

# **“Do You Know the Land Where Lemon Blossom Grows?” - Journey into the Italian Arbitration Rules on Interim Measures**

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Goethe’s famous journey along the Italian peninsula left humanity a collection of verses that still make him the most notorious German author worldwide. Amongst others, he expressed his fascination for the country in these few lines: “Do you know the land where lemon blossom grows? / Amid dark leaves the golden orange glows. / A gentle breeze drifts down from the blue sky, / still stands the myrtle, and the laurel high. / Might you know it?”[fn]Wolfgang von Goethe, *Wilhelm Meister’s Apprenticeship* (1975-1976).[/fn]

An arbitration practitioner would not need to come from afar to discover that in the Italian legal landscape the rules on interim relief in arbitration proceedings set it apart from most of the existing national regulations and institutional rules. In the spirit of Goethe’s travels, this post will compare the Italian legal framework with the German one – another civil law jurisdiction in the heart of Europe. Developments are nonetheless taking place in the Italian legal regime and the new CAM Rules represent a welcome step forward to make Italy more attractive as an arbitral seat.

## **Introduction: An “Antique Island” Resting on the Foundations of State Courts’ Imperium**

The expression “antique island”[fn]Paolo Biavati, *Spunti Critici sui Poteri Cautelari degli Arbitrati*, Convegno A.I.A. - Rivista dell’Arbitrato, Rome, 3 December 2012, Rivista dell’Arbitrato No. 2 (2013) pp. 329-346.[/fn] has been used to refer to this facet of Italian arbitration law. Italian arbitration law in principle reserves the power to order interim measures to state courts (Article 818 Italian Code of Civil Procedure (c.p.c.) Book IV, Title VIII) – a rarity in the world of international arbitration. As held by the Cassation Court in 1962 (decision No. 597 of 24 March 1962), the power of arbitrators to decide a dispute does not extend to adopting provisional measures. If historically the *raison d’être* of the prohibition lies in state courts’ prerogative to use “police power” or “imperium”, other jurisdictions have long moved on. In Germany, for example, although enforcement remains the prerogative of state courts, arbitral tribunals can order interim relief (*c.f.* section 1041 German Code of Civil Procedure or “ZPO”).[fn]Albert Henke, *Le Misure Cautelari nell’ Arbitrato Commerciale Internazionale*, Rivista di Diritto Processuale, No. 5 (2012) pp. 1207-1230.[/fn]

## **New Developments: An Island Moving Towards Other Emerged Lands**

The most recent amendments to Italian arbitration law signal that Italy is more and more embracing the trends emerging in the international arbitral practice. In 2006, Decree No. 40 modified, *inter alia*, Articles 818 and 832 c.p.c. The new wording of Article 818 c.p.c. provides for exceptions established by law to the prohibition for arbitral tribunals to issue interim measures. From a systematic point of view, the amendment to Article 818 c.p.c. serves the purpose of coordinating the code's discipline with the reform to the Italian corporate law of the same year, which introduced the possibility for arbitral tribunals in arbitration proceedings on corporate law matters (so-called "arbitrato societario") to order the suspension of the effects of a corporate deliberation ("sospensione dell'efficacia della delibera assembleare", *cf.* Article 35 of Decree No. 5 of 2003) – an express recognition of the arbitral tribunal's power to order this form of interim relief. The scholarship has pointed out that the legislator decided not to expressly refer to Article 35 of Decree No. 5 2003 in Article 818 c.p.c., leaving the door open to further exceptions.[fn]See fn 2 *supra*.[/fn]

In addition, Article 832 c.p.c. includes a *renvoi* to institutional arbitration rules. The last paragraph of Article 832 c.p.c., in particular, establishes that to the extent the parties agree on institutional arbitration and the institution declines to administrate the arbitration proceedings, the provisions regulating arbitration under the c.p.c. apply. On the basis of this wording, it is argued *a contrario* that the provisions of the c.p.c. on arbitration, including Article 818 c.p.c., do not apply insofar as the institution administers the arbitration.[fn]*Ibid.*[/fn]

## **A Step Forward: Article 26 CAM Rules 2019**

On 1 March 2019, the new CAM Rules entered into force and introduced a series of novel provisions, including Article 26 on Interim or Provisional Measures. The 2010 version of the CAM Rules only included a sentence under Article 22 (Powers of the Arbitral Tribunal) providing that "[t]he arbitral tribunal may issue all urgent and provisional measures of protection, also of anticipatory nature, that are not barred by mandatory provisions applicable to the proceedings". Article 26 of the CAM Rules 2019 now incorporates this provision and further establishes that "in any case", unless the parties agreed otherwise, the arbitral tribunal has the power, at the request of a party, to adopt "any determination of provisional nature *with binding contractual effect upon the parties*" (emphasis added). Therefore, by agreeing in the arbitration agreement to refer the resolution of disputes to arbitration, the parties undertake to comply with the arbitral tribunal's decision and any violation thereof results in a breach of the arbitration agreement.

Aligning even more with recent trends in institutional arbitration, Article 44 CAM Rules now allows for the appointment of an emergency arbitrator for "measures and determinations provided by Art. 26" prior to the confirmation of the arbitrators.

## **Arbitral Tribunals and Interim Relief Beyond Italian Borders: The Example of Germany**

As highlighted above, state courts and arbitral tribunals usually have concurrent jurisdiction to order interim relief. It is in this respect interesting to cite the example of Germany, another civil law jurisdiction sharing common origins with the Italian legal order.

In Germany, the concurrent jurisdiction of arbitral tribunals to order interim relief remained disputed until the 1998 reform of the ZPO. But under the current regime, arbitral tribunals have the express power to grant interim relief. Arbitral tribunals may issue, *inter alia*, orders to freeze assets, to

maintain the *status quo* or to enjoin a party from calling on a bank guarantee, pre-judgment attachment and preliminary injunctions. Still, German courts maintain the power to order interim measures, regardless of whether the seat of the arbitration is in Germany or abroad. And they have exclusive powers regarding enforcement. According to case-law, German courts assess whether there is a valid arbitration agreement. German courts can recast measures to ensure they comply with certain requirements pursuant to section 1041(2) ZPO and repeal or amend measures in case, for example, of change of circumstances according to section 1041(3) ZPO. It bears noting that some authors consider that the order of the emergency arbitrator should also be enforceable like a decision on interim measures.[fn]Jan Schaefer, § 1041 – *Interim Measures of Protection*, in Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimiento, *Arbitration in Germany* (Kluwer Law International 2015) pp. 226-237; Gerstenmaier in FS Elsing 153, 157.[/fn]

### **Considerations on Arbitral Tribunals’ Power to Order Interim Relief: Parties’ Rights and Guarantees of Due Process**

Interim relief is instrumental to adjudicatory bodies’ power to decide the merits of a dispute. Interim relief avoids that the legal effects of a decision on the merits are nullified by circumstances materializing while the dispute is pending, and which require emergency intervention. When the parties agree to resolve disputes by arbitration, they refer the entirety of the dispute to the jurisdiction of arbitral tribunals. Indeed, they remain free to provide otherwise in the arbitration agreement. But in the absence of any reservation, the parties should have the right to request interim relief before arbitral tribunals, especially considering that their right to apply to state courts remains untouched (*cf.* for e.g. [Article 28\(2\) ICC Rules](#) and [Article 25.3 DIS Rules](#)).[fn]See for example fn 2 and fn 3 *supra*.[/fn]

Further, the arbitral tribunals’ power to order interim relief contributes to arbitration’s efficiency and expeditiousness. It reflects party autonomy and is a practical implementation of the principle of freedom of contract. Additionally, [Article 17H UNCITRAL Model Law](#) provides that an interim measure issued by an arbitral tribunal shall be binding on the parties and enforceable upon application to competent courts. The imperium of state courts remains unaffected. Most of the time enforcement is not even necessary because the parties voluntarily comply with the arbitral tribunal’s interim order.[fn]See for example fn 2 and fn 3 *supra*.[/fn]

Moreover, a party forced to apply to state courts for interim relief faces a series of hurdles. State court judges deal with a wide range of disputes and necessarily lack the specialisation of arbitral tribunals. They are also not used to deal with substantive and procedural rules of different jurisdictions or with documents in foreign languages. Most importantly, due process is guaranteed also when interim relief is sought before an arbitral tribunal by procedural safeguards – in the case of Italy by the guarantees under [Articles 24 and 111 of the Constitution](#). [fn]See for example fn 2 and fn 3 *supra*.[/fn]

### **Concluding Remarks**

New developments in the Italian legislation on interim relief in arbitration proceedings would be welcome and any further steps in this direction encouraged. After all, Italy is embracing more and more alternative forms of dispute resolution (ADR) with Decree n. 28 of 2010 and Legislative Decree n. 132 of 2014 in application, *inter alia*, of [Article 81 TFEU](#) and secondary provisions of EU law. If the rather strict rules on interim relief in domestic arbitration would be eased, Italy could become an even

more attractive venue for arbitration. This would serve the interests of a country historically open to and economically strong in international trade.

Against the backdrop of the big steps already made towards encouraging ADR methods and incentivising international arbitration, a question comes to mind: could we soon know Italy as the country where interim relief by arbitral tribunals blossoms?