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Discerning the Arbitral Seat in Seatless Clauses: A Fresh Approach

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Discerning the Arbitral Seat in Seatless Clauses: A Fresh Approach

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A rule of thumb when drafting any arbitration clause is to mention the seat of arbitration in the clearest fashion possible. When this rule of thumb 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. This 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'. Finally, it concludes by examining the utility of this test against the English and Indian judgments already discussed.

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Une règle de base lors de la rédaction d'une clause d'arbitrage est de mentionner le siège de l'arbitrage de la manière la plus claire possible. Lorsque cette règle est enfreinte, la charge de déterminer ou de discerner un siège incombe à un arbitre, que ce soit une cour ou un tribunal. Cet article vise à expliquer les conséquences d'un tel exercice en comparant la jurisprudence anglaise et indienne sur le choix du siège dans ces clauses dites "sans siège". Le présent article met en évidence des conflits au sein des décisions rendues dans chacune de ces deux juridictions, attribuant les conflits en Angleterre à un "biais londonien" et les conflits en Inde comme étant la conséquence des approches grossières adoptées par les tribunaux indiens. Cet article propose un test en 10 parties pouvant servir de cadre de base pour la résolution de tels conflits en matière de discernement du "siège". Enfin, cet article se termine par l'examen de l'utilité de ce test par rapport aux jugements anglais et indiens préalablement discutés.

I. Introduction

'Seat' is the legal system that acts as the 'legal domicile' of an arbitral proceeding. It has been called the 'centre-of-gravity' of an arbitration, as it attaches the arbitration to a national legal system, in turn guiding the arbitral procedure. The seat thus determines the contours of arbitral challenges and provides supervisory jurisdiction to the courts of that legal system.[1] Take, for example, an arbitration proceeding where 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 the 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] As a result, a basic and mandatory rule of thumb for drafting an arbitration clause is that the seat must be clearly and explicitly stipulated.[3] However, in practice, this rule of thumb is flouted with surprising frequency; perhaps due to the ignorance or 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 may 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. While the word 'place' has been

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1 For example, seat determines the criteria for the validity of an arbitration agreement, procedural powers of an arbitrator, interim powers of the supervisory courts, manner of conduct of proceedings, duration of proceedings and standard of review of an award by courts. See Gary Born, *International Commercial Arbitration*, 2nd ed (London: Kluwer Law International, 2014) at 2053; Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford University Press, 2015) at 167–73, 221; Loukas A Mistelis, "Arbitral Seats – Choices and Competition" in Stefan M Kröll et al, eds, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 376 at 376–77; Michael Dunmore, "The Award and the Courts, The Seat: Its Influence on Proceedings and Enforcement" in Christian Klausegger et al, eds, *Austrian Yearbook on International Arbitration 2015* (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2015) 365 at 379–81.

2 See *A v B*, [2006] EWHC 2006 (Comm), [2007] 1 Lloyd's Rep 237 (QB) at para 111. See also *Bharat Aluminium Co Ltd v Kaiser Aluminium* (2012) 9 SCC 552 at para 123 (India) [*BALCO*]; See Jan Paulsson, "Delocalization of International Commercial Arbitration: When and Why it Matters" (1983) 32:1 Intl Comparative LQ 53.

3 See William W Park, "Arbitration of International Contract Disputes" (1984) 39:4 Bus Lawyer 1783 at 1788–89.

4 Similar phrasing had been used in the recent Indian case of Mankastu Impex. See *Mankastu Impex v Airvisual* [2020] SCC Online SC 30 at paras 20–22 (India) [*Mankastu Impex*].

heavily used to denote the 'legal place' or 'seat' of an arbitration, it may also be used to denote the 'physical place' or the geographical location of an arbitration. The legal place and the geographical place of an arbitration often differ, thereby causing confusion regarding the meaning of the term 'place' in an arbitration clause. Finally, there can be clauses that may indicate multiple conflicting seats. For example, a clause may say "the seat is London" but at the same time mention that the "Indian Arbitration Act applies,"[5] 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. This 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 opposed to England jurisprudence, Chapter III identifies the inconsistencies in Indian cases and traces the general approaches undertaken by the Indian Supreme Court in dealing with seatless clauses. Chapter III also demonstrates that these inconsistencies have resulted from 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, Chapter V of

5 See *Enercon GmbH, Wobben Properties Gmbh v Enercon (India) Limited,* [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep 519 [*Enercon (England)*].

this 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,[6] seatless clauses have been a constant cause of discombobulation for them. English courts have been grappling with the issue of discernment of the seat for a longer period of time 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 Amazoniza*').[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 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

6 See *Naviera Amazonica Peruana SA v Compania International de Seguros del Peru,* [1987] EWCA Civ J1110-6, [1988] 1 Lloyd's Rep 116 at para 119 [*Naviera Amazonica*]; *Enercon (India) Ltd v Enercon GmbH* (2014) 5 SCC 1 at para 100 (India) [*Enercon (India)*].

7 See *Naviera Amazonica*, *supra* note 7 at para 116.

8 *Ibid* at para 120.

9 See *ibid* at para 119.

10 See *ibid* at para 125.

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 presented a seemingly unresolvable puzzle. The clause had stipulated Indian law as the substantive law and the law governing the arbitration agreement ('the AA law'),[12] and the 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; especially 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 while adopting institutional rules.[17] However, English law, being the curial law, was to be the overriding procedural law and the law applicable to arbitral challenges.[18]

Later, in 2001, the Queen's Bench decided *Dubai Islamic Bank PJSC* v. *Paymentech Merchant Services* ('Dubai Islamic Bank'),[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.[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.[21] This was based on the presence of various factors in California, vis-à-vis the location of the parties, the proper

11 See *Enercon (England)*, *supra* note 6 at paras 59–60 (which summarises the position in *McDonnel Douglas*).
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" (2010) 76:4 Intl J Arb, Mediation & Dispute Mgmt 661 at 665.
13 See *Enercon (England)*, *supra* note 12 at paras 59–60 (which summarises the position in *McDonnel Douglas*).
14 See *ibid*.
15 See *ibid*.
16 See *ibid*.
17 See *ibid*.
18 See *ibid*.
19 See [2000] EWHC 228 (Comm) [*Dubai Islamic Bank*].
20 See *ibid* at para 16.
21 See *ibid* at paras 52–53.

law of contract and causes of action.[22] Therefore, the Court declined its jurisdiction over the matter, concluding the arbitral seat existed outside of England and Wales.

B. *The Era of 'London Bias'*

Since 2007, the English Court of Appeal has decided a host of cases pertaining to seatless clauses, some of which contradict each other. In *C* v. *D*, the seatless clause mentioned London as the venue and provided that the arbitration be governed by the English Arbitration Act, 1996 ('English Arbitration Act').[23] It also mentioned that English courts would resolve any disputes with respect to appointments.[24] The substantive law had been that of New York.[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 an English seat and venue due to the supposed 'undesirability' of the American courts and dispute resolution system.[26] To bolster this reasoning, the Queen's Bench held (and the Court of Appeal affirmed) that the stipulation of the English Arbitration Act would necessarily import the jurisdiction of English courts and make England the seat.[27] The Queen's Bench chose to ignore the presence of other factors in England in the analysis, and the primary reliance was on the mention of the English Act and the commonality of the 'Bermuda form'.

It is true that the outcome in *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 a clear intention to have England as the seat. Having said that, the decision (justifiably or not) contradicted without justification *McDonnel Douglas*' holding that a mere stipulation of domestic legislation imports a seat.[28]. 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 had a closer connection to the seat than the substantive law.[29] 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

22 See *ibid* at para 53.
23 See [2007] EWCA Civ 1282 at para 2 [*C v D*].
24 See *ibid.*
25 See *ibid.*
26 See *ibid* at para 16.
27 See *ibid* at para 19.
28 See *Enercon (England), supra* note 6 *supra* note 6 at paras 59–60 (which summarises the position in *McDonnel Douglas*).
29 See *C v D, supra* note 24 at paras 22, 26.

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 provided for Glasgow as the seat, but English law as the substantive law.[30] Further, the main contract also provided for the exclusive jurisdiction of English courts and the application of the English Arbitration Act.[31] The Queen's Bench completely contradicted the rationale in *McDonnell Douglas*, holding that Glasgow was intended only to be the geographical 'place' or the venue of arbitration and not the seat,[32] and that the reference to the English Arbitration Act imported an English seat.[33] The Court also used the reference to 'English courts' to support this reasoning.[34] Interestingly, *McDonnell Douglas* was not even cited in this case. 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* faced unresolvable situations where the clauses seemed to provide concurrent supervisory powers to courts in 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 completely contradicted one another. While the Court in *McDonnell Douglas* ignored the reference to the IAA 1940, 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' due to a reference to the English Arbitration Act. It was 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)*').[35] In this case, the parties had a dispute with respect to a shareholder's agreement signed and performed in India.[36] The seatless agreement had provided for Indian substantive law and an English venue (London).[37] The Court used a threefold reasoning to hold London/England as the seat, despite recognising the difference between seat and venue.[38] First, it was held that the choice of ICC Arbitration would

30 See [2008] EWHC (TCC) 426 at para 6 [*Braes of Doune*].
31 See *ibid*.
32 See *ibid* at para 17(e).
33 See *ibid* at paras 17(c)–(d).
34 See *ibid* at paras 17(a)–(b).
35 [2009] EWHC 957 (Comm) [*Shashoua (England)*].
36 See *ibid* at para 3.
37 See *ibid* at paras 4–5.
38 However, as explained, the seat of an arbitration is its "legal domicile", which merely determines

confer the status of 'seat' on a venue.[39] 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.[40] Therefore, it concluded that the only reason behind the choice of London as the venue was to import its *lex arbitri*.[41] However, the use of this 'reverse convenience' rationale was fundamentally flawed. Had the parties only intended to import the *lex arbitri*[42] 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 to conduct arbitral proceedings.[43] 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,[44] and the 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.[45] In *Dubai Islamic Bank*, California was discerned as the seat due to its 'proximity to the dispute.'[46] This was a comparatively reasonable

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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" (2020) 9:1 Indian J Arb L 142 at 154–55.

39 See *Shashoua (England)*, *supra* note 36 at para 27.

40 See *ibid.*

41 See *ibid.*

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 et al, *supra* note 2 at 3–4.

43 See Blackaby et al, *supra* note 2 at 288; Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International, 2017) at 154; Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, 3rd ed (Zurich: Schulthess Juristische Medien AG, 2016) at 478.

44 See *Shashoua (England)*, *supra* note 36 at para 7.

45 See the text accompanying notes 20–22.

46 See *Dubai Islamic Bank*, *supra* note 20 at paras 52–53.

approach as, although the venue may be chosen by an arbitrator due to its proximity to the arbitrators or the availability of the facilities, the choice of a seat necessarily requires the parties' consent[47] because the arbitrators and facilities would not be required at the seat courts.[48]

The third rationalisation provided in *Shashoua (England)* was simply that 'London arbitration' is a common phenomenon since London is an ideal 'place'[49] for arbitration due to its facilitative laws and implementation mechanisms.[50] This ground, coloured with the 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 primarily 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 rather than 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 further 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

47 See White & Case, "International Arbitration Survey: Choices in International Arbitration" (2010) at 17–18, (last visited 3 April 2021) online (pdf): *Queen Mary University of London School of International Arbitration* <www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> [*International Arbitration Survey*].

48 See Julian Lew, "The Law Applicable to the Form and Substance of the Arbitration Clause" in Albert Jan Van den Berg, ed, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (The Hague: Kluwer Law International, 1999) 114 at 138.

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 See *Shashoua (England)*, *supra* note 36 at para 34.

51 See *Enercon (England)*, *supra* note 6.

52 See *ibid* at para 1.

53 See *ibid*.

54 See *ibid* at para 2.

55 See *ibid* at para 56.

connection' test employed in *Dubai Islamic Bank*.[56] The judgement also contradicted *Braes of Doune* and *C* v. *D*, as those decisions 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 support its decision.[59] Interestingly, 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 provided for an LCIA arbitration.[61] The clause mentioned that the "place […] shall be England and the language shall be English."[62] Additionally, both the arbitration and the jurisdiction clauses provided for the 'exclusive jurisdiction' of the High Court of Zambia.[63] The substantive law was also Zambian.[64] 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.'[65] It was held that only the disputes governed by the latter clause would go to the Zambian High Court.[66] 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.[67]

The Queen's Bench attempted to differentiate *Braes of Doune*, highlighting that the "seat […] was merely a designation of (geographical)

56 See the text accompanying notes 46–49.
57 See *C v D*, *supra* note 24 at para 19.
58 See *Braes of Doune*, *supra* note 31 at paras 17(c)–(d).
59 See *Enercon (England)*, *supra* note 6 at para 57.
60 See *Enercon (India)*, *supra* note 7 at para 100.
61 See [2013] EWHC 260 (Comm) at para 25 [*U&M Mining Zambia*].
62 *Ibid* at para 25.
63 See *ibid*.
64 See *ibid*.
65 *Ibid* at para 43.
66 See *ibid*.
67 See *ibid* at paras 17(a)–(b).

place" in that case.[68] However, it later went on to completely contradict this rationale, interpreting the stipulation of 'place' in the disputed clause as the 'seat' of arbitration.[69] If anything, *U&M Mining Zambia* was a comparatively clear example of the reference to the venue. The use of the ambiguous term 'place' in *U&M Mining Zambia* could be interpreted as seat, which may be called a 'legal place' or as venue, which may be called a 'geographical place.' However, 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.[70] 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.' In *Shagang South-Asia Trading* v. *Daewoo Logistics* ('*Shagang South-Asia*'), the Queen's Bench dealt with a clause that provided: "Arbitration to be held in Hong Kong. English Law to be applied."[71] Further, the terms of arbitration were to be based on the English version of the Gencon 1994 Charter Party.[72] 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.[73] To a reasonable person, it would have been obvious that English law was to be the *lex arbitri*. However, the Court concluded that Hong Kong was the seat, relying on the host of perverse 'London-bias' precedents holding that a choice of venue only automatically imported the *lex arbitri* of the place d when London was the venue.[74]

This case shows how precedents manifesting London-bias have plagued English jurisprudence to such depth that even an unbiased arbiter would be forced to render a perverse 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 or London, depending on whether the dispute passed a minimum monetary threshold. The substantive law was to be that of Pakistan and the procedural

68 *Ibid* at para 46.
69 See *ibid* at para 47.
70 See *ibid* at para 25.
71 [2015] EWHC 194 (Comm) at para 2 [*Shagang South-Asia*].
72 See *ibid* at para 2.
73 See *ibid* at para 44.
74 See *ibid* at paras 31–38 (the Court relied on *Shashoua (England)*, *Enercon (England)* and *U&M Mining Zambia*).

rules were to be the LCIA Rules.[75] The LCIA Court had earlier determined London as the seat[76] using Article 16.2 of the 2014 LCIA Rules, which made London the default seat in the absence of a specific stipulation.[77] The Queen's Bench in *Atlas Power* confirmed this despite a challenge to the same by the respondents.[78] While the judgement was not perverse unlike other judgements, this may be because the correct decision was in favour of London being the seat regardless.

However, the most recent decision on the matter brings back the London-bias displayed by the earlier line of cases.[79] In *Process and Industrial Developments v. The Federation of Nigeria* ('*Process and Industrial Developments*'), the seatless agreement stipulated Nigerian law as the substantive law, London as venue and the Nigerian Arbitration and Conciliation Act ('NACA') as the governing statute.[80] During the proceedings, the Nigerian Federal Court was in the process of discerning 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.[81] Despite this, the Nigerian Court subsequently exercised the powers of a supervisory court assuming that Nigeria was the seat,[82] and the dispute regarding the seat of arbitration came to the English courts.

Though 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 greater 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 the challenges to the arbitral award were to come before London courts.[83] This reasoning was bizarre for a number of reasons. First, the term 'venue of *arbitration*' is very common; it is exclusively used to connote the geographical location of the arbitral proceedings / hearings themselves.[84] It is

75 See [2018] EWHC 1052 (Comm) at para 5 [*Atlas Power*].
76 See *ibid* at para 14.
77 See "LCIA Arbitration Rules 2014" (2014) at s 16.2, online: *London Court of International Arbitration*, <www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> [*LCIA Rules*].
78 See *Atlas Power*, *supra* note 76 at paras 14, 47–48.
79 See *Process and Industrial Developments Ltd v Federal Republic of Nigeria,* [2019] EWHC 2241 (Comm) [*Process and Industrial Developments*].
80 See *ibid* at para 6.
81 See *ibid* at para 28.
82 See *ibid* at para 30.
83 *Ibid* at para 85.
84 Literature commonly uses "venue of arbitration" exclusively for the connotation of the location of arbitral hearings. See Born, *supra* note 2 at 2075; Paulsson & Petrochilos, *supra* note 44 at 152. Even in *Shashoua (England)*, *supra* note 36, the phrase "venue of the arbitration" was only interpreted to encompass the location of the arbitral hearings; it was rather the "reverse

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*.[85] Second, even in the pertinent agreement, the term 'venue' specifically corresponded only to the 'arbitration', and not to 'court proceedings.' Since it is very common for arbitral venues and supervisory courts to be situated at different locations,[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 in London would have been predictably inconvenient, and therefore, 'venue' was intended to mean the 'seat' and not the mere geographical location.[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.[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 *lex arbitri*.[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 *lex arbitri*.[90] Obviously, the Court was unable to clarify what these 'certain procedures' were and how they winnowed them down from the rest of the Act. This unfounded rationale directly contradicted both *C* v. *D* and *Braes of Doune*, which reasoned that a domestic arbitration statute necessarily imports the jurisdiction of the courts of that country, making it the seat.[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

convenience" rationale that led to the decision on English courts having the supervisory jurisdiction. See the text accompanying notes 41–42.

85 See *C v D*, *supra* note 24 at para 2.

86 See Paulsson & Petrochilos, *supra* note 44 at 153–54.

87 See *ibid* at 153–54.

88 See *International Arbitration Survey*, *supra* note 48 at 19.

89 See *Process and Industrial Developments*, *supra* note 80 at para 6.

90 See *ibid* at para 45.

91 See *C v D*, *supra* note 24 at para 19. See also *Braes of Doune*, *supra* note 31 at paras 17(c)–(d).

facts to support its pre-determined conclusion of an English seat.

Evidently, a majority of English cases have directly contradicted one another 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 would otherwise have had simple and straightforward solutions. Therefore, despite heavy jurisprudence on seatless clauses, English courts still lack a consistent approach to such cases. This 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 'London bias' could lead to inconsistency in decisions on seatless clauses.

Table 1: Conflicts due to London-bias

Case	Earlier decisions contradicted	Contradiction on the rationale of	Eventually determined seat
C v. D (EWCA 2007)	*McDonnel Douglas*	Use of stipulation of domestic arbitration statute	England
Braes of Doune (EWHC 2008)	*McDonnel Douglas*	Use of stipulation of domestic arbitration statute	England
	Naviera Amazonica	Use of stipulation of court jurisdiction	
Shashoua (England) (EWHC 2009)	*Dubai Islamic Bank*	Use for proximity to the dispute to determine convenience (and therefore seat)	England
Enercon (England) (EWHC 2012)	*Dubai Islamic Bank*	Use for proximity to the dispute to determine convenience (and therefore seat)	England
	C v. *D*	Use of stipulation of domestic arbitration statute	
		Proximity to AA law	
	Braes of Doune	Use of stipulation of domestic arbitration statute	
U&M Mining Zambia (EWHC 2013)	*Braes of Doune*	Use of stipulation of court jurisdiction	England
		'seat' not meaning 'place', but 'place' meaning 'seat'	
Process and Industrial Developments (EWHC 2019)	*C* v. *D*	Use of stipulation of domestic arbitration statute	England
	Braes of Doune	Use of stipulation of domestic arbitration statute	

III. Indian Jurisprudence on Seatless Clauses: Discerning the General Trends

As is the case in England, the Indian jurisprudence on seatless clauses is replete with inconsistent decisions. This Chapter aims to delineate the various approaches taken by the Indian Supreme Court in the discernment of the 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 jurisprudential changes, commencing with the Indian Supreme Court's 2017 *Roger Shashoua* judgement which highlights a notable but fruitless effort by the Apex Court to conduct detailed analysis. 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 was decided that Part I of the Indian Arbitration Act on 'General Provisions' would apply to any arbitration irrespective of its seat.[92] This meant that 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 or implicitly 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]

Pursuant to this, the 2015 amendment to the Indian Arbitration Act subsequently laid down two exceptions to the *BALCO* approach, implicitly affirming 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 used the Bhatia International test, they craftily watered down the test itself to hold that even an implied choice of a non-

92 (2002), 4 SCC 105 at paras 21, 32 (India) [*Bhatia International*].
93 See *ibid.*
94 See *BALCO, supra* note 3 at paras 100, 110, 136–43, 153, 194–96.
95 See *Indian Arbitration and Conciliation Act*, 1996, c 1, s2(2).

Indian seat infers the exclusion of 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 could be exercised. 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 were several important decisions dealing with seatless clauses in 2011,[98] this paper discusses only one for brevity. In *Videocon Industries* v. *Union of India* ('*Videocon Industries*'), the arbitration agreement provided for Indian substantive law, English AA law and a Malaysian venue (Kuala Lumpur).[99] During the arbitral process, the parties shifted the venue from Kuala Lumpur to Amsterdam, and then subsequently to London.[100]

While *Videocon Industries* argued that the 'seat' had been shifted to London, the Court determined that Kuala Lumpur was the seat. It reasoned that London was in fact merely the venue, and the seat had not been shifted from Kuala Lumpur.[101] However, it failed to explain why Kuala Lumpur could be assumed as the seat in the first place, since it had only been designated as a 'venue' the agreement. No discussion was made on whether and how a designated venue could be assumed to be the seat, and whether the substantive law or the AA law were relevant. Evidently, despite pointing out the distinction between seat and venue at one instance (while discussing the shift to London), the Court conflated the two concepts while opining that Kuala Lumpur was the seat.

This demonstrated the Court's crude understanding of the fundamental tenets of arbitration, perhaps because arbitration cases only infrequently reach the Supreme Court. Helpfully, however, the distinction between seat

96 This effectively deviates from Bhatia International's intent of concurrent jurisdiction and implements BALCO's 'one-seat' policy. See *Reliance Industries Limited v Union of India* (2013), 7 SCC 603 at paras 45, 51, 53, 57 (India) [*Reliance Industries (2013)*]; *Harmony Innovation Shipping Ltd v Gupta Coal India Ltd* (2015), 9 SCC 172 at paras 45, 50–53 (India) [*Harmony Innovation*]; *Roger Shashoua v Mukesh Sharma* (2017), 14 SCC 722 at paras 74–75 (India) [*Shashoua (India)*].

97 *Noy Vallesina Engg SpA v Jindal Drugs Ltd*, (2021) 1 SCC 382 (India) 19–25.

98 See *Dozco India Ltd v Doosan Infracore Co Ltd* (2011), 6 SCC 179 (India) [*Dozco India*]; *Yograj Infrastructure Ltd v Ssang Yong Engineering and Construction Co Ltd* (2011), 9 SCC 735 (India) [*Yograj Infrastructure*]; *Videocon Industries v Union of India* (2011), 6 SCC 161 (India) [*Videocon Industries*].

99 See *Videocon Industries*, *supra* note 99 at para 3.

100 See *ibid* at para 4.

101 See *ibid*, at para 21.

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 juridical concept that must be fixed for the duration of an arbitration.[102] 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.[103]

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 the impermissibility of 'a later change in seat.'[104] The Apex Court in these cases upheld London as the seat, which had been agreed upon during the arbitral process,[105] as opposed to Paris, which had been mentioned as the seat in an earlier contractual amendment.[106] While the Court attempted to differentiate itself from *Videocon Industries*, it directly contradicted the clear *ratio decidendi* laid down in that case.[107] 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* appear to have been appropriately decided.

In the 2014 decision of *Enercon GmBH* v. *Enercon India* ('*Enercon (India)*'), the contract mentioned the 'Indian Arbitration Act 1996' as the law governing the arbitral process.[108] Additionally, the clause stipulated London as the venue, Indian law as the substantive law and Indian law as the AA law.[109] 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.[110] However, there was no clarification as to when exactly this would be the case.[111] The Court used *C* v. *D* and also differentiated *Shashoua (England)* and *McDonnel 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.[112]

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102 See *supra* note 3 at paras 100, 110, 136–43, 153, 194–96.
103 For further analysis, see the text accompanying notes 158–62.
104 *Reliance Industries (2013)*, *supra* note 97; *Union of India v Reliance Industries Limited* (2015) 10 SCC 213 (India) [*Reliance Industries (2015)*].
105 See *Reliance Industries (2013)*, *supra* note 97 at para 36. See also *Reliance Industries (2015)*, *supra* note 105 at para 3.
106 See *Reliance Industries (2013)*, *supra* note 97 at para 8; *Reliance Industries (2015)*, *supra* note 105 at para 3.
107 See *Reliance Industries (2013)*, *supra* note 97 at paras 47–50.
108 See *Enercon (India)*, *supra* note 7 at para 98.
109 See *ibid.*
110 See *ibid* at paras 100, 105.
111 See *ibid.*
112 See *Enercon (India)*, *supra* note 7 at paras 130–31.

Despite the soundness of these individual 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 the seat.[113] 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.[114] Therefore, India was determined as the seat as it would have been 'vexatious' to allow legal proceedings elsewhere.[115]

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*.[116] This does not mean that the seat has to be a mathematical 'mode'[117] of all the relevant or irrelevant factors stipulated in an arbitration clause. Second, even if all these stipulated factors were to be relevant, the Court abstained from attaching relative weight 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 rather the substantive law or the stipulation of the Indian Arbitration Act; instead, the Court chose to crudely list all the factors in favour of its decision. This unnuanced '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 was Malaysian, the substantive law Indian and the AA law English.[118] In such a scenario, the crude 'centre-of-gravity' analysis would have been ineffective 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 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.

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113 See *ibid* at para 133–34.
114 See *ibid* at para 100–32.
115 See *ibid* paras 116, 148.
116 See Blackaby et al, *supra* note 2 at 167–73.
117 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 the text accompanying notes 226–28.
118 See *Videocon Industries*, supra note 99 at paras 3–4.

Enercon (India) was followed by the Supreme Court's decision in *Harmony Innovation Shipping* v. *Gupta Coal* ('*Harmony Innovation*'), where the agreement stipulated London as the venue and also required the arbitrators to be from the London Arbitrators' Association.[119] The substantive law had been English and the contract had also provided for the London Maritime Arbitration Association as the governing institute.[120] The Court aggregated all these factors, along with the background of the parties and the contract, to discern London as the obvious seat.[121] Just as in *Enercon (India)*, the Court refrained from analysing the relative individual importance of any of these factors given that all of them aligned towards London.

Subsequently, in the 2016 decision of *Eitzen Bulk* v. *Ashapura Minechem Ltd* ('*Eitzen Bulk*'), the stipulated venue was London, and the substantive law was English.[122] Again conflating seat and venue, the Court misread this as a stipulation of 'seat', without indulging in much analysis.[123] The Court also noted that the choice of 'place' of arbitration necessarily attaches the law of such place.[124] 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*.[125]

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 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 *IMAX Corporation* v. *E-City Entertainment* ('*IMAX Corporation*'), the agreement provided for Singaporean substantive law and the exclusive jurisdiction of Singaporean courts.[126] However, this was subject to an ICC arbitration, with no specified seat.[127] During the arbitral proceedings, disputes arose with respect to the 'venue', where the parties had been conflicted between Paris and Singapore.[128] The International Court of Arbitration ('ICA') adjudicated this conflict as to the venue, but for an unknown reason ended up deciding the 'seat' of the arbitration to

119 The phrase 'general arbitration in London' indicates an intent to confer the status of venue. See *Harmony Innovation*, *supra* note 97 at para 36.
120 See *ibid*.
121 See *ibid* at para 48.
122 (2016) 11 SCC 508 at para 2 (India) [*Eitzen Bulk*].
123 See *ibid* at para 26.
124 See *ibid* at para 33–34.
125 See Born, *supra* note 2 at 2071; Mistelis, *supra* note 2 at 376.
126 (2017) 5 SCC 331 at para 5 (India) [*IMAX Corporation*].
127 See *ibid*.
128 See *ibid* at para 19.

be London.[129] The Supreme Court confirmed London as the 'seat',[130] while generously using the terms 'seat', 'venue' and 'place' in its decision, thereby obfuscating its exact reasoning. The core 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.[131]

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'.[132] At best, this could be rationalised by holding that the tribunal made a typographical error. 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*.[133] 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* discussed the distinction between seat and venue. Most of these cases either 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)*'),[134] the agreement stipulated London as the venue and Indian law as the governing law. Additionally, ICC Rules were to govern the arbitration.[135] 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.[136] 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

129 See *ibid*.
130 See *ibid* at para 25.
131 See *ibid* at paras 22, 29.
132 See *ibid* at paras 20–21.
133 See *ibid* at para 20.
134 See *Shashoua (India)*, *supra* note 97 at paras 69–70.
135 See *ibid* at para 68.
136 See *ibid*.

an implicit determination of venue as the seat.[137] It was further highlighted that the parties would have wished for a 'London arbitration,' as its legal framework and infrastructure were arbitration-friendly.[138]

The Court erroneously cited *Enercon (India)*'s unaffirmed discussion of *Shashoua (England)* to bolster the aforesaid arguments.[139] It also misquoted the judgement of the England and Wales High Court in *Enercon (England)*[140] as being made by the Supreme Court in *Enercon (India)* in several instances. It was the former judgement that followed *Shashoua (England)* and not the latter. The Indian judgement in fact, ignored *Shashoua (England)*'s rationale in arriving at the exact opposite conclusion of the case.[141] Due to these misquotations, the Indian judgement was merely a reproduction of *Shashoua (England)*'s perverse rationale. To further exacerbate matters, the wide and ambiguous 'venue and something else' ratio of *Shashoua (India)* gives more deference to the choice of venue than even *Shashoua (England)* 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 as indicative of the seat was because, in the Court's opinion, there was 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 conveniently located in India.[142] 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*').[143] In *Hardy Exploration*, the substantive law was Indian, and the stipulated venue was Kuala Lumpur.[144] Furthermore, the seatless clause provided for the applicability of the UNCITRAL Model Law as the applicable procedural law.[145] The Court laid particular emphasis on the distinction between venue and seat (which it referred to as 'place' on a few occasions).[146]

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

137 See *ibid*.
138 See *ibid* at para 46.
139 See *ibid* at paras 49–50.
140 See *Enercon (England)*, *supra* note 52.
141 For further analysis, see the text accompanying notes 111–19.
142 For further analysis, see the text accompanying notes 38–50.
143 (2019) 13 SCC 472 (India) [*Hardy Exploration*].
144 See *ibid* at paras 25–26.
145 See *ibid* at para 25 (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).
146 See *ibid* at paras 28, 33.

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.[147] 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: the substantive law (for which it cited *Harmony Innovation* and *Eitzen Bulk*),[148] the AA law (for which it cited the *Reliance Industries* cases),[149] and the determination of seat by a tribunal (for which it cited *IMAX Corporation*).[150] Therefore, though *Hardy Exploration* did not deviate from *Shashoua (India)*'s treatment of the 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*'),[151] 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.[152] 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.[153] This is an erroneous approach, as 'seat' merely refers to a legal system and is not a geographical concept,[154] 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.[155]

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.[156] 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.[157] To rationalise this, the Court cited *BALCO* to infer that a venue of arbitration necessarily attaches with it the *lex arbitri* of that place.[158]

147 See *ibid* at para 30.
148 See *ibid*.
149 See *ibid* at paras 23–24.
150 See *ibid* at para 31.
151 (2019) SCC Online SC 1585 (India) *[BGS SGS]*.
152 See Jhanwar, *supra* note 39 at 153–57.
153 See *ibid*.
154 See Born, *supra* note 2 at 1538; Blackaby et al, *supra* note 2 at 173; Girsberger & Voser, *supra* note 44 at 148; Tapobrata Mukopadhyay, "The Possible Conflict of Law Rules Employed in International Commercial Arbitration to Discern the Governing Law: An Analysis" (2013) 2:2 Indian J Arbitration L 110 at 115.
155 See Jhanwar, *supra* note 39 at 155.
156 See *BGS SGS*, *supra* note 152 at para 2.
157 See *ibid* at para 98.
158 See *ibid* paras 94.

This is an erroneous interpretation of *BALCO*, as the judgement was only referring to the attachment of the *lex arbitri* to a 'seat' (which it referred to as 'place') and not a 'venue.'[159] 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*.[160] As discussed, the reasoning in *Shashoua (India)* was also unfounded and perverse, and therefore the criticism of the distinguishment of seat and venue in *Hardy Exploration* is erroneous. The final decision was based on an evident conflation of seat and venue.[161]

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.[162] 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.[163] 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 to denote an obligation.[164] 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 is *Mankastu Impex* v. *Airvisual* ('*Mankastu Impex*').[165] In this case, the arbitration agreement provided for Indian substantive law and the exclusive jurisdiction of the courts of Delhi. It mentioned Hong Kong as the 'place' of arbitration. While the word 'place' is admittedly open to interpretation, the Court interpreted it as 'venue.'[166] 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 be adjudicated in Hong Kong.[167] This was evidently erroneous as the parties would not have provided for the exclusive jurisdiction of Delhi courts had they intended challenges to be made in Hong Kong. Since all disputes were to go to

159 See *BALCO*, *supra* note 3 at paras 116–17.
160 See *Hardy Exploration*, *supra* note 144 at paras 87, 92–94.
161 See *ibid* at paras 96–98.
162 See *ibid* at para 97.
163 For further analysis of *Shashoua (India)*, see the text accompanying notes 135–43.
164 See Tina L Stark, *Drafting Contracts: How and Why Lawyers Do What They Do*, 2nd ed (New York: Wolters Kluwer Law & Business, 2014) at 230–36.
165 See *Mankastu Impex*, *supra* note 5.
166 See *ibid* at paras 20–22.
167 See *ibid* at paras 22–23.

arbitration, the only purpose of an exclusive jurisdiction clause would have been to confer jurisdiction to decide arbitral challenges.[168]

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 approaches taken for the determination of seat. The first approach involves 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)*.[169] *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 involves the 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.[170] The third approach is the Court's unnecessary semantic jugglery to hold venue as the seat. While this was 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 undertaking a critical analysis of the Indian Supreme Court's three approachest, it must be highlighted that the most fundamental value that guides arbitration is party autonomy.[171] Arbitration allows parties to

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168 This rationale has been (rightly or wrongly) used in many cases in both England and India. See *Braes of Doune*, *supra* note 31 at paras 17(a)–(b); *Indus Mobile Distribution Ltd v Datawind Innovations Ltd* (2017), 7 SCC 678 at para 19 (India) [*Indus Mobile*].

169 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. For more on this topic, see *ibid* at Part IV(A)(2–3).

170 See *Enercon (India)*, *supra* note 7 at paras 133–34; *Harmony Innovation*, *supra* note 97 at para 48.

171 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, Loukas Mistelis & Stefan Kroll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at 36. 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 2 at 355; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012) at 979–80; Stefan Kroll, "The 'Arbitrability' of Disputes Arising from Commercial Representation" in Loukas Mistelis & Stavros Brekoulakis, eds, *Arbitrability: International and Comparative Perspectives* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) at 346; Darius Khambata,

personalise their dispute settlement law and procedure.[172] Due to the primacy of party autonomy, courts should not 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 an agreement must be respected.[173] In fact, any arbiter or arbitrator must encourage parties to mutually decide the seat instead of attempting to infer with their intention retrospectively.

However, when such a solution is not possible, an arbiter adjudicating a seatless clause can encounter two possible 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 procedural guidance.[174] In the second scenario, where there are stipulated institutional rules, a tribunal may have discretion in determining the seat, taking into consideration the circumstances of the case.[175]

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 they would not have the legal autonomy (conferred by institutional rules) to determine a seat for the parties according to their choice.[176] This is subject to criticism, as it is quite possible that the parties would have had different intentions regarding the choice of seat while

"Tensions Between Party Autonomy and Diversity" in Albert Jan Van den Berg, eds, *Legitimacy: Myths, Realities, Challenges* (Aalphen aan den Rijn, The Netherlands: International Congress and Convention Association & Kluwer Law International, 2015) at 612–14.

172 See Emmanuel Gaillard & John Savage, eds, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at 648–49.

173 See Gaillard & Savage, *supra* note 173 at para 648. This had also been the ratio decidendi in Reliance Industries (2014). See *Reliance Industries (2013)*, *supra* note 97 at para 36.

174 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.

175 Such discretion is provided by all the major institutional rules. See International Chamber of Commerce, *ICC Rules of Arbitration* (1 January 2021), art 18.1, online: *ICC Rules of Arbitration* <iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration#top>; United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2014), art 18.1; Singapore International Arbitration Centre, "SIAC Rules 2016" (2020), online: *SIAC* <www.siac.org.sg/our-rules/rules/siac-rules-2016>; Hong Kong International Arbitration Centre, *HKIAC Administered Arbitration Rules* (2018), art 14.1, online (pdf): *Hong Kong International Arbitration Centre Administered Arbitration Rules 2018* <www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018%20Rules%20book/2018%20AA%20Rules_English.pdf>.

176 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 parties' intentions. 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 a surprise to the parties and is as aligned with the principle of autonomy. *See* Annibal Sabater, "When Arbitration Begins Without a Seat" (2010) 27:5 J Intl Arb 443.

drafting a seatless clause.[177] It is also quite likely that the parties would not have had any specific intention regarding a seat. However, the discernment of objective intention behind a contract through a 'reasonable man' lens is common to any interpretative exercise where the subjective intention is unstated.[178] 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 possible, even though there may not have been any clear intention with respect to the 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 decision on seat is predictable (not unforeseeable) and fair to all the parties involved.[179] In fact, since the discretion only arises in the absence of the parties' explicit choice of seat,[180] a tribunal should 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 discerning 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 a venue or substantive law in the given case.[181] 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,[182] and so is a seat.[183] Therefore, the relevant weight to be attached to any contractual stipulation (to be referred to as a 'factor' in this

177 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* (Stockholm Chamber of Commerce 2002) 59.

178 The international recognition of the objective standard of interpretation, makes it find its way in the UNIDROIT Principles and the CISG. See UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2016* (UNIDROIT, 2016), art 4.2; UNCITRAL, *United Nations Convention on Contracts for the International Sale of Goods* (New York: United Nations, 2010), art 8.2.

179 See the text accompanying note 177 (As explained, this is in contradistinction to Sabater's approach, who rather attempts at a discernment of a 'normative' seat).

180 See the text accompanying note 174 (All the rules providing the discretion of choosing the seat to an arbitral tribunal, make such discretion subject to an agreement by the parties).

181 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.

182 See Blackaby et al, *supra* note 2 at 288; Lew et al, *supra* note 172 at 361.

183 See *International Arbitration Survey*, *supra* note 48 at 18.

paper) should depend on the alignment of the general determinants of such stipulation with the general determinants of a seat.[184] Having established a rational method, it is important to critically analyse the Indian approaches to the discernment of the seat in seatless clauses.

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.[185] 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.[186] 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.[187] There can also be arbitrations with multiple venues or those with no venue at all (online arbitration).[188]

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.[189] 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

184 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).

185 These cases include *BGS SGS*, *supra* note 152; *Eitzen Bulk*, *supra* note 123; *Shashoua (India)*, *supra* note 97; *Videocon Industries*, *supra* note 99.

186 See Nakul Dewan, "The Laws Applicable to an Arbitration" in Dushyant Dave et al, eds, *Arbitration in India* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2021) at 116.

187 See Gary Born, *International Commercial Arbitration*, 3rd ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2021) at 1667.

188 See *ibid* 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* (Deventer, Boston: Kluwer Law International, 1989) at 595–96; Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2019) at 348–49.

189 See Paulsson & Petrochilos, *supra* note 44 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 Gary Born, *supra* note 188 at 4003.

within certain circumscribing limits.[190] Seat is also a juridical concept in that the courts of the seat can exercise jurisdiction to enforce the provisions of the *lex arbitri*.[191] Most commonly, the parties approach the courts of the seat either for seeking appointments / removal of arbitrators,[192] or for challenging arbitral awards.[193] Putting it simply, when one mentions India / Bombay / Delhi as the seat, it can be roughly translated as '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.[194] 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.'[195] Therefore, aside from the conflation 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.[196] Geographic convenience is multi-faceted, 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.[197]

190 See Blackaby et al, *supra* note 2 at 167–70.

191 See *ibid* at 172–73; Waincymer, *supra* note 172 at 169; Born, *supra* note 188 at 1659–61; *A v B*, *supra* note 3 at para 111; *BALCO*, *supra* note 3 at para 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.

192 See Blackaby et al, *supra* note 2 at 240, 280; Born, *supra* note 188 at 1861–62; Giulia Carbone, "The Interference of the Court of the Seat with International Arbitration" (2012), 2012:1 J Disp Resol 217 at 225.

193 See Alastair Henderson, "*Lex Arbitri*, Procedural Law and the Seat of Arbitration" (2014) 26:Sing Ac LJ 886 at 887, 906; Julian Lew, "Does National Court Involvement Undermine the International Arbitration Process" (2009) 24:3 Am U Intl L Rev 489 at 498.

194 See Girsberger & Voser, *supra* note 44 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" (2020) 6 MJDR 216 at 219.

195 See Paulsson & Petrochilos, *supra* note 44 at 147–48.

196 Lew et al, *supra* note 172 at 361.

197 See Blackaby et al, *supra* note 2 at 288; Girsberger & Voser, *supra* note 44 at 478; Paulsson & Petrochilos, *supra* note 44 at 154. See also Irene Welser & Giovanni de Berti, "The Arbitrator

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.[198] This could involve factors like the convenience of the procedures, expediency of the court system and the extent of scrutiny of and interference in arbitral awards by courts.[199] 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.[200] Further, 'neutrality' in determination of seat means legal neutrality[201] and not geographic neutrality,[202] which is a determinant of a venue. Furthermore, even geographic convenience is one-dimensional in the determination of the seat, as it is only the location of the parties that is relevant and not that of the arbitrators, witnesses or evidence.[203] 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.[204]

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, the substantive law at the seat must ideally be in line with the substantive law of the contract to minimize the possibility that public policy and patent illegality are used as grounds to challenge an award.[205] While this is a narrow overlap, *ceteris*

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and the Arbitration Procedure" (2010) Austrian YB on Intl Arbitration 79 at 86.

198 See R Doak Bishop, "A Practical Guide for Drafting International Arbitration Clauses" at 35–37 (last visited 15 April 2021), online (pdf): <hoghooghi.nioc.ir/article/pdf/Practical%20Guide.pdf>; Michael Hwang & Fong Lee Cheng, "Relevant Considerations in Choosing the Place of Arbitration" (2008) 4:2 Asian Intl Arbitration J195 at 201; *International Arbitration Survey*, *supra* note 48 at 18.

199 See "Chapter 3: Choosing the place of arbitration" in Jan Paulsson et al, eds, *The Freshfields Guide to Arbitration Clauses in International Contracts*, 3rd ed (Kluwer Law International, 2010) 31 at 32–36 [*The Freshfields Guide*].

200 See Born, *supra* note 188 at 2215–16; Kazuo Iwasaki, "Selection of Situs: Criteria and Priorities" (1986) 2:1 Arbitration Intl 57 at 57–60.

201 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.

202 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.

203 See Lew, *supra* note 49 at 138; Bishop, *supra* note 199 at 37; *International Arbitration Survey*, *supra* note 48 at 17–18.

204 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 and Conciliation Act* 1996, c 2 s 8(1), c 7 s 34(1).

205 Gary Born highlights how conflict in the 'public policy' of the seat may conflict with substantive law. *See* Gary Born, "Chapter 12: Choice of Substantive Law in International Arbitration" in Gary Born, ed, *International Arbitration: Cases and Materials*, 2nd ed (Kluwer Law International, 2015) 961 at 1002. The grounds for challenge of an award in India include public policy and (in some cases) patent illegality. See *Indian Arbitration and Conciliation Act*, 1996, c 7, s 34(2)(b);

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, which may require an arduously synchronised use of laws of different countries in different aspects of an arbitration.[206]

The AA law is even more relevant to the determination of the seat. This is because there are more direct overlaps, not only in the determinants of, but also in the scope of the AA law and the seat of an arbitration.[207] Both can guide the arbitrability, the validity of an agreement, the constitution of a tribunal, the time limits, and several other factors.[208] Therefore, a rational businessperson should be presumed to have chosen the same AA law and *lex arbitri*.[209]

While this rationale has recently been refuted by the UK Supreme Court in *Enka Insaat Ve Sanayi* v. *OOO Insurance Company Chubb* ('*Enka Insaat UKSC*'), it was done so in a different context where the Court was required to discern the AA law as opposed to the seat.[210] 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 given.[211] 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,[212] arguing that overlaps may not be relevant (specifically)

Ssangyong Engineering & Construction Co Ltd v National Highway Authority of India (2019) 15 SCC 131 (Supreme Court, India) at paras 34–48.

206 See *NTPC v Singer Corp* (1992) 3 SCC 551 (Supreme Court, India) at paras 49–51 [*NTPC V Singer*]; See also *International Arbitration Survey*, *supra* note 48 at 17-18. This has also been recognised (although not applied) in *Yograj Infrastructure*. See *Yograj Infrastructure*, *supra* note 99 at para 51.

207 See Ian Glick & Niranjan Venkatesan, "Choosing the Law Governing the Arbitration Agreement" in Neil Kaplan & Michael Moser, eds, *Jurisdiction, Admissibility and Choice of Law in Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International, 2018) 131 at 136, 142; *Enka Insaat ve Sanayi v OOO Insurance Co Chubb* [2020] EWCA Civ 574 (Court of Appeal, England) at paras 95–99 [*Enka Insaat EWCA*].

208 See Glick & Venkatesan, *supra* note 208 at 136; *Enka Insaat EWCA*, *supra* note 208 at paras 95–99.; See Lew et al, *supra* note 172 at 189; Bernard Hanotiau, "The Law Applicable to Arbitrability" in Albert Jan Van den Berg ed, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, vol 9 ICCA Congress Series (Kluwer Law International, 1999) 146 at 154–57.

209 See *Enka Insaat EWCA*, *supra* note 208 at para 99; *International Tank & Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] Q.B. 224 (Queen's Bench Div, England) at paras 229–30.

210 [2020] UKSC 38 (Supreme Court, United Kingdom) at paras 5–6 [*Enka Insaat UKSC*].

211 See *ibid* at paras 43–54.

212 See *ibid* at paras 118–44.

for the English Arbitration Act, 1996 (though it may be relevant in other jurisdictions).[213] 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.[214]

Importantly, while the AA law has two different pulling factors (substantive law and the legal seat),[215] 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 the extent of the determination of 'public policy.'[216] Consequently, the choice of the AA law is a stronger indicator of the *lex arbitri* than the reverse. Therefore, high deference to the choice of the AA law in discernment of seat does not conflict with *Enka Insaat UKSC*.

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*,[217] respectively, are equally flawed. For example, if, in a case, the venue is New Delhi and the 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 many overlaps in the determinants, the scope of the *lex arbitri* and the AA law.[218]

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213 See *ibid* at paras 83–94.

214 See *Enka Insaat EWCA*, *supra* note 208 at paras 95–99; *Enka Insaat UKSC*, *supra* note 211 at paras 118–44.

215 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 Insaat UKSC*, *supra* note 211 at para 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 EWCA*, *supra* note 208 at paras 95–99. The Supreme Court, while disagreeing, gave a detailed 5-point reasoning why lex arbitri is extremely close in connection to the seat. See *Enka Insaat UKSC*, *supra* note 211 at paras 118–44. Consequently, the AA law has two strong pulling factors that may conflict, causing difference of opinion between the courts.

216 See the text accompanying notes 206–07.

217 See the text accompanying notes 135–51.

218 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.

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*), then the venue cannot be used to discern the arbitral seat. The former is because the seat can only be attached to a singular jurisdiction and cannot be constantly shifting like venue.[219] The latter is because, as has been discussed, the test for inference of the seat would hinge on the question of 'Why would the parties have made a stipulation (say, that of a venue)? Is the same consideration relevant for a seat of arbitration?'.[220] 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 a 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.'[221] Often the same has also been due to blind deference to decisions of foreign courts and tribunals without assessing of the merit of such decisions or the arguments at hand, especially in *Shashoua (India)*.[222] 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.

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[223] and the unwarranted semantic jugglery in imputing an implied reference to seat.[224] 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.

Such is not the case for the *lex arbitri* and the AA law.

219 See the text accompanying note 2.

220 See the text accompanying notes 182–85.

221 See *Videocon Industries*, *supra* note 99 at paras 20–21; *Eitzen Bulk*, *supra* note 123 at paras 33–34; *BGS SGS*, *supra* note 152 at paras 83–87; *Mankastu Impex, supra* note 5 at paras 20–22.

222 See the text accompanying note 40–51, 138–43; see alsothe text accompanying note 128–30.

223 This is the approach proposed in *Enercon (India)* and then subsequently affirmed in *Harmony Innovation*. See *Enercon (India), supra* note 7 at paras 133–34; *Harmony Innovation*, *supra* note 97 at para 48. See also the text accompanying notes 115–17, 121–23.

224 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 5 at paras 22–23; *BGS SGS*, *supra* note 152 at para 97. See also the text accompanying note 164–65, 168–69.

The 'centre-of-gravity' test fundamentally misinterprets the phrase the 'seat is the centre-of-gravity' of an arbitration. The phrase only connotes that the seat is of primary value in guiding the procedure of an arbitration and, to some extent, the substance and form of an award.[225] 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.[226] 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[227] rather than being crowded in the same jurisdictions as was the case 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,[228] rather than in cases that have involved a more complex mix of factors.[229] 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 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 to come before the Hong Kong courts.[230] 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.[231] The only possible purpose a jurisdiction clause has, when supplemented with

225 See Blackaby et al, *supra* note 2 at 167–73. 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 7 at para 134.
226 See the text accompanying notes 117–18, 182–85.
227 See the text accompanying note 119.
228 See the text accompanying note 56–57, 120–22.
229 Refer to above discussion on Videocon Industries. See also the text accompanying note 119.
230 See *Mankastu Impex*, *supra* note 5 at paras 22–23.
231 See the text accompanying note 166–68.

a broad arbitration clause, is to provide a location for the challenge of an award.[232] Consequently, although this 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 due to a skin-deep understanding of the concepts relating to arbitration or 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.[233] This means that any mutual agreement between the parties stipulating the seat must be respected.[234] 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.[235] This Chapter proposes a ten-stage-test, that follows a 'waterfall mechanism'[236] in the discernment of the seat,

232 See *Braes of Doune*, *supra* note 31 at paras 17(a)–(b); *Indus Mobile*, *supra* note 169 at para 12.

233 See the text accompanying notes 172–73.

234 See Gaillard & Savage, *supra* note 173 at para 648; See *Reliance Industries (2013)*, *supra* note 97 at para 36.

235 See the text accompanying notes 182–85.

236 The term 'waterfall mechanism' has been borrowed from insolvency laws across jurisdictions and is used to define a mechanism for paying off the creditors in case of liquidation. Such a mechanism categorises various kinds of creditors in 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" (2018) 11:44 Intl In-House Counsel J 1 at 4 (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

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 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 the seat in itself is a legal concept which guides the procedure of an arbitration and determines which courts exercise jurisdiction over an arbitral challenge.[237] Therefore, deciding the seat is essentially the same as choosing a national arbitration legislation[238] and the exclusive jurisdiction of the courts in that country (at least in the majority of common law jurisdictions that do not recognise delocalisation).[239] 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.[240] Against this, there seems to be no other apparent reason to select the 'exclusive jurisdiction' of the courts of a place other 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.[241]

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.[242]

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indeterminate).

237 See Gaillard & Savage, supra note 173 at paras 651–52; Blackaby et al, *supra* note 2 at 172–73; Matthew Barry, "Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts" (2015) 32:3 J of Intl Arbitration 289 at 302–04.

238 Various cases have used the reference to the domestic arbitration legislation as a choice of seat. See *C v D*, *supra* note 24 at para 19; *Braes of Doune*, *supra* note 31 at paras 17(c)–(d).

239 *Braes of Doune* heavily relies on reference to English courts as well. See *Braes of Doune*, *supra* note 31 at paras 17(a)–(b).

240 See *Enercon (England)*, *supra* note 6; *Process and Industrial Developments*, *supra* note 80 at para 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.

241 See *A v B, supra* note 3 at para 111*; BALCO, supra* note 3 at para 123.

242 As discussed above, this test will only be applicable when parties have, at no point in time,

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 commonly been used in the discernment of the *lex arbitri* and therefore have spurred vast debate and discussion, as was evident in the traced jurisprudence.

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.[243] Having said that, if the institutional rules provide for a specific default arbitral seat, then that legal system becomes the seat in the absence of any other specific stipulations.[244] This is because the parties' choice of a set of institutional rules implies their consent to all the provisions of the same.[245] The LCIA Rules are a popular example that stipulate London as the default seat.[246] 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[247] of seat. Therefore, they must be treated at par with express choice in this process.[248]

Amongst the rest, the strongest indicator of the seat is the AA law.[249]

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agreed to a specific seat of arbitration.

243 See Paulsson, *supra* note 3 at 56–57.

244 This was the major rationale behind the decision of Atlas Power, where the LCIA Rules had been stipulated. See *Atlas Power*, *supra* note 76 at paras 14, 47–48.

245 Born, *supra* note 189 at 2300.

246 See *LCIA Rules*, *supra* note 78, art 16.2.

247 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 (Court of Appeal, England) at para 25; *Enka Insaat UKSC*, *supra* note 212 at paras 227–60.

248 Such high deference to these factors had been provided in *C v D*, *Braes of Doune* and *Enercon (India)*. See *C v D, supra* note 24 at paras 19–22; *Braes of Doune*, *supra* note 31 at paras 17(a)–(d); *Enercon (India)*, *supra* note 7 at para 105.

249 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 the text accompanying notes 208–15.

This is because the AA law and the curial law highly overlap in their use, and therefore their determinants must also naturally overlap.[250] Namely, there is overlap in the determination of the validity of an agreement, its arbitrability, the recognition of separability, time limits or extensions, applicable limitation periods and the constitution of a tribunal (for example, whether two arbitrators are allowed).[251] 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.[252] The paper has already shown how the decision in *Enka Insaat UKSC* does not weaken this assertion in favour of deference to the choice of the AA law[253] 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 to the parties, availability of quality arbitrators or lawyers, the presence of facilities, neutrality and convenience in the collection of evidence.[254] As opposed to this, the choice of the seat is primarily 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, the convenience of the parties.[255] The only factor overlapping in the choice of seat and venue is convenience to the parties (and not that of the arbitrators or geographical neutrality).[256] 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.'[257] 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 the laws of multiple countries due to inherent complexities in interpretation and use.[258] In light of these overlaps, the pertinent question is the priority to which stipulation of venue and substantive law are to be given for the discernment of a seat.

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250 *Enka Insaat UKSC*, *supra* note 211 at para 95; Glick & Venkatesan, *supra* note 208 at 136, 142.
251 See *Enka Insaat UKSC*, *supra* note 211 at para 95; Glick & Venkatesan, *supra* note 208 at 136, 142; See the text accompanying notes 208–9.
252 See the text accompanying note 210.
253 See the text accompanying notes 211–14.
254 See Blackaby et al, *supra* note 2 at 288; Girsberger & Voser, *supra* note 44 at 478; Paulsson & Petrochilos, *supra* note 44 at 154. See also Welser & de Berti, *supra* note 198 at 86.
255 See *International Arbitration Survey*, *supra* note 48 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 180 at 2215–16; Iwasaki, *supra* note 201 at 57–60.
256 This has been explained above. See the text accompanying notes 202–05.
257 See Indian Arbitration & Conciliation Act 1996, *supra* note 205 at c 7, s 34(2)(b).
258 See the text accompanying note 207.

In simpler scenarios, where the stipulations of venue and the substantive law themselves overlap, the indicative legal system becomes the seat of the arbitration.[259] 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.[260] 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.[261]

A dilemma arises in more complex scenarios where 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 the 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 equal weight for the parties in determining the seat.[262] In such scenarios, an arbiter must step outside the uniform test and look at other non-indicative factors to determine the more objectively convenient legal system.[263] While *Dubai Islamic Bank* accomplishes this through a simple 'closest connection test,'[264] 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 such a scenario, the arbiter must not be bound to decide between two legal systems, and consequently has higher discretion.

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

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259 This had happened in the Indian cases of Dozco India and Eitzen Bulk. See *Dozco India*, *supra* note 99 at para 4, 15, 19; *Eitzen Bulk*, *supra* note 123 at paras 33.

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*, *supra* note 207 at paras 49–51; *BGS SGS*, *supra* note 152 at paras 83–87.

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*, *supra* note 207 at para 49–51; *Enercon (England)*, *supra* note 52 at para 56.

262 See *International Arbitration Survey*, *supra* note 48 at 17–18.

263 This is akin to the reference to background facts in cases like *Dubai Islamic Bank*. See *Dubai Islamic Bank, supra* note 20 at paras 52–53. A similar approach (though misapplied) has also been used in *Shashoua (England)* and *Enercon (England)*. See *Shashoua (England)*, *supra* note 36 at paras 26–27; *Enercon (England), supra* note 52 at para 56.

264 See *Dubai Islamic* Bank, *supra* note 20 at paras 52–53.

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 the choice of a legal system as the seat. Most of these factors are involuntary, though some are voluntarily chosen but are of relatively less importance for the determination of seat. The involuntary factors are mostly background facts used to determine the ideal legal systemfor a seat. The case of *Dubai Islamic Bank* is an example of such an approach.[265] The voluntary factors include any stipulation regarding arbitral institutes or the nationality of the arbitrators. The assessment of both these factors marks a move away from the discernment of intention and 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 to be 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 of these factors, one of them deserves a special mention. The strongest non-indicative factor is the location of the parties due to the comparative ease with which a supervisory court may be able to enforce

265 See *ibid*. 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 the text accompanying notes 117–19.

an arbitral decision against a party.[266] Further, as compared to arbitration, court proceedings are usually lengthier and more cumbersome, and hence are more difficult and costlier to manage in a foreign country.[267] 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 the seat and the courts of the place of enforcement.[268]

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 inherently be neutrally accessible to the parties.

In the absence of such a commonality of location of parties, one would need to look at the general factual background of the dispute, the agreement and the parties themselves in order to determine the most appropriate seat.[269] The various non-exhaustive factors considered in such a scenario can be the location of parties (when their respective locations are different), signing of the contract,[270] the background of arbitrators / lawyers,[271] the location of the causes of action,[272] a previous determination of the seat(s) by the parties,[273] the location of the chosen institute,[274] the nature of the dispute

266 Efficiency of court proceedings is the most important aspect of convenience that is considered while choosing a seat. See *International Arbitration Survey*, *supra* note 48 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.

267 See Gaillard & Savage, *supra* note 173 at para 33, Iwasaki, *supra* note 201 at 67; *International*

268 The most commonly seen form of such conflict is that of enforcement of annulled awards. See Sae Youn Kim & Marieke Minkkinen, "An Asian Perspective on the Enforcement of Annulled Awards" in Andrea Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity*, vol 19 ICCA Congress Series 382 (Kluwer Law International, 2017) 382 at 390–94; Clifford Hendel & Maria Antonia Perez Nogales, "Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations" in Katia Fach Gomez & Ana Lopez-Rodriguez, eds, *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International, 2019) 187 at 194–202.

269 See *Dubai Islamic Bank*, *supra* note 20 at paras 52–53.

270 See *ibid*.

271 See *Harmony Innovation*, *supra* note 97 at paras 36, 45, 48 (arbitrators had to be "commercial men" from London).

272 See *Dubai Islamic Bank*, *supra* note 20 at paras 52–53.

273 See *U&M Mining Zambia, supra* note 62 at para 26 (used a previous contract, which had London as the seat).

274 See *Yograj Infrastructure*, *supra* note 99 at para 51.

and even the normative superiority of one place as the seat.[275] These factors will collectively determine the place that is most suitable and convenient to be the seat.[276] 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 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.'[277] However, unlike its application in those cases, it is only to be used as a last resort. As mentioned earlier, this two-stage 'non-indicative factor' analysis can also be used to resolve a 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:

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 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,[278] 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

275 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 24 at para 16; *Shashoua (England)*, *supra* note 36 at para 34; *Enercon (India)*, *supra* note 7 at para 57.

276 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 the text accompanying notes 41–43.

277 See *Enercon (India)*, *supra* note 7 at paras 133–34.

278 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 the text accompanying notes 106–08.

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 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.

VI. Re-assessment of English and Indian Case Law

After having proposed a test, it is important to re-assess the previously examined English and Indian case law. First, such an analysis will assist in understanding whether the test has any practical utility; and secondly, if it has utility, then it will determine whether these prior judgements in England and India were 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 itself mentioned that the arbitration would be held 'under the conditions and laws of London,'[279] which indicates an unqualified intention for English law to be the *lex arbitri*. Consequently, the test would have been inapplicable and England would have been the seat.[280] Similarly, in *McDonnel Douglas*, the arbitration agreement explicitly mentioned a seat,[281] and therefore, the test would again have been inapplicable as England would have been the seat.

In *Dubai Islamic Bank*, there were no strong or mild indicators and the parties were from different countries. Therefore, stage ten of the test would have led to the use of the 'convenience approach.'[282] Since California was the place of performance of the contract and the place where the VISA authorities operated, an arbitration in California would have been most appropriate.[283] In *C* v. *D*, the English Arbitration Act was mentioned,[284] and therefore, the seat would have been England pursuant to stage two.[285] In all four aforementioned cases, the appropriate outcomes, according to the test, are in alignment with the actual outcomes.

In *Braes of Doune*, the seat was expressly stated to be Glasgow.[286] However, the Queen's Bench relied on strong indicators like the stipulation of English legislation and the jurisdiction of English courts to determine that England was the seat.[287] The Court held the stipulation of the 'seat' to be a typographical error in the stipulation of venue.[288] 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*.[289] 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 going against an express stipulation of seat where the test would have been inapplicable due to the

279 See *Naviera Amazonica*, *supra* note 7 at para 120.
280 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.
281 See *Enercon (England)*, *supra* note 6.
282 See the text accompanying notes 270–77.
283 See *Dubai Islamic Bank*, *supra* note 20 at paras 52–53.
284 See *C v D*, *supra* note 24 at para 2.
285 See the text accompanying notes 238–40.
286 See *Braes of Doune*, *supra* note 31 at para 6.
287 See *ibid* at paras 17(a)–(d).
288 See *ibid* at para 17(e).
289 The conflict has been discussed in the paper in detail. See the text accompanying notes 35–36.

express stipulation of the seat.

In *Shashoua (England)* the stipulated venue was London, the substantive law Indian and the parties were from different countries.[290] Consequently, stage ten of the test is triggered,[291] which would have indicated an Indian seat due to the implementation of the contract being in India and Roger Shashoua's comfort with working in India.[292] Even in *Enercon (England)*, the reference to the Indian Arbitration Act[293] would have led to the application of stage two determining India was the seat.[294] While the actual decisions in these casesare inconsistent with the proposed test, the paper has already provided a comprehensive criticism of the reasoning in each of these decisions.[295] Consequently, the decisions derived through the proposed test are more appropriate.

In *U&M Mining Zambia*, both the arbitration clause and the exclusive jurisdiction clause provided for the exclusive jurisdiction of the Zambian High Court[296] and, therefore, stage one of the test would have led to discerning Zambia as the seat.[297] 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 evidently connoted the venue of the arbitration, as already explained in the paper.[298]

In *Shagang South-Asia*, the reference to the 'laws of England' and to the Gencon Charter Party manifested a clear intention to confer the status of the seat on England,[299] 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.[300]

In *Atlas Power*, the stipulation of the LCIA Rules,[301] would have led to the determination of London as the seat as per stage three[302] due to the applicability of the default seat provision in the LCIA Rules.[303] Consequently, the actual decision was correct and aligns with the proposed test.

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290 See *Shashoua (England)*, *supra* note 36 at paras 4–5.
291 See the text accompanying notes 270–77.
292 See *Shashoua (England)*, *supra* note 36 at para 3.
293 See *Enercon (England)*, *supra* note 52 at para 2.
294 See the text accompanying notes 238–40.
295 See the text accompanying notes 56–61.
296 See *U&M Mining Zambia*, *supra* note 62 at para 25.
297 See the text accompanying notes 238–40.
298 See the text accompanying notes 63–71.
299 An English version of the Gencon Charter Party automatically imports an English seat. See the text accompanying notes 73–75.
300 See *ibid*.
301 See *Atlas Power*, *supra* note 76 at para 5.
302 See the text accompanying notes 244–47.
303 See *LCIA Rules*, *supra* note 78, art 16.2.

Finally, in *Process and Industrial Developments*, the stipulation of the Nigerian Arbitration and Conciliation Act would have led to the use of Stage 2 for the discernment of Nigeria as the seat.[304] 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 the conflation of seat and venue.[305] Ignoring the propriety of the applicability of 'issue estoppel' as a constraint in the determination of seat (which is something this paper does not address), the seat discerned through the test was more appropriate than the seat that was actually determined.

The re-assessment of the English jurisprudence reveals that the test is 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 determined England was the seat (as shown in Table 2).[306] Moreover, it also demonstrates that the 'London bias' can be resolved by utilizing this proposed 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

304 See *Process and Industrial Developments*, *supra* note 80 at para 6.

305 See the text accompanying notes 84–91.

306 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 Developments*. Out of these, only *Shagang South Asia* had concluded with the determination of a foreign seat.

Table 2: Re-assessment of English Cases

Case Name	Relevant Stage	Factors to be considered	Appropriate Seat (AS) vis-à-vis actually Determined Seat (DS)
Naviera Amazonica (EWCA 1987)	___	'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)	AS - England DS - England
McDonnel Douglas (EWHC 1993)	___	Seat had explicitly been mentioned	AS - England DS - England
Dubai Islamic Bank (EWHC 2001)	Stage 10	No specific stipulation. The contract was signed in California and was supposed to be performed in California. The relevant VISA authorities were in California.	AS – California DS - California
C v. D (EWHC 2007)	Stage 2	English Arbitration Act had been mentioned	AS - England DS - England
Braes of Doune (EWHC 2008)	____	Seat had been explicitly mentioned	AS - Scotland DS - England
Shashoua (England) (EWHC 2009)	Stage 10	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.	AS – India DS - England
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.[307] As discussed, the actual discernment of the seat as Kuala Lumpur was erroneous due to the conflation of seat and venue.[308] 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,[309] 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.[310] In both *Harmony Innovation* and *Eitzen Bulk*, the coinciding of venue and substantive law would have conferred the status of seat on England as per stage five of the test.[311] 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.[312] 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.[313] Similarly, the decision in *Shashoua (India)* had been erroneous due to blind deference to the decision in *Shashoua (England)*, which itself had been perverse.[314] As explained, in that case, stage ten would have led to determination of India as the seat.[315]

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.[316] 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).[317] The simplest

307 See *Videocon Industries*, *supra* note 99 at para 3.
308 See the text accompanying notes 133–34.
309 See *Reliance Industries (2013)*, *supra* note 97 at para 36; *Reliance Industries (2015)*, *supra* note 105 at para 3.
310 See *Enercon (India)*, *supra* note 7 at para 98.
311 See *Harmony Innovation*, *supra* note 97 at para 36; *Eitzen Bulk*, *supra* note 123 at para 2.
312 See *Imax Corporation*, *supra* note 127 at para 5.
313 See the text accompanying notes 133–34.
314 See the text accompanying notes 136–43.
315 See the text accompanying notes 291–93.
316 See *Hardy Exploration*, *supra* note 144 at paras 30–36.
317 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.

case of the lot is *BGS SGS Soma*, where the seat had evidently been Indian and there was no need for a decision on that issue.[318] Since the venue had been mentioned as Delhi or Faridabad, stage six of the test would have led to the determination of India as the seat.[319] Whether 'Delhi' can be a seat is a different question this paper does not seek to answer.[320]

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.[321] As has already been explained, the semantic jugglery used to determine Hong Kong as the seat was an erroneous exercise due to the use of the words 'finally resolved.'[322] The table below summarises the conclusions on Indian cases, with the appropriate decisions italicised and underlined and the inappropriate ones bolded and highlighted.

318 See Jhanwar, *supra* note 39 at 153–57.
319 See *BGS SGS*, *supra* note 152 at para 2.
320 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 39 at 154–55.
321 See the text accompanying notes 169–71.
322 See *ibid*.

Table 3: Re-assessment of Indian Cases

Case Name	Relevant Stage	Factors to be considered	Appropriate Seat (AS) vis-à-vis actually Determined Seat (DS)
Videocon Industries (2011)	Stage 4	AA law was English	AS - England DS – Kuala Lumpur
2012 - Balco clarified the concepts of seat and venue			
Reliance Industries (2013)	___	Consensually determined by parties later as London	AS - England DS – England
Enercon (India) (2014)	Stage 2	Contract mentioned IACA 1996 as binding	AS - India DS – India
Reliance Industries (2015)	___	Consensually determined by parties later as London	AS - England DS – England
Harmony Innovation (2015)	Stage 5	Both venue and substantive law were English	AS - England DS – England
Eitzen Bulk (2016)	Stage 5	Both venue and substantive law were English	AS - England DS – England
IMAX Corporation (2017)	Stage 1	Exclusive jurisdiction of Singapore Courts	AS – Singapore DS - England
Shashoua (India) (2017)	Stage 10	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.	AS – India DS - England
Hardy Exploration (2018)	Stage 9	Both the parties had been Indian.	AS – India DS – India (DS is India as Malaysia was denied as the seat and India was the only other relevant location)
BGS SGS Soma (2019)	Stage 6	Only venue mentioned	AS – India DS – Delhi (India)
Mankastu Impex (2020)	Stage 1	Exclusive jurisdiction of Delhi courts	AS – India DS – Hong Kong

C. *Analysing the results*

An analysis of the aforesaid tables reaffirms the conclusions drawn regarding the English and 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 the 'London bias'. Contrastingly, none of the inappropriate decisions in India have led to the discernment of India as the seat,[323] and therefore, the errors in Indian judgements cannot be attributed to a jurisdictional bias. The particular reason for this error, in *Videocon Industries*, was the conflation of seat and venue. In *Mankastu Impex*, it 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 the decisions of other courts was the reason for the inappropriate outcomes.[324] All these cases manifest the Supreme Court of India'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 the Indian judgements cannot be said to have been appropriate, the final outcomes have been in line with the appropriate outcomes as guided by the test. This contrasts the recent English judgements which have erred 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 not have 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 was used,[325] 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 be the intention of the parties. In contrast, the English High Court indulged in an unwarranted over-analysis of the facts, using the 'reverse convenience' rationale, and deemed London as an objectively superior seat that any reasonable businessperson would have intended.[326] Therefore, while neither approach 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

323 The decisions had been *Videocon Industries*, *Imax Corporation*, *Shashoua (India)* and *Mankastu Impex* (as shown in the table).

324 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 the text accompanying notes 137–43, 130–32.

325 See *Enercon (India)*, *supra* note 7 at paras 133–34.

326 See *Enercon (England)*, *supra* note 52 at para 57.

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 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 clear. While it may be argued that the test is still imperfect, it is more refined and practical than the three approaches currently used by 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. 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 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 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 such complex cases, there are bound to be externalities, that this test may not have considered. Furthermore, this test provides no guidance as to when an arbiter must balance the principle of comity with that of the arbitrator's discretion when 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 such 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 sometimes happens in India. It will also serve to prevent unnecessary over-analysis stemming from bias, as sometimes happens in England. Such practice would also further the goal of uniformity in international commercial arbitration. Consequently, the

paper 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 the 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.