# Explanatory Report

## The Hague Convention of 5 October 1961
## Abolishing the Requirement of Legalisation for Foreign Public Documents

***Rennes, 15 April 1961***
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### Introduction

The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents brought about a basic simplification of the series of formalities which complicated the utilisation of public documents outside of the countries from which they emanated.

The traditional rule *acta probant sese ipsa* does not seem to hold good on the international level; although this rule seems to be easy to accept within a country, where the institutions which are the sources of public documents are deemed to be known and all of such institutions employ the official language, or some of the official languages of the State - with the result that a formal document is considered to be authentic until the contrary has been established, while the establishment of the contrary for certain categories of documents is even subject to formal guarantees - the maxim quoted cannot be applied on the international level for the reason that the courts or the party to whom foreign documents are presented would be subject to an unduly heavy burden if they were charged with the task of judging on sight the authenticity of such foreign documents.

For this reason, there was developed the well-known chain of authentications, constituting in its entirety the legalisation of the document, which is a slow and costly procedure.

The Convention reduces all of the formalities of legalisation to the simple delivery of a certificate in a prescribed form, entitled "Apostille", by the authorities of the State where the document originates. This certificate, placed on the document or on a slip of paper attached thereto called an "allonge", is dated, numbered and registered. The verification of its registration can be carried out without difficulty by means of a simple request for information addressed to the authority which delivered the certificate. By reason of the simplicity with which the authenticity of the certificate may be checked, as well as its uniform appearance, the maxim *acta probant sese ipsa* can once again take effect.

The Convention does not serve only to lighten the task of the judges before whom foreign documents are produced; it is also of the greatest importance for everyone who wishes to rely abroad on the facts set out in a document emanating from the authorities of his own country. Thus the Convention has proved to be very useful for those countries which in their own systems of law do not have the practice of requiring legalisation, since their citizens must submit to foreign requirements each time when they wish to utilise their own countries' documents abroad, before the authorities or the courts of justice of a foreign State.

## EXPLANATORY REPORT BY YVON LOUSSOUARN *

*(translation of the original French text)*

### A. INTRODUCTION

The practice of a legalisation chain is an inconvenience from which international relations suffer. The resulting complexity creates difficulties which have given rise to frequent complaints. For this reason, the Hague Conference on Private International Law welcomed a request from the Council of Europe to think about this problem and to draw up a draft convention. The exchanges of views which took place at the Eighth Session of the Conference (1) succeeded in convincing participants, if this were necessary, of the beneficial nature of such a convention the preparation of which was then put on the agenda for the Ninth Session of the Conference. (2) In the interval between the two Sessions the work was prepared by a Special Commission which met at The Hague between 27 April and 5 May 1959 and drew up a preliminary draft Convention abolishing the requirement of legalisation for foreign official documents. (3) The First Commission of the Ninth Session of the Conference was then given the task of producing a definitive draft from this preliminary draft. It was chaired by Mr A. Panchaud, a judge in the Swiss Federal Court, with Mr R. Glusac, First Secretary in the Yugoslav Ministry for Foreign Affairs, as Vice-Chairman and Mr G. Droz from the Permanent Bureau of the Conference, as Drafting Secretary. The Commission completed the task successfully and submitted to the Plenary Session a draft *Convention abolishing the requirement of legalisation for foreign public documents* which was duly approved.

In order to understand the system of the Draft it is necessary to set out the problem which faced the Commission.

Although the institution of legalisation no longer seems to meet the needs of current practice due to its slowness and complexity, it does nonetheless fulfil a legal function as regards proof. In fact, the legalisation procedure supplies an aspect of verification which cannot be dispensed with without depriving the person producing the document of valuable assistance in establishing the origin of the document. Thus the problem was to abolish the formalities of legalisation while retaining its effect.

A possible solution would have been to adopt a treaty rule providing that a document exempt from legalisation would have, as regards the authenticity of its origin, the same force it would have had if it had been legalised. Such a rule would have meant that its probative weight in this matter would have been the same as that of a national public document bearing in mind, of course, that national laws generally admit proof to the contrary in the case of such national documents be it in the form of procedure in proof that a document has been forged or otherwise. However, it is precisely on this point that the solution mentioned above would have made the position too difficult for someone presented with a foreign document and wanting to set aside its effects because he is convinced of its lack of authenticity or its inaccuracy. In order to find the material basis

for proof to the contrary he would have been forced to undertake searches and enquiries abroad.

For this reason the Conference did not want to abolish the traditional legalisation without replacing it by another procedure which, on the one hand, would ensure for the bearer of the document the desired effect as regards proof and, on the other, would not complicate the procedure of checking the authenticity of its origin. The new formality had, moreover, to be simplicity itself. This threefold concern is resolved in the Convention by the complete abolition of diplomatic or consular legalisation and the introduction of a single check, the addition of a certificate *(apostille)* by an authority in the country where the document was prepared. Simplicity is ensured by the fact that this single certificate, to be affixed in the country where the document was prepared, is to be the only requirement necessary. The interest of the bearer will be protected by a treaty rule exempting the certificate from all proof as to the authenticity of the signature and the seal it bears. In actual fact, since the certificates have to be publicly numbered and registered, forgeries will have become so difficult that the certified document will be as reliable as to its origin as documents currently legalised. Moreover, this public numbering and registering constitutes the very essence of the protection afforded by the certificate to the person presented with the document since proof to the contrary could be obtained simply by consulting a register.

Since the rationalisation thus achieved represents an important step towards speeding up international circulation of the public documents referred to in the Convention, we should bear this preliminary observation in mind when examining the various provisions of the Convention.

## B. ANALYSIS OF THE CONVENTION

### I. ARTICLE 1

After stating the object of the Convention in a short preamble, its drafters felt it necessary to define in article I its scope as regards the documents to which it would apply.

This text calls for three comments:

a) First of all, it should be stressed that the drafters of the Convention wavered between the terms *actes publics* (public documents) and *documents officiels* (official documents). The preference which was finally shown for the former expression can be explained by the aim in view. All the Delegates were in agreement that legalisation should be abolished for all documents other than documents signed by persons in their private capacity *(sous seing privé).* The expression *documents officiels* would only partly have conveyed this idea. It would have been too narrow since notarial acts cannot be considered to be official documents. The words *actes publics* were preferred as they have the advantage of removing all doubt and conveying the security inherent in a well-known, not to say classic, category in French legal terminology. Besides, the risk of confusion arising out of the use of the word *actes* seemed, after all, illusory. True the word *actes* is ambivalent to the extent that it covers both the *negotium* and the *instrumentum*. However, there is no doubt that as we are dealing with a Convention on legalisation only the second meaning can apply. The fact that the qualifier public is

attached to the word *actes* only serves to strengthen this conviction. In order to avoid any translation difficulties the Commission, moreover, specified that in the English text of the Convention the word *actes* should be translated by documents.

b) Since it wished to determine the scope of the Convention as precisely as possible, the Commission was not content simply with using a generic term; in article 1 it listed the documents which are to be considered as public documents within the meaning of this Convention. The documents have been split into four categories as set out under points (a) to (d) of the second subparagraph of article 1. Only points (a) and (d) call for comment.

Point a) concerns *documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice").* The Commission felt that the expression "juridiction" (courts or tribunals) should be understood in its wider meaning and should apply not only to judicial courts and tribunals but also to administrative and constitutional tribunals and even to ecclesiastical courts.

Point d) of the second subparagraph of article 1 refers to *official certificates which are placed on documents signed by persons acting in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.* It is important to stress that the text does not refer to the actual documents signed by persons acting in their private capacity but solely the official certificates which may accompany them. As the distinction may seem obscure to the uninitiated, the Commission felt it wise to give a few examples by way of explanation (official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures), although this is by no means intended as an exhaustive list.

c) the third subparagraph of article 1 also helps to determine the scope of the Convention by excluding two categories of public documents, namely -

1. *Documents executed by diplomatic or consular agents.* A special problem is in fact raised by documents executed by a consul in his country of office where he also acts as a notary of his own country. Thus, a document executed in Italy by a French consul is a foreign document, as far as the Italian authorities are concerned, just as a document executed in France by a French notary would be. It seemed inappropriate to apply the rules of the Convention to such documents, as it would have necessitated sending the document executed by the consul to his country of origin in order that it should receive its certificate and then returning it to the country where it was produced. For this reason it would have been inappropriate to subject documents executed by diplomatic or consular agents to the rules of the Convention.

2. *Administrative documents dealing directly with commercial or customs operations.* This exclusion is justified by the fact that such documents are currently given favoured treatment in the majority of countries. However, it was only accepted after lengthy debate. The question was whether to make an exception to this exclusion and to bring within the scope of the Convention certificates of origin and import/export licences. It was finally decided not to do so for two reasons. First, it would have been pointless to

apply the Convention to them as they are more often than not exempt from legalisation. Second, in cases where a formality is required, it is not a question of legalisation but of an authentication of the content implying that there has been a physical check made by the competent authority. Last, it was pointed out that import and export licences are most often used in the country in which they were issued.

The Commission nonetheless wanted to avoid the exclusion, once accepted, being given too general a meaning. The qualifier "administrative" shows that commercial documents such as contracts and powers of attorney are subject to the rules of the Convention. Moreover, the adverb "directly" tends to restrict the exclusion solely to documents whose very content shows that they are intended for commercial or customs operations, thus excluding those which may occasionally be used for commercial operations such as certificates issued by the Patent Offices (authenticated copies, documents certifying additions to patents, etc.).

II. ARTICLE 2

Under article 2 of the draft -

> *Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.*

This text calls for several comments -

*a)* In the opening sentence it sets out the principle that the country in whose territory the document has to be produced must exempt that document from legalisation. Thus, for example, when France has signed and ratified the Convention, she will no longer make the production in her territory of a public document emanating from another signatory State conditional on any legalisation by a French authority.

b) Article 2 goes further towards defining legalisation within the meaning of the Convention. A more detailed definition became necessary following difficulties due to the fact that the definition of legalisation is very imprecise and that the word can be used with different meanings.

Legalisation within the meaning of the Convention, as the definition in article 2 shows, is purely the diplomatic or consular formality carried out by the country in which the document is produced which will have the obvious practical effect of rendering unnecessary any later formality such as legalisation by the Ministry for Foreign Affairs. The wording adopted and in particular the combination of the two sentences composing article 2 leaves no ambiguity as to the fact that legalisation means only the diplomatic or consular formality.

1. The opening sentence of article 2 provides that -

*Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory.*

Thus the very object of the Convention is defined with no possible fear of misinterpretation: the waiving of the requirement of legalisation by the country in which the document is produced. On the other hand, there is nothing to stop the country in whose territory the document was drawn up from taking the view that that document could only be produced abroad under certain conditions. On this point, the Commission did not want to intervene directly in the domestic law of the Contracting States. However, it is still true to say that the purpose of the Convention is to simplify the present situation which is certainly complex and to put a stop to the practice of legalisation chains. It is therefore desirable that in the country where the document is drawn up a single formality should suffice. It is difficult to see what would be gained by the country where the document was drawn up setting up a complicated procedure, the ultimate effect of which would be to penalise the production abroad of its own public documents.

The clarification made by article 2 might seem to go without saying since the object of the Convention is to abolish the legalisation of foreign public documents. Now, a document is not a foreign document in the eyes of the country from which it emanates but nonetheless all doubt had to be removed since defining the objective of the Convention has very important consequences.

It explains, in the first place, why the Convention was entitled *Convention abolishing the requirement of legalisation for foreign public documents* and that it is not a matter of simplifying legalisation. In fact, legalisation within the meaning of article 2 is quite simply abolished. The requirement of a certificate affixed by an authority in the country where the document is drawn up can hardly be seen as a legalisation or as a simplification of the formalities previously required. It constitutes an autonomous formality whose distinguishing feature, as far as legalisation within the meaning of the Convention is concerned, is that the certificate emanates not from an authority in the country where the document is produced but from an authority in the country in which the document has been drawn up.

The explanations given as to the objective of the Convention also help to refute the objection that the Convention would be of no benefit to countries, such as Japan, which do not require the legalisation of foreign public documents produced in their territory.

It is certainly true to say that foreign public documents can at this time be produced in Japan without legalisation on the part of the Japanese diplomatic or consular authorities and on this point the Convention would hardly alter the situation. On the other hand, there are many foreign countries where Japanese public documents cannot be produced without legalisation since those countries do not allow it. The Convention would alter this state of affairs, the result being that countries which do not require legalisation would have everything to gain by signing the Convention and thereby creating, through the introduction of the certificate procedure, the safeguards for the authenticity of the document required by the foreign States where these documents are likely to be produced. Far from being without benefit for those countries not requiring legalisation, the Convention would be entirely to their advantage as it would facilitate the production of their public documents in the other signatory countries.

2. The second sentence of article 2 of the Convention defines another aspect of legalisation which is to be required no longer. According to the text –

> *For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.*

This definition stresses the scope of the Convention which only abolishes legalisation in its strictest sense. The desire to define the concept of legalisation as precisely as possible is evident in the intentional use of the negative *For the purposes of the present Convention, legalisation means only the formality ...* , also in the statement that it is solely the formality by which the diplomatic or consular agents *of the country in which the document has to be produced* .... and finally in the limitative enumeration of the effects of the legalisation referred to in the agreed text.

This last detail was essential since legalisation does not have identical effects in the various signatory States.

Its minimum effect in the law of all the countries is to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears. It is this minimum common effect which has been used in the definition contained in article 2 of the Convention as describing the formality about to be abolished.

However, there are certain States (Denmark, Germany, Great Britain, Ireland, Norway, Sweden and Switzerland) where legalisation has or can have more far-reaching effects and thus allows diplomatic or consular agents to certify the competence of the public officer or authority signing the document. In some cases legalisation even means that the validity of the official document from the point of view of the *lex loci actus* is certified.

The Commission decided not to concern itself with the wider effects of legalisation. Obviously, where the text provides that *for the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify... the capacity in which the person signing the document has acted*.... the expression *capacity* cannot be understood in the sense of *competence,* from which it is quite distinct moreover in legal terminology.

Several reasons led the Commission to adopt this less ambitious attitude.

In the first place, a comparative study of the various types of legalisation made in the report by Mr G. Droz (4) showed that the additional effects connected with certain forms of legalisation have never been attributed to legalisation in its strictest sense. They can only become operative where the legalising authority states in the text of the legalisation that an additional search has been made. This is the case for example with legalisation, with attestation as used in Norway or the comprehensive legalisation used under German law.

Moreover, in some countries, such as Portugal, certification of competence and validity, while allowed, is carried out independently of legalisation. For these countries any link established by the Convention between these two formalities would have seemed strange.

Accordingly, the Commission felt that it was impossible to abolish the requirement of differing formalities not uniformly used by the Member States of the Hague Conference on Private International Law. It should be pointed out here that an express abolition of this sort would have meant that the Conference was obliged, that is if it did not want to do wrong to the persons concerned, *i.e.* the bearers of such documents, to attribute to foreign documents represented by the certificates *(apostilles)* or even to foreign official documents effects as significant and varied as those attributed to the old form of legalisation in the countries quoted.

Finally, it should be said that legalisation within the meaning of the Convention covers the formality by which the diplomatic or consular agents certify, *where appropriate, the identity of the seal or stamp which the document bears.* Mention of the seal was made at the request of certain Delegates, in particular the Delegate from the Federal Republic of Germany. In Germany, in fact, the legalisation of the seal accompanies that of the signature in order to satisfy the requirements of some foreign countries. A public document which is unsigned but bears a seal is also covered by article 2.

It seemed unnecessary, on the other hand, to mention specifically the stamped signature *(la griffe)* although this is used in some Member States of the Hague Conference, especially in Spain. It was felt that the Convention applied to it implicitly, at least in the case of Spain since in Spanish law the accompanying stamp is an integral part of the signature.

## III. ARTICLE 3

Article 3 of the Convention lays down in its first paragraph -

> *The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.*

The drafting of this text gave rise to long discussions, for it is in this connection that the fundamental question arose on which the whole system of the Convention depended. Having abolished the requirement of legalisation by the diplomatic or consular agents of the country where the document has to be produced, could one have total confidence in the authenticity of a foreign document or, on the contrary, was it necessary to require a formality simpler than legalisation and different from it?

Three systems could be envisaged for the resolution of this problem -

a) Under a first system based on a total liberalism, one could conceive of placing reliance on the genuineness of the signature in the document until the contrary was proved or, where appropriate, until a procedure in proof of a forgery was initiated under the applicable law. Public documents emanating from a Contracting State would, in this respect, have the same value in the territory of the other Contracting States as that previously attributed to documents which had been legalised in the strict sense of the term.

b) Under a second system, while abolishing legalisation, there was no intention of abandoning all safeguards as to the genuineness of the signature. The preservation of some control was deemed necessary. The safeguards would be obtained by affixing a certificate issued by the competent authority of the State whence the document emanates.

c) Finally, a third system would consist in the application of the two above-mentioned systems on a selective basis. For some documents acceptance of total liberalism would be possible. This would for instance be the case for judicial documents. On the other hand, for notarial acts and administrative documents, the affixing of a certificate by an authority of the country where the document was drawn up would be required.

The dangers inherent in a general and absolute liberalism led very quickly to the condemnation of the first system. There was longer hesitation between the second and third systems, both of them finding supporters. Before the Special Commission, the third system had won acceptance. Before the First Commission of the Ninth Session of the Conference, it was the second system which, for a number of reasons, finally carried the day.

In the first place, the application on a selective basis of an absolute liberalism and of a controlled liberalism would render delimitation problems inevitable between the respective areas of the two systems. Actually, it seemed difficult in many cases to determine the exact demarcation line between judicial and administrative documents. Every attempt at systematic classification ran into the difficulty arising from the need to classify the documents by reference to the authority from whence they emanated. However, the character of certain authorities varied according to the country. An authority which was administrative in one State was judiciary in another.

Moreover, the judiciary nature attributed to documents of the process-servers *(huissiers)* led to their being allocated a preferential position in relation to notarial acts, the legitimacy of which was questionable. The elimination of all discrimination by the introduction of a uniform system had the advantage of eliminating all delimitation problems.

However, the easy way out is not an end in itself and the objection raised against the adoption of the second system was that it marked a backward step in the case of judicial documents which may enjoy total confidence and for which it frequently happens that no legalisation is required at present. The objection did not seem decisive, for the confidence given to judicial documents applies only to those emanating from traditional courts and tribunals. But one witnesses in a number of countries a veritable proliferation of special courts and tribunals. For documents emanating from these new courts and tribunals, little known abroad, and of which the *judicial* nature in the traditional meaning

of the term is not always beyond question, it may be desirable to have the identity of the signature verified. Moreover, a verification of this nature is of a kind to facilitate the work of a judge who decides on the enforcement of a foreign judgment.

The criticisms, made by the supporters of a liberal system for judicial documents, against the generalised adoption of the certificate have not succeeded in restricting the field of application of that certificate. However, they have helped to alter article 3 of the Convention in a more liberal direction which is evident from a number of points.

a) This is to be seen in the first place in the wording of the first paragraph of article 3 itself: *The only formality that may be required ... is the addition of the certificate described in Article 4* ... This wording tends to stress two points -

1. The addition of the certificate is the maximum formality which may be required. It cannot be duplicated by an additional formality.
2. The requirement of the certificate is *optional.* The State in whose territory the document is to be produced is thus free not to require it for documents of one category or another.

b) This liberal character is expressed in a particularly explicit manner in the second paragraph of article 3 of the Convention, under the terms of which -

*However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation.*

This text provides that a certificate is not required in two cases -

1. Where, under the laws, regulations or practices in force in the territory of the State where the document is produced the document is, before the entry into force of the Convention, exempt from legalisation within the meaning of article 2. It has been desired in this case to avoid the Convention taking a retrograde step by submitting to the formality of the certificate a document which previously was subject to no formality since it was exempt from legalisation.

2. Where, after the entry into force of the Convention, an agreement between two or more Contracting States or the laws, regulations or practices in force in the State in the territory of which the document is produced will abolish or simplify the requirement of the certificate. In this regard the word "agreement" must be given the widest possible meaning and cover all agreements not cast in the form of formal treaties. Likewise, this wording allows that as a result of Community or supra-national regulations special arrangements in matters of legalisation are made.

## IV. ARTICLES 4 AND 5

Articles 4 and 5 of the Convention deal with the certificate. In this field the most important innovation is without doubt the provision laying down a uniform formality in all

countries bound by the Convention. To this end, article 4 creates a common certificate to be used by the authorities designated by the various Signatory States and of which a model is annexed to the Convention. Study of this model shows that the certificate takes the form of a square with sides at least 9 cm long and that it must include a number of standard and numbered items. There was a particular wish to ensure that the certificate should make an express reference to the Convention thus giving proof within itself of its relationship. Conformity of the certificate with the model annexed to the Convention shows that it may be drawn up in French. However, it may be drawn up in the official language of the authority which issues it and the standard terms appearing therein may be given also in a second language (second paragraph of article 4). Uniformity in language is found in any case to be partially protected by the requirement of including, in French, the title "Apostille" (Convention de La Haye du ...). The certificate is issued at the request of the signer or of any bearer of the document (first paragraph of article 5).

The principal difficulty raised in the legal context by the abolition of the legalisation chain and its replacement by the certificate system has to do with probative weight. In this connection three problems must be carefully distinguished.

a) The first difficulty concerns the probative weight of the signature, the seal or the stamp appearing on the certificate. It would have been ridiculous to subject the certificate itself to a requirement of additional proof such as legalisation or even verification by another authority. It was clear that one had to apply the maxim *acta publica probant sese ipsa.* Although such a provision might have appeared superfluous, the drafters of the Convention felt it desirable to set it out expressly in the third paragraph of article 5: *The signature, seal and stamp on the certificate are exempt from all certification*.

b) The conclusion under (a) having been established, the second difficulty is that relating to the probatory force of the certificate as regards the authenticity of the signature appearing on the public document, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which appears on the document.

Those drafting the Convention had three possibilities available -

1. They could in the first place consider determining directly the question of probative weight by laying down that in this respect the certificate would be deemed authentic, subject to procedure in proof of forgery of the document, or simply until the contrary was proved. They abandoned this, for hopes of doing so were prevented by the fact that, in certain Member Countries of the Hague Conference, procedure in proof of forgery of a document (*inscription défaux*) is unknown.

2. They could also consider enacting a rule of conflict of laws by inserting, for example, in the Convention a provision under which *the probative weight* of the certificate would be governed by the law of the country where the document was drawn up. But the drafting of a single conflicts rule was a difficult matter because of the differences existing in this field between the systems of private international law of the various Member countries of the Conference (for example, France refers to the law of the country where the document was drafted and Austria to the country where the document is produced).

3. There was the possibility also of their *not specifying the probative weight* of the certificate. This latter solution was adopted and the second paragraph of article 5 of the Convention goes no further than to declare that, *When properly filled in (the certificate) will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears,* without specifying whether this attestation is effective until initiation of procedures in proof of forgery, or at least until the contrary is proved.

In the presence of this deliberate omission, in order to determine the probatory force of the certificate in respect of the attestations which it contains, one must refer to the law indicated by the conflict of laws rule of the forum.

*c)* A final difficulty was raised by the Delegate from Great Britain concerning the probative value of the certificate as regards the characterisation of the document. If the certificate has been affixed in error upon a document which is outside the scope of the Convention, can such certification have an effect upon the characterisation of the document? A negative answer was accepted because it is unavoidable. The certificate could not in fact have the quality of transforming the nature of the document and making it a public document if it is in reality a document signed in a private capacity. The State where the document is produced thus retains the right of showing that it is not in fact a public document within the meaning of the law of the country from whence it comes. As this goes without saying, the drafters of the Convention deemed it unnecessary to mention it expressly.

V. ARTICLE 6

Article 6 of the Convention governs the question of deciding which authority in each of the Signatory States shall be responsible for issuing the certificate. It provides -

> *Each Contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.*
>
> *It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.*

This text shows the preoccupation of the drafters of the Convention not to interfere with the prerogatives of the States. It is for each Contracting State to decide for itself on the authorities which it intends to entrust with the task of issuing the certificate. The Convention trusts the States on this point. The drafters of the Convention wish simply to avoid the indirect revival of a new practice of legalisation chains which would consist of requiring legalisations before the certifying authority could affix its stamp.

The only obligation incumbent upon the States is to give notice at the time of depositing their instrument of ratification or accession, which are the authorities they have designated. It is sufficient moreover for them to give notice of the *authority by reference to its official function.* The drafters of the Convention wished to indicate in this way that it was pointless to give the name of the person designated. If for example France

designated the *"Président du Tribunal de grande instance",* it would not have to give the name of each holder of the office.

Many related questions were discussed, but have found no place in the Convention, for they seem to be questions of internal organisation which must be regulated by each State.

a) This applies in the first place to the question of the cost of the formality introduced by the Convention. Although the Convention has said nothing on this point, the Delegates agreed that the cost should be reasonable. If in fact it were to accede the cost of the existing legalisation, the Convention would lose a great deal of its usefulness.

*b)* It was also asked whether the authority designated for issue of the certificate would be competent for all documents drawn up in the country or merely for those drawn up within its local jurisdiction. The drafters of the Convention considered that it was for each State to resolve this problem.

c) Finally, it was observed that there would be some risk of private individuals having difficulty in locating the authority responsible for issue of the certificate. How could they be informed on this point? While taking note of the practical importance of this question, the drafters of the Convention considered that it fell within the scope of national administrative organisation.

## VI. ARTICLE 7

For the system to be sufficiently protective, it remained to establish some supervision making it possible to detect false information or false signatures which might be placed upon the certificate and, in particular, to facilitate proof of non-authenticity of the certificate.

Theoretically, three systems of control were conceivable. First of all, one could imagine a central office being established at international level, with the role of centralising the various signatures of officials authorised to issue the certificates. The Delegates did not support this system, as they were afraid of setting up too cumbersome a mechanism for which it would be difficult to keep the collection of signatures up to date. The idea of setting up a central office at national level was put aside for the same reason. Both organisations seemed of a size which was disproportionate to the risks run. The precedent of the bilateral Conventions concluded between Germany on the one hand and Switzerland, Denmark and Austria on the other shows that during thirty years there has in practice been no single case for verification and control of foreign documents.

For this reason the Convention endorses a third system which seemed easier in its implementation. Under the terms of article 7 of the Convention -

> *Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying -*
>
> *a) the number and date of the certificate,*
>
> *b) the name of the person signing the public document and the capacity*

*in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.*

*At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.*

It is thus the authority which is responsible for the issue of the certificate, which the Convention entrusts with the exercise of the necessary supervision. That the certificate is numbered and that the number is recorded in the register, makes identification easy. It was difficult to find a system more effective in its simplicity.

The text of article 7 calls for a twofold observation -

a) For the organisation of supervision, each State has a choice between using a register or a card index, this latter more modern form providing a comparable security.

b) Where the public document is both signed and provided with a seal or stamp, an indication of the signature and of the authority which has issued the seal or stamp both appear on the certificate. But to avoid overloading the register or card index, it is felt sufficient to mention on the latter the name of the person signing and the capacity in which he has acted. This is sufficient for the supervision to be effectively exercised. Where however an unsigned document is concerned, the register or card index must give the name of the authority which has affixed the seal or stamp, for this indication constitutes the only reference enabling the document to be identified. It seemed pointless to require in the Convention that he who applies for verification should prove the legitimate nature of the interest claimed by him. It seemed that the risk of inappropriate curiosity was not to be feared since in order to know the entries on the certificate and demand their verification it was necessary to have had access to the document.

## VII. ARTICLE 8

Article 8 of the Convention provides -

*When a treaty, Convention or agreement between two or more Contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.*

This text conveys the preoccupation of the drafters of the Convention to show with particular clarity that the Convention shall derogate from the less favourable provisions of existing treaties, conventions or agreements, but on the other hand it must not prejudice provisions which are more favourable.

Having made this point it seemed unnecessary to refer expressly to one specific convention or another, although the question had cropped up in relation to the Hague

Conventions of 1905 and 1954 on Civil Procedure. The problem of their relationship with the present Convention was finally considered as resolved by the general formula of article 8. The present Convention derogates from them in fact since it seems that the formalities which it provides are less rigorous than those imposed by the Hague Conventions of 1905 and 1954 on Civil Procedure.

## VIII. ARTICLE 9

Article 9 presents a considerable interest as regards the practical application and the effectiveness of the Convention. It was feared in fact that certain private organizations, and in particular the banks, might continue either by routine or from excessive prudence to require in business activities that foreign documents produced to them should carry a diplomatic or consular legalisation. In order to counter such a risk, article 9 invites the Contracting States to take *the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.*

## IX. FINAL CLAUSES

Under article 10 the Convention is open for signature by the States represented at the Ninth Session of the Hague Conference on Private International Law and by Iceland, Ireland, Liechtenstein and Turkey.

The addition of these four Countries to the States represented at the Ninth Session of the Hague Conference on Private International Law is explained by reasons which vary depending on whether one considers the case of Ireland and Turkey or that of Iceland and Liechtenstein.

Ireland and Turkey are both Members of the Hague Conference on Private International Law but were unable to send representatives to the Ninth Session. It seemed legitimate to open the Convention to their signature in spite of this absence of representation.

For Iceland and Liechtenstein the problem is different as the two Countries are not Members of the Hague Conference on Private International Law. Nevertheless, the advantage presented to them, and also to certain Member Countries of the Conference, by the opening of the Convention to their signature, determined the favourable reception granted to the request made for Iceland by the Council of Europe, and for Liechtenstein by Austria and Switzerland.

Article 11 fixes the entry into force of the Convention at the sixtieth day after the deposit of the third instrument of ratification.

Article 12 provides that *Any State not referred to in Article 10 may accede to the ... Convention*... However, such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to

in sub-paragraph (d) of article 15 (paragraph 2 of article 12). Article 12 locates the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents half-way between open and closed Conventions.

Article 13 permits a Contracting State to extend the application of the Convention to all the territories for the international relations of which it is responsible, whatever may be the nature of its links with those territories.

Article 14 authorises the denunciation procedure which is traditional to The Hague.

Finally, article 15 lists the notifications for which the Government of the Netherlands, as depositary of the Convention, shall be responsible.

Rennes, 15 April 1961
Yvon Loussouarn

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* Dean of the Faculty of Law at the University of Rennes, Rapporteur to the First Commission. [back to the text]

[1] See *Actes de la Huitième session (1956)*, pp. 235 *et seq*. [back to the text]

[2] See *Actes de la Huitième session (1956)*, pp. 356 *et seq*. [back to the text]

[3] See *Suppression de l'exigence de la légalisation des documents officiels étrangers*, preliminary draft Convention drawn up by the Special Commission and report by Yvon Loussouarn. Preliminary document No 2 of December 1959. [back to the text]

[4] *La légalisation des actes officiels étrangers*, Report by G.A.L. Droz, Secretary at the Permanent Bureau, Preliminary Document No 1 of March, 1959. [back to the text]