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ARMED ACTIONS AS AN INSURED RISK UNDER FIDIC CONTRACTS – A REFLECTION ON HOUTHI OPERATIONS IN THE RED SEA

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Abstract

In this paper, the authors highlight the challenges inherent in legally distinguishing between the concepts of "risk of hostilities" and "risk of terrorism" in situations where the use of armed force leads to the rerouting of equipment transportation under a contract based on the FIDIC General Conditions (the "Yellow Book", 1999 edition).[2] In this context, the paper analyzes the legal implications of altering the route of goods transportation within a construction project to be carried out in Serbia, as a consequence of maritime attacks conducted between 2023 and 2025 in the Red Sea area by the Yemeni Houthis, namely their military-political wing, the "*Ansar Allah*" movement. Taking as its factual framework a scenario in which the transport of equipment must be rerouted due to the actions of "Ansar Allah" and the consequent cancellation of a cargo insurance policy, the authors examine the potential practical consequences of the legal characterization of such conduct. In this regard, the paper addresses the interrelationship between the termination of insurance coverage and the contractual consequences arising under the FIDIC Yellow Book (1999).

Keywords: *risk, terrorism, hostilities, Houthis, FIDIC.*

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[2] Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Works and for Building and Engineering Works Designed by the Contractor (First Edition 1999).

I Introduction

The altered geopolitical landscape in the Middle East and the increased risks in maritime traffic through the Red Sea, arising after the terrorist attack carried out by the „Islamic Resistance Movement", i.e. „*Hamas*" the territory of Israel on 7 October 2023 and the subsequent escalation of the Israeli–Palestinian conflict, have caused significant disruptions in international supply chains, the effects of which have also been felt on the domestic market. In particular, attacks by the „Ansar Allah" movement, an armed formation of the Yemeni Houthi ethnic group, against commercial vessels and tankers in the Red Sea and the Gulf of Aden region have considerably complicated maritime navigation along that segment of the route, leading to substantial disturbances in the insurance market, the effects of which continue to be felt.[3]

Such developments could potentially have significant legal implications for the implementation of infrastructure projects in the Republic of Serbia, particularly with respect to the delivery of capital equipment as an integral component of numerous construction undertakings.

In this context, situations in which the contractor would be required to reroute the delivery of equipment due to security risks, coupled with the cancellation of an insurance policy under which insurers had covered transport risks through the Red Sea, would raise a number of issues concerning the contractual allocation of risk between the employer and the contractor. Such situations would also give rise to questions regarding the consequential allocation of additional costs incurred as a result of rerouting the delivery along a longer and more expensive transport route.

With regard to the contractual framework established by the FIDIC "Yellow Book" (1999 edition), and FIDIC standard forms of contract in general,[4] the answers to the foregoing questions depend on several factors:

1. How the described risks are allocated between the employer and the contractor;
2. Whether the described circumstances qualify as force majeure.
3. The existence and scope of the causal link between the described events and the costs incurred.

Accordingly, this paper proceeds from the premise that the additional costs of rerouting equipment transportation, arising from the cancellation of cargo insurance due to security risks associated with attacks by the „Ansar Allah" movement, ne predstavljaju trošak koji se po FIDIC „Žutoj knjizi" (1999) može prebaciti na naručioca.

[3] "Red Sea insurance soars after deadly Houthi ship attacks", https://www.reuters.com/business/autos-transportation/red-sea-insurance-soars-after-deadly-houthi-ship-attacks-2025-07-10/, last visited on 24 October 2025

[4] Michael D. Robinson, *A Contractor`s Guide to the FIDIC Conditions of Contract,* Wiley-Blackwell, West Sussex, 2011, 85.

do not constitute a cost that may, under the FIDIC Yellow Book (1999), be shifted to the employer. The authors argue that, in such circumstances, the situation amounts to the materialization of a commercial risk borne by the contractor, rather than the realization of an Employer's Risk within the meaning of Sub-Clauses 17.3 and 17.4, nor does it constitute a force majeure event within the meaning of Sub-Clause 19.1.

II Contractual framework

The FIDIC General Conditions base the allocation of risk on well-established and widely accepted principles of fairness.[5] In accordance with these principles, a particular risk should be borne by the contracting party that is in the best position to control such risk, manage it efficiently, reasonably foresee its consequences, or adequately insure against it. This concept of risk allocation reflects a theoretical approach that has been systematized beyond FIDIC practice,[6] and subsequently accepted and normatively incorporated into modern international standard forms of contract.

In this regard, the contractual provisions governing the allocation of risk between the parties under the FIDIC "Yellow Book" (1999 edition) are set out in Sub-Clauses 17.3 and 17.4 and are structured as follows:

> ***17.3 Employer's Risks***
> *The risks referred to in Sub-Clause 17.4 below are:*
> *(a) war, **hostilities** (whether war be declared or not), invasion, act of foreign enemies,*
> *(b) rebellion, **terrorism**, revolution, insurrection, military or usurped power, or civil war, within the Country,*
> *(c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-contractors,*
> *(d) munitions of war, explosive materials, ionising radiation or contamination by radioactivity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity,*
> *(e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,*
> *(f) use or occupation by the Employer of any part of the Permanent Works, exceptas may be specified in the Contract,*
> *(g) design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible, if any, and*

[5] Nael G. Bunni, *Risk and Insurance in Construction* (second edition), Spon Press, London, 2003, 137.
[6] Max Abrahamson, *Risk Management*, International Construction Law Review, Vol. 1, 1984, 241–264.

(h) any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precaution.

17.4 Consequences of Employer's Risks

If and to the extent that any of the risks listed in Sub-Clause 17.3 above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Engineer and shall rectify this loss or damage to the extent required by the Engineer.

If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) payment of any such Cost, which shall be included in the Contract Price. In the case of sub-paragraphs (f) and (g) of Sub-Clause 17.3 [Employer's Risks], reasonable profit on the Cost shall also be included.

After receiving this further notice, the Engineer shall proceed in accordance with SubClause 3.5 [Determinations] to agree or determine these matters.

In light of the foregoing, the cited contractual provisions place emphasis on the following aspects:

- The explicit definition of events or circumstances deemed to constitute Employer's Risks;
- The differentiation of risks based on the criterion of territoriality, whereby certain risks (such as terrorism) are considered Employer's Risks only if they occur in the Country where the Works are executed, while other risks (war, hostilities, acts of foreign enemies) are treated as Employer's Risks irrespective of the place of their occurrence;
- The definition of consequences where "Employer's Risks" result in "loss or damage" to the Contractor's "Works, Goods or Contractor's Documents."

As can be seen, the contractual provisions remain silent as to the consequences arising from the materialization of "commercial risks," such as the unilateral cancellation of a cargo insurance policy by insurers under which the contractor insures the transport of equipment, i.e. Goods.

Accordingly, in situations where insurers exercise their, in practice frequently invoked, right to terminate coverage under cargo insurance policies due to the activities of groups such as „Ansar Allah",[7] the question arises as to what consequences

[7] Institutional "War" and "Strike" clauses contain provisions granting insurers the option, at their discretion and subject to compliance with the relevant preconditions, to withdraw or terminate coverage.

such termination would have on the contractual allocation of risk and the ensuing distribution of costs between the employer and the contractor.

III Commercial risk *vs* risk of loss or damage

Given that the rerouting of goods does not entail any loss of or damage to the goods themselves, it may be concluded that the costs arising from such circumstances represent the materialization of a commercial, i.e. economic, risk. Consequently, the preconditions for the application of the contractual mechanism set out in Sub-Clause 17.4 of the FIDIC "Yellow Book" (1999 edition) would not be satisfied.

In this respect, it is necessary to determine the adequate cause giving rise to the additional costs. In such situations, the cause would not lie in any physical damage to or destruction of the goods, but rather in the extended transport route. In other words, it must be examined whether the rerouting of goods would trigger the consequences contemplated by Sub-Clause 17.4 of the FIDIC Yellow Book, in particular the provision entitling the Contractor to recover additional costs resulting from „loss or damage to the Works, Goods or Contractor's Documents", caused by an Employer's Risk.

Guided by the Latin maxim *„causa proxima non remota spectatur"*[8], one could conclude that the direct causal link would be established between the cancellation of the insurance policy, as the immediate event preventing the contractor from carrying out transportation through the Red Sea, and the additional costs incurred, rather than between the activities of *„Ansar Alah*" (which would constitute a remote cause) and the rerouting costs. Accordingly, in such a scenario, the contractor's costs would not arise from the rectification of loss or damage to the equipment caused by the activities of "*Ansar Alah*" (as stipulated by Sub-Clause 17.4. of the FIDIC „Yellow Book" (1999), but rather from the materialization of a commercial risk, such as the insurer's decision to withdraw coverage and thereby prevent transportation through the Red Sea region.

It is important to emphasize that the risk of cancellation of an insurance policy, which constitutes the dominant cause of the additional costs arising from the consequent change in the transport route, is not recognized under the FIDIC "Yellow Book" (1999) as a risk whose consequences are to be borne by the Employer, nor does it establish a contractual framework that would assist in determining which party should bear such costs.

Accordingly, the costs incurred due to rerouting do not fall within the scope of the Employer's liability as defined in Sub-Clause 17.4 of the FIDIC Yellow Book (1999), since they do not result from loss of or damage to the Works, Goods,

[8] Wan Izatul Asma Wan Talaat, *Causa Proxima Non Remota Spectatur: The Doctrine of Causation in Marine Insurance*, J. Mar. Law & Commerce 34:521 (2003), 495-502.

or Contractor's Documents, but rather from the insurer's decision to withdraw cargo coverage due to heightened security risks.

Such an approach would be consistent with the concept of the efficient proximate cause as developed in the common law tradition. Namely, in the decision of the House of Lords in *Leyland Shipping Co v. Norwich Union Fire Insurance Society (1918)*, the rule was established that the efficient cause is the cause that is most effective, rather than the one that is temporally closest to the consequence.[9] In other words, *causa proxima* refers to the dominant and operative cause of the damage, not necessarily the last event in chronological sequence. This approach has become a standard in contemporary common law jurisprudence through the application of the so-called efficient cause test. It marked a shift from a purely temporal criterion to a substantive criterion of causal dominance. Courts no longer focus solely on the final event in the causal chain, but instead identify the cause that most significantly contributed to the loss, that is, the cause that was decisive in setting the other causes in motion and in producing the damage. Applying the efficient or adequate cause test in the present context leads to the conclusion that the insurer's decision to withdraw cargo coverage constituted the legally relevant and dominant cause of the additional costs incurred, whereas the activities of "*Ansar Alah*" had the character of a remote, indirect cause which, in itself, did not produce any loss of or damage to the contractor's goods.

Moreover, continental legal systems, including Swiss and German law, apply the test of "adequate causation," which assesses whether, according to ordinary experience, a particular cause is capable of producing the damage in question. In these jurisdictions, causation is determined on the basis of the foreseeability and typicality of the causal link, rather than on the formal proximity of an event to the damage. The legally decisive cause is the one which, in the ordinary course of events, may be regarded as sufficiently significant and foreseeable to bring about the loss sustained. This concept, known as „*adäquate Kausalität*", operates as a normative filter excluding from liability those causes that are excessively exceptional or atypical in the circumstances of the case.[10]

Accordingly, it may be argued that the causal chain between the activities of "*Ansar Allah*" ,the cancellation of the insurance policy due to navigational insecurity, and the consequent increase in costs resulting from the rerouting of transport does not fall within the contractual framework defined in Sub-Clause 17.4 of the FIDIC "Yellow Book" (1999) because there is no direct link between an employer's risk and the additional costs incurred due to rerouting, which arose from the withdrawal of insurance coverage and the resulting impossibility of carrying out transportation along the originally planned route.

[9] Leyland Shipping Co v. Norwich Union Fire Insurance Society [1918] AC 350, 369 (HL).

[10] Widmer Pierre, *Causation under Swiss Law." In: Jaap Spier (ed.), Unification of Tort Law: Causation*, Kluwer Law International, The Hague, 2000, 105–122.

IV Terrorism or hostilities

With regard to the contractual qualification of the actions of the Houthis, it should be borne in mind that Sub-Clause 17.3 of the FIDIC "Yellow Book" (1999) draws a significant distinction between situations categorized as "hostilities" and those treated as "terrorism". Specifically, in the case of "hostilities," the Employer bears the risk if such "hostilities" result in "loss of or damage to the Works, Goods or Contractor's Documents," without any territorial limitation. Conversely, in the case of terrorism, the same sub-clause provides that the risk falls upon the Employer only if the act of terrorism occurs within the territory, i.e. the Country, where the project is being executed.

hen this contractual framework is placed in the context of the factual developments in the Red Sea and Gulf of Aden region, a complex interpretative issue arises: whether the actions of "Ansar Allah" would qualify as an "act of hostility" or as "terrorism", because, in the first scenario, the burden would lie with the Employer irrespective of where the hostilities occur, whereas in the case of terrorism, the Employer would bear the risk only if the terrorist acts took place in the Country where the project is carried out.

Interpreting the etymological meaning of the term "hostilities" as well as the shown phrase "act of hostility," one could conclude that it denotes "an event that may be considered a sufficient cause for war; CASUS BELLI.[11]

Furthermore, if one builds upon the definition of the term "act of war", it yields the meaning of "an act regarded as sufficient cause for hostilities."[12]

Taken together, these definitions suggest that "hostilities," in the legal sense, denote conduct amounting to a *casus belli*, i.e. a cause for war in the manner in which war is categorized under international humanitarian law.

It is worth nothing that Common Article 2 of the Geneva Conventions from 1949,[13] defines an international armed conflict as„ all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them For the sake of clarity, the term "High Contracting Parties" refers exclusively to sovereign states that have ratified the Conventions, including the Republic of Yemen, on whose territory "Ansar Allah" operates.

However, it must be borne in mind that "Ansar Allah", nor Houthis as an ethnic group, possess the status of a high contracting party, nor can they be regarded under

[11] *"Act of hostility. (16c) An event that may be considered an adequate cause of war; CASUS BELLI. – Also termed hostile act."*, Bryan Garner, Black's Law Dictionary, 12th edition (2012), 43.

[12] *"Act of war. (17c) int'l law. An act considered sufficient cause for hostilities"*, Bryan Garner, Black's Law Dictionary, 12th edition (2012), 31.

[13] The Geneva Conventions of August 1949.

international law as the legitimate representative of the state of Yemen. The internationally recognized Yemeni government, embodied in the Presidential Leadership Council („*Presidential Leadership Council – PLC*") based in Aden, constitutes the sole sovereign entity authorized to act on behalf of the Republic of Yemen.

Consequently, the actions of "Ansar Allah" could not be characterized as forming part of an "international armed conflict", nor as "hostilities" within the meaning of international humanitarian law (and by that neither in the meaning of the FIDIC „Yellow Book" (1999)).

Additionally, attention should be drawn to the category of so-called "cross-border non-international armed conflict", a concept derived from the broader notion of "non-international armed conflicts "

International humanitarian law recognizes that armed conflicts may involve non-state actors, particularly in the context of civil wars, on the understanding that „an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State ".[14]

This principle has been further developed through the concept of „*Extra-territorial Non-International Armed Conflict*", referring to "cross-border internal armed conflicts in which an armed group fighting a State is primarily (or to a large extent) based and operates from the territory of a neighbouring State (the "host State")".[15]

Thus, the essence of this principle lies in allowing certain armed conduct to be treated within the framework of international humanitarian law applicable to non-international armed conflicts, notwithstanding the fact that such conflicts may have a "cross-border dimension".

In the present context, this could suggest that the actions of "Ansar Allah" might be characterized as "hostilities" within a "cross-border non-international armed conflict", given that they involve the use of armed force by an "organized armed group" operating beyond the borders of a single State. However, the attacks carried out by "Ansar Allah" against vessels in the Red Sea did not constitute a "spillover" of the internal armed conflict in Yemen.

On the contrary, the actions of "*Ansar Alah*" were not part of the Yemeni civil war, but rather consisted of armed attacks aimed at influencing — or compelling — the Government of Israel to cease its operations in Gaza.[16] Accordingly, the nature

[14] Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law.* Cambridge: Cambridge University Press, 2010. str 117–119, 136–139.

[15] Pavle Kilibarda, *Globalization of Non-International Armed Conflicts," in The Grey Zone: Civilian Protection Between Human Rights and the Laws of War (eds. Mark Lattimer & Philippe Sands)*, Bloomsbury Publishing, 2018, 117–155.

[16] Yemen's Houthis 'will not stop' Red Sea attacks until Israel ends Gaza war, https://www.aljazeera.com/news/2023/12/19/yemens-houthis-will-not-stop-red-sea-attacks-until-israel-stops-gaza-war, last time accessed on 26.10.2025.

of such armed conduct does not lend itself to classification as "hostilities" within the meaning of international humanitarian law, and therefore not within the meaning of the FIDIC "Yellow Book" (1999).

Moreover, it is precisely the political background and motive underlying the actions of "Ansar Allah" that provides the key distinction facilitating the determination of whether such conduct should be qualified as "hostilities" or as "terrorism.".

Although there is no universally binding definition of terrorism under international humanitarian law, its core characteristics are generally understood to encompass acts of violence or credible threats of violence which are:

- Directed against civilians or civilian infrastructure and are not connected to any armed conflict or hostilities;
- Committed with the specific intent to intimidate a population or to compel a government or international organization to take, or refrain from taking, a particular action;
- Motivated by political, religious, ideological, or similar objectives.

This characterization is reflected in international conventions such as the "International Convention for the Suppression of the Financing of Terrorism".[17] In particular, Article 2 of that Convention provides:

„Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act…".

Furthermore, the constituent elements of terrorism are also recognized within the framework of the "Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation", i.e. „SUA" Convention.[18] Adopted in 1988 and amended by the 2005 Protocol, this Convention represents a foundational international legal instrument in the fight against maritime terrorism.

Article 3(1) of the Convention defines the following acts as criminal offences in the context of combating terrorism:

[17] International Convention for the Suppression of the Financing of Terrorism (1999).

[18] Convention for the Suppression of Unlawful Acts of Violence Against Safety of Maritime Navigation (1988 and 2005).

„Any person commits an offence if that person unlawfully and intentionally:
(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
(b) performs an act of violence against a person on board a ship if act is likely to endanger the safe navigation of that ship; or
(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
(d) places or causes to be placed on a ship, by any means whatsoever, device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)."

Additionaly, article 3(2) stipulates:

„Any person also commits an offence if that person:
(a) attempts to commit any of the offences set forth in paragraph 1; or
(b) abets the commission of any of the offences set forth in paragraph perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences setforth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.."

In light of public statements made by representatives of "*Ansar Alah*", who described the attacks as efforts to impose a blockade on Israel and its allies, stating that operations would continue until the war in Gaza ends, it is evident that the maritime crisis in the Red Sea, caused by attacks on civilian vessels, is directly linked to political demands addressed to the State of Israel. It therefore appears clear that such acts constitute an attempt to compel the State of Israel to refrain from further military activities in Gaza.

This nexus between the act of violence, its civilian maritime target, and its political motivation may be characterized as terrorism under the relevant international conventions.

Moreover, although there is no universally binding official list of terrorist organizations at the international level, the United Nations has recognized the nature of the activities of "*Ansar Allah*" as terrorist. In UN Security Council Resolution 2624 (2022),[19] the Sanctions Committee strongly condemned cross-border attacks carried out by the "Houthi terrorist group," including attacks on commercial vessels in the Red Sea using water-borne improvised explosive devices and naval mines, as well as attacks against civilians and civilian infrastructure in Saudi Arabia and the United Arab Emirates.

Such assertions are fully consistent with the criteria for defining terrorism set out in UN Security Council Resolution 1566 (2004).[20] That resolution provides a widely accepted working definition of terrorism within the framework of international law. As stated in paragraph 3:

> *„Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."*

Therefore, applying these international normative frameworks to the conduct of "Ansar Allah", it may be concluded that the group's actions in the Red Sea satisfy the constituent elements of terrorism, namely:

- the intentional and systematic targeting of commercial vessels and civilian infrastructure,
- the existence of intent to disrupt international trade and maritime navigation,
- the existence of intent to exert political coercion aimed at influencing the policies of sovereign third States.

Accordingly, the actions of Ansar Allah in the Red Sea cannot be qualified as "hostilities" within the meaning of Sub-Clause 17.3(a) of the FIDIC "Yellow Book" (1999), but rather as acts of terrorism occurring outside the territory of the Country in which the Works are executed, and therefore do not trigger the contractual mechanism of employer's liability.

[19] UNSC Resolution 2624 (2022).
[20] UNSC Resolution 1566 (2004).

V Force majeure

In international commercial contracts, the concept of force majeure plays a pivotal role in regulating the consequences of unforeseen circumstances which a contracting party could neither foresee, avoid, nor overcome. This doctrine exists to relieve a party from liability where, due to such an event, it is objectively unable to perform its contractual obligations, subject to strict conditions. As a rule, force majeure encompasses natural disasters, acts of war, governmental actions, and other disruptions that substantially prevent contractual performance, but does not extend to ordinary business risks such as increased costs, logistical difficulties, or changes in market conditions..

In this spirit, Sub-Clause 19.1 of the FIDIC "Yellow Book" (1999 edition) provides as follows:

In this Clause, "Force Majeure" means an exceptional event or circumstance:
(a) which is beyond a Party's control,
(b) which such Party could not reasonably have provided against before entering into the Contract,
(c) which, having arisen, such Party could not reasonably have avoided or overcome, and
(d) which is not substantially attributable to the other Party.
Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:
(i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,
(iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

Accordingly, for reliance on force majeure to be considered justified, it is necessary that the circumstances be objectively insurmountable and qualify as external, extraordinary, and unforeseeable events rendering performance of the contractual obligation impossible. This principle underlies both judicial and arbitral practice in the interpretation of force majeure, in domestic as well as international contexts. In this regard, particular significance attaches to a series of cases addressing

the impossibility of navigation through the Suez Canal during the 1950s, in which courts adopted clear and instructive positions.

The closure of the Suez Canal in 1956 provided a significant test for the application of the doctrines of force majeure and frustration, and the case law that emerged from that event unequivocally confirmed the principle that a mere increase in costs or the necessity of an alternative method of performance does not constitute sufficient grounds for release from contractual obligations on the basis of force majeure or frustration.

In *Tsakiroglou* case,[21] the court examined whether the preconditions for frustration were satisfied in a contract under which the seller had undertaken to deliver peanuts from Sudan to Hamburg via the Suez Canal. Following the canal's closure, the seller argued that performance had become impossible. The court, however, held that delivery remained possible via an alternative route around the Cape of Good Hope, albeit longer and more expensive, and that no radical change in the contractual obligation had occurred. It further determined that the seller was required to bear the additional costs of rerouting.

Similarly, in *Transatlantic Financing* case,[22] the contractor sought additional compensation due to increased costs resulting from the detour around Africa. The court concluded that a 14% increase in costs did not reach the threshold of commercial impracticability, as performance remained possible and was in fact completed.

Thus, the above cases confirm that impeded performance, whether in the form of a longer route, delay, or increased costs, does not satisfy the requirements for the application of force majeure. As Professor Christoph Brunner likewise emphasizes, force majeure does not exist where a reasonable alternative mode of performance is available, unless the parties have expressly agreed on the exclusivity of a particular method of performance.[23]

Accordingly, it may be concluded that the doctrine of force majeure would not be applicable in a situation where the contractor reroutes the goods and thereby performs its contractual obligation, as the contractor has, in such circumstances, successfully overcome the alleged force majeure event.

VI Conclusion

The hypothetical scenario described above illustrates the complexity that arises at the intersection of private and public law, particularly in borderline situations involving legal concepts that require a nuanced and sophisticated understanding of the broader normative framework.

[21] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 (HL).

[22] *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966).

[23] Christoph Brunner, *Force Majeure and Hardship under General Contract Principles*, Kluwer Law International, 2009, 432–435.

In a situation where the contractor's insurer withdraws cargo coverage, thereby compelling the contractor to reroute the transport of goods, the question of who, under the FIDIC "Yellow Book" (1999), is obliged to bear the costs of such rerouting is exceptionally complex and multidimensional.

First and foremost, the answer depends on the proper legal qualification of the actions of "Ansar Allah", namely, whether they constitute acts of "hostilities" or "terrorism," whether they amount to a force majeure event, and, ultimately, whether a legally relevant causal link exists between the activities of "Ansar Allah" and costs incurred..

Within the contractual framework established by the FIDIC "Yellow Book" (1999 edition), however, it remains possible to delineate the balance of risks assumed by the contracting parties and to draw a reasoned conclusion regarding the allocation of the additional costs.

Therefore, in the specific scenario at hand, the fundamental premises would include the following:

- The actions of the "Ansar Allah" movement constitute acts of terrorism that occurred outside the territory where the project is being implemented;
- The costs incurred as a result of rerouting the transport do not constitute costs for remedying loss of or damage to the Works, Contractor's Goods, or Contractor's Documents;
- The inability to navigate through the Red Sea does not amount to a force majeure event, as the Contractor had at its disposal a reasonable alternative means of performing its contractual obligation, thereby excluding the existence of objective impossibility of performance as a key element of force majeure;
- The immediate, i.e., adequate cause of the rerouting costs lies in the termination of the insurance policy, and not in the actions of the "Ansar Allah" movement.

In light of the foregoing, it may be reasoned that, in the given scenario, the Contractor would bear the cost of rerouting the transport, rather than the Employer, since the contractual mechanism under the FIDIC Conditions of Contract for Plant and Design-Build (the "Yellow Book", 1999) provides that the Contractor is entitled to additional payment only in situations where:

- the cost arises as a consequence of remedying loss of or damage to the Works, Contractor's Goods, or Contractor's Documents;
- the relevant risk constitutes "hostilities" (without territorial limitation) or terrorism (provided that such risk materializes within the territory where the project is being carried out);
- the event qualifies as force majeure which the Contractor could not reasonably foresee, prevent, or avoid.

In any event, the hypothetical example described in this paper demonstrates how the insurance industry, geopolitical circumstances, maritime transport, the construction industry, and normative frameworks such as the FIDIC Conditions of Contract may be intricately interconnected and mutually dependent.

Any alternative interpretation would result in an unacceptable extension of the Employer's risk allocation and a derogation from the fundamental FIDIC principle that the Contractor bears commercial and logistical risks which do not stem from loss of or damage to the Works, Goods, or Documents.

Accordingly, it is necessary to carefully "dissect" each link in the chain between cause and effect in order to determine which contractual party ultimately bears the relevant risk.

Literature

- Abrahamson M., Risk Management, International Construction Law Review, Vol. 1, 1984,
- Brunner, C., Force Majeure and Hardship under General Contract Principles, Kluwer Law International, 2009,
- Bunni N., Risk and Insurance in Construction (second edition), Spon Press, London, 2003,
- Baker E., Mellors B., Chalmers S., Lavers A., FIDIC CONTRACTS: Law and Practice, Routledge, London i Njujork, 2009
- Cullen A., The Concept of Non-International Armed Conflict in International Humanitarian Law. Cambridge: Cambridge University Press, 2010.
- FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Works and for Building and Engineering Works Designed by the Contractor (First Edition 1999)
- Robinson D., A Contractor`s Guide to the FIDIC Conditions of Contract, Wiley-Blackwell,West Sussex, 2011
- Talaat Izatul W., Causa Proxima Non Remota Spectatur: The Doctrine of Causation in Marine Insurance, J. Mar. Law & Commerce 34:521, 2003,
- Widmer P., Causation under Swiss Law. In: Jaap Spier (ed.), Unification of Tort Law: Causation, Kluwer Law International, The Hague, 2000,
- Kilibarda P., Globalization of Non-International Armed Conflicts, in The Grey Zone: Civilian Protection Between Human Rights and the Laws of War (eds. Mark Lattimer & Philippe Sands), Bloomsbury Publishing, 2018

REGULATIONS

- International Convention for the Suppression of the Financing of Terrorism (1999)
- Convention for the Suppression of Unlawful Acts of Violence Against Safety of Maritime Navigation (1988 and 2005)
- UNSC Resolution 2624 (2022)
- UNSC Resolution 1566 (2004)

CASE LAW

- Leyland Shipping Co v. Norwich Union Fire Insurance Society [1918] AC 350, 369 (HL).
- Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93 (HL).
- Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966).

INTERNET SOURCES

- "Red Sea insurance soars after deadly Houthi ship attacks", https://www.reuters.com/business/autos-transportation/red-sea-insurance-soars-after-deadly-houthi-ship-attacks-2025-07-10/, last visited on 24.10.2025.
- Yemen's Houthis 'will not stop' Red Sea attacks until Israel ends Gaza war, https://www.aljazeera.com/news/2023/12/19/yemens-houthis-will-not-stop-red-sea-attacks-until-israel-stops-gaza-war, last visited on 26.10.2025.