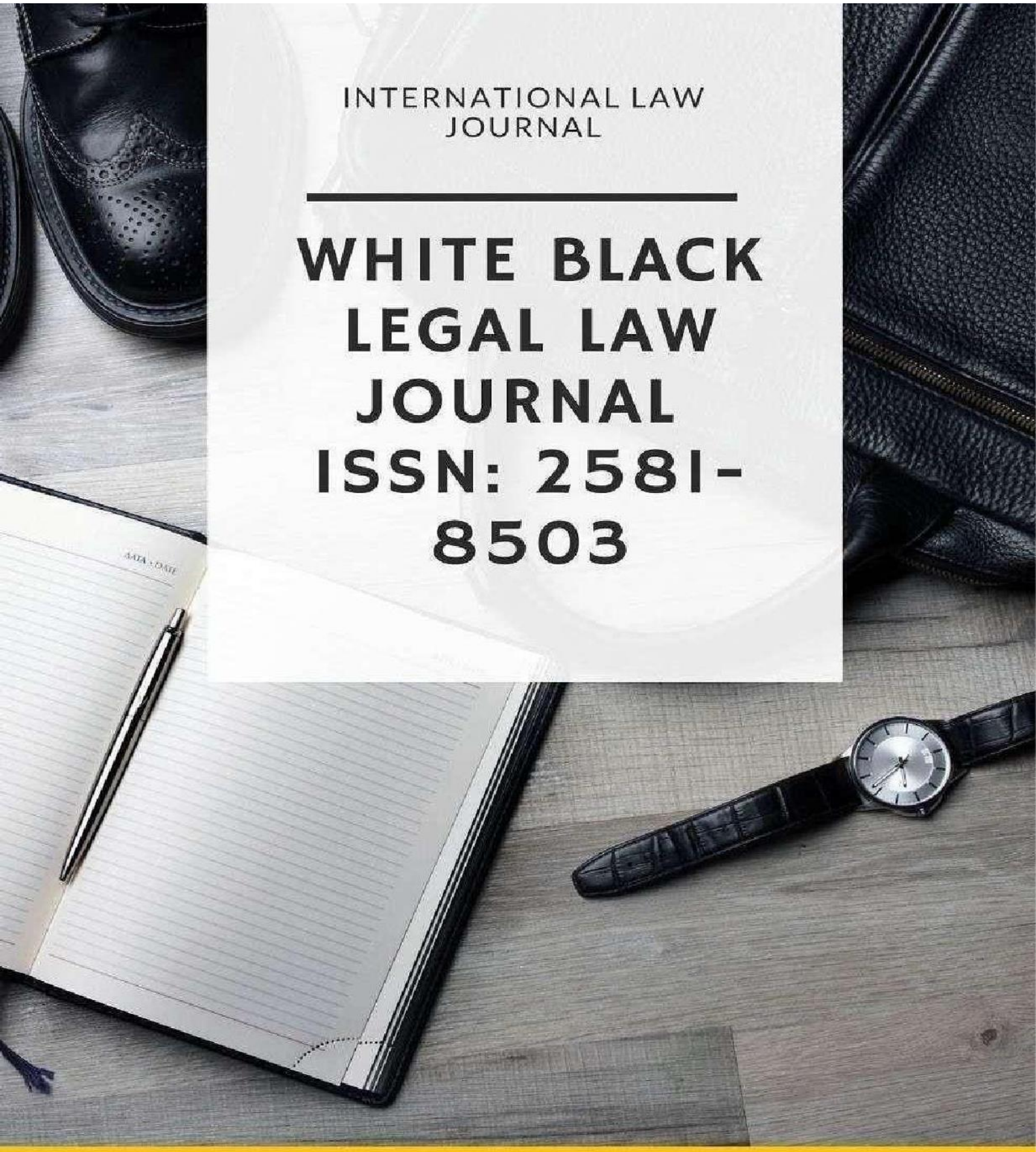

INTERNATIONAL LAW JOURNAL

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ISSN: 2581-8503

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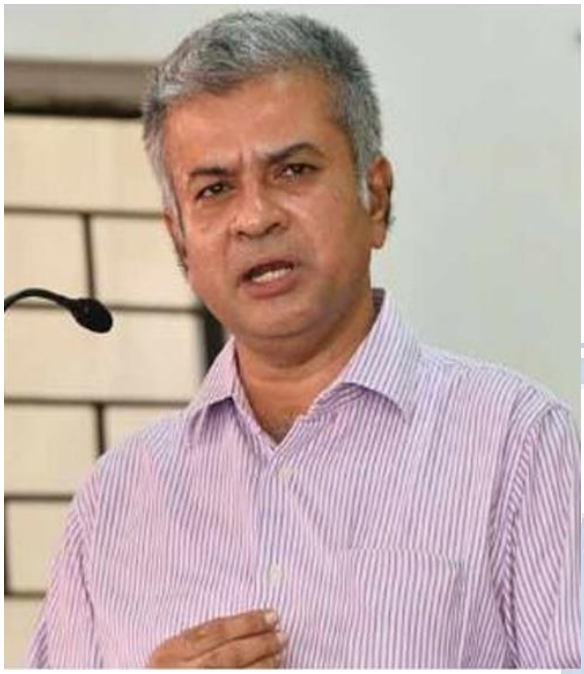

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

By- Megha Mahesh

SYNOPSIS

ABSTRACT

The field of cross-border insolvency law is marked by a complicated and demanding terrain that is typified by policy preferences that clash, national laws that differ, and the varied interests of parties. Due to the increased globalization of business, there is a greater need than ever for efficient systems that identify and uphold insolvency decisions throughout national borders. This paper investigates the application of modified universalism in the United States, United Kingdom, and Australia as well as the effects of the Model Law on cross-border insolvency. This research paper emphasizes how crucial it is to keep costs down, maximize creditors' recoveries, and provide predictability for all parties engaged in international bankruptcy procedures. Through a comprehensive analysis of the challenges, opportunities, and best practices in cross-border insolvency law, this research aims to contribute to the development of more efficient and harmonized international insolvency frameworks.

KEY WORDS: UNCITRAL Model Law, Modified Universalism, for Recognizing and Enforcing

Insolvency Judgments across Jurisdictions

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RESEARCH OBJECTIVE

"To investigate the impact of globalization on cross-border insolvency proceedings and analyze the effectiveness of the UNCITRAL Model Law in harmonizing recognition and enforcement practices across different jurisdictions, with a focus on identifying challenges, opportunities, and best practices for enhancing international cooperation in insolvency matters."

RESEARCH QUESTIONS

- What are the critical differences in the approaches to cross-border insolvency law among different countries, and how do these differences impact the effectiveness of international cooperation?
- How does adopting the Model Law on cross-border insolvency influence the recognition and enforcement of insolvency proceedings across jurisdictions?
- What role does judicial gap-filling play in addressing the gaps and inconsistencies in cross-border insolvency law, and what are the implications of this approach?

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

CHAPTER 1. INTRODUCTION

International recognition and enforcement of insolvency decisions are vital in the contemporary global economy to guarantee the efficient handling of cross-border bankruptcy processes and protect the interests of creditors, debtors, and other relevant parties. A critical tool for increasing collaboration between legal systems and standardizing international insolvency practices is the UNCITRAL Model Law on cross-border insolvency.

This research paper explores the complex terrain of cross-border insolvency law enforcement and recognition, particularly emphasizing putting the UNCITRAL Model Law into practice in essential jurisdictions, including the US, UK, Singapore, India and Australia. By looking at the application of modified universalism and evaluating the effects of global relations theories on cross-border insolvency, this research paper provides insights into how the Model Law can enhance the effectiveness and predictability of international insolvency proceedings.

The difficulties of standardizing international insolvency procedures and the obstacles to creating a legally binding mandate for global collaboration in insolvency-related issues have been studied by academics. This study aims to enhance to the ongoing conversation on enhancing cross-border insolvency frameworks and encouraging greater consistency in handling insolvency cases across borders by synthesizing these discussions and applying theoretical frameworks to the analysis of recognition and enforcement practices.

This paper provides insights into improving international insolvency procedures' efficacy, fairness, and efficiency by thoroughly analyzing cross-border insolvency law's problems, prospects, and best practices. Hence this paper attempts to overcome the difficulties of contradictory laws, stakeholder interests, and procedural complexities to offer insightful information to policymakers, practitioners, and researchers involved in cross-border insolvency.

CHAPTER 2- CROSS-BORDER INSOLVENCIES IN AUSTRALIA, UNITED STATES, UNITED KINGDOM, SINGAPORE

A. AUSTRALIA

The Australia’s cross-border insolvency has witnessed notable advancements recently, mainly because of implementation of the UNCITRAL Model Law on the subject. Australia's approach to cross-border insolvency indicates its dedication to global collaboration and standardizing insolvency procedures throughout various legal systems. Australia's laws regarding cross-border insolvency had been historically shaped by British bankruptcy laws, which date back to the 1800s. However, Australia adopted the Model Law with the passage of the Cross-Border Insolvency Act 2008, indicating a change to a more contemporary and globally compliant framework for handling cross-border insolvency matters. Australia's commitment to encouraging better efficiency in cross-border insolvency and easing the foreign insolvency procedures’ execution is demonstrated by its adoption of the Model Law.

Australia's approach to cross-border bankruptcy is based on modified universalism, which emphasizes cooperation and coordination across many jurisdictions while respecting the distinctiveness of national insolvency laws. Australia recognizes international insolvency procedures and extends support to the representatives of such actions in an effort to guarantee a fair and effective resolution of cross-border bankruptcy matters.

Despite being linked with the Model law; Australia has implemented it with some modifications. Australian policymakers have taken a nuanced approach to adjusting international norms to local conditions. Additionally, Australia's adoption of the Model Law has shown how committed the country is to upholding the values of collaboration and recognition in cross-border insolvency cases. Australia's legal structure for cross-border bankruptcy processes is still in use, despite the 2008 Cross-Border Bankruptcy Act. Challenges include national insolvency laws, protectionism, and risk pricing. Australia aims to improve efficiency, predictability, and equity by aligning its legal framework with global standards and promoting cooperation with other jurisdictions.

- Yu v. STX Pan Ocean Co Ltd.

Justice Buchanan determined that international insolvency proceedings met the criteria for being classified as "foreign main proceedings" under the CBI Act. In order to prevent Australian creditors from seizing ships that are docked in Australian waters, the foreign delegate asked for court orders. According to Section 16 of the act, the Corporations Act 2001 must be the relevant legislation that governs the stay and suspension . The power to seize particular vessels in order to enforce the security of a maritime lien is a crucial capability under maritime law. The judge received multiple

instructions from the foreign representative, but refused to issue them all since doing so would violate similar rights under maritime law. Articles 21(2) and 22(1) require that the creditors interest in Australia be taken into account prior to the issuance of an order.

The case of Yu v. STX Pan Ocean Co Ltd (South Korea) addressed several legal complexities arising from cross-border insolvency and shipping matters. STX Pan Ocean Co Ltd (STX), a bulk shipping company based in South Korea, became insolvent, leading to Mr. Yu being appointed as the company's receiver. Mr. Yu sought recognition as a foreign representative of STX and applied for recognition of insolvency proceedings commenced in Korea under the Model Law on Cross-Border Insolvency. As a recognized foreign representative, Mr. Yu would oversee the liquidation or reorganization of STX's assets in Australia.

Additionally, Mr. Yu sought additional relief under Article 21 of the Model Law to prevent creditors of STX located in Australia from taking steps to arrest or seize STX's ships under the Admiralty Act 1988 (Cth). The relief was meant to protect the assets of the debtor in the interests of creditors. However, the Court declined to grant the additional relief sought under Article 21 on the grounds that preserving local insolvency laws, creditor rights, and the Court's power to grant leave to commence proceedings were essential.

In summary, the case delved into the limitations of the Model Law and the reluctance of Australian Courts to grant additional relief to foreign representatives in circumstances where it may diminish creditors' rights. Moreover, the decision confirmed the ability of creditors to arrest a ship of an owner that is the subject of insolvency proceedings in another country without having to obtain leave of the Court or a foreign representative's consent1 . It highlighted the delicate interplay between insolvency laws, creditor rights, and the complexities of international maritime law in addressing cross-border insolvency concerns.

- Moore, as Debtor-in-Possession of Australian Equity Investors v. Australian Equity Investors

The Uniform Limited Partnership Act created limited partnerships in Arizona filed a lawsuit against Colliers International Pty Ltd. In a Sydney real estate development project, the defendants, AEI, transferred the property, after going into default. They subsequently filed a lawsuit against Colliers after learning that they had acted in a misleading or deceptive manner in violation of the law . In 2012, the defendants filed an application to have the US bankruptcy proceedings acknowledged by the Bankruptcy Court of the United States in Arizona. The designated debtor-in-possession of the

defendants, filed an application to recognize the US proceedings. Colliers cited public policy as a major defense for his refusal to accept recognition. The judge concluded that the Article 6 arguments were irrelevant to Australian public policy. Regarding recognizing the two US Bankruptcy Court cases, there is no problem with Australian public policy. The examination of these cases under the Australian Model Law demonstrates how interpretation and application of the Model Law have limited its effectiveness as a vehicle for universalism.

B. THE UNITED STATES

National and international laws, as well as judicial interpretations, create the complex cross-border bankruptcy environment in the United States.

The introduction of Chapter 15 of the U.S. Bankruptcy Code in 2005 marked a significant change in the U.S. approach to cross-border insolvency. This move brought the nation into accordance with international standards and facilitated collaboration with other jurisdictions.

Chapter 15 of the U.S. Bankruptcy Code incorporates key components of the UNCITRAL Model Law. This chapter offers a framework for recognizing and executing international insolvency processes in the United States. This Act aims to improve the efficiency and predictability of international bankruptcy procedures by improving coordination between American and abroad courts in cross-border bankruptcy cases.

The U.S. approach is characterized by a blend of territorial and universalist elements, with courts employing a flexible and pragmatic approach to manage the complexities of international insolvency situations.

One of the major challenges in cross-border insolvency cases is the interpretation and application of the "center of main interests", which designates the jurisdiction where the primary insolvency operations should take place. The debate and judicial review surrounding the definition of COMI have led to varying interpretations and outcomes in various cases. The lack of clarity around COMI underscores the need for uniformity and clarity in applying cross-border insolvency principles, as it may affect the recognition and execution of foreign bankruptcy judgments in the United States. The application of Chapter 15 has provided a legal framework for addressing these complex cases, but

challenges remain in harmonizing international insolvency practices and balancing the interests of diverse stakeholders.

The United States aims to enhance the fairness of cross-border insolvency proceedings by harmonizing its laws with international standards, adopting modified universalism, and resolving issues like COMI interpretation. This will ultimately lead to a more predictable and effective resolution of international insolvency cases.

- ABC Learning Centres

In this instance, it was necessary to liquidate an Australian childcare business that ran daycare provides both in Australia and the US. In order to safeguard their assets, secured creditors designated receivers, and the administrators authorized the receivers' tenure. The liquidators filed a Chapter 15 case. The Australian procedures were acknowledged as a significant international procedure by the bankruptcy court, which dismissed these challenges. In every state where assets are found, the US policy promotes a system of total bankruptcies, with courts typically striving to uphold the primary processes. The Third Circuit court concluded that Chapter 15 embraces the universalism viewpoint.

Because all of ABC's assets were leveraged and nothing would remain for the unsecured creditors, the judgment creditor claimed that Chapter 15 could be advantageous to the receivership. Although an exemption of this kind could run counter to the goals of Chapter 15, which is necessary for recognition, the court was unable to find any exceptions to recognize the debtor's debt at the time of insolvency.

o In Re Metcalfe

The investment vehicles Metcalfe and Mansfield, were meant to coordinate in the Canadian asset-backed paper market, which were under question in this case. Metcalfe requested that the Ontario government restructure all outstanding commitments to asset-backed commercial paper that were not sponsored by banks, totaling around $32 billion, following the financial crisis. The Ontario court issued an order putting the creditor-backed plan into effect. The contentious issue concerned injunctions and releases to third parties. The Monitor, appointed by the court, submitted a Chapter 15 petition to acknowledge and implement the global releases and injunctions. In accordance with S.1507, the bankruptcy court gave notice of the request for "additional assistance" and issued an order mandating that the Canadian releases take place in the United States. The court determined that the relief provided in a foreign proceeding did not have to match the availability of relief in a U.S. procedure.

The case surrounding "Re Metcalfe" involves various legal proceedings across different jurisdictions. It encompasses issues related to bankruptcy, appeals, breach of contract, personal disputes, and statutory rights, which have led to a myriad of legal implications and court decisions. The handling of liabilities governed by foreign law and pertaining to foreign parties, as well as the application of statutory reinstatement rights, have been key aspects of the case. Furthermore, the involvement of multiple parties in disputes such as divorce settlements and unlawful exchange charges has added complexity to the legal landscape. Moreover, the case has served as an interesting study on the principles of comity in cross-border bankruptcy cases, shedding light on the significance of consistent legal interpretation between different nations.

First and foremost, the court must determine whether the Canadian procedures follow fundamental fairness principles. The court looked at enforcement in light of the comity principles. It came to the conclusion that the comity principles cases justify the implementation of the Canadian Orders in the United States, even if the similar remedy could not be granted in a plethora of case .

C. UNITED KINGDOM

The United Kingdom's dedication to international cooperation and the prompt resolution of cross-border insolvency matters is reflected in the extensive legal system that governs cross-border insolvency in the nation. Common law customs and international agreements have an impact on the UK's approach to cross-border insolvency. Because London is a major center for commercial litigation and because its legal ideas have influenced other common law nations, the UK has facilitated a primary jurisdiction for cross-border insolvencies. The UK's legal regimes for cross-border insolvency provide a structure for handling international insolvency issues. The UK aims to advance efficiency, fairness, and predictability in international insolvency cases for recognition and upholding foreign insolvency judgments. Its approach is pragmatic and flexible, balancing domestic and foreign stakeholders' interests. The UK courts play a critical role in fostering collaboration and communication, ensuring efficient handling of cross-border bankruptcy matters. The UK's involvement in cross-border insolvency demonstrates its dedication to fostering collaboration and fairness, leveraging its legal expertise, institutional framework, and global partnerships.

- In re HIH

The UK courts are essential in choosing appropriate platforms for insolvency proceedings and coordinating procedures across national borders to guarantee the efficient administration of cross-border bankruptcy disputes. The cross-border bankruptcy cases' frequency has rised due to complexity of cross-border corporate transactions and the interconnectedness of the global

economy. Because of its adherence to international standards and accommodating stance towards cross-border insolvency, the UK plays a vital role in resolving complex difficulties.

- Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings, PLC.

Cross-border insolvency law was rocked by the Privy Council's ruling in this case. The lawsuit included shares in a shipping company held by Isle of Man corporations and a management group. Navigator Holdings, a Cayman corporation, owned seventy percent of the issued capital. The shipping company filed for Chapter 11 bankruptcy protection, but the court accepted a creditor's seizing plan of the assets of the company in place of its desire to sell its assets. Lord Hoffman emphasized that bankruptcy proceedings are collective activities designed to preserve rights rather than grant them. Furthermore, he discussed the parameters of assistance provided to foreign courts in order to eliminate needless bankruptcy proceedings and provide creditors with equal access to remedies.

In this case, investors in a shipping business filed for relief under Chapter 11 of the US Bankruptcy Code after the venture failed. The plan approved by the New York Court vested the assets of a company called Navigator in the creditors and extinguished the equity interests of previous investors. The corporate structure was complicated, involving offshore companies from various jurisdictions. The case raised questions about the nature of the New York Court's decision, its enforceability in the Isle of Man, and issues of jurisdiction and cooperation in the context of EU insolvency proceedings. The Privy Council ruled that bankruptcy proceedings exist to provide a mechanism of collective enforcement of creditors' rights and that the principle of universality forms the basis for common law principles of judicial assistance in international insolvency. However, this judgment has been widely criticized and departed from by the UK Supreme Court and the Privy Council in subsequent cases. This case illustrates the complexities and challenges involved in cross-border insolvency proceedings and their applicability in different jurisdictions. The case has also informed the framework contained in various restructuring processes, and its implications have been subject to extensive legal debate and scholarly analysis. The detailed exploration of the legal aspects in this case provides valuable insights into the intersection of international insolvency law, corporate structures, and jurisdictional issues. The case has important implications for cross-border bankruptcy law and has influenced subsequent legal decisions and discussions in this area

D. SINGAPORE

Singapore has made changes to the laws governing the acceptance and execution of judgements rendered by foreign courts. Foreign judgments registered in civil courts will be subject to a single regime under the Reciprocal Enforcement of Foreign Judgments Act (REFJA) as of March 1, 2023. This extension enables Singapore to negotiate further reciprocal enforcement agreements on a country-by-country basis and attempts to broaden the range of decisions covered under the REFJA. Four categories of decisions made in civil actions are now included in the REFJA: monetary judgments, orders from subordinate courts, interlocutory judgments, judicial settlements, consent judgments, and consent orders. The rights of litigants are safeguarded by these advances, and the validity of final judgments is maintained. On the other hand, international decisions that are upheld or recognized in Singapore under the Choice of Court Agreements Act, which implements the Hague Convention on Choice of Court Agreements. In domestic courts, the verdict rendered in the new lawsuit is enforceable. A foreign judgment needs to be final, issued by a court with the necessary authority, and for a specified amount of money. Astro Nusantara International BV v. PT First Media TBK According to the Court of Appeal, even in cases where the debtor hasn't actively contested the award in the past in accordance with Articles 16(3) or 34 of the Model Law, the courts are able to refuse enforcement of foreign arbitration awards granted in Singapore pursuant to section 19 of the IAA.

The case between Astro Nusantara International BV and PT First Media TBK involved a dispute arising from a failed joint venture in a satellite television business. The case proceeded to the Hong Kong courts following initial enforcement proceedings in Singapore, leading to a subsequent refusal by PT First Media to apply for leave to set aside the enforcement orders, believing it had no assets in the jurisdiction. However, after Astro obtained a garnishee order in Hong Kong against a debt of US$44 million due to First Media, First Media sought to set aside the garnishee order and judgment, albeit 14 months late.The Hong Kong Court of Final Appeal (CFA) unanimously allowed First Media's appeal in April 2018, overturning the earlier decisions to enforce five arbitral awards against it. The CFA held that the lower courts in Hong Kong wrongly exercised their discretion not to extend the time limit for First Media to apply to set aside the orders granting leave to enforce the awards in Hong Kong. It was considered that the failure to extend time was disproportionate and led to a failure to accord proper weight to the absence of a valid arbitration agreement between First Media and the additional parties. The CFA's decision reflected a broader approach to discretionary extensions of time, emphasizing the importance of considering the overall justice of the case and

not applying a rigid mechanistic approach. This case has significant implications for international arbitration enforcement and the principle of good faith in proceedings brought to resist enforcement. Overall, the case highlights the complexities and considerations involved in enforcing arbitral awards across different jurisdictions, particularly concerning jurisdictional objections, timeliness of applications, and the availability of remedies for parties seeking to resist enforcement, thus providing valuable insights into evolving jurisprudence on arbitration enforcement.

CHAPTER 3- ENFORCEMENT OF FOREIGN JUDGMENTS IN INDIA

Assistance in cross-border bankruptcy issues is provided by Sections 234 and 235 of the bankruptcy and Bankruptcy Code, 2016. The capacity of India to collaborate with foreign governments is essential for effective cross-border bankruptcy procedures. In order to facilitate effective cooperation between insolvency professionals and courts worldwide, give foreign professionals and creditors direct access to domestic courts, and recognize foreign actions in domestic courts, the UNCITRAL Model Law on Cross-Border Insolvency, 1997 provides legislative advice on cross-border insolvency. With advantages like protection of domestic interests, flexibility, economy protection, priority over domestic bankruptcy processes, and support in reciprocity-granting jurisdictions, India has created draft rules with a special chapter on cross-border insolvency. Setting a precedent for India's evolving bankruptcy legislation, the National firm legislation Appellate Tribunal (NCLAT) ordered the Joint Corporate Insolvency Resolution Process under IBC. However, the NCLT declined to halt insolvency proceedings of India due to the lack of coverage under Sections 234 and 235 of the Code.

The Bankruptcy Administrator appealed the ruling, which the NCLAT upheld.

The High Court of Delhi, in the recent case of Toshiaki AIBA vs. Vipan Kumar Sharma and Anr. , has increased user trust in India as a jurisdiction that upholds international bankruptcy / insolvency decisions to protect the bankrupt firms' assets situated in India. The Court further determined that the Indian Insolvency and Bankruptcy Code 2016 (the "IBC") did not prevent anything where a court directed the administration of the bankruptcy estate. Foreign creditors are afforded judicial protection when a debtor with substantial assets in India is declared insolvent by a foreign court. In order to ensure that India continues to be a creditor-friendly country where international bankruptcy trusties and administrators can seize the assets of debt dodgers, the Delhi High Court has made it a priority to cooperate fully in matters of cross-border insolvency. India has thus made an attempt to acknowledge international proceedings.

A. DRAFT PART Z

Draft Part Z's Chapter III, which includes Articles 12- 20, addresses the recognition of foreign proceedings and remedy. This will ensure that creditors and insolvency experts of corporations incorporated outside of India may reach the Adjudicating Authority (NCLT) for cooperation or recognition of overseas proceedings in order to obtain relief in India. The sections from Draft Part Z address the application of foreign procedures, presumptions, COMI, determination to recognize foreign actions, consequences of recognition, protection of creditors' rights, and relief sought.

"Draft Part Z" covers two types of overseas procedures: foreign main proceedings and foreign non-main proceedings.

A foreign main procedure takes place in that state and is focused on the principal interests of the corporate debtor. On the other hand, a foreign non-main proceeding is a foreign action that is not a foreign main proceeding that occurs in a State where the corporate debtor has an establishment.

C. THE 'INSOLVENCY LAW COMMITTEE' (ILC)

The Ministry of Corporate Affairs established the "Insolvency Law Committee on November 16, 2017." It made several recommendations for changes to the Insolvency and Bankruptcy Code in its initial report, which was turned in in March 2018. However, because of the complexity of the issue and the need for in-depth study before adopting the UNICITRAL Model Law for India, the committee has chosen to provide recommendations on "Cross Border Insolvency" separately. The Model law is based the 4 core pillars of the Cross-border Insolvency which were identified by the ILC in their Report

- Access
- Recognition
- Cooperation
- Coordination

The requirements pertaining to "Access to Foreign Representatives" to the Court of the enacting country are covered in clauses 5 through 9 of the ILC Report on Cross-Border Insolvency. The ILC Report on Cross-Border Insolvency's clauses 10 through 13 outline the guidelines for "Recognition of Foreign Proceedings and Relief."

The Model Law gives foreign representatives the authority to ask a domestic court to recognize a foreign proceeding so they can obtain the necessary remedy in connection with the foreign process.

It also offers the paperwork that the foreign delegate needs to send along with their application for

recognition. This comprises documentation attesting to the foreign representative's appointment and the existence of the foreign proceeding, as well as specifics of any ongoing foreign actions taken against the debtor. It's possible that the recognition request should also demand that these documents be translated. According to the ILC Report's Clause 10.5, the foreign representative might be required to list any ongoing domestic and international bankruptcy actions. This is to guarantee that the Adjudicating Authority is aware about the Code processes against the corporate debtor.

RELIEF ON RECOGNITION

The Report provides for two types of relief –

Two types of relief are available:

(i) mandatory recognition as a foreign main proceeding, and

(ii) discretionary recognition as either a foreign main proceeding or a foreign non-main proceeding.

CHAPTER 4- CONCLUSION

Therefore, this study explores the complex field of cross-border insolvency by looking at various nations' legal systems. This highlights the difficulties caused by disparate national insolvency laws, the value of international cooperation, and the requirement for harmonization in order to guarantee the prompt and equitable settlement of such cases.

In the global economy, cross-border insolvencies have become more common, and the legal system is always changing to handle the complexity of these cases. The necessity for a proficient strategy to cross-border insolvency is urgent due to the uncertainties and unpredictability that have been brought to light in multiple situations. A realistic and nuanced approach to harmonization is required, as cases reveal the shortcomings of the UNCITRAL Model Law, which provides a core basis for international collaboration. The difficulties in attaining uniformity across jurisdictions are highlighted by the differences in national insolvency legislation, different policy preferences, and the uncertainty present in cross-border insolvency contexts. The challenges of harmonizing insolvency laws across borders were acknowledged by the drafters of the UNCITRAL Model Law.

The Bankruptcy Code's Chapter 15 application in the United States has brought the nation's approach to cross-border insolvency into compliance with international norms, encouraging collaboration with other jurisdictions and making it easier for the recognition and enforcement of foreign insolvency proceedings. Conversely, the United Kingdom has established itself as a critical player in cross-border insolvencies, leveraging its legal expertise and institutional framework to navigate complex international insolvency cases.

The complex nature of cross-border bankruptcy cases, including figuring out the center of main interests (COMI) and juggling proceedings in several different jurisdictions, highlight how important it is to have well-defined legal frameworks and efficient court-to-court communication.

The complex legal landscape regarding cross-border insolvency has been examined. The UNCITRAL Model Law serves as a fundamental basis for international cooperation. In order to achieve an equitable settlement of cross-border insolvency cases, despite the challenges posed by disparate national insolvency laws, the importance of international cooperation and the need for harmonization must be the primary focus.

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