

'Taking-Over' in the FIDIC Red Book 1999: Common Problems

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Disputes in respect of taking-over are not unusual in economically challenging environments. Employers may be in no hurry to take responsibility for the finished project, release retention monies and/or relinquish entitlement to delay damages. Contractors will want to finish as quickly as possible, reduce/end site costs and/or start the Defects Notification Period.

Introduction

In the FIDIC forms of contract, a Taking-Over Certificate marks the date that the Works are handed back to the Employer. The Employer has no right to use the Works until a Taking-Over Certificate is issued.¹

FIDIC 1999 provides for three broad categories of Taking-Over Certificate:

1. "Taking Over Certificate" - defined in Clause 10 to embrace both a Taking-Over Certificate for the Works (or each Section) under Sub-Clause 10.1 and a Taking-Over Certificate for any part of the Permanent Works under Sub-Clause 10.2;
2. "Taking-Over Certificate for the Works (or each Section)" under Sub-Clause 10.1; and
3. "Taking-Over Certificate for any part of the Permanent Works" under Sub-Clause 10.2.²

What are the differences between these categories of Taking-Over Certificate, and how does the interface between them cause problems?

¹ This aligns with practical completion under English law. For example, in *Jarvis & Sons Ltd v Westminster Corporation* [1969] 1WLR 1448, Salmon LJ had suggested that practical completion meant "... completion for all practical purposes, that is to say, for the purpose of allowing the employers to take possession of the works and use them as intended". Nonetheless, it is widely accepted that practical completion is easier to recognise than define. In *Mears Limited v Costplan Services (South East) Limited and Others* [2019] EWCA Civ 502, the Court of Appeal considered practical completion under a non-FIDIC form of contract. After considering various authorities on practical completion, Coulson LJ said "Practical completion is easier to recognise than define: see *Keating on Construction Contracts*, 10th ed (2016), para 20–169. There are no hard and fast rules: see *Bailey* para 5.117, footnote 349".

² Which is at the "sole discretion" of the Employer.

"Taking Over Certificate" - defined in Clause 10

In the FIDIC 1999 forms, a Taking-Over Certificate is:



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'a certificate under Clause 10 [Employer's Taking Over]'

In other words, it includes both the Taking-Over Certificate for the Works (or each Section) under Sub-Clause 10.1, and a Taking-Over Certificate for any part of the Permanent Works under Sub-Clause 10.2.

In the FIDIC 2022 reprints, a Taking-Over Certificate is "issued (or deemed to be issued) by the Engineer in accordance with Clause 10 [Employer's Taking Over]", thus recognising that there is a possibility that a Taking-Over Certificate is not issued or not issued immediately in accordance with Sub-Clause 10.2. This is also reflected in the inclusion of a "Date of Completion" which is defined as:

'the date stated in the Taking-Over Certificate issued by the Engineer under Sub-Clause 10.1 [Taking Over the Works and Sections] or the first paragraph of Sub-



Clause 10.2 [*Taking Over Parts*]; or, if the last paragraph of Sub-Clause 10.1 [*Taking Over the Works and Sections*] applies, the date on which the Works or Section are deemed to have been completed in accordance with the Contract; or if the second paragraph of Sub-Clause 10.2 [*Taking Over Parts*] or Sub-Clause 10.3 [*Interference with Test on Completion*] applies, the date on which the Works or Section or Part are deemed to have been taken over by the Employer]¹

There is no definition of part in the FIDIC 1999 forms, but in the FIDIC 2022 reprints "Part" is defined as a part of the Works which is either (i) taken over by the Employer, or (ii) used by the Employer.

Upon the issue of either a Taking-Over Certificate for the Works (or each Section) under Sub-Clause 10.1, or a Taking-Over Certificate for any part of the Permanent Works under Sub-Clause 10.2:

- Responsibility for care of the Works and Goods passes from the Contractor to the Employer (except for any outstanding work, which remains the Contractor's responsibility). The trigger date is the date of issue or deemed issue of a Taking-Over Certificate for the (whole) Works or any Section "or part of the Works". (FIDIC 1999 Sub-Clause 17.2; similar wording at FIDIC 2022 Sub-Clause 17.1.)
- The Contractor must tidy up the Site "upon the issue of a Taking-Over Certificate". There is no distinction between the Taking-Over Certificate for the (whole) Works and the Taking-Over Certificate for any part of the Permanent Works. The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate – and there is no express reference to deemed issue in Sub-Clause 4.23 as there is, for example, in Sub-Clause 17.2. (FIDIC 1999 Sub-Clause 4.23; similar wording at FIDIC 2022 Sub-Clause 17.1.)

In addition, the Contractor's liability for delay damages ceases from "the date stated in [the] Taking-Over Certificate". Again, there is no distinction between the Taking-Over Certificate for the (whole) Works and the Taking-Over Certificate for any part of the Permanent Works. The trigger date is the date stated in the Taking-Over Certificate, not the date the Taking-Over

Certificate is issued. The final paragraph of Sub-Clause 10.2 provides that where a Taking-Over Certificate is issued for part of the Works the delay damages for the remainder of the Works shall be reduced³.

Whilst there is no express reference to deemed issue in Sub-Clause 8.7 of the FIDIC 1999 forms this will normally be implied, and has been addressed in the definition of Date for Completion in the FIDIC 2022 reprints. (FIDIC Sub-Clauses 8.7 and 10.2; see also FIDIC 2022 Sub-Clause 8.8 with reference to the definition of Date for Completion at Sub-Clause 1.1.24.)

Upon issue of a Taking-Over Certificate, certain obligations remain, including that the Contractor must complete any outstanding works and remedy any defects on or before the expiry of the Defects Notification Period, or as soon as practicable thereafter. (FIDIC 1999 Sub-Clause 11.1; similar wording at FIDIC 2022 Sub-Clause 11.1.)

"Taking-Over Certificate for the Works" – under Sub-Clause 10.1

Upon issue of a Taking-Over Certificate for the Works:

- The insurance for Works, Plant, Materials and Contractor's Documents is reduced from "issue of the Taking-Over Certificate for the Works" (i.e. the whole of the Works; there is no mention of parts of the Works under Sub-Clause 10.2). The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate – and there is no express reference to deemed issue in Sub-Clause 18.2. (FIDIC 1999 Sub-Clause 18.2; similar wording at FIDIC 2022 Sub-Clause 19.2.)
- The Engineer may no longer initiate Variations from issue of a Taking-Over Certificate for the Works (ie, the whole of the Works; there is no mention of parts of the Works under Sub-Clause 10.2). The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate – and there is no express reference to deemed issue in Sub-Clause 13.1. (FIDIC 1999 Sub-Clause 13.1; similar wording at FIDIC 2022 Sub-Clause 13.1.)

³ 'It is the Engineer that determines the proportional reduction of delay damages under Sub-Clause 3.5. The Engineer does this by looking at the value of the works Taken-Over as a proportion of the value of a Section (if applicable) or the whole of the Works. The last sentence of Sub-Clause 10.2 states that the proportional reduction affects only the daily rate of the delay damages and does not affect the maximum amount of the delay damages.' Howard Kennedy Knowledge Hub 'FIDIC 1999 Books – Commentary on Clause 10'.



- The restriction is lifted on the minimum amount certified in the Interim Payment Certificate from issue of a Taking-Over Certificate for the Works (ie, the whole of the Works; there is no mention of parts of the Works under Sub-Clause 10.2). The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate – and there is no express reference to deemed issue in Sub-Clause 14.6. (Sub-Clause 14.6; similar wording at FIDIC 2022 Sub-Clause 14.6.2.)
- Part of the retention monies is released. Half in the case of a Taking-Over Certificate for the Works: a proportion for Taking-Over of a Section or part of the Works. The trigger date is the date of issue of a Taking-Over Certificate, rather than the date in the Taking-Over Certificate. There is no express reference to deemed issue in Sub-Clause 14.9, but the wording in the FIDIC 2022 reprints appears to distinguish between release of the first half of the retention monies and the second half of the retention monies – there being express reference to deemed taking-over in the latter only. (FIDIC 1999 Sub-Clause 14.9; see also FIDIC 2022 Sub-Clause 14.9.)
- The DAB retainer fee ends/is reduced from the last calendar day of the month in which the Taking-Over Certificate for the whole of the Works is issued. The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate – and there is no express reference to deemed issue in Clause 6. (FIDIC 1999 *General Conditions of Dispute Adjudication Agreement*, Clause 6.)
- Any advance payment not repaid becomes due from issue of a Taking-Over Certificate for the Works (i.e. the whole of the Works; there is no mention of parts of the Works under Sub-Clause 10.2). The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate – and there is no express reference to deemed issue in Sub-Clause 14.2. (FIDIC 1999 Sub-Clause 14.2; similar wording at FIDIC 2022 Sub-Clause 14.2.)
- The Contractor must provide a Statement at completion within 84 days from issue of a Taking-Over Certificate for the Works (i.e., the whole of the Works; there is no mention of parts of the Works under Sub-Clause 10.2). The trigger date is the date of issue of a Taking-Over Certificate, not the date in the Taking-Over Certificate. Whilst there

is no express reference to deemed issue in Sub-Clause 14.10 of the FIDIC 1999 forms this might be implied, and has been addressed in the definition of Date for Completion in the FIDIC 2022 reprints. (FIDIC 1999 Sub-Clause 14.10; see also FIDIC 2022 Sub-Clause 14.10 with reference to the definition of Date for Completion at Sub-Clause 1.1.24.)

In addition:

- The Defects Notification Period commences from "*the date on which the Works or Section is completed as certified under Sub-Clause 10.1*" (ie, the whole of the Works; there is no mention of parts of the Works under Sub-Clause 10.2). (FIDIC 1999 Sub-Clause 1.1.3.7; see also FIDIC 2022 Sub-Clause 1.1.27 with reference to the definition of Date for Completion at Sub-Clause 1.1.24.)
- The Contractor's monthly obligation to submit records of its Personnel and Equipment on the Site, ceases on "*the completion date stated in the Taking-Over Certificate for the Works*". (FIDIC 1999 Sub-Clause 6.10.)

After issue of a Taking-Over Certificate for the Works, certain obligations remain, including:

- minor outstanding work and defects which do not substantially affect the use of the Works for their intended purpose (FIDIC 1999 Sub-Clause 10.1; similar wording at FIDIC 2022 Sub-Clause 10.1);
- the Performance Security must be valid and enforceable until any defects are remedied; (FIDIC 1999 Sub-Clause 4.2); and
- progress reports must continue until the Contractor has completed all work which is known to be outstanding at "*the completion date stated in the Taking-Over Certificate for the Works*" (FIDIC 1999 Sub-Clause 4.21; see also FIDIC 2022 Sub-Clause 4.20 with reference to the definition of Date for Completion at Sub-Clause 1.1.24).

"Taking-Over Certificate for any part of the Permanent Works" – under Sub-Clause 10.2

As reflected in the express terms of the FIDIC 1999 forms, and mentioned above, a Taking-Over Certificate for any part of the Permanent Works may trigger:

- use of that part of the Works by the Employer;



- transfer of responsibility for care of a part of the Works (FIDIC 1999 Sub-Clause 17.2; similar wording at FIDIC 2022 Sub-Clause 17.1);
- tidying up of that part of the Site (FIDIC 1999 Sub-Clause 4.23; similar wording at FIDIC 2022 Sub-Clause 17.1);
- a proportional reduction of delay damages (FIDIC Sub-Clauses 8.7 and 10.2; see also FIDIC 2022 Sub-Clause 8.8 with reference to the definition of Date for Completion at Sub-Clause 1.1.24); and
- a proportional release of the retention monies (FIDIC 1999 Sub-Clause 14.9; see also FIDIC 2022 Sub-Clause 14.9).

However, this is as far as the express wording of the FIDIC 1999 forms goes.

Is there any obvious practical or commercial reason why a Taking-Over Certificate for any part of the Permanent Works could not also trigger:

- cessation of the issue Variations which would impact on a defined part of the Works;
- start of the Defects Notification Period for the defined part of the Works; and
- lifting (or adjusting) the restriction on the minimum amount certified in an Interim Payment Certificate?

Perhaps not, but FIDIC has elected to make a clear distinction between events triggered by a Taking-Over Certificate for any part of the Permanent Works under Sub-Clause 10.2 and a Taking-Over Certificate for the Works (or each Section) under Sub-Clause 10.1.

It is accepted that there may be good practical or commercial reasons why a Taking-Over Certificate for any part of the Permanent Works should not trigger the following as they overarch the whole Works and are not readily divisible:

- reduction in insurance;
- end/reduction of DAB retainer fee;
- repayment of any unpaid advance payment;
- provision of a Statement at completion; and
- end to the submittal of records of Personnel and Equipment on the Site.

Common Problems

The interface between Taking-Over Certificates issued under Sub-Clause 10.1 and those issued under Sub-Clause 10.2 does raise some common problems.

(a) Multiple Taking-Over Certificates

Where there are multiple Taking-Over Certificates for parts of the Permanent Works which together cover all of the Works, is a Taking-Over Certificate for the (whole) Works also required – or is a Taking-Over Certificate for the (whole) Works required only for those parts that have not yet been taken-over?

Practically, a thing may only be taken-over once. Therefore, is it a fiction not to recognise Taking-Over of the (whole) Works without the formality of a Taking-Over Certificate for the (whole) Works?

Where there are multiple Taking-Over Certificates for parts of the Permanent Works which together cover the whole of the Works, there seems to be no practical or commercial reason (when looked at in isolation) why the following cannot occur:

- the Employer using the whole of the Works;
- the Employer being responsible for the whole of the Works;
- the Site being tidied;
- delay damages ceasing;
- the release of the retention monies;
- the issue of Variations ceasing;
- the start of the Defects Notification Period;
- lifting the restriction on the minimum amount certified in an Interim Payment Certificate;
- insurance becoming the responsibility of the Employer;
- the DAB retainer fee ending or reducing;
- any unpaid advance payment being repaid;
- a Statement at completion being submitted; and
- any requirement for continuing records of Personnel and Equipment on Site ceasing.

Of course, this would depend on all the circumstances of the case. Therefore, in principle, there is a practical argument that a Taking-Over Certificate for the (whole) Works is not required where there are multiple Taking-Over Certificates for parts of the Permanent Works



which together cover the whole of the Works. The risk is that there may be unforeseen lacunae in the partial taking-over so that the Taking-Over Certificates for parts of the Permanent Works do not, in fact, cover the whole of the Works.

However, regardless of how practical such an approach may seem, the express wording of the FIDIC forms make a very clear distinction between the consequences arising out of a Taking-Over Certificate for parts of the Permanent Works under Sub-Clause 10.2 and the consequences arising out of a Taking-Over Certificate for the (whole) of the Works under Sub-Clause 10.1, which cannot be ignored. The express wording in the FIDIC forms (apparently intentionally) omits any reference to, for example:

- a Taking-Over Certificate for any part of the Permanent Works functioning as a trigger for the issue of Variations to cease;
- the start of the Defects Notification Period;
- the lifting of the restriction on the minimum amount certified in an Interim Payment Certificate;
- insurance becoming the responsibility of the Employer;
- the DAB retainer fee ending or reducing; any unpaid advance payment repaid;
- Statement at completion submitted; and
- any requirement for continuing records of Personnel and Equipment on Site to cease etc.

It is perhaps for this reason that it is industry practice for a Taking-Over Certificate for the (whole) Works to be issued where there have been multiple Taking-Over Certificates for parts of the Permanent Works.

Further, where there are multiple Taking-Over Certificates for parts of the Permanent Works which do not together cover the whole of the Works, a Taking-Over Certificate for the (whole) Works will be required to acknowledge the completion of the non-taken-over Works.

Thus, where there are multiple Taking-Over Certificates for parts of the Permanent Works which together cover all of the Works, a Taking-Over Certificate for the (whole) Works is advised. In principle, there is nothing inconsistent in parts of the Permanent Works being taken-over on one date and the whole of the Works being taken-over on another date. The two may be read together.

(b) Deemed Taking-Over

When taking-over is deemed (for example, because the Employer has started using parts of the Permanent Works) but no Taking-Over Certificate for parts of the Permanent Works has been issued, is the answer different?

In the FIDIC 1999 forms, Sub-Clause 10.2 states:

'The Employer shall not use any part of the Works (other than as a temporary measure which is either specified in the Contract or agreed by both Parties) unless and until the Engineer has issued a Taking-Over Certificate for this part ...'

Sub-Clause 10.2 continues:

'...if the Employer does use any part of the Works before the Taking-Over Certificate is issued: (a) the part which is used shall be deemed to have been taken over as from the date of which it is used; (b) the Contractor shall cease to be liable for the care of such part as from this date, when responsibility shall pass to the Employer; and (c) if requested by the Contractor, the Engineer shall issue a Taking-Over Certificate for this part...'

The FIDIC 2022 reprints have similar wording.

In *Doosan Babcock Ltd v Comercializadora De Equipos y Materiales Mabe Limitada*,⁴ the contract provided for the issue of Taking-Over Certificates when the Defendant (MABE) used two boilers for a power plant in Brazil which had been supplied by Doosan. MABE refused to issue the Taking-Over Certificates on the basis that the boilers had been used only temporarily. The court found that the boilers had been put into commercial operation as contemplated by the contract (not just temporarily) and said, "*There is a strong case that MABE's failure to issue the Taking-Over Certificates was a breach of contract*".

FIDIC better addresses deemed taking-over in the 2022 reprints.

⁴ [2013] EWHC 3201 (TCC).



In deemed taking-over there is no (i) issue date; or (ii) completion date stated in the certificate (for example, from which the Contractor's liability for delay damages ceases). According to the express wording, deemed taking-over is the date on which the part is used. Therefore, it is likely to be implied that both the issue date and the date certified in the certificate will be the date on which the part is used – although it is probable that this presumption will be rebutted if the facts indicate otherwise.

As above, a Taking-Over Certificate for the (whole) Works is advised.

(c) Inconsistent Deemed Date of Taking-Over

What if the deemed date of taking-over is inconsistent with a date subsequently certified in a taking-over certificate? Which would take priority? Who would be responsible for the period between the deemed date of taking-over and the date subsequently certified in a Taking-Over Certificate? For example, for the insurance.

Where taking-over has been deemed but the Engineer later issues a signed Taking-Over Certificate, giving a later date for taking-over, which would take priority?

Deeming provisions are often considered to be rebuttable, but as a matter of fact Work cannot be taken-over twice. If the Contractor has placed reliance on the deemed presumption, it will be practically and commercially difficult for it to go back and take responsibility for the Works, security, insurance etc retrospectively. It is unconscionable for a party to take advantage of its own wrong, so if the Engineer has failed to issue a Taking-Over Certificate for any part of the Permanent Works when it ought to have, the Contractor ought not to be responsible for the consequences of such breach.

Sub-Clause 10.1 states that where the Engineer has failed to issue the Taking Over Certificate or reject the Contractor's application with 28 days, and if the Works

or Section are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued on the last day of that period. Thus, there would be a good argument for the deemed date to apply unless there is strong factual evidence to rebut that date.

Sub-Clause 10.2 (c) states that if the Employer uses any part of the Permanent Works before the Taking-Over Certificate is issued the Engineer must issue a Taking-Over Certificate for that part (if requested to do so by the Contractor). Implicit in this, is that the date in any such Taking-Over Certificate is the date that the part was used so that it might be read with Sub-Clause 10.2 (a) on deemed taking-over.

Conclusion

Interfaces of any type provide scope for disagreement. The interface between the Taking-Over Certificate for the Works (or each Section) under Sub-Clause 10.1, and a Taking-Over Certificate for any part of the Permanent Works under Sub-Clause 10.2 is no exception.

We advise regularly on issues concerning taking-over.

Please get in touch at victoria.tyson@howardkennedy.com with your thoughts or to discuss any concerns.

