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THE ELECTRONIC APOSTILLE IN WORLDWIDE CIRCULATION OF PUBLIC DOCUMENTS

Abstract

Already in the beginning of the 21st century, the electronic apostille emerged. It still confronts a number of challenges in its application. These problems of legal and technical character are the main reason for the states being reticent with it. The main question here is whether the adaptation of the Apostille Convention and establishment of uniform standards for applicability of the electronic apostille could ensure its smooth implementation in member states. To answer this question, the article provides an overview of the forms of verification of foreign public documents, namely legalisation and (e-) apostille. It then examines the regulation of verification of foreign public documents under German law, as well as touches on the problems that hinder the application of the e-APP in the member states. In the last part, the possibility of adaptation of the Apostille Convention to the actual situation and the establishment of uniform requirements for the application of electronic apostille are discussed.

Annotasiya

XXI əsrin əvvəllərindən etibarən elektron apostil müzakirə obyektinə çevrilmişdir. Onun tətbiqi ilə bağlı isə hələ də bir sıra çətinliklər mövcuddur. Dövlətlərin bu məsələdə ehtiyatlı davranmasının əsas səbəbi hüquqi və texniki xarakterli problemlərin mövcud olmasıdır. Burada əsas sual ondan ibarətdir ki, Apostil Konvensiyasının qəbulu və elektron apostilin tətbiqi üçün vahid standartların müəyyən edilməsi onun üzv dövlətlərdə rahat tətbiqini təmin edə bilərmə? Sualı cavablandırmaq üçün məqalədə xarici rəsmi sənədlərin təsdiq olunma formaları, yəni onların leqallaşdırılması və apostili haqqında məlumat verilir. Daha sonra isə Almaniya qanunvericiliyinə əsasən xarici rəsmi sənədlərin təsdiqlənməsinin tənzimlənməsi, eləcə də Konvensiyaya üzv dövlətlərdə "e-APP" layihəsinin tətbiqinə mane olan problemlər müzakirə olunur. Sonuncu hissədə isə Konvensiyanın cari vəziyyətə uyğunlaşdırılması və elektron apostildən istifadə üçün vahid tələblərin müəyyən edilməsi imkanlarına toxunulur.

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Introduction

In an increasingly globalised world, international civil procedure is very important as more business and private relationships emerge. Questions about the digitalisation of processes have arisen in recent years, focusing on the procedure of electronic authentication of foreign documents in international civil procedure law.

The apostille, as a special form of authentication of foreign public documents, was replaced by legalisation in the middle of the 20th century. It was of great importance for facilitating the verification process for documents in international document circulation.

The electronic apostille arose in the twenty-first century and has seen a new surge in light of the COVID-19 pandemic. The Secretary General of the Hague Conference on Private International Law (hereinafter the HCCH) emphasised a greater need for electronic authentication and recognition of public documents during the pandemic.¹ The events recently organised by the Conference demonstrate the need for digitalisation while issuance of apostilles.²

The electronic apostille is relatively new and has not yet been the subject of in-depth research in German law. The article aims to answer the following question: Could adaptation of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (“Convention”)³ and establishment of uniform standards for applicability of the electronic apostille ensure its smooth implementation in member states? The first part of the article provides an overview of the forms of verification of foreign public documents, namely legalisation and (e-) apostille. The second part addresses the current legal regulation of the respective topic in Germany and related problems that hinder the application of the e-APP in member states. The final section discusses possible solutions to current challenges by adapting

¹ Hague Conference on Private International Law, Annual Report, 2 (2021). Available at: <https://assets.hcch.net/docs/af309929-bc6c-4a38-ae7b-ddf5ec3ddb94.pdf> (last visited Nov. 14, 2022).

² See generally Annual Report of the HCCH, Part III (2020).

³ Hague Conference on Private International Law, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961). Available at: <https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf> (last visited Nov. 14, 2022).

Convention to contemporary demands and by ensuring uniformity of standards for electronic apostille. The work primarily relates to German legislation, while the experience of some member states in the use of electronic apostille is also considered.

I. Force of foreign public documents

Documents are evidence in court proceedings. Some are of the opinion that these have great reliability in proceedings.⁴ The argument behind this view is the power of written text and a personal signature.⁵ According to another view, documents do not play a major role in decision-making.⁶ The reason is that the written or signed paper does not always correspond to the actual intention of the person. It means that the manipulation over intention cannot be excluded and that is the court to decide over the existence of such intention.⁷

Nevertheless, there is no argument that the aim of a document is to bring some advantage to a party in the proceedings. This could be mainly observed in the example of the civil status acts. However, not all the civil status acts as well as other types of documents have evidential value and in order to gain it, the documents must first be authentic. In this sense, the recognition of the authenticity of foreign documents could not be on the same level as domestic documents. The physical impossibility of reading and understanding every language in the national courts, and knowing the laws and competence of the issuing authorities is the reason for that.

A. Requirements for authenticity

According to § 437 (1) of the Code of Civil Procedure of the Federal Republic of Germany (Zivilprozessordnung) (hereinafter “ZPO”)⁸ the public legal documents issued in Germany by public authorities (for example, the Marriage Registry Office) or public persons or entities (for example, notaries) are presumed to be authentic.⁹ This presumption covers only the issuer of the document, meaning that the specific document originates from the alleged issuer and does not cover the competence or content of the document, which falls under the regulation of different norms.¹⁰

Compared to domestic public documents, the authenticity of a document issued by foreign public authorities must be proven in accordance with § 438

⁴ Michael Huber, Hans-Joachim Musielak, Wolfgang Voit, Zivilprozessordnung, § 415, para. 7 (19th ed. 2022); Christian Balzer and Bianca Walther, *Beweisaufnahme und Beweiswürdigung im Zivilprozess, B. Die Beweismittel und ihre Erschließung im Einzelnen*, para. 245 (4th ed. 2018).

⁵ Huber, Musielak, Voit, *supra* note 4.

⁶ Alexander Krafka, Volkert Vorwerk, Christian Wolf, BeckOK ZPO, § 415, para. 5 (40th ed. 2021).

⁷ *Ibid.*

⁸ Zivilprozessordnung, § 437 (1) (2005). Available at: https://www.gesetze-im-internet.de/englisch_zpo/index.html (last visited Nov. 14, 2022).

⁹ *Supra* note 4, § 415, para. 8.

¹⁰ *See supra* note 8, § 415 ZPO; *See also* Klaus Schreiber, *Münchener Kommentar zur Zivilprozessordnung*, § 437, para. 4 (6th ed. 2020).

(2) ZPO.¹¹ After the foreign public documents have gone through the recognition process, German law grants them authentication. This gives documents evidential value in German courts.

B. Types of authentication of foreign public documents

According to § 438 (2) ZPO, the legalisation of the foreign documents by a consul or envoy of the Federal Government is sufficient to prove their authenticity.¹² After the Convention came into force in Germany (1966), for its member states a simplified Apostille procedure replaced the legalisation procedure specified in § 438 (2) ZPO.¹³ As a result, legalisation and apostille became independent procedures for the recognition of the authenticity of public documents issued abroad.¹⁴ With the digitalisation of governmental services worldwide, the electronic apostille has been actively introduced as a type of apostille.¹⁵ Therefore, it could not be considered an independent form.

1. Legalisation

Legalisation means the authentication of foreign public documents by the diplomatic or consular representation of the country in which the document will be presented.¹⁶ According to § 13 of the Law on Consular Officers, their Functions and Powers, legalisation confirms the authenticity of the signature, the capacity in which the signatory of the document acted and, if applicable, the authenticity of the seal with which the document is provided.¹⁷ Legalisation is a lengthy procedure. Before the document is legalised at the representation of the respective country, it has to go through the long processes of pre-authentication and sometimes final authentication.¹⁸

2. Apostille

The Convention concluded in 1961, pursued the goal to ease the provision of evidence in international document circulation.¹⁹ With this in force, the apostille took the place of the lengthy legalisation procedure.

¹¹ *Supra* note 8, § 438 (2).

¹² *Ibid.*

¹³ Apostille Convention is not the only means to exempt foreign documents from legalisation. The exemption is sometimes achieved through numerous bilateral, consular or multilateral agreements. See Adolf Baumbach, Wolfgang Lauterbach, Peter Hartmann, Monika Anders, Burkhard Gehle, Zivilprozessordnung: mit GVG und anderen Nebengesetzen, § 438, para. 5–7 (79th ed. 2021).

¹⁴ Harald Wilsch, Armin Hatje, Peter-Christian Müller-Graff, Europäisches Rechtsschutz- und Verfahrensrecht, § 26, para. 41 (2nd ed. 2021).

¹⁵ Hague Conference on Private International Law, Implementation Chart of the e-APP. Available at: <https://assets.hcch.net/docs/b697a1f1-13be-47a0-ab7e-96fcb750ed29.pdf> (last visited Dec. 20, 2022).

¹⁶ Julius Forscher & Philipp Kienzle, *Die e-Apostille – de lege lata und de lege ferenda*, 10 Deutsche Notar Zeitschrift 724, 724 (2020).

¹⁷ Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (KonsG) (1974). Available at: <https://www.gesetze-im-internet.de/konsg/BJNR023170974.html> (last visited Nov. 14, 2022).

¹⁸ Wilsch, Hatje, Müller-Graff, *supra* note 14, § 26, para. 15–20.

¹⁹ Christian Hertel, Georg Meikel, Roland Böttcher, Grundbuchordnung Kommentar, Part G. para. 349 (12th ed. 2021).

Compared to other international conventions of global importance, it contains only 15 precise articles. To answer questions about the applicability of its clauses in practice, the HCCH has published the Handbook on the Practical Operation of the Apostille Convention.²⁰ Ten years after the second edition of the document named “the Practical Handbook on the Operation of the Apostille Convention” was published (hereinafter the “Handbook”).²¹ The Handbook covers information since the establishment of the Convention up to the new form of apostille within the Program, the e-APP, and provides contemporary advice on its implementation.²²

a. Definition and applicability

Apostille takes the place of legalisation holding the same functions: confirmation of the authenticity of the signature, the capacity in which the person signing the document acted and, if applicable, the authenticity of the seal or stamp with which the document is provided.²³ Apostille, thus, as legalisation,²⁴ does not confirm the documents’ content.²⁵ However, in comparison to legalisation, it requires just a one-step procedure,²⁶ in which the documents are to be authenticated by the competent authorities of the state in which they were issued.²⁷

The apostille can be affixed to the document itself or be attached to it as an additional sheet. In addition, it must correspond to the template form that is the part of Convention.²⁸ This template is mandatory for use, as it enables to check the apostille quickly and requires no knowledge of a foreign language.²⁹ According to Article 4 of the Convention,³⁰ the foreign authorities issuing the apostille may do it in their own official language, but the title must always be in French.³¹

It has to be mentioned that the Convention and the apostille procedure are limited in their application with regard to requirements of membership and types of documentation. To date, 124 countries have become members of the

²⁰ See Hague Conference on Private International Law, *Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention* (2013); See also Forschner, Kienzle, *supra* note 16, 725.

²¹ Hague Conference on Private International Law, *Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention* (2nd ed. 2023). Available at: <https://assets.hcch.net/docs/a19ae90b-27bf-4596-b5ee-0140858abeaa.pdf> (last visited Jan. 24, 2023).

²² *Id.*, 11.

²³ *Supra* note 3, art. 3, para. 1.

²⁴ Felix Fuchs, *Der internationale Urkundenverkehr 4.0: Die elektronische Apostille*, 40 *Praxis des Internationalen Privat- und Verfahrensrechts* 302, 302-303 (2020).

²⁵ *Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention*, *supra* note 21, para. 22–23.

²⁶ Fuchs, *supra* note 24, 302.

²⁷ Forschner and Kienzle, *supra* note 16, 724–725.

²⁸ *Supra* note 3, art. 4.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ The apostille title must always include: “Apostille (Convention de La Haye du 5 octobre 1961)”.

Convention.³² In order to benefit from eased authentication procedure, the states have to obtain membership. It should also be mentioned that even in the case of membership there is an exception to consider – if one state is against the accession of another, the Convention does not come into force between these particular member states. Therefore they stay attached to the legalisation procedure.

Another limitation of the Convention is the requirement of its applicability over public documents defined in the Convention itself.³³ This is the general list and divides documents based on their issuer (courts, notaries etc.), which does not give the legal definition of a public document. This term has wide room for interpretation, so the question of whether a document is to be regarded as such must be answered by the country of origin and it is the law of the producer-country, which gives the legal definition³⁴ and attaches the public status to documents.³⁵

b. Development and functioning of the electronic apostille

The spread of technology worldwide led the states to start offering numerous governmental (e-government) and notarial (e-notary) services online. As a result, electronic documents were established. Since they did not correspond to the usual (paper) form, a new international regulation was needed. The Meeting of the Special Commission (2003) was a great platform for discussion on technological innovations.³⁶ In the meeting the member states emphasised the positive influence of emerging technologies on the implementation of the Convention.³⁷ In 2006, the e-APP was already made available to the member states.³⁸

The related term – electronic apostille was not mentioned in the Convention itself, but in publications on its practical application.³⁹ The publication from 2013 had first provided detailed information on the use and functioning of the electronic apostille. Its second edition provides more

³² Hague Conference on Private International Law, Status Table of Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=41> (last visited Dec. 20, 2022).

³³ *Supra* note 3, art. 1.

³⁴ *Supra* note 8, § 415 (1).

³⁵ *Supra* note 2120, para. 105-107.

³⁶ HCCH, *supra* note 20, para. 31.

³⁷ *Ibid.*

³⁸ The e-APP was first launched as a pilot program and only in 2012 its name was changed to “Electronic Apostille Program”. *See supra* note 21, para. 314.

³⁹ *See* Hague Conference on Private International Law, The ABCs of Apostille, How to Ensure That Your Public Documents Will be Recognized Abroad (2010). Available at: <https://assets.hcch.net/upload/abc12e.pdf> (last visited Nov. 14, 2022); Hague Conference on Private International Law, How to Join and Implement the Hague Apostille Convention, A Brief Guide for Countries Interested in Joining the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (2011). Available at: <https://assets.hcch.net/docs/0cfe4ad6-402d-4a06-b472-43302b31e7d5.pdf> (last visited Nov. 14, 2022); *See supra* note 20.

structured information on questions about its implementation on contemporary level.

The e-APP consists of two components, also called elements.⁴⁰ These are the “Electronic Apostille” (e-Apostille) and the “Electronic Register” (e-Register). The e-Apostille contemplates an apostille in electronic form, which is produced with the help of software or hardware and transmitted via email or downloaded.⁴¹

The e-Register is an electronic register for apostille. The special feature of the e-Register is that the recipients of the certificate can access it to check the authenticity of the submitted documents online. Depending on the basis information, there were previously three categories of the e-register: those that provide the basic information such as number and date of the specific apostille (Category 1); those which, in addition to the basic information, provide information about the underlying document and apostille (Category 2) and those allowing the digital verification (Category 3).⁴² The actual edition of the Handbook does not categorise e-Registers. With reference to Article 7 of the Convention, it obliges member states to define in the operated e-Registers the name, number and date of the apostille, the name and capacity of the person signing the public document.⁴³

II. The problems *de lege lata*: legal regulation of the e-APP

In the early 2000s, the HCCH, in cooperation with some member states, developed the concept of the electronic apostille and the program e-APP.⁴⁴ The organs of the HCCH, namely the Special Commission⁴⁵ and the Permanent Bureau,⁴⁶ made a significant contribution to its development with their recommendations and publications.

Currently, 51 member states use e-APP to various extent (one or both elements of the e-APP) for the verification of public documents to be executed abroad. This means that only a third of the contracting parties can offer the electronic apostille and only half have implemented both elements of the e-APP in their national legislation.⁴⁷ Thus, despite its advantages, it could not be implemented in all member states of the Convention. In order to

⁴⁰ *Supra* note 21, para. 315; *See also supra* note 24, 304.

⁴¹ *Id.*, para. 346.

⁴² *Supra* note 16, 727; *See also supra* note 20, para. 354.

⁴³ *Supra* note 21, para. 341.

⁴⁴ *See* Hague Conference on Private International Law, The First International Forum on the e-Notarization and e-Apostilles. Available at: https://assets.hcch.net/upload/concl_forum.pdf (last visited Nov. 14, 2022); *See also supra* note 20, para. 324.

⁴⁵ For the role of the Special Commission *see supra* note 20, para. 38–39; *See also supra* note 21, para. 34–36.

⁴⁶ For the role of the Permanent Bureau *see supra* note 20, para. 33–37; *See also supra* note 21, para. 29–33.

⁴⁷ Implementation Chart of the e-APP, *supra* note 15.

understand the obstacles in front of electronic apostille, it is necessary to view the legal texts, where the electronic apostille originates, and observe their legal power.

A. Competence of the HCCH's organs

The Permanent Bureau is an organ of the HCCH that secures the progress of its work.⁴⁸ According to Article 6 of the Statute of the HCCH,⁴⁹ the Permanent Bureau is responsible for preparing and organising sessions and meetings of the Conference, the Council and the Special Commissions. It also acts as the secretariat for the sessions and meetings and carries out all the duties pertaining to the secretariat's activities. The Permanent Bureau conducts primary research for each Conference topic to be discussed. It also develops and maintains contacts with national authorities, experts and member state delegations.⁵⁰ Furthermore, it responds to requests made by users of the Conventions.⁵¹ Besides this it deals with preparing guides and manuals, which it publishes afterwards.⁵²

The aforementioned editions of the Handbook, that were published by the Permanent Bureau, as a manual, aim to explain the application of the Convention to its users by communicating practical information. The Special Commission presented its view with regards to electronic apostille in the first edition of the Handbook.⁵³ According to it, the electronic apostille and the program for the electronic apostille (e-APP), do not impede "neither the spirit nor the letter" of the Convention, since the "operation of the Convention" could be improved with the application of the new technologies.⁵⁴

This opinion makes sense since our society is in constant development. It was of course at the time of the first negotiations on the implementation of the apostille difficult to imagine the future significant role of the computer and the digitalisation growing with it. Just because the authors of the Convention only thought of the paper form and did not mention the electronic apostille shall not mean the member states have to be hindered from its use.⁵⁵ The idea behind is that the law always follows a rapidly developing society in all areas

⁴⁸ Hague Conference on Private International Law, Statute of Hague Conference on Private International Law, art. 4, para. 2 (1955). Available at: <https://assets.hcch.net/docs/d7d051ae-6dd1-4881-a3b5-f7dbcaad02ea.pdf> (last visited Nov. 14, 2022).

⁴⁹ *Id.*, art. 6.

⁵⁰ Dieter Martiny, *Hague Conference on Private International Law*, Max Planck Encyclopedias of International Law, para. 34 (2009).

⁵¹ *Ibid.*

⁵² Members of the Permanent Bureau, *The HCCH: A Global Player in a Shrinking World*, 3 International Law: Revista Colombiana de Derecho Internacional 483, 491 (2004).

⁵³ Hague Conference on Private International Law, Permanent Bureau, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions, 3 (2003). Available at: <https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf> (last visited Nov. 14, 2022).

⁵⁴ *Supra* note 20.

⁵⁵ *Supra* note 21, para. 8, 313.

of our lives. Actions that were previously not even regulated by laws now fall under national, regional and international legal regulation (e.g. cybercrime, cryptocurrencies) and this process is endless. Therefore, it can be concluded that the electronic apostille does not present a model that is against the idea of functioning of the Convention. It does not violate its fundamental purpose, namely facilitating the international circulation of public documents.

B. No obligation to recognise the electronic apostille

To find application in contracting states, the Convention has to be ratified. This requirement is stipulated in Article 10 of the Convention.⁵⁶ Such a provision on ratification included into an international treaty renders it ineffective in the member state unless it has been ratified.⁵⁷ Ratification means confirmation of the international agreement through a domestic legal act.⁵⁸ In Germany, the ratification process follows the enactment of a respective law and is valid with the participation of the Federal President, Bundestag and Bundesrat of the Federal Republic of Germany.⁵⁹ Pursuant to § 59 (2) s. 1 of the Basic Law for the Federal Republic of Germany,⁶⁰ treaties that regulate political relations within the Federation or relate to subjects of federal legislation require the consent or the participation of the bodies responsible for federal legislation in the form of a federal law. Because of these requirements, the Convention was ratified by Germany on June 21, 1965⁶¹ and has been in force since February 13, 1966.⁶²

Compared to the Convention, the Handbook produced by the Permanent Bureau does not need to be ratified as it is only the product of the recommendation of the HCCH's meetings. It follows from this the Handbook cannot trigger the will of member states to be legally bound to the Convention and must be accepted by each contracting state as a mere practical guide to the states' activities within the Convention.

⁵⁶ *Supra* note 3, art. 10.

⁵⁷ Hans Jarass, Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland Kommentar, § 59, para. 4 (16th ed. 2018).

⁵⁸ Stefan Ulrich Pieper, Volker Epping, Christian Hillgruber, BeckOk Grundgesetz, § 59, para. 20 (46th ed. 2021).

⁵⁹ Jarass, Pieroth, *supra* note 57.

⁶⁰ Basic Law for the Federal Republic of Germany, § 59 (2) s.1 (1949). Available at: https://www.gesetze-im-internet.de/englisch_gg/index.html (last visited Nov. 14, 2022).

⁶¹ Gesetz zu dem Haager Übereinkommen vom 5. Oktober 1961 zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation, BGBl. II, 875 (1965). Available at: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl265s0875.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl265s0875.pdf%27%5D_1675680854068 (last visited Nov. 14, 2022).

⁶² Bekanntmachung über das Inkrafttreten des Übereinkommens zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation, BGBl. II, 106 (1966). Available at: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl266s0106.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl266s0106.pdf%27%5D_1675680880285 (last visited Nov. 14, 2022).

The problematic side is not the Handbook itself, but its content. The inclusion of new terms into the Handbook, namely the e-APP and other related terms, is the source of confusion in the work of the Convention. Similarly, the e-APP program and the apostille system established differ significantly from the fundamentals of the Convention, as they only applies to paper-based public documents. The new terms and procedures are often incompatible with the states' current laws and regulations. The result is the states to refrain from application of electronic apostille. This leads to the problem in achievement of the Convention's main purpose – facilitating the process of authentication for all member states, as some member states improve, others still act under conservative approaches. It follows that not all users can benefit from the eased authentication process associated with digitalisation.

Germany has not yet implemented either of elements of e-APP. In Germany, only the paper apostille and paper certificate were recognised by the ratification law.⁶³ It is argued that the Handbook could go beyond the scope of the Convention.⁶⁴ As stated in a judgement by the German Constitutional Court: "Significant deviations from the treaty's provisions or changes affecting the identity of the treaty are therefore no longer covered by the original act of approval".⁶⁵ This means that even if some documents are issued in Germany electronically, for the purpose of electronic apostille the German legislator has to pass a new law.⁶⁶

To conclude, because the e-APP has its own regulatory area, its application has been quite problematic to this day. The Handbook, as a collection of practical recommendations for the contracting states, does not establish any obligation to recognise and use the e-APP. Moreover, even the participation in the e-APP does not create any binding effects on members.⁶⁷

C. Obstacles created by electronic documents

More and more documents in many states are issued in electronic form.⁶⁸ They serve the purpose of "process efficiency"⁶⁹ and facilitate the process of evidence provision.⁷⁰ They can be easily ordered through e-government platforms, since instead of visiting an authority, one only shall visit the necessary website and order the document in electronic form. The competent authority then issues the document in a few hours or days. The states regulate

⁶³ *Supra* note 16, 728.

⁶⁴ *Id.*, 729.

⁶⁵ BVerfG, Leitsatz zum Urteil des Zweiten Senats vom 03. Juli 2007 - 2 BvE 2/07-, para. 44 (2007). Available at: https://www.bundesverfassungsgericht.de/e/es20070703_2bve000207.html/ (last visited Nov. 14, 2022).

⁶⁶ *Supra* note 57, § 59, para. 10.

⁶⁷ *Supra* note 21, para. 323.

⁶⁸ *Id.*, para. 170.

⁶⁹ Gehle, *supra* note 13, § 371a, para. 2.

⁷⁰ *Supra* note 4, § 371a, para. 1.

these activities by domestic laws and regulations. The same scheme applies to electronic apostille. The developers did not set uniform requirements or standards for its work and left the wide space to appliers. So the states should decide themselves, which includes establishing and financing all the technical side of electronic apostille and its standards. In the second edition of the Handbook the HCCH once more excludes any centralised technical support within implementation of the e-APP.⁷¹ The problem of absence of uniformity acts as a restraint to implementation of electronic apostille in member states.

The member states that already use the e-APP (one or both of its elements) does not have uniform mechanisms to rely on and apply numerous methods for its functioning. As a result, serious difficulties with the recognition of electronic documents verified with electronic apostilles occur. Both the country of origin and the country of destination are affected by that. The views of the HCCH on electronic documents are just as controversial as the applicability of the Convention to the electronic Apostille.⁷² According to the Handbook, electronic documents are within the scope of the Convention.⁷³ The same applies to the digitalised copy of a paper document. When a paper document is converted to a digital form, resulting in a digitalised copy, it falls within the scope of the Convention.⁷⁴

1. Problems with verification of electronic signatures

The electronic documents are usually provided with an electronic (digital) signature. Many member states use it to sign an electronic document when issuing an e-Apostille. The states may use numerous electronic signatures. The electronic signature and the technical methods associated with it, is one of the problems on the way of implementation of the e-APP.

Not all states recognise electronic signatures as a substitute to handwritten. Another issue is the existing requirements for recognition as qualified electronic signatures. The national laws of each country set different security and qualification requirements for electronic signatures. This leads again to problems when checking the originality of issued electronic apostille. To check the authenticity of apostille signed with an electronic signature, the recipient scans the QR or barcode on the document. Then the recipient is directed to the respective webpage, namely a specific website dedicated to verifying the authenticity of documents. Nowadays, websites of this kind are not complicated to self-program.⁷⁵ The receiving state authorities cannot check the validity of electronic signatures of every state for falling under country's

⁷¹ *Supra* note 21, para. 323, 324.

⁷² *Supra* note 16, 728.

⁷³ Philipp Kienzle, *Nachweis der Echtheit ausländischer öffentlicher E-Dokumente im Zivilprozess*, 24 Neue Juristische Wochenschrift 1712, 1715 (2019); *See also supra* note 21, para. 154-156, 220.

⁷⁴ *Supra* note 21, para. 146.

⁷⁵ *Supra* note 16, 727.

internal security requirements.⁷⁶ Therefore, the electronic document produced in one country and signed with an electronic signature certified under national law (country of origin) may not be accepted in another member state (country of destination).

2. Differences in the application of the electronic apostille

Some Contracting Parties offer electronic apostille for electronic documents only.⁷⁷ Others issue electronic apostille for paper documents, too.⁷⁸ Some peculiarities are observed in states that provide the paper documents with an electronic apostille. It could be that the digital copy of paper documents that have already been issued is not in itself a public document. However, it could also be the case that a digital copy would only be treated as a public document if the competent authority digitalised it. Some contracting states, for example, accept a digital copy as a public document and place an electronic apostille on the copy after it has been certified by a notary.⁷⁹

The process is more problematic in member states that do not offer electronic apostilles but already issue electronic documents. This is because the electronic documents issued there must first be converted into paper form in order to enable a paper apostille to be placed on them.⁸⁰

3. Foreign public electronic documents in German law

The traffic of public electronic documents is regulated in § 371a (3) and § 371b ZPO.⁸¹ According to the norms, public documents created by public authorities or public persons or entities and signed with a qualified electronic signature, are presumed to be authentic.

The § 371a and § 371b ZPO do not directly address the foreign public documents.⁸² According to the prevailing opinion, the lawmaker had no intention to extend the applicability of this norm to foreign public electronic

⁷⁶ *Ibid.*

⁷⁷ See Hague Conference on Private International Law, Response of Austria to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28.5. Available at: <https://assets.hcch.net/docs/c1d754e7-0fec-41a6-b203-f93c2a688c26.pdf> (last visited Nov. 14, 2022); See also *supra* note 21, para. 154, 156.

⁷⁸ *Supra* note 16, 726; See also *supra* note 21, para. 217-219.

⁷⁹ *Supra* note 21, para. 146-148, 217.

⁸⁰ *Id.*, para. 216; See also Response of United Kingdom to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28.2 (2021). Available at: <https://assets.hcch.net/docs/64a34e62-be5a-4f2f-ad42-bc25f5cf62c8.pdf> (last visited Nov. 14, 2022); Response of Italian Republic to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28.5 (2021). Available at: <https://assets.hcch.net/docs/5fa9b07e-5315-4588-9a26-4a3d0116cce4.pdf> (last visited Nov. 14, 2022).

⁸¹ *Supra* note 8, § 371.

⁸² *Ibid.*

documents.⁸³ Moreover, German law does not directly regulate the status of foreign public electronic documents with regard to possible proof of their authenticity.⁸⁴

All the aforementioned shows the crucial importance of national laws in the implementation of electronic apostille. The law of the country of production defines what is implied by public document and whether the electronic documents are recognised as public documents, whether they are on the same level as paper documents and have evidential value in legal procedures. Furthermore, the Handbook leaves it up to the member states to determine the conditions under which the digital copy is recognised as a public document.⁸⁵

In view of the discussed flexibility and possibilities that the Handbook has opened for the member states, it should be noted that the decisions of the receiving states on the requirements for the recognition of an apostille are nevertheless limited. First, the member states should not reject an apostille because it was created in electronic form.⁸⁶ For the reason that this statement does not derive from the Convention, but from the Handbook, there is an exception envisaged.⁸⁷ The recipient state is not prevented from rejecting the submitted electronic document if according to its law, any document is only to be submitted in paper form or the electronic signature is not regarded the same status as the handwritten in the legal sense.⁸⁸ In other words, refusing should be justified only in cases when electronic documents do not replace paper, as well as when the electronic signature does not replace the handwritten under the recipient's national law.

In comparison, the Convention does not place any requirements on the issuing country. This means that each member, as the country of produce, has the right to determine "the borders of public documentation" independently, but as the recipient country each member is obliged to comply with the requirements of the Convention within the terms directly included into it.⁸⁹

III. Options de lege ferenda: solutions for implementation of the e-APP

The development of the electronic apostille can be evaluated efficiently from the users' point of view. However, the majority of states delay it and some face numerous complications in its application. Therefore, several

⁸³ Kienzle, *supra* note 73, 1713–1714; Krafka, Vorwerk, Wolf, *supra* note 6, § 437, para. 8 and § 438 para. 1; Julian Sander, Stefan Görk, BeckOK Bundesnotarordnung mit Dienstordnung und Richtlinienempfehlungen der Bundesnotarkammer, § 20, para. 20 (4th ed. 2021).

⁸⁴ *Supra* note 16, 730.

⁸⁵ *Supra* note 2120, para. 217.

⁸⁶ *Id.*, para. 299.

⁸⁷ *Supra* note 16, 729.

⁸⁸ *Supra* note 21, para. 301; *Supra* note 16, 728–729.

⁸⁹ *Supra* note 16, 730.

options for the "integration" of the e-APP into the national laws of the member states should be proposed.

A. Adaptation of the Convention

The drafters of the Convention have prepared an effective treaty text, which for many years benefits the users. Nevertheless, the legal situation is a subject of constant social development and is dependent on social demands, which can be observed very clearly in the regular changes in the national legislation of the states. The national legislators adapt the applicable laws to the requirements of society or pass new laws. This process is common in some areas of law but rare in others. The legal text of international character belongs to the second category. This is not surprising, as international lawmakers, such as international organisations of various purposes, may face complications adapting old conventions to contemporary needs. They have to count on lengthy discussions since all contracting states have to agree on proposed changes and new additions. In the case of the Convention, 124 member states are involved. Compared to the 20th century, most of them have already established substantive and procedural legal standards that could be incompatible with the new form of apostille. In addition, it should be taken into account, that the international law cannot be observed separately from politics. The fast changing and complicated political situations have a direct influence on decisions and actions of states within international organisations.

Even considering all the mentioned peculiarities in adaptation of international treaties, the most reliable option to ensure the comprehensive implementation of the e-APP in all member states is to adapt the Convention. If the members could agree on its applicability, their next step would be to ratify the amended Convention.⁹⁰

The HCCH takes steps forward and organises panels for discussion among member states. In March 2021 the meeting of the experts for the e-APP and new technologies took place.⁹¹ The result of the meeting was the best practices for the use of the e-APP brought in by expert groups ("The e-APP: Key Principles and Good Practices").⁹² As its name suggests, the document has no mandatory effect on members. It contains five categories of good practices: ensuring accessibility of e-Apostille for all; preserving the integrity of the e-Apostille and the underlying documents; facilitating verification of the e-Apostille by e-Registries; the availability of systems for acceptance of e-Apostilles and the regular updating of the e-APP practices. Each category is

⁹⁰ *Supra* note 16, 731.

⁹¹ Hague Conference on Private International Law, Meeting of the Experts' Group on the e-APP and New Technologies (2021). Available at: <https://www.hcch.net/de/news-archive/details/?varevent=797> (last visited Nov. 14, 2022).

⁹² Hague Conference on Private International Law, Report from the Chair of the Experts' Group on the e-APP and New Technologies, The e-APP: Key Principles and Good Practices, 3 (2021). Available at: <https://assets.hcch.net/docs/b94fadf7-ba82-42d9-bdbb-f8088b040273.pdf> (last visited Nov. 14, 2022).

divided into several subcategories. Later the HCCH annexed this document into the new edition of the Handbook. Now the HCCH has collected all the useful information on the operation of the e-APP in one document. This allows the members to gain structured and easily accessible information on the implementation of the e-APP.⁹³

In addition, questionnaires were sent to the states (including non-member states). The Special Commission then used given answers in preparation for the 12th International Forum on the e-APP.⁹⁴ The difference between this questionnaire and the previous ones was that it includes questions about the specifics of using the e-APP. In order for the Handbook to respond to relevant problems confronted by states, they were invited to participate in its processing by submitting respective questions. It should be emphasised that the answers of the member states, provided in the questionnaire, allow to deduce that although the e-APP has not been applied everywhere, its main concepts are clear to the majority of members.⁹⁵ Moreover, those members, that have made the e-APP available for use in their territory, were already been able to gain enough practical experience.⁹⁶

B. Establishment of a uniform technical procedure

The Convention remains one of the most actively used international treaties to this day. It owes this success not only to its short and precise content (15 articles), but also to the apostille template that is mandatory for use by member states.⁹⁷ This template has helped the work of recipient member states in the way that they do not have any need to conduct their own research on the form of apostille issued in other states. In addition, the mandatory template facilitated the development of international circulation of public documents. The experience of successful application of mandatory template should be considered by the developers of the Convention in implementation of electronic apostille. In the Handbook, the HCCH finally takes relevant steps towards the problem's solution. The users of the e-Apostille component of the e-APP program must use the Model Apostille template every time when issuing electronic apostille.⁹⁸

Moreover, the introduction of unified technical solutions can exempt developers of an electronic apostille and its users. According to the prevailing

⁹³ *Supra* note 21, 139.

⁹⁴ Responses to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (2021). Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6910&dtid=33> (last visited Nov. 14, 2022).

⁹⁵ Hague Conference on Private International Law, Summary of Responses to the Apostille Questionnaire (2021). Available at: <https://assets.hcch.net/docs/562ae0df-8797-47e6-85e6-6055e7689639.pdf> (last visited Nov. 14, 2022).

⁹⁶ *Supra* note 21, para. 326.

⁹⁷ *Supra* note 16, 725.

⁹⁸ *Supra* note 21, para. 330.

opinion, the absence of uniform requirements for the form of an electronic apostille is an obstacle to its application.⁹⁹

As mentioned above, the e-APP does not create any obligation for the member states to use it. E-APP is regulated in the Handbook, which has a recommendation character. Nevertheless, some contracting parties accepted the e-APP and actively use it. This is where the dilemma lies. The developers of the e-APP did not want to oblige the member states. They tried to avoid imperative language in the texts and did it in just few places in the Handbook. Therefore, they left almost everything related to the execution of the electronic apostille to the contracting states. As a result, the contracting states, who provided the e-APP for the use, have unwanted problems related to absent uniformity. This applies above all to the form of the electronic apostille, the electronic signatures used to issue the electronic apostille and electronic registers. It would make sense if the developers of the e-APP would solve the problems that have arisen by introducing a uniform regulation. Such could be as follows: Member states are not obliged to use the e-APP. They may decide to use it in whole or in part. However, once they have decided to use it, they have to apply uniform technical standards set by its developers.

1. Uniform format of electronic apostille

Some experts have emphasised the desire to use the apostille template for digitally issued apostilles. They exemplified the recipients having verification difficulties due to incompatibility with already-known apostille templates. The experts brought to the attention that it would be better to verify the electronic documents with the electronic apostille and to combine the electronic apostille with the underlying public document. They mentioned the importance of preserving the initial digital signature of the original public document, as well as the digital signature and e-Apostille in electronic format when presenting the documents to the receiving authority.¹⁰⁰

Some of the problems highlighted by experts should no longer be a challenge. As mentioned above the new edition of the Handbook obliges the states implementing the e-Apostille component to use the mandatory template that is the same for paper apostilles. Furthermore, the HCCH requires member states to attach the underlying public document to the electronic apostille.¹⁰¹

The application of binding uniform technical standards cannot solve all the problems with implementation, but they can speed the process and more clearly define its frames. The developers of the Convention can thus continue to introduce small technical changes with obligatory effects. The practice of already introduced standards will show whether the states are willing to

⁹⁹ *Supra* note 16, 731; *Supra* note 73, 1715; *Supra* note 24, 305.

¹⁰⁰ Report from the Chair on the Experts' Group on the e-APP and New Technologies, *supra* note 92.

¹⁰¹ *Supra* note 21, para. 330.

follow them in the near future. However, applying such standards would not be that complicated and would require some minor technical changes from their side.

2. *Uniform electronic signatures for creating the electronic apostilles*

The problem with e-signatures is more complex because e-signatures are governed directly by states' national laws. The questionnaires completed by the states make it clear that several states produce the electronic documents, but not all use the e-Apostille and point to security concerns and/or limitations in national law.¹⁰² Despite the complex character, the situation is not hopeless, as there are already positive experiences in this area. The European Union requirements for the validation of qualified electronic signatures set in Article 32 of the EU eIDAS Regulation¹⁰³ could build the framework for the development of a uniform international electronic signature for the issuance of electronic apostilles.¹⁰⁴ Such qualified electronic signatures allow the receiving authority to check the responsibilities of the issuing authority and its employees through the certificate contained.¹⁰⁵ The developers understand the existing difficulties and suggest to the member states to use the digital certificates of high standards that originate from the well-recognised certificate authority to increase the probability of e-apostille to be accepted.¹⁰⁶ However, the HCCH refuses to establish any digital certificate as it will remain its "technology neutrality" and not interfere with the "flexibility" of the member states.¹⁰⁷ The HCCH may establish an international digital certificate – the must for setting up electronic apostilles in member states – for the qualification of electronic signatures, which every member state could receive. As an analog to license, this model would secure

¹⁰² See also Response of Singapore to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: <https://assets.hcch.net/docs/d6aef5ea-5c8e-4fe3-a472-64aa76c3c816.pdf> (last visited Nov. 14, 2022); Response of Brazil to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: <https://assets.hcch.net/docs/f77a5a24-afae-4dc5-8974-62390899d63f.pdf> (last visited Nov. 14, 2022); Response of Italian Republic to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: <https://assets.hcch.net/docs/5fa9b07e-5315-4588-9a26-4a3d0116cce4.pdf> (last visited Nov. 14, 2022); Response of United Kingdom to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: <https://assets.hcch.net/docs/64a34e62-be5a-4f2f-ad42-bc25f5cf62c8.pdf> (last visited Nov. 14, 2022).

¹⁰³ Regulation of the European Parliament and of the Council on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive, 1999/93/EC, art. 32 (2014).

¹⁰⁴ *Supra* note 16, 731.

¹⁰⁵ *Supra* note 4, § 371a, para. 16.

¹⁰⁶ *Supra* note 21, para. 333.

¹⁰⁷ The Hague Conference on Private International Law, Conclusions and Recommendations, No. 29 (2021); See also *supra* note 21, para. 325.

partial uniformity in application and reduce the workload of member states on both sides of the process.

3. Unified electronic register for verification of electronically designed apostilles

According to Article 7 of the Convention, every authority issuing an apostille is obliged to keep a register in paper or electronic form. The electronic register, which must be publicly accessible, represents one of the components of the e-APP. Compared to other elements of the e-APP, the member states are more positive about e-Register.¹⁰⁸ The question here is: does the state provide the same amount of information in e-Register as it does for paper apostilles? The limit of accessible information is crucial as it sets the boundaries for proper verification of electronic apostilles. The Handbook recommends to run the same register for both paper and electronic documents.¹⁰⁹ It also encourages members to provide the information or image of the apostille and underlying public document.¹¹⁰ According to the wording of the Handbook, members must follow the minimum standards and disclose the information about: the number and the date of apostille, the name and the capacity of the person, who signed the public document.¹¹¹ The wording of the Handbook in this sense is confusing. On the one hand, the Handbook requires that either form of apostille be “attached or logically associated” with the underlying public document.¹¹² On the other hand, it invites the member states to prefer e-Registers that opens information (or an image) of the underlying public document and apostille.¹¹³ The second wording would set the electronic apostille in a lower position compared to its paper form. As paper apostilles are usually attached to the document, it means that the receiving authority can check both the apostille and the underlying document.

Sometimes an electronic apostille has a QR code. When the recipient scans it, the respective website opens or it refers the recipient to another website by click. The security issue arises because without an extensive research the recipient cannot verify whether the website belongs to a member state of the Convention.¹¹⁴ The Handbook suggests using additional text on the apostille that provides information on the URL of the respective e-Register of an issued country.¹¹⁵ It also gives some recommendations on how to avoid fishing.¹¹⁶

¹⁰⁸ *Supra* note 15; The table shows that every member state using the e-APP applies an e-Register even if it does not completely respond to the requirements of the e-APP, but not all the contracting parties use the e-Apostille; *See also supra* note 21, para. 315, 322.

¹⁰⁹ *Supra* note 21, para. 273, 319, 339.

¹¹⁰ *Id.*, para. 342.

¹¹¹ *Id.*, para. 341.

¹¹² *Id.*, para. 246.

¹¹³ *Id.*, para. 342.

¹¹⁴ *Supra* note 16, 727.

¹¹⁵ *Supra* note 21, para. 326.

¹¹⁶ *Supra* note 21, para. 241.

The introduction of a common internet platform,¹¹⁷ where all issuing apostilles could be consulted, would solve the security issue of e-Registers. Such an internet platform, designed by a single authority – the HCCH, could include all the information about the electronic apostille and its underlying public document, making the verification process easier.

Conclusion

The use of the e-APP is complicated by numerous aspects. Above all, the Handbook does not oblige the members of the Convention to use the e-APP, as it is only a manual and has a recommendation character. However, the e-APP should be observed as a new tool serving the main purpose of the Convention – to facilitate the circulation of international public documents. Although it would require long negotiations, adapting the Convention to actual demands would be the only comprehensive solution to ensure the smooth implementation of the e-APP in all member states.

HCCH cannot oblige member states to use the e-APP until the Convention is adapted. In addition, the HCCH could set a requirement for the contracting states that are already using or want to use the e-APP, according to which the members would have to follow uniform standards when issuing electronic apostilles.

Furthermore, the establishment of an international digital certificate for the qualification of electronic signatures could solve security issues during verification. The introduction of a common e-Register would be ideal for the accessibility of information on apostille and underlying public document.

Thus, introducing uniform technical solutions to various technical issues could partially speed up full implementation.

¹¹⁷ *Supra* note 16, 732.