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**ESQUISSE RELATIVE À LA LOI APPLICABLE
PROJET DE DISPOSITIONS ADDITIONNELLES**

suggestions du Bureau Permanent

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**WORKING DRAFT ON APPLICABLE LAW
DRAFT ADDITIONAL PROVISIONS**

suggestions by the Permanent Bureau

*Document préliminaire No 28 de mai 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 28 of May 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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Introduction

As described in Preliminary Document No 20,¹ the optional general rules on applicable law could be presented either in the form of a Protocol² to the Convention on the International Recovery of Child Support and other Forms of Family Maintenance (Option A) or as an Optional Chapter of the Convention (Option B).

Option A: Being a separate instrument but linked to the Convention, the Protocol would require its own set of final clauses. Many of them would be drawn from the Convention but the procedures concerning signature, ratification and accession could be simpler as shown in the draft provisions set below for the consideration by the Special Commission. If this option is chosen, it would have to be decided whether the definitions in the main Convention apply equally to the Protocol, and if so, whether these should be incorporated into the Protocol by reference or repeated in the Protocol itself. At this point, the Working Draft on Applicable Law has its own definition provision. Like the Preliminary Draft Convention, it includes definitions for "creditor", "debtor" and "agreement in writing" with a small difference in the last case. A definition of the term "legal assistance", still between square brackets, appears in the text of the Preliminary Draft Convention, but it does not appear in the Working Draft on Applicable Law. Likewise, the term "law" is defined in the latter text but not in the former. The Permanent Bureau is of the view that no other definitions are required at this stage. Further to a similar examination of the Chapter on General Provisions of the main Convention, the Permanent Bureau is of the view that the general provisions set out below³ for the consideration of the Special Commission would need to be incorporated into the Protocol. Finally, the Protocol would certainly require its own Preamble.

Option B: The other possibility, *i.e.* the use of an optional Chapter, offers the advantage of having one comprehensive integrated instrument on the international recovery of child support and other forms of family maintenance, which is consistent with the mandate given by the 1999 Special Commission on Maintenance Obligations.⁴ If this option is chosen, the number of final clauses to be added to the Convention would be quite limited since States becoming party to the Convention would only have to declare, if they so wish, (1) that the chapter on applicable law would apply to them or (2) that it would not apply to them. Such declaration could be made at the time of signature, ratification, acceptance, approval or accession, or at a subsequent time, and be modified or withdrawn at any given time, and would be notified to the depositary (see Option B below). If the optional chapter possibility is chosen, a definition of the term "law" may need to be added to the chapter on applicable law. Furthermore, a provision concerning the co-ordination with other applicable law instruments and an additional transition provision may need to be added.

¹ Permanent Bureau, "Form of the Rules on Applicable Law and Possible Final Clauses", Prel. Doc. No 20 of June 2006, prepared for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance.

² Further research will be carried out by the Permanent Bureau to examine any public international law implications as to the use of the term Protocol depending on the structure of the instrument preferred by the Special Commission, particularly if the instrument is to be one which may be ratified independently of the Convention.

³ The provisions on non-unified legal systems, relationship with other instruments, uniform interpretation, review of the practical operation and transition provisions.

⁴ See "Report on and Conclusions of the Special Commission on Maintenance Obligations of 1999", drawn up by the Permanent Bureau, December 1999, p. 22: "The Special Commission [...] recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument » which would "be comprehensive in nature [...]".

Option A: Protocol on applicable law to the Hague Convention on the international recovery of child support and other forms of family maintenance

Preamble

The States signatory to this Protocol,

Wishing to modernise the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*,

Desiring to establish common provisions concerning the law applicable to child support and other forms of family maintenance,

[Considering that the principles upon which this Protocol is founded should apply whether or not the States signatory to this Protocol are States signatory to the Convention of the [...November 2007] on the International Recovery of Child Support and Other Forms of Family Maintenance,]⁵

Have resolved to conclude a Protocol for this purpose and have agreed upon the following provisions:

Article on Non-unified legal systems⁶

1. In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Protocol apply in different territorial units –

a) any reference to the law of a State shall be construed as referring, where appropriate, to the law in force in the relevant territorial unit;

b) any reference to competent authorities or public bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;

c) any reference to habitual residence in that State shall be construed as referring, where appropriate, to habitual residence in a territorial unit;

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply to maintenance obligations shall not be bound to apply this Protocol to conflicts of laws which involve solely such different territorial units.

3. This Article shall not apply to a Regional Economic Integration Organisation.

⁵ See, *supra*, note 2.

⁶ Drawn from Article 43 of preliminary draft Convention.

Article on Co-ordination with prior Hague Maintenance Conventions⁷

In relations between the Contracting States, this Protocol replaces the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* and the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children [in so far as their scope of application as between such States coincides with the scope of application of this Protocol].

Article on Co-ordination with other instruments⁸

1. This Protocol does not affect any other international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by this Protocol, unless a contrary declaration is made by the States Parties to such instrument.

2. Paragraph 1 of this Article also applies to uniform laws based on special ties of a regional or other nature between the States concerned.

Article on Uniform interpretation⁹

In the interpretation of this Protocol, regard shall be had to its international character and to the need to promote uniformity in its application.

Article on Review of practical operation of the Protocol¹⁰

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Protocol and to encourage the development of good practices under the Protocol.

For the purpose of such review Contracting States shall co-operate with the Permanent Bureau in the gathering of information, including statistics and case law, concerning the practical operation of the Protocol.

⁷ Drawn from Article 44 of preliminary draft Convention. It is to be noted that Article 29 of the Montevideo Convention provides that the Montevideo Convention shall prevail between the 1973 Hague Conventions and the Montevideo Convention unless States Parties to both instruments enter into bilateral agreements to the contrary. On the other hand, Article 30 of the Montevideo Convention states that “[t]his Convention shall limit neither the provisions of existing or future bilateral or multilateral conventions on this subject entered into by the States Parties, nor the more favourable practices that those States may observe in this area.” It may not then be necessary to address the coordination between these two instruments in the new Hague instrument on applicable law. It may be that States Parties to the Montevideo Convention want to benefit from the application of the optional applicable law rules of the new Hague regime; they may do so by ratifying the Protocol. See, P. Lortie, “Co-ordination between the Maintenance Project and other International Instruments”, Prel. Doc. No 18 of June 2006, prepared for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance, footnote 44 and paragraph 15.

⁸ Drawn from Article 23 of the *Hague Convention of 1 August 1989 on the Law Applicable to Successions to Estates of Deceased Persons*.

⁹ Drawn from Article 47 of preliminary draft Convention.

¹⁰ Drawn from Article 48 of preliminary draft Convention.

Article on Transitional provisions¹¹

This Protocol shall not apply -

- a) to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State;
- b) maintenance obligations governed by an agreement made in a Contracting State prior to its entry into force in that State.

Article on Signature, ratification and accession

Option 1¹²

1. This Protocol is open for signature by all States.
2. This Protocol is subject to ratification, acceptance or approval by the signatory States.
3. This Protocol is open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands, depositary of the Protocol.

Option 2¹³

1. The present Protocol is open for signature by any State which has signed the Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance.
2. It may be signed and ratified by every State which is a Party to the Convention, and the instrument of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands, depositary of the Protocol.
3. This Protocol is open for accession by all States Parties to the Convention.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands, depositary of the Protocol.

¹¹ Drawn from Article 12 of the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.

¹² Drawn from Article 52 Option 2 of the preliminary draft Convention and Article 27 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter 2005 Hague Convention).

¹³ Drawn from Article 9(1)(2) of the *Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (hereinafter 1971 Hague Supplementary Protocol). Article 9(1)(2) of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts* and Article 13 of the *Optional Protocol to the Convention on the Rights on the sale of children, child prostitution and child pornography* use similar language:

1. *The present protocol is open for signature by any State that is party to the Convention or that has signed it.*
2. *The present Protocol is subject to ratification and is open to accession by any State party to the Convention or that has signed it. Instruments of ratification or accession shall be deposited with the Secretary General of the United Nations.*

Article on Regional Economic Integration Organisations¹⁴

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Protocol may similarly sign, accept, approve or accede to this Protocol. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Protocol.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Protocol in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Protocol, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article ?? that its Member States will not be Parties to this Protocol.
4. Any reference to a "Contracting State" or "State" in this Protocol applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate.

Article on Accession by Regional Economic Integration Organisations¹⁵

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article ?? that it exercises competence over all the matters governed by this Protocol and that its Member States will not be Parties to this Protocol but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Protocol applies equally to the Member States of the Organisation, where appropriate.

Article on Entry into force¹⁶

1. This Protocol shall enter into force on the first day of the month following the expiration of three months after the deposit of the third [/ second] instrument of ratification, acceptance, approval or accession referred to in Article ??.
2. Thereafter the Protocol shall enter into force –
 - a) for each State or Regional Economic Integration Organisation referred to in Article ?? subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b) for a territorial unit to which the Protocol has been extended in accordance with Article ??, on the first day of the month following the expiration of three months after the notification referred to in that Article.

¹⁴ Drawn from Article 53 of the preliminary draft Convention and Article 29 of the 2005 Hague Convention.

¹⁵ Drawn from Article 54 of the preliminary draft Convention and Article 30 of the 2005 Hague Convention.

¹⁶ Drawn from Article 55 of the preliminary draft Convention, Article 19 of the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (hereinafter Hague Securities Convention), and Article 9(3) of the 1971 Hague Supplementary Protocol (adapted).

Article on Declarations with respect to non-unified legal systems¹⁷

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Protocol, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article ?? that the Protocol shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Protocol applies.¹⁸
3. If a State makes no declaration under this Article, the Protocol is to extend to all territorial units of that State.¹⁹
4. This Article shall not apply to a Regional Economic Integration Organisation.²⁰

Article on Reservations

Option 1²¹

No reservations may be made to this Protocol.

Option 2²²

1. Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article ??, make one or more of the reservations provided for in Articles ??, ?? and ?. No other reservation shall be permitted.
2. Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
3. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.²³
4. A Contracting State which has made a reservation under this Protocol shall not be entitled to claim the application of this Protocol to such matters as are excluded by its reservation.

¹⁷ Drawn from Article 56 of the preliminary draft Convention.

¹⁸ Drawn from Articles 40 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter 1980 Hague Convention), 45 of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter 1993 Hague Convention), 59 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter the 1996 Hague Convention), 55 of the *Hague Convention of 13 January 2000 on the International Protection of Adults* (hereinafter the 2000 Hague Convention), 20 of the Hague Securities Convention and 28 of the 2005 Hague Convention.

¹⁹ Drawn from Articles 45 of the 1993 Hague Convention, 59 of the 1996 Hague Convention, 55 of the 2000 Hague Convention, 20 of the Hague Securities Convention and 28 of 2005 Hague Convention.

²⁰ Drawn from Article 28 of the 2005 Hague Convention.

²¹ Drawn from Article 21 of the Hague Securities Convention and Article 26 of the 1998 Kyoto Protocol to the United Nations Framework Convention on Climate Change.

²² Drawn from Article 57 of the Preliminary Draft Convention.

²³ Drawn from Articles 42 of the 1980 Hague Convention, 60 of the 1996 Hague Convention and 56 of the 2000 Hague Convention.

Article on Declarations²⁴

1. Declarations referred to in Articles ?? and ??, may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.
2. Declarations, modifications and withdrawals shall be notified to the depositary.
3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Protocol for the State concerned.
4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

Article on Denunciation

Option 1²⁵

A denunciation of the Convention on the International Recovery of Child Support and other Forms of Family Maintenance entails the denunciation of this Protocol.

Option 2²⁶

1. A Contracting State to the Protocol may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a Multi-unit State to which the Convention applies.²⁷
2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.²⁸

²⁴ Drawn from Article 58 of the preliminary draft Convention.

²⁵ Drawn from Article 9(4) of the 1971 Hague Supplementary Protocol.

²⁶ Drawn from Article 59 of the preliminary draft Convention.

²⁷ Drawn from Article 23 of the Hague Securities Convention.

²⁸ Drawn from Articles 23 of the Hague Securities Convention and 33 of the 2005 Hague Convention.

Article on Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles ?? and ?? of the following²⁹ –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles ?? and ??;³⁰
- b) the date on which the Protocol enters into force in accordance with Article ??;³¹
- c) the declarations referred to in Articles ??;³²
- d) the reservations referred to in Articles ??;
- e) the denunciations referred to in Article ??.³³

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at The Hague, on the ?? day of ??, 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-first Session.

²⁹ Drawn from Article 24 of the Hague Securities Convention.

³⁰ Drawn from Articles 24 of the Hague Securities Convention and 34 of the 2005 Hague Convention.

³¹ Drawn from Articles 45 of the 1980 Hague Convention, 48 of the 1993 Hague Convention, 63 of the 1996 Hague Convention, 59 of the 2000 Hague Convention, 24 of the Hague Securities Convention and 34 of the 2005 Hague Convention.

³² Drawn from Articles 45 of the 1980 Hague Convention, 63 of the 1996 Hague Convention and 59 of the 2000 Hague Convention.

³³ Drawn from Articles 45 of the 1980 Hague Convention, 48 of the 1993 Hague Convention, 63 of the 1996 Hague Convention, 59 of the 2000 Hague Convention, 24 of the Hague Securities Convention and 34 of the 2005 Hague Convention.

Option B: Optional chapter on applicable law of the Hague Convention on the international recovery of child support and other forms of family maintenance

[NB: These provisions would be included respectively in the General Provisions Chapter and in the optional Chapter on Applicable Law in the main Convention and the final clauses would be the ones already contained in the main Convention with the necessary adjustments such as the rule on the application in time which would need to be adjusted. The issue of possible reservations within to the optional chapter also remains to be discussed.]

Additional provision on the co-ordination with prior Hague Maintenance Conventions³⁴

In relations between the Contracting States, the chapter on applicable law replaces the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* and the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* [in so far as their scope of application as between such States coincides with the scope of application of this Protocol].

Additional Transitional provisions³⁵

This chapter shall not apply -

- a) to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State;
- b) maintenance obligations governed by an agreement made in a Contracting State prior to its entry into force in that State.

Article on Declarations³⁶

A Contracting State may, in accordance with Article 55, declare that it will apply the Chapter ??.

³⁴ *Supra*, note 7. The co-ordination with other instruments would be governed by Article 45 of the Preliminary Draft Convention.

³⁵ Drawn from Article 12 of the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*. This provision should be included within the chapter on applicable law.

³⁶ Drawn from Article XXX of the UNIDROIT Protocol.