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PROTOCOLE DU 23 NOVEMBRE 2007 SUR LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES

RAPPORT EXPLICATIF

établi par Andrea Bonomi

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PROTOCOL OF 23 NOVEMBER 2007 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

EXPLANATORY REPORT

drawn up by Andrea Bonomi

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TABLE OF CONTENTS

I. BACKGROUND*

1. On 23 November 2007, the Twenty-First Session of the Hague Conference on Private International Law meeting in the Hague adopted the text of two international instruments designed to facilitate the international recovery of maintenance, the *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter the "Convention") and the *Hague Protocol on the Law Applicable to Maintenance Obligations* (hereinafter the "Protocol"). This Explanatory Report relates to the Protocol, as the Convention is the subject of a separate Report, drawn up by Ms Alegría Borrás (Spain) and Ms Jennifer Degeling (Australia), with assistance from Mr William Duncan and Mr Philippe Lortie of the Permanent Bureau (hereinafter the "Borrás-Degeling Report").

2. The issue of the law applicable to maintenance obligations was included from the outset in the official mandate of the Special Commission on the international recovery of child support and other forms of family maintenance, which drew up the preliminary draft Convention and Protocol: the Special Commission meeting in April 1999[1] had decided that the Agenda of the future work of the Conference should grant priority to the establishment of a more comprehensive Convention with respect to maintenance obligations, that should improve the existing Hague Conventions on the issue and include provisions relating to judicial and administrative co-operation.[2] Yet among the existing Hague Conventions relating to maintenance obligations, two are dedicated to determination of the applicable law; these are the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* (hereinafter the "1956 Maintenance Obligations Convention") and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter the "1973 Maintenance Obligations Convention").

3. In accordance with the decision of the Nineteenth Session, the Secretary General convened a Special Commission that met in The Hague from 5 to 16 May 2003, from 7 to 18 June 2004, from 4 to 15 April 2005, from 19 to 28 June 2006 and from 8 to 16 May 2007. Mr Fausto Pocar (Italy) was elected as Chair of the Special Commission and Ms Mária Kurucz (Hungary), Ms Mary Helen Carlson (United States of America) and Mr Jin Sun (China) were elected as Vice-Chairs. Ms Alegría Borrás and Ms Jennifer Degeling were elected as co-*Rapporteurs*. A Drafting Committee was organised under the chairmanship of Ms Jan Doogue (New Zealand). The proceedings of the Special Commission and Drafting Committee were greatly facilitated by major preliminary documents[3] and the observations of Mr William Duncan, Deputy Secretary General, who was in charge of the Secretariat's scientific work, and of Mr Philippe Lortie, First Secretary.

4. At its first meeting in May 2003 and in accordance with its mandate, the Special Commission discussed the issue of whether the new instrument ought to contain provisions relating to the law applicable by authorities rendering maintenance decisions, and if so, what the rules contained in those provisions ought to be. The discussion showed that there were two opposite positions. While the majority of delegates from civil law jurisdictions favoured the inclusion of some form of applicable law regime, most of

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* Please note that when published in the *Proceedings of the Twenty-First Session* the presentation of this Explanatory Report will be aligned with the current presentation of the Explanatory Report on the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

[1] For the history and decisions of that session, see the Borrás-Degeling Report, paras 1 to 5.

[2] See Final Act of the Nineteenth Session, *Proceedings of the Nineteenth Session,* Tome I, *Miscellaneous matters*, pp. 35 to 47, at p. 45.

[3] See in particular W. Duncan, "Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance", Prel. Doc. No 3 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

the delegations from common law jurisdictions were opposed.[4] That opposition is easily understood if it is borne in mind that in most common law countries, maintenance decisions are traditionally made on the basis of the law of the forum. The law of the forum is also frequently applied in States which have administrative systems for the recovery of maintenance, not all of which are common law countries.

5. Most of the delegations favourable to inclusion of a general applicable law regime considered that these negotiations were a unique opportunity to revise the 1956 and 1973 Maintenance Obligations Conventions, which ought not to be missed. While the 1973 Convention was fairly satisfactory on the whole and was to be used as the starting point for the drafting of a new instrument, some of its solutions needed to be revised and modernised, in order to remedy its deficiencies and attract a larger number of ratifications.[5] For that purpose, the revision process needed to involve all States and not merely those already Parties to the 1956 or 1973 Conventions.

6. Following the proposal by the Chair, the Special Commission decided to set up a Working Group on Applicable Law (hereinafter the "WGAL"), including experts from States Parties to the 1956 and 1973 Maintenance Obligations Conventions as well as experts from other States, and chaired by the author. On the basis of the mandate assigned to it, which was renewed and further detailed at the meetings of the Special Commission of 2004, 2005 and 2006, the WGAL drew up a working draft for an instrument on the law applicable to maintenance obligations (hereinafter the "Working Draft"). A first version of the Working Draft was presented as an appendix to the WGAL's report of June 2006[6] and discussed at the meeting of the Special Commission in July 2006. That Commission decided to convene a Special Commission for May 2007 with the issue of applicable law as its main theme. The second version of the Working Draft,[7] commented upon in the WGAL's report of April 2007,[8] served as the basis for the proceedings of the Special Commission of May 2007.

7. At the Special Commission meeting in May 2007, the issue of the applicable law was at the core of the proceedings. The Commission decided, first of all, that the rules relating to applicable law would be the object of a Protocol, formally separate from the Convention. Next, it agreed to the development of a preliminary draft Protocol[9] which, accompanied by an Explanatory Report,[10] served as the basis for discussion at the

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[4] Canada, the provinces and territories of which apply a cascading approach, though more limited than the one provided for under the 1973 Maintenance Obligations Convention, was willing to include in the future instrument some form of applicable law regime. In its common law provinces and territories, the applicable law is that of the location of the child's habitual residence; if the child is not eligible for maintenance under that law, the law of the forum applies (see for instance the Inter-Jurisdictional Support Orders Act (Manitoba), Art. 12(1)). In Quebec, a civil law jurisdiction, the applicable law is, in turn, the law of the maintenance creditor's domicile, then that of the debtor's domicile (Art. 3094 of the Civil Code).

[5] The 1973 Convention is currently in force in 14 States (Estonia, France, Germany, Greece, Italy, Japan, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland, and Turkey). The 1956 Convention on the law applicable to maintenance obligations towards children is in force in 12 States (Austria, Belgium, France, Germany, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Switzerland and Turkey).

[6] "Report of the Working Group on Applicable Law", prepared by the President of the Working Group, Andrea Bonomi, Prel. Doc. No 22 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, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention 38" then "Preliminary Documents".

[7] "Working draft on applicable law", prepared by the Working Group on Law Applicable to Maintenance Obligations which met on 17 – 18 November 2006 in The Hague, Prel. Doc. No 24 of January 2007 for the attention of the Special Commission of May 2007 on the International Recovery of Child Support and other Forms of Family Maintenance, available on the Hague Conference website, *ibid.*

[8] "Report of the Working Group on Applicable Law", drawn up by the Chair of the Working Group, Andrea Bonomi, Prel. Doc. 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, available on the Hague Conference website, *ibid.*

[9] "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, Prel. Doc. No 30 of June 2007 for the attention of the Twenty-First Session of November 2007, available on the Hague Conference website, *ibid.*

[10] "Preliminary draft Protocol on the law applicable to maintenance obligations – Explanatory Report", drawn up by Andrea Bonomi, Prel. Doc. No 33 of August 2007 for the attention of the Twenty-First Session of November 2007, available on the Hague Conference website, *ibid.*

Twenty-First Session of the Conference, which was held in The Hague from 5 to 23 November 2007. On that occasion, the author was elected as *Rapporteur* for the Explanatory Report on the Protocol.

8. The Plenary Session of the Twenty-First Diplomatic Session of the Conference was chaired by Mr Teun Struycken (Netherlands). The Vice-Chairs were Mr Gilberto Vergne Saboia (Ambassador of Brazil), Ms Xue Hanqin (Ambassador of China), Mr Ioannis Voulgaris (Greece), Ms Dorothée van Iterson (Netherlands), Ms Jan Doogue (New Zealand), Mr Alexander Y. Bavykin (Russian Federation), Ms Hlengiwe B. Mkhize (Ambassador of South Africa) and Ms Mary Helen Carlson (United States of America).

9. The Conference's Diplomatic Session entrusted drafting of the Convention to its Commission I, chaired by Ms Mária Kurucz (Hungary) and the Protocol's drafting to its Commission II, chaired by the author. The Vice-Chairs of Commission I were Mr Lixiao Tian (China) and Ms Mary Helen Carlson (United States of America); those of Commission II were Ms Nádia de Araújo (Brazil) and Mr Shinichiro Hayakawa (Japan). In addition to the delegates of the 68 Members of the Conference represented at the Twenty-First Session, observers from 14 non-Member States and nine intergovernmental and non-governmental organisations attended.

10. A Drafting Committee chaired by Ms Jan Doogue (New Zealand) was set up to work on the proceedings of Commissions I and II. In addition to its Chair, the Drafting Committee consisted of the *Rapporteurs* to both Commissions, *ex officio*, the members of the Permanent Bureau, and the following experts: Mmes Denise Gervais (Canada), Katja Lenzing (European Community), María Elena Mansilla y Mejía (Mexico) and Mary Helen Carlson (United States of America), together with Messrs James Ding (China), Lixiao Tian (China), Miloš Hatapka (European Community), Edouard de Leiris (France), Paul Beaumont (United Kingdom) and Robert Keith (United States of America).

11. The third reading of the draft Protocol was completed at the Plenary Session of 22 November 2007. The draft Protocol was formally adopted at the closing session of 23 November 2007, by means of signature of the Final Act of the Twenty-First Session.

II. TITLE, PREAMBLE AND GENERAL STRUCTURE OF THE PROTOCOL

12. The Protocol's title – "Protocol on the Law Applicable to Maintenance Obligations" – stresses that instrument's primary purpose, which is to introduce uniform rules for determination of the law applicable to maintenance obligations. This title reproduces that of the 1973 Maintenance Obligations Convention, which has the same purpose.

13. The Protocol contains no rules relating to conflicts of jurisdiction (jurisdiction of authorities and recognition and enforcement of decisions), nor any rules relating to administrative co-operation between States. Some of these issues (administrative co-operation for and during the international recovery of maintenance, and the recognition and enforcement of foreign decisions) are settled by the Convention.

14. Unlike the Convention, the title of which expressly refers to child support and other forms of family maintenance, the Protocol's title contains no indications in this respect. This reflects the very wide scope conferred on the Protocol by its Article 1: the Protocol determines the law applicable to maintenance obligations based on any family relationship, unrestrictedly and without any possible reservation (*cf*. Art. 27). Child support is included in its scope, and likewise maintenance due, according to the law designated by the Protocol, to adults.

15. The title of "Protocol" was discussed in Commission II of the Diplomatic Session until its last meeting on 22 November 2007, dedicated to the second reading of the draft Protocol. Pursuant to the decision to make the Protocol formally independent of the Convention (*cf*. Art. 23, allowing signature, ratification and accession by all States, even if not Parties to the Convention), some delegations had suggested changing the instrument's title from "Protocol" to "Convention", as the dependency between that text and the Convention was not sufficiently marked (see Minutes No 6 of Commission II, paras 11 *et seq.*, 178 *et seq.*). After discussing the benefits and drawbacks of both solutions, a consensus was eventually reached on the term "Protocol".

16. The term "Protocol", though unusual for an instrument adopted at the Hague Conference, has the advantage of emphasizing the genetic and functional connections existing between the Protocol and the Convention. Apart from its background (see above, paras 2 *et seq.*), it should be pointed out that the Protocol, like the Convention, is designed to facilitate the international recovery of maintenance: determination of the applicable law (and if relevant, application of a foreign law) is one of the difficulties that may be faced by a maintenance creditor when claiming against a debtor established abroad. Certain solutions provided by the Protocol (including in particular the heightened role that it confers on the law of the forum in relation to existing instruments, *cf*. Arts 4 and 7) are designed to facilitate the rendering of a maintenance decision, and are accordingly inspired by the same concern that founds the Convention. Finally, it should be noted that having regard to the *erga omnes* nature of the Protocol (*cf*. its Art. 2), its ratification by a large number of States may be beneficial for creditors, even those who are domiciled in States that have not acceded to it (and which do not contemplate becoming Parties to it): even creditors domiciled in such States will enjoy the benefit, in the course of proceedings initiated in a Contracting State (*e.g.*, in the State of the debtor's domicile), of the application of uniform rules favourable to the creditor, which are laid down in the Protocol.

17. This functional connection is also stressed in the Preamble, where it is noted that the development of general rules on applicable law constitutes a useful supplement to the Convention. For the remainder, the Preamble summarises the rest of the thinking that determined the Protocol's drafting, mentioning in particular the concern for uniformity of rules of conflict of laws and modernisation of the 1956 and 1973 Maintenance Obligations Conventions.

18. The Protocol has 30 Articles. It is not divided into Chapters, but its provisions may be classified into three groups. Articles 1 and 2 define its scope *ratione materiae* and *ratione loci*; Articles 3 to 14 determine the law applicable to maintenance obligations, also specifying its scope; Articles 15 to 30 are general and final provisions, which are now customary in most of the instruments developed by the Hague Conference.

III. THE MAIN ASPECTS OF THE REGIME PROVIDED FOR BY THE PROTOCOL

19. True to its aim of revising the earlier Conventions relating to the law applicable to maintenance obligations without repudiating their approach entirely, the Protocol follows in many respects the solutions applied by them, and in particular by the 1973 Maintenance Obligations Convention. That is the case in particular as regards the scope, defined very widely in Articles 1 and 2, the treatment of maintenance obligations entitled to its own choice of law rule ("a connection category") independent of the underlying family relationship (Art. 1(2)), the general rule based on connection of the maintenance obligation to the law of the creditor's habitual residence (Art. 3), the admission of certain "cascading" subsidiary connections designed to favour the maintenance creditor (Art. 4), and the very wide definition of the issues governed by the law designated as being applicable to the maintenance obligation (Art. 11). The Protocol's solutions may also, in several respects, be compared to those of the *Montevideo Convention of 15 July 1989 on maintenance obligations* (hereinafter the "1989 Montevideo Convention") (see *infra* paras 33, 36, 39, 57, 66, 67 and 165).

20. In relation to the 1973 Maintenance Obligations Convention, there are three main innovations. First, the reinforced role of the *lex fori*, which is promoted, for claims made by certain "privileged" classes of creditors, to the rank of principal criterion, with the law of habitual residence of the creditor in those cases playing only a subsidiary role (Art. 4(3)). Next, the introduction for obligations between spouses and ex-spouses of an escape clause based on the idea of close connection (Art. 5), in a break from the immutable connection to the law applied to the divorce under Article 8 of the 1973 Convention. Finally, the introduction of a measure of party autonomy, in two variations: a procedural agreement enabling the parties, with respect to any maintenance obligation, to select the law of the forum for the purposes of a specific proceeding (Art. 7), and an option regarding the applicable law that may be exercised at any time by adults capable of defending their interests, subject to certain conditions and restrictions (Art. 8).

IV. ARTICLE-BY-ARTICLE COMMENTARY

Article 1 Scope

21. Article 1 defines the scope of the Protocol in terms of subject matter. According to the first paragraph of that Article, the Protocol shall determine the law applicable to any maintenance obligation arising from a family relationship, parentage, marriage or affinity.

a) The law applicable to maintenance obligations

22. The purpose of the Protocol is to determine the law applicable to maintenance obligations. Accordingly, it contains no rules relating to conflicts of jurisdiction, nor to administrative co-operation, matters which are settled, at least in part, by the Convention.

23. In addition, it is important to point out that the Protocol determines only the law applicable to the maintenance obligation, conceived as an autonomous class of connection. Thus, it is not intended to determine the law applicable to the family relationships from which the maintenance obligation arises. This principle is important, and is clearly expressed in the 1973 Maintenance Obligations Convention, Article 2(1) of which provides that "[t]his Convention shall govern only conflicts of laws in respect of maintenance obligations". This phrasing was not reproduced in the Protocol, probably because it was considered as being superfluous having regard to the instrument's title ("Protocol on the Law Applicable to *Maintenance Obligations*", emphasis added), and the text of its Article 1(1) ("This Protocol shall determine the law applicable *to maintenance obligations* [...]", emphasis added). Despite that silence, the Protocol's approach to this issue is the same as that of the 1973 Convention, in the sense that the law applicable to the family relationships to which Article 1(1) refers (*e.g.*, parentage or marriage) is not governed by the Protocol directly. This is confirmed by Article 1(2) of the Protocol, reproducing Article 2(2) of the 1973 Convention, and specifying that "[d]ecisions rendered in application of this Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1": this rule is a mere corollary of the autonomous connection of the maintenance obligation.

24. The autonomous connection of the maintenance obligation implies that the law applicable to the family relationships to which Article 1(1) refers needs to be determined, in each Contracting State, on the basis of the rules of conflicts of laws in force and generally applicable in that State. This raises no difficulty when the existence or non-existence of the family relationship is the principal issue of the proceedings concerned (*e.g.*, when the claim relates to the proof of parentage, the validity of marriage, or legal separation or divorce), even if a maintenance claim is made on an accessory basis in the course of the same proceedings. The problem is more difficult when the issue of existence of the family relationship arises on a preliminary basis in the course of proceedings, the main object of which is the maintenance claim (*e.g.*, if the presumed debtor disputes the existence of the parentage or the validity of a marriage). Given the Protocol's silence, there is nothing to prevent reusing the interpretation that had been proposed for the 1956 and 1973 Maintenance Obligations Conventions, whereby the law designated to govern the maintenance obligation can also apply to the preliminary issue of the existence of a family relationship within the meaning of Article 1(1).[11] This solution is not binding on the Contracting States, however, and they may legitimately opt for a separate and autonomous connection of the preliminary issue; in such case, the latter will be determined according to the law designated by the forum's conflict rules. In any event, under Article 1(2), the decision rendered regarding the maintenance claim in accordance with the law designated by the Protocol is without prejudice to the existence of the relevant family relationship.

[11] Explanatory Report on the Maintenance Obligations Conventions (Enforcement – Applicable law) of 1973, drawn up by M. Verwilghen (hereinafter the "Verwilghen Report"), *Actes et documents de la Douzième session*, tome IV, *Obligations alimentaires,* pp. 383-465, paras 125 *et seq*, available on the Hague Conference website at < www.hcch.net >, under "Publications" then "Explanatory Reports".

b) Maintenance obligations arising from family relationships

25. Under Article 1(1), the Protocol shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage, or affinity. This phrasing corresponds to that of Article 1 of the 1973 Maintenance Obligations Convention. Unlike the latter (*cf*. in particular its Arts 13 and 14), however, the Protocol does not provide for reservations enabling Contracting States to limit its scope to specific maintenance obligations or to exclude others (*cf*. Art. 27, under which "[n]o reservations may be made to this Protocol"). The Protocol's scope is accordingly very broad.

i) A more extensive scope than the Convention in terms of subject matter

26. The Protocol's scope is broader, in particular, than the mandatory scope of the Convention, which is limited, under Article 2(1):

> "*a)* to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years;
>
> *b)* to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph *a)*; and
>
> *c)* with the exception of Chapters II and III, to spousal support."

This difference is due, first, to the desire to make the Protocol's scope coincide with that of the 1973 Maintenance Obligations Convention so as to enable the former to replace (at least between Contracting States) the latter (*cf*. Art. 18). It also reflects the wish not to restrict too much the scope of a text which, being the object of a Protocol separate from the Convention, is optional in any event for States ratifying the latter, and conversely, may be ratified by States which are not Parties to the Convention (*cf*. Art. 23).

27. In fact, the cases where both instruments apply could not coincide in any event, because their conditions for application *ratione loci* are different: the Convention is an instrument *inter partes*, applying in relations between Contracting States; this is true both for administrative co-operation (*cf*. Art. 9 of the Convention, which refers to applications made to the Central Authority of the requested State through the Central Authority of the *Contracting* State where the applicant resides) and for the recognition and enforcement of decisions (*cf*. Art. 20(1) of the Convention, which sets the conditions in which "[a] decision made in one *Contracting* State [...] shall be recognised and enforced in other *Contracting* States", emphasis added). The Protocol, on the other hand, is applicable *erga omnes*, even if the law it designates is that of a *non-Contracting* State (*cf*. Art. 2).

28. It should also be pointed out that the Convention's scope in terms of subject matter may also be extended, on an optional basis (by a declaration in accordance with Art. 63), "to any maintenance obligation arising from a family relationship, parentage, marriage or affinity [...]" (Art. 2(3) of the Convention). By means of such a declaration, therefore, each Contracting State may, if it so wishes, make the scope of both instruments *in terms of subject matter* coincide. Even in the presence of such a declaration, however, the coincidence will not be complete: the declaration provided for under Article 2(3) of the Convention creates obligations between two Contracting States only on the basis of reciprocity, *i.e.*, "only in so far as their declarations cover the same maintenance obligations and parts of the Convention"; on the other hand, the Protocol, as mentioned above, is applicable *erga omnes*, independent of any reciprocity (*cf*. Art. 2). It is accordingly possible, even in a State Party to both instruments having made that declaration, for the Convention not to be applicable to a case in point, unlike the Protocol.

ii) Maintenance obligations arising from a family relationship

29. The Protocol does not define the concept of a family relationship, but merely provides a few examples, which correspond to those contained in the 1973 Convention. Thus parent-child relationships, parentage, marriage and affinity are expressly mentioned. This list shows that the concept of a family relationship adopted by the Protocol is rather broad: it includes affinity, even though not all States recognise such relationships.

30. The final part of Article 1(1) specifies that in the case of child support, application of the Protocol is independent of the parents' marital status. This specification, which also appears in Article 1 of the 1973 Maintenance Obligations Convention and Article 2(4) of the Hague Convention on the International Recovery of Maintenance, establishes the fact that the Protocol applies without discrimination to children born in and out of wedlock.

31. The problem that is currently posed is that of the various forms of same sex marriage or partnership. These relationships are recognised in a growing number of legal systems, which often consider them as family relationships that may give rise to maintenance claims. Other States refuse to recognise them, however, considering in some cases that they are inconsistent with their public policy. This situation will not change with the Protocol. Indeed, the conflict rules in the Protocol determine only the law applicable to maintenance obligations; they do not determine the law applicable to what constitutes a family relationship nor to the establishment of such relationship on which the maintenance obligation is based (see *supra*, para. 23). The existence and the validity of same sex marriages or partnerships therefore continues to be covered by the national law of the Contracting States, including their rules of private international law. Moreover, the Protocol does not specify whether maintenance obligations arising out of such relationships are included within its scope; this omission is intentional, in order to avoid the draft Protocol running up against the fundamental opposition existing between States on these issues. The matter was nevertheless discussed in relation to certain connecting rules, and in particular that under Article 5 relating to maintenance obligations between spouses or ex-spouses: certain delegations had suggested an express statement in the Protocol's text that this provision could, at States' discretion, apply to these institutions similar to marriage. Though that proposal did not achieve the necessary consensus, Commission II of the Diplomatic Session accepted that those States which recognise such institutions in their legal systems, or are willing to recognise them, may make them subject to the rule under Article 5 (*cf*. *infra*, paras 92 *et seq.*), which is equivalent to an implied admission that the Protocol may be applied to them. On the other hand, nothing was decided as regards Contracting States that are not willing to treat such institutions like marriage. For the latter, a solution may be to consider that these relationships may not be treated like marriage (in that case, the applicable law will be determined on the basis of other rules in the Protocol, and in particular Arts 3 and 6). Given the silence of the Protocol and preparatory instruments, it must be admitted that this solution is legitimate, even though that implies that the Protocol's application will not be uniform among the Contracting States. This lack of uniformity is not too serious, however, if one considers that in any event, the court or authority concerned could on grounds of public policy refuse application on a case by case basis of a foreign law that recognises a maintenance obligation arising from these controversial relationships (*cf*. Art. 13; *infra*, para. 177).

32. The Protocol does not specify whether it is applicable to maintenance obligations arising from an agreement relating to the existence or extent of a maintenance obligation. Such agreements are frequently made between spouses at the time of marriage or in the event of divorce, or between unmarried partners. It will be recalled that it had not been possible to settle this issue when drafting the 1973 Maintenance Obligations Convention, and the latter accordingly allowed the courts "a large degree of latitude", enabling them to make such obligations subject to the treaty provisions or to the conflict rules that are generally applicable.[12] Despite the Protocol's silence on this point, it contains elements allowing an assertion that it is also applicable to agreements relating to maintenance, in so far as such agreements are designed to modify or further

[12] *Ibid.*, para. 120.

specify an obligation arising from a family relationship: unlike the 1973 Convention, the Protocol allows, subject to certain conditions, choice of the law applicable to the maintenance obligation (*cf*. in particular Art. 8, which allows the parties to designate the applicable law "at any time"). Yet one of the reasons – if not the primary reason – to allow that choice was precisely to provide a measure of stability to agreements made with respect to maintenance matters between spouses or other adults (*infra*, para. 126). If it is accepted that the law designated by the parties under the Protocol applies to agreements relating to maintenance, the same conclusion must be reached for the law designated by the Protocol itself through an objective connection.

c) The scope of decisions rendered in application of the Protocol

33. The second paragraph of Article 1 specifies that decisions rendered in application of the Protocol shall be without prejudice to the existence of any of the relationships referred to in paragraph 1. This provision reproduces the phrasing used in Article 2(2) of the 1973 Maintenance Obligations Convention; the same solution was selected in Article 5 of the 1989 Montevideo Convention. It states that no-one may rely on a decision ordering the debtor to pay maintenance to the creditor on the basis of the law designated by the Protocol to affirm the existence of a family relationship such as those referred to in Article 1(1). This rule is a corollary of the autonomous connection of the maintenance obligation (*cf*. *supra*, para. 23). It is the counterpart of Article 19(2) of the Convention, according to which, if a foreign decision does not relate solely to the maintenance obligation, the effect of the Convention's rules on recognition and enforcement is limited to the maintenance obligation (*cf*. the Borrás-Degeling Report, para. 438). For a deeper analysis of this approach, already well known in the Contracting States of the 1973 Convention, reference may be made to the Verwilghen Report.[13]

Article 2 Universal application

34. This provision merely specifies the universal nature of the Protocol. It will be applicable in the Contracting States even if the law designated by its provisions is that of a non-Contracting State. This approach is the same as adopted by the 1973 Maintenance Obligations Convention (Art. 2), and by several other Hague Conventions relating to applicable law.

35. In accordance with that rule, if an authority in a Contracting State is seized of an application relating to a maintenance obligation included within the material scope of the Protocol, it will have to apply that text to determine the law applicable on the merits, even if the case has very close links (as a result of the parties' residence or for other reasons) with one or more non-Contracting States. The same applies if the law designated by the Protocol is that of a non-Contracting State (which may be the case, for instance, if the creditor resides in such a State or if the parties have designated that law as the law applicable to the maintenance obligation; *cf*. Arts 3 and 8).

Article 3 General rule on applicable law

36. This provision lays down a principle of connection of the maintenance obligations to the law of the State of the creditor's habitual residence. This connection corresponds to the one used on a principal basis in the 1973 Maintenance Obligations Convention, and, for child support, in the 1956 Maintenance Obligations Convention. It is also provided for by Article 6(a) of the 1989 Montevideo Convention (albeit as an alternative to the debtor's habitual residence). This solution was accepted unanimously in the negotiations.

[13] *Ibid.*, paras 122 *et seq.*

a) The reason for this connection

37. This connection offers several advantages. The main one is that it allows a determination of the existence and amount of the maintenance obligation with regard to the legal and factual conditions of the social environment in the country where the creditor lives and engages in most of his or her activities. As rightly noted by the Verwilghen Report, "[the creditor] will use his maintenance to enable him to live". Accordingly, "[...] it is wise to appreciate the concrete problem in connection with a concrete society: that in which the petitioner lives and will live".[14]

38. The connection to the law of the habitual residence also secures equal treatment among creditors living in the same country, regardless of nationality. One fails to see why a creditor who is a foreign national should be, in the same circumstances, treated differently from a creditor having the nationality of the State where he resides.

39. Finally, it should be noted that the criterion of the creditor's habitual residence is extensively used for determination of the appropriate court with respect to maintenance, both under uniform law instruments (*e.g.*, Art. 5(2) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the "parallel" provision in Art. 5(2) of the Lugano Convention of 16 September 1988; Art. 8(a) of the 1989 Montevideo Convention) and in several domestic laws. Accordingly, use of that same criterion to determine the applicable law often leads to application of the law of the authority seized, which provides obvious benefits in terms of simplicity and efficiency. These advantages are particularly valuable in maintenance cases where the amounts at issue, and accordingly the resources available for the determination of foreign law, are usually very small.

40. As stressed by Article 3(1), the connection to the creditor's habitual residence is not applicable if the Protocol provides otherwise. This is an important restriction, as this connection is subject, under the Protocol's system, to several exceptions, provided for under Articles 4 to 8. On the whole, it should be observed that the scope of this rule is more limited here than under the 1956 and 1973 Maintenance Obligations Conventions.

b) The concept of habitual residence

41. The Protocol does not define the concept of habitual residence. The same is true of the many Hague Conventions that use this concept as a criterion for determination of the applicable law or the authorities' jurisdiction, including the Convention (see the Borrás-Degeling Report, paras 61 and 62). The task of determining in a specific case whether the creditor is resident in one State or the other falls on the authority seized; the latter is required, however, to seek a uniform concept, based on the Protocol's purpose, rather than apply domestic law criteria (Art. 20, *cf*. para. 200).

42. It should be noted that the criterion selected is that of *habitual* residence, which implies a measure of stability. Mere residence of a temporary nature is not sufficient to determine the law applicable to the maintenance obligation. If, for instance, the maintenance creditor lives for a few months in a country other than that in which he is established, for the purposes of schooling or to engage in a temporary activity, this ought not in principle to modify the habitual residence, nor the law applicable to the maintenance obligation under Article 3.

43. The criterion "habitual residence" is also used in the Convention as well as the concept of "residence". In Article 20 *c)* and *d)* of the Convention, the criterion "habitual residence" is used to determine the bases for the recognition of foreign decisions (*cf*. the Borrás-Degeling Report, para. 444) while the criterion "residence" is used in Article 9 of

[14] *Ibid.*, para. 138.

the Convention to determine the jurisdiction of the Central Authority of the requesting State and make the Convention provisions relating to administrative co-operation applicable: under Article 9, “An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State.” Pursuant to that provision, mere residence is sufficient even if it is not habitual; on the other hand, mere occasional presence is not sufficient. This solution was chosen to facilitate applications for the international recovery of maintenance as far as possible (*cf*. the Borrás-Degeling Report, para. 228).

c) Change of habitual residence

44. When the creditor changes residence, the law of the State of the new habitual residence becomes applicable as from the moment when the change occurs (Art. 3(2)). This solution, corresponding to that used in the 1956 and 1973 Maintenance Obligations Conventions (Art. 1(2) and Art. 4(2), respectively), is required having regard to the reasons on which the connection to the habitual residence is based: in the case of a change of habitual 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. Application of that law is equally justified on the basis of considerations relating to the equal treatment of all creditors residing in the same country.

45. It should be noted that the solution provided to the mobile conflict is not necessarily consistent with the concern to secure coincidence between the jurisdiction of the authorities and the applicable law: when the authority’s jurisdiction depends on the creditor’s habitual residence, the latter is usually determined at the time of the application, without regard to a later change (principle of *perpetuatio fori*). On the other hand, as regards applicable law, the change of the creditor’s habitual residence ought to be taken into account in the maintenance decision, even if it occurred in the course of the proceedings. In so far as the decision determines maintenance for the future, it would be illogical not to take into account such a significant change in circumstances.

46. Nevertheless, the latest time when that change may be asserted if it occurs during the proceedings is not determined by the Protocol. It will thus depend on the procedural rules applicable in each Contracting State.

47. It should be noted that the change of residence is to be taken into account only if, and from the time when, the creditor acquires a new habitual residence, to wit, when the new residence acquires the degree of stability implied by the habitual nature. If the creditor moves to another country in order to stay there on a strictly temporary basis (*cf*. the examples provided under para. 42), there is in principle no change of habitual residence, unless the new residence at some point becomes stable (if, for instance, the creditor undergoing training in a foreign State finds a job there enabling him to set up residence there on a durable basis).

48. The change of applicable law occurs as from the moment when the habitual residence changes, 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 right to obtain benefits for the earlier period has already accrued to the creditor and ought accordingly not to be subjected to further discussion because of a later change of the applicable law.

Article 4 Special rules favouring certain creditors

49. This provision lays down major exceptions from the connection in principle to the maintenance creditor’s habitual residence. The reason for the existence of these exceptions is to provide slightly more favourable rules for certain classes of maintenance creditors in cases where application of the law of their habitual residences is found to be contrary to their interests.

a) Scope of Article 4

50. In accordance with its purpose, the rule in Article 4 benefits only certain classes of creditors, defined under its first paragraph. In order to avoid any misunderstanding, it should be pointed out that this paragraph is not intended to set the requirements for maintenance to be granted (which is an issue for the designated domestic law), but solely to determine the classes of creditors who, for the purpose of determination of the law applicable to their claims, will be granted – by way of exception from Article 3 – the benefit of the connecting criteria defined under Article 4. The existence of entitlement to maintenance will depend on the law (or laws) designated by that Article. For the classes of creditors not referred to under Article 4, the law applicable to their maintenance claims will be determined by Article 3 or other provisions of the Protocol.

51. It should also be noted that Article 4 does not rule out application, for certain classes of creditors that it mentions, of other provisions in the Protocol: Article 3 remains applicable subject to exceptions provided for under Article 4, Article 6 allows the debtor to contest the creditor's claim in certain cases, and Articles 7 and 8 govern agreements relating to the applicable law.

52. Unlike the 1973 Maintenance Obligations Convention, under which the "cascade" system based on subsidiary connections has a general scope (*cf*. Arts 5-6), the Protocol provides for it only in favour of the classes of creditors referred to under Article 4(1) (*cf*. *infra*, paras 53 *et seq.*). This difference might be regarded, in the Contracting States of the 1973 Convention, as a step back in relation to the current level of protection afforded to maintenance creditors. However, this view would not be entirely accurate: the 1973 Convention already excluded a cascade of connecting factors for maintenance between divorced spouses, which was governed in all cases by the law applied to the divorce (Art. 8 of that Convention). The same was true of legal separation, nullity and annulment of marriage. Accordingly, if the two instruments are compared, it is observed that they diverge as to the treatment of spouses remaining married (who are included in the scope of Art. 5 of the Protocol, whereas they were excluded by Art. 8 of the 1973 Convention), and of certain adult creditors whose maintenance claims are not a matter of unanimous opinion in comparative law (*e.g.*, persons related collaterally or by affinity), and in respect of whom the Protocol provides for the introduction of certain specific defences for the debtor (*cf*. *infra*, Art. 6). Having regard to the fact that these classes of creditors are covered by less favourable special rules, it appeared to be less than logical, or even definitely contradictory, to provide these creditors with the benefit of the cascade of connecting factors under Article 4.

53. In the WGAL's Working Draft of January 2007 (Prel. Doc. No 24, *op. cit.*, footnote 7, Art. D), the special rules in what has become Article 4 were provided for only in favour of persons under the age of 21 years. At the meeting of the Special Commission in May 2007, this class was split into two separate classes. Thus Article 4 applies, on the one hand, to the maintenance obligations of parents towards their children (Art. 4(1) *a)*) and, on the other hand, to the maintenance obligations of persons other than parents towards any person who has not attained the age of 21 years (Art. 4(1) *b)*). In the former case, the parent-child relationship is the determining factor; in the latter, on the other hand, the favourable treatment depends on the creditor's age. In addition, again at the meeting of the Special Commission in May 2007, application of that Article was extended to the maintenance obligations of children towards their parents. These solutions are found in the final text of the Protocol.

i) Obligations of parents towards their children

54. Under Article 4(1) *a)*, Article 4 is applicable to the maintenance obligations of parents towards their children regardless of age. The existence of a parent-child relationship was considered to be sufficient justification for favourable treatment as regards determination of the applicable law. This does not mean that the child will be entitled to obtain maintenance regardless of his or her age, as this issue depends on the substantive rules of the designated law (or laws), but solely that he may enjoy the

benefit of the cascade of subsidiary connections, and the switch of connections, provided for under paragraphs 2 to 4 of Article 4.

ii) Obligations towards a person under the age of 21 years

55. Under Article 4(1) *b)*, the benefit of the rules of Article 4 is extended to persons under the age of 21 years. This means maintenance obligations based on family relationships to which the Protocol relates (*cf*. Art. 1(1)), exclusive of parent-child relationships (already provided for under Art. 4(1) *a)*), and marriage: Article 4(1) *b)* provides expressly that it is not to apply to maintenance obligations arising out of the relationships referred to in Article 5, to wit, maintenance obligations between spouses, ex-spouses or parties to a marriage that has been annulled. In the absence of a choice of applicable law, the obligations between spouses and ex-spouses are governed by the rules of Articles 3 and 5; the *favor creditoris* on which Article 4 is based does not apply to them.

56. The situations referred to in sub-paragraph *b)* are accordingly essentially those of maintenance claims based on a direct or collateral relationship (*e.g.*, a claim made by a grandchild, sister or brother, nephew or niece) or affinity (*e.g.*, a child towards his or her parent's spouse). It should be noted that these obligations are also subject to Article 6, so that the debtor may, if applicable, raise the defence provided for under that Article. The solution provided for by the Protocol in this respect is not very consistent, as the same relationships are privileged under Article 4 and disadvantaged under Article 6 (*cf*. *infra*, para. 100). This is naturally a compromise outcome.

57. After lengthy hesitation regarding the setting of an age limit of 18 or 21 years, the Diplomatic Session finally opted for the latter. The principal argument in support of this solution is that it is consistent with the trend observed in comparative law of favouring the award of maintenance to young persons in higher education, in particular at university. This trend has been taken into account in certain internationally-based instruments; thus the 1989 Montevideo Convention provides that the benefits arising out of that instrument apply in favour of persons who, after reaching the age of 18 years, remain eligible for maintenance under the applicable law. It should be emphasised in any event that the possibility of obtaining maintenance depends on the designated law (or laws); the Protocol merely governs the conflicts of laws and imposes on States no obligation to amend their domestic laws.

iii) Obligations of children towards their parents

58. Article 4(1) *c)* makes Article 4 applicable to the maintenance obligations of children towards their parents. This extension of this special rule's scope was proposed by a majority of delegations at the Special Commission in May 2007, on the grounds that parents also deserve, like their children, favourable treatment in terms of conflicts of law. This solution was eventually adopted at the Diplomatic Session. As in the case of sub-paragraph *b)*, the relationships to which sub-paragraph *c)* refers are also subject to the rule in Article 6, enabling the debtor to assert the defence provided for under that provision (*cf*. *infra*, para. 100).

b) The subsidiary connection to the law of the forum

59. The first advantage afforded to the classes of creditors defined under Article 4(1) consists of the provision of a subsidiary connection to the law of the forum in cases where the creditor is unable to obtain maintenance by virtue of the law of the State of his or her habitual residence (Art. 4(2)). This solution is inspired by *favor creditoris* and is designed to ensure that the creditor has the possibility of obtaining maintenance if provided for by the law of the authority seized.

60. This is a traditional solution. It is currently provided for by the 1956 and 1973 Maintenance Obligations Conventions (Arts 3 and 6, respectively). The latter provides for it, however, only as a last resort, after application, again on a subsidiary basis, of the law of the common nationality of the parties (Art. 5). The switch in the Protocol of these two

subsidiary connecting criteria (law of the forum before law of the common nationality, *cf*. Art. 4(4)) is justified for several reasons. First, it reduces the importance in practice of connection to the law of the common nationality, the relevance of which in maintenance matters is disputed (*cf*. *infra*, para. 74). Second, it facilitates the work of the authority seized, which may 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 decision to be made more quickly and at lower cost.

61. As under the 1956 and 1973 Maintenance Obligations Conventions, the subsidiary connection is provided for only if the creditor "is unable to obtain maintenance" according to the law of the creditor's habitual residence, applicable on a principal basis. The precise meaning to be given to this phrase was controversial during the meeting of the Special Commission in May 2007. The creditor clearly may enjoy the benefit of subsidiary application of the law of the forum not only if the law of his or her habitual residence does not provide for any maintenance obligation arising from the relevant family relationship (*e.g.*, it provides for no obligation of children towards their parents), but also if, while recognising such an obligation in principle, it makes the obligation subject to a condition that is not satisfied in the case in point (*e.g.*, it provides that the parents' obligation towards children ceases when they reach the age of 18 years, whereas the creditor has reached that age in the case in point).[15] The issue whether the subsidiary application of the law of the forum should also apply when maintenance is not due under the law of the habitual residence for economic reasons, to wit, on the basis of the criteria laid down by that law for determination of the creditor's needs and / or the debtor's resources (*i.e.*, if, according to the law of the habitual residence, the creditor does not require maintenance or the debtor is unable to provide it to him) remains a matter for debate. In strictly theoretical terms, it is difficult to distinguish this situation from those mentioned above, as this is also a case in which the grant of maintenance is denied on the basis of absence of a requirement laid down by the law applicable on a principal basis. According to a majority of delegations, however, *favor creditoris* (and the subsidiary connection which constitutes its expression as a norm) ought not to apply in the latter case.

62. In any event, recourse to the subsidiary connection will be excluded when the law of the creditor's habitual residence provides for a maintenance obligation in a lesser amount than the law of the forum. In that case, the law designated by Article 3 will apply, even if it is less favourable in practice to the creditor than the law of the authority seized.

63. In those cases where it is applicable, the 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 creditor's habitual residence and the law of the forum are the same. In addition, the scope of Article 4(2) is subsequently reduced by the provision of Article 4(3) of the Protocol: under the latter, the law of the forum is applicable on a principal basis in any event if the proceedings are instituted by the creditor in the State of the debtor's habitual residence (*cf*. *infra*, paras 64 *et seq*.). As a result, subsidiary application of the law of the forum under Article 4(2) may be contemplated only if the proceedings are instituted by the debtor (*e.g.*, in a case where the latter brings proceedings before the competent authority of the State of his or her own habitual residence provided the court seized can hear the case[16]; in such case, the creditor may raise the law of the forum in his or her defence) or if the authority seized is that of a State in which neither party is resident (if, for instance, the maintenance claim is brought on an accessory basis before the court having jurisdiction to determine affiliation or the dissolution of marriage).

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[15] *Ibid.*, para. 145.

[16] This will normally not be the case in the States parties to the Convention where the debtor brings an action to be released from a maintenance obligation after a previous decision rendered in the Contracting State where the creditor is habitually resident. Under Art. 18 of the Convention, and subject to certain exceptions, "[w]here a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made".

c) The switch of connecting factors in the case of proceedings instituted by the creditor in the State of the debtor's habitual residence

64. Article 4(3) provides that the law of the forum is applicable on a principal basis if the creditor has seized the competent authority of the State where the debtor has his habitual residence. In that case, however, if the maintenance creditor is unable to obtain maintenance under the law of the forum, the law of the creditor's habitual residence becomes applicable again on a subsidiary basis. This is a major switch of the connecting factors provided for under Articles 3 and 4(2) (law of the forum before law of the creditor's habitual residence). This provision is the outcome of a compromise between supporters of undifferentiated application of the law of the creditor's habitual residence and those of the law of the forum.

i) Principal connection to the law of the forum

65. Application of the law of the forum is subject to two conditions: first, the authority seized must be that of the State of the debtor's habitual residence, and second, the proceedings must be instituted by the creditor.

66. The first such condition is the one justifying application of the law of the forum instead of the law of the creditor's habitual residence. It must be observed that when 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 virtues. In such a case, that criterion does not result in application of the *lex fori*, so that the authority seized will be required 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 the case in point, it is *less favourable* to the creditor than the law of the forum (the only exception provided for under Article 4(2) being the situation in which the creditor *is not entitled to any maintenance* under the law of his or her habitual residence, *cf*. *supra*, para. 62). In such a situation, application of the law of the creditor's habitual residence leads to a result contrary to the concern for the creditor's protection on which it is based. It accordingly appeared that it would be appropriate to replace this connection by application of the law of the forum, which is also in that case the law of the debtor's habitual residence (it should be observed that other international instruments make the law of the debtor's habitual residence applicable in certain cases; this is true in particular of the 1989 Montevideo Convention, Art. 6 of which provides for application of that law as an alternative to the law of the creditor's habitual residence, if more favourable to the maintenance creditor).

67. The second condition for application of the law of the forum is that the proceedings be instituted by the creditor; it is designed to restrict, in the creditor's interest, the departure from the principle of connection to the law of his or her habitual residence. It appeared that this departure could be justified if the creditor decides himself to institute the proceedings in the State of his debtor's habitual residence, whereas it seems excessive if the proceedings are instituted in that country at the debtor's initiative (*e.g.*, for the purposes of an application for modification of a maintenance decision). The creditor often has the option of bringing proceedings in the country where he resides or the country where the debtor resides (such is the case in particular within the European judicial area by virtue of Arts 2 and 5(2) of Regulation (EC) No 44/2001 and of the Lugano Convention; Art. 8 of the 1989 Montevideo Convention provides for a similar option, *cf*. *supra*, para. 39). If he opts for the second solution, he cannot complain of application of the domestic law of the debtor's country. With this in mind, the solution settled upon constitutes a kind of compromise between the supporters of automatic application of the law of the forum and those who would have preferred making it subject to an option on the part of the creditor (*cf*. the WGAL report of June 2006, Prel. Doc. No 22, *op. cit.*, footnote 6, paras 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 habitual residence will be very solidly grounded (as it will be based on the principle of *actor sequitur forum rei*), providing sounder justification for application of the law of the forum. If, on the other hand, the proceedings are instituted by the debtor in his State of residence, the jurisdiction of that State's authorities (if it exists under the law of the forum) may be based on a jurisdiction criterion that is far less significant (such as

the nationality of one of the parties), or even clearly exorbitant (*forum actoris*). All the more reason to rule out application of the law of the forum in such a case.

68. Application of the law of the forum on a principal basis is provided only for the classes of creditors referred to under Article 4(1) (children, creditors under 21 years of age and parents). This restrictive solution, differing from the solution proposed by the WGAL in the 2006 Working Draft (*cf*. the WGAL Report of June 2006, Prel. Doc. No 22, *op. cit.*, footnote 6, paras 20 *et seq.*) is due mainly to the following reason. It appeared that application of the law of the forum to the conditions laid down by the provision in question is of substantial benefit to the creditor: by seizing the authorities of the State of his residence or those of the State of the debtor's residence, the creditor is granted the right to choose indirectly the law applicable to his maintenance claim (forum shopping). According to the Diplomatic Session, such a privilege is justifiable only for the classes favoured under Article 4.

69. As regards maintenance obligations towards children, application of the law of the forum also rests on a further consideration. In a growing number of countries, the task of determining these obligations is assigned to administrative authorities. These authorities may not have the expertise nor the means required to determine and apply the foreign law. Accordingly, the application of the law of the forum may be more appropriate for certain administrative-based systems for the recovery of maintenance. This is naturally far less of a concern with respect to the maintenance claims of adult creditors, which are usually determined by the judicial authorities (at least when they are not linked to their children's maintenance claims).

ii) The subsidiary connection to the law of the creditor's habitual residence

70. As application on a principal basis of the law of the forum is based on *favor creditoris*, it cannot be maintained where it would result in the creditor being denied any maintenance. This is why Article 4(3) *in fine* provides, in similar fashion to Article 4(2) but in the reverse order, a subsidiary connection to the law of the creditor's habitual residence when the latter is unable to obtain maintenance by virtue of the law of the authority seized. Article 4(3) thus merely switches the connections provided for in the general rules. The meaning of the phrase "is unable to obtain maintenance" is naturally the same as in Article 4(2) (*cf*. *supra*, paras 61 and 62).

d) The subsidiary connection to the common nationality of the parties

71. If the creditor is unable to obtain maintenance, whether under the law of his State of habitual residence or the law of the forum (applicable in that order or, in the case of Art. 4(3), in the reverse order), the law of the common nationality of the parties is applicable as a last resort (Art. 4(4)). This second subsidiary connection completes the protection of the maintenance creditor in cases where the laws designated by the first two criteria do not provide for any maintenance obligation. The meaning of the phrase "is unable to obtain maintenance" is naturally the same as in Article 4(2) (*cf*. *supra*, paras 61 and 62).

72. The connection to the law of the common nationality of the parties is also provided for under the 1973 Maintenance Obligations Convention (Art. 5) but in that instrument, it prevails over the law of the forum. The reasons for switching these two criteria have already been mentioned (*cf. supra*, para. 60).

73. Unlike the 1973 Maintenance Obligations Convention, the subsidiary connection to the nationality of the parties (as indeed to the law of the forum) is provided only for the classes of creditors referred to under Article 4(1). The reasons for that restriction of the scope of the cascading connections have already been explained (*cf. supra*, para. 52).

74. Use of the connection to the common nationality for maintenance obligations has been the object of many criticisms. The main one is that this criterion is discriminatory, as its benefit is provided only to creditors having a common nationality with the debtor (in support, see already the Verwilghen Report[17]). Another criticism relates to the equivocal nature of that connection when the common nationality is that of a multi-unit

[17] *Op. cit.*, note 11, para. 144.

State (the solution settled upon for that case in the Protocol is the recourse to the concept of the closest connection, *cf.* Art. 16(1) *d)* and *e)*; *infra*, para. 191). Despite these criticisms, several delegations fought for maintenance of that subsidiary connection in the Protocol, leading to the formation of a consensus in support. It should be noted that its limitation to only the classes of creditors referred to under Article 4(1) (whereas under the 1973 Maintenance Obligations Convention, that connection is general in scope), and its "demotion" to the rank of a *second* subsidiary connection (whereas in the system of the 1973 Convention, it was the *first* subsidiary connection, after habitual residence and ahead of *lex fori*), will greatly reduce both its practical impact and its drawbacks.

75. In the case of minor children, in particular, recourse to this third connecting criterion ought to be fairly rare, as most domestic laws recognise a right to maintenance in such a case. On the other hand, the common nationality can play a more important part in the other cases referred to under Article 4(1), as regards in particular the maintenance claims of adult children towards their parents, of persons under the age of 21 years towards other family members, and of parents towards their children.

76. The Protocol does not provide for the case of plurality of nationalities. The creditor and debtor, or both, may have two or more nationalities. The methods generally used to resolve these cases in the private international law of States are not suited for use pursuant to the Protocol: the priority conferred by certain States on the nationality of the forum leads to results that are hardly uniform. As for determination of the closest or most effective nationality, it contains a considerable margin for uncertainty, and it too may lead to divergent results between Contracting States. *Favor creditoris*, which is the basis of Article 4(4), ought rather to lead to application of the law of common nationality in all cases where it exists, even if that nationality is not, for one or other of the parties, the closest or most effective. The same considerations ought to apply when the parties share several nationalities, with the consequence that the creditor's claim may be admitted on the basis of one or other of those laws of common nationalities.

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

77. This Article contains a special rule for the connecting factor concerning maintenance obligations between spouses and ex-spouses. For such obligations, the connection in principle to the creditor's habitual residence is to yield, when one of the parties so requests, to application of the law of another State, in particular the State of the spouses' last common habitual residence, if that law has a closer connection with the marriage.

a) The reason for the special rule

78. The provision of a special rule for this class of maintenance obligations is based on the observation that application of the law of the creditor's habitual residence is not always suitable for obligations between spouses or ex-spouses. It should be taken into consideration that in certain domestic systems, maintenance is granted to a spouse only with great restraint and in exceptional cases (in Europe, this restrictive attitude is a feature of the law of Scandinavian States in particular). Against that background, indiscriminate application of the rules inspired by *favor creditoris* is seen in certain States as being excessive. In particular, the possibility for one of the spouses of influencing the existence and substance of the maintenance obligation through a unilateral change of residence may lead to a result that is less than fair and contrary to the debtor's legitimate expectations. Take for instance the case of a couple of citizens of State A, the law of which does not in principle provide for maintenance after a divorce. After living all their married life in that State, the spouses divorce and one of them moves to State B, where the law is more generous to divorced spouses, and then claims maintenance on

the basis of the law of his or her new habitual residence. According to the general connecting rule under Article 3, that claim ought to be allowed. In such circumstances, however, application of the law of State B, a State where the spouses never lived during their marriage, seems less than fair to the other spouse and contrary to the legitimate expectations the spouses may have held during their marriage.

79. The weaknesses of the connection to the creditor's habitual residence in the case of maintenance obligations between divorced spouses had already been observed during the drafting of the 1973 Maintenance Obligations Convention. The latter provides a special rule for this situation, whereby the maintenance obligations between divorced spouses are governed by the law applied to the divorce (Art. 8). The same is true *mutatis mutandis* of cases of legal separation, and of marriages declared void or annulled (Art. 8(2)). This solution applies not only when the maintenance claim is settled in the course of the divorce proceedings (or at the time of divorce), but also to proceedings instituted subsequently to revise or supplement the divorce decree. The reason stated for this *perpetuatio juris* is the requirement of securing continuity, by preventing the change of the creditor spouse's residence from leading to a change of the applicable law.

80. This solution has several drawbacks, however, which attracted lively criticism from the Contracting States of the 1973 Maintenance Obligations Convention. It should be noted first that, as the conflict rules with respect to divorce have not been harmonised at the international level, Article 8 in fact in no way standardises the law applicable to maintenance obligations. That law continues to depend on the private international law of the State of the court seized of the divorce proceedings, and this solution inevitably favours forum shopping. In addition, the selection of a connecting factor that is invariable in time can cause, when the maintenance obligation between spouses needs to be determined after the divorce, application of a law that has become entirely irrelevant to the ex-spouses' situation and their respective interests: the court may not take into account the law of the creditor's or debtor's current residence. The divorce decree may also contain no provision relating to maintenance; in that case, the concern for continuity on which Article 8 rests is less relevant. This is especially true when the spouses have divorced in a country that does not provide for maintenance to a divorced spouse. In such case, application of the law of the divorce results in denial of any maintenance, which does not seem justified in situations where this law does not have a particularly close connection to the case in question. Finally, application of the law of the divorce can give rise to practical difficulties because it may be difficult to detect in the decision the law on the basis of which the divorce was decreed. All these considerations are equally valid, *mutatis mutandis*, for cases of legal separation, or declaration of nullity or annulment of marriage.

81. In its search for a balance between the concern for protection of the creditor and the concern for application of the law of a State with which the marriage is significantly connected, the Special Commission turned initially towards use of the connection to the last common habitual residence of the spouses or ex-spouses. In certain circumstances, that criterion probably represents a more significant link than the habitual residence of the maintenance creditor only, and accordingly enjoys greater legitimacy (*cf*. the situation contemplated *supra*, para. 78). That is not always the case, however. If the last common habitual residence is located in State A where the spouses had recently established themselves after having lived for several years in State B, and the creditor returns to the latter State after the separation, the connection to the creditor's habitual residence (which in this case is also the State of a former common habitual residence) is better suited to the parties' expectations. In other circumstances, a different connection may be even more significant, such as for instance a previous common habitual residence or the common nationality of the parties.

82. Having regard to the specific features of each particular case and the difficulty of setting a rigid and comprehensive connecting rule, the Diplomatic Session settled upon a flexible solution. The connection to the creditor's habitual residence provided for under

Article 3 remains applicable in principle to maintenance obligations between spouses and ex-spouses. It may be excluded, however, upon the request of one party, if the marriage has closer connections with another State, in particular that of the last common habitual residence. This solution is based on a proposal from the delegation of the European Community (Work. Doc. No 4 of Commission II).

b) Operation of the escape clause

i) The request by one of the parties

83. The new rule is in the form of an escape clause based on the idea of closeness (the closest connections), application of which is contingent, however, upon a request by one of the parties. This is an original solution which does not correspond to the structure of the "traditional" escape clauses contained in several private international law texts at the domestic level (*cf*. Art. 15 of the Swiss Federal Act of 1987 on Private International Law) and at international or regional level (*cf*. Art. 4(5) of the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations* and Art. 4(3) of Regulation (EC) No 593/2008 of the European Parliament and Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)), including certain Hague Conventions (*cf*. Art. 15(2) of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*). Such provisions allow the court to deviate from the inflexible connections when that is required for reasons of closeness, but they are usually not contingent upon a request by one of the parties. The advantage of the solution contained in the Protocol is that it reduces the uncertainty inherent in any escape clause, by restricting the search for the closest connections to only those cases where one party asks for it. It should be noted that when such a request is made, the task of the authority will usually be facilitated by the information provided by the requesting party.

84. The Protocol does not state when the request is to be made, but it appears from the discussions that it is to be made in the course of specific proceedings, including alternative dispute resolution proceedings, such as mediation (Minutes No 1 of Commission II, paras 25 – 29, Minutes No 3 of Commission II, para. 21). The final deadline for making that request will depend on the procedural rules applicable in each Contracting State, as a proposal from the delegation of Switzerland aimed at establishing a uniform rule in this respect (Work. Doc. No 9 of Commission II) did not achieve the necessary consensus (Minutes No 4 of Commission II, paras 74 *et seq.*). In order to avoid such a request being used, in particular by the debtor, for dilatory purposes, it is desirable that it should not be possible to submit it when the proceedings are too far advanced. Thus its submission for the first time with the final brief on the merits or in appeal proceedings ought to be excluded. One approach might be to require its submission at the latest at the time of the first defence on the merits, but other solutions may also be contemplated.

ii) The closer connections

85. The objection by one of the parties does not automatically result in setting aside the law of the creditor's habitual residence designated under Article 3. It is also necessary, according to the assessment of the authority seized, for the law whose application is requested to have closer connections with the marriage. The closeness principle is accordingly indeed the basis for that rule. This implies that the court, pursuant to such a request, will ascertain whether the marriage has closer connections with a law other than that of the creditor's habitual residence. In so doing, it shall have regard to all the connections of the marriage with the various countries concerned, such as the spouses' habitual residence and / or domicile during the marriage, their nationalities, the location where the marriage was celebrated and the location of the legal separation or divorce. In addition, it will have to weigh them so as to determine whether they are more or less significant than the current habitual residence of the maintenance creditor.

86. Among these criteria, Article 5 confers a leading role on the spouses' last common habitual residence. This is not a real presumption, as used in other instruments (*cf*. Art. 4(2) of the Rome Convention of 19 June 1980), but a mere indication (*cf*. Work. Doc. No 2 of Commission II), reflecting the belief of the Diplomatic Session that, in many cases, the law of the last common habitual residence has very significant connections with the marriage. It shall be noted that the phrase "common habitual residence" does not imply that the spouses must have lived together, but that they resided at the same time in one and the same State during the marriage. On the other hand, common habitual residence prior to marriage does not fit the case envisaged in Article 5, even though there is nothing to prevent its being taken into consideration, like any other connection, to evaluate the existence of closer connections.

87. The spouses' current common habitual residence is not mentioned in Article 5, for the simple reason that it coincides with the creditor's habitual residence and may therefore not result in an exception from the connection under Article 3. This does not mean that the spouses' current habitual residence in the same State plays no part in the application of Article 5. Quite the opposite, the fact that both spouses reside in the same State at the time of the request will make it more difficult (though it remains theoretically possible) to set Article 3 aside, on the grounds that the law of another State (*e.g.*, that of the State of an earlier common habitual residence) has a closer connection with the marriage.

88. While the criterion of the last common habitual residence is destined to play a leading role pursuant to Article 5, other criteria may also be significant for that Article's application. This is the case of a former common habitual residence of the spouses, which may, in certain circumstances, constitute a very close connection. If spouses lived for many years in State A, then very briefly in State B, before the creditor moved to State C, there is no close connection with the State B of the spouses' last common habitual residence, but there is such a connection with the State A of the former common habitual residence.

89. Other criteria, such as the spouses' common nationality or the location of celebration of the marriage, could be taken into account theoretically, but they seem to be of secondary importance only. They can certainly play a part to increase the weight attributed to the habitual residence (present or past) of the spouses (for instance, it will be weightier if it coincides with the spouses' common nationality). Taken in isolation, they will be significant only in exceptional cases (*e.g.*, where the spouses never had any habitual residence in the same State, or moved very frequently during the marriage).

c) The scope of Article 5

90. It should be noted that the scope of Article 5 is extensive, as it covers both spouses and ex-spouses. Unlike Article 8 of the 1973 Maintenance Obligations Convention, this provision of the Protocol is meant to be applicable not only to obligations between divorced or separated spouses, or spouses whose marriage has been annulled or declared void, but also to maintenance obligations between spouses during their marriage. The Special Commission considered that it was preferable to have a single connecting rule for obligations during the marriage and after the divorce (or separation), in order to avoid changing the applicable law as a result of the divorce (or *a fortiori* as a result of mere legal separation). Furthermore, this choice is justified in so far as the connecting criterion settled upon for information in that provision, the last common habitual residence, is even weightier for obligations between the spouses during the marriage.

91. Like Article 8 of the 1973 Maintenance Obligations Convention, the special rule in Article 5 also applies to parties to a marriage which has been annulled. These are the cases of putative marriages for which the law sometimes recognises maintenance rights in favour of one of the spouses. Although Article 5 – unlike Article 8 of the 1973 Convention – does not mention the situation of a marriage that has been declared void,

this silence is not deliberate and it should be admitted accordingly that such a case is also subject to this provision.

92. Despite the proposals to that effect made by certain delegations,[18] Article 5 does not mention the institutions similar to marriage, such as certain forms of registered partnership having, with respect to maintenance obligations, effects comparable to marriage. Despite the silence of the instrument, the Diplomatic Session admitted that States recognising such institutions in their legal systems, or willing to recognise them, may subject them to the rule in Article 5 (Minutes No 6 of Commission II, paras 59 *et seq.*). This solution will enable the authorities of those States to avoid treating differently institutions which, under their domestic law, are equivalent to marriage. This is all the more so for same sex marriage, which is recognised in certain States.

93. This solution is optional, in that it is not binding on States which refuse such relationships. We have already mentioned the solutions that may be contemplated for such States (*cf*. *supra*, para. 31). It should also be pointed out that if the law designated by the Protocol provides for maintenance obligations in favour of a registered partner or same-sex partner, a court or authority in a State which does not recognise any effect of such a relationship (including in maintenance matters) could refuse the application of the foreign law to the extent that its effects would be manifestly contrary to the public policy of the forum (*cf*. Art. 13).

94. Finally, it should be pointed out that maintenance obligations arising from the relationships mentioned under Article 5 are expressly excluded from the scope of Article 4 (*cf*. para. 1 *b)*). It follows that obligations between spouses or ex-spouses do not enjoy the benefit of the cascade of connecting factors, or of the switch of the connecting criteria based on that provision. In the absence of a choice of applicable law (*cf*. Arts 7 and 8), they are governed either by the law of the State of the creditor's habitual residence by virtue of Article 3, or by the law designated by Article 5. The law of the forum and that of the common nationality may be taken into account in such a case only if they are more closely connected with the marriage within the meaning of Article 5.

Article 6 Special rule on defence

95. As regards maintenance obligations other than those towards children which arise from a parent-child relationship and those between spouses or ex-spouses (Art. 5), Article 6 provides that the debtor may contest the creditor's claim on the ground that there is no such obligation under both the law of the State of the debtor's habitual residence and the law of the State of the common nationality of the parties, if there is one.

96. This defence was inspired by the solution provided by Article 7 of the 1973 Maintenance Obligations Convention, according to which, between parties related collaterally or by affinity, the debtor may contest a claim for maintenance on the grounds that there is no maintenance obligation under the common national law of the debtor and creditor or, in the absence of a common nationality, under the internal law of the debtor's habitual residence.

a) The scope of Article 6

97. Unlike Article 7 of the 1973 Maintenance Obligations Convention, the rule in the Protocol is not applicable only to relations between parties related collaterally or by affinity, but also to any maintenance obligation other than those towards children arising out of a parent-child relationship or those between spouses or ex-spouses.

98. This extension was decided upon for several reasons. It should be observed first that the desirability of granting maintenance on the basis of the family relationship to which this rule refers was not a matter of international consensus, hence the concern by certain States to be able to limit its impact. Under the 1973 Maintenance Obligations Convention, that wish was taken into account by the provision of several reservations

[18] *Cf*. of Commission II, Work. Docs Nos 8 and 15; Minutes No 5, paras 84 *et seq.*; Minutes No 6, paras 56 *et seq.*

allowing a restriction on the material scope of the Convention (*cf.* its Arts 13 and 14). In order to avoid the making of reservations under the Protocol (*cf.* Art. 27), it was thought preferable to take account of the reluctance of certain States regarding maintenance obligations based on the aforementioned family relationships at an earlier stage, by providing for more restrictive connecting rules in such cases.

99. In some cases, Article 6 may be asserted to refuse maintenance based on the law designated by Article 3 (law of the creditor's habitual residence). This is the case of a maintenance obligation towards an adult based:

- on parentage in the direct line other than the parent-child relationship (*e.g.*, the obligation of a grandchild to a grandparent or vice versa);
- a collateral relationship (*e.g.*, the obligation towards a bother or sister);
- a relationship by affinity (*e.g.*, the obligation towards one's spouse's children).

In such cases, the law applicable to the maintenance obligation is that of the creditor's habitual residence under Article 3. If that law provides for a maintenance obligation, the debtor may contest it using the defence in Article 6.

100. In other cases, the defence in Article 6 may be raised against a maintenance claim based on one of the laws designated by Article 3 or by Article 4. That is the case of the maintenance obligation:

- of a child towards his or her parent;
- of any person other than parents and the spouse towards a person under the age of 21 years (*e.g.*, the obligation of a party related collaterally or by affinity).

In both these cases, the special rules of Articles 4 and 6 will accordingly be applicable concurrently, with the consequence that a maintenance claim due under one of the laws designated by the cascading connections of Article 4 may be denied if it does not exist under the laws specified by Article 6. That concurrent application of the cascading system and the defences is not only highly complex, but also less than satisfactory in strictly logical terms: it seems lacking in consistency to wish both to favour the creditor through subsidiary connections and to protect the debtor through cumulative connections... This is naturally a compromise solution. It should be stressed, however, that this system is not entirely new, as it corresponds to the one currently applicable pursuant to the 1973 Maintenance Obligations Convention, albeit only for persons related collaterally or by affinity.[19]

101. The defence under Article 6 may not be raised to contest a maintenance obligation between spouses or ex-spouses, as the letter of the provision expressly excludes that case. Even though maintenance obligations arising from marriage are not a matter of unanimous agreement in comparative law, they are nevertheless accepted far more widely that those arising from the other family relationships mentioned by Article 6. The solution of Article 5, which is already less favourable to the creditor than those of Articles 3 and 4, should not be subsequently made harsher through the admission of a defence.

102. Maintenance obligations arising from a family relationship similar to marriage, such as certain forms of partnership, are in a special position. In the States that recognise such institutions in their domestic law, or which are willing in any event to accept them, such relationships can be treated in the same way as marriage, so that the resulting maintenance obligations will be governed by Article 5 and accordingly escape Article 6. It will be otherwise in States which refuse such an assimilation; in those States, the debtor will be able to set such obligations aside using the defence in Article 6. Even though it is

[19] Verwilghen Report, *op. cit.*, note 11, para. 149.

not spelt out in the text of the Protocol, this "double-standard" solution was accepted at the Diplomatic Session (*cf. supra*, paras 92 *et seq.*).

b) The mechanism provided by Article 6

103. The rule in Article 6 does not contain a connecting rule, but a mere defence, that may be raised to deny maintenance, even though the latter is provided for by the applicable law designated by Article 3 or 4.

104. The mechanism provided by Article 6 is the following, therefore. The authority shall first determine the law applicable to the maintenance obligation on the basis of Article 3 or Article 4. If the law of the creditor's habitual residence or the law of the forum, designated by one of these provisions, provides for a maintenance obligation, the debtor may contest the creditor's claim on the grounds that this obligation does not exist under the law of his or her own habitual residence. This will be sufficient to dismiss the claim if the parties have no common nationality. If, for instance, the debtor's nephew, a resident and citizen of State A, makes on the basis of that State's law a maintenance claim against his uncle, resident in State B and a citizen of State C, the latter will be able to deny any maintenance on the grounds that the law of State B does not recognise any maintenance obligation between persons related collaterally. The parties' nationalities play no part in this case.

105. On the other hand, if the parties have a common nationality, the defence may be raised effectively only if the maintenance obligation at issue is provided for neither by the law of the debtor's habitual residence nor by the law of the common nationality. In the latter case, to be effective, the defence must be based, cumulatively, on both the laws mentioned. Using the same example, if the debtor's nephew were also a citizen of State C, his uncle could contest the claim only if the obligation provided for by the law of State A were unknown to the laws of both State B and State C. Taking the law of the common nationality into account is justified by the consideration that, if the parties have a common nationality and the law of their common nationality provides for the obligation concerned, it seems inequitable to allow the debtor to evade it on the grounds only that this obligation is unknown in the State of his habitual residence. This solution allows in particular the avoidance of possible abuses. As an example, if a father claims maintenance from his son on the basis of the law of his country of habitual residence, which is also the law of their common nationality, it seems inequitable for the debtor to be able to evade his obligation by transferring his habitual residence to a State where the law does not recognise such an obligation.

106. Article 6 (as indeed Art. 4(4)) does not specify whether the common nationality is to be taken into account, and how, when one of the parties also has other nationalities. In that case, the concern for uniform interpretation of the Protocol results in dismissing an approach based on primacy of the nationality of the forum State, as practised in the generally-applicable law of many States. In addition, determination of the closest or most effective nationality, another very common solution in comparative law, is not always easy to implement and it too may lead to interpretations of the Protocol that are less than uniform. For these reasons, and in the image of what we suggested for Article 4(4) (*cf. supra*, para. 76), it seems preferable for the common nationality to be taken into account in any event, even if it is not the most effective for one of the parties. This solution is more favourable to the maintenance creditor, as it makes the use of the defence under Article 6 more difficult. This is accordingly a solution consistent with the general spirit of the Protocol (*favor creditoris*), and with the nature of the rule in Article 6 as an exception.

107. Neither does Article 6 specify which solution is to be applied when the parties have several nationalities in common. Having regard to the teleological and systematic arguments we have just mentioned, the most appropriate solution is to take into account all the common national laws, and to accept the debtor's defence only if none of them provides for the maintenance obligation (*cf. supra*, para. 76).

108. It should be noted that the defence is admissible only if "there is no such" obligation under the laws to which Article 6 refers. This phrase is to be understood in the

same way as the phrase “the creditor is unable to obtain maintenance” as used in paragraphs 2 to 4 of Article 4 (*cf. supra*, paras 61 and 62); accordingly, it is necessary that no obligation be provided for or that the statutory conditions to which it is subject not be satisfied. On the other hand, if the law of the debtor’s habitual residence and, if applicable, the law of the common nationality provide for an obligation in a lower amount than provided for by the applicable law, that fact will not be sufficient to contest the claim, nor to apply for a reduction of the maintenance due to the creditor.

Articles 7 and 8 Choice of applicable law

109. The provisions of Articles 7 and 8 allow the parties, subject to different conditions and with different effects, to choose the law applicable to the maintenance obligation. The admission of party autonomy is one of the main novelties introduced by the Protocol in relation to the 1956 and 1973 Maintenance Obligations Conventions. This solution corresponds to a strong international trend towards recognition of the freedom to choose the applicable law, even in areas from which it was traditionally excluded.

110. While the admission of party autonomy with respect to maintenance obligations is a novelty for most States as regards conflicts of laws, this is not true of conflicts of jurisdictions: the possibility of entering into agreements relating to jurisdiction is already recognised in several international instruments. This is the case in particular in the European judicial area under Article 23 of Regulation (EC) No 44/2001 and Article 17 of the Lugano Convention of 16 September 1988. The Convention also recognises the legitimacy of an extension of jurisdiction, by providing that States are bound to recognise and enforce a decision made in one Contracting State in the forum designated by the parties, except for maintenance obligations towards a child (*cf*. Art. 20(1) *e)* of the Convention; Borrás-Degeling Report, para. 455). In this context, the admission of choice of the applicable law re-establishes a measure of consistency between the solutions accepted with respect to conflicts of laws and of jurisdictions.

111. The choice of law is subject to several restrictions, designed to protect the parties (and in particular the maintenance creditor) against risks of abuse. This risk is more serious where the choice is made before the occurrence of a dispute. This is why the Protocol’s system includes two variations for party autonomy, in two separate provisions; Article 7 governs the choice of law applicable for the purpose of a particular proceeding (procedural agreement), whereas Article 8 allows – on a more limited basis – a choice at any time.

Article 7 Designation of the law applicable for the purpose of a particular proceeding

112. This provision allows the parties to designate expressly the law of the forum as the law applicable to the maintenance obligation for the purpose of a particular proceeding. This is a procedural agreement on the applicable law, relating to the domestic law of the authority seized, and the effect of which is limited to a particular proceeding.

a) The scope of Article 7

113. The choice of applicable law as provided for under this provision ought to play an important role especially in relations between adults. In cases of legal separation or divorce, in particular, the spouses will have the option of making the maintenance claims subject to the domestic law of the authority seized, which cannot fail to facilitate the proceedings.

114. However, the opportunity to choose is also provided for as regards maintenance obligations towards children. It appeared that the possible risks connected with the introduction of party autonomy are amply counterbalanced by the benefits in terms of simplicity that arise from application of the law of the forum. Having regard to the special rule under Article 4(3), whereby the parents’ maintenance obligations towards their

children and those of any other person towards persons under the age of 21 years are in any event governed by the law of the forum when the claim is brought by the creditor in the State of the debtor's habitual residence, the impact of the choice of applicable law on maintenance obligations towards children is bound to remain rather limited. Article 7 may be useful, nevertheless, when the claim is brought by the debtor before the authorities of the State of his habitual residence or those of a State other than that of the creditor's habitual residence, provided the authority seized can hear the case. [20]

b) A choice made for the purpose of a particular proceeding

115. It should be emphasised that the choice provided for under Article 7 is made for the purpose of a particular proceeding; it accordingly assumes that the maintenance creditor or debtor has already brought, or is about to bring, a maintenance claim before a specific authority. At the time of that choice, the parties have the opportunity to obtain information (or will sometimes be informed by the authority seized) regarding the existence and nature of the maintenance provided for under the law of the forum. The risk of abuse is accordingly low.

116. The parties' choice under Article 7 produces effects only for the particular proceeding for the purpose of which it is made. On the other hand, if a further claim or an application for modification is made subsequently before the same authority or the authority of another State, the choice of law made previously will no longer have any effect 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 law chosen is that of the forum.

117. It should be noted, however, that with respect to maintenance obligations towards a person aged over 18 years, the creditor and debtor may also choose the applicable law under Article 8. This choice is broader than the one provided for under Article 7. First, it is not limited to the law of the forum but may relate to a selection of laws listed in the first paragraph of that provision (*cf. infra*, para. 129). Second, the choice under Article 8 is not made for the purpose of a particular proceeding; its effects are accordingly not limited to a proceeding that the creditor has already instituted or is about to institute, but they also last into the future, as long as the choice has not been cancelled or modified by the parties (*cf. infra*, para. 124). This choice may be made, as specified by Article 8, "at any time". If adults make a choice of applicable law during the proceedings, or just before they are initiated, the issue will arise whether that choice is subject to Article 7 or to Article 8. This issue is not academic, as the effects of the choice differ between the two provisions. The answer is easy if the law chosen is not that of the forum; in that case, the admissibility and effects of the choice may be determined only by Article 8. On the other hand, it may be in doubt where the law chosen is that of the authority seized. If the law of the forum is not consistent with the selection of laws listed under Article 8(1) (national law of one of the parties, law of the habitual residence of one of the parties, etc.; *cf. infra*, para. 129), it will necessarily be a choice governed by Article 7 which will accordingly have effect limited to the specific proceeding: if Article 8 were applied in that case, the choice would be void. On the other hand, if the law of the forum is also one of the laws listed under Article 8(1), as will frequently be the case, the answer will depend on the interpretation of the parties' intention.

118. The issue of co-ordination of Articles 7 and 8 does not arise when the maintenance obligation concerns a person under the age of 18 years or 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, as in those cases, the choice of Article 8 is ruled out (Art. 8(3)). The parties accordingly have an option only to choose the law of the forum for the purpose of a particular proceeding, subject to the conditions and with the effects of Article 7.

c) The manner of the choice

119. Since the choice of applicable law under Article 7(1) may also occur before the proceedings are instituted, Article 7(2) includes some details as to form, by providing

[20] See *supra*, note 11.

that in such case, the designation of applicable law shall be in an agreement in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference. It appeared essential, first, for the existence of the agreement to be easy to prove, avoiding any dispute, and second, that the parties' attention should be drawn to the important consequences that the choice of applicable law can have in relation to the existence and extent of the maintenance obligation. In the minds of the delegates to the Diplomatic Session, this provision contains only minimal formal requirements with respect to the agreement; States may provide other requirements, for instance to ensure that the parties' consent is freely given and sufficiently informed (*e.g.*, recourse to legal advice before signature of the agreement).

120. Finally, it should be noted that if the choice provided for under Article 7 is made before the proceedings are instituted, it will be valid only in so far as the parties have specified the law they intend to designate, or at least the authority before which the proceedings contemplated are to be instituted. If, subsequently, no claim is brought before the authorities of the State, the law of which has been chosen, the choice will remain ineffective (unless it meets the requirements of Art. 8). By contrast, it will not be sufficient for the parties to designate in general fashion "the law of the forum", since until an authority has been seized, the "forum" has not been determined. Such a choice made blindly does not provide an assurance that the parties have been informed, and are aware, of the object of their choice.

121. After discussions of this matter, it was finally decided not to include a time limit between the time of the choice and the time of initiation of proceedings: if a claim is brought in the State, the law of which has been chosen, it is reasonable for that choice to produce its effects, even if a fairly long time has elapsed between those two events. On the other hand, if no proceedings are instituted in that State, the choice, as mentioned, will be ineffective in any event.

122. The Protocol does not contain any rule as to the manner and timing of the choice when it is made during the proceedings. Those issues are determined by the law of the authority seized.

Article 8 Designation of the applicable law

123. This provision allows the parties to choose the law applicable to the maintenance obligation at any time and even before a dispute arises.

124. Unlike the choice of the law of the forum provided for under Article 7, the choice of applicable law under Article 8 is not made only "for the purpose of a particular proceeding"; its effects are accordingly not limited to a proceeding that 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 of the choice and until such time, if applicable, as they choose to cancel or modify it.

125. The main advantage of the choice of applicable law as provided for under Article 8 is to secure a measure of stability and foreseeability with respect to the applicable law: if the parties have made such a choice, the chosen law remains applicable despite any changes in their personal situations, regardless of the authority seized in the event of a dispute. In particular, the change of the creditor's habitual residence does not cause a change of the applicable law (*cf. infra*, para. 133), unlike in the case of an absence of choice under Article 3(2).

a) The scope of Article 8

126. The choice of applicable law is particularly useful in the relationship between spouses when they enter into, before or during marriage, an agreement relating to maintenance obligations during marriage and / or after divorce. As a result of that choice, the law applicable to the maintenance obligation is determined in advance, which prevents subsequent challenges to the validity of the agreement in the case of a change of habitual residence of the spouses or of the creditor spouse. In fact, even in the

absence of an agreement relating to maintenance obligations, the choice of law can avoid the changes of applicable law caused by a mobile dispute.

127. Once the choice of applicable law had been accepted for spouses, it appeared that it could be useful to extend it to all adults, other than persons who, by reason of an impairment or insufficiency of personal faculties, are not in a position to protect their interests. Though such "vulnerable" adults are usually protected by mechanisms set up in the various systems of domestic law (in the form, *e.g.*, of appointment of a guardian or trustee), the Diplomatic Session eventually excluded the choice of applicable law to maintenance obligations for these persons, in order to avoid any risk of abuse (Art. 8(3)). The definition of vulnerable adults used by this provision is reproduced from the *Hague Convention of 13 January 2000 on the International Protection of Adults* (*cf*. Art. 1(1)).

128. The choice of applicable law was also excluded for maintenance obligations towards minors, as the potential risks of that choice seem to outweigh the possible benefits. It should be borne in mind that a minor is usually represented by either of his or her parents, who are also bound to provide for the minor; the Diplomatic Session considered, therefore, that admitting the choice of applicable law involves an excessive risk of conflicts of interest in such cases. After some hesitation as to determination of the age from which the choice might be accepted (18 or 21 years), the age of 18 years was eventually settled upon, as it is the age of legal adulthood in most countries.

b) The selection of laws eligible for choice

129. With a concern for protection of the maintenance creditor, Article 8 makes the option for the parties to choose the applicable law subject to several conditions and restrictions. The first restriction concerns the object of the choice and is designed to limit the range of options available to the parties.

i) National law of one of the parties

130. The first option open to the parties is choice of the national law of one of them at the time of designation (Art. 8(1) *a)*). This option was accepted without particular discussion and does not require lengthy explanation. It should be noted that unlike the subsidiary criterion of connection with the common nationality under Article 4(4), it is sufficient in this case for the designation to relate to the law of a State, of which only one party (creditor or debtor) is a national.

131. In the event of plurality of nationalities, given that the Protocol is silent on the matter, it should be accepted that the choice may relate to any of the national laws of the parties: determination of the closest or most effective nationality would risk creating uncertainty as to the validity of the choice, thus weakening party autonomy.

ii) Law of the habitual residence of either party

132. The second option concerns the habitual residence of either party at the time of the designation (Art. 8(1) *b)*). This possibility was never disputed during the Protocol's preparatory work. The concept of habitual residence calls for no particular observations; it corresponds to that under Article 3 (*cf. supra*, paras 41 *et seq*.).

133. In the case of nationality, as of habitual residence, the decisive time is the time of designation. This solution corresponds to the main purpose of the choice of applicable law, which is to secure stability, regardless of the changes that occur after the designation. Despite the Protocol's silence on this point, it should be considered, therefore, that a change of nationality or habitual residence of the party concerned after the choice does not affect its validity. On the other hand, one may wonder whether the choice of the law of a State of which neither of the parties is a national or resident at the time of the choice can be validated subsequently by later acquisition of the relevant

nationality or habitual residence. The express reference to the time of designation contained in sub-paragraphs *a)* and *b)* of Article 8(1) seems to rule it out.

***The further options under sub-paragraphs* c) *and* d)**

134. The third and fourth options (Art. 8(1) *c)* and *d)*) relate to the law *designated* to govern the property regime between spouses, and legal separation or divorce, respectively, and the law that was *actually applied* to those matters. It is accordingly obvious that these options are open to spouses and ex-spouses.

135. The desirability of allowing these further options was debated at length. Against their admission, it was pointed out that they create a very complex system, without its being really necessary, having regard to the very broad options for choice already created by sub-paragraphs *a)* and *b)*. Furthermore, the additional options provided for under sub-paragraphs *c)* and *d)* depend on the national conflict rules concerning property regimes, divorce and legal separation and they accordingly create only a semblance of uniformity. Moreover, in situations where the parties have submitted the maintenance obligations to the law *designated* as applicable to their property regime or legal separation / divorce, the validity of that choice as far as maintenance is concerned depends in fact on the validity of the choice of law with respect to property regimes/legal separation / divorce. Since the choice of law applicable to property regimes between spouses and that applicable to the separation or divorce is not governed by the Protocol, it depends solely on the private international law of the forum. If that law does not allow such a choice, its invalidity will entail the invalidity of the choice of law applicable to the maintenance obligation. This risk is particularly acute with respect to divorce, as party autonomy in such matters is recognised by a small number of States only. As a result, there is a risk that the choice validly made under the private international law of one Contracting State may be considered as being void by the authorities of another Contracting State applying its own conflict of laws rules.

136. Despite these drawbacks, the options of sub-paragraphs *c)* and *d)* were settled upon by the Diplomatic Session, as they enable spouses to ensure that a single law is applicable to the various issues to be determined in the case of dissolution of the couple (divorce and legal separation, dissolution of matrimonial property regime and maintenance obligations). This concurrence is particularly important with regard to the links between these various aspects in several domestic legal systems. Thus, the determination of property consequences is sometimes considered as a condition for the grant of divorce (such is the case in particular for procedures based on mutual consent of the spouses). In addition, in certain laws (and in several common law jurisdictions in particular), the distinction between dissolution of the property regime and maintenance obligations is unclear or non-existent, as the settlement of any property effects of the divorce is entrusted to the courts.

137. It should be noted that Article 8 does not allow the spouses to choose the law *applicable* to the property regime or divorce. Since this issue is governed by the domestic rules of private international law of the Contracting States (including those which arise at an international or regional level), and the solutions provided for may be very different, the determination of the law applicable to the property regime or divorce may vary according to the rules in force in the State of the authority seized. In such case, designation of that law to govern the maintenance obligation would be made blindly, a situation which was not considered as desirable.

iii) The law designated to govern the property regime

138. Under Article 8(1) *c)*, the spouses have the right first to choose the law they have *designated* to govern their property regime. In such case, the law designated to govern the property regime will also be applicable to the maintenance obligations, the advantage obviously being to make both these issues subject to consistent legislation.

139. The choice of the law applicable to the property regime is not determined by the Protocol, but by the private international law of each Contracting State (including any instruments of an international or regional origin). This choice is widely accepted in comparative law; it is provided for, *inter alia*, by the *Hague Convention of 14 March 1978*

on the Law Applicable to Matrimonial Property Regimes. The spouses are often allowed the right to choose the national law or the law of the habitual residence of one of them (*cf*. Arts 3 and 6 of the 1978 Convention); in such case, this option does not add anything to those under sub-paragraphs *a)* and *b)*. It may occur, however, that for their property regime, the spouses are granted certain additional options, not provided for in the Protocol, such as for instance the law of the domicile (which is not necessarily identical with the habitual residence), or the law of the location of certain assets, and real property in particular (*cf*. Arts 3(4) and 6(4) of the 1978 Convention). In such cases, the maintenance obligations may also be subject to those other laws.

140. If the choice made by the parties does not comply with the conflict of laws rules in force in the State of the forum (because such a choice is not accepted there or because the conditions have not been satisfied, or that the chosen law is otherwise in conflict with these rules), it will be considered as being null and void. This invalidity will also entail that of the designation of the law applicable to the maintenance obligation, which is grafted onto it according to the Protocol.

iv) The law in fact applied to the property regime

141. Sub-paragraph *c)* also allows the spouses to make the maintenance obligations subject to the law in fact *applied* to their property regime. The situation referred to is that in which the law applicable to that regime has already been determined by the authority seized (in a case of separation or divorce in particular). By their choice, the spouses may make the maintenance obligations subject to that same law. This widens the choices open to the parties, but above all it makes all the issues relating to property subject to a single law. It should be noted that if the law applied to the property regime is the law of the forum, choice of that law for the maintenance obligations is not the same as the choice provided for under Article 7: this is not a choice made for the purpose of a particular proceeding, but a choice that will continue to produce effects in future, including for new claims (for amendment in particular) made by the creditor or debtor. Furthermore, the choice provided for under Article 8(1) *c)* does not necessarily have to be made during the proceedings, but may be made after a decision defining the property regime between the spouses has been delivered.

v) The law designated to govern the legal separation or divorce

142. Under Article 8(1) *d)*, the spouses may also make the maintenance obligation subject to the law they have *designated* to govern their legal separation or divorce. The considerations above regarding the choice of law designated for the property regime also apply, *mutatis mutandis*, to this situation. It should be pointed out, however, that designation of the law applicable to the divorce or legal separation is not very common in comparative private international law. This naturally increases the likelihood of such a choice being considered as being null and void in the forum State, including as regards the maintenance obligation. The spouses would be well advised, therefore, to be cautious. However, an evolution is becoming apparent in the private international law of certain European countries, in that choice of the law applicable to divorce and legal separations is provided for under German, Dutch and Belgian law, in particular.[21]

vi) The law in fact applied to the legal separation or divorce

143. Sub-paragraph *d)* also allows the spouses to make the maintenance obligations subject to the law that was in fact *applied* to the legal separation or divorce. The situation referred to is that in which the applicable law has already been determined by the authority seized; by their choice, the spouses may make their maintenance obligations subject to that same law. This widens the choices open to the parties, but most of all it makes all the maintenance obligations subject to the same law as was applied to the separation or divorce. The considerations above regarding the difference

[21] Subject to specific requirements of each jurisdiction, the choice of applicable law is permitted by the reference by Art. 17 to Arts 14§3 and 14§4 EGBGB, Arts 1§2 and 1§4 of the *Wet Conflictenrecht inzake ontbinding huwelijk en scheiding van tafel en bed* (Law on conflicts of law with respect to dissolution of marriage and legal separation) in the Netherlands, and Art. 55§2 of the Belgian Code of Private International Law.

between that choice and the choice governed by Article 7 (*cf. supra*, para. 141) are also applicable in this case.

c) The manner of the choice

144. In formal terms, the choice of applicable law is to be made in writing signed by the parties (Art. 8(2)). Without even mentioning its evidential advantages, the requirement of writing serves to draw the creditor's attention to the importance of the choice and to shelter him or her from the consequences of a heedless choice.

145. The writing may be replaced by any medium, the contents of which are accessible so as to be usable for future reference. This provision is intended to allow the use of information technologies. This does not dispense, however, with the requirement of a signed document; an electronic document will be sufficient, therefore, only if accompanied by an electronic signature.

d) Restrictions affecting the effects of choice

146. Major restrictions have been introduced with respect to the effects of the choice of applicable law (Art. 8, paras 4 and 5). Since the choice of a law that is restrictive in maintenance matters may deprive the creditor of his or her right to maintenance, or limit his or her entitlement to a large extent, it seemed indispensable to restrict its effects.

i) Application of the law of the creditor's habitual residence to the right to renounce maintenance

147. Article 8(4) provides that notwithstanding the law designated by the parties, the question of whether the creditor can renounce his or her right to maintenance shall be determined by the law of the State of the habitual residence of the creditor at the time of the designation. This rule was introduced into the text of the Protocol at the Diplomatic Session, pursuant to a proposal by the European Community (Work. Doc. No 5 of Commission II). It implies a restriction of the scope of the law designated by the parties; regardless of the contents of that law, the possibility to renounce maintenance, and the conditions of such a renunciation, shall remain subject to the law of the creditor's habitual residence. This provision is naturally intended to prevent the creditor, through the choice of a particularly liberal and unprotective law, being made to renounce the maintenance to which he or she would be entitled under the law applicable if there had been no choice.

148. According to the proposal on which this provision is based, the award to the creditor of a lump sum to cover his or her future needs does not constitute renunciation of the right to maintenance for the purposes of that Article. In such case, therefore, the law of the creditor's habitual residence is not taken into account.

149. In its literal sense, the provision seems designed to apply to the case in which the creditor has renounced his or her rights, and that renunciation is accompanied by the choice of a law allowing it. The justification for the provision suggests, however, that it should be applied also in the case where the choice of a particular law implies, in itself, a renunciation, as the designated law provides for no maintenance in favour of the creditor.

ii) Mitigating powers of the court

150. The effects of the choice of applicable law are, moreover, limited by the provision of mitigating power to the authority seized of the claim (Art. 8(5)). If that authority finds that application of the law chosen by the parties leads, in the specific case, to manifestly unfair or unreasonable consequences, the law chosen may be set aside in favour of that designated by the objective connecting criteria in Articles 3 to 5. This escape clause is based on considerations of substantive justice and corresponds to the powers that several national laws confer on courts to amend, or even set aside, maintenance agreements made between the parties when they lead to unfair or unreasonable results. However, delegations were also concerned that an unlimited power of the court to set aside the chosen law would completely undermine the possibility of the parties to conclude choice of law agreements under Article 8. It was therefore agreed to limit the mitigating powers of the court by providing that paragraph 5 would not apply if the

parties were fully informed and aware of the consequences of their designation. This phrase is intended to allow parties to reduce the risk of having their agreement set aside by seeking legal advice about the consequences of their choice prior to its conclusion. The requirement that the parties have to be "fully informed and aware" signifies that parties must not only have received relevant information but also have been able to understand it; the expression is not redundant because someone can be fully informed without being aware of the consequences of his / her choice.

e) The existence and validity of the agreement between the parties

151. Apart from certain restrictions regarding admissibility of the choice of applicable law and a few indications as to the timing and form of that choice, the Protocol leaves unanswered other questions relating to the existence and validity of the agreement whereby the parties designate the applicable law (for instance, it does not determine the effect of a possible defect of consent). These issues will have to be settled according to the law applicable to the designation agreement made between the parties, but that law is not expressly determined by the Protocol. The preferred solution for dealing with this deficiency is to consider that these issues will be governed by the law designated by the parties. This approach, consisting of subjecting the validity of the *optio legis* to the law that would apply if the agreement between the parties were valid, is very common in international instruments recognising party autonomy, in particular as regards the existence and validity of consent (*cf*. Art. 10 of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*; Art. 10(1) of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*; Art. 5(2) of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*; Arts 3(4) and 8(1) of the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*; Arts 3(5) and 10(1) of the "Rome I" Regulation (Regulation (EC) No 593/2008)). Its main advantage is to ensure that these issues are determined in a uniform manner in the various Contracting States of the Protocol.

Article 9 "Domicile" instead of "nationality"

152. This provision provides that a State which has the concept of "domicile" as a connecting factor in family matters may inform the Permanent Bureau of the Hague Conference that, for the purpose of cases which come before its authorities, the word "nationality" in Articles 4 and 6 is replaced by "domicile" as defined in that State.

153. This provision was included in the Protocol at the Diplomatic Session pursuant to a proposal from the European Community (Work. Docs Nos 2, 6 and 11 of Commission II). It is designed to facilitate application of the Protocol by those States (in particular the common law jurisdictions) which are not accustomed to using nationality as a connecting criterion in private international law. These States are accordingly permitted to replace the criterion of nationality used in Articles 4 and 6 by that of domicile, as defined in those States. There are similar provisions in certain European Community instruments, in favour of the United Kingdom and Ireland (*cf*. Arts 3(2) and 6(b) of Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels IIa) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000).

154. Although the definition of the circle of States that may benefit from that special rule is not very precise, it is clear that it is open to common law jurisdictions that use "domicile" as a connecting factor in family matters to make use of Article 9. The phrasing used in Article 9, referring to "a State which has the concept of "domicile" as a connecting factor in family matters", does not expressly limit that Article's application to the common law States only. There are several civil law jurisdictions that also use

connection with the domicile in family matters.[22] According to the letter of Article 9, it would seem that such States may also exercise the option recognised by this provision. This reading is not consistent, however, with the spirit of the European Community's proposal, the stated purpose of which was to facilitate the task of States that are not accustomed to use nationality as a connecting factor in their domestic systems of private international law (*cf*. Minutes No 5 of Commission II, para. 31). It seems, therefore, that if a State has and generally uses the concept of nationality in matters of conflicts of laws, even on a subsidiary basis, it will not enjoy the benefit of the special rule in Article 9.

155. In the State exercising the option provided for under Article 9, the criterion of domicile must be used "as defined in that State". This is accordingly a referral to the domestic law of the State concerned and its own definition of domicile. This approach is naturally not very favourable to uniform application of the Protocol, but its impact should not be over-estimated, since it will remain restricted to the provisions of Article 4(4) and Article 6 of the Protocol. It should also be noted that the referral to the domestic concept of domicile is also used in other instruments of uniform private international law, without having created major drawbacks in the application of those instruments (*cf*. Art. 52 of the Brussels Convention and of the Lugano Convention of 16 September 1988).

156. Replacing the concept of nationality by that of domicile within the meaning of Article 9 is provided for only with respect to application of Articles 4 and 6 of the Protocol, to wit, the two provisions that use the common nationality of the parties as the criterion. In Article 4(4), that replacement will imply that, in the Contracting States to the Protocol that have exercised this option, the creditor who is unable to obtain maintenance under both the law of his or her habitual residence and the law of the forum (in that order or the reverse order, *cf*. Art. 4(3)) may nevertheless base his or her claim on the law of the State in which both parties have their domicile. In Article 6, the replacement implies that, in the States concerned, a maintenance debtor may contest the creditor's claim if the obligation exists neither under the law of his or her habitual residence, nor under the law of the State in which both parties are domiciled.

157. In both cases referred to in Article 9, the replacement of nationality by domicile will have effects only for the Contracting State having exercised the option allowed by that provision. This means that other States will not be bound to apply the criterion of domicile, and on the contrary, shall continue to apply that of nationality. Article 9 is not subject to a requirement of reciprocity. The corollary is that other States are not bound to apply the concept of domicile as defined in the State in question; their authorities' task is accordingly not made more difficult by that Article.

158. On the other hand, the replacement provided for by Article 9 will have no impact on Article 8, although that provision also uses the criterion of nationality in paragraph 1 *a)* (choice by the parties of the national law of one of them). This is due to the concern to prevent the designation of the national law of one party, made in accordance with Article 8, being found void in another Contracting State having made use of Article 9, on the grounds that neither party was domiciled in the State, the law of which was chosen. Or, conversely, designation of the law of the domicile being considered as being void in a Contracting State remaining true to the nationality criterion.

159. It should be emphasised that the replacement of nationality by domicile as a criterion is subject, under Article 9, to the obligation to inform the Permanent Bureau, which will notify that information to the other Contracting States.

[22] *E.g.,* Switzerland, where domicile is defined as the location where a person "resides with the intention of establishment", *cf*. Art. 20(1) *a)* of the Federal Act on Private International Law of 18 December 1987.

Article 10 Public bodies

160. This provision provides that the right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which that body is subject.

161. This rule is not novel, since it already appeared in Article 9 of the 1973 Maintenance Obligations Convention, with a few drafting differences. Thus, in the French version, the phrase "*institution publique*" in the former Convention was replaced by "*organisme public*" to make the Protocol's text consistent with that of the Convention (*cf*. the latter's Art. 36).

162. This rule is very widely recognised internationally, as confirmed by the fact that a provision with the same substance was also included in the text of the Convention (its Art. 36(2)). This rule will apply, therefore, in all States parties to the latter instrument, whether or not they are parties to the Protocol (and therefore regardless of the law they apply to the maintenance obligation).

163. It should be noted that the connection to the law of the public body applies only for the latter's right to *seek* reimbursement (whether on the basis of subrogation or a statutory assignment), whereas the existence and extent of the maintenance claim are governed by the law applicable to that obligation (*cf*. Art. 11 *f)*). It was in order to clarify the relationship between these two provisions that the phrase "right to obtain reimbursement", which appeared in the 1973 Maintenance Obligations Convention, was replaced by "right to seek reimbursement": obtaining the reimbursement does not depend on the law of the public body, but on the law applicable to the maintenance obligation. In some cases, these two laws coincide; that is usually the case if the maintenance obligation is governed by the law of the creditor's habitual residence (Art. 3), since the public body providing benefits to the creditor usually operates in the latter's State of residence, in accordance with local law. A split of the two laws is more likely to occur when the maintenance obligation is subject to a law other than the law of the State of the creditor's habitual residence by virtue of Article 4, 5, 7 or 8.

164. Moreover, it is clear that the rule applies only to the reimbursement of benefits provided in place of maintenance, and not to benefits of another nature, such as public allowances, that the debtor is not required to reimburse.

Article 11 Scope of the applicable law

165. This provision further details the issues determined by the law applicable to the maintenance obligation, designated by Article 3, 4, 5, 7 or 8 of the Protocol. The scope of that law is defined fairly broadly, in accordance with the approach characterising the 1973 Maintenance Obligations Convention (*cf*. Art. 10 of that Convention), and other international instruments (*cf.* Art. 7 of the 1989 Montevideo Convention).

166. It should be noted that the list in Article 11, as indicated by the phrase "*inter alia*", does not claim to be comprehensive, and other issues not mentioned may be subject to the same law.

167. The law applicable to the maintenance obligation governs, first of all, the existence of the maintenance obligation and the determination of the debtor (Art. 11 *a)*). It determines, without limitation, a person's eligibility for maintenance, having regard to that person's family relationship with the debtor, and age.

168. The same law also determines the extent of the obligation. The Protocol has remained true to the approach of the 1956 and 1973 Maintenance Obligations Conventions, by providing that a single law determines whether, and to what extent, the creditor may claim maintenance. The split between the existence and extent of the claim, which is applied in certain legal systems (in certain Canadian provinces in particular), was not followed.

169. The extent of the obligation includes not only the basis on which the benefit is calculated (*cf*. para. *c)*), but also the extent to which the creditor may claim retroactive maintenance (*cf*. para. *b)*). The various legal systems usually restrict this possibility to the amounts due in the years immediately preceding the creditor's action.

170. The law applicable to the maintenance obligation also governs the issue of indexation of the amount due as maintenance (*cf*. para. *c)*). This issue was discussed at the Special Commission, as other solutions are theoretically conceivable (*e.g.*, systematic application of the law of the creditor's habitual residence or of the law of the forum). The Special Commission eventually considered that this issue was connected with that of determination of the extent of the maintenance obligation and was accordingly to be governed by the law applicable to the latter.

171. The law applicable to the maintenance obligation also determines who is entitled to institute maintenance proceedings (*cf*. para. *d)*). This solution corresponds to that in the 1973 Maintenance Obligations Convention (Art. 10(2)). The right usually lies with the maintenance creditor but, if the latter is a minor, the proceedings may sometimes be instituted by one of his or her parents or a public body. This issue is separate from that of the representation of incapacitated persons, which is outside the scope of the Protocol. Likewise, it should not be confused with those of procedural capacity and judicial representation, which are subject to the law of the forum.

172. The limitation period for maintenance proceedings and other time requirements to institute them (*e.g.*, peremptory time limits) are also subject to the law applicable to the maintenance obligation (*cf*. para. *e)*). These issues are accordingly characterised as substantive and not procedural, as was already the case under the 1973 Maintenance Obligations Convention (Art. 10(2)). A different question is that concerning the period for which arrears may be enforced on the basis of a foreign decision. This issue is not regulated in the Protocol, but in Article 32, paragraph 5, of the Convention, according to which "[a]ny limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period".

173. In the case of proceedings for reimbursement brought by a public body, the law applicable to the maintenance obligation governs the existence and extent (and therefore the limits) of that obligation (*cf*. para. *f)*), whereas the right to seek reimbursement is governed by the law of the body concerned (Art. 9). This rule, corresponding to that in Article 10(3) of the 1973 Maintenance Obligations Convention, is entirely logical: if the law applicable to the maintenance obligation does not provide for a claim, the public body may not seek reimbursement by the debtor of the benefits that it has provided.

Article 12 Exclusion of *renvoi*

174. This provision specifies that the conflict rules in the Protocol designate the domestic law of the State concerned, exclusive of its choice of law rules. *Renvoi* is accordingly excluded, even if the designated law is that of a non-Contracting State. This solution is consistent with the one in the 1973 Maintenance Obligations Convention and many other instruments drawn up by the Hague Conference (*cf*. Art. 10 of the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*; Art. 19 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*). It calls for no particular comments.

Article 13 Public policy

175. This article provides an option to exclude the applicable law where its effects are manifestly contrary to the public policy of the forum. The substance of this provision corresponds to that of the 1973 Maintenance Obligations Convention (Art. 11(1)), and to many instruments of uniform private international law.

176. Application of the public policy exception must be very restrictive: Article 13 requires the effects of the foreign law to be *manifestly* contrary to the public policy of the forum, *i.e.*, obviously contrary to a fundamental principle in the forum State.

177. The public policy exception is sometimes invoked when the maintenance claim is based, according to the foreign *lex causae*, on a family relationship that is not recognised in the forum State and that is considered in that State as being improper. In this respect, it should be pointed out, however, that the determination of public policy is to be performed *in concreto*, in relation to the effects of application of the foreign law designated by the Protocol. This consideration appears to be of particular importance in the area of maintenance, as in such cases the effect of application of a foreign law is felt in any case in the property area (*cf.* also Art. 1(2) of the Protocol, whereby decisions rendered in application of the Protocol shall be without prejudice to the existence of a family relationship). In order to be able to invoke public policy, it will not be sufficient, therefore, for the family relationship on which the maintenance claim is based to run up as such against the public policy of the forum State, but it will be necessary for the fact of compelling one person to pay maintenance to another on the basis of such a relationship to be seen as improper in itself. This distinction is not academic. It is well known that in several States the case law is willing to recognise certain specific rights (of a property or personal nature) arising out of a family relationship, even though the latter is in itself in breach of the forum's public policy. The best known example is that of recognition in some European States (France, Germany) of certain effects of polygamy; even though that institution cannot be recognised as such by those States, as inconsistent with fundamental principles of the law of the forum, the provision of maintenance by the husband to the various wives is not regarded there as being improper. Similar considerations could apply, *mutatis mutandis*, to other controversial institutions, such as same sex partnership or marriage.

178. Unlike other domestic or international instruments, the Protocol does not make a reservation for the forum's *lois de police* (or rules of immediate application), *i.e.*, the mandatory rules which, owing to their crucial importance for the forum State, are applicable regardless of the law designated by the choice of law rules. It would seem, therefore, that the authorities seized are bound in any case to determine the substance of the law designated by the Protocol, which could be set aside only if its effects are incompatible in a specific case with the public policy principles of the law of the forum.

Article 14 Determining the amount of maintenance

179. Article 14 provides that even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance. This is a substantive rule that is binding as such on the Contracting States, regardless of the manner in which the law applicable to the maintenance obligation is treated.

180. The text of this provision is largely the same as Article 11(2) of the 1973 Maintenance Obligations Convention, but includes two major novelties:

181. The first difference is based on the fact that Article 14 is the object of a separate provision independent of the one relating to public policy, unlike Article 11(2) of the 1973 Maintenance Obligations Convention. After lengthy discussions at the WGAL and Special Commission, this solution was adopted at the Diplomatic Session. It has an important consequence: the substantive rule in question is not merely a restriction of application of a foreign law, but it is to be applied by the authorities of a Contracting State even if the law designated by the Protocol is the law of the forum in the specific case.

182. It should be noted that taking the needs and resources into account does not necessarily involve a power of evaluation of the authority in the case in point, but may be based indirectly on the manner in which the maintenance arising from the applicable law is calculated, for instance by defining the amount of maintenance owed to a creditor in specific circumstances by way of tables which are flexible enough to take into account the parties' needs and resources. This point is important in relation to administrative systems which also rely on the needs of the creditor and the resources of the debtor, even though such factors are taken into account more abstractly than in judicial systems.

183. The second difference from Article 11(2) of the 1973 Maintenance Obligations Convention is based on the reference in Article 14 to "any compensation which the creditor was awarded in place of periodical maintenance payments". This novelty too was introduced at the Diplomatic Session upon a proposal from the delegation of the European Community.[23] It refers in particular to cases where, at the time of divorce, one spouse has obtained the payment of a lump sum or the allocation of part of the property (real or personal) belonging to the other spouse (as is the case, for instance, in certain common law jurisdictions) to liquidate all his or her claims, including maintenance. This solution is used in several national systems to favour a final settlement of the spouses' respective claims at the time of divorce, thereby putting an end with a "clean break" to their relationship, at least as regards property. In such case, the subsequent assertion by one spouse of maintenance claims incompatible with the earlier settlement, on the basis of a law that does not recognise this form of compensation, should be avoided: if the law designated by the Protocol relies on the creditor's current needs, without having regard to the compensation previously received, the result could be unfair. As a result, the substantive rule in Article 14 can be used to remedy, if applicable, the solutions arising out of the law applicable to the maintenance claims.

Articles 15 to 17 Non-unified legal systems

184. These Articles contain provisions relating to application of the Protocol in States having non-unified legal systems. These provisions are customary in Hague Conventions, but their drafting needs to be suited to the material scope of each Convention. In the case of the Protocol, draft Articles were prepared by the Permanent Bureau (Work. Doc. No 12 of Commission II). These Articles were adopted with few changes by the Diplomatic Session. Article 15 provides that the Protocol does not apply to conflicts that are strictly internal in a Contracting State, whereas Articles 16 and 17 relate to application of the Protocol in legal systems that are not unified on a personal or territorial basis.

Article 15 Non-application of the Protocol to internal conflicts

185. This Article provides that a State in which two or more systems of law or sets of rules of law apply to maintenance obligations shall not be bound to apply the rules of the Protocol to settle the resulting internal conflicts. The Protocol is intended to settle conflicts of laws in international situations and does not claim to be applied in strictly internal situations. This applies to both interpersonal conflicts (*i.e.*, where application of the various internal legal systems is based on a personal criterion, such as the religion of the persons concerned) and inter-territorial conflicts (where the various systems or sets of rules apply in different territorial units).

186. The State concerned may, on a strictly voluntary and unilateral basis, decide to apply the Protocol to settle internal conflicts if it so wishes. This solution, that may certainly be contemplated for inter-territorial conflicts, seems to be unsuitable for interpersonal conflicts, however.

[23] See of Commission II, Work. Doc. No 2; Minutes No 1, paras 64 *et seq.*, and Minutes No 2, paras 1 *et seq.*

Article 16 Non-unified legal systems – territorial

187. This Article indicates the procedure to be applied when, in an international situation, the law designated by the Protocol is that of a non-unified system, in which two or more systems of law or sets of rules of law apply to maintenance obligations in different territorial units. It should be noted that this issue does not arise only in multi-unit States, but may occur in all Contracting States of the Protocol, when the latter designates as applicable the law of a multi-unit State. If, for instance, the Protocol designates the law of State A because the creditor has his or her habitual residence in that State, and that State is a non-unified system, the authority seized in State B (Party to the Protocol) will be faced with the issue of determining whether the rules applicable are those of one or the other of the various territorial units of State A.

188. Article 16(2) provides that for the purpose of identifying in such case the applicable law under the Protocol, the rules in force in the State concerned identifying the territorial unit, the law of which is applicable, shall be applied first (Art. 16(2) *a)*). In our example, the authority in State B will accordingly rely first on the rules applicable in State A to settle inter-territorial conflicts; this may result, for instance, in application of the law of a different territorial unit from the one where the creditor has his or her habitual residence (*e.g.*, the law of the debtor's habitual residence, if that criterion is used in State A).

189. It is only in the absence of such domestic rules, and therefore on a strictly subsidiary basis, that the applicable law will be identified according to the Protocol rules (Art. 16(2) *a)*). For this purpose, Article 16(1) specifies how the concepts used in the Protocol are to be interpreted; this provision only applies if sub-paragraph 2 *b)* applies. The general idea behind this provision is to locate the spatial elements of connection settled upon by the Protocol in the territorial unit where they are actually located.

190. Thus, any reference to the law of a State shall refer, if applicable, to the law in force in the relevant territorial unit (Art. 16(1) *a)*; *e.g.*, "law of the forum" shall be understood as meaning the law in force in the territorial unit where the authority seized is located). Likewise, any reference to the competent authorities or public bodies of that State shall be construed as referring, where appropriate, to the competent authorities or public bodies authorised to act in the relevant territorial unit (*e.g.*, the right of a public body to seek reimbursement of a benefit provided to the creditor under Art. 10 shall be governed by the law in force in the territorial unit where that body is authorised to act). By the same token, any reference to habitual residence in that State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit (as a result, the law applicable under Art. 3 will be that in force in the territorial unit where the creditor has his or her habitual residence).

191. Certain provisions of the Protocol use the concept of nationality (Arts 4(4), 6 and 8(1) *a)*), and the latter is poorly suited to the resolution of internal conflicts, for the simple reason that the territorial units of a multi-unit State usually do not confer a separate nationality from that of the State in question. This is why, in such cases, sub-paragraphs *d)* and *e)* of Article 16(1) provide that in the absence of relevant rules in the State in question, the applicable law shall be that of the territorial unit with which the person is most closely connected. This solution is admittedly not very easy to implement, but it will usually break the deadlock.

192. According to paragraph 3, Article 16 shall not apply to Regional Economic Integration Organisations (REIOs). The States making up such organisations are independent States and may therefore not be treated like the territorial units of a multi-unit State.

Article 17 Non-unified legal systems – interpersonal conflicts

193. This Article refers to the situation in which the law designated by the Protocol is that of a State having various legal systems or sets of rules of law applicable to various

categories of persons (on the basis of religion, for instance). In such case, the only criterion used is that of reference to the internal conflict rules of the State concerned. This solution reflects that adopted in all the Hague Conventions having considered the issue. It is necessary, because the Protocol rules, usually based on a territorial criterion, are unsuited to the resolution of interpersonal conflicts. Unlike other Conventions, the Protocol does not provide for a subsidiary criterion for cases where there are no internal rules in the State concerned. It was suggested at the Diplomatic Session that States having several non-unified systems of law applicable to different categories of person in the field of maintenance obligations and no related domestic conflict rules ought to adopt such rules before becoming Contracting Parties to the Protocol.

Article 18 Co-ordination with prior Hague Maintenance Conventions

194. This Article specifies that the Protocol is intended, in relations between the Contracting States, to replace the 1956 and 1973 Maintenance Obligations Conventions. This rule reproduces, *mutatis mutandis*, that contained in Article 18 of the 1973 Convention.

195. The replacement occurs only in relations between Contracting States, which means that the former Conventions remain applicable, even in a State that has become a Party to the Protocol, in relations with other States which are Parties to those instruments and have not acceded to the Protocol.

196. The 1956 Maintenance Obligations Convention is applicable only where it leads to application of the law of a Contracting State. Accordingly, it claims no effect *erga omnes* (*cf.* Art. 6 of that Convention). Article 18 further provides that "as between the Contracting States", the Protocol replaces the 1956 Convention without requiring its denunciation. This provision accordingly clearly causes application of the Protocol to prevail over the former Convention, at least between States Parties to both instruments. Admittedly, one might conclude from Article 18 that it allows a State Party to both instruments to deviate from application of the Protocol in relations with a State Party to the 1956 Maintenance Obligations Convention but not bound by the Protocol. Such a situation will be exceptional in any case, but above all it will be difficult to deal with in the absence of a specific criterion to determine in which cases relations with such a State are at issue. In view of this ambiguity, the objective of Article 18 might be used as inspiration to favour application of the Protocol in such a case as well.

197. Co-ordination with the 1973 Maintenance Obligations Convention is more difficult, as that instrument claims, like the Protocol, universal application (*cf*. Art. 3 of the 1973 Convention and Art. 2 of the Protocol). As in the case of the 1956 Maintenance Obligations Convention, the effect of Article 18 is that at least "as between the Contracting States", the Protocol will prevail without requiring a denunciation of the 1973 Convention. And it might also be concluded that this provision allows a State Party to the Protocol and the 1973 Convention to deviate from application of the Protocol in its relations with a State Party to the 1973 Convention but not to the Protocol. This does not, however, resolve the issue of conflict of instruments in situations where, in practice, the two instruments lead to different solutions, in the absence of a criterion to determine when the issue is one "as between Contracting States". These cases are likely to be more common than those under the previous paragraph, owing to both instruments' universal application. In view of this difficulty, there is all the more reason to use the objective of Article 18 as inspiration to favour application of the Protocol, a more modern system destined to replace the effect of the rules in the 1973 Convention, over the latter's application. This conclusion may be further supported by Article 19 of the 1973 Convention, according to which "[t]his Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or become, a Party".

Article 19 Co-ordination with other instruments

198. Co-ordination with other instruments is easier: under Article 19, the Protocol shall not affect any other international instrument to which Contracting States are or become Parties and which contains provisions relating to the law applicable to maintenance obligations. The Protocol will prevail over such earlier or subsequent instruments only in the case of a declaration to the contrary by the States bound by such instruments.

199. It should be pointed out that under Article 19(2), this solution shall also apply to relations between the Protocol and uniform laws based on the existence of special ties between the States concerned, of a regional nature in particular. It follows that, for instance, the Protocol would yield, if applicable, to a future regional instrument governing the same subject matter.

Article 20 Uniform interpretation

200. By this provision which has become traditional in all uniform law instruments, the States Parties to the Protocol agree, in interpreting the Protocol, to have regard to its international character and to the need to promote uniformity in its application. This implies *inter alia* an obligation for the authorities of Contracting States to take into account, as far as possible, the decisions made by virtue of the Protocol in the other Contracting States. Naturally, those decisions are of persuasive authority only, as the other States' authorities are not bound to observe them.

Article 21 Review of practical operation of the Protocol

201. In order to secure monitoring, Article 21 provides that the Secretary General may, as necessary, convene a Special Commission in order to review the practical operation of the Protocol.

202. With the same purpose again, and in order to facilitate access by the authorities of Contracting States to the decisions made in the other States by virtue of the Protocol, the Contracting States agree to collaborate with the Permanent Bureau in the gathering of case law concerning the application of the Protocol.

Article 22 Transitional provisions

203. According to that Article, the Protocol shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force. The purpose of this provision is to avoid the new rules having an impact on the rights and duties of the parties that pre-existed their entry into force. This solution corresponds to that contained in Article 12 of the 1973 Maintenance Obligations Convention.[24]

204. Unlike the Convention (*cf*. Art. 56(1)), the Protocol will accordingly not apply to all proceedings initiated after its entry into force; conversely, its application is not ruled out if the proceedings were instituted prior to that date. On the contrary, it will be necessary to determine in either case *for what period* the maintenance is claimed. If it is claimed for a period prior to the new instrument's entry into force (*e.g.*, if the creditor claims the payment of arrears), the Protocol will not apply, even if the action was instituted after its entry into force. The maintenance obligation will remain subject, for that period, to the rules of private international law (based on convention or domestic sources) that were applicable in the forum State prior to entry into force of the Protocol. Conversely, an authority required to decide after the entry into force of the Protocol regarding maintenance due for the future will have to apply that instrument, even though the action was brought prior to the entry into force.

[24] Verwilghen Report, *op. cit.,* note 11, paras 182 *et seq.*

Article 23 Signature, ratification and accession

205. This provision corresponds to that found in most of the Hague Conventions. The rules it establishes for signature, ratification and accession comply with the traditional solutions, and accordingly call for no particular comments (*cf*. Art. 58 of the Convention and paras 689 – 694 of the Borrás-Degeling Report).

206. In the case of an instrument using the title of Protocol, this provision is of particular significance, however, as it establishes the principle of that instrument's autonomy in relation to the Convention with which it was developed. As already noted, any State may sign, ratify or accede to the Protocol, even if it has not signed, ratified or acceded to the Convention. After some hesitation, this solution was adopted at the Diplomatic Session, without justifying in the delegates' view a change of title from Protocol to Convention (*cf. supra*, paras 15 *et seq*.).

Article 24 Regional Economic Integration Organisations

207. Like the Convention (*cf*. Art. 59), the Protocol contains a provision setting the conditions on which an REIO may become a Party to it. This is a final clause of recent origin, which is found only in the latest instruments adopted at the Hague Conference (in particular, Art. 29 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements*; Art. 18 of the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*). It shall be recalled that the Statute of the Hague Conference was also amended in 2007 to allow REIOs to become Members of the Conference (*cf*. Art. 3 of the Statute). This evolution is connected mainly with the evolution having occurred within the European Union pursuant to the Treaty of Amsterdam, whereby the European Community has acquired domestic and external powers with respect to private international law. The European Community became a Member of the Conference on 3 April 2007. Naturally, Article 24 is drafted in general terms and may apply, as necessary, to other REIOs that might have powers in the matters governed by the Protocol.

208. The provisions of this Article are exactly those of Article 59 of the Convention. For a commentary, we accordingly refer to paragraphs 695 to 700 of the Borrás-Degeling Report.

Article 25 Entry into force

209. As regards entry into force of the Protocol, Article 25(1) requires the deposit of two instruments of ratification, acceptance, approval or accession. This solution, which is the same as used in the Convention (*cf*. Art. 60) and in other instruments adopted recently by the Hague Conference (*cf*. Art. 31 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* and Art. 19 of the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*), is particularly favourable to the instrument's entry into force. It is justified by the consideration that there are no drawbacks to applying the Protocol between two States only, if they so wish. It shall be recalled that regardless of the number of States Parties to it, the Protocol is applicable *erga omnes* (*cf*. Art. 2).

210. The other rules in Article 25 are also the same as in Article 60 of the Convention, and other instruments adopted by the Hague Conference.

Article 26 Declarations relating to non-unified legal systems

211. In accordance with the traditional approach, Article 26(1) allows a State having two or more territorial units in which different legal systems are applicable in relation to matters dealt with in the Protocol, to declare that this instrument shall extend to all its

territorial units or only to one or more of them. In the absence of that declaration, the Protocol will apply to all of that State's territory (Art. 26(3)).

Article 27 Reservations

212. This Article is very important, as it lays down the principle that no reservations may be made to the Protocol. As mentioned above (*cf. supra*, para. 25), this solution is very different from that of the 1973 Maintenance Obligations Convention, which allows States to restrict application of the Convention to certain maintenance obligations (such as those between spouses and ex-spouses and / or those towards a person under the age of 21 years and who has not been married; *cf*. Art. 13), or to exclude its application to certain maintenance obligations (between persons related collaterally or by affinity, or in certain cases, between spouses having divorced, separated, or whose marriage has been declared void or annulled; *cf*. Art. 14). In addition, Article 15 of that Convention allows reservation of application of the forum law when the creditor and debtor have the nationality of the State concerned and if the debtor has his or her habitual residence there. Reservations had been declared by several Contracting States. Thanks to Article 27, the Protocol's scope cannot be restricted and no exceptions may be provided to the solutions laid down by this instrument with respect to the applicable law.

Articles 28 to 30 Declarations, denunciation, notification

213. These Articles reproduce traditional solutions. They call for no particular comments.