

THE APOSTILLE IN THE 21ST CENTURY: INTERNATIONAL DOCUMENT CERTIFICATION AND VERIFICATION

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I. INTRODUCTION

An *apostille* (hereinafter “Apostille”) is a standard certification provided under the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (“Hague Apostille Convention”) for authenticating documents used in foreign countries.¹ Apostilles are used frequently to certify various energy industry-relevant documents, such as oil and gas leases, purchase and sale contracts, joint operating agreements, drilling contracts, supply contracts, pay orders, field-wide operating agreements, confidentiality agreements, employment records, and even diplomas.²

1. BLACK’S LAW DICTIONARY, (9th Ed. 2009); see also *Hague Conference on Private International Law: 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, 527 U.N.T.S. 189, T.I.A.S. 10072, 20 I.L.M. 1405, 1410–11 (1981) [hereinafter *Hague Apostille Convention*].

2. *Authentication of Documents*, APOSTILLE US (last visited Jan. 30, 2012), http://apostille.us/Documents/authentication_documents.shtml.

Under the Hague Apostille Convention, the Apostille is attached to documents produced in one nation state, which will be certified, or apostillized, in order to be presented to the government (or court) of another state.³ Four types of documents are mentioned in the Hague Apostille Convention: (1) court documents; (2) administrative documents, *e.g.* civil status documents; (3) notarial acts; and (4) 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.⁴

Apostilles are affixed by “Competent Authorities” designated by the government of a state which is party to the convention. A list of these authorities is maintained by the Hague Conference on Private International Law. Generally, designated authorities include government ministries, embassies, lawfully constituted courts and local governments.⁵ To be eligible for an Apostille, a document must first be issued or certified by an officer recognized by the authority that will issue the Apostille.⁶ The Apostille certificate includes the ten elements of apostillization. The Apostille certificate may be a stamp or printed form consisting of ten numbered standard fields.⁷ At the head of the certificate is the title *APOSTILLE*, followed by the required numbered fields.⁸

3. See Hague Apostille Convention, *supra* note 1, at 1409.

4. *Id.*

5. See *generally Authorities*, HAGUE CONVENTION ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.authprint&cid=41 (last visited Jan. 30, 2012) (providing a list of countries that are parties of the Hague Convention along with the Competent Authorities of each country).

6. See Hague Apostille Convention, *supra* note 1, at 1410.

7. *Id.* at 1411.

8. *Id.* These ten numbered fields and other text are as follows:

1. Country: [country name]

This public document

2. has been signed by [name]

3. acting in the capacity of [function]

4. bears the seal/stamp of [authority]
certified

5. at [location]

The information may be placed on the document itself, including the reverse or back of the document, or the information may be attached to the document as an *allonge*, or piece of paper affixed to the document.⁹

Apostille is derived from French law, meaning postscript or note.¹⁰ The effect of affixing an Apostille to a document is to certify authenticity of the signature of the official who signed the document as true for recipients in another signatory nation.¹¹ Apostilles have been compared to notarization certificates; although notary certificates appear to be similar, the legal effects are much different, as will be discussed.

This Article (1) generally discusses the Apostille; (2) outlines the current practices of apostillizing documents in selected countries, such as France, Germany, Mexico, Argentina, China, India, South Africa, Japan, the United States, and the United Kingdom; (3) addresses a prevalent problem that has arisen, *i.e.*, fraudulent documents attaining legal recognition through abuse of the Hague Apostille Convention; (4) provides an overview the electronic Apostille Pilot Program and offers suggestions for its improvement; and (5) addresses a possible solution to the fraudulent Apostille problem through a modification of the E-Apostille.

The issue of fraudulent documents is of great concern to the energy industry, as international exploration and production company documentation is especially vulnerable to the type of fraud perpetrated through abuse of the Hague Apostille Convention.¹²

6. the [date]

7. by [name]

8. No. [apostille registration number]

9. Seal/Stamp: [of the authority giving the apostille]

10. Signature: [signature of authority giving the apostille]

9. Hague Apostille Convention, *supra* note 1, at 1410; BLACK'S LAW DICTIONARY (9th Ed. 2009).

10. Hague Apostille Convention, *supra* note 1, at 1410; BLACK'S LAW DICTIONARY (9th Ed. 2009).

11. Hague Apostille Convention, *supra* note 1, at 1410.

12. Ginger Menown, *Addressing Fraud Risk Management in the Energy Industry*, ARTICLES BASE (Nov. 17, 2009), <http://www.articlesbase.com/finance-articles/addressing-fraud-risk-management-in-the-energy-industry-1469951.html>.

II. THE APOSTILLE IN ITS VARIOUS FORMS AMONGST SIGNATORY STATES

A. General Overview

1. Requirements of the Hague Apostille Convention

The Hague Apostille Convention is the controlling treaty on the general requirements of an Apostille. The Convention contains fifteen articles.¹³ The first nine treaty articles set out the important substantive aspects of the treaty while the final six articles set out the ministerial aspects.¹⁴

Article 1 of the Hague Apostille Convention, explains those circumstances under which an Apostille may be used.¹⁵ The Apostille may be used when public documents executed in one state need to be produced in another member state.¹⁶ But the plain meaning of “public documents” might be misleading. A “public document” is not precisely defined in the Hague Apostille Convention; but the treaty does offer guidance, noting it may include (1) a document issued by the courts or one of the representatives of the courts of a country, (2) administrative documents, (3) notarial acts or documents that have been notarized, or (4) “official certificates which are placed on documents and signed by persons in their private capacity.”¹⁷ This means that a mineral lease or any real estate conveyance requiring notarization would be “public documents” for purposes of the treaty.¹⁸

Article 2 of the treaty officially abolishes the legalization process in contracting states.¹⁹ This article means that legalization, a formality where diplomatic or consular agents is

13. Hague Apostille Convention, *supra* note 1, at 1409–11.

14. *See id.* at 1408.

15. *Id.* at 1409.

16. *Id.*

17. *Id.* Examples of number four are certificates that give the official date that a document came into existence or stating the date that a document was officially recorded.

18. Any documents requiring notarization would fall into the third part of the definition for “public document.”

19. Hague Apostille Convention, *supra* note 1, at 1408.

required to verify “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 no longer required of documents produced in contracting states.²⁰

After abolishing the legalization requirement, Article 3 of the Hague Apostille Convention states that a Competent Authority²¹ from the state may issue an Apostille “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.”²² An Apostille does not assert that the contents and the substantive portions of the document are correct.²³ In fact, the Apostille does not say anything about whether the document is in fact accurate; it merely certifies that the signatures of the public officials on the document are authentic, the public official signing the document is acting in his proper capacity when he signs, and that any government seal or stamp is authentic.²⁴

Article 4 of the Hague Apostille Convention explains how the Apostille may be attached and how the Apostille must look.²⁵ The Apostille must be physically attached to the document, but it may be stamped, instead of printed, on a separate sheet.²⁶ Furthermore, the Apostille must be at least nine centimeters long.²⁷ Finally, the Apostille may be made using the language of the issuing country, but the heading must be in French and

20. *Id.*

21. The various Competent Authorities within the different nations are listed in their respective subsections discussing the practice of obtaining an Apostille in that particular nation. *See Authorities, supra* note 5.

22. *Id.*

23. *See, e.g., Statement of Effect of Apostille*, U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA http://www.flmd.uscourts.gov/Forms/forms_policies.htm (last updated Apr. 2010).

24. *Id.*; *see also* Starski v. Kirzhnev, 2011 WL 923499, at *11 n.3 (D. Mass. Mar. 15, 2011). (“The Apostille, however, does not confirm [the private individual’s] signature, but rather confirms the signature of the notary public who, in turn, had attested to [the private individual’s signature]”).

25. Hague Apostille Convention, *supra* note 1, at 1408, 1410.

26. *Id.* at 1410.

27. *Id.* Annex.

state “Apostille (Convention de La Haye du 5 octobre 1961).”²⁸

Article 5 of the Hague Convention exempts the signature, stamp and seal of the issuing government from needing any form of certification.²⁹ Without this provision, the Apostille would require the same (seemingly) endless chain of signatures that the legalization process required, a process which the Apostille process sought to avoid.³⁰

Article 6 of the Hague Convention states that member nations must designate which officials may designate Apostilles.³¹ Article 7 of the Hague Convention requires those entities who are issuing Apostilles to keep a record of the Apostilles they have issued, including “[t]he number and date of the certificate” and “[t]he 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.”³² If any “interested individual” wants to verify that the Apostille was properly issued, the issuing entity must check their records and verify the Apostille.³³

Article 8 of the Hague Apostille Convention is a savings clause that “preserve[s] other treaties between member nations which call for less stringent authentication requirements than those of the Hague Convention.”³⁴ This seems to fit the purpose of the Apostille in general, namely speeding up the process of authenticating foreign public documents.³⁵

28. *Id.* art. 4.

29. *Id.*

30. See George Deukmejian, Attorney General of the State of California, *Opinion on the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, No. 81-1213, 21 I.L.M. 357, 362 (Mar. 19, 1982); see also *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, Oct. 5, 1961, U.N.T.S. 189, T.I.A.S. 10072 (“Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents”).

31. See also *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, Oct. 5, 1961, U.N.T.S. 189, T.I.A.S. 10072, art. 6.

32. *Id.* art. 7.

33. *Id.*

34. Keith D. Sherry, *Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of a Global Community Demand Retirement of the Hague Public Documents Convention*, 31 J. MARSHALL L. REV. 1045, 1058 (1998).

35. See George Deukmejian, Attorney General of the State of California, *Opinion*

Finally, Article 9 of the Hague Convention “prevent[s] the performance of legalizations by its diplomatic or consular agents in cases where the present Convention provides for exemption.”³⁶

2. Requirements by Special Commissions

In addition to the Hague Apostille Convention itself, two special commissions have formed and produced reports that answer questions of interpretation concerning the treaty.

The first of these questions is whether the Apostille may be affixed to only original documents or whether it may also be affixed to certified copies of public documents. The Special Commission of 2003 (“2003 SC”) concluded that Article 1 of the Convention applies to a certified copy of a public document, “[i]ndividual States, however, may decline to issue an Apostille to the certified copy of a document on the grounds of public policy.”³⁷ As will be discussed in section III, this interpretation is the basis for a method of abusing the Apostille to produce seemingly legitimate documents that are in fact fraudulent.

While the Hague Apostille Convention itself has stringent requirements concerning the form of the Apostille, both special commissions concluded that failure to conform to the exact form of the Apostille alone is not basis for rejecting the associated document. The 2003 SC states “that Apostilles issued by Competent Authorities should conform as closely as possible to this model. However, variations in the form of an Apostille among issuing authorities should not be a basis for rejection as long as the Apostille is clearly identifiable as an Apostille issued under the Convention.”³⁸ This resolution was further explicated

on the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, No. 81-1213, 21 I.L.M. 357, 362 (Mar. 19, 1982); see also *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, Oct. 5, 1961, U.N.T.S. 189, T.I.A.S. 10072.

36. *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, Oct. 5, 1961, U.N.T.S. 189, T.I.A.S. 10072, art. 9.

37. Special Commission Conclusions and Recommendations, *The Practical Operation of the Hague Apostille, Evidence and Service Conventions 4* (Oct. 28, 2003 to Nov. 4, 2003) [hereinafter *Evidence and Service Conventions*], available at http://www.hcch.net/upload/wop/lse_concl_e.pdf.

38. *Id.* at 5.

by the Special Commission of 2009 (“2009 SC”) to include that

Apostilles may not be refused in the State of destination on the grounds that they do not comply with that State’s national formalities and modes of issuance. The SC further stresses that the addition of text outside the box on the Certificate is not a valid basis for rejection of a foreign Apostille.³⁹

The Hague Convention does not define what exactly a public document is,⁴⁰ however, the 2009 SC noted:

[T]hat it is for the law of the State of origin to determine the public nature of a document. Keeping in mind the purpose of the Convention, the SC suggests that States Parties give a broad interpretation to the category of public documents. The SC recalls the statement in the Explanatory Report that ‘[a]ll the Delegates were in agreement that legalisation should be abolished for all documents other than documents signed by persons in their private capacity (*sous seing privé*).’ Finally, the SC also recalls that the list of public documents identified in Article 1 is not exhaustive.⁴¹

B. Apostille Practices of the Various Nations

1. Germany

Competent Authorities in Germany include:

1. The Ministry of Justice with regard to public documents issued by itself, an *Oberlandesgericht* (highest court of a *Land*) and public prosecutor’s offices serving an *Oberlandesgericht*;
2. the President of a *Landesgericht* (district court of a *Land*) for the public documents issued in his district by the other normal courts and public prosecutor’s offices, by the Authorities to which tasks of the normal courts have been delegated, by notaries and

39. Special Commission Conclusions and Recommendations, *The Practical Operation of the Hague Apostille, Service and Access to Justice Conventions* 14 (Feb. 2–12, 2009) [hereinafter *Service and Access to Justice Conventions*], available at http://www.hcch.net/upload/wop/jac_concl_e.pdf.

40. See Hague Apostille Convention, *supra* note 1.

41. *Service and Access to Justice Conventions*, *supra* note 39, at 11.

district notaries, and for other documents issued in connection with the administration of justice;

3.the district council of Tübingen for public documents issued by the ministries, except for those issued by the Ministry of Justice;

4.the district councils for the public documents issued in their districts by all other administrative bodies and by courts of all branches of the judicial system except for the normal courts.⁴²

Germany generally adopts a one step process for certification; public documents may be presented directly to a relevant Competent Authority for authentication with an Apostille, without the need for any previous or intermediate certification of any kind.⁴³ However, education documents and notarial deeds are subject to multiple certification steps.⁴⁴

Germany does not apply the Hague Apostille Convention to simple copies of public documents; the Hague Convention can only be applied to certified copies.⁴⁵

Number of Apostilles Yearly (Germany)⁴⁶

Year	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Amount	120,000	143,000	166,000	180,000	201,000

2. France

Competent Authorities in France consists of the various *Cour d'appels*, the *Tribunal Supérieur d'appel de Saint-Pierre et Miquelon*, and the *Tribunal de première instance de Mata-Utu Territoire des Iles Wallis et Futuna*.⁴⁷

42. *Authorities: Germany—Competent Authority*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Jan. 11, 2012), available at http://www.hcch.net/index_en.php?act=authorities.details&aid=322.

43. See Hague Conference on Private International Law, Response Germany to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008germany12.pdf>.

44. *Id.*

45. *Id.* at 16.

46. *Id.* at 9.

47. *Authorities: France—Competent Authority*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (JAN. 11, 2012) available at http://www.hcch.net/index_en.

France has adopted a one-step apostille process; public documents may be presented directly to a relevant Competent Authority for authentication with an Apostille, without the need for any previous or intermediate certification of any kind.⁴⁸

France is one of a handful of nations that allows the certification of simple copies.⁴⁹ This rule is due to local French law that removes the certification requirement for copies of most public documents; as such, the only way to allow apostillization of these documents is to allow simple copies to be certified.⁵⁰

Number of Apostilles Yearly (France)⁵¹

Year	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Amount	266,478	312.611	374.085	388.057	385.619

3. *Mexico*

Competent Authorities in Mexico are, like the United States, grouped into federal and state authorities.⁵² There are only two federal authorities, Policy Coordination Directorate with the Powers of the Union Formalization and the Control Branch.⁵³ On the other hand, Mexico has designated thirty-two separate Competent Authorities to issue Apostilles for state documents and act as state authorities.⁵⁴

Mexico has adopted a multi-step apostillization process.

http://www.hcch.net/index_en.php?act=authorities.details&aid=321 (follow “List of Competent Authorities” hyperlink).

48. See Hague Conference on Private International Law, Response France to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008france12.pdf>.

49. *Id.* at 14.

50. *Id.* at 14. By Decree No. 2001-899 of 1 Oct. 2001, the certifications have been removed in accordance with copies of documents issued by the administrative Authorities, with the exception of documents that are intended for foreign governments. Thus, governments, public services and facilities of the State or local governments or companies, banks and agencies controlled by the French state cannot require certification as true copies of documents issued by one of them. *Id.*

51. *Id.* at 3–6.

52. *Authorities: Mexico—Competent Authority*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (JAN. 26, 2012) available at http://www.hcch.net/index_en.php?act=authorities.details&aid=333.

53. *Id.*

54. *Id.*

Mexico has designated a single central Competent Authority; however, the signatures, seals and stamps of local officials and authorities are subject to a certification by a regional authority, whose certificate is in turn subject to an Apostille issued by the Competent Authority.⁵⁵ The goal is to ensure that the Competent Authority only deals with a limited number of signatures, seals, and stamps, for which the Competent Authority is in a position to authenticate.⁵⁶

Mexico does not apply the Hague Convention to simple copies of public documents.⁵⁷

Number of Apostilles Yearly (Mexico)⁵⁸

Year	2003	2004	2005	2006	2007
Amount	13,181	13,563	13,630	13,211	14,279

4. *Argentina*

The only Competent Authority to administer Apostilles is the Ministerio de Relaciones Exteriores y Culto.⁵⁹

Argentina has adopted a multi-step certification process. Most Argentinian documents must go through a process comprising several steps; they will require a chain of signatures before reaching the signature registered in the records of the Competent Authority.⁶⁰ Documents that are considered public

55. See Hague Conference on Private International Law, Response Mexico to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008mexico12.pdf>.

56. *Id.*

57. *Id.* at 15.

58. *Id.* at 8.

59. *Competent Authorities for Argentina*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=authorities.details&aid=306 (“...the Argentine Ministry of Foreign Affairs has signed an Agreement with the Federal Board of Notariat, by which the different Bodies of Notaries Public of Argentina have been authorised to authenticate signatures with the Apostille legalisation. This designation has become in force on 1 Dec. 2003. The Argentine Ministry of Foreign Affairs remains being the authority of Application of the Hague Convention.”).

60. See Hague Conference on Private International Law, Response Argentina to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008argentina12.pdf>.

consist of study certificates, notarial records, legality certificates, health certificates, and judicial documents.⁶¹

Argentina does not apply the Hague Convention to simple copies of public documents. This is because there is a fear that the document may be altered and then the copy will differ from the original.⁶² The legalization of simple copies would necessitate a very thorough examination of the document which would slow the apostille process.⁶³

5. *China*

The Competent Authority in China includes the Chief Executive, the Secretary for Administration and Justice, and the Director of Justice Affairs Department.⁶⁴

China has adopted a one-step apostillization process. Public documents may be presented directly to a relevant Competent Authority for authentication with an Apostille, without the need for previous or intermediate certification of any kind.⁶⁵

China does not apply the Hague Convention to simple copies of public documents because it interprets a simple copy of a public document to be a private document, not falling within the scope of the Hague Convention.⁶⁶

Number of Apostilles Yearly (China)⁶⁷

Year	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Amount	140	294	363	414	460

6. *India*

The Ministry of External Affairs of the Government of India

61. *Id.* at 8.

62. *Id.* at 16.

63. *Id.*

64. *Competent Authorities for China (Macao)*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=authorities.details&aid=634.

65. See Hague Conference on Private International Law, Response China (Macao) to 2008 Questionnaire relating to Apostille Convention (2009), available at http://www.hcch.net/upload/wop/2008china_macao12.pdf.

66. *Id.* at 15.

67. *Id.* at 8.

is the only Competent Authority to issue Apostilles in India.⁶⁸

India has adopted a multiple-step process.⁶⁹ There is one authority in each Indian state for education and personal documents verification; this authority is responsible for verifying the signatures of the issuing authority of these documents.⁷⁰ India does not apply the Hague Convention to simple copies of public documents.⁷¹

Apostilles issued yearly (India)⁷²:

Year	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Amount	N/A	N/A	N/A	N/A	26599

7. *Japan*

The Ministry of Foreign Affairs in Tokyo is the only Competent Authority to issue Apostilles.⁷³

In Japan, documents executed by a registrar (*e.g.*, authenticated copy of the registry) or by a notary public (*e.g.*, notarized deed) must be certified by an intermediate authority before it can be apostillized.⁷⁴ Japan does not apply the Hague Convention to simple copies of public documents.⁷⁵

Apostilles issued yearly (Japan)⁷⁶

68. *Competent Authorities for India*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=authorities.details&aid=643.

69. See Hague Conference on Private International Law, Response India to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008india12.pdf>.

70. *Id.* at 6–7.

71. *Id.* at 10.

72. *Id.* at 3.

73. *Competent Authorities for Japan*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=authorities.details&aid=328.

74. See Hague Conference on Private International Law, Response Japan to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008japan12.pdf> (“the seal affixed on the documents must be certified by the Director-General of the Legal Affairs Bureau to which the registrar/notary public belongs”).

75. *Id.* at 15.

76. *Id.* at 8.

Year	2003	2004	2005	2006	2007
Amount	35,059	38,170	42,097	44,410	52,104

8. *United Kingdom*

The Competent Authority to issue Apostilles in the U.K. includes:

- 1.Foreign and Commonwealth Office,
- 2.Anguilla Government House,
- 3.Bermuda Parliamentary Registry Office,
- 4.British Virgin Islands Government House,
- 5.Cayman Islands Government Administration Building,
- 6.Falkland Islands Government House,
- 7.Civil Status and Registration Office (on behalf of the Governor of Gibraltar),
- 8.Guernsey Legislation Office,
- 9.Isle of Man Courts of Justice,
- 10.Jersey Legislation Office,
- 11.Montserrat Lancaster House,
- 12.The Castle at St. Helena,
- 13.South Georgia and South Sandwich Islands Government House,
- 14.Turcs and Caicos Islands Government House, and
- 15.The High Commissioner for the British Antarctic Territories.⁷⁷

In the U.K., only original public documents are able to be directly eligible for the apostillization process.⁷⁸ Documents which are degrees, diplomas, certificates, qualifications, or other awards can be apostillized if they were issued by an educational establishment if it is registered at one of the following websites:

^{77.} *Competent Authorities for the United Kingdom*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=authorities.details&aid=352.

^{78.} See Hague Conference on Private International Law, Response United Kingdom to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008unitedkingdom12.pdf>.

1. 'Register of Providers' or the 'Recognised Degrees' sections of the Department for Innovation, Universities and Skills (DIUS) website
2. the Scottish Qualifications authority website
3. the National Database of Accredited Qualifications website
4. the British Accreditation Council Website
5. the Open and Distance Learning Quality Council
6. the Association of British Language Schools

Additionally, qualifications which are or were issued by OCR, Edexcel, Higher National Diploma, City and Guilds, National Open College Network, GNVQ or the American Study Abroad Programme in the UK can also be legalised.⁷⁹

The U.K. does not apply the Hague Convention to simple copies of public documents.⁸⁰ Birth, marriage, and death certificates, certain home office documents regarding nationalisation cannot be apostilled even if certified.⁸¹

Apostilles issued yearly (United Kingdom)⁸²

Year	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Amount	227,890	264,566	292,010	339,858	375,782

9. *United States*

The United States has three tiers of authorities competent to issue the apostille certificate. The U.S. Department of State Authentication Office affixes Apostilles to documents issued by federal agencies of the United States.⁸³

The U.S. Department of State, Bureau of Consular Affairs, and Passport Services (Vital Records Section) affixes Apostilles to consular reports of birth, death, and marriage of U.S. citizens abroad, as well as certificates of birth and death originally

79. *Id.*

80. *Id.* at 18.

81. *Id.*

82. *Id.* at 9.

83. *Competent Authorities for the United States*, HAGUE CONF. ON PRIVATE INT'L L. (last visited Jan. 30, 2012), http://www.hcch.net/index_en.php?act=authorities.details&aid=353.

issued by the Panama Canal Zone Government between 1904 and 1979.⁸⁴

The clerks and deputy clerks of the federal courts of the United States are authorized to issue Apostilles on documents issued by those courts.⁸⁵ As an alternative, the U.S. Department of Justice may authenticate the seal of a federal court; the U.S. Department of State Authentications Office will then place an Apostille over that seal.⁸⁶

Public documents issued by U.S. states, the District of Columbia, and other U.S. jurisdictions may be legalized with an Apostille by designated authorities in each jurisdiction, generally the state secretary of state's office.⁸⁷

The various states of the United States have different practices in the apostillization process. Twenty-five states allow a one-step process, wherein public documents may be presented directly to a relevant Competent Authority for authentication with an Apostille, without the need for any previous or intermediate certification of any kind.⁸⁸

Five states follow a multi-step process, wherein public documents need to be somehow certified before they may be presented to a relevant Competent Authority for authentication with an Apostille.⁸⁹

Four states in the U.S. apply the Hague Convention to simple copies of public documents, allowing the apostillization of these documents regardless of the character of the original.⁹⁰ However, twenty-four states do not apply the Hague Convention to simple copies of public documents.⁹¹ Twenty-three U.S. states responding commented that, while the underlying document

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See Hague Conference on Private International Law, Response United States of America to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008usa12.pdf>.

89. *Id.* at 18.

90. *Id.* at 24.

91. *Id.*

may be a copy, the notarization cannot be.⁹² In some U.S. states, the document signatures must be original.⁹³ Certified copies of vital records (birth certificates) must be original from the records custodian.⁹⁴

Apostilles issued by the U.S. Department of State⁹⁵

Year	2003	2004	2005	2006	2007
Amount	Not Available	3213	3639	10907	15248

Apostilles issued by each U.S. state⁹⁶

State	2003	2004	2005	2006	2007
Oregon	14407	12241	12240	10886	12071
New York	97430	120786	170042	151852	160142
Idaho	2062	2902	2593	2731	2372
New Mexico	2500	2790	2900	3000	3100
Maryland	22822	24797	22201	21020	19216
Wisconsin	16235	18375	16261	17190	14042
Missouri	16907	20186	21995	21256	17863
Oklahoma	1719	5459	4578	5774	4891
Ohio	40927	41315	37438	35009	32330
Rhode Island	6000	6200	6400	7200	7200
N. Dakota	805	0	1448	0	1185
California	93445	105680	115548	142296	141177
Colorado	13209	16284	16508	18717	21918
Nebraska	669	3067	2729	2520	2824
Texas	64345	73082	70655	79911	84670
Georgia	23513	28746	25630	27248	29351
Wyoming	3179	4070	3778	5427	3413
Nevada	12433	1140	13528	13811	15732
Pennsylvania	30718	37997	35548	35765	35705

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 12.

96. *Id.* at 13.

Washington	24555	25044	28551	29870	28959
Vermont	2785	3131	3549	2810	2984
South Dakota	727	1451	1105	833	843
Alaska	2021	2068	1883	1928	1794
Montana	0	0	0	1383	1160
Kansas	1	1	6130	6027	6545
Illinois	0	61862	60836	71127	0
Maine	0	0	0	4583	3581

10. *South Africa*

The South African Competent Authority includes:

1. "Any magistrate or additional magistrate,"
2. "Any registrar or assistant registrar of the Supreme Court of South Africa,"
3. "Any person designated by the Director-General: Justice," and
4. "Director-General: International Relations and Cooperation."⁹⁷

In South Africa, only original public documents are able to be directly eligible for the apostillization process.⁹⁸ Diplomas, other education documents, and certified copies of documents that are considered public documents must be certified first by one of the national government departments, a public notary, or by the chambers of commerce before these documents may be apostillized.⁹⁹ South Africa does not allow for the apostillization of simple copies, no matter the character of the original.¹⁰⁰

Apostilles issued yearly (South Africa)¹⁰¹

97. *Competent Authorities for S. Africa*, HAGUE CONF. ON PRIVATE INT'L L. (last visited Jan. 30, 2012), http://www.hcch.net/index_en.php?act=authorities.details&aid=345.

98. See Hague Conference on Private International Law, Response S. Africa to 2008 Questionnaire relating to Apostille Convention (2009), *available at* <http://www.hcch.net/upload/wop/2008southafrica12.pdf>.

99. *Id.* at 12.

100. *Id.* at 16.

101. *Id.* at 9.

Year	2003	2004	2005	2006	2007
Amount	N/A	5625	9339	7749	7574

III. THE PROBLEM OF FRAUDULENT DOCUMENTS ABUSING THE HAGUE CONVENTION

The Hague Apostille Convention, as mentioned earlier, has an exploitable loophole in the way it applies to copies of public documents. Recorded oil and gas leases, deeds of mineral transference, deeds of real estate transference, and affidavits of use and possession to the public are all public documents within the meaning of public documents in the Hague Apostille Convention.¹⁰²

The application of the Hague Apostille Convention to copies of public documents was discussed at the 2003 Special Commission at Conclusion and Recommendation No. 11,¹⁰³ and concluded that the Hague Apostille Convention applies to copies of public documents presented as certified copies.¹⁰⁴

The Permanent Bureau released a 2008 a special report dealing with the problem of fraudulently issued certified copies of apostillized diplomas. Alarming, the report suggests that a certified copy of a document, public or private, may be submitted to be apostillized, and the private certified copy is also conceived to be within the meaning of public documents under the Hague Apostille Convention.¹⁰⁵

102. *See supra* Section II(A)(i).

103. "Regarding the application of an Apostille to a certified copy of a public document, the [Special Commission] concluded that Article 1 of the [Hague] Convention applies. Individual States, however, may decline to issue an Apostille to a certified copy of a document on the grounds of public policy." *Evidence and Service Conventions, supra* note 37, ¶ 11.

104. *See id.* According to *The Application of the Apostille Convention to Diplomas Including Those Issued by Diploma Mills*, by the Permanent Bureau, "A *certified* copy is a reproduction of a public document that has been compared to the original, and issued with a certificate by a public authority, such as a notary, indicating that the reproduction is a genuine copy of the original. The certification in no way refers to the contents of the copied document." *The Application of the Apostille Convention to Diplomas Including Those Issued By Diploma Mills*, The Permanent Bureau, Dec. 5, 2008, n.16.

105. *Apostille Convention to Diplomas, supra* note 104, ¶¶ 11–12.

When a Competent Authority is requested to apostillize a certified copy of a document, the Competent Authority, and the Apostille affixed, makes only the assertion that the apostillized document is a true and factual facsimile of the original document.¹⁰⁶

The Apostille seal makes no statements of the contents of the document itself.¹⁰⁷ However, as the 2008 report on diplomas notes, this difference is often lost on a foreign receiver of such fraudulent documents.¹⁰⁸

The case of St. Regis University (“SRU”) exemplifies the vulnerabilities of the Hague Apostille Convention.¹⁰⁹ According to a 2008 indictment, SRU was a diploma mill in the business of producing false academic credentials, and one of its services offered was the apostillization of the fraudulent documents in an effort to lend these documents an air of authenticity.¹¹⁰ According to the special report on diplomas by the permanent bureau, SRU managed to perpetrate this deception thusly:

In March 2002, an individual, Mr Novak, was hired by SRU to obtain Apostilles and authentications. Mr Novak would travel to Washington, DC to purchase the necessary Apostilles and authentications for the diplomas. This process had several steps. Mr Novak first went to see a notary, who notarized “Authentication Attestations”. This, as stated in the interviews, indicated that the notary recognised that

106. *Service and Access to Justice Conventions*, *supra* note 39, ¶ 74 (noting that where a certified copy is issued by the same authority that issued the original document, States who regard the certified copy as a certified copy and not a duplicate original, an affixed Apostille relates only to the authenticity of the certificate).

107. *Id.* at ¶ 82.

108. Apostille Convention to Diplomas, *supra* note 104, ¶¶ 4–5.

109. *See generally* Indictment, U.S. v. Randock, No. CR-05-0180-LRS (E.D. Wash. Oct. 5, 2005); Press Release, U.S. Att’y E.D. Wash., Owners & Emps. Of Diploma Mill Indicted for Conspiracy to Commit Wire Fraud, Mail Fraud and Money Laundering, *available at* http://www.hep.uiuc.edu/home/g-gollin/pigeons/usa_press_release.htm (discussing indictment of individuals who owned several diploma mills, including “Saint Regis University,” on charges including conspiracy to manufacture, print, and sell fraudulent diplomas).

110. The Application of the Apostille Convention to Diplomas Including those Issued by Diploma Mills, Hague Conference on Private International Law, Permanent Bureau, Dec. 2008, Prel. Doc. No. 5 at 19.

“the signature on that [Authentication Attestation] was true”. According to the interviews, these “Authentication Attestations” appear to be documents presented by Mr. Novak to the notary, when he should have in fact presented the diploma. He admits he never saw a “complete package” containing the Apostille or authentication and the diploma be sent out. After obtaining the notarization of the “Authentication Attestations”, Mr. Novak went to the United States Department of State to obtain an Apostille or an authentication for the Notarial certificate of the “Authentication Attestation.”

Mr. Novak’s statement regarding Apostilles and authentications highlights potential misuse of Apostilles and authentications, “he said the Apostilles and authentications essentially didn’t say anything.” He said “you could have attached a dog license to the paperwork.”¹¹¹

U.S. v. Goodyke is yet another example of a situation where individuals had documents fraudulently apostilled.¹¹² In *US v. Goodyke*, Mr. Larry Goodyke and Mr. David Robinson sold forged documents accompanied with an apostille.¹¹³ Goodyke and Robinson would create fraudulent diplomatic identification cards and fraudulent “diplomatic immunity” cards to buyers who thought that the cards were authentic.¹¹⁴ As part of the ploy to make the cards seem more authentic, Goodyke and Robinson would attach an apostille to the cards and include an apostille number.¹¹⁵ Specifically, the documents contained “a seal of the United States Department of State in the lower left corner, said “State of Kansas” on the top, and bore the seal and signature for the Kansas Secretary of State’s office.”¹¹⁶

The apostille numbers used were not fakes; they were actual apostilles that were issued by the Kansas Secretary of State.¹¹⁷

111. *Id.* at 19–20.

112. *See generally* *U.S. v. Goodyke*, 639 F.3d 869 (8th Cir. 2011).

113. *Id.* at 871.

114. *Id.*

115. *Id.* at 871–72.

116. *Id.* at 872.

117. *See* *U.S. v. Goodyke*, 639 F.3d 869, 872 (8th Cir. 2011) (explaining that most of

At the trial level, the defendants were convicted of conspiracy to produce fraudulent diplomatic identification cards and for wrongfully using the Kansas Department of State seal.¹¹⁸ On appeal, the defendants argued that the evidence was not sufficient to support their convictions for both crimes.¹¹⁹ The court found that the evidence was sufficient using the deferential sufficiency of the evidence standard.¹²⁰ One of the relevant facts established by the trial court was that Goodyke knew that “wrongfully obtaining an apostille and misusing the seal was illegal.”¹²¹

Goodyke and Robinson were able to obtain multiple apostilles from the same official without being discovered by that official.¹²² They were only discovered after they attempted to sell a forged document with an apostille to an undercover police officer.¹²³

Until now, there have been no uniform efforts to prevent or correct the problem presented here.¹²⁴

IV. ELECTRONIC APOSTILLIZATION

Other than the issue with fraudulent documents, the Hague Convention also fails to provide guidance to electronic affixation of an Apostille to a public document. In an era of growing electronic commerce, there is a pressing need to give a framework in order to modernize the apostillization process.

The drafters of the Apostille Convention could not envisage – for obvious reasons – the use of modern technologies. In 2003, however, the Special Commission (2003 SC) examining the

the apostilles and apostille numbers used by the defendants were issued by the Kansas Secretary of State’s office).

118. *Id.* at 871.

119. *Id.* at 872.

120. *Id.* at 872–73.

121. *Id.* at 873.

122. *U.S. v. Goodyke*, 639 F.3d 869, 872 (8th Cir. 2011).

123. *Id.* at 872.

124. The latest official word from the Hague Convention is the report from the 2009 Special Convention. In it, the problem of apostillizing fraudulent documents is foisted on the various member states. *See Service and Access to Justice Conventions*, supra 39, ¶¶ 73–75.

practical operation of the Apostille Convention emphasized that the Apostille Convention operates “in an environment which is subject to important technical developments” and “that modern technologies are an integral part of today’s society and their usage a matter of fact”.¹²⁵

In this respect, the 2003 SC also expressly noted “that the spirit and letter” of the Hague Apostille Convention do “not constitute an obstacle to the usage of modern technology” and that its application and operation “can be further improved by relying on such technologies.”¹²⁶ The 2003 SC further explained that “the use of information technology could have a positive impact on the operation of the Hague Convention, in particular through lowering costs and increasing the efficiency of the creation and registration of Apostilles.”¹²⁷ Finally, the 2003 SC “recommended that States party [to the Hague Convention] and the PB [the Permanent Bureau] should work towards the development of techniques for the generation of electronic Apostilles.”¹²⁸

It is against this background that the electronic Apostille Pilot Program (e-APP) was launched by the Hague Convention on Private International Law (in co-operation with the National Notary Association of the U.S.A.) in 2006.¹²⁹ This innovative program not only allows for dramatic cost savings, but also offers very effective means to combat fraud and leads to a level of security of Apostilles which by far exceeds current standards in a paper-only environment.¹³⁰ The e-APP has two components: the issuance of electronic Apostilles (“e-Apostilles”) and the operation of electronic registers (“e-Registers”).¹³¹ These two

125. Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille Evidence and Service Conventions, Hague Conference on Private International Law, Oct. 28 to Nov. 4, 2003.

126. *Id.*

127. *Id.*

128. *See id.* ¶¶ 4, 7, 23–24.

129. *See* Hague Conference on Private International Law, Response Australia to 2008 Questionnaire relating to Apostille Convention (2009), *available at* <http://www.hcch.net/upload/wop/2008australia12.pdf>.

130. *Id.*

131. *Id.*

components are independent from each other; they may be implemented simultaneously or consecutively, in no specific order.¹³² Under the e-APP model for e-Apostilles, a Competent Authority may use out-of-the box PDF technology to issue e-Apostilles and digitally sign these Apostilles with the help of a digital certificate.¹³³

As regards the operation of e-Registers, the e-APP offers fully open-source software which enables any Competent Authority to register all of the Apostilles that it issues (independently of whether they have been issued in paper or in electronic form) in an e-Register, which is accessible online.¹³⁴ If used, any person presented with a purported Apostille may go online, access the relevant e-Register and check the origin of the Apostille with the help of the date and number that the Apostille certificate bears.¹³⁵ It is important to stress that both techniques put forward under the e-APP, *i.e.*, the PDF solution for e-Apostilles and the open-source software for e-Registers, are suggestions only – any Competent Authority may of course buy or develop any other (proprietary) software to achieve the same results.¹³⁶

Under the Hague Convention, an Apostille validly issued in one contracting state must be accepted in another contracting state. Not extending this basic principle to e-Apostilles would provide the receiving contracting states with more power in the electronic world than they have in the paper world.¹³⁷

Such a result would be very unsatisfactory, all the more so since the use of e-Apostilles is much more secure than paper Apostilles.¹³⁸

As such, the permanent bureau needs to adopt a uniform set of guidelines and requirements for e-Apostilles. In fact, the

132. *Id.*

133. *Id.*

134. See Hague Conference on Private International Law, Response Australia to 2008 Questionnaire relating to Apostille Convention (2009), available at <http://www.hcch.net/upload/wop/2008australia12.pdf>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

2009 Special Commission specifically acknowledges the need to further develop the E-App, “[t]he SC recognises that the implementation of the e-Apostille component of the e-APP presents questions that are not raised by traditional paper Apostilles and encourages States Parties, Members of the Hague Conference and the Permanent Bureau to continue considering these questions through the exchange of technical and legal information.”¹³⁹

Fortunately, this process of homogenization has been under development in the United States for electronic notarization purposes, and proposed solutions within this context may be highly applicable to any e-APP proposals that the permanent bureau or the special convention may decide to utilize.

V. ELECTRONIC NOTARIZATION IN THE UNITED STATES

During the past decade, electronic notarizations have played an increasing role in electronic commerce and other official transactions, saving businesses, as well as state and local governments, millions of dollars each year in transaction, processing, and storage costs while adding convenience to the process. New state and federal laws, such as the 2000 Electronic Signatures in Global and National Commerce Act (“E-SIGN”), authorize every state-commissioned notary in the nation to use electronic signatures in performing official acts.¹⁴⁰

Like the traditional, paper-based process, electronic notarizations must meet legal and technical requirements in order to be considered valid and binding. While the Revised Uniform Law on Notarial Acts and the updated Model Notary Act contain electronic notarization provisions, most state laws use the 1999 Uniform Electronic Transactions Act (“UETA”) as their starting point, or template.¹⁴¹ UETA was designed to facilitate electronic commerce and government transactions by making electronic records and digital signatures legally

139. *Service and Access to Justice Conventions*, supra 39, ¶ 98.

140. 15 U.S.C. § 7001 (2000).

141. National Conference of State Legislatures, *Uniform Electronic Transaction Act*, <http://www.ncsl.org/issues-research/telecommunications-information-technology/uniform-electronic-transactions-acts.aspx> (last visited Jan. 31, 2012).

equivalent to paper documents and manual signatures.¹⁴² Approved and recommended in 1999 by the National Conference of Commissioners on Uniform State Laws, now called the ULC, UETA has been adopted in forty-eight states and the District of Columbia.¹⁴³ A synopsis of the laws of electronic notaries of the various states is provided in the Appendix.

A. *The Proposed Solution to the Electronic Notarization Problem*

The Model Notary Act (“MNA”), published in 1973 by the National Notary Association and updated in 2010, covers most notarization subject areas.¹⁴⁴ More than forty states and territories have adopted provisions from the MNA.¹⁴⁵ The stated

142. *Uniform Electronic Transactions Act*, Prefatory Note (1999), http://www.law.upenn.edu/bll/archives/ulc/ecom/ueta_final.pdf.

143. Uniform Law Commission, *Legislative Fact Sheet—Electronic Transaction Act*, <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Electronic%20Transactions%20Act> (last visited Jan. 31, 2012). Only Illinois and New York have not adopted UETA. However, each of these states has similar laws.

144. National Notary Association, *Forward to Model Notary Act*, (Jan. 1, 2010), http://www.nationalnotary.org/userimages/2010_Model_Notary_Act.pdf.

145. *Model Notary Act Adoptions* (2010), http://www.nationalnotary.org/userimages/US_Jurisdictions_%20Adopting_Model_Notary_Act.pdf. Either by legislation, administrative rule or gubernatorial executive order, over 40 U.S. states and territorial jurisdictions have adopted provisions of the National Notary Association’s Model Notary Act (MNA) in one or more of its 1973, 1984 and 2002 versions. (The 1973 version was titled the Uniform Notary Act.) The following 12 jurisdictions are among those that have adopted extensive portions of the MNA:

American Samoa: 2002 MNA by legislative enactment. Also, the National Notary Association’s Code of Professional Responsibility was adopted as a training text for the Territory’s notaries public.

California: 1973 MNA by legislative enactment. This landmark bill included requirements for notary journal signatures and for fingerprinting of commission applicants.

Guam: 1984 MNA by legislative enactment. Spearheaded by Guam’s Attorney General, the Act was codified into statute virtually verbatim and *in toto*.

Massachusetts: 2002 MNA by Governor’s executive order. This was the first instance in modern times of a state governor establishing comprehensive rules of conduct for notaries.

Mississippi: 2002 MNA by administrative rule. Mississippi’s Secretary of State adopted the Act’s long-needed modernizations to compensate for legislative disinterest in notary reforms.

Missouri: 1973 MNA by legislative enactment. Spearheaded by Missouri’s Secretary of State, the legislation updated and expanded the state’s notary statutes.

purpose of the 2010 MNA is to extend the aims of the 2002 MNA, that of protecting the public from fraud by switching the role of the notary from a passive to a proactive one, into the realm of electronic certification.¹⁴⁶ The division of the 2010 MNA into three different sections, with the first two dealing with traditional practices and rules of notarization and the last dealing entirely with electronic certification, emphasizes this stated goal.¹⁴⁷ As such, the MNA is the most comprehensive and developed proposed solution to the issues that face electronic notarization.

Chapter 16 of the MNA delineates the process for registering as an electronic notary.¹⁴⁸ The drafters firmly believed that requiring a notary to obtain an additional commission in order to operate electronically would impose an impediment in violation of E-SIGN's already existing permission, not to mention an administrative hardship on the commissioning body.¹⁴⁹ The drafters, however, also believed it to be in the public interest and a reasonable accommodation to have some

New Mexico: 2002 MNA by legislative enactment. This established long-needed statutory rules based extensively on the Act's definitions, prohibitions and operating practices.

North Carolina: 2002 MNA by legislative enactment. Spearheaded by North Carolina's Secretary of State, the new law drew from both paper-based and eNotarization articles of the Act.

Northern Marianas Islands: 1984 MNA by legislative enactment. The Pacific island Commonwealth embraced the Act in its statutes virtually verbatim and *in toto*.

Rhode Island: 2002 MNA by Governor's executive order. Rhode Island's Governor and Secretary of State collaborated to put in place a fraud-deterrent code of conduct for notaries.

Virginia: 2002 MNA by legislative enactment. Spearheaded by Virginia's Secretary of the Commonwealth, the bill drew from both the paper-based and eNotarization articles.

West Virginia: 1973 MNA by legislative enactment. This pioneering legislation was one of the very first comprehensive revisions and modernizations of notary statute in the 20th century.

National Notary Association, *Model Notary Act Adoptions* http://www.nationalnotary.org/userimages/US_Jurisdictions_%20Adopting_Model_Notary_Act.pdf (accessed Dec. 24, 2010).

146. Model Notary Act, *supra* note 144.

147. *Id.*

148. National Notary Association, Model Notary Act art. III, ch. 16, general cmt.

149. *Id.*

governmental oversight over electronic notaries.¹⁵⁰ Such oversight would at the very least enable the commissioning body to authenticate a notary's electronic acts and to investigate an electronic notary's conduct in disciplinary matters.¹⁵¹

Attempting to balance the administrative hardship and need to ensure proper electronic certification, the MNA requires that the applying notary register the capability to electronically certify documents.¹⁵² Approval of this registration is subject to the applicant's completion of a special course on electronic certification and successful passing of the ensuing examination.¹⁵³ In this way, the MNA places an additional layer of qualification required to allow a conventional notary to also be an electronic notary. To ease administrative burdens, an electronic commission is valid as long as the underlying conventional commission is valid.¹⁵⁴ The commissioning provision of the MNA offers a ready solution that is directly applicable to the Hague Apostille Convention. In order to ensure both quality of Apostille certifications and administrative ease, Competent Authority from the various nations should conform to similar requirements as in the proposed MNA.

Other than the additional requirement of registration, an electronic notary is tasked with the same requirements and duties as the conventional notary, and the same prescribed notarial acts which the notary may provide.¹⁵⁵ The same duty to evaluate both the state of mind of the principal and the notary persists herein as with conventional notaries.¹⁵⁶

B. The MNA and Foreign Languages

In providing notarial services, the MNA requires that the notary public only provide these services if the principal:

1. is in the presence of the notary at the time of

150. *Id.*

151. *Id.*

152. *Id.* art. III, ch. 16, § 1.

153. *Id.* art. III, ch. 16, § 2.

154. *Id.* art. III, ch. 16, § 3.

155. *Id.* art. III, ch. 17, §§ 1–2.

156. *Id.* art. III, ch. 17, § 2.

- notarization;
2. is personally known to the notary or identified by the notary through satisfactory evidence;
 3. appears to understand the nature of the transaction requiring a notarial act;
 4. appears to be acting of his or her own free will;
 5. signs using letters or characters of a language that is understood by the notary; and
 6. communicates directly with the notary in a language both understand.¹⁵⁷

The first two requirements are fairly universal to almost all jurisdictions, and indeed the Hague Apostille Convention,¹⁵⁸ However, where the MNA departs from the laws of most other jurisdictions is the switch from a passive to an active role, and the switch from an emphasis on the state of mind of the principal to the state of mind of the notary.¹⁵⁹

Subparagraphs (3) and (4) places duties upon the notary further than requiring mere identification. The former follows the lead of two jurisdictions (*see* FLA. STAT. ANN. § 117.107(5); and GA. CODE ANN. § 45-17-8(b)(3)) requiring the notary to assess whether or not the principal is aware of the significance of the transaction involving the notarial act.¹⁶⁰

The comment to Section 5-2 further defines that duty:

The provision does not require the notary to inquire into the principal's knowledge or understanding of the document to be notarized. Nor does it mandate that the notary actively inquire into or investigate the transaction. Instead, it demands that the notary form a judgment from the circumstances as to whether or not the principal is generally aware of what is transpiring. Thus, if a principal presented a document entitled "power of attorney" and then asked the notary to notarize "this contract to purchase a burial plot," the notary might have a basis to determine that the

157. *Id.* art. II, ch. 5, § 2.

158. *See* Hague Apostille Convention, *supra* note 1, at 1409.

159. National Notary Association, Model Notary Act art. II, ch. 5, § 2.

160. Model Notary Act, *supra* note 144, art. II, ch. 5, § 2 cmt.

principal was not aware of the transaction to which the notarization related. Usually, this provision will become critical only when the notary believes the principal suffers from mental infirmity. It also can come into play, however, for principals who are operating under the heavy influence of alcohol or drugs. It is expected that the notary will make a commonsense judgment about the principal's level of awareness, mainly through conversing with and observing the individual.¹⁶¹

Subsection 4 is similar to and evolves from the duty imposed upon the notary public in subsection 3. That duty is explained by the comments to 5-2:

In Subparagraph (4), the issue is volition. The subparagraph reinforces the view that a signing is the voluntary and intended act of the principal. If the principal is being unduly influenced by another or is acting under duress, the notary should not perform the notarization. As is the case with "awareness," notaries should pay close attention to principals who appear to have mental infirmities, as they are more susceptible to manipulation and exploitation by a third party.¹⁶²

Subsections 5 and 6 further develops the duty of the notary by an inquiry not of the state of mind of the principal in either its capacity or volition, but rather questions the state of mind of the notary, and whether the notary has the ability to assess the capacity or volition of the principal. The notary is prohibited from notarizing a document if the notary cannot comprehend the principal.¹⁶³

Subsection (5) recognizes that notaries may be asked to notarize a signature written in a foreign language or in characters they cannot understand.¹⁶⁴ As a result, a notary may not be able to make a meaningful comparison of a signature affixed on a document with another signature or a printed name appearing on an identification document.

161. *Id.* art. II, ch. 5, § 1 cmt.

162. *Id.*

163. *Id.* art. III, ch. 17, § 2.

164. *Id.* art. II, ch. 5, § 2 cmt.

Subparagraph (6) takes a similar tack with respect to the notary's ability to communicate with the principal. If, for example, the notary cannot understand the spoken words of the principal, a meaningful judgment about this individual's awareness or volition cannot be made Moreover, a notary must not rely on an interpreter to communicate with the principal. Doing so would establish a dangerous policy. For any variety of reasons, an intermediary may not be capable or motivated to accurately represent the words of the principal or the notary. This subsection eliminates the risk of notarizing a document for someone the notary cannot understand.¹⁶⁵

This Article's author recommends that this provision of the MNA be included in the next special commission convened to interpret the Hague Apostille Convention, with the additional requirement that the Competent Authority place the official language not only of the nation issuing the Apostille, but also the official language of the nation receiving the Apostille upon any certifications.

VI. ELECTRONIC NOTARIZATION AS A MEANS TO LIMIT PRODUCTION OF FRAUDULENT DOCUMENTS

While the problem presented in section III of this Article has thus far been untouched by the Hague Apostille Convention, the MNA does present a possible method of solving this problem via the establishment of an electronic database that records basic information on each Apostille act. Such a system has already been implemented piecemeal by the various signatories to the Hague Apostille Convention.¹⁶⁶ This system has the various signatories maintain their own registers, keeping record of the Apostille certificate number, the certification date, the name of person signing the document and his capacity, and the seal of same if unsigned.¹⁶⁷ In order to limit the production of

165. *Id.*

166. *Implementation Chart of the E-App*, National Notary Association, http://www.hcch.net/upload/impl_chrt_e.pdf (last visited Jan. 27, 2012).

167. User's Guide for e-App e-Register Version 3.2, *available* at http://www.e-app.info/documents/eregister_user_guide_3.2.pdf, pg. 14 (last visited Apr. 27, 2012).

fraudulent documents, this Article's author recommends that the register also include information on the nature of the document (copy or original), and whether the certification is for the validity of the document itself or the validity of the certification of a copy.

VII. CONCLUSION

The Hague Apostille Convention revolutionized the exchange of public documents among different nations and jurisdictions. However, the demands of progress are such that the Treaty itself is in danger of becoming obsolete if it cannot overcome its own shortcomings and vulnerabilities to abuse, and if it cannot serve as the basis for the development of electronic certification of foreign documents. The Hague Apostille Convention has made significant headways into such development by the e-APP, and the success of this program only evidences the need for further development. In order for the Hague Apostille Convention to remain relevant to its signatories, it must further develop its electronic databases and practices, using a system similar to that which is envisioned when the MNA is finally implemented.

VIII. APPENDIX (STATE ELECTRONIC NOTARIZATION LAWS)

A. *Alaska*

A notary public may use an electronic signature and electronic seal to notarize an electronic document according to regulations adopted by the Lieutenant Governor.¹⁶⁸

B. *Arizona*

An individual must apply to the Secretary of State for an electronic notary commission and register an approved electronic notary token. A document notarized electronically must include an electronic notary token containing the notary's name, commission number, commission expiration date, a link to the notary's commission record on the Secretary of State's website, and a time and date statement.¹⁶⁹ An electronic notarization is performed in the presence of the electronic notary. The electronic document must also include the notary's electronic signature. The electronic notary token and electronic signature must be linked to the document in a way that both are invalidated if the document changes. An electronic signature must be unique to the notary, capable of verification, and under the notary's sole control. An electronic notary must keep a journal of all electronic notarial acts.¹⁷⁰

C. *California*

When a document is filed with the electronic recording delivery system, a notary seal or stamp requirement is met if the electronic signature of the notary contains the notary's name, title, jurisdiction, the notary's sequential identification

168. ALASKA STAT. ANN. §§ 44.50.063-.065 (West 2010). A summary of revisions to Alaska's notary laws in 2005 states that this language was added to accommodate future electronic notarization procedures. A search of Alaska Regulations and the Alaska Administrative Code indicates that electronic notary regulations have not yet been adopted.

169. ARIZ. ADMIN. CODE §§ R2-12-1201 to 1204 (2011).

170. ARIZ. REV. STAT. §§ 41-351 to 355(2010). Arizona Revised Statutes § 41-356 authorized electronic notarization without the presence of an electronic notary. That provision was repealed in 2010 by Ariz. Sess. L. ch. 313).

number (if any), and seal vendor's sequential identification number (if any).¹⁷¹

D. Colorado

A notary must file a notice of intent with the Secretary of State to notarize electronically. Electronic notaries are issued document authentication numbers. This includes a system validation number and a series of randomly generated document authentication numbers. A notary must take reasonable measures to secure the authentication numbers against access or use by other persons. When used together on an electronic document, the system validation number and random authentication number constitutes the notary's electronic signature. The notary's title, state, and commission expiration date must accompany the document authentication number. A notary may use an alternative electronic signature instead of document authentication numbers, in which case the notice of intent must describe the technology that will be used to perform electronic notarizations. An electronic notary must maintain a log of electronic notarizations acts.¹⁷²

E. Delaware

In order to electronically notarize documents, an individual must complete an electronic notary education course and register with the Secretary of State. The application must describe the type of technology that will be used. When notarizing an electronic document the notary must use an electronic signature and an electronic seal which contains the notary's title, state, and commission expiration date. The electronic seal and signature must be attached to the electronic document in a manner that is capable of independent verification and prevents any subsequent changes or modifications to the electronic document. An electronic notary

171. CAL. GOV'T. CODE § 27391 (2011). While this particular law does not define electronic signature, California has adopted UETA, which requires that the electronic signature be attached to or logically associated with the electronic record. *See* CAL. GOV'T. CODE ANN. § 1633.11 (2010).

172. 8 COLO. CODE REGS. §§ 1505-11 (LexisNexis 2012).

must only notarize an electronic document when the signer of the document is personally present. The electronic notary's electronic seal and signature must remain under the notary's exclusive control. An electronic notary must maintain a journal of electronic notarizations.¹⁷³

F. Florida

When electronically notarizing a document the notary's electronic signature must be attached to or logically associated with the electronic document in a manner that any subsequent alteration to the electronic document displays evidence of the alteration. When a seal is required, that requirement is satisfied if the electronic signature must contain the notary's name, title, commission number, and commission expiration date. The notary's electronic signature must be unique to the notary, capable of independent verification, and under the notary's sole control.¹⁷⁴

G. Illinois

County recorders are only required to record documents containing electronic signatures and notary acknowledgements that they have the technology to support. Any electronic signature or notarization submitted to a county recorder must comply with all applicable state and federal laws, including the Illinois Notary Public Act.¹⁷⁵

H. Kansas

In order to electronically notarize documents, an individual must complete an electronic notary course, pass an electronic notary exam, register with the Secretary of State, and obtain a digital certificate authorized by the Secretary of State. For each electronic notarization, the notary must use a digital signature. A notarial certificate must be attached to or logically associated with the electronic document. An electronic notary must only notarize an electronic document if the principal appears in

173. DEL. CODE ANN. tit. 29, §§ 4302, 4309, 4310, 4314 (West 2011).

174. FLA. STAT. ANN. § 117.021 (West 2010).

175. ILL. ADMIN. CODE tit. 14, pt. 1400.30 (2011).

person before the notary at the time of electronic notarization.¹⁷⁶

I. Michigan

A notary may use an electronic process to notarize a record if the electronic process contains the notary's name, title, jurisdiction, commission expiration date, and date of the notarial act.¹⁷⁷

J. Minnesota

A notary public must register the capability to notarize electronically with the Secretary of State. A notarized electronic document must contain a notarial certificate with notary's electronic signature and electronic seal. An electronic seal must contain the notary's name, jurisdiction, and commission expiration date, and must be logically and securely affixed to or associated with the electronic record being notarized.¹⁷⁸

K. Nevada

An individual who has been a notary in Nevada for at least four years may apply to the Secretary of State to become an electronic notary. The application must identify the technology approved by the Secretary of State that the notary will use for an electronic signature. The applicant must complete an electronic notary education course and pass an exam. The notary's electronic signature, electronic seal, and wording of the notarial certificate must be attached to or logically associated with the electronic document, and immediately perceptible and reproducible in the electronic document. An electronic notary must not electronically notarize a document for a person unless that person is in the electronic notary's presence at the time of notarization. The electronic signature and seal must remain under the electronic notary's exclusive control. An electronic notary must maintain a journal of electronic

176. KAN. STAT. ANN. §§ 7-43-2 to 4 (2010).

177. MICH. COMP. LAWS ANN. § 55.287 (West 2011).

178. MINN. STAT. ANN. §§ 358.47, 359.01-.03 (2010).

notarizations.¹⁷⁹

L. New Mexico

An electronic notary must register with the Secretary of State and identify the technologies that will be used in conducting electronic notarizations. An electronic notary must not electronically notarize a document for a person unless that person is in the electronic notary's presence at the time of notarization. In electronically notarizing a document, the notary's electronic signature, electronic seal, and electronic notarial certificate, must be attached to or logically associated with the electronic document such that removal or alteration of any of these components is detectable and will render evidence of alteration of the document containing the notary certificate which may invalidate the electronic notarial act. An electronic notary signature and seal are reliable if they are unique to the notary, capable of independent verification, under the notary's sole control, attached to or logically associated with the electronic document, and linked to the document such that subsequent alterations to the document are detectable and will render evidence of the alteration of the document containing the notarial certificate which may invalidate the electronic notarial act. An electronic image of the seal does not need to accompany an electronic signature.¹⁸⁰

M. North Carolina

A notary must register the capability to notarize electronically with the Secretary of State and describe the technology that will be used to create the notary's electronic signature. An electronic notary must take an electronic notary education course and pass an exam. An electronic notarization must not be performed unless the signer of the electronic document is in the presence of the electronic notary at the time of notarization.¹⁸¹ When notarizing an electronic document, the electronic signature and seal must be attached or

179. NEV. REV. STAT. ANN. §§ 240.192, .195, .198, .199, .201, .202 (West 2010).

180. N.M. ADMIN. CODE §§ 12.9.2.8-.9, .11 (2010).

181. N.C. GEN. STAT §§ 10B-106, -107, -116 (West 2010).

logically associated with the document, linking the data in such a manner that any subsequent alterations to the underlying document or electronic notary certificate are observable through visual examination. An image of the electronic notary's seal and handwritten signature must appear on any visual or printed representation of an electronic notary certificate regardless of the technology being used to affix the electronic notary's electronic signature and seal. The physical appearance of the electronic seal must replicate the appearance of an ink seal on paper and contain the notary's title, name, state, and county of commission. The electronic notary seal and signature must be independently verifiable, unique to the notary, and under the notary's sole control. An electronic notary solution provider must meet all applicable criteria and apply to the Secretary of State for approval. Access to electronic signature and seals must be protected by a password, token, biometric, or other form of authentication approved by the Secretary of State.¹⁸²

N. Pennsylvania

A notary must apply to the Department of State to become an electronic notary. The individual for whom an electronic notarization is performed must personally appear before the notary. When electronically notarizing a document, the notary's name, title, jurisdiction, and commission expiration date must be attached to or logically associated with the electronic record. An electronic notary must use a digital certificate from an approved electronic notary solution provider.¹⁸³ An electronic notary solution provider may apply to the Department of State for review and approval.¹⁸⁴ The electronic seal provided by the electronic notary solution provider must be unique to the notary, capable of independent verification, under the notary's sole control, attached to or logically associated with the electronic document, and linked to

182. 18 N.C. ADMIN. CODE 07C.0401 .0402, .0501, .0604 (2010).

183. 35 Pa. Bull. 7068 (Dec. 31, 2005); *see also* 57 PA. CONS. STAT. ANN. § 158 (West 2011).

184. 40 Pa. Bull. 2065 (Apr. 17, 2010).

the data in a way that that any subsequent alterations to the underlying document or electronic notarial certificate are detectable.¹⁸⁵

O. Texas

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.⁹² The person for whom the electronic notarization is performed must personally appear before the notary. The notary's electronic seal must reproduce the elements of the notary seal.¹⁸⁶

P. Utah

A notary may acknowledge an electronic document without the seal if the electronic document contains the notary's name, state, title, commission number, and commission expiration date. The electronic signature of the notary, and any other information required by law, must be attached to or logically associated with the electronic document.¹⁸⁷

Q. Virginia

An individual must apply to the Secretary of the Commonwealth for commission as an electronic notary. The application must include a description of the technology that will be used to notarize electronic documents, and a certification of compliance with Secretary of the Commonwealth notary standards. An electronic notary must maintain exclusive control of the electronic seal and signature. An electronic notary must

185. Pennsylvania Department of State, *Frequently Asked Questions about the Department of State's Electronic Notarization Program*, *PORTAL.STATE.PA.US*, <http://www.portal.state.pa.us/portal/server.pt?open=18&objID=488579&mode=2> (Last visited Dec. 26, 2011).

186. Texas Secretary of State, *Frequently Asked Questions for Notaries Public*, *SOS.STATE.TX.US*, <http://www.sos.state.tx.us/statdoc/faqs2300.shtml#np22> (Last visited Nov. 10, 2011).

187. UTAH CODE ANN. §§ 46-1-16, -4-205 (West 2011).

keep records of electronic notary acts. Each electronically notarized document must include an electronic notarial certificate. The notary must attach an electronic signature and seal to the electronic notarial certificate in a manner that is capable of independent verification and renders any subsequent changes or modifications to the electronic document evident.¹⁸⁸ An electronic notary must use a digital signature/certificate that complies with state requirements.¹⁸⁹

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188. VA. CODE ANN. §§ 47.1-14, -16, -7 (West 2011).

189. Virginia Secretary of the Commonwealth, *Electronically-enabled Notary Public Instructions and Application*, COMMONWEALTH.VIRGINIA.GOV <http://www.commonwealth.virginia.gov/Notary/eNotary.cfm> (Last visited Nov. 10, 2011).