JURISDICTIONAL ISSUES IN INDIAN ARBITRATION CASES: A UNIFORMIZED APPROACH

Soumil Jhanwar[*]

Abstract

One of the major goals of the legal regime of arbitration is the elimination of the need for courts in resolving arbitrable disputes. However, court assistance is very frequent in arbitration. This may be for conducting procedural supervision or testing substantive validity. In light of this, the determination of the court with valid jurisdiction is crucial. This determination is a two-step process. First, one needs to determine the seat of the arbitration. Then, the appropriate court must be decided on the basis of the law of the seat. Both steps of the process are very complex and have led to various conflicting judgments in India. This article attempts to provide rationally sound and normatively defensible tests for the determination of the seat and the appropriate court. In Part I, the article looks at the conflicts in the determination of the seat where an agreement does not explicitly mention a seat. In Part II, the article looks at the domestic conflicts in determination of jurisdiction. The aim of the article is to uniformize these two determinations in order to make the law more predictable.

I. The seat of arbitration

The most important rule of drafting an arbitration agreement is to clearly mention a seat of arbitration. The seat is of high importance as it decides the law that would govern the substantive validity and the procedure of an arbitration. Further, it decides the legal system and courts whose jurisdiction the arbitration will be subject to.[1] However, it is often found that parties fail to mention any specific seat in their arbitration agreements. This necessitates the usage of other factors in determination of the seat. The following sub-part analyses the apex court's usage of various factors in determination of the seat in the absence of specific stipulation of the same. The next sub-part assesses the relevance of the venue of an arbitration in determination of the seat.[2] The third sub-part proposes a unique six-part test to determine the seat in such cases. The last sub-part applies this test to major Supreme Court judgments on the determination of the seat, in order to examine its practical utility.

A. The divide at the Supreme Court

The landmark judgment of *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services* ["**BALCO**"] had explained the concept of the seat of arbitration in detail.[3] It had also overruled *Bhatia International* v. *Bulk Trading SA* ["**Bhatia International**"], holding that Indian courts can only apply Part I of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] to an arbitration seated in India[4] and that an arbitration can only have one seat.[5] However, the five-judge bench controversially held that the judgment would only apply to contracts drafted after the date of its

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* Soumil Jhanwar is a fourth-year B.A., LL.B. (Hons.) student from National Law School of India University, Bangalore.

1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2053 (2d ed. 2014) [*hereinafter* "BORN"].

2 This is because, as it would be discussed, the Indian Supreme Court is greatly divided on the importance of the venue in determination of the seat of an arbitration.

3 *See* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc. (2012) 9 SCC 552, ¶¶ 71–76, 95–117 (India) [*hereinafter* "BALCO"].

4 *See id.* ¶¶ 194–196 (it is important to note that *BALCO* uses the word "place" for the "seat" of arbitration).

5 *Id.* ¶¶ 100, 110, 136–143, 153.

pronouncement.[6] This meant that many post-*BALCO* cases would still have to use the *Bhatia International* principle[7] to determine the applicability of Part I of the Arbitration Act. However, the apex court, in subsequent cases, has subtly circumvented the approach in *Bhatia International* in excluding the jurisdiction of Indian courts, even in the absence of any "*implied exclusion*" of the Part I.[8] Thus, the *BALCO* approach has indirectly been applied.[9] This approach may be challenged on grounds of stare decisis as *BALCO* and *Bhatia International*, being judgements of higher benches, would be binding on them.[10] However, it would be imprudent to do so, especially in light of the important purpose these cases seek to achieve.[11] In any case, the *BALCO* position was reaffirmed by the 2015 amendment to the Arbitration Act, which clarified that Part I is applicable to arbitrations seated outside India only in some exceptional circumstances.[12] The apex court has also stopped differentiating between pre-*BALCO* and post-*BALCO* contracts while analysing cases.[13] Thus, it is clear that the *Bhatia International* principle stands ineffective in India today, and the courts can only interfere with arbitral proceedings if the seat of arbitration is situated in India. However, this does not mean that the determination of jurisdiction of Indian courts has become any easier over time. The determination of seat remains a very complex process and may involve multiple considerations.

The Supreme Court stands divided on the relevance of the venue in the determination of seat. In *Roger Shashoua* v. *Mukesh Sharma* ["**Roger Shashoua**"], the contract had provided the venue to be

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6 *Id.* ¶ 197.

7 *See* Bhatia Int'l v. Bulk Trading S.A., (2002) 4 SCC 105, ¶¶ 21, 32 (India) [*hereinafter* "Bhatia International"] (the *Bhatia International* principle was that the Indian Courts will exercise jurisdiction over interim applications and challenges resulting from arbitrations, unless the intention of the parties was to expressly or impliedly oust the jurisdiction of Indian courts. This means that the Indian Courts would exercise concurrent jurisdiction, along with the courts of the seat of the arbitration).

8 *See, e.g.*, Videocon Indus. Ltd. v. Union of India, (2011) 6 SCC 161, ¶¶ 16–18, 23 (India); Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 SCC 179, ¶ 20 (India) [*hereinafter* "Dozco India"]; Reliance Indus. Ltd. and Anr v. Union of India, (2014) 7 SCC 603, ¶¶ 45, 51, 53, 57 (India) [*hereinafter* "Reliance Industries 2013"]; Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., (2015) 9 SCC 172, ¶¶ 45, 50–53 (India) [*hereinafter* "Harmony Innovation"]; Union of India v. Reliance Indus., (2015) 10 SCC 213, ¶ 20 (India) [*hereinafter* "Reliance Industries 2015"] (while in each of these cases, there may have been an implied choice of a foreign seat, there had been no "implied exclusion" of Part I of the Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "Arbitration Act"]. The reasoning in these judgements seems to be that the choice of a foreign seat automatically excludes the application of Part I. However, in *Bhatia International*, the apex court had held that a choice of foreign seat does not preclude jurisdiction of Indian courts. Thus, an implied or express choice of another seat cannot be understood as an implied exclusion of jurisdiction of Indian Courts. The approach of "choice of one is exclusion of another" was rather proposed in *BALCO*, which does not apply to these cases).

9 *See* BALCO, (2012) 9 SCC 552, ¶¶ 77, 89, 198 (India) (this is because *BALCO*'s ratio was also that Part I cannot be applied to foreign seated arbitrations).

10 *See* Central Board of Dawoodi Bohra Cmty. & Anr. v. State of Maharashtra, (2005) 2 SCC 673, ¶¶ 5, 12 (India) (the judgments of larger benches are binding on the smaller ones).

11 *See* BALCO, (2012) 9 SCC 552, ¶¶ 136-143, 153 (India) (the purpose is avoidance of multiplicity and complexity in legal proceedings and upholding comity).

12 *See* Arbitration Act, No. 26 of 1996, § 2(f) (India) (this was a partial reaffirmation of the *BALCO* position, as it implied that the arbitrations seated outside India cannot be interfered with otherwise); *See* Arbitration Act, No. 26 of 1996, § 87 (India) (however, it is unclear whether this partial reaffirmation applies to contracts entered into before *BALCO*. This is because Section 87 had only barred retrospective application of the amendment to proceedings initiated before 2015); Hindustan Constr. Co. Ltd. v. Union of India, (2019) SCC OnLine SC 1520, ¶ 57 (India) [*hereinafter* "Hindustan Construction"] (further, even this bar on retrospective application was struck down by the Supreme Court as being manifestly arbitrary).

13 *See* Union of India v. Hardy Expl. & Prod. (India) Inc., (2019) 13 SCC 472, ¶ 23 (India) [*hereinafter* "Hardy Exploration"].

London and the governing law to be Indian law but had not mentioned the seat of arbitration.[14] The Court declared London to be the seat, borrowing from the reasoning of the High Court of the United Kingdom deciding the same matter.[15] This was because, *first*, the contract had provided that the arbitration be conducted in accordance with the International Chamber of Commerce ["**ICC**"] Rules of Arbitration ["**ICC Rules**"]. The choice of supranational rules for governing the proceedings meant that the ICC could determine the place/seat of the arbitration.[16] In the absence of any formal declaration by the ICC on the place/seat of an arbitration, the Court assumed that the ICC had decided London to be the seat.[17] *Second*, London is internationally regarded as an ideal seat for arbitral awards due to the legal framework of England being favourable to arbitration. Thus, the parties, being rational businesspersons, would have intended London to be the seat.[18] The Court, therefore, did not rely on the approach followed in *Bhatia International*.

In *Imax Corporation* v. *E-City Entertainment (India) (P) Ltd.* ["**Imax Corporation**"], the Supreme Court dealt with a similar factual scenario and reached the same decision.[19] However, the rationale employed was different. The Court used the *Bhatia International* approach and held that the express choice of the ICC Rules meant that the parties intended to exclude the jurisdiction of India's courts.[20]

In 2018, the apex court in *Union of India* v. *Hardy Exploration* ["**Hardy Exploration**"] dealt with a factual situation which was similar to those in *Roger Shashoua* and *Imax Corporation*. The governing law was Indian, the venue was Kuala Lumpur, and the proceedings were to be governed by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985 ["**Model Law**"].[21] However, the three-judge bench differed from the previous two benches, in holding that the determination of venue cannot automatically be used to infer a decision on seat, in the absence of other relevant concomitant factors coinciding with the venue.[22] The Court also held that the Model Law does not automatically confer the status of seat on the pre-decided venue, as it prescribes careful consideration of convenience of the parties in determination of the seat.[23] The Court held that the award could be challenged in

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14 Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, ¶¶ 69–70 (India) [*hereinafter* "Shashoua India"].

15 Roger Shashoua v. Mukesh Sharma [2009] EWHC (Comm) 957 [33]–[34] (Eng.) [*hereinafter* "Shashoua UK"].

16 *See* International Chamber of Commmerce (ICC), Rules of Arbitration 1998, art. 14(1), *available at* https://www.jus.uio.no/lm/icc.arbitration.rules.1998/portrait.pdf [*hereinafter* "ICC Rules 1998"] (while Article 14(1) of the ICC Rules 1998 mentioned the word 'place', it is well-established that for the purpose of the provision, 'place' means the seat of the arbitration. It is important to note that the ICC Rules 1998 would apply as the agreement was signed in 1998 and the arbitral proceedings had begun before the 2012 Rules came into being. Currently, the 2017 ICC Rules are available for use by parties).

17 Shashoua India, (2017) 14 SCC 722, ¶¶ 29–30, 69–72 (India).

18 *Id.* ¶¶ 37, 46.

19 Imax Corp. v. E-City Entm't (India) (P) Ltd., (2017) 5 SCC 331, ¶¶ 31–33 (India) [*hereinafter* "Imax Corporation"].

20 *Id.* ¶¶ 28, 31, 33.

21 Hardy Exploration, (2019) 13 SCC 472, ¶¶ 26–27 (India); *See* United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"] (the Model Law is similar to the ICC Rules as it also gives the arbitral tribunal the right to decide the seat if the parties have not already specified it).

22 *See* Hardy Exploration, (2019) 13 SCC 472, ¶¶ 29–30 (India).

23 *See id.* ¶¶ 29–30 (meaning thereby that the arbitral tribunal did not have complete discretion in deciding the matter).

Indian courts.[24] However, it provided no rationale for or analysis on why the substantive law must be seen as the relevant criterion for deciding the seat.[25]

In *BGS SGS Soma JV* v. *NHPC Ltd.* ["**BGS SGS Soma**"], the Court opined that the bench in *Hardy Exploration* had erred in ignoring *Roger Shashoua* while determining the seat.[26] The Court used venue and institutional arbitration rules to reach its conclusion.[27] The Court opined that whenever the venue has been mentioned along with the words 'shall be held' or 'arbitration proceedings',[28] it would, in fact, be interpreted that the venue was intended to be the seat of the arbitration.

Most recently, in *Mankastu Impex Private Limited* v. *Airvisual Ltd.* ["**Mankastu Impex**"], the Court acknowledged the conflicting positions of law that persist in the country.[29] In this case, the arbitration agreement had provided for the proper law to be Indian and the exclusive jurisdiction of the courts of India.[30] However, the Court decided that the seat was situated in Hong Kong because it was mentioned as the "*place*". The rationale was that the clause had mentioned that the arbitration "*shall finally be resolved by arbitration administered*" in Hong Kong.[31] This was held to have conferred the status of "*seat*" on Hong Kong.[32] The Court seemed to have followed the *BGS SGS Soma* approach of the use of contractual language in relation to the venue, in the determination of seat.

B. Relevance of the venue

Evidently, the aforementioned judgments evince no clear unified test or position of law. One common thread amongst all of them is their detailed discussion on the importance of the venue of an arbitration.[33] Thus, it must be assessed whether the venue should be the paramount consideration in the determination of seat.

It will be pertinent to look at the factors usually considered while determining the venue of an arbitration. *First*, geographical neutrality is very important. Venues are usually neutral locations so that one party is not unnecessarily advantaged during the proceedings.[34] *Second*, convenience of the parties is relevant. A venue must be a location which is convenient for both the parties to

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24 *See id.* ¶¶ 33–34 (this, in light of *BALCO*, implies that India is the seat of the arbitration).

25 *See supra* text accompanying notes 3–13 (while one may contend that the Court decided this based on the *Bhatia International* principle, this contention would be erroneous for two reasons: (1) the judgment does not hint at the *Bhatia International* principle being used or applied; and (2) the *Bhatia International* approach has been watered down by subsequent judgments).

26 *See* BGS SGS Soma JV v. NHPC Ltd., 2019 SCC OnLine SC 1585, ¶¶ 93–96 (India) [*hereinafter* "BGS SGS Soma"].

27 *Id.* ¶¶ 98–99.

28 *See id.* ¶ 89 (according to the Court, this would be because it would imply that all the proceedings are to be held at that particular place).

29 *See* Mankastu Impex Pvt. Ltd. v. AirVisual Ltd., 2020 SCC OnLine SC 301, ¶¶ 10, 13, 14 (India) [*hereinafter* "Mankastu Impex"].

30 *Id.* ¶¶ 8–9.

31 *Id.* ¶ 21.

32 *Id.* ¶¶ 19–23.

33 *See*, *e.g.*, Shashoua India, (2017) 14 SCC 722, ¶¶ 63–74 (India); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 22–36 (India); BGS SGS Soma, 2019 SCC OnLine SC 1585, ¶ 64 (India).

34 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION LAW: STUDENT VERSION 166 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "BLACKABY ET AL."]; Loukas A. Mistelis, *Arbitral Seats – Choices and Competition*, *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 376–377 (Stefan M. Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, Vikki M. Rogers eds., 2011) [*hereinafter* "Mistelis"].

access.[35] *Third*, the venue must have necessary facilities for the smooth conduct of an arbitration.[36]

In contradistinction, the most important aspect in determining the seat is the legal framework and the efficiency of courts of the seat.[37] While convenience of the parties may also be a consideration, it is not as crucial as the legal framework itself.[38] It is evident that the overall considerations in the determination of seat and venue differ. Further, the choice of substantive law may also be indicative of the choice of seat in some cases.[39] Hence, in the case of conflict between substantive law and venue, there needs to be a deeper analysis.[40]

The apex court has attempted to use phrases like "*shall be administered at*" and "*arbitral proceedings shall be held at*" to hold that the intent was to confer the status of seat on the venue.[41] However, this is manifestly erroneous, as seat of an arbitration is a legal concept and not a geographical one.[42] The choice of venue cannot be used to automatically imply a choice of seat, especially in the presence of other indicators that may point to the contrary.[43]

Admittedly, internationally, high importance is attached to the venue in determination of the seat.[44] However, this has often been because of the other concomitant factors being attached to

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35 JULIAN DAVID MATHEW LEW QC, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 361 (2003); MISTELIS, *supra* note 34, at 376–377.

36 BLACKABY ET AL., *supra* note 34, at 288.

37 *See* BORN, *supra* note 1, at 2053 (the legal framework of the seat of an arbitration is of much relevance as it determines the national legislation applicable to an arbitration, the jurisdiction and scope of interference of courts; the internal functioning of an arbitration, and the law determining the validity of the arbitral proceedings and the agreement to arbitrate); White & Case & School of Int'l Arb., Queen Mary Univ. of London, 2010 International Arbitration Survey: Choices in International Arbitration, *available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [*hereinafter* "2010 International Arbitration Survey Report"]; BLACKABY ET AL., *supra* note 34, at 166–167; H. HOLTZMANN, *The Importance of Choosing the Right Place to Arbitrate An International Case*, *in* PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 183, 192–197 (M. Bender ed., 1977); Parties usually prefer a seat that has consistency in laws, predictability in outcomes and expediency in legal proceedings. *See*, *e.g.*, C v. D [2007] EWCA (Civ) 1282 [16], [30] (Eng.) [*hereinafter* "C v. D"]; Fiona Trust & Holdings Corp. v. Privalov [2007] UKHL 40 [6] (appeal taken from Eng.) [*hereinafter* "Fiona Trust"].

38 *See id.*; BORN, *supra* note 1, at 2052–2053; Michael Hwang, SC & Fong Lee Cheng, *Relevant Considerations in Choosing the Place of Arbitration*, 2 ASIAN INT'L ARB. J. 195, 201 (2008); Kazuo Iwasaki, *Selection of Situs: Criteria and Priorities*, 2 ARB. INT'L 57, 57–60 (1986).

39 *See* BORN, *supra* note 1, at 1617 (this is when the parties would have assumed that the substantive law would govern the whole agreement including the arbitration agreement); Hardy Exploration, (2019) 13 SCC 472 ¶ 36 (India); Sumitomo Heavy Indus. Ltd. v. ONGC Ltd., (1998) 1 SCC 305, ¶¶ 15–17 (India) [*hereinafter* "Sumitomo"]; Nat'l Thermal Power Corp. v. Singer Corp., (1992) 3 SCC 551, ¶¶ 49–50 (India) [*hereinafter* "NTPC-Singer"].

40 *See, e.g.*, Hardy Exploration, (2019) 13 SCC 472, ¶¶ 34–35 (India); Enercon Gmbh v. Enercon India, (2014) 5 SCC 1, ¶¶ 40, 90, 92, 113, 130 (India) [*hereinafter* "Enercon"]; Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Bus. Sers. Ltd. [2008] EWHC (TCC) 426 [12], [14] (Eng.) [*hereinafter* "Braes of Doune"].

41 *See* Shashoua India, (2017) 14 SCC 722, ¶¶ 45, 65 (India); Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 22–23 (India).

42 BORN, *supra* note 1, at 1595–1597 (this assertion will be elaborated upon further in Part II(B)).

43 *See* cases cited in *supra* note 40.

44 *See*, *e.g.*, Shashoua UK, [2009] EWHC (Comm) 957 [26]–[34] (Eng.); Shashoua India, (2017) 14 SCC 722, ¶¶ 69–75 (India); Imax Corporation, (2017) 5 SCC 331, ¶ 33 (India) ; C v. D, [2007] EWCA (Civ) 1282 [16], [30] (Eng.); Atlas Power v. NTDC [2018] EWHC (Comm) 1052 [38]–[49] (Eng.) [*hereinafter* "Atlas Power"].

the venue.[45] These other aspects of an arbitration agreement must be analysed, along with the venue and the substantive law in order to determine the seat.

C. The proposed test

In addition to the venue, various other factors might be important in the determination of the seat. These factors must be ranked in the order of their similarity and affinity with the seat. The factors that are highly indicative of the choice of seat are ranked higher. A six-step test is proposed to look at these factors in a hierarchical manner.[46]

Step 1: The arbitration clause may grant exclusive jurisdiction to the courts of a country[47] or provide that a specific national legislation would govern an arbitration.[48] As stated, seat is a legal concept. Determination of national legislation is akin to determination of the seat.[49] Further, determination of seat is also the same as saying that a specific country's courts will have exclusive jurisdiction.[50] Conferment of exclusive jurisdiction must also lead the inference of determination of seat. These positions are not contradictory as usually national legislations provide for jurisdiction of the same country's courts exclusively.[51] Thus, if national legislation or exclusive jurisdiction is mentioned, that shall automatically decide the seat.[52]

Step 2: In the absence of such prescriptions, it must be seen whether the substantive law and the venue of the arbitration lie in the same country. Parties may choose substantive law, while presuming that it will apply to the arbitral proceedings as well.[53] At the same time, geographic convenience is a factor that is common in the determination of seat and venue, which may in

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45 In Shashoua India, (2017) 14 SCC 722, ¶¶ 69–72 (India), Shashoua UK, [2009] EWHC (Comm) 957 [33] (Eng.) and Atlas Power, [2018] EWHC (Comm) 1052 [47] (Eng.), the venue was declared as the seat as such prescription was supported by the choice of supranational rules of arbitration. In C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.) and Shashoua UK, [2009] EWHC (Comm) 957 [34] (Eng.), the Court used the rationale of the general normative superiority of the London courts and the concept of Bermuda Arbitration to hold that in the absence of other factors, London should be the seat. In C v. D, [2007] EWCA (Civ) 1282 [16]–[17] (Eng.), the Court also used the fact that English law would govern the agreement to arbitrate to hold England as the seat. In Imax Corporation, (2017) 5 SCC 331, ¶ 12 (India), the Tribunal had decided upon a seat and thus that was upheld. *See* cases cited in *infra* note 52.

46 Every further step is only to be used when the prior steps do not help in determination of the seat.

47 Braes of Doune, [2008] EWHC (TCC) 426 [4]–[8] (it was mentioned that the courts of England will have exclusive jurisdiction; this was held to imply that London is the seat).

48 *See, e.g.,* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc. (2016) 4 SCC 126, ¶¶ 3–4 (India) [*hereinafter* "BALCO II"] (the contract stated that English Arbitration law would apply); Enercon, (2014) 5 SCC 1, ¶ 114 (India) (it was mentioned that the Arbitration Act would apply).

49 BALCO II, (2016) 4 SCC 126, ¶¶ 12, 16 (India); Enercon, (2014) 5 SCC 1, ¶¶ 97, 101, 147, 152 (India); *see also* Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru [1988] 1 Lloyd's Rep. (CA) 116 (Eng.) [*hereinafter* "Naviera Amazonica"].

50 Braes of Doune, [2008] EWHC (TCC) 426 [4]–[8] (Eng.); *See, e.g.,* BALCO, (2012) 9 SCC 552, ¶¶ 106, 110 (India) (affirming Braes of Doune and Shashoua UK); A v. B, [2007] 1 Lloyd's Rep. 237 [111] (Eng.) (many cases have also recognized that determination of seat is akin to the exclusive jurisdiction of the courts of a country).

51 Arbitration Act, No. 26 of 1996, § 2(1)(e)(i)–(ii) (India); Arbitration Act, 1996, c. 23, § 105 (U.K.); Arbitration Act 2001, § 2(1) (Sing.).

52 *See* Union of India v. McDonnell Douglas Corporation [1993] 2 Lloyd's Rep. 48 (Eng.) [*hereinafter* "McDonnell Douglas"] (while in some cases the express stipulation of legislation may not be taken as determination of the seat, such is only because of an express choice of a conflicting seat); Naviera Amazonica [1988] 1 Lloyd's Rep. (CA) 116 (Eng.) (similarly, when another seat is clearly provided, an exclusive jurisdiction would not decide the seat); U & M Mining Zambia Ltd. v. Konkola Copper Mines plc [2013] EWCH 260 [25], [38], [45], [47]–[48] (Eng.).

53 NTPC-Singer, (1992) 3 SCC 551, ¶¶ 15, 22–23, 49–50 (India); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 34–36 (India); Sumitomo, (1998) 1 SCC 305, ¶¶ 15–17 (India).

some cases lead to concurrence of both.[54] While substantive law or venue alone may not be individually sufficient, their concurrence raises a strong presumption that the law of the chosen country would also be the *lex arbitri*.[55] This is because parties are assumed to be rational businesspersons, who could not have intended to involve multiple laws and locations when a simpler approach is possible.[56]

Step 3: When the substantive law and venue indicate different locations, the law governing the arbitration agreement must be looked at. This is because determination of the law governing the arbitration agreement depends on factors that are very similar to the factors used in determination of a seat.[57] While choosing each of these laws, the parties will be conscious of their treatment of arbitrability, validity of an agreement, strict compliance to (or flexible interpretation of, as the case may be) the contractual timelines, and treatment of costs, amongst others.[58] The law governing an arbitration agreement also coincides with the *lex arbitri* in most cases.[59]

Step 4: The aforementioned factors have been used to infer the implied intention of the parties in the determination of seat. In the absence of such factors, one needs to look for factors that do not imply an obvious choice of seat. Next, one must look for the stipulation of supranational rules. Supranational rules usually provide for the tribunal to determine an arbitral seat.[60] In such cases, the tribunal may be better suited to choose a seat because of its expertise and impartiality.[61] This does not contravene party autonomy as institutional rules are chosen by parties

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54 *See* cases cited in *supra* note 44.

55 *See, e.g.*, Eitzen Bulk A/S v. Ashapura Minechem Ltd., (2016) 11 SCC 508, ¶ 33 (India) [*hereinafter* "Eitzen Bulk"]; Dozco India, (2011) 6 SCC 179, ¶¶ 4, 15, 18 (India).

56 NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India); C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.); Fiona Trust, [2007] UKHL 40 [6] (appeal taken from Eng.); Shashoua India, (2017) 14 SCC 722, ¶ 69 (India).

57 *See* BLACKABY ET AL., *supra* note 34, at 159–163; BORN, *supra* note 1, at 2088; C v. D, [2007] EWCA (Civ) 1282 [22], [26], [28] (Eng.); Enka Insaat ve Sanayi AS v. OOO Insurance Co. Chubb [2020] EWCA (Civ) 574 [35]–[40] (Eng.) [*hereinafter* "Enka"]; *Sul América Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA (Civ) 638 [18], [32] (Eng.) [*hereinafter* "Sul América"]; Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Co. Ltd. [2014] 1 Lloyd's Rep. 479 [101] (Eng.) [*hereinafter* "Habas Sinai"]; Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 131, 141–150 (Neil Kaplan & Michael Moser eds., 2018) (this is because there are many overlaps in the purposes of the law governing the arbitration agreement and the law of the seat, and that they are generally assumed to have intended to be the same).

58 *See* Glick & Niranjan, *supra* note 57, at 136, 142 (this is because both these laws may simultaneously affect all these issues).

59 C v. D, [2007] EWCA (Civ) 1282 [22], [26], [28] (Eng.); *Sul América,* [2012] EWCA (Civ) 638 [18], [32] (Eng.); Enka, [2020] EWCA (Civ) 574 [35]–[40] (Eng.); Habas Sinai, [2014] 1 Lloyd's Rep. 479 [101] (Eng.).

60 ICC Rules of Arbitration 2017, art. 19(1), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf; London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 16.1, *available at* https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Permanent Court of Arbitration (PCA), Arbitration Rules 2012, art. 18(1), *available at* https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf; UNCITRAL Arbitration Rules 2010, G.A. Res. 65/22, art. 18; International Centre for Dispute Resolution (ICDR), Arbitration Rules 2014, art. 13, *available at* https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf; Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 14(1), *available at* https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf; Singapore International Arbitration Centre (SIAC), Rules of Arbitration 2016, art. 21, *available at* https://www.siac.org.sg/our-rules/rules/siac-rules-2016.

61 BORN, *supra* note 1, at 2094–2096; Anibal Sabater, *When Arbitration Begins Without A Seat*, 27(5) J. INT'L ARB. 443, 466 (2010).

themselves,[62] and moreover, all major institutional rules subject the choice of seat to an express choice by parties themselves.[63] Determination through such rules has been validly recognized by courts as seat.[64]

Step 5: In the absence of other factors, if only either of the substantive law or the venue has been mentioned in an agreement, then the mentioned place must be determined as the seat.[65] While both these factors counterbalance each other, the presence of only one of them would raise a strong presumption of seat, in the absence of the other. Again, this is because parties are to be understood as rational businesspersons who would not unnecessarily choose conflicting laws and locations.[66]

Step 6: In all the other cases, the intent of the parties must be traced through other surrounding factual scenarios. This would mean that a "*subtle intent*" test would need to be applied in order to resolve this conflict. The test would involve a combined analysis of the language of the contract (implied intent),[67] the analysis of the surrounding facts (closest connection),[68] and normative comparison of the two locations (normative superiority).[69] Thus, in such cases, the case as a whole would need to be looked into to determine the intention of the parties.[70]

D. Retrospective application of the test

For this test to be useful, it must help simplify the determination of seat. In *Mankastu Impex*, the parties had mentioned that the courts of New Delhi would have the exclusive jurisdiction over any proceedings.[71] Using Step 1, this would negate the need to even look at the venue of the

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62 10% of ICC Arbitrations use institutional rules to determine seat. *See* Int'l Chamber of Com., *2012 Statistical Report*, 24(1) ICC CT. BULL. 5, 14 (2013).

63 *See* sources cited in *supra* note 60.

64 *See*, *e.g.*, Shashoua UK, [2009] EWHC (Comm) 957 [27] (Eng.); Shashoua India, (2017) 14 SCC 722, ¶¶ 67–71 (India); Eitzen Bulk, (2016) 11 SCC 508 ¶¶ 26–29, 32 (India); Atlas Power, [2018] EWHC (Comm) 1052 [47]–[49] (Eng.).

65 *See* BGS SGS Soma, 2019 SCC Online SC 1585, ¶ 64 (India); NTPC-Singer, (1992) 3 SCC 551, ¶¶ 49–50 (India).

66 NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India); C v. D, [2007] EWCA (Civ) 1282 [1], [3], [16], [30] (Eng.); Fiona Trust, [2007] UKHL 40 [6] (appeal taken from Eng.); Shashoua India, (2017) 14 SCC 722 ¶ 69 (India).

67 *See* Harmony Innovation, (2015) 9 SCC 172, ¶¶ 20, 37–38 (India); Shashoua India, (2017) 14 SCC 722, ¶ 72 (India); McDonnell Douglas, [1993] 2 Lloyd's Rep. 48 (Eng.).

68 This is akin to the usage of the closest and most real connection test in light of the factual scenario, as against contractual prescriptions. *See* Enercon, (2014) 5 SCC 1, ¶¶ 98, 130–135 (India); NTPC-Singer, (1992) 3 SCC 551, ¶¶ 16–17, 44 (India); Naviera Amazonica, [1988] 1 Lloyd's Rep. (CA) 116 (Eng.); Sul América, [2012] EWCA (Civ) 638 [5], [6], [13], [15] (Eng.).

69 *See* C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng); Shashoua UK, [2009] EWHC (Comm) 957 [33] (Eng.).

70 The final test is:
(1) If the agreement prescribes the exclusive jurisdiction of courts of a country or the governance of arbitration by the arbitration law of a country, then that country becomes the seat of the arbitration;
(2) Subject to the first step, if the venue and the substantive law coincide, then the substantive law will also be the *lex arbitri*;
(3) Subject to the first two steps, if the parties have decided on a law governing the agreement to arbitrate, then that law will be the law of the set;
(4) Subject to the first three steps, if the seat has been expressly decided by the tribunal by using the chosen supranational rules of arbitration, then the same shall be finalised as the valid seat of the arbitration;
(5) Subject to the first four steps, if only either of substantive law or venue is given, then that factor must be seen as the conclusive determination of seat;
(6) Subject to the first five steps, the adjudicator must look at: the language of the contract; the surrounding facts of the case and the normative comparison of the conflicting locations. These factors must be collectively used to discern the subtle intention of the parties for the determination of seat.

71 Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 26–27(India).

proceedings and confer the status of seat on New Delhi. In *BGS SGS Soma*, the contract had only mentioned the venue of arbitration.[72] In such a case, it is obvious that Step 5 of the test would be used to hold that the venue is, in fact, the seat of the arbitration.

In *Hardy Exploration*, different venue and governing laws had been mentioned. While the Model Law was to govern the arbitral proceedings, the tribunal had not determined the seat.[73] In this scenario, the subtle intent test must be used, in furtherance of Step 6. As a matter of fact, both the parties were Indian. Moreover, Malaysia is not an arbitration hub like London. Thus, India should be the seat in such a scenario. Alternatively, it could also be argued that since the supranational rules provided for the determination of seat in consideration of the "*convenience of parties*," India should be the seat.[74]

In factual scenario of *Roger Shashoua*, one may use the Tribunal's determination of seat under Step 4 of the test to infer London as the seat. However, the Tribunal had, in fact, not even considered the question of seat.[75] Thus, Step 6 would be applied to look at the subtle intent test. Mukesh Sharma was Indian, whereas Roger Shashoua was English. In such a situation, the normative comparison of India and London would imply that the parties wanted London as the seat.[76] Thus, London should be the seat.

In *Imax Corporation*, the seat had categorically been determined in pursuance of the ICC Rules by the Tribunal.[77] Thus, Step 4 would make London the seat. In *Enercon Gmbh.* v. *Enercon India* ["**Enercon**"], the governing statute was mentioned as India,[78] thus Step 1 would apply directly to make India the seat. In *Eitzen Bulk A/S* v. *Ashapura Minechem Ltd.*, Step 2 would be used to make England the seat, as both the substantive law and the venue were in England.[79] In both the *Reliance Industries* cases,[80] since the governing law of the arbitration agreement was English, the use of Step 3 would make London the seat.

With the exception of *Mankastu Impex*, the use of the test has thus led to identical conclusions as those arrived at in the actual cases. The exception of *Mankastu Impex* is justified. This is because the conferment of the status of seat on Hong Kong completely ousted the jurisdiction of the Delhi courts.[81] This rendered Clause 17.1 of the contract ineffective and redundant.[82] This was in manifest disregard of the express intention of the parties and thus, cannot be held to be the correct interpretation. This shows that the varied and often conflicting tests in various cases must be replaced with this simple six-part test in order to assess the intention of the parties in

72 BGS SGS Soma, 2019 SCC Online SC 1585, ¶ 3 (India).
73 Hardy Exploration, (2019) 13 SCC 472, ¶¶ 25–26 (India).
74 This is because it would be more convenient for both the parties to hold the proceedings in India.
75 Shashoua India, (2017) 14 SCC 722, ¶ 68 (India).
76 This is because London is internationally renowned as an ideal seat for arbitration.
77 Imax Corporation, (2017) 5 SCC 331, ¶ 18 (India).
78 Enercon, (2014) 5 SCC 1, ¶ 107 (India).
79 Eitzen Bulk, (2016) 11 SCC 508, ¶ 2 (India).
80 Reliance Industries 2013, (2014) 7 SCC 603, ¶ 7 (India); Reliance Industries 2015, (2015) 10 SCC 213, ¶ 2 (India).
81 *See* Mankastu Impex, 2020 SCC Online SC 301, ¶¶ 26–27 (India) (this is because all the disputes were to be resolved by arbitration).
82 *See id.* ¶ 26. Further, it must be emphasized that contracts must be interpreted in such a manner that none of the clauses are rendered redundant. *See*, *e.g.*, M Arul Jothi v. Lajja Bal, (2000) 3 SCC 723, ¶ 10 (India); Insil Hydro Power & Manganese Ltd. v. State of Kerala, (2019) SCC OnLine SC 1194, ¶ 37 (India).

determination of the seat.[83] This would simplify and uniformize the process of determination of the seat, as it has generally proven to be in line with the outcomes that have been rationalised by the apex court using different tests. But the determination of seat is not the end of the process of jurisdictional determination. If the seat is determined to be India, the next big question is: which court within India would exercise jurisdiction over the relevant arbitral proceedings?

II. Domestic conflicts in determination of jurisdiction

Various sections of the Arbitration Act enable parties to go to a "*court*" for legal remedy.[84] Section 2(1)(e)(i) and 2(1)(e)(ii) mention that the appropriate court would be the court "*having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit*".[85] While most of the other parts of the Arbitration Act are borrowed from the Model Law, the definition of "*court*" in India is unique. The following sub-part looks at the various tests used by the Supreme Court in the determination of the correct meaning of "*court*". The second sub-part proposes the ideal approach to be used for this determination, by analysis of various cases.

A. Tests used by the Supreme Court

The meaning of "*court*" has been contentious since the inception of the new arbitration regime in 1996. The earliest cases indicated that the words "*questions forming subject matter of the arbitration*" connoted the issues that led to the arbitration.[86] Thus, the earlier interpretation required the court to assume that the parties were bringing those issues straight to a court of law, with a deeming fiction of non-existence of the arbitral award itself.[87] This would require the court to test jurisdiction on the basis of the Code of Civil Procedure, 1908 ["**CPC**"] or the Letters Patent, as the case may be.[88] Thus, the test would be whether the relevant court presides over the

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83 This is a very simplified test and thus may be subject to exceptions. The exclusive jurisdiction to the courts of a country may not be as important in cases where the arbitration clause in itself is extremely narrow. The mention of a national legislation may not be relevant when it is evident that such has been done only for procedural aspects of the law and not the supervisory aspects. *See*, *e.g.*, McDonnell Douglas [1993] 2 Lloyd's Rep. 48 (Eng.); Process and Indus. Dev. Ltd. v. Federal Republic of Nigeria [2019] EWHC (Comm) 2241 (Eng.); *See* BLACKABY ET AL., *supra* note 34, at 158–159 (the law governing the agreement to arbitrate may not be important when it is merely chosen to be in line with the substantive law of the contract); Mistelis, *supra* note 34 (venue may not be relevant when it is solely chosen for the purpose of convenience or neutrality); C v. D, [2007] EWCA (Civ) 1282 [1], [16], [30] (Eng.) (substantive law may not be relevant when it is clear that the parties could not, being rational businesspersons, have intended the same in the scenario); Hardy Exploration, (2019) 13 SCC 472, ¶¶ 32–34 (India) (determination through institutional rules may not be important when the tribunal does not follow the rules in determining the seat or determines an absurd seat). Thus, while using the test one would need to look out for the factors that negate the importance of any element of the test. This can be done by looking at why any specific element has been chosen. The test is flexible and can be altered accordingly.

84 Arbitration Act, No. 26 of 1996, §§ 8, 9, 13, 14, 27, 29A, 34 (India).

85 *Id.* §§ 2(1)(e)(i)–2(1)(e)(ii) (India) (the arbitration act differentiates between international commercial arbitrations and other arbitrations while defining courts. However, the definitions are almost identical with only the superiority of the court changing).

86 Khaleel Ahmed Dakhani v. Hatti Gold Miners Co. Ltd., (2000) 3 SCC 755, ¶ 6 (India) [*hereinafter* "Khaleel Ahmed"]; JSW Steel v. Jindal Praxair Oxygen Co. Ltd, (2006) 11 SCC 521, ¶¶ 66–68 (India) [*hereinafter* "JSW Steel"]; Swastik Gases (P) Ltd. v. Indian Oil Corp. Ltd., (2013) 9 SCC 32, ¶ 28 (India) [*hereinafter* "Swastik Gases"]; Fountain Head Developers v. Maria Arcangela Sequeira, 2007 SCC Online Bom 340, ¶¶ 6–7, 10–16 (India).

87 *Id.*; *See* Vaden v. Discover Bank, 556 U.S. 49, 129 S. Ct. 1262 (2009), ¶ (b) [*hereinafter* "Vaden"] (this test is very similar to the "look through" jurisdiction approach suggested by the US Supreme Court in the *Vaden* case).

88 Khaleel Ahmed, (2000) 3 SCC 755, ¶ 6 (India); JSW Steel, (2006) 11 SCC 521, ¶¶ 19, 32, 36–37, 66–68 (India); Swastik Gases, (2013) 9 SCC 32, ¶¶ 28–29 (India).

location of the cause of action or the location[89] of the respondent.[90] This test is based on the golden rule of interpretation,[91] and shall be referred to as the 'CPC Test'.

However, the CPC Test received a setback after the judgment in *BALCO*.[92] The five-judge bench in *BALCO* opined that Section 2(1)(e) must be interpreted keeping in mind the principle of party autonomy enshrined in Section 20 of the Arbitration Act.[93] The two courts having concurrent jurisdiction would, therefore, be the court where the cause of action is located and the court where the arbitration takes place.[94] This shall be referred to as the '*BALCO* Test'.[95]

The leading case interpreting *BALCO* is that of *Indus Mobile Distribution Pvt. Ltd.* v. *Datawind Innovations Pvt. Ltd.* ["**Indus Mobile**"].[96] In *Indus Mobile*, the performance of the contract was supposed to be in Delhi and Chennai, and the contract conferred exclusive jurisdiction on the courts of Mumbai.[97] The seat of arbitration was held to be in Mumbai. The Court used certain parts of *BALCO* to interpret that the seat of arbitration is akin to an exclusive jurisdiction clause.[98] Thus, the courts presiding over the seat would have exclusive jurisdiction.[99] However, the Court did not take note of the specific test in *BALCO* itself, which was a different and a wider test.[100] The Court expressly precluded any scope of application of the principles of the CPC in determination of jurisdiction.[101] The test in *Indus Mobile* will be called the 'Seat Test'.

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89 *See* CODE CIV. PROC. (1908), § 20 (India) (providing that the location of the respondent includes the residence (in case of a person), main office (in case of a company) and place of conduct of business of the respondent).

90 *See* CODE CIV. PROC. (1908), §§ 19–20 (India); Letters Patent of the High Court of Judicature at Calcutta (1862), § 12 (India); Letters Patent of the High Court of Judicature at Madras (1865), § 12 (India); Letters Patent of the High Court of Judicature at Bombay (1866), § 12 (India) (for example, if the cause of action of a contractual breach only existed in New Delhi, the defendant resided in Mumbai, the seat of the arbitration was Kolkata and the venue of the arbitration was Chennai, then only courts of New Delhi and Mumbai would have the jurisdiction).

91 *See* FRANCIS BENNION, STATUTE LAW 81–82 (1980) (according to Bennion's Golden Rule of interpretation of statutes, the statute must be interpreted literally, unless such interpretation leads to an absurdity. Since in this case, the literal interpretation does not seem to lead to an absurd outcome, the same interpretation must be used).

92 BALCO, (2012) 9 SCC 552 (India).

93 *See id.* ¶ 96 (thus, according to the Court, the "subject-matter" of an arbitration also included the venue, apart from the cause of action).

94 *Id.* (the Court also gave an example in furtherance of this. In a case where the causes of action arose in different cities, but the arbitration proceedings had been conducted in New Delhi, there would be simultaneous jurisdiction of the courts presiding the cause of action and those in New Delhi).

95 This test has also been used in several landmark high court cases. *See*, *e.g.*, Konkola Copper Mines v. Stewarts & Lloyds of India Ltd., 2013 SCC Online Bom 777, ¶¶ 56–59 (India) [*hereinafter* "Konkola Copper Mines"]; Antrix Corp. v. Devas Multimedia, 2018 SCC Online Del 9338, ¶¶ 51–53 (India) [*hereinafter* "Antrix Corporation"].

96 Indus Mobile Distrib. Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678 (India) [*hereinafter* "Indus Mobile"].

97 *Id.* ¶¶ 2, 21.

98 *Id.* ¶¶ 10, 13, 17, 19.

99 *See* Konkola Copper Mines, 2013 SCC Online Bom 777, ¶¶ 56–59 (India); BGS SGS Soma, 2019 SCC Online SC 1585, ¶¶ 56–61 (India) (the Court also gave an example in furtherance of this. In a case where the causes of action arose in different cities, but the arbitration proceedings had been conducted in New Delhi, there would be simultaneous jurisdiction of the courts presiding the cause of action and those in New Delhi); *id.* ¶¶ 19–20 (while in *Indus Mobile*, the Court does discuss the freedom of choice of parties when multiple courts have jurisdiction, the rationale provided by the Court is that decision on the seat is tantamount to decision on exclusive jurisdiction. For the purpose of this article, it is assumed that the Court decided that the courts of the seat will have exclusive jurisdiction, even when there is no exclusive jurisdiction clause).

100 *See* BALCO, (2012) 9 SCC 552, ¶¶ 125–130 (India) (while *BALCO* did say that seat was akin to exclusive jurisdiction clause, the discussion was only focused on which country the arbitration would be challenged in. The Court did not use this test for the domestic determination of jurisdiction, as that would have depended on the prescription by the national legislation. The Court's determination of the location of challenge was based on its interpretation of the

Emkay Global Financial Services v. *Girdhar Sondhi* ["**Emkay Global**"] had a similar factual scenario and the Supreme Court reached the same outcome in that case.[102] However, the Court's reasoning was centred around the exclusive jurisdiction clause and not the seat.[103] It is unclear what the Court would have done, had the seat clause and the exclusive jurisdiction clause mentioned different places. The Court does not seem to lay down a specific test.

In *Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.* ["**Brahmani River Pellets**"], while the venue of the arbitration was in Bhubaneshwar, the cause of action arose in Chennai as the pellets were to be delivered in Chennai.[104] The Court borrowed the importance of the "*venue*" from the *BALCO* judgment.[105] The Court then analysed the judgment of the Supreme Court in *Reliance Industries Ltd. and Anr.* v. *Union of India*[106] to indicate that the venue would be equivalent to the seat.[107] The Court concluded that the decision on the venue is akin to conferment of exclusive jurisdiction.[108] Thus, the Madras High Court was held to have erred in entertaining a challenge. However, this test was quite different from the *BALCO* Test, as *BALCO* had granted concurrent jurisdiction to courts presiding over the cause of action as well.[109] The test in *Brahmani River Pellets* shall be called the 'Venue Test'.

Recently, in *BGS SGS Soma*,[110] the apex court disagreed with the interpretation of *BALCO* by both the Delhi and the Bombay High Courts,[111] in holding that the courts of the seat will have exclusive jurisdiction over arbitral proceedings. Interpreting an arbitration clause which declared "*New Delhi/Faridabad*" as the venue, the Court held that this amounts to the declaration of a seat.[112] It was further held that since there were no arbitral proceedings held in Faridabad and all awards were signed at New Delhi, the seat was evidently situated at New Delhi.[113] Then, following the Seat Test, exclusive jurisdiction was held to be conferred on the courts of New Delhi.[114] This was despite the Faridabad courts presiding over the location of the cause of action.[115] The Court also held that the *BALCO* Test was erroneous as the determination of the seat automatically confers exclusive jurisdiction.[116] In another case with a similar factual

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statute and not on the basis of general principles. The apex court in *Indus Mobile* seemed to have ignored this distinction).

101 *See* Indus Mobile, (2017) 7 SCC 678, ¶ 19 (India) (this includes jurisdiction of the place of cause of action which was not excluded by *BALCO*).

102 *See* Emkay Global Financial Services v. Girdhar Sondhi, (2018) 9 SCC 49, ¶¶ 2–4 (India) [*hereinafter* "Emkay Global"] (even in this case, Mumbai was prescribed as the seat. Further, an exclusive jurisdiction clause conferred jurisdiction on the courts of Bombay).

103 *Id.* ¶¶ 8, 9.

104 *See* Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2019) SCC OnLine SC 929, ¶¶ 2–4 (India).

105 *Id.* ¶ 12.

106 *See* Reliance Industries 2013, (2014) 7 SCC 603 (India).

107 *Id.* ¶ 15.

108 *Id.* ¶¶ 18–19.

109 Applying this test, the Madras High Court would have had valid jurisdiction.

110 BGS SGS Soma, 2019 SCC Online SC 1585 (India).

111 Konkola Copper Mines, 2013 SCC Online Bom 777 (India); Antrix Corporation, 2018 SCC Online Del 9338 (India).

112 BGS SGS Soma, 2019 SCC Online SC 1585, ¶¶ 98–101 (India) (the reasons for this shall be discussed in the next sub-part).

113 *Id.* ¶¶ 100–102.

114 *Id.* ¶¶ 98–102.

115 *Id.* ¶ 23.

116 *Id.* ¶¶ 50–54, 60–62.

scenario,[117] another three-judge bench of the apex court relied on *BGS SGS Soma* to hold that the courts of New Delhi would have exclusive jurisdiction, even though the cause of action had arisen in Faridabad.[118] The following table summarizes the aforementioned tests:

Test Name	Supreme Court Cases	Places Having Jurisdiction
CPC Test	*Khaleel Ahmed* (2J);[119] *JSW Steel* (2J);[120] *Swastik Gases* (3J)[121]	Location of cause of action of the dispute; or location of residence of the defendant; or location where the defendant carries on business.
BALCO Test	*BALCO Case* (5J)	Location of cause of action of the dispute; or the venue of the arbitration.
Seat Test	*Indus Mobile* (2J); *BGS SGS Soma* (3J); *Hindustan Construction Co.* (3J)[122]	Seat of the arbitration has the exclusive jurisdiction.
Does not seem to lay down a specific test	*Emkay Global* (2J)	Test was unclear; but it was held that the parties are free to provide for exclusive jurisdiction separately.
Venue Test	*Brahmani River Pellets* (2J)	Courts presiding over the venue have exclusive jurisdiction

B. The ideal approach

The enunciation of the Seat Test by various judgments makes one thing clear: the benches have failed to appreciate the concept of the seat of an arbitration.[123] The seat of an arbitration is not a physical or a geographical concept, but a legal one.[124] Meaning thereby, the seat does not refer to a place, but rather refers to a system of laws that would govern the arbitration.[125] Therefore, when it is said that the seat confers exclusive jurisdiction, it merely means that only one legal

[117] *See* Hindustan Const. Co. v. NHPC, 2020 SCC OnLine SC 305, ¶ 3 (India) (in this case, the cause of action arose in Faridabad. However, the seat was mentioned to be New Delhi. The proceedings were first initiated in Faridabad. The argument was that Faridabad courts would have exclusive jurisdiction by virtue of Section 42 of the Arbitration Act. This was refuted by the Court.)

[118] *Id.* ¶¶ 3–6.

[119] Khaleel Ahmed, (2000) 3 SCC 755 (India).

[120] JSW Steel, (2006) 11 SCC 521 (India).

[121] Swastik Gases, (2013) 9 SCC 32 (India).

[122] Hindustan Construction, 2020 SCC OnLine SC 305 (India).

[123] The significant exception to this is the case of BALCO, (2012) 9 SCC 552 (India).

[124] BORN, *supra* note 1, at 1538; GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* 65 (2004); ROBERT M. MERKIN, *ARBITRATION LAW* ¶¶ 1.29–1.30 (2013).

[125] *Id.*; *see* BLACKABY ET AL., *supra* note 34, at 166–167 (thus, the word seat is a misnomer. *Lex arbitri* is the proper term to be used for the seat).

system can govern the arbitration proceedings.[126] Thus, irrespective of whether the seat is mentioned to be Mumbai, Delhi, Kolkata, or India, it only connotes that the parties intended Part I of the Arbitration Act to govern their arbitration procedure and validity. After choosing the Arbitration Act, the domestic jurisdiction must be determined by using the relevant provisions of the Arbitration Act itself.

This would indicate that the CPC Test would be correct as it uses a literal interpretation of the statute. However, such a test would ignore some important considerations. For instance, the *BALCO* Test interprets Section 2(1)(e) to confer jurisdiction on the courts at the venue as well, apart from the courts presiding over the cause of action.[127] Venue is an important consideration for grant of jurisdiction because it is a convenient and neutral place.[128] It makes logical sense to also allow parties to litigate at such a convenient and neutral place. The strong reasons backing both the CPC Test and the *BALCO* Test (which includes venue) lead to two important questions: *first*, whether it is prudent to confer concurrent jurisdiction on multiple courts; and *second*, if yes, what must be the various considerations for determination of jurisdiction.

The Indian civil litigation system follows the doctrine of *dominus litis* in order to grant limited discretion to the plaintiff in the determination of jurisdiction.[129] In furtherance of this principle, a plaintiff must generally be allowed to choose a convenient forum for initiation of proceedings, amongst several rationally justifiable but normatively indistinguishable forums. Further, the use of the phrase "*a court*" instead of "*the court*" in various provisions indicates that an applicant is free to approach one amongst multiple designated courts,[130] thus incorporating the *dominus litis* principle. Moreover, if jurisdiction is exclusively conferred on a single court for all the applications, then Section 42 of the Arbitration Act would be rendered redundant and ineffective.[131] Section 42 ties any application arising out of an arbitration to the court where the first application with respect to the same dispute had been made.[132] But if all applications are anyway required to be made exclusively to one designated court under Section 2(1)(e), then such tying of later applications to the same court under Section 42 is rendered redundant.[133] Such teleological redundancy of provisions must be avoided while interpreting statutes.[134] Section 42 can only serve a purpose if Section 2(1)(e)(i) and 2(1)(e)(ii) confer concurrent jurisdiction on

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126 *See* BALCO, (2012) 9 SCC 552, ¶¶ 194–197 (India) (this is manifest in the discussion in *BALCO* wherein the Court overruled *Bhatia International*'s position that the provisions of Part I of the Arbitration Act can be used in foreign seated arbitrations).

127 BALCO, (2012) 9 SCC 552, ¶ 96 (India).

128 Mistelis, *supra* note 34, at 376–377.

129 Krishna Veni Nagam v. Harish Nagam, (2017) 4 SCC 150, ¶ 13 (India); Indian Overseas Bank v. Chemical Constr. Co., (1979) 4 SCC 358, ¶ 16 (India); Dhannalal v. Kalawatibai, (2002) 6 SCC 16, ¶¶ 23, 25 (India).

130 Arbitration Act, No. 26 of 1996, §§ 9, 34, 37, 42 (India).

131 *See* Antrix Corporation, 2018 SCC Online Del 9338, ¶ 59 (India).

132 *See* Arbitration Act, No. 26 of 1996, § 42 (India); State of Maharashtra v. Atlanta Ltd., (2014) 4 SCC 619, ¶ 29 (India) (Section 42 says that once any application arising out of an arbitration agreement is made to a court, such court shall exclusively deal with all further applications. The visible purpose behind this is to avoid inconvenience by preventing a situation whereunder the parties would file different applications with respect to the same dispute before different courts. Section 42 ties all the later applications in a dispute (after the first application) to the same court as the first application, so as to avoid such chaos).

133 This is because even if Section 42 had not existed, there would anyway be only one court where the parties could go for all applications.

134 Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal, 1962 Supp (3) SCR 1, ¶ 9 (India); Hardeep Singh v. State of Punjab (2014) 3 SCC 92, ¶ 42 (India).

multiple courts.[135] Thus, both the practice of civil litigation and the principles of statutory interpretation indicate that Section 2(1)(e) must be held to confer concurrent jurisdiction on multiple courts, rather than exclusive jurisdiction on one designated court. After having answered the first question in the affirmative, it is important to determine the various factors that must be used for the determination of jurisdiction of these courts.

The considerations must include the "*cause of action*", as it is covered within the definition of "*subject-matter*" of the arbitration and that of the suit.[136] The location of the cause of action is also important as it is the place where evidence is located.[137] While an arbitral challenge itself does not require the court to peruse any evidence outside of the records of the tribunal,[138] evidence may be required in interim proceedings.[139] Further, in exceptional circumstances, evidence may be introduced even at the stage of challenge.[140] Thus, the cause of action must be one of the considerations. Further, even the location of the respondent must be read into Section 2(1)(e)(i) and 2(1)(e)(ii). This is because Section 2(1)(e)(i) and 2(1)(e)(ii) ask the court to fictionally assume that a civil suit is being filed.[141] In India, the location of the respondent is necessarily one of the places with concurrent jurisdiction in all civil suits.[142] Moreover, the location of the respondent is a fair consideration, as the principle of *dominus litis* is an equitable counterbalance to it.[143] Hence, the respondent's location of residence and business must also be valid considerations. As stated above, venue must also be a relevant consideration as it is a place of convenience and neutrality. While Section 2(1)(e)(i) or 2(1)(e)(ii) does not explicitly mention "*venue*", it can be interpreted into the sections as one of the locations of 'causes of action' for any arbitral application.[144] Such interpretation was used in *BALCO* to incorporate venue in the test.[145]

The final test that is arrived at is a combination of the *BALCO* Test and the CPC Test, whereby concurrent jurisdiction is conferred on the basis of the venue; the causes of action; and the location of the respondent. Further, in pursuance of established civil jurisprudence, the parties may, at their discretion, confer exclusive jurisdiction on any of these courts.[146] Notably however, this test comes with a caveat. Hypothetically, it is possible for all three of the aforementioned

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135 *See* Antrix Corporation, 2018 SCC Online Del 9338, ¶ 59 (India).

136 *See* Khaleel Ahmed, (2000) 3 SCC 755, ¶ 6 (India); JSW Steel, (2006) 11 SCC 521, ¶¶ 66–68 (India); Swastik Gases, (2013) 9 SCC 32, ¶ 28 (India); BALCO, (2012) 9 SCC 552, ¶ 96 (India).

137 DINSHAH FARDUNJI MULLA, THE CODE OF CIVIL PROCEDURE § 20.12 (2011).

138 Arbitration Act, No. 26 of 1996, § 34(2)(a).

139 *See id.* §§ 8, 9, 13, 14, 27, 29A.

140 *See, e.g.*, Canara Nidhi v. M. Shashikala, (2019) 9 SCC 462, ¶ 19 (India); Emkay Global, (2018) 9 SCC 49, ¶¶ 13, 21 (India) (citing Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796, ¶¶ 14, 17–18, 21, 24, 31 (India)).

141 *See* text accompanying *supra* notes 86–91 (as discussed, the "look through" approach needs to be used, by deeming that the case directly went to a civil court).

142 CODE CIV. PROC. (1908), §§ 16–20 (India).

143 Since the ultimate choice of forum is anyway granted to the petitioner, it will not be unfair to her/him to include the location of the defendant as one of the locations. If this is, in fact, chosen as the location for proceedings, it would be fair to both the parties. This is because it is already convenient to the respondent, and the petitioner has also actively chosen the same place for the proceedings.

144 *See* BALCO, (2012) 9 SCC 552, ¶ 96 (India).

145 *Id.*

146 Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286, ¶ 3 (India) [*hereinafter* "Hakam Singh"]; ABC Laminart v. AP Agencies, (1989) 2 SCC 163, ¶ 19 (India); Swastik Gases, (2013) 9 SCC 32, ¶ 19 (India); B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Inv. Ltd., (2015) 12 SCC 225 (India).

factors to be located outside India, despite India being the seat of arbitration.[147] Having said that, this problem cannot be resolved by use of any of the four pre-existing tests either.[148] Since, in such cases, all the locations in India would stand at par, any pre-determined location of exclusive jurisdiction must be given precedence.[149] This is because party autonomy is of high importance in arbitration.[150] In the absence of such a clause, places within India with good international connectivity and reputable courts may be granted default jurisdiction.[151] In any case, this gap is for the legislature to fill and the proposed test suffices to uniformize existing jurisprudence.

III. Conclusion

This article has highlighted the inconsistency in the tests used by the Supreme Court in the determination of domestic and international jurisdiction of courts to entertain arbitration cases. Such inconsistency is generally undesirable in law.[152] Further, such inconsistencies would deter parties from choosing India as the seat of arbitration and using Indian supranational rules of arbitration,[153] the use of which is likely to bring in significant revenue for the government. Thus, it is very important to uniformize the law of arbitration in India.

In Part I, this article has proposed a six-step test to simplify the determination of the choice of seat, in the absence of a specific stipulation. The proposed test hierarchically looks at all the factors that are the most akin to a seat of arbitration, in order to arrive at a conclusion. Admittedly, the test is extremely simplified and is subject to certain exceptions, as discussed above. However, the test is generally of high utility in the determination of seat, as is evident

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147 Hypothetical scenario: A bag manufacturer in Pakistan enters into a contract with a jute textile mill in Bangladesh. The contract is for the supply of jute through the seas. The venue of the arbitration is held to be Hong Kong as the arbitration is to be held in accordance with the Hong Kong International Arbitration Centre (HKIAC) Rules. However, the contract categorically provides that the seat of the arbitration is India, Indian Arbitration Act would govern the proceedings and the courts of India would have exclusive jurisdiction over the dispute. This decision may have been made as the law of arbitration is more settled in India and the parties are less comfortable with Hong Kong authorities.

148 When the seat is mentioned to be "India", even the Seat Test would not be of use. Moreover, the other reasons for discarding the Seat Test have already been discussed. Other tests involve the 3 factors already discussed (cause of action, respondent's location, and venue), which are anyway not helpful in such a scenario.

149 *See* Hakam Singh, (1971) 1 SCC 286, ¶ 4 (India). One may argue that this goes against the principle in *Hakam Singh*. However, one must use the Golden Rule of interpretation in this scenario. It is absurd that the courts of the seat do not have any jurisdiction, thus the statute must be purposively interpreted. The only other reasonable interpretation would be that all the courts in the country would have simultaneous jurisdiction (as none of them is prescribed). In such cases, the exclusive jurisdiction clause must be held valid in light of the *Hakam Singh* principle. Moreover, judgments must not be read in a pedantic manner and one must look at the intent behind the judgment rather than the strict language of it. *See, e.g.,* Amar Nath Om Prakash v. State of Punjab, (1985) 1 SCC 345, ¶ 11 (India); Union of India v. Amrit Lal Manchanda, (2004) 3 SCC 75, ¶¶ 14–18 (India); BGS SGS Soma, 2019 SCC OnLine SC 1585, ¶¶ 43–45 (India).

150 ARJUN GUPTA, SAHIL KANUGA & VYAPAK DESAI, *Blessed Unions in Arbitration: An Introduction to Joinder and Consolidation in Institutional Arbitration*, 4(2) INDIAN J. ARB. L. 134, 136, 142, 144, 149 (2016), *available at* http://www.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Arjun%20Gupta%20et%20al.pdf; *See* CHARLES CHATTERJEE, *The Reality of Party Autonomy Rule in International Arbitration*, 20(6) J. INT'L ARB. 539, 557 (2003) (in the absence of specific provisions of law to the contrary, any decision on ambiguous matters in arbitration must be made based on party autonomy).

151 *See* Fiona Trust, [2007] UKHL 40 [66] (appeal taken from Eng.); NTPC-Singer, (1992) 3 SCC 551, ¶ 15 (India) (these could be the courts of New Delhi and Bombay. The reasoning behind this is that the parties are assumed to be rational businesspersons who are presumed to prefer convenience in proceedings and competence of the adjudicator. This reasoning is used in deciding jurisdictional disputes in commercial law matters).

152 LON FULLER, THE MORALITY OF LAW 79–80 (2d. ed. 1969).

153 *See* 2010 International Arbitration Survey Report, *supra* note 37, at 17–23 (this is because parties prefer to determine countries as seats that have predictable positions of law, to escape from arbitrariness of the legal process).

from its application on major Supreme Court judgments. The article has also listed the situations in which the test needs to be suitably altered to fit the necessary requirements.

In Part II, this article has proposed that the domestic jurisdiction in arbitration cases must be simultaneously conferred on multiple courts i.e. the courts presiding over the venue, the causes of action and the respondent's location. This would not lead to inconvenience to parties, as Section 42 firmly establishes that the court approached first ousts all other courts in the future. Further, this would be in consonance with the civil law principle of *dominus litis*.

Both the proposed tests will help the judiciary in simplifying and uniformizing the process of determination of seat jurisdiction and domestic jurisdiction. While the article has addressed only a narrow part of the largely convoluted arbitration jurisprudence in India, it aims to be a small stepping-stone in the uniformization of arbitration law in India. It will indeed be interesting to see how the Supreme Court resolves the conflicts highlighted above.