



10 APRIL 2026

THE WAR IN IRAN AND THE RISING COST OF FUEL – HOW IT MAY AFFECT A CONSTRUCTION CONTRACT GOVERNED BY THE GCC 2015

Building, engineering and construction contracts are concluded for the purpose, amongst others, to define the rights and obligations of the parties and to allocate risks in the contract, whether express or implied.

Then there is the issue of risk and who bears the risk. All building, engineering and construction projects are subject to risks which can affect their successful completion. Risks can influence the delivery of a project with respect to time, cost and quality. The generic sources of risk on such projects include commercial and legal relationships, economic circumstances, human behaviour, natural events, political circumstances, technology and technical issues, management activities and controls and individual activity.

Some risks are insurable for which the contractor is usually compensated through the preliminary section of the bills of quantities and for which the contractor must provide proof of procuring such insurance. Such insurable risks may include, amongst others, contractors all risk insurance, third party liability insurance, insurance for professional fees, lateral support, amongst others.

Then, on the other hand, a construction contract may also allow for a list of excepted risks i.e. such risks that do not arise as a result of the contractor or the employer's actions and/or inactions, objectively outside of the control of both contracting parties, and for which the contractor will then be exempted from liability.

The General Conditions of Contract for Construction Works, Third Edition, 2015 (the "GCC 2015") expressly provides for excepted risk events under Clause 8.3. This does not constitute a *force majeure* clause. Clause 8.3 deals with excepted (or Employer's) risk events and must also be read in the context of Clause 9.1.1 (Termination due to external events), Clause 9.1.2 (Termination due to internal events), Clause 9.1.3 (Existing structure destroyed), Clause 9.1.4 (Additional costs), and Clause 9.1.5 (Payment if Contract is terminated), as the excepted risk event may even lead to a termination of the Contract.

The test for a Contractor to prove an entitlement under Clause 8.3 is to prove that the Contractor suffered "*damage or physical loss or any other loss...arising directly or*

indirectly as a result or consequence of” a “circumstance, event, act, or omission” provided for under Clauses 8.3.1.1 to 8.3.14, and that it “causes the Contractor to suffer any delay in achieving Practical Completion and/or brings about proven additional costs.”

Then, Clause 8.3.1.1 should be read with Clause 9.1.1, where in Clause 9.1.1 it states the following:

“If during the currency of the Contract, the excepted risks set out in Clause 8.3.1.1 occur in any part of the world, and if such event shall materially affect the carrying out of the Works, or cost of the Works...” (emphasis added)

Therefore, the “*war, invasion, act of foreign enemies, hostilities, or warlike operations (whether war or civil war be declared or not)*” may happen in any part of the world (and not only in the country where the Contract was concluded), and if it affects the carrying out of the Works in South Africa, or cost of the Works in South Africa, the Contractor shall be entitled to invoke a claim in terms of Clause 10.1, as read with Clause 8.3.2. An example would be that the supply and delivery of Plant or materials from another country may be delayed or, as can be seen from the war between the Ukraine and Russia that started in February 2022, the resultant impact, among others, was the increase of fuel prices where the use of fuel is a substantial component in most construction projects through the whole supply chain.

In the instant matter, the obligation is on the Contractor to notify an intention to claim in terms of Clause 10.1.1 of the GCC 2015, as read with Clause 8.3.2 and 5.12 of the GCC 2015. The notice must be issued within 28 days of the Contractor becoming aware of a delay to Practical Completion and/or proven additional costs and it is accepted that the proven additional costs impact can be an ongoing event, as provided for under Clauses 10.1.1.2 and 10.1.1.3 of the GCC 2015. An ongoing event will require monthly updated particulars and may even require interim payments until such time the whole claim can be quantified.

Therefore, if the Contractor suffers any damage or physical loss or any other loss (such as a financial loss) in carrying out the Works, as a result of the war between the USA/Israel and Iran, the Contractor’s remedy is available in Clause 10.1 and 8.3.2 of the GCC 2015. If the Contractor suffers a delay in carrying out the Works, as a result of the war between the USA/Israel and Iran, the Contractor’s remedy is available in Clause 10.1, 8.3.2 and 5.12.2.3 of the GCC 2015.

The notice of the claim and the submission of the claim is only the first step. The second step of the enquiry is for the Contractor to prove the additional costs and the extent of the delay incurred, and to specifically prove that the damage or physical loss or any other loss or delay is attributable to the war between the USA/Israel and Iran. The burden of proof will be upon the Contractor and if a contract was concluded between the Employer and the Contractor where Clause 6.8.2 (application of the Contract Price Adjustment

Factor) applies, then the recovery for proven additional costs will become more challenging for the Contractor. In other words, only proven additional costs not already covered by CPA will be claimable by the Contractor.

Clause 9.1.4 of the GCC 2015 unfortunately throws a bit of a curveball to the claim procedure explained above and refers to increased Cost incidental to carrying out the Works which is specifically attributable to the circumstances defined in Clause 9.1.1 of the GCC 2015. A time bar of 14 days is also introduced in this clause.

We will therefore advise when it comes to any additional costs or increased costs incurred, that a Contractor should notify in terms of Clauses 10.1, 8.3.2, 9.1.1 and 9.1.4 of the GCC 2015 within 14 days of the increase in cost becoming to the Contractor's knowledge. Major fuel increases in South Africa for April 2026 were officially announced on March 31, 2026 and the notification by the Contractor should be issued within 14 days of 31 March 2026. It will therefore be due by either 15 April 2026 (if no special non-working days apply in the Contract Data) or 17 April 2026 (if special non-working days apply in the Contract Data).

Notes and disclaimer:

This article does not constitute legal advice, and every contract should be considered on its own merits. The author or its company shall not be held liable in any way for any consequences whatsoever arising from using and applying any information and advice given in this article.

In the event that a tender was submitted before 1 April 2026 and is yet to be awarded by the Employer, the issue of increased cost or proven additional costs may have to be negotiated as part of the conclusion of the agreement, if the agreement does not provided for a CPAF.

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