's

00:12:52

not so much a bifurcation



00:12:53
or is that could be

00:12:54
but it's basically an expedited

00:12:55
proceedings do in a situation.

00:12:57
We're trying to get rid

00:12:59
of a claim really quickly

00:13:01
and focusing in particular on

00:13:03
a provision that exists in

00:13:05
the end of the extreme

00:13:06
rules and kind of focus

00:13:09
of the early resolution is

00:13:11
manifestly without legal marriage and

00:13:13
that concept is something that

00:13:14
is in the Friday that



00:13:16

makes the rules and was

00:13:17

initially introduced in 2006 rules

00:13:20

and it under rule 41

00:13:23

5 and it says the

00:13:24

same component of 41 and

00:13:27

according to the exit Secretariat

00:13:28

when that was being put

00:13:29

into place and the thought

00:13:30

was it was provided in

00:13:32

order to address concerns about

00:13:34

limited screening power of the

00:13:36

secretary-general's provide. Registering a request

00:13:40

for arbitration. So the idea



00:13:41
was to be able to

00:13:43
jump in and be able

00:13:44
to get rid of it

00:13:45
quickly of a claim or

00:13:47
claimed if their manifest without

00:13:50
legal marriage and our similar

00:13:52
Provisions within the Expedition facility

00:13:54
rules Focus initially on them

00:13:56
on real 14 15 and

00:13:58
then go into a little

00:14:00
bit of the changes that

00:14:01
have been introduced in the

00:14:02
2022 rules rule 41 5



00:14:06

basically says agreed to another

00:14:09

expedited procedure for making preliminary

00:14:11

objections party May no later

00:14:14

than 30 days after the

00:14:15

constitution of the tribunal and

00:14:17

in any event before the

00:14:18

first session of the tribunal

00:14:19

file an objection that I

00:14:21

claim as manifestly without legal

00:14:22

Merit. So that is a

00:14:24

couple of points to it

00:14:25

to make your one is

00:14:26

referring to parties could be



00:14:28

either either party and other

00:14:29

rules have a distinction as

00:14:31

between which party can bring

00:14:32

such a an objection and

00:14:35

it has to happen quickly

00:14:36

no later than 30 days.

00:14:37

The constitution of the tribunal

00:14:39

and an event before the

00:14:40

first session of the tribunal

00:14:41

and then an in a

00:14:44

force that argument is it

00:14:45

is manifestly without legal Merit.

00:14:47

Obviously without legal Merit something



00:14:49
that is evident on his

00:14:52
face and in the tribunal

00:14:54
needs to according to the

00:14:55
rule and make a determination

00:14:56
at its first session or

00:14:58
promptly thereafter. So it's intended

00:15:00
to be resolved very quickly

00:15:02
and efficiently. And tribunals had

00:15:08
interpreted that provision to apply

00:15:10
to the situations in which

00:15:12
it's lacking. The tribunal is

00:15:14
lacking in confidence like an

00:15:16
interest diction or the where



00:15:18
they're at. The the claim

00:15:19
itself is lacking in Merit

00:15:20
and it tribunals have also

00:15:24
found that that can occur

00:15:26
in front of the main

00:15:27
claim an initial payment also

00:15:28
and other proceedings I can

00:15:32
And the proof that is

00:15:33
required in such a circumstance

00:15:35
is there's a legal impediment

00:15:37
to a claim. So it's

00:15:38
not a factual issue but

00:15:39
it's a legal issue must



00:15:41

establish that it's clearly and

00:15:43

obviously that's such legal impediment

00:15:45

exist. It can't be something

00:15:46

in which there is a

00:15:48

debate or discussion about it

00:15:49

or they rely heavily on

00:15:50

the facts and to take

00:15:53

facts as well as true.

00:15:54

What changes were made with

00:15:59

a 2022 rules will now

00:16:02

it's rule 41. The entire

00:16:04

rule itself is Manifest lack

00:16:06

of legal Merit. They're focusing



00:16:07

on that particular right at

00:16:11

a party May objects and

00:16:13

still a party either party

00:16:14

may have Jack that I

00:16:15

claim as manifestly without legal

00:16:17

Merit the objection and expressly

00:16:19

States as opposed to being

00:16:20

something may relate to the

00:16:23

substance of the claim the

00:16:25

jurisdiction of the center or

00:16:26

the confidence of the Tribunal.

00:16:28

Again, also expedited saying the

00:16:32

following procedure to apply a



00:16:33

party shall file a written

00:16:34

submission no later than 45

00:16:36

days after the constitution of

00:16:38

the tribunal. So it's a

00:16:39

little it's a little bit

00:16:40

more time for the party

00:16:41

who is making the motion

00:16:42

to file but still very

00:16:44

quick and then there's certain

00:16:46

Provisions in which to What

00:16:50

what the party needs to

00:16:51

provide written submission, so I

00:16:53

shall specify grounds on which



00:16:55
the objections based in contain

00:16:56
the statement of relevant facts

00:16:58
law and arguments and the

00:17:01
tribunal done. It says specifically

00:17:03
the tribunal shall render its

00:17:04
decision or award on the

00:17:06
objection within 60 days after

00:17:08
the latter of the Constitution

00:17:10
of the tribunal or the

00:17:11
last mission on the objection.

00:17:13
So again, it's also expedited

00:17:15
very specific time frame provided

00:17:17
for the tribunal to issue



00:17:18

a decision or an award

00:17:19

and a it's intended to

00:17:22

be a specific time frame

00:17:24

after the issuance of the

00:17:27

Constitution of the tribunal or

00:17:28

the last mission on the

00:17:30

objection. Whereas prior it has

00:17:32

been more General and it

00:17:34

was the first session or

00:17:37

promptly after which doesn't give

00:17:38

a specific time frame. In

00:17:43

any case so there are

00:17:45

few few differences, but more



00:17:46
or less. It's a little

00:17:47
bit more clear. There's a

00:17:48
little bit more time after

00:17:49
the moving party to prepare

00:17:51
their objection. The tribunal has

00:17:54
a specific time frame in

00:17:55
which issue its decision or

00:17:57
award. Any question is is

00:18:00
it used often has it

00:18:02
been used often and a

00:18:03
looking at the Ford E-150

00:18:06
objections in One Source indicated.

00:18:10
There were about 40 cases



00:18:11
that have been brought and

00:18:13
of those cases at about

00:18:15
10 have been successful in

00:18:17
getting rid of the entire

00:18:18
claim and four have been

00:18:21
successful in getting rid of

00:18:22
portion to query whether or

00:18:25
not that is something that

00:18:26
is is it about 25%

00:18:29
then be successful in getting

00:18:31
rid of the same entirely.

00:18:32
So it is is useful,

00:18:34
but obviously not a guarantee



00:18:35
that that will happen. And

00:18:37
so it can have an

00:18:38
effect of potentially prolonging the

00:18:40
arbitral dispute if that is

00:18:43
unsuccessful and I'll talk about

00:18:45
one case in particular in

00:18:47
a few minutes under under

00:18:49
pasta. But I kind of

00:18:51
was looking I had looked

00:18:52
specifically at 22 because that's

00:18:54
what I was able to

00:18:55
get quickly and and delve

00:18:56
into easily to look to



00:18:59

see whether or not something

00:19:00

that the same parties are

00:19:02

raising the same countries or

00:19:03

the same claimants. I didn't

00:19:05

really see a pattern of

00:19:07

the 22 that I that

00:19:08

I saw there were three

00:19:10

cases that were raised by

00:19:11

Panama to buy Venezuela to

00:19:14

buy hungry and then one

00:19:15

each Jordan, Ukraine Croatia Italy

00:19:18

Spain Korea Germany, Albania Bulgaria,

00:19:21

Kuwait Bangladesh and Rec no



00:19:23

particular pattern there. I looked

00:19:25

at party Council perhaps there

00:19:27

are some councillors were more

00:19:28

aggressive about using the objections

00:19:30

and others. I didn't really

00:19:32

find a pattern there either.

00:19:33

It seemed to be across

00:19:34

the board and then 1010

00:19:40

were granted in full and

00:19:41

four for impart. So it

00:19:42

seems it can be and

00:19:44

I can be helpful if

00:19:46

you can be successful as



00:19:47

a claimant. There are also

00:19:51

potential downsides one obviously can

00:19:54

prolong the proceeding if if

00:19:56

it's not granted to their

00:19:59

potential costs that could be

00:20:00

awarded against the moving party

00:20:02

which can serve as a

00:20:03

deterrent to not bring frivolous

00:20:05

motions. And then there's also

00:20:08

risk of potentially prejudicing the

00:20:10

tribunal if you're making certain

00:20:11

arguments, but you can't make

00:20:13

them. They may be prejudiced



00:20:15
against hearing Amor. Morgan going

00:20:18
forward. Other areas in which

00:20:21
other rules that have similar

00:20:23
provisions and had mentioned that

00:20:25
with respect to some of

00:20:26
the US agreement. So create

00:20:29
a u.s. Free trade agreements

00:20:30
Panama ustpa and crew ustpa

00:20:35
all contain similar. Although not

00:20:37
exactly the same and we're

00:20:38
eating at Provisions to take

00:20:41
one quick focus on kafta,

00:20:43
which does also have a



00:20:45
similar provision In Articles 10.24

00:20:49
and 10.25 in that case

00:20:52
is specific to responded as

00:20:54
the moving party and as

00:20:55
the spawning can make a

00:20:56
claim as a matter of

00:20:57
law that I claim submitted

00:20:58
is not a claim for

00:21:00
which an award in favor

00:21:01
of the claimant may be

00:21:02
made under article 10.26. It's

00:21:05
to be brought before the

00:21:07
tribunal as soon as possible



00:21:08

after the tribunal has constituted

00:21:10

and a new event later

00:21:12

than the date the tribunal

00:21:13

fixes for the respondent to

00:21:14

submit the counter Memorial that's

00:21:16

with respect to the objection

00:21:17

in 5 in the event

00:21:21

that the respondent so request

00:21:22

within 45 days after the

00:21:24

tribunal is constituted the tribunal

00:21:25

shall decide on an expedited

00:21:27

basis and injection under paragraph

00:21:29

for any objection to the



00:21:31
part of speech is not

00:21:32
within the tribunals confidence. So

00:21:35
it's required again, that's the

00:21:36
expedited proceeding needs to happen

00:21:38
quickly the tribunal specifies in

00:21:41
after the tribunal is to

00:21:43
suspend that any person get

00:21:45
on the merits and issue

00:21:46
a decision or an award

00:21:48
on the objections stay in

00:21:50
the grounds there for no

00:21:51
later than 150 days after

00:21:52
the date of the request



00:21:53

was tied to their request.

00:21:55

So the intent is to

00:21:56

be an expedited process. And

00:22:01

just to talk about 11

00:22:03

case in particular with respect

00:22:07

to Pacific Rim versus El

00:22:09

Salvador for a whether or

00:22:11

not this created a quick

00:22:14

resolution of the dispute. Otherwise,

00:22:18

I have the dates to

00:22:25

just see if this works

00:22:26

for a quick resolution options

00:22:30

were filed under Articles 10.24



00:22:34
and 10.25 in January 2010

00:22:36
at a decision by the

00:22:38
tribunal at rejecting the respondents

00:22:40
objections were at was issued

00:22:42
in August 2010. So eight

00:22:44
months eight months for that

00:22:45
process to happen, then they

00:22:47
responded filed a non expedited

00:22:50
jurisdictional objections. And apparently there

00:22:52
is a bifurcation in this

00:22:53
situation and that was under

00:22:55
article 41 one of the

00:22:57
20 2006 rolls. Filed in



00:23:00

August of 2010 and decision

00:23:02

on jurisdiction was issued in

00:23:04

June of 2012. So almost

00:23:06

two years later and that

00:23:09

was also rejected. The objections

00:23:11

were rejecting. It went forward

00:23:12

claimant file. No more on

00:23:13

the merits in March of

00:23:14

2013. And the resolution of

00:23:16

the award was issued in

00:23:17

October of 2016 to initial

00:23:20

three and a half years.

00:23:21

So very long not very



00:23:23

quick resolution about dispute so

00:23:26

it can it is obviously

00:23:28

a potential having these types

00:23:31

of quick resolution of disputes

00:23:32

happened at can expedite obviously

00:23:35

if it's successful and that

00:23:37

is the benefit but it

00:23:40

can also Force add to

00:23:41

the whole process and lengthen

00:23:43

the entire process overall and

00:23:45

just add that this isn't

00:23:46

exclusive to investor-state arbitration in

00:23:51

England, the law commission's final



00:23:53

review of arbitration Act of

00:23:54

1996 in England are considering

00:23:58

introduced. The same type of

00:24:00

proceeding introduce an expressed power

00:24:02

of Summer disposal which reflects

00:24:04

desire for arbitration proceedings to

00:24:06

move swiftly when a claim

00:24:09

or defense lacks Merit, so

00:24:10

it is kind of put

00:24:11

it in other areas as

00:24:12

well. Thanks for the shout-out

00:24:16

Jennifer ended up being and

00:24:22

incidentally the objections that we



00:24:25
did say send me the

00:24:26
initial liminary without an injection.

00:24:31
We're very similar to what

00:24:33
we faced in the jurisdiction

00:24:34
face and that it was

00:24:36
repeated again in the marriage

00:24:37
stays. So it really beg

00:24:39
the question. If you could

00:24:40
have had your time machine

00:24:41
a look ahead if we're

00:24:42
just going to deal with

00:24:42
it in there. Anyways, you

00:24:44
know why I have so



00:24:49

yeah. I know very interesting

00:24:50

comment on the the the

00:24:51

kind of did this movement

00:24:53

to what what what I

00:24:55

guess you can call the

00:24:57

court affrication. Are the litigation

00:25:00

of defecation if that's the

00:25:01

word of arbitration and we

00:25:04

saw some of that debate

00:25:05

actually in our Monday session

00:25:06

when we were talking about

00:25:07

that the Nigeria p&id case

00:25:09

and chief judge Knoll critique



00:25:12
of kind of the weaknesses

00:25:14
of arbitration, which some would

00:25:15
say ours are some of

00:25:16
its strength but you can

00:25:18
end up and you know

00:25:19
corruption cases with a desire

00:25:22
to kind of coordinate processes,

00:25:24
but this is one of

00:25:26
those situations where again it's

00:25:27
brings up complications. So I

00:25:32
think right into that the

00:25:33
topic of today's session I

00:25:36
think Raphael is going to



00:25:37

kick us off and yesterday

00:25:39

we had a great session

00:25:40

excited about the new rules

00:25:43

and I think a really

00:25:44

good place to start sort

00:25:45

of where the modern practice

00:25:47

is going. It is with

00:25:49

the it's a rule. So

00:25:49

maybe a Raffaele you could

00:25:52

you could take us through

00:25:53

some of that. First I

00:25:56

want to thank you for

00:25:58

hosting and for moderating sancos



00:26:00

Antonio for inviting me to

00:26:02

this panel and think Michael

00:26:04

panelist right people in steam

00:26:08

table. what Ian is referring

00:26:13

to is a few rules

00:26:14

related specifically to buy furcation

00:26:17

specifically rule 42, which I

00:26:21

think compliments with Jennifer was

00:26:23

just mentioning which is the

00:26:25

summary disposition and it's all

00:26:28

related to Efficiency procedural economy

00:26:33

and the ability to dispose

00:26:36

of certain issues of all



00:26:39

the wall or the whole

00:26:40

case in a single and

00:26:43

normally early procedure. So the

00:26:47

div of the bifurcation of

00:26:49

the price for patient is

00:26:50

simply is simply that you

00:26:52

know, it's separating into smaller

00:26:55

pieces that can be disposed

00:26:58

quickly for you in the

00:27:00

whole picture and viewing the

00:27:02

certain issues and viewing the

00:27:04

certain issues need to be

00:27:06

either disposed completely and and



00:27:09

the case is done rule

00:27:13

42 is a new addition

00:27:15

to the exit rules in

00:27:17

the 2022 version and eat

00:27:20

addresses to specifically the bifurcation

00:27:22

of merits or it's not

00:27:24

the early procedural issues, but

00:27:26

the merits of the dispute

00:27:31

I think exit included this

00:27:33

to try to to try

00:27:37

to unify Aviation and try

00:27:39

to further that goal of

00:27:43

economy of procedural economy This



00:27:47

was already happening. I mean,

00:27:48

I I was looking at

00:27:49

some research or I was

00:27:51

doing some research and there

00:27:52

are cases as early as

00:27:53

2010 likely bendy versus Argentina

00:27:56

when the bifurcation of marriage

00:27:59

was was done base and

00:28:01

procedural economy and efficiency for

00:28:03

the case in that particular

00:28:05

occasion 2010 the tribunal bifurcated

00:28:08

liability for damages, for example

00:28:11

And glencore versus believe it



00:28:14

would just be a case

00:28:15

in 2018 for Kaden jurisdiction

00:28:18

liability and damages as a

00:28:20

try for caitian and effect

00:28:21

also based on judicial economy.

00:28:24

There were cases also very

00:28:28

early on that evaluated request

00:28:31

for bifurcation of the merits

00:28:32

and decided that it was

00:28:34

not economically to do it

00:28:36

and not efficient for the

00:28:37

parties for Temple and church

00:28:38

mining vs. Indonesia in 2014.



00:28:41

This was already happening very

00:28:43

early on in the in

00:28:45

the practice of investor arbitration.

00:28:48

However, You have to have

00:28:52

a tribunal that is willing

00:28:54

to to do with number

00:28:55

one answer. You know, that

00:28:56

is righteous enough to say

00:28:57

well this is this is

00:28:59

good for the efficiency of

00:29:00

the case, but I think

00:29:03

the overall the overall system

00:29:07

was not necessarily taking it



00:29:09

on. So excited has consider

00:29:11

it appropriate. for a sender

00:29:14

isolation purposes and for managing

00:29:17

expectations to introduce his rule

00:29:21

42 Also is g a

00:29:24

Tribune of the ability for

00:29:26

the first time to do

00:29:27

it on its own because

00:29:28

before the tribunal has had

00:29:30

to rely on the parties

00:29:32

request. So now you have

00:29:34

the ability for 30 to

00:29:36

do a Swiss Bounty and



00:29:37

decide with this issue doesn't

00:29:39

sound like he needs to

00:29:42

go all the way into

00:29:43

the marriage phase of the

00:29:44

case. We can maybe resolve

00:29:45

it early or dispose of

00:29:48

the whole case based on

00:29:50

on the fact that the

00:29:51

tribunal sees that perhaps the

00:29:53

case doesn't have doesn't have

00:29:55

enough married. Then the parties

00:29:56

are not doing or not

00:29:58

or not. We're not requesting



00:30:01
it. So I think he

00:30:02
clarifies to a large extent

00:30:05
the power of the tribunal

00:30:06
and it's standardized the rules.

00:30:09
So will the Trevino's in

00:30:10
the future. We'll we'll have

00:30:13
clear guidelines as to how

00:30:14
to approach this request reminder

00:30:17
for patient in the merits

00:30:18
face of the case. Then

00:30:21
we have a couple of

00:30:21
rules that are break out

00:30:24
from former rule 41 and



00:30:27

that's a dozen six set

00:30:29

of exit rules, and they

00:30:31

have been developed further for

00:30:33

temple Route 43 related to

00:30:36

preliminary objections and Route 43

00:30:40

44 45 Old deal with

00:30:42

preliminary objections, but in different

00:30:44

in different ways. So Route

00:30:49

43 is basically Route 41

00:30:51

one of the rule 41

00:30:53

to that has been separated

00:30:55

its own roof. I need

00:30:57

it relates to the objections



00:30:59

were returning with Syria and

00:31:01

Russia new persona. That normally

00:31:02

comes back from article 25

00:31:05

of the convection the convention.

00:31:07

Again, the issue of a

00:31:10

Cinderella station and manager of

00:31:11

expectations was very high. I

00:31:14

think in the in the

00:31:15

exit intentions of creating this

00:31:17

new rule and giving it

00:31:19

to the viewing of the

00:31:20

ability to do it again,

00:31:21

sua sponte so that the



00:31:23

tribunal could decide even when

00:31:25

the parties are not requesting

00:31:26

this this bifurcation of the

00:31:31

preliminary objections 40 44 lemonade

00:31:38

have Jackson's with a request

00:31:39

for bifurcation. This is a

00:31:42

specifically, you know, when the

00:31:44

parties are requesting the bifurcation

00:31:45

the tribunal again looking at

00:31:48

the economy and the efficiency

00:31:50

of the case if it's

00:31:52

necessary to separate that face

00:31:54

or take it all the



00:31:55

way down to the merits

00:31:56

which can sometimes takes a

00:31:59

lot of time. One point

00:32:04

that interested me in Route

00:32:05

43 and 44 is that

00:32:08

the tribunal when bifurcating has

00:32:13

180 days after the last

00:32:14

admission on the bar for

00:32:16

caitian to decide whether his

00:32:18

number for Kate or not?

00:32:20

And 240 days since I

00:32:23

last mission on the merits

00:32:24

or combined submissions to the



00:32:26

side as well on the

00:32:28

on the merits of those

00:32:30

submissions. So I was wondering

00:32:33

and I percent this I

00:32:36

never send this question to

00:32:37

do you all on the

00:32:39

panel whether there is an

00:32:40

incentive there for a tribunal

00:32:42

to bifurcate because if we're

00:32:44

not having no more time,

00:32:45

what seems to be more

00:32:47

time, although I haven't done

00:32:48

the exact math to try



00:32:50

to determine whether various in

00:32:52

fact more time for the

00:32:53

tribunal but I think there

00:32:55

is an effective incentive there.

00:32:57

So just regular to bifurcate

00:32:59

because of the 80 180-day.

00:33:03

He's going to be added

00:33:04

to the face in the

00:33:06

marriage that is going to

00:33:07

that is going to follow

00:33:09

so all these rules again

00:33:12

and I'll have the the

00:33:13

intent of provide efficiency economy



00:33:16
and an to make the

00:33:18
process more efficient to some

00:33:20
extent as well to to

00:33:22
cut on the time but

00:33:23
I don't know if that

00:33:24
is specifically accomplish based on

00:33:27
these statistics said that we're

00:33:28
going to see we're going

00:33:30
to see through this fan.

00:33:31
Thanks. Thanks very much for

00:33:35
FAL that that was a

00:33:36
great introduction to many of

00:33:38
you actually read all of



00:33:41

the new exit rules in

00:33:42

detail on some of the

00:33:43

innovations. That exit is attempting

00:33:46

to try to Marriott these

00:33:48

objectives for procedural Efficiency. Do

00:33:56

I know it's been a

00:33:57

lot of time thinking about

00:33:58

bifurcation and some of the

00:34:01

test that have developed and

00:34:03

as we see new looks

00:34:04

of rules if it is

00:34:05

kind of set up its

00:34:06

own version of the past,



00:34:08

but do you know if

00:34:09

the benefit of folks are

00:34:11

11 Time by furcation, maybe

00:34:13

if you give it a

00:34:14

little bit of a an

00:34:15

introduction describing the test and

00:34:18

then, you know a little

00:34:19

bit of an assessment what

00:34:21

you what you think of

00:34:22

the test whether it's being

00:34:23

practical and you know, how

00:34:25

is that actually work so

00:34:27

Lindsay? Thank you, and I'm



00:34:30

really happy to let me

00:34:32

see if I can make

00:34:33

a 3 Factor test for

00:34:34

bifurcation as fascinating as likely

00:34:40

the most well-known case regarding

00:34:42

the application for bifurcation on

00:34:44

the criteria to be applied

00:34:46

as gram of gold versus

00:34:48

USA which that's out. That's

00:34:50

three factors test. So the

00:34:52

first question is whether the

00:34:54

objection is 3 months. She's

00:34:56

serious and substantial. So in



00:34:59

other words is the objection

00:35:01

entirely for Bliss or excitation.

00:35:03

That's the first part of

00:35:05

the past the second part

00:35:07

of the pasta if successful

00:35:09

would the objection do away

00:35:11

with at least some part

00:35:13

or an essential part or

00:35:14

all of the preceding right?

00:35:16

So will the proceedings go

00:35:17

away if the objection is

00:35:19

successful and finally can the

00:35:22

objection be determined without prejudging



00:35:25

the merits which of course

00:35:26

would be inappropriate to do.

00:35:29

Now out of score application

00:35:31

of all of these three

00:35:33

factors is aimed at and

00:35:35

intended to achieve as both

00:35:37

Ian and Raphael mentioned earlier

00:35:39

today efficiency. That's the goal

00:35:42

at the hope. That's what

00:35:44

the factors are designed to

00:35:46

push it. Right. So if

00:35:47

the objection is not serious

00:35:48

or substantial it's going to



00:35:50

be a waste of everyone's

00:35:51

time to buy for Kate

00:35:53

that issue. If the objection

00:35:55

will not dispose of any

00:35:57

part of the key again.

00:35:58

It's a waste of time

00:35:59

then he buy for kit

00:36:00

and if the injection is

00:36:02

so intertwined with the merits

00:36:04

that you're going to have

00:36:06

to assess the evidence Twice

00:36:08

first and that bifurcated part

00:36:10

of the proceedings and again



00:36:12

at the marriage then of

00:36:13

course. The opposite of efficient

00:36:16

so that's really what the

00:36:17

goal of those three factors

00:36:19

are to obtain efficiency a

00:36:24

slightly different approach Glamis. So

00:36:29

for exam 1 tribunal aniki

00:36:32

case against Croatia expressly stated

00:36:35

that it refused to be

00:36:36

placed in the straitjacket of

00:36:37

Klamath that there should be

00:36:39

a whole host of other

00:36:40

factors that the tribunal should



00:36:42

consider on a case-by-case basis.

00:36:45

Some of those factors are

00:36:47

whether bifurcation might result in

00:36:50

Prejudice or unfair advantage to

00:36:54

one party. Another factor is

00:36:56

whether by 40 and would

00:36:58

significantly reduce the complexity of

00:37:01

the case. Whether bifurcation is

00:37:05

the requested premature or there

00:37:07

comes too early and actually

00:37:09

whether the bifurcation request has

00:37:11

come too late have there

00:37:13

been dilatory tactics on on



00:37:15
the part of the party

00:37:16
bringing the request is it

00:37:18
just too late in the

00:37:19
proceedings for bifurcations make any

00:37:21
sense and at the end

00:37:23
of the day with tribunals

00:37:25
do is apply some of

00:37:27
these factors on a case-by-case

00:37:28
basis focusing on some may

00:37:31
be others depending on the

00:37:33
facts and circumstances of the

00:37:34
particular case. Now what I

00:37:38
think is is most interesting



00:37:40

is which of these factors

00:37:43

is most important which are

00:37:46

the key ones in terms

00:37:48

of going ahead and implementing

00:37:50

that procedure efficiency. Just we'll

00:37:53

talk about the data later

00:37:54

today. He'll talk about the

00:37:55

Hard Rod data. I what

00:37:58

I tried to do before

00:37:59

this panel is go back

00:38:00

and canvas the last 15

00:38:03

bifurcation request that have been

00:38:06

in proceedings that I've been



00:38:07

a part of an admittedly

00:38:08

that's not a huge sample

00:38:09

size but and undergoing that

00:38:12

exercise and reviewing the last

00:38:14

15 times. I've seen this

00:38:16

a few things but out

00:38:18

to me. Earth is bad

00:38:20

as cleaning. We actually consented

00:38:24

to the bifurcation request most

00:38:26

of the time so of

00:38:27

the 15, I think more

00:38:28

than ten of those we

00:38:30

said sure we will book



00:38:31

him fenced bifurcation and strategically,

00:38:35

why would you can send

00:38:37

the bifurcation and almost all

00:38:40

cases and almost all the

00:38:41

times that we agree to

00:38:42

consent? It's because they're requesting

00:38:45

party presented a very narrow

00:38:47

discreet legal issue that would

00:38:50

dispose of the case. So

00:38:52

really that factor to of

00:38:54

the Glamis test is this

00:38:55

the easy discreet legal issue

00:38:59

that a tribunal to look



00:39:00

at it doesn't have to

00:39:01

know what the rest of

00:39:02

the keys and must be

00:39:04

dealt with quickly and efficiently

00:39:05

and if the answer is

00:39:07

that what ya been in

00:39:09

our view there was no

00:39:10

point opposing bifurcation because we

00:39:12

thought the tribunal would likely

00:39:14

accept that bifurcation request. So

00:39:17

it didn't make sense to

00:39:18

plead the issue. Argue the

00:39:20

issue and rather we moved



00:39:23

rate right to actually dealing

00:39:25

with on as a separate

00:39:26

phase of the proceedings. And

00:39:28

of course, there's a real

00:39:28

cost issue when you're deciding

00:39:30

whether to or or eject

00:39:32

the bifurcation request. The second

00:39:36

thing that I noticed is

00:39:37

where we objected a bifurcation

00:39:39

and were successful which was

00:39:42

in all cases except one.

00:39:44

It was on the basis

00:39:46

that the objection was intertwined



00:39:48
with the Merit that was

00:39:49
that third factor of the

00:39:51
Glamis test. That's where we've

00:39:52
been most successful in objecting

00:39:55
to a bifurcation request. And

00:39:58
what we would all we

00:39:59
argued is that the tribunal

00:40:00
gun would have to look

00:40:01
at the same evidence twice.

00:40:03
They might have to see

00:40:04
the same fact witness more

00:40:06
than once they might have

00:40:07
to have more than once



00:40:09
having an expert come before

00:40:10
than the expert and so

00:40:12
the scope of the objection

00:40:15
that we was simply too

00:40:17
broad. So it's when my

00:40:19
view that was the one

00:40:21
in my experience. That was

00:40:22
the objection that that one

00:40:25
before a tribunal most often.

00:40:28
We were also successful an

00:40:31
opposing bifurcation where the request

00:40:34
was delayed. We're simply came

00:40:37
to wait in the proceedings



00:40:39

to make any sense. I'm

00:40:41

in one case it was

00:40:44

the bifurcation request came days

00:40:46

before the statement of Defence

00:40:47

was due and the other

00:40:50

party said we simply can't

00:40:52

I want to buy for

00:40:54

kids and then it it

00:40:56

it was on a discrete

00:40:57

legal issues to be spare.

00:40:59

But that legal issue was

00:41:02

known to the other side

00:41:04

since probably even before our



00:41:05
request for arbitration. So they

00:41:08
waited until after the statement

00:41:09
of claim months after the

00:41:10
game and shortly before they

00:41:14
will actually know if I

00:41:16
forget it and we stumble

00:41:17
that simply doesn't make sense

00:41:18
this time because when you

00:41:20
put in your statement of

00:41:21
Defence, that's when you would

00:41:22
have raised the jurisdictional ejections

00:41:24
anyway, and to carve out

00:41:25
a separate bifurcation. About to



00:41:28
going to Discovery requests and

00:41:29
all the rest would only

00:41:30
delay proceedings that wouldn't be

00:41:32
efficient. And we also argue

00:41:34
that it was plainly a

00:41:36
delay tactic. So that's that's

00:41:38
kind of another way where

00:41:39
we've been losing by 4

00:41:42
kitchen. I'm so in my

00:41:44
experience the two key factors

00:41:46
than to consider. Our when

00:41:48
is the objection made does

00:41:50
it make sense to be



00:41:52

efficient? And what is the

00:41:54

scope of the objection? If

00:41:56

it's that narrow legal issue

00:41:58

that separate and apart from

00:42:00

having to decide the facts

00:42:01

of the case then in

00:42:03

my view.... The key factor

00:42:05

for a tribunal to look

00:42:06

at I've actually rarely in

00:42:09

this is done trust me.

00:42:10

I've rarely encountered a tribunal

00:42:13

being persuaded by that first

00:42:15

chapter of the Glamis test,



00:42:18
which is that the objection

00:42:19
itself is frivolous and I

00:42:21
suspect that's because I'm eating.

00:42:24
Objection. You kind of have

00:42:25
to get into the merits

00:42:26
of the objection. So, You're

00:42:28
arguing the merits and you're

00:42:29
coming dangerously close to just

00:42:31
saying, okay, let's deal with

00:42:32
that issue. But that's my

00:42:33
guess it's a bit redundant

00:42:34
but that's not been as

00:42:36
persuasive as the other two



00:42:37

factors have been in my

00:42:40

experience. So the question then

00:42:42

becomes is that right is

00:42:45

the test on these factors

00:42:47

being used correctly and I

00:42:50

know an earlier today on

00:42:51

your slide that you put

00:42:53

off rightly pointed out that

00:42:55

if the separate fees of

00:42:57

the preceding terminate proceeding. Well,

00:42:59

then of course the preceding

00:43:01

concludes more quickly and painfully

00:43:03

obvious and it's a challenge



00:43:05

is unsuccessful. And of course,

00:43:07

it takes longer to conclude.

00:43:09

So the key question then

00:43:11

is that the key issue

00:43:13

was that bifurcation 10 the

00:43:15

efficient really only if a

00:43:17

person goes away or substantial

00:43:20

part of the preceding goes

00:43:21

way. How do you know

00:43:22

if that will happen in

00:43:24

my Buick sits two of

00:43:25

the three key factors, of

00:43:27

course twitch? Thanks very much.



00:43:31

Lindsay that really sets out

00:43:34

to test. Well, you know

00:43:36

when it when I hear

00:43:37

this is called a three-part

00:43:39

test all a part of

00:43:42

it really is the efficiency

00:43:44

of the underlined in which

00:43:46

you could almost say, that

00:43:48

would be the fourth element,

00:43:49

even though it's not stated

00:43:51

exactly in that manner as

00:43:55

you mentioned it and it

00:43:56

is I could use earlier



00:43:57

a lot of this can

00:43:59

be a pretty dire consequences

00:44:00

on schedule and the cost

00:44:03

and how the arbitration will

00:44:05

proceed. I'm what what is

00:44:07

your sensitive tribunals are handling

00:44:10

a dull moment, you know

00:44:12

mindful of the impact of

00:44:15

their decisions. I mean, I

00:44:20

I think that is the

00:44:21

key driving force and essentially

00:44:23

when we're setting out our

00:44:25

objections to usually in a



00:44:27

sections bifurcation on on claim

00:44:29

inside not always but when

00:44:31

we're sending out our objections

00:44:33

to the tribunal it's it's

00:44:34

with that piece front and

00:44:36

center. So if you think

00:44:37

about when you're writing your

00:44:39

briefs objecting to the bifurcation,

00:44:41

the intro is that none

00:44:43

of this makes sense. It

00:44:45

will not be efficient on

00:44:46

any keys and here are

00:44:48

the factors that support it



00:44:49
right and that you emphasized,

00:44:51
you know, one or two

00:44:52
of the three or more

00:44:53
depending on the facts and

00:44:55
circumstances of your kids always

00:44:57
driving home. But the whole

00:44:58
point of it is is

00:44:59
whether it will be efficient

00:45:01
or not. And I think

00:45:02
if you can practically demonstrate

00:45:04
and again those of the

00:45:06
arbitrator in the room will

00:45:08
know better than me, but



00:45:09
if you can practically demonstrate

00:45:11
to a tribunal but actually

00:45:13
the calendar will be expended

00:45:15
more likely than not for

00:45:16
for no reason and I

00:45:18
think that Hopefully is that

00:45:20
is the driving force of

00:45:21
the decision-making? Select let's drill

00:45:25
drill drill down to this

00:45:26
a little bit more and

00:45:28
you know Ken I'll call

00:45:30
on you next we seen,

00:45:32
you know, the development of



00:45:35
the rules, you know, starting

00:45:37
back kind of in the

00:45:38
old Den social rules. And

00:45:40
as we now developed with

00:45:42
a new exit rules that

00:45:43
there is a real focus

00:45:44
on this question and you

00:45:47
know from a tribunal perspective

00:45:51
and I'm not asking you

00:45:52
to tip anyone off I

00:45:54
do you do ever try

00:45:55
to work but maybe more

00:45:56
with your your Council had



00:45:57

on. You know, how should

00:46:01

we all be looking at

00:46:02

Council arbitrators users at the

00:46:05

role of bifurcation. Is this

00:46:07

something that should become kind

00:46:10

of people sumption in favor

00:46:13

of or should we be

00:46:14

looking, you know towards kind

00:46:17

of single-phase arbitration does the

00:46:18

model or I mean, how

00:46:20

are you saying this as

00:46:22

well? We saw Raphael talk

00:46:25

a bit about kind of



00:46:26
this idea that developing sense

00:46:29
that you no tribunal can

00:46:31
do this to respond to

00:46:32
this kind of this inherent

00:46:33
power string all those kind

00:46:38
of into the mix. Give

00:46:39
us some of your thoughts

00:46:40
again. Thanks very much Ian

00:46:43
and Liberty First Bank of

00:46:45
Jose Antonio when you for

00:46:47
inviting me on to the

00:46:48
Stellar panel, and I want

00:46:49
to say Hello to friends



00:46:51
and colleagues and adversaries who

00:46:53
are the audience is Lowe's

00:46:55
on the chat of this

00:46:57
is a great opportunity. Thank

00:46:58
you in terms of the

00:47:00
history and the evolution the

00:47:03
it was for the longest

00:47:05
time the presumption that if

00:47:08
it was a challenge to

00:47:09
jurisdiction that a tribunal should

00:47:12
take care of that first

00:47:13
before it looks at the

00:47:16
merits and before heading full



00:47:18

engagement on the facts and

00:47:20

that is reflected. For example

00:47:22

in the 1976 concert Road

00:47:24

Rules, which says that the

00:47:26

tribunal should rule on a

00:47:29

plea concerning jurisdiction as a

00:47:31

preliminary questions. I think the

00:47:35

part that was because at

00:47:37

that time jurisdictional objections were

00:47:39

pretty discreet. We now know

00:47:42

that jurisdiction and admissibility objections

00:47:47

are very complex multi-layered. And

00:47:50

so if this idea that



00:47:52

you presumptively stop the arbitration

00:47:55

and resolved that plumbing. Our

00:47:56

question is is not as

00:47:58

realistic in today's world show

00:48:01

in 2010. The answer to

00:48:04

rules were in fact changed

00:48:05

and if they made it

00:48:07

such that it strictly amazing

00:48:11

as opposed to a should

00:48:12

as on the question of

00:48:14

whether a tribunal they fight

00:48:17

for cake and that's important

00:48:19

also reflects. The tribunal has



00:48:23

its own sua sponte powers

00:48:25

as was mentioned and it's

00:48:27

Abboud with the flexibility to

00:48:30

be able to determine the

00:48:31

best course of action. Efficiency

00:48:33

furnace equal treatment of the

00:48:35

parties are squarely within the

00:48:36

Mandate of the Tribune. from

00:48:40

the exit convention point of

00:48:42

view will 40 article 41

00:48:44

it says that the dispute

00:48:48

If there's the question is

00:48:50

whether the dispute is not



00:48:51
within the jurisdiction then it

00:48:54
shall be considered by the

00:48:55
parties by the tribunal whether

00:48:58
to deal with it as

00:48:58
a preliminary question or to

00:49:00
join it with the marriage.

00:49:01
So there's already authorization in

00:49:04
the in the in the

00:49:06
convention and that is also

00:49:08
reflected in the 2022 rules

00:49:11
in both rule 42 and

00:49:13
Rule 43 and essentially says

00:49:17
that you could you may



00:49:18
address a plenary objection in

00:49:20
a separate phase or join

00:49:23
it as rejection to the

00:49:25
parents. So that's the state

00:49:29
has the question is is

00:49:30
that the right policy and

00:49:31
is that what Advocate want

00:49:33
and I think that really

00:49:34
depends on whether you're claiming

00:49:37
were representing claimant respondent or

00:49:39
whether you're a tribunal number

00:49:40
in there have been some

00:49:43
commentators including Lucy bring would



00:49:46

have made a pretty persuasive

00:49:47

case that there should be

00:49:50

a presumption against bifurcating on

00:49:55

efficiency ground which is mentioned

00:49:58

as the principal reason unless

00:50:00

the tribunal can be convinced

00:50:03

that the determination of the

00:50:04

bifurcated issue will result in

00:50:07

the termination of the entire

00:50:09

proceeding. Because if you fail

00:50:12

and you make a heavy

00:50:14

we saw a 57% of

00:50:16

these requests for arbitration fail,



00:50:18
then you're putting the parties

00:50:20
to the task of having

00:50:21
a much more elongated entirety

00:50:25
of the preceding that usually

00:50:26
will increased by 18 months

00:50:29
to two years and posing

00:50:30
a huge burden on payments.

00:50:32
For example who may have

00:50:33
limited resources. So as to

00:50:38
why from the different points

00:50:41
of view people bring these

00:50:42
cases and we saw all

00:50:44
it in the study the



00:50:45

Burford study all but one

00:50:47

was brought by a respondent.

00:50:50

So think about that it's

00:50:52

clearly is there to get

00:50:54

them. Is that a truly

00:50:55

a technique to delay, but

00:50:59

it's part of it to

00:51:00

book for responded and they

00:51:03

want some things that are

00:51:04

not self-evident. They want the

00:51:07

tribunal from the get-go to

00:51:08

be focusing on the facts.

00:51:11

That make the claimant look



00:51:13

bad as opposed to the

00:51:16

facts of Cleveland's playing which

00:51:18

makes the respondent look better.

00:51:19

So, you know, there's often

00:51:21

defenses of corruption the illegal

00:51:23

to abuse of process all

00:51:25

of which the respondent once

00:51:26

you get before the tribunal

00:51:27

as early as possible and

00:51:30

it also it can be

00:51:34

used as a tactical. Do

00:51:36

I take a tribunal if

00:51:37

it's so obvious that will



00:51:38
be concerned about that. What's

00:51:46
interesting is that because the

00:51:47
first test looks at whether

00:51:50
you made a substantial or

00:51:52
a non-frivolous of plane or

00:51:56
objection? It really requires parties

00:51:59
to brief the request for

00:52:01
bifurcation with rape granularity. Well

00:52:06
before the tribunal has seen

00:52:09
the memorial sometime will be

00:52:11
for the parties themselves really

00:52:13
know with the opposing parties

00:52:15
facts are going to be



00:52:17
so it is is it

00:52:19
in that respect? I don't

00:52:20
think it's very helpful one

00:52:24
case where I was representing

00:52:26
claimant the respondent brought corruption

00:52:30
and fraud offences. And in

00:52:33
the request for bifurcation, they

00:52:36
brought in all sorts of

00:52:37
evidence. They brought in evidence

00:52:39
of experts they brought trying

00:52:42
to Sully the centrally the

00:52:45
claimant and I personally think

00:52:47
when I look as a



00:52:49

hindsight to what happened in

00:52:50

the case, which hopefully was

00:52:52

dismissed them really did affect

00:52:56

the Mind's Eye of the

00:52:58

tribunal in how they should

00:53:01

be receiving the claims of

00:53:02

the of the climate So

00:53:04

I responded obvious. Mike might

00:53:08

not Street Fighter for caitian

00:53:10

if Lindsay Mansion if questions

00:53:16

are intertwined with the facts

00:53:18

and that's often the what's

00:53:19

the strongest objection it wanted



00:53:22

May and also if they

00:53:26

feel that they could make

00:53:27

a more persuasive case on

00:53:30

these objections. Once they have

00:53:33

the whole case before the

00:53:34

tribunal the holistic approach. A

00:53:37

claimant will almost always oppose

00:53:41

bifurcation and they want them

00:53:44

to focus on the measures

00:53:45

of the respondent not on

00:53:47

any of the claimant of

00:53:51

but there are rare instances

00:53:53

as it once. He has



00:53:54

mentioned where if there's a

00:53:55

discreet legal issue. It actually

00:53:57

served all parties interest and

00:54:00

if there's a fundraiser and

00:54:01

bomb it may serve the

00:54:02

funders interest in having a

00:54:04

dispute legal issue B of

00:54:07

A separated and resolved before

00:54:09

moving forward. So tribunals try

00:54:13

to get it right. It's

00:54:15

in many ways. They want

00:54:16

to get the Goldilocks of

00:54:17

response, you know, they've been



00:54:18

wanted they don't want to

00:54:20

spend one way or the

00:54:21

other but it does create

00:54:23

quite a beating Prius with

00:54:25

a lot of unknown risks.

00:54:27

Such as a risk of

00:54:29

parallel proceedings if a partial

00:54:32

award is challenging Court while

00:54:34

the arbitration continues. There's that

00:54:37

that risk of the risk

00:54:40

of the tribunal having been

00:54:42

seen a portion of the

00:54:44

facts are already having prejudice



00:54:46
the issue. Before getting even

00:54:50
the memorial or certainly before

00:54:51
getting the carnival board. There's

00:54:57
also a risk of abusing

00:54:59
The Briefing on the Flesh

00:55:00
and the showcasing their cases

00:55:02
in the marriage. So they're

00:55:06
my personal view is that

00:55:08
it has to be a

00:55:10
very the scope is very

00:55:12
important. What's your question? And

00:55:14
it it it is a

00:55:15
special proceeding from a plane's



00:55:18

point of view. If you

00:55:19

along at a sitting by

00:55:21

two years 18 months to

00:55:22

two years you could have

00:55:23

been best for fatigue you

00:55:25

could have exhaustion of limited

00:55:27

resources is all sorts of

00:55:29

harm that could result in

00:55:34

those will not be recovered

00:55:36

in a class later cost

00:55:38

award if there's the intangible.

00:55:42

So for that reason it

00:55:46

seems to be there should



00:55:46

be a presumption against bifurcation

00:55:48

unless the special circumstances. Thanks

00:55:53

very much for that. Can't

00:55:54

just following up on on

00:55:55

one of the points you

00:55:56

made, you know, it seems

00:55:59

to be an accepted practice.

00:56:01

You want to hear earlier

00:56:04

or later. And do you

00:56:06

get to look at Lindsay's

00:56:08

experience? It makes sense that

00:56:10

he's aware. Potential challenge coming

00:56:17

down the pike. What do



00:56:21

you think about the timing

00:56:22

of resolving a bifurcation challenge?

00:56:26

Not the jurisdictional you early

00:56:32

as possible after the Memorial

00:56:34

after the counter Memorial with

00:56:36

which was kind of the

00:56:37

preferred timings. Juliander obviously are

00:56:43

million scenarios that one could

00:56:45

paint as to when a

00:56:47

request for bifurcation they arrived,

00:56:49

but generally you may think

00:56:50

of it before the filing

00:56:53

of the claimants Memorial. At



00:56:57
the time or after the

00:56:59
Memorial has been submitted or

00:57:02
after the counter Memorial. So

00:57:04
those are three discrete. I've

00:57:06
been involved in many cases

00:57:07
where they're done almost from

00:57:09
the outset because you you

00:57:10
when you come to that

00:57:12
first session and there's you're

00:57:15
dealing with the tribunal trying

00:57:17
to ascertain what's the strength

00:57:18
of the case or otherwise,

00:57:19
there may be a request



00:57:21
for bifurcation raised at that

00:57:24
first session. It may actually

00:57:26
be argued that the first

00:57:28
session of these at some

00:57:30
level of generalities the tribunal

00:57:33
could then ask for a

00:57:34
briefing. I'm worried substitute briefing

00:57:36
on the question. So that

00:57:38
is well before the parties

00:57:40
are filed their substantiv memorial

00:57:42
it's were coming and I

00:57:44
will say that it's dissipated

00:57:46
in the exit row 44



00:57:49
that it take place after

00:57:51
that time. It may take

00:57:53
place. Once the plane lands

00:57:55
Memorial is on file. And

00:57:57
the respondent has had a

00:57:58
chance to really understand what

00:58:01
the position is and they

00:58:02
therefore could couldn't they could

00:58:05
put forth with their objection

00:58:08
objections are in Route 44

00:58:11
says that it would have

00:58:12
to be filed within 45

00:58:14
days after the Memorial in



00:58:16
the mirror to file is

00:58:20
that if there is no

00:58:23
identified. There's no possibility at

00:58:26
least in the rule or

00:58:27
filing it after the counter

00:58:29
claim is submitted. Is it

00:58:31
is it Lindsay has shown

00:58:32
that example, you can't wait

00:58:34
to hear about to buy

00:58:35
your statement. It depends to

00:58:37
file. So I've also seen

00:58:41
by the way at the

00:58:42
at the first living room



00:58:44
conference one, once a party

00:58:47
has raised the prospect of

00:58:48
a filing for bifurcation the

00:58:51
tribunal may ask the parties

00:58:52
to propose to separate procedural

00:58:55
schedule one on the contingency

00:58:58
of having a bifurcated proceeding

00:59:00
and one of their constancy

00:59:01
of a unified Force. So

00:59:04
that that happened I should

00:59:07
mention that the new rules

00:59:08
add a feature to which

00:59:10
is that it says that



00:59:12

we're 40 41st. It says

00:59:13

that once this has been

00:59:17

raised the proceeding on the

00:59:18

merge going to be suspended.

00:59:21

So it's kind of limited

00:59:23

the unless the parties agree,

00:59:26

but I think it's limited

00:59:27

somewhat the creativity of the

00:59:28

tribunal to say. Okay, we

00:59:30

have these discreet pulmonary objections

00:59:33

are questions to be resolved.

00:59:34

We can still go through

00:59:36

disclosure. On the Mariner of



00:59:40

the fences and have them

00:59:42

happen simultaneously. The new rules

00:59:44

really don't have a design

00:59:46

proficiency looked at one path

00:59:48

of One path only. Extra

00:59:52

much. Can our time is

00:59:54

limited. We we have saved

00:59:57

the best for last no

00:59:59

sense the other apology to

01:00:02

Jennifer perhaps that being up

01:00:06

against our our time limit,

01:00:07

but you know how to

01:00:09

put it. Mildly Jeff kind



01:00:10
of wrote the book on

01:00:11
this subject and has a

01:00:13
deep knowledge and it's been

01:00:14
a lot of time analyzing

01:00:16
cost and efficiency issues because

01:00:19
this is part of his

01:00:20
business in the third-party funding

01:00:22
business that at Burford. I

01:00:24
think one of the questions

01:00:25
and goes to the title

01:00:27
of the panel is the

01:00:30
impact of trifurcation. We talked

01:00:32
about different forms of trifurcation



01:00:33
in the kind of the

01:00:34
cap that context is typically

01:00:36
the question of whether damages

01:00:39
shouldn't that be separate off

01:00:41
and address in the separate

01:00:43
stays comes up to eat

01:00:45
in many cases, but I'll

01:00:47
leave that to Jeff and

01:00:48
if you have any other

01:00:49
comments Jeff certainly your Welcome

01:00:51
to jump. It will give

01:00:53
him a time. I'll just

01:00:54
try to a couple people



01:00:55
in the front of the

01:00:58
chapter that we rode on

01:01:00
chapter 5 concerned bifurcation and

01:01:06
Fabrication. It was by far

01:01:08
the hardest chapter two, right

01:01:09
and I say that because

01:01:10
it's hard to get a

01:01:11
hold of the actual decision

01:01:12
because very few of these

01:01:14
decisions are made publicly available

01:01:16
at the time that rendered

01:01:17
so you may get them

01:01:19
after the fact I'm increasingly



01:01:20
these days you make it

01:01:22
I mean as I looked

01:01:22
this morning to see how

01:01:23
many publicly available to students

01:01:28
this year. But there's only

01:01:30
three you can find often

01:01:33
times you'll find out about

01:01:34
that when they were comes

01:01:35
out and will be one

01:01:36
paragraph that says in procedure

01:01:38
for the number to the

01:01:39
tribunal decided to bifurcate or

01:01:42
not. And that's really not



01:01:43
helpful from address potential to

01:01:47
put together at the time,

01:01:49
but I do think And

01:01:51
the dad about that and

01:01:52
finally laid out hasn't really

01:01:54
changed. I mean if you

01:01:56
look at Lucy Greenwoods data

01:01:57
in 2011, or data and

01:01:59
2019 are they that in

01:02:01
2020, up until now our

01:02:04
internal data I need these

01:02:05
applications of the average rate

01:02:08
of success is similar to



01:02:09
the average rate of success

01:02:10
in investor-state arbitration. Generally, it's

01:02:13
between fifty and sixty percent.

01:02:14
What's interesting now is increasingly

01:02:19
it's not just questions of

01:02:20
these are manifest lack of

01:02:22
legal Merit or is there

01:02:23
flaming arrow issue 3 or

01:02:24
6 in it's a Quantum.

01:02:27
So what we're seeing is

01:02:29
parties seeking either either Buy

01:02:32
application to separate out issues

01:02:35
of quantum either in addition



01:02:36
to an application to buy

01:02:37
forget jurisdiction or on its

01:02:39
own. I'm in the same

01:02:40
tribunal. Sua sponte. I think

01:02:44
sometime before there was a

01:02:46
rule that so provided themselves

01:02:49
separating. The case and often

01:02:51
times in many of these

01:02:53
cases. You don't know that

01:02:54
they're going to do it.

01:02:54
So while you're waiting three

01:02:56
years for years five years

01:02:58
for an award instead what



01:02:59

you get and you see

01:03:00

this increasingly in the Renewables

01:03:02

is a decision on liability

01:03:04

and principles of one that

01:03:08

you waited for 5 years.

01:03:09

You have a decision that

01:03:10

leads to another 12 to

01:03:11

18 months of wrangling because

01:03:13

the tribunal says, okay. Well,

01:03:14

we don't accept the claimants

01:03:16

usually don't accept the respondents

01:03:17

DCF. So why we want

01:03:19

the experts to get together



01:03:20

and have some of the

01:03:21

mission and that increases with

01:03:23

the time and the cops,

01:03:24

which is unfortunate that there

01:03:28

are good examples of tribunals

01:03:31

bifurcating issues of quantum and

01:03:33

one of the three that

01:03:35

was rendered and you could

01:03:36

find or earlier this year

01:03:38

that makes the face in

01:03:40

Serbia and Sir Daniel Bethlehem

01:03:43

was really the driving force

01:03:44

behind this procedure order number



01:03:45
for was rendered on the

01:03:47
21st of August 2023, but

01:03:49
instead of Sua sponte by

01:03:53
forgetting damages three years and

01:03:55
four years some of that

01:03:56
notice to the party's here

01:03:57
at the first session. So

01:03:58
Daniel said look at once

01:04:03
the volume. Once they leave

01:04:05
the decision on liability is

01:04:06
Rich and there's a finding

01:04:08
of viability of the tribunal

01:04:09
is left with the unenviable



01:04:10
position of trying to make

01:04:11
sense of quantum submissions expert

01:04:13
reports that have been put

01:04:15
in at the beginning of

01:04:16
that any appreciation of how

01:04:18
the liability face is going

01:04:19
to fall out. We are

01:04:20
increasingly seeing circumstances in which

01:04:21
tribunals ever admitting matters back

01:04:23
to the parties for further

01:04:25
submissions on Quantum, which goes

01:04:27
to be issue of delay

01:04:27
has to be super-efficient see



01:04:29

go to the Quantum of

01:04:32

the tribunal and this is

01:04:34

why this is so that

01:04:39

this case was registered last

01:04:40

year. He raised it at

01:04:42

the first session as I

01:04:43

as an issue seeing as

01:04:44

he is quite active and

01:04:47

then the following Father requests

01:04:52

to bifurcate and it was

01:04:53

successful at the reasons make

01:04:56

a lot of sense. But

01:04:57

frankly, I wrong and I



01:04:59

live in September of this

01:05:03

year the response plan ahead

01:05:04

and filed this it's kind

01:05:05

of more on the Merritt

01:05:06

and what this does is

01:05:07

it prevents increasing challenges two

01:05:12

words that are defective on

01:05:13

issues of Damages increasingly. If

01:05:16

you look at the number

01:05:16

of opposed to what application

01:05:17

for their rectification applications and

01:05:20

almond applications where tribunals get

01:05:22

it wrong is in Damages



01:05:24

there. They they don't think

01:05:26

the interest what they say

01:05:27

the wrong interest rate. What

01:05:29

were they don't specify between

01:05:30

pre and post awarded trip

01:05:31

where they were where were

01:05:33

they take the wrong country

01:05:34

risk premium or they used

01:05:35

the wrong exhibit in the

01:05:37

claimants depending on fire and

01:05:45

monetize Awards. We have to

01:05:46

assess the likelihood of a

01:05:47

moment. I'm so easy these



01:05:49
grounds irregularly. Take me to

01:05:51
doing what's what's today in

01:05:53
Bethlehem did here helps minimize

01:05:57
the risk of that because

01:05:58
you have parties that are

01:06:02
able to put together Quantum

01:06:03
that is in line with

01:06:04
the decision my liability because

01:06:06
in this in this procedure

01:06:07
or he goes on to

01:06:08
say, well we still haven't

01:06:15
yet figured out where we're

01:06:16
going to come out of



01:06:16
liability. There's quite a sensible

01:06:18
approach and I quite recommended

01:06:20
that's really point one. What

01:06:23
one is abused as soon

01:06:24
as they're hard to find

01:06:25
going to this is a

01:06:26
good decision, which I think

01:06:27
we should do. What is

01:06:28
Sir Daniel Bethlehem does and

01:06:30
point three World close is

01:06:32
mutual cost. I'm in the

01:06:36
sea green with data. She

01:06:37
quite rightly shows that when



01:06:39

cases are when cases are

01:06:41

bifurcated and the name of

01:06:44

the case continues after that

01:06:46

decision. I'm here at 18

01:06:48

months to two years. So

01:06:50

it increased the cost and

01:06:52

time from dependency the duration

01:06:57

and some tribunals have stabbed

01:07:00

in rendering decision on bifurcation

01:07:01

of that cost can be

01:07:03

awarded in the award. Unfortunately

01:07:06

those same tribunals when it

01:07:08

comes time for the word



01:07:09
don't actually work. I'm so

01:07:12
you know, I think tribunal

01:07:13
should be a bit more

01:07:13
aggressive in his unsuccessful applications

01:07:16
because it's some cases party

01:07:18
seek bifurcation one of the

01:07:20
one time in the case

01:07:21
or more than one kind

01:07:22
of bifurcation or if they're

01:07:23
unhappy with how that works

01:07:25
out. They'll file an application

01:07:26
for reconsideration not in the

01:07:28
rules, but it happened a



01:07:30
challenge to the tribunal because

01:07:34
You don't want to be

01:07:36
more aggressive on cost of

01:07:37
words and also interim cost

01:07:39
to make it payable within

01:07:40
30 days that's going to

01:07:41
increase proper use of of

01:07:46
the procedural application the Natural

01:07:48
Pawz 1143 your timeliness accuracy

01:07:55
to the numbers is great.

01:07:57
We do have a couple

01:07:58
of more minutes. So I'd

01:07:59
like to see if they're



01:08:01
there any questions in the

01:08:03
audience or comments. I know

01:08:05
this is an issue that

01:08:07
the address by Midian. microphone

01:08:20
Dr. Rivas a q in

01:08:23
it and thank you everyone

01:08:24
for introducing some of the

01:08:28
changes in and helping to

01:08:30
explain the development of of

01:08:33
Articles 41 and and subsequent

01:08:36
articles in the new rules.

01:08:37
I would like to to

01:08:39
be a little bit in



01:08:45
a weight challenge the notion

01:08:46
of of of a presumption

01:08:48
against bifurcation between jurisdiction and

01:08:56
and and and the marriage

01:08:58
reliability. I was looking at

01:09:00
the at the 18 of

01:09:03
of the latest statistics of

01:09:05
addiction statistics this year and

01:09:09
the the the breakdown of

01:09:16
Old Country Road exit arbitrations

01:09:19
is 48% of holding claims.

01:09:24
No, that's That's the one

01:09:26
said that were one and



01:09:28
then those that that were

01:09:30
the remaining ones are 21%

01:09:34
+ 2% I were dismissing.

01:09:37
Sorry. I weren't the kind

01:09:39
of jurisdiction. That's 21% and

01:09:42
I were deciding that the

01:09:43
claims are manifestly without legal

01:09:45
marriage. So that's that's 24%.

01:09:48
23% of the remaining ones

01:09:50
29% are those were the

01:09:54
tribunal dismissed all claims? So

01:09:56
so so my logic is

01:09:58
more like if if if



01:09:59

you didn't have a real

01:10:03

basis for for bifurcation, then

01:10:08

perhaps that number the number

01:10:10

between the number of awards

01:10:13

declined jurisdiction on towards deciding

01:10:15

that the claims are are

01:10:17

manifested without legal Merit might

01:10:20

be is smaller, but close

01:10:23

to 25% This is 23%

01:10:25

Seems to be a fairly

01:10:28

significant number 222 have not

01:10:32

to have a presumption and

01:10:33

I know that there is



01:10:34

of course, but with my

01:10:36

my my thinking on this

01:10:37

is well. Their attorneys also

01:10:41

to be on the porch

01:10:42

and you weren't where I

01:10:43

think that there's a very

01:10:44

strong argument is is is

01:10:45

on the suggestion that that

01:10:47

the the test a three-part

01:10:48

test Bebe re grossly applied

01:10:51

but the presumption against the

01:10:55

bifurcation I'm I'm still struggling

01:10:58

with that especially if if



01:11:01
you do take the the

01:11:03
road of counsel for States.

01:11:06
Does anyone want to respond

01:11:09
to Jose Antonio in that

01:11:10
Ken since you raised originally?

01:11:16
Thank you, Jose Antonio and

01:11:17
what what I don't know

01:11:18
is whether the statistics you're

01:11:20
reading encompasses partial Awards. Because

01:11:24
the partial award could dismiss

01:11:26
the claims on the basis

01:11:30
of arbitration our jurisdiction and

01:11:32
it might be considered part



01:11:35
of that 23% I'm not

01:11:40
entirely sure that I know

01:11:42
that the 4848 % that

01:11:44
I read at the beginning

01:11:45
of our Awards upholding claim

01:11:48
in Port Orange. But from

01:11:51
the statistics. I know I

01:11:54
don't know. I don't know.

01:11:57
Do you want to have

01:12:01
a full proceeding on very

01:12:04
challenged of jurisdictional objections based

01:12:12
upon the full record because

01:12:15
that's really the difference is



01:12:16
that you do it a

01:12:17
based upon the partial record,

01:12:19
but in a bifurcated proceeding

01:12:21
or do you really need

01:12:22
to Antietam before respondent has

01:12:25
put forth its kind of

01:12:27
Memorial and before work. Sometimes

01:12:29
you can before the claimant

01:12:31
has put forward its from

01:12:32
world and I think there's

01:12:34
a lot of risks and

01:12:35
doing that. So the ghetto

01:12:40
And we see that with



01:12:42

a high percentage of denial

01:12:44

of these bifurcated bifurcations. If

01:12:47

there's a real risk you

01:12:48

go through the process 18

01:12:50

months go by and then

01:12:52

they say no we're not

01:12:53

going to bifurcate or we're

01:12:55

not going to dismiss the

01:12:56

entire case. So you now

01:12:58

have to proceed forward and

01:13:00

then you have the real

01:13:01

risk of having the same

01:13:02

evidence has been presented to



01:13:04
the tribunal. We have the

01:13:05
risk of the prejudgment by

01:13:07
the tribunal having seen it

01:13:08
at least one cut on

01:13:10
those dishes so I can

01:13:11
get the matter of risk

01:13:13
assessment and I am sure

01:13:18
that there's some economic way

01:13:20
of working out of formula

01:13:21
of depending on what the

01:13:23
bait jurisdictional basis is working

01:13:25
out whether it's better for

01:13:27
the purposes of cost and



01:13:29
and the final of finality

01:13:31
of the decision, but I

01:13:33
haven't been through that. I

01:13:36
know that there have been

01:13:37
some comments that says 2

01:13:40
Go through that undertaking and

01:13:42
it doesn't justify having a

01:13:44
presumption in favor. And it

01:13:46
may not have a chance

01:13:48
to support even having a

01:13:51
no presumption. In fact the

01:13:54
presumption against maybe the better

01:13:56
course would be more realistic.



01:13:59

I think he needs to

01:14:06

be very active in making

01:14:09

this a termination with the

01:14:10

party. So I think the

01:14:12

tribunal needs to try to

01:14:14

understand the case early on

01:14:15

to determine whether there's going

01:14:19

to be a justification for

01:14:20

not only separate into Jersey

01:14:22

Channel face, which I tend

01:14:23

to agree that needs to

01:14:24

be addressed early and addressed

01:14:27

quickly. For the purposes of



01:14:30
disposing of the whole case

01:14:31
may be a very early

01:14:33
stage. However, if you is

01:14:36
a Torino can perceive or

01:14:38
see the potential risk of

01:14:40
route 41 Motions like new

01:14:43
Route 31 wishes as explained

01:14:46
by you Jennifer for subsequent

01:14:48
rule 42 bifurcation of the

01:14:51
merits. You you have to

01:14:54
as a centurion. Remember you

01:14:56
have to really be kindness

01:14:58
and of those possibilities in



01:15:00

order to avoid extending the

01:15:04

case, that could be I

01:15:05

mean if it passes the

01:15:06

jurisdictional test. It could be

01:15:09

18 to 24 months. Let's

01:15:11

take to to get an

01:15:12

award in the relatively simple

01:15:14

case. But if you start

01:15:18

bifurcating issues and discrete issues

01:15:23

that at the end of

01:15:24

the day are not going

01:15:26

to accomplish the benefits of

01:15:28

efficiency and procedural economy. Long



01:15:33
and I took the opportunity

01:15:34
to end our session there.

01:15:38
I just wanted to thank

01:15:39
our panel of just a

01:15:41
great group with lots of

01:15:43
insights, and I know I

01:15:44
learned a lot. So thanks

01:15:46
for Raphael Jeff Jennifer Ken

01:15:49
and Lindsay for their excellent

01:15:51
contributions at the thank you.

01:15:54
We're going to take a

01:15:58
break for 20 minutes and

01:16:00
we will have our next



01:16:01

battle alternative approaches to value

01:16:03

in Damages in investor-state arbitration

01:16:05

about 12:15 or so. So

01:16:08

looking forward to seeing everyone

01:16:10

there and let's thank our

01:16:11

panel for their excellent birthday.

01:16:17

music