* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: 21 March 2023**
Order pronounced on: 30 May 2023

\+ O.M.P.(EFA)(COMM.) 11/2021

NUOVOPIGNONE INTERNATIONAL SRL

..... Decree Holder

Through: Mr. Jayant Mehta, Sr. Adv. with Mr. Abhijnan Jha, Ms. Bhagya Yadav, Ms. Sadhvi Chhabra and Mr. Srikar, Advs.

versus

CARGO MOTORS PRIVATE LIMITED & ANR.

..... Judgement Debtors

Through: Mr.Varun K. Chopra, Mr. R.V. Prabhat, Ms. Mehul Sharma, Mr. Dipu Kumar Jha, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

EX. APPL. (OS) 3525/2022 (Direction)

1. The Court by means of the present order proceeds to dispose of the objections which have been preferred by the respondents in the present enforcement petition. The petition itself has come to be preferred for enforcement of a **Foreign Consent Award dated 05 October 2020 in ICC Arbitration No. 24918/GR**[1]. The enforcement is opposed by the respondents who in terms of Section 48 of the

[1] Award

Arbitration and Conciliation Act, 1996[2] contend that the Award having been passed upon consent is not one which is enforceable under the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards**[3]. It is additionally contended that since the Award itself is an outcome of economic duress and therefore contrary to public policy of India, it should not be recognised as being capable of being enforced under the 1996 Act. For the purposes of adjudging the objections which have been raised, the following essential facts may be noticed.

2. The enforcement petitioner and respondent no. 2 entered into an **Equipment Purchase Agreement**[4] for the sale of Steam Turbine Generator Package for a consideration of 6.7 million Euros which roughly translates to INR 60 crores. The respondent no. 1 executed a **Parent Company Guarantee**[5] in favour of the enforcement petitioner and stood in the position of a guarantor for the second respondent which was its subsidiary. The EPA is stated to have been amended to include additional services to be provided by the petitioner to respondent no. 2 for a consideration of 1,082,140 Euros [INR 9.52 crores approximately].

3. Consequent to disputes having arisen between parties and on a failure on the part of the respondents to make payments in respect of the goods which formed part of the EPA, the enforcement petitioner

[2] the 1996 Act
[3] New York Convention/Convention
[4] EPA
[5] PCG

submitted a request for referral of all disputes to arbitration as contemplated under Clause 26.2 of the EPA. The proceedings which ensued before the Arbitral Tribunal may be gathered from the ultimate Award which came to be rendered. The Arbitral Tribunal records that the request for arbitration was received by the **ICC International Court of Arbitration**[6], on 22 November 2019. The ICC Secretariat acknowledged receipt of that request on 25 November 2019. On 15 February 2020, counsel for the respondents confirmed to the ICC Secretariat that they have been duly engaged to represent them in the matter and also enclosed their letters of authority.

4. In terms of a communication of 18 February 2020, the ICC Secretariat called upon the respondents to provide their comments on the constitution of the Arbitral Tribunal. In terms of their communication of 19 February 2020, the respondents agreed to the appointment of a sole arbitrator and requested ICC to proceed further. On 26 March 2020, parties were informed that appropriate steps were being taken for the appointment of a sole arbitrator and were also apprised of the costs payable in advance. The appointment of the sole arbitrator was communicated to parties on 17 April 2020 whereafter the records were transmitted to the named arbitrator.

5. On 23 April 2020, the Arbitral Tribunal circulated a draft of the Terms of Reference to the parties as well as the procedural time frame and directions for inviting their comments. The Statement of Claim

[6] ICC

together with its exhibits came to be filed on 22 May 2020. The respondents served their Statement of Defence together with exhibits on 13 July 2020. By an email of 17 August 2020, the Arbitral Tribunal was informed by the claimant/enforcement petitioner that parties had settled the matters in dispute. Consequently, the Tribunal proceeded to forward a draft consent award to the parties for their review and comments on 20 August 2020.

6. Both the respondents as well as the claimant are stated to have provided their comments vide emails dated 01 September 2020 and 04 September 2020 respectively. The Tribunal specifically records that the respondents had not raised any objection to the request made by the claimant that a duly authenticated copy of the **Settlement Agreement dated 13.08.2020**[7] be included and made part of the consent Award. The Arbitral Tribunal also records that until 19 June 2020 the respondents were represented by a set of counsels whose particulars are recorded in paragraph 12 of the Award. However, by an email of 19 June 2020, a partner in Khaitan & Co. apprised the Arbitral Tribunal of the change in representation. In view of the aforesaid, the Tribunal issued revised Terms of Reference recording that change on 23 June 2020 and those revised terms were duly signed by the enforcement petitioner on 26 June 2020 and the respondents on 29 June 2020.

[7] Settlement Agreement

7. The Tribunal consequently proceeded to draw up the consent Award in the following terms: -

> "48. By this Award by Consent:
>
> a. All claims made in the arbitration are withdrawn on the terms set out in the Settlement Agreement made between the Claimant, the First Respondent and the Second Respondent and dated 13 August 2020, a copy of which is annexed hereto and initialled by the Tribunal ("**the Settlement Agreement**").
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> b. The Tribunal gives to the Settlement Agreement the force of an award and orders and directs that the parties thereto comply with its terms.
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> c. Each party shall bear its own costs incurred in connection with the Arbitration.
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> d. The ICC costs and arbitrator's fees as determined by the Court shall be paid from the Advance on Costs. Any balance remaining shall be returned to the Claimant.
>
> e. The parties shall remain jointly and severally liable for payment of VAT on the arbitrators's fees pursuant to Appendix III Article 2(13) of the ICC Rules."

8. For the sake of completeness of the record, the Court also deems it apposite to extract the following salient provisions of the Settlement Agreement: -

> "2.1 The Parties hereby acknowledge that Cargo Solar owes €1.587.140 under the EPA and Contract Amendment and €400.000 as storage and preservation costs ("**Outstanding Amount**").
>
> 2.2 Cargo Solar shall pay €1.3 million ("**Settlement Amount**") pursuant to the following schedule:

Schedule	Date of Payment	Amount
Milestone 1	7 September 2020	€337,250

Milestone 2	7 December 2020	€337,250
Milestone 3	7 March 2020	€312,750
Milestone 4	7 June 2021	€312,750
		€1,300,000

2.4 If Cargo Solar pays the Settlement Amount pursuant to this Clause 2, NP shall concede its entitlement to the remaining € 287,140 under the EPA and Contract Amendment and €400,000 as storage and preservation costs of the Outstanding Amount. Upon payment of the Outstanding Amount as per the schedule under Clause 2.2. Cargo Solar and Cargo Motor would be deemed to have duly performed their obligations under this Settlement Agreement and NP shall deliver the STG Package to Cargo as per Clause 3 below.

3.1 NP shall:

(a) store and preserve the STG Package at no additional charge until 30 June 2021; and

(b) deliver the STG Package pursuant to Clause 9 and Annexure I of the EPA, which are hereby incorporated *mutatis mutandis* into this Settlement Agreement.

3.2 Cargo Solar shall arrange for pick-up and FOB delivery of the STG Package by 30 June 2021 pursuant to Clause 11 of the EPA, which is hereby incorporated *mutatis mutandis* into this Settlement Agreement.

6.2 For the avoidance of doubt.

(a) any delay in Cargo Solar's performance shall not extend, delay, or otherwise affect the Dates of Payment set out in the payment schedule at Clause 2 above; and

(b) Clause 6.1 entitles Cargo Solar to a total of 45 (forty-five) calendar days to remedy all breaches that may arise during the course of this Settlement Agreement, Clause 6.1 does not grant Cargo Solar a period of 45 (forty five) calendar days for each instance of non-performance.

6.3 If Cargo Solar does not remedy its non-performance in accordance with this Clause 6, then:

(a) the entire Outstanding Amount (less any amount already paid under the Settlement Agreement) shall become immediately due and payable, including any interest thereon;

(b) NP may dispose the STG Package as necessary, within 9 (nine) months from the date of such non-performance or on 30 June 2022, whichever is earlier; and

(c) NP may obtain a Consent Order as set out in Appendix A to enforce the terms of this Settlement Agreement in the local courts of appropriate jurisdiction as necessary, and if required.

6.4 Cargo Solar's obligations under this Settlement Agreement shall not be discharged, delayed, excused or otherwise affected by:

(a) any force majeure event arising under the governing law of this Settlement Agreement;

(b) any reorganisation or alteration of the status of Cargo Solar and/or Cargo Motors;

(c) the insolvency, bankruptcy, winding up, liquidation, or dissolution of Cargo Solar and/or Cargo Motors, their undertakings, and/or their assets;

(d) the appointment of a receiver, administrator, trustee or similar officer of Cargo Solar and/or Cargo Motors, their undertakings, and/or their assets;

(e) any act, omission, event, or circumstances which (apart from this provision) would or might constitute a legal or equitable defence for or discharge of a surety or guarantor; or

(f) or any other analogous event.

7.1 Cargo Motors' liabilities and obligations shall be subject to the terms of the PCG, which is hereby incorporated *mutatis mutandis* into this settlement agreement.

11.2 Upon jointly requesting that this Settlement Agreement be incorporated into an arbitral award, the Parties represent that they:

(a) have received independent legal advice on this matter including independent legal advice on Indian law. On that basis, the Parties further acknowledge that the arbitral award is enforceable on its terms in an Indian court. The Parties further agree that there are no grounds for refusal to enforcement of the award whether under Section 48 of the (Indian) Arbitration & Conciliation Act, 1996 or under any other law. Cargo Solar and Cargo Motors undertake to pay on the award without demur immediately on the receipt of a copy of the award and without requiring any enforcement action; and

(b) without derogating from the obligation of Cargo Solar and Cargo Motors to pay on the award without demur, NP shall be entitled to approach the competent jurisdictional court in India for recognition and enforcement of this award. NP shall approach the court with prior notice to Cargo Solar and Cargo Motors. Cargo Solar and Cargo Motors shall promptly enter appearance in the matter and concede to recognition and enforcement of the award without citing any defence.

15.1 This Settlement Agreement sets out the entire agreement between the Parties in relation to settlement of the Arbitration.

15.2 Each party has participated in the drafting and negotiation of this Settlement Agreement. Accordingly, this Settlement Agreement shall be deemed to have been drafted jointly by the Parties which mutually declare that the contractual provisions represent in all expression of their true will."

9. The present enforcement petition has been filed before this Court alleging non-compliance on the part of the respondents to make

over the Settlement Amount as envisioned under the Settlement Agreement. The enforcement petitioner contends that the respondents are liable to pay the aggregate Outstanding Amount and has sought enforcement of the Award.

10. The respondents firstly object to the recognition of the Award contending that since it was one which was rendered on consent, it would not fall within the scope of awards as recognised under the Convention. It was the aforesaid objection which was principally urged by learned counsel before this Court. It was submitted that the New York Convention pertains to recognition and enforcement of awards *"arising out of differences between persons"*. It was submitted that since the New York Convention does not contemplate awards rendered upon settlement, the enforcement action would not sustain. Learned counsel had also referred to some of the preparatory material which preceded the formalisation of the New York Convention to submit that various nations had made specific requests for awards by consent and settlement being included. However, it was contended that when the New York Convention ultimately came to be promulgated, settlement awards were not explicitly included. According to learned counsel, this circumstance would clearly suggest that settlement awards are not covered under the Convention. The aforesaid submission proceeds on the basis of certain representations made by and on behalf of the erstwhile Federal Republic of Germany as well as by Austria. This would be evident from the extracts of their

representations as included in the **Report of the Secretary General dated 31 January 1956**[8]. The relevant parts of that report are reproduced hereinbelow: -

> "**Federal Republic of Germany**
>
> "Consideration should also be given to the idea of extending the scope of the Convention to cover, in addition to awards, settlements reached before arbitral tribunals. At the time when the Geneva Convention was drafted it was decided not to include provisions relating to such settlements; the absence of such a provision has often proved a regrettable omission in practice. It is proper, therefore, to suggest that this gap should now be closed."
>
> **Austria**
>
> "The convention should perhaps be expanded to include arbitral settlements. There would have to be an express provision to that effect; this would be in keeping with Austrian practice (paragraph 1, line 16 of the rules governing the enforcement of judicial decisions). Because the opportunities for testing the validity of decisions are adequate and the grounds for refusing enforcement offer sufficient protection, there should be no objection to such a provision."

11. The submission essentially was that since a request for the expansion of the terms of the New York Convention to include arbitral settlements never came to be specifically incorporated, consent awards must be understood as falling beyond the scope and ambit of the New York Convention.

12. Insofar as the issue of economic duress is concerned, it was the submission of learned counsel that the settlement terms were hurriedly pushed through by the enforcement petitioner during the period when the pandemic had gripped the entire world and had adversely impacted

[8] E/2822

the respondents from seeking appropriate legal opinion. It was also submitted that the respondents were coerced to agree to the consent terms even though a reading of the Settlement Agreement would establish that it is clearly designed to operate solely in favour of the enforcement petitioner.

13. The aforenoted submissions were controverted by Mr. Jayant Mehta, learned senior counsel who appeared for the enforcement petitioner and addressed the following submissions. Mr. Mehta contended that the Convention does not define *"awards"* at all. According to learned senior counsel, merely because the representations of the Federal Republic of Germany and Austria did not ultimately translate into specific provisions with respect to settlements being incorporated in the Convention, the same cannot lead one to conclude that awards on settlement would not be enforceable thereunder.

14. Mr. Mehta submitted that the objection that foreign consent awards cannot be enforced or are not recognised is a submission which came to be directly negatived by the Supreme Court in **Harendra H. Mehta v. Mukesh H. Mehta**[9]. It was pointed out that although the aforesaid decision was rendered in the context of the **Foreign Awards (Regulation and Enforcement) Act, 1961**, the principles laid down therein would clearly apply. Mr. Mehta referred

[9] (1999) 5 SCC 108

to paragraphs 22 and 23 of the report which are extracted hereinbelow: -

> **"22.** We do not understand as to how it could be said that the award was not a foreign award. All the ingredients of a foreign award were there. The parties were having business both in India and in the United States of America as a joint venture and they also acquired properties. Differences that arose between the parties were out of legal relationships and certainly of commercial nature under the laws of this country. Agreement to refer the disputes to arbitration, in writing, was made in the United States where arbitration proceedings were held and award given. It is not disputed that the United States is a country to which clause (*b*) of Section 2 of the Foreign Awards Act applies. In the present case, the parties are no doubt related to each other but that could not take the award outside the ambit of the Foreign Awards Act. We asked Mr Ganesh as to what would happen if there were two strangers having businesses both in India and in the United States or when there was a joint venture between an Indian and a US national having properties both moveable and immovable in both the countries and disputes having arisen and award given in the United States. Mr Ganesh, in spite of his resourcefulness, was unable to give any convincing reply. There is no merit in the objection of the appellant that the award is not a foreign award and that it is outside the Foreign Awards Act.
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> **23.** That the award is not an arbitral award, the submission of Mr Ganesh was that the arbitration agreement which was entered into on 17-11-1989 stood revoked after the parties arrived at the settlement agreement dated 20-3-1990. Earlier agreement dated 25-10-1989 to refer the disputes to arbitration stood superseded by the agreement dated 17-11-1989. Mr Ganesh read in detail the terms of the settlement agreement to contend that the parties themselves had resolved their disputes and that the agreement was to take effect irrespective of the fact whether the arbitrator gave his award in terms thereof or not. He said that the arbitrator was to act merely as a rubber stamp after the parties had opted for various packages containing their businesses and properties. The submission in brief was that unless there was a dispute or difference, there could be no arbitration. The arbitrator was not only not required to act

judicially after the agreement dated 17-11-1989 had been arrived at between the parties but, in fact, he was prevented from acting judicially and giving any decision whatsoever affecting the rights of the parties. He was not expected to hear or apply his mind or perform any of the arbitration functions. In such a situation, even though there was in existence an arbitration agreement that stood revoked for one basic and simple reason that at that time there existed no dispute. The agreement was straightaway made into the award. In support of his submissions, Mr Ganesh referred to a decision of this Court in *K.K. Modi* v. *K.N. Modi* [(1998) 3 SCC 573] to contend that when a person has been authorised to decide a certain dispute between the parties but he has no function to perform as arbitrator, he could not give an award. But in that case, under clause (9) of the Memorandum of Understanding between the parties there were different contentions: one contending that the clause constituted arbitration agreement, the other contending to the contrary. This clause (9) was as follows: (SCC p. 580, para 3)

> "Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

It was in this context that this Court said that looking at the nature of the functions expected to be performed by the Chairman, IFCI, his decision is not an arbitration award. This judgment hardly helps Mr Ganesh in his submissions. In the present case, the parties entered into the settlement during pendency of the arbitration proceedings. The appellant himself approached the courts in the United States never complaining that it was not an award. In proceedings under CPLR 7507 and CPLR 7510, Harendra had even accepted the execution of the settlement agreement and the award made by the arbitrator. We find that no such plea was taken either in the High Court or in the grounds of appeal to this Court. The Nassau County Court noticed the functions to be performed by the arbitrator in the settlement agreement. We do not find any merit in the argument of Mr Ganesh that the arbitration agreement stood revoked when the parties during the course of arbitration proceedings entered into a settlement among themselves and yet wanted the arbitrator to give his award in terms thereof. It is nobody's case

> that the authority of the arbitrator was revoked at any time. This argument of Mr Ganesh seems to us to be made in mere desperation.

15. Mr. Mehta then drew the attention of the Court to the judgment rendered by the United States District Court for the Southern District of New York in **Albtelecom SH.A v. UNIFI Communs., Inc.**[10] as well as of the United States District Court for the Southern District of Texas in **Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.**[11] to contend that courts in the United States itself have rejected identical pleas. Taking the Court through the decision in *Albtelecom*, Mr. Mehta submitted that the District Court was considering a petition for confirmation of a foreign arbitration award which had incorporated the terms of settlement arrived at between parties during the course of arbitral proceedings. The respondent before that court had taken the objection that the Convention would not apply since the award took the form of a consent award. Mr. Mehta submitted that the said objection came to be negatived in unequivocal terms as would be evident from the following extracts of that decision: -

> **"B. Analysis**
>
> Albtelecom first asks the Court to confirm the Award. Based on its review of the Award and the parties' submissions, and having undertaken the limited review appropriate here, the Court agrees that there is no material issue of fact for trial as to confirmation, and that the Award was properly entered. The face of the Award reflects full participation by both parties in the arbitration process, which had proceeded for more than three years as of the

[10] 2017 U.S. Dist. LEXIS 82154
[11] 2018 U.S. Dist. LEXIS 39494

date on which the Award was entered. The Award reflects consent to the terms and the text of the Award, by both parties. It reflects due care by arbitrator Knoll. And the parties' consent to the Award—their stipulation to its terms—provides a sound basis for its entry.

Unifi's sole argument against confirmation is that the Award was entered into by consent of the parties, as opposed to being based on an arbitrator's resolution of the factual and legal disputes. Unifi claims that "the parties agreed to settle their dispute outside of arbitration." Unifi Mem. at 13. But that is wrong. The parties here certainly could have dismissed the arbitration in favor of a private settlement agreement.

Instead, as the record reviewed above reflects, they affirmatively asked arbitrator Knoll to adopt as part of an ICC arbitral Award, *in haec verba*, the terms of their settlement agreement in the Award. The parties then proceeded, with the arbitrator's consent, to edit the draft Award, to assure that it reflected their agreement. Far from being resolved "outside of arbitration," the parties' dispute, therefore, was ultimately resolved *in* arbitration, based on the parties' stipulation to particular terms as embodied in the Award.

Unifi cites no law to the effect that an Award entered into by an ICC arbitrator, mid-arbitration, with the parties' consent and based on terms agreed to by the parties, is any less binding under the New York Convention than an ICC award entered into after more contentious litigation. There is no reason for such an exception. On the contrary, the opposite rule would discourage resolution of disputes in mid-arbitration. Parties who initiate arbitration under the ICC might be less willing to settle, were the implication of a settlement that the resulting Award would lose its enforceability under the New York Convention. There is indeed limited law on this point, presumably because Awards achieved following the parties' consent are less likely to result in later disputes. But the limited available precedents reflect recognition and enforcement of Awards entered into based on stipulations by the parties. *See, e.g., United States v. Sperry Corp., 493 U.S. 52, 56- 57, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989)*; *Bakers Union Factory, #326 v. ITT Continental Baking Co., Inc., 749 F.2d 350, 354 (6th Cir. 1984)*; *Bruce Hardwood Floors v. S. Council of Indus. Workers, 8 F.3d 1104, 1107 (6th*

> *Cir. 1993)*; *Voss Steel Employees Union v. Voss Steel Corp., 797 F. Supp. 585, 590 (E.D. Mich. 1992), aff'd, 16 F.3d 1223 (6th Cir. 1994).*
>
> The Court therefore will confirm the arbitral Award. The Court will order entry of judgment as provided in the Award, to wit, that Unifi was required, as of September 2, 2015, to make the 39 monthly installment payments totally EUR 1,088,000, in the amounts and on the dates indicated in the Award, and to comply with the other obligations reflected in the Award."

16. It was further submitted by Mr. Mehta that the position in law as expounded in *Albtelecom* came to be reiterated in *Transocean*. Learned senior counsel referred to the following passages from the aforenoted decision: -

> "Erin Energy's only argument against confirming the arbitral award is that it is a "consent award" and therefore not subject to the Convention. Erin Energy concludes that the petition must be dismissed because the court lacks subject-matter jurisdiction. (Docket Entry No. 28). In lieu of citing case law, Erin Energy cites the 2016 United Nations Commission on International Trade Law Secretariat Guide on the Convention, which states that neither the Convention nor reported case law specifically address consent awards. *Id.* at 2. That is no longer the case.
>
> In 2017, in a case with analogous facts and legal issues, the Southern District of New York held that an award "entered into by consent of the parties, as opposed to being based on an arbitrator's resolution of the factual and legal disputes," covered by and subject to the Convention. *Albtelecom SH.A v. UNIFI Commc'ns, Inc., 2017 U.S. Dist. LEXIS 82154, 2017 WL 2364365, at *5 (S.D.N.Y. May 30, 2017).* The petitioner in *Albtelecom* sought confirmation of an arbitral award decided by an arbitrator of the International Chamber of Commerce's International Court of Arbitration. The award was based on the parties' consent. *2017 U.S. Dist. LEXIS 82154, [WL] at *1*. The respondent's "sole argument" against confirmation was that the award was made by the parties' consent, which the respondent asserted showed that the parties had resolved their dispute "outside of arbitration." *2017 U.S. Dist. LEXIS 82154, [WL] at*

*5. The *Albtelecom* court disagreed for two reasons. First, though the parties could have dismissed the arbitration to pursue a private settlement agreement, they instead "affirmatively asked [the arbitrator] to adopt as part of an . . . arbitral Award, *in haec verba*, the terms of their settlement agreement in the Award." *Id.* Second, the respondent cited no case law to support treating a consent award as outside the Convention, or entitled to less preclusiveness or enforceability, than an award entered through an adjudicative proceeding by the tribunal, even if the parties do not agree with the outcome. *Id.* As the court explained:

> There is no reason for such an exception. On the contrary, the opposite rule would discourage resolution of disputes in mid-arbitration. Parties who initiate arbitration under the [arbitral court] might be less willing to settle, were the implication of a settlement that the resulting Award would lose its enforceability under the New York Convention. There is indeed limited law on this point, presumably because Awards achieved following the parties' consent are less likely to result in later disputes. But the limited available precedents reflect recognition and enforcement of Awards entered into based on stipulations by the parties.
> *Id.*

The analysis in *Albtelecom* is thorough and persuasive. This court reaches a similar result. The parties in this case did not dismiss the arbitration. Rather, they opted to continue the arbitration proceedings even after they came to their own agreement. While the tribunal did not make findings or reach legal conclusions, it made an award that bound the parties, within its power. (Docket Entry No. 25-1 at 7-9). No binding or persuasive statutory language or case law requires a court to hold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention. As the *Albtelecom* court noted, this rule would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide.

Erin Energy cites the London Court of International Arbitration rules, but they hurt, not help, its argument. Rule 26.2 states that "any award" made by the tribunal must be in writing "and, *unless all parties agree in writing otherwise*, shall state the

> reasons upon which such award is based." (Docket Entry No. 28 at 3 (emphasis added)). Rule 26.9 states that a consent award "need not contain reasons." *Id.* Erin Energy argues that an "award" cannot be a consent award because Rule 26.2 requires *any* award to contain reasons and Rule 26.9 permits consent awards without reasons. But Erin Energy ignores the punctuation in Rule 26.2 and the text of Rule 26.9. "Unless all parties agree in writing otherwise" in Rule 26.2 refers to consent awards, confirmed by the procedure in Rule 29.2. "In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the *settlement if the parties jointly so request in writing . . . .*" *Id.* (emphasis added). Rule 26.2, in other words, states that all awards, except for consent awards, must state the reasons the award is based on. The rules make no distinction between consent awards and other arbitral awards.
>
> Because the consent award made by the London Court of International Arbitration is subject to the Convention, this court has subject-matter jurisdiction under *9 U.S.C. § 203* to confirm the arbitral awards in this case."

17. It was then contended that the objection based on economic duress is not only misconceived but clearly contrary to the record itself. Mr. Mehta submitted that, undisputedly, the respondents were duly represented by counsels at all stages of the proceedings before the Arbitral Tribunal. It was also contended that the Arbitral Tribunal had itself and upon the receipt of the Settlement Agreement circulated a draft award for the consideration of parties and in response to which the respondents did not raise any objection at any stage. The attention of the Court was also drawn to the specific recitals appearing in the Settlement Agreement itself and which in Clause 11.2 states that parties had clearly and in unequivocal terms consented to the Settlement Agreement being incorporated into an Arbitral Award. It

was also pointed out that Clause 11.2(a) further records that parties had received independent legal advice on the matter including advise with respect to the position as would obtain under Indian law. Mr. Mehta laid emphasis on Clause 11.2(a) specifically recording parties acknowledging that the ultimate Award would be enforceable on its terms and that it would not fall foul of Section 48 of the 1996 Act. Mr. Mehta then took the Court through Clause 15.1 and 15.2 of the Settlement Agreement and to the recitals appearing therein and which clearly purport to record the understanding of respective parties that the same constituted the entire agreement and that both parties had also conceded and admitted to the factual position of the Settlement Agreement having been arrived at after due negotiations and ultimately drafted jointly by both sides. In view of the aforesaid, it was Mr. Mehta's submission, that the argument based on economic duress is liable to be outrightly rejected.

18. The Court firstly taking note of the submissions addressed on the issue of a consent award and whether it would fall within the ambit of the Convention. Undisputedly, the Convention does not specifically define the expression *"arbitral awards"*. The word *"award"* as would be evident from Article I of the Convention, is principally recognised as being a decision rendered in the backdrop of differences that may have arisen between persons. Article I contemplates arbitral awards to be not only those that may be rendered by arbitrators appointed for each case but also those that may be

rendered by institutions. Article V deals with the subject of recognition and enforcement of awards. The said Article reads thus: -

> "**Article V**
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

19. As would be evident from the aforesaid extract, a consent award is neither specifically excluded from its ambit nor does Article V declare that an award that may be drawn on the basis of a settlement between parties would not fall under the Convention. While it may be true that the suggestions mooted by the Federal Republic of Germany

and Austria did not ultimately translate into specific provisions being engrafted in the Convention, this Court finds the same to be a circumstance wholly insignificant for the purposes of answering the question that stands posited. Regard must be had to the fact that the Convention desists from defining the expression "award" itself. The various Articles of the Convention clearly indicate arbitration being recognised as a dispute resolution mechanism which may be adopted once disputes arise between the parties. Thus, what triggers the arbitral process is the existence of disputes.

20. However, no Article of the Convention proscribes arbitral proceedings from being brought to a close once parties arrive at a settlement. All settlements and agreements that may come into being could thus be adopted by an Arbitral Tribunal for rendering an effective quietus to the disputes that existed. The adoption of the terms of the settlement in the Award is a measure aimed primarily at ensuring that it binds parties, makes it enforceable in law and thus transcend beyond and above a mere private agreement between the parties.

21. As has been succinctly observed in *Albtelecom* and *Transocean*, while a settlement drawn outside arbitral proceedings may be distinguished from consent terms coming to be struck once arbitral proceedings had commenced, there exists no justification to construe the provisions of the Convention as being inapplicable to consent awards. Both *Albtelecom* as well as *Transocean* allude to the absence

of precedent or material which may have lent support to the contention that a consent award is a concept which is wholly alien to the Convention. The Court thus finds no justification to take a view contrary to that expressed in *Albtelecom* and *Transocean*.

22. The submission addressed in this regard may also be tested on the ground of larger public policy as recognised across jurisdictions. Undisputedly, the 1996 Act engrafts specific provisions for settlement terms being given the form of an arbitral award. In fact, Section 30(4) clearly stipulates that an arbitral award on agreed terms shall have the same status and effect as any other award on the substance of the dispute. Sub section (4) is essentially a reiteration of the well settled principle of Indian jurisprudence that a decree drawn on consent operates with equal vigour and stands on the same pedestal as a decree which may ultimately come to be drawn upon due contest.

23. The Court then notes that parties had in unambiguous terms agreed upon the arbitration being governed by the **ICC Arbitration Rules**. Article 33 of those Rules specifically deals with the subject of award by consent. The said Article is reproduced hereinbelow: -

> **"Article 33: Award by Consent**
> If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so."

24. The concept of an award incorporating the terms of settlement and to be rendered on consent also find resonance in various other

statutory enactments and institutional rules. Undisputedly, the **Arbitration Act of 1996**[12] of the United Kingdom too contemplates parties arriving at a settlement in the course of arbitral proceedings and the same culminating in the rendering of an award by consent. This is evident from Section 51 of the English Act, which is reproduced hereinbelow: -

> "**51 Settlement.**
>
> (1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.
> (2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.
> (3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.
> (4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.
> (5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply."

25. Undoubtedly, the **UNCITRAL Model Law on International Commercial Arbitration**[13] too incorporates provisions for an award being rendered on consent. In fact, Section 30 of the 1996 Act is a reiteration of the model law provisions. Article 30 of the Model Law is reproduced hereinbelow:-

> *"Article 30. Settlement*
>
> (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral

[12] English Act
[13] Model Law

tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case."

26. Insofar as institutional rules are concerned, the Court takes note of Article 26.9 of the **Arbitration Rules** framed by the **London Court of International Arbitration**[14], which reads as under: -

"**26.9** In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing (a "Consent Award"), provided always that such Consent Award shall contain an express statement on its face that it is an award made at the parties' joint request and with their consent. A Consent Award need not contain reasons or a determination in relation to the Arbitration Costs or Legal Costs. If the parties do not jointly request a Consent Award, on written confirmation by the parties to the LCIA Court that a final settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded by the LCIA Court, subject to payment by the parties of any outstanding Arbitration Costs in accordance with Articles 24 and 28."

27. Similar provisions stand incorporated in the **International Convention on the Settlement of Investment Disputes between States and Nationals of Other States** [15]**Arbitration Rules** in terms of Rule 55, which is reproduced hereinbelow: -

"Rule 55
Settlement and Discontinuance by Agreement of the Parties

[14] LCIA
[15] ICSID

> (1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.
> (2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:
> (a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or
> (b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.
> (3) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal."

28. The **Singapore International Arbitration Centre**[16] in the **SIAC Rules** adopts similar provisions as would be evident from a reading of Rule 32.10 which reads as follows:-

> "32.10 In the event of a settlement, and if the parties so request, the Tribunal may make a consent Award recording the settlement. If the parties do not require a consent Award, the parties shall confirm to the Registrar that a settlement has been reached, following which the Tribunal shall be discharged and the arbitration concluded upon full settlement of the costs of the arbitration."

29. The **International Council for Commercial Arbitration**[17] in its **"Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges"** expresses the following opinion on the meaning to be ascribed to arbitral decisions:-

> "Consequently, the following arbitral decisions qualify as awards:
> – Final awards, i.e., awards that put an end to the arbitration. An award dealing with all the claims on the merits is a final award.

[16] SIAC
[17] ICCA

> So is an award denying the tribunal's jurisdiction over the dispute submitted to it;
> – Partial awards, i.e., awards that give a final decision on part of the claims and leave the remaining claims for a subsequent phase of the arbitration proceedings. An award dealing with the claim for extra costs in a construction arbitration and leaving claims for damages for defects and delay for a later phase of the proceedings is a partial award (this term is sometimes also used for the following category, but for a better understanding, it is preferable to distinguish them);
> – Preliminary awards, sometimes also called interlocutory or interim awards, i.e., awards that decide a preliminary issue necessary to dispose of the parties' claims, such as a decision on whether a claim is time-barred, on what law governs the merits, or on whether there is liability;
> – Awards on costs, i.e., awards determining the amount and allocation of the arbitration costs;
> – Consent awards, i.e., awards recording the parties' amicable settlement of the dispute."

30. The **UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards** while dealing with consent awards observes as follows: -

> *"d. Consent awards*
> 36. The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue."

Insofar as the understanding of the legal position and as contained in the aforenoted guide is concerned, the Court only observes that it does not appear to take into consideration the decisions rendered in *Albtelecom* and *Transocean*. In fact, this was an aspect which was duly noted by the court rendering judgment in *Transocean*.

31. **REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, SIXTH EDITION** explains the concept of a consent award in the following terms: -

> **"(e) Consent awards and termination of proceedings without an award**
>
> **9.34** As in litigation in national courts, parties to an international arbitration often arrive at a settlement during the proceedings. Where this occurs, the parties may simply implement the settlement agreement and thus revoke the mandate of the arbitral tribunal. This means that the jurisdiction and powers conferred on the arbitral tribunal by the parties are terminated.
>
> **9.35** In many cases, however, the parties find it desirable for the terms of settlement to be embodied in an award. There are many reasons for this. The most important is that it is usually easier for a party to enforce performance by the other party of a future obligation if chat obligation is contained in an award (in respect of which the assistance of the New York Convention may be available), rather than to take further steps to enforce a settlement agreement. Other reasons for obtaining a consent award include the desirability (particularly where a state or state agency is involved) of having a definite and identifiable 'result' of the arbitral proceedings, in the form of an award, which may be passed to the appropriate paying authority for implementation. In this context, the signatures of the arbitrators on the consent award indicate a measure of approval by the arbitral tribunal to the agreement reached by the parties. Thís may help to meet politically motivated criticism of those responsible for taking the decision to reach a compromise settlement.
>
> **9.36** There should be little or no problem as far as capacity to compromise is concerned. Many countries adopt as their definition of matters that are capable of resolution by arbitration (that is, matters that are `arbitrable') the concept that parties may refer to arbitration any disputes in respect of which they are entitled to reach a compromise. The reverse holds good: if parties are entitled to refer a dispute to arbitration, they are entitled to reach a compromise in respect of the dispute.
>
> **9.37** No restrictions are imposed by national law, or international or institutional rules of arbitration, to the effect that, once arbitral

proceedings have been commenced, the parties cannot terminate them by agreement. On the contrary, a settlement is invariably welcomed, and it may be possible to have it recorded in an agreed award, Article 30 of the Model Law provides for such an agreed award; Article 36(1) of the UNCITRAL Rules provides for a settlement to be recorded by an order or by an award:

> If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms, The arbitral tribunal is not obliged to give reasons for such an award.

The ICC Rules contain a similar provision, at Article 32, if the parties reach a settlement, after the file has been transmitted to the arbitral tribunal in accordance with Article 13, then the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so. The word 'shall' is mandatory and suggests an oblígation to record any settlement in a consent award. However, it is qualified by the requirements that the parties must request such an award and the tribunal must agree to it. This indicates that, under the UNCITRAL and 1CC Rules, there is no obligation for either the parties or the tribunal to make a consent award.

9.38 Under whatever rules the parties are proceeding, however, it would be a normal act of courtesy to inform the arbitral tribunal (and the appropriate arbitral institution, if one is involved) of any settlement agreement reached between the parties, particularly if meetings or hearings have already been held. There may also be sound financial reasons for doing what normal courtesy demands. First, notifying the arbitral tribunal of a settlement will ensure that it does not incur further fees and expenses (other than any cancellation fees that may have been agreed), Secondly, such notification might lead to a refund of advance payments made to cover fees and expenses, since the actual costs incurred may well be less than expected if the case has been settled without a hearing. Thirdly, as already indícated, it is desirable to put the terms of settlement into an enforceable form when there is an element of future performance. Although most settlements involve immediate implementation of the agreed terms, it is nevertheless not unusual for there to be provisíon for

payment by instalments, or for some future transaction between the parties to be carried out.

9.39 A question occasionaly arises as to the role of an arbitral tribunal that is requested by the parties to make a consent award ordering the performance of an unlawful act. Examples might be the manufacture of an internationally banned drug, or these smuggling of contraband or-perhaps more realisticaly-an agreement that manifestly contravenes relevant competition or antitrust laws. At one time, various sets of rules (including the ICC Rules prior to 1998) seemed to leave the tribunal with no discretion, but modern rules and legislation permit the arbitral tribunal to refuse to make a consent award."

32. The Court, consequently, comes to the firm conclusion that the argument of a consent award not falling within the scope of the Convention merits rejection. There clearly appears to be unanimity across jurisdictions to accept the possibility of awards being rendered based upon a settlement that may be arrived at between the parties. The only distinction that the decisions in *Albtelecom* and *Transocean* recognise is of settlements entered into prior to initiation of arbitration proceedings and those which may be arrived at during the course thereof. There thus appears to be no legal justification to hold that consent awards are either not liable to be recognised or are unenforceable. In light of unanimity of opinion on the subject across jurisdictions and which has been duly adopted and incorporated in the 1996 Act, the Court finds that the Award cannot possibly be said to be contrary to the public policy of India.

33. The Court also bears in mind the special care that the Arbitral Tribunal clearly appears to have conferred upon the settlement before

proceeding to confer upon it the status of an Award. The Arbitral Tribunal had duly circulated a draft award and invited the comments of respective sides. It was only once those responses were received that it proceeded to pronounce the Award formally. The respondents had undisputedly vide their email of 04 September 2020 expressed their consent for the Tribunal to proceed in terms of the settlement. The objections raised on this score are for reasons aforenoted rejected.

34. That takes the Court then to consider the argument of economic duress. As was rightly contended by Mr. Mehta, the respondents were duly represented by counsels before the Arbitral Tribunal at all stages of the proceedings which were drawn. The fact that the settlement terms were drawn after parties had obtained independent legal opinion is a fact which stands clearly recorded in the Settlement Agreement itself. The Arbitral Tribunal too had been cautious to obtain the opinion and consent of parties before proceedings to adopt the Settlement Agreement and give it the form of an Award. It becomes pertinent to note that at no stage prior to the filing of the present objections had the respondents taken the plea of economic duress or coercion.

35. The concept of duress and its relationship with the formation of contracts was lucidly explained by the Privy Council in its decision in **Pao On And Lau Yiu Long,**[18] in the following terms: -

> "**The third question**

[18] [1980] A.C. 614

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent." This conception is in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] A.C. 104, 121 by Lord Wilberforce and Lord Simon of Glaisdale - observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Horner* [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not.

In the present case there is unanimity amongst the judges below that there was no coercion of the first defendant's will. In the Court of Appeal the trial judge's finding (already quoted) that the first defendant considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real was upheld. In short, there was commercial pressure, but no coercion. Even if this Board was disposed, which it is not, to take a different view, it would not substitute its opinion for that of the judges below on this question of fact.

It is, therefore, unnecessary for the Board to embark upon an inquiry into the question whether English law recognises a category of duress known as "economic duress." But, since the question has been fully argued in this appeal, their Lordships will indicate very briefly the view which they have formed. At common law money paid under economic compulsion could be recovered in an action for money had and received *Astley v. Reynolds* (1731) 2 Str. 915. The compulsion had to be such that the party was deprived of "his freedom of exercising his will" (see p. 916). It is doubtful, however, whether at common law

> any duress other than duress to the person sufficed to render a contract voidable: sec *Blackstone's Commentaries*, Book 1, 12th ed. pp. 130-131 and *Skeate v. Beale* (1841) 11 Ad. & E. 983. American law (*Williston on Contracts*, 3rd ed.) now recognises that a contract may be avoided on the ground of economic duress. The commercial pressure alleged to constitute such duress must, however, be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: *Williston on Contracts*, 3rd ed., vol. 13 (1970), section 1603. American judges pay great attention to such evidential matters as the effectiveness of the alternative remedy available, the fact or absence of protest, the availability of independent advice, the benefit received, and the speed with which the victim has sought to avoid the contract. Recently two English judges have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable: Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293 and Mocatta J. in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* [1979]3 W.L.R. 419. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordships' view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act."

36. "Duress" as per the principles enunciated in *Pao On* could be raised as a ground to resile from a contract provided a party is able to establish that the coercion was of such a degree which would lead one to conclude that the consent of the victim to the contract was not a voluntary act. It is ultimately the obligation of the victim to establish that coercion clearly vitiated consent itself.

37. This aspect also fell for consideration of a learned Judge of our Court in **Sara International Limited versus Rizhao Steel Holding Group Company Limited**[19] where the principle of economic duress was explained as comprising of elements of coercion and the same being established to taint the consent itself. *Sara International* assumes added significance for our purposes since it also holds that parties having failed to raise an objection of economic duress at the first available opportunity or where it is shown that consent was arrived at upon due consideration and on receipt of legal advice, an allegation of economic duress would not sustain. The Court deems it apposite to refer to the following passages from the aforenoted decision:-

> **"20.** Mr. Vasisht submits that commercial contracts can be avoided on the ground of economic duress if facts of the case justify such a decision. He points out that this Court in *Double Dot Finance Limited* v. *Goyal MG Gases Limited*, 2005 (117) DLT 330, held that there was no economic duress and the said order was upheld by a Division Bench of this Court in *Goyal MG Gases Limited* v. *Double Dot Finance Limited*, 2009 (2) Arb LR, 655.
>
> **21.** He further points out that in *Unikol Bottlers Ltd.* v. *Dhillon Kool Drinks*, AIR 1995 Delhi 25, (Paragraphs 31 to 37), the concept of economic duress was discussed in detail and was recognized, but once again the Court, in the facts of that case, did not find any economic duress. The learned Single Judge in the said case observed, "……*while dealing with the question of duress/coercion and unequal bargaining power one is really concerned with the question of free will, i.e. did not parties enter into the agreement with a free will? It is the plaintiff who has raised the question of its will being dominated by the defendants and, therefore, not being a free agent. Therefore, the plaintiff is*

[19] 2013 SCC OnLine Del 2236

on test. It has to be ascertained whether the plaintiff exercised a free will or not while entering into the Supplemental Agreement. For this purpose there are several factors which need to be looked into. They are-

1. Did the plaintiff protest before or soon after the agreement?

2. Did the plaintiff take any steps to avoid the contract?

3. Did the plaintiff have an alternative course of action or remedy? If so, did the plaintiff pursue or attempt to pursue the same?

4. Did the plaintiff convey benefit of independent advice?"

22. After hearing learned counsel for the plaintiff and the amicus curiae, this Court is of the opinion that the necessary ingredients to successfully avoid a contract on the ground of economic duress claim are : -

(a) Pressure which is illegitimate;

(b) Its effect on the victim i.e. that the pressure must be a significant cause inducing the Claimant to enter into the contract;

(c) Lack of reasonable alternative i.e. that the practical effect of the pressure was that there is compulsion on, or a lack of practical choice for, the victim.

23. A Court while deciding an issue of economic duress has also to keep in mind whether there was protest by the victim before or soon after the impugned contract and whether the victim had benefit of independent advice.

24. It is pertinent to mention that in *DSND Subsea Ltd.* v. *Petroleum Geo Services ASA* 2000 WL 1741490, the Court observed that "*Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.*"

25. In *CTN Cash and Carry Ltd.* v. *Gallaher Ltd.* [1994] 4 All ER 714, the Court stated that the fact that the Defendant was in a monopoly position as the sole distributor of popular brands of cigarettes was irrelevant and could not convert what was not otherwise duress into duress since the common law does not recognise the doctrine of inequality of bargaining power in commercial dealings. Steyn LJ in the case observed, "*I also readily accept that the fact that the defendants have used lawful means does not by itself remove the case from the scope of the doctrine of economic duress……..On the other hand, Goff and Jones The Law of Restitution (3rd edn, 1986) p 240 observed that*

> *English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress……. Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'. But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress."*

38. Reverting to the facts of the present case and those which have been noticed hereinabove, however, leads this Court to come to the irresistible conclusion that the allegation of economic duress and coercion is clearly an afterthought and a feeble attempt to renege from the terms of the consent Award. The said objection, for all the aforesaid reasons thus fails and stands negated. The Court thus comes to the firm conclusion that the Award is clearly enforceable and does not fall foul of any of the negative stipulations that stand incorporated in Section 48 of the 1996 Act.

39. The objections to the recognition and enforcement of the foreign award stand rejected. Ex. Appl. (OS) 3525/2022 be now placed before the appropriate Court for taking further steps for execution of the Award.

40. List before the roster Bench on 27.07.2023.

YASHWANT VARMA, J.

MAY 30, 2023 / SU