



# The Apportionment of Risk in Construction Contracts\*

by

**Patrick MM Lane SC**

## Introduction

1. The evolution of the modern construction contract has been guided by the apportionment of risk between the employer and the contractor. In many instances the process has been arduous and not always successful.
2. A contract which balances the risks fairly between a contractor and an employer will generally, in the absence of bad faith, lead to a reasonable price, qualitative performance and the minimisation of disputes. The identification of the risk, its assessment and analysis and the management of the risk should it arise are crucial elements of a properly drafted construction contract. The most desirable result is to prevent any serious consequence but in most cases the effect will be to mitigate the consequence.
3. The primary general principle that ought to be applied in assessing to whom a risk is to be allocated is that the party most able to control the risk should bear it. Put differently the party who is best able to minimise the risk eventuating and manage the consequences should it eventuate should carry the risk. Hand in hand with this principle is the allocation of management responsibility. Questions of the foreseeability of the risk, which party should bear the risk and which party benefits or suffers when the risk eventuates are pertinent.
4. It is axiomatic, however, that one must first identify the risks. Some risks are common whereas others are inherent to the particular circumstances of the contract in question. Once the risk is identified it is necessary to consider the likelihood of it arising and the severity or potential severity of its consequences.
5. Considerations of policy impact on the allocation of risk. It might well be the case that the employer, although recognising that the risk should appropriately reside in him, considers it more expedient that the contractor manage it and requiring the contractor to assume responsibility and allow for it in its tender.

---

\* This article was submitted as a conference paper in the Intl. Conference: "Arbitration & ADR in the Construction Industry Dubai 2005-organized by Dubai International Arbitration Center."