



**ALVAREZ & MARSAL**

**MAKING GOOD WHAT SHOULD HAVE HAPPENED: “BUT-FOR” CLAIMS –  
THE EXPERT’S VIEW ON THESE ISSUES**

3 February 2017

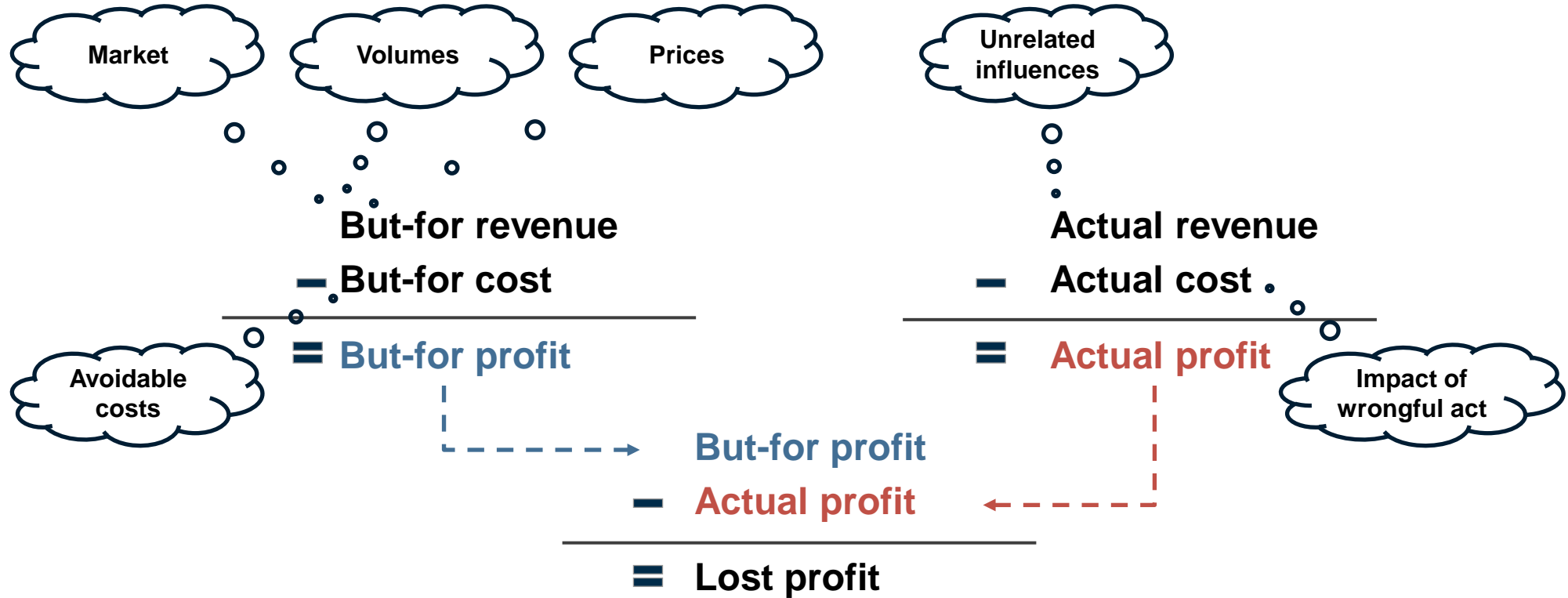


# INTRODUCTION



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The but-for method determines the amount required to compensate the damaged party by comparing its actual position to the hypothetical situation it would be in but for the wrongful act.



# THE ANCHORING EFFECT



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Anchoring effects are among the most robust and ubiquitous psychological phenomena in judgement and decision making.

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Anchoring is a cognitive bias that describes **the common human tendency to rely too heavily on the first piece of information offered** (the "anchor") when making decisions.

During decision making, anchoring occurs when individuals use an initial piece of information to make subsequent judgments. Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor.

Even explicitly forewarning judges about the potential distortion and informing them about its direction does not diminish the effect.

# PROCEDURAL MEASURES



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**A combination of various procedural measures may support the Arbitral Tribunal to be fully equipped to make a reasoned award on a but-for damages claim**

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## **(1) Communicate expectations and guidance**

- Level of detail
- Assumptions page
- Financial model

## **(2) Joint report or statement**

- Isolating agreements and disagreements
- Involvement of counsel
- Timing

## **(3) Opening presentations**

- Focus

## **(4) Witness conferencing**

- Immediately highlight differences in opinion
- Subject to immediate challenge and peer review

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