

Avoid subjective terms when signing contracts

Andrew Gibson, associate at Bin Shabib and Associates, discusses how to protect one's self against impossible deadlines by master developers.

When I announced at the beginning of this year to colleagues in the UK that I would shortly be relocating to Dubai to specialise in the resolution of construction disputes, most, if not all, imagined the typical contractor/employer type of disputes arising out of defects or delaying events.

However, upon my arrival, I was almost immediately confronted with a particular breed of dispute, which is emerging as more projects move towards their target completion dates: delays by sub-developers in starting construction.

Most construction projects in the UAE come into being with an explosive plethora of marketing activity carefully orchestrated by the master developer.

He then hands it over to the sub-developer to make things happen before the project deadline.

But what happens if the sub-developer then delays the start of the construction works?

Delay in construction is in itself nothing new. We have all come across this before and are familiar with the usual remedies in the form of liquidated damages.

Hard line

What appears to be new is the much harder line master developers are taking against the sub-developers in an effort to maintain their all important reputation within the market as being punc-

tual, and also to realise the expectations of the end users.

Let me give you a recent example that I have been involved in, which happens to relate to one of the largest ongoing construction projects in Dubai.

Here, in the event of a delay (resulting in a material breach of the contract), there is a risk that the master developer is able to take unilateral steps to terminate the contract, reclaim title, retain the full purchase price and take over the site and project facilities already in place, including the benefit of all agreements, property and equipment belonging to the sub-developer.

Sobering

All the sub-developer receives in return is an entitlement to the net liquidated value of the project facilities. A sobering thought, particularly if it can be reasonably argued that the delay may have been beyond the sub-developer's control to begin with.

Some of you may have read 'Dubailand starts to take shape' in *Construction Week* (Issue 220), concerning progress at Dubailand, in which the project's CEO Mohammed Alhabbai commented that "there will be zero tolerance on delays. We want to go ahead as planned and will not entertain companies that delay the start of construction work."

This trend comes at a time when the industry is subject to a well-documented shortage of both raw materials and skilled

workers, the key basic resources everyone is fighting for, and which are integral for keeping progress on track.

Meanwhile, master developers, in a bid to remain competitive, are drawing their target completion dates in, thus shifting the goal posts for the sub-developers even further.

The problem is exacerbated when 'the world's largest' projects are concerned. Here it will probably be stipulated that the project design must be 'iconic' or 'visionary', but who is to determine what this actually means?

It is this indeterminable and intangible language which has a habit of causing the most prolonged delays, and yet somewhat ironically, continues to attract the sub-developers like moths to a flame.

Limit your exposure

However sub-developers should, whenever possible, endeavour to limit their exposure to unduly onerous penalties for delay by considering doing the following:

1. Making sure that their obligations during both the design and construction stages are clear and comprehensive and reflect their intentions.
2. Clarifying any ambiguous terminology relating to the master developer's design requirements.
3. Scheduling frequent reviews between the parties to monitor the project's progress.



4. Including a contractual mechanism allowing the variation and/or extensions of time to the relevant deadlines in the event that certain conditions arise (especially unavoidable events such as a shortage of raw materials).

5. Referring to the relevant dispute resolution mechanism before the master developer is able to take action to terminate (during which time the sub-developer can continue to take all action possible to remedy the delay).

Don't ride the tide

The risk many sub-developers face is to attempt to ride the tide in the hope that either time will be made up elsewhere, or the master developer will simply fail to notice.

As can be expected, master developers can be less sympathetic in circumstances where there appears to have been a breakdown in communication.

In essence, provided that both parties are clear as to their respective aspirations from the outset, the number of disputes that arise in this respect should, at least in theory, be limited.