COMPETITION COMMISSION OF INDIA
Case No. 01 of 2018

In Re:

Indian National Shipowners' Association (INSA)
22, Market Tower-F, Cuffe Parade,
Mumbai-400005 **Informant**

And

Oil and Natural Gas Corporation Limited (ONGC)
Deendayal Urja Bhawan,
5A, Nelson Mandela Marg,
Vasant Kunj, New Delhi-110070 **Opposite Party**

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Mr. U. C. Nahta
Member

Ms. Sangeeta Verma
Member

Appearances

For the Informant	Mr. Amitabh Kumar, Advocate Mr. Vaibhav Choukse, Advocate Ms. Unnati Agarwal, Advocate Mr. Anil Devli, CEO Mr. Rahul Pradhan, Sr. General Manager, Marketing Ms. Amisha Ghia, Company Secretary Mr. Siddhesh Chaubal, Assistant Manager, Legal
For the Opposite Party	Ms. Madhvi Divan, ASG Mr. Harman Singh Sandhu, Advocate Ms. Nitika Dwivedi, Advocate Ms. Nidhi, Advocate

Ms. Afreen Abbassi, Advocate
Mr. Nirupam Banerjee, Chief General Manager
Ms. Kamna Sarkar, Chief General Manager
Mr. Suresh Chander, General Manager
Mr. B.C. Sharma, General Manager
Mr. M.S. Khan, Group General Manager

Order under Section 26(6) of the Competition Act, 2002

1. The present information was filed by Indian National Shipowners' Association (INSA) (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against Oil and Natural Gas Corporation Limited (hereinafter, the '**Opposite Party**'/ '**OP**'/'**ONGC**') alleging contravention of the provisions of Section 4 of the Act.

Brief facts of the case

2. The Informant is a representative body of various ship owners formed in the year 1929. At the time of filing of the information, it had 42 members which included Indian shipping companies and offshore oilfield service providers *i.e.* companies providing services such as offshore logistics services to offshore oilfield operators like ONGC, Cairn India Limited (CAIRN), Reliance Industries Limited (Reliance), British Gas Exploration and Production India Limited (BGEPIL) *etc.* The member companies of the Informant include Shipping Corporation of India Limited ('SCI'), Global Offshore Services Limited ('Global Offshore'), Ocean Sparkle Limited ('OSL'), TAG Offshore Limited ('TAG Offshore'), Triton Maritime Private Limited ('Triton'), Greatship (India) Limited ('Greatship') *etc.*

3. It is stated that ONGC, in order to undertake Oil & Natural Gas (hereinafter O&NG) Exploration and Production (E&P) activities seek support services from offshore oilfield services providers (such as the member companies of the Informant) pursuant to a competitive bidding process. One of the services is the charter-hire of offshore support vessels (hereinafter, the '**OSVs**') which are specialized vessels that support various stages of offshore O&NG E&P activities undertaken by ONGC. There are several types of OSVs, amongst which the following two are predominantly used for the offshore E&P activities in the Indian Exclusive Economic Zone ('EEZ'):

a) **Anchor Handling Tug Supply Vessel ('AHTSV')** designed to tow rig anchors from one location to another and to lift and position rig's anchors; and

b) **Platform Supply Vessels ('PSV')** to carry out supply duties and transit of manpower, fuel, fresh water, tools and materials (such as pipes and cement) to offshore drilling locations.

4. The Informant has submitted that for procuring the services of the aforesaid OSVs, ONGC used to float International Competitive Bidding (hereinafter, the '**ICB**') tenders which contained detailed technical eligibility requirements, bid evaluation criteria, a model contract comprising general conditions of contract (hereinafter, the '**GCC**') and special conditions of contract (hereinafter, the '**SCC**'), collectively referred to as the 'Charter Hire Agreement' (hereinafter, the '**CHA**'). The CHA sets out the terms and conditions which govern the contractual relationship between ONGC and the successful bidder. The Informant has claimed that ONGC possesses a dominant position in the hiring of OSVs and owing to such dominant position, it had been able to put one-sided clauses in the CHAs in the nature of boiler plate agreements, allegedly not open for negotiations.

5. Further, the CHAs between ONGC and the respective member companies of the Informant contained certain clauses which were alleged to be onerous in nature and favourable to ONGC. Specifically, the Informant has alleged the following clauses of the CHA to be one-sided, unfair and hence, abusive:

i. **Clause 14.2 of the SCC:** Unilateral right to terminate the agreement;

ii. **Clauses 18.2 and 23 of the GCC:** Unilateral termination in case of *force majeure*;

iii. **Clause 27.1.2 and 27.1.4 of the GCC:** Onerous clauses in relation to appointment of arbitrator.

6. In addition to the above, the Informant alleged that the ONGC issued termination notices for few contracts with its member companies which is indicative of abuse on its part owing to the dominant position held by it. Based on these allegations, the Informant alleged contravention of Section 4(2)(a)(i) of the Act by ONGC.

7. The Commission examined the aforesaid facts and after hearing both the parties, in a preliminary conference held on 17.05.2018, was *prima facie* satisfied that the allegations raised by the Informant in the information had merit. *Prima facie*, the Commission found ONGC to be dominant in the '*market for charter hire of OSVs (PSVs and AHTSVs) in the Indian EEZ*'. Further, with regard to the unilateral right of termination (Clause 14.2 of SCC), the Commission found the said stipulation as well as its invocation by ONGC against some of the member companies of the Informant to be *prima facie* abusive in nature. However, the allegations with regard to unilateral termination in case of *force majeure* (Clauses 18.2 and 23 of the GCC) and alleged onerous clauses in relation to appointment of arbitrator

(Clause 27.1.2 and 27.1.4 of the GCC) were not found to be abusive in nature.

8. Based on the finding with regard to unilateral right of termination being *prima facie* abusive, the Commission *vide* its order dated 12.06.2018 directed the DG to carry out a detailed investigation into the matter under Section 26(1) of the Act.

<u>Order under Section 33 by the Commission</u>

9. The Commission also considered the application filed by the Informant seeking interim relief under Section 33 of the Act and found it to be a fit case to grant such relief. However, since an undertaking filed by ONGC on 08.05.2018 was already on record, the Commission was of the view that the same will address the concern. *Vide* this undertaking dated 08.05.2018, ONGC had agreed that it will not be invoking Clause 14.2 of the SCC, in any manner, against the ship-owners until the next date of hearing. In furtherance thereof, the Commission gave an interim direction, *vide* its order dated 15.06.2018, to the effect that ONGC will not invoke Clause 14.2 of the SSC, in any manner, against the Ship-owners and the undertaking filed by it on 08.05.2018 before the Commission would remain operative until any further order(s).

<u>Observations and findings of the DG</u>

10. Pursuant to the order of the Commission passed under Section 26(1) and the information and evidence gathered during investigation, the DG submitted an Investigation Report dated 28.12.2018, the observations and findings of which are elucidated in the ensuing paragraphs.

11. In reference to the provisions of Section 2(h) read with Section 4 of the Act, the DG observed that ONGC, a Maharatna, is an Indian multinational

O&NG company which is primarily engaged in exploration and production activities in India as well as overseas. It is a public sector undertaking with a total comprehensive income of approximately Rs. 228,951.94 million in the financial year 2017-18, and as such qualifies to be an 'enterprise' under the provisions of the Act.

12. Thereafter, the DG proceeded to delineate the relevant market in the matter. The DG observed that the present case pertained to allegations of abuse of dominant position by ONGC as a procurer of services towards its suppliers (*i.e.* the OSVs). Relying on the approach adopted by the Commission in past few cases [Rajat Verma and Public Works (B&R) Department (case No. 70 of 2014 decided on 09.07.2018), *Adcept Technologies Pvt. Ltd. and Bharat Cooking Coal Limited* (Case No. 16 of 2013 decided on 08.05.2013) and *V.E. Commercial Vehicles Limited and UPSRTC* (Case no. 80 of 2015 decided on 07.01.2016)] which pertained to abuse of buyer power, the DG applied the demand-side substitutability in an inverse manner. The DG undertook the assessment of available suppliers and their ability to switch to alternative sales opportunities, both product-wise and geographically. The DG also referred to similar cases in matured jurisdictions wherein while dealing with cases of buyer power, the market was delineated by considering whether suppliers have alternative distribution channels for their goods or services.

13. The DG observed that the physical characteristics/end-use of goods, *i.e.* OSVs, demonstrates that the relevant product comprises specialised vessels used for performing specific tasks to support offshore O&NG E&P activities, which in the present case pertains to two specific OSVs, *namely* AHTSV and PSV.

14. The DG analysed the use of such vessels across the globe and found that OSV deployment is directly linked to offshore E&P activity which is determined by oil prices. If oil prices are high, then demand for OSVs is stimulated and as prices decline, the E&P activities also decline, which led to idling of OSVs. The DG, accordingly inferred that had there been significant alternative employment opportunities for these specific OSV owners, they could have moved away from the E&P activity rather than idling their vessels, showing absence of an alternative market scenario. The DG found that as of November, 2018, nearly 30% of global OSV fleet was either idle or cold-stacked.

15. Thereafter, the DG examined the Informant's submission regarding lack of sustainable alternative business opportunities for OSVs in the relevant market; making it difficult to find employment opportunities for Indian flag vessels in a market dominated by ONGC. The DG noted that the Informant admitted to the possibility of foreign deployment of its vessels but stated that such deployment is only possible during buoyant markets where demand far exceeds the supply. On the other hand, the OP maintained its stand before the DG that OSVs could be used in other sectors such as marine transportation, renewable energy generation, satellite operations and search & rescue operations. The DG, however, noted that none of the OSVs owned by the Informant's members had been deployed in these sectors. As an exception only SCI, being a public-sector entity, was able to secure 11 contracts on nomination basis for three OSVs.

16. Also, on the basis of consumer preference, the DG noted that the OSVs under question in the present case (*i.e.* PSVs and AHTSVs) are different from other types of vessels. Before the DG, ONGC claimed that all OSVs could be classified into two categories based on the nature of services rendered by them in offshore O&NG E&P activities on account of their

different technical make-up, functionality and end-use. The first category comprised of vessels providing Marine Logistics (ML) services *i.e.* logistical support services such as towing of rigs, material, manpower *etc.* and second category includes vessels providing Inspection, Maintenance and Repair (IMR) services *i.e.* services of platform inspection, sub-sea inspection, diving support, fire-fighting support vessels *etc*.

17. ONGC submitted that hiring of OSVs falling in the aforesaid categories was done by two different procurement and technical management teams, and as such owing to different technical capabilities of OSVs falling under ML and IMR, such OSVs do not perform the same function. The DG also found that the SCC forming part of CHAs executed by ONGC for the aforesaid categories are not substitutable and hence, cannot form part of the same relevant product market.

18. Applying functionality test in light of ONGC's submission, the DG observed that it was not operationally and commercially viable to utilise AHTSVs and PSVs, which primarily provide ML services, to perform the functions of IMR vessels [e.g. Windfarm Service Vessels (WFSVs) and Wind Turbine Installation Vessels (WTIV)]. Though ONGC claimed before the DG that OSVs (*i.e.* PSVs and AHTSVs) could be potentially used as Windfarm Service Vessels (WFSVs) owing to significant market size of the latter (as there are more than thousand ongoing projects across the globe), such claim was not substantiated by any evidence. Further, the DG noted that the report submitted by Drewry Maritime Advisors[1], a renowned Maritime Market Analysis Independent Firm having more than 40 years' experience of market trends analysis, indicated that there was a major difference in the technical specification of these OSVs, and Wind

[1] Need to read this report and its main observations.

Turbine Installation Vessels (WTIV), making them non-substitutable. WTIVs are required to be self-elevating, whereas OSVs are not.

19. In respect of OSVs supply market in India, the vessels are mainly provided by the 42 member companies of the Informant. The DG noted that such OSVs have been defined to include PSVs and AHTSVs which constitutes about 46% of global offshore fleet, with other OSVs comprising the remaining 54%. However, in the Indian offshore market, the share of vessels other than OSVs (PSVs and AHTSVs) is 31%. Therefore, the DG observed that though there are other types of OSVs in the Indian EEZ, mainly AHTSVs and PSVs are used.

20. The DG further observed that all vessels are designed and are equipped to perform specific functions, and it is not operationally and commercially viable to utilise one type of OSV to perform the task of another type of OSV. Considering the distinct physical characteristics and end-use, the DG delineated the relevant product market in the present case as "*market for charter hire of OSVs (specifically PSVs and AHTSVs)*".

21. For delineating the relevant geographic market, the DG took into account the factors enumerated under Section 19(6) of the Act. The DG noted that the O&NG industry operated under a highly regulated environment comprising various laws and regulations. It was observed that the National Exploration Licensing Policy (NELP) had been designed by the Government of India (GoI) in exercise of its sovereign rights of exploiting its natural resources in its EEZ. The Shipping Act, 1958, regulates all vessels registered in India as well as foreign flag vessels operating in the Indian EEZ and such Indian flag vessels are required to be registered in India with the Mercantile Marine Department (MMD) and fall within the regulatory purview of the DG Shipping. These regulatory trade barriers

coupled with national procurement policies were found to make the Indian EEZ a distinct geographic market. Hence, the DG came to the conclusion that the relevant geographic market in the instant case is "*the Indian EEZ*".

22. To ascertain whether ONGC held a position of dominance in the relevant market, the DG considered the explanation provided under Section 4 of the Act along with the factors enlisted under Section 19(4) of the Act. The DG observed that ONGC is the largest producer of crude oil and natural gas in India, contributing almost 70% to India's domestic production of oil.

23. The DG also noted that in the past 5 years, ONGC had chartered/operated, approximately 80% of the offshore drilling rigs in the Indian EEZ. Further, as on 01.01.2018, 45 out of the 48 contractually committed/operational offshore drilling rigs in the Indian EEZ were being chartered/operated by ONGC. As on 11.01.2018, there were 84 contractually committed/operational OSVs in India, out of which 69 were chartered by ONGC amounting to a market share of 82% in the market for charter hire of OSVs in the Indian EEZ.

24. In terms of size and resources, the combined group turnover of ONGC for the year 2016- 2017 was found to be Rs. 1,42,149 crore and the standalone profit was Rs. 17,900 crore. The DG further found that ONGC has the largest exploration acreage and is the mining lease holder in India with 1184 oil wells and 151 gas wells in offshore. The DG also discovered that 65 AHTSV vessels (as on 06.12.2018) were employed in the Indian OSV market by ONGC amounting to 63.1% of the market share, the remaining being hired by other E&P companies, namely Cairn Energy, British Gas, Reliance Industries and Gujarat State Petroleum Corporation. In case of PSVs, OP employed 31 out of the total 34 vessels that were hired, which accounted for 91.2% market share in 2018. Remaining PSVs were

employed by Gujarat State Petroleum Corporation, Axxis Geo Solutions and McDermott.

25. The DG further observed that in respect of economic power and commercial advantages enjoyed by an enterprise, ONGC being a PSU had a first-mover advantage which consequently led to winning of blocks and a position of dominance in the upstream market. Also, the presence of ONGC in all stages of the value chain in the E&P industry attributed to its strength in the market and brought along significant market power. The DG also found that the market for O&NG sector is characterised by high entry barriers and it is difficult for new players to enter the market.

26. The DG also applied certain economic tools to assess the strength of ONGC in the relevant market. The DG applied the Small but Significant Non-Transitory Increase in Price (SSNIP) test and based on the instances of renegotiations of charter hire rates among ONGC and OSVs suppliers in May 2016, August, 2016 and May, 2017, the DG observed that the outcome of SSNIP test showed that the OP was a hypothetical monopolist as OSV owners could not relocate to other markets/alternatives despite severe/significant downward adjustment in charter hire rates of such vessels. Thus, the DG was of the view that OSVs (specifically PSVs and AHTSVs) constitute the relevant product market in accordance with the economics of competition law. The DG also undertook Herfindahl-Hirschman Index (HHI), a measure of market concentration analysis, which showed that market was highly concentrated.

27. Based on all these factors, the DG concluded that the ONGC held a dominant position in the market for charter hire of OSVs (PSVs and AHTSVs) in the Indian EEZ.

28. The DG observed that the main grievance of the Informant was with regard to the existence of unilateral termination clause in the CHA and its invocation by ONGC in an allegedly abusive manner. For examining the conduct of ONGC, the DG started the analysis by identifying the circumstances under which '*Termination for Convenience*', *i.e.* a clause that allows termination without providing any cause or reason, could be considered exploitative and hence, abusive. The DG examined the legal position with regard to termination of agreements in the USA, UK and India.

29. It was discovered that usage of such clause originated in the USA and was followed by industrialised nations of Europe. The DG observed that at one point, the USA federal case law allowed the government to terminate the contract to get a better price as held in *Colonial Metals Co. vs. United States 494 F.2d 1355 (Fed. Cir. 1974)* (hereinafter, *Colonial Metals* case). However, this decision was highly criticised and subsequently overturned with the concept of 'changed circumstance' in *Torncello vs. United States 681 F.2d 756 (Fed. Cir. 1982)* (hereinafter, *Torncello* case).

30. Subsequently, in *Krygoski Construction Co. vs. United States 94 F.3d 1537 (Fed. Cir. 1996)*, the test laid down was that termination for convenience is generally allowed except when exercised in bad faith. This principle of 'good faith' was further developed in the case *Quester Builders Inc. vs. CB Flouring LLC 978 A.2d 651 (Md. Ct. App. 2009)* (hereinafter, *Questar* case) wherein it was held that '*the right to terminate a contract for convenience is a risk allocating tool*'. Therefore, in some cases, a change in circumstances may not be enough to justify termination for convenience, unless the termination clause is exercised in good faith.

31. While perusing the legal position in the United Kingdom (UK), the DG observed that under the English contract law, there is no general doctrine of good faith and the contracts can be terminated for convenience without the implication of duty to demonstrate good faith unless the contract expressly provides for such duty. Thus, if the contract provides for termination without assigning any reasons, the parties are at liberty to do the same. In *TSG Building Plc vs. South Anglia Housing Ltd., [2013] EWHC 1151* (hereinafter, *TSG Building* case), since the right to terminate was unqualified and unconditional under the agreement between the parties, it was held that either party could terminate at any time without assigning any reason. Further, in *Hadley Design Associates Ltd vs. Westminster City Council [2003] EWHC 1617 (TCC)*, it was held that a duty to act in good faith would not be implied in relation to a termination for convenience clause. If the clause does not require for there to be any reason for the termination, such duty cannot be taken as implied.

32. The DG also sought information from the competition authorities in the UK, Europe and USA on whether usage of termination for convenience amounts to abuse as per their respective laws or not. While USA does not have a provision of exploitative abuse, the UK (CMA) and the Europe's competition authority (DG Comp) clarified that they have never examined the 'Termination of Convenience Clause' of a contract as a case of abuse of dominance.

33. Further, the DG also examined the case laws in India in this regard to gauge the jurisprudential trend. The DG observed that the Hon'ble Supreme Court, in the decision of *Central Inland Water Transport Corporation Ltd. & Anr. vs Brojo Nath Ganguly & Anr [1986 AIR 1571]* (hereinafter, *Central Inland Water Transport* case), had laid down the principle on the basis of which a contract with an unfair termination clause can be declared void by

a court. The Hon'ble Supreme Court also emphasised on the requirement of 'reasonableness' in the terms of the contract and discussed the doctrine of unconscionability. Based on legal precedents, the Hon'ble Supreme Court had held that for a termination clause without a cause to be valid, fair and reasonable, the bargaining power of both the parties should be at par.

34. The DG further referred to Section 14(1)(d) of the Specific Relief Act, 1963 considering that this provision has a specific relevance while analysing the enforceability of clauses which allow the party to terminate the contract without assigning any reason. It was noted that such contracts, which allow termination without reason, are essentially determinable contracts, the specific performance of which cannot be granted as such. Further, an injunction could not be granted to prevent the breach of a contract, the performance of which could not be specifically enforced. The only option with the aggrieved party in such a case was to claim damages for wrongful termination, if any.

35. On the basis of the aforesaid legal position in the US, UK and India, the DG concluded that ONGC may exercise its express contractual right to terminate the contract irrespective of its reasons for doing so as long as it had complied with the contractual requirement of issuing a notice of termination as provided under the CHA. The DG further stated that the contract between ONGC and OSV Providers is a commercial transaction and both the parties are business enterprises. Thus, the principle of unfairness of a contractual term laid down in the *Central Inland Water Transport* case was not applicable to the instant case. The DG further opined that even if the principle of unfairness of a contractual term laid down in the *Central Inland Water Transport* case was applied to the facts of the instant case, the OSV providers could not be said to lack bargaining power as they operate under the aegis and guidance of the Informant which

is a powerful body recognized by the GoI having due representation on official and public bodies connected with merchant shipping. Further, the services of its member companies are indispensable to the business of ONGC. The DG also stated that though the OSV providers could offer their services to other sectors as well, apart from offering it to other companies within the E&P sector globally, ONGC has to operate in accordance with the guidelines of Director General of Shipping and is bound by them which restricts ONGC's options for availing offshore support services.

36. The DG also examined whether ONGC acted in good faith while invoking the termination clause. The DG recorded depositions of some third parties from the side of supplier who had quoted lower charter hire rates to ONGC and also examined the detailed submissions made by ONGC. Based on those submissions, the DG noted that the crude oil prices had started declining from 2014; however, instead of immediately issuing termination notices, ONGC waited for a reasonable time for the market to stabilise. It was pertinent to note that not taking advantage of the changed demand-supply situation of the OSVs and continuing the existing contracts with the OSV providers at a significantly high charter day rates (as opposed to the lower charter day rates prevailing in the market in response to the market condition) was in fact adversely commented upon by the Comptroller and Auditor General of India (CAG) in 2014-15. The DG concluded that the OP had exercised its right to issue termination notice in good faith owing to the prevalent market condition due to fall in crude oil prices.

37. The DG accordingly observed that OP was justified in terminating the contracts to prevent itself from incurring further losses. The fall in crude oil prices constituted a material change in the circumstances in which the contracts for charter hire of OSVs were entered into and therefore, ONGC had sufficient reason to either revise or re-enter into CHAs in line with the

new prevailing charter day rates. The DG also took into account the fact that O&NG companies across the globe were renegotiating or terminating contracts in response to the fall in crude oil prices, while assessing the validity of the reasons for issuance of termination notices by ONGC.

38. Besides, the DG also opined that the issue raised by the Informant is purely contractual in nature and, the CHA being a private contract, the legal relationship between the OSV Providers and ONGC is governed by the terms of the contract and not this Act.

39. In conclusion, the DG observed that invocation of this clause under the contract is completely justifiable and is a matter of contractual right available to ONGC. There was no evidence of abuse of dominance by ONGC and hence no case was made out as such against it, under Section 4 of the Act.

40. On 13.02.2019, the Commission considered the Investigation Report and decided to forward a copy of the same to the Informant as well as ONGC, to invite their objections/suggestions to the Investigation Report. In response, both the parties filed their written submissions to the Investigation Report and appeared through their counsel(s) in the hearing held on 23.04.2019. Bereft of details, the contentions of the parties are summarized in the ensuing paragraphs.

Reply/Objections of the Informant

41. The Informant reiterated the allegations made in the information. Further, the Informant had engaged a leading global maritime research consultancy firm, *i.e.* Drewry Maritime Advisors, to assist the DG in undertaking

economic analysis for delineation of the relevant market and to ascertain whether ONGC was dominant in such relevant market.

42. At the outset, the Informant raised certain preliminary issues challenging the investigation carried out by the DG. It was argued that the DG has exceeded its jurisdiction by examining the validity of termination for convenience clause under the contract laws, instead of analyzing ONGC's conduct under the provisions of the Act. By placing reliance on the judgements of USA, UK and India, the DG observed that such clause has been upheld by courts in those jurisdictions under their respective contract laws when exercised in good faith; and/ or where the parties to the contract have equal bargaining power.

43. According to the Informant, inclusion of such clauses in the CHA and the conduct of ONGC in enforcement of such clauses amounts to abuse of dominant position under Section 4(2)(a)(i) of the Act. The Informant further submitted that the validity of a clause under the contract law does not automatically grant it immunity from the applicability of competition law. Thus, the DG's investigation, which was directed at finding whether the exercise of termination for convenience clauses is valid under the contract laws, suffers from serious infirmities. It was also argued that a remedy provided (or lack thereof) by an arbitral forum cannot place fetters on the exercise of jurisdiction by the Commission.

44. To support its contentions, the Informant placed reliance on the previous orders passed by the Commission and the appellate courts. It was stated that the Commission, in *Pankaj Aggarwal and others v. DLF*, Case No. 13 and 21/2010 and 55/2012 decided on 12.05.2015, held that '*[t]he Opposite Party's argument that the Informants could have approached an appropriate forum for breach of contract is misplaced as this is not a case*

of breach of contract. The case does not entail examination of the breach of the terms/conditions specified in the contract but the way in which the Opposite Party has conducted itself while dealing with the buyers. The allegations made in the present cases squarely raise competition concern because the kind of conditions which were imposed on the buyers/allottees and the way they have been executed by the Opposite Party was alleged to be an expression of abuse.'

45. Further, in *Faridabad Industries Association v. Adani Gas Limited*, Case No. 71 of 2012 decided on 03.07.2014, the Commission rejected Adani Gas Limited's (AGL) argument "*that the issues raised by the informant did not involve any competition law concerns as the same were contractual disputes*" and held that imposition of various onerous and one-sided clauses in the gas supply agreement violated Section 4 of the Act.

46. In the case of *Uttarakhand Agricultural Produce Marketing Board & Ors. v. Competition Commission of India & Anr.* (LPA 674/2017 order dated 17.10.2017), the Division Bench of Hon'ble Delhi High Court has held that '*[m]erely because multiple remedies arise from a set of facts or multiple consequences arise from the same set of facts does not prevent recourse to more than one proceeding. Unless the proceedings are mutually destructive - which in this case they are not - recourse to multiple proceedings on the same set of facts is not barred*."

47. Placing reliance on all these case-laws, the Informant argued that the DG has wrongly opined that the present case is purely contractual in nature and does not give rise to any competition concern. Thereafter, the Informant submitted its objections/comments on the substantive findings of the DG.

48. Though the Informant concurred with the DG's delineation of the relevant market and assessment of ONGC's dominance in such market, it contested the DG's finding on abuse. The Informant submitted that the DG had erred in the application of the law and established competition law principles in holding, *inter alia*, that ONGC's conduct was not abusive.

49. It was submitted that the ONGC floats tenders for charter hiring of such OSVs in an international bidding process and tenders issued by it contains detailed technical eligibility requirements, bid evaluation criteria, a model contract (CHA) comprising GCC and SCC. Such CHAs were in the nature of a boiler plate contracts, which were one-sided and unfair. Further, the CHAs set out the terms and conditions which would govern the contractual arrangement between ONGC and the successful bidder, during the tenure of the agreement. However, owing to its dominant position, ONGC arm-twisted the OSV service providers and asked them to reduce the contracted charted hire rates, during the pendency of such CHA, by matching them to the rates discovered in newly floated tenders. Because of the foreseeable financial devastation and possible bankruptcy due to lack of alternative employment opportunities for their OSVs, the OSV providers succumbed to ONGC's abusive tactics and agreed to offer deep discounts to the contracted charter hire rates, in order to remain in business. Thus, the deep discounts were provided by OSV providers under coercion and not voluntarily as claimed by ONGC.

50. The Informant argued that the DG never investigated the issuance of verbal threats by ONGC for termination, in spite of the fact that Mr. Chakrabarti, Head of Operations at ONGC, accepted the same during the preliminary conference conducted by the Commission on 17.05.2018, based on which the Commission granted interim relief to OSV Providers by restricting ONGC from enforcing Clause 14.2 of the SCC, directly or indirectly.

51. The learned counsel for the Informant further stated that the DG, while concluding that the conduct of ONGC was objectively justified, has gone beyond the statutory framework of the Act. The allegation of the Informant is with regard to Section 4(2)(a)(i) for imposition of unfair terms and conditions. The plain reading of the explanation to Section 4(2)(a) of the Act clarifies that there is no defense available for imposition of unfair terms and conditions. The limited defense available under the said clause is "if the conduct was done to meet the competition", which is applicable only in case of discriminatory condition or price. Since the allegations of the Informant only pertain to unfair condition and not discriminatory condition or price, the DG has ignored/disregarded the statutory framework by erroneously expanding the defenses available to a dominant enterprise and holding that ONGC's conduct was objectively justified.

52. It was further submitted that the DG has erroneously observed that ONGC invoked Clause 14.2 of the SCC in 'good faith' owing to the prevalent market condition (*i.e.* due to fall in crude oil price'). The learned counsel for the Informant highlighted that during 2009-2014, ONGC executed CHAs typically for 3 years. The price of crude oil had started falling from July, 2014 (USD 108/ barrel). Thus, when ONGC issued tender (namely Tender Nos. P76BC15001 and P76BC15016 and awarded the same in July, 2015 and May 2016, respectively) for charter hire of OSV post January 2015 (USD 46/ barrel), it was fully aware of the fall in price of crude oil and the strong likelihood that the prices could decline further. In spite of such risk, ONGC chose to award only long-term contracts for a period of 5 years, when it had an option to award CHAs for a shorter duration. This was done by ONGC with an intent to capitalize on falling market prices for longer duration by locking in the OSV providers for the price quoted by them in a depressed market condition.

53. The Informant submitted that despite wide fluctuation in crude oil prices, ONGC's net realization remained fairly stable as is evidenced from the details provided in ONGC's investor presentation. Further, the Informant relied upon the following message by the Chairman in ONGC's annual report for the year 2016-2017:

> "*The slow recovery in global crude prices from mid-2016 translated to a 6.6% rise in our net realization for every barrel of crude sold. While revenues from crude sales inched up by 7%, low domestic gas prices contributed to a 23% reduction in our gas sales value despite 5% increase in gas sales volume. Overall, our gross revenues in FY'17 was '779,078 million, compared to `777,418 million in FY'16…Standalone profit growth was on account of higher crude price realization and reduction in exploratory cost write-off despite lower gas prices, provision for past royalty expense and provision for pay revision*."

54. The learned counsel for the Informant further claimed that the DG's reliance on CAG's remark in the ONGC's audit report is bereft of the context in which it was made. As such, the CAG in his audit report observed that '*[h]ad the company initiated action to invoke Cause 14.2 of SCC in July 2015, it could have avoided loss of INR 148.07 crores to company as the average reduction in day rates of PSV was 19% and average reduction in day rates of AHTSV was 11% as compared to contracts which were more than a year old.*'

55. As per the Informant, the loss mentioned by the CAG is not actual loss suffered by ONGC but a notional loss of profit. Further, the CAG's observation does not take into account implications of such actions under the (Competition) Act, which is beyond his remit. Thus, the DG has placed

disproportionate reliance on CAG's findings without realizing that such finding may not hold good for analyzing conduct under the Act.

56. The Informant also objected to the case-laws, foreign as well as Indian, relied upon by the DG. In *Krygoski Construction Company, Inc. v. The United States,* the US Court of Appeals observed *"that contracting officer may not terminate government contract for convenience in bad faith, for example, simply to acquire better bargain from another source*". In *Quester V. CB Flooring*, the US Court of Appeals while laying down the test for determining 'good faith' held that "*obligation to act in good faith and deal fairly prohibits a party from terminating its contract or otherwise exercising its discretion to recapture an opportunity that it lost upon entering a contract*".

(emphasis supplied by the Informant)

57. As regards the Indian case-laws, the Informant stated that while the DG has correctly enunciated the tests laid down by the Hon'ble Supreme Court in *Central Inland Water Transport* case *and LIC of India and Others. v. Consumer Education & Research Center and Others* (LIC Case) that for determining whether a contract/ clause is unfair, it is pertinent to examine whether the parties to the contract have unequal bargaining power; the DG erred in holding that parties to the CHA have equal bargaining power. The DG also failed to observe that in *Central Inland Water Transport* Case, the Hon'ble Supreme Court (at paragraph 89) had observed that if such a weaker party has no meaningful choice but to give his assent to a contract (or to accept a set of rules as part of the contract), however unfair, unreasonable and unconscionable they may be, the courts will strike down such unfair and unreasonable contract.

58. While refuting the observation of the DG that the Informant is as powerful a body as ONGC, the learned counsel for the Informant stated that it is merely an industrial body which acts as representative of Indian mercantile marine to the various government bodies, without any interference in commercial business dealings between its member companies and ONGC. Further, the OSV providers compete *inter se* for award of ONGC tenders and do not collectively negotiate the terms of the CHAs with ONGC under the aegis of the Informant.

59. It was also stated by the Informant that though every enterprise has a right to protect its own commercial interests, such right is not unfettered in nature (European Court of Justice (ECJ) observation in *United Brands v. Commission*).

60. The learned counsel for the Informant further contended that if the members of the Informant had equal bargaining power, as claimed by ONGC and endorsed by the DG, they would not have accepted such one-sided and unfair terms and conditions. Under the CHAs, the OSV providers have no similar/reciprocal termination right which they can exercise if they find the terms of the CHAs commercially unviable. Due to the absence of termination for convenience right in their favor, the OSV providers have no option to terminate the CHA to capitalize on the improved market conditions. Thus, bereft of any means to safeguard their commercial interests, they continue to work on commercially unviable rates as dictated by ONGC.

61. It was further submitted that due to repeated re-pricing of the CHAs by ONGC, banks have been skeptical about lending to the offshore oilfield services sector and any denial of financing would in-turn have an impact on

the development of a fleet of Indian flag OSVs and modernization of the existing fleet of OSVs.

62. Further, the learned counsel for the Informant vehemently contested the claim of ONGC that OSV providers have alternative options. Admittedly, ONGC renegotiated charter hire rates with the OSV Providers in May 2016, August 2016 and May 2017 and revised them downwards by 20-50 per cent, (4 times the price change applied in SSNIP). Despite that, most OSV providers continued servicing ONGC as they were unable to relocate to other markets due to pervasive prohibitive cabotage law in other offshore markets, high mobilization and demobilization cost for comparatively liberal markets, currency risk, *etc*. This shows that OSV providers neither have alternative market to supply its services nor they have any countervailing buyer power to counter the dominance of ONGC.

63. It was also contended that the DG only investigated the single instance of issuance of de-hiring notices by ONGC and failed to investigate the issuance of verbal threats of termination of the CHAs by ONGC to procure steep discounts (in the range of 20-50 per cent) to the contracted charter hire rates under coercion since 2016 to the gross detriment of the OSV Providers. The DG overlooked visible evidence of manifest abuse of dominance by ONGC by ignoring the fact that repeated and voluntary offering of such steep discounts by the OSV providers was contrary to the behaviour of rational market participants as it tantamounted to committing financial suicide.

64. Besides, the Informant also argued that the DG failed to investigate other allegations which were specifically pointed out in the information [relating to arbitration (Clause 27.1.2 and 27.1.4 of the GCC), unilateral termination in case of force majeure (Clauses 18.2 and 23 of the GCC)] and those which

were highlighted to the DG during investigation [ONGC's abusive conduct while introducing Goods and Services Tax (GST)].

65. It was also submitted that the DG failed to examine and investigate the Informant's allegation in relation to the CHA being violative of Sections 3(1) and 3(4) of the Act. CHA is a vertical agreement as ONGC and the OSV Providers operate at different levels of the value chain. The DG failed to observe that the conduct of ONGC of invoking abusive terms of the CHA caused substantial harm to the OSV providers in particular and the relevant market in general. Furthermore, ONGC's conduct has not resulted in any pro-competitive benefits and caused appreciable adverse effect on competition within India.

Reply/Objections of ONGC

66. At the outset, ONGC stated that the present case does not involve any competition issue and that the dispute is purely contractual in nature. ONGC objected to the case-laws relied upon by the Informant in this regard. It was stated that the Commission's decision in the *Pankaj Aggarwal and others v. DLF*, Case No. 13 and 21/2010 and 55/2012 decided on 12.05.2015 is inapplicable to the present dispute as the Commission assumed jurisdiction in the *DLF* case primarily due to the notorious nature of DLF's Buyer's Agreement which were similar to an earlier case (*Belaire* case) where the Commission had previously found DLF to be in contravention of Section 4 of the Competition Act. As opposed to DLF, ONGC's conduct is fair and transparent and cannot be equated to the conduct of DLF.

67. ONGC further contended that the Commission can assume jurisdiction in case of contractual issues only when such contract or conduct is *likely* to

distort the market or adversely affect competition. Since ONGC's conduct did not distort competition in the market, given that a significant majority of the market is still open for the OSV Providers to supply and compete for, there has been no denial of market access to warrant Commission's intervention. ONGC relied upon the Commission's decision in *Explosive Manufacturers Welfare Association v. Coal India Limited and Others* (Case No. 04/2010 decided on 26.07.2011), the facts of which were alleged to be similar to the present dispute. In the said case, the members of the Explosive Manufacturers Welfare Association (EMWA) *inter-alia* alleged that Coal India Limited (CIL) was pressurizing them to enter into agreements/contracts for procurement of explosive, by incorporating unrealistic and unfair conditions in the tender document. The Commission dismissed the said allegations and did not find any abuse on part of CIL. Specifically, in relation to shortening the period of contract and termination of contracts, the Commission held that such conditions are '*contractual obligations and thus do not come within the ambit of Competition Law, unless harm to competition is also caused due to such actions'*.

68. Further, even if the Commission were to assess ONGC's conduct, it needs to be considered that the exercise of termination clause by ONGC has not restricted competition or caused any harm to the businesses of OSV providers. Given that there is no abuse on the part of ONGC, there is no need to delineate the relevant market.

69. ONGC further submitted that, if at all the Commission were to define the relevant market, it should consider the market to be the '*global market for charter hire of all kinds of OSVs*'. Thus, ONGC contested DG's findings in relation to definition of relevant product market as well as the relevant geographic market. It was argued that the DG has conducted an erroneous assessment and failed to consider that OSV providers offer various kinds of

OSVs which are not limited to AHTSVs and PSVs. Therefore, the relevant product market cannot be restricted to include only AHTSVs and PSVs, as suggested by the Informant and opined by the DG.

70. With regard to the relevant geographic market, ONGC argued that the foreign flagged OSVs operate in the Indian EEZ and, likewise, the Indian flagged vessels operate in foreign waters as the cabotage laws do not act as a bar on the operation of OSVs in foreign waters. Further, since there is no strong consumer preference or location specific requirement, the vessels can operate globally. Thus, the relevant geographic market cannot be limited to the Indian EEZ and must be considered to be 'global' in nature.

71. Thus, as per ONGC, the relevant market should be '*global market for charter hire of all kinds of OSVs*'

72. Further, it was argued that ONGC is not dominant in the aforesaid relevant market as the use of OSVs is not limited to E&P sector. Rather OSVs are utilized by companies operating in other sectors such as defence, wind energy *etc.*, and, thus, having various other alternate options for engaging in business, the OSVs are not dependent upon ONGC for supplying their services.

73. ONGC also challenged DG's reliance on the correlation between OSV fleet idling and oil prices, which is illustrated in the Market Survey Report prepared by Drewry Maritime Advisors submitted by the Informant. Based on this, the DG had concluded that the correlation between the two variable is as high as 0.97 which indicates lack of alternative market for the OSVs. ONGC stated that this analysis cannot be relied upon since (a) the correlation does not indicate the region where the idling has taken place *i.e.*, whether global or limited to India; and (b) the increase in OSV fleet (from

67 in 2007 to 111 in 2018) has not been taken into consideration as a factor for the increase in idling.

74. With regard to alleged abuse, ONGC agreed with the finding of the DG. To counter Informant's objections to such finding, ONGC adopted a three-legged argument. It, *firstly*, argued that clause 14.2 of the SCC which provides it a unilateral right of termination is fair and justified, when read in context of the underlying risk that it is exposed to. To support this contention, ONGC highlighted various risks which it is exposed to, being in the E&P business. It was submitted that ONGC bears the geological risk, *i.e.* the difficulty of extraction and the possibility that accessible reserves in any deposit will be smaller than estimated. Therefore, if in an unfortunate event, the estimates of reserves at the drilling rigs are not as expected, ONGC may be forced to abandon the project. Beyond the geological risk, the other risk is the price of oil and gas which is a determining factor in deciding whether a reserve is economically feasible or not. Basically, the higher the geological barriers to easy extraction, the higher the price risk a given project faces. However, this does not mean that oil and gas companies automatically cease operations on a project that becomes unprofitable due to a price dip. Apart from the price risk of a project, the uncertainty of the worldwide price of crude oil is also a determining factor in the commencement and continuity of projects. Therefore, E&P companies need to guard against such risks and keep the costs of projects within the budgeted estimates to ensure sustainability of E&P projects. Often these projects cannot be shut down immediately and then restarted due to the sheer scale of such projects. Thus, given all these risks associated with the operations being carried out by ONGC, it was justified in issuing de-hiring notices to reduce its operating cost upon the discovery of lower charter hire day rates in the fresh tenders.

75. *Secondly*, ONGC argued that the conduct of ONGC was objectively justified given the change in circumstances and prevailing market conditions. The crude oil prices started to fall drastically from July, 2014, to January, 2016, which impacted the exploration and thereby the demand for OSVs and resultantly the charter hire day rates also witnessed a significant drop. Due to the drop in crude oil prices, E&P companies worldwide reduced the rig counts since it became economically unviable to operate high cost rigs. The sharp drop in rig installations meant excess supply of OSVs, which crippled their demand. As a result, oil companies operating in Brazil, South Asia and Middle East, either cancelled or re-negotiated charger hire rates for OSVs.

76. The fact of this global downturn affecting the E&P sector has also been admitted by the Informant in the information. Global Offshore Limited, one of the significant OSV providers, has stated in its annual report for 2016-2017 that, "*market oversupply remains the key challenge and is expected to keep overall vessel utilization at weak levels even in the event of a pick-up in demand as a result of an increase in oil prices*". As a result of the industry condition, the company admitted that "*it is not isolated from the rate negotiations, early termination and shorter term contracts".*

77. ONGC also pointed towards the DG's observations on the CAG Report in relation to charter hire of vessels which attributed the fall in charter hire day rates as a consequence of steep fall in crude oil prices. The Audit Report made a specific observation in relation to Tender No. P46BC15001 floated by ONGC in July 2015. It was observed that the rates offered by the OSV providers under this tender were significantly lower than day rates of the vessels hired a year before. The CAG took a stern view that had de-hiring notices been issued at that stage itself, ONGC could have avoided a loss of Rs. 148.07 crore to the company (as a result of continuing with these CHAs

at a high rate for one full year). Countering the Informant's claim that this loss of Rs. 148.07 crore was a notional loss, ONGC submitted that the Informant has failed to understand the views of CAG that ONGC has actually sustained such a loss which it could have avoided had it exercised its right to terminate the CHA earlier.

78. It was further argued that the Act allows the defence of 'meeting competition' and, in that light, the conduct of enterprises can also be objectively justified if it is proportionate and necessary to achieve a legitimate objective such as protecting or enhancing a public interest, defending the dominant company's commercial interests and/or generating efficiencies that would otherwise not be realized but for the conduct in question. Further, it was highlighted that the concept of objective justification has been recognized under the Indian and European jurisprudence.

79. In *Prasar Bharti (Broadcasting Corporation of India) v TAM Media Research Private Ltd*, Case No. 70/2012, (hereinafter, *TAM case)*, the Commission accepted the contention that the broadcasters, advertising agencies and advertisers were inherently differently situated enterprises operating in different markets with a distinct function and therefore, TAM was objectively justified in adopting a differentiated pricing mechanism. Similarly, in *M/s. ESYS Information Technologies Pvt. Ltd. v. Intel Corporation & Ors.*, Case No. 48/2011, (hereinafter, *Intel case)*, the Commission held that Intel's practice of charging different prices was justified because of cost differences as the prices were aligned to the costs. The erstwhile Hon'ble COMPAT in its decisional practice, has recognized the concept of objective justifications. The erstwhile Hon'ble COMPAT, while disposing of the appeal filed by Schott Glass India in *Schott Glass India Pvt. Ltd. vs. CCI and others [Appeal No. 91/2012 decided on*

02.04.2014], observed that Schott Glass India has not discriminated the downstream players through its target and functional discount policy.

80. Thus, given the changed market conditions, ONGC could not have turned a blind eye towards the exorbitant charter hire rates being paid by it for the same services under previously finalized tenders, especially when lower prices were discovered in the new tender. Accordingly, floating of new tender was part of the cost rationalization efforts undertaken by ONGC to ensure that production is carried out at competitive costs.

81. ONGC further stressed upon the DG's observation that the OSV providers who were not agreeable to the reduced charter hire day rates were not left remediless and that the CHA provided for an alternate resolution mechanism through arbitration. This option was in fact exercised by SCI, when ONGC terminated the CHAs entered with SCI for two AHTSV 80T and one PSV 3000 DWT on 28.05.2016 by invoking Clause 14.2 of SCC. M/s SCI offered reduced rates for only three out of their six vessels hired by ONGC. Further, SCI made a representation before Permanent Machinery of Arbitration (PMA), under Ministry of Heavy Industries, GoI against the reduction of rates and de-hiring of vessels by invoking Clause 14.2 of the SCC of CHA. The PMA had published the award and upheld the decision of invocation of clause 14.2 for existing OSVs. ONGC informed that the award had been accepted by both the parties and SCI had not challenged the same in an appeal.

82. ONGC reiterates that the Informant has failed to demonstrate an exclusionary or exploitative effect of the termination on the market for OSVs or any other market, which is an imperative condition for establishing a case of abuse under Section 4 of the Act. ONGC stated that the Informant's allegations, regarding the loss to OSVs (*i.e.* a loss of USD100

Million to the OSV providers) and also reputational loss to the OSV business in India because of ONGC's conduct, are not supported by any evidence. It was submitted that the OSV business in India has been forecasted to grow at CAGR of 6.03% during 2016-2021 and the growth is driven by rise in demand for oil and natural gas globally, increase in offshore drilling activities and growth in E&P activities. Further, the GoI has introduced policies to facilitate growth in the O&NG sector which in turn will fuel the growth of the market for OSV Providers. The Informant's themselves have submitted that the, '*[t]he number of Indian flag OSVs has grown from 67 in 2007 to 111 in 2018 as per the reports drawn from HIS Petrodata Marinebase*. Therefore, the contention of the Informant that the OSV business in India has suffered at the behest of ONGC does not match the ground realities of the OSV industry in India.

83. As the *third* limb of the argument to counter Informant's allegation on abuse, ONGC stated that it acted in good faith while invoking the termination clause. In this regard, ONGC relied upon DG's conclusions and stated that such conclusions are based on a detailed analysis of the legal position in relation to termination clause and the rare and special circumstances under which ONGC had acted. Further, the DG has not attributed any *mala fide* on the part of ONGC. Rather the DG has observed that ONGC acted in good faith in implementation of the termination clause.

84. Applying the principle of unfairness of a contractual term laid down in the *Central Inland Water Transportation* case to the present case, ONGC argued that the termination clause cannot be said to be unfair since both the parties to the contract, that is the OSV provider and ONGC, have similar if not equal bargaining power. The OSV providers are significant shipping companies operating under the aegis and guidance of the Informant which is a powerful organization of shipping companies and their services are

indispensable to ONGC. In fact, given the specialized nature of services offered by them, ONGC was stated to be dependent on OSV providers for offshore support services.

85. It was further argued that the OSV providers were not oblivious to the terms of the CHA. This is evident from the Informant's letter dated 03.05.2016 written to ONGC wherein it has been stated that, '*It is understood by our members that this clause is only to be exercised in the event of sudden drop in requirement by ONGC owing to an unforeseen extraneous reason*'. Further, the fact that the termination clause was not imposed in the past cannot be construed as a waiver of the said clause. ONGC invoked the clause in good faith only under compelling circumstances. As such, the termination clause cannot be said to be onerous and unfair since it was mutually agreeable to both the parties which are business enterprises with neither of them lacking in bargaining power.

86. It was further argued that ONGC acted in a fair manner to ensure that uniform rates were being offered for the same service provided by the same OSV providers. The OSV providers were cognizant of the fact that a fresh tender would result in uncertainty for them since there is no guarantee that the same vessels would be hired. Accordingly, acting in their own best interest and to eliminate the uncertainty of the fresh tender proposed to be floated by ONGC, the OSV providers offered to match the charter hire day rates for PSV 3000 DWT an AHTSV 80T as discovered in the new tender. Considering its decade long relationship with the OSV providers, to minimize the hardship of a detailed tendering process, and to avoid being left with no vessels, ONGC agreed to withdraw the termination notices of OSV Providers who offered prices equal to or less than the approved price for various categories of vessels, following an EPC meeting held on 25.05.2016. Further, it was argued that the reduced rates were commercially

viable to the OSV providers as the same rates were quoted by them in the new tender issued by ONGC.

87. ONGC contended that the Informant's averment that the CHA is in the nature of a boiler plate agreement which is not open to negotiation through pre-bid conferences cannot prevail. Pre-bid conferences are necessary only when there are major changes adopted in ONGC tenders. The decision to hold a pre-bid conference is taken on a tender to tender basis and they are not called for as a matter of regular practice. Further, it is not an industry practice to have pre-bid conferences with the bidders.

88. It was also claimed by ONGC that the OSV providers had been offering their services in foreign waters as well. Therefore, cabotage laws of other countries do not act as a bar on the OSV Providers from offering their services in foreign waters. The fact that the Indian OSV fleet has grown in the last few years shows that they have been providing their services to other players as well. Further, as a matter of business practices, OSV Providers own and operate vessels bearing flags of various jurisdictions. All the vessels of an OSV company based in India do not necessarily bear the Indian flag. For example, the vessel fleet of an OSV company by the name of M/s Emas Offshore headquartered in Singapore comprises vessels bearing flags of various jurisdictions and is not limited to Singapore alone.

89. With regard to other clauses, *i.e.* clause 18.2 and 23 (*Force Majeure Clause*), and clauses 27.1.2 and 27.1.4 (*Arbitration Clause*) of GCC, it was argued that since the Commission has not found these clauses to be *prima facie* abusive, the DG as such was not required to look into these allegations.

90. Based on the aforesaid averments, ONGC prayed that the Commission may close the matter forthwith as there is no abuse on its part. ONGC also submitted that if the Commission were to hold a breach on part of ONGC, it would send chilling signals to the industry that large companies cannot even take legitimate steps to protect their commercial interests (that are taken by O&NG E&P companies globally), especially in the face of a global downturn in the industry.

Observations and Findings of the Commission

91. The Commission has examined the material available on record, including the information, Investigation Report, written submissions filed by the parties, and the oral submissions made by their respective counsel on 23.04.2019.

92. Before arguing the matter on merits on 23.04.2019, the learned counsel for ONGC submitted that final hearing be not conducted in the matter by the Commission, in the absence of a judicial member being part of such hearing, in light of the judgment of the Hon'ble High Court of Delhi in the case of *Mahindra Electric Mobility Limited and Another Versus Competition Commission of India* [W.P. (C) 11467/2018 decided on 10.04.2019].

93. The Commission in this regard places reliance on the order of the Hon'ble High Court of Delhi in W.P.(C) No. 6661/2019 (CADD Systems and Services Pvt. Ltd. case) wherein it has been held that the import of judgment in Mahindra Case cited above cannot be that the working of Commission be brought to a standstill until the judicial member is appointed in the Commission. The Hon'ble Court did not interdict the functioning of the Commission pending such appointment. The Hon'ble Court also observed that as per Section 15 of the Act, orders passed by the Commission cannot

be called in question on account of any vacancy or any defect in the constitution of the Commission. Further, the Hon'ble Supreme Court, vide its order dated 10.09.2018, passed in *K.R.Tamizhmani and Others v. The State of Tamil Nadu and Others* [M.A No.2217 of 2018 in T.C.(C) No.137/2015], clarified that '*till such time a reconstitution of the tribunal does not take place arising from a retirement of a member from the legal field, the existing Tribunal will decide all the cases*'. Therefore the Commission does not find merit in the objections raised by ONGC.

94. The primary allegation by the Informant in this case is regarding abuse of dominant position by ONGC, by way of imposition of unfair and onerous terms and conditions through CHA and their invocation in an abusive manner, in contravention of Section 4(2)(a)(i) of the Act. This, as per the Informant, has adversely affected the OSV providers who had no option but to succumb to the diktats of a dominant player. For examining allegations pertaining to Section 4 of the Act, delineation of the relevant market is essential to ascertain dominance and for analyzing the alleged abusive conduct of ONGC in the present case.

95. However, before examining the case on merits, the Commission finds it imperative to deal with the preliminary issue raised by ONGC with regard to Commission's jurisdiction to entertain the matter in light of its argument that the present dispute is purely contractual in nature devoid of any competition concern. The DG had also observed in its Investigation Report that the conduct of ONGC in invoking Clause 14.2, *i.e.* the termination clause, is a contractual matter as the relationship between the OSV Providers and ONGC is governed by the terms of the CHA and not by the Act. Placing reliance on such observation of the DG, ONGC vehemently argued that the Commission has jurisdiction only when the contract or the conduct is likely to distort the market or adversely affect competition,

which has not happened in the present case, as none of the OSV providers are adversely affected because of ONGC's conduct.

96. The Informant, on the other hand, has contested the aforesaid observations and contended that the DG has failed to appreciate that the allegation relates to the manner in which ONGC, being a dominant player, has conducted itself in the market while dealing with the OSV providers. As such, the allegations squarely raise competition concerns because the imposition of the onerous one-sided clauses in the CHA and the exploitative conduct of ONGC in invoking those clauses amount to abuse of dominant position under Section 4(2)(a)(i) of the Act. It is further argued that the Commission, in cases such as *Pankaj Aggarwal v. DLF*, Case No. 13& 21 of 2010 and 55 of 2012 and *Faridabad Industries Association v. Adani Gas Limited*, Case No. 71 of 2012, has examined matters of imposition of one-sided clauses and arbitrary terms in contracts.

97. On the DG's observation that for the issue of termination of contract, the arbitration clause should have been invoked, the Informant averred that the Hon'ble Delhi High Court, in *Uttarkhand Agriculture Produce Marketing Board & Ors. v. CCI & Anr.*(LPA 674/2017 order dated 17.10.2017), had held that recourse to multiple proceedings on the same set of facts is not barred unless the proceedings are mutually destructive. Therefore, as per the Informant, it is undisputable that the instant matter can be examined under the Act.

98. The Commission has examined the rival submissions of both the parties on this issue and also considered the observations of the DG. Certainly, ONGC and OSV providers have existing CHAs for the respective hiring of the latter's vessels by the former pursuant to the ICB tender process. The conduct of such parties to the CHA will be governed by terms/conditions contained therein. However, that does not *ipso facto* exclude the

applicability of Competition Act. To conclude otherwise would mean that every case where the parties have some agreement between/amongst themselves will insulate them from the applicability of the Competition Act, which cannot be the case.

99. Undoubtedly, if there is a dispute between parties which is covered by the scope of an agreement or contract between them or if there is a breach of any of the terms of such agreement/contract, the parties have *inter-alia* recourse under the dispute settlement mechanism provided under such agreement/contract. However, the present case before the Commission is not one that involves only a *lis* between two parties to an agreement/contract, flowing from its breach thereof. The grievance of the Informant is not that ONGC has breached the terms/conditions of the CHA or that it has acted beyond the CHA. On the contrary, the grievance of the Informant goes back to the very inception of the CHA. It has been alleged that owing to the dominant position held by ONGC, it secured certain terms and condition in the CHA which favoured it at the expense of the OSV providers. Thus, allegedly, the unequal bargaining position between ONGC and its respective counter-part OSV providers obstructed the fair and equitable outcome. This, as per the allegations, empowered ONGC to exploit the OSV providers by exercising the unfair terms and conditions which could find a place in the CHAs only because of the dominant position held by ONGC.

100. The Commission is of the considered view that the aforesaid allegations squarely falling within the ambit of the Act. This is also supported by the decisional practice of the Commission whereby in several past cases the Commission has looked into the alleged exploitative conduct of the party(ies) under Section 4 of the Act, despite the existence of contractual relationship between the parties *inter-se*.

101. In *Faridabad Industries Association v. M/s Adani Gas Limited*, Case No. 71/2012 (*supra*), the Opposite Party, which is in the business of distribution of natural gas, was penalised under section 27 of the Act for imposing biased and one-sided terms in the Gas Sales Agreement on its customers who were solely dependent on it for the supply of the same. Similarly, in *Pankaj Aggarwal v. DLF*, Case No. 13 & 21 of 2010 and 55 of 2012 (*supra*), the Commission had penalised DLF Ltd., for imposing unfair terms and conditions in the Buyers' Agreement executed with the allottees. In *GHCL Limited v. Coal India Limited and Anr*. (Case No. 08 of 2014 decided on 21.04.2017), the Commission found that Coal India Limited abused its dominant position in the market by imposing unfair conditions in the fuel supply agreements with power producers for supply of non-coking coal. In some other cases such as in *Rico Auto Industries Limited and Ors. V. GAIL (India) Ltd.* (Case Nos. 16-20 & 45 of 2016, 02, 59, 62 & 63 of 2017 decided on 08.11.2018), the Commission has examined the allegation of imposition of unfair terms and conditions, by GAIL (India) Ltd. under the Gas Supply Agreement entered by it with the Informants and found no contravention of the provisions of the Act.

102. The Commission thus examines the allegations of abusive conduct having regard to the terms of the contract, out of which it emanates, from the standpoint of the provisions of the Act. The constant endeavour of the Commission has been to examine whether the terms of the contract are entered into in derogation of the provisions of the Act and whether the contract or any terms thereof, have been inked pursuant to an unconscionable bargain by the dominant enterprise, which answers such description in terms of Section 4 read with Section 19(4) of the Act.

103. Even when any of the clauses of the contract, withstands the aforesaid test of the Act, it is still open to examination as to whether any abusive conduct has resulted from its execution, either by design or default of the dominant

party. Thus, it is well within the jurisdiction of the Commission to test the tenor of the clauses of a contract, the nature and position of the parties when such contract was entered into and at the time when the allegations of abuse are made, the special circumstances, if any, surrounding the execution of the contract, and the effect of the clauses when put in operation, to see whether it emanates from the diktat of a dominant enterprise.

104. For the aforesaid reasons, the Commission is of the view that the allegations raised in the present case squarely fall within the ambit of exploitative conduct recognised under Section 4(2)(a)(i) of the Act. To agree with ONGC's argument would not only go against the tenets of Section 4(2)(a)(i) of the Act but would also be contrary to the decisional practice of the Commission as well as the Hon'ble Appellate Authorities on similar issue. The cases cited *supra* are indicative of the legal position that mere presence of contractual relationship between parties cannot *per se* be held to be a bar on the competition authority to look into a dispute between the parties when the fulcrum of such dispute lies in a competition law infraction.

105. In light of the foregoing discussion, the Commission is of the view that it has jurisdiction to look into the matter and assess it according to the provisions of the Act.

Delineation of Relevant market

106. As per the scheme of the Act, the relevant market is comprised of relevant product market and relevant geographic market. The relevant product market as defined under Section 2 (t) of the Act means "*a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use*."

107. The determining factor for defining a relevant product market is demand side interchangeability/substitutability of the product, which is to be ascertained on the basis of the factors enumerated under Section 19(7) of the Act such as physical characteristics/ end-use of goods, price of goods or service, consumer preference, exclusion of in-house production, existence of specialised producer, and classification of industrial products. Generally, the alleged dominant player / enterprise is the seller of goods/ services which adversely affects either the buying side *i.e.* its consumer or the players in its own relevant market *i.e.* its competitors. However, in the present case, the Opposite Party is the procurer of services and is alleged to be affecting the selling side of the market *i.e.* the supplier of services of OSVs/ member companies of the Informant.

108. The Commission was confronted with a similar issue in the case of *AdCept Technologies Pvt. Ltd. v. Bharat Cooking Coal Limited*, (Case No. 16 of 2013, decided on 08.05.2013). After considering the facts and law at hand, the Commission held that in cases which concern allegations against a dominant buyer/ buyer power, it is the procurement market, not the supply market which has to be defined. In such kind of markets demand-side oriented market concept is applied inversely and, from supplier's point of view, the market definition is based on their ability to switch to alternative sales opportunities. In other words, it means the ability of the supplier to switch to alternative sales opportunities as such alternative buyers would be deemed to be posing competitive constraints on the incumbent.

109. The DG has also assessed the relevant market on the aforesaid lines and has delineated the relevant product market as '*market for charter hire of OSVs (specifically PSVs and AHTSVs)*'.

110. While the Informant has agreed with the delineation of relevant product market by the DG, ONGC has opposed such delineation stating that the market is 'charter hire of all kinds of OSVs'. As per ONGC, the OSV providers offer various kinds of OSVs which are not limited to AHTSVs and PSVs.

111. The Commission finds ONGC's proposition devoid of any merit. Evidently, ONGC procures services of OSVs from the member companies of the Informant and the vessels used by the OSV providers are of specialised nature.

112. As observed by the DG, OSVs under question in the present case (*i.e.* PSVs and AHTSVs) are different from other types of vessels based on the nature of services rendered by them in offshore O&NG E&P activities on account of their different technical make-up, functionality and end-use. There are broadly two broad categories of vessels—*first*, vessels providing ML services *i.e.* logistical support services such as towing of rigs, material, manpower *etc.* and *second*, vessels providing IMR services *i.e.* services of platform inspection, sub-sea inspection, diving support, fire-fighting support vessels *etc*.

113. The investigation has established that the hiring of OSVs falling in the aforesaid categories is done by two different procurement and technical management teams, and as such owing to different technical capabilities of OSVs falling under ML and IMR, such OSVs do not perform the same function. Further, it has been found that it is not operationally and commercially viable to utilise AHTSVs and PSVs, which primarily provide ML services, to perform the functions of IMR vessels. Further, the report of the Drewry Maritime Advisors, a renowned Maritime Market Analysis, submitted by the Informant, indicates that there was a major difference in

the technical specification of AHTSVs and PSVs, and the other vessels, making them non-substitutable.

114. Further, the analysis carried out by the DG between oil prices and the idling of OSVs showed that the correlation between the two variables is 0.97 (maximum possible correlation is 1), which indicates that when the OSVs are not deployed in E&P activity, they remain idle and their idling increased significantly as oil prices and E&P activity weakened. Had there been significant alternative employment opportunities for OSV providers, they would have moved away from the E&P activity rather than idling the vessels. This clearly depicts lack of alternative markets for OSVs.

115. Further, as rightly observed by the DG, all such vessels are designed and equipped to perform specific functions, and such utilising one type of OSV to perform the task of another type of OSV may not be functionally possible and commercially viable.

116. Considering the distinct physical characteristics and end-use and other reasons cited above, the Commission agrees with the relevant product market delineated by the DG *i.e.* "*market for charter hire of OSVs (specifically PSVs and AHTSVs)*".

117. As regards the relevant geographic market, the Informant has concurred with the DG's delineation *i.e.* the '*Indian EEZ*'. ONGC, however, has proposed the market to be global in nature. It has been argued by ONGC that the foreign flagged OSVs operate in the Indian EEZ and, likewise, the Indian flagged vessels operate in foreign waters as the cabotage laws do not act as a bar on the operation of OSVs in foreign waters. Further, since there is no strong consumer preference or location specific requirement, the vessels can operate globally.

118. The Commission notes that the Indian EEZ is an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline. As per Section 7(4)(a) of the Territorial Waters, Continental Shelf, Indian EEZ and other Maritime Zones Act, 1976, the GoI possesses sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living, energy from tides, winds and currents in the Indian EEZ. Also, regulatory regime governing the O&NG E&P sector and offshore oilfield services sector creates conditions which serve as regulatory eligibility criteria for operating in the Indian EEZ.

119. The NELP has been designed by the GoI in exercise of its sovereign rights of exploiting its natural resources in its EEZ. Further, the Shipping Act, 1958, regulates all vessels registered in India as well as foreign flag vessels operating in the Indian EEZ and that Indian flag vessels are required to be registered in India with the Mercantile Marine Department ('**MMD**') and fall within the regulatory purview of the DG Shipping. These regulatory trade barriers coupled with national procurement policies makes the Indian EEZ a distinct geographic market. In view of the aforesaid discussions the Commission is of the view that the relevant geographic market in the present case is the '*Indian EEZ*'. Resultantly, the relevant market in the present case would be the '*market for charter hire of OSVs in the Indian EEZ*'.

Assessment of Dominance of ONGC

120. Having delineated the relevant market, the next step is to ascertain whether ONGC holds a dominant position in the relevant market that could enable it to act independent of the competitive forces.

121. The present case involves allegation against ONGC which is alleged to be a dominant buyer of OSV services. 'Buyer power' implies market power on the buyer side of a market which allows the dominant buyer to force sellers to reduce the price below the price that would result in a competitive equilibrium. It is noted that the OP operates 45 out of 48 contractually committed /operational offshore drilling rigs in Indian EEZ (as on 01.01.2018) and thus, has a market share of 82% in the market for charter hire of OSVs (61% market share in AHTSVs and 73% in PSVs) . Being the largest buyer of OSV services, there is high dependence of OSV suppliers on the OP and which in turn vests the OP with significant bargaining/buyer power. Thus, the Commission agrees with the DG's conclusion that ONGC holds a dominant position in the relevant market for charter hire of OSVs (specifically PSVs and AHTSVs) in the Indian EEZ.

122. It was observed that in the past five years ONGC has operated 80% of the offshore drilling rigs in the Indian EEZ. Further as on 1.1.2018, 45 out of 48 contractually committed /operational offshore drilling rigs in Indian EEZ are chartered/operated by ONGC. Also, as per 11.1.2018, there are 84 contractually committed/operational OSVs in Indian EEZ, out of which 69 are chartered by ONGC amounting to a market share of 82% in the market for charter hire of OSVs. The investigation further revealed that as of 06.12.2018, 65 AHTSVs were employed in the Indian OSV market, out of which 41 were employed by ONGC, accounting for 63.1% of the market share. British Gas employed 5 AHTS ships followed by 2 AHTS ships employed by Cairn Energy. In case of PSVs, 34 vessels were employed in the Indian OSV market, out of which 31 were employed by ONGC, accounting for 91.2% of the market share in 2018. The remaining three PSVs were employed by Gujarat State Petroleum Corporation (GSPC), Axxis Geo Solutions and McDermott during the year. Over the last six

years, OSV employment in India clearly indicated that the Indian OSV market is substantially dominated by ONGC as the company accounts for a significant part of offshore oil and gas production in the country. Thus, at the buying end, ONGC possesses a very high market share for drilling rigs which indicates its dominance in the relevant market.

123. Though market share is only one of the factors guiding determination of dominance under Section 19(4) of the Act, it acts as a potent screening test. The Commission, thus, finds it appropriate to look into other factors enshrined under Section 19(4) of the Act, to analyse whether ONGC holds a dominant position in the relevant market.

124. Being a PSU, ONGC had a first mover advantage before the advent of NELP in 1997. Its only competitor in India prior to 1997 was OIL. ONGC has won 121 out of a total 235 blocks (more than 50%) in the 8 rounds of bidding, under the NELP of the GoI. This also indicates the significant position held by ONGC in the upstream market for E&P activities and consequently charter hires the largest number of OSVs in the Indian EEZ.

125. Further, as revealed by the DG in the Investigation Report, being vertically integrated, ONGC is a strong player with significant market power. ONGC is present at all stages of the value chain in the E&P industry and operates maximum number of operational drilling rigs in the Indian EEZ, consequently hiring the maximum number of OSVs. Further, it owns and operates more than 26,600 kilometers of pipelines in India, including sub-sea pipelines. ONGC also owns few drilling rigs and OSVs and has interests in petrochemical and power businesses.

126. Further, there is no countervailing (seller) power with the OSV providers at the other side of the market. The number of OSVs hired by an enterprise is

directly proportional to the scale of its operations in the market for E&P activities and given that 80% of the offshore drilling rigs in the Indian EEZ are operated by ONGC, there does not seem to be any significant countervailing power with the OSV providers to circumscribe the ability of ONGC to operate independent of the market forces.

127. Also, O&NG E&P sector is highly regulated, demands high capital investment and is characterized by high entry barriers, making it difficult for new player(s) to enter the market.

128. In view of the above, the Commission finds ONGC to be dominant in the relevant market for '*charter hire of OSVs (specifically PSVs and AHTSVs) in the Indian EEZ*'.

Abuse of Dominant Position

129. Given that ONGC holds a dominant position, its conduct needs to be examined under Section 4 of the Act.

130. The Informant has objected that the DG has erred in investigating only Clause 14.2 of the SCC while leaving the other clauses which were specifically alleged to be anti-competitive in its information. The Commission, *vide* order dated 12.06.2018, had *prima facie* found that Clause 14.2 of the SCC to be abusive and hence, the direction for investigation was with regard to the said clause. Further, *prima facie* no contravention was found with regard to the other clauses *i.e.* Clause 18.2 and 23 (*Force Majeure Clause*), and Clauses 27.1.2 and 27.1.4 (*Arbitration Clause*) of GCC. Thus, there was no occasion for the DG to look into those clauses, especially when they were specifically found to be not in contravention of the provisions of the Act.

131. Based on the investigation carried out by the DG, ONGC's conduct warrants examination on two counts – *first*, the existence of Clause 14.2 of the SCC itself, which gives an unfettered right of unilateral 'termination for convenience' to ONGC and *second*, the use of this clause by ONGC to terminate its contracts with the OSVs in the year 2016. The Commission notes that the requirement here is to determine whether the clause, by itself, or its exercise by ONGC amounts to 'imposition of unfair condition' on the OSV providers in contravention of Section 4(2)(a)(i) of the Act.

132. Before proceeding any further, the Commission finds it imperative to reproduce Clause 14.2 of the SCC, and the way it was invoked *vide* issuance of de-hiring notices by ONGC. Accordingly, Clause 14.2 of the SCC is reproduced herein below:

> "***Clause 14.2***: *Notwithstanding anything contained herein the Charterer shall have its exclusive right to terminate the contract for the chartered vessel operating under the contract by giving to the Contractor thirty (30) days written notice without assigning any reason therefor. However, this clause would apply after first 12 months of the contract. Nevertheless, in case of performance of the Contractor not found satisfactory, provisions of clause 18.4 of general conditions of contract shall apply*."

133. Further, it is an undisputed fact that ONGC has invoked the aforesaid clause by issuing de-hiring notices to various member companies of the Informant on 28.04.2016. Such notices have been annexed with the information. The notices sent to various OSVs, which were identical, simpliciter stated the following:

"*With reference to the above contracts, it is to inform that ONGC invoke the following clause of the referred contract.*

> ***TERMINATION OF THE AGREEMENT:***
> *Notwithstanding anything contained herein the Charterer shall have its exclusive right to terminate the contract for the chartered vessel operating under the contract by giving to the Contractor thirty (30) days written notice without assigning any reason therefor. However, this clause would apply after first 12 months of the contract. Nevertheless, in case of performance of the Contractor not found satisfactory, provisions of clause 18.4 of general conditions of contract shall apply.*

This letter may be treated as notice of termination in accordance with the above clause and thus your vessels as stated above stands De-hired on 28thMay 2016."

134. The DG, pursuant to a detailed investigation, has found ONGC's conduct not to be in contravention of the provisions of Section 4(2)(a)(i) of the Act, mainly for the existence of objective justification owing to 'change in circumstances' and also because the invoking of the impugned clause 14.2 was found to be exercised by ONGC in 'good faith'. The Informant has contested DG's findings stating that the defense of objective justification is not envisaged under the scheme of Section 4 of the Act, especially for allegation pertaining to imposition of unfair terms/conditions. In the alternative, the Informant has contended that the conduct of ONGC was neither objectively justified nor exercised in good faith. ONGC, on the other hand, has echoed the observations and findings of the DG and

submitted that no harm has been caused to the OSV providers because of ONGC's alleged abusive conduct.

135. Having given due regard to the aforesaid rival contentions of the parties, the Commission observes that Section 4(2)(a)(i) primarily covers exploitative conduct within its ambit. While dealing with a case involving exploitative conduct inflicted upon a consumer, the mere existence of such conduct may fulfil the criterion embedded under Section 4(2)(a)(i) of the Act. Thus, the existence of an unfair condition may amount to a contravention of the provisions of Section 4(2)(a)(i) of the Act. However, examination of exploitative conduct which involves imposition of an unfair condition by a dominant enterprise in a B2B transaction is essentially to undertake a fairness or reasonability test, which requires examining both how the condition affects the trading partners of the dominant enterprise as well as whether there is any legitimate and objective necessity for the enterprise to impose such condition. Appreciation of the context and rationale becomes all the more important in the cases of buyer power, lest it increase the risk of large industrial buyers being penalised for what may be an attempt to negotiate competitive terms with suppliers or simply a prudent business decision having pro-competitive effects in the market for the final product in terms of lower prices, larger availability, greater choice *etc.* Keeping this framework for determination of unfairness in view, the conduct of ONGC is analysed hereunder.

Clause 14.2 of SCC: Termination for Convenience

136. 'Termination for convenience', as brought out by the investigation, is a legally accepted way of terminating a contract when used in good faith. The 'termination for convenience' provision historically was found almost exclusively in government contracts. These type of clauses have origin in the United States wherein during World War I, the federal government

introduced this concept as a methodology to allow it to circumvent or back out from any of its contractual obligations and thereby avoid costs, which according to its discretion had become redundant.

137. With the passage of time, however, the US case-laws replaced this blanket blessing to government entities for securing such a right in their favour with a stricter test *i.e.* the '*changed circumstances*' test (*Torncello* case). This test required the government to justify its action with objective proof of change in circumstances. The later cases that underwent judicial scrutiny in the US courts further refined the decisive criteria, and based on the jurisprudence examined by the DG (*Krygoski Construction Co.* case, *Quester* case *etc.*), it appears that the prevailing test is '*change in circumstances*' along with the exercise of good faith while invoking the termination for convenience clause.

138. The decisional practice in the UK, on the other hand, suggests that there is no general doctrine of good faith and the contracts can be terminated for convenience without the implication of duty to demonstrate good faith unless the contract expressly provides for such duty (*TSG Building* case). However, given that the UK case-laws examined by the DG involved existence of such termination of convenience right in favour of either party; it cannot be said with clarity whether the test would undergo a change in an event of such right being granted to only one party.

139. As regards the Indian context, the Commission observes that the Hon'ble Supreme Court, in *Central Inland Water Transport Corporation* case, had emphasised on the requirement of 'reasonableness' in the terms of contract and discussed the doctrine of unconscionability.

140. Based on the review of international experience and the Indian legal framework, the Commission observes that a provision of termination for convenience itself is not uncommon and should not generally be construed as unfair or abusive, unless it is specifically used in an unfair manner without meeting the legal tests of 'good faith' and 'change in circumstances'.

141. In the instant case the termination for convenience clause entitles only ONGC to terminate the contract without assigning any reasons while no such reciprocal right is provided to the OSV suppliers. Apparently, any such one-sided clause, being contradictory to the legal principle of mutuality of contract, appears unfair. However, the feasibility and desirability of a reciprocal right will depend on where the balance of convenience lies on account of the associated risks of the Parties to the agreement in terms of their respective businesses. Thus, a complete determination of unfairness will have to account for any objective rationale that the procurer may have for not providing a reciprocal right of termination for convenience to its suppliers.

142. ONGC has highlighted various risks that it is exposed to being in the E&P operations. It not only bears the geological risk, *i.e.* the difficulty of extraction and the possibility that accessible reserves in any deposit will be smaller than estimated, but also the uncertainty of the worldwide price of crude oil which continuously determines the commencement and continuity of projects. The kind of projects being carried out by E&P companies cannot be shut down immediately and then restarted easily. On top of this, being governed by the government procurement rules, ONGC is required to follow an elaborate process of tendering, which means a long lead-time for hiring of vessels. At any given time, ONGC has a requirement of certain number of OSVs, which are indispensable to its E&P activities. If a contract

is terminated at the behest of the OSV providers for their convenience, ONGC would have to re-issue a tender and pending its completion, the project would come to a standstill resulting in huge losses to ONGC, which will have implications for overall E&P activities in India as well.

143. Thus, given the risks associated with the operations being carried out by ONGC, the mere existence of a unilateral right of termination for convenience is not found to be in contravention of the provisions of Section 4(2)(a)(i) of the Act. It may, however, be seen as a provision with a potential for abuse; the abuse nonetheless needs to be established in light of its actual implementation.

Use of Clause 14.2 of SCC for termination of contracts with OSVs

144. On the question of invoking the clause and de-hiring of the OSVs in 2016, the investigation has analysed the circumstances under which the conduct took place and also the internal processes followed by ONGC in effecting the same. This helps understand the intent/rationale behind the termination and also to examine whether the same satisfies the legal tests of '*change in circumstances*' coupled with '*good faith*'.

145. The crude oil prices have a major impact on the E&P activity and the fall in such prices adversely impact the on-going E&P projects. As per the information in public domain, it is an undisputed fact that the crude oil prices started falling drastically from mid- 2014, from over 100 USD/barrel to under 30 USD/barrel by January 2016, which affected the Oil E&P companies worldwide. Resultantly, the Oil E&P companies worldwide reduced the rig counts since it was not economically viable to operate high cost rigs. The sharp drop in rig installations resulted in excess supply of OSVs, which was reflected in the significantly lower charter fare bid in the new tender floated by ONGC in 2016. Thus, the competitively discovered

rates in the new tenders turned out to be significantly lower than the high daily charter rates that were being paid by ONGC as per the existing contracts. The fall in price became alarming due to a worldwide meltdown of oilfield activities and it reached the bottom by the last quarter of 2015-16. Price of crude oil fell drastically from over 100 USD per barrel during mid-2014 to under 30 USD per barrel in January 2016. In April 2016, ONGC issued de-hiring notice to 27 vessels. For the first time the 'termination for convenience' clause was invoked by ONGC and it was evidently in response to the changing dynamics in the global oil market and consequently in the market for OSVs. Thus, use of the clause by ONGC in the instant case has been prompted by 'change in circumstances'.

146. The intent behind the termination becomes unambiguous from the record of discussions of Executive Procurement Committee (EPC) meeting held on 25.05.2016. The EPC qualitatively and quantitatively deliberated the number and cost of hiring the existing OSVs, the need for Termination and continuation of their existing contracts at reduced day charter rates. The relevant excerpts from EPC minutes are reproduced below:

"***8. <u>EPC Deliberation:</u>***

8.1 OLG, MR brought out in the EPC that recently a tender for 18 vessels (11 AHTS 80 T & 7 PSVs 3000 DWT) was finalized in April, 2016 wherein the rates received are substantially lower as compared to the rates of existing contracts awarded in July, 2015 for various types of vessels. In the existing contracts, there is a contract provision to terminate the contract after first 12 months of the contract and considering substantial fall in prices, it was considered prudent to issue termination notice to 27 vessels as all these vessels have completed 12 months of hiring. After issue of termination notices, Contractors submitted request letters for continuation of their contracts at reduced prices. For PSVs and

AHTS 80 T vessels, all the contractors except SCI agreed to match the rates received in recently finalized 18 vessels. [….]

8.2 [….]

8.3 [….]

8.4 [….]

8.5 To a query raised in the EPC as to whether apart from the present case, there are other running contracts also which are operating on higher rates as compared to the recent market rates discovered through in recent tender finalized in April 2016. OLG informed that there are running contracts of 20 vessels of different types which were awarded in July 2015 and these contracts will be completing one year from July 2016 onwards after which the clause to terminate the contracts could be invoked. As these contracts were also awarded at higher rates as compared to the rates finalized in April 2016 tender, OLG brought out in the EPC that they intend to adopt the same approach as in the instant case to protect the financial interest of ONGC as well as to meet operational requirement of Western and Eastern Offshore.

8.6 To a query raised in the EPC as to this case being post contract issue, why it has been put up to EPC, OLG clarified that in this case, they have landed up in a unique situation wherein existing contracts are to be amended so that one contract could be operated at two different rates for two different periods based on the principle of mutual consent between ONGC and Contractors and this situation is not covered under any contractual provision of existing contracts. Therefore, as a special case, OLG has put up the case to EPC for its consideration and approval.

8.7 In light of the above deliberation, EPC agreed to the proposal of OLG.

9. *EPC Decision:*

> *9.1 Keeping in view the reasons & justifications detailed in the agenda brief and presentation made during deliberations, EPC approved the recommendation of OLG, MR duly endorsed by Director (Offshore) as proposed at para-7 above.*
>
> *Sd/-*
> *(Sandeep Gupta)*
> *GM (MM)-EPC*
>
> *No.DLH/EPC/15/REDUCED.RATES.VESSELS/PLG.MR/2016 3rd June 2016*"

147. It is apparent from the aforesaid minutes that the intent was to take advantage of the prevailing market situation and hire vessels at current market rates, which were substantially lower than the contracted rates. The objective becomes all the more evident from the fact that barring three vessels of SCI, the contracts were finally not terminated with the OSVs. The prices were renegotiated and brought down. The termination acted as more of a renegotiation tool for bringing the pre-determined contract prices in alignment with prevailing competitive prices. The investigation further brings out that ONGC did not issue the termination notice at the first instance of reduction in oil prices (*i.e.* 2014), instead it waited for a reasonable period of time and until the expiry of the period mentioned in Clause 14.2 of the SCC. Also, the clause was invoked for the first time, only in an unprecedented and exceptional situation, though it is stated to have existed for 30 years.

148. Moreover, ONGC's action was not motivated by any malice or specifically to injure any particular OSV or OSVs in a discriminatory manner. Nor were the terminations used as a device for punishment in response to any specific conduct of the OSVs. Finally, being an enterprise governed by government regulations, the potential consequence of continuing with the contracts at

substantially higher rates cannot be overlooked. The observations of the CAG's audit report on delay in invoking clause 14.2 of SCC is noteworthy in this context, the relevant extracts of which are extracted below:

> *In view of substantial fall in the market rates of vessels consequent to steep fall in crude oil prices, on 28.04.2016 company issued 30 days de-hiring notice to all the vessel owners which had completed first 12 months of contract period as Company considered it prudent to invoke clause 14.2 of Standard Condition of Contract which allows company to terminate the contract. Immediately after the issue of de-hiring notice to 27 vessels, indent for floating a tender for 19 vessels was processed and sent to MM on 12.05.2016 to take advantage of prevailing market situation so as to hire vessels at low rates. On request of the contractors to continue the existing contracts at reduced rates, Company also decided for induction of 18 vessels against NOA (s) issued on 28.04.2016(Tender No. P76BC15016).*
>
> *Audit observed that the steep fall in the crude price started in 2014. OPEC Monthly Oil Market Report, September 2014 downturn in oil prices for second consecutive month ($ 100. 75/b), amid ample supplies and weak demand. The Economist Dec. 8th, 2014 reported that the oil price* ***has fallen by more than 40% since June 2014, when it was $115 a barrel, was below $70 in December 2014. U.S.*** *Energy information Administration, based on Bloomberg reported on January 6, 2015 that crude oil prices fell sharply in fourth quarter of 2014 as robust global production exceeded demand. It further reported after reaching monthly peaks of $112 per barrel. Crude oil benchmarks Brent fell to $62/b in December 2014. BBC news on 24 February, 2015 reported- "With the halving of world oil prices since June last year, the oil industry as a whole has been hit – but those involved in the manufacturing and servicing of offshore oil rigs have been especially affected."*
>
> *Audit further observed that when Company opened price bid for tender No. P46BC15001 in July 2015, the day rate of vessels quoted by bidder were significantly lower than the day rates of vessels hired before one year. Had the company initiated action to invoke clause*

14.2 of standard Condition of contract in July 2015, it could have avoided loss of Rs 148.07 Crore to Company as the average reduction in day rates of PSV was 19% and average reduction in day rates of AHTS was 11% as compared to contracts which were more than a year old (total 32 contracts).

Management accepted that the crude oil price started falling drastically in 2014 and stated that in the past there has been fluctuation in charter rates due to demand and supply situation of vessels. The Contract rates were not expected to be varied every time there is a change in crude price. The clause was decide to be invoked as the fall in price became alarming due to a worldwide melt down of oil field activities in response to steep decline in oil price and it reached at the bottom by last quarter of 2015-16. Use of this clause for price consideration was done for the first time in a very typical market situation. There was a complete breakdown of oil field activities due to the steep fall in oil price by 74% as mentioned earlier, upsetting the demand- supply scenario in the shipping Industry. Moreover, Tender No P76BC15016 whose prices were under evaluation was finalized in April 2016. The prices of this tender, therefore, are the market prices received in the Low-oil-price regime and in fact these prices have been used to effect price correction in the contracts of old high-oil-price regime.

The reply is not tenable in the context of decline in oil prices from January 2014 onwards and its sub sequent impact on Supply Vessels industry as reported in various reports published worldwide (as mentioned by Audit above). Further when Company opened price bid for tender No. P46BC1500 in July 2015, the day rate of vessels quoted were significantly reduced than previous rates. The average reduction in rate of PSV was 19% and average reduction in rates of AHTS was 11% as compared to contracts awarded more than 12 months back and company could have benefitted by the downward trend.

149. Evidently, delay on part of ONGC in invoking the clause led to a loss of Rs. 148.07 crore which has been adversely remarked by the CAG's report. The same could have been prevented by invoking the clause in July, 2015,

in the opinion of CAG. There was an objective necessity to bring down the costs in new market circumstances and the termination was driven solely by that necessity and obligation.

150. As a matter of fact, the crude oil prices are fluctuating in nature. Such fluctuation witnessed an exceptional trend in the year 2014 that marked a drastic decline in such prices. Nevertheless, ONGC waited for a reasonable time for the market to stabilise instead of immediately issuing termination notices. However, during the last quarter of 2015-2016, when the crude oil prices fell drastically leading to reduction in E&P activities and the high daily charter rates became extremely burdensome that ONGC resorted to this measure. These facts, coupled with CAG's Audit Report observations demonstrate that Clause 14.2 of the SCC was invoked by ONGC in an exceptional situation, which was not an ordinary change of circumstance.

151. In view of the foregoing, the Commission is of the view that it is appropriate to infer that the termination clause was not invoked in bad faith but in response to an exceptional change of circumstances.

152. To conclude, Clause 14.2 of the SCC which gives unilateral right of termination without assigning any reasons to ONGC, in itself is not found abusive given the disproportionate risk that ONGC has to bear in case of such termination by the OSVs; especially when the Commission has found, in the given facts and circumstances, that the invocation of such clause was not in bad-faith. It is unambiguously established by the evidence on record that the conduct of ONGC was driven solely in response to an exceptional change in market conditions. Further, the right of termination for convenience was exercised by ONGC for the first time in thirty years of the existence of such clause in the CHA and there is no evidence that any party

has raised any objections to the existence of such clause all this while. Had it been found that ONGC invoked this clause capriciously and/or frequently in order to make illegitimate gains at the expense of the other contracting party, the Commission may have had the occasion to look at this case differently. No such situation seems to exist in the present case. Thus, the Commission is of the considered view that in the present case the conduct of ONGC does not tantamount to an abuse of dominant position within the meaning of Section 4 of the Act. Hence, the case is directed to be closed.

153. Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(U. C. Nahta)
Member

Sd/-
(Sangeeta Verma)
Member

New Delhi
Date: 02/08/2019