

AMERICAN BAR ASSOCIATION

**ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 6, 2023**

RESOLUTION

RESOLVED, That the American Bar Association urges the Secretaries of State, and all Competent Authorities that issue apostilles in the United States, who have not yet implemented the e-APP program, which includes e-Apostilles and e-Registers, to proceed with such implementation in order to reduce costs and facilitate cross-border commerce and other public document verification.

REPORT

This Resolution seeks to minimize the delays, expense, and bureaucratic hassles associated with the cross-border presentation and authentication of documents for business and civil status purposes. This includes the verification of signatures affixed to documents signed in one country for use outside that country. No new law or treaty is required. On July 12, 2022 the National Association of Secretaries of State (“NASS”) consisting of the Secretaries of State of each U.S. state, adopted a Resolution Recommending that States Implement a Process for Issuing Electronic Apostilles. The current Resolution urges the Secretaries of State and other Competent Authorities of the U.S. states¹ who have not yet implemented to implement the e-APP program, including e-Apostilles and e-Registers. This program is already recognized by 29 countries and one U.S. state. No legislation is required to implement this program.

BACKGROUND

1. The HCCH 1961 Apostille Convention.

For over 60 years the Hague Conference on Private International Law (commonly referred to as the “**HCCH 1961 Apostille Convention**” (the “**Convention**”) has assisted in streamlining authentication of public documents such as private notarial acts and government documents including those emanating from clerks of courts, public prosecutors, and government agencies.²

The HCCH is an intergovernmental organization with over 150 countries, including the United States, connected to its work.³ It works for the “progressive unification of private international law.”⁴ The HCCH develops international treaties and monitors their practical operation. The Convention abolished the cumbersome legalization process for authenticating documents and replaced it with a single formality—the issuance of a certificate called the Apostille. An Apostille issued by the “State of Origin” authenticates the origin of a public document⁵ so that it can be presented abroad in another Contracting State—i.e., one of the 124 countries who joined the Convention.

Authenticated signatures are typically required in connection with conveyances of real property interests to be recorded in public records, the sale of vessels and the recordation of ship mortgages, the adoption of a child from another country, as well as in a variety of commercial, regulatory, civil status, family law, and other contexts. Traditionally, attorneys who wanted to use or record public documents from a U.S. state, including notarized documents from a civil business transaction in a foreign country would need to start the process by physically delivering the original document by hand or through a courier service to the Secretary of State’s office where the document was executed and

¹ An authoritative list of the designated Competent Authorities in the United States is available at: <https://www.hcch.net/en/states/authorities/details3/?aid=353>.

² The full text of the Apostille Convention is available at: <https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf>.

³ The United States has been a member of the Apostille Convention since 1979. See, <https://www.state.gov/treaties-in-force/>.

⁴ See Article 1, of the Apostille Convention.

⁵ For purposes of the Apostille Convention, public documents are what each jurisdiction determines they are. The Apostille Convention listing is not exclusive but rather provides examples of what may be considered public documents.

where the notary was licensed. Unless the attorney is located in the capital of that State, it could be an expensive and time-consuming task just to initiate the process. If the document is not “walked through” in person, one could wait weeks before the Apostille request is processed.⁶ After obtaining the Apostille, the attorney would then need to arrange to physically deliver the original document to the other country where the Apostilled document is to be used.

2. Electronic Signatures Are Accepted Internationally.

Secure electronic signatures and other types of e-signatures are increasingly employed for contracts of many types. The United Nations Convention on the Use of Electronic Communications in International Contracts (2006), which applies to electronic communications used in the formation or performance of a contract between parties whose places of business are in different countries, seeks to overcome obstacles in domestic legislation and international treaties to the use of electronic signatures. The American Bar Association (“**ABA**”) adopted resolutions urging U.S. ratification of this convention in 2006 and 2008. Private sector, for-profit businesses and services such as DocuSign, Echosign (Adobe), McAfee, Symantec, Verisign and others, provide various services and platforms for the validation of electronic signatures.

Increasingly, legislation contemplates recognition of such electronically signed documents for legal purposes within a country. UNCITRAL’s two model laws, the 1996 Model Law on Electronic Commerce and the 2001 Model Law on Electronic Signatures, have been adopted in a limited, but growing number of countries.

3. Existing United States Legislation.

In the U.S., the Uniform Electronic Transaction Act (“**UETA**”), promulgated by the Uniform Law Commission in 1999, has been the basis of legislation in 49 states, the District of Columbia and Puerto Rico. Where the parties agree to conduct a transaction by electronic means, UETA makes electronic records and signatures legally equivalent to their paper counterparts. As to the required activity of a notary public, UETA provides that “[i]f a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included in a notarization by other applicable law.”

The Electronic Signatures in Global and National Commerce Act (“**E- SIGN**”), enacted in the U.S. in 2000, 15 U.S.C. §§7001 - 7032 also includes the following provision on notarization and acknowledgement:

“If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically

⁶ The Texas Secretary of State’s website, for example, says to please allow at least 25 working days to process any request received by mail.

associated with the signature or record.”

15 U.S.C. §7001 (g). (This E-SIGN provision is superseded by state law for states that have adopted the 1999 version of UETA.) In addition to promoting the use of e-signatures, electronic contracts and records domestically, E-SIGN requires the U.S. Secretary of Commerce to promote the acceptance and use of electronic signatures internationally, and to take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.

More recently, the rise in online notarization (recognized now in 41 States) performed with electronic records over a secure, live, two-way audio-video communication and signing platform has expanded the ease by which cross-border deals can be accomplished and further demonstrates the need for electronic Apostilles. COVID restrictions have helped accelerate the trend towards online notarizations, e-signatures and authentication of signatures through electronic Apostilles.

4. The Electronic Apostille Pilot Program (“e-App”).

The “spirit and letter of the Convention do not constitute an obstacle to the usage of modern technology and [its] application and operation can be further improved by relying on such technologies.”⁷ The electronic Apostille Pilot Program (“**e-APP**”) was launched in 2006 by the HCCH and the National Notary Association of the United States of America to promote the issuance of electronic Apostilles (“**e-Apostilles**”) and the operation of electronic registers of Apostilles that can be accessed online by recipients to verify the origin of an Apostille they have received (“**e-Registers**”). The HCCH has attempted, through e-APP, to improve accessibility and usability of the Convention by encouraging use of commonly available technologies such as electronic documents and e-signatures in order to better conform to more modern business and legal practices. The goal is reciprocal recognition of these modernized procedures while at the same time avoiding placing those involved in the verification/authentication process in jeopardy of infringing foreign territorial sovereignty.

5. e-Apostilles.

The HCCH has approved the use of e-Apostilles which are certificates issued in electronic form, digitally signed by the relevant state Secretary of State and electronically transmitted or otherwise made available for download or viewing on a website. Other than the format of the Apostille, e-Apostilles have the same requirements as paper Apostilles under the Convention, namely that: (i) a Competent Authority⁸ must authenticate

⁷ See the November 2003 Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille Convention, available at: <https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf> (paragraphs 13-24). The Hague Special Commission concluded that an apostille may be issued in electronic form, much like a variety of paper forms are permitted (such as the allonge, embossed seal, ink stamp, wax seal, etc.) consistent with principles of functional equivalence and as long as authorized by the issuing state.

⁸ A Competent Authority is an authority designated by a Contracting State that is competent to issue Apostilles. The United States government has specifically designated Secretaries of State throughout the United States as “Competent Authorities” who are legally authorized to issue apostilles in whatever form. Here is the link to the official designation made by the United States government: <https://www.hcch.net/en/states/authorities/details3/?aid=353>.

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signature, capacity of person signing, and seal or stamp; (ii) the Apostille must issue from the Competent Authority of the State from which the document emanates; (iii) the Apostille must be attached or logically associated with the public document; and (iv) the Apostille must follow the model Certificate from the Convention.

The five principles and practices of e-Apostilles are:

1. **Accessibility**

e-Apostilles, and related services, should be accessible to all users.

2. **Integrity**

Competent authorities should preserve the integrity of the e-Apostilles and the underlying public document to which it relates.

3. **Verification**

e-Register maintains the e-Apostille in a publicly accessible electronic form that allows any interested person to reliably verify the Apostille online.

4. **Acceptance**

Contracting parties should have systems in place to facilitate the acceptance of e-Apostilles.

5. **Updates**

Competent authorities should regularly update and upgrade their Apostille practices, including e-App infrastructure.

The HCCH is actively encouraging contracting states and contracting parties to the Convention to adopt the e-APP program and implement e-Apostilles and e-Registers. The state of Montana has adopted the use of e-Apostilles. The National Association of Secretaries of State adopted a Resolution on the 10th day of July, 2022, recommending that all states should implement a process for issuing e-Apostilles.

EXISTING ABA POLICY:

This further supports existing ABA policies involving the verification and attestation of signatures across borders. For example, at a meeting held in August 9-11, 2011 the ABA House of Delegates (HOD) passed a resolution⁹ advocating for the adoption by all states of the Revised Uniform Law on Notarial Acts (RULONA) which revises and modernizes the original Uniform Law on Notarial Acts. RULONA covers and applies to all notarizations of both tangible and electronic records, and harmonizes treatment of notarization of electronic records with the Uniform Electronic Transactions Act (1999), the federally enacted Electronic Signatures in Global and National Commerce Act (2000), and the Uniform Real Property Electronic Recording Act (last amended in 2005).

⁹ 2011 AM 110A.

Similarly, at the same meeting in 2011, the ABA HOD adopted¹⁰ a policy for the promotion of efforts to improve legal structures globally for the conduct of secured lending, focusing particularly on countries where formalities with the identity of a signer can obstruct the efficient execution of secured lending, and that have adopted secured lending systems inspired by Uniform Commercial Code Article 9.

CONCLUSION

The traditional concepts of verification of signatures and authentication of documents for cross-border purposes through the use of paper Apostilles merit modernization and simplification to recognize new technologies and the widespread adoption of electronic communications to facilitate transnational commercial practices and public document verification across borders. Modernization of the procedures for obtaining Apostilles will reduce costs, save time and increase security for attorneys and their clients engaged in cross-border transactions and public document verification.

Respectfully Submitted,

James C. Schulwolf, Chair
Business Law Section
February 2023

¹⁰ 2011 AM 301.

GENERAL INFORMATION FORM

Submitting Entities: Business Law Section

Submitted By: James C. Schulwolf, Business Law Section Chair

1. Summary of Resolution(s).

The Resolution calls for the ABA to urge the Secretaries of State of the U.S. states and Hague Convention contracting parties who have not yet implemented the e-App program, including e-Apostilles and e-Registers, to proceed with such implementation in order to reduce costs and facilitate cross-border validation of documents.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution advances ABA's goals 1 and 2 by, increasing security and transparency and reducing time and costs associated with unnecessary administrative tasks.

3. Approval by submitting entity.

The Council of the Business Law Section approved the Resolution and Report on November 11, 2022.

4. Has this or a similar resolution been submitted to the House or Board previously?

Yes. A resolution advocating the modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts was previously submitted at the 2014 Annual Meeting, but did not address electronic Apostilles specifically which is the primary subject of this proposed Resolution.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Report notes the previous adoption by the ABA House of Delegates of Resolutions 2006 AM 303 and 2008 AM 100. These two resolutions reflected the ABA's support of The United Nations Convention on the Use of Electronic Communications in International Contracts (2006).

The Report further notes that the HOD recognized the value of re-examination of the legal frameworks supporting verification and attestation in 2011 when it endorsed the Uniform Law Commission's Revised Uniform Law on Notarial Acts promulgated for consideration by state legislatures in 2010. The proposed resolution supports further update of the Revised Uniform Law on Notarial Acts.

The Report further notes that in 2011, the ABA HOD adopted a policy for the promotion of efforts to improve the legal frameworks globally for the conduct of secured lending, a subject matter with respect to which the formalities in many jurisdictions dealing with the identity of a signer can obstruct the efficient conduct of secured lending. The proposed Resolution provides the opportunity to modernize the procedures for verification and authentication of signatures across borders and supports the existing ABA policies in this respect.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

The current practices for the authentication of documents in cross-border transactions using paper Apostilles do not reflect the advances in electronic technology through which business is routinely conducted today, nor does it reflect the expectations of individuals for interacting with governmental agencies. Therefore, modernizing cross-border authentication practices through use of e-Apostilles will improve the ability of lawyers globally to serve clients more effectively and any delays will only perpetuate antiquated procedures.

7. Status of Legislation. (If applicable)

Not applicable. On November 28, 1979, the United States Senate passed a Resolution of Ratification for the Hague Apostille Convention. The record of the ratification by the United States Senate is available at: <https://www.congress.gov/treaty-document/94th-congress/23?s=1&r=7>.

Therefore, no state level authorization is required. And the Apostille Convention is self- executing. The formal designation of Competent Authorities by the United States government is available at:

https://treatydatabase.overheid.nl/en/Treaty/Details/009051_du.html#United%20States%20of%20America.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The plan is to send a copy of the Resolution to each Secretary of State and other Competent Authority for each U.S. state and urge these state officials to adopt e-Apostilles and e-Registers. On a local level, affected ABA members will be urged to contact their state's Secretary of State and other Competent Authority to detail the benefits to their practice of e-Apostilles and e-Registers.

9. Cost to the Association. (Both direct and indirect costs)

None.

10. Disclosure of Interest. (If applicable)

None.

11. Referrals.

This will be referred to all Secretaries of State and Competent Authorities in the U.S. States.

12. Name and Contact Information.

(Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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13. Name and Contact Information.

(Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The Resolution calls for the ABA to urge the Secretaries of State of the U.S. states and Hague Convention contracting parties who have not yet implemented the e-App program, including e-Apostilles and e-Registers, to proceed with such implementation in order to reduce costs and facilitate cross-border validation of documents.

2. Summary of the issue that the Resolution addresses.

This Resolution seeks to minimize the delays, expense and bureaucratic hassles associated with the cross-border presentation and authentication of documents for business and other civil purposes. This includes the verification of signatures affixed to documents signed in one country for use outside that country. Specifically, it addresses the difficulties, costs and excessive time involved in obtaining Apostilles.

3. Please explain how the proposed policy position will address the issue.

This Resolution urges the Secretaries of State of each U.S. state to adopt an electronic authentication process already recognized by 29 countries and one U.S. state. By adopting and implementing e-Apostilles and e-Registers, the time and cost to obtain an Apostille will be significantly reduced and accessibility and security will be enhanced.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None.