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FIDIC Contracts guidance on the effects of inflation and unavailability of goods and labour following the global COVID-19 pandemic and the war in Ukraine

FIDIC Guidance Memorandum

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Contents

While the world was recovering from the global COVID-19 pandemic, countries progressively began to reopen their borders and resume regular trade, generating a booming market demand in many sectors including the construction industry. As a result, the industry has been severely affected by a combination of costs inflation, including transport cost, and unavailability or scarcity of construction inputs such as goods and labour. In addition to that, 2022 was impacted by the Russian invasion of Ukraine, and by differing COVID-19 policies in different countries, some of which continued to apply a strict zero-COVID policy throughout 2022 with total lockdowns. All the above resulted in severe disruption to the construction industry's global supply chains.

This Guidance Memorandum contains an outline of the provisions in FIDIC's various general conditions of contract[1] which can be relevant to help users deal with numerous scenarios which may arise in the above context.

Readers should be aware that in 2020 FIDIC published a Guidance Memorandum dealing with the immediate consequences of COVID-19.[2] That guidance remains relevant, and this paper will not repeat here the guidance given therein unless it is relevant to the issue under discussion.

Readers should also have regard to the Contracts Guide[3] published by FIDIC in relation to the clauses specifically referred to in this Guidance Memorandum.

In line with its Golden Principles,[4] 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 light of the specific context that governs each project, including the position being taken by international organisations as well as the national and/or

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[1] This Guidance Memorandum relates to the following:
- FIDIC Conditions of Contract for Construction, 1st Edition, 1999 (the 'Red Book 1999' or '**RB1999**');
- FIDIC Conditions of Contract for Plant and Design-Build, 1st Edition, 1999 ('Yellow Book 1999' or '**YB1999**');
- FIDIC Conditions of Contract for EPC/Turnkey Projects, 1st Edition, 1999 ('Silver Book' or '**SB1999**');
- FIDIC Short Form of Contract, 2nd Edition, 2021 ('Green Book' or '**GB2021**');
- 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, 1st Edition, 2008 ('Gold Book' or '**GOB**');
- FIDIC Conditions of Contract for Construction, 2nd Edition, 2017 (the 'Red Book 2017' or '**RB2017**');
- FIDIC Conditions of Contract for Plant and Design-Build, 2nd Edition, 2017 ('Yellow Book 2017' or '**YB2017**');
- FIDIC Conditions of Contract for EPC/Turnkey Projects, 2nd Edition, 2017 ('Silver Book 2017' or '**SB2017**'); and
- FIDIC Conditions of Contract for Underground Works, 1st Edition, 2019 ('Emerald Book' or '**EB**').

'**RB**', '**YB**' or '**SB**' are used when matters apply equally to the 1999 and the 2017 edition of the Red, Yellow or Silver Books. Where we have used 1999 or 2017 without qualifying which book then it applies to all three: RB, YB and SB.

[2] https://fidic.org/COVID-19, hereinafter referred to as the "**FIDIC COVID-19 Guidance Memorandum**"

[3] FIDIC Contracts Guide (1st Edition 2000, and 2nd Edition 2022), available at https://fidic.org/bookshop

[4] Accessible free of charge on FIDIC website: https://fidic.org/sites/default/files/_golden_principles_1_12.pdf

local governments and authorities, applicable laws and the contract agreed between the Parties (including any amendments made to the FIDIC standard forms).

This Guidance Memorandum has been prepared to assist users in understanding 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 for a specific issue or situation. Expert legal advice should be obtained whenever appropriate. Neither FIDIC nor any of the persons named in this Guidance Memorandum accept any responsibility or liability arising from any use of this Guidance Memorandum or of any other publication named herein.

FIDIC does not 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 documents comprising the contract, as well as upon the governing law, FIDIC cannot assist in the interpretation of individual contracts. This Guidance Memorandum is made independently of any specific legal system or jurisdiction, although it refers, where relevant, to the position at law in some jurisdictions. Parties to a FIDIC contract are therefore recommended to seek specialist advice (legal advice in particular) in any particular case before taking action and/or making decisions.

Lastly, readers should be aware that in December 2022 FIDIC published Reprints of the Red Book, Yellow Book and Silver Book 2017, which include all of the amendments that FIDIC made to the original text between 2017 and 2022. In particular, when considering Clauses 17 and 18 in those Books, care needs to be exercised by users to ensure they use the relevant wording.

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Preamble – Consideration when dealing with repeated COVID-19 infection waves

From the FIDIC COVID-19 Guidance Memorandum readers will recall that Force Majeure (1999 and PB wording, "FM") and Exceptional Events (GOB, EB, 2017 and GB2021 wording, "EE") were discussed. The shorthand expression FM/EE is used in this document to apply across the FIDIC contracts considered here. It is necessary to briefly revisit the provisions dealing with these subjects because they may inform the users as to the steps to consider. It was discussed that the COVID-19 pandemic, although "pandemic" is not listed as one of the examples of FM/EE in the relevant Sub-Clause, was likely to be classed as a "natural event" for the purposes of both FM and EE. Users will recall that the FIDIC COVID-19 Guidance Memorandum stated that the Contractor would however need to show that it "*could not reasonably have avoided or overcome*" the COVID-19 pandemic in order to be successful with a claim, as it can be argued that implementation of appropriate health and safety measures may make it possible to overcome the COVID-19 pandemic and therefore avoid being prevented from performing obligations.

A common objection is that, while COVID-19 may have been a relief event in the first part of 2020, it can no longer be held to be a relief event from the autumn of 2020 onwards as by then a Contractor should have known about it, having experienced one or two waves of COVID-19 infections. The argument would thus be that the Contractor should have known what to expect and could have taken steps to avoid or minimise the consequences of COVID-19, and therefore it is now a Contractor's health and safety risk.

However, it may not be that simple. It is quite correct to say that by wave three a Contractor ought to have had a plan in place to deal with the consequences of an outbreak on Site. However, that does not necessarily mean that a Contractor can no longer make any claim relating to COVID-19.

There are important factors to consider in relation to an ongoing FM/EE.

The first factor is whether the event is "exceptional" and:

- (i) is beyond a Party's control;
- (ii) is one which the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome ; and
- (iv) is not substantially attributable to the other Party,

and that it prevents the Contractor from performing any of its obligations under the contract.

Following a notice of FM/EE, the Contractor needs to be able to satisfy all of the above listed conditions in order for the claim to be valid.

Conditions (i) and (iv) will be fulfilled, given that the COVID-19 infection wave itself, i.e. the fact that a wave is impacting a project at a given point in time, has nothing to do with the Parties and cannot be controlled by them.

Condition (ii) may also be fulfilled, depending on the time of the formation of the Contract. The fact that the project may be experiencing the third or fourth wave of COVID-19 does not mean that the entire risk automatically passes to the Contractor. The question remains: what could the Contractor have reasonably provided against **before** entering into the Contract? Any past COVID-19 infection wave which occurred **after** entering into the Contract is therefore not a relevant reference point for the purpose of condition (ii). In other words, any COVID-19 infection wave occurring in 2020 or later, for a Contract entered into before 2020, will be irrelevant for the purpose of condition (ii) – the applicable reference point remains one of pre-COVID-19 times.

As to condition (iii), the Contractor will need to show that, the event having arisen (a COVID-19 infection wave hitting the project and impacting the Contract performance), it could not have reasonably avoided or overcome it. Therefore, while it might not have been possible to avoid or overcome the first and second wave, by the third a Contractor ought to have been developing strategies to avoid or overcome outbreaks of COVID-19 in line with the implementation of health and safety measures (face masks, sanitisers, social distancing, etc.) that rapidly became the "new normal" globally in the construction industry. This does not mean the Contractor has no right to claim at all. It means that the mitigation measures taken by the Contractor need to be reasonably robust, to meet the test of whether "*such Party could not reasonably have avoided or overcome*" the COVID-19 event. In other words, the avoidance/overcoming test becomes a harder one to pass for a later COVID-19 infection wave than for an earlier one. For example, the Contractor may claim for a relief should a COVID 19 infection wave be such that, despite the careful and diligent application by the Contractor of relevant health and safety measures against COVID-19, it nevertheless causes the prevention of the performance of its obligations.

The second factor is that in SC 19.3 (1999, PB) the Party is required to give a notice when the event no longer affects the Party's performance of the Works. Therefore, the Contractor can claim for all consequences of a COVID-19 infection wave up to the point when it gives an "all-clear" notice under SC 19.3.

Under SC 18.3 (2017, GOB, PB), the obligation is to give the same Notice as above at the end of the event. The addition in the 2017 forms is that the Contractor is required to give Notices every 28 days from the date of the first EE Notice for as long as the event is affecting its performance. Yet under the 2017 forms, the Employer can give a Notice to say that it regards the consequences of the event as at an end.

The next factor is the nature of the Contractor's claim.[5] Under both 1999 and 2017 editions, the Contractor can be entitled to an Extension of Time ("EOT") for Completion but not to the Cost of the consequences when it comes to a natural event.[6] Therefore, if the Site is closed due to a COVID-19 outbreak then the Contractor will not be entitled to its Cost under the FM/EE Clause. If the outbreak that delayed the Works and prevented the performance of obligations was in a third country (say, a source of supply for Goods for the Works) then the Contractor may be entitled to EOT, but again, would not be entitled to its Cost under FM/EE provisions.

Cost relief under FIDIC contracts for FM/EE can be obtained for certain man-made events. A specific category of man-made FM/EE is typically, in COVID-19 times, any law or regulation of a local authority to enforce lockdown, curfew, border closures or other measures which may prevent the execution of the Works – for example if the construction Site is closed, or if borders are closed and therefore prevent, as an example, the entry into the Country of the Contractor's foreign Personnel. As explained in the FIDIC COVID-19 Guidance Memorandum, such changes in laws or regulations qualify as a change in the Laws of the Country in the FIDIC forms, and such specific category of FM/EE is dealt with by Sub-Clause SC 13.7 (1999, PB) and SC 13.6 (2017, GOB, EB).[7] Relief for the Contractor in such cases is both EOT and Cost, but will depend on what the legal situation was at the Base Date. It would have to be

[5] "Claim" is a defined term under 2017 Edition (as amended in 2022) but not under 1999 Edition.
[6] As opposed to certain man-made events – see SC 19.4(b) (1999) and SC 18.4(b) (2017).
[7] GB2021 SC 11.1.3(h).

considered if, at the Base Date, the Country had already experienced one or several COVID-19 infection waves, resulting in legal or regulatory measures such as lockdowns or curfews, and if such measures were relaxed at the Base Date. In which case, any further similar measures being reinstated as the result of subsequent COVID-19 infection waves may give rise to an entitlement for a claim for change in Laws.

Finally, if the event having been confirmed as an FM/EE continues to prevent the progress of substantially all of the Works for a single period of 84 days or multiple periods totalling more than 140 days, then either Party may terminate the Contract under SC 19.6 or 19.7 (1999, PB), SC 18.5 or 18.6 (2017, GOB, EB)[8]. This is an extreme step to take and should only be taken after serious consideration of the ramifications and risks of doing so.

Other specific relief contemplated under the FIDIC COVID-19 Guidance Memorandum may still be applicable when it comes to further COVID-19 infection waves, and users are encouraged to refer to that Memorandum for guidance in this respect.

[8] GB2021 SC 6.6.3

Outline of FIDIC contractual provisions[9]

This Guidance Memorandum will outline several possible scenarios that may arise from the current global inflation in the aftermath of the COVID-19 pandemic and as exacerbated by the Ukraine war, and describe how they are addressed in FIDIC contracts. Users can decide which scenario(s) is (are) most applicable to their case.

Scenario 1

Scenario 1. A typical project that commenced in 2019. The Site shut three times due to COVID-19 outbreaks between March 2020 and June 2021.[10] In December 2021, the Contractor reported to the Engineer that they were unable to get deliveries of rebar to Site. The issues were that the global price of rebar had risen significantly and it was in short supply. Sourcing rebar had become very difficult. If the Contractor managed to procure rebar, then procuring shipping containers to transport the rebar was difficult.

This scenario is fairly typical of the type of circumstances beginning to develop on projects around the world in 2021.

Applying the FM/EE logic, what needs to be considered is the extent to which the Contractor was "*prevented from performing any obligations*" in this scenario. The fact that performing its obligations is more difficult, more onerous or that there is delay caused by the post COVID-19 difficulties does not necessarily amount to the Contractor being "prevented" as is required by SC 19.2 (1999, PB), SC 18.2. (2017, GOB, EB)[11]. It may come down to what weight is placed on "*any obligations*" and whether proceeding with the Works with due expedition and without delay, as required under SC 8.1 (1999/2017)[12], is regarded as a separate obligation from completing the Works on time or being able to finish the Works at all.

It should, however, be noted that FM/EE provisions not only consider permanent prevention, which may ultimately generate an entitlement to terminate the Contract as mentioned in the Preamble of this guidance, but they also consider events that temporarily prevent performance and delay the Works. For example, if, under the Contract, rebar was to be imported from a country which had imposed a lockdown, and/or where a border closure came into effect, after the Contract was formed, and this prevented the rebar from being delivered to the Site for, say, 30 days until the aforementioned measures were lifted, then as long as such delivery was on the critical path of the execution of the Works the Contractor would be entitled to an EOT under SC 19.4 (1999, PB) / SC 18.4 (2017, GOB, EB)[13]. However, this only applies if the Contractor can prove that it could not have reasonably avoided or overcome such issue by sourcing the rebar in a timely manner from an alternative supplier in another country, or in the Country (as defined in 1999/2017 Editions, GOB, EB, PB, i.e. where the Site (or most of it) is located).

It may also be argued that even in the absence of clearly identifiable FM/EE such as lockdown(s) or border closure(s) in a particular source country, the global tension on supply chains worldwide over the recent years may cause scarcity/unavailability of Goods which in itself may qualify as an FM/EE.

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[9] Words and expressions below, particularly definitions having their first letter capitalised, shall have the same meanings as are respectively assigned to them in the relevant FIDIC conditions of contract.

[10] For which see the FIDIC COVID-19 Guidance Memorandum.

[11] GB2021 SC 6.6.1

[12] PB SC 8.1, GOB SC 9.1, EB SC 8.1, GB2021 SC 6.1.2.

[13] GB2021 SC 11.1.3(b).

The factual background of a Contract, and in particular the date when the Contract was entered into and the reasonable ability to timely find alternative source(s) of Goods, would have to be however carefully considered in order to determine whether such global supply chain issues pass the FM/EE test set out in the Preamble above when it comes to assessing the validity of the above argument under a particular Contract.

However, the significant rise of the rebar price on the global market is unlikely to qualify as FM/EE. There is no entitlement simply because performance of obligations has become more onerous, or more expensive. FM/EE provisions are not hardship provisions. They only provide relief when performance is prevented, not when it is made more onerous or expensive.

It follows that, in this scenario, SC 19.4 (1999, PB) / SC 18.4 (2017, GOB, EB)[14] may be applicable only in the case of a shortage/unavailability of supplies, as per the details in the Preamble above.

SC 19.4 / SC 18.4 however does not necessarily provide the only right that a Contractor has to claim for delay in such a case. SC 8.4(d) / SC 8.5(d) (RB, YB 1999, PB / 2017, EB),[15] SC 9.3(d) (GOB)[16] may be explored as it provides that a Contractor will have a claim for an EOT if the completion of the Works is delayed by Unforeseeable shortages in the availability of personnel or Goods caused by an epidemic or by governmental actions. Unforeseeable is defined as not reasonably foreseeable by an experienced contractor by the date for the submission of the Tender (1999, GOB) or by the Base Date (2017, EB, PB, GB2021), which is 28 days before the latest date for the submission of the Tender.

It will, of course, be a matter of fact whether or not the Contractor can demonstrate that the shortage of rebar is due to the "*epidemic or governmental actions*". The shortage may be caused by the general effect of the pandemic worldwide from 2020 onwards. It may be difficult to demonstrate a direct causal link and the Contractor may have to rely on general arguments about whether this shortage would have occurred if there had not been a pandemic. There may be very clearly linked examples. One of them, as seen above, could be where there is a local outbreak at the factory contracted to manufacture the rebar which requires the factory to close temporarily. However, if the shortage of supply is found only to be as a result of the booming market demand on global supply chains in post COVID-19 times, then any delay suffered may not be seen as a direct result of the pandemic, but only indirect, hence possibly defeating the causation test and making the application of SC 8.4(d) / SC 8.5(d), SC 9.3(d) (GOB)[17] difficult.

If the Contractor overcomes that hurdle, it then needs to persuade the Employer and/or the Engineer that an experienced contractor could not have foreseen, before submitting the Tender (1999, GOB) or by the Base Date (2017, EB, PB, GB2021), the shortage of rebar and the difficulties in procuring transport. It is submitted that this hurdle is likely to be satisfied for Contracts let before March 2020. For contracts formed after the spring of 2020, it will be more complex (see Scenarios 6 and 7 below).

The other possibility raised by SC 8.4(d) / SC 8.5(d), SC9.3(d) (GOB)[18] is that the shortage is caused by a governmental action. As "governmental" is not defined, this could include actions outside the Country. An example could be a local lockdown in a particular country where the rebar is coming from, which means that the rebar cannot be manufactured. Examples could also include a factory closure, or a border closure caused by a governmental action, preventing the rebar from being exported. The

[14] GB2021 SC 11.1.3(b) and (c).
[15] This remedy is not available under the Silver Book, where it is a Contractor's risk.
[16] GB2021 SC 11.1.3(l)
[17] (n. 16)
[18] (n. 16)

government could be at local state level rather than a national government for the purposes of SC 8.4(d) / SC 8.5(d)/SC 9.3 (d) (GOB)[19].

The question whether the Contractor is entitled to claim for the increased Cost of purchasing rebar will be examined in the following Scenarios.

However, and finally, it is worth checking the governing law as some civil law countries (but not all) have provisions that provide additional remedies for the Contractor, in particular those having general hardship provisions.[20] In contrast, in most common law countries it is unlikely that the governing law will provide relief to the Contractor. It is more likely that nothing short of physical impossibility will be sufficient with regard to what qualifies as "prevention". Parties should therefore seek legal advice in order to explore the remedies that may be provided by the governing law.

Scenario 2

Scenario 2: As Scenario 1. The Contractor informs the Engineer that it has now procured the rebar in an EU[21] country and that it was en route and due to arrive on 18 March 2022. Unfortunately, they have incurred a 75% increase on the Cost of the rebar and a 300% increase on their shipping Costs. In addition, the delay in delivering the rebar has delayed the critical path of the project by 18 weeks mainly due to delay in the construction of the foundation slab.

The Contractor has several potential routes to consider in this scenario depending on the precise terms of the Contract.

We will look at the issues as follows:

(i) Costs increased by inflation;
(ii) Delay impact; and
(iii) Cost for Force Majeure or Exceptional Event.

<u>Costs increased by inflation.</u>

Most construction contracts provide that the Contractor gets paid the price he tendered for the works plus/minus any adjustments in accordance with the contract.[22] A contractor cannot claim merely because the work costs more to execute. The FIDIC forms are no exception, but they nevertheless provide specific Cost relief in particular circumstances that will be reviewed below.

The FIDIC Red Book/Pink Book has a Bill of Quantities and is subject to remeasurement. This means that the Contractor gets paid for the quantities of work actually executed, regardless of whether the quantities are more or less than what was stated in the Bill of Quantities as they are only estimates and are not a Contractor's risk. However, the rate or price for each quantity remains unchanged except as provided in the Contract, as will be seen below, as well as under Scenario 7.

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[19] (n. 16)
[20] These do not require a party to go outside the Contract's dispute resolution clause and to refer a dispute to the local courts. The tribunal provided for by the Contract (dispute board or arbitral tribunal) will apply the relevant governing law in its decision if it is explained to it in the submissions.
[21] European Union.
[22] With the exception of specific contract arrangements, such as "Cost plus", or collaborative contract forms with open book procurement arrangements.

One of these exceptions is Sub-Clause 13.8 (1999, GOB, PB) / SC 13.7 (2017, EB)[23] which is an optional provision named "Adjustment for Changes in Costs", that provides for the Employer to bear some of the risk of increased Cost due to inflationary pressure on the Cost of Goods and labour.

One of the choices to make when tendering for work is whether the Employer is to bear the risk of inflation, and if so to what extent. If the Employer chooses not to accept this risk, then the position is that the Contractor bears the risk of inflation. If the Employer decides to take the risk then, in the table of adjustment data in the Appendix to Tender (1999), or in the Schedule(s) of cost indexation (2017), the Employer should identify the elements of Goods and labour that will be adjusted for inflation, and the Contractor will complete the table/Schedule(s) by introducing price indices for such elements of Goods and labour, with coefficients for each, which approximate the proportion of Cost that each element of Goods and labour bears to the total Cost of executing the Works.

SC 13.8 (RB, YB 1999, GOB, PB)[24] or SC 13.7 (2017, EB) provide that if the table/Schedule has been completed then the Contractor is entitled to be paid the adjusted amounts in accordance with the price adjustment formula in the table/Schedule, on a monthly basis. It is worth stating that the adjustment could be upward or downward depending upon economic conditions and the operation of the formula.

There is no assurance that the actual Cost inflation suffered by the Contractor will be fully covered by the application of the price adjustment formula. Those price adjustment provisions do not fully de-risk cost inflation, because they will only provide a Contract Price increase to the extent that the price adjustment formula does. It might well be, as has been noticed on some projects in recent times, that the actual inflation is not fully captured by the increase of price indices, meaning that the Contractor would in such a case only recover a fraction of its additional Costs incurred by inflation. The non-recovered inflation Costs remain a Contractor's risk, owing to the specific language in SC 13.8 (1999, PB) / SC 13.7 (2017, EB) which provides as follows: "*To the extent that full compensation for any rise or fall in Costs is not covered by the provisions of this Sub-Clause or other Clauses of these Conditions, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs*."[25]

Where the Contract does not provide for compensation for full inflation Cost, or does not do so at all (in case the optional price adjustment provisions have not been selected under the Contract), remedies may exist at law. This is the case in some civil law countries, such as France where the so-called "hardship theory" may provide for specific remedies in such a situation. Parties should therefore seek legal advice in order to explore the remedies that may be provided by applicable law.

Finally, arguments called "economic hardship" or "financial force majeure" are sometimes advanced by claimants in such high inflation situations, where they contend that the effects of inflation are such that they drastically impact the economic balance of the Contract to an extent that makes them no longer able to continue performing their obligations under economically viable terms. Such arguments are however fraught with difficulties, given that FM/EE provisions only operate in cases where performance is prevented by an FM/EE, and not merely made more onerous or expensive because of the said event (here: inflation), this being the key difference between an FM/EE case and a hardship case. Furthermore, even in the unlikely event where an FM/EE claim were to succeed in a dispute

[23] GB2021 SC 8.8
[24] SB1999 has this price adjustment mechanism as an option under the Particular Conditions only.
[25] 2017 Edition text.

resolution forum, the only remedy is an EOT, not Costs (save for specific cases which will be studied below).

Delay impact

See Scenario 1 above for the delay implications of this situation, and any corresponding possible entitlement to an EOT.

Cost for Force Majeure or Exceptional Event

The increase of rebar and transportation Costs would generally not be recoverable under FM/EE provisions. This is because Cost entitlements under SC 19.4(b) (1999, PB) and SC 18.4(b) (2017, GOB, EB)[26] are strictly limited to some of the man-made FM/EE which are listed under SC 19.1 (1999) / SC 18.1 (2017). Inflation in the market prices for Goods is not one of those events, especially given that, as seen above and in Scenario 1, an inflation scenario is not likely to qualify as FM/EE because it does not prevent the performance of an obligation, but only makes it more onerous. A lockdown decided, or any other impeding decision made, by the government of the foreign country from where the supply originates would not be considered as a compensable event either, as such a situation is not covered by the Cost relief events described in SC 19.4(b) (1999, PB) and SC 18.4(b) (2017, GOB, EB)[27].

The only possible exception to the non-recoverability of Costs incurred in this scenario through FM/EE provisions would be in cases connected to war/hostilities/invasion/act of foreign enemies as can be seen below.

Scenario 3

Scenario 3. As per Scenario 1. However, the Contractor informs the Engineer in March 2022 that in January it procured and prepaid for the rebar from a Ukrainian manufacturer and the ship was due to leave Mariupol on 11 March 2022. Unfortunately, the ship could not leave because of the war in Ukraine, and the supply can no longer be made. Supply of rebar is on the critical path of the execution of the Works.

The issues here are the pre-payment for materials which are no longer going to be delivered because of the war in Ukraine and the further delay incurred as a result.

SC 19.1(i) (1999, PB) and SC 18.1(a) (2017, GOB, EB)[28] provide that war is considered to be an FM/EE. The war does not have to be in the Country but it has to prevent the Party from performing its obligations. Therefore, as long as the Party gives the Notice required by SC 19.2 (1999) / SC 18.2 (2017, GOB, EB)[29] then the provisions of the Clause will apply, subject to proving prevention. It should also be noted that the FIDIC forms cater for situations where it is argued, for example, that the Ukraine war is not a war but only a military or a special operation. The language used in the FIDIC forms refers to, beyond war per se, "*hostilities (whether war be declared or not), invasion, act of foreign enemies*", and is therefore broad enough to capture the Ukraine war whatever label anyone may put on it.

[26] GB2021 SC 11.1.3(b)(i).
[27] GB2021 SC 11.1.3.
[28] GB2021 SC 11.1.3(b)(i).
[29] GB2021 SC 6.6.1.

Time

SC 19.4(a) (1999, PB) / SC 18.4(a) (2017, GOB, EB)[30] provides that the Contractor may be entitled to an EOT in such a case where the supply of rebar from Ukraine is delayed because of the war, which is expressly classified as FM/EE under SC 19.1(i) (1999, PB) and SC 18.1(a) (2017, GOB, EB). It should be noted that under the latter provisions it does not matter whether a war occurs in or outside the Country; in both instances time relief is provided.

Cost

SC 19.4(b) (1999, PB), SC 18.4(b) (2017, GOB, EB)[31] entitles the Contractor to recover Costs incurred as a result of the war since, again, it does not does not matter whether a war occurs in or outside the Country; in both instances Cost relief is provided. The entitlement will depend on the facts.

If the rebar is alternatively delivered by rail or road, rather than waterways, and this takes longer , then the Contractor may be entitled to an EOT and to the associated prolongation Cost if this causes critical delay.

If the rebar can no longer be provided by the Ukrainian source, and the Contractor has to arrange for an alternative supply from another supplier in another country, then it would be entitled to the prolongation Cost associated with an EOT granted for any critical delay caused by procuring an alternative supply, as well as other additional Costs that it would incur by arranging for this alternative supply (e.g. increased purchase price) that it would not have incurred but for the war in Ukraine.

If the rebar becomes damaged/destroyed in transit or storage due to military action during the Ukraine war, SC 17.3(a) (1999, PB) and SC 17.2(e) (2017, EB), SC 17.3(b)(iv) (GOB) provide that the Employer bears the risk of war. If, later on, the Contractor is instructed to repair/replace the damaged/destroyed rebar by the Engineer (RB/YB)/Employer (SB), Employer's Representative (GOB) then the Contractor would be entitled to an EOT and to the additional Cost of dealing with the rectification of such loss or damage to the rebar in accordance with SC 17.4 (1999, PB, through a Contractor's claim) or with SC 17.2 (2017, EB) SC 17.6 (GOB)[32] (through a Variation therefore providing for an element of profit on top of the Costs), and to the extent that the war caused such loss or damage.

The cut and bent rebar could be classified as Materials for the purposes of being Goods, because the definition of Materials does not require Materials to be on Site but only to be "*allocated to the Contract*" so that materials made specifically for the Works could come under the definition of Materials, and thereby become an Employer's risk under SC 17.3 (1999, PB) and SC 17.2 (2017, EB) SC 17.3 (GOB)[33].

If any pre-payment made by the Contractor cannot be recovered from the Ukrainian supplier, then it may form part of the aforementioned rectification Cost.

[30] GB2021 SC 11.1.3(b)(i).
[31] (n. 30).
[32] GB2021 SC 11.1.3(a).
[33] (n. 32).

Scenario 4

Scenario 4. As per Scenario 1. However, the Contractor informs the Engineer in April 2022 that, in January, it procured and prepaid for the rebar from a Russian manufacturer and the ship was due to leave Saint Petersburg on 11 March 2022 and arrive at the local port on 6 April 2022. However, the Country (i.e. where the Site is located) has banned all trading with Russia and will not allow the shipment to enter the Country. The Contractor therefore procures rebar from the Americas at a further additional cost of US$120 per ton.

One may think at first that the outcome will be the same whether the rebar came from Ukraine or Russia.

Obviously, Clause 19 (1999, PB) / Clause 18 (2017, GOB, EB)[34] applies, as per Scenario 3 for the arrangement of an alternative source of supply, but when it comes to the Contractor's rights in relation to the Country's government decision to ban imports of Russian products, the Contractor has some additional rights.

As stated above for such alternative sourcing cases, the Cost caused by war is recoverable by the Contractor from the Employer under SC 19.4(b) (1999, PB) / SC 18.4(b) (2017, GOB, EB)[35]. In this case it is not the war which is directly causing the alternative sourcing, but the trade ban against Russia. Cost relief should therefore be explored under SC 13.7 (1999, PB) / SC 13.6 (2017, GOB, EB)[36], to the extent that the Cost or delay is incurred as a consequence of the Country's government banning imports from Russia, because such a ban could be classified as a change in the Laws of the Country made after the Base Date, owing to the broad definition of "Laws"[37] under the FIDIC forms.

Therefore, if the Contractor is able to demonstrate that:

- (i) the ban on imports from Russia is a change in the Laws in the Country from what those Laws were 28 days before the latest date for the submission of the Tender;
- (ii) it suffers delay or incurs additional Cost as a result of such change in the Laws; and
- (iii) the Contractor gives a Notice of its intention to claim,

then the Contractor may be entitled to an EOT for such delay and payment of additional Cost incurred.

It could be argued that the full amount paid to the Russian supplier is recoverable subject to the Contractor being able to recover the rebar (assuming the cargo can be rerouted to another country accepting it, and where the Contractor could collect it), make use of it on another project and/or sell it. Unless the Contractor can recover it and make use of it on another project, it may just be useless.

As for the additional Cost of procuring rebar from the Americas, it would appear to be recoverable as a consequence of the Government banning the import of the rebar previously purchased.

[34] GB2021 SC 6.6.
[35] GB2021 SC 11.1.3(b)(i).
[36] GB2021 SC 11.1.3(h).
[37] Please refer to the appropriate definition. For Example SC 1.1.49 in the 2017 Red Book.

Scenario 5

Scenario 5. Same as in Scenario 2, except that the EU country manufacturer was the intended source of supply for the rebars under the Contract. The Contractor contends that, despite neither Russia nor Ukraine being the direct source of rebars for the Works, the manufacturer based in the EU is using raw steel materials from both countries to manufacture rebars, and that the effects of the Ukraine war explain the 75% increase in the market price, and therefore the Contractor's Cost, for the rebars.

The same matters as those contemplated in Scenario 2 for the Cost increased by inflation would apply. There may be no relief for the Contractor, other than:

(i) under the Contract, relief provided through any price adjustment formula inserted under SC 13.8 (1999, GOB, PB) / SC 13.7 (2017, EB)[38]; and/or
(ii) in connection with the Contract, relief provided by virtue of the governing law (hardship provisions).

Obviously in this scenario the Contractor would try to argue that the Ukraine war is the cause of the increase in the steel market price, and that a Cost relief should be provided under the provisions of SC 19.4(b) (1999, PB) / 18.4(b) (2017, GOB, EB)[39]. However, it may not be that simple, mainly because, as already explained above, such provisions only grant relief when the Contractor is prevented from performing its obligations as a result of an FM/EE. However, the Ukraine war is not preventing the supply of rebar from the said EU country given that the manufacturer continues to be able to purchase raw steel materials from the market (i.e. from countries other than Ukraine and Russia), and is therefore able to ensure supplies. At best, the war only contributes to make it more expensive.

Had the EU country manufacturer become unable to supply rebar on account of raw steel materials not being delivered to it any longer due to the Ukraine war, the Contractor would have to turn to other countries to source rebar at a higher Cost than contemplated at the time of Tender. In that situation, the conclusion may be different as the Ukraine war would be held to be the cause of prevention of the supply of rebar from the intended source of supply (EU country) under the Contract, and the cause of the Contractor having to procure rebar from another source country. The time and Costs of doing so would in that case be relieved under SC 19.4(b) (1999, PB) / 18.4(b) (2017, GOB, EB)[40], as seen under Scenario 3.

As to the effects of any raw steel materials coming from Russia, the situation would be different because the EU country, as a member of the European Union, is applying trade bans against Russia. Therefore, remedies identified under Scenario 4, based on the change in the Law provisions found under SC 13.7 (1999, PB) / SC 13.6 (2017, GOB, EB)[41], may be applicable. However, this only applies if the EU country is also the Country, i.e. the country where the Site (or most of it) is located, or if the Country is in another EU country applying the same EU bans. This is because the change in Laws contemplated under SC 13.7 (1999, PB) / SC 13.6 (2017, GOB)[42] must be to those of the Country where the Permanent Works are to be executed; not those of the country where the rebar is manufactured, if different from the Country. If the Country is outside the EU and has no trade ban against Russia, such a claim would fail.

[38] GB2021 SC 8.8.
[39] GB2021 SC 11.1.3(b)(i).
[40] (n. 39).
[41] GB2021 SC 11.1.3(h).
[42] (n. 41).

In conclusion, if the Country is inside the EU, and the EU manufacturer can still deliver the rebar (having other sources of raw steel materials) though at a higher price than foreseen at the Tender stage, then the FM/EE provisions would not apply and therefore no longer provide for any relief; only change in the Law provisions (in addition to the price adjustment provisions and possible relief under the governing law mentioned in the first paragraph) would allow for relief. It would then be a matter of investigating causation, and determining what portion of the steel market price increase is caused by the EU trade bans against Russia, as only that portion could be indemnified. However, computing and proving such apportionment would most likely be an arduous task.

Scenario 6

Scenario 6. Same as Scenario 2 except that the Base Date is in February 2021, and the Letter of Acceptance was issued in July 2021 and the Commencement Date is August 2021.

A Party entering into a Contract in July 2021 is going to have more of a struggle than one in Scenario 1 and 2 to argue that delays caused by COVID-19 are FM/EE, given that by July 2021 COVID-19 was well known as were the potential consequences of an outbreak. With a Base Date in February 2021, the Contractor should have already allowed for some market price increases compared to a similar situation in 2019, and should have identified a source of supply for the rebar which would remain operational during COVID-19 times. The Contractor may have also negotiated special de-risking measures with the Employer to combat the effects of the market price volatility of some construction inputs, such as steel, on the Cost of executing the Works.

Notwithstanding the above, remedies contemplated under Scenarios 1 and 2 remain applicable to the extent that they apply to matters arising after the date of the execution of the Contract (July 2021) – the effects of the Ukraine war as of February 2022, as contemplated under Scenarios 3 and 5, being an example, as well as bringing relief through a change in the Laws in connection with the trade bans against Russia, as specifically seen under Scenarios 4 and 5 above.

Scenario 7

Scenario 7. A Contract, based on the Red Book, came into force in July 2020. The re-measured quantity of rebar now exceeds the Bill of Quantities (BoQ) item by 30%. Further, the Engineer instructed a Variation on 15 February 2022 for an additional base which requires an additional 100 tons of rebar. The rebar market price has skyrocketed since the Tender stage and the Contractor claims that the Contract BoQ rate for rebar should be re-rated.

Clause 12 deals with the principles of measurement under the FIDIC Red Book and Pink Book and in particular RB/PB[43] SC 12.3 deals, under its sub-paragraph(b) (2017)[44], with the circumstances when a change in the quantities of an item of work will allow a re-rating of the rate or price in the Bill of Quantities. Such a change in quantities typically results from either:

1. an inaccurate estimation of quantity in the BoQ; and/or
2. a Variation under Clause 13.

[43] Not applicable in YB, SB, GOB. Option in GB2021. Note that there is no re-rating mechanism defined in the EB for Excavation and Lining Works, owing to the way the corresponding BoQ items are defined and broken down under EB SC 13.8.
[44] Sub-paragraph (a) in RB1999 and PB.

A re-rating under RB/PB SC 12.3 is however subject to certain thresholds being met: (i) the measured quantity of the item of work is changed by more than 10%[45] from the quantity set out in the BoQ for that item, (ii) the change in quantity multiplied by the rate specified in the BoQ for that item exceeds 0.01%[46] of the Accepted Contract Amount, (iii) the change in quantity directly changes the Cost per unit quantity of the item by more than 1%, and, finally, (iv) the item is not said to be a "*fixed rate item*".

It can be seen that the re-rating is limited to specific situations and most importantly the re-rating is to deal with the consequences of the change in quantity.

Taking our rebar example, the increase in quantities of 30% would satisfy the first requirement (i) and for the purpose of this example, let us assume it also satisfies requirements (ii) and (iv). The problem for the Contractor lies with requirement (iii) in that the increase in the Cost per unit quantity of the rebar is driven by the turmoil in the market that followed COVID-19, rather than by the change in the quantity instructed by the Engineer. It follows that this situation is unlikely to satisfy requirement (iii) which is that "*this change in quantity directly changes the Cost per unit quantity of this item*":[47] it is not the change in quantity that increased the Cost per ton of the rebar, but the inflation of the rebar price on the market. A change in quantity can directly change the Cost per unit quantity of an item, typically in the case of fixed Costs which end up being better or less absorbed than envisaged because of the change in quantity. For example, indirect Costs such as on-Site overheads (if not separately priced under the BoQ, and if therefore spread across BoQ items) may remain unchanged or change very little despite the rebar quantity increase, hence are better absorbed with such an increase of quantity which generates higher revenue for the Contractor, hence decreasing the overheads Cost, and therefore the total Costs, per ton of rebar work.

A Contractor is not responsible for the quantities of work set out by the Employer in a Bill of Quantities in a Red Book/Pink Book Contract, and may therefore try to argue that it took the risk for the BoQ quantity but not for any additional quantity, whether instructed by a Variation or following an inaccurate estimation of quantity in the BoQ. However, the Contractor bears the risk of the pricing of BoQ items and is contractually bound, in accordance with RB SC 12.3, to apply such BoQ rates and prices to the actual quantity of work executed, whether or not the quantity is the same as initially set out in the BoQ. In other words, the Contractor is held to its pricing bargain. The only exceptions to that principle, and for which relief would be provided under the Contract, are set out as follows:

1. under SC 12.3(a) (1999, PB) / SC 12.3(b) (2017) (which does not apply for this scenario, as seen above);
2. under SC 13.8 (1999, PB) / SC 13.7 (2017) and the price adjustment provisions found there which are typically designed to address the risk of price fluctuations of construction inputs in the marketplace (see Scenario 2 above); and
3. in the specific cases contemplated under Scenarios 3 to 5 above, where the Cost per unit quantity increase is driven by relief events such as the war in Ukraine, and/or trade bans against Russia.

With respect to item 2 above, it is worth noting that under SC 13.8 (1999, PB), and under the Notes on the Preparation of Special Provisions in the Red Book 2017 Edition, the following is stated : "*The weightings (coefficients) for each of the factors of cost stated in the following table(s) of adjustment*

[45] 25% in the PB
[46] 0.25% in PB
[47] See 2017 SC 12.3(b)(iii).

data shall only be adjusted if they have been rendered unreasonable, unbalanced or inapplicable, as a result of Variations". The market price increase of the rebar could therefore generate a change in the coefficients used in the price adjustment formula in order to cater for such an increase, when combined with the relevant price index increase.

Finally, and as discussed above under various Scenarios, specific Cost relief may also be available under the governing law.

Scenario 8

Scenario 8. A project for which a Contract was entered into in early February 2022 with an anticipated Date of Completion in March 2024. At the beginning of the war in Ukraine, the Ukraine government recalled all males of working age either to join the army or otherwise to assist in the nation's efforts. Unfortunately for this project, 80% of the unskilled workers on Site were Ukrainian and 100% of the skilled workers were Ukrainian.

The consequence of this was that the project ground to a complete halt and the return date of the workers was completely unknown.

There are two relevant sets of provisions in the FIDIC contracts in this scenario.

The first relates back to the FM/EE provisions of Clause 19 (1999, PB) / Clause 18 (2017, GOB, EB)[48], and considers the war provisions of those Clauses as developed under Scenarios 1 to 5. Time and Cost relief can be found if it can be said that the consequences of the war "prevented" the Contractor from performing its obligations. It could be argued that it is unfortunate but there is nothing to stop the Contractor hiring new non-Ukrainian workers and continuing with the project. Nevertheless, while the Contractor proceeds with the mobilisation of an alternative workforce, and therefore until the prevention by war ceases to have effect, the FM/EE provisions are likely to provide for time and Cost relief in this scenario. The Employer may argue that the country from which the workforce came was the Contractor's choice, and that nothing prevented the Contractor from choosing a workforce from a different country in the first place. However, what matters is the conditions on which the Tender was established and accepted.

The second set of provisions is found under SC 8.4(d) (RB, YB1999, PB) or SC 8.5(d) (RB, YB2017, EB), SC9.3 (d) (GOB)[49] as discussed above in the Preamble and in Scenario 1, albeit only providing for a time but not Cost relief. The Ukrainian government mobilisation recall would qualify as "governmental action" under that Sub-Clause.

Finally, and as discussed above under various scenarios, specific time and Cost relief may also be available under the governing law.

Note that this scenario applies for projects where the Site is in or outside Ukraine: in the latter case, typically in countries neighbouring Ukraine where Ukrainian workforce is mobilised on construction projects. For a Site in Ukraine, the changes in the Laws of the Country may additionally entitle the Contractor to EOT and Costs under SC 13.7 (1999) / SC 13.6 (2017, GOB, EB)[50], subject to SC 20.1 (1999, PB, GOB) / SC 20.2 (2017, EB)[51].

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[48] GB2021 SC 6.6 and SC 11.1.3
[49] GB2021 SC 11.1.3(l).
[50] GB2021 SC 11.1.3(h).
[51] GB2021 SC 11.1.1.

Scenario 9

Scenario 9. A project in Eastern Ukraine where the Contract came into force in 2021 and had an anticipated Date of Completion in March 2024.

In such a scenario, it is likely that progressing the Works became impossible either due to the works being directly in a war zone, or due to the workforce being called to duty (as discussed above) and replacement labour is not an option.[52] It may even be the case that the Works are now destroyed, either partially or totally.

The war provisions of Clause 19 (1999, PB) / Clause 18 (2017, GOB, EB)[53] may apply in this scenario (see under Scenarios 3 to 6 and 8 above).

In relation to the physical loss of and damage to the Works and while the provisions of Clause 17 described in Scenario 3 above apply, the ability to make good the loss/damage is a significant consideration for the Engineer and Employer.

Given the ongoing nature of this event, the termination provisions discussed below may apply.

Scenario 10

Scenario 10. The Employer faced with each of the above scenarios has reassessed its business model and concluded that the execution of the Works by the Contractor, and their subsequent operation by the Employer, are no longer viable.

The Employer has three potential routes out of the Contract if it wishes.

The first is to terminate the Contract under SC 15.5 (1999/2017, GOB, EB, PB)[54], which is a termination for the Employer's convenience, i.e. not as a result of the Contractor's default. An Employer can terminate the Contract at any time, provided it gives 28 days' Notice and returns the Performance Security.

The second is if the COVID-19 pandemic or the war prevents progress for a continuous period of 84 days, or multiple periods exceeding 140 days, then either Party can terminate the Contract under SC 19.6 (1999, PB), SC 18.5 (2017, GOB, EB)[55]. We have now passed 84 days of the war in Ukraine so such termination could start to occur.

The third is the release from performance under SC 19.7 (1999, PB) / SC 18.6 (2017, GOB, EB) if it becomes impossible or unlawful for either Party to fulfil its obligations, and, as provided in 2017 SC 18.6, if the Parties are unable to agree on an amendment to the Contract that would permit continuing its performance. For example, if an existing facility in Ukraine was to be upgraded by the Contractor but progress is not possible either because the Works are in a war zone, labour to complete the Works is no longer available or the Works have been destroyed by military action, then the main physical

[52] Consideration of where the Ukraine government would want to continue with works critical to the war effort are beyond the scope of this paper.
[53] GB2021 SC 6.6 and SC 11.1.3
[54] GB2021 SC 10.2.4.
[55] GB2021 SC 6.6.3.

object of the Contract no longer exists, making the performance of upgrading work impossible as it would now no longer require an upgrade, but a totally new building instead.

If the Employer does terminate the Contract, then it has to pay the Contractor in accordance with SC 19.6 (1999, PB) / SC 18.5 (2017, GOB, EB)[56]. In cases of termination for the Employer's convenience under 2017 SC 15.5, besides the Costs due under SC 18.5, the amount for payment may include loss of profit and other losses or damages suffered by the Contractor as a result of the termination, as set out under SC 15.6(b)[57].

Other considerations

In all of the scenarios outlined above, the Parties are reminded to comply in a timely fashion with all their communication and record keeping obligations, such as Notices and maintaining contemporary records, as, if time limits expire, it may in some circumstances result in entitlements being barred.[58]

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.[59]

Last but not least, FIDIC contracts provide for dispute boards[60] which can provide useful informal opinions and advice on a live and real-time basis as to how to deal with issues under a Contract. Should the Parties fail to reach common ground, and find themselves entrenched in adversarial attitudes, a dispute board can greatly assist in bringing the Parties back to amicable ground, or, if that is not possible, to issue decisions expeditiously on matters in dispute.

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[56] GB2021 SC 10.4.

[57] GB2021 SC 10.4.1(c)(ii).

[58] Amongst other duties: RB, YB, SB, EB, PB , GOB and GB2021: 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 / GB2021: notice of Exceptional Event under SC 6.6.1, notice of claim and submission of contemporary records under SC 13.1 / 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.

[59] RB1999, YB1999, SB1999, PB, GOB and GB2021: SC 3.5 / RB2017, YB2017 and EB: SC 3.7.2 / SB2017: SC 3.5.2.

[60] GB2021: Adjudicator/RB1999, YB1999, SB1999 and GOB: Dispute Adjudication Board/PB: Dispute Board/RB2017, YB2017, SB2017 and EB: Dispute Avoidance/Adjudication Board.

Conclusions and recommendations

Current world events present extraordinary challenges 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 industry.

As has been emphasised in this Guidance Memorandum, a significant range of FIDIC contractual provisions are relevant and can be considered in the current situation, such as those dealing with:

- Health and safety
- Unforeseeable shortages in personnel and in supply chain
- EOT
- Changes in Laws
- Changes in Cost
- Responsibility and liability for care of the Works
- Risk allocation
- Force Majeure / Exceptional Events
- Claims and disputes, in particular dispute avoidance provisions
- Termination and the release from performance under the law.

It is recommended that users 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 provisions apply.

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:

- The impact of the governing law of the Contract – as an example, the legal definition of Force Majeure in some civil law jurisdictions may differ from what is provided in the FIDIC 1999 contracts and in the Pink Book, and the effects of hardship provisions in some civil law countries may provide relief in the present circumstances.
- Decision(s) and recommendation(s) from governments/authorities – as an example, FIDIC notes that various governments are currently recommending that public authorities on public funded works recognise the exceptional nature of the inflation that the world is going through, and to stay away from a literal or rigid application of contract terms which may significantly harm their supply chain, and instead implement jointly agreed alternative contract terms, including provisions providing for specific relief so as to preserve cashflow and keep the supply chain alive during this crisis.
- Social responsibility – as this crisis impacts everyone globally, if every business shelters behind hard-line and rigid approaches, this can lead to a booming escalation in the number 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 rigid contractual rights may not be in one's long-term interests if that means causing one's own supply chain to end.

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 them;
- consider not only contractual and legal matters in managing their projects throughout this crisis, but also 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 these times of post COVID-19 inflation and war, from those which would have been experienced in any case, but for such circumstances.

Summary table

The table below links the risk effect of the COVID-19 pandemic and the war with the relevant provisions of the 2017 Red, Yellow and Silver Books, providing relief to the Contractor, subject to certain conditions. The conditions are presented as a concise check list. The users must analyse the facts, follow the detailed procedures in the General Conditions as amended by the Particular Conditions, prove causation, and for FM/EE establish that prevention of performance actually occurred. Wherever the conditions provide for giving of a Notice, it shall be in writing and comply with the SC 1.3 requirements.

The FIDIC Contracts Committee strongly advises that users read the table below together with the scenarios above and their Contract, and seek legal advice as to the impact, if any, firstly of the facts of the specific case that is being considered; the legal implications of the Contract including Particular Conditions on the rights and obligations of the Parties; and finally, of the governing law.

risk event	**Scenario**	**possible Contractor's relief**		
		contractual (2017)/ legal basis	**entitlement**	**conditions**
unavailability of Goods because of COVID-19, with or without alternative sources of supplies	No. 1 No. 2 No. 6	SC 18.4 SC 8.5 (RB/YB)	EOT Cost: see Inflation below	for SC 18.4: • SC 18.2 prevention • SC 18.2 Notice • SC 18.3 mitigation • SC 18.3 Notices • SC 20.2 Claim procedure for SC 8.5: SC 20.2 Claim procedure
unavailability of Goods because of the war in Ukraine, with or without alternative sources of supplies	No. 3 No. 5 No. 6 No. 9	SC 18.4	EOT and Cost (incl. prolongation Costs and additional Costs)	as above for SC 18.4
unavailability of Goods because of the Country having trade bans against Russia (e.g.: EU)	No. 4 No. 5 No. 6	SC 13.6	EOT and Cost (incl. prolongation Costs and additional Cost)	changes in the Laws of the Country of the Site SC 20.2 Claim procedure
unavailability of Ukrainian Contractor's Personnel, mobilised to serve their country	No. 8 No. 9	SC 18.4 SC 8.5 (RB/YB)	EOT and Cost (incl. prolongation Costs)	for SC 18.4: as above for SC 8.5: SC 20.2 Claim procedure
		Site in Ukraine SC 13.6	EOT and Cost (incl. prolongation Costs)	changes in the Laws of the Country of the Site SC 20.2 Claim procedure

<table>
<tr><th rowspan="2">risk event</th><th rowspan="2">Scenario</th><th colspan="3">possible Contractor's relief</th></tr>
<tr><th>contractual (2017)/ legal basis</th><th>entitlement</th><th>conditions</th></tr>
<tr><td rowspan="2">damage/loss to the Goods, Works, Contractor's Documents because of the war</td><td rowspan="2">No. 3
No. 9</td><td>SC 18.4</td><td>EOT and prolongation Costs for EE</td><td>for SC 18.4: as above</td></tr>
<tr><td>SC 17.2</td><td>EOT and Cost plus element of profit (Variation) for dealing with instructed damage/loss rectification</td><td>instruction for rectification (deemed Variation)</td></tr>
<tr><td rowspan="2">inflation of Costs</td><td rowspan="2">No. 1
No. 2
No. 5
No. 6
No. 7
No. 9</td><td>SC 13.7</td><td>adjustment in the cost of labour, Goods and other inputs to the Works</td><td>Schedule(s) of Cost Indexation in the Contract</td></tr>
<tr><td>governing law</td><td>adjustment in the cost of labour, Goods and other inputs to the Works above the relief provided under SC 13.7</td><td>as provided by law
SC 20.2 Claim procedure</td></tr>
<tr><td>unbearable inflation/ continuing performance of the Contract is no longer economically viable</td><td>No. 9
No. 10</td><td>SC 15.5
SC 18.5</td><td>termination
Cost per SC 18.5

SC 15.5: additionally, loss of profit or other losses or damages suffered</td><td>for SC 15.5: at Employer's discretion, subject to 28 days' Notice and return of Performance Security

for SC 18.5: prevention for more than 84 days or multiple periods totalling more than 140 days</td></tr>
<tr><td>impossibility to continue resulting from the war or COVID-19</td><td>No. 9
No. 10</td><td>SC 18.6</td><td>release from performance
Cost per SC 18.5</td><td>SC 18.6 Notice that it becomes impossible or unlawful to continue, and Parties unable to agree on an amendment to the Contract</td></tr>
</table>

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 disseminating information and resources of interest to its members. Today, FIDIC membership covers over 100 countries of the world.

FIDIC Member Associations operate in over 100 countries with a combined population in excess of 6.5bn people and a combined GDP in excess of $30tn. The global industry, including construction, is estimated to be worth over $22tn. This means that FIDIC Member Associations across the various countries are worth over $8.5tn.

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