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IF COVID-19 DISPUTES ARE THE PROBLEM, COULD MEDIATION BE THE ANSWER?

INTRODUCTION

The current Covid-19 pandemic has the potential to give rise to disputes across the entire spectrum of economic activity. Companies and individuals will have been unable to perform their contractual obligations whether to pay rents or other sums due or to perform their part of a contract on time or in the manner agreed. One company's failure may have had knock-on effects causing others to find themselves in default and in dispute. The amounts in dispute may be relatively small (but still critically important to some or all of those involved) or may be extremely significant. There may be two disputing parties or multiple parties. There may be urgent matters which call for the swift and efficient resolution of disputes to enable the parties to get on with their businesses. The issues in dispute may be highly technical or relatively straightforward. The parties in such situations will have strict legal rights and obligations which they could resolve by the traditional dispute resolution methods of litigation or arbitration, depending on the contractual situation. In the current economic climate, that may simply not be good enough. Companies may go under unless disputes can be resolved quickly and economically.

LITIGATION / ARBITRATION

The first difficulty the parties will encounter with litigation or arbitration is that there is inevitably going to be a delay and probably a

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considerable delay in the context of businesses which require disputes to be resolved as soon as reasonably practicable. A second difficulty is that the litigation or arbitral process is likely to be expensive (and very management time-consuming) and disproportionately so where the sums involved are not particularly significant. A real risk, even where a party has a high probability of success, is that they may end up with a pyrrhic victory because the other party does not have the means to discharge a judgment or award and the successful party goes without an effective remedy and is left only with a costs bill.

MEDIATION

Mediation provides a very attractive alternative to resolve these disputes. Mediations can be arranged far more quickly than court or arbitration hearings, even where there are multiple parties. Mediations can be arranged in days or weeks, not months. The parties will not find themselves at the mercy of the court diaries or arbitrators' availability. In the current Covid-19 situation, many mediations have been conducted remotely and that is a very viable and efficient option.

Mediation is confidential and is without prejudice to the parties' strict legal rights which they can still pursue if the matter is not resolved at mediation. This confidential and without prejudice aspects enable parties to exercise complete control over the process. In an attempt to bring about a resolution of the dispute, parties can make suggestions and even concessions, which cannot be used against them subsequently. By way of example, one side may be willing to allow the other party access to its records to satisfy itself that its resources are depleted and that it is genuinely unable to discharge the entire sum which it may accept is owed. In that situation, the other party may agree to accept a lesser sum or to be paid out over a set timeframe, so that the paying remains viable and the successful party gets a material remedy, even if it is sometimes less than what it may be entitled to. Mediation is not binding unless and until a settlement is reached and signed up to by the parties. Once a mediated settlement is documented and signed, the parties can then go about their respective businesses, free from the drain on resources caused by litigation or arbitration.

Now, perhaps more than ever, one of the most compelling arguments in favour of mediation is the fact that the outcome which can be achieved is designed by the parties themselves and is not imposed by a Judge or an Arbitrator. Commercial people can create commercially-acceptable outcomes, rather than the winner/loser outcomes which litigation and arbitration deliver. Business relationships may be preserved and even enhanced.

CONCLUSION

Mediation is not a panacea but it has the potential to unlock and resolve even the most intractable disputes in a highly efficient and often mutually satisfactory manner and it should, at the very least, be seriously considered in every case. A solicitor acting for a party about to embark on litigation has

a statutory obligation to advise their client about mediation before the litigation commences. Mediation is a powerful, flexible and efficient process with an excellent track record of success in the most high value and complex cases. If Covid19 disputes are the problem, Mediation may very well be the answer.

For further information please see our Brief Guide to Mediation [here](#) or contact: john.doyle@dilloneustace.ie

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