



**THE NOTARIAL ACT: THE 'PUBLIC
DOCUMENT' CONCEPT: LEGALISATION:
THE HAGUE APOSTILLE CONVENTION OF
OCTOBER 1961,
And
INTERNATIONAL LAW**

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1. **Introduction: Ireland and International Law The Apostille Convention of October 1961**

The Hague Conference on Private International Law (an intergovernmental organisation based at The Hague, The Netherlands) was created pursuant to the *Statute of The Hague Conference on Private International Law* (1955) ('the Statute') which is, in effect, an international treaty. Ireland has been a member of The Hague Conference since 1955. Article 1 of the Statute states that 'the purpose of The Hague Conference is to work for the progressive unification of the rules of private international law'.

There are several Hague Conventions or international treaties on various aspects of the rules of private international law. One such Convention is The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents also known and referred to in this paper as 'the Apostille Convention'. It is also described in this paper as 'the Hague Convention' or 'the Convention'. It is an international treaty.

'Legalisation' - the subject of the above Convention of 1961 - is sometimes regarded as an imprecise term. While defined later in this paper, the term means the process which certifies the authenticity of the signature which the document bears, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Only states that were represented at the Ninth Session of The Hague Conference – the meeting that adopted the final text of the Apostille Convention in 1960 could sign and ratify the Convention. Ireland was a member of The Hague Conference in 1960 at the time of the adoption of the final draft of the Apostille Convention but did not send a representative to The Hague on that occasion. However, The Hague Conference considered it legitimate to allow Ireland to sign and ratify the Convention. Any other State could join the Apostille Convention by way of accession.

Ireland did not ratify the Apostille Convention until 1999. The non-ratification of the Apostille Convention by Ireland gave rise to frequent parliamentary questions. The Department of Foreign Affairs 'entertained reservations concerning the effect of the Convention on existing Irish extradition law' [See *Law Reform Commission Report on The Hague Convention* (LRC 49-1995) p. 23. The Law Reform Commission submitted in 1995 that this view was based

on a misconstruction of the Convention and its effects. The Department of Foreign Affairs had further reservations about ratification of the Apostille Convention prior to an overhaul of the whole law on evidence. However, the Law Reform Commission in its 1995 report, cited above, submitted that there were no longer (in 1995) any valid obstacles to the ratification of the Convention. The Convention was ratified by Ireland on 8 January 1999 and entered into force on 9 March 1999.

The Apostille Convention is designated as a Hague Convention as it is an international treaty developed pursuant to The Hague Conference on Private International Law. As stated, this 'Hague Conference' is a permanent intergovernmental organisation whose purpose is to work for the progressive unification of the rules of private international law and under the auspices of which the Apostille Convention was negotiated and adopted.

Private international law is that element of the law which involves a foreign element. Sometimes this branch of the law is called 'Conflict of Laws'. This aspect of law deals with what jurisdiction governs a particular issue and, for example, the recognition and enforcement of judgments of foreign courts.

Article 29.3 of the Constitution of Ireland provides:

'Ireland accepts the generally recognised principles of international law as its rule of conduct with other states'

Although this provision deals with 'conduct with other states', there are dicta of the courts in Ireland to the effect that the principles of customary international law form part of domestic law by virtue of Article 29.3 of the Constitution of Ireland. In *ACT Shipping (PTE) Ltd v Minister for the Marine* [1995] 3 IR 406, Barr J refused to accept the contention that the generally accepted practices or customs and rules of international law into domestic law required legislative intervention by virtue of Article 15.2 of the Constitution. Article 15.2.1 provides:

'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative body has authority to make laws for the State.'

In the *ACT Shipping* case, Barr J stated:

‘In my opinion Article 15. 2 does not inhibit the evolution of international customary law into Irish domestic law. It relates to the “making” of laws for the State which, it provides is a power exclusively reserved to the Oireachtas. Customary law is not made in the sense envisaged by Article 15.2. Customary international law evolves from a practice or course of conduct which in time has become widely accepted.’

Of course, such customary international laws and rules must be consistent with the Constitution, domestic legislation or the common law.

The Apostille Convention is the most widely ratified and acceded to of all the so-called Hague Conventions. It is regarded as one of the most successful international treaties in the area of international legal and administrative co-operation.

The fundamental objective of the Apostille Convention of 1961 is to facilitate the worldwide circulation of public documents.

As of 30 September 2012, there are 104 Contracting States to the Apostille Convention.

A Special Commission is convened perhaps every five or so years by the Secretary General of The Hague Conference on Private International Law in relation to the Apostille Convention.

A Special Commission convened by the Permanent Secretariat of the Hague Conference on Private International law on ‘The Practical Operation of the Apostille Convention of 1961’ was held in the Peace Palace, The Hague, Netherlands between 6-9 November 2012.

The conclusions and recommendations adopted by meetings of a Special Commission establish and recommend good practice for Competent Authorities. In Ireland, the Competent Authority for the Apostille Convention – the principal Convention the subject of this paper - is the Department of Foreign Affairs.

In the words of the 2012 Special Commission itself, the conclusions and recommendations of a Special Commission ‘are extremely valuable in addressing operational issues and greatly assist the uniform interpretation and application of the Apostille Convention throughout the world.’ In fact, jurists

have submitted that such conclusions and recommendations are sources of International law.

[Delegates, numbering 162 from 75 Contracting States to the Apostille Convention and international organisations, attended the 2012 Special Commission including delegates, participants and experts from Germany, Argentina, Australia, New Zealand, Austria, Belgium, Brazil, Canada, the United States and many African nations. The Faculty of Notaries Public in Ireland participated in the deliberations of the 2012 Special Commission as a full member of the international body known as The Notarial Forum of Great Britain and Ireland.]

In the context of the importance attached to the Apostille Convention, reference may be made to the World Bank and its reports Investing Across Borders: Indicators of Foreign Direct Investment Regulation 2010-2012 where an extra status in terms of the world's league table of nations most equipped for foreign direct investment is awarded for the successful operation of the Apostille Convention.

2. Definitions

The 2012 Special Commission adopted several definitions which will in due course be published in a Handbook on the Practical Operation of the Apostille Convention ('the Apostille Handbook') by the Permanent Bureau of the Hague Conference on Private International Law. Some of the definitions are useful in the context of any proposed legislation and for the convenience of notaries and competent authorities are set down here:

'Apostille'

A certificate issued under the Apostille Convention authenticating the origin of a public document.

For the purists, the Apostille is pronounced 'a-pos-TEE' and not 'a-pos-TEAL' and is of French origin. [An apostille was stated in the civil law to consist of an annotation in the margin of a document at the end of a letter (e.g. Napoleon, *Ordres et apostilles* (1799-1815)]. See also the *Apostille Handbook*, The Hague Conference.

Authenticate/Authentication

'Authentication' is a generic term that commonly refers to the process of 'verifying' or 'authenticating' the origin of 'a public document'. 'Authentication' and 'legalisation' are sometimes used synonymously, and 'authentication' may also be used to refer to the apostillisation process.

Competent Authority

A 'Competent Authority' is an authority designated by a Contracting State that is competent to issue Apostilles. A State may designate one or more 'Competent Authorities', and may designate Competent Authorities that are only competent to issue Apostilles for certain categories of 'public documents'. [In Ireland, the 'Competent Authority' is the Department of Foreign Affairs.]

Contracting State

A 'Contracting State' is a State that has joined the Apostille Convention, whether or not the Convention has entered into force for that State. A 'Contracting State' for which the Convention has actually entered into force may also be referred to as 'a State Party'.

e-APP

'e-APP' is the acronym for 'electronic Apostille Program' (previously known as 'the electronic Apostille Pilot Program'). [Launched in 2006 by The Hague Conference and the National Notary Association of the United States of America (NMA), the e-APP aims at promoting and assisting in the implementation of secure software technology for the issuance of e-Apostilles and the operation of the e-Registers.]

e-Apostille

An 'e-Apostille' is issued in electronic format with an electronic signature. The issuance of e-Apostilles is one of the two components of the e-App (the other being the operation of the 'e-Registers'). Under the e-App, e-Apostilles must have a digital signature.

e-Register

A, 'e-Register' is register of Apostilles that is kept in electronic format and which is accessible online by a recipient for whom the Apostille is intended. [This register is retained by the Competent Authority.]

Issuance of an Apostille

The act of completing an Apostille and attaching it to the underlying public document in order to confirm its origin.

Legalisation

'legalisation' is the process for authenticating foreign 'public documents'. ['Apostillisation' has the same effect as 'legalisation' but is the result of the simplified process established by the Apostille Convention.]

Notarial Act

A 'Notarial Act' is an instrument or certificate drawn up by a notary that sets out or perfects a legal obligation or formally records or verifies a fact or something that has been said, done or agreed. When authenticated by the signature and official seal of the Notary, the 'Notarial Act' is 'a public document' pursuant Article 1 (2) (c) of the Apostille Convention.

Public Document

['Public Document' is a broad term that is the focal point of the Apostille Convention.] A 'public document' is a document that is executed by an authority or a person in an official capacity and includes the categories of documents listed in Article 1(2) (a) to (d) of the Apostille Convention. [Article 1 (2) (c) of the Apostille Convention states that for the purpose of the Apostille Convention, a 'Notarial Act' (defined above) is deemed to be 'a public document'.

Register of Apostilles

A register in which a Competent Authority records the particulars of each Apostille issued. [The Apostille Convention requires each Competent Authority to maintain a register of Apostilles.]

3. The Apostille Convention: Purpose and General Outline Concept of 'Public Document'

It is worth reiterating here that the purpose of the Apostille Convention is to abolish the requirement of 'legalisation' and to facilitate the use of 'public documents' abroad.

Article 1(2) of the Convention - which is at the heart of the Convention - provides that for the purpose of the 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.'

Readers should note that references to notaries are used twice in the Convention in the context of the definition of a 'public document' - ('notarial acts' as defined above) and under Article 1 (2) (d) above - 'notarial authentications of signatures'. This is of crucial significance in the understanding of a 'public document' and the unambiguous reference in Article 1 of the Apostille Convention that the Convention only applies to 'public documents' executed in one State which have to be produced in the territory of another Contracting State.

Pursuant to Article 1 of the Apostille Convention when the notary completes the function of signing or sealing (as appropriate) his or her notarial act or certificate, this document is then elevated or transformed from a 'private' document to a 'public' document. In the absence of specific legislation or any rule of the Common Law to the contrary, in the context of the respect Ireland (by its Constitution) demonstrates for rules of International Law and in the context of judicial dicta referred to earlier), it is submitted that a notarial act or a notarial certificate is also a 'public' document within the jurisdiction of Ireland.

A 'public' document is, in a sense, an announcement to the world. In a colloquial sense, there is more importance associated with a public document than a private document. We live and sometimes die by 'public' documents. 'Public' documents are fundamental to an individual person and a corporate person's identity. Public documents facilitate individual and corporate persons allowing such persons to participate fully in the economic, political and social spheres. 'Public' documents if created with proper care and attention assist in the prevention of fraud. 'Public' documents also facilitate individuals and corporate persons in the enforcement of rights and obligations.

In the context of a 'Notarial Act' which is defined at para 2 of this report, the Special Commission noted that notaries are found in virtually all countries of the world. The Commission noted:

'In almost every civil law and mixed law jurisdiction, and generally throughout the common law world (with the exception of the United States [but excluding some US states of a civil law tradition]) notaries are legal professionals.'

4. The Issuance and effect of an 'Apostille'

The Special Commission emphasised that the effect of an Apostille is limited. The Apostille only authenticates the origin of the underlying public document such as the 'Notarial Act' in question or the 'Notarial Certificate' relating to the authentication of a signature or signatures. The Apostille does not certify or verify the content of any document.

The Special Commission, using capital letters as in 'NOT' in the quotation following and carrying a 'Warning Sign' for Competent authorities, stated:

‘In the case of official certifications, it is the official certificate [such as the Notarial Act or Notarial Certificate] and NOT [in original text] the underlying private document [such as a private document attached to a Notarial act or Notarial Certificate] that is the public document for the purposes of the Convention. Therefore, the Apostille will certify only the authenticity of the Notarial Certificate and not that of the underlying private document.’ (Para 130 of Hague Apostille Handbook)

In a determination of seminal significance, the 2012 Special Commission stated:

‘The [Apostille] Convention] does not specify that the private document [such as the document(s) attached to a Notarial Act or Certificate] has to be executed in the territory of the State of the person issuing the official certificate [such as a Notary] or of the Competent Authority. Accordingly, it is possible for an official certificate [such as a Notarial Act or Notarial Certificate] to be apostilled even though the document to which it relates is a foreign document.’

Inter alia, the Special Commission noted in the context of:

- (a) certified copies of original public documents (e.g., a birth certificate or a judgment,) a third party (e.g., a notary) may be authorised to certify a copy of such a public document. In those circumstances, the Apostille generally will authenticate the origin of the certificate issued by the third party, (e.g., a Notarial Act/Certificate);
- (b) Intergovernmental organisations, the signature on a document emanating from such an organisation may be authenticated by a Notary, in which case the notarial authentication may be apostilled by the Competent Authority of the host State.

5. Limited Function of Competent Authority (e.g., in Ireland the Department of Foreign Affairs)

No verification of content

The 2012 Special Commission made it abundantly clear that there is to be no verification of content by the Competent Authority (e.g., in Ireland, the Department of Foreign Affairs). The following passage of the Conclusions of the 2012 Special Commission may be quoted:

‘It is not a Competent Authority’s [e.g. in Ireland the Department of Foreign Affairs] responsibility or duty under the Convention to verify the contents or the validity of the public document [e.g., the Notarial act or Notarial Certificate.] Furthermore, in the case of ‘official certificate’ under Article 1(d) of the Convention [e.g. including notarial authentication of certificates] the Competent Authority is not required to verify the content of the private document [e.g. a Power of Attorney] to which the [official] certificate relates.’ (Para 228 Hague Apostille Handbook)

The 2012 Special Commission quoted with approval Conclusion No. 80 of the 2009 Special Commission in relation to verifying the content:

‘[W]hen asked to issue an Apostille for a notarial certificate, Competent Authorities should not consider or assess the content of the document to which the notarial certificate relates.’(Para 230 of Hague Apostille Handbook)

Obviously this is in the absence of palpable fraud or some other underlying issue of public policy such as a document of obvious gross indecency.

6. The e-Apostille

The 2012 Special Commission submitted that when the Apostille Convention was drafted, only a paper environment was then in mind. Personal computers, information technology and the Internet have changed the paper environment.

It was submitted that the Apostille Convention must keep pace with e-Government and users (individuals and business that need to produce public documents abroad). It was noted that increased numbers of public documents are executed in electronic format including e-notarial acts. The 2012 Commission noted the 2003 Commission which considered the issue initially that neither the letter nor the spirit of the Apostille Convention constituted an obstacle to the use of modern technology, and that its operation could be further enhanced by relying on such technology.

It was argued that the e-APP promotes the use of modern technology to further enhance the secure and effective operation of the Apostille Convention. Verification of e-Apostilles was stated to be much easier than the equivalent

paper-based Apostille and the e-Apostille would assist in combating fraud and abuse of Apostilles by offering a level of security which currently exceeds current standards in the paper environment. It was noted that 150 Competent Authorities (but not the Department of Foreign Affairs of Ireland - the Competent Authority for Ireland)) from 15 Contracting States had implemented at least one component of the e-Apostille - e.g., in relation to, for example, official certificates like birth, death and marriage certificates or created an e-Register. It was also noted that in recent years that had been a sharp increase in the verification of Apostilles by means of e-Registers.

Surprisingly, Germany objected at the 2012 Special Commission to a legal format for the e-Apostille and this matter was adjourned to the next meeting of a Special commission - estimated to be in three to five years time. However, the 2012 Special Commission stated this was without prejudice to the progress that could be made by consenting Competent Authorities in implementing the e-Apostille and the e-Registers.

[The Department of Foreign Affairs stated in 2012 that preparation for the introduction of the e-Register in Ireland had begun. It was apparently intended to roll out such an e-Register in December 2012 but that was not done as of end of February 2013.]

7. Two Fundamental Issues affecting the 2012 Special Commission, Notaries Public and Ireland

In the context of issues that had arisen during 2012 (affecting notaries) with the Department of Foreign Affairs in its capacity as Ireland's only official Competent Authority under the Hague Convention, two issues will be set down here as they are fundamental to the Special Commission's review of the Apostille Convention in the context of notaries.

First, in the context of Ireland and Notaries Public in relation to a Notarial Act/Certificate being presented to the Department of Foreign Affairs of Ireland for the Apostille, what, if any, is the so-called 'Irish connection'?

Second, has the Department of Foreign Affairs as the Competent Authority a duty or obligation to examine the underlying document attached to the Notarial Act/Certificate?

The writer of this paper in addition to examining the clear conclusions of the 2012 Special Commission, the proposed Permanent Bureau Hague Apostille

Handbook (not yet published) and previous Special Commissions, posed the above issues as questions to the President of the Special Commission, to senior members of the Permanent Bureau of the Hague Conference on Private International Law as well as other experts – some of the most eminent lawyers in the world.

It was made perfectly clear that in the context of the Apostille Convention, a Notarial Act or a Notarial Certificate issued within jurisdiction – i.e., by an Irish Notary Public registered with the Department of Foreign Affairs of Ireland – that the Notarial Act or Notarial Certificate of such an Irish Notary Public is a 'public document' itself within the meaning of the definitions in Article 1 of the Apostille Convention.

The Apostille verifies the origin of the 'public document' – the Notarial Act/Certificate and the signature and status of the Notary. Therefore, the so-called 'Irish connection' is the Notarial Act or Notarial Certificate of the Notary Public of Ireland – not the attached underlying document to which the Notary is referring in his/her Notarial Act/Certificate.

Second, the Department of Foreign Affairs has no duty or obligation to look behind the 'public document' – the Notarial Act or Certificate of the Notary Public of Ireland.

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