

The influence of legal tradition on Italian arbitration discourse

Maurizio Gotti

ABSTRACT

In the last few decades, arbitration has been increasingly adopted in trade and commerce to resolve conflicts. As this method of settling commercial disputes is commonly considered an efficient, economical and effective alternative to litigation, the language used in arbitration documents is usually deemed to differ from that of litigation texts. However, in recent years there has been a narrowing between the two practices, as litigation processes and procedures have increasingly been seen to influence arbitration practices.

In view of these considerations, the paper investigates the nature and the extent of the ‘colonisation’ of commercial arbitration discourse by litigation language in the Italian context, and explores the motivations for such an interdiscursive process. To better understand how and to what extent language forms/functions correlate to the ‘colonisation’ of arbitration discourse, the paper focuses on the lexico-semantic elements of the Italian arbitration texts examined here and on the linguistic expression of their rhetorical-pragmatic strategies. In particular, it examines whether key linguistic features of Italian legal language are also present in the texts taken into consideration.

The analysis is based on the recording of recent Italian arbitral proceedings as well as awards of commercial arbitration cases, and also examines documents used in Online Dispute Resolution, a field which is supposed be more user-friendly and accessible to laymen wishing for clear resolutions to resolve their disputes.

Relying on the analysis of the texts, the chapter shows the presence of the main lexical, syntactic and textual patterns typical of Italian legal language. The presence of these features can be explained not only by the legal background of many of the arbitrators but also by a process of standardization which seems to condition also the non-legal experts working in this field.

1. Introduction

In the last few decades, with the growing process of globalisation of trade and commerce, arbitration has become more and more common as an alternative to litigation for settling commercial and other disputes without resorting to ordinary justice. Many reasons have inspired the origin and spread of this alternative procedure. In certain countries, the fundamental reason was substantially the crisis of ordinary justice that was not able to provide effective and timely solutions to controversies. In general, the internationalisation of commercial transactions and the slow and time-consuming development of court cases and the elevated costs of traditional justice have led the market and the operators themselves to rely on alternative systems deemed to be faster and more efficient (Berger 2006). In addition, the social cost of litigation is extremely high. Indeed, negative consequences derive from litigation between parties belonging to the same partnership or involved in a positive economic relationship; recourse to a judge might lead to a breakdown in the economic relationship, something that is less likely to happen in an extrajudicial resolution of the controversy. This consensual approach enables the parties to maintain a good commercial relationship once the issue has been settled.

As arbitration is commonly considered an efficient, economical and effective alternative to litigation, the language used in this method of settling commercial disputes is usually deemed to differ from that of litigation texts. However, in recent years there has been a narrowing of differences between the two practices as litigation processes and procedures have increasingly been seen to influence arbitration practices, with the result that arbitration discourse itself has been affected by litigation practices, thus threatening the integrity of arbitration genres.¹ Already at the turn of the century one of the main experts in international commercial arbitration pointed out the seriousness of this change: “ICA [International Commercial Arbitration] has become almost indistinguishable from litigation, which it was at one time intended to supplant — with law, more law, legalese and more legalese: [...] motivated or reasoned decisions [...] are now increasingly long and turgid, and too full of legal learning” (Nariman 2000: 262).

As can be seen, the main reasons for this ‘judicialisation’ of international commercial arbitration are identified in the greater space taken up by legal practice on the one hand, and in the use of legal discourse,

on the other. Many commentators have observed that arbitration is being contaminated, or simply influenced, by litigative procedures. The high use of arbitrators coming from the legal field may be seen as one of the causes or the consequences of a sort of ‘colonisation’ of arbitration by litigation. As Flood and Caiger (1993: 440) remark, “lawyers are in a strong position to effect colonisation because of their power over the discourse of legalism.” This process of ‘juridification’ is not a new phenomenon. As early as 1960 Tobias wrote: “Recent criticism of the arbitration process protests that it is becoming too ‘legalistic’ and mourns the loss of the informal approach” (Tobias 1960: 596).

In view of these considerations, this paper investigates the nature and the extent of the ‘colonisation’ of commercial arbitration discourse by litigation language in the Italian context, and explores the motivations for such an interdiscursive process. To better understand how and to what extent language forms/functions correlate to the ‘colonisation’ of arbitration discourse, it will focus on the lexico-semantic elements of the arbitration texts examined here and on the linguistic expression of their rhetorical-pragmatic strategies. In particular, it will examine whether key linguistic features of legal language (Solan 1993, Gibbons 1994, Tiersma 1999) are also present in the texts taken into consideration. The analysis is based on the recording of recent Italian arbitral proceedings as well as awards of commercial arbitration cases, and also examines documents used in online dispute resolution, a field which is supposed to be more user-friendly and accessible to laymen wishing for clear resolutions to resolve their disputes.

2. The judicialisation of commercial arbitration in Italy

Before analysing some instances of Italian arbitration awards and proceedings, it is important to highlight that in Italy new arbitration rules came into force in 2006 (Legislative Decree no. 40 of 2 February 2006) which introduced some important modifications to the Code of Civil Procedure (CCP) regarding arbitral proceedings under the Italian jurisdiction (Barbieri 2007). This reform of the Italian Arbitration Law has increased the risk of making arbitration too similar to civil proceedings as arbitrators are treated in a manner comparable to state judges. Moreover, the excessively formal and legalistic character of the new legislation has influenced negatively the effectiveness and speed of the proceedings. The main problems with the new system are summed up by Cutolo and Esposito (2007) as follows: too strict legal regulations, too high fees and excessive time limits, which are virtually the same as those of ordinary civil proceedings.

The reform text clearly specifies that in case issues are not deemed arbitrable by the arbitrators, the arbitration proceedings are terminated and, consequently, parties have to involve the courts during arbitration proceedings in order to have a final decision. As a consequence, although Italian law does not require specific qualifications to become an arbitrator except for the requirement of impartiality and independence, local Chambers of Commerce strongly invite the parties to appoint legal experts as arbitrators. Indeed, although theoretically any professional can be enrolled at the Board of Arbitrators of the local Chamber of Commerce, in practice legal experts are generally appointed as arbitrators in an arbitration procedure, whereas all the other experts are appointed as consultants. This practice seems to have become entrenched, and the tacit convention of appointing lawyers appears to be well-established. On their part, the legal community have found that arbitration may be a significant means of extending their professional calling and augmenting their business income. As a matter of fact, attorney representation in arbitration is widespread across different systems and it has often been remarked that the parties believe that being represented by a lawyer increases their chances of a favourable award, even though it adds markedly to the cost of the proceedings (Block and Stieber 1987).

Even though arbitration is meant to represent a simpler procedure, the complexity of the legal principles applied, and the linguistic tools used have often been confirmed. In this respect, it is interesting to note that section 816-bis of the Italian Code of Civil Procedure states that the parties *may* be represented by a lawyer, but in most cases parties do appoint a lawyer, as they generally believe that such a complex procedure must necessarily be dealt with by legal experts. Therefore, if the parties are strongly recommended to have recourse to legal experts as arbitrators, arbitration practices are very likely to adopt litigation procedures, which in turn will encourage the exploitation of litigation features in arbitration discourse.

The influence of litigation on the process of arbitration has also been favoured by the fact that, in order to better protect their interests and prevent the risk of challenge to final awards, the parties often have recourse to legal experts as arbitrators. The Code of Civil Procedure (Section 829) indicates a list of circumstances in which an arbitral award can be challenged. Among other cases this happens when:

- the award contradicts either another award or a court decision;
- relevant legal rules have not been applied in the correct way.

It is clearly important, therefore, that arbitrators should have a solid legal background in order to ensure their familiarity with legal procedures and avoid incorrect practices that may make the award challengeable or annulable. Indeed, the majority of awards delivered up to 2006 had been challenged in front of the Court of Appeal mainly on legal grounds. This is one of the main reasons why, in the vast majority of cases, the arbitrator is also a lawyer. This appointment of a legal professional encourages the importation of typical litigation processes and procedures into arbitration practices and leads to an increasing mixture of discourses, thus threatening the integrity of arbitration practice. Indeed, legal experts use a highly formal and technical style, which is inevitably part of their *forma mentis* and of their professional background.

3. The influence of legal discourse on arbitral awards

The analysis of a corpus of Italian arbitration awards² has shown that arbitrators display a certain level of awareness of the importance of following the common linguistic conventions of this genre. Indeed, the lexical and stylistic differences between various arbitrators are nearly imperceptible; in these texts a personal style is overcome by the need to respect the textual conventions that belong to the tradition of arbitration. This may also be due to the fact that Chambers of Commerce organise training courses for both new and experienced arbitrators in order to guarantee uniformity and homogeneity in the procedure. Our corpus shows a very standardised layout and a highly restricted set of linguistic expressions commonly adopted. The general frame of the award is often identical, and standard clauses are used throughout. This not only allows the arbitrator to make savings in drafting time and costs, but also ensures that the clauses used are precise and correct.

In spite of the fact that arbitration is a procedure that is simpler and quicker than litigation, the language used in awards still presents the complexity that is typical of legal language. The linguistic differences between awards written by lawyers and non-lawyers are extremely subtle; lawyers comprise the vast majority of arbitrators, and other practitioners choose to adopt the same style in order to ensure the homogeneity of the genre. Moreover, before awards are actually issued, Chambers of Commerce often check that they comply with all the formal requirements. Consequently, all awards present a style typical of legal tradition, which uses a highly complex type of language.

3.1. The impersonality of style

The identity of the arbitrator is often hidden behind a very impersonal style, which is a feature of awards as well as of other legal documents. The use of impersonal subjects offers a clear indication of the minor role that individual identity plays in these kinds of texts, which conforms to the conventional criterion of impersonality that must be respected. Consequently, the personal pronouns related to the first persons *I* and *We* are never used in awards. The more impersonal expressions *L'arbitro* [The arbitrator] or *il Collegio arbitrale* [the Arbitration Board or Arbitration Panel] (or, simply, *il collegio* [the Board or Panel]) are always used in awards. Furthermore, impersonal structures — a typical element of legal language (Williams 2007: 36-38) — are constantly present in the corpus:

- (1) *Si ritiene opportuno decidere.*
[It is considered appropriate to decide.] (Award 3, emphasis added, like in all the other examples)

Several other expressions are used to make the style impersonal, such as the verb *essere* [to be] + adjective (e.g. *è chiaro* [it is clear], *è evidente* [it is evident], *è noto* [it is well-known], *è possibile* [it is possible]) or impersonal expressions such as *appare* [it appears], *occorre* [it is necessary], *sembra* [it seems]. Here are two examples found in the corpus analysed:

- (2) *Occorre verificare se sono state eseguite le prestazioni contenute nel contratto*
[It is necessary to verify whether the services mentioned in the contract have been performed] (Award 14)
- (3) *Sembra a questo Collegio che*
[It seems to this Board that] (Award 3)

Depersonal style is also characterised by its above-average use of passive forms, and legal texts, whenever there is a need to emphasise the effect or outcome of an action rather than its cause or originator, often make use of this form. Significantly, the agent is normally omitted in passive clauses in order to strengthen this depersonalising effect. Here is an example:

- (4) La domanda della società attrice di pagamento, in proprio favore, del compenso nella misura del 20% dell'importo del finanziamento approvato e, dunque, di €20.000,00 *può essere solo parzialmente accolta*.
[The claimant's request of the payment in its favour of a compensation corresponding to 20% of the amount of the approved funds and therefore of €20,000.00 *can only partially be granted.*] (Award 14)

In addition, the expression *il sottoscritto* [the undersigned] is repeated several times, seemingly to further emphasise the individual identity of the writer, as shown in the following examples:

- (5) Circa la Penale da € 3.000,00 *al sottoscritto* non pare si possano ravvisare questioni di illegittimità o carenze contrattuali che possano inficiare la legittimità della richiesta.
[As regards the penalty of € 3,000.00, according to *the undersigned* it is not possible to identify issues of illegitimacy or contractual omissions or oversights that could invalidate the request.] (Award 10)

Yet another typical linguistic device used in awards to make the style less personal and more objective is the suppression of the human element and the depersonalisation of the arbitrator's activities. In expressive terms, this phenomenon is realised by the adoption of inanimate subjects denoting documents or facts for typical argumentation-process verbs such as *confermare* [confirm], *dimostrare* [demonstrate], *indicare* [indicate], *ritenere* [believe], *suggerire* [suggest], as if to indicate that the validity of such conclusions was self-evident and unquestionable, resulting from the analysis of the facts and documents analysed in the arbitral proceedings. In this way conclusions are presented as a state of affairs which is analysed by the arbitrators in an impartial way and reported objectively as matters of fact. Here are two examples found in the awards corpus:

- (6) *Le motivazioni* già indicate nell'ordinanza [...] *hanno portato il Collegio Arbitrale* a respingere l'eccezione.
[The motivations already reported in the decree [...] *have led* the Arbitral Tribunal to reject the objection.] (Award 17)
- (7) *Tale documento dimostra* che alla data del 10 febbraio il rapporto commerciale con il cliente X proseguiva normalmente ed era, quindi, lungi dall'essere cessato.
[This document demonstrates that on February 10 the business relationship with customer X was progressing normally and was, therefore, far from having ceased.] (Award 3)

3.2. Lexical features

As arbitration was conceived as an alternative way to solve disputes avoiding the recourse to lawyers and courts, one would expect the texts of the awards to be written in a language which is more like ordinary discourse than legal discourse. Instead, from a lexical point of view, there are remarkable similarities between the language of awards and that of legal documents. One of the typical features of legal style is the use of

doublets or longer synonymic strings of words often referred to as ‘binomials or multinomials’ (Bhatia 1993). In legal discourse multinomials are much more common than in general discourse, and this statistical significance makes them a definite style marker of the language of the law. Binomial expressions have a long tradition in legal texts and their main function is to guarantee technical accuracy and greater precision, unambiguity, as well as all-inclusiveness. These are very frequent also in awards, as the following quotations show:

- (8) L’attore chiedeva che il Collegio Arbitrale *accertasse e dichiarasse* la società convenuta tenuta a versare il compenso pattuito
[The claimant requested that the Arbitral Tribunal should *ascertain and state* that the respondent was liable to pay the compensation agreed upon] (Award 14)
- (9) Stante la *decadenza e prescrizione* dell’azione, la domanda svolta da parte convenuta non può essere accolta.
[In view of the *limitation and lapse* of the action, the request filed by the respondent cannot be granted].
(Award 15)

Another characteristic of legal documents is its intense conservatism. Indeed, in the field of jurisprudence, fear that new terms may lead to ambiguity favours the permanence of traditional linguistic traits, which are preserved even when they disappear from general language. Old terms are preferred to newly-coined words because of their century-old history and highly codified, universally accepted interpretations. The reverence for tradition observed in legal language leads to the use of archaic spellings or obsolete forms. As regards the former, there are instances of archaic spellings also in the corpus of awards analysed here, such as *denunzia* instead of the usual *denuncia* [denouncement] and *denunziare* instead of the more common *denunciare* [denounce]. As regards the use of obsolete forms, the reading of the Italian awards has confirmed the presence of terms such as *erroneo* [wrong] instead of the common adjective *sbagliato*, or *sito* [located] preferred to the usual past participle used in an adjectival position *situato*. Most of the typical obsolete forms commonly used in legal texts and avoided in general language have been found in awards, as is the case of *addì* [on this day], *all’uopo* [to the purpose], *altresi* [moreover], *ancorché* [although], *atteso che* [inasmuch as], *d’altronde* [on the other hand], *nel caso di specie* [in this specific case], *nella specie* [in particular], *onde* [whence], *orbene* [hence], *posto che* [given that], *siffatto* [such], *talché* [thus], *testé* [just].

Very frequent also is the use of technical phrases typical of legal discourse, in which words occurring in general speech collocate with other common words to make expressions that are used only in legal contexts (Dardano 1994), such as *espletare un incarico* [perform a task], *prestare il proprio consenso* [to give one’s consent], *produrre un documento* [produce a document], *rigettare la domanda* [to deny a request], *stipulare un contratto* [to enter into a contract]. Similarly, awards contain verbs with meanings that are different from the usual ones and that instead are only found in legal contexts, such as *dedurre* [‘argue’, instead of the common meaning ‘deduce’] or *lamentare* [‘denounce’, instead of ‘complain’].

The influence of the discourse of litigation on that of arbitration is also clearly visible in the many legal expressions that occur in the awards taken into consideration. Here are a few examples: *adire il giudizio arbitrale* [resort to arbitral proceedings], *caducazione di un contratto* [annulment of a contract], *escussione di testi* [witness examination], *impugnare una sentenza* [appeal against a sentence]. Very frequent in awards is also the use of prepositional phrases typical of legal language (Cortelazzo 2006), such as: *a carico di* (e.g. *a carico del datore di lavoro* [to be borne by the employer]), *a norma di* (e.g. *a norma di legge* [according to law]), *a seguito di* (e.g. *a seguito della risoluzione del contratto* [as a consequence of the cancellation of the contract]), *a titolo di* (e.g. *a titolo di ravvedimento oneroso* [by way of compensation against payment]), *ai sensi di* (e.g. *ai sensi dell’art. 12 dello Statuto della Camera Arbitrale* [according to art.12 of the Statutes of the Arbitral Chamber]), *in sede* (e.g. *in sede giurisdizionale od arbitrale* [during judicial or arbitral proceedings]). Yet another typical characteristic of Italian legal lexis is zero derivation, which allows specialists to omit affixes when deriving a noun from a verb (Gotti 2011). Examples of this word-formation structure have also been found in arbitration awards as in the case of *convalida* [validation] from *convalidare*, *notifica* [notification] from *notificare*, *proroga* [extension] from *prorogare*, *ratifica* [ratification] from *ratificare*, *rimborso* [reimbursement] from *rimborsare*, *saldo* [settlement] from *saldare*, and *utilizzo* [utilization] from *utilizzare*.

One of the most evident features of Italian legal discourse is the use of Latinisms (Mortara Garavelli 2001), which are derived from the long tradition of jurisprudence dating back to Roman times (Fiorelli 1998). Several Latinisms are also found in awards, which strengthens the impression of ‘colonization’ of arbitration from the legal field. Here are a few Latinate forms found in our corpus: *ab origine* [from the beginning], *causa petendi* [the grounds of the claim], *contra legem* [against the law], *de facto* [according to facts], *dominus* [the owner of a right], *ex ante* [since then], *ex nunc* [since now], *in toto* [as a whole], *inter alia* [amongst others], *ope legis* [by law], *par condicio* [the same condition], *petitum* [the claim], *potestas judicandi* [judicial power], *ratio legis* [the spirit of the law], *una tantum* [once and for all].

3.3. Syntactic features

A comparison between court judgments and arbitration awards also shows great similarities from a syntactic point of view. One of the main features of legal documents is the great length of their sentences which is much higher not only than those found in general texts but also of those used in other specialised domains (Cavagnoli and Ioriatti Ferrari 2009). Even the recent reform of legal drafting promoted by the Italian branch of the Plain Language Movement (*Italiano Chiaro*) recommending that sentences in legal and administrative texts should contain no more than 25 words has not attained its goal, as sentences in legal texts commonly contain an average of twice as many words. The considerable sentence length of legal texts is due to the heavy information load required not only to minimise ambiguity and misunderstandings, but also to bring in all-inclusiveness (Bhatia 1993). Each mention is supported by specifications that clarify its status and identity. The awards contained in our corpus contain long sentences with an average sentence length of 43 words per sentence. Moreover, each sentence is subdivided into a number of embedded clauses. The following quotation exemplifies the typical structure of a sentence in the awards analysed:

- (10) Con tale domanda, come del resto ha esposto nella propria memoria conclusiva, la convenuta ha fatto valere la garanzia per i vizi della cosa che l’art. 1490 c.c. le accorda nella sua qualità di compratore e, lamentando l’inesatto adempimento nel quale a suo avviso sarebbe incorsa l’attrice consegnando cose affette da vizi, ha reclamato il suo diritto di non adempiere richiamando il precetto *inadimplenti non est adimplendum* di cui all’art. 1460 c.c. [With that request, as she also expressed in her conclusive statement, the respondent has asserted her right to a guarantee for the faults of the thing that art. 1490 c.c. grants her in her role of buyer and, bemoaning the inaccuracy that according to her the claimant would have incurred delivering faulty things, she has claimed her right not to comply, referring to the principle *inadimplenti non est adimplendum* formulated in art. 1460 c.c.] (Award 15)

This sentence, comprising 72 words, contains two main clauses coordinated by *e* [and] to express two legal actions carried out by the claimant (*ha fatto valere la garanzia* [has asserted her right to a guarantee] / *ha reclamato il suo diritto di non adempiere* [has claimed her right not to comply]). These two main clauses are then integrated by a series of specifications concerning the modalities of the request (*Con tale domanda, come del resto ha esposto nella propria memoria conclusiva* [With that request, as she also expressed in her conclusive memorial], the legal grounds of her claim with appropriate reference to specific articles of the Civil Code (*l’art. 1490 c.c.* [art. 1490 c.c.] / *di cui all’art. 1460 c.c.* [formulated in art. 1460 c.c.] and the quotation of a principle in Latin reported in one of them (*inadimplenti non est adimplendum* [he who fails to fulfil his part of an agreement cannot enforce that task against the other party, i.e. there is no duty to perform for the other side when they are in breach])). From a cognitive point of view, all these specifications and justifications lead to an increase in terms of information density; from a syntactic point of view instead, they give rise to the insertion of a series of embedded secondary and prepositional clauses, which makes the syntactic level of the whole sentence highly elaborate, relying on very complex coordination and subordination structures.

Another area in which the adoption of a legal style can be detected in awards is that of word order. Indeed, in arbitration documents one can find phrasal structures that are common in court documents such as the positioning of qualifying adjectives before their respective nouns rather than after them (as would be more common in general usage) in such cases as *contestuale esercizio* [simultaneous exercise], *espressa richiesta* [express request], *legale rappresentante* [legal representative]. A much more evident modification

of the standard word order at sentence level is the positioning of the verb in the initial position (VS(O)) rather than after its subject as is common in general speech (SV(O)): *Ritiene [V] il Collegio [S]* [The Panel believes]; *Rileva [V] la resistente [S] che [O]* [the defendant claims that], *Sono stati ultimati [V] i lavori [S]* [Work has been completed].

A typical characteristic of Italian legal discourse is the omission of the article before a noun in specific technical sentences (Rovere 2002). A few instances have also been found in the awards in the corpus, as in the expressions *avere diritto* [to have the right], *depositare denuncia* [to lodge a complaint], *far pervenire memoria* [to present a memorial], *presentare ricorso* [to file an appeal], *rigettare istanza* [to reject a request]. Similarly to what occurs in legal discourse, the article is frequently omitted before a noun phrase introduced by *a mezzo di* [by means of], *a seguito di* [following up], *con* [with], *mediante* [by means of], like in the following examples:

- (11) *Con atto introduttivo depositato alla Camera Internazionale di Arbitrato di Parigi il [...] R.G., società di diritto francese conveniva in procedura arbitrale la società di diritto italiano [...] S.p.A.*
[With a preliminary deed filed with the International Arbitration Chamber in Paris on [...] R.G. a French company started arbitral proceedings against the Italian company [...] S.p.A. (Award 6)]
- (12) *Tale attività veniva regolarmente prestata per un anno, fino a che il legale rappresentante della società revocava l'incarico mediante comunicazione a mezzo e-mail.*
[This activity was regularly carried out for a year, until the legal representative of the company revoked the task by means of a message sent by email.] (Award 18)

Very common in legal documents are also elliptical forms used to make sentences more compact. In the awards corpus these elliptical forms often correspond to past or present participles used to avoid complex active or passive verbal clauses:

- (13) *Sentito il teste, si deve concludere che la società attrice fosse a conoscenza dell'esistenza dei vizi dei beni acquistati.*
[After hearing the witness, it must be concluded that the claimant was aware of the faults in the goods that had been bought] (Award 15)
- (14) *La convenuta chiedeva di accertare e determinare ai sensi dell'art. 8 del contratto un compenso corrispondente all'attività effettivamente espletata dall'attore.*
[The respondent requested that the arbitration Panel should ascertain and determine the remuneration corresponding to the activity actually performed by the claimant according to art 8 of the contract] (Award 14)

Typical of legal discourse is also the frequent use of present participles as nouns. The examples found in the awards examined are several, such as *l'accettante* [the acceptor], *l'alienante* [the alienating person], *il delegante* [the delegant], *il dichiarante* [the declarant], *l'istante* [the petitioner], *il mandante* [the mandator], *la somministrante* [the supplier], *il rivendicante* [the claimant], *lo stipulante* [the stipulator]. Nominalization too is a characterising feature of legal discourse, which is particularly evident in deverbalised abstract nouns commonly based on suffixes such as *-anza* (*istanza* [petition], *ordinanza* [injunction]), *-enza* (*decadenza* [lapse], *soccombenza* [loss]), *-ità* (*configurabilità* [configurability], *inammissibilità* [inadmissibility]), *-mento* (*accoglimento* [acceptance], *procedimento* [proceedings]), *-sione* (*escussione* [examination], *estensione* [extension]) and *-zione* (*risoluzione* [resolution], *stipulazione* [stipulation]).

4. Legal influence on the discourse of arbitral proceedings

The influence of litigation on arbitration practices can also be detected in oral proceedings. This is particularly visible in those cases in which arbitrators belong to a legal profession. In order to analyse this issue, a few examples, drawn from real cases, will be examined in this section. The data analysed derive from five arbitration proceedings held in Italy between 2004 and 2008 concerning business-related disputes.

The role played by the arbitrator to guarantee compliance with the rules of the whole procedure is crucial, and is very similar to the role played by a judge in court. Indeed, it is not unusual for arbitrators to remind participants of the need to proceed in an orderly way:

- (15) A³: Un momento. Adesso noi dobbiamo procedere con ordine
[A: One moment. Now we must proceed in an orderly way]

Although the atmosphere in arbitration is more friendly than in court, arbitrators express their power by allowing or refusing specific questions or objections. For example, in the following extract, although one lawyer considers the question asked by the other party irrelevant, the arbitrator asks the speaker to answer it as he thinks that this information may be useful for a better understanding of the situation:

- (16) DL: Ritengo che la domanda sia ininfluyente [...]
A: Però siccome qui siamo in un interrogatorio libero che serve per chiarire i fatti, io piuttosto pregherei l'avv. PL1 di chiarire più esattamente qual è il punto che vuol fare evidenziare.
[DL: I think the question is irrelevant
A: But, as this is an informal examination whose aim is to clarify the facts, I'd ask Ms. PL1 to clarify more precisely what the point she would like to underline is.]

In arbitration proceedings arbitrators play a very important role as they are the ones who assign the allocation of turns, clearly selecting the next speaker by calling him/her by name:

- (17) A: Chiedo ora al dott. P se vuole precisare quando è giunto a conoscenza dell'attività che il sig. D svolgeva.
[A: Now I'd like to ask Mr. P if he would like to specify when he learnt about Mr. D's activity.]

In order to guarantee impartiality and neutrality, arbitrators maintain a certain level of distance and highlight the authority that they can exert. This is the reason why the participants are expected to ask the arbitrators for permission to take their turn:

- (18) DL: Io avevo solo da fare dei quesiti per precisare l'oggetto delle prime domande. Li facciamo adesso o dopo?
A: Assolutamente sì, io direi di seguito, se voi siete d'accordo.
[DL: I wanted to ask some questions regarding the subject-matter of the first questions. Shall we ask them now or later?
A: Absolutely. I would say now, if you agree.]

Another similarity with trial proceedings can be seen in those cases in which the parties interact directly without asking the arbitrator for permission to take their turns; in such cases, the latter immediately intervenes pointing out that this is not the procedure to be followed:

- (19) DL: *⁴ disponeva di una propria rete di agenti?
P: No, non disponeva di una propria rete di agenti
DL: Di agenti per la vendita [...]?
P: No, [...]
A: Ecco, io chiedo ai colleghi però, per il buon andamento, che le domande le rivolgete al collegio, dopodiché il collegio valuta se darvi corso oppure no, e dopo la persona risponde. Quindi prego, collega, se ha delle altre domande a chiarimento da chiedere su questo fatto dell'attività.
DL: Grazie Presidente. Se può chiedere qual era la forma contrattuale [...]
[DL: Did * have their own network of agents?
P: No, they didn't have their own network of agents
DL: Sales agents [...]?
P: No, [...]
A: Well, for the good running of the proceedings I'll ask the colleagues, though, to address their questions to the panel, then the panel decides whether to accept them or not, and then the person answers. So, please, my colleagues, if you have any more questions about this point
DL: Thank you President. If you can ask what the contractual form was [...]]

Indeed, the typical turn-taking sequence is similar to that used in court (Goodrich 1988): it starts with a party's request to the chair to intervene in the interrogation; the chair then addresses the question to the other party, without repeating the question but simply asking the party to answer it:

- (20) A: Bene, qualche chiarimento?
 DL: Sì, Presidente. Vogliamo chiedere al dott. D se in questa sua attività ha utilizzato materiale o qualsiasi altro elemento proveniente da o comunque appartenente a *
 A: Prego, il dott. D risponda
 D: Allora, [...]
 [A: Good, any questions?
 DL: Yes, President. We would like to ask Mr. D if he has used any material or other element coming from or belonging to * for his business
 A: Mr D, please answer
 D: Well, [...]]

The similarity between a trial and arbitration proceedings is sometimes explicitly underlined by the arbitrator, who makes a direct reference to procedures commonly used in court. In the following extract the arbitrator clearly refers to the principle on which the conduction of the hearing is based, i.e. the right of cross-examination, which guarantees that both parties have an equal possibility of taking their turns:

- (21) A: Allora adesso, per diritto di contraddittorio, chiederei a * di riproporre la domanda di prima.
 [A: Now, owing to the right of cross-examination, I would invite * to ask the previous question again.]

As Atkinson and Drew (1979: 66) remark, this procedure is typical of court examinations: "Whereas in conversation the competition among possible next speakers to self-select can inhibit long turns, in examination that pressure is relaxed, given that each speaker is assured of a next turn."

As we can see, these instances confirm a great similarity between the role of the arbitrator and that of the judge in court. Transcripts of proceedings frequently show cases in which arbitrators signal their strong loyalty to the legal profession, often underlying the membership of the same professional community to which the parties' lawyers also belong. This expression of commonality of experience is visible in the following quotation, where the arbitrator confesses his limited competence in technical matters, which he considers typical of legal professionals:

- (22) A: Questi documenti francamente sono di quelli che sono in lingua greca per noi arbitri e avvocati, quindi bisognerà poi rivederli [...]
 [A: Frankly, these documents belong to that category of papers which are all Greek to us arbitrators and lawyers, and therefore they need to be examined again [...]]

In this quotation, solidarity is increased by the adoption of the first plural personal pronoun in the expression *per noi arbitri e avvocati* [to us arbitrators and lawyers] used to underline the same kind of technical background. In other cases the belonging to a common professional community sharing the same legal competence is explicitly emphasized by the arbitrator:

- (23) A: Questo non per anticipare nessun giudizio, ma perché siamo tra avvocati e quindi è inutile fare come il giudice che sta muto ecc. La mia opinione è, a meno che poi voi mi dimostriate che è sbagliata, che l'insegnamento più recente della Cassazione sembrerebbe non applicare neppure all'Arbitrato rituale queste scansioni dolenti del processo civile.
 [A: What I am going to say does not anticipate any judgment, but since we are among lawyers and therefore there is no point in behaving like a judge who doesn't open her/his mouth, etc. My opinion is – unless you can demonstrate that it's wrong – that it may seem that even the most recent lesson learnt from the Court of Cassation does not allow these inappropriate interpretations of the civil process.]

This insistence on commonality is adopted by the arbitrators in order to promote the establishment of a more cooperative context in which their work with the counsels can be carried out smoothly and guarantee the achievement of a successful outcome in a friendly atmosphere. This sense of belonging to the same

professional community promotes a greater spirit of cooperation, which is underlined by the arbitrators' frequent request of opinion and feedback:

- (24) A: Vorrei richiamare la vostra attenzione su questo documento, 21 mi pare [...] ma quell'arco di tempo e quelle varianti in quell'arco di tempo non sono coperte da questa scrittura, ma giocano all'interno dei rapporti tra le parti?
[A: I would like to draw your attention to this document, no. 21, I think [...] yet aren't this time span and those variations in that time span covered by this agreement or rather, do they play a key role within the parties' relationship?]
- (25) A: Volevo anche chiedervi se la proroga al 28 giugno, che mi pare pacifica dal 31 maggio al 28 giugno, è stata accompagnata anche da una proroga delle polizze di assicurazione. Perché credo fossero delle polizze al 31 maggio ... Ho un appunto, può darsi che sia un mio appunto che non ...
[A: I would also like to ask you if the June 28th contract renewal – which, I think, had clearly been valid from May 31st to June 28th – is accompanied by a renewal of the insurance policies. Actually, I think they were policies expiring on May 31st ... I have a note, it may be my own which doesn't ...]

5. Legal language in online arbitration documents

The advent of computer technologies has favoured the development of procedures to resolve disputes totally, or partly, on line. This new phenomenon, which has spread widely in the last few years, is known under the acronym of 'ODR' (Online Disputes Resolution). Today there are several ODR services offered all over the world, usually with great success. This procedure has proved to respond positively to the needs of medium-small disputes, such as those in B2B (business to business) and B2C (business to consumer) transactions over the Internet. As e-commerce transactions are spreading quickly, with each of them potentially triggering a dispute, its growth greatly depends on the possibility to provide consumers with easy access to justice also taking advantage of the opportunities provided by the online environment.

Besides being the easiest and most innovative way of resolving problems deriving from transactions generated on the World Wide Web, ODR is also becoming popular to resolve off-line disputes. The reason is that the online dispute resolution service is simple and easy to carry out as it allows users to cancel time and space barriers, offering them the possibility to communicate easily. In its relatively brief history the ODR system has already been applied not only to the B2B and B2C market, but also to the C2C (consumer to consumer) transactions (Bordone 1998, Davis 2006, Hattotuwa 2006). This procedure has been defined as an 'open model' (Sali 2003) because it aims to favour direct communication between participants; the arbitrator's duty consists in helping parties discuss openly and find – through dialogue – a satisfactory solution to their dispute. In spite of the fact that arbitration on line takes place in a friendly setting and that the professional expert tries to build a relaxed and cooperative atmosphere avoiding legal jargon and conflictual tones, it is interesting to note that the documents that are drawn up often contain clear traces of 'legalese'. Look, for example, at the standard opening formula of an online arbitration agreement:

- (26) It is hereby stipulated, by and between the parties, that this matter is deemed settled pursuant to the following terms and conditions: [...].

The agreement form starts with the typical legal expression *It is hereby stipulated*, which underlines its performative value by means of the adverb *hereby* (Kurzon 1986). The sentence then continues with the doublet *by and between the parties*, again a typical feature of legal discourse (Hiltunen 1990); a few words later another doublet – very frequent in legal documents – occurs: *terms and conditions*. The same sentence contains the formal verb *deemed* (commonly found in legal texts, cf. Crystal and Davy 1969) and the expression *pursuant to* which is part of legal terminology.

Also the online arbitration agreement used by the Italian *RisolviOnline* system contains sentences which are full of legal expressions. For example, look at the following paragraph:

- (27) Dopo ampia e approfondita discussione, le parti hanno deciso di conciliare la loro controversia alle seguenti

condizioni... Le parti dichiarano di nulla avere più a pretendere l'una dall'altra in relazione all'oggetto della controversia in oggetto.

[After a lengthy and detailed discussion, the parties have decided to conciliate their dispute on the following conditions...The parties declare to have nothing more to claim from each other in relation to the object of the dispute in hand.]

Here too we find the presence of common legal features such as doublets (*ampia e approfondita* [lengthy and detailed]), specific legal terminology (*conciliare* [conciliate], *controversia* [dispute], *parti* [parties], *pretendere* [claim]) and formal expressions (*dichiarano* [declare], *in relazione a* [in relation to], *l'oggetto della controversia* [the object of the dispute], *in oggetto* [in hand]). Also from a stylistic point of view the second sentence presents an archaic expression such as *di nulla avere più a pretendere* [to have nothing more to claim] based on the anticipation of the direct object (*nulla* [nothing]) before the verb (*avere* [to have]) which is only found in a very formal style such as that typical of legal documents.

6. Conclusion

As has been seen in the analysis above, Italian arbitration texts show several instances of influence from litigation, as they clearly display a high level of formality, conform to a standard format and present linguistic features that belong to the legal tradition. This 'colonisation' of arbitration texts by litigation language is confirmed by the presence of those same elements also in awards written by arbitrators with non-legal professional backgrounds. Even when the arbitrator is not a lawyer, he/she will tend to produce texts that follow closely the traditional legal style. This may appear paradoxical, as the aim of the arbitration procedure is to simplify the process of resolving a dispute and, therefore, one might expect linguistic choices to be made with the objective of creating a document that is less complex than other forms of dispute resolution (most notably, of course, litigation). However, the advantages of using the tried-and-tested style typical of legal documents are so self-evident that they have led to an increasing adoption and consolidation of the traditional linguistic features that characterise 'legalese' even within arbitration awards.

The recent reform in arbitration practice in Italy seems to have strengthened this process of colonization, as large samples of legal discourse are present in the texts used in recent procedures too (Maci 2010, Sala 2010). This trend derives, at least in part, from the need to emphasise crucial characteristics and qualities of the award; first and foremost its legal validity and enforceability. A different and less standardised approach would lose the advantage of consolidated meaning-making, and, consequently, would be more likely to be controversial and thus run the risk of arousing further disputes.

Also the strong moves towards the use of the Internet, which have promoted procedures to resolve disputes totally, or partly, on line, have confirmed that large samples of legal discourse are present in the texts used in these virtual procedures too. Although sentences and awards are issued for laymen wishing for clear resolutions to resolve their disputes, the documents are compiled by legal experts who express their legal voice. Hence, lexical features and syntactic patterns typical of legal language appear in these texts too. This interdiscursivity is not only indicative of a process of 'colonisation' of arbitration discourse by the practices of litigation, but also provides evidence for the continuation of textual conservatism as a strong overarching phenomenon in the discourse of dispute resolution.

Notes

1. This threat to the integrity of arbitration genres has been the object of analysis of two international research projects, entitled *Generic Integrity in Legislative Discourse in Multilingual and Multicultural Contexts* (<http://gild.mmc.cityu.edu.hk/>) and *International Commercial Arbitration Practices: A Discourse Analytical Study* (<http://enweb.cityu.edu.hk/arbitrationpractice/>). The projects, led by prof. Vijay Bhatia of the City University of Hong Kong, have investigated the linguistic and discursive properties of a multilingual corpus of international arbitration laws drawn from a number of different countries, cultures, and socio-political backgrounds, written in different languages, and used within and across a variety of legal systems. Some of the results of the projects are presented in Bhatia, Candlin

and Gotti (2003); Bhatia, Candlin and Engberg (2008); Bhatia, Candlin and Gotti (2010); Bhatia, Candlin and Gotti (2012).

2. The corpus taken into consideration consists of 22 arbitration awards written in Italian, available in the archives of different Chambers of Arbitration in Italy, specifically in Reggio-Emilia (Awards 1–10), Piedmont (Awards 11–15), and Bergamo (Awards 16–22). These awards are mainly concerned with disputes that have arisen in business and private contexts.
3. A: arbitrator (sole arbitrator or president of the panel) / AB: arbitrator (member of the panel) / D: defendant / DL: defendant's lawyer / P: plaintiff / PL: plaintiff's lawyer.
4. For privacy reasons, names and other sensitive data have been replaced with an asterisk.

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