

# DISPUTE RESOLUTION

**PRESENTED BY JAMES D. FULLERTON**

[www.FullertonLaw.Com](http://www.FullertonLaw.Com)

[JFullerton@FullertonLaw.com](mailto:JFullerton@FullertonLaw.com)

James D. Fullerton  
Fullerton & Knowles, P.C.  
12642 Chapel Rd.  
Clifton, VA 20124  
(703) 818-2600, Ext. # 205

# Construction Law Survival Manual

- Credit Management
  - Fair Credit Reporting Act
  - Equal Credit Opportunity Act
- Contracts and Preserving Rights
  - Drafting, Reviewing and Revising Contracts
  - Change Orders, Claims, Dispute Resolution
- UCC Sale of Goods
- UCC Security Agreements
- Default & Termination

- Mechanic's Lien General Principles
- Mechanic's Liens in Virginia, Maryland, Pennsylvania and District of Columbia
  
- Payment Bonds
- Trust Fund Laws and Agreements
  
- Enforcement of Judgments
- Bankruptcy Primer for Creditors

-

# Dispute Resolution

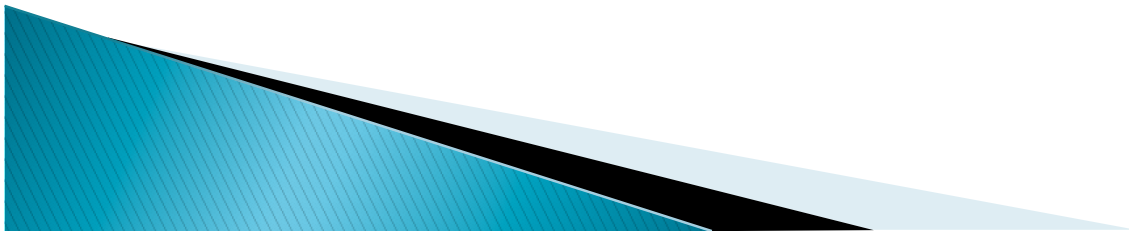
- ▣ Litigation
- ▣ Arbitration
- ▣ Mediation
  
- ▣ Dispute Resolution Procedure in Contract
- ▣ Statutory Dispute Resolution Procedure

# Leverage

- Debtor – Creditor
  - Debtor has goods and the money
  - Creditor has the burden
    - of changing the status quo
    - of moving forward
    - of incurring costs
- Debtor leverage just by holding \$
- Debtor has the incentive
  - To slow things down
  - To make things more expensive
  - To use procedure to do this

# Early Dispute Resolution

- ▶ **Fist Fight**
- ▶ **Armed Combat**
- ▶ Social cost high
- ▶ Unfairly favored physically strong
- ▶ Did not always provide best result



## LITIGATION

- First Post-Combat  
Dispute Resolution Procedure
- Some Court always has  
Jurisdiction
- Litigation always available
  - Unless the right is removed  
by statute or contract
- Dispute Resolution Procedure in Contract
- Statutory Dispute Resolution Procedure



# LITIGATION

- File lawsuit
- In the correct Court
- Serve lawsuit
- Defendant answers
- Motions Practice
  - Motion for Summary Judgment
- Discovery
  - Production of Documents
  - Depositions
- Trial (Jury?)
- Appeal

# Court Jurisdiction

- Must file in the right Court
- Personal Jurisdiction
  - Minimum contacts with Forum
- Can always sue defendant at her home state and county
- Long Arm Jurisdiction?
- Forum Selection clause

# Court Jurisdiction

- Subject Matter Jurisdiction
  - Federal Courts
    - Federal Question
      - Constitution (e.g. Civil Rights)
      - Federal Statute
        - (e.g. Miller Act or PACA)
    - Diversity Jurisdiction
      - Federal court hears state law matter
  - State Courts
    - Court of General Jurisdiction
  - Special Courts

# Litigation - Advantages

---

- Costs – Your tax dollars at work
- Discovery Rights
  - Production of Documents
  - Depositions
  - Interrogatories
- Subpoena Rights – Witnesses
- Joinder of other Parties
  - Can add any defendant if court has personal jurisdiction
- Right to Appeal
- Statutory Remedies
  - Mechanic's Lien and Payment Bond Rights
- Motions Practice
- Jury Trial

# Litigation - Advantages

13

- ▣ You can always agree to mediate any dispute later
  - After dispute starts
  - Is usually a good idea
  
- ▣ You can always agree to arbitrate any dispute later

# Mediation

- Nonbinding
  - “sit down and try to resolve it”
  - Confidentiality
    - Cannot use as evidence later
- Only by Agreement
  - in Contract or by later Agreement
  - Courts favor Mediation
    - Will enforce Mediation Agreement

- Arbitration Agreements can vary

# Mediation Procedure

- Whatever you want it to be
- American Arbitration Association
  - <http://www.adr.org/>
  - Most often used in contract term
  - No filing fee – Mediator's fee only
  - Parties decide on Procedure

# Mediation Advantages

- Quality of Mediator?
- Are all decision makers present?
- Taking the opportunity to resolve?
- Taking the opportunity to delay?



# Mediation - Advantages

- Costs
  - Fee for Mediator
- Cases usually settle
  - Is faster and cheaper
- Better feelings about result if you help make decision
- Early discovery opportunity
  - Start with better understanding of the opposition point of view
  - Start with better understanding of the opposition case
    - Saves time and money in later litigation

# Arbitration

---

- Binding
  - Only by Agreement (Contract)
    - Courts favor Arbitration
      - Will enforce Arbitration Agreement
    - Arbitration Agreements can vary
      - American Arbitration Association
        - <http://www.adr.org/>
      - One Arbitrator or three
      - Procedure can vary
- Agreement to arbitrate with no set procedure

# Arbitration Procedure

- American Arbitration Association
  - Most often used in contract term
  - AAA rules have Procedure
  - Filing fee and Arbitrator's fee
    - Demand for Arbitration
    - Initial meeting with Arbitrator
      - Discovery?
    - Arbitration Hearing
    - Report
    - Confirmation Hearing in Court

# Arbitration Procedure

- Must file a lawsuit later to enforce arbitration award
  - To get collection rights like
    - Garnishments
    - levy
  - Defendant can and will contest
    - Try to overturn arbitration
    - Very limited review
      - Discovery

# Arbitration Procedure

- Must file a lawsuit later to enforce statutory rights
  - Mechanic's Liens
  - Payment Bonds
- Multiple step litigation
- Delay can affect priority rights

# Arbitration Procedure

- Must file a lawsuit later to enforce rights against parties that did NOT agree to arbitrate
  - Architects
- Multiple step litigation
- No joinder of parties

# Arbitration - Advantages

- Faster ?
- Less Formal ?
- Cheaper ?
- Better Quality Decision Makers ?

# Arbitration - Disadvantages

- Costs – High Filing Fee
- No Discovery Rights?
- Limited Subpoena Rights – Witnesses
- Limited Joinder of other Parties
  - Arbitration only by Agreement
  - Bilateral Arbitration in a multilateral world
- No Motions Practice (need trial to get resolution)
- No Right to Appeal (win or lose, it is done)
- Cannot Enforce Statutory Remedies
  - Mechanic's Lien and Payment Bond Rights



# Arbitration can look like Litigation

- How much money is involved?
  - Parties want lawyers?
  - Parties want discovery rights?
  - Parties want subpoena rights?
  - Parties want right to appeal?
- Arbitration followed by Litigation
  - To overturn results of Arbitration
  - To enforce statutory rights
    - Mechanic's Lien and payment bonds

# Arbitration can be arbitrary

- Results less predictable
  - Judges tend to follow the law
  - Do you have “fairness” on your side?
  - Do you have legal weaknesses in your case?
- Litigation more likely to “settle”
  - Strengths & weaknesses become clear
    - Discovery
    - Motions
- Arbitration more likely to go to final hearing
  - Why not give it a try?
  - Not as clear who will win

# Litigation v. Arbitration

- Dollar Amount
  - Will you use lawyers?
- Discovery Rights
  - Do you need information?
- Subpoena Rights
  - Do you need witnesses?
- Joinder of other Parties
  - Do you need other parties?
- Right to Appeal
- Do you need Statutory Remedies?
  - Mechanic's Lien and Payment Bond Rights
- Can Motions Practice help?
- Do you have fairness, but no facts or law on your side?

# Litigation v. Arbitration

- Must decide at Contract Negotiation
  - You may not want this procedure
  - Can you negotiate out?
- Dollar Amount?
- Will you need
  - Discovery Rights?
  - Witnesses?
  - Joinder of parties?
- Do you need Statutory Remedies?
  - Mechanic's Lien and Payment Bond Rights

# Dispute Resolution Clause

---

Any dispute resolution or arbitration clause shall not impact, negate or delay any bond or mechanic's lien rights pursuant to any statute or agreement.

# Creditor v. Debtor

- Do not allow Debtor to Elect
  - Guaranteed to get it wrong
  
- Arbitration and Mediation can be an opportunity for Debtors
  - To delay
    - Mediation followed by Arbitration
    - Arbitration followed by Litigation
  - To increase creditor's costs
    - Filing Fee for Arbitration

# Statutory Dispute Resolution

Most often for Public Procurement

- Must submit to Contracting Officer or Architect
- Must then submit to Agency Head
- Must then submit to County Board of Supervisors
- Must file suit within 30 days after decision

# Dispute Resolution Procedure in Contract

## Dispute Resolution Procedure

- Parties agree to meet within 10 days of dispute for good faith effort to resolve dispute
- Parties must then Mediate as condition precedent to Arbitration or Litigation
- Parties must Arbitrate and not Litigate
- One Party can determine Arbitration or Litigation
- You must follow your contractual procedure
  - Delay and higher costs
  - Lost your rights altogether



# Conduit or Pass Through Provisions

- The provisions of the general contract are incorporated herein by reference
- The subcontractor or supplier shall be bound to the general contractor to the same extent that the general contractor is bound to the owner

# Claims Provisions

---

- ▶ Claims procedures in contract
- ▶ Must follow exact procedure in contract
  
- ▶ When to give notice
- ▶ To whom to give notice
  
- ▶ Form of Claim
- ▶ Quantification of time and money impact
  
- ▶ Be aware of procedure
- ▶ Follow to the extent possible

# Claims Provisions

---

- Two Parts:
- Notice of Event
- Quantification of Claim for time or money
- Contracts often speak of both Parts at time of event

# Importance of Notice

---

- ▶ Often impossible to provide Quantification of Claim at time of event or “within 72 hours” of event
  - ▶ Continuing delays
  - ▶ Quantities or costs unknown
- ▶ Make sure you send Notice of Event “within 72 hours” of event
- ▶ Send Quantification promptly when known

## Use lowest common denominator

---

- ▶ Terms of subcontract
- ▶ Terms of General Contract
- ▶ Statutory law that controls
  
- ▶ Procedure must comply with all Contract Docs
  
- ▶ So GC can send claim to owner
- ▶ Cannot Send Notices soon enough
- ▶ Cannot send too many Notices

# Defensive Claims for Time

- Always include time extension in all proposed change orders
- Send claims for time extensions
  - even if you have no claim for money
  - Even if it is just an email or letter notice

[www.FullertonLaw.Com](http://www.FullertonLaw.Com)

[JFullerton@FullertonLaw.com](mailto:JFullerton@FullertonLaw.com)

(703) 818-2600, Ext. # 205

Construction Law Survival Manual in NACM  
Bookstore

And at

[www.FullertonLaw.Com](http://www.FullertonLaw.Com)