TREATMENT OF SEATLESS CLAUSES BY INDIAN AND ENGLISH COURTS: A COMPARATIVE ANALYSIS

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A thumb-rule for drafting any arbitration clause is to mention the seat of arbitration in the clearest fashion possible. When this thumb-rule is breached, the burden of determining or discerning a seat befalls an arbiter, be it a court or a tribunal. This paper aims to explain the ramifications of such an exercise by analysing English and Indian jurisprudence on the discernment of seat in such ‘seatless’ clauses. It demonstrates the internal conflicts within the decisions in each of these jurisdictions, attributing the conflicts in England to a ‘London bias’ and the conflicts in India to the perversity of the crude approaches taken by the Indian courts. The paper proposes a 10-part test that can function as a basic framework for the resolution of such conflicts in the future regarding discernment of ‘seat’. The paper also examines the utility of this test against the English and Indian judgments already discussed.

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I. INTRODUCTION

‘Seat’ is the legal system that acts as the ‘legal domicile’ of an arbitration. It has been called the ‘center-of-gravity’ of an arbitration, as it attaches the arbitration to a national legal system, which guides the arbitral procedure, determines the contours of arbitral challenges, and provides supervisory jurisdiction to the courts of that legal system.¹ For example, the parties choose ‘India’ as the seat. In that case, they essentially choose to apply Part I of the Indian Arbitration Act, 1996 (‘Indian Arbitration Act’) to their arbitration, which entails the relevant provisions regarding the arbitral procedure, challenges, and jurisdiction of Indian courts. The significance of seat is further heightened in common law countries that unequivocally reject the concept of ‘delocalised’ arbitrations, i.e., arbitrations that are not domiciled in any specific jurisdiction.² Due to this, a basic and mandatory thumb-rule for drafting an arbitration clause is that the seat must be clearly and explicitly stipulated.³ However, in practice, this thumb-rule is flouted with surprising frequency, perhaps due to the ignorance or the negligence of the draftspersons. For the purpose of this paper, arbitration clauses without a specific stipulation of a seat shall be referred to as ‘seatless clauses’.

Seatless clauses can be of various types. First are the ones that do not establish any seat. Second are the ones that leave it unclear whether a seat is established or not. For example, it is unclear whether clauses such as “India is the home of arbitration” or “Hong Kong is the place of arbitration”⁴ are intended to refer to the seat of arbitration. Finally, there can be


² A ‘delocalised’ or a ‘denationalised arbitration which is not attached to a seat (one single national legal system), meaning thereby, is not bound by procedural and jurisdictional constraints imposed by domestic arbitral legislations. Scholars like Paulsson propose delocalisation of arbitrations to ensure global uniformity and expediency in arbitrations. See Jan Paulsson, Delocalization of International Commercial Arbitration: When and why it matters, Vol. 32(1), THE INTERNATIONAL COMPARATIVE L. Q., 53 (1983). However, apart from the French legal system, legal systems generally mandate arbitration to be attached to a seat, especially England and India. See A v. B, [2007] 1 Lloyd’s Rep. 237, ¶111 (Queen’s Bench Division, England); Bharat Aluminium Co. Ltd. v. Kaiser Aluminium, (2012) 9 SCC 552, ¶123 (‘BALCO’).


⁴ Similar phrasing had been used in the recent Indian case of Mankastu Impex. See Mankastu Impex v. Airvisual, (2020) SCC Online SC 30, ¶20-22 (‘Mankastu Impex’).
clauses that may indicate multiple conflicting seats. For example, a clause may say “seat is London” but at the same time mention that “Indian Arbitration Act applies”, failing to clarify which arbitration regime supersedes as the true ‘seat’.

Interestingly, however, no jurisdiction considers a seatless clause invalid per se. Thereby meaning that arbitrations can theoretically be commenced and undertaken without any reference to the seat. However, in any nonutopian scenario, a seatless arbitration will lead to many procedural and substantive conflicts between the parties, involving important questions such as ‘What is the time limit for completion of the arbitration?’, ‘What are the interim measures that can be taken by courts?’ or ‘Which court can be approached for a challenge to an award?’, all of which are answered by the law of the seat, i.e., the curial law. This necessitates the determination/discernment of a seat, despite the absence of a stipulated seat by the parties. The burden of this decision inevitably falls upon a neutral arbiter, be it a court or an arbitrator, who must somehow identify the relevant seat. English and Indian courts have frequently attempted to grapple with this dilemma, as a result developing vast jurisprudence on seatless clauses in their respective jurisdictions, with the Indian judgements often relying on their English counterparts. The paper attempts to analyse the jurisprudence in both these countries to examine whether they follow a uniform and logical approach in dealing with seatless clauses and if not, then whether a consistent and rational approach can be developed to resolve this dilemma.

In Chapters II and III, this paper comparatively analyses the development of the English and Indian jurisprudence on seatless clauses, respectively, to demonstrate inconsistencies within the decisions in these jurisdictions. Chapter II identifies that the cause of these inconsistencies in England is a ‘London bias’ in the discernment of the seat of arbitration. As against this, Chapter III identifies the inconsistencies in Indian cases and traces the general approaches undertaken by the Indian Supreme Court in dealing with seatless clauses. The Chapter also demonstrates that these inconsistencies have resulted out of under-analysis, which in turn, has been caused by a facile appreciation of concepts surrounding international arbitration and a general disinterest in delving into deep scholarly analysis. Chapter IV critically analyses various approaches undertaken by the Indian Supreme Court in the discernment of seat. Subsequently, in Chapter V, the paper proposes a uniform test to be applied in cases involving seatless clauses to help resolve the ‘London bias’ of English courts and the under-analysis by the Indian courts. Finally, Chapter VI re-assesses all the cases discussed in the paper through the lens of this proposed test in order to ascertain the utility of the test and re-affirm the conclusions drawn in the previous Chapters.

II. ENGLISH JURISPRUDENCE ON SEATLESS CLAUSES: THE LONDON BIAS

Since neither the English nor the Indian courts recognise delocalised arbitrations, seatless clauses have been a constant cause of discomobulation for them. English courts have been grappling with the issue of discernment of the seat for a longer period of time

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5 This exact scenario was manifested in an arbitration clause in the English case of McDonnell Douglas. See Union of India v. McDonnell Douglas Corporation, [1993] 2 Lloyd’s Rep. 48 (Queen’s Bench Division, England) (‘McDonnell Douglas’); [Please note: The author found no exact copy of this judgement online. Therefore, the description of this case is based on the discussion of this case in articles, blog pieces and other subsequent English judgements. Every stated fact about the case has been confirmed through multiple sources].

and have also inspired some Indian decisions. Hence, it is important to first examine whether the English jurisprudence provides us with a sound and uniform approach for the discernment of seat in seatless clauses before moving forth to an analysis of the Indian position. This Chapter traces the English jurisprudence on seatless clauses. It aims to highlight the apparent inconsistencies—and sometimes direct contradictions—amongst various English judgements on the discernment of seat. It also highlights that these inconsistencies are caused by a bias towards English seat (‘London-bias’).

A. EARLY LANDMARK CASES

Since England has been a hub of international commercial arbitration for decades, it has seen countless cases dealing with seatless clauses. Therefore, this paper generally limits itself to the more recent cases decided by English courts. Having said that, it is appropriate to commence the discussion with the English Court of Appeal’s landmark 1987 decision in *Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru* (‘Naviera Amazonica’).\(^7\) In this case, the seatless arbitration clause had stipulated that the arbitration was to be held ‘under the conditions and laws of London’.\(^8\) This ambiguous clause was, however, accompanied by another clause stating that the courts of the City of Lima would have the jurisdiction in case of a judicial dispute.\(^9\) The Court held that the former clause implicitly stipulated the seat, and the latter clause could not be implemented due to its conflict with the former’s intent of conferment of jurisdiction on English courts.\(^10\) Therefore, London (England) was held to be the seat. Despite an exclusive jurisdiction clause in favour of the courts of Lima, the Court of Appeal upheld its own supervisory jurisdiction over the arbitration due to its interpretation of the arbitration clause.

Subsequently, in another landmark case, *Union of India v. McDonnell Douglas Corporation* (‘McDonnell Douglas’),\(^11\) a pathological arbitration clause between the parties had presented a seemingly unresolvable puzzle. The clause had stipulated Indian law as the substantive law, Indian law as the law governing the arbitration agreement (‘the AA law’)\(^12\) and Indian Arbitration Act, 1940, (‘IAA 1940’) as governing the arbitral proceedings.\(^13\) However, the clause simultaneously provided for London as the ‘seat’ of arbitration.\(^14\) It was sought to be argued that this mention of ‘seat’ was in fact, a reference to the ‘venue’, as all the other factors had indicated an Indian seat, specifically the applicability of the IAA 1940.\(^15\) However, the Queen’s Bench denied this contention, holding that an express provision of ‘seat’ could not be disregarded.\(^16\) The Court held that the reference to the IAA 1940 had only been made to import the provisions regarding the internal arbitral procedure of the Act, as is done

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7 *Naviera Amazonica*, supra note 6, at 116.
8 *Id.*, at 120.
9 *Id.*, at 119.
10 *Id.*, at 125.
11 *McDonnell Douglas*, supra note 5.
12 The law governing the arbitration agreement (‘the AA law’) governs the substantive aspects of the arbitration agreement, such as its validity, interpretation, and scope. Against this, law of the seat (curial law) governs the process of arbitration and related aspects. See Mathew Parish, *The Proper Law of an Arbitration Agreement*, Vol. 76(4), INT’L J. ARBITRATION, MEDIATION AND DISP. MANAGEMENT, 661, 665 (2010).
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
While adopting institutional rules.\textsuperscript{17} However, English law, being the curial law, was to be the overriding procedural law and the law applicable to arbitral challenges.\textsuperscript{18}

Later, in 2001, the Queen’s Bench decided \textit{Dubai Islamic Bank PJSC v. Paymentech Merchant Services} (‘Dubai Islamic Bank’),\textsuperscript{19} where the agreement had made no mention of the seat, venue, substantive law, or the AA law. However, a part of the appellate board proceedings to the arbitration had been consensually held in London.\textsuperscript{20} In the absence of any stipulations, the Court seems to have used a ‘closest-connection’ test in determining that the dispute was more closely related to California and was likely to be governed by Californian substantive law.\textsuperscript{21} This was based on the presence of various factors at California, viz. location of parties, the proper law of contract and causes of action.\textsuperscript{22} Therefore, the Court denied its jurisdiction inferring the seat to exist outside of England.

\textbf{B. THE ERA OF ‘LONDON BIAS’}

Beginning from 2007, the English Court of Appeal decided a host of cases pertaining to seatless clauses, some of which contradict each other. In \textit{C v. D}, the seatless clause had mentioned London as the venue and had provided for the arbitration to be governed by the English Arbitration Act, 1996 (‘English Arbitration Act’).\textsuperscript{23} It had also been mentioned that English courts would resolve any disputes with respect to appointments.\textsuperscript{24} The substantive law had been that of New York.\textsuperscript{25} The Court of Appeal upheld the Queen’s Bench’s unfounded assumption that the case was a classic example of the supposedly common ‘Bermuda form’ of arbitration, wherein parties apply American substantive law, but stipulate English seat and venue due to the supposed ‘undesirability’ of the American courts and legal system for the resolution of the disputes.\textsuperscript{26} To bolster this reasoning, the Queen’s Bench had held (and the Court of Appeal had affirmed) that the stipulation of the English Arbitration Act would necessarily import the jurisdiction of English courts and make England the seat.\textsuperscript{27} Despite the presence of other factors in England, the Queen’s Bench had chosen to ignore those in the analysis, and the primary reliance was placed on the mention of the English Act and the commonality of the ‘Bermuda form’.

It is true that the outcome in \textit{C v. D} is difficult to question because of the larger factual background. The collective force of the stipulation of the English Arbitration Act and that of the jurisdiction of English courts evinced clear intention towards holding England as the seat. Having said that, the decision (rightly or wrongly) did contradict McDonnel Douglas’s holding, that a mere stipulation of domestic legislation does import a seat,\textsuperscript{28} without justifying such deviation. Moreover, the primary justification behind the decision was the assumption that parties would have wished for a ‘Bermuda form’ of arbitration. In obiter, the Court of Appeal also controversially mentioned that the AA law has a closer connection to the seat, than

\begin{itemize}
\item \textit{Id.}
\item \textit{Id.}
\item Dubai Islamic Bank PJSC v. Paymentech Merchant Services, [2001] 1 All E.R. (Comm) 514 (Queen’s Bench Division, England) (‘Dubai Islamic Bank’).
\item \textit{Id.}, ¶16.
\item \textit{Id.}, ¶2.
\item \textit{Id.}, ¶16.
\item \textit{Id.}, ¶19.
\item McDonnell Douglas, supra note 5.
\end{itemize}

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the substantive law. The evident intent behind mentioning this was to provide an *arguendo*, leaving no room for doubt over the question of jurisdiction of English courts. This was the first major case, where an English court decided based on the assumption that the parties would have wished for an English seat citing the commonality of the ‘Bermuda form’ of arbitration.

In *Braes of Doune Wind Farm v. Alfred McAlpine* (‘Braes of Doune’), the arbitration clause had provided for Glasgow as the seat, but English law as the substantive law. Further, the main contract had also provided for the exclusive jurisdiction of English courts and the application of the English Arbitration Act. The Queen’s Bench completely contradicted the rationale in McDonnell Douglas to hold that Glasgow was in fact intended only to be the geographical ‘place’ or the venue of arbitration and not the seat, and that the reference to the English Arbitration Act imported an English seat. Interestingly, McDonnell Douglas was not even discussed in this case. The Court also used the reference to ‘English courts’ to support this reasoning. This rationale also conflicted with Naviera Amazonica’s holding that a stipulation of exclusive jurisdiction of courts would be ignored if those were outside the seat of arbitration.

The Queen’s Benches in *Braes of Doune* and *McDonnell Douglas* had faced unresolvable situations where the clauses seemed to have provided concurrent supervisory powers to courts of multiple jurisdictions. Individually, it would be unfair to fault the reasoning in either of the cases, given the pathological nature of the pertinent arbitration clauses. However, the lines of reasoning supplied in the cases had been at complete loggerheads with each other. While the Court in *McDonnell Douglas* ignored the reference to the IAA 1940 in favouring London due to the use of the word ‘seat’, in *Braes of Doune* the same Court watered down the word ‘seat’, thereby favouring Glasgow, to mean ‘venue’ to favour England due to a reference to the English Arbitration Act. It was rather apparent that each of these cases had been decided with the predetermined intent of holding London/England as the seat to uphold the Court’s supervisory jurisdiction.

This ‘London-bias’ was also evident in the 2009 case of *Roger Shashoua v. Mukesh Sharma* (‘Shashoua (England)’). In this case, the parties had a dispute with respect to a shareholder’s agreement signed and performed in India. The seatless agreement had provided for Indian substantive law and an English venue (London). The Court used a threefold reasoning to hold London/England as the seat, despite recognising the difference between seat and venue. First, it was held that the choice of ICC Arbitration would confer

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30 Braes of Doune Wind Farm v. Alfred McAlpine, [2008] EWHC (TCC) 426, ¶6 (Queen’s Bench Division, England) (‘Braes of Doune’).
31 Id., ¶17(a)-(b).
32 Id., ¶17(e).
33 Id., ¶17(c)-(d).
34 Id., ¶17(a)-(b).
36 Id., ¶3.
37 Id., ¶¶4-5.
38 However, as explained, the seat of an arbitration is its “legal domicile”, which merely determines the procedural framework of an arbitration, supervisory courts and grounds of challenge of an arbitration. As against this, a venue is merely the geographical location where the arbitration is conducted. A venue can also be shifted from time to time. For example, an arbitration seated in India will take place in pursuance of Part I of the Indian Arbitration Act, though it may physically take place in London, Hong Kong or Singapore. See Soumil Jhanwar, *Jurisdictional Issues in International Arbitration Cases: A Uniformized Approach*, Vol. 9(1), INDIAN J. ARBITRATION LAW, 142, 154-55 (2020).
the status of ‘seat’ on a venue. Interestingly, the court did not support this rather surprising conclusion with any sound rationalisation. Second, the Court held that, since all the factual evidence was present in India due to the nature of the dispute, London could not have been chosen as the venue for mere geographical convenience. Therefore, it concluded that the only reason behind the choice of London as the venue was to import its lex arbitri. However, the use of this ‘reverse convenience’ rationale was fundamentally flawed. Had the parties only intended to import the lex arbitri of London, they would have done so directly without unnecessarily holding the arbitration at an inconvenient location.

Moreover, the rationale was not applicable to the facts at hand. Contrary to what the Court inferred, a venue is not merely chosen for its proximity to the evidence; it may be chosen for proximity to the parties or capable lawyers / arbitrators or for the presence of better facilities for the conduct of arbitral proceedings. Apart from the fact that Roger Shashoua was from London, London had evidently been chosen as the seat because of its proximity to quality arbitrators, two of whom had been English Queen’s Counsels and one of whom had been enrolled as a Barrister, and presence of world-class facilities for arbitration. Therefore, the need to import the lex arbitri of London could hardly have been the reason behind its choice as the venue.

Due to this perverse rationalisation, the decision also conflicted with that in Dubai Islamic Bank, where the venue (of the appellate board meeting) had been in England, despite the evidence being primarily situated in California. In Dubai Islamic Bank, California (as against the jurisdiction of the venue) was discerned as the seat due to its ‘proximity to the dispute’. This was a comparatively reasonable approach, as although the venue may be chosen for proximity to the arbitrators or availability of facilities, choice of a seat only requires the parties' convenience because the arbitrators and facilities would not be required at the seat courts.

The third rationalisation provided in Shashoua (England) was simply that ‘London arbitration’ is a common phenomenon as London is an ideal ‘place’ for an arbitration due to its facilitative laws and implementation mechanisms. This ground coloured with the

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39 Shashoua (England), supra note 35, ¶27.
40 Id., ¶27.
41 Id.
42 The term lex arbitri literally means ‘law of the arbitration’, which generally refers to the law at the seat of the arbitration. For example, if India is the seat, then lex arbitri would be the Indian Arbitration and Conciliation Act, 1996. The term ‘lex arbitri’ is often interchangeably used with ‘curial law’. See Blackaby, supra note 1, at 3-4.
45 See supra text accompanying notes 19-21.
46 Dubai Islamic Bank, supra note 19, ¶52-53.
49 The use of the ambiguous word ‘place’ is dangerous here as place can mean either seat (legal place of an arbitration) or venue (geographical place of an arbitration), depending on the context.
50 Shashoua (England), supra note 35, ¶34.
belief of self-supremacy was completely unfounded on the facts of the case or party autonomy and is the most blatant example of the London bias that this paper seeks to establish.

Shashoua (England) was subsequently followed by the Queen’s Bench’s decision in Enercon GmBH v. Enercon (India) (‘Enercon (England’).\(^{51}\) The case majorly pertained to a shareholding and intellectual property dispute between a German and an Indian company.\(^{52}\) The contract had been signed and was to be performed in India.\(^{53}\) The seatless agreement had stipulated London as the venue, Indian law as the substantive law, Indian law as the AA law and the Indian Arbitration Act as the procedural law.\(^{54}\) The Court employed Shashoua (England)’s ‘reverse convenience’ rationale, holding that London was not geographically proximate to the dispute and could only have been chosen as the venue to import English laws and, therefore, an English seat.\(^{55}\) As discussed, this rationalisation is perverse as had that been the case, the parties would have specified London as the seat and not as the venue. Even in this case, London was probably chosen as a neutral location that would have proximity to quality arbitrators and world-class facilities. This is also supported by the fact that the stipulation of the Indian Arbitration Act should naturally import Indian lex arbitri.

As discussed, this ‘reverse convenience’ rationale contradicts the ‘closest connection’ test employed in Dubai Islamic Bank.\(^{56}\) The judgement also contradicted Braes of Doune and C v. D, as both the latter decisions had used references to domestic arbitration statutes to determine the seat.\(^{57}\) The arguendo in C v. D was further contradicted, as its emphasis on the proximity of AA law and the seat would also have led to the inference of an Indian seat.\(^{58}\)

The Queen’s Bench also used the flawed ‘London arbitration’ rationale employed by Shashoua (England) to underprop its decision.\(^{59}\) Interestingly, however, despite having indulged in such a deep analysis of the issue, the final decision on the ‘seat’ was made subject to the decision of the Indian court, which had also been simultaneously adjudicating upon an identical dispute. In a subsequent decision to be discussed in this paper, the Indian Supreme Court proceeded to determine India as the seat,\(^{60}\) nullifying the effects of this extreme case of ‘London-bias’.

In quick succession to this case, the Queen’s bench adjudicated upon U&M Mining Zambia v. Konkola Copper Mines (‘U&M Mining Zambia’), where the arbitration clause between two Zambian parties had provided for an LCIA arbitration.\(^{61}\) The clause had mentioned that, “place […] shall be England and the language shall be English”.\(^{62}\) Additionally, both the arbitration and the jurisdiction clauses had provided for the ‘exclusive

\(^{51}\) Enercon GmBH v. Enercon (India), [2012] EWHC 3711 (Comm.) (Queen’s Bench Division, England) (‘Enercon (England’).

\(^{52}\) Id., ¶1.

\(^{53}\) Id.

\(^{54}\) Id., ¶2.

\(^{55}\) Id., ¶56.

\(^{56}\) See supra text accompanying notes 45-48.

\(^{57}\) See C v. D, [2007] EWCA (Civ.) 1282, ¶19 (Court of Appeal, England); Braes of Doune supra note 30, ¶17(c)-(d).


\(^{59}\) Enercon (England), supra note 30, ¶57.

\(^{60}\) See Enercon (India), supra note 6.


\(^{62}\) Id.
jurisdiction’ of the High Court of Zambia. The substantive law also had been Zambian. However, the Court held that the ‘exclusive jurisdiction’ granted to the Zambian High Court was not conferred under the ‘arbitration clause’, but under the ‘governing law clause’. It was held that, only the disputes governed by the latter clause would go to the Zambian High Court. However, this rationale was manifestly erroneous. Given that all disputes were to go to arbitration, the ‘exclusive jurisdiction’ granted to the Zambian High Court had evidently been jurisdiction over supervision of arbitration and challenges to the arbitral awards. This perverse rationale also conflicted with Braes of Doune, where the exclusive jurisdiction clause was used to discern England as the seat.

The Queen’s Bench attempted to differentiate Braes of Doune, highlighting that the “seat […] was merely a designation of (geographical) place” in that case. However, it later went on to completely contradict this rationale, interpreting the stipulation of ‘place’ in the disputed clause as the ‘seat’ of arbitration. If anything, U&M Mining Zambia was a comparatively clearer example of the reference to the venue (as against Braes of Doune). The usage of the ambiguous term ‘place’ in U&M Mining Zambia could be interpreted either way as seat, which may be called a ‘legal place’ or as venue, which may be called a ‘geographical place’, but the word ‘seat’ used in Braes of Doune did not provide any such interpretative room and could only have been read down if considered as a drafting error. Moreover, the word ‘place’ had been used in the same sentence as the stipulation of the ‘language’, which indicates that the reference was to tangible features of arbitration. Therefore, the reasoning of the Queen’s Bench was perverse, logically unsound, and evidently guided by the London-bias.

C. END OF THE ERA OR A SLIGHT RESPITE?

The two cases that followed U&M Mining Zambia, seem to have been free from this ‘London-bias’ manifested in a continuous line of above discussed above. In Shagang South-Asia Trading v. Daewoo Logistics (‘Shagang South-Asia’), the Queen’s Bench dealt with a clause that had provided as follows: “Arbitration to be held in Hong Kong. English Law to be applied”. Further, the terms of arbitration were to be based on the English version of the Gencon 1994 Charter Party. The Gencon scheme arbitration has three alternative versions; the English version in the Article ‘19(a)’ form provides for English curial law and English substantive law. To any reasonable person, it would have been obvious that English law was to be the lex arbitri. However, the Court discerned Hong Kong as the seat, relying on the host of perverse ‘London-bias’ precedents, that had held that a choice of venue would automatically import the lex arbitri of the place, usually only applied when London had been the venue.

This case shows how precedents manifesting London-bias have plagued the English jurisprudence in such depth that even an unbiased arbiter would be forced to render a
pervasive and illogical decision if she/ he is to follow the precedents. In the 2018 decision of _Atlas Power and Others v. NTDC_ (‘Atlas Power’), the agreement had provided for the venue to be Pakistan / London, provided that the dispute qualified a minimum monetary threshold, the substantive law to be that of Pakistan and the procedural rules to be the LCIA Rules.\textsuperscript{75} The LCIA Court had earlier determined London as the seat,\textsuperscript{76} using Article 16.2 of the LCIA Rules, 2014, that made London the default seat in the absence of a specific stipulation.\textsuperscript{77} The Queen’s Bench in Atlas Power confirmed this, despite a challenge to the same by the respondents.\textsuperscript{78} While the judgement was not perverse unlike the other judgements, the same was perhaps because the correct decision was anyway in favour of London being the seat.

However, the most recent decision on the matter brings back the London-bias that the earlier line of cases had displayed.\textsuperscript{79} In _Process and Industrial Developments v. The Federation of Nigeria_ (‘Process and Industrial Developments’), the seatless agreement had stipulated Nigerian law as the substantive law, London as venue and the Nigerian Arbitration and Conciliation Act (‘NACA’) as the governing statute.\textsuperscript{80} During the proceedings, the Nigerian Federal Court was in the process of discernment of the seat, when the arbitral Tribunal declared ‘London’ as the seat, based on the fact that, although the same had been mentioned as the venue of arbitration, the participants had arbitrated under an assumption that it had also been the seat.\textsuperscript{81} Despite this, the Nigerian Court subsequently exercised the powers of a supervisory court assuming that Nigeria was the seat,\textsuperscript{82} and the dispute on the seat of arbitration came to the English courts.

While deciding to respect the Tribunal’s decision purely on the ground of ‘issue estoppel’, the Queen’s Bench also provided an _arguendo_ by conducting a superficially independent discernment of the seat, which is of higher relevance to this paper. It held that the use of the phrase ‘venue of the arbitration’ rather than the use of a phrase like ‘venue of the hearings’ indicated that even the challenges to the arbitral award were to be at London courts.\textsuperscript{83} This reasoning was excessively bizarre due to reasons explained hereunder. First, the term ‘venue of arbitration’ is very common; it is exclusively used to connote the geographical location of the arbitral proceedings / hearings themselves.\textsuperscript{84} It is generally never used to connote the geographical location of the supervisory courts of the arbitral proceedings. Rather, for the stipulation of court jurisdiction, parties generally use clear words like ‘exclusive jurisdiction’, as was the case in _C v. D_.\textsuperscript{85} Second, even in the pertinent agreement, the term ‘venue’ specifically corresponded only to the ‘arbitration’, and not to ‘court proceedings’.

\textsuperscript{75} Atlas Power and Others v. NTDC, [2018] EWHC 1052 (Comm.), ¶5 (Queen’s Bench Division, England) (‘Atlas Power’).

\textsuperscript{76} Id., ¶14.


\textsuperscript{78} Atlas Power, _supra_ note 75, ¶¶14, 47-48.

\textsuperscript{79} Process and Industrial Developments v. The Federation of Nigeria, [2019] EWHC 2241 (Comm.) (Queen’s Bench Division, England) (‘Process and Industrial Developments’).

\textsuperscript{80} Id., ¶6.

\textsuperscript{81} Id., ¶28.

\textsuperscript{82} Id., ¶30.

\textsuperscript{83} Id., ¶85.

\textsuperscript{84} Literature commonly uses ‘venue of arbitration’ to exclusively for the connotation of the location of arbitral hearings. _See_ BORN, _supra_ note 1, at 2075; PAULSSON & PETROCHILOS, _supra_ note 43, at 152. Even in Shashoua (England), the phrase ‘venue of the arbitration’ was only interpreted to encompass the location of the arbitral hearings; it was rather the ‘reverse convenience’ rationale that led to the decision on English courts having the supervisory jurisdiction. _See_ _supra_ text accompanying notes 40-41.

\textsuperscript{85} _See_ C v. D, [2007] EWCA (Civ.) 1282, ¶2 (Court of Appeal, England).
Since it is very common for arbitral venues and supervisory courts to be situated at different locations,\textsuperscript{86} the parties would have expressly mentioned ‘court proceedings’ had they also chosen to be bound by the stipulated geographical restrictions. Therefore, the Queen’s Bench’s line of interpretation stretches beyond the bounds of interpretive imagination and goes into the realm of perversity.

The Court also attempted to use Shashoua (England)’s reverse convenience rationale to hold that any arbitration conducted at London would have been predictably inconvenient, and therefore, ‘venue’ was intended to mean the ‘seat’ and not the mere geographical location.\textsuperscript{87} However, this approach implies that any venue clause must be read down whenever the arbiter deems its enforcement inconvenient ignoring that venues are also stipulated for certainty regarding neutrality, proximity to facilities and availability of arbitrators.\textsuperscript{88} Consequently, the Court’s rationalisation of an English seat was flawed.

This was especially because the arbitration agreement’s reference to the NACA clearly indicated an intention to import the same as the \textit{lex arbitri}.\textsuperscript{89} The Court attempted to pre-emptively rebut the same by holding that the reference to NACA was intended to import only certain specific procedures and not the whole act as the \textit{lex arbitri}.\textsuperscript{90} Obviously, the Court was unable to clarify what these ‘certain procedures’ were and how they winnowed them from the rest of the Act. This unfounded rationale directly contradicted both \textit{C v. D} and Braes of Doune, which had reasoned that a domestic arbitration statute necessarily imports the jurisdiction of the courts of that country, making it the seat.\textsuperscript{91} There was no factual background behind this unnecessary inference. Further, even if the same were true, no fact indicated that the specific provisions empowering the Nigerian courts to exercise their supervisory powers were intended to be necessarily excluded. It is apparent that the Queen’s Bench indulged in a pernickety over-analysis of irrelevant facts to support its pre-determined conclusion of an English seat.

Evidently, a majority of English cases have often directly contradicted each other, in order to hold London/England as the seat (See Table 1). This ‘London-bias’ has often drawn the English courts towards over-analysis of (often irrelevant) the facts of each case, which had rather simple and straightforward solutions. Therefore, despite heavy jurisprudence on seatless clauses, English courts still lack a consistent approach to be applied to such cases. The paper shall subsequently propose a uniform test that will help minimise the scope of this ‘London bias’. However, it is first important to compare the Indian jurisprudence on seatless clauses to demonstrate another reason that could lead to inconsistency in the decisions on seatless clauses.

\textsuperscript{86} See Paulsson & Petrochilos, supra note 43, at 153-54.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} White & Case, supra note 47.
\textsuperscript{89} Process and Industrial Developments, supra note 79, ¶6.
\textsuperscript{90} \textit{Id.}, ¶45
\textsuperscript{91} See \textit{C v. D}, [2007] EWCA (Civ.) 1282, ¶19 (Court of Appeal, England); Braes of Doune, supra note 30, ¶17(c)-(d).
Table 1: Conflicts due to London-bias

<table>
<thead>
<tr>
<th>Case</th>
<th>Earlier decisions contradicted</th>
<th>Contradiction on the rationale of</th>
<th>Eventually determined seat</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Naviera Amazonica</td>
<td>Use of stipulation of court jurisdiction</td>
<td></td>
</tr>
<tr>
<td>Shashoua (England) (EWHC 2009)</td>
<td>Dubai Islamic Bank</td>
<td>Use for proximity to the dispute to determine convenience (and therefore seat)</td>
<td>England</td>
</tr>
<tr>
<td>Enercon (England) (EWHC 2012)</td>
<td>Dubai Islamic Bank</td>
<td>Use for proximity to the dispute to determine convenience (and therefore seat)</td>
<td>England</td>
</tr>
<tr>
<td></td>
<td>C v. D</td>
<td>Use of stipulation of domestic arbitration statute</td>
<td>England</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Proximity to AA law</td>
<td></td>
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<td></td>
<td>Braes of Doune</td>
<td>Use of stipulation of domestic arbitration statute</td>
<td></td>
</tr>
<tr>
<td>U&amp;M Mining Zambia (EWHC 2013)</td>
<td>Braes of Doune</td>
<td>Use of stipulation of court jurisdiction</td>
<td>England</td>
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<tr>
<td></td>
<td></td>
<td>‘seat’ not meaning ‘place’, but ‘place’ meaning ‘seat’</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Braes of Doune</td>
<td>Use of stipulation of domestic arbitration statute</td>
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</tbody>
</table>
III. INDIAN JURISPRUDENCE ON SEATLESS CLAUSES: DISCERNING THE GENERAL TRENDS

As is the case in England, the Indian jurisprudence on seatless clauses is also replete with inconsistent decisions. This Chapter aims to delineate the various approaches taken by the Indian Supreme Court in the discernment of seat from seatless clauses. Part A highlights the reason behind the rapid development of jurisprudence on seatless clauses in the last decade, by tracing the origins of the ‘one-set-theory’ in India that made the discernment of seat relevant. Part B critically analyses the jurisprudence from 2011 to 2017, highlighting the under-analysis, the inconsistency and the fundamental lack of conceptual clarity manifested in these judgements. Part C critically analyses the change in the course of jurisprudence, commencing from the Indian Supreme Court’s Roger Shashoua judgement in 2017, highlighting a notable but unfruitful effort of conducting detailed analysis by the Apex Court. Part D consolidates the discussion by tracing the general approaches common to the Indian decisions discussed in Parts B and C.

A. THE RELEVANCE OF SEAT: BALCO’S ‘ONE-SEAT-THEORY’

In the now-obsolete Bhatia International v. Bulk Trading SA (‘Bhatia International’), it had been decided that Part I of the Indian Arbitration Act on ‘General Provisions’ would apply to any arbitration, irrespective of its seat.\(^{92}\) Thereby meaning that the Indian courts could interfere in any arbitration irrespective of its seat and despite no specific conferment of jurisdiction or stipulation of the applicability of the Indian Arbitration Act. According to the Court’s decision, the Act could only ever be inapplicable to an arbitration if (and to the extent) it was expressly/ impliedly barred by the parties.\(^{93}\) This was reversed by the five judge bench decision of Bharat Aluminium Co. Ltd. v. Kaiser Aluminium (‘BALCO’), where it was held that an arbitration can have only one supervisory jurisdiction, and Part I of the Indian Arbitration Act would not apply to an arbitration unless it has its ‘place’ (the court intended it to mean ‘seat’) in India.\(^{94}\)

In pursuance of this, the 2015 amendment to the Indian Arbitration Act subsequently laid down two exceptions to the BALCO approach, implieashing the core decision.\(^{95}\) While BALCO was only supposed to apply to post-2012 contracts, the approach had been subtly implemented under the garb of the Bhatia International test, even in cases dealing with pre-2012 contracts. While these cases had used the Bhatia International test, they had craftily watered down the test itself to hold that even an implied choice of a non-Indian seat impliedly excludes the applicability of the Part I of the Indian Arbitration Act.\(^{96}\) The Indian Supreme Court recently confirmed that the ‘one-seat policy in BALCO is now effectively the law of the land for both pre-BALCO and post-BALCO contracts.\(^{97}\) Due to the direct and indirect implementation of BALCO’s ‘one-seat’ policy, the past decade has seen many cases attempting to deconstruct the concept of ‘seat’, in order to assess whether powers under Part I


\(^{93}\) Id.

\(^{94}\) BALCO, supra note 2, ¶¶100, 110, 136–43, 153, 194-96.

\(^{95}\) See Indian Arbitration & Conciliation Act, 1996, §2(2).


could be exercised or not. Having said that, several cases immediately preceding BALCO initiated the discourse regarding the ‘seat’ of arbitration at the Supreme Court.

B. THE JURISPRUDENCE OF UNDER-ANALYSIS

While there had been several important decisions dealing with seatless clauses pronounced in 2011, this paper discusses only one of them for brevity. In *Videocon Industries v. Union of India* (‘Videocon Industries’), the arbitration agreement had provided for Indian substantive law, English AA law and a Malaysian venue (Kuala Lumpur). During the arbitral process, the parties had shifted the venue from Kuala Lumpur to Amsterdam, and then subsequently to London.

While in Videocon Industries it was argued that the ‘seat’ had been shifted to London, yet the Court determined Kuala Lumpur as the seat. It reasoned that a seat cannot be shifted once chosen. Both the counsels and the Court conflated the concepts of ‘seat’ and ‘venue’ due to a typographical error in the arbitral tribunal’s order of shifting the venue from Amsterdam to London (erroneously mentioning it as a change in ‘seat’). No discussion was made on the value that needed to be attached to the stipulated substantive law and AA law. This manifested that the Court’s crude understanding of fundamental tenets of arbitration, perhaps because arbitration cases only infrequently reached the Supreme Court. Helpfully, however, the distinction between seat and venue was later clarified in the seminal BALCO judgement in 2012. BALCO explained that ‘venue’ is a geographical concept that can be changed multiple times during an arbitration, whereas ‘seat’ is a legal and a juridical concept that has to be fixated for the duration of an arbitration. Having said that, the BALCO judgement has largely engendered misinterpretations due to its sheer verbosity, which has led later judgements to read certain paragraphs of BALCO out of context.

The twin judgements of *Reliance Industries v. Union of India (2013)* (‘Reliance Industries (2013)’) and *Union of India v. Reliance Industries (2015)* (‘Reliance Industries (2015)’) contradicted Videocon Industries’ rationale of ‘a later change in seat’ not being allowed. The Apex Court in these cases upheld London as the seat, which had been agreed upon during the arbitral process, as against Paris, which had been mentioned as the seat in an earlier contractual amendment. While the Court attempted to differentiate itself from Videocon Industries, it directly contradicted the clear ratio decidendi laid down in that case. However, considering that Videocon Industries was actually justifying the irrelevance of a later change in ‘venue’ (which it had interpreted to be the ‘seat’), the twin judgements of Reliance Industries appears to have been appropriately decided.

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100 *Id.*, ¶4.

101 *Id.*

102 *Id.*, ¶¶4-6, 20-21.


104 See *infra* 159-60.


In the 2014 decision of *Enercon GmbH v. Enercon India* (‘Enercon (India)’), the contract had mentioned the ‘Indian Arbitration Act 1996’ as the law governing the arbitral process.109 Additionally, the clause had stipulated London as the venue, Indian law as the substantive law and Indian law as the AA law.110 The Court relied on the English judgements of Naviera Amazonica and Braes of Doune to highlight that the contractually stipulated venue and seat need not necessarily be the same in an arbitration.111 However, it was not clarified exactly when this would be the case.112 The Court used *C v. D* and also differentiated Shashoua (England) and McDonnell Douglas to hold that the reference to the Indian Arbitration Act indicated the seat. Thereafter, it used *C v. D* and the Sulamerica case to hold that the AA law has a close connection to the seat.113

Despite the individual soundness of these arguments, the final applicable legal test used by the Court was the ‘closest connection’ or ‘centre-of-gravity’ test, which crudely looked at the ‘cumulative effect’ of all other stipulations to infer seat.114 The Court held that the cumulative effect of the Indian substantive law, the Indian AA law and the reference to the Indian Arbitration Act caused the ‘centre-of-gravity’ of the arbitration to be situated in India.115 Therefore, India was determined as the seat as it would have been ‘vexatious’ to allow legal proceedings elsewhere.116

However, this analysis was extremely unsophisticated for two reasons. First, the seat of an arbitration is merely called the ‘centre-of-gravity’ of an arbitration as the whole proceedings hinge on the restrictions imposed by the *lex arbitri*.117 This does not mean that the seat has to be a mathematical ‘mode’118 of all the relevant or irrelevant factors stipulated in an arbitration clause. Second, even if all such stipulations are relevant, the Court had abstained from providing relative weight to be attached to each of these factors, in the discernment of the seat. It was not clear whether the AA law was the key determinative factor, or the substantive law or the stipulation of the Indian Arbitration Act; instead, the Court chose to crudely list-down all the factors in favour of its decision. This unannounced ‘unweighted approach’ would leave an arbiter in the dark in the discernment of seat in cases where various contractual stipulations are attached to different countries/ jurisdictions. For example, in Videocon Industries, the venue had been Malaysian, the substantive law Indian and the AA law English.119 In such a scenario, the crude ‘centre-of-gravity’ analysis would have been redundant in pinning the status of seat on any one of these jurisdictions.

Having said that, the outcome in Enercon (India) was not erroneous for the simple reason that all the relevant legal factors, be it Indian substantive law, Indian AA law or the Indian Arbitration Act, were attached to one particular jurisdiction – India. Therefore, even a crude unweighted analysis led to a correct outcome. However, this approach can at best be

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109 Enercon (India), supra note 6, ¶98.
110 Id.
111 Id., ¶¶99-116.
112 Id.
113 Id., ¶¶130-31.
114 Id., ¶¶133-34.
115 Id., ¶¶100-132.
116 Id., ¶¶116, 148.
117 See BLACKABY et al., supra note 1, at 167-173.
118 Mode is the figure that appears in the highest frequency in any given set. Enercon (India)’s so called ‘centre-of-gravity’ analysis aims at a crude analysis for the discernment of the legal system mentioned in the highest frequency in a contract, to hold the same as the seat. As will be explained further in the paper, such analysis is oversimplistic and flawed. See infra 226-28.
119 See Videocon Industries, supra note 98, ¶¶3-4.
called a ‘common sense’ approach for determining a glaringly obvious seat in easier cases like Enercon (India). Hence, the general utility of the ‘centre-of-gravity’ test to complex scenarios is rather questionable.

Enercon (India) was followed by the Supreme Court’s decision in *Harmony Innovation Shipping v. Gupta Coal* (‘Harmony Innovation’), where the agreement had stipulated London as the venue and also required the arbitrators to be from the London Arbitrators’ Association. The substantive law had been English, and the contract had also provided for the London Maritime Arbitration Association as the governing institute. The Court aggregated all these factors, alongside the background of the parties and the contract, to discern London as the obvious seat. Just as in Enercon (India), the Court, in this case, refrained from analysing the relative individual importance of any of these factors, given that all of them had anyway been aligned towards London.

Subsequently, in the 2016 decision of *Eitzen Bulk v. Ashapura Minechem Ltd* (‘Eitzen Bulk’), the stipulated venue had been London, and the substantive law had been English. Again conflating seat and venue, the Court misread this as a stipulation of ‘seat’, without indulging in much analysis. The Court also noted that the choice of ‘place’ of arbitration necessarily attaches the law of such place. While the same is true of a seat (legal place) of arbitration, ‘place’ in the sense of venue (geographical place) cannot automatically attach the law of the venue as *lex arbitri*.

Both Harmony Innovation and Eitzen Bulk have been decisions where the respective final outcomes could not have been in doubt, as the arbitration clauses in both the cases had unequivocally indicated the intention to conduct arbitration in accordance with English laws. However, as was the case in Enercon (India), the crude rationalisation left much to be desired and is likely to be redundant in cases involving complex seatless clauses.

In the 2017 decision in *IMAX Corporation v. E-City Entertainment* (‘IMAX Corporation’), the agreement had provided for Singaporean substantive law and the exclusive jurisdiction of Singaporean courts. However, this had been subject to an ICC arbitration, with no seat having been specified. During the arbitral proceedings, disputes had arisen with respect to the ‘venue’, where the parties had been conflicted between Paris and Singapore. The International Court of Arbitration (‘ICA’) adjudicated upon this conflict on the venue, but for an unknown reason ended up deciding the ‘seat’ of the arbitration to be London. The Supreme Court confirmed London as the ‘seat’, while generously splurging the terms ‘seat’, ‘venue’ and ‘place’ in its decision, and thereby obfuscating its exact reasoning. The core

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120 The phrase ‘general arbitration in London’ indicates an intent to confer the status of venue. See Harmony Innovation, supra note 96, ¶36.
121 Id.
122 Id., ¶48.
124 Id., ¶26.
125 Id., ¶¶33-34.
126 See BORN, supra note 1, at 2071; Mistelis, supra note 1, at 376.
127 IMAX Corporation v. E-City Entertainment, (2017) 5 SCC 331, ¶5 (‘IMAX Corporation’).
128 Id.
129 Id., ¶20.
130 Id., ¶21.
131 Id., ¶29.

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rationale for the decision seems to have been the ICA’s determination of London as the place/seat, which was said to have been within its powers under Article 14 of the ICC Rules.\textsuperscript{132}

There are two criticisms of this reasoning. First, it is absurd to hold that the ICA could have decided the ‘seat’, when it was only called upon to decide the ‘venue’.\textsuperscript{133} At best, this could be rationalised by holding that the tribunal had made a typographical error while making this decision. Second and more importantly, the contractual stipulations unequivocally attached the arbitration exclusively to Singapore, which was similar to the factual background in Enercon (India) and Harmony Innovation.\textsuperscript{134} Therefore the use of the ‘centre-of-gravity’ test (or the ‘common sense’ approach) should have led to Singapore being determined as the seat. Perhaps the major reason behind this under-analysed decision was either blind deference to the arbitral tribunal’s statement or the unwillingness to delve deep into the unchartered territory of determination of the seat.

With the notable exception of Enercon (India), none of the cases until IMAX Corporation had discussed the distinction between seat and venue. Most of these cases either had conflated seat and venue to determine the venue as the seat or had used a facile ‘centre-of-gravity’ analysis. In contradistinction to this, the subsequent judgements attempted a deeper analysis of the relationship between ‘seat’ and ‘venue’.

C. ATTEMPTS AT DETAILED ANALYSIS

In Roger Shashoua v. Mukesh Sharma (‘Shashoua (India)’), the agreement had stipulated London as the venue and Indian law as the governing law.\textsuperscript{135} Further, ICC Rules were to govern the arbitration.\textsuperscript{136} While displaying cognisance of the distinction between venue and seat, the Court vaguely proposed an unfounded caveat: the stipulation of venue alongside ‘something else’ would automatically attract the lex arbitri of such venue.\textsuperscript{137} It was not appropriately explained by the Court what ‘something else’ would constitute. It relied on Shashoua (England)’s reasoning to support this conclusion. It held that the stipulation of a venue alongside a provision of institutional rules (that allow the tribunal to decide the seat) amounted to an implicit determination of venue as the seat.\textsuperscript{138} It was further highlighted that the parties would have wished for a ‘London arbitration’, as its legal framework and infrastructure was arbitration-friendly.\textsuperscript{139}

The Court erroneously cited Enercon (India)’s unaffirmed discussion of Shashoua (England) for bolstering the aforesaid arguments.\textsuperscript{140} It also misquoted the judgement of the England and Wales High Court in Enercon (England),\textsuperscript{141} as being made by the Supreme Court in Enercon (India) in several instances. It was the former judgement that had followed Shashoua (England) and not the latter. The Indian judgement had in fact, ignored Shashoua (England)’s rationale in arriving at the exact opposite conclusion of the case.\textsuperscript{142} Due to these misquotations, the Indian judgement was merely a reproduction of Shashoua (England)’s perverse rationale. To further exacerbate the matters, the wide and ambiguous ‘venue and

\footnotesize{\begin{tabular}{l}
\textsuperscript{132} See id., ¶\textsuperscript{21}, 29. \\
\textsuperscript{133} Id., ¶\textsuperscript{20}-21. \\
\textsuperscript{134} Id., ¶\textsuperscript{20}. \\
\textsuperscript{135} Shashoua (India), supra note 96, ¶\textsuperscript{69}-70. \\
\textsuperscript{136} Id., ¶\textsuperscript{69}. \\
\textsuperscript{137} Id., ¶\textsuperscript{72}. \\
\textsuperscript{138} Id., ¶\textsuperscript{72}. \\
\textsuperscript{139} Id., ¶\textsuperscript{46}. \\
\textsuperscript{140} Id., ¶\textsuperscript{49}-50. \\
\textsuperscript{141} See Enercon (England), supra note 51. \\
\textsuperscript{142} See supra text accompanying notes 111-119.
\end{tabular}}
something else’ ratio of Shashoua (India) gives much more deference to the choice of venue than even Shashoua (England) had intended to give. This is because there was never a conflation of seat and venue in Shashoua (England). The only major reason why the choice of venue was interpreted to be indicative of the seat was because in the Court’s opinion, there had been no plausible reason behind the stipulation of London as the venue, apart from importing the applicability of the English arbitration laws, as all the evidence was anyway conveniently located in India. However, the unfounded and unexplained ‘venue and something else’ test used in Shashoua (India) was a gross and unnuanced conflation of ‘seat’ and ‘venue’.

Soon after Shashoua (India), a similar factual scenario reached the Apex Court in Union of India v. Hardy Exploration (‘Hardy Exploration’). In Hardy Exploration, the substantive law had been Indian, and the stipulated venue had been Kuala Lumpur. Furthermore, the seatless clause had provided for the applicability of the UNCITRAL Model Law as the applicable procedural law. While deciding, the Court laid particular emphasis on the distinction between venue and seat (which it referred to as ‘place’ on a few occasions).

The Court then analysed various precedents to lay out a stricter version of the Shashoua (India) test. It concluded that a stipulation of venue (in a seatless clause) can only be used to infer the intention to confer the status of seat to that jurisdiction if certain specific concomitant factors are attached to it. However, in contrast to Shashoua (India), the Court did not recognise the stipulation of procedural rules (that give the tribunal the discretion to decide seat) as a relevant concomitant factor. The Court’s analysis of precedents shows that the three possible concomitant factors are: substantive law (for which it cited Harmony Innovation and Eitzen Bulk), AA law (for which it cited Reliance Industries cases), and, the determination of seat by a tribunal (for which it cited IMAX Corporation). Therefore, though Hardy Exploration did not deviate from Shashoua (India)’s treatment of venue as the fulcrum for the discernment of seat, it definitely made the analysis more stringent.

In the 2019 decision in BGS SGS Soma JV v. NHPC Ltd. (‘BGS SGS’), the Supreme Court (perhaps erroneously) criticised Hardy Exploration’s stringent test for violating BALCO and Shashoua (India). Interestingly, the case only pertained to an internal jurisdictional conflict in an evidently India-seated arbitration, and therefore, there was no need for the discernment of seat. Instead of determining jurisdiction in accordance with Section 2(1)(e)(ii) of the Indian Arbitration Act, the Court looked for a specific city as a ‘seat’ within India. This is an erroneous approach, as ‘seat’ merely refers to a legal system and is not a

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143 See supra text accompanying notes 38-50.
144 Union of India v. Hardy Exploration, (2019) 13 SCC 472 (‘Hardy Exploration’).
145 Id., ¶26-27.
146 It is important to highlight that this seems to have been typographical error in referring to the UNCITRAL Rules of Arbitration. Even the UNCITRAL Rules are generally considered to only be useful for ad hoc arbitrations, and that is why the arbitration clause was perhaps not very well drafted. See id., ¶27.
147 Id., ¶28, 33.
148 Id., ¶30, 35.
149 Id., ¶30.
150 Id., ¶23-24.
151 Id., ¶31.
152 BGS SGS Soma JV v. NHPC Ltd., (2019) SCC Online SC 1585 (‘BGS SGS’).
154 Id.
geographical concept.\textsuperscript{155} Thereby meaning that a seat can be India or England, but can never be so specific as Delhi or Faridabad, as they do not constitute separate legal systems.\textsuperscript{156}

Even leaving aside the erroneous understanding of ‘seat’, the Court further conflated the concepts of ‘seat’ and ‘venue’. The arbitration clause had provided for the proceedings to be held either at New Delhi or Faridabad.\textsuperscript{157} However, since a majority of the proceedings were held in New Delhi, the Court held that New Delhi would in fact, become the ‘seat’ of arbitration.\textsuperscript{158} To rationalise this, the Court cited BALCO to infer that a venue of arbitration necessarily attaches with it the \textit{lex arbitri} of that place.\textsuperscript{159} This is an erroneous interpretation of BALCO, as the judgement was only referring to the attachment of the \textit{lex arbitri} to a ‘seat’ (which it referred to as ‘place’) and not a ‘venue’.\textsuperscript{160} Moreover, the Court in BGS SGS seemed to have borrowed Shashoua (India)’s ‘venue plus supranational rules’ test in order to criticise the decision in Hardy Exploration.\textsuperscript{161} As discussed, the reasoning in Shashoua (India) had also been unfounded and perverse, and therefore the criticism of the distinguishing of seat and venue in Hardy Exploration is erroneous. The final decision was based on an evident conflation of seat and venue.\textsuperscript{162}

The Court, citing Shashoua (India) further attempted to buttress the aforesaid argument by holding that the use of the word ‘shall’ alongside the word ‘venue’ would connote seat.\textsuperscript{163} However, this is a non-contextualised reading of an arbitrarily chosen paragraph from Shashoua (India), and the core rationale in that case, as has been discussed, was quite different.\textsuperscript{164} Even on pure logic, it seems absurd to say that the use of ‘shall’ would magically convert the venue to a seat. In fact, ‘shall’ is the most common word used in contracts for denotation of an obligation.\textsuperscript{165} It need not indicate anything other than suggesting that it is mandatory for a tribunal to hold proceedings at a particular geographical location. Hence, due to the unnecessary and unsubstantiated conflation of seat and venue, BGS SGS is unlikely to be of any precedential value.

The most recent Supreme Court case dealing with a seatless clause had been \textit{Mankastu Impex v. Airvisual} (‘Mankastu Impex’).\textsuperscript{166} In this case, the arbitration agreement had provided for Indian substantive law and the exclusive jurisdiction of the courts of Delhi. It had mentioned Hong Kong as the ‘place’ of arbitration. While the word ‘place’ is admittedly open to interpretation, the Court interpreted it as ‘venue’.\textsuperscript{167} However, the Court still held Hong Kong to be the seat for different reasons, interpreting the phrase “shall be [...] finally resolved by arbitration administered in Hong Kong”. Without providing much rationalisation, the Court held that the words ‘finally resolved’ indicated that even the challenges to the award were to


\textsuperscript{156} See Jhanwar, \textit{supra} note 38, at 155.

\textsuperscript{157} BGS SGS, \textit{supra} note 152, ¶2.

\textsuperscript{158} \textit{Id.}, ¶98.

\textsuperscript{159} \textit{Id.}, ¶83, 92-94.

\textsuperscript{160} See BALCO, \textit{supra} note 2, ¶16-17.

\textsuperscript{161} BGS SGS, \textit{supra} note 152, ¶87, 92-94.

\textsuperscript{162} \textit{Id.}, ¶96-98.

\textsuperscript{163} \textit{Id.}, ¶97.

\textsuperscript{164} See \textit{supra} text accompanying notes 137-43.


\textsuperscript{166} Mankastu Impex, \textit{supra} note 4.

\textsuperscript{167} \textit{Id.}, ¶20-22.
be adjudicated in Hong Kong.\textsuperscript{168} This was evidently erroneous, as the parties would not have provided for the exclusive jurisdiction of Delhi courts had they intended the challenges to be made at Hong Kong. Since all disputes were to go to arbitration, the only purpose of an exclusive jurisdiction clause would have been to confer jurisdiction to decide upon arbitral challenges.\textsuperscript{169}

D. COMMON THREADS: TRACING THE GENERAL APPROACHES

The assessment of the Indian Supreme Court’s decisions on the discernment of seat in seatless clauses divulges three different kinds of approaches that the Court has taken for the determination of seat. The first approach has involved an unnecessary conflation of the concepts of ‘seat’ and ‘venue’, ranging from absolute conflation in cases like BGS SGS, to the unnecessary correlation of the two in Shashoua (India).\textsuperscript{170} Hardy Exploration deserves a special mention, as it proposed a stringent test differentiating the concepts of seat and venue but still hinged its test on the ‘venue’ of arbitration. The second approach has involved use of the so-called ‘centre-of-gravity’ analysis, as had been undertaken in Enercon (India) and Harmony Innovation. This approach does not shed light on the relative importance of the various factors that may be used for undertaking the analysis, and therefore is inadequate for addressing most complex cases.\textsuperscript{171} The third approach has been the Court’s unnecessary semantic jugglery to hold venue as the seat. While this had been a buttressing argument in BGS SGS, such semantic jugglery was at the core of Mankastu Impex. The next Chapter critically analyses these three approaches.

IV. PARTY AUTONOMY AND FLAWS IN THE INDIAN APPROACHES

Before critical analysis of the three approaches undertaken by the Indian Supreme Court, it must be highlighted that party autonomy is the most fundamental value that guides arbitration.\textsuperscript{172} Arbitration allows parties to personalise their dispute settlement law and procedure according to their choice.\textsuperscript{173} Due to the primacy of party autonomy, it is not Utopic

\textsuperscript{168} Id., ¶§22-23.

\textsuperscript{169} This rationale has been (rightly or wrongly) used in many cases in both England and India. See Braes of Doune, supra note 30, ¶17(a)-(b); Indus Mobile Distribution Ltd. v. Datawind Innovations Ltd., (2017) 7 SCC 678, ¶19. It is important to highlight that the author does not necessarily agree with the use of this rationale in Indus Mobile, that the same is only for the reason that Indus Mobile did not really concern determination of ‘seat’ of an arbitration. See also Jhanwar, supra note 38, at 152, 154-55 (for more discussion on the same).

\textsuperscript{170} The above discussion in these judgements manifests the Indian Supreme Court’s ill-founded inclination towards either directly equating venue with a seat of arbitration, or considering venue as an unnecessarily important factor in the discernment of seat. As the paper shall subsequently show, this reliance is highly erroneous. See infra 197-223.

\textsuperscript{171} See Enercon (India), supra note 6, ¶¶133-34; Harmony Innovation, supra note 96, ¶48.

\textsuperscript{172} In their book, Lew, Mistelis and Kroll argue that the formulation of the UNCITRAL Model Law coincided with the world-wide recognition that party autonomy was to be of primal importance in International commercial arbitration. See JULIAN LEW et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 27-28 (Kluwer Law International, 2003). Other authors have also mentioned that, in terms of determination of the procedure of an arbitration, party autonomy is of paramount importance. See BLACKABY et al., supra note 1, at 355; JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, 979-80 (Kluwer Law International, 2012); Stefan Kroll, The ‘Arbitrability’ of Disputes Arising from Commercial Representation in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 317, 346 (Loukas Mistelis & Stavros Brekoulakis, Kluwer Law International, 2009); Darius Khambata, TENSIONS BETWEEN PARTY AUTONOMY AND DIVERSITY IN LEGITIMACY: MYTHS, REALITIES, CHALLENGES, 9 ICCA CONGRESS SERIES, 612, 612-14 (Albert Jan Van den Berg., Kluwer Law International, 2015).

\textsuperscript{173} WAINCYMER, supra note 172, at 985-88; FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 648-49 (Emmanuel Gaillard & John Savage, Kluwer Law International, 1999) (‘FOUCHARD GAILLARD GOLDMAN’).
for a court to impose something as fundamental as the ‘seat’ of arbitration on the parties if they are already willing to agree on a common seat. Therefore, when parties mutually agree upon a seat (not mentioned in the arbitration clause) or mutually agree to alter a pre-decided seat, such agreement must be respected.\textsuperscript{174} In fact, any arbiter must encourage parties to mutually decide the seat instead of attempting to infer their intention retrospectively.

However, when such a solution is not possible, an arbiter adjudicating upon a seatless clause can encounter two possible alternative scenarios. The first kind is when there are no institutional rules stipulated. In such scenarios, it becomes extremely important to discern or infer a seat for any procedural guidance.\textsuperscript{175} In the second kind of scenarios, where there are stipulated institutional rules, a tribunal will perhaps have high discretion in determining the seat, on consideration of the circumstances of the case.\textsuperscript{176}

In the former scenario, the arbiter (this will most likely be a court) would then be compelled to infer the original intention of the parties from the text of the agreement itself, as she/ he would not have the legal autonomy (conferred by institutional rules) to determine a seat for the parties according to her/ his choice.\textsuperscript{177} This is subject to criticism, as it is quite possible that the parties would have had different intentions regarding the choice of seat while drafting a seatless clause.\textsuperscript{178} It is also quite likely that the parties would not have had any specific intention regarding a seat. However, discernment of objective intention behind a contract through a ‘reasonable man’ lens is common to any interpretative exercise where the subjective intention is indiscernible.\textsuperscript{179} The ‘reasonable man’ standard should be applied to infer the seat in an interpretative exercise, as it will ensure that the discerned seat is as much in line with any traces of party autonomy as is possible, even though there may not have been any clear intention of stipulation of a seat. Consequently, an arbiter must be allowed to discern the ‘objective’ indication of a seat in a contract when dealing with a seatless clause.

In the latter scenario, even when there is no need to decipher any intent, it behoves a tribunal to discern any traces of implied intention by the parties to ensure that the

\textsuperscript{174} See Fouchard Gaillard Goldman, supra note 173, at 648. This had also been the ratio decidendi in Reliance Industries (2013). See Reliance Industries (2013), supra note 96, ¶36.

\textsuperscript{175} Obviously, in the absence of any lex arbitri or institutional rules to guide the procedure of an arbitration, the arbitral procedure will be unbound, unguided and unpredictable.


\textsuperscript{177} While addressing a similar issue, Anibal Sabater suggests a normative determination of seat. However, as has been manifest in various judgements discussed in this paper, it is more appropriate to discern any possible traces of an intention towards a seat by the parties. The latter approach, which is proposed by this paper, ensures that the determination of seat by a tribunal or a court does not come as an unpredictable surprise to the parties and is as aligned with their autonomy as possible. See Anibal Sabater, When Arbitration Begins Without a Seat, Vol. 27(5), J. INT’L ARB., 443 (2010).

\textsuperscript{178} In fact, one tribunal deciding upon such an issue had raised its hands in stating that the parties perhaps could have had different intentions regarding the lex arbitri. See Fernandez-Armesto, Stockholm Arbitration Report, 59 (Stockholm Chamber of Commerce, 2002).


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decision on seat is predictable (not unforeseeable) and fair to all the parties involved. In fact, since the discretion only arises in the absence of the parties’ choice of seat, a tribunal should anyway analyse whether a choice of seat is so obvious that the parties are deemed to have chosen it. Therefore, at a primary level, the exercise of determining a seat in a seatless clause is not flawed and can still be based on inferences that uphold party autonomy.

The question that naturally arises then is how one must go about in the discernment of a seat. When an arbiter looks at another stipulation, for instance, that of a venue or the substantive law, she/ he must delve into a party’s reasons behind choosing such venue or substantive law in the given case. Then the arbiter would need to assess whether those reasons would generally apply to a reasonable person’s choice of the seat of arbitration. For instance, the relevance of venue in the determination of seat is that it is usually chosen for neutrality, and so is a seat. Therefore, the relevant weight to be attached to any contractual stipulation (to be referred to as a ‘factor’ in this paper) should depend on the alignment of the general determinants of such stipulation with the general determinants of a seat. Having established a rational method, it is important to critically analyse the Indian approaches to the discernment of seat in seatless clauses through this lens.

A. OVER-RELIANCE ON THE VENUE

As discussed, a majority of the Indian cases either conflate seat and venue, or place significant weight on the venue in the discernment of the seat, compared to other factors that may have been stipulated. The assessment of venue as a relevant factor should ideally commence with a differentiation between the concepts of ‘seat’, ‘venue’ and ‘place’.

1. VENUE, SEAT AND PLACE

The word ‘venue’ strictly refers to the geographical location of the conduct of arbitral proceedings. Venue is one factor that need not be stipulated in a contract, and is usually determined by an arbitral tribunal depending on the convenience of the parties. There can also be arbitrations with multiple venues or those with no venue at all (online arbitration).

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180 As explained, this is in contradistinction to Sabater’s approach, who rather attempts at a discernment of a ‘normative’ seat. See supra text accompanying note 177.
181 All the rules providing the discretion of choosing the seat to an arbitral tribunal, make such discretion subject to an agreement by the parties. See supra text accompanying note 176.
182 This will usually be an objective exercise of assessment of what a reasonable person would have sought to achieve with a stipulation. Exceptionally, when the same is known, this can also be used for the assessment of what a specific party intended while choosing a venue, substantive law, or AA law.
183 BLACKABY et al., supra note 1, at 288; LEW et al., supra note 172, at 361.
184 White & Case, supra note 47, at 18.
185 This is because, in case of higher alignment in these determinants, one can say that a person choosing the pertinent factor to be situated in a particular jurisdiction would have probably intended the seat to be located there as well. It is important to re-emphasise, that this is the discovery of a subjective intention through the language of the agreement, rather than an a subjective one (unless a subjective common intention is discernible, which is rare).
186 These cases include Videocon Industries, Etzen Bulk, Shashoua (India) and BGS SGS.
189 Id., at 1669. While this principle is manifest in every arbitration legislation and institutional rules, Article 20(2) of the Model Law constitutes the source and the most generalised example of such discretion. See HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY, 595-96 (Kluwer Law International, 1989); PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS, 348-49 (4th ed., Kluwer Law International, 2019).
In contradistinction to this, an arbitration can only have one legal seat. The seat generally refers to the legal system that provides the procedural and substantive framework to an arbitration, within which a tribunal has to function.\textsuperscript{190} Therefore, a usual lex arbitri provides for mandatory procedures, directory procedures, the scope of discretionary interim powers and grounds of invalidity, to ensure that the flexibility of any arbitration is confined within certain circumscribing limits.\textsuperscript{191} Seat is also a juridical concept, in that, the courts of the seat can exercise jurisdiction to enforce the provisions of the lex arbitri.\textsuperscript{192} Most commonly, the parties approach the courts of the seat either for seeking appointments/removal of arbitrators,\textsuperscript{193} or for challenging arbitral awards.\textsuperscript{194} Putting it simply, when one mentions India/ Bombay/ Delhi as the seat, the same roughly translates to ‘Part I of the Indian Arbitration and Conciliation Act, 1996 applies and Indian courts will have jurisdiction over arbitral challenges and appointments’.

The ‘place’ of an arbitration is an ambiguous term, that may mean either ‘seat’ or ‘venue’, depending on the context.\textsuperscript{195} A common example of the same is Article 16 of the UNCITRAL Rules before the 2010 amendment, where under subclauses 1 and 4 the word ‘place’ was mentioned to connote ‘seat’, and under subclauses 2 and 3 to connote ‘venue’.\textsuperscript{196} Therefore, aside from the confabulation of seat and venue, any court needs to be cognizant of the ambiguous meaning of the word ‘place’, and read it contextually while interpreting contracts and precedents.

2. RELEVANCE OF VENUE AS COMPARED TO SUBSTANTIVE LAW AND AA LAW

To test the relevance of a venue for the discernment of a seat, one must compare the determinants of a venue with those of a seat. The factors guiding the choice of a venue are geographic convenience and geographic neutrality.\textsuperscript{197} Geographic convenience is multifaceted, involving the convenience of the parties and the arbitrators, the proximity to evidence and witnesses, and the availability of infrastructure and facilities for the effective conduct of an arbitration.\textsuperscript{198}

\textsuperscript{190} Paulsson & Petrochilos, supra note 43, at 149. While the seat is often called, the procedural framework of an arbitration, it also constitutes the substantive framework by providing grounds for challenge, some of which may be substantive. Public policy is a common substantive ground, that is derived from the New York convention. See Born, supra note 188, at 4003.

\textsuperscript{191} See Blackaby et al., supra note 1, at 167-70.

\textsuperscript{192} See id., 172-73; Waincymer, supra note 172, at 169; Born, supra note 188, at 1659-61; See A v. B, [2007] 1 Lloyd’s Rep. 237, ¶111 (Queen’s Bench Division, England); BALCO, supra note 2, ¶123. However, it must also be noted that courts outside the seat may exercise jurisdiction in order to assist the arbitral procedure (especially for interim measures facilitating arbitration), without encroaching upon the powers of supervision of the courts of the seat.


\textsuperscript{195} Girsberger & Voser, supra note 43, at 6. Aman Deep Borthakur has also provided a sound critique of the conflation of seat and venue by Indian courts, highlighting that the multifaceted interpretation of the word ‘place’ could be a reason behind the same. See Aman Deep Borthakur, A Tale of Two Seats: The Indian Supreme Court on the Seat/Venue Distinction, Vol.6 McGill J. Disp. Res. 216, 219 (2020).


\textsuperscript{197} Julian Lew et al., supra note 172, at 361.

\textsuperscript{198} See Blackaby et al., supra note 1, at 288; Girsberger & Voser, supra note 43, at 478; Paulsson & Petrochilos, supra note 43, at 154; Irene Welser & Giovanni de Berti, The Arbitrator and the Arbitration Procedure in 2010 Austrian Yearbook on International Arbitration 79, 85 (Irene Welser et al., 2010).

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As against this, the primary factor guiding the choice of a seat is the suitability of the legal framework at the seat for the given parties.\(^{199}\) This could involve factors like convenience of the procedures, expediency of the court system and the extent of scrutiny of and interference in arbitral awards by courts.\(^{200}\) While geographic convenience and neutrality are also relevant for the determination of the seat, their importance is insignificant compared to the overpowering importance of the legal framework.\(^{201}\) Further, ‘neutrality’ in determination of seat means legal neutrality\(^{202}\) and not geographic neutrality,\(^{203}\) which is a determinant of a venue. Furthermore, even geographic convenience is one-dimensional in the determination of the seat, as it only considers the location of the parties and not that of the arbitrators, witnesses, or evidence.\(^{204}\) This is because seat courts do not decide the merits of the dispute and arbitral challenges are mostly based on the record of the arbitration itself, which is in the form of documents and agreements.\(^{205}\)

Therefore, the overlap in the determinants of the venue and the seat is extremely minor. For this very reason, it is illogical to hold that a mere stipulation of venue would imply that the same was to be the seat of arbitration. This is especially because, the determinants of various other factors also overlap with those of the seat. For instance, substantive law at the seat must ideally be in line with the substantive law of the contract, so as to ensure that public policy and patent illegality are not attracted as grounds of challenge to an award.\(^{206}\) While this is a narrow overlap, ceteris paribus, it is assumed that rational businesspersons would refrain from choosing a substantive law that conflicts with the arbitral seat, in order to prevent unnecessary legal complexity, requires arduously synchronised use of laws of different countries in different aspects of an arbitration.\(^{207}\)

The AA law is even more relevant to the determination of the seat. This is because there are heavier and more direct overlaps not only in the determinants of, but also in

\(^{199}\) R. DOAK BISHOP, A PRACTICAL GUIDE FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 35-37 (King & Spalding), available at hoghooghi.nioc.ir/article/pdf/Practical%20Guide.pdf (Last visited on April 15, 2021); Michael Hwang & Fong Lee Cheng, Relevant Considerations in Choosing the Place of Arbitration, Vol.2 ASIAN INTERNATIONAL ARBITRATION JOURNAL 195, 201 (2008); White & Case, supra note 47, at 18.


\(^{201}\) BORN, supra note 188, at 2215-16; Kazuo Iwasaki, Selection of Situs: Criteria and Priorities, Vol.2 ARBITRATION INTERNATIONAL 57, 57-60 (1986).

\(^{202}\) This means that any third jurisdiction, where the courts would be unlikely to favour either party can qualify as a neutrals seat. See BORN, supra note 188, at 2215.

\(^{203}\) However, geographic neutrality is a separate concept, which involves the venue being equally accessible via travel to the parties. See THE FRESHFIELDS GUIDE, supra note 200, at 32.

\(^{204}\) Lew, supra note 48, at 138; BISHOP, supra note 199, at 37; White & Case, supra note 47, at 17-18.

\(^{205}\) For example, the Indian Arbitration & Conciliation provides for only ‘prima facie’ proof of arbitration agreement for reference and all challenges are to be decided based on documents. See INDIAN ARBITRATION & CONCILIATION ACT, 1996, §§ 8(1), 34(1).


the scope of the AA law and the seat of an arbitration. While both can guide the arbitrability, the validity of an agreement, the constitution of a tribunal, the time limits, and several other factors. Therefore, a rational businessperson should be presumed to have chosen the same AA law and lex arbitri.

While this rationale has recently been refuted by the UK Supreme Court in Enka Insaat Ve Sanayi v. OOO Insurance Company Chubb (‘Enka (SC)’), the same was in a different context, where the Court was required to discern the AA law, and not the seat. The unique dilemma in the discernment of the AA law is that it works in close relation with both the substantive law and the seat. Since a reasonable businessperson would not have wished to be governed by the interpretation of different clauses by different substantive laws, the Court determined that the choice of a substantive law would usually imply the choice of an AA law, unless strong countering reasons are shown. Despite holding the same, the Court also admitted that the lex arbitri is probably the most closely connected with the AA law, citing various reasons other than the heavy overlaps indicated by the Court of Appeal, arguing that overlaps may not be relevant (specifically) for the English Arbitration Act, 1996 (though may be relevant in other jurisdictions). Without delving into the debate between the opinions of the Supreme Court and the Court of Appeal, it would suffice to say that both have (for different reasons) stated that a person choosing the seat would have wished for the same AA law.

Importantly, while the AA law has two different pulling factors (substantive law and the legal seat), the seat of an arbitration does not have a similar pulling factor that counters the force of the AA law. As discussed, since the lex arbitri governs the procedural aspects of one clause and the substantive law governs the substantive aspects of all the other clauses, the only minor overlap between them is to the extent of determination of ‘public

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211 Enka Insaat Ve Sanayi v. OOO Insurance Company Chubb, [2020] UKSC 38, ¶¶5-6 (Supreme Court, United Kingdom) ‘Enka (SC)’.

212 Id., ¶¶3-43, 54.

213 Id., ¶¶114-44.

214 Id., ¶¶83-94.

215 Enka Insaat ve Sanayi v. OOO Insurance Co. Chubb, [2020] EWCA Civ. 574, ¶¶95-99 (Court of Appeal, England); Id., ¶¶118-44.

216 The AA law is very closely related to both the governing law of the main contract and the lex arbitri. The former is because, any person having stipulated a substantive law to govern the contract would have wished for it to govern the whole contract. Such person would not have wished for unnecessary application of different laws to different parts of the contract, making the task of an interpreter complex. See Enka (SC), supra note 211, ¶¶43. The relationship of the AA law to the lex arbitri arises due to different reasons. The Court of Appeal in Enka Insaat had cited various overlaps in the scope of AA law and lex arbitri as a primary reason. See Enka Insaat ve Sanayi v. OOO Insurance Co. Chubb, [2020] EWCA Civ. 574, ¶¶95-99 (Court of Appeal, England). The Supreme Court, while disagreeing, gave a detailed 5-point reasoning why lex arbitri is extremely close in connection to the seat. See Enka (SC), supra note 211, ¶¶118-44 (Supreme Court, United Kingdom). Consequently, the AA law has two strong pulling factors that may conflict, causing difference of opinion between the courts.

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policy’. Consequently, choice of the AA law is a stronger indicator of the *lex arbitri*, than the choice of the *lex arbitri* is of the AA law. Therefore, high deference to the choice of the AA law in discernment of seat does not conflict with Enka (SC).

3. CRITIQUE OF THE OVER-RELIANCE ON VENUE

The above discussion shows that, similar to the determinants of a venue, the determinants of substantive law also have minor overlaps with those of the seat. Further, the determinants of the AA law highly overlap with those of the seat. Consequently, it is not only the conflation of seat and venue that is erroneous, but also the use of venue as the fulcrum of the analysis for discernment of the seat, ignoring the possible importance of other factors. Therefore, the lenient and the stricter versions of the ‘venue plus something’ test in Shashoua (India) and Hardy Exploration, respectively, are equally flawed. To give an example, if in a case, the venue is New Delhi and substantive law is Indian, it would be erroneous to hold India as the seat of arbitration if the AA law is English, due to the high overlaps in the determinants and the scope of the *lex arbitri* and the AA law.

Even when venue is used as a relevant factor in the discernment of the seat, it must be recognised that it is only a singular unchanged venue, that has been mutually chosen by the parties, which can be of any relevance at all. If the venue is being constantly shifted (as was the case in Videocon Industries) or has been chosen by the tribunal rather than the parties (as was the case in BGS SGS Soma), then the venue cannot be used to discern the arbitral seat. The former is because seat can only be attached to a singular jurisdiction and cannot be constantly shifting like venue. The latter is because, as has been discussed, the test for inference of the seat would hinge on the question, ‘Why would the parties have made a stipulation (say, that of a venue)? Is the same consideration relevant for a seat of arbitration?’. When the stipulation is in fact not made by the parties, then the tribunal’s decision on a venue cannot be used to infer the parties’ intention regarding the *lex arbitri*.

The primary reason why the Supreme Court has displayed proclivity for using venue, seems to be because of a facile understanding of the concepts of ‘seat’ and ‘venue’, and the ignorance of the dynamic meaning of the word ‘place’. Often the same has also been due to blind deference to decisions of foreign courts and tribunals without assessing the merit of such decisions or the arguments at hand, especially in Shashoua (India). The overreliance on venue has been used as an ‘easier way out’ in cases involving seatless clauses, in order to avoid delving into deeper legal analysis. However, as has been shown, the undue importance placed on the venue is unfounded, and at best, specious.

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217 See *supra* text accompanying notes 206-07.
218 See *supra* text accompanying notes 135-151.
219 This is also considering that it is quite common for the venue and seat to be in different jurisdictions and for the substantive law and the *lex arbitri* to be that of different countries. Such is not the case for the *lex arbitri* and the AA law.
220 See *supra* note 2.
221 See *supra* text accompanying notes 182-85.
223 As discussed, the decisions in Shashoua (India) and Imax Corporation have been erroneous only because of the blind deference to author adjudicating authorities, who may themselves have decided erroneously. It has been shown how the rationale in Shashoua (England) had been flawed, yet the Indian Supreme Court affirmatively cited it without analysis. See *supra* text accompanying notes 39-50, 138-43. In Imax Corporation, similar blind deference had been shown towards the arbitral tribunal’s decision on seat in disregard of parties’ choice and in absence of the parties’ arguments. See *supra* text accompanying notes 128-30.

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B. THE ‘CENTRE OF GRAVITY’/ THE ‘CLOSEST CONNECTION’ TEST

The other two approaches taken by the Supreme Court are: the so called ‘centre-of-gravity’ or the ‘closest connection’ test,\(^\text{224}\) and unwarranted semantic jugglery in imputing an implied reference to seat.\(^\text{225}\) While the two approaches have already been critiqued during the discussion on pertinent cases in Chapter III, it is worth consolidating the criticism in this Chapter.

The ‘centre-of-gravity’ test fundamentally misinterprets the phrase ‘seat is the centre-of-gravity’ of an arbitration. The phrase only connotes that seat is of primary value in guiding the procedure of an arbitration and, to some extent, the substance and form of an award.\(^\text{226}\) This does not mean that the discernment of the seat should be as simple as finding the mathematical mode of all the contractual stipulations (finding to which country the highest number of stipulations are attached to). More importantly, such analysis is extremely crude and unsophisticated. As discussed, the discernment of the seat needs to delve deep into why each stipulated factor was chosen by the parties and the relevance that such choice has to the arbitral seat.\(^\text{227}\) Therefore, the process cannot be that of a simple aggregation. As already discussed, such simple aggregation would make the approach redundant in cases like Videocon Industries, where various factors had been connected to different jurisdictions,\(^\text{228}\) rather than being crowded in the same jurisdictions as had been in Enercon (India).

Having said that, it is important to recognise that the Supreme Court has only applied this test in cases where all contractual stipulations had collectively and unequivocally indicated a single seat\(^\text{229}\) rather than in cases that have involved a more complex mix of factors.\(^\text{230}\) Consequently, while the outcomes in the judgements are defensible, the rationale behind the use of the test is not. The approach can at best be termed as a ‘common sense’ approach, that can be used in cases where the seat is already quite obvious.

C. SEMANTIC JUGGLERY

The last approach is the inference of an implied stipulation of the seat in an arbitration agreement through the semantics of a clause. In theory, the approach is not erroneous, and one must look for implied references to the seat in any agreement. However, the same has been applied where implied inferences were unwarranted. For example, in Mankastu Impex, the phrase “dispute[…]shall be finally resolved at Hong Kong” in an arbitration clause was interpreted to mean that the challenges to the arbitral awards were also

\(^\text{224}\) This is the approach proposed in Enercon (India) and then subsequently affirmed in Harmony Innovation. See Enercon (India), supra note 6, ¶¶133-34; Harmony Innovation, supra note 96, ¶48; See also supra text accompanying notes 114-16, 120-22.

\(^\text{225}\) The major manifestation of this approach was Mankastu Impex, though similar semantic jugglery formed part of the reasoning in Shashoua (India) and BGS SGS Soma. See Mankastu Impex, supra note 4, ¶¶22-23; BGS SGS, supra note 152, ¶97. See also supra text accompanying notes 163-64, 168-69.

\(^\text{226}\) BLACKABY et al., supra note 1, 167-173. This very book had been used by the Court in Enercon (India) for mentioning the seat as the ‘centre of gravity’. See Enercon (India), supra note 6, ¶134.

\(^\text{227}\) See supra text accompanying notes 117-119, 182-85.

\(^\text{228}\) See supra text accompanying note 119.

\(^\text{229}\) As discussed, in Enercon, everything stipulated in the contract, from the substantive law and the AA law to the reference to the Indian Arbitration Act, unequivocally indicated that India was supposed to be the legal seat of arbitration and London was perhaps only chosen for its infrastructure and convenience to the arbitrators. See supra text accompanying notes 55-56. Similarly, in Harmony Innovation, the substantive law and the venue had been English, and the arbitration was to be conducted at London Maritime Arbitration Association with the arbitrators being from London Arbitrators Association. All these factors could have led no doubt regarding the intention to have an English seat. See supra notes 120-22.

\(^\text{230}\) Refer to above discussion on Videocon Industries. See also supra text accompanying note 119.
to before the Hong Kong courts. Not only was this an unnecessary semantic extension of a clear stipulation of the venue, but it also contradicted the crystal-clear stipulation of the exclusive jurisdiction of the Delhi courts. The only possible purpose a jurisdiction clause has, when supplemented with a broad arbitration clause, is to provide a location for the challenge of an award. Consequently, although the third approach is theoretically sound, the application of the same by the Indian Supreme Court has been highly indefensible. Perhaps, this semantic jugglery was stimulated by the urge for finding simpler solutions to complex questions.

Though the three approaches have led to vast inconsistencies in the jurisprudence on the discernment of the ‘seat’, they have one thing in common: All of them have evidently been used by the Supreme Court in its attempts to simplify the analysis of the discernment of the seat, and to circumvent a deeper discussion. This is perhaps either due to a skin-deep understanding of the concepts relating to arbitration or due to a general disinterest in the development of the arbitration law. However, as has been shown in the paper, the approaches are facile and oversimplistic, and a blind application of any of them risks bizarre outcomes in cases. Consequently, there is a need for a more refined approach that recognises the complexities of scenarios with seatless clauses and also attempts to attach relative weight to the relevance of each of the stipulations made in a contract.

V. A NEW TEST FOR SEATLESS CLAUSES

As discussed in this paper, the discernment of the seat must be guided by party autonomy. This means that any mutual agreement between the parties stipulating the seat must be respected. In the absence of such an agreement, and especially in the absence of the discretion to decide the seat of arbitration on behalf of the parties, an arbiter needs to analyse the various stipulations in the contract, to discern what a reasonable businessperson (making those stipulations) would have wished for the seat to be. For this, the arbiter must assess the alignment of the determinants of each of the stipulations/ factors mentioned in the arbitration clause, with the determinants of the seat of arbitration. This Chapter proposes a ten-stage-test, that follows a ‘waterfall mechanism’ in the discernment of the seat, keeping in mind the need for a holistic analysis of a clause and for weighing factors in accordance with the alignment of their determinants with those of the seat. This waterfall mechanism enlists a step-by-step process for the discernment of the seat, where every subsequent step must only be taken if the previous steps are inconclusive in arriving at the seat. To lay out this mechanism, the

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231 See Mankastu Impex, supra note 4, ¶¶22-23
232 See supra text accompanying notes 166-68.
233 See Braes of Doune, supra note 30, ¶17(a)-(b); Indus Mobile Distribution Ltd. v. Datawind Innovations Ltd., (2017) 7 SCC 678, ¶19.
234 See supra text accompanying notes 172-73.
236 See supra text accompanying notes 182-85.
237 The term ‘waterfall mechanism’ has been borrowed from insolvency laws across jurisdiction, which is used to define a mechanism for paying off the creditors in case of liquidation. Such mechanism categorises various kinds of creditors in a sequential order of priority. Then the payment out of the corporate debtor’s assets commences in chronological order, first completely paying off the category of creditors at the highest priority, only after which the creditors in in the second highest prioritised category can be paid, and so on. See Sati Mukund, Insolvency and Bankruptcy Code, 2016 – Level Playing Field for All, Vol.11 INTERNATIONAL IN-HOUSE COUNSEL. J. 1, 4 (2018). Similar to the functioning of this mechanism, the proposed 10-stage test allows an arbiter to move to a subsequent stage only when the analysis on a previous stage leaves the seat indeterminate.

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Chapter classifies the various factors into three categories: the strong indicators, the mild indicators, and the non-indicative factors.

A. THE STRONG INDICATORS

There are two extremely strong contractual indicators of the choice of the seat: the stipulation of a domestic arbitration legislation; and, the stipulation of exclusive jurisdiction of the courts of a country. This is because, seat in itself is a legal concept which guides the procedure of an arbitration and determines the courts exercising jurisdiction over an arbitral challenge.\(^{238}\) Therefore, deciding the seat is essentially the same as choosing a national arbitration legislation\(^{239}\) and the exclusive jurisdiction of the courts in that country (at least in the majority of common law jurisdictions that do not recognise delocalisation).\(^{240}\) Having said that, if these two factors are to conflict, ‘exclusive jurisdiction’ remains the strongest indicator of an arbitral seat. This is because the reference to an arbitration legislation may be countered as only importing a strictly internal procedure.\(^{241}\) As against this, there seems to be no other apparent reason to select the ‘exclusive jurisdiction’ of the courts of a place, than to designate the seat. Furthermore, since determination of the seat has been considered akin to an ‘exclusive jurisdiction clause’, a jurisdiction clause should conclusively decide the seat.\(^{242}\)

Therefore, the first three stages of the test are as follows:

*Stage zero:* If the agreement can be interpreted to have stipulated a seat, then the test need not be used.\(^{243}\)

*Stage one:* If the agreement mentions unqualified exclusive jurisdiction of the courts of a country, then that country becomes the seat.

*Stage two:* Subject to the previous stage, if the agreement mentions a domestic arbitration legislation as guiding the arbitration, then that legislation becomes the *lex arbitri* and the relevant country becomes the seat.

B. THE MILD INDICATORS

The relatively mild indicators of an implied arbitral seat are the following: the AA law; the venue; institutional rules and the substantive law. Though less relevant than the strong indicators of a seat, these factors have been the most commonly used in the discernment of the *lex arbitri* and therefore have spurred vast debate and discussion, as was evident in the traced jurisprudence.

\(^{238}\) FOUCARD GAILLARD GOLDMAN, supra note 172, at 651-52; BLACKABY et al., supra note 1, at 172-73; Mathew Barry, Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts, Vol.32(3) J. INTERNATIONAL ARB. 289, 303-04 (2015).

\(^{239}\) Various cases have used the reference to the domestic arbitration legislation as a choice of seat. See C v. D, [2007] EWCA (Civ.) 1282, ¶19 (Court of Appeal, England) (‘C v. D’); Braes of Doune, supra note 30, ¶17(c)-(d).

\(^{240}\) Braes of Doune heavily relies on reference to English courts as well. Id., ¶17(a)-(b).

\(^{241}\) See McDonnell Douglas, supra note 5 (paragraphed/paginated copy not available); Process and Industrial Developments, supra note 79, ¶45. Although this is theoretically possible (not without unnecessary legal complexities that have no answer), it is not advisable to choose a domestic legislature as procedural law, that is not the of the seat of the arbitration, as the same would create immense complexities and ethical challenges. See WAINCYMER, supra note 172, at 189-92.

\(^{242}\) See A v. B, [2007] 1 Lloyd’s Rep. 237, ¶111 (Queen’s Bench Division, England); BALCO, supra note 2, ¶123.

\(^{243}\) As discussed above, this test will only be applicable when parties have, at no point in time, agreed to a specific seat of arbitration.
The stipulation of institutional rules is usually irrelevant in the discernment of the seat, because such rules are usually supranational in nature and cannot be attached to any particular legal system.\textsuperscript{244} Having said that, if the institutional rules provide for a specific default arbitral seat, then such legal system becomes the seat in the absence of any other specific stipulations.\textsuperscript{245} This is because, the parties’ choice of a set of institutional rules, implies their consent to all the provisions of the same.\textsuperscript{246} The LCIA Rules are a popular example, that stipulate London as the default seat.\textsuperscript{247} The use of such institutional rules in seatless clauses comes with a caveat. In the presence of strong indicators, the default back-up seat option in such rules must not be triggered. As discussed, this is because the strong indicators are so directly related to a seat, that their stipulation constitutes a strong and overriding implied choice\textsuperscript{248} of seat, that therefore they must be treated at par with express choice in this process.\textsuperscript{249}

Amongst the rest, the strongest indicator of the seat is the AA law.\textsuperscript{250} This is because the AA law and the curial law highly overlap in their use, and therefore their determinants must also naturally overlap.\textsuperscript{251} Namely, there is overlap in the determination of the validity of an agreement, its arbitramility, the recognition of separability, time limits or extensions, applicable limitation periods and the constitution of a tribunal (for example, whether two arbitrators are allowed).\textsuperscript{252} Due to such heavy overlap, rational businesspersons cannot be assumed to have intended to use two conflicting legal systems to govern these matters, without an express stipulation to the contrary.\textsuperscript{253} The paper has already shown how the decision in Enka (SC) does not weaken this assertion in favour of the deference to the choice of the AA law,\textsuperscript{254} as compared to the comparatively narrowly overlapping substantive law and the venue. Therefore, a stipulation of AA law would trump the stipulation(s) of venue and, or substantive law, in the discernment of seat.

In the absence of a stipulated AA law, the venue and the substantive law become important. As has been asserted, the factors guiding the choice of venue are – convenience of parties, availability of quality arbitrators or lawyers, the presence of facilities, neutrality and convenience in the collection of evidence.\textsuperscript{255} As against this, the choice of the seat is primarily only guided by the procedural stipulations of the curial law, the threshold for review of an arbitrator’s decision, the functioning of courts of the seat and, less importantly, convenience of

\textsuperscript{244} See Jan Paulsson, \textit{supra} note 2, at 56-57.
\textsuperscript{245} This was the major rationale behind the decision of Atlas Power, where the LCIA Rules had been stipulated. See Atlas Power, \textit{supra} note 75, ¶14, 47, 48.
\textsuperscript{246} BORN, \textit{supra} note 188, at 2300.
\textsuperscript{247} LCIA Rules, §16.2.
\textsuperscript{248} The English jurisprudence on the discernment of the AA law clarifies how an ‘implied choice’ must be discerned before indulging in the reverse analysis of the objective intention of the parties. This comes as a middle stage between the subjective ‘express choice’ and the objective ‘closest connection’ tests. This approach was first coherently used in Sulamerica. See Sulamerica Cia Nacional de Seguros v. Enesa Engenharia, [2012] EWCA Civ. 638, ¶25 (Court of Appeal, England); Enka (SC), \textit{supra} note 211, ¶¶227-260.
\textsuperscript{249} Such high deference to these factors had been provided in C v. D, Braes of Doune and Enercon (India). See C v. D, \textit{supra} note 239, ¶19-22; Braes of Doune, \textit{supra} note 30, ¶17(a)-(d); Enercon (India), \textit{supra} note 6, ¶105.
\textsuperscript{250} The paper has already discussed how the AA law has a much direct overlap with the law of the seat than factors like venue and substantive law. See \textit{supra} text accompanying notes 208-215.
\textsuperscript{251} Enka (SC), \textit{supra} note 211, ¶95; Glick & Venkatesan, \textit{supra} note 208, at 136, 142.
\textsuperscript{252} Id.; \textit{See supra} notes 208-209.
\textsuperscript{253} \textit{See supra} note 210.
\textsuperscript{254} \textit{See supra} notes 211-15.
\textsuperscript{255} \textit{See} BLACKABY et al., \textit{supra} note 1, at 288; GIRSBERGER & VOSER, \textit{supra} note 43, at 478; PAULSSON & PETROCHILOS, \textit{supra} note 43, at 154; Welser & de Berti, \textit{supra} note 198, at 85.
the parties.\textsuperscript{256} The only factors overlapping in the choice of seat and venue are convenience of the parties (and not that of the arbitrators or geographical neutrality).\textsuperscript{257} As against this, the choices of substantive law and seat also narrowly overlap because of substantive grounds of challenge such as ‘patent illegality’ and ‘public policy’.\textsuperscript{258} Furthermore, commonality of substantive law and curial law has also been justified on the grounds that rational business persons would not unnecessarily want to deal with laws of multiple countries, due to complexities in interpretation and use.\textsuperscript{259} In light of these overlaps, the pertinent question is the priority in which stipulation of venue and substantive law are to be used for the discernment of a seat.

In simpler scenarios, where the stipulations of venue and the substantive law themselves overlap, the indicative legal system becomes the seat of the arbitration.\textsuperscript{260} Further, if only either one of venue or substantive law is stipulated, then in the absence of other stronger or mild indicators, such a stipulation would conclusively determine the seat.\textsuperscript{261} This is because, sans other indicators, a stipulation of venue or substantive law, as the case may be, will be the only stipulation through which an objective intention of the parties can be inferred. A rational businessperson omitting the reference to a seat in an arbitration clause, can be presumed to have intended the solitary mention of venue or substantive law as also indicative of the seat of an arbitration.\textsuperscript{262}

A dilemma arises in the more complex scenarios when the venue and the substantive law themselves point towards different jurisdictions. Since the determinants of both venue and substantive law very narrowly overlap with those of a seat (and that too in very different aspects), the exercise of determining the ‘superior factor’ between these two is highly superficial. In a recent survey, the convenience of the location and alignment with substantive law were considered to have been equally weighed by parties in determination of the seat.\textsuperscript{263} In such scenarios, an arbiter must step outside the uniform test and look at other non-indicative factors in each case to determine the more objectively convenient legal system, between the ones indicated by the venue and the substantive law, as the seat.\textsuperscript{264} While in Dubai Islamic Bank, this was done through a simple ‘closest connection test’,\textsuperscript{265} this paper proposes a slight variation in the approach in such scenarios, in the next section. The same approach must also be followed when there is no substantive law or venue stipulated in the arbitration clause; in

\textsuperscript{256} White & Case, supra note 47, at 18; Bishop, supra note 199, at 35-37; Hwang & Cheng, supra note 199, at 201; THE FRESHFIELDS GUIDE, supra note 200, at 32-36; Born, supra note 188, at 2215-2216; Iwasaki, supra note 201, at 57-60.

\textsuperscript{257} This has been explained above. See supra text accompanying notes 202-205.

\textsuperscript{258} See Indian Arbitration & Conciliation Act, 1996, §34(2)(b).

\textsuperscript{259} See supra note 207.

\textsuperscript{259} This had a happened in Indian cases of Dozco India and Eitzen Bulk. See Dozco India v. Doosan Infracore, (2011) 6 SCC 179, ¶¶4, 15, 18; Eitzen Bulk, supra note 123, ¶33.

\textsuperscript{260} This can be seen from cases only mentioning substantive law (like NTPC) or those only mentioning venue (like BGS SGS Soma). While the respective rationales employed by these cases were more blanket, it has been how such blanket ‘venue is seat’ and ‘proper law is seat’ analyses cannot be valid. The outcomes of the cases were nevertheless correct as there had been no contrary contractual stipulation. See NTPC v. Singer Corp., (1992) 3 SCC 551, ¶¶49-51; BGS SGS, supra note 152, ¶¶83-87.

\textsuperscript{261} The rational businessperson reasoning has been employed in NTPC in case of substantive and in case of seat in a host of English cases, in case of venue. See NTPC v. Singer Corp., (1992) 3 SCC 551, ¶¶49-51; Enercon (England), supra note 51, ¶56.

\textsuperscript{262} See White & Case, supra note 47, at 17-18.

\textsuperscript{263} This is akin to the reference to background facts in cases like Dubai Islamic Bank. See Dubai Islamic Bank, supra note 19, ¶¶52-53. A similar approach (though misapplied) has also been used in Shashoua (England) and Enercon (England). See Shashoua (England), supra note 35, ¶¶26-27; Enercon (India), supra note 6, ¶56.

\textsuperscript{264} Dubai Islamic Bank, supra note 19, ¶¶52-53.
such a scenario, the arbiter must not be bound to decide between two legal systems, and therefore has higher discretion.

Therefore, the next stages of the test are as follows:

Stage three: Subject to the previous stages, if the chosen institutional rules provide for a specific default seat, then that legal system is confirmed as the seat of the arbitration.

Stage four: Subject to the previous stages, the stipulation of the AA law makes that law the curial law and the relevant country the seat.

Stage five: Subject to the previous stages, if the venue and the substantive law overlap, then the relevant place indicated by both of them becomes the seat.

Stage six: Subject to the previous stages, if only either one of venue or substantive law are stipulated in a contract, then that stipulation determines the seat or curial law.

Stage seven: Subject to the previous stages, if the stipulated venue and substantive law indicate different places, then (only) one of those two places must be determined as a seat, in accordance with stages nine and ten.

Stage eight: Subject to the previous stages, if there is no stipulation of a venue or substantive law, then stages nine and ten will guide the determination of the seat.

C. NON-INDICATIVE FACTORS

The term ‘non-indicative factors’ has been chosen to refer to the factors that are usually not indicative of any subtle or manifest intention towards choice of a legal system as the seat. Most of these factors are involuntary, whereas some are voluntarily chosen but are of relatively less importance to be unilaterally relevant for the determination of seat. The involuntary factors are mostly background facts, used to determine the legal system that would be ideal for a seat. The case of Dubai Islamic Bank is an example of use of such an approach.266 The voluntary factors include any stipulation regarding arbitral institutes or the nationality of the arbitrators. The assessment of both these kinds of factors marks a move away from the discernment of intention, towards determination according to the discernment of convenience. After reaching this stage of the analysis, any arbiter is virtually free to determine any seat that it deems the most convenient for the parties. However, the following discussion prescribes the ideal course of action in undertaking this exercise.

While there is no way to provide a waterfall-like mechanism due to the individual irrelevance of all these factors, one of them deserves a special mention. The strongest non-indicative factor is the location of the parties, as more than anything else, it is important for a supervisory court to exercise effective jurisdiction over the parties, to enforce its decisions against them.267 Further, as compared to arbitration, court proceedings are usually lengthier and more cumbersome, and hence are more difficult and costlier to manage in a

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266 Id. While Enercon (India) had also used a similar ‘center-of-gravity’ or the ‘closest connection’ test, the use had been erroneous due to presence of strong and mild indicators of seat. See supra text accompanying notes 117-119.

267 Efficiency of court proceedings is the most important aspect of convenience that is considered while choosing a seat (See White & Case, supra note 47, at 18-19). Not only does this mean that the court should have internal swiftness of procedure, but also that the supervisory court should be able to conveniently enforce its orders through its jurisdiction over the parties.
foreign country. Finally, the location of the seat at the location of the place of business, residence or substantial assets of parties, ensures that the same jurisdiction can be used for enforcement, which in turn, would minimise the harrowing conflicts between the courts of seat and the courts of the place of enforcement.

Therefore, in the absence of strong or mild indicators, any legal system common to the location of the parties’ conduct of business, assets or central office of management should be determined as the seat, so as to enable the courts of the seat to effectively supervise the proceedings and prevent unnecessary conflicts between courts of different jurisdictions. This is not in conflict with the primacy of neutrality; such a jurisdiction will automatically be neutrally accessible to the parties.

In the absence of such commonality of location of parties, one would need to look at the general factual background of the dispute, the agreement, and the parties, in order to determine the most appropriate seat. The various factors considered in such a scenario can be the location of parties (when their respective locations are different), signing of the contract, the background of arbitrators/lawyers, the location of causes of action, a previous determination of seat(s) by the parties, the location of the chosen institute, the nature of the dispute and even the normative superiority of one place as the seat amongst others. These factors will collectively determine the place that is the most suitable and convenient to be the seat. Since none of these factors are particularly linked with a choice of seat, they cannot be generally ranked or weighed, and must be considered and weighed given weightage in light of each particular factual scenario. This is similar to Dubai Islamic Bank’s ‘closest connection’ or Enercon (India)’s ‘centre-of-gravity analyses’. However, unlike its application in those cases, it is only requisite to be used as a last resort. As mentioned earlier, this two-stage ‘non-indicative factor’ analysis can also be used to resolve the conflict between the stipulated venue and the governing law, to determine the more appropriate ‘seat’ between the two.

Therefore, the next stages of the test are as follows:

268 FOUCHARD GAILLARD GOLDMAN, supra note 172, at 33; See Iwasaki, supra note 201, at 67; White & Case, supra note 47, at 18-19.
270 See Dubai Islamic Bank, supra note 19, ¶¶52-53.
271 Id.
272 See Harmony Innovation, supra note 96, ¶¶36, 45, 48 (arbitrators had to be ‘commercial men’ from London).
273 See Dubai Islamic Bank, supra note 19, ¶¶52-53.
274 See U&M Mining Zambia, supra note 61, ¶26 (used a previous contract, which had London as the seat).
275 See Yograj Infrastructure v. Ssang Yong Engg & Construction, (2011) 9 SCC 735, ¶51 (used the mention of SIAC rules to hold Singapore as the seat).
276 The rationales of ‘London Arbitration’ and ‘Bermuda form’ have been used in a host of English cases, to hold that England is a more-arbitration jurisdiction seat and thus the parties must have intended it to be the seat. See C v. D, supra note 239, ¶16; Shashoua (England), supra note 35, ¶34; Enercon (India), supra note 6, ¶57.
277 It is important to note that this paper has rejected Shashoua (England)’s reverse convenience argument, because venue can be chosen for a host of reasons apart from mere convenience to parties. See supra text accompanying notes 40-42.
278 Enercon (India), supra note 6, ¶¶133-134.
Stage nine: Subject to the previous stages, if both the parties have one or more common location(s) of business, substantial assets, central management, or domicile, then the most convenient of such places becomes the seat.

Stage ten: Subject to the previous stages, the seat will be determined by looking at the most convenient and appropriate place, based on a comprehensive analysis and weighing the background facts of each particular case. This analysis will determine the most appropriate seat for the arbitration, which does not require delving into the intention of the parties.

D. THE FINAL TEST

Where there is no consensus between the parties with respect to the seat of an arbitration, an arbiter must determine the seat in accordance with the following stages:

Stage zero: If the agreement can be interpreted to have stipulated a seat, then the test need not be used.

Stage one: If the agreement mentions unqualified exclusive jurisdiction of the courts of a country, then that country becomes the seat.

Stage two: Subject to the previous stage, if the agreement mentions a domestic arbitration legislation as guiding the arbitration, then that legislation becomes the lex arbitri and the relevant country becomes the seat.

Stage three: Subject to the previous stages, if the chosen institutional rules provide for a specific default seat, then that legal system is confirmed as the seat of the arbitration.

Stage four: Subject to the previous stages, the stipulation of the AA law makes that law the curial law and the relevant country the seat.

Stage five: Subject to the previous stages, if the venue and the substantive law overlap, then the relevant place indicated by both of them becomes the seat.

Stage six: Subject to the previous stages, if only either one of venue or substantive law are stipulated in a contract, then that stipulation determines the seat or curial law.

Stage seven: Subject to the previous stages, if the stipulated venue and substantive law indicate different places, then (only) one of those two places must be determined as a seat, in accordance with stages nine and ten.

Stage eight: Subject to the previous stages, if there is no stipulation of a venue or substantive law, then stages nine and ten will guide the determination of the seat.

Stage nine: Subject to the previous stages, if both the parties have one or more common location(s) of business, substantial assets, central management, or domicile, then the most convenient of such places becomes the seat.

Stage ten: Subject to the previous stages, the seat will be determined by looking at the most convenient and appropriate place, based on a comprehensive analysis and weighing

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279 This is subject to cases where the parties have in fact agreed upon a specific seat. This can be a subsequent agreement to the arbitration agreement also, as in the Reliance Industries case. See supra text accompanying notes 106-08.
the background facts of each particular case. This analysis will determine the most appropriate seat for the arbitration, which does not require delving into the intention of the parties.

VI. RE-ASSESSMENT OF ENGLISH AND INDIAN CASE LAW

After having proposed a test, it is important to re-assess the English and the Indian case law through this test for two reasons. Firstly, to understand whether the test has any practical utility; and secondly, if it does, then whether the judgements in England and India have been appropriately decided. To answer both these questions, in every case where the test deviates from the actual outcome, the paper will attempt to rationalise the more appropriate outcome out of the two.

A. ENGLISH CASES

In Naviera Amazonica, the contract had itself mentioned that the arbitration would be held ‘under the conditions and laws of London’, which indicates an unqualified intention for English law to be lex arbitri. Consequently, the test would have been inapplicable, and England would have been the seat. Similarly, in McDonnel Douglas, the arbitration agreement had explicitly mentioned a seat, and therefore the test would again have been inapplicable, and England would have been the seat.

In Dubai Islamic Bank, there had been no strong or mild indicators and the parties had been from different countries. Therefore, stage ten of the test would have led to the use of the ‘convenience approach’. Since California had been the place of performance of the contract and the place where the VISA authorities operated, an arbitration in California would have been the most appropriate. In C v. D, the English Arbitration Act had been mentioned, and therefore, the seat would have been England in pursuance of stage two. In all the four aforesaid cases, the appropriate outcomes, according to the test, are in alignment with the actual outcomes.

In Braes of Doune, the seat had expressly been mentioned to be Glasgow. However, the Queen’s Bench relied on strong indicators like the stipulation of English legislation and the jurisdiction of English courts to determine England as the seat. The Court held the stipulation of the ‘seat’ merely to be a typographical error in the stipulation of venue. Given the other stipulations, it is not untrue that the same may in fact have been the case. However, as has been discussed, the very same could be said about the case of McDonnel Douglas. Consequently, at least one of the two decisions must be held to be erroneously decided. For convenience, Braes of Doune is assumed to have been erroneously decided for

280 Naviera Amazonica, supra note 6, at 120.
281 This means that the dilemma is resolved at stage zero. However, if the clause is interpreted otherwise, then the “exclusive jurisdiction of the Courts of Lima” would confer the status of seat on Peru, as per stage one of the test. Therefore, one must take the first conclusion with a pinch of salt.
282 See McDonnell Douglas, supra note 5.
283 See supra text accompanying notes 270-77.
284 Dubai Islamic Bank, supra note 19, ¶¶52-53.
286 See supra text accompanying notes 238-40.
287 Braes of Doune, supra note 30, ¶6.
288 Braes of Doune, supra note 30, ¶17(a)-(d).
289 Braes of Doune, supra note 30, ¶17(e).
290 The conflict has been discussed in the paper in detail. See supra text between notes 34-35.
going against an express stipulation of seat, where the test would have been inapplicable due to the express stipulation of seat.

In Shashoua (England) the stipulated venue had been London, the substantive law had been Indian, and the parties had been from different countries. Consequently, stage ten of the test gets triggered, which would have indicated an Indian seat due to the implementation of the contract being in India and Roger Shashoua’s comfort with the working in the Indian jurisdiction. Even in Enercon (England), the reference to the Indian Arbitration Act would have led to the application of stage two to discern India as the seat. While the actual decisions in these cases had been inconsistent with the test, the paper has already provided a comprehensive criticism of the reasoning in each of these decisions. Consequently, the decisions derived through the test are more appropriate.

In U&M Mining Zambia, both the arbitration clause and the exclusive jurisdiction clause had provided for the exclusive jurisdiction of the Zambian High Court, and therefore, stage one of the test would have led to the discernment of Zambia as the seat. While this is inconsistent with the Court’s determination of an English seat, the latter was erroneous as the reference to ‘place’ in the contract had evidently connoted the venue of the arbitration, due to the reasons already explained in the paper.

In Shagang South-Asia, the reference to the ‘laws of England’ and that to the Gencon Charter Party manifested a clear intention of conferring the status of seat on England, and therefore the test would have been inapplicable. Consequently, the actual decision was flawed in its discernment of Hong Kong as the seat, as it was clearly only mentioned as the venue.

In Atlas Power, the stipulation of the LCIA Rules would have led to the determination of London as the seat as per stage three, due to the applicability of the default seat provision in the LCIA Rules. Consequently, the actual decision was correct and in complete alignment with the test.

Finally, in Process and Industrial Development, the stipulation of the Nigerian Arbitration and Conciliation Act would have led to the use of Stage 2, stage two for the discernment of Nigeria as the seat. While this was inconsistent with the Court’s discernment of England as the seat, the same was only due to the Court’s application of ‘issue estoppel’, and conflation of seat and venue. Ignoring the propriety of the applicability of ‘issue estoppel’ as a constraint in the determination of seat (which is something this paper does not

291 Shashoua (England), supra note 35, ¶¶4-5.
292 See supra text accompanying notes 270-277.
293 Shashoua (England), supra note 35, ¶3.
294 Enercon (England), supra note 30, ¶2.
295 See supra text accompanying notes 238-40.
296 See supra text accompanying notes 55-60.
297 U&M Mining Zambia, supra note 61, ¶25.
298 See supra text accompanying notes 238-42.
299 See supra text accompanying notes 62-70.
300 An English version of the Gencon Charter Party automatically imports an English seat. See supra text accompanying notes 72-74.
301 Id.
303 See supra text accompanying notes 244-47.
304 The London Court of International Arbitration Rules, ¶16.2.
305 Process and Industrial Developments, supra note 79, ¶6.
306 See supra text accompanying notes 83-90.
address), the seat discerned through the test was more appropriate than the seat that had been actually determined.

The re-assessment of the English jurisprudence reveals that the test is in fact useful in filtering out judgements with perverse rationalisation from those that have been decided appropriately. It also reconfirms the existence of the ‘London bias’, as five of the six inappropriately decided judgements had ended up determining England as the seat (as shown in Table 2).\(^3\) Moreover, it also demonstrates that the ‘London bias’ can be resolved by the use of this test, which effectively filtered out the judgements with perverse rationalisation. The next sub-section reassesses Indian jurisprudence in a similar fashion. Table 2 summarises the conclusions on English judgments, with the appropriate decisions being italicised and underlined and the inappropriate ones being boldened and highlighted.

Table 2: Re-assessment of English Cases

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Relevant Stage</th>
<th>Factors to be considered</th>
<th>Appropriate Seat (AS) vis-à-vis Determined Seat (DS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Naviera Amazonica (EWCA 1987)</td>
<td>__</td>
<td>‘under the conditions and laws of London’ must be interpreted as an explicit designation of seat (Having said that, if it is argued otherwise, then Lima should be the seat, having exclusive jurisdiction)</td>
<td>AS - England</td>
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<td></td>
<td></td>
<td></td>
<td>DS - England</td>
</tr>
<tr>
<td>McDonnel Douglas (EWHC 1993)</td>
<td>__</td>
<td>Seat had explicitly been mentioned</td>
<td>AS - England</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>DS - England</td>
</tr>
<tr>
<td>Dubai Islamic Bank (EWHC 2001)</td>
<td>Stage 10</td>
<td>No specific stipulation. The contract was signed in California and was supposed to be performed in California. The relevant VISA authorities were in California.</td>
<td>AS – California</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>DS - California</td>
</tr>
<tr>
<td>C v. D (EWHC 2007)</td>
<td>Stage 2</td>
<td>English Arbitration Act had been mentioned</td>
<td>AS - England</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>DS - England</td>
</tr>
<tr>
<td>Braes of Doune (EWHC 2008)</td>
<td>__</td>
<td>Seat had been explicitly mentioned</td>
<td>AS - Scotland</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>DS - England</td>
</tr>
<tr>
<td>Shashoua (England) (EWHC 2009)</td>
<td>Stage 10</td>
<td>No previous stage applicable. Shashoua and Sharma had started an Indian JV to undertake construction business in Noida (New Delhi). The agreement had been signed in India. Even Shashoua, the English party, was comfortable investing in and</td>
<td>AS – India</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>DS - England</td>
</tr>
</tbody>
</table>

\(^3\) The judgements (as displayed in the table) are: Braes of Doune, Shashoua (England), Enercon (England), U&M Mining Zambia, Shagang South Asia and Process and Industrial Development. Out of these, only Shagang South Asia had concluded with the determination of a foreign seat.

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overseeing an Indian JV. Thus, the ‘center-of-gravity’ is in India.

| **Enercon (England) (EWHC 2012)** | Stage 2 | Contract mentioned IACA 1996 as binding | AS - India DS - England |
| **U&M Mining Zambia (EWHC 2013)** | Stage 1 | Contract twice provided for exclusive jurisdiction of High Court of Zambia | AS - Zambia DS - England |
| **Shagang South Asia (EWHC 2015)** | — | The use of the phrase ‘laws of England’ and the reference to the Gencon Charter Party | AS - England DS – Hong Kong |
| **Atlas Power (EWHC 2018)** | Stage 3 | The institutional rules were LCIA, and there were no stronger indicators. Thus, the seat/place was to be London. | AS - England DS - England |
| **Process and Industrial Developments (EWHC 2019)** | Stage 2 | Agreement mentioned Nigerian Arbitration and Conciliation Act as binding | AS - Nigeria DS - England |

**B. INDIAN CASES**

In Videocon Industries, stage four would have been used to infer an English seat from the stipulation of an English AA law. As discussed, the actual discernment of Kuala Lumpur as the seat was erroneous due to the conflation of seat and venue. Subsequent to this, the BALCO case shed light on this distinction.

In the Reliance Industries (2013) and Reliance Industries (2015) cases, the seat had been consensually determined as London, and therefore, the test would have been inapplicable, and the decisions had been correct. In Enercon (India), the reference to the Indian Arbitration Act would have led to the discernment of India as the seat in pursuance of stage two. In both Harmony Innovation and Eitzen Bulk, the coincidence of venue and substantive law would have conferred the status of the seat on England as per stage five of the test. Therefore, despite perverse rationalisation, the final outcomes in the aforesaid judgements were appropriate.

In Imax Corporation, the stipulation of the exclusive jurisdiction of Singaporean courts would have led to the use of stage one to discern Singapore as the seat. While the actual decision favoured an English seat based on the ICA’s decision on the same, it has already been shown in the paper how the ICA’s decision was in fact on the ‘venue’ of arbitration and therefore the reliance on the same had been erroneous. Similarly, the decision in Shashoua (India) had been erroneous due to blind deference to the decision in Shashoua (England), which

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308 Videocon, supra note 98, ¶3.
309 See supra text accompanying notes 100-103.
311 Enercon (India), supra note 6, ¶98.
312 Harmony Innovation, supra note 96, ¶36; Eitzen Bulk, supra note 123, ¶2.
313 IMAX Corporation, supra note 127, ¶5.
314 See supra text accompanying notes 133-34.

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itself had been perverse.\textsuperscript{315} As explained, in that case, stage ten would have led to determination of India as the seat.\textsuperscript{316}

As far as Hardy Exploration was concerned, though the seat was not expressly held to be Indian, the Court inferred the same as it ended up affirming the Delhi Court’s jurisdiction.\textsuperscript{317} Even the application of the test (stage nine) would have led to the same conclusion, as the parties had been Indian (though the venue and the substantive law conflicted).\textsuperscript{318} The simplest case of the lot is BGS SGS Soma, where the seat had evidently been Indian and there was not even a need for a decision on the same.\textsuperscript{319} Since only venue had been mentioned as Delhi or Faridabad, stage six of the test would have led to the determination of India as the seat.\textsuperscript{320} Whether ‘Delhi’ can be a seat is a different question, this paper does not seek to answer.\textsuperscript{321}

Lastly, in Mankastu Impex, the stipulation of exclusive jurisdiction of the Delhi Court would have triggered stage one of the test for the discernment of New Delhi as the seat.\textsuperscript{322} As has already been explained, the semantic jugglery indulged into to determine Hong Kong as the seat, due to the use of the words ‘finally resolved’ was an erroneous exercise.\textsuperscript{323} The table below summarises the conclusions on Indian cases, with the appropriate decisions being italicised and underlined and the inappropriate ones being boldened and highlighted.

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|l|}
\hline
\textbf{Case Name} & \textbf{Relevant Stage} & \textbf{Factors to be considered} & \textbf{Appropriate Seat (AS) vis-à-vis actually Determined Seat (DS)} \\
\hline
Videocon Industries (2011) & Stage 4 & AA law was English & AS - England DS – Kuala Lumpur \\
\hline
\textbf{2012 - BALCO CLARIFIED THE CONCEPTS OF SEAT AND VENUE} \\
\hline
Enercon (India) (2014) & Stage 2 & Contract mentioned IACA 1996 as binding & AS - India DS – India \\
\hline
\hline
\end{tabular}
\caption{Re-assessment of Indian Cases}
\end{table}

\textsuperscript{315} See supra text accompanying notes 137-43.
\textsuperscript{316} See supra text accompanying notes 291-93.
\textsuperscript{317} Hardy Exploration, supra note 144, ¶¶30-36.
\textsuperscript{318} The two parties had been the Indian government (the Union of India) and Hardy Exploration & Production (India) Inc., which had been a company incorporated in and for the purpose of conducting business in India.
\textsuperscript{319} Jhanwar, supra note 38, at 153-157.
\textsuperscript{320} BGS SGS, supra note 153, ¶2.
\textsuperscript{321} Having said that, the author is of the opinion that ‘Delhi’ by itself cannot be a seat, as against another city in India. See Jhanwar, supra note 38, at 154-55.
\textsuperscript{322} See supra text accompanying note 168-70.
\textsuperscript{323} Id.
<table>
<thead>
<tr>
<th>Case study</th>
<th>Stage</th>
<th>Decision</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harmony Innovation (2015)</td>
<td>Stage 5</td>
<td>Both venue and substantive law were English</td>
<td>AS - England DS – England</td>
</tr>
<tr>
<td>Eitzen Bulk (2016)</td>
<td>Stage 5</td>
<td>Both venue and substantive law were English</td>
<td>AS - England DS – England</td>
</tr>
<tr>
<td>Shashoua (India) (2017)</td>
<td>Stage 10</td>
<td>No previous stage applicable. Shashoua and Sharma had started an Indian JV to undertake construction business in Noida (New Delhi). The agreement had been signed in India. Even Shashoua, the English party, was comfortable investing in and overseeing an Indian JV. Thus, the ‘center-of-gravity’ is in India.</td>
<td>AS – India DS - England</td>
</tr>
<tr>
<td>Hardy Exploration (2018)</td>
<td>Stage 9</td>
<td>Both the parties had been Indian.</td>
<td>AS – India DS – India</td>
</tr>
<tr>
<td>BGS SGS Soma (2019)</td>
<td>Stage 6</td>
<td>Only venue mentioned</td>
<td>AS – India DS – Delhi (India)</td>
</tr>
<tr>
<td>Mankastu Impex (2020)</td>
<td>Stage 1</td>
<td>Exclusive jurisdiction of Delhi courts</td>
<td>AS – India DS – Hong Kong</td>
</tr>
</tbody>
</table>

**C. ANALYSING THE RESULTS**

An analysis of the aforesaid tables reaffirms the conclusions drawn regarding the English and the Indian approaches in the paper. As shown, the inappropriate decisions in England have primarily been in cases where the seat should have been a foreign legal system, but was discerned as England, manifesting what this paper has dubbed as the ‘London bias’. Contrasting, none of the inappropriate decisions in India have led to the discernment of India as the seat,\(^{324}\) and therefore, the errors in Indian judgements cannot be attributed to a jurisdictional bias. The particular reason in Videocon Industries, was the conflation of seat and venue, and in Mankastu Impex, was the unnecessary attempt at deciphering a seat from an absurd reading of the clause. As far as Shashoua (India) and IMAX Corporation are concerned, the unnecessary deference to decisions of other courts was the reason behind the inappropriate

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\(^{324}\) The decisions had been Videocon Industries, Imax Corporation, Shashoua (India) and Mankastu Impex (as shown in the table).
outcomes. All these cases manifest the Supreme Court’s general disinterest in delving into a deeper analysis of the problem, and its constant attempt to find an easier solution.

Another important conclusion is that, though the approach taken in none of the Indian judgements can be said to have been appropriate, the final outcomes have been in line with the outcomes that are appropriate per the test. This is contrasting to the recent English judgements, that have errored in their final outcomes. A plausible justification for this, is that the Indian Supreme Court does not seem to have any inherent bias while deciding cases. Consequently, while it may have not given theoretically sound justifications, its justifications are founded on an intuitive awareness of what a reasonable outcome in a case would be, free of any predispositions.

For example, in cases like Enercon (India), a crude ‘centre-of-gravity’ or ‘closest connection’ approach had been used, perhaps only because the Court knew that the use of an oversimplified test would have led to the determination of India as the seat, which seemed to have been the intention of the parties. As against this, the English High Court indulged in an unwarranted over-analysis of the facts, using the ‘reverse convenience’ rationale, and deeming London as an objectively superior seat that any reasonable businessperson would have intended. Therefore, while neither of the approaches is correct, a non-prejudicial approach still leads to a more appropriate outcome. This is not to say that the Indian courts need not adopt a more refined approach towards discernment of seat. The ten-part test provides a good basic framework for the courts to use while discerning a seat in seatless clause.

VII. CONCLUSION

The proposed ten-part test simplifies the process of discernment of seat in seatless clauses. It has been seen that the test is usually only inconsistent with actual decisions, when they are either manifestly biased or based on erroneous decisions of other courts or tribunals, due to comity. Therefore, the utility of the test is obvious. While it may be argued that the test is still imperfect, it is much more refined and practical than the three approaches being used by the Indian courts, as it covers an extremely wide scope of scenarios and is based on party autonomy and detailed rationalisation. Apart from the width of use and soundness of rationalisation, this test is also simple to implement in most factual scenarios, being much more objective. The objectivity of this test also makes it useful in the English scenario, where there is need for impartiality and consistency in decision-making.

Admittedly this test is still not impeccably perfect; it may need to be deviated from in cases with excessively peculiar or complex facts and contractual stipulations. For example, in a McDonnell Douglas-type scenario, it may actually have been the case that the parties had genuinely erred in mentioning London as the ‘seat’, as all the other facts showed that it could have been to merely import a ‘venue’. This is a deeper question that cannot be answered by an objective test. Further, this test does not account for the redundancy of an ‘exclusive jurisdiction’ clause where a different seat is mentioned, as would have been the case in Braes of Doune, had it been decided in favour of the explicit stipulation of the Scottish seat. In extremely complex cases of such nature, there are bound to be externalities, that this test

325 In Shashoua (India), the deference was towards Shashoua (England), and in IMAX Corporation, the deference had been towards the ICA’s decision on venue, that the court had assumed to be one on the seat. See supra text accompanying notes 137-43, 130-32.
326 Enercon (India), supra note 6, ¶¶133-134.
327 Enercon (England), supra note 30, ¶57.
may not have considered. Furthermore, this test provides no guidance, when an arbiter has to balance the principle of comity with that of the arbitrator’s discretion, while reviewing another court or tribunal’s decision on the same matter.

Having said that, in most of the cases, this test can be directly applied to reach an appropriate decision. The purpose of this test is not to provide a straitjacket solution for all cases involving seatless clauses. It only serves the purpose of a broad guiding framework, that can be used by courts to assess the propriety of their decisions in cases. Therefore, while courts obviously need not strictly bind themselves by the test, they should ideally provide strong reasons for any deviation from it. Such practice would provide the required flexibility, while also ensuring that the decisions are not based on insufficient analysis, as happens in India. It will also serve to prevent unnecessary over-analysis stemming from bias, as happens in England. Such practice would also further the goal of uniformity in international commercial arbitration. Consequently, the paper only proposes the test as a touchstone, against which propriety of outcomes can be examined. But more importantly, the discussion in the paper acts as a warning signal to draftspersons across the globe, by demonstrating that poor drafting can pave way for a rigmarole of arbitrary court decisions. It reaffirms the need for the stipulation of a clear seat in any arbitration clause, which functions as a vaccine against such uncertainties.