



# The Arbitration Review of the Americas 2020

---

Published by Global Arbitration Review in association with

Baker McKenzie

Borden Ladner Gervais LLP

BVI International Arbitration Centre

Center for Arbitration and Mediation of the Chamber  
of Commerce Brazil-Canada

CFGS – Correia, Fleury, Gama e Silva Advogados

Dentons

FTI Consulting

Holland & Knight

JAMS

Kobre & Kim

MHR | Martínez de Hoz & Rueda

Moreno Baldovino Estudio de Abogados

Morgan & Morgan

Pérez Bustamante & Ponce

Quinn Emanuel Urquhart & Sullivan, LLP

Ruiz-Silva Abogados, SC

WilmerHale

# The Arbitration Review of the Americas 2020

---

A Global Arbitration Review Special Report

Reproduced with permission from Law Business Research Ltd  
This article was first published in July 2019  
For further information please contact [Natalie.Clarke@lbresearch.com](mailto:Natalie.Clarke@lbresearch.com)



## The Arbitration Review of the Americas 2020

**Account manager** J'nea- Louise Wright

**Head of production** Adam Myers

**Editorial coordinator** Hannah Higgins

**Deputy head of production** Simon Busby

**Production editor** Harry Turner

**Chief subeditor** Jonathan Allen

**Subeditor** Janina Godowska

**Publisher** David Samuels

**Cover** iStock.com/blackdovfx

### Subscription details

To subscribe please contact:

Global Arbitration Review

87 Lancaster Road

London, W11 1QQ

United Kingdom

Tel: +44 20 3780 4134

Fax: +44 20 7229 6910

[subscriptions@globalarbitrationreview.com](mailto:subscriptions@globalarbitrationreview.com)

No photocopying. CLA and other agency licensing systems do not apply.

For an authorised copy, contact [claire.bagnall@globalarbitrationreview.com](mailto:claire.bagnall@globalarbitrationreview.com).

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2019, be advised that this is a developing area.

ISBN: 978-1-83862-207-7

© 2019 Law Business Research Limited

Printed and distributed by Encompass Print Solutions

Tel: 0844 2480 112

# The Arbitration Review of the Americas 2020

---

## A Global Arbitration Review Special Report

Published in association with:

Baker McKenzie

Borden Ladner Gervais LLP

BVI International Arbitration Centre

Center for Arbitration and Mediation of the Chamber of Commerce  
Brazil-Canada

CFGS – Correia, Fleury, Gama e Silva Advogados

Dentons

FTI Consulting

Holland & Knight

JAMS

Kobre & Kim

MHR | Martínez de Hoz & Rueda

Moreno Baldovino Estudio de Abogados

Morgan & Morgan

Pérez Bustamante & Ponce

Quinn Emanuel Urquhart & Sullivan, LLP

Ruiz-Silva Abogados, SC

WilmerHale

Preface .....	vi
---------------	----

## Overviews

Addressing Issues of Corruption and Arbitration in Brazil .....	1
<b>André de Luizi Correia</b> CFGs – Correia, Fleury, Gama e Silva Advogados	

Energy Arbitration in Latin America .....	7
<b>Claudio Salas</b> WilmerHale	

Enforcement in the United States.....	18
<b>Jef Klazen, Marcus J Green and Chris Cogburn</b> Kobre & Kim	

International Arbitration in the Caribbean .....	25
<b>Francois Lassalle</b> BVI International Arbitration Centre	

Investment Treaty Arbitration in the Americas .....	33
<b>David M Orta, Brian H Rowe, Julianne Jaquith and Kristopher Yue</b> Quinn Emanuel Urquhart & Sullivan, LLP	

Overview: JAMS.....	41
<b>Robert B Davidson and Matthew Rushton</b> JAMS	

Overview: Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada.....	45
<b>Eleonora M B L Coelho and Clara Kneese de Moraes Bastos</b>	

Center for Arbitration and Mediation of the Chamber  
of Commerce Brazil-Canada

The Relevance of Audited Financial Statements in a Valuation Analysis.....	50
<b>Eddie Tobis</b> FTI Consulting	

The Role of Artificial Intelligence in International Arbitration.....	56
<b>Meriam Al-Rashid and Ulyana Bardyn</b> Dentons	

## Country chapters

Argentina.....	60	Ecuador.....	84
<b>José A Martínez de Hoz and Francisco A Amallo</b>		<b>Rodrigo Jijón-Letort, Juan Manuel Marchán,</b>	
MHR   Martínez de Hoz & Rueda		<b>Javier Jaramillo-Troya and Camilo Muriel-Bedoya</b>	
		Pérez Bustamante & Ponce	
Bolivia.....	65	Mexico: The judiciary strikes back . . . in aid	
<b>Andrés Moreno Gutierrez and Daniel Arredondo</b>		of arbitration.....	90
<b>Zelada</b>		<b>Victor M Ruiz, Gustavo Manuel Llorenz</b>	
Moreno Baldivieso Estudio de Abogados		<b>and Maximiliano Pineda</b>	
		Ruiz-Silva Abogados, SC	
Canada.....	70	Panama.....	95
<b>Robert J C Deane and Craig R Chiasson</b>		<b>José Carrizo</b>	
Borden Ladner Gervais LLP		Morgan & Morgan	
Colombia.....	79	A Bridge too Far? The European Commission	
<b>Alberto Zuleta Londoño and Andrés Nossa Lesmes</b>		takes its Campaign against Intra-EU Investment	
Holland & Knight		Arbitration to US Courts.....	99
		<b>Grant Hanessian, Derek Soller and Kristina Fridman</b>	
		Baker McKenzie	

Welcome to *The Arbitration Review of the Americas 2020*, one of *Global Arbitration Review's* annual, yearbook-style reports.

*Global Arbitration Review*, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our *GAR Live* banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The Arbitration Review of the Americas*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from around North and Latin America.

Across 17 chapters, and spanning 107 pages, this edition provides an invaluable retrospective, from 35 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Argentina, Bolivia, Canada, Colombia, Ecuador, Mexico, Panama and the United States; has an overview on Brazil's national obsession with corruption and how that is playing into arbitration; and an update on how Mexico's federal courts have started to deal with the personal injunctions that had brought its prospects to a grinding halt as a seat.

Among the other nuggets it contains:

- a deep dive on the battle playing out, in the US courts, between owners of intra-EU investment awards and Spain and the European Commission;
- the strides being taken across the Caribbean to embrace international arbitration;
- a technique arbitrators can use to sense check a valuator's assertions, using a company's audited financial statements; and
- a comparison of USMCA (the new NAFTA) with NAFTA, and what the changes mean – along with an analysis of one of the first case to consider the clash between the environmental and the investor pledges in DR-CAFTA.

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to [insight@globalarbitrationreview.com](mailto:insight@globalarbitrationreview.com).

**David Samuels**

Publisher

July 2019

# The Relevance of Audited Financial Statements in a Valuation Analysis

**Eddie Tobis**

FTI Consulting

The quantification of economic damages in international arbitration disputes often requires a valuation of the claimant's investment at a specific valuation date. When preparing their respective valuation analyses, experts may utilise different methodologies, techniques and assumptions, resulting in materially different valuation conclusions. Unfortunately, this often leaves the tribunal with the difficult task of navigating through complex financial models to unravel the differences between each expert and reach what they consider to be an appropriate conclusion on quantum.

In the absence of an actual arm's-length transaction as at the valuation date for a similar sized ownership block in the same investment being valued, there will almost always be a certain level of professional judgement involved in any valuation analysis. In this regard, stronger valuation analyses will typically include secondary approaches and cross-checks where possible, to support the reasonability of the conclusions derived under the valuator's primary approach.

In this article, I will discuss how and when the carrying amount<sup>1</sup> of an asset reported in the audited financial statements of its owners can be used as a sensibility check on the valuator's conclusions. I will also explain how one may reconcile the carrying amount of the asset in the audited financial statements to an expert's valuation conclusions, and the implications of failing to do so.

When preparing a valuation analysis, it is generally considered best practice to review other valuation reports that were prepared in the normal course of business as at or around the valuation date, if available, for the specific investment that is being valued. While professionals performing valuations may offer differing opinions, previously prepared valuation reports may help the valuator ensure that they adequately consider all relevant information.

Valuators will often find that the investment they are valuing has been reported as an asset on the balance sheet of the claimant or other non-related entities that also hold an ownership interest in the same asset, and that this investment has already been valued as part of the preparation of the audited financial statements of its owners.

However, prior to relying on the carrying amount of an asset to test the reasonability of the valuator's conclusions, it is important to review and understand the specific accounting policies that are followed in the company's financial statements.

In the following section, I provide a brief summary of the accounting policies that a company reporting under International Financial Reporting Standards (IFRS)<sup>2</sup> must follow with respect to how and when assets can be reported on a company's balance sheet. I then discuss the specific policies that are followed when conducting impairment testing<sup>3</sup> on these assets under IFRS.

## Summary of IFRS accounting policies on asset recognition

According to IFRS, an asset is defined as 'A resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity.'<sup>4</sup>

Therefore, if a company reports an investment as an asset in its audited financial statements, this would imply that the company, and its external auditors, consider the value of this investment to be greater than zero, given that they expect to receive 'future economic benefits' from this investment. However, while certain assets on a company's balance sheet are adjusted to fair value<sup>5</sup> at the end of each reporting period, such as marketable securities<sup>6</sup> and derivative instruments,<sup>7</sup> there are many other types of assets that are not necessarily reported at fair value in IFRS financial statements. For example:<sup>8</sup>

- inventory is reported at the lower of historical cost and net realisable value;<sup>9</sup>
- property, plant and equipment assets are generally reported based upon the historical costs incurred less any accumulated depreciation and impairment losses;<sup>10</sup> and
- other types of assets are reported based upon the historical costs incurred and are not subject to a depreciation deduction, but are still tested for impairment at the end of each reporting period, such as:
  - intangible assets with an indefinite life, for which the cost of the asset can be measured reliably;<sup>11</sup>
  - ownership interests in other businesses where the investor does not have significant influence, and where the shares of the investee are not traded in an active market;<sup>12</sup> and
  - exploration and evaluation assets related to mineral resource properties.<sup>13</sup>

There are many types of assets that have economic value that are not reported on a company's balance sheet at all, such as internally generated goodwill,<sup>14</sup> internally generated intangible assets<sup>15</sup> or contingent assets.<sup>16</sup> This is one of the reasons why the book value of the equity reported in a company's financial statements will rarely be equal to the fair market value.

A company is required to disclose its significant accounting policies in the notes to the financial statements, and in particular, to 'inform the users of the measurement basis or bases used in the financial statements (for example, historical cost, current cost, net realizable value, fair value or recoverable amount) because the basis on which an entity prepares the financial statements significantly affects users' analysis.'<sup>17</sup> A careful reading of these notes may help the valuator understand the type of reliance that could be placed on the carrying value of the assets when attempting to use this data to test the reasonability of their own valuation conclusions.

For assets that are not adjusted to fair value in a company's financial statements, due to the passage of time, their historical cost is rarely reflective of their current fair market value as at the financial statement date. For example, suppose that a company acquired a piece of land 20 years ago for \$1 million; the carrying amount of that land on the company's balance sheet may still be reflected at \$1 million today<sup>18</sup> (land is not generally depreciated), even though

the fair market value of this land may have increased significantly between the time that it was acquired and the current date.

Nevertheless, to the extent that these assets are subjected to impairment testing at the end of each reporting period, the carrying amount of these assets in the company's audited financial statements would provide an indication of their minimum value at the financial statement date, according to the company and its external auditors. If the valuator reaches a conclusion that is significantly lower than the carrying amount of these assets, they should try to reconcile this difference, as this may be an indication that the valuator's conclusion is too low.

### Summary of IFRS accounting policies on impairment testing

According to IFRS, at the end of each reporting period, a company is required to review the assets on its balance sheet to assess whether there is any indication that an asset might have become impaired since the last financial statement date.<sup>19</sup> If the company deems that there is an indication of potential impairment, the next step requires the company to measure the 'recoverable amount' of these assets.

IFRS defines the recoverable amount<sup>20</sup> as 'the higher of its fair value less costs of disposal, and its value in use'.<sup>21</sup>

An impairment loss is recognised if the carrying amount of an asset exceeds its recoverable amount, whereby the carrying amount of the asset (ie, the book value) is reduced to its recoverable amount and a corresponding impairment expense is recorded in the company's income statement. However, if the recoverable amount of an asset is higher than the carrying amount then no adjustment is made to increase the carrying amount of the asset on the company's balance sheet to its recoverable amount, unless it relates to the reversal of a previously recognised impairment loss as discussed below.<sup>22</sup>

At the end of each reporting period, a company is also required to assess whether there is any indication that the conditions that led to an impairment loss in prior periods may no longer exist or may have decreased. If so, the company is required to recalculate the recoverable amount of the asset.<sup>23</sup> If the new calculation of the recoverable amount is higher than the asset's carrying amount, then a previously recognised impairment loss may be reversed. However, the increased carrying amount of an asset resulting from the reversal of an impairment loss cannot exceed the carrying amount that the asset would have had (net of depreciation) if an impairment loss had not been recorded in prior periods.<sup>24</sup>

A company is not required to disclose its estimate of the recoverable amount if no impairment loss is recognised. It is also not required to disclose the inputs and key assumptions it employed to estimate the recoverable amount. However, companies will often provide some details surrounding its impairment testing in the notes to the financial statements (ie, such as the discount rate that it used), and these note disclosures can be extremely useful when assessing the reasonability of the valuator's own conclusions.

In the following section, I provide a simplified example that demonstrates how impairment testing may be applied in practice, and what conclusions a valuator could derive from this when relying on this information in a reasonability check on their own valuation conclusions.

### Example of how the carrying amount of an asset can be used as a cross check on the valuation analysis

Suppose that in the year ending 31 December 2016 a company incurred \$10 million of exploration and evaluation costs relating

to one of its mineral properties and that these costs met the criteria to be recognised as an asset on the company's balance sheet (ie, the company expected to receive future economic benefits from the eventual exploitation or sale of these mineral properties).

At the end of each subsequent reporting period, the company must assess whether there is any indication that the exploration and evaluation asset reported on its balance sheet is impaired. This could result from issues such as the loss of a key permit, macroeconomic factors, lack of exploration success and so on.

If there is an indication that the exploration and evaluation asset may be impaired, the company is required to calculate the 'recoverable amount' of this asset (ie, 'the higher of its fair value less costs of disposal, and its value in use') and record an impairment loss if the recoverable amount is lower than the carrying amount (ie, \$10 million).

#### 31 December 2016

- Assume that as at 31 December 2016 the company assessed the recoverable amount of this asset to be \$14 million. In this case, the carrying amount of the asset would still be reported at \$10 million and no impairment loss (or gain) will be recorded.
- The valuator can then infer that the company considered the value of this asset to be at least \$10 million as at 31 December 2016. However, the valuator would not necessarily know how much greater than \$10 million the company considered the value to be unless the company opted to disclose this information in the notes to the financial statements.

#### 31 December 2017

- Assume that as at 31 December 2017 the company assessed the recoverable amount of this asset to be \$8 million, given that the company lost one of the key permits required to develop a portion of this mineral property. In this case, the carrying amount of the asset would be reduced to \$8 million and a \$2 million impairment loss will be recorded as an expense in the company's income statement.
- The valuator can then infer that the company considered this asset to have a value of \$8 million as at 31 December 2017.

#### 31 December 2018

- Assume that as at 31 December 2018, the company determined that one of the conditions that led to the impairment loss recorded in the 31 December 2017 financial statements no longer applied (eg, the company regained its key permit) and recalculated the recoverable amount of the asset to be \$12 million. In this case, the previously recognised impairment loss would be reversed and the carrying amount of the asset would be increased back up to \$10 million, which was the carrying amount that the asset would have had if an impairment loss had not been recorded in the prior period.
- The valuator can then infer that the company considered the value of this asset to be at least \$10 million but, like before, the valuator would not necessarily know how much greater than \$10 million the company considered the value to be, unless the company opted to disclose this information in the notes to the financial statements.

If a valuator was then required to value this asset as at 31 December 2018 and calculated a value of only \$3 million, their valuation conclusion would be significantly lower than the minimum value of the asset according to the company's audited financial statements (ie, \$10 million). This could be an indication that the

valuator's conclusion is too low and may require the valuator to revisit their analysis and amend their calculations.

However, if the valuator calculated a value of \$13 million as at 31 December 2018, then the carrying value of the asset in the audited financial statements could be used to support the reasonability of the valuator's conclusion, given that \$13 million is higher than the minimum value of the asset according to the audited financial statements.

### Responsibility of the external auditor

Management is responsible for the preparation of the company's financial statements in accordance with the applicable accounting framework, and to establish the internal controls it considers necessary to prepare financial statements that are free from material misstatement, whether due to fraud or error.<sup>25</sup> Nevertheless, one may still be concerned that a company would avoid recording an impairment charge, even if the accounting standards it follows would require it to do so, to be able to report more positive results to its shareholders.

While this may be a legitimate concern with respect to unaudited financial statements of a privately held business, this would be much less of a concern for public companies for which if management knowingly misrepresents a company's financial results to its shareholders they may be subject to significant fines or even imprisonment.<sup>26</sup> Furthermore, a public company is typically required to undergo external annual audits and external quarterly reviews prior to disclosing any of its financial results to its shareholders and the general public.

The external audit process generally requires that the auditor perform procedures and obtain audit evidence regarding the amounts and disclosures contained within a company's financial statements, in order to obtain reasonable assurance about whether the financial statements are free from material misstatement and are fairly presented in accordance with the applicable accounting framework.<sup>27</sup>

As part of these procedures, the external auditor would typically review the impairment testing carried out by the company on its assets, and if necessary, conduct its own assessments of the recoverable amounts of the company's assets to determine whether any other assets are impaired.<sup>28</sup>

An external auditor that willingly or negligently provides a clean audit opinion on a set of financial statements that contain a material misstatement (such as reporting an asset at a carrying amount that is greater than its recoverable amount) would be subject to disciplinary actions from its professional association, and may also be subject to further penalties and fines under securities legislation.<sup>29</sup> Furthermore, more serious violations may result in a loss of reputation that could prevent the auditor from obtaining any future audit assignments.<sup>30</sup>

As outlined above, the external auditor is responsible for obtaining reasonable assurance that the financial statements are free from material misstatement. According to IFRS, a misstatement is considered material 'if it could, individually or collectively influence the economic decisions that users make on the basis on the financial statements. Materiality depends on the size and nature of the omission or misstatement judged in the surrounding circumstances.'<sup>31</sup>

There are no set rules for how the auditor should determine the materiality threshold to apply in the external audit process, given that each situation is case dependent. Nevertheless, there are some general rules of thumb that auditors may use as a starting point when assessing the materiality threshold, such as 5 per cent

of pre-tax income, 1 per cent of net assets and so on.<sup>32</sup> The auditor may also determine that certain accounts have a higher materiality threshold than others depending on the riskiness or importance of that account to the users of the financial statements.

Unfortunately, auditors do not publicly disclose what materiality threshold they used in their audit, nor the specific audit procedures that they applied. However, if an asset being analysed represents a relatively large percentage of company's operations, then one can be fairly certain that the auditors conducted a detailed review of the carrying amount of this asset as part of their audit procedures.

Based on the above, if a valuator reached a conclusion that was significantly lower than the carrying value of the asset in audited financial statements of its owners, they should first seek to understand the reason for this difference, and then amend their analysis if necessary.<sup>33</sup>

### Limitations of this approach as a cross check on the valuation analysis

In this section I provide examples of situations where the reasonability test described above may not be applicable.

Valuation date is different from the financial statement date  
If significant time has elapsed, or if a material event has occurred, between the financial statement date and the valuation date, then it is possible that the value of the asset at the valuation date could be lower than the carrying amount as at the financial statement date. If this were the case, the valuator should still assess what may have changed between these two dates that could have contributed to this difference. The valuator should apply judgement in evaluating these differences; for example, suppose that the financial statements before and after the valuation date both show the same carrying value, and that the valuator's conclusion is lower than the carrying values at both dates. This could be an indication that the valuator's conclusion is too low and may require the valuator to revisit their analysis and adjust their calculations.

The 'but-for' scenario is not considered in the preparation of the financial statements

The quantification of economic damages often requires the valuation of an asset under a hypothetical or 'but-for' scenario where one assumes that the alleged wrongful acts did not occur. By definition, a company's financial statements do not consider these but-for scenarios, and therefore there may be a difference between the value of the asset for the purposes of a calculation of economic damages and the value of the asset for financial statement reporting purposes. For example, a company may have impaired one of its assets to \$nil due to a loss of a key contract or permit; however, in the but-for scenario, the valuator is asked to assume that this contract or permit is still in place. In this example, it would be possible for the valuator to arrive at a positive valuation conclusion even though the asset has been fully impaired in the company's financial statements.

The asset being analysed is not reported on the company's balance sheet

As outlined above, certain assets that have economic value are not reported on a company's balance sheet at all. This includes assets such as internally generated goodwill and internally generated intangible assets, such as brand recognition, customer relationships and so on. If the valuator is required to value one of these assets, then there would be no carrying amount on the company's

balance sheet that it would be able to reconcile its valuation conclusions with.

#### Differences in professional judgement

It is possible for a valuator to conclude that an asset has a value that is lower than its carrying amount due to differences in professional judgement between the valuator and the company's management or auditors. For example, it is possible that the valuator used a higher discount rate or lower growth assumptions in their valuation analysis when compared to the valuation used in the company's impairment testing analysis.<sup>34</sup> This would be most applicable in cases where an impairment charge was recorded against the asset in the most recent fiscal period, thereby implying that the carrying amount of the asset on the company's balance sheet would be equal to its recoverable amount. However, if the valuator reaches a conclusion that is significantly below the carrying amount of the asset, then this may imply that there are other issues with the valuator's analysis, besides for differences in professional judgement, that would require the valuator to revisit their calculations.

#### Example of application of this reasonability test in a recent international arbitration award

In a recent international arbitration dispute between Rusoro Mining Limited and the Bolivarian Republic of Venezuela, the claimant argued that the 'book value of the expropriated assets, in addition to being a useful benchmark, should act as a floor for the assessment of damages in this case', while the respondent valued the expropriated assets at an amount that was significantly lower than their carrying amount. The tribunal agreed with the claimant on this issue and further noted that 'IFRS required Rusoro to impair its assets, reducing the book value, if it believed that their "fair value" was lower than book value'.

In the end, the tribunal relied on the book value of the expropriated assets, as reported in the claimant's audited financial statements, as one component of its overall decision on quantum. However, the tribunal also recognised that the book value is likely lower than the fair market value of the assets as the book value would not reflect any potential increase in the value of the investment due to market factors or 'the development of the mining properties carried out under Rusoro's watch'.<sup>35</sup>

#### Conclusion

In this article, I have discussed how a review of the carrying value of an asset in the audited financial statements of its owners can provide valuers, judges and arbitrators with an indication of the minimum value of an asset according to the company and its external auditors.

I have summarised the relevant accounting policies that a company reporting under IFRS must follow with respect to how and when assets can be reported on a company's balance sheet, as well as the policies that are followed when conducting impairment testing on these assets at the end of each reporting period. I also discussed the role of the external auditor in the financial statement review process. Lastly, I have provided examples of situations where the reasonability test described above may not be applicable.

Based on the above, I have concluded that if a valuator valued an investment at an amount that was significantly lower than the carrying value of the asset in audited financial statements of its owners, then this could be an indication that the valuator's conclusion is too low and may require the valuator to revisit their analysis and adjust their calculations.

*The views expressed in this article are those of the author and not necessarily the views of FTI Consulting, its management, its subsidiaries, its affiliates or its other professionals.*

*This article discusses the use and implications of using financial statement values to corroborate valuation evidence and opinions. It describes best practices and common pitfalls; valuation professionals must exercise their best judgement about their applicability to their specific cases.*

*FTI Consulting, Inc, including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm.*

#### Notes

- 1 Carrying amount is defined as 'the amount at which an asset is recognized in the statement of financial position after deducting any accumulated amortization and accumulated impairment losses' (IAS38 paragraph 8). In other words, this reflects the 'book value' of the asset as reported on the company's balance sheet.
- 2 For the purposes of this article, I will refer to financial statements prepared in accordance with IFRS. IFRS represents a set of accounting rules and policies that are used in the preparation of financial statements for external reporting purposes. As at the date of this article, 144 out of 166 jurisdictions around the world require IFRS to be followed for all or most domestic publicly accountable entities in their capital markets. While the principles discussed in this article are relatively consistent with other major accounting standards such as US GAAP, there are still many differences between various sets of accounting standards that are beyond the scope of this article.
- 3 Put simply, an impairment test is an exercise that a company undertakes to determine whether the value of an asset reported on its balance sheet has declined to an amount that is lower than its book value. I discuss the details and implications of impairment testing later in this article.
- 4 IFRS Conceptual Framework for Financial Reporting, paragraph 4.4.
- 5 Fair value is defined as 'the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.' IFRS 13, paragraph 9. IFRS 13 contains several pages outlining the preferred valuation techniques that are to be applied when assessing the fair value of an asset for financial reporting purposes. These valuation techniques give the highest priority to quoted prices in active markets for identical assets or liabilities (Level 1), and the lowest priority to unobservable inputs, where there is little, if any market activity for the asset or liability at the measurement date (Level 3).
- 6 IAS 39, paragraph 46.
- 7 IAS 39, paragraph 9.
- 8 This is not meant to represent a comprehensive list of the types of assets that are not adjusted to fair value at each financial statement date, but rather is meant to provide a few examples.
- 9 IAS 2, paragraph 9. Net realisable value is defined as the 'estimated selling price in the ordinary course of business less the estimated costs of completion and the estimated costs necessary to make the sale'. IAS 2, paragraph 6.
- 10 IFRS also allows a company to report its property plant and equipment based upon a 'revaluation model', whereby the carrying value of the asset can be reported at its fair value at the revaluation date less any accumulated depreciation and impairment. However, a revaluation model is only acceptable if the fair value of the asset can be measured reliably. See IAS 16, paragraphs 29 to 31.
- 11 IAS 38, paragraphs 21, 89, 107 and 108; and IAS 36, paragraphs 2 and 9.
- 12 IAS 39, paragraph 46. A company's interest in another business that it has significant influence over (typically considered to be between 20 and 50 per cent of the voting shares of the investee),

- is accounted for under the equity method, whereby the initial investment is recognised as an asset on the investor's balance sheet, and the carrying amount of the asset is then increased or decreased to recognise the investor's share of the investee's profit or loss after initial acquisition (IAS 28, paragraphs 5 and 10). These assets are then subjected to impairment testing at the end of each reporting period (IAS 28, paragraphs 40 to 43, and IAS 36, paragraphs 2 and 9).
- 13 IFRS 6, paragraphs 8 to 18 and IAS 36, paragraphs 2 and 9.
- 14 According to IFRS, goodwill for financial reporting purposes is defined as an 'asset representing the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognized' (emphasis added). (IFRS 3, Appendix A). This differs from the definition of goodwill applied in the context of a business valuation, where goodwill is defined as 'the intangible asset arising as a result of name, reputation, customer loyalty, location, products and similar factors not separately identified'. (International Glossary of Business Valuation Terms).
- 15 IAS 38, paragraphs 48 to 53.
- 16 IAS 37, paragraph 31.
- 17 IAS 1, paragraphs 112 to 124.
- 18 Unless the company chose to report this land based upon the 'fair value model' whereby they would restate the carrying amount to fair value at each reporting period date, as long they can reliably measure the fair value of the property on a continuing basis in accordance with IAS 40. [IAS 40, paragraphs 33 to 55].
- 19 IAS 36, paragraph 9. Assets that are not subject to regular impairment testing in accordance with IAS 38 include inventories, deferred tax assets, certain types of financial assets and other types of assets that are set out in IAS 38, paragraph 2.
- 20 IAS 36, paragraph 6.
- 21 Value in use is defined as the 'present value of the future cash flows expected to be derived from an asset or cash generating unit.' (IAS 36, paragraph 6).
- 22 IAS 36, paragraphs 59-60.
- 23 IAS 36, paragraph 110.
- 24 IAS 36 paragraphs 114 and 117.
- 25 For example, see Canadian Auditing Standards (CAS) Section 200, paragraphs A2-A4 and CAS 240, paragraph 4. CAS are based upon International Standards on Auditing, which were developed and issued by the International Auditing and Assurance Standards Board, that are consistent with the International Framework for Assurance Engagements.
- 26 For example, see Sarbanes-Oxley Act Section 807: 'Criminal Penalties for Defrauding Shareholders of Publicly Traded Companies'.
- 27 For example, see CAS 200, paragraph 11.
- 28 For example, see CAS 540, paragraphs A59-A61 and A68-A101.
- 29 For example, see CPA Ontario Code of Professional Conduct, Section 205.
- 30 As was the case with Arthur Andersen and its audits of Enron in the 1990s.
- 31 IAS 1, paragraph 7.
- 32 For example, see: PCAOB 'Direct Measures of Auditors' Quantitative Materiality Judgements: Properties, Determinants and Consequences for Audit Characteristics and Financial Reporting Reliability' July 2017, p. 11.
- 33 Although there have been famous cases where analysts and valuers have uncovered fraud that was missed by the external auditors, or other errors made in the company's financial statements, such cases are relatively unusual, and a presumption of a material misstatement is not the first conclusion that a valuator ought to reach.
- 34 A valuation analysis should be considered as a whole. Selecting portions of a valuation analysis conducted for impairment testing, without considering all factors and analyses together, could result in misleading conclusions.
- 35 *Rusoro Mining Limited v. the Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 August 2016, paragraphs 683 to 707 and 789.



**Eddie Tobis**  
FTI Consulting

Eddie Tobis is a senior director at FTI Consulting in the Economic and Financial Consulting practice and is based in Toronto, Canada.

Since 2010, Mr Tobis has been exclusively involved in business valuations, financial litigation, corporate finance and financial accounting related matters. He has acted as an external auditor, financial consultant and tax adviser for private and public companies, regulatory bodies and governments.

He has worked on dozens of expert witness and financial advisory reports for commercial litigation, tax litigation, matrimonial litigation and international trade and investment disputes spanning multiple industry groups, including, but not limited to: mining, oil and gas, pharmaceuticals and gaming.

Mr Tobis graduated from the Bachelor of Business Administration Honours programme at the Schulich School of Business at York University in 2009, where he specialised in accounting and finance. He began his professional career in January of 2010 at Ernst and Young LLP in Toronto, where he worked in the Audit and Assurance group.

Mr Tobis is a Chartered Professional Accountant, Chartered Accountant (CPA, CA), a Chartered Business Valuator (CBV) and a Qualified Valuator under the Canadian Institute of Mining's Valuation Standards and Guidelines (CIMVAL).



TD South Tower  
79 Wellington Street West  
Toronto Dominion Centre  
Suite 2010,  
PO Box 104  
Toronto ON M5K 1G8  
Canada  
Tel: +1 416 649 8100  
Fax: +1 416 649 8101

**Eddie Tobis**  
eddie.tobis@fticonsulting.com

[www.fticonsulting.com](http://www.fticonsulting.com)

FTI Consulting, Inc is a global business advisory firm dedicated to helping organisations protect and enhance enterprise value in an increasingly complex legal, regulatory and economic environment. FTI Consulting professionals, who are located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges in areas such as investigations, litigation, mergers and acquisitions, regulatory issues, reputation management and restructuring. The FTI Consulting economic and financial consulting practice provides detailed damages and valuation calculations for arbitration or litigation. Our work is based on economic, accounting and finance evidence that we analyse in order to quantify the financial effects of the alleged actions of the parties. Our reports are prepared in a fashion that is easily understood by judges and arbitrators. From 2013 to 30 September 2018, our senior experts have submitted more than 1,400 expert reports and have collectively testified more than 425 times.

Our testifying experts have significant experience in delivering clear and concise opinion evidence in arbitral and judicial hearings. We have extensive industry experience in oil and gas, electric power, pharmaceuticals, healthcare, telecommunications, media and entertainment, transportation, financial services, transfer pricing, intellectual property and mining and extractive industries. The *Who's Who Legal* 2019 survey of leading expert witnesses in commercial arbitration identified that FTI Consulting has maintained its position as the pre-eminent firm globally, with 53 of the experts listed coming from FTI (or its subsidiary, Compass Lexecon) – more than four times the next listed consulting firm.

---

**Law**  
**Business**  
**Research**