

INSIGHTS Innovative Dispute Resolution: The Independent Accountant or Valuator as Arbitrator of Material Adverse Change and Reps & Warranties M&A Transaction Disputes

An innovative solution is currently being used in cases to resolve Material Adverse Change (MAC) and Representations & Warranties (R&W) M&A transaction disputes. An Independent Accountant or Independent Valuator can be readily appointed jointly by the parties, with consultation by their respective counsel, to serve as an arbitrator on financial issues. While it is common for accountants to be appointed in acquisition agreements to resolve post-closing adjustments to the purchase price, it has not been historically common to do so for MAC and R&W disputes.

Now, given the issues to be decided are primarily grounded in accounting, financial, and valuation principals, this approach has been used in recent situations through agreement by the parties to streamline and expedite the resolution process. Also, on current potential acquisitions, the parties can elect to incorporate such pre-designation in the event these types of disputes arise.

The Independent Accountant or Independent Valuator can evaluate as a finder-of-fact neutral arbitrator:

- The terms of a sale and purchase agreement between the companies;
- The accounting and/or valuation facts and circumstances;
- COVID-19-related impacts on the earnings, projections and forecasts, and/or value of the business;
- Whether the accounting and/or valuation impacts resulted in a MAC or reflected breaches of Representations & Warranties under the terms of the purchase agreement; and,
- If applicable, the quantification of the misrepresentations and/or damages.

Alternatively, the Independent Accountant or Independent Valuator can be jointly-retained to be the neutral expert advisor to a mediator.

Use of a jointly-retained Independent Accountant or Independent Valuator as an arbitrator of these issues in this era can offer the advantages of:

- · Specialized and focused expertise;
- A customized alternative dispute resolution process focused on financial evaluation of the specified issues submitted, by agreement of the parties, to the independent accountant or valuator;
- A separate means of resolution from a court process or other arbitration;
- Non-public-record confidentiality; and,
- A faster option, especially when courts are closed or have reduced access.





INSIGHTS

THE ANKURA DIFFERENCE

Our accounting and valuation professionals can serve in this role of Independent Accountant or Independent Valuator, drawing upon our expertise, experience and abilities as expert witnesses, consultants and neutral arbitrators in U.S., cross-border and international transaction and related disputes. Our professionals frequently advise clients and their legal counsel when disagreements or uncertainty arise regarding quantification of purchase price adjustments, accounting, value or economic damages of a business or stakeholder interest in a business are at issue. We bring multi-disciplinary and diverse backgrounds from global Big 4 accounting firms, valuation firms, economics consulting firms, intellectual property consulting firms, investment banks, international management consulting firms, healthcare consulting firms and federal government policy advisory councils. Plus, when needed, we can leverage our colleagues' deep expertise in Forensic Accounting, Valuation Advisory, Electronic Data Analysis, Restructuring, Healthcare Consulting, Real Estate & Hospitality Advisory, Oil & Gas, Construction, Intellectual Property Advisory, and additional areas, to bring the right combination of skills and experience to situations.

GET IN TOUCH



JOHN LEVITSKE
Senior Managing Director
john.levitske@ankura.com
+1.312.252.9533 Direct



JOSH JOHNSTON
Senior Managing Director
josh.johnston@ankura.com
+1.469.862.3608 Direct



JOHN GARVEY
Senior Managing Director
john.garvey@ankura.com
+1.312.961.3344 Mobile

ABOUT US

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