

# The Litigational ‘Colonisation’ of ADR Discourse

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The paper reports on the investigation concerning the possible colonisation of Alternative Dispute Resolution discourse by litigation practices, by assessing the situation in the Italian context. Drawing on documentary data, the paper investigates the extent to which the integrity of arbitration discourse is maintained, pointing out phenomena of contamination from litigation practices and exploring the motivations for such an inter-discursive process. An additional issue investigated concerns the relationship between the professional identity of the arbitrators and the kind of language used in their texts; for this purpose the analysis focuses on arbitration discourse both by legal and non-legal experts.

*Keywords:* Alternative Dispute Resolution, litigation, professional identity, arbitration discourse

## 1 Introduction

This paper takes into consideration the main features of the discourse commonly used in Italian commercial arbitration. As this method of settling commercial disputes is commonly considered an efficient, economical and effective alternative to litigation (Berger, 2006), 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, with the result that arbitration discourse itself has become ‘colonised’ by litigation practices. Nariman remarks that “modern International Commercial Arbitration [...] has become almost indistinguishable from litigation, which it was at one time intended to supplant” (2000, p. 262).

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Marriott (2000, p. 354) also complains about the unfortunate influence of litigation techniques on arbitration, which has led to an increase in the cost of settling disputes, thus damaging the arbitration process. Indeed, to better protect their interests, parties often have recourse to legal experts as arbitrators, which has the effect of encouraging the importation of typical litigation procedures into the arbitration practice. This in turn leads to an increasing mixture of discourses, thus threatening the integrity of arbitration genres.

This process of colonisation is also visible in the Italian context. A recent reform (Legislative Decree 40/2006) clearly specifies that in case issues are not deemed arbitrable, the proceedings are terminated and, consequently, parties have to involve the courts in order to have a final decision (Cutolo & Esposito, 2007). As a consequence, local Chambers of Commerce strongly invite the parties to appoint legal experts as arbitrators. The reason is that the majority of awards delivered up to 2006 had been challenged before the Court of Appeal on legal grounds. So now, although theoretically any professional can be enrolled at the Board of Arbitrators of the local Chamber of Commerce, in practice only legal experts are appointed as arbitrators in an arbitration procedure, whereas all the other experts are appointed as consultants. Therefore, if parties are strongly recommended to have recourse to legal experts as arbitrators, arbitration practices are very likely to adopt litigation features.

Drawing on documentary data, this paper – which is part of a more general project<sup>1</sup> – investigates the nature and the extent of the colonisation of commercial arbitration discourse by litigation language in the Italian context, and aims to identify the main reasons for such a hybridizing process. An additional issue to be investigated concerns the relationship between the professional identity of the arbitrators and the kind of language used in their texts; for this purpose the analysis will focus on arbitration discourse both by legal and non-legal experts.

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<sup>1</sup> The project referred to here (led by prof. Vijay Bhatia of the City University of Hong Kong) is an international research project entitled *International Commercial Arbitration Practices: A Discourse Analytical Study*. For further details of this project cf. the webpage at <http://enweb.cityu.edu.hk/arbitrationpractice/>. Some of the results of this project are presented in Bhatia, Candlin & Gotti (2010).

## 2 The language of awards

The analysis of a corpus of Italian arbitration proceedings<sup>2</sup> 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; as lawyers comprise the vast majority of arbitrators, other practitioners choose to adopt the same style in order to ensure the homogeneity of the genre. Moreover, before awards are actually issued, the Chamber of Commerce often checks that they comply with all the formal requirements. Consequently, all awards present a style typical of the legal tradition, which uses a highly complex type of language.

### 2.1 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

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<sup>2</sup> 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.

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, greater precision and all-inclusiveness. These expressions are very frequent also in awards, as the following quotation shows:

- 1 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)

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 the availability of 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], *altresì* [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 is also the use of technical phrases typical of legal discourse, in which words occurring in general speech collocate with other common words to form 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* [to be borne by], *a norma di* [according to], *a seguito di* [as a consequence of], *a titolo di* [by way of], *ai sensi di* [according to], *in sede* [during].

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, 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].

## 2.2 Syntactic features

A comparison between court judgements 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 & 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:

- 2 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]). The 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 statement]), while the legal grounds of her claim are asserted 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 syntactic feature which characterises Italian legal language is that it is highly formal and impersonal in style (Mortara Garavelli, 2001). Indeed, the legal text aims to present facts and opinions in an objective and depersonalised way. A typical device used to obtain this style is the use of the impersonal particle *si*:

3        *Si* ritiene opportuno decidere.

[It is considered appropriate to decide.] (Award 15)

A peculiar legal usage of this particle is found in those periphrastic forms where the *si*-particle is attached to the infinitive of the main verb rather than being put before the modal expression (such as *può*

*procedersi* [one may proceed], *è da ritenersi* [it is to be believed], *deve trasciversi* [it must be transcribed]). This postposition is very frequent also with the verb *trattare* [be about, concern] > *trattasi*:

- 4 *Trattasi* di una prospettazione a tal punto generica da non consentire neppure l'instaurazione di un serio ed effettivo contraddittorio.

[This is such a vague hypothesis that it is not to be held sufficient to start a serious and effective investigation.]

(Award 6)

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 is an example found in the corpus analysed:

- 5 *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)

An impersonal style is also characterised by its above-average use of passive forms, especially whenever there is a need to emphasise the effect or outcome of an action rather than its cause or originator. Significantly, in these cases the agent is normally omitted in order to strengthen this depersonalising effect. Here is an example:

- 6 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)

Yet another typical linguistic device used in awards to make the style less personal and more objective is the use of third-person pronouns or noun phrases even when the author refers to himself, such as *l'arbitro* [The arbitrator], *il Collegio arbitrale* [the arbitral tribunal] or *il Collegio* [the Panel] in expressions like the following: *l'arbitro*



*ritiene* [the arbitrator believes], *il Collegio arbitrale così provvede* [the arbitral tribunal decides as follows], *il Collegio ha così deciso* [the Panel has decided as follows]. A high degree of objectivity is also attained by the suppression of the human element and the depersonalisation of the arbitrators' 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 is an example found in the awards corpus:

- 7        *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)

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].

Another 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 statement], *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 example:

- 8 *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)]

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:

- 9 *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)

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 deverbal 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]).

### 2.3 Inclusion of legal references

A further element that characterises a lawyer's style is the constant citation of other legal documents. This intertextual aspect is another very typical feature of legal discourse. Indeed reference is often made to relevant documents as well as to statutes, norms and rules of the legal system that are applicable to the dispute. In the following example the contract from which the dispute originated and the Code of Civil Procedure are clearly cited:

- 10 il contratto di compravendita del 19 dicembre 1998, siccome integrato dall'accordo transattivo dell'1-3 dicembre 1999, deve essere dichiarato risoluto di diritto con effetto retroattivo, ai sensi e per gli effetti dell'art. 1457 Cod. civ. (Award 1)  
[The Sales Contract of 19 December 1998, as completed by the Agreement of Sale dated 1-3 December 1999, must be declared legally invalid, under the terms of Section 1457 of the Civil Code.]

It is unsurprising that the most frequently quoted legal text in the awards analysed is the Code of Civil Procedure, the main legal text used to rule the world of arbitration in Italy. Another text often referred to is the Arbitral Code applied by the Chamber of Commerce involved in the proceedings.

## 3 The discourse of proceedings

The influence of litigation on arbitration practices can also be detected in oral proceedings, particularly in those cases in which the arbitrators belong to a legal profession. In order to analyse this issue, a few examples, drawn from real cases, are examined in this section. The data analysed derive from five arbitration proceedings held in Italy between 2004 and 2008 concerning business-related disputes.<sup>3</sup> The events

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<sup>3</sup> The cases analysed here are part of the project presented in note 1. The analysis is based on the official transcripts of the arbitral panel sent to the parties' counsels. The examples reported here are drawn from 'Language and Power in Arbitration: the Italian Context', paper presented

analysed took place in an office, a setting completely different from a courtroom trial. Although the setting and atmosphere of the arbitration proceedings are more friendly than in court, they remain formal, as the arbitrators fear that an informal attitude might reduce the degree of detachment which is required by the situation and thus hinder their willingness to show great independence and impartiality. 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:

- 11 A<sup>4</sup>: un momento. Adesso noi dobbiamo procedere con ordine  
[A: one moment. Now me must proceed in an orderly way]

Although the atmosphere is more friendly than in court, arbitrators play a very powerful role as they are the ones who assign the allocation of turns, clearly selecting the next speaker by calling him/her by name:

- 12 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.]

One similarity with court proceedings is the fact that participants are expected to ask the arbitrators for permission to take their turn:

- 13 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

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by Patrizia Anesa at the 4th CERLIS Conference on Researching Language and the Law (Bergamo, 18-20 June 2009) and 'Arbitration in Action: the Display of Arbitrators' Neutrality in Witness Hearings', paper presented by Stefania Maci at the same conference. Dr. Patrizia Anesa and Dr. Stefania Maci are members of the Bergamo Unit of the project.

4 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.

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 arbitrator immediately intervenes, pointing out that this is not the procedure to be followed:

- 14 DL: \* 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:

- 15 A: Bene, qualche chiarimento?  
DL: Sì, Presidente. Se 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 hearing is based, i.e., the right of cross-examination, which guarantees that both parties have an equal possibility of taking their turn:

- 16 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 ask \* to ask the previous question again.]

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 belonging 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:

17 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:

18 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 dimostrate 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.

#### **4 The influence of professional identity on arbitration discourse**

In writing awards, arbitrators seem to display a certain level of awareness of the importance of respecting the textual conventions that belong to the arbitration tradition. It is interesting to note, however, that while an impersonal style is commonly adopted, the professional identity of the arbitrator is often made evident in the text. For example, in an award written by an accountant, the arbitrator's profession is clearly stated at the very beginning of the text:

19 Il sottoscritto, Dottore Commercialista arbitro unico per la soluzione della controversia insorta tra:  
- Società – Procedente (o Parte Procedente)  
- Ditta individuale – Convenuto (o Parte Convenuta).  
(Award 10)

[The undersigned, qualified business and accounting consultant, Sole Arbitrator for the settlement of the dispute that has arisen between:

- Company – claimant (or claimant party)  
- Individual company – defendant (defendant party).]

In another case an engineer was chosen as an arbitrator because of the technical nature of the dispute. Here also the profession of the arbitrator is clearly indicated at the beginning of the award:

20 Il sottoscritto dott. Ing. [...] libero professionista iscritto all'Ordine degli Ingegneri della Provincia di [...] al n. [...] e parimenti iscritto all'albo dei Consulenti tecnici del Giudice ed all'Albo dei Periti presso il Tribunale civile e penale di [...]. (Award 12)

[The undersigned [...], free-lance Engineer member of the Engineers Register of the province [...] no. [...], included in the Register of Technical Judicial Consultants, and of the Register of Expert Witnesses of the Civil and Penal Court [...].]



In this case, the qualification of the arbitrator, clearly stated at the opening of the award, not only stresses the fact that he is a qualified engineer, but also draws attention to his judicial background, and his role as an expert witness in legal procedures. The obvious intention is to emphasise the combined technical and legal expertise of the arbitrator, and establish his dual credentials as a figure of authority.

In some cases the choice of the arbitrator, especially if the appointee is not a lawyer, is explicitly justified. For example, the choice of an engineer as an arbitrator is stressed by the following sentence:

- 21 E' dunque indubitabile la competenza dell'arbitro in relazione al quesito proposto. (Award 21)  
[The competence of the arbitrator in this matter is undeniable.]

An expression of this type might sound redundant as the arbitrator's expertise is an intrinsic element to his/her appointment, but it was deemed important to affirm the appropriateness of the choice in such an explicit way.

In spite of being deliberately written so as to conform to a well-established format and language, awards sometimes contain minor elements that are suggestive of a particular professional identity derived from the arbitrator's background. As seen above, texts written by lawyers are the most representative of the colonisation of awards by standard legal language. Also the awards written by other professionals show similar legal influence and tend to conform to the linguistic practices used in litigation. However, the arbitrator's different background may surface, albeit in minor stylistic details. For example, the practice of writing figures in both numerals and letters is a strategy that is used exclusively by accountants in the corpus analysed:

- 22 Il Contratto prevede un canone d'uso pluriennale indivisibile di € 15.000,00 (*quindicimila/00*), oltre ad iva, meglio individuato nell'allegato D1 al contratto, corrispondente ad un canone annuo di € 2.500,00 (*duemilacinquecento/00*) più iva, da pagare in 4 rate trimestrali da € 625,00 (*seicentoventicinque/00*), sempre oltre iva. Oltre a tale canone il Contratto prevede anche

il pagamento di una 'quota di adesione' una tantum di € 3.000,00 (*tremila/00*), oltre ad iva. (Award 10)

[The contract includes an indivisible rent of € 15,000.00 (*fifteen thousand/00*), plus VAT, better identified in Appendix D1 to the contract, corresponding to an annual rent of € 2,500.00 (*two thousand five hundred /00*) plus VAT, to be paid in four quarterly instalments of € 625.00 (*six hundred and twenty-five/ 00*), plus VAT. In addition to the rent, the contract includes the payment of a one-off 'membership fee' at the sum of € 3,000.00 (*three thousand/00*), plus VAT.

This interest in the precision of numerical data is clearly a sign of professional allegiance. As regards awards written by engineers, all the structural elements required of an award in order to reinforce its legal validity are present, as shown in the previous sections. However, it is also possible to perceive their professional background emerge from their linguistic choices, such as the use of specific technical terms and acronyms related to the world of Information Technology (*CDN, ISP, I.P.*) or to business vocabulary (*contratto Interbusiness, start-up*). This kind of lexicon belongs to the arbitrator's professional background and also derives from his/her need to use the most appropriate and unambiguous terms. A peculiarity of an award where the arbitrator is an engineer is the use of mathematical formulae:

23 Al fine di valutare i giorni lavorativi necessari ad eseguire le opere in variante, sia di natura civile che impiantistica, si opera secondo lo schema indicato nell'espressione seguente:  $TV = \sum_i (D_i + V_i + R_i - P_i)$ . (Award 21)

[The days that are necessary to carry out the variations, both of civil and plant engineering structure, are calculated according to the following expression:  $TV = \sum_i (D_i + V_i + R_i - P_i)$ .]

The formula is used to calculate the number of working days needed to carry out the work. Every variable is then explained and the value calculated. Such a mathematical approach has not been observed in other awards. The aim of this process is to establish, in a very accurate and precise way, how the decision was made. Implicitly it also

aims to reduce the scope for any possible challenge to the decision, because a value reached through a mathematical process is hardly debatable.

The corpus also presents an award written by a surveyor. This type of professional category is rarely appointed as an arbitrator; this happens mainly in cases where the amount of money involved is not particularly high. As regards this award, the dispute derived from re-surfacing the courtyard of a block of flats. Even though all formal elements of the award were obviously respected, the issue did not present a high legal complexity; for this reason the award was particularly brief (four pages). The professional expertise is however identifiable, thanks to features such as the use of technical terms that refer to the process of re-surfacing, as well as the techniques and tools involved.

## **5 Conclusion**

The analysis carried out in this paper has shown that arbitrators have their own discursive resources which are typical of their profession, and any accomplished arbitrator will skilfully exploit such resources to achieve their institutional goals and realise their communicative actions. However, it appears as if the options available to arbitrators are considerably constrained by the fact that most of the arbitrators by virtue of their also being members of the legal community find it difficult to dissociate and distinguish themselves from their parent discipline, i.e., litigation. Hence, they continue to appropriate discursive resources that have been part of their profession for a long time. There is sufficient evidence in the corpus analysed here that arbitrators, in general, are significantly influenced by what they are quite used to doing in their litigation practice.

Indeed, arbitration awards and proceedings appear to follow the legal practice in several respects, especially in the use of technical lexico-grammatical and formulaic expressions, impersonal style, and also in the use of expressions relating to legal procedures, which are very similar to what one may find in litigation judgments. Moreover, the Italian arbitration awards in our corpus contain excessively long sentences, binomial and multinomial expressions, predominant use of nominalisations, impersonal style, and many other rhetorical features

typical of legal discourse. In spite of the fact that arbitration is a procedure that is meant to be simpler and quicker than its much more complex and slow counterpart litigation, the language used in awards still presents the complexity that is typical of legal language.

Also 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. Even the awards written by other professionals show similar legal influence. Although the arbitrator's different background may surface in some interesting stylistic details, the style adopted tends to conform to the linguistic practices used in litigation. 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.

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