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The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents

Reports and Recommendations of Section Committees

The Hague Convention[1] Abolishing the Requirement of Legalization for Foreign Public Documents.

(REPORT OF THE COMMITTEE ON THE INTERNATIONAL UNIFICATION OF PRIVATE LAW, WITH ACTION BY THE SECTION OF INTERNATIONAL LAW AND THE HOUSE OF DELEGATES)

The States signatory to the present Convention,

Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one contracting State and which have to be produced in the territory of another contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

(a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process server (*huissier de justice*);

(b) administrative documents;

(c) notarial acts;

(d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

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[1]In accordance with article 11, the Convention came into force on 24 January 1965, the sixtieth day after the deposit of the third instrument of ratification, in respect of the following States, on behalf of which the instruments of ratification were deposited with the Government of the Netherlands on the dates indicated:

Yugoslavia ..... 25 September 1962
United Kingdom of Great Britain and Northern Ireland (also applicable to Jersey, the Bailiwick of Guernsey and the Isle of Man) ..... 21 August 1964
France (also applicable to the Overseas Departments and Territories) ..... 25 November 1964

However, the present Convention shall not apply:

(a) to documents executed by diplomatic or consular agents:

(b) to administrative documents dealing directly with commercial or customs operations.

Article 2

Each contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.

However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "allonge"; it shall be in the form of the model annexed[2] to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 octobre 1961)" shall be in the French language.

Article 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer.

When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

The signature, seal and stamp on the certificate are exempt from all certification.

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[2]See p. 203 of this volume.

Article 6

Each contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.

It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands[3] at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

(a) the number and date of the certificate,

(b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

Article 8

When a treaty, convention or agreement between two or more contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.

Article 9

Each contracting State shall take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article 10

The present Convention shall be open for signature by the States represented at the Ninth session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

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[3]Pursuant to article 6, the following States have notified the Netherlands Government of their designation of the authorities indicated below:

France (communication addressed to the Netherlands Government on 5 October 1961):
President of the *Tribunaux de grande instance* and judges of the *Tribunaux d'instance*

United Kingdom of Great Britain and Northern Ireland (notificaiton deposited upon ratification):
Her Majesty's Principal Secretary of State for Foreign Affairs, Foreign Office, London, S.W. 1 (in respect of the United Kingdom, Jersey, the Bailiwick of Guernsey and the Isle of Man).

Article 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph (d) of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

Article 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation will only have effect as regards the State which has notified

it. The Convention shall remain in force for the other contracting States.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

(a) the notifications referred to in the second paragraph of Article 6;

(b) the signatures and ratifications referred to in Article 10;

(c) the date on which the present Convention enters into force in accordance with the first paragraph of Article 11;

(d) the accessions and objections referred to in Article 12 and the date on which such accessions take effect;

(e) the extensions referred to in Article 13 and the date on which they take effect;

(f) the denunciations referred to in the third paragraph of Article 14.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Convention.

DONE at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

ANNEXE À LA CONVENTION

MODÈLE D'APOSTILLE

L'apostille aura la forme d'un carré de 9 centimètres de côté au minimum

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Pays: _____
   Le présent acte public
2. a été signé par _____
3. agissant en qualité de _____
4. est revêtu du sceau/timbre de _____

Attesté

5. à _____ 6. le _____
7. par _____
8. sous N° _____
9. Sceau/timbre: _____ 10. Signature _____

ANNEX TO THE CONVENTION

MODEL OF CERTIFICATE

The certificate will be in the form of a square with sides at least 9 centimetres long

APOSTILLE

(Convention de La Hâye du 5 octobre 1961)[4]

1. Country _____
   This public document
2. has been signed by _____
3. acting in the capacity of
4. bears the seal/stamp of _____

Certified

5. at _____ 6. the _____
7. by _____
8. No. _____
9. Seal/stamp: _____ 10. Signature: _____

[4]Convention of The Hague of 5 October 1961.

American Bar Association
Section of International Law

RECOMMENDATIONS

The Section of International Law recommends the following:

BE IT RESOLVED, that the American Bar Association recommends that the United States accede to the "Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents," of October 5, 1961 [527 U.N.T.S. 189] and

BE IT FURTHER RESOLVED that the President of the American Bar Association or his designee be and hereby is authorized to indicate support of the Association for the Convention and the adherence thereto by the United States by appearances before the appropriate Committees of the Senate or in such other ways as may be appropriate.*

REPORT

The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, in force as of January 24, 1965, has been ratified by a number of important European states (including the United Kingdom, France, Yugoslavia, Austria, the Netherlands, Portugal and the Federal Republic of Germany). It is presently being considered for accession by the United States. The Judicial Conference of the United States has recommended such accession.

The purpose of this report is to discuss some aspects of the Convention in terms of its desirability for the United States.

I. Background

"Legalisation" in its broadest sense is simply a procedure whereby the formal authenticity of a document is officially certified. It is more narrowly defined by Article II of the Convention as "the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted, and, where appropriate, the identity of the seal or stamp which it bears."

The purpose of legalization is to provide a foreign recipient of the document an evidence of authenticity upon which he may rely without undertaking the difficult task of personally verifying the document directly with the original issuer.

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* The above recommendations and the Report annexed hereto were approved by the House of Delegates in 1974 at its Mid-Winter Meeting. The Report was prepared by the Sub-Committee on Formalities in International Legal Transactions, consisting of Messrs. John Gerber and Benjamin Busch, Co-Chairmen, and Messrs. Malcolm Perkins, David Earle, Stanley Freedman and Henry Landau.

Under the traditional legalization procedures a chain of certifications is ordinarily required beginning with the issuer of the document and leading through a consul of the recipient country sitting in the country of origin. The first certification is of the authenticity of the signature or seal of the issuer and each certifier thereafter merely certifies the signature, seal or stamp of the certification immediately preceding his. As a maximum example, the signature chain for a power of attorney executed in Iowa for use in the Netherlands might run as follows: (1) grantor; (2) public notary; (3) county clerk; (4) Secretary of State of the State of Iowa; (5) Secretary of State of the United States; (6) Consul of the Netherlands sitting in Chicago. Sometimes a recipient country additionally requires that the signature of its consul be certified in the recipient country by its own department of foreign relations.

It should be noted that the Consul only requires a signature which he can recognize as authentic. Thus, for example, if the Consul has on file a specimen signature of the county clerk, or if the power of attorney is originally signed by the grantor in the presence of the consul, then all of the interim steps would be unnecessary.

The Convention attempts to shorten—not eliminate—the chain by abolishing the consularization of the document and substituting a procedure whereby that function would be performed by an authorized agent of the country where the document originates. Thus, only step number six of the foregoing example would be necessarily removed by ratification of the Convention by the United States, and it would be up to the United States as an internal matter to somehow streamline the five prior steps.

II. Terms of the Convention

Article I of the Convention provides an enumeration of the kinds of public documents (*Actes Publics*) which are to be covered by its provisions. These are:

(a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");

(b) administrative documents;

(c) notarial acts;

(d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

Article I specifically provides that the Convention shall not apply:

(a) to documents executed by diplomatic or consular agents;

(b) to administrative documents dealing directly with commercial or customs operations.

The latter category of excluded documents may be criticized as a possible source of confusion when the substance of the document fits the excluded category. For example, it has been questioned whether certain notarized commercial documents, such as promissory notes or contracts or even a power of attorney appointing an individual to undertake a commercial act might be excluded notwithstanding that such documents bore a notarial certificate.

It does not appear to be the intent of the Convention to exclude the aforementioned examples. The documents presumably intended to be excluded by the provisions are those dealing *directly* with commercial or customs operations such as bills of lading, certain kinds of banking instruments, consular certificates of origin and export licenses. Such documents are traditionally handled through commercial channels where less rigorous formalities are required for their authentication.

Article II provides that each contracting State will exempt from "legalisation" the previously defined documents to which the Convention applies. The Article further defines legalization in the strict sense as the "final certification" given by diplomatic or consular agents.

Article III provides that the only formality that may be required by a contracting State on documents covered by the Convention is the formality of the "apostille" or "certificate" described in Article IV. However, it further provides even this requirement may be dropped either unilaterally or by treaty between two or more contracting States.

Article IV of the Convention describes the "apostille" or "certificate," which is the only formality that may be required on documents covered by the Convention. The apostille is a piece of paper with sides at least 9 centimeters long, that may either be placed on the document itself or on an *allonge* (a separate piece of paper attached to the document). The apostille is to have a uniform format consisting of a French heading and is limited to certain information. A model of the apostille is included in Annex I to the Convention.

Article V provides that when properly filled in, the apostille will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

Article VI provides that each contracting State shall designate the authorities who are competent to issue the apostille.

The purpose of Article VII is to provide for verifying of the genuineness of the apostille. Each issue authority is required to keep a register with the number and date of each certificate, the name of the person signing and the capacity in which he acted, or in the case of unsigned documents, the name of the authority which affixed the seal or stamp. At the request of any interested person, the authority will verify that the particulars of the certificate correspond with those of the register.

Article VIII merely provides that the Convention will override provisions of any Convention, treaty or agreement between contracting States only if they require formalities for authentication more rigorous than the formality required under Articles III and IV.

Article IX makes provision for each contracting State to prevent "legalisation" by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article X and XI provide for the ratification of the treaty and its entering into force.

Article XII provides for accession to the treaty by States not represented at the Hague Conference in 1960. It is this provision that authorizes the United States to accede. The accession may be objected to by an State which is a party to the Convention at that time, in which case the Convention will not be effective between the newly acceding State and the objecting State. However, in the case of accession by the United States such an objection is not expected.

Article XIII declares that a contracting State may provide for application of the Convention "to all the territories for the international relations of which it is responsible." This provision was meant to cover dependencies and protectorates and not the members of a federal state. Under this provision the Convention has been extended to twenty-five territories and dependencies of the United Kindgom, and to the territories and dependencies of France and the Netherlands. By a designation under this Article the United States will be permitted to extend the Convention to Puerto Rico, Guam, the U.S. Virgin Islands, the District of Columbia and the Canal Zone.

Article XIV deals with mechanics of the Convention such as the term for which it remains in force, renewal, and denunciation. Article XV provides for the Ministry of Foreign Affairs of the Netherlands to give to the contracting States the various notices required by the Convention.

III. Legal Obstacles to Ratification

There appear to be no serious legal obstacles to the adoption and implementation of the Convention but certain contentions have been raised which merit discussion here.

It has been suggested that our federalist system might provide legal obstacles to the Federal government's imposing an apostille system upon the States of the Union, *i.e.*, a Tenth Amendment problem.

Under the Convention, each contracting State will expect its public documents bearing the apostille to be accepted in any proceeding, whether State or Federal. In order to accede, therefore, the United States must be in a position to promise recognition and acceptance of *apostilles* by each of its member states.

The question of whether the United States is in such a position appears to have been clearly answered in the affirmative. Under established case law, the

provisions of treaties on international civil procedure will override conflicting state laws. [See for example, *Missouri v. Holland,* 252 U.S. 416 (1920); *Reid v. Covert,* 354 U.S. 1 (1957)]. But while the theoretical concept seems clear, conflicting state and federal requirements and procedures with respect to the mechanics of a new system, could produce difficulties. Presumably, any such difficulties could be worked out. Similar problems, inherent in all Hague Conventions, have not deterred the United States from adopting the Conventions on the Service of Documents Abroad, and on the Taking of Evidence Abroad.

IV. Analysis of the Effects of Ratification

A. The Current Situation

In analyzing the effects of ratifying the Convention certain basic facts should be recognized relative to the current situation:

1. The effects of the United States ratification of the Convention would be felt most heavily by the officials, courts, and practicing lawyers in those cities and states where international business is concentrated.

2. Without the benefit of a statistical study, it is probably safe to assume that the largest portion of documentation requiring legalization originates in New York City and Washington, D.C. and that a good share of the remainder emanates from large cities such as Chicago, Miami, Houston, and Los Angeles.

3. The present signatories of the Convention are primarily important Western European states which have consular offices in the major U.S. cities, where their international business is concentrated. Thus, consular services are generally good where the requirements for legalization are greatest.

4. A large portion of legalizations are handled by lawyers who frequently deal in such international matters and are familiar with the present legalization system.

5. In many cases, consular offices have already assented to the streamlining of the chain of signatures leading to consularization. For example, the consulate may eliminate the need for certifications by the state and federal secretaries of state by keeping on file the signature specimens of the county clerks of states within the consular jurisdiction. Other than for documentation issued by administrative authorities of the United States government or the federal appellate courts, it is indeed exceptional that a consul will require certification by the Secretary of State of the United States since consulates ordinarily keep on file the signature of specimens of the secretaries of state of the fifty states.

B. Opportunities Afforded by Ratification

If properly implemented, the *apostille* system, could eliminate chain certification for the person seeking the authentication, relieve him of the obligation to procure final consular certification, and provide him with a single,

rational procedure for authentication. As stated earlier, while some chain certification may remain necessary within the issuing authority itself, the Convention seeks to eliminate all prior steps in the authentication process except for the issuance of the *apostille.* This would eliminate the unnecessary burden and expense of procuring the various signatures of local, state, and federal authorities upon a single document, as well as relieve the attorney in question from having to discover the location, hours, and fees of the relevant consulate for final certification. Obtaining the stamp authorized by the *apostille* system upon the document at hand would constitute the first and final step of the authentication process.

Looked at from the standpoint of litigation, the Convention recommends itself for several reasons. Time and effort of counsel, both foreign and domestic, would be saved under the *apostille* system. Foreign consul, or local counsel representing foreign litigants, would no longer have to procure the chain certification required by Federal Rule 44, or required by state practice (if the action is brought in a State court). An *apostille* upon a document would be sufficient in either court system to prove the genuineness of the writing, thus promoting uniformity between state and federal practice in the authentication of documents. For American counsel litigating in foreign courts and seeking to introduce a U.S. document into the proceedings, the time-saving simplicity of an *apostille* system seems highly desirable.

Finally, perhaps the most far-reaching impact of the Convention would be upon the realm of international judicial assistance. An undoubted service would be performed by any system of authentication which could supply a simple, yet secure means by which foreign public documents might be freely recognized as genuine outside of the country of origin. The *apostille* system seeks to supply both simplicity of form and security from the danger of falsification. It provides simplicity because the standardized format of the *apostille* permits a document to be recognized in any country. It provides security because the document receives final certification from a national of the same country in which the *apostille* originated, thus affording greater weight to the authentication because it attests to the capacity under domestic law of the official signing the writing. The Convention itself maintains a great degree of flexibility in allowing for the future liberalization by signatories of even these outlined procedures. Clearly, it presents a multi-national approach to more effective international judicial assistance.

The foregoing advantages, of course, are relative to the number and importance of the signatories of the Convention as well as to the simplicity and effectiveness of the procedures developed.

C. Implementation of the System

It is a fact that consular offices of foreign countries do not exist in areas of the United States that are remote from the center of commercial activity. The need

for lessening the burdens of attorneys who require authentications, who practice in such areas, must not be overlooked. This can be done without transferring any greater burden upon attorneys who practice in the larger cities by adopting the compromise suggested by Phil Amram in his excellent article "Toward Easier Legalization of Foreign Public Documents" (March 1974 *ABA Journal,* p. 314, copy attached):

> First, designate one authorized person (preferably the clerk or a deputy clerk) for every place in each federal judicial district where the court sits and there is a federal courthouse and a clerk's office. If there is a clerk's office in every place listed in 28 U.S.C. §§ 81 to 131, this should total slightly more than four hundred. Second, have the governor of each state and the chief executive of the District of Columbia, the Canal Zone, and other territories designate an officer in the capital as an authorized official. This would provide one person in every state capital and one person at every federal district courthouse in the United States—something more than four hundred and fifty persons, not excessive for a country of 210 million population and an area of more than 3.5 million square miles.
>
> Under this formula each designee will cover an adequate, but not unreasonably large, geographical area, with a substantial number of public record offices and an adequately large population.
>
> The burden on counsel in the United States to seek the apostille from an officer in the state capital or at the federal district courthouse seems reasonable. Counsel is accustomed to securing documentation from state offices in the state capital, and, of course, all federal court business must be conducted through the clerk's office in the federal courthouse.
>
> In addition, the number of officers suggested should not be considered excessive by those who have already ratified the convention.

V. Conclusion

Ratification of the Convention affords essentially a good opportunity for standardization and simplification of international authentication procedures. For this reason, the Section's Committee on the International Unification of Private Law strongly recommends adherence by the United States to this Convention.

The foregoing report and recommendation was approved by the Council of the Section of International Law at its December 6-7, 1974 meeting in Los Angeles. Copies of this report and recommendation have been sent to the Chairmen of the following Sections: Corporation, Banking and Business Law; General Practice; Litigation; and Patent, Trademark and Copyright Law.

Respectfully submitted,
SECTION OF INTERNATIONAL LAW
By James T. Haight, Chairman

February, 1975