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Indonesia's Ratification of the Convention Abolishing the Requirement to Legalize Foreign Public Documents

On 4 January 2021, the President of Republic of Indonesia issued Regulation No. 2 of 2021 on the Ratification of the Convention Abolishing the Requirement to Legalize Foreign Public Documents (“**PR 2/2021**”) (the convention is hereinafter referred to as the “**Apostille Convention**”).

The Apostille Convention was concluded on 5 October 1961 and is intended to simplify a series of formalities for documents signed overseas for the contracting states.

Before Indonesia ratified the Apostille Convention, every Indonesian document signed overseas to be used in Indonesia had to be legalized by the relevant authorities. Now, as one of the contracting states of the Apostille Convention, Indonesia is exempt from the requirement to legalize documents to which the Apostille Convention applies.

Key Provisions of the Apostille Convention

I. The Apostille Convention only Applies to Public Documents

Under Article 1 of the Apostille Convention, the Apostille Convention only applies to public documents which have been signed in the territory of one the contracting states and which have to be produced in the territory of another contracting state. The Apostille Convention, therefore, does not apply to

documents that are signed by a person in a private capacity (eg private documents, contracts, statements).

A. The nature of *public* documents under the Apostille Convention

From the preparatory work of the Apostille Convention, the concept of “public documents” was intended to be interpreted broadly to include all documents other than those issued by persons in their private capacity (not private documents).

The bottom line for “public documents” under the Apostille Convention” is the *capacity* of the persons signing the documents (whether they are acting as public officials or private individuals/entities).

However, each state still has its own regulation which determines what kinds of documents constitute ‘public documents’. Therefore, as recognized by the Hague Conference on Private International Law (“**HCCH**”), the competent authority that issues an “Apostille Certificate” (as explained in II) is only required to certify documents that are considered “public documents” in the State of Origin. The authority of the State of Destination cannot oblige the other state’s competent authority to issue an Apostille Certificate.¹

B. Public Documents according to the Apostille Convention

The following are deemed public documents under the Apostille Convention (“**Public Documents**”):

- (i) *documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server (“huissier de justice”);*

The term, “courts or tribunals” in (i) should be interpreted broadly and should apply not only to judicial courts and tribunals but also to administrative and constitutional tribunals and even to ecclesiastical courts.²

- (ii) *administrative documents;*

An administrative document is a document that is issued by an administrative authority (either a person or an agency established under the laws of the state of origin. In some states, this may include a religious authority).³

¹ Paragraph 113 of the Apostille Handbook on the Practical Operation of the Apostille Convention issued by the Hague Conference on Private International Law (“**HCCH**”) in 2013 (hereinafter the “**Apostille Convention Handbook**”)

² The Explanatory Report on the Apostille Convention written by Y. Loussouarn (Rapporteur to the First Commission) (“**Explanatory Report**”)

³ Paragraph 123, Apostille Convention Handbook

(iii) *notarial acts*;

According to the Apostille Convention Handbook, a “notarial act” is an instrument or certificate drawn up by a public notary that sets out or perfects a legal obligation or formally records or verifies a fact or something that has been said, done or agreed to.

(iv) *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 authentications of signatures.*

The Apostille Convention does not define “official” as referred to in *official certificates* in (iv). However, the convention does provide examples of official certificates, which include, among others, “notarial authentications or signatures”. In practice, this is a very important category of public documents because it can extend the benefits of the Apostille Convention to **indirectly** apply to private documents.⁴

Article 1 of the Apostille Convention also explicitly states that the Apostille Convention does not apply to:

- (i) documents signed by diplomatic consular or agents; or
- (ii) administrative documents dealing directly with commercial or customs operations.

Question 1: Can powers of attorney signed overseas to perform corporate actions be considered public documents under the apostilles convention?

Indonesian public notaries and experts have different views on this issue. Specifically, on how we should interpret the concept of “public documents” under the apostille convention.

Referring to our explanation in i.a, documents signed by private entities are considered *private* documents and are not subject to the apostilles convention. However, some business actors interpret this to mean that we can still refer to i.b (iv) according to which official certificates placed on private documents can be deemed public documents.

On that account, it is possible to argue that if the powers of attorney are certified officially (for example, through notarial authentications), the powers of attorney can be considered “public documents” and enjoy the simplification under the apostilles convention. However, this is still subject to the willingness of the public official / person who will use the power of attorney in indonesia to accept it (ie whether they will accept and not challenge a power of attorney which has not been legalized by the indonesian embassy).

⁴ Paragraphs 132, 134 of the Apostille Convention Handbook.

II. The Formality Required for the Authentication of Public Documents under the Apostille Convention

The only formality that may be required to certify the authenticity of Public Documents signed overseas under the Apostille Convention is to obtain an “Apostille Certificate” which will be issued at the request of the person who has signed the document or of any bearer.

The Apostille Certificate is issued by a competent authority, which is one of one or more authorities designated by each contracting state which are competent to issue “Apostille Certificates” (“**Competent Authority**”).

The Competent Authority will verify the authenticity of the Public Document before issuing the Apostille Certificate. Once the Competent Authority issues the Apostille Certificate, it will then record the Apostille Certificate in the apostille register (a hard copy or e-register).

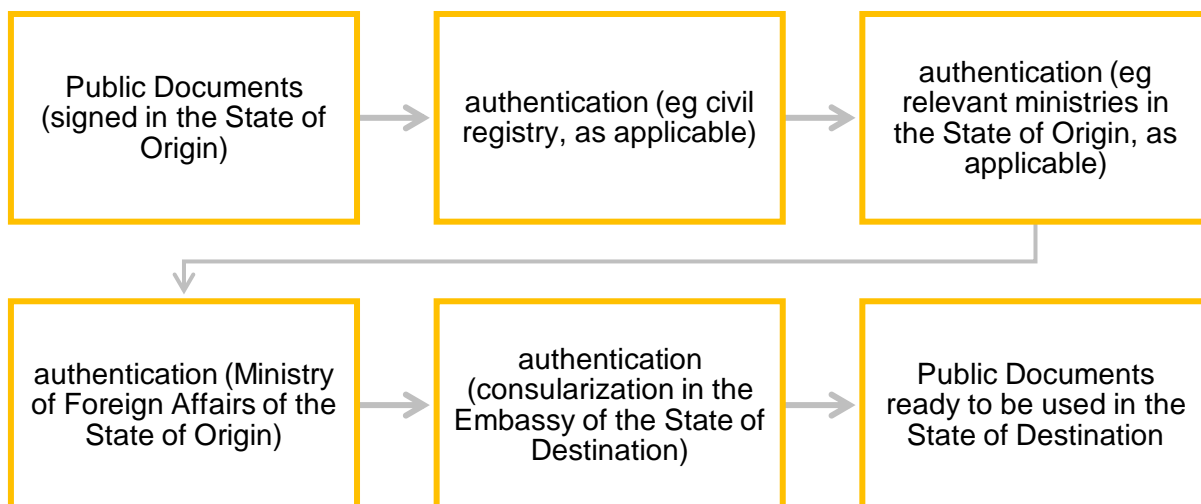
2 (two) types of Apostille Certificates can be issued by a Competent Authority:

- (i) Paper Apostilles
- (ii) Electronic Apostilles (e-Apostilles)

The Apostille Certificate must be attached to the public document by either being placed directly on the document or placed on a separate slip of paper (an “*allonge*”). An e-Apostille is usually issued in the PDF format and may be attached by incorporating the e-Apostille and electronic public document in a single PDF document. The e-Apostille can also be attached to the electronic public document file as a separate file.

The difference between the formalities before and after Indonesia’s ratification of the Apostille Convention can be seen in the charts below:

a) Before the ratification (the legalization process)



b) After the ratification (Apostille certification process)



III. The Apostille Certification Procedure for Foreign Public Documents Signed in Indonesia

Since the issuance of PR 2/2021 on 5 January 2021, the government has not yet issued an implementing regulation on the apostille certification procedure for foreign Public Documents signed in Indonesia. It is still unclear who the '*competent authority*' is that can issue Apostille Certificates in Indonesia.

IV. The Effect of an Apostille Certificate

According to the HCCH in its Apostille Convention Handbook, the effect of an Apostille Certificate is limited. An Apostille Certificate only certifies the authenticity of the signature on the Public Document; it does not certify the content of the underlying Public Document.

The Apostille Convention is silent on the expiry of an Apostille Certificate. Therefore, an Apostille Certificate may be deemed valid and effective for as long as it is identifiable and remains attached to the underlying Public Document. However, this does not prevent an authority in the state of destination setting a time limit for the effectiveness of an Apostille Certificate under its domestic laws.⁵

V. The admissibility of public documents signed overseas by Indonesian courts upon Indonesia's ratification of the Apostille Convention

The Apostille Convention does not in any way affect the right of the state of destination to determine the acceptance, admissibility and probative value of foreign public documents.⁶ Therefore, the admissibility of Public Documents is up to the courts.

⁵ Paragraph 28 of Apostille Convention Handbook

⁶ Paragraph 26 of Apostille Convention Handbook

Question 2: Are Powers of Attorney certified under the Apostille Convention acceptable to Indonesian courts?

According to Supreme Court ruling No. 3038K/Pdt/1981 dated 18 September 1986 a Power of Attorney signed outside of Indonesia must be legalized by the Indonesian embassy where the Power of Attorney was signed. This ruling has been referred to in many cases to address the acceptability of Powers of Attorney submitted to the court.

Although, arguably, a Power of Attorney certified under the Apostille Convention may be acceptable as long as it falls within the scope of "Public Documents" under the Apostille Convention as explained in Question 1. above, at the moment, we believe that for a Power of Attorney to be accepted by the Indonesian courts, the above Supreme Court ruling must be adhered to until the Supreme Court issues further clarification and guidance on this matter.

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