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研究課題名（和文）Best practices in ADR in EU and Japan: an assessment for future legislation

研究課題名（英文）Best practices in ADR in EU and Japan: an assessment for future legislation

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研究成果の概要（和文）：本研究では、EU及び日本に於ける裁判外紛争解決手続（ADR）の成功の違いの背後にある主要な原因を十分に特定することができた。とりわけ、私的に運用されつつ国家に監督されるADRが発展するかについての明確なパターンを特定した。EUでは立法的手段（例えば合意の執行可能性）及び非立法的手段（例えば、ADRに関する教育活動を通じてADRが強力に推進されている一方、日本は、とりわけ立法的措置が関わる場合には、ヨリ注意深い政策を採っているといえる。最近２０１５年の展開では、日本は私的に運用されるADRを強化することに関心を示していないことが確認され、また法制度の改正に関わる議論にもその方針が反映されている。

研究成果の概要（英文）：The research was able to achieve the expected results. It properly identified some of the key reasons behind the different success of ADR in EU and Japan: in particular, it could identify clear patterns behind the development (or non-development) of privately-managed, State-supervised ADR. While the EU is pushing hard to promote ADR, also through the use of legislative (i.e. enforceability of the agreement, tax breakdowns) and non-legislative (i.e. education about ADR, institutional cooperation between States and providers of ADR services), Japan seems to be way more cautious, especially when the legislation is concerned. The latest developments in 2015 confirm that Japan is not interested in strengthening privately-managed ADR, and the discussion about amending the legislation reflects this approach. Over two years, the (partial) results of the research were presented in 4 papers and 14 conferences/seminars/invited lectures.

研究分野：比較私法

キーワード：ADR　Dispute Resolution　EU

Research Report
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Best Practices in ADR in EU and Japan: an Assessment for Future Legislation
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1) Research background -研究開始当初の背

The research, titled Best Practices in ADR in EU and Japan: an Assessment for Future Legislation started on April 1st, 2014 and ended on March 31st, 2016. It focused on recent developments and present situation of ADR in EU and Japan, also in connection with the recent legislative activities in the countries.

The research moved from a general assessment the general push towards extra-judicial forms of dispute resolution being promoted in EU and Japan. Most advanced nations are currently employing and promoting the use of privately-managed ADR services to give relief to the State-managed court system. Europe and Japan have both faced this issue and approached the matter in slightly different ways. The legislative background of the research was, for EU, the "Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters" and for Japan the Act n. 151, 1 December 2004 on the promotion of ADR. While under these legislative frameworks both the EU and Japan provided the legal infrastructure for the constitution and management of private, fundamentally market-based, dispute resolution centers, the results have been radically different. In EU countries, ADR procedures are counted in the range of ten thousands; in Japan, only a few cases are dealt with by the recently established centers for ADR. Moreover, the caseload is highly polarized, with a few institutions based in major cities (particularly Tokyo) dealing with a disproportional majority of cases.

2) Purpose of the research - ***２．研究の目的***

As the general idea behind this legislative maneuver is to provide citizens with a simple and cost-effective system for dispute resolution, a smooth implementation would be crucial. There is also a general benefit for the system: more litigation driven outside of the court system means cost savings for the State and a relief for overburdened judges, resulting in overall quicker and better management of disputes. However, in Japan the reform fundamentally failed to achieve its purpose, and, after 12 years from the ADR legislation, it is possible to say that it was unsuccessful. On the other hand, in EU the scope of ADR is broadening and States are putting their best efforts to promote ADR not only on a legislative level, but also with non-legislative actions, like education on ADR, communication, etc.

The purpose of the research was therefore to carry out a comprehensive analysis of:

- Legislation about ADR, in comparative terms;
- Implementation of the framework in the concerned jurisdictions. The EU being composed of 28 different States, the research allowed for the analysis of

several different approaches under the same legislative umbrella (the Directive 2008/52/EC);

- Survey of the "best practices" carried out in leading ADR institutions.

The purpose of the research was therefore double-fold: from one side, to provide a solid and convincing *theoretical* analysis of the problem, the recent developments and likely outcomes in the near future. From the other side, was to provide with *practical* suggestion on how to make ADR effective.

3) Research methodology -研究の方法

From a methodological perspective, the research relied on many tools, coming from different specializations: civil procedure, sociology of law, comparative law, and practical experiences of people professionally involved in ADR, etc.

As for the methodology, the research may be divided into three main tasks: 1) reading and review of the existing literature on the subject (preliminary, and updated during the research itself); 2) interviews with scholars and professionals involved in research or practice of ADR and arbitration; 3) critical comparative law analysis of the raw data (both qualitative and quantitative) acquired through 1) and 2).

1 – Literature review

When approaching the field of ADR, the first theme one is usually confronted with is the long-debated issue of the role and function of ADR. While the theory of contemporary ADR, conceptually conceived by the so-called "School of Harvard" imagined procedures of mediation being something more refined than a mere patch for the deficiencies of the national court system, it appears that now in many jurisdictions ADR is primarily being implemented by legislators as a means of reducing the work burden of judges. This, however, marks a first difference between EU and Japan, as the latter seems to be more faithful to the orthodoxy of ADR, while Europe adopted a "heretical" approach justified by the practical need of promoting ADR. Being already familiar with the subject, I collected the latest publication and I identified some recurring patterns in the analyses of litigation and ADR. Of course, considering the practical aspects of my research, I did not limit myself to the acquisition and reading of scholarly writing, but I also collected and analyzed the latest reports by the EU Commission and the Ministry of Justice of Japan. During the research period, I constantly updated my bibliography not to miss any development.

2 – Confrontation with scholars and professionals involved in research or practice of ADR

This part of the research was implemented in three venues: international conferences; research meetings; visit to ADR institutions.

During the research period I was able to attend and/or be a speaker/invited lecturer in 19 occasions (not including of course academic events unrelated to this specific research, in which I was nevertheless able to meet experts of ADR and discuss the matter with them). The selection of the venues/event was carefully made to have the chance to meet and discuss

with expert of ADR in Japan and abroad. My attendance was not limited to purely legal conference, as the input from scholars in neighboring fields (economics, sociology, etc.) was very important to achieve a comprehensive look on the problem. Presenting the partial results of the research allowed me to receive comments and suggestion from accomplished colleagues, which I believe helped me significantly in refining my conclusions.

As for the research meetings, I was able to meet leading experts of ADR, in Europe and Japan. I was also able to approach some members of legislative committees, both politicians and scholars. The discussion with people practically involved in the legislative process helped me to understand political and strategic issues behind the reforms.

Finally, visiting ADR institutions and discussing with mediators, procedure administrators, etc. was very important to identify best practices and to reflect on their "exportability" from an institution/jurisdiction to another.

3 – Critical comparative law analysis

After acquiring the theoretical and practical insight necessary to formulate informed findings, I processed the information and presented the results in both writing (see *Publications*, below) and orally (see *Presentations*, below).

4) Research implementation and results - 研究成果

As mentioned, the research was primarily aimed to:

- acquire a complete and structured picture of ADR in EU and Japan from a legal – technical point of view;
- inquiry about the opinion of the academic and practitioners' community on present-day situation;
- asses the best practices in ADR in Japan and EU as to properly understand the impact of recent reforms.

The research, as expected, was quite easy during the first phase (1 – Literature review), while became more complex as well as more interesting during the second and third phase.

As expected in the background of the project, it appears that recent reforms aimed to promote privately managed ADR in Japan arbitration basically failed to reach the purposes, while in EU the situation is more complex, and it is very difficult to come to a final conclusion when the European context is considered.

The research, however, properly identified some of the key reasons behind this difference: in particular, I could identify clear patterns behind the development (or non-development) of privately-managed, State-supervised ADR. While the EU is pushing hard to promote ADR, also through the use of legislative (i.e. enforceability of the agreement, tax breakdowns) and non-legislative (i.e. education about ADR), Japan seems to be way more cautious, especially when the legislation is concerned. The latest developments in 2015 confirm that Japan is not interested in strengthening privately-managed ADR, and the discussion about amending the legislation reflects this approach. The guessing formulated

during the literature-review phase about the different approach to ADR theory found its confirmation in the research: Japan is still quite conservative in its approach to ADR, and it is very reluctant to adopt any kind of measure (*e.g.* mandatory mediation attempt in some selected matters; direct enforceability of agreements) that would be at odds with the voluntary, non-binding nature of ADR.

As mentioned, part of the results of my research was successfully presented in several national and international venues. Information gathered during the research was published in several books and journals (see Section 5 below).

5) List of publications and presentations -主な発表論文等

Publications

<u>*Forthcoming*</u>

1) <u>Colombo, Giorgio Fabio</u>; Shimizu, Hiroshi, "Litigation or Litigiousness? Explaining Japan's "Litigation Bubble" (2006-2010)", in *Oxford University Forum for Comparative Law*, 2016 (peer-reviewed)

<u>*Published*</u>

2) <u>Colombo, Giorgio Fabio</u>, "Nomophilacy and Beyond: Comparative Reflections on Judicial Precedents by Supreme Jurisdictions in Italy and Japan", in *European Journal of Comparative Law and Governance*, vol. 2, 4, 2015, pp. 281-315 (peer-reviewed).

3) <u>Colombo, Giorgio Fabio</u>, "Il Giappone nel diritto comparato. Un'analisi socio-legale attraverso la percezione del contenzioso" [Japan in Comparative Law. A socio-legal analysis through the perception of litigation], in Miranda, Antonello (ed.), *Modernità del pensiero giuridico di G. Criscuoli e diritto comparato. Parte III*, Giappichelli, Torino, 2015, pp. 85-102 (no peer-review)

4) <u>Colombo, Giorgio Fabio</u>, "La promozione dell'ADR in Italia e in Giappone" [The Promotion of ADR in Italy and Japan], in Ortolani, Andrea (ed.), *Diritto e Giustizia in Italia e in Giappone: Problemi attuali e riforme*, Cafoscarina, Venezia, 2015, pp. 73-87 (no peer-review)

Presentations

1) <u>Colombo, Giorgio Fabio,</u> *Japan as a Victim of Comparative Law*, international seminar "The Present and Future of Comparative Law: Perspectives from Italy and Japan", University "Roma 3", 15/03/2016

2) <u>Colombo, Giorgio Fabio,</u> *The Role of UNIDROIT Principles on International Commercial Contracts in Legal Education in Japan: some Practical Remarks*, UNIDROIT Lecture "Perspectives from Japan", UNIDROIT, Rome, 14/03/2016

3) <u>Colombo, Giorgio Fabio,</u> EU **消費者法**, invited lecture at Kobe University, 17/11/2015.

4) <u>Colombo, Giorgio Fabio,</u> *Alternative Dispute Resolution in Europe: History and Current Challenges*, invited lecture at Kobe University, 16/11/2015.

5) <u>Colombo, Giorgio Fabio,</u> *Japan as a Victim of Comparative Law*, doctoral seminar, The University of Manchester, Manchester, 14/09/2015.

6) <u>Colombo, Giorgio Fabio,</u> *Japan in Comparative Law: A History of Orientalism and Conciliation*, presentation in the panel *Japanese Law and the Rhetoric of Legal Orientalism: Contesting the Terrain* (panel moderator), BAJS 2015 Conference, SOAS, London, 11/09/2015.

7) <u>Colombo, Giorgio Fabio,</u> *Accesso alle giurisdizioni superiori e precedente in Italia e in Giappone* [Access to Supreme Courts and precedents in Italy and Japan], roundtable *Corti Supreme a confront* [Comparing Supreme Courts], **日伊比較法研究会 第 2 回研究大会**, Italian Institute of Culture, Tokyo, 18/07/2015

8) Colombo, Giorgio Fabio, *Internationalizing Legal Education in Japan: the Moot Experience*, Workshop "Japan in the World – the World in Japan. A Methodological Approach", Okayama University, 27/06/2015

9) Colombo, Giorgio Fabio, *The Italian Model of ADR: A Good Bad Example?*, seminar at the Centre For Chinese Law, the University of Hong Kong, 18/03/2015

10) Colombo, Giorgio Fabio, *Litigation or Litigiousness? Explaining Japan's "Litigation Bubble" (2006-2010)*, 11th NAJS Conference, Lund, 6/03/2015

11) Colombo, Giorgio Fabio, *Japanese University in the Vis (East) Moot*, ANJeL/Ritsumeikan Symposium, Ritsumeikan University, 12/02/2015

12) Colombo, Giorgio Fabio, *"The Consumer is Always Right". Evolutions of Consumers' Law in EU*, invited lecture at Kobe University, 11/11/2014

13) Colombo, Giorgio Fabio, *The Evolution European Model of Alternative Dispute Resolution (ADR): Background and Developments*, seminar at the EU Institute in Japan, Kansai, 11/11/2014

14) Colombo, Giorgio Fabio, *Moot Arbitration as an Educational Tool of International Lawyers*, international workshop "Training a New Generation of Legal Professionals: Mooting as Educational Experience", University of Pavia, 23/10/2014

6) Research Organization - 研究組織

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