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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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CASE MANAGEMENT AS AN ASPECT OF PUBLIC ADMINISTRATION SUBJECTED TO THE CONSTITUTIONAL PRINCIPLE OF EFFICIENCY:

THE NEW DEMOCRATIC MANAGEMENT OF INSOLVENCY PROCEEDINGS METHOD

by **Daniel CARNIO COSTA**, Permanent Sitting Judge at the 1st Court of Bankruptcies and Judicial Recoveries of São Paulo, Professor at the Pontifícia Universidade Católica de São Paulo (PUCSP) and Postdoctoral Fellow at the University Paris 1 Panthéon-Sorbonne.

The public administration, in Brazil, is divided into three different branches: executive, legislative and judiciary. The main function of the judiciary branch is to solve disputes between people, entities, governmental agencies etc. According to the law, there is a proceeding in which the parties may have the opportunity to show their rights and evidences, so the judge may render the final decision. The way the judge manages the case to get to the final result has a huge impact on the costs and on the efficiency of the Justice. So, it is possible to affirm that the case management is an important aspect of the public administration and the judge, during the proceeding, serves as a public affairs manager.

The judge determines the fate of the parties during the judicial case. But beyond that, the judge also determines how the public resources and the assets of the parties will be used during the case and it may alter the ratio of cost to benefit of the case.

Case management interferes directly in the trial's financial cost, since the clear and objective definition of the disputed points during the case will determine whether or not there is the need for probative instruction, for an expert evidence at a high cost, for the hearing of witnesses, which is expensive, all of that to the detriment of a speedy trial. And the trial in progress itself represents a significant cost for the parties. The justness and fairness of the decision are also an important aspect to streamline the case resolution, since a good decision is more likely to be upheld rapidly by the Court of Appeal. The role of the judge as a mediator may also be decisive for the rational management of judicial assets, as it lowers the cost of justice, which is considered as a public service.

It is possible to identify the fundamental importance of case management even in simple cases, involving only a few litigants. However, having in mind complex litigations, in which the rights of hundreds or thousands of people are involved in, the need of a good case management takes an even clearer meaning.

The management of an insolvency case (liquidation or business reorganization, for instance) will determine the cost, the time and the success or failure of a service that will influence in the lives of thousands of people.

Therefore, it is true that case management is the management of public resources, since it has close ties to the promptness of the delivery of Justice and the efficiency of the service provided by the Courts.

Nonetheless, how can the judge manage the case in a suitable way taking in account its specific needs, if the law sets a general proceeding to be followed in every case, no matter the differences they may have?

Will the laws need to be changed? Will there be a need for more investment in the Judiciary?

It is patent that the improvement of the procedural legislation is an important factor for the application of a more efficient case management. It is also crystal clear that the existence of major investments in the Judiciary, to create a more appropriate administrative and judicial structure, would also be important for the improvement of this type of public service.

However, it is intuitive to say that it may take too long to make fundamental changes in the law, due to the complexity of the legislative process and the political battle. On the other hand, it is not easy to have more financial investments in the Judiciary branch in times of a deep economic crisis.

So, despite the value of new investments and the creation of new procedural instruments by law – which takes time and may never happen – the judges can improve the case management by using the laws in an adequate way, having in consideration the constitutional principles imposing to the public agent an efficient use of the public funds. The interpretation of the laws has to comply with the constitutional principles of reasonable duration of the case (art. 5, LXXVIII, CF / 88)¹ and efficiency (art. 37, “caput” of CF / 88)².

Therefore, it is right to say that case management can be improved independently of additional investments or changes in applicable law. A change of attitude and mentality of the law

¹ CF/88, art. 5º, inc. LXXVIII “a todos, no âmbito judicial e administrativo, são assegurados a razoável duração do processo e os meios que garantam a celeridade de sua tramitação.” (Included by Constitutional Amendment nº 45, of 2004) “all, within the judicial and administrative scope, are guaranteed a reasonable duration of case and the means by which to ensure the swiftness of its processing.”

² CF/88, art. 37, “caput”. “A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte: “ (Redação dada pela Emenda Constitucional nº 19, de 1998) “The direct or indirect public administration of any of the Powers of the Union, of the States, of the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicness and efficiency and, also, as follows:” (wording provided by the Constitutional Amendment nº 19, of 1998)

enforcers, especially the judges, while responsible for managing cases, would suffice.

§ 1 – THE CONCEPT AND ORIGIN OF CASE MANAGEMENT

This scenario highlights the definition of *case management* that was originally coined by the US health service³. The concept of case management has a rich history dating back to 1863 in the United States. Nursing was a forerunner in the development and implementation of case management systems⁴.

According to the definition presented by the Case Management Society of America (CMSA),

“case management is a collaborative process of assessment, planning, facilitation, care coordination, evaluation, and advocacy for options and services to meet an individual’s and a family’s comprehensive health needs through communication and available resources to promote quality, cost-effective outcomes⁵.”

Said another way, case management is a collaborative process of analysis, planning, facilitation, coordination of care, evaluation and advocacy options and services to meet individual and family health needs through communication and available sources to promote quality and cost-effective results.

The purpose of applying case management in US health care services is to optimize health resources, facilitating the maintenance of health and individual satisfaction and, at the same time, streamlining resources to be expended by the health insurance companies. The premise is to optimize the cost/benefit of this type of service, with advantages for all involved in this type of process. The individual will receive better health guidance while the health insurance companies will spend fewer resources to care for the health of that individual.

This idea of *case management* originated in the health sector may be used in the Judicial Branch. It seeks to analyze individually the specific needs of the case to achieve better results with the least possible resources. It can and should be transposed onto the management of legal proceedings.

§ 2 – THE DEMOCRATIC CASE MANAGEMENT

This approach, incidentally, is also being used in the US judicial system, where the concept of *judicial case management* has been known for a long time⁶. It is a programming of the procedures

³ The history of case management, in <https://cmsadetroit.org/about-us/history-chapter>.

⁴ Kerlsberger. A.L., Case management: A rich history of coordinating care to control costs. *Nursing Outlook*, Vol. 44, Issue 4, 1996.

⁵ <http://www.cmsa.org/Home/CMSA/WhatisaCaseManager/tabid/224/Default.aspx>.

⁶ See *supra* note 3.

involving a particular matter to be judged. Each stage of the judicial process is analyzed according to the specific case. The judge must establish the entire roadmap of actions so that all relevant points brought to trial can be observed, always with a view to ensure a more rapid and effective trial. It decreases the cost of litigation and increases the satisfaction of the claimants with the service provided by the Judiciary. The judge may designate hearings and/or CMC calls (*Case Management Conference*). The main objective is to determine the steps to the resolution of the disputes presented to the court, subjected to the specific needs of the concrete case⁷.

In comparative law, especially in cases of bankruptcy and judicial business reorganization, there is also Section 105 of the US Bankruptcy Code. This is the section of the US Bankruptcy Code that grants to the judge the power to supplement the legal provisions by making decisions and taking measures that have no express provision in the law. In this sense, the bankruptcy judge is authorized to determine any action that is necessary to achieve the objectives of the law, in accordance with the specific case⁸.

⁷ As per the definition found on the website uslegal,

“case management in legal terms refers to the schedule of proceedings involved in a matter. There are various stages in litigation, such as the filing of a complaint, answers, the discovery process (interrogatories, subpoenas, depositions, etc.), and motions that occur before a trial is held or a decision is rendered. Each stage of the process has a scheduled timeframe in which it must be filed with the court or completed. When a complaint is filed and a case is assigned to a judge, the judge will often set forth a schedule for the submission or completion of the relevant pleadings, court appearances, and other matters. For example, in a divorce matter, the judge will attempt to narrow the issues involved in the case, provide deadlines for filing schedules of assets, conducting discovery, filing of proposed visitation and custody plans, and other related matters. Depending on the jurisdiction, a case management questionnaire may need to be filled out. The judge may also decide to send the parties to arbitration or mediation to settle disputed matters. The conduct of the case management conference varies by jurisdiction, so local court rules should be consulted. A Case management Conference (CMC) is part of the court procedure. It is a meeting between the judge and the parties (the Plaintiff and the Defendant). The lawyers representing the parties may also appear at the conference. A case management conference usually happens after a plaintiff begins a law suit, but before the trial. The meeting is not a trial and as such witnesses don't need to be present. The main purpose of the meeting is to try settling some or all of the issues in dispute before going to trial. If no settlement is achieved at the CMC, the matter will proceed to trial.”

(<http://definitions.uslegal.com/c/case-management-conference/>)

⁸ Pursuant to 11 U.S. Code § 105 – Power of the Court.

“(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions

The bankruptcy judge may also *ex officio* or at the request of the parties designate hearings called *status conferences* at any time and as often as deemed necessary in order to monitor the development of cases and determine the fastest, most effective and economical holding of the trial to its final and useful result (*subsection d.1*)⁹.

Based on all these ideas of comparative law and the experiences observed in other systems, the 1st Bankruptcy and Judicial Recoveries Court of São Paulo has been implementing and adapting these premises for the management of bankruptcy and judicial recovery cases¹⁰. And its experience has shown excellent results¹¹ even for the most complex cases, reducing costs, providing greater transparency, allowing greater access for interested parties, searching for consensual solutions and reaching a higher rate of correct answers in the decisions (in the sense that decisions are rendered based on a larger and more loyal body of evidence brought by all stakeholders to judicial knowledge).

The method that has been applied in the 1st Bankruptcy and Judicial Recoveries Court is called democratic case management.

The focus of this paper is to demonstrate how democratic case management in relation to bankruptcy and judicial recoveries works. However, one should point out that the method may also be applied to other cases, especially those of collective character.

relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—”

⁹ According to subsection d.1:

“(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.”

¹⁰ Daniel CARNIO COSTA, “Gestão Democrática de Processos: uma nova técnica de gestão de processos de insolvência”, *Jornal Carta Forense*:

<http://www.cartaforense.com.br/conteudo/artigos/a-gestao-democratica-de-processos---uma-nova-tecnica-de-conducao-de-processos-concursais/14648>.

¹¹ Daniel CARNIO COSTA, “Comentários Completos à Lei de Recuperação de empresas e falências”, *Curitiba: Jurua*, vol. 01, 2015, pp. 45/62.

Cases of great complexity, as it is a bankruptcy and a judicial recovery of companies, require different management than traditional management, under the risk of failing to give appropriate responses to the litigation put on trial at the Judiciary. Case time cannot be dissociated from the real time of the business in the market, especially when it involves insolvency and recovery cases in which the negotiation/ economic *timing* is critical to the success of judicial activity¹².

The purpose of an insolvency proceeding – liquidation – is to raise the assets of the bankrupt company (all its assets), evaluate them and sell them, thus paying the largest possible number of creditors in compliance with the order of legal priority.

The judicial recovery of companies also requires extreme judicial agility. The judge has to ensure that the pace of the case and the rhythm of the decisions must be compatible to the economic necessities of the companies. The development of the case shall occur within a reasonable time, providing to the company the opportunity for effective economic recovery.

It is clear, therefore, that time is an essential element for the success of those types of cases.

Traditional case management, normally employed by the Judiciary, does not provide appropriate and timely responses to achieve success in bankruptcy liquidations and judicial recoveries.

In the traditional method of case management, the stakeholders must previously give their reasons so that the judge can issue an order. Normally, the stakeholders file written petitions to provide to the judge their reasons. It takes time to every stakeholder give their reasons by filing petitions and it takes even more time to the judge to access those reasons, since there are several petitions to be analyzed. It is not rare to happen a situation in which the judge will need additional information before deciding, determining to the stakeholders another round of petitions. This back and forth implies a delay that is incompatible with the needs of the economic reality, mainly because the judicial service, in addition to being bureaucratic by nature, is absolutely overwhelmed by its workload, which far exceeds reasonable sizes. Hence, case progress slows down and its result will be often ineffective. In any event, the periods during which the case is paralyzed unduly because of judicial bureaucracy interfere decisively in the effectiveness of judicial services.

Therefore, it is not rare that the court decision is rendered in an untimely manner, when the interest, the usefulness and the most suitable opportunity have disappeared, from the viewpoint of the economy and business.

For example, the decision to collect a certain asset should be made within a reasonable time, at the risk of the disappearance or

¹² As explained in the report made by the newspaper *O Valor Econômico: Magistrado Inova em Recuperação Judicial*. Dec. 2014. [“Judge Innovates in Judicial Recovery”].

the extinction of the asset that is the subject of the collection. If the decision is not made in a timely manner, it will not produce the positive effects in the insolvency case. It might occur through the disappearance of the good or even by its sharp devaluation, which are detrimental to the creditors. Also, it should be mentioned, for example, that the decision on the sale or lease of a bankruptcy estate asset should be issued in line with the preservation of the value of this asset in the market. Delays in making the decision could represent the loss of an opportunity and, therefore, the imposition of prejudice to the interests of creditors.

Therefore, it is proposed a new management model for this type of case, which grants to the judge greater decision-making agility: the democratic case management.

Insolvency proceedings (bankruptcy liquidation and judicial recovery), even given their obvious complexity, must comply with the constitutional principles of reasonable duration of the case (art. 5, LXXVIII, CF/88)¹³ and efficiency (art. 37, “caput” of CF/88)¹⁴.

It is important to ensure that citizens have access to a fair legal system, meaning the qualified access to the case. It consists on not just the access to the courts, but also the access to an appropriate judicial solution. That is, the citizen has the right to the trial as a useful tool in the resolution of conflicts and the effective protection of rights.

As it is already stated, the problem of the duration of the case (the time it takes to get the final decision) is critical in any case, but it has an even more importance in the case of bankruptcy liquidations and judicial recoveries. In this way, case time should not be dissociated from the time of the economic reality in the market. Judicial decisions must be rendered in a reasonable time to meet the case needs, which, in turn, are dictated by the interest of the economic stakeholders.

In general, the entire society is affected by the delay on the resolution of an insolvency proceeding, since there is a public interest in giving back to the market the use of relevant assets and the availability of services offered by important businesses. The social function of the property should be observed, preserving

¹³ CF/88, art. 5º, inc. LXXVIII “a todos, no âmbito judicial e administrativo, são assegurados a razoável duração do processo e os meios que garantam a celeridade de sua tramitação.” (Included by Constitutional Amendment nº 45, of 2004) “all, within the judicial and administrative scope, are guaranteed a reasonable duration of case and the means by which to ensure the swiftness of its processing.”

¹⁴ CF/88, art. 37, “caput”. “A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte: “ (Redação dada pela Emenda Constitucional nº 19, de 1998) “The direct or indirect public administration of any of the Powers of the Union, of the States, of the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicness and efficiency and, also, as follows:” (wording provided by the Constitutional Amendment nº 19, of 1998)

not only the interests of the creditors, but also the interest of the society as a whole.

Therefore, according to the democratic management model, the judicial decisions, particularly on issues that require greater urgency and compatibility with the time of the economic agents, shall be made at public hearings attended by every stakeholder (the judicial administrator, the expert, the Prosecutor's Office and other interested parties).

The judge, in a complex insolvency case, needs to address in his/her decision many different aspects of the case at the same time (collection of goods, sale of assets, evaluation, leases, among other frequently occurring themes). All those issues must be decided in a short period of time, complying with the time of the economy. However, the judge can render the decision only after giving the opportunity to all the stakeholders to present their legal opinions.

The only way to combine all these elements to give to the judge the possibility of render a good and timely decision, preserving the participation of all the stakeholders, is by setting a democratic case management hearing.

For that purpose, the judge must set a hearing, defining in advance what will be the issues to be addressed in the hearing. All the stakeholders shall be summoned to attend the hearing. At that hearing, the judge shall discuss to the stakeholders every issue to be decided, allowing them to present their reasons. After that, the judge shall render his/her decision.

By doing that, the judge is able to decide every important issue in the hearing, rendering a timely decision and ensuring the effective participation of every stakeholder. In the traditional model, by the contrary, it would take months or years for the judge to render a decision only after listening all the stakeholder's reasonings.

In addition to establishing greater swiftness in the decision-making process, Democratic Case Management has other advantages: it ensures the participation of the parties in the decision-making process, it induces greater commitment of all those who work in the case, it grants greater transparency in the case, it provides greater oversight on the procedural progress and also franchises interested parties by supplying the judgment of relevant and useful information on several aspects of the case (for example, what would be the best allocation of specific assets, among others), contributing to a higher quality of the judicial decision.

At the hearing, everyone may bring important elements for the formation of the court decision. In addition, any founded disagreements can be analyzed immediately, making it possible to the judge to seek a consensual decision, in attendance of every stakeholder. Every party in interest will be present at the hearing, interacting with the judge in real time while the decision-making

process is being done. It is evident, therefore, that the judge will gather much more important aspects of the case – from the parties – so the decision is likely to be closer to the reality, considering the resources/assets involved in the case.

The judge may also act as a mediator during the discussions at the democratic management hearing. The mediation makes it possible to lead to acceptable rulings for every stakeholder and, therefore, it may help to avoid appeals which may cause a delay to the pace of the case.

Democratic management also induces a much greater transparency to the case, since every stakeholder will be able to witness the role and activities of all the agents of the procedure. Any debtor and creditor, or any other stakeholder, will be able to understand what is the exact role played by the judge, the prosecutor, the parties' lawyers, the trustee and experts.

Since everyone knows the roadmap of the case and can see clearly what is the role of every agent in the case, naturally the parties will abandon the traditional tough stance and start to be more collaborative with the case destiny.

The control of the steps taken by every stakeholder during the case is also favored by the democratic management. Everyone who is involved in the case will know exactly what the activities of all case agents are. Thus, the judge will be no longer the only person to monitor the conduct of creditors, debtors, trustee, examiner etc.

During the democratic case management hearing, the judge, after discussing to the stakeholders the issues that need to be decided, will define the course of the case and distribute the tasks to be fulfilled by each party involved in the case. Thus, for example, if there is the need to sell an asset of the bankrupt estate, after discussing the best technique for doing so, the judge shall order the trustee to comply with the measures of valuation and sale within a specified period of time. And everyone present in the democratic management hearing will know what those tasks and deadlines are for compliance (measures and deadlines accepted by all). Thus, it is intuitive to assume that these tasks will be effectively met, in so far as they are widely monitored, in addition to being previously accepted by all.

It is important to note that democratic management hearings are also held to monitor all decided issues and tasks assigned in the previous hearing. Depending on the necessity of the case, the judge may set monthly hearings to verify the compliance of the stakeholders with the tasks and goals defined in the previous hearing.

Thus, the democratic case management means a greater participation of every stakeholder in the case for the sake of greater speed, agility, transparency and efficiency of the adjudication.

The parties no longer feel like they were only part of the problem and they begin to see themselves as part of the solution of the case, which means that there is a significant change of attitude towards to the result of the case.

To top it off: the application of the democratic case management model can be made immediately, disregarding legislative changes and new financial investments.

According to current law in Brazil¹⁵, the judge is already allowed to designate a hearing to collect information from the parties and other interested parties whenever deemed necessary for the rapid and proper solution of the questions posed in court. This technique may be used for the insolvency cases, since this way of case management is the one that better meets the constitutional principles of efficiency and reasonable duration of the case.

A practical example of a successful democratic case management in insolvency proceedings is the VASP AIRLINES¹⁶ bankruptcy case, in progress in the 1st Bankruptcy and Judicial Recoveries Court of São Paulo.

It is an extremely complex bankruptcy case that involves different kinds of assets and requires urgent fulfillments, not only to meet the pressing needs of creditors, but also to meet the public interest.

Dozens of aircraft carcasses were parked at almost every airport in the country, clogging the already overloaded airport infrastructure in Brazil, on the eve of the world's biggest sporting event, the FIFA World Cup.

Coordinated by the National Judicial Council, several meetings were held in Brasília with the participation of all stakeholders in the allocation of aircraft (carcasses) – Infraero (public company responsible for the management of the public Brazilian airports), airport concessionaires, the Auditor's Court of the Union (TCU), Federal Prosecutors' Offices, among others. The divestment strategy of these assets and the vacating of airports were discussed and decided together, creating a positive and collaborative agenda, for the sake of accelerating the progress made while taking care of the interests of the creditors and the public interest.

The result of these hearings was the viability of the total divestment and the (almost) complete withdrawal of aircraft from Brazilian airports. At Congonhas airport, for example, there were 12 aircraft carcasses occupying space that was vital for the national airport infrastructure. The carcasses were all sold and removed within a few months for the sake of national interest. In addition to it, the proceeds of the sale were used for the payment of part of the credits of the labor creditors.

¹⁵ Civil Procedure Code, art. 139, V and VIII.

¹⁶ See <http://aviationweek.com/awin/brazils-vasp-now-under-protection-bankruptcy>.

Democratic case management hearings have been held periodically during the VASP bankruptcy proceedings, always with great participation of all stakeholders, including trade unions, association of former employees, creditors, and others. Important questions for process efficiency are discussed and decided, which enabled the full payment of all post-petition liabilities of the bankrupt estate. It has resulted in a great benefit for thousands of worker's families.

Given the success demonstrated in the VASP bankruptcy case, this methodology has also been extended to other bankruptcy and judicial recovery proceedings, resulting in greater efficiency and decision-making agility.

GENERAL CONCLUSION

The application of the democratic case management shall be made on the grounds of the constitutional principles of reasonable duration of the case¹⁷ and efficiency¹⁸.

The democratic case management allows the judge to render a timely decision, with a greater level of transparency and certainty. It is also an effective technique to improve the participation of the stakeholders in the judicial process for the sake of a greater agility and efficiency of the adjudication.

Therefore, it is possible to conclude that one can always do better and more, even without new investments and legislative reforms. The change of posture of the case manager is able to generate positive results, which grants more efficiency to the public service offered by the Judiciary.

¹⁷ Art. 5, LXXVIII, CF / 88.

¹⁸ Art. 37, "caput" of CF / 88.

