

**Extracts from the speech of Mr Justice Norris to the INSOL Academic Forum
Nottingham June 2012**

1. Winston Churchill said of politicians that they needed

“The ability to foretell what is going to happen tomorrow, next week, next month and next year: and the ability afterwards to explain why it did not happen”.

2. You academics are in a similar position as you seek to grapple with the great theme of “Too Big to Fail”.

3. You will devote your learning, insight and time to assembling the big picture and to examining its component parts. There is little that a working Judge can contribute to this process.

4. The Judge operates from an entirely different perspective. It is as if you were examining the causes of the earthquake whilst the Judge deals with the effect of the aftershocks. You examine why the pebble fell into the pond whilst the working Judge copes with the ripples. I am not for one minute suggesting that you are looking at the wrong thing in this conference: I am suggesting that in your informal conference conversations you might discuss how your thinking and your findings might be used to build confidence and encourage cooperation between judges and insolvency practitioners seeking to cope with the many practical problems that result from these great crises, and to do so across borders.

5. Let me take two scenarios: one that has happened and one that may be imminent. First, the collapse of Lehmann Brothers. Only now are some of the fundamental questions thrown up by that collapse being litigated in the Courts, for example the location and ownership of assets, and whether the “anti deprivation” principles are infringed by the terms of some loan instruments. But the Courts of different jurisdictions have ever since the collapse itself been dealing with the much more mundane side effects of the collapse, such as the seizing up of the credit markets which put many enterprises into insolvency. You must look at the big questions concerning the collapse of Lehmann: but we must not overlook the much more routine business of dealing with the immediate consequences, and how we might build confidence and encourage cooperation between jurisdictions in dealing with them. In the same way, if the euro zone troubles lead to an adjustment in one or more states (whether it be the complete localisation of a currency or something less, such as a restriction on capital flows) there will be huge and fundamental questions to be answered: but the first and immediate impact will be felt as working Judges have to face attempts to enforce then-current commercial or financial transactions, or deal with the impact upon the solvency of enterprises across Europe of a disruption in the ordinary payment processes between customer and supplier.

6. These are the frontline questions with which a working Judge has to grapple. And in every case he or she must find an answer for the parties: in unprecedented circumstances and with the resources that are provided to him or her by parties who are working often under extreme pressure of time. So in reaching a practical and just answer the Judge may not always express reasons in the most lucid way or use the

language or terminology that is the most apt. It is a bit like Bill Peterson, the Florida State football coach who once told his players to “pair up in threes and then line up in a circle”. He achieved what he wanted, but not perhaps in the most apt language or by reference to orthodox numerical or geometrical principles.

7. It is in this context that working Judges in each jurisdiction would look to academics

- To assist in the IDENTIFICATION of principle
- To illuminate the INTER-RELATIONSHIP of principles within national systems of law and across national systems of law
- To provide COMPARISON within and across systems of law of the various issues and the various solutions
- To undertake the COLLATION and analysis of data

The academic community has already made a great contribution in the field of Insolvency Law by developing the model adopted in the UNCITRAL Convention and EU Regulation for cross border cooperation. The outstanding features of that model are:

- 1) The concentration upon establishing principles rather than seeking to embark on a harmonisation of the substantive law of different jurisdictions:
- 2) The creation of concepts which are not grounded in any single system of law (the obvious example being COMI, a concept to which English Judges have made a sustained effort to give, in our jurisdiction, an “international” meaning): and
- 3) A focus upon the recognition in one jurisdiction of the procedures of another (whether in the appointment of office holders or the adjustment of rights within an insolvency).

To build on this model judges and insolvency practitioners need academics to provide them with the tools to build confidence and encourage cooperation.

8. There are, from my perspective, five areas in which that help is particularly needed.

1) The meaning of “insolvency proceedings” within these models: to what extent are we prepared to recognise across borders rescue or restructuring vehicles that are not directly initiated by the Court but are only under the ultimate supervision of the Court in the event that a dispute arises or something goes wrong.

2) What is the true value of “secondary proceedings” where the law of the insolvency is that of another state.

3) How do we address the persistent problem of “groups”. I think we have stumbled and muddled our way to a consensus where the entire group has a COMI which the same as that of the principal member of the group. But what about where the principal member (perhaps a mere holding company, or perhaps the main operating company) has one COMI, but each individual subsidiary has its own. How can a group rescue be organised? If we are to

look for some dominant insolvency regime within the group as a whole, should that be determined by the law which provides the best outcome for creditors? Or would the adoption of that principle perhaps undervalue other interests which are given particular weight in the social policy of other jurisdictions e.g. workers rights?

4) In a digital age and where significant assets may consist of de-materialised instruments are our existing rules sufficient to provide a fair and effective regime governing the location of assets?

5) Whenever there is an academic or judicial colloquium the cry goes up that there should be greater cooperation between the courts of different jurisdictions: but must this be hammered out on a case by case basis by individual judges forging their own protocol? Is it not possible to identify some principles by reference to which it can be determined that some issues will be decided in one jurisdiction rather than another (but recognised in all jurisdictions), or procedures and routes of appeal created to permit joint decisions?

That is quite enough to digest between main course and dessert.