# 14. International child abduction in Asia

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## INTRODUCTION

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter the Convention) ensures the prompt return of abducted children through administrative and judicial cooperation between contracting states. This swift return mechanism enables the Convention to provide a means of redress for the left-behind parent and to prevent the taking parent from creating a status quo to obtain a favorable forum.

It has long been a challenge for many Asian countries to join the Convention, arguably except Singapore and Hong Kong that are grounded in English common law. One reason is that family law institutions in Asia often lack a clear concept of parental 'rights' or 'obligations' for custody or favour the father as the natural custodian or guardian of the child, as under traditional Hindu and Islamic law.[1] In Japan, once a marital relationship breaks down, the mother typically takes the child and moves out of the house without the father's consent. This unilateral act is not illegal under domestic Japanese law even though the parents share parental authority, since the father is not considered to have enforceable custody rights against the mother as a primary caregiver.[2] Furthermore, 88 per cent of all divorces in Japan are carried out by non-judicial consensual divorce.[3] Pursuant to the 'clean break' principle, either the father or mother obtains sole parental authority. With consensual divorce, the parents agree on whom to give sole parental authority and whether to grant access to the child and child support. However, as these arrangements are not enforceable, access or child support often remains unfulfilled.[4]

Against this background, it was a delicate issue for Japan, like other Asian countries, to accept that a primary caregiver's act of removing or retaining the child without the other parent's consent was wrongful, and to also accept the fundamental aim of the Convention to

[1] See Stellina Jolly and Saloni Khanderia, *Indian Private International Law* (Hart Publishing 2021) 157.

[2] Takami Hayashi, 'Kokugai Tenkyo ni kansuru Kadai to Tenbo' [Issues and Perspectives of International Relocation] (2020) *Kokusaishiho Nenpo* 22, 2.

[3] For 'Jinko Dotai Chosa 2020' [Population Census 2020] see https://www.e-stat.go.jp/stat-search/files?page=1&toukei=00450011&tstat=000001028897 (in Japanese) (accessed 15 June 2022).

[4] For further details, see Yuko Nishitani, 'Identité culturelle en droit international privé de la famille' (2019) *Recueil des Cours* 401, 170; also idem, 'Kindschaftsrecht in Japan — Geschichte, Gegenwart und Zukunft —' (2014) *ZJapanR/J Japan L* 37, 77; idem, 'Familienrecht in Ostasien — Tradition und Moderne in Japan und der Republik Korea —' in Norman Wizleb et al (eds), *Festschrift Dieter Martiny* (Mohr Siebeck 2014) 1179; idem, 'Reformüberlegungen zum japanischen Familienrecht', in Martin Gebauer and Stefan Huber (eds), *Gestaltungsfreiheit im Familienrecht* (Mohr Siebeck 2017) 114; idem, 'Access to the Child in Cross-Border Family Separation' ('Access') (2021) *ZJapanR/J Japan L* 52, 51. The Japanese government is now preparing a revision of the Civil Code to allow joint custody after divorce. For consultations in the Legislative Sub-committee on Family Law, see https://www.moj.go.jp/shingi1/housei02_003007 (in Japanese) (accessed 15 June 2022).

secure the prompt return of a wrongfully removed child, thereby protecting the child by restoring the status quo. Nevertheless, since the turn of the 21st century, Japan (2014) and seven other Asian states have joined the Convention: China [only Hong Kong (1997) and Macao (1999)], Sri Lanka (2001), Thailand (2002), Singapore (2011), Republic of Korea (Korea) (2013), the Philippines (2016) and Pakistan (2016). This remarkable development may continue and thus raise Asia's presence among the Convention's contracting states.

To analyse the advantages and challenges for Asian states to ratify, accept or accede to the Convention, this chapter primarily discusses developments in legislation, case law and practice in Japan, and then examines some other jurisdictions in Asia.

## BACKGROUND TO JAPAN'S ACCEPTANCE

It took time for the government to accept the Convention and implement the return mechanism due to vigorously opposing views against the Convention in Japanese society. Many Japanese mothers living in the United States of America (US), Canada, the United Kingdom (UK), or other Western countries had taken their child and returned to Japan to escape their husband's domestic violence, financial difficulty, or other hardships abroad. The Convention would, however, force such Japanese mothers to return to the state of habitual residence with the child and undergo a difficult, lengthy and costly procedure to obtain custody. This contradicted fundamental legal and moral principles in Japan and meant Japanese nationals abroad suffered unduly.[5]

The absence of effective measures in Japanese domestic law to return abducted children had become a major diplomatic issue. As of January 2011, the US counted 230 outgoing child abduction cases to Japan since 1994 (100 active cases), and no single child had been repatriated.[6] Under diplomatic pressure, the Japanese government started to opine that Japan should abide by international standards, holding that the Convention has sufficient safeguards to refuse return of the child where necessary. Furthermore, because Japan was not a contracting state, Japanese mothers reportedly started to be disadvantaged and denied custody or relocation by the US or Canadian courts for fear of children being abducted to Japan and never returned. Nor were there any means in outgoing cases for Japan to have abducted children

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[5] For Japan's acceptance of the Convention, see Tatsushi Nishioka and Takako Tsujisaka, 'Introductory Note: Japan's Conclusion of the Hague Convention on the Civil Aspect of International Child Abduction' (2014) *Japanese Yearbook of International Law* 57, 7; Kazuaki Nishioka and Yuko Nishitani, *Japanese Private International Law* (Hart Publishing 2021) 182; Yuko Nishitani, 'The HCCH's Development in the Asia-Pacific Region', in Rishi Gulati, Thomas John and Ben Köhler (eds), *Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar 2020) 66; Masayuki Tanamura, 'International Child Abduction Cases and the Act for Implementation of the Hague Convention — Impact on Domestic Cases and Family Law' (2014) *Japanese Yearbook of International Law* 57, 24.

[6] Yuko Nishitani, 'The Hague Convention on International Child Abduction and Japan's Move toward Ratification' (2011) Commentary of the Association of Japanese Institutes of Strategic Studies (AJISS) (available at: http://www.jiia.or.jp/en_commentary/201110/25-1.html); for the background to accepting the Convention in Japan, see https://www.mofa.go.jp/mofaj/fp/hr_ha/page22_000851.html (in Japanese); for annual reports of the US Department of State on child abduction, see https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html (accessed 2 June 2022).

returned,[7] although incoming and outgoing child abduction cases occurred equally frequently.[8] Thus, it became obvious that Japan would also benefit from joining the Convention.

Ultimately, it was pointed out that the Convention provides an appropriate, value-neutral system to ensure return of abducted children so the state of habitual residence can determine custody issues on the merits by allocating jurisdiction between contracting states in mutual trust. The Convention duly enables contracting states to fulfil the obligations under the United Nations Convention on the Rights of the Child 1989[9] to realise the best interests of the child (Article 3) and guarantee that the child maintains, on a regular basis, personal relations and direct contact with both parents (Articles 9(1) and 10(2)).[10]

On 1 April 2014, the Convention finally took effect for Japan[11] and the Implementation Act entered into force to provide for return proceedings and enforcement measures.[12] During the eight years since, practice has evolved and case law has developed, particularly through the Supreme Court decisions of 21 December 2017,[13] 15 March 2018[14] and 16 April 2020.[15] The Implementation Act was reformed in May 2019 to strengthen the enforcement measures.[16] While Japan was criticised as a non-compliance state by the US in 2018, it has been removed from the list since 2019.[17] Some areas of improvement remain, but Japan has made strenuous efforts to implement the Convention by conducting comparative studies, taking necessary legislative measures, developing return and enforcement procedures, and establishing cooperation between officers, judges, attorneys and academics.[18]

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[7] Osamu Kaneko (ed), *Ichimon Itto: Kokusaiteki na Ko no Tsuresari heno Seidoteki Taio — Hague Joyaku oyobi Kanren Hoki no Kaisetsu* [Q&A on Institutional Settings to Tackle Cross-border Child Abduction — Commentary on the Hague Convention and Other Relevant Statutes and Rules] (Shoji Homu 2015) 5.

[8] The Ministry of Foreign Affairs conducted a survey (May–November 2010) to detect child abduction cases among Japanese nationals through Japanese embassies and consulates. Among the reported 64 child abduction or *ne exeat* cases, there were 18 incoming abduction cases and 17 outgoing cases. See https://www.mofa.go.jp/mofaj/press/release/23/2/PDF/020201.pdf (in Japanese) (accessed 2 June 2022).

[9] Adopted 20 November 1989 (entry into force in Japan 22 May 1994).

[10] Elisa Pérez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention* (HCCH, The Hague 1981) para 9; Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (Oxford 1999) 28; Nigel Lowe and Michael Nicholls, *International Movement of Children, Law, Practice and Procedure,* 2nd ed. (LexisNexis 2016) para 17.4; Rhona Schuz, *The Hague Child Abduction Convention*: *A Critical Analysis* (Hart 2013) 9; Mikiko Otani, 'Ko no Kango wo meguru Kokusai Mondai' [International Issues on Child Custody] (2011) *Kokusai Mondai* 607, 7; idem, 'Hague Joyaku no Jitsumu to Kokusai Jinken Ho' [Practice of the Hague Convention and International Human Rights Law] in Mikiko Otani and Yuko Nishitani (eds), *Hague Joyaku no Riron to Jitsumu: Kokkyo wo koeta Ko no Ubaiai Funso no Kaiketsu no tameni* [Theory and Practice of the Hague Convention: For Solving Cross-border Child Abduction Cases] (Horitsu Bunka-sha 2021) 121.

[11] Treaty No 2 of 2014. Japan signed and accepted the Convention on 24 January 2014.

[12] Law No 48 of 2013. For an English translation, see https://www.mofa.go.jp/fp/hr_ha/page22e_000250.html (accessed 15 June 2022).

[13] Supreme Court, 21 December 2017, Saibansho Jiho 1691, 10 (US) (INCADAT: HC/E/JP 1387).

[14] Supreme Court, 15 March 2018, Minshu 72-1, 17 (US) (INCADAT: HC/E/JP 1388).

[15] Supreme Court, 16 April 2020, Minshu 74-3, 737 (Russia) (to be reported in INCADAT).

[16] Law No 2 of 2020.

[17] See US Annual Report (n 6).

[18] Yuko Nishitani, 'Soron' [General Part] in Mikiko Otani and Yuko Nishitani (eds), *Hague Joyaku no Riron to Jitsumu: Kokkyo wo koeta Ko no Ubaiai Funso no Kaiketsu no tameni* [Theory and Practice of the Hague Convention: For Solving Cross-border Child Abduction Cases] (Horitsu Bunka-sha 2021)

## IMPLEMENTATION IN JAPAN

### 1. Central Authority

The Implementation Act designates the Minister of Foreign Affairs as the Central Authority of Japan ('JCA') and defines its competences.[19] The JCA is equipped with experts qualified as a judge, attorney, Family Court investigator, child psychologist, and domestic violence social worker. The JCA provides various services to ascertain the child's whereabouts and ensure a prompt return of the child by taking a neutral position to assist both parents, instead of representing the petitioner's interests. The JCA encourages an amicable solution, so costs for mediation or access arrangements can be borne up to four sessions. For judicial remedies, the JCA assists the parties by providing information on eligible attorneys, supports translation, and assists with the execution of a return order made in return proceedings.[20]

From 1 April 2014 until 1 June 2022, there were 150 approved return applications in incoming cases (including 48 – US, 15 – Australia, nine – France, eight – UK, seven – Germany) and 125 approved return applications in outgoing cases (including 27 – US, 12 – Philippines, 11 – Thailand, nine – Brazil, seven – Korea, seven – Russia). As for access, there were 111 approved applications in incoming cases (including 51 – US, ten – UK, ten – Australia) and 37 approved applications in outgoing cases (including eight – US, three – Russia, three – Canada, three – Germany, three – Korea).[21] It is notable that the US clearly outnumbers the other countries both in incoming and outgoing cases. The other involved countries are diverse, ranging from North and South America and Europe to Asia. It is characteristic of practice in Japan that about 63 per cent of the incoming return cases have been amicably settled thanks to in-court conciliation or out-of-court mediation.[22] This success rate is considerably higher than the average 30 per cent of all contracting states.[23] Arguably, this practice in Japan is largely due to the tradition in domestic cases to primarily seek an amicable solution, as well as efforts made by judges, attorneys, conciliators or mediators, and JCA officers.

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1; idem, 'Ko no Dasshu ni kansuru Hague Joyaku no Un-yo wo meguru Kadai to Tenbo' [Challenges and Perspectives of the Implementation of the Hague Child Abduction Convention] in Shuhei Ninomiya (ed), *Gendai Kazokuho Koza* Vol 5: *Kokusaika to Kazoku* [Contemporary Studies on Family Law Vol 5: Internationalisation and Family] (Nihon Hyoron-sha 2021) 57.

[19] Kaneko (n 7) at 3.

[20] Gaimusho Ryojikyoku Hague Joyakushitsu [Hague Convention Division, Consular Affairs Bureau, Ministry of Foreign Affairs] 'Chuo Tokyoku no Yakuwari' [The Role of the Central Authority] in Mikiko Otani and Yuko Nishitani (eds), *Hague Joyaku no Riron to Jitsumu – Kokkyo wo koeta Ko no Ubaiai Funso no Kaiketsu no tameni* [Theory and Practice of the Hague Convention: For Solving Cross-border Child Abduction Cases] (Horitsu Bunkasha 2021) 71.

[21] See the statistics as of 1 June 2022 at: https://www.mofa.go.jp/mofaj/files/100012143.pdf (in Japanese) (accessed 22 June 2022).

[22] See Shuji Zushi, 'Japan's 5-year Experience in Implementing the 1980 Hague Abduction Convention' (2019) *International Family Law Journal* 2, 83. Nigel Lowe and Victoria Stephens, *Part 1 – A Statistical Analysis of Applications Made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global Report* (HCCH, The Hague, No. 11A of February 2018), para 62.

[23] Nigel Lowe and Victoria Stephens, *Part 1 – A Statistical Analysis of Applications Made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global Report* (HCCH, The Hague, No. 11A of February 2018), para 62.

## 2. Return Proceedings

The Implementation Act provides for detailed substantive rules on the grounds for return (Article 27) and grounds for refusal (Article 28), as well as procedural rules for return proceedings and the enforcement of return orders.[24] The jurisdiction for return proceedings is concentrated on the Tokyo and Osaka Family Courts, with a view to facilitating case management and enhancing judicial expertise.

The return proceedings are summary proceedings in non-contentious matters. The judges conduct the investigation *ex officio*. The Tokyo and Osaka Family Courts generally follow the 'six-week-model' of hearings to abide by the timeframe set forth in the Convention (Article 11(2)). The first hearing is held about two weeks after the petition is filed by summoning both parties to clarify disputed points. Following this, the Family Court continues examining the case and hears the child. Notably, the judges do not interview the child directly, but rely on the Family Court investigator's written report on the child's degree of maturity, mental status, needs, and desires, and whether the child objects to being returned to the state of habitual residence. About five weeks after the petition is filed, the judges summon both parties for the second time, investigate their allegations and evidence, and conduct their hearings. About one week later, the judge renders a final decision either to order return of the child or dismiss the petition.[25]

The above-mentioned high success rate of amicable solutions indicates the importance of mediating both parties. Insofar as the parents settle and decide to return the child, the scope of the agreement is limited to access, child support, accommodation, and so forth, to the exclusion of the merits of custody for lack of jurisdiction. Only when the parents agree on the non-return of the child, can they also determine who ought to have custody.[26] Methods of amicable solution involve in-court conciliation and out-of-court mediation.

In-court conciliation is conducted by the Family Court judges and two conciliators.[27] To abide by the 'six-week-model', the parties, attorneys, and conciliators meet in up to three

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[24] For further details, Masako Murakami, 'Case Proceedings for the Return of An Abducted Child and the Compulsory Execution in Japan' (2014) *Japanese Yearbook of International Law* 57, 33.

[25] For further details, see Nishioka and Nishitani (n 5) at 184; also Tomoko Sawamura, 'Katei Saibansho ni yoru "Kokusaiteki na Ko no Dasshu no Minjijo no Sokumen ni kansuru Joyaku no Jisshi ni kansuru Horitsu" no Un-yo Jokyo ni tsuite' [Current Practice on the "Act for Implementation of the Convention on the Civil Aspects of International Child Abduction"] (2018) *Ho no Shihai* 191, 89; Ai Kuroda, 'Hague Anken ni kansuru Osaka Katei Saibansho ni okeru Jitsumu – ADR no Riyo: Bengoshi no Tachiba kara' [Practice of the Osaka Family Court Concerning the Hague Cases – The Use of ADR: From a Viewpoint of Attorney] (2019) *Katei no Ho to Saiban* 20, 12; Toshiteru Shibaike, 'Hague Joyaku no Jitsumu – Dairinin no shiten kara' [Practice of the Hague Child Abduction Convention – From a Viewpoint of Attorney] in Mikiko Otani and Yuko Nishitani (eds), *Hague Joyaku no Riron to Jitsumu: Kokkyo wo koeta Ko no Ubaiai Funso no Kaiketsu no tameni* [Theory and Practice of the Hague Convention: For Solving Cross-border Child Abduction Cases] (Horitsu Bunka-sha 2021) 133. Prior to or during the return proceedings, when there is risk of further abduction of the child out of Japan, the judge can render a *ne exeat* order to enjoin the departure of the child (Article 122(1) of the Implementation Act). Where necessary, it can be combined with an order to surrender the child's passport (Article 122(2)).

[26] HCCH, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Mediation*, The Hague 2012, para 305.

[27] Conciliators are appointed by the Supreme Court among learned and decent persons experienced as a lawyer, academic, corporate manager, or any other profession.

sessions within a week. Usually, the 'caucus' style is chosen to summon the parties separately, with a view to deterring an escalation of conflicts. Conciliation resolves 43 per cent of cases petitioned to the courts for return of the child.[28] It has the advantages of not causing any additional cost and being legally binding. An agreement reached in conciliation on access or child support is enforceable and could substitute a mirror order or safe-harbour order. Both parties, however, must be present before the Family Court, because the Japanese judiciary does not allow the use of a web-conference system across borders due to sovereignty concerns.[29]

Out-of-court mediation is arranged by mediation centres established by local bar associations. Mediation has the advantage of being flexible, expeditious, and professional.[30] Sessions can be held via Zoom or Skype by directly connecting with the left-behind parent abroad. Mediation is conducted by professional mediators, who are trained attorneys, social workers, child psychologists or academics. The mediation centres recommended by the JCA are certified alternative dispute resolution organisations. They ensure that appropriate persons are selected as mediators and conduct mediation by receiving necessary legal advice. The mediators are fluent in a foreign language and knowledgeable about cross-border child abduction cases. The challenge is how to make an agreement resulting from mediation legally binding. When a petition for return of the child is pending at the Tokyo or Osaka Family Court, the judges can incorporate the parties' agreement into a judicial settlement. Otherwise, the parties could bring a separate domestic relations case to the Family Court to obtain a formalised conciliation or decree.[31] It remains to be seen whether such agreements confirmed by the Family Court are enforceable in the state of habitual residence. To further reflect on giving effect to settlement agreements across borders, comparative research on the HCCH project for a revision of the draft Practical Guide on cross-border recognition and enforcement of agreements in

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[28] See n 22.

[29] Ai Kuroda, 'Jitsumu no Kanten kara mita Kodasshu Joyaku no Un-yo wo meguru Genjo to Kadai' [Current State and Problems of Implementing the Child Abduction Convention from a Practical Point of View] (2020) *Kokusaishiho Nenpo* 22, 84.

[30] A caveat is that the taking parent may tactically delay the petition to the court by the left-behind parent, alluding that the taking parent is interested in mediating their dispute. When over one year passes and the child is settled in the new environment, this can lead to dismissal of the petition, as was the case with the Tokyo Family Court decision of 11 December 2018 (Katei no Ho to Saiban 26, 114). See Mari Nagata, 'Current Status and Issues of Implementing the Hague Child Abduction Convention in Japan' (2020) *Japanese Yearbook of International Law* 63, 230.

[31] Kuroda further suggests the possibility of instituting arbitration to have the parties' agreement integrated into an enforceable arbitral award (Article 38(1) of the Arbitration Act). Ai Kuroda, 'Shiteki Chotei (ADR) nado Saibangai no Kaiketsu Tetsuzuki' [Out-of-Court Dispute Resolution including Private Mediation (ADR)] in Mikiko Otani and Yuko Nishitani (eds), *Hague Joyaku no Riron to Jitsumu: Kokkyo wo koeta Ko no Ubaiai Funso no Kaiketsu no tameni* [Theory and Practice of the Hague Convention: For Solving Cross-border Child Abduction Cases] (Horitsu Bunka-sha 2021) 301. However, this question concerns a delicate issue of arbitrability and requires further consideration. Considering that the suggested reform of the ADR Act (Saibangai Funso Kaiketsu Tetsuzuki no Riyo no Sokushin ni kansuru Horitsu, Law No 151 of 2004) will only provide the enforcement title for settlement agreements on maintenance to the exclusion of other family matters (approved by the Legislative Committee Meeting No 194 on 14 February 2022) (https://www.moj.go.jp/shingi1/shingi03500043.html, accessed 15 June 2022), it would be consistent to grant arbitrability only in relation to money payment (e.g., travel expenses and accommodation).

family matters involving children[32] and the 2019 EU Brussels II-ter Regulation (Recital 43)[33] will certainly be helpful to understand how to make settlement agreements enforceable and to possibly adopt comparable rules as the EU Regulation in the future.

## IMPORTANT ISSUES

### 1. Habitual Residence

Habitual residence of the child is key for the Convention, as the return mechanism remains inoperative if the child did not habitually reside in the alleged state of habitual residence immediately before his or her removal or start of retention. The notion of habitual residence has purposefully never been defined in the HCCH instruments or EU regulations.[34] The Convention ought to adopt an autonomous notion that is uniform for the contracting states.[35]

Notably, the Court of Justice of the European Union (CJEU) developed case law on the child's habitual residence through its preliminary rulings on the Brussels II-bis Regulation.[36] According to this 'hybrid approach',[37] the child is held to habitually reside in the state where he or she is integrated into a social and family environment, which depends on the circumstances of the individual case. It is ascertained primarily by factual elements, such as the physical presence of the child, the duration, regularity, conditions and reasons for the stay in or the family's move to that state, as well as the child's nationality, attendance at school, language, and family and social relationships, while a clear intent of the parents may also be taken into consideration.[38] In case of an infant or small child, their integration into a social and family environment is assessed by that of the primary caregiver.[39]

The CJEU case law has not only harmonised the notion of the child's habitual residence for the EU Member States bound by the Brussels II-bis Regulation, but also had considerable impact on contracting states of the Convention in interpreting and ascertaining the child's habitual residence. In accordance with the CJEU case law, the UK Supreme Court changed

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[32] For further details, see https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements (accessed 15 June 2022).

[33] Brussels II-ter Regulation (Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), *OJ* 2019, L 178/1).

[34] For a recent publication on habitual residence, see Bettian Rentsch, *Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts* (Mohr Siebeck 2017) 6.

[35] Article 31, Vienna Convention on the Law of Treaties, 23 May 1969.

[36] Brussels II-bis Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* 2003, L 338/1). See CJEU, 2 April 2009, Case C-523/07 [*A*]; CJEU, 22 December 2010, C-497/10 PPU [*Mercredi*], Rep. 2010, I-14309; CJEU, 8 June 2017, C-111/17 PPU [*OL v PQ*]; CJUE 10 April 2018, C-85/18 PPU [*CV v DU*]; CJEU, 28 June 2018, C-512/17 [*HR v KO*]; CJEU, 17 October 2018, C-393/18 PPU [*UD v XB*]; cf. also CJEU, 5 September 2019, C-468/18 [*C v P*] (electronic database available at: https://curia.europa.eu/).

[37] For further details, see Jeremy D Morley, *The Hague Abduction Convention* (3rd ed, American Bar Association 2021) 97; Schuz (n 10) at 186.

[38] CJEU, 2 April 2009 (n 36) at para 37.

[39] CJEU, 22 December 2010 (n 36) at para 55.

its position in 2013[40] from the 'parental intention approach' to the 'hybrid approach' to primarily focus on the child's factual circumstances and integration into the social and family environment. The same trend could be observed, among others, in Canada,[41] Australia,[42] New Zealand,[43] Hong Kong,[44] and, ultimately, in the US in 2020.[45]

In Japan, court decisions first solely reiterated general criteria for determining habitual residence in conflict of laws to consider the purpose, period, and circumstances of stay, as well as the common intent of the parents when the child is an infant.[46] Notably, the Tokyo High Court decision of 3 September 2020 declared to acquiesce to the 'hybrid approach'.[47] In this case, in November 2019 the US father allegedly started to retain two children in Japan, who had been born in the US in 2009 and 2012 respectively. The US mother living in the US petitioned for return of the children. The judges opined that, seeing the purpose of the Convention and its uniform interpretation, the 'hybrid approach' adopted in the EU and US ought to be followed. The court held that habitual residence of the child is determined according to whether the child has a close connection with the state and is integrated into its social and family environment, while the parents' intent is only considered to the extent it is relevant to assess the degree of the child's integration. The children had been living in Japan for almost one year in a stable way. Thus, they were held to have habitually resided in Japan at the time the retention started, so the petition for return of the child was dismissed.

## 2. 'Grave Risk' Exception and Protection of the Child

Article 13(1)(b) of the Convention allows the judge to exceptionally refuse the return of the child when there is a 'grave risk' that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 28(1) No 4 of the Implementation Act). As mentioned above, when deliberating on Japan's acceptance of the Convention, there was strong criticism that the Convention would put Japanese mothers in danger when they fled to Japan with the child after suffering from domestic violence or other hardships abroad. To address this opposition and set forth necessary safeguards, the legislator decided to insert a specific provision in the Implementation Act to further define the 'grave risk' exception.[48]

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[40] UK Supreme Court, *A v A and another (Children: Habitual Residence)* [2013] UKSC 60; idem, *Re L (A Child) (Habitual Residence)* [2013] UKSC 75; idem, AR v RN [2015] UKSC 35.

[41] Supreme Court of Canada, *Office of the Children's Lawyer v Balev,* 2018 SCC 16.

[42] High Court of Australia, *LK v Director-General, Department of Community Services* [2009] HCA 9; Family Court of Australia, *Commonwealth Central Authority v Cavanaugh* [2015 FamCAFC 233].

[43] New Zealand Court of Appeal Wellington, *SK v KP* [2005] 3 NZLR 590; idem, *Punter v Secretary for Justice* [2007] 1 NZLR 40.

[44] High Court of the Hong Kong SAR (Court of Appeal), *LCYP v JEK* [2015] HKCA 407.

[45] US Supreme Court, 25 February 2020, *Monasky v Taglieri*.

[46] See, inter alia, Osaka High Court, 17 August 2015 (INCADAT: HC/E/JP 1427); Osaka High Court, 7 July 2016 (INCADAT: HC/E/JP 1429); Osaka High Court, 24 February 2017 (to be reported in INCADAT); Osaka High Court, 12 July 2017 (INCADAT: HC/E/JP 1430); for an overview, see Nagata (n 30) at 218.

[47] Tokyo High Court, 3 September 2020, Katei no Ho to Saiban 36, 88; see also Tokyo High Court, 15 May 2020 (to be reported in INCADAT).

[48] Kaneko (n 7) at 141; for further details, see Nishioka and Nishitani (n 5) at 186.

Under Article 28(2) No 1-3 of the Implementation Act, the judge ought to contemplate the following factors:

(i) whether return would expose the child to the petitioner's words and deeds which may cause physical or psychological harm to the child (No 1); (ii)whether return would expose the respondent to violence by the petitioner in such a manner as to cause psychological harm to the child (No 2); or
(iii) whether the circumstances make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence (No 3).[49]

The incidences of (i) include the petitioner's violence, sexual abuse, and neglect against the child, whereas (ii) typically means domestic violence against the respondent in front of the child, or mental instability of the respondent affecting the child. The cases involving (iii) encompass alcohol addiction, lack of permit to stay, warrant of arrest, or any other serious grounds making it impossible for the respondent to re-enter the state of habitual residence and care for the child there.

Like the 2007 federal statute (Article 5) in Switzerland,[50] there was concern that such detailed rules would allow judges to extend the scope of 'grave risk' and readily dismiss a petition for return of the child. However, Japanese courts have followed a restrictive interpretation, although the taking parent often invokes the 'grave risk' exception. As for Article 28(2) No 1 and 2, the judges first ascertain whether there was violence against the child or respondent in the past and assess the risk for the petitioner to cause 'grave risk' to the child after return in the future.[51] The judges never solely rely on the respondent's allegations, but require the respondent to submit objective evidence and prove the existence of concrete acts by the petitioner, conducting careful and thorough examination of the case at hand. It generally does not suffice to prove sporadic violent acts (e.g., scolding the respondent, use of cannabis, shouting while drinking), but certain strong violent acts need to have been undertaken continuously to constitute a 'grave risk'.[52] As for Article 28(2) No 3, mere financial difficulties do not suffice, but serious grounds, such as potential risk of criminal prosecution, risk of committing a suicide and lack of means for surviving for the respondent are necessary to constitute 'grave risk'.[53]

Even though there is an imminent risk of violent acts by the petitioner, Japanese judges may render a return order, insofar as adequate protective measures are available in the state of

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[49] Kaneko (n 7) at 145.

[50] Article 5 of the Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) of 21 December 2007.

[51] Tokyo High Court, 14 July 2015 (INCADAT: HC/E/JP 1439); Tokyo High Court, 18 May 2018 (to be reported in INCADAT); see also Yoshihito Yoda, 'Hague Joyaku Jisshiho ni motozuku Ko no Henkan Moshitate Jiken no Shukyoku Ketteirei no Keiko ni tsuite' [Tendencies of Final Decisions in Cases relating to Return of Child Pursuant to the Implementation Act] (2018) *Katei no Ho to Saiban* 12, 32.

[52] Tokyo High Court, 14 July 2015 (n 51); Osaka High Court, 29 August 2016 (INCADAT: HC/E/JP 1440); Osaka High Court, 12 July 2017 (n 46); Osaka High Court, 15 September 2017 (INCADAT: HC/E/JP 1390); for cases to be reported in INCADAT, see Tokyo High Court, 28 February 2019; Tokyo High Court, 27 March 2019; Tokyo High Court, 21 January 2020; Tokyo High Court, 15 May 2020; Tokyo High Court, 12 June 2020; see also Yoda (n 51) at 32. As an exception, one time violence was held to be sufficient to constitute 'grave risk' due to the serious injury caused to the respondent. Tokyo High Court, 18 May 2018 (to be reported in INCADAT).

[53] Tokyo High Court, 31 March 2015 (INCADAT: HC/E/JP 1437).

habitual residence. When, for example, a restriction order is rendered or a shelter is provided,[54] the 'grave risk' exception is considered as mitigated, as under the Brussels II-bis Regulation (Article 11(4)) and Brussels II-ter Regulation (Recital 43 and 44), while the US Supreme Court has recently restricted the examination of ameliorative measures to prioritise the child's safety in *Golan v Saada*.[55] For Japanese judges, such an investigation of protective measures entails a further challenge to ascertain the actual practice in the state of habitual residence and evaluate the effectiveness of protective measures used there.[56] It would be desirable to seek the assistance of a foreign central authority, or network judges if this were permitted, because at present Japanese network judges do not exchange specific information on the individual case to ensure the judiciary's neutrality and independence. In any case, the petitioner's mere promise of voluntary cooperation for providing housing or paying child support, for example, is not held sufficient to order return of the child, unless such a promise is made enforceable in the state of habitual residence.[57]

## 3. Change of Circumstances and the Child's Objection

### (a) Legal framework

Even after a return order has become final and binding, circumstances may change and render it inappropriate to uphold the order in the best interests of the child. In such exceptional cases, Article 117 of the Implementation Act allows the judge to modify the return order. There have been two Supreme Court decisions concerning this provision in 2017 and 2020.

### (b) 2017 Supreme Court Decision

The Supreme Court rendered a controversial decision, dismissing the US father's petition for return of two sets of twins by modifying a return order pursuant to Article 117(1) of the Implementation Act.[58] The Japanese mother had started to retain the four children in Japan in March 2015. In January 2016, the Osaka High Court had ascertained no ground for refusal for the younger twins and exercised its discretion to order the return of all four children despite the elder sons' objection. The execution measures remained fruitless. The mother petitioned for modification of the return order in January 2017, on the ground that the father became insolvent, lost his house, and could no longer reasonably care for their children in the US. The Supreme Court accepted this argument and dismissed the petition for return by respecting the elder children's objection to being returned and ascertaining a grave risk for the younger twins were they to be separated from the elder twins.

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[54] Tokyo High Court, 31 March 2015 (n 53); Tokyo High Court, 14 July 2015 (n 52); Osaka High Court, 15 September 2017 (n 52).

[55] US Supreme Court, 15 June 2022, *Golan v Saada*; for further details, see https:// www .supremecourt.gov/docket/docketfiles/html/public/20-1034.html (accessed 19 January 2023).

[56] Notably, in an incoming child abduction case from Turkey, the Tokyo High Court refused, on 14 July 2015 (n 52), return of the child due to 'grave risk', because, unlike at the first instance, the judges did not rely on the protective orders and shelters in Turkey based on the evidence of their inefficiency and frequent violations.

[57] Yoda (n 51) at 34.

[58] See n 13.

This decision has often been criticised,[59] as the circumstances obviously did not satisfy the threshold criteria of Article 117(1) of the Implementation Act,[60] even though the outcome of the case itself was reasonable. Mere financial difficulties of the left-behind parent do not even constitute a ground for refusal of 'grave risk' pursuant to Article 28(2) of the Implementation Act, as mentioned above. The lower courts should arguably have dismissed the petition for return of the children from the outset by properly respecting the elder twins' objection and granting a grave risk should the younger twins be separated from their siblings. Japanese authors caution not to use Article 117 of the Implementation Act as a backdoor solution to deny the return of the child. Its application needs to be limited to truly exceptional cases, where the modification becomes indispensable and reasonable because of changed circumstances.

**(c) 2020 Supreme Court Decision**

The Supreme Court[61] allowed applying Article 117 of the Implementation Act *mutatis mutandis* for the modification of a conciliation clause to return the child. The daughter (aged nine) started to be retained in Japan by her Japanese mother in August 2016. After the Russian father petitioned for her return to the Tokyo Family Court in November 2016, the parents reached an agreement in in-court conciliation in January 2017 that (i) the child be returned to Russia, and (ii) the father perform child support and visitation. The agreement became legally binding after being entered into the conciliation records. In February 2017, however, the daughter took refuge in a church on her way home from school to avoid being returned to Russia. Enforcement of return by money order remained unsuccessful. In February 2018, the father petitioned for *habeas corpus* before the Sapporo District Court. In July 2018, the parents concluded a judicial settlement in the *habeas corpus* proceedings, agreeing among other things that the daughter may stay in Japan under the conditions that she take exams for the Russian school system, the father exercise visitation, and the mother reside with the child in Japan from April 2019.

Under these circumstances, the mother petitioned for modification of the agreement to return the child reached in conciliation, on the grounds that (a) the daughter vigorously refused being returned to Russia and had a strong wish to live in Japan, and (b) the obligation to return the child was annulled following the judicial settlement in the *habeas corpus* proceedings.

The Supreme Court pointed out that an agreement in conciliation entered into records is legally binding and enforceable under Japanese law. While Article 117(1) of the Implementation Act only provides for modification of a return order, comparable situations may arise and justify modification of a conciliation clause for the best interests of the child. According to the Justices, therefore, Article 117(1) is applicable *mutatis mutandis* to modify the conciliation clause (i). On the other hand, modification of the conciliation clause (ii) is admissible in a separate domestic relations case. Thus, the Justices allowed modification of both (i) and (ii) clauses and remanded the case to the Tokyo High Court for further examination. It remains to be seen whether the Tokyo High Court accepts the parents' judicial settle-

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[59] Shin'ichiro Hayakawa, 'Case Note' (2019) *Shiho Hanrei Remarks* 59, 136; Yuko Nishitani, 'Case Note' (2018) *Koseki Jiho* 770, 50; for authors affirming modification of a return order more broadly, see Masako Murakami, 'Case Note' (HJ 100036) (2018) *Hanrei Hisho* 1; Shinobu Ohama 'Case Note' (2018) *Minshoho Zasshi* 154(6), 106.

[60] For further details, see *infra* (4); for a comparable threshold of the 'grave risk' exception, see n 53.

[61] See n 15.

ment in the *habeas corpus* proceedings as conclusive and binding in the sense that the father renounced return of the child to Russia.

**(d) Reasonings**

While the 2020 Supreme Court decision is approved of by the majority of academics,[62] this case arguably demonstrates certain drawbacks in the current Japanese return mechanism, which leaves room for further consideration.

First, it ought to be clarified which factors be considered for the modification of a return order. The legislator suggested that Article 117 of the Implementation Act be interpreted in a restrictive manner for the sake of legal certainty, in order not to thwart the return mechanism and reopening the case. Thus, Article 117 would only apply under exceptional circumstances, when, for example, (i) the child has fallen seriously ill and needs to be hospitalised in Japan; (ii) the petitioner has been imprisoned for a longer time and there is nobody else in the state of habitual residence who could take care of the child; and (iii) a civil war has occurred in the state of habitual residence, seriously deteriorating the security. The legislator principally denied considering the child's changed mind or vigorous opposition against being returned to the state of habitual residence, on the grounds that the child's intent can easily alter and the child's hearings in return proceedings should suffice.[63] This position is followed by some academics.[64]

Other academics, however, hold opposing views. According to these authors, it is a mere presumption that the return would serve the child's best interests, which could turn out to be wrong subsequently. Furthermore, return proceedings as summary proceedings do not allow a thorough investigation of the child's voice. After some time has elapsed, the child may adjust to the new environment in Japan and start to have a strong wish to stay there. In my view, the child's intent ought to be considered to ascertain changed circumstances. Article 117(1) of the Implementation Act should therefore apply when, for example, the child's objection or past abuse by the left-behind parent is only revealed subsequently to a return order, or the child vigorously objects to being returned at the time of execution by substitute or *habeas corpus*.[65]

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[62] Masako Murakami, 'Case Note' (HJ100101) (2020) *Hanrei Hisho* 1; Yuko Nishitani, 'Hague Jôyaku ni yoru Ko no Henkan to Jijô-Henkô' [Return of the Child Under the Hague Convention and Changed Circumstances] in Kazuhiko Yamamoto (ed), *Ko no Hikiwatashi Tetsuzuki no Riron to Jitsumu* [Theory and Practice on the Return of the Child] (Yûhikaku 2021) 181; Satoshi Watanabe, 'Case Note' (2021) *Shiho Hanrei Remarks* 63, 138; idem, 'Case Note' (2021) *Koseki Jiho* 814, 23; Yasushi Koike 'Case Note' (2021) *Hanrei Hyoron* 749, 24; Ayako Imazu 'Case Note' (2021) *Minshoho Zasshi* 157(3) 549; Yukiko Oda 'Case Note' (2021) *Hanrei Kaisetsu Sokuho* 29, 329.

[63] Kaneko (n 7) at 246.

[64] Shin-ichiro Hayakawa, 'Hague Kodasshu Joyaku ni motozuku Henkan Meirei no Jijo Henko ni yoru Henko ― Saikousai Heisei 29nen 12gatsu 21nichi Kettei wo megutte' [Modification of a Return Order pursuant to the Hague Child Abduction Convention due to Changed Circumstances ― Some Reflections on the Supreme Court Decision of 21 December 2017], Noboru Kashiwagi et al (eds), *Nihon to Brazil kara mita Hikakuho. Ninomiya Masato sensei Koki Kinen* [Comparative Law Viewed from Japan and Brazil: Liber Amicorum Masato Ninomiya] (Shinzansha 2019) 136.

[65] Murakami (n 59) at 5; Nishitani (n 62) at 189. Notably, however, since Article 117(1) of the Implementation Act explicitly restricts the scope to the change of circumstances subsequently to a return order, considering circumstances that were revealed at the time of the return proceedings should not be taken into consideration, as suggested by some authors e.g., Ohama (n 59) at 1265.

Second, how to properly consider the child's objection is an important issue. This seems to have failed in the 2020 Supreme Court decision. The Family Court investigator had heard the child during the return proceedings and solely took note of the child's view that she could not live in Russia and wished to stay in Japan. When the parents entered into agreement in in-court conciliation to return the daughter to Russia, the mother had briefly phoned the daughter the night before and obtained a short affirming answer. A couple of months later, however, the child took refuge in a church and refused to be returned to Russia and, after several attempts failed, the parents ultimately entered the judicial settlement to let the child stay in Japan under some conditions. The entire course of events indicates that the case could have been amicably resolved at an earlier stage had the child's objection been properly examined and paid attention to. This certainly indicates some room for improvement in future practice.

**(e) Enforcement of a return order**

*(i) General remarks*

Compulsory enforcement of a return order has been a major issue in Japan. With a view to circumventing harm to the child, the original rules in the Implementation Act adopted in 2014 provided for the obligatory 'priority of money order' (indirect execution), meaning that the money order always had to be implemented as the first step. Only in its failure for more than two weeks, the obligor was allowed to proceed to the execution by substitute (ex-Article 136). Moreover, for the execution by substitute, a 'simultaneous presence' of the child and the taking parent was required at the venue. The venue was limited to the dwelling or other place occupied by the respondent (ex-Article 140(1)–(3)). While the original rules were meant to avoid damage to the child, the two-step execution measures were ineffective, cumbersome, and time-consuming. Furthermore, the requirement of a 'simultaneous presence' of the child and the taking parent frequently resulted in escalating resistance against the bailiff or allowing *de facto* the taking parent to entrust the child to a third person to circumvent execution.

*(ii) Habeas corpus order*

To complement the insufficient enforcement measures, the left-behind parent sometimes petitioned for a *habeas corpus* order. *Habeas corpus*, originating in the common law system, is an administrative summary procedure. *Habeas corpus* orders restore the freedom of an illegally retained person, insofar as the illegality is conspicuous and there is no other viable means.[66]

In the 2018 Supreme Court decision,[67] the Japanese mother had wrongfully removed the child from the US to Japan. Although a return order was rendered by the Tokyo Family Court, the mother did not abide by it and the two-step execution measures remained unsuccessful because of a forceful resistance by the mother. Upon the father's petition for a *habeas corpus* order, the Supreme Court held that the mother's retention of the child was 'conspicuously illegal' and there were no justifying grounds for the retention, although the child was 13 years old and could have voluntarily stayed with his mother in a usual domestic case.[68] Arguably, the Supreme Court exceptionally declared the retention of the child as apparently wrongful

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[66] See Hiroshi Mitsuoka, 'Case Note' (2019) *Hoso Jiho* 71(10), 197.

[67] See n 14.

[68] Although the child was 13 years old, his intention to stay with his mother was not respected on the grounds that he was taken to Japan at 11 years and three months and had, since then, been deprived of opportunities to obtain objective information, have access to his father, and understand his situation.

for the purpose of *habeas corpus,* in order not to allow the mother to continuously breach the judicially confirmed obligation to return the child to the US. After the case was remanded to the Nagoya High Court, a *habeas corpus* order was ultimately rendered.[69]

A *habeas corpus* order could be a viable solution to some extent, like in domestic child abduction cases, and complement the execution measures under the Implementation Act.[70] A *habeas corpus* order, however, entails several drawbacks in cross-border child abduction cases. First, a *habeas corpus* order establishes an obligation to 'release and hand over the child to the petitioner', instead of an obligation to 'return the child to the state of habitual residence'. Thus, once a *habeas corpus* order is rendered, the taking parent is immediately deprived of his or her custody and can no longer decide to voluntarily go back to the state of habitual residence with the child. Second, *habeas corpus* proceedings are included in the subject-matter jurisdiction of the District Courts and High Courts,[71] which – unlike Family Courts – do not have means or expertise to thoroughly examine the child's and the parents' situations. Third, a *habeas corpus* order does not have civil law effects of enforceability, nor are the sanctions for its breach by subpoena, detention, fine or criminal charges frequently employed.[72]

Considering the limitations of *habeas corpus,* it was held more desirable to reform the Implementation Act and strengthen the compulsory execution of return orders.[73]

*(iii) Reform of the Implementation Act*

After deliberations, the legislator amended the Implementation Act in 2019, together with the Civil Execution Act (CEA), to facilitate execution measures for return of the child.[74] The Implementation Act now allows exceptions to the two-step execution measures to immediately institute 'execution by substitute', when indirect execution is likely to be unsuccessful or there is imminent danger to the child (Article 136 No 2 and 3). Furthermore, the requirement of 'simultaneous presence' of the child and the taking parent has been abolished. Instead, the presence of the left-behind parent, or his or her agent, is now required to create a familiar and peaceful environment for the child (Article 140(1); Article 175(5)(6) CEA *mutatis mutandis*). Under strict conditions, release of the child can now also take place in a public place (e.g., on the street or in a park), at a school or hospital with permission of its representative, or at the dwelling of a third person where the child resides (Article 140(1); Article 175(2)(3) CEA *mutatis mutandis*).[75]

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[69] Nagoya High Court, 17 July 2018, Hanrei Jiho 2398, 87.

[70] Supreme Court, 18 January 1949, Minshu 3(1), 10; Supreme Court, 28 May 1958, Minshu 12(8), 1224; Supreme Court, 4 July 1968, Minshu 22(7), 1441.

[71] Habeas Corpus Act, Article 4.

[72] Habeas Corpus Act, Articles 18 and 26.

[73] Yuko Nishitani, 'Nihon ni okeru Kodasshu Joyaku no Un-yo to Kinji no Doko ni tsuite' [Recent Developments on the Implementation of the Child Abduction Convention in Japan] (2020) *Katei no Ho to Saiban* 26, 55.

[74] Law No 2 of 2019. For a detailed explanation, see Muneki Uchino (ed), *Q&A: Reiwa Gannen Kaisei Minji Shikko Hosei* [Q&A: The 2019 Reform of the Civil Execution Law] (Kin-yu Zaisei Jijo Kenkyukai, 2020) 304; for academic opinions, see Yukiko Oda, 'Hague Kodassyu Joyaku no Riko Kakuho no Ichi Sokumen ― Joyaku Jisshi Ho Kaisei wo chu shin'ni ―' [Perspectives of Implementing the Hague Child Abduction Convention ― Focus on the Reform of the Implementation Act] (2020) *Kokusai Ho Gaiko Zasshi* 119(3), 1.

[75] When releasing the child at the residence of a third person (e.g., the child's grandparents), where the child also resides, the permission of the third person can now be replaced by a Family Court order.

While the practice of executing return orders has been ameliorated with the 2019 reform and the success rate of 'execution by substitute' has improved from 44–80 per cent,[76] some caution is still necessary. The execution procedure is geared towards the party's initiative in Japan. The obligor needs to first petition for an authorisation of money order or execution by substitute to the Family Court (the first instance of return proceedings) and, upon receiving an authorisation, the obligor again needs to request the court to undertake the respective execution measures. It can easily exceed six months before the execution officer can finally carry out execution by substitute to take the child.[77] Although the 2019 reform of the Implementation Act allows skipping the first step of money order, more efficient and swift execution measures should further be sought, given that time is the most crucial factor to prevent the child from becoming accustomed to the new environment in the state of refuge. As a matter of legislative policy, it will be meaningful to contemplate introducing an *ex officio* enforcement mechanism where the judge rendering a return order can immediately move on to the execution, as in Germany, or providing a return order with detailed conditions on how to return the child, as in Australia.[78]

## OTHER ASIAN COUNTRIES

### 1. General Remarks

As mentioned above, to date, states party to the Convention from Asia include China [only Hong Kong and Macao], Sri Lanka, Thailand, Singapore, Korea, the Philippines, and Pakistan. Due to their common law background, Hong Kong and Singapore have readily implemented the Convention. The other Asian contracting states may have had certain challenges, but none of them is listed as a non-complying country by the US.[79]

### 2. India

For many Asian countries, the threshold of joining the Convention still seems to be high. Yet, cross-border child abductions often also occur toward non-contracting states like India. In 2019 and 2020, the US counted 102 and 99 child abduction cases to India respectively, and the

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Unlike the original Implementation Act, this will prevent the taking parent from circumventing the execution by entrusting the child to a third person.

[76] For the statistics, see n 22.

[77] Nishitani (n 62) at 189; Masako Murakami, 'Jisshiho ni motozuku Ko no Henkan no Jitsugen nit suite no Ichikosatsu – Funso no Chokika/Fukuzatsuka no Yobo no Kanten kara' [Some Reflections on Realising Return of the Child Pursuant to the Implementation Act – From a Viewpoint of Preventing Prolonged and Complicated Disputes] Hajime Sakai (ed), *Kokusaiteki Kenri Hogo Seido no Kochiku – Tayo na Kenri to Kokusai Minji Shikko/Hozen Ho* [Establishing International Framework for Protecting Rights – Different Rights and Rules on Civil Execution and Provisional Measures] (Shinzansha 2021) 357; Satoshi Watanabe, 'Kokusaiteki na Ko no Hikiwatashi no Shikko' [Enforcement of Return of the Child in Cross-border Cases] in Shuhei Ninomiya (ed), *Gendai Kazokuho Koza. Vol 5: Kokusaika to Kazoku* [Contemporary Studies on Family Law. Vol 5: Internationalisation and Family] (Nihon Hyoron-sha 2021) 353.

[78] Murakami (n 77) at 356.

[79] See the 2021 US Annual Report (n 6).

number of resolved or closed cases is only 13 and 20. It takes India about two and half years to resolve an incoming child abduction case,[80] which is usually treated as a custody dispute.[81]

To join the Convention, India has concerns about protecting Indian women and children from inhospitable living conditions, particularly criminal charges expected abroad in outgoing cases for Indian taking mothers. There is also criticism that the Convention lacks specific reference to domestic violence as a ground for refusal in incoming cases. Moreover, India would need to align its domestic law with the Convention. The 'welfare of the child' used in domestic law to determine the merits of custody could no longer be invoked in return proceedings. Furthermore, the 'intimate contact of the child' as the jurisdiction ground for custody in domestic law, pointing to the place that promotes the well-being of the spouses and children, would have to be coordinated with the notion of habitual residence under the Convention.[82]

As Indian authors point out, however, the absence of the Convention may cause forum shopping and unpredictable outcomes in custody disputes, confirming *de facto* unilateral wrongful acts by the taking parent.[83] In their view, this may also lead to stringent restrictions on Indian parents in seeking an access or travelling order from foreign courts, which risks cutting off the children's cultural ties with India. Ultimately, the Convention is the only effective remedy to deal with the increasing outgoing abduction cases from India to a foreign country. The situation in India resembles that of Japan prior to joining the Convention in 2014. It is hoped that, despite oppositions and concerns, the way can be paved for India to accede to the Convention.[84]

### 3. Islamic Countries

While 12 member states of the Organization of Islamic Conference have joined the Convention,[85] Pakistan is the only one from Asia. Other Islamic countries still hesitate to follow suit. When Pakistan became party to the Convention in 2017, it had challenges of conforming to *sharia,* under which parental child abduction is not considered illegal.[86] Indonesia, on the other hand, has not yet joined the Convention, but has had several notable child abduction cases to, or out of, Indonesia. The Indonesian courts have so far determined these abduction cases by rendering a custody decision on the merits. Notably, the mother has sometimes been awarded

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[80] India is listed as a non-complying country. See the 2021 US Annual Report (n 6).

[81] See *Surya Vadanan v State of Tamil Nadu* [2015] 5 SCC 450. For further details, see Jolly and Khanderia (n 1) at 160.

[82] Jolly and Khanderia (n 1) at 163; Stellina Jolly, 'International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India' (2017) *International Journal of Law, Policy & Family* 31, 25; Molshree A Sharma, 'Inter-country Child Abduction – Indian Legal Response', in Sai Ramani Garimella and Stellina Jolly (eds), *Private International Law – South Asian States' Practice* (Springer 2017) 214.

[83] Jolly (n 82) at 27; Sharma (n 82) at 217.

[84] For the initiatives and legislative projects to date, see Jolly and Khanderia (n 1) at 164.

[85] Albania, Turkey, Morocco, Iraq, Kazakhstan, Uzbekistan, Turkmenistan, Pakistan, Guinea, Burkina Faso, Gabon and Tunisia.

[86] Sarmad Ali, 'Inter-country Child Abduction – Pakistan's Legal Response', in Sai Ramani Garimella and Stellina Jolly (eds), *Private International Law – South Asian States' Practice* (Springer 2017) 236.

custody in Indonesia considering the child's welfare, like in Pakistan before,[87] although the father is favoured in guardianship and custody in *sharia*.[88]

In Islamic countries, the return of the child under the Convention frequently encounters hindrances, because *sharia* gives the father priority in guardianship and custody. When the father removes the child out of an Islamic jurisdiction, the return mechanism can hardly be activated. Furthermore, the best interests of the child are often understood as indicating the need to raise the child under the principles of *sharia,* so child abduction towards Islamic countries may readily be justified.[89] While other contracting states could, where necessary, refuse the return of the child to Islamic countries pursuant to Article 13(1)(b) or Article 20 of the Convention,[90] the challenge remains for Islamic countries to effectively implement return orders in incoming cases. For this purpose, Islamic countries will generally necessitate fundamental reform of their domestic law, including providing procedural rules and establishing secular courts, as well as training of judges, attorneys and officers,[91] as has been suggested in Indonesia.[92]

Against this background, the HCCH launched the Malta Process[93] as a platform to make Islamic countries familiar with the Convention and establish cooperation between them and contracting states, employing soft methods of dispute resolution grounded on the parties' agreement.[94] Contracting states like Morocco and Pakistan are leading voices in these meetings and inspire other Islamic countries to move forward. In countries, where the state is not fully vested with authority to intervene into family matters and enforce 'rights' and 'obligations', amicable dispute resolution by mediation may play an important role.[95] Hopefully, the 'Malta Process' continues to bear fruits and encourages other Islamic countries to join the Convention. It would also be desirable to further explore how to enhance mediation and possibly render the parties' agreement legally binding by a revision of the draft HCCH Practical Guide on cross-border recognition and enforcement of agreements in family matters involving children.[96]

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87 Mudasra Sabreen, 'Law on the Custody of Children in Pakistan: Past, Present and Future' (2017) *LUMS Law Journal* 4(1), 73.

88 See Afifah Kusumadara, *Indonesian Private International Law* (Hart Publishing 2021) 166.

89 Jolly and Khanderia (n 1) at 171.

90 Beaumont and McEleavy (n 10) at 135; Schuz (n 10) at 270.

91 Jolly and Khanderia (n 1) at 172.

92 Kusumadara (n 88) at 168.

93 For further details, see https://www.hcch.net/en/publications-and-studies/details4/?pid=5214 (accessed 15 June 2022).

94 See Louise Ellen Teitz, 'Malta Process and Cross-Cultural Aspects in Family Disputes', in Jänterä-Jareborg (ed), *The Child's Interests in Conflict: The Intersections between Society, Family, Faith and Culture* (Intersentia 2016) 163; Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt, 'Synopsis', in Nadjma Yassari, Lena-Maria Möller and Imen Gallala-Arndt (eds) *Parental Care and the Best Interests of the Child in Muslim Countries* (Springer 2017) 345.

95 See Shuhei Ninomiya, *Rikon Jiken no Goi Kaiketsu to Kaji Chotei no Kino. Kankoku, Taiwan, Nihon no Hikaku wo tsujite* [Amicable Solution of Divorce Cases and the Function of In-Court Conciliation: Comparison between Korea, Taiwan and Japan] (Nihon Kajo Shuppan 2018) 3.

96 See HCCH (n 32).

## CONCLUSION

Although family law in Japan and other Asian countries has remained conventional, the Convention has generally been implemented successfully. This is owing to the neutral structure and reasonable principles of the Convention that have become an international standard. The Convention not only provides a return mechanism, but also appropriate grounds for refusal and installs an effective means of administrative and judicial cooperation. The Convention also duly distributes jurisdiction between the state of habitual residence and state of refuge, and allows a flexible implementation tailored to the respective domestic legal system. It is hoped that effective cooperation and mutual trust will further be catered for among Asian countries.[97]

In this respect, monitoring activities by the HCCH fulfil important functions. The HCCH regularly convenes special commissions and regional seminars, publishes Guides to Good Practice and Judges' Newsletters, and provides an extensive database of case law 'INCADAT'. The HCCH has also launched the International Hague Network of Judges to establish direct communication between liaison judges for exchanging information and securing a safe return of the child.[98] As a result, a unique international community has gradually evolved between government officers, judges, attorneys, social workers, mediators, academics, and other stakeholders. These settings enhance and facilitate the implementation of the Convention.

Remaining challenges for Asian jurisdictions include acquiescing to the fundamental ideas of returning the child to the state of habitual residence and ensuring access by implementing necessary measures.[99] Asian countries should also contemplate joining the 1996 Child Protection Convention as well as the 2007 Child Support Convention and Protocol to support the operation of the 1980 Convention. The 1996 Convention will serve to clarify jurisdiction on the merits of custody and ensure the recognition and enforcement of protective custody measures. The 2007 Convention will also support a safe return of the child by obtaining an enforceable maintenance order in the state of refuge or the state of habitual residence.[100] Further developments are anxiously awaited.

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[97] See Nishitani (n 5) at 67.

[98] For further details, see https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ (accessed 15 June 2022).

[99] For the issue of access to the child in Japan, see Nishitani, 'Access' (2020) (n 4) at 51.

[100] Yuko Nishitani, 'Child Protection in Private International Law – A HCCH Success Story?' in Rishi Gulati, Thomas John and Ben Köhler (eds), *Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020) 261.