Developments in the Discourse of Conflict Resolution

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In the last few decades, Alternative Dispute Resolution (ADR) – in the forms of arbitration, conciliation and mediation – 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. Moreover, the advent of new computer technologies has promoted procedures to resolve disputes totally, or partly, on line. This new phenomenon is known by the acronym ‘ODR’ (Online Dispute Resolution).

Drawing on documentary data, the first part of 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 interdiscursive process. The second part of the presentation analyses the evolution from ADR to ODR, providing examples of this computer-mediated practice both in Italy and the United States. In particular, the various phases of a typical procedure are analysed so as to highlight the great potentialities of this innovative tool. The new role of the mediator is also discussed, highlighting the fact that the adoption of the traditional model of non-virtual mediation in an online context can give rise to a few problems, at least given the present state of computer technology.

1. Introduction

In the last few decades, with the growing process of globalisation of trade and commerce, Alternative Dispute Resolution (ADR) has become more and more common as an alternative to litigation for settling commercial and other disputes without resorting to ordinary justice. Many factors have inspired the origin and spread of these alternative procedures, basically relying on the desire to provide a new tool to defend the rights of all those subjects that, mainly for economic reasons, could not afford expensive and long court proceedings. 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 more economical, faster and more efficient.

Arbitration, conciliation and mediation are typical examples of ADR processes which have proved to be very successful and are now employed in many countries, where they have become an integral part of the judicial system. Arbitration, the classic dispute resolution system for companies, represents a strong alternative to litigation. This procedure results in

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an arbitration award that is both binding and enforceable. Yet, as formal arbitration often mirrors litigation in both time and expense, commercial mediation, which instead implies a negotiated agreement between the parties, has become a more attractive ADR option. In this procedure agreement is reached by the parties through the work of a neutral party, the mediator, who helps them analyze the true interests involved in the dispute. He/she also identifies the differences implied in the parties’ respective positions, leading them towards a resolution of the dispute without imposing any decision.

The terms ‘mediation’ and ‘conciliation’ are often used as synonyms for the same concept, that is, informal cooperation towards the solution of a controversy thanks to the neutral participation of a third party. In reality, mediation and conciliation have their own fields of application deriving from the specific characteristics of these two instruments, the techniques and tactics they employ, and from the professional preparation of the experts working in each field. The term ‘conciliation’ should be employed for civil, commercial and employment matters, whereas the term ‘mediation’ is better suited for procedures involving family disputes as well as social matters.

2. The spread of arbitration

In the last few decades, all over the world arbitration has become more and more common as a legal instrument for the settling of commercial disputes. The very wide acceptance of this adjudging procedure has been promoted by the growing internationalisation of commercial exchanges, which involves an ever-increasing number of trade disputes. The popularity of arbitration can be explained by the many advantages that it offers compared to litigation, the main one being that the arbitrator is usually an expert in the field of the dispute, which thus ensures that the entire procedure can be conducted without the intervention of lawyers or other representatives, resulting in major gains in speed and cost-saving. Other advantages that have contributed to the diffusion of arbitration proceedings are the fact that the parties can choose the arbitrator themselves and can either represent themselves or be represented by a person of their choice; moreover, many disputes can be resolved on paper without a hearing, as the procedure is private, self-contained and final. Another aspect that makes this procedure attractive is that it should be financially advantageous.3

The high recourse to international arbitration has given rise to a widely felt need for greater harmonisation of the procedures followed,4 which has led to the elaboration of the UNCITRAL Model Law (UML)5, to be used as a model by most of the member countries to produce their own individual statutory provisions for commercial arbitration. Indeed, this

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4 Indeed, in this process of harmonisation, arbitration has taken an early leading role, as “historically, [this process] is one of the earliest examples of an attempt to adapt independent national legal systems to the relentless progress of international commerce.” (Cremades, Bernardo M. (1998) Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, Arbitration International 14/2, p. 158.

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The model has been adopted by a large number of countries. The elaboration of this Model Law, however, has not guaranteed complete uniformity among the various national legislations, as the different countries have used this model in different ways, depending – as we have previously stated – upon their national requirements, concerns, cultures, legal systems, languages, and other constraints. Indeed, in the process of adoption of this model, the English language text of the UNCITRAL has often had to be translated into the local languages, a procedure which has implied not only the adaptation of the original discourse to the typical features and resources of the national tongues, but also its adjustment to the cultural needs and legal constraints of each specific country.7

2.1. Arbitration in Italy

Due to its origins, arbitration is more widespread in common law countries. In Italy it remained marginal until quite recently, when European Community influence and the shortcomings of traditional justice systems forced legislators in 1994 to update the Code of Civil Procedure, introducing for the first time a section on international arbitration, in line with the indications of the main recent European and United Nations conventions. Under Italian law a distinction is made between standard arbitration (arbitrato rituale) and non-standard arbitration (arbitrato irrituale). The former exists when an arbitrator acts in compliance with the Code of Civil Procedure, rendering an award (lodo) which has the same effect as a judicial sentence; if filed at the local court house, it becomes effective by decree. The latter exists only within the contractual agreement between the parties and is peculiar to Italian law; it allows those involved to avoid publicity and means that arbitrators can avoid taxation on their fees. As regards the award itself, the arbitrators can base their decision either on law (arbitrato di diritto) or on equity (arbitrato secondo equità). In the former case they

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6 Legislation based on the UNCITRAL text has been enacted in many countries, including Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, the Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Kenya, Lithuania, the Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, the Republic of Korea, the Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, Zimbabwe and some of the states in the USA (California, Connecticut, Florida, Oregon and Texas).

7 This process of adoption and adaptation of the UML has been the object of analysis of an international research project entitled Generic Integrity in Legislative Discourse in Multilingual and Multicultural Contexts (http://gild.mmc.cityu.edu.hk/). The project, led by Prof. Vijay Bhatia of the City University of Hong Kong, has investigated the linguistic and discoursal 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 project are presented in Bhatia, Vijay K., Candlin, Christopher N., Engberg, Jan and Trosborg, Anna (eds.) (2003) Multilingual and Multicultural Contexts of Legislation: An International Perspective. Frankfurt am Main: Peter Lang; Bhatia, Vijay K., Candlin, Christopher N. and Gotti, Maurizio (eds.) (2003) Legal Discourse in Multilingual and Multicultural Contexts: Arbitration Texts in Europe. Bern: Peter Lang; Bhatia, Vijay K., Candlin, Christopher N. and Engberg, Jan (eds.) (2008) Legal Discourse across Cultures and Systems. Hong Kong: Hong Kong University Press.


are bound to apply written legislation; in the latter they are authorised by the parties to
derogue from legislation wherever its application contrasts with the common sense of justice.
Finally there is a distinction between negotiated arbitration (arbitrato ad hoc), which is
carried out according to the provisions agreed by the parties in the arbitration clause, and
official arbitration (arbitrato amministrato), which takes place under the control of an
institutional body according to its guidelines.

The 1994 law introduced several changes to previous Italian legislative provisions and
custom, motivated in particular by the development of international trade. The term
‘international arbitration’ itself originally referred to disputes between sovereign states but
has now moved to the realm of private litigation; indeed, the provision is extended in Article
832 of the law to instances “where a substantial part of the obligations arising out of the
relationship to which the dispute refers must be performed abroad”.

Italy relies not only on privately-appointed arbitrators for the implementation of awards, but
also on a range of public agencies, generally operating within local chambers of commerce.
These agencies offer members involved in small controversies a set of guidelines or
regulations to be followed and provide arbitrators. They are at the forefront of the movement
towards arbitration and conciliation in business disputes, whether domestic or international.
The number of awards rendered each year in Italy is still lower than court judgments.
Plausible reasons include the unwillingness of lawyers to relinquish a lucrative option
(ordinary justice) in favour of a more cost-effective one, the varying quality and reliability of
arbitrators, and – as pointed out earlier – the relative novelty of this practice. Italy has been
neglected for a long time as a seat of international arbitration because the law concerning
arbitration lacked specific provisions which could make awards certain and unchangeable by
limiting the number of recourses.10 According to law, Italian chambers of commerce are
entitled to set up special arbitration chambers with the purpose of resolving disputes between
parties.

In spite of the innovative characteristics of the 1994 Italian Arbitration Law, the recognition
of potential conflicts between it and other parts of the Code of Civil Procedure have led to the
drafting of Law 80/2005 delegating the Government to carry out further reform of arbitration
legislation. This reform took place in 2006 with Legislative Decree 40. Since then, the local
chambers of commerce, within which arbitral courts have been constituted, have strongly
invited the parties not only to adopt a standard arbitration procedure, but also to allow arbitral
chambers to appoint legal experts as arbitrators.11 The reason is that the majority of awards
delivered up to 2006 had been challenged before the Court of Appeal on legal grounds. The
consequence of the fact that parties are strongly recommended to have recourse to standard
arbitration under the control of legal experts as arbitrators is that arbitration practices are
likely to develop in the same way as litigation proceedings.

10 Cf. Ceccon, Roberto (2000) La Corte Arbitrale di Venezia, una nuova istituzione per attrarre
l’arbitrato internazionale in Italia. In Le prospettive dell’arbitrato interno ed internazionale: il
Regolamento della Corte Arbitrale di Venezia. Turin: Giappichelli, pp. 7-12.
11 In theory, any professional can be a member of a Board of Arbitrators of a local arbitration
chamber. This is possible provided that the would-be arbitrator complies with certain requirements as
established by the law, such as, for example, having at least three years of experience in legal and
financial matters and having been appointed as an arbitrator at least three times. In practice, only legal
specialists are appointed as arbitrators in an arbitration procedure, whereas all the other experts are
appointed as consultants.
3. The influence of litigation practices on arbitration discourse

Recent studies have pointed out great changes taking place in arbitration procedures, highlighting in particular its ‘colonisation’ by litigation. In this context, Nariman, one of the most distinguished scholars in the field, remarks that “modern International Commercial Arbitration […] has become almost indistinguishable from litigation, which it was at one time intended to supplant”. It is in this context that commercial arbitration has attracted pejorative descriptions such as ‘arbitigation’, or the ‘judicialisation’ of arbitration. Marriott also complains about the unfortunate influence of litigation techniques on arbitration, which has led to increases in the cost of settling disputes, thus damaging the arbitration process.

Indeed, although, in principle, the basis of arbitration is the free will of the parties to agree to resolve their disputes through arbitration, in practice, parties do not hesitate to opt for litigation when the outcome does not favour them. To better protect their interests, the parties often have recourse to legal experts as arbitrators, which has the effect of making arbitration similar to litigation, thus encouraging the importation of typical litigation processes and procedures into arbitration practices. This in turn leads to an increasing mixture of discourses as arbitration becomes, as it were, ‘colonised’ by litigation practices, threatening the integrity of arbitration practice to resolve disputes outside the courts, and thus contrary to the spirit of arbitration as a non-legal practice.

This process of colonisation is also visible in the Italian context. The recent reform (Legislative Decree 40/2006) 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 in arbitration proceedings in order to have a final decision. As a consequence, parties tend to favour the appointment of arbitrators with a legal background, usually lawyers. This also derives from the assumption that the decision of a member of the legal profession will carry more weight than that of a non-lawyer. In any case, this notion seems to have become entrenched, and the tacit convention of appointing lawyers appears to be well-established.

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 appointment of the arbitrator is invalid;
- the award contradicts either another award or a court decision that has already become res judicata;
- relevant legal rules are not 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. This is one of the main reasons why, in the vast majority of cases, the arbitrator is also a lawyer.

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Nonetheless, one of the fundamental principles upon which arbitration is based is that arbitrators can be appointed on the basis of their expertise in the subject that has given rise to the dispute. This is particularly important in cases where the nature of the disagreement calls for very specific technical or specialised competence. As Italian law does not specify what kinds of professionals may be appointed as arbitrators, the role can potentially be assumed by any professional, but, in more practical terms, arbitrators belong to a limited number of categories: for example, lawyers, accountants, university professors and researchers, architects, chemists and engineers. Allowing the arbitrator to be appointed from within the relevant profession can obviously be advantageous to both parties, because an expert arbitrator can circumvent the need for external consultancy, thereby reducing expenditures of time and money. In spite of these benefits, lawyers remain the preferred category from which arbitrators are chosen.

Nonetheless, the role of arbitrator continues to be commonly described as a ‘second job’, because arbitrators usually remain active in their original professions. This emerged particularly during our informal interviews with a few practitioners, who identified the varying nature of the work as a key reason for this phenomenon; this also depends on the intermittent use of this type of procedure, and the differing portfolio of expertise, experience or qualifications that may be required by the circumstances of individual cases.

3.1. The language of awards

To better understand how and to what extent language forms/functions correlate to the ‘colonisation’ of arbitration discourse, I will focus on the lexico-semantic elements of the arbitration texts examined and on the linguistic expression of their rhetorical-pragmatic strategies. In particular, I will examine whether key linguistic features of legal language are also present in the texts taken into consideration. For this purpose, a corpus has been compiled consisting of 22 arbitration awards written in Italian, available in the archives of various chambers of arbitration in Italy, specifically in Piedmont, Bergamo, and Reggio-Emilia. These awards are mainly concerned with disputes that have arisen in business and private contexts.

In theory, arbitration exists to provide conflicting parties with a means of resolving their dispute(s) without resorting to legal action, with the associated time and financial costs of ‘lawyering up’. This procedure also allows the parties to keep matters within their own professional sphere: when dealing with a dispute over a business contract, for example, it is

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15 The analysis presented here is part of an international research project entitled International Commercial Arbitration Practices: A Discourse Analytical Study led by Prof. Vijay Bhatia of the City University of Hong Kong. For further details of this project, see the webpage at <http://enweb.cityu.edu.hk/ arbitrationpractice/>. Some of the results of the project are presented in Bhatia, Vijay K., Candlin, Christopher N. and Gotti, Maurizio (eds.) (2010) The Discourses of Dispute Resolution. Bern: Peter Lang.

obviously beneficial to both parties to keep the dialogue as comprehensible as possible, avoiding the notorious complexities associated with legalese. One might hypothesise, therefore, that the type of language used in the final decision would display linguistic characteristics that correspond to the language of business, rather than the law. Nevertheless, in order to better consolidate the legal importance and validity of arbitral awards, lexical choices are often derived from, and retain, the characteristics of standard legal language.

In writing awards, arbitrators seem to display a certain level of awareness of the importance of their linguistic choices. The lexical and stylistic differences between various arbitrators are nearly imperceptible; in these kinds of texts the personal style is subordinate to the need to respect the textual conventions that belong to the tradition of arbitration. It is not possible to explore new writing styles; it is important to write within a certain traditional and accredited style. Indeed, chambers of commerce organise training courses for both new and experienced arbitrators in order to guarantee uniformity and homogeneity in the procedure. The analysis of our corpus has shown a very standardised layout and a set of commonly adopted linguistic expressions. The general frame of the award is often identical, and standard clauses are used throughout. This not only allows the drafter to make further savings in drafting time and costs, but also ensures that the clauses used are precise and correct.

3.1.1. Adopting the legal style

In spite of the fact that arbitration is a procedure that is simpler and quicker than full 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. The professional 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 some implicit criteria of impersonality that must be respected. Consequently, the first person personal pronouns *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 language17 – are constantly present in the corpus:

(1) Si ritiene opportuno decidere. (RE3: 3)
   [It is considered appropriate to decide.]

Similarly, passive forms are adopted in order to emphasise the result of the action, instead of the role of the agent, as in the following example:

(2) La domanda […] non può essere accolta. (RE3: 7)
   [The request […] cannot be accepted.]

It is interesting to note, however, that while the personal identity of the agent is obscured, the profession of the arbitrator is often made evident in the opening of the award with the abbreviation *Avv.*, the abbreviation of *Avvocato* [Lawyer] as in “Arbitro unico Avv.” 

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Arbitrator Lawyer]. This strategy belongs to the Italian tradition of emphasising the professional category to which a person belongs. This element is also present in the signature. Similarly, in an award written by an accountant, the arbitrator’s profession is clearly stated at the very beginning of the text:

(3) Il sottoscritto, Dottore Commercialista arbitro unico per la soluzione della controversia insorta tra:
- Società – Procedente (o Parte Procedente)
- ditta individuale – Convenuto (o Parte Convenuta). (RE10: 1)

[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).]

As regards lexical choices, one of the features that characterises the language used by legal practitioners is the use of Latinisms, a lexical choice that contributes significantly to the complexity of the language. Latinisms are a typical element of legal language and are widely used in order to specify particular legal terms with a precise meaning; at the same time they also contribute to the overall sense of formality and traditionalism. The corpus presents a high number of Latinisms, such as Ex tunc / Inadimplenti non est ademptandum / Inter partes / Petition / Causa petendi / Expressis verbis / Compensatio lucrum cum damno. The use of Latinisms occurs most frequently in awards written by lawyers, or when the Board comprises members of the legal profession, but it is also present in texts written by non-lawyers, with expressions such as una tantum [one-off] (used by accountants) or rectius and petitum (used by engineers).

Another lexical aspect that characterises the corpus is the presence of words which display a high level of formality and constitute a prerogative of legal language. For example, in the following quotation we find the expression all’uopo [for this reason] which is typical of legal language:

(4) All’uopo va evidenziato che la società convenuta non ha in alcun modo asserito l’inimputabilità del proprio inadempimento al fine di evitare la risoluzione di diritto del contratto di compravendita. (RE1: 6)

[For this reason it must be underlined that the defendant company has in no way established its immunity in fulfilling its duties in order to avoid the legal annulment of the sales contract.]

Even the terms used to define the people involved in the dispute, attore and convenuto [claimant and defendant], assume a meaning that is specifically related to legal language. Similarly, specific legal acronyms are widely used in Italian awards, such as PQM (Per Questi Motivi [for these reasons]), used to introduce a standard section of an award. This is an obvious term for legal practitioners and most arbitrators use it, often without writing it out in full, but it may be unknown to non-experts.

In spite of being deliberately written so as to conform to a well-established format and adopt features typical of legal language, awards sometimes contain minor elements that are suggestive of a particular professional identity derived from the arbitrator’s background. For

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example, the practice of writing figures in both numerals and letters is a strategy that is used exclusively by accountants in the corpus analysed, a clear sign of professional allegiance:

(5) 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 a 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 (tremil/00), oltre ad iva. (RE10: 1)

[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.]

As regards awards written by engineers, it is interesting to note a certain use of specific technical terms and acronyms related to the world of Information Technology (CDN, ISP, I.P.). This kind of lexicon belongs to the professional background of these arbitrators and is also a necessity deriving from the need to use the most appropriate and unambiguous terms in an award. Another peculiarity of awards written by engineers is the use of mathematical formulae, as in the following example, where the formula is used to calculate the number of working days needed to carry out the work:

(6) 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 = Σi (Di + Vi + Ri – Pi). (B6: 18)

[The days that are necessary to carry out the variations, both of civil and plant engineering structure, are calculated according to the following formula: TV = Σi (Di + Vi + Ri – Pi).]

The corpus also presents an award written by a surveyor concerning a dispute deriving from re-surfacing the courtyard of a block of flats. The professional expertise is identifiable here as well, 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.

3.1.2. Making legal references

Another typical element that characterises a lawyerly style is the constant citation of other legal documents. Indeed reference is often made to private documents relating to the dispute and/or public documents. Statutes, norms and rules of the legal system that are applicable to the dispute are also constantly mentioned. In the following example the contract from which the dispute originated and the Code of Civil Procedure are clearly cited:

(7) 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. (RE1: 6)

[The Sales Contract of 19 December 1998, as completed by the Agreement of Sale dated 1-3 December 1999, must be declared legally invalid, and applied retro-actively under the terms of Section 1457 of the Civil Code.]

It is not surprising 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. References to legal documents are particularly present in awards where the arbitrator is a lawyer, because they represent a sort of juridical and linguistic convention that gives the document a greater degree of legal force. Legal references are clearly used to emphasise the legal validity of the decisions made by the arbitrator and reflect a lawyer’s knowledge of the legal rules and norms that are applicable.

3.2. The discourse of 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 events analysed took place in an office, a setting completely different from a courtroom trial. Although the setting and atmosphere of the arbitration proceedings are friendlier 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:

(8) A: un momento. Adesso noi dobbiamo procedere con ordine
    [A: one moment. Now we must proceed in an orderly way]

Although the atmosphere is friendlier 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:

(9) DL: Ritengo che la domanda sia ininfluente […]
    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.]

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19 The cases analysed here are part of a study of arbitration discourse carried out by the Bergamo Unit (led by the present writer) of the international research team working on the project presented in note 15. The analysis is based on the official transcripts of the arbitral panel sent to the parties’ counsels. The examples reported here are drawn from Anesa, Patrizia (2009) Language and Power in Arbitration: the Italian Context. Paper presented at the 4th CERLIS Conference on Researching Language and the Law (Bergamo, 18-20 June 2009) and Maci, Stefania (2009) Arbitration in Action: the Display of Arbitrators’ Neutrality in Witness Hearings. Paper presented at the 4th CERLIS Conference (see above). Dr. Patrizia Anesa and Dr. Stefania Maci are members of the Bergamo Unit.

20 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.
Moreover, it is part of the arbitrators’ duties to make sure that questions are answered adequately and to correct participants when they do not seem to report events faithfully:

(10) A: no dopo nel *21
    P: scusi mi ero perso. Questo è precedente ha ragione.
    [A: no, later, in *
    P: sorry, I was lost. This was before, you are right.]

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:

(11) 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:

(12) 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:

(13) 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: Eccò, 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:22 it starts with a party’s request to the chair to intervene in the interrogation; the chair then addresses the

21 An asterisk indicates that sensitive data has been deleted for purposes of confidentiality.
question to the other party, without repeating the question but simply asking the party to answer it:

(14) 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 conduction of the hearing is based, i.e., the right of cross-examination, which guarantees that both parties have an equal possibility to take their turn:

(15) 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 Atkinson and Drew 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 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:

(16) 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

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professional community sharing the same legal competence is explicitly emphasized by the arbitrator:

(17) 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 apply these deceitful 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. From ADR to ODR

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 United States and in the last few years also in Europe, is known by the acronym ‘ODR’ (Online Dispute Resolution). The first experiments were carried out in the United States, at first within universities and nonprofit organizations. Subsequently the new models of online resolution of controversies have been widely diffused in all sectors of the market and particularly in the virtual one. Today, in fact, there are several ODR services offered all over the world, usually with great success. For example, SquareTrade – an American company that manages the procedures of resolution of quarrels on behalf of eBay – in the first five years of this millennium managed more than a million and a half disputes, resolving over 200,000.24

ODR 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,25 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 in resolving 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 barriers of time and space, 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 markets, but also to C2C (consumer to consumer)

transactions. All these are environments where both consumers and businesses need faster and more reliable instruments to solve disputes.

The main functions performed by ODR are the following:

a. **Assisted negotiation** – Two parties exchange monetary proposals, following an automatic system offered by a provider of ODR services. In this case no neutral party, meant to help the participants solve the controversy, is present.

b. **Online conciliation or mediation** – The participants communicate by e-mail or on a chat line, in the presence of a third party, the mediator, who helps them reach an agreement. This model is the one which most faithfully resembles the traditional form of face-to-face mediation.

c. **Online arbitration** – The participants rely on the decisions of an arbitrator, who not only helps them reach an agreement, but also produces an award. This procedure is carried out exchanging all the relative documents over the Internet. In essence, if online mediation is based on the dialogue between the participants, in online arbitration the parties mainly exchange documents online.

The latest versions of online mediation enable the mediator and all other mediation parties to use their computers, as well as a means of audio and visual communication and a broadband Internet connection, to request and participate seamlessly in live, synchronous audio/visual online mediation proceedings. These proceedings occur before professional mediators who are ‘on duty’ during normal business hours. Integrated video and audio connections enable all participants to view synchronously any evidentiary materials, documents and audio/video presentations online. A person desiring to commence synchronous online mediation must connect his or her computer and monitor equipped with a Web cam to the ODR service provider and then access the online mediation request form. After agreeing to the terms and conditions of the service, the applicant authorizes payment by a major credit card for mediation fees, and then inputs detailed information about the mediation requested.

Upon approval of the request, the service provider notifies the ‘on duty’ mediator, who promptly informs the mediation parties of the imminent synchronous audio/visual online session. On the date and time arranged, the parties and the mediator connect themselves to the online mediation provider website and insert the code number of the mediation case, as well as their passwords and usernames. At the start of the session the mediator introduces himself/herself and asks the parties to do the same; afterwards, each party will be asked to give his/her own version of the facts. The mediator may then ask for further explanations and subsequently will identify the controversial matters, and draft a resolution proposal. All participants can see and hear each other synchronously and take part in simultaneous audio communication. This method thus uses a main virtual ‘conference room’, as well as multiple, additional, separate virtual ‘caucus rooms’ where the mediator may meet separately with any participant to facilitate negotiations. This shuttling to ‘caucus rooms’ and re-joining in the ‘conference room’ can be done as many times as necessary without interrupting the synchronous audio/visual online mediation connection. As happens in traditional mediation, the virtual system guarantees confidentiality in the procedure, assuring privacy in the negotiation and inaccessibility of all communications by third parties.

If an agreement is reached, the mediator sends a draft of the mediation agreement online. This can be examined on the spot by the parties, who can thus edit it live. Thus a final mediation agreement is stipulated and signed. Thanks to electronic signatures, there is no need to print and exchange documents by fax. This last operation is necessary to make the online agreement binding, thus conferring on it the nature of a real contract enforceable by law.

4.1. ODR in Italy

In Italy, although the number of people relying on ODR is still low, its diffusion is constantly growing. In the last few years this phenomenon has become more and more popular. In particular, in the years 2000-2003 there was a rapid growth of online sites set up for promoting the resolution of disputes online through the ODR system. When it appeared, some people considered ODR too innovative, destined to disappear in a short time; others believed it was suitable only for certain instances. However, despite this criticism, ODR has developed constantly, gaining more and more attention from Italian users. Nonetheless, although it is considered a faster and cheaper tool able to overcome geographical barriers, Italian firms still seem to prefer traditional mediation and arbitration practices. Experts think this is mainly due to cultural reasons and to the fact that ODR requires a certain familiarity with long-distance communication instruments.27

One of the main ODR systems in Italy is the one developed by the Milan Arbitration Chamber, called RisolviOnline (see website at <www.risolvionline.it>).28 The procedure is similar to the one presented above. To start it, the participants must fill in the form on the provider’s webpage. This form can also be submitted by the lawyer representing a consumer or a firm. There are no limits of value: all controversies can be submitted to the service, independent of their economic value. The party that intends to promote the attempt at conciliation compiles and sends the submission form online. Besides pointing out personal data, the claimant must also briefly describe the controversial matter from his or her point of view, adding any necessary attachments and describing the nature and the value of the controversy. At the beginning of the mediation process, the claimant must also indicate his or her credit card number, because the procedure fee must be paid in advance.

After having received the form by e-mail, the provider contacts the counterpart. As online mediation is voluntary in nature, in case the counterpart does not agree to participate, the mediation attempt will not take place. In case of acceptance, a mediator is named, a time and date for a virtual meeting is set and a reserved communication line is created, on which the whole procedure will develop. On the date and time arranged, the participants and the mediator connect themselves to the RisolviOnline website and insert the code of the mediation case, the passwords and the usernames assigned to them. Once the virtual contact between the parties and the mediator is established, the procedure reproduces the traditional pattern of nonvirtual conciliation. The mediator introduces himself or herself and asks the

28 Other ODR systems created by Italian chambers of arbitrations are Concilia-online (<www.conciliaonline.net>, used by the chambers of Tuscany and Piedmont and many others) and WebCuria (<www.curiamercatorum.com>, used in Treviso).
parties to do the same; afterwards, each party will be asked to give his or her own version of the facts. The mediator may then ask for further explanations and will subsequently outline the controversial matters and draft a resolution proposal. The system is predisposed in such a way as to allow the parties to choose the type of negotiation that they prefer: an exclusive conversation with the mediator (using the available ‘reply’ command) or all the participants (using the command ‘reply to all’). At the end of the meeting, if the result is positive, the mediator sends the participants the Online Mediation Agreement by mail. Two copies of the Agreement must be printed, signed and sent to *RisolviOnline* by fax (the digital signature system is still not very widespread in Italy). The service keeps a copy of the document and makes sure that each participant receives a copy signed by the other party.

The service provided by the Arbitration Chamber of Milan has proved to be very successful and has favoured international commercial relations. Indeed, 45% of *RisolviOnline* mediation requests have been initiated by foreign parties, thus demonstrating the international scope of this ODR instrument. A comparison of the figures of recent years (see Figure 1) shows a great development, with 117 new requests for online mediation services filed in 2007. This is an impressive result when compared to the 16 requests filed in 2003. The most frequent matters involved in the disputes have been online auctions, travel/tourism, and the purchase of hardware/software.

![Figure 1. *RisolviOnline* mediation requests (2003-2007).](image)

### 4.2. The language of ODR documents

The ODR procedure has been defined as an ‘open model’ because it aims to favour a direct exchange of communication between participants; the mediator’s duty consists in helping parties discuss openly and find – through dialogue – a satisfactory solution to their dispute. In spite of the fact that mediation on line takes place in a friendly atmosphere and that the mediator tries to build a relaxed and cooperative atmosphere, avoiding legal jargon and

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conflictual tones, it is interesting to note that the documents that are drawn up by the mediator often contain clear traces of ‘legalese’. Look, for example, at the standard opening formula of an ODR mediation agreement:

(18) 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. The sentence then continues with the doublet by and between the parties, again a typical feature of legal discourse; 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) and the expression pursuant to, which is also part of legal terminology.

The conciliation agreement used by the Italian RisolviOnline system also contains sentences which are full of legal expressions. For example, look at the following paragraph:

(19) 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.

Here, too, we find the presence of common legal features such as doublets (ampia e approfondita [lengthy and detailed]), specific 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 [at hand]). Furthermore, from a stylistic point of view the second sentence presents the archaic expression 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 found only in a very formal style such as that which is typical of legal documents.

4.3. The communicative effectiveness of online mediation

The ODR system offers several advantages: it allows participants who are not able or do not want to meet in person to communicate rapidly without incurring excessive costs. The system also allows the supplier of the service to name experienced and prepared mediators without worrying about travel distances and expenses, and without having to rent a facility in which to conduct the mediation proceedings. International commercial relations are favoured,

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since the resolution of a controversy between international parties is not slowed down or impeded by long distances. As lawyers’ fees are perhaps the greatest expense in traditional litigation, and even sometimes in traditional mediation, in cyber-mediation parties are able to save a large amount of money, as hiring a lawyer is often unnecessary. Moreover, taking part in cyber-mediation is very convenient, as the parties are able to engage in the negotiation when they are available. The mediator can also contact either or both of the parties privately, without affecting the flow of the mediation. The idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party. In addition, many of the cyber-mediation providers have fully automated websites that are available all-day long, every day of the year. Parties can therefore proceed to negotiate the settlement of disputes immediately, rather than waiting for a long time to go to trial. The cost of the service is also proportional to the value of the controversy. Although a payment is necessary to start the mediating process, if the counterpart refuses to participate, the sum is refunded entirely.

The system nevertheless has some drawbacks when compared to traditional mediation. Virtual communication – at least in its present state – is not very ‘communicative’ from an emotional and nonverbal point of view. Negotiations are certainly more effective when parties are able to communicate freely facing one another. For example, helping parties to listen and understand concerns, empathise with each other, vent feelings and confront emotions is considered an important art in mediation. Substituting e-mail for dialogue, for example, makes it difficult to give any weight to emotion in mediation. Additionally, communication online does not express the variable tone, pitch and volume of the participants and cannot convey personality traits or physical cues. It is therefore more difficult to evaluate the flexibility of a particular party, or the strength of a party’s feelings or confidence on a particular issue. Consequently, some authors have argued that the lack of personal presence in cyber-mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties:

The online medium, at least the e-mail environment, makes it difficult for the mediator to manage or temper the tone of the interactions without sounding controlling and judgmental. The mediator, at least in the beginning, is a disembodied voice and cannot use her own physical ‘personhood’ to set the parties at ease and create an environment for sustained problem-solving. Similarly, absent the physical presence of the disputants, the mediator has difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes.

Experts in this sector agree in considering this model inadequate and believe that new efforts to improve the level of virtual communication are necessary. Some improvement can certainly derive from a greater diffusion of video and audio communication systems (web

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cams) that make long-distance visual communication between the participants and the mediator possible. Another important issue is concern over the protection of confidential material in ODR. While traditional mediation does not necessarily create a physical record, online mediation creates an electronic record. This could potentially enable a party to easily print out and distribute e-mail communications without the knowledge of the other party. This may hinder the development of open and honest exchanges in cyber-mediation. Finally, the familiarity of users with IT technologies is fundamental when the Internet becomes the main vehicle through which mediation takes place.

In spite of the great possibilities offered by modern technology, some people prefer asynchronous communication systems such as email to synchronous systems such as chat as this gives them more time to think about the proposals, requests or objections received before writing their replies and carefully editing them. Indeed, there are several benefits that stem from the asynchronous nature of e-mail communication; messages are not transmitted live, but can be written and sent later. Other advantages are pointed out by Melamed:41

> Experienced mediators are well aware of the benefits of asynchrony. This is a big part of the reason that many mediators ‘caucus’ (meet separately) with participants. Mediators want to slow the process down and assist participants to craft more capable contributions. This concept of slowing the process down and allowing participants to safely craft their contributions is at the heart of caucusing. Surely, the Internet works capably as an extension of individual party caucus and is remarkably convenient and affordable. Internet communications take less time to read and clients do not hear a clicking of the billing meter. When the Internet is utilized for caucus, the non-causing participant does not need to sit in the waiting room or library growing resentful at being ignored.

Asynchronous communication is particularly appreciated by participants who are non-native speakers of English as it provides them with more time to analyze the texts received and solve all the linguistic and conceptual problems related to their interpretation. If language constitutes a problem, so may culture in general. Indeed, the success of mediation between participants from different countries greatly relies not only on the mediator’s professional preparation but also on his or her awareness of the particular negotiation conventions adopted by different business and cultural communities.

5. Conclusions

As can be seen in the analysis above, 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 the language of litigation is confirmed by the presence of those same elements 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 increasing adoption and consolidation of the traditional linguistic features that characterise ‘legalese’ even within arbitration awards.

Moreover, the recent 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 also present in the texts used in these virtual procedures. Although cyber-mediation is likely to become more popular and better suited to resolving disputes as technology advances, the present reality has also shown that the new role of the mediator has proved to be more critical as the reproduction of the traditional model online has been found to meet some difficulties mainly due to the present state of computer technology.

References


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