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The Guide to Construction Arbitration

General Editors
Stavros Brekoulakis and David Brynmor Thomas

Second Edition

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Editors

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Contents

Part III

Select Topics on Construction Arbitration

20

Construction Arbitration and Turnkey Projects

James Doe, David Nitek and Michael Mendelblat[1]

Introduction

A 'turnkey' project is so called because (in theory at least), the employer, after taking over the project, has only to 'turn the key' to activate the plant or other project that has been constructed. It is a frequently used model of procurement for power stations, processing plants and where the works are funded by way of project financing. The contractor takes the vast majority of responsibility in terms of design, engineering, procurement and construction. The owner specifies the output or performance that it requires of the facility or plant but rarely provides detailed specifications. It is for the contractor to determine how it intends to achieve the required output or performance. The contract price is almost always lump sum and there is a fixed completion date which can only be adjusted in a limited number of circumstances (e.g., acts of prevention by the owner).

The performance of the plant will be assessed against a range of detailed criteria specified in the contract documentation (normally in a lengthy schedule). In practice, completion will only be achieved after extensive rounds of taking over and performance tests. As well as delay and disruption-type claims, which are a common feature of arbitrations concerning construction projects, arbitrations concerning turnkey projects frequently involve issues concerning fitness for purpose, non-compliance with owner requirements and disputed variations to the specification.

While contractors are likely to price higher for taking on the increased risk as compared to more traditional forms of procurement, extreme competition in some international markets (most notably but not exclusively the Middle East) has led contractors to bid lower prices, which can in turn lead to more claims resulting in disputes. The size and

1 James Doe and David Nitek are partners, and Michael Mendelblat was a professional support lawyer until June 2018, at Herbert Smith Freehills LLP.

complexity of turnkey projects often means these disputes (and the arbitrations required to resolve them) are also large and complex.

Standard forms

While some turnkey projects are procured on bespoke forms of contract, frequently parties will use a modified version of a standard form. A form commonly encountered is the FIDIC Silver Book, which reached its second edition in 2017.[2] Consistent with the philosophy of turnkey procurement, the terms of this standard form place a heavy burden on the contractor in terms of design responsibility and risk. Fitness for purpose is a contractual requirement. The intended effect is to achieve, so far as possible, certainty of final price and completion date. However, there are exceptions to the extent of risks that the contractor takes on and these often form the basis of disputes that can lead to arbitration. These are discussed below.

Other forms encountered include the Japanese ENAA contract, ICC Model Turnkey Contract, the American AIA Contract, the British I.ChemE International Contract Suite (although this needs some adaptation to make it properly 'turnkey') and the Belgian Orgalime Turnkey Contract. While the terms of these contracts vary in some respects, the FIDIC Silver Book is discussed below on the basis that it is a typical example of a turnkey contract standard form that is commonly used as a basis for contracting on international turnkey projects.

The contractor's key obligations, as set out in the Silver Book, are as follows:

- when completed the works are to be fit for the intended purposes defined in the Employer's Requirements;
- the works are to include any work that is necessary to satisfy the Employer's Requirements, or is implied by the contract and all works that (although not mentioned in the contract) are necessary for stability or for the completion, or safe and proper operation, of the works;
- the contractor is deemed to have scrutinised the Employer's Requirements and is responsible for the design of the works and for the accuracy of the Employer's Requirements;
- the employer is not responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements and any data or information received by the contractor, from the employer or otherwise, does not relieve the contractor from its responsibility for the design and execution of the works;
- there are limited exceptions to the above where the employer is responsible for the correctness of certain portions of the Employer's Requirements and data and information provided by it. These are portions, data and information stated in the contract as being immutable or the responsibility of the employer; definitions of intended purposes of the works or any parts thereof; criteria for the testing and performance of the completed

2 Notwithstanding the release of the second edition, it is likely that the first edition of the FIDIC Silver Book, which was released in 1999, will continue to be used on turnkey projects for the next few years. This chapter therefore considers the position under both editions. Although many of the principles and procedures of the 1999 Silver Book have been adopted in the 2017 Silver Book, material changes have been introduced to the latter. To the extent that any deviations between the two editions are relevant to the topics covered in this article, these have been highlighted as appropriate.

works, and portions, data and information that cannot be verified by the contractor, except as otherwise stated in the contract.

The parties may agree to mitigate the above terms by, for example, providing for the contractor only to assume risk following a specified period for inspection or adopting existing ground condition reports as a benchmark to apportion risks between the employer and contractor. The precise scope and application of these exceptions can be areas of dispute between the parties.

The contract sum

The above does not mean that the final contract sum will not vary from that specified at the time the contract was executed. The contract sum will usually be fixed price. However, an employer will usually have the right to issue variation instructions, although it must recognise that substantial extra costs may be incurred, both as to the cost of the variation works themselves and disruption to the contractor's regular progress. The undesirable phenomenon known as 'scope creep' may also arise where the scope of a project is not properly defined at the outset and unplanned variations become necessary, notwithstanding the initial definition of what is required in the Employer's Requirements. Such a process will inevitably lead to substantial increased cost which in turn can lead to disputes over whether these costs should be borne by the contractor or the employer.

Often these disputes can be characterised as the difference between design development (which is usually at the contractor's risk) and variations (for which the employer is usually responsible).

Another form of increased cost that may not be fully budgeted for will be the interface with other works being carried out by or on behalf of the employer on other sites (or even the same site). The turnkey contract may be part of a much wider scope of work under other contracts at several different sites adjoining each other. Site and workspace boundaries may not be well defined and there may be scope for works being carried out for the employer that are unconnected with those within the turnkey contract, but that affect its regular progress, again causing more expense.

Yet another source for additional cost may be the employer's failure to comply with the requirements in the contract for it to give possession of the site or to supply feedstock or other materials or components. If these are not provided at the times specified in the contract, then the contractor may have further scope to claim for increased cost.

In all the above cases, a contractor may also claim for extra time so as to extend the completion date and reduce its liability for liquidated damages for delay. As with other forms of construction contract, allocating responsibility for delay can result in significant and complex disputes in turnkey projects.

Testing and completion

Turnkey contracts typically impose a complex regime for takeover and performance testing. Before the plant can be taken over by the employer, tests will have to be carried out to demonstrate its compliance with the contract documentation and this may itself be a lengthy process. Following takeover, performance tests may also be required in order to

observe the performance of the plant in action. The contractor's compliance with the output specification will be assessed and any failure will give rise to retesting.

If it emerges that the plant cannot be operated at the levels required in the contract, then the contractor may have to pay liquidated damages in respect of such a failure (representing the losses suffered by the employer as a result) and it will be for the employer to take on other contractors to bring the plant up to specification if he chooses to do so. Given the severe consequences of failing these tests, the reasons for failure can often be contentious issues ultimately resulting in arbitration. For example, with processing plants and power stations there can be disagreements over the feedstock or fuel that the employer was obliged to provide. Normally a turnkey contract will specify that it must be of a particular quality or composition and provided in sufficient quantities.

The contractor will usually be liable for liquidated damages should it be in delay as regards the completion date, unless it can demonstrate that it has an excuse for late completion that is allowable within the contract.

Liability

It is rarely the case that turnkey contractors will accept unlimited liability for any breaches of contract they commit. Liability may be limited in nature, for example, so as to exclude some or all of the consequential economic loss resulting from a defect, as opposed to its cost of repair. Other limitations may relate to the total amount of damages that may be payable as a result of breach. These may be limited to a percentage of the contract sum or capped as a specific figure or both. FIDIC provides for a range of limitations both as to consequential loss and total liability. Sometimes these contractual liability limits are in addition to any sums payable by way of liquidated damages for delay or lack of performance. The scope of these limitations and their effect are also common areas for dispute in turnkey projects.

Profitability

An employer's margins (and indeed the contractor's) may be relatively slim. In some cases, the employer may be using project, as opposed to corporate, finance and therefore relying largely on borrowed money which adds a layer of finance costs to what may already be an expensive contract package. Even if the employer does not obtain finance on this basis, a contractor will usually price heavily for the risks it is assuming on a turnkey basis, in particular because it will be adopting the employer's design as its own in addition to the design the contractor supplied, and must develop those designs to satisfy the Employer's Requirements.

It may also add a premium for having to tender within a limited time scale, especially where this has allowed it little time to carry out a comprehensive site assessment and it will be largely accepting responsibility for site conditions, even if these are unforeseeable in the circumstances.

All the above factors have a significant effect on the content and process of a typical construction arbitration concerning a turnkey contract. Both parties may be reluctant to give ground to protect slim margins.

Typical claims

In most arbitrations the contractor will be the claimant seeking an extension of time or loss and expense. In the Silver Book the scope for claiming an extension of time is relatively limited. As is the case in virtually all construction contracts, the contractor can claim for time as a result of variations (changes in the scope of work). In addition, the Silver Book (both the 1999 and 2017 editions) provides further grounds on which a contractor can make a claim. While the 2017 Silver Book sets out similar grounds to those in the 1999 Silver Book, there are a number of key differences between the two, including the addition of several new grounds in the 2017 Silver Book, given in the table below.

Grounds for extension of time	*1999 Silver Book*	*2017 Silver Book*
Employer's failure to obtain permits	Not included	Clause 1.12 (new to 2017 edition)
Employer's delay in giving possession	Clause 2.1	Clause 2.1
Unforeseeable instruction to cooperate	Not included	Clause 4.6 (new to 2017 edition)
Changes to access route	Not included	Clause 4.15 (new to 2017 edition)
Discovery of fossils	Clause 4.24	Clause 4.23
Delayed testing due to employer's instructions	Clause 7.4	Clause 7.4
Remedial work not due to contractor's fault	Not included	Clause 7.6 (new to 2017 edition)
Any act of prevention by the employer	Clause 8.4	Clause 8.5
Delays caused by authorities	Clause 8.5	Clause 8.6
Employer's suspension	Clause 8.9	Clause 8.10
Interference with tests on completion	Clause 10.3	Clause 10.3
Changes in legislation after the base date	Clause 13.7	Clause 13.6
Contractor's suspension	Clause 16.1	Clause 16.1
Contractor's termination	Not included	Clause 16.2 (new to 2017 edition)
Employer's risks (in 1999 edition)/liability for care of the works (in 2017 edition)	Clause 17.4	Clause 17.2
Force majeure (in 1999 edition)/exceptional events (in 2017 edition)	Clause 19.4	Clause 18.4

Under the Silver Book (as is frequently the case in turnkey projects), there is no relief or recovery for the contractor if it is delayed or incurs additional cost as a result of unfavourable site conditions, whether or not these were unforeseeable, or in respect of inaccuracies in data provided to it by the employer. Any deficiency in the Employer's Requirements is at the contractor's risk with only limited exceptions.

Claims may also arise as a result of inconsistency between contract documents. Differing standards (e.g., as to level of output required) may appear in documents produced by one or other of the parties, leading to disputes as to the correct standard and which party bears the risk of any extra work necessary for compliance. While there is a priority of documents clause in the Silver Book, this may not assist when the relevant documents are at an equal level of priority so that an arbitrator must interpret the contract documents as a whole to identify the parties' intentions. An example of the difficulties this can cause is to be found

in the recent *MT Højgaard* case,[3] in which the Supreme Court held that a provision warranting that part of the works would have a particular design life prevailed over less onerous terms requiring compliance with standards and the exercise of reasonable skill and care, even though the former was contained in a technical specification.

In response to the contractor's claims, the employer may seek liquidated damages for delay or failure to meet performance tests. The employer may also seek general damages in respect of defects in the works where these are not covered by the performance testing regime. Issues may arise as to the contractor's responsibility for defects where they arise from failures of proprietary items, as the contract may contain limited exclusions for failures in this regard.

Both parties may contend that the justification for serving a notice of termination has arisen. In the case of the contractor, common grounds are failure to make payment on the due date, the occurrence of a force majeure event (or, in the case of the 2017 Silver Book, an exceptional event) or failure to submit reasonable evidence that proper financial arrangements have been made for the contract price. The latter argument succeeded in the *Trinidad*[4] case, even though the employer was a public authority.

The employer may contend that it is entitled to terminate by reason of the contractor being materially in breach, in particular, in failing to proceed with the works with due expedition and without delay. It may also contend that a performance security has not been provided or that a force majeure event (or, in the case of the 2017 Silver Book, an exceptional event) has arisen.

The employer will typically claim for the additional costs for completion of the works. The contractor will claim loss of profit on uncompleted works. Such a claim is preserved at Clause 16.4 in both the 1999 Silver Book and 2017 Silver Book, notwithstanding the general exclusion of loss of profit claims.

Procedure

In most turnkey contracts, the contractor must give proper notice of any claim for extension of time or additional payment describing the event or circumstance giving rise to the claim. In the Silver Book such notification must be given as soon as practicable and not later than 28 days after it became aware, or should have become aware, of the event or circumstance. Failing such notice, it will not be entitled to additional time or payment. Experience suggests that contractors often fail to give adequate notice, which unnecessarily hinders their ability to recover what would otherwise have been a legitimate claim.

Under the Silver Book, the contractor must, within 42 days (in the case of the 1999 Silver Book) or 84 days (in the case of the 2017 Silver Book) of becoming aware of a claim, submit a fully detailed claim which the employer proceeds to determine. Therefore, unlike FIDIC's other books, there is no independent determination at this stage, thus increasing the likelihood of claims being taken to arbitration. Notable changes introduced in the 2017 Silver Book are that the time limits previously applicable only to the contractor under the 1999 edition now also apply to employer's claims for a reduction in the contract price

3 *MT Hojgaard A/S v. E.ON Climate and Renewables and another* [2015] EWCA Civ 407.

4 *NH International Caribbean Ltd v. National Insurance Property Development Company Ltd* [2015] UKPC 37.

or extension of the Defects Notification Period; and a late notice of claim may be treated as valid if so decided by the employer's representative.

Common issues

The battleground on which the contractor must base its claim may therefore be as to whether it can take advantage of the very limited grounds available to it to seek recompense. While the contract contains no exclusive remedies clause, so that the contractor is entitled to resort to claims at common law where the contract does not preclude such claims, it may have to produce pleadings of some ingenuity in order to succeed on a claim for, say, misrepresentation as to site conditions. However, extra-contractual claims are not uncommon in turnkey projects.

As a result of the limited scope for claims, it will often be the case that the contractor will need to analyse events surrounding the tender process and subsequent progress of the contract in minute detail in order to put together its pleadings. It follows that any resultant arbitration will be document-heavy and inevitably involve extensive expert evidence on technical matters such as engineering and design.

Choice of arbitrator

As with most forms of arbitration, the choice of arbitrator is a key decision. Given the size and complexity of disputes involving turnkey contracts, it is often advisable to choose a tribunal with extensive experience of these types of projects.

An arbitrator faced with a contention from a contractor that it had been unfairly disadvantaged by a short tender period combined with the onerous terms of the turnkey contract may be tempted to consider favourably any argument (even extra-contractual) to mitigate the harshness of the situation, such as misrepresentation or *quantum meruit*. This is where knowledge of the international construction industry, its procurement processes and the execution of projects becomes invaluable to an arbitrator.

Pre-arbitration

It is likely that the parties will have agreed on some means of interim dispute resolution prior to a full-blown arbitration. In the 1999 Silver Book, the dispute adjudication board (DAB) is selected as and when a dispute arises in the same way as an arbitrator. The default position differs, however, under the 2017 Silver Book, which provides for a dispute avoidance/adjudication board (DAAB) appointed at the outset of the project. In other forms of contract, it may be that the parties have agreed a tiered dispute resolution mechanism involving negotiations or a mediation prior to commencing arbitration.

An arbitrator may be invited to make an award enforcing the decision of a DAB (in the case of the 1999 Silver Book) or DAAB (in the case of the 2017 Silver Book). If the contract is under FIDIC 1999, the receiving party would be well advised to consider the Singapore decision known as *Persero*. There, the court decided that a DAB's decision could only be enforced on the wording of the FIDIC form if an application to enforce by way of interim award was made within an arbitration where all issues before the DAB were raised. To remedy this situation, FIDIC incorporated an amendment to its 2017 suite, but there will be many contracts where the original wording of the 1999 form has been used. Care

must therefore be taken when attempting to enforce a DAB's decision by way of arbitrator's award.

Choice of law

Arbitration will generally be the method of dispute resolution chosen in turnkey contracts as many, if not most, of them involve parties from more than one country. Parties frequently contract on the basis that the procedural law of the arbitration and its seat (location) will be that of a neutral jurisdiction, thus avoiding possible adverse consequences of proceeding in the courts of one or other party. In turnkey contracts, the choice of substantive law and the seat of the arbitration will often be different.

Procedural issues

In most cases, the contractor is the claimant as the matter referred to arbitration will generally be its entitlement to an extension of time and (usually) loss and expense. Given that most of the risk and responsibility for the works lies with the contractor, the bulk of site records and other information in relation to the progress of the project will be held by the contractor, in particular, those documents related to design and engineering matters, suppliers and subcontractors.

This may put the employer at a disadvantage in the early stages of any arbitration as it may only have had a small team on site, without the capacity to keep abreast of every development as to the contractor's progress. The contractor, by contrast, will often be ready to 'hit the ground running' and its initial statement of case will have been subject of extensive preparation. The employer's time to respond before arbitration commences may have been limited and such documents as it has been provided with during the project may not be comprehensive.

There is a distinct issue with regards to turnkey contracts that employers' disclosure will probably be limited compared to that produced by contractors, given the employer's input into the project as well as limited supervision on site. For this reason, sequential disclosure is not uncommon, as well as orders for disclosure in phases to suit the progress of the arbitration. Disputes over the extent of the contractor's disclosure are not uncommon.

The IBA rules on the Taking of Evidence in International Arbitration[5] may be adopted or even expressly referred to in the arbitration clause. These provide a framework and guidelines for the approach to document disclosure for the arbitrator to consider. Given the potential complexity of disclosure issues in turnkey projects, using the IBA rules is recommended.

While the IBA rules contemplate that either party may submit a request to produce, the employer may continue to be at a disadvantage in this respect until relatively late in the arbitration by reason of its relative lack of familiarity with the contractor's, and particularly the subcontractor's, activities. This problem may be especially acute where a contractor seeks permission to amend its statement of case to take account of developing subcontractors' claims against it, which it is then 'passing on' to the employer.

5 www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

The employer will need to engage outside experts and, unless it has had a 'watching brief' throughout the project (which is unusual), it will have a substantial learning curve when preparing its response and any counterclaim. By contrast, the contractor is likely to have begun assembling an expert team once it became apparent to it that claims were likely to result in arbitration.

Preliminary points

It is common for preliminary points to be taken in an arbitration in order to resolve matters that, in some cases, can be determinative of the issue as a whole (and, as a result, can also lead to more meaningful settlement discussions). A common example is whether the contractor complied with the claim notification time limits, such as those found in Clause 20.1 (in the case of the 1999 Silver Book) or Clause 20 (in the case of the 2017 Silver Book).

Other common issues subject to preliminary determination concern matters of contractual interpretation, the existence and effect of any collateral agreements and the extent of any limitations of liability.

Bifurcation

As well as preliminary issues, the complexity of turnkey project disputes often results in tribunals having to bifurcate issues to make submissions and hearings more manageable. Usually this bifurcation is between liability and quantum, but sometimes the project is so complex that tribunals decide to divide between different issues of liability. For example, the causes of delay to distinct sections of the project.

Other issues

In many cases contractors will largely be passing through subcontractors' claims, not necessarily adapting them to suit the terms of the main contract as opposed to the various subcontracts. Ideally, these contracts should be 'back to back' but it is not uncommon for there to be a mismatch between the main contract and subcontracts. Although some of the standard form producing bodies (for example FIDIC) produce subcontracts intended to integrate with their main contracts, they are not always adopted and bespoke forms may be encountered. If the main contractor does not 'disentangle' differing provisions of the subcontract from the claims it puts forward to the employer, the arbitration is likely to be prolonged with the need for additional rounds of pleadings and requests for further information.

Employers will generally resist any proposal by the contractor to join subcontractors into the main contract arbitration. Employers will generally refuse on grounds of increased cost and delay. It is unusual for turnkey contracts to contain provision for multiparty arbitration although the possibility is referred to by FIDIC in its discussion of particular conditions annexed to the Silver Book. Multiparty arbitration will only be available if all parties concerned agree, whether before or after the dispute has arisen. In complex turnkey projects with numerous contractors and suppliers with an integrated scope of work, it is sometimes the case that all participants are required to sign a dispute resolution deed that acts as consent for them to be joined in multiparty arbitrations. Provisions in the applicable

arbitral rules, such as articles 7 to 10 of the ICC Rules of Arbitration, may also be useful in certain circumstances.

Conclusion

Turnkey projects differ from other construction projects in terms of the high level of risk undertaken by the contractor. In particular, the risks associated with design, engineering and fitness for purpose can cause major disputes to arise. In addition, the limited grounds on which a contractor is able to seek relief and recompense can result in the deployment of complex legal arguments surrounding the interpretation of the contract documents, in particular, the specification and scope of work to be performed. Any inconsistencies between the contract documents or gaps in the specification that have had to be reconciled or filled by performing more work may give rise to a claim for additional time and money by the contractor.

Overall, this allocation of risks can give rise to a range of large and complex disputes that can, in turn, impact on the way in which an arbitration has to be conducted in order to resolve them. For example, they often require significant amounts of factual and technical expert evidence. This evidence needs to be marshalled and presented in an efficient way. The conduct of these arbitrations often benefits from having a tribunal experienced in these types of disputes.

Appendix 1

About the Authors

James Doe
Herbert Smith Freehills LLP

James is a disputes specialist with over 18 years' experience advising energy and infrastructure clients in the United Kingdom and internationally.

James is head of the UK construction, engineering and infrastructure disputes group and is based in London. James advises international oil companies, international contractors and project sponsors on their most complex disputes involving major infrastructure, oil and gas field development, drilling rigs, processing facilities and power stations.

As well as over 14 years' experience working in the HSF London office, James has considerable experience in the Middle East and Asia having headed up the firm's disputes practices in Qatar and in South Korea.

David Nitek
Herbert Smith Freehills LLP

David specialises in the resolution of complex construction and engineering disputes, in particular in the infrastructure and energy sectors. He has in-depth experience of major standard form construction contracts, including the FIDIC suite, and the key forms of dispute resolution in the construction sector, including adjudication, dispute boards, arbitration and litigation.

David has represented clients in numerous arbitration proceedings arising out of EPC and turnkey contracts, including claims for extensions of time and additional cost, and claims arising from alleged defective plant performance and contested terminations. He also advises on the management of claims, in particular the establishment of robust processes for processing and resolving claims without the need for formal dispute resolution proceedings. David has performed this role on a number of substantial projects, often in conjunction with the client's consultants and advisers.

Michael Mendelblat
Herbert Smith Freehills LLP

Michael was a professional support lawyer for the construction, engineering and infrastructure group at Herbert Smith Freehills until his retirement in June 2018. He has over 18 years' experience in this role preceded by over 20 years in practice in this field. While in practice he advised clients on all sides of the industry both in private practice and as an in-house lawyer. In particular, he acted in complex disputes concerning projects in the energy, regeneration and development fields. He is the author of many articles on construction law and has lectured widely on the topic. He has contributed to a number of publications, most recently *Kendall on Expert Determination* (fifth edition).

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