

HCCH Members:

Albania
Argentina
Australia
Austria
Belarus
Belgium
Bosnia and Herzegovina
Brazil
Bulgaria
Canada
Chile
China
Costa Rica
Croatia
Cyprus
Czech Republic
Denmark
Ecuador
Egypt
Estonia
European Union
Finland
France
Georgia
Germany
Greece
Hungary
Iceland
India
Ireland
Israel
Italy
Japan
Jordan
Korea, Republic of
Latvia
Lithuania
Luxembourg
Malaysia
Malta
Mauritius
Mexico
Monaco
Montenegro
Morocco
Netherlands
New Zealand
Norway
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Romania
Russian Federation
Serbia
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
Suriname
Sweden
Switzerland
The former Yugoslav
Republic of Macedonia
Turkey
Ukraine
United Kingdom
United States of America
Uruguay
Venezuela

The Secretary General

European Commission
Directorate-General for Justice
Unit A1 - Judicial Cooperation in Civil
Matters
B-1049 BRUXELLES
Belgium

THE HAGUE, 10 May 2011

Our ref.: 51737(11)VL/SM

Dear Sir/Madam,

The Permanent Bureau of the Hague Conference on Private International Law refers to the Green Paper entitled *Less bureaucracy for citizens: promoting free movement of public document and recognition of the effects of civil status records* released by the European Commission on 14 December 2010 (COM(2010) 747 final), and is pleased to submit this contribution as part of the related public consultation.

Contact details of the contributor:

Permanent Bureau of the Hague Conference on Private International Law
Scheveningseweg 6
2517 KT The Hague
Netherlands

Telephone: +31 (0)70 363 3303
E-mail: secretariat@hcch.net
Website: www.hcch.net

*The Permanent Bureau agrees for the present letter to be made available on
the Commission's website.*

2/...

About the Hague Conference and the Permanent Bureau

1. The Hague Conference on Private International Law is an Intergovernmental Organisation whose origins date back to 1893. As at 10 May 2011, the organisation is comprised of 72 Members: 71 Member States representing all continents and major legal systems and one Member Organisation, the European Union (since April 2007). In addition to the European Union, all EU Member States are Members of the Hague Conference.

2. The mandate of the Hague Conference is the “progressive unification of the rules of private international law” (Art. 1 of its Statute, accessible online at < www.hcch.net > under “Conventions”), which it pursues principally through the conclusion of multilateral treaties and the provision of support to their practical operation. Since 1951, the Hague Conference has concluded 38 multilateral treaties (known collectively as the “**Hague Conventions**”), which cover the following areas of private international law:

- international protection of children, family and property relations;
- international legal co-operation and litigation; and
- international commercial and finance law.

3. The Permanent Bureau is the Secretariat of the Hague Conference and is charged with coordinating its activities in these areas, including the provision of post-convention support services.

General remarks

Limitations to the scope of this contribution

4. This contribution represents the views of the Permanent Bureau and does not necessarily represent the views of the Members of the Hague Conference. Given the particular mandate of the Hague Conference, the Permanent Bureau is not in a position to respond to the specific questions posed in the Green Paper, but rather this contribution comments generally on the issues discussed in the Green Paper. Moreover, while the issues discussed in Part 4 of the Green Paper (mutual recognition of the effects of civil status records) are of great interest to the Permanent Bureau, particularly in the context of the operation of its Conventions in the field of international family law (e.g., cross-border recognition of the validity of marriages and divorces, and intercountry adoption) and its ongoing work on new topics such as international surrogacy arrangements, this contribution will focus on the issues discussed in Part 3 of the Green Paper (free movement of public documents).

Activities of the Hague Conference relevant to the cross-border circulation of public documents

5. Facilitating the cross-border circulation of public documents is a key principle underpinning many of the Hague Conventions, not only in the area of international legal co-operation and litigation, but also in the international family law field. The most significant achievement of the Hague Conference in this regard has been the conclusion of the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (hereinafter: the “**Apostille Convention**” or the “Convention”), which is referred to at a number of instances throughout the Green Paper.¹ Given its close connection with the issues discussed in Part 3 of the Green Paper, the Permanent Bureau considers it useful to clarify from the outset the operation of the Apostille Convention:

3/...

¹ It should also be noted that since the conclusion of the Apostille Convention, the Hague Conference has concluded several other Conventions that expressly dispense with the requirement of legalisation or similar formality (such as apostillisation) for specified documents. These include (without limitation): the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, whose application in the EU has been superseded by Regulation (EC) No 1393/2007 and Regulation (EC) No 1206/2001 respectively; the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, to which all EU Member States are party; and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, which the EU has signed and is expected to conclude in the near future.

- **Purpose** – As its full title suggests, the Apostille Convention abolishes the traditional legalisation procedure (chain of separate authentications), which often constitutes a slow, cumbersome and costly process, which is precisely the *raison d'être* of the Apostille Convention.
- **Where it applies** – As the Green Paper states, the Apostille Convention is in force in all EU Member States. However, what the Green Paper does not specify is that an additional 73 (very soon 74) States *outside* the European Union are party to the Convention. With 100 Contracting States (soon 101) and rising, the Apostille Convention is the most widely ratified / acceded to of all the Hague Conventions and the most accepted legal co-operation treaty after the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Furthermore, according to conservative estimates, several million Apostilles (probably more than 10 million) are issued every year around the world. The Convention is thus a widely used, and indeed hugely successful, global instrument that greatly facilitates the cross-border production of public documents by individuals and companies.
- **When it applies** – The Apostille Convention applies where a public document is issued in one Contracting State and is to be produced in another Contracting State. As the Green Paper states, the Apostille Convention does not apply to (a) documents executed by diplomatic or consular agents or (b) administrative documents dealing directly with commercial or customs operations, although this second exception is to be interpreted *narrowly*. Nevertheless, the range of public documents to which the Convention does apply is *broad*, and covers – among other things – civil status documents, judicial documents, administrative documents, educational documents (diplomas) and notarial acts.
- **How it applies** – The Convention replaces the traditional and admittedly outdated legalisation process with a single formality: an authentication certificate called an “**Apostille**”. The Apostille is issued by an authority designated by the State where the document itself was issued (the “**Competent Authority**”) and is automatically recognised in all other Contracting States. Moreover, any recipient may verify the Apostille by consulting a register that the issuing Competent Authority is required to maintain. This simplified process is commonly referred to as “apostillisation”. Where the Convention is properly implemented (as seems to be the case in most if not all EU Member States), the issuance of an Apostille is the result of a one-step process (*i.e.*, no prior formalities are required). Contrary to what the Green Paper suggests, the apostillisation process can thus hardly be considered an overly burdensome process, particularly when considering its benefits, *i.e.*, the authoritative confirmation of the origin of a foreign public document.

6. The 2009 Special Commission on the practical operation of the Apostille Convention, which was attended by over 200 experts from numerous Contracting States (including 22 EU Member States) and other Members of the Hague Conference, welcomed the Convention’s wide use and effectiveness, and the absence of any major obstacle to its practical operation. The Convention therefore seems to give full satisfaction to Contracting States, without any call for amendments, or concern that the Convention is not fulfilling its purpose or that its procedures are overly formalistic.

7. The Permanent Bureau maintains a dedicated “Apostille Section” on the Hague Conference website (< www.hcch.net >), which includes not only the full text of the Convention, but also relevant material to assist users in obtaining Apostilles (including details of Competent Authorities and other practical information). The Permanent Bureau has recently published a series of guides (available online) including a brochure entitled *The ABCs of Apostilles*, which provides users with short answers to frequently asked questions, including *when*, *where* and *how* the Convention applies, *who* issues Apostilles and *what* the effects of an Apostille are. The Permanent Bureau is also finalising a handbook, which is designed to provide practical information to Competent Authorities on the apostillisation process. Moreover, as set out in more detail below, the Permanent Bureau has developed an innovative programme (the “e-APP”) to improve the operation of the Convention even further. All these efforts greatly assist users of the Apostille Convention.

Reactions to Part 3

8. The Permanent Bureau agrees that the recognition of foreign documents is a matter of mutual trust. Within the European Union, it also accepts that there are good reasons to streamline as much as possible administrative formalities (including apostillisation) for the authentication of public documents, and where possible to abolish certain of these formalities. The Permanent Bureau supports efforts to further facilitate the circulation of foreign public documents. By improving the acceptance of foreign public documents, a State can encourage greater cross-border investment and interaction and, through reciprocal arrangements with other States, can reduce administrative difficulties encountered by citizens under its jurisdiction in their activities abroad.

9. The Permanent Bureau queries, however, whether the mere abolition of existing administrative formalities would solve the problems identified in the Green Paper concerning the free circulation of public documents. In this regard, the Permanent Bureau considers, based on its work supporting and monitoring the practical operation of the Apostille Convention, that any new EU framework should consider the following related matters:

- the operation and efficacy of *ex post facto* checks in cases where the authenticity of a public document is questioned; and
- the resurgence of conflict of law issues in relation to the characterisation of a “public document”.

Ex post facto checks

10. The Green Paper suggests that “[i]n the event of serious doubt about the authenticity of a document or if a document does not exist in a Member State, the competent national authorities could exchange the necessary information and find an appropriate solution”. Questions surrounding the authenticity of public documents arise in connection with domestic documents in much the same way as they do in connection with foreign public documents, particularly in cases of alleged forgery and unfamiliarity with the type of document. A major difference in the case of foreign documents, however, is that the recipient of the document (*e.g.*, government official) is unlikely to know who to contact in the State where the document was issued in order to verify its authenticity.

11. Practice in EU States under the Apostille Convention reveals that public documents produced abroad are usually issued by a variety of different authorities, with most being issued by civil registry offices, notaries, and educational institutions. This variety may pose considerable problems for the person seeking to verify the document’s authenticity. Moreover, in instances where the document is produced in a number of States, the same *ex post facto* check may need to be done in each State, which amounts to an unnecessary use of time and resources.

12. It will therefore be vital for any possible new EU framework to maintain a system of administrative co-operation to support and coordinate the verification of public documents issued in one State that are produced in (an)other State(s). Moreover, this system would need to encompass more than just the civil registry offices of each State. In this regard, the Permanent Bureau refers to the central authority framework established under the 1987 *Brussels Convention Abolishing the Legalisation of Documents Between the Member States of the European Communities* as an example, and reaffirms that the network of Competent Authorities established under the Apostille Convention has been instrumental in the latter Convention’s success. Without any such system in place, a possible new EU framework could risk becoming as slow and cumbersome as the traditional legalisation process it is seeking to replace, which in turn would severely undermine the anticipated benefits to EU citizens.

Resurgence of conflict of law issues

13. Through the practical operation of the Apostille Convention, a uniform conflict of law rule has developed with regard to the characterisation of a document as a “public document”. According to this rule, whether or not a document is a “public document” is determined by reference to the law of the State where the document was issued. While the characterisation of civil status records as public documents may not pose a problem in most States, issues may arise in respect of public documents that exist in some States but not in others, or public documents that are issued by bodies that are accredited in one State, but whose accreditation is not recognised in another (*e.g.*, notaries).

14. The Permanent Bureau therefore considers it equally vital for any possible new EU framework to maintain a uniform conflict of law rule for the characterisation of “public documents”. Practice under the Apostille Convention suggests that a rule referring to the State where the document was issued works effectively.

Alternative solution

15. An alternative solution to abolishing legalisation and similar formalities (such as apostillisation) might be for the European Union to support improvements to the existing operation of the Apostille Convention. After all, as noted in the Green Paper, the Convention applies in all EU States and to a very broad range of public documents.

The e-APP

16. A key feature of the Hague Conference is its commitment to post-convention support services. In the context of the Apostille Convention, this has led to the development of the electronic Apostille Pilot Program (or “**e-APP**”). The e-APP seeks to apply readily-accessible modern technologies to the apostillisation process through two components, *i.e.*, the *e-Apostille* and *e-Register*:

- ***e-Apostille*** – under the e-APP, States are encouraged to issue electronic Apostilles (“**e-Apostille**”), which will allow the applicant to receive an Apostille online for a public document with minimal time and expense.
- ***e-Register*** – under the e-APP, States are encouraged to maintain an electronic register of all Apostilles issued (“**e-Register**”), which will allow the recipient to verify the origin of the Apostille by simply entering in the details of the Apostille in a publicly accessible online register.

17. The e-APP promises to make the authentication of foreign public documents an even more efficient, seamless and secure process.

18. The European Commission has itself recognised the benefits of the e-APP in facilitating the cross-border circulation of public documents, and is currently funding a project to support the further development, implementation and operation of e-Registers and to promote the e-APP in Europe and beyond. The project, which is called *e-APP for Europe*, is an initiative of the Permanent Bureau with the Ministry of Justice of Spain as partner and the Ministries of Justice of Finland, France and the Czech Republic as associate partners. One of the main deliverables of the project is the development and implementation of a central e-Register for Competent Authorities in Spain, which is being launched in May 2011. Another element of the project is the holding of three regional meetings – Helsinki (February 2011), Prague (May 2011) and Paris (October 2011, to be confirmed) – where governmental experts from EU Member States and other interested Contracting States are convened to discuss the implementation of the e-APP in Europe and the exportability of its two components (particularly the e-Register component of the Spanish system) from one State to another.

19. More information about the background, component and status of the e-APP (including the *e-APP for Europe* project) is available at < <http://www.e-app.info> >. In addition, the Ministry of Justice of Spain has recently released a short film on the new Spanish system showcasing the benefits that the e-APP offers particularly to its citizens.² The Spanish system is a clear example of how the Apostille Convention will operate in the future in a more streamlined, secure and user-friendly manner, and is one which the Permanent Bureau and its *e-APP for Europe* partners, with the support of the European Commission, are currently promoting as an effective solution to further facilitating the circulation of public documents in the European Union and beyond.

Other post-Convention support services

20. By monitoring the practical operation of the Convention, the Permanent Bureau is constantly identifying and promoting good practices to improve the accessibility of Apostille services. These practices include:

- publishing – and providing to the Permanent Bureau for uploading on the “Apostille Section” of the Hague Conference website – comprehensive information about the contact details of the Competent Authority, its fees and procedures, and the categories of public documents for which it is competent to issue Apostilles;
- utilising a multilingual Apostille certificate, which is common to all Competent Authorities, to ensure that the Apostille is readily recognised in other Contracting States;
- encouraging each Competent Authority to fill out the Apostille certificate in English or French, in addition to any other official language of the Competent Authority, to facilitate as much as possible the use and circulation of the Apostille abroad; and
- decentralising the provision of Apostille services either by designating additional Competent Authorities, or by opening additional offices of the same Competent Authority, at a local level.

Concluding remarks

21. The Permanent Bureau respectfully suggests that experience from the almost 50 years of widespread operation of the Apostille Convention not be ignored. In particular, the European Commission is invited to bear in mind the benefits, and indeed the need, of maintaining a system of administrative co-operation to easily verify the origin of public documents, such as the Competent Authority network that continues serving the needs to verify Apostilles under the Convention. The Permanent Bureau also suggests that the Commission not lose sight of the benefits that the Apostille Convention offers in clarifying the nature of “public documents”.

22. Finally, it is important to realise that whatever internal framework exists in the European Union, the Apostille Convention will continue to apply in each EU Member State in respect of outgoing public documents to be produced in a non-EU Contracting State and incoming documents issued in a non-EU Contracting State (which comprise almost three quarters of the States currently party to the Convention). With EU citizens increasingly conducting cross-border activities not only within the European Union but also in non-EU States that may or may not be party to the Apostille Convention, the EU framework should avoid simply adding yet another regime to the authentication of foreign public documents (*i.e.*, *ex post facto* checks within the EU, apostillisation as between the EU and non-EU Contracting States, traditional legalisation as between the EU and all other States, and any other special regime that may apply based on bi- or multilateral arrangements).

7/...

² The video can be viewed online via the “Apostille Section” of the Hague Conference website under “e-APP (electronic Apostille Pilot Program”.

23. From this perspective, the Permanent Bureau considers that rather than abolishing Apostilles within the European Union and reinstating *ex post facto* checks, the preferred option would be for the relevant authorities of the European Union to continue supporting improvements to the effective and secure operation of the Apostille Convention. Such improvements would not only offer a solution to the difficulties encountered by EU citizens as described in the Green Paper, but would also assist in promoting the expansion of the Convention into States that are not yet party to it, thereby providing EU citizens with greater opportunities in their cross-border activities. In this regard, it is promising that over 35 percent of current Contracting States have only joined the Convention in the last 10 years, and that a number of other States are currently actively considering or preparing to join.

The Permanent Bureau remains at the Commission's disposal for any further information it may require in relation to this contribution.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hans van Loon', written in a cursive style.

Hans van Loon