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Foreword

Maria Caterina Baruffi* and Laura Calafà**

This special issue of the journal *Papers di diritto europeo* collects the proceedings of the conference organized within the project «Identities on the move. Documents cross borders - DxB» (selected under the call for proposals «Action grants to support judicial cooperation in civil and criminal matters» – JUST-JCOO-AG-2020, co-funded by the European Union within the Justice Programme 2014-2020). The project is coordinated by the University of Verona and the Consortium is composed of the University of Graz, the Aristotle University of Thessaloniki, the European Association of Registrars (EVS) and the Italian Association of Civil Status Officers and Registrars (ANUSCA), at whose premises the final conference took place on 23 and 24 June 2022.

The final event has provided the opportunity to deepen the analysis of Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which was at the core of the research and scientific activities of the DxB project. The idea of focusing on this Regulation comes from the limited knowledge that both practitioners and citizens still have of it, despite its being a valuable instrument to bring people closer and make the European Union more integrated thanks to the simplification of administrative formalities. The issues related to the mutual recognition of public documents and their circulation across Member States are among the most important and urgent challenges in a globalized society. The aim of the project, then, is to raise awareness among registrars and legal practitioners and gain a more extensive expertise on how and to what extent the Regulation is actually applied in national practices, ultimately ensuring a better understanding of this tool.

Against this background, the conference's speakers contributed to give an extensive overview of this EU act in the context of national civil status systems, the free movement of persons and the Charter of fundamental rights of the European Union. Presentations also provided specific information regarding how the Regulation addresses the problematic aspects and deficiencies of the current legal framework, under both interpretative and operational perspectives.

The conference has been a truly international event that effectively encouraged the development of a concrete cooperation among the participants, i.e. scholars, registrars,

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public administrators, and practitioners from all over Europe. To all of them goes our gratitude for accepting to taking part in the DxB project as well as to the authors of this special issue. We are also thankful to Alexander Schuster for his input in managing the project and organizing the conference. Thus, the proceedings collected in the following pages represent both a final output and a starting point to further debates and exchange of views on the application of the Public Documents Regulation.

Lastly, the contents of all the papers, which are published in alphabetical order, are the sole responsibility of the respective authors and do not reflect the views of the European Commission.

The changing nature of trust: the Apostille Convention, digital public documents, and the chain of authentication

Brody Warren[*] and Nicole Sims[**]

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1. Introduction.

The formalities associated with authenticating a public document for presentation abroad have long been a source of frustration for individuals, families, and companies involved in cross-border situations. As a result, there have been numerous attempts to abolish or otherwise simplify this process with international instruments, either generally or in specific contexts[1]. The challenge has always been balancing a desire to avoid unnecessary formalities with the need to establish trust in the origin of the document and therefore its content.

One of the most successful multilateral instruments in this space is the HCCH Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents[2] (Apostille Convention), the purpose of which is to abolish the requirement of legalisation for public documents within its scope, introducing an optional, simplified requirement in its place, in the form of a standardised certificate: an «Apostille». Within the European Union (EU), Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement

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All views expressed in this article are the authors' own and do not necessarily reflect the positions of either the Permanent Bureau or the members of the HCCH.

[1] In addition to the two instruments discussed in this article, other examples include: the Athens Convention of 15 September 1977 on the exemption from legalisation of certain records and documents; the European Convention of 7 June 1968 on the abolition of legalisation of documents executed by diplomatic agents or consular officers; the Protocol of Las Leñas of 27 June 1992 on judicial cooperation and assistance in civil, commercial, labour and administrative matters.

[2] HCCH, Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents.

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of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012[3] (EU Regulation 2016/1191) goes a step further than the Convention, abolishing not only the requirement of legalisation, but also that of any equivalent formalities (such as Apostilles), for certain categories of public document for use between EU member states.

While the Apostille Convention was negotiated over 60 years ago, an attempt to modernise the Convention began in 2006 with the introduction of the electronic Apostille Programme (e-APP). The e-APP is designed to support the secure and effective operation of the Convention, encouraging contracting parties to digitalise their Apostille issuance and verification processes. This allows electronic public documents, which are most secure in their digital format, to be authenticated in a cross-border context under the Convention. The e-APP has also increased trust in paper public documents by leveraging digital registers and contributes to ensuring that recipients can trust digital public documents, as well as the authorities that are issuing them. By contrast, the comparatively recent negotiation and adoption of EU Regulation 2016/1191 meant that digital public documents and electronic means were expressly contemplated in its text and no supplementary programmes or initiatives have, to date, been required.

Against the background of increasing digitalisation, this paper considers the history and origins of the Apostille Convention and the e-APP, as well as how these ideas intersect with EU Regulation 2016/1191. The paper further considers the potential for technology to provide robust assurances as to the origin of a public document, despite some hesitation among recipients to trust public documents in digital form. The paper concludes that this hesitation presents a common challenge for both the Convention and the Regulation and that this lack of trust must be overcome to harness the full potential of digital transformation in the context of public document authentication.

2. The Apostille Convention.

2.1 History and origins.

The origins of the Apostille Convention can be traced back to a 1951 proposal from the United Kingdom to the Council of Europe, requesting the consideration of possible solutions to address several private international law issues, including through a multilateral convention or a level of harmonisation among bilateral agreements[4]. In

[3] Regulation (EU) 2016/1191 of the European Parliament and of the Council, of 6 July 2016, on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012.

[4] *Mémorandum du Secrétariat concernant les relations entre le Conseil de l'Europe et la Conférence de La Haye*, in *Actes de la Septième session*, 1952, p. 277.

relation to public documents, the proposal was simple: to consider the possibility of presenting documents from courts and administrative authorities abroad without the need for proof or legalisation[5].

Shortly thereafter, the Secretary General of the Council of Europe wrote to the Minister of Foreign Affairs of the Netherlands, inviting observations on the United Kingdom's proposal. The timing was fortuitous, with the Seventh Session of the HCCH to be held later that year. Given the private international law focus of the United Kingdom's proposal[6], the Council of Europe, on the advice of the Dutch Minister, referred the matters raised by the United Kingdom to the Seventh Session of the HCCH[7]. This, in turn, resulted in a decision at the Seventh Session to conduct further work on possible measures «to abolish or simplify the legalisation of official documents»[8].

While the objective was clear from the outset, consideration of the broader historical context offers important insights into the rationale underpinning the proposal and, ultimately, the Apostille Convention. In the 1950s, the world was in the midst of a period of unprecedented change. The aftermath of World War II gave rise to a surge in global migration[9], while the economic prosperity of the «golden age of capitalism» led to an increase in international trade and commerce[10]. The corollary of these developments was a proliferation of the situations in which public documents were required abroad. This reality, together with the renewed trust in international institutions that marked the post-war period[11], meant that by the time the Eighth Session of the HCCH convened in 1956, there was a clear and increasingly pressing need to abolish, or at least simplify, the requirement of legalisation with a multilateral instrument[12].

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[5] *Ibidem.*

[6] See subsequent discussion of whether the proposal was a matter of private international law during the eight session: *Procès-verbal no. 4 de la Quatrième commission*, in *Actes de la Huitième session*, 1957, p. 240.

[7] *Mémorandum du Secrétariat*, cit., p. 280.

[8] Through a study to be conducted by the Commission of State of the Netherlands ahead of the eighth session. See *Actes de la Septième session*, 1952, p. 401.

[9] In 1951, the provisional intergovernmental Committee for the movement of migrants from Europe was born «out of the chaos and displacement of Western Europe following the Second World War». This Committee, following a series of name changes, would eventually become the International Organization for Migration of today. See International Organization for Migration.

[10] See United Nations Department of Economic and Social Affairs, *Post-war reconstruction and development in the Golden Age of Capitalism* in *World Economic and Social Survey 2017: Reflecting on seventy years of development policy analysis*, UN Doc E/2017/50/Rev.1, 2017, pp. 23-48.

[11] As demonstrated by, *e.g.*, the foundation of the United Nations in 1945, of the Council of Europe in 1949, the adoption of the Statute of the HCCH in 1951 to establish it as a permanent organisation in 1955, as well as the signing of the Schuman Declaration in 1950, which would eventually lead to the creation of what is today the EU.

[12] In its special message of 20 May 1954, the Council of Ministers of the Council of Europe referred to the facilitation of the administrative work associated with establishing the validity of official documents and its «hope to see the conclusion of a multilateral Convention to this effect»; *Conseil des Ministres du Conseil de l'Europe*, *Programme d'action du Conseil de l'Europe du 20 mai 1954*, Doc. 238, 1954, para. 93. See also the reference to the need to complete the project «as soon as possible» and the discussion of

The discussions during the Eighth Session did not lead to the adoption of a convention, but the delegates concluded that «the abolition of legalisation for judicial documents could be envisaged» and that for other official documents, such as those issued by administrative authorities or notaries, legalisation formalities should be reduced to a «strict minimum»[13]. This early progress was illustrative of the level of trust between the existing members of the HCCH and their respective authorities.

Work continued with a Special Commission meeting in 1959, where the most significant outcome was the text of a draft convention[14]. With this, the stage was set for the negotiations at the Ninth Session in 1960, by which time the chain of signatures that was part of a typical legalisation procedure was widely acknowledged to be an unnecessary burden and «obstacle to international life»[15]. The question was therefore not whether legalisation should be abolished, or simplified in some way, but what mechanism, if any, should replace it. In short, how could the formal procedure for the presentation of documents abroad be simplified, while retaining the trust in the origin of these documents[16]?

The delegates at the Ninth Session were acutely aware of the level of trust within national systems, whereby recipients have full confidence in public documents presented because they have confidence in the officials who executed them[17]. The difficulty was to replicate this trust in an international context.

One option was to abolish legalisation entirely, providing a base rule exempting all documents from the associated formalities. This would have had the advantage of affording foreign public officials the same level of trust as that enjoyed by public officials within a national system. The delegates considered, however, that it would impose a disproportionate burden on recipients to assess the authenticity of foreign documents. For this reason, it was deemed inappropriate to abolish legalisation without replacing it with another formality, one that was as simple as possible, but that would provide the holder of the document with a sufficient guarantee of its authenticity without overcomplicating the verification process[18].

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the possibility of an extraordinary session of the HCCH: *Procès-verbal no. 5 de la Quatrième commission* in *Actes de la Huitième session*, 1957, p. 250.

[13] *Acte final*, in *Actes de la Huitième session*, 1957, p. 356.

[14] *Avant-projet de convention établi par la Commission spéciale et rapport de M. Yvon Loussouarn*, Preliminary Document no. 2 of December 1959, in *Actes et documents de la Neuvième session*, 1961, pp. 15-32.

[15] *Procès-verbal de la séance plenière*, in *Actes et documents de la Neuvième session*, 1961, p. 159; see also *ivi*, p. 19.

[16] Y. LOUSSOUARN, *Rapport Explicatif*, in *Actes et documents de la Neuvième session*, 1961, pp. 173-185, at p. 174.

[17] G.A.L. DROZ, *La légalisation des actes officiels étrangers*, Preliminary Document no. 1 of March 1959 for the attention of the special Commission, 1959, p. 24.

[18] Y. LOUSSOUARN, cit., p. 174.

Despite this view, earlier drafts of the Convention drew a distinction between certain categories of documents and proposed a full exemption from legalisation for some, including those from judicial authorities and public ministries[19].While this distinction was ultimately abandoned in favour of a uniform approach for all documents within the scope of the Convention[20], the original proposal is a testament to the inherent trust in public institutions and authorities shared by the states negotiating the Convention.

2.2 The Convention approach.

The solution that was adopted by the delegates at the Ninth Session was striking in its simplicity. The new Convention would abolish – for documents within its scope – the requirements of the traditional legalisation chain and in its place, afford contracting parties the discretion to require the issuance of an «Apostille», a certificate conforming to a standard model[21].

By establishing that the Apostille was «the only formality» that could be required[22], the Convention sought to reduce the multiple signatures and authentications of traditional legalisation to, at most, a single step. This would reduce the resource burden on the authorities ordinarily implicated in the legalisation chain, including consular officials, while also reducing time and costs for applicants seeking to present their documents abroad.

The question of which authority or authorities would be competent to issue the Apostille was left to the discretion of each contracting party to the Convention, a decision that was important in accommodating the concerns relating to State sovereignty and the separation of powers[23]. To ensure this flexibility did not undermine the simplicity of the overall approach, the drafters sought to maintain a level of uniformity through the use of the model Apostille certificate annexed to the Convention[24].

With respect to the desire not to overcomplicate the process of verifying the authenticity of both the underlying public document and the Apostille, the Convention addresses this concern in two ways: the limited effect of the Apostille (Art. 5) and the requirement to maintain a register of Apostilles (Art. 7).

First, under Art. 5, the Apostille certifies only the origin of the public document, meaning «the authenticity of the signature, the capacity in which the person signing the

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[19] See Art. 2 of the draft convention: *Avant-projet de convention établi par la Commission spéciale et rapport de M. Yvon Loussouarn*, cit., pp. 16 and 23.

[20] *Procès-verbal no. 3*, in *Actes et documents de la Neuvième session*, 1961, pp. 72-7.

[21] Apostille Convention, Arts. 2, 3, 4.

[22] *Ivi*, Art. 3.

[23] *Ivi*, Art. 6. See also, *Procès-verbal No. 3*, cit.

[24] «It is of little import who legalises, if everyone legalises in the same way»: G.A.L. DROZ, cit., p. 26.

document has acted and, where appropriate, the identity of the seal or stamp which the document bears»[25]. This avoids imposing an additional burden on the designated Competent Authority to assess the authenticity of the content of the public document, relying on the principle that if the origin of the document is authentic, there should be no reason to doubt the authenticity of the document itself[26].

Secondly, by introducing a requirement for an accessible register of Apostilles in Art. 7, the Convention provides a low-threshold mechanism for the verification of any Apostille, reducing the burden on the recipient. Given the wide range of instances in which a public document may need to be presented abroad and therefore the equally wide range of potential recipients of Apostilles, it was considered important that any doubts could be resolved by simply enquiring with the issuing authority.

With these innovations, the Apostille Convention was an important step towards accelerating the international circulation of public documents, at a time when the cross-border movement of people, goods, and services was itself accelerating[27].

2.3 A global Convention.

Over 60 years on, the Apostille Convention has become the most successful Convention adopted under the auspices of the HCCH. Over 120 countries around the world have joined the Convention and millions of Apostilles are issued every year[28]. All continents and major regions of the world are represented among the contracting parties to the Convention, including all members of the European Union[29].

The Convention strikes a delicate balance between, on the one hand, the determination of whether a document is considered a public document for the purposes of the Convention and, if so, how its origin is verified for the purpose of issuing an Apostille, and on the other hand, the determination of the probative value of the underlying public document. Under the framework of the Convention, the former is left to the law of the state of origin and the latter to the law of the state of destination.

At its core, the Apostille Convention is about trust: trust in the official or authority executing a public document, trust in the competent authority issuing an Apostille, and trust that the recipient will give the document its intended effect. The model Apostille provides a level of harmonisation and facilitates recognition across all contracting parties, while the designation of competent authorities represents the need for flexibility to

[25] Art. 5(2) of the Apostille Convention, cit.
[26] G. A. L. DROZ, cit., p. 25; Y. LOUSSOUARN, cit., pp. 173-174.
[27] Y. LOUSSOUARN, cit., p. 174.
[28] HCCH Permanent Bureau, Status Table of the Apostille Convention; HCCH Permanent Bureau, Summary of Responses to the Apostille Questionnaire 2021, Preliminary Document no. 2 REV of February 2022.
[29] Following the ratification of Denmark in 2006.

accommodate different systems and traditions. Although there remain many countries that are yet to join the Convention, its success across such a diverse group is evidence of the enduring nature of the solution negotiated at the ninth session.

3. Regulation (EU) 2016/1191.

EU Regulation 2016/1191 was first proposed by the European Commission in 2013, following a Green Paper on the subject in 2010[30]. The Commission proposal focused on the need to break down barriers and remove red tape in the face of increased mobility of citizens and businesses[31].

The final components entered into force in February 2019[32], meaning that at the time of writing, the Regulation had recently celebrated its third anniversary. By comparison, the Apostille Convention dates from 1961 and entered into force in 1965, and it has therefore been operating for over five decades.

The Regulation goes a step further than the Apostille Convention and prevents member states from requiring any authentication formality. The EU considered the Apostille process – an already simplified version of legalisation – too burdensome. For documents covered by the Regulation, no further authentication is required; that is, a public document within its scope may be presented as it is issued. This is a scenario that was envisioned by the drafters of the Apostille Convention and is enshrined in Art. 3(2), which provides that an Apostille certificate cannot be required if «an agreement between two or more contracting states [has] abolished or simplified it»[33]. In this way, the Regulation complements the Apostille Convention by advancing the goal that the two instruments share: abolishing authentication formalities in an effort to facilitate the circulation of public documents, all the while maintaining trust in the origin of each document.

One of the novel additions to the Regulation is the development of multilingual standard forms. They are created as aids to eliminate the need for translation of documents, so the receiving state cannot (save exceptional circumstances) require a certified translation.

In examining the Regulation as a whole, another modern addition compared with the Apostille Convention is the express incorporation of electronic means. This is not

[30] Proposal for a Regulation of the European Parliament and of the Council, on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the european Union and amending Regulation (EU) 1024/2012, COM(2013) 228 final of 24 April 2013, p. 2.

[31] *Ivi*, pp. 2 and 4.

[32] Art. 27(2) of Regulation 2016/1191.

[33] Art. 8 would not apply in this instance as there are no certification formalities proposed in the Regulation.

surprising considering the half century that elapsed between the negotiation of the Convention and the negotiation of the Regulation, but it is nonetheless a difference worth noting. The Regulation refers to electronic versions of public documents and the associated multilingual forms[34], provides for the electronic transmission of requests for additional information in cases of doubt[35], preserves the application of EU law on electronic signatures and electronic identification[36], and invites future consideration on electronic systems for direct transmission of public documents[37]. However, while the Apostille Convention may not benefit from such prescriptive provisions in relation to electronic means, as discussed below, this has not impeded its ability to keep pace with the modern world.

4. The e-APP.

4.1. History and overview.

At the 2003 special Commission on the practical operation of the Apostille Convention, the special Commission noted that there is nothing in the spirit or letter of the Apostille Convention that would constitute an obstacle to the use of modern technology under the Convention[38]. This was endorsed in 2005 by attendees at the «First International Forum on e-Notarization and e-Apostilles» – the predecessor to the International Forum on the e-APP Forum, discussed below – who developed the idea, noting «the application and operation of the Convention can be further improved by relying on such technologies, thus enhancing the mutual confidence as a basic principle for the operation of the Convention».

Following this forum, the e-APP was launched in 2006 to complement and advance the Apostille Convention. It is designed to promote and encourage the implementation of technology in the issuance and verification of Apostilles among contracting parties. Because there was no need to amend the text of the Convention, there is no newer legal basis under which the electronic aspects operate. The programme is therefore best described as an initiative, merely designed as a promotional tool to ensure the Convention's modern operation.

The e-APP comprises two components: the e-Apostille and the e-Register. These components are separate and can be implemented independently, though have complementary operation. The e-Apostille is an Apostille certificate, ordinarily issued

[34] Recital 9 and Art. 12 of Regulation 2016/1191.
[35] Art. 14 of Regulation 2016/1191.
[36] Art. 17(2) of EU Regulation 2016/1191.
[37] Art. 26 of Regulation 2016/1191.
[38] Conclusions and Recommendations of the 2003 Special Commission on the practical operation of The Hague Apostille, Evidence and Service Conventions, 2003, no. 4.

under Art. 3 of the Convention, in electronic form. It is signed by digital signature and may be issued on electronic documents or paper documents that have been scanned into electronic form or otherwise digitised. The main benefit of the e-Apostille is increasing accessibility for users, thereby facilitating the use of documents across borders; e-Apostilles can be requested and issued online, and transmitted electronically, eliminating the need for in-person service[39].

The e-Apostille was envisioned for both paper and electronic documents[40]. Arguably, the added security of a digital signature provides more benefit to a paper public document than an electronic public document. This is because many electronic public documents already incorporate signatures that verify the signatory and are non-repudiable, or include some other means of verification, such as a quick response (QR) code.

With the creation of the e-Apostille, there are four ways in which a document can be authenticated under the Convention: (1) a paper Apostille on a paper public document, (2) a paper Apostille on an electronic public document, (3) an e-Apostille on a paper public document, and (4) an e-Apostille on an electronic public document. The first is the model that has been successfully used throughout the history of the Convention. The second should be considered something of an interim solution for those contracting parties which issue electronic public documents but do not yet have e-Apostilles. It should be approached with caution, as the printing of an electronic public document to allow for the issuance of a paper Apostille undermines the integrity of the original signature (a digital signature which is only valid in digital form). It does, however, provide an important workaround to allow these electronic documents to be presented abroad under the Convention. Of the four means of authentications mentioned above, the third is perhaps the greatest success of the e-APP, allowing paper public documents to circulate more securely and more easily. And finally, the fourth has a role for those contracting parties who are increasingly issuing electronic public documents.

The other component of the e-APP, an e-Register, is an online, publicly accessible register which allows any interested person to verify an Apostille. Just as their traditional paper counterparts, these registers must record information on the number and date of an Apostille, as well as the name of the person signing the public document and the capacity

[39] This became important, for example, during the COVID-19 pandemic. Contracting parties which issued e-Apostilles noted less disruption to their services than those that operated with paper only. These reflections led to the following conclusion: «noting the importance of Apostille services for individuals and businesses, the SC called on contracting parties to ensure the continued availability of Apostille services in challenging circumstances, such as those experienced as a result of the COVID-19 pandemic. It emphasised the benefits of e-Apostilles and online services in addressing many difficulties arising in this context», in *Conclusions and Recommendations of the 2021 Special Commission on the practical of the Apostille Convention*, (hereinafter, «C&R of the 2021 SC»), no. 10.

[40] See *First International Forum on e-Notarization and e-Apostilles*, Las Vegas, 2005, no. 14.

in which they have acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp[41]. E-Registers may record the details of paper and / or e-Apostilles. While Apostille registers are an obligation under Art. 7 and have existed under the paper system, they are rarely (if ever) used[42]. The main benefit of an e-Register is therefore the increased security it provides to the Apostille process by facilitating an accessible, additional check for the recipient.

Contracting parties to the Convention have complete discretion as to whether and how they implement the e-APP components, including which services they provide and which electronic infrastructure they use. This offers great flexibility to governments who have different requirements for – among other matters – cost, security, and internal law aspects. It also has the consequence that each system is different, both in operation and design, which may affect user experience.

Support and facilitation of the e-APP is coordinated from the Permanent Bureau of the HCCH. Most importantly, the Permanent Bureau organises meetings of the International Forum on the e-APP, which are a venue for the exchange of information and experience on the e-APP and related matters, such as electronic notarisation and digital authentication. These meetings generally involve presentations from recent adopters of the e-APP, panel discussions on contemporary topics, and offer a set of conclusions and recommendations (or other form of reflections) to assist contracting parties going forward. Since 2005, the e-APP Forum has been held on 12 occasions in 11 locations. The success of these meetings reflects the importance of information sharing and generating trust between contracting parties in the development of e-APP components, as well as ensuring the e-APP components are used and accepted following implementation.

4.2 Expansion and insights.

At the time of writing, over 25 contracting parties issue e-Apostilles and 50 contracting parties operate an e-Register[43]. This represents approximately 40 per cent of the contracting parties to the Convention.

The early adoption of the e-APP was slower than expected, likely because it was ahead of its time. In 2006, the use and recognition of digital signatures was becoming more prevalent but had not yet reached everyday use. For example, Adobe PDF, which is

[41] Art. 7(1) of Apostille Convention.

[42] In the 2021 Apostille Questionnaire, 9 per cent of respondents reported their Art. 7 register is «never» consulted with a further 11 per cent reporting it is consulted «once a year». By comparison, in 2020, in the 10 states that were able to provide statistics, their e-Registers were consulted over 1,000,000 times. For more information, see *Summary of Responses to the Apostille Questionnaire 2021*, cit.

[43] For a list of contracting parties which have implemented the e-APP, see, HCCH Permanent Bureau, e-APP Implementation Chart.

today a key part of many e-APP solutions, was only published as an open standard in 2008[44].

At the turn of the decade, four years after its launch, only three contracting parties issued e-Apostilles[45], with a slightly larger number operating an e-Register[46].

Despite these humble beginnings, the popularity of the e-APP is steadily increasing, with the second eight years of the programme seeing an additional 34 contracting parties, representing two thirds of those that have now implemented the e-APP. Newer contracting parties are more likely to implement the e-APP, typically integrating systems ahead of the entry into force of the Convention. Of those that have acceded to the Convention since 2006, 21 of 37 have implemented the e-APP[47] a much higher rate than those who joined before 2006. Within the EU, eight member states have implemented the e-Apostille[48] and ten have an e-Register[49].

There are several potential reasons for the recent increase in e-APP adoption, including a growing necessity, accelerating growth, and COVID-19.

With reference to necessity, many contracting parties are shifting towards e-government as part of whole-of-government digitisation agendas. This necessarily includes an increasing number of public documents executed in electronic form. If these documents require authentication, the e-Apostille offers the optimal solution[50]. In addition, authorities that are comfortable with issuing electronic public documents are more likely to be in a position to trust and accept e-Apostilles received from other contracting parties.

With reference to accelerating growth, the increasing development of e-APP solutions creates a greater wealth of knowledge for other contracting parties to leverage. This primarily involves information sharing between contracting parties, which has been recognised as a useful tool by the special commission[51], the key opportunity being the e-APP Forum, with participants able to gather knowledge before undertaking the task in their own jurisdiction. Inter-departmental efforts within a single contracting party have also proven useful, when, for example, there are other government digitisation efforts which are similar to e-APP components and resources, expertise, and experience can be

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[44] See International Standards Organisation (ISO), ISO Standard 32000-1:2008 *Document management – portable document format – Part 1: PDF 1.7*, 2008.

[45] Colombia, New Zealand, and Spain.

[46] Andorra, Belgium, Colombia, Dominican Republic, Guatemala, Moldova (Republic of), and the United States (Rhode Island and Texas).

[47] Bahrain, Bolivia, Brazil, Chile, Costa Rica, Denmark, Dominican Republic, Georgia, Guatemala, Indonesia, Korea (Republic of), Kosovo, Moldova (Republic of), Morocco, Nicaragua, Paraguay, Peru, Philippines, Singapore, Tajikistan, and Uzbekistan.

[48] Austria, Belgium, Bulgaria, Denmark, Estonia, Latvia, Slovenia, and Spain.

[49] Austria, Belgium, Bulgaria, Denmark, Estonia, Ireland, Latvia, Romania, Slovenia, and Spain.

[50] See C&R of the 2021 SC, no. 27.

[51] *Ivi*, no. 18.

shared. Concerns around the rejection of e-Apostilles are also less common with each contracting party that implements the e-APP (with the assumption that those contracting parties who issue e-Apostilles also have the infrastructure to accept them). This rolling adoption is perhaps most clear on a regional level. Looking at a map of e-APP adopters, the Latin American region is significantly ahead and those contracting parties that do not have the e-APP risk being left behind[52].

Finally, the COVID-19 pandemic required many in-person services to shut down. Despite this, documents still needed to circulate. Issuing e-Apostilles removed the need for in-person contact, which was safer, more efficient, and enabled applicants located abroad to access the service.

4.3 Challenges.

The Permanent Bureau circulated a questionnaire to contracting parties to the Apostille Convention in 2021 in preparation for the special commission on the Apostille Convention («2021 Apostille questionnaire»). The information provided by the 79 respondents provides some insight into the operation and challenges of the e-APP.

Approximately 70 per cent of respondents to the 2021 Apostille questionnaire issue some form of public document in electronic form. This is a clear majority and shows a need for complementary advances in electronic services, including through the e-APP. However, of this 70 per cent, it was more difficult to discern what percentage of public documents are electronic. The answers ranged from 5 to 90 per cent, with an average of 25 per cent, though most were not able to provide an accurate estimate.

What is not clear is whether e-Apostilles are being issued for paper public documents or electronic public documents. Unfortunately, there was no question on this subject within the 2021 Apostille questionnaire. This means that it is entirely possible – and in the authors' opinion, likely – that a majority of e-Apostilles are issued for paper public documents which have been converted into electronic form.

The questionnaire also asked about the challenges of e-APP implementation[53]. The greatest reported impediment concerned challenges related to implementation, arguably something that may be overcome at the international level through further promotion and information sharing. However, these implementation challenges could also encompass political will, or more accurately, a lack thereof. Implementation challenges were followed by cost, system operability concerns, and security concerns, matters that are unique to domestic governments.

[52] At present, 15 of the 18 contracting parties from Latin America have implemented one or both components of the e-APP. This represents 30% of the total number of contracting parties to have done so.

[53] Prel. Doc. no. 1 of January 2021, *Questionnaire relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention*).

In addition, it is clear through the slow uptake, as well as through practical experience, that another major challenge for the e-APP is shifting the mindset. For some contracting parties, this is a consequence of convenience and habit; when the system has been operating successfully with paper models for decades, there may be no particular need to revisit infrastructure.

Finally, another nuance that must continue to be respected is the obligation to receive an e-Apostille versus the discretion to receive an electronic public document. While a receiving authority cannot reject an e-Apostille because of its electronic format[54], this does not prevent authorities from rejecting the underlying electronic public document on the basis of their domestic law because the document is required to be produced in paper form[55]. This is similar to the EU Regulation Recital 9 which allows member states to determine «whether and under which conditions public documents and multilingual standard forms in electronic format may be presented».

5. Looking ahead.

The changes driven by advances in technology are not unique to the e-APP. New digital solutions are being studied, developed, and implemented across services, sectors, and regions. The prevalence of these new solutions, together with the number of digital transformation strategies and agencies being established, illustrates the increasing trust in, and reliance upon, technology. This must extend to the issuance and execution of public documents.

In the last decade alone, the EU has begun preparing for a single digital gateway for public services and procedures[56], the Groningen Declaration has encouraged the development of solutions for digital student data portability[57], and the availability of electronic notarial services has expanded[58]. Importantly, these examples encompass the three categories of public documents for which Apostilles are most requested: civil status documents, diplomas, and notarial authentications[59].

The COVID-19 pandemic has also accelerated innovation in the use of public documents abroad, most relevantly through the development of digital health certificates.

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[54] C&R no. 30, cit.

[55] *Ivi*, C&R no. 38.

[56] Regulation (EU) 2018/1724 of the European Parliament and of the Council, of 2 October 2018, establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) 1024/2012.

[57] Groningen Declaration on Digital Student Data Depositories Worldwide (16 April 2012).

[58] For example, the Estonian Chamber of Notaries launched its fully remote, electronic notarisation service in early 2020. For more information, see: B. OYETUNDE, *Estonia's fully remote e-notary service – 1st state e-service of its kind in Europe*, 2021, available *online*.

[59] According to the 2021 Apostille Questionnaire. See *Summary of Responses to the Apostille Questionnaire 2021*, cit.

These certificates allow individuals to present a trusted proof of vaccination or recovery abroad and are often exempt from legalisation or similar formalities[60].

With these developments in mind, the question arises of whether our collective focus on digitising individual authentication steps is distracting us from harnessing technological developments to digitalise the entire authentication process. If technology can facilitate the direct authentication of the origin of a document, there may no longer be a need to impose any additional formality. To again use an example from the COVID-19 pandemic, when vaccination certificates were discussed by the 2021 special Commission, it was concluded that no further guidance was required on the subject, with many contracting parties preferring to rely on authentication means inherent in digital vaccination certificates, rather than imposing the addition of an Apostille certificate[61].

At first, this may appear incompatible with the Apostille Convention. However, upon closer examination, it seems that such an approach is not only compatible with the text, but exactly what the drafters intended. As discussed above, as early as the first proposal in 1951, there was a clear desire to reduce the formalities required for a public document to have its intended effect abroad. Once the formal requirements of legalisation were abolished, the question of whether they should be replaced gave rise to significant discussion[62]. While the solution adopted replaced the requirement of legalisation with the issuance of an Apostille, it is clear from the text of the Convention and the negotiation history that the requirement of an Apostille was only ever conceived as optional – a new maximum formality[63]. Once again, the text of Art. 3(2) reinforces this idea, ensuring that the Apostille could not be required where authentication formalities had been abolished or further simplified by virtue of laws, regulations, practices, or agreements[64]. In addition, Art. 8 addresses this in the context of formal treaties, guaranteeing that the Convention would only override the authentication provisions of other instruments if the formalities required therein were more «more rigorous» than the issuance of an Apostille[65].

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[60] Regulation (EU) 2021/953 of the European Parliament and of the Council, of 14 June 2021, on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, Recital 23. In addition to the 27 EU Member States, over 35 third countries around the world have joined the EU system, pursuant to Art. 8 of the Regulation, demonstrating the level of international trust in the solution, even in the absence of legalisation or equivalent formalities. See also the Report from the Commission to the European Parliament and the Council pursuant to Art. 16(2) of Regulation (EU) 2021/953 of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test, and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, COM(2021) 649 final of 18 October 2021, p. 1.

[61] See C&R of the 2021 SC, cit., no. 11.

[62] Y. LOUSSOUARN, cit., p. 179.

[63] *Ivi*, p. 180; *Procès-verbal no. 3*, cit., pp. 72-77.

[64] The reference to an «agreement» in Art. 3(2), is to be interpreted in the widest possible sense, to cover «all agreements not cast in the form of formal treaties»; Y. LOUSSOUARN, cit., p. 180.

[65] Art. 8 of Apostille Convention.

While there is a certain irony in relying on historical reasoning to accelerate the digitalisation of public document authentication, there is no doubt that the drafters of the Convention sought to encourage further simplification of the process. The abolition of all formalities was their aspiration, yet to avoid creating an unnecessary burden on recipients they were left with no choice but to compromise. The Apostille was that compromise, designed to reduce authentication to a single formality while maintaining confidence in the origin of the document, and by extension, its content.

Over 60 years on, when public documents are executed in electronic form with a secure, digital means of authentication, the addition of a second certificate becomes superfluous. In short, if technology can guarantee absolute trust in the origin of a document without any formality, the authentication procedures traditionally relied upon may no longer be necessary. This is the epitome of trust in the origin of a public document, and rather than being a threat to the Apostille system, is a development that should instead be embraced as the realisation of the Convention's original goal.

6. A common challenge.

One of the main goals of the Apostille Convention is to establish trust between contracting parties. The Convention acknowledges the inherent trust in the origin of a public document that exists at a domestic level and was designed to extend this to the use of public documents in an international context. As the number of contracting parties continues to increase and the cultures and traditions of their respective systems diversify, this trust has become even more important.

By contrast, the EU, as it exists today, has an inherent trust between its member states and therefore has a different starting point. This principle of mutual trust is expressly referenced in the preamble of the Regulation[66]. This foundation explains why the Regulation can go further than the Convention: in principle, there should be no doubts between EU Member States as to the authenticity of their public documents. Practical experience with the Regulation would suggest that there is still a reluctance to relinquish all authentication formalities, though this was foreseen by the drafters of the Regulation, who preserved the right of individuals to request Apostilles for documents covered by the Regulation[67]. The core of the discussion is therefore not how we can increase trust in authentication formalities; it is how we can increase trust in the origin of a public document itself, such that any additional authentication formality is unnecessary.

It is against this background that, despite the Regulation breaking down barriers that the Apostille Convention has not (and possibly never will), there remains a challenge common to both instruments: hesitation around the use of digital public documents. This

[66] Recital 3 of Regulation 2016/1191.
[67] Recital 5 of Regulation 2016/1191.

is because the hesitation has little to do with the processes of a foreign government or understanding how their authorities issue documents, but rather, it is hesitation at a human level around digitisation.

Until we can overcome our hesitation, challenges will remain — no matter how many formalities are abolished by a Convention or Regulation. The focus should therefore be on educating individuals, authorities, and other recipients, to ensure that digital public documents are afforded the same level of trust as their paper counterparts. Together, we need to foster the creation of an environment in which digital public documents are trusted and accepted; only then can we hope to maximise the potential of the technology available to us.

ABSTRACT: The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) was developed in response to an increasing number of public documents circulating around the world and forged a new path in the authentication of foreign public documents. At its core, the Convention established a simplified mechanism by which contracting parties could trust that the documents they were receiving were authentic. The essence of this solution was the Apostille certificate and the authorities designated as competent for its issuance.

More recently, the European Union (EU) has attempted to further simplify the circulation of public documents between its member states, most notably through Regulation (EU) 2016/1191. While the Regulation relies on the inherent trust between EU Member States to better the approach used by the Convention, its goal is the same: to abolish the authentication requirements for presenting public documents abroad.

Over sixty years on from the adoption of the Apostille Convention, public documents are increasingly executed in digital rather than paper form. This rapidly evolving technological landscape inspired the establishment of the electronic Apostille Programme (e-APP), to promote and encourage the digitalisation of the Apostille process. In comparison, the Regulation has not needed any special programme or initiative to operate in a digital context, as it was developed with the realities of digital public documents in mind.

As the digital transition intensifies, both the Convention and the Regulation face similar challenges in overcoming the hesitation of authorities and individuals with respect to digital public documents. However, as governments and citizens become more comfortable with the technology, and more importantly the security underlying it, the Regulation may be able to reach its full potential and the issuance of Apostilles under the Convention may become entirely unnecessary.

Against this background, this paper considers how the pursuit of trust in the authentication process has shaped the development of the Apostille Convention. The authors also consider the EU Regulation, as it follows in the footsteps of an instrument 50 years its senior. With the digital environment in mind, the paper concludes that technology will eventually enable ultimate trust in the authentication of public documents.

KEYWORDS: HCCH; Apostille Convention; EU Regulation 2016/1191; legalisation; cross-border authentication; digital public documents.