

## Background Note on Article 1(3) Exclusions

### I. Introduction

- 1 When defining the scope of the Apostille Convention, the drafters settled on the term “public documents” because of its encompassing interpretation,<sup>1</sup> the argument being this would allow the maximum number of documents to benefit from the simplified procedure established by the Convention.
- 2 In an effort to be precise, types of documents that are considered to be public documents were included in Article 1(2). The drafters also chose to expressly exclude two categories from the scope of the Convention in Article 1(3):
  - a. documents executed by diplomatic or consular agents; and
  - b. administrative documents dealing directly with commercial or customs operations.
- 3 The drafters of the Convention sought to use the Apostille Certificate to facilitate the cross-border movement of documents. The history of negotiations show that the Article 1(3) exclusions were included for the same reasons: to avoid imposing additional formalities for authentication where it had not previously been required.<sup>2</sup>
- 4 Against this background, this document outlines the reasoning behind the Article 1(3) exclusions and examines their modern operation in practice.

### II. Article 1(3)(a)

#### A. Origin of the exclusion

- 5 Diplomatic or consular agents regularly execute documents in the territory of the State to which their Embassy or diplomatic mission is accredited (the “host State”), in the exercise of their functions on behalf of the State that they represent (the “sending State”). This is a function recognised under the *Vienna Convention of 24 April 1963 on Consular Relations*, where the agent acts as a notary, civil registrar, or in a capacity of a similar kind.<sup>3</sup>
- 6 The drafters considered it “inappropriate” to apply the rules of the Convention to these documents, as it would have complicated rather than simplified their movement.<sup>4</sup> This is because a document executed by a diplomatic or consular agent in the host State would then have to be sent to a Competent Authority in the agent’s sending State for an Apostille, only to have the document later returned to the host State where it was first executed for use.
- 7 In addition, at the time of the Apostille Convention’s negotiation, the Council of Europe – which had a similar Membership – was considering the development of a separate Convention on consular matters.<sup>5</sup> This Convention, now known as the *European Convention on the Abolition of Legalisation*

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<sup>1</sup> The drafters aimed to encompass all documents other than those signed by persons in their private capacity, and the term “public documents” was considered preferable to “official documents” for this purpose. See Explanatory Report, Section B, I. Article 1.

<sup>2</sup> See Explanatory Report, Section B, III. Art. 3.

<sup>3</sup> See *Vienna Convention of 24 April 1963 on Consular Relations*, Art. 5(f).

<sup>4</sup> See Explanatory Report, Section B, I. Art. 1.

<sup>5</sup> See “Procès-verbal No 4”, in HCCH. *Actes et documents de la Neuvième session* (Proceedings of the Ninth Session) (1960), Tome II, Légalisation, p. 94.

of Documents executed by Diplomatic Agents or Consular Officers, included a full dispensation of legalisation for documents executed by diplomatic and consular agents. If an Apostille Certificate was required for these documents, it would have imposed a higher burden than this new Convention.

## **B. The exclusion in practice**

- 8 The exclusion envisages a situation where the State of destination is the host State and legalisation would therefore not be required. The bigger practical problem is when a public document is executed by a diplomatic or consular agent for presentation in a third State (*i.e.*, neither the host State nor the sending State). If the exclusion is applied, the document cannot be apostilled by the host State, which would consider it a foreign document, nor by the sending State. This has the result that a document issued by an Embassy may be subject to legalisation for production in a third State, thereby imposing a higher burden than the Convention.
- 9 In response to the increasing movement of people, and the associated movement of public documents, some Contracting Parties now issue Apostilles for documents emanating from their Embassies or diplomatic missions abroad. This practice includes instances where the document is executed, issued, or generated at the Embassy or mission.
- 10 Technology has also played a role in the evolution of this exclusion, facilitating interactions between diplomatic missions and their capitals. The complications envisaged by the drafters of the Convention were largely driven by the paper-based format. Public documents executed by diplomatic or consular agents abroad can now be transmitted electronically back to the sending State or registered electronically in databases maintained by the sending State. The electronic Apostille Programme (e-APP) has also reduced the relevance of location, encouraging Contracting Parties to facilitate the online submission of Apostille applications, issuances, and verifications.
- 11 Finally, while the European Convention has been adopted by 24 States,<sup>6</sup> the global coverage of the Apostille Convention means it remains the more widely used Convention. For those that are only party to the Apostille Convention and cannot benefit from some other bilateral or multilateral instrument, there is no other mechanism for the simplified authentication of diplomatic and consular documents if the Article 1(3) exclusion is applied.

## **III. Article 1(3)(b)**

### **A. Origin of the exclusion**

- 12 The Article 1(3)(b) exclusion intended to avoid imposing additional formalities where they did not otherwise exist. This was because, at the time of negotiation, commercial or customs documents were already given “favoured treatment” by many countries through simplified procedures or exemption from legalisation.<sup>7</sup>
- 13 There was some discussion around whether an Apostille should be required for certificates of origin and import / export licences; however, this approach was not adopted. The drafters noted that, for import / export licenses specifically, in a majority of cases these documents are used in the country of issue and therefore do not require legalisation. Where a formality is imposed, it is not typically to authenticate the document’s origin, but its content (to which an Apostille does not relate).<sup>8</sup>

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<sup>6</sup> For more information, including a list of Contracting States, see < <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=063> >.

<sup>7</sup> See Explanatory Report, Section B, I. Art. 1.

<sup>8</sup> *Ibid.*

14 In addition, the express inclusion of the qualifiers “administrative” and “directly” was to ensure the exclusion was not too general, and that certain commercial documents, such as contracts, powers of attorney, and certificates issued by patent offices would still fall within the scope of the Convention.<sup>9</sup>

## B. The exclusion in practice

15 The main reason for excluding these documents was because they were often already exempt from legalisation, and to require an Apostille would increase the otherwise non-existent burden. This assumption has evolved as the number and diversity of Contracting Parties to the Convention has grown.<sup>10</sup>

16 There are now, broadly, three approaches to this exclusion. First, some Contracting Parties maintain an exemption for this type of document and do not require an authentication procedure. Secondly, some issue Apostilles for these documents, often because they were previously subject to legalisation or some other form of authentication prior to the entry into force of the Convention. Finally, there are a (small) number of Contracting Parties that apply the Convention text as drafted, and do not issue or accept Apostilles, instead requiring traditional legalisation.

17 Similar to the Article 1(3)(a) exclusion, the intended result of the exclusion was not to require legalisation instead of apostillisation; it was to exempt this category of documents from authentication entirely.

## IV. Guidance on Modern Interpretation

18 The two exclusions were drafted for practical purposes in an effort to avoid unnecessary formalities and they should be read in this spirit.

19 The Special Commission has discussed these exclusions at each of its meetings since 2003. This has been reflected by increasingly strong language regarding the exclusions. In 2009, the Special Commission confirmed that the Article 1(3)(b) exclusion should be “interpreted narrowly”.<sup>11</sup> This was reconfirmed in 2012 and extended to both Article 1(3)(a) and (b).<sup>12</sup> Contracting Parties were also encouraged to accept, to the extent possible, Apostilles issued for these documents even if they would not themselves issue Apostilles for such documents.<sup>13</sup> In 2016, this matter was again considered, with the Special Commission recommending the exclusions be construed “extremely narrowly”.<sup>14</sup> Most recently, in 2021, the Special Commission went a step further and, in addition to the “extremely narrowly” advice, called for flexibility amongst Contracting Parties and encouraged recipients to accept Apostilles issued for documents that would otherwise be excluded under Article 1(3).<sup>15</sup>

20 The advice of the PB continues to be that the test for determining whether to apostillise a particular category of public document should be whether the category required legalisation before the Convention entered into force for the State from which the document emanates. Conversely, if a particular category of documents did not require legalisation before entry into force of the Apostille Convention, it does not now require an Apostille. This is consistent with the principle that the Apostille Convention should be a maximum, not a minimum, requirement.<sup>16</sup>

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<sup>9</sup> *Ibid.*

<sup>10</sup> There are now over 120 Contracting Parties to the Apostille Convention. For context, the Ninth Session of the HCCH, which adopted the Convention, was attended by delegates from 19 States, 17 of which were European.

<sup>11</sup> See C&R No 77 of the 2009 SC.

<sup>12</sup> See C&R No 15 of the 2012 SC.

<sup>13</sup> *Ibid.*

<sup>14</sup> See C&R No 10 of the 2016 SC.

<sup>15</sup> See C&R No 14 of the 2021 SC.

<sup>16</sup> See Explanatory Report, Section B, III. Art. 3.