Professional Practice and Ethics

Legal Aspects

Lecture 1

Welcome to the UGC lecture series on Architecture. Today's lecture deals with the chapter, Professional Practice and Ethics - Legal Aspects.

Arbitration comprises the following:

- Arbitration Agreement and Clause
- Arbitral Tribunal
- Arbitration Proceedings
- Arbitral Award

Before we begin with Arbitration, we have to understand the concept of '*Alternate Dispute Resolution' (ADR) and the three methods of ADR* -- Mediation, Conciliation and Arbitration. In the *process of mediation*, a mediator is appointed by the contesting parties. However, his power is limited when compared to the conciliator tribunal and arbitral tribunal. In Conciliation, when compared to mediation, some specific powers are assigned to the tribunal. However, his award is not binding on the parties. In the *process of Arbitration,* the contesting parties appoint an arbitral tribunal comprising of one arbitrator or three or five or any odd number. Here, the award is binding on the contesting parties.

What is Arbitration?

When there is an interaction between any two human beings, there is every possibility of differences arising between them. So, Arbitration is an ADR method,

where the two contesting parties appoint an arbitrator or an Arbitral tribunal rather than succumbing to the process of litigation. This procedure is simpler when compared to the proceedings of the court.

Why Arbitration and not Litigation?

Litigation is nothing but filing a suit or a case before the court. The main positive aspect of arbitration is that the time taken is much less, when compared to court proceedings. The speed in decision making is far higher when compared to court proceedings. The finality of the award is another important aspect of arbitration as in the process of mediation, the parties are not compulsorily obligated to follow the award passed by the mediator, while in arbitral tribunal, the award has equal executive power, just like an award passed in the court hall. Unlike the court hall, where there is no privacy due to open proceedings, the arbitral tribunal conducts proceedings in a closed hall, thereby ensuring the privacy of the contesting parties. Another aspect of arbitration is the flexibility factor. One can fix the time and place of arbitration and also adopt a procedure which would be convenient for the parties involved. The neutrality factor, i.e. the process of adopting a procedure which is convenient for both the contesting parties rather than one party, is an extremely convenient aspect of arbitration. Unlike a court hall, the arbitrators are appointed by the contesting parties. For example, if a scientific dispute arises or if a building is to be investigated by an expert in that particular field, one has the right to appoint an arbitral tribunal comprising such experts.

Now, let us discuss about arbitration agreement and a slight variant, arbitration clause.

What is Arbitration Agreement?

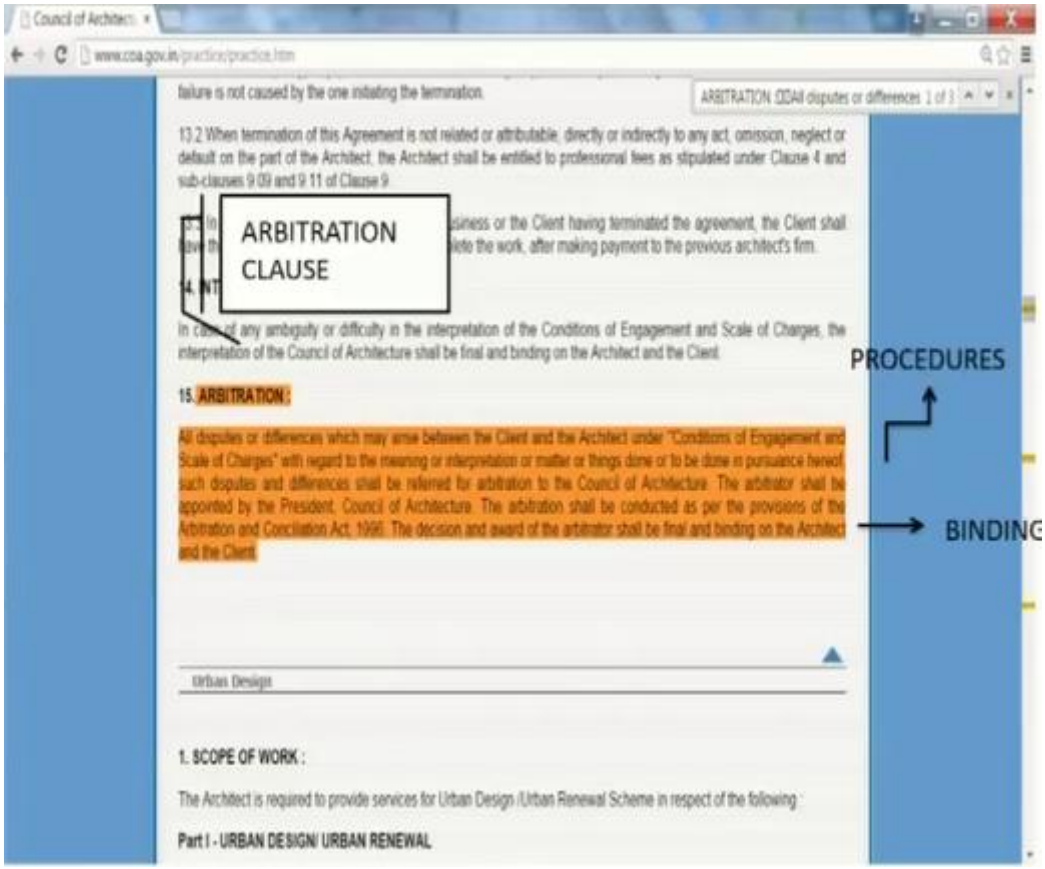
This is entered into between two parties which is independent of the main contract. For instance, if it is an agreement between an architect and his client, there will be an agreement for the contract that deals with the construction of the building, the payment, etc, and a separate agreement for arbitration. However, this is not the case if the main agreement consists of a clause which states that 'if any dispute arises between the two parties, the parties are compulsorily obligated to go for arbitration.' This is the primary difference between 'arbitration agreement' and 'arbitration clause', i.e. Arbitration agreement is a separate agreement independent of the main agreement, while the Arbitration Clause is a clause added to the main agreement.

There are *certain rules* that one must follow when one decides to arbitrate their disputes. For instance, if an architect and his client decide to arbitrate their problems, three important factors must be taken into consideration.

- There should be a written agreement. This is the basic expectation for arbitration.
- There must be an intention to refer the problem to arbitration. For example, if the architect intends to refer to arbitration, but the client doesn't want to refer to arbitration and might either go to the court or arbitration, then that will invalidate the arbitration clause or the agreement.
- The willingness to be bound by decision - the parties must be willing to subject to whatever decision the arbitral tribunal passes.

The picture below shows the Council of Architecture's arbitration clause. The initial three to four lines deal with the procedure of arbitration, i.e. which law must

be applied, etc, and the last important point is that the parties are subject to the award passed by the arbitral tribunal.



While contemplating arbitration, *certain precautions* must be kept in mind. As stated earlier, if the client is indecisive about whether he should opt for arbitration or file a suit in a court, then there are chances that he may add a clause stating that, "there is a discretion on the part of the client to refer to arbitration". Such a clause is bound to make the whole arbitration agreement/clause invalid. Hence, it is always better to cross check, i.e. there is a difference between 'a possibility of referring to arbitration if there is any dispute' and 'obligation of referring a dispute to the arbitration tribunal'. In the first instance, i.e. the possibility, arbitration is not compulsory. So, the parties can retract their statement. However, in the latter, i.e.

obligation, it makes it compulsory for the parties to go for an arbitral tribunal. In the presence of an arbitration clause, the parties do not have the right to approach a court and even if they do so, the court will refer them to an arbitral tribunal. This is the difference between '**Agreement to Arbitration vs Arbitration Agreement**', i.e. agreement to arbitration is a possibility of arbitration while the Arbitration agreement is an obligation on the parties to complete the arbitration.

There are certain methods that can impose Agreement to Arbitration like adding clauses such as 'parties can if they so desire', 'parties can consider', 'if they so agree', etc. If these clauses are added in the arbitration clause/agreement, it is not a wise idea to even consider.

What is an Arbitral Tribunal?

For example, a dispute arises between an architect and his client, the dispute maybe with regard to payment or the building. In such a case, the architect will appoint an arbitrator and the client will appoint an arbitrator. Then, the two arbitrators will appoint a final arbitrator. This is an Arbitral Tribunal explained in simple terms. There are other instances where the arbitration agreement itself names the arbitrators who should be appointed in case of any dispute.

The Arbitral Tribunal must be in odd number, the reason being the decision of the majority prevails in the case of any difference of opinion. As mentioned earlier, the arbitral tribunal can be named in the agreement itself. The names of arbitrators or an arbitral institution specifically functioning for arbitration can be mentioned in the agreement. If it is not mentioned in the agreement/clause, the parties can then appoint arbitrators on their own. When one appoints an arbitrator, the important aspect to be taken into account is that the person must be independent and impartial. For instance, if a dispute crops up between an architect and his client and if the architect wants the matter to be taken to the process of arbitration, he/she

issues a notice to the client, stating that “within the time period of 15 days, the other party should appoint an arbitrator”. What if the other party does not appoint an arbitrator? In such a case, the architect would approach the chief justice of the state in which he/she is functioning to appoint an arbitrator and then an umpire would be appointed by the two arbitrators.

Who is an umpire?

In the picture below, the appointment of an arbitrator is depicted. Party blue and Party red would appoint an arbitrator from their sides and those two arbitrators would appoint a third member who is the umpire here.

In another way, you can find a simple arbitration agreement, i.e. party A and party B would appoint a single arbitrator. In the case of an arbitral tribunal comprising three arbitrators, there is a possibility in an agreement, which states that the parties -- the architect and the client -- would appoint an arbitrator each and would remain silent with regard to the third arbitrator or the umpire. Now, in

such cases, a question arises regarding the validity of the decision passed by a two-member arbitral tribunal. In such circumstances, if the arbitrators so appointed *decide to solve the dispute in a unanimous way, there is no need for an umpire* and the arbitrators' award would be binding on the parties. However, if there is a *difference of opinion between the two, only then there is a necessity to appoint an umpire*. This helps us to understand that even if an arbitral tribunal comprises only two arbitrators and if their decisions are in consonance with each other, then such a decision is binding upon both the parties. Only in the case of a deadlock, there is a need to appoint an umpire.

After the appointment of an arbitral tribunal, the *arbitral proceedings* begin. There are few considerations to be taken into account before moving on to the arbitral proceedings like deciding the place of arbitration, deciding the language, whether it should be oral or written proceedings, what if one party absents himself during the proceedings, i.e. ***the effect of Default, i***mportance of protection of vital documents and passing of the award.

Deciding the place of arbitration:

Deciding the place of arbitration is a very convenient aspect as the parties take the decision or if the parties fail to do so, the arbitral tribunal would take a call. However, one cannot choose a place in any part of the world as the circumstances of the case, the convenience of both the parties and appropriate place for consultation among members, witness and experts are to be taken into consideration.

Importance of protection of documents:

Suppose, the architect has an important document which the client requires for the arbitration proceedings or if the client has a very important document which he/she refuses to hand it over to the architect during arbitration. These are the two possible instances likely to arise during arbitration. In such a case, the arbitral tribunal will be required to urge the party to provide the opposite party the necessary documents. Inspite of such compulsion, if the party refuses to hand over the documents, the other party can seek remedial action from the court with the permission of the arbitral tribunal. What is the negative impediment in arbitration proceedings for those parties which fail to provide documents? Certain disadvantages are imposed on parties refusing to provide the documents to the opposite parties. They may be given penalty or punishment in any other way convenient to the arbitral tribunal.

What is Effect of Default?

Default is nothing but the absence of any one of the parties during the arbitral proceedings. In such cases, the defaulting party should communicate before hand to the arbitral tribunal. If the party fails to do so, the arbitration proceedings will carry on in the absence of the defaulting parties. It is a major disadvantage, if one fails to ensure his/her presence during arbitration proceedings.

Arbitral award:

Now, we move on to the most important part of the arbitration process, the arbitral award. This award has equal effect as an order passed by the court. The arbitral award must be in writing. In case of a settlement, i.e. if there is a

possibility of a settlement between the parties even before the arbitral award is passed and the parties agree to put the settlement down in paper, then the settlement holds the same value as an arbitral award. The arbitration tribunal should sign the written arbitral award. There have been instances when one or two of the arbitral tribunal members have refused to sign the arbitral award. In such a case, the arbitral award does not become negated. If there is a written reason along with the refusal of the signing of the arbitral award, then the arbitral award is still valid. Every party involved would get a signed copy of the arbitral award. Do not think that the arbitral award is final and cannot be negated at all. There is a recourse to arbitral award and this is where the court's intervention comes in. The court can intervene in case the arbitral award has been passed without considering important aspects, i.e. without giving opportunity to either party, the arbitral award can be outrightly negated. In such cases, the parties should approach the district level or high court. There are some circumstances where he could approach the court to make the arbitral award invalid like if the party has become incapable of participating in arbitral proceedings. For instance, if the architect, on whose case arbitral proceedings are being carried on, becomes an insane person and later becomes normal, the proceedings carried out during his period of insanity cannot be valid in the eyes of law. Another factor for invalidating the award is that if the arbitration award does not consider the law existing in the country or if it is against public policy or if it violates the confidentiality that has to be maintained. There is also a possibility where the arbitrational tribunal can be misguided by corruption or fraud. In such cases, the aggrieved party who is not in favor of the arbitration award can approach the court and invalidate the arbitral award. Another important aspect of negating the arbitral award is when the tribunal goes beyond the scope of agreement. For example, if the agreement deals with only the construction aspect and if the arbitral tribunal, instead of following the procedures laid down in the

agreement, goes beyond its scope and deals with remuneration as well, the award can be invalidated in a court.

SUMMARY

> **ADR (**Alternate Dispute Resolution): There are three methods - arbitration, mediation and conciliation.

> **How does arbitration come into force? -** Through arbitration agreement or arbitration clause in the whole agreement.

> **What is arbitration? -** It is nothing but the act of solving a dispute between two parties by appointing arbitrators instead of going to court.

> **Arbitration vs Litigation** - Arbitration is simple, easy, time-saving and the matter is settled amicably rather than having bitterness between the parties. Also, arbitral proceedings are flexible when compared to court proceedings.

> Arbitration comes into force through **arbitration agreement and arbitration clause.**

> **What is arbitral tribunal? T**he tribunal is appointed by the contesting parties. The tribunal can be mentioned in the agreement itself or appointed when a dispute arises. An arbitral tribunal can have members without a legal background and those who are not citizens of the nation.

> **Who is an umpire in an arbitral tribunal?** He is the third member in the arbitral tribunal and if there is any difference of opinion between the two arbitrators, his response will have a binding effect on the arbitral award.

> **What is an arbitral award?** It is the final decision passed by an arbitral tribunal. So, before passing the arbitral award, the parties would be subjected to arbitral proceedings.

> **How are arbitral proceedings carried out?** There are certain points that have to be looked into when one carries on arbitral proceedings like the language of the proceedings and place. The parties themselves can decide the place of the arbitral proceedings or the arbitrators would do so. A decision should also be made on whether it is going to be written or oral proceedings. What would happen if a party absents himself in the arbitration proceedings? **P**roduction of documents is essential for arbitration proceedings.

> **Important aspect of arbitral award -** It has a binding effect on the parties involved and it can be executed in a court of law and one can appeal against the arbitral award in the court if the award was passed in the absence of the parties or if there was any discrepancies in the award like a notice was not properly served to one of the parties or if the arbitrator or tribunal itself is a questionable one due to fraud or corruption.

QUESTIONS:

- Is a contract that provides for only appointment of two arbitrators (by each party) valid and is the award binding?

- Can a party invalidate an arbitral award passed in his absence?
- What is the effect of an arbitral award passed by a 5-member tribunal and signed by only 3?