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RAPPORT DU GROUPE DE TRAVAIL SUR LA LOI APPLICABLE

établi par le Président
du Groupe de travail, Andrea Bonomi

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REPORT OF THE WORKING GROUP ON APPLICABLE LAW

drawn up by the Chair
of the Working Group, Andrea Bonomi

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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 27 of April 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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I. Introduction

1. The Working Group on the law applicable to maintenance obligations (hereinafter referred to as "WGAL"), set up by the Special Commission of May 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance, continued its work according to the assignment received from the Special Commission at its meeting in June 2006.

2. It should be recalled that at that Special Commission meeting, the composition of the WGAL was widened in order to make it more representative of the States interested in the issue of the law applicable to maintenance obligations. Its current membership is as follows: Patricia Albuquerque Ferreira (China, SAR Macao), Nádia de Araújo (Brazil), Antoine Buchet (European Commission), Raquel Correia (Portugal), Gloria DeHart (IBA), Edouard de Leiris (France), Michèle Dubrocard (France), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Dorothea van Iterson (Netherlands), Sarah Khabirpour (Luxembourg), Åse Kristensen (Norway), Alberto Malatesta (Italy), David McClean (Commonwealth Secretariat), Tracy Morrow (Canada), Maria del Carmen Parra Rodriguez (Spain), Angelika Schlunck (Germany), Marta Zavadilová (Czech Republic), Robert Spector (United States of America), Lixiao Tian (China), Rolf Wagner (Germany), and Andrea Bonomi (Switzerland, Chair). The Co-Reporters Alegría Borrás and Jennifer Degeling and the members of the Permanent Bureau are *de facto* members of the WGAL.

3. The assignment conferred on the WGAL by the Special Commission of June 2006 was a dual-purpose one. On the one hand it included rediscussion of the provision of Article 27(3) of the tentative draft Convention on the international recovery of child support and other forms of family maintenance (Work. Doc. No 98 of 26 June 2006, hereinafter "tentative draft Convention"). This provision was included in the draft Convention following a proposal made by the WGAL but was the subject of some criticism during the June 2006 Special Commission meeting. It is now present, unmodified, in Article 28(5) of the preliminary draft Convention reproduced in Preliminary Document No 25 of January 2007 (hereinafter "preliminary draft Convention"). The WGAL was also asked to improve the working draft of an optional instrument on applicable law, with a view to in-depth discussion of applicable law issues which will take place during the Special Commission meeting of May 2007.

4. The WGAL met once at The Hague, in November 2006; otherwise, the proceedings were conducted by means of an electronic discussion list. At its meeting in November 2006 and after rediscussion of the provision of Article 27(3) as mentioned above, the WGAL mainly concentrated on drawing up a draft optional instrument on the law applicable to maintenance obligations. In this perspective, the Working Draft presented with the June 2006 Report of the WGAL (Prel. Doc. No 22, hereinafter "June 2006 Working Draft") was supplemented and amended in a number of respects (Prel. Doc. No 24, Working Draft on Applicable Law). These additions and modifications are intended to take into account observations made by some delegations during the June 2006 Special Commission meeting, as well as the opinions of the new members of the WGAL. They also reflect the concern for achievement of a text that is acceptable to as many States as possible.

5. The Working Draft on Applicable Law (Prel. Doc. No 24 of January 2007) is merely a draft (hereinafter "the Draft"). Indeed, a number of the provisions submitted remain controversial; all of these proposals require in-depth further review or at least improvement with regard to their drafting. Accordingly, the comments in this Report are entirely provisional and merely an attempt at synthesis by the Chair of the WGAL.

II. The provision of Article 28(5) of the preliminary draft Convention

6. In accordance with the assignment received from the Special Commission, the WGAL rediscussed the provision of Article 28(5) of the preliminary draft Convention. This provision provides that the limitation on the period for which arrears may be enforced is determined by the law of the State of origin of the decision or by the law of the requested State,

depending on which provides for the longer period of time. This provision was criticised by a number of delegations during the June 2006 Special Commission meeting.

7. Initial criticism was made with regard to the connections included in the provision. Some delegations were of the opinion that the limitation should be governed by the law applicable to the maintenance obligation. The WGAL members unanimously rejected this proposal: it should be emphasised that Article 28(5) is not intended to determine the issue of the law applicable to the limitation of the maintenance obligation at the time when a decision regarding maintenance is taken, but rather, and very differently, to the limitation of the period for which arrears may be enforced on the basis of a foreign enforceable judgment. If the first point in question is effectively governed by the law applicable to the maintenance obligation according to the private international law of the State of the authority seized (which is provided for in Article J *e)* of the Draft), the second is rather a question of determining the consequences of the foreign judgment. As such, this is dependent on the law of the State of origin of this judgment, including its private international law rules. From the point of view of favouring the creditor, however, the WGAL considers it to be appropriate that the law of the requested State may be designated as an alternative if it provides for a longer period of time.

8. Further criticism was related to the difficulty in determining the limitation rules in force in the State of origin of the decision. So as to take these concerns into account and to facilitate the task of the enforcement authorities, the WGAL proposes imposing on Contracting States the obligation to provide this information and to keep it up to date. For this reason, the following modification to Article 32 of the preliminary draft Convention is proposed:

> ***Article 32 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 regarding the duration of the maintenance obligations and the time limitations for enforcement. Such information shall be kept up-to-date by the Contracting States.

III. Draft optional instrument on applicable law

9. The work of the WGAL was mainly focused on drawing up a draft optional instrument on the law applicable to maintenance obligations. The Draft is the result of a re-drafting of the June 2006 Working Draft. There now follows a short commentary on the provisions of the Draft.

Article A

10. This Article defines the substantive scope of the future Convention and has not been modified with respect to the same Article of the June 2006 Working Draft. Its content should be brought into line with the text of the future Convention (*cf.* Art. 2 of the preliminary draft Convention). The issue of whether the optional instrument should contain reservations will be discussed within the framework of the Special Commission, depending as it does *inter alia* on the solutions found for maintenance obligations arising out of certain family relationships (*cf. infra*, Art. F).

Article B

11. This Article serves only to define certain notions which are used in other provisions of the Draft. With respect to the June 2006 Draft, two definitions have been added.

12. The first, that of the "agreement in writing" such as used in Articles G and H of the Draft, is intended to specify that it suffices that the agreement on the law applicable to the maintenance obligation be registered on any kind of medium allowing its content to be accessible for consultation at a later date. It is not necessary therefore for the agreement to be set down on paper; the use of more modern technologies is acceptable. In addition, the agreement is not required to be contained in one and the same text as the attestations made by the parties can be made in separate documents.

13. The second definition is not really new. By specifying that the term "law" always designates the law in force in the State concerned, with the exception of the choice of law rules, this text merely reproduces Article K of the June 2006 Working Draft and reaffirms the exclusion of "*renvoi*".

14. It should also be noted that the definitions of creditor and debtor should be kept in line with those provided in the text of the future Convention (*cf.* Art. 3 of the preliminary draft Convention).

Article C

15. This provision corresponds to Article C(1) of the June 2006 Working Draft. It establishes the principle of connecting the maintenance obligations to the law of the State of the creditor's habitual residence. This connection corresponds to that used, on a principal basis, in the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter "the 1973 Convention") and, for maintenance towards children, in the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* (hereinafter "the 1956 Convention"). This connection offers several benefits, which have been underlined in the June 2006 Report of the WGAL. There now follows an extract of this text (para. 13-14):

> "*the main [benefit] 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.*, Art. 5, para. 2 of EC Regulation 44/2001 and the "parallel" provision of Art. 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*."

16. In the case of a change in the creditor's habitual residence, Article C(2) maintains, as did Article C(1) of the June 2006 Working Draft, the solution of the 1973 Convention (Art. 4(2)). According to this approach, 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. This solution is self-evident, having regard to the reasons on which connection to the habitual residence is based. As indicated in the June 2006 Report of the WGAL (para. 15-16),

> *"[i]n the event of a change of residence, it is logical for determination of the existence and amount of the maintenance obligation to be made 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.*"

17. Contrary to the corresponding provision in the June 2006 Working Draft, the new drafting of Article C does not provide for a cascade of connecting factors to the law of the forum and to the law of the common nationality of the parties (*cf.* Art. C(2) and (3) of the June 2006 Working Draft). Indeed, the WGAL considered that the principle of a cascade of connecting factors, which particularly favours the maintenance creditor, is only fully justified for the benefit of children. The relevant provisions can therefore be found, with a few modifications, in Article D, which determines the special rules relating to maintenance towards children.

18. Furthermore, and for the same reason, the new Article C does not provide for any derogation to the connection to the habitual residence in favour of the law of the forum, such as that envisaged in paragraph 2 *bis* of Article C of the June 2006 Working Draft. Such derogation is however provided for in Article D *b)* for maintenance obligations in respect of children.

Article D

19. In the case of maintenance obligations towards children, this provision provides for derogations to the principal connection to the maintenance creditor's habitual residence and is borne of a re-drafting of the provisions of Article C(2), (2) *bis* and (3) of the June 2006 Working Draft.

a) Subsidiary connection to the law of the forum

20. Article D *a)* provides for a subsidiary connection to the law of the forum in the event that the creditor is unable to obtain maintenance on the basis of the law of the State of his of her habitual residence. This is a classical solution and is currently provided for under the 1956 Convention (Art. 3) and the 1973 Convention (Art. 6). It is only provided for in the latter, however, as a last resort, after application, again on a subsidiary basis, of the law of the common nationality of the parties (Art. 5). Inversion of these two subsidiary connecting criteria as proposed in the Draft (law of the forum before the law of the common nationality) is justified for a number of reasons which were already indicated in the June 2006 Report of the WGAL (para. 19):

> "*First, [it] reduces the importance in practice of the connection to nationality, the relevance of which with respect to maintenance is disputed […]. 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*."

21. Contrary to the June 2006 Draft, however, subsidiary connection to the law of the forum is only provided for in the appended Draft for maintenance obligations towards children. The WGAL considers this significant modification to be justified for several reasons. First it should be pointed out that the basic concept on which a cascade of connecting factors rests, the *favor creditoris*, has considerably more weight when the maintenance

creditor is a child. It is true that in the 1973 Convention this solution is general in its scope (*cf.* Art. 4 to 6), so that any restriction to children may perhaps be seen as a step backwards. However, such an analysis would not be entirely exact. The 1973 Convention did indeed already discount a cascade of connecting factors for maintenance between divorced spouses, as these were governed anyway by the law applied to the divorce (Art. 8). This meant that apart from children, a cascade of connecting factors was in reality only beneficial to those categories of adult creditors whose maintenance claims are not all accepted from a comparative law point of view (*e.g.* parents in respect of their children, and persons related collaterally and by affinity). As the Draft, specifically for these hypothetical cases, envisages introduction of a number of means of defence favourable to the debtor (*cf. infra*, Art. F), it would seem not very logical, even appearing clearly contradictory, to allow these creditors to benefit from a cascade of connecting factors.

22. A restriction to children presupposes a definition of the underlying notion. The WGAL considered that the limitation to children under 21 years of age was appropriate and coherent with the general limits of the future Convention's mandatory scope as contained in Article 2 of the preliminary draft Convention.

23. In those cases where it is applicable, subsidiary connection to the law of the forum is naturally of use only if the maintenance proceedings are instituted in a State other than that of the creditor's habitual residence, as otherwise the law of the habitual residence and the law of the forum would coincide. Furthermore, it should be noted that if the optional draft instrument were to include a provision such as that suggested in Article D *b)* (see below), subsidiary application of the law of the forum would only be relevant if the proceedings are instituted by the debtor (*e.g.* in the hypothetical case where the debtor institutes proceedings before the competent authority of the State of his or her own habitual residence so as to be freed of a maintenance obligation on the basis of the law of the State of the creditor's habitual residence; the creditor will then be able to protect himself or herself by invoking the law of the forum), or if the authority seized is an authority of a State in which neither of the parties is resident (if, for example, the maintenance claim is brought on an accessory basis before the court having jurisdiction with respect to affiliation or the dissolution of marriage). As a matter of fact, according to Article D *b)*, the law of the forum is in any case applicable on a principal basis if the proceedings are instituted by the creditor in the State of the debtor's habitual residence.

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

24. Article D *b)* provides that the law of the forum is applicable on a principal basis if the creditor has seized the competent authority of the State of the debtor's habitual residence. However, in this case if the maintenance creditor is unable to obtain maintenance under the law of the forum, the law of the creditor's habitual residence then becomes applicable on a subsidiary basis.

25. This is an important inversion of the connecting criteria provided for in Articles C(1) and D *a)*, (law of the forum before the law of the creditor's habitual residence). The provision is the result of a compromise within the WGAL between those of its members who defend the indiscriminate application of the law of the creditor's habitual residence and those who would prefer the law of the forum. It corresponds to the "option 1" formulation of Article C(2) *bis* in the June 2006 Working Draft. Application of the law of the forum is subject to two conditions: on the one hand the authority seized must be that of the State of the debtor's habitual residence, and on the other hand the proceedings must be instituted by the creditor.

26. It is the first of these conditions that justifies application of the law of the forum in place of the law of the creditor's habitual residence. As indicated in the June 2006 Report (para. 21), the WGAL noted 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.*"

27. The second condition for application of the law of the forum is that the proceedings be instituted by the creditor. This is aimed at limiting, in the interest of the creditor, the breach of the principle of application of the law of his or her habitual residence. Indeed, it appeared that this derogation may be justified if the creditor himself decides to bring proceedings in the debtor's State of habitual residence, while it would appear to be excessive if the proceedings were instituted in this same State by the debtor (*e.g.*, for a request for modification). Indeed, in the majority of cases the creditor may choose to institute proceedings either in the country where he or she lives or in that of the debtor's residence, and if he or she opts for this second solution, application of the national law of that State will not be contestable. With this in mind, the solution settled upon constitutes an attempt at compromise between the supporters of an automatic application of the law of the forum and those who wished to subject it to an option on the part of the creditor (*cf.* the June 2006 Report of the WGAL, para. 24 and 25). Furthermore, it should be noted that if the proceedings are instituted by the creditor, the jurisdiction of the authorities of the State of the debtor's residence will be very solidly grounded (*actor sequitur forum rei*), providing perhaps better justification for the law of the forum to be applied. However, if the proceedings are instituted by the debtor in his State of residence, the jurisdiction of the authorities of that State (if it exists under the law of the forum) shall rest on a ground of jurisdiction much less significant (*e.g.,* the nationality of the parties), or even clearly exorbitant (*forum actoris*). There is thus even more of a reason not to apply the law of the forum in this case.

28. Contrary to the solutions proposed in the 2006 Draft, the new drafting of Article D *b)* only provides for application of the law of the forum for maintenance obligations in respect of children. This limitation is explained by two main considerations. On the one hand it appears that application of the law of the forum to the conditions provided for by the provision is of considerable advantage to the creditor because by seizing the authorities of the State of his or her residence, or those of the State of the debtor's residence, the creditor is given the right to choose indirectly the law applicable to his or her maintenance claim (forum shopping). The WGAL is of the opinion that such a privilege can only be justified for children.

29. Moreover, the benefits of application of the law of the forum are particularly clear with regard to maintenance obligations towards children; quicker proceedings due to application of the internal law are especially beneficial in proceedings where children are concerned, and particularly if these proceedings are given over, as is more and more frequently the case, to the competence of administrative authorities. As generally these authorities have neither the expertise nor the means available for research into and application of foreign law, only application of the law of the forum would appear to be compatible with the setting up of an administrative-based system for the recovery of maintenance. This is naturally of much lesser concern with regard to maintenance claims for adult creditors (at least when these are not linked to maintenance claims for their children), as these are generally settled by the judicial authorities.

c) Subsidiary connection to the common nationality of the parties

30. If the creditor is unable to obtain maintenance either under the law of the State of his or her habitual residence or under the law of the forum, the law of the common nationality of the parties is applicable as a last resort. This second subsidiary connection completes the protection of the maintenance creditor should the laws designated by the first two criteria not provide for any maintenance obligation.

31. Connection to the common nationality is also provided for in the 1973 Convention (Art. 5) but priority is given there to the law of the forum. The reasons which caused the WGAL to propose an inversion of these two criteria were already given in the June 2006 Report of the WGAL (para. 19). They will not be reproduced here.

32. Contrary to the June 2006 Draft, subsidiary connection to the parties' nationality (and likewise to the law of the forum) is only provided for with regard to maintenance obligations towards children. The reasons for limiting in this way the scope of the cascade of connecting factors have already been explained (*cf. supra,* para. 21). It should be noted that recourse for children to this third connecting criterion is likely to be relatively rare, as the majority of national laws recognise the child's right to maintenance.

Article E

33. This Article contains a special rule for the connection of maintenance obligations between spouses and ex-spouses. Just like Article D(1), of the June 2006 Working Draft, this provision provides an escape clause permitting the authority seized to ignore, under certain conditions, the law of the State of the creditor's habitual residence, designated by Article C, in order to apply in its place the law of the State in which the spouses had their last common habitual residence. The reasons that led to this solution were for the most part explained in the June 2006 Report of the WGAL (para.°36-37) :

> *"[…] 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. […]*
>
> *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."*

34. Article E is a compromise between these two different methods of approach (application of the general rules of Article C or *ad hoc* rule based on the spouses' common residence). Whether or not this rule should be provided for remains, however, very controversial, which is why this particular Article has been placed in brackets.

35. Contrary to Article D(1) of the June 2006 Working Draft, the proposed Article E only confers on the court seized the right to apply the law of the State of the last common residence of the spouses. This specification was introduced so as to limit the uncertainty linked to application of the exception clause, whilst at the same time respecting the wish

of the WGAL members who support application of the law of the last common residence of the spouses.

36. In addition, and also with the aim of limiting the extent of uncertainty, the conditions for application of the escape clause have been defined in a more precise manner. On the one hand, one of the spouses or ex-spouses shall still have to reside in the State of the last common residence when the claim is brought as it appeared that application of this country's law can only be justified in the event of a close and current link with that State, and that link will no longer exist if the spouses have left the State in question at the time the proceedings are instituted. On the other hand, the law of the State of the last common residence can only be applied if the maintenance obligations in question are manifestly more closely linked to this State than to the State of the of the creditor's habitual residence. Such might be the case, for example, if at the time of the maintenance request the creditor spouse has established his or her residence in a State with which the spouses had no link during their marriage.

37. Despite a certain amount of simplification with respect to the June 2006 Draft, the Article in question remains a source of uncertainty with regard to the applicable law and may lead to increased duration and costs of the proceedings. In addition, like all rules based on the concept of close links, there is a danger that it may be applied differently in the Contracting States, which would only result in false uniformity.

38. It should be noted that the scope of this provision has been extended and contrary to the June 2006 Draft, it is intended to be applicable not only to obligations between spouses who are divorced or separated or those whose marriage has been declared to be annulled or void, but also to maintenance obligations between spouses during their marriage. This is because the majority of the WGAL members felt it was preferable to have one and the same connection rule for obligations during marriage and after divorce, so as to avoid a change in applicable law solely due to dissolution of the marriage.

39. Finally, one simplification may be noted with respect to the June 2006 Draft that results from the proposal of the WGAL to limit the cascade of connecting factors to maintenance obligations towards children only (*cf. supra*, Art. D). It follows (in the absence of choice of the applicable law) that the maintenance obligations between spouses or ex-spouses are governed either by the law of the creditor's habitual residence in accordance with Article C, or by the law of the last common residence if the conditions of Article E are met. Neither the law of the forum, nor the law of the common nationality may be taken into account in this case.

Article F

40. As regards maintenance obligations other than those towards children which arise from a parent-child relationship, Article F provides that the debtor may oppose the creditor's claim that no obligation exists on his part under the law of the State of the debtor's habitual residence, nor under the law of the common nationality of the parties, should they have one.

41. This veto is drawn from the solution provided for in Article 7 of the 1973 Convention. This rule effectively allows the debtor to oppose a claim for maintenance between persons related collaterally or by affinity for the reason that there exists no maintenance obligation according to the law of the common nationality of the debtor and the creditor or, in the absence of common nationality, according to the internal law of the debtor's habitual residence.

42. Contrary to the 1973 provision, the rule proposed by the WGAL is not applicable only between persons related collaterally or by affinity, but to any maintenance obligations other than those towards children which arise from a parent-child relationship. The veto can therefore be invoked, *inter alia*, in cases where maintenance claims are made by a parent (or other ascendant) towards his or her child (or his or her descendant), or by an adult child

towards one of his or her parents or ascendants. It will also be available for claims based on other family relationships which may be recognised by the law of the habitual residence or by the law of the forum (*e.g.*, between homo- or heterosexual partners).

43. This extension was desirable for a number of reasons. First it should be noted that the appropriateness of awarding maintenance based on family relationships as intended by this rule does not meet with consensus at the international level, hence the concern held by some States that it should be possible to limit its impact. Within the framework of the 1973 Convention this concern was taken into account by providing for a number of reservations in connection with the scope of the Convention (*cf.* Art. 13 and 14 of the 1973 Convention). In the opinion of the WGAL, however, the making of reservations should be restricted as much as possible within the framework of the future Convention on applicable law, which in any case will be optional. It is then preferable that the reticence shown by some States with regard to maintenance claims based on family relationships as mentioned above be taken into account at an earlier stage by providing more restrictive connection rules for these cases.

44. Given the extended scope of this provision, the WGAL preferred to avoid too severe a formulation for the creditor. This is the reason why contrary to that envisaged in the June 2006 Draft, the new Draft proposes that the alternative reference to the law of the common nationality of the parties be maintained. In other words, if the maintenance obligation exists according to the law of the common nationality, this will result in acceptance of the claim, even though it is not provided for by the law of the debtor's habitual residence. This approach allows the two provisions of Article D(2) and (3) of the June 2006 Working Draft to be brought together under one rule.

Article G

45. This provision gives parties the right to designate expressly the law of the forum as the law applicable to the maintenance obligation. This choice of applicable law presupposes that the maintenance creditor has already instituted or is about to institute maintenance proceedings before a given authority. The consent of the parties is intended to make applicable the internal law of the authority seized and its effect is limited to specific proceedings. This provision corresponds to that of Article E of the June 2006 Working Draft which was justified as follows in the June 2006 Report of the WGAL (para. 49-50):

> "*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*."

46. The choice of applicable law ought to play a significant role in relationships between adults especially. In the event of divorce in particular, it will be possible for the spouses to submit the maintenance claims to the internal law of the authority seized, which will certainly facilitate the proceedings. However, and as was already the case in the 2006 Draft, this possibility of choice has also been included for maintenance obligations with respect to children. This is because it appeared that the possible dangers linked to the introduction of party autonomy are to a great extent counterbalanced by the advantages in terms of simplicity resulting from application of the law of the forum. Given the special rule

of Article D *b)*, according to which maintenance obligations with respect to children under 21 years of age are governed in any case by the law of the forum when the request is made by the creditor in the debtor's State of habitual residence, the effect of the choice of applicable law can thus remain only rather limited in this field.

47. Given that the applicable law can also be chosen according to Article G before instituting proceedings, the WGAL felt it would be useful to introduce a number of points relating to form, by specifying in paragraph 2 that, in this case, the applicable law should be designated by way of written consent. It appeared essential on the one hand to be able to easily prove the existence of this consent, and to draw the attention of the parties on the other hand to the important consequences that the choice of the applicable law may have with respect to the existence and extent of the maintenance obligation. For this reason, some of the WGAL members suggest going further by requiring that the parties' written consent as to the applicable law be accompanied by their signature.

Article H

48. This provision allows the parties to choose the law applicable to the maintenance obligation at any time and even before any dispute arises. Contrary to the choice of the law of the forum as provided for in Article G, the choice of applicable law in Article H is not solely made "for the proceedings" and its consequences are not therefore limited to proceedings which the maintenance creditor has already instituted or is about to institute. The law chosen by the parties is intended to govern the maintenance obligations between the parties from the time at which it is chosen until whenever they may decide to alter their choice. As indicated in the June 2006 Report of the WGAL (para. 56),

> "*[t]he 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.*"

49. The choice of applicable law is particularly useful in the relationship between the spouses when they conclude, before or during the marriage, an agreement relating to maintenance obligations and/or ownership of their respective property. Once the choice of applicable law had been accepted for spouses, it appeared that it could be extended to all adults, with the exception of those who, as a result of their diminishing or insufficient personal faculties are not in a position to look after their own interests. This category of "vulnerable adults" corresponds to those who benefit from the measures of protection set up by the *Hague Convention of 13 January 2000 on the International Protection of Adults*.

50. The choice of applicable law has been excluded regarding maintenance towards children. In this regard there is some hesitation within the WGAL as to determination of the age at which this choice should be allowed. Whereas 18 years of age corresponds to the age of legal majority in most countries, the proposal of a higher age (*e.g.*, 21 years of age) reflects a concern for the protection of young persons who can still be particularly vulnerable.

51. So as to protect the maintenance creditor, Article H provides – as did Article F of the June 2006 Working Draft – a number of limitations to the possibility for the parties to choose the applicable law.

52. The first limitation, which is formal in nature, provides that the choice of applicable law must be made in writing. Without going so far as to explain the advantages this offers for examination of the case, the requirement of a declaration in writing helps to draw the attention of the creditor to the importance of the choice and to protect him from the consequences of an unconsidered choice. For this reason some members of the

WGAL suggested providing for even stricter formal requirements by imposing notably that the parties' declaration as to the applicable law be accompanied by their signature.

53. The second limitation concerns the object of the choice itself and is intended to limit the range of options open to the parties. Among the options provided for by the June 2006 Working Draft, a number have been maintained without modification (the law of the State of the habitual residence of one of the parties, the law applicable to their property regime). However, the WGAL decided to widen the range of choice available by adding, on the one hand, the national law of one of the parties at the time the choice is made (whereas the 2006 Draft only provided for the law of the common nationality) and on the other hand, the law designated by the parties to be applicable to their divorce or to their legal separation. The latter was introduced so as to take into account developments currently underway in European Community private international law, given that the *Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters* ("Rome III"), presented by the Commission on 17 July 2006 (COM(2006) 399 final), provides in highly innovative fashion the choice of the law applicable to divorce and to legal separations.

54. The third limitation concerns the effectiveness of the choice of applicable law (Art. H(3)). As there was no modification made in this regard to the proposal of the June 2006 Working Draft (former Art. F(2), the considerations given in the June 2006 Report of the WGAL (para. 60) may be reproduced again here:

> "*[…] 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 I

55. This provision corresponds to the provision contained in Article 9 of the 1973 Convention and enjoys substantial support from within the WGAL. Following a proposal by the WGAL, a similar rule has been introduced, in the mandatory part of the Convention (Art. 33(2) of the preliminary draft Convention). The only change with respect to the June 2006 Working Draft is one of drafting ("public body" instead of "public institution") to bring this text into line with the terminology employed in the preliminary draft Convention.

Article J

56. This provision corresponds in large part to Article 10 of the 1973 Convention and enjoys substantial support from within the WGAL. The only change with respect to the June 2006 Working Draft is one of drafting ("public body" instead of "public institution") to bring this text into line with the terminology employed in the preliminary draft Convention.

Article K

57. Paragraph 1 of this provision merely provides the possibility to ignore the applicable law when its consequences are manifestly contrary to the public policy of the forum. This provision is widely accepted within the WGAL.

58. Paragraph 2 corresponds to the provision contained in Article 11(2) of the 1973 Convention, but with an important difference. Instead of actually requiring the authority seized to take into account the needs of the creditor and the resources of the debtor in every case, the Draft allows it to do so even if the applicable law provides differently. This modification clarifies that the provision is not intended to introduce a uniform substantive law rule aimed at evening out differences between national laws, but simply to permit the authority seized to ignore the foreign law where it does not take into account the needs of the creditor or the resources of the debtor. However, this rule does not meet with uniform support within the WGAL.