

AUTHENTICATION OF PUBLIC DOCUMENTS EXECUTED IN THE STATE INTENDED FOR USE OUTSIDE THE STATE

In the context of this paper, authentication means the verification of the truth, accuracy and completeness of a document executed in the State and intended to be produced outside the State, taking into consideration the law by which the document is governed, the legal capacity of the person signing it, the genuineness of the signature to it and the manner and circumstances of its execution.

For the purposes of domestic law, verification of the authenticity of a document is facilitated by the operation of the maxim *acta probant sese ipsa* which, broadly translated, says that proof of the genuineness of a document lies within the document itself. The person wishing to rely on the authenticity of such a document looks for all the external signs of its originality such as its form, physical appearance, signature made by way of execution and signatures subscribed by way of attestation. At a further remove, examination of details of stamping and registration would come into consideration

Where, however, the document in question, though executed in Ireland, is intended to be used outside Ireland (and the United Kingdom) different probative criteria apply. It is with these formal procedures, usually culminating in legalisation or the apostille, that this paper is concerned.

In the course of a typical day a Solicitor will handle a multitude of tasks. These may include drawing up wills, drafting conveyances, closing sales, preparing court pleadings as well as interviewing clients about a myriad of problems. Solicitors will take all this in their stride. It is all part of the hustle and bustle of a Solicitor's office and the Solicitor has the necessary back-up services in terms of professional expertise, computer programs and electronic gadgetry to deal with most situations. However, when the Solicitor is informed that his or her next appointment concerns a notarial matter the atmosphere may undergo a dramatic change - as indeed may the Solicitor. Notarial work is atypical of the business of most Solicitor's offices because - unlike the position in certain other jurisdictions - Solicitors and Notaries do not combine their respective operations. Though their functions may overlap in certain areas Notaries are a separate profession; and, unlike a solicitor, every Notary is a holder of a public office and has a designated jurisdictional area.

The mood and attitude of the Notary Public will correspond broadly with the amount of advance notice and information received. Ideally all visits to a Notary should be by appointment and the Notary given an indication of the nature of the business and the country to which it relates. If it is a 'cold call', the Notary is likely to be apprehensive - not knowing what is going to be thrown at him or her - and in what language. A Notary needs preparation time, if only to transform himself or herself from Solicitor (or whatever) to Notary. In the time available before the person requiring the Notary's services appears (conveniently described as the 'appearer') the Notary will do a quick physical inventory of his or her notarial accoutrements, laying out his or her various notarial stamps, adhesive seals, ribbon, brass eyelets, puncher and pincher and, most importantly, the official seal. It is unbecoming a Notary to start rummaging for these in the presence of the appearer. Not infrequently the Notary will discover that the

official seal is still reposing in the briefcase used when the Notary made his or her last outside attendance. One other thing - and for the reason I will later explain - if the Notary can ascertain in advance the language in which the foreign document to be authenticated is written, he or she may usefully add a multi-language translator or a bilingual dictionary to the inventory of things that may be needed. All being now in readiness, the appearer is ushered into the presence of the Notary.

Following the usual introductions, it is likely that the Notary will ask the appearer the nature of his or her business and, invariably, the appearer will respond along the lines of *'I just need your signature on this document'* - a statement that constitutes a wholly disproportionate description of what the Notary may eventually have to do. The response is designed, sometimes unintentionally, to minimise the importance of the Notary's involvement and, by inference, the notarial fee. We are by nature an apologetic race. The document is then tendered to the Notary who, on a quick perusal, will assimilate the nature of the document, the language in which it is written and the formalities required of the Notary to ensure that the document when notarised and authenticated will be acceptable as a public document in the country in which it is intended to be used. Seldom will the Notary's function be confined to acting solely as an attesting witness. That may be but the first step in the process of authentication of the document. Whatever the nature of the document, the Notary will not proceed further without establishing the appearer's identity and current place of residence.

The general rule is that the process of authentication of a document begins with the authentication of its author or signatory. To that end the Notary will set about establishing the identity of the appearer by requiring production of one of the following:

- A current valid passport containing a photographic image of the appearer and a specimen of the appearer's signature.
- A national identity card issued by the authorities of an EU Member State, the Swiss Confederation or a contracting party to the Agreement on the European Economic Area (EEA) signed at Oporto on 2nd May, 1992.
- A travel document issued under section 4 of the Refugee Act, 1996.
- Any other form of travel document issued by the state (Ireland) for limited purposes.

(All of the above will contain a photograph of the holder. An official driving licence, though containing a photograph, is not generally accepted for personal identification purposes because of the thousands of spurious driving licences in use throughout Europe and elsewhere.)

- A utility bill, which shows the appearer's name and place of residence and which was issued not more than three months prior to the date the appearer comes before the Notary, completes the proof of identity and abode requirement

Compliance with the foregoing requirements will satisfy the Notary's common law duty of care and will also meet (in part) the Notary's obligations under Irish statute

law giving effect to the First, Second and Third Directives EEC Directives for the prevention of money-laundering and the financing of terrorism*

If the appearer is acting in a representative capacity - such as a director or company secretary - he or she must, in addition to producing evidence of personal identity, furnish evidence that will establish that he or she is in fact the holder of the particular office. In the case of a company director or secretary an official copy of the statutory Return of Directors and Secretary to the Companies Registration Office or a printed copy of a recent Report and Accounts of the company in which the names of the directors and secretary are given, may be sufficient. A CRO print-out may be accepted with the caveat that the information may not be fully up-to-date and a further search on items pending may be necessary. Indeed, if the company and its officers are well known to the notary, a copy of the company's headed notepaper containing his name and the title of his or her office may be sufficient but should be treated with caution and verified on oath. In a word the appearer must be made prove that they are *who* they say they are and additionally in the case of an official representative, that they are *what* they say they are.

The appearer's business may concern the authentication of any one or more of a score of documents having a foreign element or counter-party. It may be a power of attorney, a purchase agreement (with or without leaseback arrangement), appointment of a fiscal agent, annual return by Irish companies to foreign host regulatory authorities, declaration of identity and professional qualifications needed to satisfy the entry requirements of overseas medical, nursing and teaching boards, affidavit or declaration relating to inter-country adoptions, authorisation regarding the temporary removal of children from the jurisdiction in the care of non-parental guardians, ships protest and protest of a bill of exchange for non-acceptance or non-payment and the list goes on.

Documents presented to Notaries Public in Ireland for authentication may be in a foreign language. They may be typed throughout in the foreign language with a translation supplied, or they may be presented as a dual language document typed in two vertical opposing columns one column being in the foreign language and the other in English. The English language version is generally intended as an explanatory guide. Notaries in Ireland are not expected to be competent in any language other than English and Irish. If the Notary is not competent in the foreign language, the convention is that he or she may rely on the English translation provided it has been furnished by the notary or lawyer requiring authentication of the document. In any other case, for reasons later explained, a verified translation by a competent translator is strongly recommended. The important thing to remember is that the document to be authenticated is that contained in the foreign language. As a Notary is advised not to release a document containing blank spaces into which additional words may be entered he or she must take care to fill in all blank spaces or rule them in such a way that no new material can be inserted. Powers of Attorney received from many European countries but particularly from France and Spain usually commence with the words (in the language of the country) "In the City of" followed by a space into which the relevant city name is to be inserted, followed by more spaces into which the day, month and year are to be inserted, followed by the words "Before me" after which the name of the notary public is inserted, and finally the name and address of the appearer. Filling in some of these details may present a

problem for the Notary. For example, if the day and month of the year are inserted in English in a seen foreign language documents rejected because of the introduction of English text to complete spaces or add additional words. I have seen foreign language documents rejected because of the introduction of English text to complete spaces or add additional words. I have equally seen similarly completed documents accepted. French language document, it may be rejected. Again at the conclusion of the document it may be felt necessary to insert words such as “Signed before me at.....in the City of....on the....day of.....2008” etc., Does the Notary insert these words in English or does the Notary use the French language equivalent.? It is for this reason that I earlier suggested that Notaries should have a set of bilingual or multi-language dictionaries or translators available for reference. Some years ago Robert G.D.Butler, a Notary Public and Member of the Council of the Notarial Society In England published an excellent booklet with Precedents and Glossories titled Solemn Acts in Foreign Languages a copy of which I am fortunate to possess. I recommend it to all Notaries, if it is still available. It goes without saying that a notarial act in the English and, possibly, the Irish language verifying the due execution of a foreign document in Ireland must be accepted by the host country.

A further feature of the French Power of Attorney that sometimes leads to anxiety on the part of the appearer is the requirement for the appearer to comply with the directions of Article L 312-17 du Code de la Consommation (Consumer Code) by completing in the French language in his or her own handwriting a clause constituting a waiver of the Law of 13 July 1979 as respects any loan the appearer may raise outside the terms of the purchase agreement.

Powers of Attorney received from foreign countries frequently contain directions and statements that Irish Notaries may sometimes find irksome as, for example:

- a. “This instrument was read out loud to the Appearer and its contents explained and the Appearer acknowledged that he understood he same.” (Portugal)
- b. “ In the execution of this instrument all the legal formalities applicable to the execution of deeds in Ireland have been observed.” (Spain)
- c. “Handwritten amendments are not acceptable and must be included in an attachment to the document before it is executed and be referred to in the attestation of the notary.” (Portugal)
- d. “All pages must be stamped and signed by the Notary and bound together as a single document the place of joining to be covered by a seal.” (Spain)
- e. “All provisions of this Power of Attorney are to be interpreted in favour of the attorneys.”

Though some Notaries may find these types of directions irksome - particularly the reading aloud of a lengthy document to a well educated person – it is preferable to carry out the instructions to the letter than take short cuts in the interest of saving time. When they are carefully considered it will be seen that there is in fact nothing objectionable in most, if not all, of these statements which are aimed at ensuring the integrity of the document. Indeed, having regard to cases currently before the Irish

courts concerned with losses arising from improvident overseas property investments by Irish citizens, it may be a timely ‘wake-up call’ for all and a reminder that anything less than a diligent attention to detail and correctness could prove both embarrassing and costly. It is regrettable that some Notaries do not attach appropriate significance to the work they undertake and are loath to spend that extra bit of time to ensure that documents notarised by them are perfected with the same degree of form and solemnity as is the case with our nearest neighbours and the Latin notaries. There was a time when Solicitors and Notaries took great pride in the way they produced their documents stitched with green cotton or laced with green silk ribbon. The boom-time pressures saw paid to that for many practitioners who became disciples of the wire stapler and the duct tape. The day of the wire stapler should be long since gone as far as the presentation of notarised documents is concerned.

Before I leave the subject of presentation of documents I wish to reiterate the statement in the **Supplement to The Irish Notary** that it is the duty of the Notary before notarising any document to satisfy himself or herself not only as to the identity and legal capacity of the appearer, and the genuineness of his or her signature to the document, but also, that the appearer appears to fully understand the general nature of the instrument intended to be signed and the consequence of his or her so doing. The days when Notaries regarded themselves as being mere attestors of signatures is also long since gone. An attestation of a signature must not be confused with the authentication of the document to which the signature is subscribed. Authentication has to go beyond the signature and establish in relation to the document as a whole that -

- the signature is genuine
- the signature has been made of the signatory’s free will e.g. without any obvious evidence of duress, fear, intimidation or fraud
- the signatory has full legal capacity
- the signatory has read the document
- the signatory understands the purpose and import of the document
- that the document is valid under Irish law and does not give rise to any statutory reporting obligations e.g. prevention of money-laundering legislation

Authentication is based on satisfying these tests. Consequently, averments to such matters should be incorporated in the narrative of the Notary’s authenticating certificate. In dealing with civil law countries a distinction exists between *public notarial acts* - which demand much formality in content and presentation - and *private notarial acts* -which demand less, foreign lawyers and notaries often look askance at notarised documents emanating from this country when they fail to incorporate averments on matters considered essential and going to the essence of the public notarial act. The notarial act is based on what the Notary states not on what the appearer tells him or her the Notary. I use a pre-printed form of certificate that can be attached to the document which is to be authenticated. It requires only to be dated, the Notary’s signature and seal affixed and a brief description of the notarised document inserted in the schedule. A copy of the form of certificate will be made available

(without charge) together with a copy of this paper on written request to the Faculty Distribution Office at 13 Fownes Street, Dublin 2,

The document having been duly authenticated by the Notary Public, consideration must now be given to the need for further authentication either by *legalisation* or an *apostille*.

Legalisation is a longstanding international protocol used to establish the authenticity of a document executed in one country which is intended to be produced and acted upon in another country. The procedure leading to legalisation entails a series of consecutive verifications each of which constitutes a link in an unbroken evidential chain from which the authenticity of the document can be concluded. For example, the signature (by way of execution) of a grantor to a deed is witnessed by a person who then signs his own name as a witness acknowledging that the deed was signed in his presence. The attesting witness then appears before a Notary Public to whom he confirms that he witnessed the execution of the deed and identifies the signature he subscribed as a witness. The Notary then notarises the statement and signature of the attesting witness and affixes his own signature, stamp and official seal to the deed before producing it to the Registrar of the Supreme Court. The Registrar, who is the keeper of the Roll of Notaries Public in Ireland, verifies the authenticity of the Notary's signature and seal by reference to specimens of such signature and seal kept in the Supreme Court Office and confirms that the name of the Notary is on the Roll of Notaries Public. This verification is given under the signature of the Registrar and is sealed with the seal of the Chief Justice. Finally, or penultimately, the signature and seal of the Registrar is legalised or verified by a consular officer of the Department of Foreign Affairs. In certain circumstances, now thankfully rare, the signature and stamp or seal applied to the deed by the Department of Foreign Affairs may have to be legalised at the embassy in Ireland (or London) of the country in which the deed is to be produced.

The requirement of legalisation as described in the preceding paragraph was abolished under the Hague Convention of 5 October 1961 in respect of certain foreign public documents. These are public document executed in one contracting state which are to be produced i.e. received, in another contracting state.** The Convention introduced the apostille in lieu as the standard form of authenticating instrument. The apostille must be in the form and contain the information set out in the specimen form contained in Hague Convention. It is stamped on or annexed to the notarial certificate authenticating the primary document. In essence the apostille authenticates the notarial act.

The aspect of the authentication or legalisation process to which the exemption applies is that involving the diplomatic representative of the country in which the foreign public document is to be produced. The 'buck' now stops with the authentication provided by the Department of Foreign Affairs which, in essence, is now looking after the interests of the country in which the foreign public document executed in Ireland is to be received.

The involvement of the Registrar of the Supreme Court is also dispensed with in any situation where verification is by means of the apostille. The Department of Foreign Affairs (Consular Section) as the competent authority of the State for the purposes of

the Convention now maintains a duplicate of the Roll of Notaries kept in the Supreme Court Office. Consequently, in cases to which the Hague Convention applies, the notarised document is brought or sent directly to the Department of Foreign Affairs (Consular Section) for verification of the Notary's signature.

Further relaxation in the procedures for establishing the authenticity of public documents was introduced by the EC Convention of 25 May 1987*** which came into force in Ireland on 9 March 1999 . This Convention exempts from any form of legalisation "or further formality" public documents executed in one contracting state intended to be produced in another contracting state. Under this Convention any form of legalisation or apostillation of notarised documents has been dispensed with as between Ireland and Belgium, Denmark, France and Italy. For anybody interested in a more detailed explanation of the two Conventions mentioned I would suggest that they refer to The **Supplement to O'Connor's The Irish Notary** (*The Faculty of Notaries Public in Ireland, 2007*) co-authored by Dr Eamonn G.Hall and E. Rory O'Connor.

That concludes my presentation.

I have a feeling that for the most part I have been 'preaching to the converted'. That being the case I admire your patience and thank you for your tolerance. But if even one of you goes away from this Seminar with a little better understanding of the role of the Notary Public in the matter of the authentication of foreign public documents or with the resolve to approach his or her notarial duties more professionally in future, then this engagement has been worthwhile.

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*Criminal Justice Act 1994 (No. 15 of 1994) and S.I. No. 242 of 2003; EU Directives 91/308/EEC, 2001/97/EEC and 2005/60/EEC

**Concluded at The Hague on 5 October 1961, ratified by Ireland on 8 January 1999 and brought into force on 9 March 1999

*** Concluded at Brussels on 25 May 1987, ratified by Ireland on 8 December 1998 and brought into force on 9 March 1999