STRATEGIES IN EFFECTIVE CASE MANAGEMENT

Introduction – Case Management in Civil Litigation Matters in Italy.

The expression “Case Management” in Italy is usually intended in quite a different way, if compared with the meaning these works have in a Common Law legal environment. Actually, the very idea that judges and lawyers can sit around a table and define for a given case how that litigation, that particular case, can be managed in order to be brought either to a friendly settlement, or to a contentious judgement in the most expeditious, convenient and efficient way, is something unthinkable in our tradition. Actually, our civil litigation is something where parties will make their submissions and the judge will judge: and that’s all. However, in these last years a different “philosophical” approach has started in some courts, under the direction of some illuminated Presidents, even though their initiatives not always have been successfully met in our old fashioned judicial environment, nor have been continued by their followers. This is the case, just to give an example, of the so called “Strasbourg Programme” of the Turin First Instance Court. Here I provide some information on it.

1. The ‘Strasbourg Programme’: An Inspirational Forerunner.

1.1. The Programme in the 2001 Version

The Strasbourg Programme has been the first court management experiment in Italy, aimed at achieving a significant reduction of backlogs and the expedition the processing of civil cases. The initiative was put in place from the year 2001, based on an idea of the previous President of the Court of Turin, Dr. Mario Barbuto. Since 2009 and until 2015 it has been continued by his successor, Dr. Luciano Panzani. The program also earned a special mention in the “Crystal Scales of Justice” price (Edition 2006) of the Council of Europe. Here a short list of key points, together with a brief explanation.

- Marking of the backlog according to the age of each case
  A prerequisite for the concrete setting up of such a program has been carrying out an examination of the backlog of civil litigation cases. To this aim, since 2001 the President of the Court of Turin has conducted a periodic survey, renewed every six months, of all civil cases pending before the same judicial office. Following this survey, all processes have been classified according to the duration (cases pending for more than a year, for more than two years, for more than three years, and so on). More specifically, the actions of more than three years were then classified into five groups by complexity, which corresponded to four groups of temporal definition, ranging from six months for easier procedures to eighteen months for the more complex.

- “Decalogue” of requirements and recommendations for the management of the “old” civil cases
  The President considered first of all that processes having lasted more than three years had to be considered in violation of the “reasonable time requirement” (Article 6 of the European Convention on Human Rights, as interpreted by the case-law of the European Court of Human Rights); he therefore proceeded to issue a Directive containing a series of recommendations to the judges (the so called “Decalogue”), in order to pursue a reduction in the duration of the processes through a quick and targeted disposal of “stale” cases. The aim of the document was also the establishment of a uniform practice in all areas of the Civil Court, without breaking, on the other hand, the principle of autonomy and independence of each judge. It is worth noting that the “Decalogue,” even if conceived some years before the “SATURN Guidelines for Judicial Time Management,” issued by the CEPEJ of the Council of Europe, in many parts dealt with issues that are addressed by the said document (in particular in Part V - Guidelines for Judges). Moreover, the same “spirit” of the “Decalogue,” as well as many of the solutions it proposed, would seem to be in harmony with the objectives, purposes and methods of the said SATURN Guidelines. To this extent it is possible to define the document adopted in Turin as a sort of SATURN Guidelines avant la lettre.

- Absolute priority of cases pending for over three years
According to the first census, the number of ordinary cases pending for a period exceeding three years in all civil sections of the Court of Turin amounted, as of April 30th, 2001, to 2,354 (52 of these dated back to a date prior to 1990). In consideration of this data, files of cases older than three years were characterized by a distinct set of stamps on the cover, both to enable judges to find them easily and to stress the importance of having them disposed of as soon as possible.

- Exhaustion of the processes according to the FIFO (first in, first out) rather than LIFO (last in, first out) Model

The FIFO model, well known in management theories and corporate law, is based on the chronological priority of the cases. In response to the clear principle that “the first action that has been brought as must be the first to be settled,” it works oppositely to LIFO which instead provides that “the last entry is the first out.” The latter model, as far as the management of Courts is concerned, could be very risky. In fact, using the LIFO method, the “old backlog” becomes even older.

- Periodic survey of all pending cases, categorized by the year of registration in the Court’s Registry

This task was entrusted to the General Statistics Office of the Court, under the control of the President of the Court. Some Judges and Presidents of Chambers were charged of monitoring the implementation of the whole process.

- Semestral-based review of the achieved results

Still to be explained and highly worthy of note was the Presidential initiative to create a periodic distribution of general statistical data and other elements on the length of proceedings, section by section. In this frame, the dissemination of statistical results indicating the rate of “productivity” of each individual judge, established an element of virtuous competition among members of the Courts, a “follow-on” effect that helped to prevent the accumulation of a backlog. This element too was entirely lacking in the past (and was unfortunately discontinued as of 2015).

- The judge plays an active role in ensuring the rapid progress of the proceedings

The Strasbourg Programme contained a set of rules aiming at encouraging judges to make use of their powers to speed up procedures [for examples see OBERTO, Study on Measures Adopted in Turin’s Court (“Strasbourg Programme”) Along the Lines of “SATURN Guidelines for Judicial Time Management,” available at the following website: http://giacomooberto.com/study_on_Strasbourg_Programme.htm]. Just to give some examples, judges were invited (a) to strictly monitor the behaviours of all the actors to a proceedings, such as lawyers, experts, parties, etc., (b) to fight all possible procedural abuses and delaying tactics, (c) to avoid losing precious time in taking useless evidences (e.g. hearing witnesses on fact which are already proven by documents, or by technical expertises), (d) to reduce as much as possible the length of the reasonings of judgements, etc.

1.2. The Success of the Initiative.

We can here briefly note the results recorded by the program in one of its last editions, the nineteenth in chronological order, released by the President in December 2011. The report showed that the length of civil cases was as follows: 96.07% of cases below three years and 88.6% of cases below two years. Furthermore, according to the prior survey conducted in December 2010, within 22,268 cases pending before the Court of Turin, 21,418 were pending for less than three years (15,325 for one year, 4,264 for two years, 1,829 for three years), while only 850 more than three years. These results, when compared with the previous year (December 2009) demonstrate the establishment of a continued positive trend in the First Instance Court of Turin, at least as long as the “Strasbourg Programme” was in place.


The President of the Court of Appeals (the same former President of the First Instance Court, Dr. Mario Barbuto), in May 2011, issued the Directive No. 1/2011 entitled “Extension of the Strasbourg Programme to all ordinary Courts of the District of Piedmont and Valle d’Aosta,” aimed at repeating throughout the Regions of Piedmont and Valle d’Aosta the positive results registered over the years in the Court of Turin. The purpose of the Directive was twofold; on one hand, to eliminate (or drastically reduce) all civil litigation with the characteristic of “ultra-three-year,” on the other, to make the duration “below three years” a constant standard for civil disputes. In other words, namely those of the President of the Court of Appeal, the category ultra-three-year causes (backlog in strict sense) must permanently disappear from the statistical sheets. Therefore only the “infra-three-years” cases (the stock in a technical sense) still may be displayed on those sheets; the stock in turn have to be divided into three sub-headings: the “cases in the third year” (defined as “stock at risk”), which have to be carefully monitored; the “cases in the second year” (defined as “routine standard”) and the “cases in the first year” (defined as “virtuous standard”).
As for the previous experience in the First Instance Court of Turin, a prerequisite for successful starting of the program was that of carrying out a census of the entire backlog (lato sensu) of civil cases by the General Direction of Statistic of the Ministry of Justice (DGStat). In this regard, each Court was required to divulge: (a) the year of registration in the Court’s Registry of the proceedings still pending in order to trace the age of each case and to develop a general framework on the backlog of the District as a whole and of any Court in particular over the years; (b) the number of civil proceedings still pending on December 31st, 2009 (that is the stock).

Except for the First Instance Court of Turin, this operation represented a breakthrough with the past: in sixteen courts—for the first time in the judicial history of our country—the age of pending civil (and criminal processes) to a certain date (December 31st, 2009) was scrutinized. Moving to data, the response offered by statistics on the Court’s District was alarming (always excluding the First Instance Court of Turin): 728 were the cases registered in the Registry before 1995 and 961 those registered during the years 1995-1999.

The President of the Court of Appeals, noting the state of emergency faced by the Judicial Offices of the District, considered the primary target to be elimination of the category “cases of the last century.” That operation passed through two intermediate stages: (a) reviewing the reports sent by the various Offices (previously merely assembled from the DGStat) with elimination of any possible errors or omissions; (b) annual analysis of individual items, distinguishing five types of “civil affairs” (contentious cases in the strict sense, executions on Real Estate, executions on movable, bankruptcy, voluntary jurisdiction) in order to flesh out the contentious cases from the total of indistinct “pending civil affairs” (as has been standard practice for years at the Court of Turin). After this, the President of the Court of Appeal, basing on statistical data collected and objectives set, proceeded to draw up a timetable, for each and any kind of cases, according to their age and kind of matters dealt with.

Finally, we note that in addition to the program discussed here concerning the District Court of the Court of Appeals, where the benchmark, as seen, is the three-year period, a parallel initiative was adopted for the inner workings of the Court of Appeals. The so-called ‘internal project’, which sees the application of some of the guidelines of the ‘Strasbourg Programme’ to the Court of Appeal, was structured according to the same logic outlined above, but differed completely in respect of the maximum duration of civil cases pending on appeal was set as two years.

From this overview of the project first launched and carried out with success at the First Instance Court of Turin, and subsequently extended to all the First Instance Courts of the District and to the Court of Appeals, it can be concluded that the reduction in the duration of the processes and the increase in the quality of the work of the Office has been a popular development within the judiciary. The Programme was a forerunner and acted as an inspiration for the law that in 2011 obliged all Italian Courts to adopt this kind of initiatives. Unfortunately, it was discontinued after the then President of the Appellate Court quit his office, in 2014.


2.1. General Notes

The Italian lawmaker, in July 2011, concurrently with the adoption of measures of strong financial and economic impact, felt the need to raise the issue of court management to positive law. Court management was dealt with in Article 37 of Law Decree No. 98 of the 6 July 2011, converted with amendments into Law No. 111 of July 15, 2011 (Budget Law). It should be noted that a provision similar to that provided by Article 37 D.L. (law decree) 98/2011 was already contained in Article 1 of d.d.l. (law bill) entitled Interventions in the Field of Efficiency of the Judicial System, approved by the Council of Ministers at its meeting on February 9, 2011.

Up until that time, the discipline here in discussion had found no legislative recognition, thus it remained subject to internal regulation of any court. This does not mean that legal limits in defines of reasonable length of process did not exist in the past: more or less stringent measures were already provided by both at the domestic level and the supranational level; however, according to Italian law, an obligation to take steps for the preparation of an annual plan aimed at the management of the workload did not lie on the heads of courts.

2.2. The Content of the Law

Paragraphs 1 through 16 of said Article 37 contain provisions to ensure greater efficiency in carrying out judicial activities through the disposal of the backlog and the acquisition of new instrumental and financial resources. The first three paragraphs, stating the constitutive and operational rules that are indispensable for the setting and the functioning of an efficient court management program, constitute the core of the provision. In particular, paragraph 1 forces each Head of the Court, after consulting with the President of local District Bar Association, to organise a program for the management of civil, administrative and tax proceedings, intended to determine:
a) the targets of reducing the duration of the processes which are concretely achievable in the current year;
b) the targets of the performance of the office, taking due account of the workload which can be imposed on Judges at its disposal and the order of priority in dealing with pending cases, as identified according to objectives and consistent criteria that take into account the length of the case, with reference to any previous areas of jurisdiction and the nature and value thereof.

As it is shown by the text of the law, among the criteria in question, the verification of the files which are characterized by earlier sets of proceedings has to be taken into account; that statement, being the object of a specific indication, should be read in terms of priorities. According to rulings provided for by the High Council for the Judiciary about the implementation of that law, the work of the court has now to be organised by “clusters” of different matters (such as: bankruptcy, family law matters, labour cases, ordinary civil cases).

In the 2nd paragraph of said Article 37 it is stated that the program drafted by each President of the Court has to be adopted by January 31st of each year, and, from 2012 onwards, should give a summary of the fulfilment of the objectives of the previous year, or should explain the reasons behind their failure. Since the drafting of the program is an element of assessment for the purposes of the confirmation of the President as Head of the Court (Article 45 of Legislative Decree No. 160/2006), after his/her four years in office, it has to be submitted to both the local Bar Association and to the High Council of Judiciary.

Unfortunately no legal provisions exist in the said law (nor in any other legal provision of the Italian system as a whole) on the need to give judges more flexibility to read and implement a procedural system like ours, which is the antithesis of efficiency (what on the contrary, the “Strasbourg Programme” tried to do). So, those same old and outdated norms can be used (and have been) by lawyers (who, unfortunately, may find also some heads of courts all too eager to indulge some of them, at least the most unrelenting), in order to threaten with disciplinary sanctions the judges who try to make efforts towards a more modern pattern of organising, managing and resolving trials (which inevitably may be at odds with the interest of lawyers).

3. The Waking Up of Awareness on Case Management in Europe.

The examples I cited above clearly show that even in a backward legal environment, like the Italian one, we are witnessing a waking up of a general awareness of the need to have a different approach on case management (intended of course as a “systemic case management” approach, not as the management of single cases, as it happens in the Common Law legal environment and would be legally impossible in our system).

This phenomenon meets a general trend in Europe, as it is shown by the setting up within the Council of Europe of the European Commission for the Efficiency of Justice (Commission Européenne pour l’efficacité de la justice – CEPEJ: http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp). Furthermore, the CEPEJ set up in 2007 a special working group, called “SATURN Centre for Judicial Time Management.”

The SATURN Centre is instructed to collect information necessary for the knowledge of judicial timeframes in the member States and detailed enough to enable member states to implement policies aiming to prevent violations of the right for a fair trial within a reasonable time protected by Article 6 of the European Convention on Human Rights. The Centre is aimed to become progressively a genuine European observatory of judicial timeframes, by analyzing the situation of existing timeframes in the member States (timeframes per types of cases, waiting times in the proceedings, etc.), providing them knowledge and analytical tools of judicial timeframes of proceedings. It is also in charge of the promotion and assessment of the Guidelines for judicial time management.

The Centre is managed through a Steering group, which works in particular for collecting, processing and analyzing the relevant information on judicial timeframes in a representative sample of courts in the member states by relying on the network of pilot courts. Thus it must define and improve measuring systems and common indicators on judicial timeframes in all member states and develop appropriate modalities and tools for collecting information through statistical analysis.

Among the activities of the SATURN Steering group we can mention the drafting of “Saturn guidelines for judicial time management.” Such guidelines are aimed to reduce the length of judicial proceedings. We can also point out that the SATURN Centre has been organizing in these last years several coaching activities on issue of judicial timeframes, in countries like Germany (Freiburg i.B.), Slovakia (Bratislava), and Italy (Syracuse). Many initiatives on the issues of case management have been carried out in countries such as Turkey, Morocco, Tunisia, Jordan, Armenia, Azerbaijan, Georgia, Republic of Moldova and Ukraine.

Further information (in English) on the Italian debate on issues of case management is available here:

1. Can case management be used effectively in civil litigation matters in your jurisdiction?

As I explained in the Introduction, case management in Italy is not a way to address some particularly complex proceedings, as all litigations have to be treated exactly in the same way. Contacts between judges and lawyers in a given case on how to manage it in an efficient way are not envisageable, as the judge has to strictly apply the (completely outdated, cumbersome, very often senseless, but legally binding!) procedural rules of our all too complex and baroque legal system.

However, a “case management” strategy—or “case management oriented approach”—on how to address the whole ensemble of cases with which a judge has to do, can be envisaged, of course under the condition that the court president endorses it and does not bow to the “orders” of lawyers (or at least, of the most meddlesome or schemer of them), who have all the interest that the case is managed in the way lawyers (or lawyers' inserts) particularly want it. This can be done, very often.

I am referring here to case management strategies of the sort which I described in the Introduction: basically addressing first of all the older cases; trying to reach a friendly settlement despite the attempts of some lawyers to have their cases last as long as possible; appointing (when required by the technical aspects of a given case) only experts who have shown in previous cases to be able to produce readable, reliable and skilled reports and to be able to convince the parties to reach friendly settlements (event though this is not in the personal interest of their lawyers); appointing technical experts who are not used to bow to the “orders” of aggressive lawyers; to deny adjournments, even if lawyers are asking for them, when there is no concrete and proven evidence on the need to give time to reach a friendly settlement, and so on… I repeat: for a judge, showing this attitude means, most of the times, seriously jeopardising some (many) lawyers’ personal interests. This can be done, very often, not without risks, especially if the head of the court is on the side of such lawyers and not on the side of his judges. In other words: for an Italian judge, showing a “case management oriented” attitude and mentality can be very, very risky!

2. Are there rules or guidelines for the use of case management in civil litigation in your jurisdiction?

Also on this issue I can only refer to the information provided in my Introduction. Rules or guidelines of this kind were (and are) those of the so called “Decalogue” of the “Strasbourg Programme,” for the Court of Turin. They may be therefore given by heads of courts who want to convince their judges of the need to have and keep a “case management oriented” approach, knowing that this may be very hardly contested by lawyers.

3. What are the advantages or disadvantages of the use of case management in your jurisdiction?

The use of case management in our Italian jurisdictions could only bring about advantages for the system. It would of course, for reasons I gave, bring about disadvantages for lawyers’ pockets and personal interests. This

https://ssrn.com/abstract=3158105
or
http://dx.doi.org/10.2139/ssrn.3158105.


IMF, Italy, selected figures, https://books.google.it/books?id=9p21BAAAQBAJ&pg=PA15&lpg=PA15&dq=italy%20justice+%22case%20management%22+backlog&source=bl&ots=Im5HplnZoi&sig=LQtubGNFCylH0XVO3NZ2iE36hWo&hl=it&sa=X&ved=0ahUKEwjrxJuZmcnbAhVHGsAKHa9RDaQ6AEbDAJ#v=onepage&q=italy%20justice%20%22case%20management%22%20backlog&f=false.
is the reason why a real “case management approach” for Italian judges can be very risky, if judges’ actions are not endorsed by the heads of their respective courts.

4. Who incurs the costs of the use of case management in your jurisdiction?

As, in practice, practically no case management (in the above indicated sense) is currently implemented in our jurisdictions, at least as a general way of treating civil cases, the “costs” for this lack are incurred by parties, who see their cases addressed in the framework of proceedings which last unbearable amounts of time, with burdens of procedural costs, which very often outnumber the amount of money expressed by the value of that given case, whilst most of such litigations could be solved quickly and with a very low level of expenses, if only judges were really encouraged (and entrusted the powers!) to fight against lawyers’ delaying tactics.

5. Can the use of case management in your jurisdiction be improved?

Before being improved, case management should be introduced... Heads of courts should be authorised (even better: compelled!) by law to issue recommendations to their judges of the same kind of those of the above mentioned “Decalogue” of the “Strasbourg Programme,” so to encourage them to effectively fight against delaying techniques and tactics by lawyers.

Turin, 10 June 2018.

Giacomo Oberto
Judge – Court of Turin (Italy)
Secretary-General of the IAJ