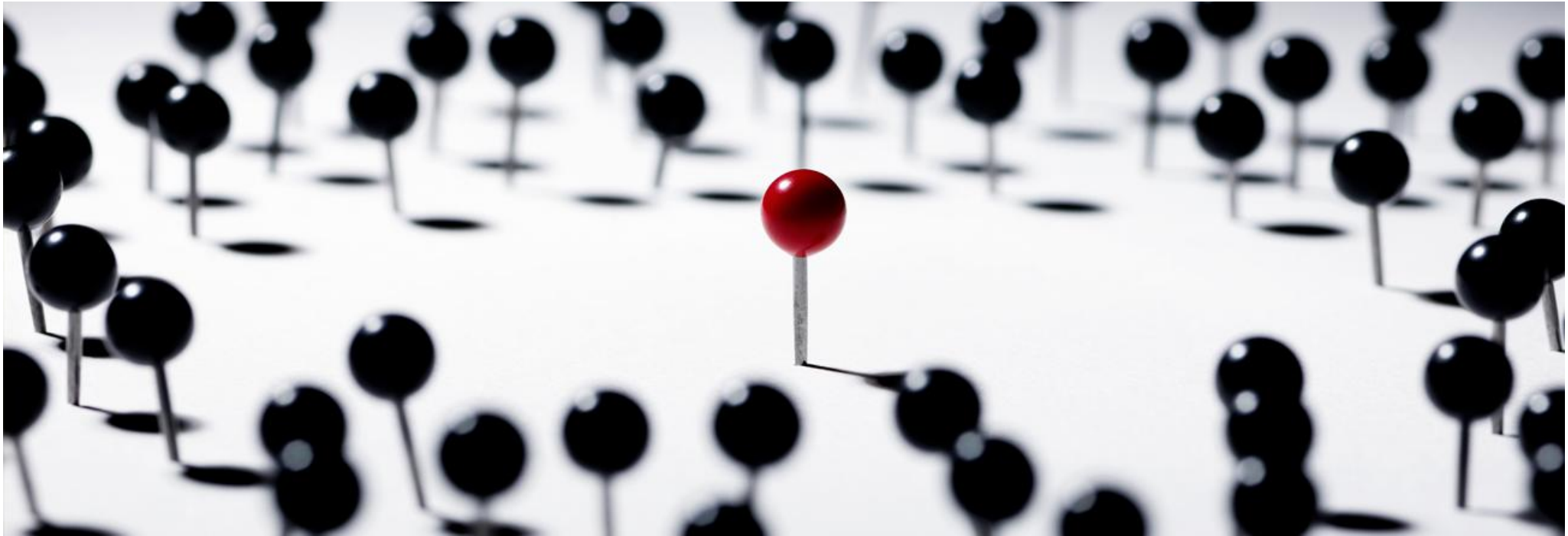




INSIGHTS



Innovative Valuation Dispute Resolution

The Independent Business Valuator as Advisor to the Mediator in Business Disputes

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Summary

An Independent Business Valuation expert can be jointly-retained by the parties to be the neutral expert advisor to a mediator. This innovative option is particularly timely because in the U.S. during the COVID-19 pandemic, courts and counsel are increasingly recommending mediation of business disputes – business divorce and complex ownership issues, merger and acquisition transaction disputes, corporate governance and fiduciary duty disputes, and bankruptcy matters.

The increasing use of Alternative Dispute Resolution (ADR), including mediation and arbitration, presents a growing need for the skills of valuation professionals. In the U.S. during the COVID-19 pandemic, courts and counsel are increasingly recommending mediation. In fact, a new American Bar Association study comments that for civil cases many, “Judges, plaintiff attorneys and defense attorneys agree that mediation is the fairest way to resolve cases.”[1] In mediation, an innovative solution is available to help the parties resolve business valuation disputes: An Independent Valuation expert can be jointly-retained by the parties to be the neutral expert advisor to a mediator. Valuation expertise is often particularly helpful in mediation of business disputes – business divorce and complex ownership issues, merger and acquisition transaction disputes, corporate governance and fiduciary duty disputes, and bankruptcy matters.

A mediation is a non-binding dispute resolution method agreed to by the parties, often facilitated by a neutral mediator who tries to help the disputing parties attain a mutually agreeable solution. When appointed as an advisor to the mediator, the Independent Valuator is expected to be an impartial neutral advisor to both parties.

Potential Non-binding Independent Valuator Advisor Services to the Mediator

As the mediator-facilitator helps the parties work through the issues related to the dispute, there is a wide range of potential Independent Valuator advisor services that could be custom-tailored to the needs of the process, such as:

- Feedback regarding:
 - Selection of valuation methodologies
 - Effects of standards of value, levels of value, or premises of value
 - Valuation issues that may be governed by underlying documents
- Business valuation analysis of the subject ownership interests or company, as of a specified valuation date or dates
 - Consideration of information provided by both parties
 - If requested, incorporate assumptions regarding disputed valuation issues from each of the parties, and prepare scenario analyses of what hypothetically the resulting calculated values would be
- Observations regarding each of the party's proposed valuations (if the parties have submitted asserted valuations)
 - Development of a comparison of and observations regarding the key drivers, strengths, and weaknesses of each of the party's proposed valuations, such as:
 - Projected future cash flows
 - Normalization adjustments
 - Weighted average cost of capital
 - Terminal value calculations at the end of the cash flow projection period
 - Comparable companies
 - Multiples
 - Weighting of valuation factors
 - Stakeholder-level discounts

Using an Independent Valuator in this capacity offers the advantages of:

- Combining the specialized and focused technical expertise of the valuation expert as neutral advisor, with the facilitative skills of the appointed mediator;
- A customized non-binding financial evaluation of the specified issues submitted;
- Non-public-record confidentiality;
- A faster option, especially when courts are closed or have reduced access; and,
- Maintaining the ability of each of the parties to consult with legal counsel throughout the process.

Ankura Engagement Example as Independent Valuator Advisor to the Mediator

Shareholder dissent and oppression litigation dispute among the four groups of shareholders of two private companies operating in a rapidly changing industry. The parties had recently agreed in a prior mediation that three of the groups of shareholders would buyout the fourth group but could not agree to price. The primary valuation issues in dispute were: the standard of value, appropriate financial projections for the companies, normalization of inter-company charges, whether and how to consolidate the financial information of the two companies, normalization of executive compensation, how to evaluate and to what extent to quantitatively factor in potential major regulatory threats, and whether or not minority and/or lack of marketability discounts apply.

As the Independent Neutral Valuation Expert Advisor to the Mediator in the follow-on mediation, Ankura was retained to: meet jointly with and interview all parties and management, objectively evaluate the above key issues in dispute, develop key assumptions where necessary, and prepare a non-binding retrospective appraisal of value of the subject ownership interests on a proportionate value basis.

Outcome: the parties used Ankura's work to promptly resolve their dispute through the mediation.

The Ankura Difference

Our Business Valuation Dispute Analysis professionals can serve in this role of Independent Valuator, drawing upon our expertise, experience and abilities as expert witnesses, consultants and neutral arbitrators in U.S., cross-border and international transactions and related disputes. Our professionals frequently advise clients and their legal counsel when disagreements or uncertainty arise regarding quantification of value 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 for tax and financial reporting, 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.

"Innovative Valuation Dispute Resolution: The Independent Business Valuator as Advisor to the Mediator in Business Disputes," Ankura Consulting Group, 01/13/21, Levitske, John.

[1] "Civil cases: Judges, plaintiff attorneys and defense attorneys agree that mediation is the fairest way to resolve cases, followed by jury trials, then bench trials. All groups rank arbitration as the least fair method." Excerpt from *New ABA Study Explains Why Civil and Criminal Jury Trials are Disappearing*, Jan. 11, 2021:
<https://www.americanbar.org/news/abanews/publications/youraba/2021/0111/disappearing-juries>