PETITIONER:
M/S. DHANRAJAMAL GOBINDRAM

Vs.

RESPONDENT:
M/S. SHAMJI KALIDAS AND CO.

DATE OF JUDGMENT:
27/02/1964

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
KAPUR, J.L.
SHAH, J.C.

CITATION:
1961 AIR 1285 1961 SCR (3)1020
CITATOR INFO :
E 1979 SC1457 (4)
F 1985 SC1156 (18)

ACT:
Arbitration-Contract for Purchase of African cotton-Provision for arbitration under statutory bye-laws on failure-Application in court for filing of arbitration agreement-Power of Court-Validity of contract-Indian Arbitration Act, 1940 (10 of 1940), ss. 20, 46-Foreign Exchange Regulation Act, 1947 (7 of 1947), SS. 5, 21Bye-laws of East India Cotton Association Ltd., Bombay-Bye law 48A.

HEADNOTE:
The appellant entered into an agreement with the respondent to purchase African raw cotton. The agreement included a clause that the contract would be subject to the " usual Force Majeure clause ", the Bye-laws of East India Cotton Association Ltd., Bombay, except bye-law 35, the said Bye-laws having statutory force, and to the jurisdiction of the Bombay High Court. Clause 6 of the agreement provided that the buyers were to obtain import licence from the Government of India, failing which the seller would be entitled either to carry over the goods at the cost of the buyers or call upon them to take immediate delivery on payment in British East Africa, and in default to sell the goods in British East Africa and claim the deficit, if any between the contractual price and the price obtained on re-sale. Clause 7 further provided that notwithstanding the import policy followed by the Government of India in respect of the import of the contracted goods, the buyers would be bound to obtain the necessary import licences and communicate the numbers thereof to the sellers on specified dates, failing which cl. 6 would operate. The buyers did not perform the contract and the sellers after notice to them re-sold the goods and thereafter claimed the deficit which the,buyers refused to pay. The sellers invoked the arbitration clause and the rules contained in bye-law 38A of the Bye-laws and others following it, which conferred on the Chairman of the Board of Directors of the East India Cotton Association Ltd., the power of selecting the arbitrator or arbitrators, and applied to the High Court under s. 20 of the Indian

Arbitration Act for filing the agreement and referring the dispute to arbitration. The buyers resisted and the trial judge dismissed the application, but the Court of appeal reversed that decision. It was urged in this Court on behalf of the buyers that (1) cls. 6 and 7 contemplated acquisition of property or Exchange in Africa and thus involved a breach of S. 5 of the Foreign Exchange Regulation Act, since no general or special exemption had been granted thereunder by the Reserve Bank, (2) that the expression " subject to the usual Force Majeure clause " was vague and uncertain and rendered the agreement void, (3) that the application of bye-law 48A et seq left no powers in the Court to act under sub-ss. (1) and (4) of S. 20n
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of the Arbitration Act and the section was thus inapplicable and (4) that the law applicable to the case was the law of British East Africa and not that of India.
Held, that the contentions must fail.
The provisions of sub-ss. (2) and (3) of s. 21 of the Foreign Exchange Regulation Act, properly construed, left no manner of doubt that they contemplated matters which were within the prohibition of S. 5 of the Act and had the effect of engrafting on the agreement of parties a term that it would be for the decreeholder before he could enforce the decree or order of the court to obtain the permission of the Reserve Bank and were thus designed to prevent the non-performance of the contract under a cover of illegality.
The contract involved no actual or contingent right to acquisition of property abroad, and even assuming it did, it was saved by s. 21 of the Act subject to its conditions. The agreement was thus enforceable.
Nor was the contract void for uncertainty. It was clear from judicial decisions that a reference to "force majeure " means the saving of the performing party from the consequence of factors beyond his control. The condition in respect of "force majeure " did not, therefore" make the contract vague. Further, the use of the word " usual " made it clear that the clause could be made certain by evidence and so it was protected by S. 29 of the Contract Act.
Lebeaupin v. CriSpin, [1920] 2 K.B 714, referred to.
British Industries v. Patley Pressing, [1953] 1 All E.R. 94 and Scammell (G) and Nephew Ltd. v. Ouston (H. C. and J. G.) [1941] A.C. 251, distinguished.
Bishop & Baxter Ld. v. Anglo-Eastern Trading & Industrial Co. Ld., [1944] I.K.B. 12, Shamrock S. S. Co. v. Storey, (1899) 5 Corn. Cas. 21, Hillas & Co. v. Arcos Ltd., [1932] All E.R. 494 and Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd., L,959) A.C. 133, relied on.
Although by s. 46 of the Arbitration Act, the Bye-laws, if inconsistent with the provisions of the Act, must prevail, it was not correct to say that their application made the Courtfunctus officio under s. 20 of the Act. It must not be overlooked that although the present was a case of statutory arbitration governed by its own rules, the court under S. 20(4) of the Arbitration Act had two distinct powers, (1) of judicially considering whether or not the arbitration agreement should be filed in court and (2) whether there should be a reference to the arbitrator or arbitrators appointed by the parties or selected by it. Since in the instant case the parties had by their agreement empowered the Chairman of the Board of Directors of the East India Cotton Association, Ltd., to select the arbitrator or arbitrators, the court could send the agreement to him to be dealt with under the pro, cedure laid by the said Bye-laws.
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Whether the law of the country where the contract is made or of the country where it is to be performed should apply is sometimes a matter of presumption. But the declared intention of the parties overrides such presumption. Where there is no such declaration, the intention may be inferred from the terms and nature of the contract and the general circumstances of the case.
In the instant case, since the parties agreed that in case of dispute the Bombay High Court would have jurisdiction and the arbitration clause indicated arbitration in India, there could be no doubt that the Indian law was to apply.
N. V. Kwick Who Tong v. James Finlay & Co., [1927] A.C. 604, Hamlyn & Co. v. Tallisker Distillery, [1894] A.C. 202 and Spurrier v. La Cloche, [1902] A.C. 446 (P.C.), referred to.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 73 of 1961.
Appeal from the judgment and order dated January 23, 1961, of the Bombay High Court, in Appeal No. 5 of 1960.
C. K. Daphtary, Solicitor-General of India, Purshottam Tricumdas, F. S. Nariman, Suresh D. Parekh and I. N. Shroff, for the appellants.
M. K. Nambiar, K. S. Cooper, Anil Dewan, RaMesh A. Shroff, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra, for the respondents.
1961. February 27. The Judgment of the Court was delivered by
HIDAYATULLAH, J.-This is an appeal (with certificate) by Messrs. Dhanrajamal Gobindram against a judgment of the Divisional Bench of the High Court of Bombay, by which a petition under s. 20 of the Indian Arbitration Act was held to be maintainable and the decision of the learned Judge (Original Side) who held otherwise, was reversed. The respondents are Messrs. Shamji Kalidas & Co. (a registered firm), who were the petitioners in the High Court.
The facts of the case are as follows: On October 24, 1957, Messrs. Dhanrajamal Gobindram (referred to as buyers, hereafter) entered into an agreement with Messrs. Shamji Kalidas & Co. (referred to as sellers, hereafter), for purchase of 500 bales of African raw cotton. The contract was in the form of a letter
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written by the sellers and confirmed by the buyers. The material portions of the letter, which bears No. SK/Bom/13/2014 and was stamped as an agreement,' are as follows:

"We confirm having sold to you African raw cotton on the following terms and conditions subject to the usual Force Majeure Clause:

Description:		ARBP 52 F. A. Q. Crop/58.
Quality	:	500 (Five Hundred) bales.
Price	:	at Rs. 1,401 nett per candy CIF Bombay.
Payment	:	Against shipping documents in Bombay.
Packing	:	420 lbs. approximately per bale.
Shipment	:	February/March 1958.

Remarks: The terms and conditions on the reverse form part of the contract. This contract is subject to the Bye-laws of East India Cotton Association, Ltd., Bombay, other

than the bye-law 35 for arbitration on Quality in case of East African cotton.

Terms and Conditions.

1. The shipment is subject to any cause beyond seller's or seller's shipper's control and is also subject to availability of freight.

5. This contract is subject to the jurisdiction of the High Court of Bombay.

6. It will be the duty of the buyers to obtain the import licence and to communicate the number thereof to the sellers immediately on the same being obtained but in any event, not later than 20th February, 1958, and in the event of their failure to do so for any reasons whatsoever including the reason that the Government of India may not allow the imports of the contracted goods, the sellers shall be entitled at their discretion either to carry over the goods, in which event the buyers shall pay to the seller all carry over charges in addition to the contracted price or to call upon the buyers to pay for the contracted goods and take immediate delivery thereof in. British East Africa and upon

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the buyers failing to do so, to sell the contracted goods at Kampala or Mombasa at the rates prevalent there in convenient lots and as and when it may be practicable to do so at the risk and account of the buyers and to claim from them any deficit that arise between the contracted price and such resale price and also all expense incidental thereto.

7. Even if the Government of India may announce the import policy of the contracted goods in such manner that only the consumers would be entitled to obtain the licences, it will be the duty of the buyers to see that necessary import licences for the contracted goods are obtained in the consumers' name or in the joint names of themselves and those of the consumers the intention being that in all eventualities it is the duty of the buyers to obtain licences under any policy that may be followed by the Government of India for the import of the contracted goods and to communicate the number thereof to the sellers within the time as specified hereinabove and on the buyer's failure to do so all the eventualities contemplated under clause 6 shall operate."

By a letter dated November 30, 1957, the contract was later amended by the parties as follows :

" With reference to the above mentioned contracts we hereby confirm that, if necessary, we shall carry over the contracted goods for two months, namely, March and April and you will pay as the carry over charges for the same. The interest payable under such carry over charges will be at the rate prevalent in Mombasa.

The other terms and conditions remain unaltered..."

The contract was not performed. The sellers wrote as many

as five letters between March 1, 1958, and May 26, 1958, before they received a reply from the buyers dated June 3, 1958. By that time, the sellers had carried forward the contract, and also invoked their right of resale after giving notice, and claimed Rs. 34,103. 15 nP. for which a debit note had been issued. This note was returned by the buyers with a letter of June 3, 1958, stating that the contract was

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void and/or illegal", that they were not obliged to perform it, that there was no right of any sale on their., account and/or on their behalf, and that the alleged" sale was not binding upon them. [Ex. " D " (Colly) No. 6.]

The sellers then invoked the arbitration clause of the agreement and Bye-law 38-A of the Bye-laws of the East India Cotton Association, Ltd., Bombay, and moved the Bombay High Court, on the Original Side, under s. 20 of the Indian Arbitration Act, requesting that the agreement be filed in Court and the dispute referred to arbitration. The buyers appeared, and resisted the petition on grounds which they set forth in affidavits filed from time to time. By their first affidavit dated July 31, 1958, the buyers contended that cls. 6 and 7, quoted above, were unlawful, as the liability created under them amounted to a contravention " of the import policy of Government of India " and the Foreign Exchange Regulation Act, 1947, and the Rules made thereunder. They contended that, in view of the invalidity of the contract as a whole, the arbitration clause in the agreement was not binding, and that the agreement could not be filed. In the second affidavit which was filed on February 4, 1959, they added the reason that the words " subject to the usual Force Majeure Clause " were vague and uncertain, and made the contract' void ab initio, as there was no consensus ad item between the parties. They contended that the con. tract being void, the arbitration clause was also void. By yet another affidavit filed on February 27, 1959, they averred that the letter dated November 30, 1957, was void, being in contravention of the Import Trade Control Act and the Foreign Exchange Regulation Act and the Rules made under the two Acts, inasmuch as the consideration was one forbidden by law and was likely to defeat the provisions of law. They also stated that the words " if necessary " in that letter rendered the contract void ab initio for vagueness and uncertainty.

The case was heard by K. T. Desai, J. (as he then war,). On March 3, 1959, the learned Judge dismissed

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the petition as not maintainable on the ground that ,the dispute was about the legality or validity of the contract including the agreement about arbitration, and that such a dispute could only be considered under ss. 32 and 33 of the Arbitration Act by the Court and not by the arbitrator in a reference under s. 20 of the Act. He declined to consider the question under the former sections, because the petition had not asked for that relief, observing that if by a proper petition the question were raised, it would be decided. Against the order of the learned Judge (0. S.), an appeal was filed by the sellers. This appeal was heard by Chainani, C. J. and S. T. Desai, J. on April 28, 1959. The learned Judges held that a claim was made by the sellers and was denied by the buyers; that there was thus a dispute arising out of or in relation to a contract as contemplated by Bye-law 38-A; that in showing cause against the petition under s. 20, the buyers had averred that the contract was illegal and void; and that such a question could be decided

by the Court before making the reference. The learned Judges pointed out that a petition under ss. 32 and 33 of the Indian Arbitration Act questioning the existence or validity of an arbitration agreement was not to be expected from one making a claim under a contract, that the plea was always likely to be raised by one resisting the petition, and that when such a plea was raised, the Court must decide it, even though the proceedings be under s. 20 of the Act for making a reference. The case was, therefore, remanded with the following direction:

" As the respondents have challenged the validity of this agreement, the Court will have to decide this question before passing further orders in the matter. Accordingly we set aside the order passed by Mr. Justice K. T. Desai, dismissing the petition filed by the petitioners, and remand the matter to the trial court for deciding the objections, raised by the respondent under sub-section (3) of section 20 of the Act, to the arbitration agreement being filed in Court, and then disposing of the matter in accordance with law."

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When the case went back for retrial, the buyers filed their fourth affidavit on November 16, 1959. They stated in that affidavit that Bye-law 38-A was a statutory Bye-law of the East India Cotton Association, Ltd., Bombay, a recognised Institution under the Forward Contracts Regulation Act, No. 74 of 1952, and that s. 46 of the Arbitration Act was applicable. They contended that inasmuch as the Bye-laws of the Association prescribed a different machinery inconsistent with and repugnant to s. 20 of the Arbitration Act, the latter section was inapplicable, and that the petition was incompetent. By his order dated November 26 and 27,1959, K. T. Desai, J. hold that the petition did not disclose sufficient materials, and that the sellers were not entitled to have the agreement of reference filed, or to have an order of reference made. Though be held that the Bye-laws of the East India Cotton Association, Ltd. were statutory, and that ss. 46 and 47 of the Arbitration Act applied, he was of opinion that s. 20 could not be invoked, because no action under sub-s. (4) of a. 20 could be taken. The reason given by the learned Judge was that under that sub-section the Court had to appoint an arbitrator, if the parties failed to agree, and that sub-section was not applicable, because the machinery of Bye-law 38-A left no power of action to the Court. He also felt that there was no averment in the petition that the parties had not agreed. On the rest of the points raised by the buyers in their affidavits, the learned Judge held against them. He held that, in view of ss. 21(2) and 21(3) of the Foreign Exchange Regulation Act, there was no infringement of that Act by the agreement entered into, though he expressed a doubt if the words " legal proceedings " in s. 21(3) were wide enough to include an arbitration. He also held that cl. 7 of the conditions under which the contract was to be performed was, at least in part and under certain circumstances, not a contravention of the Import and Export Control Act, 1947, or the Import Trade Control Order issued Under ss. 3 and 4-A of that Act, and thus not wholly void. He held lastly that the contract was not void for vagueness or

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uncertainty either on account of the reference to " the usual Force Majeure Clause ", or because of the words if necessary " in the letter of November 30, 1957.

The sellers appealed against the dismissal of the petition, and the buyers cross-objected against the adverse findings

and the disallowance of costs. The appeal was heard by Tarkunde and Chitale, JJ., and by separate but concurring judgments, the appeal was allowed and the cross-objection dismissed, and the buyers were ordered to pay costs throughout. The Divisional Bench agreed with K. T. Desai, J. on all the points decided by him against the buyers. They left open the question whether " legal proceedings " in s. 21(3) of the Foreign Exchange Regulation Act were wide enough to include an arbitration for the decision of the arbitrators to be appointed, and addressing themselves to the question raised about s. 20, held that the petition was maintainable. They were of opinion that the Court could order the arbitration agreement to be filed and also to refer the dispute to arbitrators to be chosen in accordance with Bye-law 38-A, though they felt that if the latter action could not be taken, at least the first could be, because the procedural part could not destroy the power conferred to file the agreement.

In this appeal, all the arguments which had failed before the High Court were urged before us. Shortly stated, they are: that the contract was void (a) for illegality and (b) for uncertainty and vagueness on two grounds; that the petition under s. 20 of the Indian Arbitration Act was incompetent, as that section was inapplicable; and that the law governing the parties was not the Indian law but the law of British East Africa. We shall now deal with these contentions.

The first contention is that cl. 7 of the agreement involves a breach of the Foreign Exchange Regulation Act. Reliance is placed upon s. 5 of the Act, which reads as follows:

> " (5) Restrictions on payment8.-(1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this subsection which may be granted conditionally or
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> unconditionally by the Reserve Bank, no person in, or resident in, British India shall-
> (e) make any payment to or for the credit of any person as consideration for or in association with(1) the receipt by any person of a payment or the acquisition by any person of property outside India;
> (ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside India: "

It is contended that the agreement envisaged (a) payments for goods in Africa against shipping documents, (b) payment in Africa of carrying over charges, and (c) in the event of resale, payment of deficit also in Africa. It is also contended that the two clauses (6 and 7) contemplate acquisition of property in Africa. The clauses, it is submitted, also involved acquisition of foreign exchange, if the goods were resold in Africa and credit for the price was given to the buyers. This, it is argued, was a breach of s. 5, unless there was a general or special exemption granted by the Reserve Bank in connection with this contract, and that no such exemption was in existence when the contract was made.

> In this connection, s. 21 of the Foreign Exchange Regulation Act may be read. It provides:-
> " 21. Contracts in evasion of this Act.-(1) No person shall enter into any contract or

agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.

(2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank, as the case may be; and it shall be an implied term of every contract governed

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by the law of any part of British India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except. with the permission of the Central Government or the Reserve Bank, shall not be done unless such permission is granted.

(3) Neither the provisions of this Act nor any term (whether expressed or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in British India to recover any sum which, apart from the said provisions and any such term, would be due, whether as a debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to other sums; and

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case May be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requirement. "

No doubt, sub-s. (1) prohibits contracts in contravention or evasion, directly or indirectly, of the Foreign Exchange Regulation Act, and if there was nothing more, then the argument would be understandable. But, sub-s. (2) provides that the condition that a thing shall not be done without the permission of the Reserve Bank shall not render an agreement

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invalid, if it is a term of the agreement that the thing shall not be done unless permission is granted by the Central Government or the Reserve Bank and further that it shall be an implied term of every contract governed by the

law of any part of India that anything agreed to be done by any term of that contract, which cannot be done except with the permission of the Reserve Bank, shall not be done, unless permission is granted. Sub-section (3) allows legal proceedings to be brought to recover sum due as a debt, damages or otherwise, but no steps shall be taken to enforce the judgment, etc., except to the extent permitted by the Reserve Bank.

The effect of these provisions is to prevent the very thing which is claimed here, namely, that the Foreign Exchange Regulation Act arms persons against performance of their contracts by setting up the shield of illegality. An implied term is engrafted upon the contract of parties by the second part of sub-s. (2), and by sub-s. (3), the responsibility of obtaining the permission of the Reserve Bank before enforcing judgment, decree or order of Court, is transferred to the decree-holder. The section is perfectly plain, though perhaps it might have been worded better for which a model existed in England.

It is contended that s. 21 uses the word " permission ", while s. 5 speaks of an exemption, and that ss. 21(2) and 21(3) do not cover the prohibition in a. 5. The Foreign Exchange Regulation Act, no doubt, uses diverse words like, " authorise ", " exempt " and " permission " in different parts. The word " exempt " shows that a person is put beyond the application of law, while " permission " shows that he is granted leave to act in a particular way. But the word SC permission " is a word of wide import. " Permission " in this section means only leave to do some act which but for the leave would be illegal. In this sense, exemption is just one way of giving leave. If one went only by the word and searched for those sections where the word " permission " is expressly used, ss. 21(2) and (3) are likely to prove a dead letter. This could not have been intended, and the very

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elaborate provisions in those sub-sections show that those matters were contemplated which are the subject of prohibition in s. 5. In our opinion, the argument is without foundation.

The contention, that on resale the price would have accrued to the buyers in the first instance, as the sellers would be acting as the agents of the buyers, is also incorrect. It has been rightly pointed out by K. T. Desai, J. that the right of resale given by ss. 54(2) and (4) of the Indian Sale of Goods Act is exercised by the seller for himself and not as an agent of the buyer, when the latter is given a notice of sale. This is indeed clear from the fact that the buyer is not entitled to the profit on resale in that contingency, though liable for damages. The position is different when no notice is so sent. Then the profits go to the buyer. Perhaps, in that event it may be possible to say that the seller acted as an agent. But, in the case of resale with prior notice, there is no payment to the buyer and no contravention of the Foreign Exchange Regulation Act.

The contention that the contract involved an actual or, at least, a contingent right to or acquisition of property abroad is not correct. Even if it were so, the contract is saved by s. 21, as already explained. In our opinion, the contract was not void for illegality.

The agreement is said to be void because of vagueness and uncertainty arising from the use of the phrase " subject to the usual force majeure clause ". The argument is that there was no consensus ad idem, and that the parties had not specified which force majeure clause they had in mind. We

were taken through the Encyclopaedia of Forms and Precedents and shown a number of force majeure clauses, which were different. We were also taken through a number of rulings, in which the expression force majeure " had been expounded, to show that, there is no consistent or definite meaning. The contention thus is that there being no consensus ad idem, the contract must fail for vagueness or uncertainty. The argument, on the other side, is that this may be regarded as a surplusage, and, if meaningless, ignored. It is

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contended by the respondents that the addition of the word " usual" shows that there was some clause which used to be included in such agreements. The' respondents also refer to s. 29 of the Indian Contract Act, which provides:

"Agreements, the meaning of which is not certain, or capable of being made certain, are void, " and emphasise the words " capable of being made certain ", and contend that the clause was capable of being made certain, and ex facie, the agreement was not void.

McCardie J. in Lebeaupin v. Crispin (1) has given an account of what is meant by "force majeure " with reference to its history. The expression "force majeure " is not a mere French version of the Latin expression" Vis major ". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure ". Judges have agreed that strikes, break-down of machinery, which, though normally not included in" Vis Major" are included in "force majeure ". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure ", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to " force majeure ", and even if this be the meaning, it is obvious that the condition about "force majeure, " in the agreement was not vague. The use of the word " usual " makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.

Learned counsel for the appellants relies strongly on a, decision of McNair, J. in British Industries v. Patley Pressings(2). There, the expression used was "subject to force majeure conditions ". The learned Judge held that by conditions " was meant. clauses and not contingencies or circumstances, and that there being a variety of force majeure clauses in the trade, there

(1) [1920] 2 K.B. 714.

(2) [1953] 1 All E.R. 94.

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was no concluded agreement. The: case is distinguish. able, because the reference to force majeure clauses was left at large. The addition of the word " usual " makes it clear that here some specific clause was in the minds of the parties. Learned counsel also relies upon a decision of the House of Lords in Scammell (G.) and Nephew Ltd. v. Ouston (H.C. and J.G.) (1), where the reference to " on hire purchase terms" was held to be too vague to constitute a concluded contract. It will appear from the decision of the House of Lords that the clause was held to be vague, because no precise meaning could be attributed to it, there being a variety of hire purchase clauses. The use of the word "usual" here, enables evidence to be led to make certain which clause was, in fact, meant. The case of the House of, Lords does not, therefore, apply. Both the cases to which

we have referred were decided after parties had entered on evidence, which is not the case here.

Our case is more analogous to the decision referred to in Bishop & Baxter Ld. v. Anglo-Estern Trading & Industrial Co. Ld. (2), namely, Shamrock S. S. Co. v., Storey (3). In speaking of the condition there, Lord Goddard observed as follows:

> " Abbreviated references in a commercial instrument are, in spite of brevity, often self-explanatory or susceptible of definite application in the light of the circumstances, as, for instance, where the reference is to a term, clause, or document of a wellknown import like c.i.f. or which prevails in common use in a particular place of performance as may be indicated by the addition of the epithet 'usual' : see Shamrock S. S. Co. v. Storey (a), where 'usual colliery guarantee' was referred to in a charter-party in order to define loading obligations."

The addition of the word " usual " refers to something which is invariably to be found in contracts of a particular type. Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible. This was laid down by the

(1) [1941] A.C. 251. (2) [1944] 1 K.B. 12.

(3) (1899) 5 Com. Cas, 21,

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House of Lords in Hillas & CO. v. Arcos Ltd. 1, and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.(2). There, the clause was " This bill of lading ", whereas the document to which it referred was a charter-party. Viscount Simonds summarised all the rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.

Applying these tests to the present case and in the light of the provisions of s. 29 of the Indian Contract Act, it is clear that the clause impugned is capable of being made certain and definite by proof that between the parties or in the trade or in dealings with parties in British East Africa, there was invariably included a force majeure clause of a particular kind.

In 'our opinion, the contract was not void for vagueness or uncertainty by reason of the reference in the terms stated, to the force majeure clause. Mr. Daphtary posed the question as to on whom was the burden of proving the usual force majeure clause. In our opinion if the agreement is not void for uncertainty, that question would be a matter for the decision of the arbitrators. It is too early to say by what evidence and by whom the usual force, majeure clause must be established.

The next ground on which it is said that the agreement was void for uncertainty has reference to the employment of the words " if necessary " in the letter of November, 30, 1957. The effect of that letter is to make an alteration in cl. 6 of the agreement, which has been quoted already. Under that clause, the buyers were to obtain the import licence and to communicate the number thereof to the sellers not later than February 20, 1958, and in the event of their failure to do

so for any reason whatsoever, the sellers
(1) [1932] All E.R. 494.
(2) [1959] A.C. 133, 153.
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were entitled "at their discretion " either to carry over the goods or to ask the buyers to pay for the contracted goods and take delivery in British East Africa. By that letter, the sellers confirmed that " if necessary " they would carry over the contracted goods for two months, namely, March and April, subject to payment of charges. It is contended that the words " if necessary " are entirely vague and do not show, necessary for whom, when and why. In our opinion, this argument has no force whatever. Under cl. 6, the sellers had an absolute discretion either to carry over the goods or to insist on delivery being taken. By this letter, they have said that, if necessary, that is to say. if the buyers find it difficult to supply the number of the import licence, the contract would be carried over to March and April. By this amendment, the sellers surrendered to a certain extent their absolute discretion. The clause means that the contract was not extended to March and April, but that the sellers would extend it to that period,. if occasion demanded. Since both the parties agreed to this letter and the buyers confirmed it, it cannot be said that there was no consensus ad idem, or that the whole agreement is void for uncertainty.

We shall now consider the next argument, which was very earnestly urged, before us. It is that s. 20 of the Arbitration Act cannot be made applicable to this case at all. We have already quoted extracts from the agreement which include the clause by which the Bye-laws of the East India Cotton Association Ltd., Bombay, were applied to this contract, except Bye law 35,which deals with arbitration on quality in case of East African cotton. Bye-law 1(B) relates to East African cotton, and it says that Bye-laws 1 to 46 inclusive (with certain exceptions) shall apply to contracts in respect of East African cotton. It was conceded before the High Court and also before us that the Bye-laws are statutory.. The buyers were members of the Association but not the sellers; but the Bye-laws on arbitration, with which we are concerned, include arbitrations between a member and a
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non-member. We are concerned directly with Bye-law 38-A. Bye-law 38-A in its opening portion, reads:

> All unpaid claims, whether admitted or not, and all disputes (other than those relating to quality) arising out of or in relation to contracts (whether forward or ready and whether between members or between a, member and a non-member) made subject to these Bye-laws shall be referred to the arbitration of two disinterested persons one to be chosen by each party. The arbitrators shall have power to appoint an umpire and shall do so if and when they differ as to their award."

Then follow certain provisions, which were stressed but which need not be quoted in extension Shortly stated, they are that the arbitrators must make their award in 15 days, unless time be extended by the Chairman. The umpire is to be appointed within 15 days or such extended period as may be fixed by the Chairman and the umpire is to make his award within 10 days, unless time be extended by the Chairman. In case of disagreement or failure of a party to appoint an

arbitrator, the Chairman may appoint an arbitrator, and similarly the Chairman is to appoint the umpire and he may even appoint himself. Other powers are conferred on the Chairman, who is the Chairman of the Board of Directors of the East India Cotton Association Ltd.

The contention is that arbitrations under the Arbitration Act, like those under Sch. 11 of the Code of Civil Procedure, are of three kinds described by Lord Macnaghten in Ghulam Jilani v. Muhammad Hassan (1), and that this belongs to the second category there described, in which " all further proceedings are under the supervision of the Court ". It is argued that by the application of the Bye-laws, the Court is left no powers under s. 20 which is being invoked, and that s. 20 cannot thus apply. Section 20 of the Arbitration Act, in so far as it is material to this point, is as follows:

> " 20. Application to file in Court arbitration agreement.-(1) Where any persons have entered into an
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> (1) (1901) L.R. 29 I.A. 51, 56, 57.
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> arbitration agreement before the, institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.
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> (3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.
>
> (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.
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> (5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

The sellers rely upon cl. (5), which enjoins the application of the provisions of the Arbitration Act, so far as they can be made applicable. Reference is then made to provisions of Chap. II and the Schedule of the Act laying down the powers of the Court, and they are contrasted with the provisions of the Bye. laws to show that if the latter prevail, no residuum of power is left to the Court, and that after filing the agreement, the Court must abdicate in favour of the Chairman and the Act, in terms, ceases to apply. Reference is also made to s. 47 of the Arbitration Act, which provides:

> "Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder "' (Proviso omitted)
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> The opening words of s. 47 takes us to a. 46, which may be read at this stage. It provides: "The provisions of this Act, except subsection (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

Section 46 makes the provisions of any other enactment or any rules made thereunder to prevail over the Arbitration Act, if inconsistent with the latter. In view of these several provisions, it is clear that the Arbitration Act applies to all arbitrations and Chap. III makes it applicable also to arbitrations, in which the arbitration agreement is asked to be filed in Court under s. 20, subject, however, to this that the provisions of any other enactment or rules made thereunder, if inconsistent with the Arbitration Act, are to prevail.

Learned counsel for the buyers contends that nothing is saved of the Act. This is not correct. To begin with, questions as to the existence or validity of the agreement are saved from decisions by arbitrators or umpires, however appointed. Since such a plea can only be raised in bar of an application by persons seeking a reference to arbitration, at least that portion of the Act still applies, and that power can only be exercised by the Court. Other provisions of Chap. II, like ss. 15 and 16, still remain applicable. We need not give a list of all the provisions which may be saved, because that will involve an examination side by side, of the sections of the Act and the provisions of the Bye-laws. So long as something is saved, it cannot be said that the Court after receiving the agreement and ordering that it be filed, becomes completely functus officio.

But the crux of the argument is that the provisions of tub.a. (4) of s. 20 read with sub-s.(1), ibid., cannot apply, and the Court, after filing the agreement, will have
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to do nothing more with it, and this shows that s. 20 is not applicable. This argument overlooks the fact that this is a statutory arbitration governed by its own rules, and that the powers and duties of the Court in sub-s. (4) of s. 20 are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not. That may involve dealing with objections to the existence and validity of the agreement itself. Once that is done, and the Court has decided that the agreement must be filed, the first part of its powers and duties is over. It is significant that an appeal under s. 39 lies only against the decision on this part of sub-s. (4). Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties. That also was perfectly possible in this case, if the parties appointed the arbitrator or arbitrators. If the parties do not agree, the Court may be required to make a decision as to who should be selected as an arbitrator, and that may be a function either judicial, or procedural, or even ministerial; but it is unnecessary to decide which it is. In the present case, the parties by their agreement have placed the power of selecting an arbitrator or arbitrators (in which we include also the umpire) in the hands of the

Chairman of the Board of Directors of the East India Cotton Association, Ltd., and the Court can certainly perform the ministerial act of sending the agreement to him to be dealt with by him. Once the agreement filed in Court is sent to the Chairman, the Bye-laws lay down the procedure for the Chairman and the appointed arbitrator or arbitrators to follow, and that procedure, if inconsistent with the Arbitration Act, prevails. In our opinion, there is no impediment to action being taken under s. 20(4) of the Arbitration Act.

We may dispose of here a supplementary argument that the dispute till now is about the legal existence of the agreement including the arbitration clause, and that this is not a dispute arising out of, or in relation to a cotton transaction. Reference was made to certain observations in Heyman v. Darwins Ltd.(1). In

(1) [1942] A.C. 356.

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our opinion, the words of the Bye-law "arising out 'of or in relation to contracts" are sufficiently wide to comprehend matters, which can legitimately arise under s. 20. The argument is that, when a, party questions the very existence of a contract, no dispute can be said to arise out of it. We think that this is not correct, and even if it were, the further words " in relation to " are sufficiently wide to comprehend even such a case. In our opinion, this argument must also fail.

It was contended lastly that the law applicable to the case is the lex loci solutionis, that is to say, the law of British East Africa. Reference was made to a passage from Pollock and Mulla's Contract Act, Eighth Edn., p. 11, where it is observed as follows:

> " In ordinary circumstances the proper law of a contract (to use Mr. Dicey's convenient expression) will be the law of the country where it is made. But where a contract is made in one country and to be performed wholly or in part in another', the proper law may be presumed to be the law, of the country where it is to be performed." (Auckland Corporation v. Alliance Assurance Co.) (1)
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> The learned authors observe, on the same page further :
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> "But these rules are only in the nature of presumptions, and subject to the intention of the parties, whether expressly declared or inferred from the terms and nature of the contract and the circumstances of the case."

Reliance was also placed on Chitty's Law of Contract and Rule 148, sub-r. (3), Second Presumption, in Dicey's Conflict of Laws, Seventh Edn., p. 738, on which the statement of the law in Pollock and Mulla is based.

Whether the proper law is the lex loci contracts or lex loci solutionis is a matter of presumption; but there are accepted rules for determining which of them is applicable. Where the parties have expressed themselves, the intention so expressed overrides any presumption. Where there is no expressed intention,

(1) [1937] A.C. 587.

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then the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case. In the present case, two such circumstances are decisive. The first is that the parties have agreed that in case of dispute the Bombay High Court

would have jurisdiction, and an old legal proverb says, " Qui elicit judicem eligit jus" If Courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence, that they would apply their own law to the case. See N. V. Kwick Who Tang v. James Finlay & Co. (1). The second circumstance is that the arbitration clause indicated an arbitration in India. of such arbitration clauses in agreements, it has been said on more than one occasion that they lead to an inference that the parties have adopted the law of the country in which arbitration is to be made. See Hamlyn & Co. v. Tallisker Distillery (2), and Spurrier v. La Cloche (3). This inference, it was said in the last case, can be drawn even in a case where the arbitration clause is void according to the law of the country where the contract is made and to be performed. In our opinion, in this case, the circumstances clearly establish that the proper law to be applied is the Indian Law.

In the result, the appeal fails, and is dismissed with costs.

Appeal dismissed.

(1) [1927] A.C. 604. (2) [1894] A.C. 204.

(3) [1902] A.C. 446 (P.C.).