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Proposal of the Drafting Group

PRELIMINARY DRAFT PROTOCOL ON APPLICABLE LAW

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.

¹ The Group 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 [...]”.

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 and 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 of the forum for a particular proceeding

1. Notwithstanding the provisions of Articles 3, 4, 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.

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

² The Explanatory Report should state that this provision sets out only minimum formal requirements for an agreement, and that 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. 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.

Article 8 – Designation of the applicable law

1. Notwithstanding the provisions of Articles 3, 4, 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 when compared with the consequences of applying the law which would be applicable in the absence of a choice of law agreement.

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;
- 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.

³ The Explanatory Report should state that this provision sets out only minimum formal requirements for an agreement, and that 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. 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.

Article 12 – Public policy

Protocol

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

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

Suggestions concerning the preliminary draft Convention

Article 31 Information concerning enforcement rules and procedures

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