

# The Possible Implementation of “Certification of Contracts” in the Japanese Legal System

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## ABSTRACT

*In Japan, as in many other countries, there is a growing sector of people engaged in work with contracts other than a standard employment contract. There is often a lack of awareness of employment-related obligations, perhaps also due to the asymmetry of information. This scenario concerns not only relations between those who benefit from the work and those who perform it, but also tripartite relations where there is more than one employer or where the person who employs the workers is different from the person who exercises direction and control over the work performance. This uncertainty entails an increase in employment disputes due to the need to establish employers' liability or workers' rights. In order to prevent court action, to increase the level of certainty in these relationships, and to promote fair labour relations as a way of enhancing work productivity, in 2003 Italian lawmakers have introduced the “certification of contracts” through the so-called “Biagi Law”. The certification of contracts is a procedure which verifies whether or not a contract complies with the law by establishing the nature of the relationship and the applicable law. This certification is also used as a tool for the qualification of companies who perform high-risk work in order to guarantee compliance with health and safety regulations. Certification may be seen as a special kind of CSR (Corporate Social Responsibility) aimed at a fair management of human resources, as well as conferring a competitive edge on certain companies over those which have not obtained certification. Certification could also be useful to public finance, as it could permit a reduction in the cost of inspections without threat to the labour market.*

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**KEYWORDS:** *Employment Contracts (Standard and Non-standard); Dispatched Work; Farming-out; Subcontracting; Labour Disputes; Certification of Contracts*

**SUMMARY:** *1. Asymmetric Information and Uncertainty in the Japanese Labour Market. - 1.1. "Workers" Versus "Non-workers" in Japan. - 1.2. Insourcing and Outsourcing Processes in Japan. - 2. The Italian Legal Procedure Known as "Certification of Contracts". - 2.1. The Functions of Certification. - 2.2. Bodies That May Provide Certification. - 2.2.1. The Experience of The Commission of Certification of the University of Modena and Reggio Emilia. - 2.3. Mandatory Principles of the Certification Procedure. - 2.4. The Pre-certification Phase. - 2.5. The Certification Procedure. - 2.6. The Legal Effects of Certification. - 2.7. Remedies Against Certification. - 3. Conclusions: the Certification of Contracts, a Tool That Could Improve the Japanese Labour Market.*

## **1. Asymmetric Information and Uncertainty in the Japanese Labour Market.**

Japanese Employment Law <sup>1</sup>, through the eyes of a European, is an interesting case-study because the legal system is strongly linked with culture, and the labour relationship is not regulated solely by laws but also by customs and traditions <sup>2</sup>. In this sense it can be difficult to establish the dynamics which exist in these relationships, and, considering that many contracts are not written, it seems likely that there is asymmetric information between the parties.

The only way to clearly establish certain elements concerning the relationship between the person who benefits from the work of someone else and the person who performs the work, or the relationship between a main contractor and a subcontractor, seems to be through recourse to the courts.

However, in order to prevent disputes and to increase the level of certainty in labour relations, this paper proposes the implementation of the Italian tool of the Certification of Contracts in the Japanese legal

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<sup>1</sup> For an overview of Japanese Employment Law see K. SUGENO, *Japanese Employment and Labor Law*, Carolina Academic Press / University of Tokyo Press, 2002; T. HANAMI, F. KOMIYA, *Labour Law in Japan*, Kluwer Law International, The Netherlands, 2011; K. KAGAWA, *Japanese Labour Laws: Case Studies and Comments*, Deep & Deep Publications, New Delhi, 2007; T. ARAKI, *Labor and Employment Law in Japan*, Japanese Institute of Labor, Tokyo, 2002.

<sup>2</sup> Cf. K. NAKAYAMA, *The Characteristics of the Japanese Labour Law and its Problems*, in *Waseda Bulletin of Comparative Law*, 1995, Vol. 14, 1.

system<sup>3</sup>. This tool helps parties of a contract to increase their level of information and to prevent disputes, establishing, from the beginning of the contract, its correct nature and the law applicable. The certification also helps the parties to properly draft the rules of the contract avoiding unlawful agreements.

The asymmetry of information mainly affects two areas of the Japanese labour market: employment relations in the so-called “grey areas” where people are engaged in work with contracts other than the standard employment contract, and relations between companies regarding the insourcing and outsourcing processes. In both of these fields it seems likely that issues—regarding the applicable regulation or the rights and the duties of the parties involved may arise.

Before introducing the Italian tool of the certification of contracts, this paper will focus on two fields that could greatly benefit from the implementation of the certification procedure in the Japanese legal system.

### 1.1. “Workers” Versus “Non-workers” in Japan.

People who work in Japan usually are divided in “regular workers” and “non-regular workers”, depending on the type of employment contract with which they are hired<sup>4</sup>. However, there is a further distinction concerning whether a person can be considered a “worker” or not, according to Art. 9 of Labor Standard Act<sup>5</sup>. Indeed, in this provision,

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<sup>3</sup> The certification of contracts was presented to the Japanese audience for the first time in M. TIRABOSCHI, M. DEL CONTE, *Employment Contract: Disputes on Definition in the Changing Italian Labour Law*, in *JILPT Report*, 2004, No. 1, 155 but has more recently been explained in Japanese, in Y. KONISHI, *The Certification System and Its Functions in Italy*, in *The Japanese Journal of Labour Studies*, 2012, No. 624, 35.

<sup>4</sup> See T. ARAKI, *The Widening Gap Between Standard and Non-Standard Employees and the Role of Labour Law in Japan*, in *University of Tokyo Journal of Law and Politics*, 2011, Vol. 8, 3.

<sup>5</sup> For a definition of ‘employee’ in Japanese labour laws see S. OUCHI, *Labor Law Coverage and the Concept of “Worker”*, in *JILPT Report*, 2004, No. 1, 111 where the certification of contracts as a tool implemented in the Italian legal system to reduce the

«worker means one who is employed at an enterprise or office and receives wages therefrom, without regard to the kind of occupation». This definition is fundamental because it is also used for the purposes of several other acts regarding essential issues such as minimum wage, equal employment opportunities, security of wage payment, health and safety and accident compensation insurance.

The definition of “worker” is basically composed of two elements: the concept of “being employed” and the definition of “wage”. The latter is defined in Art. 11 of Labor Standard Act as «wage, salary, allowance, bonus and every other payment to the worker from the employer as remuneration for labor, regardless of the name by which such payment may be called». From a practical point of view, a “remuneration for labour” is considered a “wage” if the amount, the method of calculation and the form of payment appear like employee wages, and whether in the retribution there is a deduction of contributions for employment insurance, employment pension and employee health insurance.

On the other hand, since there are no specific definitions to establish whether a person is employed or not, judges rely on certain evidence, including the freedom to accept or refuse work, a request or a direction; the power of the employer to exercise direction and control over the content of the work and the manner of its performance; the power of the employer to order/request the performance of work aside from that which is normally planned; the individual freedom to choose when and where to work; the possibility to outsource services to others; whether the remuneration is determined according to the numbers of working hours.

Generally if a person is not a worker, he/she has to be considered an independent contractor, someone who conducts his own business as an entrepreneur, bears the burden for machinery, tools, risks and liabilities and earns from the surplus <sup>6</sup>.

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number of conflicts in the classification of a “worker” is also mentioned; H. IKEZOE, *Legal Concept of “Employee” in Labor Protective Laws of Japan - From an Analysis of Court Cases*, in *Japan Labor Review*, 2007, Vol. 4, No. 2, 121.

<sup>6</sup> For an overview of independent contract work in Japan see Y. ZHOU, *Working as an Independent Contractor in Japan and the U.S.: Is It a Good Option for Married Women with*

However, despite the method of determining if a person can be considered a “worker”, there are some “grey areas” (as shown in Table No. 1) where it might be difficult to establish the nature of the relationship between those who benefit from the work and those who perform it<sup>7</sup>. Indeed, there might be people who receive a “wage” but are not properly “employed” because they are only partially under the employer’s direction and control (i.e. insurance agents) or, conversely, independent contractors that are exclusively tied to a specific company (i.e. ‘pseudo’-freelance translators).

Table No. 1<sup>8</sup>:

Employment contract	Gray area I	Gray area II	Self-employed
(Typical employment)	(Employed but with elements of self-employed)	(Self-employed but with elements of employed)	
Regular full-time workers	Workers on commission receiving low minimum compensation guarantee • Taxi drivers • Insurance salespeople	Disguised self-employment	Managers (who employ workers)
(Contingent employment)	Workers under the free working hours system	Working styles that are difficult to categorize (economically dependent workers) • Franchise owners • Professional athletes, entertainers, publishing and advertising, mass media, software and gaming industries • Agents and experts • Self-employed telecommuters • Construction and transportation workers	Independent contractors
Day laborers	Employed telecommuters		Typical self-employed individuals
• Short-time regular workers • Part-timers • Limited-term contract workers	Multi-job holders		
Temporary workers		Family and household employees	
Workers of subcontractors on premises			
Freeters, or job-hopping part-timers			
NPO staff, workers' cooperative unions, senior human resources center, and paid volunteers			

*Young Children?*, in *Japan Labor Review*, 2011, Vol. 8, No. 1, 103; for a comparison between employees and independent contractors see R. YAMAKAWA, *New Wine in Old Bottles?: Employee/Independent Contractor Distinction under Japanese Labor Law*, *Comparative Labor Law & Policy Journal*, 2001, Vol. 21, No. 1, 99.

<sup>7</sup> See K. IWATA, H. SATO, A. SATO, E. OOKI, A. ONO, T. FUJIMOTO, S. OUCHI, H. IKEZOE, *Diversifying Working Styles and Social-Labor Policy*, JILPT Research Report, 2004, No. 12.

<sup>8</sup> Source K. IWATA, H. SATO, A. SATO, E. OOKI, A. ONO, T. FUJIMOTO, S. OUCHI, H. IKEZOE, *a.m.*

Establishing whether a person is a “worker” is not just a matter of legal classification, as it has several implications on the worker’s protection. For example, if a contract for work and services between a company and an independent contractor, who in practice is working only for that company, is terminated during the worker’s pregnancy, she could claim compensation for unfair dismissal. Or, on the other hand, an insurance company might pay its agents less than the minimum wage claiming that a lower level of direction and control is exercised over them and they are therefore not entitled to workers’ benefits. It is also difficult to establish the nature of contracts of employees who are engaged, on the basis of their special skills, for a fixed term to perform a specific task.

In the Japanese legal system it is even more difficult to establish the nature of the relationship between those who benefit from the work and those who perform it because employment contracts are often not written.

Hence, especially during crisis periods and in an economy that is evolving from the past models of regular employment, it is likely that an increasing number of people will fall into the “grey areas” where it can be difficult to establish rights and duties. This scenario could determine an increase in labour disputes and uncertainty for both companies and workers<sup>9</sup>. Even if there are no statistics on the percentages of “workers” and “non-workers”, data shows that short-term employees have increased by around 17% in the last twenty years and non-regular employees have increased by around 15% in the same period<sup>10</sup>, so we can assume that the use of traditional regular employment contracts will continue to be less common

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<sup>9</sup> See VV.AA., *Labor Disputes and Resolution Systems*, in *Labor Situation in Japan and Its Analysis: General Overview 2013/2014*, JILPT, Tokyo, 2014, 121. For an overview of the Japan’s Employment Tribunal system see T. ARAKI, *New Forms of Dispute Resolution: Japan’s Labor Tribunal System*, in K.V.W. STONE, H. ARTHURS (Eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, Russel Sage Foundation, 2013, 174; K. SUGENO, *Judicial Reform and the Reform of the Labor Dispute Resolution System*, in *Japan Labor Review*, 2006, Vol. 3, No. 1, 4.

<sup>10</sup> For more data see VV.AA., *Diversification in Forms of Employment*, in *Labor Situation in Japan and Its Analysis: General Overview 2013/2014*, JILPT, Tokyo, 2014, 44. For an analysis on non-regular workers in Japan see Y. ASAO, *Overview of Non-regular Employment in Japan*, in *JILPT Report*, 2011, No. 10, 1.

in the future as companies are tempted to hire people using cheaper solutions.

Thus, the question will be not just be one of regular versus non-regular work, but the difference between “workers” and “non-workers” may also become essential. It therefore seems likely that courts will face more and more disputes regarding the nature of the relationship between those who benefit from the work and those who perform it<sup>11</sup>.

In this sense it may be useful to introduce into the Japanese legal system a tool capable of increasing certainty and establishing the nature of the relationship pre-emptively and without the intervention of the court.

## 1.2. Insourcing and Outsourcing Processes in Japan.

It is notorious that in the modern economy companies tend to reduce direct hiring and increase their recourse to methods which take advantage

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<sup>11</sup> Courts are already facing these kinds of disputes. As an example see Supreme Court of Japan, 2004 (Ju) No. 1250, Minshu Vol. 59, No. 5 in <http://www.courts.go.jp/english/judgments/> (commented by M. ISHIDA, R. HOSOKAWA in *Waseda Bulletin of Comparative Law*, 2007, Vol. 25, 133) where the court ruled that «a medical practitioner who participates in the clinical training and engages in medical practices at a hospital according to the training program and under the instruction of the clinical training instructing doctor is included in the scope of workers set forth in Article 9 of the Labor Standards Law (before amendment by Law No. 112 of 1998) if he/she can be regarded as performing medical practices under the instruction and supervision of the owner of the hospital». See also *Z1 v New National Theatre, Tokyo*, Supreme Court, 3<sup>rd</sup> P.B., April 12, 2011, Case No. (gyo-hi) 226 and 227 of 2009, 1026 Rodo Hanrei 6 and *Z2 v INAX Maintenance*, Supreme Court, 3<sup>rd</sup> P.B., April 12, 2011, Case No. (gyo-hi) 192 of 2009, 1026 Rodo Hanrei 27 (commented by M. ISHIDA, Y. KUROIWA, Y. AKIMOTO) in *Waseda Bulletin of Comparative Law*, 2013, Vol. 31, 60; *X. v. Chief of Fujisawa Labor Office (Injury of Carpenter)*, Supreme Court 1<sup>st</sup> P.B., June 28, 2007, Case No. (Gyo Hi) 145 of 2005, 940 Rodo Handrei 11 (commented by M. ISHIDA, H. KAWATA) in *Waseda Bulletin of Comparative Law*, 2009, Vol. 27, 125; *Z v. State & Central Labor Relations Commission (on INAX Maintenance)*, Tokyo High Court, September 16, 2009, Case No. (gyo-ko) 192 of 2009, 989 Rodo Hanrei 12 (commented by M. ISHIDA, Y. KUROIWA, Y. AKIMOTO) in *Waseda Bulletin of Comparative Law*, 2011, Vol. 29, 77. Those are exactly the genre of dispute that can be avoided through the use of certification.



of the labour force without bearing the costs and risks arising from employment contracts<sup>12</sup>.

In Japan, as in many other countries, the labour-supply business is prohibited; in other words, «no person shall carry out a labor-supply business or have workers supplied by a person who carries out a labor-supply business work under his/her own directions or orders»<sup>13</sup>. However, there are some legal ways to benefit from the work of people who are not directly hired. Among them it is possible to make a distinction between insourcing and outsourcing processes (as shown in Table No. 2): in the first scenario a company acquires another company's workers to perform a job under its own direction, so part of its production is carried out by workers who are not directly hired by the company itself, whereas, in the second scenario, a company outsources part of its production to another company and benefits, indirectly, from the labour force of the another company by taking advantage of the final result of their activity, but without exercising any direct control over them.

Table No. 2<sup>14</sup>:

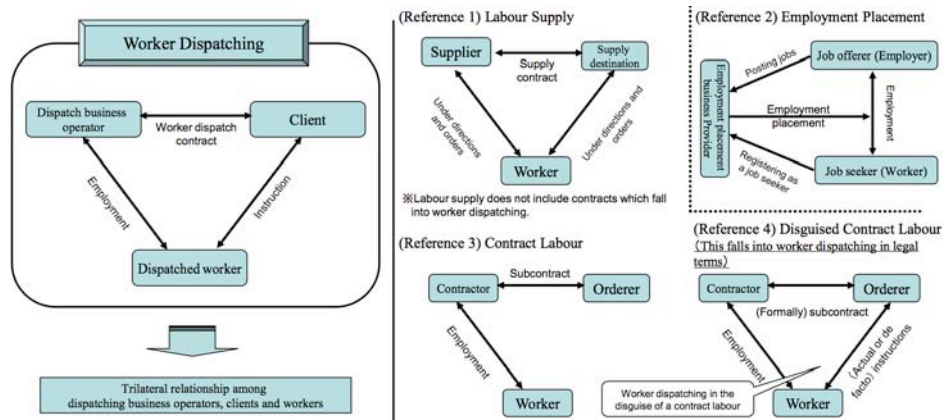
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<sup>12</sup> See, among the most recent, R. McIVOR, *Global Services Outsourcing*, Cambridge University Press, Cambridge, 2010; A. BRONSTEIN, *International and comparative labour law: current challenges*, Palgrave Macmillan, Basingstoke, 2009, 60 and, from an employment-oriented perspective, M. TIRABOSCHI, *Outsourcing of Labour and Promotion of Human Capital: Two Irreconcilable Models? Reflections on the Italian Case*, in R. BLANPAIN, M. TIRABOSCHI (Eds.), *The Global Labour Market. From Globalization to Flexicurity*, Kluwer Law International, Bulletin of Comparative Labour Relations Series, 2008, No. 65, 187; M. ISHIDA, *The Changes in Enterprise Organization and Labor Law in Japan: an Historical Exploration*, in *Waseda Bulletin of Comparative Law*, 2005, Vol. 23, 1.

<sup>13</sup> Art. 44 Employment Security Act. However, the Japanese legal system makes an exception because labour unions and other entities equivalent thereto which are provided for by an Ordinance of the Ministry of Health, Labour and Welfare are permitted to be labour supply business providers.

<sup>14</sup> Source: *Act for Partial Revision of the "Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers"* (*The Revised Worker Dispatching Act*), Japanese Ministry of Health, Labour and Welfare, 2012.





One legal form of insourcing is agency work, which, in Japan, is named “dispatched work”. Dispatched work is when, as stated by Art. 2(i) of the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (hereinafter referred to as the “Worker Dispatching Act”), «a worker(s) employed by one person so as to be engaged in work for another person under the instruction of the latter, while maintaining his/her employment relationship with the former»<sup>15</sup>. This form of labour-supply is legalised by the Worker Dispatching Act, but is subject to certain rules. For example, worker dispatching is prohibited in some sectors<sup>16</sup>, in certain situations is subject to a licence or to a notice, there are some restrictions on its duration and, in general, there is a broad regulation of the dispatching procedure.

Japanese lawmakers have, like many other lawmakers, been concerned with guaranteeing a decent level of protection of workers involved in this tripartite relationship and selecting trusted dispatching undertakings in

<sup>15</sup> For an analysis of the worker dispatching system in Japan see VV.AA., *The Current Status and the Challenges of Dispatched Work in Japan*, in *Labor Situation in Japan and Analysis: Detailed Exposition 2011/2012*, JILPT, Tokyo, 2013, 12. For a background analysis see Y. SHIMADA, S. NAITO, *The Revisions of the Law for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, etc.*, in *Waseda Bulletin of Comparative Law*, 1998, Vol. 17, 70.

<sup>16</sup> Port transport services, construction work, security services and medical-related services (Art. 4 Worker Dispatching Act).

order to avoid exploitation and the risk that those companies might merely be providing a physical work force<sup>17</sup>. However, according to the Japanese Ministry of Labour «the number of clients who repeat illegal practices with the same dispatching business operators is increasing» and «there is a growing number of employers who attempt to evade sanctions against illegal dispatching»<sup>18</sup>. In this case it might be difficult and expensive for the Ministry of Labour inspectorate to identify fraudsters, and a tool that permits the best companies to acquire a quality certification showing the lawfulness of their practices could therefore be useful.

Another type of insourcing is the “*Shukko*”, translated as “farming-out”, a practice in which a worker employed by one company is sent to another company for a fixed period, while his or her former employment contract is suspended and he or she signs another contract with the hosting company. Even if, in this case, the hosting employer should make a contract with the transferred worker, farming-out be used by some as a facade to hide a labour-supply business, which is prohibited. Furthermore, farming-out might also be used as a way to get rid of some employees and it might hide unfair practices, also because of the asymmetry of information between the parties.

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<sup>17</sup> In these situations it can be difficult to establish who is the “employer” within the scope of legislation. See, for an example, Supreme Court of Japan, 1993 (Gyo-Tsu) No. 17, Minshu Vol. 49, No. 2 at 559 in <http://www.courts.go.jp/english/judgments/> in a ruling on whether a business operator falls within the scope of “employer” set forth in Art. 7 of the Labour Union Act. Furthermore, in some cases there may be a misuse of dispatching. See Supreme Court of Japan, 2008 (Ju) No. 1240, Minshu Vol. 63, No. 10 in <http://www.courts.go.jp/english/judgments/> which ruled that, where the worker, «who concluded an employment contract with the contractor under a contract for work and was dispatched to the factory of the party ordering the work, was engaged in work while directly receiving specific directions and orders from the party ordering the work, and because of this style of work, the relationship between the contractor and the party ordering the work can be regarded as a falsified contract for work and the dispatch of the worker should be construed to be unlawful worker dispatching, it cannot be said that the relationship under an employment contract had been formed implicitly between the party ordering the work and the worker».

<sup>18</sup> See the Japanese Ministry of Health, Labour and Welfare presentation on Act for Partial Revision of the “Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers” (The Revised Worker Dispatching Act), 2012.

On the other hand there are outsourcing models where a company benefits only indirectly from the work of the labour force hired from another company.

However, even if insourcing and outsourcing are two opposing concepts, both present risks for the workers involved in those processes<sup>19</sup>. Indeed, a contract for work and services, or, as the Japanese Civil Code calls it, a “contract for the completion of work”, in practice might be just a facade to hide a labour-supply business. In order to prevent abuses, Art. 4 of the Ordinance for Enforcement of the Employment Security Act states the following requirements that every contract for the completion of work must fulfil: (i) the contractor assumes all responsibilities and liabilities, both financially and legally, as a business provider, for the completion of the work; (ii) the contractor gives directions to and provides supervision of the workers engaged in the work; (iii) the contractor honours all obligations provided by any Act as would the employer of the workers engaged in the work; (iv) the work performed does not merely involve the provision of physical labour, but also the operation of machinery, equipment or devices (excluding simple tools necessary for the work) or any material necessary for the work provided by the person, or planning or other work requiring specialized skills or experience. Moreover, even if all the conditions listed are adhered to, the contractor may not be released or exempted from being deemed as a person operating the business of labour-supply where such a situation has been created intentionally to disguise that the true purpose of the business is to supply labour. Therefore, if a contract for the completion of work does not fulfil these requirements, the company could be considered as operating a labour-supply business and the parties to the contract could face sanctions.

Also in this case it seems that the Japanese legal system does not dispose of any tools that might increase the certainty of relationships between parties and the only way to establish the real nature of a contract is by recourse to a court.

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<sup>19</sup> The issue of bogus subcontracting is mentioned also in VV.AA., *Measures regarding Dispatched and Subcontracted Labor*, in *Labor Situation in Japan and Its Analysis: General Overview 2011/2012*, JILPT, Tokyo, 2013, 145.

Furthermore, contracts for the completion of work may contain issues related to the liability of the main contractor towards the workers of the subcontractor. In this case it may be that the subcontractor's employees claim to be in an implied employment contract with the main contractor and the judges have to evaluate the nature of the relationship between companies in order to establish if the relationship is similar to a parent-subsidiary relationship and if the subsidiary is an independent company or whether it is simply being used as a front to avoid labour-related costs<sup>20</sup>. Also in this situation the only method to establish the nature of the relationship and who is liable towards the workers is through recourse to the court<sup>21</sup>. A tool that could provide an alternative way to determine rights and duties could therefore be very useful.

## 2. The Italian Legal Procedure Known as “Certification of Contracts”.

The procedure named “Certification of Contracts” (hereinafter referred to as Certification) was introduced into the Italian legal system by Art. 75 and ff. of the Legislative Decree 276/2003 (the so-called Biagi Law<sup>22</sup>) in

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<sup>20</sup> See, for example, *X. v. Matsushita PDP Co, Ltd.* Osaka High Court, April 25, 2008, Case No. (ne) 1661 of 2007, 960 Rodo Hanrei 5 (commented by M. ISHIDA, Y. KUROIWA, Y. AKIMOTO) in *Waseda Bulletin of Comparative Law*, 2010, Vol. 28, 126 where «the High Court found the original labour contract between the subcontracting company and the [claimant] unlawful and ineffective as he practically worked under the direction of the chief contractor, not the subcontracting company, and concluded that an implied labour contract was already formed between the employee and the chief contractor implicitly».

<sup>21</sup> See, for example, Supreme Court of Japan, 2010 (Gyo-Hi) No. 273, Minshu Vol. 66, No. 2 in <http://www.courts.go.jp/english/judgments/> on a case of liability of a company in the construction subcontracting business for an industrial accident compensation.

<sup>22</sup> For an overview of the Biagi reform see M. TIRABOSCHI, *The Italian Labour Market after the Biagi Reform*, in M. TIRABOSCHI, *Labour Law and Industrial Relations in Recessionary Times*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2014, 89.

order to increase certainty in labour and commercial relations and to reduce the number of legal disputes<sup>23</sup>.

Certification is a legal document binding for third parties, issued by a commission of experts at the request of parties to the contract, which establishes the nature of the contract and, on that basis, the law applicable. The commission of experts, the so-called “Commission of Certification”, also provides consultancy services in the drafting of contracts and in making changes to existing contracts if requested.

Certification aims to lessen the asymmetry of information between the parties and to help them draft a customised contract (standard or non-standard) which perfectly suits the labour scenario and reduces wrongful interpretations of contractual obligations and therefore the risk of future litigation.

Indeed, certification is useful in reducing the number of disputes because parties are aware of the content of the contract and do not need to go to the court for issues regarding its interpretation. Should one of the parties wish to challenge the issuance of certification, Art. 30(2) of Law No. 183/2010, states that evidence acquired from the commission of certification can help the judge who, in the ruling of the case, has to take into account the behaviour of the parties during the certification process and the statements released.

### **2.1. The Functions of Certification.**

Art. 75 of Legislative Decree No. 276/2003, amended by Art. 30(4) of Law No. 183/2010, states that in order to reduce the number of employment lawsuits, the parties to the contract can apply for the certification of contracts whence directly or indirectly arises a work performance. The range of certifiable contracts is very broad in order to

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<sup>23</sup> For a further analysis of the certification see C. BIZZARRO, F. PASQUINI, M. TIRABOSCHI, D. VENTURI, *The Certification of Employment Contracts: A Legal Instrument for Labour Market Regulation in Italy*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2010, Vol. 26, No. 1, 103.

prevent as many employment lawsuits as possible, and it is therefore possible to apply for the certification of (i) employment contracts (standard or non-standard), (ii) labour contracts (at company or territorial level), (iii) commercial contracts which involve employment issues, such as the contract between a recruitment agency (dispatching undertaking) and user company; the contract / sub-contract for work and services between two or more companies (the so-called “*appalto*” / “*sub-appalto*”); in case of posted workers (transferred workers), the contract between the company which makes the posting and the client for whom the services are intended.

Certification is usually a voluntary procedure and the parties to the contract apply in order to prevent lawsuits or to demonstrate their compliance with employment-related laws; however, there is a case subject to mandatory certification.

In accordance with Art. 2(1) of Presidential Decree No. 177/2011, it is possible to provide services within polluted and confined spaces only if the contracts for work and services or the related sub-contracts have been certified. Furthermore, companies must certify non-standard employment contracts (i.e. fixed-term contracts; apprenticeships; project-based contracts) of workers engaged in activities in those spaces. Indeed, in order to prevent workplace injuries and fatalities, Italian law permits activities involving a high level of risk to the health and safety of workers and others only at the most reliable companies by specifically trained and experienced workers. To overcome market restrictions, companies must obtain the certification, which, in this case, is mainly focused on compliance with health and safety regulations<sup>24</sup>.

However, the analysis of contracts for works, services and sub-contracting, in accordance with Art. 84 of Legislative Decree No. 276/2003, also concerns the genuine nature of the contract and verifies

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<sup>24</sup> With particular reference to the certification of the compliance with health and safety regulations see M. GIOVANNONE, M. TIRABOSCHI, *Work Organisation, New Forms of Employment and Good Practices for Occupational Health and Safety: Evidence from Italy within the European Context*, in M. SARGEANT, M. GIOVANNONE (Eds.), *Vulnerable Workers. Health, Safety and Well-being*, Gower Publishing Ltd., Farnham, 2011, 93.

that it has not been created for the purpose of disguising a labour-supply business.

Further to this, there are also specific provisions for other activities that Commissions of Certification are entitled to carry out.

A number of these provisions regard the termination of the employment relationship. Art. 82 of Legislative Decree No. 276/2003, as amended by Art. 31(14) of Law No. 183/2010, states that Commissions of Certification are entitled to certify renunciations and transactions and declare whether the latter conform to the will of the parties to the contract<sup>25</sup>. Indeed, Italian law permits renunciations of rights arising from employment relationships and employment transactions only if the workers are fully aware of their rights and only if they sign the renunciation or transaction and agree not to pursue any legal action regarding those rights against the employer. In order to ensure that the worker is adequately informed and acting on his/her free will, Art. 2113 of the Civil Code requires that renunciations and transactions be signed in front of the Local Labour Directorate (so-called “DTL”) conciliation commission or in front a trade union conciliation commission. In 2003, the lawmaker went on to state that a worker may also renounce his or her rights or conclude a transaction in front of a Commission of Certification. Again, concerning the termination of the employment contract, Art. 30(3) of Law No. 183/2010, states that parties to the contract can, with the assistance of a Commission of Certification, establish some fair reasons for potential dismissal. In this case, should the employee make a claim to the Employment Tribunal for unfair dismissal, in the analysis of the grounds for dismissal the judge must take into account the hypotheses established in the certified employment contract. Parties can also establish some elements or parameters that the judge must take into account in determining compensation. This function of certification is very important as it permits the employer to increase the certainty of fair dismissals and helps the judge in making the ruling. If one of the

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<sup>25</sup> Prior to the Law No. 183/2010 this function was reserved to the bilateral bodies commissions (cf. § 2.2.).



hypotheses of potentially fair dismissal established in the contract occurs, the employer can dismiss the employee in question without hesitation. Even in cases of unfair dismissal certification is still useful because the employer can better estimate the cost of firing a given employee, since the judge, in determining compensation, will take into account the parameters established in the contract.

There is another provision regarding the termination of contracts. Art. 31(10) of Law No. 183/2010, states that Commissions of Certification can certify that the parties to the contract agree to resolve any eventual disputes through an arbitration process. The commission must confirm that the parties agree not to pursue any legal action in front of a court, and the arbitration clause is void if it is not certified. According Art. 31(12) of Law No. 183/2010, an arbitration committee can be created within the commission as well as a conciliation commission.

Certification may also concern Company Law since Art. 6 of Law No. 142/2001 states that cooperative companies must declare, in an internal regulation, certain employment-related information including the types of employment contracts (standard and non-standard) with which cooperative members can be hired; collective agreements or other regulations applicable; the manner in which the work will be carried out, and they must submit this regulation to the DTL offices. Commissions of Certification, in accordance with Art. 83 of Legislative Decree No. 276/2003, as amended by Art. 31(15) of Law No. 183/2010, can confirm the compliance of the regulation with employment-related laws. In this case the certification is not of an employment contract or a business contract, but of a corporate document.

## **2.2. Bodies That May Provide Certification.**

Art. 76 of the Legislative Decree No. 276/2003, as amended by Art. 30(5) of Law No. 183/2010, establishes, as follows, the bodies that can open a Commission of Certification:

- Bilateral bodies <sup>26</sup> (with a jurisdiction depending on the collective agreement according to which they are set up);
- DTL and Provinces <sup>27</sup> (with territorial jurisdiction);
- Universities enrolled in the Ministry of Labour and Social Policies Register, in the framework of an agreement with a full Professor of Employment Law (with national jurisdiction);
- Directorate General For Working Environment of the Ministry of Labour and Social Policies (with national jurisdiction);
- Provincial Councils of Labour Consultants (with territorial jurisdiction).

With the exception of these jurisdictional rules there are no obligations which apply to a specific commission and the parties to the contract can choose the commission of certification they prefer.

Submitting an application for certification usually has a cost which changes depending on the commission and on the type of application (i.e. the application for the certification of a contract for work and services is more expensive than the application for the certification of a project-based contract), but the parties to the contract can submit the application for free at the DTLs and the Ministry of Labour and Social Policies commissions.

The latest Ministry of Labour and Social Policies data available <sup>28</sup> shows that there are 12 commissions based at universities <sup>29</sup>; one at the

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<sup>26</sup> For a comprehensive definition of “bilateral bodies” see M. TIRABOSCHI, *Bilateralism and Bilateral Bodies: The New Frontier of Industrial Relations in Italy*, in *E-Journal of International and Comparative Labour Studies*, 2013, No. 1, 115 «the expressions “bilateral bodies” or “joint bodies” are used to refer to entities that are set up and regulated by means of collective bargaining and that have three main features: 1) they consist of representatives from social partners who conclude collective agreements through which such bodies are governed; 2) provide (employment) services and protection to both workers and employers, in accordance to what is laid down by collective agreements and by statutory laws. Funds to such activities are collected by means of contributions paid by employers and – to a minor extent – by workers; 3) Upon the free choice of the parties that comprise them, bilateral bodies are autonomous legal entities».

<sup>27</sup> A province (*provincia*) is an «administrative division of intermediate level between a municipality (*comune*) and a region (*regione*) » in [http://en.wikipedia.org/wiki/Provinces\\_of\\_Italy](http://en.wikipedia.org/wiki/Provinces_of_Italy).

Directorate General For Working Environment of the Ministry of Labour and Social Policies and 72 at Provincial Councils of Labour Consultants. For the other bodies there are no official data but, on the basis of the information available on the internet, it can be concluded that there are 19 commissions at bilateral bodies <sup>30</sup>; and that every DTL (91) and every Province (110) has its own commission. Hence, despite the lack of official data, we can presume that in Italy, in July of 2014, there are around 300 commissions. However, we do not know how many of them are working and how many have recently opened but have not yet begun to issue certifications.

There are no current data on the number of applications for certification, but the latest available data <sup>31</sup> show that on December 31<sup>st</sup> 2009 there were 11,086 applications for certification, and most of them were related to project-based contracts. To be precise, there were 6,956 applications at university commissions <sup>32</sup>, 3,380 at DTL commissions, 564 at Provincial

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<sup>28</sup> Source: webpage of the Italian Ministry of Labour and Social Policies (in Italian) <http://www.lavoro.gov.it/AreaLavoro/RapportiLavoro/disciplina/Pages/commissioncertificazione.aspx>.

<sup>29</sup> According to the Italian Ministry of Education, Universities and Research (MIUR) in Italy there are 95 universities (66 public and 29 private). The following universities have a commission: University of Modena and Reggio Emilia; University of Genoa; University of L'Aquila; University of Catania; Marco Biagi Foundation; University of Padua; Cà Foscari University of Venice; Roma Tre University; University of Pavia; Sapienza University of Rome; University of Rome Tor Vergata; University of Cassino and Southern Lazio.

<sup>30</sup> From the websites of the following bilateral bodies (in Italian) it can be argued that they too have commissions of certification: *Ente Bilaterale del Commercio della Provincia di Bari*; *Ente Bilaterale Provinciale del Terziario di Palermo*; *Ente Bilaterale del settore Terziario della provincia di Vibo Valentia*; *Ente Bilaterale del Terziario di Catania*; *EBT Terziario della provincia de La Spezia*; *Enbic - Ente Bilaterale Confederale*; *Ente Bilaterale Nazionale del Settore Privato EBINASPRI*; *EPAR, Ente Bilaterale Nazionale del Settore Privato di C.I.F.A. e CONF.S.A.I.*; *Ente Bilaterale Nazionale "EBUC"*; *E.B.I.C.C. Ente Bilaterale Nazionale*; *Ente Bilaterale ENBISIT*; *Ente Bilaterale Nazionale Servizi Ausiliari Fiduciari Integrati "EBiNSAFI"*; *E.BI.TE.N. Ente Bilaterale Lombardo del terziario*; *ENBIF - Ente nazionale bilaterale costituito da Saci - Cital -Terziario*; *EBNAIP Ente Bilaterale Nazionale Agenti Immobiliari Professionali*; *E.B.A.M.O. Ente Bilaterale Aziende Marketing Operativo*; *ENBOA - Ente Nazionale Bilaterale delle Organizzazioni Autonome*; *E.BI.TER. Piacenza*; *EBLO Ente Bilaterale Lombardo*.

<sup>31</sup> Source: Ministry of Labour and Social Policies data, December 31<sup>st</sup> 2009.

<sup>32</sup> The number of applications for certification submitted to universities refers only to those applications submitted to the University of Modena and Reggio Emilia

Councils of Labour Consultants commissions, 185 at Province commissions, one at the Directorate General For Working Environment of the Ministry of Labour and Social Policies commission and none at bilateral bodies.

The number of applications is low because the certification of contracts was introduced into the Italian legal system in 2003 and it took time before the bodies entitled to open a commission were able to put theory into practice. However, most of the commissions mentioned have opened in the last few years and so in the next data from the Ministry of Labour and Social Policies we can expect to see many more applications for certification.

### **2.2.1. The Experience of The Commission of Certification of the University of Modena and Reggio Emilia.**

Although it cannot be considered representative at a national level, it is interesting to look at the data of the Commission of Certification of the University of Modena and Reggio Emilia which has been operative since 2005<sup>33</sup>.

This commission received 14,543 applications for certification between July 2005 and December 2013 and, as Table No. 3 shows, receives on average around 2,000 applications every year.

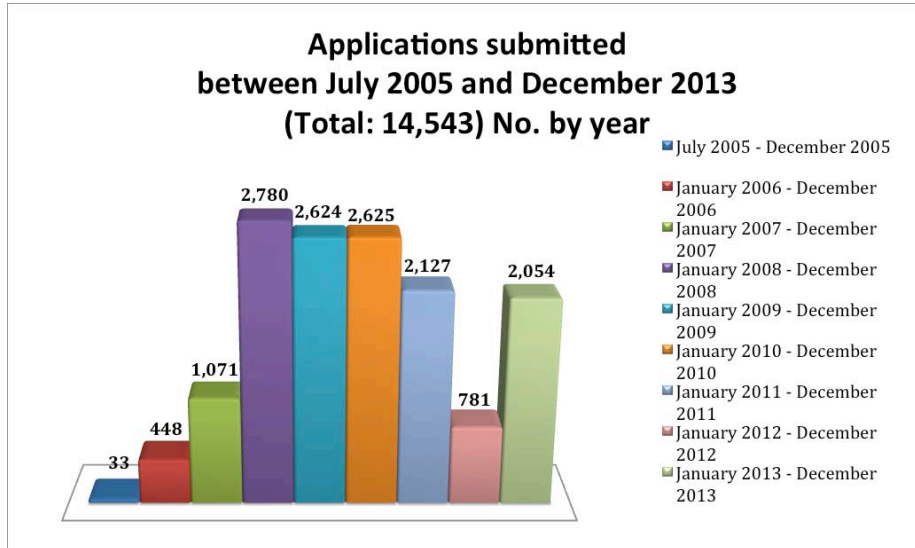
Table No. 3<sup>34</sup>:

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Commission, because on December 31<sup>st</sup> 2009 the commissions opened by other universities were inactive.

<sup>33</sup> Source: Commission for Certification of the “Marco Biagi” Department of Economics at the University of Modena and Reggio Emilia Bulletin, 2014, No. 1 (in Italian) in [http://www.adapt.it/bollettinocertificazione/?page\\_id=10](http://www.adapt.it/bollettinocertificazione/?page_id=10).

<sup>34</sup> Source: Commission for Certification of the “Marco Biagi” Department of Economics at the University of Modena and Reggio Emilia Bulletin, *a.m.*



In addition to carrying out the certification procedure the commission also acts as a consultant on contractual issues for more than 200 companies and organisations representing companies and trade-union confederations.

In accordance with new functions assigned by Law No. 183/2010, since January 2011 the Commission of Certification of the University of Modena and Reggio Emilia has certified 53 renunciations and transactions and has made 59 attempts at conciliation.

### **2.3. Mandatory Principles of the Certification Procedure.**

As mentioned earlier, the application for certification is voluntary and must be signed by the both parties to the contract.

Art. 78(2) of Legislative Decree No. 276/2003, states only a few mandatory rules about the certification procedure and leaves most of the regulation to commissions' internal codes.

The procedure must fulfil four essential provisions: (i) the commission of certification has to inform the DTL which, in turn, informs other interested authorities (i.e. the National Social Security Institute (INPS)) of

the beginning of the procedure, in order to permit them to intervene; (ii) the procedure must be completed within 30 days from the submission of the application; (iii) the issuance of certification (or a rejection of the application) must be supported by an adequate and complete motivation and it must state the remedies available and the deadline for submitting an appeal; (iv) the issuance of certification must include the civil, fiscal and social security effects it has on the parties to the contract and third parties. Besides this, the rest of the regulation is the responsibility of the commissions, which are free to determine, within their codes, the modalities for the nomination of the commissioners and the certification procedure.

#### **2.4. The Pre-certification Phase.**

Art. 81 of Legislative Decree No. 276/2003 establishes an optional pre-certification phase that the parties to the contract can go through before submitting the contract to the commission. This phase, as mentioned previously, concerns specific assistance in drafting the contract and in making changes to existing contracts. This service helps the parties to the contract tailor a solution that fits their needs and which is compliant with the law.

Furthermore, taking into account the practice of the Commission of Certification of the University of Modena and Reggio Emilia, there is another optional pre-certification phase which is not established by law, but which seems particularly useful. Indeed, according to the internal code of the aforementioned commission, the parties to the contract can apply preemptively for an informal analysis of the contract, with the aim of highlighting the main issues of the contract so that the parties involved are aware of any critical points and can decide whether to fix them or not and then apply for certification, or to leave things as they are. There are no legal consequences in the case of non-compliance with the law, it is simply a service that enables the parties to the contract to be aware of any potential risks arising from the contract.

Both the pre-certification services are completely optional and the parties to the contract can also decide to go straight to the certification procedure.

### **2.5. The Certification Procedure.**

In addition to the four principles mentioned above, there are no other mandatory rules for the certification procedure. Hence, in order to describe briefly how certification works in practice, we shall now explain the procedure established in the internal code of the Commission of Certification of the University of Modena and Reggio Emilia which, according to the latest official data available, is the commission that has received the greatest number of applications.

According to the law, both parties to the contract have to sign the application for certification and submit it to a commission of certification, taking into account the above-mentioned jurisdictional rules.

The procedure begins with a document analysis, which usually concerns the contract and its attachments. This phase could be difficult to carry out in the Japanese legal system where there are few written contracts. However, the documental analysis is just the starting point as the issuance of certification relies not just on a formal analysis, but is also based on the analysis of what happens in practice, because only in this way can the real nature of the relationship be established.

Indeed, the documental analysis is followed by an interview with the workers and an inspection of the premises, in order to understand the relationship between the parties and how the labour relationship is organised. In an employment relationship the commission focuses its inspection on working hours, workstations, the possibility of taking breaks or days off, the possibility of deciding how and when to perform activities etc. In a commercial relationship, however, the focus is on which party bears the entrepreneurial risk, manages the machinery and the labour force. This phase is the most important in the certification procedure, but it faces a number of problems since the commission of certification has



limited power in terms of inquiries and employer and worker may therefore describe different scenarios. In this case the commissioner’s experience is essential in determining when someone is providing false information or exaggerating certain issues. Furthermore, there may be a contrast between the real scenario and what happens during the inspection, but in this case it would be possible to appeal against the certification <sup>35</sup>.

At the end of this second phase, and within 30 days from the moment of the submission of the application, there is a meeting of the commission where the delegate commissioner explains the case and presents the results of both the contractual analysis and the interviews / inspection and then all the commissioners vote on whether to certify the contract or reject the application.

After the vote the delegate commissioner drafts the issuance of certification or the rejection, both of which are legal documents binding for all parties to the contract and for third parties, and which must report the motivations stated by the commissioners during the meeting.

## **2.6. The Legal Effects of Certification.**

Art. 79 of Legislative Decree No. 276/2003, as amended by Art. 31(17) of Law No. 183/2010, states that the issuance of certification is binding for the parties to the contract and third parties (i.e. Social Security Authorities <sup>36</sup>), unless an Employment Tribunal overturns the certification, declaring it void <sup>37</sup>.

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<sup>35</sup> Explained in more depth in § 2.7.

<sup>36</sup> For example, in the judgment of the Milan Employment Tribunal No. 2647/2009 (in Italian) it is stated that if the National Social Security Institute’s (INPS) interpretation of the nature of the contract or of the law applicable differs from the findings of the commission of certification, INPS, before proceeding, must make an attempt at conciliation and, if this fails, can bring a civil action against certification and can proceed only if the Employment Tribunal overturns the certification.

<sup>37</sup> See § 2.7.

In other words, the parties to the contract and third parties have to consider the nature of the contract as established in the issuance of certification and, consequently, to apply the laws the commission have declared applicable to that relationship. For example, the Social Security Authority can not consider a person to be an employee, and consequently ask the employer to pay his or her social security tax, if that person is considered self-employed in an issuance of certification.

The certification is valid from the beginning of the contract(s) in question, regardless of whether the contract was already in effect before the application for certification was submitted, as long as the behaviour of the parties has been constant since the contract was signed.

Since certification is also binding for third parties, it is often considered a useful tool to avoid risks arising from the Ministry of Labour inspections. Indeed, inspectors cannot reclassify a certified contract but can appeal to an Employment Tribunal for a review of the decision handed down by the commission; in the meantime, however, the certified contract remains in force. Furthermore, according to Minister of Labour General Directive of the 18<sup>th</sup> September 2008, Labour Inspectorates should focus their inspections on non-certified contracts, unless a written claim is filed by workers complaining of a violation of labour rights, or whether the improper execution of the contract is immediately ascertained.

In this sense certification is seen by companies as an investment in order to avoid costs arising from future litigations or fines, and by the Minister of Labour as a way to focus its inspection on companies which are not certified and may have something to hide.

### **2.7. Remedies Against Certification.**

According to Art. 80 of Legislative Decree No. 276/2003, both parties to the contract and interested third parties have the right to bring a civil action against certification, in the case of: (i) wrongful classification of the contract; (ii) a discrepancy between the content of the contract for which

certification was issued and the implementation of the contract; (iii) lack of consent.

The wrongful classification of a contract indicates an error in the evaluation of the commission and it does not depend on the parties to the contract. The mistake could be a factual error (i.e. a misjudgement of the features of the contract) or an error regarding a misinterpretation of the applicable law.

Discrepancies between the content of the contract for which certification was issued and the implementation of the contract regard the behaviour of the parties to the contract and cannot be foreseen by the commission of certification. Discrepancies may happen if one of the parties changes his or her behaviour in the relationship after the issuance of certification declaring that a given regulation, which is convenient for him or her, is applicable to the contract. However, this can also happen if both parties agree to behave in a certain way purely to obtain the certification and then use it to defraud third parties.

Finally, a lack of consent may arise when, for example, one of the parties to the contract is forced by the other party to sign the application for certification or to make certain statements.

Nonetheless, before bringing an action in front of the Employment Tribunal the parties to the contract must make a mandatory attempt at conciliation in front of the commission of certification which issued the certification. This is a further way to avoid a legal dispute, though if the attempt at conciliation fails, parties can start proceedings in front of the Employment Tribunal.

Furthermore, both parties to the contract have the right to bring an administrative action against certification in the case of: (i) a procedural defect - a violation of any of the four principles stated by Art. 78(2) of Legislative Decree No. 276/2003 and mentioned above<sup>38</sup>; (ii) the misuse of power - should the commissions commit acts when they are not entitled to do so.

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<sup>38</sup> See § 2.3.

Even if there are no official data, it can be argued that in only five cases has the issuance of certification been overturned<sup>39</sup>. From this we can deduce that if a commission of experts who follow an accurate procedure issue the certification, it is a solid document that can be very helpful in avoiding lawsuits or, in the case of disputes, can help the judge to rule on the case. The extremely low number of instances of certification being overturned compared with several thousand certified contracts makes certification a tool on which companies, workers, and even judges, can rely.

### **3. Conclusions: the Certification of Contracts, a Tool That Could Improve the Japanese Labour Market.**

In Japan there is no certification of contracts, but there are several bodies that carry out functions similar to those of commissions of certification. In general, it can be argued that, also in Japan, there is a need to identify the best companies in order to improve the quality of the labour market and to foster fair competition with the exclusion of companies that are willing to make use of illegal practices<sup>40</sup>.

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<sup>39</sup> See the judgment of the Bergamo Employment Tribunal No. 416/2010 (in Italian) (confirmed in appeal by the judgment of Brescia Court of Appeal No. 70/2011 (in Italian)) and the judgement of the Bergamo Employment Tribunal No. 718/2010 (in Italian). Both the judgments were on the nature of an employment relationship between a cooperative company and a co-operative member who was treated as a project-based worker by the commission and as a standard employee by the Court. Also the injunctions of the Torino Employment Tribunal (June 17<sup>th</sup> 2013; June 20<sup>th</sup> 2013; June 21<sup>st</sup> 2013) (in Italian) regarding the cases of three people employed with a certified joint-venture contract which, in the opinion of the Court, was a standard employment contract.

<sup>40</sup> According to the European Business Council in Japan White Paper *The Fourth Arrow The EBC Report on the Japanese Business Environment 2013* in <https://www.ebc-jp.com/index.php/downloads/annual-white-paper>, European companies in Japan require government intervention in order to ensure fair competition and the fair and equal treatment of all companies. Hence the implementation of the certification of contracts in the Japanese legal system could increase fair competition, at least for employment-related issues, and avoid the possibility that companies may profit from the use of unfair labour practices.

One indicator of this need is the black list promoted by the Japanese Ministry of Labour which identifies the companies that treat their workers unfairly. Another piece of evidence is that, in order to obtain a contract for work and services with the local government, it is sometimes necessary to obtain authorisation which is only given if the company complies with the law.

The Japanese approach seems oriented towards blacklisting, while the Italian approach, expressed in the certification, aims at the same goal but with a different perspective. The proposed change is to move away from blacklisting, which aims solely at identifying the worst companies, towards a system which makes it possible to identify the best companies, allowing certified companies to stand out in the market demonstrating to clients and competitors their compliance with employment-related regulations.

This is both a system of Corporate Social Responsibility (CSR)<sup>41</sup> and a way to improve the quality of companies operating in the market. Indeed, if a company receives certain advantages from a qualification is likely that other companies would also start to improve their organisations in order to get the same qualification and have the same amount of appeal on the market.

In Japan there are a number of initiatives working in this sense, such as, for example, the “Youth Supporting Corporation Program”, which aims to identify the best companies in hiring and managing young people. However, these programs are temporary and not provided by law and they do not seem enough to make a real improvement in the labour market which probably requires a tool, such as certification, established by law which can be applied to every sector and can assure permanent effects. This system would eventually increase workers’ awareness of Employment legislation and of their rights.

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<sup>41</sup> On CSR in Asia and in Japan see M. ISHIDA, *Corporate Social Responsibility (CSR), Socially Responsible Investment (SRI) and Labour Law in Japan The Lessons from the Nomura Securities Case*, in *Waseda Law Review*, 2010, Vol. 3, 1; S. AGO, *International labour standards in Asia and the role of emerging CSR codes*, in *Japanese Yearbook of International Law*, 2009, No. 52, 281.

After an analysis of the Japanese legal system it can be argued that the implementation of the certification of contracts in the Japanese legal system seems possible.

The bodies that can open a commission of certification could be identified by their similarity with the bodies established in Italian law. These “Labour commissions”<sup>42</sup> could carry out the same role as that of the bilateral bodies. Indeed, both are suitable for the creation of a commission of certification composed by both employers’ and workers’ representatives. DTLs and Provinces could be substituted by Prefectural Labour Bureau Offices<sup>43</sup> and Prefectures<sup>44</sup>. Universities and Professors of Employment Law could be involved in Japan as they are in Italy in order to improve the relationship between academia and business. In this case, universities might put their knowledge at the service of employers and workers aiming to improve their knowledge of employment-related issues. The function carried out by the Directorate General For Working Environment of the Italian Ministry of Labour and Social Policies could be undertaken by the Japan Institute for Labour Policy and Training<sup>45</sup> which has the authority to take on this role on behalf of the Japanese Ministry of Health, Labour and Welfare. Finally, the “Labor and Social

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<sup>42</sup> “Labour commissions” representing employers, worker and the public. For more information on Labour commissions see K. SUGENO, *Japanese Employment and Labor Law*, *op. cit.*, 668.

<sup>43</sup> «Prefectural Labour Bureaus fulfil the duties of regionally based general labour administration agencies. Prefectural Labour Bureaus provide Labour Standard Inspection Offices and Public Employment Security Offices (Hello Works) with operational guidance as higher agencies, and perform employment equality administration and duties resulting from the worker dispatch system» in <http://www.mhlw.go.jp/english/org/detail/dl/organigram.pdf>.

<sup>44</sup> «The prefectures of Japan are the country’s 47 first-order subnational jurisdictions on a state or provincial level» in [http://en.wikipedia.org/wiki/Prefectures\\_of\\_Japan](http://en.wikipedia.org/wiki/Prefectures_of_Japan).

<sup>45</sup> «JILPT, or the Japan Institute for Labour Policy and Training, is a government-related organization. The objective of The Japan Institute for Labour Policy and Training is to contribute to the planning of labour policies and work toward their effective and efficient implementation, as well as to promote the livelihood of workers and develop the national economy by conducting comprehensive research projects on labour issues and policies, both domestically and internationally, and capitalize on the findings of such research by implementing training programs for administrative officials» in <http://www.jil.go.jp/english/organization/index.htm>.

Security Attorney”<sup>46</sup>, which already provides several services to companies regarding contractual issues (but without any binding effect), might substitute the Provincial Councils of Labour Consultants.

As previously stated the certification of contracts could be useful in preventing abuses in the so-called “grey areas” (worker *vs.* non-employees and contracts for the competition of work / dispatching *vs.* illegal dispatching). It could also bring about an improvement in the activities of labour inspectorates as they would be able to focus their inspections on non-certified contracts<sup>47</sup>.

When envisaging certification in the Japanese legal system it can be argued that Japanese commissions, instead of focusing their attention on individual employment contracts, should help employers in drafting the working rules<sup>48</sup>. Indeed, according to “Labor and Social Security Attorney”, 90% of labour disputes between employer and employee are due to incomplete working rules<sup>49</sup>. Commissions could therefore have a pivotal role in improving the quality of working rules making them compliant with the law and fully understandable to workers. Commissions might be able to encourage informed negotiation between employers and

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<sup>46</sup> «Labor and Social Security Attorney is directly authorized by MHLW (Ministry of Health, Labor and Welfare) in Japan. Labor and Social Security Attorney is the authorized license in Japan, and not only drafts various documents on social insurance or employment insurance and applies it, but also specializes in having general charge of management for labor and employment» in [http://labor-consultant.com/modules/laborcon/index.php?content\\_id=1](http://labor-consultant.com/modules/laborcon/index.php?content_id=1).

<sup>47</sup> For an overview of labour inspection in Japan see R. SAKURABA, *Effectiveness of Labour Law and the Role of Labour Inspection in Japan*, *Kobe University Law Review*, 2013, No. 47, 35.

<sup>48</sup> An employer who continuously employs 10 or more workers shall draw up rules of employment covering items stated in Art. 89 of the Labour Standard Act and shall submit those rules of employment to the relevant government agency. These rules apply to the employees and are the basics of the employment relationship. On the regulation on working rules see S. OUCHI, *The Actual Legal Problems on Labor Contact in Japanese Labor Law: Impact of the “Individualization” of Working Conditions*, in *Kobe University Law Review*, 2002, No. 36, 1. For a practical guide to drafting working rules and managing human resources in Japan see T. NEVINS, *Japan True or False: People Problems, Costs, Restructuring*, TMT, Tokyo, 2004.

<sup>49</sup> Cf. [http://labor-consultant.com/modules/empreg/index.php?content\\_id=1](http://labor-consultant.com/modules/empreg/index.php?content_id=1).



workers' representatives<sup>50</sup> in order to draft working rules which properly suit the labour relationship and satisfy the needs of all parties. In this sense, the assistance of a commission in contract drafting could also enable parties to negotiate in such a way as to increase flexibility and agree on exceptions to current regulations which could be binding for third parties and compliant with the law<sup>51</sup>.

However, commissions could also improve individual contracts, working through the Japanese Labor Contract Act<sup>52</sup>. Specifically, commissions could assist the parties to the contract in concluding or changing a contract and certify that the «balance of treatment according to the actual conditions of work»<sup>53</sup>, the «harmony between work and private life»<sup>54</sup> and the «consideration to safety of a worker»<sup>55</sup> have been properly evaluated, and that the parties «comply with the labour contract and [...] exercise their rights and perform their obligations in good faith»<sup>56</sup>. Certification might also be an excellent tool for ensuring that «a worker gains an in-depth understanding of the working conditions and the contents of the labor contract presented to the worker»<sup>57</sup>.

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<sup>50</sup> According to Art. 90 of Labor Standard Act «in drawing up or changing the rules of employment, the employer shall ask the opinion of either a labor union organized by a majority of the workers at the workplace concerned (in the case that such labor union is organized), or a person representing a majority of the workers (in the case that such labor union is not organized)».

<sup>51</sup> Indeed, if an agreement is made without proper assistance there is the risk that it is unlawful. See, for example, Supreme Court of Japan, 2004 (Ju) No. 1787, Minshu Vol. 61, No. 1 in <http://www.courts.go.jp/english/judgments/> where the Court ruled that «where an employee and employer have reached an agreement which obliges the employee to continue to be a member of a particular labor union, the part of the agreement which obliges the employee never to exercise the right to withdraw from the labour union, thereby preventing the employee's withdrawal from becoming effective at all, is contrary to public policy and therefore invalid». This case would probably not have happened if a commission of experts had assisted the employer.

<sup>52</sup> On the Labor Contract Act see R. YAMAKAWA, *The Enactment of the Labor Contract Act: Its Significance and Future Issues*, in *Japan Labor Review*, 2009, Vol. 6, No. 2, 4; M. ISHIDA, H. KAWATA, *Labor Contract Act*, in *Waseda Bulletin of Comparative Law*, 2009, Vol. 27, 79.

<sup>53</sup> See Art. 3(2) Labor Contract Act.

<sup>54</sup> See Art. 3(3) Labor Contract Act.

<sup>55</sup> See Art. 5 Labor Contract Act.

<sup>56</sup> See Art. 3(4) Labor Contract Act.

<sup>57</sup> See Art. 4(1) Labor Contract Act.

This could entail a decrease in labour disputes with a saving of money for companies and the lightening of activities of courts. Furthermore, employers could avoid the risk of being fined for malpractice in human resource management or of being made to pay compensation due to a failure to comply with employment-related laws.

Finally, considering the level of rigidity in laws regarding dismissals in Japan<sup>58</sup>, certification could be used as a tool to help employers pre-establish some reasonable grounds for dismissal which are considered socially acceptable. Commissions could also foster agreements between employers and workers’ representatives on given hypotheses of potentially fair reasons for dismissal. In this case the power of judges’ interpretations would be decreased and the contractual freedom of the parties would be augmented.

Regarding the termination of contracts, employers might appreciate the certification of renunciations and transactions aiming at increasing the certainty that the worker in question will not pursue any legal action against him or her regarding the rights concerned in the renunciation or the transaction.

In conclusion, the certification of contracts is a good practice which could be exported also outside Italy as it could easily fit into foreign labour markets without requiring costs for its implementation. It might be interesting to try to implement this useful practice in other legal systems in order to see whether it could improve the quality of labour-related relationships as well as increasing the quality of the companies in the labour market. Therefore, taking into account the Italian experience, implementing the certification of contracts in the Japanese labour market could certainly be worthwhile.

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<sup>58</sup> On the rules of dismissals in Japan see K. SUGENO, K. YAMAKOSHI, *Dismissals in Japan*, in *Japan Labor Review*, 2014, Vol. 11-12, No. 2-3.

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