

# Giustizia consensuale No 2/2023: Abstracts

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

**Giuseppe Trisorio Liuzzi** (Professor at the Università degli Studi di Bari “Aldo Moro”), ***La composizione negoziata. Una soluzione consensuale della crisi d’impresa*** (*The negotiated settlement. A consensual solution to the business crisis*; in Italian)

This article examines the main features of the ‘Negotiated Settlement of the Business Crisis’ (Composizione Negoziata della Crisi d’Impresa), introduced in the Business Crisis and Insolvency Code (Codice della Crisi d’Impresa e dell’Insolvenza) in place of the initially envisaged ‘Alert Procedure’ (Procedura di Allerta). Notably, the author highlights the consensual and extrajudicial nature of the Negotiated Settlement of the Business Crisis, also focusing on the protective and precautionary measures, on the one hand, and on the authorisation to take out loans and to transfer the company or its branches, on the other, which contemplate the intervention of the court in the instant procedure.

**Monica Delsignore** (Professor at the Università degli Studi di Milano-Bicocca) e **Marsela Mersini** (Ph.D. at the Università degli Studi di Milano-Bicocca), ***Gli strumenti per la composizione dei conflitti ambientali nella realizzazione delle infrastrutture per la crescita*** (*Tools for conflict resolution in environmental law in the implementation of infrastructure for growth*; in Italian)

This article aims to provide an overview of the tools available for resolving environmental conflicts stemming from the construction of large infrastructure and public works. While crucial for the development of the country, these projects pose a definite impact on the surrounding environment. Recognising that courts may not be the optimal forum for conflict resolution in this domain, this academic contribution will question the effectiveness and challenges of existing mechanisms and discuss a proposal to introduce a professional mediator in the administrative

proceeding.

**Olga Fuentes Soriano** (Professor at the Universidad “Miguel Hernández”, Alicante), ***Riflessioni sulla fattibilità della mediazione penale nei casi di violenza di genere*** (*Reflections on the feasibility of criminal mediation in cases of gender-based violence*; in Italian)

In 2004, Spain enacted the Law on Integral Protection Measures against Gender Violence. This legislation marked a significant advancement in combating this societal issue. It explicitly prohibited using mediation as a means of justice for such crimes, a notable departure from previous Spanish laws. While prior legislation contained limited references to criminal mediation – prohibiting it in gender violence cases and allowing it in juvenile justice – the subsequent implementation of the Victims’ Statute in 2015 explicitly mentioned the incorporation of restorative justice mechanisms into the criminal field. This shift, following the 2012 European Directive, reignited a contemporary debate on the advantages and disadvantages of employing mediation in criminal cases, particularly in cases of gender violence. However, due to the inherent imbalance between the involved parties and the power dynamics characterising these violent situations, utilising consensual dispute resolution methods is deemed inadvisable.

**Vincenzo Ansanelli** (Professor at the Università degli Studi di Genova), ***Qualche minimo update sulla composizione del conflitto tramite consulenza tecnica preventiva*** (*Some updates on conflict resolution through preliminary expert consultation*; in Italian)

The ‘Preliminary Expert Consultation for the Settlement of Disputes’ (*Consulenza tecnica preventiva ai fini della composizione della lite*) was introduced into the Italian legal system in 2005. Regulated by Article 696 bis of the Italian Civil Procedure Code, this instrument is based on the assumption that the resolution of the decisive technical issue of the case would facilitate an amicable settlement. The paper offers an in-depth analysis of the most recent literature and case-law on this instrument. In particular, it focuses on its admission phase and examines two recent judgements of the Italian Constitutional Court – No. 222 of December 21, 2023, and No. 202 of November 10, 2023 – that partially redefine its scope of application.

## Observatory on Legislation and Regulations

**Cassio Scarpinella Bueno** (Professor at the “Pontificia Universidade Católica de São Paulo”), ***Meccanismi di giustizia consensuale nel diritto processuale brasiliano. Un'introduzione in chiave comparata*** (*Mechanisms of consensual justice in Brazilian procedural law. An introduction from a comparative perspective*; in Italian)

This article argues that the analysis of consensual conflict resolution methods has the power to influence the traditional understanding of civil procedural law itself and to promote an ad hoc study of conflict resolution techniques without court intervention. To this end, the paper seeks to provide a portrait of non-judicial methods of conflict resolution in the Brazilian legal system based on their provision in the Brazilian Code of Civil Procedure of 2015, with the aim of promoting a fruitful comparison with other legal systems. In this perspective, the article deals mainly with conciliation, mediation, arbitration and procedural agreements, highlighting their importance for a greater awareness of the parties themselves in voluntarily resolving their conflicts or establishing different procedural rules to allow for a more adequate resolution of disputes through judicial proceedings.

**Elena Mattevi** (Researcher at the University of Trento), ***Strutture e figure professionali nella disciplina organica della giustizia riparativa. Il ruolo della formazione del mediatore esperto*** (*Structures and professional figures in the regulation of restorative justice. The role of the expert mediator training*; in Italian)

The *Cartabia Reform* (Law 27 September 2021 No 134 reforming criminal procedure in Italy) regulated for the first time in Italy the professional figure of the mediator in criminal matters and the organizational structure called to manage restorative justice programs. The mediator plays a decisive role in the system and, precisely for this reason, Legislative Decree No 150 of 2022 and its implementing decrees provided for a highly articulated training course with an interdisciplinary slant, to acquire the necessary qualification to carry out the activity. The analysis conducted in this article focuses on

these aspects and the complexity of the mediator's role, which justifies the demand for very serious training. Universities – called to collaborate with the Restorative Justice Centres in the organization of the courses – will have a leading role, and thus the opportunity to open new perspectives in post-graduate training, but also to invest in research and curricular training on restorative justice.

## **Observatory on Practices**

**Michael S. Coffee** (Professorial Lecturer in Law at the George Washington University Law School in Washington, D.C.) and **Melissa A. Kucinski** (International family law expert based in Washington, D.C.), ***Arbitrating a Multi-Jurisdictional Children's Dispute***

Arbitration remains a relatively new dispute resolution process in family law cases in the United States, and some jurisdictions within the United States differ in terms of process, selection of an arbitrator, and whether certain discrete issues, such as those that relate to parenting and children, can be arbitrated. This may create additional complications for cross-border families who find themselves living in the United States but with connections to another country, and a contractual requirement that they engage in arbitration of their family law dispute. This article will walk readers through a situation of a family who had previously agreed, at the time the spouses married, to arbitrate future family law disputes, and, after moving to the United States from their home country, are now faced with the layer of laws and complications over how to actually proceed.

**Annalisa Atti** (Researcher at the University of Bologna), ***Profili deontologici della professione del mediatore e dell'avvocato in mediazione*** (*Deontological profiles of the mediator and lawyer's activity in mediation; in Italian*)

This article aims to examine the role, duties and styles of the mediator and the lawyer who assists the parties in mediation, in the light of the regulatory and deontological provisions in force, including non-domestic ones, and of the application made of them by civil and disciplinary jurisprudence. The intertwining between competence and professional training, correct

information to the client, behaviour according to loyalty and correctness, diligence in the fulfilment of the professional service, in the different but complementary civil and deontological levels is then outlined, not only for the best client satisfaction but also for the best solution of conflicts.

In addition to the foregoing, this issue features the following **Conference Proceedings**:

**Tommaso Greco** (Professor at the University of Pisa), ***La giustizia consensuale, alle radici del diritto*** (*Consensual justice, at the roots of law*; in Italian)

During a presentation of journal *Giustizia consensuale*, held on 4 May 2023 at the University of Pisa, the theme linking ‘justice’ and ‘consensus’ was the subject of fruitful discussions from different standpoints. The Author retraces the introductory remarks he delivered on that occasion and puts forward the idea that consensual justice goes to the roots of the law, enhancing its horizontal and cooperative dimension.

**Pierluigi Consorti** (Professor at the University of Pisa, Affiliate Professor at the “Istituto Dirpolis, Scuola Superiore Sant’Anna di Pisa”), ***Oltre la mitezza, la gentilezza del diritto*** (*Beyond meekness, the kindness of law*; in Italian)

This essay discusses the possibility of considering a soulful role of the law. In principle, law is mainly conceived as a self-referential institution that bases its ability upon the exercise of power. This power-based notion of the law does not always assist it in performing its social function effectively. In this essay the author takes into consideration the theses on ‘mild law’ and advances the proposal of a ‘kind law’, which takes care of personal relationships and tries to make the dimension of listening prevail over that of assertiveness, as well as to make unitive elements prevail over divisive ones; a ‘kind law’ does not rely on the exercise of power but, rather, on the search for consensus.

**Valentina Bonini** (Associate Professor at the University of Pisa), ***Consenso e giustizia penale: dal mercato globale alla bottega sartoriale*** (*Consent and criminal justice: From the global marketplace to the tailor’s workshop*; in Italian)

Criminal procedure used negotiated justice since 1988 to achieve procedural economy through the defendant's waiver of fundamental rights and guarantees in exchange for better terms with respect to punishment. Despite problems of compatibility with the system of simplified procedures such as the so-called plea bargaining, the legislator has progressively expanded the availability of negotiated justice. Only in more recent times other mechanisms have been implemented to enhance the defendant's will not only for the goal of efficiency but also to offer a different justice response: this is the case with the trial probation and, even more markedly, restorative justice, which proposes an autonomous justice paradigm aimed at bringing people's needs back to the center, offering a way of actively overcoming the offence perpetrated by the author and suffered by the victim.

**Luciana Breggia** (formerly Judge at the Florence Tribunal), ***Una giustizia plurale tra autonomia, responsabilità e autorità*** (A plural justice between autonomy, responsibility and authority; in Italian)

We are amidst a significant transformation within the justice system, embracing a diverse array of methodologies while championing individual autonomy and accountability. The journal *Giustizia consensuale* is not merely an outcome of this transformation; it stands as a harbinger of future growth and innovation.

Finally, it features the following **Book Reviews**:

One book review is by **Cristina M. Mariottini** (European Institute of Public Administration): **Werner HASLEHNER, Timothy LYONS KC, Katerina PANTAZATOU, Georg KOFLER, Alexander RUST (eds), *Alternative Dispute Resolution and Tax Disputes***, Cheltenham-Northampton, Edward Elgar Publishing, 2023, vii-xxv, 1-341.

Another book review is by **Angela M. Felicetti** (University of Bologna): **Emma VAN GELDER, *Consumer Online Dispute Resolution Pathways in Europe. Analysing the Standards for Access and Procedural Justice in Online Dispute Resolution Procedures***, The Hague, Eleven, 2022, 1-329.