



COMPETITION COMMISSION OF INDIA
Case No. 01 of 2018

In Re:

Indian National Shipowners' Association ('INSA')
22 Market Tower – F, Cuffe Parade,
Mumbai – 400005, Maharashtra

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. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. U.C. Nahta
Member

Appearance:

For the Informant : Shri Amitabh Kumar, Advocate
Shri Vaibhav Choukse, Advocate
Ms. Unnati Agarwal, Advocate
Ms. Diksha Rai, Advocate
Shri Pradyumna Naware, Director
Shri Rahul Pradhan, Member Representative
Shri Siddhesh Chaubal, Member Representative

For the Opposite Party : Ms. Maninder Acharya, Additional Solicitor General
Shri Varun Mishra, Advocate
Shri Viplav Acharya, Advocate
Shri M.S. Khan, GM Legal
Shri Nirupam Banerjee, General Manager
Shri Manas Chakraborty, ED-COL
Shri Inderjeet Singh, Sr. DLA
Shri Bhuwan Chandra Sharma, DGM



Order under Section 26(1) of the Competition Act, 2002

1. The present information has been filed by the Indian National Shipowners' Association ('INSA') (hereinafter, the '**Informant**'/'**IP**') 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**') alleging contravention of the provisions of Section 4 of the Act.
2. The Informant (INSA), formed on 02.12.1929, comprises of representatives of various Indian ship-owners for growth and development of Indian Mercantile Marine. Presently it has 42 members which include Indian shipping companies and offshore oilfield service providers *i.e.* companies providing services such as offshore logistics services to offshore oilfield operators like the ONGC, Cairn India Limited (CAIRN) Reliance Industries Limited (Reliance), British Gas Exploration and Production India Limited (BGEPIIL) *etc.* The member companies of the Informant include offshore oilfield service providers like 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. The Opposite Party (ONGC) is a public sector undertaking of the Government of India ('**GOI**'), under the administrative control of the Ministry of Petroleum and Natural Gas. It is primarily engaged in Exploration and Production activities ('**E&P**') with operations in India and abroad. Prior to its reorganisation in the year 1994, the GOI had set up the Oil and Natural Gas Directorate in 1955 for development of oil and natural gas resources in various regions of the country. The Directorate was elevated to the status of 'Commission' in August, 1956. In October, 1959, it was converted into a statutory body by an act of Parliament and later, in February 1994, it was reorganised as a limited company (ONGC) under the erstwhile Companies Act, 1956. The GOI currently holds 68.07% equity stake in the Opposite



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Party which is involved in exploring and exploiting hydrocarbons in 26 sedimentary basins of India. It is claimed that the Opposite Party's Oil and Natural Gas ('O&NG') production in the offshore region (Bombay High) accounts for 70 per cent of the country's hydrocarbon output. Out of the top energy companies, the Opposite Party ranks as 5th in Asia and 20th among global energy majors in Platt's Top 250 Global Energy Company Rankings, 2016.

4. It is stated that there are six core industries in India, which includes O&NG. The O&NG industry can further be sub-divided into three major segments:
 - i. The **upstream sector** refers to exploration, recovery and production of O&NG, *i.e.* E&P activities;
 - ii. The **midstream industry** processes, stores, markets and transports commodities such as crude oil, natural gas, natural gas liquids (liquefied natural gas such as ethane, propane and butane) and sulphur; and
 - iii. The **downstream sector** refers to refinement of crude oil, sale and distribution of natural gas and products derived from crude oil.

5. The Informant submits that for exploration and production of O&NG in the Indian Exclusive Economic Zone ('**EEZ**'), there are only 4 companies operating in the upstream market, namely ONGC (the Opposite Party), BGEPL, Cairn and Reliance. However, the Opposite Party is alleged to hold a dominant position in the upstream segment.

6. The O&NG E&P industry, *i.e.* the upstream segment, draws substantially on the services rendered by Offshore Oilfield Services providers by hiring offshore vessels for drilling rigs on charter-hire basis to support such operations. The Offshore Support Vessels ('**OSVs**') are required at various stages of offshore O&NG E&P activities undertaken for offshore drilling rigs and are stated to be indispensable to the upstream sector. The Informant states that OSVs are specialised vessels used for specific tasks in the offshore E&P operations such as transporting supplies, equipment and manpower to offshore drilling locations from the onshore base and



vice-versa. There are several types of OSVs, amongst which the following two are predominantly used for the offshore E&P activities in the Indian 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.

(Since bulk of operational offshore support vessels in the Indian EEZ comprise of PSVs and AHSTVs, for the purposes of this case, the term OSVs, hereinafter, only refers to these two types of vessels, unless specified otherwise).

7. The upstream sector is primarily regulated by the Petroleum Act, 1934 (**'Petroleum Act'**) and Petroleum and Natural Gas Rules, 1959 (**'Petroleum Rules'**), while the Oilfields (Regulation and Development) Act, 1948 (**'Oilfields Act'**) is the basic statute for licensing and leasing of petroleum and gas blocks by the GOI. The Petroleum Act, Petroleum Rules and Oilfields Act govern grant of Petroleum Exploration License (**'PEL'**) and mining leases. Till the early 1990s, GOI used to grant PEL on nomination basis to national oil companies; however, post the introduction of the New Exploration Licensing Policy (**'NELP'**), the national, private as well as foreign companies are required to compete on equal terms and conditions to secure PEL through bidding process. In order to carry out E&P activities, the successful bidder enters into a Production Sharing Contract (**'PSC'**) with the GOI. On the other hand, the activities of member companies of the Informant, *i.e.*, operating OSVs are primarily regulated under the Merchant Shipping Act, 1958 (**'Shipping Act'**).
8. It is submitted that the Opposite Party was a principal beneficiary of erstwhile government practice of granting PELs on nomination basis and even presently, despite change in the government practice, it is the largest holder of PELs with highest production of crude oil in India. Further, out of the 48 contractually



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committed/ operational offshore drilling rigs in the Indian EEZ, 45 are chartered by the Opposite Party and the other three by BGEPIIL, Cairn and Reliance, respectively. All these factors consequently lead to the Opposite Party charter hiring the largest number of OSVs in the Indian EEZ, *i.e.* 69 OSVs out of 84 contractually committed/operational OSVs in India as on 11.01.2018, amounting to around 82% of the relevant market proposed by the Informant, *i.e.* market for ‘*charter hire of OSVs in Indian EEZ*’. The Informant has placed reliance on various decisions of the Commission and other competition regulators, and argued that a high market share of an enterprise is an indicator of its significant position of strength in the relevant market.

9. Further, stressing on the relative strength of the Opposite Party, the Informant has argued that the competitors of the Opposite Party, collectively, charter hire less than 20% of the OSVs in the Indian EEZ. The Informant has also relied upon factors such as the Opposite Party’s size and resources, its economic power (including commercial advantage over the competitors), its vertical integration in the downstream segment, high entry barriers, and statutory monopoly *etc.* to allege that it holds a dominant position in the relevant market. It has also been stated that in India, preference for deployment is given to Indian tonnage, *i.e.* Indian flag vessels in the form of Right of First Refusal (**‘ROFR’**) as mentioned in the Shipping Development Circular no. 2/2002 dated 08.11.2002, titled ‘Guidelines for Grant of License to Foreign Flag vessels (**‘ROFR Guidelines’**) issued by the DG Shipping. A similar practice is followed in other jurisdictions, *i.e.*, preference to their respective domestic flag vessels, based on policy of domestic preference of cabotage where domestic flag vessels get deployment preference over foreign flag vessels. Such ROFR guidelines issued by the DG Shipping are followed by E&P companies while awarding contracts to successful bidders under the said International competitive bidding (**‘ICB’**) tenders. Therefore, the Indian flag vessel owners depend heavily on the Opposite Party and other Indian O&NG E&P companies for deployment as other territories outside India have specific cabotage rules protecting their domestic/ local



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flagged maritime fleet. The lack of an active spot market for OSVs, which provides short-term deployment opportunities on a fairly sustainable basis, exacerbates the problems of member companies of the Informant. Based on all these factors, the Informant has alleged dominance of the Opposite Party in the market for ‘*charter hire of OSVs in the Indian EEZ*’.

10. The Informant submits that to supports it offshore E&P activities, the Opposite Party requires OSVs for which it floats ICB tenders which contain detailed technical eligibility requirements, bid evaluation criteria, a model contract comprising of general conditions of contract (‘GCC’) and special contract conditions (‘SCC’), collectively referred to as ‘Charter Hire Agreement’ (hereinafter referred to as ‘CHA’). The CHA sets out the terms and conditions which govern the contractual relationship between the Opposite Party and the successful bidder. The CHA allegedly is in the nature of a boiler plate contract which does not allow any negotiation in relation to the terms and conditions inserted therein by the Opposite Party.
11. It is argued that despite it being a common practice in every procurement process to negotiate changes to certain terms which appear one-sided or unfair during the pre-bid conference, the Opposite Party has not allowed any changes offered by the members of the Informant. Until 2009, the member companies of the Informant were allowed to place their objections on record in a pre-bid conference, though they were never accepted by the Opposite party. However, in the recent tender documents, the Opposite Party has clearly stated that no pre-bid conference will be held, taking away the platform available to the bidders to voice their concerns.
12. 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;



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- (ii) *Clauses 18.2 and 23 of the GCC: Unilateral termination in case of force majeure; and*
- (iii) *Clause 27.1.2 and 27.1.4 of the GCC: Onerous clauses in relation to appointment of arbitrator.*
13. Further, the Informant has alleged that the Opposite Party has acted upon these clauses in an abusive manner. In 2016, the Opposite Party invoked unilateral right of termination and terminated the agreements of 27 OSVs *vide* letters dated 28.04.2016 without assigning any reason of such abrupt termination. Out of these 27 OSVs, 19 were owned/ operated by the member companies of the Informant. This, allegedly, was done to exert pressure on OSV service providers to seek a reduction in the contracted rates.
14. The Informant raised this issue of early termination with the Ministry of Shipping, Ministry of Petroleum and Natural Gas and the Hon'ble Prime Minister of India. Upon instructions from Hon'ble Ministers, member companies of the Informant held meetings with ONGC officials on 12.05.2016 and 17.05.2016 wherein ONGC allegedly reiterated its demand of steep reduction in contracted charter rates. Since the member companies of the Informant had already spent huge amount of money on acquiring OSVs to undertake the work awarded under the contract with the Opposite Party, they had no option but to reduce their rates. This reduction in rates was represented as voluntary decision on the part of member companies of the Informant by the Opposite Party in the letters which were later sent by the Opposite Party to the members of the Informant. Further, despite the Informant's members offering significant discount on prices, the term of CHAs was reduced to one year in some cases.
15. It has been submitted that the OSVs are generally acquired through external finances and if the charter hiring companies terminate the CHAs during the pendency of such CHAs, the financial institutions will shy away from lending in future, leading to



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detrimental effects on the industry as a whole. Further, such abrupt termination threats affect the sanctity of contracts and the growth of OSV business in India.

16. It is alleged that even after offering reduced rates in mid-2016, the member companies of the Informant faced verbal demands (in late 2016 and 2017) for reduction in contractual prices agreed under subsisting CHAs for contract of OSVs wherein more than 12 months of contract term had elapsed. Upon refusal to comply with the demands, the Opposite Party made verbal threats to terminate CHAs under Clause 14.2 of the SCC, and the member companies of the Informant once again offered discount on contracted charter rates.
17. Further, it is stated that till 2017, the member companies of the Informant had a limited right to terminate the CHAs in case of *force majeure*, i.e., unforeseeable circumstances that prevent someone from fulfilling a contract. However, the tender document for 2017 took away the right of OSV providers to terminate the charter hire agreements in case of *force majeure*, meaning thereby that only the Opposite Party has a right to terminate the contract in case of such a situation. The Informant has also alleged that the arbitration clause in the CHA is one sided as it gives unilateral right to the Opposite Party to propose the names of the arbitrators amongst whom the claimant has to select the arbitrator.
18. In the light of the aforesaid facts, the Informant has alleged that the clauses imposed by the Opposite Party through the CHA are one-sided, unfair and hence abusive in contravention of the provisions of Section 4(2)(a)(i) of the Act.
19. Besides, the Informant has also alleged that the CHA contravenes Section 3(4) read with 3(1) of the Act as it causes an appreciable adverse effect on competition in the market.
20. Based on the aforesaid facts, the Informant has, *inter alia*, prayed for institution of an investigation under Section 26(1) of the Act against the anti-competitive and



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abusive conduct of the Opposite Party; amendment of the restrictive and abusive clauses in the CHA, a cease and desist order; and an imposition of a monetary penalty. The Informant has also prayed that the Opposite Party be refrained from invoking clause 14.2 of the SCC directly or indirectly, in any manner, whatsoever pending adjudication.

Observations and findings

21. The Commission considered the information in its ordinary meeting held on 28.03.2018 and decided to call the parties for a preliminary conference on 23.05.2018. Subsequently, the Informant filed an application dated 11.04.2018 seeking expeditious consideration of the matter citing instances of continuing abusive conduct on the part of the Opposite Party.
22. On 17.04.2018, the Commission considered the aforesaid application and decided to prepone the preliminary conference to 08.05.2018. Subsequently, the Opposite Party filed an application dated 07.05.2018 seeking short adjournment of the preliminary conference. On 08.05.2018, the Commission decided to reschedule the preliminary conference to 17.05.2018 and directed the Opposite Party to furnish an undertaking on the same day to the effect that it will not be invoking Clause 14.2 of the SCC, in any manner, against the Ship-owners until the said date *i.e.* 17.05.2018. In the afternoon, the Opposite Party filed the said undertaking as directed by the Commission.
23. On 17.05.2018, the Informant as well as the Opposite Party appeared before the Commission through their respective authorised representatives. The learned counsel for the Informant, Shri Amitabh Kumar, reiterated the facts stated in the information, which are not repeated herein for the sake of brevity, and prayed that an investigation be ordered against the Opposite Party.
24. The learned Additional Solicitor General, Ms. Maninder Acharya, argued on behalf of the Opposite Party. Ms. Acharya submitted that the Opposite Party was using



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vessels other than PSVs and AHTSVs (*e.g.* oil tankers) and the number of such vessels is around 1204. Thus, the figures relied upon by the Informant to allege dominance of the Opposite party are misleading.

25. On allegations regarding abuse, Ms. Acharya dealt with each of the three clauses of the CHA alleged to be abusive by the Informant. With regard to Clause 14.2 of the CHA which gives an unfettered unilateral right to the Opposite Party to terminate the CHA, Ms. Acharya submitted that though this clause has been there for the last 30 years, it has never been invoked. Further, neither the Informant nor any of its members ever raised any concern with regard to it with the Opposite Party. She then explained the reasons why the said clause was invoked in 2016. It was stated that from 2014 onwards, the crude oil prices started to show a downward trend. However, the Opposite Party was reluctant to unnecessarily pressurise the ship-owners. Thus, it waited for the market to stabilise and did not invoke Clause 14.2. Yet, in the last quarter of 2015-16, the prices fell drastically and the Opposite Party was left with no option other than invoking Clause 14.2 to avoid further losses. Ms. Acharya also relied upon the CAG report to highlight that even the CAG report pointed out the loss incurred by the Opposite Party (approximately Rs. 148.07 crore) due to delay in invoking Clause 14.2.
26. Ms. Acharya further submitted that if any of the members of the Informant was aggrieved with the Opposite Party's act of invoking Clause 14.2, they had a recourse of resorting to arbitration which would have ensured that the contract remains in place for the period of arbitration proceedings. Relying on such deposition, Ms. Acharya submitted that there are in-built checks and balances in the CHA which could have been availed by the Informant.
27. With regard to the *force majeure* Clause 18.2 and 23 of the GCC that give a unilateral right of termination to the Opposite Party in case of *force majeure*, it was argued that the clause is wide enough to take care of the interests of both the parties. Ms. Acharya also averred that earlier it was being misused by the OSV owners and



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for this reason, it was amended to reserve the right of termination only for the Opposite Party.

28. With regard to the arbitration clause (*i.e.* Clause 27.1.2 and 27.1.4 of the GCC), it was argued that this clause has already been amended in the latest tenders floated by the Opposite Party and the amended clause takes care of the grievance of the member companies of the Informant. While concluding the arguments on behalf of the Opposite Party, Ms. Acharya submitted that the Commission may pass an order under Section 26(2) of the Act and consider giving directions to the Opposite Party with regard to amendment of Clause 14.2 in the CHA, if required, which the Opposite Party shall follow.
29. The Commission has examined the material available on record, including the oral submissions made by the respective learned senior counsel of the parties on 17.05.2018. The Informant has primarily alleged abusive conduct of the Opposite Party with regard to imposition of one-sided/unfair terms and conditions in the CHAs which the members of the Informant enter into with the Opposite Party for lending their OSVs. Since the allegation is with regard to abuse of dominant position, it is imperative to first delineate the relevant market as per Section 2(r) of the Act. In the said delineated market, the strength of the Opposite Party will be assessed as per the factors enumerated under Section 19(4) of the Act. Only if the Opposite Party is found to be dominant defined in the relevant market, the allegations of abuse of dominance would be subject to scrutiny.
30. 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.*”



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31. 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. 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. The 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. The definition focuses on the products offered by the supplier or would be able to offer to alternative buyers without any significant problems.
32. In the present case, the Opposite Party procures services of OSVs from the member companies of the Informant and therefore, it is necessary to test their ability to switch to alternative buyers, other than the Opposite Party, without much difficulty. In that regard, the Commission observes that the OSVs provided by the member companies of the Informant to the Opposite Party are vessels of specialised nature. The Opposite Party primarily hires two types of OSVs, namely AHTSVs and PSVs. AHTSVs are specialised vessels with on-board machinery and equipment and are used mainly for anchor handling and towing operations. Similarly, PSVs are also specialised vessels used to carry crew and supplies to the oil platform deep inside



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ocean and to bring cargo and personnel back to the shore. Although there are other types of OSVs also, *e.g.*, well intervention vessels, ice breaking vessels, cable laying vessels, field support vessels, seismic vessels, fire-fighting vessels *etc.*, in the Indian EEZ mainly AHTSVs and PSVs are used. As all these vessels are designed and equipped to perform specific functions, they do not seem to be interchangeable unless they are repurposed to be used for a purpose other than for which they are specifically designed.

33. During the preliminary hearing, the learned senior counsel for the Opposite Party argued that they are using other vessels like oil tankers also and thus, the relevant product market is broader than the one proposed by the Informant. The Commission, however, is not persuaded by this argument. The services offered by the OSVs (PSVs and AHTSVs) are of specialised nature and these vessels as such do not seem to be interchangeable in nature with the other vessels highlighted by the Opposite Party.
34. In view of the foregoing discussion, the Commission is of the view that the relevant product market would be '*market for charter hire of OSVs (PSVs and AHTSVs)*'.
35. The relevant geographic market as defined under Section 2(s) of the Act means the '*market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.*' In the instant case, the Informant has submitted that the Indian Exclusive Economic Zone (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, Exclusive Economic Zone 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



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sector and offshore oilfield services sector creates conditions which serve as regulatory eligibility criteria for operating in the Indian EEZ. The conditions of competition, thus, seem to be homogenous for the provision of the said services in different regions of India and accordingly, the relevant geographic market appears to be '*Indian EEZ*'. Resultantly, the relevant market in the present case would be the '*market for charter hire of OSVs in the Indian EEZ*'.

36. Having delineated the relevant market, the next step is to determine whether the Opposite Party is dominant in the said relevant market. The Commission notes that the Informant has relied upon various factors to demonstrate the dominance of the Opposite Party in the relevant market by alleging its dominance in the upstream market. The Commission observes that the relevant market in the present case is not the market in which the Opposite Party as such operates in its normal course of business *i.e.* the O&NG E&P market. However, being a direct procurer of charter hire of OSVs for O&NG E&P activities in the relevant market, the Opposite Party is a major consumer of such services. Charter hiring of OSVs is required by the Opposite Party to operate in the upstream market of O&NG E&P activities. Thus, the strength of the Opposite Party in the upstream market will be fairly representative of its strength in the relevant market as a procurer of services offered by OSVs. Apparently, at present, there are 48 contractually committed/operational offshore drilling rigs out of which 45 are operated by the Opposite Party as on 01.01.2018. Consequently, the Opposite Party appears to be the *de facto* dominant buyer of services offered by the OSVs as these services are specific to the drilling/E&P operations. This is evident from the data submitted by the Informant, which has not been contested by the Opposite Party, which showed that the Opposite Party has hired 69 OSVs, out of the total 84 commercially committed OSVs in the relevant market as on 11.01.2018.
37. Further, the number of players/buyers in the relevant market is limited in the present case. Though there are 3 more players, *namely* Reliance, Cairn and BGEPIIL in the



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relevant market apart from the Opposite Party, they only operate 1 drilling rig each as opposed to 45 operated by the Opposite Party. This shows the comparative strength of the Opposite Party as well as its ability as a buyer to influence the relevant market.

38. Thus, based on the factors enshrined under Section 19(4) of the Act such as market share, comparative size and resources, possession of economic power as an undertaking of the Government, dependence of member companies of the Informant on the demand/ business generated by the Opposite Party *etc.*, the Commission is of the *prima facie* view that the Opposite Party holds a dominant position in the relevant market.
39. Having ascertained the dominance of the Opposite Party in the relevant market, the Commission now proceeds to analyse the allegations of the Informant with regard to abuse of dominant position. The main grievance of the Informant is with regard to the one-sided and onerous terms imposed by the Opposite Party in the CHAs entered with the suppliers of OSVs. The Informant has stated that the Opposite Party usually executes CHAs which are in the nature of boiler plate contracts without any provision for negotiation.
40. The main clause which has been alleged to be one-sided and unfair Clause 14.2 of the SCC, *i.e.* unilateral right of termination without assigning any reason. The same 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.”



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41. A plain reading of the aforesaid clause reveals that this clause is one-sided and onerous to the OSV suppliers. Not only the OSV suppliers are without any right to terminate the agreement, the Opposite Party has an unfettered right to terminate the agreement without assigning any reasons. Further, the Commission notes that the Opposite Party has invoked the said clause by issuing de-hiring notices to various member companies of the Informant on 28th April, 2016, without assigning any justification. Such notices have been annexed with the information. The notices sent to various OSVs, which were identical, simpliciter states 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 Character 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 28th May 2016.”

42. Further, when the member companies of the Informant requested the Opposite Party to withdraw these termination notices and cited financial ruin, they were asked to reduce the rates. When the Informant’s members offered a reduction in charter hiring rates, the termination notices were withdrawn by the Opposite Party in respect of the vessels for which reduction was offered and such reduction was shown as a voluntary decision by the Informant’s members. During the preliminary conference,



it was brought to the notice of the Commission that the vessels for which the member companies of the Informant did not agree to reduce the rates, were de-hired. This fact was not disputed by the Opposite Party.

43. The very stipulation of such one-sided clause, which gives an unfettered right to a dominant party to use it in its favour without giving any reciprocal right to the other party to the agreement, is *prima facie* abusive. Further, the manner in which the termination notices were sent and then consequently withdrawn by the Opposite Party on receiving a reduced offer from the members of the Informant, shows the high-handed approach of the Opposite Party and appears to be abusive. The Opposite Party tried to justify its conduct by arguing the existence of special circumstances for invoking the termination clause in the year 2016. However, the facts stated in the information suggest otherwise. It is apparent that attempts to obtain discounts were again made by the Opposite Party through verbal demands in late 2016 and 2017. Further, the additional information furnished by the information, *vide* its application dated 11.04.2018, cites instances of continuance of such conduct on the part of the Opposite Party even in the year 2018. Thus, the claim of the Opposite Party that the invocation of Clause 14.2 by it in the year 2016 was a one-time phenomenon in view of the special circumstances does not seem to be corroborated by the other facts placed before the Commission.
44. Based on the foregoing discussion, the Commission is of the view that Clause 14.2 of the SCC, wherein the Opposite Party retains an exclusive right to terminate the agreement, and the manner in which it has been used *prima facie* amounts to abuse of dominant position in contravention of the provisions of Section 4(2)(a)(i) of the Act.
45. With regard to usurpation of OSV suppliers' right to terminate in case of *force majeure* (Clauses 18.2 and 23 of the GCC), the Commission is of the view that though the clause does not give a right of termination to the OSVs, there are sufficient safeguards to protect the rights of the OSV players. It specifically states



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that '*[i]n the event of either party being rendered unable by Force Majeure to perform any obligation required to be performed by them under the contract, the relative obligation of the party affected by such Force Majeure shall be suspended for the period during which such cause lasts*'. The Commission therefore does not find Clauses 18.2 and 23 of GCC to be abusive.

46. Lastly, with regard to the allegation pertaining to Clause 27.1.2 and 27.1.4 of the GCC wherein the Opposite Party has the right to choose the arbitrator, the Commission observes that certain amendment has been made to the said clause by Opposite Party in the year 2017. The amended Clause 27.1.4 specifically states that '*[f]or a dispute involving claims above Rs. 25 lacs and upto Rs 5 crores, in case other party is Claimant, ONGC will forward a list containing names of five jurists to the other party for selecting one from the list who will be appointed as sole arbitrator by ONGC. In case ONGC itself is the Claimant, it shall appoint the Sole Arbitrator by invoking the Arbitration clause and inform the Contractor. Such dispute shall be resolved by fast track procedure specified in Section 29B of the Arbitration and conciliation Act, 1996*'. Further, Clause 27.1.5 states that for a dispute involving claims above Rs 5 crores and upto Rs. 100 crores, the claimant shall appoint the arbitrator and inform the other party. The other party shall then appoint the second arbitrator and the two appointed arbitrators shall appoint the third arbitrator. Thus, the amended arbitration clause seems to provide equal rights to both the parties to the CHA. As such, *prima facie*, the Commission does not find the arbitration clause also to be one-sided or unfair.
47. Based on the aforesaid discussion, the Commission is of the *prima facie* view that a case of contravention of the provisions of Section 4(2)(a)(i) of the Act is made out, and the same warrants investigation. The DG is, thus, directed to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report to the Commission, within 60 days.



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48. It is, also, made clear that nothing stated herein shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observations made herein.
49. The Secretary is directed to send a copy of this order, alongwith the information and the documents filed therewith, to the DG.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(U.C. Nahta)
Member

New Delhi
Dated: 12/06/2018