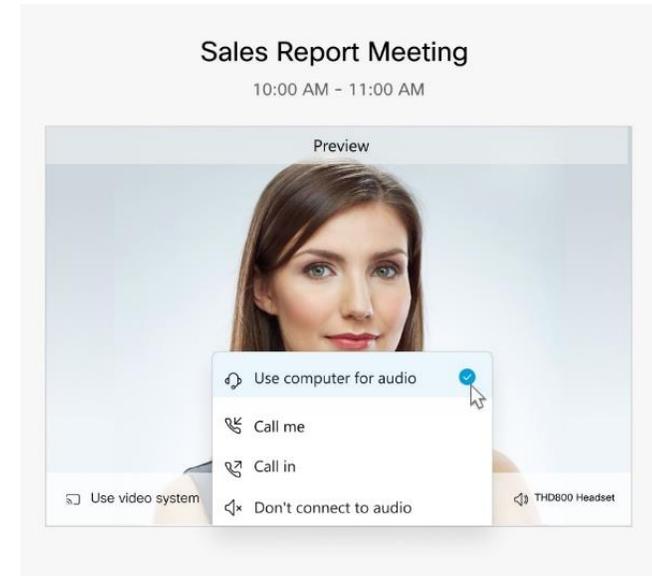
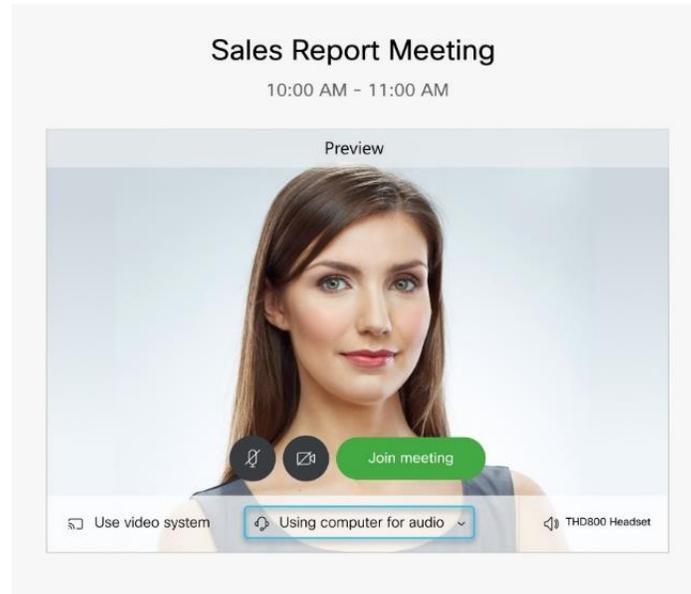


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# **International Dispute Resolution – The Enforcement of International Judgments, Arbitral Awards and Settlement Agreements**

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**The New York Convention (Arbitral Awards)**  
**The Washington Convention (ICSID - Investment Disputes)**  
**Singapore Convention (Settlement Agreements)**  
**and**  
**The Convention on the Recognition and**  
**Enforcement of Foreign Judgments**  
**(Judgments)**



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# The New York Convention



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# The New York Convention

- The Convention on the Recognition of Foreign Arbitral Awards — commonly known as — the New York Convention
- Largely responsible for the prevalence of international arbitration as a dispute resolution mechanism for cross-border transactions around the world today
- Was adopted by a United Nations diplomatic conference on June 10, 1958 and entered into force on **June 7, 1959**
- Has **158 (82%) of the 193** United Nations member states. Other nonsignatory UN member states generally enforce foreign arbitration judgments
- **97%** of respondents in a 2018 International Arbitration Survey said international arbitration is the preferred method of resolving cross-border disputes



# International Arbitration

- Enforceability of Awards: An arbitration award is enforceable in most countries of the world (64%)
- Avoidance of specific legal systems/national courts: Ability to select a neutral forum to resolve dispute rather than the local/national court of one of the litigants; avoid potential bias (60%)
- Flexibility of process: Ability to select more flexible procedures than in litigation (40%)
- Ability to select arbitrators (39%)
- Confidentiality and privacy (36%)
- Neutrality (25%)
- Finality: Arbitration awards are final, awards are not ordinarily subject to appeal (16%)
- Cost (3%)



# The New York Convention

## Features of the Convention

- Goal of Convention:
  - To enforce the parties' agreement to arbitrate
  - To enforce any resulting award
- Presumption as to the **binding nature** of arbitral awards
- Convention applies to the **recognition and enforcement of arbitral awards** made in the territory of a state **other than the state** where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to **arbitral awards not considered as domestic awards** in the state where their recognition and enforcement are sought (Article I)



# The New York Convention

## What Does the Convention Say and Do?

- Convention requires courts of contracting states to **give effect to private agreements to arbitrate** and to **recognize and enforce** arbitration awards (Non-ICSID Awards) made in territory of another contracting state — in the same way they enforce domestic awards (Article III)
- Contracting states have agreed to convert a **foreign** arbitration award into a judgment enforceable by a national court
- Applies to arbitration awards that are **not considered as domestic awards** in the state where recognition and enforcement is sought
- The award will be recognized and enforced in other states that are a party to the treaty — but not involved in the investment or other dispute



# The New York Convention

## Recognition and Enforcement

- Article II of the Convention addresses enforcement of arbitration agreements and sets out requirements for a valid arbitration agreement
- Article II (1) and (2) requires that the contracting state recognize **an agreement in writing** — which includes **an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams**
- Any agreement that complies with Article II (2) of the Convention must be enforced by the court of a contracting state — regardless of whether there is a stricter form requirement in any applicable national arbitration law
- Article III of the Convention provides that “there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards”



# The New York Convention

## What does the Convention Say and Do?

- Ensures that contracting state upholds valid arbitration agreements by staying court proceedings that have been started in breach of the arbitration agreement (Article II)
- Each contracting state shall recognize arbitral awards as binding and enforce the foreign arbitral award in accordance with the rules of procedure where enforcement is sought (Article III)
- Convention applies to the recognition and enforcement of arbitral awards that are not considered as domestic awards in the state where recognition and enforcement is sought (Article I)



# The New York Convention

## Features of the Convention

- Convention does not define “domestic” and has no nationality or resident requirement
- An enforcing court may deem an award rendered in its territory “non-domestic” if one or both parties to arbitration are foreign or reside abroad, in which case **nationality is used to enlarge the scope** of the Convention, rather than to restrict it



# The New York Convention

- An award issued in **one** state can be enforced in **another** contracting state – subject to **certain limited defenses** (Article V)

## Article V (1)

- a) A party to the arbitration agreement was, under law applicable to the party, under some **incapacity**, or the arbitration agreement was **not valid** under the party's governing law
- b) A party was **not given proper notice** of the appointment of the arbitrator or of the arbitration proceeding or was otherwise not able to present its case (procedural unfairness)
- c) The award deals with an issue **not contemplated** by or **not falling within** the terms of the submission to arbitration or contains matter beyond the scope of the arbitration agreement



# The New York Convention

(limited defenses to enforcement – cont'd)

- d) The composition of the arbitral tribunal was **not** in accordance with the parties' agreement, or with the laws of the place where the hearing took place
- e) The award has **not become binding** upon the parties, or **has been set aside** or **suspended** by a competent authority either in the country where the arbitration took place or pursuant to the laws of the arbitration agreement

## Article V (2)

- a) The subject matter of the award **was not capable of resolution** by arbitration under law of that country
- b) Enforcement would be **contrary** to “public policy” (Article V(2))



# The New York Convention

(limited defenses to enforcement – cont'd)

- ✓ No review of the merits of the award is allowed
- ✓ National law cannot be the basis of any such defense against enforcement
- ✓ List of possible grounds on which a party may resist enforcement is narrow and permits only for the most serious irregularities to form the basis of a party's defense
- ✓ The Convention is permissive, and not mandatory. The court may overrule a defense to enforcement and uphold the arbitral award, even if one of objections of Article V has been established



# “Agreement in Writing” Article II (2)

- *GE Energy Power Conversion France SAS, Corp., fka Converteam SAS v. Outokumpu Stainless USA, LCC et al.* (\*June 1, 2020) the US Supreme Court held that “NY Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration by nonsignatories.”
  - ThyssenKrupp/Outokumpu, as buyer, entered into three contracts for cold rolling mills with F. L. Industries for construction of the mills at ThyssenKrupp’s steel manufacturing plant in Alabama
  - Each contract contained an identical arbitration clause providing for arbitration in Germany
  - F.L. Industries entered into a subcontract with GE Energy Power Conversion France SAS (GE Energy) to design, manufacture and supply motors for the cold rolling mills
  - GE supplied the mill motors in 2011/2012, which all failed by 2015
  - Outokumpu commenced a lawsuit against GE; GE sought to dismiss the lawsuit and compel arbitration
  - The District Court granted GE’s motion to compel arbitration. The 11<sup>th</sup> Circuit disagreed (902 F.3d 1316 (11<sup>th</sup> Cir. 2019), holding that there was no arbitration in writing between the parties. GE, was at most, a potential subcontractor — not a signatory to the contracts, and therefore could not compel arbitration



# The New York Convention – The Future

- Refusal to Recognize or Enforce Based Upon Public Policy Grounds
  - Relatively few decisions where public policy is grounds for refusing recognition or enforcement of foreign arbitral awards
  - Public policy defense applies when the confirmation/enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice (*Cvoro v. Carnival Corp.*, N. 18-11815 (11<sup>th</sup> Cir. Oct. 17, 2019))



# The New York Convention – The Future

- Should the Convention Be Updated?
  - Some say yes
    - Albert Jan Van den Berg, emeritus professor of law at Erasmus University in Rotterdam, Netherlands, has proposed a draft replacement convention called the Miami Draft Convention to address some gaps, remove redundancies and uncertainties, and revise sections in need of updating
  - Some say maybe
    - Others argue that the Convention should just be amended and updated, or that it is too difficult and timely to achieve adherence to the Miami Draft Convention
  - Some say no
    - Others say don't rock the boat. The Convention works and most of the world has signed on. Why change it?



# **The Washington Convention – 1965**

## **International Centre for Settlement of Investment Disputes (ICSID)**



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# International Centre for Settlement of Investment Disputes (ICSID)

- The ICSID Convention: treaty ratified by 154 contracting states and entered into force in October 14, 1966. Based in Washington, D.C., ICSID is chaired by the president of the World Bank
- ICSID is an arbitral institution that administers the settlement of investment disputes between governments and private sector foreign investors
- ICSID handles arbitration cases under its rules and under other rules, such as UNCITRAL Arbitration Rules
- ICSID does not make procedural rulings or decide disputes
- Independent commissions/arbitral tribunals decide procedural issues and decide disputes



# International Centre for Settlement of Investment Disputes (ICSID)

- ICSID Convention is a treaty among member states establishing an independent, impartial and self-contained system
- ICSID proceedings are delocalized from domestic procedures
  - Local courts do not intervene in ICSID process
- Awards in ICSID Convention arbitrations are final and binding and may not be set aside by courts of any member states
- All member states, whether or not party to the dispute, recognize and enforce ICSID Convention monetary awards as final judgment in member states
- Parties who consent to ICSID arbitration accept ICSID arbitration as the exclusive remedy



# International Centre for Settlement of Investment Disputes (ICSID)

- The dispute must be between an ICSID Member State and an individual/company that qualifies as a national of another ICSID member state
- The dispute must be a legal dispute arising directly out of an investment
- The disputing parties must consent in writing to the submission of their dispute to ICSID arbitration or conciliation



**The Singapore Convention  
on  
International Settlement Agreements  
Resulting From Mediation**



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# The Singapore Convention on Mediation

- Formally: the United Nations Convention on International Settlement Agreement Resulting from Mediation
- The UN General Assembly adopted the Convention on Dec. 18, 2018; it was opened for signature as of Aug. 7, 2019, when it was signed by 46 states
- The Convention will enter into force on Sept 12, 2020



# Singapore Convention on Mediation

## Effective Date

- Mediated settlement agreements signed after the effective date are now enforceable under the Singapore Convention
- Enforcement after the effective date of the Convention will be simplified
- Current enforcement regime for cross-border transactions can be complicated, long and expensive



# Singapore Convention on Mediation

## What is the Convention?

- The Singapore Convention was organized by the United Nations to facilitate world trade and commerce through a single treaty
- The Singapore Convention places **mediated settlement agreements** on the same international enforcement level as arbitration awards under the New York Convention
- A judgment transferred cross-border requires judicial review and approval before confirmation
- A mediated settlement agreement under the Singapore Convention is subject only **to limited and expedited approval**. For that reason, it is easier to enforce than a foreign judgment



# Singapore Convention on Mediation

## Who is a Signatory to the Convention

- As of March 12, 2020, 52 states have signed the Convention and three states have ratified it. Significant trading partners of the United States that are not signatories at this time include the UK, countries in the EU, Canada and Mexico



# Singapore Convention on Mediation

## Signatories to the Convention

- Afghanistan
- Armenia
- Belarus
- Belize
- Brunei
- Chad
- Chile
- China
- Colombia
- Republic of the Congo
- Democratic Republic of the Congo
- Ecuador
- Kingdom of Eswatini
- Fiji
- Gabon
- Georgia
- Grenada
- Guinea-Bissau
- Haiti
- Honduras
- India
- Iran
- Israel
- Jamaica
- Jordan
- Kazakhstan
- Laos
- Malaysia
- Maldives
- Mauritius
- Montenegro
- Nigeria
- North Macedonia
- Palau
- Paraguay
- Philippines
- Qatar
- South Korea
- Samoa
- Saudi Arabia
- Serbia
- Sierra Leone
- Singapore
- Sri Lanka
- Timor Leste
- Turkey
- Uganda
- Ukraine
- USA
- Uruguay
- Venezuela



# Singapore Convention on Mediation Convention Applies Only to Certain Settlements

- The prerequisites are:
  - a writing
  - resulting from a mediation
  - between two or more parties who have their place of business in different states, and
  - the place of business of each of the parties to the agreement is in a state that has acceded to or ratified the Convention



# Singapore Convention on Mediation

## Importance of the Singapore Mediation Convention

- When considering mediating an international dispute, the parties engage a mediator, forbear in pursuing the underlying claim, mediate on neutral ground, and if successful, prepare a settlement agreement
- But without the Convention, the path and ability to enforce the settlement agreement was unclear under international law
- For these reasons, mediation was often not selected as a method of resolving a dispute because of the time, expense and uncertainty of enforcement



# Singapore Convention on Mediation Enforcement of Domestic Awards

- If not settled, disputes are resolved by arbitration or in court
- Party seeking enforcement of award or judgment must commence court proceedings
- Enforcement is simple when the parties and the enforcement process are in the same jurisdiction
- The settlement agreement may be enforced by the courts in that jurisdiction and the judgment may be executed (if required) against assets located in the same jurisdiction



# Singapore Convention on Mediation Enforcement of Cross Border Settlement Agreements

- The agreement may require enforcement proceedings in one jurisdiction **but** may need to enforce the agreement in another jurisdiction — *e.g.*, where assets can be found
- **Step 1:** If the agreement contemplates arbitration for enforcement, then an arbitral award to enforce the settlement must first be issued
- **Step 2:** Then the award on the settlement must be **enforced** under the New York Convention in the jurisdiction where the assets are located
- Potential enforcement issues may discourage parties from agreeing to mediate



# **Singapore Convention on Mediation**

## **Convention Encourages Good Faith Settlement Agreements**

- Previously, and as part of a scheme, bad actors could delay the arbitration proceedings, then settle in the midst of the arbitration and enter into a settlement agreement when case is substantially over
- Bad actors had no intention of performing the settlement because they knew international settlements were difficult and cumbersome to enforce
- Before the Convention, breach of the settlement agreement might require commencement of second arbitration or a new lawsuit in a new jurisdiction
- The Convention eliminates that tactic by streamlining enforcement



# Singapore Convention on Mediation

## Convention Provides One Step Enforcement

- Provides a process for the direct enforcement of cross-border settlement agreements between parties resulting from mediation
- Provides the party seeking enforcement to apply directly to the courts of the state where the assets are located
- If the mediated settlement is confirmed, it has the force of a judgment
- Execution can issue immediately from the same jurisdiction like a domestic judgment
- Eliminates potential multiple proceedings to enforce a judgment



# Singapore Convention on Mediation Certain Settlement Agreements are Excluded

- The following settlement agreements are excluded:
  - relating to consumer transactions or to family, inheritance or employment law
  - that have been approved by a court or concluded in the course of proceedings before a court and that are enforceable as a judgment in the state of that court
  - that have been recorded and are enforceable as an arbitral award, and
  - where enforcement is against a sovereign country



# Singapore Convention on Mediation

## The Enforcement Procedure

- The party seeking enforcement must provide to court or the relevant authority in the state where enforcement is sought:
  - a copy of the signed settlement agreement, and
  - evidence that the settlement agreement resulted from mediation (e.g. the mediator's signature on the settlement agreement or a document signed by the mediator confirming that there was a mediation)



# Singapore Convention on Mediation

## Obligation of the 'Relevant Authority'

- The relevant authority is to "**act expeditiously**" in considering an enforcement application
- This is similar to the duty to expedite consideration of awards under the New York Convention



# **Singapore Convention on Mediation**

## **Enforcement is Presumed Absent**

### **General Exclusions or Limited Circumstances**

- General exclusions include consumer, family and employment settlements, as well as agreements obtained through court or arbitral proceedings
- Non-enforcement may occur in circumstances similar to that under the New York Convention



# Singapore Convention on Mediation

## Reasons for Non-Enforcement

- Where a party to the settlement agreement was under some incapacity
- **Null and Void:** the settlement agreement is null and void, inoperative or incapable of being performed
- **Not Binding/Not Final:** the settlement agreement is not binding or is not final, according to its terms
- **Subsequent Modification:** the settlement agreement has been subsequently modified
- **Not Performed/Not Clear:** the obligations under the settlement agreement have not been performed or are not clear and comprehensible
- **Relief Contrary to Settlement:** granting relief would be contrary to the terms of the settlement agreement (cont'd)



# Singapore Convention on Mediation

## Reasons for Non-Enforcement

- **Serious Breach by Mediator:** there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement
- **Justifiable Doubts as to Mediator's Impartiality:** there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement
- **Relief is Contrary to Public Policy:** granting relief would be contrary to the public policy of that state
- **Dispute not Capable of Settlement by Mediation:** the subject matter of the dispute is not capable of settlement by mediation under the law of that state



# Singapore Convention on Mediation Important Considerations

- Build mediation into your cross-border agreements?
- Mediation as a prerequisite to arbitration?
- Most mediators will not/do not sign a settlement agreement. How do you prove the settlement agreement was mediated?
- How much mediation is required before satisfying the Convention?



# **The Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters**



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# The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

- Adopted on July 2, 2019 at the Hague Conference on Private International Law, but **is not entered** into force
- If ratified by a large number of countries, the Judgments Convention will regulate and facilitate the worldwide **movement of judgments** (not arbitral awards) in commercial matters
- Currently, only **Ukraine and Uruguay** are signatories to the Convention
- The Judgments Convention **enters into force one year** after two states have deposited their instruments of ratification/accession



# The Judgments Convention

- Article 4 of the Judgments Convention provides:
  1. A judgment given by a contracting state (state of origin) shall be **recognized and enforced in another contracting state** (requested state) in accordance with the provisions of this chapter. Recognition may be refused only on the grounds specified in this Convention
  2. There **shall be no review of the merits of the judgment** in the requested state. There may only be such consideration as is necessary for the application of this Convention
  3. The Judgments Convention will **only apply** if it is already in force at time proceedings are initiated



# The Judgments Convention Impact on the U.S.

**Will joining the Convention improve the recognition of U.S. judgments abroad?**

- Three Major Issues:
  1. Jurisdiction
  2. Public Policy — Punitive Damages
  3. Reciprocity



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# The Judgments Convention

Will joining the Convention improve the recognition of U.S. judgments abroad? (cont'd)

## 1. Jurisdiction

- May improve the recognition of U.S. judgments in those countries whose domestic law is **stricter** than the bases of jurisdiction in the Convention (England, Australia, India)
- Refusal of recognition of U.S. judgment was common in the past due to perception that U.S. jurisdiction was excessive.
- **Predictability:** Litigants would be able to predict more easily whether their judgments would be recognized prior to bringing a case, even if not knowing the country in which they would seek to enforce their judgment



# The Judgments Convention

**Will joining the Convention improve the recognition of U.S. judgments abroad? (cont'd)**

## 2. Public Policy Concerns About Punitive Damages

- Many countries use public policy concerns as a basis for non-recognition of foreign judgments. This justification is often used to refuse recognition of U.S. judgments which include an award of punitive damages
- Article 7 permits a refusal to recognize based upon public policy
- Article 10 allows parties to refuse recognition and enforcement of a judgment that awards damages that are not for “actual loss or harm suffered” — i.e., punitive damages



# The Judgments Convention

**Will joining the Convention improve the recognition of U.S. judgments abroad? (cont'd)**

## 3. Reciprocity:

- Trend in the U.S. is against the requirement of reciprocity
- Some countries have a reciprocity requirement. The U.S. is not a party to any treaty
- Requiring mutual recognition, and recognition and enforcement is governed by state law in the U.S.
- Many countries are doing away with more liberally interpreting reciprocity requirement in their domestic law
- The treaty removed the potential roadblock to recognition and enforcement for those countries that retain reciprocity requirements



# The Judgments Convention

## Reasons For Refusal of Recognition and Enforcement

- **Failure** of due process
- Judgment was obtained by **fraud**
- Recognition or enforcement against **public policy** of the requested state
- Proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a state other than the state of origin
- Judgment is **inconsistent with prior judgment** given by a court of the requested state in a dispute between the same parties
- Judgment is **inconsistent with an earlier judgment** given by a court of another state between the same parties on the same subject matter.
- Prior proceeding pending between same parties on same subject matter before court in requested state



# The Judgments Convention Does Not Apply to the Following Matters

- (a) the status and legal capacity of natural persons
- (b) maintenance obligations
- (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships
- (d) wills and succession
- (e) insolvency, composition, resolution of financial institutions and analogous matters
- (f) the carriage of passengers and goods
- (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims and general average
- (h) liability for nuclear damage
- (i) the validity, nullity or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs
- (j) the validity of entries in public registers
- (k) defamation
- (l) privacy
- (m) **intellectual property**
- (n) activities of armed forces, including the activities of their personnel in the exercise of their official duties
- (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties
- (p) **anti-trust (competition) matters**, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the state of origin; and
- (q) sovereign debt restructuring through unilateral state measures



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