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Ulisse Belotti

Dispute Resolution Narratives

A Linguistic Analysis of Arbitration Practices

2
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DISPUTE RESOLUTION NARRATIVES.
A LINGUISTIC ANALYSIS OF ARBITRATION PRACTICE
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To Alessandro, Clara, Marzia

Contents

Transcription conventions

The audio recorded materials in the corpus were transcribed according to the following conventions.

Symbol	**Represents**
(.)	Micro pause (< 0.2 seconds)
(1.8)	Timed pause
< ? >	Unintelligible speech
a::nd	Colons represent lengthened vowel sound
RIGHT	Underlined, capitalised words show emphatic stress, uttered louder than the surrounding speech.
?	Rising intonation
↑ ↓	Rising/falling intonation
< >	False start
o </>	Incomplete word (complete *of*)
Items in brackets indicate non-transcribable vocalizations or other actions.	(chuckle) (slight intake of breath) (breath intake) (throat clearing) (subvocalizing)

Acknowledgments

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I would like to gratefully acknowledge the cooperation of both the project main investigator, Prof. Vijay K.Bhatia, and the Italian Coordinator, Prof. Maurizio Gotti. I am also very grateful to the following advocates, scholars and arbitration experts whose precious collaboration has made this study possible: Adv. Stefano Azzali; Adv.Prof. Massimo Benedettelli; Adv. Gabriele Bonivento; Adv. Giovanni De Berti; Adv. Cecilia Carrara; Adv. Roberto Casati; Adv. Paolo Gnignati; Prof. Angelo Lucchini; Adv. William McGurn; Adv. Stefano Modenesi; Adv. Micael Montinari; Adv. Alberto Nanni; Adv. Cristina Pagni; Dr Stefano Pavletič.

I thank them for sharing their time and insights with me and for allowing me to share these narratives with a broader audience.

1 Details of the project and the network are available at the website <http://enweb.cityu.edu.hk/arbitrationpractice/index.html>.

Preface

Like any text aiming to bring together tenets of such a rich and complex field of inquiry as arbitration, this work begins with an indispensable caveat.

To begin with, I would like to make it clear that I am neither a legal practitioner nor an arbitration expert, therefore all inaccuracies or flaws concerning the description of arbitration legislation, procedures and legal technicalities rest on me.

As a linguist, my efforts are primarily directed towards the analysis of the language, mainly English as a lingua franca, that arbitration experts and practitioners used in the course of interviews on arbitration which took place between October 2008 and February 2009.

Introduction

1.1. Aims and scope

Narrative studies enjoy a long-standing tradition dating back to the 1960s. From the early twentieth century, studies focussing on narratives were influenced not only by Russian literary criticism and linguistics but also by Russian psychological theories concerning the social determinants of language and thought. More recently, narrative analysis has drawn on a number of theoretical paradigms which include structuralism, post-structuralism, hermeneutics, social constructionism, postmodernism and various contributions from linguistics and cognitive psychology (Manning *et al.* 1994). Indeed, narrative is considered a universal mode of verbal expression (Bruner 1986; Barthes 1977) and narrative analysis has been conducted according to a variety of approaches. For example, psycholinguists have mainly studied language acquisition, processing and pathology, whilst sociolinguists have analysed narratives in social contexts. On the other hand, linguists have focussed on "such properties of narrative as units of meaning, macrostructure, cohesion between sentences, and perspective" (Smith 2000: 329).

Research into narratives has shed light on various aspects, such as the concept of evaluation (Labov/Waletzky 1997), the notion of footing (Goffman 1986) and the concept of voicing (Bakhtin 1981).

In recent years, research on the roles that speakers may take on in narratives of personal experiences has been directed towards the investigation of authorial and interlocutory double voicings (Koven, 2002). In narratives, discourse speakers can play the roles of author and interlocutor at the same time, which in Bakhtin's terms (1981), is done by 'double voicing' particular stretches of discourse, meaning

that the narrator, while animating the original speaker, uses the quoted words for his/her own purpose.

Narrative analysis has also been employed to investigate different domains such as clinical reasoning, clinical ethics and human identity (Jordens/Little 2006), but also literature (Voloshinov 1973; Banfield 1982), news reporting (Fairclough 1992; Waugh 1995) and academic discourse (Swales 1990; Thompson / Ye 1991; Hunston 1993).

In this study, I focus on a particular type of narratives, i.e. semi-structured interviews which Baynham (2011:74) calls 'canonical narratives of personal experience'. Indeed, interviews, be they structured or semi-structured have received increasing attention in the past few years. These studies have investigated, among other things, the negotiation of meaning (Grindsted 2001, 2004; Mazeland/Paul ten Have 1998), clinical reasoning (Jordens / Little 2006), aspects of conversational speech (Bolden 2004), group discussions (Myers 1999) and journalistic discourse (Waugh 1995). In the legal domain, narratives are considered to be of paramount importance by legal practitioners since they believe that narratives from subjects involved in legal cases supply information which may not be available using other methods (Bruner 1986; Polkinghorne 1988). In this volume, I will investigate narratives from legal practitioners who were interviewed on various aspects of their being involved in international commercial arbitration (ICA) as either arbitrators or counsels to the parties.

Indeed, studies on international arbitration have shed light on a number of issues, such as the role of international arbitration itself (Nariman 2000; Hunter 2000; Leahy/Bianchi 2000; Brower 2008), the appointment of arbitrators (Miles 2003; Kurkela *et al.* 2007), and the challenging of arbitrators (Nicholas/Partasides 2007). Arbitration scholars have also analysed other controversial issues, such as confidentiality (Buys 2003; Ong 2005; Kouris 2005; Misra/Jordans 2006) and the cost of arbitration (CIArb 2011). One of the aspects which have recently gained prominence is the relationship between arbitration and litigation. Since Nariman's seminal article (2000:262) in which he stated that "ICA has become almost indistinguishable

from litigation", scholars from different cultural and legal backgrounds have been investigating whether and to what extent arbitration has become similar to litigation. The results of these research projects, published in Bhatia *et al.* (2003a, 2003b, 2008a, 2008b, 2010, 2012), have clearly indicated that alternative dispute resolution practices are being affected by the practices and procedures of litigation. Indeed, research on arbitration has mainly focused on written material, be it laws/rules or awards, whereas oral narratives of arbitration practice have received less attention. This volume provides evidence that may be of interest to linguists and arbitration specialists based on insights from Italian legal practitioners (acting as either arbitrators or counsels) reflecting their perception of how international arbitration functions. The main objective of this study is to analyse the linguistic features of some interviews with arbitration experts and practitioners in order to identify the characterising aspects of these narratives and thus better define the linguistic behaviour of this discourse community.

1.2. Outline of contents

This study is organized into two parts. Part 1, after providing an overview of arbitration in Italy, reports on the results of interviews conducted with arbitration practitioners. This section deals with some of the issues which have been raised by the arbitration discourse community. In particular, I will focus on how interviewees see institutionalized v. ad-hoc arbitration and on their perception of how arbitration clauses may be drafted. Respondents were also asked for their opinion on controversial aspects of international commercial arbitration, such as the duration and the costs of arbitration proceedings, confidentiality and the finality of arbitration awards. In addition, respondents' narratives have shed light on how they see the issue of informality in the arbitration procedure, the specialist background of arbitrators and how and to what extent arbitration has become similar to litigation. The final section of this part looks at the future of arbitration and how Italian arbitration practitioners see

arbitration and other alternative dispute resolution procedures, such as mediation and conciliation.

Bearing in mind that all but one of the interviewees were non-native speakers (NNSs) of English, Part 2 analyses some linguistic traits of these narratives, such as the use of metaphors, linguistic borrowing and code-switching, evaluation as a means of establishing identity, and the inclusion of voices of 'others' in these accounts.

1.3. Data and methods

This study is based on 14 interviews with Italian arbitration practitioners, mainly based in Milan and Rome, covering a time span of six months, from October 2008 to March 2009. The interviews were made on the basis of a questionnaire[2] (APPENDIX 1) which comprises thirteen sections covering various aspects of arbitration practice. In order to better clarify the content of specific answers, additional questions were also asked. The respondents were eleven law-firms professionals acting as either arbitrators or counsels to the parties in arbitration proceedings, two professionals (non-lawyers) acting as arbitrators and a chairperson of an arbitration institution.

Even though the number of experts/practitioners involved in the project may seem limited, it should be noted that the interviewees accounted for one third of all Italian arbitrators.[3] With regard to gender, 12 interviewees were males and two females while in terms of native language, the respondents were all NNSs of English using English as a lingua franca, except one whose native language was American English (AE). All interviewees agreed that interviews

2 The questionnaire is part of the international research project *International Commercial Arbitration Practice: A Discourse Analytical Study*, supported by the Hong Kong Research Grants Council-CERG Fund (Project No. 9041191). The questionnaire was drawn up by the research project's main investigator, Prof. Vijay K.Bhatia, and the Italian Coordinator, Prof. Maurizio Gotti.

3 Dispute Resolution Handbook (2008-2009), Volume 1. London: Practical Law Company Ltd; 410-412.

would be conducted in English and they were informed that they would be recorded and permission was asked in order to include the recordings in the corpus. The respondents were also informed that the transcriptions of their narratives would be used for research purposes and that anonymity would be guaranteed. A copy of the questionnaire and a description of the project outlining the main objectives were emailed to each interviewee a few weeks in advance of the interview. The following procedure was used:

- Each question was read exactly as worded in the questionnaire
- The questions were asked exactly in the order they were presented in the questionnaire.
- All the questions were used.
- Questions were repeated or clarified when they were misunderstood.

The corpus comprises fourteen audio files amounting to 9 hours 40 minutes of recorded interviews, which were then transcribed using SoundScriber (2004). The transcriptions (288,648 words) were then mailed to interviewees for proof-reading, together with a copy of the audio file of the interview. All interviewees' feedback confirmed that the transcriptions were accurate and no complaints were made.

1.4. The questionnaire

The questionnaire[4] was originally designed as a basis for structured interviews through in-depth face-to-face or on-line interviews with arbitration experts. The rationale behind it was that these practitioners could express perceptions based on their experience, so that the research project teams would be able to compare arbitration narratives from various countries and different legal systems (civil law / common law). After consulting with legal and arbitration informants, I

4 See Appendix 1 for the whole questionnaire.

decided to opt for face-to-face interviews and abandon online interviews, since a reasonable number of arbitration practitioners had agreed on being interviewed.

The questionnaire comprises 13 sections covering various aspects of arbitration practices. At the beginning of this research project, I was driven by the perception that businesses resort to arbitration mainly because it is perceived to be different from litigation. In actual fact, companies look for procedures which may help them resolve their commercial disputes bearing in mind clear objectives such as cost saving and shorter resolution times. I also realised that businesses are well aware of various shortcomings such as the intervention from national law and courts, the damages caused by unqualified arbitrators not to mention unexpected delays. The narratives reported here concern some of the issues at stake, namely institutionalized arbitration v. ad-hoc arbitration, arbitration clauses, confidentiality, duration of arbitration, informality of arbitration procedure, specialist background of arbitrators, costs of arbitration, finality of awards and the future of international arbitration.

PART I

Arbitrators as a discourse community

2. Arbitration: an overview

Arbitration is a method of dispute resolution in which a neutral third party, an arbitrator or a panel of arbitrators, conduct an evidentiary hearing and/or review written submissions from the parties. Upon consideration of the evidence, the arbitrator or the panel of arbitrators make a legally binding decision which can be enforced in the same manner as a civil court judgment.

In Italy, arbitration as a method of resolving disputes was officially promoted after the 1994 reform of the Italian Civil Procedure Code which was meant to contribute to aligning Italy to other European and international jurisdictions. Unfortunately, the reform retained the distinction between domestic and international arbitration with the consequence that international arbitration was considered a subcategory of national arbitration.

In spite of this, recourse to alternative dispute resolution methods (ADR) is on the increase in Italy (Bonsignore 2010) since parties facing disputes tend to use conciliation, mediation or arbitration procedures before resorting to litigation. According to a recent report[5], 681 arbitration procedures were conducted in Italy in 2008. Only 43 (slightly above 6% of the total) were international arbitrations which means that the great majority of all arbitration procedures were domestic arbitrations. It is also worth mentioning the fact that, in the same period of time, the Arbitration Chamber of Milan, a special agency of the local Chamber of Commerce, ran 32 international arbitrations (76% of all international arbitrations in Italy). These figures, although on the increase if we take the last four

5 ISDACI, UNIONCAMERE, CAMERA DI COMMERCIO DI MILANO, CAMERA ARBITRALE DI MILANO. 2010, Terzo Rapporto sulla Diffusione della Giustizia Alternativa in Italia. Available at <http://blogconciliazione.com/up-content/uploads/2010/02/Ebook-Terzo-Rapporto.pdf>. Accessed 15 June 2011.

years into consideration[6], clearly indicate that Italy is still very rarely chosen as a seat of international arbitration (Ceccon 2000; Benedettelli *et al.* 2010).

The reasons are numerous but may be mainly ascribed to Italian legislation itself, which has hardly ever been in line with the expectations of the companies involved in international trade. In addition, there still exists mistrust of the Italian judiciary which is not considered particularly efficient as far as international arbitration procedures are concerned. If we consider that the 2006[7] arbitration reform did not take advantage of the most effective arbitration laws regulating the matter in other countries, not to mention the UNCITRAL Model Law, we can understand why Italy is on the fringe of the whole 'arbitration market'. As regards the types of arbitration procedures, the situation in Italy shows an anomaly, as parties wanting to settle their disputes through arbitration can choose from three different types of procedures: administered arbitration, ad-hoc arbitration and the so-called *arbitrato irrituale* [free or purely contractual arbitration *my translation*]. Administered arbitration is supervised by specialized arbitral institutions (Arbitration Chambers) with the advantage that this contractually chosen way of resolving a dispute is definitive, i.e. it replaces all recourses to ordinary jurisdiction, except in a limited number of cases. On the other hand, disputes involving joint-stock companies and huge sums of money are often managed by large law-firms directly and not by arbitral institutions. In actual fact, these law firms tend to use ad-hoc

6 They were 520 in 2005, 505 in 2006, 557 in 2007 and 681 in 2008. Source: ISDACI, UNIONCAMERE, CAMERA DI COMMERCIO DI MILANO, CAMERA ARBITRALE DI MILANO. 2010, Terzo Rapporto sulla Diffusione della Giustizia Alternativa in Italia. Available at <http://blogconciliazione.com/up-content/uploads/2010/02/Ebook-Terzo-Rapporto.pdf>. Accessed 15 June 2011.

7 In order to appoint impartial and independent arbitrators, some Italian arbitration Chambers and Institutions have laid down specific rules, attached to the arbitration rules themselves, which regulate the conduct of appointed arbitrators. Quite unexpectedly, the two recent reforms of the arbitration law in Italy (1994 and 2006) are silent on the issue of the arbitrators' independence and impartiality.

arbitration and do not rely on arbitration institutions, in order to keep the disputes as reserved as possible (Bonsignore 2010:122).

Besides the traditional arbitration formats, the Italian law still provides[8] that arbitration can be administered under the auspices of the so-called *arbitrato irrituale*, in which the final award " can be enforced simply as a contract and not as a proper award" (Patocchi / Schiavello 1998:132). This kind of arbitration, still in use in Italy and few other countries (Consolo 2000), developed at the beginning of the last century and became quite popular for two main reasons. On the one hand, under an *arbitrato irrituale* the award did not need to be filed and deposited by the arbitrators within five days from its publication, as in proper arbitration (*arbitrato rituale*). On the other hand, a free or purely contractual arbitration could better ensure confidentiality, as arbitrators did not have to file the award with a first instance court. Indeed, an *arbitrato irrituale* is based on the principle that the parties at dispute agree to refer to the determination made by a third party. As this determination is said to be binding upon the parties involved, this kind of dispute settlement may be defined as a form of arbitration "wearing the hat of a contract" (Patocchi/ Schiavello, 1998:135), which suggests an idea of 'private justice' in which arbitrators tend to substitute, through the award itself, the parties' negotiating intent (Bernardini, 2000:46-47). Even though the present situation of arbitration in Italy is characterised by a lack of adequate legislation, it seems that established institutions such as the ISDACI (Istituto Scientifico per l'Arbitrato, la Mediazione e il Diritto Commerciale), AIA (Associazione Italiana per l'Arbitrato), Istituto Superiore di Studi sull'Arbitrato and the newly-founded ARBIT (Italian Forum for Arbitration and ADR), along with the Milan Chamber of Arbitration, are doing their best in order to make arbitration and ADR procedures as widespread as possible.

8 The new arbitration rules (Legislative Decree 40/2006; Legislative Decree 113/2008) still provide that parties at dispute may opt for *arbitrato irrituale* [free or purely contractual arbitration] which is considered a means of contractual determination and leading to a *lodo contrattuale* [contractual award].

2.1. The arbitration discourse community

Research has increasingly come to emphasize the importance of discourse communities as groups of people who share the same conventions and communicate with other members in order to achieve specific goals (Porter 1986; Swales 1990, 1998).

In actual fact, most participants belong to various discourse communities at the same time. As far as our corpus is concerned, the vast majority (11 out of 14) of interviewees are legal practitioners whose native language is Italian (NSs) but they use English in their profession when involved in international commercial arbitration. This implies that, on the one hand, they are members of the Italian discourse community of arbitrators and counsels to the parties but it also means that, on the other hand, they belong to the larger transnational discourse community of advocates and arbitrators who use English in their profession. In addition, if we consider that legal practitioners may be hired as either counsels to the parties or arbitrators, one may argue that these professionals do not belong to a single discourse community but to a network of discourse communities (Belotti 2012). In the case of counsels speaking Italian and/or English and arbitrators speaking Italian and/or English, the unifying traits are the conventions and the technical language that they use.

A further element which characterises these particular discourse communities or "communities of practice" (Wenger 1998:78) is the highly specialized language that they use which serves the primary function of communicating efficiently with the members of the same community (Bhatia 2004). One of the most distinctive features of the language employed by respondents is the use of Latin words and expressions, which seem to be employed for two main reasons: on the one hand, they are easily recognisable technical terms and expressions in common use within the community of lawyers, such as *ex aequo et bono*, *de facto*, *super partes*, *per se*; and on the other hand they convey well-established legal concepts using a limited number of words.

From a pragmatic point of view, these Latin words and expressions, quite unexpectedly used in spoken language, are deemed to be so deeply rooted in Italian legal language that they are transferred into English to express concepts which belong to the legal domain at large, thus including arbitration language. It seems worth noting that Italian arbitration practitioners use these Latinate forms without providing any explanation, thus implying shared knowledge on the part of the interlocutor.

2.2. Institutionalized arbitration v. 'ad-hoc' arbitration

Respondents were asked whether companies opt for 'institutionalized' arbitration under the rules of an arbitration institution or whether they prefer 'ad-hoc' arbitration. All interviewees agreed that multinational corporations and small enterprises behave in a different way. The former tend to prefer institutionalised arbitration while the latter opt for ad-hoc arbitration. In Italy, it seems that

(1) "[…] 70% of international arbitration cases are institutional arbitration cases ..that is exactly the opposite at our domestic level ..so international contracts usually are more favourable eh… for eh.. institutional arbitration eh… in domestic cases ..domestic contracts they ..in Italy for sure the ..the.. it's exactly the opposite ..70% ad-hoc and 30% institutions". (CERG 2008, I12)[9]

One of the reasons why multinationals prefer institutionalised arbitration is that it offers guarantees in terms of procedure, as clearly indicated by one of the interviewees:

(2) "[…] corporations do prefer institutionalized arbitration because they perceive that as a more guaranteed procedure" (CERG 2008, I4).

9 Throughout this book, CERG refers to the project and the numbers refer to the individual interviews. The samples of spoken language used in this study have been used verbatim, preserving misstatements, omissions, repetitions, and errors of grammar.

Under the rules of arbitral institutions, arbitrators are normally appointed or confirmed by the institution upon nomination by the parties. In addition, they must agree to conduct the arbitration in accordance with the institutional rules adopted and when the arbitral tribunals render the awards, they are normally scrutinised by the institution for procedural compliance before they are released to the parties. Another reason for choosing institutionalized arbitration was identified in the fact that the whole procedure is more certain in terms of costs than in ad-hoc arbitrations because

(3) "[…] you can monitor and know in advance more or less how the expenses of the arbitration process are going to be". (CERG 2008, I5)

Another aspect which was highlighted concerns the appointment of arbitrators since arbitration institutions seem to offer more guarantees in terms of impartiality and independence. On the other hand, ad-hoc arbitration is still quite popular in Italy among arbitrators as they are paid much better than in arbitrations run by arbitration institutions.

These findings are partially in line with the results of a survey conducted by PricewaterhouseCoopers (PWC 2006:12),[10] which indicates that the reasons for choosing institutional arbitration, may be attributed to issues such as reputation, understanding of costs and familiarity with proceedings. According to the PWC survey, large corporations opt for ad-hoc arbitration since they can take advantage of their experienced in-house legal departments. Other perceived shortcomings concerning ad-hoc arbitration are summarised by Boo (2008:7) when he states that:

> "The obvious weakness of *ad hoc* arbitrations is the lack of checks and balances over the arbitral tribunal. Complaints normally involve the high rate of fees demanded, delay in making decisions, in delivering the award, and unnecessarily prolonging of hearings etc.".

10 This study is based on joint research conducted by the School of International Arbitration, Queen Mary, University of London and PWC.

As far as the Italian situation is concerned, arbitration practitioners think that ad-hoc arbitration is still popular in domestic arbitrations and the reasons, in line with Boo's perceptions, are clearly identified by one of the respondents when he maintains that

(4) "Eh.. I think fees of the arbitrators ..freedom of the counsels ..eh.. in ad-hoc proceedings counsels of the parties and arbitrators ..they are not supervised ..so I can understand they ..they act in a..a.. an environment that is less controlled and so they ..they probably ..they like it eh.. in an institutional environment they might be judge judged ..controlled ..supervised and seen ..seen and that's something that they might not like eh.. first hidden reason.. the second one is fees of the arbitrators .eh.. they ..in ad-hoc proceedings usually they are better paid so ..and so one day they are counsels ..the day after they are arbitrators .."(CERG 2008, I12)

2.3. Arbitration clauses

The question on arbitration clauses was divided into two parts. In the first, as arbitration clauses are said to determine the form and legal basis of the whole arbitration process, I asked respondents to identify the most critical aspects of such clauses. In the second, I addressed the issue of 'standard' corporate clauses and asked whether and to what extent these might impact on the whole arbitration process. The majority of respondents stated that arbitration clauses are important but very few indicated that standard clauses are more commonly used than tailored ones.

Most interviewees (10 out of 14) also stressed the importance of the seat of arbitration as one of the most critical aspects of arbitration clauses, followed by the appointment of arbitrators and the applicable law. One of the main concerns in drafting the arbitration clause is the seat of arbitration, as exemplified by one of the interviewees:

(5) "[…] well certainly what is called in the *legal jargon* (my emphasis) the seat of the arbitration ..*which people who are not lawyers don't understand exactly* (my emphasis) what it is in real life eh.. the reason for this being one fundamental element of the arbitration clause is the following ..when the party says arbitration is in Milan or is in Paris or is Vienna by so doing they are not

> indicating the town in which the arbitrators will have to to meet.. this is completely irrelevant they can meet as they wish and they perhaps cannot even meet once because they could in theory have their discussions over the phone or with video-conference whatever eh ..the reference to a city in reality is a reference to a state to a legal system which is the legal system under the control of which the arbitration is going to be performed.
> (CERG 2008, I5, my emphasis)

The excerpt above contains two interesting stretches of language which indicate how the respondent establishes identity. The former is the use of the noun phrase *legal jargon*, which conveys the idea that what has been uttered can be understood by members of the community of legal practitioners. In addition, talking about one of the most critical and complex aspects of an arbitration clause, i.e. the decision about the seat of arbitration, the speaker says 'which people who are not lawyers don't understand exactly', with the two negative forms *not* and *don't* marking a clear line between those who belong to the community of lawyers and those who do not.

The issue of the applicable law seems to be particularly relevant since it was mentioned by a large number of respondents (8 out of 14). In particular, one of respondents states that:

(6) "[…] I have seen in my life arbitration clauses in which there is no choice of law and this creates problem [slight intake of breath] because mmm… there is always a fight .. by the two sides normally ..very often on which kind of ahm..of law to apply because each of them try to eh… bring the question debate on their bet.. the better known ground .." (CERG 2008, I2)

In addition, further critical elements were identified in the drafting of the clauses themselves, since some Italian arbitrators have experienced problems connected with the poor or unclear drafting of clauses which later caused unexpected problems mainly relating to time limits.

(7) "[…] once they make to start an arbitration they find out that the way they drafted the arbitration clause leads the parties to a very expensive arbitration proceedings to a..a an excess of power recognized to the arbitrators in terms for example of time extension eh…"
(CERG 2008, I12)

The issue of appropriateness of arbitration clauses is central since some respondents noticed that arbitration clauses are sometimes drafted in a way which is not suitable to the needs of the company.

This may put the business in question in difficult situations when, for example, an arbitration clause is copied from previous contracts.

(8) "I mean when the parties write an arbitration clause they have to think.. is this going to work in practice for what are our interests.. because very often there are a lot of mistakes done by parties who are not familiar with the difficulties of international arbitration and perhaps they take an arbitration clause from a prior document without realizing that in ..that specific case it doesn't work ..you may have a situation for instance where you have multi-party arbitration you have more than one party to the contract and then a classic traditional arbitration clause thought toward for two parties only may not work anymore you may choose an arbitration institution eh… the rules of which are not consistent with that specific contract and so on .." (CERG 2008, I5)

Other critical aspects, especially in multi-party arbitrations, were the choice of the language and the limited knowledge of arbitration itself as a means for resolving disputes, as exemplified in the following excerpt.

(9) "[…]..they don't know much ..lawyers eh.. they don't know much about arbitration .. I would say worldwide …" (CERG 2008, I12)

The issues raised by the respondents in our corpus seem to be in line with PWC's study (2006:10) in which typical defects of arbitration clauses have been identified in the omission of the seat of arbitration and the composition of the tribunal while, at an international level, corporations seem to have contrasting views on adopting arbitration clauses, since 48% use standard clauses while 46% make use of tailored clauses.

2.4. Confidentiality

Although confidentiality seems to be an important facet of the arbitral process, it is also apparent that the issue of confidentiality is treated differently not only in countries having different jurisdictions, i.e. civil and common law countries, but also within countries having the same jurisdiction (To 2008). For example, in France and Switzerland confidentiality is seen as an essential characteristic of the arbitration agreement while in other civil law countries, such as Sweden and Germany, the issue of confidentiality is not even mentioned in civil codes (Trackman 2002; Misra/Jordans 2006).

Indeed, confidentiality of arbitration proceedings is deemed to be greatly appreciated by the parties involved in the resolution of disputes (PricewaterhouseCoopers 2006) for three main reasons.

Firstly, confidentiality can help maintain good commercial relations between the parties. Secondly, it preserves confidentiality concerning the diffusion of sensible details, be they technical or economic. Thirdly, confidentiality keeps the dispute reserved and protects the parties from negative publicity which might affect the business-making process. A different perspective is adopted by Buys (2003:138) when she maintains that

> "[…] scholars, practitioners, parties, judges and arbitrators should engage in a careful weighing of the benefits and costs of confidentiality versus greater transparency under the facts of the particular situation and should not be too quick to presume the existence of a general duty of confidentiality or to enforce such a duty."

In Italy, confidentiality seems to be more relevant in the rules of local arbitration chambers (e.g. Milan, Rome, Bergamo) than in the provisions of the civil law regulating arbitration, since there is no mandatory provision that arbitration is to be kept confidential. As far as our data is concerned, this aspect of arbitration seems to be quite controversial since only 5/14 interviewees think that confidentiality still plays a relevant role in arbitration proceedings.

(10) "[…] it is eh.. definitely an advantage of arbitration proceedings and the parties do perceive this as a.. an advantage." (CERG 2008, I4)

(11) " Oh.. confidentiality yes I think that is one of the key element for the party to decide to introduce a an arbitration clause in a contract is is a st...I have some statistics in which the confidential confidentiality issue is one of the key issue …" (CERG 2008, I1)

(12) "[…]Well ..much to my surprise eh… I ..I .. much to my surprise it's still very very …a very strong argument in favour of arbitration." (CERG 2008, I12)

In addition, confidentiality is considered particularly important for intra-group disputes and one of the interviewees maintains that

(13) "[…] in that case eh.. they …there is a particular need for confidentiality …they want absolutely to avoid eh.. publicity and so arbitration is the preferred choice" (CERG 2008, I10)

Most interviewees think that confidentiality is still considered when parties decide to make recourse to arbitration but, at the same time, they strongly assert that it is not as important as it used to be in the past. In addition, one of the respondents clearly stated that confidentiality, under the auspices of an arbitration procedure, seems to be threatening but in reality it is just a 'paper tiger'; what counts in real life is a court ordering confidentiality.

(14) "[…] with arbitration ya.. there is all this talk about confidentiality but at the end of the day what happens if you disclose it.. nothing happens so …ya it's a paper tiger whereas court order confidentiality is the real thing". (CERG 2008, I7)

Another issue which has been raised concerns the fact that confidentiality may be bypassed simply by looking closely at a company's quarterly or half-year reports (also known as 10-Q and 10-K)[11] in which listed companies disclose relevant information regarding their financial position to stakeholders. This information

11 10-Q = Quarterly report / 10-K= Yearly report.

provides a detailed description of expenses connected to legal actions, arbitration included.

(15) "[…] so if you want to know about that arbitration you can find probably over fifty pages of details on it if you just read XXX's[12] reports eh.. so that proceeding was less or certainly not more confidential than if we had been in a court". (CERG 2008, I7)

The diminished importance of confidentiality is confirmed by other arbitrators. For example one of them says that

(16) "[…] so far I have never seen one of my clients choosing eh… the arbitration instead of ordinary jurisdiction just because of .. of the confidentiality ..so I do not think it is any more that important or ..for the specific target that I have ..commercial and international corporations I do not see confidentiality is a major ..major issue". (CERG 2008, I10)

The same idea is developed by another respondent, who states that the issue of confidentiality seems to be given an importance which is not supported by what happens in real arbitrations.

(17) "[…] confidentiality is eh.. mm maybe .. clashes with certain duties of of disclosure ehm.. so it has been ..when we.. if I may say so… we mmm present arbitration in seminars or so.. confidentiality is one of the things one says ..one mentions.. well eh.. it is somewhat overrated." (CERG 2008, I2)

2.5. Duration of arbitration

In theory, arbitration procedures should be quicker than litigation in courts. When the parties negotiate a contract, they stipulate arbitration in order to resolve any possible dispute quickly, efficiently and fairly.

But when a dispute arises, they will often go to any length to prevent it from being resolved. Nevertheless, the data seem to be contrasting. On the one hand, data from the International Chamber of

12 The name of the company, which is well known in Italy, has been omitted for privacy reasons.

Commerce (ICC) and the American Arbitration Association/International Centre for Dispute Resolution (PricewaterhouseCoopers 2006:7) show that an award "is rendered within 18 months from filing a request for arbitration". On the other hand, the picture is radically different in Italy.

It is generally accepted that the recent reforms of the Italian Arbitration law have contributed to progressively extending the time limits for rendering the award from 90 days to 180 (after the 1994 Reform) and 240 days (after the 2006 Reform), counting from the acceptance of appointment to when the award is rendered. This time limit may be extended under circumstances agreed in a joint request by the parties or chosen by the president of the tribunal, who may extend the time limit to render the award upon request from one the parties or on his own initiative. In addition, these time limits might be further extended, as indicated by Cutolo/ Esposito (2007:60)

> "[…] were each circumstances listed under Article 820(4) of the CPC to be invoked, the award could potentially be rendered after 960 days, i.e. nearly three years."

Indeed, arbitration proceedings often take years to complete and this has contributed to making arbitration expensive. This is mainly due to the fact that the parties often agree to extend the time-limits set by institutional arbitration rules. In other cases, parties which find themselves in a weaker position than expected, tend to produce complex issues based on either facts or the law in order to prolong the arbitration procedure.

Nonetheless, one of the reasons why parties at dispute are said to prefer arbitration to litigation is that arbitration is deemed to be faster[13]**.** Respondents, when asked if that was still a valid consideration, seemed to have contrasting views, since half of them believe that arbitration is definitely faster than litigation while the other half believe that arbitration is slower than litigation.

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13 The average duration of a full-trial civil litigation in Italy is approximately five years (Fabbri 2006).

Interestingly, those who believe that arbitration is still faster than litigation, draw distinctions about the complexity and the size of the case, as exemplified below:

(18) "Generally speaking yes .. I think that is still valid even if there are some cases in which the eh.. duration of the arbitration process eh.. was ..too long .. I have some cases in which the parties were not happy eh. for the duration of arbitration . sometimes . I remember an arbitration that.. the duration was seven years and sometimes even when is .. three or four years is too much .. depends of course on the size of arbitration ..the complexity of the case but in any case I think that a normal arbitration the duration [slight intake of breath] could be no more than two three years.. " (CERG 2008, I1)

(19) "It it is true but I have said that depends what is the comparison because I had arbitrations which were lasting for seven years eh ..because this is a point where the arbitrators say to the parties the matter that gave us is so complex that we need more time and is quite rare that the parties are ..[subvocalizing] first of all agree to say both say no because then if they say both no the arbitrators deliver the award ok we will deliver you the award that you deserve I was asking your cooperation you tell me we don't give you an extension then of course I will decide on the basis of what I have been able to understand and this is very risky and normally don't want to go against the arbitrators and normally parties are not in agreement so .. it can well be that arbitrations are carried out for long periods of time however if this happens ..this can happen because there is real need to get more time to understand the facts or because arbitrators are lazy or the arbitral institution is not carrying out his work.. what is the sanction there.. there is sanction of reputation because if you understand that a certain person is too busy or I mean he is not able to deliver in time ..very likely that person's reputation is going to be affected ..not be appointed again there will be rumours in the market ..he's a lazy arbitrator so that's a real sanction ..arbitrators normally try to avoid that to happen so if they ask for a postponement is because there are good reasons ..they need it ..if this is the case I think this would be the case also before a judge I mean the judge is going to be faster and certainly certain judges are by definition slow ..Italy's slow in terms of civil litigation and so on ..but it is true that the idea that you get an award after a few months ..that almost never happens unless the case is a very very simple one.. it is very normal to get an extension .. from.. from the parties or from the arbitral institution". (CERG 2008, I5)

2.6. Informality of arbitration procedure

Italian arbitrators have different opinions regarding the nature of arbitration proceedings compared to the more formal practice of court litigation. Those who strongly support the idea of informality in arbitration stress the fact that it is a benefit. For example, one of the respondents states that

(20) "[…] I'm somehow concerned in seeing it as a tendency to have more and more rules of procedure regulating the proceedings and somehow limiting the ehm… discretionality of the arbitrator and of the parties." (CERG 2008, I4)

Another positive aspect is the freedom arbitrators and parties enjoy in choosing the way they want to conduct arbitration.

(21) "[…] the liberty of forms eh… eh… in arbitration is still one of the key issues eh… and it's the reason for which eh… you also expect arbitration ..arbitrators always to go to the very …to the kernel of ..of the matter and therefore I would say that eh… informality is still is still a key … a key feature…"(CERG 2008, I11)

The informal nature of arbitration proceedings seems to be closely connected to flexibility, as exemplified in the following case:

(22) "[…] one Chinese party ..one English party eh… the.. applicable law ..they sign a contract ..the applicable is the Italian law eh ..but they don't want to litigate either in China nor in England nor in Italy so ..arbitration in Switzerland ..applicable law the Italian with three arbitrators that by chance are two Italian and one Swiss ..conducting in English …it's …you you understand the ..the.. this situation would never be so … balanced managed as in arbitration before a state court eh… system.." (CERG 2008, I12)

A number of arbitrators consider this aspect of arbitration as something which cannot be avoided whereas others are against the informality of proceedings in arbitration.

(23) "[…] I am strong believer that the procedure is fundamental in any dispute so I personally dislike the informality of arbitration proceedings." (CERG 2008, I6)

2.7. Is arbitration being colonized by litigation?

It seems apparent that there is a lot of concern about the fact that arbitration is becoming too similar to litigation (Nariman, 2000). This 'judicialization' of arbitration tends to make the time for resolving disputes closer to the time it would take in litigation, not to mention costs.

It is also a common belief that arbitration is radically changing and that the original principle of having an expert decide the dispute is giving way to something different, described as "judicialized, formal, costly, time-consuming and subject to hardball advocacy" (Stipanovich, 2008:1). In common-law countries, and in the U.S. in particular, "law firms continue to consider international arbitration as but one kind of 'litigation (or, more recently 'dispute resolution') among others" (Dezalay /Garth, 1996:55) and this way of dealing with arbitration has progressively spread to civil law countries. As far as our corpus is concerned, it is interesting to note that one of the interviewees, before answering the set of questions, wished to express his own idea about the rationale of arbitration itself. His words[14] unveil a vision of arbitration which is shared by the vast majority of the respondents.

(24) "Before we start .. somewhere in the questionnaire it seems to have been highlighted that eh.. the arbitrator is a subject whose function is different from the one performed by the judge eh… it's further on.. this is not true … I mean ..the arbitrator performs exactly the same function as that of the judge … I mean .. he is requested by the parties to give birth to a product which is identical for the function it performs to a judgment …therefore the arbitrator's usual starting point ..then things can go differently …but the usual starting point and the expectations of the parties…if they are well advised ..it's not of having to do with a dispute resolution phenomenon eh ..different as regards the function it performs from the one that you experience before a judge … different is the person who makes a decision eh… the procedures he follows but the result is identical to a judgement …what is peculiar .. in other words .. if we were to compare arbitration or litigation versus conciliation or mediation

14 See Appendix 2 for the original version in Italian. What is reported here is my translation into English.

> .. this is where the product is different and therefore you will have to do with a different product ..this may affect the language otherwise the advocate's expectation having to deal with an arbitration panel and the expectations of his customer .. who decided to opt for arbitration is not …I have to behave in a different way from what I should be doing if I were before a judge .. the rules are different ..they are different ..but at the end of the day ..I'm taking care of my customer in a *legal* (my emphasis) action ..within a *legal* environment which results in a product called award ..which has the same nature as that of a judgment ..I mean within litigation I consider facts and then I enforce the law .. this is the product .. and you can use it as if it were a judgment .. I can ask the court officer to use it to attack the debtor's assets … (CERG 2008, I5)

This respondent highlighted two important aspects. First, arbitration and litigation are contrasted with mediation and conciliation, meaning that the first two have something in common and should therefore be treated as an array of solutions that a legal practitioner can propose to his clients in case of a dispute. Second, the interviewee, when talking about the arbitration procedure and what is connected to it, uses the adjective *legal* and this seems to blur the line between arbitration and litigation.

Having said that, let us now consider the reasons why arbitration has become similar to litigation. Our respondents provided four different reasons which can be summarised as follows:

- poor or insufficient knowledge of arbitration as a method of resolving disputes;
- the nature of arbitration itself which is considered another form of litigation;
- litigation is better equipped to resolve disputes;
- amicability has nothing to with arbitration.

As regards the first issue, respondents mention the fact that arbitrators are sometimes not up to the task and the reasons may be mainly ascribed to the fact that they act more often as litigators than arbitrators, thus having limited expertise in arbitration.

(25) "[…] ..it happens when .. the arbitration clause makes reference to the rules provided for in civil procedural eh.. code ..or when arbitrators are not eh..

> expert in arbitration and they of course feel more comfortable in applying the the usual mmm procedural provisions." (CERG 2008, I3)

In the excerpt above, the respondent also mentions the fact that an arbitration clause including civil code provisions may contribute to making the whole arbitration procedure more similar to litigation.
With regard to the qualifications of arbitrators, only two well-known institutional arbitration rules (the LCIA and the Vienna Rules) specify that arbitrators should be chosen on the basis of the substance of the dispute. Other rules are silent on this topic. As a consequence, it may happen that arbitrators versed in litigation but with little or no knowledge of arbitration, when involved in arbitration procedures, will try to be as comfortable as possible, which means that they are likely to conduct arbitrations in the same way as in litigation. This being 'comfortable' may lead to situations in which legal practitioners, lacking experience in international arbitration, tend to "remain within their comfort zones and recommend domestic litigation even if against the interest of the clients" (Bautista 2008:9).

This seems to be difficult to understand, but if we imagine a situation in which counsels to the parties are not experts in dealing with arbitration as a method of resolving disputes, arbitration itself may be at risk, as exemplified by one of the respondents.

(26) "[…] ehm… it is also a problem when the ..counsels do not have a significant experience in ..in arbitration they may be litigators as ..as a basis ..and then eh ..they would be in fact eh ..leading [chuckle] ah.. the process to become more proceduralized ..I am … I have currently an arbitration where unfortunately this is the case ..the counsels of the opposing parties are litigators ..it's an ad-hoc arbitration and ..it's an international case but the seat is in Italy and it's an ad-hoc arbitration and even though it's a sole arbitrator ..the sole arbitrator has a great experience in international arbitration he really fights to keep it as formal ..as informal as he can and as ..as ehm.. detached as possible from the code of civil procedure but it's very difficult when one of the two parties does not play the game and ..[chuckle] .." (CERG 2008, I4)

Since arbitration has taken control of territory which was historically reserved for litigation, the character of arbitration itself has changed.

In order to cope with a variety of business disputes and the growing complexity of issues connected with the disputes, arbitration procedures have become longer and more detailed, with the consequence that lawyers tend to behave in the same manner as if they were in courts. This is not surprising, as we all tend to use the tools with which we are most familiar and, as aptly observed by Stipanovich (2008:14), lawyers "schooled in trial may predictably rely on their knowledge and experience in the private analog of the process". The risk that legal practitioners deal with arbitration as if they were in a civil court was underlined by numerous respondents, as exemplified by the following excerpt.

(27) R: Yes I.. I…I believe that ehm… based on my experience I have seen many arbitrators managing the arbitration process in the same way eh… they …they they ..the ordinary courts manage the the ordinary eh ..proceeding and ..and I think that this is the most eh ..the most important challenge for for arbitration trying to ..ehm ..to to
I: not to be colonized by litigation is that what you mean
R: ...ya…because basically as I mentioned before many arbitrators tend to eh... eh… regulate ... eh… managing the the proceeding applying eh… civil procedural ... provisions ... and (subvocalizing) it sounds not a good ... a good approach...
I: as if they were in a court
R**:** ...as if they were in a court ...ya ya (CERG 2008, I3)

If conventional wisdom suggests that business people choose arbitration mainly because it is perceived to be different from litigation, this perception is not shared by the majority of respondents, as exemplified by the excerpt below.

(28) "[…] I ..I.. depends what this means ..if depends it is similar in the sense that it is a decision making process by which you apply the law to achieve a binding decision .. actually is not seen as identical and it has to be identical because this what the parties do ..want when they sign an arbitration clause.. if this is meant by saying that you end up in having the same type of procedural complexities ..waste of time ..eh.. whatever are the bad aspects of judicial litigation then my answer is no.. not at all I don't think eh.. this is happening and in my experience .. you have very quick arbitrations ..you have very long arbitrations that depends on the case eh ..in any case you don't have to comply with all the strict formalities that have to comply with when you are before a

> judge eh.. but in general terms I would say they remain two different animals ..again. .for the way you perform the process the result of the process is and has to be identical and if a a party thinks because it has chosen arbitration then it's going to be a friendly way of settling ..that's wrong ..one should have told that party this is not true ..it's a litigation process ..it's a process to solve a dispute ..a legal dispute so.. eh ..nothing.. mediation can be also a process to solve not legal but commercial disputes ..you don't agree on a price .you don't go before an arbitration court if you don't agree on a price unless there is a contract that provides for certain obligations in how you have to negotiate a price but otherwise you don't go to arbitration or there is something where there is nothing in terms of having breached the contract but still there is a dispute of course you don't go to arbitration but if you have a breach of a contract or a difficulty in ..in the interpretation of a contract which is a legal document at the end you need a judge or you need a lawyer sitting as an arbitrator." (CERG 2008, I5)

As far as the appointment of lawyers as arbitrators is concerned, the majority of respondents stated that lawyers have played a significant role in making arbitration effective.

(29) "[…] they have a … specific experience and can make a prior estimation of what could be the real outcome of the case and mmm… and so on … are all elements that should help in eh… finding a settlement" (CERG 2008, I10)

When asked whether the frequent appointment of lawyers as arbitrators had affected the 'amicability' of the whole arbitration procedure, quite a few respondents highlighted the fact that the appointment of lawyers as arbitrators had to be seen not only as advisable but also as necessary.

(30) "No… I mean the appointment of lawyers is absolutely ..I would say ....necessary because eh… at the end of the day you expect eh… an amicable judgment by someone who is grounded in ..in law …"(CERG 2008, I11)

The excerpt above shows what seems a contradiction in terms. In fact, the interviewee calls the award *an amicable settlement*. This is a clear reference to the spirit of arbitration, which implies the active co-operation of the parties in the dispute. Nevertheless, the same respondent adds that the judgment should be made by *someone who is*

grounded in law, thus excluding the appointment of experts as arbitrators. The fact that arbitrators should be grounded in the law seems to be one of the main characteristics that the respondents to the questionnaire attach to the profession itself. Another point which has been made concerns the fact that lawyers, when appointed as arbitrators, tend to think and behave like lawyers even though they are acting as arbitrators. The way in which they will conduct arbitration is likely to be heavily conditioned not only by their educational and professional background but also by what Gotti (2008:223) calls "their specific legal philosophy". Talking about the award, one of the respondents said that:

(31) "[…] what is amicable meaning .. [subvocalizing] cannot be … summum ius .. fiat justitia et pereat mundus eh… again the law must not be forgotten eh.. you cannot.. issue an award which is eh ..plainly illegal but you must go to the real tracks of the matter.. understand what is the eh.. business problem which has emerged and how it can be solved in a business like situation eh.. let's see the rest of the.. lawyers [chuckle] …of course ..lawyers bring ehm… to arbitration their ehm.. mental structure of going to court where they argue on points of law and of course [subvocalizing] as arbitrators we often are ..confronted with lawyers or things to be in courts .. they want just writs ..split the legal hair into sixteen parts whilst it it is not really the.. really the idea and the aim of the original arbitration." (CERG 2008, I2)

It seems to be undisputed by the vast majority of the interviewees that an arbitrator, to be a good arbitrator, has to be a lawyer. This concept is clearly stated, even though with some caution, by one of the respondents when she maintained that

(32) "[…] lawyers do indeed eh… successfully add value to to the dispute provided that they are qualified lawyers and so if if.. lawyers actually do the arbitrations sector or are litigators and they don't have in their background the willingness to to.. ehm… to lead the parties to a settlement and again not to play according to formal rules then that can very much spoil the whole exercise" (CERG 2008, I4)

The fourth reason why arbitration is becoming similar to litigation is that amicability has nothing to do with arbitration. Traditionally, arbitration was conceived as a means of resolving disputes with the

active co-operation of the parties and not just a way of adjudicating a dispute (Nariman 2000). Most respondents observed that arbitration, having an adjudicatory nature, is different from an amicable settlement of disputes. One of the interviewees clearly pointed out that 'amicability' should be taken into account by the parties only in a preliminary phase, i.e. before resorting to arbitration.

(33) "[…] I I don't I don't agree with the main statement I mean eh.. you find sometimes arbitration clauses that say before resorting to arbitration the parties must make an effort to settle in an amicable way before as a condition to arbitration but once you are in an arbitration by definition you are in a situation where the parties are one against the other and they have to fight a battle which is a legal battle so they need lawyers ehm…"(CERG 2008, I5)

The excerpt above, largely representative of the whole corpus, suggests that arbitration is just another form of litigation, with the consequence that parties are advised to hire lawyers in order to be better equipped to fight the 'legal battle'.

A similar perspective is adopted by another respondent who, before talking about the specialist background of arbitrators, states that 'arbitration and amicable settlement are two different issues', making it clear that amicability has nothing to do with arbitration.

(34) "[…].. I think arbitration and amicable settlement are two different issues ..in some cases you want to settle ..in some cases you don't want to settle ..obviously arbitration was invented to promote settlement any more than courts <?> The second point is and that is the issue of the specialist background of arbitrators that's a separate issue and whether it is an engineering problem and in the areas of specific kinds of problems that can be very useful ..for example if you are in the US there are massive requirements for the settlement of security law disputes with corporate houses by eh…. arbitration and there is an army of specialised lawyers.. specialists in eh… that area for those sorts of problems and <?> to be efficient but that's a separate issue ..it's you can get that in arbitration but you can also get that in courts there are also some well organised court systems that refer tax cases to tax experts and other cases to other experts so it's not unique eh…to arbitration and finally the role of lawyers as arbitrators I think as a general rule tends to put a little order in what is otherwise really a tabula rasa because of the informality we were discussing before and lawyers are better at pretending to

be judges than non-lawyers because real judges are lawyers." (CERG 2008, I 6)

2.8. Cost of arbitration

The issue of the costs of arbitration has always been under close scrutiny by companies involved in dispute resolution, since their main aim is twofold: to resolve the dispute as soon as possible and to spend as little money as possible. Nonetheless, some arbitration procedures, especially those concerning difficult intellectual property issues or complex new technologies are so expensive that costs may easily get out of hand (Aksen 2007:257). In addition, costs can be curtailed "only in the context of domestic arbitration before a sole arbitrator and even then only in specialized fields such as maritime, commodities" (Hunter 2000:382). This perspective is shared by one of the interviewees, who lists the conditions under which costs can be kept under control.

(35) "[…] if you really draft a good arbitration clause ..if you pick up the right arbitral institution and for example you adopt a sole arbitrator clause with an institution that is not too expensive .. [throat clearing] you have some … way to.. to keep costs under control that it's still eh… less expensive than any ..any litigation." (CERG 2008, I 12).

In actual fact, arbitration proceedings often take years and are therefore expensive and this is mainly due to the fact that parties often agree to extend the time limits set by institutional arbitration rules.

The vast majority of interviewees agreed that arbitration is getting more and more expensive and this seems to be in line with the findings of the research by PricewaterhouseCoopers (2006:10) which indicate "that nearly two thirds (65%) of the respondents perceive international arbitration to be more expensive than transnational litigation and 23% believe it is about as costly as transnational litigation". Most respondents did not have any doubt about it and the excerpt below is largely representative of the whole corpus.

(36) "Yes arbitration is always more expensive definitely … you have to pay eh. at least your lawyers and the panel ... the panel of arbitrators who basically are lawyers." (CERG 2008, I3)

What contributes to making dispute resolution really expensive is also the fact that companies may find themselves in a situation in which they have to run both arbitration and litigation at the same time, as one of the respondents clearly pointed out.

(37) "[…]..you see more and more cases where you have arbitration and parallel proceedings and in that case then it becomes really questionable whether it's it's better value for money because you would end up paying both things at the same time." (CERG 2008, I4)

One of the things that may contribute to making arbitration more expensive than litigation concerns multi-jurisdictional cases, especially when interim measures are deemed to be necessary and therefore applied for to the courts.

(38) "[…] it happens that eh.. even though arbitration is eh… first choice then it happens that also state proceedings have to be eh…started at the same time for example ehm…. for example for obtaining interim measures it may be the case that you have a main arbitration .. a main case .. the arbitration and then a number of eh.. state proceedings and this is ..this is quite inefficient and is very ..eh ..well also in terms of costs but at the moment there is no ehm... no no choice I mean this is the only option available .." (CERG 2008, I7)

Other respondents highlighted the role played by arbitral institutions in keeping costs under control, meaning that the cost of arbitration conducted under the rules of arbitration institutions is more likely to be predictable, as clearly indicated by two respondents who mentioned the Milan Chamber of Arbitration as one of the Italian institutions that have succeeded in keeping costs under control.

(39) "[…] for instance recently in eh.. the ..in the arbitration .. the national international arbitration ehm… camera of Milan they decided to review the cost of arbitration in Milan and now the situation is much better than in the past .. under particular circumstances, arbitration may be even less expensive than litigation." (CERG 2008, I1)

2.9. Finality of awards

Since the 2006 reform, the grounds on which parties can challenge an award have been reduced and this has contributed to making arbitration awards more final. It is also clear that the losing party is likely to do anything in order to avoid enforcement of the award. As far as the finality of an award is concerned, opinions are once again divergent. Some respondents stated that the challenge of arbitration awards is on the increase and see this as

(40) "[…] a symptom of the fact that arbitration is more and more conceived as a form of litigation.. the culture and practice of arbitration are therefore changing as well leading to a higher degree of non-compliance." (CERG 2008, I4**)**

Another reason provided is that at times awards are seen as a compromise between two positions that are so distant that the rationale behind the solution to the dispute is difficult to understand, as exemplified by one of the respondents.

(41) "[…]…instead sometimes you have an award that you don't understand the rationality.. in term of law.. the real rationality is only a compromise because eh.. eh. one judge one arbitrator is appointed by one of the parties and the other one by the other party.. in reality the arbitrators.. are judges.. but so I repeat sometimes they forgot
I: to be judges..
R: to be judges and this is the reason why.. in my opinion ..more frequently the a party decides to challenge ..an award even if it is difficult .. because eh ..usually in the appeal phases the judge of the appeal cannot examine again the merit of the case." (CERG 2008, I1)

On the other hand, some interviewees maintain that the challenge of the arbitration award has little to do with the integrity of the arbitration process and that, on the contrary, it helps to make the whole arbitration process more reliable than in the past because

(42) "[…] the risk of getting a bad decision can be a very high one so the fact that you can challenge an award in my opinion is not something which is going

> against arbitration on the contrary it's reinforcing the fact that arbitration is a valid instrument for the settlement of disputes." (CERG 2008, I5)

2.10. The future of international arbitration

Those who are in favour of arbitration believe that (provided it is well-structured and properly conducted) this method for resolving disputes "can facilitate and even encourage a constructive dialogue between the parties, thereby providing the parties, possibly with the active support of the tribunal, not only with the solution of pathological dispute but with a service for the future." (Berger 2003:403). This is in line with the findings of the study conducted by PricewaterhouseCoopers (2006: 22), in which 95% of the international corporations taking part in the research not only expected to continue using it but also claimed that arbitration cases will be more common in the future. With regard to concerns about arbitration, the same study points to areas such as high costs, difficulties in dealing with multi-party proceedings, and the small pool of arbitrators. Nevertheless, in-house counsels are confident that arbitration laws and practices will bring about the solutions required to meet future challenges. Against this international background, the situation in Italy seems to be more problematic. If we consider the recent reforms of arbitration law, there seems to be a widespread perception that they will eventually make arbitration difficult if not impossible, as stated by numerous arbitration practitioners and scholars. For example, Cutolo and Esposito (2007: 59-60) maintain that:

> "The new provisions are likely to prevent companies from using arbitration as a means of resolving their disputes. […] The present reforms can only serve to extend the length of arbitral proceedings in Italy and, as such, only worsen the existing state of affairs. It is not unlikely that the parties will decide not to turn to arbitration, taking Italy further away from the trend in most countries".

As far as our corpus is concerned, almost 50% of respondents believe that arbitration, in spite of its well-known shortcomings, such as unqualified arbitrators, uneven administration, awards rendered as

compromise and limited appeal, still plays a relevant role in dispute resolution and will continue to be the preferred method for resolving cross-border commercial disputes. One of the reasons is that in Italy litigation, compared to arbitration, takes longer, as indicated by one of the respondents.

(43) "Ehm … as I said … I … I think that there are good ..ehm… prospects for this to ..to remain the preferred solution at least for international corporation eh… operating in… into Italy because the the time of the ordinary justice is really an issue and therefore the lack of certainty is becoming eh… really crucial and therefore the possibility of having an award rendered in as an average in one year time or so … is really a substantial advantage to … to the arbitration …" (CERG 2008, I10)

A different reason is provided by another interviewee, who states that arbitration may be very effective even though parties and arbitrators come from different jurisdictions, i.e. from different legal cultures (Elsing *et al.* 2002). Indeed, it may happen that arbitrators and parties have difficulties in communicating, owing to what Lalive (1990:80) calls "conflict of cultures" and interestingly, these conflicts may have a positive aspect which the respondent in question identifies with the issue of neutrality.

(44) "Ah .. yes indeed it will continue to be privileged mean ..tool for eh ..resolving complex disputes especially when very different legal cultures are involved in possible disputes because eh.. well often it's difficult to agree on a state court or another mean of dispute resolution when very different eh… countries are at stake ….well indeed the … the need for neutrality is eh… of overwhelming importance and this can be achieved eh… by arbitration ..cannot be achieved normally by eh… the ..opting for state court litigation." (CERG 2008, I8)

On the other hand, a significant number of respondents believe that arbitration will not continue to be the preferred way of dispute resolution. Indeed, one of the interviewees maintains that arbitration may be a good solution when companies want to take advantage of the fact that arbitration often takes longer times than litigation or when they want 'to avoid justice'.

(45) "[…]I think that ..I will say this ..my advice.. after a career .. to clients is avoid arbitration ..it's expensive if you are trying ..if you are serious company that respects its obligations and you will morally <?> be on the side of right that is ..if there is a claim or not you won't pay for it.. a classical serious multinational ..you are much better off with courts ..the arbitration is good if you want to take time because it's slow because you want to avoid justice .." (CERG 2008, I6)

It is widely recognised that ADR procedures, mainly mediation and conciliation, are becoming more and more popular. One of the reasons why mediation is used as one of the preferred dispute resolution procedures is that companies are disappointed with the cost and time involved in litigating in national courts and in arbitration; secondly, as Hunter (2000:383) aptly observes, there is "[…] a growing feeling amongst international traders that 'interest-based' solutions may produce better outcomes in the medium or long term than 'rights-based' solutions". The issue of cost/time saving is also relevant in other forms of dispute resolution in which a mediation/arbitration hybrid is employed in order to save time and costs (Oghigian 2003:7).

When interviewees were asked whether other forms of dispute resolution (e.g. conciliation and mediation) were likely to supplant arbitration procedures, once again ideas varied. One of the respondents provided a description of the procedure which is normally adopted by companies involved in commercial disputes. This normally consists of three different steps: negotiation, mediation and arbitration.

(46) "[…]….other forms of dispute resolutions ..are likely to supplant arbitration…ya.. ah.. but especially mediation .. I have been discussing this kind of problems with in-house counsels of a multinational ..and they tell me eh… when we have ..because they have very often trans-national matters ..disputes and they say well .. first we try negotiation …direct…then we try mediation negotiation with the facilitator as you know.. mediator who tries to put the parties together without having the possibility to impose or to even suggest a solution ..then of course we resort to arbitration because eh.." (CERG 2008, I2)

Other respondents, after stressing the benefits of having more conciliation and mediation as a method of resolving disputes, strongly

believe that arbitration cannot be integrally supplanted by ADR procedures, as clearly expressed in the following excerpts.

(47) "Ehm…again I. I. I would struggle being in favour of having more conciliation mediation as a way of prevention of ..eh ..more conflictual dispute but ehm… realistically that would still be a significant bulk of disputes which needs to be decided upon in ..eh…in a certain way and so I don't think that there is really the possibility to integrally supplant them… there is still a good possibility to ..to.. welcome a culture of the lawyers and of the parties to try to settle at an early stage but I I ..don't think that there is a substitution for arbitration." (CERG 2008, I4)

(48) "They will never be able to be substitution for arbitration for the simple logical reason that they are different animals ..eh ..this is something that very often companies do not understand of course arbitration is ..reason for a cost whoever is involved in it apart from lawyers for which is a source of profits but for a company is a cost and if there is a way by which a company can avoid that cost without losing too much and this is by settling in a friendly way with the counterparty or having someone who helps to settle .. great . fine.. but if that settlement is not possible for whatever reason because the parties have not reached an agreement then there is no other way then to go either to litigation before a court or to have arbitration .. the danger with conciliation and mediation is that in that context the parties may ..follow strategies which are not the same that they would follow if they are into an arbitration or litigation context and so if the mediation is successful because the parties reach an agreement then no problem … but it may happen that if it is not successful and after one month two months three months ..whatever or mediation or conciliation they have to go into arbitration the danger then is that what has been said .. shown to the other party in order to reach a good mediation may file back and may be used in the context of litigation whatever is written because normally you write that whatever you state in the context of mediation cannot be used and so on but eh.. in real life if this comes up again … eh.. for instance a party has acknowledged that it did a mistake but as I said this was a mistake not so important .or .it was due to your own eh ..reasons whatever ..but he has acknowledged he made a mistake in the context of a mediation .. to be fair ..to say ok ..I admit I made a mistake ..even if it is written in the rules of the mediation that this is not going to be used later if this goes before an arbitration tribunal and the arbitrators see that the party said I did a mistake .. this is going to affect the position of that party
I:..very badly." (CERG 2008, I5)

2.11. Conclusions

Interviewing is undoubtedly one of the most poorly investigated tools for empirical investigation (Briggs 1995) and interviews with lawyers, arbitrators and counsels to the parties are no exception. One reason for the scarcity of research into arbitration practice may be found in the profession itself. Arbitrators and counsels to the parties are very busy people and it is very difficult to schedule an interview with them. In spite of that, I have collected a small corpus of interviews with Italian arbitration practitioners. The aim was to explore some of the facets of arbitration practices paying attention to critical moments in the arbitration process. In particular, I analysed how and to what extent Italian arbitration practitioners are concerned about the increasing influence of litigation procedures on international commercial arbitration (ICA). Indeed, ICA has received consistent scholarly attention in relation to a variety of issues, such as the drafting and enforcement of awards (Zaiwalla 2003), the appointment and number of arbitrators (To 2008; Miles 2003), the production of written and oral evidence (Ziccardi 2012) and several other aspects emerging from the interpretation of arbitration laws. However, there has been little work on the relationship between mediation, arbitration and litigation, especially on the ways in which arbitration is said to be 'colonized' by litigation. As for the reasons why arbitration has become similar to litigation, respondents have identified four main reasons: the poor or insufficient knowledge of arbitration as a method of resolving disputes, the nature of arbitration itself (which is deemed to be another form of litigation), the perception that litigation is better equipped to resolve disputes, and the idea that the notion of amicability has little or nothing to do with arbitration.

On the other hand, a sizeable number of interviewees expressed the view that arbitration, although subject to various constraints, will not be substituted by other forms of alternative dispute resolutions, such as conciliation and mediation. These findings are largely in line with the results of a study conducted by WaterhouseCoopers (2006), which highlights the same concerns voiced by my respondents; apart from the need for improved multiparty, multi-contract and multi-

claims dispute resolution, which was mentioned by only one of the interviewees.

PART II

Linguistic traits of arbitration narratives

3. Metaphors in arbitration narratives

3.1. Introduction

In Hawkes's words (1984:1), a metaphor is "a particular set of linguistic processes whereby aspects of one object are 'carried over' or transferred to another object, so that the second object is spoken of as if it were the first". Metaphors are such a pervasive phenomenon that it has become common not only in ordinary language (Cameron/Deignan 2006) but also in other settings, such as the discourse of science (Lakoff /Johnson 1980; Fahnestock 1999; Vereza 2008), and specialised communication (Salager-Meyer 1990; Richardt 2005; Kermas 2006). In addition, a comparative study (Deignan/Potter 2003) has also shed light on how metahors and metonyms are used in English and Italian. On the other hand, the use of metaphors in the legal domain has received limited scholarly attention and studies have mainly focussed on the role that metaphors may play in augmenting legal reasoning and individuals' awareness of the nature of the law (Hibbitts 1994; Winter 2008), and in conflict resolution (Smith T. 2005, 2009; Chiu *et al.* 2011). If we take into account research on metaphors in the Italian context, we see that they have been investigated in normative texts (Morra *et al.* 2006) and newspaper discourse (Taylor 2008). In terms of metaphor classification, numerous are the ways in which a metaphor can be defined, identified and classified. For example, Charteris-Black (2004) provides a multi-step metaphor identification method in which words carrying metaphorical sense are initially classified as 'metaphor keywords'. A textual corpus is then investigated to check the presence of these keywords and yield quantitative data. Finally, these data are analysed to determine whether the metaphor keywords were indeed used metaphorically. In addition, the Pragglejaz Group (2007) elaborated a method, called Metaphor Identification Procedure (MIP), for identifying metaphorically used words in discourse. Crisp *et al.* (2002) developed a taxonomy of the propositional structure of metaphorical language. This taxonomy is based on the investigation of 'text units'

that are analysed and classified with regard to their metaphorical properties. These metaphors are then classified according to a set of oppositions (simple-multiple / simple-complex / pure-mixed / restricted-extended) which may be re-combined in 16 possible combinations.

This chapter aims to identify and investigate, mainly using the MPI, the metaphors that arbitration practitioners employed in their narratives. The procedure consists of four main steps. Initially, each lexical unit is examined in order to establish its meaning in both context and co-text. Then these lexical units are investigated so as to verify whether in other contexts a particular lexical unit takes on different meanings. When the lexical unit has a more basic current meaning in other contexts, the contextual meaning is contrasted with the basic meaning. If it does, the lexical unit is considered metaphorical.

In order to establish the basic meaning of words, the *Macmillan English Dictionary for Advanced Learners* was used for two main reasons. First, this dictionary is based on a systematically processed corpus of 220 million words; second, the corpus is recent and the dictionary provides a description of current English. Moreover, the on line version of the *Oxford English Dictionary* was also consulted for supplementary information about etymology.

For the purpose of this study, the idioms in the corpus were treated as non-decomposable. I will not therefore consider each component of the idiom as a separate lexical item. Instead, I will analyse the idiom itself as a whole, the main reason being that the meaning of an idiom is different from the meaning of the individual words.

As far as our corpus is concerned, I have identified numerous groups of metaphors, each arranged around a common metaphor in which the target domain is represented by arbitration and the source domain is expressed by terms such as GAME, FIGHT, JOKE, ANIMAL, WEATHER, DRAMA etc. The metaphors investigated in this chapter will be labelled using a phrase in capital letters, such as ARBITRATION IS A GAME, where ARBITRATION is the target and GAME is the source.

3.2. ARBITRATION IS A GAME

Game and sports metaphors are very common in English (Gelfand/ McCusker 2001; Kövecses 2002), and they have been studied in various domains, such as American football games (Aitchison 1987) and football match reports (Broccias/Canepa 2005), to mention a few.

Sports metaphors are very frequent also in arbitration discourse. Talking about cross-examination and the concern for a 'fair hearing', one of the interviewees claimed that both the plaintiff and the defendant should be given equal opportunities as if they were in a *playing field*.

(49) "[…]…in order to have a fair cross-examination a fair hearing in the sense that if eh.. the plaintiff has something has ..says something .. the defendant must be given the opportunity to reply and vice versa ...so that both parties be heard and be given a.. a.. ***an even playing field*** in which to act ..that should be the only procedural worry and procedural rule." (CERG 2008, I2)

In (49), the adjective *even* means 'equal' which overlaps with the basic meaning 'identical in degree, extent or amount', while the remaining part of the expression (*playing field*) shows a difference between the contextual and the basic meanings. In actual fact, the contextual meaning of *playing field* makes reference to the arbitration procedure itself in which opponents playing a game correspond to the parties which should be given the same opportunities to provide evidence, memos and all that is deemed relevant in order to be treated equally. The game can therefore be played according to the rules of the game, provided that the referee(s) is (are) impartial and independent.

On the other hand, the basic meaning of *playing field* is a field used for games, such as cricket or soccer, and therefore the contextual meaning contrasts with the basic meaning and can be understood in comparison with it. Therefore, we can understand that arbitrators are impartial and independent provided that the parties at dispute are given exactly the same chances to support their point of view.

The corpus contains other instances of lexical units which make reference to arbitration as a game. For example, one of the speakers, talking about the future of arbitration, says that if litigators are hired

by one of the parties at dispute, it may happen that these litigators tend to replicate litigation even if they are taking part in arbitration procedures. This goes against the spirit of arbitration and arbitrators themselves may feel uneasy when one of the parties acts as if it were in a court of justice.

(50) "[…]..the sole arbitrator has a great experience in international arbitration he really fights to keep it as formal ..as informal as he can and as ..as ehm.. detached as possible from the code of civil procedure but it's very difficult when ***one of the two parties does not play the game*** and ..[chuckle]." (CERG 2008, I4)

In (50), the expression *does not play the game* means that one of the parties involved does not comply with the spirit of arbitration but tends to follow the procedures and the spirit of litigation while the basic meaning of 'playing a game' means that two people or two groups of people participate in a game or sport according to a fixed set of rules. Here, the contextual meaning contrasts with the basic meaning thus conveying the idea that lawyers involved in arbitration do not behave according to the spirit of arbitration itself but tend to act as if they were in a court. The *game* is thus played either according to different rules or against the rules that had been agreed upon. The same concept is expressed by another respondent, who, talking about the role of the tribunal in controlling cross-examination, claimed that

(51) "It's fundamental because also they should be able to avoid the simple fact that the party is better equipped in terms of eh ..ability of the lawyers to test the witness or ability of the witness ***to play the game*** of cross-examination ***which is just a game*** .. prevails over the real task which is to find what is true and what is not true so eh.. the task given to the arbitrators when they have cross-examination is even a more difficult one because they must make an effort not to be influenced by someone who is good in speaking or in finding the right answer to the question or in putting the right question eh.. very often the witnesses are not people who have ever thought they would have become a witness in an arbitration case ..they don't speak sometimes very fluently the ..the language they may easily fall into tricks that the lawyers if they are well prepared can play in order to divert their attention in tribunal and the tribunal should avoid that and if this is ..there is a party which is weak should have that party for the purpose of understanding what is the truth rather than eh ..leaving to a party this ..***this play***." (CERG 2008, I4)

In (51), the speaker highlights the fact that parties dealing with cross-examination may enjoy different results depending on the time and effort they invested in this technique, which is viewed not as a turning point in arbitration procedure but as *just a game*. Here, the adverb *just*, used in conjunction with the noun *game*, conveys a negative connotation to the noun phrase. In actual fact, cross-examination is typical of common law and not of civil law and when Italian arbitration practitioners are involved in cross-examination, they tend to treat it as a game in which those who have been trained on it win and the others lose. What the speaker is trying to say is that discovering the truth is not the main purpose of cross-examination; what counts is to win the game.

3.3. ARBITRATION IS A WAR/FIGHT

Drawing on Ritchie (2003:143), I analysed metahors connected to 'war' starting from the view that these metaphorical phrases "emerge from a field of interrelated concepts, including athletic contests, games, and interpersonal quarrels as well as war and argument". For example, the word 'fight' is quite frequent in the corpus (12 occurrences) and is part of noun phrases, such as *a ground for fight*, or verbal phrases, such as *fight a battle.* Thus the term 'fight' does not occur in isolation but is often accompanied by nouns and phrases belonging to the same domain, such as *enemy*, *tactical manoeuvre*, *attack, sabotage* and others which more specifically refer to warfare situations. Interestingly, even though all interviewees but one are NNSs of English, they employed a considerable number of metaphors, which confirms the view that metaphors are extensively used when abstract concepts need to be expressed, even when using English as a lingua franca. The extract below is an example of how a single metaphor may not fully convey the idea that the speaker wished to express. As a consequence, the narrator employs other metaphoric source domains in order to adequately convey the meaning that he/she had in mind.

(52) "No, it's not that ..it's also a part of the applicable law.. I'm referring to the legal system which ***gives value*** to the activity of the arbitrators because the

> activity of arbitrators cannot be understood and performed in a ***legal vacuum*** ..you need to be eh… linked to at least at least one legal system and if you want to benefit of the fact that nowadays enforcement is still something that has.. can be done by the state in the sense that if you want to ***attack the assets of a debtor*** and you are not a criminal organization you have to go to the state eh ..then the legal system in which the parties may wish to have their arbitration be carried .. out normally is a state legal system and not another type of legal system.." (CERG 2008, I5)

Excerpt (52) provides an interesting example of what Cameron (2007) and Koller (2003) call 'metaphor cluster', i.e. metaphors that occur in close textual adjacency but do not necessarily share the same cognitive basis. As suggested by Kimmel (2010), speakers use metaphor clusters for three main reasons. First, to attract attention since metaphor clusters can be more effective than a metaphor used in isolation. Second, they serve the purpose of shedding light on complex or unfamiliar matters. Third, metaphors clusters help to make the discourse more connected and dynamic. The metaphors in (53) belong to different conceptual categories. In the first metaphor, the target domain (*the legal system*), a non-human entity, is seen as human when it *gives value* to what arbitrators do, mainly in terms of awards.

In the second metaphor (*a legal vacuum*), the contextual meaning of *vacuum* is the necessity of having a legal system that surrounds arbitration, while its basic meaning is the space that has all the air and any other gases removed from it. The term *vacuum* has therefore been used metaphorically to indicate that any arbitration procedure takes place within a well-defined legal system which serves the function of making arbitration possible. In the third metaphorical expression (*attack the assets of a debtor*), the source domain *attack the assets of a debtor* is the figurative vehicle from which new meaning is derived. In fact, the target domain is represented by the economic resources owned by a company or a person which might be considered as applicable to the payment of debts. The verb *attack* has been used metaphorically as its basic meaning, i.e. to use violence to harm a person, contrasts with the contextual meaning which refers to the idea of using personal assets in order to repay a debt.

(53) " Well I mean if you have ***a hostile jurisdiction*** that wants ***to sabotage an arbitration*** eh ..of course you you may have situations where you get an injunction against the party don't go into arbitration otherwise you may even

> have sanctions against your employees .. I remember a situation where the reaction to an arbitration claim filed by an Italian company against a company in one state of the Emirates ***triggered*** the withdrawal of the passports of the representatives of the company there ..so this can happen ..but normally if you are thinking to international arbitration involving eh.. let's say countries like European countries US this is not case." (CERG 2008, I5)

In the excerpt above, one of the interviewees, speaking of the intervention of national laws and courts, claims that in countries in which jurisdictions do not favour arbitration practices, the whole arbitration procedure is at risk. The speaker mentions a jurisdiction which proves to be *hostile* to arbitration to the point of being so unfriendly as to *sabotage* the whole arbitration process.

(53a) if you have a *hostile* jurisdiction

(53b) that wants to *sabotage* an arbitration

(53c) […] *triggered* the withdrawal of the passports

In the quotations above (53a, 53b, 53c) the words in italics have been used metaphorically as their contextual meaning contrasts with the basic meaning. Lakoff and Johnson (1980) maintain that *hostile*, *sabotage* and *triggered* should be seen as linguistic realizations of the conceptual metaphor ARGUMENT IS WAR. It is interesting to note that the vehicle *hostile* is then further explicated by *sabotage* which contributes to expanding the meaning of *hostile*. This is an interesting example of vehicle shifting which occurs when a vehicle, after being introduced into discourse, is then developed through repetition, relexicalisation and explication (Steen 1992, 2004; Cameron 2003), or extended and modified (Goatly 1997).

Indeed, the context in which these words appear suggests the idea that these expressions are typical of situations where arguing in defence of contrasting interests may reach a high level of verbal aggressiveness. In the following excerpt, the respondent mentions the difficulties which may arise when parties argue over the seat of arbitration. This decision is deemed to be relevant, since it determines the jurisdiction, i.e. the legal background, in which the whole arbitration process will take place.

(54) "[…] of course we are a multinational .. a German company would say ok let's come to Germany and and ***fight out*** but the Chinese would say no excuse me I don't come into your ***tent to be devoured*** [laughs] .. and so arbitration but I have often noted and eh ..maybe in in talking to these colleagues in-house counsel that their ehm.. appreciation of arbitration has ..[chuckle] has been diminished ***I've had blows*** because they found it very expensive .often very lengthy ehm.." (CERG 2008, I2)

(54a) I don't come into your ***tent***

(54b) ***to be devoured***

If we analyse the two main lexical units, i.e. *tent* (54a) and *to be devoured* (54b), we see that *tent* indicates the jurisdiction in which a particular legal system operates, while the basic meaning of the noun refers to a shelter, made of cloth or other materials, supported by poles and ropes. In this case, the contextual meaning contrasts with the basic meaning and can be understood by comparison with it.

We can therefore understand that a company involved in a dispute with another company from a different legal system is quite reluctant to agree on arbitration taking place in a jurisdiction which is deemed to be either unfavourable or risky. As far as the contextual meaning of *to be devoured* is concerned, we see that the verbal phrase *to be devoured* indicates the situation in which the party at stake is certainly bound to be defeated, while the basic meaning is to eat up something voraciously. Again, it seems clear that the contextual meaning contrasts with the basic meaning. We can understand that a company which agrees on an unfavourable legal system is likely to lose the arbitration very easily and therefore it is likely to be 'swallowed' by the other party. It is interesting to note that the speaker uses stretches of direct speech embedded into the narrative flow, probably serving the purpose of increasing the level of personal involvement.

3.4. ARBITRATION / ADR ARE ANIMALS

If we consider ANIMAL(S) as a source of a metaphor, we immediately think of the conceptual metaphor HUMAN IS ANIMAL which, according to Goatly (2006) may be interpreted in three different ways, i.e. humans are one type of animals, humans are more or less animals and humans are not animals but are in some respect just like animals.

In the extracts below, the target is not represented by HUMANS but by ARBITRATION which conveys the idea that arbitration may be considered, in a metaphorical sense, a special kind of animal, possibly one of those animals which can be kept in the house and which should be looked after very carefully. In other words, the ground which connects the target and the source is represented by the attitude that pet owners should have towards animals which look gorgeous and delightful but which need careful attention.

(55) "I think that it is less and less frequent this kind of approach because they finally understood that that's not eh.. the right approach because ***arbitration is very nice animal*** but has to ***be handled with care*** and has to be adapted to every ..to a case by case eh ..on a case by case basis **..**" (CERG 2008, I10)

When comparing other forms of ADR and arbitration, the majority of interviewees maintained that these two kinds of dispute resolution are different and supported their views by employing metaphors connected to animals.

In the following extracts, the source domain of the conceptual metaphor is the same in terms of linguistic realization but the target domain is different. In (56) the pronoun *they* refers to conciliation/mediation and arbitration, while in (57) it refers to litigation and arbitration. In other words, these two speakers use the figurative vehicle *animals* to express the idea that arbitration is different from both litigation and conciliation/mediation.

(56) They will never be able to be substitution for arbitration for the simple logical reason that ***they are different animals*** .. (CERG 2008, I5)

(57) "I ..I.. depends what this means ..if depends it is similar in the sense that it is a decision making process by which you apply the law to achieve a binding

> decision .. actually is not seen as identical and it has to be identical because this is what the parties do ..want when they sign an arbitration clause.. if this is meant by saying that you end up in having the same type of procedural complexities ..waste of time ..eh.. whatever are the bad aspects of judicial litigation then my answer is no.. not at all I don't think eh.. this is happening and in my experience .. you have very quick arbitrations ..you have very long arbitrations that depends on the case eh ..in any case you don't have to comply with all the strict formalities that have to comply with when you are before a judge eh.. but in general terms I would say ***they remain two different animals*** ..again. (CERG 2008, I6)

Talking about the parties involved in a contractual relationship, one of the interviewees mentioned the fact that the concept of 'parties' should not be limited to the usual two parties, since reality may offer a more complex scenario, as indicated below.

(58) "[…] it is actually in this complex world of ours it is actually pretty rare that A is angry at B and only at B the party who eh… was eh… on the eh ..other side of the contract that included your arbitration clause.. that is a ***very rare bird..*** usually there is a C out there who did not sign the arbitration clause but maybe controls B ..or maybe ***stole*** the business from A <?> and who in a normal civil procedure system all of these difficulties of our parties are solved without difficulty." (CERG 2008, I6)

(58a) that is a ***very rare bird***

(58b) .. or maybe ***stole*** the business from A

In the extract above, the contextual meaning of *very rare bird* (58a) refers to a situation in which it is unlikely that the parties involved in a dispute are only the traditional two parties. It seems more likely that other parties are also involved in the same dispute even though they do not appear in official files. It is also clear that the basic meaning of *very rare bird*, i.e. an animal covered in feathers, with two wings and a beak, is different from the contextual meaning which refers to a situation where it is unlikely that contracts are signed by two parties only. In (58b), the contextual meaning of *stole* refers to the fact that in today's competitive business world, companies take possession of other companies. In other terms, it is likely that the respondent refers to hostile takeovers, i.e. the acquisition of companies that is accomplished not by coming to an agreement but by going directly to

the company's shareholders or fighting to replace management in order to get the acquisition approved.

When the interviewees were invited to express their opinion on ad-hoc and administered arbitration, one of the respondents employed not only the metaphor of *animal* but also that of *wild jungle* as source domains, as exemplified below.

(59) "Well. Eh… I think the question is very well posed because.. why they eh… actually why they keep on using ad-hoc arbitration ..because to me if I.. I if I think like a.. a.. counsel of the party I'm ..I'm not the counsel of any party but if I would be one day counsel of a party I would rarely use ad-hoc arbitration because eh.. the system eh.. I mean the arbitration ..the ..the .. ***the animal*** is the same and ..and. eh.. the fact.. the impact .. the effectiveness of the ..of the outcome of the award is the same ..the difference is how to reach that outcome ..that award ..in one way ad-hoc is ***a wild jungle*** .." (CERG 2008, I10)

(59a) … the ***animal*** is the same and …

(59b) … in one way ad-hoc is a ***wild jungle***..

In (59a), the contextual meaning of *animal* refers to arbitration as a procedure of settling disputes and the interviewee makes reference to the two different types of arbitration that the parties can have access to, i.e. ad-hoc arbitration and administered arbitration. In (59b) the speaker, by using the noun phrase *a wild jungle*, refers to the difficulties arising from ad-hoc arbitration. The basic meaning of the word is that of tropical forest and thus contrasts with the contextual meaning.

Moreover, by adding the adjective *wild*, the speaker makes the figurative vehicle (*jungle*) more effective, since the communicative purpose of the whole metaphorical expression is to convey the idea that ad-hoc arbitration is much more complicated and troublesome than institutionalized arbitration.

3.5. ARBITRATION IS WEATHER

Talking about the future of arbitration, one of the respondents supported the idea that arbitration, albeit affected by the growing phenomenon of judicialization of procedures and concerns about the

impartiality and independence of arbitrators, still remains an important tool to resolve disputes.

(60) "[…] alternatives ..so I usually say that it is a un male necessario [a *necessary evil* my translation] it's still ..is I don't see anything better or less [chuckle] eh.. worse than this so ..of course if there are trends mmm ..mega-trends of arbitration internationally that they are not eh…they are not very positive eh ..like independence impartiality like eh… processualizzazione [*judicialization* my translation] eh.. like an excess of rules ..of eh… like the quality of the arbitrators that they are ..so I ..I .. mmm… I see ***some clouds but no major ..major ..thunderstorms*** to ..to." (CERG 2008, I10)

In order to expand his point of view, the respondent uses the metaphor cluster *some clouds but no major thunderstorms* to mean that the future of arbitration may be hampered by constraints (*some clouds*) but also that these constraints are not likely to affect the future of arbitration (*but no major thunderstorms*).

From a stylistic point of view, this stretch of discourse contains two instances of code-switching from English into Italian (*un male necessario* / *processualizzazione*). It is likely that the narrator did not know the English words for them and switched to Italian in order to keep the flow of narration going.

3.6. ARBITRATION IS DRAMA

It is generally accepted by the arbitration discourse community that an arbitration clause in a contract may contribute to making the arbitration procedure either smooth and rapid or slow and problematic.

Many of the problems which may entangle an arbitration proceeding and the enforcement of the award can be removed or significantly reduced by a carefully drafted arbitration clause. In addition, if the arbitration clause contains details about the resolution of disputes and the enforcement of the award, the parties are fully aware of both the nature and consequences of an arbitration.

(61) "[…] Eh… the ..the poor drafting .. they are < very > ..< very >.. poorly drafted eh… they are poorly drafted and that the ..let's say the beginning of the end .. once the arbitration clause is poorly drafted then ***it's when the nightmare starts*** because they .eh… either it's very difficult to start an

> arbitration either because the arbitration clause is very complicated or because it's not valid [chuckle] eh..". (CERG 2008, I10)

In (61), the speaker, talking about how certain arbitration clauses are drafted, highlights the role that arbitration clauses may play in the whole arbitration process. If these clauses are poorly drafted, serious problems may arise not only for the interpretation of the clauses but also because this may very badly affect the beginning of the arbitration procedure. Here, it is interesting to note that the speaker, in order to keep the flow of communication going, makes use of two different strategies.

On the one hand, he uses grammatical devices to stress the poor quality of certain arbitration clauses. For example, the fact that arbitration clauses may be badly written is initially expressed by the noun phrase *poor drafting* and then the same concept is reiterated with a different grammatical device. In actual fact, in the verbal phrase *they are very ..very.. poorly drafted*, the pre-modifier *very poorly* is repeated twice. In addition, the speaker emphasizes the adverb *very* not only by repeating it twice and inserting a pause between the two repetitions but also by uttering it in a deliberate slow mood. On the other hand, the interviewee makes use of the fixed phrase *the beginning of the end* to signal that things are likely to get worse if the initial phase of the arbitration process begins with a poorly drafted clause.

In addition, this fixed phrase is followed by the verbal phrase *is poorly drafted* which marks a repetition of the same phrase even though the subject is now singular and not plural as in the previous two phrases. As a second strategy, the speaker employs the metaphorical expression *it's when the nightmare starts* which signals the troublesome situation which can be caused by poorly drafted arbitration clauses. Thus, the interplay of these two strategies helps the interviewee to convey the meaning he had in mind. From a pragmatic point of view, these two strategies serve the function of ensuring coherence to what is being uttered.

3.7. LEGAL ARGUMENT IS HAIR

Lakoff/Johnson (1980,1999) claim that the most central metaphors are grounded in our human physical experience, thus attributing experiential motivation to metaphors. Following the same theoretical pattern Semino (2008:425) states that a metaphor

> […] is an indispensable tool by means of which we talk and think about relatively complex, abstract, and poorly delineated areas of experience (e.g. life, time, emotions etc.) in terms of more concrete, well delineated and often 'embodied' areas of experience.

When lawyers are involved in arbitration proceedings, they are likely to argue on points of law as if they were in court. In the excerpt below, the interviewee refers to the 'mental structure' of professionals mainly acting as advocates in court trials, who may also be hired as either arbitrators or counsels to the parties in arbitration proceedings.

Here, the target of criticism is represented by the category of lawyers who take part in arbitration proceedings but act as if they were in court.

(63) "[…] where they argue on points of law and of course [subvocalizing] as arbitrators we often are ..confronted with lawyers or things to be in courts .. they want just writs ..***split the legal hair into sixteen parts*** whilst it it is not really the.. really the idea and the aim of the original arbitration." (CERG 2008, I2)

In (63), the idiom *split the legal hair into sixteen parts* is conceptually the same as the English idiom 'split hairs'. In actual fact, the interviewee not only introduces the adjective *legal* (not present in the English idiom) with the purpose of adapting the idiom itself to the topic (arbitration), but he also adds the *sixteen parts* in which the single hair may be split. In this way, the idiom becomes metaphorically relevant because the expression *legal hair* clearly refers to the object of the dispute and the *sixteen parts* is a metaphor of how the whole matter is treated. This metaphor conveys the idea that lawyers tend to argue about irrelevant or unimportant details which should not deserve so much attention.

If we compare the English idiom 'split hair' and the expression *split the legal hair into sixteen parts*, we see that the two linguistic expressions are different surface realizations of the same conceptual metaphor. The speaker knows the English idiom but instead of using it as it is, he adapted it to the communicative purpose he had in mind, i.e. to highlight the fact that lawyers involved in arbitration focus on the legal details of the dispute and tend to minimize the business problem. It may also be worth comparing the Italian idiom 'spaccare il capello in quattro'[15] (*split the hair into four* my translation) and the newly coined expression *split the legal hair into sixteen parts*. A comparison between the two idioms shows that the original Italian expression 'in quattro' (*in four* my translation) has been modified *into sixteen parts* probably because the speaker wanted to add further emphasis to the fact that lawyers tend to make trivial distinctions on points of law which are not necessary. This results in a newly-coined idiom in which both the English and the Italian idioms overlap since they share the same conceptual metaphor.

3.8. CONTRACT IS MARRIAGE

Companies entering a contractual relationship start a process which is meant to be to their mutual benefit and they usually take all the necessary steps to achieve their goals. In the very beginning of this relationship, companies are so determined to do business together that, metaphorically speaking, they resemble two people who love each other so much that they decide to get married.

(64) […] because the arbitration clause is included in the contract when they sign the contract ..when they ***get married*** so they don't want psychologically .. they ***are not inclined to think of the divorce*** of any problem so psychologically they pay less attention to the dispute clauses eh.. in US it's ..[subvocalizing] called midnight clause that is another issue they get to the final eh ..dispute clause at the end of exhausting eh…negotiation about real issues .. what they think are real issues and they are real issues when they

15 Spaccare il capello in (per) quattro. Essere, dimostrarsi puntiglioso fino alla pedanteria. (Split the hair in (for) four. To quibble at the utmost level (my translation). Battaglia 1998: 658.

finally settle all the real issues they come to the dispute clause ..eh ..they say ok but ..you know.. ***we are getting married*** and this one issue .. (CERG 2008, I10)

(64a) …when they ***get married***

(64b) …they are not inclined to think of the ***divorce***

In (64a), the two companies wanting to enter a business relationship are personified to the extent of which, when they sign a contract, they *get married*. In commercial relationships, it is not always obvious who the partners are and in what other relationships they are engaged.

Nevertheless, the speaker uses the conceptual metaphor CONTRACT IS MARRIAGE, in which the source domain (*get married*) clearly refers to the situation in which two parties formally engage in a relationship (the target domain) which they expect will last for a long time. This is confirmed by the use of a metaphor (64b) in which the speaker, mentioning the initial phase of a marriage, states that companies, just like in a successful husband-wife relationship, *are not inclined to think of the divorce*.

A marriage-related metaphor is used by another respondent who, after mentioning the issue of the disclosure of sensitive details concerning a company involved in an arbitration procedure, said:

(65) "I was involved in eh..a.. rather well-known arbitration eh ..between XXX[16] and YYY when YYY ***divorced XXX*** .. I was XXX's lawyer .." (CERG 2008, I6)

In (65), the speaker personifies the company in a type of metaphor which Lakoff and Johnson (1980:33) call 'ontological metaphor', in which a physical entity, such as a company, is personified, thus being able to get married and to divorce.

3.9. Conclusions

This chapter has provided evidence of conceptual metaphors in the field of narratives dealing with arbitration practice in the Italian

16 The names of the two companies have been omitted for the sake of privacy.

context. Seven conceptual groups were detected, each with two or more instances. The target domain (arbitration) and arbitration-related domains, such as ADR and other legal issues, are per se complex to non-experts and require competent knowledge to be fully decoded.

If we consider that all interviewees, except one, are NNSs of English and that they used English as a lingua franca, it is clear that these arbitration experts made great efforts to deliver complex contents to laypersons, using linguistic devices such as metaphors, which were meant to simplify the most difficult aspects of the target domains. In addition, it seems worth adding that these practitioners used metaphors mainly to achieve the communicative goal of expanding viewpoints.

4. Borrowing and code-switching

There seems to be little agreement as to how code-switching (CS) fits into existing linguistic, socio-linguistic and social theories. Most approaches to code-switching may be ascribed to two main areas of research: syntactic (or structural) studies and pragmatic (or sociolinguistic) approaches. Syntactic studies (Timm 1975; Poplack 1980) mainly focus on how code-switching works, whereas pragmatic studies (Gumperz 1982; Heller 1988a; Auer 1984; Myers-Scotton 1993) concentrate on both the embeddedness of code-switching in socio-cultural contexts and its real world effects. In addition, a lot of research has been conducted on the distinction between code-switching and borrowing. Some scholars (Poplack 1980, 1981; Sankoff *et al.*1990) maintain that CS and borrowing are different, since they are based on different mechanisms.

CS occurs in three cases (Poplack 1980), namely when a lexical item displays only syntactic integration, only phonological integration or no integration at all. On the other hand, Myers-Scotton (1992, 1993a, 1993b) claims that CS and borrowing should not be seen as two distinct processes and that frequency should be the criterion to link borrowed forms with what she calls the *matrix language*.

What all these lines of research have in common is that they mainly focus on informal conversational exchanges among bilingual speakers living in culturally diverse settings. The present study takes a different perspective, since my data do not refer to informal conversations but consist of narratives from Italian arbitration practitioners who responded to a set of pre-defined questions on various aspects of arbitration procedure using English as a lingua franca.

As far as language is concerned, it may occur that, when speaking about the law, lawyers are inclined to switch to a legal terminology. In addition, lawyers tend to use legal jargon to establish identity because, in Tiersma's words (1999: 157), they

> […] are well aware of the social implications of code-switching. They learn in their careers to identify themselves as members of the profession by "talking like lawyers.

In terms of process, code-switching may entail single lexical items or the borrowing of whole phrases and sentences. Drawing on Gingràs (1974), I will use the term 'borrowing' for single words and 'code-switching' for phrases and sentences belonging to a different language which have been embedded into the narratives.

4.1. Borrowing

Our data show that arbitration practitioners make use of Italian words in isolation when facing problems resulting from a lexical gap. In other terms, a speaker, momentarily unable to produce the required word or phrase in English, shifts to Italian in order to keep the narration flowing, as exemplified below.

(66) "[…] in civil law countries that's varied a bit varied ehm… situations.. some countries are more .. some countries are less .. and I believe personally … if be do some *dilettanti* sociology [laughs] (*amateur sociologists* my translation) and it depends really on ehm.. .the ehm.. on the judges."
(CERG 2008, I2)

In (66), the speaker, talking about the intervention of national laws on arbitration and the effect that this intervention may have on arbitration as a method of resolving disputes, mentions the fact that civil law judges may be conditioned by sociological reasons when they decide to intervene. Lacking the English word 'amateur', the respondent uses the Italian word *dilettanti* which, even though does not fit in with the noun 'sociology' from a syntactic point of view, serves the function of filling a gap in the flow of speech.

In the following example, the respondent switches to Italian when he realises that he ignores the English for *processualizzazione*.

(67) "That's something that eh ..maybe is ..something we cannot avoid ..this 'processualizazione' then it's up to you to translate..good luck …this 'processualizzazione' of arbitration (*judicialization of arbitration* my translation) that is something real ..that is going on .." (CERG 2008, I10)

In addition, excerpt (67) provides an interesting example of meta-language. Here the respondent, after realising that he lacks the English word for 'processualizzazione', remarks *then it's up to you to translate ..good luck* on the difficulty that the interviewer might encounter to find a word in English to convey the meaning of the Italian term.

4.2. Code-switching

Similarly to words used in isolation, respondents very often use phrases employing a different code from the matrix language. Data show that switches may be of two different types, since they concern either everyday language or legal terms.

The two excerpts below are stretches of language uttered by the same respondent and they show how the speaker switched from English to Italian in order to keep the reasoning going. In the first, the interviewee, when asked whether arbitration would continue to be the preferred method of resolving cross-border disputes, employed the Italian noun phrase *un male necessario* (*a necessary evil* my translation) probably to mean that arbitration is not the best way of resolving disputes but that it still plays a significant role. In the second excerpt, the speaker, talking about the relationship between arbitrators and counsels, mentions the fact that arbitrators, being *uomini di mondo (men about town* my translation), know how to manage situations characterised by contrasting interests.

(68) "[…] alternatives ..so I usually say that it is a.. *un male necessario* [*a necessary evil* my translation] it's still ..is I don't see anything better or less [chuckle] eh.. worse than this so ..of course if there are trends mmm ..mega-trends of arbitration internationally that they are not eh…".(CERG 2008, I9)

(69) "[…] counsels and arbitrators they don't do much to help parties to find an agreement … for good reasons and bad reasons ..good reasons they say ..look I have been appointed to decide so that's my task I decide if you want me to stop you tell me I don't have to do anything ..you are .. you know *persone di mondo* [*men about town* my translation] you want to settle do ..do your job

..you and your counsels don't ask me as an arbitrator to promote a settlement." (CERG 2008, I10)

In extract (70), the respondent talks about cross-examination and the problems connected to a practice which is rooted in the common law tradition but which is not employed in civil law jurisdictions. The problem mentioned here, i.e. *the subornation of perjury*, refers to the practice of inducing someone to make false statements while under oath. As in the previous excerpts, the speaker uses the Italian noun phrase *subornazione di testimone* being unable to remember or produce the required phrase in English.

(70) "That's exactly the point.. I mean ..there is a a particular crime which is *subornazione di testimone* [*subornation of perjury* my translation] which is still a ..a .. still a problem for us to face eh..." (CERG 2008, I7)

The extracts above can be considered examples of what interactional sociolinguists (Gumperz 1982; Auer 1992) call 'contextualization conventions', meaning that codeswitching is a way to indicate information which is closely related to the speakers' prior experience and the perception of the situation at stake. Indeed, our data reveal that respondents used not only isolated terms or phrases to cope with the unexpected inability to find words to express what they wanted to say but also complete sentences, as in the following example.

(71) "[…] well … not really cross-examination.. that's something different..is what in Italian we say this [subvocalizing] ..*controllo del contradditorio.. che ci sia un valido contraddittorio* ..[*fair hearing control …in order to have a fair hearing* my translation] a fair hearing in the sense that if eh.. the plaintiff has something has ..says something .. the defendant must be given the opportunity to reply and viceversa ." (CERG 2008, I2)

In (71), the speaker mentions both the principle of cross-examination and the Italian principle known as *controllo del contradditorio*, stating that the two principles are different. In an attempt to be correctly understood, the respondent not only switches to Italian with the noun phrase *controllo del contradditorio*, but immediately specifies the concept using the full sentence *che ci sia un valido contradditorio* which indicates that the speaker's concern is primarily to convey the exact meaning. In addition, the use of the adjective *valido* (*sound* my

translation*)* signals that a fair hearing, in order to be fair, should be well-grounded.

(72) "*Mah* in Italy …we think .. I participate to some seminars about the mediation … that is [subvocalizing] most popular in Anglo-Saxon system . the general thought in Italy is that in reality this kind of eh…instrument to resolve dispute eh.. will not have a real success .. *non avrà successo* probably it's a cultural aspect.. and .." (CERG 2008, I1)

In (72), code-switching takes three different forms. Initially, the speaker uses the adverbial discourse marker *mah* (*instead* my translation) to indicate that he/she is sceptical about an issue which is not mentioned immediately but will become manifest as the narration continues. Then, he/she employs two subsequent sentences, one in English (*will not have a real success*) and one in Italian (*non avrà successo*). It is interesting to note that the same phrase is repeated word for word in another code.

Here the respondent, talking about mediation as an alternative form of dispute resolution, reiterates the same message switching from the matrix language (English) to Italian and not from Italian to English, as in previous cases. This serves the pragmatic function of stressing the idea that mediation is not likely to be successful in the Italian context.

4.3. Latinate forms

One of the most striking and distinctive features of legal language is the use of Latin words and expressions (Mellinkoff 1963, Williams 2005) which are employed mainly because they are easily recognisable technical terms, shared by the community of those who work with legal terminology (Crystal/Davy 1969). Research has also focused on pedagogical aspects of reading English legal texts containing Latinate forms. For example, Kurzon (1987) investigated not only how Latin words and phrases are integrated in the syntactic structure of the English sentence, but also some of the issues arising in connection with the occurrence of Latin words and phrases in English

legal texts and possible difficulties that lawyers and EALP (English for Academic Legal Purposes) students may have in their reading.

Indeed, Latin words and expressions are commonly used not only in written legal texts but also in arbitration language (Belotti 2003, 2012; Gotti 2012). As far as our corpus is concerned, nineteen occurrences have been detected and these occurrences belong to three different patterns. Some expressions are formulaic in nature and serve the purpose of conveying well established legal concepts in a limited number of words. Others are short forms of more elaborate expressions and finally there are full sentences in Latin.

4.3.1. Formulaic Latin expressions

Legal language is known to be conservative in nature and legal texts tend to be produced according to well-established formats and formulas. Indeed, the use of formulas contributes to making legal language stable and in line with the conventions of the community of legal practitioners. In particular, the use of Latin formulas seems to be one of the most commonly used devices to deliver specific legal content in a limited number of words. In this section, I will analyse various expressions which have been used by interviewees, following what Wray and Perkins (2000:1) call a 'formulaic sequence', i.e.:

> A sequence, continuous or discontinuous, of words or other meaning elements, which is, or appears to be, prefabricated: that is, stored and retrieved whole from memory at the time of use, rather than being subject to generation or analysis by the language grammar.

The formulaic Latin expression which is most commonly used by respondents is *de facto*, meaning 'concerning the fact' or 'in practice'. In written English, premodifiers are usually determiners and adjectives, whereas postmodifiers may be prepositional phrases, relative clauses, noun phrases and, under certain circumstances, adjectives and adverbs. In the corpus, the Latin phrase *de facto* is employed as premodifier (73) and postmodifier (74) of the verbs *decide* and *admit* respectively, whilst it functions as a nominal premodifier in (75) and (76).

(73) "[…] my recent experience says that it's very difficult [subvocalizing] in some cases the the expert opinion is very important and ***de facto*** decides the case". (CERG 2008, I1)

(74) "[…] some arbitrators admit ***de facto*** the cross-examination because they are aware the that this kind of interrogatory is .. could be very useful to understand the case but it depends on the decision of the judge". (CERG 2008, I3)

(75) "[…] [small intake of breath] I think eh… mmm… let me .. let me put it in this way eh… I … I think that ehm… in Italy ehm… the …eh… there is a ***de facto*** situation where the duration of process is the …" (CERG 2008, I9)

(76) "[…] Yes of course .. I mean .. I mean in Italy a ..a.. it's clear that ..cross-examination …the…the judge ..I mean …the judges cannot decide by themselves the procedure but I mean ..on a ***de facto*** basis they…" (CERG 2008, I8).

If we analyse the four stretches of language below and a make comparison between the two grammatical systems (English / Italian), we can draw some conclusions on how the speakers have expressed meaning by overlapping the Italian pattern and that of the English language. In the first two, [(73b) (73c) and (74b) (74c)], the position of the adverbial phrases *de facto* and *di fatto* perfectly overlaps because an adverb, when it depends on a verb, can be used either before it or after it in both Italian and English.

(73b) in some cases the the expert opinion is very important and ***de facto*** decides the case

(73c) in alcuni casi l'opinione dell'esperto è molto importante e ***di fatto*** decide il caso

(74b) some arbitrators admit ***de facto*** the cross-examination

(74c) alcuni arbitri ammettono ***di fatto*** il contradditorio

In the following excerpts, instead, the respondents did not overlap the Italian and English grammatical systems, since they used the adverbial phrase *de facto* as adjectival phrase of *situation* and *basis* respectively, thus placing them before the nouns, whereas in Italian the two adverbs are located after the nouns.

(75b) there is a ***de facto*** situation where the duration of process is

(75c) vi è una situazione ***di fatto*** nella quale la durata del processo è

(76b) on a ***de facto*** basis

(76b) su una base ***di fatto***

Interviewees also employed other formulaic Latin expressions, such as *per se* (in itself) and *de novo* (from the beginning) as in the following examples. These two adverbial phrases, which are found in non-legal as well as legal texts, function as parts of the sentences in which they are embedded, thus fitting the syntax of the English language.

(77) "[…] … the key issue is not confidentiality .. of course it is …eh ..the ..I mean ..confidentiality is ***per se*** a key issue but I don't see .." (CERG 2008, I8)

(78) "[…]..in systems where for example you get only one bite of the apple you do not have this in Italy because process of appeal ***de novo*** you argue you practice and then you argue all over again all the same issues." (CERG 2008, I6)

In addition, respondents used other Latin formulaic phrases, some relating to general legal concepts and others to arbitration. For example, in (79) the speakers used the phrase e*x aequo et bono*, typical of arbitration language, which means that the arbitrators or the arbitral tribunal shall decide on disputes according to the principle of equity.

On the other hand, the speaker in (80) uses the prepositional phrase *ultra petita*, meaning that the award rendered by the arbitrator grants one of the parties more than what was asked for. This phrase, typical of legal language at large, is a separate item since the speaker leaves an empty space between the nominal phrase *for lack of jurisdiction* and the Latin phrase itself. From a pragmatic point of view, the respondent, after describing a scenario which would hardly ever occur in Italy, employs the Latin phrase *ultra petita* which in Kurzon's words (1987:236) "serves as a shorthand for the explanation given in the same sentence".

(79) "[…].. but it's quite rare that the party finds itself in a win-lose situation where someone wins one hundred and the other one loses one hundred even when you have arbitrations under the law ..so there is no equity assessment involved not arbitrations ***ex aequo et bono*** or on the basis of equitable considerations but you have arbitrations where the arbitrators have to apply the law still for very many different reasons the way…." (CERG 2008, I5)

(80) "[…] Ya.. although this is it ..ya although that is a defect of the entire award ..it's difficult for a judge to .. to… to create two different awards .. I mean if this ..that was an award and the award was affected .. that affects the whole ..you know…the whole award.. I.. I can see the reasoning.. in Italy probably it would have had the same result for lack of jurisdiction ..***ultra petita*** ." (CERG 2008, I6)

4.3.2. Shortened expressions

Talking about the speed and duration of arbitration procedures, one of the respondents mentions the fact that arbitrators, in order to keep the duration of the arbitration procedure under control, may decide to fix a time limit to render the award.

(81) "[…] and for instance if it is necessary to appoint an expert to resolve technical issue so the problem is h..how long is this evidence phase …sometimes eh ..it's necessary one year for instance so the normal situation is eh.. in this situation the arbitrator asks to fix the time limit the the ***dies a quo*** for filing the award." (CERG 2008, I1)

In its full form, the phrase *dies a quo* reads *dies a quo non computatur in termino, dies ad quem computatur* in which the *dies a quo* means the day from which the time-limit starts whereas the term *dies ad quem* indicates the day on which the time-limit expires. In this case the shortened Latin phrase is used not to deliver a different concept but to underline what has already been expressed in English.

It seems interesting to note that the speaker makes use of this Latin expression without providing any explanation, thus assuming that the hearer knows exactly what is meant. Moreover, it is not surprising that the respondent makes use of a Latinate form which is typical of legal language at large and not of arbitration language in particular, conveying the idea that the language of litigation and that of arbitration are semantically similar, if not the same.

(82) "Now .. once before the reform of our arbitration process .. once in Italy it it was possible through a litigation before the ordinary court to stop an arbitration procedure because … once if for instance one of the party involved in the arbitration proceedings starts a law suit before the ordinary court against a third party in a specific contract or relationship *connesso* linked to the case pending before the arbitration court once there was a specific article that this the the procedure before the arbitration court has sorry before the ordinary court had the ***vis attractiva*** in relation to the arbitration proceedings .. now it's completely different.." (CERG 2008, I1)

In (82), the speaker makes use of the Latin expression *vis attractiva*, used as a complement noun phrase, in order to refer to a situation in which the arbitration procedure could be interrupted in case one of the parties had started a lawsuit before a state court. The court, being on a higher level than that of the arbitrator(s), has the power (*vis attractiva*) to take control of the whole arbitration procedure. In actual fact, since the 2006 arbitration reform, the intervention of the court has become much more difficult. This Latin expression, typical of insolvency regulations, is not used in its full form (*vis attractiva cuncursus*), probably because the speaker is more interested in delivering the concept of 'force of attraction' that Italian courts enjoyed in the past rather than using a phrase which, in its entirety, is employed only in legal matters involving insolvency.

4.3.3. Complete sentences

Full Latin sentences are often used in written legal texts because legal practitioners point to Latin as one of the most recognized and distinctive foundations of legal language. In speech, legal canons and maxims, if uttered in Latin, convey to the hearer the concept that the speaker is not only well-grounded in difficult legal matters but also that he/she masters them in Latin, as in the following example.

(83) "[…] ..respectful ..thank you .. of the law.. should make business sense so that is ..what is amicable meaning .. [subvocalizing] cannot be … ***summum ius .. fiat justitia et pereat mundus*** eh… again the law must not be forgotten eh.. you cannot.. issue an award which is eh ..plainly illegal but you must go to the real tracks of the matter understand what is the eh.. business problem which has emerged and how it can be solved in a business like situation eh.. let's see the rest of the.. lawyers [chuckle] …of course ..lawyers bring ehm… to arbitration their ehm.. mental structure of going to court where they argue on

> points of law and of course [subvocalizing] as arbitrators we often are ..confronted with lawyers or things to be in courts" (CERG 2008, I2)

In (83), the respondent, talking about how awards are rendered, maintains that the panel's decisions should be consistent with the nature of disputes between entities which have been doing business for a period of time and that settlements should not be made at any cost. The Latin phrase means 'extreme law is the greatest injustice' which suggests the idea that arbitrators should apply the law with the utmost care. From a syntactic point of view, we see that the Latin sentence, used as a legal principle, is used instead of a sentence uttered in English, thus perfectly fitting into the structure in which it is embedded. It is also worth noting that the Latin maxim is used without any explanation which assumes shared knowledge on the part of the interlocutor.

5. Criticism in arbitration narratives

This chapter[17] explores critical speech acts in narratives by Italian arbitration practitioners and sets out to answer two research questions:

1) What type of critical speech acts do Italian arbitration practitioners employ when narrating their professional experience?

2) What linguistic/rhetorical devices do these practitioners use to deliver such critical speech acts?

The present analysis stems from the assumption that critical claims may be realised in three different ways: i.e. unhedged, unmitigated or face-threatening. For the purpose of this study, I will consider those speech acts which may be classified as unmitigated or face-threatening. Indeed, our corpus contains a consistent number of critical speech acts which are of the 'diffuse' type, i.e. they are not attributed to anyone in particular but make reference to both the community of professionals (lawyers, arbitrators, counsels to the parties) and the parties involved in arbitration proceedings. As far as linguistic/rhetorical devices are concerned, the analysis shows that speakers employ a variety of linguistic realizations to deliver critical speech acts such as verbal phrases, noun phrases and nominalizations. In addition, interviewees make use of metaphors, grammatical parallelism and other rhetorical devices in order to deliver overt criticism.

17 A preliminary version of this chapter was presented at AILA (The 16th World Congress of Applied Linguistics) held in Bijing (PRC) on 25th August 2011, in the course of the symposium 'Interdiscursive colonization of arbitration practices (II): Specific issues and sites'.

5.1. Critical claims

The frequency of occurrence of critical claims, be they unmitigated or face-threatening, is summarised in Table 1, which shows that criticism is present in all sections of the questionnaire but one, since no occurrences were detected in the section dealing with cross-examination. It is also interesting to note that criticism is most pervasive in four sections, namely arbitration clauses, the future of arbitration, confidentiality in arbitration practice and arbitrators' specialist background. On the other hand, critical claims are also present in the remaining six sections, even though frequency counts are lower.

Section	Number of occurrences
Ad-hoc versus institutionalised arbitration	2
Arbitration clauses	5
Confidentiality in arbitration practice	4
Speed and duration –extension of time limit	1
Costs	2
Intervention from national laws and courts	1
Specialist background of Arbitrators	3
Finality of arbitration awards	1
Language use in arbitration	1
The future of arbitration	5
TOTAL	25

Table 1. Distribution and frequency of critical claims in the corpus

5.2. Direct/indirect criticism

Critical speech acts have received attention in various domains, but more specifically in academic language. For example, Salager-Meyer/ Zambrano (2001), in their study on the evolution of the linguistic means used by scientists to convey academic conflict in French and English medical discourse, classified academic conflicts as direct and indirect. Academic criticism has also been studied in terms of 'conflicting knowledge claims'. In her seminal study, Hunston (1993) analysed a corpus of biochemistry, linguistics and history research articles (RAs) covering areas connected with conflict relevance,

presentation of knowledge claims and conflict resolution. Hunston (1993: 120) maintains that when presenting conflicts, writers may choose between two different options: 'lack of knowledge' and 'incorrect knowledge claim'. In addition, Bloor/Bloor (1993) have shed light on the face-threatening speech acts and strategies social groups are likely to develop in order to mitigate such 'threats'.

Contrastive analysis has also considered critical claims. For example, comparing research paper abstracts written in English and Spanish in the fields of phonetics and psychology, Martín-Martín /Burgess (2004) noted that critical claims are much more frequent among English writers than among their Spanish colleagues.

Analysing evaluation in the discussion sections of English and Italian RAs, Giannoni (2005:81) found that "overt criticism is prevalent in both languages, but more so in Italian than in English".

Partington (2007:1554) identified the social functions that one's evaluation of others may have; in particular, he has shown that evaluation may function not only as a warning of bad news to the members of the same discourse community but also as a means of convincing "an audience of what should be seen as right and proper and what not".

Instead, little attention has been given to critical speech acts in legal language and none, to the best of my knowledge, to the language of arbitration. The specific objective of this chapter is thus to analyse critical speech acts used by Italian arbitration practitioners in the course of semi-structured interviews on arbitration.

5.3. Unmitigated claims

The unmitigated claims in the corpus were categorized according to the type of critical claim, i.e. indicating objections, describing specific faults, taking a sceptical stance, or indicating a variety of failures, such as lack of knowledge, lack of qualifications, lack of experience and lack of results. In this study, the term 'unmitigated' will be used to describe those claims which are not accompanied by hedging devices, while 'face-threatening' will be used for propositions involving speech acts which, along a scale of gravity, impact on somebody's face.

5.3.1. Indicating objections

In the following excerpt, the writer challenges the content of the question itself, in which the idea of 'amicable settlement' presupposes the active-cooperation of the parties. This was deemed to be the rationale behind the whole arbitration process.

(85) […] ***I I don't I don't agree*** with the main statement I mean eh.. you find sometimes arbitration clauses that say before resorting to arbitration the parties must make en effort to settle in an amicable way before as a condition to arbitration but once you are in an arbitration by definition you are in a situation where the parties are one against the other and they have to fight a battle which is a legal battle so they need lawyers ehm… I think they may need lawyers also when they think to conciliation and mediation but there the function is different because the result is a possible suggestion to the parties settle or find this type of agreement .. but if the arbitration if the mediation or conciliation does not work and you end up in special way where there is still a dispute then it's a legal dispute that you solve either before a judge or before an arbitration panel but certainly arbitrators do not have to be amicable vis-à-vis the parties or the parties don't have to be amicable during the arbitration vis-à-vis each other they have to fight under the rules which is the ..the.. in that moment that's the position because they accepted that .. so I think the question is a little bit ..don't .. ***is not reflecting what really happens***. (CERG 2008, I5)

In (85), criticism is not against someone in particular, but against the content of the question itself. The critical claim *I don't I don't agree* is totally unmitigated and the negative auxiliary *don't* is repeated twice in order to stress the speaker's distance from the content of the question. The interviewee's disagreement, although bluntly expressed, is followed by a long reasoning which has the pragmatic function of providing reasons for such disagreement.

Towards the end of the reasoning, the interviewee seems to be uncertain of how to proceed because the main clause in the last sentence contains the hedge *a little bit*, which mitigates the initial negative evaluation of the content of the question itself. In actual fact, the speaker, after a pause which serves the function of collecting ideas, uses the negative auxiliary *don't* which is soon abandoned in favour of a negative verbal clause (*is not reflecting*) followed by the subordinate clause *what really happens*.

This final phrase conveys the idea that the question does not take reality into account. In addition, the same respondent (86), talking about the differences between litigation and arbitration, expresses overt criticism by using a cluster of critical claims.

Thus, criticism is initially expressed by the unhedged verbal phrase *that's wrong*, in which the adjective *wrong* clearly defines the incorrect perception that arbitration is a friendly way of resolving disputes. This is then followed by a sentence (*one should have told that party this is not true*) which conveys indirect criticism towards those who were expected to illustrate the features of arbitration and failed to do it.

In addition, this reasoning is completed by the final remark *it's a litigation process*. Here, criticism is established by the fact that the two words in the noun phrase *litigation process* are pronounced in a slower and more emphatic way than the previous ones, thus conveying the idea that arbitration is not friendly at all.

(86) "[…]..in any case you don't have to comply with all the strict formalities that have to comply with when you are before a judge eh.. but in general terms I would say they remain two different animals ..again. .for the way you perform the process the result of the process is and has to be identical and if a a party thinks because it has chosen arbitration then it's going to be a friendly way of settling ***..that's wrong ..one should have told that party this is not true ..it's a LITIGATION PROCESS*** ..it's a process to solve a dispute ..a legal dispute so…" (CERG 2008, I5)

In (87) the speaker, talking about his own experience with standard corporate clauses, uses a number of different negative remarks. The first is the adjectival phrase *a bad one*, followed by the discourse marker *in the sense that* whose function is to introduce another clause which signals why corporate clauses have been such a negative experience. The negative verbal clause that follows (*they do not respond*) is slightly mitigated by the use of the adverbial clause *quite often* which conveys the idea that corporate clauses are seldom drafted in a proper way. Overt criticism is also present in the second part of the excerpt in which the adverb *quite* has been used twice to intensify the meaning of already negative adjectives, such as *difficult* and *negative.* In addition, this critical claim involves both the drafting of the clauses themselves (*they were critical ..critical issues*) and their

being useless in respect of the effect they should have produced *(they were not apt to the specific dispute).*

(87) "[…] Ehm..well .. eh.. my experience with standard corporate clauses is ***a bad one*** in the sense that eh… quite often ***they do not respond*** to the requirements for a proper eh… ehm… building of an.. an arbitration panel ..
[…]
but my experience with .. with this kind of clauses is quite ..eh ..***quite difficult ..quite negative*** .. and sometimes ***not only they were not apt to the specific dispute*** that ..that arise at that moment but also ***they were critical ..critical issues*** in terms of the drafting of the clause ." (CERG 2008, I9)

5.3.2. Describing specific faults

Talking about the fact that arbitration is becoming more and more similar to litigation, one of the speakers indicates that legal practitioners may be responsible for this. The verbal phrases *it's the lawyers' fault* and *something which cannot be avoided* are hedged by the use of the adverb *maybe*, which is used twice in order to make criticism less strong. This syntactical device helps to tone down the illocutionary effect that these utterances were likely to have on the interviewer.

(88) "[…] Well this is as you know the worry nowadays ehm…(3.0) ***maybe it's the lawyers' fault maybe it is ahm .. something which cannot be avoided*** but eh ..arbitration is more and more becoming a structured ehm…pro. processualised .. it does not exist in English…." (CERG 2008, I2).

The language in which arbitration is conducted may be one of the most critical aspects when the procedure is managed by practitioners who have a poor command of the language. In (89), the respondent, reporting on Italian arbitration conducted in English, makes use of a set of critical claims which are not targeted to one category in particular but to those practitioners *who are not able to … really to ..to do the exercise in a … very good English*.

This negative claim is not hedged and is immediately followed by two claims which contribute to making the whole description extremely negative. In actual fact, direct criticism is manifested through a crescendo of critical claims which starts with *in a so bad English* and is concluded by the final remark *we couldn't understand*

anything. It is interesting to note that verbal criticism is accompanied by non-verbal communication (chuckle) which serves the purpose of reinforcing the same message.

(89) "[…]I have seen even worse ..just an arbitration where I have been eh… chairman ..umpire here under the rules of the local eh… chamber of arbitration … it's not an international one ..it's a domestic one and all parties attending eh… are Italian.. however as one is controlled by eh… a holding company in eh… which is based abroad ..they have asked to eh… to run .. to manage the hearings and also the written defences in English and the result has been that the lawyers **..**Italian lawyers ..the counsels to the parties ***who are not able to … really to ..to do the exercise in a … very good English …*** they they have started writing and talking during the hearings ***in a so bad English that at some point the arbitration panel was so confused ..we couldn't understand anything*** [chuckle]" (CERG 2008, I7)

5.3.3. Taking a sceptical stance

Interviewees sometimes prefer not to address direct criticism and opt for strategies which convey criticism indirectly. For example, in the following excerpts, the stance taken by the two speakers is that of scepticism.

(90) "[…] I would say yes in certain jurisdictions for the reasons that we discussed before because eh… there is also an element of ..of ..neutrality perceived in arbitration when you have a French man you know a French company and an Italian company eh.. need they would accept being sued ..being sued in France or Italy ..let's have arbitration in Geneva and that's it. so I mean it's an easy way out eh ..because ..***because of this aura of neutrality*** so ..I think arbitration is also loved by lawyers because they.. you make a lot of money and eh.. so I think arbitration is here to stay and very much so ..I mean ..for international disputes.. yes." (CERG 2008, I6)

In (90), the speaker, talking about the future of arbitration, maintains that arbitration is likely to be the preferred method of resolving disputes in certain jurisdictions *because of this aura of neutrality*.

This prepositional phrase contains the noun phrase *aura of neutrality* which clearly delivers the idea that arbitration may create the impression of being neutral and therefore reliable, thus conveying negative evaluation of arbitration itself as a method of resolving disputes. The same sceptical stance is taken by another interviewee who, when describing the differences between institutionalised and

ad-hoc arbitration (91), argues that the former is slightly preferred to ad-hoc arbitration because it gives *an appearance* of being independent.

Clearly, the speaker is sceptical about the reasons why corporations tend to choose institutionalised arbitration instead of the ad-hoc one. In this context, scepticism is signalled by the use of the nominalised form *appearance*, meaning that arbitration institutions may not be as independent as people expect them to be.

(91) "[…] No I agree I think that there is a slight preference to institutionalised because it gives ***an appearance of*** .. sort of organisation independence structure and so on and also the rules are [subvocalizing] easily eh… accessible and people know them and rather than ad-hoc where you know you may have uncertainties so it's a sort of .fall back .. ." (CERG 2008, I3)

5.3.4. Indicating lack of knowledge

Direct criticism may be expressed by unmitigated forms indicating a lack of knowledge which makes reference to the fact that lawyers, acting most of the time as litigators, may be involved in arbitration proceedings without having the necessary knowledge.

(92) "[…]..the second issue is *poor culture and knowledge* ..*they don't know much* ..lawyers eh.. *they don't know much about arbitration* .. I would say worldwide …there are jurisdictions that they know more .. others that they know less eh.. but basically arbitration is very still ..a very specific eh… branch and so ..it's not ..let's say common knowledge of ..of .. eh.. a lawyer ..of a jurist .. so they sometimes *they do not know how to draft* ..they *underestimate* ..that's why ..this is another reason they should use institutional arbitration ..they can just copy the arbitration clause.. period!" (CERG 2008, I10)

In (92), the speaker mentions the problem of how arbitration clauses are drafted, especially in ad-hoc arbitrations. Here, critical claims are expressed by two distinct grammatical patterns. In the first, the noun phrase *poor culture and knowledge* contains the adjective *poor* which pre-modifies the two nouns *culture* and *knowledge*. In the second pattern, the verbal phrase *they don't know much* is repeated three times, serving the function of highlighting the fact that lack of knowledge about arbitration can cause serious problems to arbitration itself. It is interesting to note how this verbal phrase has been used.

The use of parallelism follows a route in which the central idea *poor knowledge* is being augmented as the flow of argumentation proceeds. Thus the second verbal phrase contains the object (arbitration) which these people do not know very well and the third verbal phrase outlines what this lack of knowledge consists of, i.e. *they do not know how to draft.* The same concept is then stressed again by use of the verb *underestimate* which encodes overt criticism of the manner in which arbitration clauses are sometimes drafted.

5.3.5. Indicating lack of qualifications

Nariman (2000: 268) argues that arbitration is "by no means the exclusive preserve of lawyers", meaning that an arbitrator may be a good arbitrator even though he or she does not possess any formal qualifications. The same concept is shared by Aksen (2007:257), when he maintains that "the original concept of international arbitration was having an expert decide". In actual fact, both the New York Convention and the UNCITRAL Model Law are silent on the issue of arbitrators' qualifications, while they stress the importance of an arbitrator being independent and impartial.

As regards Italy, the law provisions governing arbitration are embodied in the Code of Civil Procedure, which was amended in 2006 by Legislative Decree No. 40. The code is silent as far as the arbitrators' qualifications are concerned, even though Article 815(1) states that an arbitrator can be challenged if he does not have the qualifications expressly agreed on by the parties.

This leads to the conclusion that arbitrators should possess certain qualifications in order to be appointed. Bernardini (2004: 119), one of the most distinguished scholars in arbitration and a well-known international arbitrator himself, highlights some of the characteristics that the chairman of an arbitration tribunal should have, i.e.

> He or she needs to possess the personal and psychological qualities to enable the tribunal to listen to the parties, to understand their requirements and to shape the proceedings accordingly, without at this stage conceding anything to the opposing claims.

The issue of arbitrators' qualifications is also stressed by some of the interviewees, who highlighted the fact that arbitration is often in the

hands of people lacking qualifications, even though they all use the phrase *qualified lawyers* meaning that being a lawyer is considered a pre-requisite in order to be part of the whole arbitration procedure.

In (93), the speaker maintains that lawyers may be of great help in resolving disputes, *provided that they are qualified lawyers*. The use of the conjunction *provided that* serves the function of indicating that not all lawyers involved in arbitration proceedings are qualified, thus conveying negative criticism of those who are engaged in arbitration without possessing the necessary qualifications.

(93) "[…] Yes.. well.. I just participated yesterday in a debate and whether lawyers do contribute to dispute settlement or not and I. I think very briefly my position would be that ehm ..lawyers do indeed eh… successfully add value to to the dispute ***provided that they are qualified lawyers*** and so if if.." (CERG 2008, I4)

In (94), the speaker employs a variety of devices to express criticism, embedding some of the categories listed above. For example, talking about the selection of arbitrators, the speaker stresses the fact that both arbitrators and presidents of arbitration tribunals are sometimes appointed even though they *are not qualified*. Then the interviewee mentions the fact that arbitration institutions are responsible for appointing arbitrators and presidents who are not up to the job and that this may be *a very political choice*, in the sense that arbitration institutions may sometimes appoint arbitrators and presidents without taking their knowledge and qualifications into account but relying on a give-and-take policy which conveys the idea that certain arbitration institutions are managed according to political rather than professional interests.

(94) "[…] Ya I would add that you should pay attention to the selection of the arbitrators because eh ..you may end up with eh ..***people who are not qualified*** eh.. to ..to act as arbitrators eh… and.. and especially the selection of the chairman because by .. by in general if there is disagreement between the parties eh… the chairman is appointed by the institution and ***the institution doesn't necessarily make the best choice*** and at times *it is a* ***very political choice*** because last time I appointed him this time I appoint this other guy and so on and so forth so since in the three arbitrator arbitration usually it is the chairman the runs the show eh.. attention to how the chairman is to be selected is very important." (CERG 2008, I6)

5.3.6. Indicating lack of experience

Arbitrators' experience has been debated by experts for a long time. Böckstiegel (2008:827), for example, maintains that "experience in the particular demands of international arbitration will continue to be indispensable". The tendency of having lawyers as arbitrators in specific areas, such as construction, information, communication technology and other highly specialised domains is seen as negative because lawyers are likely to lack technical expertise (Webster 2002). The Italian Civil Code is silent on this matter and so are the rules of international arbitration of the Milan Chamber of Arbitration (Belotti 2002), even though Art. 3 of the Code of Ethics of Arbitrators (2010:21) contains a specific provision reading

> When accepting his/her mandate, the arbitrator shall, to the best of his/her knowledge, be able to devote the necessary competence with respect to his/her adjudicating function and the function and the subject matter of the dispute.

In the corpus, speakers criticise the fact that both counsels to the parties and chairmen often lack experience in arbitration. In (95), the interviewee refers to the fact that problems may arise when counsels to the parties *do not have a significant experience in ..in arbitration*, which again may result in lawyers limiting their counselling to what they know better, i.e. litigation. At this point, there seems to be a direct link between arbitrators with little or no experience in arbitration and the tendency to run the whole arbitration procedure in a way more similar to litigation.

(95) "[…] Yes… well ehm… I I have to confirm that I I have this perception indeed that there is more and more formality coming into arbitration as well [small intake of breath] ehm… again sometimes the process is led by the parties not necessarily by the arbitrators ehm… ***it is also a problem when the ..counsels do not have a significant experience in ..in arbitration*** they may be litigators as ..as a basis." (CERG 2008, I4)

Familiarity with the subject matter is one of the issues which have been raised. Speaking of how presidents are appointed, one of the speakers argues that they should possess the necessary experience in order to run the arbitration procedure in the best possible way and this

is certainly in line with the original aim of arbitration, i.e. to have experts that are well-known for their experience and qualifications.

For example, in (96) the speaker makes a complaint about the fact the president of the arbitration tribunal is a law professor who presumably holds high level qualifications but lacks experience in mergers and acquisitions, which would be much more relevant for the matter at stake.

(96) "[…] Ya .. but what I had in mind ..you know… what I had in mind for example a situation w.. which we are facing right now ..***where instead of having a law professor chairman of the arbitration panel if we had an experienced M&A lawyer he would be able to understand the contract better***." (CERG 2008, I6)

5.3.7. Indicating lack of results

One of the original aims of arbitration was to have an award rendered within a limited period of time from the beginning of the procedure. Most arbitral institutions, even though they fix time limits in the general provisions and in the provisions regulating the rendering of the award, tend to be quite flexible since the principle of the parties' autonomy is thus safeguarded.

(97) "[…] time consuming …and eh… not always satisfactory but not because [slight intake of breath] ehm… because eh… they lost <?> .. really the results .. they.. of course then we exchange horror stories in this particular in this case ***..well we have been after three years in which nothing happened in the arbitration*** ..we settled and then we had to.. we had to fight with the arbitrators about their costs [chuckle] ..***they hadn't done anything in our view*** and we had to pay all the same ..these maybe are sort of horror stories and not certainly the generality but certainly there is an approach ..very cautious approach with arbitration." (CERG 2008, I2)

In (97), criticism is expressed in two different ways. In the first part of the excerpt, the interviewee uses the verbal phrase *nothing happened in the arbitration*, in which criticism is generically directed at arbitration as the entity that the parties had relied on for the resolution of their disputes. Instead, direct criticism is expressed in the second part, where the speaker utters the verbal phrase *they hadn't done anything*, meaning that arbitrators were not committed to their task.

5.4. Face threatening acts

Brown and Levinson (1987) claim that face-threatening acts (FTAs) are those claims which might cause embarrassment and annoyance. In addition, Bloor and Bloor (1993) maintain that a face-threatening act is any claim that invades someone else's territory and thus needs to be mitigated. Indeed, FTAs have received consistent attention in studies on academic criticism (Myers 1989; Hyland 2000; Burgess/Fagan 2002), whereas these speech acts have received little if any attention in oral narratives, particularly those that concern arbitration.

The corpus contains a number of face-threatening acts uttered not in conversational exchanges but in oral narratives, which suggests the idea of an imbalance of power. Indeed, the person who utters a face-threatening act does it in a 'conversational vacuum' and this is reflected by the use of vague terms such as *a certain person* in which criticism is not targeted at a specific person but is directed at an entire category of people having that particular characteristic.

Given the features of oral narratives, face-threatening speech acts in the corpus seem to be therefore of the 'diffuse' type (Giannoni 2005:78), in the sense that criticism is not attributed to someone in particular but to general categories, such as arbitrators, the parties, counsels, and even situations, such as decisions and so on.

In (98) the speaker, talking about arbitrators' reputation, makes use of a variety of critical claims ranging from overt criticism, such as *he is not able to deliver on time* and *he's a lazy arbitrator* to expressions which apparently carry no overt criticism. For example, the interviewee uses the adjectival phrase *too busy*, which may be considered neutral since it refers to a general condition of successful professionals. Instead, it carries negative evaluation because it conveys the idea that some arbitrators are entrusted with so many tasks that it is practically impossible to perform them properly.

(98) "[…] there is sanction of reputation because if you understand that a certain person is ***too busy*** or I mean ***he is not able to*** deliver in time ..very likely that person's reputation is going to be affected not be appointed again there will be rumours in the market ..***he's a lazy arbitrator*** so that's a real sanction … ." (CERG 2008, I5)

In some cases, criticism is directed not against those who are involved at different levels in the arbitration procedure but at the way in which awards are formulated, as in the following example.

(99) "[…] the absence of any effective control by judges of the process means that *arbitrations produce an **endless** stream of **artfully** written **bad** decisions with hundreds of pages of **utterly useless** recapitulation of the proceedings and there in the hundreds of pages is a little **pirouette** by which a **completely illogical** resolve is obtained but which is essentially an exercise in **impunity** by the party arbitrators* ..if they don't have spring courts to tell them they have done a ***bad*** job and I find quite ***frustrating*** this the fact that in reality the arbitrators are answerable only to their own conscience which unfortunately too often means only answerable to their friends. (CERG 2008, I6)

Talking about rewards being produced without the control of judges, one of the interviewees utters two long sentences packed with critical claims, mainly adjectives and adverbs. In the first sentence, the object of the verb phrase *arbitrations produce* is represented by a long noun phrase which contains 17 words. Here it is interesting to note that adverbs are intensively used as pre-modifiers in noun phrases delivering overt critical claims (***artfully*** *written bad decisions*; ***utterly*** *useless recapitulation*; ***completely*** *illogical resolve*). In addition, the sentence above shows that the speaker makes use of other linguistic devices to convey criticism, such as adjectives (***endless***, ***bad***, ***useless***, ***illogical***) and nouns (***pirouette, impunity***) carrying negative connotations.

It also seems worth mentioning that the word *pirouette* is used as a metaphor of something which has been rapidly modified in order to suit the needs of one of the parties. Quite unexpectedly, this stretch of spoken language does not contain any hedges, which signals the fact that the speaker's criticism towards how certain awards are rendered is its main pragmatic goal.

5.5. Conclusions

The distribution of rhetorical strategies in the corpus revealed that Italian arbitration practitioners mainly employ overt strategies to express criticism, while indirect criticism seems to have been only

marginally used. As far as their linguistic/rhetorical devices are concerned, the corpus shows that speakers employ a variety of linguistic realizations to deliver critical speech acts, such as verbal phrases, noun phrases and adjectival phrases. In addition, interviewees make use of metaphors, grammatical parallelism and other rhetorical devices in order to convey overt criticism.

6. Voices of 'others'

A discourse feature that plays an important role in the narrative construction of the self is reported or quoted speech. Research on reported speech has mainly focused on conversational exchanges (Holt 1996), non-narrative discourses (Baynham 1996), the relationship between reported speech and the reporting context (Buttny 1998) but also courtroom interaction (Philips 1986). As Voloshinov (1971:149) puts it, reported speech is "speech within speech, message within message, and at the same time also speech about speech, message about message".

In this chapter, I will consider instances of direct speech acts embedded in narratives from semi-structured interviews of Italian arbitration specialists. In actual fact, the interviews were meant to be structured but at the end of the interviewing process they turned out to be semi-structured. This shift is mainly due to the fact that further questions were added and that, on certain occasions, the interviewee requested clarifications on the scope of the questions and, on other occasions, the interviewer and the respondent kept the conversation going by getting into more detail.

For the purpose of this study, I will use the phrase 'reported speech' to indicate direct quotations used by the respondents in order to provide evidence for their reasoning on various aspects of arbitration practice. This chapter seeks primarily to answer two research questions:

1) How is reported speech embedded in narratives?
2) What functions do reported speech acts perform?

In the first section, I will focus on how reported speech acts are embedded in narratives. In particular, I will examine stretches of reported speech from both the lexical and grammatical viewpoints. In the second section, I will investigate the functions that these speech

acts play in delivering a message. The corpus comprises 36 instances of direct speech acts, which are irregularly distributed across the 11 sections of the questionnaire (two sections, namely 11 and 12, are not included because respondents answered their respective questions in writing). Indeed, the sections in which reported speech acts are more numerous, are section 2 (arbitration clauses) with eight instances and section 13 (the future of arbitration) with five instances, followed by sections 3 (finality of arbitration awards), 4 (speed and duration-extension of time-limit), 6 (intervention from national laws and courts) and 8 (finality of arbitration awards), all containing four instances each. It is worth noting that stretches of reported speech are present in all sections of the questionnaire, even though the frequency counts vary considerably. As far as the respondents are concerned, the data show that 5 out of 14 respondents reported utterances of others in their narratives. Three respondents were particularly at ease with reported speech and used it quite extensively.

Moreover, one of the respondents used reported speech 16 times, showing how this rhetorical device was considered particularly suitable as a frame for the construction of his narrative. In terms of length, reported speech acts vary considerably, the shortest being 7 words and the longest 120 words. Data in our corpus also show that narrators incorporated reported speech into narratives by using not only reporting verbs but also signalling devices, such as discourse markers and silent or filled pauses. For example, in (100), reported speech is introduced by the reporting verb *say*, which marks the beginning of the quotation.

This way of embedding direct speech acts into narratives is the most frequent, since it is used 18 times out of 36 instances. In terms of frequency, other reporting verbs include *tell* (4) and *ask* (1).

(100) "As I said they sometimes have a strong impact because sometimes it is not even a question of a policy of a company but is a question of laziness of the people involved in negotiation (.) they take a precedent and ***they say*** (.) ***this worked two years ago why shouldn't it work now*** eh .". (CERG 2008, I5)

(101) […] you know if you look at it from a macroeconomic viewpoint and not just eh (.) e:hm (.) micro (.) e:h (.) ***I lose that's fine*** (.) ***it's bad for me but for the system the fact that I have only invested more money to appeal*** (.) *to then a supreme court and then going back and e:::h it's good thing (.) I mean it's a*

right decision it's a wrong decision get (.) *God knows* (.) *but at least it's a decision*. (CERG 2008, I6)

In (102) the narrator signals that he/she is inserting somebody else's ideas or thoughts, just by using the discourse marker *e:h*, which serves the function of introducing another voice. In this particular case, the discourse marker is followed by a pause that allows the speaker to take a small breath before starting the quotation.

(102) "[…] then we exchange horror stories in this particular in this case (2) ***well we have been after three years in which nothing happened in the arbitration*** (.) ***we settled and then we had to*** (.) ***we had to fight with the arbitrators about their costs*** [chuckle] ***they hadn't done anything in our view and we had to pay all the same***…" (CERG 2008, I 2)

Indeed, quoted speech may not be marked by syntactic framing devices, but by pauses, a change in voice quality or pitch. In (102), the speaker introduces the quotation just by saying nothing. A silent pause, two seconds long, marks a clear separation between the speaker's flow of narration and the reported speech, introduced by the discourse marker *well*.

Another way of incorporating direct speech into narrative is through the use of 'partial quotes' (Thompson 1996:513) or 'incorporated quotations' (Clark/Gerrig 1990:789), in which the quoted words are incorporated into a non-quoted clause, as in the following example.

(103) "[…] the chairman is appointed by the institution and the institution doesn't necessarily make the best choice and at times it is a very political choice because ***last time I appointed him*** (.) ***this time I appoint this other guy and so on and so forth*** ." (CERG 2008, I6)

In (103), the quoted words are syntactically incorporated into the speaker's narrative in a way that makes the incorporated words an essential part of the incorporating utterance. This means that on commenting the appointment procedure, the speaker appropriates the words reported as part of the statement he is making.

6.1. Direct speech

In this section, drawing on Thompson (1996) and Clark/Gerrig (1990), I will analyse the stretches of language in which interviewees make use of direct speech acts in order to include somebody else's beliefs, ideas and comments. For the purpose of this study, two of the aspects identified by Thompson will be investigated, namely voice and message.

6.2. Voice

Thompson (1996:507) identifies five groups of 'voices', namely self, specified other(s), unspecified other(s), community and unspecifiable other(s). As far as our corpus is concerned, it appears that the vast majority of instances of 'voices' belong to the 'specified other(s)' group, as these voices can easily be referred to specific referents. If we consider the frequency with which these referents are referred to, the corpus shows that parties (8), arbitrators (7) and counsels (6) are the most frequent, as exemplified in the excerpts below. Indeed, reported speech acts usually serve the purpose of providing evidence, as the narrator often makes use of direct quotations in order to support his/her own ideas and thoughts. This can be done in a number of ways, for example attributing what is being reported to someone who can easily be identified, as in the following excerpt.

(104) "[…] *I tell to my clients* (.) ***put it in because this may make the arbitration award less final but gives you a protection in case the arbitration is carried out in a way that results into a mistake***." (CERG 2008, I5)

In this case, the reported speech acts have specific referents (*clients*) who are strongly advised to include an arbitration clause in the contract.

6.2.1. Specified other(s)

In (105), the reporting verb (*tell*) is repeated three times and this redundancy serves to indicate the parties' responsibility in setting up

the rules of the arbitration procedure and what may happen when they fail to do so. In this case, the reported direct speech is introduced by the verbal phrase *one question …is*, which signals that the narrator is simultaneously asking the question and quoting himself uttering the same question.

(105) "[…] so when the dispute arises one question that the arbitrators have to put to the parties is (.) ***you*** (.) ***you gave us the power to decide*** (.) ***you told us what is the applicable law*** (.) ***fine*** (.) ***you told us what is the procedural law that can be very different from the one that you have to apply but you didn't tell us what is the seat of the arbitration.***" (CERG 2008, I5)

In (106), the reported voice is that of parties complaining that arbitration, far from achieving the expected results, turns out to be excessively expensive. It is interesting to note that reported speech is not introduced by any reporting verbs but by the discourse marker *well*. Another interesting feature concerns the use of personal pronouns as manifestations of identity. In this case, the respondent used the personal pronoun *we* not only to be faithful to the language of the original speakers (the parties) but also to convey negative evaluation of the situation which was caused by arbitrators (*they*).

(106) "[…] then we exchange horror stories in this particular in this case (.) ***well ..we have been after three years in which nothing happened in the arbitration*** (.) ***we settled and then we had to*** (.) ***we had to fight with the arbitrators about their costs*** [chuckle] (.) ***.they hadn't done anything in our view and we had to pay all the same***.." (CERG 2008, I2)

In (107), the reported direct speech quotes the words of a counsel who raises the issue of time limits to the production of documents. It is worth noting that the reported direct speech is not introduced by either a verbal marker or a discourse marker but by the conjunction *like*, which serves the same function. In addition, the use of the adverb *sorry*, reflects an attempt to reproduce what a counsel might have uttered on that specific situation. Empirical research has shown that it is very difficult, if not impossible, to recall an utterance word for word, even after a short period of time (Stafford/Daily 1984; Hjelmquist/Gidlung 1985). What the speaker is quoting here is not clearly represented by the words uttered by a counsel; instead, he/she

is trying to depict a part of a more extended event so that the hearer is provided with the necessary background to interpret it correctly.

(107) "[…] E::hm I would say procedural e::h (.) e::h (.) issues mmm (2) 'eccezioni procedurali'(*procedural objections* my translation) for example sometimes counsels <rr> raise questions of a (.) a (.) a time limit that has expired or (1.8) or a (.) time limitations like (.) ***sorry you cannot produce this document any longer …***" (CERG 2008, I12)

6.2.2. Unspecified other(s)

The instances of reported speech in our corpus show that when the speaker reports somebody else's thought, the source is in most cases clearly identifiable. Instead, in other cases, quotations may have generic referents, as in following example.

(108) "[…] As I said they sometimes have a strong impact because sometimes it is not even a question of a policy of a company but is a question of laziness of the people involved in negotiations they take a precedent and *they say* ***this worked two years ago why shouldn't it work now eh*** .." (CERG 2008, I5)

Here, the narrator expresses a negative evaluation of the fact that both parties and counsels to the parties keep using the same arbitration clause over and over again, but the referent is generically referred to as *people involved in negotiations*. The quoted direct speech, which may have occurred between the company's counsel and managers, provides an example of what Clark/Gerrig (1990:792) call "detachment". In actual fact, this strategy serves the purpose of detaching the speaker from the quoted matter and the use of the discourse marker *eh*, placed at the end of the quotation, reinforces the idea of detachment.

6.3. Message

Thompson (1996:512) identifies five different ways in which a message may be reported. These include: quote, echo, paraphrase, summary and omission. My corpus shows the presence of two categories, namely quotes and summaries.

6.3.1. Quotes

When a narrator reports somebody else's words, his/her original intent might be to repeat exactly the actual words spoken, which Leech (1974:353) calls *verbatim assumption*; what turns out to be reported, however, is in fact only an attempt to recall what the original speaker said. What narrators try to do, when using quotations, is to give a general picture or 'feel' of what the reported people meant. In other words, the instances of direct quotations show that what the narrator provides is not just a description of what was said but in Clark/Gerrig's words (1990:767) a 'strip of depicting behaviour'. The issue of context seems to be particularly important for the present study because 'doubled voiced discourse' should also be considered in the light of the narrator's native/non-native speaker status. As far as narrators whose native language is Italian are concerned, we should consider that direct speech was originally uttered in Italian and that the frame shift has undergone two different phases. First, direct speech acts were uttered in Italian in the original frame; we know very little about this original frame and can imagine the context in which the acts were uttered but not the actual words that were used. Then, the original frame shifted into a secondary frame, that of the reported speech and in a second and totally different context, as direct the Italian speech acts were converted into direct speech acts in English. Reported speech is, in Caldas/Coulthard's words (1994: 297) "[…] a reduction of an initial communicative event, because the reported talk is embedded in a text which has a different purpose from an original communicative event". In the excerpt below (109), one of the respondents, talking about the procedure of appointment of arbitrators at an arbitration institution, included a stretch of direct speech into the narrative. The communicative event takes place between the chairperson of an arbitration institution and someone else, (presumably an advocate whose application for the position of arbitrator was rejected because he/she proved to be lacking independence and impartiality).

(109) "[…] most of the time when we do not accept a certain arbitrator because of the (.) his or her lack of independence and impartiality the reaction is (.) very violent (.) they say (.) ***what do you WANT***↑ (.) ***mind YOUR OWN business***↓." (CERG 2008, I10)

It is clear that the narrator is animating the original speech acts also by using prosodic and paralinguistic features, with the aim of recounting not only what was said but how it was said. Let us imagine the context first. What the narrator is trying to say is that the applicant's attitude was verbally aggressive, if not offensive, and that this person was extremely disappointed because the arbitration institution rejected his application. Here, in Thompson's words (1996:512), the narrator is presenting the reported language event "more vividly" to the hearer by simulating the original event so that the animating voices make the story come alive. In this way, the audience is highly involved, as in a play (Tannen 1995). The two verb phrases *what do you want ..mind your business* have been uttered as if the narrator were interpreting the role of the rejected arbitrator through what Koven (2002: 175) calls 'inventive performance' of the original words. Let us now simulate the direct speech, trying to reach the same communicative goal but using different words, bearing in mind that the original verbal interaction was certainly uttered in Italian. The advocate might have said any of the following:

A1. Ma cosa VUOLE ↑? Pensi agli affari SUOI!
(What do you WANT ↑ Mind YOUR OWN business!)

A2. Mi faccia il PIACERE↓
(NONSENSE ↓! Don't be ridiculous!)

A3. Ma CHI: c.. si crede di essere, EH?
(WHO the hell do you think you are, EH?)

A1 is likely to have been uttered in standard Italian, showing a certain degree of intolerance, even though the level of formality is safeguarded. On the other hand, A2 may have been uttered with the intent of being aggressive, while A3, uttered using an informal register, sounds rather intimidating. What we are interested in is not

which option was uttered in reality or which one would have better served the communicative purpose. Our main objective here is to consider the reported speech act exactly as it was reported by the narrator.

(110) "[…] I have been discussing this kind of problems with in-house counsels of a multinational ..and they tell me eh (.) ***when we have*** (1.5) because they have very often trans-national matters (.) disputes and they say ***well*** (.) ***first we try negotiation*** (1.5) ***direct*** (.) ***then we try mediation negotiation with the facilitator*** as you know (.) mediator who tries to put the parties together without having the possibility to impose or to even suggest a solution (.) ***then of course we resort to arbitration because eh*** (1.2) there is a clause already in a contract in this case because the choice of a a jurisdiction eh (1.7) or a jurisdictional court would be often eh:m (.) either risky or not accepted by the other party ***of course we are a multinational*** a German company would say ***ok let's come to Germany and and fight out*** but the Chinese ***would say no excuse me I don't come into your tent to be devoured*** [laughs] .." (CERG 2008, I2)

In (110) the narrator, talking about the future of arbitration, reports one of the in-house counsels' reasoning. This stretch of reported speech shows an interesting example of what Thompson (1996: 513) calls 'partial quote'[18]. Here, the narrator begins with a quotation introduced by the reporting phrase *they tell me*, which is interrupted by the parenthetical clause *because they have very often trans-national matters*, introduced by the discourse marker *eh*. This parenthetical clause serves the function of clarifying the context in which the original words might have been uttered.

Then the quotation is resumed through the use of the reporting verb phrase *they say*. After that, the narrator switches from quoting direct speech to summarising the role and function of mediation within the arbitration process. This shift is marked by the discourse marker *as you know*, which serves the purpose of including the hearer in what is being reported. Then the narrator switches again to reported speech, signalled by the use of the adverbial clause *then of course* and resumes the same pronoun *we* which was used to signal direct speech. Then, quite surprisingly, the narrator abandons direct speech and

18 A partial quote occurs when one or more quotes appear within paraphrases and summaries.

provides a summary in which he points out the advantages of having an arbitration clause included in the contract. After summarising, the respondent switches again to direct speech introduced by the adverbial clause *of course*, followed by the pronoun *we* which marks the direct speech act.

It is interesting to note that the narrator's attempt to report the two parties' positions is likely to have involved considerable re-shaping of the original speech acts through what Clark/Gerrig (1990:767) call 'selective depiction'. This re-working of the original words becomes clear if we consider what is being reported by the narrator. One party said: *let's come to Germany and and fight out* and the other replied: *no excuse me I don't come into your tent to be devoured*.

It seems unlikely that both parties used metaphors such as *fight out* and *to be devoured*, but the narrator is trying to recollect what might have been said when the two parties were negotiating the seat of arbitration.

This excerpt clearly shows that quotations and summaries may co-exist in the same narrative and that the interplay between these two different genres enables the narrator to provide the information requested.

Direct quotations in our corpus show different levels of involvement on the part of the narrators themselves. Some do their best to perform the roles of the quoted persons, be they counsels, arbitrators or entrepreneurs. Other narrators limit themselves to reporting what is deemed to be relevant to their narration, showing a lower level of involvement.

In (109), the speaker is particularly involved in performing the role of the rejected arbitrator and his report looks similar to a role-playing situation in which the narrator animates the annoyed arbitrator trying to deliver not only the words expressing disappointment but also the way in which the words were uttered. The use of a different voice quality and pitch clearly signal an attempt to reproduce an emotional state. On the other hand, excerpt (110) shows a different level of involvement because the narrator seems to be only interested in delivering information without providing any suggestions on how the reported words might have been uttered.

6.4. Attitude

Thompson (1996: 521) identifies three different attitudes that the reporter may have towards the reported message, i.e. neutral, positive or negative. His analysis, mainly based on the reporting verbs which are used to introduce reported speech, reveals that verbs like *say* and *tell* give no indication of the reporter's attitude towards what has been said, while others (such as *point out*) signal a positive attitude towards the message. My corpus contains a large number of verbs signalling neutral attitude, since *say* and *tell* are the most frequently used reporting verbs. What may be relevant is the fact that negative attitude is expressed by evaluative expressions either preceding or following the reported message and that these expressions indicate negative evaluation of the reported speaker rather than the message, as exemplified in the following excerpts.

(111) "[…] the chairman is appointed by the institution and the institution doesn't necessarily make the best choice and at times it is a very political choice because last time ***I appointed him (.) this time I appoint this other guy and so on and so forth*** ."(CERG 2008, I6)

(112) "As I said they sometimes have a strong impact because sometimes it is not even a question of a policy of a company but it's a question of laziness of the people involved in negotiation they take a precedent and ***they say***.. ***this worked two years ago why shouldn't it work now*** eh …" (CERG 2008, I5)

(113) If you translate from a language that you already understand but of course the point is this ...***look I speak English but not very well so please give me a translator*** ..the translator that might need or not.. *so* ***I am sure I get precisely*** **..**usually ***that's nonsense*** because the translator gets tired and the translation is less comprehensible than the original English but either way the witness gets not twice but usually three times the time to think about the answer. (CERG 2008, I6)

In (111) and (112), negative evaluation is located before the reported message, thus showing a different degree of evaluation. In (113), the two clauses are placed so that the former (*the institution doesn't necessarily make the best choice*) questions the institution's fundamental role in choosing the best chairman of an arbitration panel, while the latter (*and at times it is a very political choice*)

qualifies negative evaluation by specifying that the choice of a chairman may be greatly affected by political reasons, probably referring to internal reasons concerning the managing of the institution itself. In (112), the negative attitude refers to the fact that people involved in negotiations sometimes arrive at important decisions using procedures that, succesfully employed in the past, are supposed to be effective in similar situations (*they say.. this worked two years ago why shouldn't it work now*), denoting that important aspects, such as the drafting of arbitration clauses, are sometimes treated carelessly, thus showing *laziness*. In other cases, the negative evaluative expression is placed after the reported message. In (113), for example, negative evaluation is realized through the use of the clause *that's nonsense*, with which the narrator signals his opinion on translations made upon a witness's request. In this case, evaluation refers to the content of the reported speech and not to the reported speaker.

6.5. Functions

According to Thompson (1996:512), quotations serve two main functions, i.e. to "indicate a higher degree of faithfulness to an original (or possible) language event" and to "present the reported language event more vividly to the hearer by simulating the original event". Myers (1999), analysing reported speech in group discussions, proposes a taxonomy of functions which includes: intensifying an event, offering evidence, signalling solidarity and formulating the gist.

As far as our corpus is concerned, it appears that most quotations serve the main purpose of demonstrating the validity or the likelihood of what narrators are reporting.

An example of how narrators use reported speech in order to demonstrate the validity of what they are saying is the following excerpt, largely representative of the whole corpus.

(114) "It it is true but I have said that depends what is the comparison because I had arbitrations which were lasting for seven years e::h because this is a point where the arbitrators say to the parties (.) ***the matter that you gave us is so complex that we need more time*** (2.2) [subvocalizing] first of all agree to say (.) both say no because then if they say both no the arbitrators deliver the award ***ok we will deliver you the award that you deserve*** (.) ***I was asking***

> ***your cooperation you tell me we don't give you an extension then of course I will decide on the basis of what I have been able to understand*** and this is very risky and normally don't want to go against the arbitrators and normally parties are not in agreement so .." (CERG 2008, I5)

In (114), the speaker answered a question on the issue concerning the duration of arbitration proceedings, as compared to litigation practices. In this stretch of language, reported speech acts are interwoven with the flow of the narration with the aim of providing evidence to what is being said. The narrator animates the arbitrators, giving reasons for their being late in rendering the award: *the matter that you gave us is so complex that we need more time*. The narration also provides a clear picture of what may happen if the parties deny the arbitrators an extension of the time for rendering the award: *ok we will deliver you the award that you deserve* (.) *I was asking your cooperation you tell me we don't give you an extension then of course I will decide on the basis of what I have been able to understand*.

These stretches of reported speech clearly show that they have been inserted into the narration with the purpose of supporting the initial statement *I had arbitrations which were lasting for seven years*.

On other occasions, speakers used direct speech acts not to mention facts or recall specific events, but to indicate that something might have happened if certain conditions had occurred. In other words, what they are delivering is closely related to the idea of 'likelihood'.

(115) "[…] but still if you talk to entrepreneurs and you put the question (.) ***but in that contract you have an arbitration clause why?*** I think the very first answer would be (.) ***I was American he was German*** (1.2) ***of course I was not accepting to litigate in Germany .. he was not accepting to litigate in the US and so we chose a neutral ground which could also be a court*** (.) by the way because you could also choose at least Europe at least you can choose to litigate before another court eh.." (CERG 2008, I5)

In (115), the respondent provides reasons for including an arbitration clause in contracts. It is interesting to note that the structure of the answer follows a pattern which is very often used in the whole corpus.

In actual fact, direct speech acts are inserted into the narrative when the speaker needs some support to his own reasoning. In this

particular case, the speaker is not reporting past events but is providing an answer that is likely to have been given in that situation.

It is also worth noting that the narrator plays both the part of an entrepreneur and that of a counsel, even though the level of involvement is low because the aim is to provide information rather than play the two different roles. The likelihood of the whole exchange is testified by the use of the conditional form *would be*, which introduces the reported speech in which the two nations mentioned by the respondent (US and Germany) could easily be replaced with other nations, since the pragmatic aim is to indicate a third country for the seat of arbitration.

In addition, one of the functions identified by Myers (1999), namely 'intensifying an event', is also present in our corpus. It should be noted that Myers's 'intensifying an event' seems to be very similar to Thompson's function (1996:512) 'presenting the reported language event more vividly to the hearer by simulating the original event'.

Commenting on the fact that arbitration procedures give way to more formal procedures, one of the interviewees said that the increase in the number of new arbitrators had inevitably led to situations in which these new arbitrators would request more guarantees, thus favouring more judicialised arbitration procedures. In the following excerpt, the narrator animates one of these 'new' arbitrators.

(116) "[…] the qualities getting lower and so the reaction is to find I think guarantees .. parachutes like ..ok so ***I wa:nt the right to be HEARD*** (.) ***I want to use the right to be HEARD*** (.) ***I want the RIGHT to give you*** so this is [throat clearing] probably the noble reason of this *processualizzazione* (*judicialization* my translation)." (CERG 2008, I10)

Here, the quotation presents an interesting example of grammatical parallelism, since the verb phrase *I want* is repeated three times. The result is that the reported speech act is expanded by adding the verb *to use* to the second sentence and is better qualified by adding the verb phrase *to give you* to the third sentence. It appears that repetition here signals 'involvement' (Tannen 1989: 97) on the part of the speaker, who clearly tries to perform the role played by one of the counsels. This kind of parallelism also performs the pragmatic functions of keeping the narration going and creating coherence.

It is also worth noting that the past participle *HEARD*, uttered twice, and the noun *RIGHT* show emphatic stress, as they are uttered more loudly than their surrounding speech. The aim of keeping the flow of narration going is also indicated by the use of the term *processualizzazione*, uttered in Italian as if the narrator were more interested in delivering exactly what he had in mind than in giving a tentative translation of the Italian word.

In addition, the boundaries of the quotation are clearly marked by the use of the conjunction *so*, which signals not only the beginning of the quotation but also a switch from the reported speech to narrative. This way of indicating the end of the quotation, known as 'unquote' (Golato 2000:31) not only marks the switch from reported to normal speech but also allows the speaker to exit the quotation frame. Another example of unquote can be seen in (117), in which both the beginning and the end of the quoted speech are not marked by any syntactic framing devices but by the discourse markers *beh* and *ehm* which serve exactly the same function.

(117) "[…] I remember when ah.. having to draft an arbitration clause in the old system e::hm there would be no one excluding (1.2) no lawyer really in his senses excluding the appeal because (.) ***beh if we lose what happens we cannot appeal ehm*** (.)." (CERG 2008, I2)

6.6. Intertextuality

As reported speech acts are embedded into narratives, the former represent an intertextual element which plays an important role in the construction of the whole text (the interview). Quite unexpectedly, the corpus also shows the presence of a different type of intertextuality, since in one case reported speech acts do not refer to something which was said but to something which was written.

(118) "They write in the (1.2) in the minutes of the hearing (1.3) ***we are against cross-examination*** (.) ***we don't want you arbitrators to allow parties to be cross-examined*** (.) then it's up to the arbitrators to decide…" (CERG 2008, I10)

In the excerpt above, the narrator refers to what usually happens when one of the parties wishes to have cross-examination in the course of the arbitration proceedings and the other party does not want it. In this particular case, the reporting verb is not one of the most frequently used, i.e. *say / tell / ask* but *write*. What is reported here, given the informal register of language used, is not likely to be the actual words that were written in the minutes of the hearing but what the narrator recalls as having been written. In other words, the narrator reports the 'spirit' and not the 'letter' of what was reported in the writing of the minutes.

6.7. Conclusions

This study, based on interviews with arbitration practitioners, stemmed from the assumption that their answers would be true and accurate. This is the reason why interactive resources, such as question-response management, repair organization and the management of pauses (Grinsted 2004), were not considered. The overall picture that emerges from this research is that the narrators of arbitration practices make quite extensive use of reported speech. The results highlight two aspects: first, the reported speech acts in the corpus are not a verbatim reproduction of the direct speech acts uttered in Italian. Second, reporting clearly involves significant re-shaping and re-working of the original speech acts.

The reported speech acts, whether embedded in various ways or incorporated into the narratives, serve not only the primary functions of demonstrating the validity or the likelihood what is being reported but are also used to intensify the reported events themselves by animating different actors (arbitrators, counsels, entrepreneurs).

In this respect, the level of involvement was found to vary according to the respondents' different attitude, as some of them turned out to be deeply involved in the narrating process while others limited themselves to providing the requested information. The present analysis has also suggested that reported speech acts, because of their embeddedness in the narrative, represent an interesting example of intertextuality.

7. Conclusions and further directions

Research on narratives has covered a variety of different genres and approaches. Even though the current trend has shifted from the traditional analysis of interviews to narratives in conversational interactions (Baynham 2011), this study has focussed on 'canonical' interviews to legal practitioners involved in arbitration practice in the Italian context. The rationale behind it was that an international research group, including scholars and analysts from different countries and legal systems, would collect corpora of spoken data covering various aspects of arbitration practice.

The aim of this investigation was to draw some conclusions concerning the nature and function of arbitration practices and to understand if and to what extent arbitration practice was being colonized by litigation in different legal systems.

Our findings have shown that respondents are well aware of the fact that arbitration procedures are significantly affected by both the procedures and the language of litigation.

However, it is important to note that a variety of factors have contributed to making arbitration more litigative, thus rendering it more similar to court procedures. In general, we have seen that the legislation on arbitration is characterised by a lack of incisive reforms and this has confined Italy to the fringe of the international arbitration market. This has resulted in a very limited number of international commercial arbitrations (ICA) conducted in the Italian context.

Another influential factor is the way arbitration is conducted by legal practitioners who have mainly acted as litigators, thus transferring their legal behaviour into a practice which was meant to be different.

From a linguistic point of view, this study has shown that the majority of respondents, mainly NNSs, employ an array of rhetorical devices such as metaphors, borrowings and code-switching. In addition, the corpus contains numerous instances of direct speech acts

embedded into narratives with the intent to both animate the different actors involved in arbitration procedures and to demonstrate the validity of what was reported. This is an interesting example of how direct speech acts may be framed by a different genre, i.e. narratives of personal experience.

From a lexical viewpoint, it is important to note that interviewees used a consistent number of Latin phrases, expressions and maxims which are typical of legal language. This shows that arbitration practitioners are so deeply 'rooted' in legal culture, which is mainly litigation-oriented, that when narrating their personal experiences in arbitration, they tend to use lexical items which are typical of litigation.

Though the results do not allow to draw definitive conclusions, given the limited number of interviews, I hope that this study may contribute to the comparison of the Italian situation with that of other countries.

Further research in this direction could consider the other party involved in arbitration procedures, i.e. corporations. A study of how in-house counsels view arbitration may help to provide a fuller picture of arbitration in general and to show whether and to what extent the integrity of arbitration practices is endangered.

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APPENDIX 1

AN INTERNATIONAL PROJECT Funded by
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International Commercial Arbitration Practice: A Discourse Analytical Study

Section 1 (Ad-hoc versus Institutionalized Arbitration)

- To what extent do you think it is the case that corporations often prefer 'institutionalized' arbitration to 'Ad-hoc' arbitration?

Section 2 (Arbitration clauses)

- Arbitration clauses are said to determine the form and legal basis of the whole arbitration process. What do you believe are the most critical aspects of such arbitration clauses?

- Multinational corporations often develop a 'standard' corporate clause and insist that their contract and commercial personnel should not deviate from it. What kind of an impact do you think

such a ‘standard’ corporate clause might have on the whole arbitration process?

Section 3 (Confidentiality in Arbitration Practice)

- One of the main reasons for preferring arbitration to litigation in international commercial disputes is that arbitration tends to preserve confidentiality in that it encourages privacy in relation to business practices and trade secrets of the parties. To what extent is confidentiality an important consideration for the parties at dispute today?

- To what extent does the relatively informal nature of arbitration proceedings, as against the more formal practices of litigation, make it a more attractive alternative for parties at dispute?

- To what extent do you think it is the case that this informal nature of arbitration processes and proceedings is giving way to more formal ones often similar to those found in litigation?

Section 4 (Speed and duration- extension of time-limit)

- One of the reasons why parties at dispute are said to prefer arbitration to litigation is that arbitration is deemed to be faster. Is this still a valid consideration?

- In your view, do parties at dispute voluntarily agree to prolong arbitration proceedings? If so, why do they do this? How is such an agreement to prolong the arbitration proceedings arrived at?

Section 5 (Costs)

- International commercial arbitration is said to be at least as expensive as trans-national litigation for medium/smaller cases, while possibly representing better value for money in more complex cases. Do you think this is still the case?

Section 6 (Intervention from national laws and courts)

- Is it the case that intervention through national laws or courts has had a serious effect on arbitration as a method of resolving disputes? If so, what kind of impact do you think court intervention has on the arbitration process?

- Do you think parties at dispute prefer an appeal system within the framework of arbitration proceedings to the one within the system of national courts?

- To what extent do such interventions through national laws and courts tend to compromise the integrity of arbitration processes and procedures?

Section 7 (Specialist background of Arbitrators)

- The original aim of arbitration was to help resolve disputes *'amicably'*, by which was meant involving the active co-operation of the parties to the dispute. In what ways do you think the frequent appointment of lawyers as arbitrators has affected the *'amicability'* of the whole arbitration procedure?

Section 8 (Finality of arbitration awards)

- Traditionally, one of the advantages of arbitration has been said to be its finality. In recent years, however, the number of applications challenging arbitration awards has been on the increase. In your opinion, does this trend contribute toward making arbitration more similar to litigation, thus compromising the integrity of arbitration process?

Section 9 (Cross-examination in Arbitration)

- How important is the role of cross-examination in International Commercial Arbitration practice?
- What is the role of the tribunal in controlling cross-examination?

- In your view and in your context, is it the case that cross-examination in civil law court proceedings is a relatively less familiar phenomenon? If so, what are reasons for this?

- In your view is it the case that cross-examination of witnesses forms one of the most important aspects of international arbitration proceedings?

- What sorts of challenges does cross examination pose to arbitrators and legal counsels from different legal cultures, especially in terms of somewhat different expectations as to its role?

- Do you believe that Civil Law lawyers are relatively less familiar with cross-examination techniques? If so, do you think that there is a need for specific training for this kind of skill?

- How do you characterize the style of cross-examination used by civil law lawyers and arbitrators in international arbitration proceedings (e.g. hostile, loud, risky, insistent, long, friendly, flexible, use of 'speech-questions' , open questions etc.)?

- Do you believe that it is a common practice for arbitration practitioners to prepare witnesses for cross-examination? If so, how is it done? Are there any cultural issues involved in direct versus cross-examination?

Section 10 (Language use in arbitration)

- Are there any specific guidelines provided on language policy in arbitration in your context?
- How is the language choice negotiated in a multilingual international arbitration setting?
- Is English generally preferred even where it is not the first language of the parties?
- To what extent in does language choice influence the choice of arbitrator?
- How common is the use of interpreters international arbitration?

Section 11 (Advantages of International Commercial Arbitration)

Please rate the following aspects and considerations for preferring arbitration to litigation in international commercial contexts. (Identify the most important by #1 and then follow with (#2, #3 etc) in order of decreasing importance.

REASONS FOR PREFERRING ARBITRATION OVER LITIGATION

- Flexibility and informality of processes and procedures, encouraging active participation of the parties in most areas of decision-making
- Enforceability of arbitration awards
- Confidentiality and privacy in arbitration proceedings
- Participation in the selection of arbitrators
- Relatively lower costs as compared with litigation
- Enforceability of awards
- Relative speed of completion of arbitration proceedings

- Freedom in the choice of venue of arbitration (neutrality of venue, preferred legal system)
- Costs of arbitration
- Challenge to arbitration awards-Interference from national laws and courts
- Appeal system within the arbitration framework

Section 12 (Areas of 'concern' in International Commercial Arbitration)

Please rate the following as areas of concern in international commercial arbitration, which, in your view, are likely to make it less attractive as an instrument of alternative dispute resolution:

(Please identify the most important by #1 and then follow with (#2, #3 etc) in order of decreasing importance)

- Flexibility and informality of processes and procedures, encouraging active participation of the parties in most areas of decision-making
- Enforceability of arbitration awards
- Confidentiality and privacy in arbitration proceedings
- Participation in the selection of arbitrators
- Relatively lower costs as compared with litigation
- Enforceability of awards
- Relative speed of completion of arbitration proceedings

- Freedom in the choice of venue of arbitration (neutrality of venue, preferred legal system)
- Costs of arbitration
- Challenge to arbitration awards-Interference from national laws and courts
- Appeal system within the arbitration framework

Section 13 (The future of arbitration)

- Do you believe that arbitration will continue to be the preferred method for resolving cross border commercial disputes?
- In your view, to what extent, and in which particular ways, are other forms of dispute resolution (e.g. conciliation and mediation) are likely to supplant arbitration procedures?
- In the views of at least some arbitrators, Arbitration practice seems to be being 'colonized' by the processes of litigation, in that, it has become very similar to litigation. In your experience, what aspects of the contemporary arbitration process make it similar to litigation?

APPENDIX 2

"Prima di iniziare un'altra cosa che ho notato.. da qualche parte sembra emergere eh.. la posizione per cui l'arbitro è un soggetto che svolge una funzione diversa rispetto al giudice eh… lo troviamo più in là .. questo non è vero.. cioè l'arbitro svolge esattamente la stessa funzione del giudice …cioè lui è chiamato dalle parti a dare vita ad un prodotto che è identico per la funzione che svolge ad un sentenza… e quindi il punto di partenza normale dell'arbitro.. poi le cose possono anche andare diversamente .. ma il punto di partenza normale e le aspettative in teoria delle parti.. se sono ben consigliate ..non è di trovarsi di fronte ad un fenomeno di soluzione delle controversie eh… diverso dal punto di vista ripeto funzionale rispetto a quello che si ha quando si va di fronte la giudice.. diverso è chi decide eh.. le procedure che segue ma il risultato della sua attività è identico a quello di una sentenza.. la particolarità dov'è.. per dire.. se fossimo di fronte al discorso arbitrato o giudice contro conciliazione o mediazione lì sì che è diverso il prodotto e quindi essendo diverso il prodotto può anche questo influire sul linguaggio ma altrimenti l'aspettativa dell'avvocato che si trova di fronte ad un collegio arbitrale e del suo cliente che ha scelto di andare in arbitrato non è.. mi devo comportare in modo diverso rispetto a quanto farei di fronte al giudice.. cambiano le regole.. cambiano ..però alla fine sto rappresentando gli interessi di un cliente in una lite giuridica in un contenzioso giuridico che si traduce poi in un prodotto che si chiama lodo che però ha la stessa natura di una sentenza.. cioè in un giudizio io ricevo il fatto applico il diritto.. questo è il prodotto.. ed è utilizzabile come si usa una sentenza io posso andare dall'ufficiale giudiziario ed usarla come titolo esecutivo per aggredire i beni del del debitore.. per cui questo pure l'ho visto e quando arriviamo vi dirò

secondo me non ci sono differenze proprio per questo motivo." (CERG 2008, I5)

This volume, the second of the CERLIS series, explores some features of arbitration language in the Italian context. This research is based on a corpus of interviews to 14 arbitration practitioners, mainly arbitrators and advocates. The volume consists of two parts. The first deals with controversial aspects of arbitration procedures, such as ad-hoc, institutional and free arbitration, arbitration clauses, confidentiality, cost and duration. A final section esamines the future of arbitration and the linguistic traits that make arbitration language similar to that of litigation.The second part investigates some linguistic traits of these narratives, such as the use of metaphors, linguistic borrowing and code-switching, evaluation as a means of establishing identity, and the inclusion of voices of 'others' in these accounts.

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