AN EMPERICAL STUDY ON THE DEVELOPMENT OF E-NOTARY AND E-APOSTILLE SERVICES IN IRELAND AND SPECIFICALLY AS IT RELATES TO TRADECERT.COM

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This Thesis is submitted in partial fulfillment of the requirements for achieving a Masters in Business in Strategy and Innovation Management

GALWAY-MAYO INSTITUTE OF TECHNOLOGY
27 MAY 2011
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September 2010

DEDICATION

My Earth Angels

My wonderful husband Paraic and two beautiful children, Hannah and Robert. A lot of work went into the chapters of this book but the chapter I am most looking forward to is the next one in our lives together as a family.

My Heaven Angels

To my very special mum Catherine, words cannot describe what you mean to me.

And

To my beautiful cousin Cathal, I know you loved a good book, enjoy.

ACKNOWLEDGEMENTS

- I would like to take this opportunity to say a heartfelt thank you to my supervisor Shane Moran. Thank you not only for all your help and guidance in writing this thesis but for all you have done for me in my time in GMIT. You had faith in me when I sometimes didn't have faith in myself.

- A huge thank you goes to Marie Finnegan. You had your work cut out for you this year Marie and I'm sure we weren't easy at the best of times. All your work and effort was much appreciated.

- To all the staff and faculty at GMIT but especially the lectures who have helped and guided me during my time there. I'd like to give a special mention to Mr. Kevin Heffernan, Mr. Richie Hoare, Ms. Maureen Melvin and Mr. Ivan Mc Phillips, thank you all for everything.

- I would also like to thank Mr. Tom Kelly and all the staff at Tradecert.com, without them there would be no Thesis. I would like to thank them for allowing me into their organisation and I would like to wish them continued success for the future.

- To the Masters Class of 2010, we did it!!! It was scary, hard, crazy, sometimes silly but most of all great fun. The 'special room' will always have a place in my heart!! I've made some wonderful friends and I'm sure none of you will be upset if I mention a very special friend whom I hope will be a part of my life for a long time to come...Mary T, you know who you are!!! Thanks for all the advise, motivation, words of comfort and most of all the laughs xx

- And last but by no means least, my family. Paraic, Hannah and Robert. You guys have had to put up with and sacrifice a lot over the last few years and I will be eternally grateful to you. Hannah and Robert, my wish for you both is that you will strive for and achieve your best but most of all that you will both be happy. Paraic, my poochie, my best friend, I could not have achieved any of this without your unconditional love and support, thank you from the bottom of my heart xxx

"CHANGE IS THE LAW OF LIFE"

John F. Kennedy

Statement of Original Authorship

"The work contained in this thesis has not been previously submitted for a degree or diploma at any other education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by any other person except where due reference is made."

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LIST OF ABREVATIONS

e-Notary	Electronic-Notary
e-Apostille	Electronic-Apostille
e-APP	Electronic Apostille Pilot Program
DFA	Department of Foreign Affairs
GMIT	Galway-Mayo Institute of Technology
NUIG	National University of Ireland, Galway
COO	Certificate of Origin
UETA	Uniform Electronic Transaction Act
US	United States
HCCH	Hague Convention on International Private Law
PKI	Public Key Infrastructure
AGM	Annual General Meeting

ABSTRACT

In today's world of globalization, technology and the internet it is difficult for any organisation or profession to remain in a 'pen and paper' based world when it comes to the running of their organisation. The role of the Notary Public is no different. The primary objective of this research is to investigate the development of e-notary and e-apostille services in Ireland. At present documents that require a notary stamp and an apostille seal are manually stamped and verified.

The process used to conduct this research was not limited to one source of methodology. The author felt that in order to give the best possible result a combination of methodologies would serve this research project appropriately. A combination of primary and secondary data was accumulated by various methods including, library database searches; books and journals; website searches; personal interviews; a questionnaire; and telephone interviews.

The research discovered that Ireland is progressing, however slowly, in its introduction of e-Notary and e-Apostille services. To date nine documents have been electronically notarised by a number of Irish Notaries Public. The Department of Foreign Affairs is in the latter stages of introducing the e-Apostille program to the Irish public. At present the proposed introduction is with the DFA's legal team who are ensuring that all of the legal implications of introducing such a service are studied and scrutinized to insure their compliance with Irish Constitutional Laws on data protection.

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CHAPTER 1

INTRODUCTION

1 Introduction

In today's world of globalization, technology and the internet it is difficult for any organisation or profession to remain in a 'pen and paper' based world when it comes to the running of their organisation. The role of the Notary Public is no different.

1.1 Primary Objective

The primary objective of this research is to investigate the development of e-notary and e-apostille services in Ireland. At present documents that require a notary stamp and an apostille seal are manually stamped and verified.

1.1.1 Secondary Objectives

1) To give the reader an historical background to the Notary Public in Ireland.
2) To describe the manual methods of putting a Notary and Apostille seal on a document.
3) To demonstrate the technology currently being used to electronically place a Notary and Apostille seal on a document in other jurisdictions.
4) To identify where Ireland is in relation to the introduction of e-Notary and e-Apostille services.
5) To identify business opportunities for Tradecert.com.

1.2 Rationale for the Research

Currently, the majority of Tradecert.com's (see Chapter 5 for company overview) business is based in the provision of electronic signing and certification of Certificates of Origin for export companies. Tradecert.com's directors feel the time is right for them to explore new business opportunities in the electronic signature market. The areas of e-Notary and e-Apostille are at the forefront of its investigations.

1.3 Is this research worthwhile?

This research is worthwhile for a number of reasons:

- There is a limited amount of research on this particular topic so this dissertation will add significantly to the existing body of knowledge;
- It will provide Tradecert.com with an overview to how they can grow and expand their business into the future;
- In today's economic climate where cost savings for businesses is of utmost importance it will inform businesses of the cost saving benefits of automating their certification needs.

1.4 Obstacles

Many research projects experience some obstacles during the research process. While this research for the most part went unhindered there were a couple of issues.

1.4.1 Privacy

When dealing with business organisations or individuals the issue of confidentiality may arise. This was the situation with this project. As this research dissertation will be available for public viewing some of the individuals that were interviewed did not want their personal information published, however they were happy to have their views on the subject published. When discussing their interviews they will be addressed as Interviewee 1 and Interviewee 2.

1.4.2 Lack of Information

When discussing the topic of the e-Apostille with the Department of Foreign Affairs there was certain information that was unable to be given to the author due to its sensitive nature. While every assistance was given to the author by the DFA, this did limit the research findings somewhat.

1.4.3 Time Constraint

As this research was conducted as part fulfillment of a Master of Business Studies and had to be completed by September 2010.

1.5 Chapter Overviews

1.5.1 Chapter 2: Notaries Public and their Progression into the Electronic Era

Chapter 2 describes the Notary Public, its origins, its role within the legal profession. It will illustrate the traditional method of notarization and compare it to the electronic method. It will explain what an Apostille is and when one is required. It will also compare the traditional method of Apostilling against the electronic method.

1.5.2 Chapter 3: Literature Review

The literature review chapter of this thesis aims to give the reader a background to the research through historic and currently literature. Literature written by Irish authors was limited as the processes of e-Notarizing and e-Apostilling are in their infancy in Ireland.

1.5.3 Chapter 4: Research Methodology

Chapter 4 illustrates the methods and processes used to conduct the research. The author chose to use a research process model designed by Emory & Cooper (1995). The author also discusses the much debated Qualitative V's Quantitative argument. The chapter describes how a combination of primary and secondary data collection was used and which methods were used in its accumulation.

1.5.4 Chapter 5: Research Findings

Chapter 5 outlines the findings of the research in a factual manner. It gives a description of the target population of the research, i.e. Irish Notaries Public and the Department of Foreign Affairs. It describes the results of the questionnaire and the comments and information obtained from personal interviews.

1.5.5 Chapter 6: Conclusions and Recommendations

Chapter 6, the final chapter in this thesis, gives an overview of the research findings in light of the literature review. It lays out the recommendations of the author and gives suggestions for further research that could be carried out in the future.

CHAPTER 2

NOTARIES PUBLIC AND THEIR PROGRESSION INTO THE ELECTRONIC ERA

2 Notaries Public and their Progression into the Electronic Era

2.1 The Irish Notary – A Brief History

"The notary public ranks among the most ancient of professions. Although it cannot be said with any certainty when, or where, the first notaries commenced to practice as a profession, it is generally accepted that the early civilizations had officials of great intellect, versed in the art of writing, who carried out functions similar to those performed by the notary of today." (O'Connor 1987).

As O'Connor states in his work, The Irish Notary, it difficult to state with any degree of certainty the first example of a Notary Public. This is a view shared by Brooke in his book 'Office and Practice of a Notary of England'.

The Faculty of Notaries Public gives a brief history of the Notary public on its website, www.notarypublic.ie.

"The Office of Notary Public is one of great antiquity and historical significance. It is unclear, however, when or where the first public notary was formally appointed. One of the earliest references to a notary dates back to the time of Cicero (106 – 43BC), the famed Roman orator and statesman, who, it is claimed, employed persons skilled int eh art of writing to record or 'note' his speeches.

After the abdication in 476 AD of Romulus Augustus, the last emperor of Rome, the papacy became the de facto ruler of Rome. When Pope Leo III crowned Charlemagne emperor of the Holy Roman Empire in 800AD the empire encompassed the entire heartland of Western Europe, stretching from the Danube to the Pyreness and from Rome to the North Sea. Ecclesiastical notaries were by then part of the papal household and were know to deal with both ecclesiastical and civil matters. At this time it had become the practice of kings, princes and rulers in communion with the Holy See to seek various dispensations, privileges and faculties which were at the gift of the papacy.

One such faculty concerned the appointment of notaries. The Pope, for administrative convenience, frequently delegated the power to appoint public notaries to religious (usually Archbishops) and temporal leaders throughout the Holy Roman Empire. In England, the power to create notaries was vested in and exercised by the Archbishop of Canterbury under papa and imperial authority. In Ireland, public notaries were at various times appointed by the Archbishop of Canterbury and the Archbishop of Armagh. The position remained so until the Reformation.

There is archival evidence showing that public notaries, acting pursuant to papal and imperial authority, practiced in England and in Ireland in the 13th century and it is reasonable to assume that notaries functioned here before that time.

After the Reformation, persons appointed to the office of public notary either in Great Britain or Ireland received the faculty by royal authority and appointments under faculty from the Pope and the emperor ceased.

In 1871, under the Matrimonial Causes and Marriage Law (Ireland) Amendment 1870, the jurisdiction previously exercised by the Archbishop of Armagh in the appointment of notaries was vested in and became exercisable by the Lord Chancellor of Ireland. In 1920, the power to appoint notaries public was transferred to the Lord Lieutenant of Ireland.

The position in Ireland changed once again in 1924 following the establishment of the Irish Free State. Under the Courts of Justice Act, 1924 the jurisdiction over notaries public was transferred to the Chief Justice of the Irish Free State. In 1961, under the Courts (Supplement Provisions) Act of that year, and the power to appoint notaries public became exercisable by the Chief Justice. This remains the position in the Republic of Ireland. In Northern Ireland, notaries public are appointed by the Lord Chief Justice.

2.2 The Role of a Notary Public

"The title notary public is derived from the Latin notaries publicus, the description of the office in common use throughout Western Europe, including Ireland, well into the 16th Century when Latin was widely used in public documents and statutes. There are however differing views as to the derivation of the word notary. One view is that it derives from the Latin 'natotio' (from noto, notare) meaning to record by mark, characters, symbols or abbreviations; the other, that it derives from the Latin 'nota' (from nosco, noscere, notum) meaning to know, and from that, a sign or distinguishing mark, by which a thing may be made known or manifest." (O'Connor 1987)

A notary is a public officer who is appointed in Ireland by the Irish Chief Justice. O'Connor (1987) has identified the functions of a notary public to include, the authentication of public and private documents; attesting and verifying signatures to documents in order to satisfy evidential or statutory requirements of foreign governments or of overseas institutions and regulatory authorities; noting and protesting bills of exchange and promissory notes for non-acceptance or non-payment; drawing up ship protests; and giving certificates as to the acts and instruments of persons and their identities. A notary's duties are known as notarial acts.

O'Connor (1982) cites Brooke's definition of a notarial act as, *"the act of a notary public authenticated by his signature and official seal, certifying the due execution in his presence of a deed, contract, or other writing, or verifying some act or thing done in his presence. Thus, any certificate, attestation, note, entry, endorsement or instrument made or signed and sealed by a notary public in the execution of the duties of his office is a notarial act"*.

In order to avail of the services of a Notary Public the person seeking the service must appear in person before the Notary. This is essential as one of the most important factors of a Notary Public's duties before signing a document is that they (the Notary) must be positive and beyond reasonable doubt that the person in front of them is the person that the document refers. The Notary is also responsible for making a judgment on the demeanor of the client, ensuring to the best of their ability that the client is not under duress from a third party and that the client understands fully the process of notarising a document. Only when the Notary is fully satisfied of these entire factors can they notarise the document. The document is manually signed and the notary stamp placed on it.

2.3 The Apostille

An apostille is a seal that is put on a document to certify its authenticity. It is an official certification that the document is a true copy of the original. An apostille is used when an official document is needed for use in another country. Similar to the process of getting a document notarised, the document that requires an Apostille must be presented at the offices of the Consular Section of the Department of Foreign Affairs in Dublin.

The DFA can Apostille any document that is of Irish origin if it bears and original signature, seal or stamp from an Irish practicing public official or an Irish organisation. The DFA defines an Irish document as originating or having being executed in Ireland. When signing the document the official signing it must state what exactly they are certifying in relation to the document. The signature must be a personal signature and not the stamp of an organisation.

The document is authenticated and the apostille stamp is applied. Authentication refers to the confirmation that a signature, seal or stamp on a document is genuine. Examples of documents that can be Apostilled include, birth, death and marriage certificates; education certificates; land ownership documents; medical certificates; and company documents.

Originally all foreign public documents had to be legalised by the issuing country. The Hague Convention in 1961 abolished the requirement for the legalisation of foreign public documents.

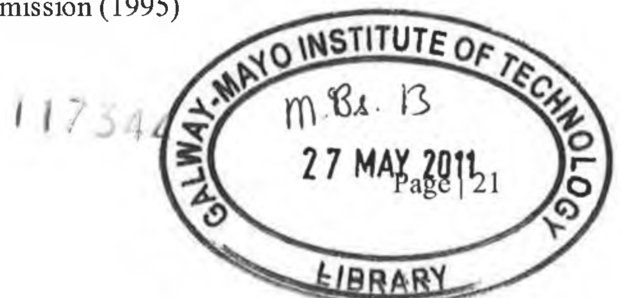
2.4 The Hague Convention on Private International Law (HCCH)

"The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents was adopted at the 9th Session of the Hague Conference on Private International Law on 5th October 1961". (The Law Reform Commission 1995)

There are currently seventy countries who are party to the Convention, a list of these countries can be found in Appendix A.

Prior to The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter "the Convention) individuals were required to have documents they wished to use in foreign countries legalised by the state in which the document originated.

Legalisation has different meanings in different jurisdictions so for the purpose of the Convention it was defined as follows, *"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 documents has acted and, where appropriate, the identity of the seal or stamp which it bears."*, The Law Reform Commission (1995)



Legalisation is a long process involving several steps. If an individual or an organisation wished to have a document legalised in order to use the document in a foreign jurisdiction they must first present themselves to a Notary Public who will notarise it. The Notary needs then to have the authenticity of his or her signature and seal certified by the Registrar of the Supreme Court in Dublin.

The seal and signature of the Registrar of the Supreme Court must then be certified by an officer of the Department of Foreign Affairs. The final step in the process is that the signature of the officer of the DFA must be certified by a diplomatic or consular officer at the embassy of the country where the documents is to be used. This cumbersome process has now been replaced by the Apostille.

Documents identified by the Convention that constitute foreign public documents include:

- Notarial acts.
- Administrative documents.
- 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.
- Official certificates which are placed on documents signed by persons 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 authentication of signatures.

Having introduced the Apostille the Convention is regularly monitoring new developments in the field of document authentication. To this end the Convention introduced the e-Apostille Pilot Program (e-APP). The HCCH define the e-APP as "developing, promoting and assisting in the implementation of low-cost, operational and secure software models for (i) the issuance and use of electronic Apostilles (e-Apostilles) and (ii) the operation of electronic Registers of Apostilles (e-Registers). The e-APP is designed to illustrate how the Conclusions and Recommendations of the 2003 Special Commission meeting on the practical operation of The Hague Apostille Convention and the 2005 International Forum on e-Notarization and e-Apostilles can be implemented in practice by relying on existing and widely used technology." (Both the conclusions and recommendations of the 2003 Special Commission meeting and the 2005 International Forum can be seen in Appendix B and C.

2.5 The Electronic Notary and Apostille Process

Electronic notarisation (e-notarisation) is the process of a Notary Public affixing a digital signature or certificate to an electronic document. The person requiring the notarisation must still appear before the Notary Public but in place of a written signature the Notary Public digitally places his or her identifying information to a document. This document then exists as electronic data in a computer-readable form. The process for electronically Apostilling a document is the same as that for the e-notarising.

Mott Kornicki, a Florida based realtor who uses e-notarisation describes the technology used in simple terms, *"The technology that allows for digital certificates and electronic signatures is precisely what makes electronic notarisation legally acceptable. A digital signature is part of a system called Public-Key Infrastructure (PKI) and has a corresponding component called a digital certificate. PKI is the generally accepted method of ensuring e-commerce security. Confidentiality, authentication, integrity and non-repudiation are four important ingredients required for trust in e-commerce transactions. The emerging response to meet these requirements is the implementation of PKI technology. In basis terms, PKI allows an individual to obtain a digital certificate, which then would be used to affix that individual's digital signature to an electronic document. A digital certificate holds vital information and allows for authentication of the individual, through the use of two related "keys", your private key and your public key, know as a key pair."*

CHAPTER 3

LITERATURE REVIEW

3 Literature Review

3.1 Chapter Overview

This chapter examines the literature that is relevant to the research subject. As the process of e-Notary and e-Apostille is in its infancy the quantity of material is somewhat limited. This a view shared by Gisela Shaw (2000) in her article, Notaries in England and Wales: Modernising a profession frozen in time. "This paper traces the inner tensions and outer pressures that have affected the profession in England and Wales, and assesses its prospects for the future.... the body of literature available on the subject is extremely slim as well as being mainly concerned with the past..."

3.2 First Example of the Technology used in e-Notarisation

An article written by Barry Cipra in 1993 in *Science* notes the first example of the technology that may be used in e-notarisation.

"Digital time-stamping, as co-inventors Stuart Haber and Scott Stometta call their approach, makes it possible to prove that a particular document existed at a particular time in a specific form, without requiring the document to exist in hard copy. How is this trick pulled off? The answer is that instead of authenticating a piece of paper or a magnetic tape, the new scheme creates a time-stamp from the data themselves. "A document with its digital time-stamp not only shows when the thing was created, but also assured anybody looking at it that the document hasn't been changed since then." says Haber. And that may be just what's needed in the increasingly electronic world of finance, insurance, and scholarship. Says Mack Hicks, a vice president for data processing in the technology division of BankAmerica, "This is the first technology I've seen for notarising electronic documents."

3.3 An example of where e-notarisation can be used

"During the mortgage process there are several documents that have to be notarised. GTE Federal Credit Union told NMN that this is the main hindrance of electronic mortgage adoption, but Pennsylvania has moved to change the landscape by enacting and e-notary system that it hope will be the basis of a forthcoming national standard. Specifically, the Pennsylvania Department of State and a special team at the commonwealth's country recorders have come together to develop what they are calling the country's first National eNotary Registry and Electronic Notary Seal Program, which allows for real-time authentication of notaries and secure online delivery of verified electronic notary seals."

The article goes on to say "The statewide system is aimed at streamlining business transactions between government officials and businesses, as well as increasing protection for the public against forgery and fraud. Pennsylvania's Electronic Notary Seal Program maintains the fundamental and protective components of notarisation, and incorporates real-time authentication of notaries via the National eNotary Registry. In order to aide them in this process, country recorders turned to the National Notary Association to form this system of electronic transfer. "The background behind this is such that we've worked with Pennsylvania to manage the issuance of a certificate to a particular party in the mortgage process" said Richard Hansberger, director of e-notarisation at the National Notary Association. "What's been key in all this is that the country recorders have been pushing for it. They wanted to bring notaries into that process to continue to move toward fully digital documents.

We've set this up as a best practice model where industry, government and notaries will agree that this provides a benefit to everyone," he said. "We'll put a digital document into the notary's hands so they can digitally sign it with as many applications as possible. We've provided a digital certificate that we hope to fan out into a national standard." "The next step from here is adoption," said Mr. Hansberger. "We want notaries to electronically sign documents in Pennsylvania to the county recorder. Everyone in the mortgage industry wants to go paperless. So folks can come to Pennsylvania and e-record and e-notarise right now."

Will there be national adoption of this standard? "It is always difficult to tell but the more that we can do to advance a standardized set of best practices, the better." answered Mr. Hansberger. "A large national company doesn't want to have to adjust to 50 different standards. This system also makes the documents much more secure. The two issues in terms of fraud are that there are notaries that become notaries to commit fraud so we worked with the state to make sure we get this to the right notary and that the state can revoke that if there are issues. We're putting professional standards around notaries to weed out those that shouldn't be there. Also what was important to us was that once that document was notarised we wanted that to be reliable, which is why we added the digital certification to validate the process electronically." Mr. Hansberger said "We want to regulate notaries so they can be trusted and also help the vendors make more secure electronic documents that include the notary."

"Now that these standards are in progress in Pennsylvania, the hope is that they will spread throughout the country," said Neal Creighton, CEO at GeoTrust Inc., a provider of identity verification solutions for e-business and an approved issuer of digital certificates for online security under this new Pennsylvania standard. "Pennsylvania was the first mover in e-notarisation. Arizona is rolling something out as well and both wanted to have a national standard.

Pennsylvania was the first to adopt those guidelines. Right now we're seeing the beginning of a real trend," he said. "The ecosystem has been built out so we can move to a digital environment. Digital documents will take over paper and to do that you have to know who signed it. This movement will provide significant cost savings reduce the time to originate a loan, etc. Deeds will be the first document imparted and the rest will be rolled out on application by application," Mr. Creighton noted. "The goal is to go to this digital world every time you need a notary. If I had to look into the future I think within the next five to ten years we'll be doing everything digitally."

3.4 **Business Week Article in favour of e-notarisation**

Three years ago, just as the Internet bubble burst, Congress passed a law that was supposed to usher in a new era of e-commerce, one in which a wide variety of transactions would be sealed by a digital signature. For a host of technical, legal, and cultural reasons, almost nothing happened. But now, notaries public, the keepers of one of the nations' hoariest legal traditions, are getting ready to move it to the digital era, opening the door to much broader use of e-signatures on contracts and other documents.

The digital signature most likely to dominate will strongly resemble the pen-and-ink kind. On May 28, the National Notary Assn., a professional organisation of more than 200,000 notaries, will endorse a new system called the Electronic Notary Journal of Official Acts (ENJOA).

This will let notaries use computer files instead of paper logbooks to record their witnessing of official signings. The $550 ENJOA hardware-software package will save a digital record of the signature along with the notary's records and supporting information on signers, including digital photos and thumbprint scans. The heart of the system in Interlink Electronics' ePad, a device that resembles those used to sign credit card transactions at retailers such as Home Depot, but which provides greater protections against forgery.

Legal documents themselves remain over-whelmingly paper and will be signed the old-fashioned way. But the ability of software such as Adobe Acrobat to add digital signatures to facsimiles of paper documents means that full electronic signing is not far off.

This is not the way most advocates of digital signatures expected things to work out. Three years ago, the dominant notion involved a mathematical procedure known as public key cryptography. Cryptographic signatures were designed so that they would not only positively identify the signer but would guarantee that the document had not been altered in any way since being signed.

It was a technically elegant solution, but its unfamiliarity was a huge drawback. Nothing about the signature itself, which appeared on an electronic document as either an icon or as a long string of random characters, resembled a "real" signature. Furthermore, for the process to work, the recipient of a digitally signed document had to verify the signature by checking the signer's "public key"—another long string of characters—against a database of keys maintained by a trusted third party. Companies such as VeriSign and Entrust provide public key services, but the mechanisms to assign keys to individuals have not developed.

Although we may be years away from a time when a digital key becomes a common part of anyone's identity, cryptographic signatures do play a vital role in e-commerce. For example, when Web browsers load secure pages, they check a signed digital "certificate" to make sure that the page on which you enter your credit-card number really does belong to Amazon.com. Businesses that do extensive online commerce use public-key signatures to validate purchase orders, invoices, and other electronic contract documents exchanged with their partners.

For signing actual documents, however, it's much more likely that a system based on digitized handwritten signatures will prevail. Devices such as the Interlink ePad to a lot more than just capture an image of a signature. They measure both the pressure and velocity of the stylus tip as you sign, which makes forging a signature difficult. Both images of the signature and the collected data can become part of the electronic version of any document signing.

Still, it will probably take some time before that stack of papers you face at a real estate closing will be replaced by a digitally signed electronic document. The rituals of signing documents have their roots in antiquity and won't change quickly. "The speed at which it happens will depend not on the technology, which is already here, but on its acceptance," says Milton G. Valera, President of the National Notary Assn. At last, however, we do seem to be moving forward.

3.5 Possible drawbacks of e-Notarisation

In July 2000, Milton G. Valera, Chair of The Notary Public Sub-Committee of the Joint Task Force's Standard Committee and President of The National Notary Association, California, gave a presentation to the Property Records Industry Joint Task Force on the concerns he had over the introduction of electronic notarisation. Where many involved in the introduction of e-notarisation are supporter of it, Milton discusses some of the possible drawbacks of this new technology. Valera made several valid points, so much so that the author feels it necessary to include the majority of Valera's address.

It started with the introduction of the UETA, which was drafted by the National Conference of Commissioners on Uniform State Laws. Its intention was to expedite electronic transactions by giving electronic signatures the same legal status as a handwritten one. The UETA permits notarial officers to use "electronic signatures" in executing acknowledgments, verifications and oaths. The UETA defines an electronic signature as "an electronic sound, symbol or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." It elaborates no further on the Notary's role in electronic notarisation. You can see that this simple – but not so simple – definition could be a landmine, depending on its interpreters. Yet, since it publication, over two dozen states have either enacted or introduced the UETA. In addition, Congress this year borrowed freely from it in passing its own electronic signature law, the Electronic Signatures in Global and National Commerce Act, which authorizes electronic notarisations for transactions in or affecting interstate or foreign commerce.

Now states are charged with either introducing legislation or drafting rules and regulations that define electronic notarisation. The problem is that in the interest of making it cheaper, faster and easier to conduct e-business, they are forgetting about security and safety and integrity. These laws allow digital certificate owners to use that certificate, issued by a licensed certification authority, to unilaterally create "notarised" digital signatures without limit and without the witnessing services of a Notary."

Valera goes on to give examples of three states, Nevada; Arizona; and Minnesota, which have introduced the Electronic Signatures in Global and National Commerce Act. Valera reinforces the argument that the electronic notarisation goes against the essential basis of notarisation, the virtues of acknowledgment. These virtues are, Personal Appearance; Identification; Lack of Duress; Awareness; and lastly Acknowledgment by the Signer. Valera argues that these guarantees are being undermined or in some cases eradicated by the use of electronic notarisation.

Valera further goes on to say "The pubic danger in laws such as those passed in Arizona, Minnesota, and Nevada lies in their authorization of the unlimited and unwitnessed use of a digital certificate. Under the technology of Public Key Infrastructure or PKI, a digital certificate is a revolutionary combination of identity card and electronic pen. As with traditional IDs like driver's licenses and passports, there is identity screening at the time a digital certificate is issued. But, once it's issued, it's up to the owner to prevent its misuse and to report if it is lost, stolen or compromised. In contrast to traditional IDs, with a digital certificate, it is the password or other access procedure that must be safeguarded. Here, let me say that the integrity and inviolability of the electronic document text is not the issue. The issue is the potential for misuse of an electronic pen whose affixation is labeled as self-authenticating and equivalent to notarisation."

Valera continues the argument with examples of how a digital certificate may be used for fraudulent purposes. These examples include:

1) The certificate may not represent the person to whom it was issued.
2) The certificate may be accessed and exploited.
3) The certificate owner may be coerced into signing an electronic document against their will.

Valera cements the argument further, "I maintain the following: First, that the fundamental principles of notarisation remain the same regardless of the technology used to create a signature. As technology and its tools change, there can be no shortcutting on principle. Second, physical presence before a Notary is critical and should be inviolate. For each electronic signing that is called "notarisation", the signer must appear in person before a Notary Public to affix or acknowledge the signature. It is improper to allow the signer of a paper document to visit a Notary once, and then to regard each signature subsequently affixed by this person, as "notarised" on other documents. So why should it be proper to let an applicant for a digital certificate visit a Notary a single time and then use a digital signature without limit to "notarise"

electronic instruments? Third, the Notary office must be strengthened, not ignored or pushed to the side. Because the complexity of digital signature technology heightens rather than diminishes the role of the Notary, the office must be strengthened through programs that stress both technical and ethical instruction.

No group more than this comprehends the underlying fraud deterrence feature of notarisation that depends on face-to-face interaction between signer and Notary. In 1955, a Texas court said, "A Notary can no more perform by telephone those notarial acts which require a personal appearance than a dentist can pull a tooth by telephone." Accordingly, any acknowledgment or other notarial act requiring a positive determination of a signer's identity, willingness and awareness cannot properly be executed without the signer's personal presence. I do not, in any way, foreclose on future technology that may allow interactive linkups between Notary and signer that may prove to be a reliable alternative to "personal presence." But until then, as states move to authorize electronic notarisations, who exactly will perform these electronic notarial acts? It will largely be Notaries, specially commissioned for that purpose. In fact, to that end, the National Notary Association has begun formulating parameters and qualifications for the office of the Electronic Notary to be published in detail in revised Model Notary Act, scheduled for publication soon.

Our work on the Task Force's Notary Public Sub-Committee will never be more important. The fundamental principles and process of notarisation must remain the same regardless of the technology used to make a signature, because, while technology may be perfectible, the nature of human beings who use it is not. Any process – paper-based or electronic – that is called notarisation, must involve the personal physical appearance of a signer before a commissioned Notary Public.

In the electronic arena, the role of the Notary Public as a trusted, impartial witness must not only be retained but strengthened so that execution of contracts and property conveyances will not be compromised by a technology that, despite its complexity, still cannot make simple, trustworthy guarantees about a signer's identity, willingness and awareness. In today's society, the Internet permits a risk-free anonymity that has emboldened a new generation of forgers and criminal identity thieves. Identity theft complaints grew from fewer than 40,000 nationwide in 1992 to 750,000 in 1999. "As identity becomes more digital, it becomes possible to reproduce and take on the identity of another person much more rapidly," said U.S. Treasury Secretary Laurence Summers.

In such an environment, there is more need than ever before for reliable human gatekeepers to prevent the exploitation of technology. Technology has changed everything but human nature. This is why an electronic procedure should not be called notarisation unless the electronic signer has appeared in person before a trusted, impartial witness – a Notary Public."

3.6 Irish Notaries Public monitor the situation

An article in the March 1998 volume of the Law Society of Ireland Gazette by Dr. Eamonn Hall discusses the introduction of the cybernotary to Florida and the steps Irish Notaries Public are taking to monitor it.

"A cybernotary mirrors that of the notary but is focused primarily on practice in international, computer-based, legal transactions. There is the Institute of Cybernotaries of Ireland under the auspices of the Faculty of Notaries Public in Ireland. The Dean of the Faculty is Walter Beatty, former president of the Law Society: the registrar of the faculty is solicitor Brendan Walsh, sheriff for Dublin City. One of the first statutes regulating cybernotaries in the international domain is the Electronic Notarisation Act, 1997 enacted by the Florida legislature of the United States.

The 1997 law authorises the Secretary of State for Florida to provide commissions for cybernotaries to perform electronic notarisations and also empowers the Secretary of State to establish a licensing programme for private certification authorities. The 1997 Act also grants rulemaking authority to the Secretary of State. The cybernotary must have specialist qualifications and be a practicing lawyer of five years' standing. The 1997 Florida legislation also regulates the registration of an electronic seal. Documents prepared or issued by persons holding a valid certification of registration may be transmitted electronically and may be signed by the registrant, dated and stamped electronically with a seal in accordance with the law. It is unlawful for any person to stamp, seal or digitally sign any document with a seal or digital signature in certain circumstances.

In Ireland, the Institute of Cybernotaries and the Faculty of Notaries Public are keeping a watchful eye on cybernotarial developments in the civilized world. The cybernotary will have to be familiar with cryptographic techniques such as encryption, digital signatures, the concepts of authentication, password control, firewalls and the law relating to electronic commerce. Technologies and the information society are developing at a phenomenal rate. If we fail to enter the technology race on time and be active participants, we may find ourselves excluded from the market."

(Authors note: The Institute of Cybernotaries is no longer in existence.)

3.7 **Ireland's first e-Notary act.**

On the 4th of May 2010 Ireland's first e-Notarisation was performed by Mr. David Walsh, a Notary Public based in Dublin. Globalsign, the organisation providing the software that enables e-Notarisation of documents announced the following in a press release.

"Irish businesses and private citizens alike are now able to have their critical business documents e-Notarised by David and a growing number of Irish Notaries who have recognized the need to act as hubs and upload trusted business information on to the Internet. The ability for notaries to be able to offer the Internet as a highly available and environmentally friendly transport mechanism for notarised documents will act as a catalyst for eBusiness and eProcurement in 2010 and beyond.

The PDF Advanced Electronic Signature (PAdES) format is a recognized European Digital Signature format under the European Telecommunications Standards Institute (ETSI) Technical Standard (TS) 102 778 (announced by ETSI in September 2009). As companies move forward to comply with the recommendations of eProcurement initiatives, such as the Pan European Public Procurement Online (PEPPOL) project's Virtual Company Dossier (VCD), notaries are also ideally placed to take advantage of the time lag between country-specific company registrars being able to offer the option of providing digitally signed company formation evidence. CDS compliant digital certificates enable an e-Notary to create an authentic digital copy of any formal evidence of a company formation.

The document e-Notarised by David was referred to the Department of Foreign Affairs for technical scrutiny and considered to be authentic. It may yet be the first Irish e-Notarial certificate to receive the e-Apostille in Ireland in due course, Ireland being well advanced in its e-Apostille pilot programme.

"These are very exciting times indeed for any Notary Public, as we now have a tool set which allows us to take advantage of the Internet, and as such provide a more efficient service to our customers, whilst at the same time retaining the security and trust which are hallmarks of the Notarial profession" commented David Walsh, Solicitor & Notary Public and Registrar for the Faculty of Notaries Public in Ireland.

"This first e-notarisation in Ireland represents a significant step towards moving away from a traditionally paper-based industry, thus reducing carbon footprint and increasing time and cost efficiencies at all levels" said Steve Roylance, Business Development Director, GMO GlobalSign. "We look forward to continuing to provide the highest levels of security and trust to an industry where compliancy is key."

CHAPTER 4

RESEARCH METHODOLOGY

4 Research Methodology

Research is the systematic approach taken in order to collect data which may consist of facts, measurements and/or observations. This data is then collated and arranged into information that can provide answers and solutions to problems.

4.1 Quantitative V's Qualitative Research

Quantitative research accumulates principally numerical data and opinion, and often relies on deductive reasoning. Deductive reasoning depicts the nature of what is being researched, and then tests whether this is correct or somewhat correct. Researchers using quantitative research often distance themselves from respondents and are purely seeking facts and figures. The results obtained from using this type of research holds up well under scrutiny and are difficult to dispute. Balsley (1970) described quantitative research as *"achieving high levels of reliability of gathered data due to controlled observations, laboratory experiments, mass surveys, or other form of research manipulations"*. However, the nature of quantitative research limits the outcome of the study to what has been shaped in the research proposal, this is due to the structured and sometimes rigid characteristic of this method.

According to Cresswell (1994) *"A qualitative approach is one in which the inquirer often makes knowledge claims based primarily on constructivist perspectives (i.e., the multiple meanings of individual experiences, meanings socially and historically constructed, with an intent of developing a theory or pattern) or advocacy/participatory perspectives (i.e. political, issue-oriented, collaborative, or change oriented) or both. It also uses strategies of inquiry such as narratives, phenomenologies, ethnographies, grounded theory studies, or case studies. The researcher collects open-ended, emerging data with the primary intent of developing themes from the data."*

Qualitative research looks beyond the who, what and when and concentrates on the why? Researchers using this method take into account respondent's opinions and are far more open to flexibility than those using the quantitative method.

In order to give a verbal picture of the difference between quantitative and qualitative research Bloomberg (2008) quoted Maanen et al (1982) *"Quality is the essential character or nature of something; quantity is the amount. Quality is the what; quantity is how much. Qualitative refers to the meaning, the definition or analogy or model or metaphor characterizing something, while quantitative assumes the meaning and refers to a measure of it…….The difference lies in Steinbeck's (1941) description of the Mexican Sierra, a fish from the Sea of Cortez. One can count the spines on the dorsal fin of a pickled Sierra, 17 plus 15 plus 9. 'But,' says Steinbeck, 'if the Sierra strikes hard on the line so that our hands are burned, if the fish sounds and nearly escapes and finally comes in over the rail, his colors pulsing and his tail beating the air, a whole new relational externality has come to being.' Qualitative research would define the being of fishing, the ambience of a city, the mood of a citizen, or the unifying tradition of a group."*

This research project used a combination of qualitative and quantitative research. Facts and figures were collected by means of a questionnaire and the feelings and opinions of individuals were collected by means of personal interview.

4.2 The Research Process

Before undertaking a research project it is advisable to follow a defined research process. Emory & Cooper (1995) describe the research process that was followed for this research project, (see Table 3.1).

Table 3.1 – The Research Process

The Research Process	
Research Question	The main objective of the research project
Exploration	Become familiar with the research topic
Design	The method of research to be undertaken
Sampling	Identification of the target population
Cost of Research	The cost of collecting the data
Data Collection	The tools that are to be used to collect the data
Analysis & Interpretation	Converting the raw data into useable information
Reporting of Findings	Presenting the findings of the research project

4.2.1 Research Question

"Poorly formulated research questions will lead to poor research", Bryman & Bell 2007.

Research questions and ideas can originate from many different sources, an idea that you have always had; a gap in the literature of a certain subject; discovered through a brainstorming session or an idea generated from a specific business need. The research question for this thesis came about through a specific business need. Tradecert.com (see Chapter 5), is an organisation that is involved in the legalisation of corporate documents. The organisation is seeking to identify new market areas that they could provide services to. The particular area that Tradecert.com is interested in is the e-Notary and e-Apostille markets.

The primary objective of this research is to explore the development of the e-Notary and e-Apostille services in Ireland. In order to achieve the primary objective one must first look at the secondary objectives of this research.

The secondary objectives of this research are:-

1) To give the reader an historical background to the Notary Public in Ireland.
2) To describe the manual methods of putting a Notary and Apostille seal on a document.
3) To demonstrate the technology currently being used to electronically place a Notary and Apostille seal on a document in other jurisdictions.
4) To identify where Ireland is in relation to the introduction of e-Notary and e-Apostille services.

Once a question or problem has been identified the next stage of the research process can begin.

4.2.2 Exploration

Investigating the area surrounding the research question begins with a search of the information that currently exists. An investigation of this type is essential before beginning research project for a number of reasons, to become familiar with the research area; it prevents replicating existing work; to identify if there are any controversies surrounding the chosen area; and are there any unanswered research questions. This investigation is universally known as the literature review. There are numerous sources of information that can assist in a literature review, see Table 3.2.

Table 3.2 – Sources of Information

SOURCES OF INFORMATION FOR LITERATURE REVIEW	
Individuals & Organisations	• Government Bodies • Private Companies • Trade Associations • Chambers of Commerce • Local employer networks • Trade Unions & employers organisations • Research organisations and professional bodies • Patent Office • Consumer organisations
Primary Sources	• Monographs • Academic journal articles • Conference papers • Unpublished research reports • Newspapers and magazines • Company annual reports • Company price list • Company internal 'house magazines'
Secondary Sources	• Books of readings • Textbooks • Encyclopedias • Bibliographies • Dictionaries • Academic journal review articles • Annual review books • Abstracts

Source: Adapted from Jankowicz 2005

A literature review can be a somewhat intimidating if the chosen area has been widely written about. It may be difficult to review all that has been written or to decide which literature to include and exclude. This problem did not arise in relation to this research project however. As the subject area is in its infancy in Ireland there has been very little written about it. The literature review undertaken for this research project involved all three categories of sources of information mentioned in Figure 3.1.

Individuals & Organisations – within this category the organisations used to collect data included, the Irish Department of Foreign Affairs; The Faculty of Notaries Public in Ireland; The National Notary Association; The Notaries Society (UK).

Primary Sources – the main source of information for the literature review gathered from primary sources was from the conference papers of the Hague Convention on the abolishment of the requirement of legalisation for Foreign Public Documents. Other sources include reports from conferences held regarding the introduction of the e-notary and e-apostille service across the globe.

Secondary Sources – an extensive search of books, journals, databases and websites was embarked upon. This search proved invaluable in relation to gaining knowledge about the chosen research area. The author utilized the facilities of the Galway-Mayo Institute of Technology Library and on-line databases. A search was also conducted in the library of the National University of Ireland, Galway.

4.2.3 Design

Definitions of research design are plentiful but to fully understand all of the important facets of it one must consider several differing descriptions from varies authors.

"A research design provides a framework for the collection and analysis of data. A choice of research design reflects decisions about the priority being given to a range of dimensions for the research process", Bryman & Bell, 2007.

"The research design constitutes the blueprint for the collection, measurement, and analysis of data. It aids the scientist in the allocation of his limited resources by posing crucial choices: Is the blueprint to include experiments, interviews, observation, the analysis of records, simulation, or some combination of these? Are the methods of data collection and the research situation to be highly structured? Is an intensive study of a small study sample more effective than a less intensive study of a large sample? Should the analysis be primarily quantitative or qualitative?" Phillips, 1971.

"Research design is the plan and structure of investigation so conceived as to obtain answers to research questions. The plan is the overall scheme or program of the research. It includes an outline of what the investigator will do from writing hypotheses and their operational implications to the final analysis of data. A structure is the framework, organisation, or configuration of……the relations among variables of a study. A research design expresses both the structure of the research problem and the plan of investigation used to obtain empirical evidence on relations of the problem." Kerlinger 1986.

Whilst these definitions vary in their content the basic message is consistent. The method used to collect the data largely depends on the question that must be answered or the problem that needs to be solved. Blumberg et al, 2008, have identified several classifications of designs, see Table 3.3 for details.

Table 3.3 – Descriptors of research design

DESCRIPTORS OF RESEARCH DESIGN	
CATEGORY	***OPTIONS***
The degree to which the research question has been crystallized	- Exploratory study - Formal study
The method of data collection	- Monitoring - Interrogation/communication - Archival sources
The power of the researcher to influence the variables under study	- Experimental - Ex-post facto
The purpose of the study	- Descriptive - Causal - Predictive
The time dimension	- Cross-sectional - Longitudinal
The topical scope – breadth and depth – of the study	- Case - Statistical study
The research environment	- Field setting - Laboratory research - Simulation
The participants' perceptions of research activity	- Actual routine - Modified routine

Source: Blumberg et al, 2008

For the purpose of this research the author utilized a combination of several different design options that best suited the research question. The design options used in this study were:-

- An exploratory study
- Archival sources
- Descriptive design

4.2.3.1 Exploratory Designs

Exploratory designs are employed to determine what the issues might be in relation to the research project. This type of design however is not usually used on its own but in conjunction with the descriptive and/or causal designs. The exploratory study undertaken has previously been described. This exploratory study also encompassed archival sources of research design. The descriptive study is concerned with discovering 'the who', 'the what', 'the where', 'the when' and 'the how much' of the research question. The function of the descriptive design is to discover the important features of the research subject and to illustrate them in a precise manner. Data gathering tools that can be used to accomplish this include market research reports and single case studies.

The causal study is a natural progression of the descriptive study as it questions the 'why' of the research question. The crucial facet of causation is that A produces B or A compels B to happen. In order to meet the expectation of causation one variable must always cause another variable and that no other variable has the same effect. Goode & Hatt 1952, are quoted as saying *"if there are two or more cases, and in one of them observation Z can be made, while in the other it cannot; and if variable C occurs when observation Z is made, and does not occur when observation Z is not made; then it can be asserted that there is a causal relationship between C and Z".*

This design type investigates the reasons questions or issues have risen in the research area. The data collected is carefully analysed and reported. The causal design is the more complex and time consuming of the three designs due to the nature of the data gathering tools that are used. The tools include, time sampling, comparative case studies and the analysis of a before and after scenario. However, for the purpose of this research the causal design was discarded due to the time constraints associated with this dissertation.

4.2.3.2 Archival Design

"The most obvious strength of archival research is that the amount of information available is virtually unlimited, and the possibilities for archival research are restricted only by the creativity of the investigator", C. James Goodwin, 2009.

As its name suggests, archival research is the collection of data from archives of previously written material in the chosen research area. The data collected using this design is all secondary data. Sources of this data are identical to those of the secondary data collected for the literary review.

4.2.3.3 Descriptive Design

Descriptive designs can be very straightforward and their aim is to identify the crucial features of the research area. It seeks to accurately describe the situation in a structured manner. This type of research design can help to achieve several research objectives: descriptions of the characteristics associated with the subject; it estimates the numbers that exhibit the characteristics; identifies any links among the different variables. Examples of descriptive design tools include a single case study, market research and surveys.

For the purpose of this research the author used a survey to discover how widely known and widely used was the subject matter of this research.

4.2.4 Sampling

"Sampling can be defined as the deliberate choice of a number of units (companies, departments, people) – the sample – who are to provide you with data from which you will draw conclusions about some larger group – the population- whom these units represent." Jankowicz 2005.

Cooper & Emroy (1995) have proposed that the sampling process consists of five stages.

1) Determining the relevant population. For the purpose of this research the relevant population consisted of the registered Notaries Public in Ireland. As registered Notaries are the only people legally permitted to notarise documents determining the population was not difficult.

2) Select the appropriate sampling frame. The function of the sampling frame is to choose members of the relevant population that would satisfactorily represent the entire population. The ideal sampling frame would include all of the relevant population. For the purpose of this research it was possible to include all of the population as there are only 180 registered Notaries Public in Ireland.

3) Decide on the type of sample. For this study the author decided on purposeful sampling. Purposeful sampling is a non-probability method in which the population selected is specifically related to the purpose of the research.

4) Decide on the size of the sample needed. As the relevant population for this research was relatively small, 180, the author made the decision to include the entire population in the sample.

5) Cost of the sample. Cost implications can have a significant impact on a researcher's decision on the type of sample chosen for a particular study. In the case of this research cost was not a significant consideration. An on-line survey company, Survey Monkey, was used to generate the survey at a cost of €20.00.

4.2.5 Cost of the Research

When undertaking any type of research the cost factor must come into consideration. There is little point commencing a research project only to discover that the cost of conducting the research is prohibitive. As the author of this research project had unlimited free access to the GMIT Library and its databases the cost of the research was relatively inexpensive.

There were two main expenses associated with this research:

1) Survey Monkey €20.00
2) Telephone expenses €250.00 (approximately)

4.2.6 Data Collection

Data collection refers to way information is collected from the relevant population. There are numerous methods of data collection and for this research the author decided on three methods to gather primary data.

4.2.6.1 Personal Interview

A personal interview is a face to face meeting of the researcher and an individual or individuals that may provide significant and interesting information about the research area. For this research a personal interview was conducted. Mr. David Walsh, Registrar of the Faculty of Notaries Public in Ireland, was interviewed at 109 Ranelagh, Dublin 6, the registered office of the Faculty.

The interview took the form of a semi-structured interview. A semi-structured interview refers to a situation where the interviewer has a number of questions prepared for the interview but is willing to deviate from these questions should others arise in response to answers given by the interviewee. A significant amount of primary data was gathered during the course of the interview. Most of this data was quantitative in nature and a little was qualitative in that Mr. Walsh gave his opinions and feelings about the research project.

4.2.6.2 Questionnaire

A questionnaire is a list of research or survey questions that are asked to respondents. It is designed to obtain exact information that will assist in the research process. A weakly written questionnaire will not present the researcher with the answers that are required or even still incorrect answers.

A questionnaire was sent to all 180 Notaries Public in Ireland in order to gauge the level of knowledge and use of e-notary services. The majority of the questions contained in this questionnaire were closed questions in that the respondent could only answer 'yes' or 'no'. One of the questions was also a closed question that had a pre-coded answer. A pre-coded answer gives the respondent a list of possible answers to choose from.

4.2.6.3 Telephone Interviews

The author conducted several telephone interviews during the course of the research. The telephone interview was chosen as a data collection tool for a number of reasons:

- The respondent was unable to meet for a personal interview.
- The distance between the author and respondent was too great.
- The nature and number of questions asked did not warrant a face to face meeting.

4.2.7 Analysis & Interpretation

Analysis the explanation of the data collected during the research process. This data is analysed and structured into organized information that answers the research question. The data collected from the questionnaire has been displayed in easily read graphs.

4.2.8 Reporting of Findings

The findings and recommendations of this research are set out in chapter seven of this thesis.

4.3 **Ethical Considerations**

"Ethics are standards of behavior that guide moral choices about our behavior and our relationship with others.....the goal of ethics in research is to ensure that no one is harmed or suffers adverse consequences from research activities", Cooper & Schindler (2000).

Like all aspects of business, research requires ethical behavior from both the researcher and the respondents. The researcher commenced all telephone interviews by stating her name, the name of the educational facility, the title of the Masters program and the nature of the research. By being open and honest with respondents the researcher was rewarded with their full cooperation.

In the case of the face to face interview conducted with Mr. David Walsh, a consent form was drawn up by the researcher. Mr. Walsh was given the opportunity to read this consent form before the interview commenced. He was happy to participate in the interview and signed the consent form.

4.4 Summary

The process used to conduct this research was not limited to one source of methodology. The author felt that in order to give the best possible result a combination of methodologies would serve this research project appropriately. A combination of primary and secondary data was accumulated by various methods including, library database searches; books and journals; website searches; personal interviews; a questionnaire; and telephone interviews.

CHAPTER 5

TRADECERT.COM

5 Tradecert.com

Established in 2005, Tradecert.com has its headquarters in the Innovation in Business Centre in the Galway-Mayo Institute of Technology, Dublin Road, Galway.

5.1 A Company Overview

Tradecert.com is the world's fastest-growing provider of online document certification systems to Exporters, Export Agents and Chambers of Commerce. At present Tradecert.com is the only Certificate of Origin service provider operating on an international basis and is the market leader in the provision of online export document certificate services. Tradecert.com's customers include, Chambers Ireland, the British Chamber of Commerce and the Canadian Chamber of Commerce. Tradecert.com provide an online application, certification and issuance service for all types of Certificates of Origin documents that are required in international trade.

"A Certificate of Origin (COO) is a document attesting that goods in a particular export shipment are wholly obtained or produced or manufactured or processed in a particular country (country of origin). Virtually every country in the world considers the origin of imported goods when determining what duty will be assessed on the goods or, in some cases, whether the goods may be legally imported at all. Certificates of Origin may be needed to comply with letters of credit, foreign customs requirements or a buyer's request." (International Chamber of Commerce).

Traditionally COO were certified manually, which was both time consuming and costly. The exporter needing a COO would manually complete the document, this would then be sent or delivered to the exporters local Chamber of Commerce. The relevant authority in the Chamber of Commerce would manually sign and certify the document and post back to the exporter. In recent years this service has been automated. By automating this process it is now carried out online through service providers such as Tradecert.com.

The automated service that Tradecert.com provides uses Virtual Document Rendering (VDR) technology to make the on screen document application templates identical to the look of the original paper-based documents. The export company completes the on screen document and then electronically sends it to the relevant Chamber of Commerce. The document is then electronically signed and certified by the Chamber and is e-mailed back to the exporter.

In order to use the service the exporter must register with the Chamber of Commerce. They request a Formal Undertaking or Indemnity form from the Chamber. This form once completed is returned to Tradecert.com who creates the exporter account. The exporter receives a username and password that gives them access to the on-line document templates. The exporting company can now apply for online Certificates of Origin. The system is very easy to use as a step by step guide is given when completing the document and no software installation is necessary.

Tradecert.com use Software as a Service (SaaS) model to charge for the service. This is a 'pay as you go' system which means the chamber is only charged when a document has been certified.

5.2 Advantages of the automated service

There are numerous advantages to the automated service provided by Tradecert.com for both the Chamber of Commerce and the exporter.

5.2.1 Advantages to the Chamber

- All documents are certified and returned in minutes as opposed to days.
- Traceability – there is an electronic record of who did what, where and when?
- Less queues at the Chamber offices as exporters no longer need to physically deliver the documents.
- Reduces the problem of human error as the online application is editable.
- Saves time and money for the Chamber as the need for counter staff at the Chamber is reduced.
- It identifies documentation errors in advance for the Chamber.
- Easy to use service that needs little training for staff.

5.2.2 Advantages to the exporter

- Eliminates the need for posting/delivering documents to the Chamber.
- Reduces the need for a paper based office.
- Exporters can copy, edit and resubmit applications and rejections online.
- It gives the exporter a breakdown of the cost before the application is submitted.
- The online document exactly matches the traditional paper certificate.

5.3 **Personnel**

Tradecert.com employs four people, three at its headquarters in Galway and one in Canada. The founding partners are Mr. Tom Kelly and Mr. Brian Smith.

5.3.1 Mr. Tom Kelly

Tom Kelly is a co-founder of Tradecer.com. Mr. Kelly is Chairman of the board and Director of Corporate Affairs. He is responsible for liaising with the company's investors and with the regulatory authorities of the international jurisdictions where the company's services are available. Mr. Kelly's professional background is in the international banking sector and he is currently a non-executive director to CIBC (Canadian Imperial Bank of Commerce) and is Chairman of their audit committee.

5.3.2 Mr. Brian Smith

Mr. Brian Smith is a founding shareholder of Tradecert.com and is a member of its Board of Directors. Mr. Smith is responsible for product and technology strategy and customer service management. He is currently based in Canada. Mr. Smith's professional background is in International Banking.

5.3.3 Mr. Eoin Leahy

Mr. Leahy joined the team at Tradecert.com in February 2006 as a non-executive director. He was appointed CEO in October 2008. Mr. Leahy's professional expertise is in the areas of telecoms billing and fraud management systems.

Source: All of the information in this chapter was sourced from Tradecert.com's website. www.tradecert.com

CHAPTER 6

RESEARCH FINDINGS

6 Research Findings

6.1 David Walsh Interview

In an interview conducted on the 15/June/2010 with Mr. David Walsh, Solicitor & Notary Public, the author used a semi-structured interview technique and this served its purpose well during the interview. Mr. Walsh has been a practicing solicitor for 38 years and has been a Notary Public for the past 31 years. He was elected to the Governing Council of the Faculty of Notaries Public in Ireland in 1979. This was a position he held until 2009 when he was appointed Registrar of the Faculty. Mr. Walsh performed Ireland's first e-notarial act in 2010 and he is at the forefront of the e-Notarial promotion in Ireland.

Set out below are the questions (not in any particular order) asked of Mr. Walsh and his subsequent answers.

Q1. When did you first become interested in the e-notary process?

Mr. Walsh became interested in the e-notary process a number of years ago (he could not give an exact time but approximated that it was at least 15 years ago) when a UK Notary Public, and friend, Mr. Michael Lightowler introduced him to the concept. Mr. Lightowler had been in discussions with his New Zealand counterparts who had already begun taking steps towards e-notarisation.

Q2. When did you become involved in the e-notary process?

Mr. Walsh became involved in the process in 2009 when he was put in contact with GlobalSign (a company offering the PKI technology for Notaries) through Mr. Lightowler. Mr. Walsh knew of the importance of becoming involved in the e-notary process and wanted to be part of it. He purchased the PKI hardware from GlobalSign. The PKI hardware comes in the form of a USB key that contains 1,000 electronic signatures belonging to Mr. Walsh. The cost of this key was €250.00. Mr. Walsh electronically notarised his first document in 2010.

Q3. What was the first document you e-notarised?

The document Mr. Walsh notarised was a land ownership document. He could not permit the researcher to have a copy of that particular document, however, he did kindly give permission for a copy of the second document he e-notarised to be published in this book, (see Appendix D). The document was a notice to the members of the Faculty of Notaries Public Ireland regarding the upcoming AGM. When looking at the electronic version of this document anyone wanting to verify its authenticity can click on Mr. Walsh's seal at the bottom of the document. This will bring up a text box verifying that the document has been notarised by a Notary Public and that the document has not been altered since its notarisation.

Q4. In your opinion, what are the feelings among notaries public regarding e-Notarisation?

Mr. Walsh, in his opinion, felt that some notaries public were not taking the introduction of the e-notary process too seriously. He felt that they thought that they did not need to be involved with the e-Notary process, that it was not something that would affect their practices'. However, Mr. Walsh told the author that this couldn't be further from the truth. He explained that the e-Notary process could not be ignored because when the DFA introduced the e-Apostille program that notaries public would have no choice but to embrace the e-Notary as public demand for the service would dictate this.

Q5. What barriers do you envisage for the introduction of e-Notary services?

Mr. Walsh felt that the only barrier that would prevent the introduction of e-Notary services in Ireland on a wide scale basis was the mindset of some Notaries Public.

Q6. How many Notaries Public can perform e-Notarial acts at present?

At the time of this interview there were two notaries public in the Republic of Ireland that could perform e-Notarial acts. Mr. Walsh and Mr. Grattan d'Esterre Roberts, a Cork based Notary Public.

Q7. Which country, if any, should Ireland look at as an example of successful e-Notarisation introduction?

Mr. Walsh said that he was impressed with the way New Zealand Notaries Public had embraced e-Notary services, however, he did point out that the New Zealand Government had introduced the e-Apostille program and that it was possible that the Notaries Public there had to follow suit. This was a situation he felt he would not like to see repeated here, he would, in his opinion, prefer if Irish Notaries Public embraced the technology voluntarily.

Q8. Is there any privacy issues involved with e-Notarisation?

Mr. Walsh told the author that there was no privacy issues involved in e-Notarising a document. This is the case because once a document has been Notarised it becomes a public document and can be viewed by anyone.

6.2 Questionnaire sent to Irish Notaries Pubic

There are at present 180 Notaries Public in Ireland. A simple questionnaire was sent to all of the Notaries Public, a list of these Notaries Public was obtained from the Faculty of Notaries Public Website (www.notarypublic.ie).

The questionnaire contained the following questions.

1. Have you heard of e-Notary services?
2. Do you offer e-Notary services?
3. Have any of your clients asked for e-Notary services?
4. If you offer e-Notary services have you e-Notarised any documents to date?
5. Has any firm approached you about providing you with the software required to provide e-Notary services?
6. Is there any particular reason why you do not currently provide e-Notary services, for example, cost of software; lack of demand; lack of knowledge on e-Notary services?
7. Do you think you may provide e-Notary services in the future?
8. Would you be willing to speak with the researcher further about this topic?

The response rate for this questionnaire was excellent with just under 75% (130 respondents) of respondents completing the questionnaire. Figures 6.1 to 6.8 show the results of the questionnaire.

Figure 6.1

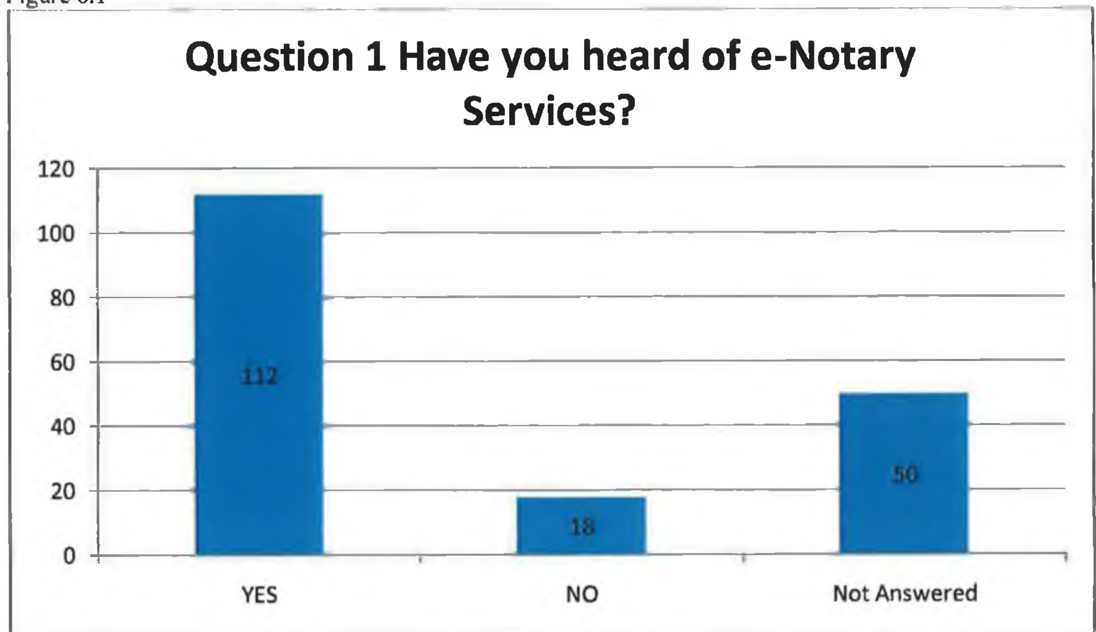


Figure 6.2

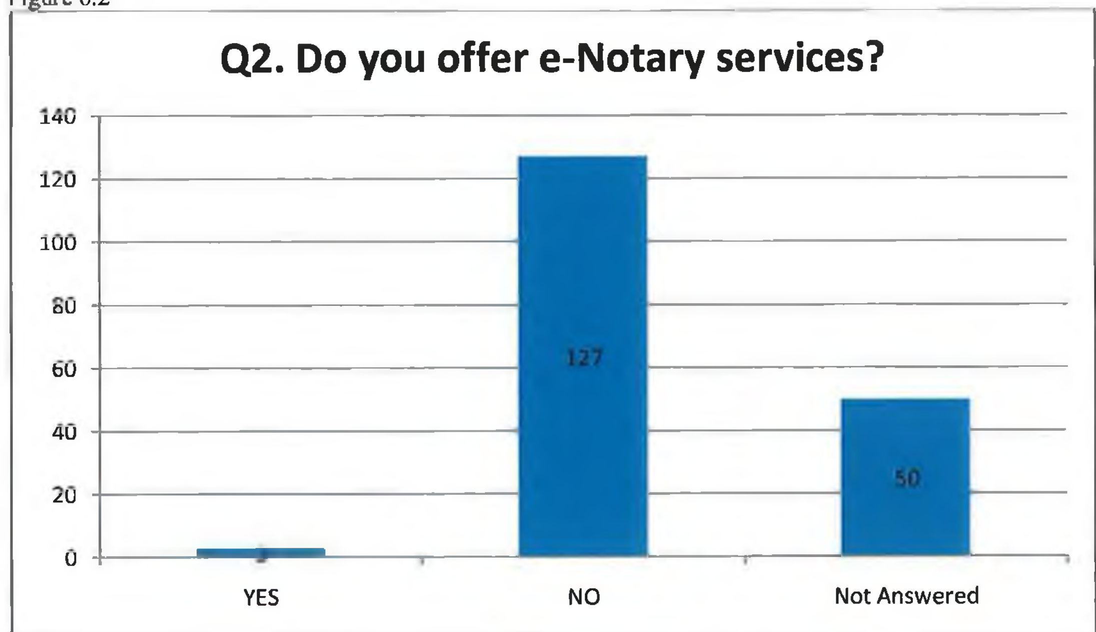


Figure 6.3 – Question 3

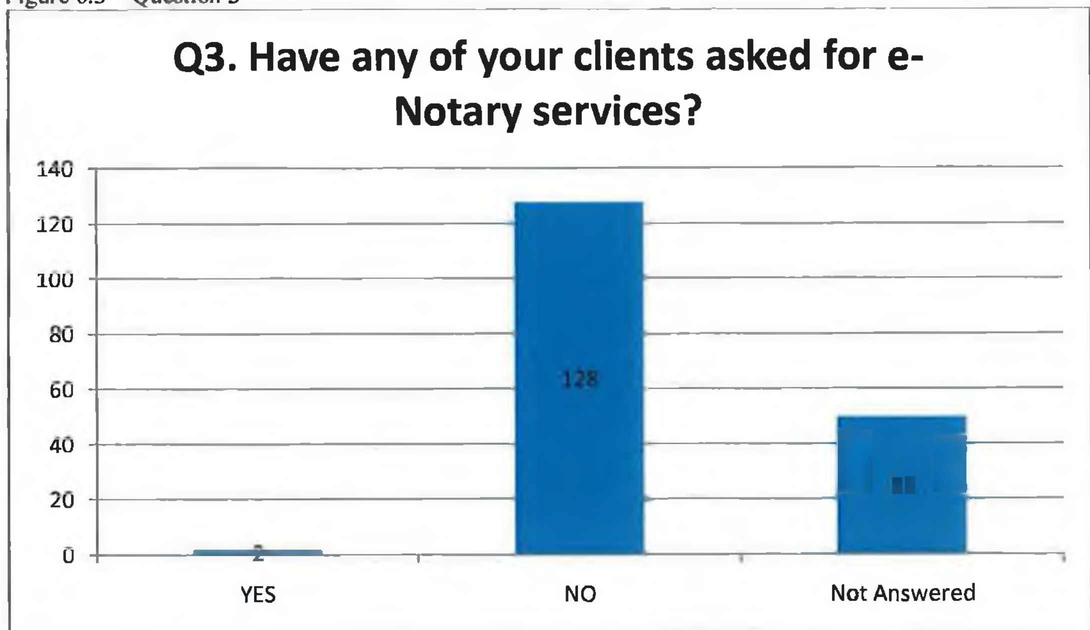


Figure 6.4 – Question 4

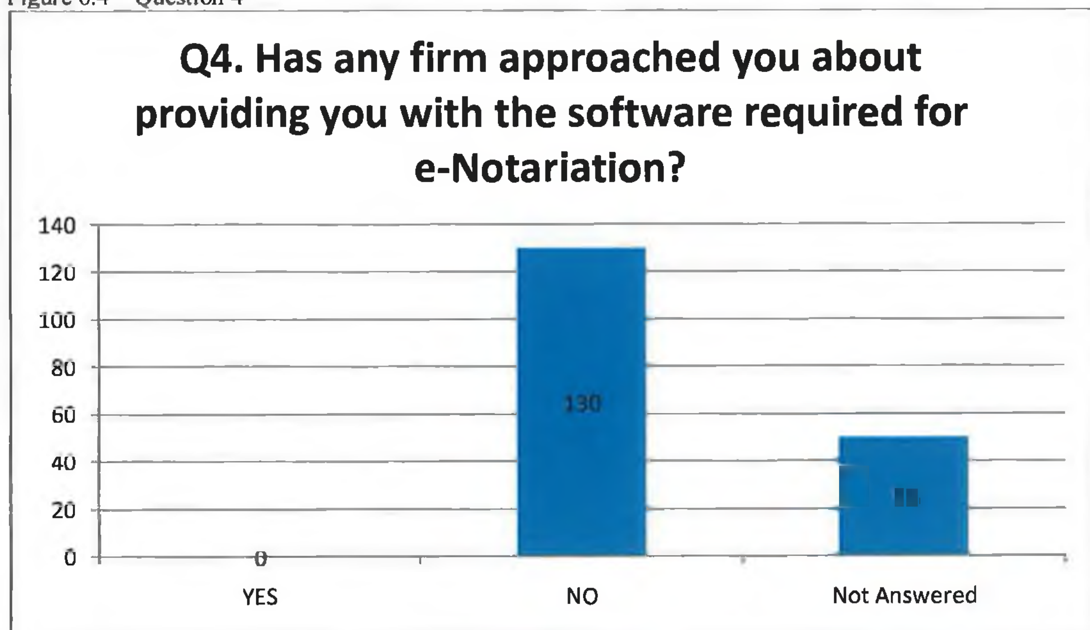


Figure 6.5 – Question 5

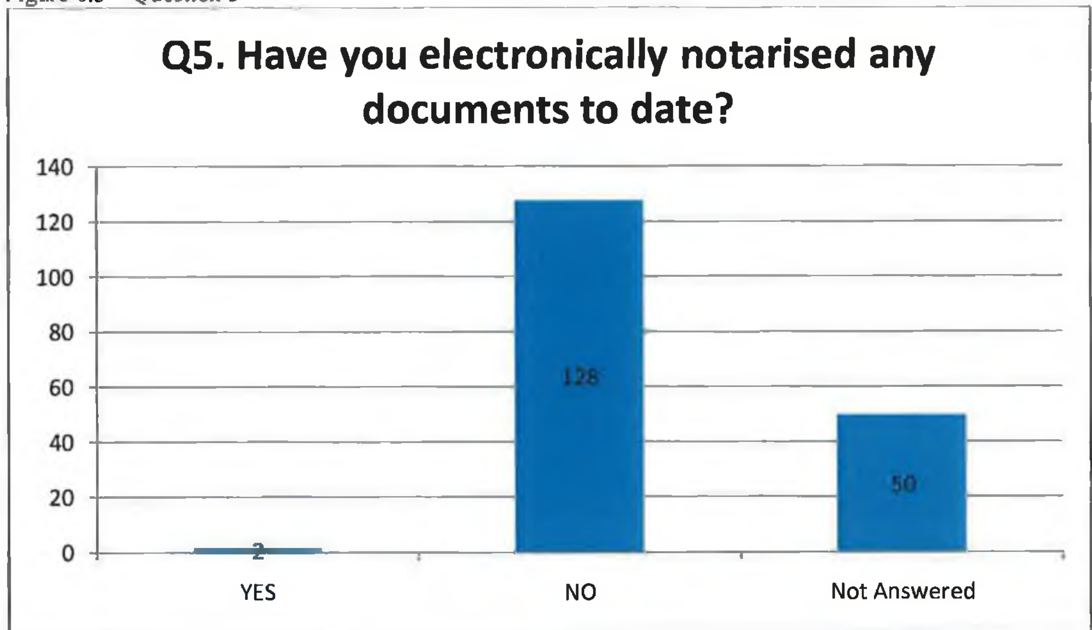


Figure 6.6 – Question 6

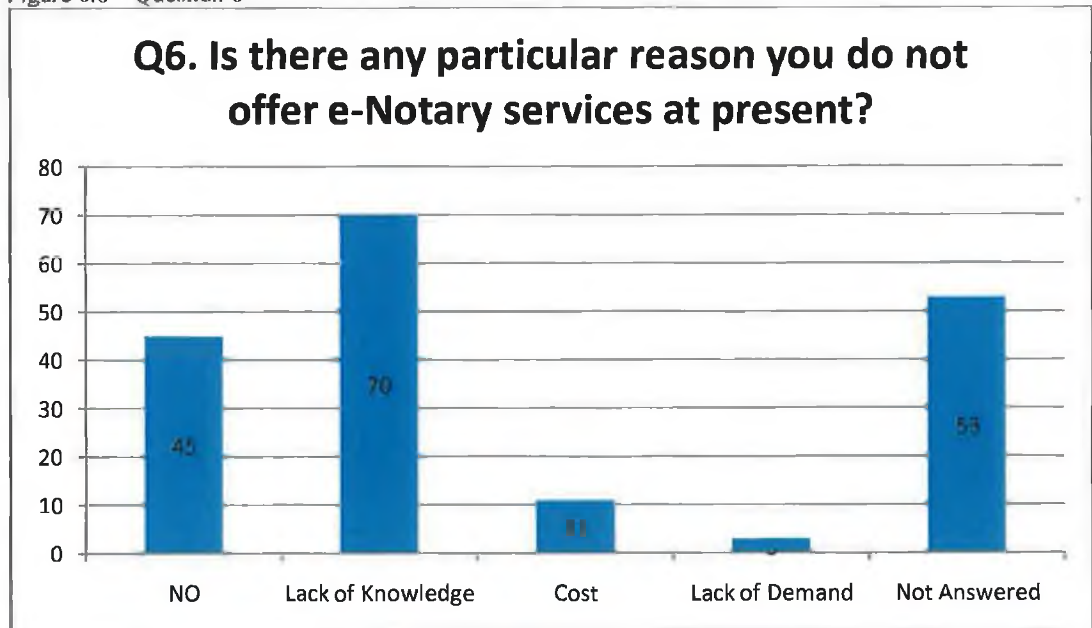


Figure 6.7 – Question 7

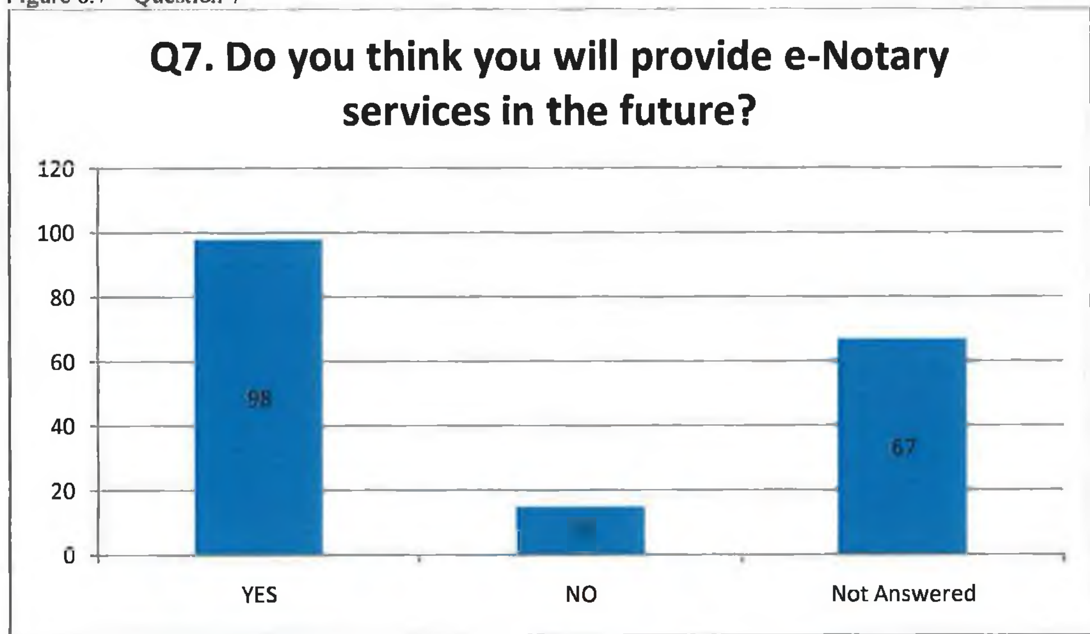


Figure 6.8 – Question 8

6.3 Telephone interview with Orla Cooper in the DFA

Ms. Orla Cooper is an employee of the Department of Foreign Affair's Consular Services. Ms. Cooper is overseeing the introduction of the e-Apostille in Ireland. This interview was an open interview where the author asked general questions but for the most part let Ms. Cooper explain Ireland's position in relation to e-Apostille.

Ms. Cooper explained how Ireland has been involved in the process of introducing the e-Apostille program since the Hague Convention introduced the e-APP. Ireland is regularly represented at the conventions dealing with the e-APP.

Ms Cooper went on to explain that, at present, the introduction of e-APP in Ireland is with the DFA's legal advisors to ensure its compliance with data protection laws. Ms. Cooper indicated that the e-APP should be ready for introduction into Ireland within the next eighteen months, at which time the DFA will put out to tender the contract to supply them with the PKI technology needed to administer the service.

Here is a statement sent to the author by e-mail from Ms. Cooper. "I refer to your recent query regarding Ireland's position in relation to the Electronic Apostille. As you are aware, the Hague Convention is presently running the e-APP.

Currently, the Department of Foreign Affairs is exploring the possibility of developing and implementing the e-Apostille and have indicated a strong interest in the Program to the Hague Secretariat. We are in the process of drawing up a framework and are looking into all aspects of this system, from the technical, security and legal aspects of such a system in order to ensure the system's compliance with both Irish law and the Hague Convention.

We are closely following developments in other Hague member states and have attended a number of Hague Conferences in relation to the e-Apostille in order to learn from the experiences of those who have already implemented some or all aspects of the e-Apostille in their jurisdictions. The Department of Foreign Affairs will continue to research and investigate the various issues surrounding the e-Apostille with a view to further developing and designing an appropriate e-Apostille system to implement in the Department".

6.4 Telephone Interviews with Notaries Public

Following the answers received from the questionnaire sent to Notaries Public, two Notaries put themselves forward to receive a telephone call from the researcher to talk about the e-Notary service in a little more detail. However, both gentlemen requested that their names not be used in the published document. For this reason they will be known as Interviewee 1 and Interviewee 2.

Both Interviewees' gave their personal opinions on the e-Notary and it should be noted that these views do not represent the Notaries Public as a whole.

Interviewee 1 started the interview by saying that he felt that Irish Notaries Public would be left behind the rest of the world when it came to the introduction of the e-Notary. Many of his colleagues had little or no knowledge of the e-Notary process and that he felt they were unwilling to learn. He backed this statement up by saying that at a recent workshop, held in Dublin by the Faculty of Notaries Public, on e-Notary services was very badly attended with approximately one third of the Notaries Public present.

Interviewee 2 had similar opinions to Interviewee 1. However, he felt that the issue facing the introduction of e-Notary services into Ireland was the age profile of many of the current Notaries Public. His opinion was that as many current Notaries Public were at a stage in their lives where technology was something to be feared. He did however say that when the Department of Foreign Affairs introduces the e-Apostille that the e-Notary would have to become common place.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7 Conclusions & Recommendations

7.1 Conclusions

The primary objective of this research was to study the development of the introduction of e-Notary and e-Apostille services into Ireland. Through a combination of secondary and primary data collection this objective was accomplished.

The introduction of both the e-Notary and e-Apostille to Ireland seems to this author at least, to be a very slow process indeed. As discussed in Chapter 2, Ireland's legal professions were monitoring the introduction of the e-Notary service to other countries in 1998. At the time of this research twelve years have passed and it is only in the last few months that Ireland has seen the introduction of the cybernotary, all be it, three of them.

So what has been the delay? In this author opinion and from comments made during the interview processes it is fear of technology that is stalling the introduction of e-Notary and e-Apostille. Those who would facilitate the introduction seemed and still seem to be waiting to see what everyone else will do first. This is a strange phenomenon for a country that is famed for its technology industry and highly educated technology graduates.

Another factor impeding the introduction of the e-Notary to Ireland is lack of knowledge on the part of Notaries Public about the area. One suggestion was that the age profile of the Irish Notary was not one suited to the introduction of new technologies. Perhaps this is something that will change in the future as new, younger, Notaries join the profession.

The main secondary objective of this research was to identify possible new market areas that Tradecert.com could enter into. While the introduction of the e-Notary and e-Apostille on a whole scale basis seems a while away yet, there is currently no organisation in Ireland offering the PKI technology that is needed to provide the e-Notary and e-Apostille. The common consensus among those interviewed was that when these services do come into being that it will become common place in a very short period of time. Therefore, it would be of enormous benefit to Tradecert.com if they were ahead of the introduction of the e-Notary and e-Apostille and had the software prepared and ready to hit the market before their competitors.

7.2 Recommendations

There are a number of suggestions that the author would like to make regarding the introduction of e-Notary and e-Apostille services.

1) Irish Notaries Public must get involved with the e-Notary process. It is only a matter of time before the western world is using this new technology on a regular, wide scale basis and it is imperative that they (the Irish Notary) are not left behind.

2) The Faculty of Notaries Public in Ireland must educate their members on the process, advantage and importance of the e-Notary. The Faculty has been monitoring e-Notary for almost twelve years now and to date there are only three practicing e-Notaries in Ireland.

3) Like the Faculty of Notaries Public in Ireland, the DFA have been monitoring the progress of other nations in the introduction of the e-Apostille. While the author understands that due processes and procedures must be followed when undertaking such a mammoth task it is baffling why Ireland feels the need to be the follower and not the leader in this process. We have a highly educated population, not least in the technology sector, and there is no reason why the introduction process cannot be accelerated.

4) In relation to Tradecert.com, the author feels there is massive potential for them it to become the industry leader in PKI provision. Following the revelations that number 1, only 3 Notaries Public currently have the technology capable of carrying out the e-notarisation of documents; and number 2, that the Department of Foreign Affairs are putting out to tender the role of providing them with the PKI technology, Tradecert.com should rigorously pursue the option of providing these services as part of their product line.

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APPENDICES

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, **DAVID WALSH**, Notary Public, 109 Ranelagh, Dublin 6, Ireland, Commissioned for Life, duly authorised admitted and sworn, practising in the Counties of Wicklow, Kildare Meath and City and County of Dublin, Ireland, DO HEREBY CERTIFY that I did on the 11th day of February 2010 post or DX as appropriate to all of the members of the Faculty of Notaries Public in Ireland notice of the A.G.M. of the Faculty to be held in the Royal Marine Hotel, Dunlaoire, County Dublin on the 12th March 2010 at 2.00 PM, including the draft non-statutory Motion attached thereto, including the accounts of the Faculty for 2009, including a Booking Form for the Seminar to be held on the same day in the same venue at 3.30 PM (cost €80.00 per person), and including a Booking form for the annual dinner of the Faculty to be held in the Kildare Street and Universtity Club, 17 Saint Stephens Green, Dublin 2 at 7.45 for 8.30 PM (cost €70.00 per person).

IN FAITH AND TESTIMONY whereof I have set my hand and affixed my seal of Office.

Dated at 109, Ranelagh in the
County of the City of Dublin,
Ireland this 11th day of February 2010

David Walsh
Notary Public
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Dublin 6, Ireland
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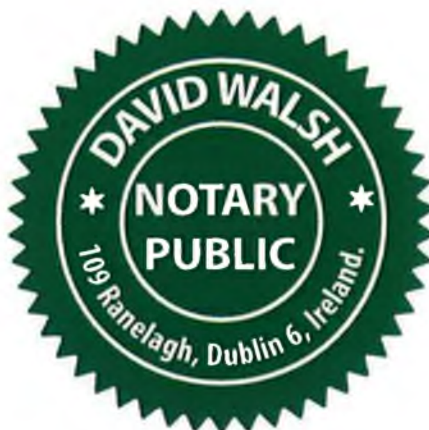
Commissioned for life



First International Forum on e-Notarization and e-Apostilles

Jointly organised by the Hague Conference on Private International Law (HCCH)
and the International Union of Latin Notaries (IULN),
hosted by the National Notary Association of the United States of America (NNA)
held on 30 and 31 May 2005 in Las Vegas, Nevada, USA

Over 150 government representatives (including several from agencies representing competent authorities designated according to the Apostille Convention), experts in notarial practice, and other dignitaries and officials from 33 States gathered in Las Vegas (Nevada, USA) to attend the first international Forum on e-Notarization and e-Apostilles. Jointly organised by the Hague Conference on Private International Law and the International Union of Latin Notaries, and hosted by the National Notary Association of the United States, the Forum attendees enthusiastically reviewed the potential of electronic notarization and electronic Apostilles.

Unanimous agreement was reached on the following Conclusions and Recommendations:

1. Echoing Recommendation 4 adopted by the Special Commission (SC) meeting of the Hague Conference held from 28 October to 4 November 2003 to review the practical operation of the Apostille Convention (and the Service and Evidence Conventions), the Forum attendees emphasize that the Apostille Convention operates in an environment that is subject to important technical developments. Although this evolution could not be foreseen at the time of the adoption of the Apostille Convention, the Forum attendees stress that modern technologies are an integral part of today's society and their usage a matter of fact. In this respect, the Forum attendees also endorse the SC's conclusion to the effect that *the spirit and letter of the Convention do not constitute an obstacle to the usage of modern technology*; on the contrary, the application and operation of the Convention can be further improved by relying on such technologies, thus enhancing the mutual confidence as a basic principle for the operation of the Convention. It is the view of the participants that an interpretation of the Convention in the light of the principle of functional equivalence permits competent authorities to both keep electronic registers and issue electronic Apostilles to further enhance international legal assistance and government services.

2. Most countries have now enacted legislation recognizing the legal effect of electronic signatures and electronic documents. States are encouraged to continue reviewing and enhancing the legal framework for allowing the use of electronic signatures and electronic documents.

I. Practical Considerations

A. Electronic Apostilles Registers

3. States and their competent authorities are encouraged to further explore the possibilities of setting up electronic Apostilles registers. The general consensus was that this goal was easily attainable using commonly available technologies.

4. There was general agreement that an electronic register could provide value to any interested person needing to verify the origin of an Apostille by requesting that the competent authority verify whether there is a register entry corresponding to the Apostille presented to the interested person.

5. It was further concluded that having electronic registers would promote the importance of the register, which is now hardly ever used in a purely paper form, and would provide a powerful deterrent to fraud and abuse of the Apostille.

6. The information in the electronic register shall include: (i) the number and date of the Apostille, (ii) the name and capacity of the person who has signed the underlying public document, and (iii) if the document is not signed, the name of the authority which affixed the stamp or seal on the public document.

7. It was agreed that the electronic register should be made available online.

8. An "interested person" should be considered any person who has been presented with an Apostille and who needs to verify with the competent authority the register entry that records the Apostille.

9. In order to query an electronic register database online, the interested party should enter at least the number and date of the Apostille appearing on the Apostille.

10. It was agreed that an electronic register could be maintained by competent authorities to record the issuance of paper-based Apostilles.

11. The records in the electronic register should be maintained so as to ensure continued access over a long period of time.

B. Use of Information Technology (IT) in issuing paper Apostilles

12. The Forum endorses Conclusion 23 adopted by the Special Commission in 2003:

> "23. The SC identified the following four stages in the issuing of an Apostille in respect of which the application of IT might be considered and thought there was no reason in principle – as far as the use of IT proves to be cost-efficient – why IT should not be applied:

1. maintenance of a secure electronic database of signatures for the purpose of verifying the signatures appearing on public documents for which an Apostille is requested;
2. use of word-processing technology to complete the information to appear on the Apostille;
3. use of electronically reproduced signatures of the issuing authority to be inserted through secure electronic means and printed on the Apostille;
4. maintenance of an electronic register."

C. Electronic Apostilles

13. Competent authorities are encouraged to issue electronic Apostilles.

14. Competent authorities are encouraged to issue electronic Apostilles for public documents submitted in both paper and electronic form. Because the Apostille does not certify the content of the underlying public document but only its origin, competent authorities can issue electronic Apostilles either for public documents received in paper form and subsequently scanned by the competent authority, or for public documents received in electronic form.

15. However, electronic Apostilles need to fulfil certain basic requirements to ensure non-repudiation:

    - In particular, the fact of the issuance of the Apostille by the competent authority must be independently verifiable.
    - In addition, the Apostille must be invalidated if the underlying document is improperly modified as when, for example, a person attempts to remove the Apostille from the public document.

16. These requirements do not in any way require the use of one specific technology, nor are they intended to privilege the use of one specific technology over another.

D. Electronic Notarization and Other Electronic Public Documents

17. States are encouraged to develop technologies to facilitate the performance of electronic notarization and the issuance of other electronic public documents.

18. However, electronic notarial acts and other electronic public documents need to fulfil certain basic requirements to ensure non-repudiation:

    - In particular, the fact of the issuance of the electronic public document must be independently verifiable.
    - In addition, the document must be invalidated if it is improperly modified as when, for example, a person attempts to alter the contents of the public document.

19. These requirements do not in any way require the use of one specific technology, nor are they intended to privilege the use of one specific technology over another.

II. General Recommendation

20. In order to assist States in the development of electronic Apostilles registers, the issuance of electronic Apostilles, and the performance and issuance of electronic public documents, it would be desirable for detailed guidelines to be drafted by the Permanent Bureau of the Hague Conference in consultation with outside experts.

* * *

Légalisation / Preuves / Notification
Legalisation / Evidence / Service

Octobre / novembre 2003
October / November 2003

CONCLUSIONS ET RECOMMANDATIONS ADOPTÉES PAR LA COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT PRATIQUE DES CONVENTIONS APOSTILLE, OBTENTION DES PREUVES ET NOTIFICATION

(28 octobre au 4 novembre 2003)

* * *

CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSIONON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS

(28 October to 4 November 2003)

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CONCLUSIONS ET RECOMMANDATIONS ADOPTEES PAR LA COMMISSION SPECIALE SUR LE FONCTIONNEMENT PRATIQUE DES CONVENTIONS APOSTILLE, OBTENTION DES PREUVES ET NOTIFICATION

(28 octobre au 4 novembre 2003)

* * *

CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS

(28 October to 4 November 2003)

Conclusions and Recommendations of the Special Commission on the practical operation of The Hague Apostille, Evidence and Service Conventions *(28 October to 4 November 2003)*

1. A Special Commission met in The Hague from 28 October to 4 November 2003 to review the practical operation of the Hague Conventions of *5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, of *15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, and of *18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. The Special Commission, which was attended by 116 delegates representing 57 Member States, States party to one or more Convention under review, and observers, unanimously approved the following conclusions and recommendations:

I. GENERAL COMMENTS

2. The Special Commission (SC) noted and emphasised the *continued importance* of the Hague Apostille, Evidence and Service Conventions.

3. In light of the value of the continued monitoring of the Conventions' practical operation, the need to promote uniform interpretation, foster mutual confidence and enhance the mutual benefits for States party to the Convention to exchange their respective experiences in operating the Conventions, as well as to promote the benefits of the Conventions to non-party States, the SC recommended to have *more frequent meetings* to review the practical operation of the Apostille, Evidence and Service Conventions. The Special Commission recommended that review meetings on the practical operation of these three Conventions be held *every five years*, subject to the availability of the additional resources needed. Also, consideration should be given to the possibility of reviewing the practical operation of the *Hague Convention of 25 October 1980 on International Access to Justice*.

4. The SC emphasised that the Apostille, Evidence and Service Conventions operate in an environment which is subject to important *technical developments*. Although this evolution could not be foreseen at the time of the adoption of the three Conventions, the SC underlined that modern technologies are an integral part of today's society and their usage a matter of fact. In this respect, the SC noted that the spirit and letter of the Conventions do not constitute an obstacle to the usage of modern technology and that their application and operation can be further improved by relying on such technologies. The Workshop held prior to the SC (*i.e.*, on 27 October 2003) clearly revealed the means, possibilities and advantages of using modern technologies in subject matters falling within the scope of the Conventions[1].

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[1] The Workshop was structured around the following presentations: MR THOMAS GOTTWALD & MR PETER FRANK (Federal Ministry of Justice, Austria): *eJustice – Datahighway to Austrian Courts – Electronic Legal Communication (ELC) – Transmission of Legal Documents*; MS JULIE NIND (Ministry of Justice, New Zealand): *Taking evidence by video link across Tasman*; MS DORY MCKENZIE & MR JAMES MASON (Foreign and Commonwealth Office, United Kingdom): *The issuance of Apostilles by the Foreign and Commonwealth Office*; MR OZIE STALLWORTH & MR KEVIN MENDELSON (National Notary Association, United States of America): *enjoa – The Electronic Notary Journal of Official Acts.*

II. APOSTILLE CONVENTION

General considerations

5. Examination of practice under the Apostille Convention confirmed its *very wide use and effectiveness*, as well as the absence of any major practical obstacle. Against this background, the SC recommended strongly that States party to the Convention should continue to *promote* it to other States. In particular, Member States of the Conference which are not already party to the Convention are encouraged to consider actively becoming party to the Convention.

6. The SC also stressed the *usefulness of linking the application of the Hague Adoption Convention of 1993 to the Apostille Convention*. In light of the high number of public documents included in a typical adoption procedure, the SC recommended that States that are party to the Adoption Convention but not to the Apostille Convention consider actively becoming party to the latter.

7. The SC emphasised that the *use of information technology (IT) could have a positive impact on the operation of the Convention*, in particular through lowering costs and increasing the efficiency of the creation and registration of Apostilles.

8. The SC noted the difficulties some States face with the recognition of Apostilles issued in States with numerous competent authorities (difficulties in identifying and verifying the competence of individual issuing authorities; differences in Apostilles issued within the same State). With a view to further promoting knowledge about the practical operation of the Convention, the SC recommended that States party send all *relevant information to the Permanent Bureau to be publicised on the Hague Conference's website, and that particular consideration to a FAQ-section be given.*

9. Furthermore, the SC recommended that a *Handbook* on the practical operation of the Convention be prepared by the Permanent Bureau, subject to adequate resources being available for the purpose.

Scope of the Convention

10. With regard to *commercial and customs documents*, which are excluded from the scope of the Convention, the SC noted that despite some isolated concerns there were no developments that would justify the need to reconsider this exclusion. The SC suggested that the matter be further explored in the Handbook (see recommendation 9 above).

11. Regarding the application of an Apostille on a *certified copy* of a public document, the SC concluded that Article 1 of the Convention applies. Individual States, however, may decline to issue an Apostille to the certified copy of a document on the grounds of public policy.

Competent Authorities

12. In addition to the obligation mentioned in Article 6 (of the Convention), the SC recommended that States party make available to the Permanent Bureau a list of *all* competent authorities to issue Apostilles, including their full contact details (postal address, telephone and fax numbers, e-mail). The SC noted the importance of keeping this information updated.

Formal requirements

13. The SC underlined the importance of the *principle that an Apostille that has been established according to the requirements of the Convention in the State of issuance must be accepted and produce its effects in any State of production*. With a view to further facilitating free circulation of Apostilles, the SC recalled the importance of the *Model certificate* annexed to the Convention. The SC recommended that Apostilles issued by competent authorities should conform as closely as possible to this model. However, variations in the form of an Apostille among issuing authorities should not be a basis for rejection as long as the Apostille is clearly identifiable as an Apostille issued under the Convention. *The SC firmly rejects, as contrary to the Convention, isolated practices among States party that require Apostilles to be legalised.*

14. The SC took note of some reports of *successful use of electronically or non-manually reproduced signatures of issuing authorities* and that the use of such signatures has not led to an increased incidence of fraud. At the same time, it was noted that most States party remained reticent towards the use of such signatures. The SC recommended the advantages of increased automation, but stressed the importance of applying appropriate anti-fraud measures to the production of automated signatures.

15. The SC agreed that it was important to maintain *mutual confidence* where electronically or non-manually reproduced signatures are used. In this respect, the SC underlined the important role that the *register* – which up to now has not often been called upon to verify the relevant information contained in a specific Apostille – could play in resolving any doubt in relation to an Apostille. The SC noted that maintenance of electronic registers could facilitate the process of verification.

16. The SC noted the *variety of means for affixing Apostilles* to the public document. These means may include rubber stamp, glue, (multi-coloured) ribbons, wax seals, impressed seals, self-adhesive stickers, etc.; as to an allonge, these means may include glue, grommets, staples, etc. The SC noted that all these means are acceptable under the Convention, and that, therefore, these variations cannot be a basis for the rejection of Apostilles.

17. As regards Apostilles to be issued for a *multi-page document*, the SC recommended that the Apostille be affixed to the signature page(s) of the document. When using an allonge, the Apostille may be affixed to the front or the back of the document.

18. The SC stressed that Apostilles may *not be refused in a State of production on the grounds that they do not comply with that State's national formalities and modes of issuance*. The only relevant consideration in this respect is that referred to in paragraph 13 above.

Language

19. The SC concluded that Article 4 of the Convention permitted the *use of more than one language* in the Apostille and that this might well assist in the circulation of documents. In the light of examples given by delegations it was clear that it was possible to create a form of Apostille with a number of languages and yet retain conformity with the model of the Apostille provided in the Convention. The SC recommended that States party give information on this to the PB for inclusion on the Hague Conference's website.

Costs

20. The SC recalled that the fees charged in connection with the issuing of the Apostille should be *reasonable*, particularly for situations like cross-border adoptions and maintenance procedures. One way of dealing with this could be to charge a single fee for a cluster of related documents rather than an individual fee for each document in a particular case.

Retention of records in a Register

21. As regards the issue of the retention and disposal of records in a register or card index established under Article 7, the SC did not suggest a minimum period during which records in a register should be kept. It concluded that it was a matter for each State party to develop *objective criteria* in this respect. The SC agreed that holding of information in electronic form would assist this process by making it easier to store and retrieve records.

Effects of an Apostille

22. The SC recalled that under the Convention, the effect of an Apostille 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" (Art. 3). In particular, the *effect of an Apostille does not extend to the content of the public document* to which it is attached.

Use of IT in issuing Apostilles

23. The SC identified the following four stages in the issuing of an Apostille in respect of which the application of IT might be considered and thought that there was no reason in principle – as far as the use of IT proves to be cost-efficient – why IT should not be applied:

    1. maintenance of a secure electronic database of signatures for the purpose of verifying the signatures appearing on public documents for which an Apostille is requested;
    2. use of word-processing technology to complete the information to appear on the Apostille;
    3. use of electronically reproduced signatures of the issuing authority to be inserted through secure electronic means and printed on the Apostille;
    4. maintenance of an electronic register.

E-Apostille?

24. The SC recommended that States party and the PB should work towards the development of techniques for the generation of electronic Apostilles taking into account *inter alia* the UNCITRAL model laws on electronic commerce and on electronic signatures, both being based on the principles of non-discrimination and functional equivalence.

Multi-unit States and Regional Economic Integration Organisations (REIOs)

25. The SC took note of the position of one Member State that the existence of a Multi-unit State clause might assist that State to accede to the Convention, but there was insufficient priority for this to be the subject of a protocol on its own; if there were to be a Protocol on other issues, then such a clause might be considered.

26. The SC accepted that, at this point, there was no need to consider the application of the Convention to documents issued by REIOs.

III. EVIDENCE CONVENTION

General considerations

27. The SC recalled the importance of the Evidence Convention as a *bridge between common law and civil law* procedures relating to the taking of evidence in civil and commercial litigation.

28. With a view to overcoming some of the differences that have arisen among States party in interpreting the Convention, in particular the scope of a possible reservation under Article 23, the SC carefully reviewed some of the principles and practices relating to the Convention.

Reservations under Article 23

29. The SC recognised that the terms of Article 23, which permits a Contracting State to "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents", are a continued source of misunderstandings. Having regard to the history of the provision, the SC agreed that Article 23 was intended to permit States to ensure that a request for the production of documents must be *sufficiently substantiated* so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding. The SC noted that the wording of the particularised declaration submitted by the UK (*i.e.,* the proponent of the provision) reflected this purpose more adequately than the wording of Article 23. The UK declaration reads as follows:

    "In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

    a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
    b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power."

30. Equally, the SC noted that Article 16 of the *Additional Protocol of 1984 to the Inter-American Convention on the Taking of Evidence Abroad* also more adequately reflects the concern of the proponents of Article 23 of the Evidence Convention. Article 16 of the Additional Protocol reads as follows:

    "The States Parties to this Protocol shall process a letter rogatory that requests the exhibition and copying of documents if it meets the following requirements:

    a. The proceeding has been initiated;
    b. The documents are reasonably identified by date, contents, or other appropriate information, and
    c. The letter rogatory specifies those facts and circumstances causing the requesting party reasonably to believe that the requested documents are or were in the possession, control, or custody of, or are known to the person from whom the documents are requested.

The person from whom documents are requested may, where appropriate, deny that he has possession, control, or custody of the requested documents, or may object to the exhibition and copying of the documents, in accordance with the rules of the Convention.

At the time of signing, ratifying or acceding to this Protocol a State may declare that it will process the letters rogatory to which this article applies only if they identify the relationship between the evidence or information requested and the pending proceeding."[2]

31. The SC noted that in some instances where States have made a general, non-particularised declaration under Article 23, they may have mistakenly believed that they are only objecting to evidence requests submitted prior to the *opening of a proceeding in the State of origin*. In fact, "pre-trial discovery" means evidence requests submitted after the filing of a claim but before the final hearing on the merits.

32. Compounding the misunderstandings that may have prompted Contracting States to make a general declaration under Article 23 denying the "pre-trial discovery of documents", the SC noted that in some cases the judicial authorities of a State of origin have concluded that no requests for the production of documents were permitted under the Convention in a State having made such a general declaration. This may result in the State of origin applying its own domestic law for the taking of evidence against foreign parties.

33. The SC took note of the fact that following the discussion of the same issue during the SC meeting in 1989, some States revised their declaration under Article 23 to reflect the more particularised terms on the UK declaration. At the same time, another State party informed the SC about changes in its internal law to further limit the scope of pre-trial discovery, including by increasing the control of judges over discovery proceedings.

34. Against this background, the SC recommended that States which have made a general, non-particularised declaration under Article 23 *revisit their declaration* by considering an amendment adopting terms such as those contained in the UK declaration or in Article 16 of the Inter-American Protocol. In this connection, the SC further recommended the production of a new edition of the *practical Handbook* on the operation of the Convention.

Scope of Article 23

35. The SC noted that Article 23 expressly refers to "documents" and that the scope of the provision should not be extended to oral testimony.

Article 1(2)

36. The SC recommended that States party submit information to the Permanent Bureau as to how Article 1(2) was interpreted and, in particular, what national judicial proceedings would be regarded as "contemplated" for purposes of this provision.

Mandatory and / or Exclusive character of the Convention

37. The SC noted that there were still differing views among States party as to the obligatory and/or exclusive character of the Convention.

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[2] Reference was also made to the treatment of pretrial discovery of documents under Art. 9 of the *Inter-American Convention of 1975 on the Taking of Evidence Abroad*.

Arbitration

38. The SC noted that in some instances, and in accordance with the internal law of some States, the Convention has been made available for use in arbitration proceedings. The SC stressed that a request for the taking of evidence under the Convention would have to be presented by the relevant judicial authority of the State where the arbitration proceedings take place.

Time issues

39. The SC recommended that requests for evidence be presented as soon as practically possible so as to provide sufficient time for their execution in the State addressed.

40. The SC also urged States party to communicate to their Central Authorities and to the authorities receiving letters of request, the importance of expeditious execution of the requests.

41. With a view to avoiding unnecessary delays where a letter of request is deficient, the SC recommended that Central Authorities or executing authorities encourage the requesting authority to reformulate and resubmit its letter of request. In cases where the request appears to be partially deficient, the executing authorities should, wherever appropriate, execute the portion of a letter that is not deficient rather than to reject the entire request.

Modern technologies

42. The SC expressed general support for the use of modern technologies to further facilitate the efficient operation of the Convention. The SC noted that there seems to be no legal obstacle to the usage of modern technologies under the Convention. However, the use of some techniques may be subject to different legal requirements in different States (*e.g.*, obtaining the consent of all parties involved in the execution). In this respect, the SC recommended that States party make relevant information on legal requirements relating to specific techniques available to the Permanent Bureau

43. The SC stressed where a special method or procedure is requested for the taking of evidence (Art. 9(2)), the *exception* for methods that are "incompatible with the internal law of the State of execution or [...] impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties" should be interpreted narrowly to permit, to the greatest possible extent, the use of modern information technology.

44. The SC stressed that early informal contact among appropriate authorities to coordinate the presentation and execution of Letters of request might be facilitated by the use of modern information technology such as e-mail.

Multi-unit States and Regional Economic Integration Organisations (REIOs)

45. The SC took note of the position of one Member State that the existence of a Multi-unit State clause might assist that State to accede to the Convention, but there was insufficient priority for this to be the subject of a protocol on its own; if there were to be a Protocol on other issues, then such a clause might be considered.

46. The SC accepted that, at this point, there was no need to consider the application of the Convention in relation to REIOs.

IV. SERVICE CONVENTION

Forwarding Authorities

47. The SC recalled that it is for the law of the requesting State to determine the competence of the forwarding authorities (Art. 3). Furthermore, the SC took note of information provided by number of experts about the position of forwarding authorities and concluded that most practical problems have been solved.

48. The SC invited all States party to provide information on the forwarding authorities and their competences to the Permanent Bureau for posting on the Conference's website. The SC also accepted a suggestion that such information be included on the Standard Form for a Request for Service[3].

49. The SC recommended that in any question of doubt as to the competence of the forwarding authority, rather than rejecting the request, the authorities in the State requested should seek to confirm that competence by either consulting the Conference's website or by making expeditious informal inquiries of the forwarding authorities, including by way of e-mail.

Designation of Central Authorities

50. The SC reaffirmed the requirement on States party to the Service Convention to designate a Central Authority under Article 2 and noted the serious difficulties which can arise in operating the Convention if such a designation is not made known to the depositary at the time of the deposit of the instrument of ratification or accession. The SC urged all States party which have not yet done so to designate, as soon as possible, a Central Authority. If delays may not be avoided in the designation of the Central Authority(ies), the SC urged that such States give full information to the Permanent Bureau about the arrangements provided to facilitate the functioning of the Convention pending such designation.

51. The SC requested all States party to provide to the Permanent Bureau complete contact information (postal address, telephone and fax numbers, e-mail and website addresses) for their Central Authorities, particularly for States that have designated more than one Central Authority or other authorities under Article 18. The SC noted the importance of regularly updating of this information on the Conference's website.

Functioning of the Central Authorities

52. The SC reaffirmed that it is for a State party to determine its own model for the organisation of the Central Authority functions. In particular, the SC noted that the terms of the Convention do not preclude a Central Authority from contracting activities under the Convention to a private entity, while retaining its status as Central Authority and ultimate responsibility for its obligations under the Convention[4].

53. The SC reaffirmed that according to Article 12(1), a State party shall not charge for its services rendered under the Convention. Nevertheless, under Article 12(2), an applicant shall pay or reimburse the costs occasioned by the employment of a judicial officer or other competent person. The SC urged States to ensure that any such costs reflect actual expenses and be kept at a reasonable level[5].

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[3] The Russian Federation did not support this recommendation and reserved its position.
[4] The Russian Federation did not support this recommendation and reserved its position.
[5] The Russian Federation did not support this recommendation and reserved its position.

54. The SC invited States party to make available to the Permanent Bureau all relevant information relating to costs, the availability and modalities of service by delivery under Article 5(2), as well as information relating to the alternative modes of transmission under the Convention, for posting on the Conference's website.

Alternative channels of transmission

55. The SC reaffirmed its clear understanding that the term "send" in Article 10(a) is to be understood as meaning "service" through postal channels.

56. The SC considered the increasing use of private courier services for the expeditious transmission of documents in a variety of business settings and heard reports that such couriers have been used to serve process under Article 10(a) of the Convention. In light of that, the SC concluded that for the purposes of Article 10(a) the use of a private courier was the equivalent of the postal channel.

57. The SC noted the further clarification submitted by the Japanese delegation on its position regarding Article 10(a):

    "Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to addressees in Japan. As the representative of Japan made clear at the Special Commission of April 1989 on the practical operation of the Service and Evidence Conventions, Japan does not consider that the use of postal channels for sending judicial documents to persons in Japan constitutes an infringement of its sovereign power.
    Nevertheless, as the representative also indicated, the absence of a formal objection does not imply that the sending of judicial documents by postal channels to addressees in Japan is always considered valid service in Japan. In fact, sending documents by such a method would not be deemed valid service in Japan in circumstances where the rights of the addressee were not respected."

58. The SC noted that the UK confirmed its position expressed at the Special Commission meeting of 1989, indicating its preference for the use of direct service through English solicitors on residents of England and Wales.

Use of IT technology

59. The SC stressed that the operation of the Convention was to be considered in light of a business environment in which use of modern technology was now all pervasive, and that the electronic transmission of judicial communications is a growing part of that environment. In this light, conclusions could be reached as follows:

60. The Convention does not on its terms prevent or prescribe the use of modern technologies to assist in further improving its operation.

61. The Convention does not on its terms deal with internal procedures but there is a link between domestic law systems and the functioning of the Convention.

62. It can be concluded, however, that the transmission of documents internationally for the purposes of the Convention can and should be undertaken by IT-Business methods including e-mail; this is already happening and the SC recommends that States party to the Convention explore all ways in which they can use modern technology for this purpose.

63. In this light, the SC identified a variety of steps for which the use of electronic means may be immediately explored: communication between a requesting party and a forwarding authority, communication between a forwarding authority and a Central Authority of a requested State, and retransmission of the certificate of execution by the designated authority.
64. The SC also recognised that in many domestic legal systems the relevant legal procedures and technological conditions did not allow for service by electronic means, although in certain systems the use of e-mail and fax was permitted in certain circumstances, particularly where approved by judicial authority in advance or agreed by the parties. Nevertheless, the SC recognised that given the pace of technological developments, existing problems might well be overcome so as to enable service by these methods to become more widely used. States party to the Convention are therefore encouraged to explore ways in which such innovations can be achieved.

Translation requirements

65. The SC recognised that no translation is required, under the Convention, for transmission under alternative channels provided by the Convention; the SC noted, however, that in isolated cases such translation requirements are imposed by a State's internal law.

66. The SC noted that the vast majority of States party do not require a translation for service by way of informal delivery (Art. 5(2)).

67. As to the translation requirement for service under Article 5(1), the SC also noted the importance of respecting the various requirements provided in the national laws of States party.

68. The SC invited the States party to make available to the Permanent Bureau all relevant information (incl. any declaration) regarding the extent of any translation requirement for execution of requests under Article 5. The SC also invited States party to provide information as to the consequences under their domestic law when acting as requesting State of a refusal of an addressee to accept service under the Convention.

Scope of application

69. As to the meaning of the terms "civil or commercial matters", the SC urged for a broad interpretation of these terms and reaffirmed the following conclusions adopted in 1989:

    a. The Commission considered it desirable that the words "civil or commercial matters" should be interpreted in an *autonomous* manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.
    b. In the "grey area" between private and public law, the historical evolution would suggest the possibility of a more *liberal interpretation* of these words. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept.

70. In addition, the SC took note of the fact that while in some States tax issues were considered as falling within the scope of the Convention, in others this was not the case.

71. The SC also noted that in some States party, the Convention had been applied in proceedings relating to the recovery of proceeds of crime.

72. Finally, the SC cautioned that the meaning of "civil and commercial" appearing in other instruments should not be relied on for interpretation without considering the object and purpose of such other instruments.

Mandatory and/or exclusive character of the Convention

73. Recalling the conclusions and recommendations of 1989, the SC confirmed the prevailing view that the Convention was of a non-mandatory, but exclusive character as described in more detail in the provisional version of the new edition of the Practical Handbook, without prejudice to international law on the interpretation of treaties.

74. The SC recalled the purpose and fundamental importance of Article 15(2), which is designed to ensure actual notice to a defender in sufficient time to organise his or her defence.

Double-date

75. The SC considered and rejected a proposal that States party adopt a recommendation to implement a system of double-date, according to which the interests of the plaintiff (*e.g.*, limitation periods) and those of the defendant (*e.g.*, time to file his or her defence) have to be protected by assigning different dates. The SC took note that many legal systems have effective means to protect the interests of the plaintiff without having to rely on the actual date of service.

Exclusion of the application of the Convention between the parties

76. The SC took note of the practice reported in one State party to the Convention whereby contractual arrangements were entered into and upheld in the courts of that State which excluded the application of the Convention for service of documents as regards parties to such contracts, including parties outside that State.

77. Several experts commented to the effect that this would not be allowed in their States and be considered as contrary to their internal law. Some experts indicated, however, that a judgment rendered pursuant to service in accordance with any such contractual arrangements would not necessarily be refused execution.

Exequatur

78. The SC recalled that the Convention does not address the issue of recognition and enforcement of judgments. In addition, experts reaffirmed the need for the Convention to operate so as to sustain the procedural rights of the defender. In particular, the SC recalled again the principle that the defender should be given actual notice in sufficient time to allow him or her to organise a defence. This was significant notably where in the State addressed consideration was given to the validity of service.

Reservations and reciprocity

79. The SC noted that States party do not assert reciprocity against other States party that have made declarations under Articles 8 and 10.

Regional Economic Integration Organisations (REIOs)

80. The SC accepted that, at this point, there was no need to consider the application of the Convention in relation to REIOs.

Future Work: Form and Handbook

81. The SC accepted that future work on the forms be undertaken by the PB in conjunction with a representative group of experts to be designated by the Secretary General, in particular with a view to assessing the necessity of amending the forms and to develop guidelines for completing those forms.

82. The SC welcomed the draft version of the new edition of the Practical Handbook prepared by the Permanent Bureau. The SC invited the Permanent Bureau to finalise the new edition, taking into account the conclusions and recommendations adopted by the SC and emphasised the desirability of maintaining and enhancing the practical utility of the Handbook in conjunction with the information provided on the Conference's website.

The Hague / 20 November 2003