



## Why A Financial Subject Matter Expert Might Be Just The Right Choice For Arbitrator or Mediator

In most cases a lawyer or retired Judge is chosen to act as the Arbitrator or Mediator. However, in many situations it might be better to have a subject matter expert fill this role. I will admit, being a financial subject matter expert who has practiced as such for over 35 years – I am biased – but with good reason.

As you know, litigation is burdensome, no matter what route is followed – court, mediation and/or arbitration. Cases often move between venues – from the court to a mediation, back to court, and then eventually to an arbitration. More and more disputes are now moving from the court to med-arb to try to expedite the entire process, including achieving a resolution sooner.

The types of cases that get litigated cover a wide range of industries, numerous legal issues, and many different circumstances. Although some cases are somewhat straightforward, many are extremely complicated – in terms of the issues to be decided as well as scientific and economic considerations. Most litigants look to be compensated for harm of some sort – be it oppression, breach of agreed terms, infringement, personal injury, missed opportunity, breached representations and warranties, etc. Although some look for vindication in kind, most cases involve the quantification of harm, by way of a monetary award. In fact, almost all cases involve the determination of economic damages or loss resulting from a finding of liability. As a result, a Subject Matter Expert, one who knows the theory as well as the mechanics of quantifying economic damages/losses and/or business valuations can be very helpful.

A Subject Matter Expert can be retained as Mediator or a solo Arbitrator, or a member of an Arbitral Panel. The types of cases in which this makes most sense include the value of shares or other corporate interests, financial but-for scenarios to be considered, business risk sensitive matters (post acquisition, employment agreement terms breaches), patent infringements, income determination, accounting/tax applications, financial oppression, and funds tracing/fraud cases. These types of disputes are financially weighted and lend themselves to detailed review and understanding by someone with financial expertise.

My pitch – before deciding on your Mediator or Arbitrator – think about using a financial Subject Matter Expert in the role ... it just might add up to getting the right decision!

*Farley Cohen is a Chartered Professional Accountant (CPA) and a Chartered Business Valuator (CBV) and is also a Fellow of the Chartered Institute of Arbitrators (FCIArb). He has acted in the roles of Expert, Mediator or Arbitrator in hundreds of cases and has been qualified as an expert in Provincial and Federal Courts in Canada as well as in the US and the UK.*