




# BAHAMAR AND LESSONS LEARNED?

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# BAHAMAR - A CASE STUDY

- ▶ THE BOND QUESTION
  - ▶ THE STALLED NEGOTIATION
  - ▶ LESSONS LEARNED
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# BOND OR NO BOND?

In June 2015 BahaMar Ltd. sued China State Construction. Baha Mar CEO Sarkis Izmirlian said the contractor had made guarantees that the project would open in November 2014 and then in late March 2015, but neither deadline was met.

The developer also said that before filing for Chapter 11 protection, it had unsuccessfully sought additional funding from its primary lender, Export-Import Bank of China, in order to help finish the project.

This story stole the headlines for many months in the Bahamas and internationally. Additionally, there was much financial headache felt by the scores of local suppliers and vendors who were left short because the funding ran out. Nevertheless, there are questions that remain unanswered and as we all should know the court battle is still ongoing despite the projects successful phased opening and expected final completion this year. The focus of our discussion today will targeted on what could have been rather than what actually occurred.

The saga that this project was for nearly two years in and out the courts was quite interesting and made for catchy headlines and sarcastic commentary. But that is not what I am here to discuss today.

Projects of this magnitude should have undoubtedly had a performance bond as an integral component of the construction contract. It would be almost inconceivable to think that this mega resort project did not have a performance bond attached as a condition of the contract.

**What are performance bonds used for?** When a developer wants to protect the investment made in a venture, the contractor that won the bid is required to provide a performance bond before work can begin. If the contractor fails to complete the project based on the previously agreed upon contract, the project owner can file a claim on the performance bond. If the claim is found to be valid, the surety company that issued the performance bond will make sure the contractor compensates the harmed party.

What is very interesting to note here is despite the months and months of failed negotiations between the developer, the main financier and the contractor, there was not a single instance mentioned of the owner calling in the bond. This fact is more telling than any “smoking gun”, as most attorneys would understand the analogy.

We now know that the developer lost the ownership of the project and a new owner is now completing the development much to the satisfaction of all concerned. One can argue that if an alternative dispute resolution method was adopted early on in the initial yet difficult stage of the claims process the developer could have fared better.

At this point no one can say how this final chapter will end but what we can conclude is that the story is one that could have had much different outcomes than the one that has now become the story of BahaMar.

# THE NEGOTIATIONS

Negotiation is a dialogue between two or more people or parties intended to reach a beneficial outcome. This beneficial outcome can be for all of the parties involved, or just for one or some of them, in situations in which a good outcome for one/some, excludes the possibility of a desired result for the other/others.- *Wikipedia*

**29 June 2015** – With the resort estimated to be roughly 97% completed, Baha Mar Limited voluntarily files for Chapter 11 bankruptcy in the U.S. In a news release, the company blames “the financial consequences of the repeated delays by the general contractor, and the resulting loss of revenue” as the reason for the bankruptcy. – *Hotels New Now, December 17, 2017*

I believe that it was at this moment that the decision to litigate by the developer caused a series of counter action that were not friendly in nature but rather aimed at ensuring that the \$3.5 Billion dollar investment did not go down as a total loss. However, we also now know that the developer was removed from control of the property and an adversarial relationship replaced the once hospitable relationship that existed between the parties.

Worldwide figures reflect that nearly 25% of all large construction project ends in dispute. We understand that there will more than likely be a contract dispute but how we choose to deal with them is a choice.

# LESSONS LEARNED

1. All parties to the original contract should ensure that they are bonded and all vendors and sub vendors should require bonding from the owner and or developer
2. Alternative Dispute Resolution must be a condition to the contract
3. Allow every opportunity for the parties to negotiate before initiating litigation proceedings

