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Emergency arbitration in India: Current scenario and future

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Abstract
Interim relief plays a critical role in arbitration, safeguarding the interests of the parties and ensuring the effectiveness of arbitral decisions. However, the interventionist approach of the judiciary under Section 9 of the Arbitration and Conciliation Act, 1996, has compromised the efficacy of such relief. To address this challenge, arbitration institutions have introduced the Emergency Arbitration process, which allows parties to seek interim relief from an emergency arbitrator before the constitution of the arbitral tribunal. Despite its advantages, the enforceability of decisions made by emergency arbitrators remains a significant issue, particularly since these decisions are not automatically enforceable under Indian law. This study examines the constitutional authority of emergency arbitrators, the legitimacy of their decisions, and the implications of amendments introduced by the 246th Law. It explores the role of emergency arbitration in providing swift relief and its evolving practice, especially in the context of India, where foreign arbitration institutions like SIAC are commonly used, and Indian institutions like MCIA, ICA, and ICADR have incorporated emergency arbitration clauses into their rules.

Keywords: Interim relief, emergency arbitration, arbitration and conciliation Act, 1996

Introduction
To protect the interests of involved parties and ensure the effectiveness of arbitral decisions, interim relief plays a critical role in arbitration. However, the effectiveness of such relief has been compromised by the judiciary's interventionist approach under Section 9 of the Arbitration and Conciliation Act, 1996. To address this issue, arbitration institutions have established the Emergency Arbitration process, allowing parties to seek temporary relief from an emergency arbitrator before the formation of an arbitral tribunal. Despite this provision, the practical application of emergency arbitrators' decisions faces challenges, particularly since these decisions are not enforceable under the Indian Arbitration and Conciliation Act, 1996. This study aims to explore the constitutional authority of emergency arbitrators and the legitimacy of their decisions, while also examining the amendments introduced by the 246th Law. Interim measures are crucial in the early stages of arbitration to protect the parties' positions. These measures can include preserving evidence, preventing asset loss, and ensuring the amount in dispute, including arbitration costs, is safeguarded. Over the last decade, emergency arbitration has gained traction as it offers disputing parties a swift means of obtaining interim relief from a designated arbitrator without needing to resort to court proceedings. Interim relief is vital for effective dispute resolution during arbitration as it prevents harmful actions, secures relevant evidence, and protects assets from being lost. Under the Arbitration and Conciliation Act, parties can seek temporary remedies from both the arbitral tribunal and national courts. However, the arbitral tribunal is often not utilized for immediate relief since it cannot provide remedies before its formation. To fill this gap, institutions have introduced emergency arbitration procedures that allow for expedited requests for immediate relief from an emergency arbitrator. According to Section 17(2) of the Arbitration Act, decisions made by an emergency arbitrator in arbitrations with an Indian seat are enforceable as court orders. This establishes that an emergency arbitrator's ruling is legally equivalent to a decision made by the arbitral tribunal under Section 17(1). However, in cases with a foreign seat, enforcement of an emergency arbitrator's ruling requires reliance on Section 9 of the Arbitration Act. The feasibility of emergency arbitration is influenced by the time and costs associated with pursuing interim relief across different jurisdictions, such as an emergency arbitrator followed by a national court. Emergency arbitration serves as a legal remedy for disputes arising from the formation of an arbitral tribunal, particularly when immediate relief is necessary.

For parties in India seeking swift remedies, waiting for the establishment of an arbitral tribunal may not be practical. Conversely, if forming an arbitral tribunal takes less than three weeks, emergency arbitration may be a more viable option. Notably, orders from an arbitral tribunal and those from an emergency arbitrator are equally enforceable, with no distinction in arbitrations with foreign seats. Courts retain the authority to grant interim relief before, during, or after a final decision is made. In India, parties often turn to foreign institutions like SIAC for emergency arbitration. Indian organizations, such as MCIA, ICA, and ICADR, have also incorporated emergency arbitration clauses into their rules. However, Indian legislation has yet to clarify the enforcement or validity of these agreements. This article examines the legitimacy of emergency arbitration in India, focusing on its practical applicability, the concurrent jurisdiction of national courts, and relevant considerations. Emergency arbitration can only be employed if the arbitration agreement includes provisions for it, primarily in urgent situations where relief cannot wait for the establishment of an arbitral tribunal. The effectiveness of emergency arbitration depends on the tight timelines and the arbitrator's capacity to assess the case's merits.

The appropriateness of emergency arbitration in the Indian context should consider the effectiveness of alternative remedies and the enforceability of the awarded remedy. During the pre-arbitral phase, parties have the option of using national courts or emergency arbitration for relief. Factors such as cost, speed, confidentiality, impartiality of the court, ex parte relief, and orders against third parties are essential to consider. While emergency arbitration institutions set deadlines for providing relief, these may occasionally be exceeded. It is also crucial for parties to evaluate the time required for enforcing relief if voluntary compliance is not met, as courts in different jurisdictions can vary in their responsiveness. Emergency arbitration processes typically require upfront payment of administrative costs and fees, with various institutions offering different fee structures. In India, court costs for Section 9 applications tend to be lower than those of institutions, although senior lawyers may charge high fees, making court options relatively expensive. Nonetheless, the emergency arbitration process can be more cost-effective in certain scenarios as it avoids multiple court proceedings.

While arbitration agreements permit parties to seek temporary relief against non-signatories, the contractual nature of arbitration limits the powers of emergency arbitrators. Indian courts can provide interim relief against third parties, yet ICC Rules confine such remedies to signatories. The need for surprise in granting relief can also complicate matters, as preemptively notifying reluctant parties may lead to asset dissipation. Confidentiality remains a primary reason for choosing arbitration, and emergency arbitration mechanisms, like those outlined in SIAC Rules, aim to uphold this confidentiality. However, judicial processes may not always provide the same level of secrecy as arbitration. Having an expert arbitrator (EA) resolve disputes is beneficial as it ensures optimal relief and a focused approach. However, the allocation of arbitration cases to non-specialist judges can undermine the legitimacy of judicial remedies due to a lack of expertise. Concerns about impartiality and neutrality may arise when seeking temporary relief from a court, especially from a state or governmental entity.

Emergency arbitration may present challenges due to inherent limitations that could render the tribunal's jurisdiction ineffective. Institutions have crafted emergency arbitration clauses to permit parties to seek relief in "extraordinary" or "appropriate" circumstances, but there is a risk of concurrent jurisdiction being exploited if parties approach courts in less fitting situations. The terminology used to describe these circumstances should be carefully defined to prevent misuse, ensuring that national courts only provide support in cases where relief is sought from third parties or on an ex parte basis. When granting temporary relief, courts can assess the merits of a case, which may indirectly influence arbitration proceedings and lead parties to settle disputes outside of arbitration. This was evident in the Channel Tunnel case, where Lord Mustill refrained from granting temporary relief to avoid undermining the panel's authority. National courts should maintain a similar approach. Concerns about the enforceability of emergency arbitration measures arise due to party compliance issues. A study by Queen Mary University found that 79% of respondents regarded enforceability as a major concern, and 46% preferred interim relief through traditional methods before emergency arbitration. Ensuring that emergency relief can be enforced is crucial.

The enforceability of relief by Emergency Arbitrators (EAs) in India hinges on two main factors: statutory recognition under the Principal Act and the location of the emergency arbitrator. Unlike advanced jurisdictions such as Singapore and Hong Kong, the Indian Parliament did not incorporate a provision for emergency arbitration. The designation of "emergency arbitrator" and the introduction of emergency arbitration processes in institutional rules support the view that an EA functions as a full-fledged arbitrator. Nonetheless, the lack of clear guidance in international conventions and national laws complicates this recognition. To be acknowledged as a complete arbitrator, an EA must possess both contractual and jurisdictional elements, allowing for the issuance of interim relief as needed while adhering to procedural standards similar to those of a conventional arbitrator. An EA's objective mirrors that of a legitimate arbitrator, aiming for impartiality and independence while ensuring due process for all parties. The kompetenz kompetenz principle applies to emergency procedures, empowering an EA to assess the legality of the arbitration agreement and evaluate their own competence. EAs hold the same authority as arbitral tribunals in granting interim relief, and their designated seat establishes the legal framework for arbitration processes. An EA's jurisdiction is influenced by the judiciary's stance on arbitration. According to Section 17(1) of the Principal Act, the Indian Supreme Court has determined that an award from an Emergency Arbitrator (EA) can be recognized as an order. The court dismissed the Future Group's argument that EAs are not formally acknowledged as full-fledged arbitrators, emphasizing that the Principal Act allows parties to resolve disputes according to institutional guidelines, which includes the provision of interim relief by EAs. While the ruling is significant for India and beyond, it may be subject to change if the higher bench of the Court issues a different decision. The court is expected to maintain a lenient stance in such eventualities. Indian courts have employed a hybrid approach in enforcing temporary relief from an Emergency Arbitration (EA) by providing a mirror remedy under Section 9, aiming to obtain relief without depending on the

emergency award itself. In the Raffales case, the Delhi High Court clarified that emergency awards are not enforceable under the Principal Act, leaving parties with no option but to initiate a civil suit. To ensure enforceability, Section 17 Arbitration and conciliation act 1996 underwent amendments in 2015. The omission of Article 17H(1) from the UNCITRAL Model Law on International Commercial Arbitration, which states that an interim order issued by an arbitral tribunal will be recognized and enforced upon application to the relevant court, was a significant oversight. This gap has diminished the appeal of the arbitration framework by 39%. Arbitration-friendly jurisdictions like Singapore and Hong Kong have underscored the importance of emergency arbitration, yet despite recommendations from the 246th Report and the Srikrishna Report, progress remains stagnant.

To address this issue, Parliament could revise the definition of "arbitral tribunal" to explicitly include Emergency Arbitration (EA), thereby enhancing the legal standing of emergency arbitrators and promoting international standards. The limited number of cases concerning enforcement of emergency relief suggests that parties tend to comply voluntarily with an EA's decisions. To reinforce this, reputable Indian institutions like MCIA might consider amending their regulations to impose daily fines for non-compliance with EA awards, providing a useful mechanism for enforcement when national courts are not an option.

While the Arbitration Act of 1996 does not explicitly mention emergency arbitration or the enforcement of an emergency arbitrator's decisions, other jurisdictions have amended their laws to recognize emergency arbitration, such as Hong Kong's Arbitration Ordinance of 2013. In India, the Law Commission and the Srikrishna Committee have advocated for including emergency arbitrators in the definition of "arbitral tribunal" and revising the term "arbitral award" to encompass decisions made by emergency arbitrators. Despite amendments made in 2015, 2019, and 2021, these recommendations have yet to be reflected in the Arbitration Act, leaving the status of emergency arbitrators' decisions as either orders or awards ambiguous.

View of supreme court of India

Ashwani Minda v. U-Shin Limited (2020) was a Delhi High Court case that addressed arbitration and contract disputes. The case involved a joint venture agreement between Ashwani Minda and U-Shin Limited, where tensions led to a legal battle. Key issues discussed included the validity of the arbitration clause, the nature of the dispute, jurisdictional questions, interim relief requests, and public policy considerations. The court examined the wording of the clause, the nature of the dispute, and the authority of Indian courts to intervene due to foreign parties. The ruling emphasized the importance of clear agreements and balancing judicial support with respect for the arbitration process. The Supreme Court of India ruled in Alka Chandewar v. Shamshul Ishrar Khan, addressing the validity of arbitration clauses in contracts. The court examined whether the disputes could be resolved through arbitration, the extent to which courts could intervene in arbitration matters, and whether enforcing the arbitration agreement would conflict with public policy principles in India. The ruling underscored the importance of clear, well-drafted arbitration clauses and careful interpretation in contracts, reaffirming the judiciary's commitment to supporting arbitration while upholding fundamental legal principles. In the context of Indian arbitration, the HSBC PI Holdings case is noteworthy, especially in relation to the judicial handling of arbitration procedures and the enforcement of emergency arbitration rulings. According to the regulations of the Singapore International Arbitration Centre (SIAC), HSBC filed for arbitration against Avitel Post Studioz Ltd. An emergency arbitration granted HSBC immediate relief with an interim award. A judicial battle regarding the acceptance of such awards under Indian law resulted from Avitel's challenge to the award's enforcement in Indian courts. The decision emphasised the necessity for Indian courts to respect the arbitration process and uphold the enforceability of emergency arbitration rulings.

Regarding the enforcement of emergency arbitration awards, the Raffles Design International case involving Educomp Professional Education is noteworthy in India's arbitration law. Under Section 17 of the Arbitration and Conciliation Act of 1996, the court's ruling granting Raffles Design International temporary relief through an emergency arbitrator was declared enforceable. The Supreme Court made sure that the weight of emergency arbitration was maintained by acknowledging its function in giving immediate remedy prior to the establishment of a formal arbitral panel. The decision established a precedent for upcoming arbitration cases and reaffirmed the validity of emergency arbitration in India. Emergency arbitration is the main topic of the Law Commission of India's 2014 Report No. 246—a recommendation to alter the Arbitration and Conciliation Act, 1996. The paper recommends changes to explain the processes for obtaining relief and define the function and authority of emergency arbitrators in order to support the acceptance of emergency arbitration under Indian law. In order to guarantee justice and fairness, it also highlights the enforceability of emergency awards, a procedural guide, conformity to international norms, and court control. The purpose of the report is to increase the efficacy and efficiency of India's dispute settlement procedures. In 2021, the Indian Supreme Court ruled that Section 17(1) of the Arbitration Act renders a decision made in an emergency arbitration conducted under SIAC Rules enforceable. This ruling applies to arbitrations with an Indian seat governed by Part II of the Arbitration Act, but not to those seated abroad. In prior cases, the courts determined that petitioners could not utilize Section 17 for enforcing an emergency arbitrator's ruling in foreign-seated arbitrations, instead granting relief under Section 9 of the Arbitration Act.

Empirical study

As emergency arbitration was present by name of interim measures in the Arbitration and the conciliation act 1996. A questionnaire was prepared to get the inputs from the lawyers, Arbitrators, Academicians etc. for the better understanding of the topic. The same was circulated by google forms and whatsApp to get the inputs from the target group. To get the input as a. YES b. NO c. CANT'SAY

1. Do you believe that emergency arbitration is a necessary mechanism in dispute resolution?
2. Have you ever participated in an emergency arbitration proceeding?
3. Do you think that the current legal framework in India adequately supports emergency arbitration?

4. Have you encountered challenges in enforcing emergency arbitration awards in India?
5. Are you familiar with the emergency arbitration rules of major institutions like SIAC or ICC?
6. Do you think emergency arbitration awards should be treated as equivalent to court orders?
7. Have you ever advised a client to pursue emergency arbitration for interim relief?
8. Do you believe that emergency arbitration provides sufficient confidentiality for parties involved?
9. Is there a clear understanding among clients regarding the benefits of emergency arbitration?
10. Do you think that judicial intervention in arbitration can negatively impact the process of emergency arbitration?

The inputs are showing in the pie form

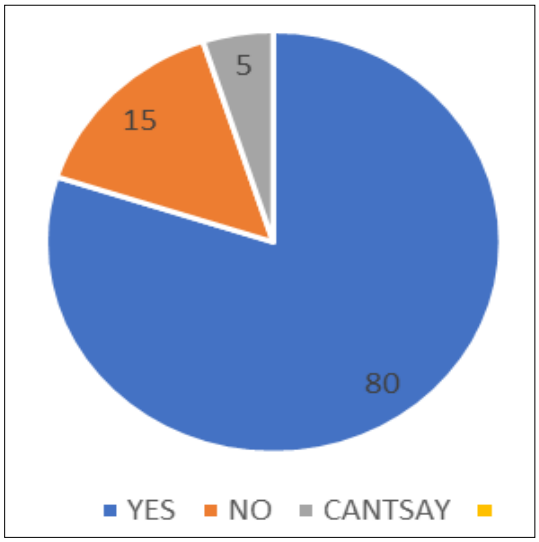

Fig 1: Do you believe that emergency arbitration is a necessary mechanism in dispute resolution?

Analysis: The 80 percent of the target group are affirmed that it is a necessary mechanism. The 15 percent answered in negative. The 5 percent of the target group are not able to say anything. Certainly, it provides the flexibility and saves the time of the arbitration process.

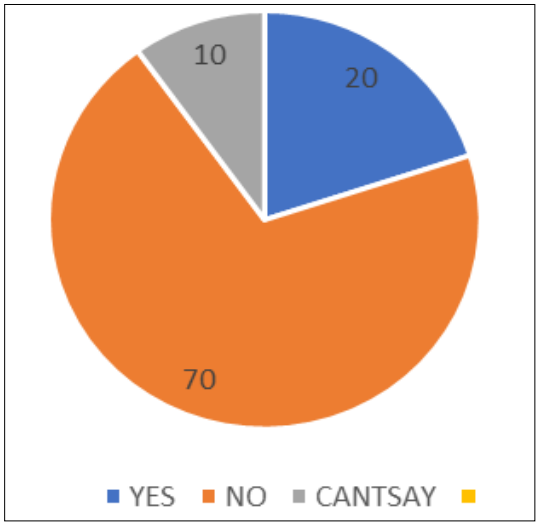

Fig 2: Have you ever participated in an emergency arbitration proceeding?

The 20 percent of the target group are affirmed that it is a necessary mechanism. The 70 percent answered in negative. The 10 percent of the target group are not able to say anything. Emergency arbitration mainly used in the institutional setup of the arbitration. As Institutional Arbitration system is new to India. So only 70 percent of the people have taken the part in the Emergency Arbitration Proceedings. However section 9 of Arbitration and Conciliation Act 1996 fulfill the gap of the emergency arbitration as both provides the interim measures. But the scope of emergency arbitration is wider in the institutional setups.

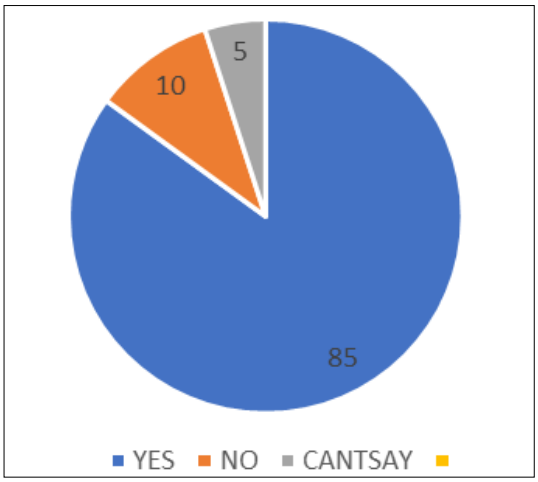

Fig 3: Do you think that the current legal framework in India adequately supports emergency arbitration?

The 85 percent of the target group are affirmed that it is a necessary mechanism. The 10 percent answered in negative. The 5 percent of the target group are not able to say anything. India is continuously leading towards the institutional setup of arbitration and soon it would be the hub to resolve the international commercial disputes.

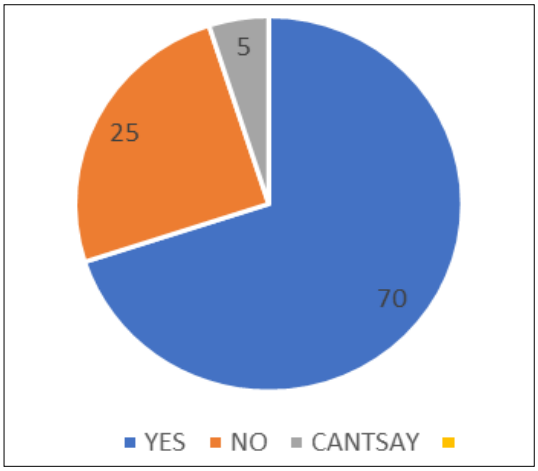

Fig 4: Have you encountered challenges in enforcing emergency arbitration awards in India?

The 70 percent of the target group are affirmed that it is a necessary mechanism. The 25 percent answered in negative. The 5 percent of the target group are not able to say anything. The emergency arbitration award passed by the institutional setup usually goes into the local court to execute. The local court ensures the implementation of the interim measures.

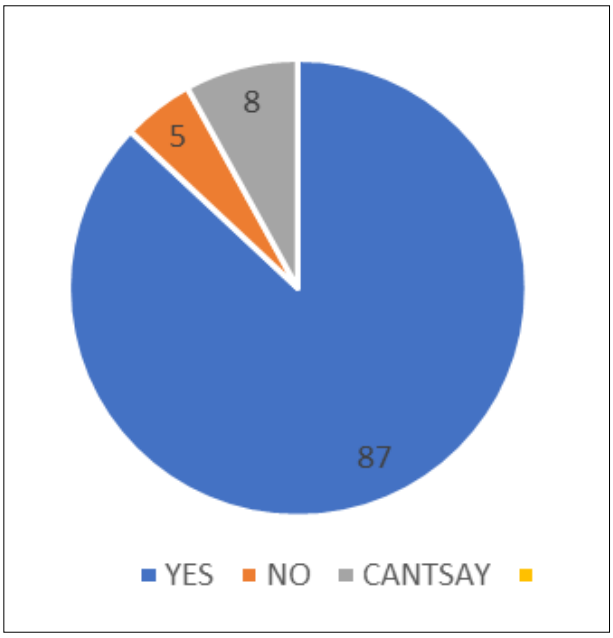

Fig 5: Are you familiar with the emergency arbitration rules of major institutions like SIAC or ICC?

The 87 percent of the target group are affirmed that it is a necessary mechanism. The 5 percent answered in negative. The 8 percent of the target group are not able to say anything. Singapore Institutional Arbitration Centre is the hub to resolve the commercial disputes

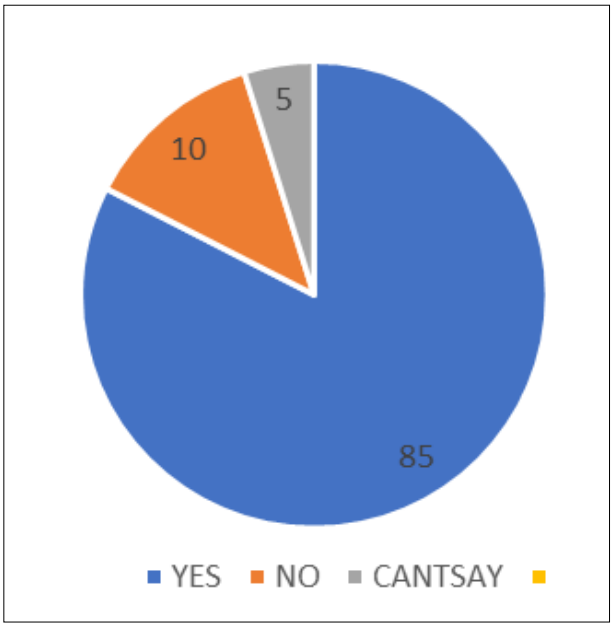

Fig 6: Do you think emergency arbitration awards should be treated as equivalent to court orders?

The 85 percent of the target group are affirmed that it is a necessary mechanism. The 10 percent answered in negative. The 5 percent of the target group are not able to say anything. The emergency arbitration award usually considered as the injunction or the stay orders. The 77 percent of the target group are affirmed that it is a necessary mechanism. The 20 percent answered in negative. The 3 percent of the target group are not able to say anything. The emergency arbitration award usually considered as the injunction or the stay orders. The emergency arbitration or the interim measures in the arbitration procedure is usually prayed to preserve the property. If the property or the subject matter would not be saved, the execution of the arbitration would be impossible.

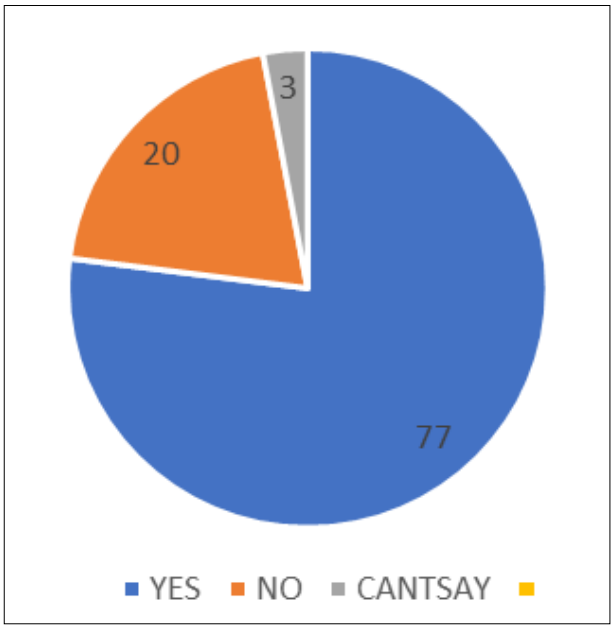

Fig 7: Have you ever advised a client to pursue emergency arbitration for interim relief?

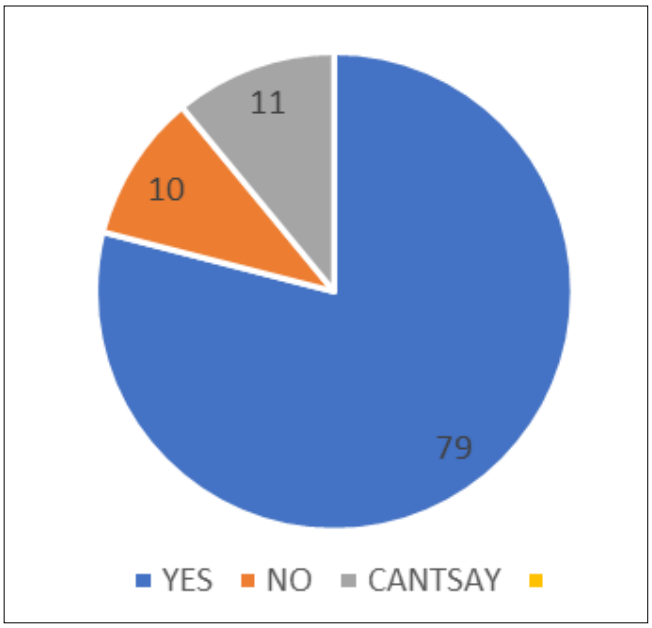

Fig 8: Do you believe that emergency arbitration provides sufficient confidentiality for parties involved?

The 79 percent of the target group are affirmed that it is a necessary mechanism. The 10 percent answered in negative. The 11 percent of the target group are not able to say anything. The confidentiality is the issue in the emergency arbitration.

The 92 percent of the target group are affirmed that it is a necessary mechanism. The 6 percent answered in negative. The 2 percent of the target group are not able to say anything. The parties are well aware about the emergency arbitration and usually every party wants that he would be able to get some interim relief.

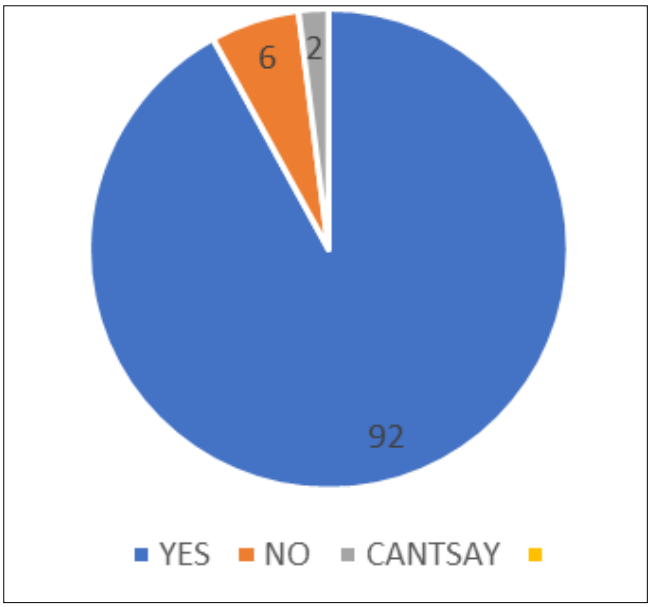

Fig 9: Is there a clear understanding among clients regarding the benefits of emergency arbitration?

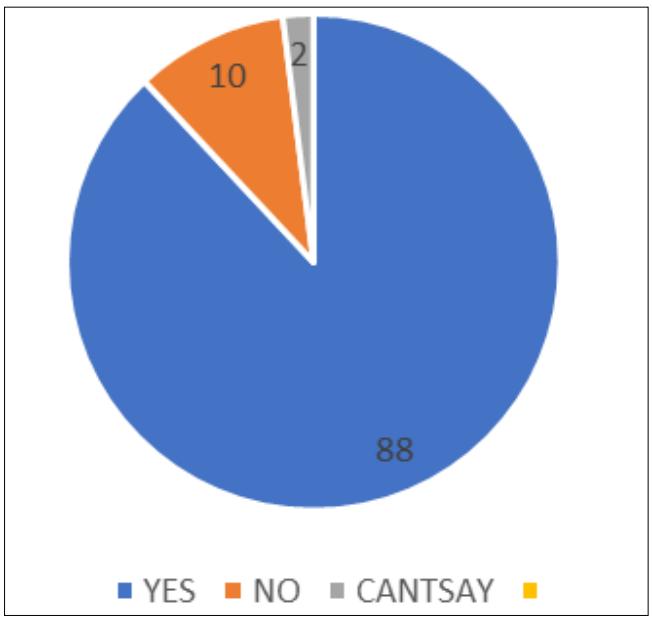

Fig 10: Do you think that judicial intervention in arbitration can negatively impact the process of emergency arbitration?

The 88 percent of the target group are affirmed that it is a necessary mechanism. The 10 percent answered in negative. The 2 percent of the target group are not able to say anything. The emergency arbitration and the interim measures provided by the judiciary both are have the different purpose. Where the emergency arbitration award is used as first thing while the judiciary is the last resource. If the party is not ready to get the emergency arbitration in the institutional setup. Certainly, it would be moved to the judiciary.

Conclusion

Emergency arbitration usually provide a immediate relief to the parties without approaching to the court. Getting a timely relief is the main purpose of the arbitration. The legal framework is supporting the institutional setup of arbitration and their rules. Which certainly creating a synchronisation between the institutional setup and the legal framework of the country. It is considered as the injunction order and it is enforced by the executing court. The confidentiality is generally maintained. But sometimes, judicial intervention is much needed in the arbitration process to safeguard the interest of the weaker party. Different countries have the mechanism to implement the emergency arbitration successfully.

References

1. Bose R, Meredith I. Emergency arbitration procedures: comparative analysis. Int A.L.R. 2012;5:186.
2. Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors. [2021] SCC OnLine SC 557.
3. Article 26.5 of the SCAI Rules; Article 9.12 of the LCIA Rules; Article 30.3 of the SIAC Rules; Article 32.5 of the SCC Rules.
4. Article 9.4 of the LCIA Rules and Article 4 of the LCIA Notes on Emergency Procedures.
5. Article 43.1 of the SCAI Rules.
6. Article 1, Appendix I of the SIAC Rules.
7. Article 6.1 and 6.2 of the ICDR Rules.
8. Article 2.1 of Appendix V of the ICC Rules.
9. Article 3.5 of the ACIAC Rules (exception).
10. Hanessian G, Dosman EA. Songs of innocence and experience: ten years of emergency arbitrator. Am Rev Int Arbitration. 2016;27:227-30.
11. Rules of Arbitration. International Chamber of Commerce. 2001. Accessed 27 December 2022.
12. The ICC Rules of Arbitration (2012). International Arbitration. 2014. Accessed 28 November 2022.
13. Horodyski D. Enforcement of emergency arbitrator's decisions – legal problems and global trends. ResearchGate. 2016:31.
14. Sperry International Trade v. Government of Israel. United States Court of Appeal. 1982;532 F. Supp.
15. Smith G. The emergence of emergency arbitrations [Internet]. 2014. Available from: http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20(12082016).pdf. Accessed 22 July 2020.
16. Mayer P. Référé pré-arbitral CCI. J Droit Int. 2004; cited in: Paraguacuto-Maheo D, Lecuyer-Thieffry C. c2017. p. 757-8.
17. Voser N, Boog C. ICC emergency arbitrator proceedings: an overview. ICC Bull Suppl. 2011, 85.
18. Bhatia S. Emergency arbitration in India: a critical analysis. Indian J Arbitration Law. 2019;8(2):25-45.
19. Caron DD, Caplan L. The emergence of emergency arbitration: a brief overview. Dispute Resol Int. 2016;10(1):27-38.
20. Chen L. The role of emergency arbitration in international commercial arbitration. Int Arbitration Law Rev. 2018;21(3):115-29.
21. Kwan C. Emergency arbitration: a practical guide. Arbitration Int. 2017;33(1):1-22.
22. Moshirian F. Emergency arbitration: a global perspective. J Int Arbitration. 2018;35(6):893-912.
23. Wang Y. The effectiveness of emergency arbitration: a comparative analysis. Int J Arbitration Mediation Dispute Resol. 2020;7(2):67-82.
24. Ziegler A. Emergency arbitration and its implications for international arbitration. J World Invest Trade. 2016;17(5):703-23.