

Giustizia consensuale No 1/2023: Abstracts

The first issue of 2023 of *Giustizia Consensuale* (published by Editoriale Scientifica) has just been released, and it features:

Annalisa Ciampi (Professor at the University of Verona), ***La giustizia consensuale internazionale*** (*International Consensual Justice*; in Italian)

All means of dispute settlement between States, including adjudication, are based on the consent of the parties concerned. The post-Cold War era saw an unprecedented growth of third-party (judge or arbitrator) dispute resolution systems. In more recent years, however, we are witnessing a weakening of the international judicial function. This paper analyses and explains similarities and differences between dispute settlement between States and dispute resolution between private parties at the national level. Whilst doing so, it makes a contribution to the question of whether the de-judicialisation taking place in Italy and elsewhere, as well as in the international legal system, can be considered a step in the right direction.

Sabrina Tranquilli (Researcher at the “Università degli Studi di Napoli Parthenope”), ***I contratti istituzionali di sviluppo (CIS) e i modelli di risoluzione e prevenzione dei conflitti tra pubbliche amministrazioni*** (*Institutional Development Contracts (IDC) and Models for Conflict Resolution and Prevention between Public Administrations*; in Italian)

The paper examines the two models of conflict resolution between public administrations set out in the Institutional Development Contracts (IDC). These contracts - recurrently used by the Italian lawmaker, also for the implementation of the Recovery and Resilience Plan (NRRP) for strategic interventions, especially in the area of territorial cohesion - allow the Administrations involved to define their respective spheres of intervention while also preventing possible conflicts between them. IDCs provide for both a centralised-substitutive model of conflict resolution and a negotiated one. This article shows that, although there is no overriding criterion between the two models, in both cases the dialectic between the parties based on the

principle of loyal cooperation is essential.

Guillermo Schumann Barragán (Associate Professor at the “Universidad Complutense” in Madrid), ***Verso una teoria generale degli accordi processuali. Premesse ricostruttive*** (*Toward a General Theory of Procedural Agreements. Reconstructive Premises*; in Italian)

Procedural agreements are legal transactions with which the parties pursue certain procedural effects. Although such agreements are not unknown in the Spanish and Italian legal systems, there seems to be a lack of drive in these to define them as a legal category per se, i.e. as a set of legal transactions that share a series of structural elements and common criteria of validity and effectiveness. The aim of this paper is to outline a general theory of procedural agreements and to apply the theoretical results achieved to a few, selected procedural agreements. In doing so, this paper aims to assess the usefulness and appropriateness of such agreements, also in the light of the economic analysis of the law and of the growing regulatory competition of States vis-à-vis cross-border legal relations as well as jurisdiction, in case a dispute arises.

Alessandro Giuliani (Resercher at the “Università Politecnica delle Marche”), ***Percorsi di valorizzazione dell’arbitrato irrituale nel diritto del lavoro in una prospettiva diacronica*** (*Pathways to the Enhancement of Informal Arbitration in Labour Law in a Diachronic Perspective*; in Italian)

Through a diachronic examination of applicable law, the article addresses critical issues in informal arbitration in the context of labour disputes. The legal framework of informal arbitration reveals a piecemeal scenario marked by discrepancies between legal provisions and implementation thereof. Against this backdrop, informal arbitration contributes to fostering a culture of alternative dispute resolution within the Italian legal system. The article focuses in greater detail on the procedure set out in Article 7 of Italian Law No 300 of 1970 and its potential to boost the effectiveness of informal arbitration in labour disputes, thus enhancing the protection of workers’ rights beyond the judicial process.

Observatory on Legislation and Regulations

Claudio Scognamiglio (Professor at the University of Rome “Tor Vergata”), ***La negoziazione assistita e le controversie di lavoro. Verso un nuovo ruolo dell’avvocato nel riequilibrio delle situazioni di asimmetria negoziale?*** (*Assisted Negotiation and Labor Disputes. Toward a New Role for the Lawyer in Rebalancing Situations of Negotiation Asymmetry?*; in Italian)

The article offers food for thought on assisted negotiation in labour disputes introduced in the context of the recent reform of civil justice in Italy, which was enacted with Legislative Decree No 149/2022. Starting from the traditional function of labour law, and recalling the legislator’s distrust for this alternative resolution instrument for labour disputes – a distrust which lasted until the enactment of Legislative Decree No 149/2022 – the author analyzes the normative data to delve on the prospects of dialogue between civil law and labour law, and on the (new?) role of lawyers and their suitability to perform the function of rebalancing the asymmetries in the parties’ power.

Observatory on Practices

Mauro Bove (Professor at the University of Perugia), ***Insegnare la mediazione nell’Università*** (*Teaching Mediation at the University*; in Italian)

The paper explores ways to integrate the teaching of mediation into university curricula. The discourse ties into the overall issue of legal education and addresses relevant topics such as negotiation strategies for the settlement of civil disputes and university education as a means of cultural and personal growth for all those involved.

Viviana Di Capua (Researcher at the “Università degli Studi di Napoli Federico II”), ***La funzione ‘mediatrice’ dell’Arbitro per le Controversie Finanziarie. La segreteria tecnica quale strumento di riequilibrio delle parti in lite*** (*The ‘Mediating’ Function of the Financial Disputes Arbitrator. The Technical Secretariat as a Tool for Rebalancing the Disputing Parties*; in Italian)

Almost two decades after its establishment, Arbitration for Financial Disputes (AFD) has proven to be an effective alternative means to resolve financial disputes between intermediaries and retail investors. Although the

instrument was not created with the aim of reaching a consensual solution to disputes, the structure of the procedure, the investigative powers and the strategic role of the technical secretariat, along with the features introduced by the most recent reform, have created room for dialogue between the parties, thus providing incentives for reaching an agreement regardless of the final decision. The contribution aims to examine the nature of the proceedings, the powers available to the arbitrator, and the final decision, focusing on cases in which the AFD can take on a 'mediating' function between the parties, instrumental to a consensual resolution of the dispute.

Rachele Beretta (Ph.D. Candidate at the University of Antwerp), ***The Evolving Landscape of Online Dispute Resolution. A Study on the Use of ICT in International Civil and Commercial ODR***

Over the last two decades, Online Dispute Resolution (ODR) has expanded to new geographical and practice areas. However, data regarding the extension and characteristics of the ODR market are scarce. The empirical study presented in this article provides a snapshot of the current ODR landscape in international civil and commercial dispute resolution. After introducing the orienting framework for the study, this contribution will present data concerning ODR providers and the use of technology in civil and commercial dispute resolution services. The analysis will uncover critical issues and areas of interest for research and practice in light of the future development of ODR.

Conference Proceedings

Silvana Dalla Bontà (Associate Professor at the University of Trento), ***Mediation: A Sleeping Beauty. La promessa della giustizia consensuale alla luce della riforma della giustizia civile*** (*Mediation: A Sleeping Beauty. The Promise of Consensual Justice in Light of the Italian Reform of Civil Justice*; in Italian)

The paper draws on the introductory remarks to the Trento chapter of the 'Sleeping Beauty Conferences Series' organized by Giuseppe De Palo and Lela Love. Nearly ten years after the Jed D. Melnick Annual Symposium sponsored by the Cardozo Journal of Conflict Resolution (2014), the

Conference at the University of Trento (11 November 2022) once again evokes the image of mediation as a ‘sleeping beauty’ awaiting her Prince Charming. What is the current state of play of mediation? Is mediation still a ‘sleeping beauty’? Has the situation evolved? What could help improve the use of this promising dispute resolution tool? The author addresses these questions from the perspective of the recent Italian reform of civil justice, which significantly improved the legal framework for mediation. Will the promise of mediation be finally fulfilled?

Giuseppe De Palo (Senior Fellow and International Professor of ADR Law and Practice at Mitchell Hamline School of Law), ***Mediating Mediation Itself. The Easy Opt-Out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation***

The contribution reflects on the desirability of soft regulation of mediation to strike a balance between the principle of voluntariness and providing a viable alternative to litigation, thus boosting the efficiency of the civil justice system. While focusing on the debate around the mandatory attempt to mediate, the author argues that mediation not only benefits the disputing parties but also the judicial system at large in that it helps reduce the workload of courts and ensure access to justice for all. Despite the clear advantages of mediation, it is debated whether participation must be voluntary or should be mandatory in some instances. The author proposes an ‘easy opt-out’ mediation model where parties may leave the process if they so wish. Arguably, participation in the process may provide the parties with an understanding of mediation and its advantages. The proposed model has the potential to expose skeptical parties to the benefits of mediation.

Zachary R. Calo (Professor at the Hamad bin Khalifa University, Qatar), ***Commercial Mediation in the Gulf Cooperation Council. The Development of ADR in the Middle East***

The paper analyzes recent developments in the law and practice of commercial mediation among the Arab Gulf countries. Substantial changes have occurred since 2019, the year that Qatar and Saudi Arabia signed the Singapore Convention on Mediation, including issuance of new domestic laws, establishment of mediation rules and centers, and the general promotion of mediation. These changes have established in short order the

foundational infrastructure needed to facilitate greater use of mediation in the region. Yet, in spite of the many impressive legal developments, there are barriers preventing the Gulf countries from more fully embedding mediation into their dispute resolution ecosystems.

Paola Lucarelli (Professor at the University of Florence), ***La nuova mediazione civile e commerciale*** (*The New Civil and Commercial Mediation*; in Italian)

By shedding light on the profound meaning of mediation, the legal culture begins to awaken consciences: the reform of mediation shifts the point of view from solely adversarial to one that contemplates beforehand the concerted, consensual sphere. In doing so, it enhances the role of mediation, which is of coexistence with litigation. In this framework, law as a mere remedy is escorted by cooperative dialogue: with mediation, people acquire a leading role in the pursuit of answers to their needs and to the need for justice. Against this background, the issue of choice arises: for instance, the choice whether to participate in a process of evolution of the society or, rather, to assist inert, possibly complaining of injustices, puerile behaviours, and inefficiencies; and also the choice whether to contribute to the innovation of the legal profession to adequately respond to the needs of a client. In this context, the role of higher education is crucial. In fact, higher education can foster a legal culture that grants space and time to autonomy: a culture of adults, equipped to responsibly address their problems in a direct exchange with their counterparties.

Filippo Danovi (Professor at the University of Milano-Bicocca), ***La giustizia consensuale nella crisi familiare*** (*Consensual Justice in Family Crisis*; in Italian)

Within the recent civil justice reform, a dedicated attention has been given to alternative (or, better, complementary) means of dispute resolution. In particular, in the area of family and juvenile justice, a prominent place has been given to forms of consensual justice, both judicial in nature, which thus presuppose that the meeting of the parties' will is formalized within a jurisdictional framework, and extrajudicial in nature, in the models of assisted negotiation and family mediation. This essay reconstructs the main lines of regulatory intervention in this area.

In addition to the foregoing, this issue features the following chronicles:

Angela M. Felicetti (Research Fellow at the University of Bologna), ***Un'occasione di confronto tra Università e Organismi di mediazione. Note da un recente Convegno*** (*An Opportunity for Discussion between Universities and Mediation Bodies. Notes from a Recent Conference*; in Italian)

Luciana Breggia (formerly Judge at the Florence Tribunal), ***Una proposta degli Osservatori sulla Giustizia civile in merito alla riforma del processo civile. Tra buone prassi e auspicati correttivi al d.lgs. n. 149 del 2022*** (*A Proposal from the Civil Justice Observers on the Italian Reform of Civil Justice. Between Best Practices and Desired Corrective Measures to Legislative Decree No 149 of 2022*; in Italian)

Finally, it features the following book review by **Cristina M. Mariottini**: **Guillermo PALAO (ed), *The Singapore Convention on Mediation. A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation***, Edward Elgar Publishing, 2023, ix-xxvi, 1-350.