

CONSTRUCTION CONTRACTS, RISK PRICING, AND CLAIM MANAGEMENT: FROM DRAFTING TO ENTITLEMENT PRESERVATION



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Construction projects are, by their very nature, complex and exposed to uncertainty. Unforeseen ground conditions, adverse weather, regulatory obstacles, performance guarantees, supply chain disruptions, geopolitical events, and countless other contingencies can delay completion, increase costs, or compromise performance. Risk allocation and the management of its consequences therefore lie at the heart of every construction contract.¹ For project participants, the real issue is not whether risk exists, but who bears it, how it is priced, and what happens when it materialises.²

In that respect, construction contracts do more than record the parties' commercial bargain. They allocate responsibility for defined categories of risk, organise the consequences of those risks, and set out the procedures through which relief may be claimed. This is true under standard forms such as FIDIC, but also under many other standard forms and bespoke construction contracts. FIDIC remains an important reference point,³ though the practical lessons extend beyond it.

That broader lesson is straightforward. In construction, entitlement does not begin when a dispute arises; it begins much earlier: when the contract allocates risks, when the parties price those risks, and when project teams decide – or fail – to administer the contract with sufficient discipline. In practice, rights are rarely lost because the contract is entirely silent. More often, they are lost because risks were poorly allocated, misunderstood, underpriced, or inadequately managed during performance. The real challenge lies in day-to-day contract administration. A party may have a sound substantive entitlement, but if it fails to issue the required notices on time, keep proper records, or follow the prescribed claims procedure, that entitlement may never crystallise into a recoverable claim.⁴ In practice, many disputes

¹ R. Adra, J. Lindsay, E. Northcott, and E. Van Espen, 'Allocation of Risk in Construction Contracts', in S. Brekoulakis and D. Brynmor Thomas KC (eds), *The Guide to Construction Arbitration*, 6th ed., Global Arbitration Review (2025), 'Introduction'.

² E. Baker, R. Hill, and I. Hakim, 'Allocation of Risk in Construction Contracts', in S. Brekoulakis and D. Brynmor Thomas KC (eds), *The Guide to Construction Arbitration*, 3rd ed., Global Arbitration Review (2019), p. 75 ("a contract which balances the risks fairly between a contractor and an employer will generally, in absence of bad faith, lead to a reasonable price, qualitative performance and the minimization of disputes").

³ R. Adra, J. Lindsay, E. Northcott, and E. Van Espen, 'Allocation of Risk in Construction Contracts', in S. Brekoulakis and D. Brynmor Thomas KC (eds), *The Guide to Construction Arbitration*, 6th ed., Global Arbitration Review (2025), 'Introduction'.

⁴ C. R. Seppälä, 'Chapter IV: Clause-by-Clause Commentary', *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (2023), p. 1134.

arise not because a party was wrong on the facts, but because it failed to comply with the contract's procedural framework.⁵

That is why this article adopts a practical approach. Its focus is not only on how risk is allocated on paper, but on how entitlement is preserved – or lost – on real projects. In particular, three points deserve attention:

- risk allocation is also risk pricing;
- poor contract administration is one of the most predictable sources of disputes;
- claims are rarely won or lost only on legal merits alone: notices, records, timing, and internal project discipline often prove decisive.

The objective is straightforward: to help employers, contractors, and project teams understand how drafting choices, site administration, and claims management interact in practice. Put differently, the article follows the lifecycle of entitlement: allocation, pricing, administration, and preservation.

I. Risk allocation is not only about legal responsibility; it is also about price

In construction, risk can be understood as any uncertain event or set of circumstances that may affect the achievement of one or more project objectives (time, cost, quality, safety, or performance).⁶ The contract is the primary instrument through which the parties translate that uncertainty into an operational framework: it determines (i) which party bears which risks, and (ii) what financial and legal consequences follow when those risks materialise.

A practical point is sometimes overlooked: risk transfer is never free. If a party is asked to assume a broader range of risks, it will normally seek to reflect that exposure in its price, contingencies, exclusions, or programme assumptions. The commercial equation is simple: more risk usually means a higher price, stricter assumptions, or both. This is not an anomaly; it is the ordinary economic consequence of risk allocation.

This logic helps explain the structure of standard construction contracts, including the FIDIC suite.⁷ Each form reflects a different distribution of design responsibility, execution risk, and performance exposure.

- In a construct-only model, often associated with the FIDIC Red Book, the employer provides the design and the contractor builds accordingly. The employer therefore retains much of the design risk, while the contractor principally bears execution and workmanship risk.⁸
- In a design-and-build model, typically associated with the FIDIC Yellow Book, the contractor assumes both design and construction responsibility. This increases the contractor's exposure, but also gives it greater control over the technical solution.⁹

⁵ *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) (16 April 2014).

⁶ E. Baker, R. Hill, and I. Hakim, 'Allocation of Risk in Construction Contracts', in S. Brekoulakis and D. Brynmor Thomas KC (eds), *The Guide to Construction Arbitration*, 3rd ed., Global Arbitration Review (2019), p. 74.

⁷ *Ibid.*, p. 75.

⁸ *Ibid.*, p. 76.

⁹ *Ibid.*

- In an EPC/turnkey model, typically reflected in the FIDIC Silver Book, the contractor undertakes to deliver a complete and operational facility, often for a fixed price by a fixed date. The employer specifies the required output; the contractor largely controls the means of achieving it and correspondingly bears a much broader range of design, coordination, cost, and performance risks.¹⁰

The practical takeaway for users is clear: the broader the contractor’s responsibility for design and delivery, the broader the risk transfer – and, usually, the higher the price.¹¹ Employers who seek price certainty and single-point responsibility must expect to pay for that transfer. Conversely, contractors that assume broad obligations must ensure that the pricing, programme, exclusions, and claims mechanisms are consistent with that exposure.

This is why risk allocation should be assessed not only as a legal exercise, but also as a procurement and project management decision. A risk poorly allocated is often a risk poorly priced; and a risk poorly priced is a common source of later claims and disputes.

In practice, the most difficult situations often arise when the contractual allocation of risk, the pricing assumptions, and the day-to-day administration of the project are no longer aligned. This may happen, for example, when the contractor has accepted broad design, coordination, and completion obligations on the basis of defined assumptions, but later faces repeated employer intervention, changing requirements, delays in approvals, or evolving technical expectations. In such circumstances, the original balance of the contract may become distorted: the contractor continues to bear extensive delivery obligations, while the assumptions underpinning its price and programme no longer hold true.

For that reason, parties should test the allocation of risk at the contract stage by asking a number of practical questions:

- Which party controls the relevant risk?
- Which party is realistically able to foresee it, mitigate it, or insure it?
- Has that allocation been reflected in the price and programme?
- Do the notice, variation, and relief mechanisms actually match the project’s risk profile?

II. Claims Are Often Lost in Administration Before They Are Lost in Dispute

Construction practitioners know that disputes under construction contracts, including FIDIC forms, do not turn solely on the underlying merits of a claim. They also frequently turn on whether the contractual claims procedure has been properly followed.

This is particularly visible under standard construction contracts such as FIDIC, where the claims regime is formal, structured, and time-sensitive. Under Sub-Clause 20.1 of the 1999 Red Book, for example, the

¹⁰ R. Adra, J. Lindsay, E. Northcott, and E. Van Espen, ‘Allocation of Risk in Construction Contracts’, in S. Brekoulakis and D. Brynmor Thomas KC (eds), *The Guide to Construction Arbitration*, 6th ed., Global Arbitration Review (2025), ‘Allocating specific risks: FIDIC approach and other standard contract forms’.

¹¹ E. Baker, A. Lavers, and R. Major, ‘Introduction to the FIDIC suite of Contracts’, in S. Brekoulakis and D. Brynmor Thomas KC (eds), *The Guide to Construction Arbitration*, 3rd ed., Global Arbitration Review (2019), p. 59.

contractor's claim may be time-barred if notice is not given within 28 days after it became aware, or should have become aware, of the relevant event or circumstance. The 2017 edition retained the same overall logic, while reorganising the claims machinery in Clause 20 and Sub-Clause 20.2 and, in substance, extending it to both contractors and employers. More generally, most construction contracts provide detailed mechanisms governing the notification of claims and disputes, and very often attach serious consequences, including loss of entitlement, to a failure to comply with those procedural requirements.

That said, it would be misleading to suggest that construction disputes are merely procedural. A notice issue almost always sits on top of an underlying substantive controversy relating to time, cost, responsibility, causation, or valuation. The procedural question matters because it determines whether that substantive issue has been raised in a manner that allows it to be examined, managed, and, where possible, resolved during the life of the project rather than after relations have broken down. Properly understood, notice provisions are therefore not ends in themselves. Their function is to ensure that potentially claim-generating events are identified early, investigated while the facts are still fresh, and addressed in real time by the parties and the contract administrator.

This was, in substance, the point emphasised in *Obrascon Huarte Lain SA v Attorney General for Gibraltar*,¹² where the Court explained that the purpose of the notice requirement was not to create traps for contractors, but to enable the employer and the engineer to monitor the time and cost consequences of events as they arose. The practical lesson is important: a party that fails to notify in time may indeed jeopardise its entitlement. But the procedural mechanism should be understood in light of its commercial and contractual purpose: facilitating transparency, preserving the ability to investigate events contemporaneously, and supporting project-level decision-making before matters crystallise into disputes.

The same is true of substantiation. FIDIC requires not only timely notice, but also adequate particulars and supporting project records (Sub-Clause 20.1 of the 1999 Red Book; Sub-Clause 20.2 of the 2017 Red Book).

In practice, claims often fail not only because notice was late, but because the party advancing the claim cannot produce sufficient contemporaneous material to demonstrate what happened, why it mattered, and what its time or cost consequences were. This issue is particularly acute on technically complex projects, where the disruption may arise not from a single event, but from a sequence of comments, delayed approvals, evolving technical requirements, or shifting expectations as to the conditions for acceptance or completion. Each individual occurrence may appear manageable in isolation. But unless those events are recorded properly, linked to the relevant contractual mechanisms, and assessed for their cumulative effect on progress, sequencing, and cost, the claiming party may later struggle to convert what was operationally obvious on site into a legally and contractually supportable entitlement.

A practical example may illustrate the point. A contractor may encounter repeated restrictions on access to certain parts of the site, delays in obtaining permits, or late handover of work fronts by other contractors. In operational terms, the impact on progress may be immediate and obvious: crews are

¹² J. Glover, 'Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar', published on Fenwick Elliott website (19 May 2014), available at <https://www.fenwickelliott.com/research-insight/newsletters/dispatch/archive/obrascon-huarte-lain-attorney-general-gibraltar> (last accessed April 27th, 2026).

reallocated, equipment remains idle, and the sequencing of the works is disrupted. Yet, unless the contractor issues timely notices, records precisely when and how those access restrictions affected the critical path, and identifies the resulting additional costs, it may later struggle to demonstrate its entitlement to an extension of time or compensation.

This again was one of the lessons from *Obrascon Huarte Lain SA v Attorney General for Gibraltar*, where several of the contractor's claims failed because of the absence of contemporaneous records and inconsistencies in the evidence presented.¹³ Records are therefore not a mere evidentiary afterthought; they are part of the contractual machinery through which the substantive merits of a claim become capable of assessment.

For that reason, a strictly formalistic approach is not always the most persuasive one. The better view is that compliance with notice provisions should be assessed in light of their purpose: ensuring early, transparent, and workable identification of issues affecting time or cost. This calls for a contextual analysis, taking into account the exchanges between the parties, the extent to which the relevant event was in fact brought to the attention of the other party, whether the claim was substantively discussed without procedural objection, and whether the parties' conduct showed that they had, in practice, prioritised the management of the underlying issue over rigid insistence on form. In that context, principles such as good faith, waiver, or estoppel may become relevant, especially where one party seeks belatedly to rely on strict procedural non-compliance after having previously entertained the claim on its merits.

In other words, the question is not simply whether the contractual machinery was followed mechanically, but whether it was followed in a manner consistent with its intended function. That approach preserves the discipline of contractual claims regimes, including under FIDIC, without turning them into purely technical devices for defeating otherwise intelligible claims. It also better reflects the commercial reality of construction projects, where procedure and merits are closely intertwined: notice, records, and substantiation matter not because they exist independently of the claim, but because they are the means by which the claim can be understood, tested, and administered fairly.

III. From Drafting to Entitlement Preservation in Practice

Claim management begins at the drafting stage and is won or lost through daily contract administration, long before any dispute board or tribunal. Strong contract management is what turns the contractual framework into practical protection. The contract provides the framework, but it is the discipline with which that framework is applied, from drafting through execution and into claims management, that determines whether the parties' rights will be preserved in practice. This is true across construction contracts generally, even if standard forms such as FIDIC make that discipline particularly visible.

At the drafting and negotiation stage, the essential task is to identify the project's likely pressure points before they become live issues. Particular attention should be paid to clauses dealing with time bars, notices, unforeseeable conditions, variations, delay damages, liability caps, suspension rights, and termination. In contracts based on standard forms such as FIDIC, the Particular Conditions should then

¹³ *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) (16 April 2014), p. 51, ¶154.

be tailored to the realities of the specific project, including its location, technical complexity, governing law, and commercial objectives. Too often, standard wording is carried over without sufficient thought, only for the parties to discover during execution that the contract does not reflect the actual risk profile of the project. Once the project is underway, the focus must shift to process, discipline, and evidence. Effective teams establish internal procedures for identifying risk events, issuing notices, tracking deadlines, escalating emerging claims, and maintaining a complete contract file. That file should include correspondence, instructions, progress reports, site records, meeting minutes, photographs, programmes, expert input, and cost data. The aim is not simply to create a paper trail, but to ensure that contractual entitlements can be demonstrated clearly and persuasively if challenged.

Training is equally important. Project managers, contract managers, planners, quantity surveyors, and engineers should understand the structure of the contract they are administering, know when contractual mechanisms must be triggered, and appreciate the consequences of missing a notice or failing to record an event properly. In many cases, the difference between preserving and losing a claim lies not in a complex legal analysis, but in whether the project team recognised the significance of an event at the right time.

As disputes begin to emerge, early assessment becomes critical. A structured review of the facts, the contractual basis of entitlement, and the available evidence allows the parties to evaluate exposure before positions become entrenched. Preparing a claim for a dispute board or for arbitration should never be treated as a last-minute exercise. It should instead be the continuation of disciplined contract administration carried out in real time throughout the project.

This is also where practical tools can add considerable value. Contract audits, bespoke training sessions, notice templates, claims checklists, and escalation protocols can help project teams respond consistently and effectively when issues arise. In our experience at Medici, these tools are often decisive in bridging the gap between the contract as drafted and the contract as actually administered on site.

Conclusion

In construction contracts, risk allocation is not simply a matter of drafting sophisticated clauses. It is a dynamic process that begins with the allocation of responsibilities in the contract and continues throughout the life of the project through disciplined administration and timely claims management.

Standard forms such as FIDIC provide a useful illustration of that logic, but the underlying lesson is broader. A balanced contractual framework will only work if the parties understand it, operate it properly, and document events as they occur. In that sense, good contract management is not merely a defensive exercise; it is the most effective form of dispute prevention.

Ultimately, the best protection against construction disputes is not found in arbitration alone, but in the quality of the drafting, pricing assumptions, and contract management that precede it.