

# Damages in International Arbitration

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Presented by

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**NANI PALKHIVALA ARBITRATION CENTRE**

## Overview

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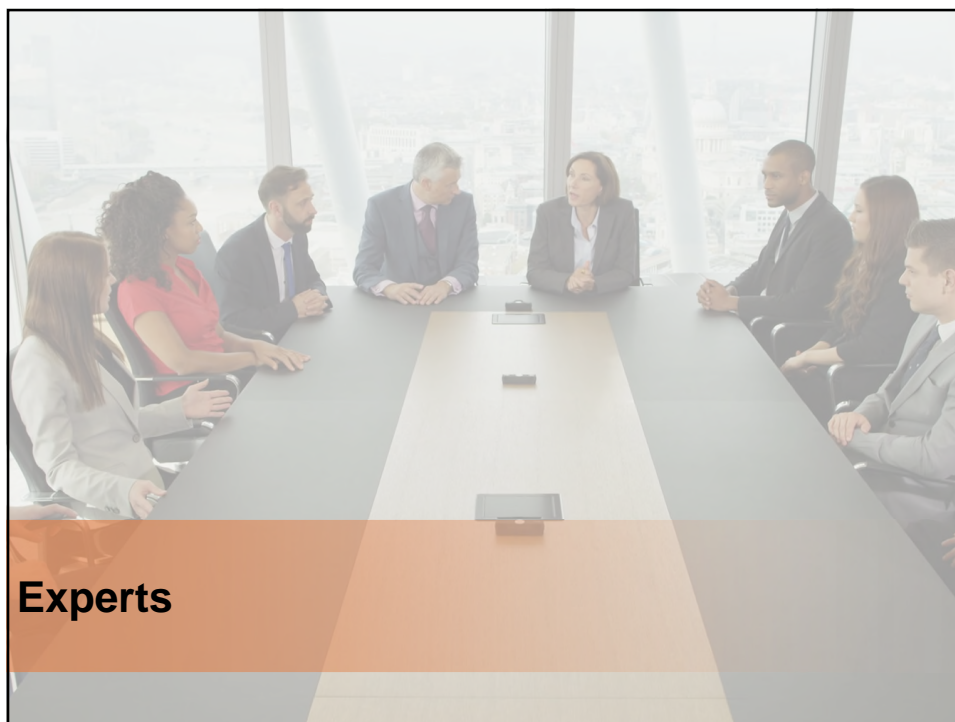
- ▶ Bifurcation
- ▶ Experts
- ▶ Compensatory and non-compensatory
- ▶ Industry-specific issues
  - » Energy & natural resources
  - » Mergers & Acquisitions
  - » Infrastructure



## **Bifurcation**

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- ▶ Bifurcation vs preliminary issues
- ▶ Relationship of quantum to merits
- ▶ Quantification options dependant on merits
- ▶ Delay in final outcome



## **Experts**

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- ▶ Tribunal or party-appointed
- ▶ Independence of party appointed
- ▶ Experts of like discipline answering the same questions and working from the same data set
- ▶ Proactive case management of experts



## **Compensatory Damages**

- ▶ Effect of the applicable law
- ▶ Effect of the parties' agreement
  - » restrictions (direct/indirect, consequential)
  - » exceptions to restrictions (gross negligence)
  - » liquidated damages

## Non-compensatory Damages

- ▶ Specific performance
- ▶ Nominal
- ▶ Punitive/Exemplary
- ▶ Moral
- ▶ Enforceability

Bifurcation

Experts

Compensation

Industries

9



**Industries**

## **Energy and Natural Resources**

- ▶ Key valuation issues in extractive resources matters
  - » Size and nature of reserves
  - » Price forecasts
  - » Contractual, regulatory and country-specific risks
  - » Legal theory of the case
- ▶ Calculating loss of profits
  - » Methodologies to assess damages
- ▶ Forfeiture remedies
- ▶ Price adjustment distinguished from damages

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11

## **Mergers & Acquisitions**

- ▶ Different but interlocking claims for loss
- ▶ Use of quantum experts
- ▶ Financial statements, reporting obligations, accuracy
- ▶ Purchase price adjustments
  - » differences between contracting and closing dates
  - » agreed date for price adjustment
  - » multipliers
- ▶ Fiscal and other obligations

Bifurcation

Experts

Compensation

Industries

12

## **Infrastructure**

- ▶ General and pre-ascertained damages – the Indian position on proof of LDs
- ▶ Damages for termination – general and contractual
- ▶ Contractual remedies for compensation
- ▶ Prolongation remedies
- ▶ Scope changes
- ▶ Acceleration-related costs

Bifurcation

Experts

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13

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**Questions?**

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14



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