

**Practical Handbook for Competent Authorities:  
the 2007 Hague Child Support Convention, the 2007  
Hague Protocol on Applicable Law (Maintenance)  
and the 2009 European Union Maintenance  
Regulation**

**October 2013**

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**Descrierea CIP a Bibliotecii Naționale a României**

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**Practical Handbook for Competent Authorities : the 2007 Hague Child Support Convention, the 2007 Hague Protocol on Applicable Law (Maintenance) and the 2009 European Union Maintenance Regulation / Philippe Lortie, Maja**

Groff. - Onești : Magic Print, 2013

Bibliogr.

ISBN 978-606-622-093-4

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34(492 Haga)

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**Disclaimer:** This Practical Handbook was developed within the frame of a Project led by the Ministry of Justice of Romania "Enhancing the judicial international cooperation in matters relating to maintenance obligations" – grant agreement number JUST/2010/JCIV/AG/0026 and has been produced with the financial support of the European Union, under the "Civil Justice" Programme. The contents of this publication are the sole responsibility of the Ministry of Justice of Romania and can in no way be taken to reflect the views of the European Commission.

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## **Introduction: The 2007 Hague Child Support Convention and the 2009 EU Maintenance Regulation**

1. The *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter “the Convention”) is an important step forward in the creation of a cost effective, accessible and simplified system for the international recovery of maintenance.

2. The *EC Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations* (hereinafter “the Regulation”) was concluded after the 2007 Hague Convention, and many of its provisions mirror those of the latter instrument, with, however, important differences.<sup>1</sup> The Regulation is applicable among Member States of the European Union as of 18 June 2011.<sup>2</sup>

3. Additionally, the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter “the Protocol”) was concluded at the same time as the Convention, and is applicable throughout the European Union (except in Denmark and the United Kingdom) as of 18 June 2011 (see Chapter 5 for more information on the Protocol).

4. Decision-makers, whether judges acting in courts or administrative authorities, and other competent authorities,<sup>3</sup> who manage cases, receive applications, and who work within their own State 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 and the Regulation.

5. This Handbook is intended to be a practical guide for judicial, administrative and other competent authorities to assist in their management of cases under the above-mentioned instruments. It has been written to assist judicial, administrative and other competent authorities in all types of legal systems, whether they work in large States with complex information technology computer systems, managing hundreds of cases, or in States with fewer cases. It addresses the issues and processes that

<sup>1</sup> The major differences being the inclusion of direct jurisdiction rules in the Regulation (see Chapter 4), the applicability of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (the “Protocol”) in most of the European Union States where the Regulation is applicable (see Chapter 5), and the two procedural tracks for recognition and enforcement of decisions under the Regulation with respect to those Member States bound or not bound by the Hague 2007 Protocol (See Chapter 8). These and other more minor differences between the two instruments are noted throughout this Handbook.

<sup>2</sup> However, the Regulation is not wholly applicable in Denmark. The Regulation applies to Denmark in so far as it modifies the Brussels I Regulation, *infra*, note 8. Art. 76 of the Regulation stipulates that its Arts 2(2), 47(3), 71, 72 and 73 apply from 18 September 2010. See a further discussion of the transitional provisions and scope of the Regulation in Chapter 3, Part I, Section III, of this Handbook.

<sup>3</sup> Competent authorities implicated in the functioning of the Regulation and Convention will include the competent enforcement authorities of a given State, when enforcement of a decision under the Convention or the Regulation is sought. Art. 20 of the Regulation refers specifically to competent enforcement authorities.

will be encountered in dealing with a range of international maintenance cases.

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

6. This Handbook is intended to assist judicial, administrative and other competent authorities in the practical management of cases under the Convention and the Regulation. Importantly, **it is not a legal guide to the Convention or Regulation and it does not contain legal advice.** Because it is a guide principally of the international elements of Convention and Regulation cases, it does not cover every aspect of the management of international cases. International cases are still subject to domestic processes such as the procedures for enforcement. Some information on relevant domestic law is included in this guide (often in footnotes), but should not be considered exhaustive.

7. The Convention was the result of negotiations spanning four years and involving more than 70 States, and the Regulation was the result of additional negotiations within the European Union. Many issues were discussed during the course of the negotiations, informing and shaping the texts of the Convention and Regulation which were 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>4</sup> The Explanatory Report provides the legal basis and proper interpretation of each Convention provision. A similarly detailed and authoritative Explanatory Report on the Protocol is also available.<sup>5</sup> At the time of drafting this Handbook, no such explanatory document was available for the Regulation.

8. This Handbook, in contrast to an Explanatory Report, provides a practical and operational explanation of Convention and Regulation processes and discusses the way that Convention or Regulation cases will actually work in practice. For a legal interpretation of the Convention, Regulation or Protocol one will need to consult the Explanatory Report or similar authoritative documents, and over time, the case law that develops with respect to the interpretation of the three instruments.

9. Thus, the Handbook does not provide answers or guidance for all issues arising in 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 Convention or Regulation applications to the parties, or the form that a maintenance decision should take. Therefore, while the Handbook may be a source of information for judicial, administrative and other competent authorities concerning the practical operation of the Convention and Regulation, it will always have to be supplemented by a full consideration of the domestic practice and law in each State.

<sup>4</sup> Explanatory Report—*Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*—found on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under the Child Support / Maintenance section.

<sup>5</sup> Explanatory Report—*Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*—found on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under the Child Support / Maintenance section.

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

10. This Handbook is not meant to be read from cover to cover or from beginning to end.

11. Instead it is divided into different parts, principally covering each type of application or request that can be made under either the Convention or the Regulation (Chapters 7 to 12). Each application or request involves two States – a sending State, called a requesting State, and a receiving State, called a requested State.

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

13. There are a number of matters that are common to all applications and requests, and instead of repeating these in each chapter, these are set out in the first part of the Handbook, in Chapters 1 and 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.

14. Chapter 3 also includes a review of the substantive scope of the Convention and the Regulation – what types of maintenance obligations are covered by the Convention or the Regulation and which ones are not – and explanations about the possible extensions or limitations to the scope of the Convention (no reservations are permitted under the Regulation). Chapter 3 also includes a description of the geographic and temporal scope of the Convention and the Regulation. Finally, there is a discussion of general issues such as language requirements, the importance of protection of personal information and the provision of effective access to procedures, legal assistance and legal aid in applications under the Convention and the Regulation.

15. Chapter 2 contains explanations for the most commonly used terms in the Handbook in relation to the Convention.<sup>6</sup> These are not legal definitions. The Convention and Regulation themselves define a number of the terms used. The Convention provides that “in its interpretation, regard shall be had to its international character and to the need to promote uniformity in its application”.<sup>7</sup>

16. The explanations in Chapter 2 are included to assist in understanding the language and intention of the Convention, in particular in those areas where the concepts or words used are quite different than those that may be used in domestic law or practice.

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<sup>6</sup> At the time of drafting of this Handbook, no glossary was available for the Regulation. However, the two instruments may use similar or identical vocabulary.

<sup>7</sup> Art. 53 of the Convention.

17. Chapter 4 provides information on the unified jurisdiction rules for maintenance matters that will be applicable in Member States of the European Union.

18. Chapter 5 provides a summary of the 2007 Hague Protocol on applicable law, which will determine the applicable law rules to maintenance matters in the majority of European Union Member States where the Regulation is applicable, and also in non-European States which are Contracting States to the Protocol. Chapter 6 provides information and resources on finding and ascertaining foreign law, when this might prove necessary in the course of handling international maintenance cases.

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

19. If you are unfamiliar with Convention or Regulation cases you should first review Chapter 1 – Introduction to types of applications and requests under the 2007 Convention and 2009 Regulation. This will give you an explanation of the different applications or requests that are available under the Convention or the Regulation and an indication as to which part of this Handbook you should refer.

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

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

21. Beyond the texts of the two instruments, the most comprehensive and authoritative supplementary source of information concerning the text of the Convention and of the Protocol are their Explanatory Reports, referenced above. Many technical questions not addressed in this Handbook are answered in the Explanatory Reports. In addition to the Explanatory Reports 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 and the Protocol. 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) > under the Child Support / Maintenance section.

22. The Regulation on maintenance has continued an on-going process of unification of private international law rules in Europe. Many of the provisions of the Regulation are in fact based on other European instruments already in force. Throughout this Handbook reference will be made to the relevant equivalent provisions in other instruments (for example the "Brussels I Regulation",<sup>8</sup> the "Brussels II a Regulation"<sup>9</sup> and

<sup>8</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>9</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

the “European Enforcement Order Regulation”<sup>10</sup>). These provisions, and case law concerning these provisions, may be of use with respect to the interpretation of the provisions of the new maintenance Regulation.

23. In general terms, the provisions of the Regulation on jurisdiction are based on the equivalent jurisdiction provisions of the Brussels I Regulation. The recognition and enforcement provisions in Section 1 of Chapter IV are based in principle on the European Enforcement Order Regulation, whilst the provisions in Section 2 of Chapter IV are based on the recognition regime from the Brussels I Regulation.

24. Questions relating to the internal laws and practices of a State in matters concerning maintenance with respect to the Convention can often be answered by referring to the Country Profile that a Contracting State has filed with the Permanent Bureau of the Hague Conference. The Country Profile contains information about enforcement measures, the basis upon which maintenance decisions are established, 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 be found on the website of the Hague Conference on Private International Law.<sup>11</sup>

25. Similar information with respect to the Regulation must be provided by European Union States to the European Judicial Network in civil and commercial matters, to be kept permanently updated.<sup>12</sup> The European Judicial Network in civil and commercial matters has a dedicated maintenance section on its website with links to specific country information.<sup>13</sup> Judicial, administrative and other competent authorities within Europe will also have at their disposal their national liaison magistrate and national contact point(s) in other European countries under the European Judicial Network in civil and commercial matters in order to assist with the “effective and practical application of Community instruments or conventions in force between two or more Member States”.<sup>14</sup>

<sup>10</sup> *Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.*

<sup>11</sup> Some States may choose not to use the recommended Country Profile form, however Art. 57 requires every Contracting State to provide the same type of information to the Permanent Bureau. This information will also be available on the Hague Conference website at [www.hcch.net](http://www.hcch.net) under the Child Support / Maintenance section.

<sup>12</sup> *Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters.* These duties to share information are according to Arts. 70 and 71 of the Regulation. See: < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm) >.

<sup>13</sup> See: < [http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_gen_en.htm) >. It should be noted that it is anticipated that such information will be re-located to the European e-Justice Portal, found at the following web link: < <https://e-justice.europa.eu/home.do> >.

<sup>14</sup> Art. 3(2) b), *Council Decision 2001/470/EC, supra*, note 12.



26. Finally, judicial, administrative and other competent authorities should, of course, consult their own domestic practices, procedures and legal manuals where necessary. As many States already have significant experience managing international maintenance cases, there is a wealth of expertise in many States to assist competent authorities in processing international cases.

***E. Some final advice***

27. As you process applications and direct requests under the Convention or the Regulation you will see a clear emphasis in the procedures on keeping the process as simple as possible, expediting applications and requests, utilising effective enforcement measures, and maintaining regular communications with Central Authorities, as necessary. These are indeed the most important objectives of the Convention and the Regulation, as reflected in Art. 1 of the Convention and in Recitals 9 and 10 of the Regulation. If these objectives can be achieved in the implementation of these instruments, 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 all those managing and processing cases, including judges and other competent authorities, that this will be achieved, and we hope that this Handbook will be a useful tool to make that happen.

## **Chapter 1 - Introduction to types of applications and requests under the 2007 Convention and 2009 Regulation: applications through Central Authorities and direct requests**

### **I. The Central Authority Co-operation System**

#### **A. Introduction to the Central Authority Co-operation System**

28. A crucial element of both the Convention and the Regulation are the systems of administrative co-operation that they establish, with the aim of better facilitating the effective cross-border recovery of maintenance. These systems of administrative co-operation, established by way of nationally-designated "Central Authorities," were not available under the old Hague Conventions concerning maintenance or under European instruments which covered this area. Judicial, administrative and other competent authorities will often work closely with their national Central Authority. The functions of competent authorities should be supported and enhanced by the key role played by, and duties assigned to, the international network of Central Authorities under both instruments.

#### **B. Specific functions of the Central Authority**

29. 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. The Regulation sets out parallel provisions, with some minor differences, in its Chapter VII.

30. The Convention (Art. 6(1)) and the Regulation (Art. 51(1)) require that Central Authorities provide assistance in relation to applications made through Central Authorities under Chapter III (Art. 10) of the Convention or Chapter VII (Art. 56) of the Regulation. In particular, they shall:

- transmit and receive applications;
- initiate or facilitate the institution of proceedings in respect of such 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 or Regulation. In Romania the Central Authority for both instruments is the Ministry of Justice.*

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 or Regulation. 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 or Regulation. In Romania the competent authorities include relevant courts, bar associations, bailiffs, notaries and other authorities.

31. Under Article 6(2) of the Convention and Article 51(2) of the Regulation, in relation to such applications the Central Authorities shall also take all appropriate measures:

- where circumstances require, to provide or facilitate the provision of legal assistance (Convention) or legal aid (Regulation) (a);
- to help locate the creditor or the debtor (b);<sup>15</sup>
- to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets (c);<sup>16</sup>
- to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes (d);
- to facilitate the ongoing enforcement of maintenance decisions, including any arrears (e);
- to facilitate the collection and expeditious transfer of maintenance payments (f);
- to facilitate the obtaining of documentary or other evidence (g);<sup>17</sup>
- to provide assistance in establishing parentage where necessary for the recovery of maintenance (h);
- 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 (i);
- to facilitate service of documents (j).<sup>18</sup>

<sup>15</sup> The Regulation specifies that such actions carried out should be "pursuant to Arts 61, 62 and 63" of the Regulation which deal with access to information for Central Authorities, transmission and use of information, and notification of the data subject.

<sup>16</sup> *Ibid.*

<sup>17</sup> The Regulation adds that facilitating the obtaining of documentary evidence should be "without prejudice to Regulation (EC) No 1206/2001" (*Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*). See Chapter 3, Part II, Section IX, for further information on this Regulation.

<sup>18</sup> The Regulation adds that facilitating the service of documents should be "without prejudice to Regulation (EC) No 1393/2007" (*Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of*

32. Each Contracting State to the Convention, and each European Union Member State in which the Central Authority Co-operation provisions of the Regulation are applicable,<sup>19</sup> will designate a Central Authority (multi-unit States can designate more than one). Each 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 or other bodies in that particular Contracting State or Member State under the supervision of the Central Authority.<sup>20</sup>

## II. Chapter 1 Overview

33. This Chapter explains the types of applications and requests that can be made through a Central Authority or without the assistance of a Central Authority under the Convention or the Regulation. It is anticipated that the majority of Convention and Regulation cases that judicial, administrative and other competent authorities will handle will be in the form of applications through Central Authorities and therefore it is important for judges and other competent authorities to understand the available applications which can be made through Central Authorities, as well as Central Authority

*judicial and extrajudicial documents in civil or commercial matters (service of documents)).* See Chapter 3, Part II, Section IX, for further information on this Regulation.

<sup>19</sup> Namely, in all Member States of the European Union except Denmark. See Chapter 3, Part I, below, for further information on the geographic scope of the Regulation.

<sup>20</sup> In Romania according to Law No. 36/2012 on certain measures required to implement certain Regulations and Decisions of the Council of the European Union, as well as private international law instruments in the field of maintenance obligations, the Ministry of Justice is the Romanian Central Authority designated under Art. 49 of Regulation (EC) No. 4/2009, for relations with other Member States of the European Union. The Ministry of Justice is also the designated Romanian Central Authority under Art. 4 of the 2007 Hague Convention for relations with non-European Union Contracting States to the 2007 Hague Convention. As the Romanian Central Authority, the Ministry of Justice cooperates with the Central Authorities of other Member States of the European Union and with other international authorities and collaborates with courts of law, judicial enforcement officers, lawyers, notaries, mediators, and any other Romanian institution or authority which has competence in the implementation of Regulation (EC) No. 4/2009 and of the 2007 Hague Convention, as follows:

### **THE RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE FROM ABROAD**

The Ministry of Justice is the requesting and transmitting Central Authority that carries out the preliminary check of applications according to Art. 58(1) and (2) of the Regulation and transmits to Member States of the European Union applications and requests mentioned in Arts 53 and 56 of Regulation (EC) No. 4/2009, together with the necessary supporting documents specified in forms provided as Annexes V to VII of the Regulation. Upon receipt of the necessary supporting documents from a creditor or debtor and after the preliminary check, the Ministry of Justice fills out Part A of the following categories of applications or requests:

a) requests for specific measures, made under Art. 53, provided in Annex V to the Regulation (EC) No. 4/2009;

b) applications for recognition, declaration of enforceability or enforcement of a court decision in matters of maintenance obligations made under Art. 56(1)(a) and (b) and para. (2)(a), provided in Annex VI to the Regulation (EC) No. 4/2009;

c) applications for establishment or modification of a court decision in matters of maintenance obligations, made under Art. 56(1) (c) to (f) and 56(2)(b) and (c), provided in Annex VII to the Regulation (EC) No. 4/2009.

Upon receipt of the supporting documents necessary and after the preliminary check, the Ministry of Justice may assist the creditor or debtor in filling out Part B of the following categories of applications:

functions. Judicial, administrative and other competent authorities will also handle cases under the Convention and the Regulation initiated by way of direct requests, which do not utilise the Central Authority systems (see Section III.C, below). The current Chapter should be read in conjunction with Chapter 3, Part I, which provides essential information regarding the scope of the Convention and the Regulation and the application of either instrument to any particular case.

34. 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 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.

35. Once you have determined whether the application or request falls within the scope of either the Convention or Regulation (see Chapter 3, Part I) and identified the type of application or request that is being made by

a) applications for recognition, declaration of enforceability or enforcement of a court decision in matters of maintenance obligations made under Arts 56 and 57, provided in Annex VI of the Regulation (EC) No. 4/2009;

b) applications for establishment or modification of a court decision in matters of maintenance obligations, made under Arts 56 and 57, provided in Annex VII of the Regulation (EC) No. 4/2009.

The Ministry of Justice is the requesting, transmitting Central Authority that carries out the preliminary check according to Art. 12(1) and transmits, to the non-EU Member States which are Contracting States to the 2007 Hague Convention, applications and requests in Arts 7 and 10 of the 2007 Hague Convention, together with the necessary supporting documents. The requests or applications and the necessary supporting documents enclosed are transmitted by the Ministry of Justice along with the transmission form provided in Annex 1 to the 2007 Hague Convention.

Upon receipt of the applications and supporting documents enclosed by the party concerned and after the preliminary check, the Ministry of Justice may transmit the following categories of applications for maintenance, as well as the necessary supporting documents, to the extent that such applications are desired to be made by the creditor, according to the model forms recommended and published by the Hague Conference on Private International Law and provided in Annexes A, B, C and D:

a) application for recognition or recognition and enforcement, made under Art. 10(1)(a) and 10(2) (a) and Art. 30 of the 2007 Hague Convention, provided in Annex A;

b) application for enforcement of a decision made or recognised in the requested State, made under Art. 10(1)(b) of the 2007 Hague Convention, provided in Annex B;

c) application for the establishment of a decision, made under Art. 10(1)(c) and (d) of the 2007 Hague Convention, provided in Annex C;

d) application for modification of a decision, made under Art. 10(1)(e) and (f) and 10(2)(b) and (c) of the 2007 Hague Convention, provided in Annex D;

e) for each category of application or for several categories of applications, the financial status report provided in Annex E.

The Ministry of Justice may certify and transmit, after the preliminary check, the following categories of necessary supporting documents, to the extent that such applications are filled out by the court, at the discretion of the party concerned, according to the model forms recommended by the Hague Conference on Private International Law and provided in Annex A:

a) extract of a decision, issued under Art. 25(3)(b) of the 2007 Hague Convention;

b) a document stating that the decision is enforceable, issued under Art. 25(1)(b) of the 2007 Hague Convention;

c) a document certifying notification, issued under Art. 25(1)(c) of the 2007 Hague Convention.

using the Sections immediately below, you can 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 (oriented primarily to the Convention).

### **III. Description of applications and requests under the 2007 Convention and the 2009 Regulation**

36. This part provides a basic overview of the different types of **applications** (recognition, recognition and enforcement / declaration of enforceability, enforcement, establishment, and modification) and **requests** through Central Authorities (**request for specific measures**) that are available under either the Convention or the Regulation, and when each might be used. It outlines the types of factors that will impact whether an application or request can be made.

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These provisions do not prevent the party concerned from applying directly to the competent foreign authorities of the EU Member State or of the non-EU Member States which are Contracting States to the Convention. The law courts and the notaries are the competent authorities that issue, at the request of the party concerned, the supporting documents necessary for the recognition, declaration of enforceability or enforcement provided in Arts 20, 28 and 48 of the Regulation (EC) No. 4/2009 (Annexes No I-IV of the same Regulation) and in Arts 25 and 30 of the 2007 Hague Convention (the extract of the decision, the certificate of enforceability according to the model form recommended by the Hague Conference on Private International Law, provided in Annex A).

#### **THE RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE FROM ROMANIA**

The Ministry of Justice is the requested or receiving Central Authority that has been designated to receive:

a) requests for specific measures under Art. 53 and maintenance applications under Art. 56 of the Regulation (EC) No. 4/2009, together with necessary supporting documents, provided in Annexes No V-VII to the Regulation (EC) No. 4/2009;

b) requests for specific measures under Art. 7 and maintenance applications under Art. 10 of the 2007 Hague Convention, together with the necessary supporting documents, provided in Annex 1 to the Convention.

After receiving maintenance applications, requests for specific measures and necessary supporting documents, and after performing the preliminary check, the Ministry of Justice sends the files for processing according to the category of application / request to the authority or institution that holds the personal data, the competent territorial bar, the Chamber of Judicial Enforcement Officers or, as appropriate, to the competent court of law. The Ministry of Justice transmits the file for processing to the Ministry of Administration and the Interior, the Ministry of Public Finance, the Ministry of Labour, Family and Social Protection, or as appropriate, to the subordinated or coordinated structures, as well as to any other competent authorities or institutions that hold personal data, in relation to requests for specific measures that concern:

a) help with locating the debtor or creditor;

b) help with obtaining information about the income or assets of the debtor or creditor.

After performing the preliminary check, the Ministry of Justice sends directly to the competent territorial bar the following categories of applications and requests received from abroad, together with necessary supporting documents:

a) applications for recovery of maintenance by establishment of the amount thereof by court decision or for modification in the amount of maintenance established by court decision, made under:

**Tip:** Throughout this Handbook you will see a distinction made between **direct requests** and **applications**. An application is an action under the Convention or Regulation that goes through a Central Authority, such as an application for recognition and enforcement. A direct request is an action that goes directly to a competent authority, such as a direct request for establishment of spousal support under the Convention, where the requested State has not extended the application of the Convention to that type of application.

Keep in mind however that a **Request for Specific Measures** under Article 7 of the Convention and Article 53 of the Regulation is an exception to this rule. Those Requests go through a Central Authority. See Section B, below.

37. While the two instruments provide for common types of applications, judges and other competent authorities will of course have to apply *either* the Convention or Regulation in any particular case. Issues of scope of the two instruments and an analysis of when the Convention or the Regulation should be applied are detailed in Chapter 3, Part I. The examples given in this Section describe the various applications in general terms, without

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(i) Arts 56 and 57 of the Regulation (EC) No. 4/2009, according to the model Annex No VII thereto;

(ii) Art. 10 of the 2007 Hague Convention, according to the model forms recommended by the Hague Conference on Private International Law, provided in Annexes C and D;

b) requests for specific measures for the establishment of parentage whenever this is necessary in order to recover maintenance debts, made under:

(i) Art. 51(2)(h) of Regulation (EC) No. 4/2009, according to the model form provided in Annex V thereto, under 3.1.4.;

(ii) Art. 6(2)(h) of the 2007 Hague Convention, according to the model form recommended by the Hague Conference on Private International Law, provided in Annex C;

c) requests for specific measures concerning provisional or interim measures, made under:

(i) Art. 51(2)(i) of the Regulation (EC) No. 4/2009, according to the model in Annex V thereto, under 3.1.5.;

(ii) Art. 6(2)(i) of the 2007 Hague Convention.

Under Art. 8<sup>1</sup> of the Government Emergency Ordinance (the "OUG") No. 51/2008 on legal aid in civil matters, as approved with amendments and supplements by Act No. 193/2008 and subsequently amended, the dean of the bar issues an urgent decision to designate, on behalf of the maintenance creditor (child or vulnerable adult) whose habitual residence is abroad, a mandatory lawyer *ex officio* who will complete and submit the application, institute court proceedings, represent him or her and assist him or her in the first instance, in ordinary and extraordinary proceedings of judicial review, or in the initiation of measures for coercive enforcement, as appropriate. For the enforcement itself the designated lawyer requests the granting of legal aid in the form of the payment of fees for the judicial enforcement officer, and Art. 26 of the OUG No. 51/2008 is applicable. The court grants legal aid according to Art. 8<sup>1</sup> of the OUG No. 51/2008. The lawyer submits the request for the interim measure, together with the court order that established the measure and the decision by the dean, to the competent territorial bailiff.

The district court in the jurisdiction in which the person who refused the recognition of the foreign decision habitually resides, or in the jurisdiction in which enforcement will take place will have competence for:

a) applications for recognition, as well as those for declaration of enforceability of a foreign decision in Romanian territory, given in a State that is a Member of the European Union but not bound by the Hague Protocol of 2007, made according to Arts 28 and 75(1) of Regulation (EC) No. 4/2009;

giving detailed information on issues of scope or application of the two instruments.

### **A. Overview of applications under the 2007 Convention and the 2009 Regulation**

38. The types of applications that may be initiated under the Convention or Regulation through Central Authorities are set out in Article 10 of the Convention and Article 56 of the Regulation. These applications are available to persons (or a public body in some cases) in the following situations:

<b><i>Situation</i></b>	<b><i>Type of application available under the Convention or Regulation</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 State in which the Convention or Regulation is in force or applicable and wants it recognised or enforced in the other State	An application for recognition or recognition and enforcement / declaration of enforceability
An applicant who does not yet have a maintenance decision where the respondent resides in another State in which the Convention or Regulation is in force or applicable	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 State in which the Convention or Regulation is in force or applicable	An application to establish a maintenance decision

b) applications for recognition, and those for declaration of enforceability of a foreign decision in Romanian territory given in any Member State of the European Union, made under Arts 28 and 75(2) of Regulation (EC) No. 4/2009;

c) applications for recognition, and those for declaration of enforceability in Romanian territory of decisions given in non-EU Member States which are Contracting States to the 2007 Hague Convention, made under Arts 10 and 19-31 of the 2007 Hague Convention.

The first instance court in the jurisdiction in which the debtor habitually resides, or where the debtor's revenues / goods are found, will have competence for:

a) applications for recovery of maintenance by enforcement, by establishment of the amount thereof by court decision or for modification in the amount of maintenance established by court decision, made under Arts 56 and 57 of Regulation (EC) No. 4/2009, according to the model in Annex Nos VI and VII thereto, and Art. 10 of the 2007 Hague Convention, according to the model forms recommended by the Hague Conference on Private International Law, provided in Annexes C and D;

b) requests for specific measures for the establishment of parentage whenever this is necessary in order to recover maintenance debts, made under Art. 51(2)(h) of Regulation (EC) No. 4/2009, according to the model form provided in Annex V thereto, under 3.1.4, and Art. 6(2)(h) of the 2007 Hague Convention, according to the model form recommended by the Hague Conference on Private International Law, provided in Annex C;

c) requests for specific measures concerning provisional or interim measures, made under Art. 51(2)(i) of Regulation (EC) No. 4/2009, according to the model in Annex V thereto, and Art 6(2)(i) of the 2007 Hague Convention.



An applicant who has a maintenance decision in another State in which the Convention or Regulation is in force or applicable but wants to modify it, and the respondent (the other party) resides in another State in which the Convention or Regulation is in force or applicable	An application for modification
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**Figure 1: Table of applications**

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

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

40. All of these applications may be made by a creditor, and some may also be made by a debtor, as set out in Article 10(2) of the Convention and Article 56(2) of the Regulation.

### **1. Application for recognition or recognition and enforcement / declaration of enforceability**

41. 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 and enforcement process eliminates the need for the applicant to apply in the requested State for a new decision in order to obtain maintenance. Instead, the recognition and enforcement 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, or Member States of the European Union in which the Regulation is applicable, and the decision must have been made in a Contracting or Member State.

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.

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

42. 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 is not requesting the assistance of the other State to enforce the decision.

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 or the Regulation. 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 or Regulation.

**b) An example:**

43. J is residing in Country A and 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 States between which either the Convention is in force or the Regulation is applicable.

44. The Central Authority in Country A will transmit an application for **recognition and enforcement** (under the Convention) / **recognition and declaration of enforceability** (under the Regulation) 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 or enforcement of the decision and may have an opportunity to challenge the decision, according to procedures specified under the Convention or the Regulation. 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>21</sup>

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

*Applicable Article of the Regulation – Article 56(1) a) and 56(2) a)*

*See Chapter 7 – 2007 Convention: Processing incoming applications through Central Authorities and direct requests for recognition or recognition and enforcement*

<sup>21</sup> The Central or competent authority is required under the Convention and the Regulation to “facilitate” enforcement and the collection and transfer of payments. The steps taken in each State to do this will be different. See Chapter 12 on enforcement of maintenance decisions.

*See Chapter 8 – 2009 Regulation: Processing incoming applications through Central Authorities and direct requests for recognition or recognition and declaration of enforceability*

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

45. This is the simplest of all applications under the Convention or Regulation. The application requests that the requested State enforce its own decision or a decision it has already recognised and assist in transmitting payments to a creditor.

46. 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 / given 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>22</sup>

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

47. This application will be made where the applicant has a maintenance decision made or recognised in the State where the respondent resides or has assets or income. The applicant can request that State to enforce the decision it has made or recognised. 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 decision to the requested State. Both States must be Contracting States to the Convention or Member States of the European Union in which the Regulation is applicable.

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

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

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

48. 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 States between which the Convention or Regulation are in force or applicable.

<sup>22</sup> As discussed in Chapters 7 and 8, in order for a decision to be recognised and enforced in the requested State it must have been made in a Contracting State to the Convention (see the Explanatory Report of the Convention, para. 240) or in a European Union Member State where the Regulation is applicable. If the decision is from a State with which the Convention or Regulation are not in force or applicable, an application for enforcement may be made if the requested State has already recognised the decision, either through another treaty or domestic law. Otherwise, an application for establishment of a new decision must be made.

49. Under the Convention or Regulation, S can ask 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. If the debtor does not pay the maintenance voluntarily, the competent authority will use the measures it has available under domestic law to enforce the decision.

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

*Applicable Article of the Regulation: Article 56(1) b)*

*See Chapter 9 – Processing incoming applications for enforcement of decisions made or recognised in the requested State under the 2007 Convention or the 2009 Regulation*

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

50. 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>23</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>24</sup> Both States must be Contracting States to the Convention, or Member States of the European Union in which the Regulation is applicable.

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

51. 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:**

52. T resides in Country D and has a four year old child. She was never married to the father of the child, and parentage 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 to the Convention, or Member States

<sup>23</sup> An establishment application under the Convention 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, Part I.

<sup>24</sup> Art. 10(3) of the Convention and Art. 56(4) of the Regulation provide that the application will be decided according to the laws of the requested State, and will be subject to the jurisdictional rules applicable in that State. (See the Explanatory Report of the Convention, para. 248.) In Member States of the European Union, the jurisdiction rules set out in the Regulation will be used in determining establishment applications, as will the applicable law rules stipulated by the Regulation, as applicable in various Member States (see Chapters 4 and 5 of this Handbook).

of the European Union in which the Regulation is applicable.

53. Under the Convention or Regulation, 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 the determination of parentage. This may be done through paternity testing and contact will be made with the mother directly or through the Central Authorities, so that the mother and child can be tested. Alternatively, in some States parentage may be established through a judicial determination or the parent may provide an acknowledgement of parentage. Once the maintenance decision is established in Country E, the competent authority in 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>25</sup>

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

*Applicable Article of the Regulation: Article 56(1) c) and d)*

*See Chapter 10 – Processing incoming applications for establishment of a decision under the 2007 Convention or the 2009 Regulation*

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

54. 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:**

55. 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 the 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 modification is to be made). If allowed under the law of the requested State, the decision will be modified or a new decision made.<sup>26</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.

56. The Convention and the Regulation do 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

<sup>25</sup> See the Explanatory Report of the Convention, para. 108, regarding the use of the term “facilitate”.

<sup>26</sup> See Art. 10(3) of the Convention and Art. 56(4) of the Regulation. The application will be decided according to the laws of the requested State, including jurisdictional rules applicable in that State. In Member States of the European Union, the jurisdiction rules set out in the Regulation will be used in determining modification applications, as will the applicable law rules stipulated by the Regulation, as applicable in various Member States (see Chapters 4 and 5 of this Handbook).

of the Convention or under Article 56 of the Regulation will be made and the applicant will make a direct request for modification to a competent authority in his or her home State, or in the State where the decision was made. However, the Convention and the Regulation do provide mechanisms for transmitting applications where a person chooses, or is required to initiate an application in one State and to have the proceedings completed in another State.<sup>27</sup>

**b) An example:**

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

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

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

*Applicable Article of the Regulation: Article 56(1) e) and f), 56(2) b) and c)*

See Chapter 11 – Applications for modification of a decision: Article 10(1) e) and f) and 10(2) b) and c) of the Convention; and Article 56(1) e) and f) and 56(2) b) and c) of the Regulation

**B. Request for specific measures**

59. In addition to the four types of applications available under the two instruments, the Convention and the Regulation also provide 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 such a request is discretionary, and the requested State will determine what measures will be undertaken in response.

60. Article 7 of the Convention and Article 53 of the Regulation set out six possible requests that can be made through a Central Authority to another Central Authority. Depending on the type of measure and on the national legal system, judicial, administrative and other competent authorities may be asked by their national Central Authority to assist in carrying out these specific measures. A request for specific measures may be made to:

<sup>27</sup> See Chapters 4 and 11. There are restrictions contained in the Convention and in the Regulation 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.

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 the obtaining of documentary or other 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:**

61. A request for specific measures will be made when an applicant requires a limited type of assistance in bringing an application for recognition, recognition and enforcement / declaration of enforceability, enforcement, establishment or modification under the Convention or the Regulation. 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.

62. In some States other international Conventions or Regulations may also be applicable in matters concerning service of documents or the obtaining of evidence (see Art. 50 of the Convention and Art. 51(2) of the Regulation). See Chapter 3, Part II, Section IX, of this Handbook.

**b) An example:**

63. 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 to which State to send it.

64. Under the Convention or the Regulation, 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 / declaration of enforceability 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*

*Applicable Article of the Regulation: Article 53*

*See also Chapter 3, Part II, Section VIII – Provisional and protective measures under the 2007 Convention and the 2009 Regulation*

**C. Overview of direct requests to competent authorities under the 2007 Convention and 2009 Regulation**

65. Judicial, administrative and other competent authorities may also receive “direct requests,” that is, requests from applicants directly to competent authorities rather than applications by way of Central Authorities, under either the Convention or the Regulation.

66. Under the Convention, direct requests are specifically provided for (Art. 37), and will largely be governed by the internal law of the requested State. Internal law / laws applicable domestically will determine whether the request can be made at all, and what forms or processes must be used. It should be noted however, that Article 37 of the Convention sets out some provisions of the Convention which will still apply to direct requests in certain cases (namely, a number of provisions pertaining to effective access to procedures / legal assistance, limits on proceedings (Art. 18), recognition and enforcement, enforcement, and public bodies as applicants).

67. Under the Regulation, the provisions of the Regulation will apply to direct requests, if the direct requests fall within the scope of the Regulation, save the most favourable legal aid provisions of Chapter V (Access to Justice)<sup>28</sup> and many of the provisions of Chapter VII (Cooperation between Central Authorities). Please also see the Chapters covering the types of applications under the Convention and Regulation for brief information on various types of direct requests under the two instruments (for direct requests for Recognition or Recognition and Enforcement under the Convention, see Chapter 7, for direct requests for Recognition or Recognition and Declaration of Enforceability under the Regulation, see Chapter 8, for direct requests for enforcement of decisions made or recognised in the requested State, see Chapter 9, and for direct requests for Establishment or Modification, see Chapters 10 and 11, respectively).

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<sup>28</sup> That the most favourable legal aid provisions of Chapter V of the Regulation enshrined in Art. 46 will not apply to direct requests by maintenance creditors under the age of 21 (but rather only to applications made by way of Central Authorities) can be deduced by a reading of Arts. 55, 56(1) and 46(1) of the Regulation, and the Regulation’s Recital 36. However, Art. 47 of the Regulation, found in Chapter V, does refer to more limited legal aid rules which would also apply to direct requests.



## Chapter 2 - Explanation of terms: 2007 Convention

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

68. The specific terms used in the Convention are the result of four years of negotiations and discussion, and a number of these terms have also been employed in the Regulation, as negotiations on this latter instrument followed negotiations on the Convention. No official glossary for the Regulation existed at the time of drafting of this Handbook, and thus this Chapter only includes definitions of terms included in the Convention. However, a description of the terms utilised in the Convention may be useful in understanding some of the terminology employed in the Regulation as well.

69. 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. 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 the Convention should be interpreted in a broad and liberal way.<sup>29</sup>

70. 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).

71. 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.

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<sup>29</sup> See the discussion in the Explanatory Report of the Convention, paras 60–65.

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

### **Accession**

72. Accession is one of the processes that may be used by a State to become a Contracting State to the Convention.<sup>30</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 of the Convention.*

### **Administrative authority**

73. 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>31</sup>

74. 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 appealed or reviewed by a judicial authority in that State and the decisions must be of similar force and effect as a decision of a judicial authority on the same matter.

*See Article 19(1) and 19(3) of the Convention.*

### **Appearance**

75. 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 or recognition and enforcement of a decision.

*See Article 25 and Article 29 of the Convention.*

*Handbook reference – Chapter 7*

### **Applicant**

76. 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).

77. 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,

<sup>30</sup> Explanatory Report of the Convention, para. 690.

<sup>31</sup> Explanatory Report of the Convention, para. 432.

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.

78. An applicant can be a creditor, a debtor, or the legal representative of a child. For the purposes of some applications, a creditor includes a public body.

*See Articles 7, 10, 36 and 37 of the Convention.*

### **Applications and requests**

79. 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.

80. A direct request 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.

81. 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 of the Convention.*

*Handbook reference – Chapter 1*

### **Authentic instrument**

*See maintenance arrangement*

### **Central Authority**

82. 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>32</sup>

83. In the case of federal States, or States with autonomous units, there may be more than one Central Authority.<sup>33</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, and 8 of the Convention.*

<sup>32</sup> Explanatory Report of the Convention, para. 85.

<sup>33</sup> Explanatory Report of the Convention, para. 89.

### **Competent authority**

84. 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 of the Convention.*

### **Contracting State**

85. 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.

86. 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 includes 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>34</sup>

*See Articles 46 and 58 of the Convention.*

### **Convention**

87. 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**

88. Under Article 57 of the Convention, each Contracting State must submit to the Permanent Bureau of the Hague Conference, 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>35</sup>

89. The Country Profile recommended and published by the Hague Conference may be used by a Contracting State as a means of providing this information. The Country Profile will indicate any State-specific documents or requirements for applications.

90. 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.

<sup>34</sup> See the Explanatory Report of the Convention, para. 637.

<sup>35</sup> See the Explanatory Report of the Convention, para. 683.

91. 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) > under the Child Support / Maintenance section.

*See Article 57 of the Convention.*

### **Creditor**

92. 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>36</sup>

93. 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.

94. 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, recognition and enforcement, 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 of the Convention.*

### **Debtor**

95. 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.

96. 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 of the Convention.*

### **Decision**

97. 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.

98. 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

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<sup>36</sup> See the Explanatory Report of the Convention, para. 66.

determination of costs or expenses.<sup>37</sup>

99. For example, the term includes the type of decision that is 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, 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 of the Convention.*

### **Declaration**

100. 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. The Country Profile for a State sets out the Declarations made by that State and the Declarations made by a State are also set out on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under the Child Support / Maintenance Section.

*See Article 63 of the Convention.*

*Handbook reference – Chapter 3*

### **Declaration of Enforceability**

101. A declaration of enforceability is a mechanisms that may be used in some States to provide that a foreign decision has the same effect (within the limits set out in the domestic law) as a decision made in that State. 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) of the Convention.*

*Handbook reference – Chapters 7 and 8*

### **Establishment of a decision**

102. 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 of the Convention.*

*Handbook reference – Chapter 10*

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<sup>37</sup> See the Explanatory Report of the Convention, paras 434–437.

## **Establishment of parentage**

103. 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>38</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 of the Convention.*

*Handbook reference – Chapters 1 and 10*

## **Ex-officio review**

104. 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>39</sup> Neither of the parties is entitled to make submissions on the review.

105. 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.

106. 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) of the Convention.*

*Handbook reference – Chapters 7*

## **Garnishment**

107. 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 of the Convention.*

*Handbook reference – Chapter 12*

<sup>38</sup> See the Explanatory Report of the Convention, para. 174.

<sup>39</sup> See the Explanatory Report of the Convention, para. 500.

**Habitual residence**

108. The term habitual residence is not defined in the Convention.<sup>40</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) of the Convention.*

**Jurisdiction**

109. 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 of the Convention.*

**Legalisation**

110. 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>41</sup>

*See Article 41 of the Convention.*

**Lien**

111. 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 of the Convention.*

*Handbook reference – Chapter 12*

<sup>40</sup> See the Explanatory Report of the Convention, paras 63 and 444.

<sup>41</sup> See the Explanatory Report of the Convention, para. 614.



**Maintenance**

112. 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.

113. 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>42</sup>

*See Article 2 of the Convention.*

**Maintenance arrangement**

114. 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 or recognition and enforcement, the term decision includes a maintenance arrangement.<sup>43</sup>

115. 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.

116. 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, or a decision arising from a mediation process between the parents may be considered to be a maintenance arrangement and enforceable under the Convention if it meets these criteria.

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

*See Articles 3 and 30 of the Convention.*

*Handbook reference – Chapter 7*

**Maintenance decision**

*See Decision*

**Means test**

118. In some situations, the Convention allows a State to use a means test to determine whether an applicant is entitled to 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

<sup>42</sup> See the Explanatory Report of the Convention, para. 65.

<sup>43</sup> See the Explanatory Report of the Convention, para. 554.

pay for legal assistance.

119. A child-centred means test is permitted by Article 16 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 16 – 17 of the Convention.*

*Handbook reference – Chapter 3*

### **Merits test**

120. 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(2) and 17 a) of the Convention.*

*Handbook reference – Chapter 3*

### **Modification of a decision**

121. 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>44</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 of the Convention.*

*Handbook reference – Chapter 11*

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

122. The Hague Conference on Private International Law (the “Hague Conference”) 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.

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

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<sup>44</sup> See the Explanatory Report of the Convention, para. 264.

124. 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 of the Convention.*

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

125. 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>45</sup>

126. 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>46</sup>

*See Articles 38, 39 and 40 of the Convention.*

*Handbook reference – Chapter 3*

### **Protocol on the Law applicable to Maintenance Obligations**

127. The Protocol is an international instrument that contains general rules on applicable law to supplement the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and other forms of Family Maintenance*. Some States that are parties to the Convention may also be parties to the Protocol and will apply the Protocol in maintenance matters.

*Handbook Reference – Chapters 5, 10 and 11*

### **Provisional measures**

128. 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>47</sup>

*See Articles 6 and 7 of the Convention.*

*Handbook reference – Chapters 1 and 3*

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<sup>45</sup> See the Explanatory Report of the Convention, para. 605.

<sup>46</sup> See the Explanatory Report of the Convention, para. 608.

<sup>47</sup> See the Explanatory Report of the Convention, para. 176.

## Public body

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

130. 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 or 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>48</sup>

131. 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.

132. Article 6(3) of the Convention also 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.

*See Article 6(3) and Article 36 of the Convention.*

## Ratification

133. 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 of the Convention.*

## Recognition

134. **Recognition of a maintenance decision is the procedure used by a State** competent authority to accept the determination of rights and obligations concerning maintenance made by the authority in the State of origin, where the decision was made and it gives the force of law to that decision.<sup>49</sup> In most cases, an applicant will also apply to have the decision enforced so the application will be for both recognition and enforcement. However, an applicant may apply for recognition of the decision only. Under Article 26, an application for recognition will be subject to the same requirements as an application for recognition and enforcement, other than that there is no requirement that the decision be enforceable in the State of origin, only that it “has effect” in that State.

*See Articles 19-28 of the Convention*

<sup>48</sup> See the Explanatory Report of the Convention, para. 590.

<sup>49</sup> See the Explanatory Report of the Convention, para. 429.

## Recognition and enforcement

135. The recognition and enforcement of existing maintenance decisions is one of the key processes under the Convention. The purpose of recognition and enforcement is to allow a decision made in one State to be effective or to be able to be enforced in another Contracting State.<sup>50</sup> The recognition and enforcement process removes the need for a creditor to establish a new decision in the State where the decision is to be enforced and allows the requested State to enforce the existing decision.

*See Articles 19 – 28 of the Convention.*

*Handbook reference – Chapter 7*

## Requesting Central Authority and requested Central Authority

136. 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 of the Convention.*

## Requesting State and requested State

137. 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.<sup>51</sup>

*See Articles 10 and 12 of the Convention.*

## Reservation

138. 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. The Country Profile for a State will set out the reservations made by that State. The complete text of all reservations made by a State can also be found on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under the Child Support / Maintenance section.

*See Article 62 of the Convention.*

*Handbook reference – Chapter 3*

<sup>50</sup> See the Explanatory Report of the Convention, para. 490.

<sup>51</sup> The terms "Requested State" and "Requesting State" are not defined in the Convention or in the Explanatory Report. See Explanatory Report, para. 64. Article 9 of the Convention contains a definition of residence for the purpose of that Article only. See Explanatory Report, para. 228.

**Respondent**

139. 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 of the Convention.*

**Specific measures**

140. Specific Measures are certain duties of administrative co-operation that are listed under Article 7 and can be the subject of a request by one Central Authority to another Central Authority. The request will be made separately from an application for recognition, recognition and enforcement, 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 of the Convention.*

*Handbook reference – Chapters 1 and 3*

**State**

*See Contracting State*

**State of origin**

141. 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.

142. 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 of the Convention.*

**Statement of Enforceability**

143. This document is required in an application for recognition or recognition and enforcement under the Convention in order to establish that the decision is enforceable in the State where it was made (the State of origin). In some States, the statement of enforceability will be in the

form of a document from the competent authority that the decision has the “force of law” meaning that it can be enforced in that State. 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.<sup>52</sup>

*See Articles 23(2) and 25(1) b) of the Convention.*

*Handbook reference – Chapter 7*

### **Statement of proper notice**

144. This document is required in an application for recognition or recognition and enforcement under the Convention where the respondent (often the debtor) did not appear and was not represented in the proceedings in the State of origin. 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 or appeal the decision on both a factual and legal basis (“on the facts and the law”).

*See Article 25 of the Convention.*

*Handbook reference – Chapter 7*

### **Vulnerable person**

145. 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 under Article 2(3) by both the requesting and requested States to extend its application.

*See Article 2 of the Convention.*

*Handbook reference – Chapter 3*

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<sup>52</sup> In some States an “*attestation de la force de chose jugée*” may be used which provides that the decision has the force of law in that State.

## Chapter 3 - Matters of general application: 2007 Convention and 2009 Regulation

### I. Purpose of this Chapter

146. There are a number of common considerations and recurring tasks that will have to be completed with each incoming application, direct request or any request for specific measures under the Convention and the Regulation. The first and most important consideration is whether the application or request comes under the Convention *or* the Regulation, and thus issues of scope—substantive, geographic and temporal—of each of the two instruments must be addressed. Although the Convention and Regulation have many similarities, they are separate and autonomous legislative regimes, and will be applied separately to relevant cases, in accordance with their respective scope provisions, described in Part I of this Chapter.

147. Generally speaking, the Regulation will apply to cross-border maintenance cases among Member States of the European Union, while the Convention will apply to international cases involving a Member State of the European Union and a State outside of the European Union which is a Contracting State to the Convention. However, the Convention will only apply between Member States of the European Union and non-European Union Contracting States to the Convention after the European Union has become a Party to the Convention and the Convention has entered into force for the European Union.<sup>53</sup> It is anticipated that the European Union will become a Party to the Convention sometime in 2014 (see also Section II.C., below). Outside of the European Union, the Convention will apply between Contracting States to the Convention.

148. It should be noted that in Member States of the European Union the Regulation's jurisdiction rules and applicable law rules (in Member States bound by the 2007 Hague Protocol) will be applied universally for all cases falling within the Regulation's subject matter and temporal scope, *i.e.*, including cases from all non-European States. For more information on the jurisdiction rules of the Regulation and on the 2007 Hague Protocol on applicable law (which has been incorporated by reference into the Regulation in Art. 15), please see Chapter 4 and Chapter 5, respectively.

149. If the application or request does not come within the scope of the Convention or the Regulation, then the procedures set out in this Handbook do not apply. However, other international instruments dealing with the international recovery of maintenance may still apply (see Part I, Section I.B., below). Part I of Chapter 3 sets out the factors that will be used to determine whether an application or direct request falls under the scope of the Convention or the Regulation.

<sup>53</sup> Denmark is not participating in the conclusion of the Convention by the European Union (see *infra*, note 59).



150. Part II of Chapter 3 covers matters that are common to all procedures under the Convention and the Regulation – the rules respecting language of communication, the need for translation of documents and decisions, protection of personal information, the requirement for effective access to procedures, provisional and protective measures, and service and the taking of evidence abroad.

## **Part I – The scope of the 2007 Convention and the 2009 Regulation**

### **I. General scope matters common to the 2007 Convention and the 2009 Regulation**

#### **A. 2007 Convention and 2009 Regulation: no effect on family relationships**

151. It is important to bear in mind that the Convention, the Regulation and the Protocol (see Chapter 5 for more information on the 2007 Hague Protocol on applicable law) do not regulate or affect the underlying family, parentage or other relationship which may give rise to maintenance obligations. The existence and nature of relationships which may give rise to maintenance obligations will be determined by the law applicable under domestic law (including, where relevant, domestic rules of private international law) in proceedings which determine such relationships, or by the law applicable where such a relationship is established by operation of law.<sup>54</sup>

152. Article 22 of the Regulation states the following:

“The recognition and enforcement of a decision on maintenance under this Regulation shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision”.

153. While there is no Article in the Convention parallel to Article 22 of the Regulation, nothing in the Convention indicates a contrary approach. However, Article 2(4) of the Convention stipulates that the provisions of the Convention apply to children “regardless of the marital status of the parents”.

154. Both the Convention and the Regulation, however, provide for applications for establishment of maintenance which may include the establishment of parentage (Art. 10 c) of the Convention and Art. 56 c) of the Regulation) and place obligations on Central Authorities to provide

<sup>54</sup> However, see the Explanatory Report of the Protocol, *supra* note 5, at p. 10, with respect to occasions where certain States may choose to apply the Protocol to the question of the existence of family relationships arising as a preliminary matter in the course of proceedings which have as their main object the determination of a maintenance claim.

assistance in establishing parentage, when necessary (Art. 6 *h*) of the Convention and Art. 51 *h*) of the Regulation (see above, Chapter 1, Section I.B and III.B)).

## **B. Other international instruments or agreements concerning maintenance**

155. Competent authorities should be aware that if neither the Regulation nor Convention is applicable, other international instruments or agreements concerning the cross-border recovery of maintenance may apply. For example, the following international instruments addressing the cross-border recovery of maintenance have previously been concluded:

- The United Nations *Convention on the Recovery Abroad of Maintenance*, New York, 20 June 1956 (hereinafter the "UN 1956 Convention")<sup>55</sup>
- The Hague *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* (hereinafter the "1973 Convention")<sup>56</sup>
- The Hague *Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* (hereinafter the "1958 Convention")<sup>57</sup>

156. Competent authorities may consult the United Nations treaty database (available at < <http://treaties.un.org> >) for information on Contracting States to the UN 1956 Convention, and the Hague Conference website for information on the 1973 and 1958 Conventions (< [www.hcch.net](http://www.hcch.net) >, under "Conventions," then "Convention No 23" and "Convention No 9," respectively). The list of Transmitting and Receiving Agencies designated by Contracting States to the UN 1956 Convention is now only kept up-to-date on the website of the Hague Conference, < [www.hcch.net](http://www.hcch.net) >, under "Conventions," then "Convention No 38," and then "1956 New York Convention".

157. States may also have concluded other international, regional or bilateral treaties addressing the international recovery of maintenance, and national maintenance authorities should be consulted to ascertain the existence of such agreements.

<sup>55</sup> Romania is a Party to the UN 1956 Convention. Romania acceded to the 1956 New York Convention by Law No. 26/1991. Romania has designated the Ministry of Justice as transmitting authority and the Bucharest Bar Association as intermediary institution. The Romanian transmitting authority **appointed pursuant to Art. 2 of Law No. 26/1991 is the Ministry of Justice, Directorate for International Law and Judicial Cooperation**, 17 Apolodor Street, Sector 5 Bucharest, code 050741, Fax: + 4037 204 1079. Email: ddit@just.ro. The competent intermediary institution is the Bucharest Bar Association, 3-5 Dr. Răureanu Street, Sector 5, Bucharest.

<sup>56</sup> Romania is not a Party to the 1973 Convention.

<sup>57</sup> Romania is not a Party to the 1958 Convention.

## **II. Scope of the 2007 Convention**

### **A. Overview: Substantive Scope of the 2007 Convention**

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

159. The Convention, unlike the Regulation, allows Contracting States to the Convention, by declaration or reservation (Art. 2(2) and 2(3) of the Convention), to expand or limit its core scope provisions.

160. 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.

161. Article 2 is the starting point for determining the substantive scope of the Convention and whether Chapters II and III apply to 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 expanded or restricted by either a declaration by a Contracting State or a reservation by a Contracting State.

162. The declarations and reservations which are anticipated to be made by the European Union when it becomes a Party to the Convention are addressed in Section II.C., below.

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

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

#### **1. Child support**

164. The broadest application of the Convention is to child support. As a starting point, all chapters of the Convention apply 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.

165. 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

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

167. 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>58</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.

168. However, if the application involves only spousal support, the provisions of Chapter II and Chapter III do not apply to the application unless the State, by declaration, has extended the application of the entire Convention by declaration to spousal support. 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. These are called direct requests to a competent authority (see above, Chapter 1, Section III.C.). 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 direct requests 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.

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

## 3. Reservations and declarations

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

<sup>58</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 the Explanatory Report of the Convention, para. 47.

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. Reservations are provided for in Article 62 of the Convention.

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

171. 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.

#### b) Spousal maintenance

172. 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 for 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

173. 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 **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 of the Convention.

#### d) Maintenance arrangements

174. A Contracting State may 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. A State may also make a declaration that applications for recognition and enforcement of maintenance arrangements shall only be made through its Central Authority. See Articles 19(4) and 30(7) of the Convention.

A **maintenance arrangement** is defined in Article 3 of the Convention 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

175. 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.

176. 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 (Arts 2(2) and 62(4)).

177. Information is available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) >, under the Child Support / Maintenance section, indicating 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

178. 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.

179. 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.

180. Information concerning whether any declarations to extend the application of Convention have been made by a Contracting State is available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under the Child Support / Maintenance section.

## **6. Case examples**

### **Example 1**

181. 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?**

182. 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**

183. 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?**

184. 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**

185. 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?**

186. 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.

187. The diagram below (Figure 2) 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.

### ***C. Declarations and reservations of the European Union with respect to the substantive scope of the 2007 Convention***

188. Under Article 59 of the Convention, Regional Economic Integration Organisations ("REIOs"), such as the European Union, may become a Party to the Convention. It is anticipated that the European Union will become a Party to the Convention in 2014 (the European Union signed the Convention on 6 April 2011).

189. Information as to the status of the European Union and the Convention is available on the website of the Hague Conference < [www.hcch.net](http://www.hcch.net) >, under "Conventions" then "Convention No 38" then "Status table" or under the Child Support / Maintenance section. Information is set out below on the declarations and reservations to the Convention by the European Union which will apply once the Convention is applicable in the European Union.<sup>59</sup>

#### **1. Child support – age of the child**

190. The European Union will not make a reservation under the Convention limiting the application of the Convention to children under 18 years old, nor extending the application of the Convention to children over the age of 21 years (Art. 2(2)). Thus, the core scope of the Convention, covering maintenance for children up to the age of 21 years, will apply.

#### **2. Spousal maintenance**

191. The European Union will make a declaration to extend Chapters II and III of the Convention to applications involving spousal support (in accordance with Art. 2(3)). Effectively this means that the duties of the Central Authority, including making or responding to requests for specific measures, and the provisions concerning applications will apply to all spousal maintenance obligations and requests.

<sup>59</sup> See Council Decision no 2011/432/EU of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (published in the Official Journal L 192, 22/07/2011, p. 39-50).



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

192. The European Union will make a unilateral declaration that it will consider, within a number of years, extending the application of the Convention to other types of maintenance arising out of a family relationship (Art. 2(3)). Therefore the European Union could in the future extend the application of the Convention to maintenance which arises in situations of affinity or another family relationship, but will not make this declaration at the time of approval of the Convention.

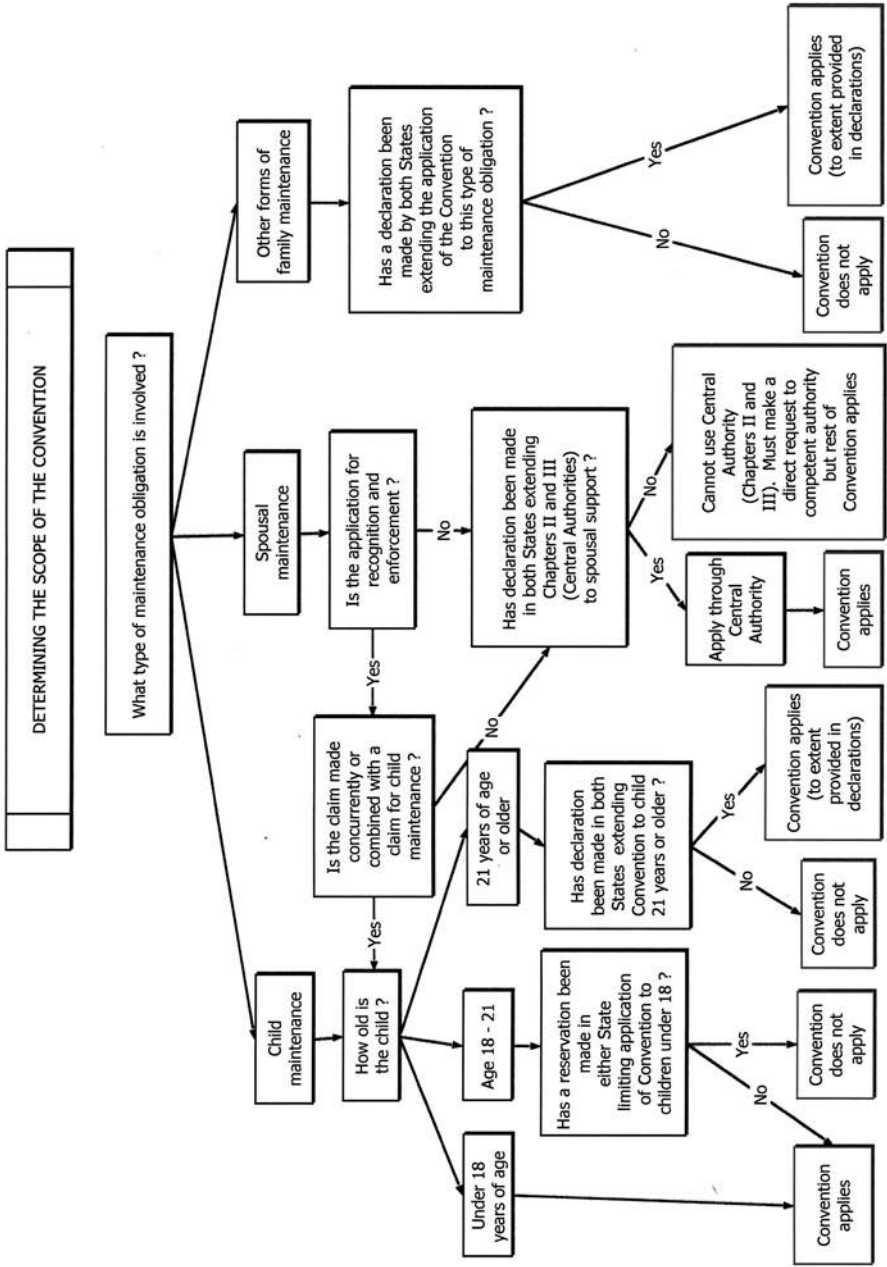


Figure 2: Determining whether an application falls within the substantive scope of the Convention

#### **4. Maintenance arrangements**

193. The European Union will not make a reservation under the Convention indicating that it will not recognise and enforce maintenance arrangements (Art. 30(8)). Nor will the European Union make a declaration under the Convention indicating that applications for the recognition and enforcement of maintenance arrangements should only be made through Central Authorities (Art. 30(7)).

#### ***D. Geographic and Temporal Scope of the 2007 Convention***

##### **1. General and commencement provisions**

194. The Convention will apply only among States which have become Contracting States to the Convention, on the first day of the month following the expiration of three months after the deposit of the State's instrument of ratification, acceptance or approval of the Convention (Art. 60(2) a)). A Status Table listing all Contracting States to the Convention, along with dates of entry into force of the Convention for those States, can be found on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >, under "Conventions" then "Convention No 38" or under the Child Support / Maintenance section.

##### **2. Transitional rules and co-ordination with other instruments**

195. Importantly, under Article 56(3) of the Convention, a decision or a maintenance arrangement in respect of payments of child support falling due before the entry into force of the Convention between two Contracting States, must be enforced if they concern maintenance obligations arising from a parent-child relationship towards a person under the age of 21. Contracting States are not bound, however, to enforce other types of maintenance obligations for which payments fall due before the entry into force of the Convention (but may still do so,<sup>60</sup> for example, under their internal law or other instruments or agreements).

196. Article 56(1) of the Convention provides that the Convention will apply to applications received by Central Authorities (including requests for specific measures under Art. 7) and direct requests for recognition and enforcement received by the competent authorities of the State addressed after the Convention has entered into force between the requesting and requested State.

197. Article 48 and Article 49 of the Convention provide for co-ordination between previous international instruments which address the cross-border recovery of maintenance. The Convention replaces the UN 1956 Convention, the 1973 Convention and the 1958 Convention among Contracting States,

<sup>60</sup> Recognising a decision which is beyond the scope *sensu stricto* of the Conventional obligation may be an efficient solution in some cases, for example, when a foreign decision for maintenance, if not recognised, would have to be referred to a national court in order to establish a new decision.

insofar as their scope of application between the co-Contracting States coincides with the scope of application of the Convention. However, Article 56(2) of the Convention provides an exception to this main rule. Namely, if a decision given in the State of origin before the entry into force of the Convention cannot be recognised or enforced under the Convention, but would have been recognised or enforced under either the 1973 Convention or the 1958 Convention, one of these latter Conventions will apply for that case (given that both States are Contracting States to the relevant Convention and it was in force at the time the decision was rendered).

198. The Convention does not affect other international instruments previously concluded which contain provisions on matters governed by the Convention (Art. 51(1)), does not affect the application of instruments of a Regional Economic Integration Organisation such as the European Union (Art. 51(4)), permits Contracting States to conclude agreements on matters covered by the Convention in order to improve its operation (Art. 51(2)), and does not prevent the application of an agreement, arrangement, international instrument or reciprocity arrangement in force that provides for more effective, broader or more beneficial provisions than those in the Convention (in accordance with the terms of Art. 52).

### **III. Scope of the 2009 Regulation**

#### **A. Substantive Scope of the 2009 Regulation**

199. The Regulation applies to all maintenance obligations arising from a family relationship, parentage, marriage or affinity (Art. 1). It is noted in Regulation Recital 11 that the term "maintenance obligation" should be interpreted autonomously for the purposes of the Regulation.<sup>61</sup> As the terms "maintenance obligation" and "family relationship" are not defined in the Regulation, the ultimate responsibility for the interpretation of these terms would fall to the Court of Justice of the European Union.

200. It is also clarified in Regulation Recital 21 that the Regulation's provisions do not determine the law applicable to the establishment of the family relationships upon which the maintenance obligations are based, which continues to be covered by the national law of Member States, including, where relevant, their rules of private international law<sup>62</sup> (see

<sup>61</sup> However, as the 2009 Regulation will modify Regulation (EC) No 44/2001 (the "Brussels I" Regulation) by replacing the provisions of that Regulation applicable to matters relating to maintenance obligations, regard should likely be given to case law which has addressed what might be substantively considered as a "maintenance obligation" under the Brussels I Regulation. For example, see ECJ, *Van den Boogaard v. Laumen*, 27<sup>th</sup> February 1997, Case C-220/95, ECR I-01147.

<sup>62</sup> Romanian domestic law pertaining to maintenance obligations is found in Law No 287/2009 concerning the Civil Code in Book II, Title V *The Maintenance Obligation* (Arts 513-534). According to Art. 516 *Subjects of the maintenance obligation*, the maintenance obligation exists between spouses, lineal descendants, brothers and sisters, as well as between other persons as specified by the law. Provisions concerning maintenance obligations between lineal descendants, as well as between brothers and sisters, are also applicable in the case of

also Part 1, Section I.A., above).

201. It should be noted that the Regulation includes under its scope “court settlements and authentic instruments” which are to be treated in the same way as decisions for the purposes of recognition and enforcement (see Art. 48).

202. No reservation or declaration by Member States with respect to the substantive scope of the Regulation is possible.

## **B. Geographic Scope of the Regulation**

203. The Regulation is directly applicable in participating Member States. All Member States of the European Union are participating in the Regulation.<sup>63</sup> However, Denmark will participate in the Regulation only in so far as its provisions amend Regulation (EC) No 44/2001 (the “Brussels I Regulation”). This means that the provisions of the 2009 Regulation on

adoption.

According to Art. 517, *Maintenance for the child by the spouse of the child’s parent*, the spouse that contributed to the maintenance of the child of the other spouse is obliged to provide maintenance to the child as long as the child is a minor, but only if the child’s natural parents are deceased, missing or in need. In turn, the child can be obliged to provide maintenance to the person that maintained him for a period of 10 years.

According to Art. 518, *Maintenance obligation of the heirs*, the heirs of the person that was obliged to provide maintenance to a minor child or that provided maintenance without being legally obliged to do so, are bound, depending on the value of the inherited goods, to continue the maintenance if the parents of the minor child are deceased, missing or in need, but only for as long as the maintained child is a minor. In cases where there are more heirs, the obligation is shared by all heirs (total liability), each contributing to the maintenance of the minor child on a pro rata basis, calculated taking into account the value of the goods inherited.

According to Art. 519, *Maintenance payment order*, maintenance is owed with the following priority: a) spouses and ex-spouses owe each other maintenance before other parties; b) a descendant is owed maintenance before an ascendant and if there are more descendants or ascendants, the closer comes before the more remote; c) brothers and sisters owe each other maintenance after the parents, but before grandparents.

According to Art. 520, *Maintenance in case of adoption termination*, after termination of adoption the adoptee can request maintenance only from his or her natural relatives or, as the case may be, from a spouse.

According to Art. 521, *Plurality of debtors*, in a case where more persons are obliged to provide maintenance to the same person, they will contribute to the provision of maintenance depending on their means. If a parent is entitled to maintenance from more than one child, the parent can, in cases of emergency, institute proceedings against one child only. The child who provided maintenance can recover all debtors’ parts from the other obliged parties.

According to Art. 522, *Subsidiary obligation*, in case the first obliged party lacks sufficient means to cover the needs of the party requesting maintenance, a guardianship court can oblige other parties to which the maintenance obligation is also applicable to fulfil the maintenance need, in the order specified in Art. 519. According to Art. 523, *Divisibility of the maintenance*, if the obliged party cannot simultaneously provide maintenance to all entitled parties, the guardianship court, considering the needs of all persons, can decide either to have maintenance provided only to one of the parties, or to have maintenance divided among several or all of the parties entitled to request it. In this case the court also decides the way in which the maintenance is paid among the receiving parties.

<sup>63</sup> The United Kingdom did not participate in the adoption of the Regulation but subsequently expressed its intention to accept the Regulation by a letter of 15 January 2009 to the Council and Commission. The Commission accepted the participation of the United Kingdom in the Regulation on 8 June 2009 (see OJ L 149/73, 12.6.2009). Denmark by a letter of 14 January 2009 notified the Commission of its decision to implement the Regulation, in a limited fashion (see OJ L 149/80 12.6.2009).

maintenance will be applied to relations between other Member States and Denmark with the exception of the provisions in Chapters III (Applicable Law) and VII (Co-operation between Central Authorities).<sup>64</sup>

204. It should be noted that with respect to the applicable law regime under the Regulation (Chapter III), the United Kingdom, alongside Denmark, will also not be bound by the 2007 Hague Protocol (for more information on the Protocol, see Chapter 5). As a consequence decisions given in these two countries will be treated differently for the purposes of recognition and enforcement (see Chapter 8).

205. It should also be kept in mind that the jurisdiction rules of Chapter II (applicable in all Member States) and the applicable law rules of the 2007 Hague Protocol in Chapter III (applicable in all Member States save the United Kingdom and Denmark) have an *erga omnes* character and thus competent authorities will apply these rules universally to *all* international cases which fall within the scope of the Regulation, not just to cases connected to or from other Member States of the European Union.

### **C. Temporal Scope of the Regulation**

#### **1. Commencement and transitional provisions**

206. The Regulation is applicable in the European Union as of 18 June 2011.<sup>65</sup>

207. Article 75(1) of the Regulation specifies that the Regulation will apply “only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established” after the date of application of the Regulation.

208. However, Section 2 and 3 of Chapter IV of the Regulation on Recognition, Enforceability and Enforcement of Decisions will apply to decisions given in the Member States before the date of application of the Regulation where recognition and declaration of enforceability are requested as from the date of application of the Regulation, and “to decisions given as from the date of application of the Regulation following proceedings begun before that date”. Such decisions must “fall with the scope of Regulation (EC) No 44/2001 [the “Brussels I Regulation”] for the purposes of recognition and enforcement” (Art. 75(2)).<sup>66</sup> The Regulation also

<sup>64</sup> *Ibid.* Additionally, the provisions of Art. 2 and Chapter IX of the Regulation will be applicable in Denmark only to the extent that they relate to jurisdiction, recognition, enforceability and enforcement of judgments, and access to justice.

<sup>65</sup> However Arts 2(2), 47(3), 71, 72, and 73, dealing primarily with information requirements under the Regulation to be provided by Member States, apply from 18 September 2010 (Art. 76).

<sup>66</sup> See *Corrigendum to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* (OJ L 131/26, 18.5.2011) and *Corrigendum to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* (OJ L 8/19, 12.1.2013).

provides that the Brussels I Regulation will continue to apply to procedures for recognition and enforcement underway on the date of application of the 2009 Regulation. These transitional provisions concerning the recognition and enforcement of decisions apply, *mutatis mutandis*, to court settlements approved or concluded or to authentic instruments established in Member States.

209. Regarding decisions given in other Member States where the Brussels I Regulation is applicable, competent authorities should bear in mind the date of entry into force of the Brussels I Regulation (1 March 2002) for Member States of the European Union at that date participating in that Regulation (Austria, Belgium, Germany, Greece, Ireland, Finland, France, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom). For a number of other States, the Brussels I Regulation would have been applicable as of 1 May 2004 (for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia) and as of 1 January 2007 (for Romania and Bulgaria).

210. The Regulation provides that its Chapter VII on co-operation between Central Authorities will apply to requests and applications received by the Central Authority as from the date of application of the Regulation (Art. 75(3)).

## **2. Co-ordination with other instruments**

211. Articles 68 (Relations with other Community instruments) and 69 (Relations with existing international conventions and agreements) of the Regulation address co-ordination of the Regulation with other existing international instruments.

212. Article 68(1) provides that the Regulation modifies Regulation (EC) No 44/2001 (the "Brussels I Regulation"), replacing its provisions with respect to matters concerning maintenance obligations, subject to transitional provisions of Article 75(2) of the Regulation (described immediately above, under Section III.C.1).

213. Articles 68(2) to (4) state, respectively, that the Regulation: 1) replaces, in matters of maintenance obligations, Regulation (EC) No 805/2004 (*Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims*), except with regard to European Enforcement Orders on maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol (see also Chapter 8); 2) shall be without prejudice to application of Directive 2003/8/EC (*Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*), subject to the Regulation's Chapter V on Access to Justice (see Part II of this Chapter, Section VII, below); and 3) will be without prejudice to *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995*

*on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (see Part II of this Chapter, Section VI, below).

214. Article 69(1) provides that the Regulation shall not affect the application of bilateral or multilateral conventions or agreements to which one or more Member States are Party at the time of adoption of the Regulation (without prejudice to the obligations of Member States under Art. 307 of the EC Treaty, regarding the priority of pre-existing treaties of EC Member States with third countries). Article 69(2) provides that, in relations between Member States, the Regulation shall take precedence over other instruments Member States are Party to in the matters governed by the Regulation.

215. Finally, Article 69(3) provides an exception to Article 69(2), and specifies that the Regulation shall not preclude the application of the Convention of 23 March 1962 between Sweden, Denmark, Finland, Iceland and Norway on the recovery of maintenance in Member States which are Party to this Convention, as it provides for a number of more favourable conditions for the cross-border recovery of maintenance. Defendant rights established by the Regulation (Arts 19 and 21), however, must be respected in the application of this Convention.

#### **IV. Other factors governing Convention and Regulation applicability**

216. There are a number of other factors that might be taken into consideration and may have an impact upon the way the Convention or the Regulation applies in a particular situation. These include:

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

##### **1. Do the parties reside in Contracting States or Member States?**

217. In order for the Convention or the Regulation to apply, the applicant (the person making the application or requesting assistance under the Convention or Regulation) must reside in a Contracting State to the Convention or in a European Union Member State where the Regulation is applicable.<sup>67</sup>

218. If the applicant resides in a Contracting State or Member State but the respondent (the person who will be responding to the application) does not

<sup>67</sup> Subject to the attenuated application of the Regulation in Denmark. See para. 203, above.



live in a Contracting State or Member State or, in the case of a respondent who is a debtor, does not have assets or income in a Contracting State or Member State, the applicant will not be able to use the Convention or the Regulation to recognise, enforce, establish or modify a maintenance decision.

219. If the applicant resides in a non-Contracting State or non-Member State but the respondent / debtor resides or has assets in a Contracting State or Member State, a Central Authority in the applicant's State will not be involved, but the applicant can make a direct request to a competent authority in the respondent's State for assistance.<sup>68</sup>

220. You can find out if a State is a Contracting State to the Convention by going to the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under the Child Support / Maintenance section.

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

221. The applicant for a remedy under the Convention or the Regulation 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.

### Why the applicant is important

222. It is important to identify the applicant, because Article 10 of the Convention and Article 56 of the Regulation set out who is entitled to bring each type of application.

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

- application for recognition or recognition and enforcement / declaration of enforceability of a decision,
- application for enforcement of a decision made or recognised 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,
- application for 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.*

<sup>68</sup> Remember that the rules and procedures for the cases that a Competent Authority accepts directly will be determined in general by the law in force domestically. 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 direct request.

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

- Application for recognition of a decision in order to limit or suspend enforcement of a previous decision, or
- Application for 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.*

225. A **public body** can only bring the following applications:

- Application for enforcement of a decision made or recognised in the requested State,
- Application for recognition or recognition and enforcement / declaration of enforceability of a decision made elsewhere, or
- under the Convention only, application for establishment of a decision only if an existing decision cannot be recognised because of a reservation under Article 20(2) (the Regulation does not allow for such reservations).

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

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

227. In addition, there are limitations under the Convention and the Regulation relating to the extent of legal assistance or legal aid that must be provided to a creditor or debtor in any application. See Part II, Section VII of this Chapter which outlines the requirement to provide legal assistance / legal aid.

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

228. 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, or an order or decision of an administrative authority, tribunal or ministry, if that decision meets the criteria set out in Article 19 of the Convention

and Article 2(1)(1) of the Regulation. A “maintenance arrangement” and an “authentic instrument”, as defined in the Convention (Art. 3 e)) and Regulation (Art. 2(1)(3)), respectively, can be recognised and enforced in a State if it is enforceable in the State where it was made. The Regulation also contains a definition of a “court settlement” (Art. 2(1)(2)).

229. Under the Convention, 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 (see Art. 30 of the Convention).

230. The Regulation, in contrast, stipulates that court settlements and authentic instruments shall be recognised and enforceable in other Member States (if enforceable in the Member State of origin) in the same way as decisions under the Regulation, and that the Regulation’s provisions will apply “as necessary” to court settlements and authentic instruments (Art. 48).

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

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

232. The place where the maintenance decision was made is important in order to determine whether the decision needs to be recognised or declared enforceable or not before it can be enforced (see Chapters 7 and 8 for information on the recognition and enforcement procedures under the Convention and the Regulation). 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.

233. In applications for recognition or recognition and enforcement / declaration of enforceability, the maintenance decision must have been made in a Contracting State to the Convention<sup>69</sup> or in a Member State where the Regulation is applicable.

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

234. In addition to considering whether the applicant and respondent in any application reside in Contracting States or Member States, determining the habitual residence of the creditor is an important consideration in applications for recognition or recognition and enforcement / declaration of enforceability, and in modification applications brought by debtors. This is because there are special provisions relating to jurisdiction for and 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.

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<sup>69</sup> See Explanatory Report of the Convention, para. 240.

235. The term “habitual residence” is not defined in the Convention or in the Regulation 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>70</sup>

236. If the creditor is habitually resident in the State where the decision was made, jurisdiction for modification in another State may not be taken under Article 8 of the Regulation or Article 18 of the Convention, and the recognition of a modification decision made at the request of a debtor in such a case may be refused unless the exceptions found in Article 18 of the Convention or Article 8 of the Regulation apply. This is covered in greater detail in Chapters 4 and 11 of the Handbook.

## **Part II — Matters common to applications and requests under the 2007 Convention and the 2009 Regulation**

237. This Part deals with a number of issues that are common to applications, direct requests and requests for specific measures under either the Convention or the Regulation. Competent authorities must first verify which instrument will apply to a given case before referring to the information pertinent to applications, direct requests or requests for specific measures under either instrument described in this Chapter (see detailed discussion in Part I, above, of scope and application issues of the Convention and Regulation).

238. Given the international nature of the operation of the Convention and Regulation, it is important that applications and communications follow the rules set out in the Convention or Regulation concerning the language of communication and any requirements for translation of documents. These are set out in Article 44 and Article 45 of the Convention and principally in Articles 59 and Article 66 of the Regulation, as well as in Articles 20, 28, 29 and 40.

### **I. Language under the 2007 Convention**

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

239. Any application made under the Convention, and the documents accompanying the application (including the decision) are to be in their original language. A translation of the application (and related documents) into an official language<sup>71</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.

<sup>70</sup> See the Explanatory Report of the Convention, paras 63 and 444.

<sup>71</sup> Where a State has more than one official language, and not all parts of its territory use all of the official languages, it is important to confirm what language is required in the territory where the application will be sent (Art. 44(2)).

240. 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.<sup>72</sup> Where there are territorial units in a State (e.g. provinces or states) and there is more than one official language, or where a State has several official languages that may be used in different parts of its territory. The Contracting State may also make a declaration specifying which language is to be used for any specific territorial unit.

241. 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. (Recommended forms for the Convention are available on the website of the Hague Conference < [www.hcch.net](http://www.hcch.net) >, under the Child Support / Maintenance section.)

### **B. Translation exceptions**

242. 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. For example, the translation services available in the requesting State may not provide translation into the language of 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>73</sup>

243. 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.

244. 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.

<sup>72</sup> Romania will not make such a declaration, specifying that it accepts languages other than Romanian. Romania will accept only the Romanian language for application forms and supporting documents enclosed in the application, pursuant to Arts 17 and 18, in conjunction with Art. 2 of Law No 36/2012. Romania will not make a reservation under Arts 44(3) and 62 of the 2007 Hague Convention, meaning that it does not oppose the use of English and French, but only for communications (other than application forms for maintenance and for specific measures, excerpts of judgments, judicial decisions, court settlements and authentic instruments, as well as necessary supporting documents) between Central Authorities in the European Union or with international authorities. Romania, through the Ministry of Justice, accepts, pursuant to Art. 2 of Law No. 36/2012, the use of English and French as well as Romanian, as mentioned, respectively, at Art. 59 of Regulation No. 4/2009 and at Art. 44 of the 2007 Hague Convention.

<sup>73</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).

245. The handling of the above exceptions to the main Convention translation rule would in general be handled by the Central Authority of the requested State, and thus judges or other competent authorities would normally not be involved with this step.

## **II. Language under the 2009 Regulation**

### **A. *Regulation general requirements for language of applications and documents (Arts 59 and 66)***

246. The Regulation (Art. 59(1)) provides that requests or applications must be completed by the requesting authority in the official language of the requested State, or an official language of a relevant sub-unit of that State where the requested Central Authority is located, or into another official European Union language that the requested Member State indicates is acceptable, unless the latter chooses to provide translation.<sup>74</sup>

247. Article 59(2) of the Regulation specifies that supporting documents shall *not* be translated, unless they are necessary in order to provide the assistance requested. This provision also states that it is without prejudice to the more detailed Regulation translation or transliteration requirements (discussed below), that may be required for proceedings, found in Article 20 of the Regulation (Documents for the purpose of enforcement), Article 28 (Procedure, regarding applications for declarations of enforceability), and Article 40 (Invoking a recognized decision).

248. Article 66 of the Regulation is a general supplementary rule on translation requirements, specifying that the court seised may require parties to provide a translation of supporting documents which are not in the language of proceedings only “if it deems a translation necessary in order to give a decision or to respect that rights of defence”.<sup>75</sup>

### **B. *Regulation translation requirements with respect to certain requests and applications***

249. The Regulation has several special provisions on the transliteration or translation of documents with respect to certain requests and applications, namely, in connection with documents for the purposes of enforcement (Art. 20), Applications for declarations of enforceability (Art. 28), Non-production of the extract (Art. 29), and Invoking a recognized decision (Art. 40). Under Article 20(1) *d*), Article 28(2), and Article 40(3), it is provided that “where necessary [...] a transliteration or a translation of the content” of the relevant form Annexed to the Regulation, into the official language of the requested Member State / court proceedings (or other languages that have been indicated as acceptable), will be provided to the relevant competent authority. Articles 20(2) and 28(2) further provide

<sup>74</sup> Romania has not indicated that it will accept languages other than Romanian. See *supra*, note 72.

<sup>75</sup> This Article is “without prejudice” to Arts 20, 28 and 40 on requirements for specific applications and requests.

that the competent authorities in the requested State “may not” require a translation of the decision, but a translation may be required if the application or request is challenged or appealed. Article 29(2) allows a competent authority to request translation of relevant documents, if it so requires. Finally, it is stipulated that any translation done under Articles 20, 28, 29, and 40 should be done by “a person qualified to do translations in one of the Member States”.

### **III. Legalisation under the 2007 Convention and 2009 Regulation**

250. In keeping with other Hague Conventions, Article 41 of the 2007 Convention provides that no legalisation or similar formalities may be required under the Convention. This Article is exactly mirrored in Article 65 of the Regulation. 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 or European Union Member 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.

### **IV. Power of attorney under the 2007 Convention and 2009 Regulation**

251. Article 42 of the Convention and Article 52 of the Regulation provide that a power of attorney can only be requested from an applicant in very limited circumstances. A power of attorney may be requested in a situation where the Central Authority or other 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>76</sup> Under the Convention, the Country Profile will indicate whether a Power of Attorney is required by the Requested State.<sup>77</sup>

<sup>76</sup> See the Explanatory Report of the Convention, para. 617.

<sup>77</sup> In Romania the Central Authority does not represent and assist the creditor before the court. The creditor is represented by a lawyer, including at the enforcement stage. After receiving maintenance applications, requests for specific measures and necessary supporting documents, and subsequent to performing the preliminary check, the Ministry of Justice will send the application or request for processing, according to the type of application or request, to the authority or institution that holds the personal data, the competent territorial bar, the Chamber of Judicial Enforcement Officers or to the competent court of law, as appropriate.

## **V. Signatures and certified copies of documents under the 2007 Convention and 2009 Regulation**

### **A. The 2007 Convention**

252. 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 (Arts 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."

253. 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. (Country Profiles of Contracting States are available on the website of the Hague Conference, < [www.hcch.net](http://www.hcch.net) >, under the Child Support / Maintenance section.)

### **B. The 2009 Regulation**

254. Under the Regulation an application form must be signed by either the applicant or the person or authority authorised in the requesting State to complete the application form on the applicant's behalf. The mandatory use of application forms Annexed to the Regulation is stipulated under relevant Articles of the Regulation (e.g., Arts 57, 20, 28, 40 and 48). For the Regulation applications which require an extract from a decision made in the requesting State and a copy of the decision, the extract (using the appropriate Annexed form) must be issued and signed by the court of origin and the copy of the decision attached must satisfy "the conditions necessary to establish its authenticity".

## **VI. Protection of personal and confidential information under the 2007 Convention and 2009 Regulation**

### **A. The 2007 Convention (Arts 38-40)**

255. 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, as this 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>78</sup>

256. 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.

257. 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 (Art. 40(1)). The person could be a child, the applicant, or respondent, or any other person. The Convention is not limited in this respect.

258. Where a Central Authority makes a determination that the disclosure or confirmation of the information could 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. The requested Central Authority is not bound by the determination of risk made by the requesting Central Authority. However the requested Central Authority is required to make a determination as to whether the disclosure could jeopardise the health, safety or liberty of a person, and under Article 40(2) the determination made by the requesting State shall be taken into account by the requested Central Authority. The way that the requested Central Authority proceeds in this situation will depend upon what is required in order to process the application, and to meet the State's obligations under the Convention (Art. 40). If the requesting Central Authority is concerned about the release of confidential information about the applicant, creditor or other person, a recommended practice is to use the address of the Central or competent authority in the requesting State, such that the creditor's or applicant's address is "in care of" that address.<sup>79</sup>

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

260. 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 part of the form. In this way, the application, 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

<sup>78</sup> See the Explanatory Report of the Convention, para. 605.

<sup>79</sup> See the Explanatory Report of the Convention, 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.

to the applicant, creditor or other person.

261. In addition, any authority, including competent or judicial authorities in the requested State that processes information under Convention procedures must follow its own internal laws concerning confidentiality of the information (Art. 39). Therefore, all transmission of information must also comply with any internal requirements set out in law in force domestically, such as the obtaining of consent to the release of information, or any restrictions on disclosure.<sup>80</sup>

### **B. The 2009 Regulation (Arts 61-63 and Art. 57(3))**

262. Article 68(4) of the Regulation states that the application of the Regulation will be “without prejudice” to *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*. Recitals 34 and 35 of the Regulation also speak to general data protection under the Regulation, with the former Recital confirming that Directive 95/46/EC, as transposed into the national law of the Member States, should be complied with.

263. The Regulation provisions pertaining to personal data and information privacy issues, Articles 61 to 63, specify limits and processes on the sharing and transfer of personal information of creditors and debtors, within Member States (*i.e.*, between Central Authorities and public authorities, administrations, other legal persons who may be in possession of personal data, competent courts and other authorities responsible for service of documents or the enforcement of a decision) and between requesting and requested Central Authorities under the Regulation.

264. Article 61 covers access to information for Central Authorities, and how Central Authorities may appropriately access and transmit information concerning the address of a debtor or creditor, the debtor’s income, the identification of the debtor’s employer and / or of the debtor’s bank account(s) and the debtor’s assets. It is specified that such information sought must be “adequate, relevant and not excessive,” and the information that the Central Authority may seek varies according to type of application (Art. 61(2)). For the purposes of obtaining or modifying a decision, only the address of the debtor or creditor may be sought. For the purposes of recognition or enforcement of a decision, information on a debtor’s assets

<sup>80</sup> Under Romanian domestic law according to Arts 5, 7 and 8 of Law No. 677/2001 on the protection of individuals in the processing of personal data and the free movement of such data, any personal data processing may be carried out only if the data subject has given his or her express and unequivocal consent for that processing. Exceptions are made when the processing is necessary in order to ascertain, assert or defend a right in a court of law or the processing is expressly stated by a legal provision. The data subject’s consent is not required when: the processing is required in order to fulfil a legal obligation of the data controller; when the processing is required in order to accomplish some measures of public interest or the exercise of official public authority prerogatives of the data controller or of the third party to whom the data are disclosed; when the processing is necessary in order to accomplish a legitimate interest of the data controller or of the third party to whom the data are disclosed, on the condition that this interest does not prejudice the interests or the fundamental rights and freedoms of the data subject.

can only be requested if information obtained on the debtor's income, employer or bank account(s) has proven insufficient.

265. Article 62 of the Regulation provides that Central Authorities will transmit information referred to in Article 61 to the appropriate national competent authorities, and that the authority or court receiving this information may use it "only to facilitate the recovery of maintenance claims". Article 62(3) provides for a general limitation to the length of time that an authority may store such information, namely, "only for the time necessary to fulfil the purposes for which it was transmitted". Any authority processing the information must ensure its confidentiality in accordance with its national law (Art. 62(4)).<sup>81</sup>

266. Notification of the data subject (Art. 63) must be in accordance with national law.<sup>82</sup> Article 63(2) of the Regulation provides an exception to data subject notification, which may be deferred for 90 days from the receipt of information by the requested Central Authority if notification may prejudice effective recovery of the maintenance claim.

267. Finally, Article 57(3) of the Regulation provides for the replacement of an applicant's personal address with another address in cases of family violence, but only "if the national law of the requested Member State does not require the applicant to supply his or her personal address for the purposes of proceedings to be brought".<sup>83</sup>

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<sup>81</sup> Under Romanian domestic law any person who acts under the authority of the data controller or of the data processor who has access to personal data, may process the data only in accordance with the data controller's specific instructions, except when the above-mentioned person's actions are based on a legal obligation.

<sup>82</sup> Under Romanian domestic law when the data are not obtained directly from the data subject, it is the data controller's obligation, at the moment of collecting data or at least before the first disclosure takes place, if he or she has the intention to disclose the data to a third party, to provide the data subject with the following minimum information, unless the data subject already possesses that information: a) the identity of the data controller and, if required, of the data controller's representative; b) the purpose of the data processing; c) additional information, such as: the categories of data, the recipients, or the categories of recipients of the data, the existence of the data subject's rights stated by the law, notably the right of access, intervention and objection as well as the terms by which they may be asserted; d) any other information which may be expressly requested by the supervisory authority, considering the specific context of the processing. The transfer to another State of personal data that are subject to processing or are destined to be processed after being transferred may take place only if Romanian law is not infringed and the State of destination ensures an adequate level of protection. The appreciation of the level of protection and the authorization of the transfer of data to a State whose legislation does not ensure an adequate level of protection do not apply when the data transfer is based on a special law or on an international agreement ratified by Romania, notably if the transfer is done for the purpose of prevention, investigation or repression of a criminal offence. The data transfer is always allowed when the data subject has explicitly given his or her consent for the transfer and when it is necessary for the accomplishment of a major public interest, such as national defence, public order or national safety, carrying out a criminal trial or ascertaining, exercising or defending a right in court, on the condition that the data is processed solely in relation to this purpose, and only for as long as it is required.

<sup>83</sup> Under Romanian domestic law a party's representative may be summoned in his or her place (with the representative appointed *ex officio* or chosen by the party), or a party may be summoned at the domicile chosen for the service of documents.

## **VII. Effective access to procedures and legal assistance under the 2007 Convention and the 2009 Regulation**

### **A. Overview**

#### **1. Effective access to procedures / access to justice under the 2007 Convention and the 2009 Regulation**

268. One of the most important principles underlying both the Convention and the Regulation 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>84</sup> It should be noted that the Regulation uses slightly different terminology than the Convention to refer to “effective access to procedures,” namely, the terminology “effective access to justice,” referencing, however, essentially the same principles enshrined in both instruments (the terms are used interchangeably in this Section).

269. Articles 14, 15, 16, 17 and 43 of the Convention and Articles 43, 44, 45, 46, 47 and 67 of the Regulation deal with the obligation of the requested State to provide effective access to procedures, including the provision of cost-free legal assistance / legal aid in certain circumstances, and the ability to recover costs from an unsuccessful party in certain circumstances (Art. 43 of the Convention and Arts 43 and 67 of the Regulation). This Section of the Handbook summarises these provisions.

270. The general obligation to provide applicants with effective access to procedures, including in enforcement and appeal procedures, is enshrined in Article 14(1) of the Convention and Article 44(1) of the Regulation. Under the Convention, applicants include creditors, debtors and public bodies (when acting in place of a creditor for the purpose of applications for recognition and recognition and enforcement), who are making applications through a Central Authority. Under the Regulation, it is provided that all “parties who are involved in a dispute covered by this Regulation” shall have effective access to justice. The Regulation adds the further specification, unlike the Convention, that effective access to justice shall be provided to “any applicant who is resident” in the requesting State.

271. Direct requests to competent authorities are principally covered by Article 17 b) of the Convention and Article 47 of the Regulation. States may apply a means and merits test for the provision of legal assistance / legal aid and there is a qualified requirement to provide legal assistance / legal aid in any recognition, enforceability and enforcement proceedings, in particular when the applicant has benefited from legal assistance / legal aid or free proceedings in the State of origin. Article 14(5) of the Convention and Article 44(5) of the Regulation also apply to direct requests.

<sup>84</sup> See the Explanatory Report of the Convention, para. 357.

## 2. Legal assistance / legal aid

272. The type of effective access that must be provided will include “legal assistance” (the terminology used under the Convention) or “legal aid” (the terminology used under the Regulation) 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 of the Convention and Article 46 of the Regulation provide that **free legal assistance / legal aid shall be provided to child support creditors (for maintenance owed to persons under the age of 21) who make applications through Central Authorities** in most situations.<sup>85</sup>

273. The obligation to provide free legal assistance / legal aid 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 / legal aid, and the Central Authority provides the necessary services free of charge.

Article 3 of the **Convention** 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”.

Article 45 of the **Regulation** defines **legal aid** as “the assistance necessary to enable parties to know and assert their rights and to ensure that their applications, lodged through the Central Authorities or directly with the competent authorities, are fully and effectively dealt with”. It covers, as necessary, the following:

- “(a) pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings;
- (b) legal assistance in bringing a case before an authority or a court and representation in court;
- (c) exemption from or assistance with the costs of proceedings and the fees to persons mandated to perform acts during the proceedings;
- (d) in Member States in which an unsuccessful party is liable for the costs of the opposing party, if the recipient of legal aid loses the case, the costs incurred by the opposing party, if such costs would have been covered had the recipient been habitually resident in the Member State of the court seised;

<sup>85</sup> See also Recital 36 of the Regulation.

(e) interpretation;

(f) translation of the documents required by the court or by the competent authority and presented by the recipient of legal aid which are necessary for the resolution of the case;

(g) travel costs to be borne by the recipient of legal aid where the physical presence of the persons concerned with the presentation of the recipient's case is required in court by the law or by the court of the Member State concerned and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means."

274. 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 / legal aid**, and these procedures will be equally available to applicants under the Convention or Regulation. 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 Authority 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 / legal aid.<sup>86</sup>

<sup>86</sup> In Romania the exequatur procedure is simplified as stipulated by the Regulation and by the Convention, in the sense that, in the first instance, the tribunal verifies only the existence of the supporting documents and the formalities, without examination of the grounds for the refusal of recognition or the basis for recognition. Despite this, in Romania, the procedure for granting legal aid for the exequatur procedure is the same and is not simplified. Concerning the procedure for granting legal aid, the following information may be mentioned. According to Arts 13, 14, 16 and 17 of Law No 36/2012, the following categories of creditors receive free legal aid, in the form provided and according to Arts 6 and 8<sup>1</sup> of the OUG No 51/2008, for applications made through the Central Authority, under Art. 46 of the Regulation (EC) No. 4/2009 and Art. 15 of the 2007 Hague Convention: a) creditors of maintenance obligations who have not reached the age of 18 or who are under the age of 21 and are continuing their education; b) creditors of maintenance obligations who are vulnerable persons, as defined in Art. 3(f) of the 2007 Hague Convention. The debtors and other creditors of maintenance obligations receive legal aid under the conditions provided in the OUG No. 51/2008, while observing the principle of continuity and equal treatment that they enjoy in their State of origin.

After performing the preliminary check, the Ministry of Justice directly sends to the competent territorial bar applications and requests received from abroad, together with necessary supporting documents:

a) applications for recovery of maintenance by establishment of a court decision or for modification of the amount of maintenance established by a court decision, made under: Arts 56 and 57 of Regulation (EC) No. 4/2009, according to Annex VII thereto; Art. 10 of the 2007 Hague Convention, according to the model forms recommended by the Hague Conference on Private International Law, provided in Annexes C and D;

b) requests for specific measures for the establishment of parentage when this is necessary in order to recover maintenance, made under: Art. 51(2)(h) of Regulation (EC) No. 4/2009, according to the model form provided in Annex V thereto, under 3.1.4.; Art. 6(2)(h) of the 2007 Hague Convention, according to the model form recommended by the Hague Conference on Private International Law, provided in Annex C;

c) requests for specific measures concerning provisional or interim measures, made under: Art. 51(2)(i) of Regulation (EC) No. 4/2009, according to Annex V thereto, under

275. In the event that simplified procedures are not available and legal assistance / legal aid is required, there are a number of provisions under the Convention and Regulation that define the circumstances under which it must be provided free of charge to applicants. Such legal assistance / legal aid entitlements must not be less than those available in equivalent domestic cases (Art. 14(4) of the Convention and Art. 44(4) of the Regulation).

276. Definitions are provided in the text boxes above for “legal assistance” (under the Convention) and “legal aid” (under the Regulation). They are similar, but differ in some important respects, notably, with the Regulation definition containing stipulations specifying the treatment of costs for interpretation, translation, necessary travel to proceedings and for an unsuccessful party receiving legal aid who is liable for costs.

277. Where legal assistance / legal aid is required by the applicant, generally, as a starting point, the Convention and the Regulation require that all Contracting States or Member 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 (under the Regulation there is no possibility for such a declaration).<sup>87</sup>

NOTE: If the decision to be recognised and enforced includes spousal maintenance as well as maintenance for a child, the same entitlement to cost-free legal assistance applies.

278. However, the entitlement by applicants to cost-free legal assistance / legal aid under the Convention and Regulation for applications concerning

3.1.5.; Art. 6(2)(i) of the 2007 Hague Convention.

Under Art. 8<sup>1</sup> of OUG No. 51/2008, the dean of the bar issues an urgent decision to designate, on behalf of the maintenance creditor (child or vulnerable adult) whose habitual residence is abroad, a mandatory lawyer *ex officio* who will complete and submit the application, institute court proceedings, represent him or her and assist him or her in first instance, in ordinary and extraordinary proceedings of judicial review, or in the initiation of measures for coercive enforcement, as appropriate. The lawyer designated *ex officio* receives, for each procedural step and for each of the measures, the fee specified in the Protocol between the Ministry of Justice and the National Union of Bars of Romania regarding the establishment of fees for lawyers providing legal aid.

The lawyer designated requests the granting of legal aid in the form of payment of judicial enforcement officer fees, with Art. 26 of the OUG No. 51/2008 applicable. The court grants legal aid according to Art. 8<sup>1</sup> of OUG No. 51/2008. The lawyer submits the request for the interim measure, together with the excerpt of the judgment that established the measure and the decision by the dean, to the competent territorial judicial enforcer.

Upon obtaining the writ of execution, following the processing of the applications or request, the designated lawyer requests the granting of legal aid in the form of payment of judicial enforcement officer fees, with Art. 26 of the OUG No. 51/2008 applicable. The court grants legal aid according to Art. 8<sup>1</sup> of the OUG No. 51/2008. The lawyer submits the request for coercive enforcement, together with the writ of execution and the decision by the dean of the bar, to the competent territorial judicial enforcer.

<sup>87</sup> Under the Convention a State may make a declaration that it will use a child-centred means test for certain cases (Art. 16(1)). The European Union will not make this declaration, and thus no child-centred means test will apply in Member States of the European Union under the Convention in this context (see Council Decision No 2011/432/EU (*supra*, note 59).

**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 / legal aid.

279. Importantly however, in all cases involving recognition and enforcement, the legal assistance or legal aid provided to all applicants (creditors, debtors or a public body<sup>88</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 (Art. 17 *b*) of the Convention and Art. 47(2) of the Regulation). This ensures that the same level of service is provided to all applicants, irrespective of their residence. Moreover, although cost-free legal assistance / legal aid may not always be available, the requested State cannot require a bond or deposit to guarantee the payment of any legal costs (Arts 37(2) and 14(5) of the Convention and Art. 44(5) of the Regulation). Whether free legal assistance / legal aid is available for an applicant will therefore depend upon the following factors:

- 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, specific measures or direct requests)
- whether a means or merits test is in use in the requested State for the particular application (child-centred or based on the applicant's circumstances).

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.

280. 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 / legal aid**

281. The following Section explains the entitlement to free legal assistance / legal aid for Convention and Regulation applications in all States, except

<sup>88</sup> See the Explanatory Report of the Convention, para. 383.



those Contracting States to the Convention that have made a declaration to use a child-centred means test<sup>89</sup> (such a declaration is not possible under the Regulation).

282. Please note that the flowcharts in this Section refer primarily to Convention provisions and cases, sometimes reflecting the effects of possible reservations and declarations to the Convention by Contracting States.

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

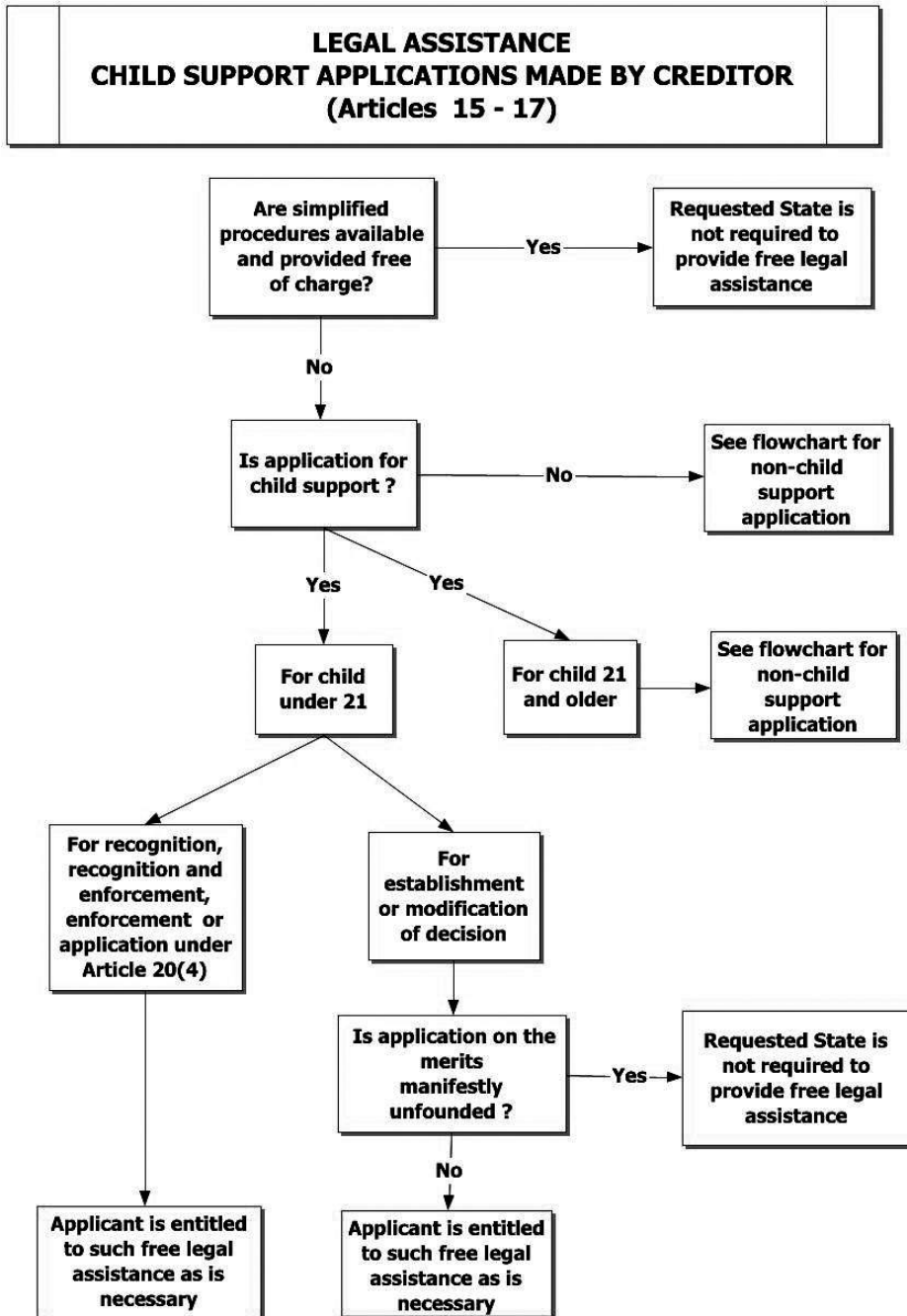
### **a) Applications concerning child support, for the support of a child under 21 years of age (or 18 years of age if a reservation has been made under the Convention)**

283. As shown below, if the application made through a Central Authority concerns recognition or recognition and enforcement or enforcement of a decision for child support, “legal assistance” under the Convention or “legal aid” under the Regulation, 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 / legal aid may be refused by a State if it considers the application or appeal to be manifestly unfounded on the merits.<sup>90</sup>

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

<sup>89</sup> Under the Convention a State may make a declaration that it will use a child-centred means test for certain cases (Art. 16(1)). The European Union will not make this declaration, and thus no child-centred means test will apply in Member States of the European Union under the Convention in this context (see Council Decision No 2011/432/EU, *supra*, note 59).

<sup>90</sup> See also Art. 43(2) of the Convention and Art. 67 of the Regulation with respect to the recovery of costs.



**Figure 3: Legal assistance under the Convention: child support applications by a creditor**

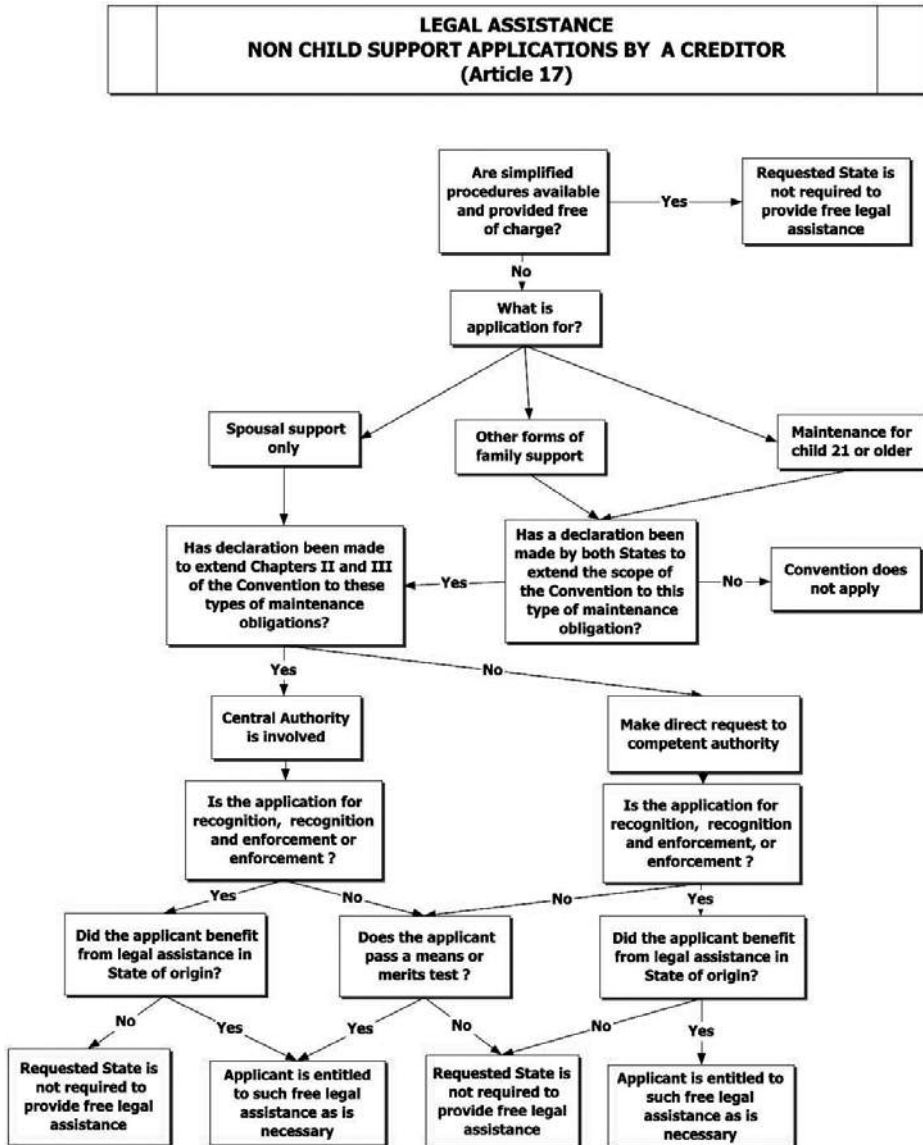
**b) Applications concerning maintenance other than child support for a child under 21 years of age (or under 18 years of age, if a reservation has been made under the Convention)**

284. Where the application concerns child support for a child 21 years of age or older, spousal or other form of support (and where, under the Convention, a State has extended the scope of the Convention to these types of cases), free legal assistance / legal aid does not have to be routinely provided. A Member State of the European Union or Contracting State to the Convention 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.<sup>91</sup>

285. However, in any case concerning the recognition, recognition and enforcement, or enforcement of an existing decision for the types of maintenance described in the forgoing paragraph, where the applicant received free legal assistance / legal aid 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 4: Legal assistance under the Convention: applications by creditor – non child support, below.<sup>92</sup>

<sup>91</sup> Under the domestic law of Romania legal aid can be refused when abusively requested, when its estimated cost is disproportionate to the value of the object of the case, when it is not requested for the defence of a legitimate interest or is requested for an action contrary the public or constitutional order, or if the applicant has refused to follow the procedure for mediation. In accordance with OUG 51/2008, maintenance creditors (other than children or vulnerable adults) can benefit from legal aid if the monthly net average income per family member in the two months prior to submission of the application is less than 300 *Lei*. If monthly net average income per family member in the two months prior to the submission of the application is under 600 *Lei*, then 50% of the legal aid amount shall be paid by the State in advance.

<sup>92</sup> *Ibid.*



**Figure 4: Legal assistance under the Convention: applications by creditor – non child support**

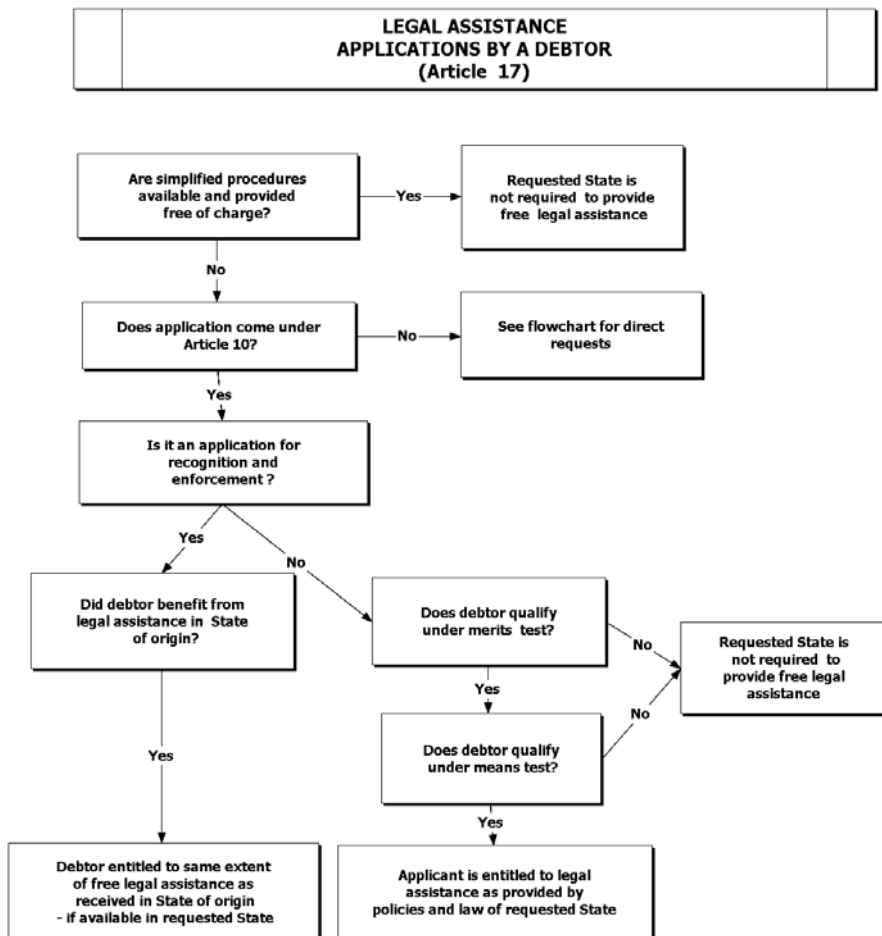
### c) Applications by a public body

286. If the applicant is a public body as defined in Article 36 of the Convention or Article 64 of the Regulation, it will come within the definition of a creditor for the purpose of applications for recognition, recognition and enforcement or enforcement of a decision. Therefore there is an entitlement

to free legal assistance / legal aid for public bodies in these applications involving decisions for child support for children under 21 years of age (or 18 years of age if a reservation has been made under the Convention).<sup>93</sup>

## 2. Applications by a debtor

287. In applications made by a debtor, the requested State may utilise both a merits test and a means test to determine whether to provide free legal assistance / legal aid (Art. 17 of the Convention and Art. 47 of the Regulation). This is shown in Figure 5 below, using the Convention as an example.



**Figure 5: Legal assistance under the Convention: applications by a debtor**

<sup>93</sup> See the Explanatory Report of the Convention, para. 383.

### 3. Parentage or genetic testing

288. Article 6(2) *h*) of the Convention and Article 51(2) *h*) of the Regulation require a Central Authority to take appropriate measures to provide assistance in establishing parentage where necessary for the recovery of maintenance (see above, para. 154 and Chapter 1, Section I.B and III.B). 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>94</sup> if parentage testing is necessary in an application under Article 10(1) *c*) of the Convention or Article 56(1) *c*) of the Regulation 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 / legal aid.<sup>95</sup>

289. The way this works in practice will depend upon the domestic procedures for genetic testing in 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, including the costs for the mother and child(ren), in advance. In other States, the debtor may be required to pay only his portion of the testing costs in advance. 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.<sup>96</sup>

<sup>94</sup> See the Explanatory Report of the Convention, para. 390.

<sup>95</sup> See the Explanatory Report of the Convention, para. 392.

<sup>96</sup> Under domestic law in Romania pursuant to Arts 262 and 330 and following the Civil Procedure Code, when taking of the approved evidence involves expenses, the court will instruct the requesting party to lodge at the registry, immediately or within the time limit established by court, proof of payment of the amount determined to cover expenses. If the evidence was ordered *ex officio*, the court will establish, by interlocutory decision, the costs for taking the evidence and the party who must pay, with the possibility of charging both parties with the expense. If necessary, the court will ask for expertise from a laboratory or specialized institute. The findings and conclusions of the laboratory or specialized institute will be registered in a written report. Based on Arts 6 and 24 of the OUG No. 51/2008, legal aid can be granted in the form of payment of the expert used during the trial, with the approval of the court, if such payment is due by the applicant. When the application for legal aid is allowed in the form of payment of fees to the expert by way of an order allowing such assistance, provisional fees owed will also be set out. After the services paid by the provisional fees have been supplied, the court will set out the final fees. **Testing.** DNA tests are performed at the request of the interested person or civil courts. The biological samples necessary for testing are blood samples (for children over 3 years and a half) or mouth swabs taken by wiping the internal face of the cheek (for instance, in the case of babies). The cost of a DNA paternity test, established by the Ministry of Health is approximately 2650 *Lei* (about 580 Euro). This fee includes taking biological samples from the mother, child and presumptive biological father, processing the three samples and drawing up of the forensic examination report. The results are communicated in written form only within 10 working days from the date on which the biological samples were taken. The scheduling for testing may be done directly at the laboratory headquarters, by telephone or in writing by a note from judicial courts. All the paternity tests performed within the official framework of the National Institute of Forensic Medicine will have value at court, either performed at the express request of the trial court or at the parties' request. The serological forensic examination of parentage is performed,

290. Where the application is for child support for a child under 21 years, the general rule is that unless the application is manifestly unfounded on the merits, the creditor will not have to pay in advance for the costs of the parentage testing.<sup>97</sup>

291. Under the Convention only, in those States that have made a declaration to use a child-centred means test, the costs of the parentage testing will be covered as part of the legal assistance available unless the child does not pass the means test.<sup>98</sup>

### **C. *Effective Access to Procedures and Legal Assistance in Romania***

292. Legal Aid is assistance granted by the Romanian State which aims to uphold the right to a fair trial and to guarantee equal access to justice, or the realization of certain legal rights or legitimate interests, including the enforcement of court decisions or other writs of execution. Any natural person can apply for legal aid if he or she cannot meet expenses that will be incurred at trial or in obtaining a legal opinion to defend a legitimate right or interest without jeopardizing his or her own subsistence or that of his or her family.

#### **Forms of and Conditions for Granting Legal Aid**

293. Legal aid may take the following forms: a) payment of legal representation fees, of legal assistance and, if applicable, of an appointed or elected lawyer (hereinafter referred to as "lawyer's fees"); b) payment of the expert, translator or interpreter used during the trial, with the approval of the court or of the authority with jurisdiction, if such payment is due by the applicant; c) payment of the fees of the officer of the court; d) exemptions, reductions, deferred payments or postponements of payment of lawyer's and bailiff fees and other judicial fees and charges stipulated by law, including those owed for enforcement. Legal aid can be granted and cumulated for any of the expenses mentioned above. The value cannot exceed, during a one-year period, a maximum sum equivalent to 12 minimum gross salaries set at the national level of the year when the relevant application was made.

294. Persons whose monthly net average income per family member in the last two months prior to the submission of the application is under 300 *Lei* will benefit from legal aid. In such a case, legal aid sums are paid for

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pursuant to Art. 31(1) of the Order for the Approval of Procedural Rules concerning the Performance of Expertise, Findings and Other Forensic Works No. 1134/C/25.05.2000 of the Ministry of Justice and No. 255/4.04.2000 of the Ministry of Health, at the request of the trial courts or at the request of interested persons. The contact details of the National Institute of Forensic Medicine "Mina Minovici" are: Sos. Vitan Bărzești 9-11, Sector 4, Bucharest, Forensic Serology Laboratory, Telephone: 021 332 1217, 021 332 1156, Fax: 021 334 6260, Email: serologie@legmed.ro.

<sup>97</sup> See the Explanatory Report of the Convention, para. 390.

<sup>98</sup> The European Union will not make this declaration, and thus no child-centred means test will apply in Member States of the European Union under the Convention in this context (see Council Decision no 2011/432/EU (*supra*, note 59)).

in advance in full by the State. If monthly net average income per family member in the last two months prior to the submission of the application is under the level of 600 *Lei*, legal aid is paid in advance by the State for 50% of costs.

295. Legal aid can also be granted in other cases on a pro rata basis in accordance with the applicant's needs, on the basis that the certain or estimated costs of the trial are such that the applicant's actual access to justice will be restricted, including on account of the difference in the cost of living between the State where the applicant has his or her place of domicile or habitual residence and that of Romania.

296. Legal aid is also granted irrespective of the financial situation of the applicant if a special law provides the right to legal aid as a measure of protection, in the context of special situations such as minority or disability status, another particular status or in other situations. In this case, legal aid is provided without a material means criteria, but may be granted only to defend or obtain the recognition of rights or interests resulting from or relating to the special situation which justified the granting through the law of the right to full or partial legal aid.

297. In order to establish an applicant's income, any periodic income, such as salaries, indemnities, fees, annuities, rents, profit derived from trading activities or freelance activity or other comparable activities, as well as sums owed periodically, such as rents and maintenance charges, are taken into account.

### **Competence and Procedure for Granting Legal Aid**

298. An application for legal aid is submitted to the court which has competence to settle the case for which aid is being sought. When legal aid is requested for the enforcement of a decision, the application will be made at the court of enforcement.

299. Legal aid is granted at any time during the trial, from the date when the applicant lodges his or her application and throughout legal proceedings. An application for legal aid is exempt from the payment of stamp duties. Legal aid for the exercise of the right of appeal is granted by way of a new application. The application for legal aid for appeal is lodged with the court where the decision will be appealed and is decided in summary proceedings, by a panel other than the one that had tried the case on its merits.

300. The application for legal aid must be made in writing and will be accompanied by documents which provide evidence of the applicant's income and that of his or her family, as well as documentation as to the applicant's maintenance or payment obligations. The application will be accompanied by a statement on the applicant's own liability reporting if during the last 12 months he or she has already benefited from legal aid (specifying the case in question and the amount of such aid).

301. The court will make a decision on the application for legal aid without summoning the parties, by ex officio judicial order made in chambers. The interested party can lodge an application for re-examination of an order



rejecting the application for legal aid, within five days from the date the decision was communicated. The application for re-examination is heard in judicial chambers by another judge, by final decision without the possibility to appeal.

302. Legal aid can be refused when it is requested abusively, when its estimated cost is disproportionate to the value of the object of the case, or when it will not be for the defence of a legitimate interest or will be used for an action running counter to the public or constitutional order. An application for legal aid can be refused if it is proven that the applicant for legal aid had refused, before the commencement of the trial, to be involved in mediation or alternative procedures for the settlement of the dispute.

303. The expenses of the party who benefited from exemptions or reductions by way of legal aid will be borne by the other party, if the latter was not given relief in the claims against him or her. The party which fails in its claims will be responsible to reimburse such sums to the State.

304. If the party who benefited from legal aid fails in his or her claim, expenses for proceedings paid for in advance by the State will be the responsibility of this party. The court can also order, concurrently with the settlement of the case, that the party benefiting from legal aid should reimburse, in full or in part, expenses paid for in advance by the State, if through negligent behaviour during the trial, he or she caused the failure in the trial or if, through a court decision, it was found that the action was abusive.

305. Legal aid rendered in the form of assistance by a lawyer is granted according to provisions of Law No. 51/1995 on the organisation and the exercise of the legal profession, as republished, with amendments concerning legal aid. If legal aid was granted in the form of assistance by a lawyer, the application together with the interlocutory decision for approval are immediately sent to the dean of the bar association within the jurisdiction of that court. The dean of the bar association or the lawyer to whom the dean has delegated the duty will appoint a lawyer registered in the Legal Aid Register, to whom he or she sends, together with the notice of appointment, the interlocutory decision for approval. The dean of the bar association also has the obligation to inform the beneficiary of legal aid of the name of the appointed lawyer. The beneficiaries of legal aid may him or herself solicit the appointment of a particular lawyer, with the consent of the latter, according to conditions established by law. For granted legal aid, the appointed lawyer is entitled to a fee established by the judicial body, according to the nature and amount of the performed activity and within the limits established by the protocol concluded between the National Association of the Romanian Bars and the Ministry of Justice. In the document for the approval of legal aid, the judicial body also states a provisional amount for the lawyer's fee. After granting legal aid, the lawyer draws up a written report about the performance of services, submitted for confirmation by the judicial body, which, depending on the volume and complexity of the activity carried out by the lawyer and according to the duration, type and particularities of the case, can order the maintenance of or an increase in the initially established fee. The confirmed report

is forwarded to the bar association, for the performance of formalities stipulated by law for the payment of the fees.

### **Legal Aid in the Form of Payment of Fees of Experts, Translators or Interpreters**

306. In cases where an application for legal aid is allowed in the form of payment of fees to experts, translators or interpreters, by way of an order allowing such assistance, the decision will also set out provisional fees owed. After supplying the service for which the provisional fees were paid, the court will set out the final fees.

### **Legal Aid in the Form of Payment of Fees of the Officer of the Court**

307. If legal aid is allowed in the form of payments of fees of an officer of the court, by way of an order allowing the assistance, the decision will also set out the provisional fees owed to the officer of the court, subject to the complexity of the file. The application together with the order will be sent immediately to the territorial chamber of the court officers from the territorial area of the relevant court. The board of directors of the territorial chamber of the court officers must also appoint an officer of the court, to whom it will send, concurrently with the notice of appointment, the order. The president must also communicate the name of the appointed officer of the court to the beneficiary of legal aid. The beneficiary can request on his or her own behalf the appointment of a certain officer of the court who is territorially competent.

### **Legal Aid for Payment of Bailiff Fees**

308. In cases where approval is granted for an application for the payment of bailiff fees, by way of an order, either an exoneration or a decrease in payment will be set out, with any relevant payment deadlines and the amount of any instalments.

309. If bailiff fees owed are in excess of twice the net family income of the applicant during the month prior to the request for legal aid, deferral of payment shall be made in such a way that the owed monthly instalment should not exceed half of the net family income, unless the court considers it necessary to grant another form of aid which is more favourable.

### **Extrajudicial Assistance**

310. Extrajudicial assistance can also be granted, consisting of counselling, completion of applications, petitions, notices, initiation of other legal remedies, as well as representation before various public authorities or institutions other than those of a judicial character or with jurisdictional competencies, for the realization of specific legal rights or interests. Extrajudicial assistance must lead to the provision of clear information accessible to the applicant, according to legal provisions in force in relation to the competent institutions, and, as appropriate, to the conditions, time

limits and procedures stipulated by law for the recognition, granting or realization of the right or interest asserted by the applicant.

311. Extrajudicial assistance is granted according to the provisions of Law No. 51/1995, as subsequently amended and completed. Extrajudicial assistance is granted by the Legal Aid Unit constituted at the level of each bar association, based on an application which must include supporting documents stating the incomes of the applicant and of his or her family, as well as evidence concerning maintenance or payment obligations. The application must also be accompanied by a sworn statement specifying if during the last 12 months the applicant benefited from legal aid, in what form, for what cause, as well as the amount of this aid. The application for the granting of extrajudicial aid and supporting documents are lodged at the legal aid unit and are settled by a decision of admission or rejection. Upon a decision to grant extrajudicial aid, the dean of the competent bar association appoints a lawyer from the Legal Aid Register of the bar association. An objection to a decision of rejection of the application for extrajudicial aid can be lodged at the bar association council.

312. The lawyer who provided extrajudicial aid cannot provide legal aid to the same person for the assertion or defence of the same right or interest, if the beneficiary of the extrajudicial aid submits a request for suing at law for the assertion or defence of that right or interest.

313. An application for legal aid, made by a citizen of a Member State of the European Union or by persons having their place of domicile or habitual residence in a Member State of the European Union other than Romania, will be made, accompanied by supporting documents translated into Romanian: a) at the Central Authority of the Member State of domicile or of residence of the applicant; b) through the Romanian Central Authority; c) or, directly with the competent Romanian court.

314. Permitted legal aid includes, in addition to what has been described above, the following: a) expenses for translation of documents; b) provision of an interpreter in procedures to be held before the court / authority with jurisdictional competence; c) expenses related to travel to Romania, where the beneficiary of the assistance or another person must submit the application to the court or another competent authority, or in cases where presence is compulsory by law.

315. Romanian citizens, as well as foreign citizens and stateless individuals who have their place of domicile or habitual residence in the territory of Romania, will benefit from free legal consultation with the Romanian Central Authority, with a view to obtaining legal assistance in cases falling within the competence of the courts of another Member State of the European Union or for the enforcement of a decision on the territory of another Member State of the European Union, under the conditions provided for by the law of that State. The Romanian Central Authority will assist the applicant to ensure that the application, completed in accordance with the relevant Annex to the Emergency Ordinance No. 51/2008 on legal aid in civil matters (the "OUG"), will be accompanied by all related documents as requested by the competent authority of the requested State.

316. The Romanian Central Authority will ensure the translation of the application and of necessary related documents. The Romanian Central Authority will submit these materials to the competent receiving authority of the relevant Member State.

317. The Romanian Central Authority can refuse to submit an application for legal aid to another Member State if such a request is obviously wrongful or exceeds the scope of application of the Directive (EC) No. 8/2003. If the application for legal assistance is rejected by the competent authority of the requested Member State, the Romanian Central Authority will request that the applicant reimburse the translation expenses.

### **VIII. Provisional and Protective Measures under the 2007 Convention and the 2009 Regulation**

#### **A. Central Authority assistance with provisional measures under the 2007 Convention and the 2009 Regulation**

318. Both the Convention and the Regulation contain provisions which require Central Authorities to assist, in certain circumstances and under certain conditions, with the institution of proceedings to obtain “provisional measures” in the requested State.

319. Article 6(2) *i*) of the Convention and Article 51(2) *i*) of the Regulation specify that a specific function of Central Authorities under both instruments is to “take all appropriate measures,” in relation to an application under Article 10 of the Convention or Article 56 of the Regulation to:

“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”.<sup>99</sup>

320. Article 7 of the Convention and Article 53 of the Regulation also provide that a Central Authority may make a request, supported by reasons, to another Central Authority to perform the function described in Article 6(2) *i*) of the Convention and Article 51(2) *i*) of the Regulation, when no application under Article 10 of the Convention or Article 56 of the Regulation is pending (see also Chapter 1, Section III.B. of this Handbook). Article 7 of the Convention and Article 53 of the Regulation stipulate that the “requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application [under Article 10 of the Convention or Article 56 of the Regulation] or in determining whether such an application should be initiated”.

321. The phrase “all appropriate measures,” used in relation to the Central Authority functions with respect to provisional measures have been understood to mean “any measures that a Central Authority could take to

<sup>99</sup> See the Explanatory Report of the Convention for a more full discussion of what is meant by “provisional measures” in this context, at para. 176 *et seq.*

achieve the required result, depending on its own powers and resources, and providing those measures are permitted by the internal laws of the [requested] State”.<sup>100</sup>

322. Thus, competent authorities in States where the Convention is in force and where the Regulation is applicable should be aware that they may receive requests from or work with their national Central Authorities for the institution of proceedings for provisional measures in the above-mentioned cases.

## ***B. Provisional and protective measure provisions unique to the 2009 Regulation***

323. The Regulation contains a range of additional rules which address provisional and protective measures in the operation of the Regulation.

### **1. Provisional measures taken in the State of origin**

324. Article 39 of the Regulation provides that the court of origin of a decision may declare a decision provisionally enforceable, notwithstanding any appeal, even if national law does not provide for enforceability by operation of law.

325. If there is a decision or a part of a decision for provisional measures which is enforceable from another Member State, this decision will be enforceable under either Article 17(2) of the Regulation (under the Section 1 procedures for decisions given in a Member State bound by the 2007 Hague Protocol), or Article 26 of the Regulation (under the Section 2 procedures for decisions given in a Member State not bound by the 2007 Hague Protocol) (see Chapter 8 for further information on recognition, enforceability and enforcement of decisions under Chapter IV of the Regulation). Article 17(2) and Article 26 of the Regulation specify that the decision given in another Member State only must be “enforceable” in that State, and do not require that such a decision is a final decision in order to be enforceable or to be declared enforceable in another Member State.

### **2. Provisional or protective measures in States other than the State of origin of a decision**

326. Article 14 of the Regulation provides for jurisdiction of courts under the Regulation with respect to provisional and protective measures:

“Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter”.

<sup>100</sup> See the Explanatory Report of the Convention, para. 121.

327. In exercising such jurisdiction with respect to provisional measures, competent authorities should be aware that a determination will also have to be made as to the law applicable to such measures.<sup>101</sup>

### **3. Provisional measures pending recognition, recognition and declaration of enforceability / enforcement of a decision in another Member State under Sections 1 and 2 of Chapter IV<sup>102</sup>**

328. Under Section 1 of Chapter IV procedures of the Regulation for Recognition, Enforceability and Enforcement of Decisions under the Regulation, for decisions given in a Member State bound by the 2007 Hague Protocol, it is clarified in Article 18 that:

“An enforceable decision shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State of enforcement”.

329. Further, under the Section 2 procedure of Chapter IV of the Regulation (for decisions given in a Member State not bound by the 2007 Hague Protocol) Article 36<sup>103</sup> clarifies that nothing prevents an applicant from availing him or herself of provisional / protective measures available under the domestic law of the Member State of enforcement, without the requirement of a declaration of enforceability of a decision from another Member State. Article 36(2) of the Regulation also clarifies that the declaration of enforceability will carry with it, by operation of law, the power to proceed to any protective measures. Article 36(3) specifies that no measures of enforcement other than protective measures against the property of the party against whom enforcement is sought may be taken during the time granted for appeal under Article 32(5) of the Regulation (see Chapter 8, for more information of provisional and protective measures in the context of enforcement proceedings under the Regulation).

## **IX. Other Conventions and Regulations on the service of documents and the taking of evidence abroad**

### **A. Overview**

330. Some States are Parties to the 1965 Hague Service Convention<sup>104</sup> and / or to the 1970 Hague Evidence Convention<sup>105</sup> both of which may

<sup>101</sup> For those Member States bound by the 2007 Hague Protocol on applicable law (see Chapter 5), it is not clear whether provisional measures would be included under the scope of applicable law of the Protocol (see Art. 11 of the Protocol on scope of the applicable law).

<sup>102</sup> See Chapter 8 for further information on recognition, enforceability and enforcement of decisions under Chapter IV of the Regulation.

<sup>103</sup> Art. 36 of the Regulation is a parallel Article to Art. 47 of the Brussels I Regulation.

<sup>104</sup> The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

<sup>105</sup> The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

be relevant in cases involving international maintenance applications.<sup>106</sup> If a situation arises where either of these Conventions might apply, it is important to seek legal advice to ensure that the requirements of the Conventions are properly met.

331. Within the European Union, *Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters* is applicable in all Member States of the European Union except Denmark, and *Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)* is applicable in all Member States. Between Denmark and the other Member States of the European Union, the 1970 Hague Evidence Convention applies rather than Regulation (EC) No 1206/2001. If a situation arises where either of the Regulations might apply, it is important to seek legal advice to ensure that the requirements of the Regulations are properly met.

332. In order to ascertain whether other non-European States are Party to the Hague Service and Evidence Conventions, competent authorities can consult Status tables for both Conventions available on the Hague Conference website, < [www.hcch.net](http://www.hcch.net) >, under "Conventions" then under "Convention No 14" and "No 20," respectively.

333. Both the Hague Service and the Evidence Conventions only apply if and when service has to be effected or evidence has to be taken *abroad*. In this regard, it is important to note that the term "**abroad**" is not used in sub-paragraphs *g*) of Article 6(2) of the 2007 Child Support Convention, which also relates to requests for specific measures, "to facilitate the obtaining of documentary or other evidence" and *j*) "to facilitate service of documents". This is because in most cases a Central Authority will be asked to facilitate the taking of evidence or the service of documents *within its own jurisdiction* for maintenance proceedings taking place *within its own jurisdiction*. Requests to facilitate the taking of evidence or service **abroad** will be less frequent. There are many situations covered by the 2007 Child Support Convention that will neither require the transmission of documents for service abroad nor the taking of evidence abroad.<sup>107</sup> The parallel Articles of the Regulation concerning Central Authority functions in relation to evidence and service of documents (Art. 51(2) *g*) and *j*)) mention Regulation (EC) No 1206/2001 and Regulation (EC) No 1393/2007, but as under the Convention, it is more likely that Central Authorities will primarily be handling domestic requests with respect to the taking of evidence and service of documents.

334. A discussion of other Conventions applicable in this area is beyond the scope of this Handbook. To find out if a State is a Party to the 1954 Hague Civil Procedure Convention,<sup>108</sup> the 1965 Service Abroad and 1970

<sup>106</sup> See Art. 50 of the Convention and the Explanatory Report of the Convention, paras 648-651.

<sup>107</sup> See the Explanatory Report of the Convention, paras 164-167 and 182-185. For a discussion as to the types of assistance that could be provided by the requested state in a manner that does not come within the Evidence Convention, see the Explanatory Report of the Convention, para. 174.

<sup>108</sup> *Hague Convention of 1 March 1954 on civil procedure.*

Taking of Evidence Abroad Conventions, consult the website of the Hague Conference, < [www.hcch.net](http://www.hcch.net) >.

**B. 1965 Service of Process Abroad Convention<sup>109</sup>**

335. This 1965 Hague Service Convention provides for the channels of transmission to be used when a judicial or extrajudicial document has to be transmitted from one State which is a Party to the Convention to another State which is also a Party to the Convention for service in the second State.

336. The Convention is applicable if all of the following requirements are met:

- (1) The law of the State where the proceedings are taking place (State of the forum) requires a document (e.g., a notification of action) to be transmitted from that State to another State for service in the latter State;
- (2) both States are Parties to the Service Convention,
- (3) the address for the person to be served is known,
- (4) the document to be served is a judicial or extrajudicial document, and
- (5) the document to be served relates to a civil or commercial matter.

337. If there is any doubt as to whether the Convention applies or how to comply with its provisions, legal counsel should be consulted.

**C. 1970 Taking of Evidence Abroad Convention<sup>110</sup>**

338. The 1970 Hague Evidence Convention establishes methods of co-operation for the taking of evidence abroad (*i.e.*, in another State) in civil or commercial matters. The Convention, which applies only between States that are Parties to it, provides for the taking of evidence (i) by means of letters of request, and (ii) by diplomatic or consular agents and commissioners. The Convention provides effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence.

339. If the need for the taking of evidence abroad arises, legal advice should be obtained, if necessary, to ensure that the requirements of the Evidence Convention are met.

<sup>109</sup> For more information on the Service Convention, see the 'Service Section' of the Hague Conference website.

<sup>110</sup> For more information on the Evidence Convention, see the 'Evidence Section' of the Hague Conference website.



**D. Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters<sup>111</sup>**

340. Council Regulation (EC) No 1206/2001 seeks to improve, simplify and accelerate co-operation between courts in the taking of evidence among Member States of the European Union.<sup>112</sup>

341. Regulation (EC) No 1206/2001 provides for two ways of taking of evidence between Member States: direct transmission of requests between the courts and the direct taking of evidence by the requesting court. The requesting court is the court before which the proceedings are commenced or contemplated. The requested court is the competent court of another Member State for the performance of the taking of evidence. A Central Body is responsible for supplying information and seeking solutions to any difficulties which may arise in respect of a request. The Regulation provides for ten forms which facilitate the making of requests. Requests are executed in accordance with the law of the requested Member State. The request must be executed within ninety days of receipt.

342. Discussions on Regulation (EC) No 1206/2001 have suggested that new technologies, specifically videoconferencing, should be exploited to better employ the Regulation,<sup>113</sup> and competent authorities may wish to explore if videoconferencing facilities exist if they must apply the Regulation.

<sup>111</sup> For more information on Regulation (EC) No. 1206/2001, please refer to the website of the European Judicial Atlas on civil matters: < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/te\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/te_information_en.htm) >. It is anticipated that such information will be re-located to the European e-justice Portal, found at the following web link: < <https://e-justice.europa.eu/home.do> >.

<sup>112</sup> As noted above, the Regulation applies between all Member States of the European Union with the exception of Denmark. Between Denmark and the other Member States the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* applies.

<sup>113</sup> *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 5 December 2007 on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [COM(2007) 769 final - Not published in the Official Journal].*

**E. Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)<sup>114</sup>**

343. Regulation (EC) No 1393/2007 (repealing Council Regulation (EC) No 1348/2000) seeks to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States. The Regulation applies between all Member States of the European Union.<sup>115</sup>

344. Regulation (EC) No 1393/2007 provides for different ways of transmitting and serving documents: transmission through transmitting and receiving agencies, transmission by consular or diplomatic channels, service by postal services and direct service.

345. Transmitting Agencies are competent for the transmission of judicial or extrajudicial documents to be served in another Member State. Receiving Agencies are competent for the receipt of judicial or extrajudicial documents from another Member State. The Central Body is responsible for supplying information to the transmitting agencies and seeking solutions to any difficulties which may arise during transmission of documents for service. The Regulation provides for seven forms to facilitate procedures under the instrument.

**X. Assessing Purchasing Power Parity: cross-border adjustment of maintenance amounts**

346. In the course of applying either the Convention or the Regulation, competent authorities will be confronted with issues of currency conversion (in particular in connection with the enforcement of a decision; see also Chapter 12, Section VI.5 of this Handbook), and also with issues of adjustments of foreign maintenance amounts, which will require the comparison of costs of living in various States, known as a comparison of Purchasing Power Parity (PPP) among countries. Such a consideration may be made in the course of the establishment, modification or enforcement of a maintenance decision. Competent authorities will have to verify domestic practices in this respect.<sup>116</sup>

<sup>114</sup> For more information on Regulation (EC) No 1393/2007, please refer to the website of the European Judicial Atlas on civil matters: < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/ds\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_information_en.htm) >. It is anticipated that such information will be re-located to the European e-justice Portal, found at the following web link: < <https://e-justice.europa.eu/home.do> >.

<sup>115</sup> This includes Denmark, which confirmed its intention to implement the content of the Regulation by means of a declaration (OJ L 331, 10.12.2008, p. 21) based on a parallel agreement concluded with the European Community.

<sup>116</sup> In Romania, in conformity with the Civil Procedure Code, in the case of amounts at issue representing income and cash in foreign currency, the credit institutions are authorised to perform the conversion into *Lei* of the foreign currency without the consent of the account holder, at the exchange rate set by the National Bank of Romania for that day. Subject to changes in the means of the debtor and the needs of the creditor, the Civil Code allows

347. A number of organisations publish and keep up-to-date tables which list comparative PPP:

- o The Organisation for Economic Co-operation and Development (OECD): < [http://stats.oecd.org/Index.aspx?datasetcode=SNA\\_TABLE4](http://stats.oecd.org/Index.aspx?datasetcode=SNA_TABLE4) >. In the "Transaction" menu, choose "PPPPC: Purchasing Power Parity for Private Consumption".
- o Eurostat of the European Commission: < [http://epp.eurostat.ec.europa.eu/portal/page/portal/purchasing\\_power\\_parities/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/purchasing_power_parities/data/database) >. (The table must be adjusted to the needs of the user.)
- o The World Bank: < <http://data.worldbank.org/indicator/PA.NUS.PRVT.PP> >.

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the increase, decrease or cessation of the maintenance obligation. The modification of maintenance can be allowed for an unspecified period of time or for temporary period, as appropriate to the change(s) in circumstance leading to the modification. In accordance with Art. 530, *Modification and Cessation of Maintenance Support*, from the Civil Code, Execution Modalities, maintenance established as a fixed amount shall be indexed on a quarterly basis, depending on the rate of inflation. For example, The National Institute of Statistics has published on its website the following index of inflation: 2000 - 45,7 %; 2001- 34,5 %; 2002 - 22,5 %; 2003 - 15,3 %; 2004 - 11,9 %; 2005 - 9 %; 2006 - 6,56 %; 2007 - 4,84 %; 2008 - 7,85 %; 2009 - 5,59 %; 2010 - 6,09 %; 2011 - 5,79 %.

## Chapter 4 - 2009 Regulation: Direct Rules on Jurisdiction

### A. *Introduction*

348. The Regulation sets out direct jurisdiction provisions which unify jurisdiction rules for maintenance matters within European Union Member States. When exercising jurisdiction in maintenance matters competent authorities within Member States of the European Union will do so in accordance with the grounds of jurisdiction provided by Chapter II of the Regulation, namely, when competent authorities process applications or direct requests for establishment or modification of maintenance decisions under the Regulation or Convention (see Chapters 10 and 11 of this Handbook).<sup>117</sup> As a result of these unified jurisdiction rules, at the time of recognition and enforcement of a decision under the Regulation there will be no need to verify the jurisdiction of the competent authority of the Member State of origin of the decision (see Chapter 8 on recognition, enforceability and enforcement under the Regulation).

349. Before applying the jurisdictional rules of the Regulation, competent authorities will first have to verify whether the maintenance matter falls within the scope of the Regulation, including an assessment of substantive, geographic and temporal scope (see Chapter 3, Part I of this Handbook). It should be noted that the jurisdiction rules of the Regulation will have universal geographic application from the perspective of competent authorities within European Union Member States. That is, the Regulation's jurisdiction rules will also apply where the maintenance matter is connected with a foreign State (including a foreign State which is a Contracting State to the 2007 Convention) which is not a Member State of the European Union.

350. In contrast to the direct jurisdiction rules of the Regulation, the Convention sets out forth only "indirect" jurisdiction rules, namely, under its Article 18 ("Limit on proceedings," discussed below, under the discussion of Art. 8 of the regulation) and Article 20 ("Bases for recognition and enforcement"). This means that the jurisdiction of the competent authority in the State of origin of the decision will be verified at the time of recognition and enforcement under the Convention. Recognition and enforcement of the decision will be conditional on the jurisdiction of the competent authority in the State of origin of the decision meeting one of the bases of jurisdiction set out in Article 20 of the Convention. On the other hand, the jurisdiction rules for the establishment or modification of a decision under the Convention by competent authorities in States which are not European Union Member States will be governed by domestic law in force.

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<sup>117</sup> It should be noted that in general the Regulation's jurisdiction rules do not solve issues of territorial competence *within* a Member State where the Regulation is applicable. These issues will be determined according to domestic rules. Note also that Convention or Regulation applications or direct requests bearing on the recognition or enforcement of decisions, described in Chapters 7, 8 and 9, do not involve a jurisdictional analysis by competent authorities, as these applications or direct requests bear only on the recognition and / or enforcement of an existing foreign decision.

351. This Chapter of the Handbook summarises the jurisdictional rules set out in the Regulation and draws attention to where these rules may mirror the indirect jurisdictional rules of the Convention.<sup>118</sup> This Chapter also notes, in footnotes, instances where the Regulation's provisions are similar to provisions found in other European private law instruments.

## **B. Article 3 of the Regulation:<sup>119</sup> general provisions**

352. Article 3 a) and b) of the Regulation provide jurisdiction for the court of the place where the defendant is habitually resident or where the creditor is habitually resident, respectively. These provisions are parallel to the indirect rule found in the Convention in Article 20(1) a) and c), which provide bases for recognition and enforcement of a decision under the Convention.<sup>120</sup>

353. Article 3 c) and d) of the Regulation provide that a court of a Member State may assume jurisdiction if according to its own law it has jurisdiction for proceedings concerning status of persons or parental responsibility matters,<sup>121</sup> where maintenance is ancillary to those proceedings, unless this jurisdiction is based solely on the nationality of one of the parties. These direct jurisdiction rules of the Regulation find their Convention cognate in the indirect jurisdiction rules contained in Article 20(1) f) of the Convention.<sup>122</sup>

354. It should be noted that the bases for jurisdiction found in Article 3 of the Regulation are without hierarchy, and thus a claimant can choose among them.

<sup>118</sup> While the Convention provisions are not direct jurisdiction rules, in practice, competent authorities may wish to bear them in mind when establishing or modifying a maintenance decision that is intended to be recognised and / or enforced abroad in a Convention Contracting State (and if the Contracting State of intended recognition / enforcement is known, whether a reservation under Art. 20 of the Convention has been made by that State). See also Chapter 7 on the recognition and enforcement of decisions under the Convention.

<sup>119</sup> Art. 3(a) of the Regulation is roughly parallel to Art. 2 of the Brussels I Regulation. Art. 3 b) and c) of the Regulation are parallel to Art. 5(2) of the Brussels I Regulation. Art. 3 d) of the Regulation is a novel provision without precedent. It should be noted that the Art. 3 of the Regulation, unlike the Brussels I Regulation, only uses the term "habitual residence," which bears a new autonomous meaning (and is left undefined by the Regulation), and does not use the concept of "domicile" found in the Brussels I Regulation.

<sup>120</sup> The Convention further specifies that the defendant and the creditor must be habitually resident "at the time proceedings were instituted." It should be noted that Art. 20(1) c) of the Convention can be the subject of a reservation of a Contracting State, as stated in Art. 20(2).

<sup>121</sup> With respect to Art. 3 d) of the Regulation, it should be noted that competent authorities which have jurisdiction under the Brussels II a Regulation may thus be able to take jurisdiction also with respect to maintenance matters which are ancillary to the proceeding concerning parental responsibility.

<sup>122</sup> It should be noted that Art. 20(1) f) can be the subject of a reservation of a Contracting State, according to Art. 20(2) of the Convention.

### **C. Article 4 of the Regulation:<sup>123</sup> choice of court**

355. Article 4 of the Regulation allows parties to enter into choice of court agreements to designate a court or courts of a Member State.<sup>124</sup> However, the Regulation sets out limitations to this autonomy. Firstly, disputes relating to maintenance obligations for a child under the age of 18 are excluded (Art. 4(3)). Secondly, the Regulation requires that there be a relevant link to the court or courts designated (Art. 4(1)). The court or courts designated must be in a Member State which is: the habitual residence of one of the parties (4(1) a)); the place of nationality of one of the parties (4(1) b)); or, in the case of maintenance obligations between spouses or former spouses, the court which has jurisdiction with respect to matrimonial matters (4(1) c)(i)), or the place of the spouses' last common habitual residence for a period of at least one year (4(1) c)(ii)). The above conditions must have been met at the time of the choice of court agreement or at the time the court is seised.

356. Article 4(4) of the Regulation validates choice of court agreements made attributing exclusive jurisdiction to a non-Member State (so long as they do not concern maintenance obligations towards a child under the age of 18), made under the Lugano Convention (*Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 in Lugano*).

357. Article 4(2) of the Regulation stipulates that agreements must be "in writing," which includes "communication by electronic means which provides a durable record of the agreement."<sup>125</sup>

358. Articles 18(2) a) and 20(1) e)<sup>126</sup> of the Convention both refer to respect for agreements by parties as to choice of forum, "in writing", "except in disputes relating to maintenance obligations in respect of children."

### **D. Article 5 of the Regulation:<sup>127</sup> jurisdiction based on the appearance of the defendant**

359. Article 5 of the Regulation provides that jurisdiction can be taken by "a court of a Member State before which a defendant enters an appearance," unless the appearance was entered to contest jurisdiction. This mirrors the indirect rule of jurisdiction found in Article 20(1) b) of the Convention.

<sup>123</sup> Art. 4 of the Regulation is parallel to Art. 23 of the Brussels I Regulation, with, however, some changes to the previous rules. The new Regulation sets out new limitations to choice of court agreements between parties in the maintenance area, in contrast to the previous unrestricted regime under the Brussels I Regulation.

<sup>124</sup> It should be noted that the Regulation, unlike the Brussels I Regulation (Art. 23(1)), no longer requires that one of the parties be "domiciled" in a Member State in order to conclude a choice of court agreement.

<sup>125</sup> Art. 23(1) a) and Art. 23 of the Brussels I Regulation use essentially parallel language in these provisions as to what constitutes an agreement "in writing."

<sup>126</sup> It should be noted that Art. 20(1) e) can be the subject of a reservation of a Contracting State, according to Art. 20(2) of the Convention.

<sup>127</sup> Art. 5 of the Regulation is parallel to Art. 24 of the Brussels I Regulation.

### **E. Article 6 of the Regulation:<sup>128</sup> subsidiary jurisdiction**

360. Article 6 of the Regulation provides a jurisdictional basis such that: "Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 and no court of a State party to the 2007 Lugano Convention which is not a Member State of the European Union has jurisdiction pursuant to the provisions of that Convention, the courts of the Member State of the common nationality of the parties<sup>129</sup> shall have jurisdiction."

361. It should be noted that a competent authority will have to undertake, *ex officio*, the test required by Article 6 as to whether another court is competent under Articles 3, 4 or 5 of the Regulation.

362. The indirect rule of jurisdiction found in Article 20(1) *f*) of the Convention specifically excludes jurisdiction based solely on the nationality of one of the parties (in matters of personal status or parental responsibility), but is silent with respect to jurisdiction based on the common nationality of both of the parties.<sup>130</sup>

### **F. Article 7 of the Regulation: *forum necessitatis***

363. Article 7 of the Regulation provides an additional exceptional basis for jurisdiction: "Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible<sup>131</sup> in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised". There is no parallel indirect rule of jurisdiction in the Convention.<sup>132</sup>

364. In assuming jurisdiction under Article 7 of the Regulation, judges will have to employ a two-part test according to the terms of the Article:

<sup>128</sup> Art. 6 of the Regulation has no parallel in the Brussels I Regulation.

<sup>129</sup> It should be noted that Art. 6 does not stipulate that nationality of the party or parties should be tested or established as effective (for example, in some jurisdictions, in cases where a party possesses dual nationality) before the application of this jurisdictional rule.

<sup>130</sup> Because the common nationality of both parties is not enumerated in Art. 20 of the Convention specifying bases for the recognition and enforcement of a decision, this more expansive allotment of jurisdiction in the Regulation could present problems for the recognition and enforcement of decisions taken on this jurisdictional basis in other Convention Contracting States. Competent authorities may wish to keep this in mind if the decision that they are establishing or modifying is to be recognised and / or enforced in a Convention Contracting State in which the Regulation is not applicable.

<sup>131</sup> For example, in the Netherlands Art. 9(b) of the Code of Civil Procedure allows for a Dutch court to declare itself competent if judicial proceedings are impossible outside of the Netherlands. According to case law the term "impossibility" has been interpreted to mean both factual (e.g., civil war, natural disaster), as well as legal impossibility (e.g., in terms of discriminatory laws with respect to certain ethnic groups).

<sup>132</sup> Thus this basis for jurisdiction could also present problems of recognition and enforcement of European Union Member State decisions based on this jurisdictional ground in Convention Contracting states, if the "sufficient connection" with the courts seised stipulated in the provision does not overlap with one of the Convention's Art. 20 enumerated grounds of jurisdiction for recognition and enforcement. Competent authorities may wish to keep this in mind if the decision that they are establishing or modifying is to be recognised and / or enforced in a Convention Contracting State in which the Regulation is not applicable.

firstly, with respect to the impossibility or inability of the proceedings being brought in a third State with which the dispute is closely connected; and secondly, a test of whether the dispute has a “sufficient connection” with the court seised.

### **G. Article 8 of the Regulation: limit on proceedings**

365. Article 8 of the Regulation, entitled “Limit on proceedings”, is essentially identical, with some minor differences, to Article 18 of the Convention, which is similarly entitled. In addition, Article 8 of the Regulation specifies in its provisions that the rules under the Article also apply where a decision is given “in a 2007 Hague Convention Contracting State,” as well as in a Member State.

366. Article 8(1) of the Regulation sets out the main rule that as long as a creditor remains habitually resident in a Regulation Member State or a Convention Contracting State where a decision has been made, proceedings to modify this decision or to produce a new decision cannot be brought in any other Member State. Article 18(1) is the parallel provision of the Convention.

367. Article 8(2) of the Regulation, parallel to Article 18(2) of the Convention, sets out the four exceptions to the main rule.

368. Firstly, the limit on proceedings will not apply if the parties have agreed to the jurisdiction of the court of the other Member State in accordance with Article 4 of the Regulation which defines the limits and restrictions on choice of court agreements between parties (see discussion, above).<sup>133</sup> Secondly, there is an exception if the creditor is considered to have submitted to the jurisdiction of the court of another Member State in accordance with Article 5 of the Regulation (see discussion, above).<sup>134</sup> Third, where the competent authority in the 2007 Hague Convention Contracting State of origin cannot or refuses to exercise jurisdiction to modify or make a new decision.<sup>135</sup> And lastly, where the decision made in the 2007 Hague Convention State of origin cannot be recognized or be declared enforceable in the other Member State where proceedings are contemplated.<sup>136</sup>

<sup>133</sup> Parallel Art. 18(2) a) of the Convention states the exception under the Convention as follows: “where, except in disputes relating to children, there is agreement in writing between the parties to the jurisdiction of that other Contracting State”.

<sup>134</sup> Parallel Art. 18(2) b) of the Convention states the exception under the Convention as follows: “where the creditor submits to the jurisdiction of that other Contracting State either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity”.

<sup>135</sup> Parallel Art. 18(2) c) of the Convention states the exception under the Convention as follows: “where the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or make a new decision”.

<sup>136</sup> Parallel Art. 18(2) d) of the Convention states the exception under the Convention as follows: “where the decision made in the State of origin cannot be recognised or declared enforceable in the Contracting State where proceedings to modify the decision or make a new decision are contemplated”.



### **H. Article 9 of the Regulation:<sup>137</sup> seising of a court**

369. Article 9 of the Regulation provides specificity as to when a court is deemed to have been “seised” under the Regulation, namely, either at the time appropriate documents are lodged at the court or by way of actions in relation to service of documents.<sup>138</sup>

### **I. Article 10 of the Regulation:<sup>139</sup> examination as to jurisdiction**

370. Article 10 of the Regulation specifies that a court seised of a case over which it has no jurisdiction “shall declare of its own motion that it has no jurisdiction”.<sup>140</sup>

### **J. Article 11 of the Regulation:<sup>141</sup> examination as to admissibility**

371. Article 11(1) of the Regulation provides for a stay of proceedings in a given Member State (which has appropriate jurisdiction) where a defendant is habitually resident in another State and has not entered an appearance, in order to give the defendant proper notice, proper documents in good time to prepare for defence, or to ensure that these steps are taken. Article 11(2) and 11(3), respectively, give alternative provisions where documents have to be transmitted under Regulation (EC) No 1393/2007 (*Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters*) or the Hague Convention of 15 November 1965 on service abroad of judicial and extrajudicial documents in civil or commercial matters. (See Chapter 3, Part II, Section IX, for more information on the service of documents abroad.)

372. While there is no Convention provision that allows for a stay of proceedings in the above-described circumstances, Article 22 e) of the Convention provides a ground for refusing the recognition and enforcement of a decision if a respondent “neither appeared nor was represented,” and either did not have proper notice of proceedings (i) or proper notice of the decision and an opportunity to challenge or appeal the decision (ii).

### **K. Article 12 of the Regulation:<sup>142</sup> *lis pendens* and Article 13:<sup>143</sup> related actions**

373. The Regulation has two provisions on *lis pendens* (cases involving the same “cause of action” between the same parties brought in other Member States) and “related actions” (actions “which are so closely connected that

<sup>137</sup> Art. 9 of the Regulation is the parallel Article to Art. 30 of the Brussels I Regulation, and Art. 16 of the Brussels II a Regulation.

<sup>138</sup> There is no parallel provision in the Convention.

<sup>139</sup> Art. 10 of the Regulation is parallel to Art. 17 of the Brussels II a Regulation.

<sup>140</sup> There is no parallel provision in the Convention.

<sup>141</sup> Art. 11 of the Regulation is parallel to Art. 18 of the Brussels II a Regulation.

<sup>142</sup> Art. 12 of the Regulation is parallel to Art. 27 of the Brussels I Regulation and to Art. 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter the “Brussels Convention”).

<sup>143</sup> Art. 13 of the Regulation is parallel to Art. 28 of the Brussels I Regulation.

it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”) brought in other Member States, found in Articles 12 and 13, respectively. The rule of the “first court seised” is applied in both provisions.

374. The Convention has one provision, under “Grounds for refusing recognition and enforcement of a decision,” Article 22 c), which deals with *lis pendens* issues. Recognition and enforcement of a decision may be refused if “proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted”.

**L. Article 14 of the Regulation:<sup>144</sup> provisional, including protective, measures**

375. Article 14 of the Regulation specifically provides for applications in Member States for provisional measures (including protective measures) as may be available under the law of that State, even if according to the Regulation the courts of another Member State may have jurisdiction as to the substance of the case.<sup>145</sup> (See also Chapter 3, Part II, Section VIII of the Handbook for further information on provisional and protective measures.)

376. The Convention does not contain a parallel provision to Article 14 of the Regulation, but it does provide for such requests which may be made via Central Authorities. Article 6(2) i) of the Convention provides that in relation to Convention applications Central Authorities “shall take all appropriate measures to 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”. Further, Article 7(1) of the Convention, “Requests for Specific Measures” gives powers to Central Authorities to make requests to another Central Authority, including for provisional measures under Article 6(2) i) of the Convention, when there is no application yet pending under the Convention. Article 7(2) additionally provides that Central Authorities may also take specific measures (including the obtaining of necessary provisional measures) upon the request of another Central Authority when an internal case known to that latter Central Authority contains an “international element”.

<sup>144</sup> Art. 14 of the Regulation is parallel to Art. 31 of the Brussels I Regulation and to Art. 24 of the Brussels Convention.

<sup>145</sup> It should be noted that the Regulation is silent as to which law should be applied to provisional measures. Further, it is not clear if the scope of the 2007 Protocol (see Chapter 5), under its Art. 11, would cover provisional measures. Some national jurisdictions leave it as a matter of judicial discretion as to which law to apply to provisional measures.

## Chapter 5 - Applicable Law under the 2007 Convention and the 2009 Regulation

### A. *The 2007 Convention and the 2007 Hague Protocol on Applicable Law*

377. The Hague Convention itself contains no comprehensive applicable law rules. The *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (the "Protocol") is an independent international instrument related to and compatible with the Hague 2007 Convention, as the two instruments were negotiated and adopted at the same time. Contracting States to the Convention are in particular invited to also become a Party to the Protocol; however, any State may become a Party to the Protocol. The status of the Protocol as to its Contracting States can be accessed on the website of the Hague Conference on Private International Law at < [www.hcch.net](http://www.hcch.net) >, under "Conventions," then "Convention 39," then "Status table" or under the Child Support / Maintenance section.

378. Competent authorities handling international maintenance cases will firstly have to ascertain whether their State is a Party to the Protocol.<sup>146</sup> If so, the Protocol will determine the applicable law rules to maintenance matters in the case of Convention applications or direct requests for the establishment of maintenance decisions (see Chapter 10) and for the modification of maintenance decisions (see Chapter 11). Applications or requests for recognition and enforcement of decisions under the Convention would in general not be subject to the provisions of the Protocol, as the applicable law issues will have been dealt with in the State of origin of the decision<sup>147</sup>). If your State is not a Contracting State to the Protocol, nor a State where the Protocol is applicable (see Section B, below), the law of the forum (*i.e.*, of the requested State), including its private international law rules, will apply to maintenance decisions.

379. However, it should also be borne in mind that the Convention does contain a number of specific applicable law rules relating to: a) the right of a public body to act in place of a creditor or seek reimbursement of benefits provided to the creditor (Art. 36(2)); b) the duration of the maintenance obligation and limitation periods for the enforcement of arrears (Art. 32(4) and (5)); and c) the eligibility of a child for maintenance in certain limited circumstances (Art. 20(5)).

380. An outline of the Protocol's provisions is provided below, in Section C.

381. Competent authorities should also bear in mind that even if the Protocol is not in force in their State, one of several older Hague Conventions dealing with law applicable to maintenance may be.<sup>148</sup>

<sup>146</sup> The Protocol is applicable in Romania. See also Section B of this Chapter.

<sup>147</sup> However, the Protocol may, of course, have been applied in the State of origin. See also Arts 32(4) and 32(5) of the Convention which bear on applicable law issues with respect to enforcement issues under the Convention.

<sup>148</sup> The *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* and the *Hague Convention of 2 October 1973 on the Law*

## **B. The Regulation and the 2007 Hague Protocol on Applicable Law**

382. Through *Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC)* the Council of the European Community (as it was then) approved the Protocol on behalf of the European Community, excluding Denmark and the United Kingdom.<sup>149</sup>

383. The Protocol is applicable in participating European Union Member States, including Romania, as of 18 June 2011.<sup>150</sup> It should also be noted that the Protocol has retroactive effect, and applies to maintenance claimed in Member States prior to the application date of the Protocol.<sup>151</sup>

384. Chapter III, Article 15, of the Regulation is the principal Article of the Regulation concerning applicable law, and it stipulates that the law applicable to maintenance obligations shall be determined in accordance with the 2007 Hague Protocol for the Member States bound by the instrument.<sup>152</sup>

385. As described at length below (see Chapter 8), under the Regulation's Section 1 of Chapter IV, rules concerning the abolition of *exequatur* for recognition and enforcement of foreign decisions are applicable among European Member States who are bound by the Protocol (all Member States save the United Kingdom and Denmark).

## **C. Application of the Protocol and outline of provisions**

386. The main provisions of the Protocol are summarised below. Competent authorities should refer to the text of the Protocol and to the Protocol's Explanatory Report for further detailed information. The Explanatory Report can be accessed on the website of the Hague Conference on Private International Law at < [www.hcch.net](http://www.hcch.net) >, under "Conventions," then "Convention 39," then "HCCH Publications."

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*Applicable to Maintenance Obligations* (hereinafter the "1973 Convention"). The status of these instruments as to their Contracting States can be accessed on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) >, under "Conventions," then "Convention 8" or "Convention 24" then "Status table".

<sup>149</sup> See Recitals 11 and 12 and Art. 3 of the *Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC)*. Recital 5 of the Council Decision declares that "The Community has exclusive competence over all matters governed by the Protocol".

<sup>150</sup> *Ibid.*, Art. 4.

<sup>151</sup> *Ibid.*, Art. 5.

<sup>152</sup> It should be noted that with Art. 15 of the Regulation, the Protocol is made a part of European law, and as such a competent authority applying the Protocol has the ability to submit a preliminary question to the Court of Justice of the European Union.

## 1. Universal application

387. The Protocol, unlike the 2007 Convention, which only applies to relations between Contracting States, has an *erga omnes* effect.<sup>153</sup> That is, competent authorities will apply its rules in a Contracting State to the Protocol or in States where the Protocol is applicable even if the applicable law is that of a State not Party to the Protocol.<sup>154</sup> In practice this *erga omnes* feature means that the Protocol can be of benefit to many creditors who are domiciled in States which are not Party to the Protocol. For instance, a creditor resident in a State to which the Protocol is not applicable who initiates proceedings in a State in which the Protocol is applicable (e.g., in the State of the debtor's domicile) will enjoy the benefit of the application of uniform rules favourable to the creditor set out in the Protocol.

## 2. Scope of the Protocol

388. The scope of maintenance obligations included under the Protocol is wider than the 2007 Convention, and determines the law applicable to maintenance obligations based on any family relationship, without the possibility for reservation.<sup>155</sup> Included in its scope are any maintenance obligations which arise from a family relationship, parentage, marriage or affinity<sup>156</sup>—a scope parallel to that of the Regulation. The Protocol does not define “family relationship” or other terms. When interpreting these terms and the Protocol, regard should be had by competent authorities to the international character of the Protocol and to the need to promote uniformity in its application.<sup>157</sup>

389. A special defence rule has been included in the Protocol to partially mitigate its broad scope.<sup>158</sup> A debtor may contest a creditor's claim on the basis that there is no such obligation under both the law of the State of the debtor's habitual residence and the law of the State of the common nationality of the parties, if there is one. This defence is applicable to any maintenance obligation other than those to children arising out of a parent-child relationship or those between spouses or ex-spouses.

390. Finally, the application of the law determined under the Protocol may be refused if “its effects would be manifestly contrary to the public policy of the forum.”<sup>159</sup>

<sup>153</sup> Art. 2 of the Protocol.

<sup>154</sup> It should be noted that for Contracting States to both the 1973 Convention and to the Protocol, issues of concurrence of the two instruments may arise in their relations with other Contracting States to the 1973 Convention which are not Party to the 2007 Protocol. Japan, Turkey and Switzerland in particular are Contracting States to the 1973 Convention, but not yet Party to the 2007 Protocol, and thus it may be questioned which of the applicable law rules of universal effect of the new Protocol or of the 1973 Convention should prevail in cases involving these States. There are differences of opinion in academic literature. See discussion in the Protocol's Explanatory Report at paras 194-197. Romania is not a State Party to the 1973 Convention.

<sup>155</sup> Art. 27 of the Protocol.

<sup>156</sup> Art. 1(1) of the Protocol.

<sup>157</sup> Art. 20 of the Protocol.

<sup>158</sup> Art. 6 of the Protocol.

<sup>159</sup> Art. 13 of the Protocol.

### 3. Scope of applicable law

391. The Protocol enumerates a non-exhaustive list of issues to which the relevant applicable law will be applied, including: whether, to what extent and from whom the creditor may claim maintenance; the extent to which the creditor may claim retroactive maintenance; the basis for calculation of the amount of maintenance, and indexation; who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation in the proceedings; prescription or limitation periods; and the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in place of maintenance.<sup>160</sup>

### 4. General rule on applicable law

392. The main applicable law rule employed by the Protocol is the application of the law of the creditor's habitual residence.<sup>161</sup> This general rule has the advantages of allowing a determination of the existence and amount of the maintenance obligation with regard to the legal and factual conditions of the social environment in the country where the creditor lives, of securing equal treatment among creditors living in the same country, and of designating applicable law that will often coincide with the law of the forum.

### 5. Special rules favouring certain creditors

393. The Protocol provides certain "cascading" subsidiary applicable law rules, designed to favour certain maintenance creditors.<sup>162</sup> These special rules are designed on the principle of *favor creditoris*, to ensure that the creditor has the greatest possibility of obtaining maintenance.

394. The types of creditors who will benefit from these additional rules include: a) children who are owed maintenance by their parents (regardless of the age of the child); b) any person who has not attained the age of 21 years who is owed maintenance by persons other than parents (with the exception of maintenance obligations arising between spouses, ex-spouses and parties to a marriage which has been annulled); and, c) parents owed maintenance by their children.<sup>163</sup>

395. The Protocol provides that a creditor in one of the above-listed categories, who is unable to obtain maintenance by virtue of the law applied under the main rule, will benefit from the application of the law of the forum.<sup>164</sup> Additionally, if such a creditor seizes the competent authority of the State where the debtor has habitual residence, the law of that forum will apply, unless the creditor is unable to obtain, by virtue of this law, maintenance from the debtor, in which case the law of the State of the

<sup>160</sup> Art. 11 of the Protocol.

<sup>161</sup> Art. 3 of the Protocol.

<sup>162</sup> Art. 4 of the Protocol.

<sup>163</sup> Art. 4(1) of the Protocol.

<sup>164</sup> Art. 4(2) of the Protocol.

habitual residence of the creditor shall again apply.<sup>165</sup> Finally, it is provided that if the creditor is unable to obtain maintenance from the debtor under the general rule or the supplementary rules, the law of the State of the debtor and creditor's common nationality, if there is one, will apply.<sup>166</sup>

## **6. Special rule with respect to spouses and ex-spouses**

396. The Protocol provides a special rule for maintenance obligations between spouses, ex-spouses, and parties to a marriage which has been annulled.<sup>167</sup> In principle, in a break from the immutable connection to the law applied to the divorce under Article 8 of the former 1973 Convention,<sup>168</sup> the law of the State of the habitual residence of the creditor applies, subject, however, to an escape clause.

397. Either party may raise an objection to the application of the law of the State of habitual residence of the creditor, after which point the court or authority seized will have to conduct an inquiry into whether the marriage has a closer connection with a law other than that of the creditor's habitual residence (for example, *inter alia* the spouses' habitual residence or domicile during the marriage, their nationalities, the location where the marriage was celebrated, and the location of the legal separation or divorce). The Protocol in particular gives a leading role to the State of the last common habitual residence to be considered in such an inquiry.<sup>169</sup>

## **7. Choice of applicable law by the parties**

398. The Protocol includes novel features that enshrine measures of party autonomy, with some restrictions, in choosing applicable law to maintenance obligations.

399. Firstly, parties are permitted to make "procedural agreements" to designate the law of the forum for the purposes of a specific proceeding.<sup>170</sup> This provision only applies when a maintenance creditor has brought or is about to bring a maintenance claim before a specific court or authority.

400. Secondly, parties are permitted to make agreements designating the law applicable to a maintenance obligation at any time, including before a dispute arises and during a proceeding, until such time as they choose to cancel or modify their agreement.<sup>171</sup> Parties are only permitted to designate the law of any State of which either party is a national, the law of the State of the habitual residence of either party, or the law previously chosen or actually applied to their property regime or to their divorce or legal separation.<sup>172</sup>

<sup>165</sup> Art. 4(3) of the Protocol.

<sup>166</sup> Art. 4(4) of the Protocol.

<sup>167</sup> Art. 5 of the Protocol.

<sup>168</sup> See *supra*, note 148.

<sup>169</sup> Art. 5 of the Protocol.

<sup>170</sup> Art. 7 of the Protocol.

<sup>171</sup> Art. 8 of the Protocol.

<sup>172</sup> Art. 8(1) of the Protocol.

401. With a view to protecting the maintenance creditor, such general agreements are restricted in important ways. Choice of law agreements covering maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties is not in a position to protect his or her interest, are prohibited.<sup>173</sup>

402. The parties' choice of applicable law is also restricted when it bears on the creditor's ability to renounce his or her right to maintenance.<sup>174</sup> The law of the State of the creditor's habitual residence at the time of designation of applicable law shall govern the possibility of renunciation of maintenance and the conditions of such renunciation.

403. The Protocol also requires that parties to an agreement on applicable law must be "fully informed and aware" of the consequences of their designation. Otherwise a court or authority seized may set aside the application of designated law if its application "would lead to manifestly unfair or unreasonable consequences for any of the parties."<sup>175</sup>

## **8. Public bodies**

404. The Protocol provides that the right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject.<sup>176</sup>

## **9. Determining the amount of maintenance**

405. Finally, the Protocol contains a substantive rule<sup>177</sup> that must be applied by the authorities of a Contracting State or a State in which the Protocol is applicable regardless of whether the applicable law is foreign law or the law of the forum. The rule stipulates that the needs of the creditor and the resources of the debtor, as well as any compensation which the creditor was awarded in place of periodical maintenance payments (*i.e.*, a "lump sum" payment), shall be taken into account in determining the amount of maintenance, even if the applicable law provides otherwise.

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<sup>173</sup> Art. 8(3) of the Protocol.

<sup>174</sup> Art. 8(4) of the Protocol.

<sup>175</sup> Art. 8(5) of the Protocol.

<sup>176</sup> Art. 10 of the Protocol.

<sup>177</sup> Art. 14 of the Protocol.



## Chapter 6 - Finding and Ascertaining Foreign Law

### A. Introduction

406. Competent authorities handling international maintenance cases under the Convention or Regulation will sometimes have to ascertain and / or apply foreign law. Please see Chapter 5 for a discussion of applicable law issues and thus instances where accessing the content of foreign law may arise under the Convention and the Regulation.

### B. Finding foreign law globally and within the European Union

#### 1. The Country Profile under the 2007 Convention

407. Under Article 57 of the Convention, each Contracting State must submit to the Permanent Bureau of the Hague Conference 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>178</sup>

408. The Country Profile recommended and published by the Hague Conference may be used by a Contracting State as a means of providing this information. Article 57(1) a) of the Convention specifically requires that Contracting States provide “a description of its laws and procedures concerning maintenance obligations” (found at Section III of the Country Profile).

409. 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) >, under the Child Support / Maintenance section.

#### 2. Information on national laws and procedures under the Regulation

410. Information similar to that which must be provided under the Convention must be provided under the Regulation by European Union Member States (according to Arts 70 and 71 of the Regulation) to the European Judicial Network in civil and commercial matters,<sup>179</sup> to be kept permanently updated. The European Judicial Network in civil and commercial matters has a dedicated maintenance section on its website with links to specific country information on maintenance matters, found at the following web link:<sup>180</sup>

<sup>178</sup> See the Explanatory Report of the Convention, para. 683.

<sup>179</sup> Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (modified by Decision 568/2009/EC of the European Parliament and of the Council of 18 June 2009).

<sup>180</sup> It should be noted that it is anticipated that such information will be re-located to the European e-Justice Portal, found at the following web link: < <https://e-justice.europa.eu/home.do> >.

< [http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_gen_en.htm) >

### 3. Other global and European online resources for finding and ascertaining foreign law

411. The website links provided in this Section, below, are for information purposes only, were accurate links at the time of drafting of this Handbook, and may or may not contain links to official or authoritative governmental legal information. However, the list below seeks to include a range of governmental, non-profit and academic institutions which provide free access to law and which often have an established reputation for quality legal information. The list below is by no means exhaustive. The websites listed below generally contain comprehensive legal information for a given jurisdiction, and are not specialised in maintenance issues.

#### INTRODUCTIONS TO GLOBAL LEGAL INFORMATION:

<b>Global Encyclopaedias / Legal System Mapping</b>	<ul style="list-style-type: none"> <li>• JurisPedia &lt; <a href="http://en.jurispedia.org/index.php/Main_Page">http://en.jurispedia.org/index.php/Main_Page</a> &gt;</li> <li>• GlobaLex &lt; <a href="http://www.nyulawglobal.org/Globalex/">http://www.nyulawglobal.org/Globalex/</a> &gt;</li> <li>• JuriGlobe &lt; <a href="http://www.juriglobe.ca/index.php">http://www.juriglobe.ca/index.php</a> &gt;</li> </ul>
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#### LINKS TO LEGAL INFORMATION:

<b>International Databases</b>	<ul style="list-style-type: none"> <li>• World Legal Information Institute (WorldLII) &lt; <a href="http://www.worldlii.org/">http://www.worldlii.org/</a> &gt;</li> <li>• Global Legal Information Network (GLIN) &lt; <a href="http://www.glin.gov/search.action">http://www.glin.gov/search.action</a> &gt;</li> </ul>
<b>Regional Databases</b>	<ul style="list-style-type: none"> <li>• Asian Legal Information Institute (AsianLII) &lt; <a href="http://www.asianlii.org/">http://www.asianlii.org/</a> &gt;</li> <li>• Members of the Commonwealth (CommonLII) &lt; <a href="http://www.commonlii.org/">http://www.commonlii.org/</a> &gt;</li> <li>• European e-Justice Portal &lt; <a href="https://e-justice.europa.eu/home.do?action">https://e-justice.europa.eu/home.do?action</a> &gt;</li> <li>• Official publications of the EU (EUR-Lex) &lt; <a href="http://eur-lex.europa.eu/">http://eur-lex.europa.eu/</a> &gt;</li> <li>• Members of the International Organisation of the Francophonie (Droit francophone) &lt; <a href="http://droit.francophonie.org/">http://droit.francophonie.org/</a> &gt;</li> <li>• Pacific Islands (PacLII) &lt; <a href="http://www.paclii.org/">http://www.paclii.org/</a> &gt;</li> </ul>

	<ul style="list-style-type: none"> <li>• Southern Africa (SAFLII) &lt; <a href="http://www.saflii.org/">http://www.saflii.org/</a> &gt;</li> <li>• UK Territories and Dependencies &lt; <a href="http://www.worldlii.org/catalog/3144.html">http://www.worldlii.org/catalog/3144.html</a> &gt;</li> </ul>
<b>National Databases</b>	<ul style="list-style-type: none"> <li>• Australia (AustLII) &lt; <a href="http://www.austlii.edu.au/">http://www.austlii.edu.au/</a> &gt;</li> <li>• Austria (RechtsInformationsSystem) &lt; <a href="http://www.ris.bka.gv.at/">http://www.ris.bka.gv.at/</a> &gt;</li> <li>• British and Irish Legal Information Institute (BailII) &lt; <a href="http://www.bailii.org/">http://www.bailii.org/</a> &gt;</li> <li>• Burkina Faso (JuriBurkina) &lt; <a href="http://www.juriburkina.org/juriburkina/">http://www.juriburkina.org/juriburkina/</a> &gt;</li> <li>• Canadian Legal Information Institute (CanLII) &lt; <a href="http://www.canlii.org/">http://www.canlii.org/</a> &gt;</li> <li>• Cyprus (CyLaw) &lt; <a href="http://www.cylaw.org/index-en.html">http://www.cylaw.org/index-en.html</a> &gt;</li> <li>• European Union Nations (N-Lex) &lt; <a href="http://eur-lex.europa.eu/n-lex/">http://eur-lex.europa.eu/n-lex/</a> &gt;</li> <li>• Hong Kong (HKLII) &lt; <a href="http://www.hklai.org/">http://www.hklai.org/</a> &gt;</li> <li>• India (LII of India) &lt; <a href="http://liiofindia.org/">http://liiofindia.org/</a> &gt;</li> <li>• Ireland (IRLII) &lt; <a href="http://www.ucc.ie/law/irlai/index.php">http://www.ucc.ie/law/irlai/index.php</a> &gt;</li> <li>• Kenya (KLR) &lt; <a href="http://www.kenyalaw.org/update/index.php">http://www.kenyalaw.org/update/index.php</a> &gt;</li> <li>• Mexico (Instituto de Investigaciones Jurídicas, UNAM) &lt; <a href="http://info.juridicas.unam.mx/infjur/leg/">http://info.juridicas.unam.mx/infjur/leg/</a> &gt;</li> <li>• New Zealand (NZLII) &lt; <a href="http://www.nzlii.org/">http://www.nzlii.org/</a> &gt;</li> <li>• Niger (JuriNiger) &lt; <a href="http://juriniger.lexum.umontreal.ca/juriniger/index.do">http://juriniger.lexum.umontreal.ca/juriniger/index.do</a> &gt;</li> <li>• Philippines (LawPhil) &lt; <a href="http://www.lawphil.net/">http://www.lawphil.net/</a> &gt;</li> <li>• U.S.A. (Legal Information Institute (LII)) &lt; <a href="http://www.law.cornell.edu/">http://www.law.cornell.edu/</a> &gt;</li> </ul>

<p><b>Library Collections / Research Institutes</b></p> <p><i>Description: Institutions which may have significant online collections of global legal information. These institutions also may provide foreign law opinions or research services.</i></p>	<ul style="list-style-type: none"> <li>• Swiss Institute of Comparative Law &lt; <a href="http://www.isdc.ch/">http://www.isdc.ch/</a> &gt;</li> <li>• Max Planck Institute for Comparative and International Private Law, Germany &lt; <a href="http://www.mpipriv.de/ww/en/pub/news.cfm">http://www.mpipriv.de/ww/en/pub/news.cfm</a> &gt;</li> <li>• Law Library of Congress, USA &lt; <a href="http://www.loc.gov/law">http://www.loc.gov/law</a> &gt;</li> <li>• Institute of Advanced Legal Studies, London, UK &lt; <a href="http://ials.sas.ac.uk/">http://ials.sas.ac.uk/</a> &gt;</li> <li>• Cornell Law Library, USA &lt; <a href="http://library.lawschool.cornell.edu/">http://library.lawschool.cornell.edu/</a> &gt;</li> <li>• Juristisches Internetprojekt Saarbrücken, Germany &lt; <a href="http://www.jura.uni-saarland.de/index.php?id=76&amp;tx_googlesearch_pi1%5Baction%5D=list">http://www.jura.uni-saarland.de/index.php?id=76&amp;tx_googlesearch_pi1%5Baction%5D=list</a> &gt;</li> </ul>
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#### 4. Accessing and ascertaining foreign law by way of legal co-operation treaties or mechanisms

412. Accessing and ascertaining the content of foreign law among European Union Member States can be done via the European Judicial Network national contact points, pursuant to *Council Decision 2001/470/EC*.<sup>181</sup>

413. Article 5(2) c) of Decision 568/2009/EC (modifying Council Decision 2001/470/EC) provides that European Judicial Network national contact points shall:

“[...] supply any information to facilitate the application of the **law of another Member State** that is applicable under a Community or international instrument. To this end, the contact point to which such a request is addressed may draw on the support of any of the other authorities in its Member State referred to [...] in order to supply the information requested. The information contained in the reply shall not be binding on the contact point, the authorities consulted or the authority which made the request [emphasis added].”

414. With respect to more complex questions on foreign law, and in relation to some third countries (*i.e.* non European Union Member States) the content of foreign law can be accessed via the national designated receiving agencies (usually the foreign Ministry of Justice), under the Council

<sup>181</sup> See *supra*, note 179.

of Europe *European Convention on Information on Foreign Law, London, 7 June 1968* (hereinafter the "London Convention"), or via other multilateral or bilateral legal assistance treaties.<sup>182</sup> The European Judicial Network national contact points may also be able to assist in the operation of the London Convention within the European Union, for instance where there are delays in responding to a request under the London Convention. Where there is no conventional legal framework in place with a foreign State, in Romania Law No 189/2003 concerning international legal assistance in civil matters and Article 2562 of the Law No 287/2009 concerning the Civil Code can be used. Also, according to Article 15 of Law No 36/2012 concerning some measures for the application of some Regulations and Decisions of the Council of the European Union, as well as instruments of private international law in matters relating to maintenance obligations, foreign and Romanian law on maintenance obligations under the Convention and Regulation can be obtained via the Ministry of Justice of Romania.

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<sup>182</sup> In Romania bilateral treaties which contain provisions on the obtaining of foreign law have been concluded with Albania, Algeria, Bosnia and Herzegovina, China, Republic of Korea, Cuba, Egypt, Macedonia, Morocco, Moldova, Mongolia, the Russian Federation, Serbia, Syria, Tunis, Turkey, and Ukraine.

## **Chapter 7 - 2007 Convention: Processing incoming applications through Central Authorities and direct requests for recognition or recognition and enforcement**

*How to use this Chapter:*

*Part I of this Chapter deals primarily with applications under the Convention to recognise or recognise and enforce a maintenance decision received by judicial or other competent authorities from a Central Authority. Part II deals with issues particular to direct requests under the Convention received by judicial or other competent authorities.*

### **Part I: Applications received from a Central Authority**

*Section I provides an overview of the Application and the general principles governing recognition and enforcement – when it will be used and who can apply for it.*

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

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

*Section IV deals with other aspects of the general procedures, including applications by debtors.*

*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 contains a summary checklist of the procedures for processing Recognition and Enforcement applications received from Central Authorities.*

*Section VIII answers some frequently asked questions.*

### **Part II: Applications received directly by competent authorities**

*Section I provides an overview and presents general issues relating to applications received directly by competent authorities.*

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

*Section III answers some frequently asked questions concerning direct requests.*

## Part I — Applications through Central Authorities for recognition or recognition and enforcement

### I. Overview and general principles

#### A. General principles

415. 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>183</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.

416. Recognition or 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.

417. The procedures for recognition or 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”. 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 underlying principle in the Convention that recognition and enforcement should be simple, low cost and speedy.<sup>184</sup>

#### B. Procedural overview

418. The declaration or registration procedures for recognition or recognition and enforcement described below and set out in Article 23

<sup>183</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 the Explanatory Report of the Convention, paras. 472-473.

<sup>184</sup> See the Explanatory Report of the Convention, para. 490. The European Court of Human Rights has ruled that national authorities have a positive obligation to assist diligently and in a timely manner with the enforcement of a foreign maintenance decision for the benefit of a creditor (see *Romańczyk v. France*, No. 7618/05 (18 November 2010), where the court found a violation of Art. 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*).

of the Convention will be used in most Contracting States. There is an alternative process provided for in the Convention (Art. 24) and through a declaration, a State may choose to use the alternative process.<sup>185</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 program or any other government entity that performs some of the tasks associated with the Convention.

419. Upon receipt of the application from another Central Authority, the Central Authority in the requested State<sup>186</sup> will send the materials to the 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.<sup>187</sup>

420. 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.

**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.

421. 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.<sup>188</sup>

<sup>185</sup> The European Union will not make a declaration that it will utilise the “Alternative procedure on an application for recognition and enforcement” (Art. 24) of a decision under the Convention. Thus competent authorities in Member States of the European Union will use the Art. 23 procedures to process applications for recognition and enforcement under the Convention (see Council Decision no 2011/432/EU (*supra*, note 59)).

<sup>186</sup> In Romania the Central Authority is the Ministry of Justice. According to Art. 2(1) and (2) of Law No. 36/2012, the Ministry of Justice is the Romanian Central Authority designated under Art. 4 of the 2007 Hague Convention, in relations with non-EU Member States which are Contracting States to the 2007 Hague Convention, and under Art. 49 of Regulation (EC) No. 4/2009, in relations with the Member States of the European Union.

<sup>187</sup> In Romania the Competent Authority is not the Central Authority. For exequatur proceedings the competent authority is, according to Art. 19 of Law No. 36/2012, the tribunal where the debtor has his or her domicile or assets.

<sup>188</sup> In Romania a registration process is not used, and instead, the maintenance decision is recognised by the competent judicial authority and a declaration of enforceability is made. Based on Art. 14 of Law No. 36/2012, the Ministry of Justice sends the request for exequatur directly, after the preliminary check, to the competent territorial bar. The dean of the bar designates a lawyer for the creditor of maintenance (child or vulnerable adult). The designated lawyer asks for legal aid and produces the application for exequatur. According to Arts 1098 and 1105 of the Civil Procedure Code, the application for recognition of the foreign



422. Once the decision has been declared enforceable both the applicant and respondent are given notice.<sup>189</sup> The respondent is entitled to challenge or appeal the declaration or registration on certain limited grounds.<sup>190</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 declaration of enforceability. The challenge or appeal will be made to the competent authority as allowed in that State.<sup>191</sup>

423. If the debtor is not willing to start making payments under the decision voluntarily, enforcement of the decision can take place as permitted by the law of the requested State, despite the ongoing challenge or appeal (see also Chapter 12 of this Handbook on Enforcement). While voluntary payments are an important means of ensuring that payments start to flow to the creditor as quickly as possible, it is also important to ensure that enforcement is taken as appropriate to avoid delays in payment.

424. If the challenge or appeal to the recognition and enforcement is successful and the declaration of enforceability 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 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 process again in the requesting State.<sup>192</sup>

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.

decision shall be settled amicably, principally by a decision, and indirectly, by an interlocutory judgment, in both cases after the parties are subpoenaed. The application may be settled without subpoenaing the parties, if the foreign decision reveals that the defendant agrees with the admission of the action. The application consenting to enforcement shall be settled by decision, after the parties are subpoenaed. If the foreign decision contains solutions related to several claims which are separable, then consent may be granted separately.

<sup>189</sup> Where both States are a Party to the 1965 Service Convention please see Chapter 3, Part II, Section IX, *supra*, concerning this issue.

<sup>190</sup> See the Explanatory Report of the Convention, para. 504.

<sup>191</sup> Under the domestic law of Romania an appeal can be lodged at the Appeal Court of the tribunal of first instance which gave the exequatur decision. The delay to appeal is, according to the Civil Procedure Code, 30 days from the service of the decision (even if given at the same time as the authorisation of enforcement). The appeal suspends the enforcement of the decision rendered at the first instance.

<sup>192</sup> Under the domestic law of Romania the issue of prorogation of competence is not expressly set out by Law No. 36/2012. Thus, the creditor, through a lawyer, will have to lodge a new application at the court of first instance if the request for exequatur is dismissed by the court.

425. Finally, if the challenge or appeal is not successful, a further appeal may be allowed by the domestic law of the requested State. 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 (Art. 23(10)).<sup>193</sup>

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

426. An application for recognition or 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.

**Recognition** of a maintenance decision is the procedure used by a State competent authority to accept the determination of rights and obligations concerning maintenance made by the authority in the State of origin, where the decision was made and it gives the force of law to that decision.

427. Although most applications will be for recognition and enforcement of a decision, in some cases a creditor will seek recognition only, and will not request enforcement of the decision.

428. 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 12).

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

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

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.

### **How this works under the Convention:**

430. The creditor<sup>194</sup> will ask the Central Authority in Country A to transmit an application for recognition or recognition and enforcement of the

<sup>193</sup> Under the domestic law of Romania after a decision is given by the Appeal Court, the second appeal can be lodged at the High Court of Cassation and Justice. The delay to lodge a second appeal is, according to the Civil Procedure Code, 30 days from the service of the decision. The second appeal does not suspend the enforcement of the decision.

<sup>194</sup> Note that in some circumstances, the application will be made by a public body (such as a Child Support Agency) on behalf of the creditor.

maintenance decision to Romania. The application will be checked to ensure it is complete and will be processed by the Central Authority in Romania. The debtor will be notified and given a chance to object to the recognition or recognition and enforcement on the limited grounds set out in the Convention. Once recognised, the decision can be enforced by the competent authority in Romania in the same manner as if it were a decision originally made in Romania.

For information about applications to **enforce** a decision made in the **requested** State (i.e. Romania) – see Chapter 9. For information about **enforcement** of any maintenance decision – see Chapter 12.

### **E. Who can apply**

431. 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, and does not need to be present in Romania in order for a decision to be recognised and enforced in that State (Art. 29). 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.

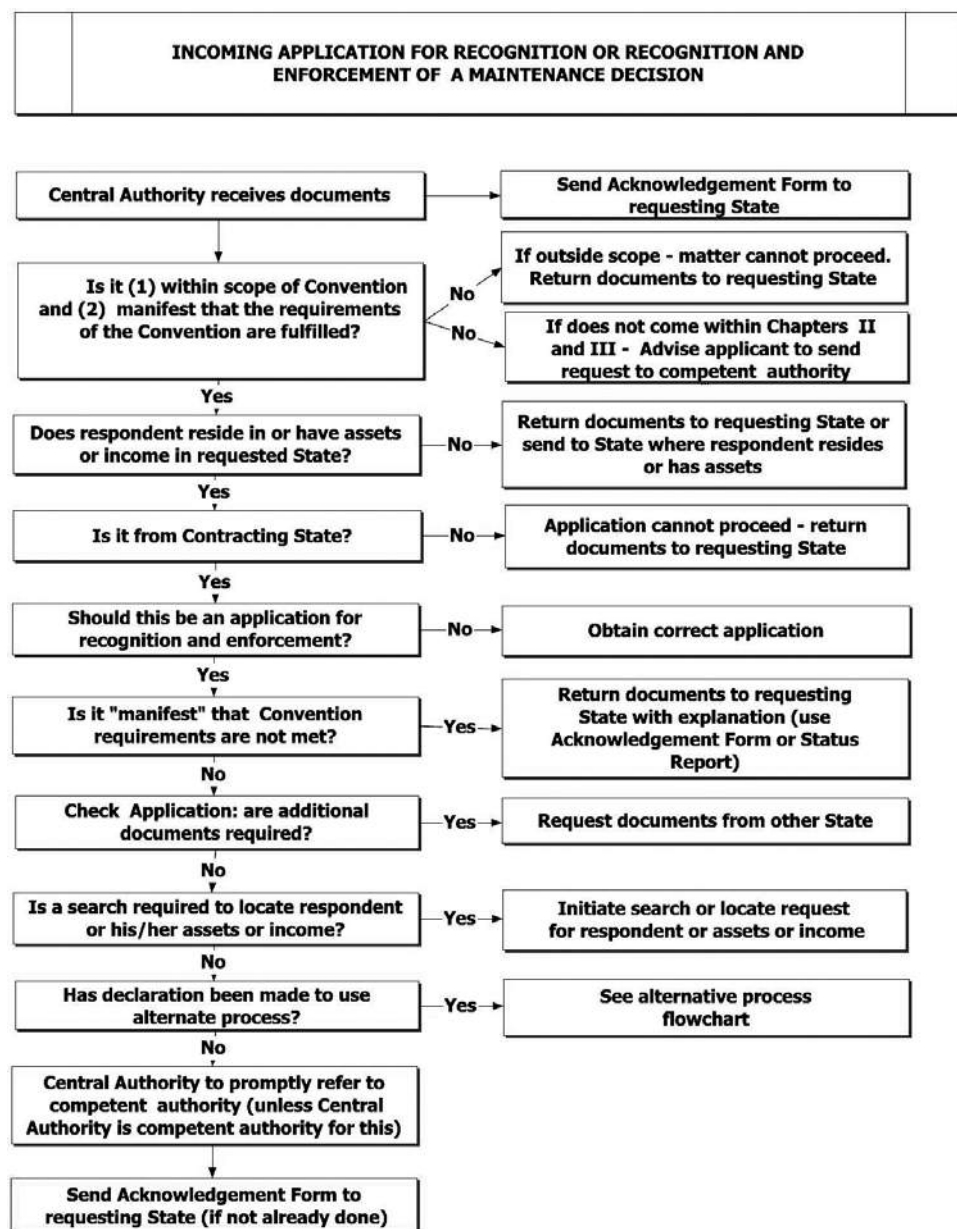
**Tip:** Are you looking for a simple checklist to follow? Do you want to skip the details? Go to the end of this chapter and use the **Checklist**.

## **II. Recognition and enforcement process summarised**

432. The table below illustrates the full process for recognition and enforcement applications by a creditor concerning maintenance decisions, including steps that will be taken by the Central Authority in Romania. The next Sections of this Chapter detail the components of the steps which may be taken by competent authorities.

433. This part applies equally to applications for recognition only. These applications will be fairly rare. Article 26 provides that the provision of Chapter V (recognition and enforcement) apply "*mutatis mutandis*" to applications for recognition only with the exception that the requirement for enforceability is replaced with a requirement that the decision has effect in the State of origin. What this means is that for practical purposes the provisions dealing with recognition and enforcement will apply to applications for recognition, except with respect to those provisions that need to be changed, because no enforcement of the decision is being requested.<sup>195</sup>

<sup>195</sup> Explanatory Report of the Convention para. 546.



**Figure 6: Diagram of incoming recognition or recognition and enforcement applications received from the Central Authority in Romania**

### III. Procedures

#### A. *Preliminary check of incoming documents and other preliminary matters*

434. Before sending the materials to the competent authority in Romania, the Central Authority of Romania should check to ensure the application comes under the Convention provisions for recognition or recognition and enforcement, and to make sure that the package of documents is complete. The competent authority in Romania will have to make a similar check

##### 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, Part I. 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, a direct request should be made to a competent authority (see Part II, below).
- 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, or returned to the requesting State.
- 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 of the Convention. See Part II, below.

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

435. Check the documents to ensure that the correct application is recognition or 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 10.
- If there is a maintenance decision but it is from your State, the decision does not need to be recognised. It can simply be processed for enforcement in your State, following your regular enforcement procedures. See Chapter 9.

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

436. 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 Art. 12(8)). The circumstances when this might be the case are quite limited.<sup>196</sup> In order to be “manifest”, the reason for rejection must be apparent or clear on the face of the documents received.<sup>197</sup> 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. Similarly, an application could be rejected on this basis if a previous application by the same party on exactly the same grounds had failed.

437. Note that if recognition and enforcement of the decision appears to be contrary to public policy, the application should still be forwarded to and processed by 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.

### 4. Check the documents for completeness

438. Central Authorities have the obligation to check an application received from the requesting State in a timely fashion to make sure it is complete, and to promptly refer the completed application to the competent authority for the decision to be recognised or recognised and enforced. If additional documents are needed the Central Authority must have requested these without delay. Article 25 of the Convention sets out a complete list of all of the documents that are required – no additional documents can be required in an application for recognition and enforcement.

439. Articles 11, 12, 25 and 44 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, was represented, or challenged decision)
<b>As needed</b>	Translated versions of documents
<b>As needed</b>	Financial Circumstances Form (for applications by creditors only)
<b>As needed</b>	Document calculating arrears

<sup>196</sup> The Explanatory Report of the Convention, para. 345.

<sup>197</sup> Explanatory Report of the Convention, para. 344.

<b>As needed</b>	Document explaining how to adjust or index decision
√	Transmittal Form

**Figure 7: Contents of application for recognition and enforcement**

440. The following is a brief description of what you can expect to see in the incoming package of materials (please consult Figure 7, above, to determine which of the below Forms are mandatory, or only as needed).

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

**(1) 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, the application should include 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.

**(2) 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.<sup>198</sup>

**(3) 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.<sup>199</sup> If the application is for recognition

<sup>198</sup> Romania requires that the full text of the judgment is presented. Romania did not specify that it will accept, instead the full text of the judgment, a summary or excerpt of the judgment (drawn up by the competent authority of the State of origin which can be presented by using the form recommended and published by the Hague Conference on Private International Law). In the reverse situation, when a summary or excerpt from the judgment given by a Romanian authority, pursuant to Art. 9 of Law No. 36/2012, is solicited from abroad, the competence for issuing an excerpt of a judgment or judicial transaction (Annex A—the model recommended form published by the Hague Conference on Private International Law) for which the exequatur procedure has not been removed (subject to procedures of Art. 23 of the 2007 Hague Convention), in relations with non-EU Member States which are Contracting States to the 2007 Hague Convention, belongs to the court of first instance or, respectively, to the court in front of which the transaction was concluded.

<sup>199</sup> Romania requires that the certificate attesting to the enforceable character of the decision is included. In the reverse situation, when a certificate is solicited from abroad, according

only, the application only needs to establish that the decision has effect in the State of origin, not that it is enforceable.<sup>200</sup> There is a provision in the Statement of Enforceability that indicates the date that the decision took effect in that State.

#### **(4) 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. It can be determined 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. Note that in some States, the challenge or reply may be made in a written form. The respondent does not always need to appear in person.

#### **(5) 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.

### **b) Other Forms that may be necessary**

441. Although Article 11(3) provides that only the documents listed in that Article (and described above) may be required in an application for recognition or recognition and enforcement, other forms may also be necessary, depending on the circumstances of the case:

#### **(a) Financial Circumstances Form**

If the applicant is also seeking enforcement of the decision (which will happen in most cases) it is always a good practice to include a Financial Circumstances Form which provides important information about the location and financial circumstances of the Respondent, to the extent known by the applicant.

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to Art. 10 of Law No. 36/2012, the competence for issuing the certificate attesting to the enforceable character of the judgment, judicial transaction or authentic document (Annex A—the model recommended form published by the Hague Conference on Private International Law) for which the exequatur procedure has not been removed (subject to procedures of Art. 23 of the 2007 Hague Convention), in the relation with a non-EU Member States which are Contracting States to the 2007 Hague Convention, belongs, respectively, to the court of first instance, the notary public, or to the court in front of which the transaction was concluded.

<sup>200</sup> Explanatory Report of the Convention para. 546.



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. If the application is for recognition only, no form will be included.

(b) Document calculating arrears

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

(c) 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, 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>201</sup>

(d) 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 (Art. 36(4)).

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

442. 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 or 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.<sup>202</sup>

<sup>201</sup> See the Explanatory Report of the Convention, 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.

<sup>202</sup> In Romania pursuant to Art. 12 under Attributions of authorities and institutions holding personal data in settling the applications for specific measures, having as an object the localisation or facilitation of the seeking of information on a debtor's or creditor's incomes or assets of Law No. 36/2012, the Ministry of Justice receives (pursuant to the provisions of Arts 51, 53 and 61 to 63 of the Regulation (EC) No. 4/2009, and of Arts 6 and 7 of the

443. 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.

444. If the respondent cannot be located, 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.

## 6. If the documentation is incomplete

445. If the required documentation has not been provided by the applicant, the Central Authority of Romania should have already promptly notified the requesting Central Authority to ask that the additional documents be supplied, before the documentation package is sent to the competent authority. If a competent authority finds that any required documentation is missing, it should notify the Central Authority of Romania immediately in order that it can request this missing information from the requesting Central Authority.

446. If a request by the requested Central Authority in Romania is made for additional documents, the requesting State has **three months** in which to provide the documents. If the requested documents are not provided

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2007 Hague Convention) applications for specific measures by way of the Central Authority of an EU Member State or from a Contracting States to the 2007 Hague Convention. The Ministry of Justice forwards for fulfilment of the request to the Ministry of Administration and Internal Affairs, Ministry of Public Finances, Ministry of Labour, Family and Social Protection, as applicable, and to their subordinated or coordinated structures, as well as to any other competent authorities or institutions holding personal data. The applications for specific measures have as their object the debtor's or creditor's localisation and / or the facilitation of the seeking of information concerning the debtor's or creditor's incomes or assets. Upon the receipt of the applications for specific measures, the authorities or institutions holding personal data must duly apply, in fulfilment of the request, the provisions set out by Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, as subsequently amended and completed. The response received from the Romanian authorities or institutions holding personal data is forwarded, by the Ministry of Justice, to the Central Authority of the EU Member State, pursuant to Art. 53 of the Regulation (EC) No. 4/2009, or to the Central Authority of the Contracting State to the 2007 Hague Convention. Under the domestic law of Romania, in order to obtain data and information necessary for the realization of the procedure of service of summons, of other procedural documents, as well as for the accomplishment of any act specific to the activity of judgment, the courts are entitled to direct access to electronic databases or other information systems of public authorities and institutions. These authorities and institutions have the obligation to take necessary measures in order to ensure direct access of the courts to these electronic databases and information systems. At the request of the bailiff, the persons owing money to the debtor must give all information necessary for the performance of enforcement. The fiscal bodies, public institutions, credit institutions and any other persons must supply the data and information necessary for the performance of enforcement. The bailiff has free access to the land register, the trade register and other public registries containing data about the debtor's assets, after the enforcement procedure has begun.

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.

447. Note that the preliminary documentation check, and requests for additional materials if necessary, will take place before a competent authority proceeds to a consideration of the merits of an application.

## **7. Appropriate provisional or protective measures**

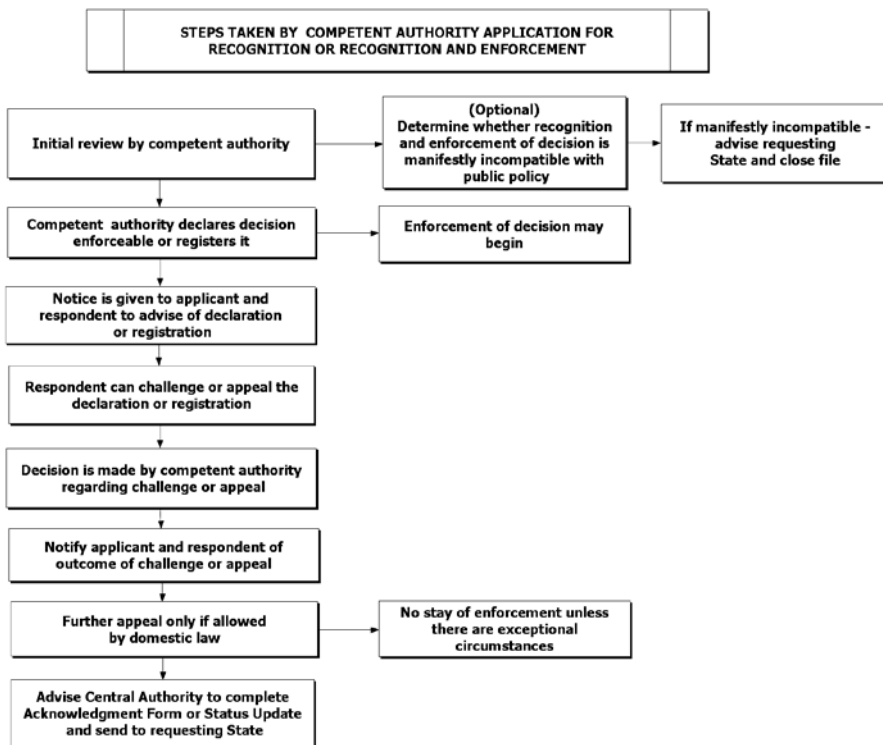
448. It may be appropriate that the competent authority take provisional or protective measures while an application is pending. The taking of these measures may occur at a number of points in time during—or even before—the application process. Please see Chapter 3, Part II, Section VIII, for further information on provisional and protective measures.

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

449. The discussion in this part covers the procedures that will be used by competent authorities, after the preliminary matters above are taken care of, for the processing of applications for recognition or recognition and enforcement of maintenance decisions under Article 23 of the Convention.<sup>203</sup> The diagram below shows the steps taken by the competent authority in Romania.

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<sup>203</sup> The European Union will not make a declaration that it will utilise the “Alternative procedure on an application for recognition and enforcement” (Art. 24) of a decision under the Convention. Thus competent authorities in Member States of the European Union will use the Art. 23 procedures to process applications for recognition and enforcement under the Convention (see Council Decision no 2011/432/EU (*supra*, note 59)).



**Figure 8: Steps taken by competent authority in recognition or recognition and enforcement application (Art. 23)**

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

450. Once the complete application has been received by the competent authority, it will be recognised and declared enforceable or registered for enforcement.<sup>204</sup> This step (declaration of enforceability or registration for enforcement) is to be taken “without delay” by the competent authority (Art. 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.<sup>205</sup>

<sup>204</sup> See *supra*, note 188.

<sup>205</sup> According to the domestic law and procedures of Romania in accordance with Art. 14 of Law No. 36/2012, the Ministry of Justice sends, after the preliminary check, the request for enforcement directly to the competent territorial bar. The dean of the bar designates a lawyer for the creditor of maintenance (child or vulnerable adult). The lawyer designated asks for legal aid in the form of bailiff fees. After approval, the lawyer files the application with the territorially competent bailiff who will initiate the measures of enforcement. See Chapter 12.

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

451. The only reason that may be used by the competent authority to refuse to recognise and declare the decision enforceable or registered the decision for enforcement 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>206</sup>

## 3. Enforce the decision

452. Once the decision has been registered or declared enforceable, no further request or application by the applicant is required under the Convention in order to have the decision enforced. There is also no requirement under the Convention that the respondent receives a further notice that the decision will be enforcement.<sup>207</sup> (Please see Chapter 12 on enforcement of decisions.)

## 4. Notify the applicant and respondent

453. Once the decision has been declared enforceable or has been registered, both parties will be notified of the decision to register or to declare the decision enforceable. There are no Convention procedures for the notification, so this will be done as required by the domestic law of Romania.<sup>208</sup> The applicant may be notified through the Central Authority

<sup>206</sup> See the Explanatory Report of the Convention, para. 478.

<sup>207</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. Under the domestic law of Romania if the application for enforcement has been approved by the First Instance Court (Judecătoria), the bailiff will serve the debtor with a copy of the enforcement order, together with a copy of the enforcement order and an order for payment. The debtor will be summoned to fulfil the obligation as soon as possible or within the time limit granted by law, indicating that, if not, enforcement will be undertaken. It is not necessary to serve the enforcement order and the order for payment if the debtor is deprived of the term of payment benefit or if the enforcement is made according to the orders and interlocutory decisions given by the court and declared enforceable by law. Service of procedural documents in the context of enforcement can be made by the bailiff either personally or through his or her procedural agent. Proof of service through procedural agent has the same evidentiary value as proof of service performed by the bailiff. Effective enforcement can take place only after expiration of the time limit stipulated in the order for payment or of the time limit stipulated by interlocutory decision by which enforcement was approved. For all acts performed during enforcement, the bailiff is obliged to make reports. Where both States are a Party to the 1965 Service Convention, please see Chapter 3, Part II, Section IX.

<sup>208</sup> If the law of Romania provides for notification, notification to parties located abroad will be done in accordance with *Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)* among Member States of the European Union, or in accordance with the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* for States outside of

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.<sup>209</sup>

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

### **a) General**

454. 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>210</sup> As noted earlier in this Chapter, the processes under the Convention have been structured such that the recognition or recognition and enforcement 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 or enforced.

455. A foreign decision, once recognised or declared enforceable, will be able to be enforced in the same way as any maintenance decision originally made in Romania. Under the Convention a State may use all of the enforcement mechanisms available to ensure compliance with the decision (see Chapter 12). The Convention also 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.

456. 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>211</sup>

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the European Union, if the Convention applies between Romania and the other State. If the Hague 1965 Convention is not in force between the two States concerned, notification will be in accordance with other multilateral or bilateral treaties in force between the two States or according to the domestic law of Romania. See Chapter 3, Part II, Section IX for further information on service abroad.

<sup>209</sup> Under the domestic law of Romania service of all judicial documents shall be made to the lawyer designated by the local bar, according to Law No. 36/2012.

<sup>210</sup> See the Explanatory Report of the Convention, para. 428.

<sup>211</sup> Art. 20 sets out what are known as “indirect rules of jurisdiction”. Art. 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 of the Convention (para. 443) for a discussion of this issue, and also Chapter 4 of this Handbook.

457. The respondent may challenge or appeal the 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.

458. 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.

459. 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**

460. 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 outside the State, that party has **60 days** from notification to bring the challenge or appeal (Art. 23(6)).<sup>212</sup>

461. 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 or her 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**

462. 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

<sup>212</sup> See the Explanatory Report of the Convention, para. 503.

- 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 (Art. 23(5))**

463. 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 (Art. 28).<sup>213</sup> The manner in which the appeal or challenge is considered will be determined by domestic law.<sup>214</sup>

464. 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 via the Central Authority of Romania to the Central Authority of the requesting State to provide certified copies or such other documents as will address the issue.

465. If the challenge or appeal is merely with 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.<sup>215</sup> 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 (Art. 23(10))**

466. Once the challenge or appeal of registration of the decision or the declaration of enforceability has been concluded, both parties must be promptly notified. This notice will take place as required by domestic

<sup>213</sup> See the Explanatory Report of the Convention, paras 504, 505.

<sup>214</sup> See *supra*, note 191.

<sup>215</sup> Under the domestic law of Romania records of arrears should be kept by the creditor. They can be calculated by the bailiff by interlocutory decision (in the form of an enforcement order). For example: there may be amounts granted within the enforcement order, without their quantum having been established; or, the value of the main obligation, specified as a monetary amount, may be updated, depending on the inflation rate calculated from the date on which the judgment became enforceable or, in the case of other enforcement orders, from the date on which the order became due for payment up to the date of the effective payment of the obligation contained in any of the orders. According to Art. 531, Modification and Cessation of Maintenance Support, of the Civil Code, maintenance established as a fixed amount shall be indexed as of right on a quarterly basis, depending on the inflation rate. For instance, the National Institute of Statistics published, on its web site, the following inflation index: 2000 - 45,7 %; 2001- 34,5 %; 2002 - 22,5 %; 2003 - 15,3 %; 2004 - 11,9 %; 2005 - 9 %; 2006 - 6,56 %; 2007 - 4,84 %; 2008 - 7,85 %; 2009 - 5,59 %; 2010 - 6,09 %; 2011 - 5,79 %. The calculation of arrears can also be established based on an expert accounting report, by an accounting expertise office. If the parties do not agree upon the total of the arrears owed by the debtor, then the matter can be brought before the enforcement court, as an objection to enforcement.



law.<sup>216</sup> The applicant may be notified through the Central Authority of the requesting State or directly, depending upon the procedures of the requested State.<sup>217</sup>

467. There will only be a further appeal if the domestic law of the requested State allows it.<sup>218</sup>

468. 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 any event, the further appeal will not act as a stay of enforcement unless there are exceptional circumstances (Art. 23(10)).

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

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

469. 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 12.

#### **2. Other outcomes**

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

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

471. 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 or 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.

<sup>216</sup> Where both States are a party to the 1965 Service Convention, please see Chapter 3, Part V - Other Hague Conventions.

<sup>217</sup> See *supra*, notes 208 and 209.

<sup>218</sup> See *supra*, note 193.

**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 or recognition and enforcement 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**

472. In some cases, a maintenance decision cannot be recognised or enforced because of a reservation that the State has made under the Convention.<sup>219</sup> However, the application will not necessarily be concluded at that point.

473. Where the decision cannot be recognised because a reservation has been made, preventing recognition on any of the following bases, Article 20(4) requires the Central Authority to proceed with appropriate measures to have a new maintenance decision for the creditor established:

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.<sup>220</sup>

474. No new application from the creditor is required, and the existing decision must be taken as establishing eligibility<sup>221</sup> of the child to bring the maintenance proceedings (Art. 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 10 for a discussion of establishment applications.

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

475. Competent authorities should be aware that their national Central Authority (in this case, the Central Authority of Romania) will have period reporting duties as to the progress of applications under the Convention (Art. 12). Competent authorities will likely be asked for progress reports

<sup>219</sup> The European Union will not make any reservation to Art. 20 c), e), or f) bases for recognition and enforcement, as provided for under Art. 20(2) of the Convention (see Council Decision no 2011/432/EU (*supra*, note 59)). The Hague Conference website, < [www.hcch.net](http://www.hcch.net) >, can be consulted to ascertain whether a Contracting State has made such a reservation to the Convention.

<sup>220</sup> Note that Article 20(3) also requires a Contracting State making this reservation to recognise and enforce a decision if it would in similar factual circumstances have conferred jurisdiction on its own authorities to make the decision.

<sup>221</sup> See the Explanatory Report of the Convention, paras 469 - 471. Note that the Convention does not define the term “eligibility” in this context, therefore the domestic law of the requested State will determine how to interpret the term and also what further information or evidence will be required in order to make the maintenance decision.

from their national Central Authority and should be prepared to cooperate with the Central Authority in this respect.

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

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

###### **1. General**

476. 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 (*i.e.*, Romania), or where the debtor has obtained a modification of an existing decision in another Contracting State, and now wishes to have it recognised in Romania, as he or she has assets there.

477. See Chapter 11 for a full discussion of modification applications.

478. If there is a maintenance decision already being enforced in the requested State where the debtor resides or has assets, in most cases, domestic law requires a modified decision made in a foreign 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 will be necessary to review the domestic law to determine whether recognition of the decision is required in any particular case.<sup>222</sup>

**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.

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

479. Since the purpose of the application for recognition under Article 10(2) *a*) is to limit enforcement, and since most enforcement takes place in the State where the debtor resides, in many cases the debtor who requires recognition of a decision will reside in the State where the decision needs to be recognised, *i.e.*, in Romania. The Convention does not specifically

<sup>222</sup> Under the domestic law of Romania, in accordance with the Convention—which will become part of Romanian private international law—the Romanian courts may amend an amount stipulated by a foreign decision without the decision being previously recognised.

address the situation where an applicant needs to apply to his or her own Central Authority. Therefore in these cases the recognition will have to be handled under domestic law as a request to a competent authority in the State where the debtor resides.<sup>223</sup> Where recognition is sought in Romania, where the debtor has assets but does not reside, the debtor may make an application under Article 10(2) a).

480. 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 or the declaration of enforceability will have to be given to the creditor.

An example:

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

How this works under the Convention:

482. 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 Romania where, using the procedures described in this Chapter, the modified decision will be recognised and 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 Romania to limit the enforcement of the original decision.

### **3. Procedures**

483. The recognition and enforcement procedures discussed in this Chapter are applicable to applications by the debtor for recognition in these circumstances. Article 26 provides that the provision of Chapter V (recognition and enforcement) apply "mutatis mutandis" to applications for recognition only with the exception that the requirement for enforceability is replaced with a requirement that the decision has effect in the State of origin. What this means is that for practical purposes the provisions dealing with recognition and enforcement will apply to applications for recognition,

<sup>223</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 11), and no new application will have to be brought. This will depend upon the internal processes of each State. In Romania the Romanian Central Authority can support the debtor in procedures to receive the application for the recognition of the foreign judgment for the reduction of maintenance or in procedures for sending the application abroad for the reduction of maintenance. In Romania, the Romanian Central Authority cannot support the debtor in order to enforce the recognised foreign judgment.

except with respect to those provisions that need to be changed, because no enforcement of the decision is being requested.<sup>224</sup>

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

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

485. See Chapter 11 respecting modification applications (and Chapter 4, Section G for additional information on Art. 18).

### B. Maintenance arrangements

#### 1. Key differences

486. 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.<sup>225</sup>

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.

<sup>224</sup> See Explanatory Report of the Convention para. 546.

<sup>225</sup> Under the domestic law of Romania no reservation was made under the Convention indicating that Romania will not recognise and enforce maintenance arrangements (Art. 30(8)). See *Council Decision No 2011/432/EU of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

## 2. Procedures

487. However, for the purposes of recognition and enforcement of a maintenance arrangement, the same general principles and procedures used for recognition and enforcement of maintenance decisions apply.<sup>226</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.

488. If an application to recognise and enforce a maintenance arrangement is received, the same general processes will be followed. A 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.

489. The following documents are required, in accordance with the domestic law of Romania, in an application for recognition and enforcement of a maintenance arrangement: the maintenance arrangement in original / authentic copy, accompanied by a certified translation into Romanian.

490. 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. The arrangement is then registered for enforcement or declared enforceable and the respondent notified.

491. There are also some differences between the grounds that can be used to object to recognition of an arrangement and the grounds that can be used to object to the recognition of a decision. These are set out in Article 30(5).

## 3. Completion of the recognition and enforcement process

492. The recognition and enforcement process for maintenance arrangements is otherwise similar to that of maintenance decisions, with one exception. The competent authority will make a decision to register or declare the arrangement enforceable, and the respondent will be given an opportunity to challenge or appeal that decision. In many States, that will conclude the registration and enforcement process. However, if a challenge is pending, in the case of a maintenance arrangement, that appeal of the recognition of the arrangement will suspend any enforcement of the arrangement (Art. 30(6)).<sup>227</sup> This suspension of enforcement is an important difference between decisions and arrangements in the recognition and enforcement process.

<sup>226</sup> See the Explanatory Report of the Convention, para. 559.

<sup>227</sup> See the Explanatory Report of the Convention, para. 564. Under the domestic law of Romania, see *supra*, note 191 for appeal information.

## V. Recognition and enforcement – other issues

### A. Legal assistance

493. Under the Convention, in general, the requested State processing any application for recognition or 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.<sup>228</sup> 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.<sup>229</sup>

494. Please see Chapter 3, Part II, Section VII for more details on the requirement to provide effective access to procedures, including the provision of cost-free legal assistance if necessary.

495. There are a number of exceptions and constraints on the provision of cost-free services that should be considered, where the recognition application is being made by a debtor, or the decision is not for maintenance for a child under 21 years of age. These are also explained in Chapter 3, Part II, Section VII.

### B. Enforcement issues

#### Currency conversion

496. 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 in 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 enforcing State. In other instances, the requesting State may have already converted the decision, including any arrears, into the currency of the requested State.<sup>230</sup>

<sup>228</sup> Under the domestic law of Romania, concerning the procedure for granting legal aid, see *supra*, note 86.

<sup>229</sup> In Romania the exequatur procedure is simplified as stipulated by the Regulation and by the Convention, in the sense that, in the first instance, the tribunal verifies only the existence of the supporting documents and the formalities, without examination of the grounds of refusal of recognition and the basis for recognition.

<sup>230</sup> In Romania in conformity with the Civil Procedure Code, in the case of amounts at issue in the form of income and cash in a foreign currency, credit institutions are authorised to perform the conversion in *Lei* of the foreign currency, without the consent of the account holder, at the rate of exchange set by the National Bank of Romania for that day. The amount can be calculated by the bailiff, for example, in the event that the value of the main obligation established in a monetary value is updated, subject to the inflation rate, calculated from the date on which the judgment became enforceable or, in the case of other enforcement orders, from the date on which the claim became due for payment up to the date of the effective payment of the obligation in any of the claims. The calculation of arrears can be also established based on an expert accounting report, by an office with accounting expertise.

497. Currency conversion issues are dealt with in more detail in Chapter 12 on enforcement of decisions.

### **C. Relevant exceptions and reservations**

498. 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. (See also Chapter 3, Part I, Section II for further information on the scope of the Convention, including information on possible declarations and reservations to the Convention.)

#### **a) Children between the ages of 18 and 21 years**

499. 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 or 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.<sup>231</sup>

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**

500. 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>232</sup>

- habitual residence of creditor
- an agreement in writing by the parties
- an exercise of authority based on personal status or parental responsibility.

<sup>231</sup> The European Union will not make a reservation under the Convention limiting the application of the Convention to children under 18 years old, nor extending the application of the Convention to children over the age of 21 years (Art. 2(2)). Thus, the core scope of the Convention, covering maintenance for children up to the age of 21 years, will apply in European Union Member States. (See Council Decision no 2011/432/EU (*supra*, note 59)).

<sup>232</sup> See earlier discussion (*supra*, note 211) regarding the bases of jurisdiction in Art. 20. The European Union will not make any reservation on Art. 20 c), e), or f) bases for recognition and enforcement, as provided for under Art. 20(2) of the Convention (see *ibid.*).



### c) Maintenance arrangements

501. A State may make a reservation stating that it will not recognise and 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>233</sup>

## VI. Additional materials

### A. Practical advice

- Once the decision has been recognised, many States will immediately 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.<sup>234</sup>
- The intent of the recognition and enforcement process set out in the Convention is to allow for speedy and efficient processing of applications. Judges, court staff, and other involved authorities 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. Judges will have to also follow the relevant domestic law and procedures.

<sup>233</sup> The European Union will not make a reservation under the Convention indicating that it will not recognise and enforce maintenance arrangements (Art. 30(8)). Nor will the European Union make a declaration under the Convention indicating that applications for the recognition and enforcement of maintenance arrangements should only be made through Central Authorities (Art. 30(7)) (see *ibid.*).

<sup>234</sup> In Romania, the judge may try to encourage the amicable settlement of the issues at litigation during proceedings. The judge will recommend to the parties amicable settlement through mediation and, throughout the length of the trial, the judge will attempt to conciliate the parties by giving them appropriate advice. The parties can appear at any time during the trial, even without being summoned, in order to ask for a judgment officialising their agreement. The agreement will be concluded in written form and will constitute the operative part of the judgment. For a request for divorce, there can be enclosed, as applicable, the spouses' agreement which resulted from the mediation on the dissolution of marriage and, as applicable, the settlement of accessory aspects to the divorce (e.g., exercise of parental authority, establishment of the minor's domicile, the maintenance obligation, etc.). Upon completion of the exequatur process, the Central Authority and the bailiff, directly or through the lawyer appointed to represent the applicant, can also attempt to encourage amicable settlement related to enforcement issues.

From 1 August 2013, in some non-criminal matters (e.g., consumer and family matters) before going to court it is compulsory that the parties be given information on mediation. The mediation itself remains facultative.

**B. Related forms**

Application for Recognition or Recognition and Enforcement

Transmittal Form

Statement of Enforceability

Statement of Proper Notice

Financial Circumstances Form

Acknowledgement Form

**C. Convention Articles**

Article 10(1) a)

Article 10(2) a)

Article 11

Article 12

Article 20

Article 23

Article 24

Article 30

Article 36

Article 50

**D. Related Chapters of the Handbook**

See Chapter 12 – Enforcement of maintenance decisions under the 2007 Convention and the 2009 Regulation

See Chapter 3 – Matters of general application: 2007 Convention and 2009 Regulation

**VII. Checklist – Recognition and enforcement applications**

	<b>Procedure</b>	<b>Handbook reference</b>
1	Receive documents from Central Authority of Romania	III(A)(1)
2	Confirm that application should be for recognition and enforcement	III(A)(2)

3	Does application meet minimum Convention requirements?	III(A)(3)
4	Check to make sure documents are complete	III(A)(4)
5	Search for respondent's location if necessary	III(A)(5)
6	Request additional documents if necessary	III(A)(6)
7	Take any appropriate provisional or protective measures	III(A)(7)
8(a)	Declare decision enforceable	III(B)(1)
8(b)	Notify the applicant and respondent of the declaration of enforceability	III(B)(4)
8(c)	Respondent has opportunity to take steps to challenge or appeal declaration of enforceability or registration on specified grounds	III(B)(5)
9	Conclude any challenge or appeal and notify the applicant and respondent	III(B)(5)

### VIII. Frequently Asked Questions

*A creditor has a decision from State A. She lives in State B. State B will not recognise and enforce the decision. The debtor lives in Romania. All three States are Contracting States. Can the decision be recognised and enforced in Romania?*

502. 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 Romania 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?*

503. 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 entire decision the same as any other maintenance decision originally made in that State?*

504. 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 under the Convention?*

505. Yes – unless it is a decision from the requested State (*i.e.*, Romania) 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?*

506. Yes – but there must be a translation of the decision or a translated extract or abstract of the text into Romanian or into another language that the requested State has indicated it will accept. See Chapter 3, Part II, Section I for a discussion of the requirements for translations of documents and decisions.

507. Under the Convention, other communications between the Central Authorities can be in either English or French.

*Under the Convention, can a decision be recognised in Romania that is of a type that could not be made in Romania?*

508. Yes – providing that the decision falls within the scope of maintenance obligations under the Convention. For example, a child support decision may include a provision for reimbursement of certain types of expenses, such as medical insurance premiums, that are not known or provided for under the law of the requested State. The decision can still be recognised in the requested State.

*Why isn't there a requirement that the Application for Recognition or Recognition and Enforcement be signed by the applicant or someone from the Central Authority?*

509. 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.

510. 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 or recognition and enforcement be processed without certified copies of documents?*

511. 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.

512. If no such declaration has been made, the application may proceed on the basis of the copies provided by the requesting State.<sup>235</sup>

*The competent authority in Romania has registered or declared the decision enforceable. What happens next?*

513. Once the decision has been registered for enforcement or declared enforceable it can be enforced.<sup>236</sup> No further application from the applicant under the Convention is necessary (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?*

514. 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 (*i.e.*, Romania) 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.<sup>237</sup> Also, there may be certain other matters (such as conditions for indexing or modification) that are found in one decision but not the other.

515. 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 it appears that there are other relevant maintenance decisions that should have been included with the application, the competent authority in Romania should inform the Central Authority in Romania in order that copies of those decisions can be requested from the requesting State.

<sup>235</sup> In Romania no declaration has been made that certified copies are required. Nevertheless, the competent authorities may solicit certified copies if the authenticity or integrity of the document is contested.

<sup>236</sup> Under the domestic law of Romania according to Art. 14(3) of Law No. 36/2012, the dean of the bar issues an urgent decision to designate, on behalf of the maintenance creditor, a mandatory lawyer *ex officio* who will complete and submit the applications, institute court proceedings, represent and assist the creditor in the first instance, in ordinary and extraordinary judicial review proceedings, or in the initiation of measures for coercive enforcement, as appropriate.

<sup>237</sup> Under the domestic law of Romania all previous foreign decisions must be recognised.

## **Part II — Direct requests for recognition or recognition and enforcement**

### **I. Overview**

516. In general, the procedures for all direct requests under the Convention (*i.e.*, requests from applicants directly to competent authorities; see above, Chapter 1, Section III.C.) will be governed by the internal law of Romania. The domestic law of Romania will determine whether the direct request can be made at all, and what forms or processes must be used.<sup>238</sup> Direct requests to the competent authorities in Romania for the purposes of establishment or modification of maintenance decisions are dealt with briefly in Chapter 10 and Chapter 11, and these applications are governed almost entirely by the internal law of Romania rather than by the Convention.

517. However, if the direct request concerns recognition or 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 or recognition and enforcement of decisions which competent authorities of Romania may receive under the Convention.

### **Documents to be included in direct requests for recognition or recognition and enforcement**

518. The Convention provides that a number of the provisions governing recognition or recognition and enforcement applications through Central Authorities also apply to recognition or recognition and enforcement direct requests made to Competent Authorities (Art. 37(2)).

519. All of the provisions of Chapter V (Recognition and Enforcement) of the Convention apply to direct requests; therefore the direct 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 and was not represented in the proceedings in the State of origin or did not challenge the maintenance decision
- Financial Circumstance Form

<sup>238</sup> Under the domestic law of Romania the request for exequatur can be sent by the creditor directly, in person or through a representative to the competent Romanian court. The application will be formulated according to the requirements set out by the Romanian Civil Procedure Code and will be accompanied by the following documents: a) copy of the foreign judgment; b) proof of its final character; and, c) copy of the proof of service of summons and of the document instituting the proceedings, served to the party who was absent in the foreign court or any other official document attesting that the summons and the document instituting proceedings were known in due time by the party against whom the judgment was rendered. The above documents will be accompanied by a certified translation. The court fee is 20 Lei.

- if necessary– a calculation of the arrears
- if necessary a statement indicating how to adjust or index the decision.

520. The recommended application form cannot be used for a direct request unless the requested state has decided that they can be used for direct requests. In some 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.<sup>239</sup>

521. In most cases concerning direct requests, documentation may be necessary 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 recognition and enforcement the applicant is entitled to the same level of free legal assistance as he or she benefited from in the State of origin, if, under the same circumstances, that same level of assistance is available in the requested State (Art. 17 b)).

522. The diagram below illustrates the requirement to provide cost-free legal assistance for direct requests to a competent authority for recognition or recognition and enforcement.

<sup>239</sup> In Romania the following form can be used:

**REQUEST FOR EXEQUATUR**

I, the undersigned ....., resident in ..... submit this REQUEST FOR RECOGNITION AND APPROVAL OF ENFORCEMENT, by which I solicit the recognition and approval of enforcement in the territory of Romania of the judgment ..... given on ..... by .....

**REASONS:**

In fact, in ....., I the undersigned together with the defendant solicited the courts of ..... to decide upon .....

Upon this request a decision was given ..... on ..... finding and pronouncing .....

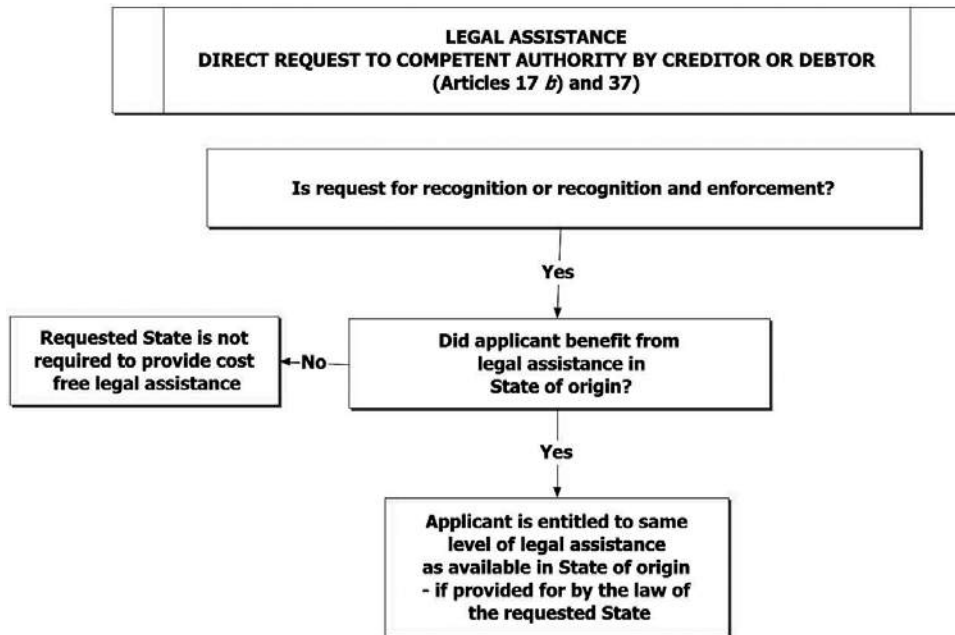
In relation to that stipulated above and the information given that fulfils the conditions set out by Arts 23-38, 39-43 of the Regulation (EC) No. 4/2009 / Arts 19-23, 25 of the 2007 Hague Convention, as well as Art. 1098 and following of the Civil Procedure Code, I respectfully solicit the admission of the proceedings as referenced and the pronouncement of a judgment for the recognition and approval of enforcement ..... pronounced on ..... by .....

Also, given that the conditions set out by law are fulfilled, namely that in connection with the foreign judgment the defendant has agreed to the admission of the proceedings, we solicit the settlement of the request without summons to the parties.

In law I base my proceedings on the provisions of Arts 23-38, 39-43 of the Regulation (EC) No. 4/2009 / Arts 19-23, 25 of the 2007 Hague Convention, as well Art. 1098 and following of the Civil Procedure Code.

I enclose, in true copies of the original, the judgment given in ....., the proofs of service of proceedings, summons and judgment, accompanied by a certified translation into Romanian, as well as proof of payment of the court fee.

**TO MR. CHAIRMAN OF THE LAW COURT.**



**Figure 9: Legal assistance – direct requests to a competent authority**

523. 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 (Arts 37(2) and 14(5)).

524. Finally, in any event, there is no requirement for a requested State (*i.e.*, Romania) 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>240</sup>

## **A. Types of incoming direct requests for recognition and enforcement**

### **a) Spousal support**

525. Unless both the requesting and requested Contracting States have made declarations to extend chapters II and III to spousal support obligations, an incoming application for recognition or recognition and enforcement of a decision for spousal maintenance only will not go through Central Authorities (see Chapter 3, Part I, Section II, above, for a discussion of this issue).<sup>241</sup> Instead, the creditor will make a direct request to the

<sup>240</sup> See the Explanatory Report of the Convention, para. 602.

<sup>241</sup> In Romania Council Decision No. 2011/432/EU of 9 June 2011, ANNEX IV, is applicable.



competent authority in the requested State. However the documentary requirements and procedures set out in Article 25 are the same.

526. In addition to the request (the recommended application form is not used for direct requests unless the requested state has decided that they can be used for direct requests), the following documents will always be required:

- Application information (or recommended application form if used)
- Text of the decision
- Statement of Enforceability
- Statement of Proper Notice, where the respondent did not appear or was not represented in the State of origin, or did not challenge the decision
- Financial Circumstances form or other document setting out financial circumstances of the parties
- Document explaining the calculation of arrears
- Document explaining how to adjust or index the decision
- Statement or information concerning the provision of legal assistance to the requestor in the requesting State.

527. Additional documents may be appropriate depending upon the internal processes of the requested State.<sup>242</sup>

528. Once the direct request has been received by a competent authority, it will go through the same type of recognition process as outlined in Part I of this Chapter. It will be declared enforceable and the respondent and requestor will be given notice (Art. 23(5)).

529. The grounds for challenging or appealing the declaration of enforceability 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.<sup>243</sup> 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,

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On the approval of the Convention by the European Union, it declared that it intends to extend the application of Chapters II and III of the Convention to spousal support when the Convention enters into force for the European Union. Thus, this category of maintenance can be sent via Central Authorities.

<sup>242</sup> Under the domestic law of Romania proof of payment of the court fee of 20 *Lei* is required.

<sup>243</sup> Under the domestic law of Romania the applicant can benefit from full legal aid if monthly net average income per family member is under 300 *Lei*, or partial legal aid if the monthly net average income per family member is under 600 *Lei*. Legal aid can be granted in other cases, too, on a pro rata basis in accordance with the applicant's needs, in cases that the certain or estimated costs of the trial are of such a nature as to restrict his / her actual access to justice, including on account of the cost of living differences between the Member State wherein he / she has his / her place of domicile or habitual residence and that of Romania.

if that level of assistance is available in Romania (Art. 17 b)).<sup>244</sup>

530. 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.<sup>245</sup>

## **b) Children 21 years of age or older**

531. Since the scope of the Convention does not include by default children who are 21 years of age or older, 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 21 years of age or older be recognised or enforced (Contracting States are free however to recognise and enforce decisions which go beyond what they are strictly obligated to enforce based on the principle of reciprocity).<sup>246</sup>

532. 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.

533. See Chapter 3, Part I, Section II for a full discussion of the scope of the Convention.

## **c) Other forms of family maintenance**

534. Although the Convention provides that States may agree to extend its provisions to other forms of family maintenance, including vulnerable

<sup>244</sup> Under the domestic law of Romania, see *ibid*.

<sup>245</sup> Under the domestic law of Romania competence to decide upon an application for legal aid for the enforcement of a judgement lies with the enforcement court (OUG No 51/20008) and this application is made separately.

<sup>246</sup> Recognising a decision which is beyond the scope *sensu stricto* of the reciprocal Conventional obligation may be an efficient solution in some cases, for example, when a foreign decision for maintenance for a person over the age of 21, if not recognised, would have to be referred to a national court in order to establish a new decision. In Romania in order to determine the maintenance obligation as the principal issue, the plaintiff-creditor must address the competent court of first instance from his or her domicile or from the defendant-debtor's domicile (Art. 94(1)c) of the Civil Procedure Code). In order to determine the maintenance obligation as an ancillary issue, competence falls to the judicial court of first instance of the last common domicile of spouses, or of the defendant's or plaintiff's domicile (Art. 914 of the Civil Procedure Code). Even if there are minor children from the marriage and the two spouses agree about the finalisation of the divorce, they can address by agreement the notary public at the place of marriage or at the last common domicile of the spouses, who can ascertain the dissolution of the marriage by the spouses' agreement, with a divorce certificate issued to them.

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.<sup>247</sup>

## **II. Additional materials**

### **A. Practical advice**

535. Refer to the Country Profile of Romania to determine what documentation will be required for a direct request. The direct request should be made using the application form or other initiating document required by the requested State. Although the documentation used for recognition or recognition and enforcement direct requests may be the same as used for applications through Central Authorities, the documentation for other types of direct requests may be very different than that used for Convention applications. (Direct requests to competent authorities in Romania for the purposes of establishment or modification of maintenance decisions are dealt with in Chapter 10 and Chapter 11, below.)

536. Competent authorities may consider contacting the Central Authority of Romania in order to take advantage of its knowledge in effectively processing cases for the purpose of direct requests.

### **B. Related forms**

For recognition and enforcement only:

Statement of Enforceability

Statement of Proper Notice

Statement of Arrears (if applicable)

Legal Assistance Statement (where necessary)

Statement explaining how to index or adjust (if applicable)

### **C. Relevant Articles**

Article 2(3)

Article 10

Article 17 *b*)

Article 25

Article 37

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<sup>247</sup> In Romania Council Decision No. 2011/432/EU of 9 June 2011, ANNEX IV, concerning the approval of the Convention on behalf of the European Union is applicable, by which the European Union did not declare that it will extend the application of the Convention to other forms of family maintenance at this time.

### III. Frequently Asked Questions

*What is the difference between an application through a Central Authority and a direct request to a competent authority?*

537. 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.

538. 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?*

539. Yes – if the internal procedures of the requested competent authority allow it (some competent authorities simply refer the matter to the Central Authority).<sup>248</sup> 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.<sup>249</sup> 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 direct request 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?*

540. Yes – there is no requirement in the Convention that a direct request be made by the creditor or debtor themselves. 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.<sup>250</sup> 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.

<sup>248</sup> In Romania the provisions of Law No. 36/2012 do not prevent the party concerned from applying directly to the competent foreign authorities of the Member States of the European Union or of the non-European Union Member States which are Contracting States to the Convention.

<sup>249</sup> In Romania if the creditors are children or vulnerable adults and address the Central Authority, the requests for maintenance are sent directly to the competent local bar association, and the request for granting legal aid is not sent to the court in order to decide upon the granting of legal aid. Legal aid is compulsory in such cases and granted free of charge, *ex officio*, without the verification of the material situation (Art. 13 of Law No. 36/2012 and Art. 8<sup>1</sup> of GEO No. 51/2008). If the creditors are children or vulnerable adults and address the court directly (in person or through a lawyer), the court must decide on the granting of legal aid, even if legal aid is granted after the verification of the material situation (Art. 8<sup>1</sup> of GEO No. 51/2008). In all other situations, where creditors and debtors other than children or vulnerable adults address either the Central Authority or the court directly (in person or through lawyer), the court must decide upon the granting of legal aid, subject to verification of the material situation.

<sup>250</sup> See *supra*, note 241.

*What forms or documents should be used for a direct request?*

541. If the direct request is for recognition or recognition and enforcement, the documents set out in Article 25 should be included, as that Article applies to direct requests for recognition or recognition and enforcement. The recommended application form is in general only for use by Central Authorities, however, so either the form required by the competent authority of Romania,<sup>251</sup> or the form used in the State of origin should be used.

*Will the creditor or debtor require a lawyer in order to make the direct request to the competent authority?*

542. That will depend entirely on the procedures of the competent authority.<sup>252</sup> If the direct request is for recognition or recognition and enforcement, under the Convention, 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 (Art. 17 b)).

543. For all other direct requests, if legal assistance is required, the person making the direct request will be responsible for covering those costs unless the law of the requested State provides otherwise.<sup>253</sup>

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<sup>251</sup> See *supra*, note 239, for an example of a recommended form to be utilised in Romania.

<sup>252</sup> Under the domestic law of Romania an applicant from abroad can also address the court directly or through a legal or other representative. Representation by a lawyer is not compulsory.

<sup>253</sup> Under the domestic law of Romania an application for legal aid is exempt from payment of stamp duty.

## **Chapter 8 - 2009 Regulation: Processing incoming applications through Central Authorities and direct requests for recognition or recognition and declaration of enforceability**

*How to use this Chapter:*

*This Chapter deals primarily with applications for recognition or for recognition and declaration of enforceability of a maintenance decision received by judicial or other competent authorities from a Central Authority.*

*Section I provides a procedural overview and 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 and III outline the procedures or steps for processing these applications or requests.*

*Section IV deals with exceptions to or variations on the general procedures, including applications by debtors.*

*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 contains a checklist, providing a simple overview of the process.*

*Section VIII covers some of the most frequently asked questions with respect to this application.*

*Section IX deals briefly with issues particular to direct requests for recognition or for recognition and declaration of enforceability received by judicial or other competent authorities without the assistance of Central Authorities.*

### **Part I — Applications for recognition or recognition and declaration of enforceability**

#### **I. Overview and general principles**

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

544. The recognition process set out in the Regulation is at the heart of the cross-border maintenance recovery process 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 Member State.<sup>254</sup>

545. Recognition or recognition and declaration of enforceability of a decision from another Member 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 Member State to discharge or carry out the duties of administrative co-operation and assistance under the Regulation.

546. The procedures for recognition, recognition and declaration of enforceability 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 Regulation is broadest for recognition and enforcement, and States are expected to provide applicants with comprehensive and effective access to justice. The recognition and enforcement mechanisms under the Regulation, both for Member States bound by the 2007 Hague Protocol and those not bound by the 2007 Hague Protocol (see Chapter 5) are designed to enable the creditor to recover a claim quickly. There are only very limited grounds for the respondent to object to, or oppose the recognition and enforcement of a decision, and there is a limited time frame for doing so. All of this reflects the underlying principle in the Regulation that recognition and enforcement should be simple, low cost and speedy.<sup>255</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 Regulation. 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 Regulation.

547. See also Chapter 3, Part I for a discussion of the scope and application of the Regulation, as an assessment of the scope and application of the Regulation with respect to a particular case is important to understand which recognition and enforcement procedures of the Regulation will apply to that case.

<sup>254</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.

<sup>255</sup> The European Court of Human Rights has ruled that national authorities have a positive obligation to assist diligently and in a timely manner with the enforcement of a foreign maintenance decision for the benefit of a creditor (see *Romańczyk v. France*, No. 7618/05 (18 November 2010), where the court found a violation of Art. 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*).

## **B. Procedural overview**

548. There are two Sections in the Regulation which cover the procedures for the recognition, declaration of enforceability and enforcement of decisions under the Regulation, set out in Chapter IV (see Art. 16). Section 1 applies to decisions given in Member States bound by the 2007 Hague Protocol (all European Union Member States, with the exception of the United Kingdom and Denmark) and Section 2 applies to decisions given in Member States not bound by the 2007 Hague Protocol (*i.e.*, decisions given in the United Kingdom and Denmark).<sup>256</sup> Thus, the procedures for recognition and enforcement described immediately below and set out in Section 1 of Chapter IV of the Regulation will be used most frequently for decisions which fall under the scope of the Regulation. This Section 1 procedure and the alternative procedure provided for in Section 2 are described in more detail below (see Section III of this Chapter).

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

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

549. Upon receipt of the application from a Central Authority in another Member State of the European Union, the Central Authority in the requested State<sup>257</sup> will send the materials to the competent authority for processing. In some Member 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.<sup>258</sup>

550. Under the Regulation, Chapter IV, Section 1, it is required that a decision be recognised without any “special procedure” and “without any possibility of opposing its recognition” (Art. 17(1)). That is, no procedure of exequatur or a similar procedure is permitted under the Regulation in order to recognise the decision, and at the point of recognition of the decision, there is no opportunity to oppose its recognition, either *ex-officio*, or by an interested party.<sup>259</sup> The Regulation also provides that if the decision is

<sup>256</sup> Note that the Section 2 procedure will also apply to decisions given in Member States before the Regulation was applicable but after the coming into force of the “Brussels I” Regulation. Please see Chapter 3, Part I, Section III.C for a full discussion of the scope and application of the Regulation.

<sup>257</sup> In Romania the Central Authority is the Ministry of Justice. According to Art. 2(1) and (2) of Law No. 36/2012, the Ministry of Justice is the Romanian Central Authority designated under Art. 4 of the 2007 Hague Convention, in relations with non-EU Member States which are Contracting States to the 2007 Hague Convention, and under Art. 49 of the Regulation (EC) No. 4/2009, in relations with Member States of the European Union.

<sup>258</sup> In Romania the Competent Authority is not the Central Authority. For exequatur proceedings the competent authority is the tribunal where the debtor has his / her domicile or assets, in accordance with Art. 19 of Law No. 36/2012.

<sup>259</sup> With the abolition of exequatur, a decision given in another Member State bound by the Protocol will be directly enforceable under the Regulation, as stipulated in Art. 17. In practice in Romania, this would mean that a foreign judgment given after 18.06.2011 (in proceedings also initiated after 18.06.2011) in a Member State bound by the 2007 Hague Protocol will be



enforceable in the Member State of origin, the decision must be deemed enforceable in another Member State without the need for a declaration of enforceability (Art. 17(2)).<sup>260</sup> It should be noted that the Regulation specifies that an enforceable decision shall carry with it, "by operation of law the power to proceed to any protective measures" which exist under the domestic law of the Member State of enforcement (Art. 18).

551. The respondent will be entitled to apply for a review of the decision, from the day he or she "was effectively acquainted with the contents of the decision and was able to react, at the latest from the date of the first enforcement measure having the effect of making his property non-disposable in whole or in part" (Art. 19(2)), *in the State of origin* if he or she did not enter an appearance in the Member State of origin because he or she was not served with the documents instituting proceedings (or equivalent documents) in sufficient time or in such a way as to enable him or her to prepare a defence, or was prevented from contesting the maintenance claim by *force majeure* (or due to "extraordinary circumstances without any fault on his part"), unless he or she failed to challenge the decision when it was possible for him to do so (Art. 19(1)). The defendant must apply for such a review within 45 days (Art. 19(2)). The application for review will be made to the competent court in the Member State of origin. If the court rejects the application for review for lack of grounds (specified in Art. 19(1)) the decision remains in force, but if the court decides that a review is justified the decision is "null and void," with however, the creditor not losing the benefits of the interrupted prescription / limitation periods nor the right to claim retroactive maintenance (Art. 19(3)).

552. If the decision remains in force and the debtor is not willing to pay the maintenance voluntarily, enforcement of the decision can take place as provided for by the law of the requested State.

553. The Regulation (Art. 21) provides several grounds for refusal or suspension of enforcement of a decision which may be raised *in the State of enforcement*, only upon application by the debtor. Generally, the grounds for refusal or suspension of enforcement of a decision are according to the law of the Member State of enforcement, so long as this law is not incompatible

recognised in Romania without it being necessary to pass through an exequatur procedure. The foreign judgment produces the same effects as a judgment given in Romania. If the debtor does not willingly enforce it, it is necessary, as for a judgment given by a Romanian court, to initiate (through the appointed lawyer, after granting legal aid, as appropriate) enforcement measures (lodging an application for enforcement with a bailiff, bringing before the enforcement court an application for the approval of enforcement etc.). Pursuant to Art. 14 of Law No. 36/2012, the Ministry of Justice forwards, after performing the preliminary check, directly to the territorially competent bar association the application for enforcement. The dean of the bar association appoints a lawyer for the creditor of the maintenance obligation (for children or vulnerable adults). The appointed lawyer solicits the granting of legal aid for payment of the bailiff's fee. The lawyer then lodges the application with the territorially competent bailiff who will initiate the enforcement measures.

<sup>260</sup> It should be noted that Art. 17 of the Regulation is parallel to Art. 5 of the European Enforcement Order Regulation. Art. 5 of the European Enforcement Order Regulation has already applied in European Member States where this Regulation is applicable to uncontested maintenance decisions. With the 2009 Regulation on maintenance, in effect, the procedure set out in 5 of the European Enforcement Order Regulation now also applies to contested maintenance decisions.

with the grounds specified in Art. 21(2) and (3) of the Regulation.

554. The debtor may apply for the refusal of enforcement of a decision, in whole or in part, if “the right to enforce the decision in the court of origin is extinguished by the effect of prescription or the limitation of action” (with the caveat that the decision will be given the benefit of the longer limitation period between that of the Member State of origin or the Member State of enforcement) or if the decision is “irreconcilable with a decision” given in the Member State of enforcement or with a decision given in another Member State or another appropriate third State (Art. 21(2)).<sup>261</sup>

555. Article 21(3) of the Regulation provides for further grounds for suspension of enforcement, if the competent court of the Member State of origin has been seised of an application for review of a decision envisaged under Article 19, or if the decision has been suspended in the Member State of origin.

556. Further applications or appeals for refusal or suspension of enforcement of a decision, in accordance with Article 21(1) of the Regulation, will be according to the law of the Member State of enforcement.<sup>262</sup>

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

557. An application for recognition or for recognition and declaration of enforceability of an existing maintenance decision will be received from another Member 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.

558. 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 Member State in order to suspend or limit the enforcement of a maintenance decision (Art. 56(2) a)).

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.

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.

<sup>261</sup> It is clarified that modification decisions on the basis of changed circumstances will not be considered as “irreconcilable decisions” under this Article.

<sup>262</sup> Under the domestic law of Romania, for provisions referring to enforcement procedures under the Civil Procedure Code concerning lapse of enforcement (Arts 687-689), postponement, suspension, restraint and cessation of enforcement (Arts 696-698), objection to enforcement (Arts 711 - 719) and the restitution of enforcement (Arts 722-725). See also para. 836 et seq.

559. 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.

560. 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 12).

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

561. The creditor has a maintenance decision from Country A requiring the debtor to pay child maintenance. The debtor lives in Romania. Instead of applying for a new decision in Romania, the creditor wishes to have the existing maintenance decision enforced in Romania. Country A and Romania are both Member States of the European Union where the Regulation is applicable, and are both bound by the 2007 Hague Protocol.

#### **How this works under the Regulation:**

The creditor<sup>263</sup> will ask the Central Authority in Country A to transmit an application for recognition (and enforcement) (Art. 56(1) a)) of the maintenance decision to Romania, under Section 1 of Chapter IV of the Regulation, using the appropriate Annexed forms as stipulated by the Regulation. The application will be checked to ensure it is complete and will be processed by the Central Authority in Romania. The decision can be enforced by the competent enforcement authorities in Romania in the same manner as if it were a decision originally made in Romania. The debtor will have the opportunity to apply for a review or object to the enforcement of the decision on the limited grounds set out in the Regulation.

For information about applications to **enforce** a decision made in the **requested State** (i.e., Romania) – see Chapter 9. For information about **enforcement** of any maintenance decision – see Chapter 12.

#### ***E. Who can apply***

562. An application for recognition or recognition and declaration of enforceability 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 a declaration of enforceability / enforcement or both). The applicant must reside in the State that is initiating the application (Art. 55), and does not need to be present or have an authorised representative / postal address in Romania in order for a decision to be recognised and enforced in that State (Art. 41(2)). 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.

<sup>263</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.

**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**.

## **II. Procedures: Preliminary matters common to applications under both Section 1 and Section 2 of Chapter IV of the Regulation**

563. Before a competent authority considers the merits of an application for recognition or recognition and declaration of enforceability of a decision under the Regulation, there are a number of preliminary matters that a competent authority will take into consideration, for applications under both Section 1 (decisions given in a Member State bound by the 2007 Hague Protocol) and Section 2 (decisions given in a Member State not bound by the 2007 Hague Protocol) of Chapter IV of the Regulation, detailed in this Section.

### **A. Preliminary check of incoming documents**

564. Before sending the materials to the competent authority in Romania, the Central Authority of Romania should check to ensure the application comes under the Regulation's provisions for recognition or recognition and declaration of enforceability, and to make sure that the package of documents is complete. The competent authority in Romania will have to make a similar check.

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

- Is the application for recognition or recognition and declaration of enforceability of a maintenance decision? It must come within the scope of the Regulation as explained in Chapter 3, Part I, Section III.
- Has it already been ascertained (by the Central Authority) that 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, or returned to the requesting State.
- Is the application from a Member State of the European Union in which the Regulation is applicable? If it is not, the Regulation 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 56. See Section IX, below.

## **2. Is recognition or recognition and declaration of enforceability the appropriate application?**

565. Check the documents to ensure that the application is for recognition or for recognition and declaration of enforceability. Consider the following:

- If there is no maintenance decision at all, the application should be for establishment, not recognition and enforcement (see Chapter 10).
- If there is a maintenance decision but it is from your State, the decision does not need to be recognised. It can simply be processed for enforcement in your State, following your regular enforcement procedures (see Chapter 9).

## **3. Is it “manifest” that the Regulation requirements are not met?**

566. The Regulation allows a Central Authority to refuse to process an application only if the Central Authority believes it is “manifest that the requirements” of the Regulation are not fulfilled (see Art. 58(8)). The circumstances when this might be the case are quite limited. 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. Similarly, an application could be rejected on this basis if a previous application by the same party on exactly the same grounds had failed. In order to be “manifest,” the reason for rejection must be apparent or clear on the face of the documents received. The competent authority will likewise verify that it is not manifest that the Regulation requirements are not met.<sup>264</sup>

## **4. Check the documents for completeness**

567. Central Authorities have the obligation to check an application received from the requesting State in a timely fashion to make sure it is complete, and to promptly refer the completed application to the competent authority for the decision to be recognised or recognised and declared enforceable. If additional documents are needed the Central Authority must have requested these without delay. Upon receipt of documentation for the purposes of an application, the competent authority should also initially check the application for completeness and notify the national Central Authority immediately if there is information or documentation missing in order that it may be requested.

<sup>264</sup> This especially will be the case when a competent authority receives a direct request from an applicant that does not come through the Central Authority system. See Section IX, below on direct requests.

## **5. Required and supporting documents and information**

### **(i) Required and supporting documents and information common to both Section 1 and 2 procedures of Chapter IV of the Regulation**

#### **a) Annex VI**

568. The Regulation requires that Annex VI, appended to the Regulation text, be used for applications for recognition or recognition and declaration of enforceability of a decision (*i.e.*, for applications under both Section 1 and Section 2 of Chapter IV of the Regulation). The Regulation requires that at a minimum the information included in the application should comprise (Art. 57(2)):

- (a) a statement of the nature of the application or applications;
- (b) the name and contact details, including the address, and date of birth of the applicant<sup>265</sup>;
- (c) the name and, if known, address and date of birth of the defendant;
- (d) the name and the date of birth of any person for whom maintenance is sought;
- (e) the grounds upon which the application is based;
- (f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;
- (g) the name and contact details of the person or unit from the Central Authority of the requesting Member State responsible for processing the application.

#### **b) Documents with respect to court settlements and authentic instruments (Art. 48)**

569. For applications for the recognition or recognition and enforceability of court settlements and authentic instruments in another Member State (see Section IV, below, in this Chapter) the competent authority of the Member State of origin must issue, upon the request of any interested party, an extract from the court settlement or authentic instrument, using Annex I or II, or Annex III or IV, as relevant (Art. 48(3)).

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<sup>265</sup> The applicant's personal address may be replaced by another address in cases of family violence, if the national law of the requested Member State does not require the applicant to supply his or her personal address for the purposes of proceedings to be brought (Art. 57(3)). Under the domestic law of Romania a party's representative may be summoned in his or her place (with the representative appointed *ex officio* or chosen by the party), or a party may be summoned at the domicile chosen for the service of documents.

### c) Additional Documents (Art. 57)

570. Article 57(4) and (5) of the Regulation require that additional documents, as appropriate or necessary, and to the extent known, accompany an application. These include:

- the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor (Art. 57(4) b))<sup>266</sup>
- any other information that may assist with the location of the defendant (Art. 57(4) c))
- any necessary supporting information or documentation including, where appropriate, documentation concerning the entitlement of the applicant to legal aid (Art. 57(5))

571. **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 (Art. 64) (for example, where the public body wishes to assert an independent right to receive a portion of the arrears of maintenance).

### (ii) Required documents for Section 1 procedures of Chapter IV of the Regulation

#### a) Documents for the purposes of enforcement (Art. 20)<sup>267</sup>

572. Article 20 of the Regulation specifies the required documents necessary for purposes of enforcement of a decision in another Member State, which must be provided to the competent enforcement authorities by a claimant:

- (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- (b) the extract from the decision issued by the court of origin using the form set out in Annex I to the Regulation (with, where necessary, a transliteration or a translation of the content)<sup>268</sup>;
- (c) where appropriate, a document showing the amount of any arrears and the date such amount was calculated.

573. Competent authorities may not require the claimant to provide a translation of a decision unless enforcement is challenged (Art. 20(2)).<sup>269</sup>

<sup>266</sup> As this is an application for enforcement, the financial circumstances of a creditor (Art. 57(4)(a)) would normally not be needed.

<sup>267</sup> It should be noted that Art. 20 of the Regulation is essentially parallel to Art. 20 of the European Enforcement Order Regulation.

<sup>268</sup> See Chapter 3, Part II, Section II, for further information on language and translation requirements under the Regulation.

<sup>269</sup> See Chapter 3, Part II, Section II, for further information on language and translation

### **(iii) Required documents for Section 2 procedures of Chapter IV of the Regulation**

#### **Documents for an application for a declaration of enforceability (Arts 28 and 29)**

574. Under the alternative Section 2 procedure for recognition and declaration of enforceability (Member States not bound by the 2007 Hague Protocol), applications must be accompanied by:

- (a) a copy of the decision “which satisfies the conditions necessary to establish its authenticity”;
- (b) an extract from the decision issued by the court of origin using the form set out in Annex II to the Regulation.

575. Where necessary, a translation or transliteration, according to appropriate language requirements, should accompany the application (see Chapter 3, Part II, Section II for more information on language requirements under the Regulation). The competent authority seised may not require a claimant to provide a translation of the decision (however, it may be required in connection with an appeal under Art. 32 or Art. 33).

576. Under Article 29 of the Regulation, if the extract of the decision using the form set out in Annex II to the Regulation is not produced, a competent authority may specify a time for its production, accept an equivalent document, or dispense with this requirement if the competent authority considers that it has adequate information before it.

### **(iv) Documents for invoking a recognised decision (Art. 40)**

577. Article 40 of the Regulation requires that any party who wishes to invoke a decision in another Member State already recognised under either Section 1 (in particular Art. 17(1)) or Section 2 of the Regulation procedures should produce a copy of the decision in question which “satisfies the conditions necessary to establish its authenticity”.

578. The competent authority may also ask, if necessary, for the party invoking the recognised decision to produce an extract issued by the court of origin using the form set out in Annex I to the Regulation (when *not* subject to proceedings for recognition or a declaration of enforceability under Section 1) or Annex II (when subject to proceedings for recognition or a declaration of enforceability under Section 2). The court of origin must also issue such an extract at the request of any interested party. Where necessary, the party invoking the recognised decision must provide a translation or transliteration, according to appropriate language requirements (see Chapter 3, Part II, Section II for more information on language requirements under the Regulation).



## **6. Request additional documents**

579. 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 to the Central Authority in Romania, which can contact the requesting Central Authority.

580. If the request is made for additional documents by the Central Authority in Romania, the requesting State has **90 days** under the Regulation to provide the documents. If the requested documents are not provided within the time specified, 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 Romania may (but does not have to) close the file and inform the requesting State accordingly.

## **7. Search for the respondent's location**

581. If the applicant did not provide a valid address for the respondent, the Central Authority of Romania may have determined his or her location in order to ensure that it will be able to provide notice (if required) of the application for recognition or recognition and declaration of enforceability or enforcement. 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.<sup>270</sup> 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 (See Chapter 3, Part II, Section VI, for a discussion of data protection and treatment of personal information under the Regulation). Central Authorities may also have access to restricted sources of information.

582. If the Respondent cannot be located for the purpose of notice, the Central Authority of the requesting State should be informed by the Central Authority of Romania (remember that in the case of an application for recognition or recognition and a declaration of enforceability 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.

## **III. Procedures: Recognition or recognition and declaration of enforceability of the decision by the competent authority**

583. The discussion in this part covers the procedures that will be used by competent authorities for the processing of applications for recognition or recognition and declaration of enforceability of maintenance decisions under Sections 1 and 2 of Chapter IV of the Regulation.

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<sup>270</sup> See *supra*, note 202.

**A. *Provisions common to both Section 1 and 2 of Chapter IV of the Regulation (decisions from Member States bound and not bound by the 2007 Hague Protocol)***

**1. Provisional Enforceability (Art. 39)**

584. The Regulation provides that the court of origin of a decision may declare a decision provisionally enforceable, notwithstanding any appeal, even if national law does not provide for enforceability by operation of law. (See Chapter 3, Part II, Section VIII for more information on provisional and protective measures under the Regulation.)

**2. Invoking a recognised decision (Art. 40)**

585. Article 40 of the Regulation sets out documentation requirements for invoking a recognised decision (which has already been recognised under Chapter IV Section 1 or 2 procedures) in another Member State (see discussion in Section II.A.5. of this Chapter, above, for further information about documentation requirements).

**3. Proceedings and conditions for enforcement (Art. 41)**

586. Article 41 of the Regulation sets out the main rule for the enforcement of decisions under the Regulation, namely that enforcement procedures will be according to the law of the Member State of enforcement and that decisions from other Member States should be enforced under the same conditions as a decision given in the Member State of enforcement (see Chapter 12 on enforcement for further information).

**4. No review as to substance (Art. 42)**

587. Regulation provides that “under no circumstances” should a decision given in another Member State be reviewed as to its substance in the Member State where recognition, enforceability or enforcement is sought.

**5. No precedence for the recovery of costs (Art. 43)**

588. The Regulations requires that the recovery of maintenance should take precedence over the recovery of any costs incurred in the application of the Regulation.

**B. *Procedures under Section 1 of Chapter IV of the Regulation: Member States bound by the 2007 Hague Protocol***

**1. Recognise the decision**

589. Once the complete application for recognition has been received by the relevant competent authority the decision will be recognised, without

any “special procedure” and “without any possibility of opposing its recognition” (Art. 17(1)).<sup>271</sup>

## 2. Take any necessary protective measures

590. A competent authority, by virtue of recognition of the decision and its enforceability in the Member State of origin (Art. 17(2)), will have the power to proceed to any protective measures which exist under the domestic law of the Member State of enforcement (Art. 18).<sup>272</sup> (See Chapter 3, Part II, Section VIII for more information on provisional and protective measures under the Regulation.)

## 3. Enforce the decision

591. The maintenance decision can be enforced directly according to the domestic laws of the requested State if the decision is enforceable in the Member State of origin, without the need for a declaration of enforceability (Art. 17(2)). The Regulation, in Article 20, sets out documentation

<sup>271</sup> See *supra*, note 259.

<sup>272</sup> Under the domestic law of Romania, Title IV of Book V on Enforcement regulates the following protective measures relevant to the recovery of claims: that is, precautionary attachment and seizure (precautionary and judicial). Precautionary attachment can be placed upon amounts of money, securities or other intangible assets owed to the debtor by a third party or which will be owed in the future according to existing legal relations. Precautionary seizure consists in the attachment of the movable or real estate assets of the debtor found in his or her possession or in that of a third person, for liquidation when the creditor of an amount of money obtains an enforcement order. The judicial seizure consists in the attachment of the assets forming the object of litigation or, subject to legal conditions, of other assets, by entrusting their guardianship to a seizure-administrator. The judicial seizure can also be made without a trial upon an asset which the interested person has sound reasons to fear being taken, destroyed or altered by the current owner. The creditor who does not have an enforcement order may require the institution of precautionary attachment or precautionary seizure, if he or she proves that he or she brought the matter before the court and bail can be obliged. The court may agree to the precautionary attachment or seizure even if the claim is not due in cases in which the debtor reduced assurances given to the creditor, did not give the promised assurance or when there is danger that the debtor will evade recovery or will hide or dissipate his or her wealth. The application for precautionary seizure is addressed to the court which is competent to judge the trial at first instance. The court will urgently decide, in camera, without summons the parties, by enforceable interlocutory decision. The interlocutory decision is submitted only to appeal at the superior court. The appeal will be judged urgently and with priority, with the summons of the parties at short notice. The precautionary attachment or seizure measure is accomplished by the bailiff. In the case of movable assets, the bailiff will apply seizure upon assets only to the extent necessary for fulfilment of the claim. Precautionary seizure applied to real estate will be immediately registered in the land register. An interested person will be able to make an objection to enforcement against the way in which the seizure is accomplished. Failure to lodge bail within the time limit established by the court leads to the dissolution by right of the precautionary attachment or seizure. If the debtor gives, in all the cases, a sufficient guarantee, the court will be able to lift, at the debtor's request, the precautionary attachment or seizure. The application is settled in camera, urgently and with the summons of the parties at short notice, by interlocutory decision submitted only to appeal at the superior court. The appeal is judged urgently and with priority. If the main application, according to which the precautionary measure has been approved, is cancelled, dismissed or lapsed by final judgment, or if the applicant has renounced at trial, the debtor can ask the deciding court to lift the measure. Upon application the court will render a judgment by final interlocutory decision, given without summoning the parties. The liquidation of the seized assets will be possible only after the creditor has obtained the enforcement order.

requirements for the purposes of enforcement under the Section 1 procedure (see Section II.A.5. of this Chapter, above, for further information about documentation requirements). 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.<sup>273</sup> (See Chapter 12 for more information on enforcement.)

#### **4. Notice to the respondent and applicant**

592. Notice to the respondent and the applicant will be in accordance with domestic law.<sup>274</sup>

#### **5. Respondent right to apply for a review in the Member State of origin (Art. 19)<sup>275</sup>**

593. The respondent is entitled to apply for a review of the decision *in the State of origin* if he or she did not enter an appearance in the Member State of origin because he or she was not served with the documents instituting proceedings (or equivalent documents) in sufficient time or in such a way as to enable the preparation of a defence, or was prevented from contesting the maintenance claim by *force majeure* (or due to “extraordinary circumstances without any fault on his part”), unless he or she failed to challenge the decision when it was possible to do so (Art. 19).

594. The defendant must apply for such a review within 45 days from the day that he or she was “effectively acquainted with the contents of the decision and was able to react”, or at the latest, from the date of the first enforcement measure “having the effect of making his property non-disposable in whole or in part” (Art. 19(2)). No time extension will be granted to the defendant on account of distance.

<sup>273</sup> According to the domestic law and procedures of Romania if the application for enforcement has been approved by the First Instance Court (Judecătoria), the bailiff will serve the debtor with a copy of the interlocutory decision, together with a copy of the outstanding claim and an order for payment. The debtor will be summoned to fulfil the obligation as soon as or within the time limit granted by law, indicating that, if not, enforcement will proceed. It is not necessary to serve the outstanding claim and the order for payment if the debtor is deprived of the term of payment benefit or if the enforcement is made according to the orders and interlocutory decisions given by the court and declared enforceable by law. Service of procedural documents within enforcement can be made by the bailiff either personally or through his or her procedural agent. Proof of service through procedural agent has the same evidentiary value as proof of service performed by the bailiff. Effective enforcement can take place only after expiration of the time limit stipulated in the order for payment or of the time limit stipulated by interlocutory decision by which enforcement was approved. For all acts performed during enforcement, the bailiff is obliged to conclude reports.

<sup>274</sup> Under the domestic law of Romania service of all judicial documents shall be made to the lawyer designated by the local bar, according to Law No. 36/2012. However, see also Chapter 3, Part II, Section IX for further information on instruments which deal with issues of cross-border notice, if service must be made to a respondent or applicant abroad.

<sup>275</sup> It should be noted that Art. 19 of the Regulation is essentially parallel (with minor differences) to Art. 19 of the European Enforcement Order Regulation, to Art. 20 of the *Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure*, and to Art. 9 of the *Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure*.

595. The application for review will be made to the competent court in the Member State of origin. If the court rejects the application for review for lack of grounds (specified in Art. 19(1)), the decision remains in force. But if the court decides that a review is justified the decision is “null and void,” with however, the creditor not losing the benefits of the interrupted prescription / limitation periods nor the right to claim retroactive maintenance (Art. 19(3)).

## **6. Applications for refusal or suspension of enforcement**

596. Article 21 of the Regulation also provides several grounds for refusal or suspension of enforcement of a decision which may be raised *in the State of enforcement*, only upon application by the debtor / respondent. More generally, the grounds for refusal or suspension of enforcement of a decision are in accordance with the law of the Member State of enforcement, as long as they are not incompatible with the grounds specified in Art. 21(2) and (3) of the Regulation.

597. The debtor may apply for the refusal of enforcement of a decision, in whole or in part, if “the right to enforce the decision in the court of origin is extinguished by the effect of prescription or the limitation of action” (with the caveat that the decision will be given the benefit of the longer limitation period between that of the Member State of origin or the Member State of enforcement) or if the decision is “irreconcilable with a decision” given in the Member State of enforcement or with a decision given in another Member State or another appropriate third State (Art. 21(2)).<sup>276</sup>

598. Article 21(3) of the Regulation provides for a third ground of suspension of enforcement, if the competent court of the Member State of origin has been seised of an application for review of a decision envisaged under Article 19 of the Regulation, or if the decision has been suspended in the Member State of origin. It should be noted that a competent authority *may*, but is not obligated, to suspend the enforcement of a decision or part of a decision under Article 21(3).

599. Further applications or appeals for refusal or suspension of enforcement of a decision, in accordance with Article 21(1) of the Regulation, will be in accordance with the law of the Member State of enforcement.<sup>277</sup>

## **7. No effect on the existence of family relationships**

600. Article 22 of the Regulation clarifies that the procedure set out in Section 1 of Chapter IV of the Regulation, involving abolition of the exequatur process, will not “in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision”.

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<sup>276</sup> It is clarified that modification decisions on the basis of changed circumstances will not be considered as “irreconcilable decisions” under this Article.

<sup>277</sup> See *supra*, note 262.

**C. Procedures under Section 2 of Chapter IV of the Regulation: Member States not bound by the 2007 Hague Protocol**

**1. Overview of Section 2 procedures**

601. Once the complete application for recognition and declaration of enforceability has been received by the relevant competent authority, it will be recognised and declared enforceable according to simplified procedures set out in Section 2 of Chapter IV of the Regulation.<sup>278</sup>

602. It should be noted that, as stated in Recital 26 of the Regulation, the procedure set out in Section 2 is modelled on the procedure and grounds for refusing recognition set out in *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.<sup>279</sup>

603. The procedures set out in Section 2 will apply to decisions which are given in Member States not bound by the 2007 Hague Protocol, namely, the United Kingdom and Denmark.<sup>280</sup>

604. According to Article 68(2) of the Regulation, the Regulation does not replace *Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims* (the “European Enforcement Order Regulation”) with respect to European Enforcement Orders for maintenance decisions given in a Member State not bound by the 2007 Hague Protocol. Therefore, the Enforcement Order Regulation may be used for decisions given in Member States where that Regulation is applicable and which are not bound by the 2007 Hague Protocol (i.e., for decisions given in the United Kingdom). It should be noted, however, that if the Enforcement Order Regulation is employed, the Central Authorities under the 2009 maintenance Regulation would normally not be involved. Contested maintenance claims from the United Kingdom will still be subject to the procedure set out in Section 2, Chapter IV of the 2009 Regulation.

<sup>278</sup> Under domestic law in Romania a registration process is not used, and instead, the maintenance decision is recognised by the competent judicial authority and a declaration of enforceability is made. Based on Art. 14 of Law No. 36/2012, the Ministry of Justice sends the request for exequatur directly, after the preliminary check, to the competent territorial bar. The dean of the bar designates a lawyer for the creditor of maintenance (child or vulnerable adult). The designated lawyer asks for legal aid and produces the application for exequatur. According to Arts 1098 and 1105 of the Civil Procedure Code, the application for recognition of the foreign decision shall be settled amicably, principally by a decision, and indirectly, by an interlocutory judgment, in both cases after the parties are subpoenaed. The application may be settled without subpoenaing the parties, if the foreign decision reveals that the defendant agrees with the admission of the action. The application consenting to enforcement shall be settled by decision, after the parties are subpoenaed. If the foreign decision contains solutions related to several claims which are separable, then consent may be granted separately.

<sup>279</sup> The systems set out in the instruments are very similar, with some differences, notably with respect to the shorter and compulsory timeframes set out in the 2009 Regulation.

<sup>280</sup> Note that the Section 2 procedure will also apply to decisions given in Member States before the Regulation was applicable but after the coming into force of the “Brussels I” Regulation. Please see Chapter 3, Part I, for a full discussion of the scope and application of the Regulation.

## 2. Recognition (Art. 23)<sup>281</sup>

605. Article 23 of the Regulation provides that “no special procedures” shall be required in order to recognise decisions from other Member States not bound by the 2007 Hague Protocol (Art. 23(1)), and that any interested party may apply in order that such a decision is recognised according to the Regulation procedures (Art. 23(2)).<sup>282</sup> It should be noted that an interested party may directly apply for a declaration of enforceability (see discussion below, regarding Art. 26) without first applying for the recognition of a decision.

## 3. Declaration of enforceability (Arts 26-30)

606. Article 26<sup>283</sup> of the Regulation provides that a decision from another Member State not bound by the 2007 Hague Protocol will be enforceable in another Member State *after* a declaration of enforceability, upon the application of any interested party. It should be noted that the decision from another Member State not bound by the 2007 Hague Protocol must be enforceable in that other State. The requirement that the decision be enforceable would include provisionally enforceable decisions, decisions bearing on interim measures, non-final decisions, etc., as long as the decision is enforceable in the State of origin.<sup>284</sup>

607. Member States must notify the Commission (in accordance with Art. 71) as to those courts or competent authorities in the Member State of enforcement where the application for a declaration of enforceability will be submitted. The “local jurisdiction” shall be determined by the place of habitual residence of the person against whom enforcement is sought, or the place of enforcement (Art. 27).<sup>285</sup> Articles 28 and 29<sup>286</sup> specify document requirements for applications for declarations of enforceability (see discussion in Section II.A.5., above).

608. The Regulation (Art. 30)<sup>287</sup> provides that a decision will be declared enforceable without review under Article 24 (see Art. 24 discussion, below), “immediately” upon completion of the documentation formalities set out in Article 28, and “at the latest” within 30 days of the completion

<sup>281</sup> Art. 23 of the Regulation is the parallel Article to Art. 33 of the Brussels I Regulation.

<sup>282</sup> Note that Art. 23(3) provides that if the outcome of proceedings is dependent upon the recognition of the maintenance decision then a court will also have jurisdiction over the question of recognition. For Art. 23(3) to be applicable the recognition of the decision must be necessary within the context of the main decision, for example, the division of matrimonial property where the maintenance decision is needed to determine the amount of available property.

<sup>283</sup> Art. 26 of the Regulation is the parallel Article to Art. 38 of the Brussels I Regulation and to Art. 31 of the Brussels Convention.

<sup>284</sup> It should be noted that under Art. 39 of the Regulation, a decision may be declared provisionally enforceable in the State of origin, notwithstanding any appeal and even if national law does not provide for enforceability by operation of law.

<sup>285</sup> Art. 27 of the Regulation is the parallel Article to Art. 39 of the Brussels I Regulation.

<sup>286</sup> Art. 28 of the Regulation is the parallel Article to Art. 53 of the Brussels I Regulation. Art. 29 of the Regulation is the parallel Article to Art. 55 of the Brussels I Regulation and to Art. 48 of the Brussels Convention.

<sup>287</sup> Art. 30 of the Regulation is the parallel Article to Art. 41 of the Brussels I Regulation.

of these formalities, save in cases of exceptional circumstances which make the declaration impossible.<sup>288</sup> At this stage, the party against whom enforcement is sought has not been given notice and does not have the opportunity to make an appearance at proceedings.

#### **4. Give notice of the decision on the application for a declaration (Art. 31)<sup>289</sup>**

609. The Regulation requires (Art. 31) that the decision on the application for a declaration of enforceability must “forthwith” be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.<sup>290</sup> Also, it requires that the declaration

<sup>288</sup> This mandatory time limit of 30 days is a new rule from the former procedures set out in the Brussels I Regulation.

<sup>289</sup> Art. 31 of the Regulation is the parallel Article to Art. 42 of the Brussels I Regulation and to Art. 35 of the Brussels Convention.

<sup>290</sup> Under the domestic law of Romania service of all judicial documents shall be made to the lawyer designated by the local bar, according to Law No. 36/2012. Under the Civil Procedure Code (Law No. 134/2010), Art. 154 and following, service of summons and of all procedural documents will be made, *ex officio*, by court procedural agents or by any other employee of the same, as well as by agents or employees of other courts, in whose district the person to whom the documents are served is located. The service is made in a sealed envelope, having enclosed the proof of service or report and the notification. If service is not possible, it should be made by post by way of registered letter, with declared content and acknowledgment of receipt, in a sealed envelope, with the proof of service or report and the notification enclosed. At the request of the interested party and at his or her expense, it will be possible to make the service of the procedural documents immediately by bailiffs. The service of the summons and of other procedural documents can be made by the court registry and by fax, email or by other means. In order to confirm, the court will serve a form together with the procedural document. The courts have a right of direct access to the electronic databases or to other information systems held by public authorities and institutions. Specific persons are summoned in the following ways: staff of diplomatic missions and Romanian citizens working within international organisations, as well as family members living with them, as long as they are abroad, will be served by the Ministry of Foreign Affairs; other Romanian citizens, found abroad for employment, inclusive of family members accompanying them, will be served by the companies / bodies who sent them; other persons found abroad, if they have a known domicile or residence, by a summons sent by registered letter with declared content and acknowledgment of receipt, the proof of sending of the letter by Romanian post, in which there will be recorded the sent documents, as evidence of procedural fulfilment, unless otherwise provided by special regulatory acts or by international treaties or conventions to which Romania is party. If the domicile or residence of the persons found abroad is unknown, the summons is made by display. In all cases, if those from abroad have a proxy known in the foreign country, the latter will be summoned. The persons found abroad, summoned for the first judgment, will be informed by summons that they have the obligation to choose a domicile in Romania where all service for the trial will be made to them. If not, service will be made by registered letter, letter service by Romanian post with receipt, in whose content will be mentioned the documents sent, as proof of procedural accomplishment. The summons and other procedural documents will be sent to the party at least five days before the trial. The service of the summons and of all procedural documents is made in person to the summoned person, at the established place or at any place the summoned person is located. The summons may be given, as the case may be, to the administrator, doorman or to his or her replacement, etc. The service of the summons will be made to the person entitled to receive it, who will sign the proof of service certified by the responsible agent. If the addressee receives the summons, but refuses to sign or cannot sign it, the agent will draw up a report indicating these circumstances. If the addressee refuses to receive the summons, the agent will place it in the post box of the residence. In the absence of the post box, he will display on the house door of the addressee a notification and the agent will draw up a report. If the addressee is not found at his or her domicile or residence or, as applicable, his or her



of enforceability, along with the decision (if not already served on that party), be served on the party against whom enforcement is sought, who may then appeal against the decision on the application for declaration of enforceability.

## **5. Appeal against the decision on application for the declaration (Arts 32-34)<sup>291</sup>**

610. The decision on the application for the declaration of enforceability may be appealed by either party, in accordance with Article 32 of the Regulation. An appeal must be lodged within 30 days of service, or within 45 days if the party against whom enforcement is sought has his habitual residence in a Member State other than that in which the declaration of

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registered office, the agent will serve the summons to an adult of the family or, in the absence of the latter, to any other adult living together with the addressee or who usually receives his or her correspondence. When the addressee lives in a hotel or a building composed of several apartments and is not found at this home, the agent will serve the summons to the administrator, door keeper or to the person who usually replaces him or her. The agent has the obligation to lodge the summons and the report at the trial court or at the city hall of the addressee's domicile or where he or she has his or her registered office. The proof of service of the summons or of another procedural document or, if applicable, the report, will contain references to the coordinates of the agent, addressee and court, the signatures and, in the case of a report, the indication of the reasons for which it was drawn up.

The procedure is considered accomplished on the date on which the proof of service was signed or, as the case may be, the report was signed; in the case of the summons or service of another procedural document performed by post or rapid courier, the procedure is considered as accomplished on the signature date by the party of the acknowledgment of receipt or registration, by the post officer or by the courier of its refusal to receive the correspondence; in the case of the summons or service of another procedural document by email or fax, the procedure is considered accomplished on the date indicated on the printed copy of the proof of service, certified by the court clerk who made the transmission. When the service of the procedural documents cannot be made because the building is demolished, became impossible to live in or use, or the addressee of the document no longer lives in it or when the service cannot be made for similar reasons, the agent will report the case to the court registry in order to inform the party who asked for the service in due time about this circumstance, and to communicate that he or she undertake to obtain the new address in order to effect the service. When the plaintiff indicates that, although he or she did all he or she could, he or she did not succeed in finding the defendant's domicile or another place where he or she could be found according to law, the court may agree to the defendant's summons by publicity. The summons by publicity is made by the display of the summons on the court door, on the portal of the competent trial court and at the last known domicile of the summoned person. When it considers necessary, the court will lodge and publish the summons in *Monitorul Oficial al României* or in a widely-distributed central newspaper. Together with the notification of the summons by publicity, the court will appoint a curator among the bar lawyers who will be summoned at proceedings to represent the defendant's interests. When the law or court orders the parties' summons or the service of some procedural document to be made by display, this display will be made in court by the court clerk and, outside the court by agents responsible for the service of the procedural documents, including the conclusion of a report. After the court is seized, if the parties have a lawyer or legal counsellor, the requests, defences or other documents may be served directly between them. The party present in court in person, represented by a lawyer or by another representative, is obliged to receive the procedural documents which are served at the hearing. If the reception is refused, the documents are considered served by their filing. If during the trial one of the parties changed his or her place of summons, he or she is obliged to inform the court, and if not, the summons procedure will be considered validly accomplished at the former summons place.

<sup>291</sup> Arts 32-34 of the Regulation are the parallel Arts to Arts 43-45, respectively, of the Brussels I Regulation.

enforceability was given (no extension will be given on account of distance). The court seized of an appeal under Article 32(4) of the Regulation must give its decision within 90 days from the date it was seized, except in exceptional circumstances (Art. 34(2)). No measures of enforcement may be taken, other than protective measures against the property of the party against whom enforcement is sought, until the appeal has been determined (Art. 36(3)).

611. The procedure for contesting the appeal decision (Art. 33) must follow procedures specified by a Member State under Article 71 of the Regulation, which will be communicated to the Commission.<sup>292</sup> The court seized of a further appeal under Article 33 of the Regulation must give its decision “without delay” (Art. 34(3))

612. Courts hearing appeals under Articles 32 or 33 of the Regulation may only refuse or revoke a declaration of enforceability on one of the grounds specified in Article 24 (see discussion, immediately below).

## **6. Grounds of refusal of recognition (Art. 24)<sup>293</sup>**

613. The Regulation provides a number of grounds of refusal of recognition of a decision (Art. 24), namely:

- (a) if the recognition would be “manifestly” contrary to public policy (with the exception of an examination of the jurisdiction rules the Regulation sets out);
- (b) if the decision was given in default of appearance of the defendant, and there were defects (as specified) in notice given to the defendant;
- (c) if the decision is irreconcilable with a decision given in a dispute between the same parties in the Member State where recognition is sought;<sup>294</sup>
- (d) if the decision is irreconcilable with an earlier decision given in another Member State or third State in a dispute involving the same cause of action between the same parties (provided that the said decision fulfils the requirements for recognition in the requested State).<sup>295</sup>

<sup>292</sup> Under the domestic law of Romania an appeal can be lodged at the Appeal Court of the tribunal of first instance which gave the exequatur decision. The delay to appeal is, according to the Civil Procedure Code, 30 days from the service of the decision (even if given at the same time as the authorisation of enforcement). The appeal suspends the enforcement of the decision rendered at the first instance.

<sup>293</sup> Art. 24 of the Regulation is the parallel Article to Art. 34 of the Brussels I Regulation.

<sup>294</sup> It is clarified that a decision which has the effect of modifying an earlier decision on maintenance, on the grounds of changed circumstances is not to be considered an “irreconcilable decision.”

<sup>295</sup> *Ibid.*

## **7. Stay of recognition proceedings (Art. 25)<sup>296</sup>**

614. The competent authority in the Member State in which recognition is sought must stay proceedings for recognition if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal (Art. 25).<sup>297</sup>

## **8. Stay of proceedings (Art. 35)<sup>298</sup>**

615. The court with which an appeal is filed under Article 32 or 33 of the Regulation must stay the proceeding, upon application of the person against whom enforcement is sought, if the enforceability of the decision is suspended in the Member State of origin for reason of appeal.

## **9. Provisional, including protective measures (Art. 36)<sup>299</sup>**

616. Article 36(1) of the Regulation clarifies that nothing prevents an applicant from availing himself of provisional / protective measures available under the domestic law of the Member State of enforcement, without the requirement of a declaration of enforceability. Article 36(2) of the Regulation also clarifies that the declaration of enforceability will carry with it “by operation of law” the power to proceed to any protective measures. Article 36(3) of the Regulation specifies that no measures of enforcement other than protective measures against the property of the party against whom enforcement is sought may be taken during the time granted for appeal under Article 32(5) of the Regulation. (See Chapter 3, Part II, Section VIII, above, for more information of protective and provisional measures.)

## **10. Partial enforceability (Art. 37)<sup>300</sup>**

617. An applicant may request a limited declaration of enforceability on parts of a decision, and a competent authority can likewise, upon its own motion, declare parts of a decision enforceable if all matters cannot be declared enforceable.

## **11. No charge, duty or fee (Art. 38)<sup>301</sup>**

618. The Regulation requires that no “charge, duty or fee calculated by reference to the value of the matter at issue” may be applied in the Member State of enforcement.

<sup>296</sup> Art. 25 of the Regulation is the parallel Article to Art. 37 of the Brussels I Regulation and to Art. 30 of the Brussels Convention.

<sup>297</sup> The obligation to stay proceedings in this circumstance is a new rule from the former procedures set out in Brussels I Regulation, where a stay of proceedings was non-mandatory in this circumstance.

<sup>298</sup> Art. 35 of the Regulation is the parallel Article to Art. 46 of the Brussels I Regulation.

<sup>299</sup> Art. 36 of the Regulation is the parallel Article to Art. 47 of the Brussels I Regulation.

<sup>300</sup> Art. 37 of the Regulation is the parallel Article to Art. 48 of the Brussels I Regulation.

<sup>301</sup> Art. 38 of the Regulation is the parallel Article to Art. 52 of the Brussels I Regulation.

## 12. Enforcement

619. Once recognised and declared enforceable (and relevant appeals have been exhausted), the maintenance decision can then be enforced under the domestic laws of the requested State.<sup>302</sup> See Chapter 12, for more information on enforcement.

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

620. Competent authorities should be aware that their national Central Authority (in this case, the Central Authority of Romania) will have periodic reporting duties as to the progress of applications under the Regulation (Art. 58). Competent authorities will likely be asked for progress reports from their national Central Authority and should be prepared to co-operate with the Central Authority in this respect.

## **IV. Other aspects: Recognition and recognition and declaration of enforceability applications**

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

#### **1. General**

621. Under the Regulation, 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 Member State (Art. 56(2) *a*)). This application may be made where the debtor wishes to have a different decision recognised in the State where enforcement is taking place (*i.e.*, Romania), or where the debtor has obtained a modification of an existing decision in another Member State, and now wishes to have it recognised in Romania, as he or she has assets there.

622. See Chapter 11 for a further discussion of modification applications. If there is a maintenance decision already being enforced in Romania, the Regulation requires a modified decision 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.<sup>303</sup>

623. It should also be noted that Article 40 of the Regulation provides a procedure whereby any party, including a debtor, may invoke a decision which has already been recognised under the recognition procedures found in Section 1 and 2 of Chapter IV of the Regulation (see Section II.A.5., above, in this Chapter regarding documentation requirements under Art. 40).

<sup>302</sup> See *supra*, note 262.

<sup>303</sup> *Ibid.*

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

624. Since the purpose of the application for recognition under Article 56(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, *i.e.*, in Romania. The Regulation 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>304</sup> Where recognition is sought in Romania, where the debtor has assets but does not reside, the debtor may make an application under Article 56(2) a).

625. In all cases where a matter proceeds as an application under Article 56(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:

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

### How this works under the Regulation

627. The debtor can make an application under Article 56(2) a) of the Regulation to the Central Authority in State A. State A will transmit the application to Romania where, using the procedures described in this Chapter, the modified decision will be recognised or recognised and declared enforceable. The parties will be notified of the decision and provided with an opportunity to challenge or appeal the recognition, declaration of enforceability or enforcement, as appropriate, according to the procedures set out in Sections 1 and 2 of Regulation Chapter IV, described above. Once declared enforceable and any relevant appeal rights have been exhausted, as applicable, the modified decision will be effective in Romania to limit the enforcement of the original decision.

<sup>304</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 11), and no new application will have to be brought. This will depend upon the internal processes of each State. In Romania the Romanian Central Authority can support the debtor in procedures to receive the application for the recognition of the foreign judgment for the reduction of maintenance or in procedures for sending the application abroad for the reduction of maintenance. In Romania, the Romanian Central Authority cannot support the debtor in order to enforce the recognised foreign judgment.

### **3. Procedures**

628. The recognition or recognition and declaration of enforceability procedures discussed in this Chapter are applicable to applications by the debtor for recognition in these circumstances.

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

629. It is important to note that the Regulation does provide an important restriction upon the debtor's right to have a modified decision recognised under the Regulation. A creditor may object to the recognition of the modified decision if the modified decision was made in a Member 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 (Art. 8). There are a few exceptions where this will be allowed, but it is important to keep in mind that the right of the debtor to have a modified decision recognised is subject to certain restrictions that do not apply to the recognition and enforcement of other decisions.

630. See Chapter 11 respecting modification applications.

### **B. Court settlements and authentic instruments**

631. Chapter VI of the Regulation provides that "court settlements and authentic instruments" which are enforceable in a Member State of origin will be recognised and enforceable in another Member State in the same way as maintenance decisions (Art. 48(1)). Article 48(2) of the Regulation specifies that provisions of the Regulation will apply "as necessary" to court settlements and authentic instruments. Documentation requirements for court settlements and authentic instruments are set out in Article 48(3) of the Regulation (see also Section II.A.5., above).

632. The Regulation defines a court settlement in Article 2(1)(2) as "a settlement in matters relating to maintenance obligations which has been approved by a court or concluded before a court in the course of proceedings".

633. Article 2(1)(3) of the Regulation defines "authentic instrument" in the following ways:

- (a) a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:
  - (i) relates to the signature and the content of the instrument, and
  - (ii) has been established by a public authority or other authority empowered for that purpose; or,

- (b) an arrangement relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them.

## **V. Recognition and recognition and declaration of enforceability – Other issues**

### **A. Legal assistance**

634. Under the Regulation the requested State processing any application made by way of a Central Authority 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.<sup>305</sup> 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.<sup>306</sup>

635. Please see Chapter 3, Part II, Section VII, for more details on the requirement to provide effective access to procedures, including the provision of cost-free legal assistance if necessary.

### **B. Enforcement issues**

#### **Currency conversion**

636. The Regulation 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. In other instances, the requesting State may have already converted the decision, including any arrears, into the currency of the enforcing State.<sup>307</sup>

637. Currency conversion issues are dealt with in more detail in Chapter 12 on enforcement of decisions.

<sup>305</sup> Under the domestic law of Romania, concerning the procedure for granting legal aid, see *supra*, note 86.

<sup>306</sup> Under the domestic law of Romania the exequatur procedure is simplified as stipulated by the Regulation and by the Convention, in the sense that, in the first instance, the tribunal verifies only the existence of the supporting documents and the formalities, without examination of the grounds of refusal of recognition and the basis for recognition.

<sup>307</sup> In Romania in conformity with the Civil Procedure Code, in the case of amounts at issue in the form of income and cash in a foreign currency, credit institutions are authorised to perform the conversion in *Lei* of the foreign currency, without the consent of the account holder, at the rate of exchange set by the National Bank of Romania for that day. The amount can be calculated by the bailiff, for example, in the event that the value of the main obligation established in a monetary value is updated, subject to the inflation rate, calculated from the date on which the judgment became enforceable or, in the case of other enforcement orders, from the date on which the claim became due for payment up to the date of the effective payment of the obligation in any of the claims. The calculation of arrears can be also established based on an expert accounting report, by an office with accounting expertise.

## **VI. Additional materials**

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

- Once the decision has been recognized, many States will immediately 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.<sup>308</sup>
- The intent of the recognition and enforcement process set out in the Regulation is to allow for speedy and efficient processing of applications. Judges, court staff, and other involved authorities 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 declaration of enforceability are contained in the Regulation. Judges will have to also follow the relevant domestic law and procedures. For example, competent authorities will have to consider any domestic requirements concerning the way that notice is to be provided to the respondent of the decision, or the way that an applicant who lives outside the requested State is to be notified of any decision.

### **B. *Related forms***

Annex I

Annex II

Annex III

Annex IV

Annex VI

### **C. *Articles of the Regulation***

Chapter IV, Articles 16-43

Article 56(2) a)

Article 57

Article 58

Article 48

Article 64

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<sup>308</sup> For further information on the amicable settlement of disputes in Romania, see *supra*, note 234.



**D. Related Chapters of the Handbook**

See Chapter 12 – Enforcement of maintenance decisions under the 2007 Convention and the 2009 Regulation

See Chapter 3 – Matters of general application: 2007 Convention and 2009 Regulation

**VII. Checklist – Recognition and enforcement applications**

	<b>Procedure</b>	<b>Handbook reference</b>
1	Receive documents from Central Authority of Romania	II(A)(1)
2	Does application meet minimum Regulation requirements?	II(A)(3)
3	Check to make sure documents are complete	II(A)(4)&(5)
4	Search for respondent's location or assets if necessary, or verify this has been completed by Central Authority	II(A)(7)
5	Request additional documents from Central Authority of Romania if necessary	II(A)(6)
6(a)	Recognise or Recognise and / or declare decision enforceable according to Section 1 or Section 2 procedures (proceed with enforcement according to Section 1 or Section 2 procedures, as appropriate)	III
6(b)	Notify the applicant and respondent of decision for recognition or recognition and declaration of enforceability, and / or enforcement	III
6(c)	Respondent has opportunity to take steps to challenge or appeal recognition, declaration of enforceability or enforcement on specified grounds under Section 1 or Section 2 procedures	III
7	Conclude any challenge or appeal and notify applicant and respondent	III

### VIII. Frequently Asked Questions

*A creditor has a decision from State A. The creditor lives in State B. State B will not recognise or enforce the decision. The debtor lives in Romania, a third State. State A and Romania are Member States where the Regulation is applicable. Can the decision be recognised and enforced in Romania?*

638. 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 Member 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 Romania 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 a declaration of enforceability / enforcement?*

639. 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 Member State?*

640. 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.

*Under the Regulation, can a decision be recognised in Romania that is of a type that could not be made in Romania?*

641. Yes – providing that the decision falls within the scope of maintenance obligations under the Regulation. For example, a child support decision may include a provision for reimbursement of certain types of expenses, such as medical insurance premiums, that are not known or provided for under the law of the requested State. The decision can still be recognised in the requested State.

## **IX. Direct requests: overview**

642. Direct requests (*i.e.*, direct requests from applicants to competent authorities) for recognition or recognition and declaration of enforceability will be governed by the Regulation, if they fall within its scope, save the most favourable legal aid provisions of Chapter V (Access to Justice)<sup>309</sup> and many of the provisions of Chapter VII (Co-operation between Central Authorities). Direct requests to competent authorities in Romania for the purposes of establishment or modification of maintenance decisions are dealt with briefly in Chapter 10 and Chapter 11, and these applications are governed in general by the internal law of Romania rather than by the Regulation (however Regulation rules on jurisdiction and applicable law will still apply; see Chapters 4 and 5 for more information on jurisdiction and applicable law rules under the Regulation).

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<sup>309</sup> That the most favourable legal aid provisions of Chapter V of the Regulation enshrined in Art. 46 will not apply to direct requests under the Regulation (but rather only to applications made by way of Central Authorities) can be deduced by a reading of Arts. 55, 56(1) and 46(1) of the Regulation, and the Regulation's Recital 36. See Chapter 3, Part II, Section VII for more information on the Regulation's access to justice and legal aid provisions.

## **Chapter 9 - Processing incoming applications for enforcement of decisions made or recognised in the requested State under the 2007 Convention or the 2009 Regulation**

### *How to use this Guide*

*This Chapter primarily deals with applications to enforce a maintenance decision, received by judicial or other competent authorities from a Central Authority (see also Section VI, below, regarding direct requests to competent authorities).*

*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 and processing the incoming materials.*

*Section III contains references and additional information on the application.*

*Section IV contains a checklist, providing a simple overview of the process.*

*Section V covers some of the most frequently asked questions with respect to this application.*

*Section VI gives an overview of procedures for direct requests to competent authorities for enforcement of decisions made or recognised in Romania.*

### **I. Overview – Applications for enforcement of a decision made or recognised in Romania under the 2007 Convention or 2009 Regulation**

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

643. This is the simplest of all applications under the Convention or the Regulation. The application requests that the competent authority of a Contracting State to the Convention or Member State in which the Regulation is applicable enforce its own decision, or a foreign decision that it has already recognised,<sup>310</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. In this case, Romania will be the requested State.

<sup>310</sup> The recognition may have taken place under the Convention or Regulation, or the decision may be recognised "by operation of law", in cases where recognition of certain types of foreign decisions is automatic. See Chapters 7 and 8 for information on recognition procedures under the Convention and the Regulation.

644. The process is very straight-forward as there is no need for the decision to be recognised before it can be enforced in Romania, the requested State. This is because the decision is either a domestic decision that was made in Romania, where enforcement will take place, or it is a foreign decision that has already been recognised in Romania.

The **requesting State** is the Contracting State to the Convention or a Member State in which the Regulation is applicable that is initiating an application and making the request on behalf of an applicant who resides in that State. The **requested State** is the Contracting State to the Convention or a Member State in which the Regulation is applicable that is being asked to process the application.

645. This application is made under Article 10(1) *b*) of the Convention or under Article 56(1) *b*) of the Regulation. (See Chapter 3, Part I for a discussion of the scope and application of both the Convention and the Regulation.)

### **B. Case example**

646. M has a maintenance decision from Romania. M now lives in State B. The debtor continues to live in Romania. M would like the authorities in Romania to start enforcing the decision for maintenance and send the payments to M. Both Romania and State B are Contracting States to the Convention or Member States of the European Union where the Regulation is applicable.

647. Using the Convention or Regulation, M will ask the Central Authority in State B to transmit an **application for enforcement of the decision** to Romania. The Central Authority in Romania will receive the application, ensure that it is complete, refer the decision to the competent enforcement authority for enforcing, and assist in transmission of payments to M as required.

### **C. Important difference – applications for enforcement of a State's own decision**

648. An application for enforcement of a decision made or recognised in the requested State is simpler than an application for recognition or recognition and enforcement of a decision made elsewhere. As discussed in Chapter 7, under the Convention, when an application for recognition or recognition and enforcement of a decision is made, the respondent has the right to object to the recognition or recognition and enforcement on the basis that the grounds for recognition or recognition and enforcement set out in Article 20 are not present, or the procedural and other requirements for recognition or recognition and enforcement of a decision in Article 22 are not met. Under the Regulation, for decisions given in Member States bound by the 2007 Hague Protocol, the respondent will have narrower

grounds to apply for a review of the decision in the Member State of origin, or to apply for a refusal or suspension of enforcement of the decision in the Member State of enforcement<sup>311</sup> (see Chapter 8).

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

649. The respondent has no similar rights concerning a decision made or already recognised in the requested State, *i.e.*, in Romania. This is because Romania 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, through the recognition or recognition and enforcement process. So there is no need for a competent authority in the requested State to consider whether the decision should be recognised or recognised and 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 or Regulation. 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 or Regulation.

650. 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 Romania as the enforcing State.<sup>312</sup> The fact that an application for enforcement is made under the

<sup>311</sup> For decisions given in Member States not bound by the 2007 Hague Protocol under the Regulation, the respondent will have broader grounds to contest the recognition or enforcement of a decision than for decisions given in Member States bound by the 2007 Hague Protocol (see Chapter 8 for details).

<sup>312</sup> Under the domestic law of Romania Arts 711 - 719 of the Civil Procedure Code permit that an interested or affected person can make objections to enforcement, against the enforcement itself, against interlocutory decisions given by the bailiff, as well as against any enforcement act. If enforcement is made according to a judgment, the debtor will not be able to make objections on reasons of fact or law which he or she could have raised during the trial at first instance or through another available legal remedy. If enforcement is made according to another enforcement order other than a judgment, objection to enforcement based on reasons of fact or law concerning the substance of the right contained in the enforcement order may be invoked, unless another legal remedy to this effect is stipulated by law. A new objection cannot be made by the same party for reasons which existed at the date of the first objection. An objection should be lodged at the enforcement court and must be made within 15 days. The judgment given on the objection can be challenged only on appeal. Until the settlement of the objection, the competent court may suspend enforcement. If the court accepts the objection to enforcement, it will, as applicable, rectify or cancel the contested enforcement act or will order the suspension or termination of enforcement. See also, however, Chapter 8 which describes various grounds for refusal or suspension of enforcement under the specific Regulation regimes for recognition and enforcement of decisions.

Convention does not give the respondent / debtor any additional grounds to contest the enforcement of the decision.

651. The process for managing incoming applications for enforcement is therefore very straightforward for the requested Central Authority in Romania.<sup>313</sup> The package of documents is reviewed to ensure it is complete, and the application is referred to a competent authority for enforcement in Romania.<sup>314</sup> 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**

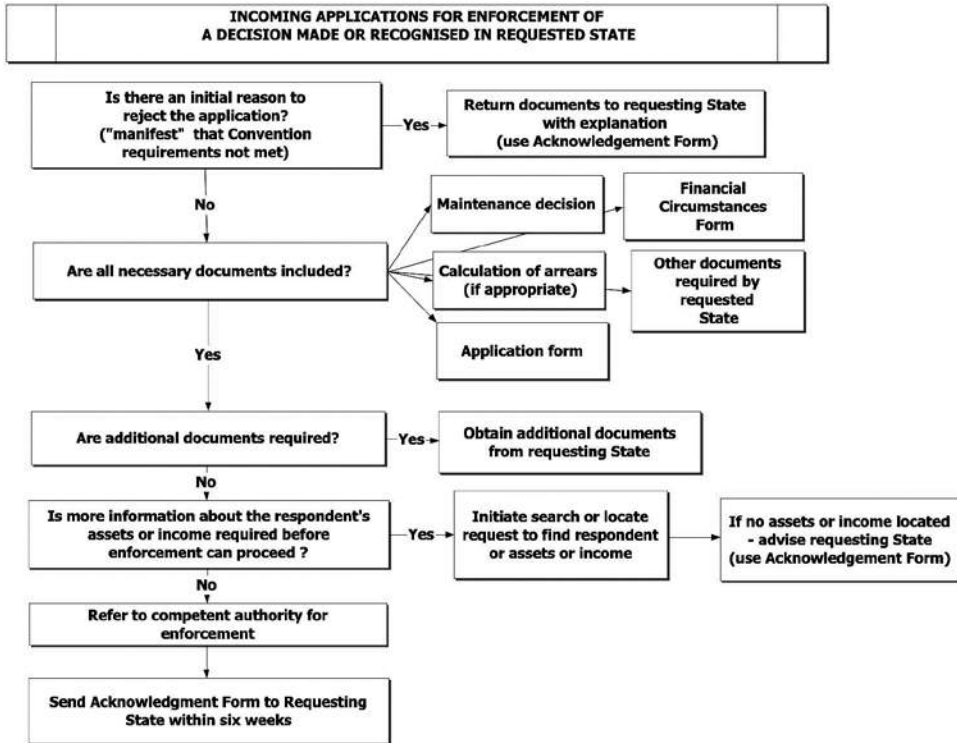
### **1. Ensure the documents are complete**

652. When an application for enforcement of a decision is received by the Central Authority in Romania from a foreign 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 competent authority in Romania for enforcement.<sup>315</sup> The competent authority in Romania will have to make a similar check to that of the Central Authority, to ensure the completeness of the document package.

<sup>313</sup> The Central Authority in Romania is: the Ministry of Justice. Based on Art. 2(1) and (2) of Law No. 36/2012, the Ministry of Justice is the Romanian Central Authority designated under Art. 4 of the Convention, in relations with non-European Union Member States which are Contracting States to the Convention, and under Art. 49 of the Regulation, in relations with the Member States of the European Union.

<sup>314</sup> The competent authorities in Romania are the bailiff and the court of first instance in whose jurisdiction the enforcement is made (*i.e.*, the court of first instance based on the debtor's domicile or on the place where the debtor's assets are located).

<sup>315</sup> Under the domestic law of Romania an application for enforcement is lodged at the competent bailiff's office. The enforcement order in original and the proof of paid stamp duties, as well as any documents stipulated by law, as applicable, will be attached.



**Figure 10: Flowchart (Convention only) – overview of enforcement application check**

653. Documents received from the Central Authority in Romania should be reviewed in a timely fashion, so that if additional documents are needed they can be requested without delay from the Central Authority in the requesting State.

654. The incoming package should include:

**a) Under the 2007 Convention**

√	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
<b>As needed</b>	Translated copies of documents

**Figure 11: List of forms and documents**



### ***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 to obtain additional copies or certified copies if those are required for enforcement.

### ***Financial Circumstances Form***

Since this is an application 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) Under the 2009 Regulation**

### **(i) Annex VI**

The Regulation requires that Annex VI, appended to the Regulation text, be used for applications for enforcement of a decision given or recognised in the requested Member State. The Regulation requires that at a minimum the information included in the application should include (Art. 57(2)):

- (a) a statement of the nature of the application or applications;
- (b) the name and contact details, including the address, and date of birth of the applicant<sup>316</sup>;
- (c) the name and, if known, address and date of birth of the

<sup>316</sup> The applicant's personal address may be replaced by another address in cases of family violence, if the national law of the requested Member State does not require the applicant to supply his or her personal address for the purposes of proceedings to be brought (Art. 57(3)). Under the domestic law of Romania a party's representative may be summoned in his or her place (with the representative appointed *ex officio* or chosen by the party), or a party may be summoned at the domicile chosen for the service of documents.

- defendant;
- (d) the name and the date of birth of any person for whom maintenance is sought;
- (e) the grounds upon which the application is based;
- (f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;
- (g) the name and contact details of the person or unit from the Central Authority of the requesting Member State responsible for processing the application.

**(ii) For decisions recognised under Section 1 Chapter IV (decisions given in a Member State bound by the 2007 Hague Protocol)**

Article 20 of the Regulation specifies the required documents which are necessary for the purposes of enforcement (under Section 1 of Chapter IV of the Regulation, for decisions given in a Member State bound by the 2007 Hague Protocol), which must be provided to the competent enforcement authorities by a claimant:

- (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- (b) the extract from the decision issued by the court of origin using the form set out in Annex I to the Regulation (with, where necessary, a transliteration or a translation of the content<sup>317</sup>);
- (c) where appropriate, a document showing the amount of any arrears and the date such amount was calculated.

Competent authorities may not require the claimant to provide a translation of a decision unless enforcement is challenged (Art. 20(2)).<sup>318</sup>

**(iii) For decisions recognised under Section 2 Chapter IV (decisions given in a Member State not bound by the 2007 Hague Protocol)**

Article 28 of the Regulation (under the alternative Section 2 procedure for recognition and declaration of enforceability, for decisions given in Member States not bound by the 2007 Hague Protocol), applications must be accompanied by: a) a copy of the decision “which satisfies the conditions necessary to establish its authenticity”; and, b) an extract from the decision issued by the court of origin using the form set out in Regulation Annex II.

<sup>317</sup> See Chapter 3, Part II, Section II, for further information on language and translation requirements under the Regulation.

<sup>318</sup> See Chapter 3, Part II, Section II, for further information on language and translation requirements under the Regulation.

Where necessary, a translation or transliteration, according to appropriate language requirements, should accompany the application (see Chapter 3, Part II, Section II for more information on language requirements under the Regulation). The competent authority seised may not require a claimant to provide a translation of the decision (however, it may be required in connection with an appeal under Art. 32 or 33).

Under Article 29 of the Regulation, if the extract of the decision using the form set out in Regulation Annex II is not produced, a competent authority may specify a time for its production, accept an equivalent document, or dispense with this requirement if the competent authority considers that it has adequate information before it.

#### **(iv) Documents with respect to court settlements and authentic instruments (Art. 48)**

Article 48 of the Regulation specifies documents necessary for applications for the recognition or recognition and declaration of enforceability of court settlements and authentic instruments in another Member State which the competent authority of the Member State of origin must issue, upon the request of any interested party, an extract from the court settlement or authentic instrument, using Annex I, II, III or IV, as relevant.

#### **(v) Additional documents**

Article 57(4) and (5) of the Regulation requires that additional documents, as appropriate or necessary, and to the extent known, accompany the application. These include:

- the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor (Art. 57(4) b))<sup>319</sup>
- any other information that may assist with the location of the defendant (Art. 57(4) c))
- any necessary supporting information or documentation including, where appropriate, documentation concerning the entitlement of the applicant to legal aid (Art. 57(5))

#### ***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.

<sup>319</sup> As this is an application for enforcement, the financial circumstances of a creditor (Art. 57(4) a)) would normally not be needed.

### c) Requesting additional documents

655. 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 to the Central Authority in Romania, which can contact the requesting Central Authority.

656. If the request is made for additional documents by the Central Authority in Romania, the requesting State has **three months** under the Convention or **90 days** under the Regulation to provide the documents. If the requested documents are not provided within the time specified, 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 Romania may (but does not have to) close its file and inform the requesting State accordingly.

### 2. Is it “manifest” that the requirements of the Convention or the Regulation are not met?

657. Both the Convention and the Regulation allow a Central Authority to refuse to process an application if it is “manifest that the requirements” of the Convention or Regulation, respectively, are not fulfilled (see Art. 12(8) of the Convention and Art. 58(8) of the Regulation). The circumstances when this might be the case are quite limited,<sup>320</sup> and whether the Central Authority chooses to consider this requirement is optional.

658. 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.

659. The competent authority in Romania may wish to do a similar check upon receipt of the application to ensure that it is not “manifest” that the requirements of the Convention are not met, and inform the Central Authority in Romania of any determination, as appropriate.

### 3. Search for the respondent’s location

660. In some limited cases, the Central Authority in Romania 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,<sup>321</sup> or where the applicant is not certain whether the debtor resides in the requested State or has assets or income in that State.

661. In carrying out any searches, the Central Authority in Romania, or a competent authority on its behalf, is expected to access any data banks

<sup>320</sup> See the Explanatory Report of the Convention, para. 344.

<sup>321</sup> See *supra*, note 202.

and sources of public information that it has access to, within the limits set out by the internal law respecting access to personal information (see also Chapter 3, Part II, Section VI, for further information on the protection of personal and confidential information under the Convention and the Regulation).<sup>322</sup>

662. If the respondent, or the respondent's assets or income, cannot be located in Romania, the Central Authority in Romania must 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.

#### **4. Appropriate provisional or protective measures**

663. It may be appropriate that the competent authority take provisional or protective measures while an application is pending. The taking of these measures may occur at a number of points in time during—or even before—the application process. Please see Chapter 3, Part II, Section VIII, for further information on provisional and protective measures.

#### **5. Start enforcement process**

664. The competent authority responsible for enforcement of maintenance decisions in Romania may now proceed with enforcement. See Chapter 12 for further information on enforcement.

### **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.<sup>323</sup>

<sup>322</sup> Under the domestic law of Romania in order to obtain data and information necessary for the fulfilment of the service of summons, of other procedural documents, as well as for the accomplishment of any duty specific to the activity of judgment, the courts are entitled to direct access to the electronic databases or other information systems held by public authorities and institutions. These authorities and institutions have an obligation to take necessary measures in order to ensure direct access of the courts to the electronic databases and information systems. At the request of the bailiff, the persons owing money to the debtor must give all information necessary for the performance of enforcement. Fiscal bodies, public institutions, credit institutions and any other persons must supply data and information necessary for the performance of enforcement. The bailiff has free access to the land registry, to the trade registry and to other public registries containing data about the debtor's assets, if enforcement has been initiated.

<sup>323</sup> In Romania, attempts to achieve voluntary compliance might be initiated by the Central Authority, the court, the bailiff, etc. Generally, the debtor would be entrusted to pay his or her obligation for the full duration of the enforcement procedure; this would be classified as from the moment when the debtor was served the order for payment and the stipulated time limit has expired, until the moment of the real estate adjudication. The debtor can also agree to forced execution to be made only with respect to one asset. In Art. 7 d) of Law No. 188/2000 concerning bailiffs, it is the duty of the bailiff to amicably recover any claims. In the Civil Procedure Code, the bailiff's role is referenced at Art. 627. In the Romanian Civil Procedure Code it is also mentioned that the bailiff may take note of parties' agreement in certain situations. For

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.
- Competent authorities should keep the Central Authority in Romania informed as to the status of an application for enforcement. The Central Authority in Romania has reporting obligations to the Central Authority in the requesting State as to the status and developments in the application.

### **B. Related forms**

#### *2007 Convention:*

Application for Enforcement of a Decision Made or Recognised in the requested State

#### *2009 Regulation:*

Annex I

Annex II

Annex III

Annex IV

Annex VI

### **C. Relevant Articles**

#### *2007 Convention:*

Article 10(1) b)

Article 12

Article 32

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instance, in an enforcement procedure concerning the seizure of movable property, a third party may still use the debtor's assets, even though the recovery obligation has reached maturity. The creditor and the debtor will have the opportunity to agree that these assets are entrusted to the debtor. As for the amicable sale of assets, the bailiff, with the creditor's agreement, may allow the debtor to him or herself sell the seized assets. As for the direct sale of assets, the bailiff may also proceed, with the agreement of both parties, to the direct sale of assets to the buyer. As for the release and distribution of the amounts gained by forced execution, the bailiff may establish a time limit for conciliation. The bailiff will not take the amounts if an agreement was reached and will rather order the allocation of the amounts according to this agreement, which will be registered in a report. If one of the decisions lodged by the creditor contains the debtor's obligation to periodically pay an amount of money, and the assets or revenues remaining in the debtor's patrimony do not ensure the payment of instalments, the amount allocated to the creditor will be determined by the parties' agreement and, in the absence of an agreement, the bailiff will ascertain this by a report. In this latter case, the interested party will have the possibility to bring the matter before the enforcement court in whose jurisdiction the enforcement is undertaken, in order to determine the amount to be allocated to the creditor.

Article 34

2009 Regulation:

Articles 16-43 (Chapter IV)

Article 56(1) b)

Article 58

Article 41

Article 20

#### **D. Related Chapters of the Handbook**

See Chapter 12 – Enforcement of maintenance decisions under the 2007 Convention and the 2009 Regulation

### **IV. Checklist – incoming requests for enforcement**

	<b>Procedure</b>	<b>Handbook reference</b>
1	Receive documents from the Central Authority in Romania	II(1)
2	Ensure documents are complete	II(1)
3	Is it “manifest” that Convention or Regulation requirements not met?	II(2)
4	Take any provisional or protective measures, as appropriate	II(4)
5	Proceed with enforcement	II(5)

### **V. Frequently Asked Questions**

*Why doesn't a decision from the requested State need to be recognised?*

665. Recognition is not necessary because Romania 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 or the Regulation be used if the request is for a State to enforce its own decision?*

666. In some States, access to the competent enforcement authority (e.g., 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 or legal aid 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 or Regulation as applicable between the two Contracting States or Member States.<sup>324</sup>

## **VI. Direct requests for enforcement of a decision made or recognised in Romania**

667. Competent authorities may receive direct requests for enforcement from applicants, which do not come by way of an application through a Central Authority. In these cases, competent authorities will have to be aware of any documentation requirements or recommendations under the Convention or Regulation (see Section II.1, above), and in particular the document requirements under Article 20 of the Regulation for the purposes of enforcement under the Chapter IV, Section 1 procedure (see also Chapter 12 of this Handbook on Enforcement). Under domestic law in Romania a direct request for enforcement of a decision made or recognised in Romania can be lodged by the plaintiff directly or through a lawyer with the competent bailiff from the debtor's domicile or in the place of the debtor's assets. The application for the approval of authority to enforce and the approval of enforcement can be lodged by the bailiff at the competent court (the court of first instance in whose jurisdiction the office of the bailiff who will perform the enforcement is located). This court is competent to judge objections to enforcement, as well as any other incidents occurring during enforcement (lapse of enforcement; postponement, suspension or limitation of enforcement; reinstatement of the limitation period due to interruption; restoration of the previous situation, prior to enforcement, etc.). A list of Romanian lawyers is published on the website of the National Association of the Romanian Bars, < <http://www.unbr.ro> >. A list of Romania bailiffs is published on the website of the National Association of Romanian Bailiffs, < <http://www.executori.ro/> >. A direct request must include the enforcement order in original, proof of payment of stamp duties and, as applicable, other documents as stipulated by law.

668. The applicant may request legal aid directly or through the Ministry of Justice (*per* European Directive 2008/8/CE, transposed by OUG No. 51/2008, also *per* the *Hague Convention of 25 October 1980 on International Access to Justice*). Only children who are maintenance creditors and vulnerable adults may benefit from *ex officio* legal aid for maintenance applications, without verification of the applicant's revenues (Art. 8<sup>1</sup> from OUG No. 51/2008). All other categories of applicants can benefit from legal aid only after verification of revenues, if the monthly net average income per family member is less than 300 *Lei*.

669. If legal aid is allowed in the form of payments of fees of the officer of the court through an order authorizing the assistance, provisional fees owed to the officer of the court will also be provided for, subject to an assessment of the complexity of the file at that date. The application together with the order of approval will be sent immediately to the territorial chamber of the court officers from competent court. The board of directors of the territorial chamber of the court officers must also appoint an officer of the

<sup>324</sup> Under the domestic law of Romania, concerning the procedure for granting legal aid, see *supra*, note 86.



court, to whom it will send, concurrently with the notice of appointment, the decision on legal aid. The president must also notify the beneficiary of legal aid of the name of the appointed officer of the court. The beneficiary of legal aid can request, on his or her own behalf, the appointment of a particular officer of the court who is territorially competent.

670. After fulfilment of the duties of the officer of the court provided for by law, the court will establish the final fees, at the request of the officer, subject to an assessment of the complexity of the case and to the volume of activity carried out, within the minimal and maximal limits of the fees established by law. The order made by the court referencing provisional fees and, if applicable, sums representing a balance between provisional and final fees, constitute a writ of execution, with no further condition or formality to be fulfilled.

671. A number of model forms for proceedings discussed above are presented at the end of this Section, below.

672. The fee for applications for approval of enforcement, suspension of enforcement, lapse, and protective measures is 20 *Lei*, 50 *Lei*, and 20 *Lei* respectively. The fee for applications for the issue of an order for payment is 200 *Lei*.

673. Order of the Minister of Justice No. 2550/2006, amended by OMJ 2561/2012, reproduced immediately below, sets out the minimum and maximum fees to be paid for services performed by bailiffs.

No.	Performed activity	Minimum fees	Maximum fees
3.	Indirect enforcement actions (pursuit of movable and real estate claims)	<p>a) for claims up to and including 50.000 <i>Lei</i>, the minimum fee is calculated in the following way:</p> <ol style="list-style-type: none"> <li>1. for claims up to and including 500 <i>Lei</i>, the minimum fee is 10% of the value of the claim which is the object of enforcement;</li> <li>2. for claims over 500 <i>Lei</i> and up to and including 1.000 <i>Lei</i>, the minimum fee is 50 <i>Lei</i> plus 5% of the amount exceeding 500 <i>Lei</i> of the value of the claim which is the object of enforcement;</li> <li>3. for claims over 1.000 <i>Lei</i>, and up to and including 50.000 <i>Lei</i>, the minimum fee is 75 <i>Lei</i> plus 2% of the amount exceeding 1.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</li> </ol>	<p>a) for claims up to and including 50.000 <i>Lei</i>, the maximum fee is 10% of the value of the claim which is the object of enforcement;</p>
		<p>b) for claims over 50.000 <i>Lei</i>, but up to and including 80.000 <i>Lei</i>, the minimum fee is 1.175 <i>Lei</i> plus 2% of the amount exceeding 50.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</p>	<p>b) for claims over 50.000 <i>Lei</i>, and up to and including 80.000 <i>Lei</i>, the maximum fee is 5.000 <i>Lei</i> plus 3% of the amount exceeding 50.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</p>
		<p>c) for claims over 80.000 <i>Lei</i>, but up to and including 100.000 <i>Lei</i>, the minimum fee is 1.775 <i>Lei</i> plus 1% of the amount exceeding 80.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</p>	<p>c) for claims over 80.000 <i>Lei</i>, but up to and including 100.000 <i>Lei</i>, the maximum fee is 5.900 <i>Lei</i> plus 2% of the amount exceeding 80.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</p>

		<p>d) for claims over 100.000 <i>Lei</i>, the minimum fee is calculated in the following way:</p> <p>1. for claims over 100.000 <i>Lei</i>, and up to and including 400.000 <i>Lei</i>, the minimum fee is 2.500 <i>Lei</i> plus 1% of the amount exceeding 100.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</p> <p>2. for claims over 400.000 <i>Lei</i>, the minimum fee is 5.500 <i>Lei</i> plus 0,5% of the amount exceeding 400.000 <i>Lei</i> of the value of the claim which is the object of enforcement. If, for the calculation of the maximum fee a percent of up to and including 0,5% is used, the same percent applies to the calculation of the owed minimum fee.</p>	<p>d) for claims over 100.000 <i>Lei</i>, the maximum fee is of 6.300 <i>Lei</i> plus up to 1% of the amount exceeding 100.000 <i>Lei</i> of the value of the claim which is the object of enforcement.</p>
4.	Attachment	<p>a) for claims up to and including 50.000 <i>Lei</i>, the minimum fee is calculated in the following way:</p> <p>1. for claims up to and including 500 <i>Lei</i>, the minimum fee is of 10% of the value of the claim which is the object of enforcement;</p> <p>2. for claims over 500 <i>Lei</i>, but up to and including 1.000 <i>Lei</i>, the minimum fee is of 50 <i>Lei</i> plus 5% of the amount exceeding 500 <i>Lei</i> of the value of the claim which is the object of enforcement;</p> <p>3. for claims over 1.000 <i>Lei</i>, but up to and including 50.000 <i>Lei</i>, the minimum fee is 75 <i>Lei</i> plus 2% of the amount exceeding 1.000 <i>Lei</i> of the value of the claim which is the object of enforcement;</p>	<p>a) for claims up to and including 50.000 <i>Lei</i>, the maximum fee is 10% of the value of the claim which is the object of enforcement;</p>

		b) for claims over 50.000 <i>Lei</i> , but up to and including 80.000 <i>Lei</i> , the minimum fee is 1.175 <i>Lei</i> plus 2% of the amount exceeding 50.000 <i>Lei</i> of the value of the claim which is the object of enforcement;	b) for claims over 50.000 <i>Lei</i> , and up to and including 80.000 <i>Lei</i> , the maximum fee is 5.000 <i>Lei</i> plus 3% of the amount exceeding 50.000 <i>Lei</i> of the value of the claim which is the object of enforcement;
		c) for claims over 80.000 <i>Lei</i> , but up to and including 100.000 <i>Lei</i> , the minimum fee is 1.775 <i>Lei</i> plus 1% of the amount exceeding 80.000 <i>Lei</i> of the value of the claim which is the object of enforcement;	c) for claims over 80.000 <i>Lei</i> , but up to and including 100.000 <i>Lei</i> , the maximum fee is 5.900 <i>Lei</i> plus up to 2% of the amount exceeding 80.000 <i>Lei</i> of the value of the claim which is the object of enforcement;
		d) for claims over 100.000 <i>Lei</i> , the minimum fee is calculated in the following way: 1. for claims over 100.000 <i>Lei</i> , but up to and including 400.000 <i>Lei</i> , the minimum fee is 2.500 <i>Lei</i> plus 1% of the amount exceeding 100.000 <i>Lei</i> of the value of the claim which is the object of enforcement; 2. for claims over 400.000 <i>Lei</i> , the minimum fee is 5.500 <i>Lei</i> plus 0,5% of the amount exceeding 400.000 <i>Lei</i> of the value of the claim which is the object of enforcement. If, for the calculation of the maximum fee a percent of up to and including 0,5% is used, the same percent applies to the calculation of the owed minimum fee the same percent applies.	d) for claims over 100.000 <i>Lei</i> , the maximum fee is 6.300 <i>Lei</i> plus up to 1% of the amount exceeding 100.000 <i>Lei</i> of the value of the claim which is the object of enforcement.
8.	Precautionary seizure	100 <i>Lei</i>	1. 200 <i>Lei</i> if the debtor is a natural person 2. 200 <i>Lei</i> if the debtor is a legal person

9.	Judicial seizure	100 <i>Lei</i>	1. 200 <i>Lei</i> if the debtor is a natural person 2. 200 <i>Lei</i> if the debtor is a legal person
10.	Precautionary attachment	100 <i>Lei</i>	1. 200 <i>Lei</i> if the debtor is a natural person 2. 200 <i>Lei</i> if the debtor is a legal person
14.	Advice concerning enforcement documents	20 <i>Lei</i>	200 <i>Lei</i>

## **MODEL FORMS FOR APPLICATIONS**

### **APPLICATION FOR ENFORCEMENT**

To: THE OFFICE OF BAILIFF \_\_\_\_\_

I, the undersigned / subscribed, \_\_\_\_\_ resident / having a head office in \_\_\_\_\_, street \_\_\_\_\_, No. \_\_\_\_, Apt. \_\_\_\_, county of \_\_\_\_\_, represented by \_\_\_\_\_, in the capacity of creditor, lodge this APPLICATION FOR ENFORCEMENT against the debtor \_\_\_\_\_, resident / having a head office in \_\_\_\_\_, street \_\_\_\_\_ No. \_\_\_\_, Apt. \_\_\_\_, county of \_\_\_\_\_.

By judgment No. \_\_\_\_ / \_\_\_\_\_ of the Court of First Instance \_\_\_\_\_, final by decision No. \_\_\_\_ / \_\_\_\_\_ of \_\_\_\_\_, the debtor was obliged to \_\_\_\_\_ (*pay the amount of \_\_\_\_\_ as \_\_\_\_\_ and the amount of \_\_\_\_\_ Lei as costs and expenses*). The claim is certain, liquid and due for payment.

The debtor refuses to willingly fulfil the obligations established in the outstanding claim, therefore I kindly ask you to proceed to enforcement, by all means of legal enforcement (*attachment; enforcement of movable assets; enforcement of real estate assets; pursuit of real estate general incomes \_\_\_\_\_ - if such incomes and details of the real estate are known*).

In law, I base my application on Article 52 of Law No. 188/2000 and Article 622 of the Civil Procedure Code.

I hereby enclose the outstanding claim in original, judicial stamp duties in the amount of \_\_\_\_ *Lei*.

Date \_\_\_\_\_

Signature \_\_\_\_\_

### **APPLICATION FOR APPROVAL OF ENFORCEMENT**

DEAR MR. CHAIRMAN,

I, the undersigned \_\_\_\_\_, resident / having a head office in \_\_\_\_\_, pursuant to Articles 622, 632 and following, and 650 of the Romanian Civil Procedure Code, lodge an authenticated / certified copy of judgment No. \_\_\_\_\_, of \_\_\_\_\_, rendered by \_\_\_\_\_, file No. \_\_\_\_\_, which is final, and I kindly ask you to order the APPROVAL OF ENFORCEMENT.

I hereby enclose the judicial stamp duty of ... *Lei*.

Date \_\_\_\_\_

Signature \_\_\_\_\_

TO MR. CHAIRMAN OF THE COURT OF FIRST INSTANCE \_\_\_\_\_

### **OBJECTION TO ENFORCEMENT**

DEAR MR. CHAIRMAN,

I, the undersigned \_\_\_\_\_, resident in \_\_\_\_\_, lodge an OBJECTION TO ENFORCEMENT against the enforcement of the judgment / civil decision No. \_\_\_\_\_ of \_\_\_\_\_ rendered by \_\_\_\_\_ which is final, at the request of the respondent \_\_\_\_\_, resident in \_\_\_\_\_. Until the settlement of this objection, I kindly ask you to order the SUSPENSION OF ENFORCEMENT. Admitting the objection and annulling the forms of enforcement, I kindly ask you to order the restitution of the stamp duty of \_\_\_\_ *Lei* to me, and that the respondent pays to me the costs and expenses of this trial.

Reasons for the objection:

In fact, [the underlying facts should be presented, along with reasons justifying the suspension of the enforcement and also the annulment of enforcement].

Based on the above facts, I kindly ask you to admit the objection, to annul all forms of enforcement and to order the suspension of enforcement until the settlement of this objection.

As this is an urgent case, I kindly ask you, pursuant to Article 718 of the Civil Procedure Code, to cancel enforcement before any appearance.

In law, I base my objection on Articles 711-719 of the Civil Procedure Code. I lodge this objection in duplicate in order that it may be served upon the respondent together with the summons. I will provide proof by \_\_\_\_\_.

I enclose the receipt of the stamp duty payment of \_\_\_\_ Lei.

Date \_\_\_\_\_

Signature \_\_\_\_\_

TO MR. CHAIRMAN OF \_\_\_\_\_

### **APPLICATION FOR POSTPONMENT / SUSPENSION / LIMITATION / CESSATION OF ENFORCEMENT**

*Enforcement court* \_\_\_\_\_

DEAR MR. CHAIRMAN,

I, the undersigned \_\_\_\_\_, resident in \_\_\_\_\_, street \_\_\_\_\_, No. \_\_\_\_\_, bldg. \_\_\_\_\_, staircase \_\_\_\_\_, floor \_\_\_\_\_, Apt. \_\_\_\_\_, sector / county \_\_\_\_\_, represented by lawyer \_\_\_\_\_, with an office in \_\_\_\_\_, street \_\_\_\_\_ No. \_\_\_\_\_, floor \_\_\_\_\_, Apt. \_\_\_\_\_, sector / county \_\_\_\_\_, in legal terms I submit as a PRESIDENTIAL ORDINANCE THIS APPLICATION FOR POSTPONMENT / SUSPENSION / LIMITATION / CESSATION OF ENFORCEMENT of civil judgment No. \_\_\_\_\_, pronounced by \_\_\_\_\_, file No. \_\_\_\_\_ / \_\_\_\_\_, on \_\_\_\_\_, which has remained final, initiated by the notice of enforcement No. \_\_\_\_\_, of \_\_\_\_\_, issued by the Office of Bailiff \_\_\_\_\_, enforcement file No. \_\_\_\_\_ / \_\_\_\_\_ as a result of the application for enforcement submitted by the creditor \_\_\_\_\_, resident in \_\_\_\_\_, street \_\_\_\_\_ No. \_\_\_\_\_ bldg. \_\_\_\_\_, staircase \_\_\_\_\_, floor \_\_\_\_\_, Apt. \_\_\_\_\_, sector / county \_\_\_\_\_, requesting at the same time, pursuant to Articles 699-704 of the Civil Procedure Code, an order by interlocutory decision the cessation / suspension of enforcement).

REASONS OF THIS ACTION:

IN FACT: by the civil judgment (decision) No. \_\_\_\_\_, the court

\_\_\_\_\_, gave satisfaction to the creditor \_\_\_\_\_, obliging the undersigned on \_\_\_\_\_, to \_\_\_\_\_.

Against the undersigned enforcement began by notice of enforcement No. \_\_\_\_\_, of \_\_\_\_\_, issued by the Office of Bailiff \_\_\_\_\_, enforcement file No. \_\_\_\_\_ / \_\_\_\_\_ as a result of the application for enforcement submitted by the creditor \_\_\_\_\_.

On \_\_\_\_\_, I the undersigned paid the owed amount, of \_\_\_\_ *Lei*, at the C.E.C. (Romanian Saving Bank), at the disposal of the enforcement body, and this is why I request that it is ordered, pursuant to the provisions of Article 708 of the Civil Procedure Code, the cessation of enforcement against the undersigned, with costs and expenses (stamp duty, lawyer's fee, etc.).

IN LAW: I base this application on provisions of Article 194 and following of the Civil Procedure Code, and Articles 447 and 708 of the Civil Procedure Code. In order to provide proof for this application I request that the court approves the certified documentary evidence which I lodge at the court. I lodge this application in duplicate, one for the court and one to be served on the defendant.

I HEREBY ENCLOSE the final civil judgment No. \_\_\_\_\_/\_\_\_\_\_; the notice of enforcement No. \_\_\_\_\_ of \_\_\_\_\_; the C.E.C. receipt for the payment of all arrears \_\_\_\_\_; the lawyer's power of attorney and the legal aid contract No. \_\_\_\_\_; the judicial stamp duty of \_\_\_\_\_.

SIGNATURE \_\_\_\_\_

## **APPLICATION FOR REINSTATEMENT OF LIMITATION ON APPROVAL OF ENFORCEMENT**

DEAR MR. CHAIRMAN,

I, the undersigned \_\_\_\_\_, resident in \_\_\_\_\_, submit: APPLICATION FOR REINSTATEMENT OF LIMITATION ON APPROVAL OF ENFORCEMENT against the debtor \_\_\_\_\_, resident in \_\_\_\_\_.

Reasons of application: In fact, by the civil judgment No. \_\_\_\_\_ of \_\_\_\_\_ pronounced by the court of first instance \_\_\_\_\_, file No. \_\_\_\_\_, which has remained final, the debtor was obliged to pay to me the amount of \_\_\_\_ *Lei*. It was required that I make the application for the approval of this judgment within three years from the date on which it became enforceable, a time limit which I exceeded because before its



expiration until \_\_\_\_\_ I was [arrested / hospitalised], released on \_\_\_\_\_.

As from the date of my release, the time elapsed does not exceed \_\_\_\_\_, and I kindly ask for the appreciation of this legitimate reason, justified, which may be the basis for the reinstatement of the limitation period for approval of enforcement. In law, I base my application on the provisions of Article 709 of the Civil Procedure Code. Proof for this application I provide with the release certificate, etc. I lodge this application in duplicate in order that it may be served upon the debtor together with the summons. I hereby enclose the receipt of payment of the stamp duty of \_\_\_\_ *Lei*.

Date \_\_\_\_\_  
TO MR. CHAIRMAN OF \_\_\_\_\_

Signature \_\_\_\_\_

## Chapter 10 - Processing incoming applications for establishment of a decision under the 2007 Convention or the 2009 Regulation

### I. Overview

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

674. An application for **establishment** of a maintenance decision in Romania, as a Contracting State to the Convention or as a Member State in which the Regulation is applicable, 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 foreign decision in Romania is not possible (or is refused, under the Convention only, because of the lack of a basis for recognition and enforcement under Art. 20 or on the grounds in Art. 22 *b*) or *e*) of the Convention).

**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.

675. An application for the establishment of a maintenance decision may include a request for a determination of parentage.

676. Applications for establishment of a maintenance decision come under Article 10(1) *c*) and *d*) of the Convention and Article 56(1) *c*) and *d*) of the Regulation. (See Chapter 3, Part I for a discussion of the scope and application of both the Convention and the Regulation.)

#### B. *A case example*

677. The **creditor** resides in State A. She has two children. The father of the children has moved to Romania. The creditor would like to obtain maintenance from the father for the children. State A and Romania are Contracting States to the Convention or Member States of the European Union where the Regulation is applicable.

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.

### **How this works under the Convention or Regulation:**

678. 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 Romania. The debtor will be notified and a maintenance decision will be made under the laws (including rules of private international law)<sup>325</sup> of the requested State (Romania). A determination of parentage will also be made if necessary.

### **C. Who can apply for establishment of a maintenance decision?**

679. If there is no existing maintenance decision, only a creditor may apply for establishment of a decision. Under the Convention only, if a decision exists but it cannot be recognised or enforced because of a reservation under the Convention,<sup>326</sup> 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 to the Convention or in a Member State in which the Regulation is applicable.

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 an existing decision cannot be recognised**

#### **1. Under the 2007 Convention:**

680. As discussed in Chapter 7 of this Handbook, under the Convention, 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.

681. Note that the European Union, as a Contracting Party to the 2007 Convention, *will not* make such a reservation under Article 20(2) of the

<sup>325</sup> If the requested State is a Member State of the European Union where the 2009 Regulation is applicable, the Regulation's direct rules of jurisdiction will apply. For more information on direct jurisdiction rules under the Regulation, see Chapter 4. If the requested State is bound by or a Party to the 2007 Hague Protocol, the applicable law rules of the Protocol will apply. For more information on the 2007 Hague Protocol, see Chapter 5.

<sup>326</sup> Note that the European Union, as a Contracting Party to the 2007 Convention, will not make such a reservation under Art. 20(2) of the Convention. Council Decision no 2011/432/EU (*supra*, note 59).

Convention, and thus this situation will not arise for competent authorities within the European Union dealing with Convention cases.<sup>327</sup>

682. For Contracting States to the Convention which have made such a reservation, 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 (Art. 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.

683. 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.

684. 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 (Art. 20(5))<sup>328</sup>. The existing decision will provide the basis for the finding that the children are entitled to bring the application for child support.

685. There may also be situations where an applicant has a maintenance decision, but he or she knows that the respondent in the requested State (Romania) will be able to successfully oppose the application for recognition and enforcement. Under the Convention, 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>329</sup> In such a case, the creditor will have to initiate an application for

<sup>327</sup> *Ibid.*

<sup>328</sup> See the Explanatory Report of the Convention, paras 469 - 471. Note that the Convention does not define the term “eligibility” in this context, therefore the domestic law of the requested State will determine what the term means and also whether further information or evidence will be required in order to make the maintenance decision.

<sup>329</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 the Explanatory Report of the Convention, para. 255. In Romania according to Art. 530 “Modalities of execution” from the Civil Code, the support obligation shall be executed in kind, by ensuring the necessary means for subsistence and, if applicable, education, schooling and professional training expenses. If the support obligation is not executed willingly, in kind, the guardianship court shall rule that such obligation be executed by the payment of a support pension, established in cash. The maintenance support may be established in the form of a fixed amount or as a percentage of the net monthly income of the person owing the support. According to Art. 529, “Amount of Maintenance” from the Civil Code, maintenance shall be owed in accordance with the need of the person requesting it and with the means of the person who shall pay for it. When a parent owes support, such support shall be established with a limit of up to a quarter of such parent’s net monthly income for one child, a third for two children and half for three or more children. The amount of the support owed to the children, together with the maintenance owed to other persons, according to law, cannot exceed half of the net monthly income of the person having the obligation to pay the support / maintenance. In practice, it is possible to establish the quantum of the maintenance obligation in a fraction or percent, because this could be enforced in kind and also could be justified on the basis of inflation. Although enforcement can be effected only if the claim is certain, liquid and due, the effective calculation of the claim can be made by the bailiff, if the outstanding claim amounts have been granted without an established quantum. If the parties do not reach an agreement, the matter may be brought before the court, by way of objection to enforcement.

establishment of a new decision, rather than an application for recognition and enforcement.<sup>330</sup>

686. These applications will also proceed in the same manner as any other application under this Chapter. However, under the Convention, since the new decision is not being established because of a refusal to recognise and enforce the existing decision because of a reservation (Art. 20(4)), the presumption as to eligibility in Convention 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.

## **2. Under the 2009 Regulation:**

687. Under the Regulation, fact patterns where a decision given in another Member State cannot be recognised or recognised and declared enforceable should be much rarer than under the Convention (see Chapter 8 of this Handbook describing procedures for the recognition and enforcement of decisions under the Regulation). However, if there are circumstances where a decision given in one Member State cannot be recognised and / or enforced in another Member State under the Regulation, a claimant can use an application for establishment under the Regulation to establish a new decision in the requested State.

## **II. Processing incoming applications for establishment of a maintenance decision under the 2007 Convention or the 2009 Regulation**

### **A. General**

688. This Section covers the general requirements for processing an incoming application for establishment of a maintenance decision. Specific procedures will be in accordance with internal laws and procedures in Romania. Some States use court-based or judicial procedures to establish the decision; others send the application to an administrative authority for a decision to be made.<sup>331</sup>

<sup>330</sup> See the Explanatory Report of the Convention, para. 255.

<sup>331</sup> Romania uses court-based / judicial procedures to establish the decision and / or the maintenance amount, and also the extrajudicial system of public notaries. The competent judicial authorities in Romania are the first instance courts. In order to determine a maintenance obligation as a principal issue, the plaintiff-creditor must address a court or a public notary. The request for bringing a suit at law in order to determine maintenance owed can also be submitted within divorce proceedings, a paternity suit, exercise of parental authority upon minor children or the establishment of the minor's domicile. Competence belongs to the court invested with the judgment of the main proceedings, and the determination of the maintenance amount is made according to the same criteria which also apply if requested through a separate proceedings. Within a divorce proceeding, either by the request for suing at law or by counterclaim, the settlement of accessory matters can be requested, such as the determination of each parent's contribution to their children's up-bringing, education and professional training expenses. At the request of the interested spouse, the court will also settle the request for maintenance. When the spouses have minor children, born before or during the marriage or adopted, the court will decide upon the exercise of parental authority, as well as upon the parents' contribution to their children's up-bringing and education

689. It is important to note that in Member States of the European Union where the Regulation is applicable, competent authorities will apply the jurisdiction rules of the Regulation to all establishment applications and direct requests under either the Convention or the Regulation, so long as they fall within the substantive and temporal scope of the Regulation (see also Chapter 3, Part I, Section III for further information as to the scope of the Regulation and Chapter 4 on the jurisdiction rules of the Regulation). Also, for those Member States of the European Union where the Regulation is applicable and which are bound by the 2007 Hague Protocol, competent authorities will apply the Protocol to all establishment applications and direct requests, so long as they fall within the substantive and temporal scope of the Protocol (see also Chapter 5 on the 2007 Hague Protocol on applicable law). The jurisdiction rules of the Regulation and the applicable law rules of the Protocol are universally applicable with regards to geographic scope.

690. In contrast, in Contracting States to the Convention outside of the European Union, establishment applications will be subject primarily to domestic law for jurisdiction issues and for applicable law issues (unless the Contracting State is Party to the 2007 Hague Protocol on applicable law).

691. The Convention and the Regulation set out certain general steps for all applications. There will be an initial review by the Central Authority in Romania when the application is received, additional documents may be requested if necessary, and then the application will be sent to the competent authority in the requested State, in this case Romania, for the decision to be established.

692. 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.

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expenses, even if this was not required in the request for divorce. During the divorce, by presidential ordinance, the court may order interim measures as to the exercise of parental authority, concerning the maintenance obligation, etc. The measures taken are valid only until the settlement of the trial concerning the dissolution of marriage. The trial in first instance contains several stages. In the written stage the request for suing at law is lodged, as well as the defence, and the counterclaim; protective measures for seizure or attachment can be taken; the parties are summoned and they are served the procedural documents. The debate stage consists in the trial session, within which procedural exceptions can be raised and evidence can be taken. Subsequently, deliberation follows and the judgment is given. After the judgment in first instance the parties may exercise the ordinary legal remedies (appeal - when the maintenance obligation is accessory; right of appeal—when the request for maintenance is submitted separately) and extraordinary remedies (right of appeal, request for annulment, revision). The Romanian Civil Procedure Code contains provisions concerning special procedures under Divorce Proceedings (Arts 914-934) and the Presidential Ordinance (Arts 996-1001). Pursuant to Art. 375(2), "Conditions," of the Civil Code, divorce by agreement of spouses may also be ascertained by the notary public if there are minor children born from marriage, outside the marriage or adopted, if the spouses agree to all aspects regarding issues of bearing the family name after the divorce, the exercise of the parental authority by both parents, determination of the children's domicile after the divorce, the modality to keep personal relations between the separated parent and each of the children, as well as the determination of the parents' contribution to the children's upbringing, education and professional training expenses.

## B. Flowchart

693. The flowchart below provides an overview of the establishment process.

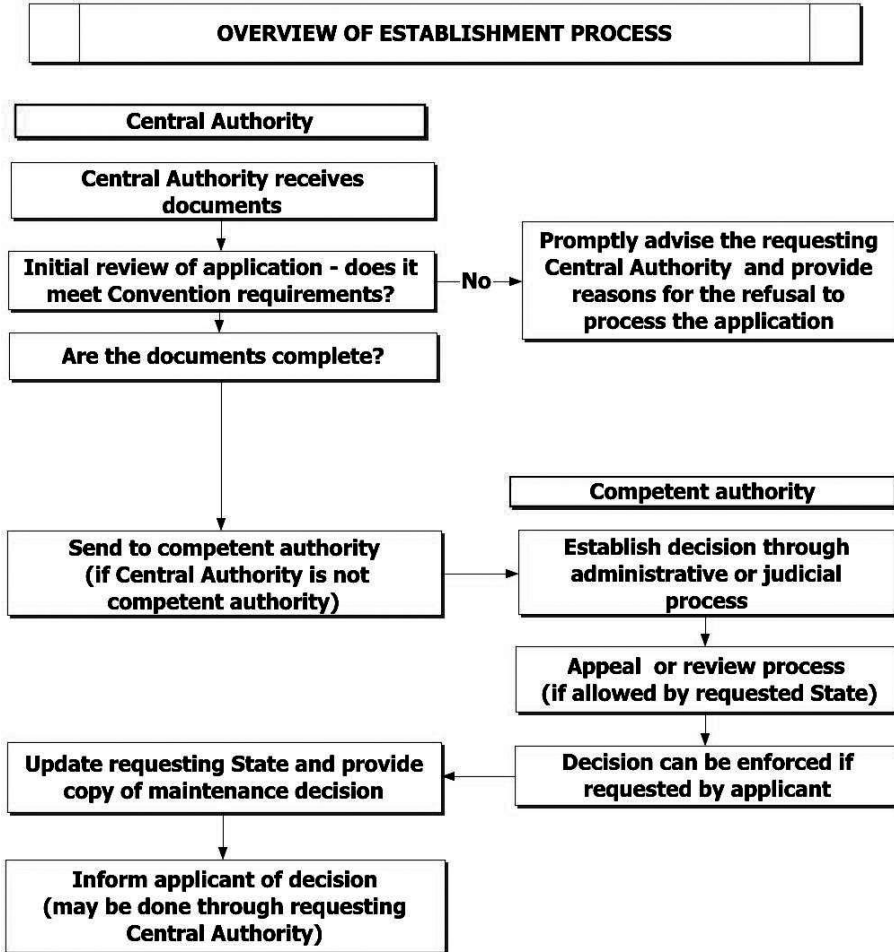


Figure 12: Overview of establishment process

## C. Steps in the establishment process

### 1. Initial consideration by the Central Authority of Romania

694. The purpose of the initial consideration by the Central Authority in Romania, as 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 or has assets or income in Romania. The competent authority in Romania will have to make a similar check.

The **requesting State** is the Contracting State to the Convention or Member State in which the Regulation is applicable that is initiating an application and making the request on behalf of an applicant who resides in that State. The **requested State** is the Contracting State to the Convention or Member State in which the Regulation is applicable that is being asked to process the application.

#### a) **Convention or Regulation requirements not met**

695. Article 12(8) of the Convention and Article 58(8) of the Regulation allows a requested Central Authority to refuse to process an application if it is “manifest” that the Convention or Regulation 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, in this case the Central Authority in Romania, will check the application simply to ensure that it is not an abuse of process or a request that falls completely outside the Convention or Regulation – for example it is an application dealing with custody of the children only.

696. The competent authority in Romania may wish to do a similar preliminary check, and to inform the Central Authority of Romania of any missing documents without delay.

#### b) **Incomplete documents**

697. A review of the incoming package should be done to ensure that the documentation is complete. Under the Convention, in every establishment case there will be the required Transmittal Form and likely the recommended Application for Establishment of a Decision Form and the Financial Circumstances Form, and other forms as necessary. Under the Regulation, in every establishment case, use of the form set out in Annex VII to the Regulation is required (in accordance with application content requirements set out in Art. 57 of the Regulation). The other required documents will vary depending upon the individual facts of each case (e.g., whether a child is at or near the age of majority).

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



### c) Determining the respondent's / debtor's location

698. In some cases the applicant will not know the exact or current location of the respondent / debtor. Therefore, the requested State, in this case Romania, 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.

699. In some cases, where there is doubt as to whether the debtor is living in Romania, it may be prudent to complete the search at the earliest opportunity. If it is established that the debtor does not reside in Romania, the requesting State can be notified and the application sent to another Contracting State or Member State. 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.<sup>332</sup>

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 or Regulation. 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 or Regulation.

700. 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 the Convention or Regulation, and laws in force domestically concerning the protection of personal information (see Chapter 3, Part II, Section VI for more information on privacy and data protection issues).

<sup>332</sup> In Romania under Art. 11 of Law No. 36/2012, the Ministry of Justice is the requested, receiving Central Authority that has been designated to receive requests for specific measures and applications for maintenance under the Regulation and the Convention. After receiving maintenance applications, requests for specific measures and necessary supporting documents and after performing the preliminary check, the Ministry of Justice will forward the applications for processing according to the category of application / request, to the authority or institution that holds the personal data, the competent territorial bar, the Chamber of Judicial Enforcement Officers, or to the competent law court, as appropriate. Under Art. 11 of Law No. 36/2012, the Ministry of Justice, as the requested Central Authority receives requests for specific measures made by the Central Authority of a Member State of the European Union or a Contracting State to the Convention. The Ministry of Justice transmits for processing to the Ministry of Administration and the Interior, the Ministry of Public Finance, the Ministry of Labour, Family and Social Protection, to the subordinated or coordinated structures, as appropriate, as well as to any other competent authorities or institutions that hold personal data, requests for specific measures that concern: a) help with locating the debtor or creditor; b) help with obtaining information about the income or assets of the debtor or creditor. Upon receiving a request for specific measures, the authorities or institutions holding personal data shall apply, *mutatis mutandis*, the provisions of Act No.677/2001 to protect persons in relation to the processing of personal data and the free circulation of such data, as subsequently amended and supplemented. The Ministry of Justice sends the reply received from the Romanian authorities or institutions holding personal data to the Central Authority of the Member State of the European Union or of the Contracting State to the Convention.

## **d) Start establishment process**

701. Once these initial steps have been completed, the application is now ready to be processed by the competent authority in Romania.<sup>333</sup> The next Section outlines the procedures for establishing the decision.

## **2. Establishing the maintenance decision – Competent authority**

702. Because there are so many variations in the way that individual States manage establishment applications this Section sets out general principles, and also includes more detailed information necessary for establishing decisions under the internal law of Romania. It is intended to give an overview of the steps that will apply to all applications.

703. According to the internal procedures of Romania, the following steps will be taken as part of the commencement of the establishment application.

### ***(1) Appropriate provisional or protective measures***

704. It may be appropriate that the competent authority take provisional or protective measures while an application is pending. The taking of these measures may occur at a number of points in time during—or even before—the application process. Please see Chapter 3, Part II, Section VIII, for further information on provisional and protective measures.

### ***(2) Jurisdiction***

705. If the requested State is a Member State of the European Union where the Regulation is applicable, the Regulation's direct rules of jurisdiction will apply. The Regulation is applicable in Romania. For more information on direct jurisdiction rules under the Regulation, please see Chapter 4. If the requested State is not a Member State of the European Union, its domestic law, including its rules of private international law will determine the jurisdiction of the competent authority in the matter.<sup>334</sup>

<sup>333</sup> In Romania the competent judicial authority is: the court of first instance from the domicile of the claimant-creditor or from the defendant-debtor's domicile (Art. 113(1) c) of the Civil Procedure Code). In order to determine the maintenance obligation as a principal issue competence belongs to the judicial court (of first instance) from the last common domicile of spouses, or defendant's or plaintiff's domicile (Art. 914 of the Civil Procedure Code). If the two spouses agree to the divorce, even if there are minor children from the marriage, they can address the notary public from the place of marriage or from the last common domicile of spouses, who can ascertain the dissolution of marriage by the spouses' agreement, with a divorce certificate issued to them.

<sup>334</sup> If the decision being established is intended to be recognised and / or enforced in another jurisdiction, competent authorities may wish to keep in mind the jurisdictional bases accepted for the purposes of recognition and enforcement of a maintenance decision in the foreign jurisdiction, and the grounds set out in Art. 20 of the Convention in particular. For example, in most circumstances courts in the United States of America will not recognise and enforce foreign child support decisions made on the jurisdictional basis of the place of a creditor's habitual residence (Art. 20(2) of the Convention allows a Contracting State to the Convention to make a reservation to this and several other jurisdiction bases for the purposes of recognition and enforcement of foreign decisions). However, in these circumstances, a Contracting State will be obliged, if the debtor is habitually resident in that State, to take all

### **(3) Documentation check**

706. 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.<sup>335</sup> There is no Convention or Regulation requirement that certified documents must always be provided (however, for a description of authenticity / authorisation requirements in relation to some documents under the Regulation, please see Chapter 3, Part II). If documents are required under the domestic law of Romania and they have not been provided, follow up with the requesting State, by way of the Central Authority in Romania.

### **(4) Notification to debtor**

707. 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.<sup>336</sup> The competent 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.

708. 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.

### **(5) Referral to dispute resolution or similar procedures**

709. 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.<sup>337</sup>

appropriate measures to establish a decision for the benefit of the creditor (see Art. 20(4)).

<sup>335</sup> In Romania in order to determine the maintenance obligation the following supporting documents are necessary: the request for suing at law, birth certificate, marriage certificate in original (as applicable), the previous divorce decision and / or paternity / maintenance obligation suit (as applicable), certificate of salary, the proof of payment of stamp duty of 50, 100 or 200 *Lei* (divorce) etc. At the notary the necessary documents are the spouses' birth certificates, identity documents, marriage certificate (original and authenticated copy) and a notary statement concerning the last common domicile.

<sup>336</sup> See *supra*, note 290.

<sup>337</sup> Under the domestic law of Romania generally, the judge recommends amicable settlement of the litigation through mediation to the parties and, during the trial, the judge attempts to conciliate the parties by giving them the necessary advice. The parties can appear at any time during the trial, even without being summoned, in order to ask for a judgment validating an

## **(6) Establishing parentage**

710. 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. In some States parentage testing will not be ordered or an application allowed where the child was born during the marriage of the parents.<sup>338</sup>

711. If parentage testing is needed, the Convention and the Regulation require a Central Authority to “provide assistance” in establishing parentage (Art. 6(2) *h*) of the Convention and Art. 51(2) *h*) of the Regulation). This does not mean that the Central Authority in the requested State (*i.e.*, Romania) is required to provide the genetic testing at the request of the debtor; rather, it must be able to advise the respondent / debtor about testing facilities or agencies that can perform the testing.<sup>339</sup>

712. However, this does not mean that the requested State must pay for the parentage testing if requested by the debtor. The requested State may

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agreement. The agreement must be concluded in writing and will form the operative part of the judgment. Pursuant to Art. 915 of the Civil Procedure Code, within the request for divorce there can be enclosed, as applicable, the spouses’ agreement which resulted from mediation concerning the dissolution of marriage and, as applicable, the settlement of aspects accessory to the divorce. The court will try at each appearance to conciliate the spouses. The spouses can conciliate at any time during the trial. The court will take note of the conciliation and will order, by final judgment, the closing of the file. Pursuant to Art. 375(2) “Conditions” of the Civil Code, a divorce by the spouses’ agreement can also be officialised by a notary public, and if there are minor children born from the marriage, outside the marriage or adopted, if spouses agree to all aspects concerning the family name which they will bear after divorce, the exercise of parental authority by both parents, the establishment of the children’s domicile after divorce, the plan to keep personal contact between the separated parent and each of the children, as well as the determination of the parents’ contribution at the children’s upbringing, education and professional training expenses.

<sup>338</sup> Under the domestic law of Romania as long as a legally established parentage was not contested in court, alternative parentage cannot be established in any way. The paternity of the child from the marriage can only be denied. In paternity denial proceedings, court practice has established that the case cannot be settled based on extrajudicial evidence (DNA expertise performed for contesting the recognition of paternity). The proceedings concerning parentage with respect to the father from marriage (Arts 429-434 from the Civil Code) are:

**A. Paternity denial proceedings.** Paternity denial proceedings can be initiated by the husband of the mother, the mother, the biological father, as well as by the children. The husband of the mother can initiate paternity denial proceedings within three years, as of either the date on which the husband knew he was presumed father of the child, or on a subsequent date, when he found out that the presumption did not correspond to reality. The paternity denial proceedings can be initiated by the mother within three years from the date of birth of the child. The paternity denial proceedings initiated by the person asserting himself as the biological father is not subject to a prescription limit and can be admitted only if he proves his paternity to the child. Paternity denial proceedings can be initiated by the child, during his or her minority, through his or her legal representative and such a suit is not subject to a prescription limit.

**B. Dispute as to parentage of the father from marriage.** Any interested person may ask the court, at any time, to scrutinize non-accomplished conditions for the paternity presumption applied to a child registered in civil status documents as being born from marriage.

<sup>339</sup> Under the domestic law of Romania the Ministry of Justice can supply only “minimum” assistance, consisting in putting at the disposal of the presumptive parent the laboratories’ contact details, information on legal provisions in force, information about conciliation of the parties and voluntary recognition, etc.

require the debtor / respondent to pay for the testing as a condition of the request.<sup>340</sup>

713. The competent authorities may wish to verify whether there has been an attempt made by the Central Authority for the presumptive father to acknowledge parentage voluntarily. Also, where necessary, the Central Authority should have ascertained the law applicable to the establishment of parentage (see also Chapter 3, Part I, Section I.A. for further information with respect to parentage issues).

### **(7) Legal assistance and the costs of parentage testing**

714. The costs of genetic testing to determine parentage vary significantly from one State to another. One of the underlying principles of the Convention and the Regulation is that services, including legal assistance / legal aid, 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 (see Art. 15(1) of the Convention and Art. 46(1) of the Regulation). Effectively this means that the creditor should not have to pay the costs associated with parentage testing.<sup>341</sup>

715. For more information with respect to the provision of legal assistance, please see Chapter 3, Part II, Section VII.

### **(8) Determination of applicable law**

716. Before determining the amount of maintenance, *i.e.*, the substance of the dispute, the competent authority will have to determine what law is applicable, either domestic or foreign. For more information with respect to applicable law issues under the Convention and the Regulation, see Chapter 5.

717. If it is determined that foreign law is applicable to the dispute, the competent authority will have to find and ascertain the content of the applicable foreign law. For more information on finding and ascertaining foreign law, see Chapter 6.

### **(9) Determining the amount of maintenance**

718. Once any parentage issues have been resolved, and the other preliminary steps completed as required by the internal procedures in force in Romania, a maintenance decision will be made. It should be noted that when determining the amount of maintenance to be awarded, some States use child support guidelines based on a debtor's income or a combination

<sup>340</sup> See *supra*, note 96.

<sup>341</sup> Unless the requested State considers the application on its merits to be manifestly unfounded (Art. 15(2) of the Convention and Art. 46(2) of the Regulation). Under the Convention only, a Contracting State may also make a declaration that a child-centred means test will be used to determine eligibility for cost-free services. The European Union will not make this declaration, and thus no child-centred means test will apply in Member States of the European Union in this context (see Council Decision no 2011/432/EU (*supra*, note 59)).

of the debtor's and creditor's income; others set maintenance solely on the costs of raising a child.<sup>342</sup>

### **(10) Appeal or review procedures**

719. 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.<sup>343</sup> This 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 to advise the applicant, with the assistance of the Central Authority, of any appeal or review remedies available, and the time limits for exercising those rights.<sup>344</sup>

720. In the event that legal assistance is required for the appeal, the above discussion also applies to the requirement of the requested State (Romania) to provide legal assistance or legal aid 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 / legal aid may be undertaken for

<sup>342</sup> Under the domestic law of Romania in the judgment admitting the proceedings on parentage, the court must decide upon the establishment of a name for the child, the exercise of parental authority and the parents' obligation to raise the child. The amount of maintenance is determined either as an accessory issue (e.g., to dissolution of marriage, exercise of parental authority), or as a principal issue. According to Art. 529 "Amount of Maintenance," of the Civil Code, maintenance shall be owed in accordance with the need of the person requesting it and with the means of the person who shall pay it. When a parent owes support, such support shall be established up to a quarter of that parent's net monthly income for one child, a third for two children and half for three or more children. The amount of the support owed to the children, together with the maintenance owed to other persons, according to law, cannot exceed half of the net monthly income of the person with the obligation to pay the support / maintenance.

<sup>343</sup> Under the domestic law of Romania according to the Civil Procedure Code (Art. 94 in conjunction with Arts 483 and 485), a judgment given in cases dealing with the determination of a maintenance obligation (either as an accessory issue, in a request for the dissolution of marriage or for exercise of parental authority, or as a principal issue), can only be appealed within 30 days of service of judgment. Judgments given in cases dealing with the determination of a maintenance obligation as an accessory issue to a parentage proceeding can be submitted to appeal or to the right of appeal within 30 days of the service of the judgment. According to Law No. 36/2012, in conjunction with Art. 8<sup>1</sup> of the OUG No. 51/2008, the dean of the bar association urgently appoints, by decision, for the creditor of the maintenance obligation (child or vulnerable adult) with a habitual residence abroad, compulsorily and *ex officio*, a lawyer for:

- formulating and lodging the requests, bringing the matter before the court, representing and assisting, in ordinary and extraordinary legal remedies, initiating the enforcement measures, as applicable,
- recognizing and approving enforcement, the legal remedies submitted against these judgments, opposing the authority to enforce, any attachment set up by the court *ex officio*, approving enforcement, initiating any measures in the enforcement stage, as well as performing the enforcement acts.

According to Arts 13 and 16 from the OUG No. 51/2008, legal aid for the exercise of appeal is granted by way of a new application. Legal aid can be refused when abusively requested, when its estimated cost is disproportionate compared to the value of the object of the case, when it is not requested for the defence of a legitimate interest, is requested for an action running counter to public or constitutional order, or the applicant refused to follow the procedure for mediation.

<sup>344</sup> *Ibid.*

the appeal, as the requested State may consider whether the appeal is manifestly unfounded on the merits, before providing assistance on a cost-free basis.<sup>345</sup>

### **(11) Enforce maintenance decision**

721. Once the decision has been finalised, if the applicant has requested enforcement of the decision (this will be indicated on the relevant application form), the competent authority should proceed with enforcement (see Chapter 12 for information on enforcement).

### **(12) Status updates**

722. It is important that the requesting State be kept informed as to progress on the establishment application. The competent authority should keep the Central Authority in Romania informed as to the status of an application for establishment. The Central Authority has reporting obligations to the Central Authority in the requesting State as to the status and developments in the application.

## **III. Additional materials**

### **A. Practical advice**

- If the applicant and the respondent reach a settlement concerning the maintenance decision, be sure to advise the Central Authority of Romania in order that it may inform the Central Authority of the requesting State promptly so that they can close their file.
- Under the Convention, there is a general obligation on all Contracting States to proceed with applications as expeditiously as possible. Expedition 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**

*2007 Convention:*

Application for Establishment of a Decision

Transmittal Form

Financial Circumstances Form

*2009 Regulation:*

Annex VII

<sup>345</sup> See the Explanatory Report of the Convention, para. 386.

### **C. Relevant Articles**

#### *2007 Convention:*

Article 10

Article 11

Article 12

Article 14

Article 15

Article 20

Article 22

#### *2009 Regulation:*

Article 56

Article 57

Article 58

Article 44

Article 46

### **D. Related Chapters of the Handbook**

See Chapter 3 – Matters of general application: 2007 Convention and 2009 Regulation

See Chapter 4 – 2009 Regulation: Direct Rules on Jurisdiction

See Chapter 5 – Applicable Law under the 2007 Convention and the 2009 Regulation

See Chapter 6 – Finding and Ascertaining Foreign Law

See Chapter 12 – Enforcement of maintenance decisions under the 2007 Convention and the 2009 Regulation

### **IV. Checklist – Incoming establishment applications**

	<b>Procedure</b>	<b>Handbook reference</b>
1	Receive documents from Central Authority in Romania	II(C)(1)
2	Ensure documents are complete and application is within scope of Convention or Regulation	II(C)(1)
3	Take any appropriate provisional measures	II(C)(2)(1)
4	Establish maintenance decision	II(C)(2)
(i)	Review documents and notify debtor	II(C)(2)(4)



(ii)	Determine parentage if necessary	II(C)(2)(6)
(iii)	Determine maintenance amount	II(C)(2)(9)
5	Advise debtor and creditor and update requesting Central Authority	II(C)(2)(10)
6	Appeal or review process if allowed	II(C)(2)(10)
7	Refer decision for enforcement if applicant has requested	II(C)(2)(11)

## V. Frequently Asked Questions

*How can the applicant find out what has happened to the application?*

723. 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 Romania will not have any direct contact with the applicant unless it has agreed to take enquiries directly. Under the Convention, the Central Authority of Romania must acknowledge receipt of the application within six weeks, and provide a further status update within three months of the acknowledgement of the receipt of the document. Under the Regulation, the Central Authority of Romania must acknowledge receipt of the application within 30 days, and provide a further status update within 60 days of the acknowledgement of the receipt of the document.

*Can the debtor / respondent dispute paternity?*

724. 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.<sup>346</sup>

*What is the role of the Central Authority if parentage testing is required?*

725. The Central Authority of Romania should assist in the process if the testing is requested by the applicant. The Central Authority in Romania should contact the requesting Central Authority and facilitate the participation of the applicant in the testing process.

726. If the debtor is allowed to request testing, there is no obligation upon Romania, the requested State, to provide the testing. However, the competent authority in Romania may wish to provide information to the debtor as to how parentage testing can be undertaken.<sup>347</sup>

<sup>346</sup> Under the domestic law of Romania parentage with respect to the father from marriage is established through the effect of the paternity presumption, and parentage with respect to the father outside of marriage is established by recognition or by judgment, as applicable. Any interested person may at any time object, by court proceedings, to the parentage established by a birth certificate which does not correspond to possession of status. In this case, parentage is proved by the medical certificate attesting to the birth, through forensic examination for establishing parentage or by any other evidence (for proceedings in disputing parentage, see Art. 421 of the Civil Code).

<sup>347</sup> See *supra*, note 338, for information on paternity proceedings under Romanian law, and *supra*, note 96, in relation to paternity testing and evidentiary matters.

*Does the applicant have to come to court?*

727. That will depend upon whether the requested State (where the establishment application is being heard) requires the applicant to be present.<sup>348</sup> The Central Authority of Romania 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?*

728. 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) of the Convention and Article 46(2) of the Regulation.<sup>349</sup> However, this does not necessarily mean that the Central Authority of Romania 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.<sup>350</sup>

*How much maintenance will be awarded?*

729. The method used to calculate the amount of maintenance payable is different in each State, according to the law applicable (see Chapter 5).<sup>351</sup>

*What happens if the respondent is notified but does not reply or challenge the decision?*

730. 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.<sup>352</sup>

<sup>348</sup> Under the domestic law of Romania pursuant to Art. 80, in conjunction with Arts 227 and 920 of the Civil Procedure Code, the parties may sue at law through a chosen representative, except when their personal presence before the court is required by law (for instance, for divorce proceedings). When the court attempts the conciliation of the parties, it may order that the parties appear in person.

<sup>349</sup> See the Explanatory Report of the Convention, para. 393. Under the Convention only, 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. The European Union will not make this declaration, and thus no child-centred means test will apply in Member States of the European Union in this context (see Council Decision no 2011/432/EU (*supra*, note 59)).

<sup>350</sup> See *supra*, note 96.

<sup>351</sup> See *supra*, note 342.

<sup>352</sup> Under the domestic law of Romania pursuant to Arts 448 and 632 of the Civil Procedure Code, a judgment at first instance is provisionally enforceable (without the need for the court to authorise enforcement) when its object is the determination of the exercise of parental authority, the establishment of the minor's domicile, the exercise of contact rights with the minor, annuities or arrears for maintenance obligations or indemnity for children. The enforcement of these judgments has a provisional character. In general, enforcement can only be made pursuant to a relevant judgment or to another enforceable act. Enforceable judgments include final judgments; judgments given upon appeal; and judgments given in the first instance, without a right of appeal. Enforceable judgments of the courts are endowed with a certification of enforceability, except those given in the first instance with provisional enforceability and authentic instruments. The courts competent to certify enforceability (and

*What happens after the decision is made?*

731. 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 Romania to be enforced and payments collected will be forwarded to the maintenance creditor.<sup>353</sup>

*Can the applicant appeal the amount of maintenance awarded?*

732. 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.<sup>354</sup>

**VI. Direct requests for establishment of decisions**

733. Direct requests to a competent authority in Romania for the establishment of a decision falling within the scope of the Convention or Regulation will be governed by the law in force domestically, which normally means domestic law (including rules of private international law). Under the Regulation, the jurisdiction rules set out in the Regulation will apply in the case of direct requests for establishment and modification of decisions (see Chapter 4), as will the rules on applicable law set out in the Protocol (see Chapter 5) for those States in which the Protocol is applicable. The provisions of the Convention discussed in Chapter 7 respecting direct requests for recognition and enforcement under the Convention do not apply to direct requests for establishment or modification. 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 in force or processes in place in Romania.

734. Importantly, even though the maintenance decision may come within the scope of the Convention or Regulation (for example, where the decision concerns establishment of spousal maintenance) the most favourable provisions concerning legal assistance do not apply to these direct requests. In some cases, a creditor or debtor may be required to retain a lawyer at their own expense in the requested State, *i.e.*, Romania in order to make the request. (See Chapter 2, Part II, Section VII for more information on effective access to procedures and legal assistance / legal aid under the two instruments.) In Romania, for direct requests for the determination of maintenance obligations (including proceedings for determination of

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not declaration of exequatur) are: for enforceable judgments, the court of first instance; and, for documents authenticated by a notary public the court of first instance in whose jurisdiction the notary public carries out his or her activity.

<sup>353</sup> In Romania the competent enforcement authorities under the Convention and Regulation are the bailiff and the court of first instance in whose jurisdiction the enforcement is undertaken (the court of first instance of the debtor's domicile or of the place where the debtor's assets are located).

<sup>354</sup> See Explanatory Report, para. 390. If the appeal is considered to be manifestly unfounded, free legal assistance may be refused. For information on the domestic law of Romania, see *supra*, note 343.

paternity), a plaintiff from abroad may also directly address, in person or through a lawyer, the competent court of the defendant's domicile. A list of Romanian lawyers is published on the web page of the National Association of Romanian Bars, < <http://www.unbr.ro> >.

735. With the judgment admitting the proceedings concerning the parentage of the child, the court also decides on the establishment of the child's name, the exercise of parental authority and the parents' obligation to raise the child. A maintenance obligation cannot be established without the paternity of a child outside of marriage being previously established.

736. The plaintiff can ask for legal aid directly to the court or through the Ministry of Justice (pursuant to Directive 2008/8/EC, transposed by GEO No. 51/2008, and according to the Hague Convention of 25 October 1980 on International Access to Justice). Only the creditors of a maintenance obligation who are children or vulnerable adults can benefit from legal aid, *ex officio*, without a verification of income (Article 8 of GEO 51/2008). Other categories of applicants can benefit from legal aid only after an assessment of incomes. In Romania, individuals may receive legal aid if income is, for each member of the family, 300 *Lei* or less per month (approximately 70 EUR). The request for determining the maintenance obligation is exempt from the payment of the judicial stamp duty. For a request for the establishment of paternity a fee of 20 *Lei*.

737. A list of model forms for applications for specific proceedings (inclusive of those related to parentage) is presented at the end of these remarks, below.

738. Pursuant to Article 375(2) of the Civil Code, divorce by agreement of the spouses can also be enacted by the notary public when there are minor children born within the marriage, outside of the marriage or adopted, if the spouses agree to all matters pertaining to the family name to be borne after the divorce, the exercise of parental authority by both parents, determination of the children's domicile after the divorce, arrangements to safeguard personal relations between the separated parent and each of the children, as well as the determination of the parents' contribution to the children's upbringing, education and professional training expenses. In this case, the notary's fee for divorce with children is approximately 900 *Lei* (about 200 EUR), and the separate agreement regulating aspects of the maintenance obligation is approximately 70 *Lei* (about 15 EUR). The notary can subsequently amend, by agreement, the amount of the maintenance obligation.

739. All other proceedings and requests not quantifiable in money, except for those exempt from payment of the judicial stamp duty according to law, are stamped by 20 *Lei*.

**MODEL FORMS FOR APPLICATIONS****PETITION FOR SUING AT LAW TO ESTABLISH PARENTAGE**

MR. PRESIDENT,

I, the undersigned, \_\_\_\_\_, residing at \_\_\_\_\_, on behalf of and as a legal representative of the minor child \_\_\_\_\_, sue at law and in person for the cross-examination the respondent \_\_\_\_\_, residing at \_\_\_\_\_, for ESTABLISHMENT OF PARENTAGE to the effect that the said respondent is the father of the above-mentioned minor child.

At the same time, I kindly ask you, pursuant to Article 450 of the Civil Code, to approve that the said minor child should bear the respondent's name, and pursuant to Article 516 and Article 499 of the Civil Code, to oblige the said respondent to pay support to the minor child under Article 529 of the Civil Code. Pursuant to Article 447 of the Civil Procedure Code, I also ask that the respondent should be obliged to pay legal fees.

Grounds of this legal action:

According to the facts [the applicant should state in brief the period in which the applicant had intimate relations with the respondent, the respondent's position after learning that the applicant was pregnant, whether the respondent granted maintenance to the child, and, if so, the nature of such maintenance, etc.].

According to law, I base my action on the provisions of Articles 424, 425, 450 and 499 of the Civil Code.

To prove my action, I understand that the respondent's cross-examination, letters and postcards I have received from him, as well as declarations of witnesses \_\_\_\_\_, shall be used. I shall file the said letters and postcards at the first judicial hearing.

I kindly ask that the Child Welfare Authority should be also summoned in this case.

I affix a revenue stamp in the value of \_\_\_\_ *Lei* (plus a revenue stamp amounting to \_\_\_\_ *Lei* for the petition for approving that the said minor child should bear the name of the respondent) and the legal stamp of \_\_\_\_ *Lei*.

Filing date \_\_\_\_\_

Signature \_\_\_\_\_

TO THE PRESIDENT OF THE COURT OF LAW \_\_\_\_\_

**PETITION TO DISPUTE THE RECOGNITION OF PARENTAGE**

MR. PRESIDENT,

I, the undersigned, \_\_\_\_\_, residing at \_\_\_\_\_, hereby sue at law the respondent \_\_\_\_\_, residing at \_\_\_\_\_, to DISPUTE THE RECOGNITION OF PARENTAGE.

Concerning the minor child \_\_\_\_\_, born on \_\_\_\_\_, such recognition being made by me on \_\_\_\_\_, for the reason that it does correspond to the truth, the minor child's father being a different man.

I also ask that the respondent be obliged to pay the legal fees I shall incur in this lawsuit.

The grounds of this legal action:

According to the facts, on \_\_\_\_\_ I commenced intimate relations with the respondent and on \_\_\_\_\_ she gave birth to the minor child \_\_\_\_\_, whose birth I declared at the Vital Statistics Office, when I admitted that I was the father of the said minor child.

On \_\_\_\_\_ I got married to the respondent.

Subsequently, on \_\_\_\_\_, I underwent a forensic expert examination and in conformity thereto it was established that I have never had nor shall I have the capacity to procreate, and therefore the fact that I have admitted that I am the said minor child's father does not correspond to the truth. The minor child's father is a different man. Therefore, I contest parentage of the minor child, \_\_\_\_\_.

According to law, I base my action on Article 434 of the Civil Code.

I present proof of my action by the respondent's cross-examination, witnesses and the findings of the forensic medical expert.

I am filing my action in duplicate together with the receipt for payment of the revenue stamp tax of \_\_\_\_ *Lei*.

Filing date \_\_\_\_\_

Signature \_\_\_\_\_

TO THE PRESIDENT OF THE COURT OF LAW \_\_\_\_\_

**PETITION TO SUE AT LAW TO DENY PARENTAGE**

MR. PRESIDENT,

I, the undersigned, \_\_\_\_\_, residing at \_\_\_\_\_, hereby sue at law and in person for a cross-examination of my wife, \_\_\_\_\_, the respondent, residing at \_\_\_\_\_, for DENIAL OF PARENTAGE, as it is impossible that I am the father of the minor child, \_\_\_\_\_, born by the above-mentioned person on \_\_\_\_\_.

Should relief be granted in response to my action I kindly ask you to order the striking-out of my surname and first name from the minor child's birth certificate (under the heading, "father") and, based on Article 447 of the Civil Procedure Code, to oblige the respondent to reimburse my legal charges.

The grounds for this legal action: Articles 429 and 430 of the Civil Code.

According to the facts, I married the respondent on \_\_\_\_\_, we separated on \_\_\_\_\_, and on \_\_\_\_\_ the respondent gave birth to the minor child, \_\_\_\_\_. Before our marriage I had no intimate relations with the respondent.

From this information it is evident that the respondent gave birth four months after our marriage such that it is impossible that I am the father of the child whose parentage I seek to deny.

I present proof of my action by way of the respondent's cross-examination, documentary evidence, and declarations of witnesses, \_\_\_\_\_.

I file this petition in duplicate and enclose a copy of the marriage certificate, a copy of the birth certificate of the minor child and a copy of the decree of marriage dissolution (which renders null and void or cancels the marriage, etc.).

I submit the receipt for the payment of the revenue stamp tax in of \_\_\_\_\_  
*Lei*.

Filing date \_\_\_\_\_

Signature \_\_\_\_\_

**PETITION FOR ESTABLISHMENT OF CHILD SUPPORT**

MR. PRESIDENT,

The undersigned \_\_\_\_\_, residing in \_\_\_\_\_, acting on behalf of and as a legal representative of the minor child \_\_\_\_\_, hereby sue at law, in person, for the cross-examination of the defendant, \_\_\_\_\_, residing in \_\_\_\_\_, in order that he is directed to pay CHILD SUPPORT on a monthly basis for the maintenance expenses of the above-mentioned minor child, and to pay to me the legal costs incurred in connection with this suit.

Grounds of this application:

*De facto*, from my marriage to the defendant, the above-mentioned minor child resulted. On the date of \_\_\_\_\_, the defendant left the marital domicile. The child remained under my care and support and, taking into account that the defendant refuses to wilfully grant maintenance to the minor child, hereby request that the defendant be ordered to pay for maintenance, subject to his material resources. He is an employee at \_\_\_\_\_, and he possesses other income-bearing assets, such as \_\_\_\_\_.

*De jure*, I ground my action at law on Article 499 and Articles 516 and 529 of the Civil Code, and I kindly request you to allow this action at law and to order the defendant to pay a monthly contribution to the maintenance expenses of the minor child.

In support of my action I will employ cross-examination of the defendant and present evidence concerning the income of the defendant.

I lodge my action at law in duplicate, enclosing a copy of the certificate of marriage and a copy of the birth certificate of the minor child.

Date \_\_\_\_\_

Signature \_\_\_\_\_

TO THE PRESIDENT OF THE TRIAL COURT \_\_\_\_\_



## **Chapter 11 - Applications for modification of a decision: Article 10(1) e) and f) and 10(2) b) and c) of the Convention; and Article 56(1) e) and f) and 56(2) b) and c) of the Regulation**

### **Part I — Introduction**

740. This Chapter first provides an overview of the way that the Convention or the Regulation apply to applications brought by debtors or creditors to modify existing maintenance decisions (Part I). The subsequent Sections of the Chapter (Part II) then provide the procedures for incoming applications for modification.

741. It is important to note that in Member States of the European Union where the Regulation is applicable, competent authorities will apply the jurisdiction rules of the Regulation to all modification applications and direct requests under either the Convention or the Regulation, so long as they fall within the substantive and temporal scope of the Regulation (see also Chapter 3, Part I, Section III for further information as to the scope of the Regulation and Chapter 4 on the jurisdiction rules of the Regulation). Also, for those Member States of the European Union where the Regulation is applicable and which are bound by the 2007 Hague Protocol, competent authorities will apply the Protocol to all modification applications and direct requests, so long as they fall within the substantive and temporal scope of the Protocol (see also Chapter 5 on the 2007 Hague Protocol on applicable law). The jurisdiction rules of the Regulation and the applicable law rules of the Protocol are universally applicable with regards to geographic scope.<sup>355</sup>

742. In contrast, in Contracting States to the Convention outside of the European Union, modification applications will be subject primarily to domestic law for jurisdiction issues and for applicable law issues (unless the Contracting State is Party to the 2007 Hague Protocol on applicable law). Whether the modification is acceptable within the limitation rules of Article 18 of the Convention, however, will be verified when taking jurisdiction and at the time of recognition and enforcement of a decision in another Contracting State.

743. The interactions between the provisions within the Convention or Regulation, the circumstances of the parties (where they reside, where the decision was made, etc.) and whether the application is being brought by a creditor or a debtor will influence where and how an applicant chooses to bring a modification application. Competent authorities should be aware of some of the underlying issues with respect to modification of decisions under the two instruments, in order to have the necessary background for the processing of modification applications and requests.

<sup>355</sup> Romania is a Member State of the European Union where the Regulation and the 2007 Hague Protocol are applicable.

**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.

## **I. Overview – Modification of maintenance decisions under the Convention and the Regulation**

### **A. General**

744. 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 and the Regulation therefore include provisions for Central Authorities to assist in the transmission and processing of applications for modification of decisions, and the two instruments also include rules for the subsequent recognition and enforcement of those modified decisions where necessary.<sup>356</sup>

745. Under Convention Article 10 and Regulation Article 56 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<sup>357</sup>) 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 or Member State.

<sup>356</sup> See the Explanatory Report of the Convention, para. 258.

<sup>357</sup> Under the domestic law of Romania according to Art. 531 “Modification and Cessation of Maintenance Support” from the Civil Code (Law No. 287/2009 on the Civil Code), if a change arises with regard to the means of the person providing support and the need of the person receiving it, the guardianship court may increase or decrease the maintenance support or it may rule on the cessation of the payment thereof, depending on the circumstances. The maintenance support established as a fixed amount shall be indexed as of right on a quarterly basis, depending on the rate of inflation. The adjustment of the maintenance can be ordered for an undetermined period or for a certain period (temporarily), in relation to the changes which justify this measure. The date on which adjustment of the maintenance occurs is as follows: the increase of the maintenance quantum takes place on the date on which the legal proceedings are brought, except where delay of its initiation is imputable; the reduction or cessation of the maintenance takes place on the date on which the case is brought, as long as the debtor was not obliged to execute the maintenance decision which granted the previous maintenance. The plaintiff creditor may ask at court for the amendment of his domicile or of the defendant debtor’s domicile. A defendant debtor may ask for the amendment only of the defendant creditor’s domicile.

746. All Contracting States or Member States have procedures to allow for the processing of Convention or Regulation applications for variation or modification of maintenance obligations, either through the modification of the existing decision or by issuing a new maintenance decision.<sup>358</sup> However, it is important to remember that in most cases the merits of the modification application will be determined under the law applicable in or the domestic law of the requested State.<sup>359</sup> Contracting States and Member States may also have very different laws concerning the grounds that must be established before a modification of a decision may be allowed.<sup>360</sup>

747. It is important to note that modification applications requesting reduction or cancellation of arrears may be treated very differently in different 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.<sup>361</sup>

748. The availability of legal assistance with respect to modification applications is also an important consideration with respect to modification applications being brought by a debtor. There is no automatic right to cost-free legal assistance with respect to a debtor's application to modify (see Art. 17 of the Convention and Art. 47 of the Regulation). Where

<sup>358</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 the Explanatory Report of the Convention, para. 264. Under the domestic law of Romania based on the Convention (which will become a part of Romanian private international law) the Romanian courts may amend the quantum of maintenance stipulated in a foreign decision without the decision being previously recognised in Romania.

<sup>359</sup> Some States will apply foreign law, not domestic law in these applications. Where a State is a Party to or bound by the 2007 Hague Protocol on the law applicable to maintenance obligations, the Protocol will apply to modification of decisions. In Romania, as it is a Member State of the European Union, the Hague *Protocol on the Law applicable to maintenance obligations of 23 November 2007* applies as of 18 June 2011, the date on which the 2009 Regulation applied, pursuant to Decision No. 2009/941/EC of 30 November 2009 (OJ L 331, 16.12.2009). The legal basis which allowed the entry into force of the 2007 Hague Protocol in the European Union (before its entry into force internationally, where two ratifications, acceptances, approvals or adhesions to the Protocol are necessary) is Art. 300(5) and following of TEC (at present Art. 218 of TFEU). In Romanian law, Book VII of the Civil Code (Art. 2562) and Law No. 36/2012 (Art. 15) allow the application and the obtaining of foreign law content, respectively. See also Chapter 5 on applicable law.

<sup>360</sup> In some States, the modification of a decision made by another State will not be recognized if the child or one of the parties continues to reside in the State of origin. This may affect whether it is effective to seek a modification other than in the State of origin.

<sup>361</sup> Under the domestic law of Romania arrears owed by a debtor cannot be adjusted retroactively, but a foreign decision adjusting arrears may be recognised in Romania. The reduction or cancellation of arrears owed according to a maintenance decision is not allowed in Romania. The non-initiation of proceedings for a reduction in the maintenance obligation at the time of the appearance of the situation which justifies the reduction presumes that the debtor has accepted and wanted to make the payment of the undiminished amount for that period. Pursuant to Art. 1091 of the Civil Procedure Code, the request for the enforcement of the foreign decision establishing a maintenance obligation through periodic payments is approved (exequatur) for overdue and subsequent payments. In the exequatur decision of the foreign decision to pay a sum of money in foreign currency, the conversion of the amount into national currency will be ordered, using the exchange rate of the day on which the decision became enforceable in the State in which it was given. Until the conversion date, the interest produced by the amount established in the foreign decision is governed by the law of the court which gave the decision.

the modification application is being brought by a creditor however, and concerns child support within the scope of the Convention, the creditor will be entitled to cost-free legal assistance.

749. Equally importantly, the Convention and the Regulation only provide 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 or Member States should treat foreign modification decisions, once made.

The **State of origin** is the State where the maintenance decision was made.

750. Therefore, there will be situations that arise in the course of managing international cases where the Convention or Regulation provide no specific guidance. In these cases, individual States, in this case Romania, will have to resolve any issues with reference to their domestic law and to the overarching principles of the Convention or Regulation requiring States to co-operate with each other to promote efficient, cost-effective and fair solutions, and encourage solutions which support the objective of the recovery of child support and family maintenance.

***B. Where can a direct request or application for modification be brought and is an application under the Convention or Regulation possible?***

751. As mentioned above, the Regulation provides direct rules on jurisdiction (see Chapter 4) which set out when a Member State where the Regulation is applicable may take jurisdiction in a maintenance matter.

752. The Convention does not provide “direct rules” of jurisdiction setting out when a Contracting State may modify a maintenance decision made in another Contracting State. This will always be a matter for domestic law in Contracting States to the Convention outside of Europe. The only situation where the Convention specifically addresses the ability to modify a decision, and which is verified at the time of recognition and enforcement of a decision in another Contracting State, 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 (Art. 18 of the Convention).<sup>362</sup>

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<sup>362</sup> See the Explanatory Report of the Convention, para. 415.

Tip: Throughout this Handbook you will see a distinction made between direct **requests** and **applications**. An application is an action under the Convention or Regulation that goes through a Central Authority, such as an application for recognition and enforcement. A direct request is an action that goes directly to a competent authority, such as a direct request under the Convention for an establishment of support for spousal support only, where neither of the Contracting States has extended the application of the Convention to those requests. See section VI, below, for more information about direct requests.

753. The Regulation also specifically addresses the ability to modify a decision in relation to modification applications brought by a debtor in a different State than the State of origin, where the creditor still resides in the State of origin (Art. 8 of the Regulation). See more information, below (Part II, “Jurisdiction”), on Article 8 of the Regulation and how this provision interacts with the other jurisdiction rules of the Regulation.

754. By providing for **applications** to be made under the Convention and Regulation for modification, and by providing rules concerning when decisions (including modified decisions) may be recognised and enforced, the Convention and the Regulation provide frameworks that respond to the needs of parties in situations where the initial decision must be modified. The Convention and Regulation allow 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 or Member 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>363</sup>

755. 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 or Regulation should be used to make an application. The applicant may decide to:

- Make an application under Article 10 of the Convention or Article 56 of the Regulation 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 a direct request to the competent authority in that other State, or
- Make a direct request 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.

756. Which of these options an applicant may choose in a particular case will depend upon:

<sup>363</sup> Note that in some cases, travel may still be required if the matter cannot proceed through the Central Authority. However, in order to avoid travel, video-conferencing facilities may be available among some States, and this option may be investigated by competent authorities, as relevant.

- The residence of the applicant and whether that is the State of origin (the State where the decision was made),
- Where the debtor resides,
- Whether the law applied in the State where the application or direct request will be made allows for the type of modification sought (e.g., 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,
- 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.

757. 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 of the Convention and Article 8 of the Regulation.

758. 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 or the establishment of new decisions will take place that create multiple decisions with respect to the same family, or applicant and respondent. Wherever possible, a course of action that results in 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.

## **Part II — Processing incoming modification applications**

759. This part deals with the procedures to be used by the requested State, that is, Romania, when an application for modification is received.

760. Competent authorities who are not familiar with modification applications generally may wish to review Part I of this Chapter to gain a better understanding of the underlying bases for and main fact patterns involved in modification applications.

### **I. Procedures — Competent authority**

#### **1. Is it “manifest” that the requirements of the Convention or the Regulation are not met?**

761. Under the Convention and under the Regulation, a Central Authority may only refuse to process an application in situations where it is “manifest” that the requirements of the Convention (Art. 12(8)) or the Regulation

(Art. 58(8)) are not met. This exception is very limited and might apply, for example, where the application does not involve maintenance.<sup>364</sup>

762. The competent authority in Romania may wish to do a similar preliminary check, and inform the Central Authority of Romania of any determination, as appropriate.

## **2. Are the documents and information complete?**

### **2007 Convention**

763. Only the Transmittal Form and an application (the recommended Application for Modification of a Decision Form can be used) 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 package of materials:

- Recommended Form for Application for Modification of a Decision
- Copy of maintenance decision - certified only if required by requested State (see Country Profile)<sup>365</sup>
- Financial Circumstances Form for debtor's circumstances
- Information necessary to locate the party responding in the requested State
- Financial Circumstances Form of creditor's circumstances
- Additional documentation necessary to support application for modification
- Additional documentation required by requested State (see Country Profile)<sup>366</sup>

### **2009 Regulation**

#### **a) Annex VII**

764. The Regulation requires that Annex VII, appended to the Regulation text, be used for applications for the modification of a decision. The Regulation requires that at a minimum the information included in the application should include (Art. 57(2)):

- (a) a statement of the nature of the application or applications;
- (b) the name and contact details, including the address, and date of birth of the applicant<sup>367</sup>;

<sup>364</sup> See the Explanatory Report of the Convention, para. 344.

<sup>365</sup> Romania requires that with the request for the increase there must be enclosed, in duplicate, in addition to the decision, the copy of the previous civil judgment of divorce or determination of the maintenance, pupil / student certificate, birth certificate of the minor, and any other necessary documentary evidence attesting to the creditor's needs.

<sup>366</sup> *Ibid.*

<sup>367</sup> The applicant's personal address may be replaced by another address in cases of family violence, if the national law of the requested Member State does not require the applicant to supply his or her personal address for the purposes of proceedings to be brought (Art. 57(3)).

- (c) the name and, if known, address and date of birth of the defendant;
- (d) the name and the date of birth of any person for whom maintenance is sought;
- (e) the grounds upon which the application is based;
- (f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;
- (g) the name and contact details of the person or unit from the Central Authority of the requesting Member State responsible for processing the application.

### **b) Additional documents (Art. 57)**

765. Article 57(4) and (5) of the Regulation require that additional documents, as appropriate or necessary, and to the extent known, accompany an application. These include:

- the financial circumstances of the creditor (Art. 57(4) a))
- the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor (Art. 57(4) b))
- any other information that may assist with the location of the defendant (Art. 57(4) c))
- any necessary supporting information or documentation including, where appropriate, documentation concerning the entitlement of the applicant to legal aid (Art. 57(5))

### **3. Incomplete documents?**

766. If any of the above documents under the Convention or Regulation are required, and are not included in the application package, the application should not be rejected. Instead, the necessary documents should be requested from the requesting State, by way of the Central Authority in Romania. Competent authorities who are missing documentation should inform the Central Authority of Romania as soon as possible, in order that it can seek the missing documents from the requesting State without delay.

### **4. Are there any preliminary considerations?**

767. The Central Authority in Romania should do a preliminary review of the received documents and determine whether there might be any barriers to the matter proceeding in the requested State and whether there are concerns that there may be impediments to the recognition or

Under the domestic law of Romania a party's representative may be summoned in his or her place (with the representative appointed *ex officio* or chosen by the party), or a party may be summoned at the domicile chosen for the service of documents.



enforcement of the modified decision. The competent authority in Romania will have to make a similar check. This assessment is particularly important with respect to applications by debtors. As discussed in Part I (Section I.B.) of this Chapter, the circumstances in which an application may be brought by a debtor under the Convention or the Regulation in another State to modify a decision are limited in some cases.

768. 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<sup>368</sup> does not allow the cancellation of arrears, advise the Central Authority of Romania, which will in turn inform the requesting State accordingly.<sup>369</sup>

## **5. Appropriate provisional or protective measures**

769. It may be appropriate that the competent authority take provisional or protective measures while an application is pending. The taking of these measures may occur at a number of points in time during—or even before—the application process. Please see Chapter 3, Part II, Section VIII, for further information on provisional and protective measures.

## **6. Processing the modification application**

770. Once a preliminary assessment has been made that the application can proceed under the Convention or the Regulation, the competent authority can then determine the case on the merits. Under the domestic law of Romania, including Romanian case law, it has been established that the state of need of the minor is presumed and the court analyses two criteria, namely, the applicant's needs and the means of the debtor. In order to analyse the defendant's revenues, effective income is taken into consideration. Thus, a simple increase of the child's expenses is not sufficient to find an increase in maintenance if the debtor does not have higher revenues.

If the defendant proves that he has several dependent children and does not have taxable income, the maintenance owed to another child will be determined in relation to the determined minimum national income. If the debtor possesses revenues, which are however inferior to the determined minimum national income, then the court can reduce the maintenance owed, taking into account the debtor's income.

771. If the child benefits from full maintenance within a military unit during the school year, his or her needs must be considered lesser during this period, and the maintenance obligation owed by the parents may be appropriately reduced. If a minor child is in competition for maintenance with another child who has reached majority and who is not continuing his or her studies, the maintenance owed to the minor child must be increased relative to the major child, whose maintenance ceases if he or she does

<sup>368</sup> In some States this includes the Hague Protocol on the Law Applicable to Maintenance Obligations (see Chapter 5 for further information on the 2007 Hague Protocol).

<sup>369</sup> See *supra*, note 361.

not continue studies. Cessation of maintenance is made by the court only, with verification of the plaintiff's claims, for instance, asserting that the defendant is not in a state of need.

772. The debtor, affirming a custodial penalty, can ask for the cessation or reduction of maintenance only by way of proceedings at the court which gave the initial decision determining maintenance. The debtor cannot ask for the cessation or reduction of maintenance by objection at the enforcement stage, in the context of enforcement actions begun for the payment of the owed instalments.

773. The debtor who does not possess full capacity to work (for instance, due to old age) or possesses only partial work capacity (for example, due to different degrees of invalidity) may also ask for a cessation or reduction in the maintenance obligation. If the debtor receives a consistent retirement pension, he is not exempt from the payment of maintenance. For the cessation of maintenance payments, the debtor should demonstrate that he or she cannot be employed for reasons beyond his or her will (due to arrest, military service, enrolment as a student, unfitness for work, sickness, lack of income for his or her own maintenance, etc.). If the child has lived with the debtor parent who has taken care of him or her, although he or she was entrusted to the other parent, the parent who was originally given custody cannot ask for maintenance for that period.

## **a) Jurisdiction**

### **i) Jurisdiction in 2007 Convention Contracting States outside of the European Union**

774. Competent authorities in Contracting States to the Convention in States outside of the European Union (*i.e.*, in States where the 2009 Regulation is not applicable) will have to determine whether they have jurisdiction in the matter in accordance with domestic law.<sup>370</sup>

775. It should be noted, however, that the Convention contains a specific "negative jurisdiction" provision, Article 18, "Limit on proceedings," addressing the ability for a debtor to modify an existing decision. So long as a creditor remains habitually resident in a Contracting State to the Convention where a decision has been given, a debtor may not bring proceedings to modify the decision in another Contracting State to the Convention, subject to a number of exceptions (for further information on Art. 18 of the Convention, which is essentially parallel to Art. 8 of the Regulation, see Chapter 4 on Regulation Jurisdiction Rules, Section G).<sup>371</sup>

<sup>370</sup> Under the domestic law of Romania the 2009 Regulation, the 2007 Lugano Convention, or Book VII of the Civil Procedure Code determine the taking of jurisdiction (territorial competence) under rules of private international law. These sources of law contain rules of private international law settling conflicts in legal competence, determining the competences of the courts as among States. Arts 94, 107 and 113(2) of the Civil Procedure Code, represent rules of civil procedure settling the territorial and material competence under domestic law and apply after competence under private international law rules has been established.

<sup>371</sup> If the decision being modified is intended to be recognised and / or enforced in another jurisdiction, competent authorities may wish to keep in mind the jurisdictional bases

## ii) Jurisdiction under the 2009 Regulation

776. Competent authorities in Member States of the European Union where the Regulation is applicable will apply the jurisdiction rules of the Regulation to incoming applications and direct requests for modification, regardless of whether the application or request has been made under the Convention or under the Regulation. This is the case as the jurisdiction rules of the Regulation are universal and have an *erga omnes* effect (see Chapter 4 for more information on the direct jurisdiction rules of the Regulation).

777. The Regulation, like the Convention, contains a special “negative jurisdiction” rule which addresses the ability of a debtor to bring proceedings to modify an existing decision (Art. 8 of the Regulation, “Limit on proceedings”). Under the Regulation, so long as a creditor remains habitually resident in a Contracting State to the 2007 Convention or in a European Union Member State where a decision has been given, a debtor may not bring proceedings to modify the decision in another Member State, subject to a number of exceptions (for a summary of Art. 8 of the Regulation, see Chapter 4, Section G).

778. Article 8 of the Regulation will interact with the other jurisdiction provisions of the Regulation in a particular way. Competent authorities applying the Regulation should first look at whether they can assume jurisdiction under Article 4 of the Regulation, which outlines the criteria for valid choice of court agreements under the Regulation. A choice of court agreement meeting the requirements of Article 4 of the Regulation is one of the specified exceptions to limits on proceedings brought by a debtor (Art. 8(2) a)).

779. If competent authorities are not able to assume jurisdiction on the basis of a valid choice of court agreement, they will then have to proceed to an inquiry as to whether they may assume jurisdiction on another ground, firstly under Article 3 of the Regulation (General provisions), and then subsequently under Article 5 (Jurisdiction based on the appearance of the defendant).

780. Once competent authorities have established that they may assume competence in a modification case under the main “positive” jurisdictional rules of the Regulation, they will then have to assess whether there will be a limit on proceedings in accordance with Article 8. Note that this limit on proceedings will only be relevant if the application or request for modification is brought by a debtor, where the creditor remains resident in the Hague Convention Contracting State or Member State of the original decision, and will be subject to the four exceptions

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accepted for the purposes of recognition and enforcement of a maintenance decision in the foreign jurisdiction, and the grounds set out in Art. 20 of the Convention in particular. For example, in most circumstances courts in the United States of America will not recognise and enforce foreign child support decisions made on the jurisdictional basis of the place of a creditor’s habitual residence (Art. 20(2) of the Convention allows a Contracting State to the Convention to make a reservation to this and several other jurisdiction bases for the purposes of recognition and enforcement of foreign decisions). However, in these circumstances, a Contracting State will be obliged, if the debtor is habitually resident in that State, to take all appropriate measures to establish a decision for the benefit of the creditor (see Art. 20(4)).

found in Article 8(2) a) to d).

781. See Chapter 4 of this Handbook for more detailed information on all of the Regulation's jurisdiction provisions (see Section G of Chapter 4 for further information on Art. 8).<sup>372</sup>

## **b) Applicable Law**

### **i) Applicable law in States not bound by the 2007 Hague Protocol**

782. Competent authorities in Contracting States to the Convention which are not Party to the 2007 Hague Protocol on applicable law and in European Union Member States which are not bound by the 2007 Hague Protocol (the United Kingdom and Denmark) will apply their domestic rules to determine what law will be applicable to the modification application or request.

### **ii) Applicable law in States bound by the Hague Protocol**

783. All Member States of the European Union, with the exception of the United Kingdom and Denmark, are bound by the Protocol on applicable law. Contracting States to the Convention outside of Europe may also be Contracting States to the 2007 Hague Protocol. Therefore, competent authorities in States which are bound by the Protocol will apply the rules of applicable law found in the Protocol to modification applications and requests.<sup>373</sup> (For further information on the 2007 Hague Protocol, see Chapter 5.)

## **7. After the decision is made**

784. If the decision is modified, the competent authority will have to forward the decision to the Central Authority in Romania, as it will send a copy of the modified decision to the Central Authority in the requesting State.

785. In some cases, the modified decision will need to be recognised in the requesting State before it can be declared enforceable or 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 in order to support the recognition process (see Chapter 7 and 8 for information on documentation requirements for the recognition or recognition and declaration of enforceability / enforcement procedures under the Convention and the Regulation).

<sup>372</sup> *Ibid.*

<sup>373</sup> However, it should be noted that there may be some difference of opinion as to the application of the rules of the 2007 Hague Protocol in relation to whether, under domestic law, a modification application is considered as a new decision or as an adjustment of an existing decision. If the modification is considered under domestic law as a new decision, it would seem clear that the applicable law rules of the Protocol would apply. However, if the modification is considered only as an adjustment of a previous decision, some may be of the view that the law applied to the original decision would continue to apply.

## II. Checklist – Incoming modification applications

	Procedure	Handbook reference
1	Receive documents from Central Authority of Romania	
2	Is it “manifest” that the requirements of the Convention are not met?	II.I.(1)
3	Are the documents complete?	II.I.(2)
4	Determine if there are to the modification application (e.g., in particular with respect to debtor’s applications)	II.I.(4)
5	Take any appropriate provisional or protective measures	II.I.(5)
6	Process Application	II.I.(6)
7	Communicate outcome to Central Authority of Romania	II.I.(7)

## III. Additional materials

### A. *Practical advice for all modification applications or requests*

- There is no requirement to send originals of any documents.
- As some modifications will proceed by way of direct requests to a competent authority, it is important to ensure that any Central Authority that has a file open is advised of the modification made by the competent authority. 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.<sup>374</sup>
- 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.<sup>375</sup>

<sup>374</sup> See *supra*, note 361.

<sup>375</sup> Under the domestic law of Romania pursuant to Art. 637 of the Civil Procedure Code (“Enforcement of judgments submitted to judicial review”), the enforcement of an enforceable judgment which can be appealed is made at the creditor’s own risk. If the claim is subsequently amended or cancelled, the creditor will be held, under the relevant legal conditions, to completely or partially reinstate the amount. The creditor or debtor may ask for the amendment of a judgment during enforcement. The enforcing court may suspend enforcement if an application for amendment or cancellation of the decision is pending (at different stages of litigation, namely, first instance, appeal proceedings, or re-examination,,), if the debtor paid the maintenance, prescription intervened (limitation period was exhausted),

**B. Related forms***2007 Convention:*

Transmittal Form

Application for Modification

Restricted Information Form

Financial Circumstances Form

Abstract of a Decision

*2009 Regulation:*

Annex VII

**C. Relevant Articles***2007 Convention*

Article 10(1) e) and f), and 10(2) b) and c)

Article 11

Article 12

Article 15

Article 17

Article 18

Article 20

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etc. Thus, all of the procedural stages of the enforcement phase (e.g., suspension, prescription, dismissal, return of enforcement amounts, etc.) are governed by the law of the executing State. Suspension of enforcement is optional and at the discretion of the judge; the judge is not obliged to suspend enforcement. Also under Romanian law, incidents hindering, temporising or extinguishing enforcement are: prescription, suspension, dismissal, granting of a grace period, debtor's death, etc. In the case of judgments, the limitation period begins from the date on which the decision becomes enforceable, which is in principle the date that the decision becomes final or is given (in the case of enforceable judgments which contain an order for temporary enforcement). Under Romanian law legal suspension can be by right (e.g., debtor's death after the beginning of enforcement) or on a discretionary basis (e.g., in the case of appeal, objection to suspension, objection at enforcement or in the case of the judgment being subject to temporary enforcement). If the debtor files a complaint for the reduction or cessation of maintenance in the Member State of origin, the judge in the enforcing State (Romania) has discretion to suspend enforcement. The creditor should benefit from the maintenance established in the judgment, and the debtor possesses the possibility to request the suspension of its enforcement. The competent authority in the State of enforcement has the competence to order the suspension of enforcement, if ordered in the Member State of origin which has the competence to judge an appeal (in both cases where a court is acting and not a bailiff). Sometimes, the optional nature of the suspension of enforcement can lead to duplication of work with respect to the activity of verification of suspension conditions, which also belongs to the enforcing court of the enforcing State. If the judgment revision procedure in the Member State of origin is not performed with celerity, the legal remedy may be used by the debtor for equivocation in order to avoid the obligation. There is also a certain risk of the conversion of the suspension of enforcement into a refusal of enforcement, which can also be a case of the debtor trying to manipulate the process (for instance, in cases of unemployment, initiation of a legal remedy, change / loss of job, bankruptcy of the natural person, etc.).

Article 22

2009 Regulation

Article 56(1) e) and f) and 56(2) b) and c)

Article 57

Article 58

Article 46

Article 47

Articles 3-7 (Jurisdiction)

Article 8

Article 15 (Applicable Law)

#### **D. Related Chapters of the Handbook**

See Chapter 3 – Matters of general application: 2007 Convention and 2009 Regulation

See Chapter 4 – 2009 Regulation: Direct Rules on Jurisdiction

See Chapter 5 – Applicable Law under the 2007 Convention and the 2009 Regulation

See Chapter 6 – Finding and Ascertaining Foreign Law

See Chapter 12 – Enforcement of maintenance decisions under the 2007 Convention and the 2009 Regulation

#### **IV. 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?*

786. In most cases – yes. The debtor will need to complete an application under Article 10(2) b) or c) of the Convention or 56(2) b) and c) of the Regulation (in accordance with which instrument is applicable) 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 direct request to the competent authority in the State where he or she resides. Whether the decision can be modified will be determined by the law applicable in the requested State.<sup>376</sup>

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<sup>376</sup> See *supra*, note 358.

*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?*

787. The next steps are primarily a matter of domestic law, depending upon where the parties reside and whether the modified decision is from the State where it will be enforced. If it is, nothing further needs to be done, as the State will be enforcing its own decision.

788. If the modified decision was made in a different Contracting State to the Convention or Member State where the Regulation is applicable from the State where it is to be enforced, it may need to be recognised or declared enforceable before it can be enforced. Recognition or a declaration of enforceability may be required in either the State where the debtor resides or the State where he or she has assets.

789. In some States, no recognition or declaration of enforceability 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 States an application for recognition of the modified decision will have to be made using the recognition and enforcement provisions of the Convention or Regulation.

*When can a maintenance decision be modified? What does the applicant have to prove?*

790. The law applicable in the place where the application is heard (the requested State) will determine whether a decision can be modified or varied. In most 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.<sup>377</sup>

*Can outstanding arrears of unpaid maintenance be reduced or cancelled in an application under the Convention or Regulation?*

791. This will be a matter of the substantive law applicable domestically, identified through applicable law rules. Competent authorities can refer to the Country Profiles for the requested State under the Convention to find out whether that State will allow arrears to be cancelled or reduced under domestic law. Whether the application will be successful will depend upon whether the law applicable in the requested State allows for the cancellation or reduction of arrears. Under the domestic law of some States, arrears of child support cannot be cancelled.<sup>378</sup>

*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?*

792. 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 or Regulation, and

<sup>377</sup> See *supra*, at para. 770.

<sup>378</sup> See *supra*, note 361.



have the application for modification transmitted to the State where the debtor now resides.

793. If the creditor does not live in the State where the decision was made, the judicial or administrative authority in that State may not be able to modify the decision.<sup>379</sup> In that case, the creditor will have to bring an application for modification under the Convention or Regulation, and have that application sent to the State where the debtor resides.

*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?*

794. Whether a modification will be allowed will depend upon the law applicable in the State hearing the application. In most 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.<sup>380</sup> Cancellation of arrears of child support may or may not be allowed by the law applicable in 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.<sup>381</sup>

*Can the applicant be required to attend in person in the requested State for the modification application?*

795. Neither Article 29 of the Convention nor Article 41 of the Regulation 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 available.

## **V. Direct requests for modification of decisions**

796. Direct requests to a competent authority in Romania, as a Member of the European Union bound by the 2007 Hague Protocol, for the modification of a decision coming within the scope of the Convention or Regulation will be governed by the Regulation provisions on jurisdiction (see Chapter 4 of this Handbook) and applicable law (see Chapter 5 of this Handbook), discussed above, and by internal law.

797. It should be noted that the provisions of the Convention discussed in Chapter 7 pertaining to direct requests for recognition and enforcement do not apply to direct requests for establishment or modification. Effectively this means that the procedures, forms and assistance available to creditors or debtors making these direct requests under the Convention will be those found in the domestic law or procedures of Romania. Importantly, even though the maintenance decision may come within the scope of the Convention or Regulation (for example, where the decision concerns modification of

<sup>379</sup> See *supra*, note 358.

<sup>380</sup> See *supra*, at para. 770.

<sup>381</sup> See *supra*, note 361.

spousal maintenance) the most favourable provisions concerning legal assistance do not apply to these direct requests. In some cases, a creditor or debtor may be required to retain a lawyer at their own expense in the requested State, *i.e.*, Romania, in order to make the direct request. (See Chapter 2, Part II, Section VII for more information on effective access to procedures and legal assistance / legal aid under the two instruments.) In Romania, for direct requests for amending the amount of the maintenance obligation, a plaintiff from abroad may also directly address, in person or through a lawyer, the competent court of the defendant's domicile. A list of Romanian lawyers is published on the web page of the National Association of Romanian Bars, < <http://www.unbr.ro> >.

798. The plaintiff can ask for legal aid directly to the court or through the Ministry of Justice (pursuant to Directive 2008/8/EC, transposed by GEO No. 51/2008, according to the *Hague Convention of 25 October 1980 on International Access to Justice*). Only the creditors of a maintenance obligation who are children or vulnerable adults can benefit from legal aid, *ex officio*, without a verification of income (Article 8 of GEO 51/2008). Other categories of applicants can benefit from legal aid only after assessment of incomes. In Romania, individuals may receive legal aid if income is, for each member of the family, 300 *Lei* or less per month (about 70 EUR). Only the request for determining the maintenance obligation is exempt from the payment of the judicial stamp duty. For a request for the establishment of paternity a fee of 20 *Lei* must be paid.

799. A list of model forms for applications for specific proceedings is presented at the end of these remarks, below.

800. Pursuant to Article 375(2) of the Civil Code, divorce by agreement of the spouses can also be enacted by a notary public when there are minor children born within the marriage, outside of the marriage or adopted, if the spouses agree to all matters pertaining to the family name to be borne after the divorce, the exercise of parental authority by both parents, determination of the children's domicile after the divorce, arrangements to safeguard personal relations between the separated parent and each of the children, as well as the determination of the parents' contribution to the children's upbringing, education and professional training expenses. In this case, the notary's fee for divorce with children is approximately 900 *Lei* (about 200 EUR), and the separate agreement regulating aspects of the maintenance obligation is approximately 70 *Lei* (about 15 EUR). The notary can subsequently amend, by agreement, the amount of the maintenance obligation.

801. All other proceedings and requests not quantifiable in money, except for those exempt from payment of the judicial stamp duty according to law, are stamped by 20 *Lei*.

**MODEL FORMS FOR APPLICATIONS****APPLICATION TO REQUEST AN INCREASE IN CHILD SUPPORT**

Mr. President,

The undersigned \_\_\_\_\_, residing in \_\_\_\_\_, acting for, on behalf of and as legal representative of the minor child \_\_\_\_\_, hereby sue at law and in person with the presence at court of the defendant \_\_\_\_\_, residing in \_\_\_\_\_, so that, on the basis of the decision that will be rendered, to order the INCREASE OF CHILD SUPPORT the defendant was ordered to pay, in accordance with civil decision No \_\_\_\_\_, dated \_\_\_\_\_, rendered by the trial court of \_\_\_\_\_.

I hereby further request that the defendant be ordered to pay for legal costs that will be incurred by me in connection with this suit.

Statement of facts:

**De facto**, by the above-mentioned decision, the defendant was ordered to pay, on a monthly basis, the amount of \_\_\_\_\_ child maintenance to the minor child \_\_\_\_\_, born on the date of \_\_\_\_\_. In establishing this maintenance obligation, the needs of the minor child and the means of the defendant were taken into account, the latter amounting to a net monthly income of \_\_\_\_\_. This situation has, as of the present, changed. The needs of the minor child, who is now \_\_\_\_\_ years old, being a student, have increased, as have the means of the defendant, who earns from his salary a greater income than that previously taken into account when the original child maintenance decision was established, the increase whereof I do hereby request.

**De jure**, I base my action on the provisions of Article 499, Article 516 and Article 529 of the Civil Code, and I kindly request you to allow my action at law and order the defendant to contribute on a monthly basis to the maintenance of the minor child.

In support of my action I understand that the defendant's replies to the hearing will be taken into account, and I request that you obtain from \_\_\_\_\_, where the defendant is employed, information on the monthly net income received by him in the last six months.

I submit my action in two copies, as well as a copy of the civil decision No. \_\_\_\_\_, dated \_\_\_\_\_.

Date of submission \_\_\_\_\_

Signature \_\_\_\_\_

TO THE PRESIDENT OF THE TRIAL COURT

**APPLICATION TO REQUEST A REDUCTION IN CHILD SUPPORT**

Mr. President,

The undersigned \_\_\_\_\_, residing in \_\_\_\_\_, herein acting in my own name and as legal representative of the minor child \_\_\_\_\_, hereby sue at law and in person with the presence at court of the defendant \_\_\_\_\_, residing in \_\_\_\_\_, on the basis of the decision that will be rendered, to order a REDUCTION IN CHILD MAINTENANCE I was ordered to pay in accordance with civil decision No \_\_\_\_\_ dated \_\_\_\_\_, passed by the Trial Court \_\_\_\_\_.

I also request that the defendant be ordered to pay for the legal costs to be incurred by me in connection with this suit.

Grounds of the application:

**De facto**, on the basis of the above-mentioned decision, I was ordered to pay to the defendant for the minor child named above, a child maintenance amount of \_\_\_\_\_ Lei, monthly. In establishing this maintenance obligation a net monthly income in the amount of \_\_\_\_\_ Lei [or, that I had only this child] was taken into account. At present, my income is lower [or, I also have a maintenance obligation toward the minor child \_\_\_\_\_, born on the date of \_\_\_\_\_ from my present marriage or from cohabitation], so that it is necessary to reconsider the amount of the child maintenance I was ordered to pay.

**De jure**, I substantiate my action on the provisions of Articles 403 and 529 (C 44) of the Civil Code.

In support of my action I understand that the defendant's replies to the hearing will be taken into account, concerning certificate No. \_\_\_\_\_, dated \_\_\_\_\_, issued by \_\_\_\_\_ from \_\_\_\_\_, which shows net monthly income obtained by the undersigned in the past six months, [or concerning the copy of the birth certificate of my second child (or of the copy of the civil decision No. \_\_\_\_\_ dated \_\_\_\_\_ passed by the Trial Court \_\_\_\_\_ establishing that I am the father of the minor child \_\_\_\_\_, born on the date of \_\_\_\_\_ having been ordered to pay for the amount of ..... Lei, on a monthly basis, as child maintenance, etc.].

I lodge my action in two copies, with which I enclose the above-mentioned documents as well as a copy of the civil decision establishing the child maintenance, the decrease of which I hereby apply.

Date of submission \_\_\_\_\_

Signature \_\_\_\_\_

TO THE PRESIDENT OF THE TRIAL COURT

## **Chapter 12 - Enforcement of maintenance decisions under the 2007 Convention and the 2009 Regulation**

### **I. Overview**

802. This Chapter differs from the other chapters in the Handbook because it does not deal with direct requests or incoming applications via the national Central Authority received by competent authorities under the Convention or Regulation. Instead this Chapter covers the steps that are taken under the internal law by the requested State (in this case, Romania) after a request from another State – to recognise an existing decision, modify the decision or establish a new decision – has been received and processed, and enforcement of the decision is requested by the applicant.

803. The authorities in Romania responsible for enforcement matters under the Convention and Regulation are the bailiff and the court of first instance in whose jurisdiction the enforcement will be undertaken (the court of first instance of the debtor's domicile or of the place of the location of the debtor's assets).

804. For the application of the Regulation, Romania has informed the European Commission that, pursuant to Article 71(1) *f*) referring to the names and contact details of authorities with competence in the field of enforcement, within the meaning of Article 21 of the Regulation, the competent enforcement authority is the court of first instance in whose jurisdiction the enforcement will be undertaken (the court of first instance of the debtor's domicile or of the place of the location of the debtor's assets). It should be noted that Article 21 of the Regulation refers to the competent enforcement authority deciding on certain matters (for instance, objection to enforcement, lapse, postponement, suspension or limitation, etc.) which may occur during the enforcement procedure. The list of the names and contact details of the courts of first instance and their territorial competencies (including the capital city of Bucharest) has been published on the website of the European Judicial Atlas in Civil Matters and can be seen under the "Serving Documents" section, "Recipient Authorities" or "Taking Evidence" sections, then under "Requested Courts". Certain information on the website of the European Judicial Atlas in Civil Matters will also be added to the European e-Justice Portal, < <https://e-justice.europa.eu/home.do> >.

### **A. Introduction to enforcement of a decision under the Convention or the Regulation**

805. Enforcement of a maintenance decision will take place once there is a valid, enforceable decision. The decision must have been made, recognised or declared enforceable 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.

806. 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. In some States, there will always be an attempt to encourage voluntary payment under the maintenance decision, either before enforcement is initiated or as part of the ongoing enforcement process.<sup>382</sup> The goal of all measures taken in the requested State should always be to promptly and effectively establish ongoing, regular maintenance payments and compliance with the decision.

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.

807. 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.

808. Under both the Convention and the Regulation the enforcement of maintenance decisions is almost entirely a matter for the domestic law of the State where enforcement will take place, notwithstanding certain general provisions related to enforcement found in both instruments (however, see also Chapter 8 of this Handbook for information on the more specific provisions with respect to enforcement of decisions under

<sup>382</sup> In Romania generally, the debtor would be expected to pay the obligation for the duration of the enforcement procedure; that is, from the moment when the debtor was served with the order for payment and the time limit of the order had expired, until the moment of the real estate adjudication. The debtor can also agree to the forced execution to be made only with respect to one asset. In Art. 7 d) of Law No. 188/2000 concerning bailiffs, it is within the bailiff's remit to amicably recover any claims. In the Civil Procedure Code, the bailiff's active role is mentioned at Art. 627. In the Civil Procedure Code it is also mentioned that the bailiff has the possibility to take note of parties' misunderstandings in certain situations. For instance, in the movable property forced execution procedure during seizure, a third party can recover the assets of the debtor, if this recovery obligation has reached maturity. The creditor and the debtor have the possibility to agree that these assets are entrusted to the debtor. As for the amicable sale of the assets, the bailiff, with the creditor's agreement, may allow the debtor to himself or herself dispose of the seized assets. As for the direct sale of the assets, the bailiff may also proceed, with the agreement of both parties, to disposal of the assets followed by direct sale to the buyer. As for the release and distribution of the amounts realized by the forced execution, the bailiff may establish a time limit for conciliation. If there has been an agreement, the bailiff will order the allocation of amounts according to this agreement, which will be registered in a report. If a claim lodged by the creditor contains the debtor's obligation to periodically pay an amount of money, and the assets / revenues remaining in the debtor's patrimony do not ensure the payment of these instalments, the amount allocated to the creditor will be determined by the parties' agreement and, in the absence of an agreement, the bailiff will ascertain this by way of a report. In this latter case, an interested party has the possibility of bringing the matter before the enforcement court in whose jurisdiction the enforcement is made, in order to determine the amount allocated to the creditor.

the Regulation procedures).

809. Competent authorities responsible for enforcement of decisions under the Convention or Regulation will firstly have to ascertain which instrument the decision falls under in order to enforce the decision appropriately under either instrument (see Chapter 3, Part I for a discussion of scope and application issues of both the Convention and the Regulation).

810. The Convention contains certain key general provisions regarding enforcement. Enforcement must be “prompt” (Art. 32(2)) and take place without further request from the applicant (Art. 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 to each enforcing State to implement in domestic law and utilise any or all of the enforcement mechanisms listed.<sup>383</sup> Not all the listed enforcement measures will be available under the domestic law of a Contracting State.<sup>384</sup>

811. The Regulation does not have general provisions on enforcement parallel to the Convention provisions described in the previous paragraph, but only specifies that enforcement should be governed by the law of the Member State of enforcement, and that enforcement of decisions under the Regulation should be under the same conditions as domestic decisions (Art. 41(1)). Chapter IV of the Regulation contains certain procedures, time limits and document requirements necessary for enforcement of decisions under the Regulation (described in Chapter 8). Article 20 under Section 1 and Article 28 under Section 2 in particular set out document requirements for enforcement of decisions under Chapter IV. It should be noted that under Section 1 of Chapter IV of the Regulation no enforcement procedure is required and a claimant need only provide the documents set out in Article 20 to the competent enforcement authority in the requested State in order to directly enforce a decision.

812. Both Article 6(2) *f*) of the Convention and Article 51(2) *f*) of the Regulation also require States to facilitate the expeditious transmission of payments to creditors. Under Article 35 of the Convention, Contracting States must promote cost-effective and efficient methods of transferring funds, and to reduce barriers to the cross-border transfer of maintenance funds.<sup>385</sup>

<sup>383</sup> See the Explanatory Report of the Convention, para. 582.

<sup>384</sup> Under the domestic law of Romania for recovery of civil claims such as maintenance obligations, the enforcement modality is indirect enforcement, in the form of attachment of the sum of money or seizure (with sale) of real estate or movable property. Even if there is not a certain decision in which these measures are ordered (e.g. if there is an order having different objects, such as sums of money, movable or real estate property), in practice, as concerns the recovery of civil maintenance claims, indirect enforcement is most frequently effected by attachment of the amount owed. This can be followed, in the absence of the amount due, by forced execution with respect to movable or real estate property.

<sup>385</sup> See the Explanatory Report of the Convention, para. 585.

## **II. Enforcement under the 2007 Convention**

### **A. *General enforcement processes***

813. 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.



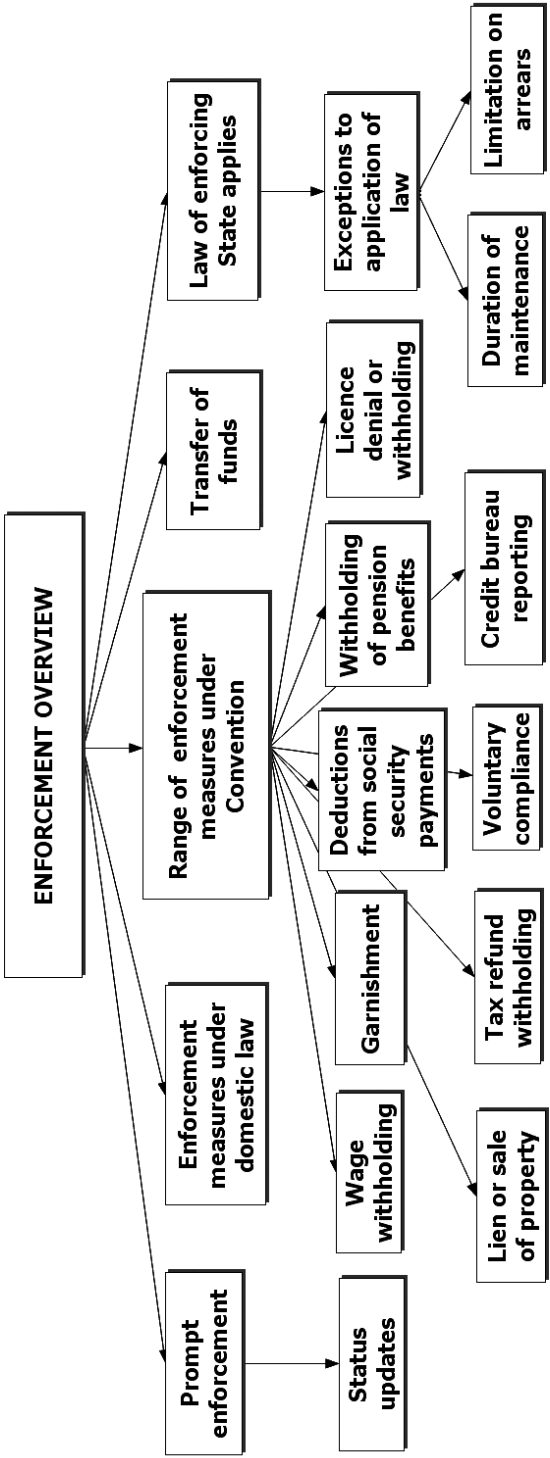


Figure 13: Overview of Convention provisions related to enforcement

### **B. Prompt enforcement**

814. 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>386</sup>

815. 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. Competent enforcement authorities will likely need to collaborate with their national Central Authority in order that it may fulfil its reporting obligations under the Convention as to the progress of a given case.

### **C. Enforcement measures**

816. All Contracting States must have in place effective measures<sup>387</sup> to enforce maintenance decisions under the Convention, 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.<sup>388</sup>

817. This Section details the range of possible enforcement measures described by the Convention, with indications where these enforcement measures may be available in Romania. Please see Section IV, below, for further information with respect to enforcement in Romania.

818. 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.<sup>389</sup> 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.<sup>390</sup>

819. 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.<sup>391</sup>

<sup>386</sup> See the Explanatory Report of the Convention, para. 572.

<sup>387</sup> See the Explanatory Report of the Convention, para. 582 for a discussion of this term.

<sup>388</sup> The Country Profile of each Contracting State will indicate the enforcement measures available in that State.

<sup>389</sup> See *supra*, note 382.

<sup>390</sup> *Ibid.*

<sup>391</sup> Under domestic law in Romania enforcement is firstly submitted for judicial verification to the enforcement court (the court of first instance in whose jurisdiction is the office of

820. 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**

821. 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

the bailiff performing enforcement). The enforcement court must settle the application for a declaration of enforceability, judge any objections to enforcement, as well as any other incidents occurring during enforcement (e.g., lapse of enforcement; postponement, suspension or restraint of enforcement; reinstatement of limitation period; restoration of the previous situation, etc.). Thus, below is presented, in summary, the bailiff's referral procedure by the creditor (application for enforcement) and the procedure to bring the matter before the enforcement court by the bailiff (the application for certification of enforceability and the authorization for enforcement). If the debtor does not voluntarily perform his or her obligation, this is accomplished by enforcement, which begins at the same time as the referral of the enforcement body (the bailiff). Enforcement cannot be made unless the claim is certain, liquid and due. Judgments are enforced by the bailiff from the jurisdiction of the court of appeal where the debtor's real estate or domicile / registered office is located. Enforcement can be performed only according to a judgment or to another document affirming executory title (and they must be final judgments). Enforcement can begin only at the creditor's request. The application for enforcement is lodged at the competent bailiff's office. With the request, the enforcement order will be attached in original and proof of having paid stamp duties, as well as, as applicable, documents stipulated by law. As soon as he or she receives the application for enforcement, the bailiff will order, by interlocutory decision, the registration of the application and the opening of the enforcement file or, as applicable, will refuse the initiation of the enforcement procedure. The creditor's application for the issuing of a declaration of enforceability is settled by the competent court, in camera, by an interlocutory decision without summoning the parties. With the application for the certification of enforceability, an authorization for enforcement will also be requested, if both applications fall within the competence of the same court. The enforceable judgments of courts and authentic documents (but not a judgment given in first instance with provisional enforcement), are submitted for proceedings on the issue of a certification of enforceability. First instance courts are competent to issue a certification of enforceability for enforceable judgments; for documents authenticated by a notary public, it is the court of first instance in whose jurisdiction the notary public carries out his or her activity. The bailiff will require the certification of enforceability to be ordered by the enforcement court, to which he or she will have forwarded the creditor's application, the enforcement order, the interlocutory decision and proof of payment of the stamp duty. The application for a certification of enforceability is settled by interlocutory decision given in camera, without summoning the parties. If the application for enforcement has been approved, the bailiff will serve the debtor with a copy of the interlocutory decision together with a copy of the enforcement order and an order for payment. The debtor will be requested to fulfil his obligation, as soon as or within the time limit granted by law, indicating that, if not, enforcement will ensue. It is not necessary to serve the enforcement order and the order for payment if the debtor did not pay before the deadline or if the enforcement is made according to orders and interlocutory decisions rendered by the court and declared enforceable by law. Service of procedural documents in the course of enforcement can be made by the bailiff either personally, or through his or her procedural agent. Proof of service through procedural agent has the same evidentiary power as proof of service performed by the bailiff. Effective enforcement can take place only after the expiration of the time limit mentioned in the order for payment or of the time limit stipulated by the interlocutory decision by which enforcement was approved. For all the acts performed during enforcement, the bailiff is obliged to make reports. Enforcement is performed, as applicable, at the place where the debtor receives income or at the place where other income or assets are submitted for enforcement follow-up. If the creditor, by fault, has let six months pass without accomplishing an act necessary for enforcement which has been requested in writing by the bailiff, any enforcement ceases to be valid in law, irrespective of its object.

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.<sup>392</sup>

## b) Garnishment

822. **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:

- tax refunds
- lump sum payments
- rent payments or payments for services
- bank accounts
- commissions.<sup>393</sup>

<sup>392</sup> Under domestic law in Romania forms of indirect enforcement are attachment of sums of money or seizure (with sale) of real estate and movable property. With respect to attachment, sums of money, securities or other intangible movable property, bank accounts (current balance and future revenue) are submitted to enforcement by attachment. Attachment is made at the creditor's request by a bailiff. Attachment is instituted without an injunction or order for payment, but rather is made with a preliminary decision for an authorization for enforcement, by a notice in which the enforcement order will be mentioned and communicated to the seized third party together with a certified copy of the decision for an authorization of enforcement. The debtor will be notified and receive a copy of the notice of the institution of the attachment, to which there will also be attached certified copies of the interlocutory decision for a declaration of enforceability and the enforcement order, if the latter have not yet been served. In the notice for the institution of the attachment, the seized third party (the garnishee) will be instructed as to the prohibition to pay the sums of money in question to the debtor. On the date of service of notice to the garnishee for the institution of the attachment, all the sums of money and assets seized are preserved. In the case of amounts in the form of incomes and cash in foreign currency, credit institutions are authorised to perform the conversion into Romanian *Lei* of the amounts in foreign currency, without the consent of the account holder, at the rate of exchange set by the National Bank of Romania for that day. Attachment continues when the debtor changes jobs or retires. In these cases, the garnishee will send the documents by which the attachment was instituted to the company where the debtor's new job is located or to the competent social security body which, from the date of receipt of these documents, becomes a garnishee. The garnishee is obliged to set aside the sums of money in question and to pay the amount withheld directly to the creditor, where amounts are owed as a maintenance obligation. At the creditor's request, the amount will be sent to a specified domicile, with sending costs borne by the debtor. If the garnishee does not accomplish the obligation to perform the attachment, the creditor or the bailiff can bring the matter before the enforcement court with a view to validating the attachment.

<sup>393</sup> *Ibid.*

**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.

### c) Deduction from social security payments

823. In some States, the competent authority will be able to enforce the maintenance decision by having the maintenance deducted from any social security or support payments from the government that the debtor is entitled to receive.<sup>394</sup>

### d) Lien or forced sale of property

824. 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.

825. A lien may be filed against real property (e.g., land, a house or building) or personal property (e.g., cars, boats, trailers and similar possessions).<sup>395</sup>

<sup>394</sup> *Ibid.*

<sup>395</sup> Under domestic law in Romania the procedures for coercive enforcement against **movable property** are as follows. The debtor's movable property excluded from coercive enforcement proceedings are those items which are for private use, items indispensable for persons in need, food and fuel necessary for the debtor and his or her family for three months, assets necessary for the exercise of the debtor's occupation or profession, etc. Wages and pensions of the debtor can be pursued: a) up to half of the monthly net income for amounts owed as maintenance obligations; and b) up to a third of the monthly net income for any other debts. If there are several coercive enforcement proceedings upon the same amount, they cannot exceed half of the debtor's monthly net income, irrespective of the nature of the claim. For regular employment income of the debtor which is at a level below the national minimum net wage, only half of the amount can be seized. Incapacity benefits, compensation for termination of an employment contract and amounts for the unemployed person can be pursued only for the amounts owed as a maintenance obligation, with the amount pursued limited to half of these incomes. The procedure for coercive enforcement against movable property has two stages: the seizure of movable property and the liquidation of the seized assets. **Stage I.** If the debtor does not pay the owed amount, the bailiff will proceed to seizure of the debtor's movable property, with a view to its liquidation, even if it is held by a third party. With respect to procedures for a vehicle which is owned by the debtor, the bailiff can order its seizure. From the moment the property is seized, the debtor cannot use the property. A third party will be able to have assets of the debtor released during seizure if his own recovery obligation has reached maturity. The debtor will be able to block the seizure or will be able to have the assets released if he or she pays the claim, inclusive of accessory costs and enforcement expenses, or makes a deposit into a special trust account. **Stage II.** If after the seizure application the amount owed and all the accessory costs and enforcement expenses have not been paid, the bailiff will proceed to liquidation of the assets seized by sale at public auction, direct sale or by other modalities permitted

### e) Tax refund withholding

826. In some States, there is a process for the government to refund to taxpayers any excess tax paid or withheld. The criteria for the refund will vary depending upon the State. Many States allow the maintenance

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by law. The bailiff, with the creditor's agreement, can allow the debtor himself to proceed to the liquidation of the seized assets. The bailiff can also proceed, with the parties' agreement, to the liquidation of the assets followed-up by direct sale to the buyer. In the absence of the parties' agreement or if the direct or amicable sale is not realized, the bailiff will proceed to sale of the assets by public auction. The sale by auction will be made at the place where the seized assets are or at another place. The successful buyer is obliged to immediately deposit the whole price. The auction will be closed as soon as amounts obtained cover all the claims as well as all enforcement costs. Under the domestic law of Romania, coercive enforcement proceedings against **real estate property** are as follows. In the case of executory titles whose inclusive value does not exceed 5.000 *Lei*, the procedure on the debtor's real estate property can be made only if the debtor does not have other assets which may be pursued or possesses assets which cannot be liquidated. The request for coercive enforcement procedures, accompanied by the enforcement order, with a land registry record of the real estate property and with confirmation of paid stamp duties, will be forwarded to the bailiff in whose area the real estate property is located. After registration of the request, the bailiff will immediately ask the enforcement court in whose jurisdiction the real estate is located for approval of coercive enforcement procedures. The court will approve the request by interlocutory decision. The interlocutory decision for an enforceability certificate will be served in certified copy by the bailiff to the debtor and any third owner, accompanied by the enforcement order and the order for payment. Co-owners of real estate property who possess an undivided share have the right to ask that the entire joint property is offered for sale. After having received the interlocutory decision approving forced execution on the property, the debtor can ask the enforcement court to allow payment of the debt to be made from the net incomes of his buildings (even if they are not the object of a coercive enforcement procedure) or from other incomes, for six months. If the debtor's application is admitted, the court will order the suspension of the coercive enforcement upon real estate. The buildings subject to the coercive enforcement procedure are liquidated by way of amicable, direct or forced sale. **Formalities prior to the sale by auction begin after the** service of the interlocutory decision approving the enforcement, in order to identify and assess the property in question; the bailiff will go to the location of the property and will conclude a situation report. The bailiff will appoint a seizure administrator who will ensure the administration of the property. If the debtor does not pay his debt, the bailiff will begin the forced sale procedure. After the payment of the price according to the auction report, the bailiff will draw up the document of sale and title. By the award of the property, the successful bidder becomes the owner. The money earned by the forced sale will be released to the creditor in order to fulfil his claim, and any remaining amount will be given to the debtor. If the coercive enforcement was begun by several creditors the bailiff will distribute the amount according to the following order of preference: a) trial costs; b) funeral expenses; c) wages, pensions, aid for the maintenance and care of persons in need, etc.; **d) family maintenance obligations, allowances, etc.;** e) taxes, fees, contributions and other sums owed to the State; f) loans granted by the State; g) indemnities; h) bank loans; i) fines to State, etc. In the case of claims which hold the same order of preference, the amount realized is distributed between creditors in proportion to the claim of each. If there are several creditors, the amount resulting from the sale is distributed to them according to the order of preference mentioned above. In the event that one of the claims lodged by the creditors contains the debtor's obligation to periodically pay an amount of money, and the assets or incomes remain in the debtor's patrimony after enforcement and do not ensure the payment of the owed instalments, the amount allocated to the creditor will be established by the parties' agreement, and in the absence of an agreement, the bailiff will ascertain this by a report.

enforcement authorities to intercept any refunds payable to a debtor.<sup>396</sup>

#### **f) Withholding or attachment of pension benefits**

827. In some States, the pension benefits or payments that a debtor is entitled to may be attached and used to pay outstanding maintenance.<sup>397</sup>

#### **g) Credit bureau reporting**

828. 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.<sup>398</sup>

#### **h) Licence denial, suspension or revocation**

829. 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 domestic law. In some States this is also known as licence withholding.<sup>399</sup>

In this latter case, the interested party will be able to bring the matter before the enforcement court in whose jurisdiction the enforcement is made in order to establish the amount to be allocated to the creditor. If the parties do not agree, the enforcement court will establish the amount the creditor will receive from the amounts realized by coercive enforcement. After the enforcement orders are submitted, the bailiff will draw up the plan for the distribution of the amounts, according to above-mentioned order of preference. The distribution plan will be served to the debtor and creditors. If by the time limit established for conciliation the debtor or creditors who raised objections drop these objections or reach an agreement on the manner of distribution, the bailiff will order distribution of the amounts according to this agreement, which will be registered in a report. If they do not reach an agreement, and those who raised an objection insist, the bailiff will conclude a report in which he will note all the parties' objections. All the objections raised against the distribution plan are judged by the enforcement court. Concerning the **payment of the amount resulting from the** coercive enforcement for the benefit of a creditor whom is owed a periodic claim, the payment of instalments shall be assured by either agreement between the parties or by the enforcement court. Documents attesting to claims which have been entirely paid will be given to the creditors, with notation of the total extinction of the debt, and the debtor will receive a certificate ascertaining the full extinction of those claims. After the fulfilment of claims, the bailiff, by interlocutory decision, asserts the termination of the coercive enforcement and orders the closing of the file.

<sup>396</sup> See *supra*, note 392.

<sup>397</sup> *Ibid.*

<sup>398</sup> In Romania arrears with respect to the maintenance obligation are not reported to the Credit Bureau (only arrears with respect to the payment of bank loans, lease agreements or insurance companies are reported).

<sup>399</sup> Under the domestic law of Romania cancellation, withdrawal or revocation of a permit (driving, hunting, etc.) or a licence to exercise a profession (medical doctor, lawyer, accountant, etc.) cannot be ordered for the non-fulfilment of a maintenance obligation. Regarding the coercive enforcement procedure with respect to a vehicle as an item of the debtor's property, the bailiff can order only the seizure of this asset, with a citation to this measure on the

**i) Mediation, conciliation or processes to encourage voluntary compliance**

830. 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.<sup>400</sup>

**j) Other measures available under domestic law**

831. 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<sup>401</sup>

registration certificate and identity card of that vehicle. If the preservation of the vehicle and documents cannot be effected, a report will be transmitted to the traffic police, which will stop the vehicle in question, irrespective of its location. The police will be able to stop the seized vehicle and proceed to take the registration certificate and identity card, informing the vehicle driver that the asset is seized and that the driver must present him or herself within a reasonable period of time before the bailiff. This procedure must be registered by the police officer in a report. The bailiff may also apply the seizure measure to a vehicle based on data obtained from the local public authority which issues driving licences and vehicle registration, if the debtor is the registered owner of that asset.

<sup>400</sup> See *supra*, note 382.

<sup>401</sup> Under domestic law in Romania another enforcement measure set out by the Civil Procedure Code concerns coercive enforcement procedures against general real estate incomes. Present and future real estate incomes, the debtor's property or property upon which there is a right of usufruct, as well as incomes from a tenant or lodger which the debtor has received from the leased or rented real estate, can be pursued. The request for coercive enforcement on the property should be submitted to the enforcement court in whose jurisdiction the real estate incomes are located. After the registration of the request, the bailiff will immediately ask the court for approval. After approval, the bailiff will appoint a seizure administrator for the administration of the real estate incomes. For information with respect to lottery winnings, payments made by insurance companies or payments received after trial, see *supra*, note 392. The Criminal Code (Law No. 286/2009, entering into force on 01.02.2014) stipulates in its special Part, at Art. 378, the offence of **abandonment** of family. **The offence of family abandonment** (which is punished by imprisonment from six months to three years or by a fine) **is established if the** person who owes the legal maintenance obligation does not fulfil, in bad faith, the maintenance obligation stipulated by law or does not pay, in bad faith, the support established by the court for three months. Criminal proceedings are initiated by the complaint of the prejudiced person, but the action is not pursued if



### III. Enforcement under the 2009 Regulation (Art. 41)

832. As noted above, the Regulation only contains one general provision regarding enforcement: Article 41. Article 41(1) stipulates that the procedure for the enforcement of decisions given in another Member State will be governed by the law of the Member State of enforcement.<sup>402</sup> It further provides that there should be non-discrimination in the enforcement of such a decision, such that the enforceable foreign decision “shall be enforced [...] under the same conditions as a decision given in that Member State of enforcement”.

833. Article 41(2) provides that a party seeking enforcement of a decision given in another Member State will not be required to have a postal address or an authorised representative in the Member State of enforcement.

834. As enforcement under the Regulation must proceed according to the law of the Member State of Enforcement, any or all of the enforcement techniques mentioned above, under Section II.C., above, with the respect to the Convention, may also be appropriate under the Regulation, if available under national law. In Member States of the European Union, there also may be a number of European instruments which may be relevant to the enforcement of maintenance decisions.<sup>403</sup>

835. Please also see Chapter 8 for information on provisions of Chapter IV of the Regulation relating to enforcement of foreign decisions which are to be recognised and enforced under the Regulation procedures.

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the defendant fulfils his obligations before the end of the criminal prosecution. If, before a definitive conviction decision, the defendant has fulfilled his obligations, the court will order, as applicable, the postponement of the penalty or the suspension of the enforcement of the penalty under supervision. Under the domestic law of Romania the cancellation, withdrawal or revocation of a passport or a prohibition to leave the territory, etc. cannot be ordered for the non-payment of a maintenance obligation. However, although rare in practice, European arrest warrants (pursuant to framework Decision 2002/584/JAI 13.06.2002) can be issued, depending on the legal basis, or, as applicable, requests for extradition can be transmitted for persons escaping criminal prosecution, judgment or enforcement of penalties in the event that the offence of family abandonment has been committed. The defendant's refusal to work does not exonerate him from the maintenance obligation, and upon establishment of the basis for calculation of the maintenance obligation, the criterion of the minimum income with respect to the national economy also applies. Romanian case law has established that, where the debtor's employment contract has been terminated (yet he possesses full capacity to work), the request for termination of the maintenance payment for the period in which the debtor does not have income will be rejected, if the debtor has not demonstrated that he or she had addressed local government authorities in order to find another job.

<sup>402</sup> See *supra*, note 262.

<sup>403</sup> For instance, as mentioned in Chapter 8, the *Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure* may be relevant in European maintenance cases. Additionally, at the time of drafting of this Handbook, there was a Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (the proposal aims at enabling creditors to obtain account preservation orders on the basis of the same conditions, irrespective of the country where the competent court is located, as well as allowing creditors to obtain information on the whereabouts of their debtor's bank accounts).

#### **IV. Further information on enforcement procedures in Romania**

836. For enforcement measures related to the attachment of monetary amounts and the forced sale of movable and real estate properties, see also *supra*, notes 272-273, 323, 382, 384, 392, 395 and 401.

837. Additional general information related to the recovery of maintenance claims can be found in the Civil Code (Law No. 287/2009). A maintenance obligation has a divisible character. Thus, according to Article 522, "Subsidiary Obligation", if the maintenance debtor does not have sufficient means to cover the needs of the creditor, then the guardianship court may compel other persons receiving a support obligation to supplement such support in an order established under Art. 519: a) spouses and former spouses shall owe support to each other with priority over other persons; b) descendants shall be compelled to provide support before ascendants, and if there are several descendants or ascendants, those with the closest degree of kinship shall have priority; c) siblings shall owe support to each other after their parents, but before their grandparents. Under Article 523 of the Civil Code, "Divisibility of Support," when the debtor cannot provide support to all those entitled to it, the guardianship court, considering each person's needs, may rule either that such support be paid only to one creditor, or that the support be divided among several or all creditors. In the latter case, the court shall also rule on the manner in which the support shall be divided among the persons receiving it.

838. According to Article 530, "Execution Modalities," from the Civil Code, a support obligation shall be executed in kind, by ensuring the necessary living means and, if applicable, the education, schooling and professional training expenses. If the support obligation is not executed willingly in kind, the guardianship court shall rule that such obligation be executed by the payment of a support amount established in cash. The maintenance support may be established in the form of a fixed amount or as a percentage of the net monthly income of the debtor. According to Article 533, "Payment of Maintenance Support," maintenance support shall be paid in periodic sums, according to terms agreed by the parties or, in absence of an agreement, according to terms established by court order. Even if the creditor dies within the period related to a periodic payment, the support shall be owed in its entirety for such a period.

839. The parties may also agree or, if there are substantiated reasons given, the guardianship court may rule that the support be given in advance by payment of a lump sum to cover the support needs of the creditor for a longer period or for the entire period the support is owed, to the extent that the debtor has the necessary means to cover such an obligation.

840. From the principle of the divisibility of the maintenance obligation in the passive manner, the law stipulates the following: in cases of emergency, a parent entitled to support can initiate a legal action against any of his or her children, and the child who has paid the support may subsequently seek a remedy from the other children for contributions from each of them (Art. 521); the heirs of the debtor of support to a minor or those who

provided support to a minor without having such a legal obligation shall be liable to continue the support to that minor (Art. 518).

841. The parents' maintenance obligation towards their minor children is an obligation *in solidum*, such that the child is entitled to ask the whole maintenance amount from each of the parents, according to the principle of equality between the mother and father, with the parent obliged to pay the whole maintenance subsequently seeking contribution from the other parent.

842. Articles 3 and 123 of Law 85/2006 concerning insolvency proceedings provide that the debtor's wealth is the totality of his or her assets and patrimonial rights, inclusive of those acquired during the insolvency proceedings, which can be made the object of enforcement under conditions stipulated by the Civil Procedure Code. The debtor is a natural or legal person under private law, who is in a state of insolvency. A creditor entitled to solicit the initiation of insolvency proceedings is a creditor whose claim against the debtor's patrimony is certain, liquid and due for payment for more than 90 days.

843. In cases of bankruptcy, claims are paid in the following order: 1) fees, stamps or any other expenses relating to the legal procedure; 2) claims resulting from the work report; 3) claims in the form of credits, with attendant interest and expenses; 4) budgetary claims; 5) claims of amounts owed by the debtor to third persons due to maintenance obligations, minor bonuses or payment of periodic sums for ensuring means of subsistence; 6) claims of amounts established for the debtor and his or her family's maintenance; 7) claims in the form of bank credits, resulting from product deliveries, performance of services or other works, as well as from rents; 8) other unsecured claims; and, 9) claims granted to the legal person responsible for the payment by an associate or shareholder and claims resulting from documents free of charge.

844. Other provisions relating to enforcement procedures in the Civil Procedure Code concern lapse (Arts 696-698), postponement, suspension, limitation and termination of enforcement (Arts 699 – 704), prescription (Arts 705-710), objection to enforcement (Arts 711 - 719) and restitution of enforcement (Arts 722-725).

### **Lapse of enforcement (Arts 696 – 698)**

845. If the creditor, by his or her own fault, has let pass six months without accomplishing an act necessary for enforcement, and has received a request, in writing, from the bailiff, any enforcement lapses by right, irrespective of its object. In cases of suspension of enforcement, the time limit in relation to lapse flows from the date of the suspension. The time limit is not suspended while enforcement is suspended at the creditor's request. The lapse is ascertained by the enforcement court by interlocutory decision, at the bailiff's or interested party's request. The lapse of enforcement leads to the dissolution of all enforcement acts, except those which led to the partial recovery of the claim. In case of lapse of enforcement, a new application for enforcement can be made within the prescription period.

After the approval of enforcement, the bailiff will serve the debtor with the court's interlocutory decision, as well as a new order for payment (including the outstanding claim).

### **Postponement, suspension, limitation and termination of enforcement (Arts 699 – 704)**

846. The bailiff can postpone enforcement if the notification procedure or the procedure for announcement or publication was not accomplished or if, by the established time limit, the enforcement cannot be performed due to the non-fulfilment by the creditor of obligations in relation to advance expenses. Postponement is ordered by the bailiff by interlocutory decision.

847. Enforcement is cancelled in cases where it is stipulated by law or has been ordered by the court. Following a request by the creditor, enforcement will be cancelled by the bailiff. For the period of the suspension of enforcement, the enforcement actions previously performed, enforcement measures ordered by the enforcement court or by the bailiff, including those of preservation of assets, incomes and bank accounts, will be maintained, except in cases which by law or by judgment it is otherwise ordered. After suspension, the bailiff, at the request of an interested party, will order continuation of enforcement, to the extent to which the enforcement actions were not dissolved by the court or did not cease by effect of law.

848. When the creditor pursues for enforcement several movable or real estate properties at the same time whose value is manifestly excessive in relation to the claim to be satisfied, the enforcement court, at the debtor's request and after summoning the creditor, can limit the enforcement actions to certain assets only. In this case, the court competent to settle such a request is the court where the enforcement was commenced on the debtor's assets which are sufficient to cover the claims of all creditors. If the request is admitted, the court will cancel enforcement on the other assets and, if the enforcement began in the jurisdiction of several enforcement courts, the debtor, based on the simple presentation of the interlocutory decision by which the limitation was approved, can ask these latter courts for suspension of the relevant enforcement actions. Until the settlement of these requests, enforcement is cancelled by right. The cancelled enforcement actions will resume only after the completion of the plan for the distribution of the amounts resulting from the performed enforcement.

849. Enforcement terminates if: the obligation stipulated in the outstanding claim has been fulfilled, and enforcement expenses have been paid, in addition to other amounts owed according to law; enforcement cannot be performed or continued due to the lack of assets or due to the impossibility of exploiting such assets; the creditor has renounced enforcement; the outstanding claim has been dissolved; or, enforcement has been cancelled. If enforcement has ceased because of lack of assets or of the impossibility of exploiting such assets, resumption of enforcement can be requested within the limitation period of the right to obtain enforcement. Resuming enforcement upon the same asset can also be requested.

**Prescription of the right to obtain enforcement (Arts 705-710)**

850. The right to obtain enforcement is prescribed by three years unless otherwise stipulated by law. With respect to securities issued in the context of real rights, the limitation period is 10 years. The limitation period begins from the date on which the right to obtain enforcement arose. With respect to judgments, the limitation period begins from the date that the judgment has become final. The right to obtain enforcement is extinguished at the end of the limitation period and any outstanding claim is no longer enforceable. In the case of judgments, if the right to obtain the obligation from the defendant is not subject to prescription or, as applicable, was not prescribed, the creditor can obtain a new outstanding claim through a new process, without being subject to *res judicata*.

851. The course of prescription is cancelled: when the suspension of enforcement is stipulated by law or has been established by the court; so long as the debtor does not have assets which may be pursued or exploited, or he or she evades the pursuit of his incomes and assets; and, in cases established by law for cancellation of the limitation period of the right to obtain the defendant's obligation (1. between spouses, for the duration of their marriage so long as they are not separated; 2. between parents or tutors, for the duration of the protection; 3. between an administrator and those whose assets are administered, so long as the administration has not ceased; 4. in the case of the person without capacity or with restricted capacity, so long as he has no legal representative or protector; 5. so long as the debtor deliberately hides from the creditor the existence of the debt or its eligibility; 6. for the duration of negotiations with a view to the amicable settlement of disputes between the parties, held in the last six months before the expiration of the limitation period, if the individual entitled to proceedings must or can use a certain procedure prior to litigation, but not more than three months from the beginning of the procedure; 8. if the holder of the right or the individual who infringed it is serving in the Romanian army while it is in a state of mobilization or war; 9. if the individual to whom the prescription is applied is hindered by *force majeure*, so long as this hindrance has not ceased (*force majeure*, when it is temporary, does not constitute a cause for the cancellation of prescription unless it has happened within the last six months before the expiration of the limitation period), etc.).

852. After the cessation of suspension, prescription resumes its course, with time elapsed before the suspension also taken into account. Prescription is not cancelled during the period in which enforcement is cancelled following a creditor's request.

853. Prescription is interrupted: on the date on which the debtor, before commencement of enforcement or during enforcement, completes a voluntary act for the enforcement of the obligation established in the outstanding claim or in the debt recognition; on the date on which the application for enforcement is lodged, accompanied by the outstanding claim; on the date on which a request is lodged for intervention within a forced execution process begun by other creditors; on the date on which, during enforcement, an enforcement act was accomplished; on the date on

which an application for resuming enforcement was lodged, etc.

854. After interruption, a new limitation period begins. Prescription is not interrupted if enforcement has been rejected, cancelled, renounced or has lapsed.

855. After the end of the limitation period, the creditor can ask for the reopening of the matter only if he or she was hindered in requesting enforcement due to substantive reasons. The request for reopening the limitation period is lodged at the competent enforcement court. The judgment of the request is made by summoning the parties, by judgment submitted only to appeal. If the request for reopening the limitation period is admitted, the creditor can submit an application for enforcement.

### **Objection to enforcement (Arts 711 - 719)**

856. Against enforcement, that is, interlocutory decisions given by the bailiff or any enforcement act, objections can be made by those with an interest in or prejudiced by the enforcement.

857. If enforcement is made pursuant to a judgment, the debtor will not be able to raise objections based on reasons of fact or law which he or she could have raised during first instance proceedings or upon appeal. If enforcement is made pursuant to an outstanding claim other than a judgment, reasons of fact or law concerning the substance of the right contained in the outstanding claim can also be invoked in the objection to enforcement, only if another remedy is not stipulated by law. A new objection cannot be made by the same party for reasons which existed on the date of the first objection.

858. Objections are lodged at the enforcement court. Objections concerning enforcement should be made within fifteen days from the date on which the interested party was informed of the enforcement act to which he or she objects, the interested party received the communication or, as applicable, the notification concerning the institution of attachment. If attachment is instituted upon periodic incomes, the time limit for objection by the debtor begins at the latest on the date on which the first garnishment on these incomes is performed by the seized third party.

859. A judgment given in relation to an objection can only be contested on appeal. Until the settlement of the objection, the competent court may suspend enforcement. The applicant must first post bail, calculated at the value of the object of the objection.

860. Upon the request for suspension, the court, in all cases, will adjudicate by interlocutory decision, before the main trial on the objection to enforcement. In urgent cases and if bail has been paid, the court can order the provisional suspension of enforcement until the settlement of the request for suspension. The interlocutory decision is not submitted to any remedy.

861. If the objection to enforcement is accepted, the court, as applicable, will rectify or suspend the contested enforcement act or will order the

suspension or termination of enforcement.

### **Restitution of enforcement (Arts 722-725)**

862. In all cases in which the outstanding claim or enforcement is dissolved, the interested party is entitled to the restitution of enforcement, by the restoration of the previous situation. If the court has dissolved the outstanding claim or enforcement at the request of an interested party, it will also order, in the same decision, the restoration of the situation before enforcement. The enforcement costs for the performed acts will be borne by the creditor.

## **V. Payments under the 2007 Convention and 2009 Regulation**

863. 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.<sup>404</sup>

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

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 or the Regulation. 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 or Regulation.

864. 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>405</sup>

<sup>404</sup> Under domestic law in Romania payment is made to the creditor's account either from the account of the seized third party (e.g., an employer), or from the bailiff's account. The Romanian Ministry of Justice, in its capacity as Central Authority appointed pursuant to Law No. 36/2012 in the application of the Convention and the Regulation, does not interfere with the procedures for enforcement or with the transfer of payments to the creditor.

<sup>405</sup> Under domestic law in Romania records of arrears are kept by the creditor. In Romania, the thresholds to which the debtor's income is protected are: a) up to half of monthly net income, for amounts owed as maintenance obligations; or b) up to one third of the monthly net income, for debts other than maintenance obligations. If several claims are upon the same amount, they cannot exceed half of the debtor's monthly net income, irrespective of the nature of the claims. Periodic income which is less than the minimum net salary based on Romanian national economic indices can be claimed only upon the part exceeding half of the set minimum amount. Also, according to Art. 529, "Amount of Maintenance," from the

865. 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.<sup>406</sup>

Civil Code, maintenance shall be owed in accordance with the need of the creditor and with the means of the debtor. When a parent owes support, such support shall be established up to a quarter of such parent's net monthly income for one child, up to a third for two children and up to half for three or more children. The amount of the support owed to the children, together with the maintenance owed to other persons, cannot exceed half of the net monthly income of the debtor.

<sup>406</sup> Under domestic law in Romania if there are amounts at issue in the form of income and cash in foreign currency, credit institutions are authorised to perform conversion of the foreign currency into *Lei* without the consent of the account holder, at the rate of exchange of the National Bank of Romania for that day. Regarding the costs of the bank transfer, according to the Civil Code (Law No. 287/2009) and Romanian doctrine, by employing mailing or banking services or any other means of expedition or transfer, the debtor will be exempt from going to the residence of the creditor to make a direct payment. Expenses incurred by such transfer shall thus be covered by the debtor, and shall not modify the amount of the debt. Maintenance amounts shall be transmitted to the residence of the recipient or in another manner agreed upon. The creditor is not only entitled to the amount due, but—within the enforcement procedure—also to the reimbursement of all procedural enforcement expenses. Mailing expenses retained by a third-party garnishee taken from the salary of the debtor which exceed the amount of the debt are defined as such enforcement procedural expenses, which are less than those incurred by the creditor going directly to the court headquarters or to the third-party garnishee. The Civil Code establishes in Art. 1494 and following that the place of payment is, in the case of pecuniary obligations, the creditor's domicile. If the payment is made by bank transfer, the payment date is the date upon which the money is deposited in the creditor's account. The payment costs will be borne by the debtor. As for enforcement costs (Art. 669 of the Civil Procedure Code), the party soliciting the accomplishment of an act in relation to enforcement is obliged to advance payment for necessary expenses. For acts or activities ordered *ex officio*, payment for costs will be advanced by the creditor. The expenses incurred by the performance of enforcement will be borne by the debtor. The debtor will also be obliged to bear any established enforcement costs paid by the creditor or, as applicable, those incurred after registration of the application for enforcement and until the date of fulfilment of the obligation established in the enforcement order, even if it is willingly fulfilled. Enforcement costs are: stamp duties necessary to begin enforcement; bailiff and lawyer fees in the enforcement phase; expert and interpreter fees; costs incurred by publicity of the enforcement procedure and of other enforcement acts; transport costs, etc. If the established amounts cannot be recovered from the debtor for lack of assets or for other reasons, they will be paid by the creditor, who will be able to recover them from the debtor when his or her financial circumstances allow, within the limitation period. Concerning the procedure for granting legal aid in the enforcement stage, the following comments can be made. According to Arts 13, 14, 16, 17, 18 and 20 of Law No. 36/2012, the following categories of creditors receive free legal aid, by way of the forms provided in and according to Arts 6 and 8<sup>1</sup> of the OUG No. 51/2008, for applications made through the Central Authority, under Art. 46 of the Regulation (EC) No. 4/2009, and Art. 15 of the 2007 Hague Convention: a) creditors of maintenance obligations who have not reached the age of 18 or who are under the age of 21 and are continuing their education; b) creditors of maintenance obligations who are vulnerable persons, as defined in Art. 3(f) of the 2007 Hague Convention. Debtors and other creditors of maintenance obligations receive legal aid under the conditions set out in OUG No. 51/2008, while observing the principle of continuity and equal treatment that they enjoy in their State of origin. After performing the preliminary check, the Ministry of Justice will send directly to the competent territorial bar the applications for enforcement received from abroad, together with the necessary supporting documents stipulated under Arts 56 and 57 of Regulation (EC) No. 4/2009, according to Annex No. VII thereto; Art. 10



866. The Country Profile will indicate what processes the State responsible for enforcement will use to send payments to the creditor, and the currency in which the payment will be sent.

## **VI. Other enforcement issues**

### **1. Challenges to enforcement**

867. 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.

868. This is supported by the provision in the Convention (Art. 32) that the law of the State “addressed” applies in enforcement matters<sup>407</sup> and the provision in the Regulation (Art. 41(1)) that the procedure for the enforcement of decisions is governed by the law of the Member State of enforcement.<sup>408</sup>

869. Under the Convention, there are specific exceptions to the general application of the principle that the law of the enforcing State applies. These are discussed below.

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of the 2007 Hague Convention, according to the model forms recommended by the Hague Conference on Private International Law, provided in Annexes C and D; as well as requests for specific measures concerning provisional / interim measures, made under: Art. 51(2)(i) of the Regulation (EC) No. 4/2009, according to the model in Annex No. V thereto, under 3.1.5.; Art. 6(2)(i) of the 2007 Hague Convention. Under Art. 8<sup>1</sup> of the OUG No. 51/2008, the dean of the bar will issue an urgent decision to designate, on behalf of the maintenance creditor (child or vulnerable adult) whose habitual residence is abroad, a mandatory lawyer *ex officio* who will complete and submit the application, institute court proceedings, represent and assist the creditor at the first instance, in ordinary and extraordinary means of judicial review, or in the initiation of measures for coercive enforcement, as appropriate. The lawyer designated requests the granting of legal aid in the form of payment of the fee for the judicial enforcement officer, and Art. 26 of the OUG No. 51/2008 is applicable. The court grants legal aid according to Art. 8<sup>1</sup> of the OUG No. 51/2008. The lawyer submits the request for an interim measure, together with the excerpt from the judgement that set up that measure and the decision by the dean, to the competent territorial enforcement officer or bailiff. Following the processing of applications and requests, and after obtaining the writ of execution, the designated lawyer will request the granting of legal aid in the form of payment of the fee for the enforcement officer or bailiff, and the provisions of Art. 26 of the OUG No. 51/2008 are applicable. The court will grant legal aid according to Art. 8<sup>1</sup> of the OUG No. 51/2008. The lawyer submits the request for coercive enforcement, together with the writ of execution and the decision by the dean of the bar, to the enforcement officer or bailiff.

<sup>407</sup> See the Explanatory Report of the Convention, para. 571.

<sup>408</sup> However, these provisions and the reference to domestic law is of course without prejudice to any overarching rules found in the Convention or Regulation which bear on the review, suspension, refusal, etc. of enforcement of a decision under either instrument. See Chapter 7 and 8 for a full discussion of these rules.

## 2. Convention (and Regulation): limitation on collection of arrears

870. Some States have limitations in their laws preventing the collection of arrears in cases where the arrears accrued outside a specific number of years (e.g., 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.<sup>409</sup>

871. Article 32(5) of the Convention 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.

872. 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.

873. It is important to remember that the limitation period for collection of arrears only affects the enforcement of arrears owed under the decision. The obligation to continue to pay any ongoing maintenance continues despite the restriction on collection of arrears.

874. Under the Regulation, as there is no reference to a special rule on law applicable to enforcement of arrears, this matter will be governed by the law of the Member State of enforcement.<sup>410</sup> The 2007 Hague Protocol on applicable law likewise does not regulate the issue of enforcement of arrears (see Chapter 5 for further information on the Protocol).<sup>411</sup>

<sup>409</sup> Under domestic law in Romania the right to obtain enforcement is prescribed by a limitation period of three years. The limitation period begins from the date on which the right to obtain enforcement takes effect. The limitation period for successive performances of maintenance obligations, such as periodic alimonies, is calculated for each performance and is also three years. The prescription period is cancelled: 1) in cases where the cancellation of the limitation period of the right to obtain the defendant's obligation are established; 2) if suspension of enforcement is stipulated by law or has been established by the court or by another competent judicial body; and, 3) as long as the debtor does not have assets, assets which could not be exploited, or he or she is hiding income or assets so as to avoid enforcement. Prescription is not suspended during the suspension of enforcement when the latter was requested by the creditor. Prescription is interrupted: 1) on the date on which the debtor accomplishes a voluntary act for the enforcement of the obligation or debt recognition, before the commencement of or during enforcement; 2) on the date on which the application for enforcement or intervention or for resuming enforcement is lodged; and, 3) on the date on which, during enforcement, an enforcement act is accomplished. After interruption, a new limitation period will begin. Prescription is not interrupted if enforcement was rejected, suspended, if it has lapsed or if the one who initiated enforcement has renounced the enforcement. After the end the limitation period, the creditor can ask for the reopening of this limitation period only if he or she was hindered from requesting enforcement on some reasonable grounds. The request for reopening the limitation period is lodged at the competent enforcement court. If the request is admitted, the creditor can then make an application for enforcement.

<sup>410</sup> *Ibid.*

<sup>411</sup> See the Protocol Explanatory Report, para. 172.

### 3. 2007 Convention: duration of maintenance obligation

875. The second specific legal rule applicable to enforcement under the Convention (the Regulation has no such rule<sup>412</sup>) is with respect to the duration of a maintenance obligation. Article 32(4) of the Convention provides that duration of the decision – that is – the period of time for which maintenance is payable, is determined by the law applicable in the State of origin.

876. 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 (e.g., 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 the maintenance obligation 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.

877. However, the duration of the maintenance obligation 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 applicable in the place where the decision was made.

878. 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 applicable in 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 maintenance obligation (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. For States Parties to the Convention, the Country Profile for the State of origin will include information about the duration of maintenance 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.

<sup>412</sup> For States bound by the 2007 Protocol, the Protocol's applicable law rules will determine the law applied to issues of duration of a maintenance obligation (see Chapter 5 for a discussion of the Protocol).

879. It is important to remember that the termination of maintenance for a child based on the duration of the maintenance obligation does not prevent the collection of any unpaid arrears of maintenance that may have accrued for that child. Those arrears can still be collected, notwithstanding the termination of the ongoing maintenance.

880. A Contracting State may make a declaration under the Convention that it will extend the application of the Convention to children who are 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 under the Convention. 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**

881. 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, Part I, Section II). 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.

882. 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 under the Convention and Regulation**

883. 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 (*e.g.*, 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.

884. Where the debtor disputes arrears that were part of the initial application for recognition and enforcement the enforcement authority should check to see whether the same issue was raised previously by the debtor. Under Article 23(8) of the Convention the respondent may challenge or appeal the recognition or recognition and enforcement if the respondent believes the debt was fulfilled or paid. If the arrears were previously disputed, 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.

885. 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.<sup>413</sup>

<sup>413</sup> Under domestic law in Romania records of arrears are kept by the creditor. They can be calculated by the bailiff by interlocutory decision (enforcement order). For example: if by the enforcement order there have been amounts granted without having established their quantum; in the event the value of the main obligation established in money is updated, depending on the inflation rate, calculated from the date on which the judgment became enforceable or, in the case of other enforcement orders, from the date on which the claim became due for payment up to the date of the effective payment of the obligation contained in any of these claims. According to Art. 531 Modification and Cessation of Maintenance Support from the Civil Code, the maintenance support established as a fixed amount shall be indexed as of right on a quarterly basis, depending on the inflation rate. For instance, the National Institute of Statistics published, on its web site, the following inflation index: 2000 – 45.7 %; 2001– 34.5 %; 2002 – 22.5 %; 2003 – 15.3 %; 2004 – 11.9 %; 2005 – 9 %; 2006 – 6.56 %; 2007 – 4.84 %; 2008 – 7.85 %; 2009 – 5.59 %; 2010 – 6.09 %; 2011 – 5.79 %. The calculation of arrears can also be established based on an expert accounting report, produced by an accounting office. If the parties do not agree upon the total of the arrears owed by the debtor, then the matter can be brought before the enforcement court, as an objection to enforcement. Special provisions referring to the calculation of amounts can be also found with respect to the release and distribution of the sums realized by enforcement, when the bailiff establishes a deadline for conciliation (in a preliminary procedure after selling the goods). The bailiff will take note of any agreement reached and will order the distribution of the amounts according to this agreement, which will be registered in a report. If one of the orders or other enforceable titles, such as contracts (stipulating that the debtor has a debt to pay to creditor) submitted by the creditor contains the debtor's obligation to periodically pay a sum of money, and the assets or incomes remaining in the debtor's patrimony do not ensure the payment of instalments, the sum allocated to the creditor will be established by the parties' agreement, and, in the absence of an agreement, the bailiff will ascertain this sum by a report. In this latter case, the interested party will bring the matter before the enforcement court in whose jurisdiction enforcement is made in order to establish the sum allocated to the creditor. Also within the stage of distribution of the sum **resulting from the pursued assets' sale**, if by the deadline established for conciliation the debtor or creditors who raised objections do not insist in maintaining the objections or an agreement is reached concerning the manner of distribution, the bailiff will take note of the agreement and will order the distribution of the sums according to this agreement, which will be registered in a report signed by the bailiff and by all persons present. If an agreement is not reached, and those who raised objections insist in maintaining them, the bailiff will conclude a report, signed by him and by persons present, in which he will register the objections. A party unsatisfied by the distribution plan can make an objection, which cancels by right the payment of the claim or of the contested part of the claim.

886. If the information is not received, and enforcement cannot proceed, a further request should be made. Although the requesting Central Authority has **three months** under the Convention and **90 days** under the Regulation 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 under the Convention and Regulation – currency exchange issues**

887. 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 many States, in order to enforce the decision, the maintenance amounts will have to be converted from the currency used in the decision to an equivalent amount in the currency of the enforcing State. The debtor will then be advised to pay the amount that has been converted into the local currency.

888. 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.<sup>414</sup>

889. 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.

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<sup>414</sup> See, *supra*, note 406 and *ibid*.

**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.

890. There is no simple resolution to this issue. Neither the Convention nor the Regulation addresses 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.

891. 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. The maintenance debt is not paid in full until the full amount owing in the currency set out in the maintenance decision has been paid. 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.

892. 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 to 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.

893. For information on cross-border adjustment of maintenance amounts based on a consideration of Purchasing Power Parity, please see Chapter 3, Part II, Section X.

## VII. Additional materials

### A. *Practical advice*

- In some cases, contacting the debtor at the earliest opportunity to obtain voluntary payments will be the most expeditious way of ensuring that payments start flowing to the creditor and the children. However, it is important to remember that all steps taken to enforce the decision, whether through voluntary compliance or enforcement measures, should be taken without delay and with the objective of ensuring that the payments are made on time and in accordance with 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, via the Central Authorities of the States involved, to the competent authority responsible for enforcement. This will assist that authority in its enforcement of the decision.
- The Convention's Status Report form provides a simple way for the competent authority in the State that is enforcing a 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.<sup>415</sup>

<sup>415</sup> In Romania at present, there is no a direct cooperation system with enforcement authorities of other States in which the debtor lives and earns income or holds assets or has bank accounts. Nevertheless, nothing hinders the creditor to begin enforcement in his or her State of origin in parallel to that of the State in which the debtor lives or earns income or holds assets / bank accounts. In Romania, judgments and other executory titles are enforced by the bailiff from the jurisdiction of the court of appeal, as follows: a) in the case of enforcement against real estate property, the bailiff from the jurisdiction of the court of appeal where the real estate is located; b) in the case of enforcement against movable property, the bailiff from the jurisdiction of the court of appeal in which the debtor's domicile is located. If assets, movable property or real estate are located in the jurisdictions of several courts of appeal, any of the bailiffs carrying out their activities under one of these courts is competent. If the movable property which is the object of enforcement was moved during the enforcement procedure, the territorially competent bailiff is that who began the enforcement procedure or the bailiff from the jurisdiction of the court of appeal to which the property was moved.



**B. Text of relevant Convention and Regulation Articles**

*2007 Convention:*

Article 6(2) e) and f)

Article 12(9)

Article 32

Article 33

Article 34

Article 35

*2009 Regulation:*

Articles 16-43

Article 51(2) e) and f)

Article 58(9)

**C. Related Chapters of the Handbook**

Chapter 3 – Matters of general application: 2007 Convention and 2009 Regulation

See Chapter 7 – 2007 Convention: Processing incoming applications through Central Authorities and direct requests for recognition or recognition and enforcement

See Chapter 8 – 2009 Regulation: Processing incoming applications through Central Authorities and direct requests for recognition or recognition and declaration of enforceability

See Chapter 9 – Processing incoming applications for enforcement of decisions made or recognised in the requested State under the 2007 Convention or the 2009 Regulation

**VIII. Frequently Asked Questions**

*What steps will / should a State under the Convention or Regulation take to enforce a decision?*

894. 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. The Regulation leaves this issue entirely to domestic law. 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 any attempts to encourage the debtor to voluntarily comply with the decision are successful.

*How will the payments be sent to the applicant?*

895. 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.<sup>416</sup> That authority will send them to the creditor directly or to the Central Authority or enforcement authority in the State where the creditor resides. The initiating application form (e.g., the Application for Recognition or 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?*

896. 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, or the debtor's income or assets.

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<sup>416</sup> See *supra*, note 404.