International Federation of Consulting Engineers
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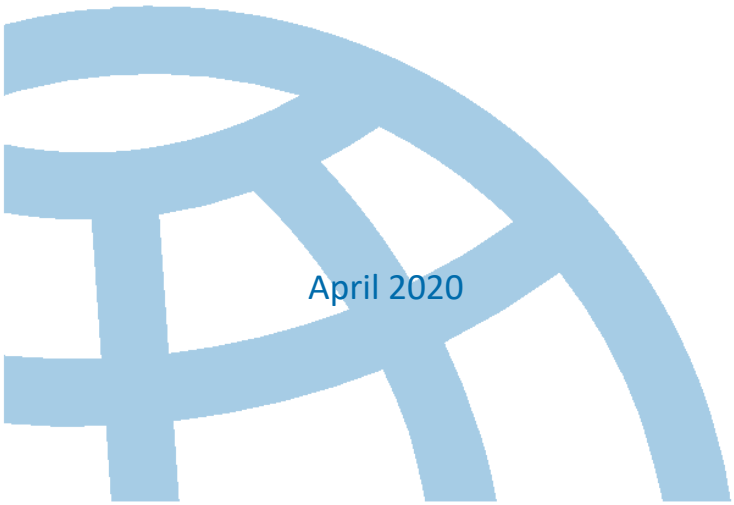
FIDIC COVID-19 GUIDANCE MEMORANDUM TO USERS OF FIDIC STANDARD FORMS OF WORKS CONTRACT

FIDIC Guidance Memorandum



April 2020

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About FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide.

Founded in 1913, FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations and to disseminate information and resources of interest to its members. Today, FIDIC membership covers over 100 countries of the world.

FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.

FIDIC also publishes business practice documents such as policy statements, position papers, guidelines, training manuals and training resource kits in the areas of management systems (quality management, risk management, business integrity management, environment management, sustainability) and business processes (consultant selection, quality based selection, tendering, procurement, insurance, liability, technology transfer, capacity building).

FIDIC organises the annual FIDIC International Infrastructure Conference and an extensive programme of seminars, capacity building workshops and training courses.

FIDIC priorities

- Leading the consultancy and engineering industry visibly and effectively
- Strengthen FIDIC's position in the overall construction industry
- Connect and support for our members more effectively
- Adopt and improve the governance of the federation
- Innovate the way the secretariat operates to be more effective and efficient.

This Guidance Memorandum was written by the FIDIC Contracts Committee which now comprises Vincent Leloup (the Chair), Des Barry, Adam Bialachowski, Deryl L. Earsom, Siobhan Fahey (currently in sabbatical), Zoltán Záhonyi, Kiri Parr, Matthias Neuenschwander, Peter Collie and Husni Madi together with Sarwono Hardjomuljadi, the FIDIC Board Member and Aisha Nadar, the FIDIC Board Member.

FIDIC wishes to record its appreciation of the time and effort devoted by all the above.

Purpose

COVID-19 presents an extraordinary challenge and FIDIC commends all members of the construction community to be focused on the successful delivery of the project before them in a way that sustains the long-term viability of the construction community

COVID-19 is having material and global impact on the delivery of construction projects across the world. Many of those projects are being delivered under FIDIC standard forms of contract.

This Guidance Memorandum contains an outline of the provisions in FIDIC's various general conditions of contract[1] for Works which can be found relevant with regards to likely scenarios that are arising as a consequence of COVID-19.

FIDIC's core purpose of drafting this Guidance Memorandum is to help Parties to a FIDIC contract to consider mutually satisfactory solutions and avoid disputes arising between them. COVID-19 pandemic is a unique broad scale and extraordinary event which should be recognized as such.

In line with its Golden Principles[2], FIDIC commends all members of the construction community to particularly keep in mind that FIDIC:

- promotes cooperation and trust between contracting Parties,
- does not support any Party taking undue advantage of its bargaining power,
- discourages adversarial attitudes and encourages dispute avoidance; and
- encourages timely and adequate payment in accordance with the Contract to maintain cashflow.

This Guidance Memorandum must also be considered in the light of the specific context that governs each project, including, the health and safety of people, the position being taken by international organizations as well as the national and/or local governments and authorities, the applicable laws and the entire contract agreed between the Parties (including any amendments made to the FIDIC standard forms).

This Guidance Memorandum has been prepared to assist users understand the contractual mechanisms that operate in the FIDIC standard forms of contract and does not provide advice specific to any project. The comments in this Guidance Memorandum are not exhaustive. They should not be relied upon in a specific issue or situation. Expert legal advice should be obtained whenever appropriate. Neither FIDIC nor the persons named in this Guidance Memorandum accept

[1] The substance of this Guidance Memorandum shall be the following:
FIDIC Conditions of Contract for Construction, 1999 (the 'Red Book 1999' or '**RB1999**'),
FIDIC Conditions of Contract for Plant and Design-Build, 1999 ('Yellow Book 1999' or '**YB1999**'),
EPC/Turnkey Projects, 1999 ('Silver Book' or '**SB1999**'),
*FIDIC Short Form of Contract ('*Green Book' *or '***GB1999***')*
FIDIC Conditions of Contract for Construction MDB Harmonised Edition, 2010 (the 'Pink Book' or '**PB**')
FIDIC Conditions of Contract for Design, Build and Operate Projects, 2008 ('Gold Book' or '**GOB**')
FIDIC Conditions of Contract for Construction, 2017 (the 'Red Book 2017' or '**RB2017**'),
FIDIC Conditions of Contract for Plant and Design-Build, 2017 ('Yellow Book 2017' or '**YB2017**'),
EPC/Turnkey Projects, 2017 ('Silver Book 2017' or '**SB2017**'),
'RB', '***YB'*** *or* '***SB'*** *are used when matters apply equally to the 1999 and the 2017 edition of the Red, Yellow or Silver Books*
*FIDIC Conditions of Contract for Underground Works ('*Emerald Book' *or '***EB***')*

[2] Freely accessible on FIDIC Web Site: https://fidic.org/sites/default/files/_golden_principles_1_12.pdf

any responsibility or liability arising from any use of this Guidance Memorandum or of any other publication named herein.

As the international federation of consulting engineers, FIDIC cannot undertake to give legal advice. For this reason, and because the legal interpretation of a contract will depend upon such matters as the precise wording of the various documents comprising the particular contract, as well as upon the governing law, FIDIC cannot assist in the interpretation of individual contracts. This Guidance Memorandum is made in isolation of any specific legal system or jurisdiction. Parties to a FIDIC contract are therefore recommended to seek specific advice (legal advice in particular) so as to cater for the aforementioned specific context before taking actions and making decisions.

Outline of FIDIC contractual provisions [3].

There are many factors which come into play with regards to COVID-19, resulting in numerous possible scenarios and interrelationships.

This Guidance Memorandum takes the approach of outlining several possible scenarios to which relevant contract likely responses are provided. Users can decide which scenario(s) is (are) most applicable to their case at hand.

Reminder of the health, safety and environment contractual obligations of the Contractor, the Employer, and the Engineer.

The Contractor has a general obligation to be responsible for the safety of all its operations and activities[4], and holds specific health, safety and environment obligations. They stipulate in particular that the Contractor shall:

- comply with the applicable health and safety regulations and Laws[5] - which is relevant in the present times where some governments are setting out COVID-19 specific obligations to be complied with on construction Sites; and
- ensure that "*suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics*"[6].
- Limit damage and nuisance to people resulting from the Contractor's operations and/or activities[7].

The Employer is generally responsible for ensuring that its Personnel (including the Engineer, depending on the FIDIC Contract used[8]) and its other contractors comply to some extent with the same health, safety and environment obligations which are imposed on the Contractor[9].

Scenarios considered

1. **The local authorities/government do not promulgate any new piece of legislation or regulation banning construction activity or works on Site. However, as a Contractor I am facing difficulties in mobilizing my personnel, who fear for their safety, and in obtaining Goods due to issues in my supply chain. What are my remedies?**

   The Contractor may explore remedies under SC 8.4(d) of the RB1999, YB1999, and SB1999, SC 8.5(d) of the RB2017, YB2017 and EB, and SC 9.3(d) of the GOB, which provide for an entitlement to an Extension of the Time for Completion (EOT) in case of "*Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions*". (RB2017 wording)

   Under SB 2017, the Contractor is entitled to an EOT only in the event of Unforeseeable shortages in the availability of Employer-Supplied Materials, if any, caused by epidemic or governmental actions.

[3] Words and expressions below, particularly definitions having their first letter capitalized, shall have the same meanings as are respectively assigned to them in the conditions of contract which are here considered.
[4] RB, YB, SB, EB, GOB and PB SC 4.1
[5] RB, YB, SB, EB, GOB and PB SC 4.8 / GB1999 SC 1.6
[6] RB, YB, SB, EB, GOB and PB SC 6.7
[7] RB, YB, SB, EB, GOB and PB SC 4.18
[8] RB, YB, EB and PB / GB1999, GOB and SB refer to an Employer's Representative
[9] RB, YB, SB, EB, GOB and PB SC 2.3

No similar provision is provided under SB 1999, as this is a Contractor's risk under that Book. No similar provision is found under GB1999 either, but SC 6.1(h), 7.3 and 10.4 can be investigated.

The Contractor should not forget that the above Sub-Clauses give an entitlement to an EOT only, and make no mention of any financial remedy, because that would depend upon the particular circumstances and whether the Contractor can establish an entitlement to financial compensation elsewhere under the Contract or at law.

2. **I am under the same circumstances as scenario No. 1 above. However, as the Contractor, instead of facing difficulties in mobilizing personnel or obtaining Goods, I am suffering delays caused by the authorities (for example making repeated health and safety inspections on the Site). What are my remedies?**

   The Contractor may be entitled to an EOT under SC 8.5 of the RB1999, YB1999, SB1999 and PB, in SC 8.6 of the RB2017, YB2017, SB2017 and EB, or in SC 9.5 of the GOB, provided that the conditions set out in these Sub-Clauses are fully satisfied.

   Regarding any financial entitlement, same comment as in scenario No.1 applies.

3. **The local authorities or government have promulgated changes to the Laws restricting construction activities and works on the Site. We are still able to proceed with the Works, however the Contractor is suffering delay and or incurring additional Cost as a result of those changes. How to handle this situation?**

   Firstly, it may be necessary to obtain legal advice as to whether a particular event constitutes a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws.

   Emergency laws or decrees that are issued right now across the world in different jurisdictions are likely to be treated as a change in Laws, given the broad definition of Laws provided in FIDIC forms[10]. It should also be noted that this definition covers a wide range of legislation as well as regulatory actions from "*any legally constituted public authority*" and therefore can apply to national parliamentary acts through to state-wide action and down to very local levels, such as a municipal orders. Users should not be limited to thinking that the word "Laws" refers to legislation only.

   If it is established that these actions by the local authorities or government are indeed considered as changes in Laws of the Country[11], then the Contractor may seek remedy under SC 13.7 of the RB1999, YB1999, SB1999 or PB, or under SC 13.6 of the RB2017, YB2017, SB2017, EB and GOB. This is because of the Contractor's obligation to comply with applicable Laws as set out under SC 1.13 of the RB, YB, SB1999, EB or PB, under SC 1.14 of the GOB, or under SC 1.12 of the SB2017.

   Such changes in Laws may impose specific COVID-19 health and safety measures on construction activities (ongoing or on resumption) such as social distancing, supply of face

[10] As an example, RB2017 SC 1.1.49 stipulates as follows: "*"**Laws**" means all national (or state or provincial) legislation, statutes, acts, decrees, rules, ordinances, orders, treaties, international law and other laws, and regulations and by-laws of any legally constituted public authority"*

[11] As an example, RB2017 SC 1.1.21 stipulates that Country "*means the country in which the Site (or most of it) is located, where the Permanent Works are to be executed*."

masks and sanitizers, alternative arrangements for transportation, facilities, working hours for staff and labour, etc. Those changes may well be treated as a Variation owing to the "*adjustment to the execution of the Works*"[12] that they may cause, or to the "*changed or new applicable standards*"[13] that they may constitute. In the alternative, they may be treated as a claim event.

4. **The local authorities/government have issued an order(s)/decree(s) preventing construction activities (including lockdown, curfew, inaccessible quarantined areas, etc.), and execution of the Works on Site has now become impossible. Consequently, the Contractor and/or the Employer is prevented from performing obligations under the Contract. Which Sub-Clauses would be applicable in this situation?**

   First of all, this situation may well be handled through the changes in Laws provisions set out under the Contract, as explained under scenario No.3 above.

   Further, or in the alternative, an investigation needs to be made whether this situation could qualify as Force Majeure as defined under SC 19.1 (RB1999, YB1999, SB1999, or PB) or SC 1.1.14 (GB1999), or as an Exceptional Event as defined under SC 18.1 (RB2017, YB2017, SB2017, or EB) or under SC 1.1.37 of the GOB.

   These Sub-Clauses provide that a "Force Majeure" or an "Exceptional Event" (as the case may be) means an event or circumstance which:

   - is beyond a Party's control;
   - the Party could not reasonably have provided against before entering into the Contract;
   - having arisen, such Party could not reasonably have avoided or overcome; and
   - is not substantially attributable to the other Party.

   SC 19.1 or SC 18.1 (as the case may be, and under the GOB as well) provide a list of examples, without limitation, of what may qualify as a Force Majeure or an Exceptional Event (as the case may be). The first 4 examples under SC 19.1 (first 5 examples under SC 18.1) are man-made events, while the last example under SC 19.1 (sub-paragraph (v)) and SC 18.1 (sub-paragraph (f)) is for "*natural catastrophes*" hence natural events.

   Cognizant of the fact that pandemics or local authorities/governmental actions are not listed as part of this list of examples, COVID-19 must be subjected to the test in SC 19.1 or SC 18.1 (as the case may be) so as to decide whether COVID-19 qualifies as a Force Majeure or an Exceptional Event (as the case may be). Under this scenario, COVID-19 may possibly fit the bill of being a Force Majeure or an Exceptional Event, owing to the local authorities/government ban on construction activities. But for such a ban, a Force Majeure/Exceptional Event case may still be argued, although the most problematic part of the test appears to be whether a Party "*could not reasonably have avoided or overcome*" the event, as it can be argued that the implementation of the relevant health and safety measures may make it possible to overcome the said COVID-19 event.

   As to entitlements, the Parties would have to look at which obligations are prevented by this Force Majeure/Exceptional Event, and notify accordingly as per SC 19.2 (RB1999, YB1999, SB1999, or PB), 13.2 (GB1999) or 18.2 (RB2017, YB2017, SB2017, EB or GOB). First

[12] SC 13.6 in RB2017, YB2017, SB2017 or EB
[13] SC 5.4 in YB, SB, EB and GOB

consequence under the Contract of a Force Majeure/Exceptional Event is that it excuses performance of the said prevented obligations. Ultimately the Contractor may be entitled to an EOT for any resulting delay as per SC 19.4 (RB1999, YB1999, SB1999, or PB), 7.3 (GB1999) or SC 18.4 (RB2017, YB2017, SB2017, EB or GOB). Financial entitlements appear unlikely[14], given that those arise only in conjunction with events of the kind referred to under SC 19.4 or SC 18.4 (as the case maybe). In this scenario No.4, financial entitlements are therefore more likely to flow from a change in Laws route, as contemplated under scenario No.3 above, than from a Force Majeure / Exceptional Event route.

5. **Under scenario No. 4 above, can I as the Contractor subject this scenario to Clause 17[15], because under Clause 17 I am entitled to a financial compensation in addition to an EOT, rather than only an EOT, when a natural Force Majeure or Exceptional Event occurs.**

   Clause 17 is not likely to be applicable under this scenario, as it relates to an event (including a Force Majeure or Exceptional Event, as the case may be) which results in loss or damage to the Works, Goods or Contractor's Documents, and that the Contractor is instructed to rectify. The remedies depicted under Clause 17 are the Contractor's recourse if the Contractor suffers delay and/or incurs Cost rectifying such loss or damage.

   It is an unlikely scenario that COVID-19 itself would cause loss or damage to the Works, Goods or Contractor's Documents, while it is more readily envisaged that it will instead delay and disrupt the performance of obligations, for which remedies are found in Clause 19 (RB1999, YB1999, SB1999 and PB) or Clause 18 (RB2017, YB2017, SB2017, EB and GOB)[16]

6. **Under scenarios Nos. 1, 2, or 3, above, can I, as an Employer or as a Contractor, resort to Clause 19 [*Force Majeure*][17], Clause 18 [*Exceptional Events*][18], or Clause 18 [*Exceptional Risks*]**19 **(as the case maybe), to address such scenarios?**

   It is likely these scenarios would fail the test of SC 19.1(c)20, SC 18.1(iii)21, or of SC 1.1.3722 of the GOB, given that under these scenarios the Contractor is most likely able to continue work on Site (although with difficulties). It can therefore be argued this is evidence that the Contractor could reasonably overcome the events contemplated under such scenarios, thus, not qualifying as a Force Majeure or an Exceptional Event (as the case may be). Performance of obligations is more difficult, onerous or disrupted, but not necessarily prevented.

   There could also be a scenario where an Employer (or the Engineer, if in RB, YB, EB or PB) sought to take precautionary action to prevent the spread of the virus by suspending progress of part or all of the Works under SC 8.8 (RB1999, YB1999, SB1999, or PB), SC 2.3 (GB1999), SC 8.9 (RB2017, YB2017, SB2017 or EB), or SC 9.7 (GOB). The risk in doing so, especially in the absence of supporting changes in Laws, is that the direction may not be supported by a Force Majeure or Exceptional Event, as discussed above, therefore not providing the necessary contractual excuse and justification for the Employer's action. This could give rise to Contractor's entitlements to the remedies prescribed under SC 8.9

[14] Except in GB1999 – see SC 10.4
[15] In RB, YB, SB, EB, PB or GOB
[16] GB1999: SC 6.1(i), SC 7.3, SC 10.4 and SC 13.2
[17] RB1999, YB1999, SB1999 or PB
[18] RB2017, YB2017, SB2017 or EB
[19] GOB
[20] (n 17)
[21] (n 18)
[22] (n 19)

(RB1999, YB1999, SB1999, and PB), SC 6.1(j), SC 7.3 and 10.4 (GB1999), SC 8.10 (RB2017, YB2017, SB2017 and EB), or SC 9.8 of the GOB. Further, or in the alternative, removing any right of access to the Site may trigger the remedies contemplated under SC 2.1.[23]

The Parties should bear in mind that during such suspension, the Contractor is under the obligation to protect, store and secure the Works against any deterioration, loss or damage. The Parties are encouraged to discuss how this obligation can be fulfilled.

7. **There have been no change in Laws of the Country nor real impact on the availability of personnel or on the supply chain so far. However, the personnel of the Employer (including the Engineer or the Employer's Representative, as the case may be) are, as a precaution, working remotely and hence are most of the time away from Site. As a consequence, I as the Contractor am suffering delay and/or incurring additional Cost due to slow decision making. How do I handle this situation?**

   Unless the Employer is successful in arguing a Force Majeure or Exceptional Event case (see scenario No.6 above), the Contractor may explore remedies under SC 8.4(e) of the RB1999, YB1999, and PB, SC 8.4(c) of the SB1999, SC 6.1(k) and 7.3 of the GB1999, SC 8.5(e) of the RB2017, YB2017 and EB, SC 8.5(c) of the SB2017, or SC 9.3(e) of the GOB, which provide for an entitlement to EOT in case of any delay, impediment or prevention caused by or attributable to the Employer, or the Employer's Personnel (including the Engineer, or the Employer's Representative, as the case may be)[24].

   The Contractor should bear in mind that the above Sub-Clauses give an entitlement to an EOT only, and make no mention of any financial remedy, because that would depend upon the particular circumstances and whether the Contractor can establish an entitlement to financial compensation elsewhere under the Contract or at law.

Other considerations:

In all scenarios outlined above, the Parties are reminded to timely comply with all their communication obligations, such as notices and contemporary records.[25]

the Parties should bear in mind the specific role allocated to the Engineer (or the Employer's Representative, as the case may be) who is to assist them in reaching agreement on any claim and, if such agreement cannot be reached, to make a fair and binding determination, taking due regard of all relevant circumstances[26]; and

Last but not least, the FIDIC contracts hold unique fully fledged dispute avoidance features – on a live and real-time basis, dispute boards[27] can provide useful opinions and advices as to how handling

[23] RB, YB, SB, PB, EB and GOB / GB1999: SC 2.1, SC 6.1(k), SC 7.3 and SC 10.4
[24] GB1999 – in case of "*any failure of the Employer*"
[25] Amongst other duties: RB, YB, SB, EB, PB and GOB: SC 1.3 / RB1999, YB1999, SB1999, PB: notices of Contractor's claims and Contractor's contemporary records under SC 20.1, notices of Employer's claims under SC 2.5, and notice of Force Majeure event under SC 19.2 / GB1999: Communications under SC 1.5, Force Majeure notice under SC 13.2 / GOB: notices of Contractor's claims and Contractor's contemporary records under SC 20.1, notices of Employer's claims under SC 20.2, and notice of an Exceptional Event under SC 18.2 / RB2017, YB2017, SB2017, EB: notices of money and time Claims (from either Contractor or Employer) under SC 20.2.1, contemporary records under SC 20.2.3, and notice of an Exceptional Event under SC 18.2
[26] RB1999, YB1999, SB1999, PB and GOB: SC 3.5 / RB2017, YB2017 and EB: SC 3.7.2 / SB2017: SC 3.5.2
[27] GB1999: Adjudicator / RB1999, YB1999, SB1999 and GOB: Dispute Adjudication Board / PB: Dispute Board / RB2017, YB2017, SB2017 and EB: Dispute Avoidance/Adjudication Board

this COVID-19 situation under the specific terms and facts of each individual Contract[28]. Should the Parties fail to reach common ground, and find themselves entrenched in adversarial attitudes, dispute boards can greatly assist in bringing Parties back to an amicable territory, or, if not possible, to quickly issue decisions as to their matters in dispute.

[28] RB1999 : SC 20.2 and General Conditions of DAA Clause 4(k) / PB : ditto plus DB Procedural Rule No.2 / GOB: ditto plus SC 20.5 / RB2017, YB2017 , SB2017 and EB: SC 21.3, GC of DAAB Agreement SC 1.3, 1.5 and 5.1(e), DAAB Procedural Rules 1 to 3 with regards to Informal Assistance.

Conclusion and recommendations

COVID-19 presents an extraordinary challenge and FIDIC commends all members of the construction community to be focused on the successful delivery of the project before them in a way that sustains the long-term viability of the construction community.

As has been emphasized in this Guidance Memorandum, a significant range of FIDIC contractual provisions are relevant and can be considered in the current COVID-19 pandemic situation, such as:

- Health and safety
- Change in Laws
- Force Majeure / Exceptional Event
- Unforeseeable shortages in personnel and in the supply chain
- Variation
- Delays caused by authorities
- EOT
- Claims and disputes, in particular dispute avoidance provisions

Users are recommended to consider the matrix of facts applying to their particular case so as to assess if and to what extent the aforementioned provisions are applicable, and/or whether additional ones also become relevant.

FIDIC would however remind its Contract users that solutions to project difficulties are not only to be found within the four corners of any contract. Care should be given to the following:

- Impact of the governing law of the Contract - as an example, the definition at law of Force Majeure in some civil law jurisdictions may differ from what is provided in the FIDIC 1999 Suite and in the PB.
- Decisions and recommendation from governments/authorities - as an example, FIDIC notes that various governments are currently recommending public authorities on public funded works to stay away from a literal or rigid application of contract terms which may significantly harm their supply chain, and instead to implement jointly agreed alternative contract terms providing for COVID-19 specific relief regimes so as to preserve cashflow and keep the supply chain alive over this crisis.
- Social responsibility – as this crisis progressively impacts everyone globally, if every business shelters behind hard-line and rigid approaches, this can lead to a booming escalation of insolvency cases, with a severe knock-on negative social effect on societies at large.
- Long-term vs short-term views - little or nothing can be recovered from an insolvent business. Enforcing strict and rigidly contractual rights may not be in one's long-term interest if that means bringing one's own supply chain to collapse.

As a corollary of the above, FIDIC encourages users to:

- familiarise themselves with the terms of their specific contract,
- understand the specific nature of local government policy and actions,
- seek legal advice specific to the relevant jurisdiction,
- seek, through cooperation, negotiation and open dialogue, practical and realistic solutions to the challenges we are all facing together,
- uphold the FIDIC Golden Principles, bearing in mind the considerations underpinning those,
- not only consider contractual and legal matters to handle their projects throughout this crisis, but also consider long-term business interests, social responsibility, long-term health of supply chains and of societies at large; and
- keep an objective view: although this crisis calls for specific/fit-for-purpose remedies and a rather lenient and open-minded approach, causation is as always critical and one should be able to differentiate difficulties caused by the COVID-19 crisis from those which would have been experienced in any case, but for the crisis.

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