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International and  
Comparative Law**

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**Study of the applicable Formalities in the European Member States re  
the Recognition of Foreign Public Documents**

**Difficulties faced by citizens and companies resulting from formalities applicable in the member States with regard to the recognition of foreign public documents, and the possible options for abolishing unnecessary and/or simplifying indispensable formalities.**

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**D. Anderson:** Welcome to the British Institute, my name is David Anderson, I've been asked to chair this expert meeting I assume on the basis that somebody thought ignorance was an advantage in a chairman because I am very much here to learn and I'm sure I'm the least expert person here in the room, although I do find this a very interesting subject.

The title of the session is '*The Cross-Border Use of Public Documents in the EU*' and our first two speakers are Dr. Christophe Bernasconi and Dr. Richard Hansberger who are going to talk about the Electronic Apostille Pilot Programme.

Probably in this company they need no introduction, but Christophe is First Secretary of the Permanent Bureau of the Hague Conference of Private International Law; Richard is the Director of E-Notarization at the National Notary Association. Christophe, I think you're going to lead off.

**C. Bernasconi:** Thank you very much indeed. Good afternoon, it is my pleasure to be here with you today and I would like to thank you for coming and joining us to discuss the future of legalisation, I think not just only within the European Union, but hopefully also at a world-wide level, in particular of course in the context of the most important Hague Apostille Convention. What we are here to do today is to present to you a new pilot program that the Hague Conference and the National Lawyers Association of the United States of America have recently launched: the electronic Apostille Pilot Programme (e-APP). Our presentation is in two parts, I will first give you a little bit of background to the Apostille Convention in general and some general information on the e-APP– what it is, what our goals and objectives are, what the timeline is for this project, and Richard, in a second part, will then show us the first software models that we have developed to show how the e-APP could actually work in practice.

To start, I think it is appropriate to recall what the Apostille Convention actually does at how it operates. Let's take an example, as shown on this slide: here is a requesting person who comes with a public document that has been executed in one State and which that person needs to produce in another State. That person, under the Apostille Convention – that is, if the Apostille Convention is in force between the State of origin of

the document and the State of production of the document – – that person goes and sees what is called a “Competent Authority” which is a State authority designated by each State party to the Convention under the Apostille framework. That Competent Authority basically does two things: first, it issues an Apostille, which is a certificate that is attached to the underlying public document. The way this is being done in practice, in most of the cases, it is just a paper Apostille which is stapled to the underlying public document. That underlying public document can be a birth certificate, a death certificate, an extract from a register; it can be a notarial act of course; it can be a certification of a signature, and so on and so forth. That Competent Authority also, in theory at least, should add a copy of or should record the main information of the Apostille in a register which that competent authority is supposed to keep and operate. That is an obligation under the Convention. In practice, I am afraid to say, there are some Competent Authorities out there which do not have a register. That is very unfortunate because that is the only means embedded in the Convention structure to fight abuse and fraud of Apostilles in the sense that if the requesting person presents the apostilled document in the State of production and the person presented with the apostille –for example, a government entity, a university because public diplomas and education degrees also fall within the scope of the Apostille Convention – if that person has doubts as to the origin of the Apostille, all that person can do is contact, somehow, the register of the issuing Competent Authority and ask the Competent Authority, “did you really issue this apostille on 5 February 2005 relating to this underlying document?” Then the competent authority is supposed to go and check the register (or the “card index” as it said in the Convention) and verify whether or not there is a matching entry. That is the very basic functioning of the Hague Apostille Convention.

The purpose of the Convention is to do away with the very lengthy, complicated legalisation process which often involves a whole series of different entities, often including Consulates or Embassies from the State of production and the State of origin of the document. That full-fledged legalisation process can take a lot of time, is very costly, and thus not very efficient. So in the 1960s, what the Hague Conference decided to do is to replace the very cumbersome legalisation process by a single formality which is the

issuance of the Apostille as shown on this slide. The Hague Apostille Convention is the most successful of all the Hague Conventions – there are 87 States around the world which are currently party to this Convention, and it's being used literally thousands of times a day, millions of times a year. It has served a very good purpose, but we believe the e-APP, the electronic Apostille Pilot Programme is the natural and obvious next step to take in the sense that we would like to take the Apostille Convention as it was negotiated and drafted in the early 60s and embed it in an electronic environment so as to ensure it is more effective, and it is more secure. The e-APP is not just a new idea that we had at the beginning of this year, no, the e-APP is designed to illustrate how the conclusions and the recommendations of an experts meeting that was held in 2003 in the Hague which basically examined the practical operation of the Apostille Convention and the first international forum on electronic notarisation and electronic apostilles, held in Las Vegas in 2005 and which was coordinated by the Hague Conference and the International Union of Latin Notaries and hosted by the NNA, how these conclusions can be implemented in practice by relying on already-existing and widely-used technology. The basic conclusion of these meetings was essentially to say, “you know what? You can use modern technology, IT, in the context of the Apostille Convention.” The wording of the Apostille Convention is neutral, it does not refer to any specific form, to any specific form requirement, and therefore you can use modern technology in the context of the Convention's operation and you make that operation more secure and more effective.

So the e-APP is basically designed to reflect how this conclusion can be implemented in practice. As I said, the spirit and letter of the Convention are not an obstacle to the use of modern technology. We also believe that use of modern technology lowers the cost of operation of the Convention quite significantly, and in particular, and maybe most importantly, we are convinced that the e-APP constitutes a very powerful deterrent to fraud and abuse of Apostilles. Not that Apostilles are very frequently used for fraudulent purposes, but we know of some isolated cases where Apostilles were indeed used for a different purpose than originally designed. One of the main reasons why this is the case, is because of this: when the Apostille is stapled to the underlying document, it is obviously quite easy to detach the Apostille from the underlying document and to use it

for a different purpose. All in all, we are convinced that the e-APP will lead to an overall improvement of the operation of the Convention. This project was officially launched in April 2006, very recently, during a Special Commission on General Affairs and Policy of the Hague Conference which is basically the counsel meeting of the Hague Conference. You will find more specific information on the e-APP on our website [www.hcch.net](http://www.hcch.net) on what is called the “Apostille Section”.

Let’s now have a look at the two main components of the e-APP. The EAPP has indeed two main components: the issuance of the electronic Apostilles, and the operation of electronic registers of Apostilles. Let’s first look at the issuing of electronic Apostilles. Basically, what we suggest to do there, we encourage Competent Authorities of States party to the Apostille Convention to use out of the box PDF technology, Adobe Acrobat, to issue electronic Apostilles by electronically signing the Apostille they are issuing. We are aware of the fact that PDF technology is not, strictly speaking, open-source technology – it’s actually *not* open-source technology – but it’s so widely used and the documents created on the PDF are so easily accessible in the sense that everybody can download the PDF-reader software for free and thus to access any PDF document, which is why we believe that this is a reasonable investment for a Competent Authority – the program costs approximately 500 USD or so – to buy the full version of PDF and to be in a position to electronically sign the Apostilles they are issuing. With a view to facilitating interoperability of systems that may be running on different systems we also suggest to support the issuance of an electronic Apostille by an XML layer of data so that, for example, you could use the same technology to issue electronic Apostilles under the new Windows Vista that will come out in 2007 and still be in a position to make sure that the documents created under this technology are easily accessible by other users. The Competent Authority signs the e-apostille by using digital certificates. That is with a view to guaranteeing integrity, authentication, and non-repudiation of electronic apostilles. Very importantly, we suggest that the possibility to issue an electronic Apostille is independent of whether the public document is presented in electronic form or in paper form. If I go and see a Competent Authority, I can submit a *paper* version of my, say, birth certificate and the Competent Authority would make an electronic copy of

it, basically just scan the document, or, we suggest that if the public document has already been created in *electronic* form, that document can obviously be submitted by email or in another electronic form to the Competent Authority to issue the electronic Apostille which could then just be wrapped around the electronic document. That is for the first part of the e-APP.

The second part is about the operation of electronic registers. Now here we rely on truly open-source technology. In particular, we suggest using PHP & MySQL, the so-called “dynamic duo” because this software is very often used in combination; it’s used around the world and has proven to be very effective. One is for server applications and the other is a database programme. The idea of having an electronic register is to allow for online queries by using the number and the date of the Apostille. So, if my colleague, who is presented with an electronic Apostille, has doubts as to the origin of the electronic Apostille, he would go online, access the register of the Competent Authority, key in the date of the Apostille that is being presented to him, the number of the Apostille, and maybe a reference to the underlying document, and he would automatically get a reply whether or not there is a matching record in the register maintained by the Competent Authority. So there is no need for a person from the Competent Authority to actually *answer* a request – all of that would be done electronically through an automatic reply indicating whether or not there is a matching record. Again, we suggest that a Competent Authority can establish an electronic register for electronic Apostilles, that’s quite obvious, but also for paper Apostilles. That means that if I am a Competent Authority and I have decided to establish electronic Apostilles in one year from now, I can already start operating an electronic register and electronically record the data relating to paper Apostilles that I continue to issue for one year. We also suggest that an electronic register is easier to install and operate than a paper-based register or card index and that it is a strong incentive for authorities which do not yet have a register to actually start operating one and to, frankly speaking, be in line with Treaty obligations. All that technology, all these software models would be freely distributed under a general public license. We will come back to this in a moment.

We are also in the process, together with the NNA, to create educational material to explain the software models for the e-APP. That consists of printed materials, and also online materials that hopefully will be available soon. Again, these education materials will be available for free and will be licensed under a creative commons license. All of this – the e-Apostille software, the software for an e-Register, and all the education material – will be offered for free. In this context, I have a little story that I'd like to share with you. I have been in contact with a former IBM technician who has been following all our work on electronic notarisation and electronic Apostilles for quite a while and, in particular, he had looked at all the presentations of the first international forum, the Las Vegas forum, which was held in 2005. He then contacted me and said, 'listen, this is all very interesting and I encourage you to do so, but my experience with governments is that they are slow. You will never manage to develop the software models, so I'm going to do this for you.' And so he said 'I'm going to develop the technology, the software. It will only cost you 120,000 USD and I will only charge you an additional 30,000 USD for the hardware that you will have to buy.' So you get all of this for just 150,000 USD – and of course, he would retain all of the IP rights, he added. So I said, 'thank you very much for your interest but I'm not quite sure that this will be an option for us.' We stayed in contact and when we had elaborated upon our models, once we knew how to go about the e-APP, I contacted him again and he actually admitted that what he had in mind was exactly the same thing as we are doing now. Using the same out-of-the-box PDF technology for e-Apostilles and open-source software for the e-Register. So what I like to tell our States here is that they basically get a free ride for something that apparently is worth 150,000 USD.

We are also currently creating a new website which is entitled e-apostille.net, unfortunately the domain e-APP was already taken for something totally unrelated. This website is currently under construction but this is the basic website where the software would be made available and could be downloaded for free. All the education material will be posted there as well, and all information documents related to the e-APP will be available on this website.

So in summary, how would this work? On this slide, we again have a requesting person coming with a paper copy of the public document, a birth certificate for example. The Competent Authority scans the paper document and gives the paper document back to requesting person. The competent authority does not want to keep paper in its office. Or, the second scenario is where the underlying public document is submitted in electronic form to the Competent Authority. That Competent Authority issues an electronic Apostille on the basis of the technology that Rich will explain to you in further detail. The Competent Authority will also record the basic data in its register. The electronic Apostille will be presented to the person or the university or the authority that has requested the apostilled document and, in the case of any doubt, that person can then access the register of the Competent Authority online and verify the origin of the Apostille. The time frame of the e-APP is an ambitious four-year programme. In essence, we hope to have *three* jurisdictions on board at the end of the first year that would actively start looking, or even better actually start issuing, electronic Apostilles and/or operate an electronic register for Apostilles. In the second year, we hope to get *five* jurisdictions on board. We will also then issue a questionnaire asking all the States that have joined the program what their experience is and asking all the other States why they haven't joined the program, and then in year three, we jump and hope to have *twenty* States on board. There will then also be the next experts meeting in the Hague on the practical operation of the Apostille Convention where the e-APP will be a very important part. The ultimate goal of the e-APP is to have half of the currently 87 States party to the Apostille Convention issuing electronic Apostilles and/or operating e-Registers of Apostilles, and actually accepting incoming electronic Apostilles as well. In a nutshell then, the e-APP illustrates how widely used and secure technology can be of great assistance in the context of the Apostille Convention. We are convinced that there are very little practical obstacles to a cost-effective implementation of IT in the context of the Apostille Convention. The e-APP strengthens the important benefits of the Apostille Convention, it results in important cost savings, and plans to reach a level of security which by far exceeds the current standards in a paper only environment. It is a very strong means to combat fraud, including the possibility to access registers online, and the overall idea is to firmly embed the Apostille Convention in the 21<sup>st</sup> century without

having to actually change the wording of the Convention, and my favourite: all of this ain't rocket science. It is possible, we can do it, the technology is there and has proven to be useful and reliable and so, 'let's do it' is our message. Richard is now going to take over and explain to you how the actual software that we have developed will work in practice.

**R. Hansberger:** Thank you Christophe and good evening everyone and forgive me one moment while I just make a switch here on the screen. As Christophe noted, there are two components to the EAPP and I would emphasize again that these are suggested models, but as we first embarked on this project and began to think about it, we quickly realized it makes a lot more sense to actually offer a model or have someone deviate from it and offer an alternative model than it is to just talk about it. As a little bit of background, I'm coming from a US perspective, the software and the kinds of concepts we developed into the EAPP are growing in use in the US in quite a number of sectors. Our federal court system, for instance, relies on PDF quite heavily and so we're starting to do notarized court filings with various federal courts, as well as land records in the US.

Although we have 3,500 separate counties that record land title instruments, about 85 of those which represent about 85% of the actual volume in the US are starting to, or have equipped themselves with electronic land title systems, largely based on a PDF model or some other (TIFF?) based model, or something very similar. So these concepts, when Christophe and I first talked about it – at the NNA we'd been involved with these technologies for quite some time, so we began to investigate a couple of simple models that we could promulgate in the world to just identify again, a model that people could follow. But I think what's been most instructive so far is, the competent authorities who are most interested have existing technology (we kind of knew this from the beginning) and already have systems in place to transact documents electronically in one way or another. So I think what's most exciting to me personally, from a software perspective, is to see what emerges from the States and to see what kinds of models we can add to the EAPP over the course of this four-year programme. So, without further adieu, I will do two things for you: I will first show you how the signature process works in PDF, and again, this is using out-of-the-box PDF technology, there are many, many different ways to process PDFs, many different third party providers – one State that will be involved in the pilot, the State of North Carolina in the US, will rely on a special PDF engine that they've already had as part of

their state government operations for some time, but essentially they'll be doing the same net effect: producing a PDF digitally-signed document.

What I'll ask you to imagine, if you will, is that the document I have here up on the screen, which is just a simple two-page document, was actually a paper original that is presented to a competent authority in whatever jurisdiction – we'll imagine this is in the States – United States, I should say. Basically what we imagine is that the person who's come to this competent authority has simply presented a one-page document that was notarized by a notary public in the US. We see here the signature of the party who presented the document; we see here the notarized affidavit, or actually an acknowledgement, attached to the document with the seal of the notary and the signature of the notary. This was scanned in to the competent authority's database. Question: so what is being apostilled here not the affidavit, but the notarial certificate? Hansberger: yes, important. From the competent authority's perspective, as Christophe noted, they're most concerned about recognizing or determining that this notary was actually in good standing when they recognized the document, and that they're not doing anything or certifying anything about the content of the underlying document; they're just concerned about this notarial act and the standing of that notary public.

From the competent authority's perspective, we have here an electronic or PDF document, which may or may not be very familiar to you – just a standard apostille as specified in the Convention, laid out in a format, in a structure, that is very common. Again, we see competent authorities that issue apostilles that vary from this in one way or another: their details, the accoutrements that they attach to the document – essentially this is all we are talking about – this apostille document. So you can see that basically the country of origin is the USA, it certifies to the fact that this public document has been signed by John Doe, which is the name of the notary public, acting in the capacity of a notary public, and it bears the seal or stamp of the state of California. The other particulars are the competent authority's jurisdiction – basically they'll indicate that they've apostilled this in Los Angeles, California, on 21 June 2006. The competent authority assigns a unique number to this apostille and now we're just going to provide the signature and seal and stamp. So basically, from the competent authority's perspective, this process is very similar. The difference is, they'll be digitally signing this. In Adobe, I have a signature field established in the document that I'll click to sign. Adobe will just walk me through a set of prompts that are very straightforward and very simple to understand. I'm going to select 'continue signing' because I'm going to digitally sign this document, and I have here on this computer a couple of digital

certificates: one is, I don't tell anybody about this back home, we'll just imagine it's the competent authority for California. So this is the digital certificate that would be issued to that competent authority in California, and then I'll select 'ok'. Again, this is all just default PDF technology. We've seen different methodologies start to emerge, and no doubt different software will be developed to handle this process, this is just using out-of-the-box technology, or PDF. I have here some options within PDF: I can pre-create a signature, if you will, that associates an image of my seal with my digital signature. It's not required, but I think we'll see it as a likely option that a lot of competent authorities select. That image has value to a receiving party; it's something visual that cues them to the fact that this document is properly processed. I'll click 'sign' and 'save as' and I'm just going to call this a different name so we don't overwrite the first document. I'll call it 'Signed' and we'll just save it. Adobe will run through a process of digitally signing the document and associating the image of the competent authority's seal with the document and the visual cues I think I would give them some credit here – it's obviously very easy on its face to understand what we're looking at here. In other words, we have the seal of the state of California and we have information that's drawn from the digital certificates' attributes that identified the signor. This process in North Carolina, as I mentioned, they already had a system for processing these documents in place and now they're in the process of accommodating these electronic apostilles so that they can generate these and send them off to a receiving party in a foreign jurisdiction.

Interestingly, in PDF, if I were to receive this document and were interested in understanding more about this digital certificate and who it was that issued this, as you'll note here, when I move my mouse over the signature, I can click and pull up information about the signor and other particulars about the document that might be useful if I wanted to investigate further who it was that signed this document. So in particular I can look up a variety of details, including email addresses of the organization that issued this, all of this is technology that we're using in the States quite frequently and I think we're seeing it used in other jurisdictions as well. From a receiving party perspective I wanted to kind of give you an impression of what it looks like when you receive this document. Again, what I think will be most interesting to track over the course of the next four years are different models that states may already have in play for different purposes but decide to re-tool for the issuance of electronic apostilles. I think we'll begin to see probably similar processes but maybe different technologies put to the same use.

With that in mind, as Christophe noted, bear with me one moment – this is actually a little server that I take with me to travel for these demos – so I will actually start up the electronic register. What I'll ask you to imagine is, once again, from the perspective of the competent authority, I am now the competent authority who needs to record the fact that I've issued this electronic apostille in my electronic register. I'm going to walk you through a simple three-step process. As Christophe noted, all of this technology is being offered for free, it was developed in PHP and MySQL open-source software and we certainly hope, the only obligation which we hope to request from people who actually adopt this software is that in the spirit of open-source development, that they'll contribute back to the develop of this software so that we can enrich it over time. I think we found, again, that many competent authorities already have systems in place that they can easily use to accommodate this process, so in many cases we imagine what I show you here today will simply be a model for them to develop their own system that duplicates this functionality. So, as a competent authority, I will login – and I've chosen the very obvious name of 'competent authority'. This software is very simple at its core, it can be modified in any way, shape, or form freely by the competent authority. That's one of the virtues of open-source software. My background, almost 10 years ago now, is in open-source development, specially developing online educational systems for universities, so it's very important in that open-source model to have code that's freely acceptable to people so that they can modify it, alter it, investigate it; their IT staff can thoroughly vet it before they actually execute it.

From the competent authority's perspective, I select the e-register link and I'm going to do three simple things for you. First, we'll create a register entry. I'm going to do this manually, so we'll imagine I'll enter an apostille number of 54321, but obviously this would be a unique number for that specific issuance. For the date of the certificate, I'll select today. As you can see I test this quite frequently, so there are lots of pre-existing entries in there. The name of the person signing is actually the name of the notary, the officer who signed this, so we'll put in John Doe, and they were signing under a specific capacity which happens to be notary public. In brief, under the Convention, this is all the information that is really required to be in the register – that's it: four very simple fields. We think that, using technology and some of its features, some of the very easily acceptable features, various competent authorities will add and modify and extend this functionality in one way or another, and that's fine, that's perfectly fine. They can keep more information in the register. This is, by definition, just the minimum amount they can keep in the register. But we decided to add to this a unique feature that allows me to do something that we thought competent authorities might be interested in investigating.

Essentially, you'll note here, I have a document source and I'm going to click this browse button and locate that document that I just signed. So we've got here the signed PDF document. We're going to select it and now we're going to add the entry to the register – I'll explain what happens in just a moment. As you can see, it just simply tells me your register entry was created and to click 'view register entry' to see all the entries, so indeed, we'll go ahead and do that. And you can see here I've got a number of test entries. Our entry down here is this last final entry in the list. Competent authorities have complete control over this source code; they can make it look and appear on the screen in a variety of different ways. The source code is freely accessible to be modified; this is just kind of a default view of the information. Now what I've actually done is I've stored these four bits of information in my register which is useful for me. I can record the fact that I've issued an apostille. I also have stored a unique digital fingerprint, a hash of the underlying electronic document.

Let me show you why we've done that. This is not something that competent authorities have to do, but it's something we think they'll probably want to do. If I am someone in the public sector, an interested third party, to borrow the term from Christophe's presentation, and I received this electronically-apostilled document, I would be interested in just knowing and verifying the fact that this competent authority actually did issue that. So again, we'll imagine from the public's perspective that I've received this document. The competent authority can offer up a freely-accessible website with this information that you see in front of you, to verify register entries. It's very important to note that this is not designed to satisfy the purposes of a fishing expedition, if you will. All that the person is going to be able to do is verify that this register has a document that corresponds to this apostille – that's all.

A competent authority may decide to offer more information, but that's really not our concern here. What we are only concerned about doing is verifying the fact that the register entry exists or does not exist. If further investigation is needed, that might be something that the interested party takes up with the competent authority for one reason or another. So I will plug in the basic information, and I know, for instance, the apostille number and date, but again, as I've noted, I've also received this electronic document, this PDF document. By itself, I could use just the number of the document and the date to verify whether or not the entry exists and that's fine, that's perfectly acceptable.

But we thought it would also be nice to illustrate how, if I were to receive this PDF document and was curious to know has it changed since this person sent it to me, since this apostille was attached? Again, as Christophe, with his demo of the staple and the apostille being removed from the underlying document – can we offer the interested party a method to know if anything altered this document? Has an apostille been detached and reattached to another document? Indeed we can. So as the person, bear with me one moment, as the person who has received this document, I can simply – we’ll imagine I received it by email – I’ll click the browse button, I’ll go find this document that I’ve been sent, and I’ll click ‘open’, and I’ll ask the register entry to verify the fact that this document is the document that the apostille was originally attached to. So I’ll click ‘verify register entry’ and it tells me indeed, this is the same document we issued, so the apostille has not be detached and reattached. Nothing about the document has changed.

We wanted to add this feature in because again, in the interest of fraud deterrence and strengthening trust in the model, in the idea of the model, this type of process we thought would be useful, so you as an interested party can verify not only that the register entry exists, but that the document that you’ve received with the apostille attached has not been modified or changed. From my perspective, I’m done. I have the easy part. Again, we’ll make all this freely available. I think many competent authorities have already-existing software that they will re-tool based on this process and this model, but this software may provide some competent authorities the ability to develop an electronic register for both paper and electronic apostilles that they don’t currently have, and we would greatly desire to see that. So with that in mind, I am done.

**D. Anderson:** Well, thank you very much. You are obviously a double act with a good deal of experience. You’ve played Las Vegas, I understand. You’ve played Washington as well and here you are in London and that was very polished and very interesting. If there are any immediate comments or questions we can take them now...

### **Questions and Comments**

**Q:** When we started thinking about establishing a PDF structure, we had an interesting experience – once you move away from the desktop version of Adobe Acrobat, costs begin to become prohibitive. This is one of the reasons we moved away from that – this is a problem for a lot of jurisdictions that have a lot of apostilles and need to move away from desktop structures

(this information is from one or two years ago); and second, if you store the hash value, why not store the complete signature?

**A (Hansberger):** On the service-side issue of PDF components, you're absolutely right – there's more of a cost to running an enterprise model that issues thousands of documents. I think the California competent authority processes somewhere on the order of half a million per year. It's a substantial cost difference to them because obviously they've got an enterprise system to set up and maintain. With that in mind, interestingly, in North Carolina, they bought third party software to address that cost question. And with that in mind as well, I think those folks that already have in place PDF systems have already absorbed these costs one way or another, but I think this underscores the need to have alternative models, and actually we hope to see – we hope to work with you to see – if we can find those alternative models as well because cost is always an issue, especially for a competent authority who may or may not have good funding behind a system of issuing these apostilles. So it's always a cost issue without a doubt. I think the goal of the PDF model is to illustrate the process, and again, to kind of echo the spirit and letter of the Convention.

And I think with regard to the hashing of the document, I think in the next version we'll take that up and actually do that in the next iteration of the software. I have, starting 1 July, we'll have budgeted about 800 hours of open-source developers to this project...I want to get ideas like this to incorporate into the model to find better, more efficient means to verify the register entries...I think storing the digital signature would be wise, absolutely....

**Q:** What is the value of an apostille?

**A (Christophe):** The apostille replaces legalization. The purpose of legalisation is only to authenticate the origin of a document and not to authenticate the content of the content of the underlying document. It simply tells you where the document comes from, but it has no impact whatsoever on the value of the content of the underlying document. That is very important to keep in mind when we assess the legal soundness of the EAPP or similar models.

**Q:** Mechanical question re: production of document with apostille on it – won't most jurisdictions want a paper document so that they can see the apostille on it? When someone presents a paper original to the notary, the notary will then prepare a certificate relating to that

document and then will he print that out himself and then print on his certificate the apostille in the same way as you just showed it on the screen but on something secure, secure paper that will establish the origin of the contents. Is that the way it happens?

**A:** We're imagining two possible courses of action: when you present to competent authority (centralized competent authority is envisaged rather than notary issuing individual apostilles), they would scan document and return paper document to you and process document as a completely electronic apostille. The issue of receiving that document and understanding it is something that we hope to work together with various competent authorities so that they know and participate in the program with the understanding that we're talking about electronic documents here. That being said, I think in a future iteration what I hope to see developed is the use of bar coding technology for printed documents. I think this is something that we have seen quite a bit in the US where a fully electronically-transacted document can be printed with a bar code that can then be scanned and linked back to the electronic register. These kinds of models exist and they might be something that a competent authority decides to offer up to the EAPP as a suggested model.

**Q:** (from Spanish lawyer and notary) 56:08 – can't understand this man at all. He seems to not like the idea of destroying paper element.

**A:** important to stress that neither the Apostille Convention in its original form, nor now the EAPP, has any impact on what the notion of a public document is under the law of the State of origin. It is not because of the EAPP that now sadly Spain or Italy or any other Latin notarial system has to change its concept of what is a public document, a notarial act in its jurisdiction. That's absolutely crucial – what I'm trying to say is that if an only if, under the law of the state of origin, it is possible to establish an electronic notarial act, it should be possible to simply wrap an e-apostille around that electronic act and send it off. If under the law of the state of origin, it is simply not possible to establish an electronic notarial act, it will probably be difficult to add an e-apostille to that act. It may well be that you may only have electronic apostilles for certain kinds of documents falling within the scope of application. The jurisdiction of origin has to quite some extent, still control of what is a notarial act under its own legislation. When it comes to the use of the apostille, one has to realize that in practice, apostilles are issued because a person from State A has to produce an apostille for one purpose in state B and the authorities in State B require some sort of legalisation. Apostilles are, to my knowledge, very rarely issued in the situation

where someone comes to the competent authority and says I would like to have an apostille just in case I may want to use it for whatever case in the future and then start to send out e-versions of these apostilles (1:02:00)

**D. Anderson:** I think now we must move on to Peter Beaton. Peter is responsible for the European Commission's study on the legalisation of public documents in the EU and he's going to speak about EU policy as regards the cross-border use of public documents.

**P. Beaton:** Thank you, David. I'm very grateful to the BIICL for giving me this opportunity to give what will be a relatively brief and general overview of the perspective of legalisation as viewed from the Directorate General of Justice, Liberty and Security and particularly unit C1 thereof responsible for civil law and civil justice policy.

I don't wish to interrupt this extremely interesting discussion which has been started by this fascinating display of what I'm extremely encouraged to see has been a very positive development coming from the review commission of 2003 on the 1961 Convention and I think it is marvellous that this has been going on, but in the terms of what I'm going to say – I'm not going to deal with the technical aspects of legalisation or the application of the apostille should such application be seen as an alternative to legalisation, or a fruit of the abolition of legalisation – which is an interesting question, but not one for this evening.

Just to give you a brief word about my background, I'm actually a Scottish solicitor by training; I'm also a notary public, so the word 'notary' is familiar to me and I have had to deal with the production of public documents in my professional capacity as a Scottish solicitor in private practice in the past. But, from 1991-2003, I was responsible for policy on civil law, civil justice and private international law in the Scottish Executive Justice Department, as it became, and for that reason, I became closely acquainted per force with developments in European law as successively the Maastricht and Amsterdam Conventions came into force, as a result of which I had to turn up more and more frequently, as part of the UK delegation, in discussion in various working groups in Brussels.

What is the background to the study of which the BIICL are cutting out on behalf of the Commission? The backgrounds are various, but I'll pick three of them to start. First, the most general: and that is, as you probably all know, one of the foundations of the Treaty of Rome, the Treaty of the European Community, is the fundamental freedoms. These include the freedom for people to move amongst the Member States for personal and professional reasons. That is to say

to settle and to find work and to invest and to do things which relate to the creation of the Community as an entity.

It does not take a huge leap of logic to realize that legalisation may enter into this process in a number of ways and for a number of purposes. For example, a person who wishes to practice in a professional capacity in a Member State of the Community other than that in which he is originates and who has been educated in that Member State will probably need to produce some evidence of education which allows the establishment for carrying on professional activities in another Member State. The question is whether there is a barrier to the exercise of these freedoms by the imposition of legalisation requirements.

The second area relates to what is more specifically the creation of an area of civil justice under the fourth part of the Treaty of Rome which was introduced by the Treaty of Amsterdam. This is specifically A61 and A65 under which a policy has been introduced which has a number of components, generally working towards the idea that the Member States should have a single area of civil justice. One of the components of that is free circulation of judgments of the courts, known in political terms as mutual recognition. This has given rise to a number of instruments where issues of legalisation are dealt with.

The third is the linkage between the law of the EC as such and other instruments which may have a bearing on EC instruments themselves or on the fundamental freedoms. The most important of these is of course the Hague Convention of 1961, of which, I think I'm right in saying, practically all the Member States of the EC are parties. Therefore, it's a very important instrument in relation to whether or not legalisation is favourable to or plays a role inhibiting in any degree whatsoever the exercise of the fundamental freedoms. There are others, though, which I'll mention in a minute.

The study which the Commission has asked BIICL to undertake and which the BIICL has extended happily into areas which the Commission hadn't thought of, and are happy to admit that, will effectively try and examine these kinds of questions and in due course throughout any suggestions for activity at the European Union level, although sitting where I am at this particular time, I do not see what sort of activity that might be. We therefore wish to go forward on an empirical basis.

But what is very important here is to see that there are two aspects of legalisation in the view of my part in the Commission. The first aspect is where legalisation requirements exist – whether they have a real effect. The second aspect is where there should be no legalisation at all, is in fact legalisation being required in any way whatsoever? The first of these relates to situations in which there is no instrument under Community law which deals with the abolition of legalisation or the non-requirement of it. And in this regard, what is very important is the way in which the Member States deal with legalisation issues in the context of their national law and such international agreements as exist, including and in particular the 1961 Convention.

The other conventions which exist and may or may not be significant, which are not very well known – it's a bit like Sheryl Crow's story about the dog in the night, what was the point of this dog, well it didn't bark – well here we have a Convention of 1987, the Brussels Convention Abolishing the Legalisation of Documents in the Member States of the European Community. This Convention is so highly thought of amongst the members of the Union that only seven of them are party to it, the UK not being one of them, by the way. It is an important issue for the Commission given that this pre-Amsterdam convention, obviously because of its date, seems not to have caught on and whether in fact, among those Member States which are party it makes any difference to anything at all. Another one is a European convention in relation to legalisation of documents by diplomatic agents or consular officers from 1968. This is a Council of Europe text which has rather more of the Member States of the Community as party to it, but again it's unclear as to whether this makes any difference. So these texts need to be examined against the general background which I've explained.

However, what is more important for my part of the Commission relates to those texts in which legalisation is dealt with. This actually was back before both Maastricht and Amsterdam – it goes back to the Brussels Convention which in A49 provided that no legalisation or other formalities should be required. In relation to, for example, the recognition and enforcement of orders of the courts for which the BC made provision.

Now, there has been no specific study on legalisation done since then, but what is rather more important from the point of view of the Commission now is that with the post-Amsterdam situation in which the various regulations in which legalisation is dealt with are directly applicable if there were to be any evidence that legalisation formalities are being applied, then this would amount to a breach of Community law.

I have had phone calls from people in which they allege this is the case, not so much under the Brussels Regulation itself, but more under the Regulation on Jurisdiction, Recognition, and Enforcement of Judgments in Divorce and Parental Responsibility known colloquially as Brussels IIbis. In Article 52 there it says no legalisation or other similar formalities shall be required in respect to the documents referred to in Articles 37, 38 and 45, or in respect of a document appointing a representative ad litem.

Now, this is all about status, it's all about recognition and enforcement of divorce but also, more important from the point of view of this text, was that it came into to what was the big idea at the time of, shall we say, the post-Amsterdam track of policy which is known in the continent of Europe as the abolition of *exequatur*. This is a strange word which can mean the conversion of a bare order of court to an enforceable order but in this context what it actually means rather more is the series of procedures under Community instruments of one kind or another which require some procedure for recognition and enforcement to take place.

So, for example, in Brussels IIbis, it refers to the recognition and enforcement of orders of the courts, and in this particular instruments relating to contact and return of children after an unlawful removal or retention. In other words, in order to fulfil the policy objective firstly, of freedom of movement judgment and secondly in Brussels IIbis the abolition of *exequatur* in relation to that process whereby effectively a judgment on contact in Member State A has to be given direct effect in Member State B without any intermediate procedure. It is a requirement of European law that there should be no legalisation.

Equally, for divorce – for example, if someone gets divorced in Member State A and wants to go to Member State B and is required to make sure they've gotten divorced in Member State A, for whatever purpose, usually to get married again, then there are certain documents which they may be required to produce. But if so, then under Brussels IIbis, no legalisation should apply to them. Again, a breach of Brussels IIbis would be a breach which the body required to ensure that Community law is being observed takes seriously. That is part of it.

The interesting part from my point of view is that this comes back into other texts as well. Not only does it relate to the Hague Convention of 1961, we'll forget Euro conventions from this point until we learn whether they make any difference at all, but comes back into other Hague

conventions. Why does it do this? Because in Brussels IIbis, for family lawyers, amongst you if there are any, you will know that one of the things that this does is that it fiddles around with the way in which the 1980 Convention on Child Abduction is applied within the EC. Let's say that it takes it forward in that the return of a child does not require any recognition or enforcement under the terms of Brussels IIbis.

Now, what do we find in the Hague Convention of 1980? In Article 23 it says 'no legalisation or similar formality may be required in the context of this Convention.' So, some years before Brussels IIbis was written and came into force, we had the Hague Convention really putting forward a similar proposition. I myself am not aware whether any of the review commissions on the Hague Convention of 1980 has gone into this in any great detail either; however, let's assume for the sake of argument that it has.

Whatever is the case that looking at the position on the new Convention on Parent-Child Contact where contact orders are not to be the subject of any procedure for R&E nor legalisation and return orders under the HC of 1980 doubly require no legalisation, this is obviously a matter of some importance on the family law side. This will be reinforced hopefully when the HC of 2002 comes into force because it has a similar provision.

The point is, there's a similar provision in the Convention on the Protection of Children which will become part of EC law because all the Member States will become party to it at the same time. So that is one way in which this is important for the Community. But these are not the only instruments. For example, there are instruments which have been adopted and are in force on insolvency, service of documents, legal aid, which also contain provisions which directly ad spec require there to be no legalisation requirements.

So, we have this specific area in which there is to be no legalisation at all. Outside this area, where it is not said or implied that legalisation should not take place and where legalisation may or may not be required to take place from the point of view of Community law, there is the general question for the purposes of the instruments under the civil justice side as to whether legalisation requirements are imposed.

Across the rest of the Community acquis as well, there are others in employment, education; in fact, I don't actually know, but the BIICL has looked at this and dug out all sorts of areas where

this potentially is an issue for the acquis specifically quite apart from the fundamental freedoms which I mentioned at the beginning of this discussion.

It's really quite a broad issue not just for the bit of the Commission in which I work, but for the Commission as a whole. That's really my area, I think in the circumstances it's probably enough for me to say, but if there are any issues which crop up and that people want to raise, I will try and answer them.

**D. Anderson:** Thank you very much, indeed. That was particularly encouraging to hear someone from the Commission say they propose to go forward on an empirical basis. Not what you always hear, but very reassuring on this occasion. We have two discussants here, one on the private international law side; one on the Community side. We'll ask them first for any immediate reactions they may have, limited to 10 minutes each. Andrew Dickinson is going to go first. He's an honorary fellow at BIICL and consultant at Clifford Chance and has been a project consultant specifically on this issue. Jukka Snell is a Professor of European Law at the University of Swansea. He's the author of a book on the fundamental freedoms as they've been called which I can thoroughly recommend and he again is a project consultant but specifically on the Community side of this issue.

**A. Dickinson:** I came to this project as someone with a background in private and to a lesser extent public international law because the person approaching me assumed that these were two of the disciplines that were an integral part of the project. But at least in the traditional sense of private or public international, I'm not sure that they have much to say about this.

The topic of legalisation seems to be much more about the law of evidence in particular states and then increasingly about European law and the way in which legalisation or equivalent procedures or things that have the same effect as legalisation effect the fundamental freedoms and here the focus of BIICL's project is the movement of people, capital, and services between Member States.

Looking at it from private international perspective, one can take a very narrow view of private international law which puts these issues to one side absolutely, at least if you're an English private international lawyer. And one must remember that private international lawyers tend to be quite parochial. They're English private international lawyers, not French or German private

international lawyers. And if you look at private international law as being a collection of rules which a particular legal system adopts to deal with cross-border aspects of the resolution of disputes, and one of the first things that you learn when you study it at an English university, you see matters of evidence as matters of the law of the forum.

Private international law can get out of it by saying that these are matters for the English law of evidence to deal with. The leading practitioner's book on evidence has very little to say about legalisation or equivalent procedures. So the parochial private international lawyer can put it onto someone else's plate. It's a problem that raises practical issues, but it's not really for me to answer.

I suspect you won't allow me to escape that easily and getting into the project, that escape is not possible because private international lawyers are increasingly encountering the influence, and some might say interference, of EC law and there are three principles that tend to crop up: the principle of non-discrimination, that differences in treatment must be objective and justified and not amount to direct or indirect discrimination on the grounds of nationality; the idea of mutual recognition, that once something has been put into circulation in one Member State it should be carried across and have the same effect or value in all the other Member State without additional requirements and taking mutual recognition at its full face value, that would be in direct conflict with the requirements of legalisation or even with the requirements of an apostille. The third principle, which may be the most important in this area, is that of mutual trust. This is one we have seen in the context of the Judgements Convention in two recent Court of Justice decisions in *Grovit* and *Turner*.

What the principle says is that you must give full faith value to the judgment of another Member State and you must not seek to look behind it in any way no matter how defective you believe that judgment to be. The EC Treaty requires that you give mutual trust to other Member States.

If one takes mutual recognition and mutual trust together, then it seems to me that the abolition or reduction in requirements of legalisation and equivalent requirements may come much more quickly in the EC than many would anticipate, that many would like, but that's a challenge we're going to have to address and it's one of the things that we at the Institute will be considering as we take this project forward. I'll stop there.

**J. Snell:** I will first tie this into a slightly wider context of the internal market and then talk more specifically about the legal issues in particular in respect of the four freedoms. When it comes to the internal market proposed in 1985 by the Commission we have seen pretty much all related measures adopted as we've discovered that not only do we need traditional measures, but that we also need to regulate things like e-commerce, etc., things that nobody thought of in 1985. That's more or less in place.

What is not in place is fully effective functioning of this internal market. We've got it there on paper, but its functioning is not optimal. Accordingly, the Commission has shifted quite a lot of its attention to making the internal market work in practice. This has to deal with things such as enforcement, making sure that Member States actually comply with the directives that they've agreed to. It also has to do with those things needed to reduce friction or transaction costs in the operation of the internal market to make it really possible for small and medium sized enterprises and individuals to transact across the frontiers without anymore hassle and worry that they would have if they transacted in-state. Against this background, one can see that the attention on legalisation requirements or any other requirements that create this kind of extra transaction costs is part of the natural target of the Commission to look at. It's no surprise that the Commission is interested in these kinds of things. It's generally, in its legislative activity, moving to these kinds of measures also in the internal market. I'll return to this in a moment with a specific example.

In a wider context, what does the law of the internal market have to say about these things? The first thing is that we don't really know, there are to my knowledge no judgments of the ECJ on these matters and I think the study will be something that will give us quite a lot of things to look at and stipulate and argue over. But it is clear that at least an argument may be mounted that anything like a legalisation requirement is an obstacle to freedom of movement.

Essentially, if you want to bring an action under any of the fundamental freedoms, you need to first show that there is some kind of obstacle, restriction, barrier, and then you have to talk about justification. It's always a two-step process. Similarly, when it comes to the issue of restriction, I would think that most Community lawyers instinctively would think that, hmmm, this looks like a restriction regardless of the fact that there is no statement by the Court as to this matter. It's something that does create extra transaction costs and delay. And it's something that doesn't operate in purely internal circumstances; it only operates if the transaction somehow has a cross-border element. So there is a specific burden placed on cross-border transactions and that, to a

Community freedom of movement lawyer in 95% of the cases equates a restriction. This is something that the study will find out more about.

Much more critical question will be the justifications. If something is a restriction, it is nevertheless accepted by Community law as long as you can prove justification for it and that the measure is proportionate. And you obviously have here the question of fraud. Generally, all kinds of public order-type arguments, I would guess, could fairly easily be made for L. However, then comes the kind of critical test: proportionality. It's not enough that you've got a good reason for doing something; also, the measures that you actually put in place, the means of achieving that objective, must be proportionate to that objective. The first part of any proportionality test is the test of suitability. Is this measure actually suitable in achieving its purported objective? If the objective is the reduction of fraud, and the apostille doesn't actually work to reduce fraud at all, that is a big problem in the context of any litigation. Even if you then accept that it is effective and the apostille would help, you have to ask whether it is really necessary. In other words, can you find less restrictive means of achieving the same thing? Is it really necessary that people engage in this legalisation process, or is there some other way that you could do the same thing? For example, take the Finnish authority that wants a UK birth certificate and know whether it's real. Could it just contact the UK authority? It's something that the study will look at. Are we looking at effective means and are the measures in place truly necessary? We must also ask a number of other questions: whether we are putting something in place that is purely excessive; do we really need every doc to be covered or should we have this in place only when document is truly questioned? What about situations where you require an apostille from docs coming from one Member State but accept docs from another Member State at their face value – is there a most favoured nation requirement under Community law that might be breached? What are the costs of the delays? Are the authorities purely charging reasonable fees or is the foreign commonwealth office trying to make money in the apostille business? Clearly this is something where free movement law has an impact.

Finally, I just want to say how this connects to what the Commission might want to do. The first issue is that for any Community action, there must always be a legal basis. Here, again, the barrier becomes relevant if you have a barrier in place then certain articles of the EC Treaty becomes a possible legal basis which it otherwise wouldn't be. We now see that Community instruments that seek to harmonize through means other than litigation actually starting to tackle these issues increasingly. I've got here the latest Commission proposal of the Services Directive

which is probably the most internal market directive for quite some time. Just to give a couple examples from this directive – it has a full chapter on administrative simplification. Essentially, when it comes to docs that you have to present when it comes to access to service provision or exercise of service, the current Article 5 says that Member States shall accept any document from another Member State...and may not require that document be produced in original form, or as certified copy, or as certified translation, save specific justifications. Obviously it doesn't talk about legalisation, but if you don't even have to produce an original copy of the document, it could be quite difficult to argue that legalisation or an apostille is needed. So that would be a Community instrument abolishing these types of requirements. The Services Directive requires, and this ties with what Christophe and Richard were talking about, that any formality and procedure that you need to go through to take up or exercise service needs to be able to be completed electronically through a single contact point. There are a lot more examples; for instance, on mutual assistance between Member States authorities, but this is just one example of where the crux of internal market legislation is now going. It's not enough to put substantive rules in place, we have to think about formalities as well to make sure that small and medium sized enterprises and individuals take full advantage of the internal market with the same ease as someone from NY can go and transact in NJ. That's all I wanted to say.

### Final comments:

C. Bernasconi: A couple bullet points. Jukka expressed concerns about fraud issues in the context of apostilles. What I need to stress here is that there is no large-scale fraud going on in the context of the Convention. There are some isolated cases where this happens, but what we are convinced that the EAPP helps to address these very few cases and hopefully eliminate them. What I also want to stress is whether or not there is the need for a requirement or proof of authenticity is not something that is imposed by the Apostille Convention as such; of course, the state of production of the public document may, in its internal law or practice may say they don't need any proof, or of course two states may agree in a bilateral or multilateral agreement to do away with legalisation and then the apostille says if you don't require any form of legalisation, it won't be imposed here either. I'm probably not going to comment anymore on what is original or copy – just to recall very briefly the basic rules: the Apostille Convention applies to original documents. What an original document is, is left to the State of original execution of the document but the Convention also applies to certified copies of public documents and therefore may apply to these copies as well. Then finally, when we talk about the EAPP, I always stress

that we don't need to over-emphasize and over-stress what we are suggesting here. What I want you to imagine is the following situation: when I called the competent authority in Paris once, a nice elderly lady sitting behind the counter was actually helping me, helping another person at the office, and filling out an apostille certificate by hand. This is just not of this world anymore. All we try to do with the EAPP is to do away with this and help and assist these people by using modern technology that is out there.

**A. Dickinson:** The study is designed to find out what the actual situation is. The study is not at present based on any preconceptions in terms of the outcome but it has to be very wide in terms of the areas it gets into and the background. It combines the fundamental public international aspects of the Treaties as such with private international law concepts in looking at the way in which the kind of situations in which legalisation might crop up may or may not be contrary to Community law. Effectively, that's the point. There may be spin-offs from it and indeed the construction of the work suggests that we will have a lot of it in terms of information and probably some interesting and unexpected things will crop up. But the point is, from the point of view of my bit of the Commission is that there are certain specific issues which need to be examined from the point of view of Community law. Just go back again to the Brussels IIbis , what has been said by Jukka about the internal market is absolutely correct – the freedom of movement is just as important. If, for example, if people want to come to another Community MS to settle or marry or whatever, they are met with requirements of one kind or another for authentication, then it is essential to see whether these are proportionate or not. There are enough examples of people coming to the Commission saying they wanted to go to X, Y, Z but were refused because they wanted an order of divorce. If there are real issues about fraud and impersonation, fine. But I tend to agree with Christophe – there are other ways of dealing with them, not legalisation. After all, money laundering is dealt with in different ways. The question of how you prove someone is who they say they are is universal and not just about Community law. Let's be clear about what we're doing here.