

## “Breathing Space”

### Concept Note 3 on guidelines for the resolution of disputes following the 2020 pandemic September 2020

#### Introduction

1. This Concept Note is a continuation of BIICL’s “Breathing Space” series, which considers how the legal and business communities might respond to the COVID-19 pandemic in order to foster economic recovery.
2. In Concept Note 1,<sup>1</sup> a concern was expressed that strict reliance by parties on their legal rights in response to this pandemic may lead to a “*deluge of litigation and arbitration*” which would overwhelm the courts, disrupt supply chains and potentially stunt economic recovery. Concept Note 1 suggested that the solution may lie partly at a private law level.
3. Concept Note 2<sup>2</sup> looked more closely at the private law response to the pandemic, specifically in the context of contractual disputes, and how existing legal principles may be applied in the context of COVID-19 related disputes, as well as how existing dispute resolution mechanisms may effectively be used to achieve negotiated solutions.
4. In this Concept Note 3, we build on this theme and propose a set of practical guidelines which might be adopted to encourage a more conciliatory approach to contractual<sup>3</sup> disputes that may arise, and which seek to avoid and/or minimise protracted legal disputes, without prejudicing or altering parties’ legal rights. The guidelines have been prepared having regard to the wider public interest in supporting the economic recovery following the COVID-19 pandemic, and may complement many commercial organisations’ existing ESG<sup>4</sup> objectives.
5. As observed in the first two Concept Notes in this series, continental legal systems have historically adopted a broader view of the relevance of good faith in the context of the exercise of contractual rights. English courts have traditionally taken a different approach, and have generally been more restrained in implying general duties of good faith in commercial contracts.
6. The practical guidelines below do not seek to modify or fetter parties’ existing legal rights or obligations, whatever they may be. Rather, they seek to encourage parties to take practical steps to promote the efficient resolution of disputes, in a manner likely also to benefit the wider public interest. Thus, they are designed to create an opportunity for reflection and pause, helping parties to preserve commercial relationships and avoid/limit any potential impact on wider supply chains. Where legal proceedings are commenced, the guidelines also seek to create an environment where claims are conducted in the most proportionate manner, fostering potential for early settlement.
7. The guidelines are not intended to replace internal processes, but should be complementary to them, and have the benefit of encouraging all parties to adopt a similar approach. Indeed, the guidelines will have the most impact where applied mutually. If possible, they should be agreed upon by all parties at the earliest stage of a disagreement arising. As guidelines, however, they

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<sup>1</sup> [Concept Note 1 on the effect of the 2020 pandemic on commercial contracts.](#)

<sup>2</sup> [Concept Note 2 on the effect of the 2020 pandemic on commercial contracts.](#)

<sup>3</sup> Whilst the Guidelines are primarily directed to contractual disputes, many of the Guidelines will be applicable to other commercial disputes.

<sup>4</sup> Environmental, Social and Governance.

do not require formal adoption. A party may choose to apply them unilaterally, invite parties to a dispute to apply them, or could chose to adopt them in all their commercial dealings should they wish.

8. The guidelines should not confer a particular advantage on either party. For this reason, they should not be used for tactical advantage, for example, encouraging one party to delay whilst the other seeks to begin proceedings in a more advantageous jurisdiction.
9. The guidelines also serve to remind parties of the possible wider implications of pursuing avoidable legal proceedings or commencing proceedings too early. For example, court and tribunal resources may be stretched and adopting a constructive approach to the timing of legal proceedings and the procedures to be adopted will have a wider benefit of limiting the demands on the time of courts and tribunals,<sup>5</sup> to allow for more efficient administration of justice. A more considered approach may also have the benefit of saving costs.
10. Although these guidelines are not intended to create a binding regime, readers will be aware that mandatory measures have been put in place in a number of jurisdictions in response to the COVID-19 pandemic with a view to assisting businesses during this challenging period, which may be relevant to the conduct of disputes and legal proceedings.<sup>6</sup>
11. Headings have been included for convenience only and each guideline should be applied at any stage of a difference or dispute where relevant.
12. Finally, the authors would like to express their gratitude to the individuals who contributed their very helpful feedback in the course of preparing these guidelines and, in particular, to Michaela Potter of CMS Cameron McKenna Nabarro Olswang LLP for her considerable assistance.

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<sup>5</sup> Including arbitral tribunals.

### **Concept Note 3 - The Guidelines**

All parties are encouraged to:

#### **A. Interactions between Contractual Parties: behaviours aimed towards supporting contractual relationships**

- 1) act fairly and responsibly in maintaining contractual performance, taking into account the following non-exhaustive factors:
  - a) the possible wider business impact of their actions;
  - b) the financial standing of all parties;
  - c) the disruption associated with continued performance against disruption reasonably likely to be caused by a change, suspension, delay or termination;
  - d) the impact, if any, on other stakeholders, including other contractual counterparties (including sub-contractors), employees, lenders and shareholders
- 2) adopt a mutual without prejudice and confidential 'cards on the table' approach, sharing information relevant to the continued performance under the contract including (but not limited to):
  - a) available resources and potential constraints;
  - b) alternative options, whether or not envisaged under the contract;
  - c) a party's financial position
- 3) engage in discussions to explore solutions for problems arising, including extensions (or reductions) of time for performance and/or payment, non-contractual remedies, increases or reductions in the scope of the contract, and re-negotiation, including with the involvement of a third-party facilitator
- 4) explore ways to balance the impact between all parties, where extensions or reductions of time and/or changes in scope and/or price are sought
- 5) where early resolution of the dispute cannot be achieved, explore whether the dispute can be ring-fenced to allow contractual performance otherwise to be maintained

#### **B. Dispute Resolution Considerations: behaviours aimed towards resolution and/or avoiding escalation**

- 6) before resorting to proceedings, and where resources are available, appoint the most appropriate party representatives on all sides to encourage an objective assessment of the dispute and bring different perspectives to its resolution
- 7) agree extensions to contractual or statutory limitation periods where to do otherwise would likely result in proceedings having to be issued
- 8) avoid adopting tactical practices intended to place other parties under unreasonable financial or time pressure

- 9) where a party seeks funding in relation to proceedings, invite any litigation funder to follow these guidelines

**C. Alternative Dispute Resolution (ADR) and Legal Proceedings: behaviours aimed towards efficient legal proceedings and resolution using ADR techniques or other available procedures**

- 10) use mediation, early neutral evaluation or other ADR techniques pre-action with a view to avoiding legal proceedings altogether or narrowing the issues in dispute (whilst recognising that emergency interim relief may be necessary as a last resort before pre-action ADR has been exhausted)
- 11) where proceedings are unavoidable, work together to adopt litigation/arbitration procedures and timetables aimed at managing the proceedings in an efficient and time-appropriate manner, taking into account:
- a) the likely cost of proceedings, proportionate to the amount in dispute or relative value of the issues in dispute;
  - b) the available court/tribunal/other procedural resources;
  - c) the relative importance of the issues in dispute in the context of wider factors including the economy (and its recovery)
- 12) use ADR techniques during legal proceedings with a view to resolving the dispute or specific issues in dispute
- 13) consider whether issues arising in the dispute are of wider significance or commonly occurring, such that a court or tribunal may make determinations of wider application through available procedural mechanisms, including a stay pending determination of other cases involving common issues of fact or law, consolidation with other proceedings or the determination of specific issues of precedent value to other parties.

BIICL welcomes your comments to Concept Note 3 ([breathingspace@biicl.org](mailto:breathingspace@biicl.org)).

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