

**PROJET DE MANUEL PRATIQUE POUR LES RESPONSABLES DE DOSSIERS CONCERNANT  
LA CONVENTION RECOUVREMENT DES ALIMENTS DE 2007**

*établi par le Bureau Permanent*

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**DRAFT PRACTICAL HANDBOOK FOR CASEWORKERS UNDER  
THE 2007 CHILD SUPPORT CONVENTION**

*drawn up by the Permanent Bureau*

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de la Commission spéciale de novembre 2009 sur la mise en œuvre de  
la Convention de 2007 sur le recouvrement des aliments et  
du Protocole de 2007 sur la loi applicable*

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of the Special Commission of November 2009 on the implementation of  
the 2007 Child Support Convention and of  
the 2007 Protocol on Applicable Law*

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## Introduction

1. The *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* is an important step forward in the creation of a cost effective, accessible and simplified system for the international recovery of maintenance.
2. The caseworkers that manage cases, initiate and process applications, and work with other States to effectively enforce maintenance decisions, are at the heart of international maintenance establishment and enforcement. Their dedication and commitment to helping children and families ensures the successful operation of the Convention.
3. This Handbook is intended for those caseworkers. It has been written to assist caseworkers in all types of legal systems, whether they work in large States with complex information technology computer systems, managing hundreds of cases, or in small States with just a few cases. It addresses the issues and processes that will be encountered in dealing with any international cases.

### ***A. What this Handbook covers (and what it does not)***

4. This Handbook is intended to assist caseworkers in the actual management of cases under the Convention. Importantly, it is not a legal guide to the Convention, for lawyers, judges, decision makers or the courts. In addition, because it is a guide to only the international elements of Convention cases, it does not cover every aspect of the management of international cases. International cases will still be subject to domestic processes such as the procedures for enforcement.
5. The Convention was the result of negotiations spanning four years and involving more than 70 States. Many issues were discussed during the course of the negotiations, informing and shaping the Convention text that was ultimately agreed upon. Very detailed explanations of the Convention provisions and the history of the negotiations are contained in the comprehensive Explanatory Report on the Convention.<sup>1</sup> The Explanatory Report provides the legal basis and proper interpretation for each Convention provision.
6. This Handbook, in contrast, provides a practical and operational explanation of Convention processes and discusses the way that Convention cases will actually work in practice. Those persons requiring a legal interpretation of the Convention will need to consult the Explanatory Report, and over time, the case law that develops with respect to the interpretation of the Convention.
7. In addition, the operation of the Convention will necessarily be complemented by domestic practices for the management of maintenance cases, because, once transmitted by a State, the maintenance case becomes part of the domestic caseload of the other State and managed according to the domestic practices of that State. At its core, the Convention covers the interactions between States, and the flow of cases and information between them. It also contains procedures, for example, for how foreign maintenance decisions should be accepted in another State. On the other hand, procedures for making maintenance decision where the parties reside in different States and for the enforcement of that decision are governed by domestic law.
8. Thus, the Handbook does not provide answers or guidance for all matters concerning international cases. Domestic practice and domestic law in each State will determine, for example, the documents that are to be used to provide notice of

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<sup>1</sup> Explanatory Report – *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* – found at Hague Conference on Private International Law < [www.hcch.net](http://www.hcch.net) >.

Convention applications to the parties, or the form that a maintenance decision should take. Therefore, while the Handbook may be the first source of information for caseworkers concerning the practical operation of the Convention, it will always have to be supplemented by consideration of the domestic practice and law in each State.

## ***B. How the Handbook is structured***

9. The Handbook is not a book to be read from cover to cover or from beginning to end!

10. Instead it is divided into different parts, covering each type of applications or requests that can be made under the Convention. Since each application or request involves two States – a sending State called a requesting State and a receiving State called a requested State – there is a separate stand-alone chapter for each end of the application or request. The chapter dealing with “Outgoing” applications covers the procedures for the requesting State, and the chapter entitled “Incoming” application covers the procedures for the requested State.

11. Each chapter contains both a discussion of the application itself, when it might be used and case examples, as well as flowcharts and step by step procedures for managing the application or request. At the end of each chapter are references to additional materials, as well as Frequently Asked Questions (FAQs).

12. There are a number of matters that are common to all applications and requests, and rather than repeating these in each chapter, they are set out in the first part of the Handbook, in Chapters 1 through 3. These chapters include a brief explanation of each of the possible types of applications or requests, and then refer the reader to the appropriate chapter of the Handbook for the detailed explanation.

13. The introductory chapters also include a review of the scope of the Convention – what types of maintenance obligations are covered by the Convention and which ones are not – and explanations about the possible extensions or limitations to the scope of the Convention. Finally, there is a discussion of general issues such as the importance of protection of personal information and the provision of effective access and legal assistance in applications under the Convention.

14. Chapter 2 contains explanations for the most commonly used terms in the Handbook. These are not legal definitions. The Convention itself defines a number of the terms used, provides that “in its interpretation, regard shall be had to its international character and to the need to promote uniformity in its application”.<sup>2</sup>

15. The explanations in Chapter 2 are included to help caseworkers understand the language and intention of the Convention, in particular in those areas where the concepts or words used are quite different than those currently used in domestic law or practice. The individual chapters reference these explanations in the chapter text to assist caseworkers who must follow the Convention provisions.

16. Finally, the last Chapter of the Handbook contains instructions for filling out the recommended forms for applications and requests under the Convention.

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<sup>2</sup> Article 53.

### **C. How to use the Handbook**

17. If you are unfamiliar with Convention cases you should first review the next part of the Chapter – applications under the Convention. That will give you an explanation of the different application or requests that are available under the Convention and an indication as to which part of this Handbook you should refer to.

18. Then go to Chapter 3 and make certain that the maintenance matter falls within the scope of the Convention. If it does not – this Handbook and the Convention processes will not apply. If the matter is within the scope of the Convention, then go to the chapter for the particular application – and follow either the incoming or outgoing procedures.

### **D. Other sources of information**

19. The most comprehensive source of information concerning the text of the Convention is the Explanatory Report, referenced above. If you have a question about a Convention case that is not answered in this Handbook, you should look at the relevant article of the Convention, and then go to the corresponding section of the Explanatory Report. You will find a lot of technical questions that are not addressed in the Handbook are answered in the Explanatory Report. In addition to the Explanatory Report there are a significant number of preliminary documents and reports containing background information and technical information, that were referred to and relied upon during the negotiations leading up to the Convention. These reports can all be accessed on the website of the Hague Conference on Private International Law at < [www.hcch.net](http://www.hcch.net) >.

20. Questions relating to the internal laws and practices of another State in matters concerning maintenance can often be answered by referring to the Country Profile that a Contracting State has filed with the Permanent Bureau of the Hague Conference on Private International Law. The Country Profile contains information about enforcement measures, the basis upon which maintenance decisions are established, and limitations on modification, and whether administrative or judicial procedures are generally used for applications. The Country Profile also contains contact information and any special requirements from that State for applications under the Convention. Links to State websites or similar sources of information will also be found in the Country Profile. The Country Profile can also be found on the Hague Conference on Private International Law website.<sup>3</sup>

21. Finally, caseworkers should, of course, consult their own domestic practices and procedures materials, and where necessary, refer issues of legal interpretation to the proper legal resources, such as legal manuals or lawyers in their own State. As many States already have significant experience managing international maintenances cases, there is already a wealth of expertise in many States that can assist caseworkers needing help processing international cases.

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<sup>3</sup> Some States may choose not to use the recommended Country Profile form, however Article 57 requires every Contracting State to provide the same type of information to the Permanent Bureau. This information will also be available on the website of the Hague Conference on Private International Law as well.

## ***E. Some final advice***

22. As you work through applications under the Convention you will see a clear emphasis in the procedures on keeping the process simple, expediting applications and requests, utilising effective enforcement measures, and maintaining regular communications between the two States involved in the case. These are indeed the most important objectives of the Convention and are reflected in Article 1 of the Convention. If these objectives can be achieved in the implementation of the Convention, there will be a clear and lasting benefit to children and families around the world. It will be through the hard work and efforts of the caseworkers managing the cases that this will be achieved, and we hope that this Handbook will be a useful tool to make that happen.



## Chapter 1 – Overview of applications and requests under the Convention

23. This Chapter explains the types of applications and requests that can be made through a Central Authority under the Convention. It should be read in conjunction with Chapter 3, which provides essential information regarding the scope of the Convention and its application to any particular case.

24. The Chapter starts with an overview of the possible applications and requests that can be made under the Convention. It then provides some flowcharts for determining which application or request is appropriate under the Convention.

25. Please keep in mind that this Chapter is intended to provide a general overview of the different types of applications and requests only; more detailed information about each type of application or request is provided in the individual chapters. Therefore, the examples and flowcharts in this Chapter are necessarily limited to the most common uses of the applications or requests and do not go into the level of detail provided in the individual chapters of the Handbook.

26. Once you have identified the type of application or request that is being made, you can go to Chapter 3 to determine whether the application or request falls within the scope of the Convention, and then proceed to the specific chapter of the Handbook that deals with the particular type of application or request that is being made. Chapter 2 contains explanations of the key terms used in the Handbook.

The **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention. These duties are set out in Chapters II and III of the Convention.

### I. Description of applications and requests under the Convention

27. This part provides a basic overview of the different types of applications (recognition, recognition and enforcement, enforcement, establishment, and modification) and requests (request for specific measures) that are available under the Convention and when each one might be used. It outlines the types of factors that will impact whether an application or request can be made.

#### A. Overview of applications under the Convention

28. The types of applications that may be initiated under the Convention are set out in Article 10. These applications are available to persons (or a public body in some cases) in the following situations:

**Tip:** Throughout this Handbook you will see a distinction made between **requests** and **applications**. An application is an action under the Convention that goes through a Central Authority, such as an application for recognition and enforcement. A direct request (referred to in the Handbook as a **request**) is an action that goes directly to a competent authority, such as a request for establishment of spousal support, where neither of the Contracting States has extended the application of the Convention to those requests.

Keep in mind however that a **Request for Specific Measures** under Article 7 is an exception to this rule. Those Requests go through a Central Authority. See Chapter 13.

<b><i>Situation</i></b>	<b><i>Type of application available under the Convention</i></b>
An applicant who has a maintenance decision from the requested State, and wants it enforced in that State	An application for enforcement
An applicant who has a decision from a contracting State and wants it recognised or enforced in another State	An application for recognition or recognition and enforcement
An applicant who does not yet have a maintenance decision where the respondent resides in another Contracting State.	An application to establish a maintenance decision
An applicant who has a maintenance decision but requires a new decision because there are difficulties in recognising or enforcing the existing decision in another Contracting State	An application to establish a maintenance decision
An applicant who has a maintenance decision from a Contracting State but wants to modify it, and the respondent (the other party) resides in another Contracting State	An application for modification

**Figure 1: Table of applications**

29. As shown in Figure 1 above, there are four general types of applications that can be made under the Convention. Within these broad categories, there are several different outcomes that may be sought. The four general types are:

- application for recognition or recognition and enforcement of an existing maintenance decision
- application for enforcement of a maintenance decision made in the requested State
- application for establishment of a maintenance decision, including the establishment of parentage if necessary
- application for modification of an existing maintenance decision.

## **1. Application for recognition or recognition and enforcement**

30. This application will be used when the applicant already has a maintenance decision and would like a State other than the one where he or she lives, to recognise or recognise and enforce that decision. The recognition process eliminates the need for the applicant to apply in the requested State for a new decision. Instead, the recognition process allows the existing decision to be enforced in the other State on the same basis as if it had been originally made in that State. Both States must be Contracting States to the Convention.

A **maintenance decision** sets out the obligation of the debtor to pay maintenance and may also include automatic adjustment by indexation and the requirement to pay arrears of maintenance, retroactive maintenance or interest and a determination of costs or expenses.

Both States must be Contracting States to the Convention.

**a) When this application will be used:**

31. In most cases, an applicant will want a decision recognised and enforced in order to have the maintenance payments collected and enforcement proceedings started where necessary. In some cases an applicant will only request recognition. For example, a debtor may request recognition only of a foreign decision in order to limit or suspend the enforcement of payments under a different decision, or a creditor may ask for recognition only, where he or she intends to use private means of enforcement.

**b) An example:**

32. J has a decision from Country A requiring her former husband to pay maintenance for her three children. Her former husband lives in Country B. J would like her maintenance decision enforced. Both Country A and Country B are Contracting States.

A **competent authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement programme or any other government entity that performs some of the tasks associated with the Convention.

33. The Central Authority in Country A will transmit an application for **recognition and enforcement** of the decision to Country B. The Central Authority in Country B will send the decision to a competent authority to be registered for enforcement or declared enforceable. The former husband will be notified about the recognition of the decision and will have an opportunity to challenge the recognition of the decision. Once the decision has been recognised, if the former husband does not pay the maintenance voluntarily, a competent authority in Country B will take the necessary steps to enforce the decision and forward the payments to Country A.<sup>4</sup>

*Applicable Article of the Convention – Article 10(1) a) and 10(2) a)*

*See Chapter 4, Outgoing applications for recognition and enforcement and Chapter 5, Incoming applications for recognition and enforcement*

## **2. Application for enforcement of a decision made or recognised in the requested State**

34. This is the simplest of all applications under the Convention. The application requests that a Contracting State enforce its own decision and assist in transmitting payments to a creditor.

35. The difference between this application and the application for recognition and enforcement, described above, is that the decision that is to be enforced was made or has already been recognised in the State that will be enforcing the decision (the requested State). Therefore the decision does not need to be recognised before it can be enforced.<sup>5</sup>

**a) When this application will be used:**

36. This application will be made where the applicant has a maintenance decision made in the State where the respondent resides or has assets or income. The applicant can request that State to enforce its own decision. The applicant does not need to go to the State that made the decision to make that request. Instead the Central Authority in the State where the applicant resides will transmit the application for enforcement of the

<sup>4</sup> The Central or competent authority is required under the Convention to “facilitate” enforcement and the collection and transfer of payments. The steps taken in each State to do this will be different. See Chapter 10 on enforcement of maintenance decisions.

<sup>5</sup> As discussed in Chapter 4, in order for a decision to be recognised and enforced in the requested State it must have been made in a Contracting State (see Explanatory Report, para. 240). If the decision is from a non-Contracting State, the only application that is available under the Convention is an application for enforcement, which requires the requested State to have already recognised the decision, either through another treaty or domestic law.

decision to the requested State. Both States must be Contracting States to the Convention.

**b) An example:**

37. S resides in Country A and has a maintenance decision from Country B where the father of her child resides. She would like Country B to enforce the maintenance decision. Both Country A and Country B are Contracting States.

38. Under the Convention, S can request the Central Authority in Country A to transmit an application for enforcement on her behalf to Country B. S will not have to apply for recognition of the decision, as it is from Country B. The Central Authority in Country B will process the application and forward it to the competent authority in Country B for enforcement.

The **requesting State** is the State where the applicant resides and where an application or request under the Convention is initiated.

The **requested State** is the State that receives the application and that is being asked to process the application or request. It is usually the State where the respondent resides.

*Applicable Article of the Convention: Article 10(1) b)*

*See Chapter 6, Outgoing applications for enforcement and Chapter 7, Incoming applications for enforcement*

### **3. Application for establishment of a maintenance decision**

39. This application will be used to obtain a decision that provides for maintenance for the applicant, his or her children or for other persons<sup>6</sup>. The applicant will ask the Central Authority in the State where he or she resides to transmit an application on his or her behalf to the Central Authority of the State where the debtor resides for the decision to be made, including a determination of parentage if required.<sup>7</sup> Both States must be Contracting States to the Convention.

**a) When this application will be used:**

40. The application will be used where no maintenance decision exists or where the applicant does have a maintenance decision, but for some reason it cannot be recognised or enforced in the State where the debtor resides or where the enforcement is to take place.

**b) An example:**

41. T resides in Country D and has a four year old child. She was never married to the father of the child, and paternity has not been established for the child. The father of the child has now moved to Country E. She would like the father to start paying child support for the child. Both Country D and Country E are Contracting States.

42. Under the Convention, the Central Authority in Country D will transmit an application for **establishment of a maintenance decision** for the child to the Central Authority in Country E. The Central Authority in Country E will take the necessary steps to initiate the application to have a decision established, usually by referring the application to a competent authority. The competent authority in Country E will facilitate testing to establish parentage and contact will be made with the mother directly or through the Central Authority in Country D, so that the mother and child can be tested. Once the maintenance decision is established in Country E, the competent authority in

<sup>6</sup> An establishment application can only be made for "other persons" if the scope of the Convention has been extended to those other persons. See the scope discussion in Chapter 3.

<sup>7</sup> Article 10(3) provides that the application will be decided according to the laws of the requested State, and its jurisdictional rules will also apply. See Explanatory Report, para. 248.

Country E will ensure that it is enforced if necessary and payments will be transmitted to the mother in Country D without the need for further application by the mother.<sup>8</sup>

*Applicable Article of the Convention – Article 10(1) c) and d)*

*See Chapter 8, Outgoing applications of establishment of a decision and Chapter 9, Incoming applications for establishment of a decision*

#### **4. Application for modification of an existing decision**

43. This application will be used where a maintenance decision exists but one of the parties wishes to have it modified.

##### **a) When this application will be used:**

44. An application for modification may be made because the needs of the creditor or the children have changed, or the ability of the debtor to pay maintenance has changed. The applicant (either creditor or debtor) will ask the Central Authority in the State where he or she resides to transmit an application for modification to the State where the other party resides (or where the application is to be made). If allowed under the law of the requested State, the decision will be modified or a new decision made.<sup>9</sup> The modified decision may then need to be recognised if it is made in a State other than the State where it is to be enforced.

45. The Convention does not cover all situations where a person in an international maintenance case wishes to modify an existing decision. In many situations, no application under Article 10 of the Convention will be made and the applicant will make the request for modification directly to a competent authority in his or her home State, or in the State where the decision was made. However, the Convention does provide mechanisms for transmitting applications where a person chooses, or is required to initiate an application in one Contracting State and to have the proceedings completed in another Contracting State.<sup>10</sup>

##### **b) An example:**

46. J has a maintenance decision from State A requiring her former husband to pay child support for his two children. J has moved to State B. The decision is being enforced in State A. J would like an increase in maintenance because her former husband's income has increased since the decision was made.

47. If J chooses to make an application for modification under the Convention, the Central Authority in State B will forward an application for **modification of an existing decision** on behalf of J to the Central Authority in State A. The former husband will be notified and the matter heard in State B. The modified decision can be enforced in State A once it has been made.

*Applicable Article of the Convention – Article 10(1) e) and f), 10(2) b) and c)*

*See Chapter 11, Outgoing applications for modification and Chapter 12, Incoming applications for modification.*

<sup>8</sup> See Explanatory Report, para. 108, regarding the use of the term "facilitate".

<sup>9</sup> See Article 10(3). The application will be decided according to the laws of the requested State, including jurisdictional rules.

<sup>10</sup> See Chapters 11 and 12. There are restrictions contained in the Convention that may impact the ability of a debtor to successfully modify an existing decision, in particular where the creditor resides in the State where the decision was made.

## **B. Request for specific measures**

48. In addition to the four types of applications available under the Convention, the Convention also provides for certain additional requests to be made to a Central Authority where an applicant has not yet made an application. These are known as Requests for Specific Measures. The provision of assistance in response to a request is discretionary, and the requested State will determine what measures will be undertaken in response.

49. Article 7 sets out six possible requests that can be made through a Central Authority to another Central Authority. A request may be made to:

1. help locate a debtor or creditor
2. help obtain information about the income and financial circumstances of the debtor or creditor, including information about assets
3. facilitate in the obtaining of documents or evidence
4. provide assistance in establishing parentage
5. initiate or facilitate the obtaining of provisional measures pending the completion of the maintenance application
6. facilitate the service of documents.

### **a) When a request for specific measures will be made:**

50. A request for specific measures will be made when an applicant requires a limited type of assistance to assist in bringing an application for recognition, enforcement, establishment or modification under the Convention. The assistance may also be requested to determine whether an application should be initiated or assistance may be sought in the course of a domestic maintenance proceeding where that maintenance matter has an international element.

### **b) An example:**

51. N lives in State A and has two children. She is divorced from the father of the children and has a maintenance decision requiring him to pay support. She believes the father may be living in either State B or State C as he has relatives in both countries. She wants to have her decision enforced but does not know which State to send it to.

52. Under the Convention, the Central Authority in State A can make a request to the Central Authorities in State B or State C to help locate the father. A request for Specific Measures will be made, indicating that N would like to submit an application for recognition and enforcement of the decision, once the father / respondent has been located. The Central Authority in State B or State C will confirm whether the respondent can be located in the State so that State A can then forward the package to the appropriate Central Authority.

*Applicable Article of the Convention: Article 7*

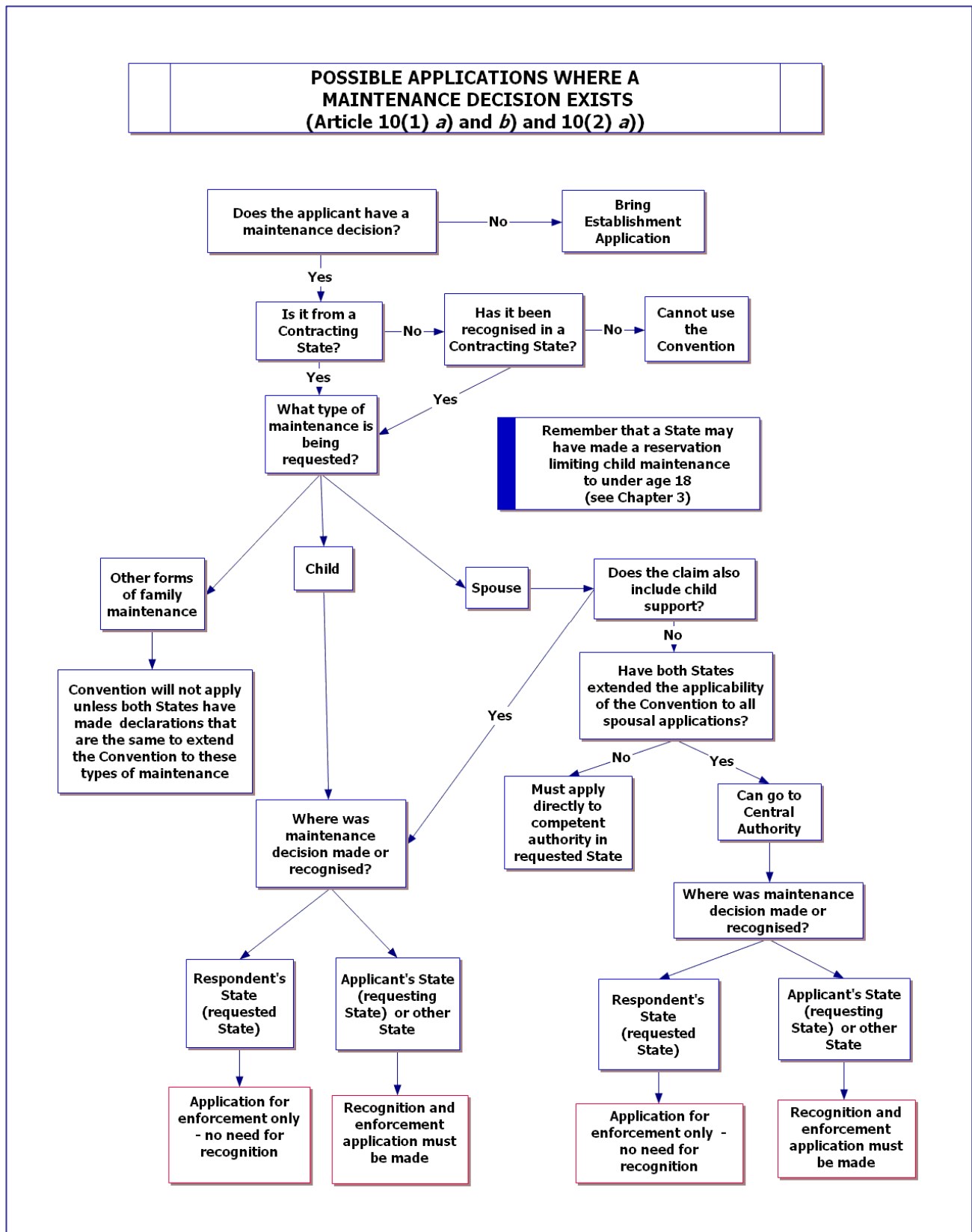
*See Chapter 13, Outgoing requests for specific measures and Chapter 14, Incoming requests for specific measures.*

## **II. Determining the type of application**

53. Determining what type of application is involved in any particular situation is fairly straight-forward. The following series of flowcharts illustrates the different options.

54. Please keep in mind that the information in this section is necessarily very general. Through the use of reservations and declarations, a State can specify the scope of the application of the Convention in that State. A State may, for example, make a reservation limiting the application of the Convention to children under the age of 18 years. This would affect the way that particular State would handle recognition and enforcement applications concerning children over 18. This is discussed in detail in Chapter 3.

## 1. Where there is already a decision in place



**Figure 2: Possible applications where maintenance decision exists**



## 2. Where there is no decision or no enforceable decision

55. The next flowchart illustrates the options where no maintenance decision exists, or where the decision cannot be recognised or enforced, possibly because of a reservation under the Convention.

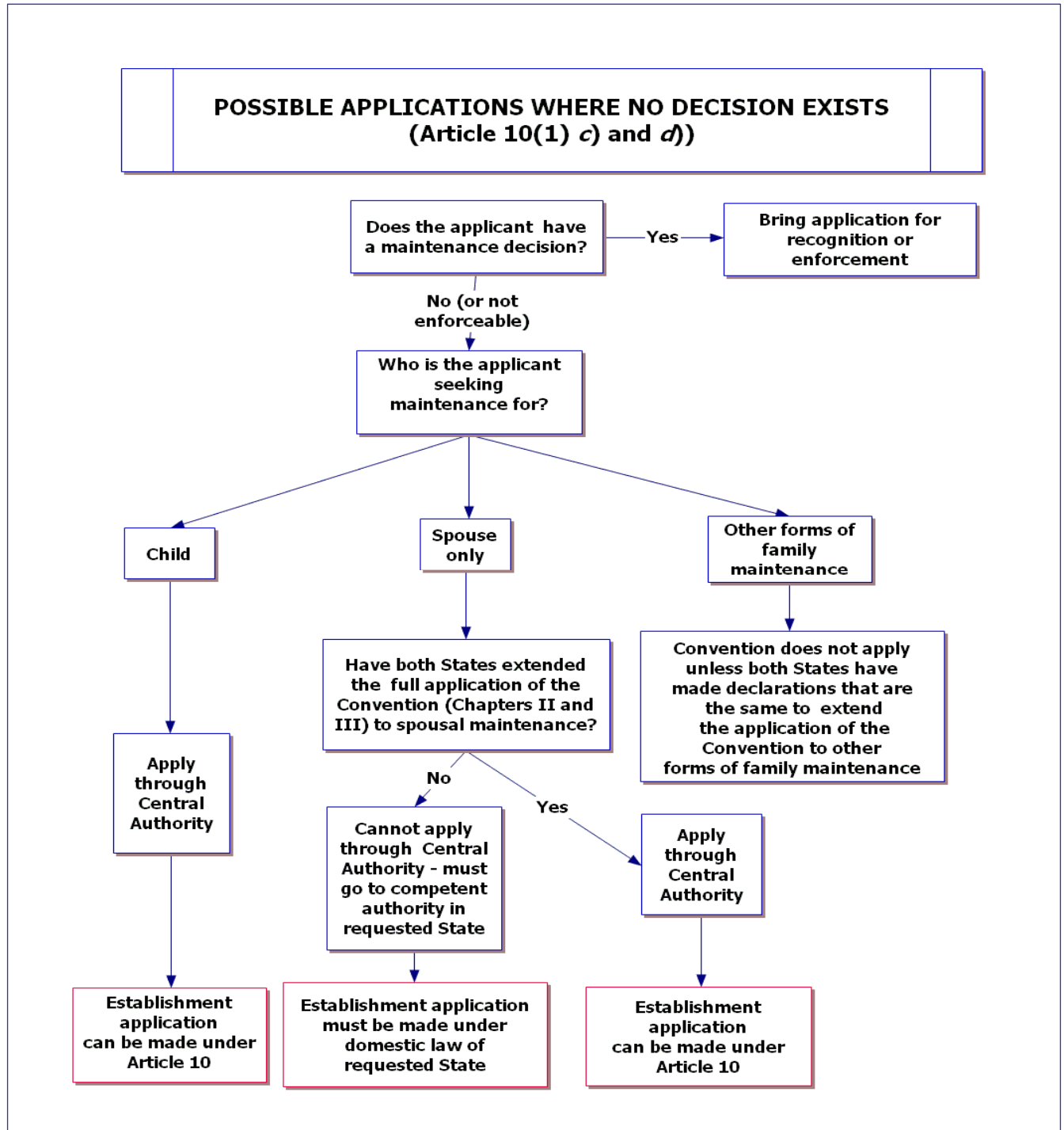
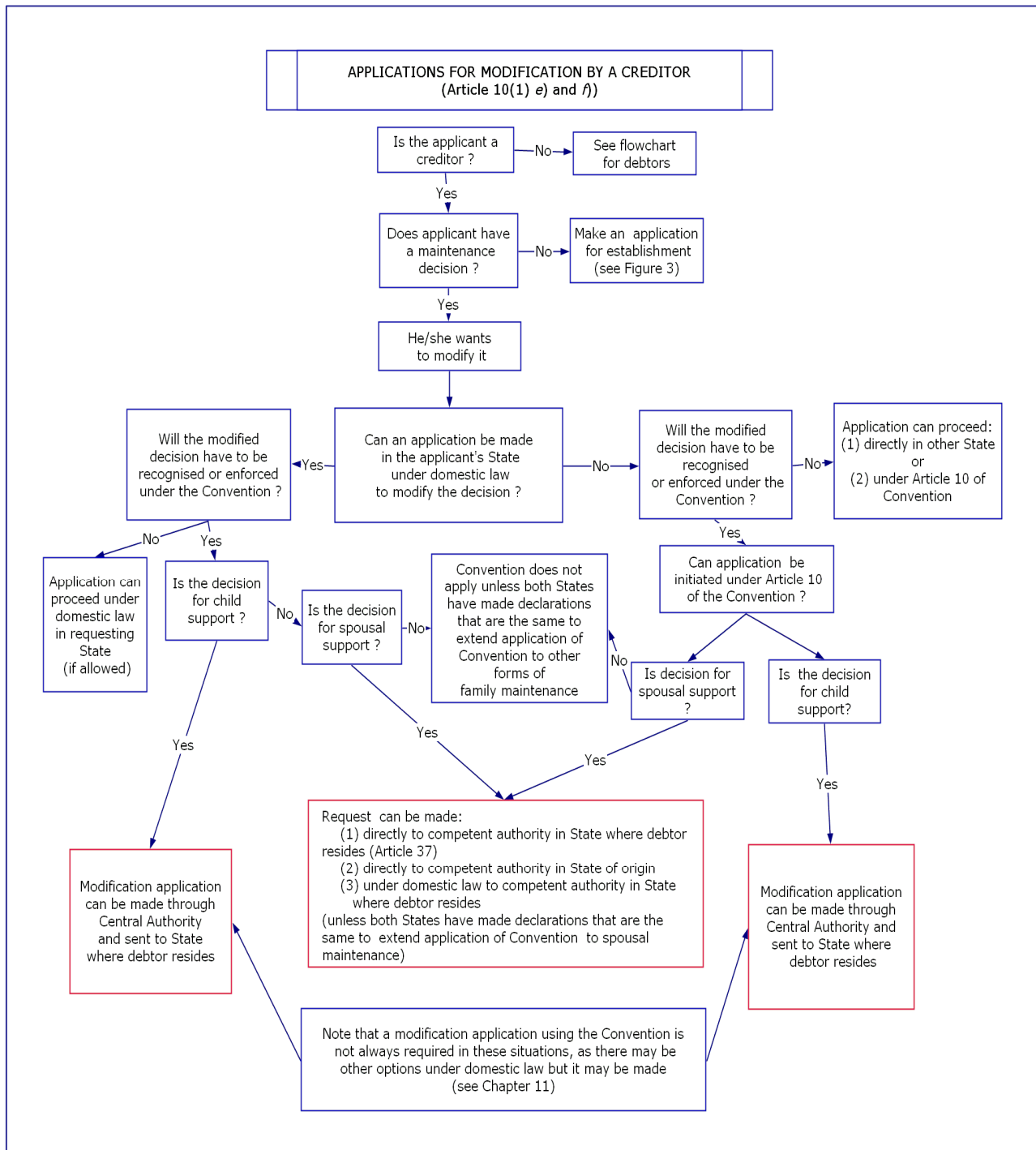


Figure 3: Possible applications where no maintenance decision exists

### **3. Where the applicant wants the decision modified**

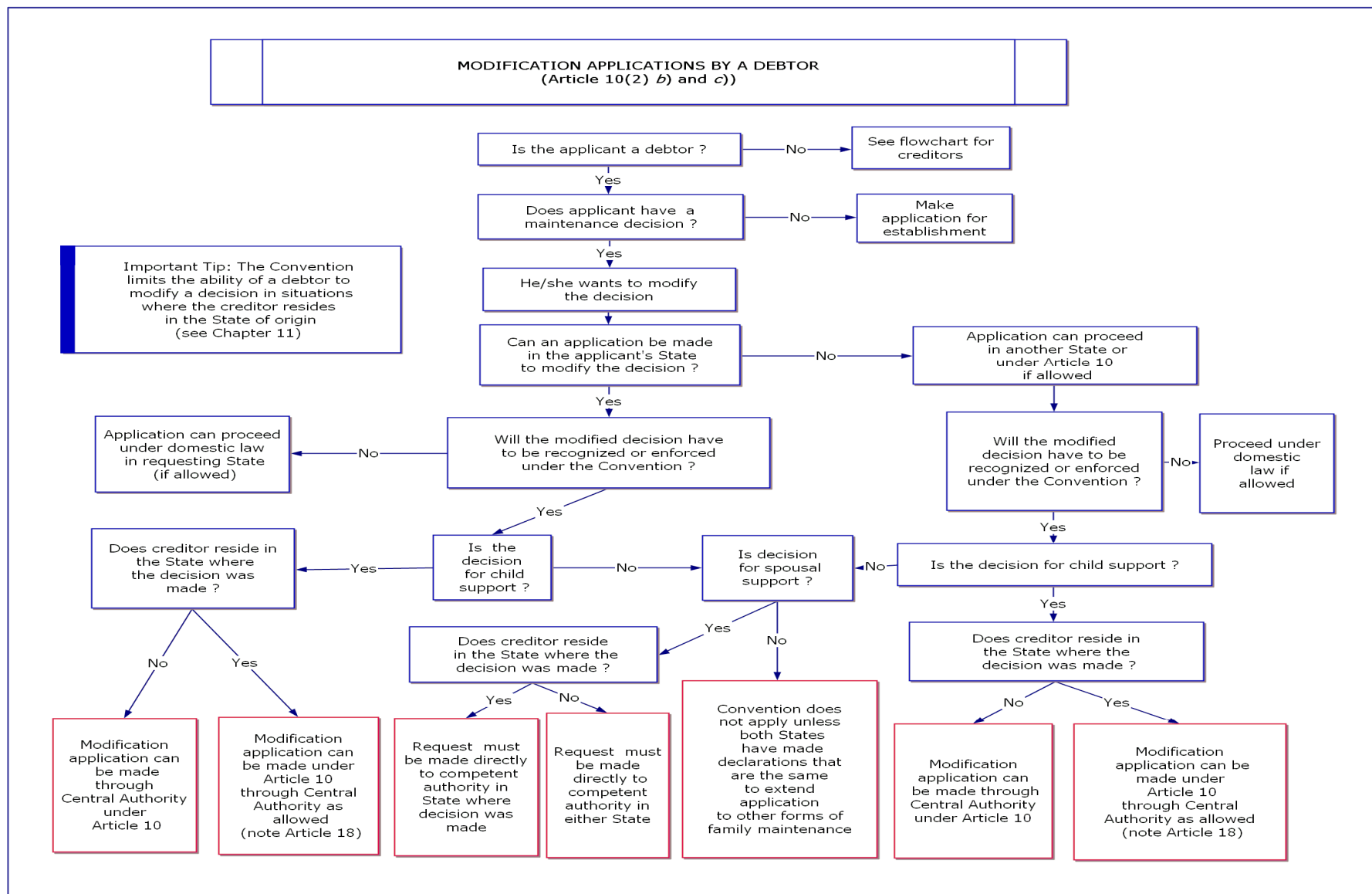
56. In some cases the applicant may need to modify the decision, in order to ensure that it reflects the changed circumstances of the parties or the child. The process will be slightly different depending upon whether it is the debtor or the creditor initiating the modification.

57. The flowchart on the next page illustrates the process where the creditor would like to initiate the modification.



**Figure 4: Applications for modification made by creditor**

58. The flowchart on the next page illustrates the process where the debtor would like to initiate the modification. As can be seen, there are some differences in the application, since there is a preference for the modification application to be heard in the State where the decision was made, if the creditor resides in that State.



**Figure 5: Applications for modification made by debtor**

#### 4. Where the applicant requires some assistance

59. In some situations, the applicant will require some assistance from a Central Authority before bringing an application under the Convention. Additional information, documents, or proof of parentage may be necessary before the application under the Convention can be initiated. The Convention also allows a request to be made by an applicant in a domestic maintenance matter to a Central Authority for assistance, where there is an international element to the domestic maintenance case. These requests are covered by Article 7. The flowchart below illustrates the process for such requests.

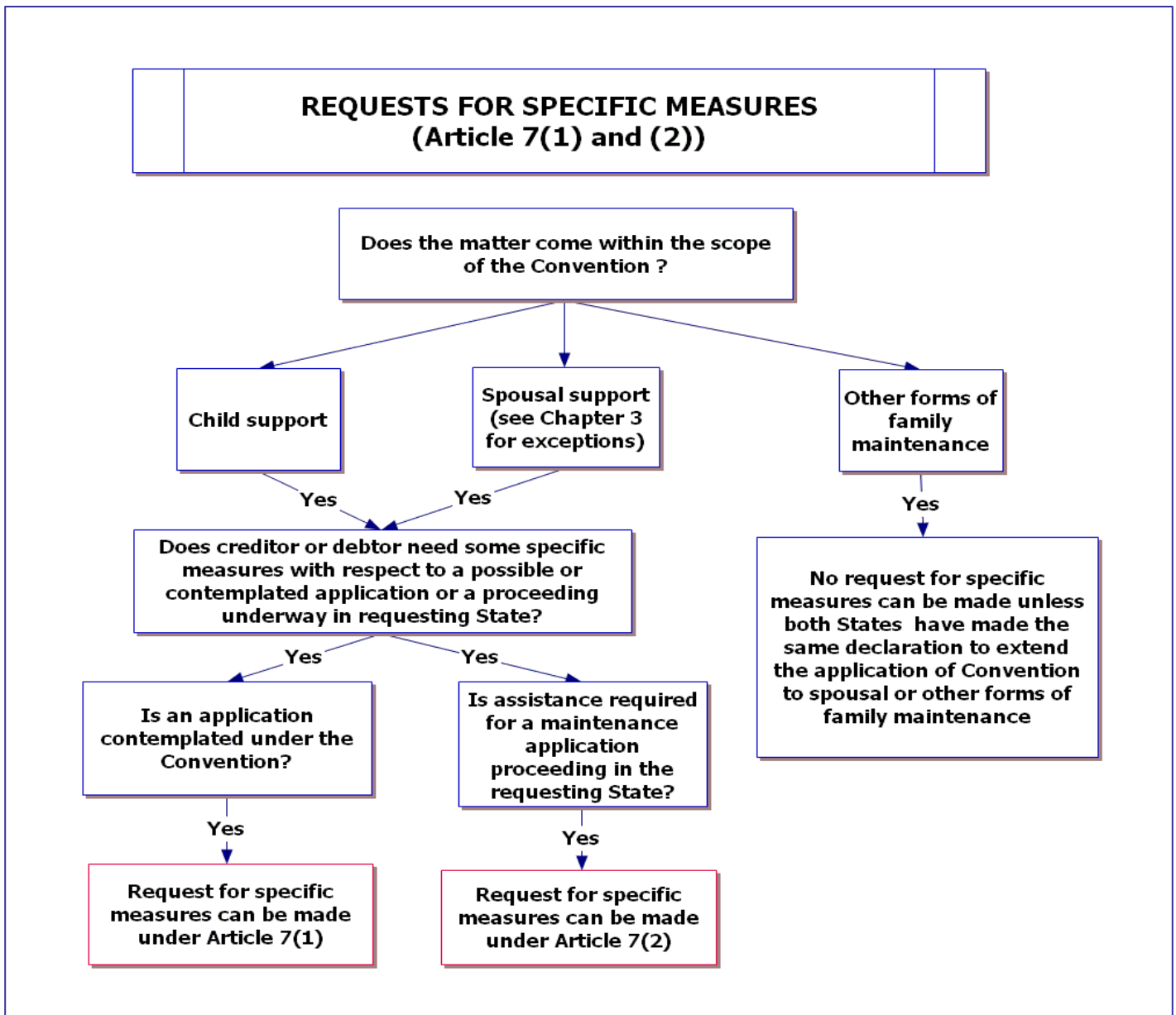


Figure 6: Requests for specific measures

## Chapter 2 – Explanation of terms

### A. *The purpose of this Chapter*

60. The specific terms used in the Convention are the result of four years of negotiations and discussion. A few of the terms used in the Convention are defined in the Convention itself. However, many others are not and the meaning of the term may depend upon the internal law of the State where the maintenance proceeding is taking place.

61. For example, there is no definition of the term enforcement. That term is used throughout the Convention, but it was felt that the Convention did not need to provide a definition because the meaning of the term is generally well agreed upon in States dealing with maintenance obligations, and because one of the important underlying principles of the Convention is that it should be interpreted in a broad and liberal way.<sup>11</sup>

62. In practice therefore, whether a particular action constitutes enforcement will be determined by the competent authority responsible for enforcement of the decision. Note however that the Convention does suggest that certain measures may be taken to enforce a decision, thereby providing guidance as to what actions are generally considered enforcement. Similarly, the meaning of the term spouse, for the purpose of determining whether the maintenance is spousal maintenance, will be decided by the competent authority making the decision (in the case of establishment of a decision) or the competent authority dealing with the request for recognition (if recognition and enforcement of a decision is requested).

63. This Chapter is not intended to provide legal or definitive definitions for the terms used in the Convention. Instead, it provides a glossary or explanation of the terms used in the Handbook, and explains their meaning ***in the context of the operational processes*** used for Convention cases, so that those not familiar with international maintenance cases will be able to better follow the procedures. In all cases, where there is any doubt as to the proper legal meaning of a particular word or term used in the Convention, the Explanatory Report and sources of international or domestic law should be consulted.

### B. *Terms used in this Handbook*

#### **Accession**

64. Accession is one of the processes that may be used by a State to become a Contracting State to the Convention.<sup>12</sup> Article 60 sets out when the Convention comes into force (three months after the deposit of the second instrument of ratification, acceptance or approval) and when it comes into effect in a specific Contracting State. The Hague Conference website shows which States have become Contracting States to the Convention.

*See Articles 58 and 60.*

#### **Administrative authority**

65. In some States, maintenance matters are decided by an administrative authority, (sometimes called a Child Support Agency), that is set up by the government specifically to assist in obtaining, enforcing and modifying maintenance decisions.<sup>13</sup>

<sup>11</sup> See the discussion in the Explanatory Report, paras 60 – 65.

<sup>12</sup> Explanatory Report, para. 690.

<sup>13</sup> Explanatory Report, para. 432.

66. Article 19(3) defines an administrative authority to be a public body whose decisions meet the two criteria set out in that article. The decisions must be able to be subject to an appeal or review by a judicial authority in that State and the decisions must be of the same force and effect as a decision of a judicial authority on the same matter.

*See Article 19(1) and 19(3)*

### **Appearance**

67. This term is used to refer to the attendance or presence of a person at some type of hearing. Depending upon the laws and procedures of a State, an appearance by a person or party may include attending the hearing in person or participating in the hearing by telephone or other electronic means. A person may also “appear in a proceeding” by having a lawyer or other representative attend or make representations on his or her behalf. Whether a party appeared in a proceeding to establish a decision is relevant under the Convention in order to determine whether a Statement of Proper Notice needs to be included with an application for recognition and enforcement of a decision.

*See Article 25 and Article 29*

*See also Statement of Proper Notice*

*Handbook reference – Chapters 4 and 5*

### **Applicant**

68. In the Handbook, the applicant is the person or government authority (“public body”) making the request to a Central Authority, for one of the applications under Article 10 (recognition, recognition and enforcement, enforcement, establishment or modification).

69. In some places in the Convention, an applicant can also be the person or party in a judicial proceeding who has initiated an appeal. For example, in Article 23(6) the applicant is the person who is appealing the decision to register a decision for enforcement or declare a decision enforceable.

70. An applicant can be a creditor or a debtor. For the purposes of some applications, a creditor includes a public body.

*See Articles 7, 10, 36 and 37.*

*Handbook reference – Chapters 1 and 3*

### **Applications and requests**

71. Throughout this Handbook and the Convention, a distinction is made between “*applications*” and “*requests*”. The term application refers to the applications made to a Central Authority under Article 10. Under that Article, an application may be made for recognition, recognition and enforcement, enforcement, establishment or modification.<sup>14</sup>

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<sup>14</sup> Explanatory Report, para. 252.



72. A request (also called a Direct Request in the Handbook) is not made through a Central Authority. A Direct Request is a request received by a competent authority, such as a court or an administrative authority, directly from an individual. It is made outside Article 10. For example a request will be made directly to a competent authority for recognition of a decision for spousal maintenance only.

73. Article 7 which allows for requests for Specific Measures is an exception to this general distinction. Although Specific Measures fall outside Article 10, the request is still made by a Central Authority to another Central Authority.

*See Articles 7, 10 and 37*

*Handbook reference – Chapters 1 and 3*

### **Authentic instrument**

*See maintenance arrangement*

### **Central Authority**

74. The Central Authority is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention. These duties are set out in Chapters II and III of the Convention.<sup>15</sup>

75. In the case of federal States, or States with autonomous units, there may be more than one Central Authority.<sup>16</sup> The Central Authority will transmit applications to other States and generally deal with the flow and processing of applications. Many of the responsibilities of the Central Authority may, to the extent permitted under the law of its State, be carried out by public bodies, for example a Child Support Agency, within a State, under the supervision of the Central Authority.

*See Articles 4, 5, 6, 7, 8*

### **Competent authority**

76. A competent authority is the public body or person in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement agency or any other government entity that performs some of the tasks associated with the Convention. In some States, the Central Authority may also be the competent authority for all or certain duties under the Convention.

*See Article 6.*

### **Contracting State**

77. A Contracting State is a State that is bound by the Convention because it has completed the ratification, acceptance, or approval process set out in Article 58.

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<sup>15</sup> Explanatory Report, para. 85.

<sup>16</sup> Explanatory Report, para. 89.

78. The term State is frequently used in this Handbook. It generally refers to a sovereign State, or country, and not to a sub-unit of the State, or territorial unit such as a province, or a state within the United States of America. However, there are situations where the term State also has to be read to mean the territorial unit. This is provided for in Article 46. For example, a reference to the competent authority in State where a decision was made may be construed or interpreted as referring to a judicial or administrative authority in the particular territorial unit.<sup>17</sup>

*See Articles 46 and 58*

### **Convention**

79. The term Convention is used in the Handbook to refer to the 2007 *Convention on the International Recovery of Child Support and Other forms of Family Maintenance*.

### **Country Profile**

80. Under Article 57 of the Convention, each Contracting State must submit to the Permanent Bureau of the Hague Conference on Private International Law, certain information about its laws, procedures and the measures that it will take to implement the Convention, including a description of the way the State will deal with requests to establish, recognise and enforce maintenance decisions.<sup>18</sup>

81. The Country Profile recommended and published by the Hague Conference on Private International Law may be used by a Contracting State as a means of providing this information. The Country Profile will also indicate what reservations or declarations a State has made under the Convention and any State-specific documents or requirements for applications.

82. The use of the Country Profile is not mandatory. However, a State that does not use the Country Profile must still provide the information required under Article 57 to the Permanent Bureau of the Hague Conference on Private International Law.

83. Both the Country Profile and any information supplied by a Contracting State under Article 57 are available on the website of the Hague Conference on Private International Law at < [www.hcch.net](http://www.hcch.net) >.

*See Article 57*

### **Creditor**

84. A creditor is defined in Article 3 as the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer. A creditor can be either the person who is seeking maintenance for the first time (for example in an application for establishment) or the person who will benefit from maintenance under an existing decision.<sup>19</sup>

85. If the scope of the Convention is extended by a Contracting State to other forms of family maintenance, including vulnerable persons, a creditor could be any other person entitled to that type of family maintenance.

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<sup>17</sup> See Explanatory Report, para. 638.

<sup>18</sup> See Explanatory Report, para. 683.

<sup>19</sup> See Explanatory Report, para. 66.

86. Article 36 provides that for some sections of the Convention, the term creditor includes a public body. A public body can only be a creditor for the purpose of an application for recognition or recognition and enforcement, or for establishment of a new maintenance decision where recognition of an existing decision was refused for the reasons set out in Article 20(4).

*See Articles 3, 10 and 36*

*Handbook reference – Chapter 3*

### **Debtor**

87. A debtor is defined in Article 3 as the individual who owes or is alleged to owe maintenance. The debtor may be a parent, or a spouse or anyone else who, under the law of the place where the decision was made, has an obligation to pay maintenance. In some States this person is called a maintenance payor, an obligor, or a non-custodial or non-resident parent. A public body, such as a social services agency, cannot be a debtor.

88. If the scope of the Convention is extended by a Contracting State to other forms of family maintenance, a debtor can also be any person that owes or is alleged to owe that form of family maintenance.

*See Articles 3 and 10*

*Handbook reference – Chapter 3*

### **Decision**

89. The term decision is defined in the Convention for the purpose of applications for recognition and enforcement, enforcement and some types of requests to competent authorities.

90. A decision sets out the obligation of the debtor to pay maintenance and may also include automatic adjustment by indexation and the requirement to pay arrears of maintenance, retroactive maintenance or interest and a determination of costs or expenses.<sup>20</sup>

91. For example, a decision that can be the subject of recognition and enforcement could be the type of decision that are commonly made by a judicial authority and contained in a judgement or order of the court. Decisions of an administrative authority are also specifically included in the scope of a decision, providing that they meet the criteria set out in Article 19(3). Therefore assessments made by a Child Support Agency in an administrative system will also come within the scope of the Convention, providing they meet these criteria.

*See Articles 3 and 19*

### **Declaration**

92. A Declaration is a formal statement made by a Contracting State with respect to certain Articles or requirements under the Convention. Declarations are provided for in Article 63. For example, a State may make a Declaration that the entire Convention will apply to spousal support, as set out in Article 2(3). Declarations may be made at the time a State enters into the Convention, or at any time afterwards. Declarations can also be modified or changed.

*See Article 63*

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<sup>20</sup> See Explanatory Report, paras 434 – 437.

**Declaration of Enforceability**

93. A declaration of enforceability is one of the mechanisms that may be used in some States to recognise or recognise and enforce a decision. A declaration of enforceability is different than a statement of enforceability which is a document stating that a decision is enforceable in the State of origin, and which must be included in the package of documents for an application for recognition or recognition and enforcement.

*See Articles 23(2) and 25(1) b)*

*Handbook reference – Chapters 4 and 5*

**Establishment of a decision**

94. This term is used to refer to the process of obtaining a maintenance decision, where either no maintenance decision exists or the maintenance decision that does exist cannot be recognised or enforced for some reason. Establishment may include a determination of parentage, if that is required in order to make the maintenance decision.

*See Article 10*

*Handbook reference – Chapters 8 and 9*

**Establishment of parentage**

95. An establishment of parentage involves a finding as to the biological or legal parentage of a child for the purposes of maintenance. Under the Convention, the determination of parentage is often sought in connection with an application for establishment of a maintenance decision, although it can also be the subject of a request for Specific Measures under Article 7.<sup>21</sup> Although parentage may be established by genetic testing, it can also be determined as a matter of law by presumptions such as the marriage or co-habitation of the parties before the birth of the child, or by an admission or acknowledgement of parentage by the parent.

*See Articles 7 and 10*

*Handbook reference – Chapters 8 and 9*

**Ex-officio review**

96. An *ex-officio* review is a form of review that may be carried out by a competent authority on its own initiative in proceedings for recognition or recognition and enforcement. The review is provided for in Article 23(4) and in Article 24(4).<sup>22</sup> Neither of the parties is entitled to make submissions on the review.

97. Unless the requested State has made a declaration to use the process set out in Article 24, the *ex-officio* review under Article 23 may consider whether registration of the decision for enforcement or making a declaration of enforceability would be manifestly incompatible with public policy.

98. If the Article 24 alternative process is used, the *ex-officio* review will be slightly different as there are additional grounds for the competent authority to consider.

*See Chapter 5 for a full discussion of this process.*

*See Articles 12(8), 23(4) and 24(4)*

*Handbook reference – Chapters 4 and 5*

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<sup>21</sup> See Explanatory Report, para. 174.

<sup>22</sup> See Explanatory Report, para. 500.

**Garnishment**

99. Garnishment is the interception by the enforcement authority of funds that would otherwise be payable to a debtor. A garnishment notice or order requires the person or organisation that would have paid those funds to the debtor to instead pay them to the enforcement authority for the benefit of the maintenance creditor. In some States a garnishment is called an attachment or an interception of funds.

*See Article 34*

*Handbook reference – Chapter 10*

**Habitual residence**

100. The term habitual residence is not defined in the Convention.<sup>23</sup> It is used in a number of Articles of the Convention in connection with whether a decision can be recognised or enforced. The individual facts in each case will determine whether a person is habitually resident in a State. A determination of habitual residence may be based on facts such as where the person resides, where the person has his or her primary (or main) residence, where he or she works or goes to school. Mere presence in a State will not be sufficient to establish habitual residence.

*See Article 20(1) a)*

*Handbook reference – Chapter 5*

**Jurisdiction**

101. In a challenge or appeal of the decision to recognise or recognise and enforce a decision, a respondent may suggest that the bases for recognition and enforcement, as set out in Article 20 are not met. Those bases for recognition and enforcement, and the reference to jurisdiction in that context, concern the connections that are required between the parties and the State where the decision maker is located. For example, a court may have the jurisdiction to make a maintenance decision if both parents reside in that State. Therefore a decision made on that basis can be recognised and enforced.

*See Articles 20 and 21*

**Legalisation**

102. Legalisation is the term used to describe certain formal legal processes. The effect of a legalisation 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 the document bears. The legalisation does not relate to the content of the underlying document itself (*i.e.*, the legalised document). Under Article 41 no legalisation or any analogous formality, including the use of an Apostille, may be required for proceedings under the Convention.<sup>24</sup>

*See Article 41*

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<sup>23</sup> See Explanatory Report, paras 63 and 444.

<sup>24</sup> See Explanatory Report, para. 614.

**Lien**

103. A lien is a legal hold or claim that may be filed against the property of a person. In some States a lien may be filed against the property of a debtor, including land and vehicles, who owes maintenance. If the property is sold, maintenance arrears may be recovered from the proceeds of the sale.

*See Article 34*

*Handbook reference – Chapter 10*

**Maintenance**

104. Maintenance includes support for children, a spouse or partner, and expenses related to the care of the children or spouse / partner. Under the Convention, a State may also extend maintenance to support obligations arising from other forms of family relationships.

105. Maintenance is paid by the debtor to the creditor. Maintenance may include both periodic payments and lump sum payments or property transfers, depending upon the law of the State where the decision is made.<sup>25</sup>

*See Article 2*

*Handbook reference – Chapter 3*

**Maintenance arrangement**

106. Under Article 30 a maintenance arrangement can be recognised and enforced if it is enforceable as a decision in the State where it was made, and for the purpose of Article 10 applications for recognition and enforcement, the term decision includes a maintenance arrangement.<sup>26</sup>

107. A maintenance arrangement is defined in Article 3 as an agreement in writing relating to the payment of maintenance that can be subject to review and modification by a competent authority and has either,

- been formally drawn up or registered as an authentic instrument by a competent authority, or
- has been authenticated, concluded, registered or filed with a competent authority.

108. The definition therefore includes both the authentic instruments that are used in some States and private agreements that are used in other States. For example, a maintenance agreement entered into by parents during divorce proceedings may be considered to be a maintenance arrangement and enforceable under the Convention if it meets these criteria.

109. A State may make a reservation indicating that it will not recognise maintenance arrangements.

*See Articles 3 and 30*

*Handbook reference – Chapters 4 and 5*

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<sup>25</sup> See Explanatory Report, para. 66.

<sup>26</sup> See Explanatory Report, para. 554.

## **Maintenance decision**

*See Decision*

## **Means test**

110. In some situations, the Convention allows a State to use a means test to determine whether an applicant is entitled to free legal assistance for the purpose of a proceeding under the Convention, and whether that assistance will be provided to an applicant or party on a cost-free basis. A means test generally looks at the income and assets of the applicant, or other financial circumstances that will impact the ability of the applicant to pay for legal assistance.

111. A child-centred means test is permitted by Article 17 for certain applications, and considers the means or financial circumstances of the child, rather than the parent, and may be used by some States to determine whether to provide cost-free legal assistance.

*See Articles 15 – 17*

*Handbook reference – Chapter 3*

## **Merits test**

112. In some situations, the Convention allows a merits test to be used by a State to determine whether to provide cost-free legal assistance to an applicant in a proceeding under the Convention. A merits test generally reviews the merits or likelihood of success of the application, considering such matters as the legal basis for the application and whether the facts in the case are likely to result in a successful outcome. The type of issues considered in a merits test will depend upon the State that uses the test.

*See Articles 15 – 17*

*Handbook reference – Chapter 3*

## **Modification of a decision**

113. Modification refers to the process of changing a maintenance decision after it has been made. In some States this is known as a variation application or an application to change a decision. The modification may relate to the amount of maintenance, the frequency or some other term of the maintenance decision. Under the Convention, the term modification also covers the making of a new decision, where the internal laws of the requested State do not have a procedure for the alteration of a foreign decision and only allow for the making of a new decision.<sup>27</sup> A modification application can be brought by either a creditor under Article 10(1) e) or f) or by a debtor under Article 10(2) b) or c).

*See Articles 10 and 18*

*Handbook reference – Chapter 11*

## **Permanent Bureau / Hague Conference on Private International Law**

114. The Hague Conference on Private International Law (HCCH) is an international intergovernmental organisation which develops and services multilateral legal instruments, promoting international judicial and administrative co-operation in the area of private law, especially in the fields of protection of the family and children, of civil procedure and commercial law.

115. The Permanent Bureau is the Secretariat of the Conference responsible for the day to day work of the organisation.

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<sup>27</sup> See Explanatory Report, para. 264.

116. Under the Convention, Contracting States must provide the information set out in Article 57 to the Permanent Bureau indicating how Convention requirements will be carried out in that State. The Permanent Bureau will also gather information, including statistics and case law regarding the operation of the Convention.

*See Articles 54 and 57*

### **Personal data / personal information**

117. Personal data is personal information about a person that is collected, used or disclosed during the course of proceedings under the Convention. It includes identifying information such as the date of birth, address of a person, income, and employment information about the individual as well as national or State identifiers such as social insurance numbers, social security numbers, personal health numbers and similar numbers that are unique to an individual.<sup>28</sup>

118. Under the Convention, personal data can only be used for the purpose for which it was gathered or transmitted and confidentiality of the data must be maintained in accordance with the law of the State dealing with the information. Disclosure of personal data or personal information is not permitted where that disclosure would jeopardise the health, safety or liberty of an individual.<sup>29</sup>

*See Articles 38, 39 and 40*

*Handbook reference – Chapter 3*

### **Provisional measures**

119. Provisional measures are provided for under Articles 6(2) *i*) and 7 of the Convention. These are proceedings that are initiated in a State in order to secure the outcome of a maintenance application. For example, provisional measures may be sought to prevent the disposal of assets, or to prevent the debtor leaving the State to avoid the maintenance proceedings.<sup>30</sup>

*See Articles 6 and 7*

*Handbook reference – Chapters 13 and 14*

### **Public body**

120. The term public body is used in two different contexts in the Convention.

121. Under Article 36 a public body is a government authority that may make a maintenance application, as a creditor, in limited circumstances. A public body can initiate an application for recognition and enforcement, or enforcement of a decision under Article 10(1) *a*) and *b*). It can also initiate an application for establishment of a decision in the circumstances where an existing decision cannot be recognised for the reasons set out in Article 20(4).<sup>31</sup>

122. In order to be entitled to bring the application, the public body must be either acting in place of the creditor, or seeking reimbursements of benefits provided in lieu of maintenance.

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<sup>28</sup> See Explanatory Report, para. 605.

<sup>29</sup> See Explanatory Report, para. 608.

<sup>30</sup> See Explanatory Report, para. 176.

<sup>31</sup> See Explanatory Report, para. 589.



123. Article 6(3) of the Convention refers to public bodies, and in that context public bodies are those entities permitted by the laws of a State to carry out the functions of a Central Authority. A public body that is responsible for these functions must be subject to the supervision of the competent authorities of the State, and the extent of their involvement in Convention cases must be communicated to the Permanent Bureau of the Hague Conference on Private International Law.

*See Article 6(3) and Article 36*

### **Ratification**

124. Ratification is one of the means that a State may use to become a party to the Convention. Article 60 sets out when the Convention comes into force (three months after the deposit of the second instrument of ratification, acceptance or approval) and when it comes into effect in a specific Contracting State. The Hague Conference on Private International Law website shows which States have become Contracting States to the Convention.

*See Article 58 and Article 60*

### **Recognition and enforcement**

125. The recognition and enforcement of existing maintenance decisions is one of the key processes under the Convention. The purpose of recognition is to allow a decision made in one State to be effective or to be able to be enforced in another Contracting State.<sup>32</sup> The recognition and enforcement process removes the need for a creditor to have to establish a new decision in the State where the decision is to be enforced.

*See Articles 19 – 28*

*Handbook reference – Chapters 4 and 5*

### **Requesting Central Authority and requested Central Authority**

126. The requesting Central Authority is the central authority in the State where the application or request is being initiated. That Central Authority will transmit the application to the requested Central Authority, which will process the application and send it to a competent authority to be completed. The duties of a Central Authority are set out in Article 7 of the Convention.

*See Article 7*

### **Requesting State and requested State**

127. The **requesting State** is the State where the applicant resides and where an application or request under the Convention is initiated. The **requested State** is the State that is being asked to process the application or request. It is usually the State where the respondent resides.

*See Articles 10 and 12*

### **Reservation**

128. A reservation is a formal statement by a Contracting State, allowed in certain circumstances under the Convention, specifying that the applicability of the Convention in that State will be limited in some way. For example, a State may make a reservation that it will not recognise or enforce Maintenance Arrangements. The process for reservations is set out in Article 62.

*See Article 62*

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<sup>32</sup> See Explanatory Report, para. 490.

**Respondent**

129. The Respondent is the person who will be answering or responding to an application or appeal under the Convention. A respondent can be a creditor or a debtor.

*See Articles 11, 23 and 24*

**Specific measures**

130. Specific Measures are certain duties of administrative co-operation that are listed under Article 7 and can be the subject of a request by a Central Authority to another Central Authority. The request will be made separately from an application for recognition, establishment, enforcement or modification. The specific measures that can be requested include assistance with respect to:

- Determining the location of a debtor or creditor
- Obtaining information about the income and financial circumstances of a creditor or debtor, including location of assets
- Determining parentage of a child
- Obtaining documents or evidence
- Service of documents
- Obtaining interim or provisional measures.

*See Article 7*

*Handbook reference – Chapters 13 and 14*

**State**

*See Contracting State*

**State of origin**

131. This term is used to refer to the State where the maintenance decision was made. The State of origin may be different from the State where either the applicant or respondent now reside, or it may be the same. Knowing which State is the State of origin is important to determine, for example, which competent authority needs to complete the Statement of Enforceability in an application for recognition or recognition and enforcement. The State of origin may also be called the issuing State.

132. In the case of a maintenance arrangement, the State of origin will most likely be the State where the agreement was concluded or formalised.

*See Articles 11, 20, 25 and 30*

*Handbook reference – Chapter 4*

**Statement of Enforceability**

133. This document is required in an application for recognition or recognition and enforcement in order to establish that the decision is enforceable in the State where it was made (the state of Origin). A statement of enforceability is different than a declaration of enforceability which is one of the mechanisms that may be used in some States to recognise or recognise and enforce a decision.

*See Articles 23(2) and 25(1) b)*

*Handbook reference – Chapter 4*

**Statement of proper notice**

134. This document is required in an application for recognition or recognition and enforcement where the respondent (often the debtor) did not appear. It will confirm that the respondent was provided with notice of the proceedings resulting in the maintenance decision and was given an opportunity to be heard, or that the respondent was given notice of the decision and given an opportunity to challenge the decision.

*See Article 25*

*Handbook reference – Chapter 4*

**Vulnerable person**

135. A vulnerable person is defined in Article 3 of the Convention as a person that is unable to support himself or herself, because of some impairment or insufficiency of his or her personal faculties. The Convention covers vulnerable persons only if a declaration has been made by a State to extend its application.

*See Article 2*

*Handbook reference – Chapter 3*

## **Chapter 3 – Matters of general application**

### **Part 1 – The scope of the Convention**

#### **I. Purpose of this Chapter**

136. There are a number of common considerations and recurring tasks that will have to be completed in each outgoing or incoming application under the Convention, or any request for specific measures. The first and most important consideration is whether the application or request comes under the Convention at all. This is known as the “scope of the Convention”.

137. If the application or request does not come within the scope of the Convention, then the procedures set out in this Handbook do not apply. This part of Chapter 3 sets out the factors that will be used to determine whether an application falls under the scope of the Convention, and equally importantly, the extent to which the provisions of the Convention apply, in whole or in part, to the type of application or request.

138. The second part of the Chapter 3 covers matters that are common to all procedures under the Convention – the rules respecting language of communication, the need for translation of documents and decisions, protection of personal information, and the requirement for effective access to procedures.

#### **II. Scope of the Convention**

##### **A. General**

139. An understanding of the scope of the Convention is very important in determining the extent to which the Convention applies in a maintenance application (an application for recognition or recognition and enforcement, enforcement, establishment, or modification). The Convention is not intended to cover every type of maintenance application where the parties reside in different States, nor does every provision of the Convention automatically apply to any application that is made under the Convention.

140. Whether the chapters of the Convention dealing with the duties of administrative co-operation and the functions of the Central Authority, including the provision of legal assistance, and the rules respecting the content and transmission of applications, apply in a particular situation is therefore an important first consideration. These duties are set out in Chapters II and III of the Convention.

141. Article 2 is the starting point for determining the scope of the Convention and whether Chapters II and III apply in a given application. Article 2 sets out the types of maintenance obligations that are covered by the Convention, and the extent to which the scope can be increased or restricted by either a declaration by a Contracting State or a reservation by a Contracting State.

## ***B. Core applicability – Maintenance obligations***

142. At its core, the Convention covers child and spousal maintenance obligations as described below.

### **1. Child support**

143. The broadest application of the Convention is to child support. As a starting point, all chapters of the Convention applies to all maintenance obligations for children, providing that:

- the maintenance obligation arose out of a parent-child relationship
- the child is less than 21 years old.

**Maintenance** includes support for children, a spouse or partner, and expenses related to the care of the children or spouse / partner. Under the Convention, a State may also extend maintenance to support arising from other forms of family relationships.

144. Contracting States can either extend or limit this initial scope through the use of declarations or reservations, as discussed in section 3 below.

### **2. Spousal maintenance**

145. The application of the Convention to spousal maintenance is not as broad as it is for child support.

146. The full Convention, including the provisions of Chapters II and III, always applies in a recognition, recognition and enforcement, or enforcement application if the spousal maintenance claim is made in combination with, or as part of a claim for child support in the context described above.<sup>33</sup> Therefore these applications will go through the Central Authorities in both States and all of the provisions of the Convention relating to Central Authorities, such as the obligations to provide updates and to transmit decisions to the competent authority within the State, apply.

147. However, if the application involves only spousal support, the provisions of Chapter II and Chapter III do not apply to the application. This means that the request or application will not go through the Central Authority, but will instead go directly to the competent authority in the other State. Because the Central Authorities are not involved, the Convention provisions respecting their activities are not applicable, but there are other provisions that will apply to requests made directly to competent authorities. All of the articles in the Convention, other than those in Chapters II and III, always apply to spousal maintenance only decisions.

148. A Contracting State can extend the involvement of its Central Authority to all matters concerning spousal maintenance, as discussed in the next section.

<sup>33</sup> The Convention uses the words “made with a claim” for child support. This does not necessarily mean that the spousal claim has to be in the same decision, but it must be linked to, or related to the claim for child support. See Explanatory Report, para. 47.

### 3. Reservations and declarations

149. The ability of Contracting States to limit or extend the application of the Convention is contained in Article 2.

#### a) Child support – age of the child

150. A Contracting State can make a reservation under the Convention limiting the application of the Convention to children under 18 years old. A Contracting State can also extend the application of the Convention (or any part of it) to children over the age of 21 years.

A **reservation** is a formal statement by a Contracting State, allowed in certain circumstances under the Convention, specifying that the applicability of the Convention in that State will be limited in some way.

#### b) Spousal maintenance

151. A Contracting State can make a declaration to extend Chapters II and III of the Convention to some or all applications involving spousal support. Effectively this means that the duties of the Central Authority, including making or responding to requests to Specific Measures, and the provisions concerning some or all applications will apply to all spousal maintenance obligations and requests.

#### c) Other forms of family maintenance

152. The Convention allows Contracting States to make a declaration extending the application of the Convention (or some portion of the Convention) to other types of maintenance arising out of a family relationship. Therefore a Contracting State could extend the application of the Convention to maintenance which arises in situations of affinity or other family relationship. A Contracting State may also extend the Convention to cover maintenance for vulnerable persons, as defined in the Convention.

A **maintenance decision** sets out the obligation of the debtor to pay maintenance and may also include automatic adjustment by indexation and the requirement to pay arrears of maintenance, retroactive maintenance or interest and a determination of costs or expense.

#### d) Maintenance arrangements

153. A Contracting State may also make a reservation under the Convention indicating that it will not recognise and enforce maintenance arrangements. If this reservation is made, only maintenance decisions, as defined under the Convention can be recognised and enforced in that State. See Articles 19(4) and 30(8).

A **maintenance arrangement** is defined in Article 3 as an agreement in writing relating to the payment of maintenance, that either has been formally drawn up or registered as an authentic instrument by a competent authority, or has been authenticated, concluded, registered or filed with a competent authority and that can be subject to review and modification by a competent authority.

### 4. Effect of reservations to limit the application of the Convention

154. As discussed above, a Contracting State may make a reservation under the Convention limiting the application of the Convention. Under Article 2(2), a Contracting State may limit the application of the Convention to maintenance for children under the age of 18 years. This means that, in that State, the Convention will not cover applications that relate to maintenance for children who are 18 years of age or older.

155. If a Contracting State has made a reservation limiting the applicability of the Convention in its State to persons less than 18 years of age, it cannot request other States to deal with applications for children 18 years of age or older (Articles 2(2) and 62(4)).

156. The Country Profile completed by a State will indicate whether any reservations to restrict the application of Convention have been made by a Contracting State.

## 5. Effect of declarations to extend application of Convention

157. Importantly, extensions of the application of the Convention must “coincide” in both the requested State and the requesting State for the Convention to apply in both States in relation to the extended scope. This does not mean that the entire extension has to be the same in both States – only that a part of it is the same.

158. For example, if Contracting State A (the requesting State) has extended the application of all of the articles of the Convention, including Chapters II and III, to cover matters relating to maintenance of vulnerable persons, this does not impose any obligation upon Contracting State B (the requested State) to accept an application for the establishment of maintenance for a vulnerable person, unless the declaration by State B extends the scope of the Convention to maintenance for vulnerable persons, and has extended Chapters II and III to establishment applications for maintenance for vulnerable persons. In this example, the declarations by State A and State B may not be identical but they “coincide” with respect to applications to establish maintenance for vulnerable persons, because both States have extended the application of the Convention to establishment applications.

A **declaration** is a formal statement made by a Contracting State with respect to certain Articles or requirements under the Convention.

159. The Country Profile completed by a State will indicate whether any declarations to extend the application of Convention have been made by a Contracting State.

## 6. Case examples

### Example 1

160. F resides in State A. She has a maintenance decision made in State A requiring H to pay maintenance for two children, who are 10 and 12 years old, and to pay spousal support. H is the father of the children and lives in State B. F would like the maintenance decision recognised and enforced in State B. Both State A and State B are Contracting States to the Convention.

#### Does the Convention apply?

161. The Convention applies to this matter. The children are under 21 years of age and the matter concerns child support arising from a parent / child relationship. As the request for recognition and enforcement of the spousal support is included with the claim for child support, the full provisions of the Convention apply to that claim as well.

### Example 2

162. J resides in State A and has a maintenance decision made in State A providing for child support for one child, now 20 years of age. J would like the maintenance decision enforced against the father of the child, now residing in State B. Both State A and State B are Contracting States to the Convention.

**Does the Convention apply?**

163. As the matter concerns child support from a parent / child relationship, the Convention applies unless State A or State B has made a reservation limiting the application of the Convention to cases where the child is less than 18 years of age. If that reservation has been made by either State A or State B, the Convention does not apply to this case.

**Example 3**

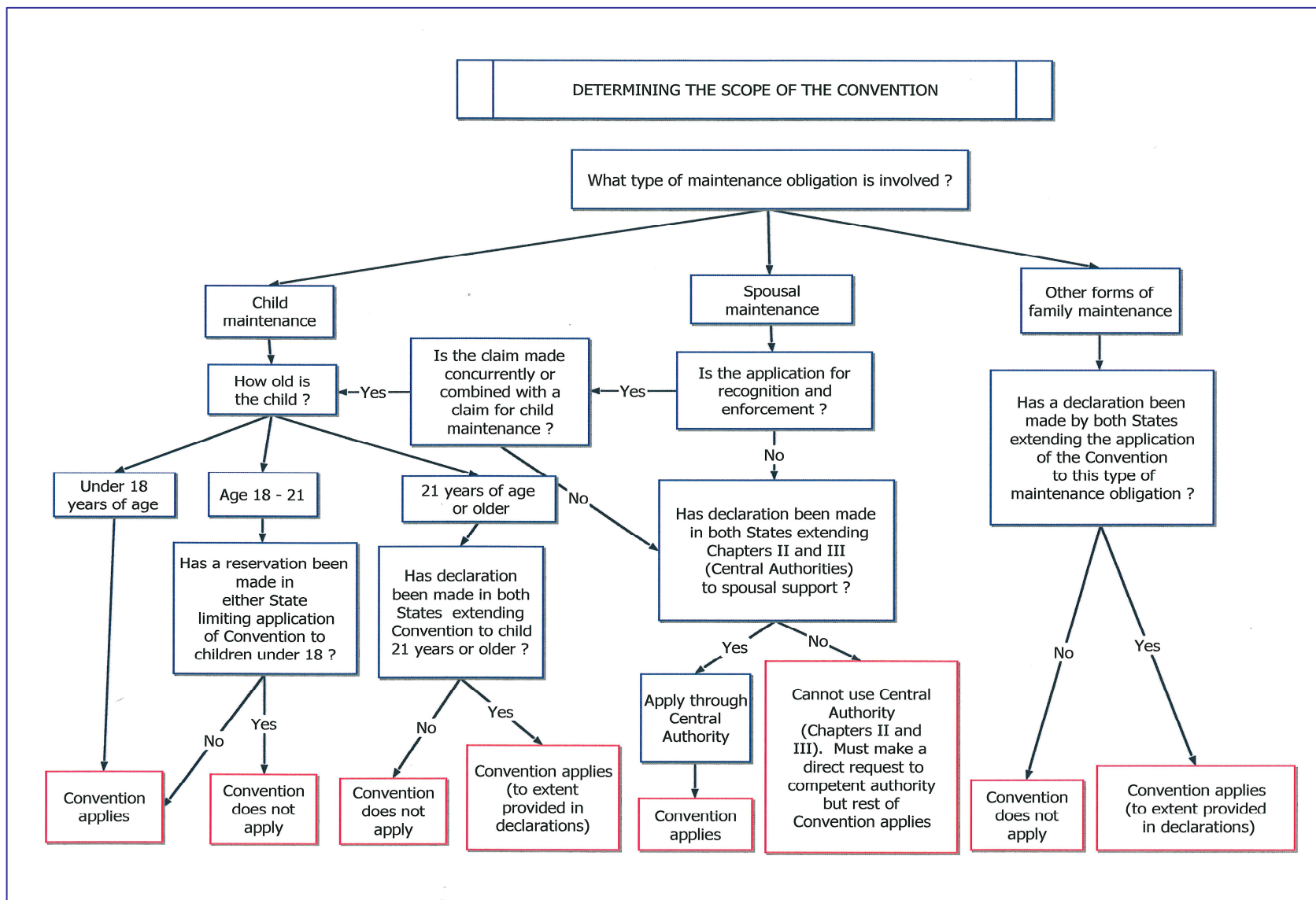
164. S resides in State A and is seeking establishment of a child support decision for her child, aged 6 months, and spousal maintenance for herself. The father of the child, her former husband, lives in State B. State A and State B are Contracting States to the Convention.

**Does the Convention apply?**

165. The Convention will apply to the application for establishment of a decision for child support. However, S cannot use the services of the Central Authority, or the provisions respecting applications under the Convention to establish a decision for spousal support, unless both State A and State B have extended the application of the Chapters II and III of the Convention to spousal maintenance obligations, or more specifically to the establishment of spousal maintenance obligations.

166. The diagram on the next page shows how to apply the scope provisions of the Convention to determine whether the Convention, or any part of it, applies to a particular maintenance obligation.





**Figure 7: Determining whether an application falls within the scope of the Convention**

## C. Other factors governing Convention applicability

167. There are a number of other factors that have an impact upon the way the Convention applies in a particular situation. These include:

- Do the parties reside in Contracting States?
- Is the applicant a debtor or a creditor?
- Does applicant have a maintenance decision?
- Where was the decision made?
- Where does creditor habitually reside?

### 1. Do the parties reside in Contracting States?

168. In order for the Convention to apply, the applicant (the person making the application or requesting assistance under the Convention) must reside in a Contracting State.

169. If the applicant resides in a Contracting State but the respondent (the person who will be responding to the application) does not live in a Contracting State or, in the case of a respondent who is a debtor, does not have assets or income in a Contracting State, the applicant will not be able to use the Convention to recognise, enforce, establish or modify a maintenance decision. In this situation the applicant may wish to seek legal advice to determine if there are other means of obtaining the particular maintenance relief sought.

170. If the applicant resides in a non-Contracting State but the respondent / debtor resides or has assets in a Contracting State, the Central Authority in the applicant's State will not be involved, but applicant can make a direct request to a competent authority in the respondent's State for assistance.<sup>34</sup>

171. If neither of the parties resides in a Contracting State, the matter cannot proceed using the Convention but the applicant may be able to use other procedures in the State where he or she resides, to establish or enforce a maintenance decision.

172. You can find out if a State is a Contracting State to the Convention by going to the website of the Hague Conference on Private International Law (< [www.hcch.net](http://www.hcch.net) >).

### 2. Is the applicant a debtor or creditor?

173. The applicant for any remedy under the Convention may be a creditor, a debtor or a public body. A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A **debtor** is the individual who owes or is alleged to owe maintenance. A **public body** is a government entity that has provided benefits to the creditor, in place of maintenance, or is acting in place of or on behalf of a creditor.

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<sup>34</sup> Remember that the rules and procedures for the cases that a Competent Authority accepts directly will be determined entirely by domestic law. So in this situation the applicant would have to contact the Competent Authority to find out what will be required in order to make the request.

### Why the applicant is important

174. It is important to identify the applicant, because Article 10 sets out who is entitled to bring each type of application.

175. A **creditor** may bring any of the following applications:

- application for recognition or recognition and enforcement of a decision,
- application for enforcement of a decision made in the requested State,
- application for establishment of a decision where no previous decision exists, including establishment of parentage if necessary,
- application for establishment of a decision where a decision exists but cannot be recognised or enforced,
- modification of a decision made in the requested State or in a State other than the requested State.

*The **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer.*

176. A **debtor** may only bring the following applications under the Convention:

- recognition of a decision in order to limit or suspend enforcement of a previous decision, or
- modification of a decision made in the requested State or in a State other than the requested State.

*The **debtor** is the individual who owes or is alleged to owe maintenance. The debtor may be a parent, or a spouse or anyone else who, under the law of the place where the decision was made, has an obligation to pay maintenance. In some States this person is called a maintenance payor, an obligor, or a non-custodial or non-resident parent.*

177. A **public body** can only bring an application:

- for enforcement of a decision made or recognised in the requested State,
- for recognition or recognition and enforcement of a decision made elsewhere, or
- for establishment of a decision only if an existing decision cannot be recognised because of a reservation under Article 20(2).

*A **public body** is a government authority that may make a maintenance application, as a creditor, in limited circumstances.*

178. Thus, a public body cannot, for example, use the Convention to initiate a modification of an existing decision, nor can a debtor use the Convention processes to establish a maintenance decision.

179. In addition, there are limitations under the Convention relating to the extent of legal assistance that must be provided to a creditor or debtor in any application. See Chapter 3 which outlines the requirement to provide legal assistance.

### 3. Does the applicant have a maintenance decision?

180. A **maintenance decision** is a provision in a decision made by a judicial or administrative authority that requires the payment of maintenance for an applicant, a child or other person requiring support. A maintenance decision can be an order made by a judicial authority, an order or decision of an administrative authority, tribunal or ministry, if that decision meets the criteria set out in Article 19.

181. A maintenance arrangement, as defined in the Convention, can be recognised and enforced in a State if it is enforceable in the State where it was made. However a maintenance arrangement is not a decision within the meaning of the Convention and there are different rules that apply to the recognition of maintenance arrangements.

182. If the applicant does not have a maintenance decision, then the appropriate application is for establishment. However, the applicability of the Convention to a request for establishment may depend upon what type of maintenance is being sought, as discussed in the scope section above.

#### **4. Where was the maintenance decision made?**

183. The place where the maintenance decision was made is important in order to determine whether the decision needs to be recognised or not before it can be enforced. If the decision was made in the requested State, no request for recognition needs to be made, and the applicant can proceed simply to request enforcement of the decision. If the decision was made in a Contracting State other than the State where it is going to be enforced, it will have to be recognised first.

184. In applications for recognition and enforcement, the maintenance decision must have been made in a Contracting State.

#### **5. Where does the creditor habitually reside?**

185. In addition to considering whether the applicant and respondent in any application reside in Contracting States, determining the habitual residence of the creditor is an important consideration in applications for recognition and enforcement, and in modification applications brought by debtors. This is because there are special provisions relating to the recognition and enforcement of a modified decision depending upon who brought the application and whether the creditor is habitually resident in the State where the original maintenance decision was made.

186. The term "habitual residence" is not defined in the Convention so whether a creditor is habitually resident in a State will depend upon the facts of the particular case. Generally, habitual residence is determined by considering factors such as where the person maintains a residence, where the person usually lives, works or goes to school.<sup>35</sup>

187. Under the Convention, if the creditor is habitually resident in the State where the decision was made, the recognition of a modification decision made at the request of a debtor may be refused under Article 18 unless the exceptions found in Article 18 apply. This is covered in greater detail in Chapters 11 and 12 of the Handbook.

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<sup>35</sup> Explanatory Report, paras 63 and 444.

## **Part 2 – Matters common to all applications under the Convention and to requests for specific measures**

188. This Part deals with a number of issues that are common to all applications and requests under the Convention.

### **I. Language**

189. Given the international nature of the operation of the Convention, it is important that applications and communications follow the rules set out in the Convention concerning the language of communication and any requirements for translation of documents. These are set out in Article 44 and Article 45.

#### ***A. Language of application and documents***

190. Any application made under the Convention, and the documents accompanying the application (including the decision) are to be in the original language. A translation of the application (and related documents) into an official language<sup>36</sup> of the requested State must be included as well unless the competent authority of the requested State (the administrative or judicial authority processing the application) has indicated that it does not require a translation.

191. The requested State may also make a declaration under the Convention that a language other than an official language of the requested State is to be used for applications and related documents. Where there are territorial units in a State (for example provinces or states) and there is more than one official language, the Contracting State may also make a declaration specifying which language is to be used for any specific territorial unit.

192. Note that one of the important advantages of using the recommended forms for an application under the Convention is that their structure allows them to be completed in any language and easily understood in another language, reducing the need for translation.

#### ***B. Language of communications***

193. Unless the Central Authorities have agreed otherwise, all communications between Central Authorities are to be in the official language of the requested State, or in either English or in French. A Contracting State may make a reservation excluding the use of either English or French in these communications. Communication in this context refers to routine correspondence, updates and notices between Contracting States.

#### ***C. Translation exceptions***

194. In some cases it may not be practical or possible for the requesting State to translate the documents into the language used or specified by the requested State. In such a case, if the application is under Chapter III (generally – any application concerning child support or recognition and enforcement of child and spousal maintenance), the requested State can agree, either for that case or generally, to complete the translation itself.<sup>37</sup>

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<sup>36</sup> Where a State has more than one official language – either can be used, subject to the comments in the following footnote.

<sup>37</sup> Note that if the requested State does complete the translation as described above, the costs of that translation must be borne by the requesting State (unless the Central Authorities of the two States have agreed otherwise).

195. If the requested State does not agree to assist in the translation, then the requesting State has the option of simply translating the documents into either English or French. The requested State can then further translate the document into its own language, if that is necessary.

196. For example, if the applicant in the requesting State (Norway) does not have the capability to translate the documents into the language of the requested State (Spanish in Mexico), and the authority in Mexico cannot translate the decision from Norwegian to Spanish, the documents could instead be translated by the applicant in Norway into English or French. The English or French translation can then be sent to Mexico.

#### ***D. How this works in practice***

1. When sending an application under the Convention, the applicant (or the representative of the Central Authority) will fill out the application in his or her own language, and include any related documents, such as the maintenance decision in the language it was originally made.
2. If the official language of the requested State is a different language than that of the requesting State, unless the requested State has agreed no translation is necessary, the application and required documents will have to be translated into that official language, or into any other language that the requested State has indicated in a declaration.
3. If the requesting State cannot translate the documents into the official language of the requested State (or other language specified by the requested State), and the application is under Chapter III, the requesting State may:
  - i) enquire whether the requested State will agree to complete the translation
  - ii) if the requested State does not agree, translate the documents into either English or French (unless the requested State has made a reservation excluding one of these languages) and send the documents to the requested State, where they may be further translated into the official language by the requested State.
4. All subsequent communications (letters, reports and similar correspondence) between Central Authorities will be in the official language of the requested State, in English or in French. The requesting State has a choice as to whether it will communicate in the official language of the requested State, or in either English, or French, unless the requested State has made a reservation excluding the use of either English or French.

#### **An example:**

197. The maintenance decision was made in Germany and will be sent to Mexico for recognition and enforcement. The materials sent to Mexico will include a copy of the decision in German if that was the original language of the decision, and a translation of the decision into Spanish. The mandatory Transmittal form, recommended application form and required documents such as the Statement of Enforceability must be provided in Spanish, so if they were prepared in German, a translated copy will have to be provided unless Mexico has made a declaration indicating that it does not require a translation. Ongoing communications on this case would be in either Spanish (the language of the requested State) or in English or French, unless Mexico has made a declaration excluding the use of either English or French.

## ***E. Other document requirements***

### **1. Legalisation**

198. In keeping with other Hague Conventions, Article 41 of the maintenance Convention provides that no legalisation or similar formalities may be required under the Convention. Therefore there is no need for any formal authentication of the signature of the public official who completes the documents or the need for an Apostille, if that is the usual practice in a Contracting State.

**Legalisation** is the term used to describe certain formal legal processes, such as the use of an Apostille or notarisation, for the authentication of documents.

### **2. Power of attorney**

199. Article 42 provides that a power of attorney can only be requested from an applicant in very limited circumstances. A power of attorney may be requested where the Central Authority in the requested State will represent the applicant, for example in a Court proceeding, or where the power of attorney is required in order to designate a representative to act in a particular matter.<sup>38</sup>

### **3. Signatures and certified copies of documents**

200. There is no requirement under the Convention that an application must be signed in order to be valid. In addition, with respect to applications for recognition, and recognition and enforcement, the applicable Articles (Articles 12(2), 13, 25 and 30) provide for a process where simple copies of documents, including the decision, can be sent with the application for recognition. During the course of the recognition and enforcement proceeding, the competent authority or the respondent may request a certified copy of any of the documents, if that is required for processing or responding to the application. However, unless that request is made, the simple copies will suffice. A State may also accept documents electronically, as the language of the Convention is deliberately “medium neutral”.

201. Under the Convention a State may also specify that it will, in all cases, require a certified copy of any document. The Country Profile will indicate if a State has made that specification for all cases.

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<sup>38</sup> Explanatory Report, para. 617.

## II. Protection of personal and confidential information

202. The Convention establishes some important safeguards for the protection of personal and confidential information transmitted under the Convention. (Note that this is called personal “data” under the Convention, because that is the term used in other Hague Conventions.) These are set out in Articles 38, 39 and 40. Personal information includes (but is not limited to) information such as name, date of birth, address or contact information, and personal identifiers such as national identity numbers.<sup>39</sup>

203. The Convention recognises that given the sensitivity of the type of information that will be shared between States concerning individuals, protection of that information is essential in order to ensure that parties are protected from any adverse consequences that may arise from the disclosure of that information.

204. There are specific limits in the Convention on the disclosure and confirmation of information gathered or transmitted under the Convention in certain circumstances. Disclosure or confirmation of information is not permitted where that would jeopardise the health, safety or liberty of a person (Article 40(1)). The person could be a child, the applicant, or respondent, or any other person. The Convention is not limited in this respect.

205. Where a Central Authority makes a determination that the disclosure or confirmation of the information would create such a risk, it will convey that concern to the other Central Authority involved, and that Central Authority will take that determination into account when processing an application under the Convention. How the Central Authority is to proceed in any situation will depend upon what is required in order to carry out the application, and to meet its obligations under the Convention (Article 40). A recommended practice in such cases is to use the address of the Central or competent authority in the requesting State, such that the creditor’s address is “in care of” that address.<sup>40</sup>

206. The mandatory and recommended forms published by the Permanent Bureau of the Hague Conference on Private International Law have been designed to cover the protection of personal information. These forms provide for a Central Authority to indicate that there is a concern that the disclosure or confirmation of the information might jeopardise the health, safety or liberty of a person (there is a “tick box” on the forms where this is noted).

207. Where this concern has been indicated, the forms allow the sensitive personal information (such as contact information or information that could be used to identify or locate the person) to be included on a separate form. In this way, the application itself, containing only the information that the respondent will need in order to respond to the application, can be provided to the respondent or competent authority, without creating a risk to the applicant.

208. In addition, any authority in either the requested State or requesting State that processes information under Convention procedures must follow its own internal laws concerning confidentiality of the information (Article 39). Therefore, all transmission of information must comply with any internal requirements set out in domestic law, such as the obtaining of consent to the release of information, or any restrictions on disclosure.

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<sup>39</sup> Explanatory Report, para. 605.

<sup>40</sup> Explanatory Report, para. 612. A State choosing to use an “in care of” address should be aware that the requested State may require, for reasons of domestic law, for example for service of documents, the personal address of a creditor.



### **III. Effective access to procedures and legal assistance**

#### **A. Overview**

##### **1. Effective access to procedures**

209. One of the most important principles underlying the Convention is that applicants must have effective access to the procedures necessary to complete their applications in the requested State. Effective access to procedures means that the applicant, with the assistance of the authorities in the requested State if necessary, is able to put his or her case effectively before the appropriate authorities in the requested State.<sup>41</sup>

210. Articles 14, 15, 16 and 17 of the Convention deal with the obligation of the requested State to provide effective access to procedures, including the provision of cost-free legal assistance in certain circumstances. This section of the Handbook summarises these provisions.

211. There is a general obligation in Article 14 to provide applicants with effective access to procedures, including enforcement and appeal procedures. Applicants include creditors, debtors and public bodies (when acting in place of a creditor) who are making applications through a Central Authority.

212. Direct requests by an applicant to a competent authority do not fall under the general provision, but Article 17 *b*) does include a general requirement to provide limited assistance in recognition and enforcement applications and Article 14(5) also applies to these applications. (This is discussed further below.)

##### **2. Legal representation**

213. The type of effective access that must be provided will include legal assistance if the circumstances require it. The means or ability to pay of the applicant should not be a barrier to this access. Therefore Article 15 provides that free legal assistance shall be provided to creditors in most situations.

214. The obligation to provide free legal assistance is qualified by the recognition that such assistance does not have to be provided if the procedures used in the requested State are simple enough to allow the applicant to effectively present his or her case without legal assistance, and the Central Authority provides these services free of charge.

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<sup>41</sup> Explanatory Report, para. 357.

215. This is important because many States have developed effective, efficient procedures for the recognition, enforcement, establishment and modification of maintenance decisions that can be used by all applicants in that State without the need for legal assistance, and these procedures will be equally available to applicants under the Convention. Depending upon the State, this may include the use of simplified forms, administrative procedures, and the provision of information and advice to all applicants, by the Central or competent authority. As long as these simplified procedures enable the applicant to make his or her case effectively, and are provided to the applicant free of charge by the requested State, the requested State is not obligated to provide the applicant with free legal assistance.

Article 3 defines **legal assistance** as “the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The means of providing such assistance may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings.”

216. In the event that simplified procedures are not available and legal assistance is required, there are a number of provisions that define the circumstances under which it must be provided free of charge to applicants.

217. Because the procedures for dealing with maintenance matters vary between States, the type of legal assistance required will necessarily be different in each case. Administrative and tribunal type systems may require one type of assistance, judicial systems another. The assistance may be provided through access to services such as legal information clinics, public legal aid or family support services. The type of legal services available will be set out in the Country Profile of the Contracting State.

218. Where legal assistance is required by the applicant, generally, as a starting point the Convention requires that all Contracting States provide such assistance at no cost for creditors in almost all situations involving **child support**. There are some exceptions to this for States that have made declarations under the Convention.<sup>42</sup>

219. However, the entitlement by applicants to cost-free legal assistance for applications concerning **non-child support matters** is more limited, as is the right of debtors to cost-free legal assistance for recognition and modification applications. For these types of applications, a means test or a merits test may be used by the requested State as a pre-condition for the provision of legal assistance.

220. Importantly however, in all cases, the legal assistance provided to all applicants (creditors, debtors or a public body<sup>43</sup>) by a State cannot be less than would be provided to the applicant if he or she was an applicant in an equivalent domestic case. This ensures that the same level of service is provided to all applicants, irrespective of their residence. Moreover, although cost-free legal assistance may not always be available, the requested State cannot require a bond or deposit to guarantee the payment of any legal costs (Articles 37(2) and 14(5)).

A **means test** looks at the income and assets of the applicant, or other financial circumstances that will impact the ability of the applicant to pay for legal assistance.

A **merits test** reviews the merits or likelihood of success of the application, considering such matters as the legal basis for the application and whether the facts in the case are likely to result in a successful outcome.

<sup>42</sup> A State may make a declaration that it will use a child-centred means test for certain cases (Article 16(1)).

<sup>43</sup> Explanatory report, para. 383.

221. Whether free legal assistance is available for an applicant will therefore depend upon:

- whether simplified procedures are available free of charge to the applicant in the requested State
- what type of maintenance is involved (child support, spousal support or other form of family support)
- whether the applicant is a creditor or a debtor
- what type of application is being made (recognition, enforcement, establishment, modification or specific measures)
- whether a means test is in use in the requested State for the particular application (child-centred or based on the applicant's circumstances).

222. The following sections and flowcharts provide a detailed explanation of the entitlement to free legal assistance in a number of different situations.

## ***B. Requirement to provide free legal assistance***

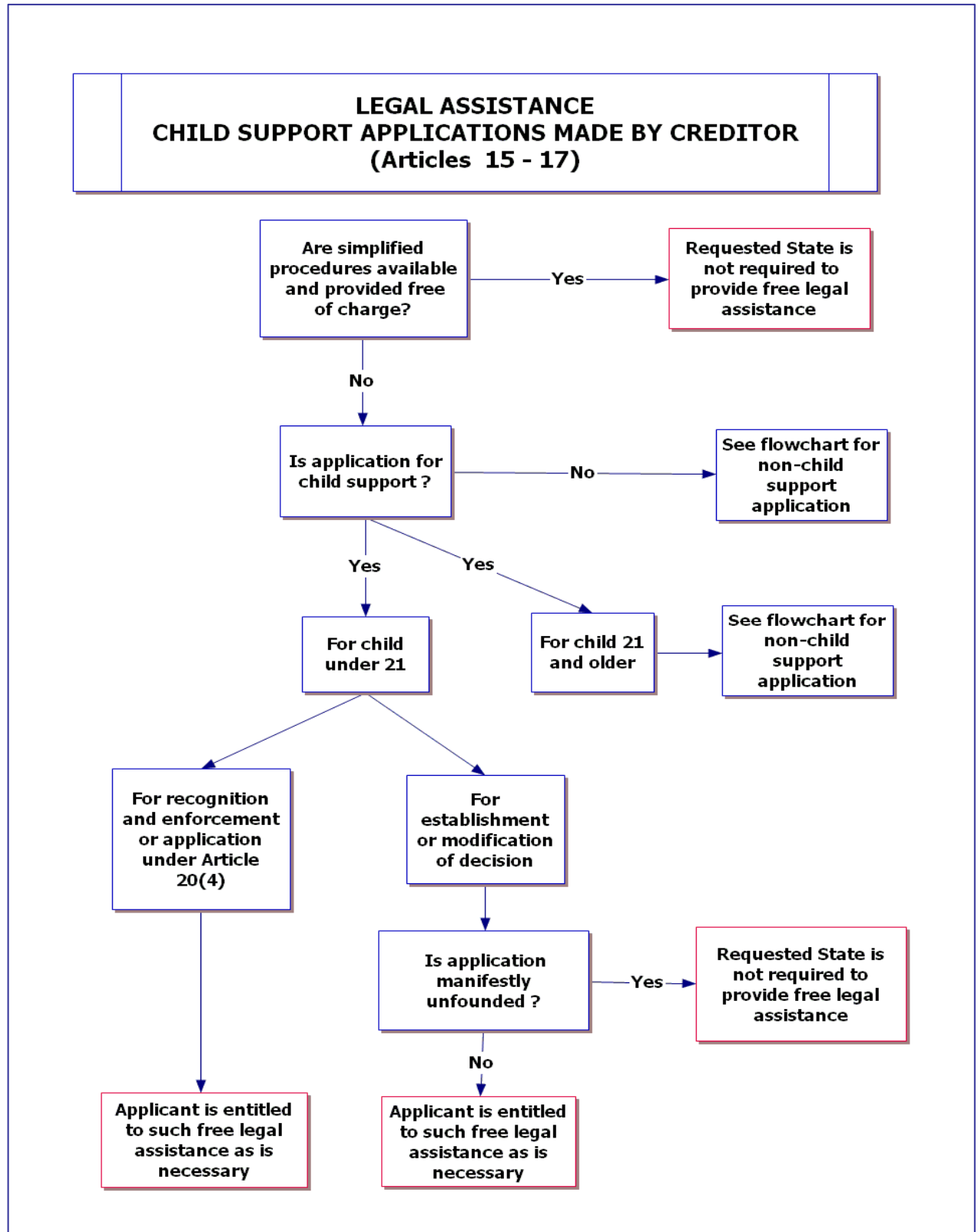
223. The following section explains the entitlement to free legal assistance for Convention applications in all States, except those that have made a declaration to use a child-centred means test. The procedures used in those States are covered at the end of this section.

NOTE: If the decision to be recognised and enforced also concerns spousal maintenance, the same entitlement to cost-free legal assistance applies.

### **1. Applications by a creditor**

#### **a) Applications concerning child support, for the support of a child under 21 years of age (or 18 years of age if a reservation has been made)**

224. As shown below, if the application concerns recognition and enforcement of a decision for child support, legal assistance must be provided on a cost-free basis. There are no exceptions to this requirement. If the application concerns child support but is for establishment of a decision or modification of a decision, cost-free legal assistance may be refused by a State if it considers the application or appeal to be manifestly unfounded on the merits.

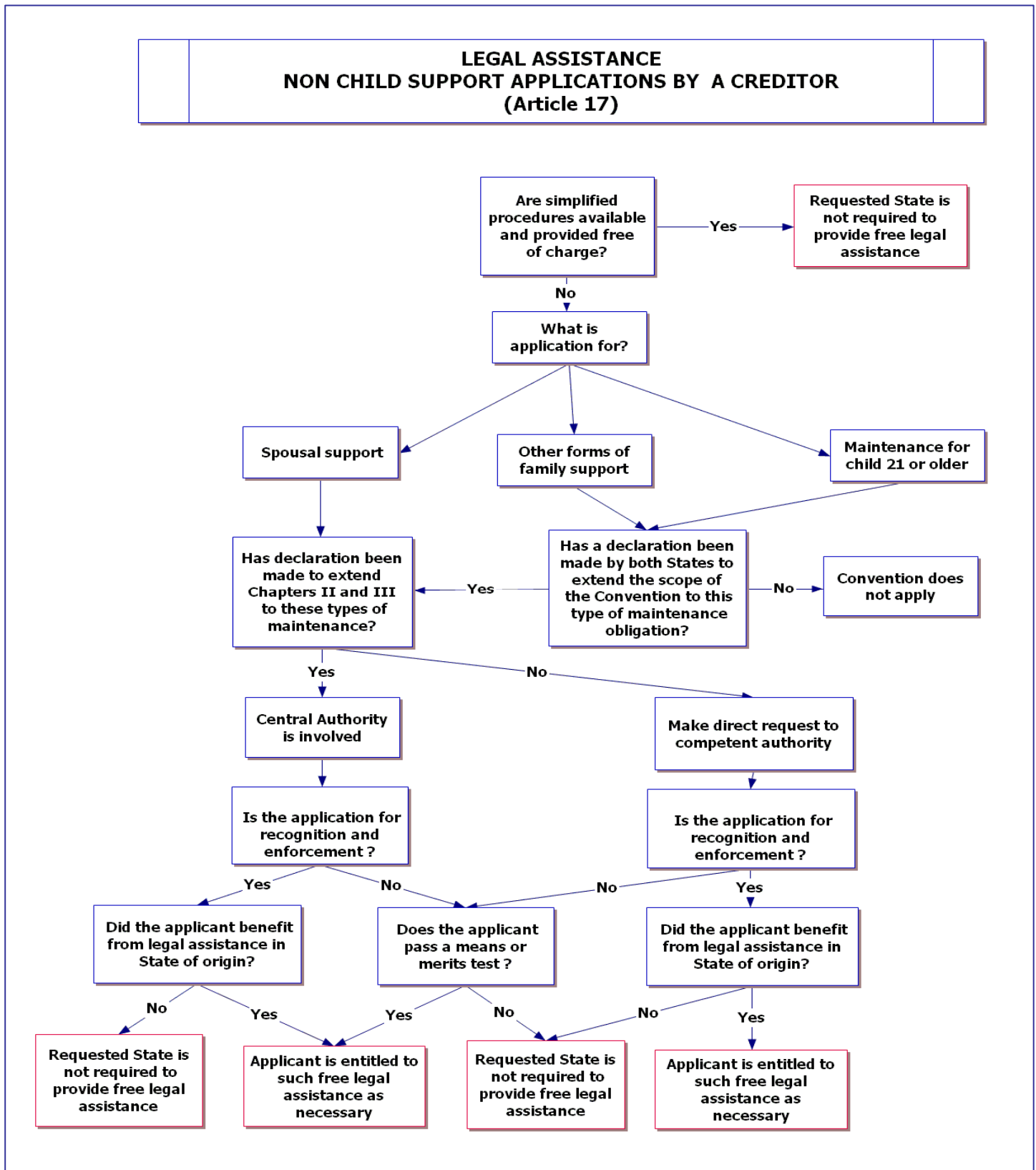


**Figure 8: Legal assistance: child support applications by a creditor**

**b) Applications concerning maintenance other than child support for a child under 21 years of age (or under 18 years of age, if a reservation has been made)**

225. Where the application concerns child support for a child over 21 years of age, spousal or other form of support, and a State has extended the scope of the Convention to these types of cases, free legal assistance does not have to be routinely provided. A Contracting State may refuse to provide such assistance if the application is not likely to be successful (a merits test) and the State may also make a means test a condition for the receipt of such services.

226. However, in any case concerning the recognition of an existing decision, where the applicant received free legal assistance in the State of origin for the establishment of the decision, the applicant is also entitled to the same level of assistance in the requested State, if that assistance is available in the requested State. This is shown in Figure 9 below.



**Figure 9: Legal assistance: applications by creditor – non child support**

**c) Applications by a public body**

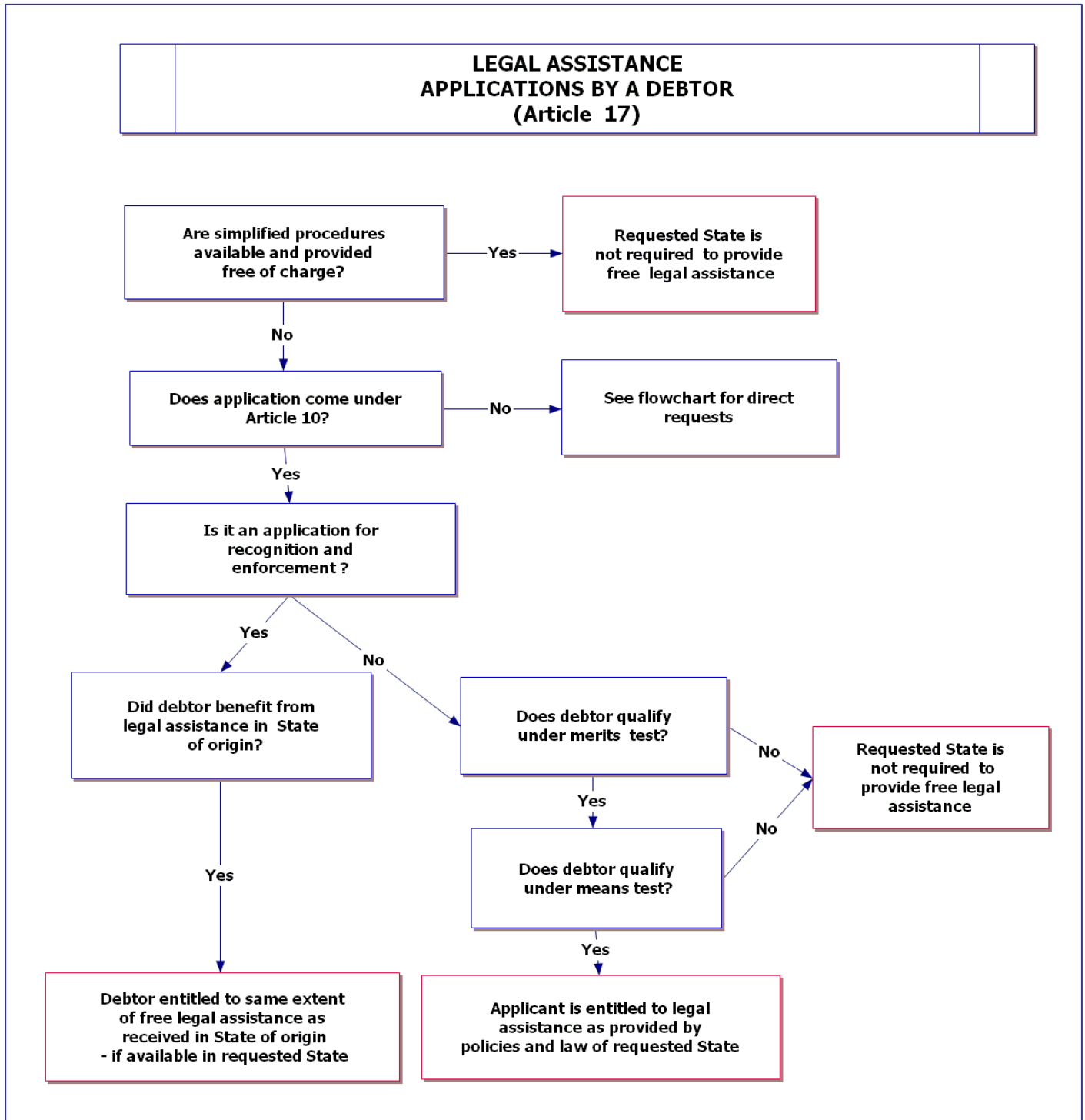
227. If the applicant is a public body as defined in Article 36, it will come within the definition of a creditor for the purpose of applications for recognition and enforcement. Therefore there is an entitlement to free legal assistance for public bodies in applications involving the recognition and enforcement of decisions for child support for children under 21 years of age (or 18 years of age as the case may be).<sup>44</sup>

**2. Applications by a debtor**

228. In applications made by a debtor, the requesting State may utilise both a merits test and a means test to determine whether to provide free legal assistance. This is shown in Figure 10 below.

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<sup>44</sup> Explanatory report, para. 383.



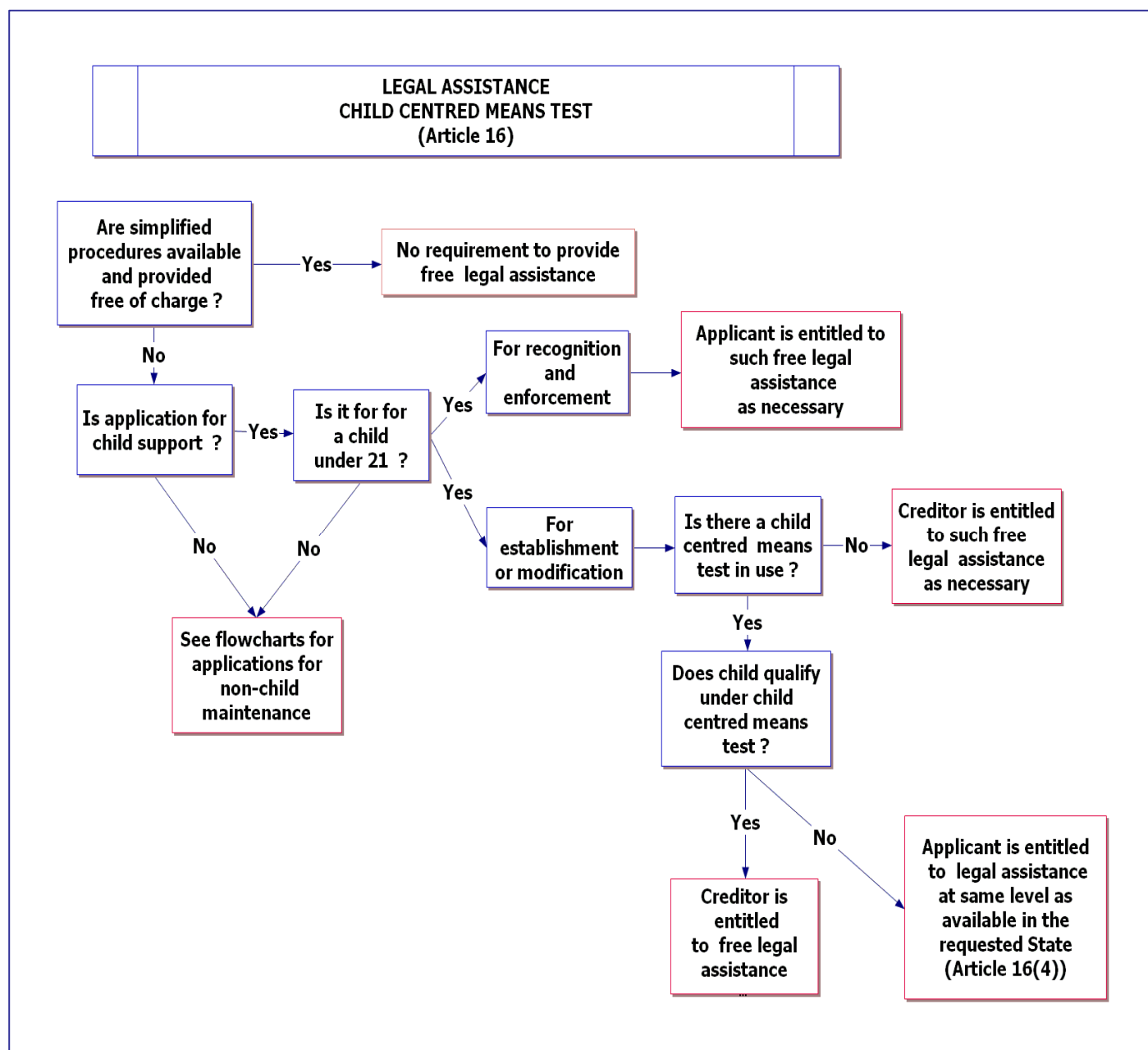
**Figure 10: Legal assistance: applications by a debtor**



### **3. Child-centred means test**

229. A Contracting state may make a declaration that it intends to utilise a child-centred means test in applications other than for recognition and enforcement of a child support decision, to determine whether the applicant is entitled to cost-free legal assistance (see Article 16(3)). The flowchart below illustrates how the test will be applied. It is important to remember that it is the means of the child, not the parent that will be considered in the application of the test, so most applicants will qualify for assistance, unless the child is independently wealthy.

230. If the requested State has made a declaration to use a child-centred means test, the application must include a “formal attestation” that the child’s means will meet the criteria established by the requested State. These criteria can be found on the Hague Conference on Private International Law website < [www.hcch.net](http://www.hcch.net) >. The attestation from the applicant will be sufficient unless the requested State has reasonable grounds to believe the applicant’s information is inaccurate.



**Figure 11: Legal assistance: child-centred means test**

#### 4. Parentage or genetic testing

231. Article 6(2) *h*) of the Convention requires a Central Authority to take appropriate measures to provide assistance in establishing parentage where necessary for the recovery of maintenance. The costs of genetic testing to determine parentage can be significant. In order to ensure that these costs do not become a barrier to the obtaining of child support decisions,<sup>45</sup> if parentage testing is necessary in an application under Article 10(1) *c*) the requested State cannot require the applicant to pay for the testing, and those costs come under the general provision to provide cost-free legal assistance.<sup>46</sup>

232. The way this works in practice will depend upon the domestic procedures of the Contracting States involved. In some States, the person requesting the testing may be required, as a condition of the request for testing, to pay the full costs of the testing in advance. In other States, the debtor may be required to pay his portion of the testing costs initially. In that event, the requested State will cover the costs for testing of the mother and child(ren) – costs that would otherwise be payable by the applicant, however these costs can be recovered from the debtor if he is found to be the parent of the child. Each State will decide, as a matter of domestic law or procedure, the extent to which the debtor will be required to bear the costs of the testing, and at what point in the process this will be required, if at all.

233. The Country Profile for each Contracting State will indicate what arrangements are in place in that State for parentage testing.

234. Where the application is for child support for a child under 21 years, the general rule is that unless the application manifestly unfounded, the creditor will not have to pay for the costs of the parentage testing.<sup>47</sup>

235. In those States that have made a declaration to use a child-centred means test, the costs of the parentage testing will only be covered as part of the legal assistance available unless the child does not pass the means test.

### IV. Specific functions of the Central Authority

236. Administrative co-operation and assistance with applications under the Convention are critical to the successful conclusion of matters under the Convention. Chapter II of the Convention sets out the general and specific functions of Central Authorities and Chapter III sets out the rules that govern applications that are made through Central Authorities.

237. Where Chapter II of the Convention applies to an application, Article 6(1) requires that Central Authorities provide assistance in relation to applications under Chapter III. In particular, they shall:

- transmit and receive applications
- initiate or facilitate the institution of proceedings in respect to such applications.

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<sup>45</sup> Explanatory Report, para. 390.

<sup>46</sup> Explanatory Report, para. 393.

<sup>47</sup> Explanatory Report, para. 393.

238. Under Article 6(2), in relation to such applications the Central Authorities shall take all appropriate measures:

- where circumstances require, to provide or facilitate the provision of legal assistance
- to help locate the creditor or the debtor
- to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets
- to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes
- to facilitate the ongoing enforcement of maintenance decisions, including any arrears
- to facilitate the collection and expeditious transfer of maintenance payments
- to facilitate the obtaining of documentary or other evidence
- to provide assistance in establishing parentage where necessary for the recovery of maintenance
- initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application
- to facilitate service of documents.

239. Each Contracting State will designate a Central Authority (multi-unit States can designate more than one) and each Contracting State will also specify which of the above types of assistance will be undertaken by the Central Authority or by a competent authority or public body in that particular Contracting State under the supervision of the Central Authority.

240. It is important to refer to the scope or extent to which the Convention may apply in a particular instance when considering the duties of the Central Authority in a case. If, for example, the applicant is seeking to establish a maintenance decision for spousal maintenance only, the above forms of assistance will not be available unless the Contracting State has extended the application of Chapters II and III to all spousal applications.

*The **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.*

*A **competent authority** is the public body or person in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement agency or any other government entity that performs some of the tasks associated with the Convention.*

## Chapter 4 – Processing outgoing applications for recognition or recognition and enforcement (Article 10(1) a) and 10(2) a))

### *How to use this Guide*

*This Chapter deals with applications to recognise or recognise and enforce a maintenance decision.*

*Section I provides an overview of the Application – when it will be used, who can apply for it and an explanation of the basic terms and concepts.*

*Section II outlines the procedure or steps for putting together and processing an application.*

*Section III goes through the required forms and documents and provides information as to what needs to be included and how the forms should be filled out.*

*Section IV covers recognition and enforcement of maintenance arrangements and other exception to the processes in Section II.*

*Section V covers other issues.*

*Section VI contains references to additional materials*

*Section VIII contains Frequently Asked Questions.*

*If all that you need is a quick summary of the process – go to Section VII for the Checklist.*

### I. Overview and general principles

241. The recognition process is at the heart of the recovery of international maintenance and ensures that there is a cost effective way for a creditor to pursue the payment of maintenance in cases where the debtor resides, or has assets or income in another State. The purpose of recognition is to allow a decision made in one State to be enforced in another Contracting State on the same basis as if the decision had been originally made in that State. The recognition and enforcement process relieves the creditor of the need to travel to the State where the decision is to be enforced and to obtain a decision in that State.

242. The Convention provisions are intended to create procedures for the recognition and enforcement of decisions that are simple, low cost and speedy.<sup>48</sup> This is achieved by providing for a system where, when a request for recognition is received from another Contracting State, there is a quick and simple process for recognition and enforcement. A declaration will be made that the decision is enforceable or the decision will be registered for enforcement without any submissions by any party and with only a limited review by the competent authority involved. Once the decision is declared enforceable or registered, enforcement measures can be taken to collect the maintenance in the requested State. The respondent may raise an objection to the registration or declaration of enforceability, but there are strict time limits and grounds for doing so.<sup>49</sup> In most cases, no objection or appeal will be filed, allowing the process to proceed as expeditiously as possible.

A **Contracting State** is a State that is bound by the Convention because it has completed the ratification, acceptance, or approval process set out in Article 58.

The term **State** is frequently used in this Handbook. It generally refers to a sovereign State, or country, and not to a sub-unit of the State, or territorial unit such as a province, or a state within the United States.

<sup>48</sup> Explanatory Report, para. 490.

<sup>49</sup> The Convention does provide for States to make a declaration to use an alternative procedure that allows for notice to the respondent prior to the registration or declaration of enforceability and for wider grounds of review by the Competent Authority. This is dealt with in Section IV of Chapter 5.

243. From the perspective of the Contracting State initiating the application (the requesting State), the procedures for putting the application together are equally straight forward and the documentation required is limited. The Convention expressly limits the documentation that can be required for a recognition and enforcement application, and in most case the application can be made without having to obtain certified copies of decisions or documents. This reflects the Convention objectives of making the process as simple and efficient as possible, allowing for the widest possible recognition of decisions.

244. There is a slightly different process for dealing with recognition and enforcement of maintenance arrangements. The process for their recognition and enforcement is dealt with in a later part of this Chapter.

## **A. When this application will be used**

245. This application will be used when a creditor already has a maintenance decision made in a Contracting State and would like the decision to be recognised and enforced in another Contracting State, where the debtor resides or has assets or income. It can also be used by a debtor who is seeking to have a decision from a Contracting State recognised in order to limit or suspend enforcement of a maintenance decision.

The **requesting State** is the Contracting State that is initiating an application and making the request on behalf of an applicant who lives in that State. The **requested State** is the Contracting State that is being asked to process the application.

246. In some cases an applicant will only request recognition – usually because enforcement is not required at that time.

247. If the decision was originally made in the requested State, the decision does not need to be recognised, only enforced. This type of application comes under Article 10(1) *b*) and is covered in Chapter 6.

## **B. A case example**

248. K and her two children reside in Country A. K has a decision requiring D to pay child support and spousal maintenance. The decision was made in Country A. D now lives in Country B. K would like the maintenance decision to be sent to Country B to have D contacted and the maintenance collected. Both Country A and Country B are Contracting States.

### How this works under the Convention:

249. K will go to the Central Authority in Country A. The Central Authority will transmit an application with the required documents on her behalf to the Central Authority in Country B. The application will request that the maintenance decision be **recognised and enforced** in Country B. If the decision meets the requirements for recognition under the Convention, the competent authority (or Central Authority if it is the competent authority) in Country B will process the request and recognise and enforce the decision. D will be advised of the recognition and enforcement, and have an opportunity to challenge or appeal the decision to recognise and enforce the maintenance decision. Once the decision has been recognised, it will be enforced in Country B by a competent authority. K only has to deal with the Central Authority in Country A. All contact with the Central Authority in Country B will generally take place through the Central Authority in Country A.

### ***C. Who can apply for recognition or recognition and enforcement?***

250. This application can be made by an individual creditor who resides in a Contracting State, by a public body acting as a creditor, who may bring the application on behalf of an applicant, or by a public body acting as a creditor, if the public body has provided benefits to the creditor in place of maintenance.

251. A debtor may also apply for recognition of a maintenance decision from another Contracting State, in order to suspend or limit the enforcement of an earlier maintenance decision.

A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child.

A **debtor** is the individual who owes or is alleged to owe maintenance. The debtor may be a parent, or a spouse or anyone else who, under the law of the place where the decision was made, has an obligation to pay maintenance. In some States this person is called a maintenance payor, an obligor, or a non-custodial or non-resident parent.

### ***D. Challenging recognition and enforcement***

252. In most cases, the recognition and enforcement process will proceed swiftly in the requested State and without any objection by the debtor or respondent. However, there may be some cases where the other party to the application (either the debtor or the creditor) will object to the recognition and enforcement of the decision, on the basis that the decision does not meet the minimum requirements for the type of decision that can be recognised or enforced under the Convention. These requirements are dealt with in more detail in Chapter 5 as the challenge or appeal will arise in the requested State where the recognition application is proceeding, and this is properly part of the incoming procedures for recognition and enforcement. However, it is important for those initiating the application in the requesting State to be aware of the possibility of a challenge or appeal of the recognition or recognition and enforcement, so that they can ensure that the documentation sent with the application is complete and the requested State has the information it needs to be able to respond to any concerns raised by the respondent.

A **respondent** is the person who will be answering or responding to an application or appeal under the Convention. A respondent can be a creditor or a debtor.

253. In addition, caseworkers completing the Application for Recognition and Enforcement will have to indicate the basis upon which the application for recognition and enforcement of the decision is being made in order to complete the appropriate section of the recommended Application Form. This is dealt with in greater detail in Chapter 15, which covers the instructions for completion of the Application Form.

Are you looking for a quick summary of the processes involved in recognition and enforcement applications? Go to the **Checklist** at the end of this Chapter.

## II. Procedure for processing and completing applications

254. The Central Authority in the requesting State is responsible for putting the documents together, ensuring the required forms or documentation are included and preparing the package to be sent to the other State. As there are differences between Contracting States, refer to the Country Profile<sup>50</sup> from the State where you will be sending the decision to, as that will indicate any special requirements, such as translation and certification requirements. However, a State cannot require that any additional documents, other than those set out in Articles 11 and 25, be sent with the application for recognition and enforcement.

### A. Checklist

<b>OUTGOING APPLICATION FOR RECOGNITION OR RECOGNITION AND ENFORCEMENT</b>	<b>Check as complete</b>
Gather necessary documents <ul style="list-style-type: none"> <li>○ Maintenance decision</li> <li>○ Application Form</li> <li>○ Country Profile</li> </ul>	
Check the information from the applicant – Is it complete?	
Consider whether the Application can be made under the Convention? <ul style="list-style-type: none"> <li>○ Is the applicant resident in your State?               <ul style="list-style-type: none"> <li>○ If not – applicant should apply through State of residence</li> </ul> </li> <li>○ Is the application for maintenance? (See Explanation in Chapter 2)               <ul style="list-style-type: none"> <li>○ If not – Convention does not apply</li> </ul> </li> <li>○ Does applicant have a Maintenance Decision?               <ul style="list-style-type: none"> <li>○ If not – make an establishment application</li> </ul> </li> </ul>	
Where was the decision made? <ul style="list-style-type: none"> <li>○ In requested State – Make application for enforcement only</li> <li>○ In requesting State or 3<sup>rd</sup> State – Application can proceed</li> </ul>	
Has decision already been recognised in the requested State If so – make an application for enforcement only	
Translate documents as necessary (Check Country Profile)	
Obtain certified copies of decision if necessary? (Check Country Profile)	
Obtain Statement of Enforceability from competent authority	
Complete Application Form for Recognition or Recognition and Enforcement (See Chapter 15)	
Attach all of the relevant documents	
Complete Transmittal Form (See Chapter 15)	
Send to Central Authority in requested State	
Await confirmation of receipt	
Provide follow documents as requested within three months of request	

**Figure 12: Checklist for outgoing application for recognition and enforcement**

<sup>50</sup> Some Contracting States will not use the recommended Country Profile, however most of this information will be provided to the Permanent Bureau of the Hague Conference on Private International Law. The information will be available at < [www.hcch.net](http://www.hcch.net) >.



## B. Procedure – step by step

*Each of the sections below provides details concerning the steps in Figure 12 above.*

### 1. Gather the necessary documents

255. You will need to have a copy of the Country Profile for the State that you will be sending the documents to, as well as a copy of the maintenance decision and the information or request from the applicant. If you do not have a copy of the Country Profile, go to < [www.hcch.net](http://www.hcch.net) >.

### 2. Check the information from the applicant

256. The applicant will complete any additional forms required by the Contracting State where he or she resides. Make sure the forms are completed to the extent possible and that all the necessary information has been provided. If the applicant is not completing any part of the recommended application form, he or she must provide sufficient information to enable the representative of the Central Authority to complete the document.

### 3. Can the application be made under the Convention?

257. Consider the following before completing the application for recognition and enforcement:

- The applicant must reside in your State in order to apply to the Central Authority for services. If the applicant lives in another State, he or she should apply through that State's Central Authority.
- If the applicant does not yet have a maintenance decision, or if the decision is not from a Contracting State,<sup>51</sup> an application to establish a new decision should be made (see Chapter 8).
- Is the decision for maintenance? See the definition in Chapter 2. If the decision does not concern maintenance, an application to recognise the decision cannot be made under the Convention.
- If the Respondent resides in a non-Contracting State, or the assets or income that are to be the subject of enforcement are located in a non-Contracting State, the Convention cannot be used to recognise and enforce the decision in that State.

**Maintenance** includes support for children, a spouse or partner, and expenses related to the care of the children or spouse / partner.

A **maintenance decision** sets out the obligation of the debtor to pay maintenance and may also include automatic adjustment by indexation and the requirement to pay arrears of maintenance, retroactive maintenance or interest and a determination of costs or expenses.

<sup>51</sup> The decision which is being sent to be recognised in the requested State must be from a Contracting State. It is not enough that it has previously been recognised in a Contracting State. Explanatory Report, para. 241.

#### **4. Determine where the decision was made**

258. If the decision was made in the State you are going to be sending the application to (the requested State) or has already been recognised in that State, then the application is simply one for enforcement. No recognition is necessary. That State is being asked to enforce its own decision, not a foreign decision. Although the applications are similar, the documentation is different. If the decision was made in the requested State, go to Chapter 6.

259. The decision to be recognised must have been made in a Contracting State. If it was not – the Convention does not apply. Other remedies may be available, such as a bilateral agreement or some other procedure under the law of the State where the debtor resides. The applicant will need to contact the appropriate maintenance or child support authority for assistance. In some cases, a new maintenance decision may need to be made.

#### **5. Do the materials need to be translated?**

260. Check the Country Profile. The application and the decision may need to be translated into the official language of the requested State or either English or French. If translation is required, the Country Profile will also indicate whether an abstract or extract of the decision can be provided (see explanation below). This may reduce the cost and complexity of the translation.

#### **6. Determine whether any certified copies of documents are required**

261. See Stage 1, Part II, Section 1 of the Country Profile. That will indicate whether the requested State always requires certified copies of some documents. If so, make the request to the appropriate authority in your State or ask the applicant to obtain the required copies.

#### **7. Obtain Statement of Enforceability**

262. This will be necessary (see below) in order to prove that the decision is enforceable in the State where it was made. If the decision was not made in your State but was made in a different Contracting State, a request for the Statement of Enforceability will need to be made to that State.

#### **8. Complete Application for Recognition and Enforcement**

263. Use the Recommended Form.<sup>52</sup> Ensure all the fields are correctly completed. Check the Country Profile to ensure that any specific requirements for the application for recognition and enforcement, such as the need for certified copies, or the ability to use an extract or abstract (see Stage 1, Part II, Section 1) are met. This will ensure that the application can be processed without delay in the requested State.

264. See Chapter 15 for instructions on completion of the recommended application form.

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<sup>52</sup> Some States will choose not to use the Recommended Form. In these States, the proper form to be used will be specified by the domestic law or policies of the Central Authority. This Handbook only covers the procedures for completion of the mandatory and recommended forms, not domestic or internal forms.

## 9. Attach all relevant documents

265. The next section of this Chapter explains in detail the other documents that are required and how to complete them.

## 10. Complete Transmittal Form

266. This Mandatory Form is required in any application under the Convention, and is sent with the application form and the required documents. The name of the authorised representative of the Central Authority transmitting the application is on the form. It is not signed. See Chapter 15 for instructions regarding completion of this Form.

## 11. Send to the other State

267. In most cases, the documents will be sent by ordinary mail to the Central Authority in the requested State. Some States may accept the documents electronically. Check the Country Profile for the requested State and send the documents in the format requested or to the address shown.

## 12. Await confirmation of receipt

268. The requested State must acknowledge receipt within six weeks. This must be done by the Central Authority using the mandatory Acknowledgement Form. At that time you will also be advised by the requested Central Authority where follow up enquires should be directed to – and the appropriate contact details for that person or unit within that State.

**Good practice:** Let the other Central Authority know if you are experiencing difficulties in obtaining the requested information or documents. Otherwise the Central Authority in the requested State may close

## 13. Provide follow-up documents as required

269. The Acknowledgement Form may request additional documents or information. Provide the information as soon as possible and in any case, within three months. If you expect that it will take longer than three months, be sure to let the other Central Authority know, as it may close its file after three months, if no response has been received.

# III. Preparing the required documents for the application

## A. General

270. Articles 11, 12 and Article 25 of the Convention set out the required contents of any application for recognition or recognition and enforcement of a maintenance decision.

271. This section of the Handbook sets out what must be in the package and how to assemble and complete the documents for the application for recognition or recognition and enforcement. The table below lists the required documents. A requested State cannot require any additional documents in an application for recognition and enforcement (Article 11(3)).

√	Application (Use Recommended Form)
√	Full Text of Decision or abstract
√	Statement of Enforceability
√	Statement of Proper Notice (unless respondent appeared or challenged decision)
<b>As needed</b>	Financial Circumstances Form (for applications by creditors only)
<b>As needed</b>	Document calculating arrears
<b>As needed</b>	Document explaining how to adjust or index decision
√	Transmittal Form

**Figure 13: Required documents – recognition and enforcement**

272. Depending upon the circumstances of the particular case, the requesting State may also wish to include information about benefits provided by the public body, if the public body is the applicant.

## ***B. Putting together the application (recognition and enforcement)***

273. This part provides a procedural guide to assembling the package of required documents to support the application for recognition or recognition and enforcement. Remember that Article 11(3) restricts the documents that are to be included to those mentioned in Article 25.

274. This part assumes that the caseworker or person preparing the application will be using the recommended forms published by the Hague Conference on Private International Law. Some States may choose not to use these forms. In these States, the caseworker should consult his or her own policies and procedures for guidance on completion of the domestic forms.

### **1. Application form**

275. Use the recommended application form (Application for Recognition or Recognition and Enforcement). This ensures that the required information is included in each application.

276. See Chapter 15 for instructions for the completion of the recommended form.

### **2. Statement of Enforceability**

277. In order to be enforced in the requested State, the decision that is being transmitted must be enforceable in the State of origin – the State where the decision was made. This is the essence of the concept of reciprocity – that decisions that are enforceable in one State should be enforced in another.

**Tip:** In some cases, the decision that is being sought to be recognised or recognised and enforced is not from either the requesting or requested State. It will be from a third Contracting State. It is important to remember that the statement of enforceability must indicate that the decision is enforceable in the State of origin.

#### **a) If the decision was made by a judicial authority**

278. If the decision was made by a judicial authority all that is required is a statement indicating that the decision is enforceable in the State where it was made.

### b) If the decision was made by an administrative authority

279. If the decision was made by an administrative authority, the Statement must indicate that,

1. the decision is enforceable in the State where it was made and,
2. the authority that made the decision was a public body whose decisions:
  - (i) may be the subject of an appeal or review by a judicial authority and
  - (ii) have the same or similar effect as a decision of a judicial authority, on the same matter.

280. This latter statement (#2 above) is not required where the State of Origin has specified under Article 57 that decisions of its administrative authorities always meet those requirements (Article 25(1) *b*)). In addition, the requested State may have specified under Article 57 that it does not require a document making the statement set out in #2 above.

281. Therefore, if the decision that is to be recognised or recognised and enforced was made by an administrative authority, you will have to check to see if either there has been a specification by the State where the decision was made or by the requested State, in order to determine what will be required in terms of the Statement of Enforceability. The Country Profile will indicate if these conditions apply in your case.

## 3. Statement of Proper Notice

282. The requested State will need to know that the respondent was given proper notice in the proceedings that led to the making of the decision. In some cases that will be notice of the proceedings and an opportunity to appear, or, in other cases, that will be notice of the decision and an opportunity to challenge it.

283. If the respondent appeared in the proceedings – that should be indicated in section 7 of the Application Form. If the respondent did not appear, a Statement of Proper Notice is required.<sup>53</sup>

A **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

A **competent authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement agency or any other government entity that performs some of the tasks associated with the Convention.

284. The Statement should be completed by a competent authority in the State that made the decision. That person will indicate that, according to the decision or to the records of the competent authority, the respondent either,

- had notice of the proceedings and the opportunity to appear, or
- had notice of the decision made and the opportunity to challenge the decision, as required by the law of the place that made the decision.

<sup>53</sup> The Convention covers decisions made in both administrative and judicial systems. In some systems, the respondent/debtor will not be notified prior to the making of the decision but will receive notice of the decision once it has been made and will be given an opportunity to challenge the decision.

## 4. Financial Circumstances Form

285. This document will assist with the enforcement of the recognised decision, and provides additional information that may help locate the respondent. Keep in mind however, that as the Form is used for a number of different applications, not all parts will need to be completed for an application for recognition or recognition and enforcement. In particular, remember that as this is an application for recognition or recognition and enforcement – it is not necessary to complete the information concerning the creditor's circumstances. However, where information is required for this application, it should be completed as fully as possible, to the extent known by the applicant.

286. The recommended form includes the necessary information about the financial circumstances of the debtor and his or her assets. This information will be particularly useful in the enforcement of the decision, if the debtor does not pay the required maintenance voluntarily.

287. The form may be completed by the creditor / applicant, as often the applicant will have access to the information about the debtor that is contained in the form. However, if the creditor / applicant completes the form, the representative of the Central Authority must check it to ensure that it is complete.

288. See Chapter 15 for detailed instructions for the completion of this Form.

## 5. Document calculating arrears

289. As part of a request for recognition or recognition and enforcement, an applicant may request enforcement of arrears of maintenance that have accrued since the decision was made. A full calculation should be provided by the applicant, showing amounts owing under the decision, amounts paid (if any) and the balance. This document should be as complete and accurate as possible, as the Respondent may challenge recognition and enforcement on the basis that the arrears have been paid in full.

**Good practice:** If a child support or maintenance enforcement agency has been involved in calculating and enforcing the arrears of maintenance, be sure to include a statement from that agency, as its records will be accurate and complete.

## 6. Document explaining how to index or adjust the amount of maintenance

290. In some States, either the decision or the domestic law under which the decision was made provides that a decision is to be automatically indexed or adjusted on a specified frequency. If this applies, the requesting State should provide details of how the adjustment will be done. For example – if the adjustment is to be made using a cost of living percentage, provide details as to which State will calculate the adjustment, what information will be necessary in order to make the calculation, and the way that the recalculated amount of maintenance will be communicated to the requested Central Authority and to the parties.

291. Similarly, some decisions issued by an administrative authority provide for a reassessment to be done at fixed intervals, and the maintenance adjusted based on the financial circumstances of the parties.<sup>54</sup> If the decision that is to be recognised will be subject to this type of reassessment, ensure that sufficient information is provided to explain to the requested State how the reassessment will take place and how any new assessment will be provided to the requested State.

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<sup>54</sup> For example, in Australia a reassessment of the maintenance is done every 15 months and a new assessment issued.

292. As a general best practice, it is recommended that the State where the decision was made should calculate the adjustment as that State will be most familiar with the calculation process. If this is the process that is expected, the document explaining how to adjust the decision would then indicate to the requested State how this process will be managed and when the requested State can expect to receive adjustments to the maintenance amount.

## 7. Complete text of decision

293. Subject to the exceptions below, a complete copy of the maintenance decision must be included in the package. Generally, this is just a simple copy of the decision itself from the judicial or administrative authority that made the decision.

### a) Unless the State has agreed that it will accept an abstract or extract

294. A State may declare that it will accept an extract or abstract of the decision, rather than the complete text of the decision. In some cases, the maintenance provisions of a decision are only a small part of the full decision, and a State may not want to incur the costs of translation of the full text, when only the maintenance provisions are required. The Country Profile for the State that is receiving the case will indicate whether an abstract or extract is acceptable.

295. If an abstract is acceptable – use the recommended form (Abstract of a Decision).

### b) Unless the requested State has specified a certified copy of the decision is required

296. Under Article 25(3) a State may specify that it requires a copy of the decision certified by the competent authority. In all other cases, a simple copy will be sufficient. The Country Profile will indicate if certified copies are necessary.

**Good practice:** Where there is more than one decision in a matter, include copies of all decisions if there are arrears or unpaid maintenance arising under those decisions. If the subsequent decision has completely replaced the earlier decision, the earlier decision should not be required by the Requested State. Also remember that if the decision was made in a State where decisions are automatically readjusted (for example Australia where a reassessment is completed on a regular basis), all of the relevant Assessments for the time period should be included, as each Assessment may be considered to be a separate, new decision.

## 8. Other supporting information

297. Although a requested State cannot require any additional documents beyond those set out in Article 25, in an application for recognition and enforcement, there may be cases where other supporting information will assist in the recognition or recognition and enforcement process.

298. For example, if the applicant is a public body, and the public body has provided benefits in place of maintenance, documentation of the provision of benefits can be provided in order to establish the right of the public body to make the application. Similarly, if the maintenance decision provides that continued maintenance for an older child is dependent upon attendance at a post secondary institution, proof of registration in university or college may assist in the enforcement of the decision. While there is no requirement that these be provided with the application for recognition or recognition and enforcement in the first instance, these documents may ensure that the application is dealt with in an expeditious way by the requested State.



## 9. Complete Transmittal Form

299. The Transmittal Form is a mandatory form that provides a standard, uniform means of sending applications between States. It must accompany every application that is initiated under the Convention. It lists the required documents and information contained in the package and it indicates to the requested Central Authority, the remedy that is being sought.

300. See Chapter 15 for instructions as to how to complete the Form.

## IV. Recognition and enforcement – Other considerations

### A. Maintenance arrangements

#### 1. General

301. Maintenance arrangements are specifically defined under the Convention in Article 3. They are not maintenance decisions although they are treated as if they were maintenance decisions in some parts of the Convention. Article 30 makes specific provisions for the recognition and enforcement of maintenance arrangements, as long as those maintenance arrangements are enforceable in the same way as a maintenance decision in the State of origin.

A **maintenance arrangement** is an agreement in writing relating to the payment of maintenance, that either has been formally drawn up or registered as an authentic instrument by a competent authority, or has been authenticated, concluded, registered or filed with a competent authority and that can be subject to review and modification by a competent authority.

302. A Contracting State may make a reservation under the Convention indicating that it will not recognise or enforce maintenance arrangements. This will be noted in the Country Profile.

#### 2. Procedures for recognition and enforcement

##### a) Application through Central Authorities

303. The provisions of Article 10 dealing with recognition and enforcement apply to maintenance arrangements. This means that the procedures for recognition and enforcement of maintenance arrangements are generally similar to those used for recognition and enforcement of decisions, providing that the maintenance itself falls within the scope of the Convention (see Chapter 3 – Scope). There are few differences in terms of the documentation required for the application for recognition and recognition and enforcement of a decision, as well as for the process and grounds that may be used by a respondent objecting to the recognition or recognition and enforcement of a decision. Article 30(3) lists the Articles of the Convention that do not apply to the recognition and enforcement of maintenance arrangements.

304. An applicant may, therefore, request a Central Authority to transmit an application for recognition and enforcement of a maintenance arrangement to another Contracting State, as long as the maintenance arrangement concerns maintenance obligations for a child under 21 years of age (or under 18 years of age if a reservation has been made) or maintenance obligations for a child and spouse.

##### b) Documentation

305. Since an application for recognition and enforcement of a maintenance arrangement will be treated in the same manner as an application for recognition and enforcement of a maintenance decision, there are similarities in the documentation required. In all cases, the following are required:



### **(1) Application form**

306. The application form covers the required information in Article 11. No specific recommended application form for recognition and enforcement of maintenance arrangements has been developed. However, with the exception of the provision respecting notice to the respondent, the Recommended Form for Recognition or Recognition and Enforcement of a maintenance decision is relevant and can be used.

### **(2) Statement of enforceability**

307. In order to be recognised or recognised and enforced, a maintenance arrangement must be enforceable in the State of origin.<sup>55</sup> To the extent that there are certain pre-conditions to the enforcement, such as, for example, the filing of the arrangement with a judicial authority, the competent authority making the statement should ensure that those are met. If the parties resided in different States when the arrangement was made, the State of Origin will generally be the State where the arrangement was concluded or where it was formalised.

308. No recommended form has been developed for the Statement of Enforceability for a maintenance arrangement. However the form for Statement of Enforceability for a maintenance decision can be adapted for this purpose.

### **(3) Statement of proper notice**

309. This is not required in an application for recognition and enforcement of a maintenance arrangement because of the nature of maintenance arrangements. In the process of concluding the maintenance arrangement, both parties were involved and consented or agreed to the arrangement, therefore the issue of proper notice does not arise.

### **(4) Financial circumstances of the debtor**

310. If the maintenance arrangement is to be enforced after it is recognised, the Financial Circumstances Form should be included with the application as it includes relevant information concerning both the location and the assets and income of the debtor. The information will also assist the requested State in locating the debtor for the purpose of advising him or her about the recognition.

### **(5) Other documents**

311. Note that although Article 25(1) does not apply to recognition and enforcement of maintenance arrangements, it is a good practice to include the following documents in the package of materials, in a case where the circumstances of the case require it:

#### Document showing the amount of the arrears

312. If the applicant is requesting enforcement of arrears that accrued under the arrangement, this information should be provided (see discussion above).

#### Document explaining how to adjust

313. If the maintenance arrangement provides for automatic indexing or adjustment, this document should be provided (see discussion above).

### **c) Process for recognition and enforcement in requested State**

314. There are some differences in the way that recognition and enforcement of maintenance arrangements will take place in the requested State. Article 30 covers the procedures. These are covered in Chapter 5 – Incoming applications for recognition and enforcement.

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<sup>55</sup> Explanatory Report, para. 558.

**d) Maintenance arrangements – Requests to competent authorities (direct requests)**

315. If the maintenance arrangement concerns maintenance obligations not within the scope of Chapters II and III of the Convention (for example spousal only maintenance), the request for recognition and enforcement of the arrangement will have to be made directly to the competent authority, as a direct request. For a discussion of the applicable procedures, please see Chapter 16.

316. Note however that a Contracting State may declare that all applications for recognition and enforcement of maintenance arrangements are to be made to the Central Authority of that State and not to a competent authority.<sup>56</sup> This declaration will be indicated in the Country Profile.

## ***B. Spousal maintenance***

317. Refer to the scope discussion in Chapter 3 above. Generally, spousal maintenance obligations only are covered by the Convention, with the exception of the duties of the Central Authority, set out in Chapters II and III (unless both Contracting State have extended the application of those Chapters to spousal maintenance). Remember that if the maintenance decision which is to be enforced includes both child support and spousal maintenance, it will automatically come within the full scope of the Convention and the procedures discussed above for recognition and enforcement of decisions concerning child support obligations will apply.

318. If the Central Authority is not involved because no declaration to extend the services of the Central Authority has been made by both the requested and requesting States, the applicant in the requesting State will have to send the request for recognition and enforcement directly to the competent authority, not to the Central Authority, in the requested State. This is a direct request, and will be covered by Article 37. Direct requests are discussed in Chapter 16.

## ***C. Other forms of family maintenance***

319. Refer to the scope discussion in Chapter 3. Unless both the requested and requesting States have made declarations that “coincide”<sup>57</sup> with respect to other forms of family maintenance, there is no basis to proceed with a request for recognition and enforcement of a decision for any other form of family maintenance. If declarations to extend the scope of the Convention have been made, the Convention provisions will apply to the extent of those declarations.

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<sup>56</sup> This may be done to provide some additional review or oversight to the requests for recognition of these arrangements. Explanatory Report, para. 565.

<sup>57</sup> “Coincide” is the term used to describe the situation where declarations or reservations made by two States (which can be very different) overlap in a specific area so that the matters covered in that part of the declaration or reservation apply in both States on a specific matter.

## **V. Other issues**

### **1. Location of the respondent**

320. In some cases, the applicant may not know the whereabouts or location of the respondent. This does not prevent an application for recognition and enforcement of a decision from being made. Upon receipt of the application for recognition and enforcement, the requested State will conduct the necessary searches to determine the location of the respondent.

321. However, there may be situations where a creditor wishes the location of the debtor confirmed before making the recognition application. This may happen where there is doubt as to whether the respondent is in the requested State at all, or where there are costs associated with the translation of the decision into the language of the requested State.

322. In addition, in some cases where the decision was made by an administrative authority it will be necessary to know whether the respondent is in the requested State before the application package is completed. This is because the Central Authority in the requesting State will need to know whether the requested State will require a document stating that the requirements of Article 19(3) are met for the decision.

323. In these types of situations, an applicant can proceed first with a request for Specific Measures (see Chapter 13) requesting that the location of the debtor or respondent (or the debtor's income or assets) be determined. Upon receipt of that information, the recognition application can proceed.

324. Note however that the address of the respondent will not necessarily be provided to either the requesting Central Authority or to the applicant if the requested State is not permitted by its domestic laws to disclose that information. In such a case, the requested State will merely confirm that the respondent or debtor (or the debtor's assets or income) have been located in the State.

### **2. Recognition and enforcement – Impact of reservations made by requested State**

325. As discussed in Part I of this Chapter, a respondent may challenge the recognition and enforcement of a maintenance decision on the grounds that none of the bases of jurisdiction for recognition and enforcement set out in Article 20 are present. A State may also make a reservation specifying that it does not accept certain of the bases set out in Article 20 as bases for jurisdiction for recognition and enforcement of a decision in that State (Article 20(2)). Effectively this means that where such a reservation has been made, for example to the creditor's habitual residence in the State of origin as a basis for recognition and enforcement of a decision, a decision made in those circumstances may not be recognised or enforced.<sup>58</sup>

326. From a practical perspective, this will mean that there are situations where the applicant can expect that the requested State may not recognise a decision because of this type of reservation. The applicant has two choices.

327. The application for recognition and enforcement can be made, and if recognition and enforcement is refused on the basis of the reservation, the applicant will have the benefit of Article 20(4). That Article requires the requested State to take all appropriate measures to establish a new decision under these circumstances. In this situation, under Article 20(5), the competent authority must accept the eligibility of the child to bring the proceedings for maintenance, expediting the process.<sup>59</sup> However, even with this

<sup>58</sup> Note that if the domestic law of the requested State would have allowed it to make a decision in similar factual circumstances, the decision should be recognised. See Explanatory Report, para. 463.

<sup>59</sup> Explanatory Report, paras 469 and 470.

acceptance of eligibility, the applicant should be aware that additional information or documents may well be required, so the application for the new decision may not be able to proceed until those are provided.

328. The second option for the creditor is to make an application for establishment of a new decision, and not attempt recognition and enforcement of the existing decision. This may be more expeditious, as all necessary documents can be provided to the requested State with the initial application. The applicant will need to ensure that the requested State is aware of the restriction on the recognition of the existing decision, so that Article 20(5) can be applied. This is covered in Chapter 8 – Outgoing applications for establishment of a decision.

## **VI. Additional materials**

### ***A. Practical advice***

- An authorised representative of the Central Authority must complete the Transmittal Form and check or complete the recommended Application Form.
- Individual States may have their own domestic applications for applicants to use. The information provided in those forms may also be used to complete the Application Form.
- States are encouraged to use the forms recommended and published by the Hague Conference on Private International Law. They are designed so that all of the necessary information is included. Only the Transmittal and Acknowledgement Forms are mandatory, and must be used.
- There is no requirement to include the originals of any documents in the package.
- Under the Convention simple copies of the documents are sufficient unless the requested State has specifically indicated that it requires certified copies of a decision. You can find this out by checking the Country Profile.

### ***B. Tips and tools***

- Reservation and declarations made by the requested State will affect both the types of applications that can be brought through the Central Authority, as well as the specific documentary requirements for the application. Check the Country Profile and the Hague Conference on Private International Law website, < [www.hcch.net](http://www.hcch.net) > to see if there are any reservations or declarations that you should be aware of when the application is compiled.
- After the application has been sent to the requested State, keep the applicant informed of any subsequent developments and, to the extent possible, let the applicant know the timeframes that he or she can expect for the completion of the application.
- In some cases, after the application for recognition or recognition and enforcement is initiated, the parties will reach an amicable solution or settlement. If this happens, be sure to let the requested State know so that the application can be withdrawn.
- It is a fundamental principle for matters brought under the Convention that the process should be managed as expeditiously as possible. Taking the time to ensure that the application is complete and accurate, and anticipating any issues that might arise in the recognition process, will ensure that the application will go smoothly in the requested State.

### ***C. Related forms***

Transmittal Form

Application for Recognition or Recognition and Enforcement (Article 10(1) *a*) and 10(2) *a*))

Restricted Information page

Statement of Enforceability

Statement of Proper Notice

Financial Circumstances Form

Abstract of a Decision

### ***D. Text of relevant articles***

Article 10(1) *a*)

Article 10(2) *a*)

Article 11

Article 12

Article 19

Article 25

### ***E. Related sections of Handbook***

See Section I (Completing the mandatory forms required for all applications) of Chapter 15

See Section I (Overview – Requests for specific measures) of Chapter 13

See Chapter 5 – Processing incoming applications for recognition or recognition and enforcement)

See Chapter 6 – Preparing outgoing applications for enforcement of a decision made or recognised in the requested State (Article 10(1) *b*))

## **VII. Checklist – Applications for recognition or recognition and enforcement**

	<b>Procedure</b>	<b>Handbook reference</b>
1	Check documents	II(B)(1)
2	Determine if application can be made	II(B)(3)
3	Determine what documents are necessary	II(B)(5) – (7)
4	Check or complete application form	II(8)
5	Attach documents	III(B)
6	Complete Transmittal Form	Chapter 15
7	Send to requested State	II(B)(11)
8	Await confirmation of receipt of application	II(B)(12)

## VIII. Frequently Asked Questions

*Why is the date of birth of the applicant required on the application for recognition and enforcement?*

329. The date of birth is required in order to properly identify the parties to the maintenance decision. Because names are often similar, the date of birth allows the Central Authority to confirm the identity of any party, as required. If the applicant is a child, the date of birth will also assist in determining if maintenance is still payable where, for example, there is a provision in the decision or in the law of the place that made the decision, that maintenance for a child terminates at a given age.

*Does the address of the applicant have to be provided where there is a concern about domestic violence?*

330. Article 11 of the Convention requires that an application include the address for the applicant. However, Article 40 of the Convention provides that an authority must not release information if it determines that to do so would jeopardise the safety, health or liberty of a person. Therefore, the recommended application forms have a box where the requesting Central Authority can note that a determination of non-disclosure has been made. If the requesting Central Authority checks that box, it can provide restricted information about the applicant on a separate form that will not be provided to the respondent.

*Can the address of the Central Authority be used instead of the applicant's address?*

331. Yes – and this may be appropriate where there is a concern about the safety, health or liberty of any person, or where the domestic law of the requesting State prohibits the disclosure of the address. However, in such a case the Central Authority must be prepared to accept service of any documentation on behalf of the applicant, as the Convention requires that applicants must be notified of certain procedures, such as the decision to recognise or not to recognise the maintenance decision.

- See also – Privacy and protection of personal information

*What differences are there if the application is being made by a government agency or public body on behalf of an applicant?*

332. The government agency or public body may have to show that it has the right under domestic law to act in place of the applicant / creditor or that it has provided benefits to the applicant in place of maintenance.

*What if the applicant does not know the Respondent's location?*

333. The applicant should still complete the application for recognition or recognition and enforcement and send it to the State where the respondent is believed to be located. The requested Central Authority will take whatever measures are appropriate in order to locate the respondent in order to process the application for recognition and enforcement.

*Can an application for recognition and enforcement be made if the applicant does not have a maintenance order or decision?*

334. No. There must be a maintenance decision. This can be a decision from an administrative authority, a judicial authority or it could be a maintenance arrangement as defined in the Convention.

335. If the applicant does not have a maintenance decision, an application to establish a maintenance decision should be made. See Chapter 8.

*Can an application for recognition and enforcement be made if the applicant has a maintenance arrangement – for example a separation agreement?*

336. Yes – as long as the maintenance arrangement is enforceable as a decision in the State where it was made. The procedures for recognition or recognition and enforcement of maintenance arrangements are generally similar to those for recognition or recognition and enforcement of maintenance decisions. Note also that some States may make a reservation under the Convention indicating that they will not recognise or enforce maintenance arrangements.

A ***maintenance arrangement*** is an agreement in writing relating to the payment of maintenance, that either has been formally drawn up or registered as an authentic instrument by a competent authority, or has been authenticated, concluded, registered or filed with a competent authority and that can be subject to review and modification by a competent authority.

- See also: Processing an application for recognition or recognition and enforcement of a maintenance arrangement

*Must a certified copy of the decision be included with the application for recognition and enforcement?*

337. Only in some cases. See Chapter 3.

338. A requested State may specify that it always requires a certified copy of a decision with all applications. The requested State will indicate this in the Country Profile (see Stage 1, Part II, Section 1 of the Country Profile). In addition, in a particular application, the competent authority in the requested State may later request a certified copy, in particular where there is a challenge to the integrity or authenticity of the decision as supplied. Otherwise, simple copies of the decision are fine.

*Can an application be made for recognition and enforcement of a decision for spousal maintenance only?*

339. Yes – but unless both the requesting a requested States have extended the scope of the Convention to these applications, the request must be made directly to the competent authority in the requested State. This may be an administrative authority or a judicial authority. The services of the Central Authority are not available in these cases (see Chapter 3).

*What if there is more than one maintenance decision? For example, there is an initial decision for maintenance and that decision has been modified by a subsequent decision. Which one should be sent with the application for recognition and enforcement?*

340. The Convention does not directly address this question. If the decision is to be enforced and there are arrears of maintenance that accrued or built up under the earlier decision, the requested State may need a copy of that decision for enforcement. This may be required by the domestic law that governs enforcement, or where a debtor disputes the arrears or alleges a different interpretation of the obligation. Also, there may be certain other matters (such as conditions for indexing or modification) that are found in one decision but not the other.

341. However, recognition of a decision should not be refused solely on the basis that there were prior decisions in the same matter that have not been included with the application. If the most recent decision is the only enforceable decision, send only that decision. If the requested State needs copies of the earlier decisions, it will let you know.

## Chapter 5 – Processing incoming applications for recognition or recognition and enforcement

*How to use this Guide:*

*This Chapter deals with applications to recognise or recognise and enforce a maintenance decision.*

*Section I provides an overview of the Application and the general principles governing recognition and enforcement – when it will be used, who can apply for it and provides a flowchart showing the procedures and steps in the application process.*

*Section II contains a flowchart illustrating the procedures for this application.*

*Section III explains the procedures for recognition in detail.*

*Section IV deals with exceptions to the general procedures, including applications by debtors and direct requests to competent authorities.*

*Section V deals with other issues such as legal assistance and enforcement*

*Section VI contains additional references, forms and some practical tips for applications.*

*Section VII answers some frequently asked questions*

*Section VIII is a checklist for Recognition and Enforcement applications.*

### I. Overview and general principles

#### A. General principles

342. The recognition process is at the heart of the recovery of international maintenance and ensures that there is a cost effective way for a creditor to pursue the payment of maintenance where the debtor resides or has assets or income in another Contracting State.<sup>60</sup>

343. Recognition and enforcement of a decision from another Contracting State eliminates the need for a creditor to obtain a new decision in the State where the debtor now resides, or where assets or income are located.

A **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

344. The procedures for recognition and enforcement of a decision are designed to provide the widest possible recognition of existing decisions and to ensure that the application is dealt with as expeditiously as possible. The scope of the Convention is broadest for recognition and enforcement, and States are expected to provide applicants with comprehensive access to effective procedures. The recognition process is straight forward, with a requirement in the Convention that steps be taken “without delay” or “promptly”.

A **competent authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement program or any other government entity that performs some of the tasks associated with the Convention.

There are only limited grounds for the respondent to object to, or oppose the recognition and enforcement, and there is a limited time frame for doing so. All of this reflects the

<sup>60</sup> There is a difference between recognition and enforcement. Recognition by another State means that the State accepts the determination or finding of legal rights and obligations made by the State of origin. Enforcement means that the requested State agrees that its own processes may be used to enforce the decision. See Explanatory Report, para. 472.



underlying principle in the Convention that recognition and enforcement should be simple, low cost and speedy.<sup>61</sup>

## B. Procedural overview

345. The declaration or registration procedures for recognition and enforcement described below will be used in most Contracting States. There is an alternative process provided for in the Convention (Article 24) and through a declaration, a State may choose to use the alternative process. That process is discussed in further detail later in this Chapter.

346. Upon receipt of the application from another Central Authority, the Central Authority in the requested State will send the materials to a competent authority for processing. In some Contracting States, the Central Authority will be the competent authority for this purpose. In other States the competent authority could be a judicial or administrative authority.

**Requesting State** – the Contracting State where the applicant resides, and the one requesting recognition and enforcement of the decision.

**Requested State** – the Contracting State that has received the application and will be recognising and enforcing the decision.

347. The competent authority is required to promptly make a declaration that the decision is enforceable or register it for enforcement. The competent authority must take this step unless the recognition and enforcement would be “manifestly incompatible” with public policy. Neither the applicant nor the respondent can make submissions at this step – known as an *ex-officio* review.

348. In Contracting States using a registration process, registration may consist of filing the decision with a judicial authority or tribunal, or the registration of the decision with an administrative agency or official (for example, the Registrar of the Child Support Agency in Australia).

349. In other States, a registration process is not used, instead a declaration is made by the competent authority that the maintenance decision is enforceable.

**Tip:** Article 23 sets out the procedures for the recognition or recognition and enforcement process. That Article refers both to a challenge or appeal (Article 23(7)) and a further appeal (Article 23(10)). The Article 23(7) challenge or appeal is limited to the three specific areas mentioned in that Article and Article 23(8) and must be brought within 60 days of the notification of the declaration or registration.

In contrast, the further appeal described in Article 23(10) proceeds entirely according to domestic law, and can only be brought if domestic law permits an appeal.

350. Once the decision has been declared enforceable or registered for enforcement both the applicant and respondent are given notice. The respondent is entitled to challenge or appeal the declaration or registration on certain limited grounds.<sup>62</sup> For example, the respondent may appeal or challenge the registration or declaration if he or she did not receive notice of the initial request for maintenance or was not given an opportunity to challenge the maintenance decision that is now sought to be recognised and enforced. The challenge or appeal must be brought within 60 days of the notification of the registration or declaration of enforceability. The challenge or appeal will be made to the administrative or judicial authority as allowed in that State.

351. If the debtor is not willing to pay the maintenance voluntarily, enforcement of the decision can take place as permitted by the law of the requested State, despite the ongoing challenge or appeal.

<sup>61</sup> Explanatory Report, para. 490.

<sup>62</sup> Explanatory Report, para. 504.

352. If the challenge or appeal to the recognition and enforcement is successful and the declaration or registration is set aside, that does not necessarily mean that the request for maintenance is at an end. Depending upon the reason for the refusal to recognise and enforce the decision, if the maintenance decision concerns child maintenance, it may be

A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer.

possible to establish a new decision in the requested State. The competent authority in the requested State may, if permitted under its domestic law, treat the recognition and enforcement application as if it was an application to establish a new decision in the requested State. This provision ensures where the creditor needs child maintenance and the existing decision cannot be recognised or enforced, that there is a means of obtaining a new maintenance decision without starting the entire processes again in the requesting State.

353. Finally, if the challenge or appeal is not successful, a further appeal may be allowed by the domestic law of the requested State. Not all States will have a provision for this. If a further appeal is permitted, the Convention specifically provides that the further appeal shall not have the effect of staying the enforcement of the decision, unless there are exceptional circumstances (Article 23(10)).

### ***C. When this application will be used***

354. An application for recognition and enforcement of an existing maintenance decision will be received from another Contracting State where enforcement of the decision is requested because the debtor resides in the requested State, or has assets or income in the requested State.

355. In most cases it will be the creditor, who is applying for recognition, however a debtor may also request recognition of a maintenance decision from another Contracting State in order to suspend or limit the enforcement of a maintenance decision.

356. Although most applications will be for recognition and enforcement, in some cases an applicant will seek recognition only, and will not request enforcement of the decision.

A **debtor** is the individual who owes or is alleged to owe maintenance. The debtor may be a parent, or a spouse or anyone else who, under the law of the place where the decision was made, has an obligation to pay maintenance.

357. If the decision was made in the State that is being asked to enforce it, then recognition is not required. The application can simply be processed for enforcement (see Chapter 6).

### ***D. A case example***

358. The creditor has a maintenance decision from Country A requiring the debtor to pay child maintenance. The debtor lives in Country B. Instead of applying for a new decision in Country B, the creditor wishes to have the existing maintenance decision enforced in Country B. Country A and Country B are both Contracting States to the Convention.

**How this works under the Convention:**

359. The creditor<sup>63</sup> will ask the Central Authority in Country A to transmit an application for recognition and enforcement of the maintenance decision to Country B. The application will be checked to ensure it is complete and will be processed by the Central Authority in Country B. The debtor will be notified and given a chance to object to the recognition on the limited grounds set out in the Convention. Once recognised, the decision can be enforced by the appropriate authority in Country B in the same manner as if it were a decision originally made in Country B.

For information about applications to **enforce** a decision made in the **requested** State – see Chapter 6. For information about **enforcement** of any maintenance decision – see Chapter 10.

**E. Who can apply**

360. An application for recognition or recognition and enforcement can be made by a creditor or a debtor (as discussed below – the debtor’s application will be for recognition only, whereas a creditor may seek either recognition and enforcement or both). The applicant must reside in the State that is initiating the application. In this application, the creditor can be the person to whom the maintenance is owed, as well as a public body that is acting in the place of the creditor, or a public body that has provided benefits to the creditor.

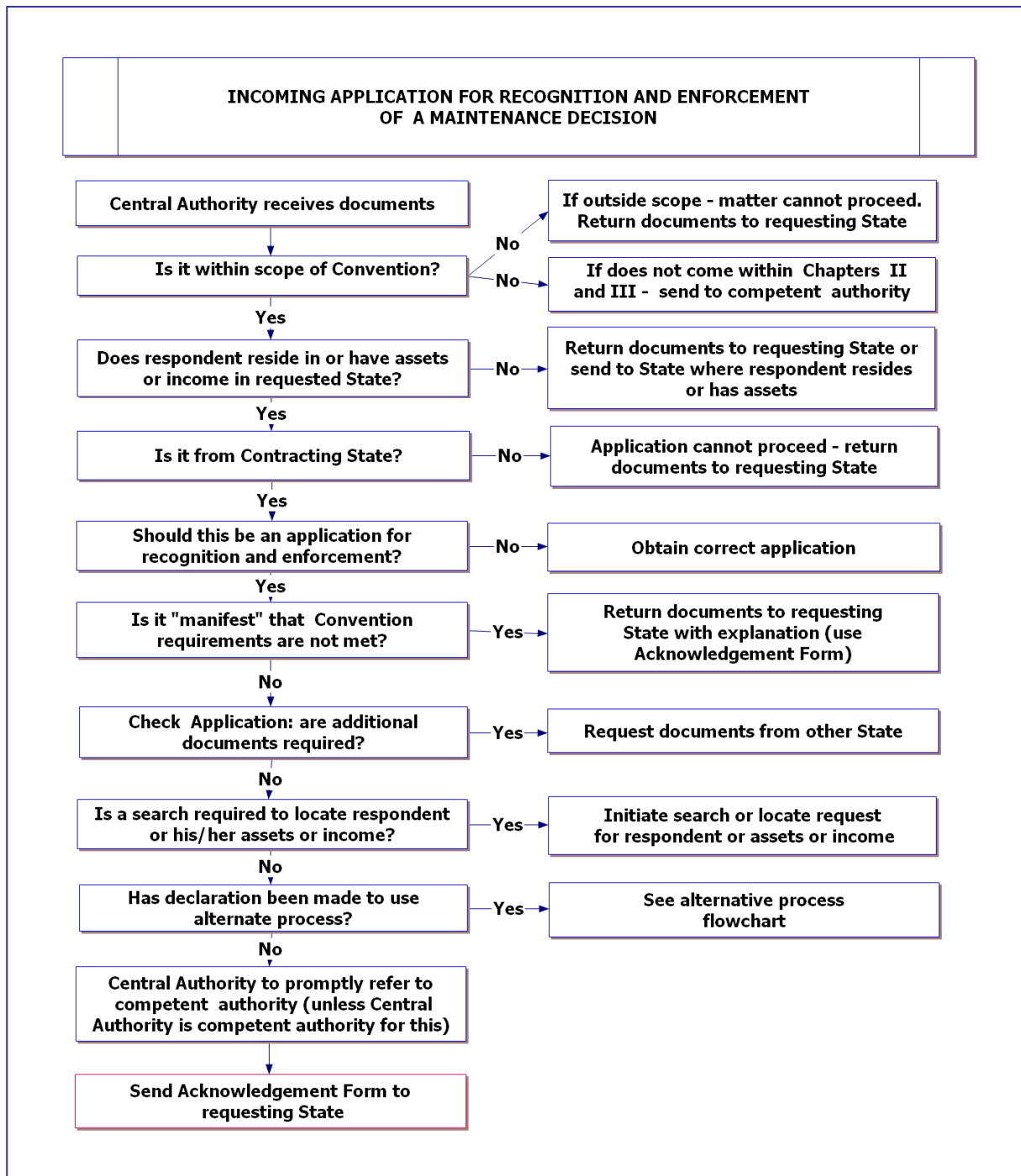
**Tip:** Are you looking for a simple checklist to follow? Do you want to skip the details? Go to the end of this chapter and use the **Checklist**.

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<sup>63</sup> Note that in some circumstances, the request will be made by a public body (such as a Child Support Agency) on behalf of the creditor.

## II. Recognition and enforcement process summarised

361. The table below illustrates the full process for recognition and enforcement applications concerning maintenance decisions. The next sections of this Chapter detail the components of each step.



**Figure 14: Diagram of incoming recognition or recognition and enforcement applications (Central Authority)**

### III. Procedures

#### ***A. Preliminary check of incoming documents by Central Authority***

362. Before sending the materials to the competent authority, the Central Authority should do a preliminary check to ensure the application comes under the Convention provisions for recognition and enforcement, and to make sure that the package of documents is complete.

##### **1. Initial review of the documents**

- Is the application for recognition or recognition and enforcement of a child support decision? It must come within the scope of the Convention as explained in Chapter 3. If the decision is for spousal support only or for another form of family maintenance and the scope of the Convention has not been extended to these other obligations, the request should be made directly to a competent authority.
- Does the respondent or debtor reside in the requested State or have assets or income in the requested State? If not, the matter should be sent to the place where the respondent or debtor resides or has assets.
- Is the application from a Contracting State? If it is not, the Convention cannot be used.

A **direct request** is not made to a Central Authority. A Direct Request is a request received by a competent authority, such as a court or an administrative authority, directly from an individual. It is made outside Article 10.

##### **2. Is recognition or recognition and enforcement the appropriate application?**

363. Check the documents to ensure that the application is for recognition and enforcement. Consider the following:

- If there is no maintenance decision at all – the application should be for establishment, not recognition and enforcement. See Chapter 9.
- If there is a maintenance decision but it is from your State, the decision does not need to be recognised. It can simply be sent to the competent authority for enforcement in your State, following your regular enforcement procedures. See Chapter 7.

##### **3. Is it “manifest” that the Convention requirements are met?**

364. The Convention only allows a Central Authority to refuse to process an application if the Central Authority believes it is “manifest that the requirements of the Convention” are not fulfilled (see Article 12(8)). The circumstances when this might be the case are quite limited.<sup>64</sup>

365. For example, an application could be rejected on this basis if it were clear from the documents that the decision had nothing to do with maintenance.

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<sup>64</sup> Explanatory Report, 344.

366. Note that if recognition and enforcement of the decision appears to be contrary to public policy, the application should still be processed and forwarded to the competent authority. The competent authority can determine if recognition and enforcement would be contrary to public policy and refuse to recognise the decision on that basis.

367. If the Central Authority rejects the application on the basis that it is “manifest” that the Convention requirements are not met, the requesting State must be informed, using the mandatory Acknowledgement Form, as discussed below.

#### 4. Check the documents for completeness

368. When the application is received from the requesting State, it should be checked in a timely fashion to make sure it is complete. If additional documents are needed those can then be requested without delay. Keep in mind that Article 25 of the Convention is a complete list of all of the documents that are required – no additional documents can be required in an application for recognition and enforcement.

**Good practice:** Use the checklist or the Transmittal Form itself to make a preliminary review as soon as possible after the application is received, in case more documents are required.

369. Articles 11, 12 and 25 of the Convention provide that the incoming package must include:

√	Application form
√	Full Text of Decision or abstract
√	Statement of Enforceability
√	Statement of Proper Notice (unless respondent appeared or challenged decision)
<b>As needed</b>	Financial Circumstances Form (for applications by creditors only)
<b>As needed</b>	Document calculating arrears
<b>As needed</b>	Document explaining how to adjust or index decision
√	Transmittal Form

**Figure 15: Contents of application for recognition and enforcement**

370. The following is a brief description of what you can expect to see in the incoming package of materials.

##### a) Forms required in every package:

###### Transmittal Form

Every application for recognition or recognition and enforcement must be accompanied by a Transmittal Form. This form is mandatory under the Convention. The Transmittal Form identifies the parties and the type of application. It also indicates the documents that accompany the application.

### Application Form

In most cases the recommended application form will be used by the requesting State. It ensures that all of the required information is provided to the requested State. If the incoming application did not use the recommended form, review the application that has been sent to ensure that the basic details required for the application are included such as the applicant's contact information, the respondent's contact information, information about the persons entitled to maintenance and details of where to send the payments.

### Text of decision or abstract

The full text of the maintenance decision is required, unless your State has indicated that it will accept just an abstract or extract of the decision. Certified copies of the decision do not have to be included with the application, unless your State has specified that it always requires them.

### Statement of Enforceability

A Statement of Enforceability, indicating that the maintenance decision is enforceable in the State where it was made, is required. If the decision was made by an administrative authority, the document must include a statement that the requirements of Article 19(3) are met, unless your State (the requested State) has specified that it does not require such a statement.

### Statement of Proper Notice

A Statement of Proper Notice is only required if the respondent did not appear or was not represented in the proceedings.

You can determine whether the respondent appeared or was represented by looking at the recommended Application Form (section 7). That paragraph provides the required information.

If the Application Form shows that the respondent did not appear or was not represented when the decision was made, the Statement of Proper Notice will indicate that he or she was either served or notified of the application and had an opportunity to appear in the proceedings that resulted in the maintenance decision, or, was notified of the decision after it was made and was given an opportunity to challenge it.

### Financial Circumstances Form

If the applicant is also seeking enforcement of the decision (which will happen in most cases) a Financial Circumstances Form should be included, providing information about the location and financial circumstances of the Respondent, to the extent known by the applicant.

If the applicant has used the recommended Financial Circumstances Form, the creditor portion of that document will be left blank, as that information is not required for an application for recognition and enforcement.

### Document calculating arrears

If there is unpaid maintenance (arrears) under the maintenance decision that are to be enforced, there must be a document included which sets out the amount of those arrears, how the arrears were calculated, and the date of the calculation.

### Document explaining how to adjust or index

In some States, either the decision or the domestic law under which the decision was made provides that a decision is to be automatically indexed or adjusted on a specified frequency. If this applies, the requesting State should have provided details in the application package as to how the adjustment will be done. For

example – if the adjustment is to be made using a cost of living percentage, provide details as to which State will calculate the adjustment, what information will be necessary in order to make the calculation, and the way that the recalculated amount of maintenance will be communicated to the requested Central Authority and to the parties.<sup>65</sup>

## **b) Additional forms**

371. Although Article 11(3) provides that only the documents listed in that Article (and described above) may be required in an application for recognition and enforcement, there are two additional forms that can be requested, if necessary, depending upon the circumstances of the case:

### Proof of benefits – public body

If the application is being made by a public body, for example a social services agency, on behalf of an applicant, that public body may need to provide information showing that it has the right to act on behalf of the applicant or include information to show that it has provided benefits in place of maintenance.

## **5. If the documentation is incomplete**

372. If it appears that some of the required documentation has not been provided by the applicant, the requested Central Authority should promptly notify the requesting Central Authority and ask that the additional documents be supplied. The package should not be returned simply because some documents are missing (Article 12(9)). The request for additional documents can be made using the mandatory acknowledgement form.

373. If the request is made for additional documents, the requesting State has **three months** in which to provide the documents. If the requested documents are not provided within three months, and the application cannot proceed, the Central Authority in the requested State may (but does not have to) close its file and inform the requesting State. In most cases further follow up with the requesting State may be appropriate to determine whether the documents will be forthcoming. If the requested State is going to close its file, the requesting State should be notified using the mandatory Acknowledgement form.

374. It may also be possible to proceed with the next steps in the application process before receiving the additional material. That will depend upon what documents are missing, and whether the next steps in the recognition and enforcement process are dependent upon receipt of that information. For example, if all that is missing is a statement of arrears, and the next step to be taken is to initiate a search or locate request to determine the location of the respondent, it would be possible to proceed with that step in the recognition and enforcement process while waiting for the additional information to be provided.

## **6. Does a search need to be done for the respondent's location?**

375. As a preliminary matter, if the applicant does not provide a valid address for the respondent, the Central Authority may wish to determine his or her location in order to ensure that it will be able to provide notice of the application for recognition and enforcement. Location of the respondent may also be necessary in order to determine which competent authority will be responsible for the application. In some States, the search or locate request will be initiated by the competent authority at a later point in the process. This is a matter of internal process.

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<sup>65</sup> Explanatory Report, para. 435. What this means is that any subsequent decision that adjusts the maintenance does not need to go through the full recognition process. The initial recognition contemplates the future adjustments. For example, the Australian Child Support Agency reassesses the maintenance every 15 months based on the financial circumstances of the parties.



376. To determine the location of the respondent, the Central Authority is expected to access any data banks and sources of public information that it has access to, and to ask other public bodies to search on its behalf, within the limits set out by domestic law respecting access to personal information. Some Central Authorities may also have access to restricted sources of information.

377. If the Respondent cannot be located for the purpose of notice, advise the requesting State (remember that in the case of an application for recognition and enforcement of a decision based on the location of assets or income in the requested State, the respondent may be located outside the State). If no additional information is available to assist in locating the respondent, the matter may not be able to proceed.

## **7. Acknowledge receipt**

378. Under the Convention, the requested State must acknowledge receipt of an incoming application within **six weeks** of the time it is received. This must be done using the mandatory Acknowledgement Form.

379. See Chapter 15 for instructions for the completion of this form.

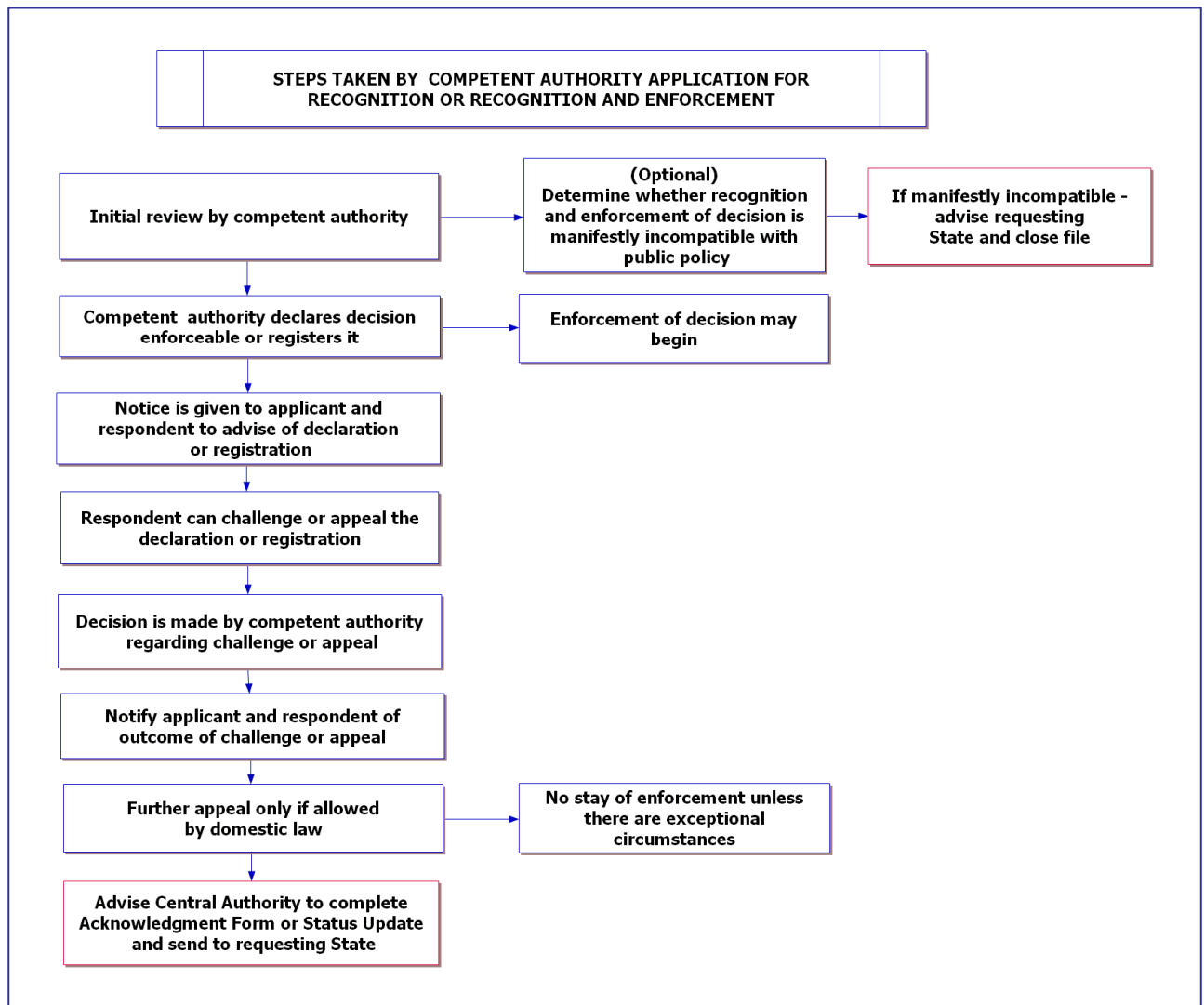
## **8. Refer to competent authority**

380. The next step is to refer the application to the competent authority for the decision to be recognised and enforced (unless the Central Authority is also the competent authority for the recognition process). This must be done promptly, once the initial checks discussed above have been completed. That competent authority may be a court, an administrative authority or any other government authority that is competent to carry out the recognition procedures.

## ***B. Declaration of enforceability or registration by the competent authority***

381. The discussion in this part covers the procedures that will be used by most States for the processing of applications for recognition and enforcement of maintenance decisions (Article 23). A State may make a declaration to use an alternative process (Article 24). This alternative procedure is discussed in a later section of this Chapter.

382. The diagram below shows the steps taken by the competent authority.



**Figure 16: Steps taken by competent authority in recognition and enforcement application (Article 23)**

## 1. Declare decision enforceable or register the decision for enforcement

383. Once the application has been received by the competent authority, it will be either declared enforceable or registered for enforcement, depending upon the process used in the requested State. This step (declaration of enforceability or registration) is to be taken “without delay” by the competent authority (Article 23(2) a)). Once declared enforceable or registered for enforcement, the maintenance decision can then, without more, be enforced under the domestic laws of the requested State.

## 2. Refusal to declare the decision enforceable or to recognise the decision for enforcement

384. The only reason that may be used by the competent authority to refuse to declare the decision enforceable or to refuse to register the decision is that the recognition and enforcement of the decision would be **manifestly incompatible** with public policy. This exception is intended to be very limited in order to ensure that, to the greatest extent possible, contracting States to the Convention recognise and enforce decisions from other Contracting States. It would only be used where the recognition or recognition and enforcement would lead to an “intolerable” result.<sup>66</sup>

## 3. Enforce the decision

385. There is no requirement under the Convention that respondent receive notice of the declaration of enforcement or registration for enforcement before enforcement of the decision commences.<sup>67</sup> No further request or application by the applicant is required under the Convention in order to have the decision enforced.

## 4. Notify the applicant and respondent

386. Once the decision has been declared enforceable or has been registered, both parties will be notified of the decision to register to declare the decision enforceable. There are no Convention procedures for the notification, so this will be done as required by the domestic law. The applicant may be notified through the Central Authority of the requesting State or directly, depending upon the procedures of the requested State, to confirm that the decision has been recognised and will be enforced, or if recognition and enforcement was refused, to advise of the refusal.

**Good practice:** The applicant and respondent should be advised of their right to challenge or appeal the declaration of enforcement or the registration, as well as the procedures and time frame for doing so.

## 5. Objection to recognition and enforcement by respondent or applicant

### a) General

387. The Convention provisions for recognition and enforcement of maintenance decisions are designed to ensure that wherever possible, existing maintenance decisions are efficiently and expeditiously recognised and enforced in Contracting States.<sup>68</sup> As noted earlier in this Chapter, the processes under the Convention have been structured

<sup>66</sup> Explanatory Report, para. 478.

<sup>67</sup> Some States may have procedures or requirements under their domestic law that notice is to be given to a debtor before enforcement, but this is separate from the Convention provisions.

<sup>68</sup> Explanatory Report, para. 428.

such that the recognition of a decision will take place unless the respondent is able to successfully establish that there are good reasons why the decision should not be recognised.

388. A foreign decision, once recognised in a State, will be able to be enforced in that State in the same way as any maintenance decision originally made in that State. Since the recognition of the decision gives rise to maintenance obligations, and the Convention allows a State to use all of the enforcement mechanisms available to ensure compliance, the Convention provides for certain limited objections to be raised by the respondent (the person who is responding to the application for recognition) in the event that he or she believes that the decision should not be recognised or enforced.

389. Article 20 sets out the requirements for a maintenance decision made in one State to be recognised and enforced by another Contracting State. These “bases for recognition and enforcement” generally relate to the type of connection that a parent, family member or the children, must have had with a State in order for the resulting decision to be able to be enforced in another State. For example, the connection to the State that made the decision may be found because of the residence of the parties and the children in the State, or from the attendance or participation of the respondent in the proceedings that led to the making of the decision.<sup>69</sup>

390. The respondent may challenge or appeal declaration for enforcement or the registration of the decision on the grounds that none of the bases for recognition and enforcement are applicable. This does not necessarily mean that the decision was not a validly issued decision in the State where it was made – only that it cannot be recognised and enforced in the requested Contracting State under the Convention.

A **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

391. Similarly, under Article 22 a respondent can object to the recognition of a decision on the basis that the recognition and enforcement is manifestly contrary to public policy or that there were deficiencies in the process used to obtain the decision, such as the failure to give notice of the maintenance proceedings or decision to the respondent, fraud, or that there is a later decision that is incompatible with the decision sought to be recognised.

A **competent authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement programme or any other government entity that performs some of the tasks associated with the Convention.

392. In most cases it will be the respondent who initiates the challenges or appeal. Although it will be rare, an applicant may challenge or appeal the refusal to register a decision or declare it enforceable.

## **b) Time for challenge or appeal**

393. If the party entitled to challenge or appeal the declaration or registration is resident in the State where the registration or declaration has taken place, the appeal or challenge must be brought within **30 days** from the date he or she was notified of the decision to register or declaration to enforce. If the challenging or appealing party resides

<sup>69</sup> Article 20 sets out what are known as “indirect rules of jurisdiction”. Article 20 does not provide rules for when an authority in a State may make a decision (“direct rules of jurisdiction”), instead they set the basis upon which a decision must have been made in order for it to be recognised and enforced in another State. See the Explanatory Report for a discussion of this issue.

outside the State, that party has **60 days** from notification to bring the challenge or appeal (Article 23(6)).<sup>70</sup>

394. In most cases the respondent will reside in the requested State, so he or she will have only 30 days to challenge or appeal the declaration of enforceability or registration. However, if the decision was sent to the requested State to be recognised because there are assets located in that State, the respondent may reside elsewhere. In that case, the respondent will have 60 days to challenge or appeal the decision. Similarly, a debtor may be seeking recognition in his home State of a foreign decision limiting enforcement. In such a case, the out-of-State creditor is entitled to challenge or appeal the declaration or registration, as the case may be, and under the Convention, he or she would have 60 days to do so.

### **c) Grounds for challenge or appeal**

395. The Convention provides only limited grounds for challenging or appealing the registration or declaration of enforceability of a maintenance decision. As discussed above, the respondent may challenge or appeal on the basis that:

- There is no basis under Article 20 for the recognition and enforcement
- There is some reason to refuse the recognition and enforcement under Article 22
- There is a question about the authenticity or integrity of the documents transmitted in the application
- The arrears that are sought to be enforced have been paid in full.

### **d) Consideration or hearing of the challenge or appeal (Article 23(5))**

396. The manner in which the appeal or challenge is considered will be determined by domestic law. The review or hearing can only be on the specific grounds or reasons allowed by the Convention, and there can be no review of the merits of the decision (Article 28).<sup>71</sup>

397. If the basis for the challenge or appeal is a question about the authenticity or integrity of the documents, and certified copies of documents were not requested or included with the materials, a request can be made to the requesting State to provide certified copies or such other documents as will address the issue.

398. If the challenge or appeal is with merely respect to the calculation of the arrears, and the respondent does not allege that the arrears were paid in full, this is, in most cases, a matter better left for enforcement. The respondent can raise those issues and provide additional information to the competent authority responsible for enforcement at that time. See also the comments below about partial recognition of a decision, as a means of allowing ongoing maintenance payments to be enforced while the arrears are being disputed.

### **e) Decision respecting challenge or appeal and further appeal (Article 23(10))**

399. Once the challenge or appeal of registration of the decision or the declaration of enforceability has been concluded, both parties must be promptly notified.

400. There will only be a further appeal if the domestic law of the requested State allows it.

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<sup>70</sup> Explanatory Report, para. 503.

<sup>71</sup> Explanatory Report, paras 504, 505.

401. Note that despite the further appeal, enforcement of the decision can take place as soon as the decision is registered or declared enforceable, and in event, the further appeal will not act as a stay of enforcement unless there are exceptional circumstances.

## ***C. Recognition and enforcement – Application outcomes***

### **1. Recognition and enforcement**

402. In most cases, the result of the application for recognition and enforcement will be that the decision can be recognised and enforced in the same manner as if it had been made by the requested State. No further application by the creditor for enforcement is required. For the enforcement processes used, see Chapter 10.

### **2. Other outcomes**

403. The Convention does provide for alternative outcomes in the event that full recognition and enforcement of the decision is not possible.

#### **a) Partial recognition**

404. Article 21 of the Convention allows the competent authority to recognise and enforce only a portion of the decision, where the whole of the decision cannot be recognised and enforced. This outcome might result, for example, where the authority is unable to recognise the maintenance decision respecting spousal support, but can recognise and enforce the decision respecting child maintenance. Similarly, if there appears to be a dispute respecting arrears of maintenance, and whether they have been paid in full, the competent authority can recognise the part of the decision providing for ongoing child maintenance, while the challenge to the recognition of the arrears is underway.

**Good practice:** An applicant does not have to request partial recognition of the decision, or that a new decision be established, in the event that the recognition application is not successful. The Convention requires that these options are considered in the recognition process as possible outcomes. The domestic procedures of the requested State will determine how the “new” application will proceed, as additional information may be required in order, for example, to establish a new decision.

#### **b) Recognition not possible because of a reservation**

405. In some cases, a maintenance decision cannot be recognised or enforced because of a reservation that the State has made under the Convention. However, the application will not necessarily be concluded at that point.

406. Where the decision cannot be recognised because a reservation has been made, preventing recognition on any of the following bases:

- The creditor’s habitual residence in the State of origin
- An agreement in writing (other than in child support cases)
- Jurisdiction based on personal status or parental responsibility.

407. Article 20(4) requires the Central Authority to proceed with appropriate measures to have a new maintenance decision for the creditor established. No new application from the creditor is required, and the existing decision must be taken as establishing eligibility of the child to bring the maintenance proceedings (Article 20(5)). Depending upon the procedures of the requested State, additional documents from the applicant / creditor may be required in order to proceed with the establishment of a new decision. These documents can be requested through the Central Authority in the requesting State. See Chapter 12 for a discussion of establishment applications.

## ***D. Communication with the requesting State***

408. In addition to the specific notice to the applicant and to the requesting Central Authority that is required at certain points (for example to advise that the decision has been recognised or will not be recognised) the Convention requires that there be ongoing general communication between the two Central Authorities, as part of the general duties of administrative co-operation.

409. Upon receipt of the application, and in any event, no later than six weeks after receiving the documents, the Central Authority of the requested State must acknowledge that the application has been received (Article 12(3)). There is a mandatory form for this purpose. See Chapter 3 for instructions on its completion.

410. In addition, the Convention requires that, at a minimum, within **three months** of acknowledging receipt of the application, the requested Central Authority shall provide a status update to the requesting Central Authority. There is a recommended form for this purpose (see Status Update)

411. At the conclusion of the recognition and enforcement process the requesting Central Authority should be notified that the decision will now be enforced and provide contact details as to the appropriate contact person or unit for enforcement purposes.

412. Communications between the Central Authorities will generally be in the official language of the requested State, or in either English or French. A State may make a reservation objecting to the use of either French or English (but not both). See Chapter 2 for additional information concerning the language of communication and translation requirements.

413. Although in many cases, these communications will be by mail, a State may indicate that it is prepared to accept communication using electronic means. The Country Profile for each State will indicate any preferences in this respect.

## **IV. Other aspects: Recognition and recognition and enforcement applications**

### ***A. Recognition applications brought by a debtor***

#### **1. General**

414. Under the Convention, a debtor may make an application for recognition of a decision where recognition is required in order to suspend or limit the enforcement of a previous decision in the requested State. This application may be made where the debtor wishes to have a different decision recognised in the State where enforcement is taking place, or where the debtor has obtained a modification of an existing decision in another Contracting State, and now wishes to have it recognised in the State where he or she has assets.

415. See Chapters 11 and 12 for a full discussion of modification applications.

416. If there is a maintenance decision already being enforced in the Contracting State, in most cases, the domestic law will require a modified decision made outside that State to be recognised before it can effectively limit or suspend enforcement of the first decision. However, some States may not require this step – for example where a modification is made by the same authority that issued the first decision. Therefore, it

**Modification** refers to the process of changing a maintenance decision after it has been made. In some States this is known as a variation application or an application to change. The modification may relate to the amount of maintenance, the frequency or some other term of the maintenance decision.

will be necessary to review the domestic law to determine whether recognition of the decision is required in any particular case.

## **2. When this application might be used by a debtor**

417. Since the purpose of the application for recognition under Article 10(2) *a*) is to limit enforcement, in many cases the debtor who requires recognition of a decision will reside in the State where the decision needs to be recognised. The Convention does not specifically address this situation and therefore it will have to be handled under domestic law as a request to a competent authority in the State where the debtor resides.<sup>72</sup> Where recognition is sought in a State where the debtor has assets, but the debtor does not reside in that State, the debtor may make an application under Article 10(2) *a*).

418. In all cases where a matter proceeds as an application under Article 10(2) *a*), the debtor will be the applicant. In these cases, the creditor will be the respondent and notice of the registration for enforcement or the declaration of enforceability will have to be given to the creditor.

### An example:

419. The debtor resides in State A, where the initial maintenance decision was made. He has assets or income in State B. The creditor resides in State B and the initial decision was recognised in State B and is being enforced against the debtor's assets in State B. The debtor has now obtained a modified decision from State A. He wishes to have the modified decision recognised in State B in order to limit the enforcement of the first decision.

### How this works under the Convention

420. The debtor can make an application under Article 10(2) *a*) of the Convention to the Central Authority in State A. State A will transmit the application to State B where, using the procedures described in this Chapter, the modified decision will be registered for enforcement or declared enforceable. The creditor will be notified of the registration or declaration and provided with an opportunity to challenge or appeal the declaration of enforceability or registration. Once declared enforceable or registered, the modified decision will be effective in State B to limit the enforcement of the original decision.

## **3. Procedures**

421. The recognition and enforcement procedures discussed in this Chapter are applicable to applications by the debtor for recognition in these circumstances.

## **4. Restrictions on recognition of modified decisions**

422. It is important to note that the Convention does provide an important restriction upon the debtor's right to have a modified decision recognised under the Convention. A creditor may object to the recognition of the modified decision if it the modified decision was made in a Contracting State other than the State where the decision was made (the State of origin) and the creditor was habitually resident in the State of origin at the time the modified decision was made (Articles 18 and 22 *f*)). There are a few exceptions where this will be allowed, but it is important to keep in mind that the right of the debtor

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<sup>72</sup> In some States, the Central Authority will act as the competent authority for this purpose and assist the debtor with the recognition process. In the case of modification applications, the recognition may be treated as the final step in that application (see Chapter 12), and no new application will have to be brought. This will depend upon the internal processes of each State.



to have a modified decision recognised is subject to certain restrictions that do not apply to the recognition and enforcement of other decisions.

423. See Chapters 11 and 12 respecting modification applications.

## ***B. Alternative process for recognition and recognition and enforcement (Article 24)***

424. The Convention provides for two slightly different procedures to be used for applications for recognition and recognition and enforcement – the regular process set out in Article 23 and an alternative process set out in Article 24.

425. A State may make a declaration to use the alternative procedure set out in Article 24.

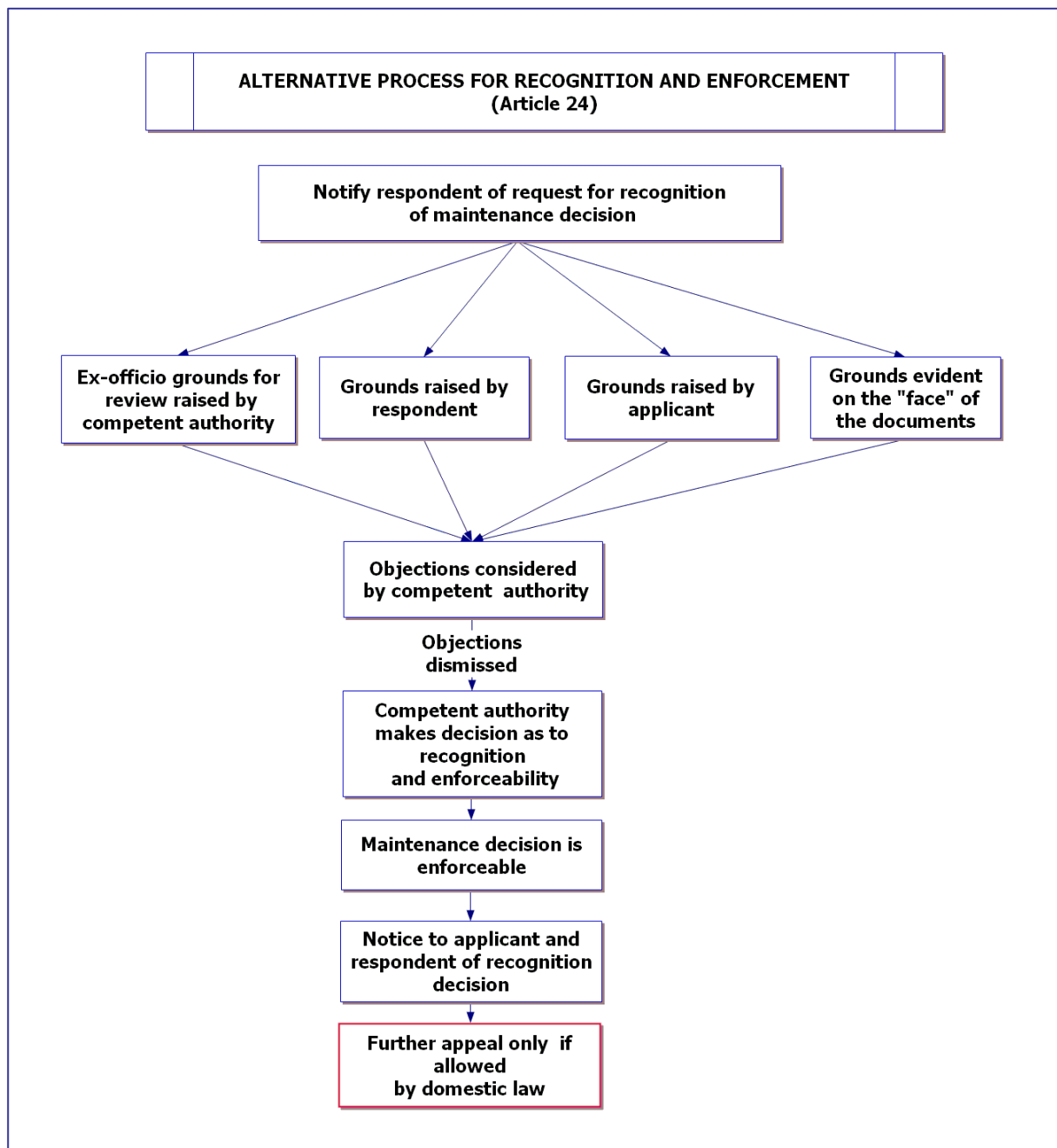
426. The principal difference between the regular process and the alternative process is that under the alternative process the recognition of the decision is only made after the respondent has been notified and both the applicant and respondent have been given an opportunity to make submissions to the competent authority. In addition, there is a wider scope for the competent authority to consider certain grounds to refuse recognition, on its own motion, or without being raised by either party. Beyond these two differences, however, the procedures are very similar.<sup>73</sup>

**Tip:** A State will always use the regular process unless a declaration has been made to use the alternative process. That information will be included in the Country Profile most countries that enforce foreign decisions under bilateral agreements that pre-date the Convention already have processes in place for the registration of foreign decisions or the making of declarations that follow the regular procedures set out in Article 23. These processes will continue with minor changes to accommodate Convention requirements.

427. The alternative process is shown below.

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<sup>73</sup> Explanatory Report, para. 516.



**Figure 17: Alternative process for recognition and enforcement – overview**

### **a) Notify the respondent of the application for recognition**

428. Unlike the regular process, the alternative process requires notification to the respondent prior to recognition of the decision. Although the respondent must be “promptly” notified, there is no time limit set out for a response or objection by the respondent after notification. The time limits, if any, will be set out in domestic law.

### **b) Consideration of objections to recognition and enforcement**

429. As in the regular process, there are only limited grounds that a respondent may raise in objecting to the recognition and enforcement. Those grounds are the same in the alternative process as they are in the regular process.

430. However, under the alternative procedure, certain grounds for refusing to recognise or enforce may also be raised directly by the competent authority, without waiting for the grounds to be raised by either party. (This is what is described in the Convention as the consideration by the competent authority “on its own motion”.) The grounds that can be considered by the competent authority are set out in Article 24(4) and include:

- Whether recognition and enforcement of the decision would be manifestly incompatible with public policy
- Whether proceedings between the same two parties on the same matter are pending in the requested State and the other proceedings started first
- Whether the decision is incompatible with a decision between the same parties and having the same purpose either in the requested State or in another State (provided, in that latter case, that the decision can be recognised and enforced in the requested State)
- From the face of the documents – (meaning that this is evident just by looking at the documents themselves) – there is no basis for recognition and enforcement under Article 20
- From the face of the documents – there is a reason why recognition and enforcement should be refused
- From the face of the documents, there is a concern about the integrity or authenticity of the documents.

**Tip:** In many States the decision making authority only considers issues that are raised by the parties to the hearing. This is the regular process set out by the Convention for recognition and enforcement applications. The alternative process authorises the competent authority to look at certain issues, even where they are not raised by either of the parties.

431. The competent authority will consider the issues noted above and any objections raised by the respondent and then determine whether the decision should be recognised and enforced.

### **c) Enforcement of decision**

432. As in the case of the regular process for recognition and enforcement, the decision is enforceable once it has been recognised using the alternative process. The competent authority can then commence enforcement, without the need for a further application or request by the applicant.

### **d) Appeal**

433. An appeal of the decision to recognise may be allowed under domestic law. If it is, that appeal will not stay the enforcement of the decision, unless there are exceptional circumstances (Article 24(6)).

## C. Maintenance arrangements

### 1. Key differences

434. The Convention makes a distinction between maintenance decisions, which are made by judicial or administrative bodies, and maintenance arrangements, which are specific types of agreements between the parties. Although the processes for recognition and enforcement of maintenance arrangements are fairly similar to those for maintenance decisions, a State may make a reservation indicating that it will not recognise or enforce a maintenance arrangement.

A **maintenance arrangement** is defined in Article 3 as an agreement in writing relating to the payment of maintenance, that either has been formally drawn up or registered as an authentic instrument by a Competent Authority, or has been authenticated, concluded, registered or filed with a Competent Authority and that can be subject to review and modification by a Competent Authority.

### 2. Procedures

435. However, for the purposes of recognition and enforcement, the same general principles and procedures apply.<sup>74</sup> Article 30 of the Convention provides that maintenance arrangements shall be entitled to recognition and enforcement as a decision, providing that the agreement is enforceable as a decision in the State where the arrangement was made.

436. If an application to recognise and enforce a maintenance arrangement is received, the same general processes apply. The same preliminary review is made by the competent authority upon receipt, consisting of a consideration as to whether the recognition and enforcement would be manifestly incompatible with public policy. The documentation required for the application is similar to that required for recognition and enforcement of a decision; however one key difference is that no Statement of Proper Notice is required. This is because the making of the arrangement necessarily involved the participation of both parties.

437. See Chapter 4 for a complete list of the documents required in an application for recognition and enforcement of a maintenance arrangement.

438. After the Central Authority has reviewed the materials to ensure that the documents are complete, the maintenance arrangement will be sent to the competent authority (unless the Central Authority is the competent authority for this purpose). The arrangement is then registered for enforcement or declared enforceable and the respondent notified, or if the alternative process is used by the State, the respondent is notified of the application to recognise the arrangement, and given an opportunity to challenge or appeal.

439. There are some variations in the grounds that can be used to object to recognition of an arrangement.

<sup>74</sup> Explanatory Report, para. 559.

### 3. Completion of the recognition process

440. The recognition process for maintenance arrangements is otherwise similar to that of maintenance decisions, with one exception. As described above, the competent authority will make a decision to register or declare the decision enforceable, and the respondent given an opportunity to challenge or appeal that decision. In many States, that will conclude the registration and enforcement process. However, if a further appeal is allowed by the requested State, in the case of a maintenance arrangement, unlike the process for recognition and enforcement of a maintenance decision, that further appeal of the recognition of arrangement will suspend any enforcement of the arrangement<sup>75</sup> (Article 30(6)).

## V. Recognition and enforcement – Other issues

### A. Legal assistance

441. Under the Convention, in general, the requested State processing any application for recognition and enforcement of a maintenance decision concerning a child less than 21 years of age must provide the creditor with cost-free legal assistance if that is required to process the application. Remember that if the State provides effective access to procedures through the use of simplified procedures, the entitlement to cost-free legal assistance will not arise.

442. Please see Chapter 3 for a complete discussion of the requirement to provide effective access to procedures, including the provision of cost-free legal assistance if necessary.

443. There are a number of exceptions and constraints on the provision of cost-free services that should be considered, where the recognition and enforcement application is being made by a debtor, or the decision is not for maintenance for a child under 21 years of age. These are explained in Chapter 3.

### B. Enforcement issues

#### 1. Currency conversion

444. The Convention does not address the issue of conversion of maintenance obligations from one currency to another. Depending upon the processes used by the competent authority to recognise a decision, there may also be a concurrent process to convert the maintenance obligation under the decision into the currency of the enforcing State. The competent authority may have to obtain a certificate confirming the exchange rate used to convert the payments, and the converted amount will then form the basis of the maintenance liability in the competent State.

445. In other instances, the requesting State may have already converted the decision, including any arrears, into the currency of the requested State.

446. Currency conversion issues are dealt with in more detail in Chapter 10 on enforcement of decisions.

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<sup>75</sup> Explanatory Report, para. 564.

## C. Relevant exceptions and reservations

447. The forgoing information will be applicable in the most common scenarios involving recognition of a child maintenance decision. However, there are a number of scenarios where reservations or declarations made by a State will have an impact upon the recognition and enforcement process.

### a) Children between the ages of 18 and 21 years

448. A State may make a reservation limiting the application of the Convention to persons who are less than 18 years old. If this reservation has been made by a State, that State will not accept for recognition and enforcement any maintenance under the Convention, decisions for a child who is 18 years or older, nor can it request another State to deal with maintenance related matters for children who are more than 18 years old.

A **reservation** is a formal statement by a Contracting State, allowed in certain circumstances under the Convention, specifying that the applicability of the Convention in that State will be limited in some way.

### b) Bases for recognition and enforcement

449. A State may make a reservation that a maintenance decision will not be recognised or enforced if it used any of the following as a basis for the making of the decision:<sup>76</sup>

- habitual residence of creditor
- an agreement in writing by the parties
- an exercise of authority based on personal status or parental responsibility.

### c) Procedure for recognition and enforcement

450. A State may declare that it will use the alternate process for recognition and enforcement (Article 24) described above, rather than the regular process (Article 23).

A **declaration** is a formal statement made by a Contracting State with respect to certain Articles or requirements under the Convention.

### d) Maintenance arrangements

451. A State may make a reservation stating that it will not recognise or enforce maintenance arrangements. Alternatively, by declaration, a State may require applications for recognition and enforcement of maintenance arrangements to be made through the Central Authority.

<sup>76</sup> See earlier discussion (footnote 69) regarding the bases of jurisdiction in Article 20.

## **VI. Additional materials**

### ***A. Practical advice***

- Once the decision has been recognized, many States will attempt to contact the debtor to seek voluntary compliance with the decision as soon as possible to ensure that the maintenance flows to the creditor and the children as soon as possible.
- The intent of the recognition and enforcement process set out in the Convention is to allow for speedy and efficient processing of applications. Caseworkers in the requested State should keep this in mind, and take steps to ensure that cases are processed as quickly as possible, with a minimum of delay.
- Not all of the procedures and requirements concerning the processing of applications for recognition or recognition and enforcement are contained in the Convention. Caseworkers will have to also follow the relevant domestic law and procedures. For example, the caseworker will have to consider any domestic requirements concerning the way that notice is to be provided to the respondent of the decision.

### ***B. Tips and tools***

- Keeping the requesting State advised of any developments or delays in a timely fashion is a good practice and will assist the requesting State in communicating with the applicant.

### ***C. Related forms***

Application for Recognition and Enforcement  
Transmittal Form  
Statement of Enforceability  
Statement of Proper Notice  
Financial Circumstances Form  
Statement of Legal Assistance  
Transmittal Form  
Acknowledgement Form

### ***D. Convention Articles***

Article 19(1) a)  
Article 10(2) a)  
Article 11  
Article 12  
Article 23  
Article 24  
Article 30  
Article 36

### ***E. Related sections of Handbook***

See Chapter 6 – Preparing outgoing applications for enforcement of a decision made or recognised in the requested State (Article 10(1) b))  
See Chapter 10 – Enforcement of maintenance decisions  
See Part 2 (Matters common to all applications under the Convention and to requests for specific measures) of Chapter 3  
See Chapter 8 – Outgoing applications for establishment of a maintenance decision

## VII. Checklist – Recognition and enforcement applications

	Procedure	Handbook reference
0	Receive documents from Central Authority	
1	Confirm that application should be for recognition and enforcement	III(A)(1)
2	Does application meet minimum Convention requirements?	III(A)(2)
3	Check to make sure documents are complete	III(A)(3)
4	Request additional documents if necessary	III(A)(4)
5	Search for respondent's location if necessary	III(A)(5)
6	Acknowledge receipt of Application	III(A)(6)
	If your State uses alternative process go to #8, otherwise use #7 (a),(b),(c)	
7(a)	Register decision and / or declare decision enforceable	III(B)(1)
7(b)	Notify the applicant and respondent of registration or declaration of enforceability	III(B)(4)
7(c)	Respondent has opportunity to take steps to challenge or appeal declaration of enforceability or registration on specified grounds	III(B)(5)
8(a)	Notify respondent of application for recognition	IV(B)
8(b)	Consider grounds, including those raised by Respondent (if any)	IV(B)
8(c)	Recognise decision and declare decision enforceable	IV(B)
9	Conclude any challenge or appeal and notify applicant and respondent	III(B)(5)
10	Send Status update to applicant and requesting Central Authority	III(D)

## VIII. Frequently Asked Questions

*A creditor has a decision from State A. She lives in State B. State B will not recognise or enforce the decision. The debtor lives in State C. Both States are Contracting States. Can the decision be recognised and enforced in State C?*

452. Yes: The creditor can seek recognition and enforcement of a decision in the State where the debtor resides or has assets or income, as long as the decision was made in a Contracting State. The decision does not have to be enforceable or recognised in the requesting State – only in the State of origin. In this case that is State A. If there is a Statement of Enforceability from State A, where the decision was made, then State C should be able to process the application for recognition and enforcement, provided that all other requirements are met.

*Why would a creditor only seek recognition of a decision, not recognition AND enforcement?*

453. In some cases the creditor may intend to enforce the decision privately, or an applicant may need the decision recognised in order to utilise certain other remedies in the requested State. For example, if there is an asset such as an estate in the requested State, the creditor may need the decision recognised before it can be filed as a claim against the estate.



*Does recognition of a maintenance decision make the decision the same as any other maintenance decision originally made in that State?*

454. No. The purpose of recognition and enforcement is simply to allow the foreign maintenance decision to be enforced using the same mechanisms and processes as a domestic maintenance decision. Therefore the laws of the requested State concerning, for example, custody or contact with the children do not apply to that decision. The decision is similar to domestic decisions for the purpose of recognition and enforcement of the maintenance obligations only.

*Does a decision always have to be recognised before it can be enforced?*

455. Yes – unless it is a decision from the requested State where the enforcement will take place. If it is from any other State, it must first go through the recognition process to ensure that the decision conforms to basic procedural or other requirements concerning the way that maintenance obligations should be established – for example – the notice that a party should receive.

*Can a decision made in another language be enforced under the Convention?*

456. Yes – but there must be a translation of the decision or a translated extract or abstract of the text into the language of the requested State or into either English or French. See Chapter 3 for a discussion of the requirements for translations of documents and decisions.

*Can a State recognise a decision that is of a type that could not be made in that State?*

457. Yes – providing that the decision falls within the scope of maintenance obligations under the Convention.

*Why doesn't the Application for Recognition and Enforcement have to be signed by the applicant or someone from the Central Authority?*

458. The Convention is "medium neutral" in order to facilitate the use of information technology and to allow for the efficient transmission of materials between States. To require a signature would make it impossible to send documents by fax, or electronically.

459. The person whose name appears on the Application is responsible for ensuring that the information in the application is consistent with the documents and information provided by the applicant and that the application complies with the requirements of the Convention.

*Can an application for recognition and enforcement be processed without certified copies of documents?*

460. That depends upon whether the requested State has made a declaration under the Convention that it requires certified copies (the Country Profile will confirm this requirement). In addition, in a particular case, a court or competent authority may request certified copies, most likely in a situation where there is a concern about the authenticity or integrity of the documents supplied.

461. If no such declaration has been made, the application may proceed on the basis of the copies provided by the requesting State.

*The competent authority has registered or declared the decision enforceable. What happens next?*

462. Once the decision has been registered or declared enforceable it can be enforced. No further application from the applicant under the Convention is necessary for that (as long as the original application came through a Central Authority). The applicant, respondent and the requesting State must be promptly advised that the recognition has been completed and enforcement is now proceeding.

*What if there is more than one maintenance decision? For example, there is an initial decision for maintenance and that decision has been modified by a subsequent decision. Which one should be recognised?*

463. The Convention does not directly address this question. If the decision is to be enforced and there are arrears of maintenance that accrued or built up under the first decision, the requested State may need a copy of that decision for enforcement. This may be required by the domestic law that governs enforcement, or where a debtor disputes the arrears or alleges a different interpretation of the obligation. Also, there may be certain other matters (such as conditions for indexing or modification) that are found in one decision but not the other.

464. However, recognition of a decision should not be refused solely on the basis that there were prior decisions in the same matter that have not been included with the application. If the most recent decision is the only enforceable decision, send only that decision. If the requested State needs copies of the earlier decisions, it will let you know.

## Chapter 6 – Preparing outgoing applications for enforcement of a decision made or recognised in the requested State (Article 10(1) b))

*How this Chapter is organised:*

*This Chapter deals with applications to enforce a maintenance decision made or recognised in the requested State.*

*Section I provides an overview of the Application – when it will be used, who can apply for it and an explanation of the basic terms and concepts.*

*Section II outlines the procedure or steps for putting together and processing an application, and goes through the required forms and documents and provides information as to what needs to be included and how the forms should be filled out.*

*Section III provides additional materials,*

*Section V answers to some frequently asked questions concerning enforcement applications.*

*If all that you need is a simple summary of the processes involved – go to Section IV for a Checklist.*

### I. Overview

#### A. When this application will be used

465. This application will be used when the applicant has either a maintenance decision that was made in the requested State, or a decision that is already recognised in that State<sup>77</sup>, and would like the decision to be enforced in that State. The creditor will usually be requesting enforcement because the debtor resides in the requested State or has assets or income in that State.

A **maintenance decision** is sets out the obligation of the debtor to pay maintenance and may also include automatic adjustment by indexation and the requirement to pay arrears of maintenance, retroactive maintenance or interest and a determination of costs or expenses.

#### B. A case example

466. H and S were married in State B. They have two children. They obtained a divorce in State B and child maintenance was awarded. S now resides with the children in State A. H continues to reside in State B. H stopped paying maintenance last year. S would like State B to enforce the maintenance decision. Both State A and State B are Contracting States to the Convention.

How this works under the Convention:

467. S will go to the Central Authority in State A. The Central Authority will send an application to the Central Authority in State B requesting that the maintenance decision be **enforced** in State B. The Central Authority in State B will process the request, and send the decision to the competent authority for enforcement. The competent authority will enforce the decision and the payments will be forwarded to S.

<sup>77</sup> Recognition of the decision may have already taken place under the Convention or it may be by “operation of law”, in cases where the decision is effective in the requested State without having to be recognised.

### ***C. Who can apply for enforcement of a maintenance decision?***

468. This application can be made by a creditor, including a public body that is acting on behalf of a creditor or that has provided benefits in place of maintenance.

A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer.

### ***D. General – Enforcement, not recognition***

469. Applications for enforcement by a State of its own decision, or for a decision already recognised in that State, are simpler than applications for recognition and enforcement of a decision. As discussed in Chapters 4 and 5, when an application for recognition and enforcement of a decision is made, the respondent has the right to object to the recognition and enforcement on the basis that the grounds for recognition and enforcement set out in Article 20 are not present, or the procedural and other requirements for recognition and enforcement of a decision in Article 22 are not met.

A **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

470. The respondent has no similar right concerning a decision made or already recognised in the requested State. This is because the State is either being asked to enforce its own order, not a foreign one, or because it is being asked to enforce a decision that has already been recognised through the recognition process under the Convention or domestic law, or is a decision which is recognised by operation of law, so it does not have to go through the recognition process.<sup>78</sup>

A **competent authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement programme or any other government entity that performs some of the tasks associated with the Convention.

471. Thus, if the respondent has objections to the enforcement of the decision, these must be raised once enforcement by the competent authority has been initiated, as allowed by the domestic law of the enforcing State. The fact that an application for enforcement is made under the Convention does not give the respondent / debtor any additional grounds to contest the enforcement of the decision.

<sup>78</sup> The Country Profile of the requested State will indicate what types of foreign decisions do not need to be recognised.

## **II. Procedure for processing and completing applications**

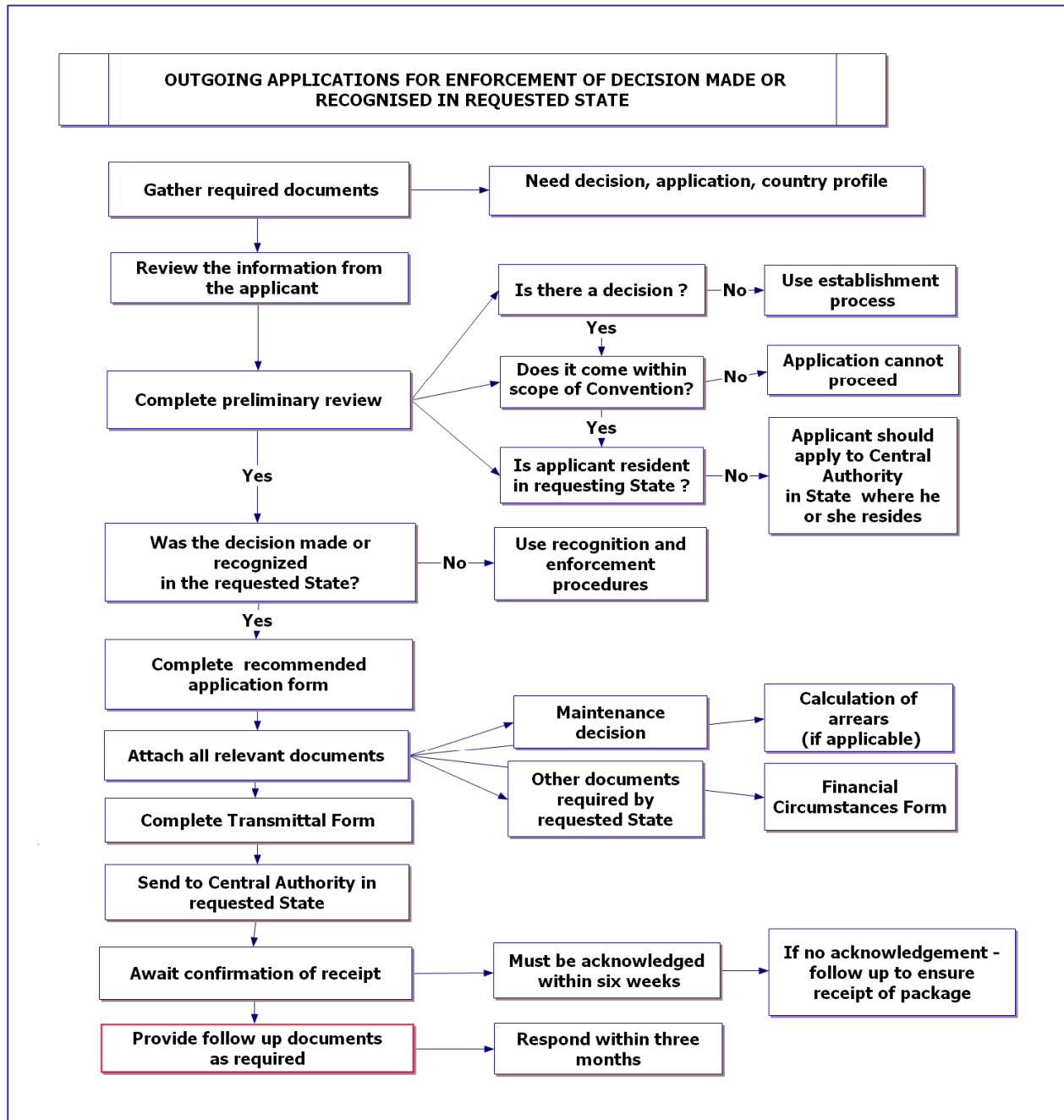
### ***A. Procedures***

472. The requesting Central Authority is responsible for putting the documents together, ensuring the required forms or documentation are included and complete, preparing the necessary forms and sending the package to the Central Authority in the other Contracting State. As there are differences between States, refer to the Country Profile<sup>79</sup> for the requested State (the State that you will be sending the application to) as that will indicate any special requirements for the application and documents.

473. The diagram below summarises the procedures.

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<sup>79</sup> Most Contracting States will complete a Country Profile and file it with the Permanent Bureau of the Hague Conference on Private International Law. The Country Profile can be found on the Permanent Bureau website at < [www.hcch.net](http://www.hcch.net) >. A Contracting State that does not complete a Country Profile must still provide the information required in Article 57, which should include this information.



**Figure 18: Procedures for outgoing application for enforcement**

## ***B. Preparing the outgoing application for enforcement***

474. Each step below corresponds to the processes set out in the table (Figure 18).

### **1. Review the information from the applicant and other documents**

475. Review the Country Profile for the requested State and any information supplied by the applicant. If the applicant is not completing the recommended application form, he or she must provide sufficient information to enable the representative of the Central Authority to complete the document.

### **2. Consider whether the request is appropriate**

476. The applicant must have a decision that can be enforced in the requested State.

- If the applicant does not yet have a maintenance decision, an application to establish a decision should be made (see Chapter 8).
- Is the decision for maintenance? See the explanation of the term in Chapter 2. If it is not for maintenance, the decision cannot be enforced under the Convention.
- The applicant must reside in the requesting State in order to bring the application. If the applicant resides in another Contracting State, he or she should apply through the Central Authority of that State.
- If the Respondent does not reside or have assets or income in a Contracting State, the applicant cannot use the Convention mechanisms to have the decision enforced. There may be a bilateral arrangement in place between your State and the State where the respondent lives, or other procedures may be available.

The **requesting State** is the Contracting State that is initiating an application and making the request on behalf of an applicant who lives in that State. The **requested State** is the Contracting State that is being asked to process the application.

### **3. Determine where the decision was made or recognised**

477. If the decision was made in the State to which you are sending the application (the requested State), then these procedures can be used.

478. If the decision was made in a different State<sup>80</sup> it must have been recognised in the requested State. If the decision has not been recognised, an application for recognition and enforcement should be made (see Chapter 4).

### **4. Complete the application form**

479. The recommended application form (Enforcement of a Decision made in the requested State) should be used. This ensures that the minimum required information is included in the application.

480. See Chapter 15 for detailed instructions for the completion of the form.

<sup>80</sup> Note that the decision need not have been made in a Contracting State, as long as it has been recognised in the requested State. See Explanatory Report, para. 243.

## 5. Complete any additional documents

481. Unlike an application for recognition and enforcement, there are no specific additional documents that need to be provided to the requested State, along with the application. However, in many cases, it is a good practice to provide the following documents, as they will be useful in order to assist the requested State with the enforcement process.

### a) Financial Circumstances Form

482. This document will assist the requested State in locating the respondent for enforcement and in enforcing the decision.

483. The Recommended Form is a useful means of compiling the necessary information about the financial circumstances of the debtor and his or her assets.

*NOTE that as this is an application for enforcement – it is not necessary to complete the information concerning the creditor's circumstances.*

484. The information about the debtor may be completed by the creditor / applicant, as often the applicant will have access to the information that is required. However, if the creditor / applicant completes the information, the name of the representative of the Central Authority responsible for the transmission of the application must be on the Form.

485. See Chapter 15 for detailed instructions for completion of this Form.

### b) Document calculating arrears

486. As part of a request for enforcement, an applicant may request enforcement of arrears of maintenance that have accrued since the decision was made. A full calculation should be provided, showing amounts owing under the decision, amounts paid (if any) and the balance.

487. It is important that this document be as complete and accurate as possible, as the Respondent may challenge the enforcement on the basis that the arrears are not accurate.

**Good practice:** If a child support or maintenance enforcement authority has been involved in calculating and enforcing the arrears of maintenance, be sure to include a statement from that authority, as its records will be accurate and complete.

### c) Complete text of decision

488. It may assist the competent authority in the requested State if a copy of the maintenance decision is included in the package. This does not have to be certified – a simple copy of the decision from the judicial or administrative body that made the decision is sufficient. Depending upon the practice of the competent enforcement authority, provision of a copy of the decision may expedite the enforcement process as it may mean the competent authority does not need to request a copy from the judicial or administrative authority that made or recognised the decision.



### d) Other supporting information

489. In some cases other supporting information may be appropriate. This will depend upon the circumstances or the particular application.

490. If applicant is a public body, it may have provided benefits in place of maintenance. In some cases it may be appropriate to provide documentation showing the provision of benefits, for example, where the public body wishes to assert an independent right to receive a portion of the arrears of maintenance.

491. Similarly, where the decision provides that continued enforcement of child support is dependent upon the child's enrolment in school, it may assist in enforcement if this information is provided along with the application for enforcement. That may reduce any potential delays should the debtor challenge the enforcement on this basis.

492. The Country Profile will also indicate if further documentation is appropriate in a given circumstance.

**Good practice:** The duration of the maintenance obligation will be determined by the law of the State of origin (where the decision was made). The Country Profile of the State of origin will indicate what may be required to establish a continued right to child support. This information should be provided along with the request for enforcement.

## 6. Complete Transmittal Form

493. The Transmittal Form is a mandatory form. It provides a standard means for sending applications between Central Authorities. It lists the required documents and information contained in the package and it indicates to the requested Central Authority what application is being made.

494. For instructions on completion of the Transmittal Form see Chapter 15.

## 7. Send to requested State

495. Once the package of documents is complete, it can be sent to the Central Authority in the requested State.

496. In most cases the materials will be sent by ordinary mail, unless the requested state has indicated that it will accept the documents electronically.

## 8. Await confirmation of receipt

497. The requested State must acknowledge receipt within six weeks. This must be done by the Central Authority using the mandatory Acknowledgement Form. At that time you will also be advised by the requested Central Authority where follow up enquires should be directed – and the appropriate contact details for that person or unit within that State.

## 9. Provide follow-up documents as required

498. The Acknowledgement Form may request additional documents or information. Provide the information as soon as possible and in any case, within three months. If you expect that it will take longer than three months, be certain to let the other Central Authority know, as it may close its file after three months, if no response has been received.

**Good practice:** Let the other Central Authority know if you are experiencing difficulties in obtaining the requested information or documents. Otherwise the Central Authority in the requested State may close its file, if there has been no response after three months.

## ***C. Exceptions to general procedures***

### **1. Decisions for spousal support only**

499. Unless both the requested and requesting Contracting States have extended the full application of the Convention (including Chapters II and III) to spousal support there is no obligation on the requesting Central Authority to assist in the transmission of the request for enforcement of a decision for spousal support only (see Chapter 3). The Central Authority in the requested State also will not be involved in the receipt or processing of the application. The request for enforcement of the decision will have to be made directly to the competent authority responsible for enforcement in the requested State.

500. The procedures for the direct request to the competent authority will be determined by the requested State. Information may be available in the Country Profile or the competent authority may have a website setting out the requirements for the request.

501. Remember however that if the spousal maintenance is contained in either the same decision as child maintenance or in a separate decision but where the application was related to or linked to the child support,<sup>81</sup> the application for enforcement can be made through the Central Authority in every case, whether a declaration has been made or not.

### **2. Decisions for other forms of family maintenance**

502. The Convention has no applicability to decisions for other forms of family maintenance unless declarations have been made by both the requested and requesting Contracting State extending the whole or any part of the Convention to those other types of maintenance.

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<sup>81</sup> See Explanatory Report, para. 47.

### **III. Additional materials**

#### ***A. Practical advice***

- An authorised representative of the Central Authority must complete the Transmittal Form and review or complete the recommended Application Form.
- States are encouraged to use the recommended forms. They are designed so that all of the necessary information is included. Only the Transmittal Form is a mandatory form, and must be used.
- A lot of useful information is contained in the Country Profile for the requested State. That document will indicate the processes that will be used for enforcement and any relevant time frames for taking action.
- There is no requirement to include the originals of any documents in the package.
- Under the Convention simple copies of the documents are sufficient unless the requested State has specifically indicated that it requires certified copies of a decision. You can find this out by checking the Country Profile.

#### ***B. Related forms***

Transmittal Form

Application for Enforcement (Article 10(1) *b*))

Restricted Information Form

Financial Circumstances Form

#### ***C. Text of relevant Articles***

Article 10(1) *b*)

Article 11

Article 12

#### ***D. Related sections of Handbook***

See Section I (Overview – Request for Specific Measures) of Chapter 13

See Chapter 10 – Enforcement of maintenance decisions

See Chapter 4 – Processing outgoing applications for recognition or recognition and enforcement (Article 10(1) *a*) and 10(2) *a*))

## IV. Checklist – Outgoing application for enforcement of a decision from the requested State

	Procedure	Handbook Reference
1	Review documents	II(B)(1)
2	Ensure application is appropriate	II(B)(2)
3	Review or Complete application form	II(B)(4)
4	Attach documents	II(B)(5)
5	Complete Transmittal Form	II(B)(6)
6	Send to requested State	II(B)(7)
7	Await confirmation of receipt of application	II(B)(8)

## V. Frequently Asked Questions

*What is the difference between an application for enforcement of a decision made or recognised in the requested State and an application for recognition and enforcement?*

503. An application for enforcement is used where the decision was made or has previously been recognised in the requested State, so it does not need to be recognised before it is enforced. It is already effective and enforceable in that State. Unlike a request for recognition and enforcement, the request is not to recognise and enforce a foreign decision, it is simply to have the requested State enforce either its own decision or a decision that it has already recognised.

*Why should the Convention be used, if the application is for a State to enforce its own decision?*

504. In some States, access to the competent enforcement authority (for example the child support agency) may be restricted to residents of that State. The Central Authorities in the requested and requesting States may also assist in the transmission of payments if this is required and they are able to do so. Finally, should legal assistance be required in the requested State in order to initiate the enforcement process, it will be provided without cost to the applicant, if the application is made under the Convention.

*Can an application for enforcement of a decision for spousal maintenance be made to the Central Authority?*

505. Only if the application also concerns a decision for child support (see Chapter 3). If the decision is for spousal maintenance only, the request for enforcement must be made directly to the competent authority in the requested State, unless both the requested and requesting State have extended the application of Chapters II and III of the Convention to spousal maintenance.

## Chapter 7 – Processing incoming applications for enforcement of decisions made or recognised in the requested State

*How to use this Guide*

*This Chapter deals with applications to enforce a maintenance decision.*

*Section I provides an overview of the Application – when it will be used, who can apply for it and an explanation of the basic terms and concepts.*

*Section II outlines the procedure or steps for reviewing the incoming materials and processing the application.*

*Section III contains references and additional materials for the application*

*Section IV contains a checklist for those that need a simple overview of the process.*

*Section V covers some of the most frequently asked questions with respect to this application.*

### I. Overview – Incoming applications for enforcement of a decision made or recognised in the requested State

#### A. When the application will be used

506. This is the simplest of all applications under the Convention. The application requests that the competent authority of a Contracting State enforce its own decision, or a foreign decision that it has already recognised<sup>82</sup>, and assist in transmitting payments to a creditor living outside that State. The creditor will be requesting enforcement of the decision because the debtor resides in the requested State or has assets or income in that State.

507. The process is very straight-forward as there is no need for the decision to be recognised before it can be enforced. This is because the decision is either a domestic decision that was made in the State where enforcement will take place, or it is a foreign decision that has already been recognised in the requested State.

The **requesting State** is the Contracting State that is initiating an application and making the request on behalf of an applicant who lives in that State. The **requested State** is the Contracting State that is being asked to process the application.

508. This application is made under Article 10(1) *b*) of the Convention.

#### B. Case example

509. M has a maintenance decision from State A. She now lives in State B. The debtor continues to live in State A. She would like State A to start enforcing the decision for maintenance and send the payments to her. Both State A and State B are Contracting States to the Convention.

510. Using the Convention, M will ask the Central Authority in State B to transmit an **application for enforcement of the decision** to State A. The Central Authority in State A will receive the application, ensure that it is complete, send the decision to the competent enforcement authority for enforcing, and assist in transmission of payments to M as required.

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<sup>82</sup> The recognition may have taken place under the Convention or the decision may be recognised “by operation of law”, in cases where recognition of certain types of foreign decisions is automatic.

## ***C. Important difference – Requests for enforcement of a State’s own decision***

511. An application for enforcement of a decision made or recognised in the requested State is simpler than an application for recognition and enforcement of a decision made elsewhere. As discussed in Chapters 4 and 5, when an application for recognition and enforcement of a decision is made, the respondent has the right to object to the recognition and enforcement on the basis that the grounds for recognition and enforcement set out in Article 20 are not present, or the procedural and other requirements for recognition and enforcement of a decision in Article 22 are not met.

The **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

512. The respondent has no similar right concerning a decision made or already recognised in the requested State. This is because the State is either being asked to enforce its own order, not a foreign one, or because it is being asked to enforce a decision that has, on a previous occasion, already been found to be enforceable, though the recognition and enforcement process. So there is no need for a competent authority to consider whether the decision should be recognised or enforced.

The **competent authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement programme or any other government entity that performs some of the tasks associated with the Convention.

513. If the respondent has objections to the enforcement of the decision, these must be raised once enforcement by a competent authority has been initiated, as allowed by the domestic law of the enforcing State. The fact that an application for enforcement is made under the Convention does not give the respondent / debtor any additional grounds to contest the enforcement of the decision.

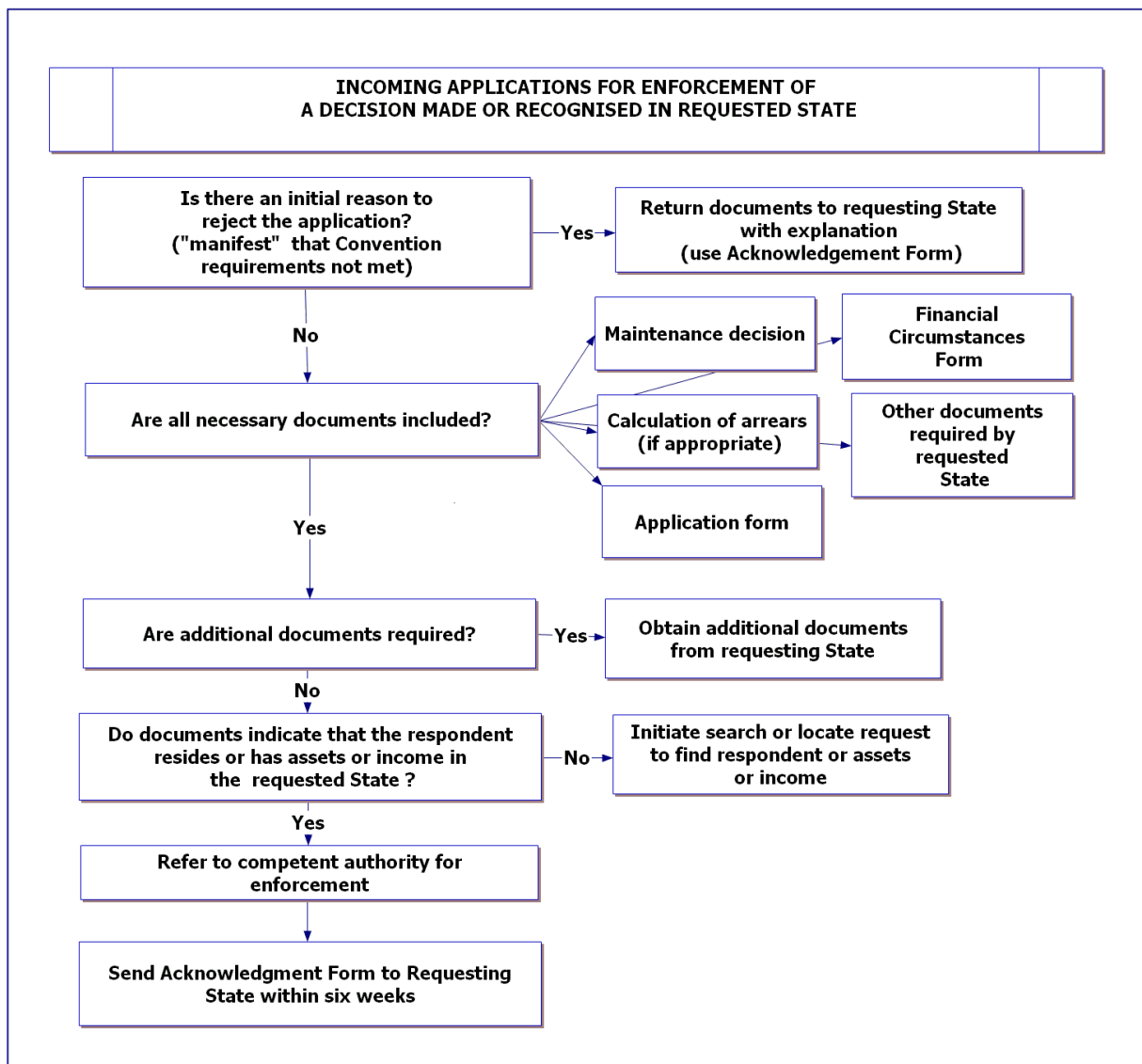
514. The process for managing incoming requests for enforcement is therefore very straight forward for the requested Central Authority. The package of documents is reviewed to ensure it is complete, and the application is referred to a competent authority for enforcement. The competent authority will then take whatever steps are permitted by domestic law to enforce the decision. These procedures are detailed in the next section.

Looking for a quick summary of the steps used in the Chapter? Go to the **Checklist** at the end of the Chapter.

## **II. Processing applications for enforcement**

### ***A. Flowchart***

515. When an application for enforcement of a decision is received from another Central Authority, the package should be checked for completeness, an initial determination made as to whether the application can be processed, and the receipt of the package acknowledged, with a request for any further documents needed. The package can then be sent to the appropriate authority for enforcement.



**Figure 19: Flowchart – overview of enforcement application process**

## **B. Review of incoming documents**

### **1. Ensure the documents are complete**

516. When the documents are received from the Central Authority in the requesting State, they should be reviewed in a timely fashion, so that if additional documents are needed those can be requested without delay.

517. The incoming package should include:

√	Transmittal Form
√	Application Form
<b>As needed</b>	Text of Decision
√	Financial Circumstances Form
<b>As needed</b>	Document Calculating Arrears
<b>As needed</b>	Proof of Benefits Provided by Public Body

**Figure 20: List of forms and documents**

#### **a) Forms included with the application**

##### ***Transmittal form***

Every application under the Convention must be accompanied by a Transmittal Form. This form is mandatory. The Transmittal Form identifies the parties and the type of application. It also lists the documents that accompany the application.

##### ***Application form***

In most cases the recommended application form will be used.

##### ***Text of decision***

In most cases the applicant will have included a simple copy of the decision. This will assist the competent enforcement authority to locate the decision and obtaining additional copies or certified copies if those are required for enforcement.

##### ***Financial Circumstances Form***

Since this is a request for enforcement, a Financial Circumstances Form will be included, providing information about the location and financial circumstances of the Respondent, to the extent known by the applicant. This form provides important information for enforcement of the decision.

If the applicant has used the recommended form, the creditor portion of that document will be left blank, as that information is not required for an application for enforcement.

##### ***Document calculating arrears***

If there is unpaid maintenance under the maintenance decision (arrears), and the applicant wishes those enforced, there should be a document included which sets out how those arrears have been calculated.



## **b) Additional forms**

### ***Proof of benefits – public body***

If the applicant is a public body, it may have provided benefits in place of maintenance. In some cases it may be appropriate to provide documentation showing the provision of benefits, for example, where the public body wishes to assert an independent right to receive a portion of the arrears of maintenance.

## **c) Request additional documents**

518. If the application appears incomplete because additional documents are required, the application should not be rejected. Instead, a request for additional documents should be made, using the mandatory acknowledgement form (see below).

519. If the request is made for additional documents, the requesting State has **three months** to provide the documents. If the requested documents are not provided within three months, further follow up with the requesting State should be initiated. However if the documents are not received and the application cannot proceed, the Central Authority in the requested State may close its file and inform the requesting State accordingly. Again, this can be done using the mandatory acknowledgement form.

## **2. Is it “manifest” that the requirements of the Convention are not met?**

520. The Convention allows a Central Authority to refuse to process an application if it is “manifest that the requirements of the Convention” are not fulfilled (see Article 12(8)). The circumstances when this might be the case are quite limited,<sup>83</sup> and whether the Central Authority chooses to consider this requirement is optional.

521. For example, the Central Authority may have previously rejected an application between the same parties. If there is no new evidence accompanying the application, it would be open to the Central Authority to reject the application again on that basis. Similarly, an application could be rejected if it were clear on the face of the documents that the request had nothing to do with maintenance.

522. If processing the application is refused on this limited basis, the requesting Central Authority should be informed, using the mandatory form, as discussed below.

## **3. Does a search for the respondent need to be completed?**

523. In some limited cases, a Central Authority may wish to conduct a search for the location of the respondent before initiating enforcement, in particular where the law of the enforcing State requires notice prior to enforcement, or where the applicant is not certain whether the debtor resides in the requested State or has assets or income in that State.

524. In carrying out any searches, the Central Authority, or a competent authority on its behalf, is expected to access any data banks and sources of public information that it has access to, within the limits set out by the internal law respecting access to personal information.

525. If the Respondent, or the Respondent’s assets or income, cannot be located in the requested State, advise the requesting Central Authority. If no additional information is available from the requesting State to assist in locating the respondent, then enforcement cannot take place.

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<sup>83</sup> Explanatory Report, para. 344.

## **4. Acknowledge receipt**

526. Under the Convention, the Central Authority of the requested State must acknowledge receipt of an incoming application within **six weeks** of the time it is received. This must be done using the mandatory acknowledgement form.

## **5. Start enforcement process**

527. The package can now be referred to the competent authority responsible for enforcement of maintenance decisions in your State.

# **III. Additional materials**

## ***A. Practical advice***

- In some States, attempts to achieve voluntary compliance will be attempted prior to, or concurrently with the enforcement process. Establishing a long-term stable flow of payments to the creditor in the most efficient way possible is the objective of all maintenance applications.
- It is important to always keep in mind that all applications should be handled in a speedy, effective manner and unnecessary delays should be avoided.
- The Status Update form can be used at any point in the application, either at the same time as the initial acknowledgement or at any time after that. It is a useful way of communicating developments on the case to the applicant and to the requesting Central Authority.

## ***B. Related forms***

Application for Enforcement of a Decision Made or Recognised in the requested State  
Acknowledgement Form under Article 12(3)  
Status of Application Report – Article 12(4) (application for enforcement)

## ***C. Relevant Articles***

Article 10(1) *b*)  
Article 12  
Article 34

## ***D. Related sections of Handbook***

See Chapter 4 – Processing outgoing applications for recognition or recognition and enforcement (Article 10(1) *a*) and 10(2) *a*))  
See Chapter 10 – Enforcement of maintenance decisions

## IV. Checklist – incoming requests for enforcement

	Procedure	Handbook reference
1.	Receive documents from requesting Central Authority	II(B)
2.	Ensure documents are complete	II(B)(1)
3.	Is it “manifest” that Convention requirements not met?	II(B)(2)
4.	Send acknowledgement form to requesting Central Authority	II(B)(4)
5.	Send to competent authority for enforcement	II(B)(5)

## V. Frequently Asked Questions

*Why doesn't a decision from the requested State need to be recognised?*

528. Recognition is not necessary because the State is either being asked to enforce its own order, not a foreign one, or because it is being asked to enforce a decision that has already been recognised.

*Why should the Convention be used if the request is for a State to enforce its own decision?*

529. In some States, access to the competent enforcement authority (for example the child support agency) may be restricted to residents of that State. The Central Authorities in the requested and requesting States may also assist in the transmission of payments if this is required and they are able to do so. Finally, should legal assistance be required in the requested State in order to initiate the enforcement process, it will be provided without cost to the applicant as long as the application comes within the scope of the Convention as applicable between the two Contracting States.

## Chapter 8 – Outgoing applications for establishment of a maintenance decision

### I. Overview

#### A. When this application will be used

530. An application for the establishment of a maintenance decision in another Contracting State (requested State) can be made in any of the following situations:

- where there is no existing decision and the creditor requires a decision to be established, or
- where recognition and enforcement of a decision is not possible, or is refused, because of the lack of a basis for recognition and enforcement under Article 20 or on the grounds in Article 22 *b*) or *e*).<sup>84</sup>

**Establishment** is the process of obtaining a maintenance decision, where either no maintenance decision exists or the maintenance decision that does exist cannot be recognised or enforced for some reason. Establishment may include a determination of parentage, if that is required in order to make the maintenance decision.

531. An application for establishment of a maintenance decision may include a request for a determination of parentage.

532. Applications for the establishment of a maintenance decision are covered in Article 10(1) *c*) and *d*) of the Convention.

#### B. A case example

533. J is seeking maintenance for her two children. She was never married to P but they lived together for many years in State A. She now lives with the children in State B. She does not have a maintenance decision and she cannot bring an application in State B because the domestic law in State B will not permit that application. P continues to live in State A. Both State A and State B are Contracting States to the Convention.

##### How this works under the Convention:

534. J may apply to the Central Authority in State B and request their assistance. The Central Authority in State B will transmit an application for **establishment of a maintenance decision** to State A. It is not necessary for J to prove that P is the parent of the children before sending the request, because she can have that determination made as part of the establishment process. If parentage testing is required, those tests will be arranged by the Central Authority in State A. Once the decision is made in State A it can be enforced in State A.

<sup>84</sup> Where recognition and enforcement of a decision is not possible because of a reservation under Article 20(2) (*i.e.*, a reservation relating to one of the bases of jurisdiction under Article 20(1) *c*), *e*) or *f*)), the applicant is entitled to cost-free legal assistance to establish a new decision (Articles 15 and 20(4)). This is the only situation under the Convention where an applicant is entitled to free legal assistance for an establishment application.

### ***C. Who can apply for establishment of a maintenance decision?***

535. If there is no existing maintenance decision, only a creditor may apply for establishment of a decision.

536. If the establishment of a decision is required because a decision exists but recognition or enforcement was refused because of a reservation under the Convention (Article 20(2)), either a creditor or a public body that has provided benefits in place of maintenance may bring an application to establish a maintenance decision. Both parties must reside in Contracting States.

Are you looking for a quick summary of the procedures for this Application? Go to the [Checklist](#) at the end of the Chapter.

537. Remember that in order to bring an application through the Central Authority for establishment of a maintenance decision the applicant must be seeking child support. Requests for establishment of spousal maintenance will not be included in the scope of applications covered by a Central Authority unless there has been a declaration by both the requesting and requested States extending Chapters II and III of the Convention to spousal maintenance (see Chapter 3). A creditor who needs to have a spousal maintenance decision established must make that request directly to the competent authority in the requested State. Requests for establishment of other forms of family maintenance are also not covered by these procedures unless there has been a declaration in both States extending the application of the Convention to those types of maintenance obligations.

### ***D. Initiating establishment of a decision – some considerations***

538. In some cases, the applicant may have the option of bringing an application for establishment of a maintenance decision either under the domestic law of the State where he or she resides, or under the Convention, as an application under Article 10 for establishment in another Contracting State. Applicants considering whether to proceed under domestic law or under the Convention may wish to keep in mind the following:

#### **a) How long it may take to process the application for maintenance**

539. The length of time it may take to process the application domestically may depend upon the laws of the State respecting service on out-of-State respondents, and how quickly the competent authority can proceed with the application. Similarly, the length of time it takes to process an application under the Convention will vary depending upon the States involved and how long the procedures in each State will take. Information about the length of time that an application can take in the requested State will be available in the Country Profile.

#### **b) Whether there are any differences in the legal effect of a decision made under domestic law or under Article 10 of the Convention**

540. In some situations, a maintenance decision made under domestic law, creating obligations against an out-of-State respondent, may not be enforceable in the State where the respondent resides. This is a complex legal issue and one which the applicant may want to discuss with legal counsel.

**c) The cost of the proceedings**

541. If an application is made under the Convention for the establishment of a maintenance decision for child maintenance for a child under the age of 18 years, the applicant is always entitled to cost-free legal services, unless the requested State has chosen to use a merits test, or a child-centred means test (see Chapter 3). Effectively, this means that cost-free legal services will be available to an applicant in the majority of these cases. This may be an important consideration for an applicant, if the same level of legal assistance is not available in his or her own State for a domestic application.

**d) The maintenance outcome**

542. There may be differences between States as to the maintenance that may be awarded in a case. The applicant may wish to consider whether there are any differences in the amount or duration of the maintenance that can be awarded, in deciding whether to proceed domestically or under the Convention. This information may be available in the Country Profile for the requested State.

543. There may also be other considerations that are specific to the applicant's particular situation. An applicant considering the options with respect to the application may wish to consult a lawyer and obtain legal advice on this issue.

***E. Special circumstances: Establishment applications where new decision is required because of reservation (Article 20(4))***

544. As discussed in Chapters 4 and 5 of this Handbook, there may be situations where recognition and enforcement of an existing decision is refused by a requested State because there has been a reservation made as to the particular basis for recognition and enforcement that applies to the decision. For example, if the decision was made on the basis of the creditor's habitual residence in the State of origin, and no other basis for recognition and enforcement in Article 20 can be found, the requested State may not be able to recognise the decision. In this case, a new decision may have to be established.

545. There is no requirement that a new application – an application for establishment of a decision – must be brought in this situation, as the requested State is required to take all appropriate measures to establish a new decision (Article 20(4)). However, in practical terms, that process may require additional information and documentation from the creditor, for example, where the costs of raising the child are relevant to the determination of quantum of maintenance. So there may be a request for further documents in that application. Importantly, in establishing a new decision under this Article, the eligibility of the child or children (if under the age of 18 years) to bring the application for maintenance will not have to be established, as the existing decision must be accepted as establishing the eligibility of that child for maintenance in the requested State (Article 20(5)).

546. If this situation arises, caseworkers may therefore wish to review this Chapter to determine the type of information that might be required for that application as it would be similar to that required to establish an initial decision.

### ***F. Special circumstances: Establishment applications where new decision is required because recognition or recognition and enforcement is not possible***

547. There may also be situations where an applicant has a maintenance decision, but he or she knows that the respondent in the requested State will be able to successfully oppose the application for recognition and enforcement. This could be because of a reservation made by the requested State, because none of the grounds for recognition and enforcement of the decision can be found, or because the decision is of a type that the requested State cannot enforce.<sup>85</sup> In such a case, the creditor will have to initiate an application for establishment of a new decision, rather than an application for recognition and enforcement.<sup>86</sup> Those applications will also proceed in the same manner as any other application under this Chapter. However, because the new decision is not being established because of a refusal to recognise and enforce the existing decision, the presumption as to eligibility to bring the application in Article 20(5) discussed above will not apply.

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<sup>85</sup> For example, the decision may set maintenance as a percentage of salary and this is considered by the requested State as too vague to be enforceable. See Explanatory Report, para. 256.

<sup>86</sup> See Explanatory Report, para. 256.

## II. Procedures for completing and transmitting the application

### A. Overview

548. The illustration below outlines the key steps in processing the outgoing application.

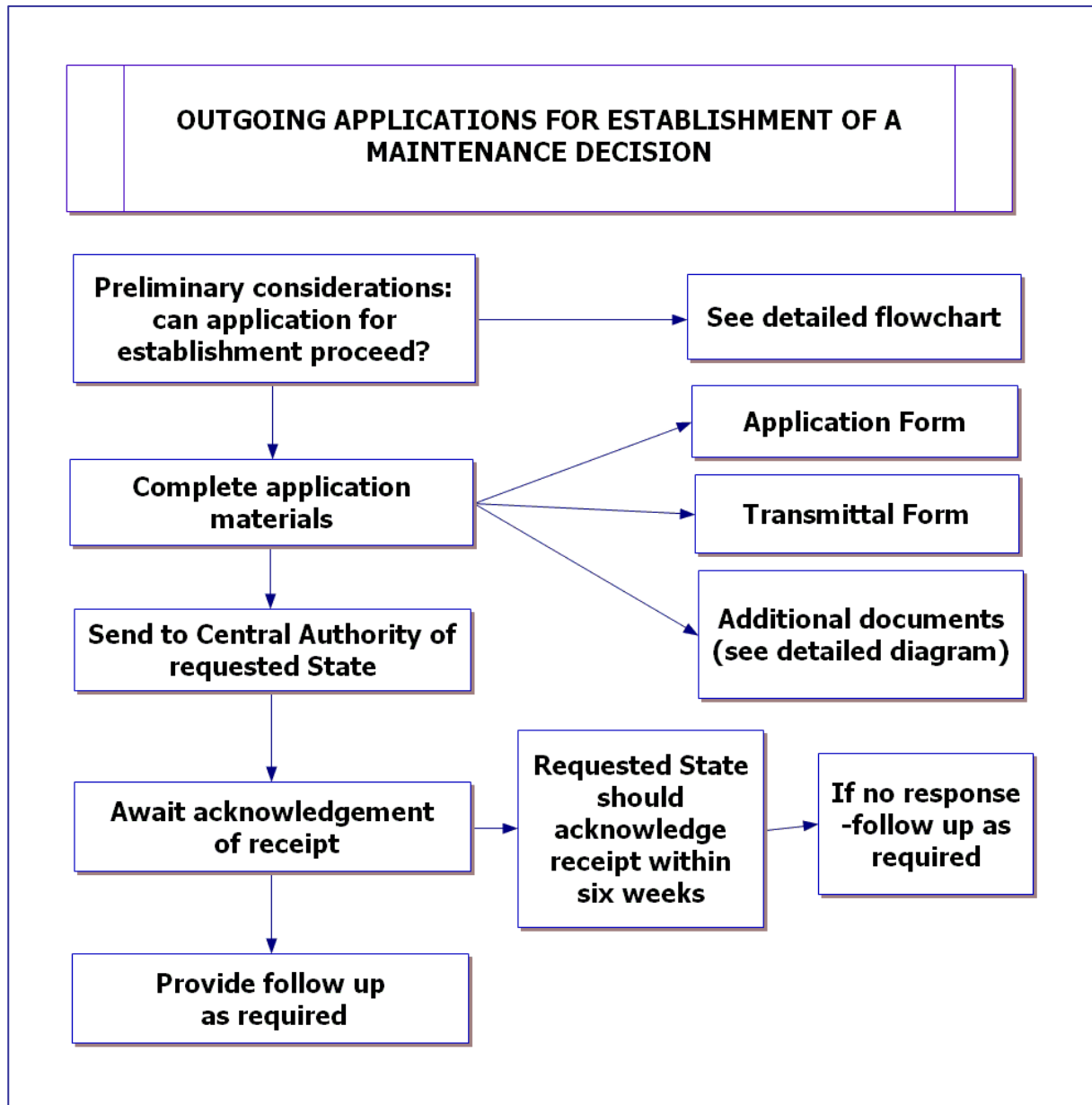
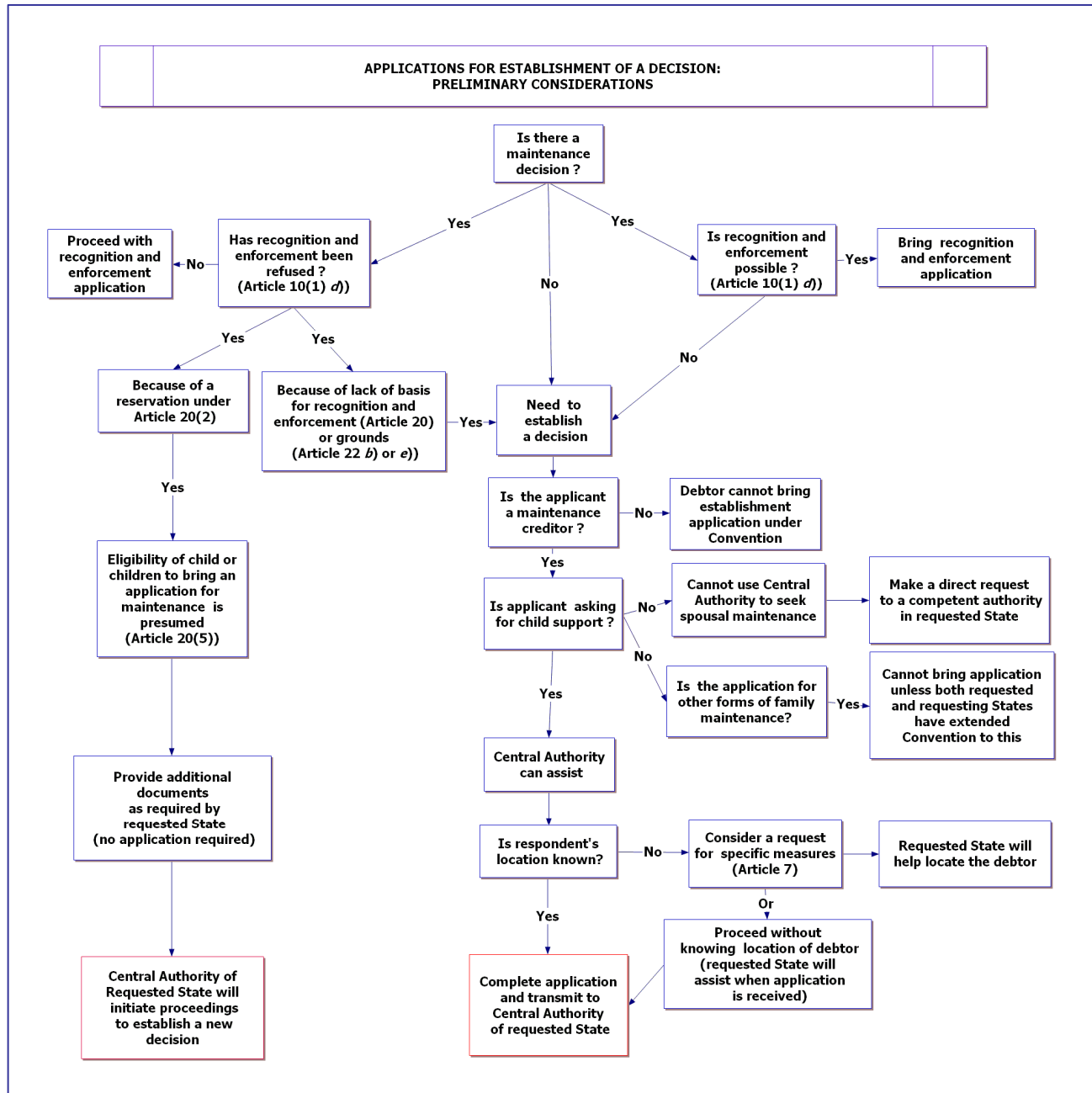


Figure 21: Overview – establishment application process



## B. Preliminary steps

549. The flowchart on the following page outlines the preliminary steps that should be taken to ensure that the establishment application is appropriate and should be processed. This is a necessary step given the duty of the Central Authority to be satisfied that the application complies with the Convention.



**Figure 22: Preliminary steps in application process**

## 1. Procedres – Initial review

**Note:** The questions in this section follow the flowchart above.

### a) Question 1: Does the applicant have a maintenance decision?

550. If the applicant already has a maintenance decision, and it is possible to recognise and enforce the decision, the appropriate application is one for recognition and enforcement of the decision (see Chapter 4).

551. If the applicant has a maintenance decision but recognition and enforcement of the existing maintenance decision is not possible, an application to establish a new decision will have to be made under Article 10(1) *d*). For example, the creditor may have a decision that is of a type that cannot be enforced, such as one that sets the maintenance amount as a percentage of salary and this is considered by the requested State as too vague to enforce.<sup>87</sup>

552. If the applicant has a decision, but recognition or enforcement of that decision has been refused because of a reservation under Article 20(2), a new decision will have to be established. However, as noted above, a new application does not need to be made (the recognition and enforcement application will be treated as if it were an application for establishment) and there will be a presumption that the child or children are eligible for maintenance. The role of the Central Authority in the requesting State therefore, is to assist in obtaining and transmitting any additional documentation required for the establishment application.

A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer.

553. If the applicant has a decision, but recognition and enforcement was refused because the basis for recognition and enforcement in Article 20 were not met, or because the grounds for refusal under Article 22 *b*) or *e*) were found, the creditor can apply for a new decision in the requested State under Article 10(1) *d*). However, the presumption as to eligibility of the child or children in Article 20(5) will not apply in this situation.

### b) Question 2: Is the applicant a creditor?

554. Article 10 of the Convention limits those who can bring an application for establishment of a decision to creditors (those entitled to receive maintenance for their support or for the support of their children). A debtor cannot use the Convention procedures to establish a maintenance decision. A public body can only bring an establishment application if it has provided benefits in lieu of maintenance, and only if it is seeking to establish a decision because an existing decision cannot be recognised and enforced based on an Article 20 reservation.<sup>88</sup>

<sup>87</sup> See Explanatory Report, at paras 255 and 256.

<sup>88</sup> See Explanatory Report, para. 586.

**c) Question 3: What type of maintenance is the applicant seeking?**

555. In order to bring an application through the Central Authority for establishment of a maintenance decision, the applicant must be seeking child support. Requests for establishment of spousal maintenance will not be included in the scope of applications covered by a Central Authority unless there has been a declaration by both the requesting and requested States extending Chapters II and III of the Convention to spousal maintenance (see Chapter 3). A creditor who needs to have a spousal maintenance decision established must make that request directly to the competent authority in the requested State for a decision.

556. Requests for establishment of other forms of family maintenance are also not covered by these procedures unless there has been a declaration in both States extending the application of the Convention to these types of maintenance obligations.

**d) Question 4: Does the applicant know the address where the respondent resides?**

557. The applicant does not need to know the precise location of the respondent in order to proceed with a request for establishment of a maintenance decision. In such a case, the requested State will initiate a search, or request another agency to do a search, using public and other accessible sources to locate the respondent for the purpose of the application.

558. However, in some cases the applicant may want to verify that the respondent is in the requested State before initiating the establishment application. For example, if there is doubt as to whether the debtor resides in the requested State at all, it may be more efficient to proceed with a request to confirm the debtor's location first, so that the Central Authority knows whether to send the application to that State. In such a case, a request for Specific Measures can be made first, simply requesting the services of the Central authority in the requested State to confirm the location of the respondent in that State (see Chapter 13). Once the debtor's location has been confirmed, the application can be sent to the State where the debtor resides.

**e) Conclusion of preliminary processes**

559. Once the above matters have been considered, the application can proceed. The next section discusses the documentation and procedures required to put together the documentation and transmit the application to the requested State.

***C. Preparing the package of documents for an outgoing application for establishment*****1. Flowchart**

560. The flowchart below illustrates the required processes for preparing and transmitting the application for establishment of a maintenance decision.

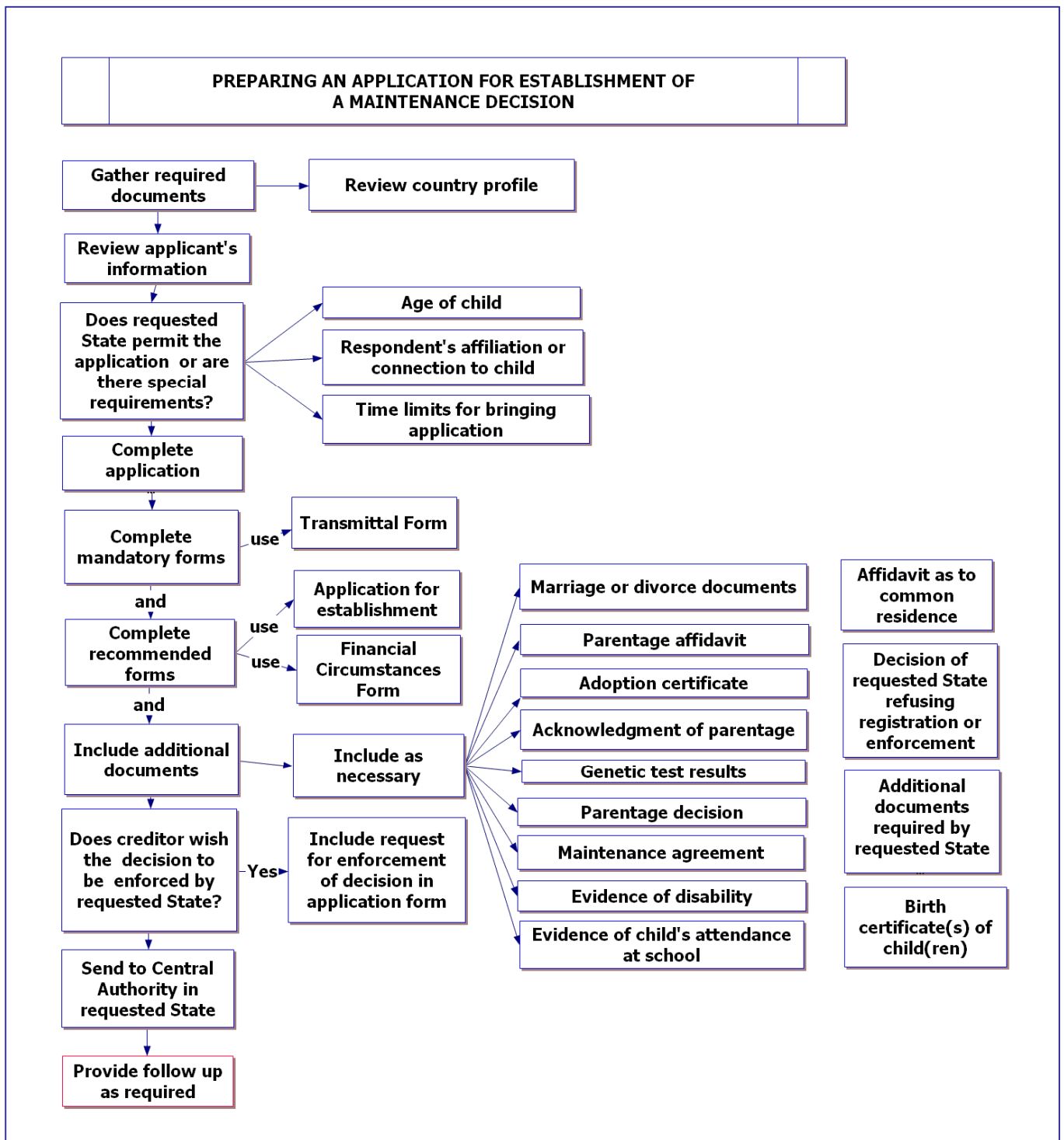


Figure 23: Preparing the establishment application

## 2. Preparing the application

The steps below follow the chart in Figure 23.

### a) Gather the required documents

561. In order to assemble the necessary documents for the establishment application, you will need to have the Country Profile for the requested State (where you will be sending the application to) and any documents prepared by the applicant. This may include the recommended application form already completed by the applicant, depending upon your internal processes.

562. Review the Country Profile. For an establishment application, determine whether the requested State has any particular limitations that may affect whether the application can proceed. The application will be decided according to the law of the requested State. The most common ones are with respect to the age of the child (if the child is 18 years of age or older), and time limits for bringing an application where parentage needs to be established (for example within a certain number of years of birth of the child).

563. The Country Profile will also set out any State specific documentary or evidentiary requirements that must be met. For example, hospital or other birth records may need to be certified, or proof of the marriage of the parents may be required. The other required documents will vary depending upon the individual facts of each case (for example, whether a child is at or near the age of majority).

564. The table below covers the documents that are most commonly required. If any of these documents appear to be required and are missing request them from the applicant.

<b>Birth certificate or equivalent</b>	Include a birth certificate for each child for whom maintenance is sought. Other similar documents include baptism certificates or citizenship documents – where no birth certificate is available. It is important that the document verify the name and date of birth of the child.
<b>Acknowledgement of parentage by the debtor</b>	This may be in the form of a declaration made at the time of the child's birth (in-hospital form) or in a later acknowledgement. This is not usually required where the child was born during the marriage of the parents.
<b>Affidavit supporting a declaration of biological parentage</b>	Where there is no documented acknowledgement of paternity, the applicant should provide an affidavit outlining the circumstances surrounding the parentage of the child, and the relationship of the debtor towards the child at the time of birth and thereafter.
<b>Decision of competent authority concerning parentage</b>	In some cases, a competent authority may already have determined parentage, without making a maintenance decision. This decision should be included.
<b>Genetic test results</b>	If genetic testing confirming parentage of the child has been done, include the results.
<b>Adoption certificate</b>	If the child for whom maintenance is sought was adopted by the debtor, include the adoption certificate.
<b>Certificate of marriage and date of divorce or separation</b>	Include this if the parties were married. It will also be used to establish whether a child was born during the marriage of the creditor and the debtor.
<b>Affidavit supporting a declaration of common residence</b>	This will not be relevant in most cases, but could arise, for example, where the parties temporarily resided elsewhere for the purpose of employment, but always maintained a common household in a specific State.
<b>Agreement relating to maintenance</b>	If the parties have previously agreed to maintenance, for example, as part of a mediated resolution of custody issues, this agreement should be included.
<b>Evidence of attendance at secondary or post secondary educational institution</b>	This will be necessary where maintenance is sought for an older child, especially one over the age of majority, as attendance in school generally determines entitlement to maintenance.
<b>Evidence of disability</b>	If maintenance is being sought for an older child or a child over the age of majority, and that entitlement is based on the disability of the child, this information must be included.
<b>Financial Circumstances Form</b>	This form needs to be completed as fully as possible. It provides specific information for the establishment and enforcement of the decision. It covers both the creditor's circumstances and the debtor's circumstances.
<b>Other Evidence required by the requested State</b>	Consult the Country Profile for the requested State to determine whether there are any additional documents that must be included.
<b>Decision of the requested State refusing recognition and enforcement</b>	Where recognition of an existing decision has been refused (for example where recognition was refused of a reservation under the Convention) a copy of that refusal should be included.

Figure 24: Table of documents – establishment applications

**b) Complete the application package**

565. The application package includes the mandatory form (Transmittal Form), the recommended application form and additional documents.

566. See Chapter 3 for instructions on how to complete the Transmittal Form and Chapter 15 for detailed instructions for the completion of the recommended form for Establishment of a Maintenance Decision.

**c) Request enforcement of the decision**

567. If the creditor wishes to have the maintenance decision, once it is established, enforced by the requested State, make sure this request is included in the package. There is no required form for this process, so the request can simply be made in writing, or the recommended form for Application for Enforcement of a Decision made in the requested State can be used, and modified as required for this situation. See Chapter 15 for instructions on completion of that form.

**3. Transmitting the application**

568. Once the Central Authority has put together the necessary documents the application can be transmitted to the Central Authority of the requested State.

569. This can be done by regular mail, but if the requested State agrees, electronic transmission is also acceptable, as long as that method provides sufficient protection for the personal and confidential information contained in the application.

**4. Follow-up and ongoing communication with requested State**

570. The Central Authority in the requested State must acknowledge receipt of the application within six weeks, using the mandatory Acknowledgement Form. The Acknowledgement Form will also provide the name of the person or unit handling the application, so any follow up enquiries can be directed to that person.

571. Within three months of the date of acknowledging the application, the requested State must provide a status report.

572. If additional information or documentation is required by the requested State, the requesting State will be notified. This request should be attended to promptly. If response or additional documents are not sent back within three months, the Central Authority in the requested State may, but is not required to, close its file. If you are having difficulty obtaining the additional documents, advise the requested State and let them know additional time will be required.

### **III. Additional materials**

#### ***A. Practical advice***

- Consider whether the decision to be established will also need to be enforced in the requested State. If so, that will need to be indicated on the application form (see Chapter 15), and you should be sure to include as much information as possible to assist in the enforcement. This information will be included in the Financial Circumstances Form.
- Advise the applicant of the length of time it could take to complete the establishment proceedings. This information will be contained in the Country Profile for the requested State.
- If it is anticipated that parentage testing may be required, ask the applicant to communicate any changes in her contact information during the time the application is proceeding so that she may be contacted for testing purposes.
- If the applicant and the respondent reach a settlement concerning maintenance, be sure to immediately advise the Central Authority of the requested State so that they can discontinue their proceedings.

#### ***B. Related forms***

Application for Establishment of a decision  
Transmittal Form  
Financial Circumstances Form

#### ***C. Text of relevant Articles***

Article 10  
Article 20  
Article 22  
Article 12

#### ***D. Related sections of Handbook***

See Part 2 (Matters common to all applications under the Convention and to requests for specific measures) of Chapter 3  
See Section I (Overview – Request for Specific Measures) of Chapter 13  
See Chapter 4 – Processing outgoing applications for recognition or recognition and enforcement (Article 10(1) a) and 10(2) a))  
See Chapter 10 – Enforcement of maintenance decisions  
See Chapter 15 – Completing the recommended forms



## IV. Checklist – Outgoing establishment applications

	Procedure	Handbook reference
1.	Preliminary Review: Should the application be for Establishment of a maintenance decision?	II(B)
(i)	Applicant does not have a maintenance decision already	II(B)(1)(a)
(ii)	Applicant is a maintenance creditor residing in a Contracting State	II(B)(1)(b)
(iii)	Applicant is seeking child support	II(B)(1)(c)
(iv)	Applicant knows location of respondent	II(B)(1)(d)
2.	Complete application package	II(C)
(i)	Mandatory Form (Transmittal Form)	Chapter 3
(ii)	Recommended Form	Chapter 15
(iii)	Additional Documents	II(C)(2)(a)
3.	Send to requested State	II(C)(3)
4.	Follow up as required	II(C)(4)

## V. Frequently Asked Questions

*Can the creditor request maintenance decision if she does not know where the debtor / respondent resides?*

573. Yes. The creditor should include as much information as possible about the respondent in the application form. That information will be used by the requested State to conduct a search using the databanks and search sources that are available to the Central Authority or to a competent authority in the requested State. Often the Central Authority will have access to resources not available to the public, to locate the respondent. Once the respondent has been located, the Central Authority will proceed with the establishment application.

*What happens after the maintenance decision is made?*

574. The maintenance decision will be sent to the appropriate authority in the State where the respondent resides or has assets or income for enforcement, if the creditor has requested that the decision be enforced. It is important that the outgoing application for establishment indicate whether the creditor also seeks enforcement of the decision, as this will ensure the decision is enforced without delay.

*What if the debtor claims that he is not the father of the children?*

575. Whether the debtor is entitled to challenge parentage of the child will depend upon the law of the State where the application is heard. If parentage testing is required to determine the parentage of the child(ren), that request will be made through the Central Authorities, and the applicant will be contacted with information about how to proceed with the testing.

*Can the applicant get a new decision if he or she wants an increase in the amount of maintenance?*

576. The applicant does not need to apply to have a new decision established.<sup>89</sup> He or she can request a modification of the existing decision using the processes set out in Chapter 12.

*How long will it take for the maintenance decision to be made?*

577. That will depend upon where the application is being sent to and what happens after the respondent is notified. All Contracting States have agreed to act as expeditiously as possible in processing applications. The requested State will send a status update three months after the receipt of the application has been acknowledged, confirming what steps have been taken and what actions are expected next.

*How can the applicant find out what has happened to the application?*

578. If the applicant has questions, he or she should contact his or her own Central Authority to find out the status of the application. Applicants should not contact the Central Authority in the other State directly, unless that Central Authority has agreed to provide information directly to applicants. Under the Convention, the Central Authority of the requested State must acknowledge receipt of the application within six weeks, and provide a further status update with three months of receiving the application.

*Can the applicant obtain a maintenance decision even if she was not married to the father of the children?*

579. Yes. The Convention covers maintenance for all children, regardless of the marital status of the parents. However, in some cases parentage will have to be determined before the maintenance decision can be made.

*The applicant is worried about her safety if the respondent finds out where she lives. How will this affect the request for a maintenance decision?*

580. The applicant must advise the Central Authority of this concern. The Central Authority will indicate on the forms that there is a concern about the release of this personal information. The address of the applicant and other personal information will then be included on a restricted information form, and the respondent will not be able to access any of the applicant's personal information. The purpose of the Restricted Information Form is to ensure that the applicant's address remains confidential.

*The applicant has been separated from the debtor for five years. Can the applicant get back maintenance from the debtor for those years?*

581. In most cases this will depend upon the law of the requested State. In some States, maintenance for the time period prior to a decision (called retroactive maintenance) will only be granted in unusual circumstances. In those States maintenance will only be payable from the time the application is first commenced, or from a later date, depending upon the law and procedures of the requested State. The Country Profile will indicate whether there are restrictions on the granting of retroactive maintenance in the requested State.

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<sup>89</sup> In some cases, the requested State is not able to modify a decision, but can only establish a new one. However, in such a case the application will be treated in the same way as a modification application and the procedures in Chapter 12 should be used.

*Who will pay the cost of any parentage testing required as part of the establishment application?*

582. The costs of parentage testing come within the cost-free services that must be provided to an applicant in a matter concerning child support. Therefore the applicant cannot be required to pay for the parentage testing, unless the application is manifestly unfounded, as provided in Article 15(2).<sup>90</sup> However, this does not necessarily mean that the Central Authority in the requested State will be responsible for the costs because the requested State may require the debtor to pay for the costs of the testing as a condition of the testing. This will be determined by the laws and procedures of the requested State.

583. See Chapter 3 for a full explanation of the right to cost-free legal assistance.

*Does the applicant need to hire a lawyer to get a decision providing for maintenance of her children?*

584. No. As long as the application is to establish maintenance for a child under the age of 18 years (and in some cases up to 21 years of age), the Central Authority in the requesting State or in the requested State will provide the applicant with the necessary legal assistance (see Chapter 3).

*Can a request be made through the Central Authority for establishment of spousal maintenance?*

585. A Central Authority is not required to assist in establishing a maintenance decision for spousal support. The applicant will need to apply directly to the competent authority in the other State to have a decision established unless both the requesting and requested States have agreed to extend the Convention to cases concerning the establishment of spousal maintenance. The Country Profile will indicate if this extension has been made.

*How much maintenance will be awarded?*

586. The method used to calculate the amount of maintenance payable is different in each State. In this respect, the question as to which law applies is a complicated legal issue, beyond the scope of this Handbook. Most States have websites where you can find out how the amount of maintenance will be calculated in that State. The Country Profile of the requested State will also indicate how the quantum of maintenance will be determined.

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<sup>90</sup> See Explanatory Report, para. 393. A State may make a declaration to use a child-centred means test, and in that event, if the child does not pass the test, the applicant could be asked to pay the costs. See Chapter 3 of this Handbook.

## Chapter 9 – Incoming applications for establishment of a maintenance decision

### I. Overview

#### A. *When this application will be used*

587. An application for establishment of a maintenance decision in a Contracting State will be received in any of the following circumstances:

- where there is no existing maintenance decision and the creditor requires a decision to be established, or
- where recognition and enforcement of a decision is not possible, or is refused, because of the lack of a basis for recognition and enforcement under Article 20 or on the grounds in Article 22 *b)* or *e)*.

**Establishment** is the process of obtaining a maintenance decision, where either no maintenance decision exists or the maintenance decision that does exist cannot be recognised or enforced for some reason. Establishment may include a determination of parentage, if that is required in order to make the maintenance decision.

588. An application for a maintenance decision may include a request for a determination of parentage.

589. Applications for establishment of a maintenance decision come under Article 10(1) *c)* and *d)* of the Convention.

#### B. *A case example*

590. The creditor resides in State A. She has two children. The father of the children has moved to State B. The creditor would like to obtain maintenance from the father for the children. State A and State B are Contracting States to the Convention.

##### **How this works under the Convention:**

591. The creditor will initiate an application for the establishment of a maintenance decision. That application will be transmitted by the Central Authority in State A to the Central Authority in State B. The father will be notified and a maintenance decision will be made under the laws of the requested State (State B). A determination of parentage will also be made if necessary.

#### C. *Who can apply for establishment of a maintenance decision?*

592. If there is no existing maintenance decision, only a creditor may apply for establishment of a decision. If a decision exists but it cannot be recognised or enforced because of a reservation under the Convention, a public body that is acting on behalf of a creditor or has provided benefits in place of maintenance may also bring an application to establish a maintenance decision. The creditor must reside in a Contracting State.

A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer.

Are you looking for a quick summary of the procedures for this application? Go to the [Checklist](#) at the end of the Chapter.

### ***D. Establishing a maintenance decision where existing decision cannot be recognised***

593. As discussed in Chapters 4 and 5 of this Handbook, there may be situations where recognition and enforcement of an existing decision is refused by a requested State because there has been a reservation made under Article 20(2) as to the particular basis for recognition and enforcement that applies to the decision. For example, if the decision was made on the basis of the creditor's habitual residence in the State of origin, and no other basis for recognition and enforcement of the decision in Article 20 can be found, the requested State may refuse to recognise the decision. In such a case, a new decision may have to be established.

594. There is no requirement that a new application – an application for establishment of a decision – must be brought in this situation, as the requested State is required to take all appropriate measures to establish a new decision (Article 20(4)) providing that the respondent is “habitually resident” in the requested State. The procedures outlined in this Chapter would then apply to the establishment of the decision.

595. This may mean that additional information and documentation from the creditor is required, for example, if the costs of raising the child are relevant to the determination of quantum of maintenance. That request should be made to the Central Authority of the requesting State.

596. Importantly however in this situation, the issue of eligibility of the child or children to bring the application for maintenance does not need to be determined on the application for a new decision (Article 20(5)). The existing decision will provide the basis for the finding that the children are entitled to bring the application for child support.

597. There may also be situations where an applicant has a maintenance decision, but he or she knows that the respondent in the requested State will be able to successfully oppose the application for recognition and enforcement. This could be because none of the grounds for recognition and enforcement of the decision can be found, or because the decision is of a type that the requested State cannot enforce.<sup>91</sup> In such a case, the creditor will have to initiate an application for establishment of a new decision, rather than an application for recognition and enforcement.<sup>92</sup>

598. These applications will also proceed in the same manner as any other application under this Chapter. However, since the new decision is not being established because of a refusal to recognise and enforce the existing decision because of a reservation (Article 20(4)), the presumption as to eligibility in Article 20(5) discussed above will not apply. Eligibility of any children for maintenance will have to be determined as part of the application for a new decision.

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<sup>91</sup> For example, the decision may set maintenance as a percentage of salary and this is considered by the requested State as too vague to be enforceable. See Explanatory Report, para. 256.

<sup>92</sup> See Explanatory Report, para. 256.

## **II. Processing incoming applications for establishment of a maintenance decision**

### ***A. General***

599. This section covers the general requirements for processing an incoming application for establishment of a maintenance decision. Procedures in individual States will differ considerably, depending upon the internal laws and procedures of each State. Some States will use court-based or judicial procedures to establish the decision; others will send the application to an administrative authority for a decision to be made.

600. However, the Convention sets out certain general steps for all applications, and establishment applications will generally follow the same procedures in each State. There will be an initial review by the Central Authority when the application is received, additional documents may be requested if necessary, and then the application will be sent to a competent authority in the requested State for the decision to be established.

601. The establishment proceedings will be governed by the domestic laws and procedures of the requested State. Once the decision has been made, if the applicant has requested enforcement of the decision, the decision will be enforced by a competent authority in the requested State.

602. The Country Profile for each State sets out what an applicant can expect in the establishment process.

## B. Flowchart

603. The flowchart below provides an overview of the establishment process.

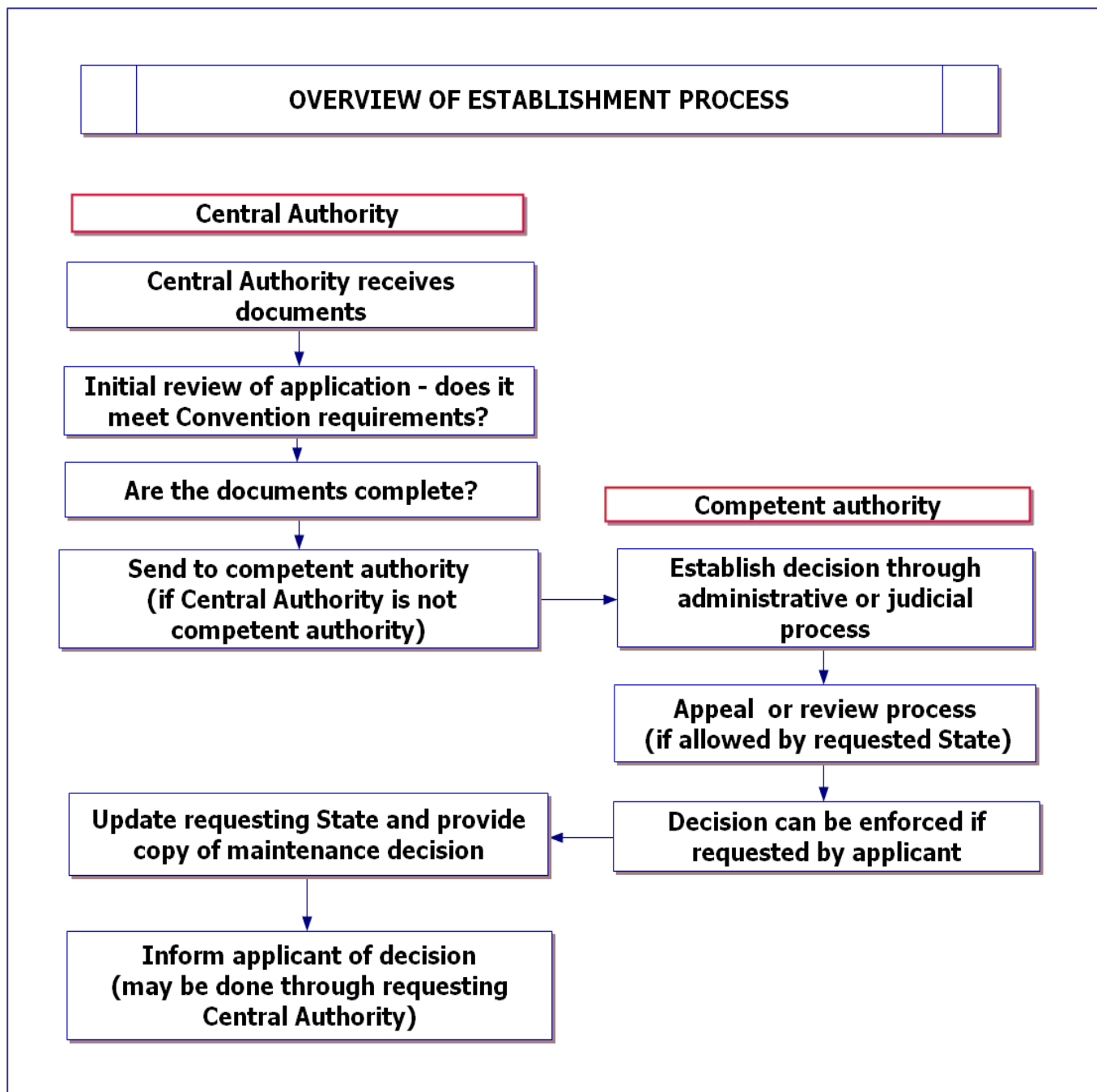


Figure 25: Overview of application process

## C. Steps in the establishment process

### 1. Initial consideration by Central Authority

604. The purpose of the initial consideration by the Central Authority in the requested State is to ensure that the application is well founded, the documentation is complete and that the application can be processed. If necessary, a search may have to be completed to determine the location of the debtor / respondent, particularly if there is some doubt as to whether he or she is residing in the requested State or has assets or income in that State.

The **requesting State** is the Contracting State that is initiating an application and making the request on behalf of an applicant who lives in that State. The **requested State** is the Contracting State that is being asked to process the application.

605. The chart below illustrates these initial steps.

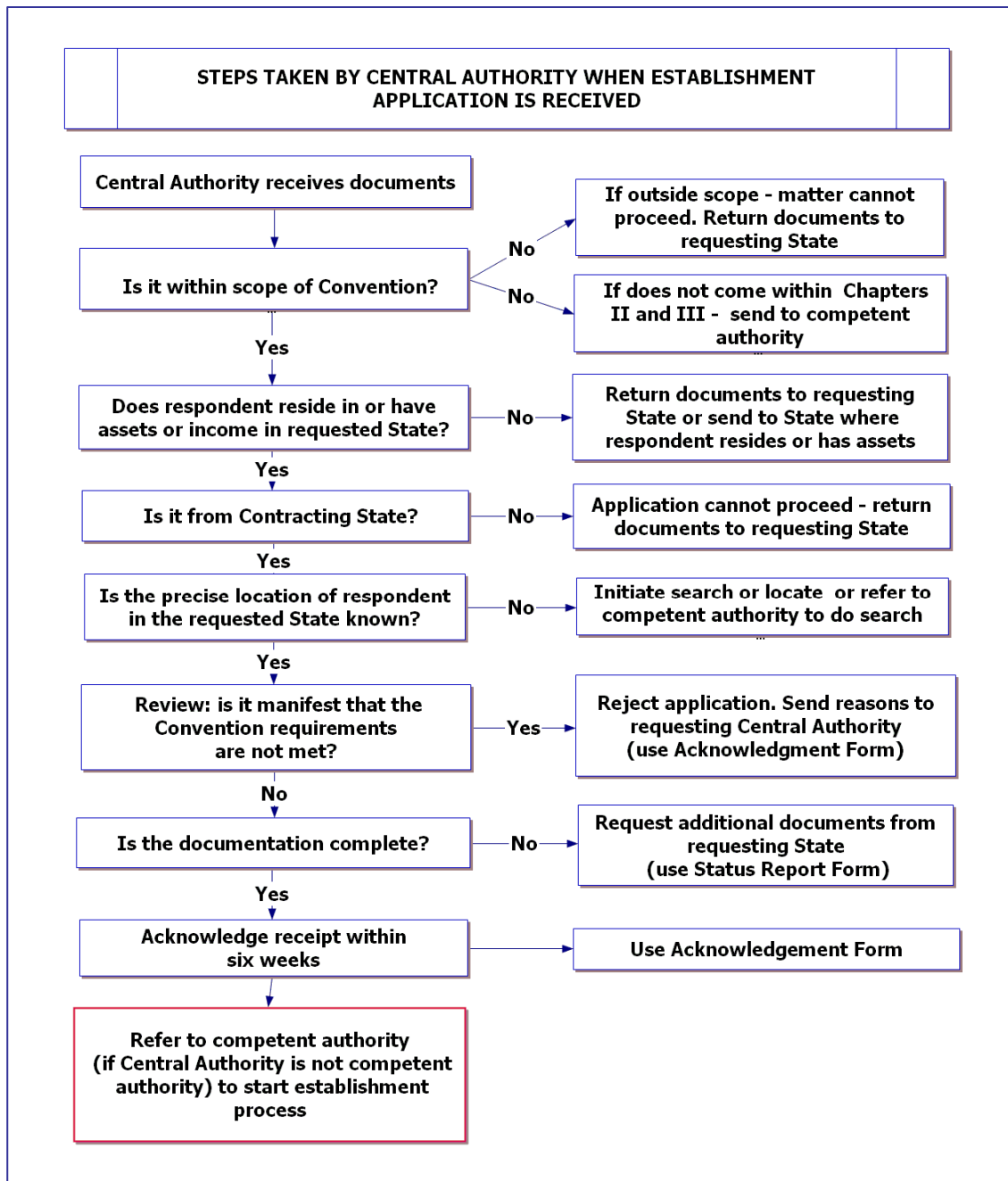


Figure 26: Initial considerations: establishment application



### a) Convention requirements not met

606. Article 12 of the Convention allows a requested Central Authority to refuse to process an application if it is “manifest” that the Convention requirements are not met. This does not mean that the requested Central Authority determines whether the application is justified on its merits. Instead, it is expected that the requested Central Authority will check the application simply to ensure that it is not an abuse of process or a request that falls completely outside the Convention – for example it is an application dealing with custody of the children only.

607. As the requesting Central Authority has already completed a similar check before transmitting the document, it is unlikely that an application would be rejected on these grounds.

608. If the application is rejected, the Central Authority in the requesting State must be notified and provided with reasons for the rejection. The mandatory Acknowledgement Form should be used to advise the Central Authority.

An example: The application might be identical to a previous application that was rejected, and unless there is new evidence, a Central Authority would be entitled to reject the application on that basis.

### b) Incomplete documents

609. A review of the incoming package should be done to ensure that the documentation is complete. In every establishment case, there will be a Transmittal Form and an application for establishment. The other required documents will vary depending upon the individual facts of each case (for example, whether a child is at or near the age of majority).

610. The recommended Status Update Form or mandatory Acknowledgement Form can be used for this purpose.

### c) Acknowledge receipt

611. Under the Convention, the Central Authority of the requested State must acknowledge receipt of the application within **six weeks**. There is a mandatory form for this purpose.

### d) Determining the respondent's / debtor's location

612. In some cases the applicant will not know the exact or current location of the respondent / debtor. Therefore, the requested State must use the available sources it has to locate the debtor so that the application can proceed. In every case, the debtor will need to be given notice of the application for maintenance at some point, and if enforcement of the decision is sought, the debtor's location will be required for that procedure as well.

The **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

613. In some cases, where there is doubt as to whether the debtor is living in the State at all, it may be prudent to complete the search at the earliest opportunity. If it is established that the debtor does not reside in the State, the requesting State can be notified and the application sent to another Contracting State.

The **Competent Authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement programme or any other government entity that performs some of the tasks associated with the Convention.

614. In other cases, the required searches will be done by the competent authority as part of the establishment procedure itself, not as a preliminary step.

615. In any case, it is important to remember that there is no requirement to share the respondent's address or contact details with the requesting State. If the information is to be shared, that must be done in compliance with domestic laws concerning the protection of personal information.

### **e) Start establishment process**

616. Once these initial steps have been completed, the application is now ready to be processed by the requested State. The application will either be handled by the Central Authority, if it is the competent authority for this purpose, or sent to the competent authority within the State. This may be an administrative or judicial authority. The next section outlines the procedures for establishing the decision.

## **2. Establishing the maintenance decision – Competent authority**

617. Because there are so many variations in the way that individual States will manage establishment applications, this section is necessarily very general. It is intended to give a high level overview of the steps that will apply to all applications. However, not each step will occur in the same order or in the same way in every State.

618. For example, in every application for establishment of a maintenance decision, the debtor will be given notice of the application or assessment of maintenance. In some States this will happen very early in the process, and the debtor will be provided with notice that maintenance is sought and he or she will be requested to provide financial information to the competent authority responsible for making the maintenance decision. That authority will then determine the amount of maintenance.

A **debtor** is the individual who owes or is alleged to owe maintenance. The debtor may be a parent, or a spouse or anyone else who, under the law of the place where the decision was made, has an obligation to pay maintenance.

619. In some administrative systems, the debtor will also receive notice of the maintenance request, but often that notice will take the form of an assessment that the administrative authority has made as to the maintenance amount payable by the debtor. The debtor then has an opportunity to object to the assessment, and the information provided by the debtor will be considered in the final maintenance decision or assessment.<sup>93</sup>

620. However, despite the different procedures, there is an important similarity in the process because in all States, at some point, the debtor will be given notice of the request for maintenance and an opportunity to make representations. The opportunity to be heard or challenge the decision may happen at any time, but notice is always part of the process.

### **a) Establishment process – Competent authority**

621. Depending upon the internal procedures of the State, the following steps will be taken as part of the commencement of the establishment application. The steps will be similar in both judicial and administrative systems.

<sup>93</sup> See, for example, Australia < <http://www.csa.gov.au> >.

**(1) Documentation check**

622. A check of the documentation will be made to ensure it is complete, and meets any specific criteria – such as the need for any documents to be certified. There is no Convention requirement that certified documents must always be provided. If your State requires them and they have not been provided, follow up with the requesting State. You can use the mandatory Acknowledgement Form (if receipt of the application has not yet been acknowledged) or the recommended Status Report form to request the documents.

**(2) Notification to debtor**

623. Notification to the debtor is discussed above. In addition there may be a request made to the debtor for production of financial or other information necessary to determine his or her income and ability to pay maintenance.

**(3) Referral to dispute resolution or similar procedures**

624. In some States, services such as alternative dispute resolution, mediation, or assistance with preparation of documents may be made available to ensure that the application proceeds expeditiously. These will be available to both applicants and respondents as necessary. In some States, efforts are made to reach a decision by consent or agreement.

**(4) Establishing parentage**

625. In some applications, a creditor may have requested that parentage be established or a debtor / respondent may question whether he is the parent of the child or children and request genetic testing. Whether the issue can be raised by the debtor will depend upon the law of the requested State. For example, in some States parentage testing will not be ordered or an application allowed where the child was born during the marriage of the parents.

626. If parentage testing is needed, the Convention requires a Central Authority to "provide assistance" in establishing parentage (Article 6(2) *h*). This does not mean that the Central Authority in the requested State is required to provide the genetic testing at the request of the debtor; however, it must be able to advise the respondent / debtor about testing facilities or agencies that can perform the testing. The Central Authority must also assist in transmitting the request for testing to the applicant in the requesting State.

627. However, this does not mean that the requested State must pay for the parentage testing if requested by the debtor. The requested State may require the debtor / respondent to pay for the testing as a condition of the request.

**(5) Legal assistance and the costs of parentage testing**

628. The costs of genetic testing to determine parentage vary significantly from one State to another. One of the underlying principles of the Convention is that services, including legal assistance, should be provided on a cost-free basis to a creditor, for the purpose of applications concerning maintenance obligations for a child who is less than 21 years old. This includes establishment applications (Article 15(1)). Effectively this means that the creditor should not have to pay the costs associated with parentage testing, unless the requested State considers the application on its merits to be manifestly unfounded (Article 15(2)).<sup>94</sup>

629. For more information respecting the provision of cost-free legal assistance, please see Chapter 3.

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<sup>94</sup> A State may also make a declaration that a child-centred means test will be used to determine eligibility for cost-free services.

**(6) Determining the amount of maintenance**

630. Once any parentage issues have been resolved, and the other preliminary steps completed as required by the internal procedures of the requested State, a maintenance decision will be made. In most cases, the amount of maintenance awarded will be determined by the law of the requested State. However some States may have accepted different rules respecting applicable law. Some States use child support guidelines based on a debtor's income or a combination of the debtor's and creditor's income; others set maintenance solely on the costs of raising a child.

631. No attempt is made here to summarise the different ways that quantum of maintenance is determined. The Country Profile can be consulted, and many countries have websites<sup>95</sup> where this information is also available.

**(7) Appeal or review procedures**

632. As soon as the maintenance decision is made, it must be communicated by the competent authority or Central Authority to all parties, including the applicant. An appeal or review of the decision may be allowed under the law of the requested State. That remedy will be open to the applicant as well, for example, where a maintenance award was refused or the applicant disputes the amount of the maintenance awarded. It may be a good practice for the Central Authority to advise the applicant of any appeal or review remedies available, and the time limits for exercising those rights.

633. In the event that legal assistance is required for the appeal, the above discussion also applies to the requirement of the requested State to provide assistance to the creditor / applicant on a cost-free basis. Note however that a new assessment of the applicant's entitlement to cost-free legal assistance may be undertaken for the appeal, as the requested State may consider whether the appeal is well founded on the merits, before providing assistance on a cost-free basis.<sup>96</sup>

**(8) Enforcing maintenance decision**

634. Once the decision has been finalised, if the applicant has requested enforcement of the decision (this will be indicated on the Application Form), the decision should be sent to the competent authority for enforcement.

**(9) Status update**

635. It is important that the requesting State be advised as to progress on the establishment application. In addition to the initial acknowledgement of receipt of the application, the Convention requires that a status update be provided to the requesting State within **three months** of the acknowledgement of the receipt of the application. There is a recommended form for this purpose.

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<sup>95</sup> See, for example, Australia, Canada, United States of America, United Kingdom, Norway.

<sup>96</sup> See Explanatory Report, para. 386.

### **III. Additional materials**

#### ***A. Practical advice***

- It is a good practice to keep the requesting State advised on a regular basis as to development in the application. The Convention requires that receipt of the application be acknowledged within 6 weeks, and that a Status Update be provided after a further 3 months. The Status Update form can also be used on a regular basis thereafter to advise of new developments.
- If the applicant and the respondent reach a settlement concerning the maintenance decision, be sure to advise the Central Authority of the requesting State promptly so that they can close their file.
- There is a general obligation on all Contracting States to proceed with applications as expeditiously as possible. This is particularly important with respect to establishment applications, as until a decision is established the applicant and children have no right to maintenance. Unnecessary delays in establishing maintenance can often cause significant hardship for families.

#### ***B. Related forms***

Application for Establishment of a decision  
Transmittal Form  
Financial Circumstances Form

#### ***C. Text of relevant Articles***

Article 10  
Article 11  
Article 12  
Article 14  
Article 15  
Article 20  
Article 22

#### ***D. Related sections of Handbook***

See Chapter 8 – Outgoing applications for establishment of a maintenance decision  
See Chapters 4 and 5 – Outgoing and incoming applications for recognition or recognition and enforcement  
See Chapter 10 – Enforcement of maintenance decisions  
See Section III (Effective access to procedure and legal assistance) of Part 2 under Chapter 3

## IV. Checklist – Incoming establishment applications

	Procedure	Handbook reference
1.	Receive documents from requesting Central Authority	II(C)
2.	Ensure documents are complete and application is within scope of Convention	II(C)(1)
3.	Send to competent authority	II(C)(1)
4.	Establish maintenance decision	II(C)(2)
(i)	Determine parentage if necessary	II(C)(2)(b) (4)
(ii)	Determine maintenance amount	II(C)(2)(b) (4)
5.	Appeal or review process if allowed	II(C)(2)(b) (8)
6.	Advise debtor and creditor and update requesting Central Authority	II(C)(2)(b) (10)

## V. Frequently Asked Questions

*How can the applicant find out what has happened to the application?*

636. If the applicant has questions, he or she should contact the Central Authority in the requesting State to find out the status of the application. The Central Authority in the other State will not have any direct contact with the applicant unless it has agreed to take enquiries directly. Under the Convention, the requested State must acknowledge receipt of the application within six weeks, and provide a further status update with three months of the acknowledgement of the receipt of the document.

*Can the debtor / respondent dispute paternity?*

637. That will depend upon the law of the requested State. In some States a request for parentage testing will be refused, for example, if the parties were married.

*What is the role of the Central Authority if parentage testing is required?*

638. The Central Authority in the requested State should assist in the process if the testing is requested by the applicant. The Central Authority should contact the requesting Central Authority and facilitate the participation of the applicant in the testing process.

639. If the debtor is allowed to request testing, there is no obligation upon the requested State to provide the testing, however the competent authority may wish to provide information to the debtor as to how parentage testing can be undertaken.

*Does the applicant have to come to court?*

640. That will depend upon whether the requested State (where the establishment application is being heard) requires the applicant to be present. The Central Authority can assist in facilitating that participation by arranging telephone or video conferencing, if available.

*Who will pay for the costs of genetic testing in an application for child maintenance for a child who is under the age of 21?*

641. The costs of parentage testing come within the cost-free services that must be provided to an applicant in a matter concerning child support. Therefore the applicant cannot be required to pay for the parentage testing, unless the application is manifestly unfounded, as provided in Article 15(2).<sup>97</sup> However, this does not necessarily mean that the Central Authority in the requested State will be responsible for the costs because the requested State may require the debtor to pay for the costs of the testing as a condition of the testing. This will be determined by the laws and procedures of the requested State.

*How much maintenance will be awarded?*

642. The method used to calculate the amount of maintenance payable is different in each State and beyond the scope of this Handbook. Most States have websites where you can find out how the amount of maintenance will be calculated in that State. The Country Profile of the requested State will indicate how the quantum of maintenance will be determined.

*What happens if the respondent is notified but does not reply or challenge the decision?*

643. That will depend upon the particular rules used in that State. If allowed by the laws of the requested State, the matter may proceed and a decision will be made in the absence of the debtor, or, in an administrative system, the maintenance decision may be considered effective once the time for challenge or dispute has passed, and the decision can then be enforced.

*What happens after the decision is made?*

644. The applicant will indicate on the application form whether he or she wishes to have the decision enforced. If so, it will be sent to the competent authority in the requested State to be enforced. That authority will collect the payments and forward them to the maintenance creditor.

*Can the applicant appeal the amount of maintenance awarded?*

645. Only if there is an appeal or review process permitted by the State where the decision was made. The Central Authority in the requested State will advise the creditor when the decision is made and whether the amount can be appealed. The applicant may also appeal a decision not to award maintenance, and the Central Authority in the requested State can assist with that process as well.

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<sup>97</sup> See Explanatory Report, para. 393. A State may make a declaration to use a child-centred means test, and in that event, if the child does not pass the test, the applicant could be asked to pay the costs. See Chapter 3 of this Handbook.

## Chapter 10 – Enforcement of maintenance decisions

### I. Overview

646. This Chapter differs from the other chapters in the Handbook because it does not deal with processing of an outgoing or incoming application received from another Central Authority. Instead this Chapter covers the steps that are taken under the internal law by the requested State after the Central Authority has received and processed a request from another State – to recognise an existing decision, modify the decision or establish a new decision – and enforcement of the decision is requested by the applicant.

#### A. *Enforcement of a decision under the Convention*

647. Enforcement of a maintenance decision will take place once there is a valid, enforceable decision. The decision must have been made or recognised in the requested State. Enforcement will usually occur in the State where the debtor resides, or in the State where the debtor has assets or income. Enforcement may sometimes be initiated in more than one State, depending upon the location of assets, income and the residence of the debtor.

648. Not all States will use the same measures to enforce a maintenance decision and the steps required in each case will depend upon the debtor's willingness and ability to make the payments.

A **maintenance decision** sets out the obligation of the debtor to pay maintenance and may also include automatic adjustment by indexation and the requirement to pay arrears of maintenance, retroactive maintenance or interest and a determination of costs or expenses.

649. As a case can remain with an enforcement agency for many years for collection, the case will be subject to different enforcement remedies over that time, and different issues will arise over the course of its enforcement.

650. Although enforcement of maintenance decisions is almost entirely a matter for the internal policy of a State, the Convention does contain certain key provisions regarding enforcement. Enforcement must be "prompt" (Article 32(2)) and take place without further request from the applicant (Article 32(3)). The Convention also requires a Contracting State to have "effective measures" in place to enforce decisions. There is a suggested list of enforcement measures in Article 34, but it is up each enforcing State to utilise any or all of the enforcement mechanisms listed.<sup>98</sup> Not all the listed enforcement measures will be available under the domestic law of a Contracting State.

651. Article 6(2) *f* of the Convention also requires States to assist in the effective transmission of payments to creditors, by promoting cost-effective and efficient methods of transferring funds, and to reduce barriers to the cross border transfer of maintenance funds.<sup>99</sup>

<sup>98</sup> See Explanatory Report, para. 582.

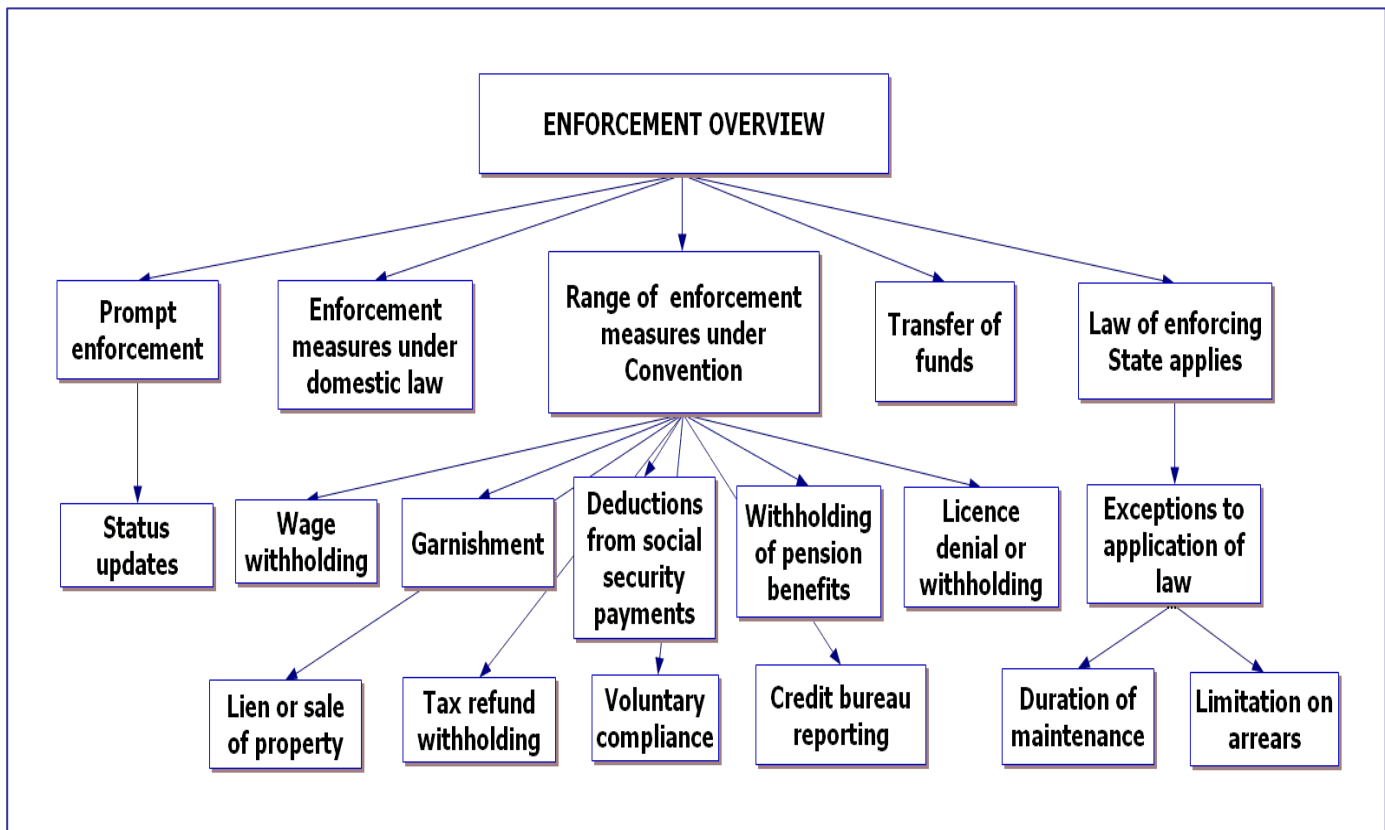
<sup>99</sup> See Explanatory Report, para. 585.



## II. Enforcement processes under the Convention

### A. General

652. The Convention contains only general provisions regarding the enforcement of decisions. This is because the actual enforcement processes and means of enforcement are provided for under the internal law of the State that is responsible for enforcement. The Convention provisions are substantially the same for applications for enforcement received through a Central Authority or direct requests to a competent authority.



**Figure 27: Overview of Convention provisions related to enforcement**

### B. Prompt enforcement

653. Since successful enforcement of the maintenance decision is the goal of many applications under the Convention, Article 32(2) requires that enforcement be “prompt”. What prompt means in any particular situation is not defined, however there is a clear expectation that enforcement steps will be taken as expeditiously as permitted under the law and rules of the State where enforcement is taking place.<sup>100</sup>

654. The requirement for prompt enforcement should also be considered together with the duties of Central Authorities under Article 12 to keep each other informed as to the person(s) or unit(s) responsible for a case, the progress of the case and to respond to enquiries.

<sup>100</sup> See Explanatory Report, para. 572.

**Good practice:** Although the Convention only requires an initial status update three months after receipt of the application has been acknowledged, regular updates thereafter to the requesting Central Authority are recommended in order to keep the applicant and the requesting Central Authority informed about progress on the case. The Status Update Form can be used for this purpose. You can indicate on the form whether the update is the first update or a subsequent one. Subsequent reports should only indicate new developments since the last report.

## **C. Enforcement measures**

655. All contracting States must have in place effective measures<sup>101</sup> to enforce maintenance decisions, and must at least provide the same range of enforcement measures as are available for domestic cases. However, the measures available will differ from State to State, as enforcement is governed by the law of the State that is doing the enforcement. The Country Profile of the requested State will indicate the enforcement measures available in that State.

656. In some States, the enforcement authority will first try to work with the debtor to have him or her comply with the decision voluntarily, either by making regular payments or by having automatic deductions from wages put in place. This will take place before any enforcement actions are started. In some States, a debtor may also be entitled to notification of enforcement, and the debtor may have certain rights to pay voluntarily before enforcement actions are taken. The Country Profile of the State that is enforcing the decision will indicate the processes applicable in that State.

657. Where payments are not made, the choice of enforcement remedy will be determined by the policies of the enforcement authority and the powers that are available. In some States, enforcement is almost entirely administrative with court processes used only on rare occasions for wilful non-compliance. In other States, almost all enforcement actions, including garnishments, must be issued by the court.

658. A number of suggested measures are listed in the Convention. Some countries will have additional remedies available. These available enforcement mechanisms may include:

### **a) Wage withholding**

659. This is an enforcement action that requires a debtor's employer to withhold a portion of the wages or salary of the debtor and to send those funds to the enforcement authority. It may also be referred to as the garnishment or attachment of wages. The withholding may be voluntarily initiated at the request of the debtor, or it may be the result of an action by the enforcement authority.

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<sup>101</sup> See Explanatory Report, para. 579 for a discussion of this term.

**b) Garnishment**

660. Garnishment is the interception by the enforcement authority of funds that would otherwise be payable to a debtor. A garnishment notice or order requires the person or organisation that would have paid those funds to the debtor to instead pay them to the enforcement authority for the benefit of the maintenance creditor. Depending upon the enforcement laws of the State responsible for enforcement, the following types of funds can be subject to garnishment:

***Garnishment, attachment and withholding*** are all terms used in the Convention to describe the process of intercepting funds that might otherwise be payable to a debtor before they are paid and requiring those funds to be transferred either to the Competent Authority or to a court or administrative authority. The funds can then be made available to pay outstanding maintenance.

- tax refunds
- lump sum payments
- rent payments or payments for services
- bank accounts
- commissions.

**c) Deduction from social security payments**

661. In some States, the competent authority will be able to enforce the maintenance decision by having the maintenance deducted from any social security payments that the debtor is entitled to receive.

**d) Lien or forced sale of property**

662. A lien is a notice filed against the title or registration of property owned by the debtor. If the property is then sold, any outstanding maintenance arrears will be paid from the proceeds of the sale. A lien may also give the enforcement authority the right to sell the property (called a forced sale) and recover the maintenance from the proceeds of the sale.

663. A lien may be filed against real property (for example, land, a house or building) or personal property (cars, boats, trailers and similar possessions).

**e) Tax refund withholding**

664. In some States, there is a process for the government to refund to taxpayers a portion of the excess tax withheld. The criteria for the refund will vary depending upon the State. Many States allow the maintenance enforcement authorities to intercept any refunds payable to a debtor.

**f) Withholding or attachment of pension benefits**

665. In some States, the pension benefits or payments that a debtor is entitled to may be attached and used to pay outstanding maintenance.

**g) Credit bureau reporting**

666. Reporting outstanding maintenance obligations to a credit reporting agency is a mechanism used by enforcement authorities in some States to ensure that any credit granter, such as a financial institution, is aware of the obligation of the debtor to pay maintenance, and the fact of any arrears. This may impact the ability of the debtor to obtain further credit or financing.

**h) Licence denial, suspension or revocation**

667. In some States, where a debtor is in arrears of maintenance, a request may be made by the enforcement authority to restrict or deny licence privileges to a debtor. The licence may be a driver's licence, a motor vehicle licence or any other special permit or licence, such as a professional licence, that has been identified under national law. In some States this is also known as licence withholding.

**i) Mediation, conciliation or processes to encourage voluntary compliance**

668. Many maintenance enforcement programmes have found that efforts to seek voluntary compliance by the debtor are extremely effective in getting arrears paid and reducing the likelihood of future default. Caseworkers in these States will work with the debtor to develop a payment plan that ensures that payments are made towards any outstanding arrears of maintenance, in addition to the ongoing maintenance payments.

**j) Other measures available under domestic law**

669. Other measures that may be available under the domestic law of the State that is enforcing the decision may include:

- Denial or suspension of passport privileges or the restriction of a debtor's right to leave the country
- Reporting of debtors in arrears to professional oversight agencies such as medical or legal associations
- Incarceration of debtors who have been found to have the ability to pay, but are wilfully non-compliant or in contempt of court decisions to pay
- Interception of funds from lottery proceeds, insurance settlements and lawsuits
- Structured job search requirements, requiring the debtor to look for employment

**D. Payments**

670. Once maintenance payments are received by the enforcing authority in the requested State, these will be transmitted to the creditor in the requesting State. In most cases, payments will flow from the debtor to the enforcement authority in the debtor's State, and then to the requesting Central Authority or to the creditor, however some States will send payments directly to the creditor in the requesting State.

671. Payments made by the debtor generally go through the enforcing authority so that the authority can maintain an accurate record of the amounts paid and determine the correct amount of arrears. This is particularly important where the enforcement legislation in a State sets a minimum threshold for arrears in order to utilise a specific enforcement remedy, or where the enforcing State provides the creditor with advance payments of the maintenance.<sup>102</sup>

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<sup>102</sup> See for example the legislation in Canada regarding suspension or denial of a passport. A threshold of \$3000 in arrears or three months default is required before the action can be initiated.

672. The mechanisms used to transfer funds vary significantly. Some States can transmit funds electronically; others use cheques or other monetary instruments to send the funds. Some States only remit funds once each month, combining all payments from that State into one transmission. In other States, each individual payment is sent as soon as it is received from a debtor. There are also differences between States in terms of whether payments will be sent in the currency of the sending State, or whether payments will be converted to the currency of the creditor's State before they are sent.

673. The Country Profile will indicate what processes the State responsible for enforcement will use to send payments to the creditor, and the currency the payment will be sent in.

## **E. Enforcement issues**

### **1. Challenges to enforcement**

674. Since enforcement is almost entirely a local matter, enforcement issues will generally be resolved by using the internal law of the place of enforcement and whatever procedures have been established in that State for enforcement.

A **Central Authority** is the public authority designated by a Contracting State to discharge or carry out the duties of administrative co-operation and assistance under the Convention.

675. This is supported by the provision in the Convention (Article 32) that the law of the State "addressed" applies in enforcement matters.<sup>103</sup>

A **Competent Authority** is the authority in a particular State that is charged with or permitted under the laws of that State, to carry out specific tasks under the Convention. A competent authority may be a court, an administrative agency, a child support enforcement programme or any other government entity that performs some of the tasks associated with the Convention.

676. There are specific exceptions to the general application of the principle that the law of the enforcing State applies. These are discussed below.

### **2. Limitation on collection of arrears**

677. Some States have limitations in their laws preventing the collection of arrears in cases where the arrears accrued outside a specific number of years (for example, preventing arrears that are more than 10 years old from being collected). Potential conflicts arise where a limitation period in one State conflicts with a limitation period (or lack of it) in another.

678. Article 32(5) provides guidance in this situation. It states that the limitation period for enforcement of arrears is to be determined by the law of the State of origin (the State that made the decision) or the law of the State where enforcement is taking place, whichever provides for the longest period.

679. From a practical perspective, this will require the State of origin to provide some form of verification as to the limitation period that is applicable for decisions made in that State. In many cases, the State of origin is also the requesting State, so this information is not difficult to obtain. The Country Profile for the State of origin will also indicate what the limitation period for collection of arrears is in that State.

680. It is important to remember that the limitation period for collection of arrears only affects the enforcement of arrears owing under the decision. The obligation to continue to pay any ongoing maintenance continues despite the restriction on collection of arrears.

<sup>103</sup> See Explanatory Report, para. 571.

### 3. Duration of maintenance obligation

681. The second specific legal rule applicable to enforcement is with respect to the duration of a maintenance obligation. Article 32(4) provides that duration of the decision – that is – the period of time for which maintenance is payable, is determined by the law of the State of origin.

682. Duration may be determined by the age of the child or there may be conditions under which maintenance ceases to be payable for a child (for example, when the child completes school). In some States the age at which maintenance ceases to be payable is known as the age of emancipation. In other States, the age of the child is only one of the factors determining the duration of maintenance for a child.

A **reservation** is a formal statement by a Contracting State, allowed in certain circumstances under the Convention, specifying that the applicability of the Convention in that State will be limited in some way.

683. However, duration of maintenance is not the same as eligibility for maintenance. Eligibility is the right of a child or an adult to receive maintenance based on certain legal criteria, such as the relationship between a parent and a child. Once a person is eligible for maintenance, the duration will be set as a term of the decision, or will be determined by the law of the place where the decision was made.

684. Effectively, this means that where the decision that is being enforced is a foreign decision, and no termination date is set in the decision, the competent authority responsible for enforcement will have to look to the foreign law (the law of the State of origin) to determine when the maintenance ceases to be payable for the child. Those rules concerning duration will apply, even though the law of the habitual residence of the child or the creditor might have given rise to a longer or shorter duration. This also means that it is possible that there will be situations where the duration of a decision (and therefore the enforcement of the decision) will be longer or shorter for decisions made outside the enforcing State than for decisions made in that State.

A **declaration** is a formal statement made by a Contracting State with respect to certain Articles or requirements under the Convention.

685. A Contracting State may make a declaration under the Convention that it will extend the application of the Convention to children who are more than 21 years of age or older, or make a reservation limiting the application of the Convention to children who are less than 18 years old.

**Example:**

A decision is made in State A, where child support is only payable for children up to their 20<sup>th</sup> birthday. The decision is sent to State B for recognition and enforcement. State B enforces child support under its internal law only for children who are less than 19 years old. Under Article 32(4), State B must enforce the child support for that child until the child turns 20 years of age, because the duration is determined by the law of State A.

#### a) Exception: children 21 years of age or older

686. The reference to the law of the State of origin for duration questions does not, however, require any State to enforce maintenance for a child who is 21 years of age or older, unless that State has specifically extended the applicability of the Convention to those cases (see Chapter 3). The scope of the Convention is independent from the terms of the decision or the law of the State of origin. The Convention ceases to apply to maintenance decisions once a child is 21 years old and accordingly there is no further obligation under the Convention to continue to enforce the maintenance for that child.

687. In such a case, the applicant will have to make a direct request to the competent enforcement authority for continuation of the enforcement of the decision. Whether such an application will be accepted will depend upon the policies of the enforcement authority and the law of the State where the enforcement is taking place.

#### 4. Arrears disputes

688. Arrears disputes arise where a debtor alleges that the arrears are incorrect because he or she has made payments that have not been taken into account in the calculation of the arrears by the enforcement agency. There may also be a dispute about interpretation of the decision (for example, regarding the commencement or cessation date for payments under the decision) or the debtor may allege that he or she is entitled to a reduction in the maintenance, for example, because maintenance is no longer owing for one of the children.

689. Where the debtor disputes arrears that were part of the initial request for recognition and enforcement the enforcement authority should check to see whether the same issue was raised at the time that the debtor was given notice of the recognition request. If the arrears were disputed at that time, and found to be correct, except in unusual circumstances, the debtor cannot again raise the same issue in the enforcement proceedings with respect to those arrears, although a debtor may dispute the calculation of other arrears.

690. Some arrears issues will require input from the requesting Central Authority or the creditor. If information needs to be obtained, the Central Authority or the competent authority responsible for enforcement will initiate contact with the Central Authority or competent authority in the other State and request the necessary information or documents.

691. If the information is not received, and enforcement cannot proceed, a further request should be made. Although the requesting Central Authority has **three months** to respond and provide the necessary information, and enforcement could be stopped if the material is not received, this should only be done where further enforcement is impossible or impractical. In many cases it will still be possible to enforce the remaining maintenance under the decision, while the arrears are being determined.

**Good practice:** Where there is a dispute as to a portion of the arrears, the remaining (undisputed) arrears and the ongoing maintenance should still be enforced, while the dispute is being resolved.

#### 5. Account reconciliation – Currency exchange issues

692. One of the most challenging aspects of the international enforcement of maintenance obligations is reconciling the payment records of the requesting State to those of the enforcing State, to accurately determine the arrears of maintenance. This can be a significant issue where the decision that is being enforced is a foreign decision, and the maintenance amounts in the decision are stated in a different currency than that used in the State responsible for enforcement. In these cases, in order to enforce the decision, the maintenance amounts will have to be converted from the currency used in the decision to the currency of the enforcing State. The debtor will then be advised to pay the amount that has been converted.

693. The rules governing this conversion (the date converted, the exchange rate used, whether the exchange rate can be updated and so on) will be those of the State that is responsible for enforcement. In many States, there is no mechanism (in law or in practice) to change this currency conversion once it has been done, so the records of the requested (enforcing) State and the requesting State will differ as the exchange rate fluctuates over time.

694. In addition to the conversion of the maintenance amount due from the currency of the decision to the debtor's currency, any payments made by the debtor will also have to be converted to the currency of the creditor. Where the exchange rate fluctuates, this can lead to differences between the amounts owing as calculated on the books of each State.

**Account Reconciliation: An Example**

A maintenance decision was made in December 2006 in Australia setting monthly child maintenance at \$400 AU. The decision was sent to the Netherlands to be enforced. It was converted at that time to €237.65 and the debtor was advised to pay that amount each month.

However, by December 2008, \$400 AU converted to only €202.56. Australia's records will continue to show \$400 AU per month while The Netherlands' records continue to show €237.65 per month, if the exchange rate has not been updated. This may create an "overpayment" of €35 per month if the debtor continues to pay as originally advised.

695. There is no simple resolution to this issue. The Convention does not address this matter. Whether the records of the State that is responsible for enforcing can be periodically updated to match those of the requesting State will depend upon the law and practice of the enforcing State. Some States are able to alter their records administratively; in other States this is neither permitted nor practical.

696. However, it is important to remember that any conversion of the maintenance amount into a different currency does not modify or vary the underlying decision. The debtor continues to owe the amount set out in the original maintenance decision. If the debtor were to return to the State where the decision was made, the amount owing would be calculated using the currency of the State where the decision was made. However, the enforcement of the decision in the foreign State may be limited by the currency conversion.

697. The challenges raised by exchange rate fluctuations highlight the need for ongoing communications between the requesting and requested States. It is critically important that the States keep each other informed as how the arrears have been calculated, and any domestic rules that govern that calculation. The requesting State may also need to assist the applicant to obtain any additional documents or decisions confirming outstanding arrears, if these are needed by the enforcing State to justify collection of arrears that have accrued as a result of exchange rate fluctuations.



### **III. Additional materials**

#### ***A. Practical advice***

- The Country Profile for each Contracting state will indicate what enforcement measures are available in that State. There are considerable differences between States, so it is important to review the profile for each State.
- Advise the applicant / creditor of the steps that can be taken to enforce the decision. This will assist the creditor in his or her understanding about any limitations in the enforcement of the decision.
- It is important that any new information that the creditor may have concerning the assets or income of the debtor be communicated in a timely fashion to the competent authority responsible for enforcement. This will assist that authority in its enforcement of the decision.
- The Status Update form provides a simple way for the competent authority in the State that is enforcing the decision to keep the requesting State advised of developments. In addition to advising of new measures initiated, a record or list of payments received by the enforcement agency can be included. This will assist the requesting State in reconciling its records and updating any arrears balances.
- Where enforcement agencies are involved in both the requested and requesting State, frequent communications between those agencies will increase the likelihood that enforcement of the decision will be successful. In some cases it may be prudent to initiate enforcement in both States to ensure that all income and assets are attached as appropriate.

#### ***B. Text of relevant Articles***

Article 6(2) e) and f)  
Article 12(9)  
Article 32  
Article 33  
Article 34  
Article 35

#### ***C. Related sections of Handbook***

See Chapter 4 – Processing outgoing applications for recognition or recognition and enforcement (Article 10(1) a) and 10(2) a))

See Chapter 8 – Outgoing applications for establishment of a maintenance decision

See Part 2 (Matters common to all applications under the Convention and to requests for specific measures) of Chapter 3

## IV. Frequently Asked Questions

*What steps will a Contracting State take to enforce a decision?*

698. That will depend upon the State where the decision is being enforced. The Convention sets out a list of recommended measures, but not all of these will be available in every Contracting State, and some States may use other measures. At a minimum, the enforcing State must use the same measures for the enforcement of foreign decisions as it does for domestic decisions. What steps are taken will also depend upon whether the debtor voluntarily complies with the decision.

*How will the payments be sent to the applicant?*

699. In most cases, payments that are made by the debtor will be sent to the enforcement authority in the State where enforcement is taking place. That authority will send them to the creditor directly or to the Central or enforcement authority in the State where the creditor resides. The initiating application form (for example the Application for Recognition and Enforcement) contains provisions for the creditor to indicate where payments should be sent.

*How long will it take before the creditor starts receiving payments?*

700. That will depend upon a number of factors. It will depend upon whether the debtor pays voluntarily or whether enforcement actions need to be initiated. It will also take longer if searches have to be undertaken to locate the debtor, his income or his assets.

## Chapter 11 – Applications for modification of a decision (Article 10(1) e) and f) and 10(2) b) and c))

701. The chapters in this Handbook dealing with modification are structured differently than those dealing with other applications and requests under the Convention. Instead of separate chapters dealing with outgoing and incoming applications, there is one chapter (this Chapter) which provides an overview of the way that the Convention applies to applications brought by debtors or creditors to modify existing maintenance decisions. The following chapter (Chapter 12) then provides the procedures for both outgoing and incoming applications for modification.

702. The Handbook has been structured in this way for modification applications, as the interactions between the Convention provisions, the circumstances of the parties (where they reside, where the decision was made) and whether the application is being brought by a creditor or a debtor all influence where and how the modification application should be brought. For this reason, this Chapter covers each of the possible fact scenarios, and provides a detailed explanation of the modification processes available in each. This Chapter will assist caseworkers in understanding some of the underlying issues with respect to modification, providing the necessary background for the processing of the applications, covered in the next chapter.

703. The first part of the Chapter provides an overview of modification in the international context generally. The second part of the Chapter covers modification applications in four different fact scenarios.

### I. Overview – Modification of maintenance decisions

#### A. General

704. Because maintenance, in particular child support, can be payable for many years, and the needs of the children and means of the parents will change over that time, the ability to modify a maintenance decision is important to ensure that children and families receive the support they need. The Convention therefore includes provisions for Central Authorities to assist in the transmission and processing of applications for modification of decisions, and the Convention also includes rules for the subsequent recognition and enforcement of those modified decisions where necessary.<sup>104</sup>

**Modification** is the process of changing a maintenance decision after it has been made. In some States this is known as a variation application or an application to change. The modification may relate to the amount of maintenance, the frequency or some other term of the maintenance decision.

705. Under Article 10 an application for modification of an existing decision can be made where one of the parties, either a creditor or debtor, seeks a modification (also known in some States as a change or variation) of the decision. A creditor may seek an increase in maintenance, termination of maintenance for one or more of the children, or a modification to terms such as the frequency of payment. Similarly a debtor may also seek a modification – often to reduce the amount payable, terminate the maintenance for one or more children, or to modify the terms of payment. The modification may also be made simply to ensure that the maintenance payment reflects the current income of the debtor. The Central Authority in a requesting State, where the applicant resides, will be involved in transmitting the request for modification to the other Contracting State.

<sup>104</sup> Explanatory Report, para. 258.

706. All Contracting States have procedures to allow for the processing of Convention applications for variation or modification of maintenance obligations, either through the modification of the existing decision or by issuing a new maintenance decision.<sup>105</sup> However, it is important to remember that in most cases the merits of the modification application will be determined under the law of the requested State.<sup>106</sup> Contracting States may have very different laws concerning the grounds that must be established before a modification may be allowed. The Country Profile of the requested State provides an explanation of what will need to be established under the domestic law of the requested State in order for the application to be successful.

707. It is important to note that modification applications requesting reduction or cancellation of arrears may be treated very differently in Contracting States. Some States may not allow any modification of arrears, and even where a decision is made that modifies arrears, that modification may not necessarily be recognised in another State. In any situation where an applicant is seeking to modify arrears of maintenance, the country profiles of both States should be consulted to see if the modification will be possible, and if the decision is modified, whether the arrears cancellation will be recognised.

708. Equally importantly, the Convention only provides basic guidance as to the types of applications for modification that can be made through Central Authorities, and some very limited rules as to how Contracting States should treat foreign modification decisions, once made.

The **State of origin** is the State where the maintenance decision was made.

709. Therefore, there will be situations that arise in the course of managing international cases where the Convention provides no specific guidance. In these cases, individual States will have to resolve any issues with reference to their domestic law and the overarching principles of the Convention requiring States to co-operate with each other promote efficient, cost-effective and fair solutions, and encourage solutions which support the objective of the recovery of child support and family maintenance.

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<sup>105</sup> Although this chapter discusses the situation where a State is being asked to modify a previous decision, it applies equally in situations where the domestic law does not permit the granting of a modified decision, only a new decision. See Explanatory Report, para. 264.

<sup>106</sup> Some States will apply foreign law, not domestic law in these applications.

## ***B. Where can a request or application for modification be brought and is an application under the Convention possible?***

710. The Convention does not provide “direct rules” setting out when a Contracting State may modify a maintenance decision made in another Contracting State. This will almost always be a matter for domestic law. The only situation where the Convention specifically addresses the ability to modify a decision is in relation to modification applications brought by a debtor in a different State than the State of origin, where the creditor resides in the State of origin (Article 18).<sup>107</sup>

711. By providing for applications to be made under the Convention for modification, and by providing rules concerning when decisions (including modified decisions) may be recognised and enforced, the Convention provides a framework that responds to the needs of parties in situations where the initial decision must be modified. The Convention allows for a cost effective, simplified process for creditors or debtors to initiate applications for modification, where the other party resides in a different Contracting State, removing the need in most cases for a party who requires a modification to travel to the other State to make the application.<sup>108</sup>

Tip: Throughout this Handbook you will see a distinction made between **requests** and **applications**. An application is an action under the Convention that goes through a Central Authority, such as an application for recognition and enforcement. A request is an action that goes directly to a competent authority, such as a request for establishment of support for spousal support, where neither of the Contracting States has extended the application of the Convention to those requests.

712. In most situations an applicant, either creditor or debtor may have a number of options in terms of where the modification can be brought, and whether or not the Convention should be used to make an application. The applicant may decide to:

- Make an application under Article 10 of the Convention and have the application transmitted to be heard in the State where the other party resides, or
- Choose to travel to the State where the decision was made or the other party resides and make the request directly to the competent authority in that other State, or
- Make the request directly to the competent authority in his or her own State, in particular where he or she still resides in the State where the decision was made.

713. Which of these options should be used by an applicant in a particular case will depend upon:

- The residence of the applicant and whether that is the State of origin (the State where the decision was made),
- Where the debtor resides,
- The domestic law of the State where the application or request will be made, consideration of whether the modified decision will need to be recognised or enforced in a different State after it is made,
- Whether the law in the State where the application will be brought allows for the type of modification sought (see comments above concerning modification of arrears),
- Whether there will be any difficulties in getting the modified decision recognised in the State where it is to be enforced,

<sup>107</sup> Explanatory Report, para. 415.

<sup>108</sup> Note that in some cases, travel may still be required if the matter cannot proceed through the Central Authority, or because the presence of the applicant is required during the proceedings.

- The length of time it will take to complete the application. This may be particularly important where a creditor requires an increase in maintenance to cover the increasing costs of raising the child,
- Whether one State offers an expedited process with respect to modification – for example the reassessment procedures available in Australia – that might allow for frequent adjustments where the parties require it.

714. It should be kept in mind that the debtor's options concerning modification will be more limited than the creditor's because of Article 18.

715. Determining where to bring a modification application request or application is a complex matter and applicants should be encouraged to obtain legal advice if they have any questions or concerns.

716. Finally, it should be noted that because the Convention may only be applicable in a limited set of circumstances, there is the possibility that modifications will take place that create multiple decisions with respect to the same family, or applicant and respondent. Wherever possible, a course of action that involves multiple decisions should be avoided, because the uncertainty caused by the decisions, and the resources required to resolve issues, will hinder the effective enforcement of those decisions.

## II. Examples

717. This part illustrates the possible modification scenarios, and the situations where applications to modify using the Convention procedures can be made. Modification applications are grouped into four possible scenarios:

- (1) Where the creditor resides in the State that made the initial decision (the State of origin), but the debtor does not,
- (2) Where the debtor resides in the State of origin but the creditor does not,
- (3) Where neither the debtor nor the creditor reside in the State of origin, and reside in different States,
- (4) Where neither the debtor nor the creditor reside in the State of origin and both now reside in the same State.

718. In each example, the critical considerations are:

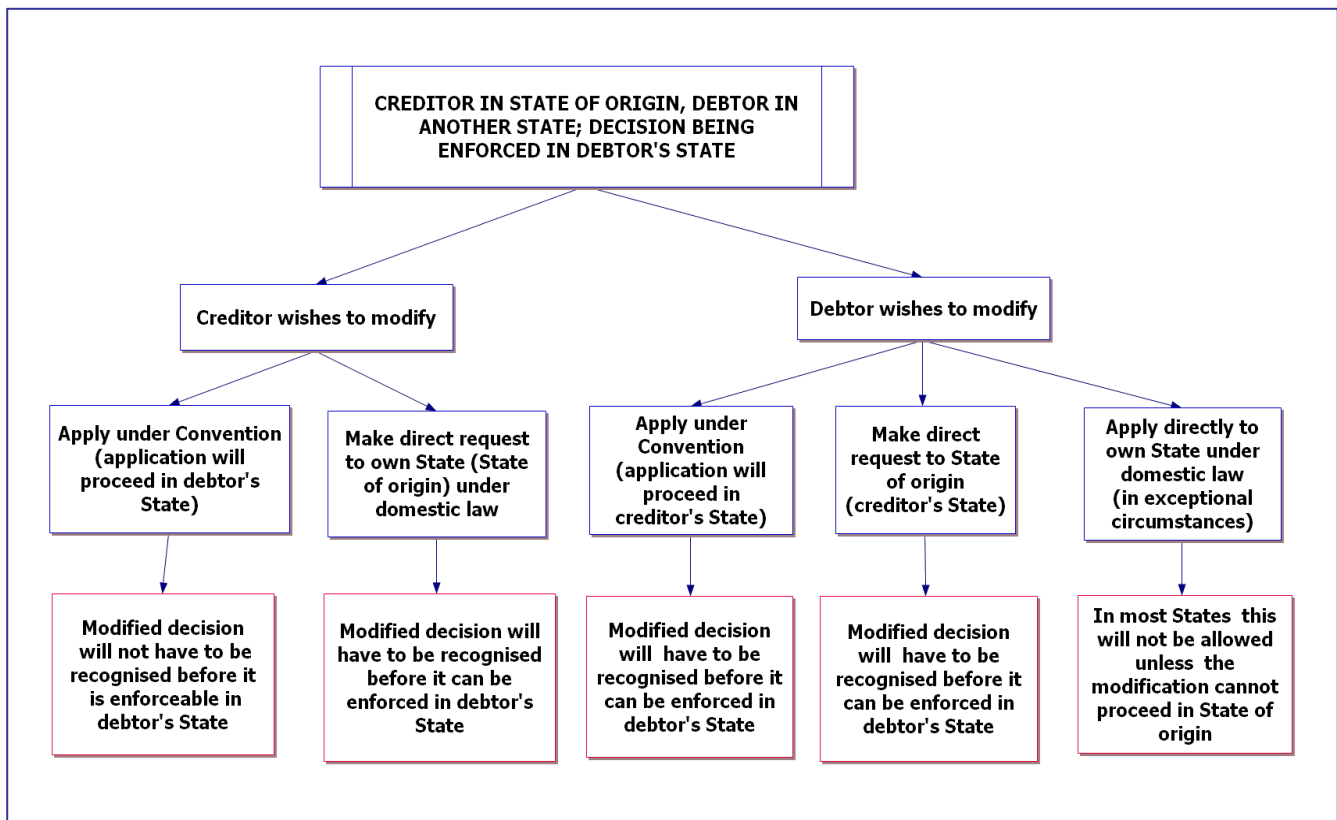
- Where was the decision made?
- Where does the creditor now reside?
- Where does the debtor reside?
- Where will the modified decision need to be recognised and enforced?

719. For each example, a graphic representation of the options has been provided.

### ***A. Example 1: Debtor has left the State of origin, creditor has not***

#### Fact situation:

720. This will be one of the most common scenarios. The maintenance decision was made in State A. The debtor now resides in State B. The creditor is still resident in State A. The decision has been sent to State B to be recognised and is being enforced in State B. Both State A and State B are Contracting States.



**Figure 28: Modification applications where creditor resides in State of origin**

## 1. If the *creditor* wishes to modify

721. The creditor will often wish to have the decision modified to cover the increasing costs of raising the children. In this situation, the creditor has a number of options.

### a) Option 1 – Apply under Article 10(1) f) of the Convention

722. In this situation the creditor can make an application under Article 10(1) f) to have the decision modified in State B, where the debtor now habitually resides. If the creditor chooses this option, the application will be transmitted by the Central Authority in State A to the Central Authority in State B. The Central Authority in State B will forward the application to the competent authority in State B, and the matter will proceed in State B according to the domestic law of State B (including its jurisdictional rules), and the decision modified.

The term **habitual residence** is not defined in the Convention. It is used in a number of Articles of the Convention in connection with whether a decision can be recognised or enforced. The individual facts in each case will determine whether a person is habitually resident in a State. A determination of habitual residence may be based on facts such as where the person resides, where the person has his or her primary (or main) residence, where he or she works or goes to school. Mere presence in a State will not be sufficient to establish habitual residence.

723. The modified decision does not need to be recognised before it can be enforced in State B, as it was made by a competent authority in State B. Unless State B requires a separate application for enforcement of the modified decision, the creditor (applicant) does not need to do anything further, if enforcement of the decision continues to be done in State B. If the debtor moves or if there are assets or income outside State B the modified decision would, of course, have to be recognised in those other States. Recognition of the modified decision in State A will not be necessary unless the domestic law of State A requires it, or the debtor has assets or income in State A and enforcement is to take place there.

724. With this option, therefore, the creditor will be applying under the Convention for a modification of the decision, and the procedures described in this Chapter and Chapter 12 apply to that application.

### b) Option 2 – Make a direct request to the competent authority in State A

725. The Convention does not apply to a modification made using this option.

726. As the initial decision was made in State A, the creditor may simply return to the judicial or administrative authority that made the decision and request a modification. That modification, like any other modification, will be determined using the domestic law (the law of State A). The law in State A will determine what notice or service of the application will be made upon the debtor in State B.

727. Since the debtor resides in State B and that State is responsible for enforcement, if the creditor chooses to make a request for the modification in State A, the modified decision, will have to be sent to State B for recognition and enforcement once it has been made. This can be done using the procedures described in Chapter 4.

728. The modified decision will be recognised and enforced in State B, unless, as discussed in Chapter 5, the debtor is able to show that none of the bases for recognition and enforcement of the decision set out in Article 20 apply, or that one of the grounds set out on Article 22 prevents the recognition and enforcement of the decision. This might be the case, for example, if the debtor were able to establish that he was not given any notice of the application to modify, as required by the law of State A.



729. However, in most cases, recognition of the modified decision will proceed without objection in State B, and the modified decision will then be enforceable in State B.

730. With this option therefore, the creditor will be applying under domestic law for the modification, but the subsequent application for recognition and enforcement of the modified decision will be made under the Convention, using Article 10. The procedures described in Chapters 4 and 5 apply to the recognition and enforcement application.

## 2. If the *debtor* wishes to modify

731. If the debtor wishes to modify the decision in this particular scenario, he or she also has a number of options, in terms of where the application can be made. As noted below, the debtor could bring an application under the Convention for modification in State A, the debtor could make a request to the competent authority in State A directly, or, in some very limited circumstances subject to domestic law, the debtor could make a request directly to the competent authority in State B.

732. In this particular situation, (where the debtor has left the State of origin and the creditor has not) there are considerations that apply only to debtors. These are important for a debtor in determining where the application should be made.

733. Although the Convention provides no direct rules as to when one State may modify a decision made in another State, the Convention does restrict the ability of the debtor to have the decision modified by a different State where the creditor is habitually resident in the State that made the original decision (the State of origin).<sup>109</sup>

**Important point:** Under Article 18 it is important to determine where the proceeding is “brought”, in order to find out if that Article would apply to prevent recognition of the decision. Note that word “proceeding” is used in this Article – not application. The “proceeding” is brought in the place where the competent authority (the court or administrative authority) holds the hearing or review and decides whether the maintenance decision should be modified. This will be the **requested State**.

734. The Convention incorporates this rule into both Articles 18 and 22. Article 18 provides that an application to modify a decision cannot be brought by a debtor in a Contracting State other than the State of origin, if the creditor is habitually resident in the State of origin, unless one of the four exceptions applies. Article 22 allows a respondent on an application for recognition and enforcement of a decision to object on the basis that it was made in contravention of Article 18.

735. Effectively this means that if the debtor has left the State of origin and wants to modify the decision, and the creditor resides in the State of origin, that the application should proceed in the State of origin. The Convention provides a means for this to be done without requiring the debtor to travel to the State of origin, as he or she may commence an application in his or her own State and have that application transmitted under the Convention to be heard in the State of origin.

736. If this is not done, and the modification proceeds outside the State of origin, if recognition of the modified decision is required, the debtor will have to ensure that Articles 18 and 22 will not create a barrier to the recognition of the modified decision.

737. The next section goes through these options in more detail.

<sup>109</sup> Explanatory Report, paras 421, 422.

**a) Option 1 – Apply under Article 10(2) b) of the Convention for a modification**

738. Article 10(2) *b*) provides an effective, often lower cost alternative for the debtor who would otherwise have to return to State A and bring the application directly in State A for modification. In this fact situation, the debtor may initiate an application for modification under the Convention, and the Central Authority in State B will transmit that application to State A. The Central Authority in State A will forward the application to a competent authority in State A for consideration, and the application will be determined according to the law of State A.

739. If a modified decision is made, the Central Authority in State A will provide a copy of the modified decision to State B. In some States, the law of State B will require that the decision from State A be recognised before it effectively modifies the previously recognised decision. In other States, this step will not be necessary, as the modified decision is simply seen as a continuation of the initial decision. In terms of the process for this recognition in the State where the debtor resides, in many States as a matter of good practice, the Central Authority will assist under Article 10(2) *a*). Otherwise, the debtor will have to use the internal procedures available in his or her State to have the decision recognised.

740. The procedures outlined later in this Chapter apply to the application for modification.

**b) Option 2 – Make a request directly to the competent authority in State A**

741. It is always open to the debtor to return to State A and bring the modification application directly to the competent authority in State A. This application would proceed under domestic law in State A.

742. In most cases the debtor will then need to have the modified decision recognised in State B, where the enforcement is taking place, in order to limit or change the enforcement of the initial decision. That application for recognition can be made either under domestic law (if State B allows it) or the debtor may make an application under Article 10(2) *a*) to have the modified decision recognised in State B in order to limit the enforcement of the previously recognised decision. The procedures for this application for recognition and enforcement are discussed in Chapters 4 and 5.

**c) Option 3 – Make a request directly to competent authority in State B**

743. Given the provisions of Article 18, there are very few States where this will be allowed, other than in exceptional circumstances.

744. An application may be made in State B, for example, where the parties agree that it would be more expeditious to proceed in State B because that State is better able to make a determination of the debtor's income and ability to pay for the purpose of spousal maintenance. In this situation, the parties have consented to the matter proceeding in State B. That application would proceed entirely under domestic law (if allowed) with notice to the creditor as provided by the law of that State.

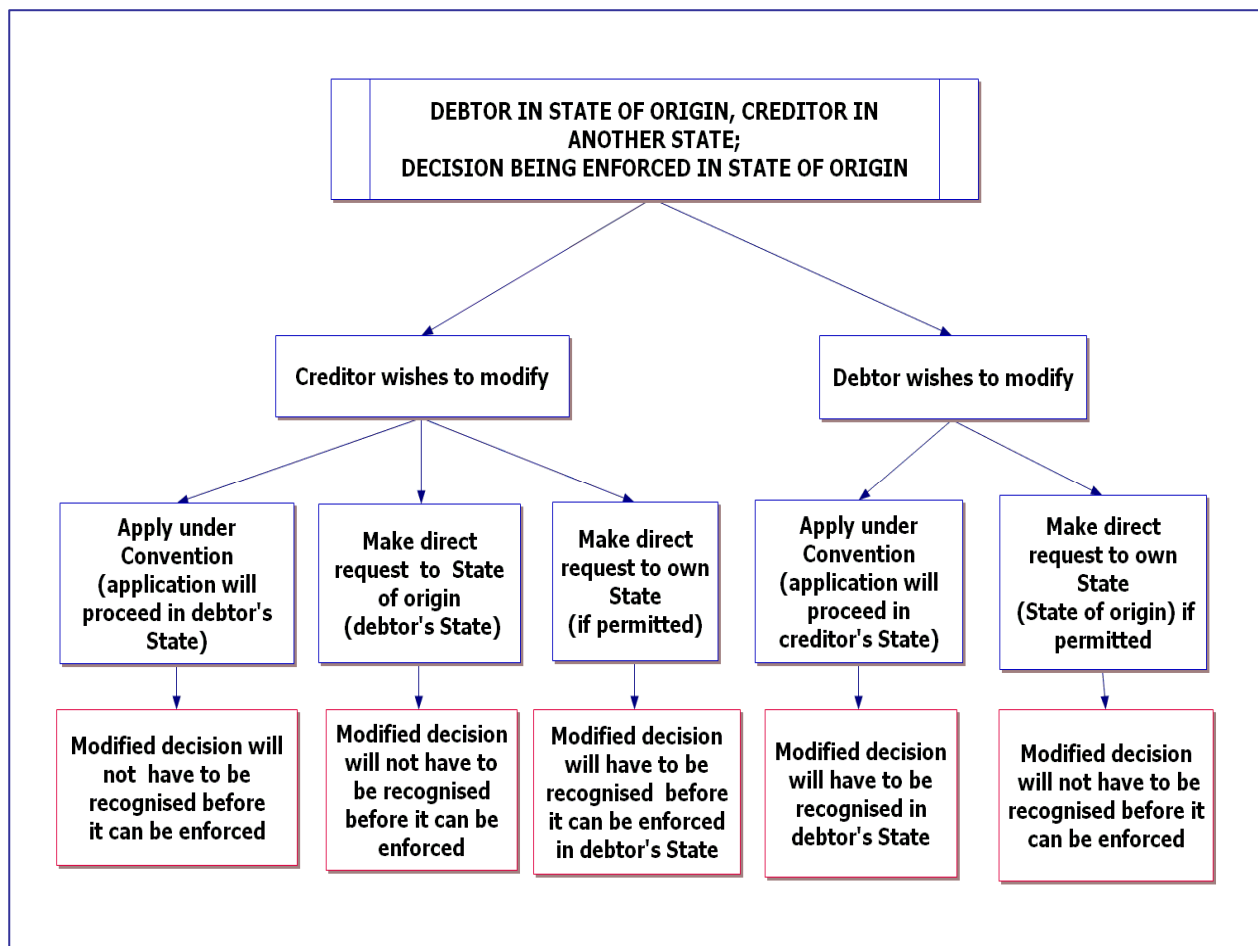
745. The Convention recognises the possibility of these situations in the exceptions to Article 18, providing that modifications may be made in a State other than the State of origin in the following limited circumstances:

- where there is agreement in writing to the jurisdiction of the State (other than in cases involving child support),
- where the creditor submits to the jurisdiction of the authority in the other State,
- where the competent authority in the State of origin refuses to modify the decision and,
- where the State cannot recognise the initial decision from the State of origin, so a modified decision from the same State would also not be recognised.

### ***B. Example 2: Creditor has left the State of origin, debtor has not***

#### Fact situation:

746. The maintenance decision was made in State A. The creditor has moved to State B. The debtor remains in State A. The decision is being enforced in State A. Both State A and State B are Contracting States to the Convention.



**Figure 29: Modification applications where the debtor resides in State of origin**

## **1. If the *creditor* wishes to modify**

### **a) Option 1 – Apply under Article 10(1) e) of the Convention**

747. If the creditor does not wish to return to State A to bring the application directly, he or she may start a modification application under Article 10(1) e) of the Convention. The application will be transmitted by the Central Authority in State B to the Central Authority in State A. The Central Authority will send it to the competent authority for processing. The application will be determined according to the law of State A, and the resulting modified decision can be enforced in State A.

748. In most cases, recognition of the modified decision in either State B (where the creditor resides) or in another State will not be necessary unless the debtor has assets or income in State B or that other State. However in the event that recognition is required elsewhere, the creditor can utilise the procedures set out in Chapters 4 and 5.

749. The procedures outlined later in this Chapter apply to the modification application made by the creditor in this situation.

### **b) Option 2 – Make a request directly to the competent authority in State A**

750. The creditor always has the option of returning to State A and bringing the modification application directly in the State where the initial decision was made. The modified decision, once it has been made, does not need to be recognised to be enforced in State A, and it can simply be provided to the competent authority responsible for enforcement, and be enforced in the same way as the initial decision. The modification will proceed entirely under domestic law in State A.

751. If, for some reason, the modified decision needs to be enforced in State B or another State because the debtor has assets or income in State B or another Contracting State, at that point the creditor would need to make the appropriate application under Article 10(1) a) to have the modified decision recognised in that State, unless the domestic law of that state allows it to be treated as a continuation of the initial decision, and therefore no recognition is necessary.

### **c) Option 3 – Make a request directly to the competent authority in State B**

752. If permitted under the domestic law of State B, the creditor could make a request directly to the competent authority in State B (where he or she resides) for a modified decision. The debtor will be notified or served according to the law of State B.

753. However, before the creditor chooses this option he or she should be aware that recognition of the modified decision may be problematic if it has to be recognised before it can be enforced in a State that has made a reservation under the Convention excluding the residence of the creditor as a basis for recognition and enforcement of a decision (see Chapter 5).<sup>110</sup>

754. Therefore the creditor may wish to determine whether this reservation has been made by State A, where the debtor resides, as the modified decision will, in most cases, have to be recognised before it can be enforced in State A. If so, it would be preferable for the creditor to bring the modification application using Article 10 of the Convention as described above.

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<sup>110</sup> If a State has made this reservation, it means that some other basis for recognition and enforcement of the decision must be found. Article 20 sets out the alternative bases for recognition and enforcement.

755. Finally, if the modification sought by the creditor in this scenario includes a modification of the arrears, the creditor should be aware that a decision made in State B may not necessarily be accepted by the competent authority in State A. The country profile for both States should be consulted in this situation to determine whether the modified decision will be accepted.

## **2. If the *debtor* wishes to modify**

### **a) Option 1 – Apply under Article 10(2) c) of the Convention**

756. The debtor has the option of proceeding under Article 10 (2) c) of the Convention to have the decision modified in State B, where the creditor resides.<sup>111</sup> The debtor may initiate an application in State A and that application will be transmitted by the Central Authority in State A to the Central Authority in State B. The modification proceedings would then take place in State B, and the domestic law of State B will apply to the modification application.

757. As the modified decision will be made in State B, and the initial decision is being enforced in State A, in most States the modified decision would have to be recognised in State A before it could be enforced (and take priority over the previous decision). How this recognition application will be done will depend upon the domestic practice in State B. Either the debtor or the creditor could apply for recognition if necessary. If the creditor applies, the procedures set out in Chapters 4 and 5 for recognition and enforcement would cover the application for recognition of the modified decision. If it is the debtor who requires recognition, in many States, as a matter of good practice, the Central authority will assist in that process as it is the final step in the modification request. However, it may be necessary for the debtor to have the decision recognised using purely domestic processes.<sup>112</sup>

### **b) Option 2 – Make a request directly to the competent authority in State A**

758. If the debtor wishes to modify the decision, he or she may be able make a request directly to the competent authority in State A where he or she resides. State A is the State of origin and will, in some cases, be able to modify its own decision. If the request is permitted,<sup>113</sup> the proceedings will be governed by the domestic law of State A. The creditor will be notified or served, according to the laws of State A. The resulting decision can be enforced in State A without the need for recognition or any further steps.

759. It is unlikely that the resulting decision from State A would need to be recognised or enforced in State B, where the creditor resides, unless the debtor also has assets or income in that State. If the creditor does want to have the modified decision recognised and enforced in State B, this should be done with little difficulty as the modified decision was made by the same authority that originally made the decision, and in most States this will be treated as an extension of the original decision, and can be recognised on the basis.

<sup>111</sup> Subject to the jurisdictional rules applicable in State B.

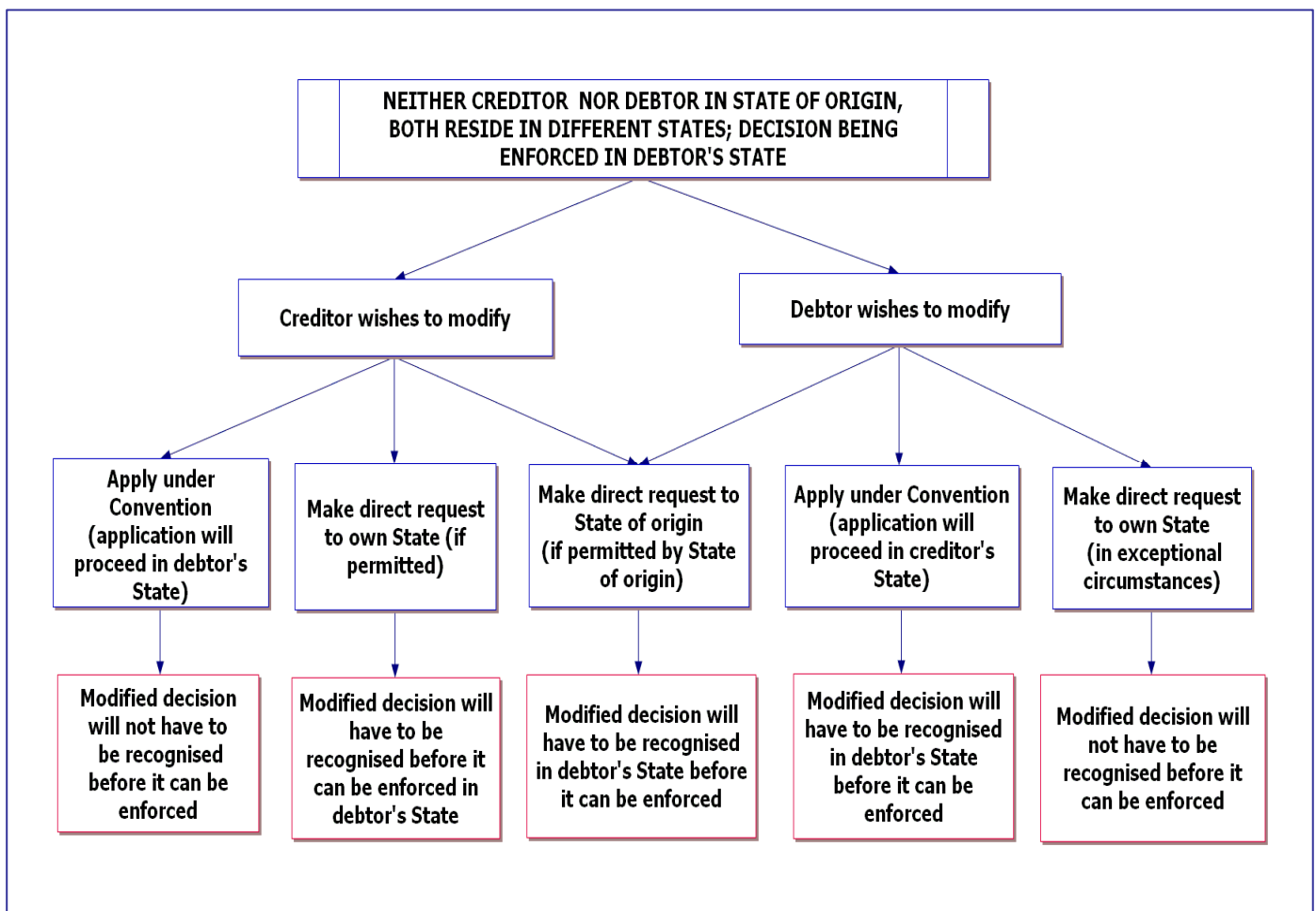
<sup>112</sup> Strictly speaking, the scope of the Convention does not cover an applicant's request for services from his or her own Central Authority for an application in that State.

<sup>113</sup> In some States the law will require that the application be brought where the creditor resides. In other States, there may be no jurisdiction (or authority) to make a binding decision against an out-of-State party.

760. However, given the limitations that may be present in the domestic law when an application proceeds directly in State A, in many cases it may be preferable for the debtor to use the Convention processes to apply to have the decision modified by State B.

### ***C. Example 3: Both the creditor and the debtor have moved from State of origin***

761. The maintenance decision was made in State A. The creditor has moved to State B. The debtor now resides in State C. The decision has been recognised in State C and is being enforced in State C. All three States are Contracting States to the Convention.



**Figure 30: Modification applications where both parties have left the State of origin and live in different States**

## 1. If the *creditor* wishes to modify

### a) Option 1 – Make an application under Article 10(1) f) of the Convention

762. The creditor can initiate a modification application in State B (where he or she resides) under Article 10(1) f) of the Convention.<sup>114</sup> That application will be transmitted by the Central Authority in State B to the Central Authority in State C where the debtor resides. The Central Authority will forward the application to a competent authority in State C and the modification will then take place in State C.

763. Note that the Convention does not require that the decision from State A be recognised in State B before a modification can be initiated in State B or heard in State C. Nor is there any requirement in the Convention that the decision that is being modified be from a Contracting State.<sup>115</sup> It must be one that falls within the scope of the Convention (see Chapter 3). However, whether the decision will actually be modified will depend upon the domestic law of State C and whether the decision is of a type that can be modified under that law.

764. If a modified decision is made using this process, State C now becomes the “new” State of origin. The modification decision from State C does not have to be recognised in State C because it is going to be enforced in the State where it was made.

765. Unless the debtor has assets or income in State B (where the creditor resides) or in another State, there is no need for any further steps to be taken, although it is a good practice to let the other State know that the modification has been made.

### b) Option 2 – Make a request directly to competent authority in State B

766. If permitted by the domestic law of State B, the creditor can make a request directly to a competent authority in State B, where he or she resides, to obtain a modification of the decision originally made in State A. The law in State B will determine what type of notice or service will be provided to the debtor / respondent in State C.

767. However, the comments in the previous example concerning applications made by creditors to their State of residence may apply here as well. If the creditor chooses this option, the modified decision made in State B will have to be recognised in State C, where the debtor resides, before it can be enforced in State C. The creditor will have to make an application under the Convention for recognition and enforcement, using the procedures outlined in Chapter 4, or make a request for recognition directly to the competent authority in State C. If State C has made a reservation excluding creditor-based jurisdiction as a basis for recognition and enforcement, the debtor / respondent may object to the recognition, and another basis for recognition and enforcement will have to be found.

## 2. If the *debtor* wishes to modify

### a) Option 1 – Make an application under Article 10(2) c) of the Convention

768. The debtor can initiate an application to modify using the Convention processes (Article 10(2) c)) through the Central Authority in State C. That application will be transmitted to the Central Authority in State B. The Central Authority in State B will forward the application to the competent authority in State B, where the application will proceed using the domestic law of State B.

<sup>114</sup> Subject to the jurisdictional rules applicable in State B.

<sup>115</sup> Explanatory Report, para. 262.

769. If the decision is modified, State B will become the “new” State of origin. The modification decision will have to be recognised in State C before it can be enforced. An application would have to be made by the debtor under Article 10(2) a) for this. Recognition should be fairly straight forward as the debtor was the one initiating the application, resulting in the decision. In some States recognition will not be necessary as the modified decision will be treated, under domestic law, as an extension of the first, already recognised decision. The procedures set out in Chapters 4 and 5 apply to the recognition and enforcement application.

770. If the debtor has to apply for recognition, as a matter of good practice, the Central authority in his or her own State may assist, as this is the final step in the modification application. In some States the debtor may have to use other internal processes to have the decision recognised in order to limit or suspend the enforcement of the original decision. Finally, in some States, the recognition process will not be used at all by the debtor, but the modified decision will be raised as a defence, or to oppose enforcement of the earlier decision.

### **b) Option 2 – Make a request directly to the competent authority in State C**

771. There may be a few States where the debtor is permitted to make a request directly to the competent authority in State C, the State where he or she resides. In most States this will not be allowed, other than in exceptional circumstances. The law in State C will provide what notice or service upon the creditor is required.

772. The resulting modification decision would not need to be recognised in State C, as the modified decision would be a domestic decision. However, if the debtor has assets or income in another State the decision would have to be recognised in that other State before it could be enforced.

773. The most likely reason for proceeding in State C in this scenario is a situation where the existing decision cannot be modified by State B, where the creditor resides, or by the State of origin. In that situation, State C would likely be able to modify the decision or make a new decision, with respect to the maintenance obligations.

774. Unless these factors are present, it is preferable that the debtor use Article 10 of the Convention to have the modification application transmitted to, and heard in, State B where the creditor resides.

## **3. Return to the State of origin for modification**

775. Although it may be rare, in a situation where neither the creditor nor the debtor reside in the State of origin, an application to have the State of origin make a modified decision could be made by either party, either under Article 10 of the Convention, or by making a request directly to the State of origin.

776. Whether this will be allowed in any given situation will be governed entirely by domestic law. In many jurisdictions this will not be possible as the administrative or judicial authority would be unlikely to allow an application to proceed where neither the creditor nor the debtor had any ties to the State.

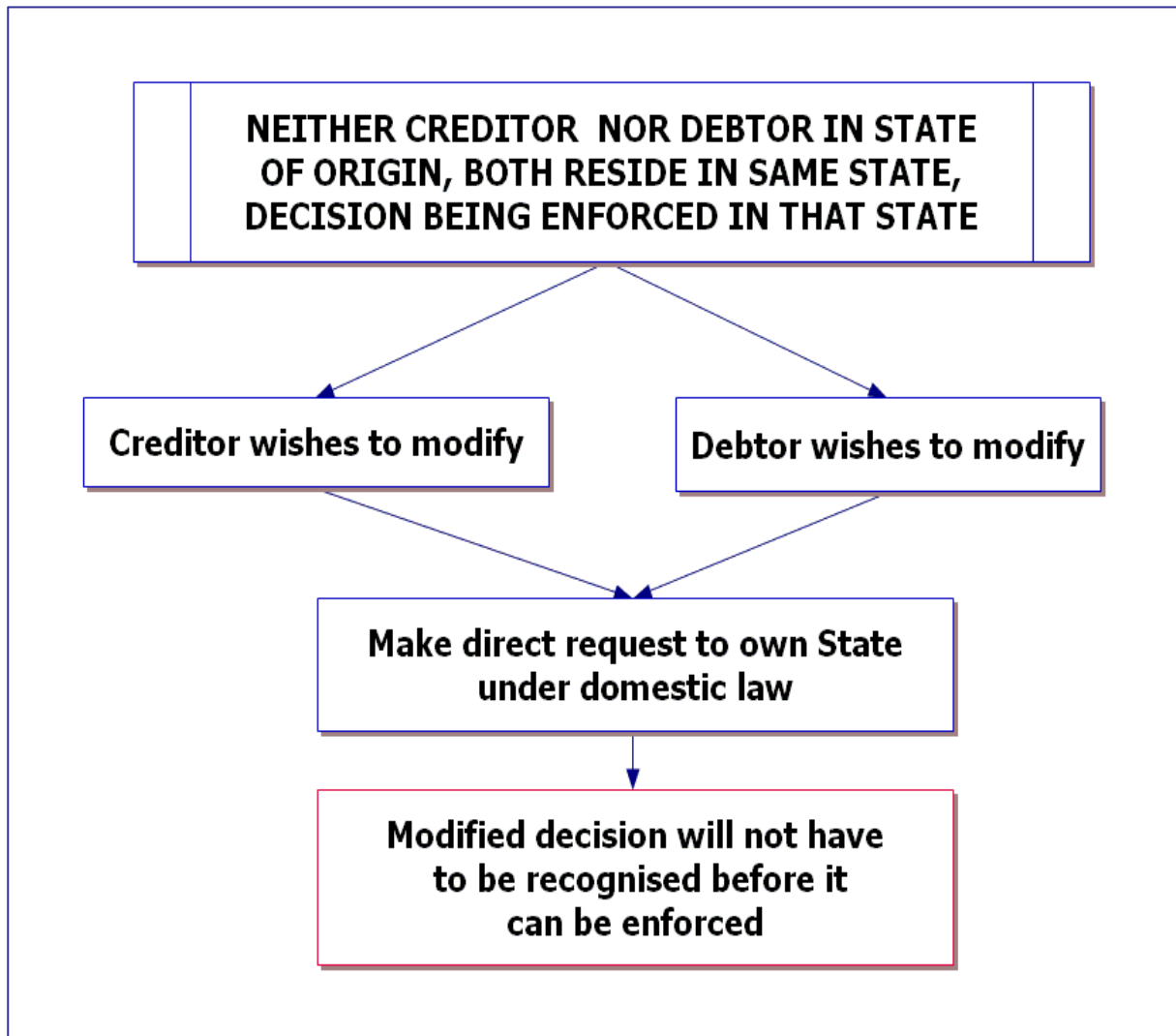
777. However, if the application does proceed, the comments in each of the previous scenarios would apply equally to the modified decision that might result from such an application. If it is to be enforced in a different State, it will need to be recognised before the enforcement can proceed.

778. Unless there is some compelling reason to return to the State of origin, it will always be more practical to have the modification application proceed in a State where one of the parties resides. Matters such as the determination of income for the purposes of maintenance and determination of ability to pay, are more easily dealt with when one of the parties is able to present that information directly.



***D. Example 4: Both parties have left the State of origin and now reside in the same State***

779. The final scenario is one where both parties have left the State of origin (State A), but both now live in the same State (State B).



**Figure 31: Modification application where both have left State of origin and are in same State**

780. The parties have two options. A request to modify the decision can be made by either the creditor or debtor directly to the competent authority in the State where he or she now resides. This will be a matter brought purely under the domestic law of State B. The Convention has no applicability to this modification application.

781. The second option is for either the creditor or the debtor to return to the State of origin and make a request for modification directly to the competent authority that originally made the decision. If this option is chosen, the creditor or debtor should be aware that this will be governed entirely by the domestic law of the State of origin. That law may not permit a modification to be brought where neither party resides in or has any connection to the State. In addition the comments made in the previous sections would apply concerning the need to have the modified decision from the State of origin recognised before it can be enforced in the State where the creditor and debtor now reside.

### ***E. Good practice in modification applications***

782. As can be seen in the discussion of the examples above, in most cases an application can be made by a creditor or debtor under the Convention to modify an existing decision. Proceeding under the Convention provides both the creditor and the debtor with the benefit of the assistance of the Central Authority in the application, ensures that the matter is properly brought before the competent authority in the requested State, and it will in many cases be much less costly than travelling to the other State to bring the application directly in the State where the other party resides.

783. Where a creditor or debtor intends to make a request directly to the competent authority in his or her home State for a modification, the creditor or debtor should, as a matter of good practice, first determine whether the modification can be made at all if the existing decision is a foreign one. The creditor or debtor seeking the modification should also consider what steps need to be taken after the decision has been modified, to ensure that the modified decision can be recognised, if that will be necessary in order to further the enforcement or limit the enforcement.

784. It is important to keep in mind that in some States, the Convention processes requiring a Central or competent authority to assist debtors with respect to modifications are a significant change from existing practices. Those States may be much more familiar with assisting creditors with applications and requests.

785. In these situations it is important that caseworkers keep in mind that the role of the caseworker in a Central or competent authority is to assist applicants, irrespective of whether the applicant is a creditor or debtor. The caseworkers are carrying out the duties of the Central or competent authority under the Convention.

786. Assisting debtors with modification applications and requests ultimately benefits the family and children as it ensures that maintenance decisions reflect the ability of the debtor to support the creditor and the children, and that children and families receive the maintenance that they are entitled to.

787. Finally, caseworkers should keep in mind that in assisting applicants under the Convention, they are providing the services required by the Convention and are not representing or advocating on behalf of that person.

### **III. Additional materials**

#### ***A. Text of relevant Articles***

Article 10(1) e) and f), and 10(2) b) and c)

Article 11

Article 12

Article 18

Article 22

#### ***B. Related sections of Handbook***

See Chapter 2 – Explanations of terms

See Chapter 5 – Processing incoming applications for recognition or recognition and enforcement

See Chapter 12 – Modification procedures – Outgoing and incoming

## **Chapter 12 – Modification procedures – Outgoing and incoming**

788. This Chapter covers the procedures for managing outgoing and incoming applications for modification of maintenance decisions. General background concerning modification applications and detailed explanations of the possible options for modification in any particular situation are covered in Chapter 11. If you need further information about modification applications, read that Chapter 11 first.

789. Part I of this Chapter covers the procedures to be used for outgoing applications for modification. Part II covers the procedures for incoming applications for modification. At the end of the Chapter there is a list of additional materials and related forms, as well as a number of Frequently Asked Questions (FAQs) concerning modification applications.

### **Part I – Procedures for outgoing modification applications**

#### **I. Overview**

##### ***A. The role of the Central Authority***

790. The examples set out in Chapter 11 illustrate the many considerations that influence whether a modification application can or should be brought under the Convention. Because this is an area where the processes for international maintenance cases can be fairly confusing for applicants, this Handbook suggests that the Central Authority of the requesting State, where the application is being initiated, should, as a matter of good practice, make a preliminary assessment as to whether the modified decision, once it has been made, is likely to be able to be recognised or enforced. This determination will assist the applicant, and the requested State, to ensure that time and resources are not expended on applications that may result in decisions that cannot be recognised or enforced.

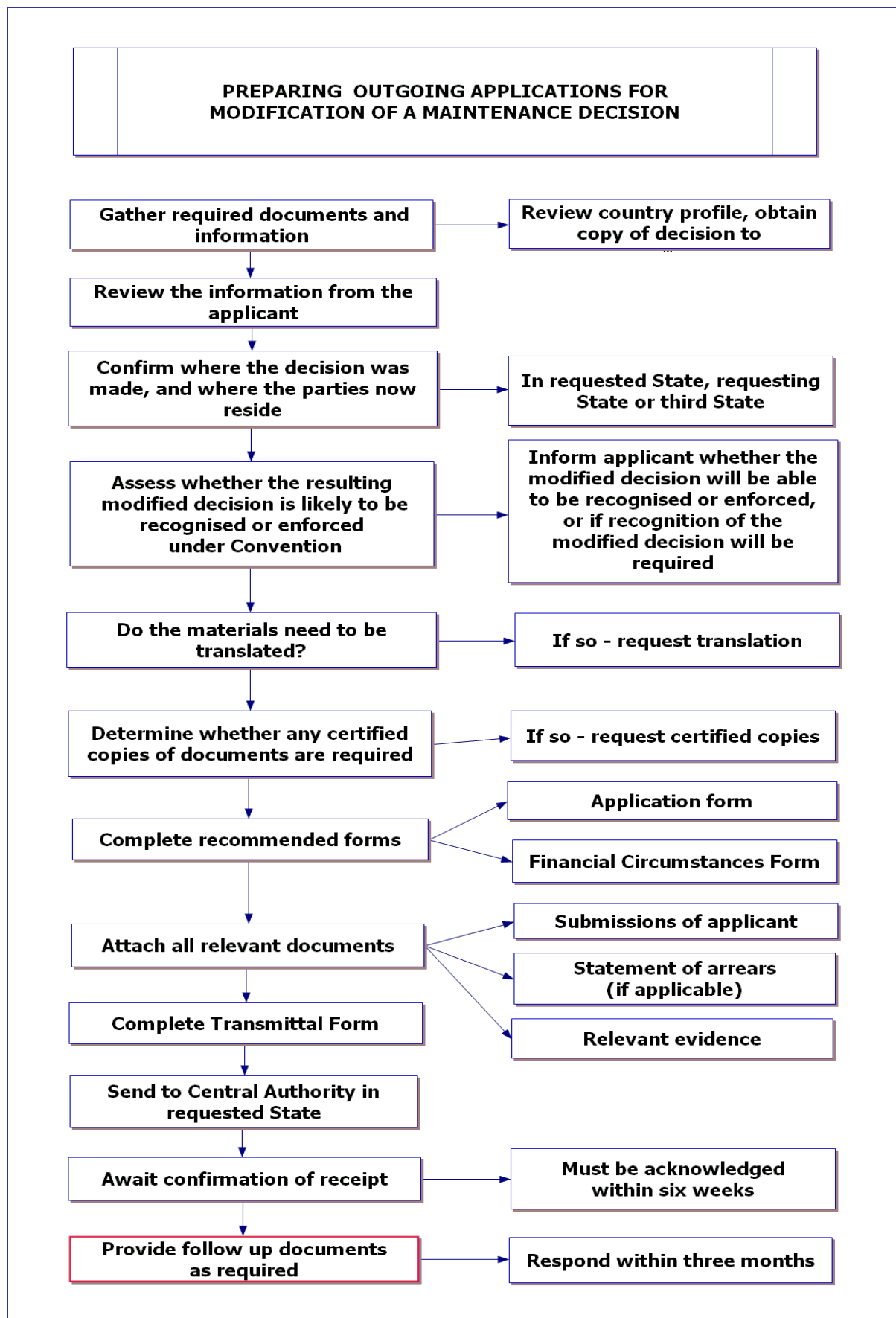
791. In addition, by considering what will happen after the modified decision is made, the Central Authority of the requesting State can ensure that the applicant is prepared to initiate any additional steps, such as recognition, in the event that is necessary.

792. Remember that unless both the requesting and requested States have extended the application of Chapters II and III to spousal maintenance (see Chapter 3), the applicant cannot use the Central Authority to bring an application for modification of a decision concerning spousal support only. The applicant will have to make a direct request to the competent authority in the requested State for modification of the decision.

##### ***B. Procedure – Flowchart***

793. The Central Authority in the requesting State is responsible for putting the documents and information together, including the application form, and sending the package to the requested State. The contents of the package and the materials to be included will be determined by the provisions of Article 11, the requirements of the requested State, as set out in the Country Profile, and the supporting evidence needed to justify the modification.

794. The flowchart on the next page sets out the steps for completing an outgoing application for modification.



**Figure 32: Procedures for completing and transmitting modification application**

Are you looking for a summary of the required procedures for outgoing or incoming applications? There is a checklist at the end of this Part for outgoing applications and at the end of Part II for incoming applications.

## **C. Procedures explained**

*Each paragraph below provides an explanation of the steps in Figure 32.*

### **1. Gather the necessary documents**

795. You will need to have a copy of the Country Profile for the State that you will be sending the documents to, a copy of the maintenance decision that is to be modified, and the application form from the applicant.

### **2. Review the information from the applicant**

796. Depending upon the State, the applicant may complete the Application Form, or he or she may complete a different form, containing sufficient information for the Central Authority to complete the application form. It may be important for the applicant to be able to be contacted during the course of the application in the requested State, so ensure that the form contains sufficient contact information to allow for this.

797. Remember that there are specific limits in the Convention on the disclosure and confirmation of information gathered or transmitted under the Convention in certain circumstances. Disclosure or confirmation of information is not permitted where that would jeopardise the health, safety or liberty of a person (Article 40(1)). The person could be a child, the applicant, or respondent, or any other person. The Convention is not limited in this respect. A recommended practice in such cases is to use the address of the Central or competent authority in the requesting State, such that the creditor's address is "in care of" that address (see Chapter 3).

### **3. Confirm where the decision was made and where the parties reside**

798. On an application by the debtor, the place where the decision was made (the State of origin) and whether the creditor is habitually resident in that State will determine whether the modification decision that results from this application can be recognised or enforced.

### **4. Consider whether recognition of the modified decision will be required**

799. If the modified decision has to be recognised after it has been made, ensure that the applicant is aware of the need for that step, and that the materials being provided to the requested State also reflect that step.

800. For example – if the modified decision made in the requested State will have to be recognised in the requesting State (your State) after it is made, and a certified copy of the decision will be required for that step, it is a good practice to ask the requested Central Authority to provide a certified copy of the decision along with the Status Update, when the modification application is concluded.

801. In addition, it may be useful to advise the applicant of other options, including the possibility of proceeding directly to a competent authority in either of the Contracting States involved, where that option might assist in the eventual recognition of the decision. Refer to the discussion in Chapter 11 for further explanations concerning the options available.

## **5. Do the materials need to be translated?**

802. Check the Country Profile. The application and the initial decision may need to be translated into the official language of the requested State, another language, or either English or French. If translation is required, verify whether an abstract or extract of the decision can be provided (see the explanation in Chapter 3 – Matters common to all applications). This may reduce the cost and complexity of the translation.

## **6. Determine whether any certified copies of documents are required**

803. See Stage 1, Part II, Sections 4 and 5 of the Country Profile. It will indicate whether the requested State requires certified copies of some documents. If so, make the request to the appropriate authority in your State or ask the applicant to obtain the required copies.

## **7. Complete application for modification**

804. See the next section for details concerning completion of the recommended form.

## **8. Attach all relevant documents**

805. The next section of this Chapter describes in detail the other documents required and how to complete them.

## **9. Complete Transmittal Form**

806. This is the only Mandatory Form necessary for a modification application. It must provide the name of the authorised representative of the Central Authority and be sent with the materials. It is not signed.

807. See Chapter 3 for instructions as to how to complete this Form.

## **10. Send to the Central Authority of the requested State**

808. In most cases, the documents will be sent by ordinary mail to the Central Authority in the requested State. Use the address shown on the Country Profile. Check the Country Profile to see if any other means of transmission, such as electronically or by fax is acceptable.

## **11. Await confirmation of receipt**

809. The requested State must acknowledge receipt within six weeks. This must be done by the Central Authority using the mandatory Acknowledgement Form. At that time you will also be informed by the requested Central Authority where follow up enquires should be directed to – and the appropriate contact details for that person or unit within the requested State.

## **12. Provide follow-up documents as required**

810. The Acknowledgement Form may request additional documents or information. Provide the information as soon as possible and in any case, within three months. If you expect that it will take longer than three months, be sure to let the other Central Authority know, as they may close their file after three months, if no response has been received.

**Good practice:** Let the other Central Authority know if you are experiencing difficulties in obtaining the requested information or documents. Otherwise they may close their file, if there has been no response after three months.

## II. Completing the required documents

### A. General

811. The Convention sets out the required contents of any application for modification (see Articles 11 and 12).

812. This section of the Handbook sets out what must be in the package and how to assemble and complete the documents for the application for modification of a decision. The table below lists the common documents. Note that only the Application Form and the Transmittal Form are required. The other forms are usually included as well as the applicant will have to establish the reasons why the modification is sought. In addition it is helpful if a copy of the decision sought to be modified is supplied, in particular in situations where the decision was not made in the requested State and has not been recognised in that State.

√	Application Form
√	Transmittal Form
√	Financial Circumstances Form
<b>As needed</b>	Full Text of Decision or abstract of decision
<b>As needed</b>	Evidence establishing a change in circumstances
<b>As needed</b>	Written submissions in support of the application

**Figure 33: Documents required for modification application**

813. If the application is being brought by a debtor and the creditor habitually resides in the State of origin, the debtor should also include, as appropriate:

- any written agreement between the parties related to modification of maintenance (other than child support) showing that the application may be brought in the requested State,
- documentation showing that the matter can proceed in the requested State because the State of origin cannot or refuses to exercise jurisdiction to modify the decision.

814. These documents may be required in order to establish that the modification is permitted under the exceptions provided in Article 18.

### B. Completing the application form (modification of a decision)

815. The recommended application form (Application for Modification of a Decision) should be used. This ensures that the required information is included in each application. However, because the reasons for the modification application can be different in each case, other documents, such as income statements or proof of a child's attendance at school, may be appropriate in a case.

816. Both creditors and debtors will use the same Form (Application for Modification).

817. See Chapter 15 for instructions for the completion of the recommended application form.



## ***C. Completing the additional documents***

### **1. Financial Circumstances Form**

818. In many States the quantum, or amount, of maintenance payable by the debtor is determined based upon the financial circumstances of the parents. The Financial Circumstances Form provides a means of presenting this information to the competent authority for the purpose of modifying the decision on that basis.

819. This document also provides additional information to locate the respondent for the purpose of providing notice of the application and will support the enforcement of the modified decision, if that is required.

820. Please see Chapter 15 for detailed instructions for the completion of this form.

### **2. Complete text of decision**

821. Except as provided below, a complete copy of the maintenance decision should be included in the package.

822. Although the provisions of the Convention dealing with requests for certified copies of decisions (Article 57) are only applicable to recognition and enforcement applications, the same approach should be used in modification applications as a matter of good practice. In some cases the requested State may not already have a copy of the decision to be modified, and it may be required as part of the modification process. A simple copy of the decision from the judicial or administrative body that made the initial decision should suffice in most cases.

#### **a) Unless the State has agreed that it will accept an abstract or extract**

823. A State may declare that it will accept an extract or abstract of the decision, rather than the complete text. In some cases, the maintenance provisions of a decision are only a small part of the full decision, and a State may not want to incur the costs of translation of the full text, when only the maintenance provisions are required. The Country Profile for the State that is receiving the case will indicate whether an abstract or extract of the text is acceptable.

824. If an abstract is acceptable- use the recommended form (Abstract of a Decision).

#### **b) Has a certified copy of the decision been requested?**

825. In all cases however, the Country Profile should be consulted because it may indicate that certified copies of the decision are always required, for every application. If a certified copy is not routinely required, a simple copy is fine, however the requested State may later advise that it requires a copy of the decision certified by the competent authority for that specific case.

### **3. Legal assistance**

826. If the modification application is being brought by the creditor, he or she will be entitled to cost-free legal assistance in the requested State (assuming that it is required because simplified procedures are not available) as long as the application concerns child maintenance and the application is not manifestly unfounded.<sup>116</sup>

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<sup>116</sup> Or the State uses a child-centred means test. See the explanations regarding legal assistance in Chapter 3.

827. If the creditor's application does not concern child maintenance, cost-free legal services will not automatically be provided by the requested State for the modification application. The creditor may be subject to a means and merits test before the assistance is made available. If a means test is used, the information in the Financial Circumstances Form will be helpful because it will establish the applicant's entitlement to legal assistance in the requesting State or State of origin.

A **means test** generally looks at the income and assets of the applicant, or other financial circumstances that will impact the ability of the applicant to pay for legal assistance.

A **merits test** generally reviews the merits or likelihood of success of the application, considering such matters as the legal basis for the application and whether the facts in the case are likely to result in a successful outcome.

828. In situations where simplified procedures are not available and a debtor requires legal assistance, there is no automatic right to cost-free legal assistance, even if the application concerns child maintenance.<sup>117</sup> In some States cost-free legal assistance may only be provided if the debtor meets both a means and merits test. The Country Profile of the requested State will indicate the extent of the legal assistance available to debtors, and under what conditions, in the requested State. The information contained in the Financial Circumstances Form will assist the requested State in making any determination concerning the entitlement of the debtor to assistance.

829. As the provision of cost-free legal assistance to debtors for modification applications is rare in many States, if the applicant is a debtor, check the Country Profile and advise the debtor if legal assistance will be required, and whether he or she is likely to qualify for such assistance in the requested State.

## 4. Other documents

830. Other information that may be included with the application includes evidence of any change in circumstances and written submissions supporting the request for modification. There are no recommended forms for this information, and what is useful or necessary will depend upon the circumstances of the case and the grounds upon which the modification is being requested. However, some of this information could be included in the Financial Circumstances Form.

831. In addition, if the preliminary review has indicated that the modified decision made by the requested State will need to be recognised in your State after it has been made, include a request for a certified copy of the decision (if your State requires one), as well as a completed Statement of Enforceability and a Statement of Proper Notice, if these will be required. Refer to Chapters 4 and 5 of this Handbook if you are unsure of what is needed.

## 5. Complete Transmittal Form

832. The Transmittal Form provides a standard, uniform means of sending applications between Contracting States. It confirms that the required documents and information are contained in the package and it indicates to the receiving Central Authority the remedy that is being sought.

833. The Transmittal Form is a mandatory form. It must accompany every application that is initiated under the Convention.

834. Please see Chapter 3 – Matters common to all applications – for instructions for the completion of the form.

<sup>117</sup> See Explanatory Report, para. 266.

### III. Checklist – Outgoing modification applications

	Procedure	Handbook reference
1.	Review documents supplied by applicant	I(C)(2)
2.	Consider whether the modified decision will have to be recognised	I(C)(4)
3.	Determine what documents are required	I(C)(5) and (6)
4.	Complete documents	II(C) and Chapter 15
5.	Send to Central Authority of requested State	II(C)(10)

## Part II – Processing incoming modification applications

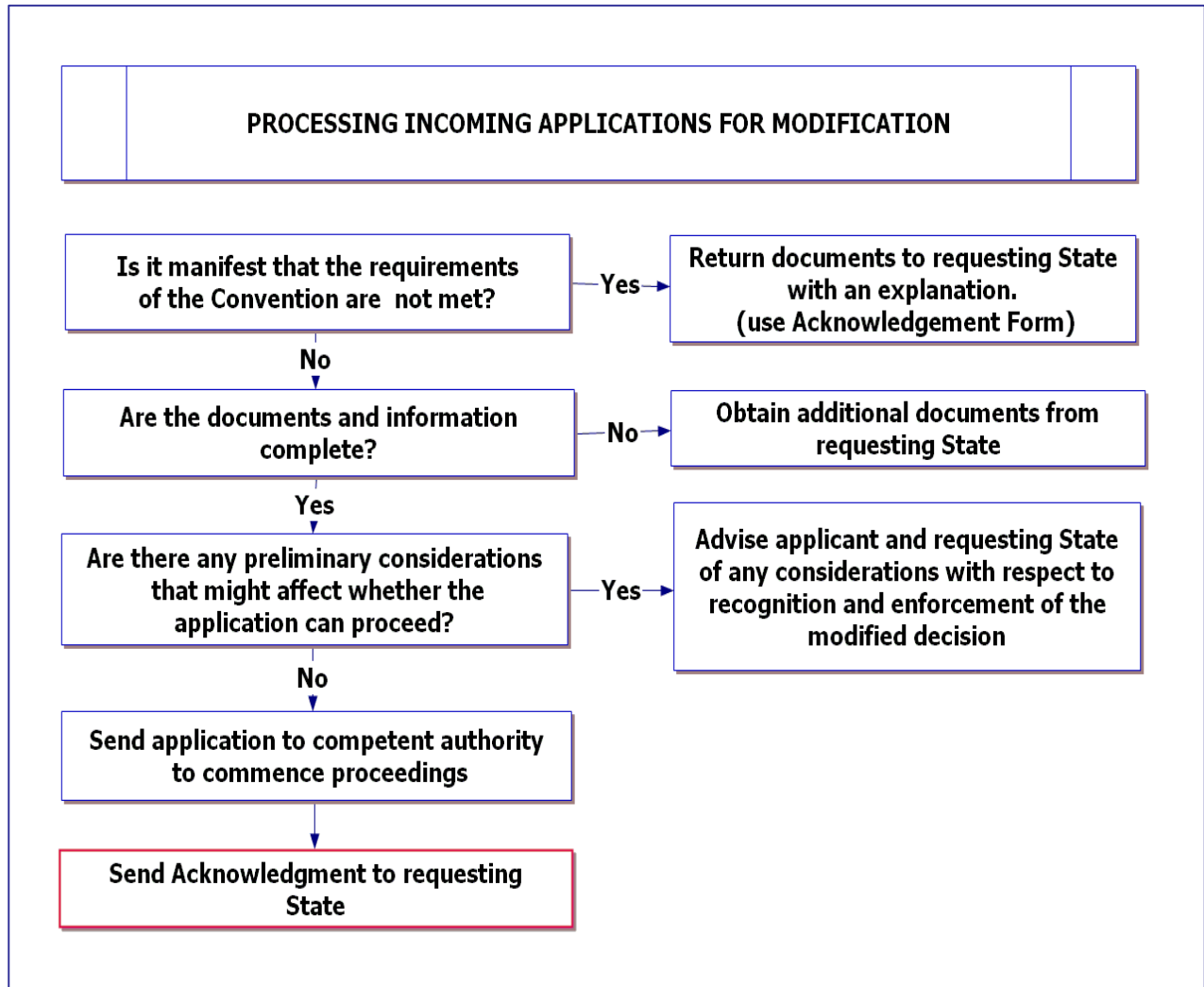
### I. Overview

835. This part deals with the procedures to be used by the requested State when an application for modification is received.

836. Caseworkers who are not familiar with modification applications generally may wish to review Chapter 11 to gain a better understanding of the underlying basis for modification applications.

### II. Procedures

837. The process for managing incoming applications where a modification of a decision is requested is fairly straightforward. The steps are shown in the diagram below.



**Figure 34: Overview of steps for incoming modification application**

## **1. Is it “manifest” that the requirements of the Convention are not met?**

838. Under the Convention, a Central Authority may only refuse to process an application in situations where it is “manifest” that the requirements of the Convention are not met (Article 12(8)). This exception is very limited and might apply, for example, where the application does not involve maintenance.<sup>118</sup>

839. If an application is rejected on this basis, the requesting State must be promptly notified and advised of the reasons why the application has been refused.

## **2. Are the documents and information complete?**

840. Only the Transmittal Form and the Application Form are required by the Convention, however in most cases other documents will be necessary in order to establish the basis for the modification. In most cases, the following documents will be contained in the application for modification:

- Recommended Form for application for modification
- Copy of maintenance decision- certified only if required by requested State (see country profile)
- Financial Circumstances Form for debtor’s circumstances
- Information necessary to locate the party responding in the requested State
- Financial Circumstances Form for of creditor’s circumstances
- Additional documentation necessary to support application for modification
- Additional documentation required by requested State (see country profile)
- Information concerning entitlement of applicant to legal assistance in applicant’s home State if the application is not for child support or is made by a debtor.

841. If any of the above documents are required, and are not included in the package sent by the requesting State, the application should not be rejected. Instead, the necessary documents should be requested from the other State. The Acknowledgement Form provides a means for making this request.

## **3. Are there any preliminary considerations?**

842. The Central Authority should review the documents and determine whether there might be any barriers to the matter proceeding in the requested State and whether the modified decision will be able to be later recognised or enforced. This is particularly important with respect to applications by debtors. As discussed in Chapter 11 the circumstances in which an application may be brought by a debtor under the Convention in another State to modify a decision are limited in some cases.

843. However, the Central Authority in the requested State should keep in mind that a similar assessment may have been made in the requesting State before the materials were transmitted. The Central Authority in the requesting State will have considered whether the modification decision that would result from the application would be able to be recognised in the requesting State.

844. Finally, in some States, the domestic law does not permit the reduction and cancellation of arrears of child support. If the application requests only the cancellation of child support arrears and your domestic law does not allow the cancellation of arrears, advise the Central Authority of the requesting State accordingly.

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<sup>118</sup> See Explanatory Report, para. 344.

## 4. Processing the modification application

845. Once an assessment has been made that the application can proceed under the Convention, the documents can be sent to the competent authority for the proceedings to be initiated. In some States the Central Authority is the competent authority for this purpose.

## 5. Acknowledgement

846. All incoming applications must be acknowledged by the requested Central Authority within six weeks of receipt, with a further status report or follow up within three months of the acknowledgement. The mandatory Acknowledgement Form must be used for the first acknowledgement. Thereafter the recommended Status Report Form can be used for this purpose.

## 6. After the decision is made

847. If the decision is modified, the Central Authority in the requested State will send a copy of the modified decision to the requesting Central Authority.

848. In some cases, the modified decision will need to be recognised in the requesting State before it can be enforced in that State. In these cases, it may be necessary for the requested State, as the State of origin of the modified decision, to assist in providing the necessary documents (Statement of Enforceability, Statement of Proper Notice, and certified copies of the decision) in order to support the recognition process. The documentation received with the Application for Modification, or follow up communication from the requesting State will indicate if there are any special requirements in this respect. Alternatively, the applicant may be able to make a request directly to the competent authority to have the recognition completed.

## III. Checklist – Incoming modification applications

	Procedure	Handbook reference
1.	Is it "manifest" that the requirements of the Convention are not met?	II(A)(1)
2.	Are the documents complete?	II(A)(2)
3.	Determine if there are barriers in domestic law of either State to the modification application	II(A)(3)
4.	Process Application	II(4)
5.	Communicate outcome to initiating State	II(A)(6)

## **Part III – Matters common to both incoming and outgoing modification applications**

### **I. Additional materials**

#### ***A. Practical advice for all modification applications or requests***

- An authorised representative of the Central Authority must complete the Transmittal Form. The applicant or a representative of the Central Authority can complete the recommended Application Form.
- States are encouraged to use the recommended forms. They are designed so that all of the necessary information is included. Only the Transmittal Form is a mandatory form, and must be used.
- There is no requirement to send originals of any documents.
- As some modification requests will proceed directly to a competent authority, it is important to ensure that any Central Authority that has a file open is advised of the modification. This will ensure that both Contracting States' files are up to date.
- There are some important restrictions in the domestic law of some States concerning cancellation of arrears. These are discussed in this Chapter. If the application or request concerns cancellation of arrears this Chapter and the country profile of both States involved should be consulted.
- The decision as to whether to proceed with a modification application or request directly to a competent authority in one of the States involved is a complex one. Applicants should be encouraged to obtain legal advice on this issue.
- A modification is not always required where the enforcement of a maintenance decision is under way or the circumstances of the parties have changed. There may be remedies available under domestic law such as a temporary stay of enforcement, or alternatives to modification including administrative recalculation or reassessment of the decision.

#### ***B. Related forms***

Transmittal Form  
Application for Modification  
Restricted Information Form  
Financial Circumstances Form  
Abstract of a Decision  
Acknowledgement Form

#### ***C. Relevant Articles***

Article 10(1) e) and f), and 10(2) a), b) and c)  
Article 11  
Article 12  
Article 15  
Article 17  
Article 18  
Article 20  
Article 22

## ***D. Related sections of Handbook***

See sub-section 4 (Application for modification of an existing decision) under Section I of Chapter 1

See Chapters 4 and 5 – Outgoing and incoming applications for recognition or recognition and enforcement

See Section III (Effective access to procedure and legal assistance) of Part 2 under Chapter 3

## **II. Frequently Asked Questions**

*The debtor is required to pay maintenance under a decision from another State. One of the children is now living with the debtor. Can the decision be modified by the debtor?*

849. In most cases – yes. The debtor will need to complete an application under Article 10(2) *b*) or *c*) and provide it to the Central Authority. The Central Authority in the State where the debtor resides will send it to the State where the decision was made, if the creditor continues to be habitually resident in that State, or to the State where the creditor now resides. In some circumstances the debtor could make a request directly to the competent authority in the State where he or she resides. Whether the decision can be modified will be determined by the law of the requested State.

*What steps need to be taken by a creditor or debtor after a maintenance decision is modified, in order to have the modified decision enforced?*

850. The next steps are a matter of domestic law, depending upon where the parties reside and whether the modified decision is from the Contracting State where it will be enforced. If it is, nothing further needs to be done, as the State will be enforcing its own decision.

851. If the modified decision was made in a different Contracting State from the State where it is to be enforced, it may need to be recognised before it can be enforced. Recognition may be required in either the State where the debtor resides or the State where he has assets.

852. In some States, no recognition of the modified decision is required because a modified decision is seen as an extension of the initial decision, providing that the initial decision was recognised in that State. In other Contracting States an application for recognition of the modified decision will have to be made using the recognition and enforcement provisions of the Convention. A direct request to a competent authority for recognition may also be possible.

853. The Convention does not deal with this issue specifically.

*When can a maintenance decision be modified? What does the applicant have to prove?*

854. The law of the place where the application is heard (the requested State) will determine whether a decision can be modified or varied. In most Contracting States an applicant must show that there has been a change in the circumstances of the creditor, debtor or the children, since the decision was made.



*Can outstanding arrears of unpaid maintenance be reduced or cancelled in an application under the Convention?*

855. This is entirely a matter of domestic law, and is not governed by the Convention. Refer to the Country Profile for the requested State to find out whether that State will allow arrears to be cancelled or reduced. Whether the application will be successful will depend upon whether the law of the requested State allows for the cancellation or reduction of arrears. In some countries, arrears of child support cannot be cancelled.

*What will happen if a modified decision is obtained, but cannot be recognised under the Convention?*

856. The purpose of the recognition process is to allow decisions to be enforced on the same basis as a decision made under the domestic law of that State. Therefore, a decision that cannot be recognised in a State cannot be enforced in that State under the Convention. However, in most cases, an applicant in this situation should review the basis upon which recognition and enforcement was refused and either bring the modification application in a different State (for example the State of origin) or commence an application for establishment of a new decision, in order to obtain a decision that can be recognised and enforced under the Convention.

*The amount of maintenance set out in the creditor's maintenance decision no longer meets the needs of the children. The debtor now resides in a foreign country. How does the creditor get an increase in maintenance?*

857. If the decision was made in the State where the creditor still resides, it may be possible to simply request that the competent authority that made the original decision modify the decision to provide an increase. If that authority cannot make a modified decision for some reason, the creditor will need to bring an application under the Convention, and have the application for modification transmitted to the State where the debtor now resides. There are a number of possibilities as to how this could proceed. These are outlined in Chapter 11.

858. If the creditor does not live in the country where the decision was made, the judicial or administrative authority in that State may not be able to modify the decision. In that case, the creditor will have to bring an application for modification under the Convention, and have that application sent to the State where the debtor resides.

*What if neither the creditor nor the debtor resides in the State where the decision was made? Where should the modification application be heard?*

859. See Chapter 11. In most cases, the proceedings will take place in the State where the responding party now resides. That could be either the State where the creditor resides or the State where the debtor resides, depending upon who initiates the application. However, the law of the requested State will determine whether that State can modify the decision.

*What are the grounds for modifying a decision? Can the maintenance be modified or the arrears of maintenance cancelled without the consent of the creditor?*

860. Whether a modification will be allowed will depend upon the law of the State hearing the application. In most Contracting States, a decision for child support cannot be varied unless there has been a change in the circumstances of the debtor, the creditor or the child. Cancellation of arrears of child support may or may not be allowed by the law of the requested State. Many States do not allow arrears of child support to be cancelled, other than in exceptional circumstances, and may not recognise or enforce a decision that modifies arrears.

*Can the applicant be required to attend in person in the requested State for the modification application?*

861. Article 29 does not address whether the physical presence of the applicant can be required in an application for modification. The Central Authorities of both the requested and requesting States should work co-operatively to ensure that the applicant's evidence is available in the application, and to assist in arranging for the applicant to make any submissions or present evidence using alternate means such as telephone or video conferencing, if those are available.

## Chapter 13 – Completing outgoing requests for specific measures

### I. Overview – Requests for specific measures

#### A. *When this request will be made*

862. A Request for Specific Measures will be made where assistance is required from another Contracting State in a maintenance matter, but that assistance is of a very limited nature.

863. The request may be made either:

(1) Under Article 7(1):

- to assist a potential applicant in making an application under the Convention for recognition or recognition and enforcement, enforcement, establishment or modification of a maintenance decision, or
- to assist the applicant in determining if such an application should be initiated.

(2) Under Article 7(2):

- to further the proceedings where a maintenance application is pending within a Contracting State and that proceeding has an international element, such as assets in another State.

**Maintenance** includes support for children, a spouse or partner, and expenses related to the care of the children or spouse / partner. Under the Convention, a State may also extend maintenance to support arising from other forms of family relationships.

864. Unlike applications for recognition and enforcement, enforcement, establishment or modification, the provision of services in response to the request is discretionary. If the request is made under Article 7(1) and concerns a potential application under Article 10 of the Convention, the requested Central Authority will first determine if the services are necessary, and then provide such measures as are appropriate, based on the resources available to the Central Authority and the internal law of the State.<sup>119</sup> The request under Article 7(1) must be for one of the measures listed under that Article.

865. In contrast, if the request comes under Article 7(2) and relates to a maintenance proceeding that is pending in the requesting State, it need not be for any of the listed measures, but the response of the requested State is entirely discretionary.

#### B. *A case example*

866. B resides in State A and has a maintenance decision requiring D to pay child support. B believes that D may be receiving pension benefits from an employer in State F. If this is accurate, B would like to send the maintenance decision to State F to have the decision enforced. State A and State F are both Contracting States to the Convention.

<sup>119</sup> See Explanatory Report, para. 203.

867. Under the Convention, B can ask the Central Authority in State A to transmit a **request for specific measures** to State F to determine whether D is receiving benefits in that State. The Central Authority in State F, if it is satisfied the measures are necessary, will take the appropriate steps to investigate and will advise the Central Authority in State A if the pension income exists.<sup>120</sup> B can then initiate an application for recognition and enforcement of the maintenance decision and send it to State F.

### **C. Who can apply?**

868. The request for specific measures may be made by a creditor (including a public body that is acting on behalf of a creditor or has provided benefits to the creditor), or by a debtor.

869. The request must come within the core scope of the Convention (see Chapter 3) unless there have been declarations made by both the requested and requesting States extending the scope of the Convention to another type of maintenance obligation.

870. Requests for specific measures must be made through the Central Authority in each State. A request cannot be directly to a competent authority.<sup>121</sup>

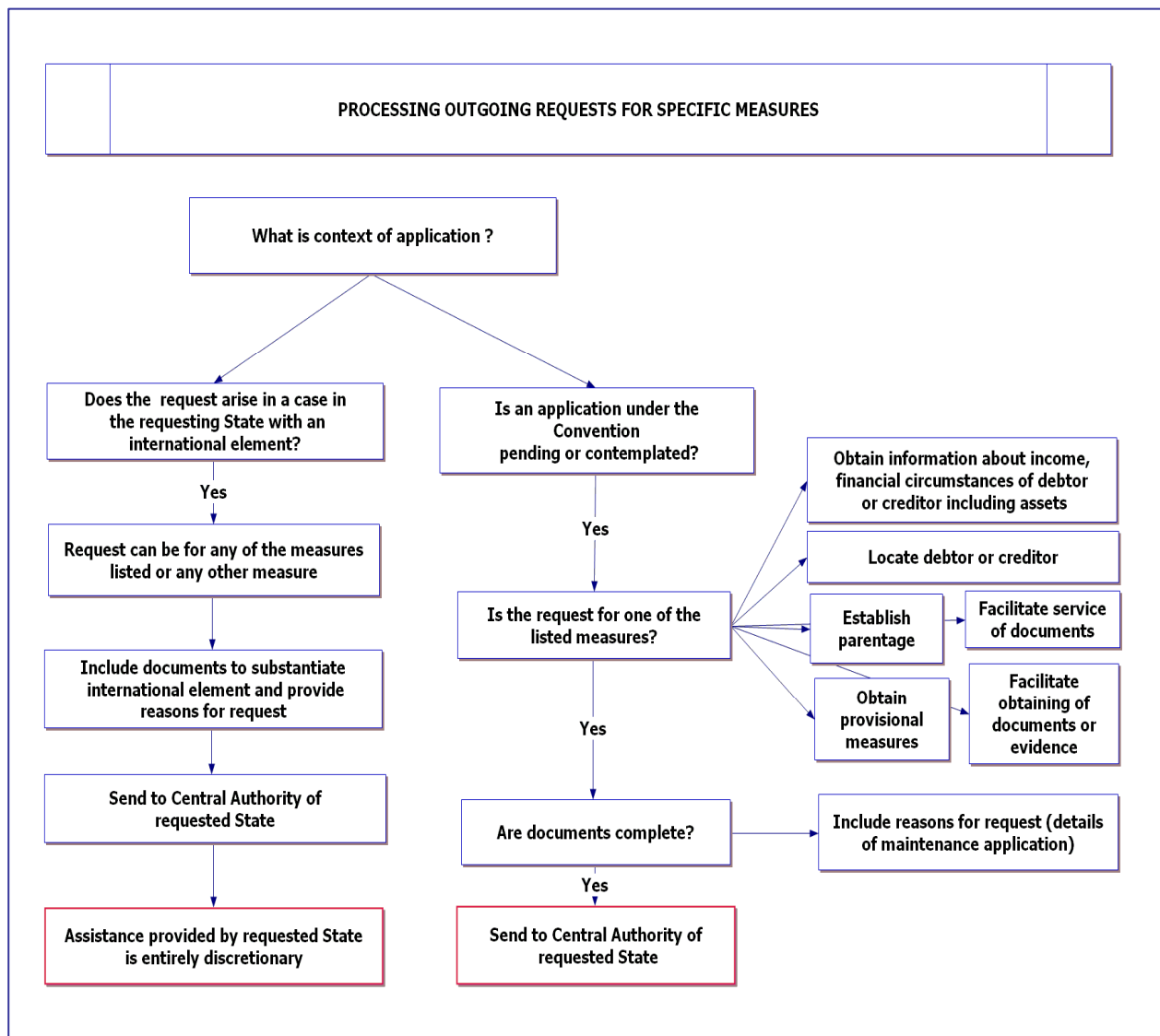
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<sup>120</sup> In some States, internal privacy laws may not allow release of the specific information, however State F will be able to advise whether the debtor has income in State F.

<sup>121</sup> Explanatory Report, para 193.

## D. Flowchart

871. The flowchart below sets out the main procedures for initiating a request for specific measures.



**Figure 35: Flowchart – processing outgoing requests for specific measures**

## II. Procedures

### A. Determine context of request

872. Under Article 7, the assistance sought must be necessary for some type of maintenance case. It can relate to either a possible or pending application under the Convention, or it can relate to a maintenance case in the requesting State that has an international element.<sup>122</sup> The former situations are covered by Article 7(1); the latter situations are covered by Article 7(2).

The **requesting State** is the Contracting State that is initiating a request and making the request on behalf of a person who resides in that State. The **requested State** is the Contracting State that is being asked to process the request.

873. If the request does not come within either of these categories, it should be rejected by the Central Authority.

### B. If the request is made in the context of a pending Convention application or a contemplated Convention application (Article 7(1))

#### 1. Is the request for one of the listed measures?

874. The Convention lists six possible measures that can be the subject of a request for specific measures. These are set out in Article 7(1) and are a subset of the general functions of the Central Authority that are to be provided by a Contracting State. A request may ask a Central Authority in another State to provide assistance with any of the following:

##### a) Help locating the debtor or the creditor

875. A request may be made to have a Contracting State search its databanks and other accessible sources of information to determine the location of a creditor or debtor. This request might be made where a creditor in one Contracting State does not wish to pursue the costs of translation of a decision into the language of another Contracting State unless the debtor is residing in that State. Similarly, a debtor may need to know whether a creditor resides in the requested State, in order to determine where a modification application should be brought.

##### b) Help obtaining information about income, assets and other financial circumstances

876. A request may be made for assistance to obtain information about the income, assets and other financial circumstances of either the debtor or the creditor. This may be necessary, as in the example above, where a creditor is contemplating sending a decision to a particular State to be enforced, if income or assets are found in the requested State.

<sup>122</sup> For an explanation of the meaning of an “international element”, see Explanatory Report, para. 206.

**c) Facilitate the obtaining of evidence**

877. In some cases, the assistance of another Contracting State may be required in order to obtain evidence for use in a maintenance proceeding. For example, documents indicating title to assets or copies of tax information may be useful to establish a debtor's ability to pay or to assist in determining whether there are assets that could be the subject of enforcement. The way that a State will respond to this request will depend upon whether the States involved are parties to any international treaties, and the domestic law of the requested State.<sup>123</sup>

**d) Assistance in establishing parentage**

878. Although the Convention allows a determination of parentage to be made as part of an application for establishment of a maintenance decision, there may be situations where a creditor seeks a determination of parentage only. For example, the parties may have agreed that the creditor's State will be the State that will make the maintenance decision, but parentage needs to be determined in order to establish liability for child support.

**e) Initiate or facilitate proceedings for provisional measures**

879. A creditor may request a Contracting State to initiate or facilitate proceedings of a provisional or temporary nature in order to ensure that a pending maintenance application will be successful. Such a request may relate to the prevention of disposal of assets, or a stay of enforcement of another decision, pending the maintenance application. This may support either a forthcoming maintenance proceeding under the Convention.

**f) Facilitate service of documents**

880. Assistance in the service of documents in a maintenance matter may be important where a matter is before the court in a State and the party needs to effect service on an out-of-State party. The way that a State will respond to this request will depend upon whether the States involved are parties to any international treaties, and the domestic law of the requested State.<sup>124</sup>

***C. If the request is made in the context of a proceeding having an international element (Article 7(2))***

881. If the request for specific measures is made in relation to a case having an international element, the request is not limited to the six particular types of request listed above. A person requesting specific measures may make the request for any other type of assistance that may be relevant to the maintenance proceeding.<sup>125</sup>

<sup>123</sup> Article 50. See also Explanatory Report, paras 648 – 651.

<sup>124</sup> See also Article 50 and Explanatory Report, paras 648 - 651.

<sup>125</sup> For additional examples, see Explanatory Report, para. 192.

## ***D. Are the documents complete?***

882. A recommended request form has not yet been developed for a Request for Specific Measures under either Article 7(1) or 7(2), however the Permanent Bureau will be developing one in the future. The content of the request package will depend upon the nature of the request itself. Pending completion of a recommended form, a State may use its own forms for the request. The following documentation can be provided to the requested State depending upon the type of request and the context of the request:

- The specific measure sought
- Whether a maintenance application is pending or contemplated under the Convention, or whether a maintenance matter is pending in the requesting State and confirmation that the case has an international element
- The type of maintenance application pending or contemplated (for example, recognition, enforcement, establishment, or modification)
- Information as to why the specific measure is necessary
- Contact information for the applicant and respondent.

883. In completing the package of materials and Request for Specific Measures, ensure that the following elements are covered:

### **a) Protection of privacy**

884. The Convention provides that any information gathered or transmitted in applications under the Convention may not be disclosed or confirmed if it would jeopardise the health, safety or liberty of a person.

885. If there is a concern, indicate this in the request form and include any personal information on a separate form rather than in request itself.

### **b) Central Authority information**

886. Provide information about the requesting Central Authority and the person who should be contacted if there is any follow up required by the requested State. The language of communication between Central Authorities will be the language of the requested State, another language, or in either English or French. The country profile will confirm which is to be used.

887. Provide the contact information for the requesting Central Authority. That information will be found in the Country Profile.

### **c) Particulars of applicant**

888. The applicant is the person that is making the request for specific measures. A debtor can also be an applicant for specific measures.

### **d) Particulars of the person(s) for whom maintenance is sought**

889. This is important to ensure that the maintenance obligation comes within the scope of the Convention (see Chapter 3). If the applicant is seeking maintenance for himself or herself, provide that information. For other family members or dependents, provide information as to the family relationship, and the date of birth of any child, to establish that the children are under 21 years of age and therefore covered by the Convention. Names as they appear on any birth or other official records should be used.



**e) Particulars of the debtor**

890. Debtor information will be required depending upon the request. Provide information for the debtor where parentage establishment is sought or where location of the debtor, or his or her assets or income is sought.

**f) List of documents attached**

891. Indicate whether any documents are included with the request, and list those documents.

***E. Send to requested State***

892. Once the documentation has been assembled, it can be sent to the Central Authority of the requested State. The time limits for acknowledgement by the requested State in Article 12 do not apply to requests for specific measures; however the general obligation to work effectively with other Contracting States means that the requested State must acknowledge the request in a reasonable period of time. It is a good practice to use, at a minimum, the time lines provided in Article 12.

**III. Other issues*****A. Costs***

893. It is important to note that the general principles regarding cost-free legal assistance (Articles 14 and 15) do not apply to requests for specific measures, even where the request concerns a potential application for child support.

894. A requested Central Authority may impose a charge for their services in responding to a request for specific measures. However, Article 8 provides that the only costs that can be recovered from an applicant are "exceptional" costs. In addition, the costs cannot be recovered from an applicant unless he or she has previously consented to the provision of the services at that cost. The Convention does not define "exceptional" and it will be a matter of internal law and policy as to what costs are considered exceptional.<sup>126</sup>

**a) An example:**

895. J resides in State A. F is the father of her child. J believes F has assets that may be disposed of in State B before a maintenance decision can be made in State B. J has two options. She can bring a request for specific measures through the Central Authority in State A, asking State B to obtain provisional measures to preserve the assets until a maintenance decision has been made. If she does, and there are costs associated with such an application (for example legal or court fees) these costs may be considered to be "exceptional", and they may be recovered from J, if she consents in advance. Alternatively, J may proceed with an application for establishment of a maintenance decision in State B and ask that the assets be preserved in the course of that application. If J chooses this option, she will not incur any costs for the provisional measures.<sup>127</sup>

<sup>126</sup> See Explanatory Report, para. 222.

<sup>127</sup> Unless the requested State has made a declaration that it will use a child-centred means test, or the requested State uses a merits test before providing cost-free legal assistance. (See Chapter 3.)

896. In the above example, if costs are an important factor for J, she may choose not to make a request for specific measures. Remember however that costs incurred by the requested State or by J in this example may be recovered from the debtor in any subsequent maintenance application, if allowed by the domestic law of the requested State.

## ***B. Protection of personal information***

897. There are specific limits in the Convention on the disclosure and confirmation of information gathered or transmitted under the Convention in certain circumstances. Disclosure or confirmation of information is not permitted where that would jeopardise the health, safety or liberty of a person (Article 40(1)). The person could be a child, the applicant, or respondent, or any other person. The Convention is not limited in this respect.

898. Where a Central Authority makes a determination that the disclosure or confirmation of the information would create such a risk, it will convey that concern to the other Central Authority involved, and that Central Authority will take that determination into account when processing an application under the Convention. How the Central Authority is to proceed in any situation will depend upon what is required in order to carry out the application, and to meet its obligations under the Convention (Article 40).

899. In some cases, domestic legislation may also prevent the release of the specific personal information to the applicant, or the Central Authority in the requesting State, but general information (for example confirmation that a debtor resides in the State) will usually be provided.

**Good practice:** If the request for information will require the release of specific personal information, verify with the requested Central Authority in advance as to whether that information can be released to the requesting Central Authority or to the applicant. If not, the applicant may have to proceed with the application under Article 10 (for recognition and enforcement, establishment, modification, etc.) without first obtaining the information.

## **IV. Additional materials**

### ***A. Practical advice***

- Remember that although a request for specific measures is not an application under Article 10, it must still be processed through the Central Authorities in each State. A direct request to a competent authority for a specific measure cannot be made.
- The measures taken by the Central or competent authority in the requested State in response to the request for specific measures will be discretionary. Therefore, in deciding whether to make a request for a specific measure (for example for determination of parentage) before proceeding with an application under Article 10, the applicant may wish to consider whether the request for specific measures will delay the proceedings unnecessarily.

## ***B. Related forms***

Transmittal Form

## ***C. Text of relevant Articles***

Article 2  
Article 3  
Article 7  
Article 8  
Article 15  
Article 38  
Article 40  
Article 50  
Article 51

## ***D. Related sections of Handbook***

See Chapters 4 and 5 – Outgoing and incoming applications for recognition or recognition and enforcement

See Chapters 8 and 9 – Outgoing and incoming applications for establishment of a maintenance decision

See Chapter 10 – Enforcement of maintenance decisions

## **V. Checklist – outgoing request for specific measures**

	<b>Procedure</b>	<b>Handbook reference</b>
1.	Determine context of request	II(A)
2.	If the request concerns a possible Convention application:	
2(a)	(a) Confirm that request is for one of listed measures	II(B)
3.	If the request relates to a domestic maintenance proceeding:	II(C)
3(a)	(a) Request can be for any assistance required	II(C)
4.	Complete package of documents	II(D)
5.	Send to requested State	II(E)

## VI. Frequently Asked Questions

*Does an application under the Convention have to be initiated in order to bring a request for Specific Measures?*

900. No. An applicant may choose to ask a Central Authority to bring a request for specific measures as a means of determining whether an application should be initiated at all. This may be the case, for example, where information concerning the income or assets of a debtor will be used to determine whether the application for enforcement should be pursued.

*Does the Central Authority have to provide the service that is being requested in a Request for Specific Measures?*

901. Not in all cases. A Central Authority only has to take appropriate measures in response to the Request for Specific Measures if it is satisfied that the measures are required in order to assist an applicant in making an application for establishment, recognition and enforcement or modification of a maintenance decision under Article 10, or deciding whether to initiate such an application (Article 7(1)). Note the difference in the terms used in Article 7(1) which provides that the requested Central Authority **shall** take appropriate measures (when a Convention case is contemplated) and Article 7(2) which provides the Central Authority **may** take specific measures (for cases with an international element).

## Chapter 14 – Processing incoming requests for specific measures

### I. Overview – Requests for specific measures

#### A. *When this request will be used*

902. This request will be made in two different situations where an applicant requires some limited form of assistance from another Contracting State.

903. A Request for Specific Measures can be made under Article 7(1) to:

- assist the applicant in making an application under the Convention for recognition, recognition and enforcement, enforcement, establishment, or modification of a maintenance decision, or to
- assist the applicant in determining if such an application can be brought.

904. In addition, under Article 7(2), a Request for Specific Measures may be initiated where a maintenance application is pending within a Contracting State and that case has an international element, in order to further the proceedings.

905. Under Article 7(1) there are six possible measures that can be requested. The manner in which the Central Authority responds to a request for Specific Measures is discretionary, and the level of assistance that is available may vary significantly between States. If the request concerns a potential application under Article 10 of the Convention, the requested Central Authority will first determine if the services are necessary, and then provide such measures as are appropriate, based on the resources available to the Central Authority and the internal law of the State.<sup>128</sup>

906. If the request is made under Article 7(2), and relates to a maintenance proceeding that is pending in the requesting State, the request is not restricted to the six measures set out in Article 7(1). The applicant may request any other measures; however whether the requested state will assist or facilitate in providing the measures requested is entirely discretionary.

#### B. *A case example*

907. The creditor has a maintenance decision from State A. The creditor believes that debtor may be residing in State B. The creditor wishes to confirm this information before expending resources on a translation of the application and the decision in order to send the decision to be recognised and enforced in State B. Both State A and State B are Contracting States to the Convention.

**Maintenance** includes support for children, a spouse or partner, and expenses related to the care of the children or spouse / partner. Under the Convention, a State may also extend maintenance to support arising from other forms of family relationships.

<sup>128</sup> See Explanatory Report, para. 203.

908. Under the Convention, the creditor can initiate a **request for specific measures**. The Central Authority in State A will transmit the request to State B requesting that a search be undertaken to determine if the debtor resides in State B. The steps taken will be governed by the internal law and policy of State B. State B will confirm whether the debtor is residing in State B. The address of the debtor will be provided only if permitted by the domestic law of State B. The creditor can then initiate the recognition and enforcement application under Article 10 of the Convention.

### **C. Who can make a request?**

909. Requests for specific measures must be made through and by the Central Authority in each State. A request cannot be directly to a competent authority.<sup>129</sup>

910. The request to the Central Authority can only be made by a creditor, including a public body that is acting on behalf of a creditor or has provided benefits to the creditor, or a debtor. Even if the maintenance application or proceedings that the measures relate to are entirely domestic and the request is made under Article 7(2), the maintenance application or proceedings that the measures are related to must come within the scope of the Convention, as set out in Chapter 3 of this Handbook.

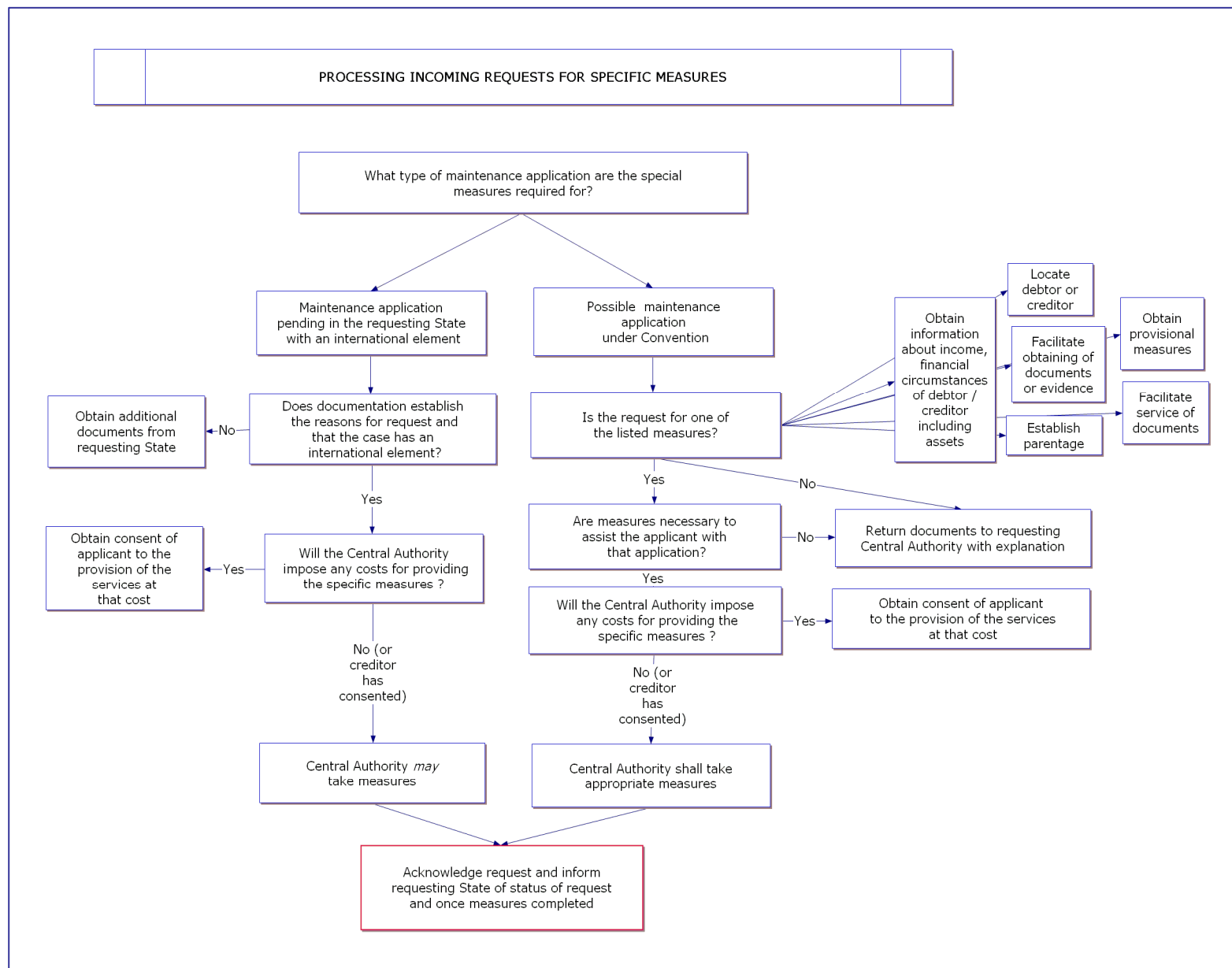
A **creditor** is the individual to whom maintenance is owed or alleged to be owed. A creditor may be a parent or a spouse, a child, foster parents, or relatives or others looking after a child. In some States, this person may be called a maintenance recipient, an obligee, or a custodial parent or carer.

### **D. Flowchart**

911. The flowchart below sets out the procedures for processing an incoming request for specific measures.

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<sup>129</sup> Explanatory Report, para. 193.



**Figure 36: Flowchart – processing request for specific measures**

## **II. Procedures**

912. This section follows the steps in the flowchart above.

### ***A. Acknowledge receipt of request***

913. The mandatory Acknowledgement Form is not required for a request for specific measures. However, the Central Authority should still follow the general requirements of the Convention and ensure that the requesting State is advised of the receipt of the request.

### ***B. Is an application under the Convention being considered?***

914. As noted above, there are differences in the way that a requested Central Authority will respond to a request for specific measures, depending upon whether the request relates to a potential application under the Convention (Article 7(1)), or whether the request relates to a maintenance proceeding pending in the requesting State (Article 7(2)).

915. If the specific measure is being sought to assist the applicant with making an application under the Convention, or to determine whether such an application should be initiated, the requested Central Authority must first be "satisfied" that the measures are necessary to assist in that application. If the request meets that threshold, the Central Authority shall take appropriate measures to assist.

916. Article 7(2) provides for a slightly different response where the request arises in connection with a maintenance proceeding in the requesting State if that case has an international element. In these cases, the response is more discretionary, as the requested Central Authority may take measures, but is not required to.

917. In either case it is up to the requested State to decide what measures are appropriate or will be used to provide the assistance requested.

### ***C. If the request for specific measures relates to a possible or contemplated Convention application (Article 7(1))***

#### **1. Is the request for one of the listed measures?**

918. The measures that can be sought are limited. If the request that has been received is for a measure not set out in Article 7, the request cannot be processed, and the requesting State should be advised accordingly. The measures that can be requested are set out below:

##### **a) Location of the debtor or creditor**

919. An applicant may request the assistance of the Central Authority in the requested State to locate the creditor or debtor. This will most likely be for the purpose of determining whether an application should be sent to that State for processing. A creditor may wish to determine whether the debtor resides in a State before sending an application to that State or a debtor may wish to know whether a creditor resides in the requested State if that State is the State where the decision was made, in order to determine where a modification application should be made.



## **b) Obtaining information about income, assets and financial circumstances**

920. A Central Authority may be asked to assist in obtaining information about the financial circumstances of a debtor or creditor, including income and asset information. This information may be sought, for example, in order to determine if a debtor has assets or income in the requested State for the purpose of enforcement of a decision. The extent to which specific personal information can be released to the requesting Central Authority or the applicant will depend upon the privacy laws of the requested State.

## **c) Obtaining evidence**

921. A Central Authority can be asked to assist in obtaining documentary or other evidence to be used in a proceeding. The way that a State will respond to this request will depend upon whether the States involved are parties to any international treaties, and the domestic law of the requested State.<sup>130</sup>

922. For example, if the child was born in State A, but the creditor no longer resides there, the creditor may require a copy of a birth certificate in order to proceed with an application for maintenance. A request for specific measures could be made to State A to obtain the birth certificate.

## **d) Provide assistance in establishing parentage**

923. The assistance of the Central Authority may be sought if establishing parentage is necessary to obtain a maintenance decision. While parentage can be established as part of an application for establishment of a decision, there may be circumstances where a creditor seeks assistance in establishing parentage prior to initiating the application.

A **debtor** is the individual who owes or is alleged to owe maintenance. The debtor may be a parent, or a spouse or anyone else who, under the law of the place where the decision was made, has an obligation to pay maintenance. In some States this person is called a maintenance payor, an obligor, or a non-custodial or non-resident parent.

## **e) Initiate proceedings for provisional measures**

924. A request may be made for provisional measures to be initiated, where necessary to initiate a maintenance application or secure the outcome of a pending maintenance application. Such measures will usually be limited to the territory of the requested State. For example, the creditor may request that a lien be filed against property to prevent its sale, so that the asset is available in a subsequent application for enforcement of the maintenance decision.

## **f) Facilitate service of documents**

925. The requested State may be asked to assist in the service of documents related to pending or possible maintenance proceedings. The way that a State will respond to this request will depend upon whether the States involved are parties to any international treaties, and the domestic law of the requested State.<sup>131</sup>

<sup>130</sup> Article 50. See also Explanatory Report, paras 648 - 651.

<sup>131</sup> Article 50. See also Explanatory Report, paras 648 - 651.

## **2. Are the requested measures necessary?**

926. If the request is necessary for a possible Convention application the documentation from the requesting State should include<sup>132</sup> enough information to allow the requested Central Authority to make a decision as to whether the measures are necessary.

## **3. Take appropriate measures**

927. Once the request has been reviewed, it is up to the requested State to decide what measures are appropriate or will be used to provide the assistance requested. The steps may be taken by the Central Authority itself, or the request may be referred to a competent authority.

### ***D. If the request relates to a case in the requesting State having an international element (Article 7(2))***

928. If the request does not relate to a possible or contemplated Convention application, the request may be for any type of assistance, including the types of assistance listed in Article 7(1). However, the response of the requested state is entirely discretionary.

929. The way that a requested State responds to such a request will be determined by the domestic law and internal policies of the State.

### ***E. Provide status to requesting State***

930. The Status Update Form used for applications under the Convention is not required for a request for specific measures, nor is the response time in Article 12 applicable to requests for specific measures. However, the Central Authority should still follow the general requirements of the Convention and ensure that the requesting State is advised of the steps taken, within a reasonable period of time. It is a good practice to follow the time lines in Article 12 in any event.

## **III. Other issues**

### ***A. Costs***

931. Requests for specific measures are an exception to the general provision under the Convention that a Central Authority must bear its own costs. A Central Authority is allowed to charge an applicant for costs associated with a request for specific measures, if those costs are exceptional (Article 8). Note however, that the costs can be recovered from someone other than the applicant (for example a debtor or a respondent) if allowed by the domestic law of the requested State.<sup>133</sup>

932. Exceptional costs are not defined. The general costs associated with processing a request would not likely be considered exceptional. However, the costs of genetic testing or legal costs for bringing a court application for provisional measures could fall into this category.

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<sup>132</sup> Once a recommended form has been developed for specific requests, all of this information will be included in the Form.

<sup>133</sup> Explanatory Report, para. 214.

933. In the event that a Central Authority intends to recover costs from an applicant, the applicant must consent to the provision of the services at that cost, in advance, before those services are provided. This will give the applicant an opportunity to determine if some other course of action should be pursued.

**a) An example**

934. A creditor resides in State A. She is seeking maintenance for her child. The debtor resides in State B. Parentage will have to be established before the decision can be made.

935. The creditor has two choices. A request for specific measures can be made, requesting the assistance of State B in establishing parentage or for facilitating the establishment of parentage in State A. State B will advise if the costs associated with the process will be recovered from the creditor. If so, then the creditor may wish to simply make an application for the establishment of a decision in State B under Article 10 of the Convention, and request a determination of parentage as part of that proceeding. If the creditor initiates an application for establishment of a decision under Article 10 of the Convention, in almost all cases, the costs of the parentage testing will be covered as part of the cost-free services to be provided to an applicant<sup>134</sup> (see Chapter 3).

## **IV. Additional materials**

### ***A. Practical advice***

- If it is likely that your State will charge costs for the provision of the specific measures, advise the Central Authority in the requesting State as soon as possible. In some cases the charging of costs will be a factor for the applicant to consider in determining whether to simply proceed with an application under the Convention, rather than proceeding with the request for specific measures.
- In any event, the applicant must be advised of any costs that will be charged, and his or her consent obtained to proceeding on that basis, before the steps are undertaken.
- Once the request has been received, it is a good practice for the caseworker in the requested State to advise the Central Authority in the requesting State how long the matter will take to be completed.
- The request for specific measures is an exception to the general rule that requests under the Convention are made to competent authorities and applications made through Central Authorities. Only a Central Authority may initiate or receive a request for specific measures.

### ***B. Related forms***

Acknowledgement Form

No form has yet been developed for a request for specific measures.

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<sup>134</sup> Subject to any declaration that a State may have made to use a child-centred means test, and the use of a merits test by the requested State.

### **C. Text of relevant Articles**

Article 6  
Article 7  
Article 8  
Article 15  
Article 43  
Article 50  
Article 51  
Article 52

### **D. Related sections of Handbook**

See Chapters 4 and 5 – Outgoing and incoming applications for recognition or recognition and enforcement

See Chapters 8 and 9 – Outgoing and incoming applications for establishment of a maintenance decision

See Chapter 10 – Enforcement of a maintenance decision

## **V. Checklist – Incoming requests for specific measures**

	<b>Procedure</b>	<b>Handbook reference</b>
1.	Acknowledge receipt of request	II(A)
2.	Determine if an application under the Convention is being considered?	II(B)
3(a)	If related to a Convention application: determine whether request is for one of listed measures?	II(C)(1)
3(b)	If related to a Convention application – are measures necessary?	II(C)(2)
3(c)	If related to a Convention application – provide assistance as appropriate	II(C)(3)
4.	If request not related to a Convention application – take measures as allowed by internal policy and domestic law	II(D)
5.	Provide status update	II(E)

## **VI. Frequently Asked Questions**

*Does the requested Central Authority have to provide the specific measures requested?*

936. Not in all cases. If it determines that the measures are not necessary to assist in proceedings under the Convention (or to determine if proceedings should be initiated) it can refuse the request. If the request is for assistance with respect to a maintenance proceeding pending in the requesting State, the provision of any assistance is discretionary.

*Can the requested Central Authority charge for its services?*

937. Yes – in limited circumstances. The costs must be exceptional, and the applicant must have consented to the services being provided on that basis.

## Chapter 15 – Completing the recommended forms

### I. Completing the mandatory forms required for all applications

938. This section covers the completion of the two mandatory forms that must be used in any application under the Convention. These are found as annexes to the Convention itself. Requests for specific measures and direct requests to competent authorities in the requested State do not have to use these forms.

#### A. Transmittal Form

939. The mandatory Transmittal Form provides a standard, uniform means of sending applications between States. It lists the required documents and information contained in the package and it indicates to the requested Central Authority, what remedy is being sought.

940. The Transmittal Form is a mandatory form. It must accompany every application that is initiated under the Convention. The information below explains how to complete it. This Part applies to all applications made under the Convention.

##### a) Preamble:

941. All information included in any document sent to another Central Authority must remain confidential and can only be used for the purpose of the maintenance application under the Convention. However, the preamble to the form also recognises that there are situations where the release of any personal information could jeopardise the health, safety or liberty of a person.

☐ *A determination of non-disclosure has been made by the Central Authority in accordance with Article 40.*

942. If the applicant has indicated that this may be a concern, put a check mark in the above "determination of non-disclosure" box which appears at the top of the first page of the form.

943. See section II of this Chapter concerning the protection of personal information.

##### b) Requesting Central Authority

*Reference: Transmittal Form Box 1 and Box 2*

944. The boxes below the personal data statement provide information about the requesting Central Authority and the person who should be contacted if there is any follow up required by the requested State. The language of communication between Central Authorities will be the language of the requested State, or English or French. The country profile will confirm which is to be used. If language is an important consideration for managing the case in your country, indicate the language preference in this area.

The **requesting Central Authority** is the Central Authority in the State where the application or request is being initiated. That Central Authority will send the application to the **requested Central Authority**, which will process the application and send it to a competent authority to be completed.

**c) Requested Central Authority***Reference: Transmittal Form Question 3*

945. The next lines are self explanatory and require the contact information of the requested Central Authority. That information will be found in the Country Profile.

**d) Particulars of applicant***Reference: Transmittal Form Question 4*

946. The applicant is the person that is making the request for maintenance services. The applicant may be a creditor, including a public body, or a debtor, depending upon the type of application involved.

**e) Particulars of the person(s) for whom maintenance is sought***Reference: Transmittal Form Question 5*

947. If the applicant is seeking maintenance for himself or herself, indicate that in section (a). For other family members or dependents, fill in the required information, including the date of birth of each child. This is necessary to establish that the children are under 21 years of age and therefore covered by the Convention. Names as they appear on any birth or other official records should be used.

**f) Particulars of the debtor***Reference: Transmittal Form Question 6*

(a) ☐ *The person is the same as the applicant named in point 4*

948. Check this box if the applicant is a debtor. Remember that a debtor may not apply for establishment of a decision.

949. In all cases, include the basic information about the debtor under this point. Additional information about the debtor will be included in the application form and in the Financial Circumstances Form, if these are used in the particular application.

**g) Identification of application***Reference: Transmittal Form Question 7*

950. The table below provides a cross reference for applications under the different sub-sections of Article 10. Check the box for the type of application that is being made.

Article Number	Explanation
Article 10(1) a)	Application by creditor for recognition or recognition and enforcement of an existing decision not made in the requested State
Article 10(1) b)	Application by creditor for enforcement of an existing decision made or recognised in the requested State
Article 10(1) c)	Application by creditor for establishment of a new decision in the requested State, where no decision exists
Article 10(1) d)	Application by creditor for establishment of a decision in the requested State where recognition and enforcement of an existing decision is not possible
Article 10(1) e)	Application by creditor for modification of a decision made in the requested State
Article 10(1) f)	Application by creditor for modification of a decision not made in the requested State
Article 10(2) a)	Application by debtor for recognition of an existing decision or limitation of enforcement of an existing decision, made in the requested State
Article 10(2) b)	Application by debtor for modification of a decision made in the requested State
Article 10(2) c)	Application by debtor for modification of a decision not made in the requested State

**Figure 37: Table of applications under Article 10**

*Reference: Transmittal Form Question 8*

951. Section 8 of the Transmittal Form lists the documents that must be included with the Application.

952. Section 8(a) is to be used where the application is for recognition and enforcement under Article 10(1) a). Check the boxes as appropriate for your application. The final boxes referencing Article 30 are to be used where the application is for recognition of a maintenance arrangement.

953. If the application is not under Article 10(1) a), the list of documents set out in section 8(b) of the Transmittal Form is applicable.

## **h) Completing the form**

*Reference: Transmittal Form Final Section*

954. The Transmittal Form is not signed by the official completing it. That person does however have to indicate their name, and date the application. (Contact information is already included on the first page.)

## **B. Acknowledgement Form**

955. This section provides instructions for the completion of the mandatory Acknowledgement Form. It is used in every application under the Convention. Article 12(3) requires that receipt of the application be confirmed, using this form, within six weeks of the date of receipt of the application.

### **a) Preamble to form**

956. As a preliminary step, consider whether release of the information in the form could jeopardise the health, safety or liberty of any person. If so, use the check box at the top of the Form.

### **b) Contact information**

*Form reference: Box 1 and Box 2*

957. Ensure that the Contact Information provided refers to the individual or unit who will be responsible for further follow up.

### **c) Requesting Central Authority**

*Form reference: Paragraph 3*

958. Use the information from the incoming application to complete this section.

### **d) Details of application**

*Form reference: Paragraph 4*

959. Indicate which applications have been received, by reference to the Article number. See the box in the section above for completing the Transmittal Form for a cross reference to each type of application.

960. This paragraph also requires details of the applicant and the persons for whom maintenance is payable. This information is indicated on the Transmittal Form that accompanied the incoming application.

### **e) Initial steps taken**

*Form reference: Paragraph 5*

961. Indicate what steps have been taken concerning the application. If the application cannot proceed because additional documents are required, list the documents or type of information required.

962. If the Central Authority has made a decision that it will not process the application because it is manifest that the requirements of the application are not met, indicate whether the reasons are included with the acknowledgement, or will follow at a later date. The detailed chapters concerning processing incoming applications for recognition and enforcement, establishment and enforcement provide an explanation as to when this response might be appropriate.

### **f) Completing the form**

963. The form is not signed; however the name of the official of the Central Authority responsible for its completion should appear on the form.



## II. Overview

964. This Chapter provides instructions for the completion of the Recommended Forms for the following applications being transmitted between Central Authorities:

- Application for recognition or recognition and enforcement
- Application for enforcement of a decision made or recognised in the requested State
- Application for establishment of a decision
- Application for modification of a decision

965. Completion of the mandatory Transmittal Form and Acknowledgement Form is discussed in Chapter 3.

966. This Chapter is divided into three parts.

967. The first part provides instructions for completing the recommended Application Forms for recognition and recognition and enforcement, enforcement, establishment, and modification.

968. The second part provides instructions for completion of the additional forms.

969. The third part contains checklists setting out the documents should be included with each type of application or request.

## III. Instructions for completion of recommended application forms

### ***A. Recommended application form for an application for recognition or recognition and enforcement***

970. This section provides instructions for the completion of the recommended form to be used in applications for recognition or recognition and enforcement of either maintenance decisions or maintenance arrangements. Please see Chapter 4 for further information concerning the procedures for this application.

#### **1. Completing the form**

##### **a) Which form to use**

971. If the applicant is a creditor, including a public body that is acting on behalf of a creditor or has provided benefits to the creditor, or a debtor, making the application as a creditor, use the form for Article 10(1) *a*) and 10(2) *a*) applications. Delete the Article numbers that do not apply.

##### **b) Protection of personal information**

*Form reference: introductory paragraph*

972. The Convention provides that any information gathered or transmitted in applications under the Convention may not be disclosed or confirmed if it would jeopardise the health, safety or liberty of a person.

973. If there is a concern about this, place a check mark in the appropriate box on the application form and include the personal information on the separate form (Restricted Information Form) rather than in section 2.

974. See Chapter 3 for a full discussion of the requirement to protect personal and confidential information.

### c) Name and contact details of applicant

*Form reference: Section 2 – Particulars of the applicant*

975. Indicate whether the applicant is a creditor (the person for whom maintenance is sought or payable), debtor or a representative of either.

976. The contact information serves two purposes. Firstly, it identifies the parties to the application, so that the Central or competent authority in each State can properly set up a case or file. Secondly, the contact information must be sufficient to allow the applicant to be notified in the event that there is an appeal of the decision to recognise and enforce the decision.

**Good practice:** The requesting Central Authority should ensure that it always has a good address or other means to contact the applicant. Issues may arise during the application that will require further information or documents and the Central Authority in the requesting State (sending State) will need to be able to contact the applicant to get the information or documents.

977. Some States may choose to use the address of the Central Authority or of another competent authority as the address for the applicant if release of the personal address is not permitted under the law of the requesting State.<sup>135</sup>

978. If the applicant is a public body, include that information.

### d) Particulars of those for whom maintenance is sought

*Form reference: Section 3 – Particulars of the person for whom maintenance is sought*

979. The application must include sufficient information to identify everyone for whom maintenance is payable under the decision. This will include both the applicant (usually the parent, although a child may also be an applicant) and any children to whom the Convention applies. In each case a date of birth must be provided to verify the identity of each of the persons entitled to maintenance, and to establish their age, to ensure the decision comes within the scope of the Convention.

980. The basis upon which maintenance is sought for the applicant and the children must also be included. This information will allow the requested State to confirm whether the application falls within the scope of the Convention. This relates to the relationship between the applicant or person for whom maintenance is sought and the debtor.

<sup>135</sup> See Explanatory Report, para. 612.

981. The following terms are used in this section of the form:

*Form reference: Sections 3.1 and 3.2 – Maintenance basis*

- **Marriage**  
If the parties were married – check this box.
- **Analogous relationship to marriage**  
Use this where the parties were not married to each other but lived in a marriage like relationship. In some States this is called a common law relationship. This only applies where both the requested and requesting States have extended the application of the Convention to these types of relationships (see Chapter 3).
- **Affinity**  
Use this where the relationship between the applicant and debtor was based on family ties – for example the debtor is an uncle or other relative. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships (see Chapter 3).
- **Grandparent / child / sibling**  
Use this if the relationship between the applicant and the debtor was one of the types listed. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.
- ***In loco parentis* or equivalent relationship**  
*In loco parentis* means a relationship where an adult stands in the place of a parent, towards a child. It may arise where an adult lived with the children, behaving as a parent towards the child. In some States this includes a step-parent relationship.
- **Parentage**  
Use this where the basis for maintenance is a parent-child relationship. This will cover both situations where the children were born during the course of a marriage, so parentage is presumed or found as a matter of law, as well as situations where the connection between the parent and child has been established or confirmed through parentage testing.

982. Complete section 3.1 with the information concerning the applicant. The applicant's date of birth has already been included in section 2. If the applicant is a child, complete this section.

983. Complete section 3.2 with information concerning any children for whom maintenance is sought or payable. If the child is the applicant, only section 3.2 needs to be completed. If there are more than three children, put a tick in box 3.4 and attach the additional information on a separate page.

984. Complete section 3.3 if maintenance is sought or payable for someone other than the applicant or a child.

**e) Name and contact details of debtor**

*Form reference: Section 4.1 – Particulars of the debtor*

985. Indicate whether the debtor is the applicant.

986. The debtor's details in section 4.1 are required in order to process the application for recognition or recognition and enforcement and give notice to the debtor as required by the law of the requested State. This section should be completed to the extent known by the applicant. The requested State must, if necessary, undertake locate or search services in order to locate the debtor, if his or her exact location is not known.

**Good practice:** If the applicant does not know where the debtor lives, be sure to include as much other information as you can on the debtor's last known whereabouts – for example, employer or location. You may also want to include information about other ties to the State – for example about relatives with whom the debtor may be staying.

987. A "National Identification Number" should be provided if known. This may be a Social Security Number (United States), Social Insurance Number (Canada), Tax File Number (Australia) or other government issued number that may assist the Central Authority in the requested State to locate the respondent or to verify his or her identity in government or other databanks.

**f) Name and contact details of creditor's representative**

*Form reference: Section 4.2 – Debtor's application – particulars of the representative of the person for whom maintenance is payable*

988. This section should be completed with details of the creditor's location or information about the creditor's representative. That representative may, in many cases, be the creditor's legal counsel.

**g) Where the payment is to be sent**

*Form reference: Section 5 – Payments*

989. If the decision is to be enforced, the requested State will need to know where to send any payments. If the payments will go to a competent authority in the requesting State, for processing include the details of payment processing or payment distribution unit as well as the file / account reference number, so that payments can be properly identified.

**\*\*\*\* Do not complete this section of the form if there is a concern about risk to the applicant. Use the Restricted Information Form. \*\*\*\***

**h) Application for recognition only**

*Form Reference: Section 6*

990. If the application is for recognition of a maintenance decision only, and the applicant does not want the decision to be enforced after it is recognised, tick the box in section 6. Note that no Statement of Enforceability is required for a recognition only application. All that is required is a statement that the decision has effect in the State of origin. See Chapter 4 for additional information concerning recognition only applications.

**i) Bases for jurisdiction to recognise and enforce the decision**

*Form reference: Section 7 – Basis for recognition and enforcement*

991. This section does not have to be completed if the application is for recognition or recognition and enforcement of a maintenance arrangement. The relevant box should be checked.

992. If the application is for recognition or recognition and enforcement of a maintenance decision, the requested State needs to know the legal basis upon which the decision can be recognised and enforced.

993. The Recommended Form lists the bases of jurisdiction set out below. These come from Article 20. Refer to the decision itself, the information from the applicant or to the file from the competent authority as necessary. On the Form, check all the boxes that may apply. If the respondent objects to the recognition or recognition and enforcement, it is up to him or her to establish that none of the bases for recognition and enforcement applies.

994. See Appendix A to the Chapter for more information as to the types of situations that could indicate a basis for recognition and enforcement.

**j) Appearance of the respondent**

*Form reference: Section 8*

995. As discussed in Chapter 4, in order for the decision to be recognised or recognised and enforced, the requested State must be satisfied that the respondent had notice of the application or proceeding for maintenance as required by the law of the State where the decision was made, and had an opportunity to be heard. If an administrative process was used, where the decision was made without holding a hearing, the respondent must have been given notice of the decision after it was made and given a proper opportunity to challenge the decision made by the authority, as required by the law of the State that made the decision.

996. Section 8 of the Form covers this requirement. Indicate whether the respondent appeared or did not appear in the State of origin.

997. The appearance of the respondent may be evident from the face of the decision, if it shows that he or she appeared in the maintenance proceeding, or was represented or challenged the decision.

998. If the respondent did not appear and was not represented the competent authority will then have to confirm that the respondent had proper notice, as required by the law of the State where the decision was made, and taking into account all of the circumstances. A recommended form has been developed to complete this requirement (Statement of Proper Notice). Completion of that Form is discussed below.

999. If the decision was made in a system where no hearing was required, the non-appearance of the debtor / respondent should be indicated and a Statement of Proper Notice will always be required.

1000. A decision made without proper notice to the respondent may not be able to be recognised or enforced under the Convention.

**k) Financial Circumstances Form***Form reference: Section 9*

1001. A Financial Circumstances Form will be necessary if the decision is to be enforced after it is recognised. See Section IV of this Chapter for instructions on completion of this Form.

**l) Legal assistance***Form Reference: Section 10*

1002. In most cases where an application for recognition or recognition and enforcement is made by a creditor, the requested State must provide free legal assistance (see Chapter 3) and the applicant does not need to provide any further information concerning this issue.

1003. However, section 10 will need to be completed if:

- The application is being made by a creditor and concerns maintenance obligations other than those arising from a parent-child relationship for a child under the age of 21 years, or
- The application is being brought by a debtor.

1004. If either of these situations applies, the requested State may use a means or merits test in determining whether to provide assistance. The Financial Circumstances Form will address the means test, and the applicant should also include information substantiating whether the applicant benefited from legal assistance in the State of origin. A letter from the authority that provided assistance should suffice.

**m) Name of the contact person at the Central Authority responsible for processing the application***Form Reference: Final sections*

1005. This should identify the person in the Central Authority responsible for either completing the application or for reviewing the application if it was completed by the applicant personally. In keeping with a “medium neutral” approach, allowing for electronic transmission of documents, the Form does not need to be signed.

***B. Recommended application form for an application for enforcement of a decision made or recognised in the requested State***

1006. This section contains instructions for the completion of the recommended form for applications for enforcement of a decision made or recognised in the requested State. See Chapter 6 for information about this application.

**1. Completing the form****a) Nature of application – Which form to use**

1007. Use the recommended Form for Article 10(1) *b*) as the application is for the requested State to enforce its own decision, or a decision previously recognised in the requested State.

## **b) Protection of personal information**

*Form reference: Introductory paragraph and section 2(d), (e), (f) and (g)*

1008. The Convention provides that any information gathered or transmitted in applications under the Convention may not be disclosed or confirmed if it would jeopardise the health, safety or liberty of a person.

1009. If there is a concern about this, place a check mark in the appropriate box on the application form and include the personal information on the separate form (Restricted Information Form) rather than in section 2.

1010. See Chapter 3 for a full discussion of the requirement to protect personal and confidential information.

## **c) Name and contact details of applicant**

*Form reference: Section 2 – Particulars of the applicant*

1011. The contact information serves two purposes. Firstly, it identifies the parties to the application, so that each Central or competent authority can properly set up a case or file. Secondly, the contact information must be sufficient to allow the requesting State to contact the applicant in the event that further information is required by the competent authority in the requested State in order to initiate enforcement (for example to confirm arrears of maintenance).

1012. Some States may choose to use the address of the Central Authority or of another competent authority as the address for the applicant if release of the personal address is not permitted under the law of the requesting State.<sup>136</sup> This may be also be a good practice where there is a child support enforcement programme involved in the requesting State and that programme has additional information about the debtor, his assets and income, or about the calculation of the arrears, that could assist the competent authority in the requested State in the enforcement of the decision.

1013. If the applicant is a public body, include that information.

**Good practice:** The requesting Central Authority should ensure that it always has a good address or other means to contact the applicant. Issues may arise during enforcement that will require further information or documents and the Central Authority in the requesting State will need to be able to contact the applicant to get the information or documents.

## **d) Particulars of those persons for whom maintenance is sought**

*Form reference: Section 3 – Particulars of the person for whom maintenance is sought*

1014. The application must include sufficient information to identify everyone for whom maintenance is payable under the decision. This will include both the applicant (usually the parent of the children) and any children to whom the Convention applies. In each case a date of birth must be provided, as it is important to ensure that the decision comes within the scope of the Convention (see Chapter 3).

1015. The basis upon which maintenance is sought for the applicant and the children must also be included. This information will allow the requested State to confirm whether the application falls within the scope of the Convention.

<sup>136</sup> See Explanatory Report, para. 612.

**Explanation of terms**

1016. The following terms are used in this section:

*Form reference: Sections 3.1 and 3.2 – Maintenance basis*

- **Marriage**  
Check this box if the decision relates to a marriage relationship between the applicant and the debtor.
- **Analogous relationship to marriage**  
Check this box if the parties were not married to each other but lived in a marriage like relationship. In some States this is referred to as a common law relationship. This only applies where both the requested and requesting States have extended the application of the Convention to these types of relationships.
- **Affinity**  
Check this box if the relationship between the applicant and debtor was based on family ties – for example the respondent is an uncle or other relative. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.
- **Grandparent / child / sibling**  
Use this if the relationship between the applicant and the debtor was one of the types listed. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.
- ***In loco parentis* or equivalent relationship**  
*In loco parentis* means a relationship where an adult stands in the place of a parent, towards a child. It may arise where an adult lived with the children, behaving as a parent towards the child. In some States this includes a step-parent relationship.
- **Parentage**  
Use this where the basis for maintenance is a parent-child relationship. This will cover both situations where the children were born during the course of a marriage, so parentage is presumed or found as a matter of law, as well as situations where the connection between the parent and child has been established or confirmed through parentage testing.

1017. Complete section 3.1 with the information concerning the applicant. The applicant's date of birth has already been included in section 2. If the applicant is a child, complete this section.

1018. Complete section 3.2 with information concerning any children for whom maintenance is sought or payable. If the child is the applicant, only section 3.2 needs to be completed. If there are more than three children, put a tick in box 3.4 and attach the additional information on a separate page.

1019. Complete section 3.3 if maintenance is sought or payable for someone other than the applicant or a child.



**e) Name and contact details of debtor (respondent)**

*Form reference: Section 4 – Particulars of the debtor (respondent)*

1020. The Respondent's details are required in order for the enforcement authority to process the request for enforcement. This section should be completed to the extent known by the applicant. The requested State will, if necessary, undertake locate or search in order to find the respondent, if his or her exact location is not known.

**Good practice:** If the applicant does not know where the respondent lives, be sure to include as much other information as you can on the respondent's last known whereabouts (employer, location, etc.). You may also want to include information about other ties to the State – for example relatives with whom the respondent may be staying.

1021. A "National Identification Number" should be provided if known. This may be a Social Security Number (United States), Social Insurance Number (Canada), Tax File Number (Australia) or other government issued number that may assist the Central Authority in the requested State to locate the respondent or verify his or her identity in government or other databanks.

**f) Where the payment is to be sent**

*Form reference: Section 5 – Payments*

1022. The requested State will need to know where to send any payments. If the payments will go to a competent authority in the requesting State for processing, include the details of payment processing or payment distribution unit here as well as the file / account reference number, so that payments can be properly identified.

**\*\*\*\* Do not complete this section of the form if there is a concern about risk to the applicant. Use the Restricted Information Form. \*\*\*\***

**g) Information about the decision made in the requested State**

*Form reference: Section 6*

1023. In the case of an application for a State to enforce its own decision, basic information about the decision must be provided so that the requested State can locate the appropriate court or administrative file and copies of the decision can be obtained. The information necessary to complete this section will usually be contained in the decision itself.

**h) Documents attached to the application**

*Form reference: Section 7*

1024. Indicate which of the listed documents are attached. In each case there must be a decision of the types listed, a statement of arrears (if there are arrears under the decision) and the Financial Circumstances Form.

1025. Tick the box "Decision (or registration) made in the requested State to recognise a decision of another State" if the decision which is sought to be enforced was not made in the requested State but was previously recognised in the requested State. Details of that recognition, if known, or the decision to recognise, can be attached to the application.

**i) Name of the contact person at the Central Authority for processing the application**

*Form reference: Final sections*

1026. This should identify the person in the Central Authority responsible for either completing the application or for reviewing the application if it was completed by the applicant personally. In keeping with a "medium neutral" approach, allowing for electronic transmission of documents, the Form does not need to be signed.

## ***C. Recommended form for an application for establishment of a decision***

1027. This section provides information for the completion of the recommended form for an application for establishment of a decision. Please see Chapter 8 for more information concerning this application.

### **1. Completing the form**

**a) Nature of application – which form to use**

1028. Use the recommended form for Article 10(1) *c*) and *d*) as the application is for establishment of a decision. Delete the Article numbers that do not apply.

**b) Protection of personal information**

*Form reference: Introductory paragraph and section 2(d), (e), (f) and (g)*

1029. The Convention provides that any information gathered or transmitted in applications under the Convention may not be disclosed or confirmed if it would jeopardise the health, safety or liberty of a person.

1030. If there is a concern about this, place a check mark in the appropriate box on the application form and include the personal information on the separate form (Restricted Information Form) rather than in section 2.

1031. See Chapter 3 for a full discussion of the requirement to protect personal and confidential information.

**c) Name and contact details of applicant**

*Form reference: Section 2 – Particulars of the applicant*

1032. The contact information serves two purposes. Firstly, it identifies the parties to the application, so each Central or competent authority can properly set up a case or file. Secondly, the contact information must be sufficient to allow the requesting State to contact the applicant in the event that further information is required for the establishment of the decision.

1033. Include the requested information about the applicant, either under section 2 or on the Restricted Information page. Some States may wish to use the address and contact information of the Central Authority for the applicant if release of the personal address is not permitted under the law of the requesting State.<sup>137</sup> If this is done however, the requesting Central Authority must be able to contact the applicant in the event that further information is required by the requested Central Authority or competent authority or where follow up is needed by the requested State. This will be particularly important where an applicant needs to be contacted in order to participate in parentage testing.

**Good practice:** The requesting Central Authority should ensure that it always has a good address or other means to contact the applicant. Issues may arise during the establishment application that will require further information or documents and the Central Authority in the requesting State (sending State) will need to be able to contact the applicant to get the information or documents.

#### **d) Particulars of those persons for whom maintenance is sought**

*Form reference: Section 3 – Particulars of the person for whom maintenance is sought*

1034. The Application must include sufficient information to identify everyone for whom maintenance is sought. This will include both the applicant (usually the parent of the children) and any children to whom the Convention applies. In each case a date of birth must be provided, as it is important to ensure that the decision comes within the scope of the Convention (see Chapter 3).

1035. The basis upon which maintenance is sought for the applicant and the children must also be included. This information will allow the requested State to confirm whether the application falls within the scope of the Convention. This relates to the relationship between the applicant, or other person for whom maintenance is sought, and the respondent / debtor.

#### **Explanation of terms**

1036. The following terms are used in this section:

*Form reference: Sections 3.1 and 3.2 – Maintenance basis*

- **Marriage**  
Check this box if the decision relates to a marriage relationship between the applicant and the debtor.
- **Analogous relationship to marriage**  
Check this box if the parties were not married to each other but lived in a marriage like relationship. In some States this is referred to as a common law relationship. This only applies where both the requested and requesting States have extended the application of the Convention to these types of relationships.

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<sup>137</sup> See Explanatory Report, para. 612.

- **Affinity**  
Check this box if the relationship between the applicant and the debtor was based on family ties – for example the respondent is an uncle or other relative. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.
- **Grandparent / child / sibling**  
Use this if the relationship between the applicant and the debtor was one of the types listed. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.
- ***In loco parentis* or equivalent relationship**  
*In loco parentis* means a relationship where an adult stands in the place of a parent, towards a child. It may arise where an adult lived with the children, behaving as a parent towards the child. In some States this includes a step-parent relationship.
- **Parentage**  
Use this where the basis for maintenance is a parent-child relationship. This will cover both situations where the children were born during the course of a marriage, so parentage is presumed or found as a matter of law, as well as situations where the connection between the parent and child may have to be established or confirmed through parentage testing.

1037. Complete section 3.1 with the information concerning the applicant. The applicant's date of birth has already been included in section 2. If the applicant is a child, complete this section.

1038. Complete section 3.2 with information concerning any children for whom maintenance is sought or payable. If the child is the applicant, only section 3.2 needs to be completed. If there are more than three children, put a tick in box 3.4 and attach the additional information on a separate page.

1039. Complete section 3.3 if maintenance is sought or payable for someone other than the applicant or a child.

#### **e) Name and contact details of respondent / debtor**

*Form reference: Section 4 – Particulars of the debtor (respondent)*

1040. This section requires the applicant to provide sufficient information to identify the debtor and his or her location for the purpose of notification about the application. If the current residential address is not known, other information can be provided, including former residential addresses or contact information for other persons that may be able to assist in locating the respondent. Note that the Financial Circumstances Form (discussed below) also has provision for additional information concerning the debtor.

1041. A "National Identification Number" should be provided if known. This may be a Social Security Number (United States), Social Insurance Number (Canada), Tax File Number (Australia) or other government issued number that may assist the Central Authority in the requested State to locate the respondent or to verify his or her identity in government or other databanks.

**f) Where the payment is to be sent**

*Form reference: Section 5 – Payments*

1042. If the applicant wishes to have the maintenance decision monitored and enforced after it has been obtained, the requested State will need to know where to send any payments. If the payments will go to a competent authority in the requesting State for processing, include the details of payment processing or payment distribution unit here as well as the file / account reference number, so that payments can be properly identified.

**g) Purpose of application**

*Form reference: Section 6*

1043. Indicate whether the application is being brought to establish a decision because no decision exists, or whether the application is brought because recognition and enforcement of the existing decision was not possible or was refused.

**h) Documents in support of the application**

*Form reference: Section 7*

1044. This section provides for a listing of the documents included with the application. The documentation that will be necessary will depend upon the facts of the case, whether parentage is an issue, the ages of the children and whether there are any existing agreements related to maintenance. The following table may be of assistance in assembling the correct documentation; however each case will vary, so this should be treated as a general guideline only.

<b><i>Birth certificate or equivalent</i></b>	Include a birth certificate for each child for whom maintenance is sought. Other similar documents include baptism certificates or citizenship documents – where no birth certificate is available. It is important that the document verify the date of birth and name of the child.
<b><i>Acknowledgement of parentage by the debtor</i></b>	This may be in the form of a declaration made at the time of the child's birth (in-hospital form) or in a later acknowledgement. This is not usually required where the child was born during the marriage of the parents.
<b><i>Affidavit supporting a declaration of biological parentage</i></b>	Where there is no documented acknowledgement of paternity, the applicant should provide an affidavit outlining the circumstances surrounding the parentage of the child, and the relationship of the debtor towards the child at the time of birth and thereafter.
<b><i>Decision of competent authority concerning parentage</i></b>	In some cases, a competent authority may already have determined parentage, without making a maintenance decision.
<b><i>Genetic Test results</i></b>	If genetic testing confirming parentage of the child has been done, include the results.
<b><i>Adoption Certificate</i></b>	If the child for whom maintenance is sought was adopted by the debtor, include the adoption certificate.
<b><i>Certificate of marriage or similar relationship and date of divorce or separation</i></b>	Include this if the parties were married. It will also be used to establish whether a child was born during the marriage of the creditor and the debtor.
<b><i>Affidavit supporting a declaration of common residence</i></b>	This will not be relevant in most cases, but could arise, for example, where the parties temporarily resided in different locations for the purpose of employment, but always maintained a common residence in a specific State.
<b><i>Agreement relating to maintenance</i></b>	If the parties have previously agreed to maintenance, for example, as part of a mediated resolution of custody issues, this agreement should be included.
<b><i>Evidence of attendance at secondary or post secondary educational institution</i></b>	This will be necessary where maintenance is sought for an older child, especially one over the age of majority, as attendance in school generally determines entitlement to maintenance.
<b><i>Evidence of disability</i></b>	If maintenance is being sought for an older child or a child over the age of majority, and that entitlement is based on the disability of the child, this information must be included.
<b><i>Financial Circumstances Form</i></b>	This form needs to be completed as fully as possible. It provides specific information for the establishment and enforcement of the decision. It covers both the creditor's circumstances and the debtor's circumstances.
<b><i>Statement of Arrears or Payment History</i></b>	It is unlikely that this form would be required unless the application is made under Article 10(1) d) and there are arrears that have accrued under the previous decision.
<b><i>Applicable Law</i></b>	If the applicable law is not "forum law" (the law of the State where the application is proceeding), documentation of the law to be used in the application must be included.
<b><i>Other Evidence required by the requested State</i></b>	Consult the Country Profile for the requested State to determine whether there are any additional documents that must be included.
<b><i>Decision of the requested State refusing recognition and enforcement</i></b>	Where recognition of an existing decision has been refused, a copy of that refusal must be included.

**Figure 38: Table of documents to be included in establishment application**

**i) Enforcement after establishment**

*Form reference: Section 8*

1045. If the applicant wishes to have the maintenance decision enforced in the requested State after it is established, that should be indicated in this section.

**j) Name of the contact person at the Central Authority for processing the application**

*Form reference: Final sections*

1046. This should identify the person in the Central Authority responsible for either completing the application or for reviewing the application if it was completed by the applicant personally. In keeping with a “medium neutral” approach, allowing for electronic transmission of documents, the Form does not need to be signed.

***D. Recommended form for an application for modification of a decision***

1047. The section provides instructions for the completion of the recommended form for an application to modify a decision. The same form is used by both creditors and debtors. See Chapter 12 for additional information regarding this application.

**1. Completing the form****a) Protection of personal information**

*Form reference: Introductory paragraph*

1048. The Convention provides that any information gathered or transmitted in applications under the Convention may not be disclosed or confirmed if it would jeopardise the health, safety or liberty of a person.

1049. If there is a concern about this, place a check mark in the appropriate box on the application form and include the personal information on the separate form (Restricted Information Form) rather than in section 2.

1050. See Chapter 3 for a full discussion of the requirement to protect personal and confidential information.

**b) Name and contact details of applicant**

*Form reference: Section 2 – Particulars of the applicant*

1051. The contact information serves two purposes. Firstly, it identifies the parties to the application, so each Central or competent authority can properly set up a case or file. Secondly, the contact information must be sufficient to allow the requested State to contact the applicant in the event that there is an appeal of the decision to modify the decision and notice of the appeal is required.

1052. Some States may choose to use the address of the Central Authority or of another competent authority as the address for the applicant if release of the applicant's personal address is not permitted under the law of the requesting State.<sup>138</sup>

**Good practice:** The requesting Central Authority should ensure that it always has a good address or other means to contact the Applicant. Issues may arise during the modification application that will require further information or documents and the Central Authority in the requesting State will need to be able to contact the applicant to get the information or documents.

1053. If the applicant is the representative of the creditor or the debtor, indicate that on the form.

**c) Particulars of those persons for whom maintenance is sought or payable**

*Form reference: Section 3 – Particulars of the person for whom maintenance is sought*

1054. The application must include sufficient information to identify everyone for whom maintenance is payable under the decision. This will include both the applicant (usually the parent of the children, but sometimes the child) and any children to whom the Convention applies. In each case a date of birth must be provided, as it is important to ensure that the decision comes within the scope of the Convention (see Chapter 3).

1055. The basis upon which maintenance is payable for the applicant and the children must also be included. This will allow the requested State to confirm that the application comes within the scope of the Convention.

**Explanation of terms**

1056. The following terms are used in this section:

*Form reference: Sections 3.1 and 3.2 – Maintenance basis*

- **Marriage**  
Check this box if the decision relates to a marriage relationship between the applicant and the debtor.
- **Analogous relationship to marriage**  
Check this box if the parties were not married to each other but lived in a marriage like relationship. In some States this is referred to as a common law relationship. This only applies where both the requested and requesting States have extended the application of the Convention to these types of relationships.
- **Affinity**  
Check this box if the relationship between the applicant and the debtor was based on family ties – for example the respondent is an uncle or other relative. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.

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<sup>138</sup> See Explanatory Report, para. 612.



- Grandparent / child / sibling  
Use this if the relationship between the applicant and the debtor was one of the types listed. This only applies where both the requested and requesting States have extended the application of the Convention to these types of family relationships.
- *In loco parentis* or equivalent relationship  
*In loco parentis* means a relationship where an adult stands in the place of a parent, towards a child. It may arise where an adult lived with the children, behaving as a parent towards the child. In some States this includes a step-parent relationship.
- Parentage  
Use this where the basis for maintenance is a parent-child relationship. This will cover both situations where the children were born during the course of a marriage, so parentage is presumed or found as a matter of law, as well as situations where the connection between the parent and child may have been established or confirmed through parentage testing.

1057. Complete section 3.1 with the information concerning the applicant. The applicant's date of birth has already been included in section 2. If the applicant is a child, complete this section.

1058. Complete section 3.2 with information concerning any children for whom maintenance is sought or payable. If the child is the applicant, only section 3.2 needs to be completed. If there are more than three children, put a tick in box 3.4 and attach the additional information on a separate page.

1059. Complete section 3.3 if maintenance is sought or payable for someone other than the applicant or a child.

#### **d) Name and contact details of debtor**

*Form reference: Section 4.1 – Particulars of the debtor*

1060. Indicate whether the debtor is the applicant.

1061. The debtor's details are required in order to process the application and give notice to the debtor of a creditor's application for modification. This section should be completed to the extent known by the applicant. The requested State will, if necessary, undertake locate or search services in order to find the debtor, if his or her exact location is not known.

1062. A "National Identification Number" should be provided if known. This may be a Social Security Number (United States), Social Insurance Number (Canada), Tax File Number (Australia) or other government issued number that may assist the Central Authority in the requested State to locate the respondent or verify his or her identity in government or other databanks.

**Good practice:** If the applicant does not know where the debtor lives, be sure to include as much other information as you can on the debtor's last known whereabouts (employer, location etc.). You may also want to include information about other ties to the State – for example about relatives with whom the debtor may be staying.

**e) Name and contact details of the creditor's representative**

*Form reference: Section 4.2 – Debtor's application – particulars of the representative of the person for whom maintenance is payable*

1063. If the creditor has a representative, this section should be completed with the necessary details. That representative may, in many cases, be the creditor's legal counsel.

**f) Where the payment is to be sent**

*Form reference: Section 5 – Payments*

1064. If the modified decision is to be enforced after it is made, the requested State will need to know where to send any payments. If the payments will go to a competent authority in the requesting State for processing, include the details of payment processing or payment distribution unit here as well as the file / account reference number, so that payments can be properly identified.

**\*\*\*\* Do not complete this section of the form if there is a concern about risk to the applicant. Use the Restricted Information Form. \*\*\*\***

**g) Decision details**

*Form reference: Section 6 – The decision*

1065. The application should include details concerning the decision that is sought to be modified. All of the information necessary to complete this section should be contained in the decision itself.

**h) Change in circumstances**

*Form reference: Section 7*

1066. The most common basis for making an application to modify is that the circumstances of the creditor, debtor or the children have changed since the decision was made. The application lists the most common changes in circumstances. These are, for the most part, self-explanatory. Changes in the circumstances of the person for whom maintenance is sought, may include a change in the child's residence or a situation where the child is no longer supported by the creditor. The remarriage or re-partnering of the creditor would also come within this category.

**i) Modification sought**

*Form reference: Section 8*

1067. Indicate in this section the modification that is being requested. Provide specifics of the change sought and the currency where appropriate.

**j) Documents included in package**

*Form reference: Section 9*

1068. A list of the documents that should be included in the package is set out in this section. In some cases other documentation will be required, depending upon the reasons for the application for modification. Ensure that the reasons for the modification are explained and supported by the appropriate documentation.

**k) Enforcement after modification***Form reference: Section 10*

1069. In some situations, for example where the modification is sought by the creditor to increase maintenance, the applicant will want to have the modified decision enforced in the requested State. If so, indicate this in section 10.

**l) Creditor information***Form reference: Section 12*

1070. Where the modification application is brought by the debtor, the habitual residence of the creditor is important in order to verify whether there are any limitations on the modification proceedings. This section provides the necessary information concerning the application of Article 18. This is discussed in more detail in Chapter 11.

**m) Name of the contact person at the Central Authority for processing the application***Form reference: Final sections*

1071. This should identify the person in the Central Authority responsible for either completing the application or for reviewing the application if it was completed by the applicant personally. In keeping with a “medium neutral” approach, allowing for electronic transmission of documents, the Form does not need to be signed.

**IV. Instructions for completion of additional forms****A. Financial Circumstances Form**

1072. This form should be included with all applications under the Convention. It contains detailed information which will be used, if necessary, to assist the requested State

- to locate the respondent for the purpose of notice of the application.
- to assist the competent authority in enforcement of the decision,
- to determine the appropriate quantum of maintenance in establishment and modification applications, or
- to support a request for legal assistance in the requested State.

**Tip:** It is a good practice to review the Country Profile for the State that the form will be sent to. The Country Profile will indicate whether any of the information in the Financial Circumstances Form can be omitted.

**1. Completing the form****a) Preamble**

1073. As with other documents in the application, there is a place on the Form to indicate whether there is a concern that the disclosure or confirmation of the information would jeopardise the health, safety or liberty of a person. In such a case, the personal information will then only appear in the Restricted Information Form.

**b) Application information**

*Form reference: Part I – Reference information*

1074. Complete this section for all applications, using the information contained on the Application Form. The details relate to the contact information for the Central Authority, not the applicant.

1075. Section 4 sets out the application that is being made. Note that if a request for legal assistance is being made under Article 17, either of the final two boxes will be ticked in addition to the box for the specific application.

1076. In section 5 indicate the currency that is used throughout the Financial Circumstances Form. If you have converted all amounts to the currency of the requested State, indicate the exchange rate used, and the date of the conversion.

**c) Part II: General information about the creditor**

*Form reference: Part II – General Information about the creditor or persons for whom maintenance is payable*

1077. This section is only completed if the application is for establishment of a decision or modification of a decision. It is not required in applications for recognition, recognition and enforcement or enforcement of a maintenance decision.

**d) General information about the debtor**

*Form reference: Part III – General information about the debtor*

1078. This Part must be completed for all applications. It provides certain basic information about the debtor, his or her income and his or her dependents. It should be completed to the extent known to the applicant.

**e) Assets and debts of the debtor**

*Form reference: Part IV – Assets and debts of the debtor*

1079. This Part must be completed for all applications. Information should be provided to the extent known.

**f) Financial statement of the applicant**

*Form reference: Part V – Financial statement of the applicant*

1080. This section is only completed if the application is for establishment of a decision, modification of a decision or where legal assistance is required in the limited circumstances set out in Article 17. It is not required in applications for recognition, recognition and enforcement or enforcement of a maintenance decision.

**g) Medical insurance**

*Form reference: Part VI – Medical insurance*

1081. This part should be completed for establishment and modification applications only.

**h) Final sections**

*Form reference: Final sections*

1082. Indicate on the form whether it has been completed by the applicant. If so, the representative for the Central Authority must review the document. The representative of the Central Authority needs to be identified, and the declaration completed. The Form does not need to be signed.

## ***B. Statement of Proper Notice***

1083. This form will only be used in applications for recognition or recognition and enforcement. It must be provided where the respondent (usually the debtor) did not appear in the proceedings, and was not represented, to obtain the maintenance decision. In these cases only, proper notice of either the application for the decision or of the making of the decision must be established. Since maintenance decisions made in some administrative systems do not provide for an appearance by the respondent prior to the making of the decision, this Form will always be required in those situations. If you are unsure as to whether this form is needed, refer to Chapter 4.

1084. The recommended form should be completed by an official able to confirm that the respondent had proper notice as required by the law of the State that made the decision (the State of origin).

## ***C. Statement of Enforceability of a decision***

1085. This document is necessary in an application for recognition and enforcement. It is not required in an application for recognition only. It provides the information required by Article 25(1) *b*). The document confirms that the decision that is to be recognised or recognised and enforced is enforceable in the State of origin. If the decision was made by an administrative authority, it also confirms that the decision meets the requirements of Article 19(3), unless the State of origin has specified under Article 57 that its administrative decisions always comply with Article 19(3).

1086. If the application is for recognition and enforcement of a maintenance arrangement (not a maintenance decision), this document will have to be modified slightly to confirm that the specific maintenance arrangement is enforceable as a maintenance decision in the State of origin (Article 30(3) *b*)).

## ***D. Abstract of a decision***

1087. This recommended form should be completed by an official of the competent authority of the State of origin, and is used in cases where the requested State has specified, under Article 57, that it will accept an abstract of the maintenance decision, for the purpose of an application for recognition and recognition and enforcement. It will be used most often in situations where the maintenance decision is lengthy, and only a portion of the decision relates to maintenance. If an abstract is acceptable, then instead of translating the entire decision, only the abstract or the extracts need to be translated.

## ***E. Calculation of arrears***

1088. Where there are outstanding arrears of unpaid maintenance under a decision to be recognised and enforced or enforced, a calculation of those arrears will have to be provided to the requested State. There is no recommended form currently available for this purpose. The calculation should show the amount of arrears outstanding and the date of calculation.

1089. A detailed calculation will assist the competent authority responsible for enforcement in the requested State, in the event that the debtor disputes the calculation of arrears. Where a child support programme or agency is involved on behalf of the creditor in the requesting State, it is a good practice to use the statement or calculation of arrears provided by that authority or agency, as its records will be comprehensive.

## ***F. Document explaining how to adjust***

1090. If the decision that is to be recognised, or recognised and enforced provides for automatic indexation or adjustment, a statement or document should be included in the application package explaining how the adjustment or indexation will be done. The document should include whether that calculation will be done by the requesting State (for example as in the case of an assessment from the Child Support Agency in Australia). Otherwise, include the information necessary to allow the competent authority in the requested State to adjust or index the decision as required.

1091. There is no recommended Form currently available for this purpose.

## ***G. Proof of benefits or right to act (public body)***

1092. A public body is entitled to act as a creditor in applications for recognition, recognition and enforcement, and for establishment of a decision where the existing decision cannot be recognised because of a reservation made under Article 20.

1093. While the public body is not required to establish its right to act as a creditor in every application, it is a good practice to always include this information where the public body is the applicant or has an independent claim to the arrears. That will prevent later delays in the event that proof is requested under Article 36(4).

1094. There is no recommended form currently available for this purpose.

## ***H. Status of application form***

1095. Four recommended forms have been developed. They can be used by the requested State to update the Central Authority in the requesting State about the progress of applications for recognition, recognition and enforcement, establishment and modification. The requested Central Authority should use the one for the specific application that has been received. These forms are used in addition to the Acknowledgement Form, which is the mandatory form used to confirm that an application has been received by the requested State.

1096. The Status of application forms can be used both to report on initial developments with respect to the application, as well as to provide regular reports throughout the life of the Convention case.

1097. Indicate in section 3 whether the report is the first status report that has been made concerning the application.

1098. For subsequent status reports, indicate the date of the last status report and advise only of new developments or changes since the last report sent. This makes it easier for the competent authority in the requesting State to update its records, and avoids duplication of information.

## V. Checklists – Documentation to be included in outgoing applications under the Convention

1099. The following tables summarises which of the Forms provided under the Convention are to be included with an outgoing applications under the Convention.

1100. Remember that the table only deals with applications under the Convention. Where a matter proceeds by way of a direct request to a competent authority, the forms specified by the competent authority must be used.

**Tip:** Always check the Country Profile for the requested State before completing the application package for applications other than recognition or recognition and enforcement. If any other documents are required by the requested State, those will be listed in the Country Profile.

## **A. Application for recognition or recognition and enforcement**

<b>Convention Form or document</b>	<b>When to Include</b>	<b>Which Convention Form to use*</b>
<b>Transmittal Form</b>	Always Include	Use Mandatory Form
<b>Application Form</b>	Always Include	Use Recommended Form
<b>Financial Circumstances Form</b>	Always include – however depending upon whether the applicant is a debtor or creditor and the type of application, not all parts of this form will be required	Use Recommended Form
<b>Statement of Proper Notice</b>	Only required if respondent did not appear and was not represented in the State of Origin	Use Recommended Form
<b>Statement of Enforceability</b>	Always include	Use Recommended Form
<b>Complete text of decision</b>	Always include unless an abstract is acceptable (see below)	See Chapter 3 for information concerning requirement for certification of decision
<b>Abstract of a decision</b>	Include only if requested State has specified under Article 57 it will accept abstract	Use Recommended Form
<b>Arrears Calculation</b>	Always include if there are arrears under decision to be recognised or recognised and enforced	Use form that is provided under law of requesting State. If the decision has been previously enforced in the requesting State, it is preferable to use documentation from the competent enforcement authority in requesting State.
<b>Document explaining how to adjust or index the decision</b>	Always include if the decision provides for automatic adjustment by indexation	Use form that is provided under law of requesting State
<b>Proof of benefits or right to act (public body)</b>	Include if public body is applicant	Use form that is provided under law of requesting State

**Figure 39: Documents to be included with an outgoing application for Recognition or Recognition and Enforcement**

\* If your State does not use the Recommended Forms, use the form that is provided under your domestic law or policy for Convention applications.



## ***B. Application for enforcement of a decision made or recognised in the requested State***

<b><i>Convention Form or document</i></b>	<b><i>When to Include</i></b>	<b><i>Which Convention Form to use*</i></b>
<b><i>Transmittal Form</i></b>	Always Include	Use Mandatory Form
<b><i>Application Form</i></b>	Always Include	Use Recommended Form
<b><i>Financial Circumstances Form</i></b>	Always include but note that depending upon whether the applicant is a debtor or creditor and the type of application, not all parts of this form will be required)	Use Recommended Form
<b><i>Complete text of decision</i></b>	Always Include	See Chapter 3 for information concerning requirement for certification
<b><i>Abstract of a decision</i></b>	Not applicable. Decision is from the requested State	
<b><i>Arrears Calculation</i></b>	Always Include if there are arrears under decision to be enforced	Use statement from competent enforcement authority in requesting State, if possible
<b><i>Statement of Proper Notice</i></b>	Not Applicable	
<b><i>Statement of Enforceability</i></b>	Not Applicable	
<b><i>Document explaining how to adjust or index the decision</i></b>	Always include if the decision provides for automatic adjustment by indexation	Use document provided for under domestic policy or law of requesting State
<b><i>Proof of benefits or right to act (public body)</i></b>	Include if public body is applicant	Use form that is provided under law or policy of requesting State

**Figure 40: Document to be included with an application for enforcement**

\* If your State does not use the Recommended Forms, use the form that is provided under your domestic law or policy for Convention applications.

### ***C. Application for establishment of a decision***

<b><i>Convention Form or document</i></b>	<b><i>When to Include</i></b>	<b><i>Which Convention Form to use*</i></b>
<b><i>Transmittal Form</i></b>	Always Include	Use Mandatory Form
<b><i>Application Form</i></b>	Always Include	Use Recommended Form
<b><i>Financial Circumstances Form</i></b>	Always include but note that not all parts of this form will be completed	Use Recommended Form
<b><i>Statement of Proper Notice</i></b>	Not applicable	
<b><i>Statement of Enforceability</i></b>	Not applicable	
<b><i>Complete text of decision</i></b>	Not applicable	
<b><i>Abstract of a decision</i></b>	Not applicable	
<b><i>Arrears Calculation</i></b>	Not applicable	
<b><i>Document explaining how to adjust or index the decision</i></b>	Not applicable	
<b><i>Proof of benefits or right to act (public body)</i></b>	Include if public body is applicant	Use form that is provided under law of requesting State

**Figure 41: Documents to include with an application for Establishment**

\* If your State does not use the Recommended Forms, use the form that is provided under your domestic law or policy for Convention applications.

## ***D. Application for modification of a decision***

<b><i>Convention Form or document</i></b>	<b><i>When to Include</i></b>	<b><i>Which Convention Form to use*</i></b>
<b><i>Transmittal Form</i></b>	Always Include	Use Mandatory Form
<b><i>Application Form</i></b>	Always Include	Use Recommended Form
<b><i>Financial Circumstances Form</i></b>	Always include but note that depending upon whether the applicant is a debtor or creditor and the type of application, not all parts of this form will be required	Use Recommended Form
<b><i>Statement of Proper Notice</i></b>	Not applicable	
<b><i>Statement of Enforceability</i></b>	Not applicable	
<b><i>Complete text of decision</i></b>	Always include unless an abstract is acceptable (see below)	See Chapter 3 for information concerning requirement for certification
<b><i>Abstract of a decision</i></b>	Include if requested State has agreed it will accept abstract (Note that Article 57 refers to abstracts for the purpose of recognition and enforcement applications only)	Use recommended form
<b><i>Arrears Calculation</i></b>	Always include if there are arrears under the decision to be modified	Use statement from competent enforcement authority in requesting State, if possible
<b><i>Document explaining how to adjust or index the decision</i></b>	Include if the decision to be modified has a provision for adjustment or indexation	Use document provided for under domestic policy or law of requesting State
<b><i>Proof of benefits or right to act (public body)</i></b>	Not applicable (a public body cannot bring a modification application)	

**Figure 42: Documents to be included with an application for Modification**

\* If your State does not use the Recommended Forms, use the form that is provided under your domestic law or policy for Convention applications

## Appendix A – Bases for recognition and enforcement of a decision

1101. The recommended application form for an application for recognition or recognition and enforcement requires the applicant or the requesting Central Authority to indicate the “Bases for Recognition and Enforcement” in paragraph 6. The paragraph consists of a series of statements to be checked by the applicant or the representative of the Central Authority. Check all of the statements that may be applicable.

**Important point:** If you are not sure the basis that should be used for recognition and enforcement in the requested State – place a checkmark beside **any** of the basis that may apply. You should not leave a box or statement unchecked unless you are sure it does not apply. It is up to the respondent in the requested State to challenge the registration of the decision or declaration of enforceability of the decision, if he or she believes there is no basis for recognition and enforcement. See Chapter 5.

### Completing the form

1102. This section below provides an explanation of the circumstances that should be considered when determining which of the statements to check. Some of the terms – such as habitual residence – can have a specific legal meaning in a State, so in some cases it may be necessary to obtain a legal opinion where there is uncertainty.

### ***Habitual residence of the respondent***

1103. The term “habitual residence” is not defined in the Convention. A respondent may be found to be habitually resident in the State where the decision was made (the State of origin) in cases where he or she has resided in that State for a number of years. A respondent may be habitually resident in a State, even if a respondent has another home in a different State, or resides in another State for the purpose of employment. Check this box if it appears that these conditions were met at the time the decision was made. To successfully dispute recognition or recognition and enforcement, the respondent will have to establish that he or she was not habitually resident in the State of origin at the time the decision was made.

### ***Respondent submitted to the jurisdiction***

1104. If the respondent (debtor) was not residing in the State of origin at the time of the decision, but appeared either in person, or through a representative, and dealt with the maintenance application on its merits, then the respondent may be found to have submitted to the jurisdiction. The respondent could also have submitted to the jurisdiction by filing a response to the proceeding. Submitting to the jurisdiction of a particular authority (judicial or administrative) is a legal concept and legal advice may assist in determining whether this applies.

1105. Look for information in the decision or related materials indicating that the respondent appeared and participated in the application, had a legal representative present or agreed that the application could proceed in that State. To successfully dispute the recognition or recognition and enforcement of the decision, the respondent will have to establish that he or she did not submit to the jurisdiction.

### ***Habitual residence of the creditor***

1106. See the comments above respecting the term “habitually resident”. If it appears that the creditor was residing in the State of origin when the decision was made and had resided there for some time, check this box. To successfully dispute the recognition or recognition and enforcement of the decision, the respondent will have to establish that the creditor was not habitually resident in the State where the decision was made, at the time it was made, unless the requested State has made a reservation.

***Habitual residence of the child and debtor lived with child or provided for child***

1107. See the comments above respecting the term “habitually resident”.

1108. For example, check this box where the decision was made in State A, the child resided in State A at the time the decision was made and the respondent also lived with the child at some point in State A. If the respondent never lived with the child, but resided in State A at some point, and provided support for the child while he or she resided there, that is also covered by this statement.

1109. If it appears the child was habitually resident in the State at the time the decision was made and the respondent resided there and provided support, check this box. To successfully dispute the recognition or recognition and enforcement of the decision, the respondent will have to establish that the child was not habitually resident in the State of origin, at that time, or that the respondent never resided there with the child or provided support for the child in that State.

***Agreement in writing***

1110. Check this box if it appears that the respondent and the creditor agreed in writing that the State that made the decision could do so. Note however that this will NOT apply in the case of child maintenance, so it will only apply with respect to spousal or other forms of family maintenance (if the scope of the Convention has been extended by both the requesting and requested States to other forms of family maintenance).

1111. In a challenge to recognition or recognition and enforcement, the respondent will have to establish that the agreement should not be used as a basis for recognition and enforcement of the decision in the requested State.

***Jurisdiction by personal status or parental responsibility***

1112. In some States, the jurisdiction to make a maintenance decision arises where the competent authority also has the jurisdiction to make a related decision concerning personal status. This may be the case, for example, with respect to a divorce decision where the court is dealing with the “status” of being married or divorced. In this situation, the authority also has the jurisdiction to make a maintenance decision.

1113. If it appears that the maintenance decision was made on this basis, check this box. Legal advice may be useful to confirm the basis upon which the decision was likely made.

1114. In a challenge to the recognition or recognition and enforcement, the respondent will have to establish that the decision should not be recognised on this basis, unless the requested State has made a reservation on that basis.

## Chapter 16 – Direct requests to competent authorities

### I. Introduction

1115. This Handbook deals primarily with applications and requests processed through Central Authorities. However, there will be cases, as has been noted in other chapters, when an applicant must make a direct request to a competent authority for using the internal law of a Contracting State for a matter governed by or within the scope of the Convention. This can include establishing or modifying a decision. A direct request will be made in situations where the applicant cannot go through Central Authority of one or both of the States involved since either the provisions of Chapter II or III have not been extended in that State to the type of matters that the applicant is pursuing, or because the application must be made outside the Central Authority system.

1116. Although a direct request does not go through a Central Authority, the matter must still come within the scope of the Convention (see Chapter 3) in both the requested and requesting States.

1117. The possibility of a creditor or debtor making a direct request to a competent authority in another jurisdiction is specifically provided for in Article 37 of the Convention. The important elements of that Article include:

- the applicability of internal law to all direct requests
- the provision that direct requests are for matters governed by the Convention including, subject to Article 18, for the purpose of having a maintenance decision established or modified
- the application of specific provisions in relation to recognition and enforcement applications
- the application of specific provisions respecting decisions concerning maintenance for vulnerable persons in certain circumstances.

1118. The most common scenario where a direct request will be made to a competent authority in another Contracting State is a request for recognition, recognition and enforcement, establishment or modification of a decision concerning spousal maintenance only.

### A. A case example

1119. J is a maintenance creditor who resides in State A. She wants to have a maintenance decision established, requiring T to pay spousal support for her. T resides in State B. Neither State A nor State B has extended the application of Chapters II and III to spousal support obligations. Both States are contracting States to the Convention.

### B. How this works under the Convention

1120. The Central Authority in State A will not be able to assist J with this request. However, J can make a request directly to a competent authority in State B to establish a maintenance decision, if the internal law of State B permits this type of application. J will use the forms and document prescribed by the internal law of State B for the establishment procedure, and the request will proceed following the domestic law and processes in State B. Once the decision has been established, J can make a request that it be enforced in State B by a competent authority, if the internal law of State B allows for enforcement of spousal support only decisions.

1121. The rest of this chapter deals with direct requests for recognition and enforcement, and then with direct requests for establishment and modification.

## **II. Direct requests for recognition and enforcement**

1122. In general, the procedures for all direct requests will be governed by the internal law of the requested State. This law will determine whether the request can be made at all, and what forms or processes must be used. However, if the request concerns recognition and enforcement of an existing decision, and the decision falls within the scope of the Convention, certain provisions of the Convention will apply to that request. The following section covers the procedures for direct requests for recognition and enforcement of decisions.

### ***A. Outgoing direct requests (recognition and enforcement)***

1123. The Convention provides that a number of the provisions governing recognition and enforcement applications also apply to recognition and enforcement requests made directly to Competent Authorities (Article 37(2)).

#### **Documents to be included**

1124. All of the provisions of Chapter V (Recognition and Enforcement) of the Convention apply to direct requests; therefore the request should be accompanied by the documents set out in Article 25. These include:

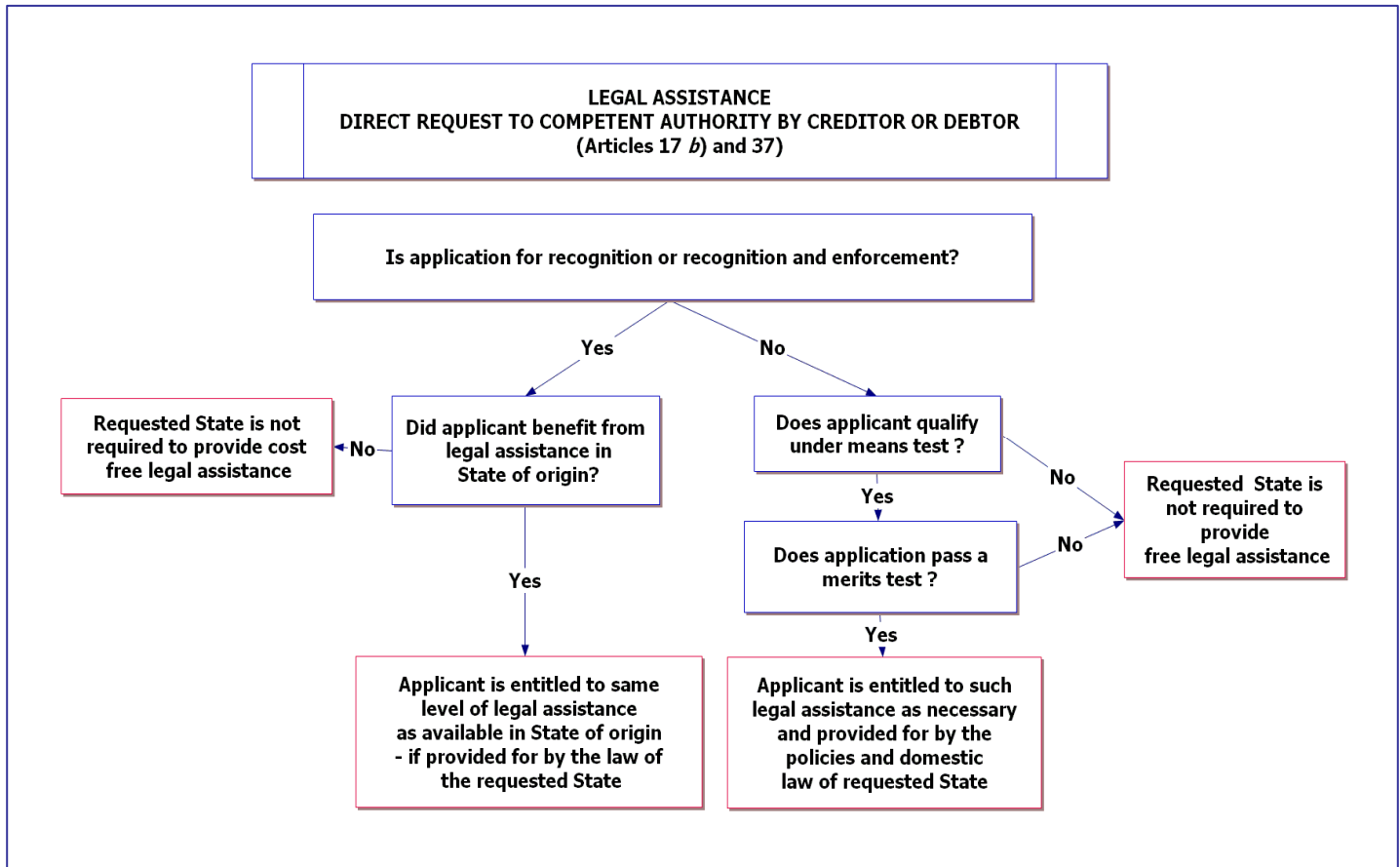
- a complete text of the decision
- a statement of enforceability
- a statement of proper notice where the respondent did not appear or did not challenge the maintenance decision
- if necessary– a calculation of the arrears
- if necessary a statement indicating how to adjust or index the decision.

1125. See Chapter 4 for information concerning these forms and Chapter 15 for instructions on the completion of the forms.

1126. The recommended application form cannot be used for a direct request. In most cases the requested competent authority will have its own forms. Check the Country Profile or contact the requested competent authority directly at the address provided in the Country Profile to obtain a copy of the form.

1127. In most cases concerning direct requests, it will also be necessary to provide documentation showing the extent to which the applicant received free legal assistance in the State of origin. This is because the provisions concerning effective access to procedures and the provision of cost-free legal assistance do not all apply to direct requests. However, at a minimum, in any proceedings for recognition or enforcement the applicant is entitled to the same level of free legal assistance as he or she benefitted from in the State of origin, if, under the same circumstances, that same level of assistance is available in the requested State (Article 17 *b*)).

1128. The diagram below illustrates the requirement to provide cost-free legal assistance for direct requests to a competent authority.



**Figure 43: Legal assistance – direct requests to a competent authority**

1129. Although cost free legal assistance may not be available, note that the requested State cannot require a security, bond or deposit, however described, to guarantee the payment of any costs and expenses in proceedings incurred by the applicant (Articles 37(2) and 14(5)).

1130. Finally, in any event, there is no requirement for a requested State to provide any form of legal assistance to an applicant who chooses to make a direct request to a competent authority, when the matter could have been initiated through the Central Authority.<sup>139</sup>

## ***B. Incoming direct requests (recognition and enforcement)***

### **a) Spousal support**

1131. Unless both the requesting and requested Contracting States have made declarations to extend chapters II and II to spousal support obligations, an incoming request for recognition and enforcement of a decision for spousal maintenance only will not go through Central Authorities. Instead, the creditor will make a direct request to the competent authority, which may be a judicial or an administrative authority. However the documentary requirements and procedures set out in Article 19(5) are the same.

<sup>139</sup> Explanatory Report, para. 602.



1132. The following documents will always be required:

- Application
- Text of the decision
- Statement of Enforceability
- Statement of Proper Notice, where the respondent did not appear or was not represented
- Financial Circumstances Form
- Document explaining the calculation of arrears
- Document explaining how to adjust or index the decision.

1133. Additional documents may be appropriate depending upon the internal processes of the requested State.

1134. Once the direct request has been received by a competent authority, it will go through the same type of recognition process as outlined in Chapter 5 (either the regular process or the alternate process). It will either be declared enforceable or registered and the respondent given notice (Article 23), or the respondent will be given notice and the competent authority will decide whether to recognise the decision after that notice has been given (Article 24).

1135. The grounds for challenging or appealing the declaration of enforceability or registration of the decision apply equally to requests initiated through a competent authority. However, if the applicant requires legal assistance to meet the respondent's challenge or appeal, a Central Authority will not provide cost-free legal assistance, and the applicant will have to make those arrangements independently. The competent authority may be able to assist the applicant in accessing other sources of assistance, including Legal Aid, if available. In any event, the applicant is entitled to at least the same level of legal assistance as he or she was entitled to in the requesting State, if that level of assistance is available in the requested State (Article 17).

1136. Finally with respect to enforcement of the decision after it has been recognised, because the Central Authority was not involved in the recognition process, the application for enforcement will not flow automatically from the request for recognition unless the law provides for it. If not, the individual making the request will have to make a separate request for enforcement as required by the domestic procedures of the requested State.

## **b) Children over the age of 21 years**

1137. Since the scope of the Convention does not include children who are more than 21 years old, a competent authority in a State does not have to accept a request for recognition and enforcement of a maintenance decision for these children unless an express declaration has been made under Article 2(3) of the Convention by both Contracting States (requesting State and requested State) to extend the application of the Convention to these children. In the absence of such a declaration, there is no requirement that a maintenance decision for a child who is more than 21 years old be recognised or enforced.

1138. Note that this will apply even where the law of the State of origin allows maintenance to be paid for children who are more than 21 years old, because Article 32(4) (applying the law of the State of origin to the determination of the duration of the maintenance obligation) must be read within the scope of Article 2.

1139. See Chapter 3 for a full discussion of the scope of the Convention.

## **c) Other forms of family maintenance**

1140. Although the Convention provides that States may agree to extend its provisions to other forms of family maintenance, including vulnerable persons, unless that is done by both the requested and requesting Contracting States, there is no requirement that a competent authority in a State accept a request to recognise or enforce a decision for other types of family maintenance.

### **III. Direct requests for establishment and modification of decisions**

1141. Direct requests to a competent authority for the establishment or modification of a decision coming within the scope of the Convention will be governed entirely by internal law. The provisions of the Convention discussed above respecting the recognition and enforcement requests do not apply to establishment or modification requests. Effectively this means that the procedures, forms and assistance available to creditors or debtors making these requests will be those found in the domestic law or process of the requested State.

1142. Importantly, even though the maintenance decision may come within the scope of the Convention (for example, where the decision concerns establishment of spousal maintenance) the provisions concerning effective access to procedures and legal assistance do not apply to these requests. In some cases, a creditor or debtor may be required to retain a lawyer at their own expense in the requested State in order to make the request.

1143. The Country Profile for the requested State will indicate what procedures are applicable to direct requests in that State, or provide information concerning how to contact a competent authority to obtain that information.

### **IV. Additional materials**

#### ***A. Practical advice***

1144. Refer to the Country Profile for the requested State to determine what will be required for the direct request. Although the documentation used for recognition and enforcement applications may be the same as used for applications through Central Authorities, the documentation for other types of requests may be very different than that used for Convention applications.

1145. A direct request should rarely be used where an application through a Central Authority can be made. Using the services of the Central Authority allows caseworkers in both States to more effectively assist creditors and debtors and to process matters more expeditiously than through a competent authority. Some competent authorities may not have the resources or knowledge to effectively process matters that could go through a Central Authority.

#### ***B. Related forms***

1146. For recognition and enforcement only:

- Statement of Enforceability
- Statement of Proper Notice
- Statement of Arrears (if applicable)
- Statement explaining how to index or adjust (if applicable)

#### ***C. Relevant Articles***

Article 2(3)  
Article 10  
Article 17  
Article 25  
Article 37

## V. Frequently Asked Questions

*What is the difference between an application through a Central Authority and a direct request to a competent authority?*

1147. Applications through Central authorities are limited to those provided for in Article 10. In order to bring the application through a Central Authority, the matter must fall within the scope of the Convention and be referenced in Article 10.

1148. A direct request will be made to a competent authority for a matter that is governed by the Convention. An example of a direct request is an application for establishment of a spousal support decision.

*Can an applicant choose to make a direct request to a competent authority rather than proceeding through the Central Authorities?*

1149. Yes – if the internal procedures of the requested competent authority allow it (some competent authorities simply refer the matter to the Central Authority). However, an applicant who chooses this course should be aware that in some States the provisions for legal assistance for direct requests may not apply to situations where an application could have been made through the Central Authority. This will be likely where the requested State has established effective procedures that allow an application to proceed without legal assistance for applications through the Central Authority.

*Can a Central Authority send a request directly to a competent authority where, for example, the requested State has not extended the application of Chapters II and III to the type of maintenance obligation?*

1150. Yes – there is no requirement in the Convention that a direct request be made by the creditor or debtor directly. This scenario is most likely to happen in situations where the requesting State has extended the application of Chapters II and III to spousal support but the requested State has not. In that case the requesting Central Authority can assist the creditor with the preparation of the documentation and assist in transmission to a competent authority in the requested State.

*What forms or documents should be used for a direct request?*

1151. If the request is for recognition and enforcement, include the documents set out in Article 25 as that article applies to requests for recognition and enforcement. The recommended application form is only for use by Central Authorities, so use either the form required by the requested competent authority, or the form used by your own State, if the requested competent authority has not specified a form.

1152. For all other applications, consult the competent authority to determine the forms or documents required for the request.

*Will the creditor or debtor require a lawyer in order to make the request to the competent authority?*

1153. That will depend entirely on the procedures of the competent authority. If the request is for recognition and enforcement, the requested State must ensure that the applicant is entitled to at least the same extent of legal assistance as available in the requesting State, if that level of assistance is available in the requested State (Article 17 *b*)).

1154. In all other applications, if legal assistance is required, the person making the request will be responsible for covering those costs unless the law of the requested State provides otherwise.