

**AVANT-PROJET DE PROTOCOLE SUR LA LOI APPLICABLE
AUX OBLIGATIONS ALIMENTAIRES**

*établi sous l'autorité de la Commission spéciale
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille
et approuvé par le Comité de rédaction*

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

*drawn up under the authority of the Special Commission
on the International Recovery of Child Support
and other Forms of Family Maintenance
and approved by the Drafting Committee*

*Document préliminaire No 30 de juin 2007
à l'intention de la Vingt et unième session de novembre 2007*

*Preliminary Document No 30 of June 2007
for the attention of the Twenty-First Session of November 2007*

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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,

[Wishing to complement with general rules on applicable law the Convention of [..] November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance,]

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

Article 1 *Scope*

1. This Protocol 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. Decisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1.

Article 2 *Universal application*

This Protocol applies even if the applicable law is that of a non-Contracting State.

Article 3 *General rule on applicable law*

1. Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise.
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 4 *Special rules with respect to children and parents*

1. The following provisions shall apply in the case of maintenance obligations of –
 - a) parents towards their children;
 - b) persons other than parents towards children under the age of [18][21]; and,
 - c) children towards their parents.

2. If the creditor is unable,¹ by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply.

3. Notwithstanding Article 3, 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.

[4. If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3, to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply.]

[Article 5 *Special rule with respect to spouses and ex-spouses*

Notwithstanding Article 3, [at the request of a [party][debtor],] maintenance obligations between spouses, ex-spouses or parties to a marriage which has been annulled are governed

Option 1

by the law of the State of their last common habitual residence if they never had a common residence in the State of the habitual residence of the creditor [provided that the debtor still resides in the State of their last common habitual residence].

Option 2

by the law of the State of their last common habitual residence if it appears from the circumstances as a whole that the [marriage is or was][maintenance obligations are] manifestly more closely connected with that State [provided that the debtor still resides there].

Option 3

by the law of the State having the closest connection with the marriage, usually the place of their last common habitual residence.]

Article 6 *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 5, the debtor may contest a claim from the creditor on the ground that there is no such obligation under both the law of the habitual residence of the debtor and the law of the common nationality of the parties, if there is one.

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

1. Notwithstanding the provisions of Articles 3, 4(1) c), 5 and 6, the maintenance creditor and debtor for the purpose only of a particular proceeding in a given State may expressly designate as applicable to a maintenance obligation the law of that State.

¹ The Drafting Group on Applicable Law asked the question whether the expression “unable to obtain ...” refers to the existence of a maintenance obligation *in abstracto* or under the concrete circumstances of the case. An alternative wording could be:

“2. If there is no maintenance obligation as between the creditor and the debtor under the law referred to in Article 3, the law of the [...]”.

2. A designation made before the institution of such proceedings shall be in an agreement, signed by both parties, in writing or recorded in any medium the information contained in which is accessible so as to be usable for subsequent reference.²

Article 8 Designation of the applicable law

1. Notwithstanding the provisions of Articles 3, 4(1) c), 5 and 6, the maintenance creditor and debtor may at any time designate 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, or the law in fact applied, to their property regime;
- d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation.

2. Such agreement shall be in writing or recorded in any medium the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties.³

3. Paragraph 1 shall not apply to maintenance obligations 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].

4. The law chosen shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences.⁴

Article 9 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 10 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 basis for 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) prescription or limitation periods;

² As the text stands this provision sets out only minimum formal requirements for an agreement, and it is open to States parties to set further requirements, relating for example to the need to ensure that a party's consent is free and fully informed. This will be made clear in the Explanatory Report. Further consideration should be given to the question of the law applicable to the essential validity of choice of law agreements made under the Protocol.

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⁴ The Special Commission thought that there should be further consideration of the formulation of this rule.

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 11 Exclusion of renvoi

In this Protocol, the term “law” means the law in force in a State other than its choice of law rules.

Article 12 Public policy

1. The application of the law determined under this Protocol 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][shall] be taken into account in determining the amount of maintenance.⁵

Article 13 Non-unified legal systems

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;

d) any reference to the State of which two persons have a common nationality shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the two persons have the closest connection;

e) any reference to the State of which a person is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the person has the closest connection.

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 Further consideration should be given to the appropriate location for this rule.

Article 14 *Co-ordination with prior Hague Maintenance Conventions*

As 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 coincides with the scope of application of this Protocol].

Article 15 *Co-ordination with other instruments*

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 16 *Uniform interpretation*

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 17 *Review of practical operation of the Protocol*

1. Secretary General of the Hague Conference on Private International Law shall as necessary convene a Special Commission in order to review the practical operation of the Protocol.

2. For the purpose of such review Contracting States shall co-operate with the Permanent Bureau in the gathering of case law concerning the application of the Protocol.

Article 18 *Transitional provisions*

This Protocol shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State.

Article 19 *Signature, ratification and accession***Option 1**

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.

Option 2

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.

Article 20 Regional Economic Integration Organisations

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 21 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 21 Accession by Regional Economic Integration Organisations

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 25 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 22 Entry into force

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 second instrument of ratification, acceptance, approval or accession referred to in Article 19.
2. Thereafter the Protocol shall enter into force –
 - a) for each State or Regional Economic Integration Organisation referred to in Article 20 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 23, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 23 *Declarations with respect to non-unified legal systems*

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 25 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.
3. If a State makes no declaration under this Article, the Protocol is to extend to all territorial units of that State.
4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 24 *Reservations*

Option 1

No reservations may be made to this Protocol.

Option 2⁶

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 25, make one or more of the reservations provided for in Articles [..], [..] and [..] 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.
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.

Article 25 *Declarations*

1. Declarations referred to in Articles 21(1) and 23(1) 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.

⁶ It has yet to be decided finally whether any reservation on scope may be permitted.

Article 26 Denunciation**Option 1**

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 2

1. A Contracting State to this 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.

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.

Article 27 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 19 and 20 of the following –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 19 and 20;
- b) the date on which this Protocol enters into force in accordance with Article 22;
- c) the declarations referred to in Articles 21(1) and 23(1);
- d) the reservations referred to in Articles [..];
- e) the denunciations referred to in Article 26.

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.