# THE INEFFICACIOUS STANDARD: FORUM SHOPPING AND THE REFORM OF INDIA'S ARBITRAL INTERIM RELIEF REGIME

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**ABSTRACT**

This article is an attempt at conducting a doctrinal analysis of the concurrent interim relief jurisdiction conferred upon courts and arbitration tribunals by Sections 9 and 17 of the Arbitration and Conciliation Act, 1996, which highlights the irony of how the undefined "inefficacious remedy" criterion introduced by the 2015 Amendment has ended up fostering forum-shopping and satellite litigation, which was precisely what the Amendment was designed to prevent. By undertaking a comprehensive analysis of the judgments primarily, "Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd. (2022)", "Welspun Enterprises Ltd. v. Kasthuri Infra Projects (2024)", and "Asad Mueed & Anr. v. Hammad Ahmad & Ors. (2023)", the article reveals how the lack of an efficacious threshold in respect of the inefficacy standard has led to interpretive inconsistencies among the various High Courts and the ability of savvy litigants to abuse the jurisdiction gateway set out by Section 9(3). It brings out three pathologies of this system: (i) the pre-constitution forum-shopping technique made possible because of the wide applicability of Section 9 before the Constitution; (ii) the post-constitution use of the "inefficacious" exception; and (iii) the open-ended third-party problem within Section 17 jurisdiction. This article conducts a critical analysis of the Draft Arbitration and Conciliation Bill, 2024, contending that the proposed amendment that would result in the repeal of Section 9(3) is likely to be an overcorrection and proposes three judicial reforms that could be implemented immediately. These include making the prior-approach test a necessary precondition to Section 9 applications; imposition of exemplary costs where the application is made tactically; and constitution of the Bench for determining the ambit of powers of the third-party tribunal under Section 17.

**Keywords:** Arbitration and Conciliation Act 1996; Section 9; Section 17; Forum Shopping; Interim Relief; Inefficacious Remedy; Procedural Delay; 2015 Amendment; Draft Bill 2024; Third-Party Relief; Comparative Arbitration Law.

## I. INTRODUCTION

When Parliament enacted the Arbitration and Conciliation Act, 1996[1] ("the Act"), there was a distinct sense of urgency to replace the obsolete Arbitration Act of 1940[2] with a modern statutory framework based on the UNCITRAL Model Law on International Commercial Arbitration, 1985[3], and thereby transform India into an acceptable venue for domestic and international commercial arbitration. The Act aspired to provide for the speedy disposal of disputes, minimise judicial intervention, and ensure party autonomy. These aims were reinforced by the Arbitration and Conciliation (Amendment) Act, 2015[4] and the Arbitration and Conciliation (Amendment) Act, 2019[5]. Nearly three decades on, the paradox is striking as arbitration in India remains synonymous with delay, satellite litigation, and procedural attrition.

The interim relief provisions drafted in the Act pose an ambiguity. Sections 9[6] and 17[7] vest concurrent power of interim relief in courts and arbitral tribunals, respectively. In an attempt to avoid repetitive resorting to the courts, Section 9(3)[8] was introduced in the 2015 Amendment[9] to preclude a court from hearing the interim application where an arbitral tribunal is already constituted, except when the measure taken by the arbitral tribunal will be “inefficacious”.[10] This was a noble attempt. However, there is no explanation anywhere as to when Section 17's relief can be considered to be inefficacious, nor has the Supreme Court provided a comprehensive list of situations. The result is a doctrinal vacuum, which is used by litigants to exploit with considerable sophistication by seeking relief from the courts under Section 9, since the undefined standards make it easy for them to claim that the tribunals are inconvenient.

This article surveys the statutory architecture of Sections 9 and 17, and diagnoses forum shopping as a pathological consequence of this architecture. Further, it analyses the systemic procedural delays that forum shopping generates and the judicial efforts to contain them. At

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[1] Arbitration and Conciliation Act, No. 26 of 1996 (India) [hereinafter A&C Act].
[2] The Arbitration Act, No. 10 of 1940 (India) (repealed).
[3] UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17 annex I (June 21, 1985), amended by G.A. Res. 61/33 (Dec. 4, 2006).
[4] Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 (India) [hereinafter 2015 Amendment].
[5] Arbitration and Conciliation (Amendment) Act, No. 33 of 2019 (India).
[6] A&C Act § 9.
[7] *Id.* § 17.
[8] *Id.* § 9(3).
[9] *See* 2015 Amendment.
[10] Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, Report No. 246, at 15-22 (Aug. 2014) [hereinafter Law Commission 246th Report].

last, it engages with proposed legislative reforms, principally the Draft Arbitration and Conciliation Bill, 2024, and offers conclusions and doctrinal recommendations.

## II. THE STATUTORY ARCHITECTURE: SECTIONS 9, 17, AND THE 2015 AMENDMENT

### *A. Section 9: The Court's Gateway to Interim Relief*

Section 9 of the Act allows the party concerned to seek relief from the court by way of provisional relief prior to, during, and even after the arbitration proceedings, but before the enforcement of the award in the arbitration. The types of interim relief provided include “preservation of assets, interim injunctions, appointment of receivers, and such other measures as the court deems just and convenient.”[11] Before the 2015 Amendment, Section 9 was an unqualified right, which allowed the parties to avoid a constituted tribunal and claim the same remedy through the court. This was usually done to get a favourable forum, to cause delays or to claim ex parte relief which would not be granted by the tribunal.

The 2015 Amendment[12] inserted two sub-sections. Section 9(2) provides that where an interim relief is ordered by the court before commencement of arbitration, arbitration proceedings should start within ninety days from the date of this order, or within such period as the court determines.[13] This was included because of the mischief of parties availing themselves of freezing injunctions under Section 9 and not commencing the arbitration proceeding at all. But the section has been widely criticised for being ambiguous since it does not impose any penalty in case of non-compliance apart from leaving discretion with the court to revoke or modify its order.

Section 9(3) is immediately responsible for the issue of forum shopping. It provides that once an arbitral tribunal has been constituted, a court "shall not" entertain an interim application "unless the court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."[14] This language brings in the element of mandatory restriction with the use of the word “shall not”; it, at the same time, introduces an exception via the

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[11] A&C Act § 9(1).
[12] *See* 2015 Amendment.
[13] A&C Act § 9(2).
[14] *Id.* § 9(3).

"inefficacious remedy" route.[15]

### *B. Section 17: The Tribunal's Powers and Their Limits*

Before the 2015 Amendment, Section 17 conferred on the arbitral tribunal a general power of passing interim measures, but there was no enforcement mechanism in it. Orders passed in favour of a party under Section 17 would have to go to a civil court for their enforcement, thus rendering the section useless for its intended purpose. With the 2015 amendment, this has been changed by inserting Section 17(2) of the Act, according to which the orders passed by the tribunal under Section 17 shall be deemed to be orders of the court and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if they were an order of a court. The powers conferred upon the arbitral tribunal under Section 17(1) are pari materia with the powers of a court under Section 9.[16]

Notwithstanding the above equalisation at the legislative level, practical differences continue to exist. It is not clear whether the powers of the tribunal under section 17 extend with certainty to non-parties who have not signed the agreement to arbitrate. An arbitrator is a creation of a contract, and thus commanding non-parties is not within the purview of the tribunal's consent-based jurisdiction. In actual third-party cases, it becomes possible to claim that the use of section 9 is justified due to the ineffectiveness of section 17 – however, such a claim can easily be made.[17]

## III. FORUM SHOPPING AS A STRUCTURAL PATHOLOGY

### *A. The Anatomy of Tactical Section 9 Recourse*

Forum shopping by way of Sections 9 and 17 involves three strategies used repeatedly in practise. The first is a Section 9 petition before the formation of the tribunal, where no one anticipates an adverse composition of the tribunal or seeks to obtain an ex parte court order before the other side has had the chance to react, and invokes Section 9 before the constitution of the tribunal. After securing interim relief, the applicant could then take time before appointing the arbitrator, thereby ensuring that his assets remain frozen while thwarting the arbitral process. This is despite the efforts made by Section 9(2) to prevent such forum

[15] A&C Act § 9(3).
[16] *See* 2015 Amendment; A&C Act § 17(2).
[17] Blue Coast Infrastructure Dev. Pvt. Ltd. v. Blue Coast Hotels Ltd., 2016 SCC OnLine Del 6560 (India).

shopping. The court in *Sundaram Finance Ltd. v. NEPC India Ltd.*[18] noted that parties must demonstrate proximity between the interim order and the intended arbitration.

The second strategy operates post-constitution. Once a tribunal is formed, a party may invoke the "inefficacious remedy" exception by pointing to any delay, inconvenience, or procedural gap in the tribunal's functioning as justification for court intervention. The Draft Delhi High Court Arbitration Rules, 2023 ("DHCAR")[19], reflect such a structural problem, being the most thorough procedural reforms to date at the High Court level; that is, parties sought interim relief under Section 17 or Section 9 from the arbitrator or court, respectively.

The third and most complex strategy is the use of parallel proceedings where an application under Section 9 is made to the tribunal. Given that there is no express power for either of these proceedings to stay the others, the two can proceed together, thus causing costs and delays. The issue is complicated further by the appeal system under Section 37[20], which permits appeals from both Section 9 and Section 17 orders, multiplying avenues for delay.

### *B. Judicial Responses: Shaping the "Inefficacious" Standard*

In the case of *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*[21], the Supreme Court finally dealt with the question of whether or not a court should apply its mind to a Section 9 application once a tribunal has been established, The court explained that 'entertain' under Section 9(3) means to consider the application based on its merits and that there are several illustrative examples of circumstances where a Section 17 remedy may be ineffective (e.g. if there is an unavailability of the tribunal members due to illness; if, due to the members of the tribunal being unable to gather together on short notice, an urgent application cannot be decided; or if there is a challenge to the constitution of the tribunal based on bias). Since the nature of any interim relief is that it requires urgency to be granted, it was the view of the Supreme Court that it was not the intent of the legislature to divest the court of all authority in these situations.

The practical difficulty is that this enumeration is illustrative, not exhaustive, and lower courts have interpreted it expansively. In *Bhubaneshwar Expressways Pvt. Ltd. v. National Highways*

[18] Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479 (India).
[19] Draft Delhi High Court Arbitration Rules, 2023, Rule 3 [hereinafter DHCAR].
[20] A&C Act § 37.
[21] Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd., (2022) 1 SCC 712, ¶¶ 85–95 (India).

*Authority of India*[22], the Delhi High Court has accepted jurisdiction under Section 9 as a result of one arbitrator having recused without substitution, making a non-functioning tribunal. It was noted by the court that it would not be an effective remedy to wait for the Section 17 application in these circumstances due to the financial difficulties the petitioner was facing and the significant risk of irreparable damage. While the decision is correct on its own facts, the language used in the decision has later been used as justification for recourse under Section 9 wherever there is a dysfunction in the arbitral process, even if that dysfunction is only temporary.

More recent decisions have attempted to tighten this standard. In *Welspun Enterprises Ltd. v. Kasthuri Infra Projects*[23], the Delhi High Court in 2024 disposed of a Section 9 petition and requested the constituted tribunal to decide the matter expeditiously as a Section 17 application, specifically finding that the respondent had not demonstrated urgent circumstances sufficient to displace tribunal jurisdiction. Similarly, in *Asad Mueed & Anr. v. Hammad Ahmad & Ors.*[24], the same court reiterated that Section 9(3) mandates judicial restraint and that court intervention is warranted only where the tribunal's remedy is genuinely inefficacious, not merely inconvenient or slower.[12]

The inconsistency that comes out of this survey study is a highly inconsistent judiciary. The threshold of inefficacy varies among different benches in the same court and among different High Courts all over India. It is important to note that the inconsistency does not exist just theoretically but also creates an environment where forum shopping can thrive. This is because the decision in filing of Section 9 is highly dependent on the specific bench.

## IV. SYSTEMIC PROCEDURAL DELAYS: CAUSES AND CASCADES

### *A. The Section 29A Mandate Problem*

The phenomenon of forum shopping under Sections 9 and 17 is not an isolated one. Rather, it is a part of the larger process of procedural delays, which emanates from the very structure of the Act. Section 29A, which was inserted through the 2015 Amendment, mandates that the

[22] Bhubaneshwar Expressways Pvt. Ltd. v. Nat'l Highways Auth. of India, O.M.P.(I)(COMM.) 155/2019 (Delhi H.C. 2019) (India).
[23] Welspun Enterprises Ltd. v. Kasthuri Infra Projects, 2024 SCC OnLine Del 4849 (Delhi H.C. July 15, 2024) (India).
[24] Asad Mueed v. Hammad Ahmad, 2023 DHC 001008 (Delhi H.C. 2023) (India).

arbitrator render his award within twelve months of the completion of pleadings, which can be extended for another six months with the agreement of the parties, and further with the court's permission.[25] The Calcutta High Court, in *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Limited*[26], ruled that the mandate of the arbitral tribunal ends under Section 29A, unless it is extended within its operation period, and an application for the same made after the expiration of the mandate cannot be considered since there is no provision for renewal of the mandate once it expires. The ruling was correct based on statutory interpretation, but the ruling has led to the filing of extension applications prematurely by parties or as a means of destabilising the arbitration process through Section 29A.[13]

### *B. The Pendency Problem and Judicial Burden*

The institutional impact of Section 9 strategy cases is considerable. Courts dealing with commerce in major jurisdictions, primarily in Delhi, Bombay, Calcutta, and Madras, deal with many Section 9 applications which could have been heard in constituted tribunals. The Law Commission of India's 246th Report[27] documented that one of the major reasons for delays in arbitration cases in courts was the large number of interim applications that should have been heard by constituted tribunals. The Expert Committee on Arbitration Reform[28], constituted by the Ministry of Law and Justice in June 2023, has identified the reduction of court involvement via amendment of Sections 9 and 17 as its priority.[14]

The process works in the following way: a party makes an application under Section 9, which results in an order to maintain the status quo or freeze. Such an order can stay on for months until the disposal of the Section 9 application. In the meantime, the arbitral process is brought to a standstill as the arbitral tribunal will not issue contradictory orders. The opposing party becomes commercially paralyzed and forced to spend time and money to fight the Section 9 application in the court while at the same time attending to the arbitration proceedings.

### *C. The Third-Party Gap: A Persistent Loophole*

An unresolved question about a tribunal's authority over third parties forms the basis of the

[25] A&C Act § 29A.

[26] Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd., 2023 LiveLaw (Cal) 266 (Calcutta H.C. Sept. 2023) (India).

[27] Law Commission 246th Report, supra note 2, at 15–22.

[28] Report of the Expert Committee to Examine the Working of Arbitration Law and Recommend Reforms, Ministry of Law and Justice, Gov't of India, ¶¶ 3.13–3.15 (Feb. 2024) [hereinafter Expert Committee Report 2024].

loophole that has enabled sustained "forum-shopping" across multiple arbitration forums. The Delhi High Court, in its decision in In *Blue Coast Infrastructure Development Pvt. Ltd. v. Blue Coast Hotels Ltd.*[29], stated that an arbitrator derives its authority solely from the parties to the arbitration agreement, and that therefore, it has no authority to issue an order to a non-party to the agreement. However, this has never been fully resolved by the Supreme Court.

As a result, every time a party has a reasonable basis for claiming the relief it seeks from the tribunal requires the issuance of an order against a third party, such as a bank holding frozen assets, a registrar or a revenue officer, it may be argued that the provisions of Section 17 of the Act are ineffectual, and that the tribunal has jurisdiction under Section 9 of the Act. This gap will provide a potentially significant opportunity for parties to circumvent the tribunal's jurisdictional limitations imposed by Section 9(3) of the Act, until such time as the Act expressly addresses the tribunal's ability to act against a third party.

Similar legal frameworks have addressed this structural problem by virtue of legislation addressing the issue directly. As per section 12A of the International Arbitration Act of Singapore[30], concurrent jurisdiction of the court exists in respect of interim orders to be made against non-parties during the entire period of arbitration, without a need for any party to first establish that there was inefficacy in the tribunal's relief as the Act itself defines the limit. "Sections 44 and 45 of the English Arbitration Act of 1996"[31] also provide similar framework of intervention by court for third parties without infringing on the jurisdiction of the arbitral tribunal.

## V. THE PATH FORWARD: LEGISLATIVE AND DOCTRINAL REFORM

### *A. The Draft Arbitration and Conciliation Bill, 2024*

In October 2024, the Government of India released the Draft Arbitration and Conciliation Bill, 2024[32] for public consultation. One of these drafts would delete Section 9(3) and replace it with a new section (Section 9A) to deal with interim measures while arbitration is pending. A new Section 9A will provide more specific criteria for determining if the court has the authority to

[29] Blue Coast Infrastructure Dev. Pvt. Ltd. v. Blue Coast Hotels Ltd., 2016 SCC OnLine Del 6560 (India).
[30] International Arbitration Act (Cap 143A, 2002 Rev Ed Sing) § 12A (Sing.).
[31] Arbitration Act 1996, §§ 44–45 (UK).
[32] Draft Arbitration and Conciliation Bill, 2024, cls. 9, 9A, Ministry of Law and Justice, Gov't of India (Oct. 2024).

order an interim relief during the period when the arbitration is ongoing (i.e., there would be a heightened requirement of urgency and irreparability). Additionally, the draft has proposed adding provisions regarding emergency arbitration. If implemented, parties will be able to obtain binding emergency interim relief from an emergency arbitrator within days of commencing arbitration, which will significantly reduce the number of pre-constitution requests for interim relief that parties will need to submit to the court.[33]

This amendment seeks to address concerns about the "inefficacious remedy" benchmarks proving to be ineffective; therefore, it removes Section 9(3) from the statute. However, removing the jurisdictional limitations on the courts during arbitration could lead to a significant overcorrection by allowing for the recurrence of previous patterns of duplicate access to the courts, which existed prior to 2015. The Draft Bill must be read alongside the Expert Committee's 2024 Report[34], which suggested that court involvement should be limited to specific criteria and not eliminated. As a result, the legislature faces an uphill battle to replace the open-ended "inefficacious remedy" terminology with a defined, finite list of situations where court intervention is allowed, as well as maintaining court jurisdiction in the case of real emergencies.

### *B. Three Doctrinal Proposals for Immediate Judicial Implementation*

Three doctrinal reforms are implementable through judicial practice and High Court rules without awaiting statutory amendment.

First, the courts must introduce the prior-approach principle. Under this principle, the person wishing to apply for Section 9 assistance shall, before instituting court proceedings, approach the body concerned under Section 17 and provide the court, through affidavit and correspondence, proof that the body has had ample time to act and has neglected to do so. The disclosure requirements provided in the DHCAR[35] are a useful template in this regard.

Secondly, where a court has entertained an application under Section 9 in spite of the existence of the tribunal's composition and the eventual conclusion that the application was maintainable in the tribunal, the court must make an order requiring the applicant to pay costs. An order

[33] Expert Committee Report 2024, supra note 27, ¶¶ 3.13–3.16.
[34] Expert Committee Report 2024, supra note 14, ¶¶ 3.13–3.16.
[35] DHCAR, Rule 3, supra note 18, r. 3.

requiring payment of exemplary costs in cases involving tactical applications under Section 9 will act as a significant deterrent, especially for parties with adequate financial means.

Third, the Supreme Court must examine and unify the law regarding third-party interim relief under Section 17, through an opinion issued by a constitution bench of judges. Both the Law Commission's 246th Report[36] and the Expert Committee's 2024 Report[37] recommend that some type of legislative clarification is required, and the Draft Bill provides a legislative vehicle for this purpose. In the absence of a resolution by statute, there is no conclusive judicial pronouncement defining how or to what extent a tribunal has the authority to bind third parties; thus, resolving this issue would eliminate by far the most durable loophole in the current statutory framework.

## VI. CONCLUSION

The Arbitration and Conciliation Act (1996) was born from a highly ambitious objective of establishing an efficient, party-driven, non-interventionist dispute resolution system based on judicial non-interventionism to suit the needs of an economy that was going through liberalisation. The 2015 Amendment has reinforced that ambition by promoting Section 17 to be on par with Section 9 and placing mandatory timelines on Section 29A. However, the failure to define the inefficacious remedy standard in Section 9(3), which is the cornerstone of the entire interim relief framework, is a matter of great concern in terms of legislative omission.

Thus, as shown in this article, it amounts to a built-in incentive to engage in forum shopping, since parties take advantage of the lack of a definition of the gateway to have the courts assume jurisdiction over arbitration proceedings, resulting in the very satellite litigation and procedural delays that the Act was meant to prevent. The judicial efforts to infuse a coherent sense to the scheme, through judgments by the Supreme Court and High Courts, have been rendered futile due to the lack of a statutory definition.

These can be addressed within the Draft Arbitration and Conciliation Bill, 2024. The omission of Section 9(3), together with the inclusion of emergency arbitration rules, is a welcome moves, which, however, require a clear definition of the remaining jurisdiction of courts, along with an explicit statutory clarification regarding the third-party powers of the arbitral tribunal.

[36] Law Commission 246th Report, supra note 10, at 24–26.
[37] Expert Committee Report 2024, supra note 27, ¶ 3.15.

Otherwise, the Bill may result in substituting one kind of ambiguity for another.

In the end, what seems to define the paradox of the Act is not the failure of the arbitral idea as such, but the inability of its legislative, judicial, and professional institutional framework to live up to its potential. Solving the problem of forum-shopping through implementing the suggested reforms will not only speed up the arbitral process itself, but it will confirm the principle behind it; that party autonomy, rather than continual judicial involvement, is what is supposed to drive business dispute resolution in India.