

The global pandemic of disputes

By Matthew L. McGrath, *Emissary Holdings*

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The Covid-19 virus has exposed more than one pandemic we face as a society. Our world today includes no fewer pandemics than those of mental health, household financial instability, socioeconomic inequities and racial injustice.

In the business sector, we see pandemics of zombie companies, bad debts and real estate losses.

For all these frictions, the global industry for disputes is booming. As Covid-19 losses are incurred at the country and company levels, there are natural tendencies to fight for scarce resources.

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Recent months have seen disputes over vaccines in Europe, water resources in East Africa and energy resources in Southeast Asia. For businesses, disputes may concern shareholder rights, true value of assets and impact on local communities.

For companies finding themselves in new disputes this year, overloaded court systems are seeing longer timeframes to resolution.

Delays of months or years to a monetary judgment diminish the underlying value of the claim. The old truism of time-value tells us that a dollar today is worth more than a dollar tomorrow. So the market is responding with new innovation.

As the global pandemic of disputes grows in the coming months, new methods for assessing, financing and settling the pent-up value are coming into the mainstream. In an industry worth trillions, dispute resolution may start to look much more like financial services in the coming years.

GLOBAL DISPUTES HAVE BECOME A GLOBAL INDUSTRY

Even prior to Covid-19, disputes had reached historically high economic proportions, particularly those adjudicated in international arbitration. Between 2014 and 2018, the global value of arbitration claims pending grew from \$1.4 trillion to \$2 trillion.

The value of disputes in international arbitration has grown at least 7% faster than the global growth rate. A normal investor-state

arbitration might cost as much as \$10 million for a corporate client battling a foreign government, with case damages normally ranging from the tens of millions to billions.

The growing scale of value at risk has drawn increasing attention from corporate clients managing their balance sheets.

“Clients are increasingly calling for a rigorous quantitative analysis of their options, just as they would in any other area of business risk,” said Donny Surtani, a barrister and arbitrator at Crown Office Chambers, tells of a growing number of lawyers and clients embracing use of case financial analytics to test which legal issues most deserve investment of time and resources. “Numerate clients expect to see their risk analysis in percentages and dollar terms.”

In the City of London, clients are demanding to see a full presentation of options for resolving disputes, including litigation or arbitration in various jurisdictions, settlements based on commercial diplomacy as well as M&A based options.

As a part of reviewing these options, general counsels are also demanding clearer enforcement analysis before initiating legal action, to know the risks of pyrrhic victory of an unenforceable award at the end of a drawn-out legal process.

THE BLUE OCEAN FOR HEDGE FUNDS

This more active approach to managing disputes through the lens of financial returns is also being driven by hedge funds investing in disputes, who demand the same level of financial rigor and precision management that would be applied to private equity or activist investments.

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With over \$20 billion in assets under management and growing, new funds are entering the market targeting 18% IRR and 2-3x cash-on-cash returns, boasting strong performance that is not affected by movements in financial markets.

“Litigation funding solutions are becoming more sophisticated and comprehensive,” says Carrie Leonard, portfolio manager at Orchard Global Asset Management, an alternative asset manager with approximately \$6.5 billion under management. “The market is evolving rapidly to enable companies to actively pursue, enforce and risk-manage claims with portfolio operations that begin to resemble other alternative asset classes.”

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The emergence of litigation funding as an alternative asset class means that it will be increasingly adopted globally and outside of the United States, United Kingdom, Australia and the European Union.

As more capital comes into this space and new cases are funded in more complex, emerging-market jurisdictions, precision-management of these investments will become a key point of differentiation.

EVEN IN DISPUTES, TIME IS MONEY

In most cases, the greatest driver of the financial returns in a dispute is the time to resolution. The fastest resolution of a dispute is to settle early — or to avoid a contentious situation altogether.

Lise Alm, Head of Business Development at the International Arbitration Institute of the Stockholm Chamber of Commerce

sees economic as well as societal imperatives noting: “Most, if not all, disputes benefit from being resolved as fast as possible. For providers of dispute resolution solutions, our goals are to help companies spend as little time as possible in disputes and support healthy economic growth.”

In the international relations of disputes, it is growing clear that financial efficiency promotes peace-making-and vice versa. Disputed assets hold pent-up value and litigation costs often precludes more productive investment elsewhere.

With a pandemic of disputes seeing over \$2 trillion and growing sitting on the sidelines, the world must find new means of settlement to provide inoculation.

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