Thou Shalt Have the Power to Grant Interim Relief: The Reform of the Italian Regime on Arbitral Interim Relief

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By Legislative Decree no. 149/2022, Italy made several amendments to its arbitration law, which will apply to proceedings starting after 28 February 2023. The most significant innovation is the eradication of the infamous prohibition of arbitral interim measures. Indeed, the reform introduces a radically new regime on arbitral interim relief that expressly recognizes the arbitrators' power to grant such relief and that contemplates mechanisms for challenging and enforcing arbitral interim measures (including interim measures issued abroad). This article aims to provide an in-depth analysis of the new provisions on arbitral interim relief, highlighting potential issues and solutions. In the authors' view, despite some minor quirks, those provisions set up a very effective regime for arbitral interim relief, and are expected to contribute to making Italy a much more appealing arbitration seat internationally.

Keywords: Interim relief, Interim measures, Provisional measures, Italian arbitration law, Arbitration, Article 818, Emergency arbitration, Italy

1 INTRODUCTION

On 18 October 2022, the Italian Government enacted Legislative Decree no. 149/2022, which, among other things, contains a comprehensive reform of Italian arbitration law ('the Reform'),[1] which will apply to proceedings instituted after 28 February 2023.[2]

Of the various amendments introduced by the Reform,[3] the most significant one is the long-awaited recognition of the arbitrators' power to grant interim relief,

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1 Italian arbitration law is mainly located in s. VIII of the Italian Code of Civil Procedure (CCP). Legislative Decree no. 149/2022 implements Law no. 206/2021, which tasked the Italian Government inter alia with a comprehensive revision of the framework governing arbitration and ADR (*see* Art. 1, para. 1, of Law no. 206 of 26 Nov. 2021).

2 *See* Art. 1, para. 380, of Law no. 197 of 29 Dec. 2022.

3 For instance, in addition to introducing a radically new regime on arbitral interim relief, the Reform also (1) overhauls the provisions on the independence and impartiality of arbitrators; (2) codifies the

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which comes with a brand-new regime on the challenge and enforcement of arbitral interim measures. This is a radical innovation considering that Italy used to be one of the few countries not to recognize such power,[4] a position that has led some authors to label it as an 'island of backwardness'.[5] Unsurprisingly, the Reform's recognition of the arbitrators' power to grant interim relief has been hailed as an 'historical development'.[6]

The purpose of this article is to provide a detailed analysis of the new regime introduced by the Reform. To provide relevant context, the article first describes the previous regime, encapsulated in the old version of Article 818 of the Italian Code of Civil Procedure (CCP) (section 2). Then it analyses the new version of Article 818 CCP, which allows the parties to confer on arbitrators the power to issue interim measures (section 3), as well as the newly enacted Articles 818-*bis* and 818-*ter*, which deal, respectively, with the challenge (section 4) and the enforcement (section 5) of arbitral decisions on interim relief. Finally, after addressing the question whether the new regime applies also to emergency arbitrators (section 6), the article provides some concluding remarks (section 7).

2 THE OLD REGIME ON ARBITRAL INTERIM RELIEF: PROHIBITION OF ARBITRAL INTERIM MEASURES

According to the prevailing view, the old version of Article 818 CCP – which will continue to apply to proceedings commenced before 1 March 2023 – forbids arbitrators seated in Italy from granting interim relief. In particular, it provides that: 'Arbitrators cannot grant attachments or other interim measures, except if otherwise provided by the law'.

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parties' right to choose the law or rules applicable to the merits and, absent such choice, the arbitrators' power to determine such law or rules based on the conflict of laws criteria they consider applicable; (3) equates the substantive effects of the request for arbitration with those of a writ of summons before a domestic court; (4) sets out the requirements for a valid *translatio iudicii*, i.e., transfer of the case, from arbitral to judicial proceedings and *vice versa*, when the forum first seized declines jurisdiction in favour of the other; (5) provides for the immediate enforceability of foreign awards upon their recognition by the competent court; (6) amends the time-limit for challenging awards; and (7) transposes into the CCP the regulation of company law arbitration previously located in Legislative Decree no. 5/2003.

4 *See* Gary B. Born, *International Commercial Arbitration* 2619–2620 (3d ed., Kluwer Law International 2021).

5 Paolo Biavati, *Spunti Critici Sui poteri Cautelari Degli Arbitri*, Rivista dell'Arbitrato 329, 330 (2013).

6 Andrea Carlevaris, *La legge-delega per la riforma dell'arbitrato: verso il riconoscimento dei poteri cautelari degli arbitri?*, Rivista di diritto internazionale 157, 159 (2022). *See also* Biavati, *supra* n. 5, at 335. The impossibility to obtain arbitral interim relief indeed made Italy a significantly less appealing seat, given that it forced parties to seek such relief from state courts, something which may be undesirable for a variety of reasons (such as the lack of confidentiality of court proceedings, the inefficiency of certain Italian courts or their inability to grasp the factual and legal intricacies often characterizing disputes deferred to arbitration, especially when they have an international dimension).

This provision rests on the fallacious assumption that arbitrators cannot grant effective interim relief because they lack coercive powers.[7] The last sentence of Article 818 CCP was only added in 2006 to cater for the provision of Article 35, paragraph 5, of Legislative Decree no. 5 of 17 January 2003, according to which, in the context of company law arbitrations,[8] arbitrators can issue interim measures suspending the effects of shareholders' meetings' resolutions. The reason why it was considered acceptable to allow arbitrators to provide that type of interim relief is that the suspension of such resolutions would be self-executing and thus not require the exercise of coercive powers for its implementation.

The prevailing view is that the old version of Article 818 CCP lays down a mandatory prohibition on arbitrators granting interim relief that reflects a principle of Italian public policy.[9] Accordingly, the parties cannot contract out of such prohibition by expressly vesting the arbitrators with the power to grant interim relief or by referring to arbitration rules that recognize and regulate such power. Any provisions of the arbitration agreement or of the chosen arbitration rules conferring such a power on the arbitrators would be null and void because it would flout a mandatory provision of Italian arbitration law. Accordingly, any interim measure issued by an arbitrator seated in Italy would have no effect whatsoever.

Some scholars, however, offer a different interpretation of Article 818 CCP, according to which that provision would not prohibit arbitrators from issuing interim measures, but rather merely exclude the enforceability of such measures through the Italian court system.[10] This position rests mainly on the fact that Article 818 CCP does not adopt the linguistic formulas typically associated with mandatory prohibitions (such as 'it is forbidden' or the like), but rather employs a language that seems merely to acknowledge that arbitrators would be unable to issue interim measures because they lack *imperium* ('[a]rbitrators cannot grant

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7 *See* Elio Fazzalari, *L'arbitrato* 98 (UTET 1997); Alberto Levoni, *La pregiudizialità nel processo arbitrale* 75 (UTET 1975); Salvatore Satta, *Commentario al codice di procedura civile*, IV-2, 282 (UTET 1971); Cass., 24 Jul. 2009, no. 9909; Cass., 18 Aug. 1990, no. 8399; Cass., 22 Feb. 1979, no. 1144. The position that arbitral interim relief is ineffective is fallacious for at least two reasons. First, it ignores that in most cases there is no need to resort to compel the parties to abide by an arbitral interim measure, for they spontaneously comply with such measures in order not to antagonize the arbitrators. Second, it overlooks that the arbitrators' lack of coercive powers may easily be obviated by setting up an enforcement mechanism that relies on court assistance, as happens with arbitral decisions on the merits. Indeed, with an enforcement mechanism in place, arbitral interim relief can be just as effective as judicial interim relief.

8 Company law arbitrations are special types of arbitrations concerning disputes between the shareholders, or the shareholders and the company, arising from the corporate relationship. Company law arbitrations are subject to a specific set of rules which used to be contained in Legislative Decree no. 5/2003 and have now migrated to s. VIII of the CCP.

9 Gian Franco Ricci, *Art. 818*, in *Arbitrato: Titolo VIII libro IV del codice di procedura civile* 589 (Federico Carpi ed., Zanichelli 2016).

10 *See* Massimo V. Benedettelli, *International Arbitration in Italy* 310 (Kluwer Law International 2020).

attachments or other interim measures').[11] It would follow from this that Article 818 CCP cannot be construed as precluding the parties from expressly entrusting the arbitrators with the power to grant provisional measures if they so wish, but rather as merely indicating that such measures would not be enforceable in Italy.

The latter interpretation of Article 818 CCP is more convincing not only in light of the language of that provision, but also in light of its rationale (and, more generally, of the *favor arbitratus* underlying Italian arbitration law). As explained, that provision was included in the Italian CCP to reflect the acquired (but flawed) wisdom that arbitral interim relief could not be effective. But if that is the rationale behind Article 818 CCP, then such provision cannot bar the parties from conferring on the arbitrators the power to issue interim relief whenever they believe that, contrary to the said baseless assumption, arbitral interim measures could be effective or useful (for instance, because those measures: (1) are to be enforced abroad, in a jurisdiction recognizing and enforcing foreign arbitral interim measures; (2) are self-executing; or (3) are assisted by other measures discouraging non-compliance, such as the possibility for arbitrators to draw adverse inference or apply sanctions (such as cost awards), or are expressly stated to have contractual value so that the non-complying party would be exposed to liability and damages). Put slightly differently, if the prohibition of arbitral interim relief of Article 818 CCP is based on the premise that such relief would be ineffective, then it should not operate whenever, contrary to that premise, there is reason to believe that, in light of the circumstances, such relief could indeed be effective (for the various reasons explained). Thus, the better approach (and the only one respectful of party autonomy) is to interpret Article 818 CCP as allowing the parties to confer on arbitrators the power to grant interim measures when they so wish, with the only implication that Italian courts would not assist them in the enforcement (if necessary) of such measures.

But even if one were to follow the mainstream interpretation of Article 818 CCP, it may be convincingly argued that the prohibition of arbitral interim relief could not operate when the parties opt for institutional arbitration and the relevant arbitration rules recognize the arbitrators' power to issue such relief. This is because Article 832, paragraph 6 CCP impliedly provides that, save for Article 815 CCP setting out the grounds for challenging arbitrators, the preceding provisions, hence including Article 818 CCP, do not apply when the proceedings are administered by an arbitral institution.[12]

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[11] *See ibid.,* at 310.

[12] Article 832, para. 6 CCP provides that if the arbitral institution chosen by the parties declines to administer the arbitration, the arbitration agreement remains valid and the preceding provisions, thus including Art. 818 CCP, apply. This means, *a contrario*, that when the arbitral institution accepts to administer the proceedings, those provisions do not apply (in the same vein, *see* Biavati, *supra* n. 5, at

3 THE REFORM'S RECOGNITION OF THE ARBITRATORS' POWER TO GRANT INTERIM RELIEF

The Reform's main innovation is the radical amendment of Article 818 CCP to recognize the arbitrators' power to issue interim relief (as well as the introduction of Articles 818-*bis* and 818-*ter* on the challenge and enforcement of arbitral decisions on interim relief, which will be discussed in the next sections).

The new text of Article 818 CCP reads as follows:

> The parties, also through a reference to arbitration rules, may confer on the arbitrators the power to grant interim measures in the arbitration agreement or in a written act preceding the commencement of the arbitration. The arbitrator's jurisdiction to grant interim measures shall be exclusive.
> Before the acceptance of the sole arbitrator or the constitution of the arbitral tribunal, the request for interim measures is filed with the competent judge pursuant to Article 669-*quinquies*.[13]

There are at least three aspects of this new provision that are worth highlighting. The first one is that, unlike equivalent provisions of other advanced arbitration laws,[14] the new version of Article 818 CCP does not automatically endow arbitrators with the power to grant interim relief, but rather requires the parties to positively confer such power on the arbitrators. If the parties opt for institutional arbitration, a choice of arbitration rules providing that the arbitrators shall have the power to grant interim relief (which is the case for essentially all the better-known arbitration rules)[15] would be enough to meet that requirement. By contrast, if the parties opt for ad hoc arbitration, they must stipulate in the arbitration agreement (or in a separate agreement) that the arbitrators enjoy such power. The obvious drawback of the new provision is that less sophisticated parties, or foreign parties

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337). Some authors may argue that the prohibition of arbitral interim relief would nonetheless operate because it reflects Italian public policy. But there would actually be no basis for that position, as demonstrated by the fact that Art. 818 CCP expressly admits exceptions to the prohibition of arbitral interim relief, which would not be conceivable were such prohibition to embody public policy. The Reform's recognition that arbitrators may issue interim measures definitively confirms that the former prohibition is not part of Italian public policy.

13 Article 669-*quinquies* CCP provides that, except as provided in Art. 818, para. 1 CCP, when the parties have agreed to settle the dispute by arbitration, applications for provisional measures must be submitted to the court that would otherwise have had jurisdiction on the merits.

14 *See* e.g., Swiss Private International Law Art. 183(1); Swedish Arbitration Act, s. 25; German ZPO, s. 1041; Austrian ZPO, s. 593; Canadian Commercial Arbitration Act, Art. 17; Japan Arbitration Act, Art. 24; Spanish Arbitration Act, Art. 23.

15 *See* e.g., International Chambers of Commerce (ICC) Rules, Art. 28; Singapore International Arbitration Centre (SIAC) Rules, Art. 30; Milan Arbitration Chamber (CAM) Rules, Art. 26; German Arbitration Institute (DIS) Rules, Art. 20; United Nations Commission on International Trade Law (UNCITRAL) Rules, Art. 26; International Centre for Dispute Resolution of the American Arbitration Association Rules (ICDR) Rules, Art. 27; London Court of International Arbitration (LCIA) Rules, Art. 25; Hong Kong International Arbitration Centre (HKIAC) Rules, Art. 23; Stockholm Chamber of Commerce (SCC) Rules, Art. 37.

not sufficiently familiar with Italian arbitration law, may fail to give due consideration to that requirement at the time they enter into the arbitration agreement, or at any rate before the start of the arbitration, thereby inadvertently foregoing the possibility of obtaining interim relief from the arbitrators.

A second aspect of the new provision that deserves attention is that the parties' agreement to confer on arbitrators the power to grant interim relief must precede the commencement of the arbitration, which means the filing of the request or notice of arbitration.[16] The rationale is to make sure arbitrators know in advance of their appointment whether they might have to decide on requests for interim relief, which may have an impact on their decision whether to accept the appointment.[17]

A third and final aspect of the new Article 818 CCP that is worth underscoring is that, after the constitution of the tribunal or the sole arbitrator's acceptance of her or his appointment, courts cease to have jurisdiction over arbitration-related interim relief, the arbitrators' power to grant such relief (if validly conferred by the parties) being exclusive.[18] This is probably the single most questionable aspect of the Reform. Indeed, it would have been preferable – and in line with other advanced arbitration laws[19] – to devise a system of concurrent jurisdiction of arbitrators and judges over interim relief, leaving the parties free to decide which forum to seize. That is because, in certain cases, arbitrator-ordered measures may not be as effective as court-ordered ones (this is the case of injunctions, the enforcement of which requires assistance from courts, rendering it more expedient for the parties to seize the latter in the first place), or may not be available at all (this is the case of *ex parte* interim measures, which it is

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[16] Under Italian arbitration law, and unless the parties have otherwise agreed, the arbitration is deemed to commence on the date of the filing of the request or notice of arbitration (Cass., 28 May 2003, no. 8532. *See also* Cass., 14 Sep. 2012, no. 15445).

[17] *See* the Explanatory Report to Legislative Decree no. 149 of 10 Oct. 2022, at 96–97. Moreover, according to the Explanatory Report, this requirement also serves the purpose of allowing the parties to know in advance whether they could obtain interim relief from the arbitral tribunal.

[18] The reference in Art. 818 CCP to the 'acceptance of the sole arbitrator or the constitution of the arbitral tribunal' as the moment when courts cease to have jurisdiction over arbitration-related interim relief may give rise to some uncertainties due to the fact that, under some arbitration rules, the arbitral tribunal or the sole arbitrator may become operational only at a later stage. For example, under Art. 16 of the ICC Rules, if the advance on costs has not been paid, the Secretariat will not transmit the file to the arbitral tribunal, which, therefore, could not exercise its functions. To avoid a jurisdictional vacuum, Art. 818 CCP should be interpreted as depriving courts of the power to order interim relief from the date on which the arbitrators are effectively in a position to operate, and thus grant such relief, under the applicable arbitration rules. Similarly, *see also* Mauro Bove, *La riforma dell'arbitrato*, Giurisprudenza Italiana 447, 452 (2023).

[19] *See* e.g., Germany (ss 1033 and 1041 ZPO); Switzerland (Swiss Private International Law, Arts 10 and 183); Denmark (Arbitration Act, ss 9 and 17); Spain (Spanish Arbitration Act, Arts 11 and 23); Japan (Japan Arbitration Act, Art. 24); and Canada (Commercial Arbitration Act, Arts 9 and 17). *See also* Art. 17 of the UNCITRAL Model Law, pursuant to which 'unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures'.

doubtful that an arbitrator can order,[20] or of interim measures against third parties). The decision to render the arbitrators' jurisdiction over interim relief exclusive is a clear example of how a radical pro-arbitration approach is not always in the users' best interest.

This said, on a reasonable and constitutionally oriented[21] interpretation of Article 818 CCP, the parties should be permitted to seek interim relief from courts even after the constitution of the tribunal (or the acceptance of the sole arbitrator) whenever it would be legally or practically impossible (or at any rate very difficult) to obtain such relief from the arbitrators. One may think of situations where the parties need to obtain interim measures against third parties, which the arbitrators would obviously be unable to grant for want of jurisdiction, or to situations where an interim measure can be effective only if granted on an *ex parte* basis and the arbitrators cannot go about deciding on that basis. In those situations, the parties should be allowed to seize the courts, for otherwise their constitutional rights of defence might be irremediably impaired.

4 NEW PROVISION ON THE CHALLENGE OF ARBITRAL DECISIONS ON INTERIM RELIEF

The newly enacted Article 818-*bis* CCP regulates the challenge against arbitral decisions on requests for interim relief by providing that:

> The arbitrator's decision granting or rejecting a request for interim relief may be challenged pursuant to Article 669-*terdecies* before the court of appeal of the district where the seat of arbitration is located, based on any of the grounds set out in Article 829, paragraph 1, if compatible, and for violation of public policy.

By virtue of the reference to Article 669-*terdecies* CCP, the losing party will have fifteen days to challenge an arbitral decision granting or denying a request for interim relief. The grounds for the challenge are those set out in Article 829 CCP,

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[20] *See* however, the recently revised Art. 26(2) of the CAM Arbitration Rules, which expressly allows *ex parte* interim measures by providing that 'upon the request of the applicant party, the Arbitral Tribunal may grant the order even without notice to the other party, if such notice may seriously harm the applicant's interests', provided that a hearing to discuss the case with the parties is scheduled within ten days from the decision.

[21] The right to adequate and effective interim relief is considered to have a constitutional dimension and to be part of the broader right of defence enshrined in Art. 24 of the Italian Constitution (*see* Corte Cost. 16 Jul. 1996 no. 249; Corte Cost. 23 Jun. 1994 no. 253; Corte Cost. 28 Jun. 1985 no. 190, which embraces the theory of 'effectiveness of judicial protection' originally formulated by Giuseppe Chiovenda in *Principi di diritto processuale civile* 41 et seq. (Jovene 1928)). It follows that every provision of Italian law relating to interim relief must be interpreted in a way that allows the parties to obtain (or at least that ensures they are not deprived of) adequate and effective interim relief. *See* Antonio Briguglio, *Il potere cautelare degli arbitri, introdotto dalla riforma del rito civile, e la inevitabile interferenza del giudice ('evviva il cautelare arbitrale!', ma le cose non sono poi così semplici)*, Rivista dell'Arbitrato 787, 793 (2022).

paragraph 1, 'if compatible' as well as the violation of public policy, which are the same grounds for challenging final awards.[22] Since none of them concerns errors on the merits, the parties will not be able to challenge arbitral decisions on interim relief for an error in analysing the facts or in applying the law.

Article 818-*bis* CCP leaves the interpreter in a quandary as to which of the grounds set out in Article 829, paragraph 1 CCP may be considered 'compatible' with challenges against decisions on requests for interim relief. There can probably be little doubt about the 'compatibility' of the grounds set out at numbers 2, 3, 7, 9 and 11 of that provision, which concern flaws that may affect every type of arbitral decision regardless of its nature. These flaws are: the violation of the agreed procedure on the appointment of arbitrators[23]; the arbitrators' lack of capacity under the applicable law[24]; breach of the 'formalities' (to be interpreted as procedural rules) established by the parties under pain of nullity (whenever such breach has not been cured)[25]; breach of due process[26]; and the existence of contradictions in the dispositive part of the decision.[27] Likewise, there can be no real question about the non-compatibility of the grounds listed at numbers 4, 5, 6, 8 and 12 of that provision, which deal with flaws that can only affect awards on the merits, such as *ultra petita*[28]; the arbitrators' failure to meet the requirements for awards on the merits set out in Article 823, numbers 5, 6 and 7 CCP[29]; the arbitrators' failure to comply with the deadline for rendering the final award[30]; the award's incompatibility with a prior award or judgment that has become res judicata[31]; and the award's failure to decide on certain claims or 'exceptions' put forward by the parties in accordance with the arbitration agreement (*infra petita*).[32]

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22 Article 829, para. 1 CCP lists the twelve grounds that, in addition to violations of public policy, justify the annulment of the award.

23 *Ibid*., no. 2 CCP.

24 *Ibid*., no. 3 CCP.

25 *Ibid*., no. 7 CCP. *See* however, Briguglio, *supra* n. 21, at 808, arguing for the incompatibility of such ground.

26 Article 829, *supra* n. 22, no. 9 CCP. Obviously, in light of the urgency underlying interim relief procedures, a slight compression of the parties' right to be heard may be justified. Thus, the ground at hand would be engaged only if there is an egregious and unjustifiable failure by the arbitrator to respect due process (for instance, because they have without reasons entirely deprived a party of the opportunity to put forward its position on the request for interim relief).

27 Article 829, *supra* n. 22, no. 11 CCP.

28 *Ibid*., no. 4 CCP. However, it may be argued that this ground applies also to arbitral decisions on interim relief that grant a measure different from the one requested (i.e., that are *ultra petita*) because, as maintained by some authors, the principle enshrined in Art. 112 CCP pursuant to which the judge cannot grant a relief different from the requested one applies also with respect to requests for interim relief (*see* Claudio Consolo, *Domanda Giudiziale*, in Digesto Civile, VII, 62 (UTET 1991)).

29 Article 829, *supra* n. 22, no. 5 CCP.

30 *Ibid*., no. 6 CCP.

31 *Ibid*., no. 8 CCP.

32 *Ibid*., no. 12 CCP. But, for the same reasons set out at n. 28, it may be argued that this ground for annulment applies also to decisions on interim relief.

It is debated whether the parties may invoke the ground of Article 829, paragraph 1, number 1 CCP, which concerns the invalidity of the arbitration agreement and has been interpreted to apply whenever the arbitral tribunal upholds jurisdiction despite lacking *potestas iudicandi* (including because the dispute is non-arbitrable).[33] Likewise debated is whether they may invoke the ground set out at number 10 of that provision, which concerns the opposite situation, where the arbitral tribunal erroneously declines jurisdiction.

According to one view, the parties should not be allowed to rely on those grounds to challenge arbitral decisions on requests for interim relief, because a scrutiny of the arbitrators' jurisdiction (whether by the arbitrators themselves when seized of a request for interim relief or by the Court of Appeal in the challenge phase) would be incompatible with the urgency underlying such requests.[34]

The better view, however, is that those two grounds are applicable to decisions on interim measures too.[35] It is a well-accepted principle that courts may annul awards when the arbitrators have wrongly upheld (or denied) jurisdiction. There is no reason not to apply that principle when the relevant arbitral decision concerns interim relief.[36] In particular, in the perspective of the state, there is no reason why those decisions should be allowed to stand where the arbitrators have wrongly upheld or declined jurisdiction (the prima facie existence of which is deemed one of the requirements for the granting of arbitral interim relief[37]). This is particularly so if one considers that even courts' decisions on interim relief may be challenged for those very same reasons (i.e., because the judge has wrongly upheld or denied its jurisdiction).[38] To consider arbitral decisions on interim relief immune from that type of challenge would create a differential treatment with respect to court decisions that may hardly be justified from a constitutional perspective.[39]

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[33] *See* Benedettelli, *supra* n. 10, at 401. According to Art. 829 CCP, this ground can only operate if the interested parties have timely raised the issue of the arbitrators' lack of *potestas iudicandi* in the course of the arbitration, as required by Art. 817, para. 3 CCP.

[34] *See* Carlevaris, *supra* n. 6, at 166.

[35] An interesting question is whether the Court of Appeal would have jurisdiction to decide itself on the request for interim relief if it annuls the arbitral decision for lack of the arbitrators' jurisdiction. In the absence of a provision expressly allowing it to do so (like Art. 830 CCP which concerns final awards), the better view is that it would not. Thus, the interested party should file the request with the first-instance court that would have jurisdiction in accordance with the ordinary rules of the Italian CCP.

[36] The urgency argument is misplaced, given that the full review of the arbitrators' jurisdiction would take place at the annulment stage, when the decision on interim relief has already been rendered (and without impacting on the enforcement of the measure, which is not suspended by virtue of the challenge, unless a 'serious harm' for the targeted party is shown to exist).

[37] *See* Born, *supra* n. 4, at 2663.

[38] *See* Cass., SU, 15 Mar. 2002, no. 3878; Cass., SU, 6 Dec. 2000, no. 125.

[39] It is worth noting that also the UNCITRAL Model Law allows courts to refuse the enforcement of arbitral interim measures in case the arbitrators lack jurisdiction, due for instance to the invalidity of the arbitration agreement (*see* Art. 17 I(1)(a)(i)). Given the Reform's underlying purpose of aligning

Pursuant to Article 669-*terdecies* CCP, a challenge against an arbitral decision granting an interim measure does not automatically suspend the enforceability of such measure. However, the Court of Appeal may suspend the enforceability of the measure, or subject it to the posting of a security, if new circumstances have arisen, or have been unearthed, showing that its enforcement would pose a 'serious harm' to the targeted party.

Although Article 818-*bis* is silent in this respect, arbitrators must be considered to have exclusive jurisdiction to revise their decisions in light of new circumstances. This may be inferred from the new Article 669-*decies* CCP, which provides that the parties can obtain a revision of courts' decisions on interim relief by filing an application with the court competent on the merits (or the one that has issued the measure, where the proceedings on the merits have not yet started), 'except as provided in Article 818, paragraph 1, CCP'. The purpose of that exception is to render that provision inapplicable in case of arbitral decisions on interim relief, because in that case jurisdiction to revise those decisions rests with the arbitrators themselves. This is in line with the lawmaker's overall intention to attribute to arbitrators *exclusive* powers with regard to interim relief.[40]

5 NEW PROVISION ON THE ENFORCEMENT OF ARBITRAL INTERIM MEASURES

The Reform also sets up a regime for the enforcement of arbitral interim measures that applies regardless of the place of the arbitration and thus also with respect to arbitral interim measures issued abroad.[41] In particular, the newly introduced Article 818-*ter* CCP provides that:

Italian arbitration law with the most advanced arbitration laws and best practices, of which the UNCITRAL Model Law is certainly the better-known embodiment, the new Art. 818-*bis* should be interpreted as allowing a challenge of arbitral decisions on interim relief where arbitrators lack *potestas judicandi*.

[40] As confirmed by the Explanatory Report to Legislative Decree no. 149, *supra* n. 17, at 94.

[41] This is evidenced by the fact that the new Art. 818-*ter* also identifies the court competent to oversee the enforcement of interim measures issued by foreign-seated arbitral tribunals. This spares the interpreters the need to address the vexed question of whether foreign arbitral interim measures may be enforced in Italy through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (*see* Andrea Carlevaris, *The Enforcement of Provisional Measures*, in *Provisional Measures Issued by International Courts and Tribunals* 297, 307–312 (Fulvio Maria Palombino et al. eds, Springer 2021); Fabio Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 Arb. Int'l 283, 303–306 (2015), doi: 10.1093/arbint/aiv012; Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* 546 (2d ed., Sweet & Maxwell 2007); Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief – How Final Is Provisional?*, 18 J. Int'l Arb. 511 (2001), doi: 10.54648/381922).

> The enforcement of interim measures granted by arbitrators is governed by Article 669-*duodecies* and takes place under the control of the court of the district where the seat of arbitration is located or, if the seat of arbitration is not in Italy, the court of the place where the interim measure is to be enforced.
> With regard to the enforcement of seizures granted by arbitrators, the provisions of Articles 677 ff. shall remain unaffected. The court indicated in paragraph 1 shall have jurisdiction.

Before describing the implications of this provision, and to better understand how it would operate, it may be useful to briefly illustrate how arbitral interim measures are enforced in other jurisdictions.

As noted by eminent commentators, there exist at least two alternative models for the enforcement of arbitral interim measures: the '*exequatur*' model and the 'court assistance' model.[42] Under the first one, the competent state court issues an *exequatur* order or decree declaring the arbitral interim measure enforceable without modifying its content.[43] The measure is then enforced through the same enforcement mechanisms that would apply to an arbitral award declared enforceable. It is not a coincidence that states adopting this approach sometimes merely extend the regime for the recognition and enforcement of arbitral awards to arbitral interim measures. Examples of this approach can be found, inter alia, in the Dutch CCP,[44] in the Hong Kong Arbitration Ordinance,[45] and in the UNCITRAL Model Law.[46]

Conversely, the 'court assistance' model entails the transposition of the arbitral interim measure into one or more self-standing orders by the competent state court. While in most cases the court order will merely reproduce the arbitral interim measure, in some cases it can modify or adapt it as required by the *lex fori*.[47] The best known example of the 'court assistance' model can be found in Article 183(2) of the Swiss Private International Law Act, which provides that in case of non-compliance with an arbitral interim measure, 'the arbitral tribunal may request the assistance of a judge having jurisdiction who shall apply his own law'.[48]

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42 *See* Carlevaris, *supra* n. 41, at 301; Poudret & Besson, *supra* n. 41, at 540.

43 *See* Carlevaris, *supra* n. 41, at 301; Poudret & Besson, *supra* n. 41, at 540. Although being unique in the international context, the Ecuadorian Law on Arbitration and Mediation 1997 provides for the direct enforcement of arbitral interim measures as if they were decisions of national courts. *See* Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* 248 (Kluwer Law International 2005).

44 Dutch CCP, Art. 1051(3).

45 Hong Kong Arbitration Ordinance, s. 2GG.

46 UNCITRAL Model Law, Art. 17 H(1).

47 *See* Carlevaris, *supra* n. 41, at 302; Poudret & Besson, *supra* n. 41, at 543–545.

48 *See* Carlevaris, *supra* n. 41, at 301; Poudret & Besson, *supra* n. 41, at 540. A variation of the 'court assistance' model, or actually a hybrid model having features of both the '*exequatur*' and the 'court assistance' models, can be found in s. 1041(2) of the German ZPO. Pursuant to that provision, courts must generally enforce arbitral interim measures without modifying their content. However, if there is no corresponding measure under domestic law, they may adapt it to fit into the German legal order (and if no such adaptation is possible, they must deny enforcement). Another hybrid approach can be

By referring to the provisions of Article 669-*duodecies* CCP and Article 677 et seq. CCP, Article 818-*ter* CCP sets up a hybrid model that envisages at least two distinct enforcement regimes (which are the same as those that apply to court-ordered interim measures) depending on the nature of the interim measure. Both regimes are intended (and expected) to ensure a fast implementation of arbitral interim measures.

With respect to measures ordering the payment of sums of money and seizures, Article 818-*ter* CCP contemplates an enforcement regime that is even more arbitration friendly than the '*exequatur*' model just described. Indeed, pursuant to Article 669-*duodecies*[49] and Article 677 et seq.[50] CCP, to which (as mentioned) Article 818-*ter* CCP refers, the parties may directly enforce those measures, if necessary with the assistance of the competent bailiff, without any need of a court's prior authorization.

By contrast, with respect to measures imposing 'duties to deliver, release, act or not to act', Article 818-*ter* CCP seems to contemplate a 'court assistance' model. Indeed, Article 669-*duodecies* provides that the competent court (which is the court of the seat or, for foreign arbitral interim measures, the court of the place where the measure is to be implemented) shall determine 'the modalities of their implementation'.[51] This means that the competent court will issue its own decree determining how to go about enforcing the arbitral interim measure. Obviously, such decree (and more generally the modalities of implementation) must be consistent with the goal of the measure ordered by the arbitrators.

As noted, Article 818-*ter* CCP applies also to interim measures issued by arbitral tribunals seated abroad, thereby rendering them directly enforceable in Italy in accordance with the enforcement mechanisms set out above. Interestingly, Article 818-*ter* CCP does not contemplate any exception to the enforceability of foreign arbitral interim measures. This notwithstanding, based on principle, it is reasonable to maintain that the competent Italian court (i.e., the one of the place where the measure is to be enforced) shall deny enforcement where the foreign measure is contrary to public policy. Moreover, according to a prominent author, all the New York Convention's grounds for resisting the enforcement of awards (which include, but are not limited to, breach of public policy) shall apply by analogy.[52]

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found in ss 41 and 42 of the English Arbitration Act, which require the interested party, in case of default of the other party, to first apply for a 'peremptory order' from the arbitral tribunal and then for an order from the state court requiring the other party to abide by the tribunal's order.

49 Under Art. 669-*duodecies*, the enforcement of measures ordering the payment of sums of money takes place 'in the forms of Articles 491 ff. to the extent applicable', i.e., the norms relating to attachments.

50 These provisions concern the implementation of court-ordered seizures.

51 The order of the competent court determining the modalities of implementation of an interim measure which exceeds the scope of such measure can be challenged pursuant to Art. 669-*terdecies* CCP. *See* Cass., 17 Apr. 2019, no. 10758.

52 *See* Briguglio, *supra* n. 21, at 822-823.

As also mentioned,[53] an arbitral interim measure may be repealed or modified by the arbitrators or annulled by the competent court. Although Article 818-*ter* CCP does not expressly deal with those scenarios, it is reasonable to assume that in those cases the interested party may apply to the supervising court for a suspension of the enforcement or the amendment of the modalities of implementation of the measure.

6 APPLICABILITY OF THE NEW REGIME TO EMERGENCY ARBITRATORS

Given the increased relevance of emergency arbitrator procedures,[54] one would have expected the Reform to directly deal with the status of emergency arbitrators and the enforceability of their decisions. The Reform is instead silent about that, and it is thus for the interpreter to determine whether the new regime on arbitral interim relief also applies to emergency arbitrators.

One potential view could be that, in the absence of an express reference to emergency arbitrators, the new regime applies only to arbitrators deciding the merits of a dispute. Indeed, according to some scholars,[55] emergency arbitrators are ontologically different from arbitrators deciding the merits, as they lack the latter's jurisdictional nature, i.e., a court-like power to render decisions which are binding for the parties and are recognized and enforced by state courts. That would be confirmed by the fact that certain states have felt the need to expressly equate emergency arbitrators to arbitral tribunals for the purpose of rendering their measures enforceable.[56]

That position would not be convincing. It is now well accepted that emergency arbitrators are full-fledged arbitrators (only having a narrower mandate), as – like arbitrators deciding on the merits – they are called upon to render a decision on a disputed matter exercising judicial-like functions.[57] It is no surprise

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53 *See* s. 4 *supra*.

54 Emergency arbitrator provisions have been adopted, inter alia, by the following arbitral institutions: the ICC, the LCIA, the SCC, the ICDR, the SIAC, the HKIAC, the Swiss Arbitration Centre, and the Netherlands Arbitration Institute (NAI).

55 *See* Baruch Baigel, *The Emergency Arbitrator Procedure Under the 2012 ICC Rules: A Juridical Analysis*, 31 J. Int'l Arb. 1 (2014), doi: 10.54648/JOIA2014001; Klaus Peter Berger, *Pre-arbitral Referees: Arbitrators, Quasi-Arbitrators, Hybrids or Creature of Contract Law?*, in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 82 (Gerald Aksen et al. eds, ICC Publishing 2005); Jean-Paul Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*, 22 J. Int'l Arb. 245 (2005), doi: 10.54648/JOIA2005013.

56 This is the case of s. 2(1) of Singapore's International Arbitration Act, which explicitly expands the notion of 'arbitral tribunal' to also include emergency arbitrators, as well as of Art. 1043b(2) of the Dutch Code of Civil Procedure, s. 22B of the Hong Kong Arbitration Ordinance, and s. 2(1) of the New Zealand Arbitration Act 1996.

57 *See* among others, Santacroce, *supra* n. 41, at 292–297. *See also* Maxime Chevalier, *Enforcement of Emergency Arbitrator Decisions: Dream or Reality? The French Perspective*, 38 J. Int'l Arb. 835 (2021), doi: 10.54648/JOIA2021038; Rania Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35 Arb. Int'l 441, 458–460 (2019), doi: 10.1093/arbint/aiz021; Rainer Werdnik, *Chapter III: The Award*

that their orders and awards have been considered enforceable under the New York Convention (which on its terms is meant to deal with awards on the merits).[58] The fact that certain states have expressly equated emergency arbitrators to arbitrators deciding the merits only reinforces the argument that there is no real difference between the former and the latter (other than with respect to the scope of their mandate). There should therefore be no obstacle in interpreting the reference to 'arbitrator' in the new version of Article 818 CCP as extending to emergency arbitrators.[59]

A seemingly more compelling objection to the extension of the new regime to emergency arbitrators is that the second paragraph of Article 818 CCP would practically prevent the parties from filing applications for emergency relief, as it provides that, prior to the appointment of the arbitrator, 'the request for interim measures is filed with the competent judge pursuant to article 669-*quinquies*'. Under all the better-known arbitration rules, applications for emergency relief must be filed prior to the appointment of the emergency arbitrator.[60] If one interprets Article 818, paragraph 2 CCP in a strictly literal manner, then recourse to emergency arbitration would be practically impossible.

But this second objection does not withstand scrutiny either. The rationale of Article 818, paragraph 2 CCP is not to bar applications for arbitral interim relief prior to the appointment of the arbitrators,[61] but rather to clarify that, prior to that moment, the parties can obtain interim relief from the courts. In other words, its purpose is to avoid a jurisdictional vacuum. Against this backdrop, such provision cannot be interpreted as precluding the parties from applying for emergency relief under the chosen arbitration rules only because at the time of their application the

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and the Courts, the Enforceability of Emergency Arbitrators' Decisions, Austrian Y.B. Int'l Arb. 249, 271 (2014).

58 *See JKX Oil & Gas plc, Poltava Gas BV and Poltava Petroleum JV v. Ukraine*, Ukraine Supreme Court, Decision of 24 Feb. 2016. *See also* decisions considering interim measures issued by arbitrators enforceable under the New York Convention: *Ecopetrol SA et al. v. Offshore Exploration and Production LLC*, 46 F. Supp. 3d 327 (SDNY 2014); *PT Perusahaan Gas Negara (Persero TBK) v. CRW Joint Operation* (2015) 4 SLR 364 (CA); Case No. 44/134 JY, Cairo Court of Appeal, seventh Commercial Circuit, Decision of 9 May 2018. This said, the enforceability of decisions on interim relief under the New York Convention is still a *vexata quaestio*, many courts and scholars having taken the different view that such decisions cannot circulate under that instrument. *See Resort Condominiums International v. Ray Bolwell and Resort Condominiums* (1993) QSC 351; *Sharbat v. Muskat*, 2018 WL 4636969, at *8 (SDNY); *Al Raha Group for Tech. Services v. PKL Services, Inc.*, 2019 WL 4267765 at *3 (ND Ga.).

59 In the same vein, *see also* Carlevaris, *supra* n. 6, at 163.

60 *See* ICC Rules, Art. 29(1); LCIA Rules, Art. 9B; SCC Rules, Appendix II; ICDR Rules, Art. 7; SIAC Rules, Sched. 1; HKIAC Rules, Sched. 4.

61 Which they usually do, for instance, by including such requests in their requests or notices for arbitration to place the issue before the arbitrator or tribunal as early as possible and expedite the decision on the request.

emergency arbitrator is yet to be appointed.[62] That is confirmed by the fact that nowhere does Article 818 CCP preclude an arbitrator from entertaining requests for interim relief put forward prior to her or his appointment.

In light of the above, on a correct interpretation of Article 818 CCP, the new regime should be considered applicable also to emergency arbitrators. It follows that also emergency arbitrators' decisions will be subject to the provisions of Articles 818-*bis* and 818-*ter* CCP on the challenge and the enforcement of arbitral decisions on interim relief.

7 CONCLUSION

On 18 October 2022, the Italian Government enacted Legislative Decree no. 149/2022, which reforms Italian arbitration law in several respects. The most innovative aspects of the Reform concern the regime of arbitral interim relief. Indeed, the Reform eradicates the prohibition of such relief, which once characterized Italian arbitration law and was seen by many as a real obstacle to the flourishing of Italy as a seat of arbitration,[63] and introduces a brand-new regimen on arbitral interim relief that expressly recognizes the arbitrators' power to grant provisional measures. Not surprisingly, the Reform has been hailed as an 'historical' development.

The preceding sections have described the main characteristics of the new regime on arbitral interim relief introduced by the Reform and pointed to some potential issues and solutions. The cornerstone of the new regime is the new version of Article 818 CCP, which allows the parties to vest arbitrators with the power to grant interim relief, provided that they do so positively (as explained, a reference to arbitration rules recognizing the arbitrators' power to grant such relief will be sufficient to meet that requirement). The regime is complemented by the newly enacted Articles 818-*bis* and 818-*ter* CCP, which deal with, respectively, the challenge and the enforcement of arbitral decisions on interim relief (including the enforcement of measures issued abroad) by making ample reference to the provisions on the challenge and the enforcement of judicial decisions on interim relief. As discussed, the better interpretation of these provisions (and particularly of the new version of Article 818 CCP) is that the new regime applies also to emergency

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[62] Obviously, consistent with the rationale of the provision at hand, pending the appointment of the emergency arbitrator the parties could file the same request for interim relief with the otherwise competent court, which, pursuant to the *perpetuatio iurisdictionis* principle enshrined in Art. 5 CCP, will retain exclusive jurisdiction over such request, notwithstanding the later appointment of the emergency arbitrator (which will be ineffective).

[63] As it had an obvious negative impact on the reputation of Italian arbitration law as a whole, which in other respects was already aligned with the arbitration laws of the most advanced and arbitration-friendly jurisdictions.

arbitrators, whose orders will therefore be enforceable as those of the arbitrators deciding on the merits of the dispute.

Despite some minor drawbacks, such as the exclusion of a concurrent jurisdiction of domestic courts over arbitration-related interim relief after the appointment of the arbitrators (an exclusion that, as mentioned, cannot be absolute), the new regime on arbitral interim relief introduced by the Reform seems very promising. Although it is too early to accurately predict the impact that it may have on the attractiveness of Italy as an arbitration seat, it is very likely that the possibility of obtaining interim relief from arbitrators and of expeditiously enforcing it will induce more parties to opt for Italy as the place of their arbitrations. It is now for arbitrators, judges and practitioners to interpret and apply the new provisions in line with the strong pro-arbitration spirit underlying the Reform.