

(Provisional Translation)

Study Group on the Implementation of the Hague Convention
hosted by the Director General of Consular Affairs Bureau,
Ministry of Foreign Affairs

-Summary of discussions by participating experts-

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General of Consular Affairs Bureau, Ministry of Foreign Affairs

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1. Background

(1) The Convention on the Civil Aspects of International Child Abduction (hereinafter, the “Hague Convention”) entered into force for Japan on April 1, 2014. As of April 2017, three years have passed since then.

(2) As of March 31, 2017, the Central Authority of Japan (Minister for Foreign Affairs) has received a total of 237 applications for assistance, of which 68 were for assistance in child's return to foreign state (assistance in realizing the return of child from Japan), 56 were for assistance in child's return to Japan (assistance in realizing the return of child to Japan), 87 were for assistance in visitation and/or contacts with child in Japan (assistance in realizing visitation and/or contacts with child in Japan), and 26 were for assistance in visitation and/or contacts with child in a foreign state (assistance in realizing the visitation and/or contacts with child in a contracting state other than Japan).

Among these applications, the Central Authority of Japan has achieved the return of child from Japan to foreign state in 20 cases and the return of child from foreign state to Japan in 19 cases. On the other hand, 16 cases were concluded that a child/children would not be returned from Japan to foreign state and 8 cases were concluded that a child/children would not be returned from foreign state to Japan. In case of assistance in visitation and/or contacts with child, some form of visitation or contact has been realized in a number of cases.

(3) With respect to the implementation of the Hague Convention in Japan, the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (hereinafter, the “Implementation Act”) was enacted on April 1, 2014 as the domestic legislation to implement the Hague Convention, stipulating various legal authorities including the role of the Central Authority.

(4) The Study Group was launched by Mr. Noke, Director-General of the Consular Affairs Bureau, Ministry of Foreign Affairs in the belief that it would be beneficial for evaluating the implementation of the Hague Convention in Japan and identifying its challenges, taking into consideration the achievements by Japan over the past three years. The meetings were held on January 10 and March 2, 2017 with the participation of observers from the relevant departments of the Ministry of Foreign Affairs, the Ministry of Justice, as well as the Supreme Court.

(5) The meetings were organized in a timely manner, in the light of the supplementary resolutions adopted by the Judicial Affairs Committees of both Houses upon approval of the Implementation Act in 2013 which state that “the implementation of the Act will be reviewed after about three years from the enactment of the Act, and the necessary measures will also be taken based on the results of the review”.

2 Topics of discussion

The following topics in (1) to (5) were presented to the Study Group by the Japanese Central Authority in order to prevent discussions from becoming too broad and to keep it focused and constructive within a limited amount of time.

(1) The effect of decision for assistance

While the Central Authority decides whether to provide assistance by reviewing the application documents in accordance with the requirements stipulated in the Implementation Act, there is no provision in the Implementation Act regulating the revocation or invalidation of decision for assistance. In consideration of this, how the effect of decision for assistance should be handled in (i) cases in which there were flaws in making the decision for assistance, (ii) cases in which the grounds for the dismissal of application for assistance arose due to changes in the circumstances after the decision was made, and (iii) cases in which there has been no substantive progress for a long period of time due to factors such as the applicant's failure to take necessary procedures.

(2) Encouraging voluntary return of child and compliance with the return order as well as support for the return of child

In the light of the Hague Convention, giving preference on the voluntary return of child (Article 7-c and Article 10 of the Convention), in accordance with Article 9 of the Implementation Act, the Japanese Central Authority takes measures such as the introducing ADR (Alternative Dispute Resolution) institutions to the parties and bearing the fee for limited number of ADR sessions.

On the other hand, in certain number of cases where the LBP (Left Behind Parent) and TP (Taking Parent) sharply confront, the TP does not agree to the voluntary return of child and refuses to return the child even after the court has ordered the return of child to the state of habitual residence. In such cases, the return of child is achieved through the enforcement procedures stipulated in the Implementation Act (indirect enforcement and enforcement by substitute (Article 134 to Article 142 of the Implementation Act)). The Implementation Act stipulates that the Central Authority may provide necessary cooperation with regard to the enforcement by substitute, such as being present during the enforcement (Article 142 of the Implementation Act). Pursuant to this provision of the Act, the Central Authority has sent its child psychology experts to provide support during the enforcement of release of child (a procedure taken by the court enforcement officer, as part of enforcement by substitute, to release the child from the care of the TP) as a part of its assistance to secure the safe return of child. However, there has been no case in which the return of child has been achieved through the enforcement of child's release.

In light of these facts, what kind of assistance the Central Authority should provide or strengthen (1) to achieve the voluntary return of child, (2) to encourage compliance with the return order, (3) to improve its support during the enforcement of child's release and subsequent departure to the state of habitual residence, etc., and (4) to reduce psychological impact to the child through involvement of child psychology experts.

(3) Visitation and/or contacts

One of the objectives of the Hague Convention is to ensure the effective respect for the right of access (Article 1-b of the Convention). The Japanese Central Authority supports transboundary visitation and/or contacts between parent and child through measures such as covering the fee at the visitation supporting institutions within the budget allocated to individual case, and introducing the Online *Mimamori* Contact (Monitored Online Contact Assisted by the Experts) .

With a belief that the realization of visitation and/or contacts may contribute to amicable resolution of dispute or voluntary return of the child, the Japanese Central Authority provides support to the parties in utilizing visitation supporting institutions and the Online *Mimamori* Contact, not only in access cases but also in return cases, in order to realize the provisional visitation and/or contacts between LBP and child.

Realizing the visitation and/or contacts across the border involves additional challenges arising from cultural, temporal, economic, and geographic factors in addition to the general issues found in the typical visitation and/or contacts.

In consideration of these issues, what kind of assistance the Central Authority may provide to enhance the quality of its support for visitation and/or contacts (particularly for the provisional visitation and/or contacts in return cases).

(4) Prevention of the further removal of child

To avoid another removal of the child, Central Authorities shall take all appropriate measures to prevent further harm to the child or prejudice to interested parties (Article 7-b of the Convention). Pursuant to this article and the Implementation Act (Article 122 and Article 131 of the Implementation Act), the Central Authority retains the child's passport when the court has issued a *ne exeat* order and passport surrender order.

In addition, when the Central Authority decides to provide assistance in child's return to a foreign state, the Central Authority submits a *note verbale* to the diplomatic mission of the state of which the child has nationality requesting to take appropriate measures, including careful examination of any request for issuance of passport or travel document for the child. When the return order becomes final and binding and the *ne exeat* order becomes no longer valid, the Central Authority tries to confirm the schedule for

departure of the child from Japan to the extent possible upon returning the child's passport to the party who surrendered the passport (TP).

In consideration of these circumstances, what kind of measures can be taken to (1) prevent the further removal of child and (2) ensure that the LBP, who is taking the child back to the state of habitual resident but does not have the child's passport in his/her possession, will be able to obtain the child's passport. (including the operations by the Central Authority that retains the child's passport).

(5) Approach towards support by the Central Authority in outgoing cases

The Hague Convention mainly envisages the mutual assistance between the Contracting States in incoming cases (where the child concerned is removed from another Contracting State to and located within the state concerned). The assistance provided by the Japanese Central Authority as stipulated in the Implementation Act is mostly concerned with incoming cases regarding the return of child from Japan to foreign state or the visitation and/or contacts with child in Japan.

Meanwhile, the assistance provided in incoming cases by each Contracting State differs from state to state. Therefore, in outgoing cases (where the child is located in a foreign state, and the applicant seeks either the return of child to Japan or assistance in visitation and/or contacts with child in a foreign state), the applicant may not be able to receive the same level of support in the foreign state as he/she may receive in Japan. This may lead to difficulties in judicial procedure in a foreign state.

In consideration of these circumstances, (1) what kind of support the Japanese Central Authority may provide in outgoing cases, and (2) what sort of conditions and circumstances should be considered in deciding whether to provide support.

3. Summary of discussions

The following is a summary of discussions at the Study Group sessions on the topics proposed by the Central Authority as mentioned above.

(1) General remarks

As for the implementation of the Hague Convention in Japan until now, Japan has been implementing the Hague Convention harmoniously, in general, while taking into consideration the best interests of the child that is the most important concept of the Hague Convention. In addition, the fact that many cases in which the children have been returned

have been resolved through amicable resolution such as in-court conciliation or ADR can be evaluated positively as being in line with the purpose of the Hague Convention.

There is concern that, in some cases, the prompt return of child was not achieved despite that the return order had been final and binding and the enforcement procedure had been taken. Nonetheless, both the number of cases in which the return order was made and the number of cases in which the enforcement by substitute has been attempted in the three years from the enactment of the Implementation Act are limited. Thus, it is difficult to reach a conclusion at this point as to whether such result is due to problems in the Hague Convention implementation system in Japan or due to the special circumstances of these individual cases.

In consideration of the above, it is necessary for the government of Japan to keep closely monitoring the implementation of the Hague Convention and continue the examining process from the viewpoints of not only improvements in the operation of the Implementation Act, but also the possibility of amending the Implementation Act. In doing so, it is useful to listen to the multiple opinions including those of social workers or domestic violence experts, and to gather information on practices in foreign states.

(2) The effect of assistance decisions

In terms of the handling of cases in which the involved parties have not taken any action for a certain period of time despite the requirements for an assistance decision are met (2(1)(iii) above), the TP will be in the unstable situation unless the decision for the assistance by the Central Authority is revoked. The accumulation of the unresolved cases is also not favorable in securing the prompt action by the Central Authority considering that the Central Authority may suddenly be required to deal with these cases simultaneously. On the other hand, as the presence of an assistance decision may affect the legal status of the parties involved, the utmost care is required towards the revocation of the decision on assistance unless the dismissal requirements under the Implementation Act are met. In case stipulations concerning revocation of decision on assistance would be established, it is recommended to examine carefully its establishment, with consideration to systems and operations in foreign states.

As for cases in which the grounds for the dismissal of the decision on assistance are met (2(1)(i) and (ii) above), in principal, they can be dismissed according to the Administrative Procedure Act. However, it is recommended to discuss the possibility of creating a special provision, if special considerations should be given to these cases due to the nature of decision on assistance related to the Hague Convention.

(3) Support for the voluntary return of child and the enforcement of return order

A. General remarks

The purpose of the Hague Convention is to secure the prompt return of children wrongfully removed or retained to the state of habitual residence, based on the recognition that the interests of children are of paramount importance (Preface and Article 1-a of the Convention). Contracting States should take all appropriate measures and use the most expeditious procedures available to achieve this purpose (Article 2 of the Convention). The judicial or administrative authorities of Contracting States should act expeditiously in proceedings for the return of children (Article 11 of the Convention). In consideration of these articles, children should be promptly returned when the return order by the court has become final and binding. As described in 3 (1) above, while it is concerned that there is no case in which the return of children have been achieved through enforcement by substitute, the accumulation of such cases is necessary in order to identify the factors which make enforcement of children's release impossible.

It should be noted that the Civil Execution Act Subcommittee of the Legislative Council of the Ministry of Justice is coming into full-scale deliberations on provisions related to the enforcement of the handover of child. It is our understanding that the provisions concerning the enforcement of the child's return order stipulated in the Implementation Act and the operation under these provisions are being referred to in the deliberations in the Legislative Council. If the provisions concerning the enforcement of the handover of child stipulated in the Civil Execution Act end up allowing more expeditious and effective enforcement compare to the provisions in the Implementation Act regulating the enforcement of the return order, there could be a possibility that the enforcement procedures under the Implementation Act could be criticized internationally in relation to the Article 2 of the Hague Convention. For this reason, it is necessary to continue the examining process of the Implementation Act including the possibility of amendment of its provisions, taking into consideration future amendments of the Civil Execution Act.

B. Measures that can be taken by the Central Authority

While the role of the Central Authority is to provide assistance to both the LBP and the TP from a neutral and fair standpoint, for cases in which the court decision of children's return has become final and binding, it is necessary for the Central Authority to contact the TP, and to try to provide explanations to the TP and child and convince them to realize the return of child, through consultation with the LBP.

As the court enforcement officer and the LBP are unlikely to have previous experience of the enforcement process under the Implementation Act, it is necessary for the Central Authority to share its accumulated experience and knowledge with the court and LBP in order to facilitate smoother preparations.

While the involvement of a child psychologist in the enforcement by substitute can be evaluated favorably from the viewpoint of easing the psychological impact on the child, it is recommended to clarify the roles of court enforcement officer and child psychologist at the enforcement site through studies and research about the impact of enforcement on the child in foreign states.

In addition, it is necessary for the Central Authority to take further public relations and awareness raising activities in order to foster a correct understanding of the operation of the Hague Convention, such as the significance of the Hague Convention and the benefits of amicable resolution.

C. Indirect enforcement

In the drafting process of the Implementation Act, the indirect enforcement was assumed as means for encouraging the obligor (TP) to realize the return of the child by him/herself. However, when the TP strongly rejects the return of child, it is difficult to expect that the return of a child could be achieved through indirect enforcement. Furthermore, when the return of a child by the TP cannot be achieved through indirect enforcement, there is concern of causing unnecessary delay of process before filing of a petition for the enforcement by substitute (requirement for two weeks from the day on which indirect enforcement order became final and binding to elapse (Article 136 of the Implementation Act)), resulting in a loss of the expeditiousness of procedures.

Therefore, the effects of indirect enforcement as a means for encouraging the return of children needs to be examined through the study of actual cases in which the return of a child was achieved after the implementation of indirect enforcement. Then, it is recommended to discuss the possibility of allowing the obligee (LBP) to file a petition for the enforcement by substitute without filing for the indirect enforcement as a prerequisite when it is unlikely for the TP to abide by the return order, so that the prompt return of child as required by the Hague Convention can be achieved.

In addition, it is also recommended to discuss, by referring to the practices by the courts of foreign states, other possible measures to encourage the compliance with the return order such as creating provisions which would allow the court to make decisions that includes the deadline for the child to be returned.

D. Improvements of the feasibility of enforcement by substitute

(A) Development of court enforcement officer with specialized expertise

In contrast to court proceeding of the return cases, the jurisdiction for enforcement by substitute is not concentrated and the district court where the child is located serves as the enforcement court. As a result, it is difficult for the court enforcement officers to

develop the expertise although the unique nature of the handover of children requires such expertise. Considering these circumstances, it is recommended to discuss measures to train the court enforcement officers to develop the knowledge and experience regarding the enforcement involving the child.

(B) So-called the “principle of simultaneous existence” (Article 140-3 of the Implementation Act)

In many cases, children have sense of loyalty towards the parent who is currently exercising the custody (usually the TP). There is also possibility that the children may witness resistance by the TP during the enforcement of child’s release. In this regard, the principle of simultaneous existence may lead to greater emotional turmoil to the child and increase the burden on the child during the enforcement. From these perspectives, it is recommended to discuss at least the establishment of exception clause to allow derogation of the principle of simultaneous existence.

(C) Location of enforcement (Article 140-1 and 2 of the Implementation Act)

Although the location of enforcement is not limited to the home of the obligor under the Implementation Act, the enforcement at a location other than the obligor’s home has not been conducted up until now. Thus, it is necessary to carry out flexible operation from the perspective of improving the feasibility of enforcement.

E. Disclosure of information related to court decisions

As the past court decisions have not been disclosed to the public, it is difficult for the parties involved or their attorneys to foresee the possible outcome of litigation. To ensure the smooth return of the child, it is necessary for the TP to make mental preparations in cases which there is a high likelihood of the return order being issued by the court so that the case would not lead to the enforcement of return order. From this perspective, it is recommended to discuss the possible disclosure of information on the past court decisions through means such as the publication of an analysis of court decisions while giving due consideration to the need to protect privacy.

(4) Visitation and/or contacts

A. General remarks

In realizing the visitation and/or contacts, it is preferable to take into consideration the best interests of child and to facilitate the resolution of case through providing

information about child in a gradual manner. On the other hand, it is necessary for the Central Authority to continue to exercise due diligence to provide the appropriate protection to the victims of domestic violence, given that it is difficult to establish the facts of domestic violence and damage caused by the violence based on objective evidences.

To achieve flexible visitation and/or contacts, the visitation and/or contacts supporting institutions play an important role. It is necessary for the Central Authority to monitor how the support for visitation and/or contacts are provided in foreign countries and to further strengthen cooperation with the visitation and/or contacts supporting institutions as well as to provide to the parties involved further information on matters such as the objectives of assistance in visitation and/or contacts by the Central Authority.

In addition, it is preferable to hold broader discussions on the comprehensive systems of assistance in visitation and contact including assistance for infrastructure development and training, and operational support for the visitation and/or contacts supporting institutions in the future.

As there is a gap in what the visitation and/or contacts are expected to be in Japan and in foreign countries, it is necessary for the Central Authority to pro-actively disseminate information through means such as public relations activities.

B. Provisional visitation and/or contacts in return cases

Visitation and/or contacts between the LBP and the child are also important in return cases. During the in-court conciliation, the court encourages the visitation and/or contacts between the child and the LBP who is visiting Japan. In some specific cases, the interim disclosure of judge's conviction about the possible return of a child leads to the discussions on visitation and/or contacts between parties and resulted in an agreement. As there are cases in foreign states which were resolved through provisional visitation and/or contacts, it is recommended to increase the possibility of the smooth resolution of cases through provisional visitation and/or contacts before the child's return to the state of habitual residence.

On the other hand, given that the court handles the children's return and the visitation and/or contacts as separate cases, it is preferable to consider operational measures which encourage the parties to further utilize provisional visitation and/or contacts, such as filing a separate petition for visitation and/or contacts with children during the return procedure in order to promote the provisional visitation and/or contacts during the process of return cases.

(5) Prevention of further removal of children

Under the current Implementation Act, there are concerns that (1) since the *ne exeat* order or passport surrender order becomes null and void after the court decision has become final and binding and the Ministry of Foreign Affairs returns the children's passports to the submitter (mostly the TP), there is a risk of further removal of child to a third country between the finalization of the return order and the return of child to the state of habitual residence, and that (2) in cases where the person who is authorized by the court to return the child in the enforcement by substitute (mostly the LBP) does not have the child's passports in his/her possession, there is no legal ground to require the TP to handover the child's passports to the person authorized to return the child. However, this has not caused any major problem until now, since in most of the cases in which the child return order has become final and binding, the TP had only a Japanese nationality and the children had a dual nationality (Japan and a foreign state).

If the concerned child has only Japanese nationality and the TP does not handover the child's passports, a consideration will need to be given to how the child may obtain a Japanese passport. Since the duplicate issuance of passports is not possible, it is preferable to start discussing how to handle the child's passport kept in the possession of TP while giving due consideration to the consistency with conventional interpretations and operations of the Passport Act.

In addition, it is preferable to be discussed further on the interpretation of substantive law regulating the applications for passport issuance by a person with parental authority and the right of a person with parental authority to demand the handover of the child's passport from the other person with parental authority.

(6) Assistance by the Central Authority in outgoing cases

A. Assistance with lawyer's fee in Japan

While the parties in outgoing cases need to conduct court proceedings in foreign states, the parties often face difficulties in communicating with foreign lawyers in foreign languages. While the representation by an attorney in Japan would be a meaningful way to support the party facing such difficulties, the legal proceedings in countries outside of Japan are not within the scope of the civil legal aid system stipulated by the Comprehensive Legal Support Act. For this reason, it is recommended to discuss forms of assistance which can be provided under current systems and other measures such as expansion of the applicable scope of the civil legal aid system.

In addition, given that legal consultation is within the scope of the civil legal aid system, it may be possible for an attorney to represent a party in outgoing case in a form of legal consultation. However, the civil legal aid system only applies to face-to-face legal consultation. Many of the lawyers who have extensive experience in the Hague cases are

mostly based in urban areas. Under these circumstances, the parties in remote areas may have to bear considerable burdens such as transport expenses. Therefore, it is recommended to discuss creating means for the Central Authority to ease such burdens on the parties in order to provide support within the framework of the current civil legal aid system.

B. Translation support

While the Japanese Central Authority does not provide assistance in the translation of evidence documents for the court procedures in foreign countries under the current systems, there are other foreign contracting states that do not provide such assistance even in the incoming cases. Under these circumstances, there are cases in which the parties have to bear considerable costs to submit sufficient evidential documents. For this reason, it is recommended to consider the expansion of the scope of assistance to cover the translation of evidential documents and Japanese laws to foreign languages for submission to the foreign courts in outgoing cases.

C. Measures to prevent outgoing cases

In order to prevent potential outgoing cases, it is recommended to consider preventive measures against the removal of children from Japan to foreign states and that the Central Authority makes further efforts in public relations activities.

(End)