

**FORME DES RÈGLES EN MATIÈRE DE LOI APPLICABLE ET POSSIBLES
CLAUSES FINALES**

suggestions du Bureau Permanent

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**FORM OF THE RULES ON APPLICABLE LAW AND POSSIBLE
FINAL CLAUSES**

suggestions by the Permanent Bureau

*Document préliminaire No 20 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 20 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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TABLE OF CONTENTS

	Page
Introduction	3
Alternative A: Protocol on Applicable Law to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance	5
Article on Signature, ratification and accession	5
Article on Regional Economic Integration Organisations.....	5
Article on Accession by Regional Economic Integration Organisations	6
Article on Entry into force	6
Article on Declarations with respect to non-unified legal systems.....	6
Article on Reservations	7
Article on Declarations	7
Article on Denunciation	8
Article on Notification	8
Alternative B: Optional Chapter on Applicable Law of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance	9
Article on Declarations	9

INTRODUCTION

1. The Working Group on Applicable Law, established by the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance in May 2003, has worked since then on the development of certain special rules intended to resolve particular problems to be included in the obligatory part of the future convention¹ and a set of optional general rules on applicable law.²
2. Regarding the set of optional general rules, the form in which they will be presented still remains to be decided and will require the consideration of the fourth session of the Special Commission. This document intends to provide some guidance to the experts by presenting the different alternatives or options available and some of their respective advantages and disadvantages.
3. The optional general rules on applicable law could either be presented in the form of a Protocol to the Convention on the International Recovery of Child Support and other Forms of Family Maintenance (Alternative A) or an Optional Chapter of the Convention (Alternative B).
4. Protocols are now widespread and several examples can be found among the treaties negotiated within various international organisations over the last years such as the United Nations, UNIDROIT, the Organisation of American States and the Hague Conference on Private International Law. This alternative provides the advantage of having a separate treaty – linked in substance to the main Convention from which it emanates – and of possibly allowing States / Regional Economic Integration Organisations to join the Protocol without being a Party to the main Convention itself. It also implies that the Protocol does not necessarily have to be concluded within the same timeframe as the main Convention. It could be concluded after the adoption of the Convention. In this case, the Special Commission could examine whether it would be appropriate to include a provision in the main Convention allowing for the conclusion of future protocols.³
5. Being a separate treaty, the Protocol would therefore require its own set of final clauses. However it is suggested that many of them would be drawn from the Convention but the procedures concerning signature, ratification and accession could be simpler. If this alternative is chosen, one would have to verify whether the definitions in the main Convention apply equally to the Protocol, and if so, it will have to be decided whether these should be incorporated into the Protocol by reference or repeated in the Protocol itself. Consideration should also be given to the question of whether additional definitions are required. A similar examination of the Chapter on General Provisions of the main Convention would be required in order to decide whether and how some of the general provisions will be incorporated into the Protocol.⁴

¹ See "Tentative Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance", Preliminary Document No 16 of October 2005 prepared by the Drafting Committee which met at The Hague from 5-9 September 2005, for the attention of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Tentative Draft Hague Convention).

² See "Report of the Working Group on Applicable Law", Preliminary Document No 22, for the attention of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance.

³ See, for example, Article 51 of the Convention on the International Interests in Mobile Equipment (UNIDROIT).

⁴ See, for example, the provisions on non-unified legal systems (Art. 41), relationship with other instruments (Art. 42), uniform interpretation (Art. 45), review of the practical operation (Art. 46), and transition provisions (Art. 48).

6. The other alternative, *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.⁵ If this alternative is chosen, the number of final clauses to be added to the Convention will be quite limited since States becoming party to the Convention would only have to declare that the chapter on applicable law would apply to them if they so wish.⁶ This 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 Alternative B below). If the optional chapter alternative is chosen, examination of the definitions found in Chapter I may also be required to determine whether new definitions should be added to the chapter on applicable law. An examination of the relationship between the optional Chapter and general provisions found in Chapter VIII would also have to be undertaken.⁷

⁵ 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 on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance [...] recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument » which would "be comprehensive in nature [...]".

⁶ Which is also done in other treaties by reserving the application of the chapter, see, for example, Article 92 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).

⁷ For example, the provisions on non-unified legal systems (Art. 41), relationship with other instruments (Art. 42), and transition provisions (Art. 48).

ALTERNATIVE A: PROTOCOL ON APPLICABLE LAW TO THE HAGUE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Article on Signature, ratification and accession

Option 1⁸

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 2⁹

1. The present Protocol shall be open for signature by every 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.

*Article on Regional Economic Integration Organisations*¹⁰

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.

⁸ Drawn from Article 49 Option 2 of the Tentative Draft Hague Convention and Article 27 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter 2005 Hague Convention)

⁹ 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.*

¹⁰ Drawn from Article 50 of the Tentative Draft Hague Convention and Article 29 of the 2005 Hague Convention.

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 Organisations¹¹

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 Convention applies equally to the Member States of the Organisation, where appropriate.

Article on Entry into force¹²

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 Convention 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.

Article on Declarations with respect to non-unified legal systems¹³

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.¹⁴

¹¹ Drawn from Article 51 of the Tentative Draft Hague Convention and Article 30 of the 2005 Hague Convention.

¹² Drawn from Article 52 of the Tentative Draft Hague Convention, Article 19 of the *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (adopted on 13 December 2002) (hereinafter Hague Securities Convention), and Article 9(3) of the 1971 Hague Supplementary Protocol (adapted).

¹³ Drawn from Article 53 of the Tentative Draft Hague Convention.

¹⁴ 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

3. If a State makes no declaration under this Article, the Protocol is to extend to all territorial units of that State.¹⁵
4. This Article shall not apply to a Regional Economic Integration Organisation.¹⁶

Article on Reservations

Option 1¹⁷

No reservations may be made to this Protocol.

Option 2¹⁸

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.¹⁹
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 on Declarations*²⁰

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.

the 2005 Hague Convention.

¹⁵ 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.

¹⁶ Drawn from Article 28 of the 2005 Hague Convention.

¹⁷ 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.

¹⁸ Drawn from Article 54 of the Tentative Draft Hague Convention.

¹⁹ Drawn from Articles 42 of the 1980 Hague Convention, 60 of the 1996 Hague Convention and 56 of the 2000 Hague Convention.

²⁰ Drawn from Article 55 of the Tentative Draft Hague Convention.

Article on Denunciation

Option 1²¹

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 2²²

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.²³

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.²⁴

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 following²⁵ –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles ?? and ??;²⁶
- b) the date on which the Protocol enters into force in accordance with Article ??;²⁷
- c) the declarations referred to in Articles ??;²⁸
- d) the reservations referred to in Articles ??;
- e) the denunciations referred to in Article ??.²⁹

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 States Members of the Hague Conference on Private International Law at the date of its Twenty-first Session.

²¹ Drawn from Article 9(4) of the 1971 Hague Supplementary Protocol.

²² Drawn from Article 56 of the Tentative Draft Hague.

²³ Drawn from Article 23 of the Hague Securities Convention.

²⁴ Drawn from Articles 23 of the Hague Securities Convention and 33 of the 2005 Hague Convention.

²⁵ Drawn from Article 24 of the Hague Securities Convention.

²⁶ Drawn from Articles 24 of the Hague Securities Convention and 34 of the 2005 Hague Convention.

²⁷ 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.

²⁸ Drawn from Articles 45 of the 1980 Hague Convention, 63 of the 1996 Hague Convention and 59 of the 2000 Hague Convention.

²⁹ 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.

ALTERNATIVE B: OPTIONAL CHAPTER ON APPLICABLE LAW OF THE HAGUE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

[NB: This provision would be included 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 attend. The issue of reservation in respect to the optional chapter also remains to be discussed.]

*Article on Declarations*³⁰

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

³⁰ Drawn from Article XXX of the UNIDROIT Protocol.