

## 4. Family Law

### **Act for Implementation of the Convention on the Civil Aspects of International Child Abduction**

Law No. 48, June 19, 2013 (Effective on April 1, 2014)

#### **Background:**

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction set return procedures that aim for speedy return of an abducted child as well as deterrence of child abduction. And it also requires the Contracting States to organize or secure the effective exercise of access, visitation or contact with children in a foreign state.

Recently, it has sometimes occurred that a Japanese wife, married to a foreign man and living in one of the Contracting States of the Hague Convention, took her child to Japan, her home country, after the rupture of the marriage, with no intention to come back. That was turned into an international agenda, since that is wrongful based on the domestic law of the Contracting States, unlike Japan. Therefore, some Contracting States asked the Japanese government for its ratification.

In response to these movements, the government started preparations to ratify it, based on the Cabinet Understanding of May, 2011. The subcommittee of the Hague Convention in the Legislative Council of the Ministry of Justice compiled its outline. And the Ministry of Foreign Affairs of Japan (hereinafter referred to as the “MOFA”) designated as the Central Authority set up a panel to discuss its commission.

In the light of the above, the Act for Implementation of the Hague Convention was established in the 183rd Ordinary Session of the Diet. Due to space limitation, we focus on the assistance of the Central Authority and the return procedures in courts.

#### **Main Provisions:**

**Article 3** The Central Authority of Japan set forth in Art.6 (1) of the Convention shall be MOFA.

**Article 4 (1)** With respect to a child who has been subject to a removal to or a retention in Japan and whose state of habitual residence is a Contracting State, a person who has the rights of custody of the said child under the laws and regulation : Regulation of Human Cloning Techniques, regulations of said state of habitual residence, if he/she considers that his/her rights of custody are breached due to the said removal or retention, may file an application to MOFA for assistance in realizing the return of the child from Japan.

**Article 11 (1)** With respect to a child who has been subject to a removal to or a retention in a Contracting State other than Japan and whose state of habitual residence is Japan, a person who has the rights of custody of the said child under the laws and regulations of Japan, if he/she considers that the said rights of custody are breached due to the said removal or retention, may file an application to MOFA for assistance in realizing the return of the child to Japan.

**Article 16 (1)** With respect to a child who is located in Japan and who held his/her habitual residence in a state or territory that is a Contracting State immediately before the visitation or other contacts with him/her became unable to be made, a person who is entitled to such a visitation or other contacts with the said child under the laws and regulations of the said state or territory, when he/she considers that the visitation or other contacts with the child is interfered with, may file an application to MOFA for assistance in realizing the visitation or other contacts with the child.

**Article 21 (1)** With respect to a child who is located in a Contracting State other than Japan and who held his/her habitual residence in a state or territory that is a Contracting State immediately before visitation or other contacts with him/her became unable to be made, a person who is entitled to such a visitation or other contacts with the child under the laws and regulations of the said state or territory, when he/she considers that the visitation or other contacts with the said child is interfered with, may file an application to MOFA for assistance in realizing the visitation or other contacts with the said child.

**Article 27** The court, when it finds that the petition for the return of a child falls under all of the grounds listed in the following items, shall order the return of the child:

- (i) The child has not attained the age of 16;
- (ii) The child is located in Japan;
- (iii) Pursuant to the laws or regulations of the state of habitual residence, the said removal or retention breaches the rights of custody with respect to the child attributed to the petitioner;
- (iv) At the time of the said removal or the commencement of said retention, the state of habitual residence was a Contracting State.

**Article 28 (1)** Notwithstanding the provisions of the preceding Article, the court shall not order the return of a child when it finds that any of the grounds listed in the following items exists; provided, however, that even in cases where there exist grounds prescribed in items (i) to (iii) or item (v), the court may order the return of the child if it finds that it serves the interests of the child to have him/her returned to his/her state of habitual residence after taking into account all the circumstances:

- (i) The petition for the return of the child was filed after the expiration of the period of one year since the time of the removal or the commencement of the retention of the child, and the child is now settled in his/her new environment;
- (ii) The petitioner was not actually exercising the rights of custody at the time of the removal or the commencement of the retention of the child (except in the case where it could be deemed that the rights of custody would have actually been exercised by the petitioner but for the said removal or retention);
- (iii) The petitioner had given prior consent or subsequently approved the removal or retention of the child;
- (iv) There exists a grave risk that his/her return to the state of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;
- (v) The child objects to being returned, in a case where it is appropriate to take account of the child's views in light of his/her age and degree of development;
- (vi) It would not be permitted by the fundamental principles of Japan relating to the protection of human rights and fundamental freedoms to return the child to the state of habitual residence.

**Article 28 (2)** The court, when judging whether or not the grounds listed in item (iv) of the preceding paragraph exist, shall consider all

circumstances such as those listed below:

- (i) Whether or not there is a risk that the child would be subject to words and deeds, such as physical violence, which would cause physical or psychological harm by the petitioner, in the state of habitual residence;
- (ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child, if the respondent and the child entered into the state of habitual residence;
- (iii) Whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence.

#### **Editorial Note:**

Our new Act has two large pillars: assistance by MOFA (Chapter II) and return procedures by courts (Chapter III).

In the assistance by MOFA, we have, if a child is in Japan, assistance in the child's return to a foreign state (Art.4) and assistance in visitation or contact with the child in Japan (Art.16), and if a child is in a Contracting State other than Japan, assistance in the child's return to Japan (Art.11) and assistance in visitation or contact with the child in a foreign state (Art.21). If a child is in Japan, MOFA may request some specific organs to provide the information relating to the child's domicile, etc. and ask the prefectural police to take necessary measures to specify his or her whereabouts by providing the police with the said information (Art.5). And it may take necessary measures, such as facilitating the discussion between the taking parents (mainly mothers responsible for primary care of children) and the left-behind parents (mainly fathers, applicants), introducing the Institutions for alternative dispute resolution (ADR), which are competent in mediation, and suggesting to them other various pieces of information (Art.9). In order to realize the return or other contacts, it is extremely effective in the light of child's interests that they make an amicable solution based on their agreement. Therefore, the Act tries to have the parents to make a voluntary resolution before the court procedures with the assistances of MOFA. And, when there are reasonable grounds to believe that the child might be subjected to abuse, it shall

notify a welfare office, etc. (Art.10). As seen above, it may also relate the parties to the specific civil or administrative organs as well as the family court.

In the return procedures by courts, the cases shall be subject to the jurisdiction of the two Family Courts: Tokyo and Osaka (Art.32), in order to make proceedings more rational. The family court before which the case seeking the return of child is pending, as a provisional remedy, may order the other party not to have the child depart from Japan and to have his or her passport surrendered to MOFA (Art.122). The Family and High courts with the consent of the parties may refer the case to the conciliation of domestic relations at any time (Art.144). And settlement may be also entered into with respect to the matters regarding the custody of the child, cooperation and mutual assistance between husband and wife and sharing of living expenses (Art.100 (2)).

When both the agreement on the return of child on the conciliation and the settlement on the above matters are stated in a record, they shall have the same effect as a final and binding judicial decision (Art.100 (3) ; Art.145 (3)). As seen above, the structure which encourages a voluntary resolution is an important characteristic running through the Act.

Finally, the Act clarifies grounds for return of the child (Art.27) and for its refusal (Art.28) regardless of this not being clearly written in the Convention. In this regard, the recent cases to which attention has been paid are ones where the mother takes her child to her home country, without intent to come back, on the grounds of domestic violence by her husband. In such cases, she is generally responsible for the primary care of the child and loses her financial and mental stability. Therefore, she is meant to make a “grave risk” defense alleging that her child’s return to the state of habitual residence, where his or her father is living, would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation (Art.28 (1), Item 4). In this respect, *Neulinger and Shuruk v Switzerland* (App No 41615/07) given by the Grand Chamber of the European Court of Human Rights in 2010 drew the attention of the Legislative Council of the Ministry of Justice. The ECHR said, “there would be a violation of Art. 8 (the right to respect for private and family life) of the European Convention on Human Rights in respect of both applicants (mother and her son) if the decision ordering the second

applicant's return to Israel were to be enforced". It stressed that the best interests of children were the most important consideration in the examination relevant to the "grave risk" defense, and it considered various factors, such as the father's behavior to his son, who joined the Jewish "Lubavitch" movement, domestic violence from father to mother, and so on. In Japan, Art.28 (2) providing some considerations in domestic violence cases was put in place by reference to the Neulinger case or the Swiss statute. It will be a future challenge how much a judge would consider the context or condition of domestic violence which may be relevant to custody matters on merits, in spite of the structure of the Hague Convention of which the principle is speedy and summary return.

## 5. Commercial Law

### **Amendments to the Financial Instruments and Exchange Act of 2014**

Law No. 44, May 30, 2014

#### **Background:**

Recently, the Financial Instruments and Exchange Act has been amended every year. In 2014, it was also amended in order to advance the investor protection and facilitate the risk money supply. The Bill of the Amendment of Financial Instruments and Exchange Act (the "Bill") was submitted to the 186th ordinary session of the Diet on March 14, 2014, subsequently enacted on May 23, 2014 and published on May 30, 2014. In 2014, one of the most important pieces of legislation in the field of business law was the amendment of the Companies Act (which was described in the previous issue of this Waseda Bulletin of Comparative Law).

#### **Main Provisions:**

The amendments made by the Bill were mainly (1) to introduce the so called "crowdfunding", (2) to introduce an exemption from the auditor's audit on the internal control reports, and (3) to amend the liability