

For the Client

Dealing With Disputes . . .

What Are the Options?

By Milton F. Lunch

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Construction projects, by their very nature, tend to generate disputes between the various parties: owners, designers, contractors, subcontractors, material suppliers, and even financial institutions and sureties. In 1990, NSPE/ PEPP published a comprehensive document, "Arbitrate, Mediate, Or Litigate?" describing what are, essentially, the three choices available for resolving construction-related disputes. Now that it is more than a decade later, and some changes have occurred in dispute-resolution practices, it seems worthwhile to review the major pros and cons of each of the options that are available to the parties involved in design and construction projects.

In the mid-1960s, when the so-called "liability crisis" confronted engineers and architects, the leaders of both NSPE and the American Institute of Architects concluded that "there must be a better way" for engineers and architects to deal with the claims against them than resorting to the courts, with the attendant costs in time and money and the uncertain and often unsatisfactory results. So, NSPE and AIA turned to the American Arbitration Association (AAA), which has a long history of dealing with dispute resolution under its commercial arbitration rules.

Together, the groups developed a special set of rules and procedures, the Construction Industry Arbitration Rules, to deal with disputes in the construction and design fields. And, from time to time, a dispute resolution committee composed of representatives of the professional societies updates those rules, with input from groups representing contractors, subcontractors, landscape architects, interior designers, specifiers, and home builders.

As a result of that initiative, EJCDC and AIA contract documents now contain an arbitration clause stating that, if the parties cannot resolve a dispute between them, either party may submit the issues to an arbitrator. Typically, an arbitrator will be appointed by the AAA from a roster of qualified arbitrators, but another option is for the parties to agree on a specific arbitrator, perhaps a retired judge or another individual in whom they have special confidence.

More recently, emphasis has shifted to the use of mediation as a prelude to binding arbitration. In that event, it is important to understand that the mediator, who may be selected under the AAA's separate set of mediation rules and roster, is not empowered to issue a binding decision. The role of the mediator is strictly to seek to induce the parties to a voluntary settlement.

Key Issues

What are the key points you should know about alternative dispute resolution? Here is a brief overview:

- **Amount in Controversy:** Initially, it was thought that arbitration would be acceptable for "small" amounts, but that parties with "large" claims would want the protections offered by the rules of evidence (not required in arbitration) and the right to appeal an adverse decision. At first, therefore, the arbitration clause applied only to claims not greater than \$200,000 (approximately 80% of claims are for lesser amounts). That concept has since been revised to allow the parties to agree on their own dollar limit.
- **Joinder of Parties:** One of the issues to be considered is whether outside parties to the design agreement should be barred from joining in any arbitration of a dispute that relates to the work of the outside party, such as a contractor. The traditional view was that such joinder should not be permitted, except with the consent of the parties to the contract, because of the fundamental differences between the legal standards governing professional services (the standard-of-care test) and the legal obligations of a contractor, such as warranties, guarantees, or strict liability. Today, many in the design and construction community believe it is more efficient to deal with issues involving a common set of facts in one proceeding than in two separate proceedings; that is, one by arbitration and the other by a court of law. Indeed, separate proceedings not only are expensive but also can have contradictory results. Thus, the current EJCDC document provides that if the dispute

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involves the work of a contractor, the owner or engineer may join that contractor in the arbitration and be bound by its result if the contractor agreed to be joined.

- **Finality of Arbitration:** The decision of an arbitrator when rendered under a properly drafted contract clause is final and binding, and is not subject to appeal to the courts unless there is a clear showing of fraud or conflict of interest on the part of the arbitrator. The courts have taken a strong position against overturning an arbitrator's award.
- **Reason Behind the Award:** There is no requirement that arbitrators state the reasons for their decisions. If the parties so desire, however, they may write in the arbitration clause that the arbitrator will furnish an explanation for the decision.

Your Choice

In light of these considerations, is arbitration right for you? The generally held view is that arbitration is less costly than litigation (although some dispute that claim), resolves the issues more quickly, and offers the parties the benefit of a "judge" who is likely to have expertise in the design and construction fields.

Milton F. Lunch, former general counsel of NSPE and a consultant on architect-engineer legal matters, passed away on January 11, 2001, at his home in Lanham, Maryland. (Refer to page 8 for information on the recently established Milton F. Lunch Memorial Fund.)

