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

% *Judgment Delivered on: 21.09.2026*

\+ **CS(COMM) 1006/2025**

NAYARA ENERGY LIMITED .....Plaintiff

Through: Mr. Rajiv Nayar and Mr. Dayan Krishnan, Sr. Advs. with Mr. Adarsh Ramanujan, Mr. Anukrit Gupta, Mr. Arihant Jain, Ms. Ayushi Saxena and Mr. Shreyas Maheshwari, Ms. Manjira Dasgupta, Mr. Dev Singh, Mr. Krishnakant and Ms. Pragya D., Advs.

versus

SAP INDIA PRIVATE LIMITED & ANR. .....Defendants

Through: Mr. Susmit Pushkar, Mr. Anchit Oswal, Mr. Gaurav Sharma and Ms. Roshni Srivastava, Advs. for D-1.
Mr. Madhav Suri and Ms. Akanksha Singh, Advs. for D-2.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J

I.A. 23754/2025 (*under Order XXXIX Rules 1 and 2 read with Section 151 CPC by plaintiff*)

1. The plaintiff has filed the present application seeking following reliefs:

> *"(a) An ex parte ad interim order directing Defendant No. 1 to* restore *full and uninterrupted access to the SAP Marketplace and the OSS (Online Service System), available at https://service.sap.com, as existed prior to July 24, 2025.*
>
> *(b) An ex parte ad interim order directing Defendant No. 1 to provide all necessary SAP hardware keys for new hardware installation, as well as the SSCR (Software Change Registration) keys for customization or migration of the SAP Software installed by the Plaintiff pursuant to the Agreements, thereby restoring the status as it stood before July 24, 2025.*
>
> *(c) An ex parte ad interim order directing Defendant No.1 to reinstate SAP support services in the form of availability of SAP's functional and technical expert, as provided prior to July, 24,2025, including for timely resolution of incidents.*
>
> *(d) An ex parte ad interim order restraining Defendant No. 1, including its partners, agents, assigns, and all individuals acting on their behalf, from interfering in any manner with the Plaintiff's right to access and continued use of the SAP Software and Services provided under the Agreements, including but not limited to Order Form 1, Order Form 2, Order Form 3, and the SAP Delivered Support Agreement."*

FACTUAL MATRIX

2. Plaintiff herein, namely Nayara Energy Limited (formerly known as Essar Oil Limited), is a company duly incorporated under the provisions of the Companies Act, 1956, operating a large-scale oil refinery and managing a network of retail fuel outlets across the country.

3. Defendant no. 1**,** SAP India Private Limited, is a company duly

incorporated under the Companies Act, 1956, and is principally engaged in the business of providing comprehensive business software solutions and technology services to enterprises across various industry sectors, whereas defendant no. 2 is arrayed as a proforma party in the present suit, being a 'partner' company of defendant no. 1, engaged in providing certain services to the customers of defendant no. 1.

4. The genesis of the contractual relationship between the plaintiff and defendant no. 1 lies in the SAP Software End-User Value License Agreement dated 17.08.2004 (in short **'EULA'**) executed between defendant no. 1 and Essar Steel India Limited (in short **'Essar Steel'**).

5. Under the terms of the EULA, defendant no.1 granted non-exclusive licenses (Perpetual in nature) to Essar Steel and its authorized affiliates for the use of specified SAP software products, subject only to the standard terms of payment and usage restrictions.

6. Thereafter, pursuant to Section 10 of the EULA, Essar Steel and Essar Oil Limited (subsequently renamed as Nayara Energy Limited i.e. the Plaintiff herein) sought and duly obtained the explicit consent of defendant no. 1 to assign all rights, benefits, and obligations under the EULA to Essar Oil Limited. This assignment was formalized through an Assignment Agreement dated 22.06.2017, made effective from 01.01.2017 (**'Assignment Agreement'**), executed between defendant no. 1, Essar Steel, and Essar Oil Limited.

7. Specifically, Clause 1 of the Assignment Agreement transferred the software license, encompassing all associated rights and benefits, to Essar Oil, thereby ensuring the continuity of the core software ecosystem, while

Clause 3 thereof obligated defendant no. 1 to provide ongoing support services in strict accordance with the SAP Support Schedule.

8. Subsequently in the year 2018, Essar Oil Limited was renamed as Nayara Energy Limited (the present plaintiff), with the plaintiff acquiring all rights under the Assignment Agreement dated 22.06.2017, that was previously assigned to erstwhile Essar Oil Limited.

9. Consequently, the EULA and the subsequent Assignment Agreement established the plaintiff as the sole beneficiary of the license rights, which presently form the fundamental bedrock of the plaintiff's operational framework.

10. In order to operationalize the assigned licenses and to procure additional software products alongside support services, the parties executed a series of Software License and Support Agreements, designated as **"Order Form"**. This was done pursuant to Clause 5 of the Assignment Agreement. Pertinently, three Order Forms were executed, which are as follows: (i) Order Form 1 dated 22.06.2017; (ii) Order Form 2 dated 16.11.2017; and (iii) Order Form 3 dated 07.06.2020.

11. Notably, Order Form 1 dated 22.06.2017 explicitly incorporated the General Terms and Conditions for SAP Software and Support (in short **'GTC'**) [2014 version] as a binding legal framework. However, the subsequent two Order Forms expressly stipulate that they shall be governed by the GTC as well as the SAP Enterprise Support Schedule (in short also referred to as **'Support Schedule'**).

12. The support services as enumerated in the Support Schedule encompass critical assistance from the technical experts of defendant no. 1

for resolving operational queries, system troubleshooting, and maintaining exigencies.

13. Subsequently, the parties executed SAP Delivered Support Agreement on 29.03.2019 (in short **'Delivered Support Agreement'**), which provisioned for supplementary support services, including access to the SAP Support Portal, Online Service System (OSS) notes, software patches, license key generation, and expert assistance through its 'partner' i.e. defendant no.2.

14. Over the years, specifically since 2017, the commercial implementation of the aforementioned licenses and support obligations has been seamlessly managed through Annual Work Orders, issued by the plaintiff and duly accepted by defendant no. 1. Importantly, these Work Orders facilitate as annual payments exclusively for the support services, which are entirely distinct from the software licenses themselves. In this sequence, the last Work Order bearing no. 4300029516 was issued and accepted by defendant no.1 for the period 01.01.2025 to 31.12.2025, and payment therefor was duly made by the plaintiff.

15. On 24.07.2025, the plaintiff was entirely denied access to the SAP Support Portal (the **'SAP Marketplace'**), through which support services are being provided against various licenses and other software products issued to the plaintiff. Specifically, at 13:24 hours on 24.07.2025, an agent of defendant no. 1 informed the plaintiff that the license had been rendered inactive citing an alleged 'export issue'.

16. Subsequently, at 16:13 hours on the same day, the defendant no.1's Global Export Control Team invoked sanctions under Council Implementing

Regulation (EU) 2025/1476 (dated 18.07.2025), amending Regulation (EU) No 269/2014, declaring business with the plaintiff "prohibited". Thereafter, plaintiff's full access to the SAP Marketplace was blocked.

17. On 29.08.2025, frustrated by the unilateral and abrupt withdrawal of SAP Support Services, the plaintiff issued an email to the defendant no. 1 requesting them to immediately resume the Support Services as per the terms agreed upon, considering the fact that advance payment was already made by the plaintiff.

18. However on 02.09.2025, to the utter shock of the plaintiff an email was received from the defendant no. 1 stating that in light of the addition of the plaintiff to the EU Sanctions list (at serial no. 639) by the Council of the European Union under EU Council Regulation No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, the defendant no.1, as an EU headquartered company, is compelled to take immediate steps to ensure compliance with these applicable laws and regulations.

PLAINITFF'S SUBMISSION

19. Mr. Dayan Krishnan, learned Senior counsel on behalf of the plaintiff submits that the actions of defendant no. 1 constitute a blatant violation of the contractual obligations agreed between the parties. He submits that the core grievance in the present matter pertains to the sudden and unjustified withdrawal of essential SAP support services.

20. According to him the sudden and unilateral suspension of the plaintiff's access to the SAP support services, without any prior notice or discussion by defendant no. 1 on the basis of plaintiff's alleged inclusion in

the EU Sanction list, is a violation of the defendant's contractual obligations.

21. Elaborating on the above submission, he submits that this unilateral suspension is *ex facie* wrongful, in terms of their contractual agreement as delineated in the GTC, that was entered into between the plaintiff and defendant no. 1. He submits that Clause 12.5 of the GTC contains an express governing law provision that eliminates any possibility of EU Sanctions overriding the parties' obligations.

22. He further submits that Clause 12.5 of the GTC operates at two levels. Firstly, it designates Indian law as the governing law by explicitly mentioning that *"any claims arising out of or relating to this Agreement and its subject matter shall be governed by and construed under the laws of the Republic of India."* Secondly, it contains an express overriding provision which states that *"In the event of any conflicts between foreign law, rules, and regulations, and Indian law, rules, and regulations, Indian law, rules, and regulations shall prevail and govern."*

23. He submits that in the backdrop of Clause 12.5 of GTC providing that laws of India will govern the GTC and any claims arising therefrom, the suspension would be a violation of the contractual obligations as India has imposed no sanctions on the plaintiff, nor prohibited the rendering of services by the defendants to the plaintiff.

24. He further submits that Ministry of External Affairs, Govt. of India had issued a Press Release in response to media queries regarding EU sanctions, wherein it has been stated by the Official Spokesperson of the said Ministry that *"India does not subscribe to any unilateral sanction measures"*. In the light of this, he submits that as the stand taken by India is

neutral, there is therefore no ground for defendant no. 1 to go against Clause 12.5 and unilaterally suspend the support services that were being offered to the plaintiff by defendant no. 1.

25. Furthermore, he submits that the other Clause 12.4 of the GTC as well, which provides for "Regulatory Matters", cannot offer any protection to the defendant no. 1 for cessation of support services to the plaintiff, and cannot be interpreted to permit the invocation of Foreign Sanctions as the term "SAP Support", which is a defined term in the GTC, is conspicuously absent from the said clause.

26. Moreover, he submits that Clause 12.4 is a standard boilerplate provision and must be construed in context, not in isolation. Clause 12.5 is the governing law clause, which expressly stipulates that Indian law governs the agreement and subordinates all foreign legal regimes - including EU sanctions - to Indian law. According to Mr. Krishnan any interpretation of Clause 12.4 that permits defendant no. 1 to invoke foreign sanctions to excuse performance would directly contradict and nullify Clause 12.5, rendering it meaningless, therefore, the two Clauses should be read harmoniously.

27. Mr. Krishnan, referring to other agreements i.e. Order Forms executed between the parties, submits that these valid and subsisting Order Forms create an unconditional, continuing obligation to provide SAP Enterprise Support services pursuant to Clause 3 thereof, which could not be arbitrarily paused. He further submits that these are not discretionary undertakings; they are enforceable contractual commitments for which defendant no. 1 has received substantial consideration totalling Rs. 63,64,61,060/- in the past

decade, only for providing support services.

28. He submits that all the three Order Forms entered between the parties have a Preamble Clause, in which it is explicitly provided that the Order Form 1 will be governed by the GTC and subsequently Order Form 2 & 3 will be governed by the GTC and SAP Support Schedule. He further submits that as the governing laws in the GTC is India, therefore, no right exists for defendant no. 1 to terminate the support services on the basis of EU Sanctions.

29. As regards another agreement namely, Delivered Support Agreement dated 29.03.2019, Mr. Krishnan submits that it does not govern the entire ambit of support services provided by defendant no. 1 to the plaintiff but was executed for a limited and specific purpose, namely, to procure certain third-party modules (4 Modules) listed in Schedule I of the Delivered Support Agreement, as provided by the partner of defendant no. 1.

30. He submits that Clause 1.1.7 of the Delivered Support Agreement expressly defines *"Partner"* as *"Avaali Solutions Private Limited"*, who has been arrayed as defendant no. 2.

31. He submits that there is one fundamental difference between the Delivered Support Agreement and the Order Forms i.e. in the Order Forms, the services were directly being provided by defendant no. 1 itself, whereas in the case of the Delivered Support Agreement, services/modules mentioned in the Schedule I thereof were being supplied through Avaali Solutions Private Limited (defendant no. 2), SAP's authorized partner. He submits that since these third-party modules were being purchased through SAP's authorized partner, therefore, the same were not incorporated into the

Order Forms, which govern only direct purchases from defendant no. 1.

32. Elaborating on this fundamental distinction, he submits that under the Delivered Support Agreement for the four (04) third-party modules as per Clause 2 of the agreement the fee payable per year is minuscule amount of Rs. 23 lakhs (approx.), whereas the support fees mentioned in the schedule of all three Order Forms collectively comes to Rs. 63,64,61,060/- approx. for the past decade. Therefore, it cannot be assumed that the Delivered Support Agreement governs the entirety of SAP Enterprise Support provided to the plaintiff.

33. In the backdrop of this, Mr. Krishnan submits that as the Delivered Support Agreement is not the mother document, therefore, the term "export law" as defined under Clause 1.1.5 won't be applicable to other agreements with defendant no.1.

34. Without prejudice, he submits that even Clause 13.6 of the Delivered Support Agreement mentions laws of India as the governing law to the exclusion of international law of conflicts, therefore, the principles of foreign law would be no excuse for non-performance of defendant no.1's contractual obligations.

35. He submits that even Clause 13.5 of the Delivered Support Agreement does not support the suspension of services by defendant no. 1 on account of the EU sanctions, inasmuch as Clause 13.5 is triggered only when "applicable Export Laws" interfere with the rendering of services. Elaborating on this, he submits that Clause 1.1.5 defines "Export Laws" to mean "trade sanctions" as well, in general terms to include any country in the world and not limited to only EU Sanctions.

36. He submits that given that services are being rendered to an Indian company within India, and Clause 13.6 mentions Indian laws as the governing law, therefore, the trade sanctions would necessarily imply sanctions imposed by India, but India has not put any trade sanctions on Russia. According to him, what logically flows from Clause 13.6 is that the EU sanctions have no force of law in India.

37. Moving to the next leg of his arguments, Mr. Krishnan submits that the foreign regulations i.e. the EU Regulation No. 269/2014, invoked to justify the suspension of support services, lacks jurisdictional authority over the present parties.

38. He submits that the EU Council Regulation No. 269/2014, under which the plaintiff company has been sanctioned, does not cover defendant no. 1 (SAP India) within its scope. Article 17 of the said EU Regulation, which explicitly outlines the jurisdictional scope, is reproduced herein below for the ease of reference:

> *"Article 17*
>
> *This Regulation shall apply:*
>
> *(a) within the territory of the Union, including its airspace;*
>
> *(b) on board any aircraft or any vessel under the jurisdiction of a Member State;*
>
> *(c) to any person inside or outside the territory of the Union who is a national of a Member State;*
>
> *(d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;*
>
> *(e) to any legal person, entity or body in respect of any business done in whole or in part within the Union."*

39. He submits that the scope, as delineated from Article 17(a) to Article 17(c), on its face does not include defendant no. 1. Further, with respect to Article 17(d), he submits that this provision would also not include defendant no. 1 within its scope, as defendant no. 1 (SAP India) was constituted under Indian laws and not EU laws. Article 17(e) would equally not include defendant no. 1 within its ambit, as the place of the performance of the various agreements is strictly situated in India.

40. Furthermore, he submits that the "Parties" defined in the first two Order Forms explicitly mentions that the agreement has been signed between the plaintiff's predecessor company (Essar Steel) and SAP India (defendant no. 1), with both entities having their registered offices in India. The "Parties" clause in Order Form 3 similarly mentions that the agreement has been signed between the plaintiff company (Nayara) and defendant no. 1 (SAP India), and both of them having their offices in India. Therefore, the contract that has been signed is entirely between two Indian companies who have their respective offices in India, the place of performance of the contract is unequivocally India, and the cause of action has arisen entirely in India. Accordingly, he concludes that the EU Sanctions are wholly inapplicable to the contract that is operating between the parties.

41. He submits that the plaintiff contracted with defendant no. 1 in India for support services to be delivered in India, and the plaintiff is not concerned with how defendant no. 1 organises its internal support service delivery. Any difficulties in the EU arising from defendant no. 1's reliance on its EU parent are extraneous and afford no defence to the Indian contract.

He submits that this reflects the fundamental principle of territorial sovereignty in international law, which dictates that no jurisdiction can impose its laws in another sovereign state's territory without consent.

42. In light of the above, he submits that permitting defendant no. 1 to invoke EU sanctions as a defence would constitute an impermissible extraterritorial application of EU law, which is entirely contrary to Indian sovereignty and the EU's own position on extraterritoriality.

43. He further submits that, while there are no direct precedents in India on the subject of foreign sanctions, UK Courts have consistently held that foreign law or foreign sanctions cannot excuse the performance of a contract under English law. He submits that UK Courts have established that the place of performance and the governing law of the contract are determinative, and not the location of related entities or preparatory steps. To buttress his contentions in this regard, he has placed reliance on the English Court decision of ***Libyan Arab Foreign Bank v. Bankers Trust, [1989] QB 728.***

44. Mr. Krishnan invites attention to FAQ No. 34 of the European Commission Consolidated FAQs, to submit that the answer to the said FAQ No.34 clarifies that scope of applicability of EU sanctions under EU Council Regulation No. 833/2014 as set out in Article 13 thereof, and explicitly states that the said EU sanctions do not apply extraterritorially. He submits that Article 13 is *pari materia* to Article 17 of the EU Council Regulation No. 269/2014, which has been invoked to justify the suspension of support services to the plaintiff. He further contends that FAQ 34 remains unamended, and is as recent as 08.09.2025.

45. He submits that the defendant no.1 is placing reliance on Article 15a that was inserted into EU Council Regulation No. 269/2014 through an amendment [Council Regulation (EU) 2025/390] dated 24 February 2025. Article 15a is reproduced herein below for ready reference:

> *"Article 15a*
>
> *Natural and legal persons, entities and bodies shall undertake their best efforts to ensure that any legal person, entity or body established outside the Union that they own or control does not participate in activities that undermine the restrictive measures provided for in this Regulation."*

46. According to Mr. Krishnan Article 15a would not be applicable for two reasons. *Firstly*, said Article has been inserted through an amendment and is therefore not applicable to a contractual obligation that is in existence for past many years. *Secondly*, Article 17 outlines the scope of the EU sanctions, which still remains unamended.

47. He thus, contends that the plaintiff has a strong *prima facie* case since the termination was illegal and not in consonance within the strict contractual obligations agreed between the parties. The remaining tests of irreparable harm and balance of convenience also weigh entirely in favour of the plaintiff.

48. He submits that the plaintiff faces catastrophic consequences, if the support services are not restored, inasmuch as mandatory regulatory compliances *qua* multiple regulatory authorities like PNGRB, CERT-In, the Ministry of Petroleum, and OISD mandate Disaster Recovery (DR) and business continuity frameworks for critical oil and gas infrastructure, would be impossible without such support services.

49. He further submits that without SAP support services, the plaintiff cannot implement DR systems requiring SAP-exclusive licenses and hardware keys. The non-compliance, according to him, exposes the plaintiff to regulatory penalties, license revocations, operational shutdowns, and legal liabilities – the consequences that cannot be remedied by damages.

50. He submits that without support, the plaintiff's SAP systems are vulnerable to unresolvable failures, security issues, bugs and errors without updates, and a lack of access to critical patches and technical help. He submits, that a recent Petroleum and Natural Gas Regulatory Board [PNGRB] Regulation dated 12.12.2025, which is on the subject of compliance of "Cyber Attack preparedness" has specifically, asked all refineries, to maintain a robust technical infrastructure, to prevent their operations getting stalled on account of any imminent Cyber Attack. PNGRB Regulation dated 12.12.2025, as brought on record by the plaintiff is reproduced herein below for ready reference:

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पेट्रोलियम एवं प्राकृतिक गैस विनियामक बोर्ड
Petroleum and Natural Gas Regulatory Board
ई-400, चतुर्थ तल, एनबीसीसी डब्लयूटीसी, नौरोजी नगर, नई दिल्ली – 110029
E-400, 4th Floor, NBCC WTC, Nauroji Nagar, New Delhi – 110029

PNGRB/Tech/18-Misc/(1)/2024-Part(1) (E-4909) **12th December 2025**

To,

Shri Prasad K Panicker
Executive Chairman
Nayara Energy Limited
5th Floor, Jet Airways Godrej BKC, Plot No. C-68,
G Block, Bandra Kurla Complex,
Bandra East, Mumbai - 400 051

Subject: Compliance on Cyber-Attack preparedness and mitigation for Refineries/LNG Terminals, under PNGRB ERDMP Regulations, 2010

Dear Sir,

With the increasing adoption of advanced technologies and the expanding digitalisation of operational processes across critical installations such as **Refineries and LNG terminals**, there has been a significant enhancement in real time monitoring, efficiency, reliability, and automation. However, this rapid expansion of digital footprints has simultaneously increased susceptibility to cyber threats that may impact operational continuity, safety systems, and supply reliability. It may be noted that, in recent years, a major Indian oil & gas entity faced a cyber compromise on its digital systems, and several global petroleum-sector installations have also experienced cyber intrusions and shutdowns due to malware/ransomware attacks, highlighting the real and evolving nature of such risks.

2. **In Clause 10.3 in the PNGRB Emergency Response and Disaster Management Plan (ERDMP) Regulations,** it is explicitly mentioned that 'Cyber Attack' shall be considered as one of the hazards while preparing the ERDMP and entities should have comprehensive prevention, mitigation, and response measures for Cyber-attacks. Considering this, it is imperative that entities maintain strict vigilance over cyber risks and ensure compliance as mandate in the clause above.

3. View above, you are requested to confirm if ***Cyber Attack*** has been considered as a Hazard in your ERDMP and whether the requisite preparedness & mitigation measures for handling such emergencies have been duly implemented, along with current status of cyber-security measures undertaken at your installations, such as cyber-security checks, periodic assessments, and deployment of protective controls to prevent malware, ransomware, unauthorised access or any such digital threats that may impact critical assets or process safety systems.

You are required to share the information by **19.12.2025.**

Yours faithfully

(Anjan Kumar Mishra)
Secretary

51. These vulnerabilities directly threaten plaintiff, who operates critical infrastructure serving 8% of India's energy needs. He also contends that the recent USA/Israel war with Iran has further raised the necessity to safeguard this critical infrastructure without disruption.

52. The plaintiff has absolutely no viable alternatives. There is no other source for SAP Enterprise Support, and migration to other ERP systems would take years and cost hundreds of crores, besides causing massive disruptions. Without SAP support services, the plaintiff cannot avail maintenance services even from third parties since SAP systems involve proprietary code inaccessible to third parties. He submits that no third-party support can match SAP's services, and the plaintiff's decade-long expenditure of Rs. 8,88,15,791/- annually reflects the indispensable nature of these services.

53. He further submits that restoring the support services imposes minimal or no inconvenience to the defendant no. 1/SAP India.

54. He submits that the present factual matrix warrants the extraordinary remedy of a mandatory injunction to prevent the plaintiff's substantive prayers from being rendered meaningless. According to him, the existing fact situation presents exceptional circumstances wherein, without such relief, the plaintiff's prayer would become entirely infructuous. He submits that, as an interim relief, the plaintiff specifically seeks the immediate restoration of the support services.

55. He submits that the plaintiff has clearly demonstrated: (1) a strong case for trial of a higher standard than a mere *prima facie* case; (2) a serious or irreparable injury that is not compensable by money; and (3) a balance of

convenience firmly favouring the plaintiff. In support of his contention, he places reliance on ***Dorab Cawasji Warden v. Coomi Sorab Warden (1990) 2 SCC 117*** and ***Deoraj v. State of Maharashtra, (2004) 4 SCC 697***, which was cited with approval in ***Hammad Ahmed v. Abdul Majeed, (2019) 14 SCC 1.***

56. Mr Rajiv Nayar, learned Senior counsel on behalf of the plaintiff additionally submits that, at its core, this case is not about software support, but rather it concerns whether an Indian contract governed by Indian law, performed in India, and paid for in India, may be suspended because a foreign government disapproves of the identity of an Indian customer. He submits that the plaintiff is an Indian company and is not a Russian subsidiary, as the Russian entity (Rosneft) owns less than 50% of the plaintiff's shareholding and does not control the board. Therefore, he submits that defendant no. 1's entire case rests on a single proposition: that a regulation framed by a foreign sovereign can relieve an Indian company of its contractual obligations owed to another Indian company.

57. Referring to the defence pleaded regarding a possible criminal exposure for defendant no.1 abroad, he submits that the threat of prosecution is not a valid defence. According to him, this Court may direct defendant no.1 to provide support without involving SAP Germany. He submits that operating under a judicial mandate of this Court completely negates such exposure.

58. Moreover, he submits that in a case in the UK Court, in which the defendant therein argued the risk of prosecution, citing the risk of prosecution on account of US sanctions, the UK Court held that there cannot

be a real prospect of prosecution when operating under a court order. The reliance was placed on the decision in ***O v C (2025) 1 All ER (Comm) 977*** to contend that therein the Court went on to hold that even risk of prosecution is not an absolute defence to contractual performance.

59. Elaborating further, he submits that this is not a routine commercial software dispute. The SAP system is the nerve centre for companies; it governs inventory, supply chain, compliance, and operational integrity at a major petroleum refinery, which forms a significant component of the national fuel supply chain. Therefore, it's disruption is not a private inconvenience, rather an industrial and economic risk.

60. Therefore, he submits that without support services, the system remains operational only until the first major failure, cyber vulnerability, or regulatory update. After that, he submits that the damage is immediate and irreversible.

DEFENDANT NO. 1 SUBMISSIONS

61. *Per contra*, Mr. Susmit Pushkar, learned counsel appearing on behalf of defendant no. 1, submits at the outset that the plaintiff company has been sanctioned under the EU Council Regulation No. 269/2014 dated 17 March 2014, which governs *"restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine"*.

62. He submits that Article 1(d) of the EU Council Regulation No. 269/2014 defines *"Economic Resources"* to mean assets of every kind, *"whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services."* He, therefore,

submits that support services are covered within the ambit of said definition being asset of intangible nature.

63. He further points out that Article 1(h) of the aforesaid Regulation defines the *"Territory of the Union"* to mean *"the territories of the Member States to which the Treaty is applicable, under the conditions laid down in the Treaty, including their airspace."* He submits that as services that are being provided, are not localised, i.e. services are not being provided through SAP India/defendant no. 1, but through its parent company i.e. SAP SE, therefore, the subject matter of support services would fall within the territory of Member State.

64. He contends that Article 2 of the aforesaid Regulation strictly mandates that all funds and economic resources belonging to, owned, held, or controlled by legal entities (or their associated bodies) listed in Annexure-I of the Regulation shall be frozen. Furthermore, no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of such legal entities. The name of the plaintiff finds mention in the updated Annexure-I, therefore, the support services being provided to the plaintiff company, were withheld.

65. He further elaborates that at serial no. 639 of Annexure-I to Regulation No. 269/2014, plaintiff company has been mentioned stating that it is an entity established in India and operating an important refinery in Vadinar, and is 49% owned by the Russian State oil company Rosneft, and a major refiner of Russian crude oil. He submits that the reason mentioned for putting plaintiff company under sanctions is that the energy sector, in particular the oil sector, is a sector providing substantial revenue to the

Russian Government, and the plaintiff is involved in an economic sector providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine.

66. He argues that Article 9 of the Regulation strictly prohibits Member States from participating, knowingly and intentionally in activities, the object or effect of which is to circumvent the prohibitions set out therein.

67. Responding to the plaintiff's submission that Article 17(e) of the EU Regulation No. 269/2014, is inapplicable due to the lack of extraterritorial effect, Mr Pushkar submits that this argument is entirely misplaced. He submits that, *firstly*, defendant no. 1 is not seeking an extraterritorial application of Article 17(e). *Secondly*, Article 17(e) clearly stipulates that the Regulation applies *"to any legal person, entity or body in respect of any business done in whole or in part within the Union."* Therefore, given that the services provided to the plaintiff are executed by defendant no.1's parent company, SAP SE, located in Germany, the place of performance is not wholly localized in India. Since the instrumentalities rendering the services are situated within the Union, a part of the business is undeniably conducted within the Union, bringing the contractual relationship squarely within the ambit of Article 17(e).

68. He further submits Article 15a was inserted into EU Council Regulation No. 269/2014 through an amendment [Council Regulation (EU) 2025/390] dated 24 February 2025, to address the need for enhancing the jurisdictional limits prescribed under Article 17 of the EU Council Regulation 269/2014. Explaining further, he argues that through insertion of

Article 15a, the obligations on entities within the EU were broadened, mandating that they ensure their subsidiaries outside the EU, which they own or control, do not engage in activities that undermine the sanctions.

69. Inviting attention to an expert legal opinion obtained by defendant no.1, Mr. Pushkar submits that the same further corroborates their stand that support services cannot be provided by defendant no. 1 and SAP SE in light of the EU Sanctions. He submits that this expert opinion remains uncontroverted by the plaintiff's own expert opinion.

70. He further submits that plaintiff's reliance on FAQ No. 34 of the European Commission Consolidated FAQs is fundamentally flawed, primarily for three reasons. *Firstly*, FAQ No. 34 is specific to EU Council Regulation No. 833/2014, and not EU Council Regulation No. 269/2014 under which the plaintiff has been sanctioned. *Secondly*, Questions 18 and 19 of the general guidelines on both the aforementioned EU Council Regulations, clarify that the prohibitions in both Regulations apply independently and must be complied with in parallel. It is expressly specified that the prohibitions under Regulation No. 269/2014 apply fully, and a party cannot rely on a derogation or exemption present in Regulation No. 833/2014. *Thirdly*, he submits that the response to FAQ No. 34 itself notes that even if a subsidiary established outside EU, enters into a transaction, EU nationals facilitating that transaction could still fall under the anti-circumvention clause if they "participate in activities" aimed at bypassing the main prohibition. He submits the response to FAQ No. 34, also states that, decisions requiring clearance by the EU parent company are highly relevant, as the parent is strictly bound by the Regulation in respect

of its own actions.

71. Next, he submits that severe penalties are prescribed for violating EU Sanctions or German export laws as any violation would attract strict criminal liability under Sections 17-19 of the German Foreign Trade and Payments Act, thereby exposing defendant no. 1 and its parent company i.e. SAP SE to immediate penalties which includes, imprisonment and substantial financial penalties.

72. He submits that the plaintiff itself has made certain averments in the plaint acknowledging that support services are provided from a central location, therefore, the plaintiff was aware of the fact that variety support services were being provided by SAP SE which is based in Germany.

73. He further submits that the agreements executed between the parties, particularly all three Order Forms, also bears out the involvement of defendant no. 1's parent company SAP SE in the provision of services and establish that the overall territorial scope is worldwide.

74. Explaining further, he submits that since the licenses granted under the Order Forms are worldwide in scope, the corresponding support services are also worldwide. He characterizes this arrangement as akin to a "gateway contract", wherein the parent company, SAP SE, retains the ultimate responsibility for providing support services, a fact fully within the knowledge of the plaintiff. He contextualizes this arrangement within the framework of modern global supply chains, where services are routinely rendered across national and territorial borders.

75. In light of the aforesaid, Mr. Pushkar submits that since the Order Forms operate on a worldwide territory and the services are routed and

provided from outside India, the legal embargo, namely, the EU Sanctions, completely incapacitates defendant no. 1 from rendering the services. Consequently, defendant no. 1 is devoid of independent means to provide these services, as the requisite delivery mechanisms reside exclusively with SAP SE. In this regard, he invites attention to Clause 5 of the Order Forms, to contend that the delivery of the software is subject to Clause 12.4 of the GTC, which expressly stipulates that SAP shall not be responsible for any delays in, or prevention of, delivery due to the application of relevant export laws.

76. He also draws attention of the Court to Clause 2 of the Order Forms to contend that the said clause specifically states that the worldwide territory remains subject to *"applicable export control laws as may be updated from time to time by the applicable jurisdiction and subject to Section 12.4 of the GTC."*

77. Mr. Pushkar further submits that all the agreements entered into between the plaintiff and defendant no. 1 logically fall under one composite bucket. He submits that all the agreements, are inter-related, interlinked, and constitute one composite arrangement governing the rights and obligations of the parties, therefore, they are to be read as a whole to ascertain the true commercial intention of the parties. It is thus, contended that the Clause 13.5 in the Delivered Support Agreement can be invoked by the defendant no.1 to terminate the entire arrangement of support services on the ground of trade sanctions.

78. He further submits that the Delivered Support Agreement is not between the third party and the plaintiff, rather the said Agreement has been

issued by the defendant no.1.

79. Next, Mr. Pushkar argued that the present dispute fundamentally attracts the statutory bars set out under the Specific Relief Act, 1963. He submits that the agreements executed between the parties namely, the GTC (Clause 5.1) and the Delivered Support Agreement (Clause 13.5) are inherently determinable in nature, thereby attracting a bar under Section 14(d) Specific Relief Act, 1963. He submits that since the contracts are determinable, they cannot be specifically enforced. Resultantly, no interim injunction can be granted, much less an interim mandatory injunction, in view of the provisions of Section 41(e) of the Specific Relief Act, 1963.

80. He further submits that the agreements runs into minute technical details and also requires the performance of continuous duties, thereby making them legally incapable of specific performance. This submission of Mr. Pushkar alludes to Section 14(1)(b) and 14(1)(d) of the unamended Specific Relief Act, 1963.

81. To buttress his above contention, strong reliance was placed by Mr. Pushkar on the following decisions :*(i)* ***Abhijit Mishra v. Wipro Ltd., 2025 SCC Online Del 4976;*** and *(ii)* ***Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors., (1991) 1 SCC 533.***

82. Proceeding to the next leg of his argument, Mr. Pushkar contends that the obligations between the parties operate as contingent contracts under Indian law. He submits that the various agreements entered upon between the plaintiff and the defendant no. 1, incorporated explicit contingencies regarding export prohibitions, and the occurrence of these events has legally discharged defendant no. 1 from further performance.

83. He submits that admittedly, the contracts are governed by the laws of India, therefore, the provisions of the Indian Contract Act, 1872, will squarely apply to the contractual obligations between the parties.

84. He further submits that in view of the specific contingency provided under several agreements, namely, the prohibition of export control laws which has come into effect since 18 July 2025 on account of the EU Council Regulation No. 269/2014 placing the plaintiff company under sanctions, the defendant no. 1 is excused from the performance of its obligations. He submits that under Section 32 of the Indian Contract Act, the contract becomes void as the provision of services is now strictly beyond the reasonable control of defendant no. 1.

85. Highlighting the relevant contractual provisions, he submits that Clause 12.4 of the *General Terms and Conditions (GTC)*, which *inter alia*, provides that the Software, Documentation, and SAP Materials are explicitly subject to the export control laws of various countries, including, without limit, the laws of the United States and Germany, read in conjunction with Clause 12.7, namely the "*Force Majeure*", makes it clear that any delay or non-performance of any provision of the GTC caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of the agreement.

86. Likewise, Clause 13.5 of the *Delivered Support Agreement*, *inter alia*, provides that the Software and Support are subject to the export laws of various countries, including, without limitation, the laws of the United States, the EU, Ireland, Australia, and Germany, therefore, EU sanctions directly affect the enforcement of SAP Delivered Support as well.

Furthermore, Clause 13.8, namely the "*Force Majeure*", states that any delay or non - performance of any provision of this Agreement caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of this Agreement.

87. To buttress his submissions on the above point, he relies upon the decisions in - (i) ***National Agricultural Cooperative Marketing Federation of India Ltd. [NAFED] v. Alimenta S.A., (2020) 19 SCC 260***; and (ii) ***PASL Wind Solution Private Limited v. GE Power Conversion India Private Limited, (2021) 7 SCC 1.***

88. He submits that in the alternative and strictly without prejudice to his preceding contention, even if the plaintiff's assertion that the various agreements do not provide for the contingency of suspending or terminating support services in the event of prohibition of export control laws, is taken at face value, the defendant no.1 is nevertheless completely excused from performance under Section 56 of the Indian Contract Act.

89. He submits that the provision of support services to the plaintiff has been rendered undeniably unlawful and/or impossible, and consequently, the contract for support services has become void. To buttress his contention on the doctrine of frustration and impossibility, he places strong reliance on the decision in ***Satyabrata Ghose v. Mugneeram Bangur& Co., (1953) 2 SCC 437***.

90. He further submits that this principle of discharge is equally recognized and enforced under English law, wherein parties are entirely discharged from the obligation to perform in the event the act becomes unlawful or impossible due to a foreign law prohibition. He places reliance

on the decision in ***Regazzoni v. K.C. Sethia (1944) Ltd.*, [1958] AC 301.**

91. Mr. Pushkar further contends that the foundational commercial arrangement governing the support services for the current calendar year simply does not exist, thereby precluding any question of specific performance. Elaborating on his submission, he submits that at present, there is no subsisting Work Order between the plaintiff and defendant no. 1 through which the commercial implementation of the support services are managed. According to him the last Work Order entered into between the parties, bearing no. 4300029516 is dated 05.12.2024 and pertained to the provision of services for the calendar year 2025, and this specific arrangement had unequivocally expired on 31.12.2025.

92. Lastly, he submits that plaintiff is wholly disentitled to any equitable relief owing to a deliberate suppression of material facts, inasmuch as the plaintiff has deliberately concealed the European Court of Justice (ECJ) proceedings from this Court. He submits that the plaintiff had admittedly, challenged the applicability of the EU Sanctions and has clearly failed to get any relief.

<u>PLAINITFF'S SUBMISSIONS IN REJOINDER</u>

93. Mr. Dayan Krishnan, learned Senior counsel appearing on behalf of the plaintiff, in his rejoinder submits that defendant no. 1's contention that all the agreements are interconnected and form a single composite arrangement is entirely misconceived. He submits that this foundational premise of the opposing party is factually incorrect, and that a proper reading of the contractual matrix reveals two entirely separate and distinct categories of documents.

94. Mr. Krishnan also brings attention of the Court to Clause 3 of the Order Forms to submit that the obligation to provide SAP Support is that of defendant no. 1 alone as the contract has been entered into between the plaintiff and the defendant no.1, therefore, contention of defendant no.1 that under the contracts, SAP Support Services are provided by SAP Group entities globally, including its German Parent i.e. SAP SE, is entirely misplaced.

95. He further contends that the defendant no. 1's contention that the application has become infructuous because the 2025 Work Order expired on 31.12.2025, and no work order exists for 2026, is totally misconceived. He argues that the fundamental obligation under Clause 3 of the Order Forms explicitly provides that SAP Support, which constitute a binding contract, is perpetual and auto-renewing.

96. With regard to the newly inserted Article 15a of the EU Regulation 269/2014 based on the "Best Efforts" obligation, he submits that Best Efforts Obligations entail those actions which are feasible for the Union operators in view of its nature, its size, and the relevant factual circumstances. He submits that "factual circumstances", would also include a Judicial Order of this Court. Such an order will make the parties respect their contractual obligations, thereby satisfying the very requirements of the clause relied upon by the defendant.

97. Mr. Nayar, appearing on behalf of the plaintiff, in rejoinder responds to the argument on the statutory bars raised by the defendant no.1 under Specific Relief Act, 1963. He submits that defendant no. 1's submission that no specific performance is possible since the contracts are determinable

under Section 14(d) read with Section 41(e) of the Specific Relief Act, 1963, is fundamentally misplaced.

98. He submits that the issue as to what constitutes a determinable contract has been conclusively settled by the Supreme Court in ***K.S. Manjunath and Ors. v. Moorasaviappa, 2025 SCC OnLine SC 2378***, wherein it has been held that simply because a contract may be terminable on certain contingencies, the same would not be considered determinable. Expanding on this legal position, he submits that the correct test is whether the party against whom specific performance is sought has the right to terminate the contract at its own sweet will, without any cause. He adds that this test has also been applied by this Court in ***Mahajan Imaging v. Pushpawati Singhania Research, 2026 DHC 1735***.

99. He draws attention of the Court to Clause 5 of the GTC and Clause 13.5 of the Delivered Support Agreement, to submit that none of the provisions relied upon by defendant no. 1 permit it to terminate at will or without cause.

100. He further submits that under Clause 3 of the Order Forms, defendant no. 1's support obligation continues perpetually and renews automatically. He contends that a perpetual auto-renewing obligation is the antithesis of a contract determinable at will.

101. Insofar as contention of defendant no.1 premised on Section 14(1)(b) of the Specific Relief Act, 1963 is concerned, Mr. Nayar submits that defendant no. 1's contention that the agreements involves continuous duties and minute technical details (such as 24x7 support and remote access) which the Court cannot supervise, therefore, the same cannot be enforced, is

entirely misplaced, inasmuch as post amendment of the 1963 Act the provision providing for the bar on enforcing contracts running into minute or numerous details was done away with, meaning thereby such contracts are now specifically enforceable. He places reliance on ***Global Music Junction Pvt. Ltd. v. Shatrughan Kumar*, 2023 SCC OnLine Del 5479**.

102. Referring to various clauses in the prayer of the present application, he submits that it is evident that the relationship between the parties is governed by the terms of the contract and that the same do not require day-to-day monitoring or supervision by the Court.

103. He submits that the submission of defendant no.1 premised on Section 32 of the Indian Contract Act, 1872 read with Clauses 12.4 and 12.7, of the GTC, and Clause 13.5 and 13.8 of the Delivered Support Agreement, is fundamentally misplaced.

104. He further contends that the defendant no. 1's own stated position is that once Nayara is removed from the sanction list, it can seamlessly continue to provide support. This stance is directly contradictory to their current argument before this Court that the contract is void or dead.

105. He submits that the claim of voidness under Section 56 is equally an afterthought that was not part of the initial pre-suit communications. According to him there is absolutely no impossibility in the present case because viable alternatives are readily available. He submits that the Hon'ble Supreme Court in ***Satyabrata Ghose*** (Supra), which is ironically relied upon by defendant no. 1, has categorically held that Section 56 applies only when the whole purpose of the contract is frustrated by a change that is so fundamental that it strikes at the root of the contract as a whole. The

doctrine of frustration applies only where performance becomes impossible in a practical sense, and not merely when performance becomes onerous or inconvenient. He places reliance on the judgment of the Supreme Court in ***Energy Watchdog v. CERC, (2017) 14 SCC 80***.

DEFENDANT NO.'1 SUBMISSION IN SUR-REJOINDER

106. In *sur-rejoinder*, Mr. Susmit Pushkar, submits that the reliance placed by the plaintiff in their rejoinder on ***K.S Manjunath*** (Supra) is misconceived. According to him, in ***K.S Manjunath*** (supra), it has been held that all licenses will be determinable in nature, therefore, Order Forms being licenses are determinable in nature. As a necessary corollary if the main software licences are themselves determinable, the support obligations in respect of those licences, as stipulated in the licenses itself i.e. Order Forms read with the GTC and applicable Support Schedule, are also determinable in nature.

107. He further submits that under Clause 6.1 of the SAP Support Schedule the agreement is terminable by either party by giving a 3 months written notice, which brings the case under category (ii) as mentioned in ***K.S Manjunath*** (supra) viz. the agreements terminable on 'without cause' basis.

108. Furthermore, he submits that the law as laid down in the decision of ***Amritsar Gas*** (Supra), is still a good law and has not been overruled, therefore, agreements terminable with or without cause, will be determinable in nature.

ANALYSIS AND FINDINGS

109. I have heard the learned Senior Counsels for the plaintiff as well as the learned counsel for defendant no. 1, who together took 11 long hearings to address, and have carefully perused the material on record.

110. The present controversy stems from the European Union (EU) Sanctions. Pursuant to these sanctions, on 18.07.2025, the plaintiff company was listed at serial no. 639 under Article 2, Annexure I of EU Council Regulation No. 269/2014. The said Regulation concerns imposition of restrictive measures against actions that undermine or threaten the territorial integrity, sovereignty, and independence of Ukraine.

111. The reason for the inclusion of the plaintiff company in the EU Sanctions list has been spelled out in the list itself, which is reproduced herein below for ease of reference:

> *"Nayara Energy Limited is an entity established in India and operating an important refinery in Vadinar. That refinery is 49 % owned by the Russian State oil company Rosneft, and is a major refiner of Russian crude oil. The energy sector, in particular the oil sector, is a sector providing substantial revenue to the Russian Government.*
> *Therefore, Nayara Energy is involved in an economic sector providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine."*

112. Defendant no.1 (SAP India Pvt. Ltd.), which is a subsidiary of SAP SE Germany (parent company of defendant no.1) granted non-exclusive licenses (perpetual in nature) to Essar Steel and its authorized affiliates for the use of specified SAP software products. The rights in the said licenses were subsequently transferred by Essar Steel to Essar Oil Limited, the

plaintiff's earlier avatar, which was subsequently re-named as Nayara Energy Limited, the plaintiff herein, under the Assignment Agreement dated 22.06.2017.

113. Subsequently to operationalize the assigned licenses and to procure additional software products alongside support service, the plaintiff and defendant no. 1, SAP India Pvt. Ltd., executed software licenses and support agreements three in number, designated as 'Order Forms'.

114. These Order Forms are expressly governed by the General Terms and Conditions (GTC), as well as terms and conditions of ongoing support services delineated under the SAP Enterprise Support Schedule. Alongside a distinct Delivered Support Agreement was executed between the parties for procuring certain supplementary third-party modules.

115. Undisputedly, the commercial implementation of these software licenses and the corresponding ongoing support obligations have been seamlessly managed over the years through Annual Work Orders which are issued by the plaintiff, with the last accepted Work Order being valid until 31.12.2025.

116. This settled contractual arrangement was abruptly disrupted on 24.07.2025 when defendant no. 1, citing the aforementioned EU Council Regulation No. 269/2014, unilaterally suspended the essential support services and completely denied the plaintiff access to the SAP Support Portal.

117. The controversy in the present suit thus, revolves around the suspension or termination of support services which are distinct from the software licenses themselves, as the latter remain irrevocably vested in the

plaintiff.

118. The grievance of the plaintiff, therefore, essentially is that this unilateral suspension is *ex facie* wrongful and constitutes a blatant violation of the agreed contractual obligations.

119. Having outlined the factual matrix in brief, the points which arise for consideration on the basis of rival contentions of the parties can broadly be put under the following categories: - (A) 'Governing Law' or 'Proper Law of Contract'; (B) Applicability of EU Sanctions/Foreign Law; (C) Applicability of Section 32 and 56 of Indian Contract Act, 1872; (D) Specific Enforceability of various agreements; (E) Suppression of proceedings regarding the European Court of Justice ["ECJ"]; (F) Triple test for grant of mandatory injunction at interim stage.

A. 'GOVERNING LAW' OR 'PROPER LAW OF CONTRACT'

120. For ascertaining the proper law of contract, that will govern and decide the mutual rights and obligations of the parties, the different agreements entered into between the parties and their relevant clauses concerning governing framework needs to be adverted to.

121. *Order Form 1 dated 22.06.2017* serves as the binding agreement between the parties for the SAP software licenses and support. The Preamble of this Order Form is reproduced below, which *inter alia* stipulates that the agreement is governed by the SAP Software General Terms and Conditions (GTC):

> ***"SOFTWARE LICENSE AND SUPPORT AGREEMENT***
> ***SOFTWARE ORDER FORM 1 ("ORDER FORM")***
> ***Dated June 22, 2017***

EFFECTIVE: January 01, 2017 ("EFFECTIVE DATE")

Between	***SAP India Private Limited,*** *06th Floor, RMZ Eco World Plot C1, 8A campus,* *Sarjapur Marathahalli Outer Ring Road,* *Devarabeesanahalli, Bangalore East Taluk,* *Bangalore 560103, Karnataka, India* *(Hereinafter "SAP")*
And	***Essar Oil Limited*** *Equinox Business Park, 4th Floor,* *Tower-2, Off Bandra Kurla Complex (BKC),* *LBS Marg, Kurla (West), Mumbai - 400070, India* *(Hereinafter "Licensee")*

PREAMBLE:

SAP and Licensee agree that this Order Form is a binding agreement for SAP software licenses and support, governed by the terms and conditions of the SAP Software General Terms and Conditions ("GTC"), all Schedules referenced by the GTC and/or Order Form ("Schedules") and the applicable Software Use Rights document ("Use Terms") current at the time of execution of this Order Form, *copies of which are found at https://www.sap.com/about/agreements/general-terms-and-conditions.html?tag=agreements.general.terms.and.conditions/on-premise-software (GTC) and https://www.sap.com/about/agreements/product-use-and-support-terms.limit?tag=agreements.product-use-support-terms/on-premise-software/software-use-rights (Use Terms) and made a part hereof. All components are Integral to this agreement, and collectively are referred to herein as the 'Agreement." Licensee acknowledges it has had the opportunity to review the Agreement, including without limitation the GTC, Schedules and Use Terms, prior to executing this Order Form. SAP recommends Licensee* *prints copies of the applicable GTC, Schedules and Use Terms for Licensee's own records.*

The parties are entering into this Order Form pursuant to Clause 5 of the Assignment Agreement dated June 22, 2017, executed between SAP, Licensee and Essar Steel India Limited ("Assignor").”

(emphasis supplied)

122. *Order Form 2 dated 16.11.2017* was subsequently executed to operationalize further software licenses and ongoing support. The Preamble of this document is extracted below to highlight that much like the *Order Form 1*, it also provides that it will be governed by the terms of GTC. The only addition in the Preamble of the *Order Form 2* is that it also mentions that the SAP Enterprise Support Schedule will also govern the Order Form 2.

“SOFTWARE LICENSE AND SUPPORT AGREEMENT
Software Order Form 2 ("Order Form")
effective as of the date of last signature below ("Effective Date")

between ***SAP India Private Limited***
06th Floor, RMZ Eco World Plot C1, 8A campus,
Sarjapur Marathahalli Outer Ring Road,
Devarabeesanahalli, Bangalore East Taluk,
Bangalore 560103, Karnataka, India

and Place of Business also at:
SAP India Private Limited
50, Mohebewala Industrial Area Saharanpur,
Dehradun, Uttarakhand - 248002
(hereinafter "SAP")

And ***Essar Oil Limited***
39 KM, Jamnagar Okha Highway,

Vadinar 361305
India
(hereinafter "Licensee")

ERP Customer Number: 442857
SAP Case Number: 3060807046

PREAMBLE:
***SAP and Licensee agree that this Order Form is a binding agreement for SAP software licenses and support, governed by the SAP Software General Terms and Conditions ("GTC") and SAP Support Schedule accepted between SAP and Licensee effective January 1, 2017 ("Initial Agreement"), all Schedules referenced by the GTC and/or Order Form ("Schedules") and the applicable Software Use Rights document ("Use Terms") current at the time of execution of this Order Form**, a copy of which is found at https://www.sap.com/docs/download/ agreements/product-use-and-support-terms/sur/sap-software-use-rights-english-v4-2017a.pdf and made a part hereof. All components are integral to this agreement, collectively form a single agreement with all other orders subject to the Initial Agreement and collectively are referred to herein as the "Agreement". Licensee acknowledges it has had the opportunity to review the Agreement, including without limitation the Schedules and Use Terms, prior to executing this Order Form. SAP recommends Licensee prints copies of the applicable Schedules and Use Terms for Licensee's own records.”*

(emphasis supplied)

123. *Order Form 3 dated 07.06.2020* was executed between the plaintiff and defendant no. 1 to procure additional software licenses and support services. The preamble of *Order Form 3* is also reproduced herein below to *inter alia* demonstrate the consistent contractual intent of the parties, expressly making this Order Form subject to the Agreements namely, the GTC and the SAP Enterprise Support Schedule.

"SOFTWARE LICENSE AND SUPPORT AGREEMENT
Software Order Form ("Order Form")
effective as of the date of last signature below ("Effective Date")

between	***SAP India Private Limited*** *06th Floor, RMZ Eco World Plot C1, 8A campus,* *Sarjapur Marathahalli Outer Ring Road, Devarabeesanahalli, Bangalore East Taluk, Bangalore 560103, Karnataka, India* ***(hereinafter "SAP")*** *Place of Business also at:* ***SAP India Private Limited*** *50, Mohebewala Industrial Area Saharanpur, Dehradun, Uttarakhand - 248002* ***(hereinafter "SAP")***
And	***Nayara Energy Limited*** *P O Box No 24, 39 KM,* *Jamnagar Okha highway,* *Vadinar 361305,* *India* ***(hereinafter "Licensee")*** ***ERP Customer Number: 442857*** ***SAP Case Number: 3061433793***

PREAMBLE:

SAP and Licensee agree that this Order Form is a binding agreement for SAP software licenses and support, governed by the SAP Software General Terms and Conditions ("GTC") and SAP Support Schedule accepted between SAP and Licensee effective January 1, 2017 ("Initial Agreement"), all Schedules referenced by the GTC and/or Order Form ("Schedules") and the applicable Software Use Rights document ("Use Terms") current at the time of execution of this Order Form*, a copy of* *which is found at https://www.sap.com/docs/download/ aqreements/product-use-and-support-terms/sur/sap-software-use-rights-enqlish-v4-2020a.pdf and made a part hereof. All components are integral to this agreement, collectively form a single agreement with all other orders subject to the Initial Agreement and collectively are referred to herein as the "Agreement". Licensee acknowledges it has had the opportunity to review the Agreement, including without limitation the Schedules and Use Terms, prior to executing this Order Form. SAP recommends Licensee prints copies of the applicable Schedules and Use Terms for Licensee's own records."*

(emphasis supplied)

124. Since the aforementioned Order Forms expressly draw their governing framework from the *General Terms and Conditions (GTC)*, it is imperative to examine its Clause 12.5 titled "*Governing Law; Limitations Period*", which *inter alia*, provides that the governing law will be the Indian law; the Indian law to prevail in the event of conflict with foreign law; and the exclusive jurisdiction shall vest in the Courts in Delhi, India. Clause 12.5 reads thus:

"SOFTWARE LICENSE AND SUPPORT AGREEMENT
General Terms and Conditions
("GTC")

12.5 ***Governing Law; Limitations Period.- This Agreement and any claims arising out of or relating to this Agreement and its subject matter shall be governed by and construed under the laws of the Republic of India, without reference to its conflicts of law principles. In the event of any conflicts between foreign law, rules, and regulations, and Indian law, rules, and regulations, Indian law, rules, and regulations shall prevail and govern. Licensee consents to the jurisdiction of any court sitting in New Delhi, India for all claims, suits, or actions arising under this Agreement (including claims for payments due hereunder) or in connection with Licensee's use or***

possession of the Software and SAP or SAP SE Proprietary Information. *The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. The Uniform Computer Information Transactions Act as enacted shall not apply. Licensee must initiate a cause of action for any claim(s) arising out of or relating to this Agreement and its subject matter within one (1) year from the date when Licensee knew, or should have known after reasonable investigation, of the facts giving rise to the claim(s).”*

(emphasis supplied)

125. The *SAP Enterprise Support Schedule*, *inter alia*, contains specific provisions governing support services for the software licensed under the agreements. The relevant part of the Support Schedule which gives its broad scope, is set out herein below:

"SAP ENTERPRISE SUPPORT SCHEDULE ("Schedule")

This Schedule governs the provision of support services by SAP as further defined herein ("SAP Enterprise Support") for all software licensed by Licensee under the Agreement (hereinafter collectively referred to as the "Enterprise Support Solutions"), excluding software to which special support agreements apply exclusively.

(emphasis supplied)

126. *SAP Delivered Support Agreement dated 29.03.2019* was *inter alia* executed to procure supplementary support services through the 'Partner' of defendant no.1 i.e. the defendant no.2. Clause 13.6 of this agreement, titled '*Governing Law; Limitations Period*', categorically designates the laws of India as the governing law to the specific exclusion of the international law of conflicts. The relevant part of the *Delivered Support Agreement* is reproduced herein below for ready reference:

"SAP DELIVERED SUPPORT AGREEMENT

*This **SAP Delivered Support Agreement** ("Agreement") as **issued by SAP India Private Limited** , a corporation, with offices at 6th F, RMZ Ecoworld plot C1,8A camp.,Saraj.Out.Ring Rd Devarabeesanahalli, Bangalore Bangalore 560103 India (hereinafter "SAP") **is an offer and when signed and returned to SAP by Nayara Energy Limited**, a corporation, with offices at 39 KM, Jamnagar Okha Highway, P O Box No 24, Vadinar 361305 India **(hereinafter "End User")**, **becomes a binding agreement between SAP and End User for the SAP Support Services listed below**. This SAP Delivered Support Agreement shall first become effective on the date signed by End User below ("Effective Date"); together referred to as "Parties".*

RECITAL

WHEREAS, End User has purchased or will purchase certain SAP software, including the software as identified in Schedule 1, from the Partner and receives the right to use the SAP software, including the software as identified in Schedule 1, from SAP or Partner under a Software License Agreement (as defined below).

***WHEREAS, SAP provides, through employees of the SAP Group and third party contractors,** software support services and End User wants to order such software support services from SAP.*

xxx xxx xxx

*1.1.5 "**Export Law**" means all constitutions, laws, statutes, codes, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits restrictive measures, **trade sanctions, embargos** and other legally binding requirements of all federal, country, international, state and local governmental authorities relating to export, reexport or import.*

xxx xxx xxx

*1.1.7 "**Partner**" means **Avaali Solutions Private Limited**, SV Towers, 1st Floor 6th Block 560047 **Bangalore India.***

xxx xxx xxx

*13.6 **Governing Law; Limitations Period. This Agreement and***

> ***any claims (including any non-contractual claims) arising out of or in connection with this Agreement are governed by laws of India to the exclusion of the international law of conflicts and the UN Sales Convention. The exclusive place of jurisdiction for all disputes arising out of or in connection with this Agreement (including any dispute regarding the existence, validity or termination of this Agreement) is New Delhi, India.*** *End User must initiate a cause of action for any claim(s) arising out of or relating to this Agreement and its subject matter within one year from the date when End User knew, or should have known after reasonable investigation, of the facts giving rise to the claim(s).”*
>
> (emphasis supplied)

127. The proper law of the contract is the substantive law intended by the parties to govern their contractual rights and obligations. Where the parties have expressly, clearly, and categorically stipulated the governing law and the exclusive jurisdiction in their contract, such expressed intention is generally decisive and binding, thereby eliminating the need for the Court to impute any alternative intention. Reference in this regard may had to the decision of the Hon’ble Supreme Court in ***National Thermal Power Corporation Vs. Singer Company And Others., (1992) 3 SCC 551***, wherein the Apex Court delineated the principles to be followed for ascertaining the “proper law of the contract” in commercial agreements. The relevant observations from the judgment are reproduced below:

> ***“13.*** *Dicey & Morris in The Conflict of Laws, 11th edn., Vol. II (‘Dicey’) refer to the ‘proper law of a contract’ thus:*
>
> > ***“Rule 180.—The term ‘proper law of a contract’ means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with***

> ***which the transaction has its closest and most real connection." (pages 1161-62)***

The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract. *In the words of Lord Herschell, L.C.: [Hamlyn & Co. v. Talisker Distillery, (1891-94) All ER Rep 849, 852 : (1884) AC 202 : 10 TLR 479]*

> ***"… In this case, as in all such cases, the whole of the contract must be looked at, and the contract must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of the contract."***

Where, however, the intention of the parties is not expressly stated and no inference about it can be drawn, their intention as such has no relevance. In that event, the courts endeavour to impute an intention by identifying the legal system with which the transaction has its closest and most real connection.

14. The expressed intention of the parties is generally decisive in determining the proper law of the contract. *[Rule 180 is further elucidated by Dicey in the sub-rules. Sub-rule (1) reads: "Sub-rule (1).* ***— When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract."]*** *The only limitation on this rule is that the intention of the parties must be* ***expressed bona fide and it should not be opposed to public policy****. In the words of Lord Wright: [Vita Food Products Inc. v. Unus Shipping Co. Ltd., (1939) AC 277, 290: (1939) 1 All ER 513 (PC)]*

"… where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy …."

16. *Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. [Dicey's sub-rule (3) of Rule 180 reads: "Sub-rule (3). — When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection."] The Judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a "reasonable man". He has to determine the intention of the parties by asking himself how a just and reasonable person would have regarded the problem", The Assunzione [(1954) P 150, 176: (1954) 1 All ER 278 (CA)]; Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd. [(1938) AC 224, 240: (1937) 4 All ER 206]*

17. *For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.*

18. *The position in these respects is summarised by the Privy Council in Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd. [(1938) AC 224, 240: (1937) 4 All ER 206]:*

"The proper law of the contract means that law which the English or other court is to apply in determining the obligations under the contract ***…. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the court.*** *But in most cases they do not do so. The parties may not have thought of the matter at all. Then the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract."*

19. Proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate connection with the contract. It must, however, be clarified that the expression 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The law of contract is not affected by the doctrine of renvoi. *(See Dicey, Vol. II, p. 1164.)*

20. In a case such as the present, there is no need to draw any inference about the intention of the parties or to impute any intention to them, for they have clearly and categorically stipulated that their contract, made in India to be performed in India, is to be governed by the 'laws in force in India' and the courts in Delhi are to 'have exclusive jurisdiction in all matters arising under this contract' (Clause 7). The cardinal test suggested by Dicey in Rule 180 is thus fully satisfied."

(emphasis supplied)

128. Now reverting to the relevant agreements, this Court on a perusal of *three Order Forms* finds that they do not independently contain any specific clause in respect of governing law or exclusive jurisdiction. However, in respective preambles of Order Forms it is explicitly mentioned that they are

governed by the terms of "GTC" and the "SAP Support Schedule".

129. Clause 12.5 of *GTC* titled as *"Governing Law; Limitations Period"* mandates that the agreement and any claims arising out of or relating to its subject matter *"shall be governed by and construed under the laws of the Republic of India."* This signifies the parties' conscious choice to anchor their rights and obligations strictly within the substantive domestic laws of India.

130. Most crucially, Clause 12.5 incorporates that, *"In the event of any conflicts between foreign law, rules, and regulations, and Indian law, rules, and regulations, Indian law, rules, and regulations shall prevail and govern."* The inclusion of this specific phrase highlights the contractual intent of the parties to unconditionally subordinate any foreign rules or regulations to the municipal laws of India in the event of any conflict. Furthermore, Clause 12.5 unambiguously provides that the licensee consents to the jurisdiction of any court sitting in New Delhi, India, for all claims, suits, or actions arising under the agreement, clearly suggesting that under the GTC, the parties have decided their place of dispute resolution to be New Delhi, India.

131. As regards, *SAP Enterprise Support Schedule* it is pertinent to note that much like the Order Forms, it does not contain an independent governing law or exclusive jurisdiction clause. However, it is an admitted position between the plaintiff and defendant no. 1 that the Order Forms, the GTC, and the Support Schedule are intrinsically interconnected and operate as a unified framework. In that view of the matter, Clause 12.5 of the GTC will equally apply to the 'Support Schedule'.

132. Notably, the only point of divergence in the submissions of the parties is with regard to the interconnection between the SAP Delivered Support Agreement and other agreements. It has been contended by defendant no.1 that the Delivered Support Agreement is inextricably connected to the other agreements, thereby forming one single composite arrangement, whereas on behalf of the plaintiff it was contended that Delivered Support Agreement was separate agreement meant for the support of third-party software supplied through defendant no. 2. The question regarding whether these agreement falls under one or two different buckets, has been answered in the later part of this judgement.

133. Insofar as *SAP Delivered Support Agreement dated 29.03.2019*, is concerned, the contractual intent of the parties is again clear from Clause 13.6 thereof, whereunder the parties have agreed that the said agreement and any claims (including any non-contractual claims) arising out of or in connection the said agreement will be *governed by the laws of India to the exclusion of the international law of conflicts and the UN Sales Convention.* By explicitly incorporating this exclusion, the parties have consciously and deliberately chosen the domestic laws of the Republic of India as the "proper law of contract". This specific phrasing reflects an underlying unequivocal intent to eliminate any scope for the application, importation, or interference of foreign laws. Furthermore, Clause 13.6 specifically vests the exclusive jurisdiction for all disputes arising out of or in connection with the said agreement, including any dispute regarding the existence, validity or termination the agreement, with the Courts in New Delhi.

134. However, at this juncture without delving into the question whether or

not all agreements form one single composite arrangement, suffice it to observe that such a distinction is practically immaterial for determining the proper law of contract, as both the governing documents, the GTC on one hand, and the Delivered Support Agreement on the other, independently, explicitly, and unequivocally dictate that the governing law shall be the laws of the Republic of India, and jurisdiction shall exclusively be of the Courts in New Delhi. Therefore, no matter how the agreements are grouped or read, all contractual paths lead to Indian municipal laws being the governing law and the Courts in New Delhi having exclusive jurisdiction.

135. To conclude, the "Governing Law" or "Proper Law of Contract" for all the agreements is the substantive domestic law of the Republic of India, therefore, the parties are legally bound by this expressly chosen law. Furthermore, the parties have consciously given overriding effect to the laws of India vis-à-vis foreign laws and regulations.

B. <u>APPLICABILITY OF EU SANCTIONS / FOREIGN LAW</u>

136. The fundamental contention articulated by the defendant no.1 is that because its parent company, SAP SE is headquartered in Germany, it is also bound by the compliance mandates of the European Union. It is the specific case of defendant no. 1 that continuing to provide support services to the plaintiff, who was added to the EU sanctions list due to its ties with ROSNEFT, a Russian company, would violate the EU Council Regulation No. 269/2014.

137. By relying on provisions of said EU Regulations such as Article 17 regarding the jurisdictional scope and Article 15a regarding the "best

efforts" obligation of the parent company, defendant no.1 asserts that continued performance of the contract in India would attract strict criminal liability for its parent company in the European Union under the laws of Germany.

138. The defendant no. 1 has placed the EU Council Regulation No. 269/2014 on record and relies upon it as the sole justification for the unilateral suspension of support services contracted under the agreements. Therefore, the foundational question that arises for consideration is whether this Court can even take judicial notice of this foreign law invoked by defendant no. 1 to decide the question of legal tenability of withdrawal of SAP Support Services.

139. The answer to this question can be explored under the evidentiary framework of Indian law with reference to Section 52(1) of Bharatiya Sakshya Adhiniyam, 2023 (in short 'BSA') [erstwhile Section 57(1) of the Indian Evidence Act, 1872], which mandates that the Court shall take judicial notice of certain facts enumerated therein, that *inter alia*, includes all laws in force in the territory of India. Relevant extracts of Section 52 are as under :-

> ***"52. Facts of which Court must take judicial notice. -***
>
> *(1) The Court shall take judicial notice of the following facts, namely:—*
>
> ***(a) all laws in force in the territory of India including laws having extra-territorial operation;***
>
> ***(b) international treaty, agreement or convention with country or countries by India, or decisions made by India at international associations or other bodies;***

(c) the course of proceeding of the Constituent Assembly of India, of Parliament of India and of the State Legislatures;

(d) the seals of all Courts and Tribunals;

(e) the seals of Courts of Admiralty and Maritime Jurisdiction, Notaries Public, and all seals which any person is authorised to use by the Constitution, or by an Act of Parliament or State Legislatures, or Regulations having the force of law in India;

(f) the accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette;

(g) the existence, title and national flag of every country or sovereign recognised by the Government of India;

(h) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(i) the territory of India;

(j) the commencement, continuance and termination of hostilities between the Government of India and any other country or body of persons;

(k) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of advocates and other persons authorised by law to appear or act before it;

(l) the rule of the road on land or at sea.

(2) In the cases referred to in sub-section (1) and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference and if the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

(emphasis supplied)

140. The aforementioned provision conspicuously does not include foreign law within its ambit. EU Council Regulation No. 269/2014, being a Regulation enacted by the Council of the European Union, a body of a foreign jurisdiction, is beyond cavil, a foreign law and falls entirely outside the ambit of Section 52(1) of BSA.

141. Section 39 of BSA [erstwhile Section 45 of the Indian Evidence Act, 1872] shows the pathway by which a foreign law may be brought before an Indian Court, that is, through an opinion of expert. Relevant extracts of Section 39 are as under :-

> *"**39. Opinion of experts.- When the Court has to form an opinion upon a point of foreign law** or of science or art, or any other field, or as to identity of handwriting or finger impressions, **the opinions upon that point of persons specially skilled in such foreign law**, science or art, or any other field, or in questions as to identity of handwriting or finger impressions **are relevant facts** and such persons are called experts."*
>
> (emphasis supplied)

142. A conjoint reading of Section 52(1) and Section 39 of BSA clearly shows that Courts in India will take judicial notice only of Indian laws, and in respect of foreign law, an opinion of expert can be adduced in evidence, on which the Court can act.

143. The legal position in that behalf has been expounded by the Hon'ble Supreme Court in ***Hari Shanker Jain v. Sonia Gandhi*, *(2001) 8 SCC 233.*** In the said decision, the Apex Court was called upon to examine whether Italian law could be judicially noticed by Indian Courts in an election petition where reliance was placed upon Italian citizenship law. The Court observed that the Courts in India cannot take judicial notice of foreign law,

therefore, it should be pleaded like any other fact. The relevant extract from the decision reads as under:

> ***"27. Italian law is a foreign law so far as the courts in India are concerned. Under Section 57(1) of the Indian Evidence Act, 1872, the court shall take judicial notice of, inter alia, all laws in force in the territory of India. Foreign laws are not included therein. Sections 45 and 84 of the Evidence Act permit proof being tendered and opinion of experts being adduced in evidence in proof of a point of foreign law. Under Order 6 Rule 2 of the Code of Civil Procedure, 1908, every pleading shall contain a statement in concise form of the material facts relied on by a party but not the evidence nor the law of which a court may take judicial notice. But the rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, it should be pleaded like any other fact, if a party wants to rely on the same*** *(see Mogha's Law of Pleadings, 13th Edn., p. 22). In Guaranty Trust Co. of New York v. Hannay & Co. [(1918) 2 KB 623 : 87 LJKB 1223 : 23 Comp Cas 399 (CA))] it was held that: "****Foreign law is a question of fact to an English court … the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive****." In Beatty v. Beatty [(1924) 1 KB 807 : 93 LJKB 750 : 1924 All ER Rep 314 (CA****)] it was held that the American law in English courts must be proved by the evidence of experts in that law****.* ***In Lazard Bros. and Co. v. Midland Bank, Ltd. [1933 AC 289 : 102 LJKB 191 : 1932 All ER Rep 571 (HL)] Their Lordships of the Privy Council observed that what the Russian Soviet law is, is a question of fact, of which the English court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The court must act upon the evidence before it in that actual case. The statement of law by Halsbury in Laws of England (3rd Edn., Vol. 15, para 610 at p. 335) is that the English courts cannot take judicial notice of foreign law and foreign laws are usually matters of evidence requiring proof as questions of fact.***

*28. **There is, thus, no manner of doubt that in the courts in India, a point of foreign law is a matter of fact and, therefore a plea based on a point of foreign law must satisfy the requirement of pleading a material fact in an election petition filed before the High Court.** The two election petitions do not satisfy this requirement……..”*

(emphasis supplied)

144. The said legal position also finds elaboration in **Halsbury's Laws of India, 10th Edition, Paragraphs 75.237 and 75.238**, wherein it has been delineated that foreign law is to be proved as a question of fact and it has also been elucidated as how the foreign law is to be proved. Paragraphs 75.237 and 75.238 are set out herein below for ready reference:

75.237. Need for proof Foreign law is a question of fact. It must be specifically pleaded by the party or parties relying upon it. It must be proved to the satisfaction of the court like other plea set up by the concerned party or parties. Thus, the onus of proof of foreign law lies on the party relying on it.

*75.238. **Mode of proof In general, an Indian Court will not research into foreign law or the concepts which have foreign origin. The foreign law or the concepts must be proved in civil proceedings by properly qualified witnesses, that is a person who is suitably qualified to do so on account of his knowledge or experience and who is competent to give expert evidence as to the law of any country,** irrespective of whether he has acted or is entitled to act as a legal practitioner there. If his evidence is not contradicted, the Court will normally accept it, unless it is obviously unreliable or extravagant.*

Where the witnesses deposit materials as part of their evidence into Court, the Court is entitled to examine those materials, and where there is conflict of evidence as to the interpretation to be placed upon the materials, the Court must scrutinize them and form its own conclusion on them.

> ***Because foreign law or concepts of a foreign origin are questions of fact, courts may not generally at common law rely upon a previous Indian decision on foreign law.***"
>
> (emphasis supplied)

145. The **Halsbury's Laws of India** have been consistently endorsed and applied by Indian Courts, including in a decision of a Coordinate bench of this Court in ***Rasmala Trade Finance Fund vs. Raman Gupta, 2019 SCC OnLine Del 9285,*** wherein the reasoning as delineated in ***Hari Shanker Jain*** (Supra) was also followed.

146. In ***Rasmala Trade*** (Supra), the plaintiff therein relied upon the provisions of the UAE Civil Code and placed on record legal opinions from two law firms to elaborate on the legal position thereunder, thereby raising an issue before the Court as to whether obligations arising from a facility agreement could be adjudicated by directly invoking the provisions of the UAE Civil Code. The Court observed that the mandate under Section 57(1) of the Indian Evidence Act, 1872 to take judicial notice is strictly confined to laws in force within the territory of India, thereby deliberately excluding foreign laws from its ambit. The Court quoted from the *Halsbury's Laws of India* that an Indian judge cannot independently research foreign law or take judicial notice of its provisions. Instead, it was categorically laid down that any foreign statute must be pleaded just like any other material fact, and the legal concepts contained therein must be formally proved in civil proceedings at the stage of trial with the aid of properly qualified expert witnesses by way of their evidence. The relevant paragraphs from the decision have been reproduced below for the ease of reference:

> *"**28**. A perusal of the clauses in the agreement shows that the*

facility agreement and the personal guarantee are governed by the laws of UAE. ***The Plaintiff has relied upon provisions of the UAE Civil Code in respect of aspects including limitation, co-extensive nature of the liability of the guarantor etc., In support thereof, the Plaintiff has also placed on record legal opinions from two law firms to elaborate on the legal position under the UAE Civil Code. The said opinions are relied upon by the Plaintiff to argue that the suit is not barred by limitation under Article 1092 of the UAE Civil Code, which prescribes six months as the limitation period and that the said limitation period can also be waived, which the Defendant had agreed to do.***

29. The fact that the Plaintiff relies upon these legal opinions for interpretation of the UAE Civil Code clearly shows that the present suit raises questions as to the legal position in the UAE. Under Section 57 of the Indian Evidence Act, 1872 the Court has to take judicial notice of all Indian laws as also Acts passed by Parliament *etc. Relevant extracts of Section 57 are as under:—*

xxx xxx xxx

30. *Section 45 of the Indian Evidence Act also reads as under:—*

xxx xxx xxx

31. A conjoint reading of the above provisions clearly shows that Courts in India have to take judicial notice of Indian laws and in respect of foreign law, expert opinion can be adduced. In Hari Shanker Jain v. Sonia Gandhi, (2001) 8 SCC 233*, the Supreme Court held as under:—*

xxx xxx xxx

32. As per the above judgement, the Court cannot take judicial notice of foreign law, the same has to be pleaded like any other fact and has to be proved with the aid of experts*.*

33. ***Halsbury's Laws of India, 10th edition also elucidates the position in respect of foreign law as under****:—*

"75.237. Need for proof Foreign law is a question of fact. It

must be specifically pleaded by the party or parties relying upon it. It must be proved to the satisfaction of the court like other plea set up by the concerned party or parties. Thus, the onus of proof of foreign law lies on the party relying on it.

75.238. Mode of proof In general, an Indian Court will not research into foreign law or the concepts which have foreign origin. The foreign law or the concepts must be proved in civil proceedings by properly qualified witnesses, that is a person who is suitably qualified to do so on account of his knowledge or experience and who is competent to give expert evidence as to the law of any country, irrespective of whether he has acted or is entitled to act as a legal practitioner there. If his evidence is not contradicted, the Court will normally accept it, unless it is obviously unreliable or extravagant.

Where the witnesses deposit materials as part of their evidence into Court, the Court is entitled to examine those materials, and where there is conflict of evidence as to the interpretation to be placed upon the materials, the Court must scrutinize them and form its own conclusion on them.

Because foreign law or concepts of a foreign origin are questions of fact, courts may not generally at common law rely upon a previous Indian decision on foreign law."

***34.** Recently, the Supreme Court in **Transport Corporation of India Limited v. Ganesh Ploytex Limited, (2015) 3 SCC 571** reads as under:—*

*"41. It is the pleaded case of the appellant that its legal obligation as transporter ends on its delivering the goods entrusted to it at Benapole Customs Station. Unloading of imported goods at any customs station in this country is also regulated by the provisions of the Customs Act, 1962. We are sure that it must be equally regulated by the law of Bangladesh. What exactly the law of Bangladesh is in this regard and how the factum of delivery of goods allegedly carried and delivered by the appellant at Benapole is to be proved are two distinct and different matters. **It is a settled principle of private international law that foreign law is***

> ***always a question of fact which is required to be pleaded and proved by the party whose rights or obligations flow from such foreign law.*** *There is no pleading or proof in this regard in the instant case."*
>
> ***35. The Plaintiff clearly relies upon the various provisions of UAE Civil Code and UAE law in support of its case. The question whether the period of limitation can be waived legally under UAE law as also whether the Defendant actually waived the said period of limitation, are both questions of fact which will have to be established in trial."***
>
> (emphasis supplied)

147. The decision in ***Rasmala Trade*** (supra) was assailed by the defendant therein before Division Bench of this Court, as well as, before the Apex Court by preferring FAO(OS)(COMM) 293/2019 and SLP(C) 26662/2019 respectively. Both came to be dismissed *vide* order dated 18.11.2019 and 13.11.2019 respectively.

148. Both the parties to the present suit have placed on record expert opinions on EU Law in support of their respective submissions. It is trite that to treat the testimony of a witness as that of an expert, it must be conclusively shown that the individual has made a special study of the subject or acquired specialized experience therein. Further, an expert's report does not go in evidence automatically; the expert must be examined as a witness in court and face cross-examination. A mere opinion unsupported by any reasons cannot be relied upon. Ultimately, the evidence provided by such a witness is entirely of an advisory character, intended solely to furnish the presiding judge with the necessary scientific or specialized criteria to apply to the proven facts and form an independent, well-reasoned judgment.

149. Reference in this regard may be had to the decision in ***State of H.P. v. Jai Lal and Ors.***, **(1999) 7 SCC 280**, wherein it was observed as under:

> *"**17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.***
>
> ***18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case.** The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.*
>
> ***19. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination**. This Court in the case of Hazi Mohammad Ekramul Haq v. State of W.B. [AIR 1959 SC 488: 1959 Supp (1) SCR 922] concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons."*

(emphasis supplied)

150. Likewise, in ***Ramesh Chandra Agrawal v. Regency Hospital Ltd. &***

Ors., **(2009) 9 SCC 709**, following pertinent observations were made by the Hon'ble Supreme Court:

> *"**16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layperson**. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialised and perhaps even esoteric, the central role of an expert cannot be disputed. **The other requirements for the admissibility of expert evidence are:***
>
> ***(i) that the expert must be within a recognised field of expertise,***
>
> ***(ii) that the evidence must be based on reliable principles, and***
>
> ***(iii) that the expert must be qualified in that discipline.***
>
> *(See Errors, Medicine and the Law, Alan Merry and Alexander McCall Smith, 2001 Edn., Cambridge University Press, p. 178.)*
>
> *xxx xxx xxx*
>
> ***20.** An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. **The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions**. (See Malay Kumar Ganguly v. Dr. Sukumar Mukherjee [(2009) 9 SCC 221 : (2009) 10 Scale 675] , SCC p. 249, para 34.)"*
>
> (emphasis supplied)

151. Clearly, for an expert opinion to be admissible, the issue must require specialized knowledge and the witness's expertise must be clearly proven. However, expert testimony is only corroborative in nature and it is not binding on the judge. It acts as a supplement to assist the court and must be evaluated along with other evidence before the court arrives at its final decision.

152. A perusal of the expert opinions produced by both the parties consist solely of the experts' personal interpretations of the text of the EU Council Regulation No. 269/2014. None of the opinion is backed by a sworn affidavit. No qualifications, credentials, or specialized experience of the expert furnishing the said expert opinions have been placed on record. Furthermore, no authoritative commentaries, official guidance documents from EU institutions, or judicial precedents from the European Courts with respect to the applicability of such EU sanctions have been cited to support the interpretations offered. The expert opinion relied upon by defendant no.1, therefore, amounts to nothing more than an *ipse dixit* - a mere assertion that the EU Regulation operates in the manner claimed, simply because the expert says so.

153. That apart, the opinion of the experts cannot be read into evidence automatically without expert having been examined and cross-examined as a witness in court. Thus, the expert evidence or opinions filed fail to meet even the threshold of legal admissibility. Resultantly, the expert opinions do not leave the Court in any better position than before.

154. The Court is thus, left only with the text of the *EU Council Regulation No. 269/2014* and German *Foreign Trade and Payments Act.* It is beyond a

pale of doubt that the said EU Regulation and the Foreign Trade and Payments Act are foreign law, therefore, in light of the law exposited in ***Hari Shankar Jain*** (supra) and ***Rasmala*** (supra), this Court cannot take judicial notice of the same.

155. The onus of proving EU Regulations and the laws of Germany on which reliance has been placed lies on the defendant no.1. They have to be proved as a question of fact to the satisfaction of this Court. This Court will not enter into the arena of research or interpretation of foreign law or the concepts which have foreign origin.

156. The evidence is yet to be adduced. It is only on adduction of evidence that this Court would be able to decisively ascertain as to whether the EU sanctions imposed on the plaintiff are applicable or their invocation is legally tenable or not. To put it differently, it is only upon proof of foreign law during trial in the manner stated above, that this Court can act upon it. Therefore, at this interim stage the defendant no. 1 cannot simply place reliance on EU Regulations and other foreign law to avoid its contractual obligations under the Indian law.

C. APPLICABILITY OF SECTION 32 & 56 OF THE INDIAN CONTRACT ACT, 1872

157. Next, referring to Section 32 of the Indian Contract Act it was argued by Mr. Pushkar that various agreements entered into between the plaintiff and defendant no.1 incorporates explicit contingencies regarding export prohibitions, and occurrence of these events has rendered it impossible for the defendant no.1 to perform its obligation, therefore, the contracts have become void.

158. Alternatively, it was submitted by him that even if the plaintiff's assertion that some of the agreements do not provide for the contingency of suspending or terminating support services in the event of 'prohibition of export laws' is taken at face value, the defendant no.1 is nevertheless completely excused from performance under Section 56 of the Contract Act.

159. To elaborate the above submission, attention of the Court was drawn to *Clauses 2 and 5* of Order Forms; *Clauses 1.11, 12.4 and 12.7* of the GTC; and *Clauses 1.1.5, 13.5 and 13.8* of the Delivered Support Agreement.

160. To appreciate Mr. Pushkar's submission, it is imperative to refer to *Clauses 2 and 5* of the three Order Forms. These clauses, which are similarly worded across all the three Order Forms, *inter alia*, stipulate the territory to be 'worldwide' for the licenses and support services, as well as the conditions governing the delivery of the software. The said clauses are reproduced herein below for the ease of reference:

> ***"2. TERRITORY. Worldwide, subject to applicable export control laws*** *as may be updated from time to time by the applicable jurisdiction and* ***subject to Section 12.4 of the GTC.***
>
> *xxx xxx xxx*
>
> ***5. DELIVERY:*** *[...]* ***Delivery of Software is subject to Section 12.4 of the GTC****, and SAP* ***is not responsible for delays*** *in or prevention of delivery* ***due to application of applicable export laws."***
>
> (emphasis supplied)

161. Apart from the Order Forms, reliance was also placed on the *GTC*. Specifically, attention was drawn to *Clause 1.11*, which defines "SAP Support"; *Clause 12.4*, which deals with regulatory matters and export control compliance; and *Clause 12.7*, which stipulates the *Force Majeure*

conditions. The said clauses are extracted below:

> *"1.11* ***"SAP Support"*** *means SAP's then-current SAP support offering made available to Licensee, as stated in the applicable Software Order Form and made a part hereof*
>
> *xxx xxx xxx*
>
> *"12.4* ***Regulatory Matters****.* ***The Software, Documentation and SAP Materials are subject to the export control laws of various countries, including without limit the laws of the United States and Germany****. Licensee agrees that it will not submit the Software, Documentation or other SAP Materials to any government agency for licensing consideration or other regulatory approval without the prior written consent of SAP, and will not export the Software, Documentation and SAP Materials to countries, persons or entities prohibited by such laws. Licensee shall also be responsible for complying with all applicable governmental regulations of the country where Licensee is registered, and any foreign countries with respect to the use of the Software, Documentation or other SAP Materials by Licensee and/or its Affiliates.*
>
> *Licensee acknowledges that the delivery of the Software (including patches, fixes, updates, upgrades and new versions), Documentation and Confidential Information may be subject to the prior obtaining of export and/or import authorizations from the competent authorities and that this process may considerably delay or prevent the delivery and/or impact SAP's ability to provide maintenance and support. Licensee shall support SAP in obtaining any required authorization by providing information and/or declarations, e.g. End Use Certificates, as may be requested by SAP. UNDER NO CIRCUMSTANCES SHALL SAP BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES, LOSS OF GOOD WILL OR BUSINESS PROFITS, WORK STOPPAGE, DATA LOSS, COMPUTER FAILURE OR MALFUNCTION CAUSED BY THE DELAY OR DENIAL OF ANY EXPORT AND/OR IMPORT LICENSES.*
>
> *xxx xxx xxx*

> *12.7* ***Force Majeure****. Any delay or nonperformance of any provision of this Agreement (other than for the payment of amounts due hereunder) caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of this Agreement,* ***and the time for performance of such provision, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing performance****."*

(emphasis supplied)

162. Lastly, in the context of the *Delivered Support Agreement*, it is pertinent to refer to *Clause 1.1.5*, which specifically defines the term 'Export Law' to include trade sanctions and embargoes; *Clause 13.5*, which deals with regulatory matters and the consequent right of termination triggered by such sanctions; and the *Force Majeure* provision encapsulated in *Clause 13.8.* The said clauses read as under:

> *"1.1.5 "****Export Law****" means all constitutions, laws, statutes, codes, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits restrictive measures,* ***trade sanctions, embargos*** *and other legally binding requirements of all federal, country, international, state and local governmental authorities relating to export, re-export or import.*
>
> *xxx xxx xxx*
>
> *13.5* ***Regulatory Matters****.* ***The Software, SAP Delivered Support, Documentation and SAP Materials as well as parts of any of these (e.g. new versions, releases, updates, upgrades, patches, fixed or correction of a software product) are subject to Export Laws of various countries, including, without limitation, the laws of the United States, the EU, Ireland, Australia and Germany****. End User agrees that it will not submit the Software, SAP Delivered Support, Documentation or other SAP Materials or parts of any of these to any government agency for licensing consideration or other regulatory approval without the prior*

written consent of SAP, and that it will not export, reexport or import any Software, SAP Delivered Support, Documentation and/or SAP Materials to countries, persons or entities prohibited by any applicable Export Law. In that context, End User is responsible for complying with all applicable Export Laws. If SAP any other member of the SAP Group wants to deliver and/or grant access to Software, SAP Delivered Support, Documentation other SAP Materials, or parts of any of these directly to an End User, End User will support SAP and any other member of the SAP Group in obtaining any required authorization, approval or other consent from the competent authorities by providing any necessary or useful declarations or other necessary or useful information, e.g. End User certificates, as may be requested by SAP or any other member of the SAP Group. End User acknowledges that the delivery of and/or granting of access to Software, SAP Delivered Support, Documentation and SAP Materials as well as parts of any of these may be subject to the prior obtaining of export or import authorizations or both from the competent authorities and that this process may (i) considerably delay or prevent the delivery of and/or granting of access to Software, SAP Delivered Support, Documentation and SAP Materials or part of any of these, (ii) impact SAP's ability or the ability of any other member of the SAP Group to provide SAP Delivered Support or other services and (iii) lead to SAP or any other member of the SAP Group having to limit, suspend or terminate End User's access to SAP Delivered Support services or other services.

Neither SAP nor any other member of the SAP Group assumes any responsibility or liability:

a) for any delay caused in the delivery and/or granting of access to Software, SAP Delivered Support, Documentation and SAP Materials or parts of any of these due to export or import authorizations or both having to be obtained from the competent authorities;

b) if any required authorization, approval or other consent for the delivery of and/or granting of access to Software, SAP Delivered Support, Documentation and SAP Materials or parts of any of *these cannot be obtained from the competent authorities;*

c) if the delivery of and/or granting of access to Software, SAP Delivered Support, Documentation and SAP Materials or parts of any of these is prevented due to applicable Export Laws; and

d) if access to SAP Delivered Support or other services has to be limited, suspended or terminated due to applicable Export Law.

SAP may terminate this Agreement with thirty days' prior written notice if SAP or any relevant member of the SAP Group may not deliver or grant access to Software, SAP Delivered Support, Documentation and SAP Materials to End User due to an embargo or other comparable trade sanction, which is expected to be in place for six months or longer.

xxx xxx xxx

13.8 ***Force Majeure****. Any delay or nonperformance of any provision of this Agreement (other than for the payment of amounts due hereunder) caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of this Agreement,* ***and the time for performance of such provision, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing performance****."*

(emphasis supplied)

163. A perusal of the relevant statutory provisions, is also equally imperative for the adjudication of the issue at hand. Section 32 of the Contract Act provides for enforcement of contingent contracts and the same is reproduced hereinunder:

*"****32. Enforcement of contracts contingent on an event happening.****—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.*

If the event becomes impossible, such contracts become void."

164. Section 56 of the Contract Act deals with the agreements to do an impossible act or to do an act afterwards becoming impossible or unlawful.

Section 56 of the Contract Act reads thus:

> *"**56. Agreement to do impossible act.**—An agreement to do an act impossible in itself is void.*
>
> ***Contract to do an act afterwards becoming impossible or unlawful**.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> ***Compensation for loss through non-performance of act known to be impossible or unlawful**.— Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise."*

165. The Hon'ble Supreme Court in ***NAFED*** (supra) relying upon its earlier decision in ***Satyabrata Ghose*** (supra) has explained the ambit, scope and interplay between Section 32 and Section 56 of the Contract Act in the following terms:

> *"48. **Section 32 of the Contract Act applies in case the agreement itself provides for contingencies upon happening of which contract cannot be carried out and provide the consequences. To this case, provisions of Section 32 of the Contract Act is attracted and not Section 56**. **In case an act becomes impossible at a future date, and that exigency is not provided in the agreement on the happening of which exigency, impossible or unlawful, the promisor had no control which he could not have prevented, the contract becomes void as provided in Section 56**. However, Section 56 also provides liability for a cause where the promisor has agreed to do something which he knew or with reasonable diligence might have known and which the promisee did not know to be impossible or unlawful. Such a promisor must make compensation to such promise and is liable to*

pay damages. The latter part of Section 56 is applicable when promisee did not know the act to be impossible or unlawful and that it was not known to the promisor; the action was impossible or unlawful or with reasonable diligence might have known.

49. In the present case, because of the clear stipulation in Clause 14 of the Agreement, it is apparent that the parties have agreed for a contingent contract. They knew very well that the Government's executive, or legislative actions might come in the way as provided in Clause 14 of the Agreement. Thus, in this case, Section 32 of the Contract Act is attracted and not the provisions of Section 56. It was an agreement to do an act impossible in itself without permission, and that is declared to be void by Section 32. The contract was capable of being performed in case the Government gave the requisite authorisation. ***It is not an event that was not in contemplation at the time of entering into the agreement. Government permission was necessary. Section 56 is not attracted as the promisor and promisee both knew the reason in advance as in agreement such a contingency was provided itself in case of the Government's executive order comes in the way, for cancellation of the contract.*** *Thus, the contract became void on the happening of the contingency, as provided in Section 32 of the Contract Act.*

50. This Court in Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., (1953) 2 SCC 437 : AIR 1954 SC 44 : 1954 SCR 310], considered the applicability of Sections 32 and 56 while considering the doctrine of frustration of contract. Impossibility and frustration are used as interchangeable expressions. The principle of frustration is an aspect of the discharge of a contract. In India, the only doctrine the courts have to go by is that of intervening impossibility or illegality as laid down in Section 56, and the English decisions in this regard may have persuasive value but are not binding. ***This Court also considered if the contract contained impliedly or expressly a stipulation, according to which it would stand discharged on happening of particular circumstances. The dissolution of the agreement would take place under the terms of***

the contract itself. Such cases would be outside the purview of Section 56 of the Contract Act altogether. They would be dealt with under Section 32 of the Contract Act, which deals with contingent contracts.”

(emphasis supplied)

166. It’s plain from the above expositions, that a clear legal distinction exists between the application of Section 32 and Section 56 of the Contract Act. If a contingency is expressly or impliedly contemplated and provided for within the four corners of an agreement, upon the happening of which the contract cannot be performed or enforced, it constitutes a contingent contract. Such a contract is rendered void under Section 32 of the Contract Act upon the occurrence of that stipulated contingency.

167. On the other hand, Section 56 contemplates a situation where the performance of a contract becomes impossible or unlawful at a future date due to the happening of an unexpected exigency, one that was not provided for in the agreement, over which the promisor had no control, and which the promisor could not prevent. In such a scenario, the agreement is rendered void under Section 56 upon the happening of that unforeseen exigency.

SAP Delivered Support Agreement [“Delivered Support Agreement”]

168. Reverting to the specific contractual clauses, Clause 13.5 read with Clause 1.1.5 of the *Delivered Support Agreement* contemplates a contingency of export prohibitions, under which defendant no. 1 can terminate the agreement with a 30 days’ prior written notice, provided that defendant no. 1 or any relevant member of the SAP Group is unable to deliver or grant access to the support services due to an embargo or

comparable trade sanction expected to be in place for six months or longer.

169. The parties having expressly anticipated and provided for the contingency of trade sanctions, they have undoubtedly agreed to a contingent contract. Therefore, the *Delivered Support Agreement* will be governed by the provisions of Section 32 of the Contract Act, and not Section 56.

<u>Order Forms/General Terms & Conditions [“GTC”]</u>

170. Next, Mr. Pushkar referred to Clause 2 of the *Order Forms* to argue that since the agreements operate across a “worldwide” territory and the services are routed and provided from outside India, the EU sanctions have completely incapacitated defendant no. 1 from rendering the services. He further submitted that Clause 5 of the Order Forms, read with Clause 12.4 of the GTC, expressly stipulates that SAP shall not be responsible for any delays in, or prevention of, delivery caused by the application of relevant export laws.

171. However, a careful perusal of Clause 12.4 of the GTC, which deals with “Regulatory Matters”, reveals a crucial distinction. While the clause explicitly states that “Software”, “Documentation”, and “SAP Materials” are subject to the “export control laws” of various countries, however the term ‘Support Services’, which is a distinct, defined term within the GTC, is conspicuously missing from this provision. Therefore, in the *prima facie* opinion of this Court, the provision of ‘Support Services’ has not been made subject to the export laws of various countries under the GTC.

172. Besides the above conscious omission, the expression ‘export control laws’, as it finds mention in Clause 2 of the Order Forms as well as in

Clause 12.4 of the GTC, has neither been defined in the Order Forms nor in the GTC. In the absence of a specific contractual definition, it is difficult for this Court to opine at this threshold stage that the expression "export control laws" encompass the specific 'trade sanctions' imposed under the EU Regulations.

173. Seemingly there is no contingency of trade sanctions contemplated under the Order Forms/GTC, therefore, it is Section 56 of the Contract Act that will assume relevance in the given scenario, if at all 'trade sanctions' are found to be a justified reason for suspension of support services.

Force Majeure Clause in 'SAP Delivered Support Agreement' and 'GTC'

SAP Delivered Support Agreement

174. The submission of defendant no. 1 premised on the *Force Majeure* clause i.e. Clause 13.8 of the *Delivered Support Agreement,* is that it stands discharged from performing its obligations on account of trade sanctions. A plain reading of the *Force Majeure* clause, however, demonstrates that it does not provide for the termination, discharge, or frustration of the Delivered Support Agreement, nor does it state that a delay or non-performance caused by the conditions beyond reasonable control constitutes a breach. Rather, the Clause provides for extension of contractual period, explicitly stating that the time for performance *shall be deemed to be extended for a period equal to the duration of the conditions preventing performance.* Since the clause contemplates an extension of the performance period rather than providing for an outright termination, the *Force Majeure* clause cannot be invoked to weaponize Section 32 of the Contract Act to

claim that the agreement has become void.

General Terms and Conditions ["GTC"]

175. Under the GTC, Clause 12.7 is the *'Force Majeure'* clause which is identically worded as Clause 13.8 of the Delivered Support Agreement, therefore, by the same token the defendant no.1 cannot claim that the GTC has been rendered void under Section 32 of the Contract Act.

SAP Enterprise Support Schedule ["Support Schedule"]

176. Insofar as the *SAP Enterprise Support Schedule* is concerned, the case set up by defendant no. 1 in its written statement is that the said Support Schedule requires the plaintiff to comply with all terms agreed between the parties, which *inter alia* includes mandatory compliance with the export control laws of various countries, including Germany.

177. However, a bare perusal of the Support Schedule reveals that it does not independently contemplate or mandate compliance with any export control laws of foreign countries. As a matter of fact, the Support Schedule has no provision at all that permits the termination or suspension of support services on account of the triggering of alleged export control laws. Therefore, the given situation will be governed by Section 56 of the Contract Act, should 'trade sanctions' is found to be a valid reason for suspension of support services.

Fundamental hurdle

178. Be that as it may, for availing the defence under Section 32 and/or Section 56 of the Contract Act, the fundamental hurdle for defendant no. 1 remains that this Court cannot take judicial notice of the EU sanctions under

the EU Council Regulation No. 269/2014, which have been invoked by defendant no. 1 in the name of “Export Laws”. Consequently, the defendant no. 1 cannot take advantage of these unproven EU sanctions to argue that the performance of contract has become impossible, thereby relieving it of its obligations under the *SAP Enterprise Support Schedule* or *Delivered Support Agreement* either under Section 32 or Section 56 of the Indian Contract Act.

Commercial hardship is not legal impossibility

179. There is yet another facet to the issue of impossibility. It was argued on behalf of the defendant no.1 that the support services are centrally managed and exclusively delivered through its parent entity, SAP SE in Germany, thereby making it impossible to render the services without violating the EU Sanctions.

180. This Court does not find favour with the above submission. The agreements executed between the parties do not contain any contractual stipulation providing that the support services shall be exclusively delivered from or routed through Germany by SAP SE; rather, Clause 2 of the three Order Forms and Clause 1.14 of the GTC defines the ‘territory’ of the licenses and the corresponding support services as ‘worldwide.’

181. In the absence of any express contractual mandate localizing the service delivery exclusively from the European Union, defendant no. 1 cannot artificially restrict its performance obligations to a single location just to claim impossibility. In other words, once it has been contended by the defendant no.1 that the territory of license and support services are ‘worldwide’, the defendant no.1 cannot then take diametrically opposite

stand that expression ‘worldwide’ connotes only SAP SE based in Germany.

182. In the pleadings, the defendants have also admitted that the support services are *‘monitored throughout multiple time zones by resources based in Germany, United States and India’*.[1] Even the term *‘SAP Group’* as defined in the Delivered Support Agreement means *‘SAP Parent and any of its Associated Companies’*, and is not limited to SAP SE based out of Germany. Therefore, the technical support services can possibly be provided or routed by defendant no. 1 from any other country where its parent entity, SAP SE, maintains a network or operates, falling outside the territorial ambit of the EU sanctions. In view of the admission in the pleadings and the express contractual provisions, defendant no. 1’s stance that all services are exclusively routed through, and entirely dependent upon SAP SE in Germany appears contradictory and cannot be accepted.

183. The SAP Marketplace or other online platforms etc., through which support is accessed, is essentially a remote or a cloud based services, unlike the cross-border movement of physical goods. The provision of digital support services, is not strictly confined to a single geographical location. It is highly improbable that a multinational technology conglomerate of SAP’s magnitude, having a vast network of offices, servers, and a customer base across the globe, is technologically or operationally incapacitated from routing its online support services through any of its non-EU regional hubs.

184. It is trite that the word ‘impossible’, as it occurs in Sections 32 and 56 of the Contract Act, must be construed in its practical, and not literal, sense.[2]

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[1] Ref para 30 of preliminary submissions in the written statement of the defendants

[2] *Satyabrata Ghose v. Mugneeram Bangur & Co., (1953) 2 Supreme Court Cases 437*

Commercial hardship cannot be equated to legal impossibility. Merely because arranging the supply of support services from an alternative location might be onerous, defendant no. 1 cannot contend that the contract stands discharged due to impossibility of performance.

185. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Energy Watchdog vs. CERC, (2017) 14 SCC 80.*** In the said decision, the Apex Court categorically held that a contract is not frustrated merely because the circumstances under which it was made are altered and performance of the contract has become onerous on account of an unforeseen turn of events. The relevant observations of the Apex Court on the doctrine of impossibility are set out herein below:

> ***"38.*** *Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath [Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522]* ***, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co.*** *[Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : (1953) 2 SCC 437 : AIR 1954 SC 44]* ***Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.***
>
> ***39****. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH [Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)] ,* ***despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the***

Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, *namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double.* ***Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.***"

(emphasis supplied)

186. In view of the admitted position that the support services operate on a worldwide basis, the defence of absolute impossibility cannot be sustained. The mere fact that providing or routing these services from an alternative country within the SAP SE network may be more onerous does not absolve defendant no. 1 of its contractual obligations.

187. Adverting now to the decisions relied upon by defendant no. 1, this Court finds that they do not advance its case.

188. Reliance was placed by the defendant no.1 on the decision in ***NAFED*** (supra) to contend that, given the explicit contingency of 'trade sanctions' providing for termination, the various agreements entered into between the parties have become void under Section 32 of the Indian Contract Act. However, this reliance is entirely misplaced. As already held, the defendant no. 1 cannot take advantage of unproven EU sanctions to argue that the performance of contract has become impossible, thereby rendering it void.

189. Likewise, defendant no. 1's reliance on ***Satyabrata Ghose*** (supra) to claim discharge under Section 56 of the Contract Act due to the 'EU

Sanctions' is equally misplaced. In that case, despite the temporary military requisition of the subject land, the Apex Court rejected the defence of impossibility, holding that the supervening event did not strike at the root of the contract or destroy its fundamental basis. Applying this test, the 'EU Sanctions' does not discharge the defendant no.1 of its contractual obligation to provide support services. As already noted, the support services operate worldwide through a global network of multiple entities. The difficulty in routing these services from alternative locations does not render their delivery practically impossible. At its highest, the restriction merely renders performance commercially onerous for defendant no. 1, which, as settled in ***Satyabrata Ghose*** (supra), does not equate to legal impossibility. Therefore, the said decision is of no avail to the defendant no.1.

190. Reliance has also been placed by the defendant no.1 on the decision in ***PASL Wind Solutions*** (Supra), to contend that under the principles of conflict of laws and international comity, defendant no. 1 stands discharged from performance because rendering support services would violate foreign export control laws and the EU Sanctions. The aforesaid decision operates within the realm of international commercial arbitration. The Hon'ble Supreme Court therein was specifically adjudicating whether two Indian companies could designate a foreign arbitral seat, and whether the resulting award would be enforceable as a 'foreign award' under Part II of the Arbitration and Conciliation Act, 1996, which is not the situation in the present case. Further, as already held, no judicial notice of foreign law can be taken before the same has been proved in the trial.

191. Similarly, the reliance placed by the defendant no.1 on ***Regazzoni*** (supra) is of no avail to the defendant no.1 for the same reason that the trade sanctions under the EU Regulations are yet to be proved as a question of fact.

D. SPECIFIC ENFORCEABILITY OF VARIOUS AGREEMENTS

192. Next, it was argued on behalf of the defendant no. 1 that the agreements are not specifically enforceable – (i) in terms of Section 14(d) of the Specific Relief Act, 1963 as the agreements in their nature are determinable; (ii) as the agreements runs into minute or numerous details that the court cannot enforce its material terms[3]; and (iii) in terms of Section 14(b) as the performance of the agreements involves the performance of continuous duty which the court cannot supervise.

Termination Clauses Across Various Agreements

193. Before delving into the above noted contentions of defendant no. 1, apposite would it be to advert to the relevant termination clauses across the various agreements entered into between the parties.

194. Initial term of the 'SAP software licenses and support' commenced with the Order Form 1 dated 22.06.2017 effective from 01.01.2017. Relevant part of Clause 3 of Order Form 1 is reproduced below, as it explicitly sets out the auto-renewing nature of the support services and the corresponding fee structure without conferring any right of termination on the defendant no.1:

> ***"3. SAP SUPPORT SERVICES AND FEES****; SAP and Licensee agree that SAP Support is offered by SAP as set forth in the*

[3] Section 14(1)(b) of unamended Specific Relief Act, 1963

applicable SAP Support Schedule found at https: //www.sap.com/ docs/download/ agreements/product-use-and-support-terms/sup/enterprise-support-schedule-india: english-v6-2016.pdf.

***SAP Support shall commence as of the Effective Date of this Order Form. The Initial term of SAP Support is the remainder of the current calendar year ("Initial Term"). After the initial Term and subject to the Agreement and SAP Support Schedule, SAP Support shall renew at the beginning of each calendar year for the subsequent one year period**. SAP Annual Support Fees shall be paid annually in advance and shall be as specified below [....]"*

(emphasis supplied)

195. Similarly, Order Form 2 dated 16.11.2017, *inter alia*, governs the procurement of further 'SAP software licenses and support'. Relevant part of Clause 3 of this document is extracted below to highlight its identical auto-renewing mechanism, alongside a specific provision that exclusively permitted only the licensee i.e. the plaintiff to terminate the support under certain conditions, with no such right of termination being available to the licensor i.e. the defendant no.1:

*"**3. SAP SUPPORT SERVICES AND FEES**: SAP and Licensee agree that SAP Support is offered by SAP as set forth in the applicable SAP Support Schedule attached to the Agreement or hereto and made a part hereof.*

*SAP Support Fees shall commence as of the first day of the month following the Effective Date of this Order Form. The initial term of SAP Support shall begin on the Effective date and continue for the remainder of the current calendar year ("Initial Term"). **After the Initial Term and subject to the Agreement and SAP Support Schedule, SAP Support shall renew at the beginning of each calendar year for the subsequent one year period. Notwithstanding anything to the contrary in the***

> ***Agreement, Licensee may terminate all SAP support under the Agreement (for all orders) effective December 31st 2017, by providing written notice to SAP any time prior to or on such date** […]”*

(emphasis supplied)

196. Subsequently, *Order Form 3* dated 07.06.2020 was executed, *inter alia*, for further ‘*SAP software licenses and support*’. The relevant portion of Clause 3 is also reproduced below to demonstrate the consistent contractual intent of an auto-renewing term, without conferring any right of termination on defendant no. 1:

> ***“3. <u>SAP SUPPORT SERVICES AND FEES:</u>** SAP and Licensee agree that SAP Support is offered by SAP as set forth in the applicable SAP Support Schedule attached to the Agreement or hereto and made a part hereof.*
>
> *SAP Support Fees shall commence as of the first day of the month following the Effective Date of this Order Form. **The initial term of SAP Support shall begin on the Effective date and continue for the remainder of the current calendar year and the next full calendar year** (except in cases of an Effective Date commencing on January 1 of a respective calendar year, in which case the initial term will run until December 31st of the respective calendar year) (“Initial Term”). **After the Initial Term and subject to the Agreement and SAP Support Schedule, SAP Support shall renew at the beginning of each calendar year for the subsequent one year period**. SAP Annual Support Fees shall be paid annually in advance and shall be as specified below [....]”*

(emphasis supplied)

197. Since the Order Forms are governed by the *Software License and Support Agreement, General Terms and Conditions (“GTC”)*, it is also imperative to examine the termination mechanism within the GTC as well.

Clause 5.1 of GTC is reproduced below, as it delineates the strict contingent scenarios viz. (i) material breach including non-payment of license fee, in the event the Licensee fails to cure the breach within the notice period of thirty days or (ii) insolvency, under which the agreement may be terminated by the Licensor i.e. the defendant no.1. The Clause reserves the right of 'at will' termination exclusively with the Licensee:

> *"5.TERM.*
>
> *5.1. Term. This Agreement and the license granted hereunder shall become effective as of the date first set forth in the applicable Software Order Form and shall continue in effect thereafter unless terminated upon the earliest to occur of the following:* ***(i) thirty days after Licensee gives SAP written notice of Licensee's direction to terminate this Agreement, for any reason, but only after payment of all License and SAP Support fees then due and owing; (ii) thirty days after SAP gives Licensee written notice of Licensee's material breach of any provision of this Agreement (other than Licensee's breach of its obligations under Sections 6, 10 or 11, which breach shall result in immediate termination), including Licensee's failure to pay any money due hereunder, unless Licensee has cured such breach during such thirty day period; (iii) immediately if Licensee files for bankruptcy, becomes insolvent, or makes an assignment for the benefit of creditors****. For the avoidance of any doubt, termination of this Agreement shall strictly apply to all Software licensed under this Agreement, its appendices, schedules, addenda and order documents and any partial termination of this Agreement by Licensee shall not be permitted in respect of any part of this Agreement, its appendices, schedules, addenda, order documents."*
>
> (emphasis supplied)

198. Clauses 6.1 and 6.3 of the *SAP Enterprise Support Schedule ("Support Schedule")* outlines the termination framework for the Support

Schedule, and *inter alia* provides for the stipulated notice periods and the effective date of any such termination. The said clauses are extracted below for the ease of reference:

> ***"6. Termination***
>
> ***6.1 SAP Enterprise Support may be terminated by either party with three months' written notice (i) prior to the end of the Initial Term and (ii) thereafter, prior to the start of the following renewal period. Any termination provided in accordance with above will be effective at the end of the then-current SAP Enterprise Support period during which the termination notice is received by the respective party. Notwithstanding the forgoing, SAP may terminate SAP Enterprise Support after one month's written notice of Licensee's failure to pay Enterprise Support Fees.***
>
> (emphasis supplied)

199. The *SAP Delivered Support Agreement dated 29.03.2019*, *inter alia*, governs the supplementary support services. The said Agreement has been issued by the defendant no.1 providing for purchase of certain specified software by the plaintiff through the '*Partner*' of defendant no.1 i.e. the defendant no.2. Relevant part of Clause 13.5 titled '*Regulatory Matters*', is reproduced below, as it is the specific provision relied upon by defendant no. 1 to justify termination based on an embargo or comparable trade sanction.

> *"13.5 Regulatory Matters*
>
> *xxx xxx xxx*
>
> ***[…] SAP may terminate this Agreement with thirty days' prior written notice if SAP or any relevant member of the SAP Group may not deliver or grant access to Software, SAP Delivered Support, Documentation and SAP Materials to End User due to an embargo or other comparable trade sanction, which is***

expected to be in place for six months or longer."

(emphasis supplied)

Statutory Provisions

200. After having noted the contractual framework providing for the termination, it is also imperative to outline the relevant statutory provisions governing the specific performance of commercial contracts. Section 14 of the Specific Relief Act, 1963 (as amended), provides for four categories of contracts, which cannot be specifically enforced. Section 14 is set out herein below for ready reference:

> *"**14. Contracts not specifically enforceable.—**The following contracts cannot be specifically enforced, namely:—*
> *(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;*
> *(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;*
> *(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and*
> *(d) a contract which is in its nature determinable."*

(emphasis supplied)

Relevant Case Law on the Determinability of Contracts

201. Having noted the contractual framework providing for termination, as well as the relevant statutory provision, it may be advisable at the outset, to advert to the law on the aspect as to when a contract can be said to determinable in its nature. The recent decision of the Hon'ble Supreme Court in ***K.S. Manjunath*** (supra), comprehensively settles the jurisprudence

surrounding the phrase *"a contract which is in its nature determinable"* under Section 14(d) of the Specific Relief Act, 1963.

202. The Apex Court noted various decisions of different High Courts and also approved the categorisation of contracts into five broad classes depending on their ease of determinability, as were delineated by the Madras High Court in ***A. Murugan v. Rainbow Foundation Ltd., 2019 SCC OnLine Mad 37961***. The relevant observation from ***K.S Manjunath*** (supra) reads thus:

> *"**47.** The High Court of Madras in A Murugan v. Rainbow Foundation Ltd., 2019 SCC OnLine Mad 37961, had further elaborated on the aspect of determinable contracts. For the purpose of ascertaining determinability, the court bifurcated contracts into several categories:* ***(i) contracts that are unilaterally and inherently revocable or capable of being dissolved such as licenses and partnerships at will; (ii) contracts that are terminable unilaterally on a "without cause" or "no fault" basis; (iii) contracts that are terminable forthwith for cause or that cease to subsist "for cause", without a provision for remedying the breach; (iv) contracts which are terminable for cause subject to a breach notice being issued and an opportunity to cure the breach being given, and; (v) contracts without a termination clause, which could be terminated for breach of a condition but not a warranty, as per applicable common law principles. The court held that the abovementioned (iii) (iv) and (v) categories of contract are not determinable contracts. The court further observed that although the (iv) and (v) categories are terminable yet the same cannot be said to be in nature determinable.*** *The relevant observations are as under:*
>
> > *"17. On examining the judgments on Section 21(d) of SRA 1877 and Section 14(c) of the Specific relief Act, as applicable to this case i.e. before Act 18 of 2018,* ***I am of the view that Section 14(c) does not mandate that all contracts that could***

be terminated are not specifically unenforceable. If so, no commercial contract would be specifically enforceable. Instead, Section 14(c)applies to contracts that are by nature determinable and not to all contracts that may be determined. *If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract would be considered as determinable by nature and, consequently, not specifically enforceable: (i)* ***contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will****; and (ii)* ***contracts that are terminable unilaterally on "without cause" or "no fault" basis. Contracts that are terminable forthwith for cause or that cease to subsist "for cause" without provision for remedying the breach would constitute a third category.*** *In my view, although the Indian Oil case referred to Clause 27 thereof, which provided for termination forthwith "for cause", the decision turned on Clause 28 thereof, which provided for "no fault" termination, as discussed earlier.* ***Thus, the third category of contract is not determinable by nature; nonetheless, the relative ease of determinability may be a relevant factor in deciding*** *whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated under specific circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination."*

48. *In Narendra Hirawat & Co. v. Sholay Media Entertainment*

Pvt. Ltd., 2020 SCC OnLine Bom 391, the Bombay High Court observed that the phrase ***"a contract which is in its nature determinable" would mean a contract which is determinable at the sweet will of a party to it, without reference to the other party or without reference to any breach committed by the other party or without any eventuality or circumstance. In other words, the phrase would contemplate a unilateral right in a party to a contract to determine the contract without assigning any reason.*** *The relevant observation is as under:*

xxx xxx xxx

49. *The Delhi High Court in DLF Home Developers Limited v. Shipra Estate Limited, 2021 SCC OnLine Del 4902, while considering an agreement to sell a property held that the question whether a contract is in its nature determinable* ***must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have the right to terminate or determine the contract when the other party is willing to perform and is not in default. In other words, where a contract cannot be terminated so long as the other party remains willing to perform its part, such a contract is not determinable and, in equity, is specifically enforceable.*** *The relevant observation is as under:*

xxx xxx xxx

> *79. Viewed in the aforesaid perspective,* ***it is at once apparent that the contract is in its nature determinable if the same can be terminated or its specific performance can be avoided by the parties. Thus, contracts that can be terminated by the parties at will or are in respect of relationships, which either party can terminate; would be contracts that in their nature are determinable.*** *If a party can repudiate the contract at its will, it is obvious that the same cannot be enforced against the said party.*
>
> *80.* ***However, if a party cannot terminate the contract as long as the other party is willing to perform its obligations, the contract cannot be considered as determinable*** *and it would,*

in equity, be liable to be enforced against a party that fails to perform the same. Almost all contracts can be terminated by a party if the other party fails to perform its obligations. Such a contract cannot be stated to be determinable solely because it can be terminated by a party if the other party is in breach of its obligations. The party who is not in default would, in equity, be entitled to seek performance of that contract. In such cases, it cannot be an answer to the non-defaulting party's claim that the other party could avoid the contract of the party seeking specific performance, had breached the contract; therefore, the same is not specifically enforceable. Thus, the question whether a contract is in its nature determinable, must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have the right to terminate or determine the contract even though the other party are ready and willing to perform the contract and are not in default.

xxx xxx xxx

50. *In Affordable Infrastructure & Housing Projects (P) Ltd. v.Segrow Bio Technics India (P) Ltd., 2022 SCC OnLine Del 4436, the lease deed provided for a termination clause. Under the termination clause, the respondent had an option to terminate the lease deed by serving a 15 days' written notice in case the petitioner failed to make the payment for two consecutive months. The Delhi High Court on the strength of DLF Home (supra) observed that almost all contracts can be terminated by a party, if the other party fails to perform its obligations and that such contracts cannot be stated to be determinable solely because it can be terminated by a party if the other party is in breach of an obligation. The non-defaulting party would in equity be entitled to seek performance of that contract.* ***The court held that the question whether a contract is in its nature determinable must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have a right to terminate or determine the contract even though the other party is ready and willing to perform the contract and is not in default****. The relevant observation is as under:*

xxx *xxx* *xxx*

64**. <u>In this backdrop, it would be useful to advert to the classification set out in A. Murugan (supra)</u>, wherein the Madras High Court categorised contracts into five broad classes depending on their ease of determinability. **Out of those, the first two i.e. (i) contracts inherently revocable such as licences and partnerships at will, and (ii) contracts terminable unilaterally on a "without-cause" basis, were held to be determinable in nature. The remaining classes, namely (iii) contracts terminable for cause without provision for cure (iv) contracts terminable for cause with notice and opportunity to cure, and (v) contracts without a termination clause but terminable only for breach of a condition, were all held not determinable in nature.

65.** <u>Further, as laid down in DLF Home (supra)</u>, **the question whether a contract is in its nature determinable lies in ascertaining whether the party against whom specific performance is sought has the right to terminate the contract even when the other party is ready and willing to perform. This means if the contract cannot be terminated so long as the other party stands willing to perform, it is not determinable in its nature and would, in equity, be specifically enforceable.** <u>The same reasoning was followed in Affordable Infrastructure (supra)</u>, **where it was held that a contract terminable for breach cannot merely for that reason be regarded as determinable, otherwise, no contract could ever be specifically enforced."

(emphasis supplied)

203. A Coordinate Bench of this Court in ***Mahajan Imaging Pvt. Ltd vs. Pushpawati Singhania Research Institute and Another., 2026 SCC OnLine Del 1779,*** also relied upon ***K.S. Manjunath*** (supra) to expound as under:

*"31. In contradistinction, **contracts which are terminable only for cause, particularly where termination is conditioned upon***

the existence of a breach and is subject to issuance of notice and affording an opportunity to cure, do not fall within the category of contracts that are determinable by their very nature.

32. Tested on the anvil of the aforesaid principles, Clause 10.2(a) of the present Agreement does not confer an unfettered, unilateral, or at- will right of termination. ***The right to terminate is expressly contingent upon the occurrence of a material breach and is further circumscribed by the mandatory requirement of issuance of a written notice granting a cure period of forty-five (45) days.*** *The contractual stipulation thus squarely falls within the fourth category identified in paragraph 64 of K.S. Manjunath (supra), namely****, contracts terminable for cause subject to notice and opportunity to cure, which have been held not to be determinable in nature.***

33. This Court also takes note of the judgment of this Court in HK Toll (supra), which, after considering a catena of authorities, explains the scope of the statutory embargo contained in Section 14(d) of the SRA and underscores that the determinability of a contract must be examined in light of the termination stipulations agreed between the parties. ***The reasoning adopted therein emphasizes that where termination is conditioned upon specific contingencies or breaches, and is not exercisable at the mere will of a party, the contract cannot ipso facto be regarded as determinable in nature.***

34. ***The above exposition, read holistically, clarifies that the question whether a contract is "in its nature determinable" must necessarily be answered with reference to the termination mechanism embodied in the contract and the extent of the power reserved to the parties thereunder. Where a contract envisages termination only upon the occurrence of specified contingencies, particularly subject to notice and cure provisions, and does not confer an unfettered right of revocation, such a contract cannot be characterised as determinable*** *in the sense contemplated under Section 14(d) of the SRA.*

35. ***Clause 10 of the Agreement in the present case provides for termination strictly upon the occurrence of defined contingencies and subject to compliance with a stipulated cure period. It does not vest either party with an unqualified or at-will power of termination. The issue of determinability must, therefore, be examined within that contractual framework, and not divorced from the express stipulations mutually agreed upon by the parties.***

36. This Court finds merit in the submissions advanced by the learned Senior Counsel for the Petitioner and is of the considered opinion that the termination clause embodied in Clause 10 of the Agreement is not in its nature determinable within the meaning of Section 14(d) of the SRA. ***The mere existence of such a clause, particularly one conditioned upon the occurrence of breach and compliance with a cure mechanism, cannot operate as a statutory embargo against consideration of interim protection.*** *Consequently, the bar under Section 14(d) of SRA is not attracted so as to preclude the grant of interim relief against the Impugned Termination Notice."*

(emphasis supplied)

204. As can be seen from the above in ***K.S. Manjunath*** (supra), the Hon'ble Supreme Court crystallized the legal position that only those contracts which are unilaterally and inherently revocable at the "sweet will" of a party, or terminable on a strictly "without cause" or "no fault" basis, fall within the ambit of contracts which are in their nature determinable. Conversely, contracts that are terminable solely "for cause", such as a breach of contractual obligations, whether subject to a cure notice or otherwise, are not determinable in nature. Endorsing a consistent line of judicial precedents, the Apex Court held that a contract cannot be deemed determinable merely because it contains a termination clause triggered by a default, provided the non-defaulting party remains ready and willing to perform its part of the

bargain.

205. The termination framework under different agreements will thus, have to be tested on the anvil of the principles of determinability of a contract as laid down in ***K.S Manjunath*** (Supra) and ***Mahajan Imaging*** (Supra).

Three Order Forms

206. Notably, Clause 3 is similarly worded across all *three Order Forms*. A plain reading of Clause 3 establishes that the agreements constitute an auto-renewing arrangement, expressly stating that after the initial term, *"SAP Support shall renew at the beginning of each calendar year for the subsequent one year period."* Conspicuously absent from the Order Forms is the provision conferring any right upon defendant no. 1 to terminate the licenses or the SAP support services due to any 'foreign sanctions' or on 'at will' basis as contended by defendant no.1.

207. Therefore, the contention advanced by defendant no.1 that the Order Forms, being in the nature of 'licenses', automatically fall under category (i) of the classification set out in ***K.S. Manjunath*** (supra) and are thus determinable, is misconceived. The said decision makes it unequivocally clear that *'category (i)'* applies only to contracts that are *unilaterally and inherently revocable or capable of being dissolved such as licenses and partnerships at will.* Merely because an agreement is styled or structured as a license does not *ipso facto* render it a determinable contract, unless it is revocable 'at will'.

208. As observed in ***DLF Home Developers Limited*** (supra) and subsequently affirmed in ***K.S. Manjunath*** (supra), the definitive test to answer the question of determinability lies in ascertaining *whether the party*

against whom it is sought to be enforced would otherwise have the right to terminate or determine the contract when the other party is willing to perform and is not in default. Clearly, under the Order Forms the defendant no. 1 does not possess the right to terminate the contract as long as the plaintiff is ready and willing to perform its obligations, therefore, the Order Forms cannot be construed as determinable in nature.

209. Further fortifying this conclusion, is a specific addition to Clause 3 of Order Form 2, which explicitly provides that "*Licensee may terminate all SAP support under the Agreement (for all orders) effective December 31st 2017, by providing written notice to SAP any time prior to or on such date.*" This clearly manifests that the right of unilateral termination is vested exclusively with the licensee i.e. the plaintiff, and not with the defendant no.1.

210. To sum up, a conjoint reading of the relevant clauses of the three Order Forms makes it abundantly clear that nowhere in these agreements is there any provision permitting the termination of the licenses and support services based on 'foreign sanctions'. Furthermore, there is absolutely no clause granting defendant no. 1 an unfettered or unilateral right to suspend or terminate the support services 'at will'. Consequently, the Order Forms are legally not determinable in nature.

***Software License and Support Agreement, General Terms and Conditions* [“GTC”]**

211. The defendant no. 1 has placed reliance on Clause 5.1 of *GTC* to assert that it possesses an unfettered and unilateral right to terminate the agreement. A plain reading of the provision reveals that defendant no. 1 has

only been granted the right to terminate the contract in strictly defined contingent scenarios. Under Clause 5.1(ii) the defendant no.1 could terminate the license by giving thirty days written notice in the event of a material breach of any provision of the Agreement including licensee's failure to pay any money due, and that too when the licensee fails to cure the breach within the notice period of thirty days. Clause 5.1(iii) provides for termination of the contract if the plaintiff becomes insolvent or files for bankruptcy. Conversely, the right to terminate the agreement *"for any reason"* or in other words, 'at will' under Clause 5.1(i) is exclusively reserved with the licensee i.e. the plaintiff.

212. Notably, the defendant no. 1 cannot repudiate the contract under Clause 5.1 of the GTC at its own 'sweet will' and can only do so upon an uncured material breach by the plaintiff. Thus, the right vested in defendant no. 1 is clearly to terminate 'for cause' with a provision to cure that breach and not a termination 'at will.' Therefore, the termination framework under the GTC will squarely fall within the fourth category (iv) of contracts i.e. *contracts terminable for cause with notice and opportunity to cure* as expounded in ***K.S. Manjunath*** (supra).

213. For the sake of completeness, it is observed that it is not the case of defendant no.1 that the plaintiff has not made payment for the license fees or is in breach of any provision of the agreement.

214. In that view of the matter, GTC and the three Order Forms governed by GTC cannot be characterized as determinable under Section 14(d) of the Specific Relief Act.

SAP Enterprise Support Schedule ["Support Schedule"]

215. During the course of arguments, in the *sur-rejoinder* for the first time, it was submitted by Mr. Pushkar on behalf of the defendant no.1 that Clause 6.1 of the *SAP Enterprise Support Schedule* provides for termination on 'at will' or 'no fault' basis. It was argued that the vesting of such an unfettered and unilateral right to terminate the agreement, without the necessity of assigning any cause, inherently makes the Support Schedule a determinable contract, thereby attracting the statutory bar against specific performance.

216. A plain reading of Clause 6.1 reveals that it is hybrid in nature. The latter part of the Clause provides that the defendant no.1 has a right to terminate the Support Schedule after giving one month's written notice to the plaintiff, if the plaintiff i.e. licensee fails to pay the Enterprise Support Fees. Therefore, termination under this part could be immediate after one month's notice but only on account of licensee's *failure to pay Enterprise Support Fees.* This part of the Clause, being founded on a specified default, is *ex facie* a termination for cause, therefore, it is not, in its nature determinable as held in ***K.S. Manjunath*** (supra).

217. However, the former part of Clause 6.1, though at first blush gives an impression that the Support Schedule is revocable by either party 'at will' or 'without cause' upon serving a 'three months' written notice but a close scrutiny of the clause reveals that it doesn't let the party to the contract quit whenever it likes, i.e., at their "sweet will".

218. Termination notice as per Clause 6.1 has to be given at defined points, either (i) *prior to the end of the Initial Term* and (ii) *thereafter, before the renewal period begins.* Further, the termination cannot take effect mid-way during the currency of the *SAP Enterprise Support period*; rather, it could

take effect only at the end of such period. In other words, while the Clause allows a party to issue a three months' notice, it explicitly provides that the termination will take effect at the end of the "then-current" SAP Enterprise Support period. The language used deprives the parties of the ability to abruptly terminate the contract at their 'sweet will' in the middle of an active term, especially when the other party, i.e., the plaintiff is ready and willing to perform the agreement.

219. The Clause, thus, mandates that the current support period must run its full course, and during this period the obligation of defendant no.1 to perform and provide support is absolute. A right of termination which could only be exercised at fixed junctures, and binds the parties for the remainder of the contractual period already underway, cannot in *prima facie* opinion of this Court be termed as "at will" termination. At the highest, it will be a 'fixed term contract' or a contract with 'lock-in' period even after three months' notice is given. A Coordinate Bench of this Court, though in somewhat different factual context, has held that during the lock-in period, recourse to a clause which provides for termination without cause by simply giving two months' notice, would not be available.[4]

220. Defendant no.1, rightly, did not invoke Clause 6.1 of the Support Schedule to terminate the support services, knowing fully well that the said Clause does not contemplate an immediate, unilateral termination of the Support Schedule. Instead, defendant no.1 chose to invoke 'EU sanctions' as the cause for termination, a cause which is neither contemplated nor provided for anywhere in the Support Schedule.

---

[4] *Millennium School. v. Pawan Dawar, 2022 SCC OnLine Del 1390*

<u>SAP Delivered Support Agreement</u> ["Delivered Support Agreement"]

221. With respect to the *Delivered Support Agreement*, defendant no. 1 has placed reliance on Clause 13.5 to contend that on account of an embargo or comparable trade sanction, the contract may be terminated by giving thirty days' prior notice, thereby making the contract determinable in its nature.

222. However, when Clause 13.5 of the Delivered Support Agreement is tested on the anvil of the principles laid down in ***K.S. Manjunath*** (supra), it becomes clear that the agreement is not inherently determinable in nature.

223. The said clause does not provide for an 'at will' or a 'without cause' termination right. Rather, the right to terminate under Clause 13.5 is strictly contingent upon a specific regulatory cause, namely, if defendant no. 1 or any member of the SAP Group is unable to deliver the software or support *due to an embargo or other comparable trade sanction, which expected to be in place for six months or longer*. Since this termination is strictly for a cause, and there is no stipulation for the cure of any sort of breach, the contract squarely falls under 'category (iii)' of ***K.S. Manjunath*** (supra), i.e., *contracts terminable for cause without provision for cure*. Therefore, by its very nature, it is not a determinable contract.

224. The reason for the termination of the Delivered Support Agreement, namely, the imposition of EU sanctions, as already held, cannot be used by the defendant no.1 to bypass its contractual obligations.

<u>Whether the agreements are inextricably interlinked</u>

225. An argument was also put forth by Mr. Pushkar that all the agreements entered into between the plaintiff and defendant no.1 would fall under one

composite bucket. Elaborating further, he submits that the Order Forms, the GTC, the Support Schedule and the Delivered Support Agreement are inextricably interlinked, constituting a single composite arrangement.

226. This argument has seemingly been articulated to justify suspension or termination of the support services, both under the Support Schedule and the Delivered Support Agreement, on account of trade sanctions.

227. The reason for the said argument is that the 'trade sanction' as a cause to terminate the support services is available only under Clause 13.5 of the Delivered Support Agreement, and there is no similar clause within the Support Schedule, furnishing 'trade sanctions' as a cause for such suspension or termination of support services.

228. Incidentally, this argument of Mr. Pushkar does not find factual foundation in the pleadings of defendant no.1, as well as, the correspondence between the parties.

229. In its written statement, defendant no.1 has pleaded in unequivocal terms that the termination is, in fact, founded upon the GTC, three Order Forms and Delivered Support Agreement. Conspicuously, there is no averment in the written statement that termination is premised on any clause of the Support Schedule, or that all agreements fall in one composite bucket.

230. For the ease of reference, the relevant pleadings from the written statement filed by defendant no.1 are set out hereinbelow:

> "***PRELIMINARY OBJECTIONS***
>
> ***A. The suspension of support services being assailed by the Plaintiff is in compliance of the terms of the Order Form 1, Order Form 2, Order Form 3, General Terms and Conditions***

<u>(GTC), SAP Delivered Support Agreement and the sanctions imposed on the Plaintiff bv the Council Regulation (EU) No. 269/2014.</u>

5. The Plaintiff has been sanctioned by the European Union ***("EU")*** *under Council Regulation (EU) No. 269/2014* ***("Sanctions Regulation").*** *Under the Sanctions Regulation, the EU has restricted all persons and entities based in EU and its subsidiaries from making available funds or economic resources for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with inter alia the Plaintiff.*

6. As per the Sanction Regulations, Defendant No. 1' parent company SAP SE, Germany is prohibited to make funds or economic resources available, directly or indirectly, to or for the benefit of a person listed in Annex I of the Sanctions Regulation, which includes the Plaintiff. This restriction includes support and maintenance services, including the provision of software updates/patches, provided from the territory of the European Union. As per the Sanctions Regulations, SAP SE Germany is required to undertake its best efforts to ensure that its subsidiary SAP India does not participate in activities that undermine the restrictive measures provided by the Sanctions Regulation. (EU) No. 269/2014 (Art. 15a Regulation (EU) No. 269/2014). ***Therefore, SAP SE, Germany has prevented SAP India from providing support and maintenance services to the Plaintiff, in compliance of the Sanctions Regulations.***

xxx xxx xxx

14. ***Thus, being compelled on account of the Sanctions Regulation, the services were suspended by the SAP Group under the Delivered Support Agreement and Order Forms in accordance with the mutual covenants agreed therein.***

xxx xxx xxx

<u>PRELIMINARY SUBMISSIONS</u>

xxx xxx xxx

*31. **The Defendant No. 1 has admittedly duly provided support services to the Plaintiff upto 20 July 2025, whereafter, to the knowledge of the Plaintiff, the support services under the Delivered Support Agreement and Orders Forms had to be suspended on account of sanctions imposed by the European Union upon the Plaintiff inter alia on account of the ongoing Russia-Ukraine war.***

xxx xxx xxx

*36. **Thus, being compelled on account of the Sanctions Regulation, the services were suspended by the SAP Group under the Delivered Support Agreement and Order Forms in accordance with the mutual covenants agreed therein**. The Plaintiff's contention that EU sanctions don't impact Defendant No. 1 is not correct, as explained hereinabove.*

xxx xxx xxx

*38. **That pursuant to the inclusion of the Plaintiff in the EU's list of sanctioned entities, the support services have been suspended.** That the Defendant No.1 's acts are bona fide and towards compliance with law applicable to it and to its parent and affiliates.*

xxx xxx xxx

PARA-WISE REPLY ON MERITS

xxx xxx xxx

*64. That the contents of Paras 17 to 20 are wrong and denied. **It is submitted that the Delivered Support Agreement or the Orders Forms do not preclude the Answering Defendant from exercising its rights under the Agreement, including suspension or termination in accordance with contractual terms and legal obligations**. The contents of the Preliminary Objections and Preliminary Submissions to the extent relevant are reiterated herein.*

xxx xxx xxx

66. That the contents of Paras 29-32 are wrong and denied.

The Plaintiff was informed of export control issues affecting the Plaintiff's account on 24.07.2025. However, the Answering Defendant denies that such action was "unlawful," "unilateral," or "arbitrary" as alleged or otherwise. The suspension was undertaken in compliance with mandatory legal obligations arising from the imposition of sanctions by the Council of the European Union under Regulation (EU) No.269/2014 as amended by Council Implementing Regulation (EU) 2025/1476 of 18.07.2025 and the terms of the contract between the parties. The contents of the Preliminary Objections and Preliminary *Submissions to the extent relevant are reiterated herein."*

(emphasis supplied)

231. Noticeably, in the reply to the present application, the emphasis of the defendant no.1 is that the support services rendered by defendant no.1 to the plaintiff are governed by the SAP Delivered Support Agreement, and suspension of the same is also under the SAP Delivered Support Agreement. Again, there is no averment that all agreements form one composite arrangement. Furthermore, there is no assertion that any Clause of Support Schedule has been invoked or that support services under the Support Schedule have also been suspended.

232. The relevant averments from the reply of defendant no.1, are set out hereinbelow:

"f. That the use of the SAP software is governed by Software Use Rights. ***The support services rendered by the Defendant No. 1 to the Plaintiff are governed by the <u>SAP Delivered Support Agreement dated 29 March 2019 ("Support Agreement").</u> The support services are managed by the SAP Group, as provided for in the Support Agreement****. The support is provided through multiple global entities within the SAP Group and is centrally managed through the Defendant No.1's parent entity based in Germany, as defined in the Support Agreement. The Support*

Agreement inter alia provides that:

xxx xxx xxx

k. The Defendant No.1 has admittedly duly provided support services to the Plaintiff upto 20 July 2025, whereafter, to the knowledge of the Plaintiff ***, the support services under the Support Agreement had to be suspended on account of sanctions imposed by the European Union upon the Plaintiff inter alia on account of the ongoing Russia-Ukraine war.***

xxx xxx xxx

p. ***Thus, being compelled on account of the Sanctions Regulation, the services were suspended by the SAP Group under the Support Agreement in accordance with the mutual covenants agreed therein. The Plaintiff's contention that EU sanctions don't impact Defendant No.1 is not correct, as explained hereinabove."***

(emphasis supplied)

233. The correspondence exchanged between the parties, particularly e-mails originating from the defendant no.1 whereby the reason for suspension of support services was notified to the plaintiff, mention only in general terms the "EU Sanctions" as the reason for termination of support services, without specific reference to any clause of any agreement.

234. For the sake of ready reference, the relevant correspondence between the parties is set out hereinbelow:

"Updated 24.07.2025 at 13:24 by SAP Agent
Info for Customer
Dear Customer.

There seems to be an export issue with your account and all of your licenses are inactive/expired and this is why you cannot see or download software*.*

I will now forward the ticket to the export component and the colleagues there will assist you with this issue.
Thank you.

Kind Regards.
Dominic Purcell.
SDS (Software Delivery Services)

Updated 24.07.2025 at 16:13 by SAP Agent

Info for Customer

Dear Customer.

I hope this message finds you well.

We would like to inform you that the customer Nyara Energy Limited is currently subject to sanctions. Consequently, we are unable to release/approve the request, as conducting business with this entity is prohibited.

Thank you for your understanding and cooperation.
Thank you.

Best Regards.
SAP Global Export Control Team.

From: Sathyanarayana.singh@nayaraenergy.com
Sent: Fri, 29 Aug 2025 16:18:51
To: <manasvi.vakharia@sap.com>
Cc: "krd srinivas - nayara energy" <srinivas.krd@nayaraenergy.com>
Subject: Urgent: Unilateral Withdrawal of SAP Support Services effective July 24, 2025 despite advance payment

Dear Manasvi,
Greetings!
This is to bring to your attention a critical issue concerning the SAP support services for Nayara Energy.

Despite Nayara Energy having made the advance payment to SAP for the continuation of SAP support services, we have

observed that SAP support services have been unilaterally and abruptly withdrawn effective 24th July 2025. without any prior notice, which has caused significant disruption to our day-to-day business operations.

Let me provide you with a detailed sequence of events that transpired:
On 24th July 2025. we logged into the SAP Support Portal and attempted to download software. However, no software setup was visible, prompting us to raise SAP Incident 867693/2025. SAP responded, indicating there was an export issue and inactive licenses, and the issue was forwarded to the export component for global support.

Later that same day, the ***SAP Global Export Control Team stated that Nayara Energy Limited is under sanctions, and consequently, business with our entity is prohibited****. The quoted statement from the SAP Global Export Control Team is as follows:*

Quote
"We would like to inform you that the customer Nayara Energy Limited is currently subject to sanctions. Consequently, we are unable to release approve the request, as conducting business with this entity is prohibited."
Unquote

By 6:00 PM 1ST on 24th July 2025, access to the SAP Marketplace was completely blocked.
To ensure business continuity and to preclude further impact on our business processes we request that SAP immediately resume the support services as per the terms agreed upon and the payment already made.
We urge you to treat this matter with the utmost urgency and provide a formal response confirming the reinstatement of services. Please also clarify the reason behind the abrupt withdrawal.
Kindly acknowledge the receipt of this email, and look forward to your prompt action and resolution.

Best Regards.
Sathyanarayana Singh
Vice President & Head IT - Refinery, Marketing, and Corporate
Nayara Energy Limited
Refinery Site, 39 KM. Jamnagar-Okha Highway, Vadinar 361305. Gujarat, India
***M** -91 7069005470 | T -91 2833 66 1444 Ext 2816*
www.nyaraenergy.com

From: manasvi.vakharia@sap.com
***Sent: Tue, 02 Sep 2025** 13:57:35*
To:sathyanarayana.singh@nayaraenergy.com<sathyanarayana.singh@nayaraenergy .com >
Cc: "krd srinivas - nayara energy” <srinivas.krd@nayaraenergy.com>, "Singh, Kulwant” <kulwant.singh01@sap.com>
Subject: Re: Urgent Unilateral Withdrawal of SAP Support Services effective July 24, 2025 despite advance payment

Dear Sir,
As a global, EU-headquartered software company, SAP has always maintained a strong commitment to ethics and compliance, including compliance with all applicable economic sanctions and export control laws. SAP software products and services are subject to the export control and sanctions laws of various countries, including without limitation, the laws of Germany, the European Union, and the United States of America.

This clear policy is affirmed repeatedly in SAP's agreements with your firm and on our website.

In light of the addition of Nayara Energy Limited among others, to the EU sanctions list by the Council of the European Union (Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the

***territorial integrity, sovereignty and independence of Ukraine as amended by Council Implementing Regulation (EU) 2025/1476 of 18 July 2025), SAP, as an EU-headquartered company, is compelled to take immediate steps to ensure compliance with these applicable laws and regulations*.**

It has come to our attention, based on publicly available information, that your company is the same legal entity as the sanctioned entity referenced above.

For this reason, SAP is compelled to immediately suspend all transactions with your company, including but not limited to the provision of goods, software, technology, or services, until further notice. Rest assured that SAP values our relationship and regret having to take this action.

Regards.
Manasvi Vakharia
SAP India Pvt Limited
M: +919819289789

(emphasis supplied)

235. As can be seen from the above, no firm stand has been taken by the defendant no.1 in respect of the specific agreement or clause thereof having been invoked to suspend the support services. As aforenoted, the pleadings and the correspondence are equally bereft of any assertion that all agreements form one composite arrangement.

236. Therefore, the question with which this Court is confronted is that whether the termination clause of Delivered Support Agreement could be invoked to suspend or terminate the support services being provided by defendant no.1 under the Support Schedule as well. In other words, as articulated by Mr. Pushkar, whether the Order Forms, the GTC, the Support Schedule and the Delivered Support Agreement, constitute a single

composite arrangement governing the rights and obligations of the parties.

237. Pertinently, the GTC, the Support Schedule and the Delivered Support Agreement have their independent termination framework. Insofar as the Order Forms are concerned, they are perpetual in nature. Having perused the expressed terms of all the aforesaid agreements, this Court does not *prima facie* find that the Delivered Support Agreement would fall into the same 'bucket' as other agreements. The reasons are manifold:

(i) While there is a clear contractual interlink between the three Order Forms, GTC and the Support Schedule, as evidenced by the preamble of the Order Forms, expressly stating that it is governed by the GTC and the Support Schedule, there is no reference made to the Delivered Support Agreement either in the Order Forms, GTC or the Support Schedule.

(ii) From the Delivered Support Agreement and Schedule I thereto, it appears that it was executed for limited and specific purpose, namely, to procure certain third-party modules [04 in number] listed therein, to be provided by the 'partner' as expressly defined in Clause 1.1.7 of the Delivered Support Agreement, to mean "*Avaali Solutions Pvt. Ltd.*" i.e. the defendant no.2. These third-party modules have not been incorporated in the schedules attached to the Order Forms, which apparently govern only direct purchases from defendant no.1.

(iii) There is also stark disparity in the financial scope of the agreements. The fee payable under the Delivered Support Agreement is minuscule compared to the fees for the support services under the Order Forms/Support Schedule. As per Clause 2 of the Delivered

Support Agreement, the fee per year is to the tune of Rs.23,32,073/-, limited to the four specific modules as mentioned in Schedule-I to the Delivered Support Agreement. In contrast, the support fee under the three Order Forms comes to approximately Rs.7,52,67,619/-, [for the year 2025], as per the contended case of defendant no.1. Even taking the defendants' figure, the financial scale is vastly different, indicating distinct commercial arrangements.

(iv) The 'territory' as defined in the GTC and the Order Forms is 'worldwide' whereas the 'territory' as defined under the Delivered Support Agreement means 'India'.

238. For the reasons aforenoted, and in the absence of express terms, it cannot be implied that the Delivered Support Agreement can be grouped with Order Forms, the GTC and the SAP Support Schedule nor will it govern the entire ambit of support services being provided by defendant no.1 to the plaintiff.

239. As a corollary thereof, the defendant no.1 cannot invoke Clause 13.5 of the Delivered Support Agreement to suspend or terminate the support services under the SAP Support Schedule, as well, on the ground of 'trade sanctions', which is not a cause available under the Order Forms, GTC and the SAP Support Schedule.

240. Turning next to the decisions relied upon by defendant no. 1 to contend that the agreements are determinable in nature and therefore attract the statutory bar against specific performance under Section 14(d) read with Section 41(e) of the Specific Relief Act, 1963, this Court finds that these precedents similarly fail to advance its case.

241. The reliance placed on ***Abhijit Mishra*** (supra) is misplaced. In that decision, a single contract, namely a contract of employment, was the subject matter, which inherently stands on a very different footing than the various commercial agreements involved in the present dispute. Furthermore, Clause 10 of the contract in ***Abhijit Mishra*** (supra) conferred upon either party an absolute right to terminate the agreement at their 'sweet will', merely by serving a notice period, without assigning any reason or cause. In stark contrast, as analysed earlier, the termination framework across the various agreements in the present case does not permit 'at-will' exit.

242. The decision in ***Amritsar Gas*** (supra) is also distinguishable on facts. That decision turned on the specific language of Clause 28 of the distributorship agreement, the sole agreement involved in that case, which granted either party an unfettered right to terminate the arrangement without assigning any cause or reason, purely at their 'sweet will' by giving a notice period. The factual matrix at hand, however, comprises multiple agreements and contains no such clause vesting an unconditional, 'at will' right of termination, in defendant no. 1.

Whether the Agreements Runs into Minute or Numerous Details

243. Mr. Pushkar also argued that the agreements are not specifically enforceable due to the statutory bar under Section 14(1)(b) of the unamended Specific Relief Act, 1963. It was contended that the agreements involve 'minute or numerous details,' making it impossible for this Court to supervise and enforce their material terms.

244. This submission, however, lacks merit. By way of Specific Relief

(Amendment) Act, 2018, the legislature has omitted the phrase *"a contract which runs into such minute or numerous details"* in Section 14(c)[5], therefore, the above ground is no more available to the defendant no.1.

Whether the Agreements Involve a Continuous Duty Requiring Court Supervision

245. The defendant no. 1 has also raised an objection under Section 14(1)(d)[6] of the unamended Specific Relief Act, 1963. It is contended that the agreements between the parties require the performance of a continuous duty which the Court cannot supervise, thereby making them incapable of specific performance.

246. The contention is misconceived. The statutory bar under Section 14(b) is not attracted merely because a contract involves ongoing obligations. This bar is triggered only when the specific enforcement of the agreements would force the Court to constantly supervise the day-to-day execution of the contract. In the present case, the agreements comprehensively encapsulate the manner in which the services are to be executed, clearly laying out the respective rights and obligations of both parties. Furthermore, the commercial relationship between the parties has existed for almost a decade. This clearly demonstrates that the practical execution of the agreements poses no operational difficulty that would require constant judicial monitoring.

247. This legal position has been clearly elucidated by a Coordinate Bench of this Court in ***Mahajan Imaging*** (Supra). In that decision, the Court

[5] Section 14(1)(b) prior to the amendment of Specific Relief Act, 1963

[6] This provision has been retained as Section 14(b) post 2018 Amendment.

clarified that the bar against specific performance only arises when the Court is compelled to remain in *seisin* of the matter to supervise reciprocal duties. The relevant observations are reproduced below:

> *"37. **Insofar as the objection founded upon Section 14(b) of SRA is concerned, this Court is unable to accept the same. Section 14(b) of SRA proscribes specific performance of a contract, the performance of which involves a continuous duty that the Court cannot supervise. The emphasis is on the nature of the obligation and the impracticability of judicial supervision over its execution.***
>
> *38. In the present case, Clause 10 of the agreement does not contemplate the enforcement of any continuous or minute operational obligations requiring constant oversight by the Court. The relief sought is confined to protection against termination pending arbitral adjudication. **A bare perusal of the agreement itself delineates the respective rights and obligations of the parties and does not require the Court to regulate day-to-day performance or assume managerial control over the arrangement.***
>
> *39. **To this Court's mind, the bar as contemplated under Section 14 (b) of SRA would arise only where the Court is compelled to remain in seisin of the matter and supervise the ongoing execution of reciprocal duties. No such situation is presented here. Accordingly, the bar under Section 14(b) of SRA is not attracted."***
>
> (emphasis supplied)

248. In view of the above, the objection raised by the defendant no. 1 on the ground of continuous duty and judicial supervision is rejected.

E. SUPPRESSION OF PROCEEDINGS REGARDING THE EUROPEAN COURT OF JUSTICE ['ECJ']

249. Lastly, it was argued on behalf of the defendant no.1 that the plaintiff has challenged the EU Sanctions before the European Court of Justice

['ECJ'] but as this fact has not been divulged by the plaintiff in the pleadings, it tantamount to material suppression of facts. The Court, however, does not find merit in this submission.

250. The relevant material placed on record by defendant no.1 pertaining to the proceedings before the ECJ shows that, the plaintiff had prayed for the annulment of the EU Council's decision to designate the plaintiff as sanctioned entity in terms of the EU Regulations, whereas the proceedings in the present suit are entirely different, in which, the relief sought is for specific performance and injunction.

251. Even assuming *arguendo* that proceedings before the ECJ and the present suit are founded on the same cause of action, still the pendency of proceedings before the ECJ will not preclude the Courts in India from trying the suit that is founded on the same cause of action, in view of the specific provision contained in the Explanation[7] to Section 10 of the Code of Civil Procedure, 1908. Reference in this regard may be had to the decision of the Division Bench of this Court in ***Magotteaux Industries Pvt. Ltd. & Ors. v. AIA Industries Ltd., 2008 SCC OnLine Del 1232.***

F. TRIPPLE TEST FOR GRANT OF MANDATORY INJUNCTION AT INTERIM STAGE

252. Having dealt with the rival submissions of the parties on merits, the Court is now confronted with the crucial question as to what relief can be granted under the given circumstances. On behalf of defendant no. 1, it was argued that the relief sought is in the nature of an interim mandatory

[7] **Explanation**.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

injunction, which can be granted only in rare and exceptional circumstances when the plaintiff is able to demonstrate a very strong *prima facie* case.

253. Undoubtedly, the interim relief prayed for by the plaintiff, seeking the immediate restoration of the SAP support services, is in the nature of an interim mandatory injunction. Before delving into the aspect of whether such a relief is warranted under the given facts and circumstances of the present case, it would be apposite to examine the settled legal parameters governing the grant of an interim mandatory injunction.

254. It is a well-settled proposition of law that a Court would grant a mandatory injunction at an interlocutory stage only if it is satisfied that withholding it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, such that at the end of the trial, the Court would not be able to vindicate the cause of justice. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Deoraj vs State of Maharashtra and Others, (2004) 4 SCC 697***, wherein it was held as under:

> *"**12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour.** In such cases the availability of a very strong prima facie case - of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and*

exceptional cases. ***The court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the court may put the parties on such terms as may be prudent****.*"

(emphasis supplied)

255. Likewise, in ***Dorab Cawasji Warden vs Coomi Sorab Warden and Others, (1990) 2 SCC 117,*** it was observed by the Apex Court that the relief of interlocutory mandatory injunctions are granted generally to preserve or restore the *status quo* of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. Certain guidelines evolved by the Courts for grant or refusal of an interlocutory mandatory injunction were also enumerated in the following terms:

"16. ***The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining****. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to*

the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. ***Generally stated these guidelines are****:*

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction*.*

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

(emphasis supplied)

256. Further, in ***Hammad Ahmed vs Abdul Majeed and Others, (2019) 14 SCC 1***, wherein the Supreme Court was again confronted with the question of granting interim directions in the nature of a mandatory injunction, the Court, relying upon ***Deoraj*** (supra), reiterated that in appropriate and compelling cases, an *ad-interim* injunction in a mandatory form can certainly be granted.

257. Testing the facts of the present case against the rigorous standards exposited by the Hon'ble Supreme Court in the above noted authoritative pronouncements, this Court finds that the plaintiff has demonstrably met the higher threshold of establishing a very strong *prima facie* case.

A strong prima facie case

258. There is no doubt that the contractual relationship between the parties is strictly governed by the domestic laws of the Republic of India. The agreements gives a conscious and unambiguous primacy to the Indian laws in the event of any conflict with foreign rules or regulations.

259. Tested on the anvil of governing law, the statutory bars raised against specific performance are found to be legally untenable. The agreements do not vest any unilateral or at 'sweet will' right of termination in defendant no.1; rather, the right to terminate is contingent upon defined regulatory causes or defaults, thereby placing the agreements outside the category of contracts that are determinable by their very nature.

260. Further, the defence that the agreements run into minute technical details rely on a repealed provision of the unamended Specific Relief Act, 1963, and is thus legally unsustainable.

261. Furthermore, the contractual framework exhaustively delineates the respective obligations of the parties. Enforcing the continuation of these well-defined support services, which have operated seamlessly between the parties for almost a decade, does not thrust upon this Court any burden of regulating minute operational details or exercising continuous managerial supervision.

262. Consequently, there is no statutory bar under Section 14 of the Specific Relief Act precluding the specific enforceability of these contracts.

263. This Court also finds no substance in the objections premised on Sections 32 and 56 of the Indian Contract Act. The entire foundation of defendant no. 1's defence, whether claiming contingent voidness or

subsequent impossibility, rests squarely upon the 'EU Sanctions'. However, these sanctions are unequivocally in the realm of foreign law. Under the Indian evidentiary framework, a Court cannot take judicial notice of foreign regulations at an interlocutory stage; their applicability, jurisdictional scope, and binding effect on the present contract is required to be pleaded and proved as a matter of fact during the trial. Defendant no. 1 cannot take premature refuge in unproven foreign laws to avoid its contractual obligations.

264. Admittedly, the support services operate on a worldwide basis. The existence of a global network implies that providing services from a non-sanctioned jurisdiction may be commercially more onerous, but it falls short of rendering the performance practically or legally impossible.

265. Even the embedded *force majeure* clauses across the agreements merely contemplate an extension of time, not the outright termination of the contracts.

266. In the backdrop of such untenable objections, the unilateral and abrupt suspension of the support services by defendant no. 1 is *ex-facie* illegal and in breach of the mutually agreed contractual stipulations.

267. As regards the defendants' contention that the application has become infructuous because the 2025 work order expired on 31.12.2025, and no work order exists for 2026, a *prima facie* examination of contractual framework illustrates that the work order is not a contract in itself. They are, in fact, the plaintiff's internal purchase documents issued pursuant to the binding contract in force between the parties.

268. Clearly, the plaintiff has established a strong *prima facie* case, of a standard much higher than what is normally required.

<u>Irreparable harm and balance of convenience</u>

269. The remaining tests of irreparable harm and balance of convenience also tilt in favour of the plaintiff. The plaintiff has not merely purchased support services, but relies on them to sustain the core commercial software licensed from defendant no. 1. Without these ongoing support services, the entire software ecosystem becomes vulnerable to unresolvable system failures, security breaches, and critical software bugs.

270. Any migration to an alternative support framework would inevitably entail significant delays, substantial costs, and operational disruptions.

271. Also, it is a matter of record that a recent PNGRB Regulation dated 12.12.2025, concerning “Cyber Attack preparedness,” specifically mandates all refineries to maintain a robust technical infrastructure to prevent operations from being stalled by imminent cyber threats. Maintaining this critical software infrastructure without disruption assumes relevance particularly in light of the volatile geopolitical situation and the current oil crisis stemming from the USA/Israel war with Iran, as argued by the plaintiff.

272. It is also pleaded by the plaintiff and not controverted by the defendant no.1 that the plaintiff caters to approximately 8% of India’s energy needs. For critical infrastructure of this scale, an uninterrupted flow of technical support services is absolutely essential.

273. On the other hand, restoring the support services poses no inconvenience to defendant no. 1, an Indian corporate entity, especially

when defendant no.1 itself has expressed that it would have continued to provide the support services had there been no trade sanctions. Also, the defence of possible threat of criminal prosecution for the parent company, SAP SE, under the laws of Germany is, *prima facie*, not a tenable defence for the detailed reasons in foregoing paragraphs.

274. Further, the direction sought to restore the support services is against defendant no. 1 (SAP India), and there cannot be a real or imminent prospect of prosecution when an Indian corporate entity is performing its contractual obligations under the direction of the Court.

275. In these compelling circumstances, withholding interim relief would indeed do violence to the sense of justice and render the main suit completely infructuous by the time it reaches final adjudication.

276. Under the facts and circumstances discussed hereinabove, the application is allowed and the defendant no.1 is directed to restore the *status quo ante* as it existed prior to 24.07.2025, by immediately resuming all enterprise and software support services to the plaintiff under the respective agreements.

277. It is clarified that the observations made hereinabove are purely *prima facie* in nature for the purpose of adjudicating the present application under Order XXXIX Rules 1 & 2 CPC and shall not have any bearing on the final adjudication of the suit on merits.

278. The application is disposed of in the above terms.

<u>CS(COMM) 1006/2025 and I.A. 23756/2025, I.A. 8343/2026 and I.A. 10493/2026</u>

279. List on 30.09.2026 before the Roster Bench.

VIKAS MAHAJAN, J

SEPTEMBER 21, 2026
aj/nsa