



Arbitration and Mediation for Attorneys and Their Business Clients



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Bridging the Valuation Gap: Strategic Tools for Managing Damages Disputes in Arbitration

The key moment has arrived. In a high-stakes arbitration involving an ownership interest in a company, your client's expert testifies that the plaintiff's interest is worth \$19.2 million, relying on industry-standard valuation methods and well-supported projections. But not so fast: the defendant's expert raises her right hand, swears to tell the truth and—just as confidently—opines that plaintiff's interest is worth no more than \$750,000.

The methodologies diverge, the assumptions clash, and the arbitrator's responsibility is to sort through the financial crossfire. How he may process the information leaves both you and your adversary feeling uncertain, and your respective clients vulnerable.

Unlike liability determinations—which typically hinge on factual disputes or legal interpretations—damages calculations in complex commercial matters frequently involve competing expert valuations that differ by orders of magnitude.

Valuation experts offer conflicting professional opinions predicated upon divergent methodologies, assumptions and risk assessments. These inherent

uncertainties create fertile ground for legitimate disagreement among well-credentialed experts.

Faced with substantially disparate presentations from well-credentialed experts, arbitrators are tasked with determining which expert's approach most accurately reflects economic reality. An arbitrator, no matter how attentive and well-intentioned, may reach a conclusion that does not align with either party's expectation.

For business litigators, the "battle of the valuation experts" constitutes one of the more challenging aspects of high stakes arbitration practice—and one where strategic planning can meaningfully reduce the potential for disappointment.

Here are a few suggestions.

Selecting the Right Arbitrator: Financial Acumen Is a Strategic Asset

When a case turns on damages, arbitrators' subject matter expertise regarding liability issues may be less important than meaningful experience in financial analysis, accounting, or valuation.

Consider arbitrators whose resumes reveal experience as a CFO, CPA, or investment banker. Other resources, such as American Arbitration Association case managers, can help you identify arbitrators who understand damages models and whose eyes won't glaze over when experts begin discussing the weighted average cost of capital.

Arbitrators with financial fluency won't necessarily eliminate the valuation gap—but they are better equipped to understand why it exists and how to navigate it intelligently.

Concurrent Testimony: Putting Experts Side by Side

Traditional expert testimony often resembles two people having separate conversations. One expert delivers an uninterrupted narrative, then the opposing expert does the same. The arbitrator is left to connect dots that may not align.

One way to change this dynamic is through concurrent expert testimony. While not the most appetizing of descriptive terms, "hot tubbing"—as this increasingly common approach in complex arbitrations is called—places both experts on the

stand at the same time. The experts address the same issues in real time, often responding to questions from the arbitrator.

The result is direct comparison, fewer missed connections, and clarity as to where and why the experts disagree.

To maximize the benefits, work with opposing counsel to organize the session around key valuation elements: lost profits calculations, growth projections, discount rates, and risk premiums. Encourage your experts not only to defend their approach, but to clearly articulate the limitations in alternative presentations.

When structured properly, concurrent testimony transforms an abstract valuation debate into a focused dialogue that provides the arbitrator with information needed for decision-making.

Avoid the All-or-Nothing Mistake: Provide Arbitrators With Flexibility Through Risk Scenarios and Sensitivity Analyses

Presenting a single valuation number may lead an arbitrator to the binary choice of accepting your expert's entire approach or rejecting it wholesale.

Instead, encourage your expert to present a range of outcomes based on variable inputs. Such “sensitivity analyses” demonstrate how changes in key assumptions affect the bottom line.

This flexibility empowers arbitrators to accept some elements of one expert's approach while adjusting others. Instead of being forced to adopt one model wholesale, the arbitrator can tailor an award based on independent assessment of each component.

Bifurcation and Mediation: Separating Issues to Create Resolution Opportunities

Sometimes the smartest move is to separate liability from damages. Bifurcating the arbitration allows parties to focus first on whether liability exists, then address damages separately if needed.

If liability is established, bifurcation creates a natural window for mediation before proceeding to a damages hearing. Once liability is clear, both sides have better

information and stronger incentives to negotiate. This approach eliminates uncertainty from divergent expert presentations and allows for creative solutions—structured payments and non-monetary remedies—that may not be available through a pure damages award.

In appropriate cases, bifurcation paired with mediation can transform a contentious arbitration into a resolved business problem.

High-Low Agreements: Quietly Managing Risk

When damages uncertainty is high, a confidential high-low agreement offers protection and predictability for both parties. These arrangements establish private minimum and maximum amounts: if the arbitrator's award falls below the floor, it's adjusted upward; if it exceeds the ceiling, it's reduced.

The arbitrator remains unaware of these boundaries and renders the award on the merits. Meanwhile, claimants are assured of recovering at least a baseline amount, and respondents limit their downside risk. Neither side gives up the ability to present a full case or obtain a binding award.

Negotiating a high-low requires careful consideration of exposure, leverage, and likely outcomes. But when parties are far apart, these agreements provide valuable insurance without compromising advocacy.

Baseball Arbitration: Encouraging Reasonableness Through Final Offers

In cases where the parties want to reduce valuation uncertainty and incentivize reasonable positions, they may consider agreeing to "baseball arbitration." Each party submits a proposed damages amount, and the arbitrator must choose one or the other without modification—no averaging, no crafting a third number.

The rationale is simple: knowing that only one number can prevail, each party is encouraged to submit a figure that is both defensible and reasonable. Extreme positions become risky, because they are unlikely to be selected. The result is often a narrowing of the damages gap and more efficient presentation of the expert evidence.

Baseball arbitration can be tailored further with “night baseball,” where the arbitrator makes a blind determination and the figure closest to that ruling becomes the award.

Final Thoughts: Closing the Gap, Enhancing the Process

No strategy will entirely eliminate uncertainty in commercial damages disputes. But smart planning and procedural creativity can bring structure and clarity to even the most complex valuations.

By selecting financially literate arbitrators and utilizing expert “hot tubbing,” counsel can facilitate damages decisions that reflect economic reality. By implementing protective techniques—mediation of damages once liability is determined, high-low agreements and baseball arbitration—counsel can hedge against well-intentioned but potentially misguided arbitral decisions.

For attorneys navigating the valuation gap, these opportunities can provide a strategic advantage. The key is recognizing that damages disputes require different tools than liability disputes—and planning accordingly.

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