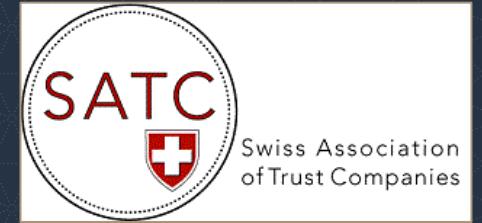


18 May 2021



Optimising Dispute Outcomes

Decision-making around family office legacy assets





Objectives for this session

1. Review the current global landscape of disputes, including for family offices
2. Share concepts, tools and frameworks that are useful for decision-making in complex disputes
3. Present case example
4. Q&A



Values

SATC's Values

1. Professionalism
2. Competence
3. Diligence
4. Integrity
5. Confidentiality
6. Transparency
7. Fairness

Emissary's Values

1. Excellence
2. Honesty
3. Integrity
4. Learning
5. Performance



Disputes are a global economic phenomenon

US\$2.5 trillion

in global arbitration claims (commercial & investment)



By how much do disputes affect family office investments?

US\$33bn-\$100bn

value of investments affected by disputes
for single family offices



What does this typically look like at the portfolio level?

0.5-2.0%

of portfolio value impacted
by disputes



How about pre-contentious legacy assets?

2.0-5.0%

of AUM are in legacy assets,
within approx. one standard deviation



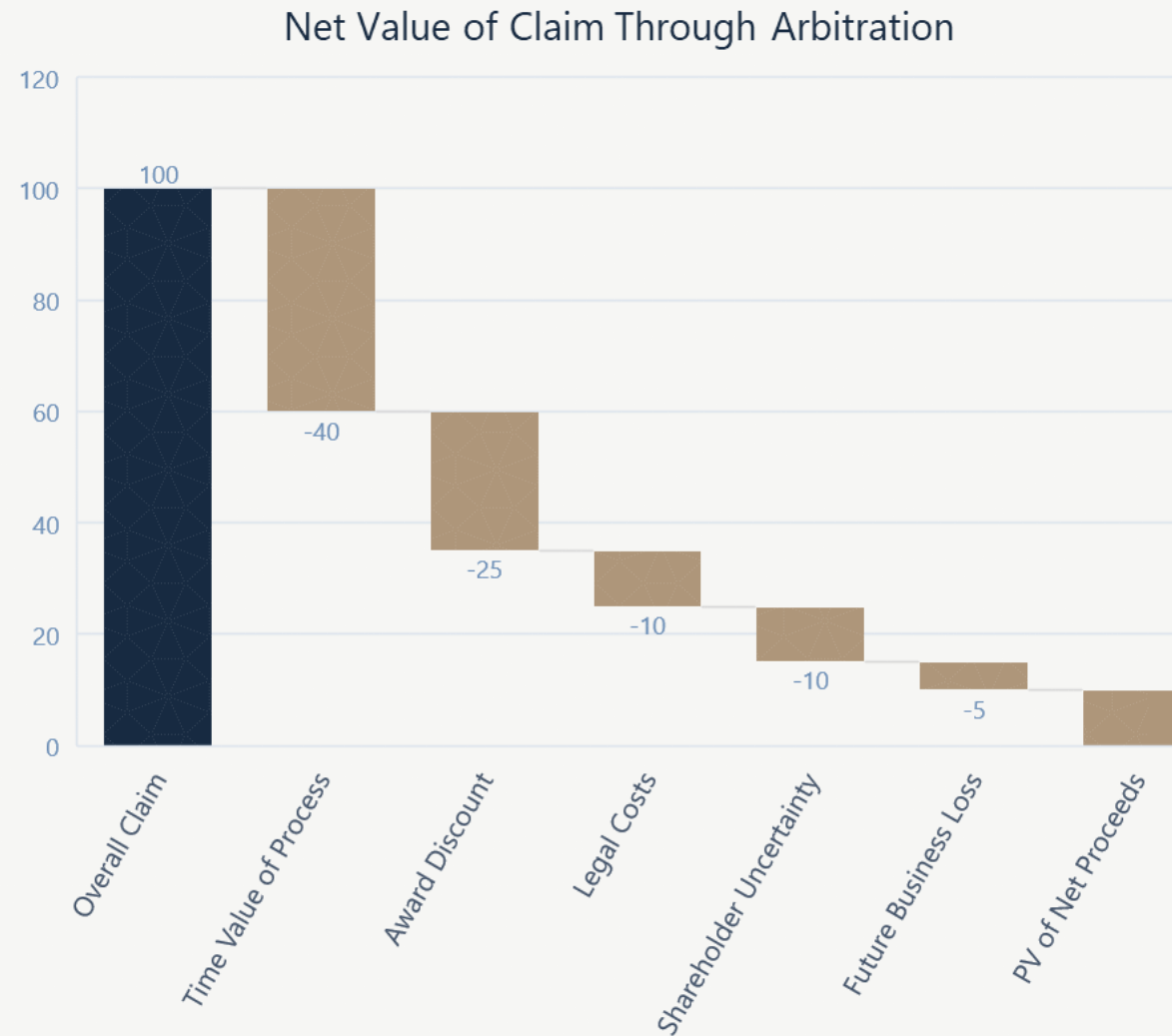
Why is the world beginning to re-think disputes?





Impact of disputes

1. Financial recovery
2. Commercial opportunity cost
3. Management opportunity cost
4. Reputational cost



Sources: ICSID data and client experience



Barriers to efficient resolution

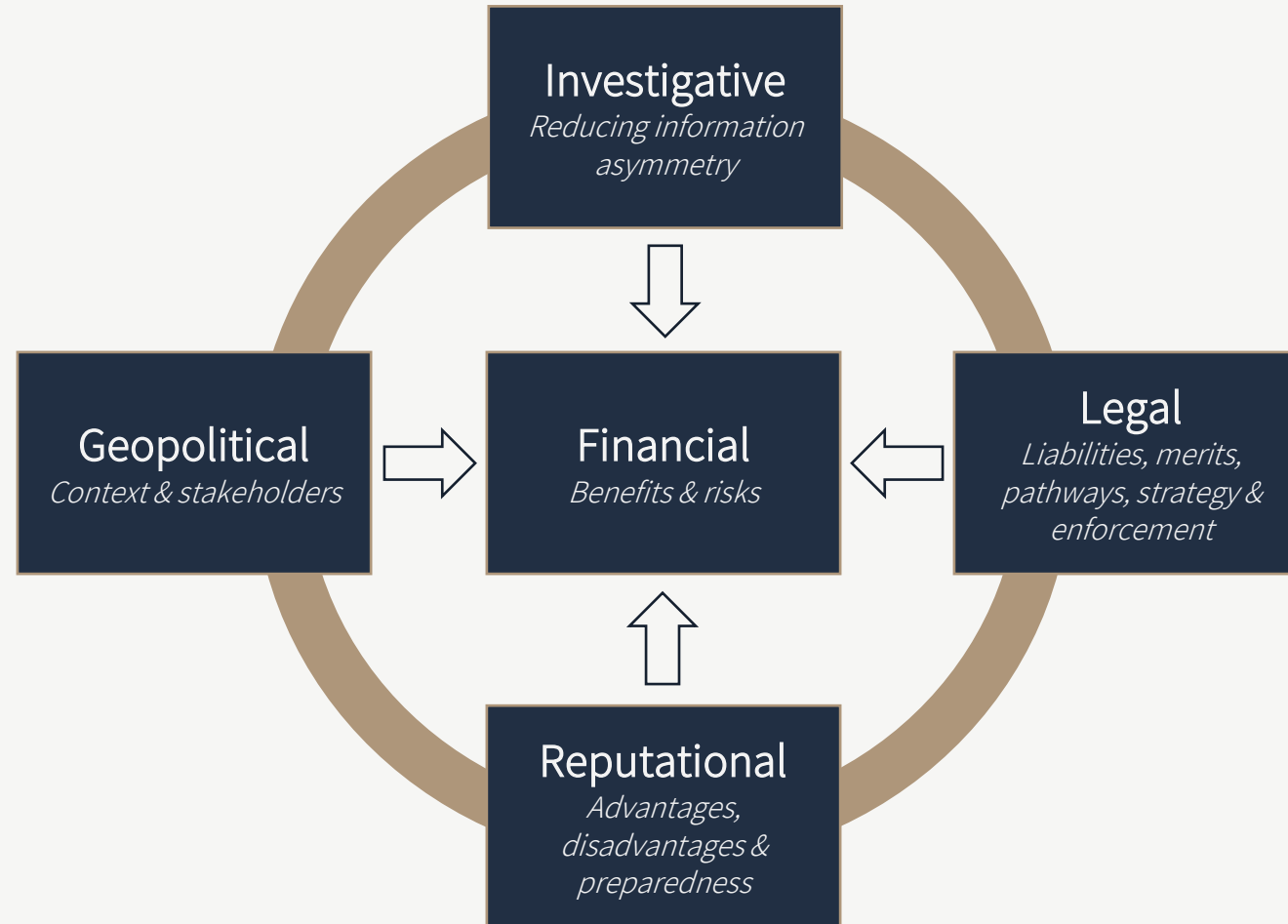
Include:

1. Drawn-out proceedings
2. Cross-border enforcement
3. Absence of a forum for settlement talks
4. Lack of clarity on choices and trade-offs





Emissary's Five Lenses risk analysis





The Five Lenses enhance expected value modelling

NPV of International Arbitration	
Headline Claim	
<i>Value</i>	\$ 25,000,000
Direct Costs	
<i>Time of arbitration - notice to award (year)</i>	1.5
<i>Costs of law firm</i>	\$ 800,000
<i>Tribunal and admin costs of arbitration</i>	\$ 250,000
<i>Potential for dilatory tactics</i>	0.5
Probabilities of Winning an Arbitration Award	
<i>Jurisdiction</i>	97%
<i>Merits</i>	90%
<i>Damages</i>	95%
Enforcement Considerations	
<i>Enforceable / attachable assets</i>	\$ 100,000,000
<i>Risks of proof of title and competing claims</i>	-30%
<i>Time to enforce (years)</i>	1
<i>Costs of enforcement</i>	\$ 150,000
<i>Probability of favorable ruling</i>	90%
<i>Potential for political interference / blockage</i>	-33%
<i>Costs of additional asset tracing</i>	\$ 100,000
Discount	
<i>Opportunity cost / discount rate</i>	5%
<i>Years</i>	3
NPV	
<i>Value</i>	\$ 7,500,000

Legal

Investigative

Economic

Geopolitical



Benefits of adjusting a case for Five Lenses risks

1. **Better management practice.** Emissary asserts that disputed investments should be managed with comparable financial rigor to that with which investments are managed. We believe this is supportive of fiduciary duties.
2. **Opportunity for case improvements.** Identification of major risks in a case provides opportunity for risk preemption and case improvements (i.e., raising the expected NPV). This includes obtaining better information on counterparties or potential liabilities and/ or consideration of alternative case theories, jurisdictions and enforceability. This may also include obtaining external litigation or arbitration funding.
3. **Alignment on decision-making.** Disputes can be complex and can also be resolved by way of litigation, arbitration, mediation, settlement and/ or another transaction. Clearer financial analysis helps complex decision-making for the stakeholders to a trust (trustee, settlor, beneficiary, counsel).



Case study

- Our client, a British single-family office, made a US\$20 million investment in the Luxembourg domiciled hedge fund of a well-known Greek-British financier on the recommendation of a long-time mutual business relationship.
- Over ten years, the client has received a return of 10%, with one remaining investment in a five-star hotels business, of which the financier is chairman, and which has expanded across Europe and the Middle East.
- The hotels business is a private company, but a well-known luxury brand. While reporting has been somewhat irregular to the client on this investment, it is thought that around US\$5-\$7 million of the original investment is still invested in the company.
- While the hotels business has clearly expanded its footprint in the past ten years, there has likely been some variance in financial performance across its portfolio, with most assets thought to be profitable and some potentially loss making.
- With Covid-19 placing the whole hotels portfolio in a liquidity crunch, the Greek founder and chairman of the business has decided to restructure the company, buying out certain minority shareholders at the original valuation from twelve years prior.



Case Study (continued)

The case is ambiguous and complex based on the factors listed to the right.

For SATC members:

- *How would you assess best course of action on a case such as this?*
- *What does fiduciary duty demand in complex disputes such as this?*
- *Have you seen any similar circumstances in your work?*

1. It is thought, but not clear, that the value of the hotels business has roughly doubled in twelve years, even despite the apparent need for a restructuring.

3. As a part of the company's growth into the Middle East, the client invested a 10% shareholding five years ago. It is not clear whether it has been similarly redeemed.

5. Counsel advises that under the investment agreements: (i) it is not clear whether the chairman had the right to redeem at will and (ii) the relevant dispute resolution clause calls for arbitration at the ICC in Paris.

2. The chairman of the business has accrued a net worth thought to be over \$2 billion as well as a reputation for sharp practice and contentious situations.

4. When a friendly request for more information on the redemption is requested, the Chairman and his office share only brief descriptions of the restructuring by email, avoid a meeting, and calling the matter "closed".

6. While counsel wants to commence books and records requests and prepare a UK litigation, the client's principal, investment team and trustees are not sure of whether or how to proceed.



Further insight

- *The global pandemic of disputes*

Thomson Reuters Westlaw
25 April 2021

- *What the Covid-19 crisis will mean for family office investment disputes*

Entrepreneur Middle East
20 April 2020

- *Nonmarket Strategy for Investment Disputes*

Saïd Business School, University of Oxford
9 October 2020
(Presentation available upon request)

THOMSON REUTERS
Westlaw.

The global pandemic of disputes

By Matthew L. McGrath, Emissary Holdings
APRIL 21, 2021

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 ills, 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.

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

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.

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.

In the UK and Europe, litigation funders are emerging as institutional-grade specialist hedge funds that are tapping green pastures for financial returns.

THOMSON REUTERS

THOMSON REUTERS EXPERT ANALYSIS

With over \$20 billion in assets under management and growing, new funds are entering the market targeting 10% ROI and 2-3% 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 looking rapidly to enable companies to actively pursue, enforce and risk-manage claims with portfolio operators that begin to resemble other alternative asset classes."

In the UK and Europe, litigation funders are emerging as institutional-grade specialist hedge funds that are tapping green pastures for financial returns.

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.

Udo Ahn, 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 preclude 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.

This article was published on Westlaw Today on April 21, 2021.

ABOUT THE AUTHOR

Matthew L. McGrath is founder and managing director of Emissary Holdings, a London-based firm advising institutional investors on financial control and management of their complex global disputes. Previously, he spent nine years with the Albright Stonebridge Group, the leading commercial diplomacy firm founded by former U.S. Secretary of State Madeleine Albright, and served as an associate in the office of then Vice President Joe Biden. McGrath comments frequently on the finance and geopolitical aspects of global disputes and lectures at Oxford's Saïd Business School on nonmarket strategy for investment disputes. He can be reached at mcgrath@emissaryholdings.co.uk.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

Thank you!

www.emissarypartners.com

