

Opinio Juris in Comparatione

Op. J. Vol. 2/2011, Paper n. 5

Studies in Comparative and National Law
Études de droit comparé et national
Estudios de derecho comparado y nacional



ADR AND CONSUMERS BETWEEN EUROPE AND CHINA

by

Laura Sempi

Suggested citation: Laura Sempi, *ADR and Consumers between Europe And China*, *Op. J.*, Vol. 2/2011, Paper n. 5, pp. 1 - 14, <http://lider-lab.sssup.it/opinio>, online publication December 2011.

ADR AND CONSUMERS BETWEEN EUROPE AND CHINA

by

Laura Sempi[♦]

Abstract:

A renewed attention to alternative dispute resolution (ADR) models give the cue for some observations in a comparative perspective: mediation is a good laboratory in order to observe cross-circulation of legal models for contemporary comparative law scholars. We witness here a recent convergence of Western systems and East Asian countries on ADR mechanisms which represent a typical feature of the legal tradition of the latter even with its own characteristics.

Indeed, in the last decade the European Union has promoted extrajudicial forms of disputes resolution, in the first place with Directive 2008/52/EC. The two proposals of Directive on consumer ADR and Regulation on consumers Online Dispute Resolution (ODR) issued on November 2011 go farther on this track, by extending recourse to ADR models to consumer litigation.

Consumer protection, a traditional policy area of the EU, represents an emerging field of law instead in the Chinese legal landscape. After scandals such as the highly debated Sanlu tainted-milk case, the Chinese Government seeks to enhance consumer protection standards. The reform draft of Chinese Consumer Law currently under discussion mandates mediation for consumers disputes as well.

The two scenarios are examined in order to highlight lights and shadows of ADR with regard to consumer rights protection.

Keywords: Consumers; Alternative Dispute Resolution (ADR); Online Dispute Resolution (ODR); Litigation; European Union; China.

[♦] PhD in Law of Market and Economics, Scuola Superiore Sant'Anna, Pisa and Università del Salento, Lecce.

I. ADR between history and dynamics of legal development

In the past few years, several countries have renewed their legal framework on mediation and other alternative means of dispute resolution by passing new legislation: this is the case of countries such as France¹, Italy², Portugal³, China⁴, but also Russia⁵, Albania⁶, and so on.

At the same time there has been a flourishing of studies, researches and conferences about the topic of amicable resolution of disputes.

One could say that Alternative Dispute Resolution (ADR) models are “back in vogue” both on legal practice and theory throughout the world. Indeed, for its dimensions which cross national borders, this phenomenon arouses interest not only from procedural law scholars and practitioners, but also among comparative law scholars.

If it is questionable whether we can discern in this circumstance a kind of cultural fashion, at least we are faced with a “legal flow”, as theorized by Maurizio Lupoi⁷: a legal flow takes place when an element peculiar of a legal system – in this case, ADR and especially mediation - is perceived in another as significant, therefore introducing an unbalance factor, subsequently rejected or assimilated by the latter legal system.

In the old continent this process has been favoured, led and quickened by the institutions of the European Union. A Directive adopted in 2008 encouraged the recourse to mediation (Directive 2008/52/EC on mediation in civil and commercial matters)⁸ in large fields of law with a view to promoting the amicable settlement of disputes. Among the goals mentioned in the Directive, also ensuring a balanced relationship between mediation and judicial proceedings, improving and simplifying access to justice (whereas 2 e 3), assuming that mediation provides for a cost-effective and quick extra-judicial resolution of disputes, with processes tailored to the needs of the parties (whereas 6).

1 Ordonnance No 2011-1540 of 16 November 2011, amending Law no. 95-125 of 8 February 1995 on the judicial organisation and civil, criminal and administrative procedure.

2 Legislative Decree no. 28 of 4 March 2010.

3 In Portugal the Law no. 21/2007, of 12 June introduced criminal mediation and the Law No 29/2009 ([Lei n.º 29/2009. D.R. n.º 123. Série I de 2009-06-29](#)) amended the Civil Procedure Law (Código de Processo Civil of 1961) by adding some new articles (Article 249-A, B, C and 279-A) concerning civil mediation, homologation of the mediation agreement, confidentiality of the mediation proceeding, and suspension of the trial.

4 The People's Mediation Law (*Renmin tiaojie fa*) was adopted by the Standing Committee of the National People's Congress (NPC) of the People's Republic of China on 28 August 2010 and entered into force on 1 January 2011.

5 In Russia two Federal Laws 193-FZ (“On Alternative Dispute Resolution Involving a Mediator (Mediation)”) and 194-FZ (“On Amendments to Certain Legislative Acts of the Russian Federation Owing to Adoption of the Federal Law ‘On Alternative Dispute Resolution Involving a Mediator (Mediation)’”) passed on 27 July 2010 and came into force on 1 January 2011.

6 The new Albanian Law on Mediation and Conflict Resolution, adopted on 24 February 2011, has replaced the previous law, entered into force in 2003, but never applied.

7 LUPOI, Maurizio, *Profili (anche linguistici) dei flussi giuridici*, 2002, available at http://www.accademiadellacrusca.it/img_usr/Profili_Lupoi.pdf (last visited on 29 November 2011).

8 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136/3, 24.5.2008).

As a result, Member States transposed the Directive into their national legislation by the deadline of 21 May 2011⁹. Nonetheless, the implementation process has met with difficulties; the most striking example is Italy, where the Legislative Decree No 28 of 4 March 2010 has not been well received by practitioners, who have challenged the decree in court and even gone on strike¹⁰.

The transposition of the Directive results in a dynamics of “communitarisation” of law in the field of administration of justice, consistently with the EU policy of judiciary cooperation in civil matters which came into the Union framework with the Maastricht Treaty, and is now generally sanctioned by Article 67 and 81 of the Treaty on the Functioning of the European Union (TFEU).

The European Union keeps on fostering forms of amicable resolution of disputes: last in time, on 29 November 2011, the EU Commission proposed legislation on ADR/ODR for consumer disputes¹¹.

Meanwhile in China, the Standing Committee of the National People’s Congress (NPC) passed the People’s Mediation Law (*Renmin tiaojie fa*) in 2010, bringing up again a propensity towards a non-judicial solution of disputes traditionally rooted in East Asian societies.

Indeed, this bias reveals the influence of classical Confucian thought, which abhorred the use of strict law to assert one’s rights, preferring the instrument of persuasion and moral values to restore social harmony¹² within family structures or other informal institutions¹³. One famous paper written by

9 Member States were required to transpose the Directive by 21 May 2011, except for Denmark, which - as provided by whereas (30) and Article 1.3 – did not take part to the adoption of the Directive and is not bound by it. At that date the majority of Member States had completed the implementation process (Italy, Portugal, Finland, Greece, Slovenia, ...). Some complied with some delay: this is the case of France, where the abovementioned Ordinance no. 2011-1540 was adopted only on 16 November 2011. On the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts, see the Report of the European Parliament of 15 July 2011 (available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0275&language=EN>, last visited on 27 November 2011), and the European Parliament Resolution of 13 September 2011 (available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0361>, last visited on 27 November 2011), urging the Commission to ensure that all Member States comply without delay with Article 6 of the Directive, which deals with one of the key aspects, i.e. the procedure for giving the mediation settlement agreement the same authority as a judicial decision.

10 Aiming at making up for the notoriously congested Italian courts by reducing judiciary workload and the nine-year average time to complete litigation in a civil case, the Italian Legislative Decree No 28/2010 provides for a mandatory mediation in a number of fields, including disputes concerning medical liability, real rights, insurance, banking and financial contracts, successions. The choice of mandatory mediation, going beyond what is required by the Directive 2008/52/EC, aroused bitter controversy and rife discontent, as it appears in contradiction with the principle of voluntariness, a typical feature of mediation. See, *inter al.*, BOVE, Mario, *La mancata comparizione innanzi al mediatore*, in *Le società*, fasc. 6, 2010, pp. 759-765; ZUCCONI GALLI FONSECA, Elena, *La nuova mediazione nella prospettiva europea: note a prima lettura*, in *Riv. Trim. Dir. e proc. Civ.*, 2, 2010, pp. 653-673; LUISO, Francesco Paolo, *Giustizia alternativa o alternativa alla giustizia?*, in *Il giusto processo civile*, fasc. 2, 2011, pp. 325-332. The Legislative Decree No 28/2010 is now under judicial review before the Italian Constitutional Court after an exception of unconstitutionality was raised by an administrative court (TAR Lazio, order of 9 March - 12 April 2011): the text of the order is available at http://www.lider-lab.sssup.it/lider/it/home/documenti/doc_download/435-pagni-la-mediazione-dinanzi-alla-corte-costituzionale-corr-giurpagni.html (last visited on 29 November 2011).

11 Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Proposed Regulation on consumer ODR - online platform for resolving consumer disputes about online purchases in another EU country.

12 Western literature is extensive on the subject of Chinese mediation, as Chinese methods of dispute resolution have historically attracted attention from foreigners, along with the interest in alternative dispute resolution (ADR) in general: see, *inter al.*, CLARKE, Donald, *Dispute Resolution in China*, in *Journal of Chinese Law*, vol. 5, no. 2, 1991, pp. 245-296; LUBMAN,

Jerome Cohen in 1966¹⁴ on Chinese mediation (*tiaojie*) quoted an old Chinese proverb which is meaningful in this sense: “It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit”.

Even today in China the use of out-of-court means of dispute settlement is remarkable, in spite of a rate of litigation before the people's courts that has been increasing in recent years, non-judicial mediation being performed before people's mediation committees and administrative organs¹⁵. In particular, it is given preference to conciliatory mechanisms for minor civil disputes and minor criminal offenses, in a wide range of areas of civil, commercial and criminal law: family and succession law, obligations, contracts, tort liability, property and other real rights, minor offenses.

Legislation on consumer protection in China represents a sensitive field in light of recent sensational cases of defective products (melamine-tainted milk powder, etc.). China's State Administration for Industry and Commerce (SAIC) is currently reviewing a reform draft of the Law on the Protection of Rights and Interests of Consumers (*Xiaofeizhe quan yi baohu fa*) of 1993¹⁶ for final submission to the Standing Committee of NPC¹⁷: the draft includes some provisions on mediation and arbitration as a first step to resolving business to consumer (B2C) disputes.

The current developments give us a starting point for some reflections on the combination of consumer protection with the spread of alternative dispute resolution techniques.

II. Consumers protection through ADR

II.1 The European Union

Consumer protection is enshrined in the EU framework since the Maastricht Treaty in 1992 with the provision of Article 129a in the Treaty establishing the European Community (TEC), now Article 169 TFEU, as before then there was no explicit legislative competence attributed to the European Community (EC) in the consumer field.

Stanley, *Deng and Dispute Resolution: 'Mao and Mediation' Revisited*, in *Columbia Journal of Asian Law*, Vol. 11, 1997, pp. 229-391. See also YU, Sheng, *La conciliazione popolare*, in PICARDI, Nicola, GIULIANI, Alessandro (eds.), *Ricerche sul processo. 7 – Il processo civile cinese*, Maggioli, Rimini, 1998, pp. 85-240; LIANG, Jiaqi, *The Enforcement of Mediation Settlement Agreements in China*, *Am. Rev. Int'l Arb.*, vol. 19, 2008, pp. 489-519; XU, Xiaobing, *Different Mediation Traditions: A Comparison between China and the U.S.*, in *Am. Rev. Int'l Arb.*, vol. 16, 2005, pp. 515-545.

13 Informal third-party dispute resolvers were chosen among neighbors, relatives, friends, and local notables, such as clan leaders. During the Mao era local notables could be locally powerful Communist Party or public security officials: CLARKE, Donald, *Dispute Resolution in China*, cit.

14 COHEN, Jerome A., *Chinese Mediation on the Eve of Modernization*, in *California Law Review*, Vol. 54, No. 3, 1966, pp. 1201-1226.

15 Administrative mediation (*xingzheng tiaojie*) is carried out by officials of basic-level people's governments and of specific administrative agencies.

16 The Standing Committee of the NPC passed the Law on Protection of the Rights and Interests of the Consumers (*Xiaofeizhe quan yi baohu fa*) on 31 October 1993, and entered into force as of 1 January 1994.

17 See www.winston.com/siteFiles/Publications/CLU_Sept2010.pdf (last visited on 5 December 2011).

Therefore, “protecting the health, safety and economic interests of consumers”, along with “promoting their right to information, education and to organise themselves in order to safeguard their interests” appear among the goals pursued by the EU.

Less explicitly, nonetheless, EU consumer policy lied (even before Maastricht) and still lies under the functioning of the integrated market, based on the assumption that a free circulation of the factors of production ultimately benefits the consumers.

The rise of consumer policy is now regarded as a case study in the expansion of law- and policy-making at EU level¹⁸.

From the mid-eighties onwards, some directives were adopted, following a minimum harmonisation approach: directives set minimum requirements and basic rights, allowing Member States to adopt more stringent rules in their national laws.

Among these “Consumer Directives” the following eight directives are worth mentioning as they represent what is commonly referred to as the “Consumer Acquis”, even though they don't cover all consumer protection legislation in the EU¹⁹: Directives on doorstep selling (85/577/EEC)²⁰, package travel (90/314/EEC)²¹, unfair contract terms (93/13/EEC)²², timeshare (94/47/EC)²³, distance selling (97/7/EC)²⁴, unit prices (98/6/EC)²⁵, injunctions (98/27/EC)²⁶, and sales and guarantees (1999/44/EC)²⁷.

Insofar as many Member States have ensured a higher level of protection as made possible by the Directives themselves, the adopted approach resulted in a fragmented and somehow uncertain regulatory framework. In order to strengthen the protection conferred to EU consumers, by eliminating or at least reducing differences existing in the level of protection and in the modalities for

18 WEATHERILL, Stephen, *Consumer Policy*, in CRAIG, Paul, DE BURCA, Grainne, *The Evolution of EU law*, Oxford University Press, Oxford, 2011, pp. 837-868.

19 For instance, we have also the Directive on liability for defective products and the Directive against unfair commercial practices: respectively, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210 of 7 August 1985, p. 29–33) and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11 June 2005, pp. 22–39).

20 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31 December 1985 pp. 31–33).

21 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23 June 1990, p. 59).

22 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21 April 1993 pp. 29–34).

23 Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis (OJ L 280, 29 October 1994, p. 83).

24 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4 June 1997, pp. 19–27).

25 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18 March 1998, p. 27).

26 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11 June 1998, p. 51).

27 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7 July 1999 pp. 12-16).

exercising the rights (withdraw, information, etc.) granted by the Directives, Consumer Acquis is now under review²⁸ and in 2008, the European Commission adopted the proposal for a Directive on consumer rights²⁹.

The aforementioned recent Commission proposals are to be framed in the outlined scenario, with a view to bringing EU legislation in line with technological change (m-commerce, online auctions, ...) and to promoting amicable settlement of disputes: the proposal for a Directive on ADR for consumer disputes (Directive on consumer ADR) and a proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR).

The proposed legislation follows two Commission Recommendations of 1998³⁰ and 2001³¹, establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users.

The proposed Directive on consumer ADR sets out a series of requirements that ADR bodies³² have to comply with, in order to guarantee homogeneous quality standard of ADR procedures (Articles 5-9). The standards are inspired to the principles of impartiality, transparency, effectiveness and fairness.

In this perspective, the examined Proposal provides for more stringent requirements than those laid down by Article 4 of the Directive 2008/52/EC³³, which, in order to ensure the quality of mediation, simply refers to voluntary codes of conduct, control mechanisms and (initial and further) training of mediators.

As for independence and impartiality of the natural persons in charge of dispute resolution, the Directive requires that where they form part of a collegial body, an equal number of representatives of consumers' interests and of traders' interests is provided for (Article 6.2). Furthermore, attention is paid also to possible pressures that can result from financing: therefore, according to Article 7.1(b), ADR entities should make public information on the source of financing (including percentage share of public and of private financing) and - but no specific provision in the proposed Directive reproduces it - whereas 17 expresses a particular need to ensure the absence of a pressure that potentially influences

28 The Commission launched the Review of the Consumer Acquis in 2004 and three years later adopted a Green Paper (Green Paper on the Review of the Consumer Acquis, of 8 February 2007, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf, last visited on 30 November 2011).

29 Proposal for a Directive of the European Parliament and of the Council on consumer rights, of 8 October 2008 (COM(2008) 614 final). The proposal aims at affording higher protection to consumers and making easier cross-border transactions, by modernising existing consumer rights and keeping up with technological change. On the subject, see HOWELLS, Geraint G., SCHULZE, Reiner (eds.), *Modernising and Harmonising Consumer Contract Law*, Sellier, Munich, 2009; SCHULTE-NÖLKE, Hans, TICHY, Lubos (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and beyond*, Sellier, Munich, 2010.

30 Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (OJ L 115, 17.4.1998, p. 31).

31 Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

32 Article 4 Directive on consumer ADR defines "ADR entity" as any entity which is established on a durable basis and offers the resolution of a dispute through an ADR procedure.

33 As for the relationship between the proposed Directive on consumers ADR and the Directive 2008/58/EC, the former is without prejudice to the latter by express provision of Article 3.

the attitude towards the dispute, where ADR entities are financed by one of the parties to the dispute or an organisation of which one of the parties is a member.

ADR procedures should be fair so that the parties to a dispute are fully informed about their rights and the consequences (i.e. legal effects) of the choices they make in the context of an ADR procedure (whereas 21). These provisions are in particular in favour of consumer in the delicate phase in which the solution is suggested, and he must decide whether to accept or reject it: he is informed that he has the choice as to whether or not to agree to a suggested solution; for this purpose he has the right to seek independent advice; the suggested solution may be less favourable than an outcome determined by a court (Article 8, 2(a)). Nevertheless, doubts arise whether the described full information is a sufficient (not only necessary) condition in order to guarantee fairness towards the party of the dispute generally weaker and inexperienced. One should take into consideration, indeed, that consumers are less familiar (at least at present) with ADR models than business operators, resulting in an additional benefit for the latter.

These quality standards are supported by the provision of a close monitoring of ADR entities (the proposed Directive devotes to the subject a specific chapter: chapter IV, Articles 15-17), and of a system of effective, proportionate and dissuasive penalties, which Member States should lay down for infringements of the national rules transposing Directive provisions about consumer information by traders and information to competent authorities by ADR entities (Article 18).

The proposed Regulation on consumer ODR offers a more specific set of rules for online B2C transactions, by providing for a European platform for the out-of-court resolution of contractual disputes arising from the cross-border³⁴ online sale of goods or provision of services between consumers and traders.

From the perspective of the proposed Regulation, the transaction is online when goods or services are offered by the trader and ordered by the consumer on a website or by other electronic means: both offer and order are to be performed electronically, so they represent cumulative conditions.

According to EU lawmakers, the platform should consist in a interactive website as a single point of entry to consumers and traders seeking the out-of-court resolution of disputes. The platform should provide an electronic form to submit complaints, propose an ADR entity to the parties, refer complaints to the ADR entity which the parties have agreed to use, enabling the parties and the ADR entity to conduct the procedure online (Article 5).

³⁴ Under Article 4(e) Regulation on consumer ODR, an online sale of goods or provision of services is to be considered cross-border “where, at the time the consumer orders such goods or services, the consumer is resident in a Member State other than the Member State where the trader is established”.

The proposed Regulation aims at increasing among consumers and traders confidence in cross-border transactions on the digital market³⁵, with the ultimate goal of developing the Internal Market itself in its digital dimension.

The EU initiative appears praiseworthy in order to accelerate and simplify the dispute resolution: the Directive on consumer ADR disputes provides that the procedure duration generally does not exceed 90 days, whereas according to the Regulation on consumer ODR, the online procedure should be completed in 30 days from the institution of the proceedings. In both cases, the ADR entity may extend the time limit when the complexity of the dispute in question so demands.

Nonetheless, some criticalities remain, particularly with respect to the costs of the procedure and language issues: in the envisaged ODR mechanism, even though the platform can be accessed electronically in all official languages of the Union (an electronic complaint form, available in all official languages of the Union, can be filled in to submit the complaint), it is not clear which language is used to conduct the procedure, depending on the rules adopted by the single ADR entity. On this regard, Article 8.3(b) of the Regulation on consumer ODR simply states that the platform shall communicate to the parties the language or languages in which the procedure will be conducted. This aspect might create problems, bearing in mind that foreign languages often represent a barrier, especially for consumers and small business operators.

As for costs, if, on the one hand, access to the ODR platform is free of charge, on the other hand the ADR entity might require fees: that consumer could afford them cannot be taken for granted. According to the Directive on consumer ADR, procedures should be free of charge or at moderate costs for consumers to guarantee effectiveness, so that it remains economically reasonable for consumers to use such procedures (whereas 20 and Article 8(c)). However, exercising the right to seek independent advice before agreeing or rejecting the suggested solution of the dispute implies additional costs for consumers. Failing to exercise this right might put the consumer, again, in a position of relative weakness.

These critical aspects could limit the effectiveness of the proposed legislation, partially frustrating the intentions of the proposing EU lawmakers, i.e. contributing to the functioning of the internal market and to the achievement of a high level of consumer protection (Article 1 Directive consumer ADR).

II.2 The Chinese experience

a. The existing legal framework

The Chinese legal framework about consumer protection is quite fragmentary, resulting from a series of laws and regulations: the aforementioned Law on Protection of the Rights and Interests of the

35 See whereas 2, 5-6 and Article 1 Regulation on consumer ODR.

Consumers of 1993, the Product Quality Law (*Chanpin zhibiliang fa*) of 1993³⁶, the Food Safety Law (*Shipin anquan fa*) of 2009³⁷ and its implementing Regulations³⁸. Last in time, the Tort Law (*Qinquan zeren fa*) of 2009³⁹ included some provisions on defective products (Articles 41-47)⁴⁰, by introducing punitive damages for manufacturers and sellers knowingly producing or selling defective products causing death or serious damages to the health of people⁴¹. Owing to the scandals and the consequent heightened concerns about safety of food and food-related products, in the last two years the Chinese authorities have issued a series of regulations for the purpose of reinforcing the existing legal framework: for instance, in 2010 the Ministry of Health published Measures restricting the use of food additives⁴². Last amendments of Criminal law, passed by the NPC in February 2011⁴³, included some provisions on food-related crimes (Articles 143-144), raising the penalties and even providing for the death penalty for cases where producing or knowingly selling food mixed with poisonous or harmful non-food raw materials causes human death or “there is any other especially serious circumstance”. Apart from doubts about the proportionality and the effective deterrence of such a provision⁴⁴, from this crackdown one can easily infer the Chinese Government's commitment to address a social emergency, using a sort of emotional band-aid to face an alarming situation.

Indeed, in 2008 the melamine-tainted milk case involving Sanlu Dairy caused a sensation in China and abroad: six children died and nearly 300.000 others were diagnosed with urinary system diseases after being fed milk powder that had been adulterated with melamine. Farmers and traders had added this toxic industrial chemical to raw milk in order to circumvent quality tests⁴⁵.

36 The Product Quality Law (*Chanpin zhibiliang fa*) was approved in 1993 and then amended in 2000.

37 The Food Safety Law (*Shipin anquan fa*) was promulgated on 28 February 2009 and entered into force as of 1 June 2009.

38 The Implementing Regulations of the Food Safety Law (*Shipin anquan fa shishi tiaoli*) became effective on 20 July 2009, the date of their promulgation by the PRC State Council.

39 The Tort Law (*Qinquan zeren fa*) was adopted on 26 December 2009 and entered into force on 1 July 2010.

40 About the previous system of protection the following contribution of the Italian scholar Crespi Reghizzi noteworthy: CRESPI REGHIZZI, Gabriele, *La responsabilità da prodotti difettosi in Cina e in Unione Sovietica*, in *Diritto commerciale e arbitrato in Cina - tra continuità e riforma*, EGEA, Milano, 1991, pp. 115-158.

41 “Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation” (Article 47 Tort Law).

42 The Measures for Administration of New Food Additives were published by the Chinese Ministry of Health on 10 March 2010. In addition, the Chinese General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) published the Rules of Administration and Supervision on Production of Food Additives on 4 April 2010 (effective on 1 June 2010), by introducing a manufacturing licence as a requirement for all manufacturers producing food additives in China.

43 The Amendment (VIII) to the Criminal Law of the PRC, as adopted at the 19th meeting of the Standing Committee of the NPC on 25 February 2011, came into force on 1 May 2011.

44 See the debate reported in the article *Will the Death Penalty Stop Food Safety Crime?*, *Chinafrica*, Vol. 3, May 2011, available at http://www.chinafrica.cn/english/pros_and_cons/txt/2011-05/01/content_353818.htm (last visited on 2 December 2011).

45 See BRANIGAN, Tania, *Chinese figures show fivefold rise in babies sick from contaminated milk*, in *The Guardian*, 2 December 2008, available at <http://www.guardian.co.uk/world/2008/dec/02/china> (last visited on 3 December 2011). As reported by some China observers, the timing of the incident raised suspicions that Chinese officials disguised the health risk to avoid a scandal in conjunction with the Olympic Games held in Beijing in August 2008: see WANG, Tina, *Olympics Led To Milk Scandal Hush-Up, Some Say*, in *Forbes*, 17 September 2008, available at http://www.forbes.com/2008/09/17/china-milk-scandal-markets-equity-cx_tw_0917markets03.html (last visited on 3 December 2011).

This – unfortunately no isolated - incident shows that safety of food and, more generally, of all products is a sensitive issue now in China. Public authorities hastened to improve the regulatory landscape by providing for harsher punishments, but such measures do not represent an adequate solution. A Chinese saying goes that “the difficult lies not in legislation, but in implementation”: here - as well as in other fields of Chinese law (see intellectual property, ..) - we have a divergence between law in the books and law in action, a traditional feature of the Chinese legal system. The problem is the enforcement, especially at the peripheral level, where officials are often reluctant to take effective measures that might affect local firms, sometimes in order to support local economy, sometimes owing to a management of public power marked by frequent episodes of corruption.

Therefore, the will expressed by central authorities (for instance with nationwide campaigns for food safety⁴⁶) is likely to be contradicted at the local government level. What is worse, resources allocated by Beijing for compliance with legal requirements and standards are reported as often spent at sub-national levels on other matters⁴⁷, so deviating from national priorities.

Still, the China’s lack of an aware and proactive civil society collectively representing the interests of consumers⁴⁸ and manufacturers also contributes to complete the opaque scenario Stanley Lubman bluntly defined as a “jungle of problems”⁴⁹.

b. What role for mediation?

As previously mentioned, Chinese lawmakers are discussing a reform of the Law on the Protection of Rights and Interests of Consumers of 1993: beyond a series of provisions concerning substantive rights for consumers (cooling-off period, protection of personal information, compensation for false advertising, ...), the draft deals with the resolution of B2C disputes by promoting the use of court-enforceable mediation and arbitration.

New emphasis given to alternative dispute resolution mechanisms can be understood as a part of a policy meant to face the increased rate of litigation that has been registered in the last decades⁵⁰. The new People's Mediation Law – laying down a set of rules concerning qualities required to mediators, organization of the people's mediation committees, mediation proceedings, form and legal effects of

46 See http://news.xinhuanet.com/english2010/indepth/2011-11/13/c_131244094.htm (last visited on 3 December 2011).

47 World Bank Report, *Equity and Public Governance in Health System Reform. Challenges and Opportunities for China*, January 2011, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/01/13/000158349_20110113134311/Rendered/PDF/WPS5530.pdf (last visited on 5 December 2011).

48 Yet, Hooper argues that right consciousness in the area of consumer rights is developing during the post-Mao era and the awareness is comparatively improved particularly in urban areas, partly as a result of a Government policy of information and education: see HOOPER, Beverley, *The Consumer Citizen in Contemporary China*, Working Paper No. 12, Centre for East and South-East Asian Studies Lund University, Sweden, 2005, pp. 2-9.

49 LUBMAN, Stanley, *Jungle of Problems: Beijing's Failure to Protect Consumers*, in *Wall Street Journal, China Real Time Report*, 16 March 2011, available at <http://blogs.wsj.com/chinarealtime/2011/03/16/jungle-of-problems-beijings-failure-to-protect-consumers/> (last visited on 5 December 2011).

50 Among factors of increased litigation in China, there are a social and cultural change in attitudes in favor of more formalized methods of dispute resolution, a greater assertion of individual rights, better access to lawyers, improved quality of court opinions.

the mediation agreement - is another brick paving the way towards a recovery in popularity of out-of-court settlements.

Since the establishment of the People's Republic of China, people's mediation was formally established in 1954 with the Provisional Organic Rules of People's Mediation Committees⁵¹. The Constitution (*Xianfa*) of 1982⁵² even envisages a mediation system, providing that residents' and villagers committees establish sub-committees for public mediation (Article 111).

More specific regulation on mediation in the PRC could be already traced in the Organic Rules of People's Mediation Committees (*Renmin tiaojie weiyuanhui zuzhi tiaoli*) of 1989⁵³, the Trial Procedures for the Resolution of Commercial Economic Disputes (*Shangye jingji jiu fen tiaojie shixing banfa*) of 1989⁵⁴, the Civil Procedure Law (*Shi susong fa*) of 1991, amended in 2007, the Organic Law of the Villagers Committees (*Cunmin weiyuanhui zuzhi fa*) of 1998⁵⁵, and Several Provisions on the Work of People's Mediation (*Renmin Tiaojie Gongzuo Ruogan Guiding*) of 2002⁵⁶. People's mediation committees are set up by villagers in rural areas and by residents' committees in urban areas to settle minor civil disputes and handle minor criminal cases.

Under the Civil Procedure Law, mediation is voluntary but at the same time is encouraged as an important means of resolving conflicts, since "the people's mediation committees shall conduct all mediations according to legal provisions and the principle of voluntariness. All concerned parties shall enforce mediation agreement. Where any concerned parties refuse mediation, fail to reach a mediation agreement, or retract a mediation agreement, they may initiate legal proceedings in a people's court" (Article 16).

On the one hand, ADR is alternative to court-based decisions where judiciary is plagued by a persistent problem of technical training and suffers from lack of independence from the executive and from the Chinese Communist Party (CCP): individual judges indeed do not have any guarantee of independence and irremovability, being instead appointed, controlled, and dismissed by the local people's congress. Moreover, the CCP exerts interference on judicial activity, either through the general supervision of the

51 As remarked by Clarke, mediation organizations had existed for years in the areas under Chinese Communist Party control, and by the time the Provisional Organic Rules were promulgated in 1954, a number of local governments at the level of city, province, and military region had already issued their own regulations: CLARKE, Donald, *Dispute Resolution in China*, cit. On the subject of resolution of disputes between individuals in China during the Mao era, see also LUBMAN, Stanley, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, in *California Law Review*, vol. 55, 1967, pp. 1284-1359.

52 The Constitution (*Xianfa*) of the People's Republic of China was adopted at the Fifth Session of the Fifth NPC on 4 December 1982.

53 The Organic Regulations on People's Mediation Committees (*Renmin tiaojie weiyuanhui zuzhi tiaoli*) was adopted on 5 May 1989 and replaced the aforementioned Provisional Organic Rules of 1954.

54 The Trial Procedures for the Resolution of Commercial Economic Disputes (*Shangye jingji jiu fen tiaojie shixing banfa*) were issued by the Ministry of Commerce on 23 November 1989.

55 The Organic Law of the Villagers Committees (*Cunmin weiyuanhui zuzhi fa*) was adopted by the Standing Committee of the NPC on 4 November 1998 and became effective on the same date. The Organic Law of the Villagers Committees for Trial Implementation of 1987 was consequently repealed.

56 Several Provisions on the Work of People's Mediation (*Renmin tiaojie gongzuo ruogan guiding*) were issued by the Ministry of Justice on 11 September 2002 and became effective on 1 November 2002.

Party in the appointment of executive positions in the judiciary, or through informal means of political pressure on the courts and individual judges.

On the other hand, out-of-court settlement can be a way to solve sensitive cases away from the spotlight, whilst people sometimes choose to bring a lawsuit in order to draw attention from media and public authorities.

This is particularly true in a field, like the consumer law, where some social instances might result in a potentially embarrassing case for people's courts: in an economy where manufacturers and providers of services often are State-Owned Enterprises (SOEs) or have some connections with Government or at least the CCP, the dispute consumer to business might become a dispute citizen v. public authority.

The archetype of harmonious society (*hexie shehui*) - which Article 1 of the People's Mediation Law not coincidentally refers to – can be read bearing in mind these considerations. The ideal descending from Confucian tradition has been evoked in order to modernize the country pursuing economic prosperity, technological progress, balanced and sustainable development, along with social equity goals, such as increasing rural incomes, boosting labor protections, improving access to health care and education, and increasing environmental oversight⁵⁷. Nonetheless, the harmonious society policy is also an useful tool in the hands of the Chinese leadership to preserve the stability in respect of the so called *status quo*. On this regard the Sanlu incident is paradigmatical, as highlighted by Yoo in a study of the dispute resolution of the case⁵⁸: the Chinese Government was somehow involved since it omitted inspections and certified melamine-tainted products as safe, Party officials were also implicated in keeping the deaths and illnesses of victims from the media and exerting pressure on judges and lawyers not to take on any milk-related cases⁵⁹. Parents of victims sought justice, some through out-of-court settlements (getting a monetary compensation and a fund to cover medical treatment expenses for the sick children until they reach 18 years of age)⁶⁰, some through individual civil lawsuits⁶¹, some by a class action suit⁶².

57 GREEN, Andrew J., *Tort Reform with Chinese Characteristics: Towards a "Harmonious Society" in the People's Republic of China*, in *San Diego Int'l L.J.*, vol. 10, 2008, pp. 122-153.

58 YOO, Yungsuk Karen, *Tainted Milk: What Kind of Justice for Victims' Families in China?*, in *Hastings Int'l & Comp. L. Rev.*, vol. 33, 2010, pp. 555-575.

59 See WONG, Edward, *Parents Accept Cash in Tainted Milk Death*, in *New York Times*, 16 January 2009, at <http://www.nytimes.com/2009/01/16/world/asia/16iht-milk.2.19429252.html> (last visited on 6 December 2011).

60 A young couple from Gansu province who lost their son in May 2008, accepted a 200.000 RMB compensation from Sanlu and forfeited any further rights to sue. The couple had filed a civil action before the Lanzhou Intermediate People's Court (Gansu province) in October 2008, but the court did not accept the case. As reported by Xinhua, more than 3.000 families in Shijiazhuang, the capital of Hebei Province, accepted compensation payments for their sick children: see WONG, Edward, *Milk Scandal in China Yields Cash for Parents*, in *New York Times*, 17 January 2009, available at <http://www.nytimes.com/2009/01/17/world/asia/17milk.html> (last visited on 6 December 2011) and *China couple get payout after child killed by tainted milk*, 16 January 2009, *Channel News Asia*, available at http://www.channelnewsasia.com/stories/afp_asiapacific/view/402860/1/.html (last visited on 6 December 2011).

61 Hundreds of families filed individual civil actions against dairy producers, as well as retailers who sold the melamine-tainted milk. Only few were accepted: in late 2009, just six of these actions were accepted by the People's courts. The first case was brought before the Shunyi district court of Beijing by a family from Henan province seeking 55.184 RMB in compensation from Sanlu and a Beijing-based supermarket. The first hearing was held in Beijing on 28 November 2009, while a second hearing was postponed to allow defendants more time to investigate the connection between the tainted formula and the child's illness. See WANG, Yan, *Compensation lawsuit over tainted milk postponed*, in *China Daily*, 9 December

Demand for justice has been given inadequate responses: preference has been granted to remedies of criminal law (harsh punishments for the executives of the companies that were involved in the scandal)⁶³ and a poor response with regard to the legitimate claims for compensation risen from the private sector⁶⁴.

III. Concluding Remark

A renewed attention to alternative dispute resolution models give the cue for some observations in a comparative perspective: beyond the particular cultural background where it has been flourishing, mediation is a good laboratory in order to observe cross-circulation of legal models for contemporary comparative law scholars.

Actually, we witness here to a recent convergence of Western systems and East Asian countries on ADR mechanisms which represent a typical feature of the legal tradition of the latter even with its own characteristics. This process marks a significant change, as in the past countries such as China and Japan used to borrow legal concepts and institutions from the Western legal tradition.

In the last decade the European Union has promoted extrajudicial forms of disputes resolution, in the first place with Directive 2008/52/EC. The two recent proposals (Directive on consumer ADR and Regulation on consumers ODR) go farther on this track, by extending recourse to ADR models to consumer litigation.

Consumer protection, a traditional policy area of the EU, represents an emerging field of law instead in the Chinese legal landscape. After scandals such as the highly debated Sanlu case that have undermined

2009, available at http://www.chinadaily.com.cn/business/2009-12/09/content_9144184.htm (last visited on 6 December 2011).

62 Since the late 2008 several class actions were filed throughout China by legal support teams on behalf of victims of the milk scandal, but they were subsequently rejected: the Intermediate People's Court in Shijiazhuang (Hebei province) rejected the action brought on 8 December 2008 by the "Sanlu Melamine Victim's Legal Support Team" representing 63 victims and seeking compensation for bodily harm (68.180.000 RMB), and emotional distress (6.910.000 RMB). In another attempted class action on behalf of 152 victims, in early March 2009 the same Court of Shijiazhuang did not accept group litigation. This outcome has drawn attention from scholars about admissibility of class actions in the Chinese legal system. Indeed, the Chinese Civil Procedure Law mandates joint litigation (Articles 53-55) rather than class action: see KATZ, Lauren M., *Class Action with Chinese Characteristics: the Role of Procedural Due Process in the Sanlu Milk Scandal*, in *Tsinghua China Law Review*, vol. 2, no. 2, 2010, available at lawlib.wlu.edu/lexopus/works/304-1.pdf (last visited on 7 December 2011). In January 2009, Chinese lawyers filed a class action product liability suit in the Supreme People's Court in Beijing on behalf of the families of 213 children, seeking nearly 32 million RMB in damages from twenty-two dairy producers. See WONG, Edward, *Families File Suit in Tainted Milk Scandal*, in *New York Times*, 21 January 2009, available at <http://www.nytimes.com/2009/01/21/world/asia/21milk.html> (last visited on 6 December 2011). Unfortunately, there has been no further media coverage about the outcome of these class actions.

63 On 22 January 2009, Zhang Yujun and Geng Jinping, two dairy producers who had sold melamine to Sanlu, were sentenced to death; Tian Wenhua, former general manager of the Sanlu Group, was sentenced to life imprisonment and ordered to pay a fine of 20 million RMB: see BARBOZA, David, *Death Sentences in Chinese Milk Case*, in *New York Times*, 22 January 2009, available at <http://www.nytimes.com/2009/01/23/world/asia/23milk.html> (last visited on 7 December 2011).

64 The response is poor not (only) for the amount of compensation, but mainly for hesitations and silences which characterized the reaction of the Chinese authorities. Even when the fund was set up to compensate victims, concerns have been expressed about the need for transparent management and open information: LAN, Xinzhen, *Questioning Compensation*, in *Beijing Review*, 29 June 2011, No. 26, available at http://www.bjreview.com.cn/quotes/txt/2011-06/29/content_372323.htm (last visited on 7 December 2011).

trust of Chinese consumers both in production system and in justice, the Chinese Government seeks to enhance consumer protection standards. The text of the reform draft of Consumer Law currently under discussion mandates mediation for consumers disputes as well.

The two scenarios show different critical aspects: here potential costs of the proceedings and language barriers might limit benefits for consumers, there, in the name of supporting local economy, protectionism and collusion between supervisors and supervised are likely to adversely affect consumers rights rather than protect them.

In China, until the system remains opaque it will be difficult to record significant improvements in consumer protection, irrespectively with recourse to mediation or other dispute resolution means. Even before focusing on models of dispute resolution, one must pay attention to the need to further develop and promote rights consciousness among Chinese consumers. A lack of consumer information limits popular use of the existing consumer reporting channels services. Therefore, the Government is often unaware of problems until they reach a national scale. Moreover, there is still a significant urban-rural divide which reduces opportunities for protection at peripheral level.

Lastly, the developments here observed in consumer law have particular importance partly due also to the current globalization dynamics and the related growing degree of delocalization in production systems: for instance, weakness in consumer protection for defective products that have been made in China (but the issue does not concern uniquely China, of course) may result in adverse effects upon consumers throughout the world as well, as demonstrated by the cases of Mattel toys⁶⁵ and Colgate toothpaste⁶⁶ in 2007. That suggests the need for solutions promoting cooperation between national (governmental and non-governmental) institutions, based on recall system, timely alert and exchange of information on dangerous products⁶⁷, as a part of a strategy, even before taking into consideration (alternative) mechanisms of dispute resolution.

65 Between August and September 2007, Mattel had to recall millions of toys produced by its Chinese subcontractors, mainly owed to an excessive level of lead-paint used on plastic toys: see BARBOZA, David, *Cheap Lead Paint Common on Chinese Goods*, in *New York Times*, 10 September 2007, available at <http://www.nytimes.com/2007/09/10/business/worldbusiness/10iht-lead.5.7455679.html> (last visited on 9 December 2011). The case stirred public opinion and raised concerns about compliance of foreign suppliers with safety standards. Though, in the following days, some industry analysts, academics and consumer advocates begun to question whether the focus on the toys' foreign subcontractors was obscuring an even bigger (more domestic) problem concerning design of new products, reportedly causing even more injuries: see SHIN, Annys and MERLE, Renae, *Misplaced Anxiety over Toys?*, in *Washington Post*, 12 September 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/11/AR2007091102153.html> (last visited on 9 December 2011).

66 In June 2007, counterfeit Colgate-labelled toothpaste imported from China was found to be contaminated with diethylene glycol (a cheap chemical substitute for glycerin), which may potentially harm children and patients with kidney and liver disease: see YANG, Xiyun, *Counterfeit Colgate Has Poisonous Chemical*, in *Washington Post*, 15 June 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/14/AR2007061401946.html> (last visited on 9 December 2011).

67 The EU Directorate General for Health & Consumers and the General Administration of Quality Supervision, Inspection and Quarantine of China (AQSIQ) signed in 2006 a Memorandum of Understanding establishing the "RAPEX-CHINA", an on-line system existing for regular and rapid transmission of data between the EU and China product safety administration.