THE ACTS OF THE APOSTILLES

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INTRODUCTION

In some cross-border transactions the procurement and authentication of "public documents" from international jurisdictions can be a time-consuming bottleneck. Before a public document can be used in a country other than the one that issued it, its origin must be authenticated. This impasse has been addressed by the Hague Apostille Convention, which facilitates the exchange and transmission of public documents issued and used by countries that adhere to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the "Hague Apostille Convention" or the "Convention"). [1] This article provides a general overview of the process for authenticating documents under the Hague Apostille Convention and under traditional legalization methods. It focuses on documents issued by competent authorities in the state of New York, but many of the observations apply to other U.S. states.

THE APOSTILLE PROCESS

The Hague Apostille Convention is a multilateral treaty that was drafted by the Hague Conference on Private International Law (the "Hague Conference"). It was first enforced in 1965 by the initial ratifying states, including the United Kingdom, the Netherlands, and Hong Kong. [2] The Hague Apostille Convention specifies how certain types of documents issued in a signatory state can be certified for legal purposes in the other signatory states. The Convention covers only "public documents," such as a court document, an administrative document, a notarial act, or other official certificates. Convention parties may further narrow the types of documents that may be certified by means of an apostille.

A certification pursuant to the Convention is called an "apostille"; it is generally analogous to notarization in national law and normally supplements notarization of the document under applicable domestic law. Where the originating country and the receiving country are both member states of the Hague Apostille Convention, an apostille authenticates the validity of a document and removes the need for double-certification, namely notarization by the originating country followed by legalization by the receiving country.

Apostilles are affixed to public documents by "competent authorities" designated by (or under delegation from) the government of a country that is party to the Hague Apostille Convention. For example, in the state of New York, the New York Secretary of State is the designated competent authority who holds the power to issue an apostille. In order for a document to be eligible for an apostille, it must have been issued or certified by an officer recognized by the competent authority issuing the apostille. For example, in the state of New York, notaries public

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are commissioned by the New York Secretary of State and registered in the county in which they have been commissioned. Therefore, a document that has been attested by a notary public in New York State may receive an apostille when the document has been duly notarized and then certified by the county clerk in the county where the notary was commissioned.

However, the process is different in the case of birth, death, marriage, and divorce records issued by the New York City Office of Vital Records because the New York Secretary of State does not directly recognize that office. As a consequence, the signature of the city clerk must be certified by the county clerk of New York County to make the birth certificate eligible for an apostille. In another U.S. state or territory, or foreign country, the Supreme Court, or other such government body may have apostille authority. Each U.S. state has its own unique rules of practice: some states have a one-step process and others a multi-step process. The process may be more streamlined in certain jurisdictions than in others based in part on the volume of apostille requests.

The Convention prescribes the form and substance of the apostille itself, which is a printed form document consisting of 10 numbered standard fields and prescribed language. It is important to note that the apostille must be obtained from the relevant authority in the same state where the document was issued or notarized. In order for the certification to be deemed authentic, the issuing institution must use specific language placed either on the document itself or on an *allonge* affixed to the document. Once the apostille is produced, it is ready for presentation to competent administrative or judicial bodies of the receiving country.

It is important to note that the power of the apostille does not run to the content of the document being certified. In other words, it does not certify that the contents and substantive portions of the document are correct or even accurate. It only 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.

Although the apostille serves an important purpose in international transactions, it is not without challenges. Apostille fraud remains common, especially to the extent that competent authorities and certifying entities do not confirm the content of the document being certified. There have been several instances where a document has been properly authenticated by apostille but it was discovered later that the underlying document was a forgery. Other challenges include the expiration of the apostille prior to its use in the transaction, misuse of the apostille process to obtain information that was not provided by the entity requesting certification, and the need to ensure a secure method of attachment to the underlying public documents, which may include sensitive information. In many respects, the apostille is only as reliable as the underlying notarization or certification regime.

THE APOSTILLE GOES DIGITAL

Notwithstanding the advantages of certification by apostille, technological developments have threatened to reduce the efficiency of the apostille process. Modernizing the apostille process is an area of growing importance for private entities and government agencies alike. When the Convention was drafted in 1961, the parties to the Convention could not envision the creation of the Internet, the growth of the global data economy, the renaissance of the cryptocurrency market, and the introduction of distributed ledger technology. Employing an electronic apostille will help transacting parties match the speed, efficiency, and transparency found in the digital age of algorithmic transactions.

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Beginning in 2007, the Hague Conference sought to update the apostille process to reflect improvements in digital technology by creating the Electronic Apostille Program ("e-APP"). E-App consists of two components. The e-apostille component of the e-APP program involves the use of a digitally signed electronic file that is transmitted by electronic means, such as email, or is otherwise made available for download or viewing from a website. The e-Register component of the e-APP program consists of electronic registers that are accessible online to enable the recipients to readily verify the origin of the apostille they have received. The e-APP has been implemented by approximately 32 parties to the Hague Apostille Convention, including the United States and Hong Kong. Essentially an electronic apostille, the e-APP is the Convention parties' response to calls for a simplified authentication process for the production of public documents abroad. Using an e-APP, whether in an analog transaction or in a digital payments deal, provides a means of combating fraud and provides an increased level of security, which far exceeds that of a paper-only environment. Other benefits include the nonexpiration of the apostille, so that the certification will remain valid even after the digital certificate of the person signing the e-APP expires, and an easy and secure method of attachment to underlying public documents.

When trying to determine whether the apostille process is either desirable or necessary for your transaction, consider approaching your legal services providers for specific guidance on the latest development in this important but underutilized international mechanism.

WHEN APOSTILLE IS NOT AVAILABLE: THE LEGALIZATION PROCESS

Where a country has not signed or ratified the Convention (or entered into a bilateral treaty for the recognition of each other's public documents) or where certification involves a document that is not a "public document" covered by the Convention, the authentication of documents intended for usage abroad requires the more cumbersome process known as "legalization" (also known as "embassy legalization"). [3] The legalization process consists of a chain of individual authentications of the public document the parties wish to have certified, including certification of the document by the foreign ministries (sometimes acting through an embassy or consulate) for both the country in which the document originated and that of the state in which the document will be used. In practice, this means the document must be certified twice before it can have legal effect in the receiving country. For example, as Canada is not a signatory to the Convention, Canadian documents for use in other countries must be certified by the Deputy Minister of Foreign Affairs in Ottawa or by a Canadian consular official abroad and subsequently by the relevant government office or consulate of the receiving state. Because of the number of authorities involved, the legalization process is often slow, cumbersome, and expensive for transacting parties.

Since legalization is still required for countries that are not parties to the Convention, the parties to a transaction must undergo the legalization process if either the country issuing the public document or the country where the document will be used is not a signatory, or both. Before proceeding, you should consult the local authorities about the rules and requirements of undergoing the legalization process.

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[1] "12: Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents." Hague Conference on Private International Law, https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf.

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[2] The Hague Apostille Convention has 116 parties, which include Hong Kong and Macau despite the fact that the People's Republic of China is not a member state. The Convention has most recently become effective in Guatemala on September 18, 2017. It is scheduled to become effective in Bolivia on May 7, 2018. Bilateral restrictions limit the effectiveness of the Convention between certain states. For example, apostilles from Burundi, the Dominican Republic, Kosovo, Kyrgyzstan, Mongolia, Tajikistan, and Uzbekistan are not recognized in several other countries.

[3] Countries that are not party to the Convention include Canada, the People's Republic of China, Indonesia, and Haiti.

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