

## **ESQUISSE RELATIVE À LA LOI APPLICABLE**

*préparée par le Groupe de travail sur la loi applicable aux obligations alimentaires  
réuni les 17 et 18 novembre 2006 à La Haye*

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## **WORKING DRAFT ON APPLICABLE LAW**

*prepared by the Working Group on Law Applicable to Maintenance Obligations  
which met on 17-18 November 2006 in The Hague*

*Document préliminaire No 24 de janvier 2007  
à l'intention de la Commission spéciale de mai 2007  
sur le recouvrement international des aliments  
envers les enfants et d'autres membres de la famille*

*Preliminary Document No 24 of January 2007  
for the attention of the Special Commission of May 2007  
on the International Recovery of Child Support  
and other Forms of Family Maintenance*

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## WORKING DRAFT ON APPLICABLE LAW

### Article A – Scope

1. This text shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity[, including a maintenance obligation in respect of a child regardless of the marital status of the parents].
2. The application of this text shall not prejudice the existence of any of the relationships referred to in paragraph 1.

### Article B – Definitions

For the purpose of this text –

- a)* “creditor” means an individual to whom maintenance is owed or is alleged to be owed;
- b)* “debtor” means an individual who owes or who is alleged to owe maintenance;
- c)* “agreement in writing” includes an agreement recorded in any medium the information contained in which is accessible so as to be usable for subsequent reference;
- d)* “law” means the law in force in a State other than its choice of law rules.

### Article C – General rule on applicable law

1. Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor.
2. 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 as from the moment when the change occurs.

### Article D – Special rules with respect to children

In the case of maintenance obligations in respect of children under the age of 21, the following provisions shall apply –

- a)* if the creditor is unable, by virtue of the law referred to in Article C, to obtain maintenance from the debtor, the law of the forum shall apply;
- b)* notwithstanding Article C, if the creditor has seized the competent authority of the State where the debtor has his habitual residence, the law of the forum shall apply. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the law of the habitual residence of the creditor shall apply;
- [*c)* if the creditor is unable, by virtue of the laws referred to in Article C and subparagraphs *a)* and *b)*, to obtain maintenance from the debtor, the law of the State of their common nationality shall apply.]

### **[Article E – Special rule with respect to spouses and ex-spouses**

Notwithstanding Article C, maintenance obligations between spouses or ex-spouses are governed by the law of the State of their last common habitual residence if it appears from the circumstances as a whole that these maintenance obligations are manifestly more connected with this State and provided that one of the spouses or ex-spouses still resides there.]

### **[Article F – Special rule on defence**

In the case of maintenance obligations other than those arising from a parent-child relationship towards a child and those referred to in Article E, the debtor may contest a claim from the creditor on the ground that there is no such obligation under the law of the habitual residence of the debtor nor under the law of the common nationality of the parties, if there is one.]

### **Article G – Designation of the law of the forum for a particular proceeding**

1. Notwithstanding the provisions of Articles C, D, E and F, the maintenance creditor and debtor for the purpose of a particular proceeding may expressly designate as applicable to a maintenance obligation the law of the forum.
2. A designation made before the institution of such proceedings shall be in an agreement in writing [signed by both parties].

### **Article H – Designation of the applicable law**

1. Notwithstanding the provisions of Articles C, D, E and F, the maintenance creditor and debtor may at any time designate in an agreement in writing [signed by both parties] one of the following laws as applicable to a maintenance obligation –
  - a) the law of the nationality of either party at the time of the designation;
  - b) the law of the State of the habitual residence of either party at the time of designation;
  - c) the law designated by the parties as applicable to their property regime;
  - d) the law designated by the parties as applicable to their divorce or legal separation.
2. Paragraph 1 shall not apply in respect of a child below the age of [18][21] 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.
3. The law chosen shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences.

### **Article I – Public bodies**

The right of a public body to seek reimbursement of a benefit provided to the creditor in lieu of maintenance shall be governed by the law to which the body is subject.

## **Article J – Scope of the applicable law**

The law applicable to the maintenance obligation shall determine *inter alia* –

- a) whether, to what extent and from whom the creditor may claim maintenance;
- b) the extent to which the creditor may claim retroactive maintenance;
- c) the calculation of the amount of maintenance and indexation;
- d) who is entitled to institute maintenance proceedings, except for issues relating to procedural capacity and representation in the proceedings;
- e) limitation periods or time limits on the institution of proceedings;
- f) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor in lieu of maintenance.

## **Article K – Public policy**

1. The application of the law determined under this text may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.

[2. Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor may be taken into account in determining the amount of maintenance.]

## **Suggestions concerning the preliminary draft Convention**

### ***Article 31 Information concerning enforcement rules and procedures***

Contracting States, at the time of becoming a Party to this Convention, shall provide the Permanent Bureau of the Hague Conference with a description of their enforcement rules and procedures, including any debtor protection rules and rules concerning the duration of maintenance obligations and limitation periods. Such information shall be kept up-to-date by the Contracting States.