Damages in investment and commercial arbitration

A menu of issues

1. **Standards** of compensation and standards of proof.

   Short of liability caps or clauses on liquidated damages, are arbitrators occasionally too reluctant to embrace the principle of "**full compensation**" (but-for, differential method, expectational/consequential damages, *lucrum cessans*…)? Do they focus excessively on reliance/performance/direct damages (*damnun emergens*)?

2. **Moral** damages: why are they so seldom granted? Is double counting a real risk?

3. Any role for (non-contractual) **punitive** damages?

4. **Contributory fault**: is there any objective alternative to the frequent subjective "haircut" (e.g. 25% of damages, as in *Yukos*)?

5. Is ***anchoring*** real ("the more you ask, the more you get")? Do counsel systematically **inflate claims** (e.g. to protect against "Salomonic" arbitrators)?

6. Do damages raise **special issues** in some types of commercial disputes (construction projects, M&A transactions, financial disputes…)

7. When is **bifurcation** (1. liability-2. *quantum*) efficient or desirable? Should the standard of proof be the same on either one?

8. How can Tribunals make the most (and enhance the impartiality) of **party-appointed experts** (e.g. use of common model/methodology, hot-tubbing, list of agreed and disagreed points…)? Under what exceptional circumstances should Tribunals appoint their own expert?

9. **Pre-award interest**: do parties typically neglect this issue, even when its economic impact on the final award may be