Giustizia consensuale No 1/2024: Abstracts

The first issue of 2024 of *Giustizia consensuale* (published by Editoriale Scientifica) has just been released, and it features:

Paolo Comoglio (Associate Professor at the University of Genoa), **Giustizia forzata. Lo strano caso dell'*offer to settle* in Cassazione nel nuovo art. 380 bis c.p.c.** (*Forced Justice. The Strange Case of the Offer to Settle before the Court of Cassation pursuant to the New Article 380-bis of the Italian Code of Civil Procedure*; in Italian).

> This article examines the accelerated definition procedure for Cassation appeals pursuant to Article 380-bis of the Italian Code of Civil Procedure, as amended by the 'Cartabia reform'. Beginning with an analysis of case law, the article critically explores the main questions of unconstitutionality surrounding Article 380-bis and the uncertainties that this peculiar procedural device poses.

Paola Licci (Researcher at the Università di Roma Tor Vergata), **La centralità della giustizia consensuale nelle controversie di lavoro** (*The Centrality of Consensual Justice in Labor Disputes*; in Italian)

> This article examines the evolution of consensual justice in labor matters, beginning with the first form of conciliation provided by the law on probiviral tribunal and ending with the assisted negotiation introduced in labor disputes by the 'Cartabia reform'. The analysis of these institutions reveals

that consensual justice plays a fundamental role in resolving labor disputes, both due to the nature of the litigation and the inability of the justice system to offer effective (and differentiated) protection swiftly.

Observatory on Legislation and Regulations

Federico Ferraris (Associate Professor at the Università degli Studi di Milano-Bicocca)**, Il regolamento di procedura e le spese di mediazione secondo il nuovo d.m. n. 150 del 2023 (ovvero come rendere sovrabbondante ciò che avrebbe dovuto rimanere essenziale, comprensibile e contenuto)** (*The Rules of Procedure and mediation costs under the new Ministerial Decree No 150 of 2023 (i.e. how to make superabundant what should have remained essential, understandable and contained)*; in Italian)

This article focuses on parts of Ministerial Decree No 150/2023, which repealed Ministerial Decree No 180/2010 (which, in turn, implemented Legislative Decree No 28/2010). In particular, it takes into consideration, on the one hand, the rules of procedure, which every mediation body must be equipped with, and, on the other hand, of the mediation fees, amended to take into account the nature of the first mediation session under the new rules, which has become 'effective' (as opposed to merely 'informative'). The article aims to emphasise the complexity – if not the unreasonableness of some provisions – in the face of a procedure, the mediation, that should instead remain by definition flexible and adaptable.

Observatory on Jurisprudence

Elena Zucconi Galli Fonseca (Professor at the University of Bologna)**, Mediazione e nuove domande** (*Mediation and New Claims*; in Italian)

This article addresses the complex issue of whether mediation is a prerequisite for newly introduced claims within ongoing legal proceedings. The discussion begins with a landmark decision by the Plenary of the Italian Supreme Court, which ruled that counterclaims are not subject to mandatory mediation. This decision hinges on the principles of judicial economy, legal certainty, and the reasonable duration of legal processes. The article

critiques the Court's narrow view of mediation as merely a tool for reducing judicial caseloads, arguing instead for a more positive perspective on mediation as a valuable means for dispute resolution. It suggests that mandatory mediation should be understood as a mechanism to foster a culture of mediation rather than merely a procedural hurdle. The author advocates for a uniform approach to mediation obligations across different types of disputes and concludes by emphasizing the importance of court-ordered mediation in cases where counterclaims or third-party interventions open a new perspective for dispute resolution.

Angela M. Felicetti (Research Fellow at the University of Bologna)**, ADR per ordine del giudice nella *common law* inglese. I nuovi orizzonti aperti da *Churchill v. Merthyr Tydfil*** (*ADR by Court Order in English Common Law. The New Horizons Opened by* Churchill v. Merthyr Tydfil; in Italian)

This comment explores the relationship between civil litigation and ADR in the United Kingdom, focusing on the evolution of court-ordered ADR. The discussion begins with an examination of the landmark decision *Halsey v. Milton Keynes General NHS Trust* and its impact on subsequent common law, particularly in shaping judicial attitudes towards ADR. The analysis then delves into the development of court-mandated mediation post-2004, highlighting significant changes and trends. Finally, a detailed review of the 2023 *Churchill v. Merthyr Tydfil* judgment exemplifies the new direction in ADR practices in England and Wales, indicating a shift in judicial perspectives and procedural approaches.

Observatory on Practices

Tony N. Leung (Magistrate Judge, District of Minnesota), **Finding the Intersection of Self-Interests. One Judge's Mediation Objective, Approaches Using Science and Art, and for Settling Civil Lawsuits**

This article focuses on how to conduct mediations to resolve American civil lawsuits. Mediators must know position-based and interest-based approaches to negotiation and move insouciantly between them to find the parties' intersection of self-interests to resolve cases. A modality exists to settlement that requires knowing when to mediate, deciding on a place, preparing in

advance, and deciding on the manner to conduct the mediation. The mediation modality also has structured sections: a start inspiring parties that settlement is attainable; a middle with the mediator moving from room to room while utilizing the essential skills of listening, observing, conveying empathy, and building trust, rapport, and respect; and a closing that may require the mediator to break impasse by using certain settlement tools and reminding the parties that the alternatives to settlement have unavoidable costs and risks that are worse alternatives to settlement.

Pierfrancesco C. Fasano (Director of Mediation Centre and Scientific Director of the Academy for Qualifying Mediators), **The Elephant, the Forest, and the Pudding. Understanding the Patent Mediation and Arbitration Centre (PMAC) of the Unified Patent Court (UPC)**

This paper, using the narrative technique of metaphors, traces the institution, future operation, possible technical advantages, and potential of the Patent Mediation and Arbitration Centre of the Unified Patent Court. The regulatory framework, though fragmented and evolving, has led the first interpreters and commentators to provide doubtful or skeptical readings on the uniqueness and ability of this institution to act as a model. The conclusions reached by the author are more optimistic because they are orientated towards systematic and functional interpretation, starting from the originality of the organisational structure of the Centre, challenging cognitive biases, which sometimes frustrate the world of consensual justice.

Conference Proceedings

Silvana Dalla Bontà (Professor at the University of Trento), **La cura delle parole. Sinteticità e chiarezza nel dialogo processuale e nella giustizia consensuale** (*The Care of Words. Clarity and Conciseness in Civil Litigation and Alternative Dispute Resolution Mechanisms*; in Italian)

This article draws on the introductory remarks delivered at the Seminar ‘The care of words. Clarity and conciseness in civil litigation and alternative dispute resolution mechanisms’, held at the University of Trento on 5 December 2023. After analysing the recent codification of the principle of clarity and conciseness in the drafting of pleadings pursuant to the Italian

Code of Civil Procedure (Art. 121) and its implementation in the Ministry of Justice Decree No 130/2023, the author inquires whether this principle can be applied to arbitration proceedings and consensual dispute resolution mechanisms such as negotiation and mediation. While acknowledging the difficulty of striking the right balance between clarity and conciseness, the article argues that the real solution of this dilemma would be to focus not on the length requirements of the pleading but on the accurate use of the words in conveying the party's point of view. This means investing in a new culture that promotes conscious and mindful communication as a decisive means to serve justice and strengthen a cohesive society.

Marco Gradi (Professor at the University of Messina), **Il processo come dialogo** (*The Judicial Process as a Dialogue*; in Italian)

Drawing on the speech delivered at the Conference 'The care of words. Clarity and conciseness in civil litigation and alternative dispute resolution mechanisms', held at the University of Trento on 5 December 2023, the essay deals with the form of the procedural dialogue between the parties from an ethical perspective. The judicial process is a dialogue between the litigants, which requires a fair exchange on the disputed issues, according to a principle of cooperation. Based on this premise, the author examines the question of the length and conciseness of procedural acts, the art of eloquence and the elegance of speech, and the relationship between truth and clarity of the parties' statements.

Maria C. Erlicher (formerly President of the First Division (Civil) of the Bolzano Tribunal), **Il processo bilingue italiano-tedesco. La cura delle parole tra garanzie e sfide** (*The Bilingual Italian-German Process. The Care of Words Between Guarantees and Challenges*; in Italian)

Drawing on the speech delivered at the Conference 'The care of words. Clarity and conciseness in civil litigation and alternative dispute resolution mechanisms', held at the University of Trento on 5 December 2023, the article provides an overview of the use of Italian and German in the judicial offices of the Autonomous Province of Bolzano – South Tyrol, with a focus on the bilingual Italian-German civil trial. Particular attention is paid to the difficulties that the application of the principles of clarity and conciseness set forth in the 'Cartabia reform' may encounter in the context of the bilingual

Italian-German trial and the practices adopted to date to make the management of court proceeding more efficient. The aim is to highlight the importance of careful wording on the part of all legal practitioners in the judicial offices of the Autonomous Province of Bolzano – South Tyrol in order to avoid misunderstandings both in the procedural dialogue, particularly in the bilingual Italian-German trial, and in the context of consensual justice, where language is an essential tool to ensure a proper understanding.

Elena Gabellini (Researcher at the University of Bologna), **La cura delle parole nella dimensione arbitrale: tra libertà e vincoli** (*The Care of Words in Arbitration: Between Freedom and Constraints*; in Italian)

Drawing on the speech delivered at the Conference 'The care of words. Clarity and conciseness in civil litigation and alternative dispute resolution mechanisms', held at the University of Trento on 5 December 2023, the article analyses how written and spoken language, which are elements constituting the minimal framework of each trial, are applied in the arbitration. After a brief overview of the features of arbitration proceeding, the study focuses on the significance of dialogue within this procedural framework. In this way, it will be possible to define the actual application of the principles of conciseness and clarity of procedural acts, which have been recently incorporated embedded into the civil trial, within the framework of arbitration.

Silvana Dalla Bontà (Professor at the University of Trento), **La cura delle parole tra processo e metodi consensuali. Per una gestione responsabile del conflitto** (*The Care of Words Between Process and Consensual Methods. For a Responsible Management of the Dispute*; in Italian)

Drawing on the speech delivered at the Seminar 'The care of words. Clarity and conciseness in civil litigation and alternative dispute resolution mechanisms', held at the University of Trento on 5 December 2023, the article explores the crucial role of 'the care of words' in diffusing conflict, rebuilding trust, and generating creative solutions. To this end, lawyers can play a pivotal role in encouraging conflicting parties to adopt a cooperative and non-adversarial approach to conflict resolution. In this respect, client interviews represent a unique opportunity for lawyers to empower parties, explore their interests, and assess the best way to deal with their problems.

> Effective communication, appropriate questions, active listening, and constructive feedback are some of the tools lawyers can use to foster a collaborative approach to problem resolution. This 'new' lawyer will be the best promoter of a 'new' justice which, by integrating judicial and non-judicial dispute resolution mechanisms, will foster social cohesion and preserve the judicial function for disputes that truly require the intervention of a third-party decision.

Finally, this issue features the following **Book Reviews**:

A book review by **Silvana Dalla Bontà** (University of Trento): **Giuseppe RUFFINI** (a cura di), ***Diritto processuale civile***, vol. I, ***La giustizia civile***, il Mulino, Bologna, 2023, 1-549; vol. II, ***La giustizia consensuale e il processo di cognizione***, il Mulino, Bologna, 2024, 1-506.

A book review by **Jachin Van Doninck** (Vrije Universiteit Brussel): **Anna NYLUND and Antonio CABRAL** (eds.), ***Contractualisation of Civil Litigation – Contractualisation de la Procédure Civile***, Cambridge, Intersentia, 2023, i-xv, 1-517.

A book review by **Marco Buzzoni** (Luxembourg Center for European Law, University of Luxembourg): **Katia FACH GÓMEZ**, ***The Technological Competence of Arbitrators: A Comparative and International Legal Study***, European Yearbook of International Economic Law (Special Issue), Springer Nature, 2023, vii-xiv, 1-172.