



PUC  
RIO



# What Do New York and The Hague Have in Common?

A comparative analysis of the 1958 New  
York and 2005 Hague Conventions

*Seminar on international dispute resolution*

Rio de Janeiro, Brazil - 5 November 2010

**Marta Pertegás**

Secretary

Hague Conference on Private International Law

# New York and The Hague: something in common?

## New York



## The Hague



# New York vs. The Hague



## New York

The Big Apple, Gotham, The City That Never Sleeps

New York State, United States

1624 (as New Amsterdam)

8.4 M on 1,214.4 km<sup>2</sup>  
(10,630 inhab./km)

New Yorker

Cheesecake, pastrami, Waldorf salad and many more...



Name

## The Hague



Nicknames

Residentiestad, Hofstad (Court city), the Large Village

Location

South Holland, Netherlands

Foundation

1230 (as a hunting residence)

Population by Area  
(Density)

0.5M on 98.20 km<sup>2</sup>  
(5,894 inhab./km<sup>2</sup>)

Demonym

Hagenaar or Hagenees

Staple Local Food Item

Haagsche Hopjes





# New York Arbitration Convention and The Hague Choice of Court Convention

<b>Convention on the Recognition and Enforcement of International Arbitral Awards (New York Arbitration Convention)</b>	<b>Full Title (Short Title)</b>	<b>Convention of 30 June 2005 on Choice of Court Agreements (Hague Choice of Court Convention)</b>
<b>UNCITRAL(United Nations)</b>	<b>Issuing Body</b>	Hague Conference for Private International Law
10 June 1958	<b>Concluded</b>	30 June 2005
7 June 1959	<b>Entry into Force</b>	Not yet
144 (142 of 192 UN members + Holy See + Cook Islands)	<b>Current status</b>	1 acceding State: Mexico The European Union (1 April 2009) and the United States (19 January 2009) have signed the Convention
Yes on 7 June 2002	<b>Ratified by Brazil?</b>	Not yet



# What have the Conventions in common?

- 1. Overview of Both Instruments**
- 2. Comparative Analysis**
- 3. Future developments?**



- 1. Overview of Both Instruments**
2. Comparative Analysis
3. Future developments?

## Common objectives

- ▶ Provide legal **certainty** and **predictability** with respect to dispute settlement choices made by the parties
- ▶ Ensure that the judgment/arbitral award is **recognised and enforced** in other Contracting States (hence the importance of ample outreach in the world)
- ▶ Provide for more **legal certainty** in international transactions to facilitate international trade.

- ▶ Three conditions for the Hague Choice of Court Convention to apply:
  - Parties to the contract have agreed on the chosen court in an **international case**
  - The choice of court agreement is **exclusive** (but there is a presumption; and possible extension)
  - The choice of court agreement must relate to a **civil or commercial matter**
  
- ▶ Naturally, arbitration and proceedings relating thereto are excluded (See Art. 2(4) and para. 84 of the Hartley/Dogauchi Report)

- ▶ Three conditions for the New York Arbitration Convention to apply
  - **In international cases**
  - Where the parties agreed “to submit to arbitration **all or any differences**” arising between them
  - The arbitration agreement must arise out of “a **defined legal relationship**, whether contractual or not, concerning a subject matter **capable of settlement by arbitration**”
  
- ▶ See arts. I and II Convention



1. Overview of Both Instruments
- 2. Comparative Analysis**
3. Future developments?

### From the outset: there is no conflict of Conventions

- The **New York Convention** applies to arbitral awards and targets referral to arbitral tribunals
- The **Hague Choice of Court Convention** respects the strong implantation of arbitration as an alternative dispute resolution method for business disputes.
- Further info: A. Schulz, Prel.Doc Nr 32 of June 2005, available at [www.hcch.net](http://www.hcch.net).

## 2. Comparative Analysis

- ▶ **Similar rationale and mechanism:**
  - Both Conventions seek to strengthen and consolidate contractual freedom in the settlement of international disputes
  - Similar operative mechanism:
    - Uniform requirements to determine the venue; and
    - Favourable regime for recognition and enforcement abroad.

- ▶ **Similar operative mechanism – three key obligations**
  - 1) A choice of court agreement/arbitration agreement must be **respected**
    - Article 5 Hague CoC Convention – Article II(1) NY Convention
  - 2) A court seised but not chosen **must** suspend/dismiss proceedings
    - Article 6 Hague CoC Convention– Article II(3) NY Convention
  - 3) A judgment given by the chosen court **must** be recognised and enforced
    - Article 8 Hague CoC Convention – Article III NYC

### First Obligation: Art. 5 Hague CoC Convention; Art. II (1) NY Convention

- Dispute settlement arrangement to be respected as the basic rule;
- **Unless** agreement is null and void according to the law of the State of the chosen court (uniform rule under the Hague CoC Convention)
- Question whether the agreement is null and void (at recognition and enforcement stage) has given rise to interpretative difficulties under the New York Convention.

### Second obligation: Art. 6 Hague CoC Convention; Arts. II (3) and V NY Convention

- A court seised **must** suspend or dismiss proceedings
- Unless exceptions apply:
  - Paragraphs a) and b) of Article 6 correspond to the “ null and void” provision in Article II(3) of the NY Convention.
  - Specification of the applicable law > law of the chosen court (different under the NY Convention)
  - Paragraphs d) and e) cover the same ground as “inoperative or incapable of being performed” (NYC)
  - Exceptions in Hague CoC Convention may seem more complex but, on closer examination, they are similar. It is expected that “case law under the NY Convention could furnish a valuable guide to the interpretation of the [Hague] Convention.

### Third Obligation: Arts. 8 and 9 Hague CoC Convention; Arts. III and V NYC

- Free circulation of judgments/awards given on the basis of the parties' agreement
- Unless:
  - The agreement was null and void
  - A party lacked capacity
  - No proper notification was given
  - The judgment was obtained by procedural fraud
  - Recognition would be manifestly incompatible with public policy, esp. fundamental principles of justice
  - Hague CoC Convention: Specific grounds in the litigation context:
    - *Lis pendens*
    - *Res judicata*
  - NY Convention-specific exceptions:
    - decision was not arbitrable (either because of the matter itself or because it falls outside the scope of the agreement)
    - decision is not final.



1. Overview of the instruments
2. Comparative Analysis
- 3. Possible evolution**

### The New York Convention

- The NYC is well implanted:
  - “Beyond cavil, the New York Convention is one of the most successful commercial treaties in history. The treaty creates what might be described as a form of ‘full faith and credit’ obligation towards foreign arbitration awards.” (William W. Park and Alexander A. Yanos, “Treaty Obligations and National Law: Emerging Conflicts in International Arbitration” (2006-2007) 58 Hastings L.J. 251, at p. 257)
- It can always benefit from stronger recognition of party autonomy in international litigation.
- States that have embraced the New York Convention to attract foreign investments should also consider choice of court agreements.

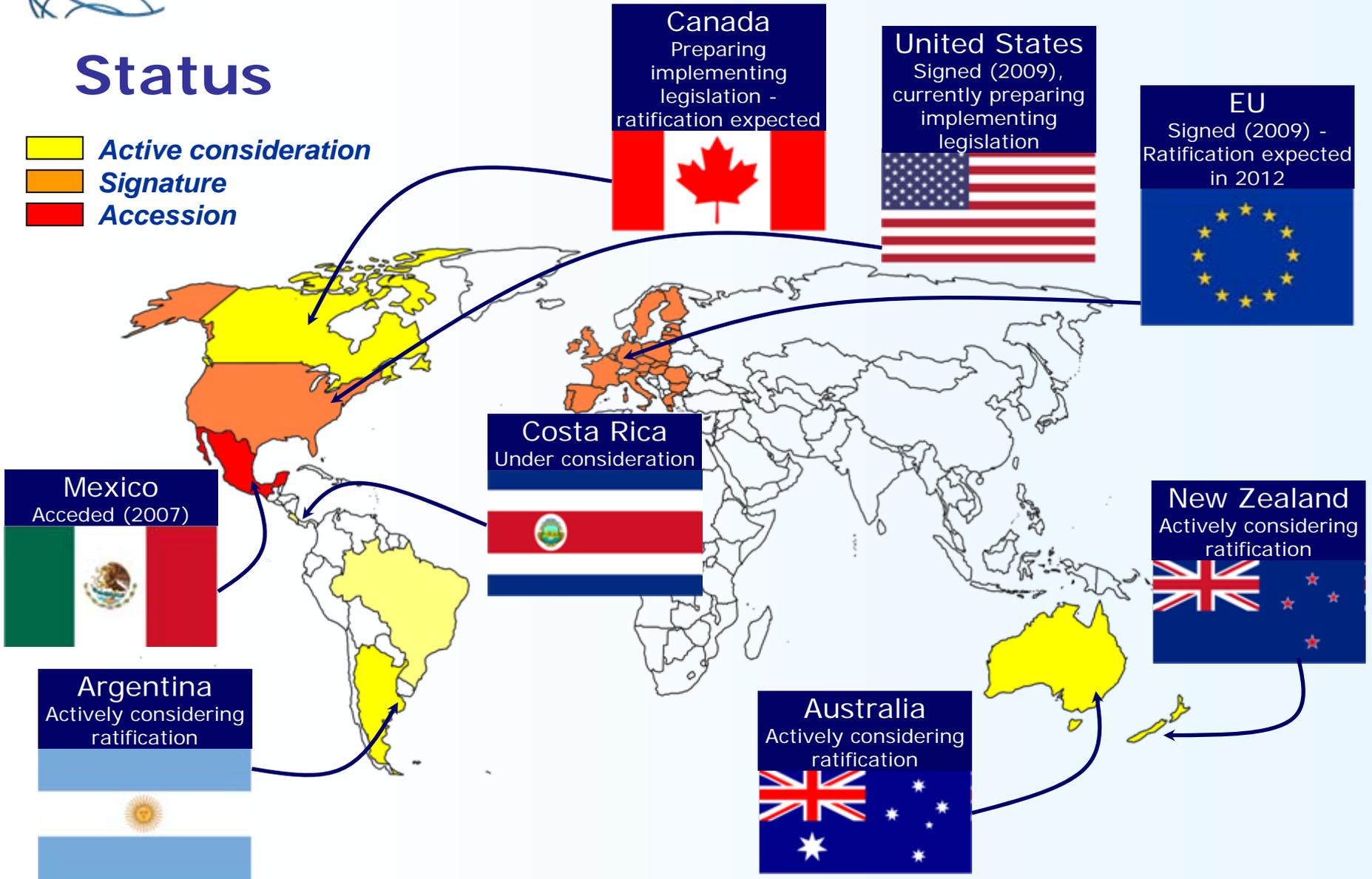
# The Hague Choice of Court Convention

- Is a “recent” instrument that still has to enter into force
- But it is well received:
  - “The convention will serve as an indispensable source both for transaction lawyers drafting transnational commercial contracts of the future and for litigators involved in the resolution of disputes between parties to important transnational commercial transactions” (Ronald A. Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: commentary and documents* (Cambridge: CUP, 2008), p. 1)
- According to the Hartley/Dogauchi Report, « the hope is that the Convention will do for choice of court agreements what the [NY] Convention has done for arbitration agreements ».

# 4. Possible evolution

## Status

-  **Active consideration**
-  **Signature**
-  **Accession**



- Arbitration and judicial resolution are two sides of the same (dispute settlement) coin.
- A strong implantation of arbitration does not stand in the way for the setting up of a uniform litigation setting.



PUC  
RIO



**Obrigada!**

**Marta Pertegás**  
**mp@hcch.nl**

**[www.hcch.net](http://www.hcch.net)**