

COMPARATIVE APPROACHES TO SEAT-LESS ARBITRATION CLAUSES AND THE NECESSITY FOR A DEFINITIVE FRAMEWORK

GARGI BINDAL* AND SUCHETANA CHAKRABORTY**

*This paper explores the anomalies and implications of vaguely drafted arbitration clauses, especially those failing to mention the applicable law or the seat law. Seat allocates the exclusive jurisdiction of a court to oversee the arbitration, and a failure to mention the seat creates significant procedural obstacles for parties. This issue recently came to the forefront in *M/S Kings Chariot v. Tarun Wadhwa* (“**Kings Chariot case**”),¹ wherein the Delhi High Court (“**Delhi HC**”) significantly departed from the previous approaches by referring to the Code of Civil Procedure, 1908 (“**CPC**”) ² instead of considering exclusive jurisdiction to designate the seat.*

Further, positions on how to designate the seat in such cases have been haywire, within and across jurisdictions. Presently, there are multiple approaches considering multiple factors to designate seats in such scenarios. The multiplicity of approaches is detrimental to the cause of jurisprudential stability and certainty in legal systems. With this backdrop, we suggest the need for a determinative approach or a test by institutional bodies that can be implemented uniformly by the courts for the benefit of the parties.

Structurally, this paper propounds its arguments in seven sections. The first four sections introduce the concept of seat, its importance, the implications of seatless arbitration clauses, and how differing approaches exist in India to designate seats in seatless arbitration, which causes uncertainty; the fifth section compares approaches to seatless arbitration across jurisdictions, to come to the most desirable suggestive test; the sixth section underlines the necessity of a definitive test for designating seat by institutions, that can be referred to uniformly, and makes suggestions in that regard; and the final section concludes the arguments presented in this paper.

* Student at Institute of Law, Nirma University.

** Student at Institute of Law, Nirma University.

¹ *M/S Kings Chariot v Tarun Wadhwa*, ARB.P. 421/2024.

² The Code of Civil Procedure, 1908.

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I. INTRODUCTION

The laws governing arbitration proceedings are multifaceted, including the concepts of venue and seat. In an arbitration agreement, the venue merely underscores the geographical location of the proceedings and holds no legal connotation.³ On the other hand, ‘Seat Law’ refers to a court’s exclusive jurisdiction to oversee the proceedings, e.g., the power of a court to appoint arbitrators on the failure of the party to appoint them or to hear an appeal from the arbitration award.⁴ Additionally, the seat may become quintessential to determine the ‘*lex arbitri*’, i.e., the procedural law applicable to arbitration, for example, International Chamber of Commerce (“ICC”) Rules, Singapore International Arbitration Centre (“SIAC”) Rules, etc.⁵

In this context, legal misconceptions about the meaning of a seat have constantly created substantial procedural difficulties for parties. For instance, in the Supreme Court’s decision in *Devyani International Ltd. v. Siddhivinayak Builders and Developers* (“**Devyani**

³ Blackaby and Nigel, ‘Applicable Laws’, *Redfern and Hunter on International Arbitration*, (6th edn, OUP 2015) 159-160 [*hereinafter* ‘Redfern and Hunter’]; Lavranos and Nikos, *Gary B. Born on International Commercial Arbitration* (3rd edn, 2021) vol 1, 366-368 [*hereinafter* ‘Gary Born’]; Roopadaksha Basu, ‘The Seat versus Venue Debate: A Continuing Saga’ (*Mondaq*, June 24, 2020) <<https://www.mondaq.com/india/arbitration-dispute-resolution/957918/the-seat-vsvenue-debate-a-continuing-saga>> accessed November 28, 2024.

⁴ *ibid.*

⁵ The International Chamber of Commerce Rules, 2021 <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>; Arbitration Rules of the Singapore International Arbitration Centre, 2025 <<https://siac.org.sg/siac-rules-2025>> accessed November 28, 2024.

International”), and in a few other cases,⁶ arbitration agreements have designated different cities, respectively, for the seat and the court having exclusive jurisdiction to oversee the arbitration, causing confusion. Another crucial debate exists regarding situations where neither ‘seat’ nor ‘venue’ is designated by the parties.⁷

An arbitration clause failing to mention either the seat or both can be termed a ‘seatless arbitration clause.’ In such cases, most courts have designated the seat through the general jurisdiction clause/law governing the matrix contract,⁸ or through the ‘venue’ clauses if mentioned,⁹ and recently, through a flawed reference to the ‘territorial cause of action’ under the CPC. India and renowned arbitration jurisdictions across the globe have thus developed a haywire jurisprudence on interpreting such clauses to designate a seat, enunciating varied approaches in different cases, thereby confusing the commonplace parties.

Pro-arbitration jurisdictions, such as Singapore have prioritised the intention of parties¹⁰ while designating the seat in such scenarios.¹¹ Nevertheless, it has become necessary to search for a definitive test to approach seatless arbitration clauses to eliminate inconsistencies in approaches. Despite attempts by several courts to formulate tests, it is ideal that institutional bodies like United Nations Commission on International Trade Law (“**UNCITRAL**”), ICC, etc., take positive steps to formulate definitive tests in furtherance of the model law or the existing institutional rules. Such tests would reduce the judicial burden and minimise confusion among arbitrating parties. Thus, the authors have arrived at a suggestive test, elaborated later

⁶ *Devyani International Ltd. v Siddhivinayak Builders and Developers* [2017] SCC OnLine Del 11156; *Aniket Sa Investments LLC v Janapriya Engineers Syndicate Pvt. Ltd.* [2021] SCC OnLine Bom 919; *BGS SGS SOMA JV v NHPC* [2020] 4 SCC 234; *Nitin Kwatra v Stadhawk Services Pvt. Ltd. and Ors.* ARB.P. 722/2023.

⁷ Bhumika Indulia, ‘Seat versus Venue: A Damsel Distressing Domestic Arbitrations- SCC Times’ (*SCC Times*, June 3, 2024) <https://www.sconline.com/blog/post/2024/05/27/seat-versus-venue-a-damsel-distressing-domestic-arbitrations/> accessed November 28, 2024; JSA Advocates & Solicitors, ‘Seat’ versus ‘Venue’ - the Saga Resurrects – JSA’ (*JSA*, November 3, 2023) <<https://www.jsalaw.com/Art.s-publications/seat-versus-venue-the-saga-resurrectus/>> accessed November 28, 2024.

⁸ *M/S Swastik Gases Pvt. Ltd. v Indian Oil Corp. Ltd.*, AIR ONLINE 2013 SC 365.

⁹ *Roger Shashoua & Ors v Mukesh Sharma & Ors.* [2017] 14 SCC 722; *M/s Inox Renewables Ltd v Jayesh Electricals Ltd.* [2021] SC 219.

¹⁰ Lew JDM, Mistelis LA, Kroll S, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003); Julian Lew, *Comparative International Commercial Arbitration* 27-28 (Kluwer Law International, 2003); Nigel Blackaby KC, *Supra* note 1 at 355; Jeffrey Waincymer, *Procedure And Evidence In International Arbitration* 979-80 (Kluwer Law International, 2012); Stefan Kroll, ‘The Arbitrability of Disputes Arising from Commercial Representation’, *Arbitrability: International And Comparative Perspectives* 317, 346 (Kluwer Law International, 2009).

¹¹ Darius Khambata, ‘Tensions Between Party Autonomy and Diversity’, *Legitimacy: Myths, Realities, Challenges*, 612-14 (Kluwer Law International, 2015); Fouchard Goldman, ‘International Commercial Arbitration’ in Emmanuel G. & John S. (eds), 648-49 (Kluwer Law International, 1999) [*hereinafter* ‘Fouchard’].

in this paper, where we have examined approaches to seatless arbitration across jurisdictions to pick the best element for each.

II. INDIAN CASE BACKGROUND: SPECIAL EMPHASIS ON THE KINGS CHARIOT CASE

The discussion on the approaches to seatless arbitration in India was recently invigorated after the *Kings Chariot* ruling,¹² where the Delhi HC interpreted the seat to be where the cause of action arises, pursuant to Sections 16-20 of the CPC.¹³ However, the presence of a general jurisdiction clause required no recourse to the 'cause of action' approach. Additionally, Section 19 of the Indian Arbitration and Conciliation Act of 1996 ("A&C Act") specifically precludes recourse to CPC in arbitration matters.¹⁴ These varying judicial pronouncements on seat designation, previously based on venue/jurisdiction clause and subsequently on the cause of action, have been haphazard and, at the very least, jurisprudentially confusing.

A. Background

The *Kings Chariot* case entailed a situation where the parties failed to designate either a seat or a venue in the arbitration clause of their contract. A dispute relating to outstanding dues and the labour workforce management arose through a contract to construct a hotel. The respondent, Mr. Tarun Wadhwa, consequently invoked arbitration through the dispute resolution clause in the contract, and the petitioner challenged the invocation before the Delhi HC. Herein, the court clarified that the cause of action did not arise in Delhi, and designated the territorial court (wherein the cause of action arose) as the court having exclusive jurisdiction to oversee the matter. This reasoning flows from the territorial jurisdiction to file Civil Suits provided in Sections 16 to 20 of the CPC. In the words of Justice Neena Bansal while deciding the case-

"The Court within the legal limits of whose jurisdiction the defendant actually or voluntarily resides or carries on business, or where any part of the cause of action has arisen, would essentially have the territorial jurisdiction to entertain the Suit."

As the petitioner's business was based in Guna of Madhya Pradesh, the parties were directed to appear for another application by the respondent before the Gwalior Bench of Hon'ble Madhya Pradesh High Court. Additionally, in response to the argument that the Delhi HC had

¹² *M/S Kings Chariot v Mr Tarun Wadhwa*, ARB.P. 421/2024.

¹³ The Code of Civil Procedure 1908, s 16-20.

¹⁴ Arbitration and Conciliation Act 1996, s 19.

jurisdiction given the contract containing the dispute resolution clause was stamped in Gurgaon, the court stated that the same is wholly irrelevant for an arbitration. This line of reasoning severely negates the implied choice of law concept, where courts have considered that parties intend general contractual jurisdiction clauses to be the seat.

B. Critical Comment

In the *Kings Chariot* case, the Delhi HC held that the general jurisdiction clause, which subjected all disputes to the jurisdiction of Delhi, cannot be construed as designating Delhi as the seat of arbitration. The reasoning behind this was that the arbitration clause in the contract merely stipulated the referral of disputes to arbitration. However, it did not specify a seat or venue for the proceedings. The court referenced Section 2(1)(e) of the A&C Act¹⁵ which, when read with Sections 16–20 of the CPC, is invoked where the arbitration clause does not specify the seat of arbitration. Since the parties involved did not designate a seat and no cause of action arose in Delhi, the Court concluded that it lacked territorial jurisdiction to hear the petition. However, this interpretation overlooks several important factors.

First, the Court's interpretation isolated the arbitration clause from the general jurisdiction clause, asserting that the latter cannot be construed to determine the seat of the arbitration. In *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (“**Bharat Aluminium case**”),¹⁶ the Supreme Court clarified that the definition of “Court” under Section 2(1)(e) of the A&C Act should be interpreted in conjunction with Section 20,¹⁷ which emphasises the parties' autonomy in determining the seat of the arbitration and not in isolation.¹⁸

This rigid separation between the arbitration and exclusive jurisdiction clause, fails to harmonise the contractual clauses, overlooking the potential that the parties intended for the exclusive jurisdiction clause to guide all legal proceedings, including arbitration. For instance, it is possible that the parties chose Delhi as the venue for legal proceedings due to convenience, perhaps because they had their head office there rather than in Madhya Pradesh. Despite the contention of the respondent that the contract was signed and executed in Madhya Pradesh for interior works at their hotels and that they conduct business there, the parties' decision to grant exclusive jurisdiction to Delhi suggests their intention to centralise all legal proceedings in that location. This aligns with the core principle of arbitration, which prioritises party autonomy,

¹⁵ Arbitration and Conciliation Act, 1996, s 2(1)(e).

¹⁶ *Bharat Aluminium Co v Kaiser Aluminium Technical Services* [2016] 4 SCC 126.

¹⁷ Arbitration and Conciliation Act, 1996, s 2(i)(e).

¹⁸ Arbitration and Conciliation Act, 1996, s 20.

thereby rendering the application of the CPC incapable in such matters. The intention of the parties is the cornerstone of arbitration, which is generally perceived as a process governed by party autonomy.¹⁹ A key reason arbitration is often preferred over traditional litigation for resolving commercial disputes is its emphasis on party autonomy, enabling each party to tailor and characterise an arbitration component that best meets their needs. However, if such an approach is disregarded, the essence of arbitration would be lost.

Second, Section 2(1)(e) of the A&C Act, 1996, in conjunction with Sections 16-20 of the CPC, indeed provides a framework for determining jurisdiction when the seat is not specified. Nevertheless, the Court did not sufficiently consider the spirit of the arbitration agreement with a harmonious reading of the general jurisdiction clause, which was to resolve disputes under the mutually agreed terms potentially inclusive of the Delhi jurisdiction. Therein, the Court did not explore whether the implied intent behind the clauses indicated a preference for Delhi as the seat. Judgements like *BGS SGS Soma JV v. NHPC* (“**BGS Soma case**”)²⁰ and *Indus Mobile Distribution v. Datawind Innovations* (“**Indus Mobile Distribution**”)²¹ have held that in the arbitral proceedings, courts at the designated seat would possess exclusive jurisdiction over the arbitral procedure. This means that under Indian law, when parties specify a seat of arbitration, it is treated as giving exclusive authority to the courts of that place to oversee the arbitration proceedings. This is a compelling reason enough to understand that the seat can have the connotation of exclusive jurisdiction. The rationale is that the seat in domestic arbitration confers exclusive jurisdiction on a particular court. To this extent, there would be no substantial difference if the parties, instead of specifying New Delhi as the seat, stated that all disputes would be subject to the jurisdiction of courts in New Delhi only. The essence of arbitration is taken away if parties are not allowed to confer jurisdiction exclusively on a ‘neutral’ court, and arbitration is thereby reduced to litigation.

Third, the Delhi HC heavily relied on precedents such as *Ravi Ranjan Developers v. Aditya Kumar Chatterjee* and *Indus Mobile Distribution*.²² These precedents emphasised the importance of a designated seat of arbitration but did not address the situation of a seatless arbitration clause. In the present case, where no specific seat was designated, a more contextual interpretation respecting the party intent should have prevailed. For instance, the Supreme

¹⁹ *Centrotrade Minerals and Metal v Hindustan Copper* [2017] 2 SCC 228.

²⁰ *BGS SGS Soma JV v NHPC Ltd.* [2020] 4 SCC 234.

²¹ *Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.* [2017] 7 SCC 678.

²² *M/s Ravi Ranjan Developers Pvt. Ltd. v Aditya Kumar Chatterjee* [2022] SCC OnLine SC 568.

Court in *Swastik Gases v. Indian Oil Corporation Ltd.* (“**Swastik Gases Case**”) dealt with a case involving an arbitration clause that did not mention the seat; but stated in the jurisdiction clause that “*the agreement shall be subjected to the jurisdiction of the courts at Kolkata.*”²³ The Supreme Court noted that the intention of the parties was “clear and unambiguous” and allowed exclusive jurisdiction at Kolkata.

Other cases also relied on *Swastik Gases* case and held the same.²⁴ However, the *Swastik Gases Case* did not state that exclusive jurisdiction is akin to the seat. Nevertheless, in *Sanjay Kumar Verma v. Planning and Infrastructural Development Consultants*,²⁵ a case involving the parties’ intention to choose Patna as the seat, it was noted that any dispute would be subjected to the jurisdiction of Patna even if the seat was not expressly decided. The Court held that even though no cause of action arose in Patna, the parties still intended to designate Patna as the seat, and hence followed the jurisdiction of the appropriate courts in Patna. Further, in *Paul Smith Ltd. v. H&S International Holding Inc.* (“**Paul Smith Ltd. case**”), the dispute resolution clause did not specify the seat; it gave the exclusive jurisdiction to the Courts of England, and the Court interpreted this as indicating *lex arbitri* and thus established jurisdiction accordingly.²⁶

Furthermore, the Court’s dismissal of the petitioner’s assertions regarding the purchase of stamp paper and signing the agreement in Gurgaon, alongside the execution of the contract in Madhya Pradesh, suggests a missed opportunity to apply a more nuanced understanding of the parties’ intentions. The jurisdiction clause included by the parties implies an intention to resolve the dispute through the same. The court’s recourse to CPC was unnecessary and arbitrary, having no relation to either the convenience of the parties or the parties’ intention. In that case, the complexities of the arbitration clause warranted a flexible approach, which the court’s strict adherence to jurisdictional technicalities failed to achieve.

III. IMPLICATIONS OF SEATLESS ARBITRATION: AN INDIAN PERSPECTIVE

The *Kings Chariot* case highlights the problems of seatless arbitration. Intriguingly, no jurisdiction invalidates the arbitration clause if the reference has not been given to the seat. The reason is that reasonable commercial parties choose arbitration as a comprehensive method of dispute resolution and do not intend the applicable law to undermine the validity and scope of

²³ *Swastik Gases Pvt. Ltd. v Indian Oil Corporation Ltd.* [2013] 9 SCC 32.

²⁴ *B.E. Simoes Von Staraburg Niedenthal v Chhattisgarh Investment Limited* [2015] 12 SCC 225.

²⁵ *Sanjay Kumar Verma v Planning and Infrastructural Development Consultants* [2024] SCC OnLine Del 59.

²⁶ *Paul Smith Ltd. v H&S International Holding Inc.* [1991] 2 Lloyd’s Rep 127.

their agreement to arbitrate.²⁷ When establishing the arbitration clause in any agreement, it is crucial to state the arbitration seat precisely. Any uncertainty in the arbitration agreement could result in needless legal complexities. Many contracts that include arbitration clauses are silent about the arbitration's seat, which causes misunderstandings and problems between the parties, particularly when those parties operate in different states.

If the parties have not defined the seat, crucial questions arise, such as, "What is the time limit for completion of the arbitration?"; "What are the interim measures that courts can take?"; and "Which court can be approached for a challenge to an award?" In any practical scenario, the absence of a designated seat in arbitration, is likely to give rise to multiple procedural and substantive conflicts between the parties. Even if the parties have not agreed upon a seat, a decision still needs to be taken to designate it. A neutral arbiter, such as a court or an arbitrator, is ultimately responsible for making this judgment and must find the appropriate seat in some way. One of the significant concerns of seatless arbitration is that the parties' intention is often neglected. Therefore, it is vital to define the seat.

A. Situations Entailing Seatless Arbitration

In domestic agreements, the simultaneous inclusion of seat and exclusive jurisdiction often creates ambiguity. There is considerable debate regarding whether the seat or exclusive jurisdiction should govern the arbitration agreement. Because of this, this issue intensifies in seatless arbitration, raising interpretative challenges on judicial authority over the proceedings. First, where parties have not defined the seat, but they have defined the venue. Second, where parties have defined both seat and exclusive jurisdiction. Third, where parties have not defined seat, venue or exclusive jurisdiction. *Fourth*, when venue and exclusive jurisdiction are both mentioned in the agreement.

(i) Parties have not defined the seat, but have defined the venue

This situation has arisen multiple times and has evolved over four phases in Indian jurisprudence. In the first phase, the judgment which discussed the notion of seat and venue in great detail, was the *Bharat Aluminium case*.²⁸ The Supreme Court reflected upon the established *Shashoua principle* of English jurisprudence, advanced by Justice Cooke in the *Roger Shashoua v. Mukesh Sharma*.²⁹ The *Shashoua principle* establishes that if an agreement

²⁷ *Enka Insaat Ve Sanayi AS v OOO 'Insurance Company Chubb' & others* [2021] 2 All ER 1.

²⁸ *Bharat Aluminium Co v Kaiser Aluminium Technical* [2016] 4 SCC 126.

²⁹ *Roger Shashoua v Mukesh Sharma* [2009] 2 Lloyd's Rep 376.

explicitly specifies a venue without any express reference to the seat and there is no significant evidence indicating a different intention, the venue will be interpreted as the seat of arbitration. The Supreme Court likewise recognised and upheld this idea in *Enercon (India) Ltd. v. Enercon GmbH*.³⁰ In this instance, the Court found that even though London was designated as the venue for arbitration, all relevant laws (substantive, curial, and arbitration) were Indian, indicating that India should be considered the seat of arbitration. This conclusion relies on the *Shashoua principle*, which suggests that if a venue is specified without a designated seat and no significant opposing factors, the venue can be regarded as the seat.³¹ The Court extensively used the *Shashoua principle* to reach these abovementioned decisions.

However, in the second phase, the Supreme Court held in *Union of India v. Hardy Exploration and Production (India) Inc. (“Hardy Exploration”)*³² that a venue does not automatically qualify as the seat of the arbitration. For its designation as a seat, there must be an explicit action accompanied by relevant supporting factors. It does not automatically acquire the status of a seat.

In the third phase, a similar question was reassessed in the *BGS Soma* case,³³ wherein the Supreme Court concluded that when a clause specifies a venue, and states that the arbitration would take place there, it means that the same location is the seat. The fact that there is no mention of the seat further supports the idea that the venue is the seat. As a result, the Court upheld the *Shashoua principle* again and ruled that the position of *Hardy Exploration* was “not good in law” since it went against the principles established by the *Bharat Aluminium* case.

In the final phase, the *Mankatsu Impex Ltd. v. Airvisual Ltd. (“Mankatsu Impex”)* decided by the Supreme Court held that mere mentioning of the place of arbitration would not necessarily entail that the parties intended it to be the seat.³⁴ Other provisions of the agreement and the parties’ actions must be used to ascertain the parties’ intention regarding the seat. This seems to be a viewpoint that leans more in the direction of the ratio discussed in *Hardy Exploration*. The Court’s reasoning in *Mankatsu Impex* likewise ran counter to the findings in the *BGS Soma* case, which went further than the *Bharat Aluminium* case and found that, without

³⁰ *Enercon (India) Ltd. v. Enercon GmbH* [2014] 5 SCC 1.

³¹ *ibid.*

³² *Union of India v. Hardy Exploration and Production (India) Inc.* [2019] 13 SCC 472.

³³ *BGS SGS Soma JV v. NHPC Ltd.* [2020] 4 SCC 234.

³⁴ *Mankatsu Impex Ltd. v. Airvisual Ltd.* [2020] 5 SCC 399.

contraindications, the identification of a venue and a supranational body of regulations would also amount to the designation of a seat.

Over these four phases, the Indian judiciary has oscillated between adherence to the *Shashoua principle* and having a more fact-intensive approach. While *Bharat Aluminium* and *BGS Soma* established a presumption favouring the venue as the seat, *Hardy Exploration* and *Mankatsu Impex* emphasised the need for explicit intent and supporting evidence. This evolution reflects the judiciary's ongoing effort to balance party autonomy with legal clarity in arbitration agreements.

(ii) *Seat of arbitration and exclusive Jurisdiction clause both are mentioned*

In *Devyani International* and a few other cases, the arbitration agreement stated the seat to be Delhi while empowering the courts of Mumbai with exclusive jurisdiction upon disputes arising out of the same arbitration.³⁵ In these situations, courts have ruled that the exclusive jurisdiction resides with the courts located within the designated seat of arbitration. Further, in the case of *Aniket Sa Investments LLC*³⁶ and *BGS Soma*, the Courts have repetitively determined that choosing a “seat” amounts to selecting the exclusive jurisdiction of the Courts at which the seat is located.

The Delhi HC attempted to harmonise the aforementioned ideas in the recent case of *Manmohan Kapani v. Kapani Resorts Ltd.* (“**Manmohan Kapani**”),³⁷ ruling that the exclusive jurisdiction clause should not take precedence over the arbitration's seat unless it specifically addresses the proceedings related to arbitration. A jurisdiction clause would only be applicable if the parties did not use arbitration.

These instances show a distinct trend in Indian jurisprudence, prioritising the seat of arbitration when determining exclusive jurisdiction. Nonetheless, rulings such as *Manmohan Kapani* demonstrate the careful method courts use to harmonise contradictory provisions, guaranteeing that arbitration agreements are construed to preserve procedural clarity while honouring party autonomy.

(iii) *When seat, venue and exclusive jurisdiction clause is not given*

³⁵ *Devyani International Ltd. v Siddhivinayak Builders and Developers* [2017] SCC OnLine Del 11156.

³⁶ *Aniket Sa Investments LLC v Janapriya Engineers Syndicate Ltd.* [2021] SCC OnLine Bom 919.

³⁷ *Manmohan Kapani v Kapani Resorts Ltd.* [2023] SCC OnLine Del 1618.

An arbitration proceeding can occur in a neutral location, which may not have the legal authority to handle the dispute if the cause of action did not occur there.³⁸ However, where seat, venue and exclusive jurisdiction clauses are not given, the seat is determined where the cause of action originated.³⁹ This would not invalidate the legitimacy of the arbitration's location. Courts with supervisory jurisdiction would still have the authority granted by the Act to exercise their powers accordingly. The High Court distinguished *Indus Mobile Distribution* by noting that the parties had not only agreed upon the location of arbitration but also included an exclusive jurisdiction clause that explicitly excluded the jurisdiction of other countries. The Court held that cause of action will become relevant in the cases where there is no exclusive jurisdiction clause. However, when the arbitration agreement specifies a seat, the designated seat must take precedence, even if the cause of action did not arise at that location. This reinforces the principle that the choice of seat reflects the parties' intent to confer exclusive jurisdiction on the courts at that location.⁴⁰

(iv) *Situation when the venue will override the presence of exclusive jurisdiction clause*

A relevant situation to consider would be the one where venue and exclusive jurisdiction clauses are given. In *Raman Deep Singh Taneja v. Crown Realtech Ltd.* (**"Raman Deep Singh Taneja case"**), the clause designated Faridabad, Haryana, as the arbitration location and granted exclusive jurisdiction to the Delhi courts.⁴¹ The Delhi HC granted the venue primacy over the Delhi courts' exclusive jurisdiction. It concluded that the Delhi courts have exclusive jurisdiction over cases that need to be settled beyond the purview of arbitration. However, the courts in Faridabad, Haryana, have exclusive jurisdiction when arbitration is selected as the dispute resolution process, and the venue would be in Faridabad.

In *the Global Credit Capital Ltd. v. Crown Realtech Ltd.*, the Delhi HC, faced with a similar situation, referred to the judgment of the *Raman Deep Singh Taneja case*.⁴² The Court opined that the designation of venue would take precedence over an exclusive jurisdiction clause. In the subsequent ruling, *Yassh Deep Builders LLP v. Sushil Kumar Singh*,⁴³ a division bench of the same court reaffirmed this position.⁴⁴ The Bench clarified that an exclusive jurisdiction

³⁸ *BGS SGS Soma JV v NHPC Ltd.* [2020] 4 SCC 234.

³⁹ *L&T Finance Ltd. v Manoj Pathak and Ors.* [2020] SCC OnLine Bom 177.

⁴⁰ *Delhi Tourism & Transportation Development Corporation v Satiner Mahajan* [2024] SCC OnLine Del 3206

⁴¹ *Raman Deep Singh Taneja v Crown Realtech Ltd.* 2017 SCC OnLine Del 11966

⁴² *Global Credit Capital Ltd. v Crown Realtech Ltd.* [2017] SCC OnLine Del 11966

⁴³ *Yassh Deep Builders LLP v Sushil Kumar Singh* [2024] SCC OnLine Del 1547

⁴⁴ *Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.* [2017] 7 SCC 678.

clause can override a venue designation only if it is explicitly included within the arbitration clause itself rather than as an independent provision. Furthermore, the court emphasised that the exclusive jurisdiction clause applies only when parties opt out of arbitration or when the arbitration clause is deemed inapplicable to the dispute. Therefore, these rulings collectively establish that the courts have consistently prioritised the venue as the seat of arbitration over an exclusive jurisdiction clause.

Several High Court rulings, however, have adopted a different stance and saw the party's decision to grant exclusive jurisdiction to another court as a contrary indicator that precludes the location from serving as the arbitration's seat. In *Cravants Media Ltd. v. Jharkhand State Coop. Milk Producers Federation Ltd.*⁴⁵ the High Court addressed a similar inconsistency. It observed that when parties specify exclusive jurisdiction in a location different from the designated arbitration venue, it indicates that the chosen venue was intended for convenience rather than serving as the actual seat of arbitration. Similarly, in the *Homevista Décor and Furnishing Ltd. Case*,⁴⁶ the Hon'ble Calcutta High Court weighed in on this issue, ruling that an exclusive jurisdiction clause designating a different forum serves as a strong indication that the chosen venue should not be interpreted as the seat of arbitration.

The above rulings testify that courts generally regard the venue as the arbitration's seat, granting it precedence over exclusive jurisdiction clauses. However, where parties explicitly designate an exclusive jurisdiction unrelated to the venue, courts may interpret this as an indication that the venue was intended as a place of convenience rather than the true arbitration seat.

B. Present Situation Entailing Seatless Arbitration

Given that party autonomy is a fundamental principle in arbitration, court rulings have established that an arbitral seat clause generally holds priority over an exclusive jurisdiction clause. This rule may be set aside only when the parties have explicitly and consciously agreed otherwise. However, when an arbitration agreement includes a conflicting exclusive jurisdiction clause and merely designates a venue or place of arbitration, a more nuanced analysis becomes essential. This prudence stems from the essential difference between an arbitration's "seat" and a simple "venue."

⁴⁵ *Cravants Media Ltd. v Jharkhand State Coop. Milk Producers Federation Ltd.* [2021] SCC OnLine Del 5350

⁴⁶ *Homevista Decor and Furnishing Ltd. v Connect Residuary Ltd.* [2023] SCC OnLine Cal 1405

The seat is crucial because it establishes the pertinent courts' supervisory jurisdiction and the legislative framework that governs the arbitration processes. Conversely, the choice of location is often made for practical purposes, serving primarily as a logistical convenience for the proceedings. A contrary exclusive jurisdiction clause (without other considerations) might not be a significant contrary indicator, though, as a venue may also be regarded as indicative of the parties' intention to treat the same as the arbitration's seat in the absence of a specific clause providing for it. However, given the differing opinions, the courts may adopt a different stance, as seen by some of the rulings that have been addressed.

A generalized position of law can be established from the various cases discussed so far. Table 1 below summarizes the above discussion by delineating the types of seatless arbitration clauses with their respective case of precedence in terms of seat, venue, etc.

S. No.	Clause type	Precedence
1.	When the seat and exclusive jurisdiction both are mentioned in the agreement.	The seat will prevail. ⁴⁷
2.	When venue and exclusive jurisdiction both are mentioned in the agreement.	Venue will prevail if the parties intend to make it the seat. ⁴⁸
3.	Neither seat nor venue is named in an arbitration clause/agreement.	Other factors, such as the cause of action, might be considered. ⁴⁹
4.	When the exclusive jurisdiction clause is mentioned in the agreement and the seat is not mentioned.	Exclusive Jurisdiction would be treated as the seat. ⁵⁰

Table 1: Types of Seatless Arbitration Clauses

⁴⁷ *Devyani International Ltd. v Siddhivinayak Builders and Developers* [2017] SCC OnLine Del 11156.

⁴⁸ *Balapreetham Guest House Ltd. v My preferred Transformation and Hospitality Ltd.* [2021] SCC OnLine Mad 1126.

⁴⁹ *BBR (India) Pvt. Ltd. v S.P. Singh* [2023] 1 SCC 693.

⁵⁰ *Sanjay Kumar Verma v Planning and Infrastructural Development Consultants Pvt. Ltd.* [2024] SCC OnLine Del 59.

IV. IMPLICATIONS OF SEATLESS ARBITRATION FROM AN INTERNATIONAL PERSPECTIVE

Across the globe, different conventions have similar but slightly different approaches to seatless arbitration. UNCITRAL Model Law countries, courts apply Art. 20 and the ‘Conflict of Laws’ rules (“COL”) to designate the seat in a seatless arbitration clause. This Model Law in Art. 20 states that on the failure of parties to agree on a place of arbitration, it ‘*shall be determined by the arbitral tribunal having regard to the circumstances of the case.*’⁵¹ The phrase ‘*circumstances of the case*’ herein refer to the unique factual matrix and party intention in each case, depending on which seat designation will differ. COL delineates elements of those facts, e.g., domicile, territory of operation of parties, etc., to conclude a place as the seat.

Similarly, the European Convention in Art. 8 requires the application of ‘*proper law under the rule of conflict that the arbitrators deem applicable*’ when parties fail to agree on the seat.⁵² Under the ‘*Inter-American Convention*’ for International Commercial Arbitration (“ICA”) and the ‘*New York Convention*,’ national laws are applied on failure to expressly designate seats, again while referring to COL.⁵³

These rules are the ‘connecting factors’ and differ from country to country. For determining seat law, COL of different jurisdictions may require considering the domicile of parties, the territory of operation, the ‘*most closely connected law to the arbitration agreement*’ or the underlying contractual law in the absence of any ‘*express or implied choice of seat.*’⁵⁴ However, to prevent confusion created by contending substantive laws and COL of different nations, courts developed the ‘*Common Choice of Law Framework*,’⁵⁵ constituting a determinative test to designate the seat in international arbitration. This framework is three-tiered and multifaceted; however, it best helps an arbitral tribunal to designate the seat in any

⁵¹ UNCITRAL Model Law on International Commercial Arbitration, 1985, Art. 20.

⁵² The European Convention on International Commercial Arbitration, 1961, Art. 8.

⁵³ Convention on Recognition and Enforcement of Foreign Arbitral Award, Art. V(1)(a); Dongdoo C., ‘Choice of Law Rules Applicable for International Arbitration Agreements’ (2015) 11 Asian Int’l Arb. J. 105 [hereinafter ‘Dongdoo’]; Ian G. and Niranjana V., ‘Choosing the Law Governing the Arbitration Agreement’, *Jurisdiction, Admissibility and Choice of Law in International Commercial Arbitration* by Neil K. & J. Moser (eds) 131 (Kluwer Law International, 2018); Maxi Scherer & Ole Jensen, ‘Implied Choices and Close Connections: Two Pervasive Issues Concerning the Law Governing the Arbitration Agreement’, *State of Arbitration: Essays* by Julie Bedard & Patrick W. Pearsall (eds.), 667 (Juris 2022); Enka Insaat Ve Sanayi AS v OOO ‘Insurance Company Chubb’ & Ors. [2021] 2 All ER 1; BNA v BNB [2019] SGCA 84.

⁵⁴ Adrian Briggs, Adrian, *The Conflict of Laws* (5th edn., Oxford Academic 2024) <<https://doi.org/10.1093/oso/9780198895527.001.0001>> last accessed 23 November 2024.

⁵⁵ Fiona Trust & Holding Corp. v Privalov [2007] UKHL 40; Kabab-ji (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48, para. 52.

pathological clause. The seat requires a determination of an express choice, an implied choice, and the closest and most real connection to the matter. The following sections elaborate upon this method.

A. Express and Implied Choice

Express choice of seat is considered, where parties have expressly designated a seat, the same is to be effectuated without any further consideration.⁵⁶ Well-drafted arbitration clauses that delineate the applicable laws expressly, including the seat law, can be effectuated by any tribunal. However, consideration to party intention becomes imperative while arriving at the implied choice of law.⁵⁷ This is often also referred to as the tacit choice of law, which is deciphered through a consideration of different factors,⁵⁸ such as the law of the underlying matrix contract,⁵⁹ the venue⁶⁰ or the exclusive jurisdiction clause,⁶¹ etc.

The first factor enumerates the business sense of parties, where parties to the contract see the arbitration clause as part and parcel of the matrix contract.⁶² This reflects a party's intention of applying the law of the contract as the law of the arbitration agreement. The other two factors of the venue and the exclusive jurisdiction clause are more strongly advocated by scholars as indicative of implied choice, resonating the separability of the arbitration agreement from the main contract.⁶³

While English and Indian Courts have adopted the venue clauses to mean implied choice, jurisdictions such as China, the US, etc., have inclined to the law of the matrix contract. To strike a balance, the courts in Singapore have consistently opined that while the separability doctrine usually incapacitates the law of the matrix contract to apply to the arbitration agreement, from a commercial sense of the parties, assuming that the arbitration clause is separate from the main contract is undesirable. Thus, the law of the main contract shall

⁵⁶ *ibid.*

⁵⁷ *Black Clawson International Ltd. v Papierwerke AG* [1982] 2 Lloyd's Rep 446; *Sonatrach Petroleum Corporation v Ferrell International Ltd* [2002] 1 All ER (Comm) 627.

⁵⁸ Redfern and Hunter at 159; Dongdoo at 105.

⁵⁹ Dicey, *The Conflict of Laws* (14th edn, Sweet & Maxwell, 2000), para 16; Mustill and Boyd, *Commercial Arbitration* (2nd edn, LexisNexis Butterworths, 1989).

⁶⁰ M Blessing, 'The Law Applicable to the Arbitration Clause, in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention' by A van den Berg (ed.) (Kluwer, 1999)

⁶¹ Gary Born at 552–553.

⁶² *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 [*hereinafter* 'Sulamérica']; *BCY v BCZ* [2016] SGHC 249; *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co. Ltd.* [2013] EWHC 4071 (Comm); *National Thermal Power Corp. v The Singer Co.* [1992] 3 SCC 551.

⁶³ *FirstLink Investments Corp. Ltd v GT Payment Pte Ltd* [2014] SGHCR 12.

logically apply where the party's intention does not indicate otherwise. The same would prevent invalidation of the pathological arbitration clauses. This complements the validation principle upheld by several courts.⁶⁴

B. Closest and Most Real Connection Test

The 'closest and most real connection' test applies in the absence of any express or implied choice of law by parties. Drawing from the English position in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* ("**Sulamerica case**"), this test has been substantially inculcated in the arbitration jurisprudence in India and several other jurisdictions.⁶⁵ The test has been interpreted to consider various factors connected to the arbitration agreement, be it the cause of action where arising, the place of incorporation of the parties,⁶⁶ where the business operations exist,⁶⁷ where the dispute was first submitted for hearing,⁶⁸ or the location which would be the most convenient for the parties. The concerning factor is which among these factors would be considered to calculate the closest and most real connection. Tribunals have exercised a free hand to consider whichever factor they find appropriate to designate the connected law, and the same would become the arbitration seat.⁶⁹

This three-tiered test may benefit ad-hoc and institutional arbitrations, providing arbitrators with a definitive scale for seat designation. However, the ever-growing uncertainty over the multifaceted considerations of this three-fold test prevents international tribunals from applying COL, which forms the essence of private international law.⁷⁰ Further, it creates a disparity between the approaches by national courts in domestic arbitration, which are bound to apply the national COL and the arbitral tribunals ICA, which may apply merely a soft standard, i.e. the three-tiered test. This test leaves it to the arbitral tribunal to consider which factor at each stage of this test is to be considered, leading to conflicting positions in the ICA jurisprudence.

⁶⁴ Shouvik Bhattacharya, Saurav Rajurkar, 'What's the Law?' (2022) 39 Jnl. of Int. Arb 4, at 593-610 <<https://kluwerlawonline.com/journalArt/Journal+of+International+Arbitration/39.4/JOIA2022026>> last accessed 29 November 2024; HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studios Ltd, 2014 SCC OnLine Bom 102, para 73.

⁶⁵ Vidya Drolia v Durga Trading, paras 151 and 227; Enercon (India) Ltd & Ors v Enercon GmbH (2014) 5 SCC 1, para 137; PTI, "India Becoming Hub of International Arbitration Will Also Promote Ease of Doing Business: Kiren Rijju" *The Economic Times* (July 15, 2021) <<https://m.economictimes.com/news/india/india-becoming-hub-of-international-arbitration-will-also-promote-ease-of-doing-business-kiren-rijju/Art.show/84449793.cms>> last accessed 29 November 2024.

⁶⁶ *OJSC Ukrnafta v Carpatsky Petroleum Corp.* [5th Cir. 2020] 957 F.3d 487.

⁶⁷ *ibid.*

⁶⁸ *BBR (India) Pvt. Ltd. v S.P. Singla* [2023] 1 SCC 693.

⁶⁹ Rules of the Arbitration Institute of the SCC, Art. 22(1); SCC, *Stockholm Arbitration Report* (SCC 2002) 59.

⁷⁰ Goldman, 'La lex mercatoria dans les contrats et l'arbitrage internationaux: Réalité et perspectives' (1979) *J du Droit Intl* 475; *Sapphire Int Ltd. v The National Iranian Oil Co.* [1964] 13 ICLQ 1011.

V. COMPARATIVE APPROACHES TO SEATLESS ARBITRATION- FOREIGN JURISDICTIONS VIS-À-VIS INDIA

Courts across arbitration hubs have taken different approaches to seatless arbitration clauses while examining to decipher the ‘*implied choice of law*’ or the ‘*closely connected law*’ as mentioned above in the three-fold test. A comparative discussion on the manner of applying such a test in different jurisdictions becomes quintessential to arrive at a uniform standard towards seatless clauses. The following section highlights jurisdiction-specific approaches to seatless arbitration clauses.

A. Australian Courts

Australia has adopted the New York Convention, reflecting the same in its International Arbitration Act of 1974.⁷¹ On a prescriptive note, Art. 28(1) requires tribunals to apply COL to consider the applicable law. Courts have differed on cases of pathological arbitration clauses that do not delineate the seat.⁷² In situations where seat law has not been separately stated in the arbitration agreement, the tribunal has applied the law applying to the matrix contract.⁷³

Hence, comparatively, the international arbitration jurisprudence of the US, India and Australia offer a similar stance.⁷⁴ These jurisdictions currently give the tribunal the *kompetenze-kompetenze* to decide upon the law governing the assets to designate seat law and whether it has jurisdiction over the matter. Yet, an important aspect that sets Australian jurisprudence apart from its Indian counterpart is that international arbitration awards cannot be subjected to appeal in Australia. For domestic arbitration, an appeal is accepted only if parties agree under Section 34A of its Commercial Arbitration Act,⁷⁵ and if the courts allow it.

B. Chinese Courts

Art.18 of the ‘Law on Foreign-Related Civil Relations’⁷⁶ empowers Chinese courts to decide upon the seat. However, these statutory provisions have produced negligible guidance to these

⁷¹ International Arbitration Act 1974, No. 136, 1974 (9 November 2018).

⁷² Edwina Kwan and Domenico Cucinotta, ‘The Conflicting Lore of Applicable Law: How Australian and Chinese Courts Determine the Governing Law of Arbitration Agreements’, (*Kluwer Arbitration Blog*, January 8, 2021) <<https://arbitrationblog.kluwerarbitration.com/2021/01/08/the-conflicting-lore-of-applicable-law-how-australian-and-chinese-courts-determine-the-governing-law-of-arbitration-agreements/>> last accessed 5 November 2024.

⁷³ *IBM Australia Ltd v National Distribution Services Pty Ltd*. [1991] 22 NSWLR 466; *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd*. [2021] QSC 75.

⁷⁴ International Arbitration Act 1974 (6th) Sch. 2, Arts. 8, 16.

⁷⁵ Commercial Arbitration Act 2017.

⁷⁶ Law of the People’s Republic of China on the Application of Laws to Foreign-Related Civil Relations, 2011.

courts on the manner in which the court shall analyse the seat, when not already mentioned. Previously, Chinese courts have showcased an apathy towards seatless arbitration agreements. For example, the Taizhou Intermediate People's Court of China, in the *Taizhou* case of 2012,⁷⁷ interpreted a seatless arbitral clause as invalid. This position has also been upheld by the Supreme People's Court of China.⁷⁸ Courts of Hong Kong have also held the arbitration clause invalid due to the non-mention of the seat.⁷⁹ Further, the *Wuxi Wo* case⁸⁰ signified the necessity to specify an arbitral institution, and held that any arbitration agreement of domestic parties choosing a non-Chinese arbitral institution would be invalid under Chinese law.⁸¹

Moving towards a more lenient stance on seatless arbitration, Chinese courts temporarily followed the 'institution standard', where the institution's domicile of the arbitration became the seat.⁸² Therein, the courts in Paris would become the seat court for an ICC arbitration, as ICC headquarters are in Paris. This does not consider ICC offices in Hong Kong and Shanghai.⁸³ Hong Kong International Arbitration ("**HKIAC**") Rules provide that whenever its rules are used, and the seat has not been mentioned, Hong Kong becomes the seat by default unless the courts otherwise determine it.⁸⁴ Chinese arbitral institutions have opined that absent party agreement regarding the arbitration seat, the arbitration will take place in the arbitration's domicile (headquarters) or, in the case of the China International Economic and Trade

⁷⁷ *Taizhou Haopu Investment Co., Ltd. v Wicor Holding AG, Taizhou Court, P. R. China, Case Docket Number: [2015] Tai Zhong Shang Zhong Shen Zi No. 00004* (2 June 2016).

⁷⁸ Supreme People's Court Reply on Castel Electronics Pty Ltd.'s Application for Recognition and Enforcement of Foreign Arbitral Award, [2013] Min S., No. 46 (10 October 2013); 'Taizhou Intermediate People's Court Refuses Recognition and Enforcement of ICC Award on Basis of Public Policy' (*HSF Arbitration Notes*, September 13, 2016) <<https://www.herbertsmithfreehills.com/notes/arbitration/2016-09/taizhou-intermediate-peoples-court-refuses-recognition-and-enforcement-of-icc-award-on-basis-of-public-policy>> accessed 26 November 2024.

⁷⁹ Philipp Hanusch, "Failure to Specify Arbitral Seat in the Arbitration Clause May Result in Unenforceable Award - Global Arbitration News" (*Global Arbitration News*, July 5, 2023) <<https://www.globalarbitrationnews.com/2016/09/21/failure-specify-arbitral-seat-arbitration-clause-may-result-unenforceable-award/#:~:text=Actions%20to%20Consider,the%20circumstances%20of%20the%20case>> last accessed 30 November 2024.

⁸⁰ *Züblin International, GmbH v Wuxi Woco-Tongyong, Rubber Engineering Corporation*, ICC Case No. 12688/TE/MW

⁸¹ 'China International Arbitration Comparative Guide - All Chapters' <<https://www.mondaq.com/guides/results/2/145/all/china-international-arbitration>> last accessed 30 November 2024.

⁸² S. Wei, M. Willems, *Arbitration in China: A Practitioner's Guide* (Kluwer Law International, 2015) 104; Chinese Civil Procedure Law, 2024, Art. 290; Ximin Sanzhongzi Di [Xupulin International GmbH's Application for Annulment of a Foreign Arbitral Award], Wuxi Intermediate People's Court, 19 July 2006.

⁸³ Jus Mundi, "China: Court Confirms 'Seat Standard' and IBA Guidelines/Rules in Setting aside Proceedings" <<https://jusmundi.com/en/document/publication/en-china-court-confirms-seat-standard-and-iba-guidelines-rules-in-setting-aside-proceedings>> last accessed 30 November 2024.

⁸⁴ HKIAC Administered Arbitration Rules, Art. 14.1; 'Choosing Venue for Arbitration' (*LawAsia*, November 13, 2020) <<https://law.asia/choosing-venue-for-arbitration/#:~:text=As%20seat%20and%20venue%20bear,of%20experienced%20arbitrators%20and%20counse>> last accessed 6 November 2024.

Arbitration Commission and the China Maritime Arbitration Commission, at the relevant branch location of such institution.⁸⁵

However, China has transitioned towards the ‘seat standard’ with time, wherein the Chinese courts will have jurisdiction over foreign-related arbitrations seated in mainland China, such as ICC arbitration, which is seated in Shanghai.⁸⁶ The courts have endorsed party intention frequently in interpreting implied choice of seat law. Some parties, hence, have also successfully applied the ‘floating seat’ concept, where if one of the parties commences arbitration, the seat would automatically be of the respondent’s jurisdiction.⁸⁷ Regarding enforcement, the party may request interim measures from the Chinese courts to support arbitrations held in Hong Kong and administered by accredited organisations.⁸⁸

Like India, Chinese courts have also considered the concept of venue in their evolving jurisprudence, despite not explicitly mentioning it in their ‘institution standard’ and ‘seat standard’. Yet, compared to China, Indian courts have showcased a more lenient approach towards seatless arbitration clauses. While both jurisdictions provide minimal space to party intention, India could be considered to have had a less rigid stance towards pathological clauses not mentioning the seat of arbitration.

C. English Courts

The English jurisprudence has substantially delved into the concept of seatless arbitration clauses. The courts of England have evolved from a position of predominant bias to designate England as the seat to a more nuanced approach considering party intention. In the landmark *Naviera Amazonica* case⁸⁹ heard in the English ‘Court of Appeal’ in 1987, the concerned clause provided for arbitration to proceed “*under the conditions and laws of London*”; however,

⁸⁵ CMAC (China Maritime Arbitration Commission) Arbitration Rules (2021); China International Economic and Trade Arbitration Commission, 2015.

⁸⁶ *Züblin International GmbH v Wuxi Woco-Tongyong Rubber Engineering Co. Ltd.* 8 July 2004; Ningbo IPC in *Duferco S.A. v Ningbo Art & Craft Import & Export Corp.*, 2008; ZHU and Weidong, ‘Law Applicable to Arbitration Agreements in China’, vol. XI (2009) in Andrea Bonomi and Paul Volken (eds.), Berlin, New York: Otto Schmidt/De Gruyter European law pub 2010, 255-264; *China Light Tri-union Int’l Co., Ltd. v Tata International Metals (Asia) Ltd.* [2017] Jing Min 04 Min Te No. 25.

⁸⁷ Philipp Hanusch, “Failure to Specify Arbitral Seat in the Arbitration Clause May Result in Unenforceable Award - Global Arbitration News” (*Global Arbitration News*, July 5, 2023) <<https://www.globalarbitrationnews.com/2016/09/21/failure-specify-arbitral-seat-arbitration-clause-may-result-unenforceable-award/#:~:text=Actions%20to%20Consider,the%20circumstances%20of%20the%20case>> last accessed 6 November 2024.

⁸⁸ “Mainland China-Hong Kong Interim Measures Arrangement One Year on: Crossing the River by Feeling the Stones” (*Kluwer Arbitration Blog*, August 10, 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/08/10/mainland-china-hong-kong-interim-measures-arrangement-one-year-on-crossing-the-river-by-feeling-the-stones/>> last accessed 5 November 2024.

⁸⁹ *Naviera Amazonica Peruana S.A. v Compania Internacional De Seguros Del Peru* [1988] 1 Lloyd’s Rep. 116.

another clause in the same agreement provided the courts in the City of Lima to be approached to settle any dispute. It was noted that the arbitration clause clarified upon the seat and that implementing a reference to the courts of Lima would be prejudicial to the intent to provide for a seat and grant jurisdiction to English courts.

Similarly, in *McDonnell Douglas Corp. v. Green*,⁹⁰ where the IAA was to apply, and London was mentioned as the seat, a Queen's bench strictly opined that the English law was to apply, except for the procedural rules of the IAA. In cases where no seat was mentioned, for instance, in the *Dubai Islamic Bank* case in 2001, a Queen's bench designated London as the seat due to a part of the arbitration already being held consensually in London. Thus, over the years, English courts had consistently designated London as the seat on any slight mention of the English Arbitration Act or courts of England, making negligible space for implications of party intention. This has been popularly called the '*London Bias*' of English courts while ruling on arbitration matters.⁹¹

The English Court of Appeals in the *Sulamerica* case also devised the most popular three-stage enquiry test, involving express choice, implied choice and the 'closest and most real connection' with the arbitration agreement, step-wise. However, in furtherance of the London bias still persisting, the court held the proper law of the arbitration to be English Law and the seat to be England, despite the agreement allotting Brazilian Courts to have jurisdiction and the contract being governed by Brazilian Law. The Court reasoned this through the mention of English Law as the governing law of the arbitration agreement.

More recently, English courts have moved towards a 'venue' inclined approach. In the *Shagang* case of 2015,⁹² an English court ruled Hong Kong as the seat, even mentioning that '*choice of venue would import the lex arbitri*' of that place. Similarly, in the *Process and Industrial Developments* case of 2019,⁹³ primacy was given to the venue while designating the seat. Thus, over several years, implied choice in English Courts has been inclined towards the 'venue' wherever mentioned. This approach parallels the Indian jurisprudence, where the venue has also been given primacy.

⁹⁰ *McDonnell Douglas Corp. v Green* [1973] 411 US 792.

⁹¹ "Bias by Arbitrators: The UK Supreme Court Clarifies the Law" *Insights | Sidley Austin LLP* (December 16, 2020) <<https://www.sidley.com/en/insights/publications/2020/12/bias-by-arbitrators-the-uk-supreme-court-clarifies-the-law>> last accessed 5 November 2024.

⁹² *Daewoo Logistics v Shagang South-Asia (Hong Kong) Trading Co. Ltd.* [2015] EWHC 194 - 2 févr. 2015.

⁹³ *Process and Industrial Developments Ltd. v The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, No. 21-7003 (D.C. Cir. 2022).

D. Russian Courts

The Russian law for arbitration is predominantly Model Law based.⁹⁴ Similar to the Chinese jurisdictions, Russian courts have previously held seatless arbitration clauses to be unenforceable.⁹⁵ Thereafter, Russia's Supreme Court has grown towards a more pro-arbitration stance, with a mildly increased recognition of foreign arbitral institution recommended clauses.⁹⁶ The '*International Commercial Arbitration Court*' of Russia, in particular, provides that where seat law is not mentioned, the arbitral tribunal shall decide based on the circumstances and convenience of the parties.⁹⁷ Further, the Russian Civil Code also provides a COL that defines applicable seat law where a 'foreign element' is involved in the dispute.⁹⁸ The Russian Civil Code provides that on the failure of parties in choosing a governing law, the law of the main executor location shall be applied.⁹⁹ This approach provides moderate significance to the parties' implied choice when compared to the Indian jurisprudence.

Nevertheless, despite several efforts to create an arbitration-friendly environment, since February 2022 (post the Russia-Ukraine crisis), the enforcement of Western awards has become limited. In August 2022, the Moscow Circuit Arbitrazh Court refused to enforce an LCIA award against a Russian corporation, stating potential impacts on the national budget as an excuse.¹⁰⁰ Similarly, arbitration proceedings with countries sanctioned by Russia or countries sanctioning Russia have significantly been affected.¹⁰¹ Arts. 248.1 and 248.2 of the Russian Court for Arbitral Procedure¹⁰² provide Russian Courts with exclusive jurisdiction over cases involving sanctioned entities. This allows domestic courts to injunct foreign arbitration awards.¹⁰³ In 2023, the Arbitrazh Court of Saint Petersburg and Leningrad Region invalidated an HKIAC arbitration clause seated in Hong Kong due to anti-Russia sanctions.¹⁰⁴ With regard to

⁹⁴ Federal Law No 382-FZ, 'On Arbitration in the Russian Federation', 29 December 2015.

⁹⁵ *Bowers Hydraulic Dredging Co. v United States* N A40-176466/2017.

⁹⁶ "Wind of Change in Russian Arbitration: Review of Supreme Court Clarifications" (*HSF*, 29 April 2019) <<https://www.herbertsmithfreehills.com/notes/arbitration/2019-04/wind-of-change-in-russian-arbitration-review-of-supreme-court-clarifications>> last accessed 27 December 2024.

⁹⁷ Russian Federation on International Commercial Arbitration, Art. 20(1).

⁹⁸ Federal Law No 146-FZ, 26 November 2015.

⁹⁹ Civil Code of the Russian Federation, 1995, Art 1211.

¹⁰⁰ *Banwell International Limited v Rosshelf Llc*. LCIA Case No. 173595.

¹⁰¹ *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64.

¹⁰² Arbitration Procedural Code of the Russian Federation No. 95-FZ, 2002.

¹⁰³ *PESA Bydgoszcz SA v UralTransMash* SCC Case No. V2018/114.

¹⁰⁴ *VTB Bank PJSC v VTB Bank (Europe) SE* (No. A56-84760/2023); *Rosneft v BP Oil International* (No. A40-197598/2023); *Ruschemalliance v Linde* (case No. A56-129797/2022); *Sberbank v Glencore Energy UK* (case No. A40-237252/2022).

enforcement, Russia has relied heavily on the 1958 New York Convention and the 1993 Minsk Convention on Legal Assistance between the CIS states.¹⁰⁵

E. Singaporean Courts

Singaporean courts have consistently prioritised ‘party intention’ while interpreting implied choice of seat law.¹⁰⁶ They have often held that the general jurisdiction clauses can create supervisory jurisdiction of a court to oversee the arbitration, given there was an implied party intention for the same.¹⁰⁷ In the recent *Silverlink Resort v. First Capital Insurance Ltd.* case,¹⁰⁸ Judge Heng stated that disputes carved out of the arbitration clause could be validly governed by the general jurisdiction clause, if the parties intended so. It was also emphasised that party intention must be given a ‘*generous and harmonious*’ construction. That being said, parties can intend to subject a category of disputes to litigation through the general jurisdiction clause and another category to arbitration. For example, while labour disputes might be required to be arbitrated, other disputes can be taken to court. The court also cited cases from Australian¹⁰⁹ and New Zealand¹¹⁰ jurisdictions in support, where courts have propagated similar views.¹¹¹

Further, in the *Paul Smith Ltd.* Case, where the arbitration clause and general jurisdiction clause explicitly conflicted with each other, the courts gave a ‘*generous interpretation*’ by construing the jurisdiction clause as the seat. Hence, rather than adopting a technical approach, courts in Singapore have rationally construed party intention to interpret the implied choice.¹¹²

Unlike the Indian approach, there is negligible recourse to the mentioned venue or *cause of action*’ approach of *Kings Chariot* while determining the seat. Hence, a stark line of difference may be drawn between the Singaporean and Indian approaches to interpreting factors of implied choices. This difference exists despite both jurisdictions adopting the UNCITRAL Model

¹⁰⁵ Marina Akchurina, ‘Russia’s Supreme Court Discusses Key Arbitration-Related Cases’ (*Cleary Gottlieb*, January 17, 2019) < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.clearygottlieb.com/-/media/files/alert-memos-2019/2019_01_17-russias-supreme-court-discusses-landmark-arbitrationrelated-cases-eng-pdf.pdf > last accessed 5 November 2024.

¹⁰⁶ Andrea Utasy Clark, “Singapore Court Issues Landmark Ruling on ‘Law of Seat’ to Determine Arbitrability” *Pinsent Masons* (December 9, 2021) <<https://www.pinsentmasons.com/out-law/news/singapore-court-ruling-law-of-seat-arbitrability>> last accessed 30 November 2024.

¹⁰⁷ *Paul Smith Ltd. v H&S Inc.* [1991] 2 Lloyd’s Rep 127; *BXH v BXI* [2020] SGCA 28.

¹⁰⁸ *Silverlink Resorts v First Capital Insurance Ltd.* [2020] SGHC 251

¹⁰⁹ *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SLR 821.

¹¹⁰ *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29.

¹¹¹ *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd.* [2006] NZHC 1228.

¹¹² *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd’s Rep 267; *Premium Nafta Products Ltd v Fili Shipping Co Ltd.* [2008] 1 Lloyd’s Rep 254; *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd’s Rep 127.

Law,¹¹³ with international arbitration in Singapore¹¹⁴ being governed by the International Arbitration Act of 1994 (“IAA”).¹¹⁵

F. Courts in the United States of America (“USA”)

For domestic arbitrations in the USA, states have their respective enacted legislation which applies to arbitrations seated in that particular state, provided that it does not violate Section 2 of the Federal Arbitration Act of the USA.¹¹⁶ If and when parties have not pre-decided the seat law, the choice of law rule propounded in the *Sulamerica* case is applied.¹¹⁷ Courts have also sometimes given parties the autonomy to agree to a change in the procedural law.¹¹⁸

For international arbitrations, the USA jurisprudence has usually opined that arbitration proceedings shall be seated where the assets lie, denoting a factor to draw the ‘most real and closest connection’ to the arbitration.¹¹⁹ Hence, the USA Courts have substantially rendered awards either favouring matrix contract’s law governing the assets or otherwise applying the law of the domicile of the business corporation. George Bermann of Columbia Law School analysed this approach in the project “*Restatement of the U.S. Law of International Commercial and Investor-State Arbitration*.”¹²⁰ The Restatement iterates that absent any explicit mention of law applicable to the arbitration agreement, the parties must be subjected to the general choice of law underlying the contract.¹²¹ Scholars such as Redfern and Hunter have been a staunch proponent of this approach, stating that it is reasonable to govern the arbitration by the general jurisdiction clause, given an arbitration agreement is a part of the larger contract itself.¹²² Courts have also tended to favour domicile inclinations. Nevertheless, commentators on the ‘*New York Convention*’ have criticised the application of general contractual choice of law in arbitral

¹¹³ ‘Arbitration in Singapore: A Practical Guide’ (Sweet & Maxwell, 2nd edition) 4050.

¹¹⁴ Indian Arbitration and Conciliation Act, 1996, s 5(2)(b).

¹¹⁵ Singapore’s International Arbitration Act, 1994.

¹¹⁶ Federal Arbitration Act, U.S.C. Title 9.

¹¹⁷ *Gomes v Karnell* (Del. Ch. Nov 30, 2016) No. 11814-VCMR.

¹¹⁸ Huth WE. *Mastrobuono v Shearson Lehman Hutton, Inc.*, 89(3) (*American Journal of International Law* 1995) 601-603 <doi:10.2307/2204179> last accessed 29 November 2024; *R.R Package Sys, Inc. v Kayser* (3d Cir. 2001) 257 F. 3d 287; *Security Insurance Co. of Hartford v TIG Insurance Co.* (2d Cir. 2004) 360 F.3d 322; *Pinnacle Group, Inc. v Shrader* (N.C. Ct. App. 1992) 412 S.E.2d 117.

¹¹⁹ Shelby Grubbs, “A Neutral’s Perspective on ‘Seating’ International Arbitration Proceedings in the U.S.” (2023) <<https://www.jamsadr.com/files/uploads/documents/Art.s/grubbs-shelby-lawdotcom-a-neutrals-perspective-1123.pdf>> last accessed 20 November 2024.

¹²⁰ American Law Institute, *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration*, vol. 1 (ALI, 2023).

¹²¹ *Mastrobuono v Shearson Lehman Hutton, Inc.* [1995] 514 U.S. 52.

¹²² Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 2.03.

clauses, a position supported by professors Albert Van Der Berg and Gary Born.¹²³ Cases such as *Mastrobuono v. Shearson Lehman Hutton* have explicitly ruled that the ‘*general choice of law clause*’ shall be inapplicable to the arbitration clause.¹²⁴

In *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, the party agreement for joint gas development by a Ukrainian company, Ukrnafta, and a Texas company, Carpatsky, required any possible arbitration to proceed at the Stockholm Chamber of Commerce while applying Ukrainian law.¹²⁵ In a dispute regarding power control brought about by Carpatsky, the Stockholm Tribunal awarded Carpatsky 150 million USD.¹²⁶ However, Ukrnafta preemptively sued Carpatsky in Texas. While Carpatsky argued that Swedish law applied due to the seat being Stockholm, Ukrnafta argued that Ukrainian law applied due to a Ukrainian ‘*choice of law*’ stated in the contract. Additionally, it was claimed that the arbitration agreement was rendered ineffective under Ukrainian law due to the change of Carpatsky’s incorporation from Texas to Delaware. The Fifth Circuit Court hearing the case decided that the applicable law would be that of Delaware, which is Carpatsky’s domicile, and that the change of incorporation would have no impact. This is because under Art. V(1)(a) of the New York Convention,¹²⁷ as ratified by the US, the law of the state where the party concerned is incorporated becomes the law governing the capacity of parties to arbitrate.¹²⁸ Further, enforcement under the ‘*New York Convention*’ is also always governed by the national law of the award debtor and where its assets are located.

If the American jurisprudence through the years and the most recent post-2020 Indian Jurisprudence were to be compared, the placement and location of assets involved in the dispute play the most significant role in drawing the ‘*most real and closest connection*’ test to designate the seat. Table 2 below tracks the differences in each jurisdiction’s approach in this regard.

S. No.	Jurisdiction	Approach
1.	Australia	Seat is designated depending upon the facts of the case, using COL.

¹²³ Albert B., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 293 (1981); Gary Born at 3463-69.

¹²⁴ *Mastrobuono v Shearson Lehman Hutton, Inc.* [1995] 514 U.S. 52.

¹²⁵ *OJSC Ukrnafta v Carpatsky Petroleum Corp.* [5th Cir. 2020] 957 F.3d 487.

¹²⁶ *Ukrnafta v Carpatsky Petroleum Corp.* [5th Cir. 2020] 957 F.3d 487

¹²⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; Aceris Law Llc, “Laws Applicable to an International Arbitration” (*Aceris Law*, February 6, 2021) <<https://www.acerislaw.com/laws-applicable-to-an-international-arbitration/>> last accessed 5 November 2024.

¹²⁸ *Erie R.R. Co. v Tompkins* 304 U.S. 64, 78 (1938).

2.	England	A three-factor test is to be followed step-wise to designate a seat, i.e., (i) ‘ <i>express choice</i> ’, (ii) ‘ <i>implied choice</i> ’, and (iii) ‘ <i>real/closest connection test</i> ’, which was laid down by the <i>Sulamerica</i> case. Venue is construed as an implied choice.
3.	China	Bars international arbitration for two domestic parties. The Domicile of the institution, or where proceedings are to take place, becomes the seat; known as ‘institutional standard’ and ‘seat standard’ respectively.
4.	Russia	Usually, the law of the country where the executor of the contract is located shall be applied as the seat law. Russia has taken a very anti-international arbitration approach recently.
5.	Singapore	Courts have given a generous interpretation by construing the jurisdiction clause to be the implied choice. Party intention is duly considered, giving utmost primacy to the validation principle.
6.	USA	The matrix contract or the incorporation domicile of the party involved is referred to as a factor to determine the absent seat.

Table 2: Table of Comparison for Various Foreign Jurisdictions

VI. TEST FOR SEATLESS CLAUSES: SUGGESTIONS AND SOLUTIONS

Seat selection or designation in arbitration is more than a jurisdictional formality; it plays a crucial role in determining the applicable procedural law. When the parties have mutually agreed on a specific seat, it is neither ideal nor appropriate for a court to impose an alternative. Therefore, agreements by parties to alter a predetermined seat or to choose a non-specified seat in the arbitration provision should be respected. Instead of deducing the parties’ intentions from facts, arbitrators should encourage parties to jointly decide on the seat from the outset. In situations where parties fail to agree on the seat of arbitration, a structured approach becomes essential. Established jurisprudence on arbitration seat selection considers three main tests: the expressed choice test, the implied choice test, and the closest connection test. These tests follow a hierarchy, as outlined below.

- Stage 1 (Express Choice): The first consideration is whether the arbitration agreement explicitly specifies a seat. If an express choice exists, further analysis (Stages 2 and 3) is unnecessary.

- Stage 2 (Implied Choice): Absent any express choice by the parties, the next step should be to determine if an implied choice of seat can be discerned. This involves assessing whether the agreement demonstrates a contrary intention; whether there are any indications that the parties preferred an alternative seat; and studying the reasons underlying the selection of a particular venue or substantive law in the case. An arbitrator should evaluate these factors to infer whether a reasonable person would view the chosen seat as aligning with the parties' intentions.
- Stage 3 (Closest Connection): If both the express and implied choice are not evident, the "closest and most real connection" test applies. Factors considered may include the residence or place of incorporation of the parties, the location where the cause of action arose, the signing of the contract, where the dispute was initially submitted for hearing, and any other location convenient for the parties. Tribunals have the discretion to consider the factor most relevant to determining the applicable law and, thus, the arbitration's seat. Yet, in the *Kings Chariot* case, the court bypassed the implied choice test, prioritising the closest connection test instead. This disregarded the parties' implied intent to set Delhi as the seat, as evidenced by factors like contract signing, stamp duty payment, and exclusive jurisdiction granted to Delhi Courts. The Supreme Court of India has consistently interpreted arbitration agreements with a view to upholding commercial sensibility and respecting parties' intentions, an approach that should also apply to the hierarchy of express, implied, and closest connection tests.

The uncertainty over approaches to seatless arbitration needs to be necessarily solved by arbitration institutes, just as how several other aspects of any arbitration are overseen. It has now become a given fact that a growing number of arbitration clauses and agreements are so drafted that it does not properly delineate seat law. As per a 2013 survey by Kluwer Arbitration Blog, 70 to 80 % of arbitration clauses internationally are pathological in some way.¹²⁹ Cases in plenty are brought before tribunals and courts for determination of the seat of the concerned arbitration, which could not be construed from pathological clauses. Provided there is this growing disparity among jurisdictions in approaching seatless arbitration clauses, it is high time that the governing bodies of international trade and commerce, such as the UNCITRAL, draw up model rules and tests.

¹²⁹ Michael McIlwrath, 'The Gang of Four Rides Again: Pathological Clauses' (*Kluwer Arbitration Blog*, 30 July 2024) <<https://arbitrationblog.kluwerarbitration.com/2013/07/30/the-gang-of-four-rides-again-pathological-clauses/>> last accessed 5 November 2024.

Similar to definitive guidelines by institutional rules on the appointment of arbitrators, joinder, etc., guidelines for approaching pathological clauses need to be formulated, and such approaches shall serve as a model test on how to determine the seat of arbitration through the consideration of various ancillary factors. References to the already existing three-tiered test can be contemplated, as it has been adopted by several renowned arbitration hubs. However, a more determinative test, where the ancillary multifaceted factors are to be considered at all three tiers (for example, the law of the state where parties were incorporated, or the law of the place where assets lie to draw the closest connection test) must be uniform. This would decrease legal disparities and provide parties with greater certainty.

VII. CONCLUSION

To determine a seat, it becomes essential to underline that while the prudence of a tribunal or court holds great value, such prudence must not serve as an excuse to skip the levels of the suggestive test or to neglect party intention, as done in the *Kings Chariot* case. Logical reasoning must solely be used to supplement the existing three-tier test of seat determination, first laid down in the *Sulemerica* case and thereafter affirmed by several jurisdictions. Additionally, while applying the three-tiered test, arbitrators and judges must ensure uniformity in applying factors of each tier chronologically. For example, between the venue, jurisdiction clause, and law of the matrix contract, there should desirably exist a chronology as to what factor shall be applied to determine the implied choice of seat. Such a structured approach will benefit parties, who can then rely on a stable jurisprudence, governing seat determination.

From a comparative study across jurisdictions, there exists a clear disparity as to which of these factors are approached to either decipher an implied choice or to draw the most real and closest connection to the arbitration. Such a disparity proves to be a bane for cross-continental parties with operations across the globe. This is because their actual intention to designate a seat might differ from the approach to the implied choice of seat, hence defeating the cornerstone of any ideal arbitration proceeding, i.e., the party-centred approach. For all such reasons, uniformity across jurisdictions in applying the three-tiered test diligently is thus quintessential.