Insolvency: substantive and/or procedural challenge?

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It is not a secret that the form to teach law in civil law countries differs from the way law is taught in common law countries. On the latter, the law is formed by the decisions made by judges. A good lawyer needs to know the main arguments that solved relevant cases in order to build the law and to know the rule that must be applied to a specific situation.

On the contrary, on civil law countries the law is contained in codes and statutes passed by the legislature. Such codes contain general and abstract rules which must be applied to every specific situation governed by such codes. According to the principles established during the French Revolution, which originated the first Civil Code, which by the way, became the model to civil law countries: judges should only be the "mouth" of the law, their function was only to confirm what the codes provided and not to deviate from such written path.

Nowadays, it is much more common in civil law countries for the courts to have more participation and initiative. When the statute is not clear or cannot be expressly applied to solve a specific situation governed by it, a judge has the authority to construe the law, creating new specific rules, and in certain instances such rules may be generally applicable to all cases containing the same facts.

Following the tradition of codes and statutes, in civil law countries there has always been a clear distinction between substantive law (*derecho sustantivo*) and procedural law (*derecho adjetivo*). Substantive law provides the rules that must be applied to solve a legal problem; they go to the substance of the problem. Procedural law is not intended to go to the substance of the problem, but to provide a set of rules to be followed to fight a legal problem in court. Generally speaking, its function is not substantive, but formal, provides a series of steps required to have access to a court and to obtain a binding decision that will end a controversy.

In civil law countries, insolvency law has usually been a special proceeding forming part of a procedural code, applicable where the debtor has more than one creditor. Therefore, an expert in insolvency law would usually be a litigator that has represented debtors or creditors in insolvency proceedings before a court. At least in Mexico, formal insolvency proceedings have always been court-driven.

The foregoing has caused the fact that in Mexico law schools have usually taught insolvency merely as a proceeding part of a procedural law course, this is, in the same course where students would learn to enforce a mortgage or a security interest, to terminate an agreement and sue for damages, or enforce a default under an agreement.

Consequently, the substantive issues of insolvency are usually not studied, and if the program of studies of a University does contemplate one course exclusively to study the insolvency proceeding, it will almost certainly be a subject that students may choose to take but is not compulsory (*optativa*).

The foregoing has caused that most corporate lawyers do not get involved with the Insolvency law, do not study it, do not know it and do not know its consequences. Therefore, when they structure a transaction, negotiate a loan or simply advice on any kind of corporate matter, the insolvency factor is not taken into account, which is unconceivable in a common law country, where all business law courses, all transactions, all agreements are studied and negotiated closely contemplating the insolvency factor.

Clearly, insolvency is the worst scenario where the parties negotiating a deal could get to, therefore, studying the consequences of a potential insolvency and introducing in the documentation the remedies that could ameliorate the problem is something, we lawyers, need to be doing.

It may be a challenge to try to change a well-established system and a traditional legal education; however, why not to try it? After all, all institutions require improving and renovating. Are we ready to the challenge?