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# AVANT-PROJET DE PROTOCOL
# SUR LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES

## RAPPORT EXPLICATIF

*établi par Andrea Bonomi*

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# PRELIMINARY DRAFT PROTOCOL
# ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

## EXPLANATORY REPORT

*drawn up by Andrea Bonomi*

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## I. Introduction

1. The question of the law applicable to maintenance obligations was included from the start in the mandate of the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance. The 1999 Special Commission on Maintenance Obligations indeed recommended that "the Hague Conference should commence work on the elaboration of a new worldwide international instrument" which should "be comprehensive in nature".[1] On this basis, the Special Commission on General Affairs and Policy of May 2000 decided that "the drawing up of a new comprehensive convention on maintenance obligations, which would improve the existing Hague Conventions on this matter, and include rules on judicial and administrative co-operation" should have priority on the Conference's Agenda for future work. Now, of the existing Hague Conventions dealing with maintenance obligations, two concern determination of the applicable law: the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* (hereinafter, "the 1956 Convention") and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter, "the 1973 Convention").

2. During its first meeting in May 2003 and in conformity with its mandate, the Special Commission discussed the question of whether the new instrument should contain provisions on the law applicable by the authorities or courts that render maintenance decisions and, if so, what these provisions should be. The discussion revealed the existence of two opposing viewpoints. Whereas the majority of delegates from civil law jurisdictions preferred the inclusion of a (certain type of) system of applicable law, those from common law jurisdictions were in general against the proposal.[2] This lack of agreement can be easily explained if one considers that in the majority of common law countries, maintenance decisions are traditionally made on the basis of the law of the forum. This tendency was reinforced further by the introduction in a number of States of administrative systems for the recovery of maintenance, within the framework of which research into and application of foreign law are not easily carried out.

3. The majority of delegations favouring the inclusion of a general applicable law system considered that the current negotiations represented a unique opportunity to review the 1973 Convention and one which should not be missed. Although the 1973 Convention was generally quite satisfactory and should, it was felt, serve as the starting point for the elaboration of a new text, some of its solutions needed to be revised and modernised with the aim of rectifying any deficiencies so as to attract a larger number of States to ratify. In order to do so, it was felt the revision process should involve all States and not only those who are already Parties to the Conventions of 1973 and / or 1956.

4. The Special Commission decided to form a Working Group on applicable law (hereinafter, "WGAL") comprising experts from States Parties to the 1956 and 1973 Hague Conventions, as well as from other States. At the beginning, the WGAL's mandate was defined as follows: (1) examine whether the 1973 Convention needed to be revised and, if so, to what extent, (2) explore the possibilities for compromise between the different approaches to the applicable law, (3) examine the possibilities for compromise on a number of issues relating to the applicable law, such as limitations on the period of enforcement, autonomy of the parties in the context of spousal support, the right to maintenance, and the judicial representation of children. The author was appointed Chair of the WGAL. Originally comprising 10 members, the size of the WGAL was gradually increased over

[1] Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999, December 1999, para. 46.

[2] Canada, where the common law provinces and territories adopt a cascading approach, although more restrictive than that set down in the 1973 Hague Convention, was in favour of including a certain type of system of applicable law. In these common law jurisdictions, the applicable law is that of the State where the child is habitually resident and, if the child is not eligible for maintenance under that law, it is the law of the forum (*e.g.*, *The Inter-jurisdictional Support Orders Act* (Manitoba), Art. 12(1)). In Quebec, a civil law jurisdiction, the applicable law is successively the law of the domicile of the maintenance creditor, then that of the domicile of the debtor.

the years. Its current membership is as follows: Patricia Albuquerque Ferreira (China, Macao SAR), Nádia de Araújo (Brazil), Katja Lenzing and Miloš Hatapka (European Commission), Raquel Correia (Portugal), Gloria DeHart (IBA), Edouard de Leiris (France), Michèle Dubrocard (France), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Dorothea van Iterson (Netherlands), Sarah Khabirpour (Luxembourg), Åse Kristensen (Norway), Alberto Malatesta (Italy), David McClean (Commonwealth Secretariat), Tracy Morrow (Canada), Maria del Carmen Parra Rodriguez (Spain), Angelika Schlunck (Germany), Marta Zavadilová (Czech Republic), Robert Spector (United States of America), Lixiao Tian (China), Rolf Wagner (Germany). The Co-Reporters, Alegría Borrás and Jennifer Degeling, as well as the members of the Permanent Bureau, are *de facto* members of the WGAL.

5. In accordance with the mandate received, which was renewed and clarified during the meetings of the Special Commission of 2004, 2005 and 2006, and with the help of the responses received to a Questionnaire relating to the law applicable to maintenance obligations, drawn up by the WGAL and distributed in September 2004 (Prel. Doc. No 12), the WGAL drew up a number of concrete proposals which were then made the subject of a number of Reports drafted by the author as Chair of the Working Group (*cf.* Work. Doc. No 13 of 10 June 2004, as well as Prel. Docs. No 14 of March 2005, No 22 of June 2006 and No 27 of April 2007).

6. In its Report of March 2005 (Prel. Doc. No 14), after having determined that it was not possible to reach a compromise between the approaches of those States open to application of the foreign law and those that prefer the *lex fori*, the WGAL proposed not to include a set of general rules on the applicable law in the mandatory part of the Convention; in the opinion of the WGAL, this question would be more suitably dealt with in an optional part, or an *ad hoc* protocol. This Report also contained some indications as to the possible content of the optional rules on the applicable law.

7. These indications were further discussed and developed during the work of the Group at its successive meetings which then resulted in the drawing up of a draft optional instrument on the law applicable to maintenance obligations (hereinafter, "Working Draft"). An initial version of the Working Draft was annexed to the June 2006 Report of the WGAL (Prel. Doc. No 22) and discussed during the meeting of the Special Commission in June 2006. This Commission decided to convoke a meeting of the Special Commission in May 2007, for which the main subject would be the question of the applicable law. The second version of the Working Draft (Prel. Doc. No 24 of January 2007), which was commented on in the WGAL report of April 2007 (Prel. Doc. No 27), formed the basis for the work of the Special Commission of May 2007.

8. At its meeting in May 2007, the question of the applicable law was at the centre of the Special Commission's work. The Commission decided at the start that the rules relating to the applicable law would be formulated in a protocol, formally separate from the Convention. The Commission then held in-depth discussions on the provisions of the Working Draft presented by the WGAL (Prel. Doc. No 24); the main basis of this text was maintained in the preliminary draft Protocol, but after substantial modification. Finally, the Special Commission held an initial discussion on the general provisions and final clauses to be included in the preliminary draft, using as a basis the suggestions formulated by the Permanent Bureau (Prel. Doc. No 28 of May 2007), but without reaching any definitive conclusion.

9. This Explanatory Report concerns the preliminary draft Protocol on the law applicable to maintenance obligations, which resulted from the meeting of the Special Commission of May 2007 (Prel. Doc. No 30 of June 2007). It will analyse more particularly the provisions concerning the scope of application and connection rules (Arts 1 to 12). With regard to the general provisions and final clauses (Arts 13 to 27), observations made herein will be limited to a few concerning Article 19 only. The other provisions have not yet been discussed in depth by the Special Commission; they

essentially reproduce the suggestions contained in Prel. Doc. No 28 drawn up by the Permanent Bureau.

## II. Article-by-article analysis of the principal provisions

### Article 1 Scope

10. The first paragraph of this Article defines the substantive scope of the future instrument. According to this provision, any maintenance obligation arising from a family relationship, parentage, marriage or affinity falls under the scope of the Protocol.

11. This formulation corresponds to that adopted in Article 1 of the 1973 Convention. Contrary to that instrument (*cf.* Arts 13 and 14), the preliminary draft Protocol does not however allow for Contracting States to make reservations so as to exclude any particular kind of maintenance obligation from its scope.

12. The scope of the Protocol is set wider than the mandatory scope of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance; the Convention itself is restricted, according to Article 2(1) of the revised preliminary draft of the Convention, "to maintenance obligations arising from a parent-child relationship towards a child under the age of 21 [including claims for spousal support made in combination with claims for maintenance in respect of such a child] and, with the exception of Chapters II and III, to spousal support." This difference can be explained on the one hand by the desire to have the scope of the Protocol coincide with that of the 1973 Convention, in order for the Protocol to replace (among the Contracting States at least) the latter instrument. It also reflects the wish not to overly restrict the scope of a text which, formulated in a separate Protocol, is in any case optional for the States which will ratify the Convention. It should also be noted that the scope of the Convention can also be widened, in an optional manner, by way of a declaration in accordance with Art. 58 of the revised preliminary draft Convention, "to any maintenance obligation arising from a family relationship, parentage, marriage or affinity." (Art. 2(2) of the revised preliminary draft Convention). By such a declaration, each Contracting State will be able, if it should so wish, to make the scope of the two instruments coincide; the declaration will only have effect, however, in respect of those States where the scopes of the Convention coincide, whereas the future Protocol is applicable *erga omnes* (*cf. infra*, Art. 2).

13. The text in brackets underlines that, for maintenance in respect of children, application of the Protocol would be independent of the marital status of their parents, with no distinction made between children born in or out of wedlock. This specification also features in Article 1 of the 1973 Convention and, between brackets, in Article 2(3) of the revised preliminary draft Convention on the international recovery of child support. Whether or not it should be maintained remains to be decided because of the difficulties that might be created in some Islamic States (*cf.* the draft Explanatory Report on the revised preliminary draft Convention, paras 53-54). Whatever the outcome for the final text, the Special Commission was unanimous in its view that the Protocol will apply to all children, independently of the marital status of their parents.

14. The second paragraph reproduces the formulation used in Article 2(2) of the 1973 Convention. It clarifies that the Protocol only concerns the law applicable to the maintenance obligation, designed as it is to be an autonomous connection category, and is not intended to determine the law applicable to any family relationships from which the maintenance obligation arises. The law applicable to these relationships shall be determined on the basis of the conflict of laws rules in force in each Contracting State. In the same way, maintenance decisions made on the basis of the future Protocol shall be without prejudice to the existence of any of these family relationships; no-one may make use of a decision ordering the debtor to pay maintenance to the creditor on the basis of the law designated by the Protocol in order to support the existence of a family relationship of the sort referred

to in Article 1, paragraph 1. This provision constitutes the equivalent of that of Article 16(2) of the revised preliminary draft Convention, according to which, if a foreign decision does not relate solely to a maintenance obligation, the effect of the norms of the Convention on recognition and enforcement remains limited to the maintenance obligation. For a more in-depth analysis of this approach, already well-known in the Contracting States of the 1973 Convention, reference is made to the Explanatory Report on that Convention.[3]

## Article 2 Universal application

15. This provision serves only to specify the universal nature of the future Protocol, which shall be applicable in the Contracting States even if the law designated by its provisions is that of a third State. This approach corresponds to that adopted by the 1973 Convention (Art. 2), along with several other Hague Conventions on applicable law and requires no particular further comment.

## Article 3 General rule on applicable law

16. This provision establishes the principle of connecting the maintenance obligations to the law of the State of the creditor's habitual residence. This connection corresponds to that used, on a principal basis, in the 1973 Convention and, for maintenance in respect of children, in the 1956 Convention.

17. This connection offers several benefits. The main advantage is that it allows a determination of the existence and amount of the maintenance obligation having regard to the legal and factual circumstances of the social environment in the country where the creditor lives and engages in most of his or her activities. As was appropriately pointed out in the Explanatory Report on the 1973 Convention, "he [the creditor] will use his maintenance to enable him to live", thus "[...] it is wise to appreciate the concrete problem arising in connection with a concrete society: that in which the petitioner lives and will live."[4] The connection to the law of the habitual residence also secures equal treatment among creditors living in the same country, without distinction on the basis of nationality: one fails to see why a creditor who is a foreign national should, in the same circumstances, be treated differently than a creditor having the nationality of the State where he or she lives.

18. It should also be noted that the criterion of the creditor's habitual residence is used extensively to determine the court having jurisdiction with respect to maintenance, both in instruments of uniform law (*e.g.*, Art. 5, para. 2 of EC Regulation 44/2001 and the "parallel" provision of Art. 5, para. 2 of the 1988 Lugano Convention) and in several domestic legislations. Accordingly, the use of the same criterion for determination of the applicable law frequently leads to application of the law of the authority seized, with obvious benefits in terms of simplicity and efficiency.

19. The notion of habitual residence is not defined by the preliminary draft Protocol, but corresponds to that used in the revised preliminary draft Convention to determine the basis for recognition of foreign judgments (Art. 17 *c)*). It should be noted that the criterion retained is that of the habitual residence, which thus implies stability. Simple residence (or stay) of a temporary nature is not sufficient to determine the law applicable to the maintenance obligation.

20. As emphasised in the last part of Article 3(1), the connection to the creditor's habitual residence is not valid if the preliminary draft Protocol provides otherwise. This specification is an important one because in the Protocol's system this connection is subject to several

[3] *Explanatory Report on the 1973 Hague Maintenance Conventions (Enforcement – Applicable Law)*, drawn up by M. Verwilghen, paras 122 *et seq.*
[4] *Explanatory Report on the 1973 Hague Maintenance Conventions (Enforcement – Applicable Law)*, drawn up by M. Verwilghen, para. 138.

important exceptions, which are provided in Articles 4 to 8. Consequently, the effect of this rule is more limited here than in the 1956 and 1973 Conventions.

21. In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply from the moment when the change occurs (Art. 3(2)). This solution, which corresponds to that retained in the 1956 and 1973 Conventions (Art. 4(2)), is self-evident, having regard to the reasons on which connection to the habitual residence is based. In the event of a change of residence, it is logical for determination of the existence and amount of the maintenance obligation to be made according to the law of the country where the creditor lives. That law's application is justified also by considerations based on equal treatment of all creditors living in the same country.

22. It should be noted that the solution provided for the issue of mobility is not necessarily coherent with the idea ensuring that the jurisdiction of the authorities and the law applicable coincide. Indeed, where the jurisdiction of the authority depends on the creditor's habitual residence, this residence is generally determined at the time of application, without taking into account any change (*perpetuatio jurisdictionis*). However, having regard to the applicable law, the change in the creditor's residence will have to be taken into account for the maintenance decision, even if that change occurs during the proceedings. If the decision should set a maintenance amount for the future, it would indeed be illogical not to take into account such a substantial change in circumstances. The time limit for this change to be taken into account is not determined by the preliminary draft Protocol, but will depend on the rules of procedure applicable in each Contracting State.

23. The change of applicable law occurs at the time of the change of residence, but only for the future (*ex nunc*). The creditor's claims relating to the period prior to the change thus remain subject to the law of the former habitual residence. This solution is justified if one considers that the creditor's entitlement to maintenance for the earlier period is already vested, and accordingly ought not to be called into further question owing to a subsequent change of applicable law.

**Article 4 Special rules with respect to children and parents**

24. This provision sets out important derogations from the principal connection to the maintenance creditor's habitual residence. The reason for these derogations is to introduce a system that is more favourable to some categories of maintenance creditors should the application of the law of their habitual residence show itself to be counterproductive for them.

25. In the WGAL Working Draft of January 2007 (Prel. Doc. No 24, Art. D), these derogations were only provided to benefit children younger than 21 years of age. At the Special Commission meeting in May 2007, the majority of the delegations were in favour of their extension to maintenance obligations of children towards their parents, for the reason that these parents also, in the same way as the children, should receive favourable treatment in a situation of conflict of laws.

26. In addition, in order to better specify the content of the notion of obligations towards children, two categories have been distinguished: that of maintenance obligations of parents towards their children without age limit on the one hand, and that of maintenance obligations of persons other than parents towards any child of 18 (or 21) years of age or less, on the other. For the first category, the determining element is the parent-child relationship, whereas for the second category access to the benefit depends on the age of the creditor. For this last category, the age limit has not yet been set; it will also depend on the solution adopted to the question of age in the Convention.

*a) Subsidiary connection to the law of the forum*

27. The first advantage accorded to the categories of creditors defined in Article 4(1) is through the provision of a subsidiary connection to the law of the forum in the event that the creditor is unable to obtain maintenance on the basis of the law of the State of his or her habitual residence (Art. 4(2)). This solution is inspired by the concept of *favor creditoris* and aims to ensure that the creditor has the possibility of obtaining maintenance if provided for by the law of the authority seized.

28. This is a classical solution and is currently provided for under the 1956 Convention (Art. 3) and the 1973 Convention (Art. 6). It is only provided for in the latter, however, as a last resort, and after application, again on a subsidiary basis, of the law of the common nationality of the parties (Art. 5). Inversion in the preliminary draft Protocol of these two subsidiary connecting criteria (the law of the forum before the law of the common nationality) is justified for a number of reasons. First, it reduces the importance in practice of the connection to common nationality, the relevance of which as regards maintenance is disputed (*cf. infra* para. 42). Second, it facilitates the work of the authority seized, which will be able to apply its own law on a subsidiary basis without being required first to be informed of the substance of the law of the parties' common nationality; as a result, this solution is also beneficial to the creditor as it allows a decision to be made more quickly and at less cost.

29. As in the 1956 and 1973 Conventions, the subsidiary connection is only provided if the creditor "cannot obtain maintenance" according to the law applicable on a principal basis. The exact meaning of this expression was much debated during the meeting of the Special Commission in May 2007. It is clear that the creditor will be able to benefit from subsidiary application of the law of the forum not only if the law of the habitual residence does not provide for any maintenance obligation arising from the family relationship concerned (*e.g.*, no obligation is provided for children with respect to their parents), but also if, while recognising in principle such an obligation, that law subjects the obligation to a condition which is absent from the case at hand (*e.g.*, it provides that the obligation of parents with respect to their children ceases once the latter have reached the age of 18 years, while in the case at hand the creditor has already reached that age).[5] It is, however, a matter for debate whether subsidiary application of the law of the forum is also to play a role when maintenance is not due under the law of the habitual residence for economic reasons; *i.e.*, as a result of the criteria provided for by this law in order to determine the needs of the creditor and / or the means of the debtor (that is to say, if, under the law of the habitual residence, the creditor is not in need of maintenance or the debtor does not have the means to pay). From a strictly theoretical point of view, it is difficult to distinguish this situation from those cited above, because it is also a hypothetical situation whereby the awarding of maintenance is refused because of the absence of a condition set by the law applicable on a principal basis. According to many delegations, however, the *favor creditoris* (and the subsidiary connection which constitutes the norm) should not be applicable in this last case.

30. Contrary to the 1973 Convention, in which the subsidiary connection to the law of the forum is effective generally (*cf.* Arts 4 to 6), it is only present in the preliminary draft Protocol for the benefit of those categories of creditors specified in Article 4(1). In the Contracting States of the 1973 Convention, this difference may perhaps be seen as a step backwards with respect to the current level of protection that exists for maintenance creditors. However, such an analysis would not be entirely exact. The 1973 Convention did indeed already reject a cascade of connecting factors for maintenance between divorced spouses, as these were governed anyway by the law applied to the divorce (Art. 8). This meant that apart from children, a cascade of connecting factors in reality only benefited those categories of adult creditors whose maintenance claims are not all accepted from a comparative law point of view (*e.g.* persons related collaterally and by affinity) and for whom the preliminary draft Protocol envisages the introduction of a number of specific means of defence in favour of the debtor (*cf. infra*, Art. 6). In this context, it would seem

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[5] *Cf. Explanatory Report on the 1973 Hague Maintenance Conventions (Enforcement – Applicable Law)*, drawn up by M. Verwilghen, para. 145.

not very logical, even clearly contradictory, to allow these creditors to benefit from a cascade of connecting factors.

31. In those cases where it is applicable, subsidiary connection to the law of the forum is naturally of use only if the maintenance proceedings are instituted in a State other than that of the creditor's habitual residence, as otherwise the law of the habitual residence and the law of the forum would coincide. Furthermore, it should be noted that if the preliminary draft Protocol were to include a provision such as that suggested in Article 4(3) (see below), subsidiary application of the law of the forum would only be relevant if the proceedings are instituted by the debtor (*e.g.*, in the hypothetical case where the debtor institutes proceedings before the competent authority of the State of his or her own habitual residence so as to be freed of a maintenance obligation on the basis of the law of the State of the creditor's habitual residence; the creditor will then be able to protect himself or herself by invoking the law of the forum), or if the authority seized is an authority of a State in which neither of the parties is resident (if, for example, the maintenance claim is brought on an accessory basis before the court having jurisdiction with respect to affiliation or the dissolution of marriage). By contrast, if the proceedings are instituted by the creditor in the State of the debtor's habitual residence, the law of the forum is in any case applicable on a principal basis according to Article 4(3).

*b) Connection to the law of the forum when the proceedings are instituted in the State of the debtor's habitual residence*

32. Article 4(3) provides that the law of the forum is applicable on a principal basis if the creditor has seized the competent authority of the State of the debtor's habitual residence. However, in this case if the maintenance creditor is unable to obtain maintenance under the law of the forum, the law of the creditor's habitual residence then becomes applicable on a subsidiary basis.

33. This is an important inversion of the connecting criteria provided for in Articles 3 and 4(2) (law of the forum before the law of the creditor's habitual residence). The provision is the result of a compromise between those who defend the indiscriminate application of the law of the creditor's habitual residence and those who would prefer the law of the forum. Application of the law of the forum is subject to two conditions: on the one hand the authority seized must be that of the State of the debtor's habitual residence, and on the other hand the proceedings must be instituted by the creditor.

34. It is the first of these conditions that justifies application of the law of the forum in place of the law of the creditor's habitual residence. Indeed, it should be noted that if the maintenance proceedings are instituted in the State of the debtor's habitual residence, the connecting factor of the creditor's habitual residence loses some of its merit: in such a case, this criterion will not result in application of the *lex fori*, so that the authority seized will need to determine the substance of a foreign law, an operation that may be time-consuming and costly. In addition, that foreign law will have to be applied even if, in a specific case, it is *less favourable* to the creditor than the law of the forum (the only exception provided for under Article 4(2) being the situation in which the creditor is *not entitled to any* maintenance under the law of his or her habitual residence). In such a situation, application of the law of the creditor's residence results in an outcome inconsistent with the concern for protection of the creditor on which it is based. It accordingly appeared appropriate to replace this connection by application of the law of the forum.

35. The second condition for application of the law of the forum is that the proceedings be instituted by the creditor. This is aimed at limiting, in the interest of the creditor, departure from the principle of applying the law of his or her habitual residence. Indeed, it appeared that this derogation may be justified if the creditor himself decides to bring proceedings in the debtor's State of habitual residence, while it would appear to be excessive if the proceedings were instituted in this same State by the debtor (*e.g.,* for a request for modification of a maintenance decision). Indeed, in the majority of cases the creditor may choose to institute proceedings either in the country where he or she lives or in that of the debtor's residence, and if he or she opts for this second solution, he or she cannot complain about the application of the national law of that State. With this in mind, the solution settled

upon constitutes an attempt at compromise between the supporters of an automatic application of the law of the forum and those who would have preferred to subject it to an option on the part of the creditor (*cf.* the Report of the WGAL of June 2006, Prel. Doc. No 22, paras 24 and 25). Furthermore, it should be noted that if the proceedings are instituted by the creditor, the jurisdiction of the authorities of the State of the debtor's residence will be very solidly grounded (it will effectively rest on the principle of *actor sequitur forum rei*), providing better justification for the law of the forum to be applied. However, if the proceedings are instituted by the debtor in his State of residence, the jurisdiction of the authorities of that State (if it exists under the law of the forum) will rest on a ground of jurisdiction much less significant (*e.g.,* the nationality of the parties), or even clearly exorbitant (*forum actoris*). There is thus even more of a reason not to apply the law of the forum in this case.

36. Contrary to the solutions proposed in the 2006 Draft, (*cf.* the Report of the WGAL of June 2006, Prel. Doc. No 22, paras 20 *et seq.*), application of the law of the forum on a principle basis is only provided for those categories of creditors specified in Article 4(1). This limitation is mostly explained as follows: it appears that application of the law of the forum in the conditions set out in the provision is of considerable advantage to the creditor because by seizing the authorities of the State of his or her residence, or those of the State of the debtor's residence, the creditor is given the right to choose indirectly the law applicable to his or her maintenance claim (forum shopping). The Special Commission was of the opinion that such a privilege can only be justified for children and parents.

37. As regards maintenance obligations with respect to children, application of the law of the forum also rests on a further consideration. In an increasing number of countries the task of determining these maintenance obligations is given over to administrative authorities. As generally these authorities have neither the expertise nor the means available for research into and application of foreign law, only application of the law of the forum would appear to be compatible with the setting up of an administrative-based system for the recovery of maintenance. This is naturally of much lesser concern with regard to maintenance claims for adult creditors (at least when these are not related to maintenance claims for their children), as these are generally settled by the judicial authorities.

38. As application on a principal basis of the law of the forum is drawn from the concept of *favor creditoris*, it cannot be maintained if it should result in the creditor being refused any maintenance. This is the reason why Article 4(3) *in fine* provides, as does Article 4(2), for a subsidiary connection to the law of the creditor's habitual residence if he or she is unable to obtain maintenance under the law of the authority seized. Article 4(3) is therefore limited to inversing the connections provided for by the general provisions. The sense of the expression "unable to obtain maintenance" is naturally the same as that in Article 4(2) (*cf. supra*, para. 29).

*c) Subsidiary connection to the common nationality of the parties*

39. If the creditor is unable to obtain maintenance either under the law of the State of his or her habitual residence or under the law of the forum, the law of the common nationality of the parties is applicable as a last resort. This second subsidiary connection completes the protection of the maintenance creditor should the laws designated by the first two criteria not provide for any maintenance obligation. The sense of the expression "is unable to obtain maintenance" is naturally the same as that in Article 4(2) (*cf. supra*, para. 29).

40. Connection to the common nationality is also provided for in the 1973 Convention (Art. 5) but it enjoys there priority over the law of the forum. The reasons which caused inversion of these two criteria have already been mentioned (*cf. supra*, para. 28).

41. Contrary to the 1973 Convention, subsidiary connection to the parties' nationality (and likewise to the law of the forum) is only provided for those categories of creditors specified in Article 4(1). The reasons for limiting the scope of the cascade of connecting factors in this way have already been explained (*cf. supra*, para. 30). It should be noted that recourse for minor children to this third connecting criterion is likely to be relatively

rare, as the majority of national laws recognise the child's right to maintenance. On the other hand, the common nationality can play a much more important role in the case of maintenance claims of adult children towards their parents, as well as of parents towards their children.

42. Use of the connection to the common nationality for maintenance obligations was the subject of much criticism. Principally it was felt that this criterion is discriminatory because only of benefit to those creditors who have a common nationality with the debtor (*cf.* in this context already, the Explanatory Report of the 1973 Convention).[6] Further criticism was linked to the ambiguous nature of the connection in question, if the common nationality is that of a multi-unit State. Despite this criticism, several delegations expressed themselves in favour of retaining this subsidiary connection in the preliminary draft. It should be emphasized that its restriction to only those categories of creditors specified in Article 4(1) (while in the 1973 Convention it is applied generally), together with its "reassignment" to the level of *second* subsidiary connecting factor (while in the system of the 1973 Convention, it was the *first* subsidiary connecting factor, after the habitual residence and before the *lex fori*) will considerably reduce both the practical impact and the disadvantages.

### Article 5 Special rule with respect to spouses and ex-spouses

43. This Article contains a special rule for the connection of maintenance obligations between spouses and ex-spouses. The exact content of this rule is yet to be defined, but one point is firm: for maintenance obligations between spouses and ex-spouses, the principal connection to the creditor's habitual residence must give way, at least in some cases, to the application of the law of a State with which the marriage has closer ties, in particular to the law of the last common habitual residence of the spouses. Whether or not this rule should be included remains much debated, which explains why this Article has been placed between brackets.

44. Inclusion of a special rule for this category of maintenance obligations rests on the recognition that application of the law of the creditor's habitual residence is not always appropriate for obligations between spouses or ex-spouses. It is necessary to consider that in some national systems maintenance is accorded to a divorced spouse only to a very limited extent and under exceptional circumstances (in Europe, this restrictive attitude is to be found in particular in the law of the Scandinavian States and also in some *common law* jurisdictions). In this context, indiscriminate application of general provisions inspired by the principle of *favor creditoris* is perceived, by some delegations, to be excessive. In particular, the possibility for one of the spouses to influence the existence and content of the maintenance obligation through a unilateral change to his or her habitual residence may lead to a result that is less than fair and contrary to the legitimate expectations of the debtor; take, for example, the case of a couple comprising two citizens of a State A, the law of which does not provide in principle for maintenance after divorce. After having lived for the whole of their married life in this State, the spouses divorce and one of them moves to a State B, the law of which is more generous towards divorced spouses, and claims maintenance in accordance with the law of the State of his or her new habitual residence. According to the general connection rule of Article 3, this claim should be allowed. However, under such circumstances, application of the law of State B, where the spouses never lived during their marriage, would seem to be unfair as regards the other spouse and contrary to the legitimate expectations that the spouses might have formed during their marriage.

45. The weaknesses of the connection to the creditor's habitual residence for maintenance obligations between divorced spouses were already noted when drawing up the 1973 Convention. That Convention includes a special rule for this case according to which the obligations between divorced spouses are governed by the law applicable to the divorce (Art. 8). The same is true *mutatis mutandis* in cases of legal separation and of annulment of

[6] *Explanatory Report on the 1973 Hague Maintenance Conventions (Enforcement – Applicable Law)*, drawn up by M. Verwilghen, para. 144.

marriage (Art. 8(2)). This solution is applicable not only if the maintenance claim is settled within the framework of the divorce proceedings (or at the time of divorce), but also to claims brought later when modifying or supplementing the divorce judgment. The reason invoked for this *perpetuatio juris* is the need to guarantee continuity to avoid any change in residence of the creditor spouse incurring a change in the applicable law.

46. This solution does, however, have a number of disadvantages which gave rise to lively criticism in the Contracting States of the 1973 Convention. It should be noted on the one hand that as the conflict rules in the field of divorce have not been harmonised on an international level, Article 8 has in fact no standardising effect on the law applicable to maintenance obligations; this law continues to depend on the private international law of the State of the court seized with the divorce proceedings, and this solution inevitably favours *forum shopping*. Moreover, the choice of a connecting factor that is invariable with time can, if the maintenance obligation between spouses has to be settled after the divorce, cause a law to be applied which no longer has any relevance with regard to the situation of the ex-spouses and their respective interests. Surprising though it might be, the judge will not be able to take account of the law of the current residence of either the creditor or the debtor. It is also possible that the divorce decree includes no provision relating to maintenance, and in this case the need for continuity on which Article 8 rests is less relevant. This is particularly true if the spouses have divorced in a country which does not provide for maintenance for a divorced spouse, and in this case application of the law of the divorce causes any claim to be refused, except if this application is set aside by public policy. Finally, application of the law of the divorce can cause practical difficulties in the sense that it can sometimes prove difficult to determine from the decree the law under which the divorce was pronounced.

47. In its search for a balance between the need to protect the creditor and the need to apply the law of a State with which the marriage has significant ties, the Special Commission turned towards the use of the connection to the last common habitual residence of the spouses or ex-spouses. This criterion expresses a link that is more significant than the residence of the maintenance creditor only. It is clear that it can only have an autonomous role to play if the spouses no longer live in the same State at the time the maintenance claim is made, because if they do it coincides with the general connection of Article 3.

48. The conditions for implementation of this special rule remain under discussion. During the meeting of the Special Commission in May 2007, three options were put forward.

*Option 1*

49. According to the first option, the law of the last habitual residence of the spouses can only be applied if the spouses have never lived during their marriage in the State of the creditor's habitual residence. Derogation from the principal connection of Article 3 would therefore be limited to a particular case; that in which the marriage clearly has very weak connections with the State of the creditor's habitual residence, such that application of the law of this State would appear unjustified. The situation aimed at here is that of the example given earlier (*cf. supra*, para. 44). The advantage of this option is the foreseeability it provides, as it leaves no room for further consideration by the authority seized. Naturally, its rigidity presents the disadvantage that it does not allow for other situations to be covered in which application of the law of the creditor's habitual residence can also prove to be inappropriate (*e.g.*, if the creditor has moved to a State where the spouses did actually live during their marriage but only for a very short period of time).

50. Some delegations were of the opinion that any exception to the law of the creditor's habitual residence must be more narrowly defined by requiring that one of the spouses (notably the debtor) should have maintained his or her habitual residence in the State of the last common habitual residence of the spouses. This supplementary condition, which is placed between brackets, is aimed at avoiding application of the law of a State in which

neither the creditor nor the debtor are living any longer at the time of the maintenance claim.

*Option 2*

51. According to the second option, the law of the State of the creditor's habitual residence can be set aside in favour of that of the State of the last common residence of the spouses each time that it arises from the circumstances of the case that the marriage is or has been (or, according to another version, the maintenance obligations are) manifestly more closely connected to this State. In this case, the decision to apply either law lies with the authority seized, which will have to decide on the basis of an evaluation of the circumstances of the case at hand. Like any escape clause based on the notion of proximity, this option would have the advantage of offering some degree of flexibility, which would enable the exception to be applied in the situations described above and not covered by option 1. The price to pay is naturally the lack of foreseeability.

52. In this case also, some delegations feel that derogation from the law of the creditor's habitual residence must only be possible if one of the spouses (notably the debtor) is still living in the State of the last common habitual residence of the spouses.

*Option 3*

53. The third option offers a maximum of flexibility. Contrary to options 1 and 2, it does not provide any escape clause with respect to the general rule of Article 3, but introduces a completely independent connection rule that is directly based on the principle of proximity; the authority seized is required to apply the law of the State which has the closest connection with the marriage. In order to render this general clause more concrete and reduce the degree of uncertainty it would cause, the provision specifies that this connection generally exists with the State of the last common habitual residence of the spouses. Even though it is not indicated by the provision, it should naturally be understood here that if the spouses are both currently living in the same State, the closest connection generally exists with the law of that State.

54. Whichever option is adopted, it remains to be determined whether the special rule of Article 5 is to be applied automatically by the authority seized, or only upon request of one of the parties or of the debtor. Indeed, some delegations are of the opinion that derogation from the principal connection of Article 3 should only be envisaged as a means of defence for the debtor (as provided for in Art. 6) or, out of concern for fairness, upon request by one or other of the spouses. It should be noted that this solution, conceivable if either option 1 or option 2 is retained, would not appear to be very compatible with option 3, as this last option provides for an actual connection rule based on the closest connection and entirely independent from Article 3; application of this rule (contrary to application of an escape clause) cannot depend on a request made by the parties.

55. It should be noted that the scope of this provision has been extended and, indeed, contrary to Article 8 of the 1973 Convention, is intended to be applicable not only to obligations between spouses who are divorced or separated, or those whose marriage has been declared void or annulled, but also to maintenance obligations between spouses during their marriage. This is because the Special Commission felt it was preferable to have one and the same connection rule for obligations during marriage and after divorce, so as to avoid a change in applicable law solely due to dissolution of the marriage.

56. Finally, one simplification may be noted that results from limiting the cascade of connecting factors to maintenance obligations with respect to children and parents (*cf. supra*, Art. 4). It follows (in the absence of choice of the applicable law) that the maintenance obligations between spouses or ex-spouses are governed either by the law of the creditor's habitual residence in accordance with Article 3, or by the law designated by

Article 5. Neither the law of the forum, as such, nor the law of the common nationality may be taken into account in this case.

**Article 6 Special rule on defence**

57. As regards maintenance obligations other than those with respect to children which arise from a parent-child relationship, and those between spouses and ex-spouses, Article 6 provides that the debtor may contest the creditor's claim that no obligation exists on his part under the law of the State of the debtor's habitual residence, nor under the law of the common nationality of the parties, should they have one.

58. This defence is drawn from the solution provided for in Article 7 of the 1973 Convention. This rule effectively allows the debtor to contest a claim for maintenance between persons related collaterally or by affinity for the reason that there exists no maintenance obligation according to the law of the common nationality of the debtor and the creditor or, in the absence of common nationality, according to the internal law of the debtor's habitual residence.

59. Contrary to the 1973 provision, the rule of the Protocol is not applicable only between persons related collaterally or by affinity, but to any maintenance obligations other than those towards children which arise from a parent-child relationship, and those between spouses or ex-spouses. This extension was decided upon for several reasons. First, it should be noted that the question of whether it is appropriate to allow maintenance based on the family relationships aimed at by this rule does not meet with agreement at the international level, which resulted in the desire of a number of States to enable its impact to be limited. Within the framework of the 1973 Convention this concern was taken into account by providing the possibility of several reservations regarding the scope of the Convention (*cf.* Arts 13 and 14 of this Convention). However, with the aim of avoiding as far as possible the possibility of reservations within the framework of an instrument which is in any case purely optional, the Special Commission considers that the reticence of some States as regards claims for maintenance based on the above-mentioned family relationships is more suitably taken into account at an earlier stage, through the provision of more restrictive connection rules for these cases.

60. This defence can therefore be invoked, *inter alia*, in cases where maintenance claims are made by a parent towards his or her child, as well as by a minor towards someone other than one of his or her parents (*e.g.*, someone with whom he or she is related collaterally or by affinity). In these two cases, the rules of Articles 4 and 6 will be applicable competitively, and consequently maintenance due in accordance with one of the laws designated by the cascade of connections in Article 4 will be refused if it is not due according to the laws provided for in Article 7. This concurrent application of the system of cascading connecting factors and means of defence is very complicated and not very satisfactory from a strictly logical point of view; it does seem rather incoherent that one would wish to benefit the creditor by way of subsidiary connections and at the same time protect the debtor by way of cumulative connections. This solution is of course a compromise. Nevertheless, it should be recognised that the system is not entirely new, corresponding as it does to that currently applicable in the system of the 1973 Convention for persons related collaterally or by affinity.[7]

61. This defence could also be used against claims brought by an adult creditor on the basis of a family relationship other than marriage, which may be recognised by the law of the habitual residence or by the law of the forum (*e.g.*, between homo- or heterosexual partners). In these cases, coherence is guaranteed as these categories of creditors do not benefit from the cascade of connections in Article 4.

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[7] *Explanatory Report on the 1973 Hague Maintenance Conventions (Enforcement – Applicable Law)*, drawn up by M. Verwilghen, para. 149.

**Article 7 Designation of the applicable law in the context of a particular proceeding**

62. This provision gives parties the right to designate expressly the law of the forum as the law applicable to the maintenance obligation. This choice of applicable law presupposes that the maintenance creditor has already instituted or is about to institute maintenance proceedings before a given authority. The consent of the parties is intended to make applicable the internal law of the authority seized and its effect is limited to specific proceedings.

63. It should be stressed that this is a choice made at the time of proceedings; it pre-supposes that the maintenance creditor has already instituted or is about to institute maintenance proceedings before a specific authority. At the time of making this choice, the parties may obtain information (or will be informed by the authority seized) as to the existence and nature of the maintenance benefits provided for under the law of the forum.

64. The consent of the parties has an effect only for specific proceedings. Accordingly, if a further claim or claim for modification is made subsequently to the same authority or an authority of another State, the choice of law made previously will no longer be effective and the applicable law will have to be determined according to the objective connections. This limitation on the effects of choice is justified, as the chosen law is the law of the forum.

65. The choice of applicable law ought to play a significant role in relationships between adults especially. In the event of divorce in particular, it will be possible for the spouses to submit the maintenance claims to the internal law of the authority seized, which will certainly facilitate the proceedings. However, this possibility of choice has also been included for maintenance obligations with respect to children. This is because it appeared that the possible dangers linked to the introduction of party autonomy are to a great extent counterbalanced by the advantages in terms of simplicity resulting from application of the law of the forum. Given the special rule of Article 4(3), according to which maintenance obligations of parents with respect to their children and those of any other person towards children of less than 18 (or 21) years of age are governed in any case by the law of the forum when the request is made by the creditor in the debtor's State of habitual residence, the effect of the choice of applicable law can thus remain only rather limited in this field.

66. Given that the applicable law can also be chosen according to Article 7(1) before instituting proceedings, Article 7(2) introduces a number of points relating to form, by specifying that, in this case, the applicable law should be designated by way of written consent or recorded in any medium, the content of which may be accessed for consultation at a later date. It appeared essential on the one hand to be able to easily prove the existence of this consent, and to draw the attention of the parties on the other hand to the important consequences that the choice of applicable law may have with respect to the existence and extent of the maintenance obligation. This provision only provides for a minimum of form in relation to the agreement and States are at liberty to make other requirements; for example, by establishing modalities to guarantee that the parties' consent is free and sufficiently informed (*e.g.*, the necessity of a signature or recourse to legal counsel before the agreement is signed).

67. It should finally be noted that if the choice provided for in Article 7 is made before introducing proceedings, it will only be valid if the parties have specified the law that they wish to designate, or at least the authority before which the envisaged proceedings shall be brought. It will not be sufficient for the parties to designate "the law of the forum" in a general manner, because as long as an authority has not been seized, the "forum" has not been determined. Such a blind choice does not provide the guarantee that the parties would have been informed and conscious as to the consequences of their choice. If, later, no claim is brought before the authorities of the State whose law was chosen, the choice will remain without effect.

68. After some discussion on this point, the Commission finally renounced the notion of providing for a time limit between the time of the choice and the institution of proceedings. Indeed, if a claim is brought in the State whose law was chosen, it would be reasonable for the choice to have an effect, even if a relatively long period of time has passed between these two moments. However, if no proceedings are instituted in that State, the choice, as indicated, will not have any effect in any case.

**Article 8 Designation of the applicable law**

69. This provision allows the parties to choose the law applicable to the maintenance obligation at any time and even before any dispute arises. Contrary to the choice of the law of the forum as provided for in Article 7, the choice of applicable law in Article 8 is not solely made "for the purpose of a particular proceeding" and its consequences are not therefore limited to proceedings which the maintenance creditor has already instituted or is about to institute. The law chosen by the parties is intended to govern the maintenance obligations between the parties from the time at which it is chosen until whenever they may decide to alter their choice.

70. The main advantage of the choice of applicable law is to secure a measure of stability and foreseeability: if the parties have made such a choice, the law designated remains applicable despite any changes in their personal situations, and regardless of the authority seized in the event of a dispute. In particular, a change of the maintenance creditor's habitual residence will not entail a change of the applicable law.

71. The choice of applicable law is particularly useful in the relationship between the spouses when they conclude, before or during the marriage, an agreement relating to maintenance obligations and / or ownership of their respective property. Thanks to this choice, the law applicable to the maintenance obligation is set in advance, which avoids any questioning of the agreement later.

72. Once the choice of applicable law had been accepted for spouses, it appeared that it could be extended to all adults. A doubt remains for those persons who, by reason of an impairment or insufficiency of their personal faculties are not in a position to look after their own interests. Some delegations feel that these persons must be especially protected against the risks related to the choice of applicable law, while others consider that the protection mechanisms in place to that effect in the different national law systems (for instance, in the form of nomination of a guardian or trustee) are sufficient. It is of course clear that the law applicable to the measures for the protection of adults does not fall within the scope of application of the Protocol (*cf.* the *Hague Convention of 13 January 2000 on the International Protection of Adults*).

73. The choice of applicable law has been excluded regarding maintenance towards children because the potential risks presented by this choice seem in this case to outweigh the possible benefits. In this regard there is some hesitation as to determination of the age at which this choice should be allowed. Whereas 18 years of age corresponds to the age of legal majority in most countries, the proposal of a higher age (*e.g.,* 21 years of age) reflects a concern for the protection of young persons who can still be particularly vulnerable.

74. So as to protect the maintenance creditor, Article 8 subjects the possibility for the parties to choose the applicable law to a number of limitations. The first limitation concerns the object of the choice itself and is intended to limit the range of options open to the parties. A number of options are quite widely accepted, *e.g.*, the national law of one of the parties or the law of the State of the habitual residence of one of the parties at the time of the designation. In addition, the spouses are given the possibility to choose the same law they designated as applicable, or that is effectively applied, to their property regime, divorce or legal separation. This possibility is aimed at allowing the spouses to make the law applicable to the maintenance obligations on the one hand, and that governing the

matrimonial property regime and / or the divorce or legal separation on the other, coincide. It should be noted that the spouses are not able to choose the law *applicable* to the property regime or to the divorce; as this is generally governed by national conflict rules that differ greatly, the law applicable to the property regime or to the divorce can vary according to the rules in force in the State of the authority seized and therefore the choice of this law for the maintenance obligation would be a blind one. However, the spouses are able to choose the law which has actually been *applied* to the property regime or to the divorce, which allows for stability of the applicable law to be guaranteed on a voluntary basis. In addition, they are able to choose the law that they have *designated* to be applicable to the property regime or to the divorce; in this case, the choice will only be valid if the choice of the law applicable to the property regime or to the divorce is possible and valid under the private international law of the State of the authority seized. As regards designation of the law applicable to divorce, at present it is not very common in comparative law, but developments are underway in the field of European Community private international law given that the *Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters* ("Rome III"), presented by the Commission on 17 July 2006 (COM(2006) 399 final), provides in highly innovative fashion the choice of the law applicable to divorce and to legal separations.

75. From a formal point of view, the choice of applicable law must be made in writing. Not to mention the advantages to be gained with respect to evidence, the requirement of a declaration in writing helps to draw the attention of the creditor to the importance of the choice and to protect him from the consequences of an unconsidered choice. This provision only provides for a minimum of form in relation to the agreement and States are at liberty to make other requirements; for example, by establishing modalities to guarantee that the parties' consent is free and sufficiently informed.

76. The third limitation concerns the effectiveness of the choice of applicable law (Art. 8(3)). Since the choice of a law that is restrictive with respect to maintenance may deprive the creditor of any maintenance claim, or limit such claims substantially, it appeared essential to allow a mitigating power for the authority seized of the claim. If that authority finds that application of the law chosen by the parties causes, in the case in point, consequences that are manifestly unfair or unreasonable, the chosen law may be set aside in favour of the law designated by the objective connecting criteria provided for under the preliminary draft. This escape clause is based on considerations of substantive justice and corresponds to the power conferred by several domestic laws on judges to amend, or even to set aside, maintenance agreements made between the parties when they have unfair or unreasonable consequences. The circumstances that could trigger application of this clause include, for instance, the fact that the chosen law is only very distantly related, at the time of the dispute, to the parties, or that one of the parties (especially the creditor) consented to the choice of applicable law without being sufficiently informed of its consequences. The formulation of this rule is not unanimously accepted, however, and will be the subject of further consideration.

### Article 9 Public bodies

77. This Article provides that the right of a public body to claim reimbursement of the sum paid to the creditor in lieu of maintenance is subject to the law which governs that body. A similar rule has been introduced in the mandatory part of the Convention (Art. 33(2) of the revised preliminary draft Convention).

78. It should be noted that this connection is only valid for the right of a public body to claim the reimbursement, while the existence and extent of the maintenance claim are governed by the law applicable to the maintenance obligation (*cf.* Art. 10 *f)*). Moreover, it is clear that this rule is only valid for reimbursement of sums which have been paid as maintenance, and not for sums of any other nature (*e.g.*, public allowances), which the debtor is not obliged to reimburse.

79. This is not a new rule as it was already included in Article 9 of the 1973 Convention. The only change is one of drafting ("public body" instead of "public institution") to bring this text into line with the terminology employed in the revised preliminary draft Convention.

**Article 10 Scope of the applicable law**

80. This provision specifies the matters determined by the law designated by Articles 3, 4, 5, 7 or 8 of the preliminary draft Protocol. The scope of application of the law applicable to the maintenance obligation is quite widely defined, in conformity with the approach of the 1973 Convention (Art. 10). This law governs in particular the existence of the maintenance obligation, the determination of the debtor, the extent of the obligation, as well as the basis for calculation of the amount payable and the extent to which the creditor can claim maintenance retroactively (arrears). It should be noted that the list numerated in Article 10, as indicated by the expression "*inter alia*", is not exhaustive, and other points not mentioned may also be covered by the same law.

81. The law applicable to the maintenance obligation also governs the question of indexation of the sum due as maintenance (Art. 10 *c)*). This question was discussed by the Special Commission, as theoretically other solutions might be feasible (*e.g.*, systematic application of the law of the creditor's habitual residence or the law of the forum). The Special Commission finally felt that this question was related to the determination of the extent of the maintenance obligation and should therefore be governed by the law applicable to that determination.

82. The law applicable to the maintenance obligation also determines who may legitimately institute maintenance proceedings (Art. 10 *d)*). This solution corresponds to that included in the 1973 Convention (Art. 10(2)). The role normally falls to the maintenance creditor but, if the creditor is a minor, the proceedings can sometimes be instituted by one of his or her parents, or by a public body. This is to be distinguished from the concept of representation of incapacitated persons, which does not fall within the scope of the preliminary draft. In the same manner, it should not be confused with the concepts of procedural capacity and judicial representation, which both fall under the law of the forum.

83. Prescription or limitation periods in respect of the institution of maintenance proceedings (*e.g.*, peremptory time limits) also fall under the law applicable to the maintenance obligation (Art. 10 e). These questions have therefore been qualified as substantive and not procedural matters, as was already the case for the 1973 Convention (Art. 10(2)).

84. For proceedings for reimbursement brought by a public body, the law applicable to the maintenance obligation governs the existence and the extent (and therefore the limits) of this obligation (Art. 10 *f)*), while the right to claim reimbursement depends on the law of the body concerned (Art. 9).

**Article 11 Exclusion of *renvoi***

85. This provision specifies that the conflict rules of the Protocol designate the internal law of the State concerned, excluding its conflict of law rules. *Renvoi* is therefore excluded, including even if the law designated is that of a non-Contracting State.

**Article 12 Public policy**

86. The first paragraph of this provision is limited to providing for the possibility to set aside the applicable law if its effects are manifestly contrary to the public policy of the forum. The content of this provision corresponds to that included in the 1973 Convention (Art. 11(1)), as well as to several uniform private international law instruments. It does not require any further comment.

87. Paragraph 2 corresponds to the provision of Article 11(2) in the 1973 Convention, but its final formulation, together with its scope and position in the text, remain under discussion.

88. According to one formulation, which largely corresponds to that of the 1973 Convention, the needs of the creditor and the resources of the debtor "are taken into account" to determine the amount of maintenance, irrespective of the content/provisions of the applicable law. This version provides a substantive private international law rule, that obliges any Contracting State to the Protocol to take into account the needs of the creditor and the resources of the debtor, even if the law designated by the preliminary draft Protocol indicates otherwise. In addition, this substantive rule would be applicable even if the maintenance obligation is governed by the law of the forum. Formulated as such, the rule has no connection with questions of public policy of the forum and could therefore be made into a provision that is separate from Article 12.

89. According to a second formulation, which was suggested by the WGAL (*cf.* Prel. Doc. No 24, Art. K(2)), the provision authorises the authority seized to take into account the needs of the creditor and the resources of the debtor (without imposing it on him or her) to the extent that the foreign law applicable to the maintenance obligation does not provide as such. It therefore simply renders more concrete the public policy clause of Article 12(1). This second version clearly intrudes to a much lesser degree into the manner in which the Contracting States settle maintenance obligations in their domestic law.

**Article 19 Signature, ratification and accession**

90. The Special Commission meeting of May 2007 decided that the instrument on applicable law would take the form of a Protocol separate from the Convention on the international recovery of child support and other forms of family maintenance. It has not yet finally been decided, however, whether this Protocol should be joined to the Convention or entirely independent from it. These two options are currently included in the text of Article 19. According to the first option, the Protocol would be open to ratification and accession only by States Parties to the Convention on the recovery of maintenance. According to the second option, any State would be able to become a Party, even if not a Party to the Convention. During the meeting of the Special Commission of May 2007, the majority of delegations was in favour of the first option, but no decision has yet been taken.