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RAPPORT DU GROUPE DE TRAVAIL SUR LA LOI APPLICABLE

préparé par le président du
Groupe de travail, Andrea Bonomi

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REPORT OF THE WORKING GROUP ON APPLICABLE LAW

prepared by the President of
the Working Group, Andrea Bonomi

Document préliminaire No 22 de juin 2006
à l'intention de la Commission spéciale de juin 2006
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Preliminary Document No 22 of June 2006
for the attention of the Special Commission of June 2006
on the International Recovery of Child Support
and other Forms of Family Maintenance

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I. INTRODUCTORY

1. The Working Group on the law applicable to maintenance obligations (hereinafter the "WG") set up by the Special Commission of May 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance continued its proceedings in accordance with the assignment received from the Special Commission of April 2005.

2. It shall be recalled at that this Special Commission, the WG's membership was modified, in order to make it more representative of the States interested in the issues of applicable law. Its current membership is as follows: Sheila Bird (Australia), Antoine Buchet (European Commission), Nadia de Araujo (Brazil), Raquel Correia (Portugal), Gloria Dehart (ABI), Edouard de Leiris (France), Michèle Dubrocard (France), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Sarah Khabirpour (Luxembourg), Ase Kristensen (Norway), David McClean (Commonwealth Secretariat), Alberto Malatesta (Italy), Tracy Morrow (Canada), Maria del Carmen Parra Rodriguez (Spain), Marta Sosnovcová (Czech Republic), Robert Spector (United States of America), Dorothea van Iterson (Netherlands), Rolf Wagner (Germany), Andrea Bonomi (Switzerland, President). Alegría Borrás (Co-Reporter, Spain) and Jennifer Degeling (Co-Reporter, Australia) are *de facto* members of the WG.

3. The members of the WG would like to express their thanks to the Hague Conference on Private International Law and to the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance, for the opportunity they were given to analyze and debate the important issues relating to the law applicable to maintenance obligations and to present this report. They would also like to thank the Permanent Bureau for the support provided during all their activities.

4. The assignment conferred on the WG by the Special Commission of April 2005 was to continue with its work in order to develop general rules, to be included in the text of the Convention, and a working draft of an optional instrument on applicable law. The WG met twice in the Hague, in July 2005 and March 2006; for the remainder, the proceedings were conducted by means of an electronic discussion list.

5. During its first meeting in July 2005, the WG reached agreement on some general rules of conflict of laws, intended for inclusion in the mandatory part of the Convention. The WG's President was invited to take part in the September meeting of the Drafting Committee; on that occasion, the rules submitted by the WG were included in the text of the Tentative Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Prel. Doc. No 16 of October 2006); these are Articles 16(5), 27(2) and (3) and 32(2). These provisions correspond to those submitted in the WG's March 2005 report (Prel. Doc. No 14 of March 2005) and discussed at the April 2005 Special Commission. They will accordingly not be specifically commented upon in this report.

6. At its meetings in July 2005 and March 2006, and during the discussions held through an electronic discussion list, the WG then concentrated on the development of a draft optional instrument on the law applicable to maintenance obligations. In this perspective, the working draft submitted with the WG's March 2005 report (Prel. Doc. No 14) was supplemented and amended in several respects. These additions and modifications are intended to take into account observations made by certain delegations at the April 2005 Special Commission, and the opinions of the WG's new members. They also reflect the concern for achievement of an instrument that is acceptable to the greatest possible number of States. In this perspective, the WG decided to extend its review to the rules on applicable law contained in the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, submitted by the European Commission on December 15, 2005 (COM/2005/0649 final - CNS 2005/0259).

7. The draft appended to this report is merely a working draft (hereinafter the "Working Draft"): several of the provisions submitted are still controversial; all these proposals require review in further depth, or at least drafting improvements. Accordingly, the observations contained in this report are entirely provisional and merely an attempt at synthesis by the WG's President. In addition, these observations focus on the most important or most controversial provisions.

II. COMMENTARY ON SOME PROVISIONS OF THE APPENDED WORKING DRAFT

Article A

8. This Article is intended to determine the future instrument's substantive scope. It will need to be coordinated with the text of the future Convention (see Article 2 of Prel. Doc. No 16 of October 2005). The issue whether the optional instrument should contain reservations will need to be analyzed; it depends, *inter alia*, on the solutions found for maintenance obligations arising out of certain family relationships (see *infra*, Art. D).

Article B

9. This Article contains definitions that will need to be coordinated with the contents of the future Convention (see Article 3 of Prel. Doc. No 16 of October 2005).

Article C

10. This provision provides for a cascade of three connecting factors: the maintenance creditor's habitual residence is the main criterion (para. 1), supplemented by two subsidiary criteria, the law of the forum (para. 2) and the common nationality of the parties (para. 3). Application of these subsidiary connections is triggered by the impossibility for the creditor to obtain maintenance under the law designated by the previous criterion. Paragraph 2 *bis*, however, still much debated, provides for reversal / inversion of the first two criteria (creditor's habitual residence and law of the forum) when the maintenance claim is made in the State of the debtor's habitual residence.

11. This system repeats the main lines of that of the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter the "1973 Convention"). Its substantive aim is to favour the maintenance creditor by preventing the effect of rules of conflict of laws from depriving him or her of any maintenance claim. This is a transposition to the field of applicable law of the approach demonstrated in the draft Convention as a whole: the reason for that instrument's existence is to favour the maintenance creditor in international situations, whether as regards procedures to be observed or international recognition of his or her claims. As the applicable law is only one element of this structure, no-one doubts that its regulation should be consistent with the overall objective.

a) Principal connection with the creditor's habitual residence

12. The creditor's habitual residence is the principal connecting factor in the proposed draft. This connection corresponds to that used, on a principal basis, in the 1973 Convention and, as regards child support, in the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children* (hereinafter the "1956 Convention").

13. This connection offers several benefits; the main one 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. 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 be privileged or favoured, in the same circumstances, over a creditor having the nationality of the State where he or she lives.

14. 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.*, Article 5, para. 2 of Regulation 44/2001 and the "parallel" provision of Article 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.

15. In the case of a change of the creditor's residence, the law of the State of the new habitual residence becomes applicable from the time when the change occurs. This solution 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 performed 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, and with a view to consistency between jurisdiction and applicable law.

16. 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 accordingly 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 ought accordingly not to be called into further question owing to a change of applicable law.

b) Subsidiary connection to the law of the forum

17. If the creditor is unable to obtain maintenance on the basis of the law of the State of his or her habitual residence, the law of the forum becomes applicable on a subsidiary basis. This solution is based on *favor creditoris* and is intended to secure for the creditor the opportunity to obtain maintenance, if the latter is based on the law of the authority seized. Naturally, this subsidiary connection is useful only if the maintenance proceedings are brought in a State other than the State of the creditor's habitual residence, as otherwise the law of the habitual residence and law of the forum would coincide.

18. It should be noted that if the optional text were to include a provision such as that proposed under Article C, paragraph 2 *bis* (see infra), subsidiary application of the law of the forum would be relevant only if the authority seized were an authority of a State in which neither of the parties is resident (*e.g.*, if the maintenance claim has already been brought on an accessory basis before the court having jurisdiction with respect to affiliation or the dissolution of marriage): paragraph 2 *bis* provides that if the proceedings are brought in the State of the creditor's habitual residence, the law of the forum applies in any event, either automatically (option 1) or at the creditor's request (option 2).

19. Subsidiary application of the law of the forum is currently provided for under the 1956 Convention (Art. 3) and 1973 Convention (Art. 6); the latter provides for it, however, only as a last resort, after application, again on a subsidiary basis, of the law of the parties' common nationality (Art. 5). The reversal / inversion of these two subsidiary connecting criteria in the Working Draft (law of the forum before the law of common nationality) is justified for several reasons. First, it reduces the importance in practice of the connection to nationality, the relevance of which with respect to maintenance is disputed (see *infra*, lit. d). 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 quicker and cheaper decision to be made.

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

20. Article C, paragraph 2 *bis*, provides for reversal / inversion of the two connecting criteria provided for under paragraphs 1 and 2 when the authority seized is that of the country of the debtor's habitual residence. According to this provision, the law of the forum would then apply on a principal basis, automatically (option 1) or at the creditor's request (option 2). This provision remains controversial within the WG.

21. It is based on the finding 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 paragraph 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.

22. It should be noted that this situation is not entirely novel in relation to the existing instruments: in several Contracting States of the 1973 Convention, the law of the forum is already applicable by virtue of the reservation provided for under Article 15, when the creditor and debtor are nationals of the State concerned and the debtor has his habitual residence there. The same reservation is provided for, with respect to child support, under Article 2 of the 1956 Convention.

23. Application of the law of the forum is fairly widely supported within the WG, but also strongly opposed. Its main drawback is to make the applicable law depend on the authority seized of the claim; in a system where harmonisation of the rules of direct jurisdiction has been renounced, this solution could be an incentive to forum shopping.

24. Opinions also differ as to the conditions required for application of the law of the forum. According to one view (expressed by option 1), the law of the forum ought to be applied automatically when the authorities seized are those of the State of the debtor's habitual residence. This solution has the advantage of simplicity, but it involves a substantial breach of the principle of application of the law of the creditor's habitual residence. In order to protect the creditor, it has been proposed that application of the law of the forum be restricted to cases in which the creditor has decided himself or herself to seize the authority of the State of the debtor's residence (text in brackets).

25. According to the second option (2), the law of the forum becomes applicable only at the creditor's request. From the creditor's point of view, this solution is preferable in the abstract, since it enables the creditor to select the law with the most favourable substantive content, but, in the view of some, it goes too far as it does not provide equal treatment of the parties. In addition, it may cause the cost of legal advice to rise, as exercise of the choice pre-supposes adequate information of the creditor. Finally, it raises issues which have not been fully clarified, in particular when the debtor enters a request for modification of the initial decision (see the considerations in Prel. Doc. No 14 of March 2005).

d) Subsidiary connection to the parties' common nationality

26. If the creditor is unable to obtain maintenance either by virtue of the law of the State of his or her habitual residence, or by virtue of the law of the forum, the law of the parties' common nationality is applicable as a last resort. This second subsidiary connection supplements the maintenance creditor's protection in cases where the laws designated by the first two criteria provide for no maintenance obligation. In the most common situation in practice, child support, recourse to this third connecting criterion ought to be fairly rare, as most domestic laws recognise a right to maintenance payments.

27. Connection to the law of the parties' common nationality is also provided for under the 1973 Convention (Art. 5) and in that instrument, it prevails over the law of the forum. The reasons why the WG suggested reversal / inversion of these two criteria have already been mentioned in part (see *supra*, lit. d). Among these reasons, a leading role was played by the arguments raised against the use, in the field of maintenance, of the criterion of nationality. Thus, it was stated that this criterion is discriminatory by nature, as it favours without justification creditors having the same nationality as the debtor. In addition, this connection may lead to application of a law with which the parties have no (or no remaining) genuinely significant link (in particular when the creditor and debtor do not live in the State of their nationality, or have never lived there). In addition, this criterion frequently causes a split between jurisdiction and applicable law, compelling the authority seized to apply a foreign law; in such cases, this connection - which is supposed to *favour* the creditor - in fact requires the judge to determine the substance of a second foreign law (after the law of the creditor's habitual residence), whereas in many cases, maintenance is due under the law of the forum in any case. Finally, it was observed, more generally, that the importance conferred on nationality in the 1973 Convention, quite understandable at a time when this criterion still played a pivotal part in the private international law of many European States, seems less justified nowadays: in recent decades, the role of nationality as a connecting criterion has declined both in many domestic systems and in international conventions on private international law. Setting the criterion of nationality aside would be especially appropriate in the field of maintenance, having regard to the patrimonial nature of the benefits demanded.

28. Despite these objections, subsidiary connection to the law of the parties' common nationality has been maintained, for two main reasons. First, it appeared that simply renouncing it was not acceptable to certain States; second, provision of this subsidiary criterion reflects the *favor creditoris* which is the basis of the proposed draft. Confined to the third stage of the cascade, after the law of the creditor's habitual residence and the *lex fori*, this criterion is nevertheless reduced to a very marginal role. This is especially true for child support, as the law of the child's habitual residence and the law of the forum allow the grant of child support in most cases.

Article D

29. This provision contains several exceptions from the general rules in Article C for maintenance obligations arising out of certain family relationships, to wit, obligations between divorced or legally separated spouses, those between persons related collaterally or by affinity, and obligations to other classes of adults (such as ascendants). Some of these provisions remain highly controversial within the WG.

30. The reason for the existence of these special rules lies in the absence of international consensus regarding the desirability of granting maintenance based on these family relationships. In this context, the principle of *favor creditoris* on which Article C of the Working Draft is based is difficult to transpose to these special situations, with a risk of considerably reducing the number of States interested in the optional instrument.

31. Under the system of the 1973 Convention, this concern is also taken into account, either through special rules (in particular Articles 7 and 8), or by reservations allowing States to restrict the Convention's application to maintenance obligations arising out of certain family relationships (Articles 13 and 14). One of the objectives of the special rules under Article D is to restrict, or even to exclude entirely, the opportunity of making reservations against the future optional instrument.

a) Maintenance obligations between divorced or legally separated spouses

32. As regards maintenance obligations between divorced or legally separated spouses, or spouses whose marriage has been annulled or avoided, Article D, paragraph 1 provides for an escape clause allowing the authority seized to set aside, on certain conditions, the law designated by the general rules and to apply the law of another country with which the relationship is manifestly more closely related.

33. In the system under the 1973 Convention, maintenance obligations between divorced spouses were governed solely by the law applied to the divorce (Art. 8). The same applies, *mutatis mutandis*, to a legal separation or a declaration that the marriage is annulled or void. This applies not only when the maintenance claim is determined during the divorce proceedings (or at the time of divorce), but also in the case of any subsequent revision or modification of decisions relating to maintenance obligations between divorced spouses, in the case in particular of proceedings supplementary to a divorce decision granted abroad.

34. This solution has various weaknesses, for which it was criticised in certain Contracting States to the 1973 Convention. It may be observed, first, that as the cascade of connections under Articles 4 to 6 is ruled out, the creditor's interests are not fully protected. In particular, if the law governing the divorce does not provide for any maintenance, it may not be set aside in favour of another law, except by means of the public policy exception. In addition, the legal and factual conditions of the social environment where there is a genuine need for maintenance are not taken into account, which is inconsistent with the general spirit of the Convention. It should also be noted that as the rules of conflict of laws with respect to divorce have not been harmonised internationally, Article 8 has had in fact no effect of harmonisation of the law relating to maintenance obligations: this law remains dependent on the private international law of the State of the court seized of the divorce proceedings, and this solution inevitably favours forum shopping. In addition, the selection of a connecting factor that is invariable in time may result, when the maintenance obligation between spouses is to be determined after the divorce, in application of a law that has lost any relevance to the situation of the former spouses and their respective interests. However surprising it may be, the judge may not take account of the law of either the creditor's or the debtor's habitual residence. The divorce judgment may also be devoid of provisions relating to maintenance. In such case, the concern for continuity on which Article 8 is based seems unjustified. This is especially true when the spouses have divorced in a country which does not provide for maintenance to a divorced spouse (*e.g.*, a State applying muslim law); in this case, application of the law governing the divorce results in a denial of any benefit, unless that application is ruled out on grounds of public policy. Finally, application of the law governing the divorce can result in practical difficulties since it may be difficult to determine from the judgment the law on the basis of which the divorce was granted.

35. Having regard to these objections, several delegations stated their favour for removal of Article 8, with the consequence that obligations between divorced and legally separated spouses would be governed by the generally-applicable rules under Article C of the Working Draft.

36. According to other delegates, however, this solution goes too far. It should be considered that, in certain domestic systems, maintenance is granted to a divorced spouse only with great restraint and in exceptional situations (in Europe, this restrictive attitude in

characteristic, in particular, of the laws of Scandinavian States and certain common law jurisdictions). In this context, indiscriminate application of the general rules inspired by *favor creditoris* is perceived as being excessive. In particular, the opportunity for one of the spouses to influence the existence and substance of the maintenance obligation through a mere change of habitual residence may lead, in certain cases, to rather unfair results, inconsistent with the debtor's legitimate expectations. Let us take the case of a couple of two Swedes having lived in Sweden, a country where maintenance obligations between spouses are excluded or very limited, from the time of their marriage. After ten years of marriage, they divorce and the wife moves to Switzerland, where she enters a claim for maintenance, in accordance with Swiss law as designated under Article C, paragraph 1, of the Working Draft. The grant of such maintenance seems unfair on the husband and inconsistent with the legitimate expectations that the spouses might have had during the marriage.

37. To take these situations into account, a proposal was made at the WG to make maintenance obligations between spouses subject to a conflict rule independent of the one under Article C and based on the connecting criterion of the spouses' common habitual residence or last common habitual residence. Such a proposal, however, received a very mixed response from certain members of the WG, as it hardly seems consistent with the concern for protection of the creditor and with the general architecture of the proposed draft.

38. Article D, paragraph 1, is a compromise solution between these two different approaches (application of the general rules under Article C or *ad hoc* rule based on the spouses' common residence). This provision does not provide for a separate connecting criterion, but contains an escape clause, enabling the authority seized to set aside, in certain circumstances, the law designated by the general rules under Article C. For this purpose, it will be necessary for the marriage (or, more broadly, the parties' situation) to be both *distantly related* to the country, the law of which is applicable pursuant to the rules under Article C (in particular the law of the creditor's habitual residence), and *manifestly more closely related* to another country; these conditions are cumulative and intended to avoid excessively easy recourse to this escape clause. If they are satisfied concurrently, the law applicable is that of the country with which the marriage has the manifestly closer links.

39. This compromise solution may rely on support from several members of the WG. Its main drawback is that it creates an uncertain situation regarding the applicable law, and accordingly compounds the risk and costs of litigation. In addition, like any rule based on the concept of close links, it could be applied in a non-uniform manner among Contracting States, resulting in a mere show of uniformity. The two combined conditions are designed to mitigate these risks; in order to reduce them further, it might also be specified that the escape clause may operate only if there are closer links with the country of the spouses' last common residence (wording in brackets). These corrections do not, however, allow the uncertainty connected with this clause to be ruled out entirely.

40. In order to limit its impact, and to avoid a step back in relation to the system under the 1973 Convention, the escape clause should be limited to obligations between spouses divorced or legally separated, or whose marriage has been declared to be annulled or void. There is no unanimous agreement on this point within the WG, however.

b) Maintenance obligations between persons related collaterally or by affinity

41. As regards maintenance obligations between persons related collaterally or by affinity, Article D, paragraph 2, provides that the debtor may assert against the creditor's claim the absence of an obligation to the latter under the law of his or her habitual residence. If the debtor makes use of this veto, the rule implies cumulative application of the law governing maintenance according to the generally-applicable rules under Articles 4 to 6, on the one hand, and of the law of the debtor's residence, on the other hand.

42. This veto is based on the solution provided for under Article 7 of the 1973 Convention. This rule allows the debtor to contest a request based on the generally-applicable rules relating to applicable law, on the ground that there is no maintenance obligation under the law of the debtor's and creditor's common nationality, or, in the absence of common nationality, under the domestic law of the debtor's habitual residence. This provision, however, raises questions as to the desirability of maintaining the criterion of common nationality, used here not in an "affirmative" role (*i.e.*, as the basis for entitlement to maintenance), but in a "negative" role (to contest that entitlement when provided for by the general connections). We shall refer to the considerations in this respect contained in the WG's previous report (Prel. Doc. No 14 of March 2005).

43. Article D, paragraph 2, of the Working Draft renounces the use of this criterion, allowing the debtor to base his or her veto on the law of his or her country of residence. This solution, less favourable to the creditor than the one under the 1973 Convention, is still debated, however.

c) Maintenance obligations to other adults

44. Article D, paragraph 3, also grants the debtor a veto when the issue is a maintenance obligation other than child support, between divorced or legally separated spouses, or between persons related collaterally or by affinity. This rule remains highly controversial within the WG.

45. The main situations concerned are the maintenance claims of parents or other ascendants of the debtor, and those arising out of other family relationships provided for under certain domestic laws, such as registered partnerships. As mentioned previously, these are situations in which the existence of a maintenance obligation is provided for under certain legal systems only, so that application of the generally-applicable rules based on *favor creditoris* give rise to great perplexity and may impede the accession to the optional instrument of certain States potentially interested. In order to avoid a proliferation of reservations, some have suggested that these relationships should be subject to a restrictive rule, based on a veto granted to the debtor.

46. The proposed rule is intended to mitigate *favor creditoris*, though without going to the other extreme. Under this solution, the debtor may veto only if there is a maintenance obligation neither under the law of his or her habitual residence nor under the law of the parties' common nationality, if there is one. These conditions are cumulative, which results in reducing the scope of the exception in relation to the generally-applicable rules under Article C, which favour the creditor.

Article E

47. This provision grants the parties the right to designate expressly the law of the forum as the law applicable to the maintenance obligation. This choice of applicable law assumes that the maintenance creditor has already instituted or is about to institute maintenance proceedings before a specific authority. The parties' consent is intended to make the domestic law of the authority seized applicable, and its effect is limited to specific proceedings.

48. The 1956 and 1973 Conventions are silent as to the possibility for the parties to agree on the law applicable to the maintenance obligation. In most Contracting States, that silence is construed as excluding the parties' autonomy. In one Contracting State, the Netherlands, the courts have nevertheless considered that a choice of law is possible, at least when it relates to the law of the forum[1].

[1] *Hoge Raad*, February 21, 1997, *Nederlands Internationaal Privaatrecht*, 1997, No 70.

49. This limited opening for the party autonomy does not seem to run up against any obstacles of principle. 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.

50. 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 of the effects of choice is justified, as the chosen law is the law of the forum.

51. The law of the forum is already applicable in several States under their domestic rules. In the system of the 1956 and 1973 Conventions, and in accordance with the Working Draft (Art. C, para. 2), application of the law of the forum is provided for on a subsidiary basis when the creditor is unable to obtain maintenance under the law (or laws) designated on a principal basis. Under Article C, paragraph 2 *bis*, the law of the forum would also be applicable, automatically or at the creditor's request, when the proceedings are instituted in the State of the debtor's habitual residence. The grant to the parties of a right to choose the law of the forum is accordingly merely an improvement of the existing rules, rather than an upheaval of the system.

52. After some hesitation, this opportunity to choose was provided for even with respect to maintenance obligations to children: it appeared that the risks connected with this opening towards party autonomy are substantially outweighed by the benefits in terms of simplicity arising out of application of the law of the forum. However, this issue remains undecided.

Article F

53. This provision enables the parties to select the law applicable to the maintenance obligation at any time, before a dispute even arises. Unlike the choice of law of the forum provided for under Article E, the choice of applicable law provided for under Article F is not made solely "for the purposes of specific proceedings"; its effects are accordingly not limited to proceedings already instituted or about to be instituted by the maintenance creditor: the law chosen by the parties is meant to govern the maintenance obligations between the parties from the time of the choice, and until the time when they decide, if applicable, to modify their choice. This provision remains controversial within the WG.

54. The choice of applicable law is of particular use in relations between spouses when, before or during marriage, they enter into an agreement relating to maintenance obligations and/or the ownership of their respective assets. Since the choice is allowed for the law applicable to matrimonial property regimes under the Hague Convention of 14 March 1978 and under several domestic systems of private international law, it appeared that it could also be contemplated for maintenance obligations.

55. Once the choice of applicable law had been allowed for spouses, it appeared that it could be extended to all adults other than those who, owing to impairment or insufficiency of their personal faculties, are unable to protect their own interests. This class of "vulnerable adults" corresponds to that enjoying the protective mechanisms established by the *Hague Convention of 13 January 2000 on the International Protection of Adults*. The choice of applicable law was also ruled out with respect to child support.

56. 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.

57. Despite these advantages, party autonomy in the field of maintenance has obvious dangers: it should not be forgotten that the choice of law may expose one of the parties, in particular the less informed or more open to influence, to unfair consequences. If the chosen law is very restrictive as regards maintenance, the result of the choice may be to deprive the creditor of any claim, which is clearly inconsistent with the concern for protection on which the draft optional instrument is based. This liberal solution is in fact difficult to reconcile with the attitude in several States to maintenance agreements: several domestic laws refuse to treat such agreements as genuinely binding, or allow the courts to amend them, or even to set them aside, in the event of a dispute. The main concern of this mitigating power is to avoid the creditor being able to give up in advance all or part of his or her rights without any judicial review of the agreement on the merits. Full discretion to choose the applicable law is hardly reconcilable with these restrictions provided for under substantive law.

58. With a concern for protection of the maintenance creditor, Article F provides for certain restrictions on the opportunity the parties have to choose the applicable law. According to a first restriction, of a formal nature, the choice of applicable law is to be made in writing or by other means making the information accessible so as to be usable for subsequent reference. The requirement of writing is intended to draw the creditor's attention to the importance of the choice and to protect him or her from the consequences of an ill-considered choice. Some members of the WG submitted the provision of more demanding formal requirements, such as the form of a notarial deed, but standardisation of these terms seems difficult in connection with an international instrument.

59. A second restriction concerns the object of the choice and is intended to restrict the range of options available to the parties. They will be able to choose only the law of their common nationality, or the law of the country of the habitual residence of one of them, or the law applicable to their property relationship (to wit, the matrimonial property regime). All these connecting criteria need to be satisfied at the time of designation of the applicable law.

60. The third restriction concerns effectiveness of the choice of applicable law. 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 Working 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.

Article G

61. This provision corresponds to that of Article 9 of the 1973 Convention and may rely on wide support within the WG. A rule with the same substance was introduced, upon the WG's proposal, in the mandatory part of the Convention (Article 32, para. 2 of Prel. Doc. No 16 of October 2005).

Article H

62. This provision corresponds to a large extent to Article 10 of the 1973 Convention, and may rely on wide support within the WG.

Article I

63. This rule of substantive law corresponds to that under Article 11, paragraph 2, of the 1973 Convention. Its desirability is disputed by certain members of the WG, whereas others fear that it might be used merely to evade the law designated by the other conflict rules in the Working Draft. As an alternative, the introduction of a public policy clause such as that contained in Article J, paragraph 2, has been suggested.

Article J

64. Paragraph 1 of this provision merely provides an opportunity to set aside the applicable law when its effects are manifestly inconsistent with the forum's public policy. This provision is widely accepted within the WG. On the other hand, paragraph 2 is a more flexible and less "cumbersome" version of the substantive rule in Article I.

Article K

64. This provision merely prevents *renvoi* being taken into account. It does not call for any specific comments.

A N N E X E

Esquisse relative à la loi applicable

A N N E X

Working Draft on Applicable Law

Working Draft on Applicable Law

Meeting of the working Group on Applicable Law, 9 – 11 March 2006

Article A

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

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) ...[1]

Article C

1. Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. 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.

2. If the creditor is unable, by virtue of the law referred to in paragraph 1, to obtain maintenance from the debtor, the law of the forum shall apply.

[2bis

Option 1 : Notwithstanding the provisions of paragraphs 1 and 2, the law of the forum shall apply [if the debtor has his habitual residence there] [if the creditor has seized the competent authority of the State where the debtor has his habitual residence]. If the creditor is unable, by virtue of the law of the forum, to obtain maintenance from the debtor, the law of the habitual residence of the creditor shall apply.

Option 2 : Notwithstanding the provisions of paragraphs 1 and 2, the law of the forum shall apply if the debtor has his habitual residence there and if the creditor so requests.]

3. If the creditor is unable, by virtue of the laws referred to in paragraphs 1 [and 2] [to 2bis], to obtain maintenance from the debtor, the law of the State of their common nationality shall apply provided that it appears from the circumstances as a whole that there is a close connection between the maintenance obligation and that State.

[1] Other definitions may be required such as for "spouses".

Article D

1. In the case of maintenance obligations between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled[2], if it appears from the circumstances as whole that [the situation of the parties] [the marriage] has only a loose connection with the State whose law is designated under paragraphs 1 [and 2] [to 2bis] of Article C[3] and that it is manifestly more closely connected with [another State] [the State in which the spouses had their last common habitual residence], the law of this State shall apply.[4]

2. In the case of a maintenance obligations between persons related collaterally or by affinity, [except in cases of child support,] the debtor may contest a claim by the creditor on the ground that there is no such obligation under the law of the State of the habitual residence of the debtor.

[3. In the case of maintenance obligations other than those in respect of children and those referred to in paragraphs 1 and 2, 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 E

Notwithstanding the provisions of Articles C and D, the maintenance creditor and debtor for the purpose of particular proceedings may expressly designate as applicable to a maintenance obligation the law of the forum.[5]

Article F

1. Notwithstanding the provisions of Articles C and D except for maintenance obligations in respect of a child [below the age of 18] 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, the maintenance creditor and debtor may at any time designate in writing or by other means that will make information accessible so as to be usable for subsequent reference one of the following laws as applicable to a maintenance obligation –

a) the law of their common nationality 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 applicable to their property regime at the time of designation.

2. The law chosen shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences.[6]

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[2] The Working Group will be giving further consideration to the question of whether the provision of Article D, paragraph 1, should be applicable also to spouses before divorce or legal separation.

[3] Discussion is continuing on the question of whether the cascade system of Article C should be applicable to spousal maintenance.

[4] Discussion is continuing on the question of whether a special provision as that of Article D, paragraph 1 is needed and, if yes, of how it should be formulated.

[5] The Working Group will be giving further consideration to the question of whether the following should be included after the words “article C and D”: “[except for maintenance obligations in respect of a child [below the age of 18] 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]”.

[6] Discussion is continuing on the question of how the right of the parties to choose the law applicable to the maintenance obligation could be restricted.

Article Fbis[7]

Article G

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 H

1. 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 I

Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance.][8]

Article J

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

[2. In particular, its application may be refused where it takes no account either of the resources of the debtor or of the needs of the creditor.]

Article K

In this text the term 'law' means the law in force in a State other than its choice of law rules.

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[7] *Quaere* whether there is a need for an explicit rule governing the material validity of a maintenance agreement along the following lines:
"1. The material validity of a maintenance agreement is governed by the law of the habitual residence of the creditor at the time of the agreement [proceedings in respect of the agreement].
2. Where the agreement involves more than one creditor the agreement is materially valid if it is so valid under the law of the habitual residence of each creditor."

[8] Discussion is continuing on the question of whether any further rules of substance are needed.