



Electronic Commerce, e-Notarisation and the e-Apostille

Eamonn G Hall, Notary Public

Introduction

Terms such as 'cyberspace' and electronic commerce' became commonplace in Ireland (as elsewhere) during the 1990s. 'Cyberspace' is a term usually attributed to science-fiction writer, William Gibson, in *Neuromancer* (1984). Cyberspace is regarded as a description (in part) of that nebulous territory without physical dimensions where 'electronic communications' happen, including where communications over the Internet are transmitted, frequently in real time involving various communications and computing technologies.

During the 1990s, the American Bar Association and its section on Science and Technology Law made submissions to agencies of government of the United States that there should be a new public officer known as a 'cybernotary'. The cybernotary with his or her legal expertise would serve with complementary functions associated with the traditional role of the notary together with a certain level of qualification on information security. The cybernotary would also be empowered to certify electronically and authenticate elements of an electronic commercial transaction which would facilitate its enforceability under relevant laws.

The Programme for Government (of the Government of Ireland) – *An Action Plan for the Millennium* – as reviewed in November 1999 – had, as a key priority, the promotion of a competitive environment in which e-business would flourish and legislation was to be enacted to provide for the legal recognition of electronic signatures and electronic contracts. Subsequently, the 'dot-com bubble' – the so called speculative bubble period associated with the Internet –

the rise in shares on stock exchanges related to the Internet and other commercial related-activity associated with the Internet - substantially collapsed in the period 1999-2001.

Cybernotarial Ireland Ltd

In 1995, influenced by developments in the United States and Europe, the Faculty of Notaries Public in Ireland established a separate company called Cybernotarial Ireland Ltd. The principal object of this company was:

‘The promotion, advancement and regulation of those members of the professional body of notaries public practising in the Republic of Ireland and Northern Ireland as are desirous of becoming proficient in cybernotarial knowledge and membership of the proposed cybernotarial organisation....’

In reality, the cybernotary as a distinct professional and the proposed international cybernotarial organisation never materialised. However, during the 1990s and in 2000 there were several major developments in the law governing electronic commerce and these are considered in the following paragraphs.

International Developments

The EU European Signatures Directive on a Community Framework for Electronic Signatures (1999/93/EC) provided a legal framework for electronic signatures and endeavoured to harmonise the legal acceptance of electronic signatures throughout the European Union. The Directive was adopted on 13 December 1999 and came into force on 19 January 2000.

The Electronic Commerce Directive (2000/31/EC) provided for on-line and other legal aspects of electronic commercial communications. Essentially, the Electronic Commerce Directive endeavoured to facilitate e-business throughout the European Union and protect consumers in relation to contracting on-line.

The Electronic Commerce Directive was adopted on 8 June 2000 and entered into force on 17 July 2000.

In 1996, the United Nations Commission on International Trade published a Model Law on Electronic Commerce. The Model Law was intended to provide a 'prototype' to assist states in enhancing their legislation governing the use of alternatives to paper-based methods of communications.

Electronic Commerce Act 2000

The Electronic Commerce Act 2000 of Ireland ('the 2000 Act') transposed the European Union's Electronic Signatures Directive into domestic law as well as certain articles of the Electronic Commerce Directive referred to above. Many sections of the 2000 Act were based on sections of the United Nations Model Law on Electronic Commerce (as revised).

It may be useful to set out here some of the key definitions in the 2000 Act. 'Advanced electronic signature' is defined as meaning 'an electronic signature

- (a) uniquely linked to the signatory,
- (b) capable of identifying the signatory,
- (c) created using means that are capable of being maintained by the signatory under his, her, or its sole control, and
- (d) linked to data to which it relates in such a manner that any subsequent change of the data is detectable.'

'Certificate' means 'an electronic attestation which links a signature verification data to a person or public body, and confirms the identity of the person or public body.'

'Certification service provider' means 'a person or public body who issues certificates or provides other services related to electronic signatures.'

'Electronic' is defined as including 'electrical, digital, magnetic, optical, electro-magnetic, biometric, photonic and any other form of related technology.'

‘Electronic contract’ is defined as meaning ‘a contract concluded wholly or partly by means of an electronic communication.’

‘Electronic signature’ means ‘data in electronic form attached to, incorporated in or logically associated with other electronic data and which serves as a method of authenticating the purported originator, and includes an advanced electronic signature.’

‘Qualified certificate’ means a certificate which meets the requirements set out in Annex 1 [of the Act of 2000] and is provided by a certification service provider who fulfils the requirements set out in Annex 11 [of the Act of 2000].’

‘Signature verification data’ means data, such as codes, passwords, algorithms or private cryptographic keys, used by a signatory or other source of the data in generating an electronic signature.’

The Legal Recognition of Electronic Signatures and Contracts

Part 11 of the Act of 2000 provides, *inter alia*, for legal recognition of electronic signatures, electronic originals, electronic contracts, retention of electronic documents and admissibility of evidence in courts.

Section 9 of the 2000 Act provides that information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. That provision does not apply to all legal instruments – and the exceptions are set out in the following paragraphs.

Certain legal instruments are (pursuant to section 10 of the Act of 2000) excluded from the key provisions of the Act – at least until ‘technology has advanced to such an extent and access to it is so widely available, or there are adequate procedures and practices that have developed in public registration or other services, so as to warrant such action or the public interest so requires’. The relevant sponsoring Minister for the time being (after consultation with other Ministers of the Government may, by regulations, (for the purpose of encouraging the efficient use of electronic communication facilities and services in commerce and the community generally while at the same time protecting the public interest), extend the provisions of the Act to the instruments set out below – subject to such conditions as the Minister thinks fit and the Act of 2000 shall apply accordingly.

The excluded law (and legal instruments) relate to the following:

- (a) the law governing the creation, execution, amendment variation or revocation of -
 - (i) a will, codicil or other testamentary instrument to which the Succession Act 1965 applies,
 - (ii) a trust, or
 - (iii) an enduring power of attorney,

(b) the law governing the manner in which an interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered, other than contracts (whether or not under seal) for the creation, acquisitions or disposal of such interests,

(c) the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose, or

(d) the rules, practices or procedures of a court or tribunal.

Section 13 of the 2000 Act provides that an electronic signature can be used to meet the requirement of a written signature. It seeks to accord the same standing in Irish law to electronic signatures as accorded to written signatures - with certain provisos as set out above.

In relation to documents required to be under seal, section 16 of the 2000 Act provides that an advanced electronic signature (defined earlier) may be used to meet the requirement that a document be sealed. As to the production or retention of electronic information, section 18 of the Act of 2000 provides that electronic information can be used to meet a requirement to produce or retain information that is in the form of paper or other material. In effect, this allows for the retention and subsequent production of documents in electronic format as distinct from the retention or production of such documents in paper format.

Section 19 of the 2000 Act provides, in relation to contracts, that the electronic contract shall not be denied legal effect, validity or enforceability, solely on the grounds that it is wholly or partly by way of an electronic communication.

Certification Service Providers

Part 3 of the Act of 2000 provides for matters relating to service providers who issue electronic certificates or provide other services related to electronic signatures. These service providers are known as certification service providers.

eNotarisation and the eApostille

The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ('Hague Convention' or 'the Apostille Convention') which came into force in Ireland on 9 March 1999 was drafted only with a paper environment in mind. New technologies have changed the conduct of state business.

In some states, notarial acts and other authentic acts are being executed electronically. Public registers in electronic form are becoming the norm in several states. Accordingly, in 2003 a Special Commission of the Hague Conference on Private International Law - a permanent intergovernmental organisation whose purpose is to work for the progressive unification of the rules of private international law – agreed that the use of modern technology could have a positive impact on the operation of the Apostille Convention. That Special Commission recognised that neither the spirit nor the letter of the Convention constituted obstacles to the use of modern technology and that the Convention's operation could be further enhanced by relying on such technology.

The 2003 Special Commission as above provided for the development of the electronic Apostille Pilot Programme (e-App). This e-App programme was subsequently launched in 2006 by the Hague Conference on Private International Law and the National Notary Association of the United States. The purpose of the eApp programme was to promote the issuance of electronic Apostilles (e-Apostilles) and the operation of electronic registers of Apostilles (e-Registers) that can be accessed online by recipients to verify the origin of an

Apostille they have received.¹ Several countries have implemented one or both of these components – but mainly the e-Register. In January 2012, the name of the programme was changed to the ‘Electronic Apostille Program’. An up-to-date implementation chart for the e-App is available on the Apostille Section of the Hague Conference website ([www. hcch.net](http://www.hcch.net)). The Department of Foreign Affairs and Trade of Ireland has implemented the e-Register facility which enables a person to verify the authenticity of the Apostille or ‘Authentication’ (in the case of non-Apostille countries) issued by the Department of Foreign Affairs & Trade. [See www.dfa.ie]

The Hague Conference on Private International Law stated that the advantages of adopting the e-Apostille include:

rendering the issuance and use of Apostilles faster and more efficient as it reduces turnaround time;

increasing security by providing assurance that the file consisting of the e-Apostille and the underlying public document has not been altered by evidencing attempts to tamper with the Apostille or the underlying public document (the e-Apostille is automatically rendered ‘invalid');

providing assurance as to the origin of the e-Apostille via the appropriate use of a digital certificate (i.e., authentication);

providing assurance that the e-Apostille was signed by the Competent Authority identified in the Apostille, thus avoiding possible rejections based on doubts about the origin of the Apostille (i.e., non-repudiation);

providing a secure method of attaching Apostilles to the public document;

facilitating access to Apostille services as requests can be made to the Competent Authority online and Apostilles can be issued to the applicant online (e.g., by email or through a secure site);

facilitating the verification of the underlying document as the system for issuing e-Apostilles may be integrated into an electronic signature and seal database so that the origin of an underlying document may be verified with one click;

¹ See generally the *Handbook on the Practical Operation of the Apostille Convention* (2013) by the Permanent Bureau Hague Conference on Private International Law, paras 319-361, The Hague. Website: www.hcch.net

lowering costs for the issuance of Apostilles as there is no need for extensive security paper or sophisticated methods of attaching paper Apostilles to paper public documents;

reducing the workload of competent authorities as most of the work will be carried out electronically without the need to physically attach, seal and sign Apostilles;

facilitating the circulation of public documents globally and thus saving on courier charges by eliminating the need to dispatch documents to the State of destination; and

minimising the risk of document loss by allowing storing and transmitting documents through electronic means.

An up-to-date implementation chart for the e-App (including a separate list of operational e-Registers) is available on the Apostille Section of website of the Hague Conference on Private International law . (www.hcch.net)

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