

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



Twelfth Edition – December 2021

### GENERAL CONDITIONS OF CONTRACT FOR CONSTRUCTION WORKS

#### THE EVOLUTION OF EXCEPTED RISKS

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The General Conditions of Contract for Construction Works (the “GCC”) has been utilised by the construction industry for a several decades now, with numerous updates/amendments being published at varying intervals. The purpose of these newer versions has been to keep up-to-date with the changing times and cater for the developing needs of the industry. Sometimes these amendments are reactionary i.e. through continued use, recurring problems or issues start to materialise exposing a clear need for a change. Other times, these amendments are anticipatory – the drafters foresee the possibility of certain issues or events occurring and effect amendments to cater for it.

The most recent update was published in 2015 (the “GCC 2015”), which included a number of vitally important changes and additions compared to its

predecessor (the “GCC 2010”). This article will analyse those changes, with specific focus of the excepted risks, highlighting the importance thereof and offer some speculation as to what changes can be expected.

Historically, care of the works was the Contractor’s responsibility. Contractors carried the risk of loss or damage to the works and therefore, needed to make provision for such risks in their pricing. This resulted in Employers paying for risks which may or may not materialise.

It became more economically prudent for the Employer to assume some of the more extreme risks, in which case, the Employer would only pay for the risks that actually materialise.

These extreme risk events were separated and the liability for care of the works in the event of the materialisation of one these extreme risks was placed on the Employer, either as an Employer's Risk or an Excepted Risk.

FIDIC has separated such extreme risks into two clauses. The Employer's Risks in Clause 17 relate to the care of the works while the Force Majeure events in Clause 19 relate to the progress of the works.

The GCC combines the effects of these types of extreme risk events into a single Excepted Risks clause. The Excepted Risks clause in the GCC, therefore, covers risks relating to progress of the works and risks relating to care of the works. In terms of the both the GCC 2010 and 2015, the excepted risks are listed in Clause 8.3. While an excepted risk is an Employer's risk, the mere occurrence of an excepted risk, however, does not mean that the Contractor will not suffer any actual loss at all.

#### Consequences of Excepted Risk Materialising:

In terms of Clause 8.3.1, the excepted risks are risks of not only "*damage or physical loss*" but also "*any other loss caused by or arising directly or indirectly as a result or consequence*" of the events listed therein.

There are a number of possible consequences in the event of an excepted risk materialising. The works could be destroyed or damaged, alternatively, the progress of the works could be delayed or even, in some cases, rendered impossible.

In terms of Clause 8.2.2.2 of the GCC (2010 and 2015),

if the works are damaged as a result of an excepted risk, the Contractor may be instructed to repair the damaged works and the costs of such reparation will be valued and paid in accordance with Clause 6.4. In other words, the additional work will be considered a variation. In these circumstances, it is a relatively simple procedure for the Contractor to claim.

It is, however, very often the case that an excepted risk does not necessarily damage the works, but delays the progress of the works. In these circumstances, the Contractor's position under the GCC 2010 was somewhat unclear.

Under the GCC 2010, if the Contractor considered himself entitled to an extension of time, Clause 5.12 entitled the Contractor to make a claim in terms of 10.1. This is based on the wording of Clause 5.12.2.3 which lists one of the circumstances in which a Contractor may be entitled to an extension of time to include "*Any disruption which is entirely beyond the Contractor's control*". Since the cornerstone of an excepted risk is the fact that it was beyond the control of the Contractor, Clause 5.12 read with Clause 10.1 would apply.

However, the Contractor would only be entitled to claim an extension of time and additional time-related general items occasioned by the excepted risks. The Contractor would not be able to claim for any proven additional costs despite broad wording of Clause 8.3.1.

Possibly the most significant change to the GCC 2015, insofar as the issue of excepted risks is concerned, is the addition of Clause 8.3.2.

This Clause has introduced a Contractor's right to claim for excepted risks under Clause 10.1. Under the GCC 2010, Contractors were not afforded an express entitlement to claim following the materialization on an excepted risk as Clause 8.3 did not make reference to Clause 10.1. As discussed above, the Contractors were able to claim for an extension of time and time related general items by virtue of Clause 5.12. They were not, however, given an express entitlement to claim proven additional costs.

In terms of Clause 8.3.2 of the GCC 2015, the Contractor may claim, not only for an extension of time and time-related expenses, as was the case under the GCC 2010, but also for proven additional costs. The Contractor's position under the GCC 2015 has therefore been significantly strengthened when it comes to claims relating to excepted risks.

Apart from the addition of a Contractor's claim for excepted risks, the GCC 2015 also included some new excepted risks.

The GCC 2015 has also included a new Clause 8.3.1.4 which reads:

*"Strike, riot, commotion, disorder, violent demonstrations, sabotage or any form of civil disturbance (whether lawful or not) which is not attributable to any action or inaction of the employees of the Contractor or his Subcontractors".*

This amendment was likely a reactionary measure taken as a result to the persistent strikes and, often violent, disruptions experienced in the construction industry. Under the GCC 2010, the Contractor was left somewhat exposed. This clause, in essence, seeks to

protect the Contractor from any form of interruption/damage effected by "outside entities".

Strikes are common-place in the construction industry. Prior to the inclusion of this Clause, the Contractor had the burden of proving that the strike was beyond his control, with the result that the Contractor would have had to do everything reasonably possible to prevent/stop the strike from taking place before being entitled to an extension of time under Clause 5.12.

Progress under construction contracts is often subjected to violent disruptions and threats from the disgruntled community in which the construction works is taking place. The wording of this Clause 8.3.1.4 seemingly protects the Contractor in such circumstances. However, there is a problematic aspect to this excepted risk, predominantly for Contractor's under government construction contracts in light of the Contract Participation Goal (CPG) requirements, which may render the Contractor's claims for this excepted risk unenforceable.

The Contractor is responsible and therefore, liable for the actions of his subcontractors. The issue with this Clause, not always but generally, when a contract is subject to CPG requirements, is that more often than not, when there is unrest and disruptions inflicted by the local community and/or business forums, the Contractor's CPG subcontractors and their employees become roped into the "collective action" of the disgruntled community. Therefore, the Employers often maintain the position that if any one participant of the disruption is a CPG subcontractor or an employee of a CPG subcontractor then the Contractor is prohibited from relying on Clause 8.3.1.4.

There is a strong argument to be made in this regard as to the Employer's failure to fulfil its own statutory obligations prior to commencement of these contracts being the actual cause of such disruptions but that will be more fully addressed in a subsequent article.

These disruptions, despite the fact that they may be perpetrated in part by the Contractor's subcontractors or their employees are entirely beyond the control of the Contractor and therefore, the strict application of this Clause is often to the detriment of the Contractors. There is a dire need for changes to be made to this Clause, primarily when used in contracts that are subject to CPG requirements but that, presumably, would also require some amendments to the legislation that imposes such requirements.

Clause 8.3.1.6 of the GCC 2015 now includes, as an excepted risk, the:

*"Disconnection of electricity supply not covered by the agreement with the supply authority."*

The addition of this Clause was presumably in response to the increasing, and ongoing electricity disruptions experienced by the South African industry as a whole. Apart from the crippling effect loadshedding has had on all industries, Contractors were notably impacted. This Clause, together with Clause 8.3.2, has provided Contractors with a remedy to claim for an extension of time, time-related general items as well as proven additional costs.

Another novel excepted risk is found in Clause 8.3.1.17:

*"Epidemic, famine and plague"*

In light of the events which haven unfolded around the world in the last two years, that being the Covid-19 pandemic, this Clause is likely the most stand-out addition to the excepted risks in the GCC 2015. The GCC 2010 contained no such provision and therefore, when Covid-19 swept across the globe, many Contractors under GCC 2010 Contracts were left severely exposed as they would not have been able to rely on the pandemic as an excepted risk.

Clause 8.3.1.7 refers to an "Epidemic", which is a sickness or disease on a local or regional scale and therefore, a pandemic, which is on a global scale, would nevertheless be covered by the Clause.

This amendment to the GCC was likely not inspired as a reactionary measure but it was a very significant addition to the GCC. The drafters deserve full credit for its inclusion.

There is, however, an argument to be made as to whether or not a pandemic was the actual cause that resulted in a delay or proven additional costs. It may be arguable that the pandemic was not in fact the cause of any delays or additional expenses, but rather, the government's regulations. It was the respective governments who enforced regulations forcing shut-downs, banning people from work, requiring more restrictive working conditions and health and safety precautions, restricting travel and imports and exports. Therefore, the argument would go, that the Contractor could not rely on the pandemic, in this case Covid-19, as a basis to claim for an excepted risk.

With that being said, the opening paragraph of clause 8.3.1, in our opinion, is broad enough to include the said regulations as it refers to “any other loss caused by or arising directly or indirectly as a result or consequence of”. It may be something to include in the next version to avoid any debate.

### Conclusion

The GCC 2015 now provides a clear entitlement to Contractor’s to claim as a result of the materialisation of an excepted risk, for an extension of time, time-related general items and proven additional costs. However, the construction industry is ever-changing and the listed excepted risks will inevitably change over time. The changes we can expect to see in the next edition of the GCC will likely be clarification of the existing excepted risks, with the goal of avoiding disputes relating to interpretation. However, we do not foresee any significant change to Clause 8.3.1.4 as the issues with that Clause do not emanate from the clause itself, but rather from requirements imposed by other legislation such as the CIDB Act, the Preferential Procurement Policy Framework Act, and the associated regulations.

The drafters of the GCC are currently working on amendments for the next edition. Excepted Risks are always going to be a moving target so it will be interesting to see what changes are made once the next edition is published.