THE APOSTILLE CONVENTION IN PRACTICE – REFLECTIONS OF A CRITICAL FRIEND

A Position Paper prepared by
Professor Peter Zablud, RFD, Dist.FANZCN
for the Australian and New Zealand College of Notaries

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Document rédigé par le
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pour le Collège des Notaires d’Australie et de Nouvelle-Zélande

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— REFLECTIONS OF A CRITICAL FRIEND

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OUTLINE

This paper has been prepared to assist the deliberations of the Hague Conference on Private International Law Special Commission meeting of November 2016 on the practical operation of the Apostille Convention.

After noting that for more than half a century since entering into force, the Apostille Convention continues to be one of the most successful and highly regarded of the Hague Conventions, the paper considers several aspects of the Convention in practice arising from the Responses of Contracting States to the Permanent Bureau’s Questionnaire of April 2016.

The paper also directs attention to the excessive number of Competent Authorities designated by Contracting States and discusses possible solutions to the emerging problem of authenticating documents executed by intergovernmental or supranational organisations.

In conclusion, the paper looks to the probable sources for and possible numbers of new Contracting States able to accede to the Convention by 2030.

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The Australian and New Zealand College of Notaries is honoured to have been granted Observer status at the Hague Conference on Private International Law Special Commission meeting of November 2016 on the practical operation of the Apostille Convention. The College presents its compliments to the Special Commission.

Prologue

The great English jurist Professor Ronald Graveson, when writing about the Ninth Session of the Hague Conference, which took place in October 1960, at which the final text of the Apostille Convention was established, noted the significance of The Netherlands as a centre for meetings concerned with international law when he said that:

International lawyers, whether public or private, who meet [in The Hague] ... [are conscious] of the international community to which they belong, and in a way may be making a pilgrimage to one of the holy places of international law.¹

He went on to say that:

[The] psychological inclination toward the subject of their meetings is greatly strengthened when [the meetings] take place [at] the Peace Palace.²

Introduction

As part of its preparation for the Special Commission, the Permanent Bureau of the HCCH prepared and circulated its Questionnaire of April 2016 concerning the operation of the Apostille Convention ("the Questionnaire").

Fifty-one of the Contracting States and six non-Contracting States responded to the Questionnaire ("the Responses") in sufficient time to enable the Permanent Bureau to prepare its synopsis of responses to the Questionnaire as at 30 September 2016.³ There is no reason to suppose that the Responses are not properly representative of the views of all the Contracting States in relation to the practical operation of the Apostille Convention during the four years which have elapsed since the 2012 Special Commission meeting (SC 2012).

A number of important issues have emerged from the Responses. The purpose of this paper is to provide material and commentary in relation to several of those issues in order to assist the Special Commission in its deliberations.
A Jewel in The Hague Conference Crown

The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (“the Apostille Convention”) entered into force on 24 January 1965.4

For more than half a century, the Apostille Convention has been a jewel in the Hague Conference Crown. It is one of the most successful and highly regarded of the Hague Conventions.

The Apostille Convention:
- has been acceded to by more Contracting States than any other Hague Convention — and the number continues to rise;
- provided a simple, workable and acceptable solution to the burdensome administrative problem of legalisation of public documents faced by international trade and commerce — and continues to do so; and
- has assisted millions of people around the world in conducting their cross-border personal and business affairs — and continues to do so.

Even so, in recent years, among other things, matters arising from:
- the different legal systems of the Contracting States;
- an excessive number of Competent Authorities designated by Contracting States;
- pressures on Competent Authorities brought about by
  - unprecedented cross-border student and labour mobility; and
  - increasingly sophisticated fraudulent documents;
- varying interpretations of key provisions of the Convention by Competent Authorities;
- inadequate initial and ongoing staff training by many Competent Authorities; and
- uncertainty in the public mind as to the limited effect of an Apostille have all caused or contributed to problems relating the practical operation of the Convention, which have confronted and occasionally vexed Contracting States.

The problems, issues and challenges identified by critical friends and by Contracting States in their Responses are not and should not be seen as being somehow indicative or symptomatic of systemic failure of the Apostille Convention in practice.

To the contrary. It would be extraordinary if, during over half a century of operation, this international Convention, the substantive provisions of which have been applied literally on millions of occasions — possibly hundreds of millions of occasions — by the Competent Authorities of (now) 112 Contracting States, did not give rise to problems, issues and challenges in its practical application.

It is trite to say that the prime purpose of Special Commission meetings is to consider the identified matters of concern and interest for the benefit of all Contracting States and to come to conclusions and make recommendations to assist in the resolution of those matters.

It is also trite to say, but it is well worth repeating, that candid appraisal of perceived difficulties and where appropriate, robust discussion at Special Commission meetings which result in consensus, are proof of the strength and vitality of this Convention.
Continuing Matters of Concern

Overwhelmingly, the matters which continue to concern Contracting States and which emerge from the Responses appear to be largely the same as those arising out of the responses to the 2012 Questionnaire, which were comprehensively discussed and considered at SC2012 and which are dealt with in detail in the *Apostille Handbook* published by the Permanent Bureau in 2013.

One reason is the 2016 Questionnaire itself, understandably focusing as it does on issues which are central to the practical operation of the Convention and, which are essentially the same as those which have previously been of concern to the Contracting States and the Permanent Bureau.

Another and more troubling reason is the conclusion which can be drawn from the Responses that Competent Authorities have neither paid sufficient attention to the deliberations and resolutions of past Special Commission meetings nor have they taken steps to ensure that staff are adequately trained and familiar with the *Apostille Handbook* and other materials which are available on the Apostille page of the Hague Conference website.

The Importance of Accurate Information and Statistics

The importance of accurate information and statistics should never be underestimated. Reliable information, no matter how unpalatable or difficult to collect and collate it may be, is absolutely essential to effective decision-making by Contracting States and their designated Competent Authorities in relation to the practical operation of the Convention within their own territories and generally.

Unhappily, it is clear from the Responses that when asked to provide statistics and associated information:
- more than a few Contracting States could only offer estimates rather than empirical data; and
- in many cases, States obviously have no facility to continually collect and collate data from all or most of their Competent Authorities or at all.\(^5\)

Given the high quality of information technology now available, there is presently every opportunity for Contracting States to establish the means to network their Competent Authorities or to otherwise obtain and collate reliable statistics and information concerning the Convention and its operation.

Two Apparent Shortcomings

There are two apparent shortcomings in the practical application of the Convention brought about by the terms of the Convention itself.

The first is the sheer number of Competent Authorities designated by the Contracting States pursuant to Article 6 of the Convention which gives individual States a discretion and imposes no limits on numbers.

The second, which arises out of the first, is the increasing incidence of concern voiced by recipients of documents bearing apostilles affixed by Competent Authorities, which effectively authenticate their own status, signatures and seals.
The Number of Competent Authorities

For reasons such as:

- the desire to provide an accessible, decentralised service to citizens and residents;
- the number of administrative divisions in their countries;
- deeply entrenched notions of separation of powers and functions;
- precedents set by influential Contracting States;
- inter-departmental and inter-agency jealousies, rivalries and politics; and
- failure to properly appreciate the level of knowledge and amount of training required by staff

the majority of Contracting States have chosen, for their respective domestic purposes, to designate multiple Competent Authorities to affix apostilles to their public documents.

For example, Niue (population of approximately 1200) is the smallest Contracting State. Yet it has seen fit to designate seven Competent Authorities.\(^6\) Two other small Contracting States, Andorra (which comprises seven parishes with a total estimated population of 86,000) and The Seychelles (total estimated population of 93,000) have each designated four centrally located Competent Authorities.\(^7\)

At the other end of the scale:

- the USA has designated 170 Competent Authorities including Clerks and Deputy Clerks of US Federal Courts and senior officers of its 56 individual states and territories;
- in addition to some 138 Court officials authorised to affix apostilles to “judicial documents”, Turkey has also designated the Governors and other officials of its 81 provinces and the District Heads of its 581 major towns as Competent Authorities in relation to “Administrative Documents”;
- South Africa has included its 1,914 magistrates and its 15 High Court Registrars among its designated Competent Authorities; and
- one of the newest Contracting States, Morocco has designated 79 officials of certain of its courts and the local authorities in its 75 provinces and prefectures as competent authorities.\(^8\)

All in all, there are some several thousand Competent Authorities designated by Contracting States.\(^9\) It is thought that many of them have never affixed an apostille, or, if they have, over the years they have only affixed a handful at best.

Questions inevitably arise as to the need for and the value of so many separate Authorities, the ability of staff members to carry out their tasks reliably and efficiently and their levels of understanding of the Convention and its subtleties.

The Need for Independence and Impartiality

The efficacy of the Convention is significantly derived from international institutional and public perception of the independence and impartiality of the Competent Authorities when affixing apostilles.

The concepts of “independence” and “impartiality” although obviously related, are separate and distinct values or requirements. “Impartiality” refers to a state of mind or attitude ... in relation to the issues and the parties in a particular case. “Independence ... connotes not only a state of mind but also a status or relationship to others ... that rests on objective conditions or guarantees.”\(^10\)
Courts and notaries are originators of many public documents to which apostilles are affixed.

Designating:
- notaries (as Estonia, Lithuania and Sweden have done); and
- courts or their senior officials or presiding officers (as Turkey, the USA and many other Contracting States have done).

as competent authorities has not only expanded the number of competent authorities unnecessarly, but has also placed the notaries, the courts and their senior officials and presiding officers in a most invidious position by potentially compromising perceptions of their independence and impartiality.

Anecdotal evidence indicates that recipients of self-authenticated notarial acts or court documents bearing apostilles affixed by officials or presiding officers of the very courts which handed down the particular judgements or which generated other court documents, are not infrequently concerned as to the propriety of apostilles which have been affixed or the possibility that, on the basis of a perceived conflict of interest, the documents might not be accepted in their destination countries.

It should be noted that there is no suggestion, nor is there any evidence, that any notary or court official or presiding officer has ever acted improperly in the execution of his or her duty in the affixing of an apostille to a public document.

The perceived problems could readily be obviated if the Contracting States concerned followed the procedure adopted by many other States and designated clearly impartial and independent bodies, such as ministries of foreign affairs, justice ministries, chambers of notaries and the like to affix apostilles to notarial acts and court documents, including judgements.

Similar concerns potentially arise in jurisdictions such as Mauritius and New Zealand where the Competent Authority is the same government department which registers births, deaths and marriages and issues civil status documents which later have apostilles affixed to them.11

Again, there is no suggestion of any impropriety on the part of the officials of either department.

**Diplomatic Missions and Consular Posts as Competent Authorities**

Allied to the imperative of appropriate decentralisation and issues surrounding the number of Competent Authorities already existing in many Contracting States is the question of the designation of diplomatic and consular personnel as Competent Authorities.

Australia, Austria and Tonga have all designated certain of their diplomatic missions and consular posts as being competent to affix apostilles to a limited range of public documents produced to them by their citizens for use in their host states.

Overall, the Responses do not indicate any enthusiasm or immediate appetite by Contracting States to emulate the Austrian, Australian or Tongan examples. It may be that once data can be produced justifying the practice, other Contracting States will give consideration to reviewing their present views.
Austria’s statement in its Response that “336 apostilles were issued by [some 94] Austrian diplomatic and consular missions in ... 2015” appears to be scant justification.

**Additional Text “Outside the Box”**

Within the limited confines of Competent Authorities, it is usually well understood that an apostille does not add any legal significance to or officially verify the content of the public document to which it relates, or in the case of a notarial certificate, the content of the notarially certified document.

On the other hand, within the various Contracting States, in courts, tribunals, public offices and commercial institutions and enterprises as well as in the public mind generally, all too often apostilles are seen as official foreign government endorsement or verification of the contents of documents which are produced. This is particularly so when it comes to original and certified copies of degrees, diplomas and other academic documents.

The misapprehension may readily and easily be dispelled by the simple expedient of adding appropriate additional text as to the limited effect of an apostille “outside the box”, (i.e. outside the area or frame containing the ten numbered prescribed items of the apostille) of each apostille which is affixed.

Recommendations as to the wording of additional text have been made by the Permanent Bureau and may be found in the *Apostille Handbook* (para. 256) and online at the Apostille section of the HCCH website.

Given the value of additional text and especially in light of a recommendation by the 2009 Special Commission meeting to add additional “text” out of the box (C& R No. 85 of SC 2009) and the recognition by the 2012 Special Commission of the useful nature of additional text (C & R No. 23 of SC 2012), it is most disappointing to see from the Responses that fewer than 40% of the Competent Authorities include additional text “outside the box” as to the limited effect of an apostille.

**The Threshold Question**

“What is a public document?” is of course the threshold question for the purpose of the Convention.

Successive Special Commission meetings have eschewed a strict constructionist approach to the terms of Article 1 of the Convention and have determined that the list of public documents enumerated in Article 1 is not exhaustive and that it is a matter for individual Contracting States to determine whether or not a particular document is a public document and whether or not a person or authority executing a document is doing so in an official or private capacity.

This does not mean that officials and bureaucrats, however senior, within the Competent Authorities or who are themselves designated as Competent Authorities have been given a carte blanche on behalf of their Contracting States to unilaterally determine which documents may properly be categorised as public documents, as appears to have occurred in relation to certain medical certificates.
The primary source of domestic law in all civil law, common law and mixed law jurisdictions is legislative. In a number of jurisdictions the Sharia or other religious laws co-exist with legislation. Within the common law and mixed law jurisdictions a body of law exists which has been created by decisions of the courts.

Generally speaking, in most Contracting States, “public documents” are defined by statute, regulations or legislative instruments.

At common law, in a series of English cases beginning with the House of Lords decision in *Sturla v Freccia* (1880) 5 A.C. 623, makes it clear that a public document (not otherwise categorised as such) must:

- concern a public matter
- be made by a public officer acting in the discharge of a strict duty to inquire into and be satisfied of the truth of the facts recorded; and
- have been brought into existence as a document of record to be retained indefinitely and not as a document intended to be of temporary effect or designed to serve only a temporary purpose.15

**Medical Certificates**

Accordingly, unless medical certificates or other similar certificates fall within the category of “administrative documents” under Article 1 of the Convention or are otherwise designed by legislation as “public” documents or in common law jurisdictions are deemed by case-law to be “public” documents they cannot have apostilles directly affixed to them, much as Competent Authorities may wish to do so from time to time.

**Administrative Documents Dealing Directly with Commercial or Customs Operations**

“Administrative documents dealing directly with commercial or customs operations” are excluded from the ambit of the Convention.16

Judging from the Responses, determining the parameters of that exclusion is continuing to cause angst within many of the Competent Authorities as they attempt to balance the requirements of the Convention and the commercial needs of their own countries’ exporters.

The exclusion is formulated in a very general way. As the Convention’s rapporteur, Professor Yvon Loussouran noted in his Explanatory Report,

> The Commission nonetheless wanted to avoid the exclusion, once accepted, being given too general a meaning.17

It is important to bear in mind that by its wording, the exclusion does not relate to all documents which may be from time to time directly concerned with “commercial or customs operations”. It only relates to “administrative documents” and then not to the full range of documents which could possibly be so described.

“Administrative documents” are of course among the documents deemed to be public documents for the purposes of the Convention. Whenever considering whether a particular document falls into that category, it is always helpful to turn to the definitive French language text of the Convention for guidance.18

The expression “*les documents administratifs*” where appearing in paragraphs 2 and 3 of Article 1 is poorly translated as “administrative documents” in the English language text. The latter expression is woolly and imprecise and is not a term of art.19
On the other hand, “les documents administratifs” is a well understood legal descriptor of various classes of documents issued by French government and government institutions. It does not include private “administrative” documents relating, in this case, to trade and customs matters. Nor does it include documents issued by non-government organisations (such as Chambers of Commerce) which may be recognised by government, no matter how prestigious or important those organisations may be in the world of trade.

Even if a document is on its face, a “document administratif”, it must also pass a specific test before it can be excluded from the operation of the Convention. It must have been brought into existence directly for the purposes of particular “commercial or customs operations” and not merely be a document which partially or on occasion may be used for international trade purposes.

As Professor Loussouran also observed in his Explanatory Report:

... the adverb “directly” tends to restrict the exclusion solely to documents whose very content shows that they are intended for commercial or customs operations, thus excluding those which may occasionally be used for commercial operations such as certificates by the Patent offices (authenticated copies, documents certifying additions to patents, etc.).

While significant legally and commercially, “administrative documents” represent a relatively small proportion of the myriad of commercial, administrative and regulatory documents now associated with international trade and commerce.

The Questionnaire sought specific responses from Contracting States in relation to a limited sample of documents. That sample comprised both “administrative documents” (Export and Import Licences, Health and Safety Certificates and Certificates of Product Registration) and international trade documents typically issued by non-government sources (Certificates of Origin, Certificates of Conformity, End User Certificates and Commercial Invoices).

To the extent that documents used in international trade and commerce originate from private or non-government sources, they do not fall within the exclusion. As a general rule, they may readily be notarially authenticated. Apostilles may then be affixed to notarial certificates in the ordinary course.

To the extent that documents are indeed “administrative documents”, technically they ought not have apostilles affixed to them. If however, as so often happens, persons or institutions in an importing country require a document to be “authenticated” before acceptance, then the authentication may be provided by a notary. In turn, an apostille may then be affixed to the notary’s authentication which is a public document in its own right.

A good example is a Certificate of Pharmaceutical Product for a Solely Export Medicine which is issued by Australia’s Therapeutic Goods Administration. That Certificate is unquestionably an “administrative document” dealing directly with commercial or customs operations. As such, it is excluded from the ambit of the Convention. However, institutions in almost every South American country to which certificates of this nature are sent, normally require the Certificates to be authenticated before they may be used at the destination. Invariably, notarial authentications to which apostilles are affixed are accepted without question.
Copies of Public Documents

Across the board, the documents known generically as ‘civil status documents’ or ‘vital records’ comprise one of the largest group of documents for which apostilles are required. Whether or not copies of those or other public documents may have apostilles affixed to them is a vexed question, the answer to which varies between countries. In the USA, the answer varies between the 56 U.S. states and territories.

It should go without saying that a simple photocopy of any public document, including a civil status document, should not be capable of having an apostille affixed to it. The possibilities of forgery are too great for the risk to be taken, whatever the source of the copy.

In many countries, original civil status records and other public documents are permanently kept by their official custodians. Only certified copies of the records are ever issued to members of the public. In those cases the “certified copies” are, for all practical purposes, treated as originals and apostilles may readily be affixed to them.

Copies of public documents certified by notaries form a separate class of their own. Certifying copies of documents of domestic or foreign origin is probably the most common service that notaries around the world are called upon to provide for international purposes.

It is accepted in virtually every country other than the United States, that their own notaries have the power to certify copies of public documents, including copies of civil status documents. In almost every jurisdiction, apostilles are routinely affixed to notarially certified copy documents, subject always to the proviso that an apostille relates to the notarial certification and not to the underlying document. However, given the degree of trust reposed in notaries and in their acts, notarially certified copy documents are, for the most part, accepted everywhere as the functional equivalents of the original documents.

The principal exception to the rule is found in the USA. The power of American notaries to perform what is perceived internationally to be a simple, basic notarial service is often heavily circumscribed – to the point where sometimes the service cannot be provided at all, or an ersatz certification is prepared which may not be acceptable for use in the country in which it is to be produced.

Save for a general, but not identically formulated restriction on certifying copies of domestic vital records and other public documents, there is no policy consensus or legislative consistency in relation to the power of American notaries to certify copy documents.21

Translations

Question 6.5 of the Questionnaire related to the application of the Convention to translations of public documents.

Even though determining precisely which documents are ‘public documents’ must be left to the State from which the documents emanate, a simple translation of a public document cannot by its very nature possibly be itself a public document. To allow it to
be so effectively means that, potentially, an apostille could be affixed to a document purporting to be a translation prepared by anybody within or without the jurisdiction. It is therefore surprising that any Competent Authority in any Contracting State would, even for a moment, consider that the Convention could apply to a simple translation of a public document.

Does it make a difference if the translation is prepared by an “official” or “accredited” or “sworn” translator? Despite the number of Responses received which say that it does make a difference, it is respectively submitted that in the majority of cases it should not.

Merely because a translator holds a state issued or state sanctioned credential or is in some way “recognised” by a government or semi-government authority, does not automatically mean that the translator’s translation of a public document, or for that matter any other document, should be deemed to be a public document in its own right.\textsuperscript{22}

Official recognition of competence or the grant of a state regulated or issued credential only means that the translator has been accorded professional status or has received particular training.

On the other hand, if a person, however qualified, is employed by the state as a translator or possibly even engaged in that capacity on an \textit{ad hoc} basis, the position is quite different. In those circumstances a translation of a public document from or into the official language of the state which is made or verified by that translator is capable of being classified as a public document.

In every other case where a translation is required, the only appropriate methods of admitting the translation to the record as it were, are to either have the translation made or verified by a suitably qualified notary or to have the translator make an affidavit or sworn statement in the presence of a notary as to the accuracy of the translation that he or she has made or verified. In either event, an apostille may properly be affixed to the notary’s certification.

By way of footnote to the issue. It should be carved in stone on the desk of every official who affixes apostilles to documents, that a translation is not a discrete document in itself. To have any meaning at all, either the original document which has been translated or a certified copy of it must be appended to the translation. The translator must make it clear in a covering affidavit, sworn statement or official certificate (as the case requires) that the translation is a true and fair translation of the translated document. It is a matter of concern how often this fundamental rule is breached.

\textbf{Language of the Apostille}

The Convention specifically provides in Article 4 that the apostille may be drawn up in the official language of the authority (i.e. the country) which issues it. The Article goes on to say that the standard terms appearing in the apostille may be in a second language as well.

Particularly in circumstances where apostilles are drawn up in languages which are not readily accessible to most people, it is appropriate for an apostille to also have its standard terms and its inserted text written in a second language.
The two official languages of the Convention are French and English. Either language may appropriately be used as the second language for apostilles. The important thing to remember is that apostilles are designed to be used outside the countries in which they are affixed and that recipients must be able to comprehend them.

A number of bilingual and trilingual model apostilles have been developed by the Permanent Bureau and may readily be accessed on the HCCH website.

**The Need for Ongoing Education**

It is evident from the Responses that all Contracting States are conscious of the need to provide continuing education in addition to induction training for the staff of their Competent Authorities. It is also evident that there is no consensus as to the type, style or frequency of educational activities provided.

Quality induction training is essential to ensure that new staff members not only have the necessary skills to carry out their tasks efficiently, but that they also have an appropriate theoretical background to support their roles. In that regard, materials published by the Permanent Bureau including the *Apostille Handbook* are invaluable resources.

Competent Authorities should take the time and trouble to develop a comprehensive continuing education programme for staff members, perhaps to be presented over a three year cycle, to enable both front and back office staff to maintain, develop and update their performance, knowledge and skills.

Programmes need not be lengthy, complex or expensive. Where possible, important stakeholders such as the notariat, tertiary education authorities and officials associated with the generation of civil status documents should be involved in the preparation and presentation of induction training and continuing education.

As with all private and public sector organisations, it is always appropriate for specialist units such as Competent Authorities to undertake periodic assessments of their operations and the service levels they provide.

Key issues to be considered in any analysis would include:

- whether current procedures accord with the legitimate expectations and requirements of the public and the stakeholders;
- what inefficiencies and bad practices exist;
- how may procedures be standardised across a number of Competent Authorities (if there are more than one) within the Contracting State;
- what factors limit or restrict the organisation’s ability to meet its desired performance levels; and
- what specialist advice or services can be called up to assist the organisation.

It should not be assumed that once a country has acceded to the *Apostille Convention* and has announced its accession and subsequently the entry into force of the Convention in its official government media, all its public servants, lawyers, bank officials, public institutions and authorities, let alone the public generally, will immediately be familiar with the apostille system or even be aware that it has replaced consular legalisation of public documents emanating from other Convention countries.
It should also not be assumed that all or any of those persons have even heard of 'legalisation’ in any form or if they have, that they understand the difference between consular legalisation and the affixing of apostilles or appreciate that for the foreseeable future, the two systems will both operate side by side depending upon the origin or destination of documents.

The task of educating institutions and persons who advise the public in relation to apostilles and the need for the authentication of public documents emanating from their own country for production abroad and, just as importantly, vice-versa, is substantial, ongoing and time consuming. Assistance in disseminating information to the public as well as to their own members and staff, may be obtained from societies of notaries, bar associations, professional bodies for accountants and bankers’ associations.

**Meeting the Expectations of the Public**

The need to educate Competent Authorities and their staff includes the need to educate them to meet the expectations of the public.

it is true that affixing apostilles to public documents is only a small part of government service delivery within the Contracting States; but it occurs literally millions of times each year and typically involves direct interface between bureaucrats and members of the public.

In a Report published in February 2015, accounting giant Deloitte outlined the forces shaping the citizen service sector and the manner in which governments deliver services and provide their citizens with access to information.23

The Report posits that the changing environment brought about by rising citizen expectations for service, government fiscal constraints and advances in information technology, is redefining the way customer services in the public sector are designed and delivered.24 It then provides a summary of a “variety of leading global practices and lessons learned for governments aiming to enhance customer service” and identifies “eight key drivers and twenty-four trends that are shaping the future of public sector service delivery”.25

Two earlier papers published in 2007 by the prestigious Washington think-tank, Center for the Study of Social Policy (CSSP), *Customer Satisfaction: What the Research Tells Us* and *Customer Satisfaction: Improving Quality and Access to services and Supports in Vulnerable Neighbourhoods*26 present a framework directed towards improving the quality of public sector services, especially in vulnerable communities. Both papers emphasise the need for service providers to include focus on customer needs when establishing their priorities and to continually monitor and examine customer experiences, opinions and suggestions.

The Deloitte Report and the CSSP papers are valuable references for Competent Authorities to assist in improving their levels of service delivery and are highly commended.

**Documents Executed by Inter-Governmental or Supranational Organisations**

Preliminary Document No. 3 of October 2016 canvasses the important question of the authentication of documents executed by inter-governmental or supranational organisations and suggests several options to be considered by the Special Commission.
In theory, a protocol to the *Apostille Convention* would probably be the best method of resolving the problem, but it would be a long and technically complex journey should the Special Commission determine to follow that path.

The notion of using host agreements suggested in paragraph 8 of the Preliminary Document has much to commend it, so long as the relevant intergovernmental or supranational organisation is not designated as a Competent Authority in its own right by the host nation. If by legislative fiat an organisation's documents are deemed to be public documents emanating from the host state, then apostilles may be affixed to them in the ordinary course.

Mere notarial authentication of signatures on intergovernmental or supranational organisation documents is not of itself sufficient or satisfactory. If notaries are to be involved in the process at all, the use of a notarial act in private form which goes well beyond a simple signature authentication would be required. Such an act could be prepared by most civil law and common law notaries without difficulty, but not by most U.S. notaries, who are typically untrained ministerial officers rather than legal professionals.27

**Looking to the Future**

Conscious as we must all be of the dictum by the Swedish physicist, Neils Bohr, that it is always difficult to make predictions, especially about the future, the Apostille Convention is alive and well and it is safe to predict that it has a bright future.

In the 16 years that have elapsed since the turn of this century, the Convention has entered into force in 45 large and small countries around the globe.26

Given the Convention’s utility and wide acceptance, it is not excessively optimistic to expect to see at least another 45 to 50 states accede to it by 2030.

In that regard, it should be noted that on 14 October this year, Saudi Arabia became the 82nd member of the Hague Conference. With the accession of Ghana on 21 September to the *1993 Convention on Intercountry Adoption*, there are now 150 States connected to the Hague Conference, either as members or as parties to particular conventions.

It is encouraging to see the responses of Iran, Malaysia and The Philippines to the Questionnaire. All three countries are looking to accede to the Convention in the near future.

Iran’s accession will undoubtedly give impetus to its trading partners and other middle-east and gulf countries which are not yet party to the Convention, to come on board.

Malaysia and The Philippines as two of the foundation members of ASEAN (“the Association of South-east Asian Nations) are both influential within their region. Brunei Darussalam has already led the way among the ASEAN States. Once Malaysia and The Philippines join Brunei as Contracting States, hopefully it will not take too long for the seven remaining ASEAN members to follow suit.29
Canada is presently considering its position. It is too soon to make any predictions about its likely decision, but it would be surprising if Canada did not decide to join the vast majority of States in the Americas which are already states party to the Apostille Convention.

Even though the Special Administrative Regions of Hong Kong and Macau are both subject to the Convention, regrettably the People’s Republic of China has not yet committed itself to joining them. For obvious reasons, it is important that the PRC, as an important member of the Hague Conference, will, sooner rather than later, see its way clear to acceding to the Convention.

Africa is the world’s second largest and second most populous continent. Its 55 sovereign states are home to over 1.2 billion people and between them generate an estimated annual GDP to the order of US$2.6 trillion.\(^\text{30}\)

To date, only 16 African states are party to the Apostille Convention. It is to be hoped that in the coming years a significant number of the remaining thirty-nine states will accede to the Convention.

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\(^2\) Ibid.

\(^3\) The Questionnaire and the individual Responses may be found at the 2012 Special Commission page of the apostille section of the HCCH website <www.hcch.net>

\(^4\) 24 January 1965 was the sixtieth day after the deposit of the third instrument of ratification by a contracting state with the Netherlands’ Ministry of Foreign Affairs. (The process is set out in Articles 10 and 11 of the Convention).

On 25 September 1962, the Socialist Federal Republic of Yugoslavia, which incidentally had abstained from voting for the Apostille Convention Text at the Ninth Session, was the first Contracting State to deposit an instrument of ratification. The second instrument was deposited by the United Kingdom on 21 August 1964. The third instrument was deposited by France on 25 November 1964, thus triggering the Convention’s entry into force.

\(^5\) The inability to provide comprehensive data is a continuing problem and was also evident from the Responses to the 2012 Questionnaire.

\(^6\) See particulars of Designated Authorities at the Apostille page of the Hague Conference website.

\(^7\) Ibid.

\(^8\) Ibid.

\(^9\) Ibid.

\(^10\) Extract from the Ratio as stated in the Headnote to the published report of \emph{Valente v The Queen} [1985] 2 Supreme Court of Canada Reports, 673.
In Mauritius, the Prime Minister’s office is the designated Competent Authority. The Prime Minister’s office has 15 departments, including the Civil Status Division, the Mauritius Police Force and the Government Information Service.

In New Zealand, the Department of Internal Affairs which is the Competent Authority, also provides services including births, deaths and marriage registration.

In that regard, see discussion about “Diploma Mills” and apostilles in Preliminary Document No. 5 of December 2008 prepared for SC 2009 by the Permanent Bureau.

Also see remarks on the authentication of academic credentials in the ANZCN Position Paper, Aspects of the Apostille Convention, Information Document No. 5 of November 2012 prepared for SC 2012.

The figure is approximately the same as reported in the 2012 Responses.


Apostille Convention, Article 1, paragraph 3(b).


The execution clause of the Convention provides as follows: “Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts (emphasis added).

There are now some 20 different translations of the Convention which may be found at or accessed via the Hague Conference website. Without seeking to be rude or churlish, it is fair to ask whether those translations were based on the French version of the Convention and to question the extent that in relation to the exclusion the translations truly and fairly translate the meaning and purport of “les documents administratifs”.

Yvon Loussouran, above n 17.

For a detailed examination of the power of American notaries to certify copy documents, including vital records and other public documents see Peter Zablud, Notarizing for International Use (2012), The Notary Press, Chapter 6.

If it were so, it would follow that any person who holds a state issued credential or licence in any field in the particular state could potentially, as of right, prepare and execute a document in his or her field of expertise, which would be entitled to have an apostille affixed to it.


Ibid 4 and 5.

Ibid 5.

CSSP February, <www.cssp.org/publications>

For appropriate precedents, see Peter Zablud, Principles of Notarial Practice (2nd ed. 2016), The Notary Press.
See the list of Contracting States found at the Apostille page of the Hague Conference website.

Vietnam’s response to the Questionnaire effectively foreshadows its intention to accede to the Convention.

Statistic found at www.statistica.com