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Seal of Disapproval: International Implications of South Carolina's Notary Statute

T. David Hoyle

SEAL OF DISAPPROVAL: INTERNATIONAL IMPLICATIONS OF SOUTH CAROLINA'S NOTARY STATUTE

T. David Hoyle[*]

During the past forty years, the world has shrunk: not in Lilliputian[1] terms, but in the time it takes to ship goods, transmit data, and travel from Charleston to Kilimanjaro.[2]

These changes have transformed national borders into minor inconveniences and prompted a new, global creed.[3] As one might expect, converts to this creed are located all over the world,[4] even in

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[1] JOHNATHAN SWIFT, GULLIVER'S TRAVELS 15-57 (Running Press 1992) (1726). Gulliver's ease of travel was aided by international recognition of the seal of the King of Luggnagg. *Id.* at 150.

[2] *See generally* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (Oxford University Press 2004) and MARTIN WOLF, WHY GLOBALIATION WORKS (Yale University Press 2005). For a popular narrative of these events, *see* THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar Straus Giroux 2006).

[3] *See, e.g.*, RICHARD PEET, UNHOLY TRINITY: THE IMF, THE WORLD BANK, AND THE WTO (Zed Books 2003); DAVID HARVEY, THE NEW IMPERIALISM (Oxford University Press 2005); Rainer Bauböck, *Political Community Beyond the Sovereign State, Supranational Federalism, and Transnational Minorities*, *in* CONCEIVING COSMOPOLITANISM: THEORY, CONTEXT, AND PRACTICE 110-136 (Steven Vertovec & Robin Cohen eds., Oxford University Press 2003); TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE (David Held and Mathias Koenig-Archibugi eds., Polity Press 2003).

[4] *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press 2005); ROBERT KEOHANE, POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD (2002); JOHN DRAHOS & PETER BRAITHWAITE, GLOBAL BUSINESS REGULATION (Cambridge University Press 2000). Slaughter's theories of transnational governing networks and "disaggregated sovereignty" are particularly germane to this article. She discusses larger implications of transnational governing networks such as their efficacy,

the small triangle on the map known as South Carolina.[5] International actors such as BMW, Haier, Michelin, and Siemens are increasingly becoming important in the South Carolina economy.[6] While South Carolina's reliance on international capital is not new,[7] with globalization, the speed and intensity of capital and labor have dramatically increased its flows. Amidst this global reality it may appear quaint to spend time examining South Carolina's notary statute.[8] But, the international and commercial significance of the office of notary public is just as true today as it was twenty-five years ago or even one hundred twenty-three years ago.[9]

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democratic accountability, and normative value, and specifically focuses on the role of sub-national judicial actors in transnational business litigation.

[5] *See, e.g.*, MICHAEL E. PORTER, SOUTH CAROLINA COMPETITIVENESS INITIATIVE: A STRATEGIC PLAN FOR SOUTH CAROLINA (2005) *available at* http://www.monitor.com/binary-data/MONITOR_ARTICLES/object/173.PDF (last visited September 10, 2006), *and* Mark Sanford, Governor of S.C., State of the State Address (January 18, 2006) *available at* http://www.scgovernor.com/uploads/upload/2006StateOfTheState.pdf (last visited September 10, 2006) ("The State of our State is that we are a state in transition. Thomas Friedman wrote the book, *The World is Flat*, and his premise is that the world has changed in ways unimaginable to my father, and even to me or you, over the last few years. In this new found 'flat world,' for the first time in world history a kid in Hampton County is directly competing with a kid in Shanghai, New Delhi or Dublin."). South Carolina is not the only state giving this global creed a southern accent. *See generally* James Cobb, *Beyond the 'Ya'll Wall': The American South Goes Global, in* GLOBALIZATION AND THE AMERICAN SOUTH (James Cobb & William Stueck eds., University of Georgia Press 2005); Alfred Eckes, *The South and Economic Globalization* in COBB & STUECK, *supra*; DAVID CARLTON & PETER COCLANIS, THE SOUTH, THE NATION, AND THE WORLD: PERSPECTIVES ON SOUTHERN ECONOMIC DEVELOPMENT (University of Virginia Press 2003).

[6] THOMAS ANDERSON & WILLIAM ZELIE, US AFFILIATES OF FOREIGN COMPANIES, SURVEY OF CURRENT BUSINESS 195-211 (2006) ("In 2004, as in 2003, South Carolina had the largest share of private employment accounted for by majority-owned U.S. affiliates, 7.9 percent, down from 8.3.").

[7] *See* JAMES C. COBB, THE SELLING OF THE SOUTH: THE SOUTHERN CRUSADE FOR INDUSTRIAL DEVELOPMENT, 1936-1990 (University of Illinois Press 2d ed. 1993).

[8] Specifically, this article examines South Carolina's Uniform Recognition of Acknowledgement Act, S.C. CODE ANN. §§ 26-3-10 to -90 (1977).

[9] Michael L. Closson, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 694 (1998) ("Essential to the efficient functioning of domestic and transnational commerce is the interstate and international recognition of notarial acts. The recipients of documents passing from state to state and from country to country must have some degree of confidence in their

Acknowledging the importance of notarized documents and in aid of inchoate globalization, the United States in 1981 acceded to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.[10] This treaty ensures that notarized documents can be easily authenticated across borders.[11] South Carolina's notary statute,[12] however, makes no provision for authentication pursuant to that treaty and in fact, actually conflicts with that treaty.[13] A 1997 South Carolina Court of Appeals decision[14] involving a foreign affidavit further muddies the international evidentiary waters by interpreting South Carolina's Notary Statute without a single reference to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.[15] Accordingly, it appears far from quaint, it is perhaps even imperative,

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trustworthiness, or else commerce would falter. Historically, the principal source of assurance of authenticity of the signatures on documents has been the notary public.") *See also* Pierce v. Indseth, 106 U.S. 546, 549 (1883) (calling notaries "officers recognized by the commercial law of the world") *and* Wood v. St. Paul Ry. Co., 44 N.W. 308 (Minn. 1890) ("A public notary is considered not merely an officer of the country where he is admitted or appointed, but as kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over.").

[10] Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, October 15, 1981, 33 U.S.T. 883, T.I.A.S. 10072 [hereinafter Hague Convention].

[11] *See* Letter of Submittal from Joseph John Sisco, Acting Sec. of State, to President Gerald R. Ford (April 8, 1976) ("At a time when the volume and importance of litigation with international aspects is growing, it seems desirable to secure for American documents and American litigants the benefits of the streamlined procedures of the Convention.").

[12] S.C. CODE ANN. § 26-3-30(b) (1977) ("If the notarial act is performed by a person authorized by the laws or regulations of a foreign country to perform the act, there is sufficient proof of the authority of that person to act if: (1) Either a foreign service officer of the United States resident in the country in which the act is performed or a diplomatic or consular officer of the foreign country resident in the United States certifies that a person holding that office is authorized to perform the act; (2) The official seal of the person performing the notarial act is affixed to the document; or (3) The title and indication of authority to perform notarial acts of the person appear either in a digest of foreign law or in a list customarily used as a source of such information.").

[13] *See infra* Sections II and III.

[14] Lister v. NationsBank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

[15] In all fairness to the South Carolina Court of Appeals, a review of the Appellate Record indicates that the issue of whether the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents preempts S.C. Code 26-3-30 was not raised at the trial court or on appeal.

to query the effect of this international treaty, which the United States has signed, within the State of South Carolina.[16] This article examines a conflict between a multilateral treaty to which the United States is a party and South Carolina law. While the South Carolina statute is likely preempted because of that conflict,[17] attorneys presenting a document that was notarized abroad to a court in South Carolina are faced with a practical uncertainty as to if it will be received. These attorneys also incur increased transaction costs in the absence of South Carolina legislative or judicial recognition of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Section One of this article addresses the legalization process and the Hague Convention Abolishing the Legalization of Foreign Public Documents,[18] Section Two addresses the South

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[16] *See, e.g.*, State of South Carolina, Ordinance of Nullification (Nov. 24, 1832) (declaring the Tariffs of 1828 and 1832 passed by the Congress of the United States to be "null, void, and no law, nor binding upon this State, its officers or citizens"). In all fairness to the Palmetto state and putting historical references aside, South Carolina is but one of at least ten states where this question should be asked. *See infra* notes 70-72. Accordingly, it may appear reasonable to assume that the federal government would intervene. *See, e.g.*, Connie de la Vega, *Human Rights and Trade: Inconsistent Application of the Treaty Law in the United States*, 9 UCLA J. INT'L L. & FOREIGN AFF. 1, 42 (2004) ("[T]he Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents . . . had to be implemented by each individual state, since each state regulates its own notaries. Presumably at the time the United States became a party to that treaty, the federal government took steps to ensure that the states complied with the treaty."). While the federal government has ensured that there is a central authority in every state capable of ensuring Treaty compliance for U.S. executed affidavits that will be produced abroad, it does not appear that the federal government has taken steps to ensure that every state complies with the Treaty concerning the receiving of foreign-executed affidavits. *See infra* text pp. 12-13. This is perhaps due to the fact that the Treaty does not contain "provisions to ensure enforcement." Keith D. Sherry, *Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of a Global Community Demand Retirement of the Hague Public Documents Convention*, 31 J. MARSHALL L. REV. 1045, 1061 (1998). Or, it could be that Congress thinks that "the topic of notary recognition . . . isn't necessarily the most exciting issue." *The Internet and Intellectual Property: Hearing on H.R. 1458 Before Subcomm. on Courts*, 109th Cong. 2 (2006) (statement of Rep. Berman, Subcommittee on Courts, the Internet, and Intellectual Property) (calling an attempt to unify and standardize the acceptance of out-of-State notarial acts by State and Federal courts "extremely practical," but not exciting).

[17] Missouri v. Holland, 252 U.S. 416, 434 (1920).

[18] *See infra* notes 23-66 and accompanying text.

Carolina Notary Statute,[19] Section Three addresses the conflict between the two,[20] while Section Four addresses the international implications[21] and the Conclusion calls for legislative action.[22]

I. THE HAGUE CONVENTION ABOLISHING THE REQUIREMENT OF LEGALIZATION FOR FOREIGN PUBLIC DOCUMENTS

A. Overview

The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents "ranks among the greatest successes of the Hague Conference on Private International Law."[23] As of August 15, 2006, eighty-eight countries have ratified or acceded to the treaty[24] which "brought about a basic simplification of the series of formalities which complicated the utilization of public documents outside of the countries from which they emanated."[25]

Traditionally, judicial authorities in one country receiving a notarized document coming from another country have held that the document must be authenticated for the document to be found genuine and entitled to recognition under the receiving country's evidentiary rules.[26] Authentication involved a "chain method" where a notary's

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[19] *See infra* notes 67-92 and accompanying text.

[20] *See infra* notes 93-99 and accompanying text.

[21] *See infra* note 100 and accompanying text.

[22] *See infra* note 101 and accompanying text.

[23] Hague Conference on Private Int'l Law Permanent Bureau, *Preliminary Document Number 3: Succinct explanations in preparation of the Special Commission* (2003).

[24] Hague Conference on Private Int'l Law, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=41 (last visited September 9, 2006).

[25] Yvon Loussouarn, *Explanatory Report on the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents in* II ACTS AND DOCUMENTS OF THE NINTH SESSION, LEGALISATION (1961).

[26] *See* Letter of Submittal from Joseph John Sisco, *supra* note 11 (describing the process of authentication of a document originating in Iowa for use in the Netherlands). Although slow and complex, the process of legalizations fulfills "a legal function as regards proof. In fact, the legalisation procedure supplies an aspect of verification which cannot be dispensed with without depriving the person producing the document of valuable assistance in establishing the origin of the document." Loussouarn, *supra* note 25. In 1802, South Carolina held that a similar authentication process was necessary for an affidavit executed in North Carolina to be produced in a South Carolina court.

signature and seal were authenticated serially from the origin of the document through each level of government until diplomatic channels passed the chain of authentication from one country to another.[27] By way of example, suppose that a hypothetical Charleston resident was injured during her recent climb of Mount Kilimanjaro.[28] After filing suit against her guide in Tanzanian court, our hypothetical Charlestonian needs to submit an affidavit detailing her injuries. She then executes the affidavit before a notary public in Charleston. Afterwards, the affidavit is sent to the South Carolina Secretary of State who then forwards it to the Authentications Office in the United States Department of State who then forwards it to United States consular authorities in Tanzania.[29] Once the consular authorities deliver the document to the local court, the Tanzanian court will likely find that the signature and seal of the Charleston notary public have been properly authenticated and that the affidavit is entitled to reception by the court.[30]

Hammon & Hattaway v. Smith, 3 S.C.L. 110, 1802 WL 520 (1802). However, upon further reflection on the United States Constitution's Full Faith and Credit Clause, the South Carolina Constitutional Court of Appeals overturned *Hammon* six years later. Flourenoy v. Durke, 4 S.C.L. 256, 1808 WL 271 (1808). The State of Michigan, however, still requires an authentication process for affidavits executed in the other forty-nine states. Apsey v. Memorial Hospital, 702 N.W.2d 870 (Mich. Ct. App. 2005) *cert. granted* 716 N.W.2d 558 (Mich. 2006). Although six other states have statutes similar to Michigan's that require an authentication procedure for documents notarized in another state, the "National Notary Association has found no information indicating this special notarial certification is actually being enforced or required for interstate notarizations anywhere other than in Michigan." Brief of the National Notary Association, Apsey v. Memorial Hospital, No. 251110 (Mich. Ct. App. Aug. 15, 2005). The 109th Congress considered a bill to require any Federal or State court to recognize any notarization made by a notary public licensed by a State other than the State where the court is located when such notarization occurs in or affects interstate commerce. H.R. 1458, 109th Cong. (2005).

[27] *See* Letter of Submittal from Joseph John Sisco, *supra* note 11.

[28] No representation is made concerning whether this hypothetical is consistent with Tanzanian law. Although our hypothetical Charlestonian survived the fall, she suffered numerous broken bones and conscious pain and suffering.

[29] *See* Letter of Jeffrey D. Kovar, Assistant Legal Adviser for Private Int'l Law, U.S. Dep't of State, to Alan N. Cote, Dir. of Pub. Relations Div., Office of the Sec'y of the Commonwealth of Mass. (November 26 2003), *available at* http://www.state.gov/s/l/2003/44339.htm.

[30] *Id. See also* ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK 46-51 (East Coast Publishing 1996). Because Tanzania is not a contracting state to the Hague Convention Abolishing the Requirement of Legalization for Foreign

While few, if any, affidavits that originate in Charleston are produced to courts in Tanzania, this cumbersome and time-consuming process was international law's primary means of ensuring the authenticity of foreign executed notarized documents until the Ninth Session of the Hague Conference on Private International Law met in 1960.

B. Treaty Development

Recognizing that international relations suffered as a result of the legalization process, the Council of Europe requested that the Hague Conference on Private International Law draft a treaty that abolished the formalities of legalization while retaining its effect.[31] Accordingly, a Special Commission met at the Hague in 1959 to draft a treaty for consideration by the Hague Conference on Private International Law.[32] The Commission considered and rejected a proposal that would have given foreign notarized documents the same probative weight as that of a national affidavit or national notarized document, reasoning that the burden of establishing a foreign notarized document's authenticity should not be shifted to the party against whom it was offered.[33] Instead, the Commission retained the traditional legalization requirement while replacing it with a simple procedure to easily ensure a document's authenticity.[34] On October 5, 1960, the Ninth Session of the Hague Conference on Private International Law approved the Special Convention's draft.[35]

C. The Treaty

The Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents abolished diplomatic or consular legalization between contracting states[36] and introduced a single method of ensuring the authenticity of foreign notarized documents and other foreign public documents: the apostille.[37] An

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Public Documents, this is the actual process that would currently take place to authenticate a public document originating in the United States for a Tanzanian court. THE INTERNATIONAL LEGALIZATION HANDBOOK 205 (Chancellor 1996).

[31] Loussouarn, *supra* note 25; THE INTERNATIONAL LEGALIZATION HANDBOOK, *supra* note 30, at 9.

[32] Loussouarn, *supra* note 25.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Hague Convention, *supra* note 10, at Preamble.

[37] *Id.* at art. III.

apostille is a certificate affixed to the document by an authority in the country where the document was prepared.[38] The certificate is publicly numbered and registered to prevent fraud.[39]

In addition to foreign notarized documents, the treaty also applies to those foreign public documents issued by a court, administrative documents, and official certificates which are placed on documents signed by persons in their private capacity.[40] For these foreign notarized documents and foreign public documents, the requirement of legalization is abolished.[41] Therefore:

> The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.[42]

This certificate called an "Apostille" "shall be placed on the document itself or on an 'allonge,'" a paper attached to an instrument to provide space for additional endorsements.[43] The certificate must be in the form of the model attached to the treaty[44] and is issued at the

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[38] *Id.* at art. IV.

[39] *Id.* at art. VII. For criticism of the treaty, including its "blatant" failure to "prevent the issuance of ... counterfeit apostilles," *see* Sherry, *supra* note 16, at 1065.

[40] Hague Convention, *supra* note 10, at art. I.

[41] *Id.* at art. II.

[42] *Id.* at art. III.

[43] *Id.* at art. IV.

[44] The model certificate is reproduced below:

> The certificate will be in the form of a square with sides at least 9 centimetres long
>
> APOSTILLE
>
> (Convention de La Haye du 5 octobre 1961)
>
> 1. Country: .....
> This public document
> 2. has been signed by .....
> 3. acting in the capacity of .....
> 4. bears the seal/stamp of .....

request of the person who has signed the document.[45] Each contracting state must designate authorities who are competent to issue the certificate.[46] These authorities keep a register or card index recording the number and date of each certificate and the name of the person signing the public document along with his or her capacity.[47] "At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index."[48] The treaty also includes a savings clause which preserves treaty arrangements between two States concerning less rigorous formalities[49] and specifies that "[e]ach contracting State shall take the necessary steps to prevent the performance of legalizations by its diplomatic or consular agents in cases where the present Convention provides for exemption."[50]

In summary, the treaty abolished the chain method of authentication between contracting states through a prohibition on diplomatic or consular officials performing legalizations between contracting States and made the apostille the sole formality that a contracting State can require to certify the authenticity of an affidavit or other public document that originated from another contracting state.[51]

Certified
5. at .....
6. the .....
7. by .....
8. No .....
9. Seal/stamp: 10. Signature:

....

Hague Convention, *supra* note 10, at Annex.

[45] *Id.* at art. V.

[46] *Id.* at art VI. In the United States, apostilles are issued by the federal court clerks, state secretaries of state, and the State Department.

[47] Hague Convention, *supra* note 10, at art. VII.

[48] *Id.*

[49] *Id.* at art. VIII.

[50] *Id.* at art. IX.

[51] Articles 3 and 8 of the Treaty do, however, work in tandem to allow two or more States to agree via treaty to abolish, simplify, or exempt certain types of documents from legalization. Article 3 also provides that "the laws, regulations, or practice in force in the State where the document is produced" can "abolish, simplify, or exempt certain types of documents from legalization." When a multilateral treaty refers to the word "State," it is not referring to a political subdivision such as South Carolina, rather it is referring to an entity such as the United States, which is capable of entering into treaties. *See, e.g.*, Montevideo Convention on the Rights and Duties of States, art. I,

D. U.S. Accession

In 1975, the American Bar Association's House of Delegates adopted the recommendation of the ABA's Section of International Law and Practice to call for the United States to accede to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.[52] The following year, President Gerald Ford transmitted the treaty to the Senate, writing that the treaty's "provisions would eliminate unnecessary authentication of documents without affecting the integrity of such documents."[53] The treaty was referred to the Committee on Foreign Relations which favorably reported the treaty on November 20, 1979[54] and the full Senate gave its advice and consent on November 28, 1979.[55] President Jimmy Carter signed the treaty on December 27, 1979[56] and the United States of America deposited its instrument of accession on December 24, 1980.[57] On September 21, 1981, President Ronald Reagan issued a Proclamation that the treaty would enter into force for the United States of America on October 15, 1981.[58]

Dec. 26, 1933, 49 Stat. 3097. ("The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."). The fact that the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents applies to a country in its entirety is the reason Canada has not acceded to the Treaty. Response of the United States of America to the Questionnaire of the 2003 Special Commission on the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, 2 [hereinafter Questionnaire]. ("We are aware that Canada would find it easier to accede . . . on a province-by-province basis.").

[52] James T. Haight, *History of the Section of International Law and Practice 1913-1933*, 28 INT'L LAW 615 (1994).

[53] Letter of Transmittal from Gerald R. Ford to the United States Senate, 94th Congress, July 19, 1976 (noting that the treaty's ratification was also supported by the Judicial Conference of the United States).

[54] Proclamation of President Ronald Reagan, September 21, 1981, *available at* 1981 WL 375769.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

E. Twenty-Five years later

Today, the treaty enjoys "very wide use and effectiveness."[59] A Special Commission that met in 2003 at The Hague "noted and emphasized the continued importance" of the treaty.[60] In the United States, over 350,000 apostilles are issued a year.[61] The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents has quietly simplified the practice of admitting a foreign notarized document in the courts of the United States. Federal courts[62] and most states have implemented the Convention's procedures.[63]

Looking towards the future, the 2003 Special Commission also called for the continued promotion of the treaty to those states that have not acceded to it,[64] and noting positive information technology developments, called for the development of techniques for the generation of electronic apostilles.[65] The United States has

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[59] CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE, AND SERVICE CONVENTIONS, Nov. 20, 2003 [hereinafter SPECIAL COMMISSION].

[60] *Id.* at 3. 116 delegates representing 57 countries attended the Special Commission.

[61] Questionnaire, *supra* note 51. The information was based on reports "from 22 states and from the Department of State Office of Authentications. This is regrettably not therefore a complete picture of practice under the Convention in the United States. It does not take into account judicial documents, and the reported statistics represent only a portion of the existing cases." *Id.*

[62] *See, e.g.,* Fed. R. Civ. P. 44(a)(2) (amended to "dispense with the final certification when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement."); Committee Note, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 102 F.R.D. 407, 429 (1984); *accord* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 134 F.R.D. 525 (1991).

[63] Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 505-06 (noting that while the treaty appears to preempt conflicting state practices, "most states enacted legislation to ensure implementation anyway either through adoption of the Uniform Law on Notarial Acts or separate legislation.").

[64] SPECIAL COMMISSION, *supra* note 59, at 4.

[65] *Id.* at 6.

subsequently hosted two international forums on e-notarization and e-apostilles.[66]

II. SOUTH CAROLINA'S NOTARY STATUTE

A. Twenty-five years later in South Carolina

In 2005, the South Carolina Secretary of State issued approximately 8,859 apostilles in accordance with the Hague Convention Abolishing the Legalization of Foreign Public Documents.[67] Thus, it appears that the State of South Carolina is ensuring that affidavits executed by South Carolina notaries are properly authenticated for use in countries that are parties to the treaty. While it is difficult to generalize about the introduction of foreign-executed affidavits in South Carolina courts, anecdotal evidence and a review of the only reported case addressing the statute suggest that South Carolina's notary statute is outdated and should be repealed.

B. The Uniform Recognition of Acknowledgements Act (URAA)

In 1972, South Carolina adopted the Uniform Recognition of Acknowledgements Act.[68] The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Act in 1968 to provide uniformity in the notarization of documents in several states.[69] With respect to foreign notarized documents, the URAA provided that a receiving court should accept the document if the notarial act was performed by a person authorized by the laws of the foreign country to do such an act, and:

> (1) Either a foreign service officer of the United States resident in the country in which the act is performed or a diplomatic or consular officer of the foreign country

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[66] Jonathan Tee, "*International Delegates Meet in Nation's Capital to Examine Progress in Bringing Security to eDocument Exchange*," NATIONAL NOTARY ASS'N NOTARY NEWS, *available at* http://www.nationalnotary.org/news/index.cfm?Text=newsNotary&newsID=920 (last visited September 10, 2006); THE FIRST INTERNATIONAL FORUM ON E-NOTARIZATION AND E-APOSTILLES: CONCLUSIONS AND RECOMMENDATIONS, *available at* http://www.hcch.net/upload/concl_forum.pdf (last visited September 10, 2006).

[67] Interview with Patricia L. Hamby, Dir. of Authentications, Notaries, Boards and Commissions, Office of the S.C. Sec'y of State (November 15, 2006).

[68] S.C. CODE ANN. § 26-3-10 (1977).

[69] UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT (1968). Previous versions of this Act were promulgated in 1914, 1939, 1942, and 1960.

> resident in the United States certifies that a person holding that office is authorized to perform the act;
>
> (2) The official seal of the person performing the notarial act is affixed to the document; or
>
> (3) The title and indication of authority to perform notarial acts of the person appear either in a digest of foreign law or in a list customarily used as a source of such information.[70]

South Carolina is one of fifteen states and the U.S. Virgin Islands that adopted the Uniform Recognition of Acknowledgements Act.[71] As of September 1, 2006, five of these states have repealed the Uniform Recognition of Acknowledgements Act.[72] States with foreign notary provisions similar to those contained in the Uniform Recognition of Acknowledgements Act have also revised or amended their statutes in light of the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents.[73]

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[70] *Id.* at § 2.

[71] Alaska (ALASKA STAT. §§ 09.63.050 to 09.63.130 (2005) (effective 9-22-1981)); Arizona (ARIZ. REV. STAT. §§ 33-501 to 33-508 (LexisNexis 2006) (effective 3-22-1943)); Colorado (COLO. REV. STAT. §§ 12-55-201 to 12-55-210 (2006) (effective 7-1-1969)); Connecticut (CONN. GEN. STAT. ANN. §§ 1-57 to 1-65 (West 2006) (effective 10-1-1969)); Illinois (765 ILL. COMP. STAT. 30/1 to 30/10 (2006) (effective 1-1-1970)); Kentucky (KY. REV. STAT. ANN. §§ 423.110 to 423.190 (2005) (effective 7-1-1970)); Maine (ME. REV. STAT. ANN. tit. 4, §§ 1011 to 1019 (2006) (effective 10-1-1969)); Michigan (MICH. COMP. LAWS. ANN. §§ 565.261 to 565.270 (West 2006) (effective 3-20-1970)); Nebraska (NEB. REV. STAT. §§ 64-201 to 64-215 (2006) (effective 8-25-1969)); New Hampshire (N.H. REV. STAT. ANN. § 456-A:1 to 456-A:9 (repealed 2006) (effective 8-2-1969)); North Dakota (N.D. CENT. CODE § 47-19-14.1 to 47-19-14.8 (2005) (effective 2-20-1971)); Ohio (OHIO REV. CODE ANN. §§ 147.51 to 147.58 (LexisNexis 2006) (effective 1-1-1974)); South Carolina (S.C. CODE ANN. §§ 26-3-10 to 26-3-90 (1977) (effective 5-8-1972)); Virginia (VA. CODE ANN. §§ 55-118.1 to 55-118.9 (2006) (effective 6-26-1970)); West Virginia (W. VA. CODE § 39-1A-1 to 39-1A-9 (2006) (effective 5-6-1971)); Virgin Islands (V.I. CODE ANN. tit. 28, §§ 81 to 89 (2004) (effective 10-20-1981)).

[72] Arizona (ARIZ. REV. STAT. § 41-325 (2006)); Colorado (COLO. REV. STAT. § 12-55-123 (2006)); Kentucky (KY. REV. STAT. ANN. § 324.30, 324.34 (2005)); Nebraska (NEB. REV. STAT. § 64-202 (2006)); New Hampshire (N.H. REV. STAT. ANN. § 118:13, III (2005) (effective Jan 1, 2006)).

[73] *See, e.g.*, Delaware (DEL. CODE ANN. tit. 29, § 4936 (amended 1983)); Iowa (IOWA CODE §§ 9c, 13 (amended 1990)); Kansas (KAN. STAT. ANN. § 53-207 (amended 1984)); Minnesota (MINN. STAT. § 358.46 (amended 1985)); Montana (MONT. CODE ANN. § 1-5-608 (amended 1993)); Nevada (NEV. REV.

C. Subsequent Models

Intending to replace the Uniform Recognition of Acknowledgements Act, the National Conference of Commissioners on Uniform State Laws formulated the Uniform Law on Notarial Acts in 1982.[74] The Uniform Law was promulgated a year after the United States acceded to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Under the Uniform Law, "An 'Apostille' in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office."[75] As of September 2006, eight states have enacted the Uniform Law, including one that had previously adopted the Uniform Act.[76] South Carolina considered adopting the Uniform Law in 2001, but the bill died in committee.[77]

In addition to the Uniform Act, the National Notary Association promulgated the Model Notary Act in 2002.[78] The Model Notary Act similarly provides that "[a]n 'Apostille' in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office."[79]

D. Unclear Waters

A review of South Carolina case law and anecdotal evidence indicates that while rare, South Carolina's Circuit Court judges are at times required to rule on the threshold question of admissibility for foreign-executed affidavits.

STAT. § 240.165 (amended 1993)); New Mexico (N.M. STAT. § 14-4-6 (amended 1993)); Oklahoma (OKLA. STAT., tit. 49, § 117 (amended 1985)); Washington (WASH. REV. CODE § 42.44.150 (amended 1986)).

[74] UNIFORM LAW ON NOTARIAL ACTS (1982).

[75] *Id.*

[76] Delaware (DEL. CODE ANN..tit. 29, §§ 4321-4328 (2006)); Iowa (IOWA CODE ANN. §§ 77A.1 to 12 (2006)); Kansas (KAN. STAT. ANN. §§ 53-501 to -511(2005)); Minnesota (MINN. STAT. ANN. §§ 358.40 -.50 (West 2006)); New Hampshire (N.H. REV. STAT. ANN. § 456-B:1 (2005)); Oklahoma (OKLA. STAT. ANN. tit. 49, §§ 111-121 (West 2006)); Oregon (OR. REV. STAT. §§ 194.505-.595 (2005)); Wisconsin (WIS. STAT. ANN. § 706.07 (West 2005)). The District of Columbia has also adopted the Uniform Law (D.C. CODE. ANN. §§ 45-621 to -628 (LexisNexis)).

[77] H.R. 4921, 114th Gen. Assem., 2001-2002 Sess. (S.C. 2002).

[78] MODEL NOTARY ACT (2002).

[79] *Id.* at app. C § 6(b).

In 1995, attorneys involved in a constructive fraud and breach of contract action did not raise the Hague Convention Abolishing the Legalization of Foreign Public Documents when the trial court ruled on the admissibility of an affidavit executed in Aruba. Accordingly, when the case was appealed to the South Carolina Court of Appeals, an opportunity for clarity was thwarted.

This case began a year earlier, when the Lister family of Spartanburg took a vacation to Aruba and the manager of a rental car agency placed approximately $8,000 in unauthorized charges on their credit card.[80] The family's attorney contacted the agency and demanded the withdrawal of the charge, but was rebuffed.[81] The family brought suit and the car rental agency failed to answer the complaint. After the entry of default, the Circuit Court held a damages hearing.[82] Counsel for the car rental agency argued that punitive damages were improper under Aruban law and attempted to submit the affidavit of an Aruban attorney to that effect.[83] The trial judge refused to admit the affidavit and awarded punitive damages in the amount of $200,000.[84] On appeal, the rental car agency argued, among other reasons, that the trial court failed to properly admit the affidavit.[85]

The South Carolina Court of Appeals held that the affidavit was admissible as an acknowledged document under South Carolina Rule of Evidence 902.[86] The Court of Appeals relied upon S.C. Code 26-3-30 for this holding:

> Pursuant to the Uniform Recognition of Acknowledgments Act, notarial acts performed outside of South Carolina by a person authorized to perform notarial acts by the laws or regulations of a foreign country for use in this state have the same effect as if performed by a notary public of this

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[80] Lister v. Nationsbank, 329 S.C. 133, 494 S.E.2d 449, at 452 (Ct. App. 1997).

[81] *Id.*

[82] *Id.* at 452-53.

[83] *Id.*

[84] *Id.* at 452.

[85] *Id.* at 453.

[86] Lister v. Nationsbank, 329 S.C. 133, 494 S.E.2d 449, at 453 (Ct. App. 1997). S.C. R. Evid. 902 provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ... (8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments."

> state, as long as the official seal of the person performing the notarial act is affixed to the document.[87]

Accordingly, the Court held that the affidavit was admissible because the affidavit bore the Aruban notary seal of Eman.[88] The trial court's error, however, was harmless because the Court later concluded that South Carolina law applied to the question of punitive damages.[89]

While the opinion and the appellate record are void of any reference to the Hague Convention Abolishing the Requirement of the Legalization of Foreign Public Documents,[90] it is worth considering that Aruba, a territorial unit of the Netherlands, was a contracting state to the Hague Convention Abolishing the Requirement of the Legalization of Foreign Public Documents at the time the affidavit was executed.[91] Because of the Court's ruling on choice of law, this fact likely would have had no bearing on the Court's analysis concerning the propriety of the punitive damages award. But, this fact does call into question the Court's holding concerning the admissibility of a foreign-executed affidavit.[92]

III. TREATY VS. STATUTE

A. Conflict

According to the plain text of the treaty, the "only formality" that a court in the United States can require to authenticate an affidavit originating from another contracting state is an apostille.[93] Since the treaty makes the single-signature apostille the only formality or requirement necessary toward the authentication for foreign affidavits emanating from signatory countries to be produced in the territory of the United States and the treaty prohibits contracting states from participating in the "chain method" of authentication through

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[87] *Lister*, 494 S.E.2d 449, 453.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] http://hcch.e-vision.nl/index_en.php?act=conventions.childstatus&cid=41&mid=335.

[92] At a minimum, the question of whether the Hague Convention Abolishing the Requirement of the Legalization of Foreign Public Documents preempts S.C. Code 26-3-30 is an open question. It is also worth noting that *Lister* is South Carolina's only reported decision on the subject of affidavits executed in a foreign country.

[93] Hague Convention, *supra* note 10, at art. III.

diplomatic or consular channels,[94] the South Carolina notary statute[95] plainly conflicts with the treaty.

B. Preemption

This conflict likely means that the South Carolina notary statute is preempted as a matter of law.[96] The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[97]

Although the United States' accession to the Hague Convention Abolishing the Requirement of the Legalization of Foreign Public Documents was done "under the authority of the United States," the federal treaty power is not unqualified, but is subject to constitutional constraints.[98] A constitutional examination of the treaty, however, would likely find that the treaty affects the same matters addressed by the South Carolina statute, concerns matters that are "properly the subject of negotiation with a foreign country," does not violate any express provision of the United States Constitution, including the Tenth Amendment, and that it accordingly preempts the South Carolina statute as a matter of law.[99]

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[94] Hague Convention, *supra* note 10, at art. IX.

[95] On its face, the South Carolina notary statute provides three methods for a South Carolina court to admit a foreign affidavit: 1) if the affidavit is authenticated through the "chain method"; 2) if the affidavit bears a seal; and 3) if the name of the notary is listed in a digest of international law. S.C. CODE ANN. § 26-3-30 (1977).

[96] *See* Opinion on the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 21 Op. Ca. Att'y. Gen. 1-8 (1982), *available at* 21 I.L.M. 357 (holding that with respect to the documents designated therein, the treaty supersedes, with respect to those nations which are signatories, the provisions of the California notary statute pertaining to the proof or acknowledgment of instruments made without the United States).

[97] U.S. CONST. art. VI, cl. 2.

[98] Reid v. Covert, 354 U.S. 1, 16-17 (1957).

[99] *See id.* at 16-18 *and* Missouri v. Holland, 252 U.S. 416, 434-435 (1920) ("Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.'").

IV. FROM KILIMANJARO TO CHARLESTON

Imagine again our hypothetical Charlestonian who was injured during her recent climb of Mt. Kilimanjaro. In addition to her suit filed in Tanzania, she has also sued under a products liability theory alleging a defectively designed and manufactured harness. The harness was designed and manufactured in Sweden and her attorneys have filed suit in South Carolina state court against the Swedish company that manufactured it and the Charleston retailer that sold it.[100] The Swedish harness manufacturer moved to dismiss the suit on the basis of forum non conviens and attached to its motion an affidavit from Sweden's leading tort scholar about the adequacy of Sweden as a forum to litigate the case. In preparing to file the motion, the manufacturer's attorneys researched the statutory and case law requirements for presenting a foreign affidavit to a South Carolina court. They filed the affidavit, which was executed in Stockholm, without an apostille. Sweden happens to be a signatory to the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents.

What is the result?

Attorneys for our hypothetical Charlestonian could and likely will argue that the affidavit is inadmissible because the treaty preempts the South Carolina notary statute. While such an argument is strongly rooted in international and constitutional law, attorneys for the Swedish manufacturer will likely not agree with such an analysis because it would result in their affidavit being ruled inadmissible. Accordingly, a trial court will likely have to spend considerable time and devote considerable resources in researching and deciding the threshold question of admissibility. As a result, the parties and the court incur increased costs and additional time. More importantly, the confidence in South Carolina's judicial system by international actors, who typically value judicial predictability, likely is weakened.

V. CONCLUSION

Although the scenario described above is currently an infrequent one, it will likely increase if the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents is not

[100] No representation is made concerning whether this hypothetical is consistent with South Carolina law. Like the previous scenario, our hypothetical Charlestonian survived her fall but, suffered numerous broken bones and conscious pain and suffering.

judicially or legislatively recognized in South Carolina.[101] Until such recognition occurs, litigation involving international actors in South Carolina courts will cost more and be less certain. Recognition of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents would alleviate these added costs and uncertainties while improving South Carolina's business climate and better positioning the state for foreign investment.

South Carolina's nearly forty-year old notary statute is simply outdated and the statute's international implications require action by the South Carolina General Assembly. While the Uniform Law on Notaries and the Model Notary Act are suggested starting points, the South Carolina General Assembly should also examine the recent discussion over e-Notarization and e-Apostilles when it drafts a notary statute appropriate for South Carolina's international actors, litigants, and courts functioning in a shrunken world.

[101] In addition to the forces of globalization, the author suspects that this article will raise awareness of this issue among the South Carolina Bar, which may increase the frequency to the point that this issue is heard by South Carolina's appellate courts. In the author's opinion, the South Carolina General Assembly should address this "practical," but not "exciting," issue before such an event occurs.