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CS Professional 2024 Question Paper · Arbitration, Mediation and Conciliation

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Question Paper

SUBJECT
Arbitration, Mediation and Conciliation

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NEW SYLLABUS

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Roll No. .....

Time allowed : 3 hours ***Maximum marks : 100***

Total number of questions : 6 ***Total number of printed pages : 15***

NOTE : *Answer* ***ALL*** *Questions.*

PART–I

1. Model Public School (MPS) is a very reputed school in Delhi having its branches across all the major cities in India. Praj is engaged in the business of providing transport services and carries on his business under the name and style M/s. Triumphant Transports ('TT'), a proprietorship concern. MPS had floated a tender calling for quotes, for contracting services relating to driving, managing its buses and to provide additional transportation services, as and when needed. Praj had some contact in the senior management of MPS and was able to put in a good word about himself and his track record before the committee of the school. After a detailed evaluation, the management of the school approved TT's proposal and he was empaneled as the transport provider for the school. Accordingly, on April 1, 2018 the parties entered into an Agreement, whereby TT agreed to provide transport services to MPS. The school owned twenty-two buses, which TT agreed to operate and maintain. TT was required to provide conductors, drivers, supervisors, cleaners, full-time mechanics, and other personnel. In addition, TT also agreed to provide additional buses for the purposes of picking up and dropping off the students and the employees of MPS.

The Agreement was for a term of eight years that is, from April 1, 2018 till March 31, 2026 with the first five years as a lock in period. Further, TT agreed to strictly abide by

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the obligations stipulated in the Agreement such as, adhering to the timing for transportation of students; regular maintenance of the buses, maintaining motorable conditions of the buses; complying with the safety guidelines issued by the Supreme Court of India; limiting the number of students transported in each bus to the permissible limit; and, in the event of breakdown of buses, providing alternate vehicles etc.

For the initial year, the services were provided without any issues and the payments were also received by TT in a timely manner. However, after the first year, there was a considerable delay in payments made to TT and he was having challenges, as the working capital was getting struck. In September 2019, TT sent a communication to the Principal of the school to release the outstanding payments as per terms of the Agreement. He further stated that even though the school was collecting the transportation fee from the students well in advance, the school was making payments to him in small instalments after a substantial delay.

The Principal of MPS responded by an e-mail, alleging deficiencies in the services provided by TT. He also informed that MPS would be compelled to take strict action against TT, if the said deficiencies were not rectified within a period of two weeks. In first week of November 2019, through a communication MPS terminated the Agreement with TT.

Aggreived by the termination of Agreement, TT invoked the arbitration clause in terms of Clause 36 of the Agreement. Subsequently, the Court, by an order dated April 6, 2020, directed the Delhi International Arbitration Centre (DIAC) to appoint an arbitrator to adjudicate the disputes between the parties. During the arbitration, MPS also produced evidences including the complaints filed by parents of the students against TT.

In the background of above facts, answer the following :

(*a*) Prepare a draft Statement of Claim, assuming necessary facts.

(*b*) In the background of a case law, examine whether MPS has any recourse, if there is a delay in filing counter claims.

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(*c*) The Arbitral Tribunal rejected evidence provided by the school including the complaints filed by parents of the students against TT on the ground, that it did not abide by the statutory requirements in an arbitration. With reference to a judicial pronouncement, examine the validity of Arbitral Tribunal's action.

(*d*) While invoking arbitration clause, TT sent a notice of arbitration to MPS indicating certain claims, however, it did not mention those claims in its statement of claim during arbitration proceedings. Later, during the pendency of the proceedings, TT wanted to include those claims in its claim statement, but the school called it as time barred. Is the contention of the school valid ?

(*e*) State the course of action available to Arbitral Tribunal, when the school did not appear before the arbitral tribunal or object on service of notices. Also comment, whether an arbitral award is binding on a third party, who is not a singnatory to the arbitration agreement ?

(*5 marks each*)

2. Creative Contractors Ltd (CCL), a listed Company entered into a long-term contract with Mahati Interiors (MI), an architect firm run by Mahati. The contract was finalised on February 15, 2021. As per the terms of the agreement, Mahati was to provide designs as per the specifications by clients of the Company. Whatever may be the negotiations with the Client, the Company needs to pay ₹ 1 Lakh per design, subject to applicable taxes. The terms and conditions including the resolution of any disputed matters, to be settled by way of arbitration was clearly mentioned in the agreement and duly signed off by the parties and witnesses. On an average, annual payout as per the assignments from time to time was in the range of ₹ 60 to ₹ 80 Lakh.

Disputes arose on reductions in payouts due to rejection of certain designs by the clients of the Company, for which Mahati protested for non-receipt of an amount of ₹ 50 Lakh.

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Seemingly, the matter was required to be settled through arbitration. The arbitration clause of the agreement indicated that in case of any dispute, the matter can be settled through arbitration, on appointment of one to three Arbitrators as may be mutually agreed.

Mahati, did not have much of administrative support and was busy preparing designs for clients. In this process, she had misplaced the copy of agreement with the Company. She was also not willing to pay Arbitrator fee, more than ₹ 25,000, irrespective of the number of sittings or the time taken for completing arbitration proceedings, in other words, she wanted to make only one time payment.

A two-member arbitral tribunal was constituted, having been chosen by the Company and Mahati respectively. While petitioning before the Arbitral Tribunal, Mahati quantified her claim of ₹ 50 Lakh together with interest thereon @ 16% per annum and damages of ₹ 50,000, though there was no clause on interest in the agreement.

The Company wanted to change the Arbitrator, if permissible. Mahati was having a second thought if she could approach the Civil Court to claim the unpaid fee and damages, although there was an arbitration clause. The parties were not sure of the contract terms and were relying on communication exchange, work orders and certain oral evidences.

The Company noticed after two hearings, that one of the arbitrators suffers from competence and wants to find grounds for challenging his appointment. Further, they wish to ascertain the competence of the Tribunal in passing any interim measures.

However, both the parties are aware that the Arbitration Tribunal proceedings are not bound by the rules and procedures in terms of Civil Procedure Code, 1908 and Indian Evidence Act, 1872, but bit unsure as to the procedures to be agreed and suggestions to be made in this behalf.

For proper conduct of proceedings, the Company suggested that the suitable place is their meeting room at the registered office for which Mahati agreed. They agreed to get the

proceedings conducted on the basis of documents and evidences and to avoid any oral evidences or arguments as far as possible. Both the parties agreed with the Tribunal to appoint experts, as and when necessary.

The arbitration proceedings were continuing for the last one and half year and there is less expectation of its completion within next twelve months. Parties desire to know the consequences for such inordinate delay. Unfortunately, during the pendency of arbitration proceedings, Mahati met with a fatal accident and passed away. She was survived by her husband and two minor children.

In the background of the above facts, answer the following :

(*a*) Can the Arbitral Tribunal reduce the rate of interest as claimed by Mahati ? With reference to a settled case law, indicate what should the Arbitral Tribunal consider, in absence of specific rate of interest agreed between the parties to the agreement.

(*b*) Can the Company challenge the appointment of arbitrators on the grounds of competence ? Explain in the background of a judicial pronouncement.

(*c*) The Company contends that the arbitration agreement is discharged after Mahati's demise. Is the Company's contention justified ?

(*5 marks each*)

3. Versov Industries Ltd (VIL) was awarded a contract for mobile air compressor for a period of five years in a tender floated by Dragon Drill Ltd (DDL). However, DDL shortly after entering into the contract, terminated the same on the ground that some part of the equipment was not new and was defective. This position was disputed by the VIL and on the very next day, the vendor code of the VIL was blocked, thereby, disabling VIL to bid for any other further bids floated by DDL. A Show Cause Notice was issued by DDL to VIL asking why it should not be black listed for a period of two years. Since disputes had arisen between the parties, VIL invoked the arbitration clause contained in the contract. This

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notice was the subject-matter of dispute before the Arbitrator as well as before the Court. Pursuant to the notice, Srimaan (Retd. High Court Judge) was appointed as a Sole Arbitrator to decide the disputes between the parties. A claim petition was filed by VIL before the learned Arbitrator in which the termination of the contract/show cause notice was challenged and damages claimed. After this claim petition was filed, VIL was blacklisted by an order passed by the DDL for a period of two years. Meanwhile, a Section 17 application was also moved before the learned Arbitrator. Applications were then moved by VIL to amend both the petition as well as the Section 17 application to challenge this order, the amendements for which, were granted by the learned Arbitrator.

Subsequently, an appeal against the Section 17 Order was filed and disposed of by the jurisdictional City Civil Court, by which the learned Arbitrator's order was upheld. Consequently, the first appeal filed under Section 37 was dismissed. At this stage, a Special Civil Application was filed under Article 227 of the Constitution of India before the State High Court in whcih the City Civil Court's order was challenged. The High Court referred to a preliminary contention that the petition filed under Article 227 should be dismissed at the threshold, as it did not raise any jurisdictional issue. It was also held on a reading of the notice for arbitration that the notice did not raise the issue of ban for two years and was confined only to illegal termination. The High Court finally held that no stay could possibly have been granted under Section 17 of the ban order as an injunction cannot be granted in cases where the party can be compensated later in damages. Meanwhile, one of the consultants of VIL, in a meeting with the management, indicated that instead of taking the legal route and complicating the matter, they could have opted for online dispute resolution (ODR), which would have saved time and cost involved.

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In the background of above facts, answer the following :

(*a*) With reference to a judicial pronouncement, comment whether High Court can exercise jurisdiction in such matters ? If yes, will it impact the speedy disposal of such cases ?

(*b*) 'If petitions were to be filed under Article 226 of the Constitution against the orders passed in appeals under Section 37, the entire arbitration would be derailed'. Elucidate.

(*c*) 'ODR can address delays and provide faster resolution of disputes.' Explain.

(*5 marks each*)

Attempt all parts of either Q No. 4 or Q No. 4A

4. (*a*) Anima Technology Ltd, was looking for consultants who would help to develop technology, for tracking the time spent by the employees on various tasks. The Company had published an advertisement and it had received many responses. After detailed evaluation, the Company finalized the proposal given by Ketan, a freelancing IT specialist. The Company had finalized the work order which included various terms like the nature of services, amount to be paid, milestones and the resolution mechanism in case of any disputes. As a part of the transaction, Ketan was requested to provide a bank guarantee of ₹ 5 Lakh, towards execution of the agreement. The terms were agreed by both the parties and the work order was executed. After few months, the management noticed that the services provided by Ketan were not as per expectation and the concerns were communicated to him. However, Ketan did not respond and the Company encashed the bank guarnatee given by Ketan. Aggrieved by this act of the Company, Ketan wanted to initiate arbitration proceedings. The matter was referred to arbitration. The Company contended that the arbitration agreement was not enforceable as the work order was not stamped as per the Indian Stamp Act, 1899.

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In the background of a judicial pronouncement, comment whether the Company's contention is appropriate.

(*5 marks*)

(*b*) Mani Mekhala, a retired government employee had invested in large stocks with an intent to supplement her retirement income. As most of her investments were in physical form, she had compiled all the documents meticulously and used to track the dividend received from her investments. Many years ago, she had invested in the IPO of Alma Tech Ltd, in which she was allotted 100 equity shares. The Company used to pay dividends regularly and Mani was very happy with her investment. However, since last two years, she had not received any dividends and had written several letters to the Company, for which she did not get any reply. She was not sure if she can complain about non-receipt of dividend at any forum. She reaches out to you, a Company Secretary, to help her in this matter.

Advise Mani, whether she can file a complaint for non-receipt of dividend and the process of filing a complaint online with SEBI.

(*5 marks*)

(*c*) The management of Drupad Ltd, was planning to set up a plant near the coastal region in Tamil Nadu. The Company was simultaneously, finalising multiple agreements with various service providers and vendors. Aadesh, the CFO of the Company suggests that, with so many agreements being executed, it would be in better interest of the Company to get them reviewed by an external consultant who can also provide recommendations and suggest changes, if any. The management concurs with Aadesh's view and asks him to empanel a consultant who would not only help them with

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these agreements and arbitration matters but also support them in ensuring compliance with the applicable laws and regulations. Aadesh recommends the name of Akhshaj, a Practising Company Secretary for supporting them on the matters relating to agreements and compliance aspects. In this background, explain the role of a Company Secretary in the arbitration and conciliation matters.

(*5 marks*)

Or (Alternate to Q. No. 4)

4A. (*i*) Thiru Industries Ltd (TIL) had floated a tender calling for contractors to lay cable in the plant located near a village in Nashik district. Many bids were received, as TIL was a reputed name in the market and many vendors wanted to be associated with it. TIL finalised the bid and it was awarded to Meru Ltd for execution. Later, dispute arose between TIL and Meru Ltd regarding the approval of the milestones and payments. TIL was forced to termiante the contract as per the tender document. The matter was referred to arbitration as per the terms of agreement. Now, Tej, a Senior Manager of TIL Ltd was asked to produce evidence by way of affidavit before the arbitrator. The Director of TIL was dicussing this matter with Biju, a Senior Lawyer, who said 'though the Evidence Act, 1872 is not strictly followed in arbitration, production of evidence by way of affidavit forms an inevitable part of arbitration.' In this background, draft an affidavit assuming necessary facts.

(*6 marks*)

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(*ii*) Charan Ltd (CL) was having a contract with Kalipur Toys Ltd (KTL) for the supply for the raw materials and other products for manufacturing of toys. However, in recent times, CL was supplying defective/faulty materials to the company. After repeated communications and raising concerns, KTL terminated the contract with CL. The matter was referred to arbitration as per terms of the agreement. KTL obtained an award through Arbitral Proceedings for an amount of ₹ 25 Lakh as a loss suffered due to CL. However, CL denied to make the payment. KTL wanted to approach the Court, for enforcement of the arbitral award. In this context and in the light of various provisions of the Arbitration and Conciliation Act, 1996, draft a petition for enforcement of Arbitral Awards, assuming necessary facts.

(*6 marks*)

(*iii*) Saadar Ltd (SL), a Company providing IT and ITES services was planning to enter into an agreement with Technko Tip Inc., based in Canada. The draft agreement was prepared by a consultant and shared with the management of SL. It was also shared with the Company Secretary for his review and inputs. Indicate the key points to be considered while drafting an International Commercial Contract with a party in Canada ?

(*3 marks*)

PART–II

5. Case Study :

Varenya group, was a well-known group in Kerala dealing in gold, diamond jewellery and related products. The group was founded by Vipul Varenya, who had three children, Vardhan,

Viraj and Veena. All his children were well educated and gradually, Vipul handed over the businesses to his children and enjoyed retirement life. However, he was always available for any advice, but refrained from interfering in the business matters. Vardhan, being the eldest one had a different attitude. He wanted things to happend his way and was very ambitious. On the contrary, Viraj was calmer and believed in expanding the business gradually. Veena was supportive of her brothers and always gave them suggestions when needed. However, all was not well within the family. There seemed to be a cold war between the brothers and Veena was troubled with this. It was no more a happy family. With Vardhan intending to reorganize the companies and expand the business to US and South Asia, there was a conflict between the brothers. Situation was such that both the brothers could not stand each other. Veena was very concerned and discussed the same with her father. Vipul, was thinking if the property/business needs to be distributed between his children to avoid further conflicts. He consulted his close friend and confidante Har, a Company Secretary and Senior Partner of Har & Co. LLP, Company Secretaries. Har was known to all the members of Varenya family and they trusted him for his insights. Veena wanted to appoint Har to mediate the issue between Vardhan and Viraj. Vipul, was also in agreement with Veena's proposal. However, he was unsure if the mediation settlement so concluded would hold validity in Court of law, considering the conflict between Vardhan and Viraj.

In this background, answer the following :

(*a*) Draft a mediated settlement agreement, assuming necessary facts.

(*b*) Indicate the key ethical principles, which Har should adhere to as a mediator.

(*c*) Can the mediated settlement agreement be enforced ? Explain with reference to the provisions of Arbitration and Conciliation Act, 1996 ?

(*5 marks each*)

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Attempt all parts of either Q 6. or Q 6.A.

6. (*a*) Dhanik lodged an instrument for transmission of equity shares of Mayurika Constructions Private Ltd. The Company refused to register transmission due to certain discrepancies like non-execution of proper instrument, etc, noticed while processing the request from Dhanik. Within twelve days of receipt of the instrument, the Company sent notice of refusal to him. Dhanik was sure of the documentation he had filed with the Company and was alleging that there was a wrong doing within the Company, for refusing the transmission of shares. Dhanik has filed an appeal before NCLT under the Companies Act, 2013 to resolve the matter. Considering the time and cost involved, both the parties agreed to initiate Mediation and Conciliation Proceedings. In this background, Dhanik reached out to you, to help him with the procedure. Advise Dhanik on this matter.

(*5 marks*)

(*b*) Kolhar India Private Ltd (KIPL) and Oswaj Private Ltd (OPL), were both registered under Micro, Small and Medium Enterprises Development Act, 2006. The Companies, entered into an agreement for providing raw materials and related job works. The agreement between the companies was robust and also included a clause on dispute resolution mechanism. The transactions between the companies were taking place smoothly. However, OPL, suffered a major loss when one of its key customers went bankrupt and a large amount of receivable was written off. The Company had tough time managing its working capital requirements and could not honor many of its commitments. After giving sufficient time KIPL, raised a dispute with OPL and the matter was

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referred to arbitration. KIPL was planning to approach the Facilitation Council. In the background of a judicial pronouncement, comment whether KIPL will succeed.

(*5 marks*)

(*c*) Sheru, was the leader of the information-technology vertical of Ignite Techno Ltd, a company providing software services. The Company had approached Suko Inc., a Taiwanese company with a proposal to implement accounting software for its global entities. This proposal was a prestigious one for the Company and Sheru was working on this since last two months. However, they seemed to have a challenge with Kungo, the Senior Director of Suko Inc., as it was very difficult to convince him on certain aspects of the agreement and to negotiate with him to finalise the deal. In this context, advise how effective negotiation plays a critical role in getting the desired outcome, considering the various elements of negotiation.

(*5 marks*)

Or (Alternate to Q. No. 6)

6.A. (*i*) Krupa & Co., a partnership firm dealing with supply of perfumes and essential oils enters into an agreement with Glassko Private Ltd (GPL). Pursuant to this agreement GPL was supposed to provide glass bottles for packaging the products manufactured by Krupa & Co. The agreement between the two parties spelt out all the key clauses, including mediation as the mode of alternate dispute resolution, in case of any disputes. Both the parties were supportive of each other for their business. However, there was a change in GPL's management and the equation between the two parties also

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changed. There were concerns relating to equality of goods supplied by GPL. Krupa & Co., was evaluating to invoke the alternate dispute resolution mechanism as per the terms of the agreement. The matter was referred to mediation and the proceedings were taking place. However, during the pendency of the matter, GPL made the news of mediation public in one of Glass Association Forum's meeting, which impacted Krupa & Co. In the background of a case law, comment whether GPL's action is justified ?

(*5 marks*)

(*ii*) Pranjal Kare Labs Ltd (PKLL), is a Hyderabad based pharmaceutical company with large supply chain network. PKLL procures the materials and other chemicals required for manufacturing pharmaceutical products from Hiro Industries Ltd (HIL). PKLL and HIL had a commercial agreement for the purposes of supplying raw materials. However, dispute arose over supply of materials in a consignment which was destroyed on the way to PKLL's factory due to flood. PKLL contended that it was not going to bear the loss, as HIL should have insured the goods in transit. However, HIL denies the claim. The matter was escalated and the management of PKLL concludes that it would be appropriate to resolve the matter through mediation. In this background, draft a mediation application form for commercial disputes, assuming necessary facts.

(*5 marks*)

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(*iii*) Narath was a Senior Partner, in Narath & Co. LLP, Company Secretaries. The firm was specializing in mediation and conciliation matters. Mina, one of Narath's assistant, was discussing about Singapore Convention on mediation. While discussing various aspects of the convention, Narath mentions that there are some instances wherein the convention does not apply. Explain in brief Singapore Convention on mediations and also indicate the instances where it does not apply.

(*5 marks*)

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