Giustizia consensuale No 2/2024: Abstracts

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

Tommaso dalla Massara (Professor at Università Roma Tre), **Per un'ermeneutica della certezza nel processo civile romano: tra *regula iuris* e determinazione pecuniaria** (*For a Hermeneutics of Certainty in the Roman Civil Process: Between* Regula Iuris *and Pecuniary Determination*; in Italian).

> This contribution offers a reflection on procedural certainty, starting from the Roman classical process. In particular, crucial is the idea that, in this procedural system, certainty is to be related to the rule of '*condemnatio pecuniaria*'. Thus, certainty is translated into the determinacy of the pecuniary sentence. What emerges is a peculiar way of understanding judicial activity, which is characterised by the alternativeness between the groundedness and groundlessness of the claim (*si paret/si non paret* oriented to *a certum*), as opposed to the hypothesis in which the assessment is left entirely to the judge.

Beatrice Ficcarelli (Associate Professor at the University of Florence), **L'acquisizione di informazioni e «prove» nella negoziazione assistita da avvocati: la tessera che mancava** (*The Acquisition of Information and 'Evidence' in Negotiation Assisted by Lawyers: The Missing Piece of the Puzzle*; in Italian).

The recent reform of 'negoziazione assistita' (attorney-assisted negotiation procedure) introduces within the procedure a so-called out-of-court instruction, through the acquisition of statements from third parties on facts relevant to the subject of the dispute and the request to the other party to declare in writing the truth of facts unfavorable and favorable to the requesting party. This is a striking innovation that opens up new scenarios in the establishment of facts also for the purpose of the possible future judgment in case of an unsuccessful negotiation. The absolute protagonists of the proceedings are the attorneys, on the unfailing prerequisite of the duties of good faith and loyalty incumbent on them to amicably resolve their clients' dispute. The main purpose of the new rules is to enable them to acquire all the information that can lead, in the best way, to the settlement of the dispute.

Antonio Maria Marzocco (Associate Professor at the Università degli Studi della Campania *Luigi Vanvitelli*), **Tentativi obbligatori e facoltativi di conciliazione nell'ecosistema digitale regolato dall'AGCom** (*Mandatory and Optional Attempts at Conciliation in the Digital Ecosystem Regulated by AGCom;* in Italian).

Technological developments have broadened the competences of the Communications Authority (AGCom) and the extent of its conciliatory function. This function is no longer limited to the electronic communications sector (in particular for disputes between users and operators), but extends to other sectors of the digital ecosystem, such as audiovisual media services and video-sharing platforms. The essay identifies the main sources that have assigned AGCom the task of regulating procedures for extrajudicial dispute resolution: the law establishing the AGCom (Law No. 249 of 1997), the electronic communications code (CCE) and the consolidated text on audiovisual media services (TUSMA). The Author points out that these sources represent the basis of several mandatory or voluntary conciliation attempts. Their regulatory discipline is converging in parallel with the technological convergence among the various sectors of the digital ecosystem.

Alessandro Fabbi (Associate Professor at the University of Catania), **Contratto e processo nella nomina congiunta dell'esperto ex art. 473 bis.26 c.p.c.** (*Contract and Process for the Joint Appointment of an Expert Pursuant to Art. 473*

bis (26)of the Italian Code of Civil Procedure; in Italian).

> The article analyses the newly introduced joint-appointed expert, in the context of the proceedings for families and individuals, referred to in article 47 -bis(26) of the Italian Civil Procedure Code. The contribution deals with its operational aspects, particularly centered on the core of the agreement, as well as with – formulating proposals on – the dubious nature of the tool at issue, placed in the dynamical context of the civil process, but undoubtedly representing a private contract between the parties and the expert.

Observatory on Legislation and Regulations

Mauro Bove (Professor at the University of Perugia), **La domanda di mediazione** (*The Petition for Mediation*; in Italian).

> The Author examines the content of the mediation request, comparing it with the content of the judicial application, to identify structural differences and differences in their legal 'reading'. Starting from the exclusion of the paradigm of invalidity from the field of mediation, practical implications are drawn taking into account the different points of view that the crisis of cooperation entails: while mediation looks at the human relationship, seeking to mend its breakdown, judicial proceedings focus on the infringement of a substantive right and the respective ascertainment.

Edoardo Borselli (Research Fellow at the University of Florence), **Mediazione e processo civile riformato: quando il giudice dispone l'invio?** (*Mediation and the Reformed Civil Procedure: When Does the Judge Order the Case to Be Sent to Mediation?*; in Italian).

> This article investigates the time frames in which a judge can order the referral to mediation, both when the parties have not satisfied the procedural condition required by law and when the judge intends to use court-ordered mediation. In particular, the article focuses on the possibility that such a referral takes place, within the procedure introduced by the Cartabia reform and amended by the Law No 164/2024, following the preliminary checks under Article 171-bis of the Italian Civil Procedure Code, when the judge finds that the procedural condition required by law has not been satisfied.

The conclusion supports the admissibility of such a procedural approach, promoting a systematic and teleological interpretation of the introductory phase of the trial, in line with the decision No 96/2024 of the Constitutional Court, prevailing doctrinal orientations, and practices developed within judicial offices. Furthermore, the article analyzes the relationship between referral to mediation and opposition proceedings to injunction orders, and it concludes by discussing the stay of the trial during the extrajudicial process.

Observatory on Practices

Silvana Dalla Bontà (Professor at the University of Trento)**, Silvia Toniolo** (Coordinator of German language courses at the University of Trento Language Centre) **and Federica Simonelli** (Accredited mediator at the Chamber of Commerce of Bolzano, JAMS Diversity Fellow), **La mediazione come strumento di integrazione. Potenzialità e sfide dell'insegnamento interdisciplinare e bilingue della mediazione** (*Mediation as an Integration Tool. Potential and Challenges of Interdisciplinary and Bilingual Mediation Teaching*; in Italian).

The paper focuses on the ADR teaching experience hosted at the *Istituto di Diritto Italiano/Institut für Italienisches Recht* (Institute for Italian Law) of the Universität Innsbruck. Offered in a unique context – i.e, in the context of the European Region Tyrol-South Tyrol-Trentino, a European Grouping of Territorial Cooperation with European legal personality – the course on Alternative Dispute Resolution Mechanism, with a specific focus on Mediation, is bilingual (Italian and German). By adopting an interdisciplinary and practice-oriented approach, the two teachers of the course – one, a full professor of Civil Procedure; the other, a translator in Italian/German and expert in cross-culture communication – walked students through the complexity conflict management with a view to reaching a sustainable solution via mutual agreement. Against this background, on the one hand, knowledge of effective communication fundamentals and soft skills has proven essential to deal with multi-linguistic and multi-cultural disputes. On the other hand, mediation has proven to be an effective method to foster cohesion and resilience in a society which is increasingly complex, multi-faceted and, thus, challenging.

Alessandro Triolo (Doctoral Candidate at the Università di Roma Tor Vergata), **Tra decisione algoritmica e mediazione robotica** (*Between Algorithmic Decision and Robotic Mediation*; in Italian).

By examining the theoretical applications of Artificial Intelligence (AI) in civil justice, in the two concepts of 'artificially intelligent judgment' and 'intelligent organisation of judgment', this paper assesses AI's applicability to the field of Alternative Dispute Resolution (ADR). Starting with the hypothesis of a 'robot mediator' capable of facilitating conflict management among parties, the analysis leads to the irreconcilability of such a model with the typical function of mediation, thus highlighting the need for the re-humanization of dispute resolution methods. The potential extension of AI systems could be applied to evaluation tools, which, although currently underutilized in the Italian legal system, might – in a *de iure condendo* perspective – encourage parties to settle disputes extrajudicially based on a forecast of the dispute's outcome, indirectly contributing to the deflation of litigation.

Conference Proceedings

Matteo Lupano (Associate Professor at the University of Turin), **Il futuro della mediazione familiare** (*The Future of Family Mediation*; in Italian).

This paper draws on the introductory remarks to the Conference 'The Future of Family Mediation. The Mandatory Mediation in France and in Italy after the Cartabia reform of Civil Justice', held at the University of Turin on 19 January 2024. The contribution highlights the effectiveness of family mediation in facilitating the consensual resolution of conflicts, particularly in cases of separation and divorce, by reducing conflict and safeguarding minors. The Author summarizes the key aspects of the debate on the mandatory nature of the process, emphasizing the need for proper training for lawyers and mediators and for ensuring the quality of the service.

Marc Juston (*Magistrat honoraire*; *formateur et médiateur inscrit auprès des Cours d'Appel de Nîmes, Grenoble et Aix en Provence*), **La mediazione familiare in Francia: sullo slancio della giustizia del XXI secolo** (*Family Mediation in France: On the Momentum of 21st Century Justice*; in Italian).

Drawing on the speech delivered at the Conference 'The Future of Family Mediation. The Mandatory Mediation in France and in Italy after the Cartabia reform of Civil Justice', held at the University of Turin on 19 January 2024, the paper analyses the importance and use of family mediation in France as part of 21st-century justice. It outlines the regulatory foundations of mediation, its voluntary nature, and, in some cases, its encouragement by the judge or obligatory implementation. The Author highlights the role of the Juge aux Affaires Familiales and the effectiveness of mediation in resolving family conflicts, reducing litigation, and promoting the well-being of children. The adoption of mediation is proposed as a fundamental step toward a more humane judicial system, focused on empowering the parties and promoting co-parenting.

Filippo Danovi (Professor at the University Milano Bicocca), **Il presente e il futuro della mediazione familiare in Italia** (*The Present and Future of Family Mediation in Italy*; in Italian).

Drawing on the speech delivered at the Conference 'The Future of Family Mediation. The Mandatory Mediation in France and in Italy after the Cartabia reform of Civil Justice', held at the University of Turin on 19 January 2024, the paper explores the present and future of family mediation in Italy, contextualising it within the framework of consensual justice. Following a legal analysis, including the measures introduced by the Cartabia reform, the Author highlights the role of mediation in resolving family disputes through interdisciplinary and dialogic approaches aimed at rebuilding strained relationships. The discussion delves into the limitations of mediation, such as its inadequacy in cases of domestic violence, and outlines prospects, emphasizing the need for structured training to ensure the effectiveness of this tool in family disputes.

Isabella Buzzi (Researcher in Psychology, Pedagogist, Consultant and Family Mediator), **La mediazione familiare, come è diventata una professione** (*How Family Mediation Became a Profession*; in Italian).

Drawing on the speech delivered at the Conference 'The Future of Family Mediation. The Mandatory Mediation in France and in Italy after the Cartabia Reform of Civil Justice', held at the University of Turin on 19 January 2024, this paper traces family mediation's evolution as a profession

in Italy. It analyses historical roots and international influences, particularly from North America and Europe. It highlights the role of key regulations in defining training standards, ethics, and skills. The Author emphasizes its complexity, which requires legal knowledge, psychological skills, and practical abilities, as well as the importance of integrated and interdisciplinary training programs, so as to ensure the needed professional support to families, in a mindful and respectful management of their own conflicts.

Chronicles

Elena Zucconi Galli Fonseca (Professor at the *Alma Mater* University of Bologna), **Digitalisation of ADR: A New Category?**

The paper analyses the impact of digitisation on alternative dispute resolution (ADR). It starts from the pre-existing fragmentation of the ADR category, highlighting the differences between autonomous and heteronomous methods. The advent of digital, initially seen as a category in its own right (ODR), is now seen as a cross-cutting element that modifies the use of ADR tools, but does not change their essence. New forms of ADR are then explored, such as blockchain-based 'On-chain Dispute Resolution', with its advantages and disadvantages, and the use of artificial intelligence (AI) to improve the efficiency of ADR processes, while raising ethical and security issues. Finally, it concludes by reaffirming the importance of the human factor ('Human Dispute Resolution' or HDR) in dispute resolution, despite technological advancement.

Roberta Tiscini (Professor at the Università di Roma Sapienza), **La dialettica verità/certezza alla prova della negozialità nel processo** (*The Truth/Certainty Dialectic Put to the Test of Negotiability in the Process*; in Italian).

The Author addresses the objectives of the trial, in the perspective of the search for material truth, according to new (applicative and normative) experiences that increasingly place the negotiation in the dynamics of the trial itself. This happens not only in the framework of alternative dispute resolutions, but also through experiences, such as those of contractualised justice or differentiated jurisdictional protection, contexts in which it is not

so much the achievement of the truth that constitutes the ultimate goal, but the pacification of the contenders.

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

A book review by ***Antonia Menghini*** (Associate Professor at the University of Trento): **Valentina BONINI** (a cura di), ***La giustizia riparativa (d.lgs. n. 150/2022 – d.lgs. n. 31/2024),*** Giappichelli, Torino, 2024, I-XX, 1-335.

A book review by ***Rachele Beretta*** (Ph.D): **William URY**, ***Possible: How We Survive (and Thrive) in an Age of Conflict***, Harper Business, New York, 2024, 1-368.

A book review by ***Pietro Ortolani*** (Professor at Radboud University): **Elena D'ALESSANDRO and Davide CASTAGNO**, ***Handbook on cross-border litigation***, Wolters Kluwer, Milano, 2024, I-XXV 1-238.